

Regulating the Political Process

By

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Abstract

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This dissertation confronts several important questions about the institutional regulation of elections at the intersection of law and political science. I begin by showing how recent political reforms linking responsiveness to legislative action are misguided. State lawmakers that are elected by very narrow margins are no more likely to vote with the opposing party on legislative bills than are state lawmakers elected by huge margins. In fact, lawmakers elected by more than 85% of the vote are *more likely* to engage in cross-party voting. This empirical finding turns the traditional view of gridlock on its head; electoral responsiveness and political gridlock are complementary and not competing values. The median voter theorem is actually agnostic about polarization and gridlock, but my findings suggest that the conventional predictions about close elections and gridlock attributed to the median voter theorem may be incorrect.

I also show how independent political spending has been driven underground in the wake of *Citizens United v. FEC*. Because all of the “new” money that was permitted by *Citizens United* was funnelled to nonprofit organizations that are not required to disclose their donors, shareholders and the public cannot regulate the process as the majority expected they would. On the other hand, new independent political expenditures after *Citizens United* were not disproportionately large. In other words, the fear that large corporations would drown out the voice of individuals appears to be misplaced.

Finally, we see that the decision to delegate is not just about expertise or efficiency. Instead, delegation requires an analysis to match policy domains to the most appropriate regulatory body. In some cases delegation can mitigate problems, in other cases delegation can exacerbate problems. I show that delegation is not advisable for hot-button partisan issues (e.g., voter I.D. laws, voter registration requirements, recount procedures, redistricting), but is very valuable for the regulation and administration of technical, nonpartisan issues (e.g., accessibility for disabled voters, voter intent standards, voting technology).

The main goal of this dissertation is to show how careful empirical analysis can orient effective political reform and improve the election law jurisprudence. I hope that this thesis will inspire other scholars to engage in empirical research about the political process and that my analysis will be a valuable resource for them.

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Finally, lest anybody who reads this thinks that dissertations are merely the product of luck, I want to acknowledge several people who helped me painstakingly create

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For Katrina.

The greatest moment in my life
was when you walked into it.

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Chapter 1

Introduction

The United States Constitution is conspicuously silent with respect to the regulation of the electoral process. While the structure of the government is laid out in some detail, the Constitution provides little guidance about who gets to vote, how votes are counted, how elections are financed, or what body should decide these questions. Article I section 4 provides that “the times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.” Thus, states have full autonomy over the rules and regulations of elections when there are no federal candidates on the ballot (i.e., in off-year and local elections).¹ When there is at least one candidate for federal office on the ballot, however, Congress has the authority to supersede any state law, whether it applies to ballot design, polling station rules, campaign finance, or anything else. With a handful of exceptions,² state and federal election laws and policies are congruent, and purposefully so. In practice, states almost always incorporate federal laws into their state codes in large part because the states are hesitant to administer two different sets of policies and procedures. In theory, this gives Congress broad power to regulate the operation of the election apparatus. However, strong federalism norms and the constitutionalization of election law at the state level prevents Congress from passing uniform federal standards that disrupt current practices.

1.1 States as Laboratories of Experiment

In practice, American election law is administered by 10,072 government districts, many with overlapping jurisdictions (Election Data, 2008), in what has been characterized as a “hyper-decentralized” election ecosystem (Ewald, 2009). In one of his most oft-cited opinions, Justice Brandeis (in dissent) defended the social and eco-

conomic benefits of decentralization in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) when he wrote:

“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. The Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold” (311).

This variation provided by these “experiments” afford ample research opportunities for social scientists.³ In each of the following three chapters I take advantage of variation in election law and practice at the state level and empirically analyze the role that institutions play in regulating elections and the right to vote. First, I explore the relationship between competitive elections and legislative gridlock and I show how recent political reforms linking responsiveness to legislative action are misguided. I also show how relaxing laws that restrict corporations and unions from making political expenditures has pushed independent political spending underground to groups that do not disclose their donors. Finally, I provide a blueprint for correctly estimating how delegating authority of various election law domains affects the implementation of the law.

1.1.1 Electoral Responsiveness and Political Gridlock

In Chapter Two I look at the relationship between competitive elections and legislative gridlock. In particular, I challenge the theory that competitive elections attract less partisan candidates and that closely contested races produce candidates more willing to vote with the other party, thus alleviating the congestion of political gridlock. The median voter theorem predicts that as the number of voters increases, the preferred political platform of candidates will converge toward the median voter’s preferences and result in closely contested elections. I present empirical evidence that challenges this theorem. Specifically, I evaluate several recent state-level reforms that attempted to increase the number of political races decided by close margins. In all of these reforms (mostly redistricting plans and party primary rules) the goal to “increase competition” was cited by reformers as a means to overcoming gridlock and polarization in state legislatures. I argue that close elections are a poor mechanism

for addressing gridlock for several reasons. First, gridlock is not necessarily a problem (Summers, 2013). Second, using election returns and roll call data I find no evidence that legislators elected by narrow margins are more likely to vote with the other party and/or facilitate compromise and legislative action. Third, close elections suffer from the fallacy of the beard: there is no *a priori* threshold that defines a close election, making it difficult to judge the success or failure of any particular political reform motivated by the need for more competitive races — are races decided by 0.001% more than the arbitrary threshold failures? Finally close elections, however defined, are not intrinsically “better” than uncontested or blow-out political races. Indeed, one way to describe a close election is that it maximizes the number of people that are dissatisfied with the electoral outcome. In reality, close elections give rise to a tradeoff in the forum for political deliberation. Where there are close elections, legislators are responsive to the voters and, as a result, the deliberation about ideas, public policies, and political theory happen among the general public and as part of electoral campaigns. When legislators win by large margins and are “safe” from electoral defeat, the deliberation happens in statehouses, in legislative committee rooms and offices, and on the floors on Congress. Both of these models are congruent with American democracy, but each responds to different forces and yields different outcomes — responsiveness in the former, compromise and legislative action in the latter. Thus, I argue that recent political reforms linking responsiveness to legislative action are misguided.

1.1.2 Campaign Finance Law and Political Equality

In Chapter Three my coauthor and I conduct the first systematic empirical analysis of the *Citizens United* by looking at the effect of the decision on state elections. When the *Citizens United* opinion was published in January 2010, twenty states prohibited corporations and/or unions from making independent expenditures to state campaigns. As Justice Stevens lamented in his *Citizens United* dissent, all of these state laws were overturned by the Court’s holding: “the Court operates with a sledge hammer rather than a scalpel” and “compounds the offense by implicitly striking down a great many state laws as well,” 130 S.Ct. at 933 (Stevens, J., concurring in part and dissenting in part). In fact, it was a state law that had given rise to the 1991 case *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) that was overruled in *Citizens United*. The exogenous shock of *Citizens United* on the laws of twenty states provides a natural setting to measure the effects of an independent expenditure ban on the spending behavior of corporations and unions. In chapter 3 we use recently compiled state-level reports of independent expenditure to test whether corporate and/or union spending was elastic to the change in campaign finance law. We find that independent expenditures increased in both treated and control states

between 2006 and 2010, but that the increase was more than twice as large in the pool of treated states. A closer look at the data reveals that the increase in spending was driven almost exclusively by 501c nonprofit organizations and 527 political committees, so named because of the tax code under which they are organized. Information about the donors to these groups is unavailable, meaning that we cannot empirically verify whether corporations and/or unions funneled money to them. However, we know that the most substantive changes to campaign finance laws between 2006 and 2010 eliminated prohibitions on corporate and union political spending, specifically on spending for the type of activities (independent expenditures) that are often managed by advocacy organizations and groups with political advertising expertise. In light of these facts, we interpret these findings as evidence that corporations and unions increased their political spending in response to laws that permitted them to do just that. This conclusion is neither surprising nor controversial, and our analysis provides the first systematic estimate of the magnitude of the response—a 100% spending increase—as well as the mechanism—an almost exclusive reliance on 501c and 527 organizations. Finally, we examine the distribution of independent expenditures and find that the spending increase in treated states is not driven by the largest expenditures (i.e. larger than \$55,000); rather the effect is most pronounced in the center of the distribution (20th to 70th percentile)—expenditures ranging from \$1,000 to about \$40,000. This finding is particularly striking because it cuts against the conventional wisdom of spending behavior and raises questions about the states’ equality interest, generally framed as a problem of disproportionate changes in the “tails” of the spending distribution, which we do not observe.

Our takeaway from this empirical analysis of independent spending is that there is a disconnect between the political system that the Supreme Court envisions and the political system that actually exists. This disconnect, we argue, has transformed the conservative judicial philosophy of “deregulate and disclose” into “cutback and conceal.” As more and more political spending goes underground—40% of all outside federal spending in 2010 was by groups that do not disclose their donors—it becomes increasingly difficult to measure the effects of campaign finance laws on the political process. Furthermore we strongly disagree with the legal fiction promoted in *Citizens United* that independent expenditures cannot corrupt as a matter of law, evidence to the contrary notwithstanding. This legal fiction is particularly dangerous for state campaign finance; states have unique histories—unique from each other and unique from the federal experience—and each has a different set of laws passed at different times for different reasons. Indeed, when the state of Montana produced evidence of a long history of *quid pro quo* corruption to justify its state law, the Supreme Court dismissed the case without a hearing. The Court’s indifference to the empirical record in that case, as well as its general aversion to as-applied challenges in campaign finance cases is, in our view, both short-sighted and imprudent.

1.1.3 Institutional Regulation of Election Law

Finally, in Chapter Four I evaluate the effect of delegating authority over the administration of various election policies on the implementation and success of these policies. Across the country states are adopting new voting technology each year, legislatures are enacting voter ID requirements across the country, voting rights lawyers continue to challenge at-large elections, early voting and vote-by-mail are becoming more popular, and campaign finance laws are being rewritten at the federal, state, and local levels. All of these reforms are being initiated with almost no idea how institutional arrangements will affect their administration or enforcement (Hasen, 2005; Persily, 2002; Issacharoff, 2002; Issacharoff and Pildes, 1998; Cain and Noll, 1995). In almost every case, the decision to regulate or delegate is based on a determination of political expediency and not a focus on effective public administration. Unfortunately, we lack an understanding of the different potential outcomes of different regulatory models — regulate, delegate, litigate, or some kind of hybrid.

My analysis of the potential outcomes of different regulatory models draws on the “potential outcomes framework” in the causal inference literature. Specifically, I provide the first outline for analyzing delegation as a treatment using a two-step estimation process. First, I estimate the probability that any given state legislature will delegate authority over various election domains given a set of political covariates. (There is a rich literature in political science describing the conditions under which states are likely to delegate). Second, I use these estimated probabilities to delegate (called “propensity scores”) to reweight regressions of delegation on a set of election administration outcomes. I find that residual vote rates — a highly technical and non-partisan election issue — are lower (better) in states that delegate authority over technology while the rejection rate of provisional ballots — a hotly contested issue with serious partisan implications — is higher (worse) in states that delegate authority over provisional ballots. These findings validate the logic of the information-impartiality tradeoff: with greater information comes a clearer understanding of how a law or policy will impact particular individuals. However, by knowing a policy’s impact on any particular person, decisions may not be very impartial (note that lady justice wears a blindfold). Given this logic and the findings reported in Chapter Four, I argue that legislatures should not delegate authority over election laws that can be manipulated for partisan gain, e.g., voter I.D. laws, the allocation of voting machines on election day, ballot design, voter registration requirements, recount procedures, redistricting, and deciding which ballots are valid. Election laws that are less susceptible to partisan manipulation, e.g., accessibility for disabled voters, voter intent standards, voting technology, etc. are arguably better administered by administrative agencies.

1.2 Empirical Scholarship about Election Law

Despite two decades of theorizing, the publication of at least three casebooks, and a sharp increase in election law litigation, there is a dispute whether any one theory can unify the whole of election law. Harward (2011) recently described this dispute when she wrote that

“Deeming ‘election law’ a field of study is somewhat like deeming the former Yugoslavia a country. You can draw a line around almost anything, but if the interior lacks unifying features or principles, the exercise may not yield anything useful. Indeed, if you group unlike things together and expect them to cohere when they should not, spurious discord results” (283).

Hayward argues that the field of election law has lost constitutional integrity because it has become overly functionalist. More specifically, Hayward argues that an otherwise consistent election reform agenda (with which she disagrees) oversteps its bounds when it tries to apply a Fourteenth Amendment-style balancing test to campaign finance law. “Campaign finance restrictions are not election administration laws,” she writes. “They are content-based restrictions on speech and association” and thus deserve First Amendment deference by the courts (285). Tokaji (2011) responds to Hayward’s endorsement of strict scrutiny in campaign finance cases by arguing that “this doctrine is not justified by a coherent conception of the proper role of courts in a democracy” (287).

The confusion about the role of courts is not limited to campaign finance, nor to academics. In fact, the Supreme Court’s *own* approach to election law often appears *ad hoc* (Pildes, 2004). Consider, for example, the Supreme Court’s decision in *Northwest Austin Municipal Utility District Number One v. Holder*, 129 S.Ct. 1695 (2009) avoiding a constitutional challenge to section 5 of the Voting Rights Act by awkwardly reading the statute very narrowly, even though constitutional questions were clear and very relevant. Contrast that case to the Court’s decision one week later to require reargument of whether the McCain-Feingold restrictions on advertising extend to on-demand advocacy videos. In this second case, *Citizens United v. FEC*, 130 S.Ct. 876 (2010), a clear statutory interpretation case, the Court specifically asked the parties to argue the First Amendment implications of McCain-Feingold’s restrictions, even though constitutional questions were avoided by both parties during the original hearing (Hasen, 2012*a*, and Chapter 3 below). These two cases illustrate the Court’s own lack of a consistent election law theory.

The missing ingredient that has created this inconsistency is a solid understanding of the empirics. Indeed, the vast majority of election law scholarship is normative and doctrinal. Prominent examples include an argument that the Supreme Court has

created an “illusion of coherence” in campaign finance law (Hasen, 2011), a call for enfranchising former felons (Karlan, 2004), an exploration of election law’s “doctrinal interregnum” during the final years of the Rehnquist court (Gerken, 2004), and a theory that partisan lockups in politics are analogous to market failures in the private sector (Issacharoff and Pildes, 1998). These erudite expositions are provocative and have played an important role in the development of the law. What lacks is a body of empirical work to test and challenge these theories. Looking to political science is the first step. Political scientists have studied institutions for several decades and there is a large literature showing how structures and rules determine substantive outcomes (e.g., Brady and McNulty, 2011; Hansford and Gomez, 2010; Gerber, Green and Larimer, 2008). Unfortunately, this research often lacks an appreciation for the role of law, or the implications of institutional design on justice and fairness. This has led to a disconnect between political scientists and election law scholars; neither group’s research speaks to the other. My dissertation bridges this gap by applying the empirical work of political scientists (e.g., Cox and McCubbins, 2005; Huber, Shipan and Pfahler, 2001; Mayhew, 1991; McCubbins, Noll and Weingast, 1989; Squire, 1988; Shepsle, 1979) to the doctrinal and aspirational election law literature. My dissertation also draws heavily from the public choice literature on institutions (e.g., Farber and O’Connell, 2010; Mueller, 2000; Buchanan and Congleton, 1998; Farber and Frickey, 1991; Buchanan and Tullock, 1962), and the economic literature on the regulation of public goods (e.g., Cooter, 1999; Ayres and Braithwaite, 1992; Olson, 1965; Schumpeter, 1962).

My work contributes to the small but growing field of empirical election law. Notable recent examples include research on the racial effects of voter ID laws (Cobb, Greiner and Quinn, 2010), racially polarized voting (Ansolabehere, Persily and Stewart III, 2010), panel effects for appellate litigation of the Voting Rights Act (Cox and Miles, 2008), litigation outcomes for Voting Rights Act Section 2 cases by geography (Katz, 2005), the outcomes of incumbent drawn gerrymanders (Persily, 2002), the effect of voter registration rules on turnout (Ansolabehere and Lovett, 2008); the benefits and costs of non-precinct voting (Leighley, Nagler and Tokaji, 2009), election day registration (Burden et al., 2009), and the effect of voting technology on wait times (Spencer and Markovits, 2010). My dissertation is just one small part of my larger research agenda to test election law theories in each of the three pillars of election law: election administration, voting rights, and campaign finance. See figure 1.1 (next page). My dissertation contributes to the existing literature in two primary ways. First, I have collected a large amount of data: twelve years of roll call votes in four state legislatures, independent political spending data for all state races in 18 states, textual analysis and coding of all election statutes in every state, data on the number of bills introduced, passed and vetoed in all fifty states over a ten year period, in addition to updating several existing datasets with variables for

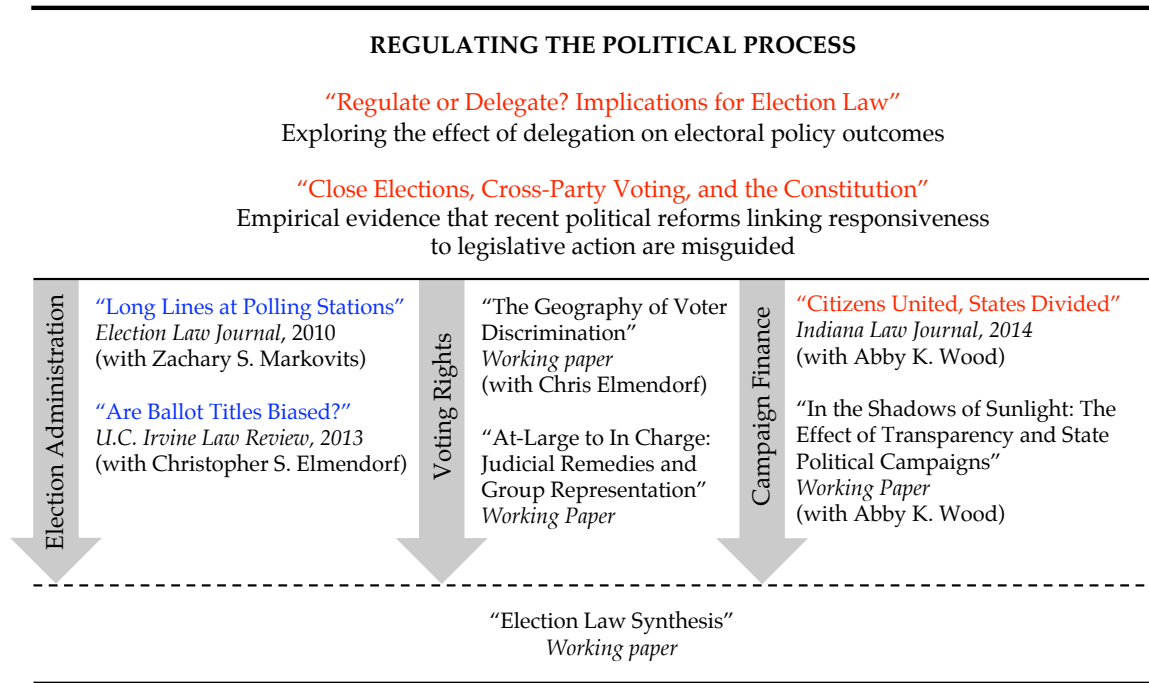


Figure 1.1: Publications and working papers. The three titles in red comprise my dissertation (see the following chapters). The titles in blue have been published or are forthcoming. All remaining titles are under construction.

divided government, political competition, and partisan composition of state legislatures (Dal Bo, Bo and Snyder, 2009; De Figueiredo, 2002). All of this data will be made public after the chapters of my dissertation are published. Second, I employ a variety of empirical methods and analysis — difference in difference estimation, quantile regression, and propensity score reweighting — that is often not used in the analysis of election laws. The following chapters are written for an audience of law professors and election scholars who may not be familiar with these methods. I hope that my dissertation will be a resource for these scholars as they pursue their own empirical studies of the political process.

Notes

¹Though since the passage of the Voting Rights Act of 1965, however, several Southern states have been under federal receivership, meaning that any changes in election practices — federal or state — must be “precleared” by the Department of Justice or a three judge panel of the District Court for the District of Columbia (see 42 U.S.C. §1973c (2010), which codified §5 of the Voting Rights Act). In the 1970s Texas and Arizona, as well as a handful of counties in California, Florida and New York became “covered” jurisdictions as well (Thernstrom, 2009). According to Persily (2007), “No other statute applies only to a subset of the country and requires covered states and localities to get permission from the federal government before implementing a certain type of law” (177).

²Notable distinctions between state and federal law include voter encouragement policies and some campaign finance laws. In some states (e.g., California and Alaska), independent groups, like parties, may pay voters in order to boost turnout, but these groups face up to two years in prison if they do so when a federal candidate is on the ballot (Hasen, 2000). 18 U.S.C. §597 prohibits “expenditure[s] to any person, either to vote or withhold his vote, or to vote for or against any candidate.” No state permits *quid pro quo* payments for voting a particular way, but some states permit individuals or groups to offer coupons for goods (e.g., doughnuts) in exchange for an “I voted” sticker or its equivalent as a way to increase turnout. With respect to campaign finance, six states permit unlimited contributions to candidates by individuals, though there are strict limits for giving to federal candidates. And before 2010, twenty states permitted unlimited independent expenditures though this kind of spending was banned at the federal level (the federal ban was ruled unconstitutional in *Citizens United v. FEC*, 558 U.S. 08-205 (2010)).

³Note, however, that the hyper-decentralization of rules and regulations that creates ideal research opportunities may violate the Fourteenth Amendment’s guarantee of equal protection, which the Supreme Court has ruled applies to the administration of elections. In *Bush v. Gore*, 531 U.S. 98 (2000), the Court held that “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.” See also *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463 (6th Cir. 2008)(holding that plaintiffs pled sufficient facts to survive motion to dismiss with respect to their equal protection claims); *Black v. McGuffage*, 209 F.Supp.2d 889 (N.D.Ill. 2002)(holding that variable residual vote rates by county violated the Equal Protection Clause); *Common Cause S. Christian Leadership Conference of Greater L.A. v. Jones*, 213 F.Supp.2d 1106 (C.D. Cal. 2001)(holding that variable voting procedures by county were enough to survive a motion for judgment on the pleadings notwithstanding plaintiffs’ equal protection claims). In the words of Overton (2007), “there is no ‘right’ to vote outside the terms, conditions, hurdles, and boundaries set by the ‘matrix’ [of diffuse electoral institutions].”

Chapter 2

Close Elections, Cross-Party Voting and the Constitution

Electoral competition is the bedrock of democracy. Much like prices signal the consumption preferences in a private market, democratic elections help signal the political preferences of the population and make governments responsive to these preferences (Cooter, 1999).¹ Competition is not important, however, just for the sake of competition. Competition channels egoism into public gain. Indeed, it is not from the generosity of governors or the sympathy of senators that we can expect liberty, but from their regard to their own interests...harnessed by electoral competition.

In this chapter, I look closely at the theory and importance of competitive elections. The median voter theorem predicts that as the number of voters increases, the preferred political platform will converge toward the median voter's preferences and result in closely contested elections. I provide empirical evidence that supports this theorem. I also provide empirical evidence that undermines the theorem. Namely, log-rolling by legislators, multi-peaked preferences among voters, and less than 100% turnout complicate the story. I discuss the implications of these limitations and caution against the uniform reliance on closely contested elections as the motivating aim of political reform. I discuss several recent reforms at the state level that attempted to increase the number of political races decided by thin margins. In all of these reforms (mostly redistricting plans and party primary rules) the goal to "increase competition" was cited as a means to overcoming gridlock and polarization. I show that these reforms fall short of their aims for three reasons. First, there is no evidence that legislators elected by narrow margins are more likely to buck their party's platform and/or facilitate compromise and legislative action. Second, competitive elections suffer from the fallacy of the beard. In the fallacy of the beard, no follicle of facial hair defines the difference between having a beard and having no beard. If I grow one hair on my face, I do not have a beard. If I grow one more hair on my

face, I also do not have a beard, etc. This leads to the paradox that no matter how many individual hairs I grow on my face I will never have a beard. In general, the fallacy of the beard and other continuum fallacies is that thresholds are meaningless for determining quality. This is not true, of course. We can think of several uncontroversial examples of people with and without beards. The fallacy of the beard does illustrate, however, that defining “close elections” *a priori* is arbitrary, making it difficult to judge the success or failure of any particular political reform motivated by the need for more competitive races — are races decided by 0.001% more than the arbitrary threshold “failures”? Finally “close elections,” however defined, are not intrinsically “better” than uncontested or blow-out political races. Indeed, one way to describe a close election is that it maximizes the number of people that are dissatisfied with the electoral outcome. In reality, close elections give rise to a tradeoff in the forum for political deliberation. Where there are close elections, legislators must be responsive to the voters and, as a result, the deliberation about ideas, public policies, and political theory happen among the general public and as part of electoral campaigns. When legislators win by large margins and are “safe” from electoral defeat, the deliberation happens in statehouses, in legislative committee rooms and offices, and on the floor on Congress. Both of these models are congruent with American democracy, but each responds to different forces and yields different outcomes — responsiveness in the former, compromise and legislative action in the latter.

In the second part of this chapter I discuss the role of constitutions as arbiters of this tradeoff and explore the implications of my empirical findings on the constitutional lawmaking process. Election law is best situated in constitutions, though because we have such a limited understanding of political institutions and the equilibrium of any one election policy, the constitutionalization of election law presents a paradox. Constitutional amendments are often conceptualized as high risk, high reward for the proponents of change. However, the risks extend to the general electorate as well with no additional benefits. This requires a rethinking of how we regulate the political process, a topic I turn to in the final section of the chapter.

2.1 Competitive vs. Close Elections

In general, the definition of competition in the election literature is taken for granted. However, researchers and commentators often use one singular term, “competitive election,” to refer to one of two distinct phenomena, defined as:

First-order definition:

An election that pits two or more candidates against each other for one office;

Second-order definition:

An election between two or more people in which the winning margin is close, but not equal, to zero.

These definitions are not often articulated and are often confused for each other or conflated. This can lead to a mistaken understanding of the root cause(s), or the appropriate response(s) to non-competitive elections. For example, from 1990-2003 more than 70% of all state legislative races were contested in the general election by more than one candidate (Carsey et al., 2003). In thirteen states, the rate was more than 90%, including California (96%), which is often characterized as a state without competitive elections. These numbers suggest a very high level of competition as understood by the first-order definition above. Almost the exact opposite is true regarding the second-order definition: over the same time period, for the same offices, the national average proportion of races decided by 2% or less (meaning the winner garnered less than 51% of the vote) is just 3.5%. For example, in California's 709 Assembly district elections between 1990-2010, just 3% of the winners garnered less than 51% of the vote. These numbers suggest that the bigger threat to competition in California and many other states relates to margins of victory and not to ballot access issues. This threat of the "vanishing marginals" was first articulated by David Mayhew in 1974 regarding federal Congressional elections (Mayhew, 1974; Fiorina, 1977; Ansolabehere, Brady and Fiorina, 1992) and has also been observed in several other state legislative bodies as well (Weber, Tucker and Brace, 1991).

In this chapter I use the term "competitive election" to refer to the first-order definition (more than one candidate) and the term "close election" to refer to the second-order definition (margin of victory). For the reasons described above, my main focus is on close elections, though the theory and implications for competitive elections are similar.

2.1.1 Median Voter Theorem

The median voter theorem, in its simplest form, is a predictive theory about the behavior of political candidates and voters in a majority winner-take-all system. The theorem is based on contested assumptions, such as perfect information, single-peaked preferences (more on this later), and the fact that the winner actually takes all (some candidates find value in losing elections by affecting the dialogue or establishing credibility for a future run). Notwithstanding these limitations, the median voter theorem remains the most widely-accepted predictive theory about voting. The median voter theorem assumes that political platforms, or preferences, can be aligned on a left-right scale and mapped onto a two-dimensional space.² Based on the spatial model of voting formalized by (Downs, 1957), the median voter theorem predicts that as the

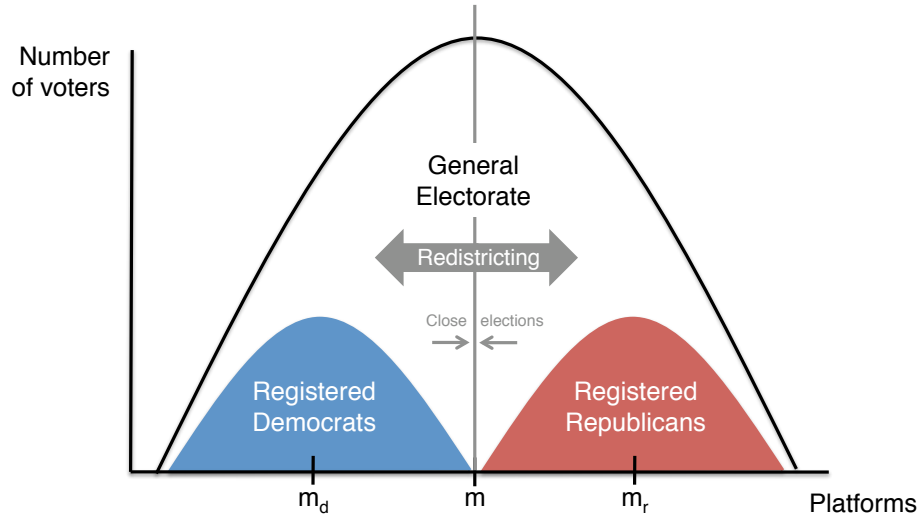


Figure 2.1: Median voter theorem.

number of voters increases, the preferred political platform will converge towards the median voter and lead to closely contested elections. See figure 2.1.

Consider an election with two candidates who compete for the Republican nomination to a particular office. In states with closed primaries, these two candidates compete for the votes of registered Republicans. The median voter theorem predicts that these candidates will converge on the platform of the median Republican voter, marked m_r in Figure 2.1, as doing so will maximize the number of votes each candidate can earn (think in terms of majority rule elections, though the same logic applies to plurality systems as well). Candidates in the Democratic primary behave similarly, yielding a candidate that endorses the platform m_d . By extension, when the Republican and the Democrat meet in the general election, the median voter theorem predicts that both candidates will converge toward the platform endorsed by the median voter of the general electorate (m) in order to maximize their chances of winning the election. The rationale of the median voter theorem predicts that shifts toward the (relative) political center will yield more voter support, thus incentivizing candidates to adopt the median platform, or else risk losing voter support to their opponent.

Consider the 2012 presidential candidacy of Mitt Romney. During the Republican primaries, Romney endorsed a platform preferred by the average Republican voters in each of the states where he campaigned (as determined via campaign polls and meetings with voters and party leaders). During the primary election season, Romney endorsed anti-immigration legislation, expressed strong views opposing gun control,

and hinted that he would appoint Supreme Court justices willing to overturn *Roe v. Wade*, and would sign legislation to ban all abortions if given the opportunity. After securing the Republican nomination, Romney's views on these issues "evolved" toward the median position of the American public.³ A few months after securing the Republican nomination Romney asserted that military service or a college degree would be a pathway to legal citizenship under his administration. In October 2012 Romney released a political advertisement supporting wide access to contraception and support for abortion in cases of rape, incest and threat to a mother's life. Romney was criticized by conservatives for pivoting to more centrist policies during the general election (and Romney ultimately failed to convince the public that he was a moderate) but his behavior (and the behavior of countless other politicians) is convincingly explained by the median voter theorem.

The median voter theorem is a predictive model of a political candidate's position and also applies when a candidate becomes a voter, e.g., when a candidate is elected and must choose from among a set of policies (Shepsle, 1979). Several benefits have been identified from the outcome(s) predicted by the median voter theorem. For example, the median voter theorem predicts that elections will be decided by very close margins, thus making it easier for voters to hold elected officials accountable by "voting the bums out" (though see Moreno-Jaimés, 2007). In addition, politicians who represent the median voter are, by definition, less extreme at the margins. This is important inasmuch as a legislature full of moderate candidates is theoretically more likely to enact bipartisan laws and cooperate with each other.

One of the difficulties for applying the principles of the median voter theorem to real-world scenarios is that the "median voter" is a symbolic and hypothetical person. The best way to understand the identity of the median voter is to describe who the median voter is not. First, the median voter theorem is not the mean voter. In other words, the median voter theorem does not account for the intensity of preferences among voters. For example, if Democrats strongly support gun control laws and Republicans are generally indifferent but lean slightly against the law, the median voter theorem does not weigh Democratic votes more heavily than Republican votes. To understand why we look to the one person, one vote rule in America that precludes people with extraordinarily strong preferences from casting more than one ballot.⁴ Thus, the median voter is defined as the person whose preferences represent the 50th percentile or for whom the number of people who disagree are the same as the number who agree (Condorcet, 1785; Hotelling, 1929; Downs, 1957; Cooter, 1999). This means that the median voter can also be thought of as the decisive voter. This does not mean, however, that the median voter is a moderate or that her preferences more closely align to independent or undecided voters than to loyal partisan voters. The median position can be manipulated. Most notably, legislative districts are redrawn every ten years and the resulting balance of political preferences

is often skewed in one direction or the other. See figure 2.1. Redistricting does not undermine the median voter theorem — no matter the distribution of voters, there will always be a 50th percentile. Where this (relative) median falls on the left-right political spectrum, however, is determined by the makeup of an election jurisdiction, over which redistricting bodies have great power. And no matter the distribution or the median position, the median voter theorem predicts a convergence of preferences to the center of that distribution and, as a result, a closely contested election.

2.1.2 Close Elections as Political Reform

The median voter theorem can help explain a spate of recent political reforms aimed at increasing the closeness of state legislative races. In the mid-2000s several states adopted new models for redistricting, namely the creation of independent bodies to oversee the process. The goal behind these initiatives (9 states now use non-legislative commissions for redistricting) is to prevent lawmakers from carving out safe seats for themselves. In other words, “independent” redistricting commissions are tasked, either explicitly or implicitly, with decreasing the margins of victory of current and future lawmakers. In California and Washington, voters approved ballot initiatives to create a “top-two primary” election system. In most states the primary election process is regulated and administered by the several parties, each of which chooses the rules by which its candidates are selected for the general election. In some states this process happens as part of the party convention (e.g. Utah) and in most states the process happens in a primary election held several months before the general election. The rules vary with respect to who can vote for candidates during a primary. Some states have “closed” primaries meaning voters may only vote for candidates in the party in which the voter is registered. Other states allow independent or undeclared voters to participate. Still other states have “open” primaries where any voter can request the ballot of any party and vote for whomever they prefer. The top-two primary eliminates the parties’ control over the primary process and the separation of candidates into party lists. Instead, all candidates for an office, from all parties, are listed on one ballot that is given to all voters in the primary election. The top two vote earners from this ballot — no matter their party — run against each other in the general election. In districts that are extremely conservative the top two vote earners may both be Republicans and *vice versa* in extremely liberal districts. The motivation for the top-two primary was a frustration by many citizen groups that the candidate selection process too often happened during the primary election season. In extremely conservative districts, for example, Democratic candidates are non-viable and the Republican candidate will always win the general election. Because the Republican candidate is chosen during the Republican primary and because the primary election is regulated by the Republican party, many groups (and a major-

ity of voters in California and Washington) felt that candidates were beholden more to party leaders than to the general public. The top-two primary was an attempt to realign the allegiance of lawmakers to the general public. Tellingly, both the Republican and Democratic parties on California and Washington vigorously opposed the top-two primary initiatives.

The frustration with primary election rules and the concern about lawmaker allegiance in Washington and California grew out of frustration with legislative gridlock and increasing polarization in the state legislature. With too few competitive and close elections, the argument went, candidates were pivoting away from the median voter's policy preferences and toward more extreme and partisan positions creating gridlock and bad public policy. By creating close elections, lawmakers were thought to be more likely to cooperate because they would (a) adopt positions close to the median voter and, thus, to each other and (b) be more likely to appeal to voters outside of their party in order to maximize the chances of winning reelection. This belief proved to be very strong rhetorically and mobilized a winning coalition of voters that changed the rules for candidate selection. Whether this belief actually represents events in the real world is a matter of debate. In the next section I present empirical evidence that suggests the relationship between close elections and cooperation turns out to be not very strong at all.

2.2 An Empirical Analysis of Close Elections and Cross-Party Voting

2.2.1 Case Study: California

In 2009, the California State Legislature was deadlocked on the state budget. With just one more vote necessary to reach the two-thirds super majority threshold, California state Senator Abel Maldonado wielded great power as one of a handful of holdouts who was willing to bargain. Maldonado, a ten year veteran of Sacramento — six as an Assembly representative from San Luis Obispo County, and four as a state senator — agreed to vote for the pending budget resolution in exchange for a political favor. The buying price? Legislative support for Maldonado's ballot initiative to amend the state constitution in favor of open primaries where the top two vote getters, drawn from one list regardless of party, advance to a run-off in the general election. Maldonado believed that open primaries would lead to close general elections, where more moderate candidates would emerge and prevent future budget stalemates because of their willingness to cooperate and compromise. In the end, Maldonado struck his bargain. The budget passed and on June 8, 2010 the open primary amendment appeared on the ballot as Proposition 14.

In the lead up to the election, there was a serious, statewide dialogue about the effects of Proposition 14. The Los Angeles Times endorsed the measure as “a modest step toward eliminating some of the incentives that encourage our representatives to dig in and resist sensible compromise” (Editorial, 2010*c*). The Monterey County Herald (one of Maldonado’s home newspapers) opined that Proposition 14 would “move candidates toward the middle” because “rather than appealing only to their party’s core. . . the candidates would try to seek votes from everyone” (Editorial, 2010*b*). Most of the opposition to Proposition 14 centered on the measure’s possible effect on campaign spending and on minority party candidates who some believed would be harmed by the open primary system. There was some opposition, however, that questioned the benefits predicted by the median voter theorem. The Orange County Register publicly opposed Proposition 14 on the basis that “. . .encouraging moderate, middle-of-the-road candidates, essentially amounts to elections between candidates with few policy differences where personality trumps substance” (Editorial, 2010*a*).

Proposition 14 ultimately passed with 53.8% of the vote and went into effect in 2012. Maldonado’s efforts attracted the attention of then-Governor Schwarzenegger. When Lieutenant Governor John Garamendi won a special election to serve in the United States Congress before the end of his term, Schwarzenegger nominated Maldonado to serve out the term and the state legislature consented.⁵

Proposition 14 is a real-world instantiation of the median voter theorem, though in reverse. Whereas the median voter theorem predicts centrist candidates will garner a slim majority of votes, the Proposition 14 is based on the idea that close elections will produce centrist candidates who are more likely to cooperate with each other. Whether either of these theories explains California politics is an empirical question.

The median voter theorem suggests that as the number of voters increases, the preferred platform of the winning candidate will reflect the preferences of the median voter in that jurisdiction (see above). By pandering to the median voter, a political candidate is able to attract as many votes as possible — at minimum 50% plus one vote. The median voter theorem thus suggests that no matter how electoral districts are drawn (i.e., no matter where the median voter’s preferences are along a left-right dimension), electoral outcomes should hover, on average, near 50%. The solid line in Figure 2.2 (next page) represents the average margin of victory for all Assembly seats between 1898 and 2002 and illustrates that outcomes in California are not, on average, close to 50%. In fact, elections for the California Assembly are rarely closely contested. The average margin of victory between 1992-2004 was 33.7% meaning that a winning candidate for the Assembly earned, on average, 66.85% of the vote.⁶

Despite the lack of widespread close elections in this period, they are some of the most competitive, and closely contested in the past 100 years. At the same time, the Assembly has become more polarized than any other time in the state’s history. The dotted line in Figure 2.2 represents the polarization score of the California Assembly.



Figure 2.2: Margin of electoral victory for members of the California Assembly from 1898 to 2004 is depicted by red line. The black dotted line represents the polarization score for the California Assembly over the same time period. Polarization is measured as the distance between the ideal point of the mean Republican Assembly member and the mean Democratic Assembly member. 1898-1992 election data based on data compiled by Seth Masket from the California Blue Book and the California Assembly Roster (Masket, 2001). 1992-2004 election data compiled by author based on published reports by the CA Secretary of State. Polarization score calculated by Masket using DW-NOMINATE software (Masket, 2007).

These data are not strong evidence in favor of the median voter theorem, though perhaps they are the product of aggressively partisan redistricting. If the median voters in Republican districts and Democratic districts move further and further apart, we would expect to see an increase in polarization, we might see both high polarization and close elections. However, elections were not that close. As it relates to Proposition 14, these data illustrate that in 2009 the Assembly was highly polarized and Assembly elections were not generally close. These two facts appear to undermine the central argument in favor of political reforms that are motivated by or seek to create closely contested elections, such as Proposition 14. Note that the relationship between polarization and the margin of victory, as illustrated in Figure 2.2, is a comparison of aggregated number averaged over time. In the next section I evaluate this relationship at the individual level, though my findings are not very different.

	<u>High cleavage</u>	<u>Low cleavage</u>
<u>Liberal</u>	California	Massachusetts
<u>Conservative</u>	Wisconsin	Idaho

Table 2.1: State legislatures in my sample based on ideological differences and variation in the extent of partisan cleavage or polarization. See Shor and McCarty (2011) and Appendix, figure 2.8.

2.2.2 Evidence From Four States

In order to test the marginal effect of close elections on cross-party voting, I identified four states that represent the two most important political variables that explain legislative voting behavior: ideology and polarization. In table 2.1 I present a 2×2 matrix that characterizes the four states in my sample. Drawing on the research of (Shor and McCarty, 2011), I selected the two most liberal legislatures (California and Massachusetts) and two of the most conservative legislatures (Idaho is the most conservative and Wisconsin is the 8th most conservative). I chose these four particular legislatures with an eye toward variation in partisan polarization. California and Wisconsin have two of the most highly partisan legislatures, first and sixth respectively, while both Massachusetts and Idaho have polarization scores (measured as the difference between average NOMINATE scores by party) that are below the national average Shor and McCarty (2011). My roll call analysis confirms these characteristics as first identified in Shor and McCarty (2011) (see Appendix, figure 2.8).

2.2.3 Legislative Cooperation

To test the marginal effect of close elections, I compare the margin of victory for every legislator in the lower house of the California, Idaho, Massachusetts, and Wisconsin legislatures between 1992-2004 to individual roll call votes over the same time period. Each roll call vote was coded “1” when the legislator voted with the majority and “0” otherwise (see Appendix, figure 2.9). I use a legislator’s rate of voting with the majority as a measure of their cooperativeness. This is an admittedly imperfect measure, though I think it captures the deficiency that Abel Maldonado and proponents of Proposition 14 (and other like-minded reformers) sought to remedy: an unwillingness to cooperate, which I define as voting with one’s opponents. There are various ways to define cooperation (e.g., co-sponsoring a bill with somebody from a different party, introducing an amendment that garners bipartisan support, refraining

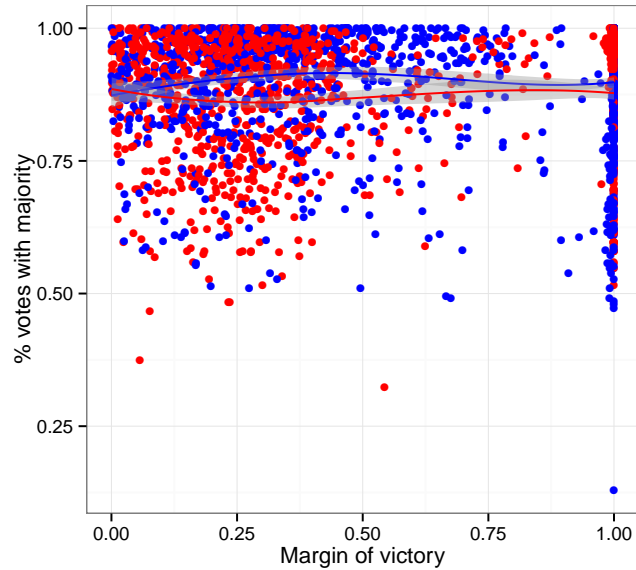


Figure 2.3: Likelihood of voting with the majority plotted against margin of victory. Each point represents one state legislator.

from invoking procedural hurdles, etc.), but I prefer the rate of voting with the majority because it involves the commodity of greatest interest — a legislator’s vote — and, unlike other measures, it includes things that are not initiated by the legislator and are out of their control. Legislators can co-sponsor all kinds of bipartisan bills that have no chance of reaching a vote or of passing, but if legislative stalemate is the concern, then voting matters, and voting with the majority party when one is in the minority party is a defensible measure of cooperation.

Each state’s legislative record includes a notation for legislators that do not vote, whether by abstention or because he or she was absent. From this information I calculated the rate at which each member of the Assembly voted with the majority, and the rate at which they did not vote. I then plotted these rates on the electoral margin of victory for each corresponding member of the Assembly. See figure 2.3. Electoral margins of victory are plotted on the x-axis and the percent of roll call votes in which each legislator voted with the majority on any given bill (a ‘yea’ vote on bills that passed and a ‘nay’ vote for bills that did not pass). Every point in figure 2.3 represents a single legislator; blue points represent Democratic legislators and red dots represent Republican legislators. The lines are loess smoothers with 95% confidence intervals. If it were true that closely contested elections induced legislators to compromise or vote in favor of bills at a higher rate, then we would

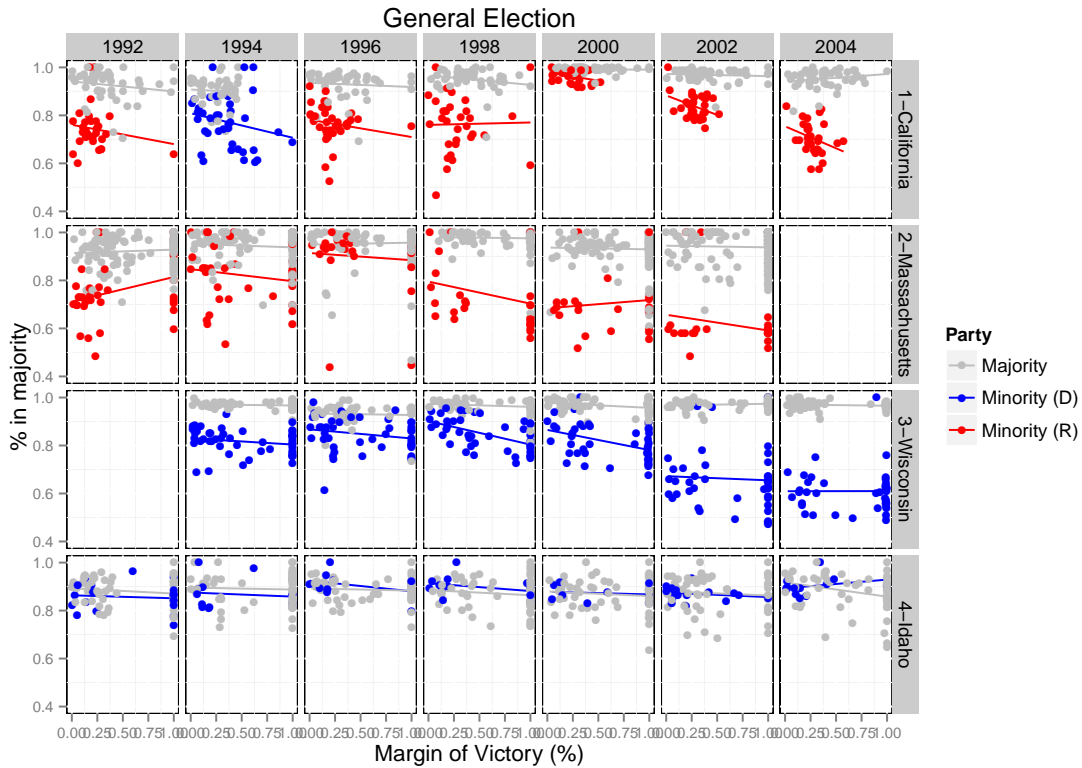


Figure 2.4: Margins of victory coded using the State Legislative Election Returns database (Carsey et al., 2003) and individual state Secretary of State websites. Roll call votes coded by author from state legislative journals.

expect to see a negative relationship between these two variables, or a downward sloping line. Instead, we see a horizontal line that suggests no relationship between these variables. If anything the relationship between these variables is slightly *positive* (a bivariate regression yields $\beta = 0.02$ with a p-value of 0.007). Note that the pattern is the same in each individual state (see Appendix, figure 2.10).

In figure 2.4 I break out the plot by state and legislative session (the reported year is the year of the election with roll call votes from the subsequent two years). I also re-color the individual legislators based on their status in the majority or the minority. In Idaho and Wisconsin, Democrats were in the majority over the entire time period. In California and Massachusetts, Republicans were in the minority in every time period except one session of the California Assembly from 1995-1996. Broken down to this granular level still does not reveal a relationship suggesting that close elections produce legislators willing to vote with the other party. Note that this

relationship is the same whether cooperation is measured as the percent of votes with the majority or as the NOMINATE score itself (see Appendix, figure 2.11). If close elections lead to higher levels of cooperation, then we would expect the best fit lines on the plots to slope downward (the plotted lines are best linear approximations). In other words, we would expect to see higher rates of cooperation where the margin of victory was closer to zero and lower rates of cooperation where the margin of victory was closer to one. This is not the case. The relationship is unstable from one time period to the next. Contrast the relationship of cross-party voting and margin of victory to voting patterns and party identification where there is obviously strong party discipline: Republicans are more likely to vote like Republicans, no matter their margin of victory, and Democrats likewise. This party discipline is robust across all years in the sample and suggests that party identification is a very good predictor of how a legislator will vote (this is not a surprising result).

To test the possibility that the relationship between margin of victory and cross-party voting is not linear, I identified all races that were decided by various thresholds (see table 2.2). In all, there were only 138 races (of 2,709) that were decided by 5% of less. Testing for various victory thresholds reveals no pattern, though all of the coefficients are negative. See table 2.3. Because the number of elections is so small, the standard errors on all of the coefficients, with and without state fixed effects, are very large and the R^2 are very small, in some cases negative meaning that we could predict a vote with majority better by chance than by looking at the margin of victory. This is hardly a vote of confidence for political reformers. While we cannot draw any strong conclusions about the possible effects of an intervention like Proposition 14

	Winner's Vote Percentage			
	< 50.01%	< 50.5	< 51%	< 52.5%
1992	2	4	5	15
1994	1	5	5	15
1996	4	2	7	10
1998	0	3	4	6
2000	0	3	1	7
2002	1	3	6	11
2004	1	1	4	12
TOTAL (cumulative)	9 (9)	21 (30)	32 (62)	76 (138)

Table 2.2: Number of elections decided by narrow margins in the lower houses in California, Idaho, Massachusetts, and Wisconsin. The total number of individual-level elections between 1992-2004 is 2,709. *Source: Election data is based on published reports by the respective Secretary of State's office.*

	All races	< 0.5%	< 1%	< 2%	< 5%	< 10%
Margin of victory	0.01 (0.01)	-0.34 (0.39)	-0.35 (0.39)	-0.64 (0.51)	-0.54 (0.40)	-0.31 (0.22)
(with state fixed effects)	0.00 (0.01)	-0.55 (0.38)	-0.58 (0.39)	-0.73 (0.53)	-0.50 (0.40)	-0.24 (0.22)
Intercept term	0.88* (0.00)	0.92* (0.01)	0.92* (0.01)	0.91* (0.01)	0.90* (0.01)	0.90* (0.01)
N	2442	21	29	60	125	241
R^2	0.00	0.04	0.03	0.03	0.01	0.01
adj. R^2	0.00	-0.01	-0.01	0.01	0.01	0.00

Standard errors in parentheses

* indicates significance at $p < 0.05$

Table 2.3: Linear probability models predicting a vote with the majority on any given bill. *Source: Author coded roll call votes in the lower legislative houses of California, Idaho, Massachusetts, and Wisconsin, 1992-2004.*

from observational data, these data suggest that the median voter theorem may not have the predictive magnitude accorded it by reformers.

Non-Voting

In addition to cross-party voting, I also compared electoral margins of victory to rates of non-voting (see Appendix, figure 2.12). Non-voting rates were generally very low with just 4% of all legislators missing more than 15% of recorded roll call votes. Non-voting has not been raised as a problem by political reformers, but the median voter theorem suggests that there are reasons to believe that the margin of victory might be a good predictor of how often a legislator votes. On the one hand, winning in a landslide may induce a legislator to take their job less seriously, and to abstain without fear of repercussion. On the other hand, winning a very close election may also induce a legislator to abstain, though for different reasons. Fearful of losing the next election, a legislator elected by a slim margin may abstain from voting on controversial bills to avoid being on record for or against issues that might be used against them. The data offer no evidence to support or to reject either of these hypotheses. Given that the median non-voting rate was 1.7%, and that this 1.7% was equally distributed between parties and across victory margins, non-voting does not appear to be a significant problem warranting reform or further analysis.

2.2.4 Legislative Updating

Given the lack of a strong relationship between legislative cooperation and electoral margin of victory, I turn my attention to the legislators themselves. Perhaps singular elections are an unreliable measure because, in a winner-take-all system, just winning an Assembly seat is all that matters. Once elected, past events are forgotten and legislators pursue similar strategies regardless of their chances for reelection. In other words, if a close election does not produce a candidate more willing to compromise, perhaps candidates change their strategy after voters judge their behavior as opposed to judging their promises. To test this hypothesis, I plotted the cooperative rate of each legislator over time, focusing on whether changing margins of victory affect their behavior. See figure 2.5 (next page). The x-axis measures the cooperative rate of each legislator in the legislative session after his or her initial election. The y-axis measures the cooperative rate of each legislator in the legislative session after his or her reelection. The plot is then conditioned on 16 combinations of electoral returns for both elections (see table 2.4), and scatterplots are presented for each combination of these categories. For example, in the top left corner of the plot, legislators won both their first election and their reelection by less than 25%. The panel in the bottom left corner reports the cooperative rates for legislators elected by less than 125% and reelected by more than 75% of the vote.

If margin of victory is either the cause or effect of legislative votes, then we might expect to see different patterns in different panels of the plot. The idea is that legislators may view their reelection as a referendum on their behavior and change their political strategy accordingly. We see that most legislators were elected by more than 75% of the vote in both time periods. We also see that most legislators fall on, or very near, the 45-degree line (marked with a dotted gray line) in all of the panels.

n(elect)	Margin of victory	n(reelect)
391	0% to 24.99%	298
382	25% to 49.99%	366
116	50% to 74.99%	138
696	75% to 100%	783
1,585	TOTAL	1585

Table 2.4: Categories of election returns by margin of victory in two time periods. Data is subsetting to the 612 legislators that were elected more than once. Legislators elected more than twice are included in the sample multiple times; each independent reelection preceded by the previous election.

In each panel, deviations from the 45-degree line are as likely to be above as they are below. This suggests that the margin of victory is not as strong of a predictor of cross-party voting as is a legislator's previous behavior. On the 45-degree line, the cooperative rate is identical in the legislative session before and after reelection; whatever the cooperative rate in the legislative session after an election, the legislator is likely to cooperate at the same rate in the legislative session following his or her reelection. Perhaps the most relevant plot is in the top right corner, illustrating the behavior of legislators that were elected by a large margin but then re-elected by a small margin. This plot is the most relevant for purposes of evaluating the possible effect of a law that artificially establishes close elections. What we see is no different than the behavior of legislators in the rest of the plots, and that is the margin of victory has no effect on the likelihood of cross-party voting.

It is worth noting that the highest rate of cross-party voting occurs in the bottom right panel of the plot where legislators were both elected and reelected by a landslide. The average rate of votes with the majority among these legislators is 99.4%. The next highest average is 80% from the two adjacent panels (one to the left and one just above). In other words, the larger the margin of victory the *more likely* legislators are to vote in the majority (this is true for legislators in the majority and legislators in the minority).

On some level, these data suggest that political reformers may have the relationship between elections and policymaking exactly backwards. Legislators in safe seats appear to be more willing to buck their party's platform and vote with the other party than are legislators that eke out narrow victories. This has very important implications for future reform efforts as well as understanding the current state of affairs in state legislatures across the country.

The strongest effects, however, are unrelated to margin of victory. Party identification and previous voting behavior are the strongest predictors of a legislator's vote. In other words, perhaps there are some people who are just more likely to be cooperative by nature, regardless of the electoral rules or outcomes. In the next section I look at the relationship between the personal characteristics of legislators (previous political experience, military service, etc.) and their voting behavior.

2.2.5 Personal Characteristics of Cross-Party Voters

Of the four legislators most likely to vote with the other party between 1992 and 2004, two are female and two are male, both males served in the military, and three of the four had previous elected experience in local politics. These legislators' electoral margins of victory ranged from 1.8% to 22.1%. Of the four least cooperative legislators in the past 15 years, all were male, one served in the military and only one had been elected to local office previously. These legislators' electoral margins

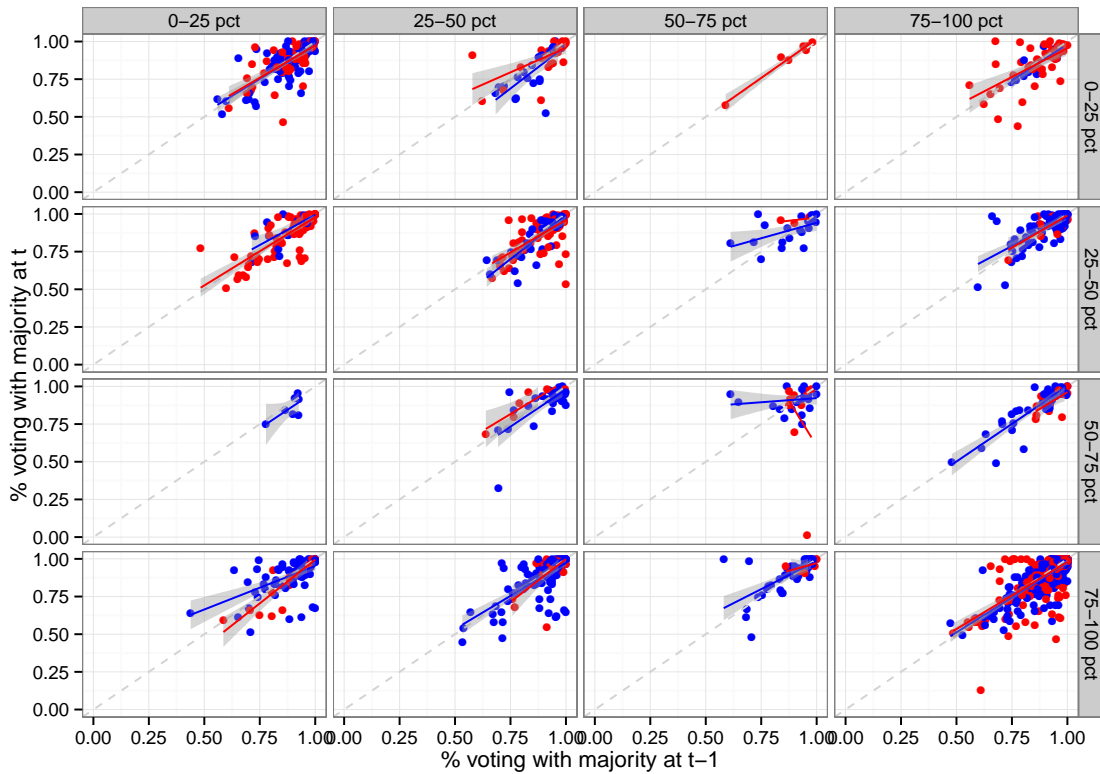


Figure 2.5: Likelihood of cross-party voting by margin of victory in two time periods. The x-axis represents the rate of cross-party voting in the legislative term after the first election. The y-axis represents the rate of cross-party voting in the legislative term after the second election. Each panel represents a combination of electoral margins of victory in each time period.

of victory range from 7.6% to 33.4%. Do any of these personal characteristics have a predictive effect on a legislator cross-party voting in more systematically? To test this I coded each legislator with information published in the Bluebook for each state in my sample. The personal characteristics listed for each member include sex, educational institution, prior elected experience, military service, and a short personal biography with other information (e.g., children, membership in a civic club, political philosophy, etc.). I coded each member of the Assembly on four dimensions, with dummy variables for whether the legislator had previously served as a mayor or on a city council, whether the legislator had served in the military and whether the legislator previously worked as a party leader. See figure 2.6. None of these personal characteristics is predictive of higher rates of cooperation in the sample. In fact, not

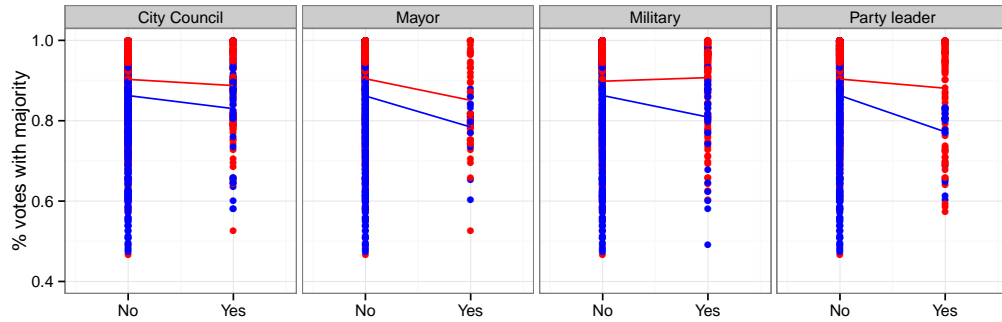


Figure 2.6: Personal characteristics of state legislators on four dimensions. *Source: Legislative Bluebooks, 1992-2004.*

only are the means for each dummy substantively equal but the distribution of each variable have nearly the same variance. What does this mean? Simply, it means that we do not have a very clear idea about how to predict the cooperative rate of legislators, much less how to *induce* cooperation.

2.3 Implications for Constitutional Lawmaking

Like most election laws, the recent political reforms described above (independent redistricting commissions and the top-two primary) were instituted as constitutional amendments. From the standpoint political theory, this makes a great deal of sense. Constitutions define the rules of the electoral process. For example, the U.S. Constitution established the Electoral College with a detailed description of the selection process (art. II, §1), defined the election for President as a plurality, winner-take-all system (*Id.*), created term lengths for both houses of Congress (art. II, §§2-3), and explicitly granted election administration rights to the States (art. I, §4). Of the seventeen amendments adopted since the Bill of Rights, more than half concern election-related issues: the Twelfth revised election procedures for the Vice President; the Fifteenth established voting rights protections against racial discrimination; the Seventeenth created popular elections for the United States Senate; the Nineteenth provided for female suffrage; the Twentieth set out succession procedures for members of Congress upon death; the Twenty-second established presidential term limits; the Twenty-third afforded the District of Columbia a presidential elector; the Twenty-fourth abolished poll taxes; and the Twentieth-sixth lowered the voting age from twenty-one to eighteen. At the state level, constitutions govern everything from redistricting (e.g., ILLINOIS CONST.. art IV, §2(a) and TEXAS CONST. art. III,

§28) and electoral structures (e.g., OREGON CONST. art. II, §16 and N.H. CONST. art. XLVIII)⁷ to voting technology (e.g., UTAH CONST. art. IV, §8)⁸ and campaign finance (e.g., HAWAII CONST. art. II, §5).⁹ Whereas political parties are absent from the U.S. Constitution, party structure, membership, voting rules, and access to the ballot are sometimes regulated by state constitutions.

Why do constitutions deal with these issues? What are the risks of relying on statutes and the common law? Election law creates the rules by which political actors are chosen. As the highest law of the land, constitutions are difficult to revise or amend, and they bind future lawmaking. Thus, constitutionally entrenched electoral rules are immune to changes by temporary political coalitions and instead may be changed only with the support of a very broad movement that involves the general citizenry. Statutory law, on the other hand, is subject to the political preferences of a majority of elected representatives — from as few as 32 people in Alaska to 214 people in New Hampshire — who cannot bind future lawmakers.¹⁰ The common law is subject to the preferences of even fewer people, sometimes even a single judge. Because democracy is predicated on fair elections, and because fair elections require that no person or group of people systematically benefit from the rules of the game, these rules are best situated in constitutions that are less the product of political vagaries and more an expression of political philosophy and democratic theory.¹¹ At the root of these democratic theories is the notion that competition is the cure for the systematic public defects stemming from self-interested human nature.

As the highest law of the land, constitutions are difficult to revise and amend, and they bind future lawmaking. Thus, constitutionally entrenched election law is immune to changes by temporary political coalitions, which is important inasmuch as election law creates the rules by which political actors are chosen. Because fair elections require that no person or group or people systematically benefit from the rules of the game, these rules are best situated in constitutions that are less the product of political vagaries, and more the result of a broad movement that involves the general citizenry. At the very least, some state constitutions like California's may be amended with a bare majority vote of citizens. Though this puts constitutional amendments on par with popular laws effectuated via the ballot initiative process, the amendment process is still more difficult than passing ordinary legislation in the state legislature, and often has a higher signature gathering threshold to gain access to the ballot.¹² In other words, constitutional amendments will never be easier to pass than ordinary legislation and more often than not are much harder to pass. Thus, even though some state constitutions may not be difficult to amend in absolute terms, they remain the hardest law to overturn in relative terms.

As a general directive, the rules of a game should be arbitrated at the highest possible level, and not by the players themselves. But this directive comes at a cost. Players are in a better position to bargain efficiently, and “final word” decisionmak-

ing bodies are hyper-centralized and risk being too narrow-sighted. Applying this to the world of elections, we generally adopt the theory that electoral rules should be entrenched at the highest, constitutional level. But constitutional adjudication prevents parties from efficiently bargaining with each other, it precludes judicial checks and balances, and it increases the risks associated with making bad laws.

2.3.1 Political Theory Meets Empirical Legal Studies

Statutory law and the common law may both be manipulated at the hands of small groups of people. This is a deficiency when inferior laws are passed, but is a good thing when trying to overturn inferior laws. Constitutional law, on the other hand, is very difficult to revise and amend and is, therefore, an ideal habitat for election law, provided the law is congruent with the will of We, the People. Philosophical questions regarding the general will aside, constitutions are powerful because they transcend ordinary politics and raise the stakes of lawmaking, thus increasing the importance of getting it right. By “getting it right” I mean that a proposed amendment has the predicted effect. As an example, Californians disapprove of the job the state legislature is doing at a rate of 8-to-1 (80% disapprove of the job the state legislature is doing compared to 10% who approve, with 10% no opinion). According to Field Poll (2010), “this is lowest assessment of the legislature’s job performance by *The Field Poll* during the past twenty-seven years.” It comes as no surprise, then, that California residents favor interventions meant to shake up the political process in Sacramento, such as Proposition 14. But what if these interventions do not have their intended effect? What if voters amend the constitution only to discover that the problem they sought to remedy still exists? Because constitutions are so difficult to amend, the electorate bears the risk of any miscalculations about the effect of a law. Where constitutional amendments fail to live up to their promise, voters may be stuck with a new law that they do not prefer, but cannot overturn. This leads to the paradox of constitutional lawmaking: because constitutions are hard to amend, it is important that proposed amendments perform as promised. However, because constitutions are hard to amend, there is an increased tolerance for a margin of error in predicting the effect of an amendment.

2.3.2 The Constitutional Lawmaking Paradox

Most laws are passed with some expectation of a particular effect. There is a margin for error but voters rely on a particular expectation when voting for a law. When laws are implemented, voters tolerate deviations from their expectations to a degree. But to what degree? In Figure 6, I model how the constitutional amendment process leads to a paradox. When precision is needed most, flexibility is liberally

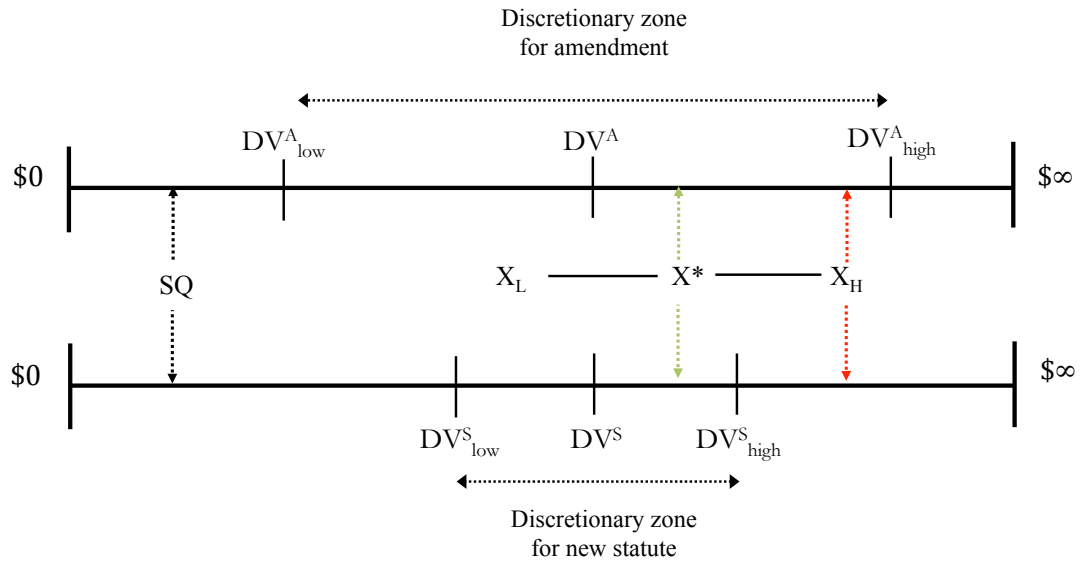


Figure 2.7: Spatial model of policy choices. X^* represents a proposed policy. X_L and X_H represent the margin of error for the proposed policy’s actual implementation. DV^A represents the decisive voter for a proposed constitutional amendment and DV^S represents the decisive voter for a proposed statute.

afforded; the same features of the constitutional amendment process that demand getting the law right,

tolerate a high degree of getting it wrong. The spatial models in Figure 2.7 compare the decision calculus of passing a constitutional amendment versus enacting an ordinary law. For the sake of clarity, Figure 2.7 models a decision about how much money to spend on a particular policy though the model can be used to describe other non-monetary policy choices with ordinal policy options (e.g. level of political competition). Points near the left of the spatial model represent low levels of spending and points near the right of the model represent high levels of spending. The top line represents the constitutional amendment process and the bottom line represents the legislative process. DV stands for decisive voter — DV^A for amendments and DV^S for statutes — and is located at the most preferred point of the decisive voter. For the sake of comparison, I assume that DV^A and DV^S share the exact same spending preference for this particular policy.¹³ I also assume that there are transactions costs associated with passing a constitutional amendment and with passing a statute. I model these costs by noting where the decisive voter’s dissatisfaction with a particular proposal equals the transactions costs of passing a new law. DV^A_{low} and DV^S_{low} indicate

the lower values, DV_{high}^A and DV_{high}^S denote the upper values. Because constitutions are more difficult/costly to amend than statutes, the set $[DV_{low}^A, DV_{high}^A]$ will almost always be larger, and will never be smaller than the set $[DV_{low}^S, DV_{high}^S]$. Any point inside the set $[DV_{low}^A, DV_{high}^A]$ will not trigger a new amendment and any point inside the set $[DV_{low}^S, DV_{high}^S]$ will not trigger a new statute. This is the case because it would cost more to overturn a law in the set demarcating transactions costs than to just bear the costs of the inefficiency of the law. Thus, those wishing to make a new law have discretion to set the spending limit anywhere within the set demarcating the transactions costs. These discretionary zones are marked in Figure 2.7.

Now for a specific example. Suppose the status quo (marked SQ) is so unsatisfactory that a new law could be passed either via constitutional amendment or by the legislature (i.e., it is outside both of the discretionary zones). Suppose further that law X^* is proposed. This proposed law is not the most preferred point for either the constitution amenders or the legislature. However, both groups prefer it to the status quo so let us compare the consequences of passing the law as a statute versus as an amendment to the constitution. First note that voters expect the proposed law to have effect X^* , though the law is based on a set of untested hypotheses and there is likely to be some margin of error in the final effect of the law. This margin of error is denoted by the set $[X_L, X_H]$ in Figure 2.7. Given the expectation that the law will have effect X^* , the law is likely to pass whether it is taken up by the legislature, or whether it is promoted as an amendment to the constitution. This fact is noted by the green dashed arrows in Figure 62.7.

Now suppose that the actual effect of the new law is X_H . This situation is marked by red dashed arrows in Figure 2.7. Because X_H is further from the decisive voters' most preferred point, it is inferior to X^* . Yet note that when the original law is passed as a constitutional amendment, the real-world effect X_H does not trigger an overriding amendment. On the other hand, X_H does trigger action by the legislature; it is cheaper to engage in statutory lawmaking to override X_H than to tolerate it. And herein lies the paradox. The transactions costs of statutory lawmaking are low, and overturning bad laws is easy. Thus, the risk of passing bad laws is not very high. However, because the override costs are so low, sponsors of new statutes must take extra care to minimize the margin of error that might trigger an override. Conversely, the transactions costs of amending the constitution are relatively higher, and overturning bad laws is relatively more difficult. Thus, it is important to minimize bad laws, or to more accurately predict the effects of an amendment, in order to prevent getting stuck with suboptimal laws. However, because the override costs are so high, proponents of constitutional amendments can get away with proposals with high margins of error that are unlikely to be overturned in the future.¹⁴

2.3.3 Should Election Laws Be Constitutionalized?

Despite this paradox and the inherent risks it illustrates, there are important reasons to embed election law in the constitution. As a result, we might expect to see imprecise or inefficient election laws in California that do not deliver as promised. Time will tell whether Proposition 14 qualifies as one of these laws. The evidence presented in this paper does not inspire much confidence and, in light of the constitutional lawmaking paradox, proponents for a more cooperative state legislature might conduct more careful research on the topic. Indeed, there is a dearth of empirical research on election law (see Pew, 2008; Gerken, 2009 for a discussion of this problem). Given the difficulty in overturning election laws that ultimately make their way into the constitution, it is important to have a better understanding of how electoral structures affect politics and policymaking. In the past 15 years, there have been several laws aimed at increasing electoral competitiveness in California. 1996 saw the blanket primary, 2008 saw an independent redistricting commission, and 2010 saw the open, top-two primary. While the theory behind all of these laws is sound, it is not clear what effect these laws will have in the future. It is not clear that any of these reforms will lead to closer elections. And even if they do, it is not clear that close elections yield moderate candidates who are more willing to compromise and cooperate. What is clear is that these new laws will remain a part of the California constitution for many, many years to come. Responsible reformers should more carefully examine the effects of future laws before passing more risky constitutional amendments that may or may not ultimately accord with the will of the people. When close elections do not have the remedial quality ascribed to them, are we not then merely maximizing the number of people who are dissatisfied with the results of every election?

2.4 Conclusion

In California, elections are not decided by close margins and legislators are not particularly cooperative. Whether these two facts are related is unclear, although California voters assumed a strong relationship when they amended the state constitution to promote close elections in 2010. The recent history of California politics suggests that the relationship between close elections and legislative cooperation is weak, if a relationship even exists. At present, we do not have a very clear idea about how to forecast whether a legislator will be cooperative and electoral margins of victory appear to be a particularly weak predictor. Nevertheless, election reformers continue to pursue constitutional amendments aimed at narrowing election margins. We need more empirical work on these issues before we risk embedding these laws, and others like them, in state constitutions across the country.

Though election laws are best situated when embedded in constitutions, the para-

dox of constitutional lawmaking illustrates the risks of doing so. Constitutional amendments are often conceptualized as high risk, high reward for their proponents, but the risks extend to the general electorate often without the accompanying reward (“good” laws are likely to be preserved by legislatures just as they are by constitutions). And just because election reformers can get away with passing laws that have large margins of error does not mean that they should. What the paradox of constitutional lawmaking teaches us is that a more careful understanding of the effects of proposed reforms is necessary. When structural changes do not have their intended effect, voters ultimately bear the risk of the miscalculations that may lead to negative consequences. Those who seek to amend the constitution must better understand the reality of legislative behavior if they genuinely intend to have an effect on politics. For example, the California legislature is highly polarized, the parties are highly disciplined, and the Assembly almost never rejects bills that come up for a vote; only 27 of the 7,402 bills were rejected by the Assembly between 2000 and 2006. Like market imperfections that undermine the assumption of perfect competition, these features of California politics undermine some assumptions of the median voter theorem. Thus, election reforms that chiefly rely on the median voter theorem (e.g., Proposition 14) risk having an unpredictable effect. Though the constitutional amendment process may tolerate this unpredictability, it is socially inefficient and possibly detrimental for long-term progress.

2.5 Appendix

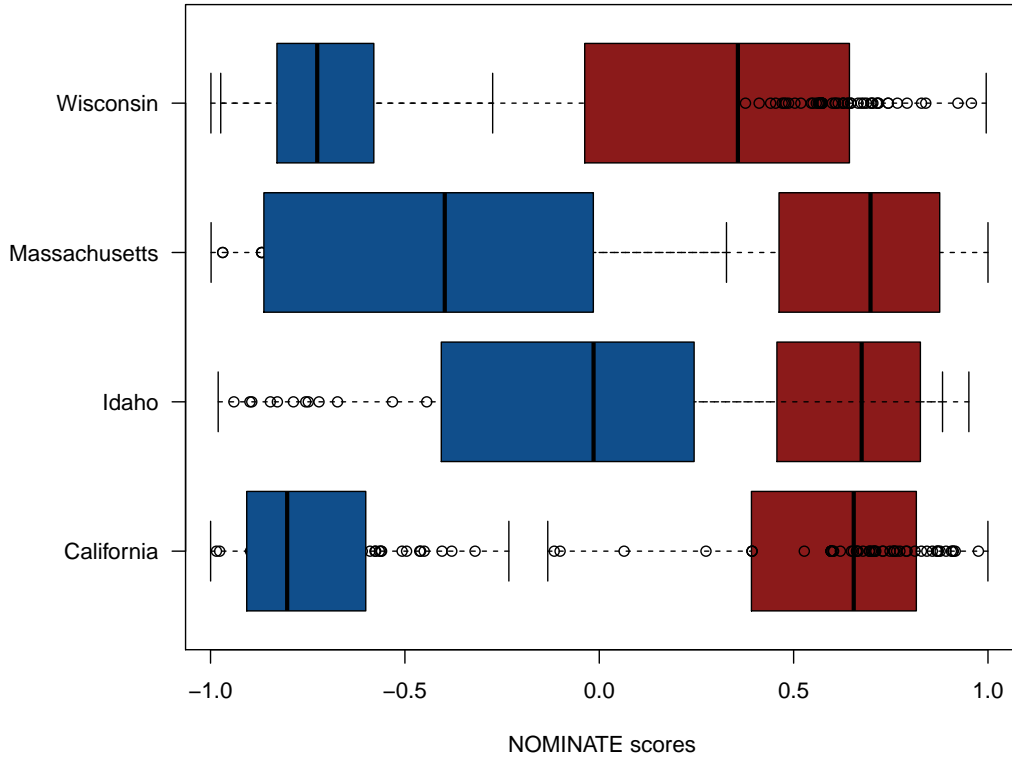


Figure 2.8: Pooled NOMINATE scores in each state from 1992-2004. Scores generated using the 'wnominate' package in R.

Chapter 2. Close Elections, Cross-Party Voting and the Constitution

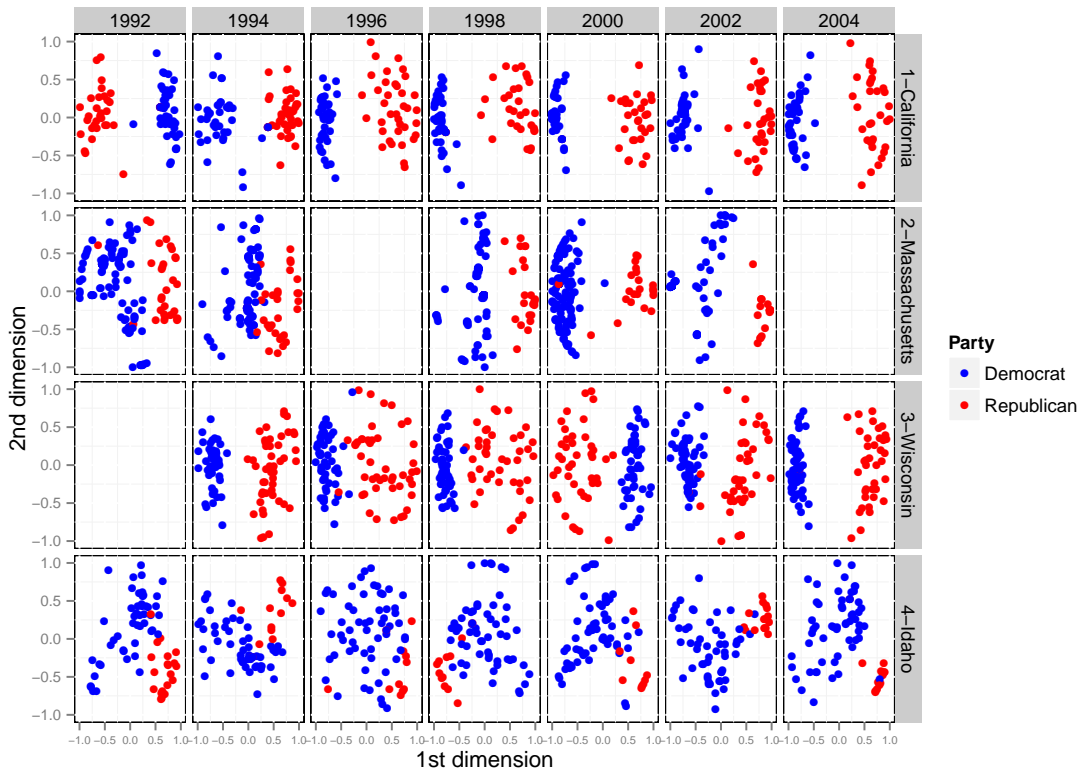


Figure 2.9: DW-NOMINATE scores for lower house legislators in California, Idaho, Massachusetts, and Wisconsin. *Source: Author coded roll call votes, 1992-2004.*

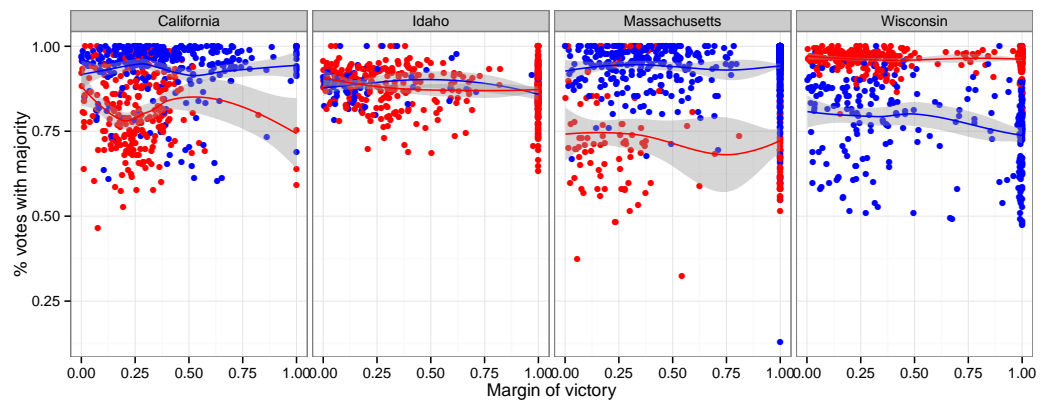


Figure 2.10: Likelihood of voting with the majority plotted against margin of victory by state, 1992-2004.

Chapter 2. Close Elections, Cross-Party Voting and the Constitution

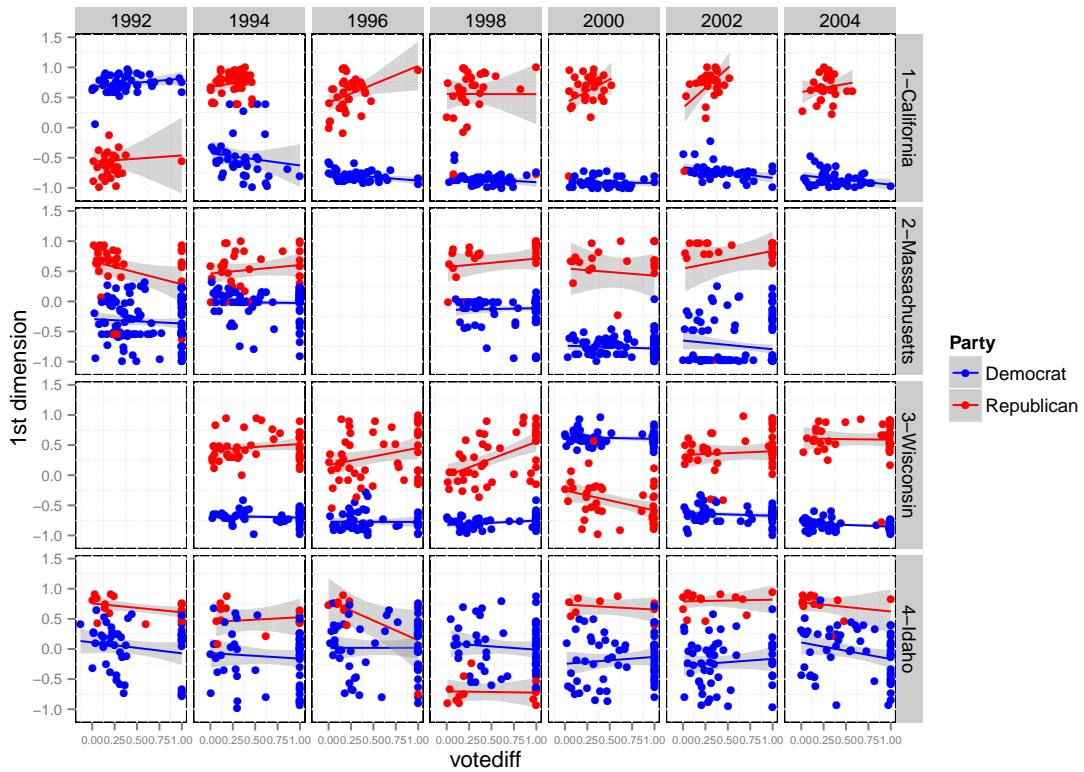


Figure 2.11: First dimension NOMINATE scores plotted against electoral margin of victory. Margins of victory coded using the State Legislative Election Returns database (Carsey et al., 2003) and individual state Secretary of State websites. Roll call votes coded by author from state legislative journals.

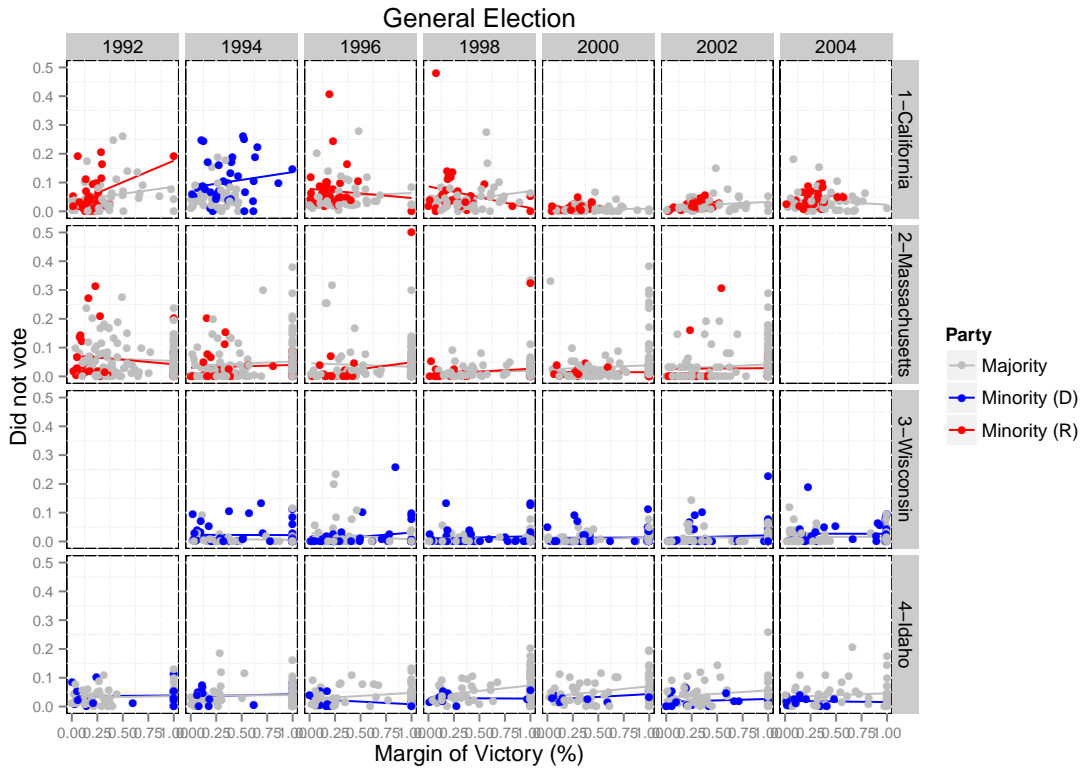


Figure 2.12: Rate of abstention or other non-votes plotted against electoral margin of victory. Margins of victory coded using the State Legislative Election Returns database (Carsey et al., 2003) and individual state Secretary of State websites. Roll call votes coded by author from state legislative journals.

Notes

¹Cooter (1999) (“democracy is the best form of government for satisfying the political preferences of citizens.”).

²Voting on multiple issues might increase the space-dimensions. However, because multiple issues often involve highly correlated matters, mapping these platforms and preferences is still possible in low-dimensional space where the application of the median voter theorem is strongest (Quinn and Martin, 2002).

³A few days after securing the Republican nomination for president, one of Mr. Romney’s top advisers quipped that “everything changes. It’s almost like an Etch a Sketch. You can kind of shake it up and restart all over again” (Shear, 2012).

⁴The one person, one vote was first articulated by the Supreme Court in *Gray v. Sanders*, 372 U.S. 368 (1963) (“The 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 — one person, one vote”). See also *Reynolds v. Sims*, 377 U.S. 533 (1964) (citing *Gray*).

⁵In November 2010, just five months after Californians endorsed his open primary initiative, Maldonado lost his bid for a full term as Lieutenant Governor by 11 points to San Francisco Mayor Gavin Newsom.

⁶As a rough control, I looked at California state senate election returns. The California Secretary of State only provides election return data for the state Senate for the years 1990-2008. During this period, the average margin of victory for Senate seats was 32.8% (compared to 33.7% in the Assembly). By comparison, ballot propositions (both initiatives and referenda) over the same span were more slightly more competitive with an average margin of 24.3%.

⁷OREGON CONST. art. II, §16 (establishing plurality rule and providing for the possibility of proportional representation); N.H. CONST. art. XLVIII (establishing plurality rule for gubernatorial elections).

⁸UTAH CONST. art. IV, §8 (providing for the use of electronic voting machines, which are statutorily called “mechanical contrivance”).

⁹HAWAII CONST. art. II, §5 (establishing state campaign fund to be used for partial public financing of state public offices).

¹⁰The Alaska state House is comprised of 40 members, and the state Senate 20, for a minimum winning coalition of 32 lawmakers. The New Hampshire state House is comprised of 400 members, and the state Senate 24, for a minimum winning coalition of 214. The minimum coalition in the U.S. Congress is $(435/2 + 1) + (100/2 + 1) = 269$ people.

¹¹Some state constitutions may be amended with a majority vote of citizens. Though this puts the constitution on the same level as laws that are effectuated via the ballot initiative process, the amendment process is still more difficult than passing ordinary legislation in the state legislature. Thus, even though some state constitutions may not be difficult to amend in absolute terms, they remain the hardest law to overturn in relative terms.

¹²For example, in California, the number of signatures required to place an initiative on the ballot is 5% of the total votes for Governor in the last gubernatorial election whereas the number of signatures required to put a constitutional amendment on the ballot is 8% of the total votes for Governor in the last gubernatorial election.

¹³The decisive voter for a constitutional amendment may be the median voter of the general electorate, or the voter at the threshold of some supermajority. The decisive voter for a statute is likely the median legislator (presuming an up-or-down vote on a singular issue without bargaining).

NOTES

It is not unrealistic to assume that the preferences of these decisive voters might overlap, though it is more likely that they do not.

¹⁴Note that only one time in the history of the United States Constitution has an amendment been repealed by another amendment. See U.S. CONST. amend. XXI, repealing amend. XVIII.

Chapter 3

Citizens United, States Divided

Douglas M. Spencer and Abby K. Wood

The United States Supreme Court opinion in *Citizens United v. FEC*, 130 S.Ct. 876 (2010), sparked a national conversation about campaign finance laws that included a multitude of predictions about the decision’s effect on political spending. Most of the commentary and related scholarship about the decision correctly anticipated that election-related spending would increase post-*Citizens United*: during the 2012 federal election cycle independent spending related to all federal races exceeded \$1 billion, which was 3.5 times more than spending in 2008 and 5.3 times more than spending in 2004.¹ Independent spending has, in fact, increased in every federal election cycle since 1996.² Pundits and scholars have sharply disagreed, however, whether the *type* of increased spending warrants caution and/or a legislative response. To date, nearly all academic and popular commentary has focused on federal elections, which, as we discuss below, severely limits any causal inferences about the effect of *Citizens United* on spending. As with any analysis of federal-level behavior, there is no “control” group against which to compare changes in spending behavior before and after an event. As a result, it is very difficult to ascertain whether changes in political spending after *Citizens United* are attributable to changes in the law or to other factors. In this Article we examine the effects of *Citizens United* as a natural experiment on the states. Before *Citizens United* about half of the states banned corporate independent expenditures and thus were “treated” by the Supreme Court’s decision, which invalidated these state bans. By comparing spending in states affected by the decision to spending in states that were not affected by the decision, we provide the first systematic estimates of the effect of *Citizens United* on independent political spending.

We begin in Part I by retracing the steps that led to the Supreme Court’s decision in January 2010. Originally a relatively trivial challenge about disclosure, the case

ultimately invalidated well-established laws at the federal level and in 20 states. The public backlash to the Court's opinion was swift and the response was generally negative. Barely one week after the decision was announced, President Obama argued in his State of the Union address that the opinion had "open[ed] the floodgates" for spending "without limits in our elections."³ This Article is motivated by the President's remarks and is organized around the simple empirical question whether Citizens United actually "opened the floodgates" of independent spending.

In Part II we present our empirical findings. Using recently-released data from a sample of 18 states—the universe of states for which data on independent expenditures are currently available—we address three questions related to spending before and after *Citizens United*: (1) has spending increased after the decision and, if so, by how much? (2) has the distribution of spending shifted toward corporate and/or union expenditures? and (3) are spending increases disproportionately driven by large expenditures?

To analyze the first question, we utilize a difference-in-differences model to parse out the extent to which *Citizens United*—as opposed to other factors—is responsible for changes in political spending. We find that independent expenditures increased in both treated and control states between 2006 and 2010, but that the increase was more than twice as large in the pool of treated states. A closer look at the data reveals that the increase in spending was driven almost exclusively by 501c nonprofit organizations and 527 political committees, so named because of the tax code under which they are organized. Information about the donors to these groups is unavailable, meaning that we cannot empirically verify whether corporations and/or unions funneled money to them. However, we know that the most substantive changes to campaign finance laws between 2006 and 2010 eliminated prohibitions on corporate and union political spending, specifically on spending for the type of activities (independent expenditures) that are often managed by advocacy organizations and groups with political advertising expertise. In light of these facts, we interpret these findings as evidence that corporations and unions increased their political spending in response to laws that permitted them to do just that. This conclusion is neither surprising nor controversial, and our analysis provides the first systematic estimate of the magnitude of the response—a 100% spending increase—as well as the mechanism—an almost exclusive reliance on 501c and 527 organizations.

Finally, we examine the distribution of independent expenditures and find that the spending increase in treated states is not driven by the largest expenditures (i.e. larger than \$55,000); rather the effect is most pronounced in the center of the distribution (20th to 70th percentile)—expenditures ranging from \$1,000 to about \$40,000. This finding is particularly striking because it cuts against the conventional wisdom of spending behavior and raises questions about the states' equality interest, generally framed as a problem of disproportionate changes in the "tails" of the spending

distribution, which we do not observe.

In Part III, we provide some context for our analysis and consider the implications of our findings. First, we note that independent expenditures represent a fraction of overall campaign dollars at both the state and federal level. Campaign finance is still dominated by direct contributions to candidates and Citizens United did not change the rules governing contributions. Second, we note a disconnect between the political system that the Court envisions and the political system that actually exists. This disconnect, we argue, has transformed the judicial philosophy of “deregulate and disclose” into “cutback and conceal.” As more and more political spending goes underground—40% of all outside federal spending in 2010 was by groups that do not disclose their donors—it becomes increasingly difficult to measure the effects of campaign finance laws on the political process. Finally, we discuss the Supreme Court’s decision to create a legal rule that defines away the risk of independent expenditures. In *Citizens United* the Court admits that it does not care whether independent expenditures *actually* corrupt the political process because, in the Court’s view, independent expenditures *cannot* corrupt as a matter of law, any evidence to the contrary notwithstanding. We strongly disagree with the Court’s reliance on this legal fiction. It is a blunt instrument for judging regulations of the political process. This is particularly true in cases that impact state campaign finance laws such as *Citizens United*. States have unique histories—unique from each other and unique from the federal experience—and each has a different set of laws passed at different times for different reasons. Indeed, when the state of Montana produced evidence of a long history of *quid pro quo* corruption to justify its state law, the Supreme Court dismissed the case without a hearing. The Court’s indifference to the empirical record in that case, as well as its general aversion to as-applied challenges and narrowing of acceptable evidence in campaign finance cases is, in our view, both short-sighted and imprudent.

3.1 Citizens United

3.1.1 Background

The Supreme Court’s sweeping decision in *Citizens United v. FEC* culminated a controversial case that was initially motivated by a very modest challenge. *Citizens United* is perhaps best known for extending First Amendment protections to the political speech of corporations. Yet the case had almost nothing to do with corporations or corporate identity. The opinion also reaffirmed the proposition, first articulated in *Buckley v. Valeo*, 424 U.S. 1 (1976) that independent expenditures cannot corrupt the political process.⁴ Yet the legal challenge in *Citizens United* was not

about independent expenditures (which are made independent of the campaign and advocate the election or defeat of a candidate), nor was it about alleged corruption or appearance of corruption. The plaintiff, a conservative nonprofit advocacy organization called Citizens United, wanted to broadcast a series of television commercials to promote a new political documentary it had produced and did not want to disclose the donors who funded the film or the television advertisements.

In 2002, Congress passed the Bipartisan Campaign Reform Act (“BCRA”), Pub. L. No. 107-155, to regulate “sham issue ads,” which are advertisements that look like a public service announcement about a political or social issue but that are intended to persuade listeners to vote for or against a particular candidate. As part of BCRA, Congress coined a term – “electioneering communication” – to precisely define the kind of ads that would be subject to regulations under the new law. As defined in the Act (see 2 U.S.C. 434(f)(3)) an electioneering communication is (1) a broadcast ad on television or radio that (2) refers to a federal candidate that (3) airs within 30 days of a primary election or 60 days of a general election, and that (4) reaches an audience of 50,000 or more. This statutory creation was Congress’s response to the Supreme Court’s ruling in *Buckley* that any regulation of expenditures for ads that did not *expressly* advocate a candidate’s election or defeat risked being void for vagueness. Congress’ bright-line definition of “electioneering communications” responded directly to the Court’s concern about vagueness. Under BCRA, electioneering communications (i.e., clearly-defined ads that do not expressly advocate the election or defeat of a candidate) were subject to several regulations including, but not limited to:

1. **Disclosure** rules for identifying donors, BCRA §201, as codified in 2 U.S.C. §434(f);
2. A **disclaimer** requirement (e.g., “_ is responsible for the content of this advertisement”) BCRA §311, as codified in 2. U.S.C. 441(d)(2), and;
3. A **prohibition** against corporations and unions from using general treasury funds to make electioneering communication, BCRA 203, as codified in 2 U.S.C. § 441(b).

As the 2008 presidential primary heated up, Citizens United produced a documentary film about Hillary Clinton as well as several television spots advertising the film. Citizens United understood that the television commercials it wanted to air met the statutory definition of electioneering communications: they would be broadcast on TV, refer to a federal candidate without expressly advocating her defeat, air 30 days before the 2008 primary, and reach 50,000 or more households. Furthermore, among Citizens United long list of donors that had contributed more than \$1 million to fund

the film and its advertisements were two for-profit corporations that contributed a combined amount of \$2,000 to the project.⁵ Although BCRA prohibited all electioneering communications created with corporate general treasury dollars, the Supreme Court had carved out an exemption in a 2007 case *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) (“WRTL II”). Wisconsin Right to Life was a conservative non-profit advocacy organization that, like Citizens United, accepted contributions from corporations and wanted to run television and radio advertisements that met the statutory definition of electioneering communications (they urged listeners to contact their Senators and ask them to stop filibustering President Bush’s judicial nominees, but they did not urge listeners to vote against the Senators). Prior to 2007, BCRA §203 prohibited these advertisements from being broadcast because of the corporate dollars used to fund them. The Supreme Court had already upheld §203 against a facial challenge in *McConnell v. FEC*, 540 U.S. 93 (2003), but the Court had held open the door for as-applied challenges, and Wisconsin Right to Life obliged in 2006: “In upholding §203 against a facial challenge [in *McConnell*], we did not purport to resolve future as-applied challenges” (411-12). The Supreme Court ultimately accepted Wisconsin Right to Life’s argument that the definition for “electioneering communications” was overbroad. In the Court’s opinion, a ban on corporate and/or union expenditures is constitutional (per *Buckley*) when the expenditures expressly advocate the election or defeat of a clearly identified candidate. When there is no express advocacy, the constitutionality of a ban on corporate and/or union expenditures depends on whether the Court interprets the expenditure as a “genuine” issue ad or as a “sham” issue ad. In the case of genuine issue ads, a ban would be unconstitutional. In the case of a sham issue ad (what the court referred to as an advertisement that is “the functional equivalent of express advocacy”) a ban on corporate and/or union expenditures would be constitutional.⁶ In *WRTL II*, the Court established a standard for determining whether an advertisement is the functional equivalent of express advocacy: “only if the ad is susceptible of *no reasonable interpretation other than* as an appeal to vote for or against a specific candidate” (*WRTL II* at 465, emphasis added). In the case of Wisconsin Right to Life’s ads about the filibuster, the Court held that they “may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate, . . . they are not the functional equivalent of express advocacy, and therefore fall outside the scope of *McConnell’s* holding” (*Id.* at 471).

Citizens United believed, correctly, that its ads could reasonably be interpreted as something other than an appeal to vote against Hillary Clinton; namely that they promoted a commercial product (the documentary film). Thus, Citizens United’s motion for preliminary injunction did not mention §203 but took for granted that the ads could air under a WRTL II exemption. The goal of the preliminary injunction was to extend the *WRTL II* exemption to other provisions of BCRA, specifically

§§201 and 311.⁷ Section 201 would require Citizens United to disclose the “name and address of each donor who donated an amount aggregating \$1,000 or more,” 2 U.S.C. 434(f). Citizens United argued that this disclosure requirement would put its donors in a position to suffer retaliation by political opponents.⁸ Section 311 would require that each advertisement include a four-second disclaimer that “Citizens United is responsible for the content of this ad” where the disclaimer appears in a “clearly readable manner,” or is “conveyed by an unobscured, full-screen view of a representative” from the sponsoring organization, 2 U.S.C. § 441(d)(2). Citizens United planned to air two 10-second ads and one 30-second ad and it argued that the four-second disclaimer would ruin the 10-second ads and prevent the 30-second ad from communicating a substantive message.

Citizens United’s motion had clear practical goals: get its advertisements on television without a costly four-second disclaimer and without the need to disclose the identity of donors who presumably wanted to remain anonymous. However, it is clear that Citizens United had jurisprudential goals as well. As one of the original plaintiffs in the inaugural constitutional challenge to BCRA (consolidated with 10 other challenges as *McConnell v. FEC*),⁹ Citizens United signaled that it did not agree with the trajectory of American campaign finance reform and that it was willing to take action to limit the effects of new regulations, specifically regulations that targeted expenditures.¹⁰ However grand its ambitions, Citizens United’s complaint was admittedly an incremental challenge that, at best, would chip away the scope of two provisions of a five-year-old law. A promising, though ultimately not very successful, business opportunity changed everything.

On the same day that Citizens United filed its initial motion for preliminary injunction, a national media consortium offered Citizens United a four-month Video on Demand (VOD) contract that would make its documentary film available to 32 million households nationwide for a fee of \$1.2 million.¹¹ With this offer on the table, the film itself became a potential electioneering communication. Citizens United recognized that the film, unlike the film’s advertisement, might not qualify for a *WRTL II* exemption. With repeated direct attacks on Hillary Clinton’s character and fitness for office, Citizens United feared that a court might interpret the film as the functional equivalent of express advocacy. Thus, Citizens United immediately amended its complaint to include an as-applied challenge to BCRA §203, hoping a *WRTL II* exemption for the documentary film would permit its broadcast on demand. Indeed, Citizens United’s legal strategy was almost entirely focused on *WRTL II*. Consider that *WRTL II* was invoked 134 times in Citizens United’s original 38-page motion for preliminary injunction (on average 3.5 times per page), and 66 times in the 16-page amendment (on average 4.1 times per page). This amendment ultimately proved key to Citizens United’s success. Though the VOD offer was never particularly lucrative,¹² Citizens United’s constitutional challenge of §203 was the first of two gateways whose

openings permitted the Supreme Court to significantly restrict BCRA's reach, and to overturn 22 years of precedent in the process.

3.1.2 In the Courts

Section 403 of BCRA provided for a jurisdictional process where initial actions are heard by a three-judge panel of the District Court for the District of Columbia and appeals are made directly to the U.S. Supreme Court. Citizens United initial motion for preliminary injunction against the FEC was unanimously denied by a three-judge panel of the D.D.C. The District Court determined that the documentary film was the functional equivalent of express advocacy because it "is susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her."¹³ Thus, the District Court concluded that Citizens United did not have a substantial likelihood of success on the merits. Note the court took for granted that VOD technology was covered by the definition of electioneering communication, pointing to an FEC Advisory Opinion. In footnote 6 the Court wrote that "the parties did not raise the issue of whether VOD was within the definition of "electioneering communication." However, a broadly worded FEC regulation defining "electioneering communications" indicates that VOD would be a "broadcast, cable, or satellite communication" because it is "disseminated through the facilities of a . . . cable television system," 11 C.F.R. §§ 100.29(b)(1), (b)(3)(i) (indicating that "broadcast, cable, or satellite communications" include communications "aired, broadcast cablecast or otherwise disseminated through the facilities of a television station, radio station, cable television system, or satellite system"). Regarding the disclosure and disclaimer requirements, the District Court agreed with Citizens United that the advertisements were not the functional equivalent of express advocacy, but merely electioneering communications. However, the Court disagreed with Citizens United's interpretation that *WRTL II* protects electioneering communications against *any regulation*. The District Court did not believe that *WRTL II* went that far. "The only issue in [*WRTL II*] was whether speech that did not constitute the functional equivalent of express advocacy could be *banned* during the relevant pre-election period."

Citizens United appealed this decision to the Supreme Court, but the Supreme Court dismissed the appeal for want of jurisdiction. As a point of civil procedure, BCRA §403(a)(3) states that a "final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States." The denial of a motion for preliminary injunction was not considered a "final decision" for purposes of appeal. The parties subsequently filed cross motions for summary judgment and the District Court granted the FEC's motion. Citizens United appealed once more.

By the time the parties reached the Supreme Court for the second time, Citizens United had replaced their lead attorney Jim Bopp (who had successfully litigated the *WRTL II* case two years earlier) with former Solicitor General Ted Olson who is a luminary litigator in his own right. This personnel change immediately wrought changes to Citizens United's arguments. Gone were the platitudes and the strict reliance on *WRTL II*. Consider the language used by Bopp that "campaign finance laws may only regulate communications that are 'unambiguously related to the campaign of a particular federal candidate.'" (quoting *Buckley*). In his briefs for *WRTL II* a few years earlier, Bopp had rhetorically set the stakes as high as possible by introducing his argument with the following statement:

"The deep roots of this case lie not in the Bipartisan Campaign Reform Act of 2002, the Federal Election Campaign Act of 1971, the Taft-Hartley Act of 1947, the Tillman Act of 1907, nor even the First Amendment, but in the struggle of the Anglo-American people to (a) establish themselves as sovereign and (b) curb the power of government officials to prevent the people from criticizing official actions."¹⁴

Olson crafted a more aggressive assault on the constitutionality of BCRA. Consider, for example, the first question presented in Olson's first brief:

"Whether the prohibition on corporate electioneering communications in BCRA can constitutionally be applied to a feature-length documentary film about political candidate funded almost exclusively through non-corporate donations and made available to digital cable subscribers through Video on Demand?"

This question raised issues that had not yet been considered, or fully fleshed out by either party or any court. For example, was §203 systematically overbroad because it encompasses expenditures where corporate involvement is *trivial*? If so, perhaps the Court should reconsider a facial challenge to the law. Is there something special about Video on Demand technology that makes it anomalous to §203? If so, perhaps the case can be resolved on narrow grounds. Olson also confronted *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), for the first time; the controlling precedent for corporate and union bans on independent expenditures that *expressly* advocate the election or defeat of a candidate. Until Olson's brief, both parties had taken corporate and union bans on express advocacy for granted. Olson, for his part, did not equivocate: "*Austin* was wrongly decided and should be overruled because it is flatly at odds with the well-established principle that First Amendment protection does not depend on the identity of the speaker."¹⁵

These novel arguments were not lost on the FEC. Responding to the possibility of a facial challenge on §203, the government pointed out that “although appellant previously sought to have BCRA Section 203 declared facially unconstitutional, it later abandoned that claim, and the district court ultimately ordered dismissal of the relevant count pursuant to the parties’ stipulation.” Regarding the petition to overturn *Austin*, the government argued that “Appellant presents no basis for overruling this court’s decision in *Austin*” and that in any case, “Appellant’s argument is not properly before the Court.”¹⁶

Posturing aside, both parties understood that this was primarily a case about the definition and breadth of electioneering communications. Did the documentary film qualify for a *WRTL II* exemption as an electioneering communication? Do *WRTL II* exemptions extend to additional provisions of BCRA that regulate electioneering communications (e.g., disclosure and disclaimer requirements)? Both parties addressed these questions in great depth: in Olson’s 37-page brief, he refers to electioneering communications 78 times; the government’s 55-page brief had 46 references to electioneering communications. Compare these numbers to the number of references to independent expenditures or express advocacy. Citizens United’s brief mentioned independent expenditures 10 times and express advocacy 2 times. The government’s brief mentioned independent expenditures just 9 times. This is worth noting, given that the eventual holding changed regulation of independent expenditures. As a reminder independent expenditures advocate election or defeat of a candidate. Electioneering communications do not.

The primacy of electioneering communications in the case evaporated at oral argument in about one minute. In the space of 62 seconds, Deputy Solicitor General (DSG) Malcolm Stewart, responding to a query by Justice Alito, argued that regulations on electioneering communications would be constitutional, even beyond the statutory limitation of electioneering communications to “broadcast, cable, and satellite communications.”¹⁷ DSG Stewart suggested that the Constitution does not prohibit the government from banning corporate electioneering communications on other media, such as books, so long as the electioneering communications were the functional equivalence of express advocacy. This idea elicited spirited responses from Justices Alito, Roberts, and Kennedy with Justice Alito pointing out that “most publishers are corporations.” In defense of his argument, DSG Stewart offered a reminder that proved key in broadening the scope of the ultimate decision. He said

“And it’s worth remembering the preexisting Federal Election Campaign Act restrictions on corporate electioneering which have been limited by this Court’s decisions to express advocacy.”¹⁸

The comment ultimately paved the way for the Court to reevaluate its decisions regarding the regulation of express advocacy. And reevaluate these decisions it did.

On the last day of the 2009 term, the Court announced that they would rehear arguments in the case. In this relatively rare announcement,¹⁹ the Court directed both parties to file supplemental briefs and address the following question:

“For the proper disposition of this case, should the Court overrule either or both *Austin*, and the part of *McConnell*, which addresses the facial validity of Section 203 of BCRA, 2 U.S.C. §441(b).”²⁰

With that, the case took on an entirely new mandate. Instead of clarifying the relationship between BCRA and *WRTL II*, the Court announced that it would revisit more than 20 years of established campaign finance precedent. Both parties responded with force in their briefs. Scattered through its arguments, the government traced the long history of well-accepted regulations on the political behavior of corporations and unions, from the Tillman Act’s 1907 ban on direct contributions to candidates and Taft-Hartley’s 1947 ban on corporate and union independent expenditures, to the fact that 22 states passed bans on corporate independent expenditures throughout the 20th century.²¹ Citizens United smelled blood. Twenty pages of the 23-page brief were devoted to *Austin*, the bigger prize. Citizens United painted *Austin* as an outlier from the trajectory of campaign finance jurisprudence that started in *Buckley* and spelled out the weaknesses inherent in the “antidistortion” and “equality” rationales that motivated *Austin*.²²

The longer Citizens United kept its case in front of the Court the less it resembled anything close to its initial complaint. Perhaps sensing this transfiguration during the oral reargument, Justice Sotomayor remarked, “wouldn’t we be doing some more harm than good by a broad ruling in a case that doesn’t involve more business corporations and actually doesn’t even involve the traditional nonprofit organization?”²³

Ultimately, the Supreme Court decided that it would not do more harm than good to issue a broad ruling in the case. Pushing to the side more narrow constructions of constitutionality and statutory interpretation²⁴ the Court, in a 5-4 decision, held that Citizens United’s documentary film, though clearly the functional equivalent of express advocacy, should be permitted to be broadcast On Demand because the federal provision banning corporate and union independent expenditures on express advocacy (2 U.S.C. §441b) violated the First Amendment. There is some irony that Roberts so easily applied the “functional equivalence” test of *WRTL II* as one of his primary complaints in his *WRTL II* dissent was the unworkable standard for determining functional equivalence (Hasen, 2011). Section 441b was a creature of the 1974 amendments of the Federal Election Campaign Act (FECA) and had been specifically upheld against a constitutional challenge in *Austin*. Before the Court had explicitly upheld the corporate ban on independent expenditures (i.e. electioneering that expressly advocates the election or defeat of a candidate) in 2 U.S.C. §441(b) in *Buckley*

v. Valeo, 424 U.S. 1 (1976). In addition, the Court had implicitly upheld the corporate ban in several other cases; for example, *FEC v. Mass. Cit. for Life*, 479 U.S. 238 (1986), *McConnell v. FEC*, 540 U.S. 93 (2003) and *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (“*WRTL II*”). Section 441b was amended by BCRA §203 to include electioneering communications as well. The Court invalidated the entire section, incorporating corporate and union bans on both electioneering communications and independent expenditures. Note that Citizens United’s complaint against §203 (and later §441b) concerned corporate funding directly and not unions. However, both §203 more narrowly and §441b more generally applied equally to corporations and unions. Because the Court did not distinguish corporations from unions but ruled the entirety of §441b as unconstitutional, the holding applies to unions as well.

On the question whether the *WRTL II* exemption extended beyond corporate and union spending bans (i.e., Citizens United’s original complaint), the Court said no. By a margin of 8-1, the Court upheld BCRA’s disclosure and disclaimer requirements as applied to any electioneering communication whether the functional equivalent of express advocacy or not.

3.1.3 The Aftermath

Like the many legal analysts that would later comment on the outcome of the case, the Supreme Court justices had almost no idea what the practical implications of their decision would be. They understood very well the legal implications of overturning 20 years of precedent and they could almost certainly predict how the political spin-doctors would portray their decision. But it is unlikely that they understood the impact of their decision on incumbency rates, on the composition of candidate pools, on political participation, or on the behavior of corporations and unions. Commentators and scholars were quick to make their predictions.²⁵

Less than one week after the *Citizens United* decision was announced, President Barack Obama addressed the decision during his State of the Union. With six of the nine justices sitting a few feet away, the President accused them of “revers[ing] a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections.”²⁶ Obama’s statement elicited one of the great Freudian slips of all time in Congress: no sooner had he finished his sentence that the Supreme Court had “open[ed] the floodgates for special interests... to spend without limit in our elections” than Congress began applauding and audibly cheering. Justice Alito was caught on camera during this applause muttering “simply not true.”²⁷ The President concluded his attack by arguing that American elections should not be “bankrolled by America’s most powerful interests, or worse, by foreign entities. They should be decided by the American people.” These American people, as it turned out, were also disappointed by the decision. Less

than three weeks after the ruling, 80% of respondents to a Washington Post/ABC News survey said they were opposed to the decision (with 65% expressing “strong” opposition).²⁸ This negative opinion was shared by Democrats (85%), Republicans (76%), and Independents (81%) alike. As recently as January 2012 (the two-year anniversary of *Citizens United*) the Pew Research Center reported that 65% of respondents to their nationwide poll who had heard about Citizens United said the opinion was having a negative impact on the 2012 presidential election.²⁹

Perhaps the most notorious consequence of *Citizens United* was the emergence of “Super PACs” or independent expenditure-only PACs that are able to amass unlimited pots of money from corporations and unions (a direct result of *Citizens United*) as well as from individuals (see *SpeechNow.org v. FEC*, 599 F.3d. 686 (2010), which adopted the rationale of *Citizens United*) and then spend unlimited amounts in support of, or against candidates.³⁰ Though Super PACs are prohibited from contributing directly to candidates or from even coordinating their expenditures with a campaign, six of the top eight Super PACs have been endorsed by major presidential candidates as their “official” Super PAC, dedicated to their success and often run by their former staffers.³¹ As a result, Super PACs have become sidecars to each campaign’s motorcycle: ostensibly separate entities, but comprising one vehicle.³² In addition, as it turns out, despite *Citizens United*’s green light for corporate and union spending, the bulk of Super PAC money has come from individuals, which creates the sense that Super PACs are merely conduits around individual contribution limits. (Briffault, N.d.). According to an analysis of Super PAC filings by USA Today, “less than \$1 out of every \$5 flowing into Super PACs’ coffers came from corporations.”³³

Perhaps more controversial, however, is the emergence of non-profit political activism, specifically the increase in political spending by 501c organizations that do not have to disclose their donors. According to the Center for Responsive Politics, not a single dollar was spent by 501c organizations on independent expenditures or electioneering communications in 2006 federal election cycle. During the 2010 election cycle (the first post-*Citizens United* election), 42% of all outside spending was made by 501c organizations.³⁴ This is particularly impressive considering that 501c groups are limited with respect to their permissible political activity; it cannot be their primary purpose. In other words, when a donor gives to a 501c, over half of that money cannot be used to support political activity.

Interpreting all of these facts is quite complicated, despite the detail of available information and the clarity of comparisons across time. Proper evaluation requires an accurate expectation of the law’s effect *ex ante*. We draw our expectation from the history of modern campaign finance laws.

3.1.4 Research Hypotheses

Modern campaign finance laws are rooted in the Progressive Era of the early 1900s and were part of a broad political reform movement to limit the power of corporate interests (e.g., railroad “robber barons” in California and “copper kings” in Montana) over state legislatures and in Congress. In 1907, the U.S. Congress passed the Tillman Act, which prohibited corporations from making campaign contributions directly to political candidates, a prohibition that survives today. The federal ban on direct contributions by corporations was most recently validated by the Supreme Court in *FEC v. Beaumont*, 539 U.S. 146 (2003). Several circuits have addressed the viability of corporate contribution bans since *Citizens United* and all have ruled that *Beaumont* is the controlling authority for the regulation of direct contributions to candidates. The Second Circuit upheld New York’s “Pay-to-Play” contribution limits, *Ognibene LLC v. Parkes*, 671 F.3d 174 (2d Cir. 2011) (petition for *writ of certiorari* denied on June 25, 2012); the Fourth Circuit overturned a Federal District Judge who had argued that *Citizens United* “may have eroded *Beaumont*’s reasoning,” *U.S. v. Danielczyk*, 683 F.3d 611 (4th Cir. 2012) (petition for *writ of certiorari* denied on February 25, 2013). The Circuit Court wrote that “*Citizens United*, a case that addresses corporate independent expenditures, does not undermine *Beaumont*’s reasoning” (p. 2); the Eighth Circuit unanimously upheld a state ban on direct contributions by corporations in Minnesota and specifically distinguished *Citizens United* by arguing that *Beaumont* is the controlling authority for the regulation of direct contributions to candidates, *Minnesota Citizens Concerned for Life v. Swanson*, 692 F.3d 864 (8th Cir. 2012) (taken *en banc* and pending); the Ninth Circuit also relied on *Beaumont* to uphold a city-level ban on corporate contributions in the same year, *Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. 2011).

Though not explicitly articulated at the time, the Tillman Act raised four important constitutional questions that are still being debated today as the previous cases illustrate:

1. To what extent may Congress ban (or regulate) the participation of individuals or groups in the political process?
2. What “state interests” justify an acceptable ban or regulation?
3. Are there different standards for evaluating regulations targeting individuals versus those targeting groups of individuals (e.g., unions and corporations)?
4. Are there different standards for evaluating regulations that target different *types* of groups of individuals (e.g., unions vs. PACs vs. nonprofits vs. corporations, etc.)?

Chapter 3. Citizens United, States Divided

	Direct contributions to candidates		Independent expenditures	
	Individual	Corporation / Union	Individual	Corporation / Union
1907		Tillman Act Prohibits <u>corporate</u> "money contributions in connection with any election to any political office."		
1940	Hatch Act (amends) Annual limit of \$5,000 contribution to federal candidate			
1943		Smith-Connally Act Extends Tillman Act to <u>unions</u> .		
1947				Taft-Hartley Act Prohibits <u>unions</u> from making "expenditures in connection with any federal election."
1974	FECA amendments \$1,000 contrib. limit.	FECA amendments Ban on direct contribs by <u>unions and corporations</u>	FECA amendments \$1,000 IE limit.	FECA amendments \$1,000 IE limit by "groups"
1976	<i>Buckley v. Valeo</i> Contrib. limit = constitutional.		<i>Buckley v. Valeo</i> IE limit = unconstitutional	
1978				<i>Bellotti</i> Corporations have First Amendment right to influence political process.
1989				<i>Austin</i> Prohibits IEs from general treasury of <u>corporations</u> .
2002	BCRA Increased limits. Ban on contributions from minors.	BCRA Add "foreign entity" to ban list.	BCRA Limits on "soft money"	BCRA §203 banning corporate and union funds from financing "electioneering communications" shortly before an election.
2003	<i>McConnell v. FEC</i> Ban on minors = unconstitutional.	<i>McConnell v. FEC</i> Upheld	<i>McConnell v. FEC</i> Upheld	<i>McConnell v. FEC</i> Upheld
2010			<i>SpeechNow.org v. FEC</i> Invalidated FECA limits on individual donations to IE groups.	<i>Citizens United</i> Invalidated BCRA §203 / overturned <i>Austin</i> .

Table 3.1: Brief historical timeline of modern American campaign finance law. For a more detailed history, see Corrado (1997) and Lowenstein, Hasen and Tokaji (2008).

The Tillman Act singled out corporations as special creatures that warranted strict regulation because of the state's compelling interest in curbing widespread and well-known corruption at the hands of large corporate contributors. Unions (via the War Labor Dispute Act ("Smith-Connally") of 1943, 57 Stat. 163) and foreign organizations (via 1966 Amendments to the Foreign Agents Registration Act, later incorporated into the 1974 amendments to the Federal Election Campaign Act, 22

U.S.C. §611 *et seq.*) have since joined corporations with direct contribution bans of their own, both justified by an anti-corruption interest.³⁵ In the mid-1940s Congress treaded into the murky waters of independent expenditures. In 1947, Congress passed the Taft-Hartley Act over the veto of President Harry Truman. This post-New Deal, anti-union law statutorily prohibited unions (and by extension corporations) from making any expenditures “in connection with federal campaigns,” 61 Stat. 159. Unlike the Tillman Act’s ban on direct campaign contributions, the regulation of independent expenditures has proven trickier for courts to interpret, due in large part to the state interests that courts have accepted as justifiable (and perhaps due in larger part to the state interests the courts have not accepted as justifiable). The Supreme Court has upheld the Tillman Act and other statutes regulating contributions to candidates on the basis that that they prevent corruption or the appearance of corruption. The clearest articulation of the Court’s respect for preventing corruption or the appearance of corruption is *Buckley v. Valeo* where the Court held that “Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated,” (30) and “[s]ince the danger of corruption and the appearance of corruption apply with equal force to challengers and incumbents, Congress had ample justification for imposing the same fundraising constraints upon both,” (33).

The Court’s logic is predicated on the proposition that contributions to candidates may stimulate *quid pro quo* arrangements that violate fundamental principles of representative democracy. Using this same logic, the Supreme Court has invalidated some limits on independent expenditures because, the Court reasons, independent expenditures are, by definition, independent of candidates and thus cannot give rise to *quid pro quo* corruption. For example, in *Buckley* the Court held that “the independent advocacy restricted by the [FECA] does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions” (46). In *Citizens United* the Court noted that the lack of examples where votes were exchanged for expenditures “confirms Buckley’s reasoning that independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption. . . In fact, there is only scant evidence that independent expenditures even ingratiate. . . Ingratiation and access, in any event, are not corruption” (45). Lower courts have also adopted this logic. For example in *SpeechNow.org v. FEC* the D.C. Circuit held that “. . . the only interest we may evaluate to determine whether the government can justify contribution limits [to PACs] as applied to *SpeechNow* is the government’s anti-corruption interest. Because of the Supreme Court’s recent decision in *Citizens United v. FEC*, the analysis is straightforward. There, the Court held that the government has no anti-corruption interest in limiting independent expenditures. . . [therefore] contributions to groups that make only independent

expenditures also cannot corrupt or create the appearance of corruption” (14).³⁶

It is this logic that motivated the Court to invalidate the ban on corporate independent expenditures in *Citizens United*. We draw the reader’s attention to the fact that the Court does not believe independent expenditures “do not” corrupt, but that they “cannot” corrupt as a matter of law. We address this tension in Part III below. In this section we note that while the logic of *Citizens United* has broad implications for campaign finance jurisprudence more generally, the scope of the decision is somewhat narrow. Our expectations for how *Citizens United* will impact spending behavior are driven by the fact that the decision was limited to the use of corporate or union general treasury funds to engage in political speech. We formulate our inquiry in the language of economics, where changes to campaign finance laws are interpreted as changes to individual demand curves and the effect of the law is captured by the elasticity of demand for the relevant actors.³⁷ In other words, we credit *Citizens United* with eliminating a major cost for firms. Before *Citizens United*, if firms wanted to make independent expenditures they had to clear legal hurdles in the form of setting up a PAC and convincing employees to contribute, or giving to outside groups like 527s and 501c organizations which, before *Citizens United* and its extension in *SpeechNow.org*, had limits in many states. *Citizens United* eliminated that price for political participation. Assuming that no other election laws and regulations change (which we know to be false—see Hypothesis 2b below) we would, as President Obama (and others) predicted, expect an increase in the amount of independent spending after this transaction cost has been removed. President Obama referred to an opening “floodgate.” This metaphor characterizes campaign finance laws as a blockage or barrier to political spending. Strict campaign finance laws are like dams, and when spending restrictions are lifted, the “floodgate theory” predicts that money will pour into political campaigns like flooding after a dam breaks.

Hypothesis 1: Citizens United “opened the floodgates” for independent expenditures generally.

More specifically, because the scope of *Citizens United* is limited to bans on corporate and union independent expenditures, we would expect to see an increase in the amount of independent expenditures made from the general treasuries of corporations and unions relative to other sources of independent expenditures.

Naive hypothesis 2(a): Because Citizens United eliminated the transaction costs for corporations and unions, corporate/union independent expenditures will be larger as a share of all independent expenditures after 2010.

As we point out above, nonprofit organizations that do not contribute funds directly to campaigns or coordinate their expenditures with a campaign (i.e., 501c and

527 groups) may solicit unlimited sums of money from corporations and unions among other sources. Because 501c nonprofits are not required to disclose their donors, and because we might predict that corporations, like people, typically prefer to remain anonymous when spending money on political activities, we might expect the amount of independent expenditures made by nonprofit organizations to increase substantially after 2010. Some scholars, expanding on the water metaphor of “floodgates,” have called this the “hydraulic theory,” which characterizes campaign finance laws as large mallets in a political game of “whack-a-mole” (Issacharoff and Karlan, 1999; La Raja, 2010). According to this theory, targeted laws, like bans on independent expenditures, may have a marginal effect on their target, but ultimately money will flow into campaigns one way or another and any marginal effect of a law will be offset by increased spending elsewhere. As an example, a ban on direct contributions may lead to increased independent expenditures. Or a law that bans spending by corporations from their general treasuries may lead to increased spending by corporations via PACs, or earmarked (and anonymous) contributions to other nonprofit organizations.

Strategic hypothesis 2(b): Facing a lower price for political action after Citizens United, strategic corporations and unions will funnel their independent expenditures to nonprofit organizations that have weaker disclosure requirements.

Finally, we explore the possibility that *Citizens United* had an effect on the distribution of individuals and groups of individuals that make independent expenditures. If it is true that *Citizens United* “opened the floodgates” to corporate and union spending in elections (whether via the general mechanism in Hypothesis 1 or the more specific mechanism(s) in Hypothesis 2), and if it is true that corporations and unions spend large amounts of money on independent expenditures, then we might expect to see smaller spenders crowded out as the probability that their expenditure is pivotal shrinks. At some threshold, the cost of spending will outweigh the expected benefit and rational would-be spenders will opt out.

Hypothesis 3: If Citizens United opened the floodgates to corporate and union spending, then small spenders, behaving rationally, will be less likely to participate after Citizens United.

One major limitation on the ability to answer these questions comes from an almost universal focus by both academic and popular commentators on spending at the federal level. As with any analysis at the federal level, the lack of a control group makes causal inference extraordinarily difficult; without a control group there is no counterfactual baseline against which to compare changes in spending patterns after *Citizens United*. At a minimum, a federal-only analysis is threatened by history

and maturation effects (Campbell, 1969). We overcome this limitation by turning our attention to the states where two important features existed at the time of the *Citizens United* decision. First, about half of the states had an analogous ban on corporate independent expenditures and thus were “treated” by the decision that also invalidated their state laws. Second, nearly every state held a statewide election in 2010. We treat *Citizens United* as a natural experiment on the states—an exogenous shock to half of the state’s laws. By measuring state-level spending over time, we are able to exploit the variation in campaign finance laws between states and better estimate the extent to which *Citizens United*, as opposed to other interventions or general time trends, is responsible for changes that we observe.

3.2 States Divided

In January 2010, twenty states prohibited corporations and/or unions from making independent expenditures to state campaigns. New Hampshire, which enacted a ban in 1979 had already overturned it in 2000. Although most of these bans were passed after the federal independent expenditure ban that the Court overturned in *Citizens United*, a handful of states had enacted bans earlier, including Wisconsin and West Virginia, which enacted bans in 1905 and 1908, respectively. A full chronology of state independent expenditure bans is found in Table 3.2. As Justice Stevens lamented in his *Citizens United* dissent, all of these state laws were implicated by the Court’s holding: “the Court operates with a sledge hammer rather than a scalpel” and “compounds the offense by implicitly striking down a great many state laws as well,” 130 S.Ct. at 933 (Stevens, J., concurring in part and dissenting in part). In fact, a state law had been in dispute in *Austin v. Michigan Chamber of Commerce*. By overruling *Austin* the Court directly invalidated Michigan’s ban on corporate and union independent expenditures, something the Michigan Secretary of State acknowledged one week later in a public statement (Michigan, 2010). By July 2010, nine more states had passed legislation that explicitly repealed their bans on corporate independent expenditures, and the chief campaign finance board or official in eight additional states had adopted an emergency rule or published an advisory opinion that *Citizens United* invalidated their state ban, which would go unenforced until the legislature acted (see Appendix, Figure 3.2). The fate of corporate independent expenditure bans in the two remaining states was not determined for several more months. The North Carolina state legislature passed HB 478 on August 2, 2010 striking the independent expenditure ban from its state code (among other things). Because North Carolina is a covered jurisdiction under Section 5 of the Voting Rights Act, however, the new law did not take effect until the Department of Justice “precleared” the changes, which took nearly 8 months.³⁸ Montana’s IE ban hung in limbo for much longer, as the

	State	Year ban took effect
1	Wisconsin	1905
2	West Virginia	1908
3	Montana	1947
4	Tennessee	1972
5	North Carolina	1973
6	Kentucky	1974
7	Massachusetts	1975
8	Michigan	1976
9	Wyoming	1977
10	Arizona	1978
11	New Hampshire	1979
12	Pennsylvania	1979
13	Texas	1987
14	Minnesota	1988
15	Alaska	1996
16	Connecticut	2000
17	Oklahoma	2000
18	Colorado	2003
19	Iowa	2003
20	Ohio	2005
21	South Dakota	2007

Table 3.2: States that banned corporate and/or union IEs at the time of *Citizens United*. Note: New Hampshire overturned its ban *sua sponte* in 2000.

state defended its law against multiple legal challenges for two years.

3.2.1 The Case of Montana

Montana Attorney General Steve Bullock had originally led an effort to author an amicus brief in *Citizens United* on behalf of twenty-six Attorneys General that urged the Court to rule narrowly on just the federal issues and to either uphold or ignore *Austin* as it represented the jurisprudential bedrock of many states' regulations on corporate campaign spending (Attorneys General, 2009). Less than two weeks after *Citizens United* was decided, Bullock appeared before the U.S. Senate Committee on Rules and Administration and lamented that he “didn’t want this fight in Montana, but the *Citizens United* decision will likely invite a challenge to the people’s law of 1912,” (Bullock, N.d.). It took just one month for that challenge to materialize.

In March 2010, two corporations (later joined by a third) sued Bullock and asked the court to permanently enjoin him and all county attorneys from enforcing Mon-

tana's corporate independent expenditure ban, *Western Tradition P'ship, Inc. et al. v. Attorney Gen.*, 2010 Mont. Dist. LEXIS 412 (Oct. 18, 2010). The trial court declared the state law unconstitutional, citing *Citizens United*, and granted the plaintiffs motion for summary judgment. Quoting a United States District Judge who had held Minnesota's corporate independent expenditure ban unconstitutional several months earlier, the trial court wrote that the "Supreme Court's decision in *Citizens United* is unequivocal: the government may not prohibit independent and indirect corporate expenditures on political speech," *Minn. Chamber of Commerce v. Gaertner*, 710 F.Supp.2d 868, 873 (D.Minn. 2010).³⁹ The Montana Supreme Court concluded that Montana's law "favors some speakers over corporations" and thus "abridges Plaintiffs' right to engage in political speech. . .and is not narrowly tailored to meet any interest claimed to be compelling." One year later, the parties argued their case on appeal before the Supreme Court of Montana. In a surprise decision, the Supreme Court reversed the lower court ruling that had, in the Supreme Court's eyes "erroneously construed and applied the *Citizens United* case," *Western Tradition P'ship., et al. v. Attorney Gen.*, 271 P.3d 1 (Mont. 2011). After expressing skepticism that the plaintiff-appellees were at risk of any material harm, the Court sought to distinguish the facts of the case by writing that "unlike *Citizens United*, this case concerns Montana law, Montana elections and it arises from Montana history." The Court noted that the burden of establishing a PAC was much less "onerous" in Montana than at the federal level (referencing one of the arguments by the *Citizens United* majority). The Court also traced out the history of serious corruption in Montana politics that had prompted the state to enact its Corrupt Practices Act in 1912, now in question. Finally, the Court honed in on the potential negative effects of corporate money in state judicial elections, something the U.S. Supreme Court had acknowledged, and worried about in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009). Two justices dissented. Both expressed sincere sympathy with the majority's opinion, yet felt constrained to follow what they saw as a clear application of a broad United States Supreme Court ruling. In the words of Justice Nelson:

"I have never had to write a more frustrating dissent. I agree, at least in principle, with much of the Court's discussion and with arguments of the Attorney General. More to the point, I thoroughly disagree with the Supreme Court's decision in *Citizens United*. I agree, rather, with the eloquent and, in my view, better-reasoned dissent of Justice Stevens. As a result, I find myself in the distasteful position of having to defend the applicability of a controlling precedent with which I profoundly disagree. (fn. 2. The task is all the more distasteful in light of *Western Tradition Partnership's* questionable tactics and blatant hypocrisy."

In the words of Justice Baker:

“The State of Montana made no more compelling a case than that painstakingly presented in the 90-page dissenting opinion of Justice Stevens and emphatically rejected by the majority in *Citizens United*.

On June 25, 2012 the United States Supreme Court summarily reversed Montana’s high court without a hearing. The Court’s statement was simple and clear: “There can be no serious doubt that [*Citizens United* applies to the Montana state law],” *Am. Tradition Partn. et al. v. Bullock*, 132 S.Ct. 2490 (2012) (*per curiam*) (citing to the Supremacy Clause). Four Justices voted to deny the petition for *writ of certiorari* by American Tradition Partnership (as the corporation was now called) though they argued, in dissent, that Montana’s clear history of political corruption warranted, an as-applied review of *Citizens United*.

The Montana case raises important questions about the relevance of empirical facts in American campaign finance jurisprudence. Taken together, *Citizens United* and *American Tradition Partnership* stand for the proposition that independent expenditures cannot corrupt as a matter of law, any facts to the contrary notwithstanding. We take up the implications of this legal fiction below.

3.2.2 *Citizens United* As A Natural Experiment

As of June 25, 2012, corporations and unions were free to spend unlimited amounts of money from their general treasuries on independent expenditures for every election in every state. The exogenous shock of *Citizens United* on the laws of twenty states provides a natural setting to measure the effects of an independent expenditure ban on the spending behavior of corporations and unions. We do so by relying on recently compiled state-level reports of independent expenditures, which have been accumulated by the National Institute on Money in State Politics, a nonpartisan, nonprofit organization in Helena, Montana that maintains a “comprehensive and verifiable” database of political spending in all 50 states, freely available to the public at <http://followthemoney.org>. Independent expenditure data are currently available for 18 states between 2006 and 2011—twelve states whose independent expenditure bans were invalidated by *Citizens United* (“treatment”) and six states that never had an independent expenditure ban (“control”). Our primary model, a difference-in-differences design, compares spending related to all state races (gubernatorial, other statewide races, judicial, and state legislative) in treatment and control states between 2006 and 2010. This design requires us to drop two states from our sample for which there are available data: North Carolina (a “treated” state) because, as we describe above, the state’s repeal of their independent expenditure ban did not take effect until 2011, and Florida (a “control” state) because the only reported independent expenditures are on ballot measures, and corporate independent expenditures in

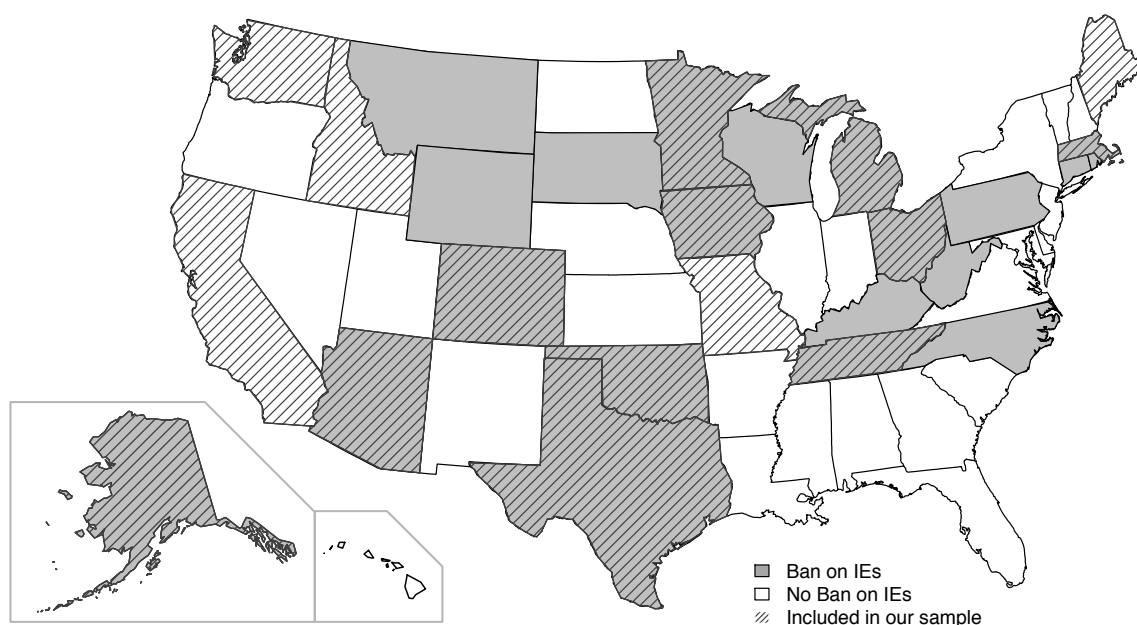


Figure 3.1: States’ corporate independent expenditure ban status at the time *Citizens United* was decided. Shaded states had a ban. Diagonal stripes represent the states included in our sample. Note that data for Florida and North Carolina are also available, though we exclude them from our sample.

support of or opposition to ballot measures has always been legal, see *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). For the remaining 16 states in our sample, which comprise 48.9% of the population of the United States (see figure 3.1 map), information is available about the name of each spender, the type of spender (e.g., union, party, nonprofit, etc.), the recipient of the expenditure, the target candidate, the targeted elected office, and the amount of each expenditure.

Because *Citizens United* was decided three-quarters of the way into the 2010 election cycle, and because state responses to the decision took effect even later in the year, we first test our assumption that treatment states in our sample were indeed “treated” in a meaningful way. For statewide seats with four-year terms the 2010 election cycle began on the day immediately following the 2006 gubernatorial election and was already three years old when the Supreme Court ruled in *Citizens United*. For seats up for election every two years, the 2010 election cycle was also well underway. However, we note that almost all of the independent expenditures during the 2010 election cycle were made after every state in our sample had changed their law. In fact, 96.4% of all independent expenditures in our sample were made after the individual

states passed their bans, and 100% of all independent expenditures in seven of the 11 treated states (see Appendix, Figure 3.8). We drop all expenditures that were made before the law changed in order to validly test the difference in spending in states with and without a prohibition on corporate independent expenditures. However, we note that the data are still vulnerable to various sources of confounding bias—factors that may jointly impact the likelihood that a state had imposed a spending ban and the level of independent expenditures. We include several variables in our models below to control for this bias. A summary of our covariates appears in the Appendix, Table 3.4.

One of the most important potential confounding variables is the level of political competition in a given election year. Increased political competition could result in increased amounts of money going toward campaigns and election efforts, independent of the legal status on independent expenditures at the state level. We measure political competition as the percent of Democrats in the upper and lower house, lagged by one year, or the absolute value of $0.5 - (\# \text{ Democrats in each house} / \text{size of house})$. We also note whether the state is under divided or unified government, as well as the number of seats that were closely contested in each house, meaning the winner received less than 55% of the vote, as well as the lagged turnover in the upper and lower house (Dal Bo, Bo and Snyder, 2009; Burnham, 1996; Ansolabehere et al., 2010). Finally, we include demographic information about each state’s population including the percent of residents with a bachelor’s degree or more, median income, the percent of employees that are represented by unions, and the sum of all payrolls for firms with more than 100 employees.

Overall Spending

Our primary hypothesis is that overall independent spending will increase after Citizens United. We address this hypothesis using a difference-in-differences model of independent expenditure spending over time where ‘ c ’ represents each election cycle and ‘ L ’ represents the law in each state with respect to independent expenditure bans for corporations and/or unions (= “ban” in treated states and = “no ban” otherwise). The difference-in-differences estimator ‘ τ ’ can be written:

$$\tau = E[Y_i|c = 2010, L = \text{ban}] - E[Y_i|c = 2006, L = \text{ban}] - E[Y_i|c = 2010, L = \text{no ban}] + E[Y_i|c = 2006, L = \text{no ban}] \quad (3.1)$$

or, in other words, the observed outcome is the difference between states before and after a ban among those that have a ban and states before and after a ban among states without a ban. In Figure, we plot the raw independent expenditures in treatment and control states before and after Citizens United. Because the number

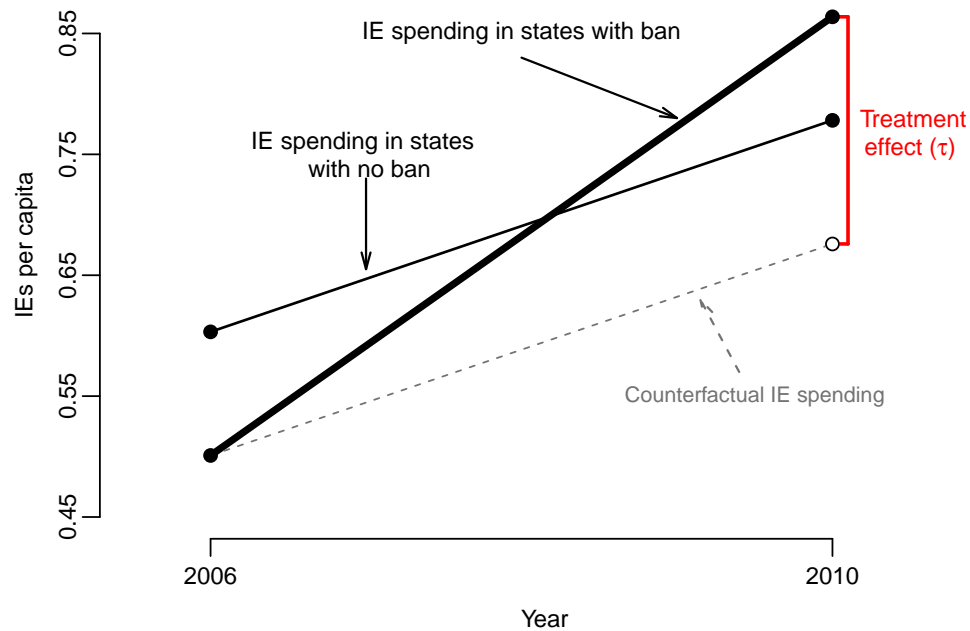


Figure 3.2: Difference-in-differences between per capita independent expenditures in 2006 and 2010 and between states with a corporate independent expenditure ban and states without a ban. This approach assumes a parallel time trend between treated states and control states. The “treatment effect” or difference between spending in states in the treatment condition and the hypothetical counterfactual is 18.8 cents per person. *Data source: National Institute on Money in State Politics 2012.*

of states in the treatment and control conditions is not equal—eleven treatment and five control—we plot independent expenditures on a per capita basis, where there is more balance between the two groups. The average population in treated states between 2006 and 2010 was 82,343,434 (or 28% of the U.S. population) and in control states the population was 64,518,787 (or 22% of the U.S. population)⁴⁰ In Figure 3.2 we see that when the corporate independent expenditure bans were still in effect, independent expenditures were smaller, per capita, in states affected by the bans than in states that did not have a ban. In 2010, after the repeal of all state independent expenditure bans in the sample, the relationship changed: independent expenditures in states whose bans had been repealed was higher per capita than independent expenditures in control states.

In a difference-in-differences design, the “treatment effect” is the difference between total independent expenditures in treated states and independent expenditures

in a hypothetical counterfactual state that parallels the control states (marked with a gray dotted line in Figure 3.2). We address the limitations of this parallel time trends assumption below, but here note that the parallel counterfactual baseline provides context to the change that we observe in the treated states. If we just compared spending in treated states before and after Citizens United we would over-estimate the impact of the legal change. Conversely, if we just compared the difference in independent expenditures between treated and control states in 2010 we would underestimate the impact of the legal change. In real dollars, independent expenditures increased from \$40 million to \$72 million in our sample of states that had a corporate independent expenditure ban in 2006, and independent expenditures also increased from \$38 million to \$51 million in our sample of states that never had a corporate independent expenditure ban. In other words, with an assumption of parallel time trends, we would have expected to see about 35% more spending in the treated states whether or not they repealed their corporate bans on independent expenditures.

With this information we can generate a more precise estimate of the change in spending attributable to changes in campaign finance law. This crucial information is missing for those who attempt to estimate the effect of *Citizens United* on federal spending, though careful commentators who recognize this have offered theoretical counterfactuals to bolster their claims (Bai, 2012).

Based on raw spending numbers in our sample, of the \$32 million increase in spending in treated states, \$13 million is explained by the counterfactual trend and the remaining \$19 million increase, or 19 cents per person in Figure 3.2 (identified as the “treatment effect” or τ), can be attributed to external effects such as *Citizens United*, unique features of the states, or randomness.

One of the limitations of the parallel time trends assumption is that all time-varying predictors of the outcome are considered to be equal in both control and treated states across the entire time period. We know this is not true in our sample; in fact we know that our units of analysis (the states) vary in important ways that are related to the amount of independent expenditures we observe in treated (T) and control (C) states. For example, some states experienced periods of divided government while others did not. In some states, e.g., Colorado (T) and Ohio (T), the incumbent Governor was term-limited in 2006. In other states, e.g., Maine (C), Michigan (T) and Oklahoma (T), the incumbent Governor was term-limited in 2010. Some states in our sample are heavily populated, e.g., Texas (T) and Ohio (T), and some are sparsely populated, e.g., Alaska (T) and Maine (C). Some states are heavily Democratic, e.g., California (C) and Massachusetts (T) and some are heavily Republican, e.g., Idaho (C) and Tennessee (T). Some states have high rates of union membership, e.g., Michigan (T) and Washington (C). In short, the states in our sample vary in many important respects that may be related to the amount of independent expenditures made in a particular election and which may undermine the assumption

of parallel time trends between treatment and control states. Regression analysis is helpful for dealing with this problem.

In Table 3.3 we present the results of OLS estimations of the difference between treated and control states, with and without a set of control variables. The outcome variable is the natural log of independent expenditures. When we control for state-level measures of political competition and demographics, the differences between the states in both the pre- and post time periods shrinks slightly, but the difference-in-difference estimator is nearly identical. In fact, the entire model with controls, though less precisely measured, is very similar to the model without controls. This suggests that the treatment effect (i.e., the difference spending between treated states and a control-parallel counterfactual) is not being driven by confounders that we model, but by the treatment itself. In addition to the models presented, we also ran models with the following control variables: Democratic percentage of the state upper house (highly correlated with percentage in the lower house), lagged turnover in the upper house, the number of incumbents running, the number of seats in both houses, the size of legislative districts in both houses, the number of contested seats in both houses, divided government, number of firms in the state, payroll of all large firms, percent of workforce that belongs to a union, and the percent of population with a B.A. or more. Because our model includes so few observations (32 state-years), we risk saturation by including too many variables in any one model. We ran multiple iterations of the difference-in-differences model

$$\begin{aligned} \log(\text{IE})_{sy} = & \alpha_{sy} + \beta_1(2010)_y + \beta_2(\text{IE ban})_s + \\ & \beta_3(2010*\text{ban})_{sy} + \beta_4(\text{controls})_{sy} + \varepsilon_{sy} \end{aligned} \quad (3.2)$$

and the treatment effect was robust to every covariate that we included singly as well as nearly every combination of covariates (as the number of covariates exceeded five the model became unstable). In these models, the interaction term fluctuated from as low as 1.14 to as high as 1.35. We note that our model is limited to observable and measurable covariates. This means that we cannot control for variation in state culture, unmeasured attitudes toward political spending or other unobservable confounders. By assumption, these confounders are considered to be time-invariant.

Identifying the Source of Spending

These observed changes in overall spending implicate *Citizens United* but cannot tell the whole story. If *Citizens United* caused an increase in spending, then that increase will have been driven by corporate and/or union independent expenditures. In Figure 3.3 we plot spending by the known identity of the spender to see whether, as hypothesized above, we see an influx of corporate and union dollars after 2010.

	(A) Without controls	(B) With controls
States with Bans	-1.40 [-3.89, 0.71]	-1.12 [-3.74, 1.03]
Post Citizens United	0.36 [-1.88, 2.37]	-0.22 [-2.17, 1.44]
Bans * Post CU	1.28 [-1.36, 4.33]	1.27 [-0.88, 3.93]
N	32	32
Adj. R^2	0.02	0.34
95% bootstrap confidence intervals in brackets (10,000 resamples)		

Table 3.3: Logged independent expenditures in 2006 and 2010. One observation per state year ($N = 32$). Model (A) represents a simple OLS interaction model with no control variables. In model (B) we include the following covariates: Democratic percentage of state lower house, number of contested seats in the current election, lagged turnover rates in lower house, state median income, and state population. Due to our low statistical power for this part of the analysis, these models are not statistically significant.

In theory we should observe no change in levels of corporate/union spending in the control states across the entire time period and low (or no) levels of corporate/union spending in the treatment states in 2006, with convergence to control state levels in 2010. The data do not support this hypothesis. Corporate and union spending increase after *Citizens United*, but only in the control states. The majority (62%) of the increase in control state spending between 2006 and 2010 can be attributed to union spending in the 2010 California gubernatorial race. Without California, union spending was just \$4 million higher in 2010. One additional curiosity is the lack of convergence between treated and control states in 2010; treated states look less similar to the control states in 2010.

We observe very little corporate spending. Among all of the control states one corporation (Stolar Partnership LLP in Missouri) spent \$1,300 in 2006 and two corporations (Koch Industries in Washington and Energy Horizon Technologies in California) spent \$1,400 in 2010. Among all of the treated states one corporation (Deloitte & Touche LLP in Texas) spent \$3,000 to cater a meal at an event supporting the state Comptroller candidate in 2006, and one corporation (Lutak Lumber & Supply

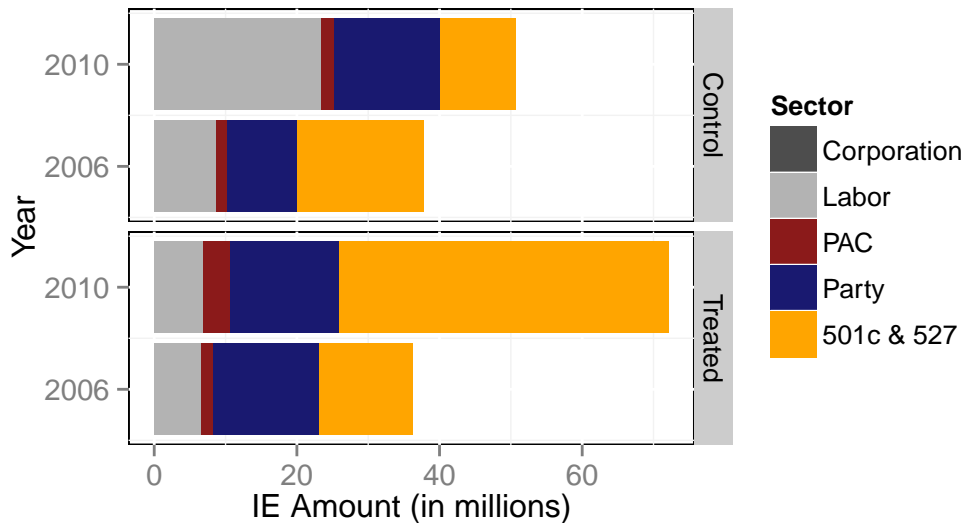


Figure 3.3: Raw independent expenditures, in millions of dollars, by spender. We exclude spending by individuals (three-tenths of one percent of spending) and spending categorized as “Other” (four-tenths of one percent) by the National Institute on Money in State Politics (NIMSP). The largest category of spending is coded by the NIMSP as “Single Issue” and comprises spending by both 501c organizations and 527 political committees.

Inc. in Alaska) spent \$100 in 2010. Unions spent far more than corporations, but the difference between 2010 and 2006 in treated states was very small (4%). We note that Iowa, Massachusetts, Minnesota, and Washington (all treated states) banned independent expenditures by corporations but not by unions. The \$6.5 million of reported spending by unions in these states in 2006 was thus completely legal. Union expenditures in these four states increased \$300,000 or by 5% in 2010. Figure 3.3 is hardly evidence of a floodgate of spending by corporations and unions.

We do observe a floodgate of spending by outside groups—both 501c nonprofit organizations and 527 political committees—in the treated states. Spending by these outside groups nearly doubled both in terms of actual dollars (\$25 million increase) and as a share of all spending (77% increase). Unfortunately, we do not know the source of contributions to these groups. 501c organizations are not required by law to disclose the identity of their donors meaning we may never know who backed these groups. 527 political committees are required to disclose their donors; however, the information is not easily accessible. State officials that we contacted said this information could be obtained through formal public records requests. We have begun

this process but are unable to report any findings in this Article.

One possible explanation for the observed divergence between treated and control states in 2010 is variation in political culture. In control states, tolerance for spending by unions and corporations is likely higher than in treated states. If states had corporate/union bans, particularly long-held bans, then the public's perception that corporate/union money can corrupt politics might provide an extra incentive for corporations/unions in treated states to make independent expenditures through 501c and 527 organizations, as we hypothesize above. In states that had no bans, this incentive may be much less powerful or nonexistent.

In summary, we observe a disproportionate increase in overall independent expenditures in states affected by *Citizens United* that is driven by 501c and 527 group spending. Although we cannot empirically verify that corporations and/or unions increased their political activity, we know that the most substantive changes to campaign finance laws between 2006 and 2010 eliminated prohibitions on corporate and union political spending, specifically on spending for the type of activities (independent expenditures) that are often managed by advocacy organizations and groups with political advertising expertise. In light of these facts, we view the findings in this section as evidence that corporations and unions increased their political spending in response to laws that permitted them to do just that. This conclusion is neither surprising nor controversial. We note, moreover, that our analysis provides the first systematic estimates of the magnitude of the response—a 100% spending increase—as well as the mechanism—an almost exclusive reliance on 501c and 527 organizations.

Distributional Effects

In addition to our analysis of aggregate spending above, we evaluate how the distribution of independent spending changed over time. Our interest in the distribution of spending is motivated by concerns about equality, a concern about which judges have shown mixed interest. In 1990, the Supreme Court recognized equality as a legitimate state interest when it upheld Michigan's Campaign Finance Act. In *Austin v. Michigan Chamber of Commerce*, the Supreme Court admitted concern about the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." Although the idea of equality, or what is sometimes referred to as "antidistortion," has historically focused on the corporate form, the logic applies to non-corporate entities as well; to the extent that the wealthy spend large stockpiles of money in support of candidates, the Court recognized a state interest in preventing that money from distorting the public's access to information or from distorting legislation and judicial decisions in favor of the spender. In *Citizens United*, the Court held that the antidistortion

concern was not sufficiently compelling to justify limits on First Amendment speech and one year later the Court explicitly rejected the antidistortion rationale altogether when the majority opined that

“leveling the playing field’ can sound like a good thing. But in a democracy, campaigning for office is not a game. It is a critically important form of speech. The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the ‘unfettered interchange of ideas’—not whatever the State may view as fair.”

The rejection of the antidistortion rationale has proven controversial, in large part because the Court itself has acknowledged that disproportionate spending may create bias in favor of the spender and violate the Constitution’s guarantee of due process. In addition, for several decades political scientists have reported high rates of political inequality—the affluent are politically active and the less advantaged are not—and policy outcomes that benefit those whose voices are heard. One hypothesis about the rise of overwhelmingly large expenditures is that it will drown out the voices of smaller donors, or crowd them out altogether. We cannot directly test this hypothesis because we cannot observe individuals or groups who contemplate making independent expenditures, but ultimately decide not to. We can, however, test whether smaller spenders are more elastic to changes in campaign finance law, which may be instructive on this point, and we do so in two ways. First we analyze the entire distribution of independent expenditures and compare the relative share of large and small spenders per year. If smaller spenders are getting crowded out then we should observe a shift toward larger independent expenditures. Second, we compare the incidence of repeat spenders to see whether those who have made independent expenditures in the past continue to do so after *Citizens United*.

The distribution of all independent expenditures in our sample is shown in Figure 3.4. Because many spenders make repeated expenditures during one election, we aggregate spending to the level of the spender. The average (median) spender amount in 2006 and 2010 was \$7,545. Thirty-six spenders in the dataset (of 843 total) spent \$1 million or more in a state in a given year.

Our first statistical approach is to compare changes in spending between treatment and control states by percentile. We present quantile-quantile (QQ) plots for 2006 and 2010 in Figure 3.5. Control states are black circles, treatment states are red Xs, and the 45° line represents equal spending in 2006 and 2010. As Figure 3.5 illustrates, there was very little change in the amount spent per spender in the control states in 2010 compared to 2006. The change in the treatment states was much more pronounced. Two, two-sample Kolmogorov-Smirnov tests, one on treatment and one

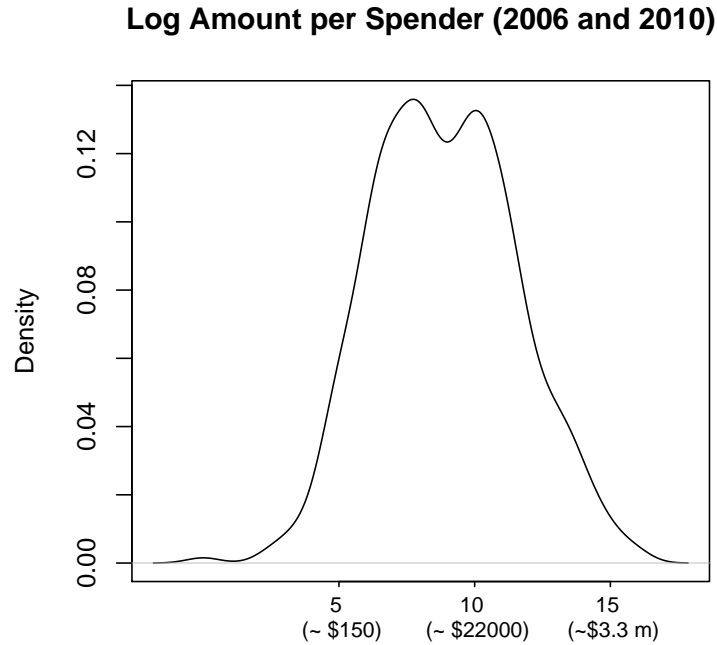


Figure 3.4: Logged amount spent by each unique spender in 2006 and 2010. Logged amounts “translated” into dollar amounts in parenthesis. The data includes 843 reported spenders from 16 states. Note that reported spenders are simply those that report independent expenditures pursuant to campaign finance requirements, and these reported spenders could all be spending money received by the same “root” spender or donor, which goes unreported.

on control, confirm that the difference is larger and more precisely measured among treatment states ($D = 0.24$, $p\text{-value} = 0.00$) than among control states ($D = 0.07$, $p\text{-value} = 0.40$). We also observe a slight downward departure from the line among treatment states at the lower percentiles indicating that at least at some part of the distribution, spending in 2006 was higher than 2010. The most prominent effect, however, is an increase in spending in treatment states after Citizens United in the middle of the distribution.

We explore the robustness of this effect by running the same differences-in-differences analysis presented in the previous section on every percentile in the data. Figure 3.6 illustrates which parts of the distribution drive the differences between the states, helping us gain traction on the question of whether smaller spenders are affected differently than larger spenders. We observe that spending increased more in absolute dollar terms in the treated states than in the control states across nearly every

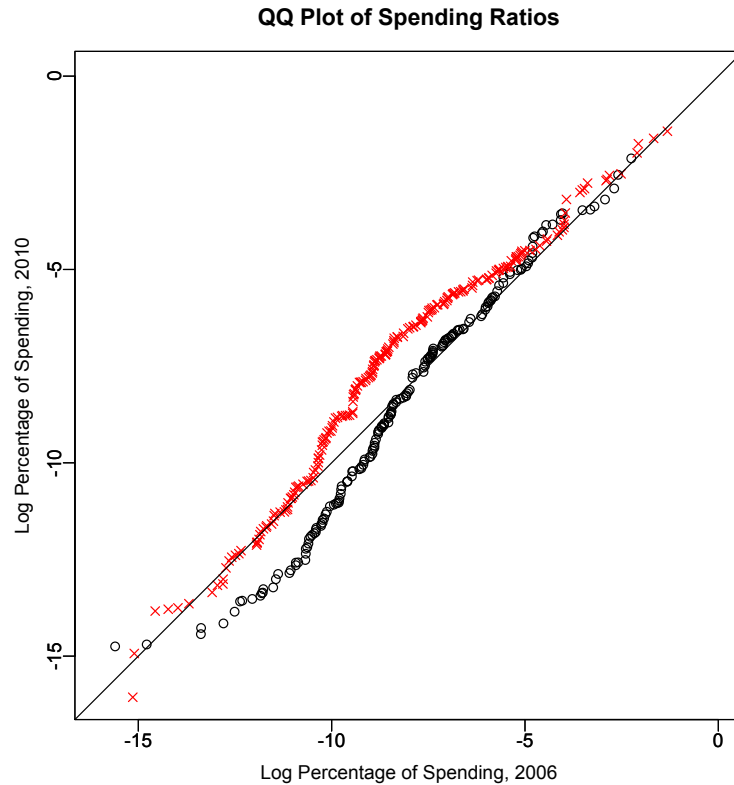


Figure 3.5: Quantile-quantile plots for treatment and control states between 2006 and 2010. Each dataset (treatment and control) are broken into 100 equally sized quantiles, or percentiles. Black circles represent percentiles in control states and red Xs represent percentiles in treatment states. The 45° line represents equal spending in 2006 and 2010.

percentile, with the most significant difference in the middle of the distribution and not the tails. In other words, the treatment effect that we identified in the previous section is not driven by the largest expenditures.

Rather, the increase in post-*Citizens United* spending is the result of more independent expenditures in amounts between approximately \$1,000 (20th percentile) and \$40,000 (70th percentile). We observe that spending in the lowest percentiles of the treated states is indistinguishable between 2010 and 2006 meaning that the smallest spenders were relatively inelastic to the changes in overall spending. Similarly, spending differences in the highest percentiles are indistinguishable from zero. These findings are particularly striking because they cut against the conventional wisdom of spending behavior and raise questions about the states' equality interests, which

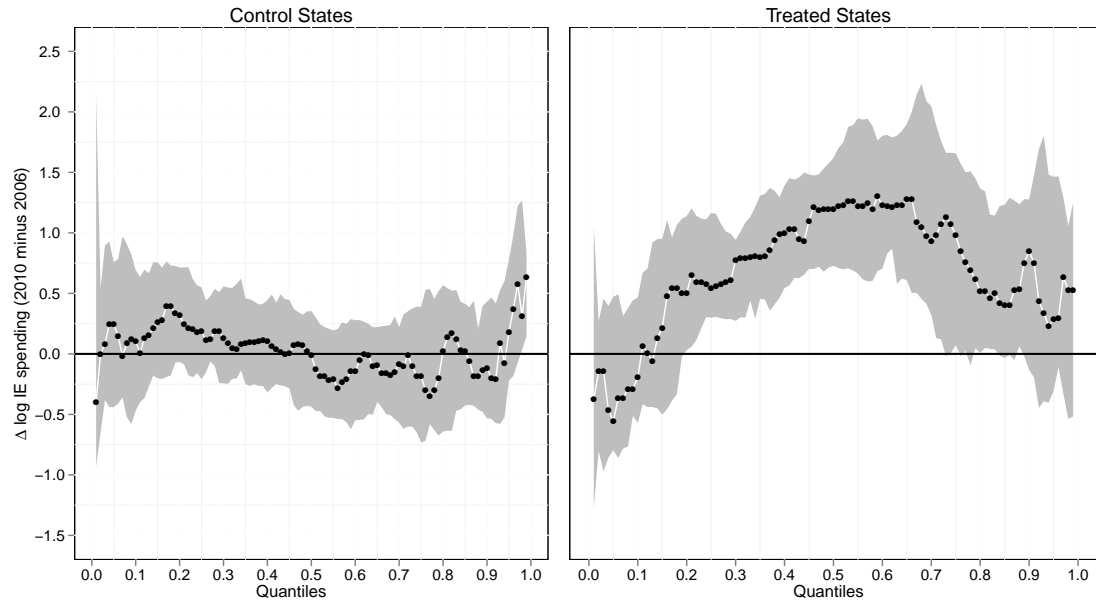


Figure 3.6: Quantile regression (on 100 quantiles) by control and treated states, including state fixed effects. Each dot is the difference between spending in that percentile for 2010 and spending in that percentile for 2006 in both treatment and control states. The grey region is a 95% confidence interval.

presume significant activity in the “tails” of the spending distribution. The findings also challenge the characterization of political spending as an investment that is more valuable as the probability increases that spending will be pivotal in securing a candidate’s victory. In this model, those who spend the very most and the very least are most elastic to changes in the law that regulate spending. Those who can afford to spend large amounts of money should positively respond to a law that permits unlimited expenditures as each additional dollar increases the likelihood of playing a pivotal role. In response, those who spend the least—whose expenditures become relatively smaller and smaller—withdraw from the game altogether. We do not observe this behavior. Instead, we see evidence, at least for expenditures in the lowest five percentiles (less than \$420), that the decision to spend money on political advocacy might be modeled more precisely as an act of consumption, where the utility of political participation is greater than the size of the expenditure. No existing theory, nor any that we can conjure, predicts that this kind of consumptive behavior would be altered by a decision like *Citizens United*.

What about the largest spenders? Is it possible that the “consumption value” theory explains the inelasticity of those who spend in the top third of the spending

distribution? We are skeptical. First, though we acknowledge that the consumption value of political participation is subjective, we are not convinced that the value exceeds \$40,000, which is the size of expenditures in the 70th percentile. Second, we think it is more likely that the most sophisticated political operatives—individuals and groups that, in our opinion, are also likely to spend the most money on political advocacy—find ways to influence the process in spite of regulations on different types of spending. In other words, it may be the case that the largest, most sophisticated spenders were already engaged in political advocacy at an efficient level. Removing the ban on corporate and union independent expenditures may have changed the way that independent expenditures are made and managed but not the amount of independent expenditures overall.

With regards to our statistical approach, we acknowledge two features that limit the inferences we are able to make. The first is that we cannot distinguish between spenders. Thus, large spenders may be making one large expenditure or they may make several smaller expenditures. For example, suppose that Google wants to spend \$1 million to support conservative candidates. After *Citizens United* it can either make expenditures from its general treasury, which we could track, or it could give money to several other politically active groups, many of which would not disclose Google's donation. Because we do not know the source of funds for the 501c and 527 organizations in our sample, we cannot distinguish between a world where Google gives its entire \$1 million to a single organization and a world where Google gives \$10,000 to each of 100 groups. This severely limits our interpretation of the quantile regression model. However, if corporations and unions are giving money to just one or two political advocacy groups or charities, then Figure 7 is suggestive that this corporate and union money did not overwhelm the entire distribution of expenditures.

The second limitation of our model is that spending amounts are not weighted by their relative importance. Politics is more expensive in some states and less expensive in others. For example, all Arizona gubernatorial candidates combined spent \$2.3 million in 2006. In that same year gubernatorial candidates in California spent \$12.9 million. In 2010, all candidates for state legislative office in Maine spent \$3.3 million while spending in California reached \$102.4 million. Thus, a \$50,000 independent expenditure during the 2006 Arizona gubernatorial election or the 2010 Maine state legislative election would be far more important than the same amount given in California in those years. We investigate whether relative spending amounts change the interpretation by weighting each expenditure by the total amount of money in that state's campaigns. Because legislative races—even aggregated—typically have much less money spent than gubernatorial races, we weight them separately. Each spender, then, is represented by the ratio of her expenditures to the total spending in that race. These “spender ratios” are very small percentages, ranging from 0.0000001 to 0.26. In the former case, the spender's independent expenditures comprised one ten millionth

of the amount spent in the race. In the latter, the spender's independent expenditures comprised over one quarter of the amount spent in the race. The quantile regression of spender ratios (plot not presented) looks nearly identical to the model with raw spending numbers. Control states are uniform and indistinguishable from zero and treated states have a distinct hump in the middle of the distribution.

In our final analysis, we subset the data to just those spenders who appear in both 2006 and 2010 and we observe that the repeat players were much more likely to increase their spending in 2010 relative to 2006, especially at the lowest end of the expenditure distribution (see Appendix, Figure 3.10). Perhaps the more important observation about repeat spenders is that there are only 94 in the entire dataset (7% of all spenders). We do not think this is evidence that independent expenditures are a one-shot game. Quite the contrary; as we describe in the previous section, the independent expenditure market is largely driven by nonprofit organizations and political committees. These groups notoriously enter and exit the market (e.g. "National Security PAC" in 1988, "Swift Vets and POWs for Truth" and "And For the Sake of the Kids" in 2004, "American Crossroads" in 2012, etc.) while the administrators and donors behind the groups remain in the market for future elections. In other words, understanding the behavior of these groups is only the beginning. Without more robust disclosure laws, we are limited in the inferences that we can draw from these empirical findings.

3.3 Discussion

3.3.1 Independent Expenditures As Share of All Spending

A full discussion of the implications of our findings requires some context. Independent expenditures have been the central focus of campaign finance news since the Citizens United decision. Indeed, in the two years since the decision, the term "Citizens United" has become a ubiquitous catchphrase for all of America's campaign finance ills, though it is just one of several deregulatory decisions under the Roberts Court. With all of this attention on independent expenditures, it might be easy to forget that independent expenditures represent just a fraction of overall campaign dollars. In the sixteen states that we analyze in this paper, nearly \$140 million was spent independently in gubernatorial races between 2006 and 2010. Direct contributions to gubernatorial candidates in those same states over that same time period exceeded \$1 billion, a ratio of more than \$7 to \$1 in favor of contributions. At the federal level the ratio is smaller but still dominated by direct contributions: \$641 million of independent expenditures in the 2012 presidential race compared to \$1.4 billion contributed directly to the candidates, a ratio of more than \$2 to \$1. This

relationship is often obscured by the media both because of sloppy reporting as well as an overreliance on *Citizens United* to frame nearly every story related to money in politics. Missing from most stories is a careful attention to the important distinctions—contributions vs. spending, spending by candidates vs. spending by others, express advocacy vs. issue advertisements, etc., that determine whether, and the extent to which, regulations on political money are tolerable.

The logic of *Citizens United* is arguably very broad and has implications for contribution limits, the regulation of foreign money, and political equality in general. Indeed, much of the public backlash against the opinion stems from opposition to its logic and its signal that the Roberts Court is skeptical about campaign finance regulations more generally. The actual holding, however, is limited to bans (not limits) on corporations and unions making independent expenditures from their general treasuries. *Citizens United* is not responsible for Sheldon Adelson, it did not prohibit corporate contributions to PACs, and it does not permit corporations and unions to directly contribute to candidates.⁴¹ There is no doubt that *Citizens United* has changed the campaign finance landscape in important ways—both the jurisprudence and the way that campaigns are actually run. There is little value in responding to exaggerated claims about *Citizens United* with claims that undersell its importance. The truth is that *Citizens United* is both a very narrow decision about corporate accounting practices and also the first case to significantly chip away at the underlying logic of *Buckley v. Valeo* that each individual voter should have an equal voice. With regard to the empirics, regardless of the political activity of corporations and unions, political candidate campaigns are still dominated by direct contributions and *Citizens United* did not change the rules governing contributions.

3.3.2 The Supreme Court’s Disclosure Disconnect

One of the most overlooked aspects of the *Citizens United* decision was the nearly unanimous vote (8-1) upholding the disclosure provisions of BCRA. The Court explained that “disclosure is a less restrictive alternative to more comprehensive regulations of speech.” A few months after *Citizens United* Justice Scalia articulated perhaps the Court’s strongest endorsement of disclosure on record when he opined that “[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. . . . [Anonymous campaigning] does not resemble the Home of the Brave.” In light of this rhetoric it appears that the Supreme Court did not foresee that so much political spending would go underground. According to the Center for Responsive Politics, \$0 were spent by 501c organizations (those groups that are not required to disclose their donors) on federal political advocacy in 2006, whereas 40% of all outside spending in 2010 was by 501c organizations. The disconnect between the political system the Court envisions and the political sys-

tem that actually exists has transformed the judicial philosophy of “deregulate and disclose” into “cutback and conceal.”

As a result, one of the most difficult challenges in judging campaign finance regulations is a lack of data. Lack of quality data prevents an evaluation of both assumptions underlying campaign finance laws and the effects of the laws and decisions that emerge based on those assumptions. Some opacity is by construction: many disclosure laws are tailored specifically to protect the identity of political donors (both to candidates and to outside groups) and to mask the size of the contribution or expenditure. And sometimes collecting data is not considered to be worth the benefit gained by public accessibility of the data; most disclosure laws have a floor below which reporting is not required because the cost of disclosure outweighs the benefit of the information. Some opacity, however, is not by design but is rather the result of bureaucratic incompetence and/or poor data accessibility. In some cases, where publicly-reported spending could offer valuable data, access issues pose a challenge for collection. For example, the independent spending data in this paper was collected by the National Institute on Money in State Politics, which reported data accessibility limitations in at least seventeen states. Many of those states were not included in our sample because the data were incomplete or inaccessible. Without data, statutes and judicial opinions are limited to justifications and conclusions based on anecdotes. This has important consequences. As Heather Gerken has argued, “pure political compromise can be produced without coming to grips with the empirics; a sound decision cannot.” As we highlight above, we lack important information necessary to estimate the effect of Citizens United on the federal level because there is no counterfactual spending trend against which to compare observable changes in spending. At the state level, the subject of this paper, the information exists, but the data are incomplete: we are limited to a subset of states in just a handful of years. Yet even with data from a handful of states for only a few years we are able to estimate the magnitude of changes in independent spending and observe differences between states, expenditure types and expenditure amounts.

There are certainly many values that outweigh the benefits of evaluating and optimizing public policy. For example, anonymity is important for protecting the privacy, and therefore safety, of people who choose to donate to unpopular candidates or causes. We do not consider our advocacy of an empirically-grounded campaign finance jurisprudence (below) at odds with these values. We do believe that the government has a legitimate state interest in understanding the effects of campaign finance on the functioning of the democratic process, and that this interest justifies stricter disclosure requirements than the status quo. Broad disclosure of all independent expenditures, regardless of the source, would enable researchers to better understand the role of money in politics: its effect on agenda setting, policy outcomes, recruitment of candidates, and even the quality of governance. This state interest of research is distinct

from the traditional rationale for disclosure rules that informs the voter about who is funding individual candidates. The traditional “informational” rationale requires disclosure at a very fine-grained level, which implicates the First Amendment, raises important privacy concerns, and suffers from the problem of infinite regress: everybody gets their money from somebody else. Instead, we join the chorus of campaign finance reformers calling for aggregate “semi-disclosure.” As described by Richard Briffault, campaign finance reports should be used “more like Census data or income tax returns, with the focus for the most part not on the activities of specific individual donors and more on the behavior of demographic or economic aggregates.” By understanding the effect of various campaign finance regimes—and the states are currently good laboratories, with a variety of laws—legislative bodies and judges will be in a better position to set up rules that promote political participation, protect free speech, and ensure fair and equal opportunities for self-expression as necessary for our democratic republic.

3.3.3 Political Equality: Legal Rules vs. Empirical Evidence

The political equality rationale of *Austin* that the Court rejected in *Citizens United* was intimately tied to corporate identity. The compelling governmental interest in *Austin* was to prevent “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form.” The Court in *Austin* distinguished corporations from wealthy individuals by virtue of the “special advantages” available only to corporations “such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets.” In its supplemental brief on *Citizens United* the government argued that the “use of corporate treasury funds for electoral advocacy is inherently likely to corrode the political system.”

The Court in *Citizens United* flatly rejected the distortion qua corporate dominance rationale in *Austin* as well as its broader implication “that the Government has an interest ‘in equalizing the relative ability of individuals and groups to influence the outcome of elections.’” The Court warned that “it is a dangerous business for Congress to use the election laws to influence the voters’ choices” and concluded that “the rule that political speech cannot be limited based on a speaker’s wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker’s identity.”

Although the importance of political equality has fallen into disfavor as a jurisprudential theory, it remains a central tenet of democratic theory and a “time-honored goal in American constitutional thought” according to Cass Sunstein who articulated the political equality rationale in this way:

“People who are able to organize themselves in such a way as to spend large amounts of cash should not be able to influence politics more than people who are not similarly able. . . . Of course economic inequalities cannot be made altogether irrelevant for politics. But the link can be diminished between wealth or poverty on the one hand and political influence on the other. The ‘one-person-one-vote’ rule exemplifies the commitment to political equality. Limits on campaign expenditures are continuous with that rule.”

This political equality rationale and its narrow articulation as corporate distortion are both predicated on empirical assumptions about the underlying distribution of political spending and the behavior of corporations in the political marketplace. We test these assumptions in this paper and observe spending patterns that are not consistent with the distortion hypothesis at the state level, whether narrowly applied to corporate behavior or broadly defined as political inequality. Direct spending by corporations in the sample we analyze was very rare between 2006 and 2010, accounting for just \$5,800 of the \$140 million spent on state races. And while it is almost certain that corporate dollars funded the independent expenditures of some advocacy groups, the relative significance of groups that spent more than \$40,000 across the entire 2010 election cycle was no greater than these groups in 2006 when the law prohibited the use of corporate funds to finance their independent expenditures. In other words, even if all of the top 20% of spenders were corporations, or funded entirely by corporate money, there was no observable distortion brought about by Citizens United in treatment states; the size of independent expenditures by this group was the same in 2010 as in 2006.

This finding has important implications for both campaign finance jurisprudence and legislative strategies that aim at political equality. If the election years in our sample are representative of larger trends then spending, while skewed toward larger amounts, is relatively continuous. There are no big gaps in spending amounts between the “spenders” and the “big spenders.” More importantly, the spenders who were the most elastic to the removal of the corporate IE ban were not the largest spenders but those in the middle of the spending distributions (20th to 70th percentiles of expenditures). It is quite possible that these same “middle spenders” are the most elastic to stricter campaign finance rules; a possible unintended consequence of laws targeting the largest expenditures. With respect to the Court’s view on distortion, *Citizens United*’s rejection of the political equality rationale may correctly reflect an underlying empirical distribution of spending that is continuous and not the victim of corporate distortion. (Our data do not speak to this directly as they are limited to state elections). However, we note that the Court was not interested in the empirical distribution of spending; rather, it rejected the view that equality is a valid

state interest with an *ipse dixit* that distortion is an unsuitable proxy for corruption. In the process, the Court created a legal rule to define away a problem that it later admitted was serious enough to warrant judicial intervention. In other words, the Court admitted that it did not care whether independent expenditures actually corrupt the political process because, in the Court's eyes, independent expenditures cannot corrupt as a matter of law, any evidence to the contrary notwithstanding.

We strongly disagree with the Court's reliance on this legal fiction; it is the bluntest of all possible instruments for judging regulations of the political process. This is particularly true for cases that impact state campaign finance laws as *Citizens United* did. States have unique histories—unique from each other and unique from the federal experience—and each has a different set of laws passed at different times for different reasons. Indeed, when the state of Montana produced evidence of a long history of *quid pro quo* corruption to justify its state law, the Supreme Court dismissed the case without a hearing. The Court's indifference to the empirical record in that case, as well as its general aversion to as-applied challenges and narrowing of acceptable evidence in campaign finance cases is both short-sighted and imprudent. Although current disclosure laws prevent analysis of individual-level data (see above), even aggregate spending numbers lend themselves to insights that would significantly improve the jurisprudence on political spending if permitted. As it turns out, the empirical evidence presented in this Article seems to support the Court's skepticism that corporate independent expenditures distort the political process. Nevertheless, we do not believe that the end justifies the means in this case. Campaign finance statutes and jurisprudence relies heavily on assumptions about the effects of money on the political process. Many of these effects are empirically testable. To the extent that judges sincerely care about preventing corruption and protecting First Amendment speech they ought to rely on empirical evidence over arbitrary legal rules to determine whether the political process is actually corrupted and whether political speech has actually been chilled.

A better understanding of the underlying distribution of spending and the elasticity of demand for political participation is central to the debate about the role of money in politics and the responsibility of governments to regulate the political process. This paper contributes to that understanding and in doing so joins a growing empirical literature that challenges some of the basic assumptions about campaign finance.

3.4 Conclusion

In this Article, we retraced the steps that led to the Supreme Court's decision in *Citizens United* and systematically examined the effect of this decision on spending

at the state level. We find that independent spending increased at twice the rate in states whose laws were affected by the decision. When we decompose the sources of independent expenditures, it does not initially appear that the predicted onslaught of independent spending by corporations materialized. However, we observed that spending by 501c and 527 organizations dramatically increased in the treated states, which we interpret as evidence of strategic behavior by firms to hide behind weak disclosure rules. Finally, we examine the distribution of independent expenditures before and after *Citizens United*. We do not observe spending patterns consistent with a distortion hypothesis. Instead, we find that increased spending in treated states was not driven by the largest expenditures (i.e. larger than \$55,000); rather the effect was most pronounced in the center of the distribution (20th to 70th percentile)—expenditures ranging from \$1,000 to about \$40,000. We acknowledge as forthrightly as possible that an empirical analysis like that at the core of this Article can only tell part of the story. Any analysis of money in politics, specifically an empirical analysis, should also consider the broader institutional framework encompassing campaign finance regulations, of which *Citizens United* is only the most recent appendage. We have tried to do that here.

3.5 Appendix

Figure 3.7: State-by-state responses to *Citizens United*

	Repeal	Enacted	Effective	EC ban
Alaska	AG opinion	Feb. 22, 2010	Feb. 22, 2010	Y
	Notes		Source	Sample
	Legislature passed SB 284 formally repealing independent expenditure ban on June 1, 2010 effective the next day.		http://www.legis.state.ak.us/basis/get_bill.asp?session=26&bill=SB284	Y
Arizona	Repeal	Enacted	Effective	EC ban
	HB 2788	April 1, 2010	April 1, 2010	N
	Notes		Source	Sample
		http://www.azleg.gov/DocumentsForBill.asp?BillNumber=HB2788&SessionID=93	Y	
Colorado	Repeal	Enacted	Effective	EC ban
	SB 203	May 25, 2010	May 25, 2010	N
	Notes		Source	Sample
		http://www.leg.state.co.us/CLICS/CLICS2010A/csl.nsf/fsbillcont3/19FCBA5EBA4D531F872576DA006B4483?Open&file=203_01.pdf	Y	
Connecticut	Repeal	Enacted	Effective	EC ban
	HB 5471	June 8, 2010	June 8, 2010	Y
	Notes		Source	Sample
		http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=5471&which_year=2010	N	

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	Repeal	Enacted	Effective	EC ban
Iowa	SF 2195	April 8, 2010	April 8, 2010	N
	Notes		Source	Sample
			http://coolice.legis.iowa.gov/Cool-ICE/default.asp?Category=billinfo&Service=Billbook&frame=1&GA=83&hbill=SF2354	Y

	Repeal	Enacted	Effective	EC ban
Kentucky	Registry of Election Finance AO 2010-001	March 24, 2010	March 24, 2010	N
	Notes		Source	Sample
	Law is still on the books.		http://kref.ky.gov/NR/rdo nlyres/99DD9B22-58DA-4AF2-A641-9343CF7780E3/0/AO2010_001.pdf	N

	Repeal	Enacted	Effective	EC ban
Massachusetts	Office of Campaign & Pol. Finance	Feb. 8, 2010	Feb. 8, 2010	N
	Notes		Source	Sample
	Re-interprets “expenditure” to just mean contribution or coordinated expenditure.		http://www.ocpf.net/legal doc/citizensunitedstatement.pdf	Y

	Repeal	Enacted	Effective	EC ban
Michigan	<i>Citizens United v. FEC</i>	Jan. 21, 2010	Jan. 21, 2010	N
	Notes		Source	Sample
	<i>Austin</i> was a case about Michigan’s independent expenditure ban. Thus, CU directly overturned the ban. The Sec. of State acknowledged this in a statement on Jan. 29, 2010.		http://www.michigan.gov/sos/0,1607,7-127-1633_8723_15274-230880--,00.html	Y

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	Repeal	Enacted	Effective	EC ban
Minnesota	HF 2574	May 18, 2010	May 28, 2010	N
	Notes		Source	Sample
	Less than two weeks before HF 2574 was passed, a fed dist court held that Minnesota's IE ban was unconstitutional. <i>Chamber of Commerce v. Gaertner</i> , 710 F.Supp.2d 868 (D.Minn. 2010).		https://www.revisor.mn.gov/revisor/pages/search_status/status_detail.php?b=Senate&f=SF2471&ssn=0&y=2010	Y
Montana	Repeal	Enacted	Effective	EC ban
	<i>ATP v. Bullock</i> 132 S. Ct. 2490	June 25, 2012	June 25, 2012	N
	Notes		Source	Sample
		http://www.supremecourt.gov/opinions/11pdf/11-1179h9j3.pdf	N	
North Carolina	Repeal	Enacted	Effective	EC ban
	HB 478	August 2, 2010	April 5, 2011	Y
	Notes		Source	Sample
Statute required DOJ preclearance (submission nos. 3057, 3059 and 3090) approved on April 5, 2011.		http://www.ncga.state.nc.us/gascripts/BillLookup/BillLookup.pl?Session=2009&BillID=h748	N	
Ohio	Repeal	Enacted	Effective	EC ban
	Secretary of State Advisory Opinion	Feb. 26, 2010	Feb. 26, 2010	Y
	Notes		Source	Sample
Secretary of State acknowledged <i>Citizens United's</i> effect on state law on her blog. She was running for Senate at the time. Blog post was cross-posted at DailyKos.		http://www.dailykos.com/story/2010/02/26/840929/-Mad-about-Citizens-United-Yeah-it-rsquo-s-Bad-but-We-Can-Do-Something	Y	
Oklahoma	Repeal	Enacted	Effective	EC ban
	Ethics Comm'n Rule Amd #20	Feb. 1, 2010	July 1, 2010	Y
	Notes		Source	Sample
Ethics Commission said it would not enforce the law on Feb. 1. Legislature and Governor agreed and amendment became formal law on July 1, 2010.		http://tempdocuments.ok.gov/cdm/compoundobject/collection/stgovpub/id/43670/rec/45	Y	

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	Repeal	Enacted	Effective	EC ban
Pennsylvania	Secretary of State Advisory Opinion	Mar. 4, 2010	Mar. 4, 2010	N
	Notes		Source	Sample
			http://www.portal.state.pa.us/portal/server.pt/gateway/PTARGS_0_160329_772781_0_0_18/DOS%20Statement%20on%20Citizens%20United%20Case%2003-10.pdf	N
	Repeal	Enacted	Effective	EC ban
South Dakota	HB 1053	Mar. 11, 2010	Mar. 11, 2010	N
	Notes		Source	Sample
			http://legis.state.sd.us/sessions/2010/Bill.aspx?File=HB1053CNF.htm	N
	Repeal	Enacted	Effective	EC ban
Tennessee	HB 3182	June 23, 2010	June 28, 2010	N
	Notes		Source	Sample
			http://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=HB3182&ga=106	Y
	Repeal	Enacted	Effective	EC ban
Texas	Ethics Comm n Adv. Opinion No. 489	April 21, 2010	April 21, 2010	N
	Notes		Source	Sample
	Legislature meets every 2 years (i.e. it was not in session in 2010). Passed HB 2359 on June 17, 2011.		http://www.ethics.state.tx.us/opinions/489.html	Y

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	Repeal	Enacted	Effective	EC ban
West Virginia	HB 4647	Mar. 13, 2010	June 1, 2010	N
	Notes		Source	Sample
			http://www.legis.state.wv.us/bill_status/bills_text.cfm?billdoc=HB4647%20SUB%20ENR.htm&yr=2010&sesstype=RS&i=4647	N
	Repeal	Enacted	Effective	EC ban
Wisconsin	Government Accountability Bd Emergency Rule	May 10, 2010	May 20, 2010	N
	Notes		Source	Sample
			http://gab.wi.gov/sites/default/files/news/nr_gab_emergency_rule_05_20_10_pdf_34804.pdf	N
	Repeal	Enacted	Effective	EC ban
Wyoming			Jan. 21, 2010	N
	Notes		Source	Sample
	Acc to Robert Stern, no legal changes, just not enforcing.		http://www.citizen.org/documents/sunlight-state-by-state-report.pdf	N

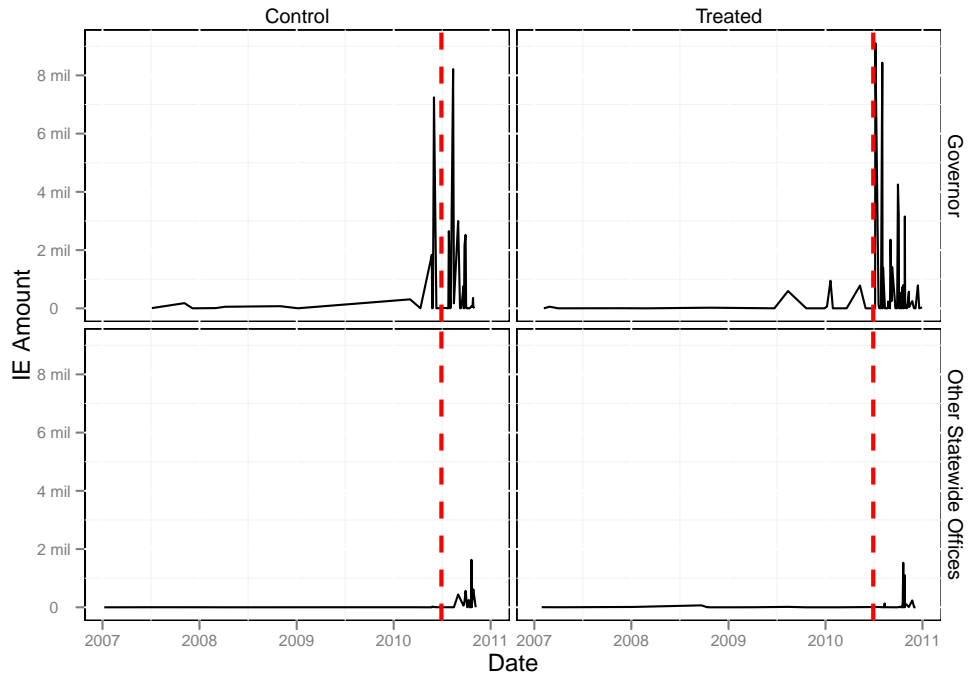


Figure 3.8: Independent expenditures during the 2010 election cycle. The vertical red, dotted line represents July 1, 2010 when every state in the sample had repealed its ban on corporate independent expenditures. In the “treated” states, 89.8% of all independent expenditures happened after July 1. This is a lower bound, since many of the states repealed their bans much earlier than July 1. Aggregated independent expenditures after the date of each individual state’s repeal accounts for 96.4% of all independent expenditures in the 2010 election cycle (and 100% in seven of the eleven treated states).

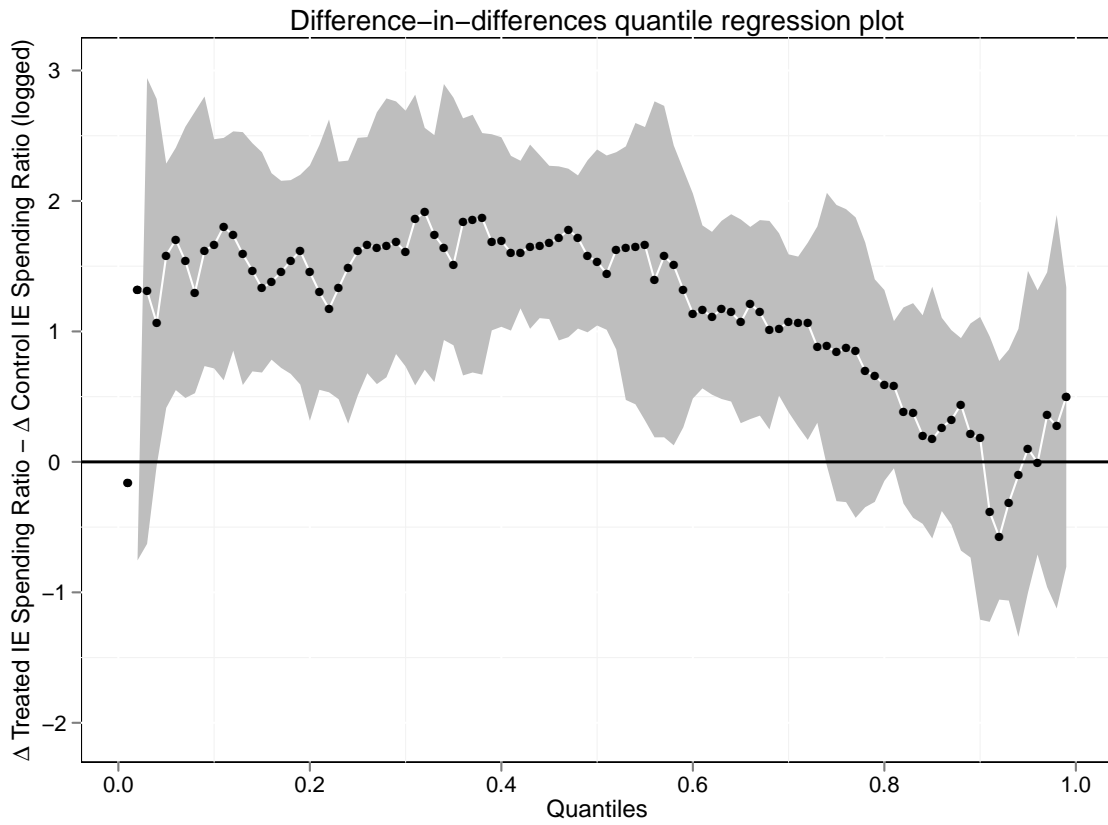


Figure 3.9: Quantile difference-in-difference regression interaction term including state fixed effects. The [treatment – control] difference at every percentile is shown, comprising the [2010 – 2006] difference in log independent expenditures by spender state and year. Grey region is 95% confidence interval.

Variable	Min	Max	Mean
Years	2006	2010	2008
Total Spent	0	28,268,883	178,758.6
Lower House Dems	0.186	0.894	0.507
Lower House Size	40	163	106.8
Lower House District Size	8708	466,700	88,870
Lower House Turnover	6	61	25
Lower House Contested	26	147	73.61
Upper House Dems	0.200	0.875	0.494
Upper House Size	20	67	39.33
Upper House District Size	33,870	933,500	238,900
Upper House Turnover	0	22	7.20
Upper House Contested	2	65	19.81
Gubernatorial Dem	0	1	0.574
Divided Gov't	0	1	0.5185
Unified Gov't	0	1	0
% with B.A. or higher	21.7	38.2	26.97
Median Income	39940	65,520	51,470
State payroll of firms	6,857,313	749,900,003	141,700,000
% unionized employees	0.039	0.247	0.126
State population	677,300	37,340,000	9,004,000

Table 3.4: Summary statistics of variables used in difference-in-difference models.

QQ plot of repeater amounts, treatment and control states

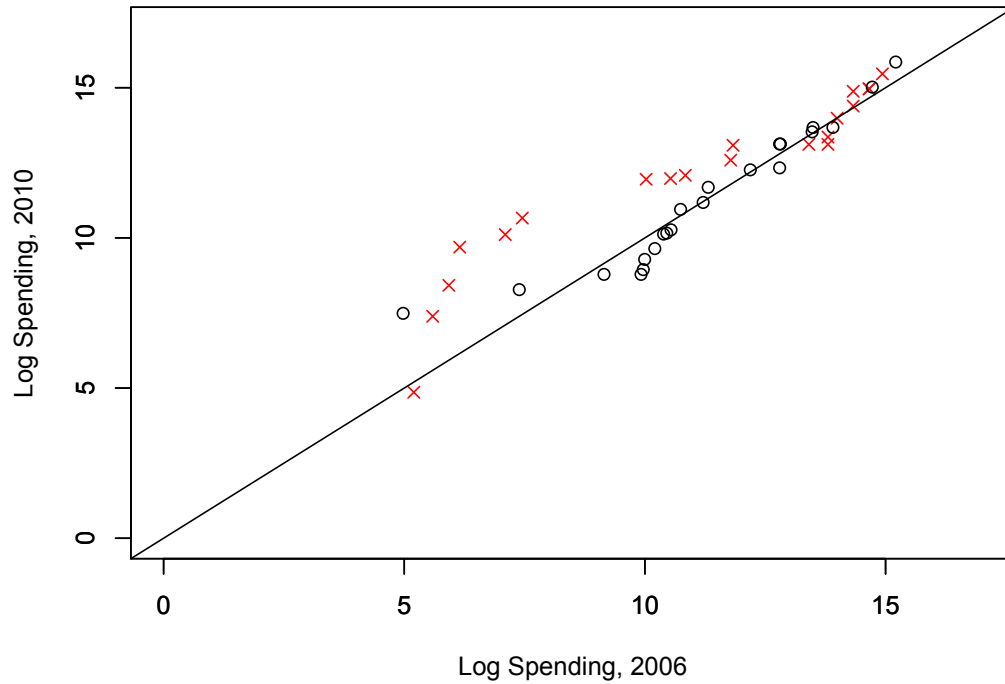


Figure 3.10: Quantile-quantile plots for “repeat players” in treatment and control states between 2006 and 2010. Black circles are the QQplot for the control states ($N = 53$), and red Xs are the QQ plot for treatment states ($N = 41$). The diagonal line is where the points would be if spending in 2006 were exactly equal to spending in 2010 for each group.

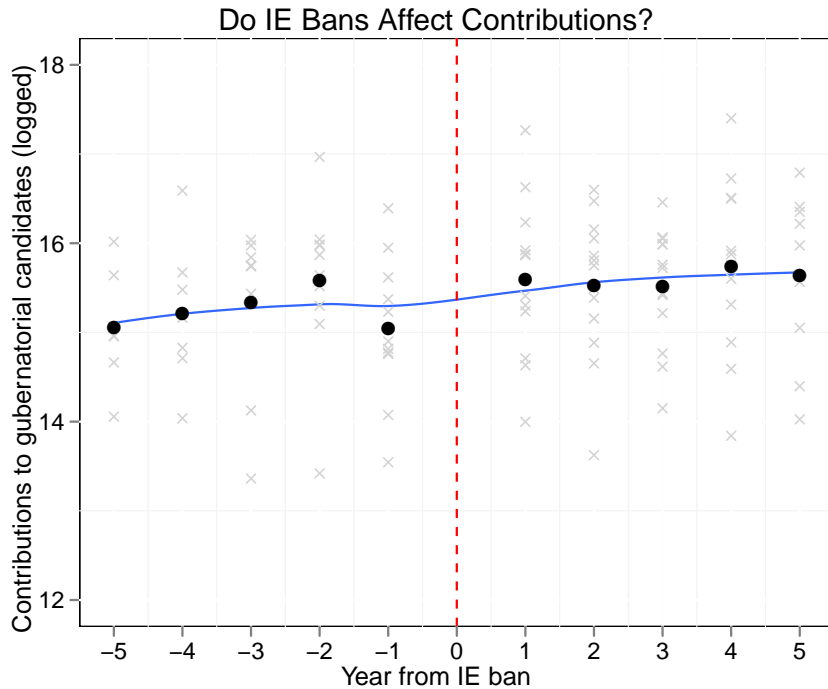


Figure 3.11: Direct campaign contributions to gubernatorial candidates in states that passed a ban on corporate/union independent expenditures. *Source: The Gubernatorial Campaign Finance Database compiled by Thad Beyle and Jennifr M. Jensen.* If there is a substitution away from independent expenditures in reaction to a ban, then we would see more contributions in years following a ban. In most states, only individuals are allowed to substitute in this way; corporations and unions are banned in 23 states from making direct contributions to candidates. See *Life After Citizens United*, National Conference on State Legislatures (2011) at <http://www.ncsl.org/legislatures-elections/elections/citizens-united-and-thestates.aspx>.

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¹Independent spending includes electioneering communications, independent expenditures and other non-candidate and non-party communications. See Center for Responsive Politics, *Total Outside Spending by Election Cycle, Excluding Party Committees*, OpenSecrets.org (last accessed Jan. 7, 2013) at <http://www.opensecrets.org/outsidespending>.

²*Id.*

³Remarks by the President in State of the Union Address. Transcript available at: <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

⁴424 U.S. at 45 (“We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify [FECA] §608(e)(1)’s ceiling on independent expenditures.”)

⁵Citizens United reported that it collected \$1.2 million for the production and distribution of the film. See Brief for Appellant at 33, *Citizens United v. FEC*, 558 U.S. 50 (2010) (No. 08-205), available at: http://www.fec.gov/law/litigation/cu_sc08_cu_brief.pdf. Among its donors, Citizens United only refers to its “large donors,” or those that gave at least \$1,000 aggregate to Citizens United. It is possible the amount of corporate money backing the film was higher, contributed in small amounts (less than \$1,000) by many corporations, though Citizens United only references the \$2,000 figure in its briefs.

By accepting corporate contributions, Citizens United was not eligible for a “qualified nonprofit” exemption that the Court recognized in *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986) (“MCFL”). In order to qualify as an “MCFL corporation,” and thus be exempt from regulation by the FEC, a nonprofit must (1) “be formed for the express purpose of promoting political ideas, and cannot engage in business activities” *Id.* at 264; (2) “ha[ve] no shareholders or other persons affiliated so as to have a claim on its assets or earnings,” *Id.*; and (3) not be “established by a business corporation or a labor union” or “accept contributions from such entities,” *Id.* The Court’s reasoning for exempting MCFL organizations is that they pose no risk for corrupting the political process. “MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace.” *Id.* at 259. See also 11 C.F.R. § 114.10.

In his *Citizens United* dissent, Justice Stevens argued that one possible (and narrower) solution to the case would have been “expand[ing] the MCFL exemption to cover § 501(c)(4) nonprofits that accept only a *de minimis* amount of money from for-profit corporations. Citizens United professes to be such a group.” 130 S. Ct. at 937. See text accompanying note 24.

⁶WRTL II at 451-52 (“Resolving [this case] requires us first to determine whether the speech at issue is the ‘functional equivalent’ of speech expressly advocating the election or defeat of a candidate for federal office, or instead a “genuine issue ad. . . We further conclude that the interests held to justify restricting corporate campaign speech or its functional equivalent do not justify restricting issue advocacy.”) (citations omitted).

⁷Citizens United’s original prayer for relief was (1) 11a declaratory judgment declaring BCRA §§ 201 and 311 unconstitutional as applied to (a) communications that may not be prohibited as electioneering communications under *WRTL II*, and (b) Citizens United’s ads. (2) a preliminary and permanent injunction enjoining the FEC from enforcing BCRA §§ 201 and 311 as applied to (a) communications that may not be prohibited as electioneering communications under *WRTL II*, 127 S. Ct. 2652, and (b) Citizens United’s ads.” Verified Complaint for Declaratory and Injunctive Relief (December 2007), available at: http://fec.gov/law/litigation/citizens_united_complaint.pdf.

⁸Memorandum in Support of Preliminary Injunction Motion, *Citizens United v. FEC*, Civ. No. 07-2240 (D.D.C. 2007) at 8. Available at: http://www.fec.gov/law/litigation/citizens_

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[united_cu_motion_memo_supp_pi.pdf](#).

⁹540 U.S. 93 (2003). Citizens United and its PAC, Citizens United Political Victory Fund, joined Congressman Ron Paul, the Gun Owners of America and its PAC, RealCampaignReform.org, and two Libertarian candidates for office in Massachusetts as plaintiffs challenging the constitutionality of BCRA on the grounds that it violates the First Amendment's guarantee of a free press. See Paul, *United States Congressman, et al. v. FEC, et al.*, No. 02-1753.

¹⁰In 2004 Citizens United's President, David Bossie, formally submitted Comments to the FEC in response to proposed changes to the definition of "expenditure" strongly opposing "any changes to the Commission's rules that would broaden the definition of 'expenditure' ... to encompass activities that fall short of express advocacy of the election or defeat of clearly identified federal candidates." See Comments of Citizens United Regarding Proposed Changes To the Definitions of "Expenditure," "Contribution," and "Political Committee" (FEC Notice 2004-6), April 5, 2004, available at: http://www.fec.gov/pdf/nprm/political_comm_status/boss.pdf.

¹¹Plaintiff's Summary Judgment Motion, *Citizens United v. FEC*, No. 07-2240 (May 16, 2008) at: http://fec.gov/law/litigation/cu_cu_mot_sj.pdf.

The national conglomerate, National Cable Communications (NCC) Media, is an advertising and marketing agency that develops media plans for clients that want to advertise on television, cable, satellite, and online. The agency is "jointly owned by three of the nation's largest cable system operators—Comcast, Cox Communications, Time Warner Cable—and represents virtually every other TV service provider in the country." See "Owners and Affiliates" at <http://nccmedia.com/about/owners-affiliates>.

¹²In its first 8 months, the "Election '08" on-demand channel on which *Hillary: The Movie* would have aired, just 500,000 segments split between all of the available programs and ads had been viewed. With more than 11 available ads and films on the "Election '08" station, each would have been viewed (on average) by less than 50,000 people, thus falling short of the statutory requirement for definition as an electioneering communication. As reported in the New York Times, "Neither traffic nor advertising on the election channel has been particularly strong." Stephanie Clifford, *Cable, Quietly, Introduces an Anytime Elections Channel*, N.Y. TIMES, Aug. 28, 2008, at C7. Citizens United had offered a similar, yet different explanation for why video-on-demand failed to meet the statutory definition of electioneering communication. "Because, unlike a broadcast, [video-on-demand] is sent only to the requesting converter box (as opposed to a geographic area), a Video On Demand transmission will generally be viewed only by the members of the household who requested the Video On Demand program. Unless the recipient converter box is located in a sold-out football stadium, the transmission will not be able to be viewed by 50,000 people." Brief for Appellant at 26 (n. 2), *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205).

¹³Memorandum Opinion denying Citizens United's Motion for Preliminary Injunction, No. 07-2240, at 8. Available at: http://www.fec.gov/law/litigation/citizens_united_memo_opinion_pi.pdf.

¹⁴Brief for Appellee WRTL, Nos. 06-969 & 06-970 (March 2007).

¹⁵Brief for Appellant at 13-14, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205).

¹⁶Brief for Appellee at 33. *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205) (internal citations omitted).

¹⁷Audio of the oral argument is available at: <http://bit.ly/10M0gzM>. The referenced exchange happens from 29 : 03 to 30 : 05.

¹⁸Citizens United, transcript of oral argument (No. 08-205) at 27 online, at: http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205.pdf.

¹⁹Between 1946 and 2010, the Supreme Court called for reargument in just 2.3% of its cases (172 of 8,330). See Harold Spaeth, et al. *The Supreme Court Database*, at <http://scdb.wustl>.

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edu/index.php (we tabulated the number of cases in the subset of “Cases Organized by Supreme Court Citation” with an entry in the vector “dateRearg”). See also Valerie Hoekstra and Timothy Johnson, *Delaying Justice: The Supreme Court’s Decision to Hear Rearguments*, 56 POL. RES. Q. 351 (2003) (pointing out that many of the Supreme Court’s most famous cases, including *Brown v. Board of Education* and *Roe v. Wade* were decided after postponements for reargument).

²⁰Order in Pending Case, *Citizens United v. FEC*, No. 08-250 (June 29, 2009) (internal citations omitted), at: http://www.fec.gov/law/litigation/citizens_united_sc_08_order_rearg.pdf.

²¹Supplemental Brief for the Appellee, *Citizens United v. FEC* 558 U.S. 50 (2010), available at: http://www.fec.gov/law/litigation/citizens_united_sc_08_fec_supp_brief.pdf.

²²Supplemental Brief for the Appellant, *Citizens United v. FEC*, 558 U.S. 50 (2010) (“*Austin* was a poorly reasoned departure from *Buckley*,” at 5 and “*Austin* is simply a jurisprudential outlier”, at 10.), available at: <http://electionlawblog.org/archives/Citizens%20United--Supplemental%20Brief.pdf>.

²³*Citizens United*, 558 U.S. 50 (2010), transcript of oral argument (rehearing) (No. 08-205) at 33-34 online, available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205%5BReargued%5D.pdf

²⁴130 S.Ct. at 937 (J. Stevens dissenting) (“First, the Court could have ruled that, on statutory grounds, that a feature-length film distributed through video-on-demand does not qualify as an “electioneering communication” under §203 of BCRA. . . Second, the Court could have expanded the MCFL exemption to cover 501(c)(4) nonprofits that accept only a *de minimis* amount of money from for-profit corporations. . . Finally, let us not forget Citizens United’s as-applied constitutional challenge.”).

²⁵In the 27 months following the decision, the Wall Street Journal, USA Today, and Washington Post ran a combined 787 stories that mentioned *Citizens United* (an average of one every three days per paper) while the New York Times ran an astonishing 1,100 stories mentioning *Citizens United* (an average of 1.3 articles per day). Stories include columns and opinion pieces but not blog posts and the numbers are based on authors’ search of individual newspapers’ online archives. The numbers for all four newspapers are:

Newspaper	of articles about CU
New York Times:	1,100
Washington Post:	372
USA Today:	220
Wall Street Journal:	195

Compare, for example, Fred Wertheimer, *Supreme Court Decision in Citizens United Case is Disaster for American People and Dark Day for the Court*, ACSBLOG (January 21, 2010) <http://www.acslaw.org/acsblog/node/15151> (“The decision will unleash unprecedented amounts of corporate ‘influence-seeking’ money on our elections and create unprecedented opportunities for corporate ‘influence-buying’ corruption.”) with Bradley A. Smith, *Pure Science Fiction*, USA TODAY, January 22, 2010, at 8A (“the various ‘doomsday’ scenarios being floated by critics of the decision claiming that corporations will dominate American politics with billions of dollars in expenditures, are pure science fiction.”).

Other critical responses include Bob Kerrey, *The Senator From Exxon-Mobil?*, HUFFINGTON POST (January 21, 2010) at: <http://huff.to/YHieXz> (“With \$85 billion in profits during the 2008 election, Exxon Mobil would have been able to fully fund over 65,000 winning campaigns for U.S. House or outspend every candidate by a factor of 90 to 1. That’s a scary proposition when you consider the health of our planet is at stake.”); Richard L. Hasen, *Citizens United: What Happens Next?*, HUFFINGTON POST (January 21, 2010) <http://www.huffingtonpost.com/rick-hasen/>

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icitizens-unitedi-what-ha_b_431696.html (outlining four potential legislative responses and one constitutional amendment in response to “a very bad day for American democracy.”).

Examples of arguments that *Citizens United* warrants no concerns include Ilya Shapiro, *Supreme Court Ruling on Hillary Movie Heralds Freer Speech For All Of Us*, CATO@LIBERTYBLOG (January 21, 2010) <http://bit.ly/Y97vS0> (“Today’s ruling may well lead to more corporate and union election spending, but none of this money will go directly to candidates—so there is no possible corruption or even ‘appearance of corruption.’ It will go instead to spreading information about candidates and issues. Such increases in spending should be welcome because studies have shown that more spending—more political communications—leads to better-informed voters.”); Kenneth P. Doyle, *Ban On Corporate, Union Campaign Money Swept Aside By 5-4 Supreme Court Decision*, BNA MONEY AND POLITICS REPORT (January 21, 2010) (quoting Joseph Sandler that “the impact of the Supreme Court ruling would be ‘more marginal than cataclysmic’ to the current campaign finance system.”).

²⁶Remarks by the President in State of the Union Address. Transcript available at: <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

²⁷Video of the exchange is available at: <http://www.cbsnews.com/video/watch/?id=6154907n> (at 0:20 mark), last accessed July 1, 2012.

²⁸Jennifer Agiesta, *Campaign Finance Ruling Sparks Bipartisan Agreement*, WASH. POST (February 17, 2010), in “Behind the Numbers” available at: <http://wapo.st/11LrhHw>.

²⁹PEW RESEARCH CENTER FOR PEOPLE AND THE PRESS, SUPER PACS HAVING NEGATIVE IMPACT, SAY VOTERS AWARE OF ‘CITIZENS UNITED’ RULING, January 17, 2012, available at: <http://www.people-press.org/files/legacy-pdf/1-17-12%20Campaign%20Finance.pdf>

³⁰Two months after *Citizens United* the D.C. Court of Appeals invalidated various limits on individual contributions to independent expenditure groups, citing *Citizens United* which, in the words of the court, “resolves this appeal” because “after *Citizens United*, independent expenditures do not implicate [quid pro quo corruption].” *SpeechNow.org v. FEC*, 599 F.3d 686 at 689, 693 (D.C. Cir. 2010) (footnote 3).

³¹See, for example Kenneth P. Vogel, *Debate Shows Super PACs Strength*, POLITICO (Jan. 8, 2012), www.politico.com/news/stories/0112/71217.html (reporting that Mitt Romney admitted, with regards to the staff of his Super PAC, “of course they’re former staff of mine.”).

³²This motorcycle metaphor originated from an unnamed GOP operative who predicted to the L.A. Times that “everybody will have [a Super PAC] – there will be a sidecar for every motorcycle.” Melanie Mason, *Jon Huntsman Latest Hopeful to be Backed by ‘Super PAC,’* L.A. TIMES (Aug. 30, 2011), <http://lat.ms/XA1N0v>.

³³Fredreka Schouten, et al. *Individuals, Not Corporations, Drive Super PAC Financing*, USA TODAY, Feb. 9, 2012, at A7.

³⁴Spencer MacColl, *Citizens United Decision Profoundly Affects Political Landscape*, OpenSecrets.org (May 5, 2011) at: <http://bit.ly/17nEzww>.

³⁵For a short history and discussion the prohibition on foreign nationals (defined as individuals without “green cards’ or with foreign citizenship, or foreign corporations, or foreign governments or foreign political parties), see “Foreign Nationals” at <http://www.fec.gov/pages/brochures/foreign.shtml>.

³⁶Many scholars disagree with the Court. See, for example, Michael S. Kang, *After Citizens United*, 44 IND. L. REV. 243, 244 (2010) (calling this distinction “the greatest absurdity of campaign finance law—that independent expenditures pose no threat of campaign finance corruption.”)

³⁷For a broad discussion of laws as transactions costs, see Buchanan and Tullock (1962); Buchanan and Congleton (1998); Ayres and Braithwaite (1992). Cast as a public choice problem, all of the actors in the campaign finance ecosystem—incumbents, candidates, lobbyists, bundlers, donors,

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supporters, and regulators—simultaneously pursue their own self-interest. See generally Farber and O’Connell (2010); Farber and Frickey (1991). This hypothesized premise led John Samples to argue against campaign finance “reform,” which he writes is code for “incumbency protection” inasmuch as no incumbent would vote for reform unless it benefited him or her (Samples, 2006)

³⁸North Carolina submitted three separate petitions for preclearance: 2010-3057, 2010-3059, and 2010-3090. See *Archive of Notices of Preclearance Activity Under the Voting Rights Act of 1965, as Amended*, available at: <http://www.justice.gov/crt/about/vot/notices/vnote080910.php>. The three preclearance submissions were approved on April 5, 2011.

³⁹Interestingly, the federal district court did not wait for the state legislature to act in ruling the law unconstitutional, even though the legislature was in conference on a repeal that it had debated for three months. The Minnesota legislature ultimately passed SF 2471 one week after the district court opinion (though without reference to the opinion). See https://www.revisor.mn.gov/revisor/pages/search_status/status_detail.php?b=Senate&f=SF2471&ssn=0&y=2010.

⁴⁰See *Population Estimates*, U.S. Census Bureau, available at: <http://www.census.gov/popest/data/historical/index.html>.

⁴¹Note that several prominent publications misunderstood the reach of *Citizens United* creating confusion about the decision. For example, two New York Times political reporters wrote that Sheldon Adelson’s “last-minute interjection underscores how [*Citizens United*] has made it possible for a wealthy individual to influence an election (Confessore and Lipton, 2012); the National Law Journal’s Capitol Hill reporter wrote that “in *Citizens United* the Court found that corporations and unions cannot be banned from making independent expenditures to political action committees or candidates” (Ruger, 2012); and an editorial in the Washington Post characterized *Citizens United* as “overturn[ing] an Act of Congress limiting corporate and union campaign contributions” (Lane, 2012).

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Variable	Source
Independent expenditures	National Institute on Money in State Politics http://www.followthemoney.org
Legislative competition	Updated from Burnham (1996); Dal Bo, Bo and Snyder (2009); Ansolabehere et al. (2010)
State population	U.S. Census population estimates http://www.census.gov/popest/data/historical/index.html
Legislative turnover	Book of the States, Table 3.4 http://www.csg.org/policy/publications/bookofthestates.aspx (2006-present). Data before 2006 are not available online.
Number of competitive races	Election returns reported on individual Secretaries of State websites. We identified races as “competitive” where the winner received less than 55% of the vote.
Legislative district size	National Conference of State Legislatures, Constituents per State Legislative District (http://bit.ly/Xpi3zj) Earlier years calculated: number of seats/state population.
Median income	U.S. Census State Median Income http://www.census.gov/hhes/www/income/data/statemedian
Number of firms	U.S. Census Statistics of U.S. Businesses http://www.census.gov/econ/susb/historical_data.html
Firm payrolls	U.S. Census Statistics of U.S. Businesses http://www.census.gov/econ/susb/historical_data.html
Percent of employees represented by unions	Source: U.S. Bureau of Labor Statistics http://www.bls.gov/webapps/legacy/cpslutab5.htm
Percent population with B.A. or more	National Center for Education Statistics, Digest of Education Statistics. The reported percentage is precisely estimated over time and we use the most recent measure reported for any given year. http://nces.ed.gov/programs/digest/

Table 3.5: Data Sources. The data for this project come from various sources. The following table explains each variable used, its source, and any coding decisions we made.

Chapter 4

Regulate or Delegate? Implications for Election Law

4.1 Introduction

Americans are strongly opposed to the idea of partisans running elections. Nevertheless, the partisan administration of elections in America is pervasive even while nearly every other nation with democratic elections has taken great care to build a firewall between candidates and election administrators (Alvarez, Hall and Llewellyn, 2008; LeDuc, Niemi and Norris, 2002). Because most statewide election administrators are elected officials with partisan affiliations, the risk is high that partisans may manipulate the rules to entrench their own party or its preferred policies (Issacharoff and Pildes, 1998). Delegation of election law is therefore a highly political decision and, unlike other areas of law, delegation may actually *exacerbate* rather than mitigate the effect of partisanship on policy outcomes. However, because elections require year-round attention and a broad array of tasks, e.g., the purchase and certification of election equipment, the printing and distribution of voter information pamphlets, the organization of an army of election judges and polling stations, to name just a few, it would be impossible for a state legislature to regulate the day-to-day operations of the election apparatus. Instead, in almost every state, these tasks are delegated to the Department of State, which is led by an elected partisan Secretary of State. With several hundred employees, individual state Departments of State have all of the benefits of large administrative agencies. However, because the Secretary of State is an elected office in most states, he or she is in a unique position; umpire of the elections of partisan colleagues. This peculiar feature became an absurdity in 2000 when Florida Secretary of State Katherine Harris found herself at the center of a recount controversy involving George W. Bush, whom she was committed to getting elected as the state co-chair of his Florida campaign. Harris made several decisions

that favored George W. Bush and she ultimately certified him the winner of Florida's decisive electoral votes.¹ Other examples abound. In 2004 the Ohio Republican Secretary of State Ken Blackwell *sua sponte* directed local election administrators to withhold provisional ballots from voters they did not trust; a move aimed at limiting Democratic vote shares in the state (Tokaji, 2005). In 2012, California Democratic Attorney General Kamala Harris has joined a long list of elected officials accused of playing politics with the language of citizen-initiated ballot measures (see, for example, Elmendorf and Spencer, 2013; Burnett and Kogan, 2010).² These episodes, and many others like them, have prompted scholars and commentators to advocate for the end of partisan election officials (see, for example, Hasen, 2012*c*; Tokaji, 2010). The extent to which elected *legislators* directly regulate the political process or defer to state and local election officials remains largely unstudied. A long line of research suggests that administrative agencies are often the objects of political control, even when legislatures delegate broad rulemaking authority to seemingly independent bodies (Ho, 2007; Stephenson, 2006; Ferejohn and Shipan, 1990; Calvert, McCubbins and Weingast, 1989; McCubbins, Noll and Weingast, 1989, 1987; Weingast and Moran, 1983). To the extent that state legislatures do delegate responsibility over elections (and they do), it is not clear what the implications of this political choice are.

In this chapter I explain how recent econometric advances permit a rigorous analysis of delegation that has, until now, been largely ignored. For the first time I explore two related questions that are almost always asked separately:

1. Under what conditions do legislatures delegate authority over the administration of particular laws?
2. What effect does delegation have on substantive policy outcomes?

The answers to these questions are dependent on each other. On the one hand, the only reason we care whether legislatures delegate authority is because we think delegation has important effects on the implementation of rules that impact public policy outcomes. On the other hand, the decision to delegate is almost certainly correlated with features of the government that impact policy outcomes (e.g., polarization, divided government, etc.). In order to understand the effect of delegation, we must understand (and account for) the decision to delegate in the first place. With respect to election law, political reform is afoot in every corner of the election world: states are adopting new voting technology each year, legislatures are enacting voter ID requirements across the country, voting rights lawyers continue to challenge at-large elections, early voting and vote-by-mail are becoming more popular, and campaign finance laws are being rewritten at the federal, state, and local levels. All of these reforms are being initiated with almost no idea how institutional arrangements will affect their administration or enforcement (Hasen, 2005; Persily, 2002; Issacharoff,

2002; Issacharoff and Pildes, 1998; Cain and Noll, 1995). In almost every case, the decision to regulate or delegate is based on a determination of political expediency and not a focus on effective public administration. To the extent that efforts at reform achieve their stated purpose, we ought to craft legislation with a better understanding of the potential outcomes of different regulatory models.

In the next section I explain how the two questions about delegation above mirror the “potential outcomes” framework from the causal inference literature, specifically the methodological use of propensity scores to create valid control and treatment groups for estimating treatment effects. I use the Help America Vote Act of 2002 as a running example to explain how propensity score reweighting can yield accurate and defensible estimates of the effect of delegation on an election performance indicator, in this case the probability that a provision ballot is rejected.

In the final section of the paper I extend my analysis to various additional election performance indicators compiled by the Pew Center on the States (Pew, 2013). The lack of reliable data prevent a full analysis including the propensity score reweighting approach that I advocate and so the implications of my findings have important implications that I confront and discuss in the following section about the information impartiality tradeoff.

4.2 Delegation as a Potential Outcome

4.2.1 Potential Outcomes Framework

The potential outcomes framework is a research design of the experimental paradigm. The logic of the potential outcomes framework is that the effect of an intervention can be estimated by measuring the effect of the intervention as a “treatment” analogous to clinical drug trials. Rubin (1974) was the first to articulate the potential outcomes logic as a measuring stick for social science research. In the potential outcomes framework, for any unit (whether an individual, a group, or a state) there are two potential outcomes: (A) a world in which the unit is treated and (B) a world in which the unit is not treated. The “treatment effect” is simply the difference between (A) and (B). Of course, in the real world researchers can only ever observe one of these outcomes, (A) or (B), but not both. See table 4.1 for an illustration of the logic and limitations of this approach. Because researchers can only observe one outcome the treatment effect is confounded by variables that contributed to the sorting of units into one group (treatment or control) or the other. This confounding prevents robust causal inference unless researchers are able to estimate counterfactual outcomes for each unit, which they can do by matching treated units to similar control units and extrapolating the outcome for each unit as the counterfactual outcome of the other

State (s)	Y_x	(A)	(B)	X_s	Treatment effect
		$Y_s(X = 1)$	$Y_s(X = 0)$		$[Y_x(X = 1) - Y_x(X = 0)]$
Alabama	0.14	(0.05)	0.14	1	(-0.09)
Alaska	0.08	0.08	(0.07)	0	(0.01)
Arizona	0.19	0.19	(0.08)	0	(0.11)
Arkansas	0.01	(0.11)	0.01	1	(0.10)
.					
.					
.					
Wyoming	0.05	(0.05)	0.05	1	(0.00)

Table 4.1: Hypothetical data on the rejection rate of provisional ballots illustrating that outcomes are only known for one of two possible states of the world (A) and (B). Red numbers (also in parentheses) are not observed, but are necessary for estimating the treatment effect.

unit. The success of this method depends on how well the researcher can match similar units. The most important consideration for matching is that units cannot be matched on any post-treatment variables. In other words, the matching of treatment and control units must be limited to variables that existed before the treatment was assigned. Large experiments with random assignment are the gold standard for matching. With true randomization and a large enough sample, treated and control units can be assumed to be identical in every way except with respect to whether they were treated.

Where randomization is not feasible or even possible, researchers must identify a small number of covariates on which to match treated and control units. Matching can be done computationally based on the distance between units in Euclidean space, but as the number of dimensions on which to match increases, the computation can break down (this is called the “curse of dimensionality”). In 1983 Donald Rubin, the same man who introduced the potential outcomes framework to the social sciences, developed a new matching technique that avoided the curse of dimensionality, namely the estimation of “propensity scores” (Rosenbaum and Rubin, 1983). A propensity score is merely the propensity of any given unit to be treated, given a set of covariates. In other words researchers can estimate the likelihood that any given unit will be treated using regression analysis that does not suffer from the curse of dimensionality. As the sample size increases, we can include more and more covariates into our logit/probit models to predict the probability of treatment. We can then match treated and control units that have similar propensity scores. Propensity score matching techniques turn out to be quite relevant to the study of delegation, though nobody

has made this connection before. The most well-developed studies of delegation in political science and law have tried to identify the conditions under which legislatures delegate authority to executive agencies. In the language of potential outcomes, this literature comprises multiple attempts to estimate the propensity score of delegation. This turns out to be important because we can use this propensity score to estimate the effect of delegation as a treatment on policy implementation.

4.2.2 Estimating Propensity Scores for Delegation

The decision to regulate or delegate is contingent on several characteristics of the legislature and the executive. Epstein and O'Halloran (1999) identify the relevance of divided versus unified government and emphasize the importance of parties (see also Di Figueiredo, 2005). Huber, Shipan and Pfahler (2001) and Squire (1988) highlight other institutional features, such as the responsiveness of the legislature and the professionalization of the bureaucracy. Although election law is characteristically distinct from the types of laws evaluated by these authors, my research hypotheses are driven, in large part, by their relatively canonical predictors of delegation. Drawing from previous political science research on delegation, I adopt the following hypotheses:

Hypothesis 1: Legislatures are less likely to delegate when party leadership is divided between branches of government.

Hypothesis 2: Legislatures are less likely to delegate when the majority party is dominant and stable.

Hypothesis 3: The more professionalized the bureaucracy, the more likely a legislature will delegate.

4.3 Delegation and Election Administration

4.3.1 Application: The Help America Vote Act

To test these hypotheses, I take advantage of an important change in the legal landscape in 2002. Prior to 2002, state regulatory structures were highly decentralized and varied greatly. In the wake of the 2000 presidential election, and the electoral meltdown in Florida, Congress passed the Help America Vote Act (HAVA). This new federal law created statewide standards for various election administration rules and processes. The three main provisions of HAVA required states to (1) upgrade their voting technology, (2) make available provisional ballots to any voter who shows up to

	Statute			Delegation		
	Mentions	Describes	Total	Authority	Discretion	Total
Provisional ballots	15	21	36	20	20	40
Accessible technology	36	10	46	9	33	42
Voter intent standard	NA	25	25	20	11	31

Table 4.2: Number of state election law statutes that mention and/or describe the three primary sections of the federal Help America Vote Act and whether the administration of these sections at the state level is delegated to a state administrative agency. A delegation of authority grants an administrative agency jurisdiction to administer the legislatively-determined rule(s). A delegation of discretion grants the agency full autonomy to create the rules, administer the system, and arbitrate disputes.

vote but is unable to for any reason, and (3) centralize the voter registration database at the state level. In response to HAVA, state legislatures were forced to alter their election laws unexpectedly, and the responses varied (see table 4.2).

Historically, HAVA represented a national response to one state’s problems (Florida). As a result, I treat HAVA as an exogenous shock to the election law of every state except Florida. In the wake of the 2000 election, state legislatures across the country became very active on the topic of election reform (Stewart III, 2011). In the 2001-2002 legislative session, more than 2,000 election reform bills were considered, and more than 300 were ultimately enacted (Liebschutz and Palazzolo, 2005). Two of the three primary variables in my models are specifically tailored to address this potential for endogeneity bias.

1. **Provisional ballots.** State policies regarding provisional ballots varied widely before 2002. One of the major complaints in Florida after the 2000 presidential election was that voters were turned away from the polls and not allowed to vote because their names were not on the voter rolls. As it turned out, as many as 10,000 voters had been improperly purged from the voter rolls by a private company the State had hired to “scrub” the voter registration database. Congress viewed the expansion of provisional ballots as a key component of HAVA, permitting election officials to sort out administrative snafus after the election without jeopardizing the votes from legitimate persons.
2. **Disability accessibility.** Disability accessibility was not at issue in Florida. The provision was inserted into HAVA by Senator Dodd, who was a key ne-

gotiator of the bill. Senator Dodd’s sister is blind (*see* Stewart III, 2011). Though existing federal statutes had ensured access to the polling station for disabled voters, HAVA was different in that it sought to protect the right of disabled voters to vote *independently*, without the assistance of a poll worker. The practical effect was that every jurisdiction would have to purchase at least one direct-recording electronic (DRE) voting machine, which has the capability to accommodate various disabilities: headphones with audio for the blind, and “sip-and-puff” technology for the severely handicapped.

3. **Voter intent standard.** Unlike the disability provision that was not at issue in Florida yet codified in HAVA, the lack of a clear voter intent standard was perhaps the most notorious shortcoming of Florida’s election law, yet did not find its way into the final language of HAVA. Thus, while states were almost certain to be thinking about voter intent in the wake of *Bush v. Gore*, a standard was not mandated by HAVA. This politically charged issue divided Senators who had serious federalism concerns about telling states how to define a valid vote.

To measure the effect of the legislative decision to delegate or regulate these election rules, I begin by estimating a propensity score for each state legislature based on its decision to delegate authority over each of HAVA’s three main provisions. Using the notation of potential outcomes let

$$Y_s = \begin{cases} Y_{1s} & \text{if } D_s = 1 \\ Y_{0s} & \text{if } D_s = 0 \end{cases}$$

where Y_s is the outcome variable in state s and $D_s = 1$ when a state legislature delegates and $D_s = 0$ otherwise (see Rubin, 1974). Unlike many potential outcomes analyses, we are equally as interested in modeling D_s as we are modeling Y_s . Thus we first estimate what I will call the “delegation model”

$$D_s = \alpha + \beta_1 X_s + \varepsilon_s \tag{4.1}$$

to predict when states delegate, where X_s is a vector of delegation-relevant covariates and ε_s is an uncorrelated error term. D_s is thus a vector a propensity scores. I estimate the “delegation model” for each state (excluding Florida and Nebraska) based on the likelihood that it delegated responsibility over one of three election-related issues: (1) the administration and counting of provisional ballots, (2) the accessibility of voting machines for the disabled, and (3) the definition of voter intent. I note whether these three issues are mentioned in each of the state’s annotated code, whether the statutes describe or define standards for each issue, and whether there is delegation of responsibility over these issues to state or local election officials. See

	Provisional ballots	Accessibility	Voter intent
Average dep. var.	0.408 (0.497)	0.673 (0.474)	0.633 (0.487)
Agency head salary	-0.000** (0.000)	0.000*** (0.000)	-0.000* (0.000)
VRA covered	0.094 (0.081)	0.123 (0.178)	0.060 (0.193)
Divided gov't	-0.057*** (0.004)	-0.102** (0.038)	0.113 (0.079)
Leg. pol. competition	0.368* (0.130)	-0.344* (0.128)	0.067 (0.139)
Dem. governor	-0.109 (0.159)	-0.033 (0.150)	0.197 (0.162)
Legislative flow	0.004 (0.082)	0.919* (0.375)	0.281 (0.405)
<i>N</i>	48	48	48
<i>R</i> ²	0.268	0.221	0.136
adj. <i>R</i> ²	0.160	0.107	0.010
Resid. sd	0.457	0.450	0.487

* $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$

Table 4.3: Linear probability models predicting delegation over the administration of three election laws. Data compiled from the annotated code of 48 states, Florida and Nebraska excluded. Agency head salary, legislative political competition, governor party and “legislative flow” (the percent of all introduced bills that ultimately pass) are compiled from the *Book of the States*. The Department of Justice maintains a list of states, counties, and municipalities that are “covered” under Section 5 of the Voting Rights Act (VRA).

table 4.2. I then estimate a series of linear probability models that include covariates based on previously published theories of delegation. These include measures of divided government, bureaucratic professionalization, legislative flow, and partisan composition.

The independent variables are compiled from three sources: (1) The Election Assistance Commission (EAC) administers a biennial Election Administration and Voting Survey that asks states to report various aspects of their election administration, including provisional ballots. The number of provisional ballots distributed to voters in each election is one measure of a state’s compliance with this mandate. I focus, however, on the rejection rate of provisional ballots as a measure of each state’s

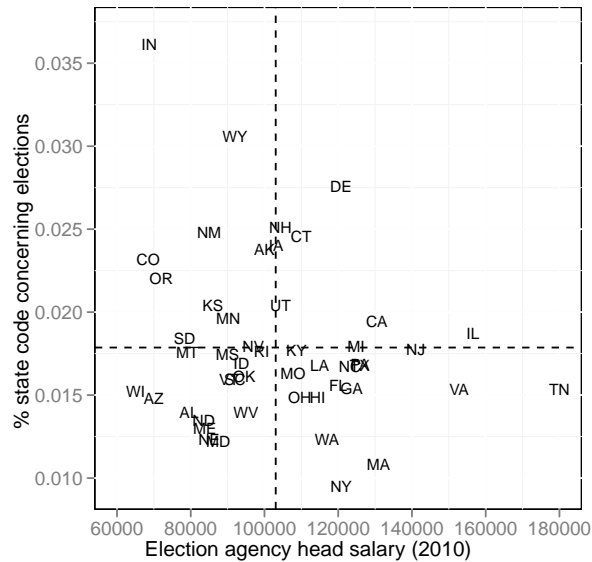


Figure 4.1: Election law and state bureaucracy. The x-axis measures the salary of the head of the agency that administers elections in each state (most often the Secretary of State) as reported in the *Book of the States*. The y-axis measures the number of words in every election law title in proportion to the number of words in the entire annotated code of each state. The dotted lines represent the average value for each category.

commitment to educating voters about provisional ballots and the state’s diligence in counting valid votes. (2) The Council of State Governments publishes an annual volume of the *Book of the States* with important information about the partisan composition, political competition, and productivity of state legislatures as well as the professionalization of state bureaucracies. All of these measures serve as important predictor and control variables. (3) Finally, the Department of Justice maintains a list of jurisdictions covered by Section 5 for the Voting Rights Act.

I use the salary of the chief election official in each state as a measure of bureaucratic professionalism, following Huber, Shipan and Pfahler (2001). In figure 4.1, I compare the relative length of each state’s election code to the salary of the chief election official in each state. In nearly every case the Secretary of State serves in this capacity, though in three states the Lieutenant Governor oversees the administration of elections. Salaries range from \$54,594 (Arkansas) to \$180,000 (Tennessee). I calculate the “length” of each state’s election code by dividing the number of words in all election-related Titles by the total number of words in the entire annotated code.

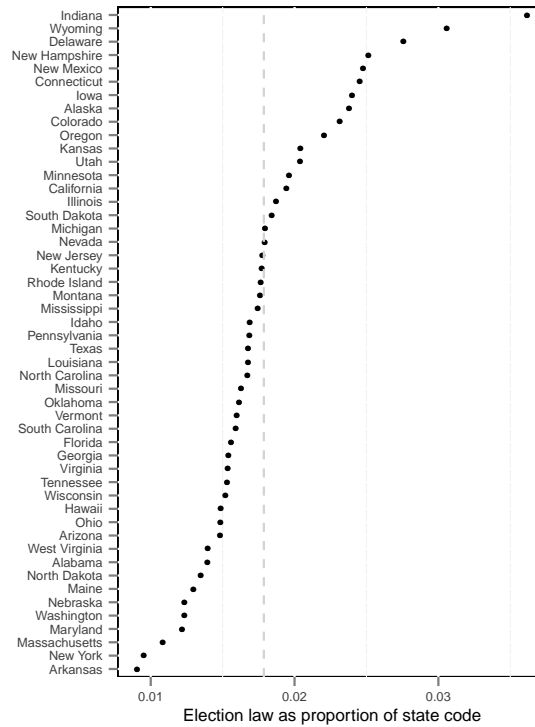


Figure 4.2: Proportion of each state’s full annotated code that concerns the administration of elections, measured by number of words. *Source: Author’s coding of the annotated code in all fifty states.*

In general, approximately 1%-3% of a state’s code concerns the “times, places, and manner of holding elections” that states are constitutionally empowered to administer (see figure 4.2).³ The dotted lines represent the average value for each category (0.018 on the y-axis and \$105,000 on the x-axis). These lines divide the plot up into a two-by-two matrix and are instructive. For example, in states with relatively long election codes (higher than the national average), chief election administrators are twice as likely to be paid below the national salary average. Conversely, in states that pay their election agency head more than the national average, election laws are nearly three times as likely to be *shorter* than the national average. While merely descriptive, this data is very general and weak evidence in support of *Hypothesis #3* above inasmuch as election laws are longer, and likely more expository, in states where the state election bureaucracy is relatively less professional and vice versa.

Despite the association between a statute’s length and the agency head’s salary reported in figure 4.1, there does not appear to be any relationship between the

salary of the chief election administrator (which I use as a proxy for bureaucratic professionalism) and the probability that a state delegates administration over provisional ballots, voter accessibility or standards for voter intent. In states with divided government, the legislature was less likely to delegate responsibility over provisional ballots and accessibility. This accords with several previously published studies of delegation and Hypothesis #1 above that legislators are less inclined to delegate responsibility to the executive branch when the Executive belongs to a different party. The impact of political competition, on the other hand, is not consistent across models. Increased political competition, measured by the partisan composition of the state legislature, increased the likelihood of delegation over provisional ballots but *decreased* the likelihood of delegation over voter accessibility. This raises the possibility that models of delegation are sensitive to the substance of delegation as well as more structural components. In general, we might predict that legislatures with low levels of competition—dominated by one party—are more likely to engage in direct oversight and less likely to cede power to another branch of government. This theory is supported in the case of provisional ballots, but not in the case of voter accessibility where states with higher political competition were less likely to have delegated responsibility over voting technology.

4.3.2 Elections Performance Index

With the propensity scores estimated in table 4.3, we now turn our attention to the outcomes of the various election policies described above. In February 2013 the Pew Center on the States released a new report with data on 17 measurable elections performance indicators in all fifty states and the District of Columbia (Pew, 2013). The report draws on data from the U.S. Census, state election division records, the Current Population Survey's Voting and Registration Supplement and the Election Assistance Commission's Election Administration and Voting Survey, among other sources. The following indices are reported: absentee ballots rejected, absentee ballots not returned, a rating of data completeness, disability- or illness-related voting problems, military and overseas ballots rejected, military and overseas ballots not returned, online registration available, whether a post-election audit is required, the number of provisional ballots cast, the proportion of provisional ballots that are rejected, the percent of registrations that are rejected, turnout, rate of voter registration, the number of voter information look-up tools available, voting technology accuracy, and voting wait time in minutes. I estimate models for several of these indices, but use the rejection rate of provisional ballots as a running example to illustrate the method of propensity score reweighting that permits a causal analysis of delegation.

States report both the number of provisional ballots cast and the number of provisional ballots rejected in the biennial Election Administration and Voting Survey

(EAVS). In 2008, more than one million voters cast a provisional ballot and 187,173 were rejected for one reason or another. On average then, approximately 17% of provisional ballots were rejected, though there was considerable variation at the state level: 4% of provisional ballots were rejected in Montana while more than 77% were rejected in Texas. This measure of provisional ballot rejection is problematic for several reasons. First, I do not distinguish between the various reasons why a provisional ballot may be rejected. The EAVS asks states to distinguish between 9 different reasons why a provisional ballot was rejected, e.g., failure to provide sufficient ID, ballot missing from envelope, voter not registered in the state, etc. but states do not uniformly report this information and, indeed, many leave these questions blank. This prevents me from parsing out the difference between ballots that are rejected due to voter error (e.g., no signature, ballot missing from envelope, etc.) and ballots that are rejected due to voter registration issues that may or may not be voter error (e.g., when the state accidentally purges a voter from the rolls so she is no longer registered at her precinct). This introduces the possibility of omitted variable bias—I cannot control for the endogeneity between voter list composition and voter behavior. This limits the causal inferences that can be drawn about this particular variable. Nevertheless, the overall rejection rate of provisional ballots, while flawed, paints a broad and informative picture about a state’s commitment to educating voters about provisional ballots and the state’s diligence in counting valid votes.

4.3.3 Overcoming Selection on Observables

Of course, layered on top of this omitted variable bias is a selection on observables bias. This bias forms the most important barrier to understanding the effect of delegation on policy outcomes. To overcome this selection on observables problem, we must estimate treatment and outcome separately. In the first step, we predict why and/or when observations are treated, or in this case, why and/or when states delegate. As it turns out, this is our primary research question (the “delegation model”). Instead of relying on a naive outcome model $[Y_{1s} - Y_{0s}]$ with imbalanced covariates, the delegation model creates a firewall between $(Y_s|D_s)$ and $(Y_s|X_s)$ because the only estimated relationship is assignment to treatment $(D|X)$. With this vector of propensity scores (D_x) we can estimate what I will call the “policy model”

$$Y_s = \alpha + \beta_2 D_s + \eta_s \tag{4.2}$$

to evaluate the effect of delegation on the rejection rate of provisional ballots. In an experimental setting, where the “treatment” of delegation is randomly assigned, equation (1) becomes obsolete and we add any delegation-relevant variables X_s to model (2) as controls to estimate the average treatment effect of delegation D_s on

outcome Y_s . However, even though HAVA was exogenous to state laws, the decision to delegate was not random. Therefore, a naive comparison of observed outcomes $[\mathbb{E}(Y_s|D_s = 1) - \mathbb{E}(Y_s|D_s = 0)]$ would mask any underlying selection bias into the treatment group and would violate the ignorability assumption of regression (2) above. Ideally, regression covariates X_s increase the precision of estimates of treatment. When the covariates are correlated with the treatment, however, a simple model that includes the treatment dummy and the covariates generates biased and unreliable estimators.

We next use Bayes' Rule to reweight observations in the "policy model" based on the propensity scores from the "delegation model." This creates balance between treatment and control units and permits an assumption of ignorability. Note that for any function $g(\cdot)$

$$\mathbb{E}[g(X_s)|D_s = 1] = \mathbb{E}\left[g(X_s)\frac{p(X_s)}{1-p(X_s)} \cdot \frac{1-q}{q} \middle| D_s = 0\right] \quad (4.3)$$

$$\mathbb{E}\left[g(X_s)\frac{q}{p(X_s)} \middle| D_s = 1\right] = \mathbb{E}\left[g(X_s)\frac{1-q}{1-p(X_s)} \middle| D_i = 0\right] = \mathbb{E}[g(X_s)] \quad (4.4)$$

where $p(X_s)$ is the propensity score, or the conditional probability of treatment given the covariates $p(D_s|X_s)$ (Rosenbaum and Rubin, 1983). Equation (3) illustrates how reweighting a sample creates a distribution of X_s among control units that is the same as the distribution of X_s among treated units. This produces results that are nearly identical to matching algorithms (Busso, DiNardo and McCrary, 2011; Sekhon, 2009; McCrary, 2002). Note that the weight is only applied to the control units. In equation (4) the sample is reweighted such that the distribution of X_s among control units *in the sample* is the same as the distribution of X_s *in the population*, and likewise for treated units.⁴ Both of these equations can be easily derived using iterated expectations and suggest the following estimator for the average treatment effect on the treated (ATT):

$$\hat{\theta}_N = \frac{\sum_{s=1}^n D_s Y_s}{\sum_{s=1}^n D_s} - \frac{\sum_{s=1}^n (1 - D_s) \cdot \frac{\hat{p}(X_s)}{1-\hat{p}(X_s)} \cdot Y_s}{\sum_{s=1}^n (1 - D_s) \cdot \frac{\hat{p}(X_s)}{1-\hat{p}(X_s)}} \quad (4.5)$$

where the weights are normalized and forced to sum to 1 (Busso, DiNardo and McCrary, 2011; McCrary, 2002). The propensity score is integral to this approach and is the starting point for any reweighting approach similar to the one above. My preference for this reweighting approach as opposed to, for example, a propensity score matching approach, is a mix of Occam's razor and the ability to visually represent kernel densities and the effect of the weights. I graphically present kernel density

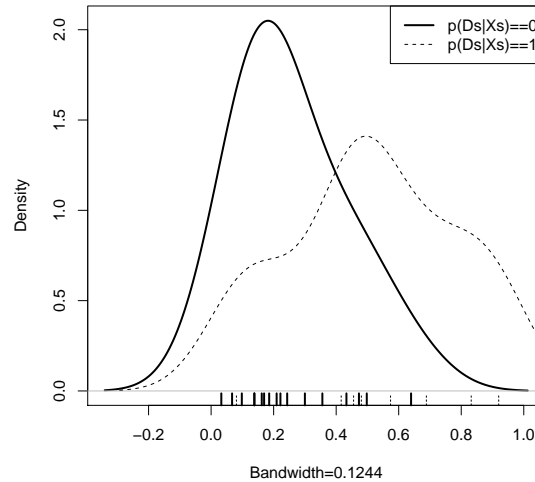


Figure 4.3: Kernel density function for propensity scores generated by the delegation logit model. While there is overlap between control units and treatment units, the p-score distribution where $D_s = 1$ is higher than the distribution where $D_s = 0$, suggesting a positive selection bias.

comparisons below, and here note that the weighting scheme is intuitively straightforward: weight control units so they look more like treated units. The programming required to do this is very simple:

R code:

```
glm.out <- glm(delegate ~ X1 + X2 + X3, data=x,
               family=binomial(link='logit'))
phat <- glm.out$fitted
weight <- ifelse(x$delegate==0, phat/(1-phat), 1)
w.norm <- weight/(sum(weight))
lm.out <- lm(outcome ~ delegate, weights=w.norm, data=x)
att <- lm.out$coefficients[2]
```

Consider the distributions of propensity scores in figure 4.3. If the treatment (here delegation) were randomly assigned, then the two distributions would overlap perfectly. In this case we see some overlap, but observe that the distribution of the treated units (where $D_s = 1$) is higher than the distribution of control units (where $D_x = 0$). The propensity score reweighting method helps us combat this imbalance

between control units and treatment units. Because we have already modeled the propensity for treatment ($D_s|X_s$) in the delegation model, we know exactly how much the observations that predict treatment vary from the observations that do not. In short, I reweight the control units to look more like the treated units.

In panel (A) of figure 4.4 I plot a kernel density comparison for one of the variables in the policy model. The x-axis denotes whether states are “covered” by Section 5 of the Voting Rights Act and the y-axis represents the rejection rate of provisional ballots in the November 2008 general election. In the sample of states that reported provisional ballot rejections we see a higher rejection rate in covered states than in states that are not covered, though the difference is not statistically significant. Figure 4.4(A) also illustrates the imbalance between control states whose legislatures explicitly define the circumstances that warrant a provisional ballot and/or establish a standard for making a final determination on the validity of provisional ballots

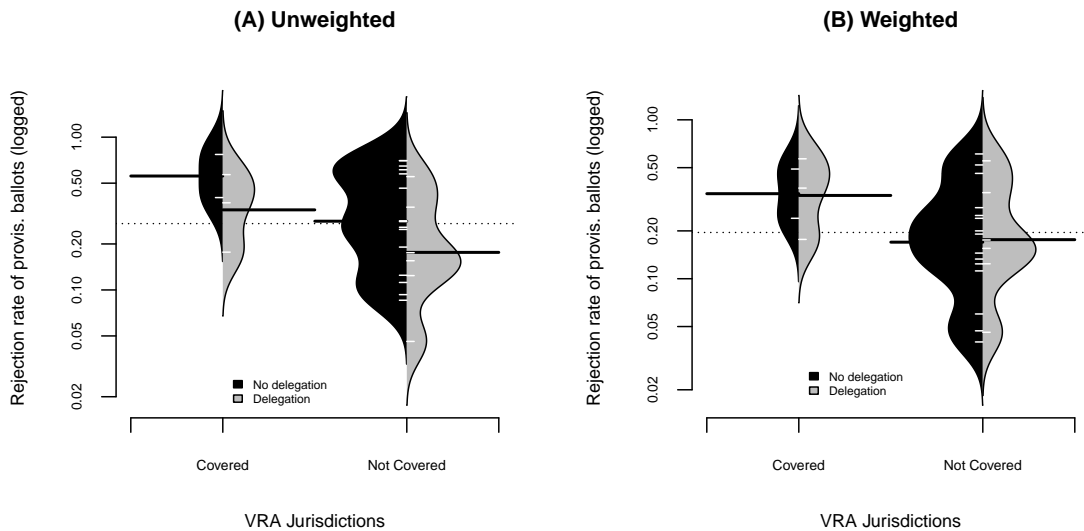


Figure 4.4: Beanplots of the VRA dummy variable. The x-axis denotes whether states are “covered” by Section 5 of the Voting Rights Act. The y-axis represents the rejection rate of provisional ballots in the November 2008 general election as reported in the *Election Administration and Voting Survey* of the Election Assistance Commission. Black curves are kernel densities of the outcome in states without delegation (control) and gray curves are kernel densities of the outcome in states with delegation (treatment). In panel (A) the observations are not balanced. In panel (B) the control states have been reweighted, and balance has improved.

(denoted by the black curve) and treated states that expressly delegate responsibility over provisional ballots (represented by the gray curve). The mean of each group is different — higher in the control groups — as are the distributions — more compact in the control groups. This imbalance has negative implications for the traditional policy model that would include this “control covariate” in a model with the treatment dummy, even though the two are correlated and the “control covariate” is actually an intermediate cause, correlated to both the treatment and the outcome.

In panel (B) of Figure 4.4, the kernel densities for the control units (in black) in each value of the VRA Section 5 dummy have been reweighted based on the p-scores in figure 4.3 and the result is better balance with the treated units (in gray). This weighted variable now acts as a suitable “control” in the policy model which now provides an unbiased estimate of the relationship between delegation and the rejection rate of provisional ballots.

Table 4.4 illustrates the effect of the weights on the various delegation-relevant covariates. In the unweighted model (A), the raw mean (\bar{X}_s) for each covariate is presented conditional on delegation, and the difference $\Delta\bar{X}_s$ between means is reported. A naive estimate of the average treatment effect, $[(Y_s|D_s = 1) - (Y_s|D_s = 0)]$ is -0.106 , suggesting that the rejection rate of provisional ballots is *lower* in states that delegate this responsibility. In the reweighted model (B), all of the covariates are better-balanced and the average treatment effect is 25% larger at -0.135 . In other words, the rejection rate of provisional ballots is 13% lower in states where the provisional ballot policies have been delegated to state and local election officials.

<i>Outcome</i>	(A) Unweighted			(B) Weighted		
	\bar{Y}_s1	\bar{Y}_s0	ATE	$w\bar{Y}_s1$	$w\bar{Y}_s0$	ATE
Rejection rate	0.39	0.28	-0.106	0.148	0.015	-0.135
<i>Covariates</i>	\bar{X}_s1	\bar{X}_s0	$\Delta\bar{X}_s$	$w\bar{X}_s1$	$w\bar{X}_s0$	$\Delta w\bar{X}_s$
Overall turnout	0.621	0.637	-0.016	0.621	0.623	-0.002
Num. provis. ballots	13116.00	51439.94	-38323.94	13116.00	44442.82	-31326.82
Agency head salary	99298.31	122140.81	-22842.50	99298.31	97113.44	2184.87
Divided government	0.444	0.353	0.091	0.444	0.023	0.001
Leg. political competition	1.203	0.733	0.470	1.203	1.194	0.009
Dem. governor	0.556	0.765	-0.209	0.556	0.548	0.008
VRA covered	0.333	0.118	0.215	0.333	0.222	0.111
Legislative flow	0.290	0.223	0.067	0.290	0.281	0.009

Table 4.4: Difference in means for covariates conditional on delegation. The unweighted sample (A) reports raw mean values for covariates. The weighted sample (B) reports the mean values for the same covariates where the control units have been reweighted. In every case, the covariates in column B are better balanced (measured as the difference between means when Y_s1 and Y_s0).

	Provis. cast	Provis. reject	Disab. prob	Absentee reject	UOCAVA reject	Voting tech. accuracy
Provis. ballots	0.62 (0.42)	0.12* (0.05)		-0.04 (0.05)	2.32 (1.52)	
Disab. accessibility			0.19 (1.51)			
Mentions HAVA						-0.33* (0.15)
(Intercept)	0.43 (0.32)	0.10* (0.04)	13.18* (0.46)	0.22* (0.03)	5.02* (1.06)	0.72* (0.09)
Year	2010	2010	2010	2010	2010	2008
N	39	41	49	42	42	43
R^2	0.05	0.13	0.00	0.01	0.05	0.10
adj. R^2	0.03	0.10	-0.02	-0.01	0.03	0.08
Resid. sd	0.19	0.02	0.44	0.02	0.70	0.06

Standard errors in parentheses

* indicates significance at $p < 0.05$

Table 4.5: OLS models (with delegation weights) for various outcomes as measured by the Pew Center on the States' Elections Performance Index, 2008-2010.

In table 4.5 I present models for several other elections performance indices,

weighted by the propensity of states to delegate authority over relevant sections of the state election code. Here I rely exclusively on the numbers reported by Pew (2013). Only two of the coefficients are statistically significant. As I reported above using data that I compiled, the rejection rate of provisional ballots is statistically significantly higher in states that delegate discretionary authority over the regulation and administration of provisional ballots. Note that Pew has complete data from fewer states so the effect is not identical (12% from data in 41 states compared to 13.5% based on my compilation of data from 48 states). The other effect we see is an increase in the accuracy of voting technology in states that mention the Help America Vote Act in their statutes (negative scores are better). This is important because the Help America Vote Act appropriated \$3 billion to help states improve their voting technology in the wake of congressional hearings and academic studies that revealed high rates of inaccuracy by punchcard and lever voting systems (see, for example Caltech/MIT, 2001 reporting that error rates were 50% higher in counties that used punchcard voting systems in the late 1990s). The “voting technology accuracy” indicator measure’s the residual vote rate (proportion of under- or over-votes) by state. According to Pew (2013) “high residual vote rates often are associated with high levels of machine malfunction and voter confusion, which lead to lower accuracy.” The residual vote rate ranges from 0.2% (Nevada) to 3.2% (West Virginia). The average residual rate is 1% and the standard deviation is 0.6%. This means that the residual vote rate was half of one standard deviation below (better) the national average in states that mentioned HAVA in their state codes.

4.4 The Information Impartiality Tradeoff

Much of the delegation literature focuses on delegation as a positive political theory. The findings reported in this chapter raise important normative questions about delegation. Given the complexities of the electoral ecosystem,⁵ it is unlikely that any one institution is normatively the most efficient or appropriate for regulating all aspects of elections. It is more likely that some political institutions perform better in some circumstances and worse in others. Matching the institution to the appropriate circumstances requires some theoretical analysis. I rely on John Rawls’ concept of the “veil of ignorance” as an instructive starting point. According to Rawls (1971),

“[P]ersons in the original position try to acknowledge principles which advance their system of ends as far as possible. They do this by attempting to win for themselves the highest index of primary social goods, since this enables them to promote their conception of the good most effectively whatever it turns out to be” (125).

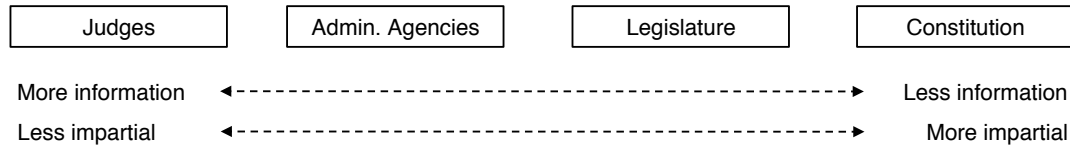


Figure 4.5: A general theory of tradeoffs with respect to an institution’s impact on any particular individual. Judges almost always encounter specific controversies with a lot of information whereas administrative agencies and legislatures make policy choices that affect many people. As a general rule, constitutional amendments are enacted with only general ideas about potential controversies in mind. Note, however, that by constitutionalizing election law, power shifts back to judges.

Fitts (1990) generalizes all of these ideas by defining the veil of ignorance as a tradeoff between information and impartiality. Behind the veil of ignorance decisions are more impartial because they are further removed from any single event or conflict. However, this very removal means there is less information available from which to confidently arrive at the efficient and fair decision. Fitts concludes that there are normative reasons to limit the information available to decisionmakers.⁶ I extend this logic to the institutions that regulate elections.

Institutions with more information are more likely to know the parties that will be affected by a particular policy. For example, judges, who are likely to have an extraordinary amount of information at their disposal, also know that their decisions will affect the parties in front of them. On the other hand, constitutional amendments represent broad public consensus on a very general topic (like “political competition”) that are far removed from any specific case or controversy. Legislative bodies and administrative agencies are temporally related to the policy choices they make (unlike constitutions), yet the impact of their choices on any one particular individual is not always clear (unlike the case of judges). The choice between legislative regulation or delegation is typically made with an eye towards information and capacity. Administrative agencies develop expertise in a particular field, relative to legislatures. This expertise, or information surplus, is often the stated justification for a broad delegation of power to agencies. With greater information comes a better understanding of how the law impacts individuals, which is essential for good policymaking. However, in the case of election law this feature can become a bug. According to the logic of the veil of ignorance, election laws that can be manipulated for partisan gain (e.g., voter I.D. laws, the allocation of voting machines on election day, ballot design, voter registration requirements, recount procedures, redistricting, and deciding which ballots are valid) are best administered by legislative bodies and constitutions. Election laws that are less susceptible to partisan manipulation (e.g., accessibility for disabled

voters, voter intent standards, voting technology, etc.) are arguably better administered by administrative agencies. My findings validate this logic: residual vote rates — a highly technical and non-partisan election issue — are lower (better) in states that delegate authority over technology while the rejection rate of provisional ballots — a hotly contested issue with serious partisan implications — is higher (worse) in states that delegate authority over provisional ballots. These findings support the delegation of nonpartisan issues to administrative bodies, but caution against doing so for hot-button, partisan issues.

4.5 Conclusion

Two caveats are in order. First, election laws are not typical laws. They are foundational to our form of government, they comprise odd mixtures of statute and constitutional law, and they have historically been “hyper-decentralized” to the lowest levels of government.⁷ Second, as I discuss above, although election data are possible to capture and easy to measure, they are notoriously poor.⁸ The data limit what kind of conclusions we can draw from the findings. For example, we do not know *why* rejection rates of provisional ballots are higher in states that delegate. We do not know if the differences are due to voter error, clerical error, or some combination of the two. Furthermore, because we have no information about the content of rejected provisional ballots, we cannot test the hypothesis that partisan administrators are manipulating the rules for partisan gain.

Nevertheless, there are virtually no other empirical data on the effects of delegation in election law. This is a notable deficiency considering the reforms that are afoot in every corner of the election world: states are adopting new voting technology each year; legislatures are enacting voter ID requirements across the country; voting rights lawyers continue to challenge at-large elections; early voting and vote-by-mail are becoming more popular; and campaign finance laws are being rewritten at the federal, state, and local levels. All of these reforms are being initiated with almost no idea how institutional arrangements will affect their administration or enforcement (see, for example, Hasen, 2005; Persily, 2002; Issacharoff, 2002; Issacharoff and Pildes, 1998; Cain and Noll, 1995). In every case, the decision to regulate or delegate is based on a determination of political expediency and not a focus on effective public administration. The findings in this chapter offer the first glimpse into the effect of delegation and suggest that future reforms consider the information-impartiality tradeoff when deciding the extent to delegate authority over the administration of elections.

In addition, this chapter provides the first outline for properly analyzing the effects of delegation as a treatment, using propensity score estimation methods and

reweighting or matching to mitigate the bias of selection on observables. My goal has been to paint an introductory picture of the relationship between political institutions and the election laws they administer. My study highlights the importance of collecting better election data and also presents a model for evaluating the effect of delegation on various policy outcomes. To the extent that we are committed to reforming the electoral process, we ought to do so with a better understanding of the potential outcomes of different regulatory models and this chapter is a blueprint for doing so.

Notes

¹Harris' certification was ultimately upheld by the United States Supreme Court in *Bush v. Gore*, 531 U.S. 98 (2000), though that decision has been criticized for being overtly partisan, with all of the Republican-appointed Justices voting in favor of George W. Bush on an unconventionally broad reading (for them) of the Fourteenth Amendment's equal protection clause requiring uniform counting standards between counties, and all of the Democratic-appointed Justices voting in favor of Al Gore on an unconventionally narrow reading (for them) of the equal protection clause as not applying to matters of election administration.

²See also Goodman, Josh, "Fate of ballot measures often depends on the wording," Stateline.org, March 9, 2012.

³Article 1 §4 of the U.S. Constitution reads: "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof."

⁴Note that q represents the probability of treatment unconditionally, i.e., $Pr(D = 1)$, and drops out when the propensity score weight is normalized.

⁵The idea of an "election ecosystem" comes from Huefner, Tokaji and Foley (2007) who write that "changes in any one part of the system are likely to affect other areas, sometimes profoundly," (p. v).

⁶Vermeule (2001) argues that the information-impartiality tradeoff is less about avoiding gridlock and more about encouraging high quality candidates to seek office.

⁷See Ewald (2009) who writes that "[w]hile important components of the suffrage live in constitutions and courts, there is an aspect of the right to vote that is 'visibly present in everyday life.' And to a degree unique in the democratic world, that visible, practical dimension of American voting rights varies across counties and towns," (p. 9).

⁸For example, we do not know how many votes were cast in the 2010 elections (though we are relatively confident about the number of voters who *correctly* cast ballots. See Gerken, 2009).

Chapter 5

Conclusion

The goal of each of the preceding research projects has been to empirically test some of the primary theories and assumptions behind America's election laws. What have we learned? Perhaps most importantly, we observe behavior that calls into question traditional interpretations of the ubiquitous median voter theorem. State lawmakers that were elected by very narrow margins were no more likely to vote with the opposing party on legislative bills than state lawmakers elected by huge margins. In fact, lawmakers elected by more than 85% of the vote were *more likely* to engage in cross-party voting. This empirical finding turns the traditional view of gridlock on its head; electoral responsiveness and political gridlock are complementary and not competing values. Thus, it is unlikely that efforts to overcome gridlock will succeed if they are motivated by the goal of increasing electoral responsiveness. Legislators in competitive districts appear to spend more time campaigning for office, more time signalling their partisan loyalty, and more time debating policy ideas with constituents instead of with each other. Legislators in safe seats do not face the same pressure and are able to engage in log-rolling and compromise without risking their jobs. These results suggest that there would be less gridlock (and more satisfied voters) in states with high ratios of safe legislative seats. The median voter theorem is actually agnostic about polarization and gridlock, but my findings suggest that the conventional predictions about close elections and gridlock attributed to the median voter theorem are misguided.

Another important outcome that we observe is the funnelling of independent political spending to underground sources that do not disclose their donors. This is true at both the state and federal level. The majority opinion in *Citizens United v. FEC* said that bans on corporate independent expenditures were unnecessary because corporations had internal democratic structures whereby shareholders could ensure monitor the behavior of directors and prevent the proliferation of political expenditures that might create bad public relations for the firm. Furthermore, if this democratic check

proved to be ineffective, political watchdogs would monitor the spending and the market itself could regulate corporate spending; for example unpopular expenditures might lead to customer boycotts. As it turns out, all of the “new” money that was spent after *Citizens United* was funnelled through nonprofit organizations that are not required to disclose their donors, meaning shareholders and the public are in the dark about corporate involvement in the political process. Understanding the actual flow of money severely undercuts the logic behind *Citizens United’s* central holding.

On the other hand, new independent political expenditures after *Citizens United* were not disproportionately large. In other words, the fear that large corporations would drown out the voice of individuals appears to be misplaced. This finding supports the Court’s controversial position that political equality is not a compelling state interest that can be used to justify restrictive campaign finance laws.

Finally, we see that the decision to delegate is not just about expertise or efficiency. Instead, delegation requires an analysis to match policy domains to the most appropriate regulatory body. The information-impartiality tradeoff is instructive for this analysis. In some cases delegation can mitigate problems, in other cases delegation can exacerbate problems. The empirical analysis in the previous chapter suggests that delegation is ill-suited to situations where impartiality is very important. With respect to election laws, this means that legislatures should not delegate authority over election laws that can be manipulated for partisan (e.g., voter I.D. laws, the allocation of voting machines on election day, ballot design, voter registration requirements, recount procedures, redistricting, and deciding which ballots are valid), but should delegate authority over technical, nonpartisan issues (e.g., accessibility for disabled voters, voter intent standards, voting technology).

Each of the analyses above bridges an unfortunate gap between political science and election law scholarship. The vast majority of election law scholarship is doctrinal and normative yet lacks rigorous empirical analyses of underlying assumptions and theories. Political scientists have studied institutions for several decades yet often ignore the role of law, or the implications of institutional design on justice and fairness. Instead of speaking to each other, however, these two camps have developed relatively unaware of each other. This dissertation bridges this gap by applying the empirical work of political science to the doctrinal election law literature. The main goal of this dissertation is to show how careful empirical analysis can orient effective political reform and improve the election law jurisprudence. I hope that this thesis will inspire other scholars to engage in empirical research about the political process and that my analysis will be a valuable resource for them.

Chapter 6

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