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Abuse of Discretion: The U.S. Supreme Court's Indefensible Use of Evidence in Election Law Cases

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Introduction

Thank you so much for the opportunity to speak with you today on the topic of the U.S. Supreme Court's approach to facts and evidence in election law cases. It is wonderful that there is a large enough group of people in Southern California interested in the intersection of law and social science for such an impressive conference to be put together.

I am giving a shorter version of this talk to a group of appellate lawyers in a few days in a luncheon honoring the California Supreme Court. I had proposed for the title the same title I'm using here: "Abuse of Discretion: The Supreme Court's Indefensible Use of Evidence in Election Law Cases." Someone suggested to me that this might be a little harsh to be on an invitation for an event honoring the California Supreme Court—something so dissing the U.S. Supreme Court—so the title has become "Abuse of Discretion*?* The Supreme Court's *Troubling* Use of Evidence in Election Law Cases."

But despite the softening of the title, I'm not holding back in the content of my remarks on what I tell them—or you—about the Supreme Court's approach to evidence. It's indefensible. But for you—but not them—I'm going to ask an additional question: how should social scientists and law professors who take social science seriously respond to the Court's indefensible use of evidence in these cases?

* * *

In 1986, the United States Supreme Court decided a little-remembered case called *Munro v. Socialist Workers Party*. *Munro* concerned a change that the Washington state legislature made to its laws regarding ballot access. Under the old law, Washington had two-stage election. It began with a blanket primary in which a voter could vote for whichever candidate a voter wanted regardless of the party of the voter or the candidate. (California had a system like this briefly before the Supreme Court struck it down in the *California Democratic Party v. Jones* case.) In the second stage of the election, the top vote-getter from each party from the first round was listed on the general election ballot.

But the old law had a different path to the general election ballot for minor party candidates. A minor party could bypass that first round blanket primary, nominate a candidate by convention, and have that candidate's name appear on the general election ballot. The new law took away the bypass: the minor party candidate would have to appear on that first round blanket primary ballot, and the candidate would have to obtain at least 1% of the total votes cast for that office to get onto the general election ballot.

Minor party candidates unsurprisingly complained about this new restrictive ballot access rule, which made it difficult for them to get listed on the general election ballot. The Socialist Workers

Party brought a First and Fourteenth Amendment challenge to the law, which succeeded in the Ninth Circuit but then failed at the U.S. Supreme Court.

What could justify this new restriction? The state of Washington posited that the law was necessary to prevent voter "confusion" which could come from having too many candidate names on the ballot.

The Socialist Workers' response to the state was: "prove it." Where is the evidence of confusion? Indeed, you all may remember the 2003 recall of Governor Gray Davis, which, thanks to a hole in California's election law, featured 135 candidates on the ballot including watermelon-smashing Gallagher, actor Gary Coleman, and a porn star. Voters did not seem confused at the polling place, and the candidates who were leading in the polls indeed got the most votes. At most, academic studies showed, there were a few extra votes for "Schwartzman" from people who likely intended to pick "Schwarzenegger."

The Supreme Court in *Munro* accepted as "historical fact" that Washington's history "evidences no confusion from ballot overcrowding." But Justice White's *Munro* opinion rejected the argument that the state had to prove confusion. He wrote:

> "To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the 'evidence' marshaled by a State to prove the predicate."

How odd that Justice White put the word *evidence* in quotation marks. Isn't that what trial courts do all the time? Don't they figure out if parties can actually prove what they allege in their pleadings? Why *not* require evidence?

Had the Supreme Court allowed an exploration of the record in *Munro*, they would have found that preventing confusion had nothing to do with the passage of the Washington state law tightening ballot access.

The actual story of the 1977 amendments to Washington's election laws is more complex and surprisingly more entertaining than you might expect. In the 1976 election, a jazz musician named Red Kelly decided to qualify a minor party to the ballot that he dubbed the "OWL" Party. "OWL" stood for "Out with logic; on with lunacy," and the party's goal appeared to be social and political satire rather than a desire to mount serious candidacies to gain election or influence the position of major party candidates on particular issues. The OWL Party ran a slate of candidates in the 1976 election, and their names, pictures and platforms were featured in the 1976 Washington state ballot pamphlet, printed at state expense and mailed to Washington state voters.

'Fast' Lucie Griswold, who from her picture looked to be 80 years old, ran for Secretary of State as an OWL candidate who advocated that the next Secretary be able to "take shorthand or do typing." She also took "unequivocal stands" against "(1) the heartbreak of psoriases; (2) Bed wetting; (3) The big 'O'; [and] (4) Post nasal drip." Jack 'The Ripoff' Lemon ran as OWL Party candidate for Lieutenant Governor, proclaiming that his platform "is a four cornered triangle which has as its cornerstone a piece of pink Venetian marble which [he] picked up while spelunking in the catacombs under the Vatican." He pledged that "heads will roll" after the election, to be accomplished "by the renting of two Porta Pottys, placing them on wheels and pushing them over the precipice behind the Governor's mansion." He concluded that "[i]f you care enough to send the very least, vote for a Lemon and throw the rascals out."

These joke candidacies inspired the *Seattle Times* to editorialize soon after the 1976 election that the state should tighten up ballot access rules to prevent embarrassment. Others did not want state money being used to print the ballot statements of frivolous candidates. But there was also some evidence that these protest OWL candidates had a chance to actually win, or at least affect, election outcomes, and that the new law might have been motivated by state legislators fearing new competition.

This history of *Munro* does not prove that the Supreme Court reached the wrong result in the case. It might be that the 1 percent threshold was so minor that the restriction was justified by the need to prevent frivolous candidacies. On the other hand, maybe if the law was motivated by incumbency protection, it deserved closer scrutiny.

But the case does illustrate that in the Court's election cases, the extent of the evidentiary burden often is dictating the outcome. *Munro* demonstrates a kind of double-speak which allows the state to posit a false interest, then not have to prove it, to win the day. In other cases, as we will see, the Court says it *does* require evidence, but then doesn't really scrutinize the evidence it requires.

My argument today is two-fold.

First, in the Supreme Court's election law cases, talk about "facts" and "evidence" is the tail wagging the dog. The Court is imposing value judgments in these cases, but sometimes camouflaging them behind a search for evidence, or worse yet, asserting facts about the state of the evidence which are not borne out by the evidence.

Second, the Court needs to take one of two paths to correct its approach. Either it needs to get serious about facts and evidence in these cases, a change which has the potential to profoundly change our laws about campaign finance, voter identification, gerrymandering, and ballot access. Or the Court needs to stop camouflaging its value judgments and admit that facts don't matter and no amount of evidence will matter given the Justices ideological commitments. I strongly favor the first approach, but the second approach would be better than the status quo when it comes to transparency and intellectual honesty.

After I make these two points I want to ask a different question: how should social scientists and law professors who value social science respond to the Court's misuse and abuse of social science in the election law cases?

Let me begin with my first point: the Court's talk about facts and evidence is the tail wagging the dog. I will give three examples: from campaign finance law, from the racial gerrymandering cases, and the fight over voter identification laws.

First, campaign finance. In the 1976 *Buckley v. Valeo* decision, the Supreme Court held that limits on both contributions and expenditures implicate First Amendment free speech and associational rights. It further held that prevention of corruption and the appearance of corruption serve as important or compelling interests which could potentially justify limitations on money in politics. Because spending restrictions more directly impinged on the First Amendment, these laws are judged under strict scrutiny, while contribution limitations, impinging only marginally on free speech, get a less search "exacting" standard of review. In *Buckley* the Court upheld the contribution limits on anti-corruption grounds but struck down the spending limits on grounds that there was no evidence presented in the case that independent spending can corrupt candidates.

In cases after *Buckley*, the Court has almost always found enough evidence in the record of corruption to justify a contribution limitation and almost never found enough evidence of corruption to justify a spending limit.

In the 2000 case *Shrink Missouri Government PAC*, the evidence submitted to justify Missouri's campaign contribution limits was terribly flimsy: the affidavit of a state legislator that large contributions "have the real potential to buy votes," a few newspaper editorials, and the results of a voter initiative overwhelmingly supporting contribution limits. How did any of this prove the danger of *quid pro quo* corruption or undue influence? The evidence was at best anecdotal and at worst irrelevant: voters may have supported the initiative not because of a fear of corruption but a concern about political equality, an interest the Supreme Court since *Buckley* has said is forbidden as a justification against the First Amendment.

Justice Souter said that no more evidence was necessary in *Shrink Missouri* because the claim that large contributions buy votes "was neither novel nor implausible."

In contrast, in the 2010 case of *Citizens United v. FEC*, Justice Kennedy, writing for the Court majority, refused to consider evidence that large corporate independent spending favoring or opposing candidates could lead to corruption. He wrote: "we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." Further, "[t]he appearance of influence or access…will not cause the electorate to lose faith in our democracy."

Was Justice Kennedy characterizing the evidence or masking his value judgment in evidentiary garb? In a case heard soon after *Citizens United*, *American Tradition Partnership v. Bullock*, the Supreme Court gave the back of its hand to a Montana Supreme Court decision upholding the state's ban on corporate spending in elections. The Montana court said it was applying *Citizens United* in looking for evidence whether independent spending can corrupt state elections. It concluded that while there may not have been good evidence that independent spending could corrupt *federal* elections, there *was* good evidence such spending could corrupt *Montana* elections. The state opinion discussed the history of the "Copper Kings" in Montana and the role of corporations in corrupting the state legislature.

The U.S. Supreme Court did not even see the need to set the case for argument, issuing a single one paragraph per curiam opinion reversing the Montana Supreme Court on the basis of *Citizens United* and ignoring the Montana Supreme Court's evidence. Justice Breyer in dissent wrote: "this Court's legal conclusion [in *Citizens United*] should not bar the Montana Supreme Court's finding, made on the record before it, that independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana." But evidence was irrelevant for the Court majority.

Next, consider the Supreme Court's controversial creation of a cause of action for "unconstitutional racial gerrymandering." In the 1993 case of *Shaw v. Reno*, Justice O'Connor wrote an opinion for the Court holding that the separation of voters into different districts on the basis of race without sufficient justification violated the Equal Protection Clause. The case arose out of a controversial congressional redistricting. North Carolina's congressional redistricting plan was subject to preapproval by the Justice Department under Section 5 of the Voting Rights Act. DOJ demanded that the North Carolina legislature create another majority-minority district.

Democrats, who controlled the legislature drew an extra majority-minority district to both meet DOJ demands and to keep up the number of Democratic districts in the states. It was an extremely odd shaped district drawing together two far-flung African-American urban populations through a narrow corridor drawn down the I-85 freeway. As the Court explained: "One state legislator has remarked that '[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district.'"

The claim in *Shaw* was not one of vote dilution but instead about the unconstitutionality of separating voters by race into districts. (Never mind that the district in question was one of the most racially integrated districts in the entire country.)

But what kind of harm was this? The Court explained that drawing such racial districts was an *expressive harm* which harmed both voters and representatives: Such districts "reinforce[] the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." Further, "When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole."

The Court in *Shaw* offered no evidence to support the supposition that odd-shaped majority-minority districts would have these effects on voters or representatives. And later social science research cast serious doubt on these suppositions. Here, as in

Citizens United, the Court posited as fact—and without considering any evidence—some very doubtful propositions.

Things got even worse in the racial gerrymandering cases as the Court moved in *Miller v. Johnson* to require courts to examine whether the "predominant factor" motivating the redistricting was to separate voters on the basis of race or other considerations such as partisanship. Put aside the question how a multi-member body can have a single "intent." In an era where race and party affiliation often overlap, especially in the South, this search for evidence of the legislature's predominant intent became non-sensical—but the Court's view of such intent was also, thanks to the Court's rulings, outcome determinative. Call it about race and it's unconstitutional; call it about party and it's just fine.

My favorite recent example of the problem of how the Supreme Court treats facts and evidence in election cases comes from the 2008 case over Indiana's voter identification law, *Crawford v. Marion County Election Board*. As I'm sure you know, the fight over voter id laws is one of the most contentious over our election laws in the period since the 2000 election debacle that I've termed "the voting wars." Republicans claim that tough photo id laws are required to prevent voter fraud, and Democrats argue that the laws prevent no fraud but suppress a lot of votes.

Now my own view is that there is a lot of exaggeration on both sides about the extent of fraud and suppression. *New York Times* correspondent Ethan Bronner summed up the fight this way: "'It's a fight between two bald men over a comb.'"

In *Crawford*, the Court considered the constitutionality of Indiana's law using the same level of scrutiny that the Court applied in the *Munro* ballot access case: it is a "flexible" standard of review—now commonly referred to as the *Anderson-Burdick* balancing test—in which the scrutiny a state law varies with the burden which the law imposes on voters. In *Crawford*, as in *Munro*, the Court said that the scrutiny would be relatively light because the burden on most voters to produce i.d. was small. (It further said that if special classes of voters faced more serious burdens, they might bring an as-applied challenge).

Although the scrutiny was light, the Court did examine the state's argument that the law was necessary to prevent voter fraud. Indiana conceded it never had prosecuted any case of impersonation fraud---the kind of fraud voter id laws prevent. This is no surprise. For my book "The Voting Wars" I tried to find a single election since 1980 where impersonation fraud could have been involved in swinging an election. I could not find one. In contrast, I could find cases routinely brought involving absentee ballot fraud—a kind of fraud voter id laws do *not* prevent.

Even with that concession of no cases of impersonation fraud in Indiana, Justice Stevens, writing for a plurality, held that Indiana's law could stand. He said that such fraud *could* happen. His evidence? One footnote pointed to evidence from Boss Tweed's corrupt New York machine *in 1868* and another to a *single case* of impersonation fraud in a 2004 Washington state gubernatorial election.

Interestingly, Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit, who sided with the state of Indiana in the *Crawford* case before it reached the Supreme Court, has now backed away from his decision. In his 2013 book, *Reflections on Judging*, he wrote: "I plead guilty to having written the majority opinion (affirmed by the Supreme Court) upholding Indiana's requirement that prospective voters prove their identity with a photo ID—a law now widely regarded as a means of voter suppression rather than fraud prevention."

He said in a later interview that dissenting Judge Terence Evans got it right in that case when he wrote: "Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic."

OK, enough with the examples. I believe the examples demonstrate that the Court is reverse-engineering its look at the evidence and its levels of scrutiny, and sometimes stating disputed empirical facts as though they were uncontestable legal holdings, to buttress the value judgments the Court is making silently in its decisions.

In *Citizens United*, for example, Justice Kennedy is making the value judgment that the Court does not *care* that independent spending may corrupt candidates or cause the public to lose confidence in the fairness of the electoral process. This is the price that must be paid to have unfettered political speech in elections; free speech is simply a higher value to Justice Kennedy than the prevention of corruption.

The same could be said on the flip side of *Citizens United*. When Justice Souter writes in *Shrink Missouri* that the state's evidence of a problem with corruption is sufficient to prove there is a problem, he cannot be serious. A newspaper editorial proves something about the role of money in politics which serious political scientists have struggled with for decades? No—the better way to understand Justice Souter is that he so strongly believes a system of large campaign contributions is bad for democracy that he is not going to require states to produce *any* evidence to support limiting laws.

Before turning to what we should do about this, let me say why this matters. The Supreme Court says in all of these cases that it is about balancing of rights and interests. So election lawyers do two things. First, they fight about the level of scrutiny, arguing for the level of scrutiny which eases or toughens the burdens on the government and those challenging the election law. Second, once that fight is resolved, they fight about evidence.

A few years ago I helped the City of San Diego defend its campaign contribution laws against a First Amendment attack in federal court and the Ninth Circuit. Thad Kousser served as an expert for the City. The parties on both sides spent a great deal of time in these cases marshaling evidence, including through expert testimony, on how these laws could work to prevent corruption and how much they could curb free speech and the competitiveness of campaigns.

If none of this stuff matters, and it is all about value judgments and not about evidence, then why have lawyers waste their time with the evidence? Why make lower courts such as the

Montana Supreme Court go through this close look at evidence if it is never going to matter? It is the wrong way to decide these cases.

There are two possible solutions to this problem, although I am not confident that the Court would adopt either one. The first is for the court to get serious about evidence. If the Court got serious above evidence, we might see a different configuration of election laws upheld and struck down.

It would be much harder to sustain strict voting laws such as strict voter identification laws which appear to be more motivated by partisan gain than fraud prevention. Racial gerrymandering claims would likely disappear. Minor parties would have an easier time getting ballot access.

It is not clear what would happen with campaign finance laws. There is virtually no evidence that public confidence in our democracy is at all influenced by appearance of corruption; there is no correlation between the presence or absence of campaign finance laws and public confidence in the fairness of the electoral process. However, depending upon how broadly or how narrowly the Court defines corruption, it could mean many more or many fewer laws being upheld.

Either way, a serious look at evidence would probably mean a more consistent treatment of spending and contribution limits: after all, if the court thinks at $25 million contribution can corrupt a candidate, why not a $25 million contribution to an independent Super PAC supporting the candidate? Consistent look at the evidence and clarity about the legal standard could mean that both sets of limits are constitutional, or maybe that both sets are not.

Taking evidence seriously would test the limits of social science. There are many things we do not know about how laws affect political competition, voting rights, and political speech. But it be better than paying lip service to evidentiary standards.

I said that the first solution to the facts and evidence problem is for the Court to get serious about the kind of evidence it requires in these cases. The alternative is for the Court to admit that the evidence does not matter: it would be an admission that social science cannot tell us enough to answer all of the questions we have about law and politics, or that such and that absent enough evidence, courts have to make value judgments.

In *Citizens United*, the Court values robust political speech over the danger of money having undue influence over the electoral and legislative process. Justice Souter's *Shrink Missouri* opinion makes the opposite normative commitment. In *Munro* and *Crawford*, the Court values efficient election administration and a desire to keep garden variety election disputes out of court over a desire to protect candidates voters from relatively minor burdens. This seems true even when the state has no good reasons—and sometimes when it has a bad partisan or incumbency-protecting reason—to burden voters.

Now one might say that such a system is just like the one we have now, and that when, for example, Justice Kennedy made his statements of fact about how independent spending cannot corrupt, he didn't really mean them as statements of fact. I've heard many people defend *Citizens United* in this way.

But if that's true, and if facts don't matter and evidence doesn't matter, then my second approach has two virtues: intellectual honesty and transparency.

If the Court was intellectually honest about what's at stake in a case like *Citizens United*, and what value judgments the Court is making, that transparency would help voters and policymakers understand what's at stake. There would be no more wasting time in litigation trying to muster evidence which is not relevant. And if people do not like the value judgments made explicitly by the Court, the people can move to amend the Constitution.

Now one critique of what I've just said is that nothing I have described is unique to election cases, that I have described how the Supreme Court deals with many areas of the law, especially constitutional law. That may well be true. I frankly do not have the depth of knowledge in any other area of the law aside from election law to be confident in my opinion as to how much of a problem this is generally.

But just because this problem might extend beyond election law is no reason to leave things alone in the election law area. The Supreme Court has said that the right to vote is fundamental because it is preservative of all other rights. Our politics and elections today are hard fought, our legislators polarized. The stakes are high. Election law is a great place to start with taking evidence seriously or, in the alternative, at least intellectual honesty and transparency.

We should all understand how the Supreme Court decides cases in the political thicket, and it is not too much to demand that what the Court says and what it does match up.

* * *

Finally, I want to turn to the question of the appropriate social science reaction to all of this.

A few weeks ago I was at a conference on Social Choice and the Law at UC Irvine, and law professor Max Stearns of the University of Maryland was presenting a paper on tiers of scrutiny: strict scrutiny, rational basis, intermediate scrutiny, rational basis with bite, strict scrutiny lite. He was talking about how the Court's approach to these cases is all over the map, and he was trying to make sense of it using Arrow's Impossibility Theorem and tools of social choice.

I was sitting near an economist in the audience who turned to me and said: "This is gibberish, right? Word games." Later, at a dinner reception for conference participants, this economist asked if I thought he could walk in and pass a bar exam without studying. "I'm good at word games," he said.

These exchanges drove home the point to me that to an outsider, it could look like the *only thing* the Supreme Court does is play word games and issue value judgments masked as social science policy. This suggests that law is an empty set, a vessel for the rhetoric to engage in political activity.

Now there are some critical legal studies or legal realists who might subscribe to this view. But I don't think it is right in the vast majority of cases decided by lower courts in the U.S., and I don't think it is even right for perhaps a majority of cases decided by the

Supreme Court. The law is not an empty set, and Justices are doing more than just politics. There is a legal method: common law adjudication, usual tools of statutory analysis, respect for precedent, which yields fairly certain results in a very many cases.

It just so happens that the cases I focus upon are the most contentious ones, the ones without clear right answers from the text of the Constitution, and the ones most likely to cause an ideological divide on the Court. In those cases the use of social science may be more predictable and accepted: I'm thinking, for example, of measures of racial polarization in a redistricting lawsuit under Section 2 of the Voting Rights Act.

So what does this mean about the role of social science in this special subset of cases? I think social science can play two primary purposes in these election cases.

First, social science does seem to matter to the lower courts. Second, social science speaks truth to power to the Supreme Court in these highly ideological election cases.

On the first point: evidence and the lower courts: In the San Diego case that I was involved in, the judge appeared persuaded by Thad Kousser's testimony about the relationship between competitiveness and campaign finance limits—that lower campaign finance limits did not seem to make elections less competitive. In the same case, we also assembled a pretty extensive dossier on corruption scandals, prosecutions, and convictions in the City of San Diego which I believe convinced the judge that talk of corruption was real and not just rhetoric.

Evidence matters in voter id cases too. The fact that both sides have trouble coming up with evidence of either much voter fraud prevented by such laws or much voter suppression prevented by such laws provides valuable data for lower courts to use.

Pennsylvania is a good example. The most important data in that case involved the question whether the state Department of Transportation was up to the task of providing free identifications to all voters who wanted it and did not have otherwise complying id. The court was convinced from the evidence that the state bureaucracy could not handle it and it has put the id law on hold.

Another interesting example in this regard is the trial over Texas's voter id law. Before the Supreme Court scuttled section 5 of the Voting Rights Act, the United States Department of Justice blocked Texas's voter id law, and Texas appealed that blockage to a three judge court in D.C.

Under the law governing at the time, the burden fell upon Texas to prove that the law would not make minority voters worse off. Both Texas and DOJ hired top social scientists to work on the problem. The court looked closely at the evidence and it concluded that the social science was inconclusive on *both* sides. Given that fact, and the burden of proof, and the fact that the evidence the court *did* credit showed that poor people were likely to lack ids and in Texas minorities tended to be disproportionately poor, the court blocked the law.

Now, with Section 5 gone, Texas has implemented its voter identification law and the DOJ has sued to block it under Section *2* of the Voting Rights Act. Not only is Section 2 different from Section 5 in that the challengers—in this case, the federal government—has the burden of proof to show a discriminatory effect, the test is different. The question is not whether minority voters are worse off under the new law. The question is whether the conduct violates the convoluted language of section 2, which requires proof that the this law, perhaps combined with others, means that members of minority populations have less opportunity to participate in the political process and to elect representatives of their choice. While we have developed strong social science tests of racial polarization and minority voting strength to use in the redistricting context, no one is quite sure yet what the test looks like in the *vote denial* context.

Social science evidence will be useful in this case not only to show how such laws might affect minority voter participation. What is tested and what is testable might influence how the courts take the abstract statutory language of section 2 and turn it into a workable judicial test for voting rights discrimination related to vote denial.

I said that there were two purposes social science can serve in these election cases, even if at the Supreme Court level on these cases it is more politics than law. One purpose was to help at the lower court level.

The other purpose is to speak truth to power at the Supreme Court level. Neither Justice Kennedy nor Justice Souter should be able to hide behind discussions of the evidence in the campaign finance cases, letting intuition and value judgments be masked in a discussion of what the record shows. Justice Kennedy has a normative commitment to robust speech over corruption prevention. Justice Souter has a normative commitment to corruption prevention (or perhaps to political equality) over robust speech. Where the two ideals clash, one must give.

The fact is that there are going to be situations where the social science might not be up to the task of providing all the information that judges want to know to be able to decide a case.

In such circumstances, it may be no more than value judgments and intuition about the state of the world which guides the Justices. That's ok.

But a little judicial humility and honesty would go a long way. Having the Justices admit what they are doing without hiding behind concerns about evidence provides an opening for the public to see their rulings as not the reading of entrails or some divine understanding of truth but a political judgment—one which can and should be questioned by others in a democratic polity.

It is our job to educate the Justices on what we know, and what we don't, and to call the Justices out when they make empirical statements which don't comport with reality.

That of course is the beauty of our system. Anyone is free to criticize a Supreme Court Justice or opinion without fear of retribution. Criticisms are only as strong as the evidence behind them. Social scientists are uniquely qualified to provide that evidence, and to respectfully but forcefully state when the Court or a Justice has erred.

Finally, I want to turn to one more nefarious possibility about the relationship between Supreme Court justices and empirical evidence. It might be that some Justices on the Court do not even trust social science to provide objective truth or even relevant evidence to be considered by the Justices in making their decisions. Those Justices would both be less apt to rely upon evidence from social science in their rulings but also less apt to be swayed by it. For those justices social scientists have little to offer.

I think those Justices are in the minority, and that most of the Justices believe good social science can be helpful in appropriate circumstances. But what about these Justices in the minority? For example, what of Justices Alito and Thomas, who seem to believe, despite uncontradicted evidence in the *Doe v. Reed* case, that individuals do not generally face threats of harassment from signing referendum petitions, even on controversial issues, or for donating money for controversial ballot measures.

Good social science is important not to convince these Justices, but to provide an alternative reality-based view of these cases, so that the public can feel more comfortable rejecting the unsupported assertions or beliefs of such Justices.

* * *

In the end, it is a longshot that the work of social scientists will fundamentally remake the way that Supreme Court Justices decide election law cases. Social science could sway some Justices if they decide to match up their rhetoric to reality, but I'm not holding my breath. That is why I consider the Court's approach to be indefensible.

But even if social science faces an uphill battle in these contentious election cases in the Supreme Court, social science is still relevant for both the lower courts and the general public. The general public should view with skepticism a Supreme Court which says one thing about evidence but does another. It is our job to make sure that the public knows when the Supreme Court Justices are playing fast and loose with the evidence.

"Fast" Lucie Griswold and the rest of the gang would expect no less. Thank you very much.