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Volume 32

Number 4 *Symposia—Bankruptcy Reform and
Election Law as Its Own Field of Study*

Article 11

6-1-1999

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James A. Gardner, *Stop Me before I Quantify again: The Role of Political Science in the Study of Election Law*, 32 Loy. L.A. L. Rev. 1141 (1999).

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STOP ME BEFORE I QUANTIFY AGAIN: THE ROLE OF POLITICAL SCIENCE IN THE STUDY OF ELECTION LAW

*James A. Gardner**

I. INTRODUCTION

One of the most striking recent developments in the academic study of law is its increasingly interdisciplinary character. Historians, of course, have long found the legal academy a congenial home, but these days scholars from what seems like every department on the university campus have begun to descend, as it were, upon the law and to stake claims to pieces of the field. Sociologists, statisticians, psychologists, economists, linguists, literary analysts of every stripe, and even a few theoretical scientists have quite deliberately begun to sally forth beyond the traditional boundaries of their disciplines and to bring their insights to the analysis of law. This trend is understandable enough. Law is a discipline in which ideas can directly and powerfully affect the way real people live their lives, far more so than in most other fields. Scholars who spend their careers within the confines of their disciplines may influence one another and few others. Those who make their pitch to a legal audience, in contrast, may very well end up convincing a court or legislature to put their ideas into practice in a way that most academics can only dream about. At the same time, law itself has become more open-textured and self-reflective, making it more receptive to insights from other disciplines. Increasingly, academics from other fields are welcomed into the legal academy.

Among those making the trek to law are political scientists who, in growing numbers, can be found offering their knowledge to lawyers, judges, legislators, and legal academics. Many legal scholars,

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moreover, have embraced political science as a legitimate source of valuable insights and have folded into their scholarly agendas a commitment to confront, and even in some cases to employ, the methods and insights of contemporary political science. Not surprisingly, this trend is especially pronounced in the field of election law. Indeed, political scientists seem to have a special claim to be heard in this area. Election law involves, among other things, the management of politics, a subject that political scientists seem to "own" in ways that lawyers do not precisely because the study of politics is the very essence of their field. A fruitful partnership between lawyers and political scientists has readily emerged on many fronts. Some kinds of overtly political claims, for example, simply cannot be mounted successfully without the assistance of a professional political scientist. It is impossible, for instance, to win a vote dilution claim under section 2 of the Voting Rights Act¹ without expert testimony from a political scientist to establish the existence of racial bloc voting.² Other kinds of more traditional legal claims have been applied in novel ways with the help of political science insights and methodology. For example, courts have invoked principles of equal protection to invalidate ballot placement schemes that place incumbents at the top of the ballot.³ This abusive bit of incumbency protection would still be in widespread use had not political scientists formally demonstrated both the existence of the "donkey vote" and its relevance to ballot placement.⁴

Political science, however, is not always a polite guest at the legal table, graciously assisting its host in the management of legal problems with political ramifications. On the contrary, some of political science's most significant findings sharply challenge fundamental assumptions of the American constitutional order. One of the

1. 42 U.S.C. § 1971 (1994).

2. *See generally* Thornburg v. Gingles, 478 U.S. 30 (1986) (describing the factual finding necessary to meet plaintiff's burden).

3. *See* Graves v. McElderry, 946 F. Supp. 1569 (W.D. Okla. 1996); McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980); Bloomenthal v. Lavelle, 614 F.2d 1139 (7th Cir. 1980); Gould v. Grubb, 14 Cal. 3d 661, 536 P.2d 1337, 122 Cal. Rptr. 377 (1975).

4. A "donkey vote" is one in which voters are uninformed or indifferent about any or all of the candidates running for a particular office. *See* Clough v. Guzzi, 416 F. Supp. 1057, 1063 (D. Mass. 1976).

mainstays of the constitutional regulation of politics, for example, is the implicit assumption that citizens are fully capable of effective self-government.⁵ This belief shows up in the Supreme Court's deep hostility to government regulation of political speech, including campaign finance regulation; its skepticism toward measures that limit the public's choice of candidates, such as ballot access restrictions and term limits; and its preference for measures that increase the amount of publicly available information, such as disclosure. Yet one of the signal accomplishments of contemporary political science is its powerful demonstration of the depth and breadth of voter irrationality.⁶ Another important strand that runs through American constitutional thought from the Framers through the Progressives to modern-day civic republicans is a neo-classical belief in the importance of good citizenship—including regular political participation—to the development of individuals and the nation as a community. Yet political scientists have shown convincingly that Americans do not participate widely in politics and typically are grossly ignorant concerning even the most pressing political issues of the day. As one student of the subject has written, "[t]he typical American voter . . . knows little about politics, is not interested in politics, does not participate in politics, does not organize his or her political attitudes in a coherent manner, and does not think in structured, ideological terms."⁷

The most far-reaching challenges to the constitutional order, however, come from rational choice theory⁸ and allied disciplines which purport to cast doubt on the meaningfulness, indeed the very possibility, of democracy itself. Through such insights as Arrow's Impossibility Theorem,⁹ political scientists working in these fields have powerfully challenged the basic coherence of such concepts as

5. See Daniel Ortiz, *The Engaged and the Inert: Theorizing Political Personality under the First Amendment*, 81 VA. L. REV. 1, 2 (1995).

6. See generally, ANGUS CAMPBELL, ET AL., *THE AMERICAN VOTER* (1960).

7. ERIC R.A.N. SMITH, *THE UNCHANGING AMERICAN VOTER* 1-2 (1989).

8. See DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* 1-12 (1994).

9. See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 2-3 (2nd ed. 1963).

majority rule and legislative and adjudicative rationality—concepts that fundamentally undergird our political, constitutional, and legal order and ultimately legitimate the institutions of government. These conclusions, moreover, seem to resonate with popular beliefs concerning the shortcomings of contemporary government and politics, beliefs that seem to flow from a widely shared intuition that popular self-government has somehow failed to live up to its own ideals.¹⁰

This juxtaposition of “good” and “bad” political science presents participants in the legal system with some difficult questions. What kind of knowledge does political science offer law, and how exactly can law make use of it? Is it possible to enjoy the fruits of political science research selectively, either by picking and choosing among empirical findings or by accepting empirical results without also accepting the theoretical problems they raise? Or is it impossible to detach political science findings from the infrastructure—the assumptions and methodology—that produces them? What indeed are those who work within the legal system, and particularly within the portion of the legal system devoted to creating and maintaining a democratic regime, to make of political science work that casts doubt upon the legitimacy and coherence of the very enterprise in which they are engaged?

In this essay, I approach these questions by examining some of the pitfalls associated with reliance on political science and by suggesting some ways to distinguish political science knowledge of a kind on which the law may reasonably rely from that on which it should not. My conclusion is modest. I argue, in brief, that political science is useful to law when it helps law to determine the existence of factual circumstances or conditions that, *according to the law*, count as achievement or violation of a *legally* specified norm. In contrast, political science is of far less utility when either the norm to be assessed, or the set of facts and circumstances that are to be counted as achievement or violation of the norm, are supplied by political science itself rather than by the law. The latter problem, unfortunately, taints a good deal of political science research, requiring legal actors to approach it with some skepticism and with a clear sense of its inherent limitations.

10. See MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT 274-315 (1996).

II. THE SCIENTIFIC STUDY OF POLITICS

Contemporary political science is, as its name declares, a “scientific” discipline. Its goals, methods, and assumptions are modeled on those of the natural sciences. Like chemistry or physics, political science aspires to understand its subject—human society and its politics—as it truly is. Moreover, just as human understanding of the natural world increases human welfare through scientific advances and inventions, so advances in human understanding of social and political phenomena will, it is hoped, yield equally beneficial results—keeping liberty secure, perhaps, or achieving and maintaining world peace. These are lofty and unimpeachable goals, and political science demands that they be pursued through methods that are rigorously scientific. Thus, political scientists must approach their subject with the greatest possible objectivity and detachment, along with a scientist’s constitutional skepticism. They aspire to proceed as much as possible through the collection of objective measurements of political phenomena and the objective analysis of the data so collected. From such data, the political scientist constructs law-like generalizations about the political world. These generalizations may then be used to predict political phenomena, and the validity of the model may then be tested empirically through subsequent experimentation.

This way of studying politics is a relatively recent arrival on the intellectual scene, having emerged only since the Enlightenment.¹¹ For many centuries, the study of society and its politics was deemed a philosophical enterprise.¹² By the late eighteenth century, however, the natural sciences had begun to acquire such prestige, and to justify their stature with such impressive performative successes, that other disciplines came not only to admire but to emulate them.¹³ Contemporary political science, like most of the social sciences, has strong roots in this kind of emulation.¹⁴ Political science also owes a considerable debt to the discipline of economics, which was the first of the social sciences to employ advanced scientific techniques such

11. See Leo Strauss, *An Epilogue*, in *ESSAYS ON THE SCIENTIFIC STUDY OF POLITICS* 309 (Herbert J. Storing ed., 1962).

12. See *id.*

13. See *id.* at 313.

14. See *id.* at 314.

as mathematical modeling and sophisticated quantitative analysis.¹⁵ Political science's embrace of public choice theory, for example, seems to result not a little from a sort of economic equation envy.¹⁶ By the middle of the twentieth century, the scientific method of studying politics had become so well established that, as the political philosopher Leo Strauss bitterly complained, "[i]t controls whole departments of political science in great and in large universities."¹⁷

Despite its honorable aspirations, the scientific study of politics raises some troubling difficulties. Indeed, some have challenged the entire enterprise as deeply misguided. The major criticisms fall roughly into four areas. First, some have criticized political science for adopting a reductive and improperly limited conception of political knowledge. For example, in his characteristically gentle critique of political science's grander aspirations, the late philosopher Isaiah Berlin argued that political judgment was necessarily a kind of practical judgment based on knowledge that cannot easily be deemed scientific.¹⁸ Although scientific knowledge is often helpful, even in the political world, sciences and theories

cannot be even a partial substitute for a perceptual gift, for a capacity for taking in the total pattern of a human situation, of the way in which things hang together—a talent to which, the finer, the more uncannily acute it is, the power of abstraction and analysis seems alien, if not positively hostile.¹⁹

For Berlin, excellence in the political world, which he called "statesmanship,"²⁰ depended not on the systematic collection and analysis of data in scientific ways but rather on a kind of "semi-instinctive knowledge"²¹ that the scientific study of politics seems to rule out of bounds.

15. See GREEN & SHAPIRO, *supra* note 8, at 1.

16. See BRIAN BARRY, *SOCIOLOGISTS, ECONOMISTS & DEMOCRACY* ch. 1 (1970).

17. Strauss, *supra* note 11, at 307.

18. See Isaiah Berlin, *Political Judgment*, in *THE SENSE OF REALITY: STUDIES IN IDEAS AND THEIR HISTORY* 40 (Henry Hardy ed., 1996).

19. *Id.* at 50.

20. *Id.*

21. *Id.* at 51.

Leo Strauss criticized the scientific view of political knowledge on similar grounds. Striving self-consciously to be as scientific as possible, political science proceeds, said Strauss, from the premise that "only scientific knowledge is genuine knowledge. From this it immediately follows that all awareness of political things that is not scientific is cognitively worthless."²² The old political science admitted that political facts are known independently of political science and thus made political science stand or fall "by the truth of the pre-scientific awareness of political things."²³ In rejecting the possibility of pre-scientific political knowledge, Strauss argued, the new political science "comes into being through an attempted break with common sense."²⁴ This, according to Strauss, has had disastrous consequences for the discipline:

The break with the common sense understanding of political things compels the new political science to abandon the criteria of relevance that are inherent in political understanding. Hence, the new political science lacks orientation regarding political things; it has no protection whatever, except by surreptitious recourse to common sense, against losing itself in the study of irrelevancies.²⁵

This is an observation with which former Senator William Proxmire, who so enjoyed lampooning the triviality of some social science research, would surely have agreed.²⁶

Another way to criticize the limited scope of political science's conception of knowledge involves examining its methods. Because it aspires to be scientific, political science seeks to apply itself to objective data. But for data to be objective, it must be measurable. Consequently, political science must confine itself to the analysis not

22. Strauss, *supra* note 11, at 313-14.

23. *Id.* at 315.

24. *Id.* at 316.

25. *Id.* at 318.

26. Senator William Proxmire bestowed his annual "Golden Fleece Awards" upon the most egregious examples of wasteful government spending. See Cliff Haas, *Senate Maverick Proxmire to Retire*, STAR-TRIB. (Minneapolis-St. Paul), Aug. 28, 1987, at 1A. A number of these awards have been conferred upon absurd-sounding social science research projects. See Peter Riesenberger, *The Case Against Sociology: It Has An Attitude Problem*, NEWSDAY, Apr. 3, 1990, at 55.

merely of "measurable phenomena,"²⁷ but of phenomena that are measurable by the tools of political science. Walter Berns, among others, has severely criticized this limitation.²⁸ In reviewing political science studies that seek to determine why people vote the way they do, Berns noted that the easiest way to collect this information would be to ask voters directly.²⁹ The answers, however, would be subjective, unverifiable, and difficult to compare and quantify, which in turn would make them too difficult to analyze using political science's tools of choice. The political scientist responds to this problem by asking different questions, questions that respondents "can, and perhaps do, answer accurately (such as their age, sex, education, religion, and voting choice)," and then reporting the answers "with statistical exactitude."³⁰ The result, says Berns, is "the sacrifice of political relevance on the altar of methodology. The questions asked and pursued are determined by the limits of the scientific method rather than by the subject matter."³¹

The problem Berns identifies is pervasive in political science. It is sometimes said, for example, that the most basic definition of politics is well captured in Harold D. Lasswell's phrase: "Who Gets What, When, How."³² Yet it is hardly self-evident that "who gets what" is the fundamental question to which the study of politics should be addressed. Some of the greatest students of politics have asked very different questions—questions concerning the nature of the good life, the characteristics of the good citizen, the structure of the best regime, the sources of political legitimacy, and so on. It is quite clear, on the other hand, that Lasswell's definition of politics is especially congenial to the scientific method, for "who gets what,

27. John Ferejohn, *Rationality and Interpretation: Parliamentary Elections in Early Stuart England*, in *THE ECONOMIC APPROACH TO POLITICS: A CRITICAL REASSESSMENT OF THE THEORY OF RATIONAL ACTION* 279, 280 (Kristen Renwick Monroe ed., 1991).

28. See Walter Berns, *Voting Studies*, in *ESSAYS ON THE SCIENTIFIC STUDY OF POLITICS*, *supra* note 11, at 55.

29. See *id.*

30. *Id.*

31. *Id.*

32. HAROLD D. LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* (1950).

when, how" is much more susceptible to measurement and verification than, let us say, the characteristics of the best regime.

A second difficulty associated with the scientific study of politics is its adoption of an attitude of objectivity toward the objects of its study. Political science seeks to explain political phenomena. To give an impartial explanation of some phenomenon requires the scientist to assume a vantage point that is neutral, and this typically requires the scientist to stand outside—or to behave just as though standing outside—the system he or she seeks to explain. There are numerous difficulties in identifying and attempting to occupy such a vantage point even in the physical sciences, but where the study of politics is concerned there are reasons to think that the attempt itself may be inappropriate given the nature of the subject. At the very least, any explanation of politics from a point of view wholly external to the actual practice of politics is necessarily incomplete. As Jürgen Habermas recently observed, "insofar as [social science] insists on an objectivating view from the outside, remaining insensitive to the symbolic dimension whose meaning is only internally accessible, sociological perception falls into the . . . danger of remaining blind."³³ In other words, by remaining outside the system, observers who seek to be objective and neutral deliberately blind themselves both to the considerations that motivate people within the system to act, and to the meanings with which the actual participants invest their actions.³⁴

This approach may make no difference in the study of the natural sciences. No one much cares what a gas molecule experiences in a pressure chamber; it is the mass action of large numbers of molecules that interests us, and rightly so. Many would even agree that the experience of living organisms in an ecosystem may rightly be

33. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 66 (William Rehg trans., 2d ed. 1996).

34. In his contribution to this symposium, Michael Fitts identifies another cost of the objectivating viewpoint: a loss of faith among participants in the political system. As Fitts points out, attempts to "explain" the workings of the political system from an outsider's perspective may delegitimize it in the minds of those who live and act within the system. See Michael Fitts, *Confronting the Free Will Problem in Election Law Scholarship: The Hazards of Legal Fine Tuning*, 32 *LOY. L.A. L. REV.* 1121, 1129 (1999).

ignored by scientists studying ecology, thus validating their adoption of a vantage point outside the ecosystem. But where the political behavior of people is concerned, it is not nearly so clear that the objectivating standpoint is ethically defensible or even relevant to any useful understanding of human politics.

A concrete application of this criticism may illuminate the point. Consider, for example, the so-called "black box" methodology of the social sciences. This familiar heuristic allows social scientists essentially to bypass complex sub-processes in the systems they are studying by bracketing those processes and thinking of them collectively as a single "black box," i.e., a device whose internal workings are mysterious. Despite the opacity of the black box, the social scientist may not be thwarted in his effort to understand the system as a whole since he is still able to observe the inputs to and outputs from the black box. By carefully comparing inputs and outputs, the social scientist may be able to construct a kind of second-best model of the internal workings of the black box that does not purport accurately to render its internal workings, but only mimics the operation of the black box by reproducing its effect on inputs. The social scientist has succeeded in this enterprise if his arbitrary substitute for the systems represented by the black box accurately reproduces the input-output relationship produced by the black box subsystem.

This is more or less the method by which political science attempts to predict voting behavior. The internal workings of the voter's mind are opaque, a black box. Yet by examining some inputs to the voting decision—age, race, gender, political affiliation, income, and place of residence, for example—and the voter's actual votes, political scientists may construct a model that mimics, sometimes with great accuracy, the effect of the actual political thought processes by which voters decide how to cast their ballots. But in so doing, it is far from clear that political scientists have attended to the right problem. It could well be that most of what is worth studying about politics takes place inside the black box, the very thing the political scientist methodologically is required to ignore. John Stuart Mill, for example, held that the primary justification for democracy lies in the beneficial effects on the citizenry of active political

participation.³⁵ From this point of view, political science's approach to the study of voting behavior requires its practitioners to look in all the wrong places at all the wrong phenomena. In the political science account, as Walter Berns has pungently observed:

[T]he "organism" (the voter) is subjected to the "stimulus" of the campaign and his "response" is a vote, almost as if he (or it) had no choice in the matter. But a human being is not an inert object that moves only by being moved Being a creature able to form opinions, the voter brings along with the opinion the very faculty that enabled him to form it in the first place[:] the uniquely human faculty to form . . . political opinions.³⁶

All of these difficulties with the scientific study of politics flow from what is certainly its most basic feature: its goal. The goal of political science is not merely to understand political behavior, but through the identification of scientific laws of politics, to predict it.³⁷ Indeed, in the scientific study of any subject there is no meaningful difference between understanding and prediction, for the ultimate measure of the validity of any scientific knowledge is its ability to predict—to know is to verify and to verify is to predict. Yet there are extremely sound reasons to doubt that the desire to predict political behavior is a legitimate goal for the study of politics. Perhaps all knowledge has intrinsic value, but the principal justification for scientific knowledge, and certainly the main reason our society holds it in such high regard, lies in the fact that the power to make scientific predictions confers upon scientists the power to manipulate the things they study. The ability to predict the behavior of fluids allows the engineer to manipulate air so as to make an airplane fly; the ability to predict the reactions of chemicals allows the chemist to manipulate those reactions in a human cell so as to cure disease. Yet these are not the kinds of achievements that translate readily to the arena of the social sciences. If the ability to predict political

35. See JOHN STUART MILL, *Representative Government*, in *UTILITARIANISM, LIBERTY & REPRESENTATIVE GOVERNMENT* 278 (E.P. Dutton & Co. 1969).

36. Walter Berns, *Voting Studies*, in *ESSAYS ON THE SCIENTIFIC STUDY OF POLITICS*, *supra* note 11, at 41.

37. See *id.* at 8.

phenomena confers the ability to manipulate them, by whom shall they be manipulated, and to what end? The very notion of manipulating political outcomes smacks of totalitarianism precisely because it appears to deny, or at least to thwart, the belief in human agency and collective self-determination that both underlies and legitimates contemporary democratic practices.

It is useful here to compare political science with economics, the social science cousin from which it has obtained most of its stock of scientific concepts and methodology. Economics seeks to understand economic processes; it measures its success by its ability to predict economic activity; and its predictive abilities are then put to use by policy makers, openly and self-consciously, for the purpose of manipulating economies to achieve certain goals. Yet there is a critical difference between manipulating an economy and manipulating a political system.

In Western societies, there is widespread agreement that economic activity increases human welfare³⁸ and that the purpose of economic policy should be to maximize social welfare by increasing net economic benefits. Because of this consensus, the manipulation of economic activity is largely uncontroversial. The same cannot be said of politics. There is simply no consensus anywhere concerning the goals that politics should pursue or the means they should employ. Politics, indeed, may plausibly be understood as the very process by which politics decide upon their collective goals. To import the tools and methods of economic analysis into the political realm may thus mistakenly apply the tools and methods of scientific manipulation to an enterprise that must, if it is to be meaningful, remain manipulation-free. This inappropriateness undoubtedly accounts for the public cynicism attending the increasingly widespread use of polling in contemporary politics. Polling is a powerful tool for predicting, and consequently for manipulating, political outcomes. There is clearly something inauthentic about a type of politics in which popular approval, as measured by polls and focus groups, is treated as a precondition for the adoption of a position or the proposal of a policy, rather than the other way around.

38. Marxists, of course, might disagree, but after the fall of communism as a viable system of political economy, it is doubtful that a contrary view prevails in any significant part of the western world.

A related criticism leveled against the predictive aspirations of the scientific study of politics is that the goal itself is utopian. As Isaiah Berlin puts it, "[t]here is no natural science of politics any more than a natural science of ethics. Natural science cannot answer all questions."³⁹ In the realm of the natural sciences, Berlin observes:

[C]ertain laws and principles are recognized as having been established by proper methods Those who deny or defy these laws or methods . . . are quite rightly regarded as cranks or lunatics. But in ordinary life, and perhaps in some of the humanities—studies such as history, or philosophy, or law . . . —those are Utopian who place excessive faith in laws and methods derived from alien fields, mostly from the natural sciences, and apply them with great confidence and somewhat mechanistically. . . . [B]ad judgment here consist[s] not in failing to apply the methods of natural science, but, on the contrary, in overapplying them.⁴⁰

In consequence, political science's goal is unrealistic; it attempts to apply methods and kinds of knowledge to realms of human activity within which they have only limited application.

Some critics have gone even further, claiming that political science's goal of predicting and manipulating political phenomena is not merely inappropriate or pursued with excessive enthusiasm, but impossible. Alasdair MacIntyre, for example, argues that the social sciences rest on false premises, and that the entire enterprise is a pernicious pathology of liberalism. According to MacIntyre, one of the Enlightenment's great failings was its abandonment of the concept of a human *telos*, the idea that humans have goals and purposes which are given to them by their social situation and which provide a benchmark against which to make moral judgments about the behavior of individuals.⁴¹ The expulsion of the concept of a *telos*, says MacIntyre, resulted in the divorce of fact from value, which in turn gave rise to a view of the world in which human behavior can be understood as resulting from the operation of mechanisms the behavior

39. Berlin, *supra* note 18, at 49.

40. *Id.* at 51-52.

41. See ALASDAIR MACINTYRE, *AFTER VIRTUE* chs. 5-7 (2d ed. 1984).

of which can be known and explained through the use of "lawlike generalizations."⁴² This belief in turn summoned to prominence a quintessentially modern "character," the "bureaucratic manager" or expert, who identifies and administers these laws of social control.⁴³

The problem, MacIntyre continues, is that the task of these bureaucratic managers is impossible. "What managerial expertise requires for its vindication," MacIntyre observes, "is a justified conception of social science as providing a stock of law-like generalizations with strong predictive power."⁴⁴ Yet, "the salient fact about those sciences is the absence of the discovery of any law-like generalizations whatsoever."⁴⁵ What social scientists do not understand, according to MacIntyre, is that human affairs are characterized by several kinds of "systematic unpredictability" that render predictions of human behavior impossible.⁴⁶ MacIntyre argues ultimately that human behavior is unpredictable because each of us constantly strives to achieve two different and incompatible goals: the attempt "to embody his own plans and projects in the natural and social world," on the one hand, and on the other, to retain some degree of autonomy, which we express by attempting to remain "to some degree opaque and unpredictable."⁴⁷ From this, however, MacIntyre draws a conclusion that he considers salutary: social control is impossible—"[n]o one is or could be in charge."⁴⁸

This brings us to the final criticism often made of the scientific study of politics: its lack of success. Interestingly, this argument is made not only by critics standing outside the discipline who approach it from a philosophical or humanistic perspective, but by many within political science itself. The criticism, moreover, becomes more pointed the more scientific political scientists aspire to become. For example, Donald Green and Ian Shapiro, two highly regarded political scientists, recently published a forceful critique of rational choice theory.⁴⁹ Even accepting without challenge "rational

42. *Id.* at 82.

43. *See id.* at chs. 7-8.

44. *Id.* at 88.

45. *Id.*

46. *See id.* at 93.

47. *Id.* at 104 (emphasis omitted).

48. *Id.* at 107.

49. *See generally* GREEN & SHAPIRO, *supra* note 8.

choice theorists' aspirations to study politics scientifically,"⁵⁰ they concluded that "exceedingly little has been learned" as a result of the efforts of these theorists.⁵¹ In a recent forum in *PS*, the in-house journal of the American Political Science Association, one commentator took an even stronger view: "The main problem is not that much of the writing of academic intellectuals is too mathematical, but that it is insignificant, unimportant, trivial."⁵² It is indeed curious that political science should choose to emulate economics and the methods of economic analysis when the most advanced, scientific economic models are perhaps most notable for their virtually complete inability to predict economic phenomena.⁵³

III. THE DIVERSITY OF POLITICAL SCIENCE KNOWLEDGE

Although it may be impolite to look a gift horse in the mouth, these criticisms suggest that actors within the legal system should exercise some degree of caution before embracing and relying upon political science knowledge that is offered for legal applications. But what kind of caution should they exercise, and with respect to what kinds of knowledge? Despite their apparent comprehensiveness, the criticisms set out above can hardly be taken to mean that all political science knowledge is not only suspect, but useless, and that political science therefore has nothing at all to offer law. In the first place, "political science" is by no means the monolithic discipline its critics depict. Not every political scientist sits at a computer crunching numbers or devising equations. Many political scientists continue to study politics in the philosophical and humanistic traditions. Descriptive and comparative political science seem to be making something of a return after a period of professional exile. The work of some political scientists who study the institutions of American government—the powers of the various branches, for example, or

50. *Id.* at ix.

51. *Id.* at x; but see *THE RATIONAL CHOICE CONTROVERSY: ECONOMIC MODELS OF POLITICS RECONSIDERED* (Jeffrey Friedman ed., 1996).

52. Chalmers Johnson, *Preconception vs. Observation, or the Contributions of Rational Choice Theory and Area Studies to Contemporary Political Science*, 30 *PS: POL. SCI. & POL.* 170, (quoting MARTIN ANDERSON, *IMPOSTERS IN THE TEMPLE* 101 (1992)).

53. For an amusing account, see Alan Ehrenhalt, *Keepers of the Dismal Faith*, *N.Y. TIMES*, Feb. 23, 1997, at E13.

trends in the rulings or adjudicative practices of courts—is often hard to distinguish from the work of their counterparts in the legal academy. This diversity of method and approach within the field of political science is significant, for it means that political scientists produce a broad variety of different kinds of knowledge. Not all of this knowledge is vulnerable to the criticisms outlined above, and for that reason a good deal of it may well prove useful to law. In light of this diversity, it is probably more fruitful, and certainly more accurate, to view the work of political scientists as falling along a spectrum from the least to the most “scientific.”

One extremely common kind of political science study that lies toward the “unscientific” end of the spectrum, for example, is the kind of study that seeks nothing more than to document rigorously, or perhaps to disprove, some characteristic of the political world. What are the main features of American systems of government, and how frequently are they found? What are the historic patterns of political party registration? Do blacks and whites turn out to vote in similar proportions? Do members of various ethnic and racial groups tend to vote for candidates with certain kinds of attributes? How often do voters initiate contacts with elected officials? How frequently and in what ways do lobbyists actually gain access to politicians? Political scientists often mount studies the principal object of which is simply to gather sufficient data to provide answers to these and similar questions. In scientific terms, the political scientist who undertakes such studies is something like a field biologist who seeks to observe, classify and quantify natural phenomena through direct observation.

While these kinds of studies certainly count as “political science,” they are typically conceived in light of and framed around beliefs or suppositions that originate in the ordinary, everyday experience of politics by ordinary political actors. Both the subject matter of the study and the conviction that the results will be of some use in understanding political phenomena are supplied not by some kind of professional expertise possessed by the political scientist, but by ordinary political experience. This kind of study, then, far from dismissing what Strauss calls “pre-scientific knowledge,”⁵⁴ is based

54. See Strauss, *supra* note 11, at 317.

on and organized around just such knowledge. Indeed, as Strauss concedes, “[n]o one in his senses ever dreamt that he could know anything, say, of American government as such or of the present political situation as such except by looking at American government or at the present political situation.”⁵⁵

The results of these studies, moreover, might equally be characterized as pre-scientific. Although such studies may gather relevant data by sophisticated means that are not readily available to the non-specialist, or from sources that are known only to political science professionals, the kind of knowledge these studies produce is in principle accessible to anyone with an adequate background understanding of the political phenomena under study—even if that understanding derives from direct experience of the political world rather than from professional training. The professional expertise of the political scientist here consists primarily in applying professional tools and methods to the investigation of a problem that is given, framed, and interpreted by ordinary political understandings.

A second common kind of political science study with somewhat more scientific aspirations seeks not merely to investigate observable political phenomena, but through the application of scientific expertise to reveal facts and relationships about the political world that might otherwise remain hidden. A good example of this kind of project is Maurice Duverger’s study of the relationship between electoral systems and parties, a study that yielded what is often called Duverger’s Law. According to Duverger’s Law, simple-majority, single-ballot electoral systems tend to result in two-party systems, whereas systems of proportional representation tend to produce multipartyism.⁵⁶ Another example is Douglas Rae’s now-classic study showing, among other things, the ways in which different electoral systems overreward political success, and the declining improvements in proportionality associated with increasing the size of election districts in proportional systems.⁵⁷ Studies such as these

55. *Id.* at 314.

56. See William H. Riker, *Duverger’s Law Revisited*, in *ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES* 19 (Bernard Grofman & Arend Lijphart eds., 1986).

57. See generally DOUGLAS W. RAE, *THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS* (1971).

are based on and inspired by real-world observations of political phenomena, but go beyond mere documentation or classification to hypothesize causal mechanisms and relationships that are hidden from plain—that is to say, pre-scientific—view. The professional expertise of the political scientist in this situation consists in using scientific tools to discover and explain these hidden relationships, thereby increasing our understanding of the operation of the political world. In this respect, the political scientist functions something like the chemist who investigates chemical reactions at the molecular level, or the meteorologist who studies the relationships between atmospheric conditions and weather phenomena. These kinds of projects are clearly more scientific than the data-collecting variety not only because they purport to reveal truths unavailable to ordinary experience, but also because they postulate relationships that may be verified by prediction. One may infer Duverger's Law from observations, but one tests it by evaluating its power accurately to predict the results of changes in the political environment. Duverger's Law thus predicts that a change in some jurisdiction from first-past-the-post to proportional representation will cause an increase in the number of political parties; if that does not occur, the principles and explanations embodied in the rule become suspect.

The kinds of political science studies that most aspire to be scientific include studies employing the tools and methods of rational choice theory, public choice theory, game theory, and so on. They are characterized by the use of sophisticated tools of mathematics and formal logic employed in the attempt to develop models of political phenomena that are as complete and as self-contained as possible. Studies of this type take a significant step beyond the kind of discovery of hidden relationships just mentioned. These studies aspire to discover hidden relationships and to predict phenomena, but they seek to do so not through step-by-step investigation and discovery, but by examining the characteristics of a fully abstracted, comprehensive, rigorously scientific description of the phenomenon under study. Once such a model is developed and validated, the political scientist has no need to examine the modeled political phenomenon in its real-world setting; manipulation of the model tells the

political scientist everything he or she needs to know.⁵⁸ Here, the political scientist functions more like a theoretical physicist, describing a set of phenomena that cannot be experienced other than scientifically simply because the mathematical and logical relationships that describe the phenomena are not themselves susceptible to any kind of pre-scientific experience. Like sub-atomic particles that obey certain scientific laws without any awareness of them, political actors cannot be aware of the laws that describe their behavior precisely because such laws are invisible to participants; they become visible only through adoption of the scientific standpoint, which is objective, neutral, and outside the activity observed.

In light of the sheer diversity of knowledge that political scientists produce, there seems to be no valid reason for law categorically to reject all political science knowledge, and indeed it has not done so: the law in many instances routinely deems at least some kinds of political science knowledge to be relevant to the solution of legal problems. The work of political scientists is indispensable to the success of any claim of racial vote dilution or retrogression under the Voting Rights Act.⁵⁹ Political scientists play integral roles in mounting any apportionment claim premised on the violation of the one-person-one-vote principle, and they often assist trial courts directly in crafting reapportionment plans to remedy identified constitutional defects. Political scientists have been tapped by courts seeking to determine the constitutionally relevant impacts of state laws regulating party endorsements and cross-endorsements of candidates. In short, the law already recognizes certain kinds of political science knowledge as pertinent and helpful to the legal enterprise. None of this is to say that law may accept and willy-nilly rely upon all political science knowledge of every kind and in every context. Instead, the real problem seems to involve distinguishing political science knowledge which is useful to law from that which is not.

58. One of Green and Shapiro's criticisms of rational choice theory is that its practitioners seem far more interested in developing such models than in subjecting them to empirical tests of their validity. See GREEN & SHAPIRO, *supra* note 8, at 42-46.

59. See 42 U.S.C. §§ 1971-1973.

IV. POLITICAL SCIENCE AND THE IDENTIFICATION OF NORM VALIDATING CONDITIONS

If some kinds of political science knowledge must be treated skeptically while other kinds of knowledge are useful to the legal enterprise, how may practitioners and students of election law tell them apart? The answer requires attention to two characteristics of law, one obvious and the other less so. First, law is an enterprise that deals primarily with norms. Some of the most commonplace legal activities involve identifying appropriate norms to guide social activities, determining the means by which those norms may best be achieved, and applying appropriate norms in diverse situations. If political science is to be of much use to law, it must be useful in the pursuit of norms generated by the legal system for legal ends rather than in the pursuit of norms generated by political science for scientific ends.

This condition seems, at first glance, to play directly to political science's greatest strength. After all, the scientific study of politics typically proceeds from the premise that the scientist is neutral and is therefore neither a generator of norms nor an evaluator of norms on their merits. Political science thus expressly disclaims any role in the one area that law must insist upon reserving to itself. Although this disjunction means that law and political science frequently will not speak to each other directly, it also means that political science is in an important sense well-suited to the role of helping law. Law supplies the norms and thus defines the parameters of the scientific analysis; political science then investigates the manifestation of these norms in political phenomena. Each discipline's strength matches exactly the other's weakness, creating a useful partnership.

This analysis is correct as far as it goes, and it goes a long way indeed. These factors well suit political science to address questions concerning whether norms selected by the legal system have been achieved, for example, or the means by which such norms may most effectively be pursued. Probably the most common legal use of political science thus involves the proof of legally relevant facts. For example, to use an illustration alluded to earlier, section 2 of the Voting Rights Act establishes a norm prohibiting racial vote dilution. The Supreme Court has ruled that the existence of racial bloc voting is a fact that, in conjunction with other facts, serves to demonstrate a

violation of the controlling statutory norm. Political science is useful to law in this context if it is capable of assisting legal actors to establish the existence of this fact. Of course political science is particularly well equipped to determine the presence of bloc voting, and to do so in a way the law accepts as valid. Similarly, the Equal Protection Clause establishes a norm requiring that each person's vote be given equal weight, and the Supreme Court construes this to require that election districts contain, as nearly as possible, equal numbers of voters.⁶⁰ Political science is clearly of great use to law in this situation because its practitioners have tools that allow them readily to provide the necessary numerical data not only for existing apportionment plans but also for hypothetical plans proposed for jurisdictions found to be in violation of the one-person-one-vote norm. Political science may also be useful to law in helping legal regulators achieve a desired result. For example, legislators may wish to enact legislation that will increase voter turnout, minimize quid pro quo corruption of candidates for political office, or increase minority representation on legislative bodies. Much political science work is devoted to exploring the relationships among different kinds of political phenomena, and such work may be precisely what is called for in identifying the most effective means to achieve legislatively determined ends.

This brings us to the second, less obvious characteristic of the legal enterprise. Law does more than merely specify norms to be achieved. It also specifies *the factual circumstances and conditions that count as achievement of those norms*. This is in a sense the very essence of law; it is what distinguishes law from philosophy or other disciplines that deal with norms but whose conventions may permit norms to be addressed exclusively at a very abstract level. The law has no such luxury. Its business is to apply norms in the often complex and messy conditions of real life. This is the very characteristic that makes law difficult, but it is also the source of law's power—the same power that makes law attractive to practitioners of other academic disciplines such as political science.

60. See *Mahan v. Howell*, 410 U.S. 315, 324-25 (1973); *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969).

Political science is useful in the situations mentioned above, then, not merely because it is in each of those situations employing a norm supplied by law. In each of those situations, political science also employs and adheres to a legally generated definition of the facts and circumstances that count as achievement—or violation—of the controlling norm. For example, if political science is to be of use to law in determining whether a certain piece of legislation will increase voter turnout, it must do more than accept the legal norm providing that increasing voter turnout is a desirable end. It must also adopt the law's definition of what would count as an increase in voter turnout. If political scientists assess the impact of a piece of legislation on voter turnout using an understanding of voter turnout that differs from the law's, their results will be of little use to legislators. Political science, then, is useful to law when the factual circumstances and conditions that count as achievement of a legal norm are supplied by that norm itself.⁶¹ It follows, of course, that political science's usefulness to law decreases dramatically whenever the conditions that are to count as satisfaction of some legal norm are supplied not by the norm, but by the political science analysis. Here is where the danger to law arises, and it is a significant danger because just this happens all too frequently in political science analysis. For reasons that have nothing to do with the norms under study, and everything to do with political science methodology, political science often disregards definitions of norm-satisfaction generated by first-order normative enterprises, such as law, and substitutes definitions of its own devising.⁶²

61. I do not mean to imply that law must necessarily treat political science instrumentally, or that the two disciplines are incapable of engaging one another on a normative level. It is possible, for example, that political science's demonstration of the widespread non-satisfaction of a legal norm could lead law to question and rethink the norm. It may also be possible for political science to go a step further by engaging law in a normative dialogue at the most fundamental levels. *See generally* W.T. MURPHY, *THE OLDEST SOCIAL SCIENCE? CONFIGURATIONS OF LAW AND MODERNITY* (1997) (discussing the role of law in society); Francis J. Mootz III, *Desperately Seeking Science*, 73 WASH. U. L.Q. 1009, 1010-18 (1995) (distinguishing between genuine interdisciplinary encounters and "mutual intellectual colonization").

62. In Bruce Cain's account, this does not happen very often in the election law area. Cain views law as having set the agenda for political science research on some of the major questions in election law. *See* Bruce Cain, *Elec-*

Very often, the norms that the law seeks to apply in political matters, and the questions that the law contemplates regarding these norms, are not readily framed in terms susceptible to political science analysis. The law, for example, may wish to construct a political system that makes people happy, or it may wish to take actions designed to assure that people become good citizens. Political science is not well-suited to assess phenomena such as happiness or good citizenship because they are not readily susceptible to measurement by its tools. Often, however, difficulty in measuring phenomena will not dissuade political scientists from making the attempt. Since they cannot measure the phenomenon as defined by law, however, political scientists must redefine it in other, more easily measured terms. Suppose, for example, that legal actors wish to know whether Americans as a group are good citizens, and that the law defines the good citizen as one who is interested in and participates in politics. Neither of these terms is readily susceptible to measurement, the first because it is largely subjective and the second because the forms that political participation may take are extraordinarily diverse and difficult to verify. A quintessential political science move would be to redefine good citizenship as consisting in, say, the regular reading of a newspaper and regular voting.⁶³ Having thus reframed in empirically measurable terms the factual circumstances that count as achievement of the good citizenship norm, the political scientist may then proceed to use the tools of political science to evaluate whether the norm of good citizenship has been achieved by existing political institutions. It does not necessarily follow, however, that the political scientist's results demonstrate anything significant about the norm under study; all political science shows in this situation—all it can ever show—is achievement or nonachievement of the proxy measure that the political scientist has chosen to stand in for the norm's own validating conditions. This is precisely what Berns

tion Law as a Field: A Political Scientist's Perspective, 32 LOY. L.A. L. REV. 1105, 1107-14 (1999). He concedes more of an impact to political science in other areas such as campaign finance and corruption, but apparently only because he assigns democratic theory to the domain of political science rather than to law. See *id.* at 1114-18. Apparently Cain seems to view law narrowly as consisting of "litigation and court intervention." *Id.* at 1120.

63. For a recent example of this approach see SIDNEY VERBA ET AL., *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* 37-48 (1995).

meant when he referred to "the sacrifice of political relevance on the altar of methodology."⁶⁴

Certainly the great exemplar of this defect in the annals of contemporary political science is Arrow's Impossibility Theorem.⁶⁵ Arrow's Theorem demonstrates that in certain circumstances voter preferences among multiple alternatives may "cycle."⁶⁶ This means that at any given moment it may be true of every alternative that some majority of voters prefers it to a second alternative, but also that a different majority of voters prefers a third alternative more.⁶⁷ Arrow's finding is commonly understood to mean that the concept of a majority will is incoherent because the majority wills no single thing; instead, different majorities simultaneously will different and conflicting things.⁶⁸ Alternatively, Arrow's Theorem is often understood to show that real power in apparently democratic decision-making systems is held not by a majority of voters, but by whatever individual or group is capable of manipulating the agenda by which choices are brought to and framed for the electorate.⁶⁹ Since a majority might be found for many different alternatives, whoever wields the power to set the agenda possesses in functional terms the power to decide the outcome. It matters little which of these accounts one prefers; both purport to lead to the same conclusion: democracy itself is impossible.

Now what is one to make of this conclusion—particularly one who works within the American legal system, a system that not only presumes but depends for its very legitimacy upon the possibility of democracy and its coordinate doctrines, majority rule and democratic self-government—a system whose adherents believe firmly in all the concepts that Arrow's Theorem is said to disprove? These dire interpretations of Arrow's paradox are strongly reminiscent of a similar challenge to common understandings posed long ago by Zeno. In

64. Walter Berns, *Voting Studies*, in *ESSAYS ON THE SCIENTIFIC STUDY OF POLITICS*, *supra* note 11, at 55.

65. *See* ARROW, *supra* note 9, at 2-3.

66. *See* Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2129 (1990).

67. *See id.*

68. *See id.* at 2135-36.

69. *See id.* at 2136-37.

one of Zeno's famous paradoxes, a tortoise challenges Achilles to a footrace. Because Achilles is much faster, the tortoise is granted a head start. Zeno "proves," however, that no matter how fast Achilles runs, he can never catch the tortoise. He reasons as follows. When Achilles begins to run, the tortoise is at a certain point ahead of Achilles. By the time Achilles reaches that point, the tortoise has moved ahead to a second position, still ahead of Achilles. By the time Achilles reaches that second position, the tortoise has again moved ahead. By the time Achilles reaches that point, the tortoise, no matter how slow, has again proceeded ahead. Because Achilles must always reach the point formerly occupied by the tortoise—*voila!*—he can never catch up to it.⁷⁰ What makes this a paradox, of course, is that everybody knows that Achilles is perfectly capable of passing the tortoise. There is nothing wrong with Zeno's reasoning, on the other hand. The difficulty lies elsewhere, in his definition of the problem. It was not until the invention of the concept of the limit, and with it the calculus, that mathematicians came to understand how to reframe the problem of Achilles and the tortoise to describe it in ways that comport more closely with experience and thus to dissolve the paradox.⁷¹

Arrow's paradox is similar to Zeno's in many ways. Elections involve cycling, cycling means there is no unique, coherent majority will, and—*voila!*—democracy cannot exist. Yet it certainly *seems* as though democracy exists, if not all the time then on a great many occasions, both important and obscure. This paradox arises because political science here purports to assess the existence of a norm by investigating a set of norm-validating conditions that are defined for their ease of measurement, and consequently for the convenience of the political scientist, rather than by the norm under study or by the enterprise that generated the norm in the first place. Arrow's conclusions can have legal relevance only if Arrow uses a legally relevant definition of what counts as democracy. Yet it is clear that the Theorem defines democracy in a highly reductive and oversimplified manner. Arrow's Theorem is capable of impugning democracy only

70. See generally R.M. SAINSBURY, PARADOXES 5-6 (1988) (reciting an account of this famous paradox).

71. See A.W. MOORE, THE INFINITE 71-74 (1990); ADOLF GRUNBAUM, MODERN SCIENCE AND ZENO'S PARADOXES 100-09 (1967).

if democracy exists solely when every collective decision is made in accordance with a unique majority will that is determined solely by the aggregation of individual preferences as expressed in single-issue balloting, in a decision presenting exactly two alternatives, where those preferences are expressed in ways that do not take into account the intensity of voter preferences.⁷² Although these characteristics are not irrelevant to any modern conception of democratic self-government, they hardly exhaust it. The conception of democracy implicitly embodied in Arrow's Theorem is one that focuses heavily, indeed exclusively, on ultimate decisions. Yet some conceptions of democracy, such as developmental democracy and deliberative democracy, place comparatively little emphasis on the actual decision-making apparatus of democratic institutions. In these theories, democracy is much more about the process preceding the decision itself, and democracy's real significance lies in the way that the polity confronts challenges that demand a decision rather than in the decisional outcomes themselves.⁷³

Many other conceptions of democracy place some stock in the outcomes of decision-making processes, but their perspective takes in much more than the mere aggregation of votes in individual balloting decisions. These theories employ broad concepts of popular sovereignty, for example, or invoke complex relationships of representation. Many theories of popular sovereignty, including the theory embodied in the United States Constitution, require only retrospective popular acceptance of official action to confer legitimacy.⁷⁴ Clearly, Arrow's Theorem is rendered irrelevant to the extent that democratic self-government is legitimated by contemporaneous or retrospective popular acceptance of official actions rather than by technical compliance with the Theorem's formal criteria of majority rule. Because the law need not and does not define democracy in the neatly measurable terms in which Arrow's Theorem defines it, the Theorem's conclusions are of extremely limited relevance to the

72. For a related, though more sympathetic critique of Arrow's Theorem, see JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 41-44 (1997).

73. See James A. Gardner, *Shut Up and Vote: A Critique of Deliberative Democracy and the Life of Talk*, 63 TENN. L. REV. 421 (1996).

74. See U.S. CONST. arts. V, VII.

legal enterprise. Just as Achilles could respond to Zeno's theorem by overtaking the tortoise, so may law respond to Arrow's Theorem with a performative refutation of its own: "You say democracy is impossible? Watch this."

V. SKEPTICISM IN ELECTION LAW APPLIED

I want to conclude with an example of how practitioners and students of election law might apply the kind of skepticism I have described to their own use of political science. At the risk of biting the hand that feeds me—it was Professor Rick Hasen who very generously invited me to participate in this Symposium—I shall take as my example a recent article by Professor Hasen in which he uses some of the tools and methods of political science to examine the feasibility of compulsory voting legislation.⁷⁵ The problem Professor Hasen addresses in his article is the problem of low voter turnout in the United States, and his goal is to assess whether legislation making voting compulsory would solve this very important problem.⁷⁶

At the outset, however, we are met with a critical question: what exactly is the "problem" with low voter turnout? To ask this question in a legal context is immediately to invite a host of possible replies. To a Lockean, low voter turnout might be problematic because it could indicate dwindling popular consent to existing forms of government, thereby threatening the legitimacy of the regime.⁷⁷ To a Millian, low voter turnout is worrisome because it contributes to a general deterioration in citizenship skills and impedes the personal development of citizens as human beings.⁷⁸ To an Aristotelian, low voter turnout might show a lack of appropriate virtue in the citizenry.⁷⁹ To a communitarian, low voter turnout might undermine the community's sense of joint purpose, indicating an unhealthy preoccupation with private conduct that might threaten the community's

75. See Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135 (1996).

76. See *id.* at 2136-38.

77. See JOHN LOCKE, *THE SECOND TREATISE ON CIVIL GOVERNMENT*, 54-72 (Prometheus Books, 1986).

78. See MILL, *supra* note 35.

79. See ARISTOTLE, *THE POLITICS* (T.A. Sinclair trans., Penguin Books 1962).

coherence and continuing development. The law not only easily accommodates any of these points of view, but also provides a forum in which the nature of the problem may be thoroughly debated by those who wish to address it. This kind of discussion is a vitally necessary precondition to any consideration of legislative solutions because no problem can be meaningfully solved until it has been adequately defined. A compulsory voting law backed by sufficiently harsh sanctions might well increase turnout, but it will certainly accomplish nothing of any use—it will not address the underlying problem—if people do not vote because, say, they feel alienated from a government they consider oppressively harsh and of dubious legitimacy. In such circumstances a compulsory voting law would only exacerbate the very problem in need of solution.

Because Professor Hasen chooses to view the problem from the perspective of political science, these kinds of considerations rate at most a sentence here or there in his article.⁸⁰ This should come as no surprise. Political science, as we have seen, cannot readily process normative concepts such as legitimacy, personal development, virtue, or community—it cannot readily confront, that is to say, the ends to which voter turnout is merely a means. Political science needs objects that are measurable, and voter turnout itself certainly fits the bill. Consequently, political science frames its analysis of compulsory voting laws not by asking whether such laws would solve the problem of which low voter turnout is a symptom, but rather by asking simply whether such laws would increase turnout. This is a very different question.

Now, I do not wish to be misunderstood. The question political science poses is undeniably relevant, and if political science can shed light on the ability of compulsory voting laws to increase voter turnout it will contribute something to the deliberations of a legislature contemplating the enactment of such laws. But this information is useful only if the legislature has already determined that increasing voter turnout *by means of a compulsory voting law* is a way of

80. See generally Hasen, *supra* note 75, at 2154 (“decreasing social connectedness”); see *id.* at 2165 (“legitimizing democratic government”); see *id.* at 2168 (people “follow the law because they believe that following the law itself is right”); see *id.* at 2174 (“poorer decisionmaking”).

solving the problem posed by low voter turnout. On this question, political science, in Professor Hasen's account, is silent.

The reasons for political science's silence on this question are instructive. For the political scientist, the problem of low voter turnout is analyzed by reference to the so-called "paradox of voting."⁸¹ Political scientists regard voting as paradoxical because it cannot be readily explained in traditional political science terms. If people are rational utility-maximizers who decide what to do based on cost-benefits analyses, then voting is irrational because the costs associated with voting, like collecting information, traveling to the polls, and so on, however small, vastly exceed any benefit that an individual voter might reasonably expect to receive in consequence of an electoral victory by the voter's preferred candidate. This reasoning reveals the objectivating scientific viewpoint at work with a vengeance. To anyone other than a political scientist, there is nothing paradoxical about voting. People vote, as Professor Hasen ultimately reports,⁸² because voting is a duty of citizenship, because it is the right thing to do, because it is a validating social practice.

Dimly aware that voting involves reasons like these, political science reframes the analysis by hypothesizing the existence of something called "norms"⁸³ that through some mysterious process "cause" people to vote. The task that political science sets for itself is to "explain" how norms appear and how they impose their discipline on their adherents. Its explanation focuses on the conditions in which "demand" for a norm might "arise" and on who might "benefit" from the norm.⁸⁴ From a legal perspective, this is an awfully strange way of speaking about the problem. Political science speaks in these terms because, unable to measure and thus to comprehend the internal workings of the voter turnout process, it must resort to the methodology of the black box. Using that methodology, political science brackets the voting process, creates a set of proxy variables, and attempts to simulate the results. Putting aside the palpable distaste with which political science approaches these "norms"—they are described in Professor Hasen's article the way a pathologist

81. *Id.* at 2138-46.

82. *See id.* at 2168.

83. *See id.* at 2147-51.

84. *Id.* at 2148.

might describe a growth and are displayed while held at arm's length with rubber gloves and forceps—the black box method is of highly questionable utility in this situation. By bracketing the internal mechanisms of voter turnout, political science succeeds in reducing the question to one of comparative empirical results: are “norms and laws . . . good substitutes for one another[?]”⁸⁵ In other words, are compulsory voting laws, which get people to the polls for fear of official punishment, as good at causing people to vote as are voting norms, which get people to the polls by producing in them a belief that they ought to go? While this way of framing the question allows the answer to be investigated through the kinds of measurements that political science routinely undertakes, the reframing is accomplished at a devastating price. The very aspects of the voting problem that must be consulted to determine whether compulsory voting laws are capable of increasing voter turnout *in a way that is responsive to the problem* are deliberately effaced by bracketing them and stuffing them into a black box, never to be examined further. In this particular case, then, the methodological imperatives of political science cause it to reframe the problem in a way that greatly impairs, for law, the utility of the answer.

My purpose in this analysis, let me reemphasize, is neither to denigrate political science as a discipline nor to suggest that it has nothing of value to offer law. Far from it. As Isaiah Berlin, no great enthusiast of the application of social science methods to humanistic pursuits, observed:

Of course, whatever can be isolated, looked at, inspected, should be. We need not be obscurantist. I do not wish to say or hint, as some romantic thinkers have, that something is lost in the very act of investigating, analysing and bringing to light, that there is some virtue in darkness as such, that the most important things are too deep for words, and should be left untouched This I believe to be a false and on the whole deleterious doctrine. Whatever can be illuminated, made articulate, incorporated in a proper science, should of course be so There are vast regions of reality which only scientific methods, hypotheses,

85. *Id.* at 2164.

established truths, can reveal, account for, explain, and indeed control. What science can achieve must be welcomed.⁸⁶

I could not agree more. Yet it is extremely important to the success of all social enterprises that they be pursued in an appropriate way, in reliance on appropriate kinds of knowledge and methods. Our society is impressed by science, and science's obvious and continuing successes place constant pressure on other kinds of knowledge to enhance their popular authority by appearing scientific. The professional study of politics has succumbed to this pressure by remaking itself in the scientific image. Law itself had a Langdellian flirtation with science from which it is still recovering. Today, law must not permit itself to be overly impressed by the scientific credentials of the discipline of political science. Political science may have much useful knowledge to offer law, but whenever it makes such an offer, legal actors must keep their eyes fixed firmly on the goals of the legal enterprise. This in turn requires them to approach political science knowledge skeptically, and to evaluate the usefulness of such knowledge case by case.

86. Berlin, *supra* note 18, at 48.

