

# ELECTIONS AND ALIGNMENT

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*Election law doctrine has long been dominated by rights-and-interests balancing: the weighing of the rights burdens imposed by electoral regulations against the state interests that the regulations serve. For the last generation, the election law literature has emphasized structural values that relate to the functional realities of the electoral system, competition chief among them. This Article introduces a new structural theory—the alignment approach—that has the potential to reframe and unify many election law debates. The crux of the approach is that voters’ preferences ought to be congruent with those of their elected representatives. Preferences as to both party and policy should correspond, and they should do so at the levels of both the individual district and the jurisdiction as a whole.*

*The alignment approach is attractive because it stems from the core meaning of democracy itself. If it is the people who are sovereign, then it is their preferences that should be reflected in the positions of their representatives. The approach also is appealing because of the support it finds in the Supreme Court’s case law. While the Court has never embraced the approach explicitly, it has often recognized the significance of preference congruence. However, it is important not to overstate the approach’s utility. Other election law values matter too and cannot be disregarded. Moreover, many of the factors that produce misalignment are nonlegal and thus cannot be addressed by law reform alone.*

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## INTRODUCTION

Something important is missing from the prevailing judicial and academic accounts of many election law issues. Consider the spate of franchise restrictions that states around the country recently have enacted: photo identification requirements for voting, proof-of-citizenship requirements for registering to vote, cutbacks to early voting, and the like.<sup>1</sup> According to the Supreme Court, the only cognizable harm that these policies may inflict is a burden on the individual right to vote. The policies should be upheld if they are tied closely enough to the state's alleged interests in preventing fraud and improving election administration. According to most of the legal literature, franchise restrictions should be assessed based on their implications for structural values such as competition and participation. The validity of the policies should hinge on whether they entrench incumbents in office or deter many people from engaging in the political process.

But the uproar over photo identification requirements and their ilk has not arisen primarily—or even mostly—because of concerns about liberty, competition, or participation. The main objection to the measures, rather, is that they disproportionately prevent certain *kinds* of people from voting: minorities, the poor, the young, in a word,

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1. See Wendy Weiser & Diana Kasdan, Brennan Ctr. for Justice, *Voting Law Changes: Election Update 1–6, 17–21* (2012), available at [http://www.brennancenter.org/sites/default/files/legacy/publications/Voting\\_Law\\_Changes\\_Election\\_Update.pdf](http://www.brennancenter.org/sites/default/files/legacy/publications/Voting_Law_Changes_Election_Update.pdf) (on file with the *Columbia Law Review*) (describing franchise restrictions adopted by nineteen states in 2011–2012 period); Wendy R. Weiser & Lawrence Norden, Brennan Ctr. for Justice, *Voting Law Changes in 2012*, at 1–3 (2011), available at [http://www.brennancenter.org/page/-/Democracy/VRE/Brennan\\_Voting\\_Law\\_V10.pdf](http://www.brennancenter.org/page/-/Democracy/VRE/Brennan_Voting_Law_V10.pdf) (on file with the *Columbia Law Review*) (summarizing various restrictions adopted in 2011). Other new restrictions included limiting voter registration drives, eliminating election day registration, and making it more difficult to restore voting rights to ex-felons. See *id.* at 2–3.

Democrats. As Judge Evans of the Seventh Circuit has written, in a rare judicial acknowledgement of this point, “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.”<sup>2</sup> Uneven declines in turnout, of course, may produce different election outcomes from those that would have arisen in the absence of the franchise restrictions. More Republican candidates may prevail due to the change in the composition of the electorate. Above all, it is this potential partisan distortion, not the worries identified by courts and scholars, that fuels the controversy over the “new vote denial.”<sup>3</sup>

Next, consider the record spending that took place during the 2012 campaign: about \$6.3 billion in federal races alone, a sum 20% higher than in 2008 and 100% higher than in 2000.<sup>4</sup> According to the Court, the only problem with this spending is *quid pro quo* corruption, the explicit exchange of money for political favors.<sup>5</sup> The legal literature highlights a broader range of concerns, including unequal influence over the electoral process and reduced competition due to the financial advantage of incumbency.<sup>6</sup> But to many observers, an even more urgent issue is the *imbalance* in the resources available to the two major parties.<sup>7</sup> If one party enjoys a substantial financial edge (as the Republicans did in 2012<sup>8</sup>), and

2. Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting), *aff’d*, 553 U.S. 181 (2008) (plurality opinion).

3. Daniel P. Tokaji, The New Vote Denial: Where Election Reform Meets the Voting Rights Act, 57 S.C. L. Rev. 689, 691–92 (2006) (coining phrase for recent wave of measures aimed at making voting more difficult).

4. The Money Behind the Elections, OpenSecrets.org, <http://www.opensecrets.org/bigpicture/index.php> (on file with the *Columbia Law Review*) (last visited Dec. 28, 2013) [hereinafter Election Money].

5. See, e.g., FEC v. Nat’l Conservative Political Action Comm., 470 U.S. 480, 496–97 (1985) (“The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.”).

6. See *infra* notes 232–235 and accompanying text (reviewing this literature).

7. One of these observers is former President Bill Clinton. See Noam Levey, Clinton: GOP Money Advantage Could Still Swing the Election, L.A. Times (Sept. 23, 2012), <http://articles.latimes.com/2012/sep/23/news/la-pn-clinton-gop-money-20120923> (on file with the *Columbia Law Review*) (“Citizens United gave [an enormous financial advantage] to these Republican super PACs . . . .” (quoting interview with former President Bill Clinton)).

8. See 2012 Outside Spending, by Race, OpenSecrets.org, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=R&pty=A&type=A> (on file with the *Columbia Law Review*) (last visited Dec. 28, 2013) (noting pro-Republican outside groups outspent pro-Democratic outside groups \$834 million to \$501 million); 2012 Presidential Race, OpenSecrets.org, <http://www.opensecrets.org/pres12/index.php> (on file with the *Columbia Law Review*) (last visited Dec. 28, 2013) (noting Republican spending on presidential race totaled \$1.24 billion compared to \$1.11 billion for Democrats); Price of Admission, OpenSecrets.org, <http://www.opensecrets.org/bigpicture/stats.php> (on file with the *Columbia Law Review*) (last visited Dec. 28, 2013) (showing Republicans outspent Democrats \$580 million to \$476 million in House races and \$377 million to \$309 million in Senate races).

if dollars spent have an impact on votes received, then election outcomes may deviate from what they would have been in an environment with more even outlays. The fear that voters may be swayed by asymmetric spending animates much of the popular conversation about campaign finance—but is largely absent from the judicial and academic debate.

Last (for now), consider redistricting, the decennial redrawing of district lines, whose most recent iteration generated 206 lawsuits in 42 states,<sup>9</sup> as well as howls of outrage when Republicans retained their House majority in 2012 despite receiving 1.4 million fewer votes nationwide than their opponents.<sup>10</sup> The Court has floundered for decades in its efforts to determine why (and whether) gerrymandering might be unconstitutional. The most prominent recent scholarship argues that the practice's core harm is the decline in competition that ensues when bipartisan plans shield incumbents from electoral challenge.<sup>11</sup> But the most glaring problem with gerrymandering—the problem that spawned the term two centuries ago—is the partisan havoc that it may wreak. Clever district configurations may give rise to legislatures whose composition diverges sharply from the will of a majority of voters. This sort of mismatch arose in several states in 2012,<sup>12</sup> and it is the quintessential injury inflicted by gerrymandering.

A common thread runs through all of these examples. In each case, an electoral practice may produce a misalignment<sup>13</sup> between the preferences of voters and the preferences of their elected representatives. In each case, this misalignment is precisely what is objectionable about the practice (even if it is not *all* that is objectionable). And in each case, both the doctrine and the legal literature seem oddly uninterested in the misalignment. They plainly are missing something important.

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9. Litigation in the 2010 Cycle, All About Redistricting, <http://redistricting.ils.edu/cases.php> (on file with the *Columbia Law Review*) (last visited Dec. 28, 2013).

10. E.g., Greg Giroux, Republicans Win Congress as Democrats Get Most Votes, Bloomberg (Mar. 18, 2013, 8:00 PM), <http://www.bloomberg.com/news/2013-03-19/republicans-win-congress-as-democrats-get-most-votes.html> (on file with the *Columbia Law Review*).

11. See *infra* note 268 and accompanying text (discussing this scholarship).

12. At the congressional level, for example, Democrats received a majority of the statewide vote in Michigan, North Carolina, Pennsylvania, and Wisconsin, but won only 36%, 31%, 28%, and 38% of the available seats, respectively. 2012 election results are on file with the *Columbia Law Review*.

13. Misalignment also could be conceived in agency cost terms as the divergence between the interests of the principal (the electorate) and of agents (elected representatives). See, e.g., D. Theodore Rave, Politicians as Fiduciaries, 126 Harv. L. Rev. 671, 706 (2013) (using this framework). I prefer the terminology of alignment because it lends itself more easily to the various classifications that I employ in this Article (partisan versus policy alignment and district-specific versus legislative alignment).

The purpose of this Article, then, is to introduce the *alignment approach* to election law.<sup>14</sup> By alignment I mean that the preferences of voters are congruent with the preferences of their elected representatives. Preferences with respect to two concepts are relevant here: first, partisan affiliation, so that, if a majority of voters wish to be represented by a candidate from a certain party, this in fact is who represents them; and second, public policy, so that if most voters hold a certain ideology or issue position, their representative tends to do so as well (or at least to vote accordingly). Alignment also operates at two distinct levels: first, within a particular district, so that the preferences of the district's median voter are aligned with those of the district's representative; and second, within a jurisdiction as a whole, so that the preferences of the jurisdiction's median voter are aligned with those of the legislature's median member. The *median* voter and legislator bear special significance under the alignment approach because it is only they, thanks to their positions at the midpoints of their respective distributions, who speak by definition for popular or legislative majorities.

While there is no particular locus classicus for the alignment approach in the democratic theory literature, an impressive range of thinkers have made the normative argument that the preferences of voters ought to be aligned with those of their representatives—and that elections are the key instrument for producing this alignment. For example, Hanna Pitkin, the famed scholar of representation, once wrote that “[o]ur concern with elections and electoral machinery . . . results from our conviction that such machinery is necessary to . . . secure a government responsive to public interest and opinion.”<sup>15</sup> Similarly, Joseph Bessette, one of the pioneers of the deliberative democracy movement, has commented that “[t]he chief mechanism for ensuring a reliable link between the deliberations of representatives and the interests and desires of the represented is the electoral connection.”<sup>16</sup> The alignment approach may be new to election law, but it is hardly unfamiliar to democratic theory.

And in fact the alignment approach is *not* entirely new to election law. Hints of it are evident in the Court's great one-person, one-vote decisions, in which the Justices made clear that legislatures must accurately reflect the will of the electorate. Intimations of it also can be found in the Court's campaign finance case law, in which the argument appears on occasion that contributions may be regulated in order to prevent politicians from embracing the views of their donors rather than of their vot-

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14. Cf. Edward B. Foley, *Election Law and the Roberts Court: An Introduction*, 68 *Ohio St. L.J.* 733, 734 (2007) (imploiring scholars to “offer the Supreme Court ideas and principles concerning their field as a whole” to “make[] the cumulative body of the Court's precedent cohere as a sensibly unified law”).

15. Hanna Fenichel Pitkin, *The Concept of Representation* 234 (1967).

16. Joseph M. Bessette, *The Mild Voice of Reason: Deliberative Democracy and American National Government* 36 (1994).

ers.<sup>17</sup> In the legal literature as well, the responsiveness that many scholars value is not so different a concept from alignment.<sup>18</sup> Responsiveness refers to the *rate* at which legislative preferences change given some shift in voters' preferences, while alignment denotes the *congruence* of these preferences. Both terms share the premise that, in a democracy, public policy ultimately must be tied to public opinion.

Still, there is no question that the alignment approach is not the Court's usual approach in election law cases. To the extent the Court has an overarching theory in this domain, it is that valuable individual rights—speech, association, and the franchise—sometimes are burdened by regulations of the political process, and that in such circumstances it is the Court's duty to weigh the burdens against the countervailing interests served by the regulations. This methodology has little in common with the alignment approach's emphasis on the correspondence between voters' and representatives' preferences. Analogously, the dominant theory in the legal literature, that electoral practices should be assessed based on their implications for competition, is largely orthogonal to the alignment approach in terms of values and prescriptions. Competition and alignment may both be important democratic principles, but there is no reason to expect them to be especially highly correlated. Electoral systems easily may be competitive but misaligned, or uncompetitive but properly aligned.

The payoff of the alignment approach is that it reframes—and provides a common vocabulary for analyzing—an array of election law issues. For instance, *partisan misalignment*, the divergence between voters and representatives in terms of partisan preference, is a serious concern in the franchise restriction, campaign finance, and party regulation contexts. In the franchise restriction context, the misalignment occurs when the median actual voter (who is pivotal to the representative's election) differs from the median eligible voter who would have gone to the polls in the absence of the measure at issue. In the campaign finance setting, the misalignment arises when asymmetric spending creates a gap between the median actual voter and the median hypothetical voter exposed to more even outlays. And in the party regulation arena, an even starker sort of misalignment ensues when the presence of a third party on the ballot, enabled by lax regulation, results in the victory of a candidate not even preferred by the median actual voter.

In all of these cases, partisan misalignment produces *policy misalignment* too: the divergence between voters and representatives in terms of policy preferences. But other common electoral scenarios may generate policy misalignment even if there is no partisan misalignment. For example, the contributions that fuel modern campaigns may cause repre-

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17. See *infra* notes 143–145 and accompanying text (describing case law).

18. See *infra* note 67 and accompanying text (providing sample of responsiveness literature).

sentatives' issue preferences to reflect the views of their donors rather than those of their constituents. Likewise, closed primaries, which are used by about half the states, may encourage candidates to embrace the opinions of party activists instead of general election participants. And districts that are highly heterogeneous may make politicians more susceptible to partisan pressures since the signals they receive from their constituents are more difficult to interpret.

The above examples all involve district-level harms that may then aggregate into partisan or policy misalignment at the legislative level. But legislative misalignment also may be brought about *directly* by redistricting. Shrewd district lines may cause the party preferred by the median voter in a jurisdiction not to win a majority of the jurisdiction's seats. The partisan divergence is obvious in this case, and so too, given the parties' very different issue stances, is the resulting gap in policy preferences between the median voter and the median representative. Ironically, efforts to augment minority representation may give rise to the same kind of legislative misalignment. Minority-heavy districts often are very safe for the Democrats, so if too many of them are drawn, Republicans may end up winning a majority of a jurisdiction's seats even if they do not enjoy the support of a majority of the jurisdiction's voters.

In addition to reframing these issues, the Article draws on work by political scientists to estimate the *extent* of the misalignment in each context. For instance, photo identification requirements reduce turnout by 2% to 3%, on average, and result in a net pro-Republican swing of 0% to 1%.<sup>19</sup> The latter figure represents the partisan misalignment between the median actual voter and the median eligible voter who would have gone to the polls in the absence of the restriction. Similarly, the voting records of representatives are about six times more reflective of the views of affluent contributors than they are of the opinions of the median-income constituent.<sup>20</sup> This differential constitutes the policy misalignment between the representative and the median voter. And in the most recent election, congressional district plans featured an average partisan bias of about 10%.<sup>21</sup> If the disadvantaged party had won 50% of the vote (and the support of the median voter), it would have won only 40% of the seats (and not the allegiance of the median legislator).

To be clear, the Article does not claim that alignment is the *only* value that is relevant to the resolution of election law disputes. Individual rights (the Court's mainstay) and electoral competition (the darling of the legal literature) plainly are implicated in many cases, as are participation, political equality, minority representation, and a host of other con-

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19. *Infra* notes 186–188 and accompanying text.

20. *Infra* notes 252–258 and accompanying text.

21. *Infra* notes 292–293 and accompanying text.

siderations.<sup>22</sup> The Article's aim is to draw attention to a vital democratic principle that has been underappreciated to date—not to displace all other election law theories. Misalignment also is not a problem that is caused or can be solved by the law alone. The factors that produce misalignment (particularly of the policy variety) include internal legislative structures, powerful political parties, politicians' perceptions of their constituents' preferences, politicians' own ideologies, the geographic distribution of the parties' supporters, and single-member districting itself. Many of these factors are political; some are historical or psychological; but none clearly lies within law's empire.

The Article proceeds as follows: Part I surveys the existing accounts of election law disputes and identifies a crucial value—the alignment of voters' and representatives' preferences—that courts and scholars largely have neglected. Part II explicates the alignment approach. It outlines the approach's intellectual and doctrinal origins, explains what it is that ought to be aligned, and argues for the importance of preference congruence in a democracy. Part III, the pragmatic core of the Article, uses the alignment approach to reconceptualize a series of election law debates. It covers topics including franchise restriction, party regulation, campaign finance, redistricting, and minority representation. Lastly, Part IV sets forth some of the limits of alignment. It stresses the plurality of election law values as well as the constraints on what the law alone can achieve.

One final introductory point: The Article's rationale for introducing the alignment approach is not just that it redirects attention to a key issue in many election law cases. It is also that the problem of misalignment has never been greater in modern American history. Franchise restrictions that distort the composition of the electorate have surged in popularity in recent years.<sup>23</sup> The Supreme Court's 2010 decision in *Citizens United v. FEC* has opened the floodgates to much higher and more uneven campaign spending.<sup>24</sup> The partisan bias of congressional district plans reached a forty-year high in the 2012 election.<sup>25</sup> Conversely, the congruence between House members' voting patterns and constituents' opinions is now at a forty-year low.<sup>26</sup> Under these circum-

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22. See *infra* Part I.A–B (reviewing Court's and scholars' perspectives on election law).

23. See Weiser & Kasdan, *supra* note 1, at 1–6, 17–21 (surveying recent restrictive state voting laws).

24. 130 S. Ct. 876 (2010); see *infra* note 225 (discussing effects of *Citizens United*).

25. See *infra* notes 292–293 and accompanying text (noting that both absolute and pro-Republican redistricting biases are at highest levels since 1966).

26. See Stephen Ansolabehere et al., Candidate Positioning in U.S. House Elections, 45 *Am. J. Pol. Sci.* 136, 151 (2001) [hereinafter Ansolabehere et al., Candidate Positioning] (presenting chart of U.S. House candidate responsiveness over time); John D. Griffin, Party Polarization and Representation 12 fig.2 (n.d.) (unpublished manuscript), available at <http://www.dartmouth.edu/~govt/docs/John%20Griffin%20paper.pdf> (on file with the *Columbia Law Review*) (demonstrating increase in “average citizen distance



stances, it is not only scholars who may benefit from a renewed focus on preference alignment. It is also American democracy itself.

### I. WHY ELECTIONS?

In a well-known 2002 essay, Samuel Issacharoff posed the provocative question: Why elections?<sup>27</sup> Why, that is, do we use the ballot box to decide who will have the privilege of governing us? Issacharoff asked this question not as a democratic theorist but rather as an election law scholar. His aim was to formulate a theory that could both explain what is at stake in electoral disputes and guide courts in their resolution of these disputes. As he put it, a central task “in developing an organic view of the law of the political process is to provide a more robust understanding of what justifies . . . judicial intervention into the political domain.”<sup>28</sup>

I begin this Part by distilling from its case law the theory, such as it is, on which the Supreme Court relies to explain its activity in the election law arena. In brief, the Court’s view is that regulations of the political process, though they may serve many worthwhile state interests, also may burden valuable individual rights.<sup>29</sup> The Court’s duty is to ensure that the interests served by the regulations are worth the burdens imposed on the rights. I next describe the most prominent academic accounts of the harms that may arise in the electoral context and the ways that courts should strive to ameliorate them. Some scholars are sympathetic to the Court’s framework of rights balanced against interests. But the dominant perspective in the legal literature—the one that Issacharoff adopted to answer his “why elections” question—is that structural values, competition chief among them, provide the appropriate prism for making sense of the law of democracy.<sup>30</sup> Finally, I argue that both the doctrine and the literature largely have overlooked the vital value of aligning the preferences of voters with those of their elected representatives. Like competition, alignment is a structural value that does not fit easily into the Court’s rights-and-interests framework. But unlike competition, alignment has not yet been advanced as a unifying election law principle.

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from members of Congress”); cf. *The Polarization of the Congressional Parties*, Voteview.com, [http://voteview.org/political\\_polarization.asp](http://voteview.org/political_polarization.asp) (on file with the *Columbia Law Review*) (last updated Jan. 18, 2013) (illustrating dramatic increases in congressional polarization through 2012).

27. Samuel Issacharoff, *Surreply, Why Elections?*, 116 *Harv. L. Rev.* 684 (2002).

28. *Id.* at 684; see also Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 *N.C. L. Rev.* 1103, 1138 (2002) [hereinafter Charles, *Constitutional Pluralism*] (arguing ideal theory of judicial intervention in election law domain “would combine the constitutional text, with its silences, and its vagueness[,] . . . in addition to substantive principles of democratic theory”).

29. See *infra* Part I.A (reviewing Court’s election law jurisprudence).

30. See *infra* Part I.B (reviewing scholarly perspectives).

*A. The Court's Answer*

The closest the Supreme Court has come to articulating a general theory of judicial activity in the election law domain is its discussion of rights and interests in the 1992 case of *Burdick v. Takushi*.<sup>31</sup> The Court stated that “the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.”<sup>32</sup> If the burden on these rights—speech, association, and the franchise—is “severe,” then the regulation must be “narrowly drawn to advance a state interest of compelling importance.”<sup>33</sup> On the other hand, if the burden is more moderate, then “important regulatory interests are generally sufficient to justify” the regulation.<sup>34</sup> Courts almost always employ this approach in franchise restriction and party regulation cases.<sup>35</sup> They also use a variant of it in the campaign finance context, subjecting expenditure limits (which are thought to impose a heavy burden on the freedom of speech) to stricter scrutiny than contribution caps (whose burden is seen as lighter).<sup>36</sup> Related rights-and-interests tests are applied as well in certain kinds of redistricting<sup>37</sup> and minority representation<sup>38</sup> disputes.

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31. 504 U.S. 428 (1992). *Burdick* drew in turn on a number of earlier Court precedents, most notably *Anderson v. Celebrezze*, 460 U.S. 780, 786–90 (1983) (setting forth similar framework of individual rights balanced against countervailing state interests); see also Christopher S. Elmendorf, Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities, 156 U. Pa. L. Rev. 313, 317 (2007) [hereinafter Elmendorf, Judicial Review] (noting *Burdick* Court “undertook to restate the doctrines governing constitutional challenges to electoral mechanics”).

32. *Burdick*, 504 U.S. at 434.

33. *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

34. *Id.* (quoting *Anderson*, 460 U.S. at 788).

35. Some notable examples include *Crawford v. Marion County Election Board*, 553 U.S. 181, 189–91 (2008) (plurality opinion) (noting, in photo identification case, “a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the ‘hard judgment’ that our adversary system demands”), *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357–59 (1997) (observing, in fusion candidacy case, “we weigh the character and magnitude of the burden the State’s rule imposes on [individual] rights against the interests the State contends justify that burden” (quoting *Burdick*, 504 U.S. at 434) (internal quotation marks omitted)), and *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 213–14 (1986) (balancing rights and interests in party regulation case). See also Richard L. Hasen, The “Political Market” Metaphor and Election Law: A Comment on Issacharoff and Pildes, 50 *Stan. L. Rev.* 719, 721 (1998) (describing “current Supreme Court approach to election law cases in which the government provides a reason or reasons justifying the law, and the Court balances those reasons against any infringement on individual rights”); Samuel Issacharoff & Richard H. Pildes, Politics as Markets: Partisan Lockups of the Democratic Process, 50 *Stan. L. Rev.* 643, 645 (1998) [hereinafter Issacharoff & Pildes, Politics as Markets] (“In case after case, courts . . . apply sterile balancing tests weighing individual rights of political participation against countervailing state interests in orderly and stable processes.”).

36. See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 241–42, 246–47 (2006) (plurality opinion) (contrasting expenditure limits’ heavier burden on free speech with lighter

What seems to underpin this framework is a commitment to *optimizing* the simultaneous protection of individual rights and realization of state interests. The rights that may be encumbered by regulations of the political process are very important. The franchise, in particular, is a “fundamental matter in a free and democratic society” because “the right to exercise [it] in a free and unimpaired manner is preservative of other basic civil and political rights.”<sup>39</sup> But the interests served by electoral regulations are highly significant as well. Goals such as avoiding voter confusion, ensuring that elections run smoothly, and preventing political corruption are essential both on their face and in the eyes of the Court.<sup>40</sup> Confronted with pressing concerns on both sides of the ledger, the Court consistently casts itself in the role of balancer-in-chief. It assesses, on an ad hoc basis, the magnitude of the burdens that are imposed and the interests that are advanced, and it validates only those regulations that, in its view, confer policy benefits that outweigh their rights costs. Its apparent philosophy is that judicial intervention is justified in the election law arena in order to provide the optimal mix of rights protection and interest promotion.

Two related points about this philosophy are worth stressing. The first is that it is indistinguishable from the Court’s approach to constitutional disputes *outside* the electoral context. The Court carries out the same sort of rights-and-interests balancing in free speech, equal protection, and due process cases that do *not* involve any electoral issues. As Richard Pildes has put it, the Court’s framework “is conventional because it imports into the law of democracy the same doctrinal tools, legal tests, and ways of framing the issues from more fully developed areas of constitutional law.”<sup>41</sup> The second point is that the Court does not base its

burden of contribution limits); *Buckley v. Valeo*, 424 U.S. 1, 19–23 (1976) (per curiam) (same); see also Elmendorf, *Judicial Review*, supra note 31, at 357–61 (“[I]t is . . . appropriate to view the Court’s recent contribution limit jurisprudence as substantially informed by . . . the electoral mechanics case law.”).

37. See, e.g., *Karcher v. Daggett*, 462 U.S. 725, 740–41 (1983) (noting that inquiry in malapportionment context weighs dilution of right to vote against state interests such as compactness and respect for political subdivisions).

38. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 920–27 (1995) (observing that inquiry in racial gerrymandering context weighs representational harm against state interests such as remedying effects of past discrimination and complying with Voting Rights Act).

39. *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964); see also *Buckley*, 424 U.S. at 25 (asserting freedoms of speech and association “lie[] at the foundation of a free society” (quoting *Shelton v. Tucker*, 364 U.S. 479, 486 (1960))).

40. See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983) (“There can be no question about the legitimacy of the State’s interest in fostering informed and educated expressions of the popular will in a general election.”); *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 208 (1982) (describing “importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption”).

41. Richard H. Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, 3 *Election L.J.* 685, 687 (2004) [hereinafter Pildes, *Democracy*] (reviewing Richard A.

theory of election law on any substantive value that the democratic process is meant to realize, such as competition, participation, or alignment. The state may invoke a democratic value as a justification for burdening an individual right, but there is otherwise no place for democracy in the Court's theory. In the (rather harsh) words of Richard Posner, the Court has "failed to articulate a coherent conception of democracy even though the relation between law and democracy is fundamental to the proper role of judges in a democratic society."<sup>42</sup>

To be fair, the Court does sometimes use techniques other than rights-and-interests balancing to decide election law cases. Particularly in the redistricting and minority representation contexts, the Court often conceives of the harms it is seeking to cure in terms that do not involve infringements of individual rights. The "consistent[] degrad[ation]" of a party's "influence on the political process,"<sup>43</sup> a racial group's diminished "opportunity . . . to elect legislators of [its] choice,"<sup>44</sup> and a district plan's conveyance of the "message that political identity is . . . predominantly racial"<sup>45</sup> all are not rights-related injuries—but all have motivated the Court's interventions in these areas. It also is not the case that the Court has failed *entirely* to ground its election law decisions in democratic values. Issacharoff has identified an array of cases in which the Court hinted at the importance of holding representatives accountable to their constituents.<sup>46</sup> Later in the Article, similarly, I highlight several doctrinal passages that reveal the Court's occasional appreciation of the alignment principle.<sup>47</sup>

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Posner, *Law, Pragmatism, and Democracy* (2003)); see also James A. Gardner, *The Dignity of Voters—A Dissent*, 64 U. Miami L. Rev. 435, 438 (2010) ("Democratic politics is not . . . treated differently from any other arena of governmental and citizen activity.").

42. Richard A. Posner, *Law, Pragmatism, and Democracy* 131 (2003); see also Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny*, 80 N.C. L. Rev. 1411, 1427 (2002) [hereinafter Gerken, *Minimalism*] ("Despite demands from its own members to offer a sufficiently robust theory for deciding what equality should mean in the reapportionment context, the Court never did so." (footnote omitted)); Issacharoff & Pildes, *Politics as Markets*, supra note 35, at 646 ("[T]he Court's electoral jurisprudence lacks any underlying vision of democratic politics that is normatively robust or realistically sophisticated . . .").

43. *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality opinion) (stating standard for partisan gerrymandering challenges).

44. *White v. Regester*, 412 U.S. 755, 766 (1973) (stating standard for racial vote dilution challenges under Fourteenth Amendment).

45. *Bush v. Vera*, 517 U.S. 952, 980 (1996) (plurality opinion) (stating standard for racial gerrymandering challenges).

46. Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 605–06 (2002) [hereinafter Issacharoff, *Gerrymandering*]; see also Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28, 46 (2004) [hereinafter Pildes, *Constitutionalization*] ("[T]he actions of courts in this domain reveal that they are enforcing structural values concerning the democratic order as a whole, albeit erratically and not always self-consciously . . .").

47. See *infra* Part II.C (showing that alignment principle has made repeated appearances in certain Justices' opinions).

Notwithstanding these caveats, it is clear that the Court's dominant election law theory is the concurrent optimization of individual rights and state interests. It also is clear that this theory does not include a major role for any substantive democratic value. Next, I consider the accounts that scholars have put forward of the harms in election law cases and the ways in which courts should address them. Some academics support the Court's rights-and-interests balancing; others are passionate advocates of a structural theory of election law; and still others aim to reconcile the two sides of the heated balance-versus-structure debate.

### B. *Balance Versus Structure*

To begin with, a number of prominent scholars agree with the Court that its task should be to balance the rights burdens imposed by electoral regulations against the interests that the regulations serve. These scholars do not necessarily concur with the Court's conclusions in each case, but they are receptive to the notion of the Court as ultimate assessor of burdens and interests. Richard Hasen, for example, writes that he "agree[s] with the Court's jurisprudence that a balancing of interests is required when a plaintiff's assertion of a . . . right is defended by the state's assertion of a government interest."<sup>48</sup> Likewise, Bruce Cain comments that it is "important that the courts balance [election] laws against the rights of voters, candidates, parties, and groups to determine whether they are constitutionally permissible."<sup>49</sup> And Nathaniel Persily argues that it is unsurprising—indeed commendable—that "[t]he Court's jurisprudence in 'democracy' cases . . . flows logically from or fits comfortably within larger constitutional doctrines."<sup>50</sup>

The prevailing position in the legal literature, however, is that the Court's discourse of rights and interests fails to capture what is truly at stake in election law cases.<sup>51</sup> What is at stake, on this view, is irreducibly *structural*: the relationships between candidates, groups, and parties; the allocation of power between different political actors; and the operation of the electoral system as a whole. It is these structural factors—summa-

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48. Richard L. Hasen, *The Supreme Court and Election Law: Judging Equality from Baker v. Carr to Bush v. Gore* 97 (2003) [hereinafter Hasen, *Election Law*].

49. Bruce E. Cain, *Commentary, Garrett's Temptation*, 85 *Va. L. Rev.* 1589, 1603 (1999).

50. Nathaniel Persily, *Commentary, The Search for Comprehensive Descriptions and Prescriptions in Election Law*, 35 *Conn. L. Rev.* 1509, 1515 (2003); see also Daniel H. Lowenstein, *The Supreme Court Has No Theory of Politics—and Be Thankful for Small Favors*, in *The U.S. Supreme Court and the Electoral Process* 283, 297–302 (David K. Ryden ed., 2d rev. ed. 2002) (arguing Supreme Court should not try to develop theory of democracy to apply in election law cases).

51. See, e.g., Hasen, *Election Law*, *supra* note 48, at 139 (referring to structuralism as "new election law orthodoxy"); Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 *Ind. L.J.* 1289, 1290 (2011) [hereinafter Fishkin, *Individual Right*] (describing "emerging consensus hold[ing] that courts ought to focus on 'structural' benefits and harms").

rized by Pildes as the “interlocking relationships of the institutions . . . that organize the democratic system”<sup>52</sup>—that explain why much election law litigation is launched in the first place. It is also these factors that are most affected, for good or for ill, by the outcomes of the litigation. Accordingly, they should be the focus of the Court’s jurisprudence, not rights and interests that are linked only tenuously to the underlying functional realities.

The ranks of the structuralists include Issacharoff, Pildes, and Posner, as well as Justice Stephen Breyer,<sup>53</sup> Christopher Elmendorf,<sup>54</sup> Heather Gerken,<sup>55</sup> Michael Kang,<sup>56</sup> Pamela Karlan,<sup>57</sup> Michael Klarman,<sup>58</sup> Daniel Ortiz,<sup>59</sup> Spencer Overton,<sup>60</sup> and David Schleicher.<sup>61</sup> But while these scholars agree on the unsuitability of the Court’s framework, they are divided as to what the most important structural consideration might be. Electoral competition is the value that most of them favor; as Issacharoff and Pildes put it in their seminal 1998 article, “Our aim is to read into the Constitution an indispensable commitment to the preserva-

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52. Pildes, *Constitutionalization*, supra note 46, at 41.

53. See, e.g., Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 28 (2005) (“[W]e can find in the Constitution’s structural complexity an effort to produce a form of democracy . . . that could produce legislation that would match the needs of the nation.”).

54. See, e.g., Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 *Hastings Const. L.Q.* 643, 644 (2008) [hereinafter Elmendorf, *Undue Burdens*] (“[C]ourts would have an easier time developing judicially manageable rules for decision if they adopted an expressly structural understanding of the right to vote . . .”).

55. See, e.g., Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 *U. Pa. L. Rev.* 503, 519 (2004) (“Should the Court . . . choose to remain in the political thicket, it could try to get a better map by adopting an explicitly structural approach.”).

56. See, e.g., Michael S. Kang, *Race and Democratic Contestation*, 117 *Yale L.J.* 734, 738 (2008) [hereinafter Kang, *Contestation*] (“[A] structural commitment to competition in politics ought to transcend the simple maintenance of competitive elections between the major parties.”).

57. See, e.g., Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 *N.C. L. Rev.* 1345, 1346 (2001) (noting Court’s use of “structural” equal protection in regulating political institutions).

58. See, e.g., Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 *Geo. L.J.* 491, 528–39 (1997) (critiquing Court’s election law doctrine from “anti-entrenchment,” majoritarian perspective).

59. See, e.g., Daniel R. Ortiz, *From Rights to Arrangements*, 32 *Loy. L.A. L. Rev.* 1217, 1218 (1999) (suggesting election law has improved by shifting focus to “more pragmatic and structural view of politics as a matter of institutional arrangements”).

60. See, e.g., Spencer Overton, *Voter Identification*, 105 *Mich. L. Rev.* 631, 674 (2007) [hereinafter Overton, *Identification*] (“Judges should not ignore questions of democratic structure and skewed results . . .”).

61. See, e.g., David Schleicher, “Politics as Markets” Reconsidered: Natural Monopolies, Competitive Democratic Philosophy and Primary Ballot Access in American Elections, 14 *Supreme Ct. Econ. Rev.* 163, 167 (2006) (“[T]he American political system has structural characteristics that do not fit neatly into a simple market analogy.”).

tion of an appropriately competitive political order.”<sup>62</sup> On the other hand, Justice Breyer,<sup>63</sup> Elmendorf,<sup>64</sup> and Overton<sup>65</sup> have argued for the primacy of voter participation, considered in the aggregate rather than individually. Under either account, election law disputes should be analyzed directly in terms of their implications for the relevant structural value. Courts should invalidate practices that unjustifiably suppress competition (or turnout), and uphold practices that do not.<sup>66</sup>

Both the competitive and the participatory variants of structuralism derive from normative visions of a properly functioning democracy. According to its proponents, competition is necessary for the achievement of two key democratic goals: accountability, the ability of voters to oust from office politicians whose records they dislike, and responsiveness, the degree to which shifts in voters’ preferences result in changes in the composition (and policies) of the government.<sup>67</sup> Similarly, participation is lauded by its advocates because it enhances the legitimacy of electoral outcomes, exposes politicians to more of the public’s views, and connects voters more closely to their representatives.<sup>68</sup> Competition and

62. Issacharoff & Pildes, *Politics as Markets*, supra note 35, at 716; see also, e.g., Issacharoff, *Gerrymandering*, supra note 46, at 615 (“[T]he concept of ‘fair’ representation has no meaning outside an appropriately competitive electoral process.”); Kang, *Contestation*, supra note 56, at 738 (defining and arguing for “democratic contestation”); Klarman, supra note 58, at 497–98 (defining and arguing for “anti-trenchment”); Daniel R. Ortiz, *Got Theory?*, 153 U. Pa. L. Rev. 459, 485–90 (2004) [hereinafter Ortiz, *Got Theory?*] (discussing anticompetitive effects of partisan gerrymandering); Pildes, *Democracy*, supra note 41, at 688 (“[A]s long as the system remains open to constant change—remains competitive—courts ought not intervene.”).

63. See, e.g., Breyer, supra note 53, at 5 (emphasizing importance of citizen participation in modern liberty).

64. See, e.g., Elmendorf, *Undue Burdens*, supra note 54, at 653 (arguing that “aggregate pattern of voter participation is a proper object of constitutional concern”).

65. See, e.g., Overton, *Identification*, supra note 60, at 673 (discussing effect of photo identification laws on aggregate turnout); see also Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. Pa. L. Rev. 73, 105 (2004) [hereinafter Overton, *Donor Class*] (noting financial disparities’ impact on citizens’ electoral participation).

66. See Michael S. Kang, *When Courts Won’t Make Law: Partisan Gerrymandering and a Structural Approach to the Law of Democracy*, 68 Ohio St. L.J. 1097, 1113 (2007) (“[Structuralists] argue that . . . in the law of democracy, courts ought to serve those structural goals more directly.”).

67. See Issacharoff, *Gerrymandering*, supra note 46, at 600, 615–16 (discussing gerrymandering’s implications for accountability); Issacharoff & Pildes, *Politics as Markets*, supra note 35, at 646 (noting genuinely competitive process is required to ensure responsiveness); Richard H. Pildes, *Commentary, The Theory of Political Competition*, 85 Va. L. Rev. 1605, 1607 (1999) [hereinafter Pildes, *Political Competition*] (arguing that “‘artificial’ barriers to robust partisan competition” must “not be permitted”).

68. See, e.g., Elmendorf, *Undue Burdens*, supra note 54, at 677 (“The aggregate rate of voter participation might be thought an object of constitutional concern insofar as it signifies the legitimacy of the political order.”); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 Tex. L. Rev. 1705, 1710 (1993) [hereinafter Karlan, *Rights to Vote*] (arguing that voter participation promotes “civic inclusion”); Overton,

participation therefore are instrumental rather than intrinsic values. They matter not for their own sake but because they allegedly make possible a healthy democratic order.

A final group of scholars do not fit easily into either the balancing or the structuralist camps. Their hallmark, in fact, is that they hope to bridge the divide between the camps, to forge a synthesis between individual- and polity-centered theories of election law. For instance, Guy-Uriel Charles has argued that electoral disputes are inherently *dualistic*, in that they involve both genuine rights claims and consequences for underlying political arrangements. Courts should (and do) consider both of these aspects when resolving the disputes.<sup>69</sup> Likewise, Daniel Farber has proposed an approach that “lies somewhere between structuralism and the traditional conception of individual rights,” in that it recognizes systemic harms but asks courts to address them only when they are manifested in identifiable individual injuries.<sup>70</sup> And Joseph Fishkin has contended that the appropriate judicial methodology varies based on the doctrinal context. Rights-and-interests balancing works well in franchise restriction cases, while structural analysis is necessary in areas such as redistricting and minority representation.<sup>71</sup>

Much more could be—and has been<sup>72</sup>—said about the roiling theoretical debate in the election law literature. But my aim in describing the debate was not to cover its every nuance, but rather to demonstrate that the alignment approach, despite its intuitiveness, has not yet been advanced in any sort of systematic fashion. In the next section, I explain how the approach draws, but also stands distinct, from much existing doctrine and scholarship. Alignment is *related* to other structural values (and their democratic ends), but it is far from the same thing.

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Identification, *supra* note 60, at 636, 657 (arguing that “widespread participation” furthers democratic deliberation, accountability, responsiveness, and citizen self-definition).

69. See Guy-Uriel Charles, *Judging the Law of Politics*, 103 *Mich. L. Rev.* 1099, 1113–30 (2005) [hereinafter Charles, *Law of Politics*] (reviewing Hasen, *Election Law*, *supra* note 48) (articulating dualistic theory).

70. Daniel A. Farber, *Implementing Equality*, 3 *Election L.J.* 371, 377 (2004) (reviewing Hasen, *Election Law*, *supra* note 48).

71. See Fishkin, *Individual Right*, *supra* note 51, at 1292 (noting suitability of rights-and-interests balancing in certain contexts); Joseph Fishkin, *Weightless Votes*, 121 *Yale L.J.* 1888, 1893 (2012) [hereinafter Fishkin, *Weightless Votes*] (advocating structural approach in one-person, one-vote context).

72. Works that discuss this debate in more detail include Hasen, *Election Law*, *supra* note 48; Charles, *Law of Politics*, *supra* note 69; Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 *Geo. L.J.* 1411 (2008); Fishkin, *Individual Right*, *supra* note 51; Luke P. McLoughlin, *The Elysian Foundations of Election Law*, 82 *Temp. L. Rev.* 89 (2009); Pildes, *Political Competition*, *supra* note 67; and Yen-Tu Su, *Retracing Political Antitrust: A Genealogy and Its Lessons*, 27 *J.L. & Pol.* 1 (2011).



C. *The Missing Structural Value*

Beginning with the Supreme Court's framework, it is clear that balancing rights and interests is different from aligning voters' and representatives' preferences. No individual right to a properly aligned representative has ever been recognized by the Court. Nor would such a right make any conceptual sense, since it is only the *median* voter, not *every* voter, whose preferences have normative significance under the alignment approach. The median voter is pivotal because, by definition, she speaks for a majority of all voters. Nonmedian voters have no comparable claim that their preferences should be shared by their representatives.

It is true that alignment may be invoked doctrinally as a justification for burdening an individual right. In fact, as discussed later in the Article, the concept occasionally has surfaced in Court opinions in precisely this manner.<sup>73</sup> But states only rarely try to defend their electoral regulations against rights challenges by pointing to the regulations' aligning attributes. And even if states more often mounted such defenses, courts still would be able to endorse alignment only in cases where rights claims triggered judicial review in the first place. Courts would not be able to strike down misaligning practices that do not burden any individual rights. Nor would courts be able to strike down misaligning practices that *do* burden rights (at least on the basis of the misalignment), since interests other than alignment obviously would be used to justify the practices.

Of course, it is unsurprising that the alignment approach cannot be reconciled with the Court's rights-and-interests balancing. Alignment is a quintessential structural value—a value that matters to the entire polity, not to any particular group or individual—and the whole point of the structuralist critique is that the Court's jurisprudence does not adequately account for such values. How, then, does alignment relate to the literature's favored values of competition and participation? Are they actually distinct concepts?

They plainly are. Competition refers above all to the margin of victory in elections, though it also covers related ideas such as how often incumbents are defeated, how many campaigns are uncontested, and what proportion of races are expected (even if they do not turn out) to be close.<sup>74</sup> At the level of an individual district, it is easy for an election to be competitive but to produce partisan or policy misalignment. For example, one candidate may receive 48% of the vote, another candidate may receive 45%, and a third candidate may get 7%, all of whom prefer the second candidate to the first. This election is extremely competitive, with a margin of victory of only 3%, but it also results in a winner who is

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73. See *infra* Part II.C (showing that alignment principle has made repeated appearances in certain Justices' opinions).

74. See, e.g., Issacharoff, *Gerrymandering*, *supra* note 46, at 620–30 (discussing competition in all of these senses).

not preferred by the median voter. Similarly, even in a two-party election, a candidate may win a close race but may then start casting votes in the legislature that diverge sharply from the preferences of the median voter. In this (all too common<sup>75</sup>) scenario, a high level of competition is compatible with significant policy misalignment.

At the level of the legislature as well, a competitive district plan is not necessarily a properly aligned one. Suppose that a state has ten districts and a thousand voters, of whom 55% are Republicans and 45% are Democrats. Suppose also that eight of the districts elect Democrats by a 52% to 48% margin and two of them elect Republicans by a 83% to 17% margin. The median margin of victory is just 4% in this case but the partisan misalignment is staggering—Democrats prevail in eight of the ten districts even though the median voter is a Republican. Conversely, imagine that six of the districts elect Republicans by a 65% to 35% margin and four of them elect Democrats by a 60% to 40% margin. The median margin of victory is 30% in this case, a very high level, but there is no partisan misalignment at all. The median voter is a Republican and so is the median representative.

That alignment is not the same thing as participation is even clearer. Considered in the aggregate, participation refers to the rate of voter turnout in an election.<sup>76</sup> Alignment and turnout simply are unrelated concepts. Voters' and representatives' preferences may be aligned whether turnout is high or low, just as they may be misaligned no matter how many or how few people show up at the polls. To be sure, there may be *links* between alignment and turnout, but, if so, this is because the concepts are connected by certain causal chains, not because they are alternative terms for the same phenomenon.

But recall from the above discussion that competition and participation are instrumental rather than intrinsic values—values that matter, above all, because of the kind of democracy that they allegedly bring about.<sup>77</sup> Interestingly, alignment is related more closely to the demo-

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75. See, e.g., Stephen Ansolabehere et al., *The Effects of Party and Preferences on Congressional Roll-Call Voting*, 26 *Legis. Stud. Q.* 533, 540–41 & fig.1 (2001) [hereinafter Ansolabehere et al., *Roll-Call Voting*] (showing distribution of legislators' roll-call votes is far more bimodal than distribution of constituents' opinions); Joseph Bafumi & Michael C. Herron, *Leapfrog Representation and Extremism: A Study of American Voters and Their Members in Congress*, 104 *Am. Pol. Sci. Rev.* 519, 528–29 & fig.1 (2010) (same); Seth E. Masket & Hans Noel, *Serving Two Masters: Using Referenda to Assess Partisan Versus Dyadic Legislative Representation*, 65 *Pol. Res. Q.* 104, 109–10 & fig.1 (2012) (same).

76. See Elmendorf, *Undue Burdens*, *supra* note 54, at 690–91 (advocating “representative” over “rampant” voter participation); Fishkin, *Individual Right*, *supra* note 51, at 1301 (noting importance of participation for political clout); Overton, *Identification*, *supra* note 60, at 672–74 (emphasizing importance of aggregate over individual voter turnout).

77. See *supra* notes 67–68 and accompanying text (discussing array of democratic ends served by competition and participation).

cratic *ends* of competition and participation than it is to the values *themselves*. Competition, first, is deemed vital by its proponents because it increases responsiveness,<sup>78</sup> which in turn has been defined as “a positive correlation between opinion and policy”<sup>79</sup> or “the degree to which the partisan composition of the legislature responds to changes in voter preferences.”<sup>80</sup> Responsiveness is similar to alignment in that it too describes how public opinion is linked to important outputs such as legislative composition, politicians’ voting records, and actual public policy. It too acknowledges that, in a democracy, the will of the people ultimately should be sovereign.<sup>81</sup>

But responsiveness differs from alignment in that it refers to the *rate* at which these outputs change given some shift in public opinion. Alignment, in contrast, denotes whether or not the outputs are *congruent* with the public’s preferences.<sup>82</sup> To illustrate the difference, suppose that in one election the Democrats receive 51% of a state’s vote and 41% of the state’s seats, and that in the next election they receive 52% of the state’s vote and 49% of its seats. Both elections result in partisan misalignment between the median voter and the median representative. But, in tandem, the elections reflect an extremely high level of responsiveness—an 8% swing in seats for just a 1% swing in votes. Analogously, imagine (quite plausibly) that a politician is highly unlikely to vote for same-sex marriage when 55% of his constituents support the policy, but highly likely to do so when 65% support it.<sup>83</sup> Then the politician’s preferences are misaligned with those of the median voter at the 55% point but properly aligned at the 65% point. And responsiveness is very high when public opinion moves from 55% to 65% but very low for all other opinion shifts.

78. See sources cited *supra* note 67 (explaining competition’s connection to responsiveness).

79. Jeffrey R. Lax & Justin H. Phillips, *The Democratic Deficit in the States*, 56 *Am. J. Pol. Sci.* 148, 148 (2012).

80. Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 *Am. Pol. Sci. Rev.* 541, 542 (1994).

81. More specifically, some responsiveness is necessary to achieve alignment whenever public opinion shifts. Without any responsiveness, misalignment inevitably would ensue whenever people’s preferences change.

82. As Lax and Phillips explain, “Policy adoption may increase with higher public support (suggesting responsiveness), but policy may still often be inconsistent with majority opinion (suggesting a lack of congruence).” Lax & Phillips, *supra* note 79, at 148; see also Boris Shor, *All Together Now: Putting Congress, State Legislatures, and Individuals in a Common Ideological Space to Assess Representation at the Macro and Micro Levels 2* (Apr. 25, 2011) (unpublished manuscript), available at <http://ssrn.com/abstract=1697352> (on file with the *Columbia Law Review*) (noting that responsiveness “denotes the idea that legislators . . . respond to their constituents’ policy preferences” while congruence requires that “preferences of constituents and the representative . . . match in some common metric”).

83. See Lax & Phillips, *supra* note 79, at 156 fig.2 (showing relationship between probability of policy adoption and public opinion for array of issues).

Competition theorists might respond that I am taking their references to responsiveness too literally. Competition, they might argue, promotes *both* responsiveness and alignment. The trouble with this claim (aside from the fact that it has not been made) is that, empirically, there is only a weak relationship between competition and alignment. Voters' and representatives' preferences are only slightly more congruent in highly competitive districts than they are in highly uncompetitive districts.<sup>84</sup> The levels of policy misalignment in highly competitive districts still are staggering.<sup>85</sup> The evidence that competition fosters alignment therefore is much less compelling than the evidence that it fosters responsiveness (which includes a strong negative correlation between responsiveness and the average margin of victory in a jurisdiction).<sup>86</sup> At the very least, if alignment were one's core democratic objective, one would not seek to achieve it primarily by making elections more competitive.

As for participation, one of the democratic goals that it is supposed to attain is the enhancement of the legitimacy of electoral outcomes.<sup>87</sup> Outcomes are more legitimate, according to Elmendorf, when "the distribution of interests and concerns among the voting public [mirrors] the corresponding distribution within the normative electorate as a whole."<sup>88</sup> Asking how similar the preference distributions are of actual voters and of eligible voters, it is true, is similar to asking how aligned the preferences are of the median actual voter and of the median eligible voter. However, one difference between the approaches is that a preference *distribution* is more complex, and more difficult to analyze, than the mere position of the *median*. Another difference is that distributional alignment is not ultimately a majoritarian value, but rather one that sounds in the register of proportional representation. Moreover, the

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84. See Ansolabehere et al., *Candidate Positioning*, supra note 26, at 145 (finding shift from 30% margin of victory to perfect tie increases candidate convergence by only 0.069 points on 0 to 1 scale); Thomas L. Brunell & Bernard Grofman, *Evaluating the Impact of Redistricting on District Homogeneity, Political Competition, and Political Extremism in the U.S. House of Representatives, 1962 to 2006*, in *Designing Democratic Government: Making Institutions Work* 117, 131–32 (Margaret Levi et al. eds., 2008) (showing almost no relationship between Democratic share of two-party House vote and representative's voting record).

85. See sources cited supra note 75 (finding high policy misalignment even when districts are very competitive).

86. According to data on file with the *Columbia Law Review*, this correlation was -0.72 for state legislative elections held between 1968 and 2012. See also John D. Griffin, *Electoral Competition and Democratic Responsiveness: A Defense of the Marginality Hypothesis*, 68 J. Pol. 911, 919 (2006) (finding "as competitiveness within districts increases, legislators become more responsive to change in their district's liberalism").

87. See sources cited supra note 68 (describing greater legitimacy and other ends allegedly achieved by increased participation).

88. Elmendorf, *Undue Burdens*, supra note 54, at 675–76; see also Fishkin, *Individual Right*, supra note 51, at 1308–09 (describing antifraud measures that, by reducing participation, cause "political distortion or skew"); Overton, *Identification*, supra note 60, at 668–69 (explaining skewing effect of voter fraud measures on certain communities).

skewing of distributions of “interests and concerns” corresponds to only one kind of misalignment: policy misalignment at the district level. To the extent that other kinds of misalignment are troubling as well—such as partisan misalignment and misalignment at the legislative level—such skewing is an inadequate articulation of the democratic harm.

Why has the legal literature overlooked a value as seemingly intuitive as alignment?<sup>89</sup> One answer is that scholars may have supposed, incorrectly, that the democratic ends advanced by their own preferred values are functionally identical to alignment. They may have thought that by arguing for responsiveness or for undistorted preference distributions they also were arguing for a properly aligned political system.<sup>90</sup> Another answer is that the empirical advances that have made possible the quantification (and comparison) of voters’ and representatives’ policy preferences are very recent. Until the last few years, alignment could have been proposed as a normative ideal, but it could not have been measured with any confidence.

A final explanation for the oversight is that, over the last generation, “debates about democratic theory” in the legal literature “have been organized around conflicts between competitive and rights-oriented conceptions of democracy.”<sup>91</sup> Scholars have quarreled extensively about whether electoral disputes are better conceived in competitive or in rights terms—but they have neglected, for the most part, the exploration of *other* democratic values. This Article’s introduction of the alignment approach therefore is similar to the efforts by certain scholars to stress the significance of voter participation.<sup>92</sup> It too is an attempt to raise the profile of a crucial value that has been underappreciated to date.

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89. Of course, alignment has not been overlooked entirely by the literature. Some of the works that have addressed it in passing include Charles, *Constitutional Pluralism*, supra note 28, at 1146 (describing responsiveness to majority interests as basic tenet of democracy); Samuel Issacharoff & Richard H. Pildes, Not by “Election Law” Alone, 32 *Loy. L.A. L. Rev.* 1173, 1181 (1999) (criticizing “structural obstacles to the realization of majority preferences in American democracy” (emphasis omitted)); Karlan, *Rights to Vote*, supra note 68, at 1717 (describing hypothetical voter’s concern for effective interest representation); and Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 *N.Y.U. L. Rev.* 750, 806 (2001) [hereinafter Persily, *Autonomy*] (describing skeptically “system that intends to channel elections toward the choice of the median voter”).

90. Cf. Posner, supra note 42, at 165–66 (conflating “responsiveness to public opinion” with “align[ing] the behavior of politicians and officials with the people’s interests”).

91. Pildes, *Democracy*, supra note 41, at 686; see also Nathaniel Persily, Reply, In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders, 116 *Harv. L. Rev.* 649, 651 (2002) (“[T]he debate has revolved around the desirability of a jurisprudential shift away from rights-based analysis toward an emphasis on electoral competition.”).

92. See supra notes 63–65 and accompanying text (citing efforts of Justice Breyer, Elmdorf, and Overton).

## II. THE ALIGNMENT APPROACH

In order to raise the profile of alignment, of course, it is necessary to define the concept carefully, to identify its intellectual and doctrinal origins, and to explain why it is normatively attractive. Alignment cannot possibly be embraced until it is clear what it *is*. In this Part, then, I begin the project of explicating and defending the alignment approach. I first discuss what ought to be aligned and at which levels. It is voters' partisan and policy preferences that should correspond to those of their representatives, and these preferences should match within both each district and the jurisdiction as a whole. Partisan and policy alignment are related in interesting ways, as are district-specific and legislative alignment.

Next, I consider what the democratic theory literature has to say about alignment. An overlapping consensus exists, among several sorts of thinkers, that voters' and representatives' preferences should be congruent. One therefore can adhere to any of several perspectives on democracy and still regard alignment as an important value. From theory I then move on to doctrine. In the Supreme Court's case law too, the significance of alignment has been recognized in contexts including party regulation, campaign finance, and redistricting. The Court rarely has *focused* on alignment, but it often has acknowledged it. Finally, I articulate what I take to be the normative appeal of the alignment approach. By emphasizing how closely voters' and representatives' preferences correspond, the approach directs our attention to the crux of what it means to be a democracy. The people only rule—we only have a *kratos* of the *demos*—when the views of the governed and of the governing ultimately are consistent.

### A. Conceptual Framework

The most obvious question about the alignment approach is what should be aligned—and the most obvious answer is voters' and representatives' *partisan preferences*.<sup>93</sup> If a majority of a jurisdiction's voters prefer Party A to Party B, then a politician from Party A should represent the voters. The partisan preference of the median voter should correspond to the partisan affiliation of the representative. Any other outcome would be undemocratic because it would thwart the unambiguous will of the majority.

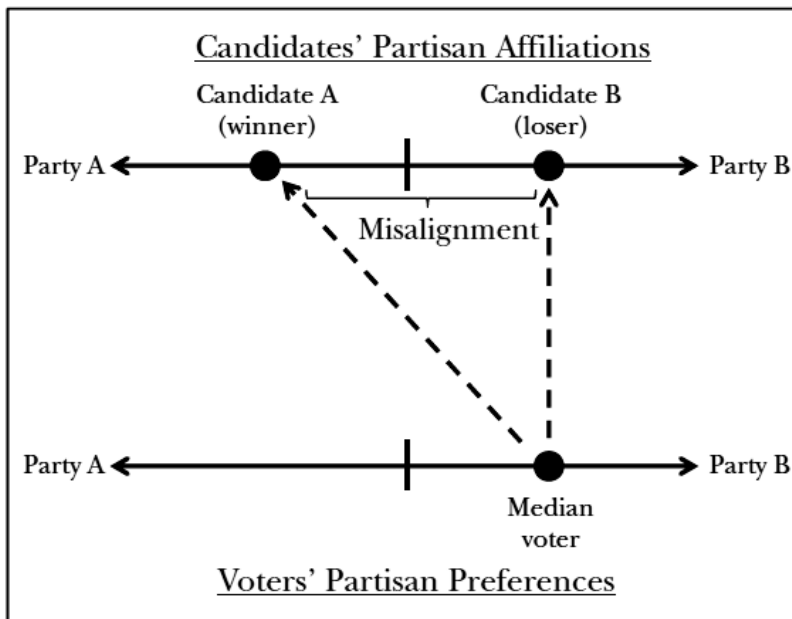
This point likely seems correct but banal. Of course, the majority's partisan preference should not be frustrated, but how *can* it be frustrated? In fact, partisan misalignment can arise in two distinct ways (even in an election that is not rigged). First, in a race with multiple candidates

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93. Although this section is largely descriptive, it inevitably includes more normative elements as well. See David Held, *Models of Democracy* 6 (Polity Press 3d ed. 2006) (1987) (noting discussions of democracy “involve necessarily . . . a shifting balance between descriptive-explanatory and normative statements”). Part II.D, *infra*, presents a more explicitly normative case for the alignment approach.

competing for a single position under a plurality voting rule—a common scenario in the United States—the candidate preferred by the median voter easily can fail to be elected. Suppose that Candidate *A* receives 48% of the vote, Candidate *B* receives 45%, and Candidate *C* gets 7%, and that all of Candidate *C*'s supporters prefer Candidate *B* to Candidate *A*. In this case, Candidate *A* is elected even though the electorate prefers Candidate *B* by a 52% to 48% margin.<sup>94</sup> This kind of misalignment is depicted in Figure 1, and it occurs whenever the median voter's partisan preference is not satisfied due to the way the vote is divided among multiple candidates.

FIGURE 1: PARTISAN MISALIGNMENT DUE TO MULTIPLE CANDIDATES



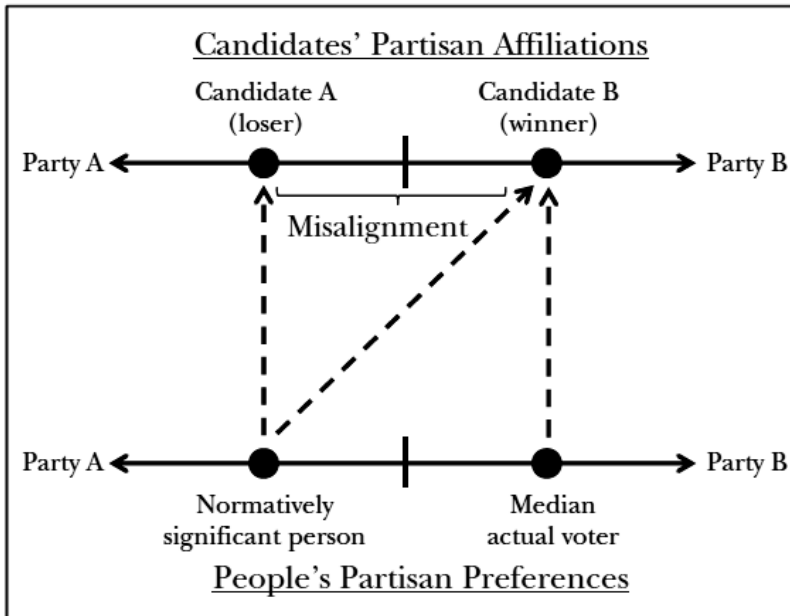
Second, even in a two-party race in which the partisan preference of the median actual voter necessarily is satisfied, the partisan preference of a *different* person with normative significance may not be realized. A disjunction then emerges between the median actual voter (whose preferred candidate is elected) and the normatively significant person (whose preferred candidate is not). Imagine that a majority of eligible voters who would like to vote—a group with clear normative appeal—

94. This is the same hypothetical that I used earlier to demonstrate the difference between alignment and competition. *Supra* text accompanying notes 74–75; see also G. Bingham Powell, Jr. & Georg S. Vanberg, *Election Laws, Disproportionality and Median Correspondence: Implications for Two Visions of Democracy*, 30 *Brit. J. Pol. Sci.* 383, 399 (2000) (“[T]he presence of multiple parties may split the votes in a way such that the party closest to the median is not even the plurality winner.”).

prefer Candidate *A* to Candidate *B*. Imagine too that some of these people are prevented from voting by a franchise restriction, and that Candidate *B* ends up receiving the most votes. Then Candidate *B* prevails, because he is the choice of the median actual voter, but his election is troubling because he is not the choice of the median eligible voter who would have participated in the absence of the restriction. This type of misalignment is illustrated in Figure 2, and it is possible whenever the actual electorate is distorted relative to the normative electorate.<sup>95</sup>

To be clear, the alignment approach does not assist in the selection of the normatively significant person whose partisan preference should be satisfied. This figure can be chosen only on the basis of *other* democratic values, such as civic participation or political equality.<sup>96</sup> But once this figure has been picked, the alignment approach provides a useful framework for analyzing electoral policies. Policies that widen the gap between the median actual voter and the normatively significant person are problematic because they make it more likely that the latter figure's preferred candidate will fail to be elected. Conversely, policies that shrink the gap are appealing because they reduce the odds of such wrong-winner outcomes.

FIGURE 2: PARTISAN MISALIGNMENT DUE TO DISTORTION OF ELECTORATE



95. See Elmendorf, *Undue Burdens*, *supra* note 54, at 677 (arguing “representative voting public best approximates the electoral ideal in which public officials are chosen by and accountable to the normative electorate as a whole”).

96. See *infra* Part III.A, C (discussing median eligible voter who wishes to participate in election and median hypothetical voter exposed to even campaign expenditures).



While partisan alignment is a crucial first step, alone it does not suffice to realize key democratic values. For the will of the people actually to be authoritative, representatives should share not only median voters' *partisan* preferences but also their *policy* preferences—that is, their general political ideologies as well as their views on more specific policy matters.<sup>97</sup> Only policy alignment enables constituents to exercise genuine substantive control over their representatives. Partisan alignment merely ensures that constituents can pick their representatives' party labels, which is quite a modest conception of popular sovereignty. As political theorist Michael McDonald has written, "To be truly democratic, the rules for [elections] should empower the voter median by ensuring that it is also the policy position of the [representative]."<sup>98</sup>

Policy misalignment is almost inevitable whenever there is partisan misalignment. Since the parties hold different policy views,<sup>99</sup> if the partisan preferences of the median voter<sup>100</sup> and the representative are not congruent, it is a virtual certainty that their policy preferences also will be at odds. But policy misalignment can arise as well in the absence of partisan misalignment. Even if the partisan affiliation of the representative is consistent with the wishes of the median voter, the representative's policy stances might not be. The representative might compile a highly conservative voting record while the median voter prefers center-right moderation. Or the representative might support universal health insurance while the median voter prefers a more limited expansion of existing government programs. This characteristic kind of policy misalignment, in

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97. Cf. Barry C. Burden, *Institutions and Policy Representation in the States*, 5 *St. Pol. & Pol'y Q.* 373, 374 (2005) (noting importance of both "general policy representation" and "representation on particular issues").

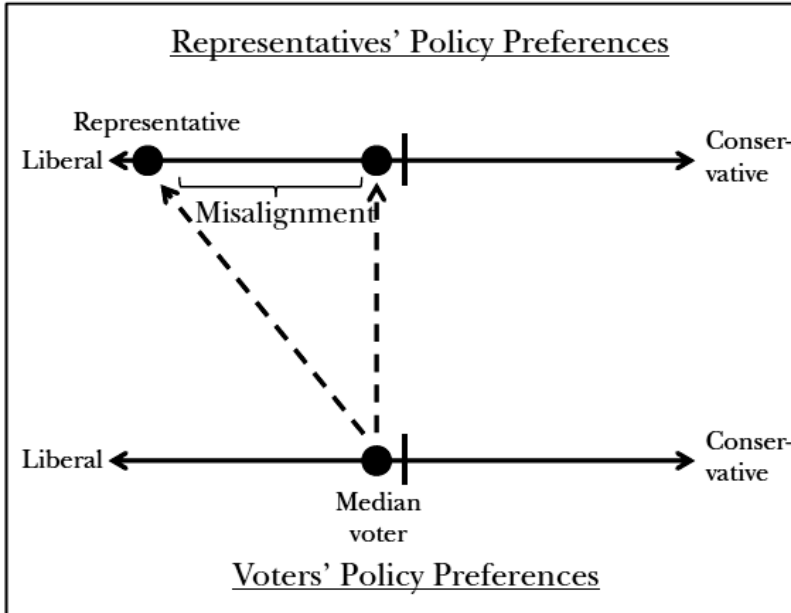
98. Michael D. McDonald et al., *What Are Elections For? Conferring the Median Mandate*, 34 *Brit. J. Pol. Sci.* 1, 2 (2004). For examples of other works that treat policy alignment as normatively desirable, see G. Bingham Powell, Jr., *Elections as Instruments of Democracy: Majoritarian and Proportional Visions* 122 (2000) ("In contemporary democracies elections are supposed to establish connections that compel or greatly encourage the policymakers to do what the citizens want."); Bafumi & Herron, *supra* note 75, at 519 (critiquing "distinct lack of congruence between federal legislators and their constituencies"); Matt Golder & Jacek Stramski, *Ideological Congruence and Electoral Institutions*, 54 *Am. J. Pol. Sci.* 90, 90–91 (2010) (describing different conceptions of "congruence"); and John D. Huber & G. Bingham Powell, Jr., *Congruence Between Citizens and Policymakers in Two Visions of Liberal Democracy*, 46 *World Pol.* 291, 291–92 (1994) ("[C]ongruence between the preferences of citizens and the actions of policymakers constitutes a major claim and goal of liberal democracy.").

99. See, e.g., Ansolabehere et al., *Candidate Positioning*, *supra* note 26, at 138 (finding "enduring historical pattern in American politics" that "[c]andidates diverge at the district level, just as parties diverge nationally").

100. As discussed above, one kind of partisan misalignment involves a divergence between the median voter and the representative, while the other kind involves a gap between the median actual voter and another figure with normative significance. I use "median voter" here as shorthand for both types of misalignment.

which the representative's views are more extreme than those of the median voter, is shown in Figure 3.<sup>101</sup>

FIGURE 3: POLICY MISALIGNMENT DUE TO REPRESENTATIVE'S EXTREMISM



A potential concern about policy alignment is that it may be impossible to determine voters' and representatives' policy preferences, let alone to collapse them onto a single common axis that enables their comparison. Fortunately, political scientists recently have made great strides in quantifying policy views using tools such as surveys, interest group ratings, and voting records.<sup>102</sup> The most exciting new work takes advantage of questions answered by *both* voters and representatives to

101. See *supra* note 75 (citing findings by political scientists that representatives generally are more extreme than their constituents).

102. See, e.g., Ansolabehere et al., *Candidate Positioning*, *supra* note 26, at 139–40 (using National Political Awareness Test (NPAT) and voting records); Bafumi & Herron, *supra* note 75, at 522–24 (using Cooperative Congressional Election Study and voting records); Elisabeth R. Gerber & Rebecca B. Morton, *Primary Election Systems and Representation*, 14 *J.L. Econ. & Org.* 304, 313 & n.19 (1998) (using Americans for Democratic Action ratings); Cheryl Boudreau et al., *Legal Interventions in the Market for Political Information: Lessons from Survey Experiments in Local Elections* 5, 12 (Apr. 2013) (unpublished manuscript) (on file with the *Columbia Law Review*) (using surveys of candidates and voters); Thad Kousser et al., *Reform and Representation: Assessing California's Top-Two Primary and Redistricting Commission* 6–7 (Aug. 27, 2013) (unpublished manuscript), available at <http://ssrn.com/abstract=2260083> (on file with the *Columbia Law Review*) (using NPAT and surveys); Shor, *supra* note 82, at 3 (same).

plot their positions in a common policy space.<sup>103</sup> Political scientists also have determined that, at least over the last generation, policy preferences with respect to a vast array of issues can be captured by a single left-right dimension corresponding to governmental intervention in the economy.<sup>104</sup> A second dimension corresponding to civil rights views formerly was necessary as well, but has receded in importance since the 1970s.<sup>105</sup> Voters' and representatives' ideologies therefore seem both intelligible and relatively simple in structure.<sup>106</sup> There is little risk of them falling victim to familiar traps such as Arrow's Impossibility Theorem or Condorcet's Paradox.<sup>107</sup>

Of course, voters' views on specific policy matters often are less stable and intense than their overall political ideologies. A voter may be a committed liberal or conservative, as a general matter, but may not have a consistent or strongly held position on a particular policy question. Overall ideological alignment, then, is more important than alignment on each individual issue that appears on the political docket. Similarly,

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103. See, e.g., Bafumi & Herron, *supra* note 75, at 522–25 (using legislator and voter data sets to compare estimated ideal points); Boudreau et al., *supra* note 102, at 9–10 (combining data “to place voters and local legislative candidates on the same ideological scale”); Kousser et al., *supra* note 102, at 7 (“Measuring and placing voters’ and lawmakers’ ideologies on the same scale is the first step toward quantifying representation.”); Shor, *supra* note 82, at 3 (using methodology “measuring ideological distributions of state congressional delegations, legislatures, and citizens all on the same scale”).

104. See Nolan McCarty et al., *Polarized America: The Dance of Ideology and Unequal Riches* 22 (2006) [hereinafter McCarty et al., *Polarized*] (finding single left-right policy dimension for members of Congress); Boudreau et al., *supra* note 102, at 10–12, 21 (finding similar progressive-moderate dimension for San Francisco representatives and voters); Shor, *supra* note 82, at 10–13 (finding left-right dimension for state legislative members and voters).

105. See McCarty et al., *Polarized*, *supra* note 104, at 22–23 (“Other dimensions, such as a civil rights dimension, have largely vanished . . .”).

106. See Stephen A. Jessee, *Spatial Voting in the 2004 Presidential Election*, 103 *Am. Pol. Sci. Rev.* 59, 72 (2009) (finding “not only do ordinary citizen[s] possess real ideological beliefs, but also these beliefs map onto specific policy proposals in much the same way as do the ideologies of senators and the president”).

107. Arrow argued that no rank-order voting system can comply simultaneously with a set of basic fairness criteria (rationality, unrestricted domain of citizen preferences, nondictatorship, unanimity producing preferred result, and decisionmaking independent of irrelevant alternatives). See Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 *J. Pol. Econ.* 328, 328–29 (1950) (introducing paradox); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 *Colum. L. Rev.* 2121, 2131–32 (1990) (describing fairness criteria). Condorcet noted that if people's individual preferences are nontransitive, voting can result in paradoxical cyclic outcomes. See Marquis de Condorcet, *An Essay on the Application of Analysis to the Probability of Decisions Rendered by a Plurality of Votes* (1785), reprinted in *Classics of Social Choice* 91, 97–104 (Iain McLean & Arnold B. Urken eds. & trans., 1995); see also Kenneth J. Arrow, *Social Choice and Individual Values* 93–96 (Yale Univ. Press 2d ed. 1963) (1951) (describing subsequent theoretical elaboration of Condorcet's paradox).

persistent policy misalignment is more problematic than misalignment that is temporary and that soon resolves. Indeed, short-term deviations from constituents' preferences, in the form of logrolling and tactical concessions, sometimes may promote long-term congruence. Accordingly, the subset of policy misalignment that is most worrisome is ongoing ideological misalignment. Time-limited and issue-specific instances of incongruence more easily may be forgiven.

To this point, the discussion has assumed that it is a single representative's preferences that should be congruent with those of a district's median voter. But alignment is a useful concept at the level of not only the individual district (where there is one representative) but also the jurisdiction as a whole (where there are many). At the latter level, it is the preferences of the legislature's median representative that should correspond to those of the jurisdiction's median voter. This kind of correspondence—*legislative* alignment rather than district-specific alignment—makes it more likely that the balance of power in the legislature will reflect the balance of opinion in the electorate. It makes it more likely that the views of the jurisdiction's median voter in fact will be followed. As Robert Weissberg has observed, "Th[e] dyadic perspective (i.e., one legislator and one constituency) is surely important, but it is not the only way of approaching representation. . . . [A] long and equally valid tradition exists that views representation in terms of institutions collectively representing a people."<sup>108</sup>

Legislative misalignment may arise when multiple district-specific misalignments are aggregated. For example, if a third party plays spoiler to the same major party in several districts, then it is possible that the major party will be denied a legislative majority even if it is preferred by the jurisdiction's median voter. On the other hand, multiple district-specific misalignments also may cancel out and thus lead to legislative alignment. For instance, even if most representatives hold more extreme policy views than their constituents, the median member of the legislature might be a moderate whose opinions are congruent with those of the jurisdiction's median voter. Furthermore, legislative misalignment is possible even in the absence of district-specific misalignment. In particular, gerrymandering typically does not affect preference congruence within districts, but it often prevents the party preferred by most voters in a jurisdiction from winning a legislative majority.<sup>109</sup> The relationships between district-

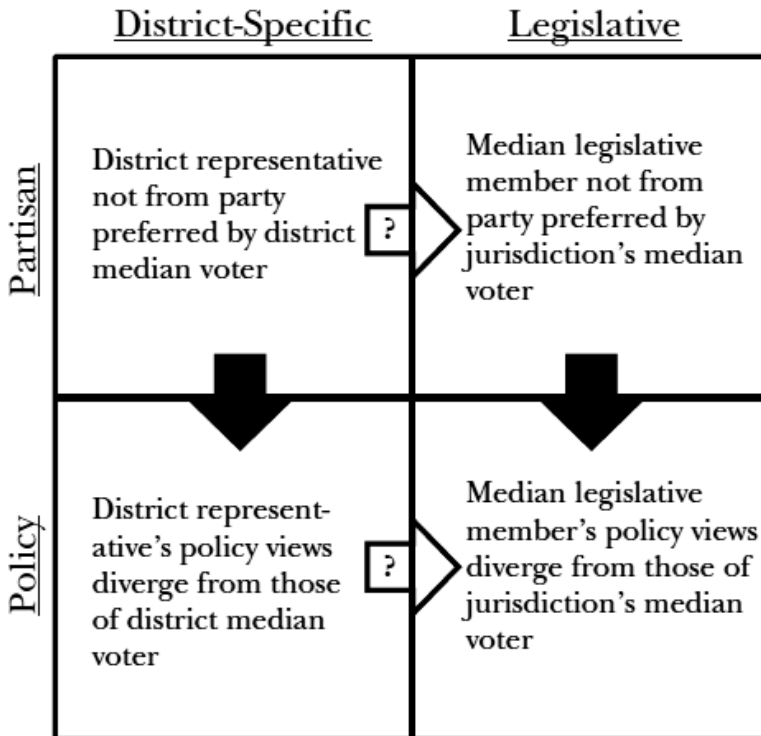
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108. Robert Weissberg, *Collective vs. Dyadic Representation in Congress*, 72 *Am. Pol. Sci. Rev.* 535, 535 (1978) (emphasis omitted); see also, e.g., Bafumi & Herron, *supra* note 75, at 519 (distinguishing between "micro-level" alignment at district level and "macro-level" alignment between "aggregate American voter preferences and aggregate preferences at the congressional chamber level"); Gerber & Morton, *supra* note 102, at 305–06 (distinguishing dyadic from collective representation).

109. See, e.g., Elisabeth R. Gerber, *Legislatures, Initiatives, and Representation: The Effects of State Legislative Institutions on Policy*, 49 *Pol. Res. Q.* 263, 265 (1996) [hereinafter Gerber, *Institutions*] (noting that redistricting may result in individual

specific and legislative misalignment, and between partisan and policy misalignment, are depicted in Figure 4. As noted earlier, partisan misalignment leads almost inevitably to policy misalignment,<sup>110</sup> while district-specific misalignments may or may not aggregate into legislative misalignment.

FIGURE 4: RELATIONSHIPS BETWEEN TYPES OF MISALIGNMENT



While only partisan and policy alignment are possible at the district level, another kind of alignment could be pursued at the legislative level: congruence between the median voter's policy preferences and the actual policies enacted by the government. In other words, perhaps the policies preferred by the median voter should be *passed*, not just supported by the median representative. I am sympathetic to this argument, and in fact several studies have evaluated democratic systems by examining how closely voters' policy views correspond to policy outcomes.<sup>111</sup>

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legislator congruence but still "produce policies that deviate from the population majority preference").

110. *Supra* notes 99–100 and accompanying text.

111. See, e.g., Robert S. Erikson et al., *Statehouse Democracy: Public Opinion and Policy in the American States 244–45* (1993) (describing study of correlation between voter policy preference and policy outcomes); Lax & Phillips, *supra* note 79, at 152–57

However, policy outcome alignment (as opposed to policy preference alignment) probably is too ambitious a goal for election law to achieve. The laws that a government enacts are the product of not only politicians' policy preferences, but also the relationship between the executive and legislative branches, legislative structures and voting rules, lobbying efforts, and many other factors that are beyond the domain of election law.<sup>112</sup> If elections are organized so that they make policy preference alignment more probable—which in turn may improve the odds of policy outcome alignment too—then they are doing all that reasonably can be expected of them.

A few final points about this conceptual framework may help resolve any lingering confusion. First, the reason why the *median* voter and representative are so important is that only they belong by definition to a popular or legislative majority. Any position other than the median in a distribution along a single axis may be outvoted by another position that is closer to the median.<sup>113</sup> Second, while it is possible in theory to compare voter and legislator distributions in their entirety, such comparisons require additional data and address issues other than whether the majority's preferences are realized, and hence are conducted very rarely. According to Matt Golder and Jacek Stramski, "To our knowledge, there is no research on representation that explicitly conceptualizes ideological congruence as a many-to-many relationship."<sup>114</sup>

Third, voters' and representatives' preferences are not fixed, but rather vary as they hear new arguments, receive more information, or undergo changes in their circumstances.<sup>115</sup> The point of the alignment ap-

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(same); John G. Matsusaka, *Popular Control of Public Policy: A Quantitative Approach*, 5 Q.J. Pol. Sci. 133, 142–44 (2010) (same).

112. I discuss some of these nonlegal determinants of policy outcome misalignment in Part IV.B, *infra*.

113. See, e.g., Michael D. McDonald & Ian Budge, *Elections, Parties, Democracy: Conferring the Median Mandate* 26 (2005) (arguing that actors at median have bargaining power to move enacted position to their own); Huber & Powell, *supra* note 98, at 293 ("On a single issue or a single-issue dimension . . . the position of the median voter is the only policy that is preferred to all others by a majority of voters."). And the reason why the median voter is so important (as opposed to the median donor or the median volunteer) is that, in a democracy, voting is the mechanism by which people ultimately determine who will have the privilege of governing them.

114. Golder & Stramski, *supra* note 98, at 95–96; see also Hee-Min Kim & Richard C. Fording, *Extending Party Estimates to Governments and Electors*, in *Mapping Policy Preferences: Estimates for Parties, Electors, and Governments 1945–1998*, at 157, 159 (Ian Budge et al. eds., 2001) (noting often "it is not feasible to describe the exact shape of the voter distribution on an ideological dimension"). In particular, a comparison of voter and legislator distributions in their entirety would indicate how accurately all voter preferences, not just those held by a majority, are reflected in the legislature. Such accurate reflection is the fundamental goal of proportional representation systems, but it is at most a secondary aim of U.S.-style plurality voting regimes.

115. See, e.g., Cass R. Sunstein, *Preferences and Politics*, 20 Phil. & Pub. Aff. 3, 10 (1991) [hereinafter Sunstein, *Preferences*] ("[P]references are shifting and . . . are a

proach is that their preferences should correspond *after* this dynamic process has unfolded, not before. Fourth, the approach applies with equal force to both courts and policymakers. Courts should take alignment into account when deciding election law cases, while policymakers should consider it when designing democratic institutions. Lastly, alignment is not quite the same thing as raw majoritarianism. Majoritarianism usually implies that a majority can get whatever it wants—that the median position of the majority inevitably is enacted. But under the alignment approach it is not the *majority's* median that matters but rather that of the distribution *as a whole*. True, the overall median is necessarily supported by a majority, but it is still distinct from (and more moderate than) the median of the majority alone.<sup>116</sup>

### B. Intellectual Origins

Interestingly, no particular thinker is associated with the normative argument that voters' and representatives' preferences should be aligned. The economist Anthony Downs famously explained why candidates and parties converge on the median voter under certain conditions,<sup>117</sup> and a large political science literature has sought to measure the extent of this convergence.<sup>118</sup> But neither Downs nor his empirically minded successors have set forth a normative account of why alignment is desirable. Instead, they typically have assumed its desirability before embarking on elaborate investigations of whether it in fact is being achieved.<sup>119</sup>

In the democratic theory literature, on the other hand, normative analyses abound, and scholars from several different schools have portrayed alignment as an appealing democratic principle. I do not purport to exhaust this literature in the brief discussion that follows. My aim, ra-

function of current information, consumption patterns, legal rules, and general social pressures.”).

116. See Marty Cohen et al., *The Party Decides: Presidential Nominations Before and After Reform 25* (2008) (distinguishing “median position of the majority party” from “median of the legislature as a whole”); Ansolabehere et al., *Roll-Call Voting*, *supra* note 75, at 560 (making same distinction).

117. Anthony Downs, *An Economic Theory of Democracy* 114–27 (1957) (describing incentives for parties on both ends of spectrum to appeal to center).

118. For just a taste, see the sources cited above in notes 75, 98, and 102.

119. See, e.g., Andrew Rehfeld, *Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy*, 103 *Am. Pol. Sci. Rev.* 214, 219 (2009) (“The reigning view within empirical political science presumes the delegate model of representation as the ideal.”); Andrew Sabl, *Does “Democracy” Mean that Outcomes Should Track Voter Preferences? Why Empirical Political Scientists Assume the Answer Is Yes and Political Theorists Assume It’s No 4* (Sept. 1, 2012) (unpublished manuscript), available at <http://ssrn.com/abstract=2104914> (on file with the *Columbia Law Review*) (noting “many political scientists . . . assume . . . something like the correspondence theory”). Two studies that include more extended theoretical discussions of alignment before commencing their empirical analyses are McDonald & Budge, *supra* note 113, and Powell, *supra* note 98.

ther, is to show that even though no theory of democracy makes alignment its centerpiece, several prominent accounts treat it as an important value that any polity should hope to realize. Alignment has at least as distinguished an intellectual pedigree as structural values such as competition and participation.<sup>120</sup>

First, in the Madisonian theory that underpins the American constitutional system, it was thought vital that members of the House of Representatives (though not necessarily other politicians) share the views and values of their constituents. Madison wrote that “it is particularly essential that [the House] should have an immediate dependence on, and an intimate sympathy with, the people.”<sup>121</sup> He added that “[f]requent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured.”<sup>122</sup> Recurring elections motivate House members to stay faithful to their constituents’ positions—and enable their punishment at the polls if they stray too far.

Second, for scholars of representation, one of the classic conceptions of the representative is the *delegate* model. A delegate “must do what his principal would do, must act as if the principal himself were acting . . . must vote as a majority of his constituents would,” as Pitkin put it in her landmark work.<sup>123</sup> In other words, a delegate must align his own preferences with those of his constituents. He must not deviate from his constituents’ views even if he is urged to do so by his party or personal ideology.

Third, the minimalist theory of democracy views a rough form of alignment as one of the only functions of elections. Minimalists understand campaigns to be struggles between competing elites, and they expect the electorate to do nothing more than choose between candidates on the basis of their records and promises. A plausible outcome of this process, in which candidates usually prevail when their stances are shared by the electorate and vice versa, is the congruence of voters’ and representatives’ positions. According to Posner, “The essence of [minimalist]

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120. See *supra* notes 62–68 and accompanying text (discussing competition and participation).

121. The Federalist No. 52, at 347 (James Madison) (Harvard Univ. Press ed. 2009); see also The Federalist No. 57, *supra*, at 377 (James Madison) (“[T]he House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people.”).

122. The Federalist No. 52, *supra* note 121, at 347 (James Madison); see also Bernard Manin, *The Principles of Representative Government* 162–63 (1997) (arguing in Madisonian theory “[a] link of some sort was thus posited or presupposed between the preferences of the people and the decisions of their representatives”).

123. Pitkin, *supra* note 15, at 144–45; see also, e.g., Donald J. McCrone & James H. Kuklinski, *The Delegate Theory of Representation*, 23 *Am. J. Pol. Sci.* 278, 278 (1979) (“The delegate theory of representation . . . posits that the representative ought to reflect purposively the preferences of his constituents.”).



democracy . . . is that the interests (preferences, values, opinions) of the population . . . be represented in government."<sup>124</sup>

Fourth, pluralists see elections as opportunities for groups of all stripes to pursue their respective interests and influence the policymaking process. Elections play this role because, after winning office, representatives have a strong incentive to support the positions of the groups that helped elect them. In Robert Dahl's words, elections "vastly increase the size, number, and variety of minorities whose preferences must be taken into account by leaders in making policy choices."<sup>125</sup> The minorities whose views are considered may not accurately reflect the public at any given moment, but they should mirror the electorate over the long run (or at least that is the pluralist hope).

Fifth, for participatory democrats, one of the normative rationales for mass participation is that it raises the salience of the public's preferences and makes it more likely that they will be respected. Representatives should find it more difficult to ignore voters' opinions when their legitimacy has been enhanced through intensive involvement. As David Held has written, "If people know opportunities exist for effective participation in decision-making, they are likely to . . . hold that collective decisions should be binding."<sup>126</sup> An engaged public is more apt than an apathetic one to insist on alignment.

Finally, the deliberative theory of democracy does not value deliberation for its own sake, but rather because it refines voter preferences that then ought to be converted into policy. Deliberation is only worthwhile if the outcome of all the reasoned dialogue eventually is enacted into law. According to Joshua Cohen, "The *point* of deliberative democracy is not for people to reflect on their preferences, but to decide, in light of reasons, what to do."<sup>127</sup> The point, in other words, is for deliberation to re-

124. Posner, *supra* note 42, at 165; see also, e.g., Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* 269, 273 (2d ed. 1947) (defining democracy as "competitive struggle for the people's vote" and arguing this definition "assure[s] the standing of the majority system within the logic of the democratic method").

125. Robert A. Dahl, *A Preface to Democratic Theory* 132 (1956); see also, e.g., David B. Truman, *The Governmental Process: Political Interests and Public Opinion* 318 (1962) ("A group that can point to activities suggesting a contribution to the election results is not likely to be turned away by a recently elected official.").

126. Held, *supra* note 93, at 212; see also, e.g., Benjamin R. Barber, *Strong Democracy: Participatory Politics for a New Age* 151 (1984) ("[Strong democracy] turns dissensus into an occasion for mutualism and private interest into an epistemological tool of public thinking."); Iris Marion Young, *Inclusion and Democracy* 132 (2000) ("Without . . . citizen participation, the connection between the representative and constituents is most liable to be broken . . .").

127. Joshua Cohen, *Deliberative Democracy*, in *Deliberation, Participation and Democracy* 219, 222 (Shawn W. Rosenberg ed., 2007); see also, e.g., Bessette, *supra* note 16, at 36 (arguing that representatives' deliberation "should result in policies" similar to what "people themselves would have chosen"); Amy Gutmann & Dennis Thompson, *Democracy and Disagreement* 130 (1996) ("[I]n a deliberative democracy constituents

shape voters' views, and in turn to reshape representatives' positions and actions.

To be sure, there are accounts of democracy that do not place much weight on alignment. For example, the other classic conception of the representative is the *trustee* model. Trustees are supposed to exercise their own independent judgment when deciding how to act in the legislature, not to abide by the preferences of their constituents.<sup>128</sup> Similarly, Madison may have wanted House members to be tied closely to the people, but he also believed that popular opinions should be “refine[d] and enlarge[d] . . . by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country.”<sup>129</sup> Later in this Part, I discuss the normative appeal of theories that cast representatives as statesmen who should pursue the public interest as they perceive it.<sup>130</sup> But here the point must be conceded that scholars do not all agree about the importance of alignment in a democracy. There may be an overlapping consensus on this issue, but there plainly is not unanimity.

### C. Doctrinal Hints

In the Supreme Court's case law, there is not even an overlapping consensus—nothing close to it, in fact. As discussed earlier, the Court's typical approach in election law cases is to identify any rights that have been burdened by electoral regulations and then to weigh the burdens against the interests served by the regulations. This methodology pays no heed to the congruence of voters' and representatives' preferences.<sup>131</sup> Nevertheless, the idea that such congruence is desirable *has* made repeated appearances in certain Justices' opinions, in contexts including party regulation, campaign finance, and redistricting.<sup>132</sup> At least occasion-

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should be able to give effect to their views . . . by influencing the judgments that their representatives make in the legislative process.”).

128. See Pitkin, *supra* note 15, at 127 (describing trustee theory); Rehfeld, *supra* note 119, at 215 (detailing differences between trustee and delegate theories).

129. The Federalist No. 10, *supra* note 121, at 58 (James Madison); see also The Federalist No. 71, *supra* note 121, at 470 (Alexander Hamilton) (“The republican principle . . . does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive . . .”); James A. Gardner, Madison's Hope: Virtue, Self-Interest, and the Design of Electoral Systems, 86 Iowa L. Rev. 87, 129–30 (2000) (concluding that founders saw “purpose of election” as “select[ing] leaders,” not “involv[ing] the public in affairs of government”).

130. *Infra* Part II.D.

131. See *supra* Part I.A (surveying Court's election law doctrine).

132. Alignment also has made more limited appearances in two other election law contexts: franchise restriction and minority representation. See, e.g., *Bartlett v. Strickland*, 129 S. Ct. 1231, 1245 (2009) (plurality opinion) (defending Court's holding that minority group must constitute majority of proposed district's population in order to prevail under section 2 of Voting Rights Act by invoking “special significance, in the democratic process, of a majority”); *Carrington v. Rash*, 380 U.S. 89, 94 (1965) (striking down ban on voting by

ally, some Justices do seem to think that voters' partisan and policy positions should be shared by their elected leaders. Alignment therefore is not alien to the law, and it easily could be made a more significant factor in the doctrine if a majority of the Court were persuaded of its value.<sup>133</sup>

Beginning with the party regulation context, alignment has manifested itself in both its partisan and policy guises. First, with respect to partisan alignment, several Justices have defended statutes that limit the ability of third parties to secure places on the ballot on the ground that these laws make it more likely that candidates preferred by majorities of voters will be elected. In a 1968 case involving Ohio's rules for qualifying for the ballot, Justice Stewart worried that third-party contestation could cause elections to be won by "candidates who gain a plurality but who are, *vis-à-vis* their principal opponents, preferred by less than half of those voting."<sup>134</sup> He added that "the State's interest in attempting to ensure that a minority of voters do not thwart the will of the majority is a legitimate one"<sup>135</sup>—a view that Justice Harlan endorsed as well.<sup>136</sup> Likewise, in a 1972 case involving Texas's ballot access requirements, the Court declared that "the State understandably and properly seeks to . . . assure that the winner is the choice of a majority."<sup>137</sup> The Court then referred approvingly to a provision requiring a runoff election if no candidate received a majority in the first round.<sup>138</sup>

Second, with respect to policy alignment, a number of Justices have expressed support for primaries that are open to voters who are not party members, reasoning that they are more likely to produce nominees

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members of military in part because "[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible").

133. I do not claim that the alignment approach is constitutionally compelled, but it is worth noting here that several modalities of constitutional argument do support it. This section sets forth the doctrinal case for the approach. Arguments based on text (particularly the Republican Guarantee Clause), history (particularly the Madisonian conception of the House), democratic theory, and prudential consequences also can be made on its behalf. Cf. Philip Bobbitt, *Constitutional Interpretation* 12–13 (1991) (summarizing modalities of constitutional interpretation).

134. *Williams v. Rhodes*, 393 U.S. 23, 54 (1968) (Stewart, J., dissenting).

135. *Id.* at 56.

136. See *id.* at 46 n.8 (Harlan, J., concurring in the judgment) (noting "presence of third parties may on occasion result in the election of the major candidate who is in reality less preferred by the majority of the voters" and listing various reforms that could prevent this scenario from occurring). The majority also recognized the importance of partisan alignment, but held that it was outweighed by the burden on third parties' participational rights. See *id.* at 32 (majority opinion) ("Concededly, the State does have an interest in attempting to see that the election winner be the choice of a majority of its voters.").

137. *Bullock v. Carter*, 405 U.S. 134, 145 (1972).

138. See *id.* (justifying provision on basis of avoiding "expense and burden of runoff elections"). However, in the case's principal holding, the Court struck down high filing fees that prevented some candidates from running in primary elections. See *id.* at 145–49 ("[T]he imposition of filing fees ranging as high as \$8,900 tends to limit the number of candidates entering the primaries.").

whose views correspond (and appeal) to the median general election voter. In a 1981 case, Justice Powell argued that, “[b]y attracting participation by relatively independent-minded voters,” Wisconsin’s open primary “may enlarge the support for a party at the general election.”<sup>139</sup> Similarly, in a 1986 case, the Court held that the open primary sought by Connecticut’s Republican Party would help it determine “how . . . most effectively [to] appeal to the independent voter.”<sup>140</sup> “By inviting independents to assist in the choice at the polls . . . the Party rule is intended to produce the candidate and platform most likely to achieve that goal.”<sup>141</sup> And in a 2000 case, Justice Stevens contended that California’s interest in increasing the “representativeness” of its elected officials was compelling—and thus that the state’s innovative blanket primary should have been upheld.<sup>142</sup>

Policy alignment also has been an occasional concern of the Court in the campaign finance context. Here the Justices have worried that large contributions might induce politicians to adopt the views of their donors rather than those of their constituents. In a 1985 case, Justice White argued in favor of a restriction on spending by outside groups because “[t]he candidate may be forced to please the spenders rather than the voters, and the two groups are not identical.”<sup>143</sup> Likewise, in a 2000 case, the Court used the vocabulary of alignment to define the state interest that was advanced by a Missouri contribution limit. “[W]e recognize[] . . . the broader threat from politicians too compliant with the wishes of large contributors.”<sup>144</sup> And in its historic 2003 decision upholding the Bipartisan Campaign Reform Act, the Court affirmed the state’s alignment interest in still more striking terms. “Just as troubling to a

139. *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 133 (1981) (Powell, J., dissenting).

140. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 221 (1986).

141. *Id.*

142. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 600 (2000) (Stevens, J., dissenting). In a blanket primary, each voter selects in which party’s race to cast a ballot, and may vary her choice from race to race. See *id.* at 570 (majority opinion) (reviewing history of California voting procedures). In an open primary, each voter must select a single party’s primary in which to participate (for all races). The majority in *Jones* was critical of the blanket primary’s aligning effects because the policy threatened to produce misalignment within the party. A nominee could have views congruent with those of the median general election voter, but incongruent with those of the median party member. See, e.g., *id.* at 578–79 (describing misalignment generated by blanket primary); cf. *Burdick v. Takushi*, 504 U.S. 428, 439–40 (1992) (upholding ban on write-in voting in order to prevent “party raiding” that could produce misalignment within party); *Rosario v. Rockefeller*, 410 U.S. 752, 760–61 (1973) (upholding law requiring voters to enroll in party thirty days before primary for same reason).

143. *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 517 (1985) (White, J., dissenting).

144. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 389 (2000). In dissent, Justice Thomas attacked this alignment-oriented conception of corruption, calling “it a new, far-reaching (and speech-suppressing) definition.” *Id.* at 423 (Thomas, J., dissenting).

functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder.<sup>145</sup>

Lastly, in the redistricting domain, fears about misalignment at the legislative level have motivated several of the Court's most important interventions. The Court imposed the one-person, one-vote rule in the 1960s in part because of its view that "in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators."<sup>146</sup> Prior to the rule's imposition, rural minorities in many states had been able to control majorities in the states' legislatures and congressional delegations.<sup>147</sup> Similarly, a recurrent theme in the Court's gerrymandering doctrine is that a *partisan* minority also should not command a legislative majority. In the 1986 case that first recognized a cause of action for gerrymandering, the plurality stated that "evidence of continued frustration of the will of a majority of the voters" is necessary to establish a constitutional violation.<sup>148</sup> In a 2004 case, Justice Breyer sharply criticized "situation[s] in which a party that enjoys only minority support among the populace has nonetheless contrived to take, and hold, legislative power."<sup>149</sup> And in the Court's most recent gerrymandering decision, Justice Stevens devoted much of his dissent to statistics showing that if Texas's Democrats had won a majority of the statewide vote, they would have won only twelve of the state's thirty-two congressional seats.<sup>150</sup>

It is true that these references to alignment are rare snippets in a body of doctrine that is far more interested in rights-and-interests balanc-

145. *McConnell v. FEC*, 540 U.S. 93, 153 (2003), overruled in part by *Citizens United v. FEC*, 130 S. Ct. 876 (2010). Justice Kennedy again denied the importance of policy alignment, arguing that "[i]t is in the nature of an elected representative to favor certain policies[] and . . . contributors who support those policies." *Id.* at 297 (Kennedy, J., concurring in the judgment in part and dissenting in part).

146. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). Even some of the dissenters in the great one-person, one-vote cases embraced the alignment principle. See, e.g., *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 753–54 (1964) (Stewart, J., dissenting) ("[T]he [district] plan must be such as not to permit the systematic frustration of the will of a majority of the electorate of the State.").

147. See, e.g., *Reynolds*, 377 U.S. at 543 (referring to "rural strangle hold" on Alabama legislature).

148. *Davis v. Bandemer*, 478 U.S. 109, 133 (1986) (plurality opinion). In her concurrence, Justice O'Connor oddly equated partisan alignment with proportional representation, which she argued "is in serious tension with essential features of state legislative elections." *Id.* at 159 (O'Connor, J., concurring in the judgment).

149. *Vieth v. Jubelirer*, 541 U.S. 267, 360 (2004) (Breyer, J., dissenting). Like Justice O'Connor in *Bandemer*, the plurality in *Vieth* claimed that partisan alignment is equivalent to proportional representation—and judicially unworkable to boot. See *id.* at 287–89 (plurality opinion).

150. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 466–67 (2006) (Stevens, J., concurring in part and dissenting in part).

ing than in preference congruence. The point of this discussion certainly is not that the Court somehow has adopted the alignment approach sub silentio. Rather, the claim is that the case law contains tantalizing hints that the approach may appeal to the Court—at least to certain Justices in certain kinds of cases—and may offer a workable framework for resolving election law disputes. The doctrinal roots of alignment plainly are shallow. But its doctrinal future may still be bright.

#### D. *Democratic Appeal*

Alignment is not only promising because it enjoys support in the democratic theory literature and in the case law. It also could serve as a unifying election law principle because it is normatively attractive—because it flows directly from the core meaning of democracy. Below I describe the democratic provenance of the principle. I then explain why other key democratic values are realized as well in a properly aligned political system. Lastly, I argue that the appeal of alignment is not undercut by trustee theories of representation that downplay the relevance of popular preferences.

The most basic definition of democracy is a government (*kratos*) of the people (*demos*).<sup>151</sup> A polity is democratic if the people are sovereign, if their will is acknowledged and, ultimately, heeded by their elected representatives. This is not the idiosyncratic view of a particular camp. It is, rather, a “minimal core conception, one on which a number of more specific theories converge,” according to Bernard Manin.<sup>152</sup> The notion of “congruence between the preferences of citizens and the actions of policymakers . . . is not a unique position but rather . . . a common assumption of those who theorize about liberal democracy,” in the words of John Huber and G. Bingham Powell.<sup>153</sup>

As the second quote reveals, the alignment approach is so closely related to the essence of democracy that to state the latter is almost to articulate the former. If it is the people who are sovereign, then it is their preferences, as to both party and policy, that should be followed. If it is the people who rule, then it is their preferences that should be reflected in the positions of their representatives and, ideally, in the laws that their government enacts. And since not *all* of the people’s preferences can be

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151. E.g., Giovanni Sartori, *The Theory of Democracy Revisited* 21 (1987) (“[T]he etymological definition of democracy is, very simply, that democracy is the rule or power of the people.”).

152. Bernard Manin et al., *Introduction to Democracy, Accountability, and Representation* 1, 2 (Adam Przeworski et al. eds., 1999).

153. Huber & Powell, *supra* note 98, at 292; see also Jane Mansbridge, *Rethinking Representation*, 97 *Am. Pol. Sci. Rev.* 515, 526 (2003) (arguing “constituent-representative congruence . . . is a factor in each of the forms of representation”); Sunstein, *Preferences*, *supra* note 115, at 6 (“Should a constitutional democracy take preferences as the basis for political choice? In contemporary politics, law, and economics, the usual answer is affirmative.”).

followed, it is the view of the majority (embodied by the median voter) that should be heeded when there is disagreement. Analogously, in the legislature, it is the pivotal (typically the median) legislator who should be aligned with the median voter, so that the weight of public opinion corresponds to the fulcrum of legislative power. Median-median alignment of this sort increases the likelihood that the people's preferences will be realized. It increases the likelihood, in other words, that a polity genuinely will be democratic.<sup>154</sup>

The democratic appeal of the alignment approach also is evident from the sense of injustice that is provoked by cases of *misalignment*. Suppose that a majority of voters wish to be represented (or governed) by Party *A*, but instead it is Party *B* that holds the reins of power. Hamilton deemed this situation a “poison” in *The Federalist Papers*, because it “subject[s] the sense of the greater number to that of the lesser.”<sup>155</sup> The unfairness is comparable when it is a nonpartisan majority preference—a preference as to general ideology or specific policy—that is frustrated. If the majority favors conservative representation and a minority backs liberalism, why should it be the latter position that prevails? If the majority wants stricter gun control laws and a minority does not, why should elected officials privilege the view of the smaller group?<sup>156</sup> None of this is to say that the will of the majority should triumph even in areas that the Constitution has declared off-limits to ordinary politics.<sup>157</sup> But it is to say that it is troubling when the majority operates within constitutional bounds but nevertheless is thwarted by a minority. Majorities should not be losers in a democracy, at least not too often, or else the polity's very claim to *be* a democracy may start to be called into question.<sup>158</sup>

Beyond its connection to the core meaning of democracy, the alignment approach is attractive because it promotes the achievement of

154. See, e.g., Powell, *supra* note 98, at 16 (arguing if congruence “between voters and policymakers[] is very strong, then elections seem to be performing well as instruments of democracy”).

155. *The Federalist* No. 22, *supra* note 121, at 136 (Alexander Hamilton).

156. One possible answer is that the minority's preferences are more intense, and thus that aggregate utility will increase if they are satisfied. But in a democracy that is committed to the political equality of all citizens, it is difficult to justify the unequal weighting of people's preferences. In theory, if not in fact, everyone is supposed to be equal when votes are cast and public policies are enacted. See Sartori, *supra* note 151, at 227 (noting “majority principle” embraced by democracies “disregards the unequal intensity of individual preferences”); see also Powell, *supra* note 98, at 167 (finding people's *mean* preferences, which take intensity into account, do not vary appreciably from their *median* preferences, which do not).

157. See Elaine Spitz, *Majority Rule* 109 (1984) (“Majority sovereignty says nothing about which substantive decisions . . . are within the majority's purview.”).

158. See *The Federalist* No. 22, *supra* note 121, at 134 (Alexander Hamilton) (referring to “fundamental maxim of republican government, which requires that the sense of the majority should prevail”); *The Federalist* No. 58, *supra* note 121, at 387 (James Madison) (referring to “fundamental principle of free government” that “majority . . . would rule”).

key democratic goals such as accountability, responsiveness, and legitimacy. (These, of course, are precisely the goals that advocates of competition and participation hope to attain.)<sup>159</sup> With respect to accountability, the approach provides a valuable benchmark by which the performance of elected officials can be assessed. Officials can be ousted from office when their records are incongruent with the preferences of their constituents and reelected when their records are congruent.<sup>160</sup> Similarly, with respect to responsiveness, a properly aligned political system necessarily is responsive to changes in public opinion. If voters' and politicians' positions correspond both before and after shifts in opinion occur, then politicians must be responding with alacrity to swings in the mood of the electorate. As for legitimacy, it is hard to see what could be more appropriate in a democracy than representation (and, ideally, public policy) that accurately reflects the views of the people. Legitimacy stems directly from alignment.<sup>161</sup>

It bears repeating here that my argument is only that alignment is democratically appealing, not that it is the *most* appealing democratic principle. Later in the Article, I discuss the plurality of election law values and offer some tentative thoughts as to which values are most salient in which contexts.<sup>162</sup> It also is true that at least one prominent family of democratic theories—those that conceive of representatives as trustees who pursue the public interest as they see it—places little weight on alignment. The whole point of a trustee is that she does what she thinks is in the best interest of her constituency, not what her constituents want her to do.<sup>163</sup> Do these trustee theories undermine the normative case for the alignment approach? They do not, in my view, for three reasons.

First, there often may be no difference between what an elected official thinks is in the best interest of her constituency and what her constituents want her to do. In this case—which scholars of representation regard as the norm<sup>164</sup>—trustee theories and the alignment approach

159. See *supra* notes 67–68 and accompanying text (discussing these scholars).

160. See Brandice Canes-Wrone et al., *Out of Step, Out of Office: Electoral Accountability and House Members' Voting*, 96 *Am. Pol. Sci. Rev.* 127, 133 (2002) (“[A]n incumbent receives a significantly lower electoral margin the more he votes with the extreme of his party . . . .”); Shor, *supra* note 82, at 38 (“[S]patial proximity between voters and their House incumbents does very well in predicting individual vote.”). Of course, voters may well want to hold representatives accountable for more than their voting records. Constituent service, seniority, good character, and many other factors also may play into voters' decisions.

161. Cf. Sartori, *supra* note 151, at 135 (arguing “majority principle . . . adds an element of legitimacy” to public policy).

162. *Infra* Part IV.A.

163. See *supra* notes 128–129 and accompanying text (discussing role of independent judgment in trustee theory).

164. See, e.g., Pitkin, *supra* note 15, at 165 (“Normally, the conflict between what [the representative] thinks best (for them) and what they want (as best for themselves) simply should not arise.”).



point in the same direction. Second, when the policy assessments of a politician and of the electorate do diverge, it is by no means clear that the politician's judgment is superior. The politician may be corrupt or ignorant or motivated by an ideology that the public does not share, and even a fair-minded expert frequently is less accurate than an aggregation of many laypeople.<sup>165</sup> Lastly, there is abundant empirical evidence that, at least in contemporary American politics, representatives very rarely behave as trustees. Representatives often respond to the policy preferences of their constituents, and they almost always respond to the demands of their political party. But the quantum of legislative behavior that cannot be explained by these factors (and that could be attributable to impartial analysis of the public interest) is very small.<sup>166</sup> Accordingly, even if trustee theories are theoretically alluring, their practical applicability to modern politics is highly limited.<sup>167</sup>

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The alignment approach, then, calls for the congruence of voters' and representatives' preferences, with respect to both party and policy, at the levels of both the individual district and the entire jurisdiction. The approach is supported by an overlapping consensus in the democratic theory literature as well as by occasional references in the case law. And the approach is normatively attractive because it derives from the basic definition of democracy itself. In the next Part, I show how the approach could be used to reframe election law disputes in a variety of areas. I show, that is, how election law might look through the prism of alignment.

### III. ALIGNMENT AND ELECTION LAW

Election law would look quite different indeed through the alignment prism. In field after field, the attention of courts and scholars would be directed to how closely voters' and representatives' preferences correspond—not to rights-and-interests balancing or to structural con-

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165. See generally Cass R. Sunstein, *Infotopia: How Many Minds Produce Knowledge* (2006) (describing means and benefits of aggregating knowledge).

166. See, e.g., McCarty et al., *Polarized*, supra note 104, at 37–41 (showing that constituency and party variables explain 76% to 90% of variation in House members' voting records from 1973 to 2003); Elisabeth R. Gerber & Jeffrey B. Lewis, *Beyond the Median: Voter Preferences, District Heterogeneity, and Political Representation*, 112 *J. Pol. Econ.* 1364, 1375–78 (2004) (finding that same variables explain over 90% of variation in California legislators' voting records in 1990s); Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 *U. Chi. L. Rev.* 769, 826, 830 (2013) [hereinafter Stephanopoulos, *Exceptionalism*] (using empirical evidence to argue for inapplicability of trustee theories to redistricting context).

167. Another argument against trustee theories is that they are too elitist for the more populist modern conception of democracy. See James S. Fishkin, *The Voice of the People: Public Opinion and Democracy* 62 (1995) ("The *elite democracy* of the Founders . . . has given way in successive battles and innovations to . . . mass democracy.").

siderations such as competition and participation. Election law would be focused on one of the most crucial values that elections are meant to realize.<sup>168</sup>

Below I explore how the alignment approach could be applied to five distinct election law contexts: franchise restriction, party regulation, campaign finance, redistricting, and minority representation. With each context, I start by summarizing the prevailing judicial and academic accounts of the harms that may arise and the ways that they may be alleviated. I then explain how the relevant injuries might helpfully be reconceived under the alignment approach. Next I offer sketches of how courts could use the approach to uphold aligning policies and strike down misaligning ones. Lastly, I draw on the political science literature to estimate the current level of misalignment in each area. The level is high and growing higher—meaning that the need for a theory that advocates alignment has never been more urgent.

#### *A. Franchise Restriction*

I begin my election law survey with franchise restrictions: measures that make it more difficult for otherwise eligible individuals to vote.<sup>169</sup> In earlier periods, these restrictions included property ownership requirements, pauper exclusions, poll taxes, literacy tests, and grandfather clauses.<sup>170</sup> They typically aimed to (and did) prevent members of disfavored groups such as immigrants, the poor, and African Americans from participating in elections.<sup>171</sup> In recent years, many new restrictions have been enacted around the country. In 2011 and 2012 alone, nineteen states adopted photo identification requirements for voting, proof-of-citizenship requirements for registering to vote, limits on voter registration drives, cutbacks to early voting, or stricter felon

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168. In the next Part, I discuss reasons why the alignment approach is not always applicable. But here my focus is on the election law areas to which the approach does indeed apply.

169. The line between franchise restrictions and eligibility requirements for voting is not always very clear. The alignment approach also could be applied to eligibility requirements—many of which likely would survive review, even if they have misaligning effects, because they serve important state interests such as defining the normative electorate.

170. For a comprehensive list of these earlier restrictions, see Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* app. tbls.A.1–A.16 (rev. ed. 2009).

171. See, e.g., *id.* at 91 (“[T]he late-nineteenth-century effort to transform the South’s electorate was grounded solidly in class concerns as well as racial antagonism.”); *id.* at 104, 111 (describing class-based and anti-immigrant rationales for franchise restrictions in North); J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880–1910*, at 7 (1974) (noting partisanship as motive for racial disenfranchisement).

disenfranchisement laws.<sup>172</sup> This burst of activity constitutes the most significant retrenchment in the public's access to the polls since the end of the Civil Rights Era.

When franchise restrictions are challenged in litigation, courts weigh the limitation on the right to vote against the state interests served by the restrictions (improving election administration, preventing fraud, and the like).<sup>173</sup> Courts thus conceptualize the injury that is inflicted as an encumbrance on an individual right, which is to be tolerated only if the resulting cost is outweighed by the benefits that accrue when the state's interests are advanced. Some of the legal literature endorses this sort of rights-and-interests balancing.<sup>174</sup> Other scholars argue that the key harm caused by franchise restrictions is a decline in competition. A decline occurs, on this view, when a party seeks to entrench itself in office by preventing its opponent's supporters from voting.<sup>175</sup> Still other scholars regard the harm of these restrictions as mostly participational. Voter turnout is vital in a democracy, but it declines when barriers to casting ballots are high.<sup>176</sup>

Under the alignment approach, in contrast, the injury perpetrated by franchise restrictions is the potential divergence between the median actual voter and the median eligible voter who would have gone to the polls in the absence of the restrictions. The partisan preference of the

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172. Weiser & Kasdan, *supra* note 1, at 1–6, 17–21. This trend has accelerated since 2012 thanks to the Supreme Court's recent invalidation of section 4(b) of the Voting Rights Act, which previously had prevented southern states from adopting many franchise restrictions. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (holding Voting Rights Act's coverage formula unconstitutional); see also, e.g., Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, N.Y. Times, July 6, 2013, at A9 (“State officials across the South are aggressively moving ahead with new laws requiring voters to show photo identification after the [*Shelby County*] decision striking down a portion of the Voting Rights Act.”).

173. See, e.g., *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (setting forth standard that strict scrutiny applies when franchise restrictions are severe, but “reasonable, nondiscriminatory restrictions” should be upheld if they serve “State’s important regulatory interests” (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983))); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (noting that restrictions on voting are subject to close scrutiny); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) (observing that apportionment “statutes, which may dilute the effectiveness of some citizens’ votes, receive close scrutiny”).

174. See, e.g., Hasen, *Election Law*, *supra* note 48, at 97 (“I agree with the Court’s jurisprudence that a balancing of interests is required . . .”); Fishkin, *Individual Right*, *supra* note 51, at 1292 (arguing “individual-rights-versus-state-interests doctrinal framework . . . will remain the right approach”).

175. See, e.g., Issacharoff & Pildes, *Politics as Markets*, *supra* note 35, at 652–74 (discussing “partisan manipulation” of franchise); Klarman, *supra* note 58, at 535–36 (expressing suspicion of restrictions on ballot access).

176. See, e.g., Elmendorf, *Undue Burdens*, *supra* note 54, at 675 (“[A] requirement is constitutionally suspect to the extent that it reduces the total number of eligible citizens who participate.”); Overton, *Identification*, *supra* note 60, at 673 (arguing that judges should assess policies’ aggregate effects on turnout).

median actual voter necessarily is dispositive in a two-party race, and her policy preferences also exert a substantial influence on the positions taken by her representative.<sup>177</sup> But in a democracy committed to the principle that *all* people who are entitled to vote should be able to do so if they so desire,<sup>178</sup> the median actual voter is a less compelling figure than the median eligible voter who wishes to participate in an election. A gap between these two individuals emerges whenever franchise restrictions distort the partisan or ideological composition of the electorate. A gap emerges, that is, whenever the restrictions impose different voting burdens on different political groups.

In this Article's terminology, partisan misalignment at the district level is the most obvious harm that may occur as a consequence of measures that make it more difficult to vote. This kind of noncongruence arises if the partisan preference of the median actual voter differs from that of the median eligible voter who would have participated had the measures not been enacted. For example, the median actual voter might be a Republican, but the median eligible voter who would have turned out had there not been, say, a photo identification requirement might be a Democrat. Another harm that franchise restrictions may cause, even if there is no partisan mismatch, is policy misalignment at the district level. This sort of noncongruence develops if a representative adopts the views of the median actual voter and if these views are not shared by the median eligible voter who would have liked to participate. For instance, the median actual voter might be highly conservative, but the median eligible voter who would have turned out had there not been, say, a proof-of-citizenship requirement might be relatively moderate.<sup>179</sup>

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177. See John D. Griffin & Brian Newman, *Are Voters Better Represented?*, 67 J. Pol. 1206, 1207–09 (2005) (finding representatives far more responsive to voters than to nonvoters).

178. See, e.g., *Blumstein*, 405 U.S. at 336 (“[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.”); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (extolling “right of qualified voters, regardless of their political persuasion, to cast their votes effectively”). Of course, the participatory principle is not absolute. Some franchise restrictions—for instance, set hours for polling places—are necessary in order to conduct elections in the first place. Restrictions essential to the basic operation of the electoral system should be upheld even if they happen to have misaligning effects. The misaligning effects are outweighed in such cases by the compelling interests served by the restrictions. Moreover, the participatory principle also plainly stems from a democratic value other than alignment itself. As noted earlier, the alignment principle does not help in selecting the normatively significant person whose preferences should be satisfied. *Supra* text accompanying note 96.

179. These district-level misalignments, if they occur in multiple constituencies, may aggregate into partisan or policy misalignment at the legislative level too.

It is worth noting here that many franchise restrictions aim to prevent voter fraud,<sup>180</sup> and that fraud itself may result in misalignment. If enough fraudulent votes are cast to change an election's outcome, then a clear disjunction emerges between the median lawful ballot and the median ballot that actually is counted.<sup>181</sup> However, levels of fraud have been found to be very low in recent American elections.<sup>182</sup> The misalignment that might be caused by fraud therefore pales in comparison to the misalignment that is produced by measures that make it more difficult to vote. This is an area in which the cure is worse than the ailment.

How, then, should courts tackle cases involving franchise restrictions under the alignment approach? My goal in this Article is not to make detailed doctrinal recommendations, but the crucial point is that courts should seek out—and then focus on—evidence about the misalignment that is likely to result from the measures at issue. If the measures probably will impose similar voting burdens on different political groups, then they probably should be upheld.<sup>183</sup> But if the odds are high that the policies will affect some groups (minorities, the poor, the young) more than others (whites, the affluent, the middle-aged), then they should be regarded with significant skepticism. All of the varieties of misalignment are more likely to materialize in this case, and such risks should be accepted only if the interests asserted by the state are highly compelling. The alignment approach therefore might take the form not of rights-and-interests balancing but rather of congruence-and-interests balancing. The greater the danger of misalignment, the stronger the state's interests would need to be to sustain the relevant measures (and the tighter the measures' tailoring), and vice versa.<sup>184</sup>

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180. See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 194–97 (2008) (plurality opinion) (discussing antifraud interest asserted by Indiana in case involving photo ID requirement).

181. See, e.g., Fishkin, *Individual Right*, supra note 51, at 1307 (“The first and most obvious reason to prevent fraudulent votes is that they might alter an election outcome . . .”).

182. See, e.g., Lorri Minnite & David Callahan, *Securing the Vote* 4, 15 (2003) (finding “incidence of election fraud [was] minimal” between 1992 and 2002); Natasha Khan & Corbin Carson, *Comprehensive Database of U.S. Voter Fraud Uncovers No Evidence that Photo ID Is Needed*, News21 (Aug. 12, 2012, 10:39 AM), <http://votingrights.news21.com/article/election-fraud/> (on file with the *Columbia Law Review*) (finding “infinitesimal” rate of voter fraud since 2000).

183. More precisely, such measures should not be invalidated on an alignment theory, but could still be struck down because of their infringements of individual rights. See *infra* Part IV.A (discussing plurality of election law values).

184. For example, photo identification requirements would be unlikely to be upheld under the alignment approach because they produce moderate levels of misalignment, see *infra* notes 186–188 and accompanying text, without preventing a substantial amount of voter fraud, see, e.g., *Crawford*, 553 U.S. at 194 (conceding there was “no evidence” of voter impersonation fraud ever taking place in state). I should also note that my earlier criticisms of the Court's rights-and-interests framework, *supra* Part I, were directed at the

The political science literature sheds light on how great the danger of misalignment actually is with different kinds of franchise restrictions. First, the most common restrictions in the Jim Crow South, poll taxes and literacy tests, disproportionately reduced the turnout of African Americans and poor whites, thus strengthening the electoral position of the then-dominant Democratic Party. According to one analysis, the poll tax increased the Democratic share of seats in southern state legislatures by about 3%, and the literacy test increased it by about 8%.<sup>185</sup> Second, the partisan impact of the most controversial modern restrictions, photo identification requirements for voting, is still hotly debated. Surveys of eligible voters typically find substantial differences in the possession of valid identification between Democratic- and Republican-leaning constituencies.<sup>186</sup> However, studies that examine actual election results usually conclude that photo identification laws have smaller effects.<sup>187</sup> The best estimates are that such laws reduce overall turnout by 2% to 3% and produce a pro-Republican swing of 0% to 1%.<sup>188</sup>

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exclusion of alignment from the Court's balancing analysis, not at balancing per se. I see nothing objectionable about balancing as long as the right factors are being balanced.

185. Timothy Besley & Anne Case, *Political Institutions and Policy Choices: Evidence from the United States*, 41 *J. Econ. Literature* 7, 27 tbl.4 (2003); see also Keyssar, *supra* note 170, at 85, 91–92, 138 (discussing historical partisan impact of franchise restrictions); Kousser, *supra* note 171, at 240 (noting that in Jim Crow South “there were massive declines in turnout and opposition party strength after suffrage restriction[s]” were enacted).

186. See, e.g., Matt A. Barreto et al., *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, 42 *PS: Pol. Sci. & Pol.* 111, 114 (2009) (finding valid identification gap of 4.5% between registered Democrats and Republicans in Indiana); Charles Stewart III, *Voter ID: Who Has Them? Show Shows Them?* [sic] 22 (Apr. 4, 2013) (unpublished manuscript) (on file with the *Columbia Law Review*) (finding valid identification gap of 2% to 3% between registered Democrats and Republicans nationwide); see also, e.g., Brennan Ctr. for Justice, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification* 3 (2006), available at [http://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_39242.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf) (on file with the *Columbia Law Review*) (finding that 16% to 25% of voting-age African American and Hispanic citizens lack valid identification compared to 8% of voting-age white citizens).

187. See, e.g., R. Michael Alvarez et al., *The Effect of Voter Identification Laws on Turnout* 3 (Cal. Inst. of Tech., Social Science Working Paper No. 1267R, 2008), available at <http://ssrn.com/abstract=1084598> (on file with the *Columbia Law Review*) (“In general, there does not seem to be a discriminatory impact of the [voter identification] requirements on some subpopulations of registered voters . . . .”); Brad T. Gomez, *Uneven Hurdles: The Effect of Voter Identification Requirements on Voter Turnout* 19 (Apr. 2008) (unpublished manuscript) (on file with the *Columbia Law Review*) (finding “slight” increase in Republican vote share in states with photo identification laws); Timothy Vercellotti & David Anderson, *Protecting the Franchise, or Restricting It? The Effects of Voter Identification Requirements on Turnout* 11 (2006) (unpublished manuscript), available at [http://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_50903.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/download_file_50903.pdf) (on file with the *Columbia Law Review*) (finding 2.9% decline in turnout in states with photo identification requirements).

188. See Nate Cohn, *Finally, Real Numbers on Voter ID*, *New Republic* (July 22, 2013), <http://www.newrepublic.com/article/113986/voter-id-north-carolina-law-hurts>

Third, other common modern restrictions seem to have widely divergent partisan consequences. One study determined that early closing dates for voter registration and purges of voter rolls cause significant declines in turnout but do not alter the partisan composition of the electorate.<sup>189</sup> In contrast, two other studies found that the elimination of election day registration both reduces turnout and results in a pro-Republican swing of about 5%.<sup>190</sup> And a study of felon disenfranchisement laws concluded that the people they prevent from voting lean Democratic by a two-to-one margin, and that at least seven Senate elections over the last few decades would have had different outcomes had ex-felons been able to vote.<sup>191</sup> Lastly, there is evidence that elected officials' voting records are more consistent with the policy preferences of voters than with those of nonvoters.<sup>192</sup> Since voters and nonvoters tend to have different preferences,<sup>193</sup> policies that deter eligible individuals from going to the polls are likely to produce policy misalignment.

Unfortunately, the political science literature rarely has linked the partisan swings caused by franchise restrictions to the views of the median eligible voter, and the work on the policy misalignment generated by these measures remains in its infancy. Still, there is little doubt that the misaligning effects of voting rules can be quantified and then pre-

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democrats (on file with the *Columbia Law Review*) (estimating pro-Republican swing of about 0.6% if North Carolina enacts photo identification law); Nate Silver, Measuring the Effects of Voter Identification Laws, N.Y. Times: FiveThirtyEight (July 15, 2012, 9:28 AM), <http://fivethirtyeight.blogs.nytimes.com/2012/07/15/measuring-the-effects-of-voter-identification-laws> (on file with the *Columbia Law Review*) (concluding that switch from no photo identification law to strict photo identification law can reduce turnout by as much as 2.4% and cause pro-Republican swing of up to 1.2%); see also Gomez, *supra* note 187, at 19 (“[I]n states with photographic identification requirements, the Republican Party does experience a slight (but significant) increase in vote share.”).

189. See Glenn E. Mitchell & Christopher Wlezien, The Impact of Legal Constraints on Voter Registration, Turnout, and the Composition of the American Electorate, 17 *Pol. Behav.* 179, 186, 195 (1995) (finding that measures “constrain registration” and “ultimately diminish turnout,” but “partisan balance . . . remain[s] largely unaltered”).

190. Besley & Case, *supra* note 185, at 25–26 (finding that “[s]tates with . . . registration on polling day, or not requiring registration at all [] have voter turnout that is roughly 2 percentage points higher on average”); Barry C. Burden et al., Election Laws and Partisan Gains: The Effects of Early Voting and Same Day Registration on the Parties' Vote Shares 8 (2013) (unpublished manuscript) (on file with the *Columbia Law Review*) (finding that elimination of election day registration results in 5% to 6% pro-Republican swing and elimination of early voting results in similarly sized pro-Democratic swing).

191. See Christopher Uggen & Jeff Manza, Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States, 67 *Am. Soc. Rev.* 777, 786–89 (2002) (discussing felons' seven-to-one Democratic lean and potential effects on Senate elections since 1978).

192. See Griffin & Newman, *supra* note 177, at 1207–09, 1216 (concluding that senators are disproportionately responsive to voters' interests).

193. See *id.* at 1214–15 (finding voters generally more conservative than nonvoters); see also Jack Citrin et al., What if Everyone Voted? Simulating the Impact of Increased Turnout in Senate Elections, 47 *Am. J. Pol. Sci.* 75, 81 (2003) (concluding that voters are generally more Republican than nonvoters).

sented in a usable format to courts. There also is little doubt that these effects vary widely from case to case, but at least sometimes are large enough to wreak serious democratic damage. Accordingly, no empirical obstacle exists to the adoption of the alignment approach in the franchise restriction context, and in fact abundant empirical evidence indicates that the ill it seeks to combat is substantial. Misalignment is not mere conjecture in this domain, but rather well-documented reality.

### B. *Party Regulation*

I next consider regulations of political parties, two kinds of which often result in litigation. First, all states impose ballot access requirements with which parties must comply in order to secure places on the general election ballot. They include laws that certain numbers of signatures be gathered, filing deadlines for the completion of the signature-gathering process, and “sore loser” provisions that bar candidates defeated in primaries from running again in the general election.<sup>194</sup> Second, all states also regulate the procedures that parties use to determine their general election nominees. Primaries almost universally are required for legislative positions, and their particular form typically is specified as well. The most common variants are closed primaries (in which only party members may vote) and open primaries (in which any voter may participate). Two rarer options are blanket primaries (in which voters decide race by race in which party’s election to cast a ballot) and top-two primaries (in which voters choose among *all* of the available candidates and then the two with the most votes advance to the general election).<sup>195</sup>

When party regulations are challenged, courts assess them using exactly the same rights-and-interests framework that they employ in the franchise restriction context. An array of rights potentially are implicated in these disputes: the right of voters to cast a ballot for whom they please, the right of candidates to run for office, and the right of parties to control their nomination procedures. Burdens on these rights are weighed against countervailing state interests such as avoiding voter confusion,

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194. See Dmitri Evseev, *A Second Look at Third Parties: Correcting the Supreme Court’s Understanding of Elections*, 85 B.U. L. Rev. 1277, 1282–87 (2005) (discussing ballot access requirements generally); Barry C. Burden et al., *Nominations and the Supply of Candidates: The Connection Between Sore Loser Laws and Congressional Polarization* 33 tbl.1 (2013) [hereinafter Burden et al., *Polarization*] (unpublished manuscript), available at <http://users.polisci.wisc.edu/behavior/Papers/BurdenJonesKang2013.pdf> (on file with the *Columbia Law Review*) (listing sore loser provisions by state).

195. See Christopher Westley et al., *Primary Election Systems and Candidate Deviation*, 30 E. Econ. J. 365, 371 tbl.2 (2004) (listing primary type by state); *Congressional and Presidential Primaries: Open, Closed, Semi-Closed, and “Top Two,” FairVote*, <http://www.fairvote.org/congressional-and-presidential-primaries-open-closed-semi-closed-and-top-two> (on file with the *Columbia Law Review*) (last visited Dec. 31, 2013) (same).



increasing voter participation, and promoting political stability.<sup>196</sup> Some of the legal literature is supportive of this methodology.<sup>197</sup> Other scholars contend that party regulations should be evaluated based on their implications for competition. They should be particularly suspect when they make it difficult for third parties to qualify for the ballot<sup>198</sup> or mute the policy differences between the two major parties.<sup>199</sup> Still other scholars maintain that party autonomy is paramount, and that governmental intrusions into how parties manage their affairs usually should be struck down.<sup>200</sup> Yet another perspective is that parties, especially when they conduct elections, are nothing more than adjuncts of the state that may be regulated in whatever fashion the state deems desirable.<sup>201</sup>

Under the alignment approach, on the other hand, the core concern about party regulations is that they may produce misalignment, either by changing the choices presented to voters in the general election, or by altering the electorate that is entitled to participate in primary elections. To begin with, ballot access requirements may result in partisan misalignment if they enable a third party to qualify for the ballot and if this party then acts as a “spoiler” that prevents the party preferred by the median voter from prevailing. To return to a hypothetical I have already

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196. E.g., *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (holding that courts must first consider “character and magnitude” of any infringement of protected rights, must then determine “legitimacy and strength” of state’s interests, and finally must evaluate “extent to which those interests make it necessary to burden the plaintiff’s rights”); accord, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (applying *Anderson* balancing test); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986) (same).

197. See, e.g., Hasen, *Election Law*, supra note 48, at 97 (“I agree with the Court’s jurisprudence that a balancing of interests is required . . .”); Evseev, supra note 194, at 1322–30 (defending *Anderson* approach and arguing that it be “revitalized”).

198. See, e.g., Issacharoff & Pildes, *Politics as Markets*, supra note 35, at 681–87 (explaining ballot access restrictions as anticompetitive “barriers to entry”).

199. See, e.g., Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 *Colum. L. Rev.* 274, 299 (2001) (criticizing blanket primaries because of their tendency to push parties toward center). But see Daniel R. Ortiz, *Duopoly Versus Autonomy: How the Two-Party System Harms the Major Parties*, 100 *Colum. L. Rev.* 753, 773–74 (2000) (defending blanket primaries because they moderate parties’ anticompetitive excesses).

200. See, e.g., Bruce E. Cain, *Point/Counterpoint, Party Autonomy and Two-Party Electoral Competition*, 149 *U. Pa. L. Rev.* 793, 805 (2001) (“[I]t is functionally important in a free, democratic system for groups undertaking party-like functions . . . to have the greatest possible degree of self-determination and autonomy.”); Persily, *Autonomy*, supra note 89, at 752 (making “pro-party autonomy argument” that is “in favor of broad judicial protection for political parties’ First Amendment right to determine who should be allowed to vote in party primaries”).

201. See, e.g., Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 *Colum. L. Rev.* 775, 779–82 (2000) (describing “managerial” conception of political parties, under which states have “near plenary authority to regulate”).

mentioned,<sup>202</sup> suppose that Party *C* qualifies for the general election ballot thanks to a permissive regulation, and that it then receives 7% of the vote while Party *A* gets 48% and Party *B* (the second choice of Party *C* supporters) gets 45%. Then the lax rule is directly responsible for the partisan misalignment that ensues. Party *B* would have won had Party *C* not made it onto the ballot.

This is not to say, of course, that third parties should be excluded from American politics. They have played an important role at several historical junctures,<sup>203</sup> and the current two-party duopoly is unsatisfactory in many respects. The point is only that third parties are potentially problematic in an electoral system that relies on single-member districts and plurality voting rules. If these aspects of the system were revisited, then third (and fourth, and fifth) parties could compete vigorously without fomenting any fear of partisan misfire.<sup>204</sup>

Ballot access requirements also may result in misalignment in two subtler ways. First, as Michael Kang has noted, a common consequence of sore loser laws is that moderate candidates who are defeated in primaries cannot run again in the general election, either as independents or under a different party's banner.<sup>205</sup> If the laws did not exist, these candidates *would* be able to run again—and if they won in the general election, closer policy congruence between their views and those of the moderate median voter would follow.<sup>206</sup> Second, when a third party qualifies for the ballot thanks to a lax regulation, policy misalignment may arise even if partisan misalignment does not, due to the implications of the third party's involvement for the positioning of the two major parties. Imagine that a centrist third party competes effectively for the support of voters in the middle of the policy spectrum. Then the two major parties may safely shift their positions toward the spectrum's edges, because the votes they lose by doing so go to the third party, not to their principal rivals. Policy divergence thus may develop between the major parties—which in turn

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202. *Supra* text accompanying notes 74–75, 94; see also *Williams v. Rhodes*, 393 U.S. 23, 54 n.8 (1968) (Stewart, J., dissenting) (presenting analogous hypothetical).

203. See generally Steven J. Rosenstone et al., *Third Parties in America* 215–30 (2d rev. ed. 1996) (concluding that third parties historically “popularize[d] ideas that the major parties would otherwise ignore” and have “serve[d] as political vehicles for citizens['] discontent with . . . major parties”).

204. For instance, single-member districts with instant-runoff voting rules would drastically reduce the likelihood of partisan misalignment, as would multimember districts with some kind of proportional representation.

205. Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 *Geo. L.J.* 1013, 1015–16 (2011).

206. See *id.* at 1030 (“By loosening restrictions on ballot access . . . it may be possible to . . . tip party politics in the direction of centrism.”). The presence of a third-party candidate on the ballot thus is not inherently misaligning. If the third-party candidate wins, and if her views are closer to those of the median voter than the views of the major-party candidates, then her involvement has an aligning effect.

may produce policy misalignment when one of these parties triumphs despite having deviated from the preferences of the median voter.<sup>207</sup>

Regulations of party primaries may give rise to policy misalignment as well, by making more likely the selection of nominees who are extreme relative to the median voter. In particular, when jurisdictions require primaries to be closed to nonmembers, nominees tend to reflect the views of the *party's* median voter. This figure is quite different from—and more ideologically polarized than—the median voter in the general election. Conversely, when jurisdictions mandate open primaries, the distribution of opinions in the primary electorate is more similar to the distribution in the general electorate. Nominees therefore tend to diverge less from the preferences of the median general election voter.<sup>208</sup> This aligning effect is even stronger when blanket or top-two primaries are employed. If voters decide race by race in which party's primary to cast ballots, then the gap between the primary and general electorates shrinks as nonparty members “cross over” to participate in races that interest them.<sup>209</sup> And if voters choose among *all* of the available candidates, then the gap between the electorates disappears almost entirely and the median primary voter becomes almost identical to the median general election voter.<sup>210</sup>

Under the alignment approach, then, judicial review of party regulations would vary based on the type of rule at issue. If a rule is potentially misaligning (such as a sore loser law), courts would engage in precisely

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207. See James Adams & Samuel Merrill, III, Why Small, Centrist Third Parties Motivate Policy Divergence by Major Parties, 100 Am. Pol. Sci. Rev. 403, 406 (2006) (modeling polarization of major parties in presence of centrist third party); Gary W. Cox, Centripetal and Centrifugal Incentives in Electoral Systems, 34 Am. J. Pol. Sci. 903, 915 (1990) (describing electoral incentives to run toward “extremes” when parties cluster around center). On the other hand, “the effect of a minor, peripheral party contesting the election is typically to shift the optimal strategies of both major parties in the direction *opposite* to that of the small party.” Adams & Merrill, *supra*, at 414. Whether the third party's impact is aligning or misaligning in this scenario depends on which major party prevails. If the major party closer to the third party wins, then the impact generally is aligning, and vice versa.

208. However, it is worth noting that open primaries (and their variants) only have an aligning effect if sincere crossover voting predominates over strategic crossover voting. If many nonparty members cross over in order to vote for candidates they expect to be weaker in the general election, then open primaries may produce more extreme nominees. Fortunately, primary “raiding” of this sort seems to be quite rare. See Will Bullock & Joshua D. Clinton, More a Molehill than a Mountain: The Effects of the Blanket Primary on Elected Officials' Behavior from California, 73 J. Pol. 915, 917 (2011) (reviewing literature finding “almost no evidence of ‘raiding’”).

209. However, as noted earlier, blanket primaries may result in better alignment between nominees and the median general election voter at the cost of worse alignment between nominees and parties' median voters. The Supreme Court invalidated the blanket primary in *Jones* in part for this very reason. See *supra* note 142.

210. The most important reason why the primary and general electorates are not perfectly identical under a top-two system is that turnout typically is higher in the general election.

the same congruence-and-interests balancing as in the franchise restriction context. The greater the likelihood of misalignment, the more compelling the state's interests would need to be for the rule to be sustained (and the tighter the rule's tailoring), and vice versa. Conversely, if a rule is potentially *aligning* (such as a mandatory inclusive primary or a measure that restricts third-party ballot qualification), courts would balance the rule's potential benefit in congruence against its attendant burden on parties' associational rights. The rule would be upheld if its aligning benefit were deemed to outweigh its rights burden, and struck down if not. Alignment would be treated as an additional state interest that could justify the encumbrance of parties' rights. Under either sort of inquiry, of course, accurate data about the alignment or misalignment that is likely to ensue would be crucial.

Unfortunately, no political science studies address how often third-party involvement prevents the party preferred by the median voter from prevailing. But in 2000, Ralph Nader's presence on the ballot cost Al Gore Florida (and with it the presidency),<sup>211</sup> and in the most recent election, the votes received by third parties exceeded the major party's margin of victory in about a dozen House races.<sup>212</sup> With respect to the policy divergence that third parties may generate, a British study found that the more seats the centrist Liberal Democrats contest in an election, the higher the level of polarization is between the Conservative and Labor Parties. When the Liberal Democrats contest almost every seat, the gap between the major parties' policy platforms is more than twice as high as when they contest only a handful of seats.<sup>213</sup> Similarly, another study determined that states with sore loser laws feature ideological differences between the Democratic and Republican candidates that are 13% larger than in states without the laws.<sup>214</sup> The provisions' presence also is linked to an increase in legislative polarization, measured using incumbents' voting records, of 5% to 10%.<sup>215</sup>

As for party primaries, the majority of studies have concluded that inclusive primaries bolster moderate candidates who are closer to the median voter, while a minority have found no relationship between primary type and policy alignment. According to the majority of scholarship, primary electorates are ideologically more similar to general elec-

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211. See, e.g., Michael C. Herron & Jeffrey B. Lewis, Did Ralph Nader Spoil Al Gore's Presidential Bid? A Ballot-Level Study of Green and Reform Party Voters in the 2000 Presidential Election, 2 Q.J. Pol. Sci. 205, 206 (2007) (finding 60% of Nader supporters preferred Gore to Bush and thus Nader "was a spoiler for Gore").

212. See Election 2012—House Results, N.Y. Times, <http://elections.nytimes.com/2012/results/house/big-board> (on file with the *Columbia Law Review*) (last updated Nov. 29, 2012) (listing 2012 House election results).

213. See Adams & Merrill, *supra* note 207, at 412 (noting that Liberal Democrats' "presence in the party system . . . motivates the major parties to polarize").

214. Burden et al., Polarization, *supra* note 194, at 19.

215. *Id.* at 21–23.

torates under inclusive systems;<sup>216</sup> House members<sup>217</sup> and state legislators<sup>218</sup> elected via inclusive systems adopt policy views more proximate to those of their constituents; and in California, moderate candidates enjoyed greater electoral success during the state's experiment with the blanket primary in the 1990s.<sup>219</sup> According to the academic minority, levels of polarization do not vary among the states based on the kinds of primaries that they use,<sup>220</sup> and California's more recent experiment with the top-two primary has not narrowed the preference gap between elected officials and the median voter.<sup>221</sup> There is thus no consensus in the literature about the implications of inclusive primaries, but the

216. See, e.g., Karen M. Kaufmann et al., *A Promise Fulfilled? Open Primaries and Representation*, 65 *J. Pol.* 457, 465 (2003) (“[P]rimary reform produces some ideological convergence of the party primary vote.”).

217. See, e.g., Gerber & Morton, *supra* note 102, at 321–22 (“U.S. representatives from states with closed primaries take more extreme policy positions, relative to their district's median voter, than representatives from states with more open primaries.”); Kristin Kanthak & Rebecca Morton, *The Effects of Electoral Rules on Congressional Primaries*, in *Congressional Primaries and the Politics of Representation* 116, 126 (Peter F. Galderisi et al. eds., 2001) (“Candidates who are selected from semiclosed, semiopen, and nonpartisan states are significantly more likely to have moderate positions relative to their districts' median voters than are those selected from pure-closed primary states.”); Westley et al., *supra* note 195, at 373 (“[M]ore open primaries produce candidates with positions that are closer to those of the median voter.”).

218. See Besley & Case, *supra* note 185, at 30 (“[O]pen primaries are associated with reductions in the absolute differences between the ideologies of citizens and [state] elected officials . . .”).

219. See Eric McGhee with Daniel Krimm, *Pub. Policy Inst. of Cal., At Issue: Open Primaries* 8 (2010), available at [http://www.ppic.org/content/pubs/atissue/AI\\_210EMAI.pdf](http://www.ppic.org/content/pubs/atissue/AI_210EMAI.pdf) (on file with the *Columbia Law Review*) (“[E]vidence—much of it from California's experience with the blanket primary—points toward a slight advantage to moderate candidates.”); Bullock & Clinton, *supra* note 208, at 923 (“[T]he adoption of the blanket primary does appear to result in the election of slightly more moderate representatives.”); Elisabeth R. Gerber, *Strategic Voting and Candidate Policy Positions*, in *Voting at the Political Fault Line: California's Experiment with the Blanket Primary* 192, 210 (Bruce E. Cain & Elisabeth R. Gerber eds., 2002) (observing that blanket primary “clearly made a difference in the State Assembly races, leading to the nomination of a significantly greater number of moderates”); see also R. Michael Alvarez & Betsy Sinclair, *Electoral Institutions and Legislative Behavior: The Effects of Primary Processes*, 65 *Pol. Res. Q.* 544, 545 (2012) (finding “legislators elected under [California's] blanket primary are more likely to agree and compromise with other legislators”).

220. See, e.g., Eric McGhee et al., *A Primary Cause of Partisanship? Nomination Systems and Legislator Ideology* 11 (May 1, 2013) (unpublished manuscript), available at <http://ssrn.com/abstract=1674091> (on file with the *Columbia Law Review*) (“[T]he predictions of a heterogeneous effect are fragile and dependent on assumptions that may not be realistic in practice.”).

221. See Kousser et al., *supra* note 102, at 32 (noting that “top-two primary has [not] halted the continuing partisan polarization of California's elected lawmakers or their drift away from the average voter in each district”).

weight of authority does suggest that they have at least some aligning effects.<sup>222</sup>

Accordingly, there again is no empirical impediment to the adoption of the alignment approach in the party regulation context, and again the available evidence confirms that misalignment is a genuine worry in this domain. Courts would not be chasing chimeras by orienting their review of party rules around the preference noncongruence that they may produce. Next I consider how the field of campaign finance might look if it too were organized around the alignment principle. I consider, that is, how money in politics may distort the relationships between voters and their representatives (and how the law may seek to correct these distortions).

### C. Campaign Finance

A small number of policies are employed (or often proposed) to regulate money in American politics. First, limits on contributions to candidates and other political actors apply at the federal level<sup>223</sup> and in almost all states.<sup>224</sup> Second, expenditure restrictions on candidates and other political actors used to exist at the federal and state levels, but have been deemed unconstitutional by the courts.<sup>225</sup> Third, both contributions and expenditures typically must be disclosed to the public.<sup>226</sup> Lastly, public financing is available in presidential elections<sup>227</sup> and in about half of the states,<sup>228</sup> in return for which candidates usually must agree to limit

222. Some reasons why more inclusive primaries may not produce the expected aligning effects are that voters may not be able to identify candidates' ideological positions accurately and that crossover voting may be too infrequent to make any real difference. McGhee et al., *supra* note 220, at 11 n.2, 28–29.

223. 2 U.S.C. § 441a(a) (2012) (prescribing dollar limits on individual contributions in federal elections).

224. See, e.g., Contribution Limits: An Overview, Nat'l Conference of State Legislatures, <http://ncsl.org/legislatures-elections/elections/campaign-contribution-limits-overview.aspx> (on file with the *Columbia Law Review*) (last updated Oct. 3, 2011) (reviewing state restrictions on election contributions).

225. See *Citizens United v. FEC*, 130 S. Ct. 876, 896–99, 916–17 (2010) (striking down bans on corporate expenditures); *Buckley v. Valeo*, 424 U.S. 1, 58–59 (1976) (*per curiam*) (striking down restrictions on expenditures by candidates and other political actors). Prior to *Citizens United*, bans on corporate and union expenditures existed in about half of the states. See, e.g., Life After *Citizens United*, Nat'l Conference of State Legislatures, <http://ncsl.org/legislatures-elections/elections/citizens-united-and-the-states.aspx> (on file with the *Columbia Law Review*) (last updated Jan. 4, 2011) (describing “[l]aws in 24 states . . . affected by *Citizens United*”).

226. See 2 U.S.C. §§ 434, 441d (detailing reporting and public disclosure requirements).

227. *Id.* § 441a(b) (setting expenditure limits on presidential candidates using public financing); 26 U.S.C. §§ 9031–9042 (2012) (describing eligibility, conditions, and procedures for receiving public financing).

228. See, e.g., Public Financing of Campaigns: An Overview, Nat'l Conference of State Legislatures, <http://ncsl.org/legislatures-elections/elections/public-financing-of>

their fundraising and spending. Despite these measures, the total cost of American elections has increased steadily, especially in recent years. Between 2000 and 2012, outlays approximately doubled in campaigns for both Congress (from \$1.7 billion to \$3.6 billion) and the White House (from \$1.4 billion to \$2.6 billion).<sup>229</sup>

When campaign finance laws are challenged, courts evaluate them using a variant of the rights-and-interests balancing on which they rely in several other domains. The right at issue in these cases is the freedom of speech: the ability of citizens, candidates, and other actors to donate and spend money in accordance with their political beliefs. The only countervailing state interest that courts have recognized is the prevention of corruption and its appearance.<sup>230</sup> Expenditure restrictions are particularly suspect under this framework, while contribution limits are reviewed more leniently.<sup>231</sup> In the legal literature, the most common argument is that another compelling interest also justifies campaign finance laws: preventing inequalities in wealth from being translated into inequalities in political influence. On this view, political equality is a crucial value that is undermined when some groups and individuals are able to dedicate far greater resources than others to swaying electoral outcomes.<sup>232</sup> Other perspectives stress the implications of campaign finance laws for competition,<sup>233</sup> the possibility that low-dollar donations could enhance

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campaigns-overview.aspx (on file with the *Columbia Law Review*) (last updated Jan. 23, 2013) (describing public financing schemes in twenty-five states). The extent of public financing varies widely among these states, from tax incentives for citizens to full governmental funding. See, e.g., *id.*

229. Election Money, *supra* note 4.

230. See *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496–97 (1985) (“[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.”).

231. See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 246–48 (2006) (plurality opinion) (holding that contribution limits must meet less rigorous “closely drawn” standard); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259–60 (1986) (“[R]estrictions on contributions require less compelling justification than restrictions on independent spending.”); *Buckley v. Valeo*, 424 U.S. 1, 24–25 (1976) (per curiam) (upholding contribution limits closely drawn to prevent corruption or its appearance).

232. See, e.g., David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 *Yale L. & Pol’y Rev.* 236, 237 (1991) (asserting that economic imbalances give “certain voices inordinate influence” in shaping political views); Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 *Colum. L. Rev.* 1204, 1204 (1994) (advocating equal expenditures per voter to eliminate disproportionate influence of wealthy); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 *Colum. L. Rev.* 1369, 1370 (1994) (arguing that concern over corruption can be mitigated by achieving “appropriate level of equality”).

233. See, e.g., Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 *U. Chi. Legal F.* 111, 138 (describing anticompetitive effects of incumbents’ financial and fundraising advantages); Klarman, *supra* note 58, at 522 (noting legislators’ “obvious incentive” to entrench themselves using campaign finance laws).

opportunities for civic participation,<sup>234</sup> and the impairment of representation that follows when candidates devote too much of their time to fundraising.<sup>235</sup>

Under the alignment approach, in contrast, the fear about money in politics is that it may cause the preferences of voters and representatives to diverge—and the hope is that well-crafted regulations may prevent this divergence from emerging. To begin with, partisan misalignment may occur when asymmetric spending creates a gap between the median actual voter and the median hypothetical voter exposed to more even expenditures. Suppose that Candidate *A* outspends Candidate *B* by a large margin and then wins the election.<sup>236</sup> Suppose also that had Candidate *A* and Candidate *B* spent the same amount of money, Candidate *B* would have prevailed. Then the partisan preference of the median actual voter is realized, but that of the median hypothetical voter exposed to more even outlays is not. Relatedly, unbalanced spending may give rise to policy misalignment even in the absence of partisan misalignment. Imagine that Candidate *A* outspends Candidate *B* by a large margin, wins comfortably, and then embraces the views of the median voter. Imagine too that had Candidate *A* and Candidate *B* spent the same amount of money, Candidate *A* still would have won, but the median voter would have arrived at different policy views. Then the policy preferences of the median actual voter again are satisfied, but those of the median hypothetical voter exposed to more even outlays again are not.<sup>237</sup>

These forms of misalignment may seem less troubling than most of the other varieties discussed in this Article. This is because the figure whose preferences are not realized in these scenarios—the median hypothetical voter exposed to more symmetric spending—is not highly normatively compelling, at least not to most contemporary Americans. For better or worse, our democracy is not committed to the notion that campaign spending should be equalized, let alone to the idea that the “right” electoral outcomes are those that would arise under conditions of even outlays.<sup>238</sup> Still, there is at least some force to the argument that voter

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234. See, e.g., Overton, *Donor Class*, *supra* note 65, at 105 (suggesting that campaign finance laws should “empower more citizens to participate in the funding of campaigns”).

235. See, e.g., Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 *Colum. L. Rev.* 1281, 1282–83 (1994) (arguing that eliminating necessity of excessive fundraising would produce better governance).

236. Here I am referring to all of the expenditures that are made on behalf of candidates (including by outside groups), not just to the candidates’ own spending.

237. Of course, these district-level misalignments, if they occur in multiple constituencies, can aggregate into partisan or policy misalignment at the legislative level too. In addition, I assume here that campaign spending can influence both the partisan and the policy preferences of voters. This does not strike me as a controversial assumption.

238. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (*per curiam*) (labeling “wholly foreign to the First Amendment” the “concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others”);



preferences should not be reshaped by lopsided spending, because then election results reflect the uneven expenditures rather than voters' balanced assessments of their needs and interests. The above forms of misalignment capture this view, even though it is not the dominant perspective in the campaign finance context.

The other kind of misalignment that may arise from money in politics derives not from candidates' *spending* but rather from their *fundraising*. Candidates at all levels, of course, must raise money to fund their campaigns. They are therefore likely to be quite attentive to the policy preferences of their donors, since it is the donors who provide them with the resources they need to run successfully for office. If the donors differ in their policy views from the electorate as a whole, then policy misalignment ensues to the extent that candidates espouse the positions of the median donor rather than those of the median voter.<sup>239</sup> And donors *do* typically differ from voters at large, in that they are wealthier, better educated, and, by definition, more politically active.<sup>240</sup> Their high socioeconomic status endows donors with a distinctive set of views on many policy issues,<sup>241</sup> while their high political engagement tends to polarize them ideologically relative to the general population.<sup>242</sup>

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Kathleen M. Sullivan, Political Money and Freedom of Speech, 30 U.C. Davis L. Rev. 663, 677–78 (1997) (discussing difficulties of using disproportionate campaign contributions as proxy for electoral distortion). As noted earlier, whatever the normative appeal may be of the median hypothetical voter exposed to more even outlays, it stems from a democratic value—political equality—distinct from alignment itself. See *supra* Part III.A.

239. Exactly the same kind of misalignment ensues if the donor is an outside group rather than an individual, or if the money takes the form of an expenditure rather than a contribution. I focus here on individual donors because of the empirical evidence that corporate and union contributions have only a minor influence on politicians' voting records. See, e.g., Stephen Ansolabehere et al., Why Is There So Little Money in U.S. Politics?, J. Econ. Persp., Winter 2003, at 105, 114 (summarizing this evidence).

240. See, e.g., Donald A. Gross & Robert K. Goidel, The States of Campaign Finance Reform 24 (2003) (discussing donor demographics); Henry E. Brady et al., Redistribution, Polarization, and Medians: Bringing Data to Downsian Puzzles 17 (Aug. 30, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1451280> (on file with the *Columbia Law Review*) (finding median campaign dollar is contributed by donor with family income in top 10% of overall distribution).

241. See, e.g., Martin Gilens, Affluence and Influence: Economic Inequality and Political Power in America 97–124 (2012) (examining variation in policy preferences across income spectrum); Benjamin I. Page et al., Democracy and the Policy Preferences of Wealthy Americans, 11 Persp. on Pol. 51, 53–64 (2013) (presenting results of opinion survey of Americans in top 1% of wealth distribution).

242. See, e.g., McCarty et al., Polarized, *supra* note 104, at 153–58 (showing that donors' views tend to be ideologically extreme relative to general population); Bafumi & Herron, *supra* note 75, at 536–37 & fig.6 (showing that ideological distribution of donors is much more bimodal than that of voters); Jesse H. Rhodes & Brian F. Schaffner, Economic Inequality and Representation in the U.S. House: A New Approach Using Population-Level Data 35 (Apr. 7, 2013) (unpublished manuscript) (on file with the *Columbia Law Review*) (finding higher levels of ideological polarization among donors than voters).

Under the alignment approach, then, the central issue for courts assessing campaign finance laws would be the measures' capacity to curb the noncongruence that stems from electoral spending and fundraising. If the laws promise to exert substantial aligning effects, then courts would be more likely to tolerate the burden they impose on First Amendment rights, and vice versa. This methodology probably would result in expenditure restrictions being upheld more often than under the status quo. Since asymmetric spending may give rise to partisan and policy misalignment, it follows that measures aimed at evening outlays sometimes would be valid. Contribution limits also typically would be sustained under the alignment approach, even if they are quite low. When candidates must solicit smaller contributions from larger numbers of donors, the median donor ceases to be so different from the median voter. Lastly, public financing regimes would sit on even sturdier legal ground than they do today. If candidates receive comparable resources from the state and have less need to solicit donations on their own, then both relevant forms of misalignment are addressed in a single stroke.<sup>243</sup>

In the political science literature, scholars are divided as to both whether asymmetric spending influences election results and whether laws that tend to equalize expenditures have any electoral impact. With respect to spending, studies have found that Republican presidential candidates average a 3.5% increase in vote margin thanks to their financial advantage over Democratic candidates,<sup>244</sup> and that a 1% change in a party's share of campaign receipts results in a 0.5% change in the party's share of state senate seats.<sup>245</sup> But studies also have determined that spending by incumbents makes almost no difference in U.S. House races (although challenger spending is somewhat more effective).<sup>246</sup> Similarly, with respect to campaign finance laws, studies have found that corporate contribution limits increase the share of state legislative seats held by

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243. I recognize, of course, that most existing public financing regimes neither provide for perfectly even spending nor end the need to fundraise. They therefore reduce the misalignment caused by money in politics, but they do not eliminate it.

244. Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age* 123 (2008).

245. See Andrew B. Hall, *Systemic Effects of Campaign Spending* 18 (Mar. 24, 2013) (unpublished manuscript), available at <http://ssrn.com/abstract=2120637> (on file with the *Columbia Law Review*) ("In state upper houses, a one percentage-point increase in the Democratic share of total campaign contributions is estimated to cause a 0.45 percentage-point increase in the Democratic share of the legislature on average.").

246. See, e.g., Steven D. Levitt, *Using Repeat Challengers to Estimate the Effect of Campaign Spending on Election Outcomes in the U.S. House*, 102 *J. Pol. Econ.* 777, 780 (1994) (finding that "campaign spending has an extremely small impact on election outcomes"); Thomas Stratmann, *Some Talk: Money in Politics. A (Partial) Review of the Literature*, 124 *Pub. Choice* 135, 138 (2005) (finding that U.S. House incumbents' spending has insignificant positive or even negative effect while "challenger spending . . . increases challengers' vote shares").

Democrats by anywhere from 2.1% to 6.0%,<sup>247</sup> and that the Supreme Court's recent rejection of all corporate spending bans made Republican candidates 2.0% more likely to prevail in the 2010 election.<sup>248</sup> But studies also have determined that contribution limits have virtually no impact on vote margins in gubernatorial elections,<sup>249</sup> and that corporate and union spending bans are unrelated to seat shares<sup>250</sup> and policy liberalism<sup>251</sup> in state legislatures.

In contrast to this muddled picture, there is near consensus in the empirical literature that politicians' positions more accurately reflect the views of their donors than those of their constituents. This heightened sensitivity to donor preferences is evident, first, in the bimodality of politicians' voting records, which matches the twin-peaked distribution of donors but not the more normal distribution of voters. Other forces are responsible for legislative polarization too, but a crucial "contributing factor [is] the relative extremism of donating voters."<sup>252</sup> The influence of donors on elected officials also is evident in the much greater attention that politicians pay to the views of their wealthy constituents. According to an array of studies, the preferences of the rich exert a powerful impact

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247. Besley & Case, *supra* note 185, at 27 tbl.4, 31 tbl.5; Hall, *supra* note 245, at 28 tbls.3 & 4.

248. Tilman Klumpp et al., *Money Talks: The Impact of Citizens United on State Elections 9* (Univ. of Alta. Dep't of Econ., Working Paper No. 2012-18, 2012), available at <http://www.economics.ualberta.ca/~media/economics/FacultyAndStaff/WPs/WP2012-18-Klumpp-Mialon-Williams> (on file with the *Columbia Law Review*).

249. See Gross & Goidel, *supra* note 240, at 80–81 (finding almost no statistically significant differences in margins between states with and without regulations); David M. Primo et al., *State Campaign Finance Reform, Competitiveness, and Party Advantage in Gubernatorial Elections*, in *The Marketplace of Democracy: Electoral Competition and American Politics* 268, 277–78 (Michael P. McDonald & John Samples eds., 2006) (finding organizational contribution limits to have no effect on margins).

250. See Raymond J. La Raja & Brian F. Schaffner, *The (Non-)Effects of Campaign Finance Spending Bans on Macro Political Outcomes: Evidence from the States 16* (Mar. 1, 2012) (unpublished manuscript), available at <http://ssrn.com/abstract=2017056> (on file with the *Columbia Law Review*) (finding that "corporate spending bans have little, if any effect on [state legislative] political and policy outcomes").

251. See Timothy Werner & John J. Coleman, *Assessing the Potential Effects of Citizens United: Evidence from the States 20, 31* (Aug. 2012) (unpublished manuscript), available at <http://ssrn.com/abstract=2108171> (on file with the *Columbia Law Review*) (finding "relative lack of connection between independent expenditure bans and political and policy outcomes").

252. Bafumi & Herron, *supra* note 75, at 536; see also Christopher Ellis, *Understanding Economic Biases in Representation: Income, Resources, and Policy Representation in the 110th House*, 65 *Pol. Res. Q.* 938, 945 (2012) [hereinafter Ellis, *Understanding Economic Biases*] (presenting regression results showing that large donors are closer ideologically to their representatives and tend to get their preferred policies enacted more frequently); Rhodes & Schaffner, *supra* note 242, at 35 (finding U.S. House members' roll call votes "more strongly associated with the views of their donors (and outside donors) than with those of their voting constituents").

on the voting records of House members<sup>253</sup> and senators,<sup>254</sup> as well as on actual policy outcomes at the federal<sup>255</sup> and state<sup>256</sup> levels. By comparison, the preferences of the middle class have only a modest effect, and the preferences of the poor make almost no difference at all.<sup>257</sup> Again, there are several explanations for this divergent pattern of representation, but again, “wealthy individuals’ much greater propensity to contribute . . . plays an important role in explaining why high wealth groups enjoy greater responsiveness.”<sup>258</sup>

The available evidence therefore indicates that fundraising-induced misalignment is a significant threat, while spending-induced misalignment is a more uncertain proposition. Since the normative case for worrying about the latter kind of noncongruence is weaker as well, the implication is that courts (and scholars) should concentrate on the former. Politicians’ proclivity to better represent their donors than their constituents is both democratically troubling and empirically corroborated, and it would be the focus of the alignment approach in the campaign finance context.

#### D. *Redistricting*

I turn next to redistricting, the decennial redrawing of congressional, state, and local district boundaries. When they reshape their district lines, jurisdictions must comply with the one-person, one-vote rule, which compels almost perfect population equality at the congressional

253. See, e.g., Ellis, *Understanding Economic Biases*, supra note 252, at 943 (finding U.S. House vote representativeness significantly associated with constituent income level); Rhodes & Schaffner, supra note 242, at 37 (“[W]ealthier citizens . . . receive more representation from members of the House of Representatives than the least wealthy.”).

254. See, e.g., Bartels, supra note 244, at 253, 259–61 (finding senators “vastly more responsive to affluent constituents than to constituents of modest means”).

255. See, e.g., Gilens, supra note 241, at 79–82 (finding federal policy “responsiveness to the preferences of the 90th [income] percentile . . . equally strong whether their preferences diverge from the poor, from the middle class, or even from . . . the 70th percentile”).

256. See, e.g., Patrick Flavin, *Income Inequality and Policy Representation in the American States*, 40 *Am. Pol. Res.* 29, 43–44 (2011) (“[C]itizens with low incomes receive little substantive political representation in the policy decisions made by state governments.”).

257. Supra notes 253–256. In addition, the representational gap between the rich and poor is growing over time; it is now four times as large as it was in the 1970s. See Christopher Ellis, *Representational Inequity Across Time and Space: Exploring Changes in the Political Representation of the Poor in the U.S. House 2–3* (n.d.) (unpublished manuscript) (on file with the *Columbia Law Review*).

258. Rhodes & Schaffner, supra note 242, at 38; see also Bartels, supra note 244, at 280 (finding that if senators responded only to donors, they would be six times more responsive to affluent constituents than to middle-income constituents—a differential that corresponds closely to reality); Gilens, supra note 241, at 10 (“Money . . . is the root of representational inequality . . .”).

level<sup>259</sup> and a high degree of equality at the state level too.<sup>260</sup> Jurisdictions also must comply with the nebulous constitutional prohibition of gerrymandering.<sup>261</sup> An array of race-related requirements apply to redistricting as well, and are discussed in the next section.<sup>262</sup> Lastly, many states impose additional line-drawing criteria such as compactness, respect for political subdivisions, and respect for communities of interest.<sup>263</sup>

When courts consider equal population challenges to district plans, they understand the potential injury to be entirely personal. The right to vote belongs to the particular individual, and it is violated if districts vary unjustifiably in population.<sup>264</sup> In contrast, courts do not currently adhere to any coherent theory in gerrymandering disputes.<sup>265</sup> But during the two decades in which a justiciable standard did exist in this domain, it emphasized both adverse election results and (somewhat oddly) restrictions on voter participation.<sup>266</sup> In the legal literature, scholars tend to accept the courts' conceptual framework in malapportionment cases, though they sometimes offer structural twists on the one-person, one-vote rule.<sup>267</sup>

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259. See, e.g., *Karcher v. Daggett*, 462 U.S. 725, 730–31 (1983) (noting requirement that congressional “districts be apportioned to achieve population equality ‘as nearly as is practicable’” (quoting *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964))); *Wesberry*, 376 U.S. at 7–8 (“We do not believe that the Framers of the Constitution intended to permit . . . districts containing widely varied numbers of inhabitants.”).

260. See, e.g., *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (noting application of “mathematical equality” principle to state legislatures); *Connor v. Finch*, 431 U.S. 407, 409–10 (1977) (noting “elemental requirement of the Equal Protection Clause . . . that [state] legislative districts be ‘as nearly of equal population as is practicable’” (quoting *Reynolds v. Sims*, 377 U.S. 533, 577 (1964))).

261. See *Vieth v. Jubelirer*, 541 U.S. 267, 305 (2004) (plurality opinion) (mustered only four votes to hold partisan gerrymandering nonjusticiable and thus leaving cause of action in doctrinal limbo).

262. *Infra* Part III.E.

263. See, e.g., Nat'l Conference of State Legislatures, *Redistricting Law 2010*, at 125–27 (2009), available at <http://redistrictingonline.org/uploads/Redistrictinglaw2010.pdf> (on file with the *Columbia Law Review*) (listing redistricting criteria by state).

264. See, e.g., *Reynolds*, 377 U.S. at 561 (stating in malapportionment cases “rights allegedly impaired are individual and personal in nature”); *Gray v. Sanders*, 372 U.S. 368, 380 (1963) (“Every voter’s vote is entitled to be counted once.”).

265. See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 414 (2006) (discussing “disagreement over what substantive standard to apply”); *Vieth*, 541 U.S. at 305 (plurality opinion) (finding no “judicially enforceable limit” to apply).

266. See *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality opinion) (holding unlawful gerrymandering “occurs only when the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole”). As noted earlier, hints of the alignment approach can be found in several Justices’ opinions in the gerrymandering context. *Supra* notes 148–150 and accompanying text.

267. See, e.g., Fishkin, *Weightless Votes*, *supra* note 71, at 1892–93 (“[I]n one person, one vote cases . . . the real action is . . . in structural questions about the allocation of group political power.”); Gerken, *Minimalism*, *supra* note 42, at 1421–27 (discussing principles potentially justifying one-person, one-vote standard); Karlan, *Rights to Vote*,

With respect to gerrymandering, the most prominent camp contends that its key harm is the lack of competition that ensues when incumbents are placed in overly safe districts.<sup>268</sup> Other perspectives stress how symmetrically the major parties are treated,<sup>269</sup> the shape and composition of individual districts,<sup>270</sup> and whether the purpose underlying a plan is excessively partisan.<sup>271</sup>

Under the alignment approach, on the other hand, the chief concern about district boundaries is that they may give rise to preference noncongruence—both within particular constituencies and in the jurisdiction as a whole. At the district level, policy misalignment may develop if highly demographically, socioeconomically, or ideologically heterogeneous constituencies are drawn. The signals that the residents of such districts convey to their representatives are unusually varied and difficult to interpret. The representatives therefore may be unsure how to act in accordance with the wishes of the median voter, and instead may take their behavioral cues from their donors, political parties, or personal predilections. To illustrate the point, suppose that one district is half rich and half poor, while another is mostly middle-class. It may be harder for the representative of the former district to identify and vote consistently with the views of the median voter. It may be easier, that is, for policy misalignment to emerge.<sup>272</sup>

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supra note 68, at 1717–18 (“One-person, one-vote provided a relatively self-executing, clearly judicially manageable standard . . .”).

268. See, e.g., Issacharoff, *Gerrymandering*, supra note 46, at 600 (arguing “risk in gerrymandering is . . . constriction of the competitive processes by which voters can express choice”); Klarman, supra note 58, at 516 (describing gerrymandering as anticompetitive); Ortiz, *Got Theory?*, supra note 62, at 484–90 (noting under gerrymandering “[f]ew, if any, districts will remain in true competition”); Pildes, *Constitutionalization*, supra note 46, at 60–62 (describing gerrymandering as “covenant not to compete between the incumbents of the two parties”).

269. See, e.g., Gelman & King, supra note 80, at 545–46 (analyzing gerrymandering’s effect on “partisan bias,” i.e. “deviation from partisan symmetry”); Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering After LULAC v. Perry*, 6 *Election L.J.* 2, 5 (2007) (praising Justices’ apparent openness to arguments about asymmetry).

270. See, e.g., Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 *Yale L. & Pol’y Rev.* 301, 302 (1991) (“[W]e suggest that those who define district boundaries must also be required to respect . . . the constraint of compactness.”); Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 *U. Pa. L. Rev.* 1379, 1435–40 (2012) [hereinafter Stephanopoulos, *Redistricting*] (“[D]isruption [of communities] can and should be minimized by intelligent district drawing.”).

271. See, e.g., Mitchell N. Berman, *Managing Gerrymandering*, 83 *Tex. L. Rev.* 781, 825–28 (2005) (explicating “excessive partisanship” as criterion for evaluating redistricting schemes); Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 *Cornell J.L. & Pub. Pol’y* 397, 399 (2005) (“[E]xcessive partisanship is the most important constitutional argument against partisan gerrymandering.”).

272. See generally Stephanopoulos, *Exceptionalism*, supra note 166, at 825–28 (making this argument at greater length).

At the legislative level, both malapportionment and gerrymandering may produce both partisan and policy misalignment. Malapportionment may result in partisan misalignment when there are partisan patterns to districts' population discrepancies. Imagine that a state has ten districts and a thousand voters, of whom 52% are Democrats and 48% are Republicans. Imagine also that two of the districts have 200 voters (of whom 140 are Democrats and 60 are Republicans), while eight of the districts have 75 voters (of whom 30 are Democrats and 45 are Republicans). Then the overpopulation of the Democratic districts and the underpopulation of the Republican districts give rise to a startling degree of partisan misalignment. Eight of the ten districts elect Republicans while the state's median voter is a Democrat.

A minor adjustment to this hypothetical demonstrates how malapportionment may produce policy misalignment even in the absence of partisan misalignment.<sup>273</sup> If the two overpopulated Democratic districts each have 125 Democrats and 75 Republicans, then the state's median voter becomes a Republican and there is no longer any partisan misalignment. But policy misalignment is still probable because, while the electorate now leans Republican by a miniscule 51% to 49% margin, the median district features a much larger 60% to 40% Republican advantage. The state's median voter thus is likely to be a center-right moderate, but, as long as politicians' positions are related to the partisan makeup of their districts, the legislature's median member is likely to be substantially more conservative.<sup>274</sup>

Analogously, gerrymandering may result in partisan misalignment when there are partisan patterns to districts' margins of victory (even if the districts are equal in population). Take the above state with its ten districts, thousand voters, and 51% to 49% Republican-Democratic composition. If three of the districts elect Republicans by a 72% to 28% margin, while seven of them elect Democrats by a 58% to 42% margin, then a stark partisan mismatch arises between the state's median voter (a Republican) and the legislature's median member (a Democrat). Again, a small tweak to the hypothetical shows how gerrymandering may generate policy misalignment even in the absence of partisan misalignment. If

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273. Of course, policy misalignment follows almost inevitably when there is partisan misalignment. See *supra* notes 99–100 and accompanying text (discussing this relationship); see also Gerber, *Institutions*, *supra* note 109, at 265 (noting possibility of policy misalignment “if districts are drawn such that the median of the district median positions differs from the overall population median”).

274. The empirical evidence indicates that the relationship between voting record and district composition is modest but real. See Nolan McCarty et al., *Does Gerrymandering Cause Polarization?*, 53 *Am. J. Pol. Sci.* 666, 670–71 & fig.3 (2009) (showing that, in both 1972 and 2004, politicians' voting records became somewhat more conservative as their districts' Republican vote shares increased); Walter J. Stone & Elizabeth N. Simas, *Candidate Valence and Ideological Positions in U.S. House Elections*, 54 *Am. J. Pol. Sci.* 371, 372 (2010) (summarizing literature finding “members of Congress differ in the positions they take consistent with variations in district preferences”).

the first three districts elect Republicans by a narrower 62% to 38% margin, then the state's overall composition shifts to 52% Democratic and there is no longer any partisan misalignment. But policy misalignment is still probable because the median district (at 58% Democratic) diverges considerably from the midpoint of the electorate. The state's median voter is likely to be a center-left moderate, while the legislature's median member is likely to be more liberal.<sup>275</sup>

Under the alignment approach, then, courts would evaluate both individual districts and entire district plans by weighing their misaligning potential against the legitimate interests they advance. At the district level, courts would be skeptical of highly heterogeneous constituencies because of the policy misalignment they promote. Such districts might be permitted only if they are necessary for compliance with the one-person, one-vote rule, the Voting Rights Act (VRA),<sup>276</sup> or some similarly pressing state goal.<sup>277</sup> At the legislative level, the reddest flag for courts would be district plans that threaten, through either malapportionment or gerrymandering, to give one party control of the legislature even though the state's median voter prefers the opposing party.<sup>278</sup> Such plans might be upheld only if there is no alternative that is consistent with the applicable legal requirements. Lastly, courts would be wary as well of plans that result in large divergences between a state's median district and its electorate as a whole. Plans of this sort tend to produce policy misalignment in the legislature, and thus would require a compelling justification to be sustained.<sup>279</sup>

In the political science literature, substantial evidence confirms the danger of policy misalignment in highly heterogeneous districts. One study found that as the ideological diversity of Los Angeles-area districts increases, elected officials become less likely to abide by the preferences of the median voter, and more likely to vote in unison with their party.<sup>280</sup> Another study determined that the policy positions taken by Senate can-

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275. I assume again that voting record and district composition are related. See *supra* note 274 (establishing relationship).

276. 42 U.S.C. §§ 1973–1973bb-1 (2006), invalidated in part by *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

277. See Stephanopoulos, *Redistricting*, *supra* note 270, at 1435–40 (making similar proposal).

278. See *Vieth v. Jubelirer*, 541 U.S. 267, 360–62 (2004) (Breyer, J., dissenting) (making similar proposal).

279. See Christopher S. Elmendorf & David Schleicher, *Districting for a Low-Information Electorate*, 121 *Yale L.J.* 1846, 1876 (2012) (arguing for district plans in which “median voter in the median district is also the median voter in the polity as a whole”). On the other hand, unlike under current law, interdistrict population discrepancies that do not result in any noncongruence might be upheld under the alignment approach.

280. Gerber & Lewis, *supra* note 166, at 1368 (“Regression analyses reveal that the effect of the median voter on legislator roll call voting behavior decreases as the variance in district preferences increases.”).



didates are less congruent with the views of the median voter in states that are more demographically or ideologically diverse.<sup>281</sup> Still other studies concluded that incumbent senators' votes on free trade issues are better explained by constituency characteristics in socioeconomically homogeneous states, but by partisan affiliation in diverse states.<sup>282</sup> And in my own prior work, I have found that House members' voting records correspond more closely to key district attributes in geographically homogeneous constituencies, but to partisanship in spatially diverse districts.<sup>283</sup>

With respect to partisan misalignment at the legislative level, political scientists have devised a metric—*partisan bias*—that captures the concept almost perfectly. Partisan bias refers to the divergence in the share of seats that each party would win given the same share of the statewide vote.<sup>284</sup> For example, if Democrats would win 48% of the seats with 50% of the vote (in which case Republicans would win 52% of the seats), then a district plan would have a pro-Republican bias of 2%. Bias typically is calculated at the point at which each party receives 50% of the vote,<sup>285</sup> and thus reveals both whether and to what extent partisan misalignment exists.

Because population equality has now been required for half a century, it is necessary to look to an earlier era to determine the misaligning effects of malapportionment. Prior to the Supreme Court's intervention in the 1960s,<sup>286</sup> then, there was a persistent pro-Republican bias of about 6% in House elections held in non-southern states.<sup>287</sup> Interestingly, how-

281. Benjamin G. Bishin et al., Does Democracy "Suffer" from Diversity? Issue Representation and Diversity in Senate Elections, 129 *Pub. Choice* 201, 206–10 (2006) ("[C]andidates' positions in politically and demographically homogeneous states are significantly more responsive to the average citizen's ideological preferences compared to candidates' positions in heterogeneous states.").

282. Michael Bailey & David W. Brady, Heterogeneity and Representation: The Senate and Free Trade, 42 *Am. J. Pol. Sci.* 524, 537 (1998) (noting voting patterns more aligned with constituents' views in homogeneous states); Christopher Dennis et al., Constituency Diversity and Congress: The Case of NAFTA, 29 *J. Socio-Economics* 349, 355 (2000) (same).

283. Nicholas O. Stephanopoulos, Spatial Diversity, 125 *Harv. L. Rev.* 1903, 1944–46 (2012) [hereinafter Stephanopoulos, Diversity].

284. See Gelman & King, *supra* note 80, at 545–46 (defining term); Grofman & King, *supra* note 269, at 8 (same).

285. See, e.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 466–68 (2006) (Stevens, J., concurring in part and dissenting in part) (explaining and applying standard); Janet Campagna & Bernard Grofman, Party Control and Partisan Bias in 1980s Congressional Redistricting, 52 *J. Pol.* 1242, 1245 (1990) (showing theoretical and mathematical basis for standard).

286. The Court's intervention began with *Baker v. Carr*, 369 U.S. 186 (1962), and culminated in *Wesberry v. Sanders*, 376 U.S. 1 (1964), which mandated population equality for congressional districts, and *Reynolds v. Sims*, 377 U.S. 533 (1964), which did the same for state legislative districts.

287. Gary W. Cox & Jonathan N. Katz, *Elbridge Gerry's Salamander* 59 (2002); see also David W. Brady & Bernard Grofman, Sectional Differences in Partisan Bias and

ever, this bias was the result not of unequal population but rather of gerrymandering by Republican-controlled legislatures. The average Democratic district was actually somewhat *smaller* in population than the average Republican district, and it was the heavily Republican suburbs that were most sharply underrepresented.<sup>288</sup> But while malapportionment was not a major driver of partisan misalignment in this period, it does seem to have fostered policy misalignment. Underrepresented counties consistently received fewer state funds than overrepresented counties, suggesting that governmental spending did not correspond to the views of the median voter.<sup>289</sup> These distributional inequities vanished within years of the Court's decisions as rural areas lost their longstanding overrepresentation.<sup>290</sup> So too did the pro-Republican bias in much of the country, though due not to population equality but rather to the substitution of neutral plans for maps that favored the Republicans.<sup>291</sup>

As for the bias attributable to gerrymandering, it has fluctuated widely over the years, but is now both higher and more tilted in a Republican direction than at any other point in modern history. According to one study, there was an overall pro-Republican bias of about 6% in the 2012 House election, the highest figure since 1956.<sup>292</sup> According to my own calculations, the typical 2012 congressional plan featured an absolute bias of about 11% and a net pro-Republican bias of about 6%, both the highest scores in my 1966–2012 database.<sup>293</sup> Not surprisingly,

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Electoral Responsiveness in US House Elections, 1850–1980, 21 *Brit. J. Pol. Sci.* 247, 253–55 (1991) (describing historical pro-Republican bias in non-southern states).

288. Cox & Katz, *supra* note 287, at 14–15.

289. See Stephen Ansolabehere et al., *Equal Votes, Equal Money: Court-Ordered Redistricting and Public Expenditures in the American States*, 96 *Am. Pol. Sci. Rev.* 767, 770–72 (2002) [hereinafter Ansolabehere et al., *Equal Votes*] (“[C]ounties that had less representation received relatively less money during the pre-*Baker* era.”); see also Yusaku Horiuchi & Jun Saito, *Reapportionment and Redistribution: Consequences of Electoral Reform in Japan*, 47 *Am. J. Pol. Sci.* 669, 676 (2003) (reporting similar findings for Japan); Jonathan Rodden, *Strength in Numbers? Representation and Redistribution in the European Union*, 3 *Eur. Union Pol.* 151, 163 (2002) (finding same for European Union).

290. See Ansolabehere et al., *Equal Votes*, *supra* note 289, at 775–76 (detailing redistributive consequences of *Baker*).

291. E.g., Cox & Katz, *supra* note 287, at 60; cf. Brady & Grofman, *supra* note 287, at 255 (“[B]y the late 1970s, bias in both the non-South and the nation as a whole was very low.”).

292. John Sides & Eric McGhee, *Redistricting Didn't Win Republicans the House*, *Wash. Post: Wonkblog* (Feb. 17, 2013, 11:33 AM), [http://www.washingtonpost.com/blogs/wonkblog/wp/2013/02/17/redistricting-didnt-win-republicans-the-house/?wprss=rss\\_ezra-klein](http://www.washingtonpost.com/blogs/wonkblog/wp/2013/02/17/redistricting-didnt-win-republicans-the-house/?wprss=rss_ezra-klein) (on file with the *Columbia Law Review*) (displaying information in first graph). This figure controls for incumbency.

293. Calculations are on file with the *Columbia Law Review*; see also Nicholas O. Stephanopoulos, *The Consequences of Consequentialist Criteria*, 3 *U.C. Irvine L. Rev.* (forthcoming 2014) (manuscript at 9, 12–13), available at <http://ssrn.com/abstract=2230955> (on file with the *Columbia Law Review*) (describing assembly of database and calculation of partisan bias). Unlike Sides and McGhee, I did not control for incumbency.

scholars have found that when a party is in full control of a state government, the district plans it enacts tend to award it about 6% more seats than if the opposing party had been responsible for redistricting.<sup>294</sup> The recent spike in pro-Republican bias thus stems from the Republicans' capture of many state houses in 2010, right before the latest redistricting cycle began. However, it is important to note that not all bias is the product of gerrymandering. The geographic distribution of the parties' supporters—in particular, the overconcentration of Democratic voters in urban areas—also influences the level of bias, and indeed is thought by some scholars to be its most significant determinant.<sup>295</sup>

Accordingly, the empirical case for the alignment approach is strongest with respect to the policy misalignment caused by heterogeneous districts and the partisan misalignment caused by gerrymandering. In both of these areas, there is abundant evidence that misalignment exists, can be measured accurately, and is substantial in magnitude. In contrast, there is less proof at present regarding the misaligning effects of malapportionment or policy misalignment at the legislative level. Courts (and policymakers) thus would be wise to defer intervention on these grounds until the harms to be addressed have been established more definitively.

#### E. *Minority Representation*

The final election law topic that I examine here is minority representation: specifically, the set of statutory and constitutional rules that help determine the composition and number of districts in which minority groups are able to elect their preferred candidates. Under section 2 of the VRA, large and geographically concentrated minority groups typically are entitled to the construction of districts in which they comprise a majority of the population.<sup>296</sup> Under section 5 of the statute, certain jurisdictions (mostly in the South) formerly were required to receive federal approval in order for their district plans to go into effect, and were prohibited from reducing their existing levels of minority

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294. E.g., Gelman & King, *supra* note 80, at 553; see also Besley & Case, *supra* note 185, at 34 (finding party responsible for redistricting wins larger proportion of seats in state legislative elections).

295. See Jowei Chen & Jonathan Rodden, *Using Legislative Districting Simulations to Measure Electoral Bias in Legislatures* 30 (July 15, 2010) (unpublished manuscript), available at <http://polmeth.wustl.edu/media/Paper/ChenRodden.pdf> (on file with the *Columbia Law Review*) (finding district plans of most U.S. states containing major cities biased in Republican direction); Jonathan A. Rodden, *The Long Shadow of the Industrial Revolution: Political Geography and the Representation of the Left* 5–6 (Mar. 25, 2011) [hereinafter Rodden, *Long Shadow*] (unpublished manuscript), available at <http://www.stanford.edu/~jrodden/wp/shadow.pdf> (on file with the *Columbia Law Review*) (“[B]ecause of electoral geography, small, compact winner-take-all districts in industrial societies have been quite good for parties of the right.”).

296. See 42 U.S.C. § 1973 (2006), construed in *Thornburg v. Gingles*, 478 U.S. 30, 47–51 (1986) (Brennan, J.) (prohibiting dilution of minority voting power by redistricting).

representation.<sup>297</sup> And under the Equal Protection Clause, intentional racial vote dilution is forbidden,<sup>298</sup> as is the formation of districts with race as the predominant motive (i.e., racial gerrymandering).<sup>299</sup>

To the extent courts subscribe to an overarching theory in this domain, it is that minority groups' claims to representation are most compelling when either their ability to participate in the political process has been burdened or they constitute cohesive geographic communities. In its first wave of vote dilution cases in the 1970s, the Supreme Court ruled in favor of minority plaintiffs only when they could demonstrate some kind of participational impairment.<sup>300</sup> More recently, majority-minority districts have been mandated under section 2, and upheld against racial gerrymandering challenges, only when they have corresponded to distinct minority communities.<sup>301</sup> In the legal literature, some scholars argue that the VRA should be extended to all minority groups, including geographically diffuse ones,<sup>302</sup> or to all instances of racially polarized voting.<sup>303</sup> Other scholars contend that the VRA may no longer be necessary now that one-party Democratic rule in the South has been replaced with

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297. § 1973c, invalidated by *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

298. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 617 (1982) (describing as unconstitutional voting schemes “conceived or operated as purposeful devices to further racial discrimination” by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population” (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971))); *White v. Regester*, 412 U.S. 755, 765–70 (1973) (noting that Court entertains “claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups”).

299. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (explaining that test for invalidity is whether “race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district”); *Shaw v. Reno*, 509 U.S. 630, 649 (1993) (enunciating standard that “plaintiff challenging a reapportionment statute . . . may state a claim by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race”).

300. See, e.g., *White*, 412 U.S. at 766 (sustaining vote dilution challenge by African Americans who had suffered infringement of their “right . . . to register and vote and to participate in the democratic processes”); *Whitcomb*, 403 U.S. at 149 (rejecting vote dilution challenge where there was no evidence that “poor Negroes were not allowed to register or vote”).

301. See, e.g., Stephanopoulos, *Redistricting*, supra note 270, at 1416–21 (making this argument at greater length).

302. See, e.g., Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor’s Clothes*, 71 *Tex. L. Rev.* 1589, 1617–41 (1993) (“[T]he assumption that a territorial district can accurately approximate a fixed racial-group identity . . . is problematic.”); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 *Harv. C.R.-C.L. L. Rev.* 173, 199–213 (1989) (arguing that “core concern in racial vote dilution cases must remain political isolation, rather than geographical isolation”).

303. See, e.g., Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 *U. Pa. L. Rev.* 377, 442–46 (2012) (arguing that VRA should be interpreted to authorize “depolarization claims”).

robust two-party competition.<sup>304</sup> Still other scholars believe that majority-minority districts conflict with a constitutional commitment to color-blindness, and thus are inherently illegitimate.<sup>305</sup>

Under the alignment approach, in contrast, the worry about policies that promote minority representation is that they may produce preference noncongruence too, at the levels of both the individual district and the entire legislature. At the district level, the VRA may encourage the creation of constituencies that are highly heterogeneous with respect to both race and other politically salient factors. (As discussed above, such constituencies foster policy misalignment by hindering elected officials from identifying and responding to their constituents' views.<sup>306</sup>) The reason why the VRA may give rise to racially diverse districts is simply that it requires majority-minority districts to be drawn in many circumstances.<sup>307</sup> Such districts necessarily are racially diverse as long as the minority group's share of the population is not extremely high. Similarly, there are two reasons why the VRA may generate districts that are heterogeneous with respect to nonracial factors. First, dissimilar minority populations often need to be combined in order to muster a district-wide majority,<sup>308</sup> and second, these groups often need to be joined with miscellaneous "filler people" in order to hit the district population target.<sup>309</sup>

At the legislative level, the VRA may result in misalignment by inefficiently "packing" Democrats into majority-minority districts. Suppose that a state has ten districts and a thousand voters, of whom 51% are

304. See, e.g., Issacharoff & Pildes, *Politics as Markets*, supra note 35, at 700–07 (arguing that "robust political markets" in modern South create pressures making VRA potentially obsolete); Pildes, *Constitutionalization*, supra note 46, at 97–99 ("[C]ompetition itself creates the incentives and provides the checks that most effectively realize representational equality."). For a different competition-oriented perspective on the VRA, see Kang, *Contestation*, supra note 56, at 738–42 (arguing that "growing skepticism about the VRA is based on an impoverished account of political competition," which is only "a means to . . . greater democratic ends").

305. See, e.g., Stephan Thernstrom & Abigail Thernstrom, *America in Black and White* 477–83 (1997) (summarizing arguments that "drawing race-conscious legislative districting lines . . . may widen the racial divide, heightening our sense of racial identity").

306. Supra notes 269, 280–283 and accompanying text.

307. Under section 2, the relevant minority group must be able to constitute a majority in at least one additional district in order to state a claim. See *Bartlett v. Strickland*, 129 S. Ct. 1231, 1245–46 (2009) (plurality opinion). Under section 5, a district received protection even if the minority group comprised less than 50% of the population, as long as the group reliably was able to elect the candidate of its choice. See *Texas v. United States*, 887 F. Supp. 2d 133, 147–49 (D.D.C. 2012), vacated, 133 S. Ct. 2885 (2013). But any group large enough to wield such electoral power likely rendered the district that contained it quite racially diverse.

308. However, the VRA may not require majority-minority districts to be created if the minority communities that must be joined are too dissimilar. See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 432–35 (2006) (rejecting district combining urban Hispanics in Austin with rural Hispanics along Mexican border).

309. T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 Mich. L. Rev. 588, 601 (1993).

Democrats and 30% are African Americans. Suppose also that initially six of the districts are 36% black and 55% Democratic,<sup>310</sup> but that subsequently a successful VRA lawsuit forces the state to create three majority-minority districts that are 58% black and 79% Democratic.<sup>311</sup> Then the VRA is responsible for shifting the state from partisan congruence to stark partisan misalignment, with seven Republican districts out of ten even though the median voter is a Democrat. Analogously, if the state is 49% rather than 51% Democratic, then the VRA gives rise to policy misalignment even in the absence of partisan misalignment. In this scenario, the median voter and the median member of the legislature are both Republicans—but the median voter is a center-right moderate while the median member (representing a 61% Republican district) is substantially more conservative.<sup>312</sup> Of course, these are precisely the same misaligning effects that may be induced by conventional gerrymanders too.<sup>313</sup>

It should be emphasized, however, that these misaligning effects are not inevitable. For one thing, majority-minority districts need not over-concentrate Democrats. If minority members comprise just over 50% of such districts' populations, and if the districts' *non*-minority residents are heavily Republican, then Democratic votes are not squandered needlessly.<sup>314</sup> Similarly, after the requisite number of majority-minority districts have been drawn, *other* districts may be constructed in which Democrats are reasonably likely to prevail. In southern states with racially polarized voting, these often take the form of 30% to 50% black districts in which a relatively small number of white votes suffice to hand victory to Democratic candidates. Whether the VRA exerts a misaligning influence therefore depends on how exactly district lines are configured. If minority voters are packed into a few districts and dispersed among the rest, then misalignment is likely to follow. But if the filler people in majority-minority districts are staunch Republicans, and if additional districts are formed in which biracial coalitions often elect Democrats, then

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310. Assuming for the sake of simplicity that there are only two district types in the state, this means that the remaining four districts are 21% black and 45% Democratic.

311. With the same simplifying assumption, this means that the remaining seven districts are 18% black and 39% Democratic.

312. I assume once again here that voting record and district composition are related. See *supra* note 274 (establishing this relationship).

313. See *supra* Part III.D (detailing these misaligning effects).

314. See Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. Chi. L. Rev. 553, 573 (2011) (noting optimal districts for Democrats, assuming blacks are reliable Democratic voters, are ones in which "African American Democrats . . . outnumber the white Republicans" by "thinnest margin"). Moreover, if *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009) (plurality opinion), were reversed and sub-50% crossover districts could be drawn under section 2 of the VRA, then the tension between alignment and minority representation would be reduced still further.

substantial minority representation indeed is compatible with legislative alignment.<sup>315</sup>

Under the alignment approach, then, courts would strive to realize the VRA's goal of racial inclusion while also reducing the risk of preference noncongruence in both individual districts and the legislature as a whole. At the district level, courts would favor constituencies whose minority and non-minority members are socioeconomically and culturally similar and would frown on districts whose residents are excessively heterogeneous. Current VRA doctrine already requires courts to consider the variation within districts' *minority* populations,<sup>316</sup> so it presumably would be possible for courts to examine instead the variation within districts' *entire* populations. At the legislative level, the judicial focus would be on the levels of partisan and policy misalignment associated with different district plans. The judicial aim would be to minimize these levels while still providing for a comparable degree of minority representation. Plans therefore might be returned to their drafters even if minorities already were represented adequately, on the ground that the adequate representation could have been achieved at a lower misalignment cost.

In the political science literature, there is substantial evidence that majority-minority districts are heterogeneous along a number of dimensions (and thus prone to policy misalignment). With respect to race, America's twenty-six majority-black House districts in the 2000s had an average black population of 59%, and the most heavily black district in the country (Illinois's Second) was only 69% black.<sup>317</sup> Given current demographic patterns, it apparently is infeasible to construct majority-minority House districts that are as racially homogeneous as many majority-white districts. With respect to political views, similarly, a recent study discovered a strong relationship between ideological diversity and the size of a district's minority population.<sup>318</sup> The relationship likely stems from both the wide range of opinions held by minority members and the gap between their opinions and those of whites.<sup>319</sup> With respect to other key variables too, I have found in earlier work that majority-minority dis-

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315. Not surprisingly, the former approach is the preferred strategy of Republicans responsible for redistricting, while the latter approach is the preferred strategy of Democratic line-drawers. See, e.g., *Georgia v. Ashcroft*, 539 U.S. 461, 469 (2003) (describing Democratic plan in Georgia aiming to "maintain the number of majority-minority districts and also increase the number of Democratic Senate seats").

316. See, e.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 432–34 (2006) (noting "different characteristics, needs, and interests" of urban and rural Latino communities); see also Stephanopoulos, *Diversity*, supra note 283, at 1929–33 (describing cases where Court rejected merger of spatially heterogeneous minority groups).

317. Stephanopoulos, *Exceptionalism*, supra note 166, at 817 n.220.

318. See Scott Clifford, *Reassessing the Unequal Representation of Latinos and African Americans*, 74 J. Pol. 903, 907 (2012) (finding district heterogeneity is positively, and statistically significantly, related to Latino and African American population percentages).

319. *Id.* at 906.

tricts are particularly heterogeneous. For example, majority-black House districts in the 2000s exhibited greater spatial variation than their peers in terms of both socioeconomic status and urbanism.<sup>320</sup>

The empirical literature also documents the adverse partisan and policy impact that the VRA may have on Democrats and minorities, respectively. In the 1990s, southern states drew many more majority-minority districts than they had in previous decades, due to both amendments in 1982 that strengthened the VRA and aggressive federal enforcement of the statute.<sup>321</sup> According to an array of studies, the creation of the new majority-minority districts harmed the Democrats electorally at both the congressional and state legislative levels. The Democrats lost about a dozen House seats as a direct consequence,<sup>322</sup> and they also suffered setbacks in every southern state legislature (including the Republican capture of two state houses for the first time since Reconstruction).<sup>323</sup> Ironically, the greater descriptive representation that minorities obtained in this period did not even result in improved substantive representation. Several studies concluded that the hostile stances of the newly elected

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320. Stephanopoulos, *Exceptionalism*, supra note 166, at 818 n.223. Majority-minority districts likely would be even more heterogeneous were it not for the Supreme Court's racial gerrymandering doctrine. As I have argued elsewhere, this doctrine exerts a homogenizing influence by prohibiting some of the highly diverse districts that states might otherwise draw to comply with the VRA. *Id.* at 818-19.

321. See Introduction to Joint Ctr. for Political and Econ. Studies, *Redistricting and Minority Representation* 1, 1 (David A. Bositis ed., 1998) ("Following the 1990 reapportionment, there was a quantum increase in minority representation in the U.S. House of Representatives, in state legislatures, and elsewhere."). The changes in minority representation in subsequent decades were much less dramatic, and thus have received less attention in the literature.

322. See Carol M. Swain, *Black Faces, Black Interests* 232 (1995) (finding that majority-minority districting cost Democrats "no fewer than five seats in 1992 and at least twelve in 1994"); Kevin A. Hill, *Does the Creation of Majority Black Districts Aid Republicans? An Analysis of the 1992 Congressional Elections in Eight Southern States*, 57 *J. Pol.* 384, 399 (1995) (finding "definite link between the rising fortunes of African American and Republican representatives in the 1992 elections"); David Lublin & D. Stephen Voss, *The Partisan Impact of Voting Rights Law: A Reply to Pamela S. Karlan*, 50 *Stan. L. Rev.* 765, 772 (1998) ("[R]acial redistricting played . . . a key role in the election of greater numbers of African Americans (but overall fewer Democrats) in 1992 and 1994.").

323. See David Epstein et al., *Estimating the Effect of Redistricting on Minority Substantive Representation*, 23 *J.L. Econ. & Org.* 499, 506 (2007) (detailing Democratic losses in South Carolina state senate); Lisa Handley et al., *Electing Minority-Preferred Candidates to Legislative Office, in Race and Redistricting in the 1990s*, at 13, 30-34 (Bernard Grofman ed., 1998) (noting loss of "31 house and 26 senate seats in the South and 10 house and 9 senate seats in the non-South" in state legislatures); David Lublin & D. Stephen Voss, *Racial Redistricting and Realignment in Southern State Legislatures*, 44 *Am. J. Pol. Sci.* 792, 793 (2000) ("The new black districts cost the Democratic party legislative seats in all ten southern states and likely account for the Democrats losing control of state Houses in both South Carolina and Virginia for the first time since Reconstruction.").



Republicans on issues such as civil rights more than outweighed the favorable positions of the new minority politicians.<sup>324</sup>

Unfortunately, the literature on the 1990s redistricting cycle has not addressed alignment explicitly (because it has not analyzed the partisan and policy swings that occurred in relation to the preferences of the median voter). Nor have the studies establishing the heterogeneity of majority-minority districts sought to determine whether they, like other diverse districts, undermine the quality of representation. Still, there is enough evidence in the existing scholarship for courts to be confident that misalignment is a real possibility in this domain. There is no reason why district diversity would have different consequences in the majority-minority context,<sup>325</sup> nor is it plausible that the median voter in the 1990s shifted as rapidly as did electoral outcomes and representatives' policy views. Accordingly, the alignment approach is empirically viable in this area too—and, if adopted, it would strike an attractive balance between minority representation on the one hand and preference congruence on the other.

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Much more could be said, of course, about how the alignment approach applies to the debates that dominate the field of election law. Past cases could be reexamined based on their aligning implications, specific standards could be proposed to convert theory into workable doctrine, and empirical analyses could be conducted to investigate the prevalence of misalignment. In future work, I plan to flesh out the approach in exactly these ways. Here, however, my aim has been merely to offer a snapshot—not an exhaustive exegesis—of what election law might look like through the alignment prism. If I have persuaded the reader that the prism is novel to the case law and legal literature, appealing because of its democratic antecedents, and amenable to quantification by social sci-

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324. See, e.g., Charles S. Bullock, III, *The Impact of Changing the Racial Composition of Congressional Districts on Legislators' Roll Call Behavior*, 23 *Am. Pol. Q.* 141, 149 (1995) ("Republicans who replaced Democrats were 24 points more conservative and 53 points less supportive of civil rights than their predecessors."); Charles Cameron et al., *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 *Am. Pol. Sci. Rev.* 794, 795 (1996) (finding tradeoff "between maximizing the number of black representatives in Congress and maximizing the number of votes in favor of minority-sponsored legislation"); Epstein et al., *supra* note 323, at 510 (discussing post-redistricting changes in mean and median vote scores in South Carolina state senate); Christine Leveaux Sharpe & James C. Garand, *Race, Roll Calls, and Redistricting: The Impact of Race-Based Redistricting on Congressional Roll Call*, 54 *Pol. Res. Q.* 31, 42 (2001) (showing conservative shift in white House members' voting after loss of minority constituents).

325. Cf. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 434 (2006) (observing heterogeneity of majority-Hispanic district "could make it more difficult for . . . Latino-preferred candidates . . . to provide adequate and responsive representation" (quoting *Session v. Perry*, 298 F. Supp. 2d 451, 502 (E.D. Tex. 2004))).

entists, then I have met my goal. The precise details of how the approach would operate in each electoral context I leave for another day.

#### IV. THE LIMITS OF ALIGNMENT

To this point, I have focused on the affirmative case for the alignment approach. But it also is important to acknowledge the approach's limitations: the reasons why it cannot be applied to every election law dispute and cannot guarantee that voters' preferences in fact are congruent with those of their representatives. It is to these limitations that I turn in this Part. I first concede that alignment is just one of several compelling democratic values. Other values may be more salient than alignment in certain kinds of cases, and alignment is less applicable when it conflicts with competing concerns or when there is no serious risk of noncongruence. I then explain why election law cannot hope to solve the problem of misalignment by itself. Many of the factors that produce misalignment are political, historical, geographical, or even psychological—and thus beyond the domain of the law, at least as the domain commonly is understood. Law can (and should) exert an aligning *influence*, but the actual achievement of preference congruence would require more than legal reform.

##### A. *Value Pluralism*

As several scholars have recognized,<sup>326</sup> elections implicate, and seek to realize, a range of democratic values. This Article's thesis is that preference alignment is one of these values, indeed one of the most significant of them. But it plainly is not the only relevant consideration in the electoral sphere. Other noteworthy concerns (most of which have been mentioned already) include: protecting individual rights such as the franchise and the freedom to advocate one's political views; promoting electoral competition, especially when there is a danger of incumbent entrenchment; increasing voter participation, turnout in particular; respecting the political equality of all citizens; and ensuring that minorities are represented adequately in the halls of power.<sup>327</sup> These values derive from an array of cogent theories and cannot easily be ranked relative to one another. Alignment therefore cannot pretend to clear the field of

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326. See, e.g., Charles, Constitutional Pluralism, *supra* note 28, at 1142 (identifying values of "majority rule, political participation, accountability, responsiveness, substantial equality, and interest representation"); Fishkin, Individual Right, *supra* note 51, at 1297 (defending idea of "election law pluralism": the proposition that there are multiple, irreducibly distinct interests at stake in voting controversies"); Pildes, Democracy, *supra* note 41, at 690 ("Democracy might be justified by a number of different values: participation, accountability, representation, stability, legitimacy, economic growth, and better policy outcomes, to name just a few.").

327. See *supra* Part I (examining these concerns in detail).

competing objectives. It is *a* valuable democratic goal, but it is not the *only* such goal.

In which doctrinal contexts is each of these values most salient? This is not the place for a definitive answer to this question, but I offer below some tentative assessments, all based on the proposition that values apply most urgently where they face the greatest potential threats. First, the protection of individual rights seems most relevant in the franchise restriction, party regulation, and campaign finance fields. These are the areas in which governmental action most directly may burden people's rights to vote, associate, or promote their political opinions.<sup>328</sup> Second, electoral competition likely matters most in the party regulation, redistricting, and franchise restriction contexts.<sup>329</sup> Stringent ballot access requirements may prevent rival groups from even being able to challenge incumbent parties, while bipartisan gerrymanders and impediments to voting may make elections glaringly uncompetitive even if they nominally are contested.

Third, voter participation probably is most germane in the franchise restriction field, in which measures that make it more difficult to vote may cause turnout to plummet.<sup>330</sup> Participation also is a concern (albeit a lesser one) in the party regulation and redistricting areas, in which inclusive primaries<sup>331</sup> and homogeneous constituencies,<sup>332</sup> respectively, may result in modest turnout increases. Fourth, political equality appears most applicable in the franchise restriction, campaign finance, and redistricting contexts. The norm is undermined when certain people, relative to their peers, vote with greater ease, expend more resources to sway elections, or reside in less populous districts.<sup>333</sup> Lastly, minority representation is implicated most directly by the legal rules that help de-

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328. See Fishkin, *Individual Right*, *supra* note 51, at 1292 (arguing rights-and-interests balancing is "right approach to the rapidly expanding area of litigation now known as 'the new vote denial'").

329. Not surprisingly, scholars who laud competition tend to focus their commentary on precisely these areas. See, e.g., Issacharoff, *Gerrymandering*, *supra* note 46, at 601–30 (addressing redistricting); Issacharoff & Pildes, *Politics as Markets*, *supra* note 35, at 652–87 (addressing franchise restriction and party regulation); Klarman, *supra* note 58, at 513–17, 521–22 (addressing redistricting and party regulation).

330. As one also might expect, participation-oriented scholars devote much of their attention to franchise restrictions. See, e.g., Elmendorf, *Undue Burdens*, *supra* note 54, at 653 (noting "franchise's role in maintaining [constitutional] lines of accountability"); Overton, *Identification*, *supra* note 60, at 673 (discussing photo identification requirements as franchise restrictions).

331. See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 601 (2000) (Stevens, J., dissenting) (citing study showing "higher voter turnout levels in blanket primary States than in . . . closed primary States").

332. See Stephanopoulos, *Exceptionalism*, *supra* note 166, at 824–25 (presenting evidence that turnout is higher in more demographically and socioeconomically homogeneous districts).

333. See Hasen, *Election Law*, *supra* note 48, at 75 (setting forth series of political equality principles applicable to these contexts).

termine where minority groups will be able to elect their preferred candidates.<sup>334</sup> The value also is at stake in disputes over voting regulations that may disproportionately affect minority members.

Alignment, then, is a less compelling objective when (and to the extent that) it conflicts with the achievement of these other goals in the areas in which they are most salient. Fortunately, there seems to be little tension between alignment and voter participation or political equality. Alignment and voter participation both are advanced by the lifting of franchise restrictions, the use of inclusive primaries, and the creation of homogeneous districts. Similarly, alignment and political equality both are furthered by liberal voting rules, equally populated districts, and policies that increase the quantity and decrease the variation of campaign contributions. Not surprisingly, different democratic values sometimes point in the same direction.

But sometimes different values point in different directions. For instance, party and campaign finance regulations may burden the freedom of speech while also exerting an aligning influence. There is no alternative to balancing in this situation—to weighing the cost in rights protection against the benefit in preference congruence.<sup>335</sup> The regulations' implications for individual liberties cannot simply be overlooked if the liberties indeed matter in these contexts. Analogously, alignment and competition offer divergent perspectives on strict ballot access requirements, inclusive primaries, and incumbent-protecting district plans. Competition theorists oppose all three policies,<sup>336</sup> while the alignment approach favors the first two and is agnostic about the third.<sup>337</sup> The approach's prescriptions thus can be followed only if the relevant decisionmaker has made the difficult decision to prioritize alignment *over* competition. Lastly, as noted earlier, the goals of alignment and minority representation clash when certain kinds of majority-minority districts are

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334. See Karlan, *Rights to Vote*, *supra* note 68, at 1740 (arguing “central task of modern voting rights law must be to control the effects of this [racial] polarization”).

335. See *supra* Part III.B–C (advocating such balancing in party regulation and campaign finance contexts); see also Farber, *supra* note 70, at 377 (arguing that when election law values conflict, best “strategy is to ‘satisfice’: try to achieve a minimum satisfactory level of each one”).

336. Competition theorists oppose strict ballot access requirements because they keep third parties off the ballot; they oppose inclusive primaries because they mute the policy differences between the major parties; and they oppose incumbent-protecting district plans because they make elections less competitive. See *supra* notes 198–199, 268 and accompanying text (discussing these objections).

337. The alignment approach favors strict ballot access requirements (assuming single-member districts and plurality voting rules) because they reduce the risk of a third-party spoiler; it favors inclusive primaries because they encourage nominees to adopt positions closer to the median general election voter; and it is agnostic about bipartisan gerrymanders because it regards partisan bias, not competitiveness, as the primary measure of interest. See *supra* Part III.B, D (explicating alignment approach in these areas).

drawn.<sup>338</sup> However, this conflict is not as stark since it often is possible to create an equivalent number of majority-minority districts without generating misalignment at either the district or legislative levels.<sup>339</sup>

The alignment approach also is less applicable when the threat of misalignment is less severe. If the danger against which the approach guards is less apt to materialize, then the rationale for employing the approach (potentially at some cost to other election law values) weakens in tandem. Earlier in the Article, I cited the best available estimates of the extent of misalignment in different areas. These estimates often were substantial—but sometimes they were rather small. For example, in the franchise restriction context, photo identification laws seem to produce a pro-Republican swing of only 0% to 1%, and closing dates for voter registration and purges of voter rolls apparently have no partisan consequences.<sup>340</sup> Likewise, in the party regulation field, third parties rarely play the role of spoiler, and the evidence about the aligning effects of inclusive primaries is mixed.<sup>341</sup> In the campaign finance arena too, the literature is divided as to whether uneven spending alters election outcomes and whether expenditure limits have any electoral impact.<sup>342</sup> In all of these areas, I therefore would hesitate to endorse the alignment approach unequivocally. Misalignment is a theoretical possibility in each context, but the existing data does not permit the conclusion that it is an empirical certainty.

In a few additional contexts (which I have ignored until now for this very reason), misalignment is not even a theoretical possibility. Here there is no reason to invoke alignment instead of one of the other values that elections seek to realize. Fusion candidacies, in which multiple parties nominate the same candidate and then all of the candidate's votes are aggregated, present one such case.<sup>343</sup> Since any votes that a third party receives when it nominates a major party candidate accrue to the candidate, there is no risk of a spoiler when fusion is permitted. Internal party affairs that do *not* pertain to ballot access or nominee selection are another topic about which the alignment approach has little to say. Neither attendance at party conventions,<sup>344</sup> nor the organization of party

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338. *Supra* notes 310–312 and accompanying text.

339. See *supra* notes 314–315 and accompanying text.

340. See *supra* notes 186–189 and accompanying text (reviewing franchise restriction literature).

341. See *supra* notes 212, 216–222 and accompanying text (reviewing party regulation literature).

342. See *supra* notes 244–251 and accompanying text (reviewing campaign finance literature).

343. See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 353–54 (1997) (describing fusion candidacies and upholding state restrictions on them).

344. See *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 87–88 (Tex. 1997) (reciting facts).

committees,<sup>345</sup> to cite the facts of two leading cases, can give rise to any form of misalignment. Still another issue that is unrelated to alignment is the disclosure of campaign contributions and expenditures. As long as voters' partisan and policy preferences are not affected by disclosure (and there is no evidence that they are), the availability of this information has no aligning implications.

Accordingly, the alignment approach cannot be applied unthinkingly to every kind of election law dispute. Sometimes the threat of misalignment is real, but other important values are implicated as well and demand to be considered. Sometimes the threat of misalignment is insignificant, in which case the argument for taking other considerations into account is even stronger. And sometimes misalignment is not a possibility at all, meaning that other concerns are the only ones that need to be heeded. Unsurprisingly, there is no one-size-fits-all solution to the many problems of election law. The alignment approach often is the most democratically appealing and empirically supported framework for deciding these cases. But occasionally it is not.

### B. *Law's Domain*

Suppose that every legal reform advocated by this Article were implemented. Franchise restrictions that disproportionately affect particular political groups would be eliminated. Blanket or top-two primaries would be used to select nominees. Campaign contributions and expenditures would be limited and generous public financing would be provided. And district plans would be drawn so as to minimize partisan bias while still maintaining the requisite level of minority representation. Would these policies end the scourge of misalignment once and for all? No, they would not. They undoubtedly would help, but, as I next discuss, there are many reasons why voters' and representatives' preferences may diverge, only some of which lie within the domain of election law. These other explanations for misalignment are highly varied, sounding in partisan influence, legislative structure, political geography, and candidate psychology, among others. What they have in common is that none relates to a topic that the law of democracy typically is thought to address.<sup>346</sup>

To begin with, political scientists have identified a host of nonlegal factors that may result in policy misalignment at the district level (that is, divergence between the policy preferences of the median voter and those of her representative). Of these, partisan pressures probably are the most important. Inside the legislature, party leaders urge representatives to

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345. See *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 216–19 (1989) (reciting facts).

346. To clarify, some of the factors considered in this section are law-related in the sense that they sometimes can be the subjects of legislation or litigation. But they are not commonly considered to be topics within the domain of election law in particular.

vote with their party and threaten them with various adverse consequences—inferior committee assignments, reduced campaign contributions, perhaps even primary challenges—if they fail to do so.<sup>347</sup> Outside the legislature, party activists, who are much more polarized than the general electorate, lobby candidates to shift their policy positions in the activists' direction. Candidates often comply because the activists' volunteer service, campaign donations, and general enthusiasm are the lifeblood of their campaigns.<sup>348</sup> The products of these partisan forces are politicians whose policy stances are more consistent with their party's views than with those of the median voter.<sup>349</sup>

Institutional features of state government also may have significant aligning implications at the district level. According to one study, both legislative professionalization and the presence of term limits are linked to higher levels of congruence between public opinion and public policy.<sup>350</sup> More professional legislators have greater resources to ascertain the views of the electorate, while term-limited legislators are less beholden to parties and other actors whose stances may differ from those of voters.<sup>351</sup> According to another set of studies, the availability of the voter initiative promotes policy correspondence as well. At least with respect to issues that are likely to be the subjects of ballot measures, politicians tend to diverge less from the preferences of their constituents—perhaps because they fear embarrassment if their positions are repudiated by the electorate.<sup>352</sup>

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347. See Barbara Sinclair, *Party Wars: Polarization and the Politics of National Policy Making 67–142* (2006) (discussing transformation of internal House organization over last generation); Sean M. Theriault, *Party Polarization in Congress 142* (2008) (“Party leaders have an arsenal of weapons to cajole recalcitrant members into casting party-loyal votes . . .”).

348. See Cohen et al., *supra* note 116, at 7 (describing parties as “vehicles by which the most energized segments of the population attempt to pull government policy toward their own preferences”); Geoffrey C. Layman et al., *Activists and Conflict Extension in American Party Politics*, 104 *Am. Pol. Sci. Rev.* 324, 331–35, 343 (2010) (finding rise in activist polarization over time and linking it to rise in polarization in Congress).

349. See McCarty et al., *Polarized*, *supra* note 104, at 42 (showing rise of within-district polarization over time even controlling for district characteristics); Ansolabehere et al., *Roll-Call Voting*, *supra* note 75, at 542 (finding “increasing level of partisan divergence as we move from constituents to candidates to legislators”); Maskett & Noel, *supra* note 75, at 115 (finding legislators “ideologically extreme relative to their districts”).

350. Lax & Phillips, *supra* note 79, at 160. This study assesses policy outcome alignment, not policy preference alignment. But the reason why legislative professionalization and term limits promote policy outcome alignment is that they tend to make legislators' policy preferences more consistent with those of their constituents. Throughout this Part, I categorize studies based on the topics they investigate, not the particular metrics they employ.

351. E.g., *id.* at 158–59.

352. See Kevin Arceneaux, *Direct Democracy and the Link Between Public Opinion and State Abortion Policy*, 2 *St. Pol. & Pol'y Q.* 372, 383 (2002) (reporting findings suggesting that “presence of initiatives and referenda leads to better policy representation of public opinion”); Burden, *supra* note 97, at 384–85 (finding that initiative process has

Still other nonlegal factors that may affect district-level policy alignment are psychological in nature, relating to the perceptions that representatives and voters have of one another.<sup>353</sup> With respect to representatives (especially on the Republican side of the aisle), they typically believe that their constituents are far more conservative than they actually are.<sup>354</sup> The representatives therefore may *think* they are voting in accordance with their constituents' preferences when in fact they are not.<sup>355</sup> With respect to voters, they tend to ascribe their own views to representatives of whom they approve, often asserting erroneously that the representatives' votes are more consistent with their preferences than the votes actually are.<sup>356</sup> Voters also display high levels of partisan loyalty, casting ballots for candidates from their preferred party even if other candidates are closer to them in policy terms.<sup>357</sup> Voters thus are likely both to fail to grasp the

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"positive effect on issue-specific policy responsiveness" for certain issues); Elisabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 *Am. J. Pol. Sci.* 99, 101 (1996) (reporting analysis suggesting that "states that allow initiatives pass legislative policies . . . that more closely reflect the state's estimated median preference"); Matsusaka, *supra* note 111, at 149–52 (finding that "direct democracy" promotes congruence). But see Lax & Phillips, *supra* note 79, at 160–63 (finding no link between voter initiative and policy congruence); James Monogan et al., *Public Opinion, Organized Interests, and Policy Congruence in Initiative and Noninitiative U.S. States*, 9 *St. Pol. & Pol'y Q.* 304, 319 (2009) (same).

353. A few more factors with aligning implications did not fit neatly into these categories. Policy responsiveness is higher in individualistic states than in traditionalist states. See Erikson et al., *supra* note 111, at 244–47 (showing correlation between "state-level ideology" and policy responsiveness). Policy congruence is higher in election years. See Gilens, *supra* note 241, at 170–74 (showing higher levels of responsiveness in congressional and presidential election years). And politicians' own preferences are another (unsurprising) explanation for policy misalignment. See Michael H. Crespin et al., *Ideology, Electoral Incentives, and Congressional Politics*, 34 *Am. Pol. Res.* 135, 153 (2006) (showing policymaking influence of "reelection goal" and "own policy preference").

354. See David E. Broockman & Christopher Skovron, *What Politicians Believe About Their Constituents: Asymmetric Misperceptions and Prospects for Constituency Control 3* (Mar. 3, 2013) (unpublished working paper), available at [http://www.ocf.berkeley.edu/~broockma/broockman\\_skovron\\_asymmetric\\_misperceptions.pdf](http://www.ocf.berkeley.edu/~broockma/broockman_skovron_asymmetric_misperceptions.pdf) (on file with the *Columbia Law Review*) ("[C]onservative politicians appear to overestimate support for conservative policy views among their constituents by over 20 percentage points on average.").

355. See *id.* at 21–22 ("[N]early every conservative legislator . . . believes that they are congruent with majority opinion in their districts, yet less than half actually are." (emphasis omitted)).

356. See J. Matthew Wilson, *Testing the Limits of "Representation": The Effects of Citizen Biases on Legislative Accountability 12* (July 27, 2012) (unpublished manuscript), available at <http://ssrn.com/abstract=2108253> (on file with the *Columbia Law Review*) (finding that when voter approves of senator, "rate of correct roll-call vote identifications is dramatically higher when the vote is in accord with the respondent's own position" and vice versa).

357. See Jessee, *supra* note 106, at 73 (finding tendency toward partisan loyalty); Boris Shor & Jon C. Rogowski, *Proximity Voting in Congressional Elections 20–21* (May 8, 2013) (unpublished manuscript), available at <http://ssrn.com/abstract=1643518> (on file



true extent of policy misalignment (if they like their representatives) and to vote for candidates despite the misalignment that they do perceive (if the candidates hail from the right party).

At the legislative level, political geography is the most potent driver of partisan misalignment that falls outside the scope of election law. As noted earlier, Democratic voters tend to be highly concentrated in urban areas, while Republican supporters tend to be distributed more efficiently in suburban, exurban, and rural regions.<sup>358</sup> This spatial pattern frequently results in district plans that exhibit a marked pro-Republican bias—even if the line-drawing authority did not *aim* to advantage either party. A recent study designed hypothetical congressional and state legislative plans for nineteen states using only contiguity and compactness as criteria.<sup>359</sup> Almost all of the resulting plans strongly favored the Republicans, sometimes by 15% or more, despite the absence of any partisan intent in their formation.<sup>360</sup> The only states without a significant pro-Republican bias either lacked large cities (e.g., Wyoming), contained dispersed African American populations (e.g., Mississippi), or possessed nonurban clusters of white Democrats (e.g., Massachusetts).<sup>361</sup>

The very character of the American electoral system also may be responsible for legislative misalignment, though this time of the policy variety. A large literature analyzes how closely the policy preferences of the median voter and of the governing party correspond under single-member districts with plurality voting rules versus under proportional representation (PR).<sup>362</sup> Most of these studies find that PR systems systematically produce higher levels of correspondence.<sup>363</sup> The inferior perfor-

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with the *Columbia Law Review*) (noting that “self-identified partisans” tend to vote consistent with affiliation). However, providing additional information to voters makes them more likely to support candidates who are spatially more proximate. See Jessee, *supra* note 106, at 73 (showing correlation between information level and willingness to deviate from party affiliation); Boudreau et al., *supra* note 102, at 25 (finding that low-information voters voted more consistently with policy preferences when provided with “voter guide”).

358. See *supra* note 295 and accompanying text (discussing literature showing this concentration).

359. Chen & Rodden, *supra* note 295, at 15, 29 (explaining study methodology).

360. *Id.* at 49 fig.10.

361. *Id.* at 30, 49 fig.10; see also Rodden, Long Shadow, *supra* note 295, at 145–63 (finding persistent bias in favor of right-wing party in Australian, British, Canadian, and New Zealand district plans).

362. E.g., McDonald & Budge, *supra* note 113; Powell, *supra* note 98; André Blais & Marc André Bodet, Does Proportional Representation Foster Closer Congruence Between Citizens and Policy Makers?, 39 *Comp. Pol. Stud.* 1243 (2006); Ian Budge & Michael D. McDonald, Election and Party System Effects on Policy Representation: Bringing Time into a Comparative Perspective, 26 *Electoral Stud.* 168 (2007); Golder & Stramski, *supra* note 98; Huber & Powell, *supra* note 98; McDonald et al., *supra* note 98; Powell & Vanberg, *supra* note 94.

363. See, e.g., McDonald & Budge, *supra* note 113, at 129 (finding median voter better represented in proportional representation system); Powell, *supra* note 98, at 221

mance of U.S.-style systems is due to both the vote-seat distortion that is common with plurality voting rules and the smaller number of parties in these systems, which makes it less likely that the governing party will reflect the views of the median voter. In contrast, PR systems convert votes to seats with greater accuracy and give rise to a larger number of parties, thus increasing the odds that the governing party (or coalition) will capture the median voter's preferences.

Finally, though this Article does not emphasize policy *outcome* alignment,<sup>364</sup> it is worth noting a few of the factors that may cause enacted law not to match the median voter's preferences even if the median legislator's views do. First, the median legislator may not get the opportunity to vote on a bill favored by the median voter. Party leaders maintain strict agenda control in most modern legislatures, and they often have reasons not to permit popular legislation to be put to a vote.<sup>365</sup> Second, the median legislator rarely is the *pivotal* legislator whose consent is necessary for a bill to pass. Committees that do not mirror the composition of the entire body, supermajority voting rules, and the existence of two chambers with distinct preference distributions are just some of the features of American legislatures that bestow great power upon legislators located away from the overall median.<sup>366</sup> Third, even if the median legislator is the pivotal legislator and even if she gets to vote on a bill, the executive, whose consent also is necessary for the bill to be enacted, may not share the median voter's preferences. In a government with separated powers, *both* the median legislator and the executive must hold the median voter's views in order for these views to be realized.

None of this should be construed as the counsel of despair. The right kinds of election law rules certainly can exert an aligning influence, and indeed can eliminate one form of misalignment—partisan misalignment between the median voter and her representative—altogether. Moreover, that some of the forces that cause voters' and politicians' pref-

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(same); Budge & McDonald, *supra* note 362, at 175 (same); Huber & Powell, *supra* note 98, at 309 (same); McDonald et al., *supra* note 98, at 24 (same). But see Blais & Bodet, *supra* note 362, at 1259 (finding no clear difference in policy alignment between U.S.-style and PR systems); Golder & Stramski, *supra* note 98, at 101 (same).

364. See *supra* note 111 and accompanying text (citing and discussing studies exploring outcome alignment in depth).

365. See generally Gary W. Cox & Matthew D. McCubbins, *Legislative Leviathan: Party Government in the House* 237 (1993) (noting House Speaker's agenda control "stabiliz[es] policy decisions that may be far away in spatial terms from the median floor member's ideal point"); Theriault, *supra* note 347, at 53 (reviewing legislative majorities' methods and strategies for controlling floor votes).

366. See Keith Krehbiel, *Pivotal Politics: A Theory of U.S. Lawmaking* 232 (1998) (arguing "strong form of the median voter theory—which claims that lawmaking outcomes are *always* median-legislator outcomes—is . . . too strong"); Jim Battista et al., *Policy Representation in the State Legislatures* 24–26 (Mar. 24, 2013) (unpublished manuscript), available at <http://polisci.uga.edu/uploadedfiles/peress.pdf> (on file with the *Columbia Law Review*) (finding model taking into account pivotal legislators and party cartels explains policy outcomes better than median legislator model).

erences to diverge are nonlegal simply means that law reform cannot solve the problem of misalignment by itself. It does not mean that the problem is unsolvable, or that an effort that married legal, political, and institutional proposals would be doomed to failure. It generally is the case that law alone cannot remake society. It should be no cause for gloom that the democratic sphere is not an exception to this rule.

#### CONCLUSION

Election law doctrine has long been dominated by rights-and-interests balancing: the weighing of the burdens imposed on individual rights by electoral regulations against the state interests served by the regulations. For the last fifteen years or so, the election law literature has emphasized structural values that relate to the functional realities of the electoral system, competition chief among them. In this Article, I have sought to introduce and defend a new structural theory—the alignment approach—that has the potential to reframe and unify many election law debates. The crux of the approach is that voters’ and representatives’ preferences ought to be congruent, with respect to both party and policy, at both the district and legislative levels. Alignment is normatively attractive because it derives from the basic definition of democracy itself. Alignment also is doctrinally useful because it directs our attention to a key potential harm, *misalignment*, in contexts including franchise restriction, party regulation, campaign finance, redistricting, and minority representation.

The alignment approach walks a fine line between obviousness and novelty. On the one hand, the notion that voters’ and representatives’ preferences should be congruent hardly is revolutionary. It is a similar idea to the economists’ proposition that agents (here elected officials) should obey principals (here the electorate), as well as to the median voter theorem of political science, which asserts that candidates should converge on this figure’s position.<sup>367</sup> On the other hand, the courts very rarely have acknowledged the importance of alignment in a democracy, and legal scholars have been preoccupied to date with structural values other than preference congruence. The argument that the purpose of elections is to promote alignment—and that the purpose of election law should be to facilitate their aligning role—has not previously been advanced in any sort of systematic fashion. Again, I doubt that this thesis would strike anyone engaged in the field as entirely unexpected. But there is still value in saying something explicitly that until now has only been implicit. There is still value in taking a claim that has long been inchoate and making it concrete.

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367. See *supra* notes 13, 117–118 and accompanying text (discussing principal-agent perspective and median voter theorem).

