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# Returning to Common-Law Principles of Insider Trading After United States v. Newman

Richard A. Epstein

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ALIGNING CAMPAIGN FINANCE LAW

Nicholas O. Stephanopoulos\*

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INTRODUCTION

*“You have some ideological extremist who has a big bankroll and they can entirely skew our politics.”* –Barack Obama, Press Conference October 8, 2013<sup>1</sup>

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<sup>1</sup> Press Release, The White House, Press Conference by the President (Oct. 8, 2013), <https://www.whitehouse.gov/the-press-office/2013/10/08/press-conference-president>.

HERE are some facts about money and politics in today's America. At the federal level, campaign spending totaled \$7.3 billion in 2012.<sup>2</sup> Almost all of this funding came from individual donors, not corporations or unions.<sup>3</sup> Individuals gave about half of their contributions to specific candidates, a quarter to political parties, and a quarter to Political Action Committees ("PACs") and Super PACs.<sup>4</sup> These donors were in no way representative of the country as a whole. They were heavily old, white, male, and, of course, wealthy.<sup>5</sup> They also were far more polarized in their political views than the general population.<sup>6</sup> Most Americans were moderates in 2012, but most donors were staunch liberals or conservatives.<sup>7</sup>

However, there is no evidence that much of this money is traded explicitly for political favors. Proof of quid pro quo transactions is vanish-

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<sup>2</sup> See Press Release, Fed. Election Comm'n, FEC Summarizes Campaign Activity of the 2011–2012 Election Cycle (Apr. 19, 2013), [http://www.fec.gov/press/press2013/20130419\\_2012-24m-Summary.shtml](http://www.fec.gov/press/press2013/20130419_2012-24m-Summary.shtml) [hereinafter *FEC 2012 Summary*] (2012 spending by entities disclosing donors totaled \$7.0 billion); 2012 Outside Spending, by Group, Ctr. for Responsive Politics, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=O&type=U&chrt=D> (last visited June 23, 2015) (2012 spending by entities not disclosing donors totaled \$308.7 million).

<sup>3</sup> See Stephen L. Ansolabehere et al., *Why Is There So Little Money in U.S. Politics?*, 17 *J. Econ. Persp.* 105, 109 (2003) ("It is evident that individuals, rather than organizations, are by far the most important source of campaign funds."); Adam Bonica, *Avenues of Influence: On the Political Expenditures of Corporations and Their Directors and Executives* 1, 8 (June 20, 2014) (unpublished manuscript, available at <http://ssrn.com/abstract=2313232>) (disclosing that corporate spending totaled only \$75 million and disclosed union spending only \$105 million in 2012).

<sup>4</sup> See *FEC 2012 Summary*, *supra* note 2. Conventional PACs may contribute to candidates but are subject to contribution limits in their fundraising. Super PACs may *not* contribute to candidates but may raise money in unlimited quantities. See also *SpeechNow.org v. FEC*, 599 F.3d 686, 694–98 (D.C. Cir. 2010) (authorizing creation of Super PACs).

<sup>5</sup> See Peter L. Francia et al., *The Financiers of Congressional Elections: Investors, Ideologues, and Intimates* 16 (2003) ("[C]ontributors are indeed overwhelmingly wealthy, highly educated, male, and white. The pool of congressional contributors does not remotely look like America . . ."); Adam Bonica et al., *Why Hasn't Democracy Slowed Rising Inequality?*, 27 *J. Econ. Persp.* 103, 111 (2013) (noting "that the share of campaign contributions made by the top 0.01 percent of the voting age population is now over 40 percent").

<sup>6</sup> See 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, 536 (2010) (showing bimodal distribution of donors compared to more normal distribution of non-donors); Michael Barber, *Representing the Preferences of Donors, Partisans, and Voters in the U.S. Senate 19–20* (Apr. 30, 2014) (unpublished manuscript, available at <https://csed.byu.edu/Documents/BarberPaper2.pdf>) (showing wide gulf between ideal points of donors and voters).

<sup>7</sup> See Bafumi & Herron, *supra* note 6, at 536; Barber, *supra* note 6, at 19–20.

ingly rare,<sup>8</sup> and studies that try to document a link between PACs' contributions and politicians' votes typically come up empty.<sup>9</sup> But there is evidence that politicians' positions reflect the preferences of their donors to an uncanny extent.<sup>10</sup> The ideal points of members of Congress—that is, the “unique set[s] of policies that they ‘prefer’ to all others”—have almost exactly the same bimodal distribution as the ideal points of individual contributors.<sup>11</sup> They look nothing like the far more centrist distribution of the public at large.<sup>12</sup>

Suppose a jurisdiction is troubled by this situation and decides to enact some kind of campaign finance reform. What reason might it give? One option is preventing the corruption of elected officials. But the Supreme Court has recently narrowed the definition of corruption to *quid pro quo* exchanges,<sup>13</sup> and, as just noted, such exchanges do not occur with any regularity in contemporary America.<sup>14</sup> Another possibility is avoiding the distortion of electoral outcomes due to the heavy spending of affluent individuals (and groups). But the Court has emphatically rejected any governmental interest in ameliorating “the corrosive and distorting effects of immense aggregations of wealth.”<sup>15</sup> Yet another idea is equalizing the resources of candidates or the electoral influence of vot-

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<sup>8</sup> See *McConnell v. FEC*, 540 U.S. 93, 149 (2003) (noting that, when assembling record for Bipartisan Campaign Reform Act of 2002, Congress was unable to find “concrete evidence of an instance in which a federal officeholder has actually switched a vote” in response to a contribution).

<sup>9</sup> See, e.g., Ansolabehere et al., *supra* note 3, at 116 (concluding in meta-study of relevant literature that “changes in donations to an individual legislator do not translate into changes in that legislator’s roll call voting behavior”). But see Thomas Stratmann, *Some Talk: Money in Politics: A (Partial) Review of the Literature*, 124 *Pub. Choice* 135, 146 (2005) (reaching opposite conclusion).

<sup>10</sup> See Bafumi & Herron, *supra* note 6, at 536–37 (showing that members of Congress and donors both have highly bimodal ideal point distributions); Barber, *supra* note 6, at 19–20 (showing that typical donor is much closer ideologically to her senator than is typical voter); Bonica, *supra* note 3, at 17–18, 32 (also showing highly bimodal distributions for members of Congress and donors).

<sup>11</sup> Chris Tausanovitch & Christopher Warshaw, *Measuring Constituent Policy Preferences in Congress, State Legislatures, and Cities*, 75 *J. Pol.* 330, 331 (2013); see also, e.g., Bafumi & Herron, *supra* note 6, at 521 (“Ideal points . . . are best thought of as reflecting preferred policy choices in a given policy space.”).

<sup>12</sup> See *supra* note 10.

<sup>13</sup> See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014) (plurality opinion) (“Congress may target only a specific type of corruption—‘*quid pro quo*’ corruption.”); *Citizens United v. FEC*, 130 S. Ct. 876, 909–10 (2010).

<sup>14</sup> See *supra* notes 8–9 and accompanying text.

<sup>15</sup> *Citizens United*, 130 S. Ct. at 883 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)) (internal quotation marks omitted).

ers. But this equality interest has been deemed invalid in even more strident terms. “[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”<sup>16</sup>

So is our reformist jurisdiction out of luck? Not quite. This Article’s thesis is that there is an additional interest, of the gravest importance, that both is threatened by money in politics and is furthered by (certain) campaign finance regulation.<sup>17</sup> This interest is the promotion of *alignment* between voters’ policy preferences and their government’s policy outputs. Alignment operates at the levels of both the individual constituency and the jurisdiction as a whole. Within the constituency, the views of the district’s median voter and the district’s representative should align. One step up, the preferences of the *jurisdiction’s* median voter and the *legislature’s* median member should correspond. Moreover, at the jurisdictional level, the median voter’s views should be congruent not only with the median legislator’s positions, but also with actual policy outcomes. *Preference alignment* refers to the former sort of congruence; *outcome alignment* to the latter.

Alignment is a significant—indeed, compelling—interest because of its tight connection to core democratic values. At the district level, it follows closely from the delegate theory of representation. 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 Hanna Pitkin wrote in her landmark work.<sup>18</sup> In other words, a delegate must align his own positions with those of his constituents. Likewise, at the jurisdictional level, alignment is essentially another term for majoritarianism. To say that policy should be congruent with the preferences of the median voter is to say that it should be congruent with the preferences of the voting *majority*. Of course, majoritarianism is not our only democratic principle. But, as Jeremy Waldron has argued, it *is* “required as a matter of fairness to all those who participate in the social choice.”<sup>19</sup>

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<sup>16</sup> *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976).

<sup>17</sup> In earlier work, I have applied the alignment approach to election law as a whole. See Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 *Colum. L. Rev.* 283, 286–87 (2014); see also *infra* Section I.A (explaining motivation for campaign finance focus of this Article).

<sup>18</sup> Hanna Fenichel Pitkin, *The Concept of Representation* 144–45 (1967).

<sup>19</sup> Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 *Yale L.J.* 1692, 1718 (2014) (emphasis omitted) (referring to decision-making procedures in legislatures and courts).

Unsurprisingly, given its democratic roots, the concept of alignment has surfaced repeatedly in the Court's campaign finance decisions. In a 2000 case, the Court recognized "the broader threat from politicians too compliant with the wishes of large contributors"—and not compliant enough with the wishes of voters.<sup>20</sup> In a 2003 case, the Court warned of "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."<sup>21</sup> And in its most recent campaign finance decision, *McCutcheon v. FEC*,<sup>22</sup> a decision otherwise unremittently hostile to regulation, the Court strikingly concluded its opinion with a paean to alignment. "Representatives are not to follow constituent orders, but can be expected to be cognizant of and responsive to those concerns. Such responsiveness is key to the very concept of self-governance through elected officials."<sup>23</sup>

Despite these doctrinal hints, some scholars claim that alignment is a forbidden interest in the campaign finance context. Kathleen Sullivan reasons that alignment reflects a particular theory of democracy, and that speech cannot be restricted based on "one vision of good government."<sup>24</sup> Similarly, Robert Post contends that in the First Amendment domain of public discourse, public opinion is forever changing shape. Thus "[t]here is . . . no 'baseline' from which [misalignment] can be assessed."<sup>25</sup> These critiques are misplaced. As to Sullivan, it might be controversial for the *Court* to embrace a specific model of democracy, but surely a popularly elected *legislature* may do so. In fact, legislatures adopt theories of self-governance all the time, both when they regulate money in politics and when they enact other electoral policies. As to Post, public opinion actually is not as fluid as he suggests, and alignment furthers what he deems the crucial aim of public discourse: making "persons believe that government is potentially responsive to their views."<sup>26</sup> It is unclear as well why electoral speech should be considered part of public

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<sup>20</sup> *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (2000).

<sup>21</sup> *McConnell v. FEC*, 540 U.S. 93, 153 (2003).

<sup>22</sup> 134 S. Ct. 1434, 1434 (2014) (plurality opinion).

<sup>23</sup> *Id.* at 1462 (plurality opinion).

<sup>24</sup> Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. Davis L. Rev. 663, 680 (1997).

<sup>25</sup> Robert C. Post, *Citizens Divided: Campaign Finance Reform and the Constitution* 53 (2014).

<sup>26</sup> *Id.* at 49.

discourse rather than the managerial domain of elections, in which speech may be regulated to serve the domain's ends.

Even if alignment is not a forbidden interest, it may be a duplicative one. As Richard Hasen has argued, it may be nothing more than a slick repackaging of the anti-distortion or equality interests that the Court already has rejected.<sup>27</sup> This charge also misses its mark. The distortion that cannot justify campaign finance regulation, in the Court's view, is the skewing of *electoral* outcomes due to large *expenditures*.<sup>28</sup> The Court has never suggested that the warping of *policy* outcomes due to large *contributions* (or their equivalent) is an illegitimate basis for regulation. The distortion of *voters* is different from that of *representatives*.

Alignment also is distinct from equality (in all its guises). One form of equality is the leveling of candidate resources. But candidates need not be equally funded to produce alignment, nor does alignment follow from evenly sized war chests. Another kind of equality is equal representation for all voters. But it is only the *median* voter, not *every* voter, who is entitled to congruence under the alignment approach. Alignment at the median can arise only if there is *misalignment* at all other points in the distribution. A final type of equality is equal voter influence over the political process. But equal influence is, at most, a *means* to achieving alignment. It is not the end itself. Alignment also is possible under conditions of unequal influence, and equal influence does not necessarily result in alignment.

Assume, then, that alignment is a compelling interest that neither is barred by First Amendment theory nor is identical to goals the Court already has rebuffed. We are not done yet. The next step is to determine whether money in politics can generate misalignment, and whether campaign finance reform can promote alignment. According to a burgeoning political science literature, the answer to both questions is yes, at least sometimes. The relevant empirical evidence fits into three categories.

First, according to numerous studies, wealthy Americans have more influence on politicians' voting records and actual policy outcomes than do poor or middle-class Americans.<sup>29</sup> This extra sway is evident whether House or Senate voting records, or state or federal policy outcomes, are

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<sup>27</sup> See Richard L. Hasen, Is "Dependence Corruption" Distinct from a Political Equality Argument for Campaign Finance Laws? A Reply to Professor Lessig, 12 Election L.J. 305, 308 (2013).

<sup>28</sup> See *supra* note 15 and accompanying text.

<sup>29</sup> See *infra* Section III.A.

considered. It also appears even after non-monetary forms of political participation (voting, volunteering, contacting officials, etc.) are controlled for. Second, as noted at the outset, politicians and donors have nearly identical ideal point distributions: highly bimodal curves in which they cluster at the ideological extremes and almost no one occupies the moderate center.<sup>30</sup> Voters' views, in contrast, exhibit a normal distribution whose single peak is in the middle of the political spectrum. It is fair to say that donors receive exquisitely attentive representation—and that voters receive virtually no representation at all.

Third, campaign finance regulation can be aligning *or* misaligning based on its implications for how candidates raise their money.<sup>31</sup> Tight individual contribution limits reduce the funds available from polarized individual donors. They therefore encourage candidates to shift toward the ideological center, the home of the median voter. Conversely, stringent *party* or *PAC* contribution limits have the opposite effect. Both parties and PACs are relatively moderate in their giving patterns—parties because their chief goal is winning as many seats as possible, PACs because they want access to incumbents of all political stripes. Reducing the funds available from these more centrist sources thus incentivizes candidates to move toward the ideological fringes. As for public financing, its impact hinges on its treatment of individual donors. “Clean money” schemes that provide block grants to candidates after they receive enough individual contributions are misaligning because of the extremism of the donors who initially must be wooed. But multiple-match systems that offer high matching ratios for small contributions may be aligning because of the more representative pool of donors they attract.

What do these findings mean for the constitutionality of different policies? Individual contribution limits would sit on sturdy legal ground under the alignment approach. Whatever their link may be to the prevention of corruption, they demonstrably further the governmental interest in alignment. Unlike under current law, individual *expenditure* limits also might survive judicial scrutiny. Since politicians mirror the views of not only individuals who donate directly to them, but also individuals who spend on their behalf, no great significance would attach to the contribution/expenditure distinction. Public financing that relies on individual donors who resemble the general population (or that does not rely on

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<sup>30</sup> See *infra* Section III.B.

<sup>31</sup> See *infra* Section III.C.



individual donors at all) would be valid as well. On the other hand, contribution and expenditure limits for parties and PACs could not be sustained by reference to alignment. Since these entities are relatively moderate, their funds exert little misaligning pressure. Public financing that requires appeals to polarized individual donors also could be justified only on the basis of other interests.

The Article proceeds as follows. Part I introduces the alignment interest. It describes the different forms of alignment, explains the role the concept has played in earlier campaign finance cases, and responds to the claim that general First Amendment principles proscribe the interest. Part II argues for the distinctiveness of alignment. It compares alignment to the interests the Court already has considered—anti-corruption, anti-distortion, and equality—and shows that it is different from each of them. Part III conveys the current state of knowledge about alignment. It summarizes the many studies on the misaligning influence of money in politics, as well as the fewer studies on the aligning impact of (some) regulation. Lastly, Part IV assesses the implications of this literature for the validity of different policies. Individual contribution and expenditure limits, and certain kinds of public financing, should be upheld because they promote alignment. But contribution and expenditure limits for parties and PACs, and other kinds of public financing, cannot be justified on this basis.

One final question should be answered before proceeding further. Given the array of interests already asserted in the campaign finance context, is there really a need for another one? In fact, the need is dire, for two reasons. First, the only interest the Court currently considers to be legitimate—the narrowly construed anti-corruption interest—neither captures the full extent of the harm caused by money in politics, nor is sufficient to sustain most campaign finance regulation. In recent years, policies have toppled like dominos, rejected by the Court due to a lack of fit with this interest. If the reform project is to avoid collapsing entirely, we must, in Michael Kang's words, "look[] beyond the prevention of corruption as defined by the Court."<sup>32</sup>

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<sup>32</sup> Michael S. Kang, *The End of Campaign Finance Law*, 98 Va. L. Rev. 1, 47 (2012); see also Richard Briffault, *On Dejudicializing American Campaign Finance Law*, 27 Ga. St. U. L. Rev. 887, 890 (2011) ("The central constitutional question in campaign finance law is what public interests justify restrictions . . . affecting the use of campaign money."); Guy-Uriel E. Charles, *Corruption Temptation*, 102 Calif. L. Rev. 25, 26 (2014) ("We no longer

Second, the misalignment produced by electoral fundraising and spending is not holding steady. Instead, it is getting worse. Over the last generation, the share of campaign funds provided by the wealthiest 0.01% of Americans has surged from about 10% to more than 40%.<sup>33</sup> During the same period, individual donors steadily have become more extreme in their political views,<sup>34</sup> and candidates steadily have become more dependent on their contributions.<sup>35</sup> As a result, the representational gap in favor of the affluent is now *five times* larger than it was in the 1970s and 1980s.<sup>36</sup> Misalignment thus is not a problem that can safely be ignored. Rather, it is a problem that—increasingly—threatens to swallow American democracy.

### I. THE ALIGNMENT INTEREST

The term *alignment* is unhelpful until it is clear *what* should be aligned and *where*. I begin this Part, then, by identifying two axes that can be used to categorize different forms of alignment. The first refers to the governmental output that should be aligned with voters' preferences; the second to the governmental level where the alignment should occur. After defining the alignment interest, I address a series of related issues: its democratic appeal, its administrability, its novelty, and its legal and practical limitations.

Upon conclusion of this brisk survey, I turn to the place of alignment in the campaign finance doctrine. The Supreme Court often has used

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talk about the gamut of values that we would like to see reflected in a system of campaign financing.”).

<sup>33</sup> See Bonica et al., *supra* note 5, at 112.

<sup>34</sup> See Raymond J. La Raja & David L. Wiltse, Don't Blame Donors for Ideological Polarization of Political Parties: Ideological Change and Stability Among Political Contributors, 1972–2008, 40 Am. Pol. Res. 501, 510 (2011) (showing rise in proportion of donors who are “ideologues” from 40% in 1972 to 60% in 2008).

<sup>35</sup> See Michael Barber, Ideological Donors, Contribution Limits, and the Polarization of State Legislatures 22 (Oct. 3, 2013) (unpublished manuscript, available at <https://politicalscience.byu.edu/Faculty/Thursday%20Group%20Papers/Limits.pdf>) (showing rise in share of state legislative candidate funds received from individual donors from 25% in 1990 to 50% in 2012); Michael Barber & Nolan McCarty, Causes and Consequences of Polarization, in *Negotiating Agreement in Politics: Report of the Task Force on Negotiating Agreement in Politics* 31 (Jane Mansbridge & Cathie Jo Martin eds., 2013) (showing analogous rise in individual contributions to congressional candidates from 50% to 75%).

<sup>36</sup> See Christopher Ellis, Representational Inequity Across Time and Space: Exploring Changes in the Political Representation of the Poor in the U.S. House 9 (unpublished manuscript, on file with the Virginia Law Review Association) (showing gap between alignment of House members with rich and with poor constituents over time).

language evoking alignment to denote a legitimate basis for regulation, including in its most recent decision on the subject. But, ironically, the *substance* of the Court's holdings often has contributed to the misalignment that plagues modern American politics. And again the Court's most recent case is no exception.

Lastly, I respond to the critique, made in the 1990s by Sullivan and in the 2013 Tanner Lectures by Post, that alignment (or something like it) is a forbidden interest in the campaign finance context. Sullivan wrongly claims that it is impermissible for a jurisdiction to embrace a particular theory of democracy, and wrongly supposes that such a choice can be avoided. And Post should be more receptive to *actual* alignment given his endorsement of *perceived* alignment as a basis for regulation. The gap between reality and perception is insufficient to bar one interest but to compel the other.

#### A. Reprise

I mentioned above that my survey of the alignment interest would be brisk. This is because I have elaborated on the interest elsewhere, in work arguing for the adoption of alignment as an overarching principle of election law.<sup>37</sup> There is no reason to repeat all of that analysis here. But there *is* reason to say more about alignment in the campaign finance context specifically. As noted earlier, the anti-corruption interest urgently needs to be bolstered, and the misalignment caused by money in politics is steadily worsening.<sup>38</sup> The bulk of the Article thus examines the intersection of alignment and campaign finance. Only this Section deals with alignment more generally.

Starting with taxonomy, there are three kinds of governmental outputs that should be congruent with voters' preferences.<sup>39</sup> The first is a representative's partisan affiliation. If a representative belongs to the party preferred by the median voter,<sup>40</sup> then there is *partisan alignment*. The

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<sup>37</sup> See generally Stephanopoulos, *supra* note 17 (introducing and urging adoption of alignment approach).

<sup>38</sup> See *supra* notes 32–36 and accompanying text. This also is the only domain where the very validity of the alignment interest is disputed.

<sup>39</sup> See Stephanopoulos, *supra* note 17, at 304–10. Careful readers may note that my terminology is slightly different here than in my earlier work. What I previously called “policy alignment” I now refer to as “preference alignment.” I also discuss outcome alignment in this Article while I omitted it before. See *id.* at 311–12.

<sup>40</sup> The median voter is the voter at the *midpoint* of the relevant distribution. Only this voter necessarily represents the views of a majority of the electorate, and so cannot be outvoted by

second is a representative's policy views. If a representative has the same ideal point as the median voter, then there is *preference alignment*. And the third is actual policy outcomes. If enacted policy corresponds to the wishes of the median voter, then there is *outcome alignment*. Of these three variants, I address only the latter two in this Article (and depict only them in Figure 1). Asymmetric campaign spending *can* cause partisan misalignment, by shifting electoral outcomes from what they would have been under conditions of more equal outlays.<sup>41</sup> But this is the one form of misalignment that the Court's precedent unambiguously rules out as an acceptable basis for regulation.<sup>42</sup>

Next, there are two governmental levels at which alignment should occur.<sup>43</sup> The first is the individual constituency, in which the preferences of the district's median voter and the district's representative should be congruent. Since districts have (almost) no policymaking authority, only partisan alignment and preference alignment are sensible concepts at this level. The second is the jurisdiction as a whole, in which governmental outputs should match the preferences of the jurisdiction's median voter. With respect to partisan alignment and preference alignment, the relevant outputs are, in turn, the partisan affiliation and the ideal point of the median legislator. With respect to outcome alignment, the relevant output is enacted policy. As discussed below, both *dyadic* and *collective* alignment should be deemed valid rationales for regulation.<sup>44</sup>

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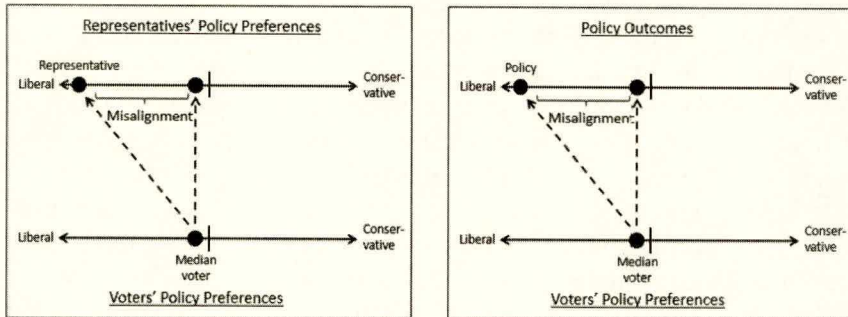
any other group. For this majoritarian reason, the median voter serves here as the normative benchmark relative to which alignment is determined.

<sup>41</sup> See Stephanopoulos, *supra* note 17, at 338–39. In this case, misalignment ensues between the median *actual* voter and the median *hypothetical* voter exposed to more equal outlays. See *id.*

<sup>42</sup> In case after case, the Court has rejected interests that are based on a benchmark of equal campaign spending. See, e.g., *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825 (2011) (“We have repeatedly rejected the argument that the government has a compelling state interest in ‘leveling the playing field’ that can justify undue burdens on political speech.”); *Citizens United v. FEC*, 130 S. Ct. 876, 904 (2010) (rejecting interest in preventing distortion of electoral outcomes due to heavy corporate spending); *Davis v. FEC*, 554 U.S. 724, 741–42 (2008) (rejecting interest in “level[ing] electoral opportunities for candidates of different personal wealth”); *Buckley v. Valeo*, 424 U.S. 1, 54 (1976) (rejecting “interest in equalizing the relative financial resources of candidates competing for elective office”). I do not agree with these cases' reasoning, but I bracket this disagreement for present purposes.

<sup>43</sup> See Stephanopoulos, *supra* note 17, at 310–11. Again, my terminology for these levels is slightly different here than in previous work. What I previously called “district-specific alignment” I now refer to as “dyadic alignment,” and what I previously labeled “legislative alignment” I now dub “collective alignment.”

<sup>44</sup> See *infra* Sections I.B–I.C, Part II.

**Figure 1: Illustrations of Preference and Outcome Misalignment**

Why, then, is alignment an attractive value? The most important answer is that it is implied by several widely accepted theories of democracy. At the dyadic level, one of the classic conceptions of the representative's role is the delegate model. As the earlier quote from Hanna Pitkin illustrates, a delegate is supposed to act in accordance with the wishes of his constituents—to “do what his principal would do.”<sup>45</sup> In the words of two other theorists, “The delegate theory of representation . . . posits that the representative ought to reflect purposively the preferences of his constituents.”<sup>46</sup> Both of these formulations come close to requiring alignment. If a delegate does what his constituents want, he should be aligning his positions with theirs.

Likewise, at the collective level, one (though hardly the only) pillar of American democratic thought is majoritarianism. Madison stated in *The Federalist Papers* that the “fundamental principle of free government” is that the “majority . . . would rule.”<sup>47</sup> Hamilton declared it a “poison” to “subject the sense of the greater number to that of the lesser.”<sup>48</sup> In more recent times too, Alexander Bickel has remarked that we are “a nation

<sup>45</sup> Pitkin, *supra* note 18, at 144.

<sup>46</sup> Donald J. McCrone & James H. Kuklinski, *The Delegate Theory of Representation*, 23 *Am. J. Pol. Sci.* 278, 278 (1979).

<sup>47</sup> *The Federalist* No. 58 (James Madison).

<sup>48</sup> *The Federalist* No. 22 (Alexander Hamilton). My aim here is not to make an *originalist* case for alignment, but rather to observe that positions consistent with it are well within the mainstream of the American democratic tradition. See also Bruce E. Cain, *Democracy More or Less: America's Political Reform Quandary* 147 (2015) (observing that populism is one of three major schools of American democratic thought, and that populism understands “democratic distortion” to be “a chronic deviation from median voter preference”).

committed to . . . majoritarian democracy,”<sup>49</sup> and Jesse Choper has written that throughout “this nation’s constitutional development from its origin to the present time, majority rule has been considered the keystone of a democratic political system.”<sup>50</sup> Once again, alignment follows from these arguments. If the wishes of the collective majority (embodied in the median voter) are heeded by officeholders, then governmental outputs should be congruent with those wishes.<sup>51</sup>

To be sure, there are other theories of democracy with which alignment is in tension.<sup>52</sup> The trustee model of representation holds that elected officials should exercise their own independent judgment, not abide by the preferences of their constituents.<sup>53</sup> Pluralists argue that “minorities rule” as they join together in ever shifting combinations.<sup>54</sup> Minimalist democrats downplay congruence in favor of retrospective accountability based on politicians’ records in office.<sup>55</sup> And so forth. But the point here is not that alignment is *required* by democratic theory. It is only that alignment is *consistent* with key conceptions of democracy—and thus that jurisdictions should have the discretion to invoke it if they so desire. Alignment may not be an *obligatory* state interest, but surely its democratic origin makes it a *permissible* one.<sup>56</sup>

The other advantage of alignment is that it is more determinate than concepts such as corruption, distortion, and equality. As I explain in Part II, the Court has struggled for nearly forty years to construe these terms,

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<sup>49</sup> Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 188 (1962).

<sup>50</sup> Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* 4 (1980).

<sup>51</sup> Of course, majoritarianism is inapplicable to “areas that the Constitution has declared off-limits to ordinary politics,” such as the provisions of the Bill of Rights. Stephanopoulos, *supra* note 17, at 321. It also is important to distinguish between majoritarianism in the *election* of representatives and majoritarianism in the *adoption* of positions and policies by representatives. Only the latter form of majoritarianism is equivalent to alignment.

<sup>52</sup> Though as I have explained in my previous work, this tension is more illusory than real, in particular for pluralism and minimalism. See *id.* at 313–16.

<sup>53</sup> See Pitkin, *supra* note 18, at 127.

<sup>54</sup> Robert A. Dahl, *A Preface to Democratic Theory* 132 (1956).

<sup>55</sup> See Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* 272 (2d ed. 1947).

<sup>56</sup> A fascinating issue, which I note here but do not explore further, is what makes a given interest “compelling” for purposes of constitutional law. Is it enough that an interest corresponds to a theory of democracy? But, if so, why is equality not a compelling interest? And how does an interest rooted in a democratic theory rate relative to interests based on *other* values, such as national security or the righting of historical wrongs? These are important and difficult questions, and I hope to address them in future work.

lurching unpredictably from one definition to another.<sup>57</sup> In contrast, alignment quite plainly refers to the correspondence of a given popular input with a given governmental output. Per the above taxonomy, it is true that there are different inputs and outputs that can be aligned at different levels. But this only means that there are several kinds of alignment. It does not undermine the clarity of the idea itself. If “[a]n ounce of administrability is worth a pound of theoretical perfection,” as David Strauss has quipped about justifications for campaign finance reform, then alignment may tip the scale.<sup>58</sup>

A skeptic might retort that alignment is theoretically determinate but practically hopeless. How, after all, are voters’ policy preferences and their government’s policy outputs even supposed to be measured, let alone compared to each other? Not long ago, this objection might have been fatal. But in the last few years, political scientists have made great strides in quantifying both public opinion and the activities of elected officials.<sup>59</sup> The most promising “new work takes advantage of questions answered by *both* voters and representatives to plot their positions in a common policy space.”<sup>60</sup> To the extent that they pertain to money in politics, these studies are discussed in Part III.<sup>61</sup> In sum, this scholarship leaves little doubt that, as a group of political scientists has written, “methodological advances [now] allow us to evaluate the congruence between voters and legislators across districts and time.”<sup>62</sup>

But while the indeterminacy charge falls flat, there are other critiques (or, rather, caveats) that ought to be acknowledged. First, the alignment

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<sup>57</sup> See *infra* Part II.

<sup>58</sup> David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 *Colum. L. Rev.* 1369, 1386 (1994).

<sup>59</sup> See Stephanopoulos, *supra* note 17, at 308 n.102 (discussing these advances).

<sup>60</sup> See *id.* at 308–09 & n.103 (examining these studies in particular).

<sup>61</sup> See *infra* Part III.

<sup>62</sup> Thad Kousser et al., *Reform and Representation: A New Method Applied to Recent Electoral Changes 2* (June 3, 2014) (unpublished manuscript, available at <http://ssrn.com/abstract=2260083>); see also, e.g., Bafumi & Herron, *supra* note 6, at 524 (noting ability to “bridg[e] institutions and voters in a way that allows common space ideal point estimates to be generated”); 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 3* (Apr. 25, 2011) (unpublished manuscript, on file with the Virginia Law Review Association) (succeeding in “measuring ideological distributions of state congressional delegations, legislatures, and citizens all on the same scale”). Moreover, both voters’ and officeholders’ ideologies typically can be captured by a single left-right dimension corresponding to governmental intervention in the economy (at least in recent years). See Stephanopoulos, *supra* note 17, at 309 & nn.104–05.

interest does not always support the lawfulness of campaign finance regulation. Policies that exert an *aligning* influence may be defended on this basis. But policies whose effects are ambiguous or misaligning—of which there are many—must be tethered to other interests or else face invalidation. Alignment does not give a free pass to challenged laws. Second, while no other scholar has argued explicitly for alignment as a compelling interest, the idea that money in politics may disrupt the link between public opinion and public policy is not new. It has appeared in the work of, among others, Richard Briffault, Bruce Cain, Samuel Issacharoff, and Lawrence Lessig.<sup>63</sup> What *is* new here is the framing of the issue as well as the systematic treatment of the theory, doctrine, and empirics of alignment.

Third, alignment is not, of course, the only available interest in the campaign finance context. The prevention of (a constricted notion of) corruption remains a valid basis for regulation, and the Court also recognizes an informational interest in providing voters with data about campaign contributions and expenditures.<sup>64</sup> Moreover, the anti-distortion and equality rationales may have been “orphaned,” in Hasen’s phrase, but their resonance cannot be denied in a democracy that adheres to the principle of one person, one vote.<sup>65</sup> Fourth, it is important to be clear that money in politics is only one of many causes of misalignment in today’s America. Even if the misaligning effects of campaign funds were eliminated entirely, significant non-congruence would persist thanks to franchise restrictions, partisan pressures, legislative rules, gerrymandered

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<sup>63</sup> See, e.g., Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It* 151 (2011) (proposing concept of “substantive distortion,” the “gap between what ‘the People’ believe about an issue and what Congress does about that issue”); Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 *Tex. L. Rev.* 1751, 1772 (1999) (identifying “danger that officeholders will be too attentive to the interests of donors . . . and insufficiently concerned about the public interest”); Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 *U. Chi. Legal F.* 111, 138; Samuel Issacharoff, *On Political Corruption*, 124 *Harv. L. Rev.* 118, 126 (2010).

<sup>64</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010).

<sup>65</sup> See Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 *Ga. St. U. L. Rev.* 989, 990 (2011). There also are several important election law values other than alignment, such as competition, participation, and minority representation. See Stephanopoulos, *supra* note 17, at 356–58, 360.



districts, etc. Misalignment is a complex phenomenon with no simple solution.<sup>66</sup>

And fifth, *perfect* alignment is an inherently unattainable goal. Even a jurisdiction (or representative) that cares about nothing else might lack information about voters' preferences on certain subjects, or be unable to change policies (or policy stances) at exactly the same rate at which public opinion shifts. Voters' preferences on particular matters also might be weak, uninformed, or unstable—and so less worthy of respect from a democratic perspective (and more difficult to heed from a practical one). *Overall* ideological alignment, then, is more vital than alignment on each individual issue that appears on the political agenda. Likewise, *persistent* misalignment is more objectionable than misalignment that is temporary and soon resolves.<sup>67</sup>

Lastly, it is worth noting two ways in which the alignment approach advocated here is more modest than the one I have recommended elsewhere. First, I only claim that alignment is a legitimate interest that may *shield* aligning laws from invalidation. I do not claim that alignment is a constitutional imperative that may be wielded as a *sword* to strike down misaligning laws.<sup>68</sup> And second, the only benchmark I use for assessing alignment is the median actual voter. I do not consider more exotic benchmarks such as the median hypothetical voter exposed to more even campaign spending.<sup>69</sup> The normative appeal of the median actual voter is hard to deny in a democracy in which the electorate chooses the representatives who then enact policy. There also is little relevant difference between the median actual voter and other attractive figures such as the median *eligible* voter or the median *citizen*. All of these figures' policy preferences are quite centrist—in marked contrast to the views of those who represent them.<sup>70</sup>

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<sup>66</sup> See Stephanopoulos, *supra* note 17, at 324–36, 342–55, 360–65 (discussing misaligning effects of other election laws); *id.* at 360–65 (discussing misaligning effects of non-legal factors).

<sup>67</sup> See *id.* at 309–10 (also making this point).

<sup>68</sup> See *id.* at 327, 333–34, 346, 353 (discussing situations where alignment could be used as sword).

<sup>69</sup> See *id.* at 338; see also *id.* at 325 (using benchmark of median eligible voter who would have gone to polls in absence of franchise restriction).

<sup>70</sup> If anything, actual voters are *more* extreme (and, on net, conservative) than eligible non-voters or non-eligible non-voters. See, e.g., Jan E. Leighley & Jonathan Nagler, Who Votes Now? Demographics, Issues, Inequality, and Turnout in the United States 159 (2013); John D. Griffin & Brian Newman, Are Voters Better Represented?, 67 J. Pol. 1206, 1214 (2005).

*B. Doctrinal Role*

The above was admittedly a bit of a breakneck tour of the alignment interest. But it sufficed, I hope, to lay the groundwork for the ensuing application of the interest to campaign finance law.<sup>71</sup> I begin this application by considering the role that alignment has played in the Court's cases on money in politics. It by no means has been their centerpiece, but it *has* appeared in them repeatedly—less surprisingly in the more pro-regulatory period of the early 2000s, but more unexpectedly in the Court's most recent blockbuster, *McCutcheon v. FEC*.<sup>72</sup> However, despite the lip service they sometimes have paid to alignment, the Court's decisions also have helped produce the startling *misalignment* that defines American politics today. By nullifying all expenditure limits and, just this year, permitting much larger aggregate contributions, the Court often has strengthened misaligning forces at the expense of aligning ones.

Most analyses of campaign finance doctrine begin with the 1976 decision of *Buckley v. Valeo*,<sup>73</sup> but the Court's first references to alignment date back (at least) to 1957. In *United States v. Automobile Workers*,<sup>74</sup> involving the prosecution of a labor union for funding a campaign commercial, the Court defended the federal ban on corporate and union electoral activity as follows: "The idea is to prevent . . . the great aggregations of wealth from using their corporate funds . . . to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests as against those of the public."<sup>75</sup> The Court added that "when an individual or association of individuals makes large contributions . . . they . . . occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest."<sup>76</sup>

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The levels of misalignment reported in Part III thus would *increase* if a different benchmark were used.

<sup>71</sup> Readers who would like a more extensive treatment should consult my earlier work. See Stephanopoulos, *supra* note 17, at 304–65 (detailing alignment approach to election law).

<sup>72</sup> 134 S. Ct. at 1461–62.

<sup>73</sup> See, e.g., *id.* at 1444 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)).

<sup>74</sup> 352 U.S. 567 (1957).

<sup>75</sup> *Id.* at 571 (quoting Elihu Root, *Addresses on Government and Citizenship* 143 (Robert Bacon & James Brown Scott eds., 1916)) (internal quotation marks omitted).

<sup>76</sup> *Id.* at 576 (quoting 65 Cong. Rec. 9507 (1924) (statement of Sen. Robinson)); see also *id.* ("[O]ne of the great political evils of the time is the apparent hold on political parties which

Both of these passages articulate an interest akin to alignment. In the first excerpt, the stated purpose of the federal ban is preventing elected officials from pursuing the “protection and the advancement of [corporate] interests” and so neglecting “those of the public.”<sup>77</sup> This is another way of saying that the ban aims to avoid misalignment in the direction of corporate concerns. Similarly, the second quote asserts that large contributions sometimes can induce “consideration by the beneficiaries” that is “harmful to the general public interest.”<sup>78</sup> In other words, large contributions sometimes can induce misalignment in the direction of contributors.

In the post-*Buckley* era, the first hint of the alignment interest came in the 1985 case of *FEC v. NCPAC*.<sup>79</sup> The majority struck down a limit on PAC spending in presidential races.<sup>80</sup> But in dissent, Justice White voiced his concern about the potential “infusion of massive PAC expenditures into the political process.”<sup>81</sup> His fear was that, thanks to these expenditures, “[t]he candidate may be forced to please the spenders rather than the voters, and the two groups are not identical.”<sup>82</sup> That is, the candidate may be forced to align her positions with the spenders who support her campaign rather than the voters who actually elect her.

Justice White’s argument in dissent became the holding of the Court in two important cases in the early 2000s. First, in *Nixon v. Shrink Missouri Government PAC*, the Court described the problem that contribution limits are meant to solve as the “broader threat from politicians too compliant with the wishes of large contributors.”<sup>83</sup> Politicians too compliant with the wishes of contributors, of course, are not compliant enough with those of voters. The Court also noted that outsized checks can foster the “cynical assumption that large donors call the tune.”<sup>84</sup> This

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business interests . . . seek and sometimes obtain by reason of liberal campaign contributions.” (quoting 65 Cong. Rec. 9507 (1924) (statement of Sen. Robinson)).

<sup>77</sup> *Id.* at 571 (quoting Root, *supra* note 75) (internal quotation marks omitted).

<sup>78</sup> *Id.* at 576 (quoting 65 Cong. Rec. 9507 (1924) (statement of Sen. Robinson)) (internal quotation marks omitted). To be fair, the “public interest” is not necessarily identical to the views held by the median voter. These excerpts thus convey a slightly different conception of misalignment.

<sup>79</sup> 470 U.S. 480 (1985).

<sup>80</sup> See *id.* at 501.

<sup>81</sup> *Id.* at 517.

<sup>82</sup> *Id.*

<sup>83</sup> 528 U.S. 377, 389 (2000).

<sup>84</sup> *Id.* at 390; see also *id.* at 401 (Breyer, J., concurring) (arguing that contribution limits “seek to protect the integrity of the electoral process—the means through which a free socie-

is a claim about the *appearance* rather than the *reality* of misalignment, but it sounds in a similar register.

Second, in *McConnell v. FEC*,<sup>85</sup> the Court used language even more evocative of alignment to uphold the Bipartisan Campaign Reform Act's ("BCRA") soft money ban.<sup>86</sup> The Court observed that soft money donors received special access to officeholders, which led in turn to undue influence over their decisions. "Implicit . . . in the sale of access is the suggestion that money buys influence."<sup>87</sup> The Court also catalogued a number of cases in which soft money donors managed to thwart the passage of popular bills. "The evidence connects soft money to manipulations of the legislative calendar, leading to Congress' failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation."<sup>88</sup> And in its clearest ever statement of the alignment interest, the Court declared, "Just as troubling to a functioning democracy . . . is the danger that officeholders will decide issues not on . . . the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder."<sup>89</sup> This "danger" is the essence of misalignment.

In the decade after *McConnell*, no Court majority referred to alignment, but the concept continued to surface in individual Justices' opinions. In the 2007 case of *FEC v. Wisconsin Right to Life, Inc.*, Justice Scalia lamented that "the effect of BCRA has been to concentrate more political power in the hands of the country's wealthiest individuals."<sup>90</sup> He noted that in 2004, "a mere 24 individuals contributed an astounding total of \$142 million to [unregulated groups]."<sup>91</sup> In the 2010 case of *Citizens United v. FEC*, Justice Stevens argued that when "private inter-

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ty democratically translates political speech into concrete governmental action"); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001) (citing language from *Shrink Mo.*, 528 U.S. at 388–89 on "undue influence on an officeholder's judgment").

<sup>85</sup> 540 U.S. 93 (2003).

<sup>86</sup> "Soft money" refers to previously unregulated funds that were donated to political parties to pay for activities other than express advocacy for or against candidates. See *id.* at 122–24.

<sup>87</sup> *Id.* at 154 ("[P]urchasers of such access unabashedly admit that they are seeking to purchase just such influence.").

<sup>88</sup> *Id.* at 150.

<sup>89</sup> *Id.* at 153.

<sup>90</sup> 551 U.S. 449, 503 (2007) (Scalia, J., concurring in part and concurring in the judgment).

<sup>91</sup> *Id.* at 503–04; see also *id.* at 522 (Souter, J., dissenting) (discussing the "pervasive distortion of electoral institutions by concentrated wealth" through "the special access and guaranteed favor that sap the representative integrity of American government").

ests . . . exert outsized control over officeholders solely on account of the money spent on (or withheld from) their campaigns, the result can . . . [be] a ‘subversion . . . of the electoral process.’”<sup>92</sup> And in the 2011 case of *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, Justice Kagan remarked that the “ultimate object” of the First Amendment is “a government responsive to the will of the people.”<sup>93</sup> She added that “[i]f an officeholder owes his election to wealthy contributors, he may act for their benefit alone, rather than on behalf of all the people.”<sup>94</sup>

Lest these comments be dismissed as the sour grapes of dissenting Justices, the full Court, in its most recent campaign finance case, *McCutcheon v. FEC*,<sup>95</sup> concluded its opinion with what can be read as a tribute to alignment. “For the past 40 years, our campaign finance jurisprudence has focused on the need to . . . [avoid] compromising the political responsiveness at the heart of the democratic process,” began the Court’s coda.<sup>96</sup> Turning to political theory, the Court continued: “As Edmund Burke explained . . . a representative owes constituents . . . judgment informed by ‘the strictest union, the closest correspondence, and the most unreserved communication with his constituents.’”<sup>97</sup> And summing up its views, the Court announced, “Representatives are not to follow constituent orders, but can be expected to be cognizant of and responsive to those concerns. Such responsiveness is key to the very concept of self-governance through elected officials.”<sup>98</sup>

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<sup>92</sup> 130 S. Ct. 876, 962–63 (2010) (Stevens, J., concurring in part and dissenting in part) (quoting *Auto. Workers*, 352 U.S. at 575).

<sup>93</sup> 131 S. Ct. 2806, 2846 (2011) (Kagan, J., dissenting).

<sup>94</sup> *Id.* at 2830.

<sup>95</sup> 134 S. Ct. at 1434.

<sup>96</sup> *Id.* at 1461 (plurality opinion).

<sup>97</sup> *Id.* at 1461–62 (quoting Edmund Burke, *The Speeches of the Right Hon. Edmund Burke* 129–30 (J. Burke ed., Dublin, James Duffy 1867)).

<sup>98</sup> *Id.* at 1462; see also *id.* at 1441 (arguing that “a central feature of democracy” is that “constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns”). Justice Breyer’s dissent also contained several passages noting the importance of alignment. See, e.g., *id.* at 1467 (Breyer, J., dissenting) (discussing “*the end* that government may be responsive to the will of the people” (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931))); *id.* at 1468 (explaining “the constitutional effort to create a democracy responsive to the people—a government where laws reflect the very thoughts, views, ideas, and sentiments”).

Given the context, it is unclear what kind of responsiveness the Court had in mind when it penned this passage. In *McCutcheon*, the Court voided aggregate contribution limits that imposed a ceiling on the total amount of money that donors could give in federal elections.<sup>99</sup> The Court thus may have been lauding politicians' responsiveness to *contributors* here, not their responsiveness to *voters*.<sup>100</sup> But even if this is what the Court meant, it certainly is not what it said. Indeed, the Court referred three times to "constituents" as the group to which elected officials should be responsive.<sup>101</sup> Accordingly, *McCutcheon* remains the Court's most recent, most extensive—and most unexpected—account of the importance of alignment.

To be sure, neither *McCutcheon* nor any other case actually has held that alignment is a distinct governmental interest that can justify the regulation of campaign funds. The paean in *McCutcheon* was pure dictum in a decision otherwise hostile to regulation.<sup>102</sup> Likewise, the excerpts from *Shrink Missouri* and *McConnell* were efforts to broaden the Court's definition of corruption, not to devise a new rationale for regulation.<sup>103</sup> The Court also has shied away from these excerpts in subsequent cases.<sup>104</sup> The point, then, is not that the Court has been employing something like the alignment approach all along. It plainly has not been. Rather, the point is that the Court sometimes has appreciated the value of alignment, and sometimes has recognized that money in politics can exert a misaligning influence. Were a future Court to designate alignment as a discrete state interest, it thus would be building on—not disrupting—its own precedent. (And this is very much a project for a future Court; the odds of the current majority embracing a new state interest in this area are next to nil.)

A second caveat about the Court's case law is that however positively it might have *portrayed* alignment, its actual *impact* often has been high-

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<sup>99</sup> See *id.* at 1442–43 (plurality opinion) (describing operation of aggregate limits).

<sup>100</sup> Some support for this view comes from Justice Kennedy's opinion in *McConnell*. He also declared that "[d]emocracy is premised on responsiveness," and elaborated that "a substantial and legitimate reason . . . to make a contribution to[] one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors." *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in the judgment in part and dissenting in part).

<sup>101</sup> See *McCutcheon*, 134 S. Ct. at 1461–62.

<sup>102</sup> See, e.g., *id.* at 1441 (listing types of campaign finance laws barred by Court's precedent).

<sup>103</sup> See *McConnell*, 540 U.S. at 153; *Shrink Mo.*, 528 U.S. at 389.

<sup>104</sup> See *McCutcheon*, 134 S. Ct. at 1441; *Citizens United*, 130 S. Ct. at 910.

ly misaligning. As discussed in Part III, the key mechanism through which money in politics causes misalignment is the donating and spending of highly unrepresentative individuals.<sup>105</sup> Either candidates shift their positions in these individuals' direction in order to attract more funding, or only candidates who share the individuals' positions in the first place become financially viable. Either way, non-congruence ensues in favor of this class of donors and spenders—and against ordinary voters.

The Court's decisions have bolstered this dynamic by removing many of the constraints that jurisdictions have tried to place on individual contributions and expenditures. In *Buckley* itself, the Court struck down limits imposed by Congress on individual expenditures.<sup>106</sup> In *Citizens United*, the Court vetoed limits on corporate expenditures as well.<sup>107</sup> Its conclusion that independent expenditures are inherently non-corrupting<sup>108</sup> also enabled the creation of Super PACs: entities that can accept unlimited contributions (mostly from wealthy individuals) because they devote all of their resources to expenditures rather than candidate donations.<sup>109</sup> And in *McCutcheon*, the Court dismantled the aggregate contribution limits that had prevented rich donors from writing checks to dozens or hundreds of a party's candidates.<sup>110</sup> Now a single donor may give as much as \$3.6 million in a single cycle.<sup>111</sup>

In combination, these decisions have increased sharply the resources that affluent individuals can bring to bear on the electoral process. Had all three cases come out the other way, for instance, individuals would be able to donate no more than \$5,200 per federal candidate,<sup>112</sup> no more than \$123,200 in aggregate,<sup>113</sup> and not at all to Super PACs (which would not exist).<sup>114</sup> Individuals also would be able to *spend* no more

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<sup>105</sup> See *infra* Part III.

<sup>106</sup> See *Buckley*, 424 U.S. at 39–51.

<sup>107</sup> See *Citizens United*, 130 S. Ct. at 896–913.

<sup>108</sup> See *id.* at 910 (“[I]ndependent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption.”).

<sup>109</sup> See *supra* note 4; see also Kang, *supra* note 32, at 34 (discussing formation of Super PACs in immediate aftermath of *Citizens United*).

<sup>110</sup> See *McCutcheon*, 134 S. Ct. at 1444–62 (plurality opinion).

<sup>111</sup> See *id.* at 1473–74 (Breyer, J., dissenting).

<sup>112</sup> See *id.* at 1442 (plurality opinion) (noting current base contribution limit). All figures cited here are per two-year election cycle.

<sup>113</sup> See *id.* at 1443 (noting aggregate contribution limit struck down in case).

<sup>114</sup> See *supra* note 112 and accompanying text (discussing role of *Citizens United* in giving rise to Super PACs).

than \$2,000 advocating for the election or defeat of a given candidate.<sup>115</sup> In contrast, under current law, a single billionaire, Sheldon Adelson, managed to deploy \$150 million in the 2012 cycle, mostly in contributions to Super PACs and other even less regulated groups.<sup>116</sup> Another 150 or so individuals provided at least \$1 million each.<sup>117</sup> It is the Court, then, that deserves a good deal of the blame for the misalignment that pervades American politics. The Court's rulings have freed wealthy individuals from most of their regulatory restraints, thus intensifying their misaligning effect on the political system. Regrettably, this actual effect far outweighs the Court's occasional warm words about the merits of alignment.

### C. A Forbidden Interest?

And as for these warm words, two prominent scholars warn that they should not be taken too seriously. In fact, according to both Sullivan and Post, alignment (or something closely related to it) is a *forbidden* interest in the campaign finance context, barred by general First Amendment principles. Sullivan's critique is based on her observation that a jurisdiction that asserts the alignment interest thereby commits itself to a particular conception of democracy. Post's challenge follows from his view that public opinion is inherently fluid, and thus incapable of being aligned or misaligned with any governmental output. I respond to both of their claims below.

Beginning with Sullivan, she acknowledges that concern about misalignment is a common rationale for campaign finance regulation. "Officeholders who are disproportionately beholden to a minority of powerful contributors, advocates of finance limits say, will shirk their responsibilities to their other constituents . . ." <sup>118</sup> She also recognizes that alignment is linked to a specific democratic theory: "a populist view in which the representative ought be as close as possible to a transparent

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<sup>115</sup> See *Buckley*, 424 U.S. at 39–40 (per curiam) (noting individual expenditure limit struck down in case).

<sup>116</sup> See Peter H. Stone, Sheldon Adelson Spent Far More on Campaign than Previously Known, *Huffington Post* (Dec. 3, 2012, 12:00 AM), [http://www.huffingtonpost.com/2012/12/03/sheldon-adelson-2012-election\\_n\\_2223589.html](http://www.huffingtonpost.com/2012/12/03/sheldon-adelson-2012-election_n_2223589.html).

<sup>117</sup> See Bonica et al., *supra* note 5, at 112–13.

<sup>118</sup> Sullivan, *supra* note 24, at 679.



vehicle for plebiscitary democracy.”<sup>119</sup> But this link is precisely the problem, in her view. “[S]electing one vision of good government is not generally an acceptable justification for limiting speech . . . [Alignment] claims the superiority of a particular conception of democracy as a ground for limiting speech.”<sup>120</sup> In other words, the democratic origin of the alignment interest is not the core of its appeal but rather its fatal flaw.

Sullivan is correct that the primary reason for a jurisdiction to invoke alignment is that it is drawn to the theory of democracy that alignment represents. But she is wrong to suppose that there is anything illegitimate about a jurisdiction embracing a particular democratic theory. In fact, jurisdictions do so all the time, and they then cite these theories as justifications for burdening a host of individual rights, not just speech. Take, for example, the myriad requirements that states apply to candidates (especially from minor parties) seeking to be listed on ballots. These requirements typically are defended on the grounds that they “favor the traditional two-party system” and “temper the destabilizing effects of . . . excessive factionalism”—and they typically are upheld.<sup>121</sup> Or consider the countless districts that deviate at least somewhat from the rule of one person, one vote. When these districts are contested, jurisdictions argue that the deviations are justified by their interests in compactness, congruence with political subdivisions, and the like.<sup>122</sup> And they usually prevail as well.<sup>123</sup>

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<sup>119</sup> *Id.* at 681. This is not quite how I would describe the democratic theories with which alignment is most consistent. See *supra* notes 45–51 and accompanying text (explaining how alignment follows from delegate model of representation and from majoritarianism).

<sup>120</sup> *Id.* at 680–81 (emphasis omitted). Similar arguments can be found in some of the Court’s recent cases. See, e.g., *McCutcheon*, 134 S. Ct. at 1441 (plurality opinion) (“Campaign finance restrictions that pursue other objectives [than preventing corruption], we have explained, impermissibly inject the Government ‘into the debate over who should govern.’” (quoting *Bennett*, 131 S. Ct. at 2826)).

<sup>121</sup> *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997) (upholding ban on fusion candidacies); see also, e.g., *Burdick v. Takushi*, 504 U.S. 428, 439 (1992) (upholding ban on write-in candidacies based on state’s interest in avoiding “unrestrained factionalism”); *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973) (upholding deadline on party enrollment based on state’s interest in “preservation of the integrity of the electoral process”).

<sup>122</sup> See, e.g., *Voinovich v. Quilter*, 507 U.S. 146, 161–62 (1993) (upholding malapportioned districts resulting from “policy in favor of preserving county boundaries”); *White v. Regester*, 412 U.S. 755, 764–75 & n.8 (1973) (same); *Mahan v. Howell*, 410 U.S. 315, 323 (1973) (same where state “sought to avoid the fragmentation of such subdivisions”).

<sup>123</sup> See *Action on Redistricting Plans, 2001-07*, Nat’l Conf. of State Legislatures (Jan. 9, 2008, 9:08 PM), <http://www.senate.leg.state.mn.us/departments/scr/redist/redsum2000/action2000.htm> (showing that majority of redistricting lawsuits failed in 2000s cycle); see also *Briffault*, *supra* note 63, at 1767–68 (“[W]hat is striking about the jurisprudence of elec-

Even in the campaign finance context, it is not only the alignment interest that entails a commitment to a particular vision of democracy. The anti-corruption and informational interests, which Sullivan omits from her analysis, do so too. In a recent article, Deborah Hellman explains that corruption is a “derivative concept” that is meaningful only if one first adopts a theory of how an *uncorrupted* individual or institution would act.<sup>124</sup> When the relevant individual is an officeholder and the relevant institution is a legislature, “[w]hat constitutes political corruption . . . depends on a theory of democracy.”<sup>125</sup> What constitutes corruption, that is, depends on precisely the issue that Sullivan deems off-limits.<sup>126</sup> Likewise, the rationale for notifying voters about the sources of campaign messages is, in the Court’s words, to “enable[] the electorate to make informed decisions and give proper weight to different speakers . . . .”<sup>127</sup> This aim also rests on a contested view of how democracy should operate—as evidenced by the fact that at least one Justice disagrees with the Court’s position.<sup>128</sup>

Sullivan might respond that the anti-corruption and informational interests are invalid as well.<sup>129</sup> Perhaps money in politics should be deregulated *entirely* so as to prevent jurisdictions from picking among demo-

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tions is the Court’s willingness to let legislatures determine some of the substantive values that election rules may advance . . . .”)

<sup>124</sup> Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 Mich. L. Rev. 1385, 1389 (2013).

<sup>125</sup> *Id.* at 1394; see also Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 Const. Comment. 127, 128 (1997) (“Any adequate standard of corruption . . . must be grounded in a convincing theory of representation.”).

<sup>126</sup> Because Hellman is wary of having the Court select a theory of democracy, she argues for judicial deference to the elected branches’ conception of corruption. See Hellman, *supra* note 124, at 1410–11. This, of course, is almost the exact opposite of Sullivan’s position. Sullivan believes that the elected branches should not choose a theory of democracy *at all*. Hellman believes that *only* the elected branches should make this choice.

<sup>127</sup> *Citizens United*, 130 S. Ct. at 916.

<sup>128</sup> See *id.* at 979–82 (Thomas, J., concurring in part and dissenting in part) (arguing that disclosure requirements are unconstitutional because they abridge right to anonymous speech). Moreover, as soon as the Court recognizes an interest asserted by a jurisdiction, it too necessarily adopts a specific theory of democracy. See Hellman, *supra* note 124, at 1402 (“[W]hen the Court defines corruption, it inescapably puts forward a conception of the proper role of a legislator in a democracy.”).

<sup>129</sup> Indeed, she gestures in this direction when she criticizes contribution limits on the ground that “contributions may be consistent with some notions of democratic theory.” Sullivan, *supra* note 24, at 681 n.56.

cratic theories. But even complete deregulation would not get us out of the theoretical box. If there were no campaign finance restrictions at all, individuals and groups would try to influence elections in whatever manner they thought was most beneficial to their interests. Candidates then would be elected, and policies enacted, based on the interplay of all of these individuals' and groups' activities.<sup>130</sup> But this is not a description of a political process divorced from democratic theory. Rather, it is an account of some kind of pluralism—"the aggregation of self-regarding interests, each of which is free to seek as much representation as possible," as Sullivan puts it.<sup>131</sup> Deregulation thus involves exactly the same sort of democratic choice as regulation.

Next, Post sets forth a complex theory of the First Amendment that distinguishes between the general domain of public discourse and an array of specific managerial domains. In public discourse, people freely "participat[e] in the ongoing and never-ending formation of public opinion,"<sup>132</sup> and so come to "believe that government is potentially responsive to their views."<sup>133</sup> Post refers to this belief in the government's responsiveness as "democratic legitimation," and he considers its creation the central purpose of public discourse.<sup>134</sup> In a managerial domain, on the other hand, "speech may be regulated in order to achieve the instrumental goals of the domain."<sup>135</sup> In the managerial domain of elections, for instance, Post posits the goal of "electoral integrity," by which he means elections that produce "popular trust that representatives are responsive to public opinion."<sup>136</sup>

Assuming that campaign speech is part of public discourse, then, the problem with the alignment approach is that it requires public opinion to be *measured* and then compared to some governmental output. But public discourse "conceptualizes public opinion as a continuous process," as an "unending unfolding" that "can never be decisively known or fixed."<sup>137</sup> Therefore any effort to gauge (and then apply) public opinion

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<sup>130</sup> The actual preferences of voters also would play some role, even in a wholly deregulated system.

<sup>131</sup> Sullivan, *supra* note 24, at 681; see also *id.* ("Campaign finance reformers necessarily reject pluralist assumptions about the operation of democracy . . .").

<sup>132</sup> Post, *supra* note 25, at 36.

<sup>133</sup> *Id.* at 49.

<sup>134</sup> See *id.*

<sup>135</sup> *Id.* at 81.

<sup>136</sup> *Id.* at 66.

<sup>137</sup> *Id.* at 53-54.

is doomed. "There is . . . no 'baseline' from which [misalignment] can be assessed . . . no Archimedean point[] from which to normalize the content of public opinion."<sup>138</sup>

Post's conception of public opinion warrants several responses. First, as an empirical matter, political scientists have found that it is not nearly as volatile as he suggests. One landmark study, for example, concluded that Americans' policy preferences "form meaningful patterns consistent with a set of underlying beliefs and values" and "do not in fact change in a capricious, whimsical, or evanescent fashion."<sup>139</sup> Second, even if public opinion is highly fluid, the applicability of the alignment approach is not undermined as a result. The approach holds that voters' views and governmental outputs should be congruent over time. If voters' views change from one period to the next, then so should the outputs. The approach can cope with shifting public opinion.<sup>140</sup> And third, Post repeatedly argues that there is no way to tell if public opinion is "distorted"—indeed, this is the thrust of his critique.<sup>141</sup> But the concept of alignment does not rely on a notion of "undistorted" public opinion. It takes public opinion as it finds it, and merely claims that officeholders' positions and policy outcomes should correspond to it.<sup>142</sup>

A different kind of answer to Post focuses not on public opinion but rather on the value of democratic legitimation that underpins public discourse. Democratic legitimation, crucially, is in essence a subjective form of alignment. It is people's *belief* that government is responsive to

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<sup>138</sup> *Id.*; see also *id.* at 156 (claiming that alignment approach "has no intrinsic answer to the obvious question: Who are the People?").

<sup>139</sup> Benjamin I. Page & Robert Y. Shapiro, *The Rational Public: Fifty Years of Trends in Americans' Policy Preferences* 384–85 (1992); see also, e.g., Stuart N. Soroka & Christopher Wlezien, *On the Limits to Inequality in Representation*, 41 *PS: Pol. Sci. & Pol.* 319, 319–25 (2008) (showing respondents' coherent and stable preferences for taxing and spending levels over time); Joseph Daniel Ura & Christopher R. Ellis, *Income, Preferences, and the Dynamics of Policy Responsiveness*, 41 *PS: Pol. Sci. & Pol.* 785, 787–89 (2008) (showing same for respondents' overall policy liberalism).

<sup>140</sup> See Stephanopoulos, *supra* note 17, at 312–13.

<sup>141</sup> See, e.g., Post, *supra* note 25, at 54 ("[L]imiting speech to prevent distortion is equivalent to freezing public opinion and preventing it from changing in response to new ideas and new convictions.").

<sup>142</sup> The one exception is the category of misalignment that hinges on divergence from the hypothetical voter exposed to more even campaign outlays. I concede, however, that this type of misalignment is not a legitimate concern under current law. See *supra* notes 41–42 and accompanying text.

their views, while alignment is the *reality* of a responsive government.<sup>143</sup> Subjective and objective alignment may diverge, of course, but the more reasonable hypothesis (in the absence of empirical evidence) is that they typically coincide.<sup>144</sup> It is hard to imagine, after all, what could be more likely to produce a *feeling* of alignment than *actual* alignment. As Justice Stevens remarked in *Citizens United*, a “[g]overnment captured by corporate interests,” and so misaligned in their favor, also may cause people to “*believe*” that it is “neither responsive to their needs nor willing to give their views a fair hearing.”<sup>145</sup> Accordingly, it may be possible to reconcile Post’s theoretical framework with the alignment approach in a fairly straightforward fashion. If public discourse sometimes may be regulated for the sake of democratic legitimation, perhaps it also may be regulated for the sake of the alignment from which legitimation arises.<sup>146</sup>

A final reply to Post builds on his observation that campaign speech could be conceptualized *not* as part of public discourse but instead as part of the managerial domain of elections. This domain’s boundaries are elastic, and, in Post’s words, they could be “enlarged to authorize control of [money in politics] that threaten[s] electoral integrity.”<sup>147</sup> If the proper rubric is the electoral domain, not public discourse, then there are two further ways to reconcile Post’s theory with the alignment approach. First, the goal Post specifies for the domain, electoral integrity, is very similar to the value of democratic legitimation that is secured by public discourse. (The only difference between them is that integrity re-

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<sup>143</sup> See *supra* notes 133–134 and accompanying text. I note that I am treating alignment and responsiveness as synonymous here, while in fact they have different technical definitions. See Stephanopoulos, *supra* note 17, at 299–302 (discussing these concepts’ differences).

<sup>144</sup> Because it only has become possible very recently to measure objective alignment, no study to date has investigated the relationship between it and subjective alignment (which can be assessed using polls).

<sup>145</sup> *Citizens United*, 130 S. Ct. at 974 (Stevens, J., concurring in part and dissenting in part) (emphasis added); see also *Wis. Right to Life*, 551 U.S. at 507–08 (Souter, J., dissenting) (arguing that “integrity . . . of democratic government” is “derived from the responsiveness of its law to the interests of citizens”).

<sup>146</sup> Post partially concedes this point when he observes that “there might be little difference” between his own framework and something akin to the alignment approach. Post, *supra* note 25, at 156. They may be “simply using different words to describe the identical phenomenon.” *Id.*

<sup>147</sup> *Id.* at 91; see also Briffault, *supra* note 63, at 1763 (arguing for “a distinctive jurisprudential regime for election speech”); Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 *Tex. L. Rev.* 1803, 1817 (1999) (also arguing for electoral domain detached from general First Amendment principles).

lies on *elections* to produce a sense of responsiveness, while legitimation relies on *civic participation*.<sup>148</sup>) Consequently, if alignment can function as a means for achieving legitimation in the realm of public discourse, it should be able to do the same for integrity in the electoral domain. There is no reason to expect alignment to have different connections to these highly related, almost equivalent, aims.

Second, once we find ourselves in the electoral domain, Post's goal of electoral integrity is entitled to no particular deference. The ends of managerial domains are "democratically determined,"<sup>149</sup> and there is no evidence that the public prefers integrity over, say, alignment. In fact, while I am aware of no polling on the popularity of integrity, two recent surveys found that a substantial majority of Americans support the delegate model of representation (to which alignment is closely tied) over the trustee model.<sup>150</sup> The democratic legitimacy of alignment thus is at least as robust as that of integrity.

Moreover, putting aside the vagaries of public opinion, electoral integrity is an odd choice for an objective because it does not appear to be linked to any aspect of campaign finance. Political scientists have detected no relationship whatsoever between levels of electoral spending or types of electoral regulation and people's trust in government (a passable proxy for integrity).<sup>151</sup> In contrast, as detailed in Part III, both levels of spending and types of regulation *are* connected to alignment in intui-

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<sup>148</sup> See *supra* notes 133–134, 136 and accompanying text.

<sup>149</sup> Post, *supra* note 25, at 81.

<sup>150</sup> See Kay Lehman Schlozman et al., *The Unheavenly Chorus: Unequal Political Voice and the Broken Promise of American Democracy* 59 (2012); Mollyann Brodie et al., *Polling and Democracy: "The Will of the People,"* *Pub. Persp.*, July/Aug. 2001, at 1, 12; see also Cain, *supra* note 63, at 121 (referring to "more widely accepted[] delegate model").

<sup>151</sup> See, e.g., Pamela S. Karlan, *Citizens Deflected: Electoral Integrity and Political Reform*, in *Citizens Divided*, *supra* note 25, at 141, 144; Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 *U. Pa. L. Rev.* 119, 122 (2004) (finding that "trends in general attitudes of corruption seem unrelated to anything happening in the campaign finance system"); David M. Primo, *Public Opinion and Campaign Finance: Reformers Versus Reality*, 7 *Indep. Rev.* 207, 215 (2002) (finding no relationship between trust in government and campaign spending). There also is no obvious connection between campaign finance and people's belief that government listens to their views. Indeed, "[p]ublic belief in the responsiveness of the government appears to have *risen* during a period of increased campaign spending and soft money fundraising." John Samples, *The Fallacy of Campaign Finance Reform* 115 (2006) (emphasis added); see also Shaun Bowler & Todd Donovan, *The Limits of Electoral Reform 88–94* (2013) (finding that public's attitudes toward political system are largely unaffected by campaign finance reforms).

tive and empirically verifiable ways.<sup>152</sup> Alignment thus has a clear practical advantage over integrity. Unlike integrity, it indeed is threatened by money in politics, and promoted by certain kinds of reform.

## II. THE DISTINCTIVENESS OF ALIGNMENT

Even if the alignment interest is permitted by First Amendment theory, it is not yet out of the conceptual minefield. The possibility remains that it might be indistinguishable from one of the multiple interests the Court has either rejected or downplayed in its campaign finance decisions. In this case, the theoretical availability of alignment would be irrelevant. In order to recognize it, the Court would be obligated to overturn its precedents and to resuscitate one of the stricken interests—in short, to launch a doctrinal revolution. Even for a future Court more amenable to regulation than the current Justices, this would be a tall order.

In this Part, then, I explain why alignment is distinct from the three key interests—anti-corruption, anti-distortion, and equality—that have made appearances in the Court's case law.<sup>153</sup> First, as to corruption, there simply is no connection between misalignment and quid pro quo corruption (the only variant accepted by today's Court). Misalignment is more closely related to undue influence corruption (endorsed by the Court in the early 2000s), but it still is not the same thing. The undue influence of donors is, at most, one of several *means* that can produce the *end* of misalignment. Second, as to distortion, the term (as used by the Court) refers to the skewing of electoral outcomes due to asymmetric campaign spending. It has nothing to do with how money in politics may affect officeholders' positions or policy outcomes.

And third, equality comes in various forms, but none of them is synonymous with alignment. Equality of candidate resources is an entirely orthogonal goal; there is no reason why evenly funded candidates should be any more aligned with voters than unevenly funded ones. Equality of representation actually is inconsistent with alignment. For there to be any kind of congruence with the median voter, there must be *non*-congruence with voters at all other points in the spectrum. And equality

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<sup>152</sup> See *infra* Part III.

<sup>153</sup> Presumably, no one would claim that alignment is identical to the informational interest that the Court has recognized. See *Citizens United v. FEC*, 130 S. Ct. 876, 914–16 (2010) (discussing this interest).

of voter influence may be conducive to the achievement of alignment, but it too is one of several possible means, not the end itself. It also is neither a necessary nor a sufficient condition for alignment to be realized.

### A. Anti-Corruption

The prevention of corruption is, without a doubt, the most prominent interest in the campaign finance case law. On one occasion, the Court even labeled it “the only legitimate and compelling government interest[] thus far identified for restricting campaign finances.”<sup>154</sup> However, the prominence of the anti-corruption interest is matched by the Court’s vacillation over how best to construe it. In *Buckley* itself and for about a decade thereafter, the Court mostly limited the concept to quid pro quo corruption—the explicit exchange of “dollars for political favors.”<sup>155</sup> In the early 2000s, the Court broadened its definition to include “undue influence on an officeholder’s judgment.”<sup>156</sup> It was in this period that the Court acknowledged “the broader threat from politicians too compliant with the wishes of large contributors”<sup>157</sup> and “the danger that officeholders will decide issues . . . according to the wishes of those who have made large financial contributions.”<sup>158</sup> And, coming full circle, the Court has reverted to its quid pro quo conception over the last few years. In *McCutcheon*, the Court baldly declared that “Congress may target only a specific type of corruption—‘quid pro quo’ corruption.”<sup>159</sup>

What is the relationship, then, between alignment and quid pro quo corruption? In brief, there is (next to) none. Alignment refers to the con-

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<sup>154</sup> *FEC v. NCPAC*, 470 U.S. 480, 496–97 (1985).

<sup>155</sup> *Id.* at 497; see also, e.g., *id.* (“The hallmark of corruption is the financial *quid pro quo* . . . .”); *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976) (per curiam) (“To the extent that large contributions are given to secure a political quid pro quo . . . the integrity of our system of representative democracy is undermined.”). Hints of a broader notion of corruption, however, can be found even in these early cases. See, e.g., *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 788 n.26 (1978) (referring to “corruption of elected representatives through the creation of political debts”); *Buckley*, 424 U.S. at 70 (discussing “[t]he Government’s interest in deterring . . . the undue influence of large contributors on officeholders”).

<sup>156</sup> *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001).

<sup>157</sup> *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 389 (2000).

<sup>158</sup> *McConnell v. FEC*, 540 U.S. 93, 153 (2003).

<sup>159</sup> *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014) (plurality opinion); see also, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010) (stating that anti-corruption interest is “limited to *quid pro quo* corruption”); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 478–79 (2007) (plurality opinion).



gruence of voters' policy preferences with representatives' positions or enacted policy.<sup>160</sup> Quid pro quo corruption refers to transactions in which money (or some other tangible asset) is traded overtly for a politician's vote (or some other beneficial action).<sup>161</sup> The two concepts are wholly unrelated. The former is concerned with the level of correspondence between a given popular input and a given governmental output. The latter scrutinizes how exactly a politician is paying back someone who has given her something of value. Unfortunately for the alignment interest, it cannot be shoehorned into the one rationale for campaign finance regulation that the current Court unquestionably accepts.

The reason there may be a *hint* of a connection between the two concepts is that quid pro quo corruption may give rise to misalignment. If a politician votes a certain way because of a monetary benefit she received, but would have cast a different and more congruent vote had she not received the benefit, then the quid pro quo exchange induced the non-congruence. But, as noted earlier, quid pro quo corruption appears to be quite rare in contemporary America.<sup>162</sup> The misaligning effect it could have on the political process thus is relatively limited.

In contrast, alignment has a much stronger link to undue influence corruption. To say that politicians are "too compliant with" their contributors' preferences,<sup>163</sup> and inclined to "decide issues . . . according to" them,<sup>164</sup> in essence is to say that politicians' and donors' positions are *aligned*. And as long as donors and voters have divergent views, politicians who are aligned with the former must be *misaligned* with the latter. To be unduly influenced by donors means not to be influenced enough by voters.<sup>165</sup> It is because of this tight connection that I earlier cited the Court's undue influence cases as the best evidence of the alignment approach in the Court's doctrine.<sup>166</sup> If a future Court were ever to adopt the approach, it likely would rely heavily on these decisions.

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<sup>160</sup> See *supra* notes 39–44 and accompanying text.

<sup>161</sup> See *supra* note 155 and accompanying text; see also, e.g., Burke, *supra* note 125, at 130 (referring to quid pro quo corruption as "trades of votes for money"); Yasmin Dawood, *Classifying Corruption*, 9 *Duke J. Const. L. & Pub. Pol'y* 103, 122 (2014) (same).

<sup>162</sup> See *supra* notes 8–9 and accompanying text.

<sup>163</sup> *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (2000).

<sup>164</sup> *McConnell v. FEC*, 540 U.S. 93, 153 (2003).

<sup>165</sup> See Dawood, *supra* note 161, at 125 ("The wrong of undue influence . . . is that elected officials are disproportionately responsive to the wishes of large donors as compared to other constituents.").

<sup>166</sup> See *supra* notes 83–89 and accompanying text.

But despite these parallels, misalignment and undue influence corruption are not identical. First, even if contributors' undue influence is the only mechanism that results in misalignment, it remains just that: a mechanism, not the outcome itself. The Court thus could recognize alignment as a compelling interest without having to revise its conception of corruption. Ends are different from means. Second, contributors' undue influence is not, of course, the only mechanism that generates misalignment. Within the campaign finance field, it is not just donors but also *spenders* who may have a misaligning impact. If candidates align their positions with those of spenders who advocate for their elections, then misalignment ensues without any undue influence by donors. And outside the realm of money in politics, there exist a host of additional misaligning forces. Even in the absence of any undue influence, partisan pressures, legislative rules, gerrymandered districts, and so on would still cause significant non-congruence.<sup>167</sup>

Third, contributors' undue influence does not even necessarily produce misalignment. If donors and voters have the same policy preferences, then extra sway for donors does not translate into diminished pull for voters. As discussed in Part III, donors and voters typically do *not* have the same ideal point distributions<sup>168</sup>—but the fact that donors' undue influence would not give rise to misalignment if they did further demonstrates that the concepts are distinct. And fourth, at least in my view, the terminology of alignment is substantially clearer than that of undue influence. The Court's phrase does not tell us how much influence is *due* to donors, nor does it help with the measurement of either donors' or voters' hold over politicians. Alignment, on the other hand, plainly calls for the comparison of voters' policy preferences with officeholders' positions and actual policy outcomes. Both the inputs and the outputs in this formulation can be quantified and then matched against each other.<sup>169</sup>

All of this analysis also applies to a version of the anti-corruption interest recently introduced by Lessig. He begins with the premise that representatives (especially members of the U.S. House) are meant to be

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<sup>167</sup> See Stephanopoulos, *supra* note 17, at 323–36, 342–56, 360–65.

<sup>168</sup> See *infra* Part III.

<sup>169</sup> See *infra* Part III; see also *supra* notes 57–62 and accompanying text.

“dependent on the people alone.”<sup>170</sup> But because of their unending need for campaign funds, they now are dependent on not just the people but also the donors who supply these funds.<sup>171</sup> The result is a “dependence corruption” in which elected officials who are supposed to depend exclusively on one body (“the people”) also have become dependent on another (“the funders”).<sup>172</sup> In Lessig’s view, the governmental interest in preventing dependence corruption is compelling, and it justifies regulations including contribution limits and public financing (but not expenditure limits).<sup>173</sup>

Like undue influence corruption, dependence corruption is closely tied to misalignment. When politicians are dependent on donors, they are likely to be aligned with them, and so misaligned with voters.<sup>174</sup> But like undue influence corruption, dependence corruption also is not equivalent to misalignment. In fact, all four of the distinctions between undue influence corruption and misalignment also apply to dependence corruption. First, dependence on donors is one way in which misalignment can arise. It is not the end itself. Second, donor dependence is not the only way in which misalignment can arise. *Spender* dependence can be just as misaligning as *donor* dependence.<sup>175</sup> Third, donor dependence does not necessarily produce misalignment. As Lessig notes, if donors and voters have the same preferences, then “a dependence upon ‘contributors’ could in effect be the same as a dependence upon voters.”<sup>176</sup> And fourth, dependence corruption does not convert easily into a doctri-

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<sup>170</sup> Lawrence Lessig, What an Originalist Would Understand “Corruption” to Mean, 102 Calif. L. Rev. 1, 7 (2014) (quoting The Federalist No. 52, at 243 (James Madison) (Clinton Rossiter ed., 1961)).

<sup>171</sup> See id.; see also Lawrence Lessig, A Reply to Professor Hasen, 126 Harv. L. Rev. F. 61, 65 (2013) (“Politicians in our system have become dependent upon their funders. Their ‘funders’ are not ‘the people.’”).

<sup>172</sup> See Lessig, supra note 171, at 65.

<sup>173</sup> See Lessig, supra note 170, at 19 (noting that “compelling interest” “would obviously support public funding systems” and “would plainly justify aggregate contribution limits”); id. at 20–21 (noting that interest “would not revive *Austin v. Michigan Chamber of Commerce*” and “would also not reverse *Citizens United v. FEC*”).

<sup>174</sup> See Lessig, supra note 171, at 68 (explaining that dependence corruption makes “representatives responsive to funders first, and only then to citizens”).

<sup>175</sup> See Bruce E. Cain, Is “Dependence Corruption” the Solution to America’s Campaign Finance Problems?, 102 Calif. L. Rev. 37, 43 (2014) (pointing out that “outside spending often reinforces a very specific connection between the candidate’s successful election and the group’s interests and issues”); Richard L. Hasen, Super PAC Contributions, Corruption, and the Proxy War over Coordination, 9 Duke J. Const. L. & Pub. Pol’y 1, 2 (2014).

<sup>176</sup> Lessig, supra note 63, at 243.

nal standard. It provides no guidance as to how dependence (on donors or on voters) actually is to be assessed.<sup>177</sup>

A final divergence between misalignment and dependence corruption relates to their policy prescriptions. Both theories support the validity of contribution limits on individuals (which are aligning and also reduce politicians' dependence on donors).<sup>178</sup> But Lessig states that his approach would uphold public financing programs, while the alignment approach would not shield the many such programs whose effects are ambiguous or misaligning.<sup>179</sup> Lessig also maintains that his approach would *not* ratify expenditure limits, while the alignment approach would permit them if their impact is aligning.<sup>180</sup> Accordingly, the contrasts between the methods are not so many angels dancing on the head of a pin. They are distinctions that make a difference.

### B. Anti-Distortion

A second interest that has appeared in the campaign finance case law is the prevention of electoral distortion. This interest first emerged in pre-*Buckley* decisions such as *Automobile Workers*, in which the Court expressed concern about the "deleterious influences on federal elections resulting from . . . large aggregations of capital."<sup>181</sup> It also turned up in decisions in the first decade after *Buckley*, in which the Court worried that the "corrosive influence of concentrated corporate wealth" would undermine the "integrity of the marketplace of political ideas."<sup>182</sup> But the interest did not come into its own until the 1990 case of *Austin v. Michigan Chamber of Commerce*,<sup>183</sup> which upheld Michigan's ban on campaign expenditures by corporations. The Court famously expounded on the "corrosive and distorting effects of immense aggregations of

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<sup>177</sup> See Cain, *supra* note 175, at 44 ("Would the empirical evidence for dependence corruption be easier to find than quid pro quo corruption? I doubt it."). Lessig's one suggestion for how to measure dependence is to examine the time candidates spend fundraising. See Lessig, *supra* note 171, at 65.

<sup>178</sup> See *supra* note 173; see also *infra* Part IV.

<sup>179</sup> See *supra* note 173; see also *infra* Part IV.

<sup>180</sup> See *supra* note 173; see also *infra* Part IV.

<sup>181</sup> *United States v. Auto. Workers*, 352 U.S. 567, 585 (1957); see also, e.g., *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 416 (1972) (noting interest in "eliminat[ing] the effect of aggregated wealth on federal elections"); *United States v. C.I.O.*, 335 U.S. 106, 115 (1948).

<sup>182</sup> *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 257 (1986); see, e.g., *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 789 (1978).

<sup>183</sup> 494 U.S. 652 (1990), overruled by *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

wealth . . . that have little or no correlation to the public's support for the corporation's political ideas."<sup>184</sup> *Austin*, however, stood for only two decades. Its holding that corporate expenditures could be limited was reversed in *Citizens United*—and the anti-distortion interest on which its holding rested was rejected as well.<sup>185</sup>

For present purposes, the crucial point about distortion is that, at least as understood by the Court, it refers to the skewing of *electoral* outcomes due to large *expenditures*. Distortion occurs, in the Court's view, when wealthy entities spend heavily during a campaign and thus induce some number of voters to cast their ballots differently than they would have under conditions of more even outlays. This conception explains why the *Austin* Court concluded its opinion by warning of the "threat that huge corporate treasuries . . . will be used to influence unfairly the outcome of elections."<sup>186</sup> It also explains why the Court, in other cases, highlighted the "governmental interest in reducing . . . the influence of wealth on the outcomes of elections"<sup>187</sup> and the risk that "wealthy and powerful" entities "may drown out other points of view" and "exert an undue influence on the outcome of a . . . vote."<sup>188</sup> As Julian Eule has observed, *Austin*'s theory was that "corporations spoke too loudly and wielded too much influence on the electorate."<sup>189</sup>

The definition of distortion matters because if the term denotes the skewing of electoral outcomes due to large expenditures, then it does *not* denote misalignment. Misalignment, again, is the lack of fit between voters' policy preferences and key governmental outputs. It accepts voters' preferences as they are, without seeking to convert them to some

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<sup>184</sup> *Austin*, 494 U.S. at 660. The Court dubbed this distortion "a different type of corruption in the political arena." *Id.*

<sup>185</sup> *Citizens United*, 130 S. Ct. at 903–08.

<sup>186</sup> *Austin*, 494 U.S. at 669.

<sup>187</sup> *Davis v. FEC*, 554 U.S. 724, 755 (2008) (Stevens, J., concurring in part and dissenting in part); see, e.g., *McConnell v. FEC*, 540 U.S. 93, 274 (2003) (Thomas, J., concurring in the judgment in part and dissenting in part) ("[T]he 'corrosive and distorting effects' described in *Austin* are that corporations . . . will be able to convince voters of the correctness of their ideas.").

<sup>188</sup> *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 789 (1978) (noting this risk but not finding it present on facts of case).

<sup>189</sup> Julian N. Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 Sup. Ct. Rev. 105, 109; see, e.g., Briffault, *supra* note 32, at 922 ("*Austin* was rooted in concern to protect the political equality of voters from corporate war chests . . ."); Issacharoff, *supra* note 63, at 122; Lessig, *supra* note 170, at 12.

sort of pure or unadulterated state.<sup>190</sup> It also compares voters' preferences to products of the political process such as officeholders' positions and actual policy outcomes. In contrast, *Austin*-style distortion does not take voters' views as it finds them. Its central aim is to determine how asymmetric spending *changes* these views relative to a hypothetical benchmark of more even outlays.<sup>191</sup> *Austin*-style distortion also is indifferent to the positions that representatives adopt and the policies that in fact are enacted. Public opinion is its sole focus—not, as with misalignment, merely one side of the equation. Accordingly, it seems clear that *Austin*-style distortion and misalignment are not the same thing. The former cares only about the effect of campaign money on voters; the latter only about its impact on officeholders.<sup>192</sup>

To be sure, *Austin*-style distortion is not the *only* kind of distortion that one could imagine.<sup>193</sup> For instance, one could define an aligned political system—a system in which voters' policy preferences are congruent with key governmental outputs—as an undistorted state. Then any divergence from this state (that is, any misalignment) would constitute distortion.<sup>194</sup> But the availability of such conceptual moves is not particularly relevant. The anti-distortion interest does not encompass every sort of skew that a commentator can concoct. Rather, it includes only the specific phenomenon that the Court has described in its decisions on money in politics: the shifting of voters' preferences as a result of lopsided campaign spending. Whatever the case may be for other types of distortion, *this* phenomenon simply is not misalignment.<sup>195</sup>

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<sup>190</sup> But see *supra* notes 41–42 (discussing another form of misalignment, not advocated here, that does involve distortion of voters' preferences due to uneven spending).

<sup>191</sup> See Sullivan, *supra* note 24, at 677 (“[T]he concept of ‘distortion’ assumes a baseline of ‘undistorted’ voter views and preferences.”).

<sup>192</sup> Cf. Lessig, *supra* note 170, at 15 (also distinguishing between “two paradigms—regulating speech that corrupts government officials (constitutional) and regulating speech said to corrupt citizens (unconstitutional)”).

<sup>193</sup> See Lillian R. BeVier, Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform, 73 Calif. L. Rev. 1045, 1078 (1985) (noting indeterminacy of concept of distortion); David Cole, First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance, 9 Yale L. & Pol’y Rev. 236, 277 (1991) (“The problem, of course, is in defining when the marketplace is . . . ‘distorted’ . . .”).

<sup>194</sup> Cf. Richard L. Hasen, Fixing Washington, 126 Harv. L. Rev. 550, 572 (2012) (book review) (claiming that “Lessig’s idea that campaign money distorts policy outcomes sounds very much like the language used by the Supreme Court in *Austin v. Michigan Chamber of Commerce*”).

<sup>195</sup> Cf. Hasen, *supra* note 27, at 311 (conceding that Lessig’s position “differs in some particulars from the equality argument in *Austin*”).

## C. Equality

The final interest in the campaign finance case law—one long championed by liberals<sup>196</sup> but never accepted by a majority of the Court—is equality. In *Buckley*, the Court considered equality justifications for expenditure limits on candidates and on individuals.<sup>197</sup> It spurned the justifications in both cases, declaring in perhaps the field's best-known line that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."<sup>198</sup> The Court adhered to its position on candidate equality in subsequent cases such as *Davis v. FEC*<sup>199</sup> and *Bennett*. In *Bennett*, faced with a "trigger" provision that allocated matching funds to publicly financed candidates if their opponents spent heavily, the Court commented that "it is not legitimate for the government to attempt to equalize electoral opportunities in this manner."<sup>200</sup> The Court also stuck to its guns on individual equality in *Citizens United*. Quoting *Buckley*, it reaffirmed that "the Government has [no] interest 'in equalizing the relative ability of individuals and groups to influence the outcome of elections.'"<sup>201</sup>

From these decisions (as well as the academic literature), we can glean three kinds of equality. The first is equality of candidate resources, referred to by Hasen and Daniel Lowenstein as equality of *outputs*.<sup>202</sup> This sort of equality is present when candidates have the same amount of money to spend in their campaigns, but is absent when one candidate enjoys a financial advantage over her opponent. The second, only hinted

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<sup>196</sup> See, e.g., Edward B. Foley, Equal-Dollars-per-Voter: A Constitutional Principle of Campaign Finance, 94 Colum. L. Rev. 1204, 1204 (1994); Jamin Raskin & John Bonifaz, The Constitutional Imperative and Practical Superiority of Democratically Financed Elections, 94 Colum. L. Rev. 1160, 1162 (1994); Cass R. Sunstein, Political Equality and Unintended Consequences, 94 Colum. L. Rev. 1390, 1392 (1994).

<sup>197</sup> *Buckley v. Valeo*, 424 U.S. 1, 439–59 (1976) (per curiam).

<sup>198</sup> *Id.* at 48–49; see also *id.* at 49 n.55 (rejecting position that "First Amendment permits Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society").

<sup>199</sup> 554 U.S. 724 (2008).

<sup>200</sup> *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011); see also *Davis*, 554 U.S. at 742 ("The argument that a candidate's speech may be restricted in order to 'level electoral opportunities' has ominous implications . . .").

<sup>201</sup> *Citizens United*, 130 S. Ct. at 904 (quoting *Buckley*, 424 U.S. at 48).

<sup>202</sup> See Hasen, *supra* note 27, at 312; Daniel Hays Lowenstein, A Patternless Mosaic: Campaign Finance and the First Amendment After *Austin*, 21 Cap. U. L. Rev. 381, 394 (1992).

at in the doctrine but developed more fully by scholars such as Yasmin Dawood and Sullivan, is equality of *representation*. This variant exists when every voter is represented equally, but not when “elected officials are disproportionately responsive” to their constituents.<sup>203</sup> And the third is equality of voter influence over the political process, dubbed equality of *inputs* by Hasen and Lowenstein.<sup>204</sup> Voters have equal influence (at least from a financial perspective) when they each are able to donate and spend the same amount of money. But they lack it when some voters are able to deploy greater resources than others.

Are any of these forms of equality equivalent to alignment? If so, then alignment would be an illegitimate interest under the Court’s precedent, but I believe the answer is no. To begin with, equality of candidate resources (that is, output equality) is an essentially unrelated concept. A candidate may disburse just as much money as her opponent during a campaign, but then flout her constituents’ preferences once in office. Conversely, a candidate may outspend her opponent (or be outspent), but then abide by voters’ wishes after being elected. There is no logical link between a candidate’s relative spending and her subsequent alignment with her constituents. In fact, there is not even much of a *correlation* between these variables. Even if equal spending produces more-competitive races, candidates who squeak into office are only barely more aligned with voters than candidates who prevail in landslides.<sup>205</sup> In addition, the effect of public financing systems that equalize candidate resources has been to *increase* misalignment, not to reduce it.<sup>206</sup>

Next, equality of representation actually is profoundly at odds with alignment. Alignment is the congruence of governmental outputs with the views of the median voter. As long as voters diverge in their opin-

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<sup>203</sup> Dawood, *supra* note 161, at 125; see also Sullivan, *supra* note 24, at 678 (referring to “legislators’ unequal responsiveness to different citizens”).

<sup>204</sup> See Hasen, *supra* note 27, at 312; Lowenstein, *supra* note 202, at 393.

<sup>205</sup> See Stephen Ansolabehere et al., Candidate Positioning in U.S. House Elections, 45 *Am. J. Pol. Sci.* 136, 145 (2001) (finding that 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 House member’s voting record).

<sup>206</sup> See *infra* Section III.C; see also Lessig, *supra* note 171, at 66 (explaining that policies that addressed dependence corruption would not produce “equality of candidate funding” but rather “government-funded inequity”).



ions, such congruence can be achieved only if there is *non*-congruence with the views of voters at all other points in the distribution. Alignment at the median requires misalignment at all other locations. Moreover, this conclusion holds even if we use Dawood or Sullivan's formulation of equal *responsiveness*.<sup>207</sup> When the preferences of the median voter change, governmental outputs must change in tandem in order to maintain alignment. But when voters' preferences shift without affecting the position of the median, governmental outputs must not shift at all. Alignment thus is possible only if "elected officials" indeed "are disproportionately responsive" to their constituents.<sup>208</sup>

This leaves us with equality of voter influence, which is precisely the concept that Hasen claims is indistinguishable from alignment. Alignment, in his view, amounts to "a call for equality of *political inputs*," an effort "to reduce the voice of some to enhance the relative voice of others."<sup>209</sup> Hasen clearly is correct that equality of voter influence and alignment are related. To see why, assume that candidates' positions are entirely a product of the money that voters donate to them or spend on their behalf. (Assume also that candidates aim to maximize the sum of these donations and expenditures.<sup>210</sup>) Under the status quo, different voters deploy vastly different resources, and so candidates' positions gravitate toward the voters with the most funds to offer.<sup>211</sup> But in a regime in which all voters offered the *same* funding possibilities, candidates would have a powerful incentive to shift their stances toward the median. The median is where candidates would be able to secure the most money, and, by stipulation here, resource maximization drives candidate posi-

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<sup>207</sup> See supra note 203 and accompanying text. "[R]esponsiveness 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." Stephanopoulos, supra note 17, at 301.

<sup>208</sup> Dawood, supra note 161, at 125. The implication of this analysis, of course, is that equal representation is an unattainable ideal. As long as voters do not all share the same preferences, governmental outputs inevitably will be better aligned with (and more responsive to) some groups' views than others'. An additional point is that the alignment approach *does* treat all voters equally in the initial stage of determining the position of the median. It is only after this position has been ascertained that the approach begins treating voters unequally.

<sup>209</sup> Hasen, supra note 27, at 312 (making this argument with respect to Lessig's goal of preventing dependence corruption); see Cain, supra note 175, at 41 (agreeing that "equality considerations underlie the particular dependency problem that Lessig is concerned with").

<sup>210</sup> Assume further that all campaign resources are supplied by voters (and not by parties, corporations, unions, etc.).

<sup>211</sup> See infra Section III.B.

tioning. Alignment thus would follow naturally from equal voter influence.<sup>212</sup>

Despite this connection, alignment and equal voter influence are not equivalent, largely for reasons that have been alluded to already. First, even if equal voter influence is a necessary and sufficient condition for alignment to arise, it still is just a condition, not the actual objective. It may *yield* alignment by inducing candidates to move toward the median, but yielding something is not the same as *being* something. It thus is beside the point that a regulation that promotes equal voter influence also may promote alignment. As Justice Kagan pointed out in her dissent in *Bennett*, “No special rule of automatic invalidation applies to statutes having some connection to equality; like any other laws, they pass muster when supported by an important enough government interest.”<sup>213</sup>

Second, equal voter influence is *not* a necessary condition for alignment to arise. Imagine that a jurisdiction randomly selects half of its voters and gives each of them a sum of money that they must donate or spend during the next campaign. Imagine also that the jurisdiction bans the other half of its voters from deploying any electoral resources at all. The inequality of voter influence in this example could not be starker. Yet alignment still would ensue because candidates still would have a strong incentive to shift their positions toward the median. The random selection would make the distribution of subsidized voters identical to that of *all* voters, and thus would preserve the median as the point at which candidate funding is maximized.<sup>214</sup>

Third, equal voter influence is not a sufficient condition for alignment either. If candidates’ stances are wholly a function of the funds deployed by voters on their behalf, *and* if there are only two candidates in a race, then convergence at the median occurs under conditions of perfect input

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<sup>212</sup> This is a variant of Anthony Downs’s famous argument that *vote*-maximizing candidates will converge on the median voter. See Anthony Downs, *An Economic Theory of Democracy* 114–27 (1957). If candidates’ positions are entirely a function of the funds deployed on their behalf, and if all voters deploy equal funds, then *resource*-maximizing candidates also will converge on the median voter.

<sup>213</sup> *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2845 (2011) (Kagan, J., dissenting); see also Hasen, *supra* note 27, at 308 (“[A] campaign finance law justified on [legitimate] grounds should not become unconstitutional if the law incidentally promotes political equality.”); Lessig, *supra* note 171, at 66–67.

<sup>214</sup> This point also stands with respect to certain unequal funding schemes that do *not* employ random selection. For example, if the half of voters closer to the median received subsidies, and the half of voters farther from it were barred from deploying any resources, then alignment again would follow despite the inequality.

equality. But the introduction of additional candidates causes this relationship to break down. With three or more contestants, resource-maximizing candidates garner more funds by positioning themselves at different points along the spectrum, not by clustering in the middle (where they can be outflanked by their opponents). As Gary Cox has explained, "when there are more than two candidates competing under [standard American rules], equilibria are noncentrist; rational [resource]-seeking politicians have an incentive to avoid bunching at the median."<sup>215</sup>

Finally, the assumption on which the link between equal voter influence and alignment relies—that candidates' positions stem from the funds donated to or spent for them by voters, and from nothing else—is obviously wrong. Candidates' positions actually stem from all sorts of other sources too: their own ideologies, their parties' platforms, franchise and party regulations, the views (rather than dollars) of their primary and general electorates, etc.<sup>216</sup> In the real world, then, alignment does not necessarily follow from equal voter influence, even if candidates are hungry for resources and there are only two candidates per race. Equal voter influence may have an aligning *effect*, but so too may several other factors, and its impact easily may be offset by forces pushing in the opposite direction. Accordingly, equal voter influence has no stronger claim to constituting alignment itself than do any of the other aligning elements that dot the electoral landscape. It simply is one such element among many.<sup>217</sup>

### III. THE EMPIRICS OF ALIGNMENT

It is not enough, though, to show that alignment is conceptually distinct from the anti-corruption, anti-distortion, and equality interests. No matter which interest is asserted in a campaign finance case, the Court carefully scrutinizes the *connection* between the interest and the policy

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<sup>215</sup> Gary W. Cox, Centripetal and Centrifugal Incentives in Electoral Systems, 34 Am. J. Pol. Sci. 903, 912 (1990).

<sup>216</sup> See Stephanopoulos, *supra* note 17, at 323–36, 342–56, 360–65.

<sup>217</sup> Moreover, even if all of this analysis is unconvincing and equal voter influence still seems identical to alignment, the Court may be more receptive to arguments about input (rather than output) equality. See Hasen, *supra* note 65, at 1003; Lowenstein, *supra* note 202, at 395 (noting that "the [Court's] hostility seems to have been directed primarily at equality of outputs").

that is being defended.<sup>218</sup> For alignment to serve as a viable rationale, it thus must be established that money in politics produces misalignment, and that the regulation of such money promotes alignment. The burden of proof also is heavier for alignment than for other, more familiar interests. As the Court made clear in *Shrink Missouri*, “The quantum of empirical evidence needed to satisfy heightened judicial scrutiny . . . will vary up or down with the novelty and plausibility of the justification raised.”<sup>219</sup>

In this Part, then, I survey the empirical evidence on both the misaligning effects of campaign finance and the aligning effects of campaign finance reform. This evidence—most of which has emerged only in the last few years<sup>220</sup>—falls into three main categories. First, numerous studies examine the relationship between governmental outputs and the preferences of poor, middle-class, and rich Americans. Most of them find that the outputs are tied more closely to the wishes of the rich than to those of any other group. Second, a smaller set of studies address the same issue but with respect to donors as opposed to non-donors. Their results are even more unequivocal: The influence of donors dwarfs that of non-donors. And third, a handful of very recent studies explore the implications of campaign finance regulations for alignment. They conclude that individual contribution limits and certain kinds of public financing are aligning, but that party and PAC contribution limits and other kinds of public financing are misaligning. Because of the emphasis that *Shrink Missouri* placed on actual data, I review this scholarship at some length in the pages that follow.

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<sup>218</sup> See, e.g., *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387–88 (2000) (holding that contribution limits must be “closely drawn” to serve “sufficiently important interest”); *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976) (applying “exacting scrutiny” to expenditure limits).

<sup>219</sup> *Shrink Mo.*, 528 U.S. at 391; see also Renata Strause & Daniel P. Tokaji, *Between Access and Influence: Building a Record for the Next Court*, 9 *Duke J. Const. L. & Pub. Pol'y* 211, 214 (2014) (“A strong record is essential both to document the interests served by legislation, and to show that it is appropriately tailored.”); Strauss, *supra* note 58, at 1388, 1389.

<sup>220</sup> A landmark 2005 report lamented that “political scientists have paid less attention to issues of differential government responsiveness than they should,” and declared that “[n]owhere is the need for additional, more sophisticated research more obvious than for understanding how . . . flows of money affect U.S. politics and governance.” Lawrence R. Jacobs & Theda Skocpol, *Studying Inequality and American Democracy: Findings and Challenges*, in *Inequality and American Democracy: What We Know and What We Need to Learn* 214, 220, 222 (Lawrence R. Jacobs & Theda Skocpol eds., 2005). Much of the research that I discuss in this Part was undertaken in response to this report.

*A. The Influence of the Affluent*

The topic of differential representation by income group burst onto the political science stage with the 2008 publication of Larry Bartels's *Unequal Democracy*.<sup>221</sup> Like many scholars before him, Bartels quantified voters' preferences using survey responses and officeholders' (here U.S. senators') positions using roll call votes.<sup>222</sup> But, unlike most previous work, Bartels did not treat public opinion as a single undifferentiated mass. Instead, he computed separate estimates of the attitudes of low-income, middle-income, and high-income respondents.<sup>223</sup> Analyzing the links between these estimates and senators' voting records, he found that the views of the poor exerted no influence whatsoever, the views of the middle-class exerted a modest influence, and the views of the rich exerted a much greater influence.<sup>224</sup> As he summed up his results (which are displayed in Figure 2), "senators in this period [1989–1994] were vastly more responsive to affluent constituents than to constituents of modest means."<sup>225</sup>

Bartels's finding of misalignment<sup>226</sup> in favor of the rich subsequently was extended in multiple directions by other scholars. First, Christopher Ellis,<sup>227</sup> Jesse Rhodes and Brian Schaffner,<sup>228</sup> and Chris Tausanovitch<sup>229</sup> all determined that *House members'* voting records also are more re-

<sup>221</sup> Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age* (2008) [hereinafter Bartels, *Unequal Democracy*]. Earlier work by both Bartels and Martin Gilens also addressed this topic. See Larry M. Bartels, *Economic Inequality and Political Representation* (Aug. 2005) (unpublished manuscript, available at <http://www.princeton.edu/~bartels/economic.pdf>); Martin Gilens, *Inequality and Democratic Responsiveness*, 69 *Pub. Opinion Q.* 778 (2005).

<sup>222</sup> See Bartels, *Unequal Democracy*, *supra* note 221, at 254–55.

<sup>223</sup> See *id.* at 257–58.

<sup>224</sup> See *id.* at 259–62.

<sup>225</sup> *Id.* at 253.

<sup>226</sup> Technically, Bartels analyzed responsiveness, not alignment. See Stephanopoulos, *supra* note 17, at 299–302 (discussing these concepts' differences).

<sup>227</sup> See Christopher Ellis, *Social Context and Economic Biases in Representation*, 75 *J. Pol.* 773, 779 (2013) [hereinafter Ellis, *Social Context*]; Christopher Ellis, *Understanding Economic Biases in Representation: Income, Resources, and Policy Representation in the 110<sup>th</sup> House*, 65 *Pol. Res. Q.* 938, 943 (2012) [hereinafter Ellis, *Understanding Biases*]; Ellis, *supra* note 36, at 7.

<sup>228</sup> See Jesse H. Rhodes & Brian F. Schaffner, *Economic Inequality and Representation in the U.S. House: A New Approach Using Population-Level Data* 29 (Apr. 7, 2013) (unpublished manuscript, available at <http://people.umass.edu/schaffne/Schaffner.Rhodes.MPSA.2013.pdf>).

<sup>229</sup> See Chris Tausanovitch, *Income and Representation in the United States Congress* 22 (unpublished manuscript, available at <http://ctausanovitch.com/IncomeRepresentation2013.pdf>).

sponsive to the preferences of the affluent than to those of other individuals. Rhodes, Schaffner, and Tausanovitch generated especially robust results by using far larger samples than those to which Bartels had access: a private vendor's database of 265 million people in Rhodes and Schaffner's case,<sup>230</sup> and a "super-survey" combining five earlier surveys in Tausanovitch's.<sup>231</sup> Ellis, for his part, probed some of the factors that may explain variations in the level of pro-rich misalignment. He found that the poor are worst represented "in districts represented by Republicans, in districts with high median incomes, and in districts that are electorally safe."<sup>232</sup>

Second, in his landmark 2012 book, *Affluence and Influence*,<sup>233</sup> Martin Gilens discovered that there also is *outcome* (as opposed to *preference*) misalignment in favor of the wealthy. Gilens compiled responses to thousands of survey questions over multiple decades, and used these responses to estimate income groups' opinions on a host of national policy issues.<sup>234</sup> He then painstakingly tracked whether each policy asked about by a survey actually was enacted by the federal government during the next four years.<sup>235</sup> With respect to issues about which income groups disagreed, Gilens found clear responsiveness to the preferences of respondents at the ninetieth percentile. As their support for a policy increased, the odds of the policy's enactment increased steadily as well.<sup>236</sup> But Gilens found no responsiveness *at all* to the preferences of

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<sup>230</sup> See Rhodes & Schaffner, *supra* note 228, at 2.

<sup>231</sup> See Tausanovitch, *supra* note 229, at 12–13. Tausanovitch also found, however, that if legislators were equally responsive to all income groups' preferences, their voting records would not be dramatically different from the status quo. See *id.* at 28–32.

<sup>232</sup> Ellis, *Social Context*, *supra* note 227, at 781; see also Ellis, *supra* note 36, at 30 (reporting similar results); John D. Griffin & Brian Newman, *Voting Power, Policy Representation, and Disparities in Voting's Rewards*, 75 *J. Pol. Sci.* 52, 56 (2013) (finding that "win ratio" measuring likelihood that member of Congress votes consistent with constituent's preferences is about 4.5 points higher for high-income earners than for low-income earners); cf. Lawrence R. Jacobs & Benjamin I. Page, *Who Influences U.S. Foreign Policy?*, 99 *Am. Pol. Sci. Rev.* 107, 114–15, 117 (2005) (finding that preferences of business leaders have much larger impact on positions of foreign policy officials than do preferences of general public).

<sup>233</sup> Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (2012).

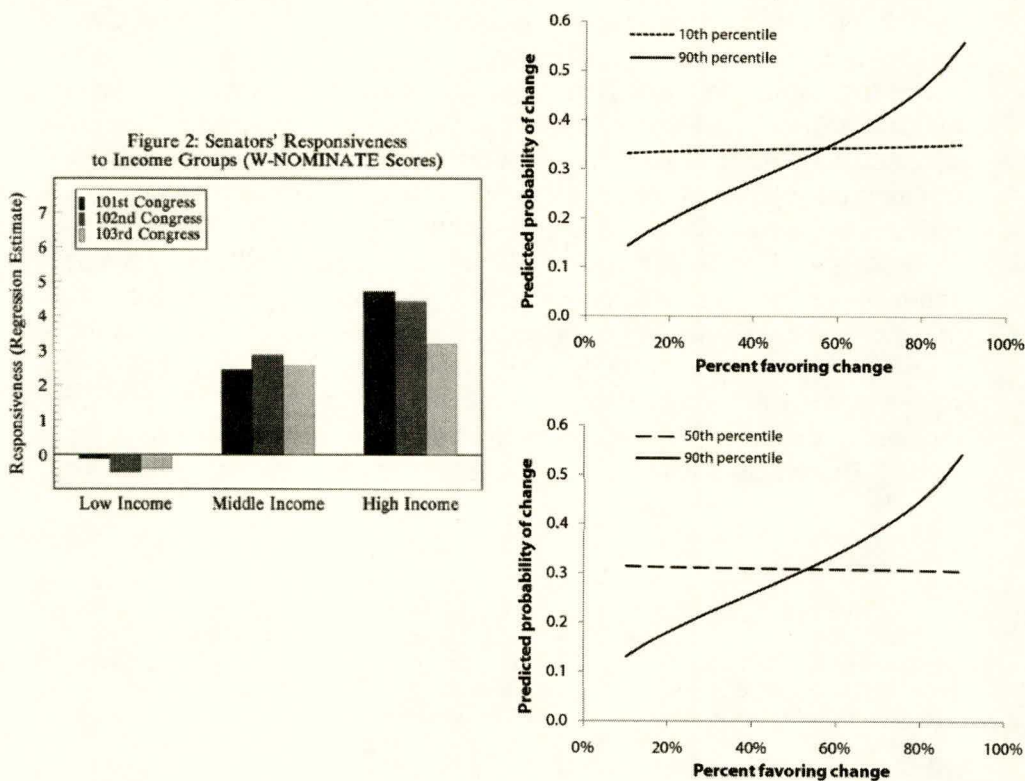
<sup>234</sup> See *id.* at 50–62.

<sup>235</sup> See *id.* at 60.

<sup>236</sup> See *id.* at 80. Specifically, as the share of respondents at the ninetieth percentile favoring a policy rose from 10% to 90%, the odds of the policy's enactment rose from 10% to 50%. See *id.*

respondents at the tenth or fiftieth percentiles.<sup>237</sup> As he put it (and as shown in Figure 2), “when preferences between the well-off and the poor [or middle-class] diverge, government policy bears absolutely no relationship to the degree of support or opposition among the poor [or middle-class].”<sup>238</sup>

**Figure 2: Findings of Pro-Affluent Misalignment by Bartels<sup>239</sup> and Gilens<sup>240</sup>**



<sup>237</sup> See *id.* For respondents at both of these percentiles, the odds of a policy's enactment stayed constant at about 30% no matter what share of the respondents supported the policy.

<sup>238</sup> *Id.* at 81; see also Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *Persp. Pol.* 564, 570–75 (2014), available at [http://scholar.princeton.edu/sites/default/files/mgilens/files/gilens\\_and\\_page\\_2014\\_-testing\\_theories\\_of\\_american\\_politics.doc.pdf](http://scholar.princeton.edu/sites/default/files/mgilens/files/gilens_and_page_2014_-testing_theories_of_american_politics.doc.pdf) (reporting similar results and also determining that business-oriented interest groups have larger impact on policy enactment than mass-based groups).

<sup>239</sup> Bartels, *supra* note 221, at 52.

<sup>240</sup> Gilens, *supra* note 233, at 80.

Third, Patrick Flavin<sup>241</sup> and Elizabeth Rigby and Gerald Wright<sup>242</sup> determined that pro-rich outcome misalignment exists at the state level as well. Flavin analyzed overall policy liberalism, taking into account state laws in twenty different domains, as well as a series of hot-button issues such as the death penalty, abortion, and gun control.<sup>243</sup> In all of these areas, he found that “citizens with low incomes receive little substantive political representation in the policy decisions made by state governments.”<sup>244</sup> Similarly, Rigby and Wright considered aggregate indices of state economic and social policy.<sup>245</sup> In both cases, they too discovered greater responsiveness to the preferences of wealthier individuals.<sup>246</sup>

Lastly, Ellis<sup>247</sup> and David Weakliem et al.,<sup>248</sup> respectively, studied how misalignment in favor of the affluent varies temporally and internationally. Ellis calculated the relative proximity to their House members of individuals in the top income tercile versus individuals in the bottom income tercile over the 1972–2008 period.<sup>249</sup> He found that the representational advantage enjoyed by the wealthy increased *fivefold* from the beginning of this era to the end.<sup>250</sup> Weakliem et al. examined the extent to which income inequality in other countries reflects the preferences of different income groups.<sup>251</sup> They determined that, abroad, the views of individuals at the eightieth income percentile correspond most closely to levels of inequality, and the views of individuals at the fiftieth and nine-

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<sup>241</sup> See Patrick Flavin, *Income Inequality and Policy Representation in the American States*, 40 *Am. Pol. Res.* 29 (2011).

<sup>242</sup> See Elizabeth Rigby & Gerald C. Wright, *Whose Statehouse Democracy? Policy Responsiveness to Poor Versus Rich Constituents in Poor Versus Rich States*, in *Who Gets Represented* 189 (Peter K. Enns & Christopher Wlezien eds., 2011).

<sup>243</sup> See Flavin, *supra* note 241, at 40–41.

<sup>244</sup> *Id.* at 44. While the coefficients for low-income opinion were always lower than the coefficients for middle-income and high-income opinion, the latter two coefficients were not always distinguishable. See *id.* at 41–45.

<sup>245</sup> See Rigby & Wright, *supra* note 242, at 195–99.

<sup>246</sup> See *id.* at 217. Like Flavin, Rigby and Wright also sometimes found that the coefficients for middle-income and high-income opinion were indistinguishable. See *id.* at 207–17.

<sup>247</sup> See Ellis, *supra* note 36.

<sup>248</sup> See David L. Weakliem et al., *By Popular Demand: The Effect of Public Opinion on Income Inequality*, 4 *Comp. Soc.* 261 (2005).

<sup>249</sup> See Ellis, *supra* note 36, at 5–10.

<sup>250</sup> See *id.* at 9 (noting that representational gap averaged one point from 1972 to 1994 but five points in 2004 and 2008). But see Gilens, *supra* note 233, at 201 (finding that rich-poor gap with respect to *outcome* alignment peaked in 1980s and was smaller in earlier and later years).

<sup>251</sup> See Weakliem et al., *supra* note 248, at 265–73.



ty-ninth percentiles are about equally influential.<sup>252</sup> Pro-rich misalignment thus exists in other countries, but is not as stark as in America.<sup>253</sup>

While the conclusion that the rich are better represented than other classes is widely accepted in the literature, it has been subjected to at least two critiques. The first is largely data-driven. Scholars such as Peter Enns, Robert Erikson, Stuart Soroka, Joseph Ura, and Christopher Wlezien have argued that different income groups' preferences actually do not diverge very much.<sup>254</sup> If this claim is correct, then alignment cannot vary significantly by income stratum.<sup>255</sup> But the claim only seems to be correct with respect to relatively crude measures of people's preferences, such as their ideological self-placement<sup>256</sup> and their views on governmental spending by issue area.<sup>257</sup> More sophisticated metrics that rely on people's answers to a battery of policy questions, of the sort employed by Gilens<sup>258</sup> and Tausanovitch<sup>259</sup> in particular, in-

<sup>252</sup> See *id.* at 276.

<sup>253</sup> Further extensions of Bartels's initial finding include James N. Druckman & Lawrence R. Jacobs, *Segmented Representation: The Reagan White House and Disproportionate Responsiveness*, in *Who Gets Represented*, *supra* note 242, at 166, 179–80 (finding that President Reagan's public statements on economic policy best reflected views of wealthy respondents to administration's polls), and Elizabeth Rigby & Gerald C. Wright, *Political Parties and Representation of the Poor in the American States*, 57 *Am. J. Pol. Sci.* 552, 557 (2013) (finding that *candidates'* positions at all levels are most responsive to preferences of high-income groups).

<sup>254</sup> See Yosef Bhatti & Robert S. Erikson, *How Poorly Are the Poor Represented in the U.S. Senate?*, in *Who Gets Represented*, *supra* note 242, at 223, 236; Peter K. Enns & Christopher Wlezien, *Group Opinion and the Study of Representation*, in *Who Gets Represented*, *supra* note 242, at 1, 4–5; Soroka & Wlezien, *supra* note 139, at 321; Ura & Ellis, *supra* note 139, at 785; Christopher Wlezien & Stuart N. Soroka, *Inequality in Policy Responsiveness*, in *Who Gets Represented*, *supra* note 242, at 285, 287.

<sup>255</sup> See Bhatti & Erikson, *supra* note 254, at 233; Soroka & Wlezien, *supra* note 139, at 325; Ura & Ellis, *supra* note 139, at 792; Wlezien & Soroka, *supra* note 254, at 287.

<sup>256</sup> See Bhatti & Erikson, *supra* note 254, at 233 (using this approach); cf. Ura & Ellis, *supra* note 139, at 788 (using people's overall policy liberalism).

<sup>257</sup> See Enns & Wlezien, *supra* note 254, at 5 (using this approach); Soroka & Wlezien, *supra* note 139, at 321 (same); Wlezien & Soroka, *supra* note 254, at 287 (same).

<sup>258</sup> See Martin Gilens, *Preference Gaps and Inequality in Representation*, 42 *PS: Pol. Sci. & Pol.* 335, 335 (2009) (noting that his "data set of policy preferences across income groups covers a far broader range of issues and shows dramatically greater differences between the preferences of low- and high-income Americans").

<sup>259</sup> See Tausanovitch, *supra* note 229, at 15 (explaining that ideal points calculated using array of policy questions "give[] us more information about the location of individuals in the policy space" than ideological self-placements); see also Patrick Flavin, *Differences in Policy Preference and Priorities Across Income Groups in American Public Opinion* 8, 13, 21, 24 (2009) (unpublished manuscript, on file with the Virginia Law Review Association) (finding that even with respect to governmental spending by issue area, sizeable differences in income group opinion appear if more specific policies are asked about).

deed find substantial differences between income groups' preferences. The data-driven objection thus appears to be an artifact of less advanced approaches to ascertaining public opinion.

The second critique is that even if there is misalignment in favor of the rich, it could result from their higher level of *non-monetary* participation (e.g., voting, volunteering, attending meetings, contacting officials, etc.).<sup>260</sup> In this case, the misalignment would be the product not of money in politics but rather of heightened civic engagement—generally considered a good thing. This possibility, though, has been considered explicitly, and then rejected, by both Bartels and Ellis.<sup>261</sup> These scholars ran models in which they included controls for several forms of non-monetary participation (as well as respondents' education and knowledge).<sup>262</sup> These variables often were associated with higher levels of alignment, but their inclusion never eliminated (or even much dampened) the statistical significance of income.<sup>263</sup> In Bartels's words, "[s]ignificant disparities in responsiveness to rich and poor constituents *do* still appear even after allowing for differences attributable to turnout, knowledge, and contacting."<sup>264</sup>

The inference that Bartels drew from this result is that the larger campaign donations of the affluent must explain the misalignment in their favor.<sup>265</sup> Gilens speculated in the same vein in his book, claiming that "[m]oney—the 'mother's milk' of politics—is the root of representational inequality."<sup>266</sup> But neither Bartels nor Gilens, nor any of the other scholars discussed in this Section, were able to provide any direct support for this hypothesis. I turn in the next Section, then, to scholars who *have* mustered actual evidence of the misaligning effects of campaign

<sup>260</sup> For some of the voluminous literature on the higher participation of wealthier individuals, see Schlozman et al., *supra* note 150, at 15, 124; Benjamin I. Page et al., *Democracy and the Policy Preferences of Wealthy Americans*, 11 *Persp. Pol.* 51, 54 (2013); Joe Soss & Lawrence R. Jacobs, *The Place of Inequality: Non-Participation in the American Polity*, 124 *Pol. Sci. Q.* 95, 97 (2009).

<sup>261</sup> See Bartels, *supra* note 221, at 275–81; Ellis, *Understanding Biases*, *supra* note 227, at 944–46.

<sup>262</sup> See Bartels, *supra* note 221, at 275–81; Ellis, *Understanding Biases*, *supra* note 227, at 944–46.

<sup>263</sup> See Bartels, *supra* note 221, at 275–81; Ellis, *Understanding Biases*, *supra* note 227, at 944–46.

<sup>264</sup> See Bartels, *supra* note 221, at 277; see also Ellis, *Understanding Biases*, *supra* note 227, at 948 (“[O]nly a small part of this representation gap can be explained by patterns of participation, knowledge, [or] education . . .”); cf. Rhodes & Schaffner, *supra* note 228, at 31–32 (finding that result of unequal responsiveness holds even after limiting analysis to voters).

<sup>265</sup> See Bartels, *supra* note 221, at 280 (“[T]he data are consistent with the hypothesis that senators represented their campaign contributors to the exclusion of other constituents.”).

<sup>266</sup> Gilens, *supra* note 233, at 10.

contributions. Their work is the strongest proof to date that the alignment interest is threatened by money in politics.

### B. *The Influence of Donors*

If there is one thing that political scientists have learned about the small slice of Americans who give money to candidates, it is that they are nothing like their peers who do *not* give money. With respect to demographics, surveys carried out by Peter Francia et al.,<sup>267</sup> Clyde Wilcox et al.,<sup>268</sup> and the Institute for Politics, Democracy, and the Internet<sup>269</sup> all have found that individuals who contribute at least \$200 to federal candidates are “overwhelmingly wealthy, highly educated, male, and white.”<sup>270</sup> In 2004, for example, 58% of these donors were male, 69% were older than fifty, 78% had a family income above \$100,000, and 91% had a college degree.<sup>271</sup> In 2012, these donors amounted to just 0.4% of the population, but supplied 64% of the funds received by candidates from individuals.<sup>272</sup>

Likewise, with respect to ideology, study after study has concluded that donors hold more extreme views than the public at large. While the ideal point distribution for the public is normal, with a single peak in the moderate middle,<sup>273</sup> the distribution for donors is strikingly bimodal, with one peak in the far left and another in the far right. This result is robust to multiple analytic approaches. It holds for donors to congressional candidates, whom Joseph Bafumi and Michael Herron<sup>274</sup> and

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<sup>267</sup> See Francia et al., *supra* note 5, at 15 (carrying out survey in 1996).

<sup>268</sup> See Clyde Wilcox et al., *With Limits Raised, Who Will Give More? The Impact of BCRA on Individual Donors, in Life After Reform: When the Bipartisan Campaign Reform Act Meets Politics* 61 (Michael J. Malbin ed., 2003) (carrying out survey in 2000).

<sup>269</sup> See *Small Donors and Online Giving: A Study of Donors to the 2004 Presidential Campaigns*, Inst. for Pol., Democracy & the Internet 1 (2006), [http://www.cfinst.org/president/pdf/IPDI\\_SmallDonors.pdf](http://www.cfinst.org/president/pdf/IPDI_SmallDonors.pdf) [hereinafter *IPDI Study*] (carrying out survey in 2004).

<sup>270</sup> Francia et al., *supra* note 5, at 16.

<sup>271</sup> See *IPDI Study*, *supra* note 269, at 12; see also Francia et al., *supra* note 5, at 28; Wesley Y. Joe et al., *Do Small Donors Improve Representation? Some Answers from Recent Gubernatorial and State Legislative Elections*, 19–20 *tbl.1* (Aug. 28, 2008) (unpublished manuscript, available at [http://www.cfinst.org/pdf/books-reports/APSA\\_2008\\_SmallDonors.pdf](http://www.cfinst.org/pdf/books-reports/APSA_2008_SmallDonors.pdf)) (reporting similar results for donors to state legislative races); Wilcox et al., *supra* note 268, at 65.

<sup>272</sup> See *Donor Demographics*, Ctr. for Responsive Pol., <https://www.opensecrets.org/bigpicture/DonorDemographics.php> (last visited Feb. 2, 2015).

<sup>273</sup> See Bafumi & Herron, *supra* note 6, at 536–37; Seth E. Masket & Hans Noel, *Serving Two Masters: Using Referenda to Assess Partisan Versus Dyadic Legislative Representation*, 20 *Pol. Res. Q.* 104, 112 (2011); Shor, *supra* note 62, at 22.

<sup>274</sup> See Bafumi & Herron, *supra* note 6, at 537 (showing that donor ideal point distribution is more bimodal than analogous voter distribution).

Rhodes and Schaffner<sup>275</sup> both surveyed. It holds for donors to *all* candidates over the 1972–2012 span of the American National Election Survey, as reported by Michael Barber.<sup>276</sup> It holds for donors in all fifty states, as also reported by Barber based on the Cooperative Congressional Election Study.<sup>277</sup> And it holds as well if donors' views are determined not through survey responses but rather through the ideologies of the candidates to whom they choose to contribute. Using this last approach, Barber, Adam Bonica, Nolan McCarty, and others have produced charts that reveal the bimodality of donor opinion in arresting detail.<sup>278</sup>

The distinctiveness of donors would matter less if they gave money for non-ideological reasons (such as personal connections or a desire for access). In this case, the *recipients* of the contributions would not necessarily be ideologically extreme, and the contributions would not necessarily exert a misaligning influence. But surveys carried out by Barber,<sup>279</sup> Wesley Joe et al.,<sup>280</sup> and Wilcox et al.<sup>281</sup> all found that the most common reason given by donors for their contributions is candidates' ideological proximity to them. As Barber put it, "ideological considerations are more likely to be rated as extremely important by donors than access-related motivations or motivations related to personal connections to the candidate."<sup>282</sup> In addition, studies by Barber, Michael

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<sup>275</sup> See Rhodes & Schaffner, *supra* note 228, at 34 (finding that variance of donor opinion is 50% higher than that of voter opinion).

<sup>276</sup> See Barber, *supra* note 35, at 14 (showing that donors are more extreme than non-donors in each survey year but one); see also *id.* at 14–16 (showing that donors remain more ideological even after controls are added for non-monetary forms of participation).

<sup>277</sup> See *id.* at 14–15 (showing that donors are more extreme than non-donors in each state).

<sup>278</sup> See Nolan McCarty et al., *Polarized America: The Dance of Ideology and Unequal Riches* 162 (2006) (using soft money donations to national parties); Barber, *supra* note 35, at 23 (using donations to state legislative candidates); Michael Barber, *Access Versus Ideology: Why PACs and Individuals Contribute to Campaigns* 11 (Dec. 3, 2013) (unpublished manuscript, on file with the Virginia Law Review Association) (using donations to state and federal candidates); Bonica, *supra* note 3, at 26 (finding same bimodal distribution for donors generally and Fortune 500 executives specifically); Bonica et al., *supra* note 5, at 115 (same for small donors, donors in top 0.01% of income distribution, and Forbes 400 and Fortune 500 donors).

<sup>279</sup> See Barber, *supra* note 278, at 10 (surveying donors to congressional candidates in 2012); Michael Barber et al., *Presidents, Representation, and Campaign Donors* 18–24 (Aug. 2014) (unpublished manuscript, available at [http://static1.squarespace.com/static/51841c73e4b04fc5ce6e8f15/t/54d24dbce4b01b55b6de2b06/1423068604847/APSA2014\\_donors\\_draft3.pdf](http://static1.squarespace.com/static/51841c73e4b04fc5ce6e8f15/t/54d24dbce4b01b55b6de2b06/1423068604847/APSA2014_donors_draft3.pdf)) (surveying donors to presidential candidates in 2012).

<sup>280</sup> See Joe et al., *supra* note 271, at 22 tbl.3 (surveying donors to state candidates in 2006).

<sup>281</sup> Wilcox et al., *supra* note 268, at 68 (surveying donors to congressional candidates in 2000 and also reporting results of 1996 Francia et al. survey).

<sup>282</sup> Barber, *supra* note 278, at 8.

Ensley, Bertram Johnson, Raymond La Raja, Walter Stone, and others all determined that the more extreme candidates are, the more money they raise from individual donors.<sup>283</sup> Donors' survey responses, then, are more than mere words. Their replies are corroborated by their tendency actually to contribute more heavily to candidates who share their immoderate views.

In combination, donors' abundant resources, policy extremism, and ideological giving contribute to severe misalignment in their favor. Bafumi and Herron used the voting records of members of Congress and the survey responses of donors to plot their ideal point distributions in a common policy space.<sup>284</sup> Bonica used data on who gave and received all disclosed campaign contributions to do the same.<sup>285</sup> Both studies found that the distributions of donors and members of Congress are more or less identical.<sup>286</sup> Their distributions are distinctly bimodal, again in marked contrast to the normal distribution of the general public.<sup>287</sup> Similarly, Barber used roll call votes and survey responses to determine the ideal points of senators, voters from each party, and all voters.<sup>288</sup> Senators, it turns out, are very distant ideologically from their state's median voter (who is represented only slightly better than a voter chosen at random).<sup>289</sup> They are substantially more aligned with the median voter from their own party.<sup>290</sup> But "[a]mong both Republicans and Democrats, the ideological congruence between senators and *donors* is nearly perfect."<sup>291</sup> (Bonica's and Barber's results are displayed in Figure 3.)

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<sup>283</sup> See Barber, *supra* note 35, at 23–28 (analyzing state legislative candidates); Raymond J. La Raja & Brian F. Schaffner, Do Party-Centered Campaign Finance Laws Increase Funding for Moderates and Challengers? 19–20 (Jan. 2014) (unpublished manuscript, available at <https://polsci.umass.edu/uploads/profiles/sites/la-rajay/SPSA-LaRaja-Schaffner-Parties.pdf>) (same); see also Michael J. Ensley, Individual Campaign Contributions and Candidate Ideology, 138 *Pub. Choice* 221, 227 (2009) (analyzing U.S. House candidates); Bertram Johnson, Individual Contributions: A Fundraising Advantage for the Ideologically Extreme?, 38 *Am. Pol. Res.* 890, 899 (2010) (same); Walter J. Stone & Elizabeth N. Simas, Candidate Valence and Ideological Positions in U.S. House Elections, 54 *Am. J. Pol. Sci.* 371, 381 (2010) (same).

<sup>284</sup> See Bafumi & Herron, *supra* note 6, at 522–26.

<sup>285</sup> See Bonica, *supra* note 3, at 26–28; see also Adam Bonica, Mapping the Ideological Marketplace, 58 *Am. J. of Pol. Sci.* 367, 368–70 (2014) (explaining methodology in more detail).

<sup>286</sup> See Bafumi & Herron, *supra* note 6, at 536–37; Bonica, *supra* note 3, at 29.

<sup>287</sup> See Bafumi & Herron, *supra* note 6, at 536–37; Bonica, *supra* note 3, at 29; see also *supra* note 273 and accompanying text (discussing ideal point distribution of public at large).

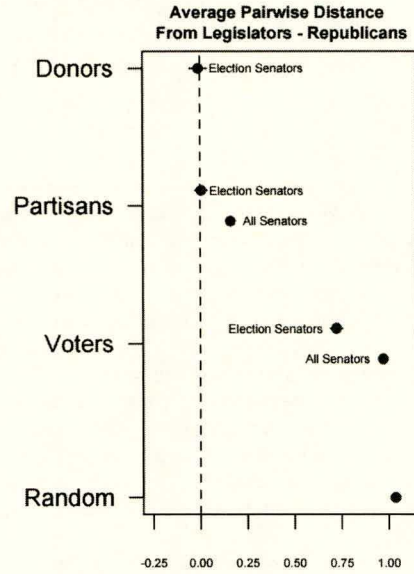
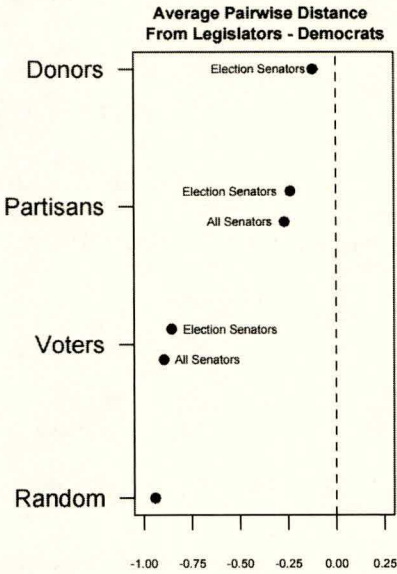
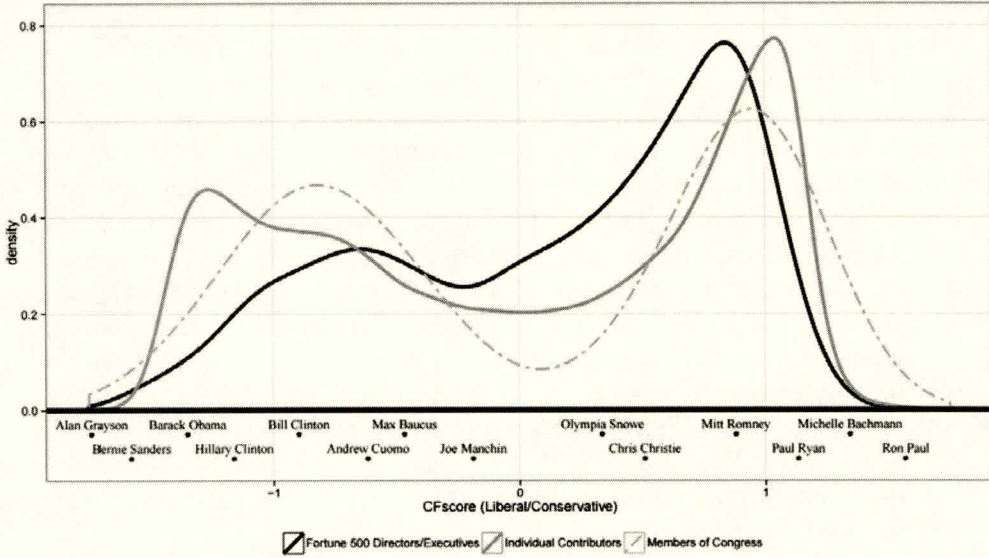
<sup>288</sup> See Barber, *supra* note 6, at 10–19.

<sup>289</sup> See *id.* at 19–20.

<sup>290</sup> See *id.* at 20–21.

<sup>291</sup> *Id.* at 22 (emphasis added). Barber et al. also have found that the positions taken by the *President* are much more responsive to same-party donors' views than to same-party non-

**Figure 3: Findings of Pro-Donor Misalignment by Bonica<sup>292</sup> and Barber<sup>293</sup>**



donors' views. In fact, only the former are statistically significant in a model that includes both sets of views as well as overall public opinion. See Barber et al., *supra* note 279, at 28–29.

<sup>292</sup> Bonica, *supra* note 3, at 32.

<sup>293</sup> Barber, *supra* note 6, at 21.

Barber's analysis suggests that the proximity of donors' and office-holders' views is causal rather than correlational. Since senators represent their donors better than their constituents or their co-partisans, the sway of campaign contributions must exceed the electoral incentive to appeal to the median voter or the partisan urge to please fellow party members.<sup>294</sup> Additional evidence along these lines comes from Ellis<sup>295</sup> and Rhodes and Schaffner,<sup>296</sup> both of whom found that donors' preferences remain a significant driver of House members' voting records even after adding controls for voters' preferences and various forms of non-monetary participation. Still more such evidence comes from an experimental study recently conducted by Joshua Kalla and David Broockman.<sup>297</sup> They sent e-mails to House members, half from "local constituents" and half from "local campaign donors," asking to meet to discuss environmental issues.<sup>298</sup> Only 5.5% of the constituent e-mails resulted in a meeting with the House member or a senior staffer, compared to 18.8% of the donor e-mails.<sup>299</sup> More work on causation is necessary, but the existing literature does reveal a clear connection between campaign giving and misalignment.

Lastly, the misaligning influence of individual donors may be growing over time. As noted earlier, the level of preference misalignment has surged over the last few decades (at least with respect to the U.S. House).<sup>300</sup> Over the same period, the proportion of funds supplied to

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<sup>294</sup> Barber also suggests that legislators' preferences might resemble those of donors because both groups are more affluent than the non-donating population. Legislators' bimodal preference distribution might be attributable to their own affluence, in other words. See *id.* at 28–32. This hypothesis warrants further investigation, but it cannot fully account for legislators' bimodality since they are more ideologically extreme than affluent *non*-donors. Cf. Barber, *supra* note 35, at 12–15 (finding that donors are more ideologically extreme than equally politically active non-donors).

<sup>295</sup> See Ellis, *Understanding Biases*, *supra* note 227, at 945–46 (finding that being large donor increases alignment with House member even after controlling for voting, political activity, political knowledge, and other factors).

<sup>296</sup> See Rhodes & Schaffner, *supra* note 228, at 36–38 (finding that donor ideology remains statistically significant predictor of House member ideology even after controlling for voter ideology).

<sup>297</sup> See Joshua L. Kalla & David E. Broockman, *Congressional Officials Grant Access to Individuals Because They Have Contributed to Campaigns: A Randomized Field Experiment* (Mar. 11, 2014) (unpublished manuscript, available at [https://www.ocf.berkeley.edu/~broockma/kalla\\_broockman\\_donor\\_access\\_field\\_experiment.pdf](https://www.ocf.berkeley.edu/~broockma/kalla_broockman_donor_access_field_experiment.pdf)).

<sup>298</sup> See *id.* at 7–12.

<sup>299</sup> See *id.* at 16–17.

<sup>300</sup> See *supra* notes 249–50 and accompanying text.

House candidates by individual donors has increased from about 50% to nearly 75%.<sup>301</sup> The share of individual donors who self-identify as ideologically extreme also has increased from around 40% to just over 60%.<sup>302</sup> These trends may be unrelated, but their juxtaposition still is striking. If individual donors are becoming both more vital to candidates and more radical in their views, then what we would expect for misalignment is exactly what we have witnessed: a steady, seemingly inexorable rise.

### C. *The Impact of Reform*

That money in politics is misaligning, however, is only half the story. For the alignment interest to be a valid justification for campaign finance regulations, these policies actually must be *aligning*. If their effects are ambiguous (or worse), then they lack the tight connection with alignment that is necessary for them to be upheld on this basis.<sup>303</sup> I conclude this Part, then, by discussing a series of very recent studies on the aligning implications of contribution limits on individuals, parties, and PACs as well as different kinds of public financing. This literature only now is emerging because the techniques for measuring voters' and officeholders' preferences previously did not exist.<sup>304</sup>

But before getting to the studies' findings, it is important to complete the survey, begun above, of campaign funders' ideological inclinations. It should be clear by now that individual donors tend to be ideologically extreme, with starkly bimodal ideal point distributions. But what about the *other* two key sources of money in politics, parties and PACs?<sup>305</sup> What do their policy preferences look like? Starting with parties, La Raja and Schaffner found that their views, at least as reflected in their

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<sup>301</sup> See Barber & McCarty, *supra* note 35, at 31; see also Barber, *supra* note 35, at 21–23 (showing similar increase for state legislative candidates).

<sup>302</sup> See La Raja & Wiltse, *supra* note 34, at 510. Perhaps relatedly, the share of campaign contributions supplied by the richest 0.01% of Americans has skyrocketed from about 10% in 1980 to about 40% in 2012. See Bonica et al., *supra* note 5, at 112.

<sup>303</sup> See *supra* note 218 (discussing stringent scrutiny applied by courts when campaign finance regulations are challenged).

<sup>304</sup> See Stephanopoulos, *supra* note 17, at 303 (noting recent development of these techniques).

<sup>305</sup> In combination, individual donors, parties, and PACs account for essentially all of the contributions that candidates receive. See Barber, *supra* note 35, at 22 (showing trends in these funding sources over time for state legislative candidates); Barber & McCarty, *supra* note 35, at 31–32 (same for congressional candidates).



committees' campaign contributions, are strikingly centrist. Parties donate about twice as much money to candidates in the middle of the political spectrum as they do to candidates at the edges.<sup>306</sup> The distribution of party giving by candidate ideology (shown in Figure 4) is distinctly normal, with a mode very near the ideological midpoint.<sup>307</sup> Of course, the *reason* for this pattern is not that parties prefer moderate over liberal or conservative policies. They plainly do not. Rather, the reason is that "parties put a premium on winning elections," and moderate candidates are more likely to prevail at the polls than extreme ones.<sup>308</sup>

Turning next to PACs, their ideologies (for the most part) are centrist as well. Barber<sup>309</sup> and Bonica<sup>310</sup> both used the positions of the candidates to whom PACs contribute to estimate the groups' ideal points. The resulting distributions were normal and unimodal in every case: for PACs that donated to state legislative candidates from 1996 to 2012,<sup>311</sup> for PACs that donated to federal candidates in 2012 (shown in Figure 4),<sup>312</sup> and for PACs that donated to *any* candidate over the 1980–2010 period.<sup>313</sup> Consistent with these findings, Bonica and Andrew Hall both determined that moderate candidates raise more money from PACs than do extreme ones. At the state legislative level, moderates raise about \$12,000 more than liberals and about \$7,000 more than conservatives.<sup>314</sup> At the U.S. House level, the advantage for moderates is about \$46,000

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<sup>306</sup> See La Raja & Schaffner, *supra* note 283, at 8, 14 (analyzing party donations to state senate candidates from 1996 to 2008).

<sup>307</sup> See *id.*

<sup>308</sup> *Id.* at 21; see, e.g., Brandice Canes-Wrone et al., *Out of Step, Out of Office: Electoral Accountability and House Members' Voting*, 96 *Am. Pol. Sci. Rev.* 127, 133, 135 (2002) (finding that House incumbents with more extreme voting records are less likely to be reelected); Anthony Gierzynski & David A. Breaux, *The Financing Role of Parties*, in *Campaign Finance in State Legislative Elections* 185, 195–200 (Joel A. Thompson & Gary F. Moncrief eds., 1998) (finding that parties give most heavily to nonincumbent candidates in competitive races).

<sup>309</sup> See Barber, *supra* note 278, at 9–11; Barber, *supra* note 35, at 16–21.

<sup>310</sup> See Adam Bonica, *Ideology and Interests in the Political Marketplace*, 57 *Am. J. Pol. Sci.* 294, 295–98 (2013).

<sup>311</sup> Barber, *supra* note 35, at 18–19.

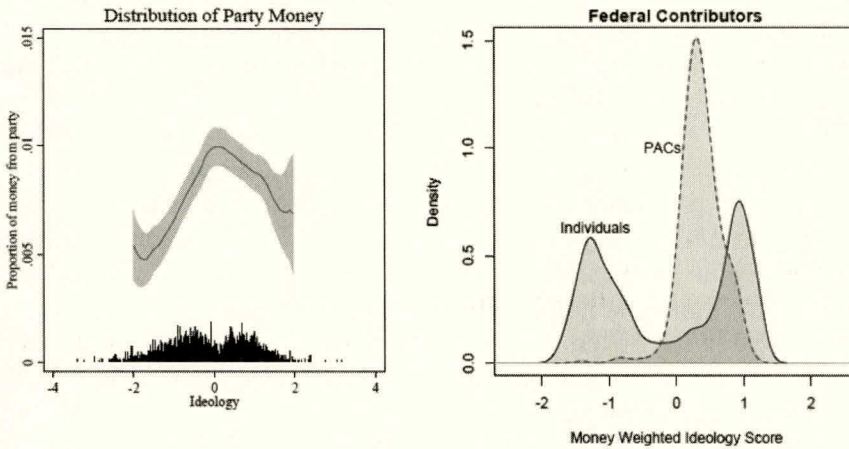
<sup>312</sup> See Barber, *supra* note 278, at 10–11 (finding clearly unimodal distribution for federal contributors but slightly bimodal (though still centrist) distribution for state contributors).

<sup>313</sup> See Bonica, *supra* note 310, at 301.

<sup>314</sup> Andrew B. Hall, *How the Public Funding of Elections Increases Candidate Polarization* 20 (Aug. 13, 2014) (unpublished manuscript, on file with the Virginia Law Review Association) (considering state legislative candidates over 1992–2010 period).

over liberals and about \$69,000 over conservatives.<sup>315</sup> PACs' ideologies, like individuals', thus are reflected in their contributions.

**Figure 4: Findings on Party and PAC Ideal Points by La Raja & Schaffner<sup>316</sup> and Barber<sup>317</sup>**



I noted above that PACs are centrist *for the most part*. The main exceptions to this rule are labor PACs, which are liberal in their orientation,<sup>318</sup> and single-issue PACs (focusing on abortion, taxes, the environment, and the like), which cluster at the ideological fringes.<sup>319</sup> However, these entities' donations are dwarfed by those of corporate and trade PACs, to which the rule applies in full.<sup>320</sup> Another caveat is that PACs'

<sup>315</sup> See Bonica, *supra* note 310, at 306, 308 (considering U.S. House candidates in 2006 and 2008).

<sup>316</sup> La Raja & Schaffner, *supra* note 283, at 8.

<sup>317</sup> Barber, *supra* note 278, at 11.

<sup>318</sup> See Bonica, *supra* note 310, at 301, 306–08; Bonica, *supra* note 285, at 375 (finding that “ideological model” performs better than “investor model” in explaining labor PACs’ contributions); see also McCarty et al., *supra* note 278, at 148, 152 (finding that labor PACs mostly contribute to liberal candidates).

<sup>319</sup> See Bonica, *supra* note 310, at 301; La Raja & Schaffner, *supra* note 283, at 8, 14 (showing bimodal pattern for donations by issue groups); see also Michael Jay Barber, *Buying Representation: The Incentives, Ideology, and Influence of Campaign Contributors in American Politics* 17–19 (Sep. 2014) (unpublished Ph.D. dissertation, Princeton University, on file with the Virginia Law Review Association) (finding that “ideological groups” including both labor PACs and single-issue PACs have bimodal ideal point distribution).

<sup>320</sup> See *Business-Labor-Ideology Split in PAC & Individual Donations to Candidates, Parties, Super PACs and Outside Spending Groups*, Ctr. for Responsive Pol.,

centrist ideal points may be the product not of actual moderation but rather of tactical giving to politicians from both parties aimed at securing access. There is some truth to this story; PACs give more heavily to incumbents than to challengers,<sup>321</sup> and the variance of the ideologies of the candidates to whom PACs contribute is relatively high.<sup>322</sup> But Bonica<sup>323</sup> and McCarty et al.<sup>324</sup> both found that this variance is *not* as high as it would be if PACs actually were insensitive to candidates' views. PACs' motives for giving thus seem to be a mix of acquiring access and supporting like-minded candidates.

This typology of campaign funders' ideologies—in which individual donors are extreme, and parties and PACs are moderate—explains why certain campaign finance regulations are aligning and others are misaligning. In brief, regulations that decrease the relative importance of individual donors, or increase the relative importance of parties and PACs, are aligning. Conversely, policies that make candidates more reliant on individual donors, or less reliant on parties and PACs, are misaligning. Policies' aligning implications follow directly from their impact on the composition of candidates' funds.

Accordingly, as Barber found, contribution limits on *individuals* are aligning. The lower a state's individual limit is, the smaller the average individual donation is, the more individuals hit the contribution ceiling, and the less candidates raise from individuals.<sup>325</sup> As a result, a state that switches from no individual limit at all to some sort of limit can expect candidates' ideologies to shift toward the center by 0.1 to 0.3 units (on a -2 to 2 scale).<sup>326</sup> And a state that cuts its individual limit in half can ex-

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<http://www.opensecrets.org/bigpicture/blio.php?cycle=2012> (last visited Feb. 23, 2015) [hereinafter Business-Labor-Ideology Split] (showing that in 2012 cycle, business PACs provided 72% of PAC contributions, compared to 13% for labor PACs and 15% for ideological PACs).

<sup>321</sup> See Barber, *supra* note 278, at 13–14 (showing that, relative to individual donors, PACs give greater share of contributions to incumbents at both state and federal levels); Barber, *supra* note 35, at 16–20 (same at state level).

<sup>322</sup> See Barber, *supra* note 278, at 12–14 (showing that variance is larger for PACs than for individual donors at both state and federal levels).

<sup>323</sup> See Bonica, *supra* note 310, at 302 (showing that variance for most PACs at state and federal levels is below threshold that would indicate ideologically random giving).

<sup>324</sup> See McCarty et al., *supra* note 278, at 148–50 (showing that variance for most PACs at federal level is below threshold that would indicate ideologically random giving).

<sup>325</sup> See Barber, *supra* note 35, at 32–33 (presenting charts displaying each of these relationships).

<sup>326</sup> See *id.* at 36–38. The larger of these figures is for Republican candidates.

pect candidates' positions to become 0.02 to 0.03 units more moderate.<sup>327</sup> These effects may seem modest but they actually are quite substantial. As Barber wrote about the impact of adopting individual limits in the first place, "This change is large and is two thirds of the standard deviation of [party] ideal points . . . ."<sup>328</sup>

Next, as La Raja and Schaffner determined, contribution limits on *parties* are misaligning. Where such limits are present, state senate candidates receive a smaller proportion of their funds from parties, and a larger proportion from individual donors.<sup>329</sup> For moderate candidates in particular, party limits cause their share of party-supplied funds to drop from above 8% to below 4%.<sup>330</sup> Consequently, party limits exert a centrifugal influence on candidates' positions, and the absence of such limits exerts a centripetal influence. Specifically, the median Democrat's ideology is 1.56 units apart from the median Republican's in state legislatures subject to party limits, but only 1.15 units apart in legislatures free from such limits.<sup>331</sup> Party limits thus are associated with roughly a 35% increase in polarization.<sup>332</sup>

Analogously, as Barber also found, contribution limits on *PACs* are misaligning too. The tighter a state's PAC limit is, the smaller the average PAC donation is, the more PACs bump up against the contribution ceiling, and the less candidates collect from PACs.<sup>333</sup> As a result, a state that switches from no PAC limit at all to some kind of limit can expect candidates' ideologies to move away from the midpoint by 0.1 to 0.2 units.<sup>334</sup> And a state that cuts its PAC limit in half can expect candidates' positions to become 0.005 to 0.02 units more extreme.<sup>335</sup> These effects

<sup>327</sup> See *id.* The larger of these figures again is for Republicans.

<sup>328</sup> *Id.* at 36 (referring to Republican candidates and also finding that impact is smaller for Democrats). Moreover, these effects are quite a bit larger in states with more professional legislatures. See *id.* at 37; see also Nicholas O. Stephanopoulos et al., *The Realities of Electoral Reform*, 67 *Vand. L. Rev.* (forthcoming 2015) (manuscript at 40–42, on file with author) (also finding that individual contribution limits improve district-level alignment).

<sup>329</sup> See La Raja & Schaffner, *supra* note 283, at 16 (showing bar charts to this effect); *id.* at 19 (confirming result with multiple regression model).

<sup>330</sup> See *id.* at 17.

<sup>331</sup> See Ray La Raja & Brian Schaffner, *Want to Reduce Polarization? Give Parties More Money*, *Wash. Post* (July 21, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/07/21/want-to-reduce-polarization-give-parties-more-money>.

<sup>332</sup> See *id.*

<sup>333</sup> See Barber, *supra* note 35, at 32–34 (presenting charts displaying each of these relationships).

<sup>334</sup> See *id.* at 37–39.

<sup>335</sup> See *id.*

are sizeable as well: “[M]oving to unlimited PAC contributions shifts . . . legislators’ predicted ideal point . . . [by] 43 percent of the standard deviation of [party] ideal points.”<sup>336</sup>

This leaves us with public financing, two types of which have been analyzed for their aligning impact. First, Hall<sup>337</sup> and Seth Masket and Michael Miller<sup>338</sup> examined the “clean money” systems used in Arizona, Connecticut, and Maine. Under these systems, candidates who obtain a certain number of small contributions from individual donors then receive block grants that fund the rest of their campaigns.<sup>339</sup> Publicly funded candidates also must abide by spending limits and accept no further donations.<sup>340</sup> Despite their popularity with reformers, these schemes are misaligning because they eliminate most party and PAC contributions and make the grants contingent on candidates’ appeal to individual donors. According to Hall, the gap between a Democrat and a Republican representing the same district (and the same median voter) jumps from 1.16 units to 1.51 units under clean money.<sup>341</sup> According to Masket and Miller, candidates entering the legislature after being elected with clean money often (but not always) are more polarized than their privately financed peers.<sup>342</sup>

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<sup>336</sup> *Id.* at 38. These effects are larger for Democrats in states with more professional legislatures and for Republicans in states with less professional legislatures. See *id.* at 37.

<sup>337</sup> See Hall, *supra* note 314, at 4–5 (focusing on clean money systems but also considering older (and less generous) public financing systems used in Minnesota and Wisconsin).

<sup>338</sup> See Seth E. Masket & Michael G. Miller, *Buying Extremists? Public Funding, Parties, and Polarization in Maine and Arizona* 4–6 (2012) (considering Arizona and Maine).

<sup>339</sup> See *id.* at 4–5; Hall, *supra* note 314, at 4–5.

<sup>340</sup> See Masket & Miller, *supra* note 338, at 5.

<sup>341</sup> See Hall, *supra* note 314, at 19.

<sup>342</sup> See Masket & Miller, *supra* note 338, at 15–19, 30. In particular, this effect holds for Democrats and Republicans in Arizona (where the polarizing effects are larger too), and for Republicans in Maine. See also Jeffrey J. Harden & Justin H. Kirkland, *Do Campaign Donors Influence Polarization? Evidence from Public Financing in the American States*, *Legis. Stud. Q.* (forthcoming 2016), available at <https://jhkirkla.wordpress.com/2015/01/27/do-campaign-donors-influence-polarization-evidence-from-public-financing-in-the-american-states-with-jeffrey-j-harden/> (also finding increase in polarization following enactment of reform in Arizona and Maine, but concluding that increase is not statistically significant); Seth E. Masket & Michael G. Miller, *Does Public Election Funding Create More Extreme Legislators? Evidence from Arizona and Maine*, 15 *St. Pol. & Pol’y Q.* 1, 9–12 (2014) (re-running earlier analysis and finding statistically significant polarizing effect only for Arizona Republicans); Stephanopoulos et al., *supra* note 328 (manuscript at 40–42) (also finding that public financing is misaligning at district level).

Second, Elizabeth Genn et al.<sup>343</sup> and Michael Malbin et al.<sup>344</sup> uncovered tantalizing clues that New York City's multiple-match system may be aligning (though they did not measure alignment directly). Under New York City's system, contributions up to \$175 from individual donors to city council candidates are matched six-to-one by the government.<sup>345</sup> Publicly funded candidates again must comply with spending limits, but they are not barred from receiving contributions from parties and PACs.<sup>346</sup> That these more centrist entities are not excluded from participation is one reason why multiple-match may perform differently than clean money.

The more important reason is that multiple-match transforms the pool of individual donors. Genn et al. compared donors to city council candidates to donors to New York City's state house candidates (to whom multiple-match does not apply).<sup>347</sup> They determined that the former are poorer (with almost the same poverty rate as the city as a whole), more racially diverse (with almost the same non-white proportion), and less educated (with almost the same share not completing high school).<sup>348</sup> Multiple-match thus attracts a much more representative group of donors than conventional private financing. Similarly, Malbin et al. found that city council candidates raise 63% of their funds from donors who give less than \$250.<sup>349</sup> In contrast, U.S. Senate candidates raise only 14% of their funds from such donors, U.S. House candidates raise only 8%, and New York state legislative candidates just 7%.<sup>350</sup> This result al-

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<sup>343</sup> See Elisabeth Genn et al., *Donor Diversity Through Public Matching Funds* 7 (2012) (unpublished manuscript, available at [http://www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport\\_WEB.PDF](http://www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport_WEB.PDF)).

<sup>344</sup> See Michael J. Malbin et al., *Small Donors, Big Democracy: New York City's Matching Funds as a Model for the Nation and States*, 11 *Election L.J.* 3, 4 (2012).

<sup>345</sup> See *id.* at 5–6.

<sup>346</sup> See *id.* at 5, 7.

<sup>347</sup> See Genn et al., *supra* note 343, at 8. More specifically, they compared the census block groups ("CBGs") where donors live, because information about the donors themselves was unavailable.

<sup>348</sup> See *id.* at 14. In particular, 21% of New Yorkers are below the poverty line, compared to 19% of city council and 16% of state house small-donor CBGs; 55% of New Yorkers are non-white, compared to 54% of city council and 39% of state house small-donor CBGs; and 28% of New Yorkers have not finished high school, compared to 26% of city council and 22% of state house small-donor CBGs. See *id.*

<sup>349</sup> See Malbin et al., *supra* note 344, at 14–15 (including matching funds received from city).

<sup>350</sup> See *id.* at 14. Just below New York City on the list is Minnesota, where state legislative candidates raise sixty percent of their funds from small donors. Minnesota has the most gen-

so suggests that donors to city council candidates, unlike most other individual donors in American politics, may be a centripetal rather than a centrifugal force.

#### IV. THE IMPLICATIONS OF ALIGNMENT

A key lesson from this empirical evidence is that alignment is affected in different ways by different policies. Unlike interests such as anti-corruption, anti-distortion, and equality, which tend to be asserted in defense of every kind of campaign finance regulation,<sup>351</sup> alignment is an available justification only in limited circumstances. In this Part, I explore what exactly these circumstances are. I explore, that is, what the doctrinal implications of the alignment approach are for the main types of campaign finance regulation: contribution limits, expenditure limits, and public financing.<sup>352</sup> In this discussion, I draw heavily on the political science studies detailed above. But I also rely on informed speculation where actual empirics are unavailable.

Three more points before beginning this analysis: First, that a given policy is misaligning, or neutral in its impact, does not mean that it is necessarily unconstitutional. It only means that the alignment interest cannot be used to justify the policy. Quite possibly, *other* interests still can be invoked in the policy's defense. I focus here on the doctrinal consequences that would follow from judicial recognition of the alignment interest. But I do not mean to slight other interests whose consequences may be quite different. Second, the constitutionality of a given policy hinges on *both* its connection to alignment and the magnitude of the burden it imposes on First Amendment rights. I only consider the link to alignment here. But it is worth noting that a heavy rights burden triggers

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erous of the first-generation public financing systems, offering donors a rebate of up to fifty dollars for their campaign contributions, as well as block grants to participating candidates. See *id.*

<sup>351</sup> In particular, the anti-corruption interest has been invoked in essentially every Supreme Court case since *Buckley*. See *supra* Section I.B.

<sup>352</sup> I do not discuss disclosure requirements because there is no available evidence on their aligning effects. They also rest on sturdier legal ground than other regulations thanks to their connection to the government's distinct informational interest. See *Citizens United v. FEC*, 130 S. Ct. 876, 914–16 (2010) (discussing this interest). I also do not discuss measures *outside* the campaign finance context that might both improve alignment and burden First Amendment rights. There is only so much ground a given paper can cover.

more stringent judicial scrutiny,<sup>353</sup> which in turn may lead to the voiding of a policy that *is* aligning (just not aligning enough).

And third, this Part's doctrinal conclusions are provisional in several respects. Most obviously, they hinge on very recent empirical studies whose findings may turn out to be incorrect. If individual donors are *not* ideologically extreme, or if parties and PACs are *not* relatively moderate, then very different results would follow. Even if the studies are accurate at present, actors' views may shift over time. One can imagine a future world, not too unlike our own, in which aroused centrists are the largest individual donors, and parties and PACs choose to prioritize ideology over electability.<sup>354</sup> Lastly, laws that differentiate by entity may be vulnerable to manipulation. For instance, if individuals were subject to tighter limits than parties or PACs, they could channel more of their funds through the latter groups. The laxer restrictions on the groups then would have to be revisited to take into account their increased extremism.<sup>355</sup>

#### *A. Contribution Limits*

Contribution limits are perhaps the most familiar kind of campaign finance regulation. They restrict contributions to candidates by individuals, parties, PACs, corporations, unions, and other entities.<sup>356</sup> At the federal level, individuals can donate up to \$5,200 per candidate per cycle.<sup>357</sup>

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<sup>353</sup> See *supra* note 218 and accompanying text (noting that standard of review is stricter for expenditure limits, which Court views as particularly burdensome, than for contribution limits). Assuming that alignment is a compelling interest, the main reason why the standard of review matters is that strict scrutiny typically requires a regulation to be the least restrictive means for achieving the interest. A plaintiff thus could try to show that there exist less burdensome but equally aligning measures that could be enacted. However, this showing would not be easy. The evidence on the aligning effects of most electoral regulations is either mixed or nonexistent, and many of these regulations burden constitutional rights as well.

<sup>354</sup> Though it is worth noting that the relative ideological positions of individuals, parties, and PACs have not varied greatly in the past, see Barber, *supra* note 35, at 14–16, and that there are good theoretical reasons to expect each entity to continue to hold the views that it does today.

<sup>355</sup> Though it is unclear that parties or PACs would change their giving patterns if they received more money from ideologically extreme individuals. The groups' incentives to contribute to more moderate candidates would remain in place.

<sup>356</sup> They also restrict contributions to some of the entities that themselves are restricted in how much they may give to candidates.

<sup>357</sup> See 2 U.S.C. § 441a(a)(1)–(2) (2012); Contribution Limits 2013–14, Fed. Election Comm'n, <http://www.fec.gov/pages/brochures/contriblimits.shtml> (last visited June 26, 2015).



The equivalent figure is \$10,000 both for parties and for PACs, while direct corporate and union contributions are banned.<sup>358</sup> The *aggregate* limit of \$123,200 on individual donations per cycle recently was struck down in *McCutcheon*.<sup>359</sup> At the state level, contribution limits vary dramatically from one jurisdiction (and funding source) to another.<sup>360</sup> Individual limits, for instance, range from \$320 in Montana to no cap at all in a dozen states.<sup>361</sup> Similarly, corporate and union limits run the gamut from outright prohibition to no restriction whatsoever.<sup>362</sup>

Beginning with individual contribution limits, they generally would be valid under the alignment approach for the simple reason that they generally are aligning. The empirical evidence shows that individual donors hold ideologically extreme views and that politicians mirror these views almost perfectly.<sup>363</sup> Barber also found that restrictions on individual contributions cause politicians' positions to move toward the center (though further confirmation of this finding would be helpful).<sup>364</sup> To be sure, one can conceive of scenarios in which individual limits would *not* be aligning—if individual donors in a given jurisdiction were ideologically moderate, if they gave for reasons other than candidates' ideological proximity to them, or if candidates were not motivated to maximize their campaign resources. But there is no indication that these scenarios are common in modern American politics. The connection between individual limits and alignment thus is strong.

Next, contribution limits on parties typically could *not* be sustained under the alignment approach. La Raja and Schaffner determined that parties give more heavily to moderate candidates than to extreme ones.<sup>365</sup> They also found that restrictions on party contributions are linked to about a 35% increase in legislative polarization (though further confirmation again would be useful).<sup>366</sup> True, the motivation for the parties' giving may be strategic rather than ideological. The parties may

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<sup>358</sup> See 2 U.S.C. § 441a(a)(3); Contribution Limits 2013–14, *supra* note 357.

<sup>359</sup> See Contribution Limits 2013–14, *supra* note 357; see also *McCutcheon v. FEC*, 134 S. Ct. 1434, 1442–43 (2014) (plurality opinion).

<sup>360</sup> See Contribution Limits: An Overview, Nat'l Conf. of State Legis. (Oct. 3, 2011), <http://www.ncsl.org/research/elections-and-campaigns/campaign-contribution-limits-overview>.

<sup>361</sup> See *id.*

<sup>362</sup> See *id.*

<sup>363</sup> See *supra* Section III.B.

<sup>364</sup> See Barber, *supra* note 35, at 37–39.

<sup>365</sup> See La Raja & Schaffner, *supra* note 283, at 8, 14.

<sup>366</sup> See La Raja & Schaffner, *supra* note 331.

want to win more elections by supporting more moderate candidates, not to see more moderate policy actually enacted.<sup>367</sup> But the parties' intent is irrelevant for present purposes. It is the effect that counts here, and the impact of party limits is plainly misaligning.

The story is somewhat more complicated for contribution limits on PACs. According to Bonica, corporate and trade PACs usually have moderate ideal points.<sup>368</sup> According to Barber, restrictions on PAC contributions (most of which are made by corporate and trade groups) cause politicians' positions to shift away from the center.<sup>369</sup> So far, so good; contribution limits on corporate and trade PACs, like such limits on parties, are not aligning and so could not be upheld under the alignment approach. But there are other types of PACs too, and their ideal points are *not* moderate. In particular, Bonica determined that labor PACs are quite liberal, and that single-issue PACs are highly bimodal in their stances.<sup>370</sup> Contribution limits on *these* PACs might well be aligning, as they could reduce politicians' incentive to veer left in the case of labor PACs, or toward either extreme in the case of single-issue PACs.<sup>371</sup> The doctrinal fate of PAC limits thus might vary by PAC category.

This conclusion may be unsettling to some readers. Are PACs not a *threat* to the integrity of the electoral system, rather than a largely benign presence? And of the various types of PACs, are corporate and trade PACs not the most dangerous—the very epitome of big money? There are several responses to this unease. First, some corporate and trade PACs do have extreme ideal points and donate more money to extreme candidates.<sup>372</sup> PACs in the construction and energy sectors, for in-

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<sup>367</sup> See *supra* note 308 and accompanying text.

<sup>368</sup> See Bonica, *supra* note 310, at 301; Bonica, *supra* note 285, at 375.

<sup>369</sup> See Barber, *supra* note 309, at 37–39.

<sup>370</sup> See Bonica, *supra* note 310, at 301, 306, 308; Bonica, *supra* note 285, at 375; see also McCarty et al., *supra* note 278, at 148 (finding that labor PACs have more liberal contribution patterns than other PACs); La Raja & Schaffner, *supra* note 283, at 8, 14 (finding that issue groups donate to more ideologically extreme candidates).

<sup>371</sup> Alas, this prediction has not yet been tested by political scientists. Another hypothesis that has yet to be investigated is that contribution limits on *corporations* and *unions* have the same aligning implications, respectively, as limits on corporate and union PACs. This hypothesis seems reasonable because corporate PACs raise almost all of their money from corporate employees, and union PACs obtain almost all of their funds from union members.

<sup>372</sup> See Bonica, *supra* note 310, at 306 (showing that PACs in certain sectors give more money to extreme Democrats and/or Republicans relative to baseline candidate). In addition, PACs' overall moderation may mask particular positions (quite possibly on the issues that matter most to the PACs) that are very different from those of the general public.

stance, are skewed distinctly to the right.<sup>373</sup> If their contributions were limited, the effect likely would be aligning. Second, corporate and trade PACs may undermine the electoral system through mechanisms other than misalignment. Their donations may buy them special access to lawmakers and special influence over the shaping of public policy. These are troublesome results even if they do not produce measurable non-congruence. And third, it is possible that the democratic threat posed by business influence has been overstated. Corporate and trade PACs are nobody's idea of altruistic groups sacrificing for the public good. But their relative moderation in a time of surging polarization may be valuable.

Another potentially worrisome implication of this analysis is that the validity of contribution limits may vary based on the identity of the entity being limited. Restrictions on individual contributions may be lawful, for example, while restrictions on party or PAC contributions may not be. Does this not amount to illegal viewpoint discrimination? Again, there are several replies to this objection. First, the essence of viewpoint discrimination is action taken by a jurisdiction because it "fears, dislikes, or disagrees with" the "substantive content" of a given message.<sup>374</sup> But if a jurisdiction limits certain entities' donations in order to promote alignment, then the rationale for the limitation is the promotion of alignment—not any fear, dislike, or disagreement with the entities' views. It also is not the entities' *views* that concern a jurisdiction seeking to improve alignment, but rather the views' *divergence* from the position of the median voter. Location along an ideological spectrum is distinct from the substantive content that the government is prohibited from taking into account.

Second, it is unlikely that courts would consider contribution limits to be vulnerable to a viewpoint discrimination challenge in the first place. Any particular restriction treats identically all donors whom it covers. A contribution limit on individuals, for instance, in no way distinguishes between moderate and extreme persons. At the aggregate level too, con-

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<sup>373</sup> See *id.*

<sup>374</sup> *Wood v. Moss*, 134 S. Ct. 2056, 2066 (2014). Or as now-Justice Elena Kagan has put it, "[w]hen *hostility* toward ideas as such . . . has played some part in effecting a restriction on speech, the restriction is irretrievably tainted." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 431 (1996) (emphasis added). "In contrast . . . when the government has restricted ideas only as and when they bear harmful *consequences*[,] the government's purposes support sustaining the action." *Id.* (emphasis added).

sidering the full set of limits in effect in a given jurisdiction, the policies may differentiate by *entity*, but they do not do so by *viewpoint*. And under the Court's precedent, speaker-based regulations are subject only to review for reasonableness, in contrast to the strict scrutiny that applies to viewpoint-based regulations.<sup>375</sup>

Lastly, while the contribution limits that best promote alignment may vary by entity, *existing* limits do so too. At the federal level, as noted earlier, the donation ceiling is \$5,200 for individuals, \$10,000 for parties and PACs, and \$0 for corporations and unions.<sup>376</sup> Most states also specify different limits for different entities.<sup>377</sup> The reasons for this divergent treatment have not been disclosed, but they presumably include judgments about the relative threat posed by different funding sources. Accordingly, if the optimal pro-alignment policy set may be challenged on viewpoint discrimination grounds, then so too may be the status quo. Both the alignment approach and the status quo distinguish among entities based on their capacity to undermine key democratic values. But if the status quo is *secure* from such attack—as suggested by the lack of any campaign finance regulation struck down for discriminating by viewpoint—then the alignment approach should be safe as well.<sup>378</sup>

### B. Expenditure Limits

Limits on electoral *expenditures* are a second kind of campaign finance regulation, albeit one more important in theory than in practice. Congress's 1974 amendments to the Federal Election Campaign Act included spending limits on individuals, groups, candidates, and parties.<sup>379</sup> But all of these limits were struck down in *Buckley* on the grounds that

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<sup>375</sup> See Leslie Kendrick, Content Discrimination Revisited, 98 Va. L. Rev. 231, 267 (2012) (observing that "speaker- and medium-based discrimination appears not to be suspect in itself"); Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189, 247 (1983) (noting that "the Court sharply distinguish[s] speaker-based from viewpoint-based restrictions and . . . test[s] speaker-based restrictions by a standard of reasonableness").

<sup>376</sup> See *supra* notes 357–58 and accompanying text.

<sup>377</sup> See *supra* notes 360–62 and accompanying text.

<sup>378</sup> A related First Amendment concern may be that the alignment approach seems, at first glance, to permit the silencing of dissenters seeking to persuade the public of their unorthodox views. In fact, the approach does no such thing. Either dissenting speech fails to persuade, in which case it is irrelevant, or it *does* persuade, in which case people's preferences shift and there is a new benchmark with which governmental outputs should align. Speech never can be regulated under this approach because of its impact on the public.

<sup>379</sup> *Buckley v. Valeo*, 424 U.S. 1, 39 (1976).

they burdened First Amendment rights more heavily than contribution limits, while not preventing corruption as effectively.<sup>380</sup> Spending bans on corporations and unions survived *Buckley* and also were upheld in *Austin*.<sup>381</sup> But they too fell by the wayside in *Citizens United*.<sup>382</sup> At present, no form of expenditure limit, at either the state or federal level, is permitted.<sup>383</sup>

Because few spending limits have been in place since *Buckley*, there is little direct evidence on their aligning implications. Political scientists cannot easily assess policies that have not been enacted. But it still is possible to make some educated guesses as to how different types of spending limits would fare under the alignment approach, using the data that is available. One reasonable hypothesis is that campaign funders exhibit the same ideological inclinations whether they use their funds on contributions or expenditures. In other words, individuals, unions, and single-issue groups are ideologically extreme (and prefer extreme candidates) whether they are donating money or spending it themselves. Likewise, parties and businesses are relatively moderate (and prefer moderate candidates) no matter how they are deploying their resources.

Some support for this hypothesis comes from the identities of the individuals who gave money to Super PACs in the 2012 election. (Super PACs, again, may fundraise and spend in unlimited quantities because they do not contribute directly to candidates.<sup>384</sup>) According to the Center for Responsive Politics, more than 80% of the individuals who donated to Restore Our Future, the Super PAC supporting Mitt Romney's candidacy, also gave the maximum possible amount to Romney's own campaign.<sup>385</sup> The proportions were similar for other presidential candi-

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<sup>380</sup> See *id.* at 39, 44–59.

<sup>381</sup> See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660–61 (1990).

<sup>382</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 901–908, 911–913 (2010).

<sup>383</sup> Prior to *Citizens United*, bans on corporate and union expenditures existed in about half of the states. See *Life After Citizens United*, Nat'l Conference of State Legis. (Jan. 4, 2011), <http://ncsl.org/legislatures-elections/elections/citizens-united-and-the-states.aspx>; see also *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (per curiam) (summarily reversing Montana Supreme Court decision upholding corporate expenditure ban, and thus confirming that “the holding of *Citizens United* applies to . . . state law”).

<sup>384</sup> See *supra* notes 4, 109 and accompanying text. Super PACs have become the vehicle of choice for funders who would like to make independent expenditures. Relatively few funders choose to make such expenditures *themselves*. Of course, as with conventional PACs, it is possible that Super PACs' spending priorities may diverge from those of their funders.

<sup>385</sup> See *Double-Duty Donors, Part II: Large Numbers of Wealthy Donors Hit Legal Limit on Giving to Candidates, Turn to Presidential Super PACs in Continuing Trend*, Ctr. for Respon-

dates.<sup>386</sup> Donors to Super PACs and donors to actual campaigns thus were the very same people. Analogously, McCarty et al. found that in the 2002 election—the last before the use of soft money to pay for parties' unlimited issue advertising was banned—almost all large soft money donors held extreme views.<sup>387</sup> The same pattern held in 2004 when funds flowed to other groups that also could engage in unlimited issue advertising. “The major contributors to . . . [these groups were] exactly the same people who made large soft money contributions.”<sup>388</sup>

Data from the 2012 election further suggests that corporations are relatively moderate and unions are liberal in their spending choices. Free for the first time to tap their treasuries in federal elections, corporations allocated just \$75 million to independent expenditures.<sup>389</sup> This sum amounted to about 1% of total federal outlays,<sup>390</sup> and contrasts sharply with the \$365 million that corporate PACs gave to candidates.<sup>391</sup> Such limited spending is what one would expect if corporations are mostly centrist entities seeking to ruffle few feathers and maintain their access to officeholders. Unions, on the other hand, took full advantage of their newfound flexibility in 2012. They devoted \$105 million to independent expenditures,<sup>392</sup> compared to \$66 million in labor PAC contributions to candidates.<sup>393</sup> Such aggressive exploitation of new funding opportunities is what one would expect from highly ideological actors.<sup>394</sup>

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sive Pol. (Feb. 21, 2012), <http://www.opensecrets.org/news/2012/02/double-duty-donors-part-ii-large-nu.html>. Unfortunately, this study only covered donations to candidate-linked Super PACs in 2011. More research is needed on donors to the entire array of Super PACs over the whole election cycle.

<sup>386</sup> See id.

<sup>387</sup> See McCarty et al., *supra* note 278, at 155–58, 162.

<sup>388</sup> See id. at 158. These groups were organized under § 527 of the Internal Revenue Code and included America Comes Together, a sort of shadow campaign for Democratic nominee John Kerry.

<sup>389</sup> See Bonica, *supra* note 3, at 10. Technically, corporations and unions also were able to make independent expenditures in part of the 2010 cycle, since *Citizens United* was decided in January 2010. See also Diana Dwyre, *After Citizens United and SpeechNow.org: Considering the Consequences of New Campaign Finance Rules 13* (Sept. 3, 2011) (unpublished manuscript, available at <http://ssrn.com/abstract=1901547>) (finding that corporations gave just \$0.05 million to Super PACs in 2010, and unions \$10.9 million).

<sup>390</sup> See FEC 2012 Summary, *supra* note 2 (noting total federal spending of \$7.3 billion in 2012).

<sup>391</sup> See *Business-Labor-Ideology Split*, *supra* note 320.

<sup>392</sup> See Bonica, *supra* note 3, at 12.

<sup>393</sup> See *Business-Labor-Ideology Split*, *supra* note 320.

<sup>394</sup> Of course, this data is merely suggestive of corporations' and unions' ideological inclinations. Corporations *could* be extreme despite devoting only a small share of their funds to

That campaign funders have the same policy preferences no matter how they use their money, however, does not prove that expenditures are linked to alignment itself. For this conclusion to follow, expenditures also must exert an influence on *candidates*. On this point, a reasonable hypothesis is that expenditures indeed affect candidates—but not quite to the same extent as contributions. Candidates tend to hold the same positions as their donors, either because they shift their views in the donors' direction to attract funding, or because only candidates who share the donors' views in the first place are financially viable.<sup>395</sup> These mechanisms also seem likely to produce convergence between candidates and those who *spend* on their behalf, only not to the same degree because a donated dollar is more valuable to a candidate than an independently spent dollar. The candidate has full control over the donated dollar, while the spent dollar may not be used precisely as the candidate would have liked.

Unfortunately, I am unaware of any empirical evidence on the impact of expenditures on candidates. The Court, though, seems convinced that candidates are not indifferent to money that is spent on their behalf. In *McCutcheon*, the Court gave an example of a candidate faced with a choice between \$26,000 in contributions and \$500,000 in supportive expenditures.<sup>396</sup> The Court was confident the candidate would prefer the latter.<sup>397</sup> The candidate's lack of control over the spending may “undermine[] the value of the expenditure”—“[b]ut probably not by 95 percent.”<sup>398</sup> Many scholars concur with the Court. Briffault, for instance, has argued that the “prospect of . . . extremely large—and legally unlimited—donations to an allied Super PAC . . . is at least as likely to affect the . . . decisions of elected officials as the relatively paltry amounts that candidates' personal campaign committees are allowed to receive.”<sup>399</sup>

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independent spending, and unions *could* be moderate despite devoting a large share. This is an area where further research plainly would be valuable.

<sup>395</sup> See *supra* Section III.B.

<sup>396</sup> See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1454 (2014) (plurality opinion).

<sup>397</sup> See *id.*

<sup>398</sup> *Id.* (quoting *Citizens United v. FEC*, 558 U.S. 310, 357 (2010)); see also *FEC v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480, 498 (1985) (noting that “absence of prearrangement and coordination” of expenditure “undermines” but does not eliminate “the value of the expenditure to the candidate”).

<sup>399</sup> Richard Briffault, *Super PACs*, 96 *Minn. L. Rev.* 1644, 1692 (2012).

Likewise, Cain has commented that a candidate will not “feel any less obligated to a large independent spender than to a large contributor.”<sup>400</sup>

If spenders and donors are equally ideological, and if spending and donating have similar effects on candidates, then spending and donating *limits* would have the same legal status under the alignment approach. They would rise or fall together for each category of campaign funder.<sup>401</sup> Accordingly, spending limits on individuals, unions, and single-issue groups (all ideologically extreme funding sources) generally would be valid because they generally would be aligning.<sup>402</sup> On the other hand, spending limits on parties and businesses (both relatively moderate sources) typically could not be sustained by reference to alignment.<sup>403</sup> The doctrinal distinction between contributions and expenditures, a cornerstone of campaign finance law since *Buckley*, thus would crumble under the alignment approach. Money would be treated the same whether it is donated or spent.

### C. Public Financing

Public financing is the final major category of campaign finance regulation, and it can be divided in turn into three types of policies. First, several states provide block grants to participating candidates who re-

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<sup>400</sup> Cain, *supra* note 175, at 43; see also, e.g., Cole, *supra* note 193, at 272 (arguing that “expenditures are just as corrupting as contributions”); Richard L. Hasen, Three Wrong Progressive Approaches (and One Right One) to Campaign Finance Reform, 8 Harv. L. & Pol’y Rev. 21, 33 (2014) (observing that “\$20 million in a Super PAC supporting Member of Congress X is less bad (but still bad) than \$20 million in Member X’s campaign account”); Michael S. Kang, The Year of the Super PAC, 81 Geo. Wash. L. Rev. 1902, 1914 (2013) (noting that Super PACs “embody a dramatic increase in the . . . influence of the very wealthy in national politics”).

<sup>401</sup> As for spending limits on *candidates*, they could not be upheld on the basis of alignment. Candidates’ *own* spending cannot induce them to move in any particular ideological direction. Furthermore, the earlier discussion of viewpoint discrimination challenges, see *supra* notes 374–77 and accompanying text, applies here as well. Spending limits that distinguish between different entities might be subject to such attacks, but for the reasons stated earlier, I do not believe that the attacks would succeed.

<sup>402</sup> This conclusion also likely would hold for PACs, Super PACs, or other groups funded by these actors. And unlike under Lessig’s model, there would be no reason to distinguish between individual expenditures (whose restriction Lessig would bar) and individual contributions to Super PACs (which Lessig would allow to be curtailed). See Lessig, *supra* note 170, at 20–21. If funds from individual donors are misaligning, they could be regulated under the alignment approach no matter what form they take.

<sup>403</sup> Again, this conclusion likely would hold for PACs, Super PACs, or other groups funded by these entities.



ceive a sufficient number of small individual donations.<sup>404</sup> In some cases, these grants are relatively stingy, and candidates may continue fundraising until they hit the spending limits that accompany the public funds.<sup>405</sup> But in Arizona, Connecticut, and Maine (the clean money states), the grants are meant to pay for campaigns in full, and candidates may collect no further contributions after accepting them.<sup>406</sup>

Second, numerous jurisdictions at the federal, state, and local levels encourage individual donations through matching programs and tax benefits. The federal government matches contributions up to \$250 to qualifying candidates in presidential primary elections.<sup>407</sup> About half a dozen states offer tax credits or deductions for donations, typically up to \$50 or \$100.<sup>408</sup> And cities such as Los Angeles and Oakland have one-to-one matches similar to the federal government's,<sup>409</sup> while New York City employs a *six-to-one* match for contributions up to \$175.<sup>410</sup> Third, another ten or so states provide block grants to political parties.<sup>411</sup> These (quite modest) grants usually are paid for by income tax check-offs ranging from \$1 to \$5 that enable taxpayers to steer funds to the party of their choice.<sup>412</sup>

Of these policies, the doctrinal fate of block grants triggered by individual donations is clearest. These measures generally could not be upheld under the alignment approach because they generally are misaligning. Hall found that candidates' positions diverge from the ideological center after clean money systems (or their less generous predecessors) are adopted.<sup>413</sup> Likewise, Masket and Miller determined that candidates

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<sup>404</sup> See Michael G. Miller, *After the GAO Report: What Do We Know About Public Election Funding?*, 10 *Election L.J.* 273, 274–75 (2011); *Public Financing of Campaigns: An Overview*, Nat'l Conference of State Legis. (Jan. 23, 2013), <http://www.ncsl.org/research/elections-and-campaigns/public-financing-of-campaigns-overview.aspx> [hereinafter *Public Financing Overview*].

<sup>405</sup> See *Public Financing Overview*, supra note 404.

<sup>406</sup> See *id.* A few more states employ clean money systems for statewide (as opposed to legislative) elections. See *id.*

<sup>407</sup> See *Public Funding of Presidential Election*, Fed. Election Comm'n (Apr. 2014), <http://www.fec.gov/pages/brochures/pubfund.shtml>.

<sup>408</sup> See *Public Financing Overview*, supra note 404.

<sup>409</sup> See Steven M. Levin, *Keeping It Clean: Public Financing in American Elections* 116–17 (2006); see also *Public Financing Overview*, supra note 404 (showing that several states also offer matching funds to candidates for statewide office).

<sup>410</sup> See supra note 345 and accompanying text.

<sup>411</sup> See *Public Financing Overview*, supra note 404.

<sup>412</sup> See *id.*

<sup>413</sup> See Hall, supra note 314, at 19.

elected with clean money often are more polarized than their peers who rely on private financing.<sup>414</sup> Both studies attributed their findings to candidates' need to appeal to ideologically extreme individual donors in order to qualify for public funds.

To be sure, there may be compelling rationales for these regulations *other* than alignment. For example, the very terminology of "clean" money suggests that it is less corrupting than the usual "dirty" cash.<sup>415</sup> Political scientists also have observed striking increases in competitiveness in the clean money states.<sup>416</sup> Moreover, it may be possible to revise the regulations in ways that make them more aligning. For instance, if block grants were offered automatically to candidates (as they are in presidential general elections<sup>417</sup>), then candidates would not have to woo polarized individual donors. Alternatively, if candidates had to collect contributions from voters from *both* parties (and from independents too) before qualifying for grants, then their donor bases would be less skewed toward the ideological fringes. Reformers who value alignment should consider such tweaks.

Next, most of the programs aimed at spurring individual donations also could not be sustained under the alignment approach. The problem here, though, is not that these programs are misaligning, but rather that they seem to have little impact on the composition of the donor pool. According to a series of surveys, donors in presidential elections (in which contribution matching is available) are just as unrepresentative of the general population as donors in congressional elections (in which it is not).<sup>418</sup> Similarly, at the state level, candidates raise a median of 15% of their funds from small donors in states offering tax credits or deduc-

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<sup>414</sup> See Masket & Miller, *supra* note 338, at 15–17. And if Harden and Kirkland are correct that clean money systems have *no* impact on polarization, then they still are not aligning and so cannot be sustained under the alignment approach. See Harden & Kirkland, *supra* note 342 (manuscript at 23–24).

<sup>415</sup> Cf. Fair Facts, Pub. Campaign, <http://www.publiccampaign.org/fair-facts> (last visited Aug. 1, 2014) (claiming that clean money will end solicitation of "well heeled donors and lobbyists" as well as government "bought and paid for by special interests").

<sup>416</sup> See, e.g., Hall, *supra* note 314 (manuscript at 12–15); Neil Malhotra, *The Impact of Public Financing on Electoral Competition: Evidence from Arizona and Maine*, 8 *St. Pol. & Pol'y Q.* 263, 273–77 (2008); Miller, *supra* note 404, at 283–84.

<sup>417</sup> See *Public Funding of Presidential Election*, *supra* note 407.

<sup>418</sup> Compare Wilcox et al., *supra* note 268, at 66–67 (analyzing presidential donors), and IPDI Study, *supra* note 269, at 12 (also analyzing presidential donors), with Francia et al., *supra* note 5, at 27–28 (analyzing congressional donors).

tions.<sup>419</sup> The equivalent figure in states that do not offer such incentives is a nearly identical 17%.<sup>420</sup> Since these programs do not meaningfully alter the donor pool, it is hard to see how they could affect the level of alignment.

The main exception to this pessimistic conclusion is New York City's multiple-match system. Malbin et al. determined that city council candidates collect 63% of their funds from small donors, the highest such figure in the nation.<sup>421</sup> Likewise, Genn et al. concluded that donors to city council candidates are very similar to the city's general population in terms of race, income, and education.<sup>422</sup> If these donors also are *ideologically* representative (a proposition that has yet to be tested), then they would exert an aligning influence on the candidates who seek their support. In this case, New York City's system, unlike most efforts to stimulate contributions, would be valid under the alignment approach.

So too (most likely) would be voucher schemes of the sort proposed by Bruce Ackerman and Ian Ayres,<sup>423</sup> Hasen,<sup>424</sup> and Lessig.<sup>425</sup> All of these schemes would grant to each voter a voucher of a set dollar amount, which the voter then could disburse to candidates as she saw fit. If almost all voters took advantage of their vouchers, then the donor population would closely resemble the general population, and the vouchers would create powerful aligning incentives for candidates.<sup>426</sup> Even if voucher use was more uneven, it is doubtful that the donor population would be more unrepresentative than it is today, meaning that the vouchers still would be aligning relative to the status quo.

Finally, though they have not yet been studied by scholars, the existing block grants to the parties seem too small to have much of an effect

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<sup>419</sup> See Malbin et al., *supra* note 344, at 14 (including data for five of these states: Arkansas, Minnesota, Ohio, Oklahoma, and Oregon (of which Arkansas is median)). As noted earlier, Minnesota's rebate program seems unusually effective at promoting small donor participation. See *supra* note 350.

<sup>420</sup> See Malbin et al., *supra* note 419, at 14 (showing that Maryland is median such state).

<sup>421</sup> See *id.*

<sup>422</sup> See Genn et al., *supra* note 343, at 14.

<sup>423</sup> See Bruce Ackerman & Ian Ayres, *Voting with Dollars: A New Paradigm for Campaign Finance* 186-222 (2002).

<sup>424</sup> See Richard L. Hasen, *Clipping Coupons for Democracy? An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 *Calif. L. Rev.* 1, 5 (1996).

<sup>425</sup> See Lessig, *supra* note 171, at 66.

<sup>426</sup> For the reasons discussed earlier, even perfect participation in the voucher system would not *guarantee* alignment. See *supra* Part II (explaining why alignment is distinct from equality of voter influence).

on alignment. These grants often are used to cover some of the costs of state party conventions.<sup>427</sup> They rarely are redistributed to the parties' actual candidates in substantial sums.<sup>428</sup> However, Lowenstein's proposal that much larger amounts of public money be provided to the parties, which then could channel the funds to the candidates of their choice,<sup>429</sup> likely would pass muster under the alignment approach. Since the parties' first priority is winning elections, and since moderate candidates are more likely to prevail than extreme ones, the parties probably would allocate most of their resources to relatively centrist contestants. This is how the parties deploy their funds today,<sup>430</sup> and there is no obvious reason why their tactics would change if their coffers swelled with public money.

#### CONCLUSION

Campaign finance law is in crisis. In a series of unfortunate decisions, the Supreme Court has rejected state interests such as anti-distortion and equality, while narrowing the anti-corruption interest to its quid pro quo core. This core cannot sustain the bulk of campaign finance regulation. As a result, expenditure limits, aggregate contribution limits, and certain public financing programs all have been struck down by the Court. If any meaningful rules are to survive, a new interest capable of justifying them must be found.

Alignment is just such an interest. The congruence of voters' preferences with key governmental outputs is a compelling objective because it accords with core democratic values. Indeed, the Court has said as much on several occasions. Alignment also is a goal that neither is forbidden by general First Amendment principles nor is duplicative of the interests the Court already has rebuffed. And if it were to be recognized by the Court, it would result in much (though not all) campaign finance

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<sup>427</sup> See Levin, *supra* note 409, at 27; Public Financing Overview, *supra* note 404.

<sup>428</sup> See Levin, *supra* note 409, at 27.

<sup>429</sup> See Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 Hofstra L. Rev. 301, 351–52 (1989) (recommending that national parties be provided with enough funds to support fifty strong challengers nationwide); cf. Peter J. Wallison & Joel M. Gora, *Better Parties, Better Government: A Realistic Program for Campaign Finance Reform* 88, 92–111 (2009) (also arguing for larger role for parties in funding of campaigns). In foreign democracies, it is common for parties to receive large sums of public funding. See Stephen Ansolabehere, *Arizona Free Enterprise v. Bennett* and the Problem of Campaign Finance, 2011 Sup. Ct. Rev. 39, 46.

<sup>430</sup> See *supra* notes 306–08, 329–32 and accompanying text.

regulation being upheld. Specifically, policies that curb the influence of polarized individual funders would be valid. But measures that burden ideologically moderate funders, such as parties and PACs, could not be sustained on this basis.

What are the odds that the current Court would adopt the alignment approach? They are extremely low. The Court's hostility to campaign finance regulation is driven above all by its libertarian theory of the First Amendment, not by its inability to identify suitable interests. But it still is worthwhile to make the case for alignment. For one thing, the Court may realize that some regulation serves an end whose significance it has acknowledged in cases such as *McCutcheon*. For another, a *future* Court may not be as uninterested in new rationales for reform as this one. The alignment approach offers a receptive majority a roadmap for upholding policies without reversing the Court's existing precedents. Finally, alignment deserves recognition because it is a concept that undeniably is intertwined with money in politics. In campaign finance law, as in all law, it is important to be clear about the values that are threatened by unregulated activity and furthered by regulation. And of these values, few are as vital as alignment.

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