

FINANCIAL INCLUSION IN POLITICS

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Our deregulated campaign finance system has a race problem. In this Article, we apply innovations in statistical methods to the universe of campaign contributions for federal elections and analyze the racial distribution of money in American politics between 1980 and 2012. We find that white people are extremely over-represented among donors. This racial gap in campaign contributions is significantly greater than the gap between white and nonwhite voter participation and white and nonwhite officer holders. It is also relatively constant across time and elected offices.

This result is an important missing piece in the conversation about equity in political participation. We argue that the courts and Congress should take steps to address the racial gaps in campaign finance participation. The participation and representation problems that flow from racial inequality in deregulated campaign finance could inform claims under the Voting Rights Act (VRA), and politico-financial inequalities certainly bear on the normative problems that the statute intends to address. But the most politically viable way to address the campaign finance racial gap lies in adoption of public financing for political campaigns, which offer the promise of increasing the racial representation of campaign contributions. When racial representation in contributions is improved, improved equality in the distribution of resources and power in electoral and political systems should follow.

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INTRODUCTION

It is time for the courts to take seriously the connection between racial inequality and campaign finance in America.

In the United States, political contributions are largely unregulated. Indeed, the Supreme Court has often struck down campaign finance regulations on the theory that political spending is political speech, and restrictions on such spending violate the First Amendment.¹ Much scholarly attention has been paid to one result of this deregulated environment: Rich people are able to spend massively in campaigns.² But as our Article demonstrates, there is another implication that is equally troubling: Non-Latino whites are severely overrepresented in political contributions.

We should not be surprised by this result. The legacies of slavery and racial exclusion have generated stark racial inequalities in wealth. By striking down laws limiting political contributions and spending, the Court has elevated the speech of the wealthiest people in our society—almost all of whom are white—above the speech of poorer people in our society—many of whom are Black and Latino. Because the racial identities of campaign donors have been largely unobservable to scholars until now, however, the racial wealth gap and its implications for campaign finance jurisprudence have not played a large role in our scholarship.³

¹ See *Buckley v. Valeo*, 424 U.S. 1, 14–23 (1976) (per curiam).

² E.g., Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 *YALE L. & POL'Y REV.* 273, 278 (1993) (questioning whether big donors have become so dominant that they crowd out meaningful participation by smaller donors); Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 *COLUM. L. REV.* 1204, 1213 (1994) (arguing that the allowing massive donations robs people of the equal opportunity to persuade others to their own view point). These arguments often make an analogy to the voting context (“one-dollar, one vote”). See, e.g., David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 *YALE L. & POL'Y REV.* 236, 244 (1991) (“Unless [monetary] political participation is in some measure equalized, the ‘one person, one vote’ guarantee is in danger of being reduced to a formalistic symbol.”); Foley, *supra*, at 1237 (arguing that it is no more wrong for a citizen to be able to purchase a vote than it is for a citizen to be able to purchase the right to persuade others); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 *U.C. DAVIS L. REV.* 663, 671–72 (1997) (arguing that each person should have an equal formal opportunity to influence the outcome of an election).

³ The main exception is a series of famous papers by Spencer Overton in around the turn of this century, which we update and extend here. See generally Spencer Overton, *Voices from the Past: Race, Privilege, and Campaign Finance*, 79 *N.C. L. REV.* 1541 (2001) [hereinafter Overton, *Voices*] (arguing that existing literature on campaign finance reform is incomplete because it ignores the sources of the wealth gaps that affect campaign

Our study provides the crucial missing piece to this conversation. The new data we present here help to establish that, while everyone's campaign donations, or "speech" and "association," are theoretically protected under the Court's deregulation of campaign finance, the people who are most able to enjoy that protection by contributing to campaigns are not only wealthy, they are almost all white.⁴ Consistent with speculation by some observers in the past, campaign finance deregulation has had disproportionate racial impacts.⁵

More recently, social scientists have established many linkages between political donations, access, and power. Here, we contribute the racial evidence to support and expand the argument: The advantages that accrue to donors accrue disproportionately to white people, since white people donate ninety-one percent of all individual campaign contributions.⁶ The flood of white money into our campaigns has systematic effects that not only affect who gets to run, but who is elected, who gains access to elected officials, whose preferred policies are enacted, and who is represented by elected officials that look like them. As white donors accrue these benefits, the racial wealth gap expands further, making the playing field even less racially equal in subsequent elections. Figure 1 illustrates this argument. This figure shows the flow of racial wealth inequality through our campaign finance, electoral, and policymaking systems. Donating, running for office, voting, lobbying elected officials, and influencing the policymaking process are all forms of political participation.

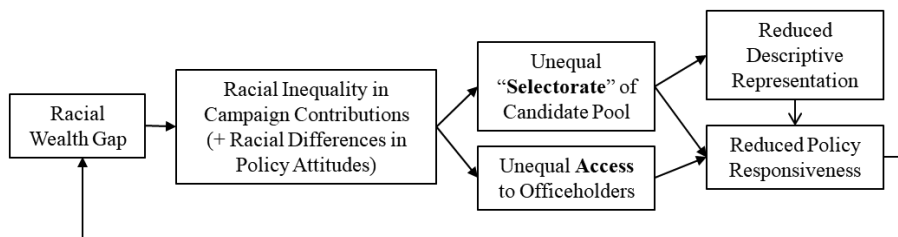
finance); Spencer Overton, *But Some Are More Equal: Race, Exclusion, and Campaign Finance*, 80 TEX. L. REV. 987 (2002) [hereinafter Overton, *More Equal*] (arguing that reform proposals which ignore the role of race in campaign finance are woefully incomplete).

⁴ DAVID B. MAGLEBY, JAY GOODLIFFE & JOSEPH A. OLSEN, WHO DONATES IN CAMPAIGNS: THE IMPORTANCE OF MESSAGE, MESSENGER, MEDIUM, AND STRUCTURE 40 (2018) ("Donors to presidential and congressional candidates . . . have overwhelmingly been rich, well-educated, middle-aged, white males; and the word *overwhelmingly* is not an exaggeration."). Magleby, Goodliffe, and Olsen use a survey to study a sample of donors from two presidential elections. They managed to contact just under 7,000 donors—a tremendous survey effort but one that falls short of the data we have now. Here, we use the entire set of itemized contributions (over 87 million) to all federal campaigns from 1980 to 2012.

⁵ See generally Overton, *Voices*, *supra* note 3; Overton, *More Equal*, *supra* note 3.

⁶ This finding is once again consistent with the findings of Magleby, Goodliffe and Olsen. See MAGLEBY ET AL., *supra* note 4, at 47 (finding that between eighty-seven and eighty-nine percent of donors to presidential elections in their random sample of donors from 2008 and 2012 were white).

FIGURE 1. FLOW OF RACIAL WEALTH INEQUALITY



Despite major changes in civil rights policy and an increasingly diverse electorate, the racial wealth gap in the United States continues to grow,⁷ with the median white family holding over ten times more wealth than the median Black family. One potential cause is the outsized influence of white donors in electoral politics, an influence that is growing over time as campaigns get more expensive.⁸ It is nearly impossible to change policy to reduce the racial wealth gap when campaign donations influence who is on the ballot (the “selectorate”) and ultimately *who governs*.⁹

Campaign finance and voting should be thought of as parts of a broader, continuous, and mutually reinforcing system. Campaign financing determines who has viable candidacies. It determines which candidates are more likely to be elected.¹⁰ It also determines who has greater access to elected officials as they consider legislation.¹¹ Campaign financing is more than just political speech; it is a key gateway to meaningful participation in elections, voting, and policymaking influence. The narrow First Amendment approach to campaign finance is, therefore, ripe for reconsideration.

⁷ See THOMAS SHAPIRO, TATJANA MESCHEDÉ & SAM OSORO, INST. ON ASSETS AND SOC. POL’Y, THE ROOTS OF THE WIDENING RACIAL WEALTH GAP: EXPLAINING THE BLACK-WHITE ECONOMIC DIVIDE 1 (2013), <https://drum.lib.umd.edu/bitstream/handle/1903/24590/racialwealthgapbrief.pdf> [<https://perma.cc/X9DM-KLPD>].

⁸ See Karl Evers-Hillstrom, *Most Expensive Ever: 2020 Election Cost \$14.4 Billion*, OPEN SECRETS, (Feb. 11, 2021, 1:14 PM), <https://www.opensecrets.org/news/2021/02/2020-cycle-cost-14p4-billion-doubling-16> [<https://perma.cc/377L-3ZPV>] (discussing how political spending in the 2020 election totaled \$14.4 billion, making the election the most expensive of all time).

⁹ See generally Abhay P. Aneja, *Voting for Welfare*, 109 CALIF. L. REV. 2013 (2021) (arguing that taking on economic inequality is only possible where the disadvantaged group is sufficiently powerful).

¹⁰ See Adam Bonica, *Professional Networks, Early Fundraising, and Electoral Success*, 16 ELECTION L.J. 153, 154 (2017) (pointing out that there is a close relationship between fundraising and primary election outcomes).

¹¹ See *infra* Section I.B.

Little scholarly attention has been given to the fact that racial minorities constitute a disproportionately small share of donors¹² and the legal ramifications that follow from this fact. Thus, we now consider how racial political inequality under deregulated campaign finance practices may trigger the special protections afforded to racial minorities with regard to the right to vote under the VRA. The statute provides courts substantial latitude to determine whether a jurisdiction engages in political discrimination against racial minorities.¹³ This latitude is a feature, not a bug, when it comes to conceptualizing the absence of campaign finance regulation as a voting rights injury. Both the unequal opportunity of minorities to influence electoral politics through contributions, as well as the representational harms that arise because of minorities' low average economic status, are analogues of the classic VRA injuries of vote denial and vote dilution.

The Court's race-blind approach to campaign finance thus sits uncomfortably beside American ideals of equal protection and voting rights. Plaintiffs raising an Equal Protection claim based on the state's failure to act to regulate campaign finance in an effort to correct these inequalities would have an uphill battle.¹⁴ The Court's voting rights jurisprudence, on the other hand, embraces state efforts to treat voters equally and views with great skepticism systems which deny or dilute votes, including minorities' votes, particularly under the VRA.¹⁵ Because *McCutcheon v. FEC* acknowledged a "right to participate,"¹⁶ there is an opening to harmonize the voting rights and campaign finance jurisprudence. The Court should conceptualize both voting

¹² Exceptions include work by Terry Smith and Spencer Overton, as well as recent work by Joshua Sellers, David Magleby, Jay Goodliffe, and Joseph Olsen. See Overton, *Voices*, *supra* note 3; Overton, *More Equal*, *supra* note 3; Joshua S. Sellers, *Election Law and White Identity Politics*, 87 *FORDHAM L. REV.* 1515 (2019); MAGLEBY ET AL., *supra* note 4.

¹³ The original VRA provided the courts with little concrete guidance on how to diagnose a voting rights violation. To offer courts contemporaneous guidance on how to interpret the amended section 2, the Senate Judiciary Committee issued a report (the "Senate Report") that enumerated a set of factors to consider when determining if a political system was "equally open" to minority voters. Christopher S. Elmendorf, Kevin M. Quinn & Marisa A. Abrajano, *Racially Polarized Voting*, 83 *U. CHI. L. REV.* 587, 597–98 (2016) (citing S REP. NO. 97-417, at 28–29 (1982) (listing all seven factors)). These factors were derived from the analytical framework of *White v. Regester*, 412 U.S. 755 (1973), and reaffirmed by *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc).

¹⁴ Today's court would probably fail to find state action. See *infra* Section III.A.2.

¹⁵ *Thornburg v. Gingles*, 478 U.S. 30, 31 (1986). See also *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014), *vacated*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014) ("[W]e agree with the Sixth Circuit that a Section 2 vote-denial claim consists of two elements"); *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) ("We now adopt the two-part framework employed by the Fourth and Sixth Circuits").

¹⁶ *McCutcheon v. FEC*, 572 U.S. 185, 203 (2014) (plurality opinion).

and contributing to campaigns as forms of political participation worthy of protection.¹⁷

We are, of course, not the first scholars to suggest that the First Amendment approach to campaign finance regulation should be revisited,¹⁸ nor that it is an overly narrow approach to a continuous electoral process.¹⁹ We are not even the first to argue that campaign finance deregulation falls unevenly on class²⁰ and racial²¹ lines. However, most of the work so far in this vein has flown from deep normative concerns, supported by very limited data available at the time of the writing. Our contribution to this debate comes from the rich data and statistical analysis that we bring to bear on these issues, and our exploration of how this data should affect our jurisprudence.

We begin with Federal Elections Commission (FEC) data available in Bonica's Database on Ideology and Money in Elections (DIME).²² The dataset is comprised of over 87 million individual contributions from 27 million Americans from 1980 through 2012, amounting to over \$33 billion in total.²³ With this dataset in hand, we can generate data on the racial identities of campaign donors using an innovative statistical technique to predict an individual's (census-categorized) race using the information in their name and geographic location.²⁴ This technique provides, for the first time, the opportunity for comprehensive, externally valid estimates of the racial makeup of money in American politics. It allows us to add an empirically verified

¹⁷ See Robert Yablon, *Voting, Spending, and the Right to Participate*, 111 Nw. U. L. REV. 655, 691–92 (2017) (arguing that voting and other forms of political participation should not be treated so differently by the court, and, instead, should be seen as different manifestations of the same right).

¹⁸ See e.g., Jessica A. Levinson, *The Original Sin of Campaign Finance Law: Why Buckley v. Valeo Is Wrong*, 47 U. RICH. L. REV. 881, 882 (2013) (“To solve what ails our government . . . [a] re-examination of the Court’s decision to equate political money . . . to political speech is overdue.”); Foley, *supra* note 2, at 1206 (arguing that constitutional law is doing exactly the opposite of what it should be doing in prohibiting campaign finance restrictions, and that it should instead require them); Richard Briffault, *On Dejudicializing American Campaign Finance Law*, 27 GA. ST. U. L. REV. 887, 898–900 (2011) (arguing that the distinction between contributions and personal expenditures which the court makes in allocating First Amendment protection is problematic).

¹⁹ See Yablon, *supra* note 17, at 700–01.

²⁰ See Raskin & Bonifaz, *supra* note 2, at 277.

²¹ See generally Overton, *Voices*, *supra* note 3; Overton, *More Equal*, *supra* note 3.

²² Adam Bonica, *Database on Ideology, Money in Politics, and Elections: Public Version 2.0*, STAN. U. LIBR. (Mar. 11, 2016, 2:01 PM), <https://data.stanford.edu/dime> [<https://perma.cc/S9TW-FLC3>]. This dataset uses FEC data compiled by the Sunlight Foundation and the National Institute for Money in Politics.

²³ *Id.*

²⁴ The method applied is documented in a recent paper by Jacob M. Grumbach and Alexander Sahn. See Jacob M. Grumbach & Alexander Sahn, *Race and Representation in Campaign Finance*, 114 AM. POL. SCI. REV. 206, 210–11 (2020).

racial dimension to the hairy problem of campaign financing in this country.

After statistically describing the racial makeup of campaign contributions, we use the data to explore the relationship between race, contribution, and representation. First, we show that fundraising is an obstacle for racial minority candidates. Specifically, our analysis shows that, all else equal, more expensive elections decrease the likelihood that racial minority candidates run for office relative to white candidates. Second, we show that campaign contributions from racial minorities affect representation in Congress. When Black donors contribute greater shares of campaign contributions, it results in more liberal-leaning legislative voting from their congressional representative, all else equal. As we also show, this brings congressional representation more in line with the political attitudes of Black constituents.

Public financing is the main policy tool to address racial inequalities in campaign finance. Public financing holds promise for correcting unequal donor power, diversifying the donor and candidate pool, and improving representation for constituents, who are more likely to be donors in publicly funded systems than in privately funded systems.²⁵ There are only a handful of robust public financing programs in the United States.²⁶ As a result, studying them is difficult, because the number of observations is, necessarily, very small.²⁷ However, recent studies suggest that public financing programs have had some of the salutary effects promised by reformers.²⁸

For purposes of legitimacy and public buy-in, we will argue that public financing should be implemented by the policymakers at the federal, state, county, and city level. But we also do not concede the possibility that courts could require public financing in response to

²⁵ See generally Nirali Vyas, Chisun Lee & Gregory Clark, *Small Donor Public Financing Could Advance Race and Gender Equity in Congress*, BRENNAN CTR. FOR JUST. (Oct. 15, 2020), <https://www.brennancenter.org/our-work/research-reports/small-donor-public-financing-could-advance-race-and-gender-equity> [<https://perma.cc/B34V-L9FU>].

²⁶ Neil Mahotra, *The Impact of Public Financing on Electoral Competition: Evidence from Arizona and Maine*, 8 ST. POL. & POL'Y Q. 263, 264 (2008) (“Only two states have offered complete public financing of state legislative campaigns for multiple election cycles: Arizona and Maine.”).

²⁷ Robert M. Stern, *Public Financing in the States and Municipalities in Public Financing in American Elections* (Costas Panagopoulos ed., 2011), 62–65.

²⁸ Malhotra, *supra* note 26, at 263; PUBLIC FINANCING IN AMERICAN ELECTIONS, *supra* note 27; Patrick D. Donnan & Graham P. Ramsden, *Public Financing of Legislative Elections: Lessons from Minnesota*, 20 LEGIS. STUD. Q. 351, 351 (1995); Brian J. McCabe & Jennifer A. Heerwig, *Diversifying the Donor Pool: How Did Seattle's Democracy Voucher Program Reshape Participation in Municipal Campaign Finance?*, 18 ELECTION L. J. 323, 323 (2019).

challenges under the Voting Rights Act. Public financing can help equalize opportunities for minority voters and candidates to participate meaningfully in the political process, as is mandated under the Voting Rights Act and the Constitution. Judicial imposition of public financing is a second-best solution; nevertheless, we believe that race-blind jurisprudence in the campaign finance context is untenable in the face of new data on the racial distribution of political contributions. Courts have forced states to do equally—if not more—ambitious reforms, from prison reform to school financing.

This Article proceeds as follows. Part I briefly explains the racial wealth gap and its persistence over time, building the foundation for our argument that a race-blind approach to campaign finance is inapposite. We then demonstrate our empirical findings on white dominance of campaign financing; in Part II, we argue that the Court's deregulation of campaign finance contributes to underrepresentation of racial minorities in the political sphere. Part III explains how deregulation of campaign finance has opened the door to an Equal Protection or Voting Rights Act challenge, though we are clear-eyed about these claims' chances of succeeding in the current moment. Finally, we offer reformers a way through in Part IV, explaining policy options that may ameliorate some of the ways racial inequality in campaign finance disadvantages minorities in the political process.

I

RACIAL INEQUALITY IN POLITICAL PARTICIPATION & REPRESENTATION

Wealth provides individuals the ability to contribute money to political campaigns. However, wealth holding is racially unequal, which leads to unequal opportunity to participate in the campaign finance system.²⁹ In this Part, we first provide historical background on the origins of the racial wealth gap in the United States, which has led to a racial gap in campaign contributing. Second, we explain how campaign contributions affect electoral politics and political representation, based on social science produced in the past twenty years.

If campaign contributions influence political representation, then racial disparities in contributing have consequences for representation. Our final task in this Part—and one of our central contributions of the Article—is to use novel data on the racial identities of cam-

²⁹ Neil Bhutta, Andrew C. Chang & Lisa J. Dettling, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RESRV. SYS. (2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm> [<https://perma.cc/RQ4Z-W SX4>].

campaign donors to analyze these racial disparities and their consequences. We show that the advantages that accrue to donors accrue to white people, who dominate the donor class in a way that far outstrips their share of the American population and electorate. As Overton argues, if state discrimination has widened the racial wealth gap, and campaign contributions affect the quality of minority representation, then campaign finance structures that rely on private money will have representational consequences.³⁰

A. *Historical Background: Disparities in Economic Status and Political Inequality*

The racial distribution of economic status in the United States paints a stark picture of inequality. For instance, the earning gap between Black and white men is as large today as it was before the Civil Rights era,³¹ and Black unemployment has for decades been an order of magnitude higher than the white unemployment rate.³² Across various data sources and methods of measurement, white families also hold significantly more wealth than both Black and Latino families. Social scientists like Thomas Shapiro estimate that the median white family possesses over \$236,000 more wealth than the median Black family—a gap that has tripled since 1984.³³ This empirical fact holds despite increased educational attainment among racial minorities in the post-Civil Rights period.³⁴

In order to draw the connection between racial economic disparities, campaign financing, and public policy, we provide a brief history of how American public policies have contributed to racial differences

³⁰ Overton, *More Equal*, *supra* note 3, at 1002–03.

³¹ See Patrick Bayer & Kerwin Kofi Charles, *Divergent Paths: A New Perspective on Earnings Differences Between Black and White Men Since 1940*, 133 Q.J. ECON. 1459, 1459 (2018) (“[T]he median black man’s relative position in the earnings distribution has remained essentially constant since 1940.”).

³² See generally Robert W. Fairlie & William A. Sundstrom, *The Racial Unemployment Gap in Long-Run Perspective*, 87 AM. ECON. REV. 306 (1997) (tracking the unemployment gap from 1880 to the current day).

³³ THOMAS SHAPIRO, TATIANA MESCHÉDE & SAM OSORO, INST. ON ASSETS & SOC. POL’Y, *THE ROOTS OF THE WIDENING RACIAL WEALTH GAP: EXPLAINING THE BLACK-WHITE ECONOMIC DIVIDE 1* (2013), <https://heller.brandeis.edu/iasp/pdfs/racial-wealth-equity/racial-wealth-gap/roots-widening-racial-wealth-gap.pdf> [<https://perma.cc/C7ZP-GDQ6>]; see also Nick Noel, Duwain Pinder, Shelly Stewart & Jason Wright, *The Economic Impact of Closing the Racial Wealth Gap*, MCKINSEY & CO. (Aug. 13, 2019), <https://www.mckinsey.com/industries/public-sector/our-insights/the-economic-impact-of-closing-the-racial-wealth-gap> [<https://perma.cc/VYZ8-P5NU>] (“The median white family had more than ten times the wealth of the median black family in 2016 In fact, the racial wealth gap between black and white families grew from about \$100,000 in 1992 to \$154,000 in 2016.”).

³⁴ See SHAPIRO ET AL., *supra* note 33, at 5–6.

in economic status that we observe today. As other law of democracy scholars have noted, these differences have underappreciated implications for racial minorities' ability to participate in the political process through financial support of their preferred candidates.³⁵ In the first centuries of the Republic, laws permitting chattel slavery (and Indian removal) facilitated the labor coercion of nonwhites, and a transfer of income and wealth to whites.³⁶ In 1860, eighty-nine percent of Black Americans were enslaved.³⁷ The best evidence from economic historians suggests that by the end of the Civil War, per capita Black income was roughly twenty-five percent of whites'.³⁸

Reconstruction introduced a brief period of relative equal political opportunity and good-faith representation of minorities in America. Black citizens were elected to local and state offices for the first time.³⁹ Democratic inclusion in turn produced social and economic gains for Black people.⁴⁰ Representatives in turn focused on improving the economic conditions of newly emancipated Black Americans.⁴¹ This period witnessed Black families benefitting from public goods for the first time.⁴² Access to government resources during this period of relative political equality had downstream benefits. Investments in schooling, for example, contributed to shrinking Black-white educational and earnings gaps.⁴³

The prosperity of the Reconstruction period dissipated quickly, however. Southern whites reacted to Reconstruction by passing a suite of policies that eliminated Black voting clout and economic

³⁵ See generally Overton, *Voices*, *supra* note 3; Overton, *More Equal*, *supra* note 3.

³⁶ See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1718 (1993) ("Through slavery, race and economic domination were fused.").

³⁷ *The Making of African American Identity: Volume 1, 1500-1865*, NAT'L HUMANS. CTR., <https://nationalhumanitiescenter.org/pds/maai/enlavement/text3/text3read.htm> [<https://perma.cc/XDP5-8F87>].

³⁸ Robert A. Margo, *Obama, Katrina, and the Persistence of Racial Inequality*, 76 J. ECON. HIST. 301, 306 (2016).

³⁹ See Trevon D. Logan, *Do Black Politicians Matter? Evidence from Reconstruction*, 80 J. ECON. HIST. 1, 6 (2020). See generally ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* (Perennial Classics 2014) (1988) (providing a survey of advancements in the period immediately following the Civil War).

⁴⁰ See Logan, *supra* note 39, at 27 (presenting a table showing that Black officeholders during Reconstruction increased per capita county tax revenues).

⁴¹ See *id.*

⁴² See *id.* at 4 (showing that Black politicians generated greater tax revenue and greater literacy for Black males).

⁴³ See Marianne H. Wanamaker, *150 Years of Economic Progress for African American Men: Measuring Outcomes and Sizing Up Roadblocks*, 32 ECON. HIST. DEVELOPING REGIONS 211, 214-15 (2017) (discussing how Black students were "on relatively equal footing to whites in terms of school access").

power.⁴⁴ These “Jim Crow” laws took many forms—including poll taxes, literacy tests, vouchers for good moral character, disqualifications for crimes of moral turpitude, and whites-only primaries.⁴⁵ The Supreme Court essentially endorsed this suppression. *Giles v. Harris*, for example, neutered the Fifteenth Amendment by divesting federal courts of the power to enforce the Amendment’s guarantees.⁴⁶

Jim Crow suppression left Black Americans in positions of extreme, concentrated economic disadvantage.⁴⁷ Black political participation in the South, where most Black Americans lived, plummeted. In some states, Black voting participation hovered in the single digits.⁴⁸ The exclusion of Black Americans from politics facilitated numerous forms of labor repression, such as the passage of vagrancy⁴⁹ and anti-enticement⁵⁰ laws, as well as racial violence that went unad-

⁴⁴ See generally ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877* (Perennial Classics 2014) (1988).

⁴⁵ See Daniel B. Jones, Werner Troesken & Randall Walsh, *Political Participation in a Violent Society: The Impact of Lynching on Voter Turnout in the Post-Reconstruction South*, 129 J. DEV. ECON. 29, 33 (2017) (listing all Jim Crow-style political restrictions and their dates of enactment, by state); see also J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910*, at 38–39 (1974).

⁴⁶ *Giles v. Harris*, 198 U.S. 475 (1903) (holding that federal courts could not hear cases brought against state officials claiming that those officials were conspiring to prevent Black citizens from voting).

⁴⁷ See Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U. CHI. L. REV. 1161, 1161 n.1 (1984) (arguing that the economic legacy of the postbellum South was an outgrowth of political restrictions on Black Americans which can be viewed “as a legal and political system that had economic consequences. The labor laws . . . are examples of economic legislation passed under the umbrella of disenfranchisement”); Wanamaker, *supra* note 43, at 214–15 (describing the eroding socioeconomic wellbeing of Black Americans during the Jim Crow period). See generally Celeste K. Carruthers & Marianne H. Wanamaker, *Separate and Unequal in the Labor Market: Human Capital and the Jim Crow Wage Gap*, 35 J. LAB. ECON. 655 (2017) (describing wage and occupational status gaps in the South using Census data from 1940); William J. Collins & Marianne H. Wanamaker, *African American Intergenerational Economic Mobility Since 1880* (Nat’l Bureau of Econ. Rsch., Working Paper No. 23395, 2021), https://www.nber.org/system/files/working_papers/w23395/w23395.pdf [<https://perma.cc/H6G6-2BFW>] (finding large disparities in economic mobility between Black and white Americans starting in the Jim Crow Era).

⁴⁸ See John Lewis & Archie E. Allen, *Black Voter Registration Efforts in the South*, 48 NOTRE DAME L. 105, 112 (1972) (citing statistics indicating that Black registration across the South was just 40.8%, compared to 63.1% for whites, and in Mississippi, it was just 6.7%, compared to 70.2% for whites).

⁴⁹ See Roback, *supra* note 47, at 1164 (defining vagrancy laws as laws “designed to prevent blacks from being unemployed or otherwise out of the labor force” and explaining that these laws were designed to limit wage competition in the labor force).

⁵⁰ *Id.* at 1166–68 (describing the use of anti-enticement laws to prevent employers from “enticing” a worker away with higher wages, thereby keeping Black labor prices stagnant and low).

dressed by state authorities.⁵¹ These formal and informal institutions kept Black labor cheap for white property owners, and maintained a social order favored overwhelmingly by white citizens.⁵² Political domination by white voters also led to laws segregating Black and white Americans in all dimensions of social life—within restaurants, buses, and railroads.⁵³

In addition to discriminatory laws, Black exclusion from politics shaped government spending on Black communities. Without the political clout to affect the distribution of public goods and social welfare expenditure, the quality of segregated Black schools deteriorated and remained low for decades.⁵⁴ Substandard Black schools limited the opportunities for children and depressed earning opportunities later in life—a fact well established by labor economists today.⁵⁵

Minorities in the North were not shielded from the impact of state-sanctioned discrimination. In the aftermath of the Great Depression, the Roosevelt Administration created the Home Owners' Loan Corporation (HOLC) in 1933 to stabilize rapidly deteriorating housing markets.⁵⁶ The agency lent money to distressed mortgagors in order to “resurrect[] the American mortgage markets.”⁵⁷ Ostensibly to manage the risk involved in home credit provision, though, the agency designated areas that were worthy of government subsidization.⁵⁸ Unsurprisingly, these maps led to the systematic exclusion of

⁵¹ See Jones et al., *supra* note 45, at 41–44 (documenting the occurrences of lynching between 1882 and 1912). See generally STEWART E. TOLNAY & E. M. BECK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882–1930* (1995) (identifying the economic and social factors that led to occurrences of lynching).

⁵² See Roback, *supra* note 47, at 1162 (“The planters wanted to collude to hold down black wages, both to increase their own profits and to solidify the dominant position of the white race.”).

⁵³ See Wanamaker, *supra* note 43, at 215 (“Disenfranchisement efforts hit full steam, and various new laws and regulations served to segregate blacks and whites in every dimension imaginable, including economic ones.”).

⁵⁴ For excellent studies on how Jim Crow political disenfranchisement decreased the quality of schools attended by Black children and caused an economic loss for Black laborers while improving the economic conditions of landowners, see generally Suresh Naidu, *Suffrage, Schooling, and Sorting in the Post-Bellum U.S. South* (Nat'l Bureau of Econ. Rsch., Working Paper No. 18129, 2012), https://www.nber.org/system/files/working_papers/w18129/w18129.pdf [<https://perma.cc/HV44-MTHA>]; Robert A. Margo, *Race Differences in Public School Expenditures: Disfranchisement and School Finance in Louisiana, 1890-1910*, 6 SOC. SCI. HIST. 9 (1982) (focusing on schools).

⁵⁵ See Wanamaker, *supra* note 43, at 215 (explaining that up to fifty percent of the Black-white wage gap by 1940 was attributable to differences in school quality).

⁵⁶ See LOUIS HYMAN, *DEBTOR NATION: THE HISTORY OF AMERICA IN RED INK* 46–47 (2011) (explaining the function of HOLC and its limitations).

⁵⁷ *Id.* at 49.

⁵⁸ CHLOE N. THURSTON, *AT THE BOUNDARIES OF HOMEOWNERSHIP: CREDIT, DISCRIMINATION, AND THE AMERICAN STATE* 48–49 (2018).

people of color from home borrowing—a practice widely known as “redlining.”⁵⁹

In response to this state-sponsored economic subordination, the Civil Rights movement emerged. Individual civil rights were intended not only to confer equal citizenship status but also to improve the economic mobility of Black Americans.⁶⁰ The fruits of this movement included the Civil Rights Act, the Economic Opportunity Acts, and the Voting Rights Act—all of which were part of a broad-based assault on racial and economic inequality.⁶¹ Protecting Black constituents’ voice in government was viewed as essential to ensuring a fair redistribution of resources, as well as equal employment and educational opportunities.⁶² The redistribution, in turn, was viewed as necessary to reverse the condition of the economically and politically disenfranchised⁶³—many of whom were mired in poverty after centuries of slavery, and another eighty years of state-sanctioned discrimination.⁶⁴

To be sure, as Chief Justice Roberts noted in *Shelby County v. Holder*, things did improve in the United States as a product of civil

⁵⁹ See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 64–65 (2017) (describing the mechanisms by which the maps created by HOLC ended up excluding Black families from the benefits HOLC provided).

⁶⁰ See RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 74 (2007) (describing civil rights measures designed to confer mobility on Southern farm workers).

⁶¹ Aneja, *supra* note 9, at 2031–32 (describing the goals of all three laws and their intended impact on ethno-racial disadvantage).

⁶² Steven F. Lawson, *Freedom Then, Freedom Now: The Historiography of the Civil Rights Movement*, 96 AM. HIST. REV. 456, 463 (1991) (discussing how many at the forefront of the civil rights movement, including the “backbone of the Montgomery bus boycott, . . . viewed economic woes and political disfranchisement as deeply intertwined”); see also Interview by Blackside, Inc. with Bayard Rustin, in *Eyes on the Prize: America’s Civil Rights Years (1954-1965)*, WASH. UNIV. LIBRS., FILM & MEDIA ARCHIVE (1979), <http://digital.wustl.edu/e/eop/eopweb/rus0015.0145.091bayardrustin.html> [<https://perma.cc/KWK6-VU4A>] (speaking of how, in order to change conditions of poor unemployment, health, and education for Black people, enfranchised Black people would “have to go into the ballot box”).

⁶³ John Lewis, Chairman, Student Non-Violent Coordinating Comm., Speech at the March on Washington (Aug. 28, 1963), <https://snccdigital.org/inside-sncc/policy-statements/march-washington-speech> [<https://perma.cc/KZ3B-X4W6>] (“We all recognize the fact that if any radical social, political and economic changes are to take place in our society, the people, the masses, must bring them about.”).

⁶⁴ For example, Bayard Rustin urged concerted political action not just for symbolic rights, but for instrumental gains, in order obtain decent jobs, good wages, and opportunities to advance socioeconomically. Rustin believed Black political action was necessary “to destroy an[y] unjust laws and discriminatory practices,” for “total freedom,” and for “equal pay and equal opportunity.” Bayard Rustin, *The Meaning of Birmingham*, LIBERATION, June 1963, <https://www.crmvet.org/info/bhammean.htm> [<https://perma.cc/E33X-NJB2>].

rights policies aimed to empower minorities socially and politically.⁶⁵ The end of legal racial discrimination in voting, employment, public accommodations, and housing led to at least a decade of rapid progress in the economic conditions of racial minorities in America.⁶⁶ Between 1959 and 1969, Black poverty rates decreased from 48% to 30%, while Black family income increased by 53%.⁶⁷ The Black middle class doubled in size from 1960 to 1970, partly in direct response to pressures stemming from civil rights policies.⁶⁸

Civil rights policies alone could not rectify the damage done by centuries of state neglect of minority wellbeing. While the economic gaps between whites and minorities converged temporarily, improvement plateaued starting in the 1980s and continuing through the present day. Racial disparities exist on many measures of substantive wellbeing today. The unemployment rate for Black workers has for decades been double that of white workers,⁶⁹ and these disparities are not explained by racial differences in educational attainment.⁷⁰ Black people are three times more likely to live in poverty as whites—essentially the same rate observed fifty years ago.⁷¹ As alluded to at the beginning of the Section, the racial differences in wealth have been staggeringly large for generations.

Research from economics, political science, and sociology suggests that the persistence of racial inequality is due in part to deliberate policy choices. Minority voters, however, appear powerless to address these social ills through the political process.⁷² Given the somber facts of persistent economic inequality along racial lines,

⁶⁵ 570 U.S. 529, 547–49 (2013).

⁶⁶ See generally Marta Tienda & Leif Jensen, *Poverty and Minorities: A Quarter-Century Profile of Color and Socioeconomic Disadvantage*, in *DIVIDED OPPORTUNITIES: MINORITIES, POVERTY, AND SOCIAL POLICY* 23 (Gary D. Sandefur & Marta Tienda eds., 1988).

⁶⁷ *Id.* at 27, 31.

⁶⁸ See generally BART LANDRY, *THE NEW BLACK MIDDLE CLASS* (1987).

⁶⁹ See Fairlie & Sundstrom, *supra* note 32, at 307 fig.1 (demonstrating the increasing gap in unemployment between Black workers and white workers).

⁷⁰ See MARY C. DALY, BART HOBIN & JOSEPH H. PEDTKE, *FED. RSRV. BANK OF S.F., DISAPPOINTING FACTS ABOUT THE BLACK-WHITE WAGE GAP 4* (Anita Todd ed. 2017), <https://www.frbsf.org/economic-research/publications/economic-letter/2017/september/disappointing-facts-about-black-white-wage-gap> [<https://perma.cc/3WBH-VM2W>] (noting that a “significant portion” of the gap is “unexplained,” and only five percentage points of the gap can be explained through educational attainment).

⁷¹ In 1959, the 55.1% Black poverty rate was over three times that of whites. Michael A. Fletcher, *Fifty Years After March on Washington, Economic Gap Between Blacks, Whites Persists*, *WASH. POST.* (Aug. 28, 2013), <https://www.washingtonpost.com/business/economy/50-years-after-the-march-the-economic-racial-gap-persists/2013/08/27/9081f012-0e66-11e3-8cdd-bcdc09410972> [<https://perma.cc/H566-AA9F>].

⁷² This may be true both because they lack the numerical force, as well as the de facto power that comes with being the economically dominant class.

scholars in the law of democracy should be asking themselves: Why have democratic institutions failed to respond?

One reason may be that the financial barriers to meaningful participation in politics—the type of participation that brings about policy change—are prohibitive for racial minorities. We discuss in the next Section the relationship between democratic structures financed primarily through private money and the responsiveness to minority interests. Black and Latino Americans simply lack the same level of economic resources (e.g., income and wealth) held by white Americans, highlighting a cyclical relationship between poverty and political underrepresentation. The racial wealth gap affects the amount of money that families from different ethnic and racial backgrounds can spend, including in politics. As we explain below, campaign contributors gain better access to elected representatives than noncontributors. So, whereas we now have a formal equality of access to the ballot box,⁷³ equality of access to our representatives is still far off.

B. Theory: Why Contribution Patterns Affect Minority Political Selection and the Quality of Representation

The racial wealth gap described in the previous Section is likely to produce a racial gap in campaign contributions. Such a contributions gap will produce racially unequal political outcomes if campaign contributions buy influence. In this Section, we present evidence from social science research on the multiple ways in which campaign contributions affect (1) who is on the ballot (casting donors as the “selectorate”), (2) who gets access to elected officials, and (3) who gets their desired policies.

First, campaign contributions may influence the composition of the population of candidates. If so, campaign donors serve as a kind of “selectorate,” determining which candidates run viable or successful election campaigns. Contributions may increase the probability that a candidate wins a primary or general election contest, determining the composition of individuals who serve in office. Research by political scientist Adam Bonica shows that early fundraising is key to securing party nomination in the primary election process.⁷⁴ Quantitative studies suggest that early money is an effective way for individuals and

⁷³ See Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (barring all attempts by a state to deny the right to vote on account of race or color). However, there are still plenty of systematic barriers to vote, but that is beyond the scope of this paper.

⁷⁴ Adam Bonica, *Professional Networks, Early Fundraising, and Electoral Success*, 16 ELECTION L.J. 153, 154 (2017).

groups, such as party insiders,⁷⁵ lawyers,⁷⁶ and other interest groups,⁷⁷ to shape the candidate pool. This fundraising can both “clear the field” by scaring off potential high-quality opponents and increase the competitiveness of a favored but otherwise unlikely candidate.

Second, campaign contributions can buy *access* to politicians.⁷⁸ For instance, a pathbreaking study by political scientists Joshua Kalla and David Broockman provides causal evidence that donors are more likely to be granted a meeting with their congressional representative than nondonor constituents.⁷⁹ Access to a politician’s time and attention provides individuals the potential to lobby on policy issues. Such lobbying may directly influence the politician’s opinion on a given policy issue. It also may affect the politician’s agenda, moving the donor’s policy priorities to the top of the list. Access and lobbying are potentially advantageous strategies for donors, as they may be able to influence the “fine print” of legislation and agency rules in ways that

⁷⁵ Hans J.G. Hassell, *Party Control of Party Primaries: Party Influence in Nominations for the US Senate*, 78 J. POL. 75, 81 (2016); HANS J.G. HASSELL, *THE PARTY’S PRIMARY: CONTROL OF CONGRESSIONAL NOMINATIONS* 31 (2018).

⁷⁶ See generally Adam Bonica, *Why Are There So Many Lawyers in Congress?*, 45 LEGIS. STUD. Q. 253 (2020) (finding that the advantage lawyers have in early fundraising explains their success in being elected at higher rates than candidates from other professions).

⁷⁷ See generally Jacob M. Grumbach, *Interest Group Activists and the Polarization of State Legislatures*, 45 LEGIS. STUD. Q. 5 (2020) (finding that the effect interest group activist donations have on the political process is most impactful early in the candidate selection process).

⁷⁸ David Austen-Smith, *Campaign Contributions and Access*, 89 AM. POL. SCI. REV. 566, 575 (1995); Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627, 1645 (1999) (“[M]oney buys access, giving the contributor . . . a greater chance of . . . mak[ing] an argument in favor of the contributor’s position on legislation. . . . [N]on-contributors are much less likely to have [this advantage]. Those buying access are using their campaign expenditures as part of a *legislative strategy* to influence . . . the legislative process.”); Christine Stapleton, *Trump in Palm Beach: For 2020 Fundraising, Mar-a-Lago Is a Money Machine*, PALM BEACH POST (Feb. 21, 2020, 8:55 AM), <https://www.palmbeachpost.com/story/news/politics/elections/2020/02/21/trump-in-palm-beach-for-2020-fundraising-mar-a-lago-is-money-machine/112238262> [<https://perma.cc/8VCK-MRH3>] (“‘Every dollar is important but when I have someone tapping on my shoulder to close a \$100 donation and I’m speaking to a six-figure guy, it’s not good use of our time,’ Trump Jr. said”); see also Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797, 814 (1990) (finding that campaign contributions “mobilize” legislators who are already likely to support an interest group’s positions and that contributions bought the “marginal time, energy, and legislative resources that committee participation requires”).

⁷⁹ See Joshua L. Kalla & David E. Broockman, *Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment*, 60 AM. J. POL. SCI. 545, 552 tbl.1 (2016) (finding that 2.4% of offices arranged a meeting with a constituent whereas 12.5% did so when the attendee was revealed to be a donor).

are obscure to ordinary voters—limiting punishment through elections, or, in the case of business donors, consumer markets.

Finally, common in the mass public is the belief that campaign contributions serve as *quid pro quo* bribes in which a donor contributes to a politician's campaign in exchange for an action such as voting for a particular piece of legislation. Given that bribery is illegal and there are strong incentives to avoid being caught doing it, it is unsurprising that quantitative studies find little clear evidence of *quid pro quo* on legislative votes.⁸⁰ Nevertheless, there is evidence that lobbying organizations use campaign contributions to buy amendments to legislation,⁸¹ which is more difficult to detect than vote buying.

Social scientists have provided additional contextual evidence to the notion that money in politics influences political outcomes, lending greater credence to the notion that contributions buy access and shape the candidate pool. For instance, political scientists Sanford C. Gordon, Catherine Hafer, and Dimitri Landa show that corporate executives whose pay is more tied to firm performance are more likely to contribute to campaigns, suggesting an instrumental influence strategy rather than a taste-based explanation for giving.⁸² Corporations that contribute more tend to be less compliant with regulation.⁸³ Corporations whose business models are more exposed to regulation tend to give more to the members of Congress in committees that oversee relevant regulatory agencies.⁸⁴

⁸⁰ See Gregory Wawro, *A Panel Probit Analysis of Campaign Contributions and Roll-Call Votes*, 45 AM. J. POL. SCI. 563, 576 (2001) (finding that contributions from PACs do not result in decisions by politicians that directly favor PAC preferences). In practical terms, quantitative research designs are unlikely to detect vote buying. It is unlikely that contributions within legal limits would convert, for instance, a member of Congress from supporting to opposing abortion rights. In addition, the set of roll-call votes that appear on legislative agendas are strategic, a fundamental challenge for quantitative analyses of influence on legislative votes.

⁸¹ Amy Melissa McKay, *Buying Amendments? Lobbyists' Campaign Contributions and Microlegislation in the Creation of the Affordable Care Act*, 45 LEGIS. STUD. Q. 327, 350–51 (2019).

⁸² See Sanford C. Gordon, Catherine Hafer & Dimitri Landa, *Consumption or Investment? On Motivations for Political Giving*, 69 J. POL. 1057, 1068–69 (2007) (noting that corporate executives make political donations because of “investment motivations,” such as increasing the likelihood of being able to meet with a politician).

⁸³ See Sanford C. Gordon & Catherine Hafer, *Flexing Muscle: Corporate Political Expenditures as Signals to the Bureaucracy*, 99 AM. POL. SCI. REV. 245, 258 (2005) (finding, for example, that the Nuclear Regulatory Commission (NRC) reduces inspections at nuclear plants whose operators contribute more).

⁸⁴ See Alexander Fourniaies & Andrew B. Hall, *The Exposure Theory of Access: Why Some Firms Seek More Access to Incumbents Than Others* 21–22 (Feb. 29, 2016) (unpublished manuscript), https://www.andrewbenjaminhall.com/Fourniaies_Hall_Regulation.pdf [<https://perma.cc/AH7G-TA29>].

Both the access effect and the selectorate effect of contributions disrupt traditional models of representation, the relationship between the governing and the governed. The *delegate model* of representation posits that politicians should be responsive to dynamics in the opinions of their constituents and continually update their issue positions based on the desires of citizens in their districts.⁸⁵ It is easy to see how unequal political influence via campaign contribution gaps can disrupt this model of representation. Contributions buy access to politicians, giving donors greater opportunity to communicate their preferences to officeholders and potentially even persuade politicians to take actions they would not have taken otherwise.

Indeed, social science evidence suggests that legislators are more responsive to donor opinion than constituent opinion. Specifically, the correlation between donors' policy attitudes and legislative roll-call votes is stronger than the correlation between a legislative district's constituent opinion and the legislator's votes.⁸⁶ Such misalignment may, by itself, give rise to a cognizable claim by reformers. As Nicholas Stephanopoulos has written, the "promotion of *alignment* between voters' policy preferences and their government's policy outputs" is a government interest of "the gravest importance."⁸⁷ Stephanopoulos argues for alignment in policy views between the constituency's median voter and the representative as well as with actual policy outcomes.⁸⁸ Because of the systematic skew in representation that social scientists are able to document, we are a long way from alignment between the constituency and its elected representatives.

In contrast to the delegate model, the *trustee model* of representation suggests that politicians should faithfully pursue the *interests* of their constituents, but with considerable autonomy and opportunity to use expert judgment in doing so.⁸⁹ Going back to the eighteenth-century political philosophy of Edmund Burke, constituents in the trustee model should select representatives who will faithfully pursue

⁸⁵ See generally Donald J. McCrone & James H. Kuklinski, *The Delegate Theory of Representation*, 23 AM. J. POL. SCI. 278 (1979) (explaining the delegate theory of representation and the conditions necessary for it to apply).

⁸⁶ Brandice Canes-Wrone & Nathan Gibson, *Does Money Buy Congressional Love? Individual Donors and Legislative Voting*, 46 CONGRESS & PRESIDENCY 1, 14–15 (2019).

⁸⁷ Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425, 1428 (2015).

⁸⁸ *Id.*

⁸⁹ See Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774), in 2 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 95–96 (3d ed. Boston, Little, Brown, & Co. 1869) (explaining to his electors that he will serve his electors' interests but informed through his own judgment, even if such judgment conflicts with their opinion); Jane Mansbridge, *Clarifying the Concept of Representation*, 105 AM. POL. SCI. REV. 621, 623 (2011).

the best interest of their constituents, even though it may at times conflict with constituent opinion. However, donors' role as a selectorate allows them to systematically shape the characteristics of the trustees.

Racial minority (and women) voters often use descriptive identity as a cue for selecting a representative that will faithfully serve as a trustee to the interests of the group in the polity.⁹⁰ Indeed, a large body of social science evidence shows that descriptive representation matters for substantive representation.⁹¹ Black members of Congress are more likely to sponsor and vote for civil rights bills, and they are more likely to vote for bills favored by Black Americans.⁹² Even in terms of basic communication with constituents, white legislators respond less often to the average communiqué from a Black constituent than from a white constituent, but Black legislators do not.⁹³

⁹⁰ See Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes"*, 61 J. POL. 628, 638 (1999); Andy Baker & Corey Cook, *Representing Black Interests and Promoting Black Culture: The Importance of African American Descriptive Representation in the U.S. House*, 2 DU BOIS REV.: SOC. SCI. RSCH. ON RACE 227, 236 (2005) (explaining that it is "being Black *per se* . . . that drove African American members of Congress to pursue the . . . interests of their racial group" and that this is "strong evidence for the effectiveness of descriptive representation"). See also Celeste M. Montoya, Christina Bejarano, Nadia E. Brown & Sarah Allen Gershon, *The Intersectional Dynamics of Descriptive Representation*, POL. & GENDER: FIRSTVIEW (Mar. 16, 2021), <https://www.cambridge.org/core/journals/politics-and-gender/article/intersectional-dynamics-of-descriptive-representation/E01BC0B489B95DAF714DE3BBC720A6F8> [<https://perma.cc/KHW7-L4HL>] (arguing that descriptive representation has both a substantive and symbolic impact on politics and procedure); Susan A. Banducci, Todd Donovan & Jeffrey A. Karp, *Minority Representation, Empowerment, and Participation*, 66 J. POL. 534 (2004); Melinda S. Jackson, *Priming the Sleeping Giant: The Dynamics of Latino Political Identity and Vote Choice*, 32 POL. PSYCH. 691 (2011) (analyzing the impact of group identity on the preferences of Latino voters); Rene R. Rocha, Caroline J. Tolbert, Daniel C. Bowen & Christopher J. Clark, *Race and Turnout: Does Descriptive Representation in State Legislatures Increase Minority Voting?*, 63 POL. RSCH. Q. 890 (2010) (finding increased participation among Black and Latino voters in states with high rates of descriptive representation in their legislatures).

⁹¹ See, e.g., Daniel M. Butler & David E. Broockman, *Do Politicians Racially Discriminate Against Constituents? A Field Experiment on State Legislators*, 55 AM. J. POL. SCI. 463 (2011) (observing differential treatment of constituent requests to legislators based on the racial identity of the legislator and the putative racial identity of the requesting constituent); CHRISTIAN R. GROSE, *CONGRESS IN BLACK AND WHITE: RACE AND REPRESENTATION IN WASHINGTON AND AT HOME* 8 (2011) (concluding that "descriptive representation yields substantive representation in Congress").

⁹² See Grose, *supra* note 91, at 83 (noting that Black legislators are five percent more pro-civil rights than non-Black legislators); Michael D. Minta, *Legislative Oversight and the Substantive Representation of Black and Latino Interests in Congress*, 34 LEGIS. STUD. Q. 193, 202–04 (2009); see also Robert R. Preuhs, *The Conditional Effects of Minority Descriptive Representation: Black Legislators and Policy Influence in the American States*, 68 J. POLITICS 585, 586 (2006) (noting that the lack of minority representation in Congress has so far prevented comprehensive studies on the matter).

⁹³ See Butler & Broockman, *supra* note 91, at 471.

However, as a disproportionately small share of donors, racial minorities have little ability to act as a selectorate.

In summary, campaign contributions can produce *de facto* quid pro quo arrangements, but they are especially important for buying *access* to officeholders and allowing donors to be a “selectorate” that shapes the pool of viable candidates early in the political process. Since contributions facilitate these forms of influence over candidates and officeholders, campaign finance deregulation poses profound challenges to traditional models of representation if racial minorities are excluded from this form of participation. In the next Section, we present our results on the racial makeup of campaign contributors in American politics.

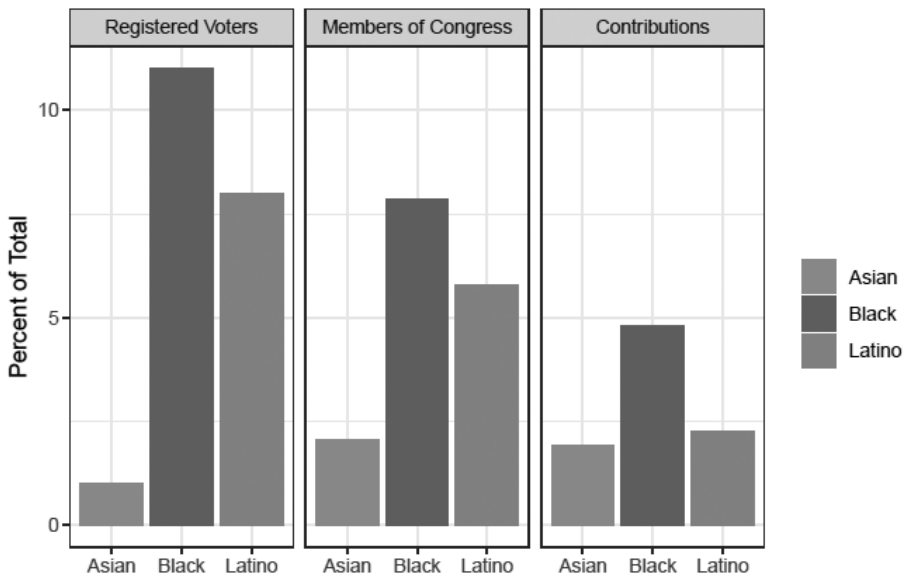
C. *The Campaign Finance Participation Gap*

1. *An Overview of the “Racial Contributions Gap”: Static and Dynamic Evidence*

We now turn to the main results of our analysis of the racial distribution of campaign contributions. Below, Figure 2 shows the racial makeup of important political actors. In each panel of the figure, the light gray bar represents the percent of the group that is Asian American, while the darkest gray and medium gray bars represent the percent of the group that is Black or Latino, respectively. In each group, the remaining share is white. We do not display bars for the white percentages, because they would render the Asian, Black, and Latino bars mostly illegible.

The leftmost panel shows the racial composition of registered voters in the United States (as of 2012, given that this is the last year covered in our campaign finance data, though later we analyze the racial composition of voters in many elections over time). The middle panel shows the racial composition of the 113th Congress. In the rightmost panel, we show the percent of campaign contributions that come from Asian, Black, and Latino donors.

FIGURE 2. BY-RACE DISTRIBUTION OF POLITICAL ACTORS⁹⁴



As is immediately apparent, racial minorities make up larger proportions of the U.S. electorate and even of members of Congress than they do among campaign contributions. Registered voters are about 1% Asian, 11% Black, and 8% Latino. Members of the 113th Congress were 2% Asian, 8% Black, and 6% Latino. Congress has since diversified further. Nearly one-fourth of members of the 116th Congress (2019–2020) are racial minorities.⁹⁵

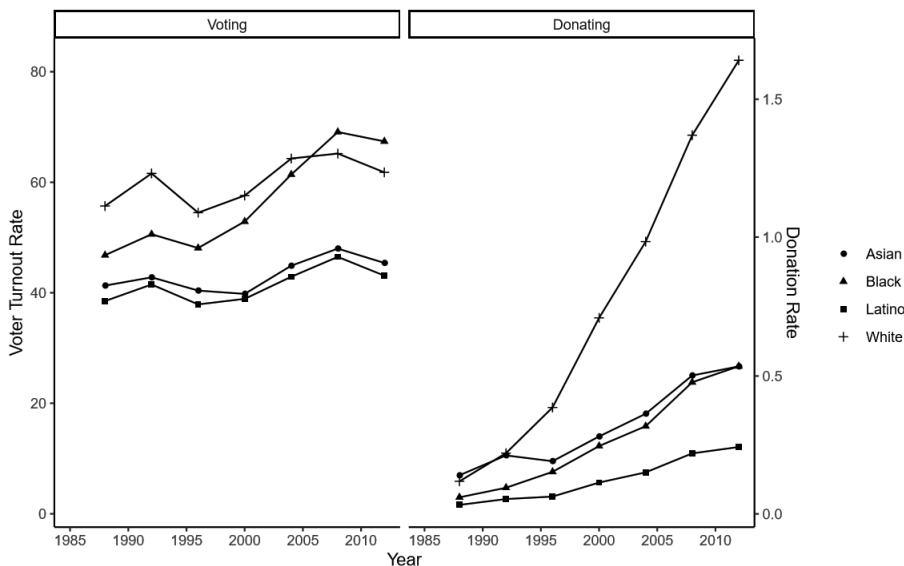
Although racial minorities are still underrepresented among U.S. voters and members of Congress compared to their shares of the overall adult citizen population, campaign contributions are even more unrepresentative. We estimate that 91% of individual campaign contributions to state and federal candidates between 1980 and 2012 came from non-Latino white donors, 1.92% came from Asian American donors, 4.79% from Black donors, and 2.26% from Latino donors. Until now, there has been relatively little population-level evidence of the enormous bias in the composition of campaign contributions. Given our discussion of theoretical expectations in Section I.B, this racially skewed distribution has potentially powerful implications

⁹⁴ Contributions (right panel) include all individual hard money contributions to candidates for U.S. House, U.S. Senate, U.S. President, governor, and state legislator (1980–2012). Member of Congress demographics are from the 113th Congress.

⁹⁵ Katherine Schaeffer, *Racial, Ethnic Diversity Increases Yet Again with the 117th Congress*, PEW RSCH. CTR. (Jan. 28, 2021), <https://www.pewresearch.org/fact-tank/2021/01/28/racial-ethnic-diversity-increases-yet-again-with-the-117th-congress> [<https://perma.cc/9F73-F9K5>].

for the exercise of minority political rights and minorities' representation in government.⁹⁶

FIGURE 3. POLITICAL PARTICIPATION RATES—VOTING AND CONTRIBUTING⁹⁷



In Figure 3 above, we further highlight the scale of the racial gap in campaign finance, comparing voting and contributing. Figure 3 estimates participation rates by race over time. The participation rate is the percent of a racial group that engages in a form of participation—voting or contributing money—in a given election cycle. The denominator for a participation rate is the number of people of each racial group in the voting age public. Note that because donating money to campaigns is a much less common activity than voting, the y-axis scales differ for voting and donating.

The left panel of Figure 3 is a familiar graph of voter turnout rates by racial group over time. Of note is the substantial increase in African American voter turnout through the 1990s and 2000s, which by 2008 surpasses the white turnout rate. Voter turnout among Asian, Latino, and white Americans also increases slightly during this period. Overall, the white-minority gap in turnout declines over these years,

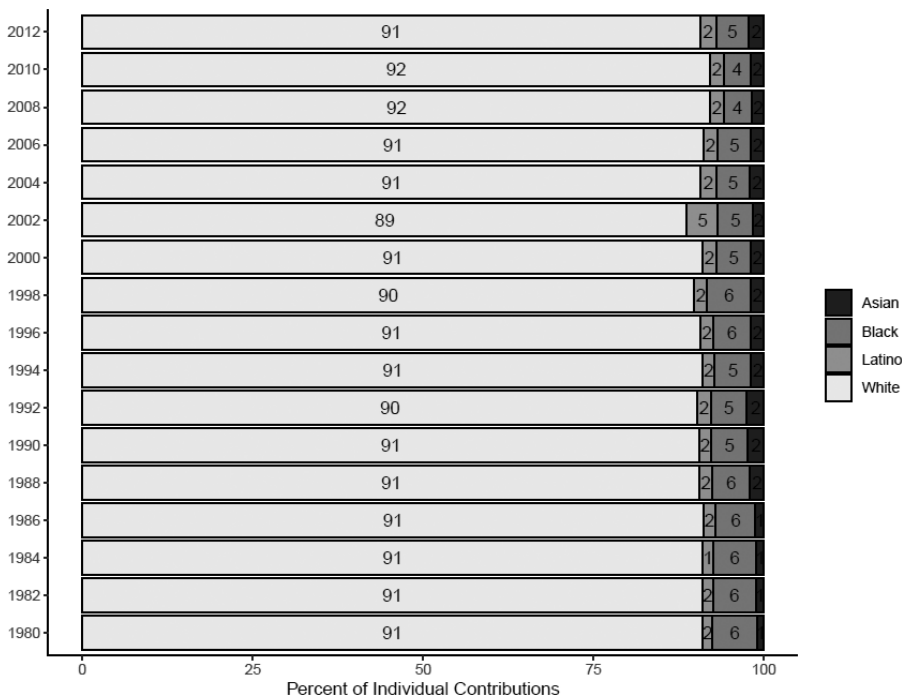
⁹⁶ See *supra* Section I.B.

⁹⁷ Voter turnout rates are from the CPS. Voter Supplement. Donation rates, the percent of each racial group that makes campaign contributions, are based on name and geographic racial predictions of all donors to candidates for U.S. House, U.S. Senate, U.S. President, governor, and state legislator, with census counts of voting age public as the denominator. Turnout rate and donate rate are in percentage points [0, 100].

driven in part by increased Asian and Latino turnout, but mostly from increased Black turnout.

By contrast, the right panel, which focuses on the campaign contribution rate, shows a very different trend. In the right panel we see all racial groups increase their contribution rates since the 1980s and 1990s, but at very different paces. The Asian, Black, and Latino contribution rates increase somewhat; by 2012, more than 1 in 200 (0.5%) Asian and Black American adults contributes to a campaign. But the increased contribution rate among white Americans dwarfs all others. The white contribution rate shows a staggering fourteen-fold increase between 1988 and 2012.

FIGURE 4. PROPORTION OF INDIVIDUAL CONTRIBUTIONS BY RACE, 1980–2012⁹⁸



Our analysis of rates of participation in contributing shows increased contributing from individuals of all races over time, but a larger increase for white individuals. Here we present analysis that shows more clearly the percent of contributions from each racial

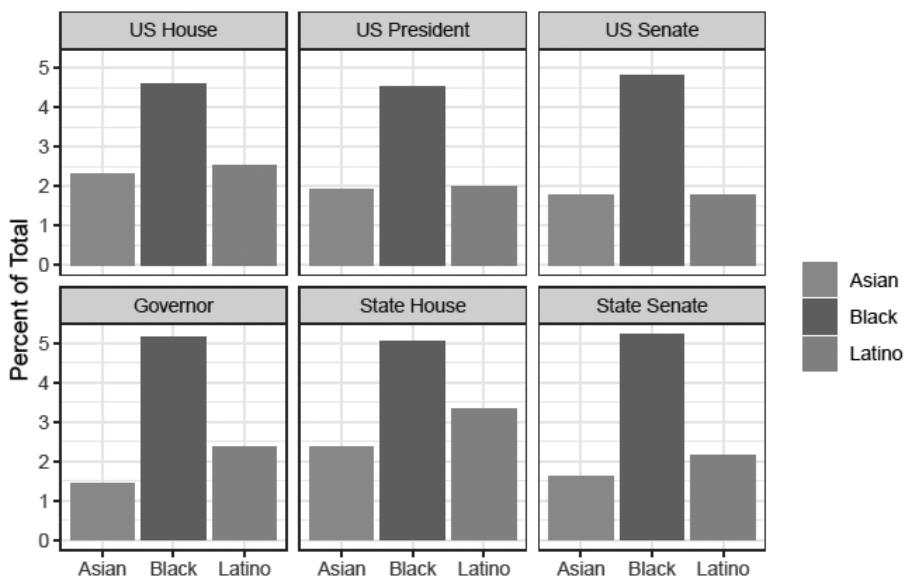
⁹⁸ Each year, white people comprise between eighty-nine and ninety-one percent of individual contributions; other racial groups are severely under-represented among the donor pool.

group by election year. Figure 4 demonstrates a mostly static trend over time: Contributions from white donors comprise about ninety-one percent of all individual contributions in all years from 1980 through 2012.

2. *The Racial Composition of Money Across Election Types*

Does the racial makeup of contributions vary for candidates running for different offices? Figure 5 suggests that the answer is mostly no. There are some differences, such as lower Asian contributing to gubernatorial than U.S. House races, and greater Latino contributing to state lower house candidates than presidential candidates. But overall, the differences are minor in context. The overall share of contributions from donors of color is typically between nine and ten percent for all of these offices. Like the overall racial distribution of contributions, there is little change over time within these groups.⁹⁹

FIGURE 5. LITTLE DIFFERENCE IN RACIAL COMPOSITION OF MONEY BY TYPE OF ELECTION¹⁰⁰



⁹⁹ It is also notable that we do not observe an “Obama effect” on the share of Black contributions. While in the data we see that the total amount from Black donors increases in 2008 and 2012, the total amount from other racial groups increases as well. The “Obama effect” on voting is clearer; Black voters became a larger share of the electorate in 2008 and 2012 than in other presidential elections in part due to the presence of Barack Obama on the general election ballot. However, we find no evidence of this trend in contributions.

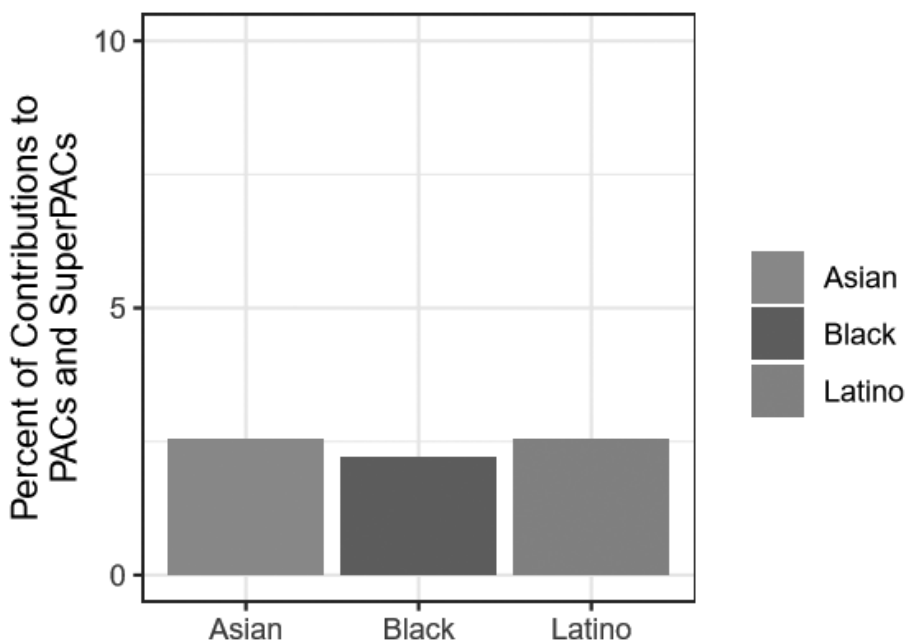
¹⁰⁰ We observe similar racial distributions of contributions across election types.

This finding that the racial makeup of contributions does not vary much by election again underscores the importance of the racial wealth gap. Rather than social and political factors that might vary by election type, such as media coverage, it appears that the racial distribution of donors is shaped by structural factors like the wealth gap. In the next Section, we turn to the racial distribution of contributions to political organizations.

3. Underrepresentation in Contributions to Outside Groups

To this point we have focused on contributions to candidates. However, a lot of money in campaigns comes from so-called “outside groups.” Minority money is even less likely to appear in contributions to outside groups. Nearly 93% of individual contributions to PACs and SuperPACs in 2014 were from white donors. Only 2.5, 2.2, and 2.6% of contributions came from Asian, Black, and Latino donors, respectively.

FIGURE 6. RACE AND CONTRIBUTIONS TO PACs AND SUPERPACs¹⁰¹



¹⁰¹ Data are from 2014 contributions to political action committees. As with other figures, the missing category here is white. Donations from white people comprise 92.7% of individual contributions to PACs and SuperPACs.

This analysis shown in Figure 6 suggests that outside groups do not substitute for racially unequal contributions to candidates. In fact, they show greater racial inequality than traditional hard-money contributions to candidates. Although the FEC data do not comprise a complete record of all money given to SuperPACs (e.g., via 501(c)(4) organizations), this evidence suggests that a deregulatory stance toward contributions to groups is unhelpful for racial minorities.

This Section establishes that campaign contributions are a racially unequal form of political participation. Campaign contributions in the aggregate, as well as individual contributors themselves, are overwhelmingly white—more racially homogenous than the U.S. electorate or members of Congress. In contrast to the electorate, the racial composition of money in politics has not changed substantially since the 1980s and does not vary much by election type. In the next Section, we provide additional analysis of the representational consequences of racial inequality in campaign finance.

D. The Participation Gap Worsens Minority Representation

Campaign contributions are an important form of political participation, but, as we established in the last Section, they are a racially unequal one. In this Section, we present results from three analyses that show that this racial inequality in contributions affects representation. First, we show that the racial composition of campaign contributions is correlated with the racial composition of candidates who run in U.S. House elections. Second, we show that public opinion on major policy issues varies significantly across racial groups. Finally, we show that the racial composition of contributions is associated with ideological representation, with larger shares of Black or Latino money producing more liberal congressional representation.

1. Campaign Finance Disparities and Political Selection

Expensive elections are an obstacle for Black and Latino candidates. Specifically, more money in congressional elections reduces the likelihood that Black and, to a lesser extent, Latino candidates are successfully able to become viable. To this end, we estimate a linear probability model using ordinary least squares (OLS) regressions of the following form:

$$1(\text{Candidate} = \text{Black/White})_{dt} = \beta_1 \text{TotalContributions}_{dt} + \gamma X_{dt} + \delta_d + \delta_t + \varepsilon_{dt}$$

In this empirical model, *TotalContributions* is the total volume of campaign contributions given to congressional candidates in Democratic primary elections, in millions of dollars. We focus on

Democratic primaries, since the vast majority of minority congressional candidates seek the nomination of the Democratic rather than the Republican Party.¹⁰² $1(Candidate = Black/White)$ is an indicator variable that tells us whether the candidate who emerges from the primary (and thus contests in the general election) is either white or Black.

In this simple associational regression, β_1 in essence tells us the association between the level of total spending at the stage of the election where a candidate is chosen (the primary election stage), and the likelihood that the candidate chosen is a racial minority. X indicates various control variables that may be correlated with the likelihood that minority candidates run, or are of a particular quality (i.e., factors that affect political selection). Those control variables include the fraction of union workers, the fraction of voters over age sixty-five, the fraction of unemployed workers, the fraction of public sector workers, and the fraction of blue-collar workers in a given district. δ_d are district fixed effects and δ_t are cycle fixed effects to account for time-invariant place characteristics as well as time-varying nationwide confounders, respectively.

TABLE 1. TOTAL PRIMARY CONTRIBUTIONS ARE ASSOCIATED WITH FEWER MINORITY CANDIDATES¹⁰³

Race	Black			White		
	None	District	District & Cycle	None	District	District & Cycle
Controls						
Change in Likelihood per Million Dollars	-0.0505*	-0.0382*	-0.0281*	0.0519*	0.0430*	0.0283*
Standard Error	0.0176	0.0173	0.0108	0.0237	0.0237	0.0161
<i>N</i>	6399	6399	6399	6399	6399	6399
<i>R</i> ²	0.0117	0.248	0.592	0.0289	0.176	0.551

¹⁰² See Ebonya Washington, *How Black Candidates Affect Voter Turnout*, 121 Q.J. ECON. 973, 981 (2006) (noting that Black Americans vote for the Democratic candidate seventy to ninety percent of the time); see also Sarah Bryner, *Racial and Gender Diversity in the 117th Congress*, OPEN SECRETS (June 30, 2020), <https://www.opensecrets.org/news/reports/gender-and-race-2020> [<https://perma.cc/G52B-9BVM>] (finding that 83 of 116 BIPOC congressional candidates in the 2020 election ran for the Democratic Party, while only 33 of 116 BIPOC congressional candidates ran for the Republican Party in the same election).

¹⁰³ This table presents results from six separate regressions, one per column. In short, the table summarizes the association between the level of total campaign contributions in a primary election and the likelihood of a minority candidate emerging as the general election candidate. Each column reports estimates of a linear probability model relating

In essence, this empirical test summarizes the relationship between total money spent in the party candidate selection phase, and the likelihood that the candidate is a minority. As we see in Table 1, large sums of campaign contributions are *strongly* negatively associated with the likelihood that the Democratic Party's chosen congressional candidate will be Black. Our baseline estimate of this association is presented in column 1, and the punchline is clear: For every additional million dollars donated in a primary election contest, the likelihood that candidate is a Black American is reduced by five percentage points. This result is statistically significant at the one percent level. In column 2, we observe that this result is quite robust—the story is largely the same when we control for both district-level controls. Finally, in our most “demanding” specification, presented in column 3, we control fixed unobserved differences across congressional districts (within a given election cycle) using district and cycle fixed effects. Even with this more demanding model, the story is the same: More money is associated with a lower likelihood of having a Black candidate compete for congressional office.

In columns 4–6, we repeat the exercise for white candidates. As one might expect, the results are largely symmetric—greater levels of campaign contributions are strongly associated with the increased likelihood of white candidates winning Democratic primaries.

A potential confounder for the finding that greater spending leads to a lower likelihood that a Black candidate is elected is the fact that Black communities tend to be poorer than white communities, as well as geographically concentrated. Indeed, residential segregation is one of the reasons that majority-minority districts are one of the primary remedies to Voting Rights Act section 2 vote dilution violations. As such, due to racial polarization, heavily minority districts may tend to nominate (and elect) minority candidates given the structure of these districts. These heavily Black districts are relatively poor and also extremely safe for Black candidates by design. In short, districting to comply with section 2 may tend to reduce the total contributions that Black candidates receive on average.

We believe that districting that leads to poorer districts is unlikely to be the only explanation for our results for a few reasons. First, the inclusion of district-redistricting cycle fixed effects accounts for fixed differences in the amount of money that candidates are able to raise within a district. Second, and to address this concern head-on, we drop

the level of primary campaign contributions to an indicator variable for whether the primary winner was a particular race (indicated in the first row). An observation is a district-year. Standard errors are in parentheses and are clustered by state. + and * denote statistical significance at the ten and five percent levels, respectively.

majority-minority districts from our analysis in Table 2 below. As we can see, the results are qualitatively unchanged.

TABLE 2. TOTAL PRIMARY CONTRIBUTIONS ARE ASSOCIATED WITH FEWER MINORITY CANDIDATES, EXCLUDING MAJORITY-MINORITY DISTRICTS¹⁰⁴

Race	Black			White		
	None	District	District & Cycle	None	District	District & Cycle
Controls						
Change in Likelihood per Million Dollars	-0.0354*	-0.0367*	-0.0288*	0.0364	0.0405*	0.0290*
Standard Error	0.0165	0.0171	0.0111	0.0234	0.0235	0.0164
<i>N</i>	6068	6068	6047	6068	6068	6047
<i>R</i> ²	0.0123	0.129	0.533	0.0285	0.0948	0.511

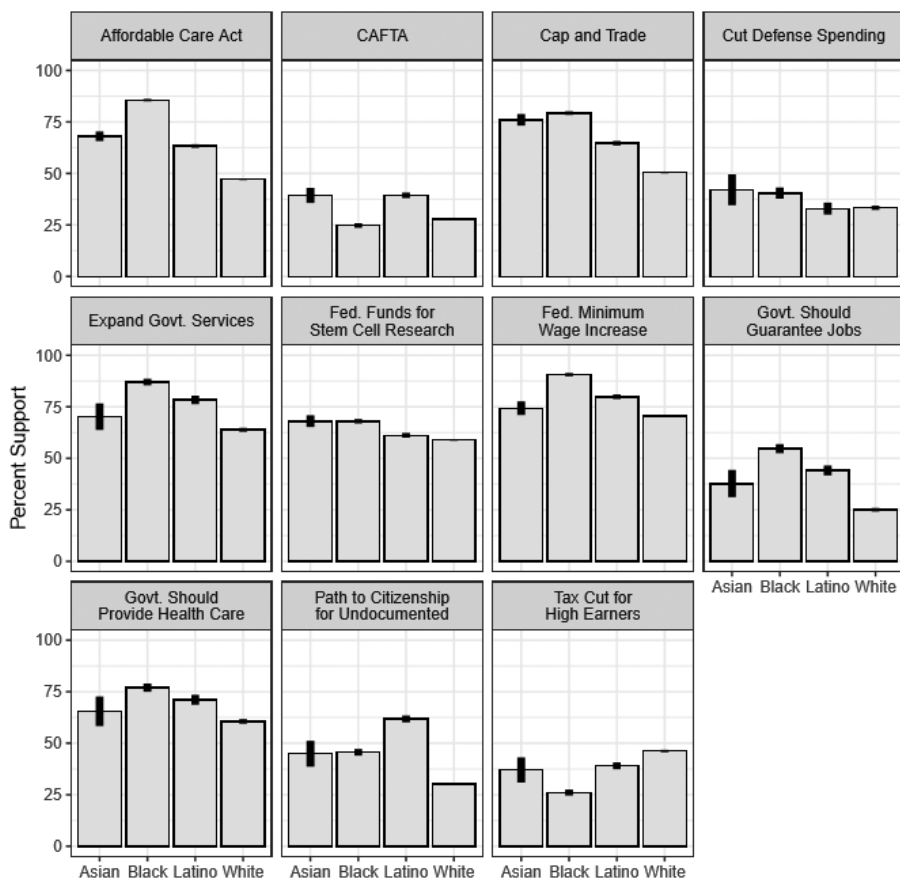
2. Campaign Finance Disparities and Substantive Representation

Racial minorities cannot count on white donors for policy representation because there are large gaps in policy opinions across racial groups. To show this, Figure 7 presents support for significant congressional bills by racial group. Of note, the difference in policy support from Black and white Americans is statistically significant ($p < 0.05$) on every issue. Christopher Elmendorf and Douglas Spencer also show that large racial differences in opinion exist within congressional districts.¹⁰⁵

¹⁰⁴ This table presents results from six separate regressions, one per column. In short, the table summarizes the association between the level of total campaign contributions in a primary election and the likelihood of a minority candidate emerging as the general election candidate. Each column reports estimates of a linear probability model relating the level of primary campaign contributions to an indicator variable for whether the primary winner was a particular race (indicated in the first row). An observation is a district-year. Standard errors are in parentheses and are clustered by state. + and * denote statistical significance at the one and five percent levels, respectively.

¹⁰⁵ See Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2209–10 (2015) (showing significant gaps in ideology between racial groups, particularly between white and minority citizens).

FIGURE 7. SIGNIFICANT DIFFERENCES IN PUBLIC OPINION BY RACE¹⁰⁶



Finally, we investigate the effects of the racial composition of contributions on the behavior of members of Congress. The results of cross-sectional and difference-in-differences analyses suggest that elections with greater shares of Black contributions lead to more liberal representation in Congress, which, recalling our analysis of public opinion, is more congruent with the political attitudes of Black constituents. To measure legislative ideology in Congress, we use DW-NOMINATE scores, which are based on statistical models of legisla-

¹⁰⁶ Policy attitudes vary significantly by race. Plot shows average support for policies by racial group, along with ninety-five percent confidence intervals. Government job guarantee, government healthcare, and expanded government services questions are from the American National Election Study (1992–2016). AM. NAT'L ELECTION STUD., <https://www.electionstudies.org> [<https://perma.cc/438D-79BG>]. All other questions are from the Cooperative Election Study (2006–2014). *Cooperative Election Study*, HARV. UNIV. <https://cces.gov.harvard.edu/data> [<https://perma.cc/N4GW-LVTU>].

tors' roll-call votes (higher scores indicate greater conservatism, and lower scores greater liberalism).¹⁰⁷

TABLE 3.1. GREATER SHARE OF BLACK CONTRIBUTIONS IN PRIMARY ELECTIONS IS ASSOCIATED WITH MORE LIBERAL REPRESENTATION¹⁰⁸

Controls	None	District	District & Cycle FE
Change in ideology per unit increase in Black contributions in primary elections	-1.515*	-0.463+	-0.405+
Standard Error	0.251	0.236	0.241
<i>N</i>	1866	1866	1839
<i>R</i> ²	0.057	0.773	0.775

TABLE 3.2. GREATER SHARE OF BLACK CONTRIBUTIONS IN GENERAL ELECTIONS IS ASSOCIATED WITH MORE LIBERAL REPRESENTATION

Controls	None	District	District & Cycle FE
Change in ideology per unit increase in Black contributions in general elections	-1.334*	-0.365+	-0.315+
Standard Error	0.209	0.189	0.183
<i>N</i>	1856	1856	1829
<i>R</i> ²	0.054	0.773	0.775

We estimate that a ten percentage-point increase in Black contributions increases the liberalism of the congressional representative by between three and fifteen percent of a standard deviation, a substantial amount.¹⁰⁹ To give a sense of the magnitude, this is about eighteen percent of the gap between the median Democratic and median

¹⁰⁷ See Jeffrey B. Lewis, Keith Poole, Howard Rosenthal, Adam Boche, Aaron Rudkin & Luke Sonnet, *Voteview: Congressional Roll-Call Votes Database*, VOTEVIEW, <https://voteview.com> [<https://perma.cc/D8ZB-SCT8>] (creating a database of congressional member ideology based on DW-NOMINATE scores).

¹⁰⁸ As the share of Black contributions increases, the liberalism of elected officials increases (DW-NOMINATE score is more negative). As we explain in the text, these are large differences. + $p < 0.10$, * $p < 0.05$.

¹⁰⁹ In Tables 3.1 and 3.2, the coefficient represents a one-unit shift in the proportion of Black contributions, i.e., the effect of moving from 0% Black contributions to 100%. In our discussion here, we write in terms of ten percentage-point changes in Black contributions, which means dividing the coefficients in Table 3.1 and 3.2 by ten.

Republican U.S. Representative in the 116th Congress.¹¹⁰ More specifically, the difference-in-differences results in columns 2 and 3 in Table 3 show that, all else equal, a ten percentage-point increase in Black contribution share in *primary* elections is associated with an increase in the liberalism of the representative by between four and five percent of a standard deviation. We find similar results for *general* elections, with effects ranging between three and thirteen percent of a standard deviation more liberal for each ten percentage-point increase in Black contributions. Columns 5 and 6 of Table 3 show that a ten percentage-point increase in Black contribution share in the general election period increases the representative's liberalism by between three and four percent of a standard deviation.

This Section presented evidence that racial minorities are under-represented in campaign finance. The racial gaps in contributions exist in every kind of electoral race, and the gaps have not changed appreciably since the 1980s. While the ranks of the American electorate and elected officials have diversified significantly, campaign contributions remain white-dominated. Social science evidence suggests that campaign contributions influence political outcomes, so this racial inequality in contributions is likely to produce racial inequality in politics more broadly.

Our subsequent analyses showed more specifically the relationship between the racial contours of campaign finance and representation. More expensive elections predict fewer racial minority candidates, limiting descriptive representation for Americans of color. However, where contributions from Black donors are higher, we observe more liberal congressional representation, which is more in line with the political attitudes of Black Americans. These findings suggest a role for campaign finance policy and litigation in addressing issues of representation and racial equity in the political system.

In the next Part, we explain how the Court's aggressive interpretation of the First Amendment has exacerbated the problems we have described here. We then discuss solutions, both in terms of policies elected officials and reformers can create today, and court challenges that litigants could bring to help hurry them along.

¹¹⁰ See Jeffrey B. Lewis, Keith Poole, Howard Rosenthal, Adam Boche, Aaron Rudkin & Luke Sonnet, *Parties*, VOTEVIEW, <https://voteview.com/parties/all> [<https://perma.cc/JYX3-CZW4>]; see also NOLAN McCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 33 (2016) (explaining that even senators from the same party may have sharply different NOMINATE scores).

II

THE PLUTOCRATIC IMPLICATIONS OF CAMPAIGN FINANCE JURISPRUDENCE

So far, we have argued that the racial wealth gap has led to racial inequality in campaign contributing, which, in turn, biases political representation against racial minorities. In this Part, we argue that the Court's conceptualization of campaign spending as "speech" has contributed to this representational bias against racial minorities. And we highlight two proposals that the Court may use to course correct: the alignment interest and the *McCutcheon* majority's right to participate.

A. Narrow "Compelling" Government Interests

Campaign financing has only been "constitutionalized" since 1976, the year that *Buckley v. Valeo* upheld the Federal Elections Campaign Act (FECA). FECA is the comprehensive statute passed by Congress in the wake of the Watergate scandal to rein in political spending and facilitate disclosure and enforcement.¹¹¹ The *Buckley* Court, in a lengthy per curiam opinion, ruled that limits on political expenditures violated donors' right to free speech under the First Amendment and that political contributions should be analyzed as First Amendment protected association.¹¹² In the intervening forty-five years, plaintiffs have used the *Buckley* rationale to convince the courts to find many campaign finance regulations unconstitutional. These include regulations facilitating public financing,¹¹³ requirements that corporations spend from segregated funds rather than directly from their treasuries,¹¹⁴ limits on independent expenditures generally¹¹⁵ and by corporations,¹¹⁶ aggregate contribution limits for those able to spend more than \$123,200 on federal campaigns,¹¹⁷ and others.

¹¹¹ Trevor Potter, *Money, Politics, and the Crippling of the FEC: A Symposium on the Federal Election Commission's Arguable Inability to Effectively Regulate Money in American Elections*, 69 ADMIN. L. REV. 447, 452 (2017) (noting that the FECA created the FEC as an independent agency in the wake of Watergate in charge of administration and enforcement of campaign funding).

¹¹² *Buckley v. Valeo*, 424 U.S. 1, 14–23 (1976) (per curiam).

¹¹³ See *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 727–28 (2011) (finding that regulations on public financing burden protected political speech under the First Amendment); *Davis v. FEC*, 554 U.S. 724, 743–44 (2008) (finding that campaign finance regulations aimed at balancing contributions received by competing candidates burden the First Amendment standard under *Buckley*).

¹¹⁴ See *Citizens United v. FEC*, 558 U.S. 310, 321 (2010).

¹¹⁵ See *Buckley*, 424 U.S. at 143 (finding limitations on campaign and independent expenditures by individuals "constitutionally infirm").

¹¹⁶ See *SpeechNow.org v. FEC*, 599 F.3d 686, 693–94 (D.C. Cir. 2010) (applying the *Buckley* standard to limits on corporate political contributions).

¹¹⁷ See *McCutcheon v. FEC*, 572 U.S. 185, 194 (2014) (plurality opinion).

The Court has regularly—and explicitly—rejected “leveling the playing field” as a sufficiently compelling government interest to limit the “speech” of donors or candidates.¹¹⁸ But of course, deregulation facilitates increased inequality for all the reasons we have explained as well as the reality of who exactly benefits from deregulation. Campaign contributors who give over \$200 in federal races (the disclosure threshold) comprise less than one percent of the U.S. population.¹¹⁹ Only 0.05% of U.S. adults—that is 1 in 2,000—contribute the maximum to *any* federal candidate. The contributors advantaged by these deregulatory decisions—those able to donate through corporate forms, or in excess of statutory maximums to outside groups, or contribute the maximum to multiple candidates—are far rarer than the one percent who donate above the \$200 disclosure threshold. The *Buckley* decision, and all subsequent decisions deregulating campaign finance, therefore, takes the lid off of the amount of “speech” and “associating” that people can do in our elections, enabling the wealthy to “speak” and “associate” as much as they choose to given their

¹¹⁸ See *Buckley*, 424 U.S. at 17–18 (noting that a government interest in “equalizing the relative ability of all voters to effect electoral outcomes” is not sufficient to uphold the expenditure limitations at issue); *McCutcheon*, 572 U.S. at 207 (plurality opinion) (“We have consistently rejected attempts to suppress campaign speech based on other legislative objectives. No matter how desirable it may seem, it is not an acceptable governmental objective to ‘level the playing field’ or to ‘level electoral opportunities,’ or to ‘equaliz[e] the financial resources of candidates.’” (citations omitted) (first quoting *Bennett*, 564 U.S. at 748–50; then quoting *Davis*, 564 U.S. at 741–42; and then quoting *Buckley*, 424 U.S. at 56)); see also *Bennett*, 564 U.S. at 749–50 (“We have repeatedly rejected . . . a compelling state interest in ‘leveling the playing field’ that can justify undue burdens on political speech. . . . ‘Leveling electoral opportunities means making and implementing judgments about which strengths should . . . contribute to the outcome of an election,’—a dangerous enterprise . . . that cannot justify burdening protected speech.” (citations omitted) (quoting *Davis*, 554 U.S. at 749–50)).

¹¹⁹ The number is slightly higher when we take into account contributors below \$200 (the disclosure threshold), who we can observe when they donate via intermediaries like ActBlue or RedWin. The closest analysis of these “hidden donors” we have is R. Michael Alvarez, Jonathan N. Katz & Seo-young Silvia Kim, *Hidden Donors: The Censoring Problem in U.S. Federal Campaign Finance Data*, 19 ELECTION L.J. 1, 5 (2020), which measures not donors but the percent of money received that is not itemized (because it is below \$200). In recent elections, unitemized contributions constituted around twenty-two percent of contributions to House Democrats and fourteen percent to House Republicans. See *supra* Table 1.

resources.¹²⁰ As our analysis has found, these donors are not only wealthier; they are much more likely to be white.¹²¹

A jurisprudence that privileges (mega)donors over nondonors would not matter if donations had no effect on (1) who gets elected (the selectorate); (2) who has access to elected officials; and (3) whose preferred policies are implemented (i.e., representation). Privileging donors over nondonors would also not matter if both groups' political interests and desires were the same. Unfortunately, none of this is true.¹²²

The Court has had little to say about the selectorate or representation. However, it has repeatedly refused to recognize the government's interest in preventing unequal access to elected officials as sufficiently compelling to uphold campaign finance regulations. In its two major statements on campaign finance and corruption in recent years—*Citizens United v. FEC* and *McCutcheon v. FEC*—the Court has emphasized that “ingratiation and access . . . are not corruption,” so the Court will reject regulations aimed at limiting ingratiation or access.¹²³

¹²⁰ See, e.g., Raskin & Bonifaz, *supra* note 2, at 294 (noting that citizens earning more than \$125,000 a year (2.7% of the population) are ten times more likely to make contributions than those making under \$15,000 a year (17.7% of the population)). That remains true today, and as the rich get richer and inequality in this country widens, the gap between the donor and nondonor classes has widened as well. Only about 11% of American adults have donated to a political campaign in recent decades, and only 0.5% have contributed \$200 or more. Yet 33% of American families have no money they think of as savings, and the Federal Reserve has found that between 39–50% of Americans would not be able to cover a \$400 emergency expense using cash or its equivalent. BD. OF GOVERNORS OF THE FED. RESRV. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018, at 2 (2019), <https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-dealing-with-unexpected-expenses.htm> [<https://perma.cc/LJW8-RHBT>]; see also *Pew Finds American Families Ill-Equipped for Financial Emergencies*, PEW CHARITABLE TRUSTS (Nov. 18, 2015), <https://www.pewtrusts.org/en/about/news-room/press-releases-and-statements/2015/11/18/pew-finds-american-families-ill-equipped-for-financial-emergencies> [<https://perma.cc/2TYJ-FSA3>] (looking as well at racial disparities in savings, finding that on average “white household[s] ha[ve] . . . one month’s income in liquid savings, compared with . . . 12 days for . . . Latino household[s] and . . . five days for . . . African-American household[s]. . . . [25%] of black households would have less than \$5 if they liquidated . . . their financial assets, compared with \$199 and \$3,000 for . . . [25%] of Latino and white households”). See also Adam Hughes, *5 Facts About U.S. Political Donations*, PEW RSCH. CTR. (May 17, 2017), <https://www.pewresearch.org/fact-tank/2017/05/17/5-facts-about-u-s-political-donations> [<https://perma.cc/P2VV-TURC>] (asserting that higher-income Americans are more likely to donate).

¹²¹ See *supra* Sections I.C–D.

¹²² See *supra* Sections I.C–D.

¹²³ *Citizens United v. FEC*, 558 U.S. 310, 360 (2010); *McCutcheon*, 572 U.S. at 192 (plurality opinion) (quoting *Citizens United*, 558 U.S. at 360). Of course, several scholars disagree with the belief that ingratiation and unequal access do not corrupt. See, e.g., Sullivan, *supra* note 2, at 679 (arguing that corruption “is really a variant on the problem of

It is worth highlighting an error in the Court's reasoning regarding access and ingratiation before moving on with our argument. The Court claims that ingratiation and access "embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns."¹²⁴ But it is not *constituents* who financially support most candidates. It is *donors*. Constituents live in one's district and can vote in their elections, whereas donors are not bound by geography.¹²⁵ The Court assumes more overlap between constituents and donors than exists in our politics, especially at the national level, where the median candidate for the House of Representatives received only twenty-nine percent of her funding from inside the district in 2018.¹²⁶ This distinction matters, because donors get more access to elected officials than nondonor constituents, as we explained in Part I.

Returning to our explanation on the narrowing of the Court's jurisprudence, we arrive at the sole acceptable interest that governments can serve with campaign finance regulations: actual bribery. "Any regulation must instead target what we have called '*quid pro quo*' corruption or its appearance. . . . [A] direct exchange of an official act for money."¹²⁷ Of course, establishing that a *quid pro quo* has occurred is next to impossible.¹²⁸ Elected officials have gotten away

political equality: unequal outlays of political money create inequality in political representation"); 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 (2013) (arguing that inequality of political input and political opportunity can corrupt).

¹²⁴ *McCutcheon*, 572 U.S. at 192 (plurality opinion).

¹²⁵ See generally David Fontana, *The Geography of Campaign Finance Law*, 90 S. CAL. L. REV. 1247 (2017) (explaining the geographical concentration of donors and the implications of this concentration for campaign finance law).

¹²⁶ This is our analysis, using data from OpenSecrets.org, available here: *In-District vs. Out-of-District*, OPEN SECRETS, <https://www.opensecrets.org/overview/district.php> [<https://perma.cc/Q7CK-7FWB>]. As we explain in Part III, this has important implications for candidates of color, who tend to get more of their funding from out-of-district, when compared to their white counterparts. See *infra* Part III.

¹²⁷ *McCutcheon*, 572 U.S. at 192 (plurality opinion) (quoting *Citizens United*, 558 U.S. at 359); see also Douglas M. Spencer & Alexander G. Theodoridis, "Appearance of Corruption": Linking Public Opinion and Campaign Finance Reform, 19 ELECTION L.J. 510, 510 (2020) (noting that Supreme Court jurisprudence requires regulations focus only on *quid pro quo* corruption). Note that scholars argue that *quid pro quo* corruption is problematic specifically because of equality concerns, despite the Court's insistence that they are not considering equality in their First Amendment jurisprudence. See Yasmin Dawood, *Classifying Corruption*, 9 DUKE J. CONST. L. & PUB. POL'Y 103, 107–10 (2014).

¹²⁸ See Ciara Torres-Spelliscy, *Deregulating Corruption*, 13 HARV. L. & POL'Y REV. 471, 496–99 (2019) (discussing the difficulty in establishing *quid pro quo* corruption as a result of the Court's narrowing of what is *quid pro quo*).

with egregious behavior in recent years, because prosecutors have not been able to establish one of the elements of quid pro quo corruption (bribery).¹²⁹ Because the Court says that combatting quid pro quo corruption is the only relevant interest for abridging campaign finance activities¹³⁰ and because so few activities connected to campaign finance can be narrowly described as quid pro quo corruption, the Court allows few campaign finance regulations to survive.¹³¹

Scholars have traced two additional interests in the campaign finance jurisprudence, which might suffice to help a government defend regulations aimed at improving alignment or helping constituents engage their right to participate. The alignment interest fits squarely in the First Amendment jurisprudence, and we turn to it next. The right to participate straddles the First Amendment, Fourteenth, and Fifteenth Amendments, as well as the Voting Rights Act. We conclude this Part by discussing participation as a bridge to more equality-friendly doctrines.

B. Taking Alignment and Participation Seriously

First, governments could defend campaign finance regulations that provide an alignment benefit, or which better align the policy preferences of voters and the policy outputs of government.¹³² As Professor Nicholas Stephanopoulos argues, the government should be able to defend regulation in the service of (1) *preference alignment*, between the median voter in a constituency and the preferences of her representative, and (2) *outcome alignment* between the views of the median voter of the constituency and the policy outcomes from the legislature.¹³³ This alignment interest is distinct from the anticorruption interest that the court most often uses to uphold regulations. Importantly, it is also distinct from the equality interest the Court rejects.¹³⁴ And, crucially, it can be defended by governments as a compelling interest under the delegate model that we describe in Part I.

Our findings in this Article provide a new dimension of the alignment interest that governments may use to defend certain campaign

¹²⁹ See, e.g., *McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016) (holding that the requisite “official act” to establish bribery is read narrowly, and remanding for determination of whether the defendant’s conduct fell within this narrow standard).

¹³⁰ “Any regulation must . . . target what we have called ‘quid pro quo’ corruption or its appearance.” *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014).

¹³¹ Torres-Spelliscy, *supra* note 128, at 496–99.

¹³² See generally Stephanopoulos, *supra* note 87 (arguing for campaign finance reform along an alignment theory promoting more unity between voter preferences and policy decisions by government).

¹³³ *Id.* at 1428.

¹³⁴ *Id.* at 1455, 1463.

finance regulations. As our country diversifies, the median voter is increasingly likely to be Black, Latino, or Asian American. Yet their representation and the policies that result from it are more likely to favor white people.

Another potential avenue for reformers is to focus on a right to participation. The *McCutcheon* plurality, which writes so narrowly about corruption, reframes campaign contributions as one of many forms of participation, opening the door for litigants to demand equal rights to political participation.¹³⁵ “There is no right more basic in our democracy than the right to participate in electing our political leaders,” the Chief Justice wrote for himself and the three Justices who signed on to the plurality opinion.¹³⁶ He continued, “[c]itizens can exercise that right in a variety of ways: They can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate’s campaign.”¹³⁷ Professor Yasmin Dawood rightly says that here, the Court is acknowledging a “common matrix of participation” in campaign financing and voting.¹³⁸ We add to this argument that participation in campaign finance is currently unequal along the very racial lines that concerned the drafters of the Equal Protection Clause, the Fifteenth Amendment, and the Voting Rights Act.

The Court has been deregulating campaign finance in the name of the First Amendment, but with effects that entrench racial inequality. Instead, the Court should use our empirical findings as a jumping off point for a new jurisprudence that takes seriously the alignment interest and the right to participate.

¹³⁵ *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014) (plurality opinion); see also Yablon, *supra* note 17, at 669. Conversely, they may be shutting the door on equality-based arguments in the voting rights context. See Yasmin Dawood, *Democracy Divided: Campaign Finance Regulation and the Right to Vote*, 89 N.Y.U. L. REV. 17, 25 (2014).

¹³⁶ *McCutcheon*, 572 U.S. at 191 (plurality opinion).

¹³⁷ *Id.* Justice Thomas concurred without commenting on this dictum, saying he would have struck down individual contribution limits as well. *Id.* at 231–32 (Thomas, J., concurring).

¹³⁸ Dawood, *supra* note 135, at 17–18; see also Yablon, *supra* note 17, at 655. In contrast to our argument that the Court leaves the door open to voting rights equality concerns influencing campaign finance, Dawood rightly points out the flip side of the Court’s language in *McCutcheon*: the danger of allowing the First Amendment to make incursions into voting rights. Dawood, *supra* note 135, at 26 (“Now that the First Amendment also apparently protects the right of citizens to choose their representatives, political equality is under even greater threat.”).

III

CAMPAIGN FINANCE INEQUALITIES THROUGH THE LENS
OF VOTING RIGHTS

We have demonstrated the racial bias in the current campaign finance system, including in (1) who donates, (2) who can fundraise enough to mount a viable campaign, (3) who gets access to elected officials, and (4) whose preferred policies are implemented by elected officials. Political inequality for racial minorities leads to policy regimes that maintain and expand racial wealth inequality—making it more difficult for racial minorities to participate in politics, completing the vicious cycle. At every step in the chain, white people, in their status as donors, come out ahead of people of color. And while America becomes more diverse, the inequality expands and deepens. When we put our cynicism aside, it is hard to fathom a court that would receive evidence that indicates (1) campaign donors are the “selectorate,” receiving better access *and* better representation, and (2) campaign donors are overwhelmingly white, and yet limit its analysis of a challenged campaign finance system to the First Amendment framework.

There are two levels at which litigants can challenge these disparities. First, they arguably present constitutional violations, either of the Fourteenth Amendment’s Equal Protection Clause or of the Fifteenth Amendment. Alternatively, though only slightly more likely to bear fruit, litigants can challenge racial inequality in campaign finance as a violation of the Voting Rights Act. Unfortunately, as other scholars have noted,¹³⁹ the current doctrinal landscape leaves little hope that courts will expand the conception of the right to vote to include racial inequality within campaign finance—though to be sure, we and others¹⁴⁰ believe there are reasons to adopt such a “right to participate” beyond *McCutcheon*. We thus close our discussion with a more modest approach for incorporating evidence of racial disparities in either contributions behavior or access to campaign finance: as a factor to consider in the “totality of circumstances” framework under section 2 of the VRA.

¹³⁹ See, e.g., Joshua S. Sellers, *Election Law and White Identity Politics*, 87 FORDHAM L. REV. 1515 (2019) (noting the Court’s disinterest in considering the racial implications of politics).

¹⁴⁰ See, e.g., Yablon, *supra* note 17, at 691–92 (arguing that *McCutcheon* leaves a “promising path forward” for the right to participate). Dawood points out that the *McCutcheon* majority’s framing of the right to participate may instead leave the door open for the First Amendment to make conceptual inroads into voting rights. See Dawood, *supra* note 135, at 25–27.

A. Racial Inequality in Campaign Financing and the Constitution

1. Right to Vote Harms

The Equal Protection Clause under the Fourteenth Amendment guarantees equal protection under the law.¹⁴¹ The Court has long recognized that the definition of equality evolves over time, and the clause is not “shackled to the political theory of a particular era.”¹⁴² For purposes of our argument, the requirements of the Fifteenth Amendment are identical to the requirements under the Fourteenth Amendment, and so we analyze them together.¹⁴³

The Court has struck down, as equal protection violations, laws that erect barriers to the act of voting, that restrict would-be candidates’ participation, and that reduce the choices that voters can make. In *Harper v. Virginia State Board of Elections*, the Court struck down Virginia’s poll tax, saying, “a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.”¹⁴⁴ While *Harper* was focused on voters, the Court later applied the same reasoning to help increase equality among candidates by striking high candidate filing fees in Texas primaries, in *Bullock v. Carter*.¹⁴⁵ The Court noted that reducing the impact of wealth inequality on candidate ballot access increased equality among candidates as well as the amount of choice among candidates that voters had in elections.¹⁴⁶

The concentration of an ethnic majority’s political power through the unequal distribution of money and wealth also raises similar issues to mid-century apportionment cases of the 1960s and 1970s, as a few other scholars have noted.¹⁴⁷ These cases concerned the division of power among citizens. The touchstone constitutional vote dilution case is *Reynolds v. Sims*,¹⁴⁸ in which the Supreme Court generally rec-

¹⁴¹ U.S. CONST. amend. XIV, § 1.

¹⁴² *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 669 (1966).

¹⁴³ See generally *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (discussing whether at-large elections discriminated against African Americans in violation of the Fourteenth and Fifteenth Amendments).

¹⁴⁴ *Harper*, 383 U.S. at 666.

¹⁴⁵ 405 U.S. 134, 149 (1972).

¹⁴⁶ *Id.* at 143–44.

¹⁴⁷ See, e.g., Mark C. Alexander, *Money in Political Campaigns and Modern Vote Dilution*, 23 MINN. J.L. & INEQ. 239, 286 (2005) (discussing how politicians rely on wealthy contributors to support their campaigns, keeping influence increasingly in the hands of a smaller number of individuals).

¹⁴⁸ 377 U.S. 533, 557–58 (1964) (“How . . . can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? . . . [A]ll who participate in the election are to have an equal vote” (quoting *Gray v. Sanders*, 372 U.S. 368, 379–80 (1963))); see Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Reynolds Reconsidered*, 67

ognized that vote dilution is an actionable wrong under the Equal Protection Clause.¹⁴⁹ Electoral schemes that gave “citizens in rural regions” concentrated power “99 times the strength of urban dwellers” violated the Constitution’s fundamental guarantee of “an equally weighted vote.”¹⁵⁰ The Fourteenth Amendment guarantees that all persons have equal opportunity to participate effectively, “without regard to race, sex, economic status, or place of residence.”¹⁵¹

The outsized electoral influence of (overwhelmingly white) wealthy donors has downstream electoral effects similar to unfairly designed legislative districts that render minority votes meaningless.¹⁵² In winner-take-all elections, not every minority group can be afforded an opportunity to win in every election. But, just as the Supreme Court has decided there is something intuitively problematic about “electoral arrangements that systematically deprive out-groups of any such opportunity to elect candidates [by] a simple re-drawing of [district] lines,”¹⁵³ there is something problematic about electoral systems that deprive minorities of representation because of financial prerequisites that functionally exclude them from being able to meaningfully contest elections.

During the heyday of racial vote dilution litigation, courts acknowledged the financial barriers to political success that minorities faced—a fact that we have seen given little attention. One of the high-water mark cases of the constitutional vote dilution era, and the broad protection of minority political voice in all its forms, was *White v. Regester*.¹⁵⁴ In *White*, the Supreme Court ruled that Texas’s urban voting district in Bexar County, which covered more than one thousand square miles and included nearly one million people, was unconstitutional because it diluted the Mexican American vote.¹⁵⁵ In

ALA. L. REV. 485, 520 (2015) (suggesting that the *Reynolds* Court “ensured that white suburban majorities enjoyed the right to govern that was their due”).

¹⁴⁹ *Reynolds*, 377 U.S. at 565–66.

¹⁵⁰ Alexander, *supra* note 147, at 242 (noting counties would be weighted by units not population giving greater influence to residents of rural counties); *id.* at 242 n.33 (quoting *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736 (1964)).

¹⁵¹ *Reynolds*, 377 U.S. at 560–61; *Garza v. County of Los Angeles*, 918 F.2d 763, 774 (9th Cir. 1990). In other words, a government must represent all its citizens.

¹⁵² See Alexander, *supra* note 147, at 286.

¹⁵³ Dale Ho, *Minority Vote Dilution in the Age of Obama*, 47 U. RICH. L. REV. 1041, 1049 (2013).

¹⁵⁴ 412 U.S. 755, 759 (1973) (challenging the redistricting plan on the grounds that it created “impermissible deviations from population equality,” and that the multimember districts it created impermissibly diluted minority voting power).

¹⁵⁵ *Id.* at 769 (holding that the county’s Mexican Americans were “effectively removed from the political process” in violation of the Fourteenth Amendment).

striking down the Texas state districting scheme, though, the Court did not focus on one aspect of political participation, such as voting. Instead, the Court acknowledged that “*economic realities of the [minority] community*” prevented them from “effective participation in political life.”¹⁵⁶ The Constitution thus required that Texas’s electoral structure “bring the [minority] community into the full stream of political life of the county and State by encouraging their further registration, voting, and *other political activities.*”¹⁵⁷ The Supreme Court thus spoke in general terms about Latinos’ exclusion from the political process in Texas.

While the financial disadvantages that minorities face in campaigns is rarely discussed in voting rights debates today, the systemic economic disadvantages preventing minorities from electing their preferred representatives was important in *White*. Indeed, when Mexican American Legal Defense and Educational Fund (MALDEF) attorney Eduardo Idar appeared before the Supreme Court in 1973, he noted that minority candidates in Texas simply could not afford the huge campaign budget necessary to reach and persuade voters.¹⁵⁸ As such, Black and Latino people were “frozen into permanent political minorities destined for constant defeat at the hands of the controlling political majority.”¹⁵⁹

The attention given toward financial barriers and to successful minority political contestation was even more important in the district court’s decision.¹⁶⁰ The plaintiffs in *White* relied substantially on evidence that they simply lacked the financial resources needed to compete for state assembly seats.¹⁶¹ Noting the importance of “campaign and communication expenses,” the district court acknowledged that Black and Latino voters in Texas “may operate to eliminate or to delimit candidates and political associations that would otherwise be able to wage more tenable campaigns.”¹⁶² The lower court readily acknowledged the resource disadvantage faced by Black and Latino

¹⁵⁶ *Id.* (emphasis added).

¹⁵⁷ *Id.* (emphasis added).

¹⁵⁸ *White v. Regester: MALDEF Case Helped Kill Off Mega-Voter Districts that Suppressed the Mexican American Vote*, MALDEF (Dec. 26, 2018), <https://www.maldef.org/2018/12/white-v-regester-maldef-case-helped-kill-off-mega-voter-districts-that-suppressed-the-mexican-american-vote> [<https://perma.cc/8WD2-SY33>].

¹⁵⁹ *Id.*

¹⁶⁰ *Graves v. Barnes*, 343 F. Supp. 704, 732 (W.D. Tex. 1972) (“[W]hen a minority group is invidiously disadvantaged by the concomitance of poverty . . . the Court will void such an apportionment scheme.”), *aff’d in part, rev’d in part sub nom. White v. Regester*, 412 U.S. 755 (1973) (noting “a State may not design a system that deprives such groups of a reasonable chance to be successful”).

¹⁶¹ *White*, 412 U.S. at 769.

¹⁶² *Graves*, 343 F. Supp. at 720–21.

voters, and the existence of “radically unequal expense” problems for minority candidates.¹⁶³ A change in Texas’s electoral system was thus necessary to provide minority votes with “the opportunity to participate effectively in the political process.”¹⁶⁴

In short, participation in the campaign finance system was an essential part of effective participation in political life. The inability of minority candidates to raise the resources necessary to campaign effectively was an important factor that ultimately led the Court to strike down the Texas scheme as dilutionary. The financial disadvantages faced by minorities, which affected both voters’ ability to donate and candidates’ ability to run campaigns, was an important factor, even if it was not explicitly mentioned in the opinion. This language omission, though, has had potentially important downstream effects.¹⁶⁵ Several crucial aspects of political participation require money—most importantly, in order to conduct effective campaigns.

2. *The Problem of State Action*

Do racial disparities in citizen participation in the campaign finance system or candidate-side racial disparities in access to campaign resources constitute voting discrimination under the Constitution? There has been some, though not much, scholarly debate related to this question.¹⁶⁶ No researcher has squarely confronted the question, though, of whether deregulated campaign finance constitutes a voting rights violation under the Constitution.

For practical reasons, we think a constitutional challenge is unlikely to succeed. A successful challenge must establish that the current campaign finance system is the result of state action. State action is ill-defined,¹⁶⁷ and in the classic case, it involves a state passing a law or enacting a regulation that deprives a plaintiff of equal protection. But state action is arguably broader than legislating or regulating. It

¹⁶³ *Id.* at 721.

¹⁶⁴ *Id.* at 734.

¹⁶⁵ Using language that would later appear in the amended VRA, the Court defined minorities’ voting rights in expansive terms—as the ability to both “elect legislators of their choice” and “to participate in the political process[.]” *White*, 412 U.S. at 766. However, resource disparities in running campaigns were not explicitly mentioned.

¹⁶⁶ *See, e.g.*, Alexander, *supra* note 147, at 285–86 (arguing that principles from notable voting rights case can be used in analysis of campaign finance reform); Raskin & Bonifaz, *supra* note 2, at 278; Foley, *supra* note 2, at 1213; Sellers, *supra* note 139, at 1533–40. Note, however, that while we agree with nearly all of the claims in this literature, these studies do not squarely take on the issue of the political inequality created by our campaign finance structures and which create problems related to the right to vote.

¹⁶⁷ *See generally* Christopher W. Schmidt, *On Doctrinal Confusion: The Case of the State Action Doctrine*, 2016 *BYU L. REV.* 575, 575 (describing the state action doctrine as a “notoriously murky field of constitutional law”).

can also include state “entanglement” in repression, outside of the official functions of the state apparatus.¹⁶⁸ For example, in *Terry v. Adams*, the Court struck down a white primary system in Texas, in which white people got together before the official primary to choose which (white) candidate would be the nominee.¹⁶⁹ While there was no majority rationale in *Terry v. Adams*—four Justices thought the system violated the Fifteenth Amendment, and four thought it violated the Equal Protection Clause—Justice Clark’s opinion explains that “any ‘part of the machinery for choosing officials’ becomes subject to the Constitution’s restraints.”¹⁷⁰ Justice Frankfurter said that the “vital requirement” for state action is that “somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with state power, into any scheme by which colored citizens are denied voting rights merely because they are colored.”¹⁷¹

An even broader interpretation of state action—and one that plaintiffs might need in order to bring a constitutional challenge—involves interpreting “state neglect” as having ripened into state action.¹⁷² To establish state action in the campaign finance context, reformers would need to argue that after decades of neglecting to regulate campaign finance, states’ failures to do so (particularly in light of citizen requests to act) should be interpreted by the courts as state action. This is not a new scholarly angle—Cass Sunstein said in the 1990s that “[a] system of unlimited campaign expenditures should be seen as a regulatory decision to allow disparities in resources to be turned into disparities in political influence.”¹⁷³ While today’s Court is unlikely to take such a broad view of the state action doctrine, particularly in the campaign finance context, we join prior scholars in seeing an opening—albeit a narrow one—for a court to find state action in either state involvement in private campaign financing systems, or in state failure to regulate such a racially biased system.¹⁷⁴

¹⁶⁸ See *id.* at 589.

¹⁶⁹ 345 U.S. 461, 463 (1953).

¹⁷⁰ *Id.* at 481 (Clark, J., concurring).

¹⁷¹ *Id.* at 473 (Frankfurter, J., concurring).

¹⁷² See Schmidt, *supra* note 167 at 590; *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (“By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.”); *cf.* *Flagg Bros. v. Brooks*, 436 U.S. 149, 164 (1978) (“[A] State’s mere acquiescence in a private action” does not suffice to establish state action).

¹⁷³ Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1399 (1994).

¹⁷⁴ See Raskin & Bonifaz, *supra* note 2, at 306–12.

B. *Deregulated Campaign Finance and the Voting Rights Act*

Because of the intent requirement in constitutional litigation,¹⁷⁵ section 2 of the VRA is the main weapon now used to challenge discriminatory political structures. To prevail under section 2, plaintiffs must show that “based on the totality of circumstances . . . the political processes leading to nomination or election in the State or political subdivision are not equally open to participation” for minority voters, in that they “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”¹⁷⁶

There are two main types of voting discrimination challenges brought under section 2 of the VRA: “vote denial” and “vote dilution.” Vote denial cases implicate *participation* in the political process—being able to register, vote, and have one’s vote be counted.¹⁷⁷ Policies that are challenged for denying individuals the right to vote include voter identification (voter ID) requirements, voter purges, felon disenfranchisement laws, and restrictive voting periods.¹⁷⁸ Vote dilution cases implicate *fair representation* through the aggregation of minority citizens’ preferences.¹⁷⁹ Dilution cases challenge practices that diminish a group’s political influence. Common examples include

¹⁷⁵ See *City of Mobile v. Bolden*, 446 U.S. 55, 67 (1980). In *Bolden*, the plaintiffs brought suit claiming that election of city commissioners at-large diluted Black citizens’ right to vote, in violation of the Fourteenth and Fifteenth Amendments. While Black voters comprised thirty-five percent of the population, no Black person had ever been elected as city commissioner. Moreover, the plaintiffs cited a long history of racially polarized voting at a level akin to what would be expected from a racially exclusionary primary system, and that city officials were not responsive to the Black population. Both the district court, 423 F. Supp. 384 (S.D. Ala. 1976), and the Fifth Circuit, 571 F.2d 238 (5th Cir. 1978), ruled in favor of the plaintiffs. See *Bolden v. City of Mobile*, 423 F. Supp. 384 (S.D. Ala. 1976), *aff’d* 571 F.2d 238 (5th Cir. 1978). However, the Supreme Court reversed, holding intent was necessary to establish racial discrimination. 446 U.S. 55, 67 (1980).

¹⁷⁶ 52 U.S.C. § 10301(b).

¹⁷⁷ See Pamela S. Karlan, *All Over the Map: The Supreme Court’s Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 248–49 (noting that “vote denial” VRA cases challenge practices that restrict voter participation, which is a component of the right to vote).

¹⁷⁸ See Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO ST. L.J. 763, 766 (2016) (explaining that while section 5 had previously prevented vote denial in covered jurisdictions, the *Shelby County* decision in conjunction with increased partisan polarization led Republican-sponsored laws to reduce voter turnout).

¹⁷⁹ See Karlan, *supra* note 177, at 249 (identifying aggregation as a component of the right to vote distinct from participation); see also Pamela S. Karlan, *The Impact of the Voting Rights Act on African Americans: Second- and Third-Generation Issues*, in *VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES* 121, 122–23 (Mark E. Rush ed., 1998).

the use of at-large elections,¹⁸⁰ multimember districts,¹⁸¹ and gerrymandered districts.

Admittedly, just as campaign finance doctrine is unlikely to be shaped by equal protection concerns, it is unlikely to be affected by disparate impact analysis under the VRA. Nevertheless, it is useful to at least discuss the parallels between the harms imposed by electoral structures traditionally challenged under the VRA—like at-large elections and voter ID laws—and the rules that structure the financing of elections. Our empirical examination suggests that inequities in the campaign finance system bear on both substantive elements of the rights to vote embodied within the VRA—the right to participate and the right to be fairly represented.

1. *The Equal Participation Goal*

When talking about the “right to vote” as participation, courts and scholars are generally referring to the act of voting itself. However, the franchise’s participatory value is more general than the ability to cast a ballot on election day. Meaningful political participation has rarely been limited to the act of voting exclusively.¹⁸² Rather, citizen participation consists of “purposeful activities in which citizens take part in relation to government.” The right to participate thus includes “run[ning] for office themselves, vot[ing], urg[ing] others to vote for a particular candidate, volunteer[ing] to work on a campaign, and contribut[ing] to a candidate’s campaign.”¹⁸³ Viewed under the broad umbrella of participation that includes both voting and donations to campaigns, this “contributions gap” appears very similar to

¹⁸⁰ See Chandler Davidson & George Korbel, *At-Large Elections and Minority-Group Representation: A Re-Examination of Historical and Contemporary Evidence*, 43 J. POL. 982, 983 (1981) (describing how scholars have long believed that the use of at-large elections prevents the election of minority officials). The Supreme Court case *White v. Regester* involved the use of at-large elections in a way that was ultimately deemed impermissible. See *supra* Section III.A.

¹⁸¹ See Walter L. Carpeneti, *Legislative Apportionment: Multimember Districts and Fair Representation*, 120 U. PA. L. REV. 666, 670 (1972) (defining a multimember districting scheme as one where “a city, county, or other area, which is numerically entitled to more than one representative in the state legislature, is not subdivided into the appropriate number of individual districts, but rather elects its delegation on an at large basis”). In the famous vote dilution case, *Whitcomb v. Chavis*, 403 U.S. 124 (1971), plaintiffs unsuccessfully attacked a multimember apportionment scheme on the grounds that it unconstitutionally diluted their representation.

¹⁸² See Spencer Overton, *The Participation Interest*, 100 GEO. L.J. 1259, 1273–74 (2012) (defining political participation broadly to include donating to or volunteering with campaigns, lobbying government officials, and “public advocacy and protest”); Foley, *supra* note 2, at 1226–27 (describing the “argumentative stage” of the electoral process in which competing factions of voters attempt to persuade each other).

¹⁸³ *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014) (plurality opinion).

disparities in voter turnout that animate challenges to policies like voter ID, voter purges, and the like.

Support for the “right to vote” as a protection of political participation can be found throughout the last seventy years of voting rights jurisprudence. As far back as the 1950s, the Supreme Court has indicated a willingness to provide minorities with equal opportunities to participate at *all* points of the political process, not just on election day. When the Court invalidated Texas’s “white primary” system, for example, it denounced the exclusion of Black Americans from even pre-primary organizations that affected who would run from a political party.¹⁸⁴ More recent cases demonstrate that political participation includes a range of activities centered on, but not limited to, voting. And finally, the *McCutcheon* plurality explicitly equated voting and spending as equivalent manifestations of “the right to participate in electing our political leaders.”¹⁸⁵

Scholarly analysis in the wake of *Citizens United* suggests there is little normative justification for treating contributions and votes differently, in light of the Court’s recent campaign finance decisions.¹⁸⁶ The Court applies equal protection principles to vote denial challenges, but First Amendment principles to campaign finance restrictions cases. As Yablon points out: “[O]pen-ended constitutional guarantees of equality and of expressive and associational liberty are not so rigidly deterministic. Indeed, given that neither [the First or Fourteenth Amendment] expressly refers to voting or spending, it is not axiomatic that they are even the right constitutional starting points.”¹⁸⁷ In other words, the same underlying constitutional values, such as the right to associate or express one’s point of view during the political process, animate a voter’s decisions both to pull a voting lever or make a donation to a candidate. Both are manifestations of what Pamela Karlan refers to as “voting as participation.”¹⁸⁸

We endorse the view that contributions and votes are both part of a broad umbrella concept of “political participation.” An implication

¹⁸⁴ *Smith v. Allwright*, 321 U.S. 649 (1944). The underlying principle was general: A slating system that did not allow minority participation was a systematic attempt to deny them “an effective voice in the governmental affairs of their country, state, or community.” *Terry v. Adams*, 345 U.S. 461, 466 (1953) (plurality opinion).

¹⁸⁵ *McCutcheon*, 572 U.S. at 191 (plurality opinion).

¹⁸⁶ A notable, and crucial exception is articulated in Dawood’s important work emphasizing that lumping voting and donating into the “participation” category, as the *McCutcheon* plurality did, may open the court to disregarding voting equality as they do speech equality in the campaign finance context. See Dawood, *supra* note 135, at 25–27.

¹⁸⁷ Yablon, *supra* note 17, at 679.

¹⁸⁸ Karlan, *supra* note 178, at 768 (2016) (quoting Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1709–12 (1993)).

stemming from this inquiry is that racial disparities in the ability to contribute to politics within a particular political subdivision is a manifestation of political inequality. As such, efforts to reform systems of campaign finance at all levels of government have an underappreciated connection to minority voting rights. To the extent that contributions are a form of political participation, racial disparities in the campaign finance system may indicate that an electoral system has deprived a minority community of its right to participate under the VRA.

To see this, note that how the racial contribution gap feeds into the turnout gap.¹⁸⁹ Voters require sufficient information to make informed decisions. As the *Buckley* Court itself acknowledged, “informed public opinion is the most potent of all restraints against misgovernment.”¹⁹⁰ However, because minorities are less able to contribute, they are also less likely to be approached by political campaigns. The lack of campaign contact in turn reduces the likelihood that minority voters know which candidate to pull a lever for on election day—and thus less likely to show up at all.

Recent scholarship demonstrates how the financial needs of campaigns lead to disparate exposure to candidate campaigns that fall along class-based lines. Campaigns are resource-constrained—and candidates competing in heavily minority districts are even more cash-strapped.¹⁹¹ Candidates running for office in these places must thus allocate their limited campaign money in the most cost-effective way.¹⁹² These strategic cost considerations lead campaigns to allocate mobilization efforts away from poor voters.¹⁹³ Given that poor communities are comprised disproportionately of racial and ethnic minori-

¹⁸⁹ This argument was eloquently made by Bertrall Ross and Doug Spencer, who argue that campaigns “disproportionately neglect the poor when canvassing, calling, and sending political mailers to potential voters—mobilization activities that have a sizeable turnout effect. In our view, the most significant voter suppression tactics of the twenty-first century are therefore not what legislatures are doing, but what campaigns are not doing.” Bertrall L. Ross II & Douglas M. Spencer, *Passive Voter Suppression: Campaign Mobilization and the Effective Disenfranchisement of the Poor*, 114 Nw. U. L. REV. 633, 633 (2019).

¹⁹⁰ *Buckley v. Valeo*, 424 U.S. 1, 67 n.79 (1976) (per curiam) (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936)).

¹⁹¹ See Tables 1 and 2, *supra*; see generally Jacob M. Grumbach & Alexander Sahn, *Race and Representation in Campaign Finance*, 114 AM. POL. SCI. REV. 206 (2020).

¹⁹² Bertrall L. Ross II, *Addressing Inequality in the Age of Citizens United*, 93 N.Y.U. L. REV. 1120, 1170 (2018) (describing how candidates will optimize their campaign mobilization spending to maximize turnout subject to a budget constraint: “What campaigns would like to do is spend the least amount of money to secure the most number of votes.”).

¹⁹³ *Id.* at 1170–71.

ties,¹⁹⁴ biased campaign mobilization will disproportionately hurt minority voters. Research from the social sciences consistently confirms that minority voters are the most difficult for campaigns to turn out on election day.¹⁹⁵ By extension, “biased mobilization” also reduces the campaigns’ opportunities to learn about the needs and preferences of their constituents, which can shape their perception of the electorate.¹⁹⁶

Former FEC Chair Ann Ravel further elaborates on how the current operation of political campaigns—a crucial part of the political process “leading to nomination [and] election”—leaves racial minorities less able to make equally informed choices about voting.¹⁹⁷ In particular, the increased use of “micro-targeting” by campaigns allows candidates to target people who participate the most in politics, and it helps campaigns seek additional donors.¹⁹⁸ This targeting is based on personal information including past campaign contributions.¹⁹⁹ Given the underparticipation of minorities in terms of donations, political campaigns often neglect campaign communication with lower income voters—particularly minority voters.²⁰⁰ This omission is exacerbated because these groups have lower voting rates to begin with.

2. *The Fair and Effective Representation Goal*

The VRA has been interpreted to protect not only the right to cast a ballot, but to provide aggregative protection to minorities

¹⁹⁴ See *Poverty Rate by Race/Ethnicity*, KAISER FAM. FOUND. (2019), <https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity> [<https://perma.cc/Z95E-2EAN>] (demonstrating that only ten percent of Americans living under the poverty line are white, while approximately twenty percent of people living under the poverty line are Black and Latino).

¹⁹⁵ See Daniel Stevens & Benjamin G. Bishin, *Getting Out the Vote: Minority Mobilization in a Presidential Election*, 33 POL. BEHAVIOR 113, 126–28 (2011).

¹⁹⁶ Ross, *supra* note 192, at 1126–27.

¹⁹⁷ See Ann Ravel, *A New Kind of Voter Suppression in Modern Elections*, 49 U. MEM. L. REV. 1019, 1046 (2019) (“This segmenting of voters in campaigns leaves out a large swath of the population who never receive political communications at all—primarily lower income people or minorities.”).

¹⁹⁸ See Christopher S. Elmendorf & Abby K. Wood, *Elite Political Ignorance: Law, Data and the Representation of (Mis)Perceived Electorates*, 52 U.C. DAVIS L. REV. 571, 588 (2018) (discussing how political profiles are constructed to predict a voter’s “partisanship, turnout propensity, policy preferences and even his or her likely response to different campaign messages”).

¹⁹⁹ See Ravel, *supra* note 197, at 1051 n.176 (noting targeting can be based on voting behavior, past contributions, and data obtained by companies). See generally EITAN D. HERSH, *HACKING THE ELECTORATE: HOW CAMPAIGNS PERCEIVE VOTERS* (2015) (discussing how political campaigns use databases with voter information to perceive the electorate and shape outreach tactics).

²⁰⁰ See Ravel, *supra* note 197, at 1046.

through the right to “elect the representatives of their choice.”²⁰¹ Historically, the “[d]ilution of racial minority group voting strength may be caused [either] by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority.”²⁰² In either case, a minority group may be denied the right to elect the representative of its choice despite the fact that its individual members cast votes that are weighed equally with those of majority voters.

In terms of “fair and effective representation,” addressing districting practices like “cracking” and “packing” only partially addresses the set of electoral practices that ensure minorities have a “fair opportunity”²⁰³ to elect their preferred representatives.²⁰⁴ As our empirical analysis suggests, money is a prerequisite for the selection of democratic representatives. Financial resources are necessary for campaigns, making them a precondition for the electoral success of any community’s preferred candidate. Money is needed to pay for media, staff involved in voter mobilization, and numerous other administrative expenses.²⁰⁵ One recent study found the candidate who raises the most money ultimately wins in over ninety percent of congressional elections.²⁰⁶ This summary statistic should be treated with caution, since it may very well be a reflection of better candidates simply raising more money. Nevertheless, it is suggestive evidence of the importance of money for electoral success.

The “political effectiveness” command of the VRA is hollow if it does not encompass the ability of minorities to harness their voting strength through voter mobilization and persuasion on minorities’

²⁰¹ *Thornburg v. Gingles*, 478 U.S. 30, 46 n.12 (1986).

²⁰² *Id.* at 46 n.11.

²⁰³ We use the term “fair opportunity” in the same manner as Professor Lani Guinier, who defined it as “a principle of proportional power designed primarily to maintain legitimacy from the perspective of minority interests.” Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 *CARDOZO L. REV.* 1135, 1143 (1993) (arguing for proportionality as means of increasing minority interest representation).

²⁰⁴ See Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 *TEX. L. REV.* 225, 234 (1993) (“[A]ggregation claims are largely group-based: They involve claims by individual voters that they are part of a discrete group of voters whose direct preferences have been unfairly ignored.”).

²⁰⁵ See Robert C. Smith, *Financing Black Politics: A Study of Congressional Elections*, 17 *REV. BLACK POL. ECON.* 5, 7 (1988) (“The pattern for media expenditures is as follows: 23 percent for television, 33 percent for printing, 9 percent for newspaper ads, 6 percent radio and 23 percent in undesignated ad expenses.”).

²⁰⁶ ADAM LIOZ, *DEMOS, STACKED DECK: HOW THE RACIAL BIAS IN OUR BIG MONEY POLITICAL SYSTEM UNDERMINES OUR DEMOCRACY AND OUR ECONOMY* 5 (2015), https://www.demos.org/sites/default/files/publications/StackedDeck2_1.pdf [<https://perma.cc/6SEL-F98G>].

preferred issues. Harnessing this strength requires some commitment to providing minority communities with the resources necessary to compete in elections. As we have just discussed, the omission of Black and Latino voters from the donor class has the potential to do the opposite, if minority-preferred candidates are either deterred from running or guaranteed to lose due to financial constraints. The legislative debates surrounding the VRA support this interpretation. To Congress, equal “political opportunity” meant including opportunities for legislative lobbying and representative-constituent interaction.²⁰⁷ All of these types of political participation are dependent on candidates having money.²⁰⁸

3. *A Modest Proposal: Campaign Finance Disparities Under the “Totality of Circumstances” Test*

In our view, the evidence is clear that the deregulation of campaign finance “operate[s] to minimize or cancel out the voting strength of racial or political elements of the voting population,”²⁰⁹ due to preexisting racial disparities in economic status. In an ideal world, campaign finance structure schemes would be subject to examination under section 2, to the extent that politicians from minority communities faced resource disadvantages due to electoral financing rules. Unfortunately, unlike the Fourteenth Amendment, the VRA is unlikely to serve as a remedial tool for the problems we have laid out above, given the Court’s current composition.²¹⁰ Challenging an electoral system because of its campaign financing rules would probably be viewed as too distant from the types of discriminatory practices intended by the drafters of the VRA.

The VRA is a discriminatory results-based law, not a discriminatory intent one. Whether a jurisdiction deprives minorities of equal political opportunity is decided under a localized, totality-of-circumstances analysis. A more modest way to incorporate the problems related to racial disparities in campaign finance participation and access would be to incorporate evidence of such inequities into claims that are commonly alleged under current doctrine. Since

²⁰⁷ See Kathryn Abrams, “Raising Politics Up”: *Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 460 (1988) (“Others described the Act as combatting the reluctance of white and minority voters to interact in the political process, thus highlighting not only lobbying activities, but the caucuses, meetings, and informal contacts through which political alliances are forged.”).

²⁰⁸ LIOZ, *supra* note 206.

²⁰⁹ The Senate Report accepts the Supreme Court’s observation that “[t]he right to vote . . . includes the right to have the vote counted at full value without dilution or discount.” S. REP. NO. 97-417, at 19 (1982).

²¹⁰ See Sellers, *supra* note 139, at 1557.

the seminal case *Thornburg v. Gingles*, a plaintiff aiming to demonstrate that her political influence was illegally diluted must show what is now commonly referred to as the “*Gingles* preconditions”²¹¹: (1) that the minority group is sufficiently large and geographically compact; (2) that the minority group is politically cohesive; and (3) that white voters vote as a bloc and thereby typically defeat minority-preferred candidates.²¹² Together, these factors provide evidence of racially polarized voting, which has become the primary consideration for assessing whether vote dilution exists.

Once the *Gingles* preconditions are satisfied, though, courts will engage in a multifactor balancing inquiry before determining whether vote dilution exists.²¹³ In this stage of the analysis, litigants will generally discuss the additional evidence that may be probative of whether a political system was “equally open to minority voters.”²¹⁴ To guide

²¹¹ 478 U.S. 30 (1986). The Supreme Court later suggested that the *Gingles* factors would be necessary but not sufficient conditions for section 2 liability. See *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994) (“[*Gingles*] clearly declined to hold [the three factors] sufficient in combination, either in the sense that a court’s examination of relevant circumstances was complete once the three factors were found to exist, or in the sense that the three in combination necessarily and in all circumstances demonstrated dilution.”).

²¹² *Gingles*, 478 U.S. at 50–51.

²¹³ See *Johnson*, 512 U.S. at 1013.

²¹⁴ S. REP. NO. 97-417, at 28–29. The enumerated factors were:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. In addition, the Senate enumerated two additional factors that were probative on the issue of voter discrimination: “Whether there is a lack of responsiveness on the part of elected officials to the particularized needs of minority group members,” and “[w]hether the policy underlying the state or political subdivision’s use of the challenged standard, practice, or procedure is tenuous.” *Id.* at 29. However, the report describes this list of factors as neither exclusive nor comprehensive. Moreover, a plaintiff need not prove any particular number or a majority of these factors in order to succeed in a vote dilution claim. These factors were derived from the analytical framework of *White v. Regester*, 412

the analysis, the Senate Judiciary Committee in 1982 issued a report to accompany the amended statute, widely known as “the Senate Report.” These so-called “Senate Factors” were culled from voting cases of the 1960s and 70s, and include a jurisdiction’s history of political discrimination or prior use of election structures to submerge the voting power of minorities.²¹⁵ They have been used by plaintiffs to supplement the evidence on the *Gingles* test for discrimination.

Several of the factors that Congress believed were demonstrative of vote discrimination apply to privately funded elections. In our view, evidence of systematic disadvantages faced by racial minorities in financing campaigns can and should be used as additional evidence in section 2 inquiries. We thus briefly discuss now how a jurisdiction’s deregulated campaign finance structure relates separately to at least two Senate Report factors that help determine whether an electoral practice runs afoul of the VRA.

Importantly, this proposed use of campaign finance disparities would not significantly alter existing doctrine in any way. As in all dilution cases under section 2, a plaintiff would still need to first show that a protected minority group is politically cohesive and geographically segregated. The plaintiff could then proceed to provide quantitative evidence of racial disparities in campaign finance as a factor to consider in the second-stage “totality of circumstances” analysis. The defendant jurisdiction could respond by offering other neutral justifications for why racial minorities are poorly represented in the financing of elections.

a. Factor Four: Deregulated Campaign Finance Schemes
Exclude Minorities from the Candidate Slating Process

Elections funded primarily by wealthy, white donors mean that candidates of color are less likely to run in primaries, they raise less money when they do run, and they are less likely to win. The fourth factor in the Senate Report instructs courts to consider whether “there is a candidate slating process, [and] whether the members of the minority group have been denied access to that process.”²¹⁶ This factor clearly relates to the exclusion of minority voice in the selection process of a party’s candidate—i.e., its primary process.²¹⁷ In *White v.*

U.S. 755 (1973), and reaffirmed by *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff’d sub nom.* *E. Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976) (per curiam). S. REP. NO. 97-417, at 28–29.

²¹⁵ See S. REP. NO. 97-417.

²¹⁶ *Id.* at 29.

²¹⁷ Existing section 2 case law suggests that courts view slating as “a process in which some influential non-governmental organization selects and endorses a group or ‘slate’ of

Regester, the Court relied substantially on the fact that the Democratic Party had only nominated a Black candidate twice.²¹⁸ The exclusion of both Black citizens in the Democratic Party's deliberation (and the total absence of minority candidates fielded by the party) indicated that "'the black community has been effectively excluded from participation in the Democratic primary selection process,' and was therefore generally not permitted to enter into the political process in a reliable and meaningful manner."²¹⁹

Candidates of color are unable to compete in the "wealth primary" necessary to run competitive campaigns needed to qualify for the general election.²²⁰ Research shows that financial barriers to competing in the primary are an important determinant of minority political selection (the "supply" of minority candidates).²²¹ In other words, most Black voters now believe that fewer candidates of color run for office because they lack the financial networks necessary to raise enough money for a run.²²² Moreover, because minorities are on average poorer than whites, they are also less likely to be able to self-fund campaigns.²²³

The notion that evidence of financial barriers is relevant to the fourth Senate factor is supported by existing case law from the lower courts. There are several cases in which courts have found section 2 liability due to the exclusion (formal or informal) of minority candidates from the party selection process.²²⁴ Moreover, in one particular case, a lower court explicitly considered the exclusion of minority can-

candidates, rendering the election little more than a stamp of approval for the candidates selected." *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1116 n.5 (5th Cir. 1991).

²¹⁸ *White*, 412 U.S. at 766–67 ("[S]ince Reconstruction days . . . these two were the only two [Black people] ever slated by the Dallas Committee for Responsible Government (DCRG), a white-dominated organization that is in effective control of Democratic Party candidate slating in Dallas County."); see also *Rogers v. Lodge*, 458 U.S. 613, 625 (1982) ("[P]ast discrimination had prevented blacks from effectively participating in Democratic Party affairs and in primary elections.").

²¹⁹ *White*, 412 U.S. at 767.

²²⁰ See *supra* Part I.

²²¹ Paru Shah, *It Takes a Black Candidate: A Supply-Side Theory of Minority Representation*, 67 POL. RES. Q. 266, 272 (2014).

²²² LIOZ, *supra* note 206, at 27.

²²³ Indeed, a cursory glance at the financial health of members of Congress suggests that money is an important determinant of political selection. According to recent reporting, the median net worth for a member of Congress in 2013 was \$1.03 million. Alan Rappeport, *Making It Rain: Members of Congress Are Mostly Millionaires*, N.Y. TIMES: FIRSTDRAFT (Jan. 12, 2015, 5:54 PM), <https://www.nytimes.com/politics/first-draft/2015/01/12/making-it-rain-members-of-congress-are-mostly-millionaires> [<https://perma.cc/BE8W-BMV8>].

²²⁴ See, e.g., *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 504 (5th Cir. 1987).

didates from primaries due to financial barriers as a factor that militated in favor of VRA violation.²²⁵ In this challenge to at-large elections in a Georgia town, the district court concluded that the city's election practices constituted vote dilution in large part because "African-American voters appear to have been unable to sponsor candidates."²²⁶ As the Court noted, part of the reason for this was likely due to the fact that in prior elections, "none of the African-American candidates received more total monetary contributions than any of the white candidates."²²⁷

b. Factor Nine: Deregulated Campaign Finance Schemes Reduce Responsiveness on the Part of Elected Officials to the Particularized Needs of the Members of the Minority Group

Responsiveness is the only Senate factor that considers whether an electoral system is achieving the democratic goal of substantive representation.²²⁸ Social scientists have provided extensive evidence that contributions buy access to officeholders and influence the pool of viable candidates—and that legislators' roll-call votes are more responsive to donor opinion than constituent opinion.²²⁹ As we showed in Part I of the Article, higher levels of campaign spending reduce the likelihood the representatives support the interests of Black constituents.²³⁰ We also showed in Part I that when contributions from Black donors make up a greater share of election funds, the resulting congressional representation is more liberal and more in line with the political attitudes of Black constituents.²³¹

Unlike votes for candidates for Congress, state legislatures, governorships, and the like, campaign contributions can cross district boundaries.²³² This allows individuals to contribute to campaigns for candidates who would not represent them geographically, but may provide a kind of "surrogate representation."²³³ Moreover, evidence suggests the higher the percentage of out-of-district contributions a

²²⁵ Cofield v. City of LaGrange, 969 F. Supp. 749, 777 (N.D. Ga. 1997).

²²⁶ *Id.*

²²⁷ *Id.* at 768.

²²⁸ See Stephanopoulos, *supra* note 87.

²²⁹ See *supra* Section I.B.

²³⁰ See *supra* Part I.

²³¹ See *supra* Section I.D.2.

²³² See James G. Gimpel, Frances E. Lee & Shanna Pearson-Merkowitz, *The Check Is in the Mail: Interdistrict Funding Flows in Congressional Elections*, 52 AM. J. POL. SCI. 373, 390–92 (2008); Fontana, *supra* note 125.

²³³ Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515, 522–23 (2003).

member receives, the greater their responsiveness to the national donor base.²³⁴ Given the evidence in Table 3 above, the role out-of-district contributions is particularly problematic for facilitating responsive representation for racial minorities.²³⁵

IV

THE ROLE OF PUBLIC FINANCING IN ADDRESSING THESE PROBLEMS

No single reform, whether created legislatively or judicially, can eliminate the racial wealth gap and improve political representation. However, studies of public campaign financing suggest that a well-designed public financing regime can help to reduce racial and class inequality among donors and in the candidate pool. If we can put donors and nondonors on more equal footing, other salutary effects should follow, like more equal access to elected officials and better representation of constituents—who, under public financing, are also more likely to be donors.²³⁶ For reformers, creating a public financing program legislatively would be much more fruitful than challenging our current, deregulated system and asking judges to impose a public financing system as a judicial remedy.

Consistent with the First Amendment analysis in Part II, these public financing programs can withstand constitutional scrutiny if they are voluntary, avoid including provisions that might “level the playing field” between candidates or among donors, and focus on anticorruption motivations for adopting the programs.²³⁷ Tying the two strands of jurisprudence together, we note that some courts might view a governmental interest in avoiding section 2 claims as a compelling governmental interest sufficient to tolerate some (voluntary) restrictions on political spending in a public financing program. According to Morgan Kousser, Southern jurisdictions are historically the most likely

²³⁴ See, e.g., Brandice Canes-Wrone & Kenneth M. Miller, *Out-of-District Donors and Representation in the US House*, LEGIS. STUD. Q. (forthcoming) (manuscript at 35) (on file with the *New York University Law Review*).

²³⁵ See *supra* Section I.D.2, Table 3.

²³⁶ See generally Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563 (1999).

²³⁷ *Id.* at 578. *Arizona Free Enterprise* and *Davis* both suggest that “leveling the playing field” justifications for public financing are on shaky First Amendment ground. *Ariz. Free Enter. Club v. Bennett*, 564 U.S. 721, 750 (2011); *Davis v. FEC*, 554 U.S. 724, 739 (2008). For an argument in favor of public financing based around the incentive-aligning results of public financing programs and corruption reduction that should follow, see generally ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA* (2014).

to face section 2 claims brought under the VRA, so they might find this defense particularly appealing.²³⁸

In the balance of this Part, we describe the variety of public financing programs and research to date on their effects on diversifying the “selectorate” and candidate pool, and courts’ reactions to them. We then propose that reformers should work through electoral channels, though we believe that a court could require such as scheme as a remedy in a section 2 claim as described above. Indeed, courts have required more aggressive remedies in the past.

A. *Public Financing Can Improve Financial Inclusion in Politics*

Public financing works because candidates voluntarily limit the size of contributions they can receive and the amount that they will spend. The programs take many forms. Matching programs match small donations with public money for any qualifying candidates. Voucher programs send vouchers to people in the constituency that they can assign to qualifying candidates. Other programs give block grants to candidates once they have raised a certain number of small donations and gathered a certain number of signatures.²³⁹ A voucher program is more in line with solving the problems we identify here, since it is more egalitarian in design and does not require any financial outlay by donors in order to participate. A voucher pilot program is currently contemplated for federal elections in H.R. 1, the For the People Act.²⁴⁰

²³⁸ Morgan Kousser, *Do The Facts of Voting Rights Support Chief Justice Roberts’s Opinion in Shelby County?*, *TRANSATLANTICA* (2015), <https://journals.openedition.org/transatlantica/7462> [<https://perma.cc/FXH4-5X9W>].

²³⁹ Resources abound. See, e.g., MICHAEL J. MALBIN, *CAMPAIGN FIN. INST., CITIZEN FUNDING FOR ELECTIONS* (2015), http://www.cfinst.org/pdf/books-reports/CFI_CitizenFundingforElections.pdf [<https://perma.cc/AN4A-9TCH>]; *State Public Financing Options 2015-2016 Election Cycle*, NAT’L CTR. OF STATE LEGISLATURES, <https://www.ncsl.org/Portals/1/Documents/Elections/StatePublicFinancingOptionsChart2015.pdf> (July 17, 2015) [<https://perma.cc/4Q7D-6557>]; DEMOS, *PUBLIC FUNDING FOR ELECTORAL CAMPAIGNS: HOW 27 STATES, COUNTIES, AND MUNICIPALITIES EMPOWER SMALL DONORS AND CURB THE POWER OF BIG MONEY IN POLITICS* (2017), https://www.demos.org/sites/default/files/publications/Public_Financing_Factsheet_FA%5B5%5D.pdf [<https://perma.cc/J6U4-ZJKA>]; *CFI Historical Database of State Campaign Finance Laws*, CAMPAIGN FIN. INST., https://cfinst.github.io/#contribution-limits?question=IndividualToCandLimit_H_Max&year=2018 [<https://perma.cc/FD3E-JS57>]; *Interactive Tool for Citizen Policy Analysts*, CAMPAIGN FIN. INST., <http://www.cfinst.org/State/CitizenPolicyTool.aspx> [<https://perma.cc/3AUT-YRUV>].

²⁴⁰ See generally Gareth Fowler & Daniel I. Weiner, *Understanding HR 1’s Public Financing Provisions*, BRENNAN CTR. FOR JUST. (2019) https://www.brennancenter.org/sites/default/files/2019-09/Report_Understanding%20HR1%20Public%20Financing.pdf [<https://perma.cc/JW5F-QCGZ>].

Public financing programs are hard to study because there are not many of them, and they change over time. However, social scientists have been able to draw some conclusions despite the difficult research terrain. We highlight a few of their general benefits before turning to their specific race and class equality benefits. Public financing programs have been found to increase the number of donors to campaigns²⁴¹ and, in some jurisdictions, increase the number of candidates running for office.²⁴² They also increase political competition, when measured as reducing the number of uncontested seats or reducing the incumbency advantage,²⁴³ though there is little evidence that, among competitive races, publicly financed elections are more competitive.²⁴⁴ When it comes to campaigning, candidates in public financing programs dedicate more resources to door-to-door contact and constituent phone calls. This should improve racial equality in access and information, because as we explained in Part III, voter outreach is currently biased toward donors (read: white people) under deregulated campaign finance.²⁴⁵ Moreover, despite fears that public financing would prompt low-quality candidates to enter electoral campaigns, the new candidates drawn to electoral politics by public financing seem to be of similar quality to incumbents and candidates that run under private financing.²⁴⁶ As Malbin reminds us, fine-grained details in these programs can have big impacts on the outcomes that reformers seek.²⁴⁷

Fewer studies have analyzed whether public financing programs increase financial inclusion in politics for racial minorities. For those that have, the potential seems promising. New York City's long-standing small-donor matching program (an eight-to-one match on small donations) and Seattle's "Democracy Voucher" program have

²⁴¹ Michael J. Malbin, Peter W. Brusoe & Brendan Glavin, *Small Donors, Big Democracy: New York City's Matching Funds as a Model for the Nation and States*, 11 ELECTION L.J. 3, 3 (2012); Brian J. McCabe & Jennifer A. Heerwig, *Diversifying the Donor Pool: How Did Seattle's Democracy Voucher Program Reshape Participation in Municipal Campaign Finance?*, 18 ELECTION L.J. 323, 332–33 (2019).

²⁴² ELISABETH GENN, MICHAEL J. MALBIN, SUNDEEP IYER & BRENDAN GLAVIN, BRENNAN CTR. FOR JUST., CAMPAIGN FIN. INST., DONOR DIVERSITY THROUGH PUBLIC MATCHING FUNDS (2012), https://www.brennancenter.org/sites/default/files/2019-08/Report_DonorDiversity-public-matching-funds.PDF [<https://perma.cc/TJ7B-M49N>]; see also Malbin et al., *supra* note 241.

²⁴³ Neil Malhotra, *The Impact of Public Financing on Electoral Competition: Evidence from Arizona and Maine*, 8 ST. POL. & POL'Y Q. 263, 264 (2008).

²⁴⁴ Kenneth R. Mayer, *Public Election Funding: An Assessment of What We Would Like to Know*, 11 FORUM 365, 370–71 (2013).

²⁴⁵ See generally MICHAEL G. MILLER, SUBSIDIZING DEMOCRACY: HOW PUBLIC FUNDING CHANGES ELECTIONS AND HOW IT CAN WORK IN THE FUTURE (2014).

²⁴⁶ *Id.*

²⁴⁷ See MALBIN, *supra* note 239, at 30–31.

greatly increased campaign finance participation in their cities.²⁴⁸ Neither program has fully equalized participation along racial or class lines, but the programs offer much more promise for donor and candidate financial inclusion than deregulated campaign finance. Seattle's program has now existed through two local elections (2017 and 2019). Jennifer Heerwig and Brian McCabe show that donor racial diversity was higher among voucher users than among private donors in both years.²⁴⁹ Seattle is a majority white city, but its two most diverse districts saw much higher participation in the voucher program than they did in private financing, especially in 2017.²⁵⁰ Class representation of voucher donors was also closer to the class distribution in the city, when compared to class representation among private donors, who tended to be richer.²⁵¹ Michael Malbin and his coauthors show that in New York City, the proportional role of small donors increased, the number of small donors increased, and the demographic and class profile of donors shifted to be more representative as a result of the program's move from one-to-one to multiple matching.²⁵²

While studies seem fairly settled as to the potential of public financing to increase and (usually) diversify the donor pool, it is harder to get clear evidence on whether public campaign financing definitively diversifies the candidate pool.²⁵³ Evidence from Seattle is sparse, since the program is very new; however, women of color seem to be more likely to declare their candidacies—and win—than under

²⁴⁸ See Malbin et al., *supra* note 241; see also McCabe & Heerwig, *supra* note 241; JENNIFER A. HEERWIG & BRIAN J. MCCABE, GEORGETOWN UNIV., BUILDING A MORE DIVERSE DONOR COALITION: AN ANALYSIS OF THE SEATTLE DEMOCRACY VOUCHER PROGRAM IN THE 2019 ELECTION CYCLE 9 (2020), <https://georgetown.app.box.com/s/r2skgxfnc230ukkb3dfqgm4576phzabd> [<https://perma.cc/KX7T-59Q6>].

²⁴⁹ One caveat is that in 2019, two socialist candidates for city council in Districts 3 and 4 received a lot of small cash donations (< \$25) from a diverse set of donors, making the small cash donor pool look more diverse than the voucher pool. However, the voucher donor pool was more diverse than the pool of cash donors who gave more than \$25. See HEERWIG & MCCABE, *supra* note 248, at 9.

²⁵⁰ See McCabe & Heerwig, *supra* note 241, at 332–33.

²⁵¹ *Id.*

²⁵² Malbin et al., *supra* note 241, at 7.

²⁵³ Compare GENN ET AL., *supra* note 242, with Raymond J. La Raja & David L. Wiltse, *Money that Draws No Interest: Public Financing of Legislative Elections and Candidate Emergence*, 14 ELECTION L.J. 392 (2015), and Mitchell Kilborn, *Public Campaign Financing, Candidate Socioeconomic Diversity, and Representational Inequality at the U.S. State Level: Evidence from Connecticut*, 18 ST. POL. & POL'Y Q. 296, 313–14 (2018) (studies finding that the Connecticut public financing program did not improve socioeconomic diversity among candidates compared to similar states, but not analyzing racial impacts). We agree with Malbin that more research is needed to settle the issue. See MALBIN, *supra* note 239, at 18.

private campaign financing in that city.²⁵⁴ In New York City's small-dollar matching program, research on candidate diversity is limited, but in the wake of the program and its increases in matching, more minority candidates were elected, which Malbin says is plausibly attributable to the matching program.²⁵⁵ Our firmest results on this question come from Brazil. Political and development economists studied mandatory public financing after a recent Supreme Court decision in Brazil. They found that the candidate pool under public financing was both larger and, on average, less wealthy than the candidate pool under private financing.²⁵⁶ Despite differences between the U.S. and Brazil, the Brazilian case is consistent with evidence from the smaller-scale examples of public financing in the U.S.

The Court's friendliness to public financing programs is not guaranteed. The Court's most recent statement on a public financing program is *Arizona Free Enterprise Club v. Bennett*, which struck down a public financing regime that provided a subsidy of matching funds for competing candidates facing independent expenditures under various scenarios.²⁵⁷ The Court said the provisions "impose[] an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right[s]," in particular because they engaged in the "dangerous enterprise" of attempting to "level the playing field."²⁵⁸ The end result is that independent expenditures will probably always remain a potential threat in public financing programs, or as Malbin puts it, "that citizen funding programs cannot squeeze private money out of politics."²⁵⁹

While we have little jurisprudential guidance on the matter, it seems that as long as they avoid the pitfalls of the Arizona program just described, public financing programs can allow escape hatches from the voluntary public financing restrictions in response to

²⁵⁴ SEATTLE ETHICS & ELECTIONS COMM'N, 2019 ELECTION CYCLE EVALUATION ex. 7 (2020), https://www.seattle.gov/Documents/Departments/EthicsElections/DemocracyVoucher/Final%20DVP%20Evaluation%20Report%20July23_2020.pdf [<https://perma.cc/VMQ8-ZN66>].

²⁵⁵ MALBIN, *supra* note 239, at 30.

²⁵⁶ Eric Avis, Claudio Ferraz, Frederico Finan & Carlos Varjão, Money and Politics: The Effects of Campaign Spending Limits on Political Entry and Competition (July 2021) (unpublished manuscript), https://eml.berkeley.edu/~ffinan/Finan_Limits.pdf [<https://perma.cc/A7LL-ML4T>].

²⁵⁷ *Ariz. Free Enter. Club v. Bennett*, 564 U.S. 721 (2011).

²⁵⁸ *Id.* at 736 (quoting *Davis v. FEC*, 554 U.S. 724, 739 (2008)) (invalidating a provision raising contribution limits for candidates participating in the public financing program who face self-funded candidates).

²⁵⁹ See MALBIN, *supra* note 239, at 2. Recall our analysis in Figure 6 that independent expenditures are even more racially imbalanced than direct contributions. See *supra* Figure 6.

independent expenditures. For example, Seattle’s campaign finance regulator allows candidates an escape hatch from the program’s lower contribution limits and lower spending requirements once independent expenditures made against a candidate exceeded the voucher program’s spending limit. Amazon spent millions in independent expenditures to support a slate of candidates in Seattle’s 2019 election.²⁶⁰ In response, all but one of the publicly financed candidates availed themselves of the escape hatch. So far, the Seattle program has survived constitutional scrutiny, including a recent denial of a petition for certiorari from the Supreme Court on a challenge to the “forced speech” landlords claimed the program thrust on them.²⁶¹ Observers interpreted the certiorari denial as a win for public financing.²⁶²

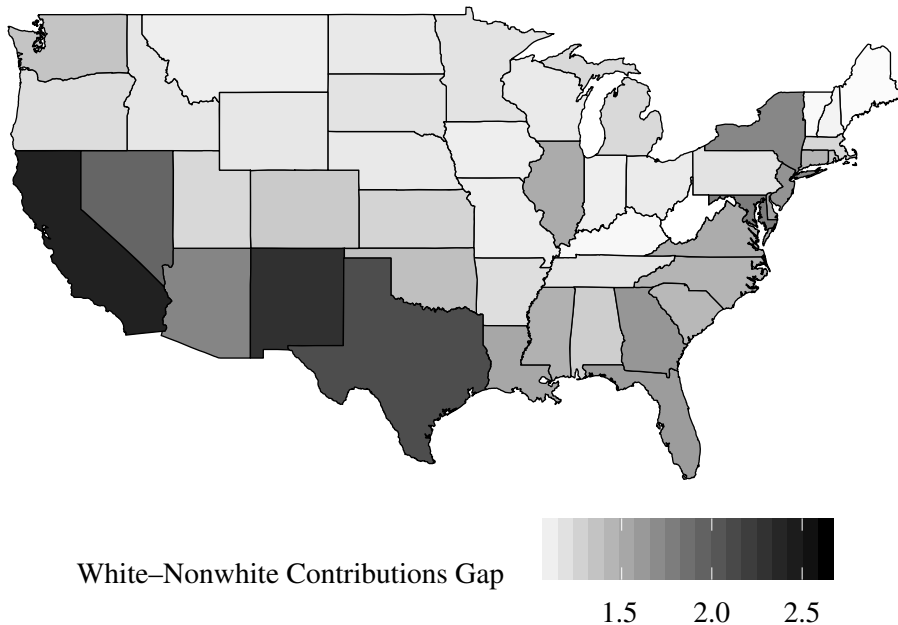
B. Electoral Jurisdictions Should Adopt Public Financing

The best way to implement these programs is through the elected branches or via referendum. Legislators, governors, mayors, city council representatives, and county elected officials are the closest to the problem. Moreover, public buy-in (“this is *our* campaign finance program”) will help a program persist over time.

²⁶⁰ All but one lost their elections. See Daniel Beekman & Jim Brunner, *Amazon Lost the Seattle City Council Elections After a \$1 Million Power Play. Will It See a New Head Tax?*, SEATTLE TIMES (Nov. 10, 2019, 6:00 PM), <https://www.seattletimes.com/seattle-news/politics/amazon-lost-the-seattle-city-council-elections-after-a-1-million-power-play-will-it-see-a-new-head-tax> [<https://perma.cc/WF69-4ZYX>].

²⁶¹ *Elster v. City of Seattle*, 444 P.3d 590, 592 (Wash. 2019), *cert. denied*, 140 S. Ct. 2564 (2020).

²⁶² This escape hatch is different than the “subsidy” provided to campaigns in *Arizona Free Enterprise*, because it merely allows publicly funded candidates to fundraise according to the rules the privately funded candidates follow once money spent against them reaches their limit, rather than providing them additional public funds to help equalize the campaigns. Ciara Torres-Spelliscy, *A Win for Public Financing at the Supreme Court*, BRENNAN CTR. FOR JUST. (May 15, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/win-public-financing-supreme-court> [<https://perma.cc/GQB7-R8UX>].

FIGURE 8. RACIAL CONTRIBUTIONS GAP BY STATE²⁶³

While we think that adopting public financing would be beneficial to all jurisdictions, interest groups advocating for the adoption of these policies must set priorities subject to resource constraints. One useful way to prioritize is to consider which places in the United States have the largest contributions gaps. In Figure 8, we show estimates of the contributions gap in each state. We calculate the contributions gap as the ratio between the percent of a state's contributions that come from white donors to the percent of a state's population that is white. A larger contributions gap means that the contributions from a state's donors are more white-dominated than we would expect from its population demographics. As Figure 8 shows, the gap tracks state diversity.²⁶⁴ States with higher percentages of nonwhite

²⁶³ The white-nonwhite contributions gap is measured as the ratio of the percent of campaign contributions by white people to the percentage of the voting age population that is white. State racial demographics are from the U.S. Census Bureau's Bridged-Race Population Estimates, available at Bridged-Race Population Estimates 1990-2019, CTRS. FOR DISEASE CONTROL & PREVENTION WONDER SEARCH, <https://wonder.cdc.gov/bridged-race-v2019.html> [<https://perma.cc/GB8M-7MSC>].

²⁶⁴ See, for example, the maps at William H. Frey, *Diversity Defines the Millennial Generation*, BROOKINGS INST. (June 28, 2016), <https://www.brookings.edu/blog/the-avenue/2016/06/28/diversity-defines-the-millennial-generation> [<https://perma.cc/LV9Q-Y8NL>]; Niraj Chokshi, *Diversity in America's Counties, in 5 Maps*, WASH. POST (June 30, 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/06/30/diversity-in-americas-counties-in-5-maps> [<https://perma.cc/YRJ4-M8M3>].

residents also have larger inequalities between donors of color and white donors. For example, 89% of California-based contributions since 1980 come from white donors—more diverse than the contributions from other states—but the state’s population is only 37% non-Latino white in recent years. By contrast, a state like New Hampshire has a smaller racial contributions gap because, although its contributions are 98% white, its population is 90% non-Latino white.²⁶⁵

C. *Public Financing as a Judicial Remedy*

Of course, reformers could instead sue the government to enjoin the *laissez-faire* system we currently have. The remedy requested would be bold: Litigants would ask the courts to force the government to create a public financing program. It is a tall order: What Court would ever force a jurisdiction to adopt public financing? To that, we respond, the same kind of Court who saw racial inequality in schooling and required that states fix it, or the same kind of court that saw Eighth Amendment violations in prisons and required that cities, counties, and states implement reforms.²⁶⁶ In other words, requiring a jurisdiction to implement public financing is less impactful or onerous than other major court-mandated actions to ameliorate untenable situations. It is also less costly than a judicial remedy to directly rectify the racial wealth gap would be.

While it may not be particularly likely in the current political climate, and while it is less desirable than a legislative fix, there is nothing obviously legally or constitutionally flawed in a request. A future Court could require public financing of campaigns as a remedy to the cycle of representational problems described in this Article.

CONCLUSION

Campaign finance has a race problem. Because of our country’s historical and ongoing policies that create and exacerbate the racial wealth gap, white donors are far more able to donate, and to donate large amounts, than Americans of color. We show this with new data estimating the race of contributors, finding that approximately ninety-one percent of contributions since 1980 are from white donors—a number that has changed little in more recent years.²⁶⁷

²⁶⁵ *Quick Facts: New Hampshire*, U.S. CENSUS BUREAU (July 1, 2021), <https://www.census.gov/quickfacts/NH> [<https://perma.cc/X42J-MB57>].

²⁶⁶ See *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (directing the lower courts to issue orders to desegregate public schools).

²⁶⁷ See *supra* Section I.C.1, Figure 4.

The racially homogenous composition of campaign contributions leads to racial biases in representation. Social science research over the past two decades has established causal evidence of how campaign contributions influence the electoral candidate pool as well as buy access to the ears of incumbent officials.²⁶⁸ Our new analyses show that more expensive elections reduce the likelihood that candidates of color run, and that the racial makeup of campaign contributions affects legislators' behavior in office.²⁶⁹

The massive gap in contributions has follow-on effects, in which donors get better access to and better representation from their elected officials. All of this can give rise to a cognizable claim. One solution is for candidates to bring a claim under the Voting Rights Act to urge the courts to force the government to implement a public financing program. But the better option is to implement these programs and then defend them in court.

²⁶⁸ *See supra* Section I.B.

²⁶⁹ *See supra* Section I.D.