

## THE LAW OF LEGISLATIVE REPRESENTATION

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*Law has much to say about the practice of legislative representation. Legal rules from different substantive domains collectively determine the landscape in which legislators act. Most obviously, the law of democracy—the law regulating elections, redistricting, and money in politics—shapes the incentives that legislators face and the sorts of representation that they provide once in office. But so too does the law that governs legislative organization and procedure. Congress and other legislatures are governed by rich bodies of internal rules, many of which receive little attention from either the public or legal scholars. These internal rules can empower or constrain legislators. By the same token, they can empower or constrain those that seek to influence how legislators behave, such as party leaders and interest groups.*

*This Article examines how law shapes representation. It takes a legislator's point of view of public law, looking to how law shapes legislators' choices and incentives. In taking this approach, the Article makes three principal contributions. First, it shows how the law of legislative representation is pluralist. Rather than unequivocally pointing legislators toward one type of representation or another, the law enables and encourages legislative responsiveness to each of three groups: constituents, interest groups, and party leaders. The law gives each of these groups distinct tools for exerting influence over legislative behavior, but it does not institutionalize the primacy of any one of them. Second, fully understanding representation requires focusing on internal legislative organization and procedure. Those topics can be just as consequential for American democracy as more familiar constitutional law and law of democracy topics. Centering legislative*

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*organization and procedure reveals powerful possible levers of congressional reform. Such creative approaches are especially important given the constitutional and political hurdles that stand in the way of many reforms to the law of democracy. Third, a detailed descriptive account of political institutions and legal rules should be part of our normative theorizing about representation. Because representation is a construct of law, understanding how it operates—and how it should operate—requires close attention to legal rules.*

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#### INTRODUCTION

Legislators face many choices. Should they do what is best for their constituents or the nation as a whole? When should they be responsive to pressure from interest groups? When should they be loyal to their political parties? How should they mediate between the conflicting demands that they face?

It might seem that law has little to say about these dilemmas. Constitutional law focuses on the structure and power of Congress as a whole, but not on individual legislators.<sup>1</sup> The statutes and cameral rules that dictate how legislative chambers operate set out procedures for lawmaking, but they do not expressly instruct members how to act.<sup>2</sup> And political science research on legislative behavior typically focuses on the goals that legislators pursue—most notably reelection, but also other goals<sup>3</sup>—in a way that is not directly tied to law.

But legislators, like all of us, act in the shadow of the law.<sup>4</sup> Legal rules, doctrines, and institutional structures establish the landscape in which legislators act.<sup>5</sup> Law determines what courses of action are permitted and forbidden to legislators. It dictates which approaches to representation will be easier and which will be more difficult in practice. A focus on legislators’ goals alone therefore only tells part of the story of legislative

<sup>1</sup> See U.S. Const. art. I; see also Daniel A. Farber, William N. Eskridge, Jr., Philip P. Frickey & Jane S. Schacter, *Cases and Materials on Constitutional Law* 865–1078 (6th ed. 2019).

<sup>2</sup> See generally Barbara Sinclair, *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress* (5th ed. 2017); Walter J. Oleszek, Mark J. Oleszek, Elizabeth Rybicki & Bill Heniff, Jr., *Congressional Procedures and the Policy Process* (10th ed. 2016).

<sup>3</sup> The canonical account “conjure[s] up a vision of United States congressmen as single-minded seekers of reelection” and argues that such a vision “fits political reality rather well.” David R. Mayhew, *Congress: The Electoral Connection* 5, 6 (1974). See also Richard F. Fenno, Jr., *Congressmen in Committees* 1 (1973) (describing House members’ goals as “reelection, influence within the House, and good public policy”).

<sup>4</sup> Cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *Yale L.J.* 950 (1979).

<sup>5</sup> This Article uses the term “rules” broadly to include legal rules from sources as diverse as constitutional provisions, statutes, cameral rules, judicial doctrines, and parliamentary precedents.

behavior. A fuller understanding of legislative representation requires observing how law creates the environment in which legislators pursue their goals. To put the point simply, law shapes representation.

Scholars of the law of democracy know this well. Election law, redistricting law, and campaign finance law matter precisely because law shapes representation. Legislators need to be responsive to their primary constituencies, which can pull them away from advocating for the preferences or interests of their electorate's median voter.<sup>6</sup> Legal rules dictate the size, shape, and demographic composition of districts, which in turn affect the representation that legislators provide.<sup>7</sup> Legislators receiving campaign contributions from outside their districts might at times be more responsive to non-constituent donors than to their constituents.<sup>8</sup> And so forth.

But another, much less examined body of law matters as well: the law governing how legislatures organize themselves, how the legislative process is structured, and how members may or may not behave while in office. The law of democracy literature has not traditionally encompassed these topics.<sup>9</sup> To better understand legislative decision making, however, the law governing how legislatures operate is necessarily a part of the story. Consider the following examples:

- A senator wishes to vote contrary to her party's position on a high-profile issue because the party line runs counter to the preferences and interests of her constituents. The senator votes with her party, however, because party leaders threaten to strip her of a powerful committee chairmanship if she defects.<sup>10</sup>
- A House member committed to representing his constituency must vote on a foreign aid bill with no obvious effect on his constituents and about which his constituents do not have a clear preference. He attempts to introduce an amendment to

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<sup>6</sup> See *infra* Subsection II.A.3.

<sup>7</sup> See *infra* Subsection II.A.4.

<sup>8</sup> See *infra* Section II.B.

<sup>9</sup> The leading law of democracy casebook does not cover internal legislative dynamics. See Samuel Issacharoff, Pamela S. Karlan, Richard H. Pildes & Nathaniel Persily, *The Law of Democracy: Legal Structure of the Political Process* (5th ed. 2016).

<sup>10</sup> See *infra* Section III.C.

give the bill local relevance, but the amendment is barred as not germane under House rules.<sup>11</sup>

- A senator wishes to achieve a policy outcome favored by her constituents or by a key interest group within her state, but which an overwhelming majority of the Senate opposes. Despite being outnumbered, the senator places a “hold” on legislation that is a priority for her party and refuses to drop the hold until her demands are met.<sup>12</sup>
- A state legislator is trying to decide how to vote on a highly technical bill, which requires economic and scientific expertise in order to be fully understood. The legislator serves in a chamber with little staffing capacity, however, and the only information that he can find about the bill’s likely impacts comes from an industry source with a strong financial interest in the bill.<sup>13</sup> As a result, the legislator must cast his vote based on incomplete or biased information.

These examples show that whoever legislators are trying to represent, they do so within a rich institutional context. Some rules, like House germaneness requirements, constrain what rank-and-file legislators may do. Others, like Senate holds, empower legislators. Still others, like rules enabling party leaders to strip committee chairmanships, shape the various pressures legislators face. Even rules which expand or diminish legislative capacity shape responsiveness, though in more subtle ways. In each case, legislative organization helps determine how legislators behave.

This Article examines how law shapes representation. It takes a legislator’s point of view of public law, looking to how law shapes legislators’ choices and incentives. In so doing, it devotes equal time to familiar law of democracy topics and to less familiar issues of legislative organization. It considers a sampling of the many different sorts of legal rules that create the environment in which legislators act. Some of the rules that the Article discusses are formally part of constitutional law, grounded in constitutional text and precedent. Most are part of the small-

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<sup>11</sup> See *infra* Subsection III.A.1.

<sup>12</sup> See *infra* Subsection III.A.2.

<sup>13</sup> See *infra* Subsection III.B.3.

“c” constitution: the “set of rules and norms and institutions that guide the process of government.”<sup>14</sup>

In taking this approach, this Article makes three principal contributions. It shows how the law of legislative representation is pluralist, pulling legislators in competing directions. It centers the role of legislative organization, arguing that reforms to a legislature’s internal operations can at times serve as alternate means of achieving the same goals sought by proponents of electoral reforms. And it contends that theorists of representation cannot fully understand that concept without attending to the ways in which it is constructed by law.

First, this Article’s analysis shows that both the law of democracy and legislative organization are *pluralist* about representation. Elements of each area of law pull legislators in competing directions. Rather than pointing legislators toward one type of representation or another, the law enables and encourages legislative responsiveness to each of three groups: constituents, interest groups, and party leaders.<sup>15</sup> These groups each have the ability to reward or punish legislators. Knowing this, legislators have incentives to attend to the preferences and interests of each. On any given issue, understanding why a legislator behaves as they do often requires looking to their constituents, to relevant interest groups, and to party leaders. Pluralist approaches to legislative representation have long existed in political theory; this Article argues that U.S. law likewise takes a pluralist approach to representation.<sup>16</sup>

This pluralism is not only a theoretical way of understanding representation; it also provides insight on possible reforms. Consider the frequent criticism that Congress and state legislatures are overly responsive to corporate interests or the wealthy.<sup>17</sup> The most obvious way to reduce the power of these interests is to do so directly, hence well-

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<sup>14</sup> Richard Primus, *Unbundling Constitutionality*, 80 U. Chi. L. Rev. 1079, 1127 (2013); see also A.V. Dicey, *The Law of the Constitution* 20 (J.W.F. Allison ed., 2013) (“[Constitutional law] includes (among other things) all rules which define the members of the sovereign power, all rules which regulate the relation of such members to each other, or which determine the mode in which the sovereign power, or the members thereof, exercise their authority.”).

<sup>15</sup> The groups are conceptually distinct, so this Article largely considers them separately. But they can overlap in practice: many constituents are also loyal partisans, many constituents are also active members of interest groups (either centered within or outside of the constituency), and interest groups play a key role in constituting and supporting political parties.

<sup>16</sup> See *infra* Section I.C.

<sup>17</sup> See *infra* note 25 and accompanying text.

known proposals for campaign finance reform.<sup>18</sup> This Article's analysis suggests an additional possible approach: seeking to reduce corporate power indirectly, through better empowering constituents or party leaders. The theory behind this approach is that, because different groups compete for the limited attention of legislators, empowering some groups (such as constituents or party leaders) can reduce the influence of others (here, certain interest groups). The choice between direct and indirect approaches to reducing corporate power will turn on many factors—some legal, some political, some practical. But attending to law's pluralism can reveal levers of reform that may not be evident at first glance.<sup>19</sup>

Second, the Article shows how fully understanding representation requires focusing on internal legislative organization and procedure. Those topics can be just as consequential for American democracy as more familiar constitutional law and law of democracy topics. Moreover, the same analytic tools that have long been applied in the law of democracy context can be applied to analyze how legislative organization and procedure matter for representation. Rules internal to how legislative bodies operate can either strengthen or attenuate legislators' responsiveness to their constituents, to interest groups, and to party leaders. As such, legislative organization and procedure should be studied alongside the law of democracy.

A key implication of this insight is that changes to legislative organization and procedure can sometimes be a *substitute* for changes in traditional law of democracy areas. Reformers have long sought to change how representation operates through changes to voting, redistricting, or campaign finance rules. In some cases, similar shifts in responsiveness could be achieved by making changes to legislative organization and procedure instead. To be sure, changes in internal legislative operations are not a perfect substitute for reform to the law of democracy, which is often (and rightly) viewed as required by principles of political equality. But reform to legislative procedure holds significant promise as a vehicle for achieving some of the ends sought by law of democracy reformers.

Consider again the example of corporate power. The most widely known proposals to restrict corporate power involve changes to campaign finance laws. Even if reform to campaign finance law would reduce

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<sup>18</sup> See, e.g., Richard L. Hasen, *Plutocrats United: Campaign Money, the Supreme Court, and the Distortion of American Elections* (2016); Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It* (2011).

<sup>19</sup> See *infra* Section IV.B.

legislators' responsiveness to corporate interests, changes in that area of law require the passage of new legislation and would have to withstand judicial review by a Supreme Court that has consistently struck down such regulation.<sup>20</sup> But, even absent campaign finance reform, each chamber of Congress has tools that it could deploy to seek to reduce corporate power. Even modest changes to lobbying regulations, transparency rules, revolving door rules, or congressional capacity could advance some of the goals sought by campaign finance reformers. Such internal changes might reasonably be viewed as second-best solutions, relative to directly reforming campaign finance law. But the difficulty of changing the law in that area warrants allocating more reformist attention to organizational and procedural reforms.<sup>21</sup>

Third, this Article argues that a detailed descriptive account of political institutions and legal rules should be part of our normative theorizing about representation. Political theorists have developed rich accounts of legislative representation and legislators' duties.<sup>22</sup> Legal scholars have likewise considered legislators' duties, with recent work arguing that legislators have obligations to act in accordance with the Constitution, to promote good governance, to abide by principles of justice, and to advance the national interest.<sup>23</sup> The arguments for the existence and importance of these duties are often persuasive. This Article seeks to supplement existing work by emphasizing the importance of rules in structuring how legislators behave, and thus whether and how they fulfill whatever duties they have. In particular, its focus on constituents, interest groups, and parties trains our attention on the actors who can plausibly

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<sup>20</sup> See *infra* note 319 and accompanying text.

<sup>21</sup> See *infra* Section IV.B.

<sup>22</sup> See, e.g., Hanna Fenichel Pitkin, *The Concept of Representation* (1967); Bernard Manin, *The Principles of Representative Government* (1997); Andrew Sabl, *Ruling Passions: Political Offices and Democratic Ethics* (2002); Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (2006); Suzanne Dovi, *The Good Representative* (2007); Jane Mansbridge, *Rethinking Representation*, 97 *Am. Pol. Sci. Rev.* 515 (2003); Andrew Rehfeld, *Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy*, 103 *Am. Pol. Sci. Rev.* 214 (2009); Jane Mansbridge, *Clarifying the Concept of Representation*, 105 *Am. Pol. Sci. Rev.* 621 (2011); Andrew Rehfeld, *The Concepts of Representation*, 105 *Am. Pol. Sci. Rev.* 631 (2011).

<sup>23</sup> See, e.g., Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 *Stan. L. Rev.* 585 (1975); Vicki C. Jackson, *Pro-Constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy*, 57 *Wm. & Mary L. Rev.* 1717 (2016); Neil S. Siegel, *After the Trump Era: A Constitutional Role Morality for Presidents and Members of Congress*, 107 *Geo. L.J.* 109 (2018).

induce legislators to fulfill—or violate—their duties. Most generally, this Article seeks to heed political theorists' calls for greater sensitivity to institutional arrangements as a part of normative theorizing.<sup>24</sup>

My discussion of pluralism should not be taken as an endorsement of how Congress or any other legislature operates in practice. Even if a pluralist account of legislative representation is sound as a matter of theory, and even if the law instantiates that pluralist approach at a high level of generality, the devil is in the details. And there is significant evidence that the practice of representation today is vastly unequal. Political scientists have documented significant capture of the federal and state legislative processes by corporate interests and the wealthy.<sup>25</sup> Congress is beset with other challenges as well, including high levels of partisan polarization,<sup>26</sup> broad public disapproval,<sup>27</sup> and a significant democratic deficit, most notably on account of the apportionment of the

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<sup>24</sup> See *infra* notes 321–22 and accompanying text.

<sup>25</sup> There is voluminous literature on the degree and mechanisms of these groups' influence. See, e.g., Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age* (2016); Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (2012); Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: How Washington Made the Rich Richer—and Turned Its Back on the Middle Class* (2010); Alexander Hertel-Fernandez, *State Capture: How Conservative Activists, Big Businesses, and Wealthy Donors Reshaped the American States—and the Nation* (2019); Kay Lehman Schlozman, Sidney Verba & Henry E. Brady, *The Unheavenly Chorus: Unequal Political Voice and the Broken Promise of American Democracy* (2012); Benjamin I. Page, Jason Seawright & Matthew J. Lacombe, *Billionaires and Stealth Politics* (2018).

For dissenting views of some of this literature, see, e.g., Peter K. Enns, *Relative Policy Support and Coincidental Representation*, 13 *Persps. on Pol.* 1053, 1054 (2015) (“I show theoretically and empirically that even on those issues where the preferences of the wealthy and the median diverge . . . policy can (and does) end up about where we would expect if policymakers followed the economic median and ignored the affluent.”); Jeffrey R. Lax, Justin H. Phillips & Adam Zelizer, *The Party or the Purse? Unequal Representation in the U.S. Senate*, 113 *Am. Pol. Sci. Rev.* 917, 917 (2019) (“We find that affluent influence is overstated and itself contingent on partisanship . . . . The poor get what they want more often from Democrats. The rich get what they want more often from Republicans, but only if Republican constituents side with the rich. Thus, partisanship induces, shapes, and constrains affluent influence.”).

<sup>26</sup> See, e.g., Sarah Binder, *The Dysfunctional Congress*, 18 *Ann. Rev. Pol. Sci.* 85 (2015); Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 *Colum. L. Rev.* 1689 (2015).

<sup>27</sup> *Congress and the Public*, Gallup News, <https://news.gallup.com/poll/1600/congress-public.aspx> [<https://perma.cc/C7KV-QRPB>] (last visited Jan. 20, 2021) (showing congressional approval ratings not greater than 40%, and frequently less than 20%, over the past fifteen years).

Senate and the existence of the filibuster.<sup>28</sup> For these and other reasons, leading observers have decried Congress as the U.S. government's "broken branch."<sup>29</sup> To characterize the law of legislative representation as pluralist is not to defend Congress. To the contrary, one of the virtues of a pluralist picture is that it points toward new avenues for reform.

A brief disclaimer is in order before proceeding. In taking a legislator's point of view, this Article treats the identity of the legislator as fixed. Holding our hypothetical legislator's identity constant allows us to better see how manipulating any given legal rule would change the environment in which they operate. This clarity comes at the cost of not engaging with important questions about the role of law in shaping who gets elected in the first instance.<sup>30</sup> Further, a focus on the choices and incentives facing individual legislators leads to relatively little engagement with some vital system-level design features, including the legislative process's many

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<sup>28</sup> See, e.g., Robert A. Dahl, *How Democratic Is the American Constitution?* 46–54 (2d ed. 2003) (criticizing unequal representation in the Senate); Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)* 52 (2006) (noting that "the Senate can exercise a veto power on majoritarian legislation passed by the House that is deemed too costly to the interests of small states, which are overrepresented in the Senate" (emphasis omitted)); Adam Jentleson, *Kill Switch: The Rise of the Modern Senate and the Crippling of American Democracy* 5 (2021) (arguing that "from its inception to today, the filibuster has mainly served to empower a minority of predominately white conservatives to override our democratic system"); Frances E. Lee & Bruce I. Oppenheimer, *Sizing Up the Senate: The Unequal Consequences of Equal Representation* 158–222 (1999) (documenting the policy and financial advantages that accrue to small states on account of Senate representation).

<sup>29</sup> See, e.g., Thomas E. Mann & Norman J. Ornstein, *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track* (2006).

<sup>30</sup> Thus, I do not discuss descriptive representation, the idea legislators should share demographic or other characteristics with their constituents. See, e.g., Pitkin, *supra* note 22, at 60–91 (situating descriptive representation within a broader taxonomy of representation); Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes,"* 61 *J. Pol.* 628 (1999) (describing benefits of descriptive representation for disadvantaged groups). Nor do I engage in the debate among social scientists about the relationship between the number of minority representatives and the substantive representation of minority interests in legislative bodies. Compare, e.g., David Lublin, *The Paradox of Representation: Racial Gerrymandering and Minority Interests in Congress* (1997) (arguing that, under certain circumstances, creating majority-minority legislative districts makes the House less likely to adopt legislation favored by African Americans), with Ebonya Washington, *Do Majority-Black Districts Limit Blacks' Representation? The Case of the 1990 Redistricting*, 55 *J.L. & Econ.* 251 (2012) (finding no evidence for the view that majority-minority districts decrease substantive minority representation in Congress).

veto points,<sup>31</sup> possible partisan biases in that process,<sup>32</sup> and unequal representation in the U.S. Senate.<sup>33</sup> Critical as these features are to understanding and evaluating Congress, this Article's focus is instead on how law constructs the day-to-day choices and incentives facing rank-and-file legislators. Even with these limitations, however, a close look at the legal mechanisms bearing on representation can illuminate why legislators act as they do and how they might be incentivized to act differently.<sup>34</sup>

The remainder of the Article proceeds as follows. Part I makes the case for a pluralist approach to representation. It argues that legislators have normative reasons to be responsive to their constituents, interest groups, and party leaders, and further argues against categorically placing any one duty or group above all others. The next two Parts show how specific legal rules roughly instantiate a pluralist approach to representation by pulling legislators in competing directions. Part II examines the law of democracy. It notes that the reelection incentive encourages legislative responsiveness to constituents, but it also highlights how several areas of law weaken the links between legislators and their constituents and enable interest groups and party leaders to exercise considerable influence. Part III conducts a similar inquiry for internal legislative organization. It shows how legislative organization can either enhance or constrain the ability of legislators to represent their constituents, the degree of interest group power, and the amount of influence that party leaders have over their rank-and-file members. Part IV turns to implications, both for the scholarly literature and for those seeking to reform a contemporary Congress widely perceived to be broken.

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<sup>31</sup> See *infra* note 214 and accompanying text.

<sup>32</sup> See, e.g., Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. Rev. (forthcoming 2022) (manuscript at 24–29) (on file with author).

<sup>33</sup> See sources cited *supra* note 28.

<sup>34</sup> In addition, space constraints preclude a full treatment of every type of law that shapes representation. The discussion that follows shows how different mechanisms—some from the law of democracy, some from legislative organization—can ratchet up or down different sorts of responsiveness. But this treatment is illustrative rather than exhaustive. Many other legal rules shape responsiveness, sometimes directly (such as rules concerning access to the franchise) and sometimes indirectly (such as rules regulating the media, which in turn shape the information ecosystem in which legislators operate). More fundamentally, representation is also constituted by foundational institutional design choices, such as the choice of a presidential rather than a parliamentary system, which are beyond my scope here.

## I. PLURALISM AND REPRESENTATION

Scholars of representation differ on precisely what representation requires, but most accept some degree of public responsiveness as a core part of representation.<sup>35</sup> Responsiveness does not mean governance based on the latest public opinion poll, but it does require representatives to give at least some consideration to the preferences and interests of the public. A legislator who was not at all responsive to any segment of the public would not be acting properly as a representative, at least on the contemporary understanding of the term. But accepting that representation entails public responsiveness gives rise to another question: To whom should legislators be responsive?

This Part argues that normative justifications exist for legislators to be responsive to three different types of groups: constituents, interest groups, and party leaders. There is distinctive value in legislative responsiveness to each group, given both the different types of interests that each one represents and the distinctive roles that each one plays in facilitating democratic governance. The approach to representation taken by U.S. law is, to a first approximation, consistent with this pluralism.

*A. Responsive to Whom?**1. Constituents*

A legislator's most straightforward duty is toward their constituents: the residents of their geographic district.<sup>36</sup> It is so common as to be nearly trite for legislators to publicly affirm that their primary obligations are to their constituents. One senator put the widespread sentiment simply: "[M]y first obligation is to the people who elected me."<sup>37</sup> Other legislators

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<sup>35</sup> See, e.g., Philip Pettit, Representation, Responsive and Indicative, 17 *Constellations* 426, 426 (2010) ("[T]heorists have focused mainly on the responsive variety of representation."); Pitkin, *supra* note 22, at 209–10 (defining political representation as "acting in the interest of the represented, in a manner responsive to them," but recognizing conditions under which representatives may follow the interests, rather than preferences, of the represented); see also Heinz Eulau & Paul D. Karps, The Puzzle of Representation: Specifying Components of Responsiveness, 2 *Legis. Stud. Q.* 233, 233 (1977) (defining representation in terms of responsiveness).

<sup>36</sup> This Article uses the term "constituents" in its conventional sense of residents of the geographic area (district or state) that elects a legislator. Some have used the term more broadly. See, e.g., Amy Gutmann & Dennis Thompson, Democracy and Disagreement 147 (1996) (distinguishing "electoral" and "moral" constituents).

<sup>37</sup> 107 Cong. Rec. 15,292 (2001) (statement of Sen. Patty Murray (D-WA)).

likewise ritualistically invoke their duties to their constituencies: “[M]y job is to do what the people of Georgia want me to do.”<sup>38</sup> “[T]he safety and security of Southern Arizonans is my first priority.”<sup>39</sup> “[M]y first priority is our local businesses and workers in Louisiana.”<sup>40</sup> Though this sort of constituency-centered representation may be self-evident to legislators and constituents, it still requires justification.

A first grounding for constituent-focused representation is the distinctive electoral relationship between legislators and their constituents. An election creates a formal link between a legislator and their constituents. It causes legal authority to be vested in a legislator who, if not for the election’s outcome, would not possess that authority. This relationship between a legislator and their constituents is different in kind from the legislator’s other relationships—including the more general relationship between the legislator and the populace as a whole, and relationships with donors, party leaders, or particular groups of non-constituents. None of these other relationships have the formal, electoral grounding that defines the legislator-constituent relationship.<sup>41</sup>

Another justification for constituency-centered representation lies in the importance of ensuring that certain types of interests receive sufficient representation in the political process. Some policy areas affect the entire nation: taxpayers, public school students, and Medicare recipients exist in every state and legislative district. But many other important political

<sup>38</sup> 113 Cong. Rec. 359 (2014) (statement of Sen. Johnny Isakson (R-GA)).

<sup>39</sup> 113 Cong. Rec. 15,620 (2013) (statement of Rep. Ronald Barber (D-AZ)).

<sup>40</sup> 112 Cong. Rec. 15,360 (2011) (statement of Sen. Mary Landrieu (D-LA)). But see Scott Shafer, *Showhorses vs. Workhorses: What Makes an Effective US Senator?*, S. Cal. Pub. Radio (Oct. 5, 2016), <https://scpr.org/news/2016/10/05/65366/showhorses-vs-workhorses-what-makes-an-effective-u/> [<https://perma.cc/NR7M-UE6M>] (quoting the view of Sen. Patrick Leahy (D-VT) that senators should “[w]ork first for the country”).

<sup>41</sup> Many relationships that legislators have, such as their relationships with interest groups, are informal in character. Nonelectoral mechanisms for the citizenry to engage with legislators do not create formal links between a single legislator and a discrete group of people. Under the once-common practice of formally petitioning Congress, for example, petitions were directed to Congress as a whole, not to specific legislators. See Maggie McKinley, *Lobbying and the Petition Clause*, 68 *Stan. L. Rev.* 1131, 1136 (2016) (describing petitioning as having “more closely resembled the formal process afforded in courts” than contemporary lobbying).

Normative arguments based on the relationship between a legislator and *voters* in that legislator’s constituency cannot explain why the legislator owes duties to non-voter constituents such as children, noncitizens, disenfranchised persons, or those who have voluntarily not registered to vote. But it is widely accepted in the United States that legislators should represent all constituents: “As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote.” See *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016).

interests are geographically concentrated within one or a few districts. The fates of specific manufacturing plants, localized environmental concerns, or public infrastructure projects typically have a direct impact on only (or, at least, primarily) residents of a discrete geographical area. If legislators did not prioritize the preferences and interests of their constituents, it is possible that no legislator would attend to these sorts of localized concerns.<sup>42</sup> To the extent that it is important for legislatures to address localized concerns, the most natural way for that to occur is through each legislator paying special heed to their own constituency.

The structure of legislative constituencies provides further support for constituency-centered representation. Many legislatures outside of the United States use party-list systems, under which voters cast ballots for parties and parties receive legislative seats in proportion to the share of votes they receive.<sup>43</sup> By contrast, Congress and nearly all sub-national legislative bodies in the United States elect their members using single-member districts.<sup>44</sup> It is not obvious at first glance why an electoral system would employ single-member districts given the many advantages of a party-list system. Party-list systems can better promote equality among

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<sup>42</sup> Exceptions include the few localized issues that garner national attention, but even in those instances legislators representing the affected area typically take the lead. See, e.g., Todd Spangler, *Congress Approves at Least \$120M for Flint Water Fix*, *Detroit Free Press* (Dec. 10, 2016), <https://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/12/10/congress-flint-water-funding/95243816/> [<https://perma.cc/CB45-E39T>].

<sup>43</sup> See Stephen Ansolabehere, William Leblanc & James M. Snyder Jr., *When Parties Are Not Teams: Party Positions in Single-Member District and Proportional Representation Systems*, 49 *Econ. Theory* 521, 535 (2012) (“In the list system, the parties offer a list of candidates running under their label, and the entire national electorate votes for one of the two parties. Parties win shares of seats equal to their shares of the vote. The number of seats won by the party equals the number of seats times the share of seats it deserves.”).

<sup>44</sup> See 2 U.S.C. § 2(c) (requiring single-member districts in the U.S. House); Am. Acad. Arts & Scis., *Our Common Purpose: Reinventing American Democracy for the 21st Century* 26, 71 (2020), [https://amacad.org/sites/default/files/publication/downloads/2020-Democratic-Citizenship\\_Our-Common-Purpose\\_0.pdf](https://amacad.org/sites/default/files/publication/downloads/2020-Democratic-Citizenship_Our-Common-Purpose_0.pdf) [<https://perma.cc/9PFR-3EAP>] (noting that only ten states, nearly all of them sparsely populated, use multimember districts to elect state legislators).

voters,<sup>45</sup> more easily enable representation of minority groups,<sup>46</sup> and avoid the possibility of “wasted” votes.<sup>47</sup> One of the few advantages of a system of single-member geographic districts is that it creates a strong representational link between each legislator and a well-defined set of geographic constituents. A system of single-member districts promotes legislative responsiveness to constituents, local civic and political organizations, and local governments.<sup>48</sup>

## 2. *Interest Groups*

Not all interests are geographically concentrated in one or a few legislative districts. Many Americans’ primary interest in what goes on in Congress or their state legislature has little to do with geography. Instead, it rests on their relationships to specific government policies. Unionized workers, small-business owners, and senior citizens all have strong interests in public policy. But, as is the case for many Americans in the contemporary “policy state,”<sup>49</sup> the policy areas they care about are not tied to geography. Each of these individuals shares policy interests with many others who are not their geographic neighbors. And for each one,

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<sup>45</sup> See, e.g., John Stuart Mill, *Considerations on Representative Government*, in *On Liberty and Other Essays* 303 (John Gray ed., Oxford Univ. Press 1991) (1859) (arguing that without proportional representation, there is necessarily “not equal government, but a government of inequality and privilege”). For an extended analysis of the inequality created by single-member districts, consider Jonathan Rodden’s findings that across western democracies, single-member districts have a consistent and significant pro-rural (and anti-urban) bias. See generally Jonathan Rodden, *Why Cities Lose: The Deep Roots of the Urban-Rural Political Divide* (2019).

<sup>46</sup> See Robert Richie & Steven Hill, *The Case for Proportional Representation*, *Bos. Rev.* (Mar. 1, 1998), <http://bostonreview.net/politics/robert-richie-steven-hill-case-proportional-representation> [<https://perma.cc/9DRG-EKLR>]; see also Issacharoff et al., *supra* note 9, at 609–980 (materials on U.S. jurisprudence illustrating the challenges of fairly achieving minority representation in a system of single-member districts).

<sup>47</sup> Wasted votes have been defined as votes for a losing candidate or votes for a winning candidate in excess of what is needed to prevail. See Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 *U. Chi. L. Rev.* 831, 834 (2015). For a critical perspective on the normative case for proportional representation, see Charles R. Beitz, *Political Equality: An Essay in Democratic Theory* 123–40 (1989).

<sup>48</sup> Single-member districts have at least one non-geographic benefit as well: they provide an avenue for voters to assess the quality of candidates rather than leaving that work to party leaders.

<sup>49</sup> Cf. Karen Orren & Stephen Skowronek, *The Policy State: An American Predicament* 6 (1st ed. 2017) (“[W]e argue that policy has expanded its role in American government and society by eroding the boundaries and dissolving the distinctions that once constrained policy’s reach.”).

there are organized interest groups seeking to advance their interests in the legislative process. For legislators to ignore interest groups would be to ignore the reasons millions of citizens care about politics. Responsiveness to interest groups, in short, is critical to ensuring responsiveness to the full range of interests that exist in a polity.

Interest group representation can also provide an avenue for representation for groups that would otherwise lack it. Some Americans feel that their elected representatives are indifferent or even hostile to their well-being. Interest groups can fill that void by facilitating what Jane Mansbridge has termed surrogate representation: “representation [for] voters who lose in their own district.”<sup>50</sup> Thus, while the districts that elect members of the Congressional Black Caucus include less than half of the nation’s total African-American population, the caucus’s members describe their mission as supporting “African Americans and other marginalized communities in the United States”—without regard to geography.<sup>51</sup> Similarly, former Representative Barney Frank (D-MA), the first openly gay member of Congress, tasked his staff with addressing LGBTQ issues “at large” rather than in his district alone.<sup>52</sup> When legislators attend to the preferences and interests of groups that might otherwise be disadvantaged in the electoral process, they help ensure that all members of the political community receive meaningful representation.<sup>53</sup>

Much ink has been spilled on whether and when legislators should be responsive to interest groups. One important tradition lauds the role that interest groups play in American politics. Alexis de Tocqueville argued that “associations” enable collective action and serve as a counterweight

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<sup>50</sup> Mansbridge, *Rethinking Representation*, supra note 22, at 523 (“Legislators deeply allied with a particular ideological perspective often feel a responsibility to nondistrict constituents from that perspective or group,” especially when “the surrogate representative shares experiences with surrogate constituents in a way that a majority of the legislature does not.”); see also Orren & Skowronek, supra note 49, at 6.

<sup>51</sup> See About the CBC, Congressional Black Caucus, <https://cbc.house.gov/about/> [<https://perma.cc/J8Q3-AV74>] (last visited Jan. 18, 2021).

<sup>52</sup> See Mansbridge, *Rethinking Representation*, supra note 22, at 523.

<sup>53</sup> Judicial review is often seen as the default means of serving such groups, see, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938); see also John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 135–180 (1980). But mechanisms promoting legislative responsiveness to interest groups can accomplish similar results. See, e.g., Daryl J. Levinson, *Rights and Votes*, 121 *Yale L.J.* 1286, 1292 (2012) (arguing that legal rules can “allocate decisionmaking power or structure decisionmaking processes in such a way as to stack the deck in favor of desirable outcomes or against undesirable ones”).

to majority tyranny.<sup>54</sup> Similarly, a twentieth-century school of thought, led by Robert Dahl, maintained that intergroup competition is an inevitable and desirable feature of U.S. politics.<sup>55</sup> In Dahl's words, interest groups are "necessary to the functioning of the democratic process itself, to minimizing government coercion, to political liberty, and to human well-being."<sup>56</sup> To be sure, there is a darker side of interest group power. An important countertradition criticizes legislatures for being overly responsive to interest groups, for being responsive to the wrong kind of interest groups, or for prioritizing some interest groups over others—typically with a focus on the disproportionate political power of corporate interests and the wealthy.<sup>57</sup> But few would argue against responsiveness to interest groups as a categorical matter.

### *3. Party Leaders*

A third pillar of representation is party loyalty. The simplest justification for a duty of party loyalty rests on voters' use of party cues. Voters, especially in low-information elections, often cast their ballots based solely on candidates' party identifications, inferring that their preferred party's candidate will act in certain ways once in office.<sup>58</sup> For a legislator to defy their party on major issues would, at the very least, thwart voter expectations. We might even understand it as a violation of an implicit campaign promise, if we view the legislator's choice to identify with a given party as an implicit promise to maintain at least some minimal degree of party loyalty.<sup>59</sup>

Another justification for party loyalty rests on the central role of parties in structuring the legislative process. Modern democracy is, in E.E.

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<sup>54</sup> See Alexis de Tocqueville, *Democracy in America* 180–86 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835).

<sup>55</sup> See generally, e.g., Robert A. Dahl, *Who Governs?: Democracy and Power in an American City* (1961); Robert A. Dahl, *Pluralist Democracy in the United States: Conflict and Consent* (1967).

<sup>56</sup> Robert A. Dahl, *Dilemmas of Pluralist Democracy: Autonomy vs. Control* 1 (1982). Dahl does warn that interest groups at times use their power "to foster the narrow egoism of their members at the expense of concerns for a broader public good." *Id.*

<sup>57</sup> See *supra* note 25 (citing sources).

<sup>58</sup> See John G. Bullock, *Elite Influence on Public Opinion in an Informed Electorate*, 105 *Am. Pol. Sci. Rev.* 496, 497–98 (2011) (reviewing literature on voters' use of "party cues").

<sup>59</sup> This account of party loyalty would not require adherence to every party position, but it would require general fidelity to the party's core priorities or, put in negative terms, that legislators not switch parties between elections or otherwise actively impede their party's agenda.

Schattschneider's words, "unthinkable save in terms of [political] parties."<sup>60</sup> Contemporary legislation is often partisan in character, and even bipartisan legislating only occurs when the leaders of one or both parties put forth proposals, prioritize an issue, and mobilize their members.<sup>61</sup> Parties provide a vehicle through which legislators can enact legislation. If legislators have duties to the public interest at large,<sup>62</sup> working with and through their parties is arguably the best means of fulfilling those duties. Without at least a modicum of party loyalty from members, parties could not carry out their roles as the chief organizers and agenda-setters in Congress and other legislative bodies.

### B. Pluralist Representation

Responsiveness to constituents, interest groups, and parties seems destined to create conflicts in practice. Consider, first, the tensions that arise when a legislator wishes to represent their constituents while simultaneously acting as a loyal partisan. A legislator's constituents might be more liberal or more conservative than the representative's party, such that the legislator must choose between their party's position and their constituents' preferences. Legislators who vote the party line sometimes act in ways contrary to the preferences or interests of their constituents,

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<sup>60</sup> E.E. Schattschneider, *Party Government* 1 (1942); see also Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *Harv. L. Rev.* 2311, 2385 (2006) ("From nearly the start of the American republic . . . [t]he enduring institutional form of democratic political competition has turned out to be not branches but political parties.").

<sup>61</sup> Further, many of the most important interest groups in American politics derive their power from serving as key parts of one or the other party's coalition.

<sup>62</sup> See, e.g., Edmund Burke, *Speech to the Electors of Bristol, on His Being Declared by the Sheriffs Duly Elected One of the Representatives in Parliament for that City (1774)*, reprinted in 2 *The Works of the Right Honourable Edmund Burke* 96 (John C. Nimmo ed., 1887) ("Parliament is not a *congress* of ambassadors from different and hostile interests . . . Parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole—where not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole. You choose a member, indeed; but when you have chosen him, he is not a member of Bristol, but he is a member of *Parliament*."); see also Documents Relating to New-England Federalism, 1800–1815 at 195 (Henry Adams ed., 1877) ("The Senate of the United States is a branch of the legislature; and each Senator is a representative, not of a single State, but of the whole Union. His vote is not the vote of his State, but his own individually; and his constituents have not even the power of recalling him, nor of controlling his constitutional action by their instructions." (quoting John Adams)); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837–38 (1995) ("Members of Congress are chosen by separate constituencies . . . they become, when elected, servants of the people of the United States. They are not merely delegates appointed by separate, sovereign States; they occupy offices that are integral and essential components of a single National Government.").

while those who take a more constituent-centered approach risk sanctions from party leaders.<sup>63</sup> These sorts of conflicts will not always arise, since a party's agenda will often be consistent with a given constituency's preferences or interests. When a conflict does exist, however, a legislator faces a political dilemma: "regardless of their choice" between party and constituency, "they increase the risk of isolating one of their two core bases of support."<sup>64</sup> How legislators resolve this tension can have high stakes, determining, for example, whether major legislative initiatives succeed or fail.<sup>65</sup>

Representation of constituents and interest groups can similarly come into conflict. While some interest groups sit entirely within one legislative district, many cut across district boundaries. Some interest groups might not even have any physical presence at all in a given legislator's district. A legislator's responsiveness to an interest group can be in tension with their responsiveness to their constituency. This can occur either when interest groups from outside a legislator's constituency seek to exercise influence or when within-constituency interest groups advocate for positions that run counter to the preferences or interests of the majority of constituents.<sup>66</sup>

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<sup>63</sup> See, e.g., Gary W. Cox & Mathew D. McCubbins, *Setting the Agenda: Responsible Party Government in the U.S. House of Representatives* 218 (2005) ("When a party *successfully* influences one of its members' votes this typically means that the member will cast a vote at odds with her constituents' opinions."); Jamie L. Carson, Gregory Koger, Matthew J. Lebo & Everett Young, *The Electoral Costs of Party Loyalty in Congress*, 54 *Am. J. Pol. Sci.* 598, 601 (2010) ("If [legislators] vote with the party on controversial or highly salient issues, they risk alienating their political base in the next election. But, if they repeatedly vote in line with their district and against the party, then they may lose favor with the party leadership and risk sanctions." (internal citation omitted)).

<sup>64</sup> See Carson et al., *supra* note 63, at 601; see also *id.* at 598 (discussing findings suggesting that party loyalty on divisive votes can be a political liability for incumbent House members). In addition to party leaders and general election electorates, legislators must also be mindful of their primary electorates, which are often more extreme than either party leaders or their constituencies as a whole. See *infra* Subsections II.A.3, II.C.2.

<sup>65</sup> Senator John McCain's (R-AZ) vote against repealing the Affordable Care Act in 2017 is illustrative. Repeal was a top policy priority of Republican Party leaders in both the legislative and executive branches, but it would have cost Arizona's Medicaid program \$7.1 billion over nine years. This was front of mind for McCain, who crassly stated his fear that "Arizona was about to get screwed" by repeal. Paige Winfield Cunningham, *The Health 202: Here's Why John McCain Voted 'No' on Health Care*, *Wash. Post* (Aug. 4, 2017), <https://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2017/08/04/the-health-202-here-s-why-john-mccain-voted-no-on-health-care/59837b3d30fb045fdae10f6> [<https://perma.cc/5M9M-F4RU>].

<sup>66</sup> The relationship between responsiveness to parties and interest groups is more complex, given some political scientists' views of the parties themselves as merely collections of interest

How should legislators manage these sorts of conflicts? It would be tempting to try to resolve them. But doing so would necessarily require privileging some forms of representation over others when they come into conflict. As Dennis Thompson has noted, “a representative owes allegiance to many different principles and many different groups of people,” and it would be wrong to “simplify the activity of representation” by seeking to describe precisely how legislators should act in every possible circumstance.<sup>67</sup>

Consistent with this insight, this Article endorses a pluralist approach to representation. Under a pluralist approach, legislators have normative reasons to be responsive to the many sorts of interests that exist in a diverse polity, and good representation thus entails responsiveness to constituents, interest groups, and party leaders alike.<sup>68</sup> There is room for reasonable disagreement about the source, scope, or strength of legislators’ duties to these competing groups. But a good representative

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groups. See, e.g., Kathleen Bawn et. al., *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 *Persps. on Pol.* 571, 571 (2012) (“We propose a theory of political parties in which interest groups and activists are the key actors, and coalitions of groups develop common agendas and screen candidates for party nominations based on loyalty to their agendas. This theoretical stance contrasts with currently dominant theories, which view parties as controlled by election-minded politicians.”). Regardless of the ultimate foundation of the political parties, however, this Article’s discussion of legislative responsiveness to parties focuses on responsiveness to party leaders, rather than the interest groups that help make up the parties.

<sup>67</sup> Dennis F. Thompson, *Political Ethics and Public Office* 99 (1987); see also Amy Gutmann & Dennis Thompson, *The Theory of Legislative Ethics*, in *Representation and Responsibility: Exploring Legislative Ethics* 171 (Bruce Jennings & Daniel Callahan eds., 1985) (“Even if we were able to spell out all the possible roles a legislator might legitimately adopt, we would not yet have a theory of representation, because we would not have indicated which role a representative ought to adopt. Such a theory, however, is probably not possible in [the] face of the manifold conditions that affect the choice of roles. General principles instructing legislators on which role to adopt usually prove inadequate.”). These ideas have a long lineage in both democratic theory, see, e.g., Mill, *supra* note 45, at 373–83 (arguing against legislative instruction), and in political science, see, e.g., Warren E. Miller & Donald E. Stokes, *Constituency Influence in Congress*, 57 *Am. Pol. Sci. Rev.* 45, 56 (1963) (arguing that “no single tradition of representation fully accords with the realities of American legislative politics” and describing instead “a mixture, to which the Burkean, instructed-delegate, and responsible-party models all can be said to have contributed elements”).

<sup>68</sup> More formally, under a pluralist approach to legislative representation, the concept implicates multiple values that are not reducible either to each other or to any single supervalue. Cf. Elinor Mason, *Value Pluralism*, in *Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., 2018), <https://plato.stanford.edu/entries/value-pluralism/> [<https://perma.cc/7YNG-J3NX>]. This understanding of pluralism, drawn from moral philosophy, is distinct from the term’s use by political scientists to describe the work of Robert Dahl and his followers. See *supra* notes 55–56 and accompanying text.

will be at least somewhat responsive to each of these types of groups. Table 1 summarizes how responsiveness to different sorts of groups allows, collectively, for representation of the full range of political interests.

**Table 1: Interests to be Represented**

	<i>Specific interests</i>	<i>General interests</i>
<i>Constituency-based interests</i>	Interest groups within a constituency	Constituency as a whole
<i>Cross-constituency or national interests</i>	Interest groups that are geographically diffuse	Polity as a whole (with political parties often as mediating institutions)

Under a pluralist approach to representation, legislators' duties cannot be described by any sort of algorithmic rule: say, that a legislator should always seek to maximize their constituents' well-being or should always remain loyal to their political party. To treat any one group's preferences or interests as consistently trumping those of all others would be to take an overly cramped view of representation. If all legislators thought only of their constituents, for example, interest groups that were spread diffusely across district lines might receive insufficient representation relative to those that were geographically concentrated. Conversely, if all legislators focused on the national interest, local interests could be left behind. Representing the many interests in a complex society is incompatible with legislators placing one sort of interest categorically above others.

The task of the legislator, on this approach, is instead to take seriously the preferences and interests of their constituents, interest groups, and their parties. This pluralism has the advantage of accounting for competing normative demands on legislators. But a pluralist theory is not rigidly prescriptive, in that it allows for some level of legislative discretion as to how to mediate between the claims of different groups.

A pluralist theory also accommodates different approaches to representing each of the three groups. Consider a legislator's role in representing their constituents. The legislator can seek to follow their constituents' preferences or advance their constituents' interests—often described as the choice between acting as a delegate and trustee,

respectively.<sup>69</sup> Constituent preferences and interests often converge, of course, but not always. And scholars of representation have rightly disaggregated and complicated the delegate-trustee dichotomy.<sup>70</sup> But that dichotomy nonetheless captures an important question: Even if legislators knew whom they wanted to represent, when (if at all) would it be appropriate for them to take actions that run counter to the preferences of those whom they represent? A pluralist approach to representation would not seek to set out precise rules for exactly when legislators should act as delegates and when they should act as trustees—just as it does not provide precise rules for how legislators should strike a balance among the demands of constituents, interest groups, and party leaders.

A critic might charge a pluralist approach to representation with being indeterminate, leaving legislators with discretion to act however they please. A pluralist approach is less determinate than fixed rules, to be sure. But theories that ask public officials to weigh competing values or sources of evidence in a holistic way are familiar from other contexts. The norms governing constitutional interpretation provide a useful example. Scholars and jurists largely agree that text, history, structure, and precedent should all bear on how judges read the Constitution.<sup>71</sup> They do not agree, however, about precisely how these various factors should interact. They give different weight to different factors.<sup>72</sup> Most have resisted strict, hierarchical rankings of the modalities of constitutional interpretation.<sup>73</sup> Yet this does not mean that anything goes. Judicial opinions can be ranked as better and worse examples of constitutional interpretation. There is broad consensus that some types of arguments are

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<sup>69</sup> See, e.g., Burke, *supra* note 62, at 96; Mill, *supra* note 45, at 354; Pitkin, *supra* note 22, at 146, 209.

<sup>70</sup> See Mansbridge, *Clarifying the Concept of Representation*, *supra* note 22, at 624–28; Rehfeld, *Representation Rethought*, *supra* note 22, at 221–25.

<sup>71</sup> On these and other modalities of interpretation, see Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 3–119 (1982); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *Harv. L. Rev.* 1189, 1192–1209 (1987).

<sup>72</sup> See, e.g., Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 *Const. Comment.* 353, 358 n.15 (2007) (noting “the relative weight originalists give certain modalities as compared to the living constitutionalists”).

<sup>73</sup> See, e.g., Philip Bobbitt, *Constitutional Interpretation* 155–62 (1991) (arguing that when multiple modalities are in tension the conscience of the judge should control, rather than a fixed hierarchy of modalities); Fallon, *supra* note 71, at 1243–46 (setting out a hierarchy of modalities, but characterizing the hierarchy as tentative and noting that it will not definitively resolve all cases).

out of bounds in constitutional decision making.<sup>74</sup> The same holds with legislative representation: even if there is no mechanistic way of specifying exactly how legislators should proceed in every case, it is still possible to articulate a series of principles and evaluate legislators' general success or failure in living up to those principles.

### *C. Law's Pluralism*

A pluralistic model of representation is reflected in U.S. law. The law gives legislators wide latitude in how to behave. It does not enact any sort of affirmative mandate with respect to how legislators are to act. Historical and transnational comparisons underscore the fact that this legislative discretion is contingent; it is a creation of law rather than a necessary feature of legislative institutions.

The law governing legislative behavior in the United States could have been much simpler. It nearly was. The First Congress considered including language in what would become the First Amendment that would have allowed the issuance of "instructions" binding on legislators.<sup>75</sup> A constitutionalized "right to instruct," Gordon Wood has argued, would have "implied that the delegate represented no one but the people who elected him and that he was simply a mistrusted agent of his electors, bound to follow their directions."<sup>76</sup> A right to instruct came closer to becoming law than many realize.<sup>77</sup> It is a road not traveled for the law of legislative representation, and it would have left legislative representatives with many fewer choices.<sup>78</sup>

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<sup>74</sup> Arguments based on partisan advantage, religious dogma, or crude cost-benefit analysis are widely regarded as out of bounds. See Bobbitt, *supra* note 71, at 6; David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 *Mich. L. Rev.* 729, 746–68 (2021).

<sup>75</sup> See 1 *Annals of Cong.* 761–73 (1789) (deliberations in House of Representatives over inclusion of a right to instruct in a draft of the First Amendment); see also *Cook v. Gralike*, 531 U.S. 510, 521 (2001) ("[T]he First Congress rejected a proposal to insert a right of the people 'to instruct their representatives' into what would become the First Amendment." (internal citation omitted)).

<sup>76</sup> Gordon S. Wood, *The Creation of the American Republic: 1776–1787*, at 189 (1969).

<sup>77</sup> See, e.g., Richard A. Primus, *The American Language of Rights* 96 (1999) (describing "the strength of support for a right to instruct during the Founding" and noting that "the idea was often popular, codified into more than one state constitution, and required serious debate in Congress").

<sup>78</sup> This is not to say that politics would have been excised from legislative representation. To the contrary, constituents, interest groups, and parties would have clashed in the process of writing instructions. But a right to instruct would have made representation simpler *for the legislator*, who would have merely been tasked with following the instructions that they were given.

Other systems likewise provide legislators with little choice about how to vote. A number of national parliaments, for example, operate under “anti-defection” laws. These sorts of rules discipline or even expel legislators who do not vote the party line.<sup>79</sup> For a legislator in a system with an anti-defection law, the choice of how to vote on any given issue is an easy one, determined entirely by party leaders.

Legislators in the United States are not subject to a right to instruct, required to act as loyal partisans, or otherwise bound to behave in any particular way. Instead, to be a legislator is to exercise discretion. Legislators must decide how to vote (both in committee and on the floor); which bills and amendments to introduce; and how to otherwise engage in the lawmaking process, such as by using holds or pursuing earmarks.<sup>80</sup> In each of these instances, the choices that legislators make are just that—choices.

But law still has much to say about representation. Most fundamentally, representative relationships are creatures of law in the first instance. They are constituted by legal rules without which they would not exist. More practically, law enables and encourages legislators’ responsiveness to constituents, interest groups, and party leaders. Law determines the leverage that these actors have over legislators’ behavior and can ratchet up one group’s influence at the expense of another’s. Just as different liability rules in tort law can shape the conduct of private actors, different public law rules can shape how legislators go about the practice of representation.<sup>81</sup> The next two Parts consider those rules,

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<sup>79</sup> See, e.g., G.C. Malhotra, *Anti-Defection Law in India and the Commonwealth* (2005); Csaba Nikolényi, *The Adoption of Anti-Defection Laws in Parliamentary Democracies*, 15 *Election L.J.* 96 (2016); Csaba Nikolényi & Shaul R. Shenhav, *The Constitutionalisation of Party Unity: The Origins of Anti-Defection Laws in India and Israel*, 21 *J. Legis. Stud.* 390 (2015); Kenneth Janda, *Laws Against Party Switching, Defecting, or Floor Crossing in National Parliaments* (Legis. Reg. of Pol. Parties, Working Paper No. 2, 2009), <http://www.partylaw.leidenuniv.nl/uploads/wp0209.pdf> [<https://perma.cc/K8D3-582G>].

<sup>80</sup> This Article focuses only on legislators’ lawmaking activities and brackets the many non-legislative activities that they regularly engage in. See, e.g., Mayhew, *supra* note 3, at 49–73 (discussing ways in which legislators seek to improve their public reputations); Joshua Bone, *Stop Ignoring Pork and Potholes: Election Law and Constituent Service*, 123 *Yale L.J.* 1406 (2014) (discussing provision of constituent services).

<sup>81</sup> This is a claim about the incentives that law creates. As a general matter, while law shapes incentives, it does not determine legislators’ normative duties or alter whatever background duties they have. But legislators do have a general “fundamental natural duty . . . to support and to comply with just institutions,” John Rawls, *A Theory of Justice* 115 (1971), and the requirements imposed by that duty will differ depending on the content of legislative organization and procedure. Moreover, law might affect how legislators *perceive* their

beginning with the law of democracy before then turning to legislative organization.

## II. REPRESENTATION AND THE LAW OF DEMOCRACY

The body of law that most obviously shapes legislative representation is the law governing campaigns and elections, often referred to as the law of democracy. The law of democracy includes the law regulating voting, redistricting, political parties, and party primaries. It also includes the law governing money in politics, such as regulations on contributions and expenditures by individuals and groups, along with court-imposed constitutional limits on such regulation. Election and campaign finance law do not, of course, directly bind legislators to act in certain ways once elected. But given the power of the reelection incentive in shaping legislative behavior, it stands to reason that legislators will act differently depending on how legal rules structure their interactions with voters, donors, and party leaders. As a result, laws governing who may vote, what constituencies look like, and the role of money in politics can all shape the character of the representation that election winners will ultimately provide.<sup>82</sup>

This Part synthesizes work from both legal scholars and political scientists showing how the law of democracy shapes representation. It shows that the law of democracy, rather than promoting any single type of representation, instead creates incentives for legislators to be responsive to their constituents, to interest groups, and to party leaders. The law of democracy thus tracks, at least roughly, the pluralist picture of representation set out in the previous Part.

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normative duties, even when it does not affect the content of those duties. Cf. Bert I. Huang, *Law and Moral Dilemmas*, 130 *Harv. L. Rev.* 659, 688–95 (2016) (reviewing *The Trolley Problem Mysteries* (2015)) (showing that liability rules influence experimental subjects' intuitions about moral duties).

<sup>82</sup> See, e.g., Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 *Va. L. Rev.* 1425, 1428 (2015) (arguing that campaign finance bears on the “interest [in] the promotion of *alignment* between voters’ policy preferences and their government’s policy”); Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 *Mich. L. Rev.* 1385, 1391 (2013) (arguing that law of democracy doctrines “impl[y] a commitment to a particular, contested theory of representation”); Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 *U. Chi. Legal F.* 111, 134 (noting an “emerging consensus that current practices in campaign finance are undermining the one person, one vote logic of representation in the single-member voting system”).

*A. Legislators and Constituents*

Only constituents can vote in legislative elections. This banal but critical fact encourages reelection-seeking legislators to be responsive to their constituents. Both chambers of Congress and most state and local legislatures draw their members from single-member districts, with each legislator elected to represent a geographically defined group of constituents.<sup>83</sup> Elections in single-member geographic districts place “supreme emphasis on the protection of local interests.”<sup>84</sup> What David Mayhew famously called the “electoral connection”<sup>85</sup> is a critical determinant of legislative behavior. Legislators seeking to ensure their reelection cannot neglect their constituents.<sup>86</sup> And empirical evidence confirms that constituents hold their legislators accountable for how those legislators behave in office.<sup>87</sup>

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<sup>83</sup> See *supra* note 44 and accompanying text. Intuitive as single-member districts are in the United States, democratic representation does not require geographic districting. See, e.g., Basic Law: the Knesset § 4, translated *in* Israel’s Written Constitution 27 (5th ed. 2006) (providing that Israel’s parliament be elected in a nationwide, proportional election). Nor, in earlier periods, did all view representation as requiring elections at all. See, e.g., Quentin Skinner, *Hobbes on Representation*, 13 *Eur. J. Phil.* 155, 175 (2005) (discussing Thomas Hobbes’s account of a king representing the people); Alexander A. Guerrero, *Against Elections: The Lottocratic Alternative*, 42 *Phil. & Pub. Affs.* 135, 154–55 (2014) (noting the selection of public officials by lottery in ancient Athens and in late-medieval and early-renaissance Italy).

<sup>84</sup> Frances E. Lee, *Geographic Representation and the U.S. Congress*, 67 *Md. L. Rev.* 51, 53 (2007). While most Americans take geographic constituencies for granted, Lee contrasts U.S. House elections with elections in nearly all other democracies, which have “implicitly acknowledged that political parties are more important as expressions of voters’ values and interests than their local concerns, and hence have adopted some form of [proportional representation].” *Id.*

<sup>85</sup> See Mayhew, *supra* note 3, at 16–17 (“Reelection underlies everything else, as indeed it should if we are to expect that the relation between politicians and the public will be one of accountability.”).

<sup>86</sup> Most activities other than voting (such as lobbying or making campaign contributions) are not limited to constituents alone. See *supra* Section II.B, Subsections III.B.1–2. But at least one other area of law likewise treats the legislator-constituent relationship as distinct: the franking privilege allows members of Congress to send postage-free mailings to constituents but not to non-constituents. 39 U.S.C. § 3210(a)(7) (2018); see also Benjamin Ginsberg & Kathryn Wagner Hill, *Congress: The First Branch* 83 (2019) (discussing franking).

<sup>87</sup> See, e.g., Stephen Ansolabehere & Shiro Kuriwaki, *Congressional Representation: Accountability from the Constituent’s Perspective*, *Am. J. Pol. Sci.* (forthcoming) (manuscript at 29–30), <https://osf.io/preprints/socarxiv/zuskq> [<https://perma.cc/SN5U-M79X>] (arguing that “constituents hold their representatives accountable for their votes on key legislative decisions,” and providing evidence showing that “voters can punish representatives with whom they disagree on legislative decisions, even if the representative is a copartisan”). Evidence also suggests that legislators want to be responsive to constituent opinions, at least

But we know that any picture of constituent primacy is incomplete. The electoral connection between constituents and legislators alone provides a radically incomplete picture of legislative behavior.<sup>88</sup> Why?

One answer is that legislators can and do win reelection without being responsive to *all* of their constituents. Legislative candidates must win only a majority or plurality of the vote to be elected. It is inevitable that legislators construct winning electoral coalitions that fall short of including all of their constituents. A Republican legislator in a solidly red district could gain reelection only by attending to the preferences and interests of Republicans; the opposite holds for a Democrat in a solidly blue district. A legislator can even secure a winning electoral coalition through taking some positions opposed by a majority of constituents, if doing so garners enough support from the right sub-groups of constituents to form a majority or plurality of voters.<sup>89</sup>

Another, more contingent, answer is that law can impede responsiveness to constituents. Legal rules can insulate legislators from their constituents' preferences or incentivize responsiveness to subgroups of constituents at the expense of the entire constituency.<sup>90</sup> A closer look

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in some circumstances. See, e.g., Daniel M. Butler & David W. Nickerson, Can Learning Constituency Opinion Affect How Legislators Vote? Results from a Field Experiment, 6 Q.J. Pol. Sci. 55 (2011) (providing a randomly selected group of state legislators with public opinion data from their constituents and finding that legislators who received the public opinion data were considerably more likely to vote in line with constituent opinion than those who did not).

<sup>88</sup> See Eulau & Karps, *supra* note 35, at 235 (“[R]epresentatives are influenced in their conduct by many forces or pressures or linkages other than those arising out of the electoral connection and . . . restricting the study of representation to the electoral connection produces a very limited vision of the representational process.”).

<sup>89</sup> See Benjamin G. Bishin, *Tyranny of the Minority: The Subconstituency Politics Theory of Representation* 10 (2009) (developing a theory of “subconstituency” representation, defined as occurring “when politicians advocate the preferences of groups of intense citizens over those of the majority in a district”).

<sup>90</sup> Mechanisms that loosen constituent control reduce only the likelihood of a delegate approach to representation; one might still think that room remains for legislators to act as trustees. Cf. *supra* notes 69–70 and accompanying text (discussing the delegate-trustee distinction). But legislators who are not incentivized to act as delegates for the preferences of their constituents are not likely to turn to trustee-style representation. Instead, they are likely to opt for responsiveness to groups other than their constituents, such as interest groups from outside their districts or their political parties. See *infra* notes 116–17 and accompanying text (elaborating on this dynamic).

Design choices that weaken responsiveness to constituents are not necessarily unjustified, as there are often other reasons to support such designs. Longer terms, for example, allow legislators to accumulate expertise and incentivize legislators to invest energy in the policymaking process. See, e.g., *The Federalist* No. 64, at 392 (John Jay) (“The duration [of

at these mechanisms can reveal why legislative responsiveness to constituencies is weaker than it might be if the rules were different.

### *1. Mechanisms of Electoral Insulation*

Electoral rules can enhance legislators' accountability or insulate them from the voters. One source of insulation is time. Longer periods between elections enable legislators to persuade skeptical constituents, to be vindicated by policy outcomes, or to wait for public attention to turn to other issues. Between federal and state legislative bodies, term lengths can be two, four, or six years.<sup>91</sup> While two-year terms in the House and many state legislative chambers promote responsiveness to constituents, the longer terms in the Senate and some state legislative chambers provide legislators with greater insulation from their constituents' preferences.<sup>92</sup>

Closely related to term length are two other mechanisms: recall elections and term limits. Neither exists for members of Congress, but both are important features of some subnational legislatures. Nineteen states and the District of Columbia have mechanisms allowing voters to recall legislators.<sup>93</sup> Some states impose strict standards governing when recalls are permitted, requiring malfeasance in office or criminal activity,<sup>94</sup> but in others, constituents can recall their legislators on the

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Senate terms] prescribed is such as will give them an opportunity of greatly extending their political informations, and of rendering their accumulating experience more and more beneficial to their country.”); Rocio Titunik, *Drawing Your Senator From a Jar: Term Length and Legislative Behavior*, 4 *Pol. Sci. Res. & Methods* 293, 293 (2016) (using random assignment of term length in three state senates to show that senators serving shorter terms abstain more often and introduce fewer bills than those serving longer terms). Similar arguments could be made in support of other mechanisms that temper electoral accountability to constituents.

<sup>91</sup> U.S. Const. art. I, § 2, cl. 1 (House terms of two years); *id.* art. I, § 3, cl. 1 (Senate terms of six years); see Nat'l Conf. of State Legislatures, *Number of Legislators and Length of Terms in Years* (Aug. 9, 2019), <https://www.ncsl.org/research/about-state-legislatures/number-of-legislators-and-length-of-terms.aspx> [<https://perma.cc/T4FQ-QQ4G>] (state legislative terms of two or four years).

<sup>92</sup> Institutional designers also use term length to shape the extent of accountability in non-legislative contexts. See, e.g., U.S. Const. art. III, § 1 (life tenure during good behavior for federal judges); 28 U.S.C. § 532 note (ten-year term for FBI directors), 12 U.S.C. § 241 (fourteen-year terms for members of the Federal Reserve Board of Governors).

<sup>93</sup> See *Recall of State Officials*, Nat'l Conf. of State Legislatures (July 8, 2019), <https://www.ncsl.org/research/elections-and-campaigns/recall-of-state-officials.aspx> [<https://perma.cc/C68U-KZNG>].

<sup>94</sup> See, e.g., Mont. Code Ann. § 2-16-603 (2019) (requiring, for recall, “[p]hysical or mental lack of fitness, incompetence, violation of the oath of office, official misconduct, or conviction of [certain enumerated] felony offense[s]”); R.I. Const. art. IV, § 1 (requiring, for recall, a

basis of policy differences. In recent years, Wisconsin voters recalled a Republican state senator because of his policy views and loyalty to a controversial governor,<sup>95</sup> and Colorado voters recalled two Democratic state senators for supporting gun control.<sup>96</sup> When constituents have the power to recall a legislator, legislators are likely to be more responsive to constituent preferences, at least on high-salience issues. The absence of recall elections in Congress provides members with a type of insulation from constituent preferences that is lacking in states where voters can recall their legislators.

By the same logic, term limits reduce legislators' accountability to their constituents, at least in legislators' final terms. There are no term limits for members of Congress. But fifteen states have term limits for state legislators,<sup>97</sup> and at any given time hundreds of sitting legislators nationwide are lame ducks on account of term limits.<sup>98</sup> Most discourse around term limits focuses on whether they wrongfully constrain citizens' choices, prevent legislatures from developing expertise, or prevent the formation of a strong institutional culture.<sup>99</sup> Term limits also implicate representation, however. A term-limited legislator might be less focused on their constituents and more on other considerations: a different electoral constituency (if they plan to run for higher office), interest groups (who might be their future employers when they leave office), or the demands of conscience.<sup>100</sup>

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“general officer who has been indicted or informed against for a felony, convicted of a misdemeanor, or against whom a finding of probable cause of violation of the code of ethics has been made by the ethics commission”).

<sup>95</sup> Heather Asiyani, Review: Road to Recall for State Sen. Van Wanggaard, Patch (Jan 16, 2012, 2:04 AM), <https://patch.com/wisconsin/mountpleasant/review-road-to-recall-for-state-sen-van-wanggaard> [<https://perma.cc/XK8J-QD3E>].

<sup>96</sup> Lynn Bartels, Kurtis Lee & Joey Bunch, Colorado Senate President John Morse, State Sen. Angela Giron Ousted, Denver Post (Apr. 28, 2016, 9:44 AM), <https://www.denverpost.com/2013/09/10/colorado-senate-president-john-morse-state-sen-angela-giron-ousted/> [<https://perma.cc/EH66-5DHF>].

<sup>97</sup> The Term-Limited States, Nat'l Conf. of State Legislatures (Nov. 12, 2020), <https://www.ncsl.org/research/about-state-legislatures/chart-of-term-limits-states.aspx> [<https://perma.cc/76KV-7HE3>].

<sup>98</sup> See Alan Greenblatt, Term Limits Could Hurt Republicans in 2018, *Governing* (Aug. 16, 2017), <https://www.governing.com/archive/gov-term-limits-state-legislative-republicans-2018.html> [<https://perma.cc/94AY-M5YB>].

<sup>99</sup> See, e.g., *Institutional Change in American Politics: The Case of Term Limits* (Karl T. Kurtz, Bruce Cain & Richard G. Niemi eds., 2007); John M. Carey, Richard G. Niemi & Lynda W. Powell, *Term Limits in State Legislatures* (2000).

<sup>100</sup> See Carey et al., *supra* note 99, at 41–64 (providing evidence of term limits' effects on legislative behavior).

## 2. Electoral Competition

Safe constituencies can also undermine strictly constituency-centered representation. Incumbents in safe seats devote more time to national issues than do their counterparts for whom reelection is less secure.<sup>101</sup> Those in safe seats have the luxury of knowing that focusing their energies on matters not directly relevant to their constituencies is unlikely to jeopardize their reelection. Those facing competitive reelection races, by contrast, have greater incentive to focus on constituency-specific priorities, such as securing targeted appropriations or position-taking on matters of local relevance. Because legislators in competitive and noncompetitive districts face different sets of incentives, the degree of electoral competition bears on the character of representation.<sup>102</sup>

A constituency's competitiveness is not a natural product of its voters' preferences. It is a creature of law. Redistricting law could seek to promote electoral competition, but in practice it does not. Instead, the Supreme Court has "recognized incumbency protection . . . as a legitimate state goal"<sup>103</sup> in the drawing of legislative districts. In so concluding, the Court has failed to "ensure the competitive vitality of the political process."<sup>104</sup> Some scholars have called for competition to play a greater role in redistricting law,<sup>105</sup> but such calls have not been heeded by lawmakers and jurists. Instead, redistricting law allows for the drawing of safe districts in which the winner of the general election is all but predetermined. Such districts weaken the pressure for legislators to be maximally responsive to their constituents.<sup>106</sup>

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<sup>101</sup> See, e.g., Justin Grimmer, *Appropriators Not Position Takers: The Distorting Effects of Electoral Incentives on Congressional Representation*, 57 *Am. J. Pol. Sci.* 624 (2013) (showing that senators in safer seats more frequently take positions on national issues than senators from more competitive seats).

<sup>102</sup> Legislators from seats that are safe in the general election may nonetheless face competition in party primaries. See *infra* Subsection II.A.3.

<sup>103</sup> *Bush v. Vera*, 517 U.S. 952, 964 (1996) (citing cases).

<sup>104</sup> Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 *Harv. L. Rev.* 593, 597 (2002).

<sup>105</sup> See, e.g., Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *Stan. L. Rev.* 643, 644 (1998) ("This article explores the ways in which dominant parties manage to lock up political institutions to forestall competition, with a principal focus on the failure of the institution best positioned to destabilize these lockups, the United States Supreme Court, to develop a theoretical framework that would enable effective judicial performance of this role").

<sup>106</sup> See Issacharoff, *supra* note 104, at 615 (describing competition as "critical to the ability of voters to ensure the responsiveness of elected officials to the voters' interests through the after-the-fact capacity to vote those officials out of office").

### 3. *Party Primaries*

The use of party primaries to select nominees for seats in Congress and in state legislatures empowers the subset of voters who are eligible to vote in primary elections and choose to do so. Before legislative candidates can ever face a general election constituency, they have to win the approval of their party's primary electorate. Legislators are attentive to the fact that they serve "two electorates rather than one—a November electorate and a primary electorate nested inside it but not a representative sample of it."<sup>107</sup> Where general elections are not competitive, one party's primary voters effectively select the constituency's legislator.<sup>108</sup>

Party primaries incentivize legislators to act in ways that do not track the preferences of their constituency's median voter. The need to win primaries leads legislative candidates to position themselves closer to more extreme primary voters, rather than to more moderate general-election voters.<sup>109</sup> The result is that Republican legislators are well to their median constituent's right and Democratic legislators are well to their median constituent's left.<sup>110</sup> The need to appeal to a primary electorate provides a counterweight to a legislator's responsiveness to their entire district.

### 4. *Constituency Composition*

The composition of constituencies also shapes the type of representation that legislators are able to provide. A Pennsylvania senator's response to a constituent's accusation that the senator failed to represent the constituent captures this dynamic well. "Obviously," the

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<sup>107</sup> Mayhew, *supra* note 3, at 45.

<sup>108</sup> See Shigeo Hirano & James M. Snyder, Jr., *Primary Elections in the United States* 1–2 (2019) (providing examples).

<sup>109</sup> See David W. Brady, Hahrie Han & Jeremy C. Pope, *Primary Elections and Candidate Ideology: Out of Step with the Primary Electorate?*, 32 *Legis. Stud. Q.* 79 (2007) (empirically showing that congressional candidates position themselves closer to primary electorates than to median district preferences).

<sup>110</sup> See, e.g., Joseph Bafumi & Michael C. Herron, *Leapfrog Representation and Extremism: A Study of American Voters and Their Members in Congress*, 104 *Am. Pol. Sci. Rev.* 519, 519 (2010) (using roll-call and public opinion data to show that "members of Congress are more extreme than their constituents" and that "when a congressional legislator is replaced by a new member of the opposite party, one relative extremist is replaced by an opposing extremist").

senator admitted, “I can’t represent everybody’s viewpoint.”<sup>111</sup> This is true for any constituency, but it is particularly true in highly heterogeneous ones. The more varied the preferences and interests of constituents, the more difficult it is to effectively represent them all. To be sure, there is no such thing as complete heterogeneity or complete homogeneity. But some constituencies will be more diverse than others on the key axes that structure much of contemporary U.S. politics: race, ethnicity, economic class, education level, religion, population density, and so forth. These elements of identity are especially important for representation, given how they relate to citizens’ material interests and ideological views on political issues.<sup>112</sup>

Legislators from heterogeneous constituencies face the challenge of allocating time and political capital between constituents with divergent preferences and interests.<sup>113</sup> Even more challenging for such legislators is when they confront measures that their constituents disagree about or that help some constituents but hurt others.<sup>114</sup> Consider, in this regard, a former New Mexico senator’s efforts to avoid taking a position on hydraulic fracking, given the power of both energy interests and environmental groups in his state. Because either supporting or opposing fracking would have provoked opposition from vocal parts of his diverse constituency, he was instead “known for calling loudly for extended study

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<sup>111</sup> Bishin, *supra* note 89, at 120 (quoting Sen. Rick Santorum (R-PA), as reported by Dennis Roddy, *How Santorum Advanced the Gay-Rights Debate in the Wrong Way*, *Pitt. Post-Gazette*, Apr. 27, 2003 at B1).

<sup>112</sup> Preferences and interests are conceptually distinct from demographic characteristics such as race, ethnicity, class, and so forth, but they are often highly correlated. The importance of demographics to politics both explains and justifies the fact that empirical work measuring the extent of a district’s homogeneity or heterogeneity often does so by reference to demographic variables.

<sup>113</sup> See, e.g., Matthew S. Levendusky & Jeremy C. Pope, *Measuring Aggregate-Level Ideological Heterogeneity*, 35 *Legis. Stud. Q.* 259, 260–61 (2010) (“If more constituents fundamentally disagree about an issue, then more constituents will always be unhappy with any decision the legislator makes and may therefore be receptive to a potential challenger. When representing a heterogeneous district, a legislator must solve a more complex decision-making calculus, not only for roll-call votes, but for time and resource allocation.”).

<sup>114</sup> Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 *U. Pa. L. Rev.* 1379, 1393 (2012) (“[H]eterogeneous districts should pose a greater representational challenge since they make it trickier both to discern districts’ needs and to satisfy them effectively.”); see also *Prosser v. Elections Bd.*, 793 F. Supp. 859, 863 (W.D. Wis. 1992) (*per curiam*) (“[R]epresentative democracy cannot be achieved merely by assuring population equality across districts. To be an effective representative, a legislator must represent a district that has a reasonable homogeneity of needs and interests; otherwise the policies he supports will not represent the preferences of most of his constituents.”).

of the fracking question, presumably so that he would be able to avoid having to vote.”<sup>115</sup>

Heterogeneity among constituents can lead legislators to turn toward other sorts of representation. Legislators who cannot represent their entire constituency at times turn to representing a subset that may not be characteristic of the constituency as a whole.<sup>116</sup> In other instances, legislators turn to their parties: legislators from more heterogeneous constituencies are more loyal to their political parties than are those from more homogeneous ones. Nicholas Stephanopoulos has found, for example, that “[t]he records of politicians from geographically varied districts are driven more by partisanship and less by their constituents’ actual needs and interests,” and districts’ “demographic and socioeconomic attributes are better predictors of their representatives’ voting records in spatially homogeneous districts than in spatially heterogeneous districts.”<sup>117</sup> These findings are consistent with the intuition that it is difficult or perhaps even impossible for a legislator representing a highly heterogeneous constituency to effectively represent all of their constituents.

#### *a. Constituency Size*

Law shapes the homogeneity or heterogeneity of constituencies in several ways. The most straightforward is size: all else equal, a more populous constituency is likely to be more diverse on various dimensions. This relationship between size and heterogeneity means that

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<sup>115</sup> Ginsberg & Hill, *supra* note 86, at 84–85 (discussing Sen. Jeff Bingaman (D-NM)).

<sup>116</sup> See generally Bishin, *supra* note 89 (furnishing a “subconstituency theory” of representation).

<sup>117</sup> Nicholas O. Stephanopoulos, *Spatial Diversity*, 125 *Harv. L. Rev.* 1903, 1907 (2012); see also *id.* at 1945–46 (“A district’s underlying partisan orientation was thus a far better predictor of its member’s voting record if the district was highly heterogeneous. If the district was highly homogeneous, then partisan slant was a much less significant factor, and, to reiterate, residents’ actual characteristics were much more influential. . . . Elected officials from spatially diverse districts are indeed more sensitive to partisan pressures than to the evident interests of their constituents.” (footnotes omitted)); Elisabeth R. Gerber & Jeffrey B. Lewis, *Beyond the Median: Voter Preferences, District Heterogeneity, and Political Representation*, 112 *J. Pol. Econ.* 1364 (2004) (finding that legislators in more homogenous districts are more constrained by median voter preferences); Michael Bailey & David W. Brady, *Heterogeneity and Representation: The Senate and Free Trade*, 42 *Am. J. Pol. Sci.* 524 (1998) (finding that on trade-related issues, state-specific characteristics were predictive of senators’ votes in more homogeneous states, while ideology and party were more predictive of votes by senators from more heterogeneous states).

constituency-centered representation will almost always be easier in smaller constituencies and harder in larger ones. And many U.S. legislative districts are quite large. Each U.S. House district contains roughly 700,000 constituents.<sup>118</sup> Legislative districts in some states' lower chambers contain up to 200,000 constituents each, though others are less than one-tenth that size.<sup>119</sup> Considerable variety also exists at the municipal level: Los Angeles and Providence both have fifteen-member city councils, but each Los Angeles district is over twenty times more populous than each Providence district.<sup>120</sup>

The trend in the United States has been toward larger constituencies. Law that fixes the number of districts, coupled with population growth, has led the number of residents of each U.S. House district to triple over the past century.<sup>121</sup> The result is a House with “by far the highest population-to-representative ratio among a peer group of industrialized democracies, and the highest it’s been in U.S. history.”<sup>122</sup> Similar dynamics exist in the states: each member of the Texas House of Representatives, for example, represents nearly three times as many constituents today as compared to in 1970.<sup>123</sup> Heterogeneity will, all else equal, tend to increase as constituencies become bigger. This greater heterogeneity, in turn, makes constituency-centered representation more difficult.

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<sup>118</sup> See Nat’l Conf. of State Legislatures, 2010 Constituents Per State Legislative District Table (last visited Jan. 22, 2021), <https://www.ncsl.org/research/about-state-legislatures/2010-constituents-per-state-legislative-district.aspx> [<https://perma.cc/365Q-VNR8>].

<sup>119</sup> See *id.*

<sup>120</sup> See Josh Whitehead, A Look at City Council Size Around the Country, Smart City Memphis (May 3, 2010), <https://www.smartcitymemphis.com/2010/05/a-look-at-city-councils-around-the-country/> [<https://perma.cc/X853-X8HA>].

<sup>121</sup> Drew DeSilver, U.S. Population Keeps Growing, but House of Representatives is Same Size as in Taft Era, Pew Rsch. Ctr. (May 31, 2018), <https://www.pewresearch.org/fact-tank/2018/05/31/u-s-population-keeps-growing-but-house-of-representatives-is-same-size-as-in-taft-era/> [<https://perma.cc/2J9A-76PU>] (“[T]he representation ratio has more than tripled—from one representative for every 209,447 people in 1910 to one for every 747,184 as of last year [2017].”).

<sup>122</sup> See *id.*

<sup>123</sup> The state constitution sets the size of the House of Representatives at 150 members, Tex. Const. art. III, § 2, while the state’s population rose from slightly over 11 million in 1970 to slightly over 28 million in 2017, Tex. State Libr. & Archives Comm’n, United States and Texas Populations 1850–2017, <https://www.tsl.texas.gov/ref/abouttx/census.html> [<https://perma.cc/8AGW-DWMW>].

*b. Redistricting*

The law governing legislative redistricting also shapes the extent of district homogeneity or heterogeneity. One could imagine a legal regime that created maximally heterogeneous districts, such as by randomly assigning citizens to districts with the aim of every district mirroring the demographics of the polity as a whole. Conversely, maximally homogenous districts would seek to group citizens together based on both demographics and interests, with the goal of creating as little internal diversity as possible within each district.

Redistricting law in the United States takes neither of these extreme approaches. Instead, it pulls districts toward homogeneity in some respects and heterogeneity in others. A full treatment of redistricting law is beyond this Article's scope, but a few brief examples illustrate the competing pressures that it creates. The Voting Rights Act's requirement that states draw majority-minority districts when certain conditions are met<sup>124</sup> promotes a degree of constituency homogeneity by grouping a critical mass of citizens of the same race in a single district. But it fosters heterogeneity in practice because majority-minority districts are particularly diverse with respect to both race and other demographic variables.<sup>125</sup> The Court's constitutional racial gerrymandering jurisprudence, moreover, bars attempts to promote racial homogeneity at the cost of too much geographic heterogeneity.<sup>126</sup> Further, a given jurisdiction's use (or non-use) of other districting criteria—such as whether districting accounts for political subdivisions, natural geographic

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<sup>124</sup> See 52 U.S.C. § 10301(a) (barring practices which “result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color”); see also *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986) (enumerating factors for evaluating vote-dilution claims).

<sup>125</sup> Majority-minority districts “are usually heterogeneous with respect to both race and other politically salient factors.” Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. Chi. L. Rev. 769, 817 (2013). Because otherwise disparate communities often have to be brought together to form majority-African American districts, those districts are often “more diverse than their peers with respect to crucial factors *other* than African American background, such as socioeconomic status, urban versus suburban location, and Hispanic ethnicity.” *Id.* at 818 & n.223.

<sup>126</sup> In holding that certain majority-minority districts violate the Equal Protection Clause, the Supreme Court lamented in *Shaw v. Reno* that districts included individuals who were “widely separated by geographical and political boundaries.” 509 U.S. 630, 647 (1993). This was exemplified, for the Court, by a North Carolina district that moved “in snakelike fashion through tobacco country, financial centers, and manufacturing areas.” *Id.* at 635.

features, and communities of interest—shapes the degree of homogeneity or heterogeneity of its districts as well.<sup>127</sup>

### *B. Legislators and Interest Groups*

Rules limiting the franchise to constituents provide the main incentive for legislators to be responsive to their constituencies. Campaign finance laws, however, place constituents and non-constituents on equal footing. By allowing non-constituent money to fund legislators' campaigns, campaign finance law creates an avenue for legislators to be responsive to non-constituents—more precisely, affluent non-constituents in positions to contribute to political campaigns. Just as the need to win votes makes legislators responsive to constituents, the need to raise campaign funds makes legislators responsive to donors. Political scientists disagree about the degree to which campaign contributions influence legislative behavior.<sup>128</sup> But permissive campaign finance rules seem to lead

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<sup>127</sup> Stephanopoulos, *supra* note 125, at 816 fig.3 (cataloguing these and other districting criteria with respect to whether they are diversifying or homogenizing); see also Nat'l Conf. of State Legislatures, *Redistricting Criteria*, (Apr. 23, 2019), <https://www.ncsl.org/research/redistricting/redistricting-criteria.aspx> [<https://perma.cc/WQ8T-AQKG>] (providing an overview of districting criteria used in each state).

Before leaving the topic of district composition, note a tension between district homogeneity and district competitiveness. Greater homogeneity and greater competitiveness each promote legislative responsiveness to constituents, but those two features of districts can be at cross-purposes with one another: a district in which residents' political preferences are more homogenous will be less competitive, and a district that is more competitive will necessarily contain a degree of preference diversity. This tension points toward two distinct ways of promoting an electoral connection between legislators and constituents. Competitiveness can promote legislators' attending to their districts, given the constant risk that they lose reelection, but the diversity that necessarily accompanies competitive districts means that legislators will at times have no choice but to prioritize some constituents above others. Homogeneity can make it easier for legislators to represent all of their constituents, but sufficient homogeneity to enable that sort of representation can give rise to safe seats in which legislators are at no risk of losing general elections, which can also undermine legislators' connections with their constituencies. It is not clear what sort of district—and what precise blend of competitiveness and homogeneity—best enables legislators' responsiveness to their constituencies. But it is clear that district composition matters for how legislators go about representing their constituents.

<sup>128</sup> Compare, e.g., Thomas Stratmann, *Can Special Interests Buy Congressional Votes? Evidence from Financial Services Legislation*, 45 *J.L. & Econ.* 345, 345 (2002) (“I find evidence that changes in contribution levels determine changes in roll call voting behavior.”), with, e.g., Stephen Ansolabehere, John M. de Figueiredo & James M. Snyder Jr., *Why Is There so Little Money in U.S. Politics?*, 17 *J. Econ. Persps.* 105, 125 (2003) (“It doesn't seem accurate to view campaign contributions as a way of investing in political outcomes.”). See

legislators to be responsive to donors, at times at the expense of responsiveness to their constituents.<sup>129</sup>

Federal campaign finance law does not seek to limit the influence of non-constituent donors. No federal law limits donors to only making contributions to legislative candidates from their own states or districts. When states have tried to enact laws limiting out-of-state donations, federal courts have given the First Amendment interests of non-constituent donors primacy over any interest in preserving constituent influence.<sup>130</sup> The Supreme Court’s controlling opinion in *McCutcheon v. FEC*,<sup>131</sup> for example, directly invokes theories of representation: “Constituents have the right to support candidates who share their views and concerns. . . . [R]esponsiveness is key to the very concept of self-governance through elected officials.”<sup>132</sup> Entirely absent from *McCutcheon* is any mention of the fact that the plaintiff was seeking to contribute to candidates in nine states other than his own.<sup>133</sup> The plurality’s own theory of responsive government could have been used to justify *restricting* non-constituent donations, as a means of preserving constituent power. The rights of non-constituent donors carried the day, however, and likely will for the foreseeable future. “It is virtually certain,”

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also Lynda W. Powell, *The Influence of Campaign Contributions on the Legislative Process*, 9 *Duke J. Const. L. & Pub. Pol’y* 75 (2014) (reviewing relevant literature).

<sup>129</sup> The convergence between donor interests and public policy has several possible causes: the time that legislators spend meeting with donors, legislators receiving self-serving information from donors, or legislators receiving positive or negative feedback from donors about their performance. See, e.g., Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *Persps. on Pol.* 564, 567 (2014).

<sup>130</sup> See Richard Briffault, *Of Constituents and Contributors*, 2015 *U. Chi. Legal F.* 29, 55–60 (discussing *VanNatta v. Keisling*, 151 F.3d 1215 (9th Cir. 1998), which struck down an Oregon ban on state candidates accepting any contributions from outside of the districts in which they are running, and *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), rev’d on other issues sub nom. *Randall v. Sorrell*, 548 U.S. 230 (2006), which struck down a Vermont law imposing a 25% cap on what percentage of funds state candidates, political parties, and PACs could accept from outside the state); George J. Soti, *The Death of Non-Resident Contribution Limit Bans and the Birth of the New Small, Swing State*, 28 *Wm. & Mary Bill Rts. J.* 995, 1002–11 (2020) (discussing *VanNatta*, *Landell*, and other litigation on the topic); see also, e.g., *Thompson v. Hebdon*, 909 F.3d 1027, 1031, 1041–43 (9th Cir. 2018) (striking down an Alaska law that limited state candidates from accepting more than \$3,000 per year from out-of-state contributors by concluding that a state interest in combatting undue influence of donations by non-constituents “is no longer sound after *Citizens United* and *McCutcheon*”).

<sup>131</sup> 572 U.S. 185 (2014).

<sup>132</sup> *Id.* at 227 (plurality opinion).

<sup>133</sup> See Verified Complaint at 5, 11–12, *McCutcheon v. FEC*, 893 F. Supp. 2d 133 (D.D.C. 2012) (No. 1:12-cv-01034-JEB).

Richard Briffault observes, “that the Supreme Court would invalidate laws that target contributions by non-constituents, including those that limit the amount or percentage of total donations a candidate or political committee may accept from non-constituents as well as laws that ban non-constituent donations outright.”<sup>134</sup>

This legal framework empowers non-constituents, especially well-funded interest groups and the affluent. Even individuals who cannot vote for a legislator can make campaign contributions in an effort to influence the legislator’s electoral fortunes or their behavior while in office.<sup>135</sup> Many Senate candidates receive more than half of their campaign contributions from out-of-state supporters—and some receive 90% or more of their contributions from out of state.<sup>136</sup> A significant majority of individual donations to House candidates come from outside of those candidates’ districts.<sup>137</sup> Running for Congress or a state legislature requires courting not only the votes of constituents but also the donations of non-constituents.

Interest groups can use permissive campaign finance rules to seek to influence legislators across the nation. Many industries are geographically clustered, as exemplified by Wall Street financial institutions and Silicon Valley technology companies. But firms in these industries do not geographically restrict their campaign giving. Instead,

<sup>134</sup> See Briffault, *supra* note 130, at 62.

<sup>135</sup> See *id.* at 39–43. For state-level elections, rules allowing campaign contributions to cross state lines “allow[] individuals who feel alienated from their own state government to affiliate with another state government.” Jessica Bulman-Pozen, *Partisan Federalism*, 127 *Harv. L. Rev.* 1077, 1140 (2014).

<sup>136</sup> See, e.g., Lucia Geng, *From South Carolina to Maine, Out-of-State Donors Give Big in Senate Races*, *Ctr. for Responsive Pol.* (Oct. 22, 2020, 11:57 AM), <https://www.opensecrets.org/news/2020/10/senate-races-outstate-donors> [<https://perma.cc/Q2UQ-WZV6>]; Bill Allison & Aaron Kessler, *Georgia Senate Runoffs Fueled Mostly by Out-of-State Donors*, *Bloomberg* (Dec. 16, 2020, 4:52 PM), <https://www.bloomberg.com/news/articles/2020-12-16/georgia-senate-runoffs-fueled-mostly-by-out-of-state-donors> [<https://perma.cc/G7C3-2XHZ>].

<sup>137</sup> See *In-District vs. Out-of-District*, *Ctr. For Responsive Pol.*, <https://www.opensecrets.org/elections-overview/in-district-vs-out-of-district?cycle=2018&display=T> [<https://perma.cc/8GME-RUFQ>] (showing that nearly half of legislators raises more than three-quarters of their campaign funds from non-constituent contributions); see also 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, 373 (2008) (showing that “nonresident contributions are primarily partisan and strategic in nature, rather than access-oriented or expressive/identity-based,” and that “[f]unds are efficiently redistributed from a small number of highly educated, wealthy congressional districts to competitive districts anywhere in the country”).

they distribute campaign funds in competitive races nationwide and to members of committees with jurisdiction over their activities.<sup>138</sup> In one recent year, “nearly half the Senate received contributions from Facebook, Google and Amazon.”<sup>139</sup>

Campaign finance rules also enable members of underrepresented groups to join together to support their chosen candidates. Candidates have successfully raised funds from non-constituents who share their racial identity or sexual orientation.<sup>140</sup> There is a strong “gender affinity effect” among Democratic donors, with “Democratic female donors appear[ing] to value the election of liberal Democratic women over other traditional predictors of fundraising support.”<sup>141</sup> And though Puerto Rico presently lacks voting representation in Congress,<sup>142</sup> its residents have made campaign contributions to congressional candidates representing other districts.<sup>143</sup> Whatever opportunities campaign contributions can create for minority groups, however, may be blunted by the fact that

<sup>138</sup> See, e.g., Joe Light, Bill Allison & Rachael Dottle, Wall Street Put Its Money on the 2020 Election’s Winners, Bloomberg (Dec. 10, 2020), <https://www.bloomberg.com/graphics/2020-wall-street-election-winners/> [<https://perma.cc/L4GN-P9AM>]; Factbox: U.S. Democrats on House Antitrust Panel Scored Biggest Big Tech Donations, Reuters (July 29, 2020, 6:16 AM), <https://www.reuters.com/article/us-usa-tech-congress-lobbying-factbox/factbox-u-s-democrats-on-house-antitrust-panel-scored-biggest-big-tech-donations-idUSKCN24U1H4> [<https://perma.cc/V29K-98JF>].

<sup>139</sup> Shoshana Zuboff, The Coup We Are Not Talking About, N.Y. Times (Jan. 29, 2021), <https://www.nytimes.com/2021/01/29/opinion/sunday/facebook-surveillance-society-technology.html> [<https://perma.cc/85BT-K9H3>].

<sup>140</sup> See, e.g., Our Candidates, LGBTQ Victory Fund, <https://victoryfund.org/our-candidates/> [<https://perma.cc/DWR2-P2ZR>] (last visited Jan. 21, 2021) (soliciting donations to “build long-term LGBTQ political power by helping elect LGBTQ leaders at every level of government”).

<sup>141</sup> Danielle M. Thomsen & Michele L. Swers, Which Women Can Run? Gender, Partisanship, and Candidate Donor Networks, 70 Pol. Rsch. Q. 449, 449–50 (2017); see also *id.* at 450 (noting that candidate gender is “largely irrelevant” to Republican donors).

<sup>142</sup> See generally Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution (Christina Duffy Burnett & Burke Marshall eds., 2001) (discussing Puerto Rico’s legal status).

<sup>143</sup> “I represent two districts,” Rep. José Serrano (D-NY) has said, “one in the Bronx and one that’s Puerto Rico.” See Rick Rojas, Anguish Turns to Fury for Leaders with Ties to Ailing Puerto Rico, N.Y. Times, Oct. 10, 2017, at A14. By allowing citizens to influence legislators for whom they cannot vote, campaign finance law provides a channel for legislators to be responsive to non-constituents. In one recent election cycle, a mainland legislator raised one-fifth of her campaign funds from the San Juan metropolitan area and was later among Congress’s strongest proponents of federal funds to rebuild Puerto Rico in the aftermath of major hurricanes. See Rep. Nydia M. Velázquez—New York District 07, Ctr. For Responsive Pol., <https://www.opensecrets.org/members-of-congress/geography?cid=N00001102&cycle=2016> [<https://perma.cc/QP73-7M2L>].

“Black and Latino representation in contributions is much smaller than in the general population, electorate, and elected offices.”<sup>144</sup> Even if cross-constituency contributions can at times benefit underrepresented minority groups, inequalities in who donates illustrate the limits of such contributions for promoting legislative responsiveness to minority groups.

Donations across state or district lines matter. David Fontana has shown how campaign contributions direct legislators’ attention away from their constituencies and toward geographically concentrated donors.<sup>145</sup> Analysis by Anne Baker demonstrates that “[w]ithout exception, contributions from individual donors residing outside of the district disrupt the ideological ties between House members and their constituents.”<sup>146</sup> As a result, campaign contributions to legislators in other districts can allow donors to “successfully gain[] surrogate representation while leaving constituents short-changed when it comes to the quality of representation they are likely to receive from their members of Congress.”<sup>147</sup> One review of public opinion data put the issue starkly: “[i]t is fair to say that donors receive exquisitely attentive representation—and that voters receive virtually no representation at all.”<sup>148</sup>

It would be easy to take this state of affairs for granted. After all, there are few restrictions on campaign contributions from out-of-state or out-of-district donors and little hope that these sorts of restrictions would pass constitutional muster under current First Amendment doctrine.<sup>149</sup> But the law’s treatment of political contributions by foreign nationals illustrates a different paradigm of campaign finance regulation. A federal statute bars campaign contributions or independent expenditure by foreign nationals.<sup>150</sup> The statute has survived a First Amendment challenge,<sup>151</sup> with the Supreme Court reasoning that “the United States has a

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<sup>144</sup> Jacob M. Grumbach & Alexander Sahn, *Race and Representation in Campaign Finance*, 114 *Am. Pol. Sci. Rev.* 206, 206 (2020).

<sup>145</sup> David Fontana, *The Geography of Campaign Finance Law*, 90 *S. Cal. L. Rev.* 1247, 1273 (2017).

<sup>146</sup> Anne E. Baker, *Getting Short-Changed? The Impact of Outside Money on District Representation*, 97 *Soc. Sci. Q.* 1096, 1104 (2016). Within-district contributions do not, Baker finds, meaningfully counteract the influence of outside contributions. See *id.* at 1106.

<sup>147</sup> *Id.* (internal citation omitted).

<sup>148</sup> Stephanopoulos, *Aligning Campaign Finance Law*, *supra* note 82, at 1431.

<sup>149</sup> See *supra* notes 130–34 and accompanying text.

<sup>150</sup> See 52 U.S.C. § 30121(a).

<sup>151</sup> See *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (three-judge panel), *aff’d*, 565 U.S. 1104 (2012) (mem.).

compelling interest . . . in limiting the participation of foreign citizens in activities of American democratic self-government.”<sup>152</sup> To be sure, limits on cross-state or cross-district political contributions raise harder normative questions than do limits on contributions from abroad.<sup>153</sup> Foreign contribution limits show what a two-track system might look like, but Congress has declined to distinguish between constituent and non-constituent contributions—and the courts would almost certainly not allow them to do so.

### *C. Legislators and Party Leaders*

#### *1. Campaign Finance*

Campaign finance rules also shape the power that party leaders hold over their members. Party leaders play an “active role in financing the campaigns of their congressional colleagues” and have “the opportunity to exert party discipline by rewarding loyal partisans with campaign money.”<sup>154</sup> Campaign contributions are often a carrot that party leaders use to reward loyal caucus members or to secure key votes for the party’s legislative priorities.<sup>155</sup> Party leaders also sometimes use campaign funds as a stick, by threatening to withhold them from wayward members or, in extreme cases, by financially supporting primary challengers to disloyal incumbents.<sup>156</sup> And party leaders incentivize member fundraising by

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<sup>152</sup> Id. An earlier line of cases likewise allows the exclusion of noncitizens from various aspects of the political process. See *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982); *Foley v. Connelie*, 435 U.S. 291 (1978); *Sugarman v. Dougall*, 413 U.S. 634 (1973).

<sup>153</sup> See *Bluman*, 800 F. Supp. 2d at 290 (expressly distinguishing foreign nationals from “citizens of other states and municipalities,” noting that only the latter are “members of the American political community,” and concluding that “[t]he compelling interest that justifies Congress in restraining foreign nationals’ participation in American elections—namely, preventing foreign influence over the U.S. government—does not apply equally to . . . citizens of other states and municipalities”).

<sup>154</sup> Kathryn Pearson, *Party Discipline in the U.S. House of Representatives* 146 (2015); see also id. at 146–60 (providing evidence of how party leaders distribute campaign funds to promote party loyalty).

<sup>155</sup> See C. Lawrence Evans, *The Whips: Building Party Coalitions in Congress* 54–55 (2018) (describing the Republican Party’s financial and other campaign support for a legislator who cast a difficult vote in favor of the party’s position on a trade issue).

<sup>156</sup> See Lou Dubose & Jan Reid, *The Hammer: Tom DeLay, God, Money, and the Rise of the Republican Congress* 100, 149 (2004).

allocating committee assignments based in part on how prolific caucus members are at fundraising on behalf of the party.<sup>157</sup>

A radically different system of financing campaigns would change the power that party leaders hold over their members. But even within the basic contours of a system of private campaign fundraising, changes in campaign finance law can ratchet up or down the ability of party leaders to use fundraising as a point of leverage over individual members. Richard Pildes has described how changes in campaign finance law have made “candidate campaigns . . . dramatically *more dependent* on individual donors in recent decades than on all other sources,”<sup>158</sup> including party-based fundraising. Among the legal changes curbing party power was the Bipartisan Campaign Reform Act of 2002<sup>159</sup> (“BCRA”), which tightened campaign finance regulations, including by prohibiting political parties from raising “soft money” not subject to Federal Election Commission restrictions and limits.<sup>160</sup> After BCRA, nonparty spending dramatically increased, while party spending either remained constant or decreased.<sup>161</sup> As contributions from individual donors became a greater share of overall campaign funding,<sup>162</sup> party leaders came to have “less capacity to force party members to toe the party line.”<sup>163</sup> One former Republican member vividly described outside

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<sup>157</sup> See Marian Currinder, *Money in the House: Campaign Funds and Congressional Party Politics* 36–39 (2008).

<sup>158</sup> Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 *Yale L.J.* 804, 826 (2014).

<sup>159</sup> Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2, 8, 18, 28, 36, and 47 U.S.C.).

<sup>160</sup> Pub. L. No. 107-155, tit. 1, § 323, 116 Stat. 81, 82–86 (2002) (codified at 2 U.S.C. § 441(i) (2018)).

<sup>161</sup> See Raymond J. La Raja, *Why Super PACs: How the American Party System Outgrew the Campaign Finance System*, 10 *Forum* 91, 101 (2012) (showing how “starting in 2004 (after BCRA),” the role of parties in financing elections “has been challenged by non-party groups”).

<sup>162</sup> Pildes, *supra* note 158, at 826 (noting that individual donors’ share of contributions to congressional campaigns increased from 25% to 61% between 1990 and 2014).

<sup>163</sup> See *id.* at 830 (describing this as a consequence of the “fragmentation reflected in the explosion of Super PACs, 527s, and 501(c) organizations”). For a competing interpretation, see Thomas E. Mann & Anthony Corrado, *Party Polarization and Campaign Finance*, Brookings Ctr. Effective Pub. Mgmt., 7–9 (July 2014), [https://www.brookings.edu/wp-content/uploads/2016/06/Mann-and-Corrado\\_Party-Polarization-and-Campaign-Finance.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/Mann-and-Corrado_Party-Polarization-and-Campaign-Finance.pdf) [<https://perma.cc/RE2C-QLJQ>] (arguing that the national parties found other ways to increase their roles after BRCA, even if those ways were not reflected in party financial statements).

groups: “[T]hey come in [and] raise you boatloads of cash and they love it when you give the middle finger to your own party’s leadership.”<sup>164</sup>

While BCRA shows how legal changes can undermine party power, legal changes can also empower parties. The role of parties in campaign finance was reinvigorated by the Supreme Court’s 2014 decision in *McCutcheon v. FEC*.<sup>165</sup> *McCutcheon* struck down BCRA’s aggregate contributions limits, which restricted how much money a donor may contribute in total to all candidates or committees, but the Court left base contribution limits in place.<sup>166</sup> The result is that while wealthy donors are limited in how much they can contribute to any candidate, they can spend far more supporting the political parties.<sup>167</sup> An increased role for parties in campaign finance can increase party leaders’ leverage over rank-and-file members. The roles of BCRA (in curbing party power) and *McCutcheon* (in enhancing it) show the impact campaign finance rules can have on the power of party leaders.

Debates over money in politics often focus on the identity of donors and the amount of money in the system. Both of these features of a campaign finance ecosystem are, of course, critical. But details of how money flows matter as well: recent decades show how changes to campaign finance rules can empower or weaken party leaders’ leverage over their members. Rules channelling money through parties give party leaders tools to induce party loyalty, while those enabling donors to circumvent parties are more likely to empower interest groups at the expense of the parties.

## 2. *Party Primaries*

We have already seen how responsiveness to primary electorates leads legislators to take positions that do not track the preferences of their

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<sup>164</sup> John Phillips, *Washington Power Brokers Lose Their Carrots and Sticks*, *Orange County Reg.* (Apr. 6, 2017, 11:11 PM), <https://www.oregister.com/2017/04/06/washington-power-brokers-lose-their-carrots-and-sticks/> [<https://perma.cc/RRT6-NL8C>] (quoting Rep. Trey Radel (R-FL)).

<sup>165</sup> 572 U.S. 185 (2014).

<sup>166</sup> See *id.* at 192–93.

<sup>167</sup> The process is somewhat circuitous—donors contribute to so-called joint fundraising committees, which give money to state parties, which transfer money to their national affiliates—but the effect is a windfall for the national and state parties alike. See Carrie Levine, *Soft Money is Back—And Both Parties Are Cashing In*, *Politico* (Aug. 4, 2017), <https://www.politico.com/magazine/story/2017/08/04/soft-money-is-backand-both-parties-are-cashing-in-215456/> [<https://perma.cc/TF8S-YRVC>].

constituency's median voter.<sup>168</sup> This skew can either encourage or discourage legislators from acting as loyal partisans, depending on the circumstances. It can promote party loyalty in relatively centrist constituencies. Though such constituencies have moderate median voters, legislators will be incentivized to take positions that are either more left-wing (for Democrats) or more right-wing (for Republicans) in order to win their primaries. Party leaders who might otherwise worry about centrist members defecting from the party line can be helped by primary electorates, who aid them in encouraging legislators to support the party's agenda.

In other instances, the ideological skew of a primary electorate can weaken the alignment between party leadership and rank-and-file legislators. The ideological character of primary electorates can incentivize legislators to take positions more extreme than those of their party leaders. In recent years, extreme primary electorates have led to the defeats of a number of prominent establishment Republicans.<sup>169</sup> Legislators who fear future primary challenges can tailor their behavior to prevent such challenges from materializing. For Republicans, this has led to legislators taking more right-wing positions than their party leaders, in extreme cases even publicly undermining those leaders out of fear of primary challenges from the right.<sup>170</sup> In these instances, primary elections

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<sup>168</sup> See *supra* Subsection II.A.3.

<sup>169</sup> See Matt Grossmann & David A. Hopkins, *Asymmetric Politics: Ideological Republicans and Group Interest Democrats* 234–35 (2016) (providing examples); see also *id.* at 235–38 (comparing the parties and explaining why similar dynamics do not exist on the Democratic side); Ruth Bloch Rubin, *Building the Bloc Intraparty Organization in the U.S. Congress* 261–94 (2017) (discussing “conservative revolutionaries” in Congress in the late twentieth and early twenty-first centuries).

<sup>170</sup> Former Speaker John Boehner (R-OH) has argued that far-right members of the Republican Party dissented from the party line during his tenure in part out of fear of primary challenges. See Grossmann & Hopkins, *supra* note 169, at 297–98. One empirical analysis of roll-call data identifies Republican legislators whose voting patterns moved rightward in anticipation of and in response to primary challenges. See Elaine C. Kamarck & James Wallner, *Anticipating Trouble: Congressional Primaries and Incumbent Behavior* 7–8, Brookings (Oct. 2018), [https://www.brookings.edu/wp-content/uploads/2018/10/GS\\_1029\\_2018\\_Primaries-and-Incumbent-Behavior.pdf](https://www.brookings.edu/wp-content/uploads/2018/10/GS_1029_2018_Primaries-and-Incumbent-Behavior.pdf) [<https://perma.cc/XRP3-AZNM>]. Another study finds an absence of strong evidence that legislators change voting behavior in response to primary challenges but argues that the threat of primaries likely affects legislative behavior, given that legislators are constantly anticipating possible electoral challenges and behave in ways that seek to fend off such challenges. See Robert G. Boatright, *Getting Primaried: The Changing Politics of Congressional Primary Challenges* 139–74 (2013).

can pull legislators away from party loyalty and instead empower dissenters to break ranks from their party leaders.<sup>171</sup>

Contemplating alternative institutional designs shows how party primaries shape party power. The choice to hold primary elections initially served as a counterweight to the power of party insiders and other elites. Before the proliferation of primary elections during the Progressive Era, party leaders exercised stronger control over candidate selection.<sup>172</sup> But they saw their power wane as nearly all states introduced primary elections in the first two decades of the twentieth century.<sup>173</sup> Instituting party primaries, then, shifted influence from party leaders to voters. Consistent with this account, the advent of party primaries for congressional elections led to a modest decrease in party loyalty in Congress.<sup>174</sup>

Beyond the choice to institute primaries in the first instance, details of how primaries operate can matter for representation as well. State governments have broad (though not absolute) discretion to structure primary elections for both federal and state offices.<sup>175</sup> They have used this

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<sup>171</sup> See, e.g., Molly K. Hooper, Fearing Primaries, Republican Members Opted to Shun Boehner's "Plan B," *The Hill* (Dec. 22, 2012, 11:00 AM), <https://thehill.com/homenews/house/274407-fearing-primaries-gop-members-opted-to-shun-boehners-plan-b> [<https://perma.cc/UC93-JDMK>] (reporting that "[m]any House Republicans refused to vote for [leadership's tax] bill because they were 'gun shy' about drawing primary challengers").

<sup>172</sup> See Hirano & Snyder, *supra* note 108, at 18–21.

<sup>173</sup> *Id.* at 21–23.

<sup>174</sup> See Stephen Ansolabehere, Shigeo Hirano & James M. Snyder, Jr., What Did the Direct Primary Do to Party Loyalty in Congress?, in *2 Party, Process, and Political Change in Congress: Further New Perspectives on the History of Congress 35–36* (David W. Brady & Matthew D. McCubbins eds., 2007).

<sup>175</sup> U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."). The Supreme Court's understanding of the First Amendment associational rights of political parties serves as a constraint on how legislatures may structure primary elections. In *California Democratic Party v. Jones*, 530 U.S. 567 (2000), the Court concluded that California's blanket primary infringed on parties' associational rights by forcing them to "adulterate their candidate-selection process . . . by opening it up to persons wholly unaffiliated with the party." *Id.* at 581. The Court dismissed concerns about representation, characterizing those concerns as "simply circumlocution for producing nominees and nominee positions other than those the parties would choose if left to their own devices." *Id.* at 582. Later cases stepped back from *California Democratic Party* somewhat, but likewise eschewed a focus on representation in favor of a framework focused on associational rights. See *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 444 (2008) (upholding Washington's top-two primary); *Clingman v. Beaver*, 544 U.S. 581,

authority to implement a diverse range of primary structures.<sup>176</sup> Primaries are sometimes closed, permitting only party registrants to vote, and sometimes open, allowing non-registrants to vote as well.<sup>177</sup> A few jurisdictions use blanket primaries, in which “all qualified candidates, regardless of party affiliation, appear on the same ballot, and all voters, with like disregard of party, are entitled to vote.”<sup>178</sup> Additional variations exist in other nations: some weigh the votes of party members and non-members differently, while others hold multi-stage primaries with one closed stage and one open stage.<sup>179</sup> These variations in primary structure can influence legislative behavior. There is some evidence that legislators from states with closed primaries take policy positions further from their district’s estimated median voter than do legislators from states with other forms of primaries,<sup>180</sup> though other work casts doubt on these findings.<sup>181</sup> There is stronger evidence that blanket primaries cause legislators to take more moderate positions, at least in some circumstances.<sup>182</sup> Changing the

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593 (2005) (upholding Oklahoma’s semi-closed primary); *Democratic Party of Haw. v. Nago*, 833 F.3d 1119, 1125 (9th Cir. 2016) (upholding Hawaii’s open primary).

<sup>176</sup> See *State Primary Election Types*, Nat’l Conf. of State Legislatures (Jan. 26, 2021, 7:43 PM), <https://www.ncsl.org/research/elections-and-campaigns/primary-types.aspx> [https://perma.cc/4NMM-FLSR] (cataloguing different types of primaries across the fifty states).

<sup>177</sup> See Ofer Kenig, William Cross, Scott Pruyers & Gideon Rahat, *Party Primaries: Towards a Definition and Typology*, 51 *Representation* 147, 153 tbl.1 (2015).

<sup>178</sup> *Love v. Foster*, 147 F.3d 383, 385–86 (5th Cir. 1998) (describing blanket primaries in Louisiana); see also *Nat’l Conf. of State Legislatures*, supra note 176 (noting the use of blanket primaries in three other states as well).

<sup>179</sup> Kenig et al., supra note 177, at 153–54 (describing the use of these systems in Taiwan and Italy, respectively).

<sup>180</sup> See, e.g., Elisabeth R. Gerber & Rebecca B. Morton, *Primary Election Systems and Representation*, 14 *J.L. Econ. & Org.* 304, 304 (1998) (finding that House members “from states with closed primaries take policy positions that are furthest from their district’s estimated median [voter]” as compared to those from states with other sorts of primaries); Christian R. Grose, *Reducing Legislative Polarization: Top-Two and Open Primaries Are Associated with More Moderate Legislators*, 1 *J. Pol. Inst. & Pol. Econ.* 1, 13 (2020) (finding that “[l]egislators elected in open primary systems are 4 percentage points less extreme than legislators elected in closed primary systems”).

<sup>181</sup> See, e.g., Hirano & Snyder, supra note 108, at 296 (summarizing authors’ findings that their “analyses provide no evidence that open primaries are associated with the election of ideological moderates”); Jon C. Rogowski & Stephanie Langella, *Primary Systems and Candidate Ideology: Evidence from Federal and State Legislative Elections*, 43 *Am. Pol. Rsch.* 846, 846 (2015) (finding “no evidence that the restrictiveness of primary participation rules is systematically associated with candidate ideology” in a study of congressional and state legislative elections).

<sup>182</sup> See, e.g., Will Bullock & Joshua D. Clinton, *More a Molehill than a Mountain: The Effects of the Blanket Primary on Elected Officials’ Behavior from California*, 73 *J. Pol.* 1

rules governing primary elections can change the subgroups of voters to which legislators are accountable, which in turn may make legislators more or less loyal partisans.

### III. REPRESENTATION AND LEGISLATIVE ORGANIZATION

A treatment of law and representation might both begin and end with the law of democracy. But other types of law matter as well: the law governing how legislatures organize themselves, how the legislative process is structured, and how members may and may not behave while in office. The law of how Congress operates can shape representation. Internal congressional organization, just as much as electoral rules, can determine the incentives under which legislators labor. Even if all of the rules discussed in the previous Part were held constant, changes to legislative organization and procedure would still change the character of representation as it plays out on the ground.

The law governing how Congress operates comes from many sources. The Constitution sets out a few basic rules governing the legislative process.<sup>183</sup> Statutes lay out additional rules, such as those structuring the committee system<sup>184</sup> and the federal budget process.<sup>185</sup> Yet more procedural rules are made by the legislative chambers themselves, each of which has promulgated highly detailed cameral rules.<sup>186</sup> A large body

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(2011) (showing that California’s shift to a blanket primary appeared to cause incumbent legislators (both federal and state) to take more moderate positions, but noting that the effect was absent in the most partisan districts); Grose, *supra* note 180, at 12–13 (showing that “the top-two primary is associated with legislators who are 7 percentage points more moderate than those legislators from closed systems”).

<sup>183</sup> Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 *U. Chi. L. Rev.* 361, 361 (2004) (noting constitutional “rules for assembling the legislature, selecting its officers, and disciplining its members; voting and quorum rules; rules governing the transparency of deliberation and voting . . . the Origination Clause, special quorum rules for supermajority voting, and the procedures for overriding a presidential veto” (footnotes omitted) (citing U.S. Const. art. I, §§ 4, 5, 7; *id.* art. II, § 1)).

<sup>184</sup> See, e.g., Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812 (codified as amended in scattered sections of 2 U.S.C.); Legislative Reorganization Act of 1970, Pub. L. No. 91-510, 84 Stat. 1140 (codified as amended in scattered sections of 2 U.S.C.).

<sup>185</sup> See Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified as amended at 2 U.S.C. §§ 601–55 (2012)); see also Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 *J. Contemp. Legal Issues* 717 (2005) (discussing statutes that structure congressional procedure).

<sup>186</sup> See Rules of the House of Representatives, *reprinted in* H.R. Doc. No. 112-161 (2013) [hereinafter *House Rules*]; Standing Rules of the Senate, *reprinted in* S. Doc. No. 113-18

of precedent, consisting of rulings of the presiding officers of the House and Senate, interprets these cameral rules, as well as relevant framework statutes.<sup>187</sup> The political parties also have their own sets of internal rules.<sup>188</sup> And both lobbying regulation<sup>189</sup> and public corruption law<sup>190</sup> dictate how legislators and interest groups can lawfully interact. At the federal level, the past half-century has witnessed significant changes to several of these areas of law. This Part traces how some of those changes have shaped the practice of legislative representation.

Congressional organization, like the law of democracy, instantiates pluralism. It sometimes enables legislators to advocate for their constituencies, but it can also make it harder for legislators to attend to constituent preferences or interests. It creates significant space for interest groups to exercise influence, in ways that are both obvious and subtle. And it empowers party leaders to discipline their members, giving those leaders tools to induce party loyalty.

### *A. Legislators and Constituents*

#### *1. Amendment Procedures*

One way that legislators serve their constituents is by attempting to influence legislation to benefit those constituents. But for many bills, rank-and-file legislators have little sway. At the federal level, the executive branch has long played a role in legislative drafting.<sup>191</sup> Some legislation is drafted through negotiations between party leaders and the White House, rather than through the traditional committee process.<sup>192</sup>

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(2013) [hereinafter Senate Rules]. These rules are promulgated based on the constitutional power of each chamber to “determine the Rules of its Proceedings.” U.S. Const. art. I, § 5, cl. 2. See also Josh Chafetz, *Congress’s Constitution: Legislative Authority and the Separation of Powers* 267–301 (2017) (discussing cameral rules).

<sup>187</sup> See generally Jonathan S. Gould, *Law Within Congress*, 129 *Yale L.J.* 1946 (2020) (discussing this body of law).

<sup>188</sup> See *infra* Section III.C (discussing several such rules).

<sup>189</sup> See *infra* Subsection III.B.1.

<sup>190</sup> See *infra* Subsection III.B.2.

<sup>191</sup> See, e.g., Ganesh Sitaraman, *The Origins of Legislation*, 91 *Notre Dame L. Rev.* 79, 103–06 (2015) (providing examples of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and the reauthorization of the Prescription Drug User Fee Act in 2012).

<sup>192</sup> Examples of legislation developed in this way include the post-9/11 Authorization for the Use of Military Force, the Troubled Asserpts Relief Program passed in 2008, and the two COVID-19 relief bills passed in 2020. See David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against*

When the committee process is used, it is often overseen closely by party leaders and the White House.<sup>193</sup> And many legislators never have the chance to be committee chairs. In the contemporary Congress, a “new order sacrifices deliberation for leadership control and speed” and “committees and their deliberative processes are increasingly bypassed in favor of a centralized process controlled by the leadership.”<sup>194</sup> The result is that “[m]embers are asked to vote on bills that they and their staffers have never read,”<sup>195</sup> much less had a hand in drafting.

Legislators who do not play an active role in legislative drafting will often find themselves voting on legislation that does not directly affect their constituents, and about which their constituents do not have opinions. Some statutes, from the New York City Loan Guarantee Act<sup>196</sup> to the Northern Great Plains Rural Development Act,<sup>197</sup> do not directly implicate significant parts of the country. It is not obvious how a California legislator could take a strictly constituency-centered approach to either of these statutes. These region-specific pieces of legislation are unlikely to materially change the lives of California constituents, and those constituents are unlikely to hold strong views about the merits of the legislation.<sup>198</sup> Without clear constituent preferences or interests, it would be difficult for a constituency-centered legislator to determine how to vote on these statutes.

Amendments provide such a legislator with a solution: legislators can seek to modify bills to make them more directly relevant to their constituents. Rules that allow legislators to more easily modify bills thus enable constituency-centered representation, while rules that make such

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International Terrorism, 43 *Harv. Int'l L.J.* 71 (2002); David M. Herszenhorn, Administration Is Seeking \$700 Billion for Wall Street, *N.Y. Times* (Sep. 20, 2008), <https://www.nytimes.com/2008/09/21/business/21cong.html> [<https://perma.cc/6G9F-GL66>]; John Bresnahan, Marianne Levine & Andrew Desiderio, How the \$2 Trillion Deal Came Together—and Nearly Fell Apart, *Politico* (Mar 26, 2020, 1:14 AM), <https://www.politico.com/news/2020/03/26/inside-the-10-days-to-rescue-the-economy-149718> [<https://perma.cc/K6LC-YXTN>].

<sup>193</sup> See, e.g., Lawrence R. Jacobs & Theda Skocpol, *Health Care Reform and American Politics: What Everyone Needs to Know* 50–100 (3d ed. 2016) (describing the enactment of the Affordable Care Act).

<sup>194</sup> See Ginsberg & Hill, *supra* note 86, at 181.

<sup>195</sup> *Id.*

<sup>196</sup> Pub. L. No. 95–339, 92 Stat. 460 (1978).

<sup>197</sup> Pub. L. No. 103–318, 108 Stat. 1781 (1994).

<sup>198</sup> Except, perhaps, at a very high level of generality: constituents might hold a position on government spending or economic development as a general matter.

modifications harder often require, in practice, that legislators consider factors external to their constituencies in deciding how to vote.

Changes in the House in the past half-century have made it more difficult for legislators to take constituency-centered approaches to representation. One key development has been the rise of the closed rule. In the House, open rules allow for all germane amendments, while closed rules prohibit most amendments, allowing only those offered by the reporting committee.<sup>199</sup> (Other types of rules, such as modified open rules and structured rules, lie between these two poles.<sup>200</sup>) While “[f]or much of the twentieth century, open rules were the norm,” they “generally have fallen into disuse for consideration of controversial measures.”<sup>201</sup> Most major legislation is now brought to the floor under either a closed rule or under a structured rule that tightly limits amending activity.

The rise of closed rules has cut off one channel for constituency-centered representation.<sup>202</sup> Under an open rule, a legislator can introduce an amendment to convert a bill from one that does not directly concern their constituency into one that does. Even if a bill was initially about a narrow topic, amendment-friendly procedures can enable constituency-centered representation. Under restrictive rules, by contrast, some bills will simply be unrelated to many legislators’ constituencies. “Because the closed rule narrows the scope of permissible floor activity for the rank and file, it also narrows the range of legislative activity” that legislators can undertake, making them “weaker agents of their constituents.”<sup>203</sup>

House germaneness requirements have similar effects. House rules provide that “[n]o motion or proposition on a subject different from that under consideration shall be admitted under color of amendment.”<sup>204</sup> While there are multiple tests to determine whether a proposed amendment is germane,<sup>205</sup> a germaneness requirement of any sort bars

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<sup>199</sup> Sinclair, *supra* note 2, at 28.

<sup>200</sup> See *id.*; Michael Doran, *The Closed Rule*, 59 *Emory L.J.* 1363, 1366 (2010).

<sup>201</sup> Doran, *supra* note 200, at 1366.

<sup>202</sup> On other effects of the rise of closed rules, see *id.* at 1398–1401.

<sup>203</sup> *Id.* at 1429. To the extent that closed rules channel more activity into committees, it is possible that legislators can achieve constituency-centered objectives in committees. But most members are not on most committees, so even with this proviso it is fair to conclude that closed rules shut off one possible channel for constituency-centered representation, even if others may remain.

<sup>204</sup> House Rules, *supra* note 186, r. XVI(7); see also Charles W. Johnson, John V. Sullivan & Thomas J. Wickham, Jr., *House Practice: A Guide to the Rules, Precedents, and Procedures of the House* 544 (2017) (noting the long history of House germaneness requirements).

<sup>205</sup> See Johnson et al., *supra* note 204, at 549.

some amendments that would have been permitted absent such a requirement. In this way, germaneness rules make it harder for a legislator to convert a bill not obviously relevant to their constituency into one that is.

Illustrative, in this regard, is the fate of an amendment to a foreign aid bill that would have directed the Agency for International Development to establish resource centers for minority-owned businesses. That amendment was proposed by a House member representing a largely African-American district in and around Baltimore. The amendment was ruled not germane and so was not permitted.<sup>206</sup> This germaneness determination denied the legislator a chance to give the foreign aid bill a much more direct effect on his district.

Senate rules give greater room for amendments in theory, but often not in practice. Though Senate rules do not contain a germaneness requirement, they do require germaneness for amendments to specific types of legislation (most notably appropriations and budget measures). Unanimous consent agreements often significantly restrict amending activity, including by imposing germaneness requirements in particular instances.<sup>207</sup> Senate leaders can also use various procedural tactics to functionally limit amendments.<sup>208</sup> As a result, the Senate's amendment procedures are not as loose as they might at first appear.

Most state legislatures are even more restrictive than either the House or Senate in limiting legislators' ability to insert constituency-specific content into pending bills. Over forty states have "single-subject rules" which require state legislatures to confine each bill to covering only a single topic.<sup>209</sup> These rules apply not only to amendments but also to bills as initially drafted. The most frequently cited purpose of single-subject rules is to prevent logrolling, the bundling together of multiple provisions to garner a majority for a full bill when its various components might have

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<sup>206</sup> 124 Cong. Rec. 13,499 (1978).

<sup>207</sup> See Valerie Heitshusen, Cong. Rsch. Serv., 96-548, *The Legislative Process on the Senate Floor: An Introduction* 6-7 (last updated July 22, 2019), <https://fas.org/sgp/crs/misc/96-548.pdf> [<https://perma.cc/5PXJ-PZJ9>].

<sup>208</sup> See, e.g., *id.* at 11 (describing how the Senate majority leader can fill the so-called "amendment tree" to prevent additional amendments).

<sup>209</sup> See William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, *Legislation and Statutory Interpretation* 176-81 (2d ed. 2006) (discussing single-subject requirements); Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 *U. Pitt. L. Rev.* 803 (2006).

been unable to secure majority support if considered individually.<sup>210</sup> In making logrolling more difficult, single-subject rules also make it harder for legislators to pursue constituency-specific goals in either general legislation or legislation not directly relevant to their constituents.<sup>211</sup>

## 2. *Single-Member Power*

Procedural rules can also temper constituency-centered behavior by limiting how much a legislator, acting alone, can accomplish. At the most basic level, requirements that bills (or amendments or motions) gain majority support mean that legislators must make common cause with other members who represent different constituencies. If a rank-and-file legislator is unable to make the case for their favored proposals in general terms—other than by arguing that the proposals would benefit their consistency alone—that legislator will typically accomplish little.<sup>212</sup> The fact that legislators have virtually no power when acting alone is a check on overly constituency-centered behavior in the House and in most subnational legislative bodies.

The Senate is a notable outlier, with a unique “tradition[] of extreme individualism.”<sup>213</sup> The most important effect of rules empowering individual senators is the creation of additional hurdles in a legislative

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<sup>210</sup> See Eskridge et al., *supra* note 209, at 176.

<sup>211</sup> One might respond to this Section’s focus on amendment rules by noting that such rules should not matter, since all legislators have the formal power to introduce new bills on any topic, including on topics with particular or even exclusive relevance to their constituencies. But party leaders control the agenda in both the House and Senate, and the overwhelming majority of bills introduced never see the light of day, much less become law. See Statistics and Historical Comparison, GovTrack (last visited Sept. 1, 2020), <https://www.govtrack.us/congress/bills/statistics> [<https://perma.cc/B7JF-YA49>]. By far the most promising avenue for a rank-and-file legislator to advance their preferred policy is to attach it to another bill that seems likely to pass.

<sup>212</sup> Logrolling can allow legislators to engage in dealmaking that, under the proper circumstances, enables them to take a constituency-centered approach and still garner majority support, if a sufficiently large number of constituency-centered provisions are grouped together in a single bill. But logrolling can be challenging in practice, given the planning, coordination, and trust between members that it requires.

A small subset of legislators might be able to exercise power even without building a broad coalition, by virtue of serving as a committee chair or through the good luck of happening to be a swing voter, but most legislators do not hold such positions. See, e.g., Ginsberg & Hill, *supra* note 86, at 158–59 (discussing the power of committee chairs); Jonathan S. Gould, *Rethinking Swing Voters*, 74 *Vand. L. Rev.* 85, 102–04, 107–09 (2021) (discussing the power of legislative swing voters).

<sup>213</sup> John C. Roberts, *Gridlock and Senate Rules*, 88 *Notre Dame L. Rev.* 2189, 2191 (2013).

process already rife with veto points.<sup>214</sup> Less examined, however, is the impact of Senate individualism on the practice of representation. If rules that force legislators to build coalitions temper constituency-centered behavior, Senate rules that empower legislators to act alone can have the opposite effect.

Senate holds are perhaps the most dramatic illustration of Senate individualism. Significant Senate decision making, especially on procedural matters, takes place under a system of “unanimous consent,” under which Senate rules can be set aside so long as no senator objects.<sup>215</sup> Senate action under unanimous consent can, as its name suggests, be impeded by a single senator. Since the 1970s, objections to unanimous consent, commonly referred to as holds, have been “serious impediment[s] to moving measures to the floor.”<sup>216</sup>

Senators often use holds to pursue constituency-specific objectives that could not otherwise garner majority support. An Alabama senator once placed holds on dozens of executive branch nominees to demand restoration of funding cut from an Alabama FBI facility and funding for an Air Force tanker fleet that would have generated thousands of Alabama jobs.<sup>217</sup> An Alaska senator once used a hold to prevent a military general from being promoted until the Air Force announced that a squadron of F-16 fighter jets would remain stationed in Alaska.<sup>218</sup> Without holds, individual senators could not take bills or nominees hostage over state-specific concerns. Even if maintaining a successful hold required support from ten or twenty senators, senators would have less ability to sway legislation or nominations when their concerns were strictly parochial. Under a system of holds, bills may rise or fall not based on an assessment of their benefits and costs nationwide, but rather based on their effects on a single state—or, in some cases, their effects on a powerful interest group

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<sup>214</sup> See Jentleson, *supra* note 28, at 9 (describing the modern Senate as “a kill switch that cuts off broad-based solutions and shuts down our democratic process”); see also William N. Eskridge, Jr., *Vetogates and American Public Law*, 31 *J.L. Econ. & Org.* 756, 757–60 (2012) (describing nine “vetogates” in the U.S. legislative process); Alfred Stepan & Juan J. Linz, *Comparative Perspectives on Inequality and the Quality of Democracy in the United States*, 9 *Persps. on Pol.* 841, 844 (2011) (noting that the United States has more veto points than other established democracies).

<sup>215</sup> See Sinclair, *supra* note 2, at 66–72.

<sup>216</sup> Steven S. Smith, *Call to Order: Floor Politics in the House and Senate* 110 (1989).

<sup>217</sup> Sinclair, *supra* note 2, at 64. The senator lifted the holds after significant public criticism. *Id.*

<sup>218</sup> *Id.* at 64.

within a single state.<sup>219</sup> For majority party leadership, “the most practical course of action” in response to a hold “is often to lay the matter aside and attempt to promote negotiations that could alleviate the concerns that gave rise to the hold.”<sup>220</sup> Put simply, holds are a potent tool for promoting constituency-specific objectives.

In the scheme of U.S. legislative bodies, Senate holds are the exception rather than the rule. And even in the Senate, abuses of holds have led to periodic calls to weaken or eliminate the practice.<sup>221</sup> By denying legislators the ability to act alone in most circumstances, legislative procedure in most chambers forces legislators to build coalitions. In so doing, procedural rules make it more difficult for legislators to influence policy for the sake of their constituents alone when they cannot at least justify their constituency-oriented interventions in the language of the broader public interest.

### 3. *Earmark Rules*

One of the major ways that legislators serve their constituents is by bringing home targeted financial benefits. A legislator who secures an appropriation for a new bridge or a tax break for a local industry can claim credit for a tangible achievement that delivers material benefits to their

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<sup>219</sup> The failure of a bill to reform the American foster care system illustrates this dynamic. See Family First Prevention Services Act of 2016, H.R. 5456, 114th Congress (2016). This bill unanimously passed the House in 2016. In the Senate, the reform was initially included as part of another proposed bill, but Senator Richard Burr (R-NC) insisted upon its removal from that other bill and also objected to its attachment to a continuing resolution then under consideration. The reason for Burr’s objection was pressure from the Baptist Children’s Homes of North Carolina, which would have lost substantial revenue if reforms to keep families together—instead of putting children in foster care—had gone into effect. The Baptist Children’s Homes was able to convince Burr to oppose the bill, and Burr’s opposition, in turn, prevented the bill from becoming law. See Ryan Grim, Jason Cherkis & Laura Barrón-López, *A Sweeping Reform of the Foster Care System Is Within Reach but Hanging by a Thread*, *Huffington Post* (Dec. 2, 2016, 11:16 AM), [https://www.huffpost.com/entry/a-sweeping-reform-of-the-foster-care-system-is-hanging-by-a-thread\\_n\\_5840f925e4b0c68e04802b7c](https://www.huffpost.com/entry/a-sweeping-reform-of-the-foster-care-system-is-hanging-by-a-thread_n_5840f925e4b0c68e04802b7c) [<https://perma.cc/2G5J-V2LM>]; Ryan Grim, *A Single Senator Is Blocking Reform of the Foster Care System*, *Huffington Post* (Dec. 6, 2016, 11:31 PM), [https://www.huffpost.com/entry/senator-blocks-foster-care-reform\\_n\\_584783d3e4b0b9feb0da3920](https://www.huffpost.com/entry/senator-blocks-foster-care-reform_n_584783d3e4b0b9feb0da3920) [<https://perma.cc/3WFT-JEP9>].

<sup>220</sup> See Mark J. Oleszek, Cong. Rsch. Serv., R43563, “Holds” in the Senate 1 (2017), <https://fas.org/sgp/crs/misc/R43563.pdf> [<https://perma.cc/Q656-PGMY>].

<sup>221</sup> See Oleszek, *supra* note 220, at 2; Walter J. Oleszek, Cong. Rsch. Serv., RL31685, *Proposals to Reform “Holds” in the Senate* (2011), <https://fas.org/sgp/crs/misc/RL31685.pdf> [<https://perma.cc/R2H9-PE3L>].

constituents.<sup>222</sup> Rules making it easier for legislators to obtain these targeted benefits enable constituency-centered representation.

Recent battles over earmarks provide another example of how rules shape representation.<sup>223</sup> Both the House and Senate prohibited earmarks in 2011,<sup>224</sup> but the House ban was lifted in 2021.<sup>225</sup> Much of the public debate on the topic has focused on the impact of earmarks on federal spending (minimal)<sup>226</sup> and legislative dealmaking (potentially significant).<sup>227</sup> But rules around earmarking also shape representation. Earmarking, like more open amendment rules or more lax germaneness requirements, enables legislators to advance the material interests of their constituents. Conversely, an effective earmark ban would restrict the ability of legislators to modify bills to affect their constituencies more directly.

The impact of the decade-long earmark ban on representation is difficult to assess because legislators developed workarounds that mimicked direct earmarks. For example, Congress could still appropriate

<sup>222</sup> See Ginsberg & Hill, *supra* note 86, at 85.

<sup>223</sup> There is no single definition of an earmark, but the term has been defined as encompassing “funds set aside within an account for a specified program, project, activity, institution, or location,” or, more narrowly, as “specified funds for projects, activities, or institutions not requested by the executive, or add-ons to requested funds which Congress directs for specific activities.” See Memorandum from the Cong. Rsch. Serv. Appropriations Team on Earmarks in Appropriations Acts 2–3 (Jan. 26, 2006), <https://fas.org/sgp/crs/misc/m012606.pdf> [<https://perma.cc/W9K6-7U43>].

<sup>224</sup> See Megan S. Lynch, Cong. Rsch. Serv., R45429, *Lifting the Earmark Moratorium: Frequently Asked Questions 1–3* (last updated Dec. 3, 2020), <https://crsreports.congress.gov/product/pdf/R/R45429> [<https://perma.cc/7UK9-NS68>] (noting that though the earmark bans are not part of either chamber’s cameral rules, they have been part of party rules and committee protocols since 2011). See also Mariano-Florentino Cuéllar, *Earmarking*, 49 *Harv. J. on Legis.* 249 (2012).

<sup>225</sup> Jennifer Shutt, House Appropriators Officially Bring Back Earmarks, Ending Ban, Roll Call (Feb. 26, 2021, 6:30 PM), <https://rollcall.com/2021/02/26/house-appropriators-to-cap-earmarks-at-1-percent-of-topline/> [<https://perma.cc/33QJ-9Z8R>].

<sup>226</sup> See, e.g., Chris Good, *The Future of Earmarks Depends on Senate Republicans*, *The Atlantic* (Nov. 9, 2010), <https://www.theatlantic.com/politics/archive/2010/11/the-future-of-earmarks-depends-on-senate-republicans/66314/> [<https://perma.cc/LDQ4-JCTD>] (noting that earmarks comprise less than one percent of the federal budget); Steven C. LaTourette, *The Congressional Earmark Ban: The Real Bridge to Nowhere*, Roll Call (July 30, 2014, 1:59 PM), <https://www.rollcall.com/2014/07/30/the-congressional-earmark-ban-the-real-bridge-to-nowhere-commentary/> [<https://perma.cc/PYL4-NVK2>] (contending that in the absence of earmarks federal agencies spend the same funds without congressional direction).

<sup>227</sup> See, e.g., Diana Evans, *Greasing the Wheels: Using Pork Barrel Projects to Build Majority Coalitions in Congress 25* (2004) (arguing that “the judicious distribution of pork barrel benefits is an important technique for forming majority coalitions for general interest legislation” and providing empirical support for that theory).

money using neutral language, but include conditions and requirements that inevitably steer funds toward a specific constituency.<sup>228</sup> Legislators could also contact agency officials responsible for spending the appropriated funds and request that agency spend the funds in particular ways.<sup>229</sup> These workarounds make it too simple to say that the earmark ban did much to impede constituency-centered representation. But an earmark ban that was not so easily circumvented would make district-centered representation harder. And even if workarounds were to lead to the exact same distribution of funds as direct earmarks, there may still be an effect on representation—the fact that funding allocations are made by facially neutral criteria or by agency officials may, at the margin, make it harder for legislators to claim credit for targeted financial benefits.

### *B. Legislators and Interest Groups*

#### *1. Lobbying Regulation*

Legal regulation of lobbying parallels regulation of campaign contributions in opening the door for non-constituent interest groups to influence legislators. The law bars lobbyists from giving gifts to legislators,<sup>230</sup> imposes registration and reporting requirements,<sup>231</sup> regulates the “revolving door” between Congress and the private sector,<sup>232</sup> and (in some jurisdictions) regulates lobbyist fees.<sup>233</sup> Yet no

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<sup>228</sup> See Ginsberg & Hill, *supra* note 86, at 171 (describing this practice, known as “zombie earmarking”).

<sup>229</sup> See *id.* at 172 (describing this practice, known as “letter marking”).

<sup>230</sup> See 2 U.S.C. § 1613 (prohibiting registered lobbyists from giving a legislative branch official any gift prohibited by the rules of the House or Senate).

<sup>231</sup> At the federal level, this legal regime is set out in the Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691 (codified at 2 U.S.C. § 1601 *et seq.*); and the Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735 (codified as amended in scattered titles of U.S.C.).

<sup>232</sup> See 18 U.S.C. § 207(e) (imposing such requirements on former executive branch officials, members of Congress, and legislative staff).

<sup>233</sup> See Richard Briffault, *The Anxiety of Influence: The Evolving Regulation of Lobbying*, 13 *Election L.J.* 160, 180–82 (2014) (discussing state bans on lobbyists accepting contingency fees).

A wide range of lobbying regulations are constitutional, though the First Amendment likely places outer bounds on such regulation. See, e.g., *id.* at 163 (“Lobbying is an aspect of the freedoms of speech, press, association, and petition protected by the constitution.”); Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 *Stan. L. Rev.* 191, 196 (2012) (“The activity of lobbying . . . squarely implicates both the Free Speech and Petition Clauses of the First Amendment.”). But see Zephyr Teachout, *The Forgotten Law of Lobbying*, 13

aspect of federal lobbying law distinguishes between lobbying on behalf of constituents and non-constituents.

This absence bears on representation: federal law facilitates legislators' responsiveness to non-constituents by declining to limit lobbying activities undertaken on their behalf. A system of lobbying regulation could privilege lobbying on behalf of constituents rather than non-constituents. But existing law applies precisely the same rules to lobbyists representing cities, corporations, unions, or universities in a member of Congress's district as it does to lobbyists representing interests located hundreds of miles away. Legislators' responsiveness to those latter groups can pull them away from attending to the preferences and interests of their constituents. By failing to draw distinctions based on geography, lobbying law creates conditions for legislative responsiveness to non-constituents.

This state of affairs is not natural or preordained. Lobbying law is able to draw distinctions based on geography; it simply opts not to do so with respect to non-constituents. Federal law is considerably stricter in regulating foreign lobbying as compared to domestic lobbying. The Foreign Agents Registration Act of 1938<sup>234</sup> ("FARA"), as amended over the years, sets out a distinctive set of rules applicable only to lobbyists representing foreign clients.<sup>235</sup> Regulation of foreign lobbying under FARA is much more demanding, particularly with regard to disclosure requirements, than regulation of domestic lobbying.<sup>236</sup> Recent years have witnessed an uptick in FARA enforcement, and proposed legislation would further tighten regulation of lobbying on behalf of foreign clients.<sup>237</sup> The existence of a two-track system distinguishing domestic and foreign lobbying reflects a theory of representation that is acutely

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Election L.J. 4, 6 (2014) (noting that "[t]he modern Supreme Court has not directly addressed whether there is a right to hire a lobbyist, or be hired as a lobbyist, and if so, the source of that right, or the scope of that right" and providing historical evidence that "[t]he First Amendment was not even implicated in lobbying discussions, for over 150 years").

<sup>234</sup> Pub. L. No. 75-583, ch. 327, 52 Stat. 631 (codified as amended at 22 U.S.C. §§ 611–621 (2018)).

<sup>235</sup> See U.S. Dep't of Just., Crim. Res. Manual § 2062, <https://www.justice.gov/archives/usam/criminal-resource-manual-2062-foreign-agents-registration-act-enforcement> [<https://perma.cc/F4CC-HBVH>] (last updated Dec. 7, 2018).

<sup>236</sup> See David Laufman, Paul Manafort Guilty Plea Highlights Increased Enforcement of Foreign Agents Registration Act, Lawfare (Sept. 14, 2018, 1:58 PM), <https://www.lawfareblog.com/paul-manafort-guilty-plea-highlights-increased-enforcement-foreign-agents-registration-act> [<https://perma.cc/FW6B-7GN9>].

<sup>237</sup> See *id.*

concerned about legislative responsiveness to foreign influences.<sup>238</sup> The absence of such a two-track system for lobbyists representing constituents and non-constituents places responsiveness to non-constituents as on par with responsiveness to constituents.

## 2. Public Corruption Law

Public corruption law distinguishes legally permissible relationships between citizens and public officials from unlawful corruption.<sup>239</sup> In doing this, public corruption law could, in principle, privilege legislator-constituent relationships over other sorts of relationships. In practice, however, public corruption law mirrors other areas of law in placing constituents and non-constituents on equal footing.<sup>240</sup>

This feature of public corruption law is striking given that courts sometimes invoke principles of representation in interpreting public corruption statutes. The federal bribery statute, for example, bars donors from giving something of value to a public official with the intent “to influence any official act”<sup>241</sup> and bars public officials from accepting something of value in return for “being influenced in the performance of any official act.”<sup>242</sup> In *McDonnell v. United States*,<sup>243</sup> the Supreme Court narrowly construed the bribery statute to exclude certain actions taken by Governor Bob McDonnell (R-VA) from the definition of “official act.” In so doing, the Court expressly noted concerns about chilling relationships between elected officials and their constituents. In an illuminating passage, the Court wrote:

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<sup>238</sup> This concern has deep roots. Alexander Hamilton warned that “[o]ne of the weak sides of republics, among their numerous advantages, is that they afford too easy an inlet to foreign corruption.” The Federalist No. 22, at 149 (Alexander Hamilton). For this reason, the Constitution included strict limits on how federal officials were permitted to interact with foreign actors. See U.S. Const. art. I, § 9, cl. 8 (barring public officials from accepting “any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State”).

<sup>239</sup> See, e.g., 18 U.S.C. § 201(b) (2018) (federal bribery statute); *id.* § 201(c) (federal gratuities statute).

<sup>240</sup> See Ctr. for the Advancement of Pub. Integrity, A Guide to Commonly Used Federal Statutes in Public Corruption Cases: A Practitioner Toolkit (2017), [https://web.law.columbia.edu/sites/default/files/microsites/public-integrity/a\\_guide\\_to\\_commonly\\_used\\_federal\\_statutes\\_in\\_public\\_corruption\\_cases.pdf](https://web.law.columbia.edu/sites/default/files/microsites/public-integrity/a_guide_to_commonly_used_federal_statutes_in_public_corruption_cases.pdf) [<https://perma.cc/E4ZD-MUD6>] (providing an overview of federal public corruption statutes).

<sup>241</sup> 18 U.S.C. § 201(b)(1)(A).

<sup>242</sup> *Id.* § 201(b)(2)(A).

<sup>243</sup> 136 S. Ct. 2355 (2016).

The basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns—whether it is the union official worried about a plant closing or the homeowners who wonder why it took five days to restore power to their neighborhood after a storm. The Government’s position could cast a pall of potential prosecution over these relationships . . . Officials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse.<sup>244</sup>

This idealized vision of constituent representation was at least plausible in *McDonnell*, which concerned Virginia’s governor arranging meetings and contacting other government officials on behalf of a Virginia businessman.<sup>245</sup>

But narrow readings of the public corruption statutes protect non-constituents as well as constituents. The statutes themselves do not distinguish between the two groups. As a result, when courts invoke principles of representation to read those statutes narrowly, one result is that non-constituents are empowered to influence legislators. Whatever the merits of *McDonnell*’s definition of what constitutes an “official act,” its holding was quickly applied to cases involving non-constituents.

The prosecution of Senator Robert Menendez (D-NJ) is illustrative. In 2015, Menendez was indicted for allegedly soliciting and accepting gifts from a Florida doctor in exchange for attempting to influence a federal enforcement action and encouraging the government to intervene on the doctor’s behalf in a transnational contract dispute.<sup>246</sup> *McDonnell*’s holding “loomed over” Menendez’s trial and the judge “referred repeatedly to the *McDonnell* ruling throughout the case.”<sup>247</sup> But the *McDonnell* Court’s discussion of the union official or homeowner assumes constituents turning to their own legislator, not to those from

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<sup>244</sup> Id. at 2372.

<sup>245</sup> Id. at 2361.

<sup>246</sup> United States v. Menendez, 831 F.3d 155, 159 (3d Cir. 2016).

<sup>247</sup> See Nick Corasaniti, Justice Department Dismisses Corruption Case Against Menendez, N.Y. Times (Jan. 31, 2018), <https://www.nytimes.com/2018/01/31/nyregion/justice-department-moves-to-dismiss-corruption-case-against-menendez.html> [<https://perma.cc/4TFY-4FEB>]. When prosecutors dropped all charges against Menendez in 2018, many attributed their decision to the difficulty of prosecuting public corruption after *McDonnell*. See id.

other districts or states. Even so, none of the three opinions in *United States v. Menendez* treated the doctor's status as a non-constituent as worthy of any discussion.<sup>248</sup>

In sum, public corruption law tracks campaign finance law and lobbying law in declining to distinguish between constituents and non-constituents. This equal treatment originated with Congress and the text of the public corruption statutes. But *McDonnell* shows how courts interpret those statutes in light of principles of representation, and *Menendez* shows how an initial interpretation intended to protect legislator-constituent interactions can, in practice, empower non-constituents to exercise influence.

### 3. Legislative Capacity and Expertise

Interest groups sometimes seek to influence legislators directly, through campaign contributions or lobbying. But regulation of those practices is not the only way to ratchet up or down interest group power. More institution-wide design choices are relevant as well.

Interest group power in a legislature is inversely related to the body's internal capacity and expertise. Legislatures with fewer internal resources are more reliant on interest groups for information.<sup>249</sup> When legislators lack easy access to expert information, they turn to lobbyists, who in turn provide information favorable to the interest groups for whom they work.<sup>250</sup> A leading theoretical account of lobbying treats the practice as a grant of "costly policy information, political intelligence, and labor" to legislators.<sup>251</sup> Extensive evidence illustrates how heavily legislators rely on interest groups as sources of information.<sup>252</sup> When a legislature lacks internal capacity, interest groups step in to fill the void.<sup>253</sup>

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<sup>248</sup> See *United States v. Menendez*, 137 F. Supp. 3d 688 (D.N.J. 2015); *United States v. Menendez*, 132 F. Supp. 3d 610 (D.N.J. 2015), *aff'd*, 831 F.3d 155 (3d Cir. 2016).

<sup>249</sup> See Lee Drutman, *The Business of America Is Lobbying: How Corporations Became Politicized and Politics Became More Corporate* 33–42 (2015) (presenting evidence and citing sources); Hertel-Fernandez, *supra* note 25, at 78–111 (2019) (detailing dynamics at the state legislative level).

<sup>250</sup> See Hertel-Fernandez, *supra* note 25, 78–111.

<sup>251</sup> Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 *Am. Pol. Sci. Rev.* 69, 69 (2006).

<sup>252</sup> See, e.g., Drutman, *supra* note 249, at 40; Hertel-Fernandez, *supra* note 25, at 78–111.

<sup>253</sup> Cf. Jeffrey R. Lax & Justin H. Phillips, *The Democratic Deficit in the States*, 56 *Am. J. Pol. Sci.* 148, 161 (2012) (finding, in a study of state legislatures, that legislatures with higher staffing capacity were more responsive to the public, and theorizing that increasing capacity made legislatures better able to take actions preferred by voters).

The past century has witnessed a rise and fall in legislative expertise. In the middle third of the twentieth century, Congress took significant steps to increase its capacity. The Legislative Reorganization Act of 1946<sup>254</sup> significantly increased congressional staffing capacity,<sup>255</sup> and Congress further expanded its staffing in the 1970s.<sup>256</sup> Large staffs with specialized knowledge supported the work of congressional committees. In the 1970s, Congress created new research-focused offices, most notably the Congressional Budget Office (“CBO”) and the Congressional Research Service (“CRS”), both nonpartisan offices that provide expert information to aid in the lawmaking process.<sup>257</sup> Together, member staff, committee staff, the CBO, and the CRS came to ensure that significant policy expertise was housed within Congress.<sup>258</sup>

<sup>254</sup> Pub. L. No. 79-601, 60 Stat. 812 (1946) (codified as amended in scattered sections of 2 U.S.C.).

<sup>255</sup> See 1 Robert C. Byrd, *The Senate 1789–1989: Addresses on the History of the United States Senate* 537–50 (1989); Michael J. Malbin, *Unelected Representatives: Congressional Staff and the Future of Representative Government* (1980); George B. Galloway, *The Operation of the Legislative Reorganization Act of 1946*, 45 *Am. Pol. Sci. Rev.* 41 (1951).

<sup>256</sup> See, e.g., Eric Schickler, *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress 217–20* (2001) (describing expansions in Senate staffing in the 1970s).

<sup>257</sup> The CBO “produce[s] independent analyses of budgetary and economic issues,” “does not make policy recommendations,” “is strictly nonpartisan,” and hires employees “solely on the basis of professional competence.” Introduction to CBO, Cong. Budget Off., <https://www.cbo.gov/about/overview> [<https://perma.cc/DN3J-Q97G>]; see also Philip Joyce, *The Congressional Budget Office at Middle Age 5–8* (Hutchings Ctr. on Fiscal & Monetary Pol’y at Brookings, Working Paper No. 9, 2015), [https://www.brookings.edu/wp-content/uploads/2016/06/PJ\\_WorkingPaper9\\_Feb11\\_Final.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/PJ_WorkingPaper9_Feb11_Final.pdf) [<https://perma.cc/5X66-873A>] (detailing how the CBO seeks to maintain nonpartisan objectivity). The CRS conducts research to help legislators “form sound policies and reach decisions on a host of difficult issues.” See About CRS, Cong. Rsch. Serv., <https://loc.gov/crsinfo/about/> [<https://perma.cc/D6L8-XFAK>]. The mid-century Congress took other steps to enhance its expertise as well. See, e.g., Bruce Bimber, *The Politics of Expertise in Congress: The Rise and Fall of the Office of Technology Assessment* 25–49 (1996) (discussing the 1972 founding of the Office of Technology Assessment).

<sup>258</sup> See Ginsberg & Hill, *supra* note 86, at 75 (noting that “[p]rior to the creation of the CBO, Congress was dependent upon the reports and estimates of the OMB” and that “the 1970 Legislative Reform Act . . . expanded committee staffing, provided computers for members’ offices, introduced electronic voting machines to the House floor, created the Congressional Research Service (formerly the Legislative Reference Service), and otherwise strengthened Congress’s operational capabilities”); see also *id.* at 144–49 (describing internal congressional capacity). A parallel infrastructure exists in subnational legislatures, though it is typically less robust. See State Legislative Research Service Bureaus, *Ballotpedia*, [https://ballotpedia.org/State\\_legislative\\_research\\_service\\_bureaus](https://ballotpedia.org/State_legislative_research_service_bureaus) [<https://perma.cc/PV7F-9K7V>] (last visited Jan. 16, 2021).

Congress's capacity has fallen precipitously in recent decades, however. The number of committee staffers fell by roughly a third from the 1970s to the 2000s.<sup>259</sup> Low staff salaries mean that staffers are disproportionately young; older and more experienced staffers often leave Congress for lucrative private-sector positions.<sup>260</sup> Expertise-promoting institutions have been hollowed out, with the CBO, CRS, and General Accounting Office having lost nearly half of their combined staffs from 1975 to 2015.<sup>261</sup> While the trend toward diminishing expertise within Congress has persisted under both parties, some congressional leaders have actively sought to accelerate it. Former Speaker Newt Gingrich (R-GA) thinned committee and CBO staffs and eliminated the science-focused Office of Technology Assessment.<sup>262</sup> Most recently, some legislators have marginalized the CBO by declining to engage its services in scoring proposed legislation.<sup>263</sup>

Other changes in Congress have reduced the level of expertise held by legislators themselves. Committee and subcommittee chairs develop expertise during their time in office, and experienced chairs are more effective than their less experienced counterparts.<sup>264</sup> House rules long

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<sup>259</sup> See Drutman, *supra* note 249, at 34.

<sup>260</sup> See *id.* at 33–34.

<sup>261</sup> Curtlyn Kramer, *Vital Stats: Congress Has a Staffing Problem, Too*, Brookings (May 24, 2017), <https://www.brookings.edu/blog/fixgov/2017/05/24/vital-stats-congress-has-a-staffing-problem-too/> [<https://perma.cc/4YXP-RSY8>].

<sup>262</sup> See Bruce Bartlett, *Gingrich and the Destruction of Congressional Expertise*, N.Y. Times: Economix (Nov. 29, 2011), <https://economix.blogs.nytimes.com/2011/11/29/gingrich-and-the-destruction-of-congressional-expertise> [<https://perma.cc/37WA-A4TQ>] (providing staffing statistics and noting that Gingrich “did everything in his power to dismantle Congressional institutions”); Bimber, *supra* note 257, at 69–77 (describing the 1995 closing of the Office of Technology Assessment).

<sup>263</sup> See Nathaniel Weixel, *Senate GOP May Not Use CBO to Score Cruz Amendment*, Hill (July 13, 2017, 2:15 PM), <https://thehill.com/policy/healthcare/341904-senate-gop-may-not-use-cbo-to-score-cruz-amendment> [<https://perma.cc/U7EX-FGYR>]; see also Michelle Cottle, *The Congressional War on Expertise*, Atlantic (July 9, 2017), <https://www.theatlantic.com/politics/archive/2017/07/why-lawmakers-need-the-congressional-budget-office/532929/> [<https://perma.cc/2KCK-2CTZ>].

<sup>264</sup> See Craig Volden & Alan E. Wiseman, *Legislative Effectiveness and Problem Solving in the U.S. House of Representatives*, in *Congress Reconsidered* 248, 255 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 11th ed. 2017) (creating a quantitative measure of legislators’ effectiveness and finding that “the average Legislative Effectiveness Scores of committee and subcommittee chairs are increasing over their tenure in the House”); see also Craig Volden & Alan Wiseman, *How Term Limits for Committee Chairs Make Congress Less Effective*, Wash. Post. (Jan. 4, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/04/how-term-limits-for-committee-chairs-make-congress-less-effective> [<https://perma.cc/5TJ2-JCMH>].

permitted committee chairs to serve indefinitely, but since 1995 Republicans have restricted members to three consecutive terms in top committee leadership roles when they have controlled the House.<sup>265</sup> Limits on how many terms legislators can serve in office, which exist in some state legislatures but not in Congress, further prevent—and deter—legislators from gaining the expertise that comes from long terms of service.<sup>266</sup>

Campaign finance law also shapes legislative expertise, albeit indirectly. Developing expertise takes time: legislators must receive briefings, read background materials, and meet with experts from both inside and outside government. The demands of fundraising prevent most legislators from having the time necessary to become experts. Federal campaign finance law does not provide public financing for congressional candidates, and it caps campaign contributions but not expenditures. As a result, legislators raise large amounts of money in small increments. To do this, they spend at least several hours per day fundraising, with some estimating that fundraising can consume half of legislators' time.<sup>267</sup> Time devoted to fundraising is time that legislators do not spend developing policy expertise.<sup>268</sup>

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<sup>265</sup> Molly E. Reynolds, Retirement from Congress May Be Driven by Term Limits on Committee Chairs, Brookings (Nov. 30, 2017), <https://www.brookings.edu/blog/fixgov/2017/11/30/committee-chair-term-limits-and-retirements/> [https://perma.cc/XPV6-LM3X].

<sup>266</sup> See, e.g., Casey Burgat, Five Reasons to Oppose Congressional Term Limits, Brookings (Jan. 18, 2018), <https://www.brookings.edu/blog/fixgov/2018/01/18/five-reasons-to-oppose-congressional-term-limits/> [https://perma.cc/54VQ-N2ZH].

<sup>267</sup> The few scholarly treatments of fundraising time include Lynda W. Powell, *The Influence of Campaign Contributions in State Legislatures: The Effects of Institutions and Politics* 78–105 (2012), and Ciara Torres-Spelliscy, Time Suck: How the Fundraising Treadmill Diminishes Effective Governance, 42 *Seton Hall Legis. J.* 271 (2018). For journalistic accounts, see e.g., Ryan Grim & Sabrina Siddiqui, Call Time for Congress Shows How Fundraising Dominates Bleak Work Life, *Huffington Post* (Dec. 6, 2017), [https://www.huffpost.com/entry/call-time-congressional-fundraising\\_n\\_2427291](https://www.huffpost.com/entry/call-time-congressional-fundraising_n_2427291) [https://perma.cc/E9W9-VHP4]; Steve Israel, Confessions of a Congressman, *N.Y. Times* (Jan. 9, 2016) <https://www.nytimes.com/2016/01/09/opinion/steve-israel-confessions-of-a-congressman.html> [https://perma.cc/ZA8J-XGBL]; Tim Roemer, Why Do Congressmen Spend Only Half Their Time Serving Us?, *Newsweek* (July 29, 2015, 11:38 AM), <https://www.newsweek.com/why-do-congressmen-spend-only-half-their-time-serving-us-357995> [https://perma.cc/6PXM-RAQA].

<sup>268</sup> Time spent on fundraising could be reduced not only by wholesale campaign finance reform but also by considerably more modest changes in law. A recent bipartisan proposal to ban legislators from personally soliciting campaign contributions, for example, would reduce time spent fundraising even while leaving the system of private campaign finance in place. See Stop Act of 2016, H.R. 4443, 114th Cong. (2016); see also Editorial, This Would Be a Nice First Step on Campaign Finance Reform, *Wash. Post* (June 10, 2016),

Recent years have witnessed a renewed focus on the decline of Congress's capacity and expertise.<sup>269</sup> The dearth of expertise in Congress did not arise because of any principled theory of representation. It resulted from a combination of other factors: conservative hostility toward scientific expertise,<sup>270</sup> concerns about legislators and committee chairs remaining in power for too long,<sup>271</sup> and the broader campaign finance landscape. But developments in each of these areas weaken legislative expertise. And a less expert legislature is likely to be more dependent on interest groups, even if that responsiveness comes at the cost of the interests of constituents or the broader public.

#### 4. *Legislative Transparency*

The extent of legislative transparency also shapes interest group power. One senator captured the common perspective that “the more people are aware of what we are doing in the Senate and the Congress, or in Washington generally, the more accountable we are.”<sup>272</sup> Contrary to this optimistic view, however, there is significant evidence that transparency empowers well-resourced interest groups to monitor and influence legislators.<sup>273</sup> More openness has “made it much easier for special

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[https://www.washingtonpost.com/opinions/this-would-be-a-nice-first-step-on-campaign-finance-reform/2016/06/10/745de05a-2e69-11e6-b5db-e9bc84a2c8e4\\_story.html](https://www.washingtonpost.com/opinions/this-would-be-a-nice-first-step-on-campaign-finance-reform/2016/06/10/745de05a-2e69-11e6-b5db-e9bc84a2c8e4_story.html) [https://perma.cc/7ES4-K7YD].

<sup>269</sup> See generally *Congress Overwhelmed: The Decline in Congressional Capacity and Prospects for Reform* (Kevin R. Kosar, Lee Drutman & Timothy M. LaPira eds., 2020) (collecting essays on the topic).

<sup>270</sup> See, e.g., Matthew Motta, *The Dynamics and Political Implications of Anti-Intellectualism in the United States*, 46 *Am. Pol. Rsch.* 465 (2017); Gordon Gauchata, *Politicization of Science in the Public Sphere: A Study of Public Trust in the United States, 1974 to 2010*, 77 *Am. Socio. Rev.* 167 (2012).

<sup>271</sup> See, e.g., James Fallows, *The Republican Promise*, *N.Y. Rev. Books* (Jan. 12, 1995) (discussing the term limits proposal in Republicans' 1994 “Contract with America”).

<sup>272</sup> 156 *Cong. Rec.* S11,503 (2010) (statement of Sen. Chuck Grassley (R-IA)).

<sup>273</sup> See, e.g., R. Douglas Arnold, *The Logic of Congressional Action* 131 (1990) (“Open markup sessions often give organized interests a powerful advantage over inattentive citizens, for they can monitor exactly who is doing what to benefit and to hurt them.”); David E. Pozen, *Transparency's Ideological Drift*, 128 *Yale L.J.* 100, 130–33 (2018) (discussing how increased transparency in the legislative process has empowered interest groups). Scholars of Congress have also noted other effects of transparency reforms besides their empowering interest groups. See, e.g., Sarah A. Binder & Frances E. Lee, *Making Deals in Congress*, in *Political Negotiation: A Handbook* 105 (Jane Mansbridge & Cathie Jo Martin eds., 2016) (arguing that increased transparency can undermine legislative negotiation and dealmaking); Julian E. Zelizer, *Taxing America: Wilbur D. Mills, Congress, and the State, 1945–1975* at 356 (2000) (arguing that pro-transparency reforms empowered party leaders to better monitor and oversee

interests to determine whether members were actually delivering on their end of the deal.”<sup>274</sup>

As in other domains, legal rules determine the character and extent of legislative transparency.<sup>275</sup> Prior to the late twentieth century, little in Congress was transparent. In the House, for example, nearly all legislative activity took place not on the floor but in the “Committee of the Whole,” in which there were no recorded roll-call votes.<sup>276</sup> Congress sought to open its doors beginning in the 1970s. House votes on amendments were made public, and the introduction of electronic voting in 1973 made it feasible for recorded votes to become the norm.<sup>277</sup> Congress has taken further steps toward greater transparency in recent years, including a 2011 requirement that committee chairs post bill text online prior to markup.<sup>278</sup> More generally, legislatures may or may not make records of various activities public in a timely, complete, or easily searchable manner.<sup>279</sup>

The contemporary legislative process is more transparent than ever before. Most pro-transparency reforms were intended to serve the public interest by making it more difficult for legislators to strike deals behind closed doors that benefit special interests at the expense of the public.<sup>280</sup> Contrary to reformers’ hopes, however, increased legislative transparency has instead made it easier for interest groups, especially those with significant resources, to monitor and influence the legislative process.<sup>281</sup>

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committee proceedings); Justin Fox, *Government Transparency and Policymaking*, 131 *Pub. Choice* 23, 26 (2007) (arguing that “unbiased politicians, who always select the policy that maximizes the public’s welfare when policy is determined behind closed doors, no longer do so when policy is made in the open”).

<sup>274</sup> Morris P. Fiorina & Samuel J. Abrams, *Disconnect: The Breakdown of Representation in American Politics* 83 (2009).

<sup>275</sup> For overviews, see Paul Rundquist, *Secrecy in Congress*, in 4 *The Encyclopedia of the United States Congress 1774–75* (Donald C. Bacon, Roger H. Davidson, & Morton Keller eds., 1995); Walter J. Oleszek, *Cong. Rsch. Serv.*, R42108, *Congressional Lawmaking: A Perspective on Secrecy and Transparency* (2011), <https://fas.org/sgp/crs/secrecy/R42108.pdf> [<https://perma.cc/MGE8-D4HE>].

<sup>276</sup> David W. Rohde, *Parties and Leaders in the Postreform House* 21 (1991).

<sup>277</sup> *Id.* at 154, 195. Whether votes are recorded is largely the domain of cameral rules and practices, though the Constitution does require that votes be recorded if one-fifth of members present so request. See U.S. Const. art. I, § 5, cl. 3.

<sup>278</sup> 157 *Cong. Rec.* H13 (2011).

<sup>279</sup> The Sunlight Foundation uses these and other metrics to construct its “Open Legislative Data Report Card” for state legislatures. See Open States, *Open Legislative Data Report Card*, <http://openstates.org/reportcard> [<https://perma.cc/XFJ7-Q3XX>] (last visited Jan. 26, 2021).

<sup>280</sup> See Pozen, *supra* note 273, at 115–23 (describing motivations for transparency-enhancing reforms in the 1960s and 1970s).

<sup>281</sup> See *supra* notes 273–74 (collecting sources).

Those effects, when viewed in conjunction with other legal changes, have strengthened responsiveness to interest groups—at the expense of other modes of representation.

### C. Legislators and Party Leaders

Each party's leadership—in the House, Senate, and state legislatures—devotes considerable energy to ensuring that rank-and-file legislators vote in accordance with party priorities. Senior party leadership includes designated “whips” tasked with promoting party loyalty among caucus members.<sup>282</sup> Presidents and governors, too, work hard to ensure that their co-partisans in the legislative branch support their agendas.<sup>283</sup> Scholars differ on precisely how effective party pressure on legislators is in practice, but party leaders almost certainly have at least some amount of influence on legislative behavior.<sup>284</sup>

Rules that vest greater power in party leaders give those leaders greater abilities to pressure rank-and-file legislators to toe the party line. Political scientists describe the period following the Legislative Reorganization Act of 1946 as the “textbook Congress,”<sup>285</sup> a period in which committee chairs wielded significant power. Beginning in the 1970s, however, a number of reforms shifted power away from committee chairs. Some of

<sup>282</sup> See generally Evans, *supra* note 155 (examining the role of whips in Congress).

<sup>283</sup> See Jon R. Bond & Richard Fleisher, *The President in the Legislative Arena* (1990); Jeffrey E. Cohen, *The President's Legislative Policy Agenda, 1789–2002* (2012); Mark A. Peterson, *Legislating Together: The White House and Capitol Hill from Eisenhower to Reagan* (1990); Andrew Rudalevige, *Managing the President's Program: Presidential Leadership and Legislative Policy Formulation* (2002).

<sup>284</sup> See, e.g., Cox & McCubbins, *supra* note 63, at 217 (“[P]arties do significantly affect the voting behavior of their members.”); Steven Ansolabehere, James M. Snyder, Jr. & Charles Stewart III, *The Effects of Party and Preferences on Congressional Roll-Call Voting*, 26 *Legis. Stud. Q.* 533, 558 (2001) (“The American parties in Congress . . . have an overwhelming influence on the rules of debate and amendment . . . . To a lesser—but still significant—extent, the parties influence votes on amendments and final passage.”). But see, e.g., Mayhew, *supra* note 3, at 100 (“Party ‘pressure’ to vote one way or another is minimal. Party ‘whipping’ hardly deserves the name. Leaders in both houses have a habit of counseling members to ‘vote their constituencies.’”); David R. Mayhew, *Observations on Congress: The Electoral Connection a Quarter Century After Writing It*, 34 *Pol. Sci. & Pol.* 251, 252 (2001) (“I have not seen any evidence that today’s congressional party leaders ‘whip’ or ‘pressure’ their members more often or effectively than did their predecessors 30 years ago. Instead, today’s pattern of high roll-call loyalty seems to owe to a post-1960s increase in each party’s ‘natural’ ideological homogeneity . . . .”).

<sup>285</sup> Kenneth A. Shepsle, *The Changing Textbook Congress*, in *Can the Government Govern?* 238 (John E. Chubb & Paul E. Peterson eds., 1989).

these reforms shifted power to party leadership,<sup>286</sup> in what David Rohde describes as a significant increase in “the impact and influence of political parties on the operation of the House and the behavior of its members.”<sup>287</sup> The move to strengthen party leaders was effectuated by changes to both the House’s cameral rules and to the internal rules of the House Democratic caucus.

Among the most important reforms were changes increasing the House leadership’s role in making personnel decisions within the chamber.<sup>288</sup> Positions of power within the chamber, most notably committee chairmanships, had long been allocated based on seniority.<sup>289</sup> Liberal Democrats mounted a sustained attack on the seniority system in the early 1970s, in response to conservative committee chairs blocking liberal legislation. Reforms soon followed: power over committee assignments shifted away from the Ways and Means Committee and toward House leadership;<sup>290</sup> the Speaker was empowered to appoint the chair and Democratic members of the House Rules Committee;<sup>291</sup> and House

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<sup>286</sup> Id. at 254–56 (shifting power to Speaker and Democratic caucus). Other reforms shifted power “downward” to subcommittees and to rank-and-file legislators. Id. at 252–53 (shifting power to subcommittees); id. at 253–54 (shifting power to members).

<sup>287</sup> Rohde, *supra* note 276, at 2. “Our textbook picture must change,” Rohde concludes, “to include stronger and more influential party leaders.” Id. at 171. Rohde’s theory of conditional party government contends that party leaders are stronger when party caucuses are more ideologically homogeneous because members of a more ideologically homogeneous caucus are more willing to transfer power to party leaders. Id. at 31.

<sup>288</sup> Other reforms strengthened party control by other means, such as by consolidating control in party leaders over the path of proposed legislation through the House. See id. at 25. Still others focused on weakening committee chairs and shifting power to subcommittees or to the caucus as a whole. See id. at 20–23. For a detailed account of the congressional reforms of the 1970s, see Schickler, *supra* note 256, at 189–248.

<sup>289</sup> For accounts of the seniority system as it operated during the textbook Congress, see Barbara Hinckley, *The Seniority System in Congress* (1971); Nelson W. Polsby, Miriam Gallaher & Barry Spencer Rundquist, *The Growth of the Seniority System in the U.S. House of Representatives*, 63 *Am. Pol. Sci. Rev.* 787 (1969); George Goodwin, Jr., *The Seniority System in Congress*, 53 *Am. Pol. Sci. Rev.* 412 (1959).

<sup>290</sup> See Shepsle, *supra* note 285, at 254–55.

<sup>291</sup> Rohde, *supra* note 276, at 25. Party leadership also had a strong voice on a new House Democratic Steering and Policy Committee, half of the members of which were party leaders or their designees. See id. at 24. Rule changes also established minimum ratios of majority to minority members on committees and subcommittees, making it more difficult for committee chairs to ally with minority members in defeating proposals favored by the majority party. See id. at 25. The effects of the 1970s reforms reverberated for decades. See Jay Newton-Small, *Getting Her Way: Pelosi’s Powers of Persuasion*, *Time* (Mar. 20, 2010), <http://content.time.com/time/politics/article/0,8599,1973868,00.html> [<https://perma.cc/EFY4-Y7RR>] (quoting a House member’s comment that the speaker “controls the steering and policy committees . . . [e]veryone knows that what the speaker wants, the speaker gets”).

leadership was given a voice on the Committee on Committees.<sup>292</sup> Reforms like these made party loyalty “part of an exchange relationship: it is costly to [legislators] to supply loyalty (i.e., they run electoral risks by voting with their parties); thus, [legislators] expect and receive something in return (e.g., better committee assignments).”<sup>293</sup>

These reforms shaped legislators’ behavior. When party leaders have greater leverage over rank-and-file members, those members are more likely to vote the party line. In one notable instance, a House member publicly pledged to vote against a budget reconciliation bill that was a priority for Speaker Jim Wright (D-TX), initially voted against it, but later changed his mind, enabling the bill to pass by a single vote. The next year, Speaker Wright transferred the member to the powerful Appropriations Committee.<sup>294</sup> More recently, Speaker John Boehner (R-OH) “punished several Republicans who had refused to follow his lead on an important piece of legislation by depriving them of subcommittee chairs and threatening future reprisals.”<sup>295</sup> In reflecting on his time in office, President Obama lamented that Republican Senate leadership used its power over committee assignments to induce loyalty from caucus members who may have been inclined to cross the aisle.<sup>296</sup>

Party leaders need not use their power, or even threaten to use it, in order to secure party loyalty. One study found that “the removal of seniority from the list of universalistic rules of congressional procedure has led several key Democrats to toe the party line to a much greater degree than they would have if adherence to the seniority system had

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<sup>292</sup> See Shepsle, *supra* note 285, at 255.

<sup>293</sup> Cox & McCubbins, *supra* note 63, at 217; see also Gary W. Cox & Mathew D. McCubbins, *Legislative Leviathan: Party Government in the House 163–87* (1993) (analyzing committee assignments and concluding that “party loyalty seems to be a criterion in making assignment decisions to most House committees” because “those whose roll call votes demonstrate loyalty to the leadership are rewarded with committee transfers,” *id.* at 182); Nicole Asmussen & Adam Ramey, *When Loyalty Is Tested: Do Party Leaders Use Committee Assignments as Rewards?*, 45 *Congress & Presidency* 41, 41 (2018) (showing empirically that “majority party members who support their party on the subset of votes for which party leaders have taken positions in floor speeches are more likely to be rewarded with plum committee assignments”).

<sup>294</sup> Pearson, *supra* note 154, at 2.

<sup>295</sup> Ginsberg & Hill, *supra* note 86, at 38 (describing actions taken by Speaker John Boehner (R-OH) in summer 2015).

<sup>296</sup> See Barack Obama, *A Promised Land* 415–16 (2020) (noting that Republican Leader Mitch McConnell (R-KY) threatened to strip Senator Olympia Snowe (R-ME) of her seniority on the Senate’s Small Business Committee if she voted for the Affordable Care Act).

continued unabated.”<sup>297</sup> Though few committee chairs were removed from their positions as a result of changes in seniority rules, “the reason for this may be that most committee chairmen since 1975 have been quite careful to avoid giving the caucus any reason to vote them out of the chair.”<sup>298</sup> If party leadership lacked power over committee assignments, legislators would have more latitude to buck the party line.

Rule changes shifting power to party leaders were not motivated by a desire to change the character of legislative representation. To the contrary, reformers had a clear political motivation: liberal Democrats sought to disempower senior, conservative Democrats who were using their committee chairmanships to block liberal legislation.<sup>299</sup> But even though reformers sought to shift power between competing factions in the Democratic caucus at a specific moment in time, their changes to the rules affected the character of representation more generally and in the longer term.

#### IV. LESSONS AND IMPLICATIONS

Legal rules create a tangled web of incentives for legislators. Law induces legislators to be at least partially responsive to their constituents, to interest groups, and to party leaders—but it prevents complete responsiveness to any of these groups. The law of democracy and legislative organization together shape representation. This Part considers the lessons of this account for the state of representation in the contemporary United States, for political reformers, and for scholars.

##### *A. Taking Stock of Pluralism: Sources, Virtues, and Vices*

The law of legislative representation does not systematically endorse or promote any single mode of representation. Individual rules and doctrines sometimes do, as previous Parts have shown. But law does not create uniform incentives or embody a theory of representation in any straightforward way. Instead, different legal rules direct legislators’ attention to different groups and different modes of representation. All

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<sup>297</sup> Sara Brandes Crook & John R. Hibbing, *Congressional Reform and Party Discipline: The Effects of Changes in the Seniority System on Party Loyalty in the US House of Representatives*, 15 *Brit. J. Pol. Sci.* 225 (1985).

<sup>298</sup> *Id.* at 225.

<sup>299</sup> See Schickler, *supra* note 256, at 228 (“Much of the impetus for empowering Democratic leaders came from liberals who wanted to promote progressive legislation.”).

legislators need sufficient constituent support to be reelected, but law also promotes a degree of responsiveness to interest groups and to party leaders. The law makes it all but impossible for legislators to act as simple agents for any one principal. Instead, law encourages—and in practice demands—that legislators be responsive to different sorts of actors. The law, in other words, is pluralist about representation.

This pluralism about representation results directly from how the relevant law is made. The areas of law considered in this Article are the product of many different institutional actors operating across time. Their development has been driven by practical politics, rather than by principled reasoning about the proper role of the legislative representative. Cameral rules, for example, nearly always result from inter- or intra-party conflict, with legislators changing the rules to achieve their policy and political goals.<sup>300</sup> “Congressional institutions,” in Eric Schickler’s words, “typically develop through an accumulation of innovations that are inspired by competing motives, which engenders a tense layering of new arrangements on top of preexisting structures.”<sup>301</sup> Even as political contexts change with the passage of time, old rules remain in place and continue to shape representation. As a result, any latent theory of representation embodied in cameral rules is incidental, rather than by design. Consistent with this observation, it is conspicuous that the cameral rules of the House and Senate—unlike other collections of procedural rules—do not open by setting out their purposes.<sup>302</sup>

A similar dynamic holds for judicial decisions bearing on representation, such as decisions about campaign finance, party primaries, and legislative redistricting. Courts tend to view political actors primarily in their capacity as rights-holders, but possessing judicially enforceable rights is neither necessary nor sufficient for exercising political power. A judicial focus on rights fails to fully “address[]

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<sup>300</sup> See generally *id.* at 4 (describing how “legislative organization develops through the accumulation of innovations, each sought by a different coalition promoting a different interest”); see also, e.g., *supra* notes 288–99 and accompanying text (discussing how reforms in the House of Representatives in the 1970s arose from ideological conflict between factions of a divided Democratic caucus).

<sup>301</sup> Schickler, *supra* note 256, at 15.

<sup>302</sup> Compare House Rules, *supra* note 186 (not containing a statement of purpose), and Senate Rules, *supra* note 186 (same), with Fed. R. Civ. P. 1 (“[The rules] should be construed, administered, and employed . . . to secure the just, speedy, and inexpensive determination of every action and proceeding.”); and Fed. R. Crim. P. 2 (“[The rules] are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.”).

structural problems concerning the proper allocation of political representation.”<sup>303</sup> So the judge-made law that bears on representation, like cameral rules, has developed apart from a consistent, motivating normative theory of representation. As Michael Dorf has put it, “Legal institutions, doctrines, and texts that were originally thought to serve one purpose can come to serve quite different purposes.”<sup>304</sup>

What, then, should we make of this pluralism? At a high level of generality, it has underappreciated virtues. Pluralism is a reasonable approach—indeed, the only approach—for those who believe that legislators should be responsive to their constituents, to interest groups, and to their parties. A body of law that pulls legislators in competing directions enables responsiveness to competing interests that each *should* be given a voice in the legislative process. A system that balances representation of constituents, interest groups, and party leaders can serve goals that a system in which any one of those groups predominated could not. By fostering an electoral connection between legislators and their constituents, the law promotes responsiveness to geographically concentrated interests. By empowering interest groups regardless of location, the law provides avenues for a wider range of groups to influence policymaking, regardless of how they are geographically distributed. And by empowering party leaders, the law recognizes that many citizens cast votes based on party cues and acknowledges the central role of parties in structuring legislative politics.

The benefit of pluralism becomes clear when it is compared to systems in which legislators are tied to any single principal. If all legislators were strictly responsive to majorities of their constituents, geographically diffuse interests would receive little representation. And we know that these sorts of interests are important to political identities: an individual’s status as a unionized worker, small-business owner, or senior citizen is often core to how they relate to politics. Moreover, a strictly constituent-centered approach is a poor fit given that the most important legislation

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<sup>303</sup> Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 *Harv. L. Rev.* 29, 59 (2004).

<sup>304</sup> Michael C. Dorf, *Spandrel or Frankenstein’s Monster? The Vices and Virtues of Retrofitting in American Law*, 54 *Wm. & Mary L. Rev.* 339, 341 (2012). Cf. also S.J. Gould & R.C. Lewontin, *The Spandrels of San Marco and the Panglossian Paradigm: A Critique of the Adaptationist Programme*, 205 *Proc. Royal Soc’y London B* 581, 587, 593 (1979) (arguing that “[o]ne must not confuse the fact that a structure is used in some way . . . with the primary evolutionary reason for its existence” and that “[t]he immediate utility of an organic structure often says nothing at all about the reason for its being”).

that Congress passes is general in character, such as regulatory legislation, social welfare legislation, tax legislation, and legislation relating to foreign affairs. If legislators are encouraged to take an overly constituency-centered approach to legislation, bills that are national in scope may be jeopardized by parochial demands.<sup>305</sup> In short, a well-functioning pluralist system allows legislators to represent the many interests in a diverse society.

The status quo is much less rosy as a matter of practice, however. For pluralism to effectively lead to the representation of all interests, no type of interest can predominate over others. Contemporary politics demonstrates that this cannot be taken for granted. Law is nominally pluralist, in that it does not require responsiveness to one type of interest or another. But it can still stack the deck, encouraging legislators to be consistently more responsive to some sorts of groups than others.

Most notable, in this regard, is the power that corporate interests and the wealthy have in American politics, often at the expense of constituents and less well-resourced interest groups. A generation of empirical work has demonstrated that the preferences of corporate interests and the wealthy carry great weight in the legislative process.<sup>306</sup> One quantitative study found that “a typical low-income constituent had only half as much influence on his or her representatives’ behavior as a typical high-income constituent did.”<sup>307</sup> More qualitative work has documented in meticulous detail the tactics used by the American Legislative Exchange Council, a conservative group largely funded by corporate interests, to capture state-level legislative processes.<sup>308</sup> For those holding egalitarian conceptions of democracy, these findings raise concerns about interest group influence in practice, whatever its virtues may be in theory.

Law has enabled this state of affairs. We have seen how campaign finance law, lobbying law, and public corruption law all open the door to

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<sup>305</sup> See, e.g., Joran Fabian, *Obama Healthcare Plan Nixes Ben Nelson’s “Cornhusker Kickback” Deal*, *The Hill* (Feb. 22, 2010, 3:00 PM), <https://thehill.com/blogs/blog-briefing-room/news/82621-obama-healthcare-plan-nixes-ben-nelsons-cornhusker-kickback-deal> [<https://perma.cc/8NJ2-Z8TM>] (describing negotiations over state-specific Medicaid funding during attempts to secure the support of a senator from Nebraska for the Affordable Care Act); see also *supra* note 219 (describing the failure of national foster care reform on account of its impact on one North Carolina interest group).

<sup>306</sup> See *supra* note 25 (collecting sources on unequal representation).

<sup>307</sup> See Bartels, *supra* note 25, at 241–42.

<sup>308</sup> See generally Hertel-Fernandez, *supra* note 25.

non-constituents exercising influence over legislative representatives.<sup>309</sup> This would perhaps be justifiable if all interest groups held roughly equal influence, or if there was at least some degree of balance between interest groups of different sorts. But this is far from the reality. A critic of political scientist Robert Dahl's optimism about interest groups constituting a "heavenly chorus" of diverse voices famously quipped that "the heavenly chorus sings with a strong upper-class accent."<sup>310</sup> And, in moments of candor, legislators have admitted publicly to the role that moneyed interests play in their decision making. One former senator joked that his vote couldn't be bought, but it could be rented by the highest bidder.<sup>311</sup> When legal rules enable these sorts of influence, legislative outcomes are unlikely to reflect public preferences.

In sum, the cross-cutting incentives created by existing legal rules can create inequalities between citizens and lead to legislative outcomes that differ sharply from public preferences. But these facts on the ground need not lead to condemnation of a pluralist system as a theoretical matter. To the contrary, the many proposals seeking to reform U.S. elections or the operation of Congress are *all* consistent with a pluralist approach to representation. Contemporary politics does not, conspicuously, include proposals for binding legislative instructions, anti-defection laws, or other proposals that would shift the law of legislative representation away from its pluralist paradigm.

### *B. Lessons for Congressional Reformers*

Law has created a much-maligned status quo, but it also provides opportunities for reformers. Nearly any representation-related goal can be pursued through multiple legal and policy levers. Some avenues of reform may be politically or doctrinally impossible at any given point in time. But there is often more than one option for using law to change the character of legislative representation.

The running example of the power of well-resourced interest groups again illustrates the point. The most attention-grabbing reform proposals are often direct reforms to the law of democracy: proposed tightening of

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<sup>309</sup> See *supra* Section II.B, Subsections III.B.1–2.

<sup>310</sup> E.E. Schattschneider, *The Semi-Sovereign People: A Realist's View of Democracy in America* 35 (1960).

<sup>311</sup> See Hacker & Pierson, *supra* note 25, at 6 (quoting Senator John Breaux (D-LA)).

campaign finance laws. But this Article's analysis points toward at least three less familiar approaches to reform as well.

First, reforms could ratchet up the power of constituents or parties. Responsiveness is, to some extent, zero sum. Legislators have limited time, staff, and political capital, and the interests of various groups at times conflict. Reforms that increase the power of constituents or party leaders can mean less power for corporate interest groups. Drawing districts to be more competitive, for example, could make legislators more responsive to constituents.<sup>312</sup> More provocative is the possibility of increasing party power as a counterweight to interest group power. Suggestions to strengthen political parties might seem counterintuitive in a polarized age. But political scientists have asked how legislators behave when "party and purse pull in opposite directions,"<sup>313</sup> with a focus on the power of the affluent in contemporary politics. They have found that "party trumps the purse," in that legislators from "both parties are far more responsive to copartisan opinion than rich opinion."<sup>314</sup> Party power already offsets interest group power, and further empowering parties could further curb interest group influence.<sup>315</sup>

Second, reforms to legislative procedure are especially promising. Either chamber of Congress, for example, could more tightly regulate lobbying. Either could impose new transparency requirements in an effort to curb interest group power (such as requiring legislators to publicly release their schedules) while perhaps cutting back on those that have enhanced interest group power (such as open markups). Either could tinker with its cameral rules in an effort to shift how representation plays out on the ground. While these changes are unlikely to be as effective as more aggressive reforms to the law of democracy, they are considerably easier to achieve.

Third, Congress could take seriously the importance of increasing its own capacity. Scholars have noted the subtle impacts of declines in Congress's capacity and suggested reforms to reverse that trend.<sup>316</sup> And members of Congress have recognized how internal capacity shapes

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<sup>312</sup> See *supra* Subsection II.A.2.

<sup>313</sup> Lax, et al., *supra* note 25, at 918.

<sup>314</sup> *Id.* (reaching this conclusion based on analysis of public opinion and roll call votes in the Senate).

<sup>315</sup> In this vein, Richard Pildes has proposed reforms that would give the parties a greater role in campaign finance. See Pildes, *supra* note 158, at 836–45.

<sup>316</sup> See *Congress Overwhelmed: The Decline in Congressional Capacity and Prospects for Reform*, *supra* note 269.

interest group power. Senator Elizabeth Warren (D-MA), for example, has called for Congress to “invest in resources to allow members of Congress to make informed decisions without relying on self-interested outside sources.”<sup>317</sup> Such changes would not be a panacea, but they exemplify the sorts of indirect measures that could be impactful.

This Article is not the first to contend that there are multiple legal tools to achieve similar goals.<sup>318</sup> But that argument is particularly strong for those seeking to change the character of legislative representation. Democracy reform legislation is an uphill climb: it must be passed through a veto-laden legislative process, and even if enacted it could easily be undone by a Supreme Court that has invoked constitutional rights<sup>319</sup> and structure<sup>320</sup> to strike down past reform efforts. Reforms that would empower constituents might be more likely to survive judicial scrutiny. And changes to legislative procedure or efforts to enhance internal capacity and expertise can improve the quality of representation while avoiding political and legal obstacles that beset other types of reform.

### *C. Directions for Further Research*

Finally, this Article’s approach suggests directions for future work in both political theory and public law. I have attempted to map the relationships between these different domains, showing how various legal rules and institutional design choices implicitly embody positions about the character of representation, even if not by design. This analysis points toward several areas of inquiry for further study.

For political theorists who study representation, this Article’s focus on rules and institutions points toward the potential of looking closely at the

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<sup>317</sup> See, e.g., Elizabeth Warren, *Strengthening Congressional Independence from Corporate Lobbyists*, Medium (Sept. 27, 2019), <https://medium.com/@teamwarren/strengthening-congressional-independence-from-corporate-lobbyists-bb953bb466c> [<https://perma.cc/X6N U-RWR8>].

<sup>318</sup> See, e.g., Levinson, *supra* note 53, at 1288 (“One way of protecting a minority is to create and enforce rights against majoritarian exploitation. Another is to structure the political process so that minorities are empowered to protect themselves.”).

<sup>319</sup> See, e.g., *McCutcheon v. FEC*, 572 U.S. 185 (2014); *Ariz. Free Enter. Club v. Bennett*, 564 U.S. 721 (2011); *Citizens United v. FEC*, 558 U.S. 310 (2010); *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449 (2007).

<sup>320</sup> See, e.g., *Shelby Cnty. v. Holder*, 570 U.S. 529, 540–57 (2013) (striking down the Voting Rights Act’s coverage formula as contrary to a principle of equal sovereignty among the states).

normative implications of seemingly quotidian features of our institutions. Dennis Thompson has observed that “interpreting political principles requires attending to institutional context.”<sup>321</sup> Representation is one such political principle, and a promising one for this sort of institutionally grounded inquiry. Representation is often thought of as a normative principle, but it is entirely constructed by law—there is nothing natural about legislators, the elections that give them power, or the chambers in which they operate. This Article’s treatment of representation points toward the importance of normative theorists looking closely at the institutional structures in which normative principles play out on the ground.<sup>322</sup>

For legal scholars, one value of this Article’s analysis is that it provides an example of how to center Congress as an object of inquiry and a potential site of reform. Among legal scholars, too often “[i]t is considered pointless or incoherent to address recommendations to legislatures about ways to improve their procedures.”<sup>323</sup> But the public law toolkit, most notably close attention to issues of institutional design, is well suited for imagining and evaluating proposals for legislative reform. I have focused on providing a framework for analysis rather than on recommending specific reforms. And reform-oriented scholarship must consider a number of values, of which representation is only one. Congressional organization matters most obviously for when legislation will be enacted and what sorts of bills will pass. But it bears on other topics in public law as well; Josh Chafetz, for example, has traced the relationship between congressional organization and the separation of powers.<sup>324</sup> Given the many implications of legislative procedure for the constitutional system and the laws under which we live, legal scholars can and should participate in discourse about congressional reform.

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<sup>321</sup> Dennis F. Thompson, *Just Elections: Creating a Fair Electoral Process in the United States*, at viii (2002).

<sup>322</sup> See generally Jeremy Waldron, *Political Political Theory: Essays on Institutions* 6 (2016) (calling for political theorists to engage with “the way our political institutions house and frame our disagreements”).

<sup>323</sup> Edward L. Rubin, *Statutory Design as Policy Analysis*, 55 *Harv. J. on Legis.* 143, 144 (2018). When legal scholars do consider legislative procedure and operations, they most often do so in the context of debates over statutory interpretation. See, e.g., Robert A. Katzmann, *Judging Statutes* (2016); Victoria Nourse, *Misreading Law, Misreading Democracy* (2016); Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 84 *U. Chi. L. Rev.* 177 (2017).

<sup>324</sup> See generally Chafetz, *supra* note 186.

The area of study historically most attentive to legislative representation is the law of democracy. That literature explores both the normative and empirical implications of legal rules regulating voting, redistricting, political parties, and money in politics. This body of scholarship's illumination of how representation is shaped by law provides a model for a similar examination of other areas of public law. This Article has attempted to do just that for some key features of congressional organization and procedure. But Congress's rules are voluminous, and representation is one normative value of many. Other congressional rules, and their relationships to other values, would benefit from exploration similar to the sort provided here.

Public law scholarship on legislative representation can also both learn from and complement political science work on the topic. This Article's analysis has relied on quantitative political science scholarship that has carefully measured the effects of different institutional design choices on representation. This empirical literature represents an underutilized resource for public law scholars, who have much to gain from the vast knowledge that political scientists have developed about the consequences of institutional design choices. And public law is well-positioned to add value to this literature as well, especially in areas where small sample sizes or insufficient variation prevent the sorts of causal identification that are *de rigueur* in most political science scholarship.

Finally, comparative studies could provide further insight into these questions. Examining legislative procedure in both the states and in other nations can shed light on the effects of congressional rules on representation and can suggest possible procedural reforms. Some comparative work on legislative procedure exists in the political science literature,<sup>325</sup> but the topic is "typically neglected" by legal scholars.<sup>326</sup> This is striking given the study of comparative procedure of other types, including comparative civil procedure<sup>327</sup> and comparative administrative

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<sup>325</sup> See, e.g., *Legislatures: Comparative Perspectives on Representative Assemblies* (Gerhard Loewenberg, Peverill Squire & D. Roderick Kiewiet eds., 2002); David M. Olson, *Democratic Legislative Institutions: A Comparative View* (1994).

<sup>326</sup> Vermeule, *supra* note 183, at 364.

<sup>327</sup> See generally *The Dynamism of Civil Procedure: Global Trends and Developments* (Colin B. Picker & Guy I. Seidman eds., 2015) (collecting essays on comparative civil procedure).

procedure.<sup>328</sup> My focus here has been predominately on Congress, with occasional discussion of state legislative procedure as well. But a more systematic comparative study would be a fruitful extension.

#### CONCLUSION

For all the scholarly and public discourse about America's broken Congress, we hear far less about how Congress and its members should go about their business. Politics is inherently messy, and no democracy has ever settled the question of the ideal approach to legislative representation. Any democratic legislature, no matter how it is structured, inevitably confronts representatives with hard normative choices.

This Article has argued that there are payoffs to viewing legislative representation as a creature of law, not just as a venue for power politics, on the one hand, or a topic for normative theorizing, on the other. The law that shapes legislative representation is dynamic, having changed significantly in recent decades, and with more changes likely in the decades ahead. This matters because the dilemmas that legislators face are more than merely individual-level moral dilemmas. They are, instead, the products of institutional design choices. Just as tort, regulatory, and criminal law collectively shape how private actors behave, so too several areas of law collectively shape how legislators behave. Understanding why legislators act as they do, and what reforms might prompt them to act differently, requires that we examine how law shapes legislative representation.

The likely futility of searching for a grand unified theory of representation should not prevent us from closely examining the mechanics of the law of representation. Legislators must frequently choose between different modes of representation, often through choosing between responsiveness to different actors in the democratic process. Those choices inevitably play out against a legal backdrop. Law can pull legislators into closer dependence on their constituents, interest groups, or their parties—or it can provide them with insulation from any of those groups. Understanding these relationships is key to understanding how representation works in practice. And it provides

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<sup>328</sup> See generally *Comparative Administrative Law* (Susan Rose-Ackerman & Peter L. Lindseth eds., 2011) (collecting essays on comparative administrative law, including administrative procedure).

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reformers who seek to make representation work differently with many tools for achieving that goal.