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## Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality

**ABSTRACT.** This Article proposes an innovative approach to remedying the crisis of political inequality: using law to facilitate organizing by the poor and working class, not only as workers, but also as tenants, debtors, welfare beneficiaries, and others. The piece draws on the social-movements literature, and the successes and failures of labor law, to show how law can supplement the deficient regimes of campaign finance and lobbying reform and enable lower-income groups to build organizations capable of countervailing the political power of the wealthy. As such, the Article offers a new direction forward for the public-law literature on political power and political inequality. It also offers critical lessons for government officials, organizers, and advocates seeking to respond to the inequalities made painfully evident by the COVID-19 pandemic.

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## INTRODUCTION

Among the painful truths made evident by COVID-19 are the deep inequality of American society and the profound inadequacy of our social-welfare infrastructure. The nation's lack of comprehensive health care,<sup>1</sup> its underfunded and inefficient system of unemployment insurance,<sup>2</sup> and weak workplace safety and health guarantees,<sup>3</sup> along with nearly nonexistent paid sick leave,<sup>4</sup> debtor-forgiveness rules,<sup>5</sup> and tenant protections<sup>6</sup> leave poor and working-class communities—particularly communities of color—dangerously exposed to the ravages of this pandemic, both physical and economic.<sup>7</sup> America's weak social safety net is, in turn, a product of a profound failure that has plagued American democracy for decades now: the wealthy exercising vastly disproportionate power over politics and government.<sup>8</sup>

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1. See Aaron van Dorn, Rebecca E. Cooney & Miriam L. Sabin, *COVID-19 Exacerbating Inequalities in the US*, 395 LANCET 1243, 1243-44 (2020).
  2. See Kathryn A. Edwards, *Millions Need Unemployment Benefits. Unfortunately, the Delivery System Is Broken*, RAND BLOG (Apr. 6, 2020), <https://www.rand.org/blog/2020/04/millions-need-unemployment-benefits-unfortunately-the.html> [https://perma.cc/7566-3WHA].
  3. See Emily Schwing, *How OSHA Has Failed to Protect America's Workers from COVID-19*, REVEAL (Apr. 4, 2020), <https://www.revealnews.org/article/how-osha-has-failed-to-protect-americas-workers-from-covid-19> [https://perma.cc/C3P5-454A].
  4. See *179 Countries Have Paid Sick Leave. Not the US*, WORLD (Mar. 13, 2020, 3:30 PM EDT), <https://www.pri.org/stories/2020-03-13/179-countries-have-paid-sick-leave-not-us> [https://perma.cc/FP5J-7C4K].
  5. See Tomasz Piskorski & Amit Seru, *If You Want a Quick Recovery, Forgive Debts*, BARRON'S (Apr. 15, 2020, 1:14 PM EDT), <https://www.barrons.com/articles/if-you-want-a-quick-recovery-forgive-debts-51586969309> [https://perma.cc/T99X-99T6].
  6. See Dan Keating & Lauren Tierney, *Which States Are Doing a Better Job Protecting Renters from Being Evicted During the Coronavirus Pandemic*, WASH. POST (Apr. 29, 2020), <https://www.washingtonpost.com/nation/2020/04/29/which-states-are-doing-better-job-protecting-renters-being-evicted-during-coronavirus-pandemic> [https://perma.cc/BJ7H-SSCM]; *COVID-19 Housing Policy Scorecard*, EVICTION LAB, <https://evictionlab.org/covid-policy-scorecard> [https://perma.cc/8WHW-4AA8].
  7. See Matt Apuzzo & Monika Pronczuk, *COVID-19's Economic Pain Is Universal. But Relief? Depends on Where You Live*, N.Y. TIMES (Apr. 5, 2020), <https://www.nytimes.com/2020/03/23/world/europe/coronavirus-economic-relief-wages.html> [https://perma.cc/8VYU-LC87]; Chris McGreal, *The Inequality Virus: How the Pandemic Hit America's Poorest*, GUARDIAN (Apr. 9, 2020, 2:09 PM EDT), <https://www.theguardian.com/world/2020/apr/09/america-inequality-laid-bare-coronavirus> [https://perma.cc/35Q2-RXPC].
  8. Even in the midst of the pandemic, as unemployment soared and poor and working-class Americans suffered enormous financial pain, the power of the wealthy was manifest in the relief bills that emerged from Washington. For example, the Coronavirus Aid, Relief, and

Indeed, public faith in American democracy is at near-record lows, and increasing numbers of Americans report that they no longer feel confident in the health of their democratic institutions. When asked why, many say that money has too much of an influence on politics and that politicians are unresponsive to the concerns of regular Americans.<sup>9</sup> Research supports these fears, showing both that wealthy individuals are spending record sums on electoral politics<sup>10</sup> and that elected officials are at best only weakly accountable to nonwealthy constituents.<sup>11</sup>

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Economic Security (CARES) Act suspended the limit on losses that can be used to offset, for tax purposes, nonbusiness income. This provision helps *only* individuals with more than \$250,000 in nonbusiness income, and the congressional Joint Committee on Taxation estimates that 82% of the benefits of this part of the Act will go to individuals earning more than \$1 million a year. Moreover, “[a]ccording to Congress’s official revenue estimators, the benefits of this CARES Act provision this year will go to 43,000 millionaires who receive a total of \$70.3 billion from this break alone.” Steve Wamhoff, *The CARES Act Provision for High-Income Business Owners Looks Worse and Worse*, JUST TAXES BLOG (Apr. 24, 2020), <https://itep.org/the-cares-act-provision-for-high-income-business-owners-looks-worse-and-worse> [<https://perma.cc/M9SH-CQCE>].

9. See *Americans’ Views on Money in Politics*, N.Y. TIMES (June 2, 2015), <http://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html> [<https://perma.cc/E7NK-ZMVM>]; see also Nathaniel Persily & Jon Cohen, *Americans Are Losing Faith in Democracy—and in Each Other*, WASH. POST (Oct. 14, 2016), [https://www.washingtonpost.com/opinions/americans-are-losing-faith-in-democracy--and-in-each-other/2016/10/14/b35234ea-90c6-11e6-9c52-0b10449e33c4\\_story.html](https://www.washingtonpost.com/opinions/americans-are-losing-faith-in-democracy--and-in-each-other/2016/10/14/b35234ea-90c6-11e6-9c52-0b10449e33c4_story.html) [<https://perma.cc/559P-W7LA>]; Greg Sargent, *Why Did Trump Win? New Research by Democrats Offers a Worrisome Answer*, WASH. POST (May 1, 2017, 8:44 AM EDT), <https://www.washingtonpost.com/blogs/plum-line/wp/2017/05/01/why-did-trump-win-new-research-by-democrats-offers-a-worrisome-answer> [<https://perma.cc/7LNX-WXF6>]; Richard Wike, Laura Silver & Alexandra Castillo, *Many Across the Globe Are Dissatisfied with How Democracy Is Working*, PEW RES. CTR. (Apr. 29, 2019), <https://www.pewresearch.org/global/2019/04/29/many-across-the-globe-are-dissatisfied-with-how-democracy-is-working> [<https://perma.cc/5ZN9-5M6F>]. For a more in-depth account, see ARLIE RUSSELL HOCHSCHILD, *STRANGERS IN THEIR OWN LAND: ANGER AND MOURNING ON THE AMERICAN RIGHT* (2016).
10. See Matea Gold & Anu Narayanswamy, *How 10 Mega-Donors Already Helped Pour a Record \$1.1 Billion into Super PACs*, WASH. POST (Oct. 5, 2016), [https://www.washingtonpost.com/politics/how-10-mega-donors-already-helped-pour-a-record-11-billion-into-super-pacs/2016/10/05/d2d51d44-8a60-11e6-875e-2c1bfe943b66\\_story.html](https://www.washingtonpost.com/politics/how-10-mega-donors-already-helped-pour-a-record-11-billion-into-super-pacs/2016/10/05/d2d51d44-8a60-11e6-875e-2c1bfe943b66_story.html) [<https://perma.cc/S78T-KVS6>] (describing record contributions from “rich donors on both sides of the aisle”); *Donor Demographics*, OPENSECRETS, <https://www.opensecrets.org/elections-overview/donor-demographics?cycle=2020&display=A> [<https://perma.cc/6NEB-8HZK>] (showing group of donors comprising 1.11% of U.S. population gave 75.43% of all political contributions in the 2020 cycle); see also *Lobbying Data Summary*, OPENSECRETS, <https://www.opensecrets.org/lobby> [<https://perma.cc/7ZKA-RGQ8>] (showing spending on lobbying was highest ever in 2019).
11. See LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 2* (1st ed. 2008); MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 12* (2012); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 565 (2014).

As political scientist Martin Gilens has observed, “[W]hen preferences between the well-off and the poor diverge, government policy bears absolutely no relationship to the degree of support or opposition among the poor.”<sup>12</sup>

Of course, democracy does not require that policymaking always follow majority will or the median voter’s preferences. But democracy, as well as the faith citizens have in their government, falters when lawmakers persistently disregard the priorities of nonwealthy citizens.

Much of the legal scholarship (and public commentary) concerned with this democracy deficit focuses on the increased flow of money into electoral politics and advocates for stemming that flow.<sup>13</sup> Scholars writing in this vein criticize the Supreme Court’s jurisprudence, exemplified by *Citizens United v. FEC*, that has enabled unfettered campaign spending.<sup>14</sup> They offer a range of reforms designed to limit the flow of money into elections, many of which would require a change in the composition of the Supreme Court or the ratification of a constitutional amendment.<sup>15</sup> A related group of scholars advocates for shielding the legislative and administrative process from money’s influence through, for example, lobbying restrictions and disclosure requirements.<sup>16</sup>

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12. GILENS, *supra* note 11, at 81; *see also infra* Section I.B (discussing empirical findings).
  13. *See, e.g.*, RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN POLITICS 6 (2016); LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 7 (1st ed. 2011).
  14. 558 U.S. 310 (2010); *see, e.g.*, HASEN, *supra* note 13, at 247-48; LESSIG, *supra* note 13, at 238-39; Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 2 (2012).
  15. *See* HASEN, *supra* note 13, at 247-50; LESSIG, *supra* note 13, at 271-72; Michael S. Kang, *The Brave New World of Party Campaign Finance Law*, 101 CORNELL L. REV. 531, 576-77 (2016); Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425, 1429 (2015). Other election-law scholars are less concerned with money’s influence and more concerned with mounting partisanship and political fragmentation. *See, e.g.*, Samuel Issacharoff, *Outsourcing Politics: The Hostile Takeover of Our Hollowed-Out Political Parties*, 54 HOUS. L. REV. 845, 845-46 (2017) (bemoaning the weakened political party); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2316-30 (2006) (describing the problem of partisanship); Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 809 (2014) (arguing for strengthening party organization and leadership to reduce the influence of other partisan actors); *see also infra* notes 135-136 (describing proposals to reform the outsized effect of money in politics).
  16. *See infra* notes 134-136 and accompanying text. Lobbying restrictions, too, would be subject to constitutional challenge. *See, e.g.*, *United States v. Harriss*, 347 U.S. 612, 625 (1954) (stating that “the freedoms guaranteed by the First Amendment—freedom to speak, publish, and petition the Government” are involved in the assessment of lobbying regulation); *Autor v. Pritsker*, 740 F.3d 176, 182-84 (D.C. Cir. 2014) (emphasizing that registered lobbyists are protected by the First Amendment, and remanding for the district court to consider whether the policy barring government service by registered lobbyists was nonetheless justified).

A second robust body of scholarship focuses not on insulating the political process from money but on trying to ensure equal rights of individuals to participate in the governance process through elections. These scholars criticize barriers to equal voting rights, including contemporary uses of gerrymandering and legislation that impose hurdles on individual voters' ability to exercise the franchise or minimize the effective voting power of particular constituents.<sup>17</sup> Scholars urge both doctrinal and legislative reform that would ensure more equal rights of participation.

In the last few years, a third approach has begun to emerge in the legal scholarship. This approach begins by recognizing the difficulty—both practical and constitutional—of keeping money out of politics. It also recognizes that while equal voting and participation rights are critical to the goal of combatting political inequality, they are not enough to ensure political equality in a system where wealth functions so prominently as an independent source of political influence. Thus, this third approach moves beyond campaign finance and individual participation rights and focuses instead on what we will call countervailing power. In particular, this approach is concerned with the ability of mass-membership organizations to equalize the political voice of citizens who lack the political influence that comes from wealth.<sup>18</sup>

The beneficial effects of countervailing, mass-membership organizations are well known to theorists and researchers of democracy.<sup>19</sup> Put simply, such groups increase political equality by building and consolidating political power for the

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17. See, e.g., Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1418-26 (1991) (using the Voting Rights Act to conceptualize the nature of minority-voting exclusion); Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CALIF. L. REV. 1201, 1216-20, 1227-32 (1996) (arguing for race-conscious districting); Nicholas Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 304-23 (2014) (arguing that the key issue for districting should be whether district lines properly align the jurisdiction's median voter with the legislature's median member).
18. See, e.g., K. SABEEL RAHMAN & HOLLIE RUSSON GILMAN, CIVIC POWER: REBUILDING AMERICAN DEMOCRACY IN AN ERA OF CRISIS 142-68 (2019); Kate Andrias, *Hollowed-Out Democracy*, 89 N.Y.U. L. REV. ONLINE 48 (2014) [hereinafter Andrias, *Hollowed-Out Democracy*]; Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419, 493-503 (2015) [hereinafter Andrias, *Separations of Wealth*]; Tabatha Abu El-Haj, *Making and Unmaking of Citizens: Law and the Shaping of Civic Capacity*, 53 U. MICH. J.L. REFORM 63, 98-136 (2019); Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148, 168-76 (2013). Some scholars offer more radical approaches to furthering countervailing power in governance, for example reserving a significant fraction of seats in the legislature for representatives from disadvantaged socioeconomic groups. See JULIA CAGÉ, THE PRICE OF DEMOCRACY: HOW MONEY SHAPES POLITICS AND WHAT TO DO ABOUT IT 253-323 (2020); cf. AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION 1-24 (1977) (arguing that a system of consociational democracy can help produce stability in plural societies).
19. See *infra* Part I.

nonwealthy, thus serving as counterweights to the political influence of the rich. Mass-membership organizations can serve in this capacity because, at bottom, they aggregate the political resources and political power of people who, acting as individuals, are disempowered relative to wealthy individuals and institutions.<sup>20</sup> More particularly, mass-membership organizations enable pooling of politically relevant resources, including money, among individuals with few such resources; they provide information to decisionmakers about ordinary citizens' views; they navigate opaque and fragmented government structures, thereby enabling citizens to monitor government behavior; and they allow citizens to hold decisionmakers accountable. And, in fact, when citizens are organized into mass-membership associations that are active in the political sphere, researchers find an exception to the general rule that policymakers are disproportionately responsive to the preferences and concerns of the wealthy.<sup>21</sup>

Over recent decades, however, there has been a decline in broad-based, mass-membership organizations of low- and middle-income Americans.<sup>22</sup> This decline in countervailing organizations has exacerbated the political distortions caused by the increase in political spending by the wealthy. But the *capacity* for countervailing organizations to address the distorting effects of wealth raises a critical question for legal scholars: How can law facilitate the construction of countervailing organizations among the nonwealthy? Put differently, how can law facilitate political organizing among Americans whose voices are drowned out by the distorting effects of wealth? That is the question we address in this Article.

Recently, legal scholars have begun to address related topics. For example, K. Sabeel Rahman and Miriam Seifter have written about ways that participation in administrative processes can improve the organizational strength of citizen groups. Thus, Rahman argues for designing administrative processes in ways that enhance the countervailing power of ordinary citizens,<sup>23</sup> while Seifter urges administrative-law scholars to pay attention to the characteristics of interest groups participating in the administrative process and to consider “looking

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20. See, e.g., Joshua Cohen & Joel Rogers, *Secondary Associations and Democratic Governance*, 20 POL. & SOC'Y 393, 424 (1992) (noting that such organizations help remedy political inequality “by permitting individuals with low per capita resources to pool those resources through organization”).

21. GILENS, *supra* note 11, at 121, 157-58.

22. See *infra* Section I.A.

23. K. SABEL RAHMAN, DEMOCRACY AGAINST DOMINATION 97-180 (2016); K. Sabeel Rahman, *From Civic Tech to Civic Capacity: The Case of Citizen Audits*, 50 PS: POL. SCI. & POL. 751, 751 (2017); K. Sabeel Rahman, *Policymaking as Power-Building*, 27 S. CAL. INTERDISC. L.J. 315, 333-40 (2018) [hereinafter Rahman, *Power-Building*]; see also *infra* note 137 (discussing earlier work in administrative law on citizen engagement).

within interest groups,” referencing the manner by which interest groups determine the views of their constituents, “to illuminate the quality and nature of participation in administrative governance.”<sup>24</sup> Tabatha Abu El-Haj has urged greater use of universal benefits and targeted philanthropy, to encourage the growth of mass-membership organizations, since both “create reasons to organize on the part of beneficiaries.”<sup>25</sup> Both of us have written about the countervailing role that labor organizations can play in politics.<sup>26</sup> And Daryl Levinson and one of us have written about the ways in which ordinary public policy often has the effect – and at times the intent – of mobilizing political organization around the policy.<sup>27</sup>

Meanwhile, another group of legal scholars has highlighted the importance of social movements and their organizations in legal change, focusing on how movements shape decisionmaking by courts, legislatures, and administrative agencies.<sup>28</sup> In particular, a rich literature has developed on the relationship between popular mobilization and evolving constitutional principles,<sup>29</sup> and on

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24. Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1304 (2016); see also Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 146 (2018) (“The weakness of civil society oversight in the states undermines the notion that state governments are closer to the people; in turn, it highlights their vulnerability to regulatory failures and factional influence.”).
  25. Abu El-Haj, *supra* note 18, at 71; see also Tabatha Abu El-Haj, *Beyond Campaign Finance Reform*, 57 B.C. L. REV. 1127, 1129-30, 1132-33 (2016) (“[T]hose concerned about the outsized political influence of moneyed elites . . . should shift [the focus] to ways the law might encourage civic reorganization.”).
  26. See Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 84-88 (2016); Sachs, *supra* note 18, at 168-82.
  27. Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 430-48 (2015).
  28. See, e.g., JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 2-3 (1978); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2756-57 (2014); Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 2 (2001).
  29. See, e.g., Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 503-11 (2007); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 946-50 (2006); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1501-11 (2005); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 419-20 (2001) [hereinafter Eskridge, *Channeling*]; William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2194-2353 (2002); Lani Guinier, *The Supreme Court, 2007 Term – Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 47-59 (2008); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De*



how “cause lawyers” can best serve social movements.<sup>30</sup> More recently, there has been a resurgence of scholarship that “cogenerates legal meaning alongside left social movements, their organizing, and their visions.”<sup>31</sup> This work builds on an older tradition of critical legal studies and critical race theory that interrogates the limits of traditional legal rights in bringing about progressive social change given the political, economic, and social conditions that systematically disadvantage poor people and people of color.<sup>32</sup>

To date, however, no one has tackled directly the question that we pose here.<sup>33</sup> Rather than asking how the enactment of substantive legislation or administrative-participation mechanisms might boost organizing, how social

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*Facto ERA*, 94 CALIF. L. REV. 1323, 1364 (2006); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 307-28 (2001). For a helpful synthesis of the literature, see Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 878 nn.4-6 (2013).

30. See, e.g., CAUSE LAWYERS AND SOCIAL MOVEMENTS 2-3 (Austin Sarat & Stuart A. Scheingold eds., 2006); JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 4-9, 74-76, 148-236 (2005); Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 447 (2001).
31. See Amna Akbar, Sameer Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. (forthcoming 2021) (manuscript at 3) (on file with authors); see also *infra* note 44 (citing legal scholarship that engages with contemporary organizing efforts among workers, tenants, debtors, and others).
32. See, e.g., STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 5-6, 14-21, 218-19 (2d ed. 2004) (arguing that the “myth of rights,” including the related focus on courts, legitimates existing social arrangements and is unlikely to produce fundamental change); Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 512-13, 516 (1976) (critiquing the National Association for the Advancement of Colored People (NAACP) Legal Defense and Education Fund’s school desegregation-litigation strategy and its focus on “symbolic manifestations of new rights”); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2178 (2013) (arguing that *Gideon* demonstrates that rights are indeterminate and regressive, failing to improve the situation of most poor people and in some ways worsening their plight); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1363-64 (1984) (describing rights as unstable, indeterminate, and overly abstract); cf. Kimberle W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1334, 1356 (1988) (finding the critique of rights compelling but “incomplete” because it fails “to appreciate fully the transformative significance of the civil rights movement in mobilizing Black Americans and generating new demands”).
33. In prior work we have each made the case that legal scholars and reformers should pay more attention to “facilitating the participation of countervailing organizations in government,” Andrias, *Separations of Wealth*, *supra* note 18, at 495, and have argued that “reforms designed to facilitate political organizing are more likely to avoid the problems of circumvention that have undermined traditional modes of regulation,” Sachs, *supra* note 18, at 157; see also Andrias, *Hollowed-Out Democracy*, *supra* note 18. But the extant analysis – including our own – has been insufficiently informed by careful consideration of where and how law can successfully facilitate and empower mass-membership organizations of nonelites.

movements can or hope to reshape law, or how a focus on traditional legal rights disables fundamental social change, we ask how law could be used explicitly and directly to enable low- and middle-income Americans to build their own social-movement organizations for political power.

The question is particularly urgent today as the COVID-19 pandemic has exacerbated society's existing inequalities. Working-class communities, especially low- and middle-income people of color, have experienced hardships as a result of the disease to a far greater extent than the wealthy—from massive unemployment to dangerous working conditions, from food insecurity to rising debt and risk of eviction.<sup>34</sup> The suffering wrought by the pandemic, as well as by the financial crisis of 2008, has led to an upsurge in protests by low- and middle-income Americans, particularly among workers, tenants, and debtors.<sup>35</sup> At the same time, endemic violence against Black communities, including the recent killing of George Floyd, has led to widespread organizing around issues of racial justice.<sup>36</sup> These movements demand that government respond to the

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34. See Max Fisher & Emma Bubola, *As Coronavirus Deepens Inequality, Inequality Worsens Its Spread*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/15/world/europe/coronavirus-inequality.html> [<https://perma.cc/9R3V-AMFB>]; Adriana Gallardo & Ariel Goodman, *Los New Yorkers: Essential and Underprotected in the Pandemic's Epicenter*, PROPUBLICA (May 2, 2020, 5:00 AM EDT), <https://www.propublica.org/article/los-new-yorkers-essential-and-underprotected-in-the-pandemics-epicenter> [<https://perma.cc/BBJ4-WBQU>]; Dylan Scott, *Covid-19's Devastating Toll on Black and Latino Americans, in One Chart*, VOX (Apr. 17, 2020, 4:10 PM EDT), <https://www.vox.com/2020/4/17/21225610/us-coronavirus-death-rates-blacks-latinos-whites> [<https://perma.cc/53C4-Q7PW>].
35. See, e.g., Harold Meyerson, *The Renters' Revolution*, AM. PROSPECT (Apr. 30, 2020), <https://prospect.org/blogs/tap/the-renters-revolution> [<https://perma.cc/5789-MNVE>]; Noam Scheiber & Kate Conger, *Strikes at Instacart and Amazon over Coronavirus Health Concerns*, N.Y. TIMES (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/business/economy/coronavirus-instacart-amazon.html> [<https://perma.cc/QPC3-2HHE>]. On the upsurge in organizing and strikes prior to the pandemic, see, for example, Alexia Fernández Campbell, *A Record Number of US Workers Went on Strike in 2018*, VOX (Feb. 13, 2019, 3:00 PM EST), <https://www.vox.com/policy-and-politics/2019/2/13/18223211/worker-teacher-strikes-2018-record> [<https://perma.cc/X9RU-HV6H>]; Aaron Ross Coleman, *How a Group of Student Debtors Took on Their Banks—and Won*, GQ (Oct. 8, 2019), <https://www.gq.com/story/debt-collective-union-organizing> [<https://perma.cc/HUM5-MUJY>]; Noam Scheiber, *In a Strong Economy, Why Are So Many Workers on Strike?*, N.Y. TIMES (Oct. 19, 2019), <https://www.nytimes.com/2019/10/19/business/economy/workers-strike-economy.html> [<https://perma.cc/3WEQ-XLKJ>]; and Jimmy Tobias, *Meet the Rising New Housing Movement that Wants to Create Homes for All*, NATION (May 24, 2018), <https://www.thenation.com/article/archive/the-way-home> [<https://perma.cc/E5C5-YXGN>].
36. Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/B9QU-B3D6>]; see Amna Akbar, *An Abolitionist Horizon for Police Reform*, 108 CALIF. L. REV. 1781, 1787

concerns of ordinary Americans and attempt to elicit better treatment from powerful actors. Yet, despite their promise, such movements face significant obstacles in translating their members' anger into robust and lasting political power.<sup>37</sup> A pressing task, therefore, is to ask how law can facilitate and protect these new and revived protest movements, helping to create durable organizations that can exercise sustained power in the political economy.

We start from the premise that the robustness of countervailing, mass-membership organizations should be understood as a problem both of and for law. The shape of civil society and organizational life is already a product of legal structures and rules.<sup>38</sup> And although law has frequently been a tool of oppression, rather than of empowerment, of poor and working-class people and movements,<sup>39</sup> alternative legal regimes that encourage the growth of and the exercise of power by social-movement organizations of the poor and working class are possible. Indeed, for those who are committed to decreasing political inequality, alternative legal structures that encourage the growth of countervailing organizations are imperative.

In analyzing how legal and institutional reforms could facilitate a different picture of organizational and political life in the United States, we draw from the successes and failures of labor law – the area of U.S. law that most explicitly and directly creates a right to collective organization for working people – while also moving beyond that context to literature considering “how, in what forms, and under what conditions social movements become a force for social and political change.”<sup>40</sup> We do not attempt to adjudicate priority among factors that

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(2020) (arguing that the racial-justice abolitionist movement “aims to contest and then to shrink the role of police, ultimately seeking to transform our political, economic, and social order to achieve broader social provision for human needs”).

37. See Steven Greenhouse, *Turning Worker Anger into Worker Power*, AM. PROSPECT (Apr. 29, 2020), <https://prospect.org/labor/turning-worker-anger-into-worker-power> [https://perma.cc/9G87-HTQJ] (discussing the recent upsurge in worker organizing and challenges in creating long-term power); Meyerson, *supra* note 35 (“Over the course of the Great Depression, the tenant organizations and leagues of the unemployed won occasional local victories over specific demands, but failed to become ongoing institutions.”).
38. See *infra* notes 147-165 and accompanying text.
39. See *supra* note 32 and *infra* notes 90-91, 162-165.
40. Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s*, 111 AM. J. SOC. 1718, 1753 (2006); see also Doug McAdam, *Conceptual Origins, Current Problems, Future Directions*, in COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS 24-25 (Doug McAdam, John D. McCarthy & Mayer N. Zald eds., 1996) (considering definitions and interpretations of the term “political opportunity”); sources cited *supra* notes 38-39. This Article thus seeks to incorporate insights from social science into legal scholarship on social movements. See Eskridge, *Channeling*, *supra* note 29 (identifying three social-movement-theory frameworks); NeJaime, *supra* note 29, at 879

contribute to successful organizing, nor do we attempt to build an exhaustive list of such factors. Instead, we consolidate factors that have two attributes: (1) they are likely to contribute to the successful building of membership organizations among poor and working-class people, and (2) their existence or development might be enabled by law.

We recognize that some factors, undoubtedly critical to successful organizing, are beyond the reach of our proposal. For example, sociologists and historians have demonstrated that several structural opportunities helped facilitate the growth of the Civil Rights movement, including the collapse of cotton; the increase in Black migration and electoral strength; and the advent of World War II and the Cold War.<sup>41</sup> These kinds of objective structural conditions, exogenous to movements themselves, are frequently important to movement formation, but they cannot be directly affected by the kinds of legal reforms we suggest. Likewise, sociologists have shown that strategic leadership within organizations is critical to movement success,<sup>42</sup> but internal leadership dynamics are not easily affected through legal regulation.<sup>43</sup>

Three additional principles guide our analysis. First, because small-scale, concrete victories are essential to successful organizing, and because organizing tends to be most successful among people with shared identities and existing relationships, we focus on reforms that enable organizing within particular structures of authority and resource relations. By way of examples, we consider organizing among workers, tenants, debtors, and recipients of public benefits. We pick these contexts in part because they are ones rife with exploitation and

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(arguing that social-movement scholarship could enable legal scholars to better assess the possibilities and limitations of law and courts for contributing to social change); Rubin, *supra* note 28 (describing a divergence between legal scholarship and social-movement scholarship); cf. Lauren B. Edelman, Gwendolyn Leachman & Doug McAdam, *On Law, Organizations, and Social Movements*, 6 ANN. REV. L. & SOC. SCI. 653, 654-55 (2010) (reviewing literature and arguing for a synthetic approach to the study of law, social movements, and organization); Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 ANN. REV. L. & SOC. SCI. 17, 19-20 (2006) (arguing that sociolegal theory and social-movement theory should take greater account of one another in part to understand better the efficacy and legacy of legal mobilization).

41. See MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 11-17 (rev. ed. 2011); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 4 (2004); DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930-1970*, at 73-83 (2d ed. 1999); FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* 181-84 (1979).
42. See Marshall Ganz, *Resources and Resourcefulness: Strategic Capacity in the Unionization of California Agriculture, 1959-1966*, 105 AM. J. SOC. 1003, 1019 (2000).
43. That said, some of our proposals may have an indirect effect on factors like strategic-leadership development and political opportunities.

power imbalances and populated by the relevant income groups, and in part because they are home to important organizing efforts, both historical and contemporary.<sup>44</sup> We do not suggest that these are the only relevant contexts in which our suggestions might be explored, nor do we in any sense imply that broader organizational development encompassing poor and working-class people as a whole is impossible or ineffective. In fact, the context-specific organizing regimes we envision might well facilitate broader community-based and political organization. However, we leave for another day exploration of how the law might directly enable broad-based political organization — say, a political organization of all poor people or a political-party system that incentivizes grassroots participation among nonwealthy individuals.<sup>45</sup>

Second, we focus on how law can build *organization*, as opposed to more amorphous configurations of insurgency. The organizations our reforms seek to facilitate are very much social-movement actors, in that they seek to change “elements of the social structure and/or reward distribution of a society.”<sup>46</sup> But the goal is to encourage enduring organization that can wield sustained,

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44. See, e.g., Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 269 (2015) (“These movements explicitly use the human right to housing as an organizing framework. . . . These movements define their actions as ‘liberating’ homes from the shackles of an unjust and immoral housing system that privileges profits over people.”); Luke Herrine, *The Law and Political Economy of a Student Debt Jubilee*, 68 U. BUFF. L. REV. 281, 325 (2020) (“In recent years, there have been some signs that more and more student debtors have begun to understand their plight not as an individual responsibility but as a collective failure.”). On labor exploitation and new worker-organizing efforts, see, for example, Andrias, *supra* note 26, at 6, 40-44; and Veena B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CALIF. L. REV. 65, 67 (2017). Cf. Beatrix Hoffman, *Health Care Reform and Social Movements in the United States*, 93 AM. J. PUB. HEALTH 75, 75 (2003) (asking “why there has never been such a movement for universal health care, and whether and how one may emerge now and in the future”).
45. For earlier scholarship examining the relationship between law and the makeup and organization of political parties, see, for example, Joseph Fishkin & Heather K. Gerken, *The Party’s Over: McCutcheon, Shadow Parties, and the Future of the Party System*, 2014 SUP. CT. REV. 175, 175-79; Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 146-59 (2005); and Pildes, *supra* note 15, at 828-33.
46. John D. McCarthy & Mayer N. Zald, *Resource Mobilization and Social Movements: A Partial Theory*, 82 AM. J. SOC. 1212, 1217-18 (1977). We refer to the organizations interchangeably as mass-membership organizations and as social-movement organizations (SMOs). Social-science scholars broadly define a social movement as “a set of opinions and beliefs in a population which represents preferences for changing some elements of the social structure and/or reward distribution of a society.” *Id.*; see also Brown-Nagin, *supra* note 29, at 1503 (defining social movements as persistent, interactive campaigns that make “sustained, collective claims for relief or redistribution in response to social marginalization, dislocation, change, or crisis” (emphasis omitted)); Guinier & Torres, *supra* note 28, at 2756-57 (defining social movements).

countervailing power.<sup>47</sup> Thus, our approach rejects the idea that formal structures facilitated by law are necessarily deradicalizing and inimical to social change.<sup>48</sup>

Finally, our focus is on how law can facilitate organizations of working-class and poor Americans – not on either of two other questions: one, how law could be designed specifically to enhance the political power of communities of color, or two, how law could encourage the formation of interest groups generally. The first question could not be more critical. Just as our government is disproportionately responsive to the wealthy, it is also disproportionately responsive to white people,<sup>49</sup> and the crisis of structural racism is perhaps the most acute we face as a nation. As such, a program for building political power among communities of color is just as necessary as a program for building power among workers and the poor. But it is also true that our focus on working and poor Americans ought, in practice, and in part due to the crisis of structural racism itself, to amount to a program for building power among and by communities of color. This is not the exclusive reach of our proposals, and continued attention must be paid to ensure that racial inequities do not infect the political organizing we aspire to enable. But because people of color are over-represented in the sectors of the population that we do address – low-income workers, tenants, government-benefits recipients, debtors – these communities would likely benefit from the success of our proposals. As to the second question, while a more expansive civil society may bring a host of benefits, including greater social cohesion and civic education, this Article’s concern is with building organizations that can serve as a countervailing force to the extraordinary power of economic elites in our political economy.<sup>50</sup>

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47. See MCADAM, *supra* note 41, at 54–56 (emphasizing the importance of enduring organization).

48. Cf. PIVEN & CLOWARD, *supra* note 41 (providing a history of four disruptive social movements, and arguing that organization is often antithetical to movement success among poor people). For further discussion, see *infra* note 370 and accompanying text.

49. See, e.g., BRIAN F. SCHAFFNER, JESSE H. RHODES & RAYMOND J. LA RAJA, HOMETOWN INEQUALITY: RACE, CLASS, AND REPRESENTATION IN AMERICAN LOCAL POLITICS 13–14 (2020) (“Whites and wealthier people receive substantially more ideological representation both from local government officials and from municipal policy outputs than do nonwhites and less wealthy individuals. The inequities in representation we identify are frequently shocking in their magnitude.”); John Griffin, Zoltan Hajnal, Brian Newman & David Searle, *Political Inequality in America: Who Loses on Spending Policy? When Is Policy Less Biased?*, 7 POL. GROUPS & IDENTITIES 367, 368 (2019) (“[T]he racial inequalities we uncover are as large as, and often larger than, income-based bias.”).

50. Other work examines the value of robust civil society more broadly. E.g., ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000); THEDA SKOCPOL, *DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIL LIFE* (2003).

We argue that a legal regime designed to enable this kind of organizing should have several components. First, the law should grant collective rights in an explicit and direct way so as to create a “frame” that encourages organizing. Second, as importantly, though more prosaically, the law should provide for a reliable, administrable, and sustainable source of financial, informational, human, and other relevant resources. Third, the law should guarantee free spaces – both physical and digital – in which movement organization can occur, free from surveillance or control. Fourth, the law should remove barriers to participation, both by protecting all those involved from retaliation – no worker may be fired, no tenant evicted, no debtor penalized, and no welfare recipient deprived of benefits because they are active in or supportive of the movement’s efforts – and by removing material obstacles that make it difficult for poor and working people to organize. Fifth, the law should provide the organizations with ways to make material change in their members’ lives and should create mechanisms for the exercise of real political and economic power, for example by providing the right to “bargain” with the relevant set of private actors and by facilitating organizational participation in governmental processes. Finally, the law should enable contestation and disruption, offering protections for the right to protest and strike.<sup>51</sup>

The particulars necessarily vary by context. For example, a law designed to generate organizing among tenants would start by affirmatively granting tenants the right to form and join tenant unions. It would grant such unions the right to access information and landlord property for organizational purposes. It would vest the organization with authority to collect dues payments through deductions from rent payments. It would mandate that landlords negotiate with tenants’ organizations over rent and housing conditions. It would ensure that organizations have special rights of participation in administrative processes related to housing policy. And it would provide for the right of tenants to engage in rent strikes and protests, free from retaliation. A law designed to facilitate organizing among debtors would similarly create a collective frame, provide a mechanism for funding, protect against retaliation, mandate bargaining and

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51. Some, though not all, of the interventions we propose might require the state to determine which organizations are entitled to the law’s benefits. For example, if the government directly funds organizations, or requires bargaining with organizations, or mandates access to property for organizations, the law might need to establish criteria according to which organizations qualify (or don’t) for the entitlements in question. Current labor law offers one, quite imperfect model: many legal entitlements (the employers’ bargaining obligation, for example) are granted when, and only when, a union can demonstrate support from a majority of the relevant group of workers. *See* 29 U.S.C. § 159(a) (2018). This model could be modified so that some threshold showing of support – short of a majority – is required before the organization could avail itself of the relevant legal right. This administrability question is an important one but is beyond the scope of the current Article.

rights of participation in governance, and protect the right to protest and strike, but a debtor-organizing law might not provide for access to physical spaces, instead putting more emphasis on providing information and enabling online organizing.

Some of our proposals will generate resistance – theoretical, legal, and political. And, indeed, we concede that our approach has limitations. For example, we do not attempt to articulate the optimal level of political influence that the organizations in question ought to enjoy, nor a way of measuring when and whether they have become sufficiently strong. As Richard Pildes has written in a related context, we believe it is possible to “identify what is troublingly unfair, unequal, or wrong without a precise standard of what is optimally fair, equal, or right.”<sup>52</sup> In addition, the scope of our inquiry is limited to problems of economic inequality. Yet we do not mean in any way to minimize other aspects of inequality, including racial and gender discrimination and hierarchy, which are both inseparable from economic inequality and worthy of separate examination and intervention. To that end, we believe law ought to require inclusion and nondiscrimination among poor and working people’s social-movement organizations.<sup>53</sup>

Finally, we recognize both that our recommendations will not provide a panacea to the imbalance in power that characterizes our political economy and that our proposals will be difficult to enact. Indeed, although we suggest a range of possible reforms and explain how they could be achieved, the goal is to illuminate law’s constitutive potential and to suggest a path for further work, not to provide a comprehensive blueprint.<sup>54</sup> In short, analysis of what makes poor and working people’s social-movement organizations succeed helps show that law

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52. Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1612 (1999).

53. Labor law provides a useful example for much in this Article, including the profound risk of racial and gender exclusion. The National Labor Relations Act (NLRA), for example, entrenched and perpetuated certain forms of race- and gender-based oppression by excluding from statutory coverage occupational groups – like domestic workers and agricultural workers – where Black, Latino, and women workers are disproportionately represented. See IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* 53–61 (2005); see also *infra* note 384 (describing requirements of nondiscrimination, inclusion, and antisubordination that might be imposed on social-movement organizations to prevent internal domination along lines of race, class, and gender).

54. A host of institutional-design questions, specific to particular constituencies and contexts, are thus beyond the scope of this paper.



can make a difference – and that the absence of such law is a choice, one we believe our society cannot afford to make.<sup>55</sup>

The remainder of this Article proceeds as follows. Part I describes the problem by tracing the relationship between rising economic inequality and the decline of mass-membership organizations, on the one hand, and political responsiveness on the other. It also explains why this form of inequality is a problem, theoretically, for a democratic republic, and describes existing approaches to using law as a mechanism for addressing political inequality. Part II details, at a high level of generality, the promise of legal intervention to encourage organization, drawing on historical and contemporary examples and underlining the extent to which the absence of such regimes is a political choice that favors a particular distribution of power. Part III uses social-science research and lessons from labor law to elaborate the conditions necessary for poor and working-class organizations to thrive and explains how law can facilitate the existence of such conditions in a range of contexts. Finally, in conclusion, we explain why progress toward a law of organizing might be feasible, notwithstanding significant obstacles.

## I. INEQUALITY, DEMOCRACY, AND COUNTERVAILING ORGANIZATIONS

### A. *The Unequal Landscape of Political Organization*

At every stage of the electoral and governing process, wealthy Americans dominate.<sup>56</sup> They vote at higher rates, they contribute more frequently and in greater amounts to campaigns, they volunteer more often on political campaigns, and they are more likely to contact a representative about an issue.<sup>57</sup> In

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55. The legal reforms we suggest are targeted to generate organizing among people in specific income classes but not targeted to generate political organizing among people who hold specific political views. As a result, it is possible that our reforms would facilitate organizing by those who hold reactionary views as well as those who hold progressive ones. Of course, it will remain critical to combat discriminatory and exclusionary political developments through other means.

56. KAY LEHMAN SCHLOZMAN, SIDNEY VERBA & HENRY E. BRADY, *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* 6-8, 14 (2012); see also *id.* at 122 & n.8, 136, 169, 197 (demonstrating that the higher the socioeconomic-status quintile to which a person belongs, the more likely he or she is to vote, contribute money to a campaign, engage in political discussion daily, be more persistently politically active over time, and to have come from a politically engaged family).

57. See *id.* at 136.

addition, wealthy individuals are, and have always been, far more likely to serve as elected and appointed leaders than are working-class and poor Americans.<sup>58</sup>

The story of how economic elites, as individuals, dominate campaign spending, lobbying, and elected office is likely familiar to most readers. Less well known is the relationship between inequality and political organization. Here, too, the picture is one of domination by the wealthy. Those in the top income quintile, for example, are far more active in organized political groups.<sup>59</sup> They can more easily bear the economic costs of organization, and they are more likely to possess the skills, information, resources, and media savvy essential to the successful functioning of such groups.<sup>60</sup> Similarly, business organizations are dominant in both federal- and state-level politics. Indeed, the majority of organized, national political groups focus on economic issues, and of these, more than three-quarters represent business interests.<sup>61</sup> Over three-fourths of lobbying expenditures are made on behalf of corporate America.<sup>62</sup> Political participation by business and the wealthy, moreover, vastly outpaces participation by organizations of the nonwealthy: business groups outnumber and far outspend organizations of working-class and poor Americans.<sup>63</sup>

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58. NICHOLAS CARNES, *WHITE-COLLAR GOVERNMENT: THE HIDDEN ROLE OF CLASS IN ECONOMIC POLICY MAKING* 107-08 (2013).
59. SCHLOZMAN ET AL., *supra* note 56, at 259-61; *see also id.* at 276 (“[B]arriers to entry into the political fray have potential consequences for the representation – and, in particular, for the equal representation – of citizen interests.”).
60. For discussion of why the wealthy are better able to organize, *see id.* at 316-17; *see also* E.E. SCHATTSCHNEIDER, *THE SEMI-SOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA* 35 (1960) (discussing the disproportionate role that the wealthy play in political organizing).
61. *See* SCHLOZMAN ET AL., *supra* note 56, at 320, 322 (noting that “[m]ore than two-thirds of the organized interests in Washington are institutions or membership associations directly related to the joint political concerns that arise from economic roles and interests” and those representing business constitute more than three-quarters of these).
62. LEE DRUTMAN, *THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE* 8-9 (2015). In fact, these numbers significantly undercount the true corporate investments in politics, because many activities seeking to influence the political process are not captured by lobbying-disclosure rules. *See id.* at 9.
63. *Id.* *But see* SCHLOZMAN ET AL., *supra* note 56, at 419 (noting that participation in litigation via amicus briefs is one exception). One study found that “72 percent of expenditures on lobbying originate with organizations representing business.” SCHLOZMAN ET AL., *supra* note 56, at 442. Another concluded that “[l]obbying expenditures by corporations and trade associations represent more than 84% of total interest group lobbying expenditures at the US federal level.” John M. de Figueiredo & Brian Kelleher Richter, *Advancing the Empirical Research on Lobbying*, 17 ANN. REV. POL. SCI. 163, 165 (2014). A single business group, the U.S. Chamber of Commerce, spent \$1.62 billion lobbying the federal government between 1998 and 2020, *Top Spenders*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/lobby/top.php?>

This inequality in political organization has not always been so severe. In the years after the Civil War until the mid-twentieth century, American civil society was made up of numerous federated organizations with membership from the working class.<sup>64</sup> In the early twentieth century, labor organizations like the Knights of Labor, the American Federation of Labor, and the early industrial unions, along with civic organizations like the National Consumers League and National Urban League, engaged millions of low- and middle-income Americans and immigrants in grassroots political activity. Members participated in organizational meetings, decisionmaking, and leadership, as well as in political action at the local, state, and federal levels. Notably, these organizations were primarily member-funded. They were by no means perfect—some were exclusionary or segregated on the basis of race or gender—but they engaged Americans in democratic, political activity at all levels.<sup>65</sup>

Progressive era intellectuals, writing against the background of a political economy with significant parallels to today's, understood that working people's organizations could redistribute power over political decisionmaking and thereby could ensure a more egalitarian political economy.<sup>66</sup> John Dewey, for example, wrote of a society of citizens whose equality was guaranteed by their participation in voluntary associations with real power in the governance process.<sup>67</sup>

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showYear=a&indexType=s [https://perma.cc/K8VR-AFK2], compared to \$889 million by all labor unions combined, *Ranked Sectors*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/federal-lobbying/ranked-sectors?cycle=a> [https://perma.cc/H9JZ-JZN3]. The top three healthcare-industry groups spent more than three times as much on lobbying during this period as the American Association of Retired Persons (AARP). See *Top Spenders*, *supra*.

64. SKOCPOL, *supra* note 50, at 152-57.
65. *Id.* at 98-158; see also SUZANNE METTLER, *SOLDIERS TO CITIZENS: THE G.I. BILL AND THE MAKING OF THE GREATEST GENERATION 2-5* (2005) (noting the ways in which civic organizations prepared Americans for participation in democratic politics); SCHLOZMAN ET AL., *supra* note 56, at 148 (discussing the role of labor unions in mobilizing voters).
66. See DONALD R. BRAND, *CORPORATISM AND THE RULE OF LAW: A STUDY OF THE NATIONAL RECOVERY ADMINISTRATION 50* (1988) (describing progressives' commitment to encouraging broad participation in economic decisionmaking in order to achieve fundamental structural changes in the economy); BILL NOVAK, *A NEW DEMOCRACY: LAW AND THE CREATION OF THE MODERN AMERICAN STATE, 1866-1932* (forthcoming 2021) (manuscript at 51, 57-65) (on file with authors) (arguing that Progressive era "reformers had a thicker and more substantive conception of what was entailed by democracy than the comparatively thin renderings of de-liberation, representation, voting, or office that prevail at present"); MARC STEARS, *DEMANDING DEMOCRACY: AMERICAN RADICALS IN SEARCH OF A NEW POLITICS 94-97, 105-14* (2010) (describing the rise of industrial unions and their relationship to Progressive era democratic theory); ROBERT B. WESTBROOK, *JOHN DEWEY AND AMERICAN DEMOCRACY 434-39* (1991) (discussing Dewey's efforts to develop a workable form of democratic socialism).
67. John Dewey, *What Are We Fighting for?*, *INDEPENDENT*, Apr.-June 1918, at 482. For further discussion of progressive and New Deal approaches to working-class membership

Public opinion and the ballot, he argued, were insufficient tools to achieve change. For the public to solve its problems, organizations of citizens, and organizations of working-class Americans in particular, “needed concrete ways to exercise power over the range of economic and political decision making.”<sup>68</sup>

Following the Great Depression and the resulting protest movements among the unemployed and industrial workers, the New Deal fostered a rapid growth in the organization of the working class.<sup>69</sup> In 1935, Congress enacted the National Labor Relations Act (NLRA), which guaranteed workers the right to organize and bargain collectively with their employers.<sup>70</sup> In 1935, John Lewis of the United Mineworkers and Sidney Hillman of the Amalgamated Textile Workers Union formed the new Committee for Industrial Organization (CIO), with the goal of organizing all workers, immigrant and native-born, male and female.<sup>71</sup> The CIO’s success was remarkable. In the year following the United Auto Workers strike at General Motors in Michigan, nearly five million workers took part in industrial action, and almost three million joined a union.<sup>72</sup> Over the next decade, unions continued to grow, with some becoming a vehicle for the empowerment of Black Americans as well as a force for rising living standards, workplace democracy, and political change.<sup>73</sup>

The 1950s and 60s saw the rise of several new transformative social movements among low- and middle-income Americans.<sup>74</sup> In particular, the Civil Rights movement organized Black Americans and their allies, engaging them in a political struggle against racial injustice, including its economic dimensions.<sup>75</sup>

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organizations and their role in government, see Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 *YALE L.J.* 616, 625-33 (2019).

68. Andrias, *supra* note 67, at 648.

69. See IRVING BERNSTEIN, *TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933-1941*, at 37-61 (1970); NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 18 (2013); PIVEN & CLOWARD, *supra* note 41, at 44-76; ROBERT H. ZIEGER, *THE CIO 1935-1955*, at 16-17 (1995).

70. National Labor Relations Act of 1935, 29 U.S.C. §§ 151-169 (2018).

71. See, e.g., MELVYN DUBOFSKY & WARREN VAN TINE, *JOHN L. LEWIS: A BIOGRAPHY* 162-63 (1986); LICHTENSTEIN, *supra* note 69, at 43-53. See generally STEVEN FRASER, *LABOR WILL RULE: SIDNEY HILLMAN AND THE RISE OF AMERICAN LABOR* 329-48 (1991) (describing Hillman’s founding goals for the Committee for Industrial Organization).

72. LICHTENSTEIN, *supra* note 69, at 51-52.

73. *Id.* at 78-85, 104.

74. SKOCPOL, *supra* note 50, at 127-38.

75. See TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS: 1963-65*, at 210-11 (1998); MICHAEL K. HONEY, *TO THE PROMISED LAND: MARTIN LUTHER KING AND THE FIGHT FOR ECONOMIC JUSTICE* 1-16 (2018); MCADAM, *supra* note 41, at 75-84; PIVEN & CLOWARD, *supra* note 41, at 181-211.

The National Welfare Rights Organization and numerous related community-based groups organized welfare recipients and the poor more generally.<sup>76</sup> Union organization among service workers and public-sector workers expanded during this period as well.<sup>77</sup>

By the 1970s, however, membership organizations began to decline in prominence.<sup>78</sup> Theda Skocpol estimates that membership in the federated mass-membership organizations built in the Progressive and New Deal eras dropped by sixty percent between 1974 and 1994.<sup>79</sup> Today, less than a third of the organizational advocates operating in Washington are membership associations of any kind, and only about an eighth are membership associations of individuals.<sup>80</sup> Although groups associated with the 1960s social movements have survived, they are no longer democratically governed mass-membership organizations. Most are now professionally managed advocacy groups, organized as charitable nonprofits funded mainly by wealthy donors.<sup>81</sup>

Labor unions stand as an exception to this dominant model. Their membership and funding are still drawn from working Americans, and unions are still federated, national organizations whose members have governance rights and the organizational capacity to exercise power in the political economy.<sup>82</sup> Unions provide voice for millions of Americans, enabling workers to improve collectively

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76. See NICK KOTZ & MARY LYNN KOTZ, *A PASSION FOR EQUALITY: GEORGE A. WILEY AND THE MOVEMENT* 15-21 (1977); PIVEN & CLOWARD, *supra* note 41, at 264-96.

77. See, e.g., LEON FINK & BRIAN GREENBERG, *UPHEAVAL IN THE QUIET ZONE: A HISTORY OF HOSPITAL WORKERS' UNION*, LOCAL 1199, at 17-27 (1989); MARJORIE MURPHY, *BLACKBOARD UNIONS: THE AFT AND THE NEA, 1900-1980*, at 213-29 (1990); JOSEPH E. SLATER, *PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900-1962*, at 1-12 (2004).

78. See SKOCPOL, *supra* note 50, at 135-38; see also PUTNAM, *supra* note 50, at 27, 48-64 (showing Americans have become increasingly disconnected from one another and that institutions have disintegrated); SCHLOZMAN ET AL., *supra* note 56, at 320, 322 (describing the relative lack of organization among lower-income groups and the overwhelming dominance of elites and business interests in lobbying).

79. SKOCPOL, *supra* note 50, at 212-19.

80. *Id.* at 212-19; see SCHLOZMAN ET AL., *supra* note 56, at 319.

81. See SCHLOZMAN ET AL., *supra* note 56, at 319; SKOCPOL, *supra* note 50, at 212-19; David Pozen, *The Tax-Code Shift That's Changing Liberal Activism*, ATLANTIC (Nov. 27, 2018), <https://www.theatlantic.com/ideas/archive/2018/11/501c3-501c4-activists-and-tax-code/576364> [<https://perma.cc/V8WA-MZX4>]; see also DANA R. FISHER, *ACTIVISM, INC.: HOW THE OUTSOURCING OF GRASSROOTS CAMPAIGNS IS STRANGLING PROGRESSIVE POLITICS IN AMERICA* 73 (2006) (describing the outsourcing of grassroots organizing). For further discussion of funding dynamics, see *infra* Section III.B.1.

82. The other major exceptions include the AARP and the National Rifle Association, which maintain federated membership structures and continue to wield significant power, but neither focuses on organizing working-class or poor Americans on the basis of their class interests. See Abu El-Haj, *supra* note 18, at 95-97.

their wages, benefits, and working conditions.<sup>83</sup> They also have significant political and civic impact by educating workers about political issues, mobilizing them to support political candidates, contributing financially to political campaigns, and successfully advocating for policy changes at the local, state, and federal levels.<sup>84</sup> Researchers have found that unions are remarkably effective at boosting voter turnout, particularly among the least educated and least well-represented in the electorate.<sup>85</sup> States with higher union density tend to have higher turnout rates among the working class.<sup>86</sup> And union members, as a result of their experience with politically impactful and democratic organizations, tend to join more civic associations.<sup>87</sup> In short, unions enable workers to participate

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83. See RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* (1984); JAKE ROSENFELD, *WHAT UNIONS NO LONGER DO* (2014); David Card, *The Effect of Unions on Wage Inequality in the U.S. Labor Market*, 54 *INDUS. & LAB. REL. REV.* 296 (2001); Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 *AM. SOC. REV.* 513 (2011); Henry S. Farber, Daniel Herbst, Ilyana Kuziemko & Suresh Naidu, *Unions and Inequality over the Twentieth Century: New Evidence from Survey Data* (Nat'l Bureau of Econ. Research, Working Paper No. 24587, 2018), <https://www.nber.org/papers/w24587.pdf> [<https://perma.cc/3HV2-74WP>]; Alexander Hertel-Fernandez, William Kimball & Thomas Kochan, *How U.S. Workers Think About Workplace Democracy: The Structure of Individual Worker Preferences for Labor Representation* (Aug. 28, 2019) (unpublished working paper) (on file with the Washington Center for Equitable Growth), <https://equitablegrowth.org/wp-content/uploads/2019/08/WP-Workplace-Democracy-Hertel-Fernandez-Kimball-Kochan.pdf> [<https://perma.cc/JS47-5NZ6>]. For a philosophical account that elaborates the harm to democratic society when workers lack basic rights at work, see ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT)* (2017).
84. See JOHN S. AHLQUIST & MARGARET LEVI, *IN THE INTEREST OF OTHERS: ORGANIZATIONS AND SOCIAL ACTIVISM* (2013); SCHLOZMAN ET AL., *supra* note 56; DANIEL SCHLOZMAN, *WHEN MOVEMENTS ANCHOR PARTIES: ELECTORAL ALIGNMENTS IN AMERICAN HISTORY* (2015); Hertel-Fernandez et al., *supra* note 83; Sung Eun Kim & Yotam Margalit, *Informed Preferences? The Impact of Unions on Workers' Policy Views*, 61 *AM. J. POL. SCI.* 728 (2017); Jan E. Leighley & Jonathan Nagler, *Unions, Voter Turnout, and Class Bias in the U.S. Electorate, 1964-2004*, 69 *J. POL.* 430 (2007).
85. ROSENFELD, *supra* note 83, at 170, 173; Richard B. Freeman, *What, Me Vote?*, in 1 *SOCIAL INEQUALITY* 714-15 (Kathryn M. Neckerman ed., 2004); see also Sean McElwee, *How Unions Boost Democratic Participation*, *AM. PROSPECT* (Sept. 16, 2015), <https://prospect.org/labor/unions-boost-democratic-participation> [<https://perma.cc/Q6ET-5E8M>] (collecting research that shows a positive correlation between union membership and voting).
86. Benjamin Radcliff & Patricia Davis, *Labor Organization and Electoral Participation in Industrial Democracies*, 44 *AM. J. POL. SCI.* 132, 136-38 (2000).
87. See McElwee, *supra* note 85.

collectively at every level of politics and government, equalizing power in the political economy and providing a countervailing voice to organized business groups.<sup>88</sup>

At their high point in the 1950s, unions represented about a third of workers.<sup>89</sup> Since the 1970s, however, the labor movement's size and power have declined considerably. This is partly a result of weaknesses in the original NLRA, antiunion reforms in the 1947 Taft-Hartley Act, and a host of Supreme Court decisions that privilege employers' managerial and property rights over workers' right to organize. After decades of capital flight, the fissuring of the employment relationship, and intense managerial resistance, unions now represent only about six percent of employees in the private sector and ten percent of the labor force overall.<sup>90</sup> Recently enacted antiunion laws in previously union-dense states, along with the Supreme Court's decision in *Janus v. American Federation of State, County & Municipal Employees*, further threaten unions' ability to exercise effective political voice.<sup>91</sup> In short, unions remain politically active and continue to provide substantial resources to proworker candidates, but because

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88. See JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 57 (2010) (“[O]rganized labor’s role is not limited to union participation in the determination of wages. Much more fundamental is the potential for unions to offer an organizational counterweight to the power of those at the top.”); ROSENFELD, *supra* note 83, at 4-8. For theoretical accounts of the importance of collective rights to democracy, see ROBERT A. DAHL, A PREFACE TO ECONOMIC DEMOCRACY 5-6 (1985), which states that, “of the various kinds of equality that might exist in a good society, political equality is surely one of the most crucial, . . . including . . . the freedom to help determine, in cooperation with others, the laws and rules that one must obey”; and Alex Gourevitch, *The Right to Strike: A Radical View*, 112 AM. POL. SCI. REV. 905, 905, 909-15 (2018), which argues that “every liberal democracy recognizes that workers have a right to strike” because workers need the ability to resist “the oppression that workers face in the standard liberal capitalist economy.”
89. GERALD MAYER, CONG. RESEARCH SERV., RL32553, UNION MEMBERSHIP TRENDS IN THE UNITED STATES (2004) (“As a percent of wage and salary employment and a percent of total employment, union membership peaked in 1954 at 34.8% and 28.3%, respectively.”).
90. Bureau of Labor Statistics, *Union Members Summary*, U.S. DEP’T LAB. (Jan. 22, 2020, 10:00 AM EST), <https://www.bls.gov/news.release/union2.nro.htm> [<https://perma.cc/36B5-6EFF>]. For a discussion of the causes of the decline, including the role of a weak legal regime, see ROSENFELD, *supra* note 83, at 10-30; LANE WINDHAM, KNOCKING ON LABOR’S DOOR: UNION ORGANIZING IN THE 1970S AND THE ROOTS OF A NEW ECONOMIC DIVIDE 6-9 (2017); Andrias, *supra* note 26, at 6-7; and Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 266-67 (1978).
91. 138 S. Ct. 2448 (2018). See generally Kate Andrias, *Janus’s Two Faces*, 2018 SUP. CT. REV. 21 (discussing recently enacted antiunion laws, as well as the evolution of Supreme Court doctrine).

there are so few of them and their funding is increasingly under attack, they represent a declining share of organizational activity in politics and governance.<sup>92</sup>

### *B. Political Inequality in a Democratic Republic*

The impact of these developments on the health of American democracy is stark. Political scientists including Larry Bartels, Martin Gilens, and Benjamin Page are finding that government policymaking is responsive to the views of poor- and middle-income Americans *only* in settings where the balance of interest-group power aligns with the preferences of these income groups.<sup>93</sup> This finding confirms the critical role played by political organization, but it also confirms that in contemporary America – where the wealthy dominate political organization – government is by and large unresponsive to the views of the vast majority of citizens.<sup>94</sup>

By examining two thousand public-opinion surveys conducted between 1981 and 2002, and federal policy adoption during that same period, Gilens estimated the extent to which different income groups influence policy outcomes.<sup>95</sup> His findings are unambiguous: with a single exception, “when preferences between the well-off and the poor diverge, government policy bears absolutely no

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92. See HACKER & PIERSON, *supra* note 88, at 179–80; SCHLOZMAN ET AL., *supra* note 56, at 368–69. In 2012, corporations spent \$2.57 billion on reportable lobbying expenditures, which amounted to fifty-six times the amount spent by unions. DRUTMAN, *supra* note 62, at 8–9, 14. Recent court decisions prohibiting unions from collecting fees from objecting workers, while maintaining the obligation that unions represent such workers, further weaken unions’ economic and political position. See, e.g., *Janus*, 138 S. Ct. 2448; *Harris v. Quinn*, 573 U.S. 616 (2014).

93. See BARTELS, *supra* note 11; GILENS, *supra* note 11; Gilens & Page, *supra* note 11.

94. As with all empirical findings, there is debate about the extent to which Gilens’s and Page’s findings hold up. See Dylan Matthews, *Remember that Study Saying America Is an Oligarchy? 3 Rebuttals Say It’s Wrong*, VOX (May 9, 2016, 8:00 AM EDT), <https://www.vox.com/2016/5/9/11502464/gilens-page-oligarchy-study> [<https://perma.cc/HCT5-ALN9>] (summarizing the critiques). But see Martin Gilens & Benjamin I. Page, *Critics Argued with Our Analysis of U.S. Political Inequality. Here Are 5 Ways They’re Wrong*, WASH. POST (May 23, 2016 12:00 PM EDT), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/05/23/critics-challenge-our-portrait-of-americas-political-inequality-heres-5-ways-they-are-wrong> [<https://perma.cc/ELP9-JX2A>] (responding to critics); Sean McElwee, *To Influence Policy, You Have to Be More than Rich*, WASH. MONTHLY (Feb. 16, 2016), <https://washingtonmonthly.com/2016/02/16/to-influence-policy-you-have-to-be-more-than-rich> [<https://perma.cc/JN3S-QMKT>] (“[A] full accounting of the evidence leaves the core finding of Gilens and Page standing: the views of the wealthy are disproportionately represented by policymakers, and representation for low and middle income Americans primarily comes from their congruence with the wealthy.”).

95. GILENS, *supra* note 11, at 53.



relationship to the degree of support or opposition among the poor.”<sup>96</sup> Moreover, even when the poor and middle class agree with each other and disagree with the wealthy, it is still the views of the wealthy that predominate. Hence, “for Americans below the top of the income distribution, any association between preferences and policy outcomes is likely to reflect the extent to which their preferences coincide with those of the affluent.”<sup>97</sup> The rare exception occurs when organized political-group power is aligned with the preferences of the poor and middle class.<sup>98</sup>

The Gilens findings, moreover, hardly stand alone. Other recent work reveals that “the views of constituents in the bottom third of the income distribution receive[] no weight at all in the voting decisions of their [S]enators.”<sup>99</sup> Likewise, Presidents often respond to the “narrow political and economic interests” of the wealthy.<sup>100</sup> And, at the state level, “the poor have next to no influence over . . . policy.”<sup>101</sup> Summarizing these findings, Gilens and Page conclude bluntly that in twenty-first-century America, “the majority does *not* rule — at least not in the causal sense of actually determining policy outcomes.”<sup>102</sup>

A political system in which government policy is responsive to the preferences of the wealthy few rather than to the majority of citizens may be more accurately categorized as an oligarchy than as a democracy or a republic.<sup>103</sup>

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96. *Id.* at 81.

97. *Id.* at 83.

98. *Id.* at 122–23.

99. BARTELS, *supra* note 11, at 254.

100. JAMES N. DRUCKMAN & LAWRENCE R. JACOBS, WHO GOVERNS?: PRESIDENTS, PUBLIC OPINION, AND MANIPULATION, at xiii (2015).

101. Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1578 (2015); see also Elizabeth Rigby & Gerald C. Wright, *Political Parties and Representation of the Poor in the American States*, 57 AM. J. POL. SCI. 552, 552 (2013) (finding that low-income preferences rarely “get incorporated in parties’ campaign appeals at [the] early stage in the policymaking process”). Scholars are beginning to examine how race and gender interact with income for purposes of representation, with early studies suggesting that Black Americans are particularly likely to be ignored by policymakers. See Griffin et al., *supra* note 49, at 368.

102. Gilens & Page, *supra* note 11, at 576.

103. Like the political-science literature on which we rely, we use the term “preferences.” However, we are not of the view that preferences are in any sense static or that the relationship between preferences and policymaking is unidirectional. Indeed, our analysis proceeds on the assumption that preferences are dynamic and subject to change through processes that include organizing. Put differently, the idea that government should respond to the preferences, priorities, and concerns of constituents is consistent with the idea that those preferences change over time through deliberation, contestation, and collective debate. Cf. Lisa Disch, *Democratic Representation and the Constituency Paradox*, 10 PERSP. ON POL. 599, 610 (2012) (challenging the focus on responsiveness to preferences and concluding that “[t]he fundamental

Indeed, in an influential recent book, political-science professor Jeffrey Winters defends the claim that the United States is now functioning as an oligarchy. As he describes the current political reality, “regardless of the other ways in which political power might be equal—such as one-person-one-vote or an equal right to speak or participate—yawning differences in material power create enormous inequalities in political influence and account for key political outcomes won by oligarchs.”<sup>104</sup> But, whether best described as an oligarchy or not, the lack of government responsiveness to the views and desires of the vast majority of citizens is a serious problem for a democratic republic.

Indeed, nearly all democratic theorists consider responsiveness to constituents as an important feature of a functioning democracy.<sup>105</sup> As Robert Dahl put it, “[A] key characteristic of a democracy is the continuing responsiveness of the government to the preferences of its citizens, considered as political equals.”<sup>106</sup> Hannah Pitkin, explicating the complicated nature of representation, concluded that, at the very least, representatives “must not be found persistently at odds with the wishes of the represented.”<sup>107</sup> So, too, the Supreme Court, even as it has struck down campaign-finance regulations, has reiterated that “responsiveness is key to the very concept of self-governance through elected officials.”<sup>108</sup> Nicholas Stephanopoulos puts this widely accepted point in terms of political “alignment,” arguing that alignment occurs when “the preferences of voters are congruent with the preferences of their elected representatives,” with respect to partisan affiliation, public-policy views, and public-policy outcomes.<sup>109</sup> He argues that Madisonian, minimalist, pluralist, participatory, and deliberative democrats all put some version of *alignment* between voter preferences and representative behavior as an important component of their views of what comprises “democracy.”<sup>110</sup>

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democratic deficiency of US politics is that it has taken on an organizational form that gives wealthy interests a significant strategic advantage while at the same time making it increasingly unlikely that opposition would mobilize through electoral politics”).

104. JEFFREY A. WINTERS, *OLIGARCHY* 214 (2011).

105. We do not believe that responsiveness is the only important normative goal in a democracy, nor is it the only goal served by our proposals. See *infra* notes 111-112 and accompanying text.

106. ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* 1 (1971).

107. HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 209 (1967). Pitkin allows, however, for divergence with “good reason in terms of the[] interest” of the represented. *Id.*

108. *McCutcheon v. FEC*, 572 U.S. 185, 227 (2014).

109. See Stephanopoulos, *supra* note 17, at 287.

110. *Id.* at 313-16.

Although the relationship between preferences and policymakers in a democracy is neither simple nor unidirectional,<sup>111</sup> the current U.S. government described by Bartels, Gilens, Page, and others is one defined, quite simply, by *misalignment* and *unresponsiveness*: the concerns of the majority are rarely reflected in government policy unless by coincidence, and instead that policy aligns with the preferences and priorities of a small, wealthy minority. This mismatch is a problem, moreover, not just from the perspective of democratic government, but from the perspective of republican government as well.<sup>112</sup>

The Constitution, of course, requires that the “United States . . . guarantee to every state in this Union a Republican Form of Government,”<sup>113</sup> a guarantee taken to extend to the structure of the federal government as well.<sup>114</sup> As with democracy, there is robust debate about the particular characteristics of a “republican form of government,” but widespread agreement exists about its core

111. See Lisa Disch, *Toward a Mobilization Conception of Democratic Representation*, 105 AM. POL. SCI. REV. 100, 101-12 (2011) (exploring the reflexive process that sets claims about preferences in play); Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515, 518 (2003) (analogizing legislators to market entrepreneurs insofar as they are both “active . . . in searching out and sometimes even creating preferences”).

112. The reforms we urge also serve other important democratic goals, including that of increasing and equalizing participation. As democracy-law scholars have argued, participation enhances the legitimacy of electoral outcomes, exposes government officials to more of the public’s views, and connects voters more closely to their representatives. See, e.g., Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L.Q. 643, 677 (2008); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1709-11 (1993); see also Steven L. Winter, *Down Freedom’s Main Line*, 41 NETH. J. LEGAL PHIL. 202, 203 (2012) (“Democracy’s moral appeal lies not in the promise of an impossible radical freedom, but in the commitment to equal participation in determining the terms and conditions of social life – what, even before the currency of the term ‘democracy,’ the ancient Greeks called *isonomia*.”). As such, the reforms urged in this paper should appeal even to those scholars who argue that because public opinion is “a continuous process” that is “never definitively represented,” “[t]here is thus no ‘baseline’ from which ‘distortion’ can be assessed.” ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 53 (2014). Moreover, though adequate discussion is beyond the scope of this Article, normative theories of nondomination, self-determination, and agonism also lend support to the kinds of organizational reforms this Article advocates. On nondomination, see Harry Arthurs, *Labor Law as the Law of Economic Subordination and Resistance: A Thought Experiment*, 34 COMP. LAB. L. & POL’Y J. 585, 602 (2013); and ANDERSON, *supra* note 83, at 64-71. On self-determination, see, for example, Hanoch Dagan, *Autonomy and Property*, in RESEARCH HANDBOOK ON PRIVATE LAW THEORY 185-86, 187-88, 199-202 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020). On agonism and the importance of contestation, see CHANTAL MOUFFE, *AGONISTICS: THINKING THE WORLD POLITICALLY* 5-9 (2013); and Disch, *supra* note 103, at 610-11.

113. U.S. CONST. art. IV, § 4.

114. See, e.g., Jack M. Balkin, *Republicanism and the Constitution of Opportunity*, 94 TEX. L. REV. 1427, 1429 (2016).

features. Akhil Amar, for example, concludes that “majority rule popular sovereignty” is a “central pillar” and the “central meaning” of Republican government.<sup>115</sup> Quoting from *Federalist No. 39*, Amar concludes, “Republicanism must be defined as against aristocracy and monarchy – as ‘a government which derives all its powers . . . from the great body of the people.’”<sup>116</sup>

Like Amar, both Jack Balkin and William Forbath define republican government by way of contrast to aristocracy and, of particular relevance here, to oligarchy. Balkin explains, “[T]he Founders opposed republicanism . . . to monarchy, aristocracy, and oligarchy. A republic is therefore an antimonarchical, antiaristocratic, and anti-oligarchical form of government.”<sup>117</sup> And Forbath warns, “You cannot have a constitutional republic, or what the Framers called a ‘republican form of government’ . . . in the context of gross material inequality among citizens [because] gross economic inequality produces an oligarchy in which the wealthy rule.”<sup>118</sup>

### C. Extant Approaches to Using Law to Combat Political Inequality

In light of the problems for democratic and republican government posed by the current unresponsiveness of American government, legal interventions designed to rebalance political power as between the wealthy and the nonwealthy are essential.<sup>119</sup> The public-law literature has identified ways in which extant law

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115. Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749, 751 (1994). In support, Amar draws extensively on Hamilton who wrote in *Federalist No. 22*, for example, that “a fundamental maxim of republican government . . . requires that the sense of the majority should prevail.” *Id.* at 763 (quoting THE FEDERALIST NO. 22, at 146 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

116. *Id.* at 764 (quoting THE FEDERALIST NO. 39, at 240-41 (James Madison) (Clinton Rossiter ed., 1961)).

117. Balkin, *supra* note 114, at 1432.

118. William E. Forbath, *The Distributive Constitution and Workers’ Rights*, 72 OHIO ST. L.J. 1115, 1118 (2011); see also ALEX GOUREVITCH, FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY 38-46 (2014) (emphasizing that republican freedom must be realized under conditions of equal liberty in the economic sphere); GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC 3-5 (2017) (arguing that the U.S. Constitution assumes relative economic equality but that such equality is now absent); Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 670-71 (2014) (urging that avoiding oligarchy and building a robust middle class are constitutional principles).

119. While we focus on reforms to build countervailing political organization, we recognize that also important are reforms that would more equitably distribute economic power and

works to redistribute political power. In his *Harvard Law Review* Foreword, Daryl Levinson lays out four areas of public law that are concerned with “distributing power among political interests”: election law, judicial intervention on behalf of groups lacking political power, campaign-finance law, and anticapture judicial review (along with institutional design) in administrative and constitutional law.<sup>120</sup> Although these areas are not designed to facilitate organizing among working-class voters, they all share an ambition of equalizing political power so as to correct for imbalances that would otherwise plague democratic participation.<sup>121</sup>

For example, Levinson shows how parts of election law – or, the law of democracy – advance this goal. He explains that “the ideal of equalizing political power continues to serve as a normative touchstone in debates about how electoral rules and institutional structures should be designed”<sup>122</sup> and that “in at least one area of election law the goal of redistributing political power has always been front and center: the enfranchisement and political empowerment of previously excluded black voters.”<sup>123</sup> To ensure that Black voters not only have the formal right to vote but are also “effective[ly] represent[ed],” the federal government banned at-large election systems that diluted the power of Black minorities and also required the construction of majority-minority districts to empower these minorities actually to elect their desired representatives.<sup>124</sup> Levinson also shows how judicial enforcement of constitutional rights to protect “politically powerless” groups, à la *Carolene Products* and political-process theory, is a second

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resources, including tax reform, antitrust reform, and banking and corporate-law reform. For some recent scholarly efforts to that end, see, for example, KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* 21-22 (2019); TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* 1-3 (2018); and Lily Batchelder & David Kamin, *Taxing the Rich: Issues and Options* 1 (Sept. 11, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3452274> [<https://perma.cc/G9M7-G9CX>].

120. Daryl J. Levinson, *The Supreme Court, 2015 Term – Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 38, 112 (2016) (arguing that structural constitutional law should be more attentive to power as it manifests in democratic-level interests, as opposed to the power of government institutions); cf. Kate Andrias, Response, *Confronting Power in Public Law*, 130 HARV. L. REV. F. 1 (2016) (critiquing Levinson for remaining agnostic on existing maldistributions of power and for offering as a prescription only that “‘pockets of public law’ ought to be linked to one another and to structural constitutionalism ‘by a common concern with balancing and diffusing power.’”).

121. Levinson, *supra* note 120, at 113.

122. *Id.* at 120.

123. *Id.* at 124.

124. See *id.* (quoting Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1363-65 (1995)).

area where law redistributes political power.<sup>125</sup> Indeed, the essence of the *Carolene Products* footnote – and of political-process theory – is that certain groups lack an appropriate level of political power and that the law ought to step in to compensate for that absence. Thus, the Supreme Court has long held that a group’s political powerlessness is a relevant factor in determining whether that group qualifies as a suspect class and is therefore entitled to heightened judicial protection. As Levinson writes,

In the first instance, the *Carolene Products* approach calls for courts to rearrange the democratic process in order to fully empower disenfranchised groups. Failing that, however, courts are then charged with replicating the policy outcomes that would have resulted from an idealized process in which all groups exercised their fair share of power.<sup>126</sup>

What we propose are legal interventions of a different sort but with the related goal of rebalancing political power in the direction of political equality. In essence, we suggest multiple ways that the law might enable low- and middle-income people to build organizations with political power – organizations aiming to increase the responsiveness of government to the policy preferences of low- and middle-income Americans, while at the same time shifting power relations between powerless individuals and powerful economic actors like employers, landlords, welfare agencies, and banks. These organizations would aggregate the political voice and resources – financial and human – of their members.

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125. See *id.* at 129 & n.553 (discussing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

126. Levinson, *supra* note 120, at 129; see also Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 745 (1985) (“[I]f we are to remain faithful to *Carolene’s* concern with the fairness of pluralist politics, we must repudiate the bad political science that allows us to ignore . . . victims of poverty and sexual discrimination who find it most difficult to protect their fundamental interests through effective political organization.”); Stephanopoulos, *supra* note 101, at 1577-79 (describing studies showing group-based powerlessness for low-income Americans). On the role of campaign-finance law in equalizing political power, see Levinson, *supra* note 120, at 135-36. See also HASEN, *supra* note 13, at 7 (arguing that limiting money in politics “would be a reasonable step” toward “equality in political power”); David A. Strauss, *What Is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 158 (arguing that campaign-finance reform can be justified by “[t]he promotion of equality”). On administrative law and institutional design, see Levinson, *supra* note 120, at 113-18. See also Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 17 (2010) (addressing the “overlooked elements of agency design that are particularly well-suited to addressing the problem of capture when interest groups line up on one side of an issue”); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 264-66 (1987) (describing ways to enhance constituency voices in agency administration); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1760 (1975) (developing an account of “administrative law as interest representation”).

It is through such aggregation that these organizations would amass political power and could thereby serve as a counterweight to the political influence that flows from wealth. As Joshua Cohen and Joel Rogers have explained,

[I]nequalities in material advantage . . . translate directly to inequalities in political power. Groups can help remedy these inequalities by permitting individuals with low per capita resources to pool those resources through organization. In making the benefits of organization available to those whose influence on policy is negligible without it, groups help to satisfy the norm of political equality.<sup>127</sup>

The closest extant analogue to what we propose in this Article is federal labor law. As we have explained previously, “In the United States, the legal regime that has most successfully facilitated lower- and middle-class political organizing has been labor law.”<sup>128</sup> Despite its many flaws, which we explore below, labor law has helped workers build powerful political organizations (i.e., labor unions) through several basic mechanisms. First, labor law explicitly grants workers the right to organize and strike, creating a “frame” for collective action. Second, labor law has historically provided workers with a viable and sustainable organizational funding mechanism by requiring employers to bargain over payroll-deduction systems, and it has provided workers access to some of the information necessary for organizing. Third, the law provides workers the right to use the workplace as a geographical site for organizing by, for example, granting employees the right to discuss unionization on company property and, in limited contexts, allowing nonemployee union organizers to do the same. Fourth, the law plays a critical role in facilitating organizing by promising to insulate workers from employer retaliation.<sup>129</sup> Fifth, the law grants workers the collective right to bargain with employers over terms of employment, including their wages, hours and working conditions. Finally, once organized into unions, low- and middle-income workers are positioned to exercise collective political power through electoral and administrative channels—and also through collective direct action and protest when those traditional channels fail.<sup>130</sup>

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127. Cohen & Rogers, *supra* note 20, at 424.

128. Sachs, *supra* note 18, at 152; *see also* Andrias, *Separations of Wealth*, *supra* note 18, at 500 (discussing the importance of labor unions for low- and middle-income Americans).

129. *See* Sachs, *supra* note 18, at 172-75. Of course, the statutory labor-law regime only needs to grant these rights because common law first grants employers near authoritarian control over workers while on employer property. The prior distribution of power is neither natural nor neutral. *See infra* notes 147-150.

130. *See supra* notes 82-88; *see also* Alison D. Morantz, *What Unions Do for Regulation*, 13 ANN. REV. L. & SOC. SCI. 515, 520 (2017) (discussing how “[u]nion involvement has helped secure the

To be sure, labor law has significant limitations, many of which we have highlighted in our own previous work: labor law excludes large numbers of workers, many of whom are women and people of color; it is characterized by weak enforcement mechanisms, leaving workers effectively unprotected from retaliation when they organize or engage in protests, strikes, or other collective activity; the law places multiple limitations on the form and content of the right to strike; and, although the law provides a right to bargain, it mandates that such bargaining occur only at the worksite level (as opposed to the sectoral or industry level, where power over working conditions is frequently exercised).<sup>131</sup>

Despite these very real shortcomings, however, labor law has served as a critical legal mechanism for facilitating the growth of powerful, collective political organizations of working people. In this way, it has been an important tool for rebalancing political power between wealthy and nonwealthy citizens. The ambition of this Article is to suggest how law might do this for low- and middle-income people more broadly and even more effectively.

## II. URGENCY AND PROMISE OF A LAW OF ORGANIZING

Such a project is necessary because the democracy-reform proposals that have captured scholarly or political attention to date would do little to build countervailing social-movement organization among working-class and poor Americans. Instead, most scholars and advocates propose reforms to campaign-finance and lobbying law, increasing the voting rights of individual citizens, and improving transparency in politics and government.<sup>132</sup> While important, such proposals have limited capacity to create a more equal political economy. Limitations on the ability of the wealthy to fund campaigns or lobbying, in particular, would require the Supreme Court's First Amendment doctrine to be overruled by a new alignment on the Court or by constitutional amendment.<sup>133</sup> Moreover, such reform faces significant practical hurdles. Money finds new channels when campaign-finance and lobbying regulators shut down one avenue; therefore, capping contributions or even expenditures is unlikely to have much effect.<sup>134</sup>

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passage of federal protective legislation in areas such as Occupational Safety & Health, fair labor standards, and equal employment opportunity" and has produced higher levels of regulatory compliance).

131. See Andrias, *supra* note 26, at 33.

132. See *supra* notes 13-17 and accompanying text.

133. See *supra* notes 14-16 and accompanying text.

134. See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708-17 (1999) (arguing that money finds new channels when existing routes are closed off); Kang, *supra* note 14, at 40 (detailing recent Court decisions and



Disclosure and transparency regimes, while valuable, have done little to counterbalance wealth's influence.<sup>135</sup>

So, too, efforts to protect the right to vote at the individual level are essential. But participation through voting is only one small way in which citizens participate in politics and governance. Likewise, making it easier for a diverse range of participants to lobby,<sup>136</sup> or to engage in the regulatory process more broadly,<sup>137</sup> are worthy goals. But without greater organization, poor and working-class Americans are unlikely to engage their legislators or the administrative state effectively.

Legal interventions designed to facilitate and increase the power of countervailing mass-membership organizations are a necessary complement to

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describing “reverse hydraulics” whereby the Court rolled back campaign-finance law as it stood for decades and “political money has rushed back to newly deregulated channels like water finding its own level”); Sachs, *supra* note 18, at 165 & n.68 (discussing the limitations of lobbying reform).

135. See, e.g., Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443, 1443 (2014) (finding that “compliance with existing disclosure regulations is inconsistent and that the current regime fails to identify the most potentially influential players in the campaign finance system”). Proposals for expanded public financing or “democracy vouchers” are perhaps more promising, but they have yet to gain political traction, and, in any event, on their own, would be insufficient to counterbalance the power of wealth throughout the political system. See CAGÉ, *supra* note 18, at 253-323 (arguing for a public voucher system to give each voter an equal amount to spend in support of political parties, as a complement to other reforms); LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS — AND A PLAN TO STOP IT* 266-70 (2011) (urging the use of “democracy vouchers”).
136. In recent years, election-law scholars have increasingly turned their attention to lobbying law. E.g., Richard Briffault, *The Anxiety of Influence: The Evolving Regulation of Lobbying*, 13 ELECTION L.J. 160 (2014); Heather Gerken, *Keynote Address: Lobbying as the New Campaign Finance*, 27 GA. ST. U. L. REV. 1147, 1155, 1157 (2011); Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191 (2012); Zephyr Teachout, *The Forgotten Law of Lobbying*, 13 ELECTION L.J. 4 (2014); cf. Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1132 (2016) (analyzing the history of the Petition Clause and “argu[ing] for a stronger petition right, especially a right to consideration and response”).
137. For proposals to increase participation in the administrative state, see, for example, Nina A. Mendelson, *Foreword: Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1380 (2011); and Wendy Wagner, *The Participation-Centered Model Meets Administrative Process*, 2013 WIS. L. REV. 671, 677-78, 692. Cf. IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 15-16 (Donald R. Harris, Keith Hawkins, Sally Lloyd-Bostock & Doreen McBarnet eds., 1992) (proposing regulatory regimes more responsive to industry and consumer associations); Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339 (2012) (analyzing the ways in which federal spending programs promote the robust participation and inclusion of varied groups to further civil-rights norms); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 56 (2011) (analyzing minimalist and experimentalist models of public intervention).

proposals that have thus far dominated reform debates. Organizations permit low- and middle-income individuals to pool resources and speak with a stronger voice.<sup>138</sup> Organizations can turn out voters, involve citizens in lobbying, and influence public debate.<sup>139</sup> They can also help shape regulatory agendas, comment on proposed rules, press for agency-enforcement activity, and navigate the complicated and fragmented processes of government. When political organizations are membership groups, rather than professionally managed “check-book” organizations, their participation helps facilitate more equal political involvement, while giving Americans a chance to practice democracy on a more regular basis.<sup>140</sup>

Historians have illuminated the instrumental role mass-membership organizations played in the passage of a host of legislation – including labor legislation, the GI bill, and civil-rights legislation – even in the face of staunch opposition from elites.<sup>141</sup> Social-movement theorists and legal scholars of movements have likewise demonstrated the critical role that movement organizations played in winning changes in law and policy.<sup>142</sup> Recent quantitative empirical work supports the conclusion that organization is essential to achieving a more equitable democracy. As we have noted, Gilens finds an exception to the general rule that policymakers are far more responsive to the preferences of the wealthy: where countervailing interest-group power is exerted, government policy no longer simply tracks the preferences of the wealthy.<sup>143</sup> Rather, on issues where

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138. See Cohen & Rogers, *supra* note 20, at 424; see also Clause Offé, *Some Skeptical Considerations on the Malleability of Representative Institutions*, in ASSOCIATIONS AND DEMOCRACY 114, 126-27 (Erik Olin Wright ed., 1995) (describing the conventional view of associative action and interest-group formation); JOHN D. STEPHENS, THE TRANSITION FROM CAPITALISM TO SOCIALISM 49-50 (Michael Mann ed., 1980) (discussing the importance of labor unions and other organizations in strengthening the welfare state and facilitating movement from capitalism to socialism); David Bradley, Evelyn Huber, Stephanie Moller, François Neilsen & John D. Stephens, *Distribution and Redistribution in Postindustrial Democracies*, 55 WORLD POL. 193, 197 (2003) (“Organization in unions results in a shift of power in the market toward the union members.”).

139. See Sachs, *supra* note 18, at 152, 157, 169.

140. See *supra* notes 79-81 and accompanying text.

141. For a few examples from the rich historical literature, see LICHTENSTEIN, *supra* note 69, at 122-28, which discusses the role of labor unions in enacting wage legislation; GARY MAY, BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY (2013), which describes the role of Civil Rights movement in the passage of the Voting Rights Act; and METTLER, *supra* note 65, at 18-22, which details the role of the American Legion in the passage of the GI Bill. See also BRANCH, *supra* note 75 (providing an account of the role played by civil-rights mass-movement organizations in enacting legislative change).

142. See *infra* Part III (collecting and analyzing sociology literature); *supra* notes 28-31 (citing legal literature on social movements).

143. See GILENS, *supra* note 11, at 121-22, 157-58.

organized groups advance the preferences of low- and middle-income Americans, government outcomes more often correspond to the preferences of low- and middle-income Americans.<sup>144</sup> Consistent with these findings, the state and local governments that have been most active in attempting to redress wealth inequality of late are those operating in regions with higher levels of organization among working people.<sup>145</sup>

The legal literature frequently treats the paucity of collective organization among nonelites as an inevitable collective-action problem, a natural occurrence.<sup>146</sup> In reality, however, the lack of organization among low- and middle-income Americans – along with the strength of organization among elites – is, in part, a product of law. As Lauren Edelman and Mark Suchman have written, “[O]rganizations are not ‘real’ primordial creatures, but are social constructions, defined and given meaning in large part by legal institutions.”<sup>147</sup> Legal forms sometimes directly influence organizational behavior and performance.<sup>148</sup> On other occasions, law shapes organizational practices less directly, by contributing to an underlying cultural logic of “legal-rationality.”<sup>149</sup> As legal realists, critical legal scholars, and, more recently, the burgeoning Law and Political Economy movement, have pointed out, law constructs economic and political power.<sup>150</sup>

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144. For example, Martin Gilens found that unions are among the most important forces moving policy in a direction desired by the less well-off. *Id.* at 158.

145. See *supra* notes 85-87 (collecting political-science research on unions and governmental responsiveness).

146. See notes 231-232 and accompanying text; cf. Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1284-91 (2006) (discussing the history of capture theory in administrative law). Meanwhile, the leading scholarship on the shape of civil society focuses little attention on the role of law, instead examining how factors such as technology and evolving cultural norms have eroded connections among Americans, making them less likely to join organizations. See, e.g., MARC J. DUNKELMAN, *THE VANISHING NEIGHBOR: THE TRANSFORMATION OF AMERICAN COMMUNITY* 3-78 (2014); ROBERT D. PUTMAN, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 183-286 (2000).

147. Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOC. 479, 504 (1997) (paraphrasing W. Richard Scott, *Law and Organizations*, in *THE LEGALISTIC ORGANIZATION* 3, 12 (Sim B. Sitkin & Robert J. Bies eds., 1994)).

148. *Id.* (first citing Heather A. Haveman, *Organizational Size and Change: Diversification in the Savings and Loan Industry After Deregulation*, 38 ADMIN. SCI. Q. 20, 35-36 (1993); and then citing Hayagreeva Rao & Eric H. Neilsen, *An Ecology of Agency Arrangements: Mortality of Savings and Loan Associations, 1960-1987*, 37 ADMIN. SCI. Q. 448, 448 (1992)).

149. *Id.* (citing MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 329-41 (A.M. Henderson & Talcott Parsons trans., The Free Press 1968) (1947)).

150. For just a few examples of these insights from the legal realists, see Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 568-70 (1933), which argues that, because of

So, too, the landscape of organizational life – and the rights and power wielded by different organizations – are neither natural nor neutral.

Thus, law has played a critical role in constructing the modern corporation;<sup>151</sup> in shaping the boundaries between private firms, public agencies, collective enterprises, and nonprofit organizations;<sup>152</sup> in empowering and constraining the modern trade union;<sup>153</sup> and in enabling some forms of economic coordination, while disabling others under antitrust law.<sup>154</sup> Ultimately, it is a

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background economic and social conditions, formal freedom of contract did not reflect a truly free choice. See also Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 472, 478 (1923) (“To take this control by law from the owner of the plant and to vest it in public officials or in a guild or in a union organization elected by the workers would neither add to nor subtract from the constraint which is exercised with the aid of the government. It would merely transfer the constraining power to a different set of persons.”). From the subsequent generation of critical legal scholars, see, for example, Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 660 (2007), which emphasizes, as law’s most significant feature, “its difficult, but inevitable, accommodation of power and reason”; and Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939, 958–68 (1985), which critiques the standard treatment of law in neoclassical microeconomic theory. See also Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 17 (1988) (“[A]ll markets are based on and constituted by a structure of legal rules . . . [which] are intimately involved in shaping substantive outcomes, and therefore the distributive results of all bargaining processes.”). And from the newly revived field of Law and Political Economy, see Jedediah Britton-Purdy, Amy Kapczynski & David Singh Grewal, *Law and Political Economy: Toward a Manifesto*, LAW & POL. ECON. PROJECT (Nov. 6, 2017), <https://lpeblog.org/2017/11/06/law-and-political-economy-toward-a-manifesto> [<https://perma.cc/AEU5-HHBV>].

151. KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* 30, 35, 41 (2007) (critiquing the dominant view that corporate law is private law, defined by agency relationships and contracts).
152. John L. Campbell & Leon N. Lindberg, *Property Rights and the Organization of Economic Activity by the State*, 55 AM. SOC. REV. 634, 634–35 (1990); Edelman & Suchman, *supra* note 147, at 504 (first citing Victor Nee, *Organizational Dynamics of Market Transition: Hybrid Forms, Property Rights, and Mixed Economy in China*, 37 ADMIN. SCI. Q. 1, 2 (1992); and then citing HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 3–5 (2000)).
153. See Andrias, *supra* note 26, at 36–40; Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 169 (2015).
154. Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 380 (2020). As Katharina Pistor has recently detailed, under our current system, the legal construction of organization tends to benefit capital. Capital is coded “in institutions of private law, including property, collateral, trust, corporate, bankruptcy law, and contract law . . . [all of which] bestow critical legal attributes on the select assets that give them a comparative advantage over others in creating new and protecting old wealth.” PISTOR, *supra* note 119, at 21.

matter of political choice which organizations deserve status, protection, and rights under law.<sup>155</sup>

In circumstances when the political choice has been to facilitate poor and working people's organizations, that choice has had effect. Indeed, recent empirical work on constitutions suggests that protecting organizational rights, including the right to form labor unions and political parties, has greater effect than granting individual rights because such organizations have both incentives and means to protect substantive rights.<sup>156</sup> The labor context in particular provides numerous examples of how law can further organization building. For example, in the five months following congressional recognition of the right to organize in the 1933 National Industrial Recovery Act, 1.5 million workers joined unions, an increase described by one scholar of the period as "dramatic."<sup>157</sup> In just six years following the enactment of the NLRA in 1935, more than six million workers organized,<sup>158</sup> a massive increase from the earlier period in which law punished collective action among workers rather than facilitating it.<sup>159</sup> The subsequent passage of the Fair Labor Standards Act (FLSA) – which in its initial form gave unions a privileged position in negotiating wage minimums on an industry-by-industry basis and empowered them to bring collective actions against wage violations – further buoyed organizing among workers.<sup>160</sup> And during World War II, the tripartite War Labor Board, which afforded labor a relatively unprecedented role in setting national labor and employment policy, along with pro-union decisions from the National Labor Relations Board (NLRB), helped

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155. See PISTOR, *supra* note 119, at 21; cf. Robert W. Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 413, 418 (David Kairys ed., 2d ed. 1990) (explaining that people tend to perceive legal prescriptions as "natural and necessary" or, at least, as "basically uncontroversial, neutral, acceptable").

156. Adam S. Chilton & Mila Versteeg, *Do Constitutional Rights Make a Difference?*, 60 *AM. J. POL. SCI.* 575, 583 (2016) (explaining that the distinctive feature of organizational rights is that they aid the establishment of organizations that have the incentives and means to safeguard rights as well as the means to act strategically to protect them from government repression).

157. PHILIP DRAY, *THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA* 421 (2010).

158. See MAYER, *supra* note 89, at 23 tbl.A1.

159. On the use of courts against labor, see WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991). To be clear, our claim is not that law was the only, or even the primary, factor driving the rise and fall of unionization over the course of the twentieth century. As one of us has detailed in prior work, and as numerous scholars have documented, the legal regime was but one of multiple factors playing a role in the rise and fall of unions. See Andrias, *supra* note 26, at 13-46.

160. Andrias, *supra* note 67, at 667.

produce an explosion in union density, with the number of workers in unions growing from nine to fifteen million over the course of World War II.<sup>161</sup>

Conversely, the passage of the Taft-Hartley Act, which significantly constrained union rights, the repeal of the FLSA industry committees, and numerous subsequent doctrinal developments narrowing labor rights, correlate with a decline in union organization.<sup>162</sup> In particular, the Taft-Hartley Act altered federal policy so that it no longer expressly favored workers' collective rights, instead balancing those rights with employees' "full freedom" to *refrain* from engaging in union activity.<sup>163</sup> Moreover, the Act codified employers' right to campaign against unionization, permitted individual states to pass "right to work" laws banning union-security agreements, and limited workers' ability to exercise power over the economy by forbidding unions from engaging in secondary boycotts.<sup>164</sup> Though scholars disagree on the extent to which Taft-Hartley was a turning point or a codification of preexisting court precedent, little disagreement exists that the statutory amendments weakened labor unions, the social-movement organizations that prior law had previously helped facilitate.<sup>165</sup>

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161. See JOSIAH BARTLETT LAMBERT, "IF THE WORKERS TOOK A NOTION": THE RIGHT TO STRIKE AND AMERICAN POLITICAL DEVELOPMENT 110 (2018); Clyde Summers, Book Review, 2 U. PA. J. LAB. & EMP. L. 375, 375 (1999) (reviewing JAMES B. ATLESON, *LABOR AND THE WARTIME STATE* (1998)); Steve Fraser, *The Good War and the Workers*, AM. PROSPECT (Sept. 20, 2009), <https://prospect.org/special-report/good-war-workers> [<https://perma.cc/TEE7-RMMP>]. Membership in the United Auto Workers and the United Steelworkers increased twofold and in the Electric Workers fourfold, surpassing ninety percent, rivaling union coverage rates in the social democracies of Europe. LAMBERT, *supra*, at 106.

162. See LAMBERT, *supra* note 161, at 105.

163. 29 U.S.C. § 151 (2018).

164. *Id.* § 158(b)(4) (prohibiting secondary boycotts); *id.* § 158(c) (protecting employer speech); *id.* § 165(b) (enabling state "right to work" laws).

165. See Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?*, 47 CATH. U. L. REV. 763, 763-65 (1998). Although beyond the scope here, comparative analysis provides further support for the conclusion that law can facilitate organization among low-income groups. In numerous other jurisdictions, law facilitates organization among students and tenants, in addition to workers. For example, French law expressly recognizes and empowers a range of "representative" organizations beyond labor unions, including consumer-protection associations; environmental-protection associations; associations for parents of students; family associations; and tenants associations. See Edith Archambault, *Historical Roots of the Nonprofit Sector in France*, 30 NONPROFIT & VOLUNTARY SECTOR Q. 204, 215 (2001); Nicolas Farvaque, *The Implementation of the Emplois d'Avenir in France: The Role of Local Actors*, EUR. COMMISSION 1 (Nov. 2013), <https://ec.europa.eu/social/main.jsp?langId=en&catId=1047&newsId=2028&furtherNews=yes> [<https://perma.cc/H7BJ-R7XB>] (follow "Host Country Paper Peer Review on 'Emplois d'avenir'" hyperlink); *Associations de Locataires*, SERV.-PUB.FR (May 20, 2019), <https://www.service-public.fr/associations/vosdroits/F1218> [<https://perma.cc/A95R-Z5EL>]; *Associations de Parents D'élèves*, SERV.-PUB.FR (Oct. 18, 2019), <https://www.service-public.fr/associations/vosdroits/F1218> [<https://perma.cc/A95R-Z5EL>].

Law thus matters to the possibility of organizing for countervailing power. But the question remains, what would a legal regime explicitly designed to facilitate organizing by the poor and working class in contexts beyond labor look like? We offer ways to approach that question in the next Part, and to animate the analysis to come, we conclude this Part with a thought experiment—by imagining what a law designed to facilitate organizing would look like in a real-world context. For these purposes, consider housing. Today, when local zoning commissions, city councils, state legislatures, state and federal agencies, and Congress discuss housing policy, real-estate developers and landlords spend millions on lobbying.<sup>166</sup> Affluent, single-family home owners turn out in force.<sup>167</sup> The mortgage and construction industries are typically active as well.<sup>168</sup> But Section 8 recipients, poor renters, and the homeless—a group that is growing again after a decade of decline<sup>169</sup>—rarely participate equally in the discussion, let alone exercise significant influence over decisionmaking.<sup>170</sup> Meanwhile, rents and home purchase prices are rising much faster than income, with the median home

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public.fr/associations/vosdroits/F1390 [https://perma.cc/F7VC-4GMX]; *Associations Reconnues Représentatives*, SERV.-PUB.FR, https://www.service-public.fr/associations/vosdroits/N19508 [https://perma.cc/22H7-7TY2]. Both German law and British law facilitate the organization of tenant unions by, *inter alia*, providing for formal recognition of such unions and mandating that landlords provide contact information of renters to such unions. See Landlord & Tenant Act 1985, c. 70, § 29; Housing and Planning Act 2016, c. 22, § 29A; *Welcome to Berlin Tenants' Association*, BERLINER MIETERVEREIN, https://www.berliner-mieterverein.de/sprachen/englisch.htm [https://perma.cc/T3R7-P4UK]. And Canadian law contributes significantly to the organization of student unions through a series of statutes that are often patterned on the labor code. See Finn Makela & Sophie Audette-Chapdelaine, *The Legal Regulation of University Student Associations in Canada*, 22 EDUC. & L.J. 267, 287–91 (2013).

166. See *Agency Profile: Dept of Housing & Urban Development*, OPENSECRETS, https://www.opensecrets.org/lobby/agencysum.php?id=035 [https://perma.cc/E6EQ-356V].
167. See Roderick M. Hills, Jr. & David Schleicher, *Building Coalitions out of Thin Air: Transferable Development Rights and "Constituency Effects" in Land Use Law*, 12 J. LEGAL ANALYSIS 79, 80 (describing the political economy of housing policy).
168. For data on lobbying by these industries, see *Construction: Lobbying, 2020*, OPENSECRETS, https://www.opensecrets.org/industries/lobbying.php?ind=C [https://perma.cc/4ALW-52ZC]; *Mortgage Bankers & Brokers: Lobbying, 2020*, OPENSECRETS, https://www.opensecrets.org/industries/lobbying.php?cycle=2020&ind=F4600 [https://perma.cc/8XRY-UBWC].
169. *The State of Homelessness in America*, NAT'L ALLIANCE END HOMELESSNESS, https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-report-legacy [https://perma.cc/LR8Y-CYWJ].
170. See Hills & Schleicher, *supra* note 167, at 80–81; cf. MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016) (following families in Milwaukee as they struggle to maintain housing).

price in some 200 cities approaching \$1 million and “almost half of all renters pa[ying] more than 30 percent of their income in rent.”<sup>171</sup>

In numerous cities and states, faced with unaffordable rents and substandard housing, tenants are organizing.<sup>172</sup> Indeed, in response to mass unemployment and economic distress resulting from the COVID-19 pandemic, tenant groups have organized numerous protests and rent strikes, while also pushing for new laws that commit funds to housing construction and restrict the unfettered ability of landlords to raise rents.<sup>173</sup> But the groups are typically local, they struggle for funding, and they are most active in a few urban centers like Los Angeles, San Francisco, and New York.<sup>174</sup> In many areas of the country, particularly in suburbs and rural communities, there is little organization among tenants or the homeless, and there is no legal infrastructure for their mobilization and political success.

Imagine, then, a new law of tenants’ unions that would foster incipient organizing. What should such a law look like? The discussion below suggests that the law should explicitly convey that substandard and unaffordable housing is an *injustice* and that tenants have a *collective right to organize* to achieve fair housing for all. The legal regime should guarantee *safe spaces* in which tenants and organizers could meet and discuss concerns about their housing conditions; give organizers the right to *access* properties to engage tenants in organizing; and

171. Tanza Loudonback, *The US Has More Million-Dollar Real Estate Markets than Ever—Here Are 23 Cities Where the Typical Home Will Be \$1 Million by Next Year*, BUS. INSIDER (Nov. 16, 2018, 1:16 PM), <https://www.businessinsider.com/us-cities-median-home-value-1-million-san-francisco-california-2018-8> [<https://perma.cc/NT59-KNLW>]. “Almost all the new rental housing built in the past decade has been high-end luxury units . . . . The number of renters paying over half their income for rent is expected to increase from 11.8 million in 2015 to 13.1 million in 2025.” Peter Dreier, *Housing and the Working Poor*, DEMOCRACY (Mar. 29, 2016, 4:30 PM), <https://democracyjournal.org/arguments/housing-and-the-working-poor> [<https://perma.cc/6TJE-SUJ9>].

172. See *2018 Annual Report*, NAT’L LOW INCOME HOUSING COALITION (2018), [https://nlihc.org/sites/default/files/AR-2018/Annual-Report\\_2018.pdf](https://nlihc.org/sites/default/files/AR-2018/Annual-Report_2018.pdf) [<https://perma.cc/TN74-TL96>]; Lillian M. Ortiz, *Tenant Power: Organizing for Rent Strikes and Landlord Negotiations*, SHELTERFORCE (July 30, 2018), <https://shelterforce.org/2018/07/30/tenant-power-organizing-for-rent-strikes-and-landlord-negotiations> [<https://perma.cc/3T7Q-YC2U>]; Tobias, *supra* note 35.

173. See Samuel Stein, *Tenants Won This Round*, JACOBIN (June 18, 2019), <https://www.jacobin-mag.com/2019/06/new-york-housing-tenants-universal-rent-control> [<https://perma.cc/DPQ7-KM7N>].

174. See, e.g., *Who We Are*, HOUSING JUST. FOR ALL, <https://www.housingjusticeforall.org/who-we-are-1> [<https://perma.cc/X5DS-STSZ>]; see also Jimmy Tobias, *A New Housing-Rights Movement Has the Real-Estate Industry Running Scared*, NATION (Feb. 9, 2018), <https://www.thenation.com/article/archive/a-new-housing-rights-movement-has-the-real-estate-industry-running-scared> [<https://perma.cc/ABG7-L3T6>] (describing local efforts and recognition among organizers of the need to build a national campaign).



provide organizers with *information*, such as tenants' names and contact information, as well as information about the housing market. As important, the law should create new *mechanisms to fund* tenant organizations, supplementing charitable donations with a dues system paid through rent check-off and subsidies from the government and landlords themselves. It should provide *resources* to train tenant leaders and allow them leave from their jobs so they could engage in housing organizing and policy work. It should allow tenants to *bargain collectively* with their landlords about problems in their buildings, while also giving tenant organizations a seat at the table during administrative processes regarding housing policy. By creating federated organizations, the tenant organizations could develop sufficient power to challenge local, national, and multinational corporate entities that influence housing policy.

Such organizations could also deploy their newly developed political power in ways that go beyond the particular issues around which they formed: just as labor unions speak across a range of policy questions broader than "labor" issues, tenants' unions could as well, using their resources to further broader-based political organizing. The law should protect such "bargaining for the common good."<sup>175</sup> It also should guarantee the right to protest and to strike, free from retaliation by the government or the private landlord.<sup>176</sup>

To be sure, this legal regime would not spontaneously or inevitably create robust social-movement organizations with political power at the local, state, and federal level. Many factors beyond the reach of law influence the ability of social-movement organizations to form and to thrive, including political opportunities, underlying economic trends, leadership capacity, and the commitment and energy of individual organizers.<sup>177</sup> But law matters, and in the next Part we suggest a host of ways in which law can be structured to facilitate organizing for countervailing power.

### III. FACTORS AND FACILITATORS

Having illustrated in the last Part the importance of stronger countervailing social-movement organizations and the plausibility of legal intervention to encourage their growth, in this Part, we show how law can facilitate organization

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175. See Joseph A. McCartin, *Bargaining for the Common Good*, DISSENT (Spring 2016), <https://www.dissentmagazine.org/article/bargaining-common-good-community-union-alignment> [<https://perma.cc/28YW-PXRY>].

176. In turn, the law might require the organizations to commit to independence, to democratic governance, to financial disclosure, and to nondiscrimination, inclusion, and a duty of fair representation. For a brief discussion of duties, see *infra* note 384.

177. See *supra* notes 41-42; see also McAdam, *supra* note 40, at 24-25 (describing the concept of "political opportunities").

in contexts that are populated by low- and middle-income Americans and rife with exploitation and power imbalances. To do so, we draw from the social-science literature, as well as from the experiences of labor law, to offer a more nuanced and theoretically grounded picture of how a different set of legal choices could help facilitate conditions critical to organizing success. We undertake this analysis with the recognition that while this literature is revealing and suggestive, it does not aspire to be firmly predictive.<sup>178</sup> We begin, in other words, with the premise of Saul Alinsky’s seminal work on organizing theory: “At no time in any discussion or analysis of mass movements, tactics, or any other phase of the problem, can it be said that if this is done then that will result. The most we can hope to achieve is an understanding of the probabilities consequent to certain actions.”<sup>179</sup> In this spirit, the discussion that follows aims to illuminate a series of legal interventions that would make organizing by the poor and working class more probable even if not certain.

### A. Framing

A prominent strand in the social-movement literature stresses the importance of a symbolic or social-psychological requisite for successful collective action.<sup>180</sup> Put simply, this school of thought is concerned with understanding the cognitive work that goes into translating the raw “events or occurrences” of everyday life into issues around which people organize collectively.<sup>181</sup> This body of work thus examines the role played by “collective action frames,” which are “action-oriented sets of beliefs and meanings that inspire and legitimate the activities and campaigns of a social movement organization.”<sup>182</sup>

Although the framing literature is now vast, the leading work in the field can be productively condensed by focusing on four core aspects – or “tasks” – of collective-action frames: *diagnostic* framing (which involves both problem

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178. See D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2121 (2012) (referring to randomized control trials as the “gold-standard” for empirical research).

179. SAUL D. ALINSKY, *RULES FOR RADICALS: A PRACTICAL PRIMER FOR REALISTIC RADICALS* 17 (1971).

180. See generally Pedriana, *supra* note 40, at 1719 (analyzing the “legal framing of the women’s movement in the 1960s” to “further develop theoretical knowledge on the cultural and symbolic processes that enable, constrain, and transform social movements”).

181. David A. Snow, E. Burke Rochford, Jr., Steven K. Worden & Robert D. Benford, *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464, 464 (1986).

182. Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611, 614 (2000).

identification and blame attribution and which is alternatively named “injustice” framing in the literature); *prognostic* framing (which involves developing a potential collective approach to addressing the identified problem); *motivational or agency* framing (through which the collective efficacy of the group to carry out the approach is implied); and *identity* framing (in which the collective identity of the group that will carry out the approach is developed).<sup>183</sup> Taken as a whole, the literature suggests that successful political organizing is enabled by collective-action frames that diagnose injustices, suggest collective solutions, motivate collective responses, and generate collective identity. In this Section, we review each of these four core framing tasks and then move to discuss ways in which law might be deployed to facilitate each of them.

According to Robert Benford and David Snow, the first thing a collective-action frame must do if it is to enable collective action is help potential-movement participants diagnose some set of conditions as a *problem* that ought to be remedied, rather than as a set of conditions that, although undesirable, is a natural, perhaps unavoidable part of life.<sup>184</sup> For William Gamson, such diagnostic work in the context of political action and mobilization necessarily involves diagnosing a set of conditions as an *injustice*.<sup>185</sup> This is critical because injustice, unlike a mere problem, brings forth what Gamson calls “hot cognition, not merely an abstract intellectual judgment about what is equitable,” but “righteous anger that puts fire in the belly and iron in the soul.”<sup>186</sup> For both sets of authors, problem identification is not enough: diagnosis must also involve blame attribution. In Benford and Snow’s words, “[s]ince social movements seek to remedy or alter some problematic situation or issue, it follows that directed action is contingent on identification of the source(s) of causality, blame, and/or culpable agents.”<sup>187</sup> For Gamson, “[a]n injustice frame requires a consciousness of motivated human actors who carry some of the onus for bringing about harm and suffering.”<sup>188</sup>

Gamson, moreover, usefully distinguishes between different types of agents that might be blamed for the injustice diagnosed in a collective-action frame. At one end of the spectrum lie abstract, structural forces like the economic system, the political order, and the government. At the other end of the spectrum are individual human actors like a particular manager or landlord. Blaming an abstraction like the market or the political system risks diffusing the “indignation”

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183. See *infra* notes 185-200 and accompanying text.

184. See Benford & Snow, *supra* note 182, at 615-16.

185. See WILLIAM A. GAMSON, TALKING POLITICS 7 (1992).

186. *Id.* at 32.

187. Benford & Snow, *supra* note 182, at 616.

188. GAMSON, *supra* note 185, at 7.

that Gamson finds essential to successful diagnostic framing. On the other hand, blaming particular agents risks shifting attention from structural forces that are legitimately responsible for people's suffering. Thus, Gamson concludes that frames, to facilitate collective action, must work to attribute blame somewhere between broad, abstract structural forces and discrete human actors. As he writes:

To sustain collective action, the targets identified by the frame must successfully bridge abstract and concrete. By connecting broader socio-cultural forces with human agents who are appropriate targets of collective action, one can get the heat into the cognition. By making sure that the concrete targets are linked to and can affect the broader forces, one can make sure that the heat isn't misdirected in ways that will leave the underlying source of injustice untouched.<sup>189</sup>

So, perhaps, the injustice of low wages is laid at the feet of neither capitalism nor the factory superintendent, but the corporation that controls the employment relationship or even the corporations that make up the relevant economic sector. And the injustice of high rent and poor living conditions is laid at the feet of neither the market nor a particular building owner, but the landlords who have undue influence at the city council and state legislature.

Once an injustice is identified, and blame properly attributed, a successful collective-action frame then must identify and communicate an approach to remedying the injustice: it must, according to Benford and Snow, "articulat[e] . . . a proposed solution to the problem, or at least a plan of attack, and the strategies for carrying out the plan."<sup>190</sup> Importantly, although there must be a connection between prognosis and diagnosis—how to address a problem depends on the nature of the problem to be addressed—the articulation of injustice and attribution of blame narrows but does not determine how to address the injustice.<sup>191</sup> This point may be obvious, but it is worth noting. Take the injustice of low wages in the fast-food industry as attributed to the five largest corporations controlling that industry. A range of approaches to remedying the injustice are plausible. Workers might, for example, sue the corporations under wage-and-hour laws, picket their restaurants as a means of pressuring the corporations, or organize into unions and attempt to bargain collectively wage increases. Any of these approaches would constitute a plausible approach to the injustice. The prognostic work of a collective-action frame involves articulating one or

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189. *Id.* at 33.

190. Benford & Snow, *supra* note 182, at 616.

191. See *id.* at 616-17; see, e.g., David A. Snow & Scott C. Byrd, *Ideology, Framing Processes, and Islamic Terrorist Movements*, 12 *MOBILIZATION: INT'L Q. REV.* 119, 126-27 (2007).

more of these approaches: this allows participants to formulate a viable plan of attack.

The first two framing tasks—diagnostic and prognostic—involve cognitive work about dynamics external to the mobilizing group: what is the injustice and who is causing it. The second two tasks—motivational and identity—involve cognitive work internal to the mobilizing group. This is work focused on bringing participants into motion and struggle, in an effort to build a collective identity. For Benford and Snow, motivational framing involves a call to action, the “construction of appropriate vocabularies of motive” that provide prods to action by, among other things, overcoming both the fear of the risks often associated with collective action and Olson’s vaunted free-rider problem.<sup>192</sup> Gamson, who names this framing task “agency,” describes its function in terms of efficacy. Thus, to fulfill the agency task, a collective-action frame must give participants a sense both that they are capable of redressing the injustice in question and that their opposition is vulnerable to challenge. The frame must imply that “it is possible to alter conditions or policies through collective action” and must “deny the immutability of some undesirable situation.”<sup>193</sup> In even simpler terms, the motivational task involves a communication to potential participants that “we can do this.”

As the above suggests, however, there remains a final task for the frame: defining, or creating, the “we” that can successfully act collectively against the articulated injustice. Gamson names this framing task “identity”: the process by which a collective identity among movement participants is constructed.<sup>194</sup> Indeed, in stressing the importance of this kind of collective identity, this aspect of framing theory is resonant with other strands of social-movement theory which are centered around the observation that successful movement building and mobilization are enabled by the existence of a collective identity among movement participants. For example, Bert Klandermans, a leading scholar of identity and movement participation, writes that “[t]he basic hypothesis regarding collective identity and movement participation is fairly straightforward: a strong identification with a group makes participation in collective political action on behalf of that group more likely.”<sup>195</sup>

Here, the identity-construction task of a collective-action frame is connected closely to the blame-attribution task. As Gamson explains, in the political

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192. Benford & Snow, *supra* note 182, at 617.

193. GAMSON, *supra* note 185, at 7.

194. *Id.* at 7-8.

195. Bert Klandermans, *The Demand and Supply of Participation: Social-Psychological Correlates of Participation in Social Movements*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS* 360, 364 (David A. Snow, Sarah A. Soule & Hanspeter Kriesi eds., 2004).

context, collective identities are often oppositional: the “we” exists in opposition to a “they,” where “they” are the agents responsible for the injustice.<sup>196</sup> Thus, if the injustice of low wages paid to fast-food workers is attributed to a particular manager, the “we” who can fight that injustice will be a narrow group, probably just those impacted by this particular manager’s actions. On the other hand, if low wages are attributed to the five largest corporations in the fast-food industry, the “we” can be all fast-food workers.

This is not to imply that collective identity flows ineluctably from successful blame attribution. However, collective-action frames can contribute to collective-identity construction, not only by identifying an oppositional “they,” but also by increasing the *salience* of certain aspects of potential participants’ identities. Because identities “exist in a hierarchy of salience,” the more salient an aspect of identity is, the more likely it is that the individual will act in accordance with that identity.<sup>197</sup> For example, all individuals who live in a certain neighborhood will share a collective identity of neighborhood resident. This identity may remain largely irrelevant for much of an individual’s life and never form the basis for action of any kind. But, as Klandermans teaches, if the government constructs a waste-disposal plant in the neighborhood, “[c]hances are that within a very short time the collective identity of the people living in that neighborhood becomes salient.”<sup>198</sup> Finally, we know from Bernd Simon’s work that a shared sense of unjust treatment can increase the salience of a collective identity that is the basis of that unjust treatment.<sup>199</sup> For example, racial- and religious-based discrimination has functioned throughout history to increase the salience of collective identities based around racial- and religious-group membership.<sup>200</sup> Thus, by framing certain events or occurrences as injustices, a frame can increase the salience of a collective identity built around the shared experience of that injustice. Framing low wages in the fast-food industry as an injustice suffered by all fast-food workers can contribute to the activation of a collective identity among fast-food workers. Framing high rents as an injustice suffered by tenants in a city can activate a collective identity of city tenants.

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196. GAMSON, *supra* note 185, at 7–8.

197. Sheldon Stryker & Peter J. Burke, *The Past, Present, and Future of an Identity Theory*, 63 SOC. PSYCHOL. Q. 284, 286, 291 (2000).

198. Klandermans, *supra* note 195, at 364.

199. Bernd Simon, *Individuals, Groups, and Social Change: On the Relationship Between Individual and Collective Self-Interpretations and Collective Action*, in INTERGROUP COGNITION AND INTERGROUP BEHAVIOR 257, 257–58 (Constantine Sedikides, John Schopler & Chester A. Insko eds., 1998).

200. See, e.g., MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW 31–32 (1997).

In sum, then, theorists posit that successful collective action can be enabled by collective-action frames that accomplish four interrelated tasks: they diagnose an injustice and attribute blame for it; they elaborate a means of remedying the injustice; they motivate participants to fight for that remedy; and they help activate the identity of the collective who will do the fighting. As some social-movement theorists recognize, moreover, law has the capacity to serve as a powerful collective-action frame. Indeed, civil-rights law is often identified in the social-movement literature as a “master frame”—a frame that “resonate[s] deeply across social movements and protest cycles.”<sup>201</sup> In the workplace-rights context, legal scholar Jennifer Gordon describes the powerful way that rights have served as a collective-action frame:

The idea that employers were *supposed* to be acting differently—that in paying so little and demanding so much they were ignoring a set of established norms, codified as rights—suggested a less individualized, more systemic explanation of the problems immigrant[] [workers] faced in trying to earn enough money to support themselves and their families. . . . If the problem was systemic, immigrant[] [workers] would need to respond in kind.<sup>202</sup>

And workplace statutes can also fulfill the diagnostic and prognostic work of collective-action framing.<sup>203</sup>

But how might we tailor legal interventions in a manner designed to enable laws to serve as collective-action frames more generally? We think the ideal way to do so is as follows: couple statutory provisions of substantive standards with the right to organize collectively to enforce those standards and to achieve greater substantive protections in the future. For purposes of this discussion, imagine a statute that affirmed a right to adequate and sustainable housing, granted tenants the right to just-cause eviction, and also granted tenants a right to organize unions.<sup>204</sup> The organizing right would include, among other things, the right of organizers to access tenant contact information; the right of organizers to come onto building property to speak to tenants and a free building space for the tenants’ union to meet; a robust antiretaliation guarantee; an obligation for the

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201. Pedriana, *supra* note 40, at 1725.

202. GORDON, *supra* note 30, at 171-72.

203. See Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2723-25 (2008).

204. See Alexander, *supra* note 44, at 248 (showing how housing movements are constructing “the human right to housing in American law by establishing through private and local laws a right to remain, a right to adequate and sustainable shelter, a right to housing in a location that preserves cultural heritage, a right to a self-determined community, and a right to equal housing opportunities for nonproperty owners”).

building owner (or other relevant economic actor, such as real-estate investment trusts) to bargain with a union once it was formed; and the right of the union to a seat at the table in administrative processes regarding housing policy. Such a statute has the potential to fulfill all four framing tasks.

With respect to diagnosis, the statute would clearly identify an injustice and attribute blame: by banning evictions without cause, the law identifies such evictions as unjust; by making building owners liable for damages, the law attributes blame to the owners. Thus, the provision of right and remedy might in themselves accomplish the diagnostic-framing task. But the law could go much further in the direction of diagnostic framing. For example, in the legislative findings or statement of purpose, the law could explicitly identify evictions without cause as an injustice by detailing the harms such evictions cause to families. The law might also name evictions without cause as one example of a broader injustice, namely the power of landlords unchecked by the *collective* strength of tenants. In either case, the findings and purposes can list the unjust benefits that building owners extract from without-cause evictions and can directly name owners as the source of the problem. They could go on to detail other deleterious consequences that flow from unchecked landlord discretion.

Crucially, given its status as a powerful source of social and political legitimacy, the law can offer *convincing* diagnoses.<sup>205</sup> As a complement to diagnoses made by tenant organizers themselves, a statutory pronouncement that evictions without cause are illegal and that building owners are legally liable for violating this norm provides an additional source of diagnosis, and one that many tenants would likely credit. These suggestions, moreover, are not at all unprecedented. For example, when Congress enacted the Wagner Act in 1935, it identified an injustice and attributed blame explicitly in the statute. Thus, 29 U.S.C. § 151 states that “[t]he denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining” had the effect of, inter alia, “depressing wage rates and the purchasing power of wage earners.”

With respect to prognosis, the statutory grant of organizing rights would articulate for potential participants a viable plan of attack. Here, again, the grant of rights itself might be sufficient. A law that marries a substantive right with a protected right to engage in collective action communicates that organizing is a means of remedying the injustice identified in the statute. Again, too, the law might go further in the direction of accomplishing the framing task. In particular, the findings and statement of purpose could identify the legislature’s faith in

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205. See generally Pedriana, *supra* note 40, at 1726 (explaining how legal rights have a “powerful impact on how grievances and objectives are conceived, legitimized and acted upon in the American political system”).



the power of collective action as a means of carrying out its legislative goals. In our hypothetical statute, this might include a statement that substantive standards – the right to just-cause evictions – are generally best enforced when the protected class is organized collectively. More broadly, the findings and purposes section of the law might state that organizing would balance bargaining power between landlords and tenants and thus enable tenants to accomplish important goals beyond the protection of just-cause eviction. Here, again, there is historical precedent for law fulfilling the task of prognostic framing. Having articulated injustice and attributed blame, the Wagner Act’s findings section moves on to set out a viable plan of attack for workers. Thus, § 151 states:

It is hereby declared to be the policy of the United States to . . . encourag[e] the practice and procedure of collective bargaining and by protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Our hypothetical statute can also perform the task of motivational framing. As the above discussion reveals, the task involves a combination of “prodding” participants into action, helping them overcome fears related to participation, and convincing them of their efficacy in combating the named injustice. With respect to motivating action, our statute signifies legal legitimation of and thus legal support for the tenants’ effort to organize unions in order to better their housing conditions. Such legitimation can motivate subsequent organizing efforts. For example, labor organizers successfully used congressional protection for the right to organize as a call to action. Thus, John L. Lewis famously translated legal protection for the right to organize into a slogan that was instrumental to the massive campaign of the United Mine Workers of America to unionize the coal mines, “The President wants you to join a union.”<sup>206</sup> Our statute also can help overcome fears of participation by offering robust antiretaliation provisions, including significant damages for violations. And the statute can contribute to the interrelated goals of demonstrating the oppositions’ vulnerability and participants’ efficacy. The existence of the statutory right coupled with meaningful remedies is a step in the direction of establishing that landlords are vulnerable to challenge. And, as discussed above, the grant of access rights to organizers strengthens this function of the law.

Finally, the hypothetical statute can contribute to the construction – or activation – of a collective identity. By making landlords legally liable for evictions

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206. See, e.g., Nelson Lichtenstein, *Workers’ Rights Are Civil Rights: How to Put the Labor Movement Back at the Center of American Political Culture*, WORKINGUSA, Mar.-Apr. 1999, at 57, 59.

without cause, and by granting tenants organizing rights, the statute establishes a “we” and a “they.” “We” are the tenants protected by the statute; “they” are the landlords governed by it. Of course, much of the identity-activation work will occur – if it does – as a product of organizing and struggle that the statute might itself facilitate. As tenants begin to exercise the collective rights that the statute provides and engage in contestation with their landlords, it is likely that the collective identity of “tenant” will become more salient. The statute’s contribution to this work should not be underestimated.

The hypothetical tenant-organizing statute imagined here would, of course, have analogues in multiple contexts. In the labor context, it would involve granting both new substantive standards – say, a just-cause dismissal guarantee – coupled with more robust protections for organizing than exist under current law. In the debtor context, it might involve a substantive right – cancellation of student debt – combined with a new explicit right to organize a debtor’s union.

A broader observation is in order before moving on. The ability of a law like this to accomplish the four core framing tasks is enhanced by the law’s *explicitness*. Coupling the grant of a substantive right with explicit protection for collective action makes clear the law’s determination that participants ought to organize to fight the injustice that the law condemns. Statutory findings and statements of purpose that name injustices and identify blameworthy agents make it even more likely that the law will effectively provide a diagnostic frame. So too, explicit legislative expression of support for organizing as a means of addressing injustice will increase the effectiveness of the law as a prognostic frame.

### B. Resources

While the foregoing accounts of mobilization and organization stress symbolic factors, the literature suggests that resources of various kinds are equally important. John D. McCarthy and Mayer N. Zald, for example, argue that traditionally powerless groups have capacity to sustain movement activity only if they are able to aggregate resources through social-movement organizations.<sup>207</sup>

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207. See McCarthy & Zald, *supra* note 46, at 1216; John D. McCarthy & Mayer N. Zald, *The Trend of Social Movements in America: Professionalization and Resource Mobilization* (Univ. of Mich. Ctr. for Research on Soc. Org., Working Paper No. 164, 1973), <https://deepblue.lib.umich.edu/bitstream/handle/2027.42/50939/164.pdf> [<https://perma.cc/7WL8-P487>]; see also Bob Edwards & John D. McCarthy, *Resources and Social Movement Mobilization*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS*, *supra* note 195, at 116, 142 (describing the dynamic, sometimes reciprocal, process of resources supporting collective action which, in turn, builds more resources); Mayer N. Zald, *Looking Backward to Look Forward: Reflections on*

Resources enable movements to form and then to engage in effective political action and protest.<sup>208</sup> They help movements “convert[] adherents into constituents and maintain[] constituent involvement.”<sup>209</sup> Constituents, in turn, create more resources for the movement.<sup>210</sup> Ultimately, resource aggregation is critical to the ability of movements to persist over time.<sup>211</sup> Daniel M. Cress and David A. Snow have observed that “fluctuation in the level of discretionary resources accounts . . . for variation in the activity levels of social movements.”<sup>212</sup> Sarah Soule, Doug McAdam, John McCarthy, and Yang Su have found that resources matter more for movement formation and collective protest than numerous other factors, including political opportunities.<sup>213</sup>

Empirical work demonstrating the importance of resources cuts across populations, time periods, and geography.<sup>214</sup> To take just a few examples, sociologists have demonstrated the importance of resources to organizing success among national women’s and civil-rights organizations in the mid-twentieth century in the United States;<sup>215</sup> homelessness-rights organizations in cities in the late 1980s and early 1990s;<sup>216</sup> environmental organizations in both the United States and Western Europe;<sup>217</sup> state-level suffrage organizations in the

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*the Past and Future of the Resource Mobilization Research Program*, in *FRONTIERS IN SOCIAL MOVEMENT THEORY* 326 (Aldon D. Morris & Carol McClurg Mueller eds., 1992) (exploring the developments of resource-mobilization research).

208. See Debra C. Minkoff, *The Sequencing of Social Movements*, 62 *AM. SOC. REV.* 779 (1997); Sarah A. Soule, Doug McAdam, John McCarthy & Yang Su, *Protest Events: Cause or Consequence of State Action? The U.S. Women’s Movement and Federal Congressional Activities, 1956-1979*, 4 *MOBILIZATION: INT’L J.* 239 (1999).

209. McCarthy & Zald, *supra* note 46, at 1221.

210. *Id.*

211. McADAM, *supra* note 41, at 22-23, 43-48, 54-56.

212. Daniel M. Cress & David A. Snow, *Mobilization at the Margins: Resources, Benefactors, and the Viability of Homeless Social Movement Organizations*, 61 *AM. SOC. REV.* 1089, 1090 (1996).

213. Soule et al., *supra* note 208, at 249-54.

214. See Edwards & McCarthy, *supra* note 207, at 116-17 (surveying literature).

215. DEBRA C. MINKOFF, *ORGANIZING FOR EQUALITY: THE EVOLUTION OF WOMEN’S AND RACIAL-ETHNIC ORGANIZATIONS IN AMERICA, 1955-1985*, at 31-33, 37-40 (1995); Soule et al., *supra* note 208, at 249-54.

216. Cress & Snow, *supra* note 212, at 1107.

217. RUSSELL J. DALTON, *THE GREEN RAINBOW: ENVIRONMENTAL GROUPS IN WESTERN EUROPE* 7 (1994); Paul McLaughlin & Marwan Khawaja, *The Organizational Dynamics of the U.S. Environmental Movement: Legitimation, Resource Mobilization, and Political Opportunity*, 65 *RURAL SOC.* 422, 437 (2000).

nineteenth century;<sup>218</sup> shantytown residents in Chile during the Pinochet regime;<sup>219</sup> and antiapartheid activists in South Africa.<sup>220</sup>

Social-movement organizers recognize that a principal antecedent task to effective collective action is resource aggregation.<sup>221</sup> So do their political opponents. Consider the battle over union funding that has persisted over many decades. Though union leaders and union opponents agree on little, they share a conviction that funding is essential to the success of the labor movement and its impact on politics.<sup>222</sup>

While early work treated resources as an undifferentiated category, subsequent studies offer varying taxonomies of resources, tangible and intangible, upon which movements depend.<sup>223</sup> Bob Edwards and John D. McCarthy provide a fivefold typology: moral, cultural, social organization, human, and material.<sup>224</sup> Michael McCann discusses “instrumental” resources, which can be manipulated or exchanged in a direct way, and “movement culture” resources, which are associational bonds that contribute to effective communication and solidarity.<sup>225</sup> Cress and Snow focus on four categories: moral, material, human, and informational resources.<sup>226</sup> Though the literature has not settled on a single

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218. Holly J. McCammon, *Stirring up Suffrage Sentiment: The Formation of the State Woman Suffrage Organizations, 1866-1914*, 80 SOC. FORCES 449, 472 (2001).

219. CATHY LISA SCHNEIDER, SHANTYTOWN PROTEST IN PINOCHET'S CHILE 201 (1995).

220. ANTHONY W. MARX, LESSONS OF STRUGGLE: SOUTH AFRICAN INTERNAL OPPOSITION, 1960-1990 (1992).

221. See, e.g., KIM BOBO, JACKIE KENDALL & STEVE MAX, ORGANIZING FOR SOCIAL CHANGE: A MANUAL FOR ACTIVISTS IN THE 1990S, at 194-200 (2d ed. 1996); LEE STAPLES, *Analyze, Strategize, and Catalyze*, in ROOTS TO POWER: A MANUAL FOR GRASSROOTS ORGANIZING 123, 133-35 (3d ed. 2016).

222. See SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT (2014) (detailing history of right-to-work movement); Catherine L. Fisk & Martin H. Malin, *After Janus*, 107 CALIF. L. REV. 1821 (2020) (collecting data on the need for fair share fees to the success of labor organizations); Hertel-Fernandez et al., *supra* note 83, at 37 (demonstrating political-party preferences related to right-to-work and collective-bargaining laws).

223. John D. McCarthy & Mayer N. Zald, *The Enduring Vitality of the Resource Mobilization Theory of Social Movements*, in HANDBOOK OF SOCIOLOGICAL THEORY 533, 544-45 (Jonathan H. Turner ed., 2001).

224. Edwards & McCarthy, *supra* note 207, at 117.

225. MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 109-110 (1994).

226. Cress & Snow, *supra* note 212, at 1094; see also Daniel M. Cress & David A. Snow, *The Outcomes of Homeless Mobilization: The Influence of Organization, Disruption, Political Mediation, and Framing*, 105 AM. J. SOC. 1063, 1067 (2000) (focusing on material resources including money, office space, and supplies and their effect on outcomes sought by homeless social-movement organizations).

way of unpacking the category of resources, certain types of resources repeatedly emerge as essential. These include: funding, informational resources, human resources, and spaces—physical and virtual. Other intangible resources, such as credibility and legitimacy, are important as well.

Obtaining sufficient resources to sustain effective organizing and political activity is a significant challenge for social-movement organizations.<sup>227</sup> As Mancur Olson warned in his classic text, when an organization primarily delivers collective goods, individuals will not, on their own, bear the costs of obtaining such goods.<sup>228</sup> To some extent, this familiar account is overdrawn, as many individuals participate in social movements for ideological or moral reasons, even where rational-choice theorists would predict indifference.<sup>229</sup> Nonetheless, few individuals can or will bear the full costs of sustaining social movements. The problem is particularly acute among communities with limited resources.<sup>230</sup>

Classic public-choice theory has long recognized the organizational advantages of high-income, well-organized constituencies in the legislative and regulatory process, but it largely treats these advantages as a given.<sup>231</sup> On this account, certain interests have an inevitable advantage over a dispersed public when it comes to resources. Law might shield against these advantages, for example through limiting campaign contributions or adjusting judicial review of administrative action, but law is not itself responsible for creating the advantages.<sup>232</sup> As the following Section demonstrates, however, the resource problem faced by poor people's movements is already fundamentally shaped by law—and can be reshaped by legal intervention.

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227. See Edwards & McCarthy, *supra* note 207, at 117.

228. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 33-35 (1965).

229. See Rubin, *supra* note 28, at 16 (describing how “[s]ocial movement scholars soon became aware that the resource-mobilization approach failed to account for . . . [ideological and moral] motivations”).

230. SCHLOZMAN ET AL., *supra* note 56, at 13-16.

231. See George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3, 5 (1971).

232. On campaign-finance regulation, see *supra* notes 134-137 and accompanying text. On the role of courts in addressing administrative capture, see, for example, Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 *CHI.-KENT L. REV.* 1039 (1997); and Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 *ADMIN. L. REV.* 1139, 1151-55 (2001). See also *supra* notes 23-24 (citing recent scholarship on how ordinary citizens and interest groups get involved in the administrative process).

1. *Funding*a. *Charitable Donations: Limits and Pitfalls*

The most obvious resource needed by social-movement organizations for their operation and survival is money. Currently, the law facilitates fundraising primarily through grants of nonprofit status by state governments and tax-exempt status by the Internal Revenue Service to qualified organizations.<sup>233</sup> Foundations, philanthropies, and individual donors contribute to qualified nonprofit organizations of their choice. In the process, donors reduce their own tax burden. Most rights organizations in the United States are organized under section 501(c)(3) of the tax code<sup>234</sup> and receive the bulk of their funding from large donations by foundations and philanthropies.<sup>235</sup>

Legal-mobilization scholars largely have viewed this external funding as indispensable to successful rights litigation and social-movement building.<sup>236</sup> Early social-movement theory also emphasized the extent to which professional, philanthropically funded social-movement organizations contributed to movement building in the 1960s and 1970s.<sup>237</sup>

Although the value of donations to low-resourced organizations is substantial, more recent work has demonstrated that reliance on foundation money and charitable donations also has significant drawbacks. First, the tax code puts constraints on the kinds of activities in which recipients of charitable donations can

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233. Edwards & McCarthy, *supra* note 207, at 121. The law also exempts the nonprofit organizations' income from taxation. See Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 357-58 (1976) (discussing the rationale for nonprofit organizations' exemption from federal income taxation); Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 59, 60 & n.25 (1981) (arguing that the Bittker and Rahdert justification for the exemption is unsatisfying).

234. 26 U.S.C. § 501(c)(3) (2018).

235. Megan Ming Francis, *The Price of Civil Rights: Black Lives, White Funding, and Movement Capture*, 53 LAW & SOC'Y REV. 275, 277 (2019).

236. *Id.* at 277 (first citing CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998); then citing Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974); then citing STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008); and then citing MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987)).

237. See McCarthy & Zald, *supra* note 46, at 1216-17.

engage.<sup>238</sup> Organizations respond to these constraints by dividing their political activity from their nonpolitical tax-exempt activity and by limiting their political engagement.<sup>239</sup>

Accordingly, several scholars who worry about the decline of mass-membership organizations and their engagement in politics argue that the law should be reformed to permit political activity by 501(c)(3)s or at least those nonprofits that qualify as mass-membership organizations.<sup>240</sup> But such a proposal misses the mark. Allowing 501(c)(3)s to engage in unfettered political activity would not address the fundamental problem created by social-movement organizations' reliance on charitable donations: when most resources flow from elite donors and foundations, those entities influence which organizations are funded, shaping the overall organizational landscape. Not surprisingly, social movements that resonate with the concerns of relatively privileged social groups predominate. Groups that focus on the mobilization of the poor receive less funding and are less numerous than groups that focus on concerns of higher-income populations.<sup>241</sup>

Second, and perhaps more troubling, when poor and working people's organizations receive most of their funding from elite donors, the democratic character of such organizations can be undermined.<sup>242</sup> Organizations find their

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238. Edwards & McCarthy, *supra* note 207, at 137 (“SMOs that choose to become officially registered with the US Federal government as nonprofit organizations are expected to adopt certain standard operating procedures and may, as a result, adopt ways of doing things that constrain their choice of certain mobilizing technologies and encourage others.”); *see also* SKOCPOL, *supra* note 50, at 206-07 (discussing how “U.S. tax rules encourage foundations,” a type of organization that, in turn, encourages the development of “advocacy groups with expert professional staffs”); Daniel M. Cress, *Nonprofit Incorporation Among Movements of the Poor: Pathways and Consequences for Homeless Social Movement Organizations*, 38 SOC. Q. 343, 357-58 (1997) (arguing that the relationship between moderation and nonprofit incorporation by homeless social-movement organizations is complicated and context-dependent); John D. McCarthy, David W. Britt & Mark Wolfson, *The Institutional Channeling of Social Movements by the State in the United States*, in 13 RESEARCH IN SOCIAL MOVEMENTS, CONFLICTS AND CHANGE 45, 52 (Louis Kriesberg & Metta Spencer eds., 1991) (explaining how regulations on tax-exempt organizations “channel the activities of many modern SMOs”).

239. SKOCPOL, *supra* note 50, at 206-07; Edwards & McCarthy, *supra* note 207, at 121.

240. *See* Abu El-Haj, *supra* note 18, at 135 n.368; *see also* Dana Brakman Reiser, *Dismembering Civil Society: The Social Cost of Internally Undemocratic Nonprofits*, 82 OR. L. REV. 829, 831-32, 892-93 (2003) (discussing the significant social costs of a trend away from member-driven organizations and suggesting tax benefits for membership organizations as one of several potential responses to mitigate these costs).

241. Edwards & McCarthy, *supra* note 207, at 117, 122-23.

242. J. Craig Jenkins & Craig M. Eckert, *Channeling Black Insurgency: Elite Patronage and Professional Social Movement Organizations in the Development of the Black Movement*, 51 AM. SOC. REV. 812, 827 (1986).

priorities shaped by elites.<sup>243</sup> Ultimately, such organizations become less likely to challenge structural inequalities that put elite interests at risk.

Reliance on charitable donations also tends to shift organizational priorities and tactics. Elite donors tend to show more interest in supporting litigation and policy campaigns and show less interest in funding membership mobilization, new-member organizing, and protest or other confrontational tactics.<sup>244</sup> As a result, organizations develop extensive professional fundraising mechanisms, shifting resources and time away from organizing members and engaging them in collective action.<sup>245</sup>

That is not to say that charitable donations are wholly unhelpful or that elites have fully captured social-movement organizations. Rather, such donations have long provided critical funding to struggling, low-income groups.<sup>246</sup> Research also suggests that donations provide donors influence rather than full control.<sup>247</sup> Research does suggest, however, that sources of funding influence an organization's capacity for effective collective action.

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243. See KAREN FERGUSON, *TOP DOWN: THE FORD FOUNDATION, BLACK POWER, AND THE REINVENTION OF RACIAL LIBERALISM* 3 (2013) (exploring how the Ford Foundation's effort to reforge a national consensus on race had the effect of remaking Black-power ideology and accommodating inequality); Francis, *supra* note 235, at 278 (arguing that private funders "operate like interest groups or private firms, to buy influence over the goals and strategies of activists and cause lawyers," and that, in the case of the NAACP, the Garland Fund shifted the organization's "agenda away from racial violence," criminal justice, and labor rights "to education," with both positive and negative consequences); Benjamin Marquez, *Mexican-American Political Organizations and Philanthropy: Bankrolling a Social Movement*, 77 *SOC. SERV. REV.* 329, 330 (2003) (showing that gifts and grants underwrite Mexican American groups, but only when they pursue political activities favored by corporations, foundations, and wealthy individuals); cf. RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 190 (2007) (highlighting the indeterminate nature of the NAACP's legal agenda in the mid-twentieth century and the initial focus on economic justice, subsequently lost).
244. Sameer M. Ashar & Catherine L. Fisk, *Democratic Norms and Governance Experimentalism in Worker Centers*, 82 *LAW & CONTEMP. PROBS.* 141, 182-83 (2019) (discussing this problem in the context of worker centers and labor unions); Francis, *supra* note 235, at 276-281 (discussing the dynamic of movement capture). A potential solution would be to impose more stringent caps on charitable donations, but this would result in an overall decline in funding and in an additional investment in fundraising rather than organizing.
245. Edwards & McCarthy, *supra* note 207, at 138-40; see also PIVEN & CLOWARD, *supra* note 41, at 5 (arguing that professionalized social-movement organizations deradicalized the movements from which they were created and led them to adopt less confrontational and more conventional tactics in social-change campaigns); Jenkins & Eckert, *supra* note 242, at 819, 826-27 (showing that elite patronage professionalized the Black movement, which may have accelerated movement decay but did not transform movement goals or tactics).
246. Ashar & Fisk, *supra* note 244, at 156 (noting that "foundation funding has been, and remains, essential to the operations of worker centers").
247. See *id.* at 157, 182-83 (noting that worker-center leaders reported that "foundations have not dictated their agenda" but that they "can impact priorities").



Finally, it is worth noting that not all tax-exempt contributions carry the same level of capture risk. Daniel Cress and David Snow have found that when low-income groups receive a significant portion of their donations from “social gospelite” organizations or related social movements (e.g., religious institutions or labor unions), the risk of elite capture is reduced.<sup>248</sup> In such cases, the institutions that are providing resources are themselves membership organizations, often part of the same social movement. Thus, homeless organizations have been successful by partnering with churches,<sup>249</sup> while worker centers representing poor, vulnerable workers have been successful by partnering with unions.<sup>250</sup> The more resource-rich social-movement organizations have enabled organizing among their impoverished counterparts. Still, overall resources available are limited under this model.<sup>251</sup>

*b. Self-Funding Facilitated by Law*

The previous Section shows that donations are unlikely, alone, to sustain mass-membership organizations that effectively counterbalance the power of the wealthy in our democracy. There may be good reasons to maintain the flow of donations to nonprofit organizations, but a mechanism for organizations to engage in what sociologists refer to as “indigenous” funding—that is, dues or membership-based funding—is a critical supplement.

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248. Cress & Snow, *supra* note 212, at 1106.

249. *Id.* at 1098-99, 1105-07.

250. See Ashar & Fisk, *supra* note 244, at 141-44, 186.

251. Notably, in recent years, some nonprofits have begun to deemphasize their reliance on tax-exempt charitable donations. See Pozen, *supra* note 81. One reason is that, under the recent overhaul of the tax code, most taxpayers will no longer itemize deductions, reducing the incentive to donate to 501(c)(3)s and rendering public-charity status less relevant to fundraising. Tax Cut and Jobs Act of 2017, Pub. L. No. 115-97, § 11021, 131 Stat. 2054, 2072-73 (codified in scattered sections of 26 U.S.C.) (increasing the standard deduction substantially for single and joint filers); see Joseph Rosenberg & Philip Stallworth, *The House Tax Bill Is Not Very Charitable to Nonprofits*, TAX POL'Y CTR. (Nov. 15, 2017), <https://www.taxpolicycenter.org/taxvox/house-tax-bill-not-very-charitable-nonprofits> [https://perma.cc/L9CS-5WXA] (predicting a substantial decline in itemized deductions). In addition, social-justice organizations have begun to question whether a 501(c)(3) model, and its required focus on litigation and courts over politics and grass-roots organizing, is capable of producing lasting social change, and have created new 501(c)(4) branches that can engage in political action. Pozen, *supra* note 81. Although the shift to 501(c)(4) “social-welfare” organizations might enable organizations to change their tactics, the change will not necessarily weaken the influence of elite donors on these organizations. Indeed, social-welfare organizations, like charitable nonprofits, are likely to derive much of their funding from elites. David S. Miller, *Social Welfare Organizations as Grantmakers*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 413, 417 (2018).

A dues model has the advantage of aligning an organization's funding stream with basic commitments to democracy and self-governance. Organizations that are self-funded tend to be more accountable to their members, more democratically governed, and less at risk of a decline in funding due to changes in donor-giving patterns or foundation priorities.<sup>252</sup> The labor movement, in particular, has achieved independence and relative financial stability through a dues model.<sup>253</sup> Numerous grassroots-organizing groups have recently begun to experiment with dues systems in order to reduce their reliance on philanthropic donations.<sup>254</sup>

In order for a dues model to sustain an organization, however, the Mancur Olson collective-action problem must be overcome. Absent a legal mechanism to mandate or facilitate dues, constituents are likely to free-ride, either for self-interested (albeit rational) reasons or simply because of the logistical difficulty of contributing. Indeed, low-income individuals who, in principle, are willing to pay to support their organization frequently cannot do so easily because of limited access to banking or formal financial services.<sup>255</sup>

The most direct way to remedy the collective-action problem is through legal reforms that mandate contributions. However, a legal requirement that landlords transfer a mandatory tenant fee to a membership-based tenant organization, or that public-benefits providers transfer a mandatory recipient fee to welfare-rights organizations, would likely be deemed unconstitutional, even if tenants or beneficiaries were given the option not to become organization members. In *Janus v. AFSCME, Council 31*, the Supreme Court concluded that a public-sector employer cannot require that all workers covered by a collective-bargaining agreement pay an agency fee to a labor organization to cover the cost of collective bargaining and grievance handling; such payment constitutes impermissible compelled speech.<sup>256</sup> Under *Janus's* logic, a government requirement that individuals contribute to a representative housing, welfare-rights, or debtors organization would also likely violate the First Amendment.

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252. See Shayna Strom, *Organizing's Business Model Problem*, CENTURY FOUND. 15-17 (Oct. 26 2016), <https://production-tcf.imgix.net/app/uploads/2016/10/31124103/organizings-business-model-problem.pdf> [<https://perma.cc/W5EC-6QJA>].

253. See Fisk & Malin, *supra* note 222, at 1826-33.

254. See Strom, *supra* note 252, at 6 (describing dues efforts of such groups as National Domestic Workers Alliance, the Restaurant Opportunities Centers United, and Kentuckians for the Commonwealth, as well as other innovative mechanisms of fundraising by grassroots organizing groups).

255. Ashar & Fisk, *supra* note 244, at 182.

256. 138 S. Ct. 2448, 2459-60 (2018).

In separate articles, each of us has argued that the *Janus* majority's First Amendment analysis is incorrect.<sup>257</sup> But accepting the doctrine as binding, there are still several ways law can facilitate self-funding. First, the law could permit *private* entities and social-movement organizations to enter into contracts that require fees and that facilitate the fee transfers, as is permitted under the NLRA for private-sector employers and unions.<sup>258</sup> For example, the law could enable membership-based tenant organizations of low-income renters to negotiate contracts with private landlords that require tenants to pay a small percentage of their monthly rent to their tenant organization in exchange for services provided by that organization. Because the state itself would not be compelling fees under this approach, state action would not be sufficient to trigger the First Amendment.<sup>259</sup>

A second approach would be for the law to require private entities to facilitate the transfer of *voluntary* dues. This approach is unlikely to solve fully the collective-action problems discussed above. Comparative data on labor unions strongly suggest that voluntary dues, even when paired with services available only to members, result in a significant free-rider dynamic.<sup>260</sup> But a facilitative model does vastly improve upon the status quo, solving some of the logistical hurdles that exist when organizations seek to fundraise internally. One promising example is the recently enacted New York City law that gives employees the option of deducting contributions to qualified nonprofit organizations that will advocate for nonunion workers; if employees exercise this option, the law requires employers to facilitate such transfers.<sup>261</sup> Another example is the voluntary-dues campaigns that many unions have engaged in the aftermath of *Janus*, where unions obtain dues authorization and the public employer subsequently transfers money to the union.<sup>262</sup> In order to ensure stability, many states allow

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257. Andrias, *supra* note 91, at 29-30; Benjamin I. Sachs, *Agency Fees and the First Amendment*, 131 HARV. L. REV. 1046, 1076 (2018); *see also, e.g.*, William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 171 (2018) ("The better view, we think, is that requiring people only to pay money, whether to private organizations or to the government, is not a First Amendment problem at all.").

258. *See* 29 U.S.C. § 158(a)(3) (2018); *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 741-42 (1963).

259. *See Janus*, 138 S. Ct. at 2486 (reserving the question whether private-sector agency fees violate the Constitution).

260. *See* Fisk & Malin, *supra* note 222, at 1926-30.

261. *Rest. Law Ctr. v. City of New York*, 360 F. Supp. 3d 192, 239-40 (S.D.N.Y. 2019); Justin Miller, *In New York City, Fast-Food Workers May Soon Have a Permanent Voice*, AM. PROSPECT (June 16, 2017), <http://prospect.org/article/new-york-city-fast-food-workers-may-soon-have-permanent-voice> [<https://perma.cc/8BAA-5XNH>].

262. Ian Kullgren & Aaron Kessler, *Unions Fend Off Membership Exodus in 2 Years Since Janus Ruling*, BLOOMBERG L. (June 26, 2020, 6:15 AM), <https://news.bloomberglaw.com/daily-labor->

revocation of authorization only during designated windows.<sup>263</sup> A similar model could facilitate transfers to tenant organizations, debtors' unions, and organizations of public-benefits recipients. Finally, to encourage membership, organizations can combine the voluntary-dues model with provision of benefits and services, such as insurance, education, discount cards, and legal assistance; the National Rifle Association and the American Association of Retired People have both successfully used this approach.<sup>264</sup> Indeed, government could empower organizations to serve as providers of social-welfare benefits, as in the Ghent system in Europe, where unions administer unemployment insurance, thereby providing organizations additional opportunities to recruit voluntary-dues payments.<sup>265</sup>

To be sure, self-funding models are not a panacea, particularly when members can afford only minimal donations.<sup>266</sup> Self-funding models can also have demobilizing effects, creating a transactional model in which members pay dues in exchange for services but do not engage in the broader movement work. Nonetheless, even movement organizations skeptical of a transactional-dues approach recognize that a membership-funding system helps safeguard against elite domination and, if combined with other organizational commitments, builds a more participatory and effective organization.<sup>267</sup> The model should thus be one part of a multipronged approach to facilitating resource aggregation.

### c. Cost-Shifting

A variation on a self-funding model would shift costs to the entity around which the social-movement organization is organizing. That is, the law could require those entities to pay for a portion of the organizing activity. For example, landlords of low-income residents could be required to contribute a small percentage of monthly gross rents to the representative tenant organizations.

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report/unions-fend-off-membership-exodus-in-2-years-since-janus-ruling [https://perma.cc/8BCZ-JVEB].

<sup>263</sup> See Fisk & Malin, *supra* note 222, at 1858-60.

<sup>264</sup> Peter Murray, *The Secret of Scale: How Powerful Civic Organizations like the NRA and AARP Build Membership, Make Money, and Sway Public Policy*, 2013 STAN. SOC. INNOVATION REV. 32, 34-35.

<sup>265</sup> See Matthew Dimick, *Labor Law, New Governance, and the Ghent System*, 90 N.C. L. REV. 319, 324-25 (2012).

<sup>266</sup> See Ashar & Fisk, *supra* note 244, at 182-83 (reporting that dues requirements for worker-center members were thought to be "terribly onerous"); Cress & Snow, *supra* note 212, at 1094-1107 (demonstrating that for homeless social-movement organizations to be viable, external resources are essential, and explaining that homeless organizations have been particularly successful where their external funders were "social gospelite" organizations, not elites).

<sup>267</sup> Ashar & Fisk, *supra* note 244, at 166, 183.

Public-benefits programs could contribute a small percentage of their budget to the representative welfare-rights organizations. Lenders could be required to contribute a percentage of profits to debtor organizations.

One problem with this approach is that, as applied to private payors, it would likely face constitutional challenge under the Supreme Court's evolving compelled-speech doctrine.<sup>268</sup> A potential alternative would permit social-movement organizations to bargain for such transfers without mandating them by law. Still, skeptics might worry that if a social-movement organization's funding comes from one of its targets and opponents, the organization may be more likely to curb its tactics and demands.<sup>269</sup> The organization could even become dependent on the entity with whom it negotiates and against whom it advocates. However, this concern can be mitigated by ensuring that only a portion of funds are from this stream and, to the extent constitutionally permitted, by making cost transfers mandatory by law, or bargained through arms-length transactions, rather than at the discretion of the funder.<sup>270</sup>

#### d. State Subsidies

Another helpful (and constitutionally permissible) legal intervention would be to provide for government funding of social-movement organizations as a supplement to self-funding and charitable donations.<sup>271</sup> Public funding has historically been an important part of social movements' funding base. For example, since the 1960s, a large number of women's movement groups have taken

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268. See Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 323-39 (2016) (detailing the developing compelled-speech doctrine); cf. Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195, 198-203 (2014) (identifying constitutional expression of neoliberalism in judicial interpretations of the First Amendment).

269. See Fisk & Malin, *supra* note 222, at 1350-57.

270. See Cress & Snow, *supra* note 212, at 1094-1107 (demonstrating that for homeless social-movement organizations to be viable, external resources are essential and explaining that homeless organizations have been particularly successful where their external funders were "social gospelite" organizations, not elites); Edwards & McCarthy, *supra* note 207, at 118, 135 (emphasizing the importance of multiple funding streams).

271. On the constitutionality of governmental funding for entities with particular viewpoints, see, for example, *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-52 (2002); and *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). Cf. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983) (holding that Congress has not violated the First Amendment by choosing not to subsidize charities' lobbying).

on social-service functions in exchange for funding from the government.<sup>272</sup> Also during the mid-1960s, as part of President Lyndon Johnson's War on Poverty, Congress established the Community Action Program, charged with helping the poor develop "autonomous and self-managed organizations which are competent to exert political influence on behalf of their own self-interest."<sup>273</sup> Government-funded Community Action Agencies (CAA) recruited "issue-oriented community organizers" and provided "financial assistance to indigenous community organizations."<sup>274</sup> More recently, worker centers representing low-wage workers have "collaborat[ed] with government agencies, particularly on enforcement campaigns in progressive jurisdictions with expansive, but under-enforced legal protections for workers," which has "generated . . . financial support" for the centers "in the form of government grants to facilitate investigation and enforcement . . . and training in know-your-rights programs."<sup>275</sup>

A challenge is that state subsidies usually come with strings attached. Thus, an organization "seeking affirmative state assistance invites a political debate over whether or how much such assistance is justified" and "about the conditions

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272. See Myra Marx Ferree & Patricia Yancey Martin, *Doing the Work of the Movement: Feminist Organizations*, in *FEMINIST ORGANIZATIONS: HARVEST OF THE NEW WOMEN'S MOVEMENT* 19, 21 (Myra Marx Ferree & Patricia Yancey Martin eds., 1995) (discussing the impact on select feminist organizations of receiving funding from the government).

273. J. DAVID GREENSTONE & PAUL E. PETERSON, *RACE AND AUTHORITY IN URBAN POLITICS: COMMUNITY PARTICIPATION AND THE WAR ON POVERTY* 5 (1973) (quoting Office of Econ. Opportunity, *Workbook: Community Action Program*, U.S. DEP'T HEALTH (Mar. 18, 1965), <https://files.eric.ed.gov/fulltext/ED103502.pdf> [<https://perma.cc/XK25-4UKE>]); see *id.* at 7 ("[T]he fundamental political objective was generally understood to be the organization and consequent institutionalization of black (and other minority group) interests."); see also Tara J. Melish, *Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty*, 13 *YALE HUM. RTS. & DEV. L.J.* 1, 8-12 (2010) (discussing successes and failures of community action programs (CAPs) and urging a contemporary equivalent); Paul E. Peterson & J. David Greenstone, *Racial Change and Citizen Participation: The Mobilization of Low-Income Communities Through Community Action*, in *A DECADE OF FEDERAL ANTIPOVERTY PROGRAMS: ACHIEVEMENTS, FAILURES, AND LESSONS* 241 (Robert H. Haveman ed., 1977) (arguing that community action was primarily an attack on the exclusion of Black Americans).

274. Peterson & Greenstone, *supra* note 273, at 264.

275. Ashar & Fisk, *supra* note 244, at 158-59; see Janice Fine, *Enforcing Labor Standards in Partnership with Civil Society: Can Co-Enforcement Succeed Where the State Alone Has Failed?*, 45 *POL. & SOC'Y* 359, 361 (2017); Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers' Organizations*, 38 *POL. & SOC'Y* 552, 569 (2010); Seema N. Patel & Catherine L. Fisk, *California Co-Enforcement Initiatives that Facilitate Worker Organizing*, *HARV. L. & POL'Y REV. ONLINE* (2017).

that should be attached to the assistance.”<sup>276</sup> This debate is one worth having and should become less burdensome as mass-membership organizations grow. Moreover, while relying exclusively on state funding would leave organizations vulnerable to changes in the political climate, state funding can be one important part of a mixed-funding regime and can help serve as “seed” money while organizations build their indigenous funding. Improving upon past efforts, state funding could be targeted to organizations that meet particular criteria. For example, grants could take into account organizational mission, leadership-development practices, and whether the organization is governed by members, federated in structure, and inclusive.<sup>277</sup>

## 2. *Physical and Virtual Spaces*

In addition to funding, physical and virtual spaces for organizing are essential to the success of mass-membership organizations. As Daniel Cress and David Snow write, “A regular place to meet and adequate supplies are requisites for doing regular organizational business.”<sup>278</sup> They quote a supporter of the Detroit Union of the Homeless, who observes that “[t]here is a kind of franticness when you don’t really have a place where you can invite anybody into. But when you do, people can find you. Strategies can be developed. You can get a sense of your own identity.”<sup>279</sup>

Sociologists have demonstrated that natural gathering spaces, where people are in close proximity, are the most fruitful locations for social-movement building.<sup>280</sup> Yet many of the spaces in which poor people naturally congregate are controlled not by those people themselves, nor by their social-movement organizations, but rather by governmental or corporate entities. Providing access to these

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276. Eskridge, *Channeling*, *supra* note 29, at 524. On the clash between the state and rape-crisis providers, see Nancy Matthews, *Feminist Clashes with the State: Tactical Choices by State-Funded Rape Crisis Centers*, in FEMINIST ORGANIZATIONS, *supra* note 272, at 291-92. On the backlash against legal-aid lawyers and their advocacy on behalf of the poor, see John Kilwein, *The Decline of the Legal Services Corporation: ‘It’s Ideological, Stupid!’*, in THE TRANSFORMATION OF LEGAL AID: COMPARATIVE AND HISTORICAL STUDIES 41, 41-42 (Francis Regan, Alan Paterson, Don Fleming, & Tamara Goriely eds., 1999); and Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 754-55 (2002).

277. On the duties that might be imposed on organizations in conjunction with state funding, see *infra* note 384 and accompanying text.

278. Cress & Snow, *supra* note 212, at 1098.

279. *Id.*

280. Aldon Morris, *Black Southern Student Sit-in Movement: An Analysis of Internal Organization*, 46 AM. SOC. REV. 744, 759-62 (1981); Dingxin Zhao, *Ecologies of Social Movements: Student Mobilization During the 1989 Prodemocracy Movement in Beijing*, 103 AM. J. SOC. 1493, 1501-23 (1998).

spaces can be particularly helpful for organization building: access communicates acquisition and control of a space in which poor and working people typically have little authority and thereby helps legitimize the social-movement organization.<sup>281</sup>

In the contemporary era, the availability of digital – that is, internet-based – “space” can be just as important as the availability of physical space. In the labor context, for instance, workers often no longer share a common workplace and thus simply have no shared physical space in which to congregate, discuss, and organize. The same is true for debtors, who may live dispersed across the entire nation and for whom no feasible central physical meeting location exists.<sup>282</sup> In these settings, access to email, text, social media, and other “digital meeting spaces” can be critical,<sup>283</sup> and, in fact, access to such digital resources for organizing purposes is a hotly contested question in NLRB law.<sup>284</sup> This is true for the simple reason that digital resources can be powerful substitutes for physical spaces. Take, for example, the recent Google walkouts – protest actions engaged in by workers across the globe whose only contact with one another was through online forums and tools.<sup>285</sup> It is also the case that teachers involved in organizing the RedforEd movement gathered on a Facebook page, as well as in person.<sup>286</sup>

Indeed, digital spaces can be important to organizing even where physical space is available, especially in contexts where meeting online is more practicable

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281. See Cress & Snow, *supra* note 212, at 1098.

282. See, e.g., Nick Martin, *The Radical Possibilities of Not Paying Your Student Loans*, NEW REPUBLIC (Feb. 7, 2020), <https://newrepublic.com/article/156468/radical-possibilities-not-paying-student-loans> [<https://perma.cc/D2D9-BWNX>] (reporting on debt-strike activism and quoting one organizer describing debtors as “a collectivity; we just haven’t *seen* one another yet”).

283. See, e.g., Sharon Block & Benjamin Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy*, LAB. & WORKLIFE PROGRAM, HARV. L. SCH. 53-54 (2020), [https://lwp.law.harvard.edu/files/lwp/files/full\\_report\\_clean\\_slate\\_for\\_worker\\_power.pdf](https://lwp.law.harvard.edu/files/lwp/files/full_report_clean_slate_for_worker_power.pdf) [<https://perma.cc/C78K-F7WS>].

284. See *Caesars Entm’t*, 368 N.L.R.B. No. 143 (Dec. 17, 2019) *overturning* *Purple Commc’ns, Inc.*, 361 N.L.R.B. 1050 (2014).

285. See Alexia Fernández Campbell, *Why Thousands of Google Employees Are Protesting Across the World*, VOX (Nov. 1, 2018, 2:10 PM EDT), <https://www.vox.com/2018/11/1/18051884/google-employee-walkouts-explained> [<https://perma.cc/Q5JC-9KFR>].

286. Caroline O’Donovan, *Facebook Played a Pivotal Role in the West Virginia Teacher Strike*, BUZZFEED NEWS (Mar. 7, 2018, 7:47 PM ET), <https://www.buzzfeednews.com/article/carolineodonovan/facebook-group-west-virginia-teachers-strike> [<https://perma.cc/NBR3-744M>]; *Labor Leaders – Randi Weingarten ’80*, WORK! EXPLORING FUTURE WORK, LAB. & EMP’T (Apr. 28, 2020), <http://work.ilr.cornell.edu/692043/3537832-labor-leaders-randi-weingarten> [<https://perma.cc/SAB7-RF3X>].



or advantageous than gathering together in a single physical location.<sup>287</sup> This principle has been most apparent in the era of COVID-19, when the need for social distancing means that in-person meetings, especially large ones, are a public-health threat. Unions are recommending that workers who can no longer organize in person gather on Zoom instead.<sup>288</sup> And tenant activists are turning to the internet to organize rent protests and strikes during the economic crisis that the pandemic has produced. According to one organizer, “If you’re bringing new people into your movement right now, you’re doing it online.”<sup>289</sup>

The potential for legal intervention to provide access to both physical and digital spaces is significant. The law could provide a legal right for both paid organizers and organization members to access the relevant constituency groups in person and online. It could grant the right to come onto employer property, to enter building lobbies and common areas, and to hold meetings in welfare centers. The law could also provide access to digital meeting spaces, requiring employers, landlords, benefit providers, and lenders to provide digital resources to workers, tenants, benefit recipients, and borrowers for organizing purposes.<sup>290</sup> We discuss some of these options in more detail below when we take up the need for “free” associative spaces.<sup>291</sup>

### 3. Information

Another critical resource for social-movement organizations is information, particularly information about the organization’s constituency.<sup>292</sup> Organizers need to know who the relevant constituency is and where they can be contacted: Who are the workers in a given firm, the tenants in a given building, or the recipients of a given welfare benefit?

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287. For instance, tenants have harnessed digital spaces to organize for rent relief during the COVID-19 crisis. See, e.g., Conor Dougherty & John Eligon, *How to Protest When You’re Ordered Not to Gather*, N.Y. TIMES (May 6, 2020), <https://www.nytimes.com/2020/04/23/business/economy/coronavirus-tenants-rent-protests.html> [<https://perma.cc/J6TP-X7M8>].

288. *5 Steps to Organizing for Protection at Work*, UE UNION, <https://fight.ueunion.org/five-steps> [<https://perma.cc/GZR6-64K7>].

289. Dougherty & Eligon, *supra* note 287.

290. See, e.g., Block & Sachs, *supra* note 283, at 53. But see Mark Engler, *The Limits of Internet Organizing*, DISSENT BLOG (Oct. 5, 2010), <https://www.dissentmagazine.org/blog/the-limits-of-internet-organizing> [<https://perma.cc/457L-LCTJ>] (emphasizing that the internet is a useful tool but no substitute for in-person organizing).

291. See *infra* Section III.C.

292. Cress & Snow, *supra* note 212, at 1095 tbl.3, 1098-99 (dividing information into strategic support, technical support, and referrals).

The NLRA again provides a partial model. It requires employers to provide an *Excelsior* list of bargaining-unit members to a union that makes a showing of employee interest in being represented by that union.<sup>293</sup> The list includes both names and contact information. Similar informational rights exist under several states' public-sector bargaining systems, requiring, for example, that unions be notified when new members join the bargaining unit and afforded the opportunity to meet with new unit members (on the clock).<sup>294</sup> Statutes could create parallel rights for tenant organizations, debtor organizations, public-benefits organizations, and so on.

In addition to information about the constituency, organizations also need information about the broader political and economic context in which they are organizing. To some extent, the internet has made such information more accessible, facilitating movement activity.<sup>295</sup> Yet, much information remains proprietary and inaccessible to workers, tenants, debtors, welfare beneficiaries, and their social-movement organizations. For example, a recent study found that only four percent of workers have access to information about compensation of senior executives, managers, supervisors, and colleagues, as well as information about how well their organization is doing.<sup>296</sup>

Here, legal intervention could again be valuable. Law could require the disclosure of relevant information about the relevant entity, industry, or program to inform the strategic work of the social-movement organization. For example, the NLRA has been interpreted to require that employers provide information to unions about their finances to the extent such information is relevant to the employer's bargaining positions.<sup>297</sup> Law could impose similar obligations in the context of housing, public benefits, and education debt. Or, even better, it could require more expansive disclosure that does not hinge on bargaining positions or organizational requests. Washington, D.C.'s tenant law provides a partial model: it provides tenant organizations the right to information about new

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293. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1239-40 (1966).

294. See Michael Wasser, *Making the Case for Union Membership: The Strategic Value of New Hire Orientations*, JOBS WITH JUST. EDUC. FUND (Sept. 2016), [http://www.jwj.org/wp-content/uploads/2016/09/JWJEDU\\_BestPractice\\_Report\\_2016\\_FINAL.pdf](http://www.jwj.org/wp-content/uploads/2016/09/JWJEDU_BestPractice_Report_2016_FINAL.pdf) [<https://perma.cc/P4RJ-MWCN>]; see, e.g., CAL. GOV'T CODE § 3558 (West 2019); MD. CODE ANN., EDUC. § 6-407.1 (West 2018); N.J. STAT. ANN. 34:13A-5.13(c) (West 2018); N.Y. CIV. SERV. LAW § 208(4)(a) (McKinney 2019).

295. See Edwards & McCarthy, *supra* note 207, at 120.

296. Alexander Hertel-Fernandez, *American Workers' Experiences with Power, Information, and Rights on the Job: A Roadmap for Reform*, ROOSEVELT INST. 17-18 (Apr. 2020), [https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI\\_WorkplaceVoice\\_Report\\_202004.pdf](https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_WorkplaceVoice_Report_202004.pdf) [<https://perma.cc/E4GM-A5L7>].

297. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-54 (1956).

development and the right to an appraisal during any sale process.<sup>298</sup> Ultimately, disclosure of information is critical not only to engaging with the private entity but also to social-movement organizations' engaging in the political process in an informed way.

#### 4. *Human Resources*

A final category of resources that is essential to organization success is human resources—including labor, leadership, and expertise.<sup>299</sup> Yet a movement's ability to deploy human resources is limited by the time and skill available to its constituents. Poor and working-class people tend to have less leisure time to donate to organizations; they also frequently have fewer technical skills to provide (though no less potential).<sup>300</sup>

Here too, law could make a significant difference. It could guarantee paid time off for individuals to participate in the organization and to attend leadership or technical training, possibly reimbursing employers, or allowing them to deduct from taxes the amount of wages they pay to people for participation. Jury-duty laws provide one model. Eight states require an employer to pay employees while serving on jury duty.<sup>301</sup> Labor law also provides some examples. Under numerous private collective-bargaining agreements and under several public-sector labor-relations statutes, employees are permitted to perform organization functions on official time (i.e., release time with pay from their regular duties). The Federal Service Labor-Management Relations Statute, for example, requires that union representatives who are also employees of the agency be granted

298. D.C. CODE § 42-3404.02 (2020).

299. Edwards & McCarthy, *supra* note 207, at 127.

300. A significant literature in sociology examines the importance of both leadership development and rank-and-file militancy and participation in poor people's organizations. See, e.g., Stuart Eimer, *The Crisis of New Labor and Alinsky's Legacy: Some Questions, Comments, and Problems*, 43 POL. & SOC'Y 443, 444-45 (2015); Paul Osterman, *Building Progressive Organizations: An Alternative View*, 43 POL. & SOC'Y 447, 449 (2015); see also Paul Osterman, *Evading the Iron Law: Culture and Ritual in Social Movement Organizations*, MASS. INST. TECH. 22-27 (Mar. 2004), <http://web.mit.edu/osterman/www/Evading-Iron-Law-Osterman.pdf> [<https://perma.cc/Y2RV-KZ44>] (arguing that successful social-movement leadership potentially requires an adversarial culture within the organization and an enhanced sense of capacity and agency within the membership). We recognize that the legal interventions we propose do little to build leadership or rank-and-file militancy directly beyond creating the time and funds for development. That is not because we believe those goals are unimportant but rather because we are skeptical the law has much to offer.

301. See ALA. CODE § 12-16-8 (2013); COLO. REV. STAT. § 13-71-126 (2016); CONN. GEN. STAT. § 51-247a (2012); LA. STAT. ANN. § 23:965 (2019); MASS. GEN. LAWS ch. 234A, § 49 (2017); NEB. REV. STAT. § 25-1640 (2015); N.Y. JUD. LAW § 519 (McKinney 2016); TENN. CODE ANN. § 22-4-106 (2009).

official time for negotiating a collective-bargaining agreement, including participation in impasse proceedings.<sup>302</sup> Numerous state systems, even those that are “right-to-work,” similarly mandate paid release time.<sup>303</sup> Other collective-bargaining agreements provide education funds so that workers can increase their skills.<sup>304</sup>

The precise design of a release-time requirement would vary depending on the context. For example, a tenant-related law could require unpaid release time for workers to participate in tenant-organizing efforts and in training programs, with the member able to recoup lost wages up to a designated amount from the landlord. In the public-benefits context, to the extent states require public-benefits recipients to work, labor performed for movement organizations could count as qualified work.<sup>305</sup>

### C. Free Spaces

Another prominent strand of social-movement theory suggests that successful political organizing depends on the availability of “free spaces” open to and suitable for organizational work.<sup>306</sup> The literature takes a capacious view of what such spaces may consist of, and it includes discussion of both literal physical

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302. 5 U.S.C. § 7131(a) (2018); *Bureau of Alcohol, Tobacco & Firearms v. Fed. Labor Relations Auth.*, 464 U.S. 89, 94-95 (1983).

303. See, e.g., Fisk & Malin, *supra* note 222, at 1846 n.124 (citing *Cheatham v. DiCiccio*, 379 P.3d 211, 213 (Ariz. 2016)) (describing the cited case as “holding that a provision in Phoenix police collective bargaining agreement granting official time to employees to perform representational functions, including 100 percent official time to several, did not violate the Gifts Clause of the Arizona Constitution”); Martin H. Malin, *Life After Act 10?: Is There a Future for Collective Representation of Wisconsin Public Employees?*, 96 MARQ. L. REV. 623, 657 (2012) (discussing union-release practices in Tennessee).

304. See generally *Training and Employment*, 1199SEIU FUNDS, <https://www.1199seiubenefits.org/funds-and-services/training-and-employment> [<https://perma.cc/6B53-X22K>].

305. Cf. Noah D. Zatz, *Get to Work or Go to Jail: State Violence and the Racialized Production of Precarious Work*, 45 LAW & SOC. INQUIRY 304, 328-30 (2020) (addressing the coercive nature of state-mandated work).

306. See SARA M. EVANS & HARRY C. BOYTE, *FREE SPACES: THE SOURCES OF DEMOCRATIC CHANGE IN AMERICA* 18 (1986) (“Democratic action depends upon these free spaces, where people experience a schooling in citizenship and learn a vision of the common good in the course of struggling for change.”).

spaces—for example, churches,<sup>307</sup> mosques,<sup>308</sup> student dormitories,<sup>309</sup> and union halls<sup>310</sup>—but also more abstract figurative spaces including linguistic codes<sup>311</sup> and artistic performance.<sup>312</sup> Despite the breadth of concepts encompassed in the definition of free space, however, there is some agreement on core elements of the definition. In summarizing work on the question, for example, Rick Fantasia and Eric L. Hirsch conclude that “[o]n the most basic level” free spaces are

meeting places where communication can be facilitated without deference to those in power, representing “liberated zones” to which people can retreat, spatial “preserves” where oppositional culture and group solidarity can be nourished, tested, and protected. It is in such relatively “free” social spaces that members of subordinate groups discover their common problems, construct a collective definition of the sources of their oppression, and note the limits of routine means of redressing grievances, where collective identity and solidarity are cultivated in practices, values, and social relations.<sup>313</sup>

Similarly, William A. Gamson writes that free spaces are “limited access public spaces that permit the development of an oppositional culture.”<sup>314</sup> And Francesca Polletta, although critical of aspects of the free-space literature, concludes that there is broad agreement among scholars that in identifying the unifying characteristic of a free space, “freedom from the surveillance of authorities is essential.”<sup>315</sup> In sum, then, the free-space literature suggests that political organizing requires space in which groups can assemble to discuss their grievances and

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307. See, e.g., ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE*, at xii-xiii, 6 (1984).

308. See, e.g., Rick Fantasia & Eric L. Hirsch, *Culture in Rebellion: The Appropriation and Transformation of the Veil in the Algerian Revolution*, in *SOCIAL MOVEMENTS AND CULTURE* 144, 157 (Hank Johnston & Bert Klandermans eds., 1995).

309. See Zhao, *supra* note 280, at 1502-09.

310. See ERIC L. HIRSCH, *URBAN REVOLT: ETHNIC POLITICS IN THE NINETEENTH-CENTURY CHICAGO LABOR MOVEMENT* 158-59 (1990).

311. See, e.g., JAMES C. SCOTT, *DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS*, at xi-xiii (1990).

312. See, e.g., JAMES J. FARRELL, *THE SPIRIT OF THE SIXTIES: MAKING POSTWAR RADICALISM* 53-54 (1997).

313. Fantasia & Hirsch, *supra* note 308, at 146 (citations omitted).

314. William A. Gamson, *Safe Spaces and Social Movements*, 8 *PERSP. ON SOC. PROBS.* 27, 31 (1996).

315. Francesca Polletta, “Free Spaces” in *Collective Action*, 28 *THEORY & SOC’Y* 1, 6 (1999) (footnote omitted).

develop their objectives and in which they are free of interference from those in power who would oppose their organizational efforts.

The theoretical work on free space is complimented by historical analysis of the role that such spaces have played in social-movement mobilization. Perhaps the central animating example is the role played by Black churches, both in the struggle against slavery and in the Civil Rights movement. Thus, Sara M. Evans and Harry C. Boyte write that successful political mobilization requires “community places . . . where [movement participants] can think and talk and socialize, removed from the scrutiny and control of those who hold power over their lives. The black church especially has played this crucial role as a free space in black history.”<sup>316</sup> Aldon D. Morris, in examining the origins of the Civil Rights movement, observes that the church played a central role by providing “a safe environment in which to hold political meetings”<sup>317</sup> and “an institutional alternative to, and an escape from, the racism and hostility of the larger society. Behind the church doors was a friendly and warm environment where Black people could be temporarily at peace with themselves while displaying their talents and aspirations before an empathetic audience.”<sup>318</sup> Gamson, summarizing Morris’s historical work, put it more bluntly: “Morris shows the centrality of the Black churches in the building of the Southern civil rights movement. . . . [T]hey provided a place where Blacks could assemble without whites being present.”<sup>319</sup>

Critically, and obviously, the church was more than a “space” for organizational activity: it was, among other things, a rich source of spiritual tradition, deep community ties, and leadership. The point here is simply that the church played a crucial role by providing a free space for political organizing.

Similar to the church’s role as a safe space for civil-rights organizing, Fantasia and Hirsch document the role played by the mosque – and the Casbah – in Algerian resistance to French colonization.<sup>320</sup> Dingxin Zhao writes about the importance of the physical structure of Beijing university campuses to the mobilization of students during the 1989 democracy movement, noting that “the existence of campus walls” – which separated student living space from the public road system – “was important for the development of the movement,” and concluding that “the simple existence of walls . . . created a low-risk environment and facilitated student mobilization.”<sup>321</sup> And Hirsch stresses the importance of so-called Turner halls as “havens where the Chicago working class . . . could

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316. EVANS & BOYTE, *supra* note 306, at 27-28.

317. Morris, *supra* note 280, at 748.

318. MORRIS, *supra* note 307, at 6.

319. Gamson, *supra* note 314, at 32 (citation omitted).

320. See Fantasia & Hirsch, *supra* note 308, at 157.

321. Zhao, *supra* note 280, at 1495.

develop their politics in relative isolation from the intrusions of the city's political and business elite."<sup>322</sup>

Of course, the existence of free spaces is neither necessary nor sufficient for political organization. To state the obvious, much more is required for successful political organizing than a physical location for meetings free of surveillance.<sup>323</sup> But the literature provides a solid basis for concluding that the presence of free spaces can be an important contributing factor to the success of political-organizing efforts.

Accordingly, the question for us is what the law might plausibly do to facilitate the creation of free spaces for political organizing. We see two basic categories of possible interventions: (1) the provision of space and (2) prohibitions on surveillance. Labor law, again, provides an incomplete but important model for these types of intervention. Under the rules set out in the Supreme Court's *Republic Aviation* opinion, employers must allow employees to discuss unionization efforts in the workplace, so long as those discussions occur during nonworking time.<sup>324</sup> Moreover, in certain narrow circumstances—in fact, extremely narrow circumstances under current law—employers must allow nonemployee union organizers to access company property for the purpose of discussing union organizing with employees.<sup>325</sup> Coupled with these grants of rights to use employer property for organizational purposes is a ban on employer surveillance of employee-organizing activity. Thus, “[s]ince the earliest days of the Act, surveillance of employees by an employer, whether with supervisors, rank-and-file employees, or outsiders, has consistently been held to” constitute an unfair labor practice.<sup>326</sup> Accordingly, federal labor law creates a legal requirement that

322. HIRSCH, *supra* note 310, at 159 (emphasis omitted). In the contemporary context, the internet may also provide opportunities for the construction of free spaces for organizational development. For example, Rosemary Clark-Parsons studied Girl Army—a Philadelphia-based feminist group—which used a closed Facebook group (one open only to Facebook users invited by current members of the organization and approved by one of six moderators) in an attempt to construct a space safe for political discourse. Rosemary Clark-Parsons, *Building a Digital Girl Army: The Cultivation of Feminist Safe Spaces Online*, 20 *NEW MEDIA & SOC’Y* 2125, 2128-31 (2018).

323. See Polletta, *supra* note 315, at 19-20. James Tracy notes, for example, that certain elements of the radical pacifist movement during World War II emerged from organizing done inside federal prisons. See JAMES TRACY, *DIRECT ACTION: RADICAL PACIFISM FROM THE UNION EIGHT TO THE CHICAGO SEVEN* 3 (1996).

324. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 805 (1945).

325. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539 (1992) (discussing an exception to the general rule restricting nonemployee access “wherever nontrespassory access to employees may be cumbersome or less-than-ideally effective,” which has been interpreted narrowly).

326. 1 *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT* 6-111 (John E. Higgins, Jr. ed., 7th ed. 2017).

employers cede part of their property rights to the organizational efforts of their workers and prohibits employers from engaging in surveillance of those efforts. Still, “only slightly over half of workers report having access to physical spaces” to meet with other workers (let alone organizers), “and access is more likely for higher-income and more highly educated workers.”<sup>327</sup>

Building on the partial precedent provided by labor law, a law of political organizing could require the provision of space *within* the property of the dominant party. As the above discussion anticipates, moreover, this might be space within the *physical* property of the dominant party, or it might be “space” within the *digital* resources of the dominant party. Thus, for example, tenants and tenant organizations could be entitled to access space within buildings where they are organizing, or have organized, tenants.<sup>328</sup> Public-benefits recipients could be provided space in welfare centers. Workers and their organizations – in an expansion of current rights – could be entitled to space on company property. Similarly, the law could mandate that employers, landlords, lenders, or welfare agencies provide workers, tenants, debtors, and benefits recipients the right to use the dominant party’s online resources (such as email lists, websites, and chat rooms) for organizing purposes. In addition, or alternatively, the law could require the creation of public spaces – political meeting halls, essentially – funded by tax dollars and made available to political organizations for organizational purposes. Here, again, the public spaces could be physical or digital. Finally, the law might subsidize the cost of procuring such space on the private market: political organizations could receive tax credits for reasonable costs incurred in securing space for organizational efforts.

It is worth noting that there are costs and benefits to each of these approaches. With respect to a legal requirement that organizations be granted space within the property – physical or digital – of the targets of their organizational activity, the downside is that preventing surveillance may be more

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327. See Alexander Hertel-Fernandez, *Why Workers Need Physical Spaces for Workplace Discussions – and What Labor Law Can Do*, DATA FOR PROGRESS 2 (Feb. 2020), [https://filesforprogress.org/memos/worker\\_places.pdf](https://filesforprogress.org/memos/worker_places.pdf) [<https://perma.cc/5YEM-DA8P>].

328. Indeed, a few localities already provide some access rights for tenant organizers. For example, Washington, D.C. provides tenant organizers the right to canvass in multifamily housing. D.C. CODE § 42-3505.06(b)-(c) (2020). For a discussion of tenant-organizing laws, see Christopher Bangs, Note, *A Union for All: Collective Associations Outside the Workplace*, 26 GEO. J. ON POVERTY L. & POL’Y 47 (2018). Access rights, however, raise various First Amendment issues. See, e.g., *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44-54 (1983) (allowing the teachers’ union exclusive-bargaining representative access to teacher mailboxes and the interschool mail system, rejecting that such access violated a rival union’s rights under the First Amendment, and holding that the access granted to the exclusive bargaining representative was reasonable because it enabled the union to perform its obligation to represent all of the district’s teachers).



difficult. Moreover, even absent actual surveillance, participants may be more wary of surveillance in these settings and thus, whether or not they are actually being surveilled, feel less free to “question the rationalizing ideologies of the dominant order”<sup>329</sup> and organize. On the other hand, there can be significant symbolic value in allowing organizing to take place on the physical property or the digital resources of the opposition. For one thing, such access signals to participants that the organizations in question are not outsiders to the relationship around which organizing is taking place: for example, a worker organization that meets in a company break room – or a company chat room or listserv – can come to seem a more natural part of the work relationship than one that meets only off-site in a union hall. More important from an organizing perspective, granting *on-site* space to organizations can signal the *vulnerability* of the opposing party in a way that can be critical to success.

The political-process model of social-movement emergence helps illuminate this point.<sup>330</sup> As Doug McAdam shows, successful collective action – in our context, successful political organizing – depends on, among other things, the “collective assessment [by participants] of the prospects for successful insurgency.”<sup>331</sup> This assessment, in turn, depends on participants holding two interrelated views: first, they must believe that the organizations they are forming have the potential to exercise effective power, and, second, they must believe that the status quo – the forces they are contesting – are “vulnerable to challenge.”<sup>332</sup> This perception of vulnerability is accordingly a prerequisite to successful organizing. The point makes intuitive sense. If participants believe that the current regime is invincible, they are unlikely to participate in an organizing campaign designed to change those conditions. On the other hand, if individuals can be shown that the current structure is subject to challenge – that it is vulnerable to the efforts of an organized opposition – then participation becomes more plausible. As Francis Fox Piven and Richard Cloward put it, “The social arrangements that are ordinarily perceived [to be] . . . immutable must come to seem . . . mutable.”<sup>333</sup>

The employer’s control over the workplace, like the landlord’s control over the building, can be an important means for communicating power and thus for signaling to workers and tenants that neither the employer nor the landlord is vulnerable to challenge. This suggests, however, that by enabling organizers to

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329. Fantasia & Hirsch, *supra* note 308, at 145.

330. For a more developed version of this argument, see Benjamin I. Sachs, *Law, Organizing, and Status Quo Vulnerability*, 96 TEX. L. REV. 351 (2017).

331. McADAM, *supra* note 41, at 40.

332. *Id.* at 49.

333. PIVEN & CLOWARD, *supra* note 41, at 12.

access workplaces and buildings, the law can disrupt these projections of invincibility and communicate that employers and landlords may in fact be vulnerable to challenge. As one of us explained previously,

As vigorous as employers are when it comes to attempts to prohibit their own employees from talking union at work, they are even more adamant when it comes to the ability of full-time union organizers to come onto employer property to discuss unionization. . . . This opposition stems in part from the fact that physical presence of union organizers on company property marks a major incursion into the employer's control over the workplace. Excluding union organizers thus reinforces a perception of employer control. By the same token, a legal requirement that employers admit union organizers conveys to workers management's susceptibility to the law of union organizing.<sup>334</sup>

Indeed, a classic scene from the film *Norma Rae* captured this dynamic cinematically. At the outset of that movie – which involved a union-organizing drive at a textile mill in the southern United States – the union organizer is barred from the factory by a locked, barbed-wire fence. This exercise of employer property rights clearly conveys employer power and dominance vis-à-vis the union. But later in the film, the organizer is permitted – through the operation of a contempt sanction imposed under federal labor law – to walk through the factory in order to inspect a company bulletin board. The scene of a union representative physically present in what had previously been a site of unchallenged employer authority communicates to workers on the shop floor a new sense that perhaps the employer is vulnerable to union challenge.<sup>335</sup>

Thus, because perceptions of vulnerability can contribute to the success of organizing efforts, a legal requirement that organizations be granted on-site “free spaces” has significant virtue. But whether organizing space is granted on-site or off, a note is in order about the challenges of making sure such space is genuinely free – the challenges of preventing surveillance in the modern era. Much of the free-space literature examines social-movement development that occurred prior to the proliferation of smartphone, internet, and modern surveillance technology. Although, of course, state actors possessed electronic-surveillance capabilities during the Civil Rights era, those technologies were relatively less available to nonstate actors like employers and landlords. This is no longer the case. The proliferation of cybertechnology means that nongovernment actors – including employers and landlords – have access to affordable means for surveilling challengers, should they wish to do so. In today's environment, an

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334. Sachs, *supra* note 330, at 375.

335. *NORMA RAE* (Twentieth Century Fox Film Corp. 1979); see Sachs, *supra* note 330, at 375 n.134.

employer or landlord could purchase a device that looks like a cockroach or a dragonfly and provides high-quality video and audio recordings of any organizing meeting.<sup>336</sup> Surveillance capabilities are certainly as great in cyberspace and thus the challenge of ensuring surveillance-free digital organizing is also a daunting one.

For our purposes, this means that if the legal regime is to provide free space for political organizing it must also protect against sophisticated forms of surveillance. At a minimum, the law should establish meaningful sanctions for any type of surveillance carried out against political-organizing efforts. These sanctions should include punitive damages. Beyond sanctions, the law also could provide for public funding of antisurveillance technologies, either through direct provision or tax credits for organizations that incur reasonable expenses purchasing such technologies.

#### *D. Removing Barriers to Participation*

Legal reforms to facilitate aggregation of resources and access to spaces are essential, but they are not sufficient to enable organization building among vulnerable populations. As sociologists have documented, a movement organization's vitality and longevity are dependent on its ability to attract and retain members.<sup>337</sup> Yet, even when participants are motivated and sufficient resources exist, several barriers to recruitment and retention remain.

A chief obstacle for many individuals is fear of reprisal. As sociologists have demonstrated, fear of retaliation can jeopardize collective action, particularly in high-risk environments.<sup>338</sup> Among low-income populations, the risk is high. For workers, tenants, debtors, and benefit recipients, retaliation might mean the loss of livelihoods, shelter, future creditworthiness, and emergency support.

Retaliation and repression do not always defeat organization. Movement identity, solidarity, and social bonds can help individuals resist and challenge authority. Rick Fantasia, for example, illuminates how organizing and strikes foster a culture of solidarity that makes it possible for workers to persist, even in

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336. Len Calderone, *Is That a Bug or a Robotic Spy?*, ROBOTICS TOMORROW (Dec. 5, 2017, 8:15 AM), <https://www.roboticstomorrow.com/article/2017/12/is-that-a-bug-or-a-robotic-spy/11089> [<https://perma.cc/65AA-ZMN3>].

337. See, e.g., Sharon Erickson Nepstad, *Persistent Resistance: Commitment and Community in the Plowshares Movement*, 51 SOC. PROBS. 43, 43 (2004).

338. See Jeff Goodwin & Steven Pfaff, *Emotion Work in High-Risk Social Movements: Managing Fear in the U.S. and East German Civil Rights Movements*, in PASSIONATE POLITICS: EMOTIONS AND SOCIAL MOVEMENTS 282, 284-85 (Jeff Goodwin, James M. Jasper & Francesca Polletta eds., 2001).

the face of antiunion campaigning, intimidation, and arrests.<sup>339</sup> Jeff Goodwin and Steven Pfaff show that intimate social networks, mass meetings, collective identities, shaming, and appeals to divine protection all helped mitigate fears of police repression and encouraged movement participation during both the Civil Rights movement and the East German Opposition movement.<sup>340</sup> At the same time, the literature highlights the extent to which repressive action by state and private actors frequently prevails, impeding successful organizing and even leading to organizational collapse.<sup>341</sup>

A second barrier to joining and remaining part of a movement organization is life responsibility, which can render people, in sociologist Sharon Nepstad's terms, "biographically unavailable."<sup>342</sup> Numerous sociologists observe that full-time employment, family obligations, lack of transportation, and other material obstacles can pose significant barriers to movement participation.<sup>343</sup> Some individuals overcome these barriers because of deep motivation and allegiance to the cause or because of connections to other organization members.<sup>344</sup> Yet, sociologists have demonstrated that overcoming barriers need not only be a personal, individual-level effort. Some social movements have had success by providing material assistance and family support so that members are free to participate. Nepstad, for example, has documented how the Catholic Left Plowshares

339. RICK FANTASIA, *CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION, AND CONTEMPORARY AMERICAN WORKERS 138-60* (1988).

340. Goodwin & Pfaff, *supra* note 338, at 282-301; *see also* MCADAM, *supra* note 41, at 218-29 (describing state efforts to repress Black-power groups).

341. *See, e.g.*, RICK FANTASIA & KIM VOSS, *HARD WORK: REMAKING THE AMERICAN LABOR MOVEMENT 38, 69-75* (2004) (describing the defeat of the Knights of Labor after violent state and employer repression in the early twentieth century as well as the successful use of antiunion threats, discipline, strike breaking, and capital flight to defeat organized workers in the late twentieth century); FORBATH, *supra* note 159, at 105-18 (describing the use of state coercion and violence against strikers in the United States in the early twentieth century); CHARLES TILLY, *FROM MOBILIZATION TO REVOLUTION 98-115* (1978) (explaining that repression may make participation too costly); WINDHAM, *supra* note 90, at 3, 8 (describing the effects of employer resistance to union organizing in the late twentieth century).

342. Nepstad, *supra* note 337, at 56.

343. *E.g.*, Bert Klandermans & Dirk Oegema, *Potentials, Networks, Motivations, and Barriers: Steps Towards Participation in Social Movements*, 52 *AM. SOC. REV.* 519, 520, 529 (1987); Nepstad, *supra* note 337, at 56.

344. Nepstad, *supra* note 337, at 56; *see also* JAMES DOWNTON JR. & PAUL WEHR, *THE PERSISTENT ACTIVIST: HOW PEACE COMMITMENT DEVELOPS AND SURVIVES 37-38* (1997) (discussing how activists lower barriers and reinforce commitment by "life designing"); PAUL LICHTERMAN, *THE SEARCH FOR POLITICAL COMMUNITY: AMERICAN ACTIVISTS REINVENTING COMMITMENT 24-25* (1996) (juxtaposing "personalized" and "communitarian" commitments that create "bonds of responsibility"); Klandermans & Oegema, *supra* note 343, at 520 (showing that among applicants to the Freedom Rides, those who ultimately participated knew more participants than those who did not).

movement provided stable childcare so protesters could go to prison if needed; the organization also provided housing, legal support, transportation, and other assistance.<sup>345</sup>

Law may not be able to increase individual motivation, build social networks, or foster solidarity, but it can help remove barriers to participation – both by protecting those engaged in organizing work from retaliation and by removing material obstacles to participation.

First and foremost, the law must protect all those involved in organizing efforts from retaliation: no worker may be fired, no tenant evicted, and no welfare recipient deprived of benefits because they are active in or supportive of the organization's efforts. Penalties and enforcement mechanisms must be strong enough to deter violations of law. Indeed, several regimes protect organizing rights, including the NLRA and several states' tenant laws, but lack sufficient penalties or enforcement mechanisms to ensure consistent compliance.<sup>346</sup> Private rights of action, compensatory and punitive damages, class relief, prohibitions on mandatory arbitration, and other strong remedies are necessary to truly remove this barrier to participation.<sup>347</sup>

In addition, the law could provide just-cause protections. Under this model, no worker could be fired, no tenant evicted, no welfare recipient deprived of benefits without the employer, landlord, or benefit provider demonstrating just cause.<sup>348</sup> The victim would not need to show antiorganizing animus or that opposition to organization was a motivating factor in the adverse action. The advantage of this approach is that it could create a more secure environment, shifting the burden to the authority figure when a dispute about retaliation exists. Yet, even just-cause provisions are no panacea. General due-process protections

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345. Nepstad, *supra* note 337, at 57.

346. On insufficient enforcement and lack of robust penalties in labor law, see Andrias, *supra* note 26, at 26–27 nn.123–26; Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 75, 75 (Sheldon Friedman, Richard W. Hurd, Rudolph A. Oswald & Ronald L. Seeber eds., 1994); Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 *CHI.-KENT L. REV.* 59, 62–63 (1993); and Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 *HARV. L. REV.* 1769, 1787–1803 (1983). On problems with enforcement of tenants' rights, see, for example, Kathryn A. Sabbeth, *(Under)Enforcement of Poor Tenants' Rights*, 27 *GEO. J. ON POVERTY L. & POL'Y* 97, 119–34 (2019).

347. See, e.g., David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 *COLUM. L. REV.* 1244 (2012); Fine & Gordon, *supra* note 275, at 562; Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 *EMORY L.J.* 1531, 1531–32 (2016).

348. See Kate Andrias & Alexander Hertel-Fernandez, *Ending At-Will Employment: A Guide for Just Cause Reform*, *ROOSEVELT INST.* 5–8 (2021), <https://rooseveltinstitute.org/publications/ending-at-will-employment-a-guide-for-just-cause-reform> [<https://perma.cc/K2RU-E8LA>].

already exist in several of these areas—in public benefits, for example<sup>349</sup>—and power dynamics still create fear of reprisal. Antiretaliation and just-cause protections, while helpful, must be part of a broader regime enabling organizing.

To that end, law should also work to remove material barriers. Here, the literature on resources is again instructive.<sup>350</sup> As discussed above, the law could require paid time off from work; it could also provide subsidized childcare or other material support for participation in qualified organization activities.<sup>351</sup>

#### *E. Material Changes, Incremental Victories, and Structural Power*

Another facilitator of organizing success is success itself. That is, the ability of people to build powerful organizations depends on their ability, first, to win smaller-scale, incremental victories along the way, and, second, to operate in structures that enable meaningful large-scale victories.

The origins of the insight about incremental victories can be traced to Saul Alinsky, a community organizer and author of *Rules for Radicals*. In that book, Alinsky lays out a program for building mass political organizations based on his own experience as an organizer and educator. Alinsky stresses the importance of winning small-scale victories this way:

The organizer knows . . . that his biggest job is to give the people the feeling that they can do something, that while they may accept the idea that organization means power, they have to experience this idea in action. The organizer's job is to begin to build confidence and hope in the idea of organization and thus in the people themselves: to win limited victories, each of which will build confidence and the feeling that "if we can do so much with what we have now just think what we will be able to do when we get big and strong."<sup>352</sup>

Alinsky's thesis is borne out by both sociological accounts of organizing campaigns and the theoretical literature on collective efficacy. Thus, for example, in his seminal study of the union campaign at Springfield Hospital, Rick Fantasia reports that workers' successful engagement in what he calls "mini-insurrections"—small-scale collective actions—increased the likelihood that they would

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349. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

350. For a discussion of how organizers ensure access to, and mobilization of, resources crucial to the success of social movements, see, for example, Edwards & McCarthy, *supra* note 207, at 131-43.

351. See *supra* text accompanying notes 301-305.

352. ALINSKY, *supra* note 179, at 113-14.

participate in more full-scale union organizing efforts.<sup>353</sup> Fantasia concludes that workers gained a “courageousness” from their experience with small-scale organizing success and that this courageousness was a “crucial component of union formation, especially in the face of sharp employer resistance.”<sup>354</sup> Similarly, in her study of the contemporary labor movement, Rachel Meyer concludes that organizers can increase the prospects for ultimate success by making it “possible for people to first succeed at small collective actions so that they become aware of their power to make change.”<sup>355</sup>

The theoretical literature on efficacy also confirms Alinsky’s insight. This literature suggests that people decide what actions to take in the face of obstacles based on perceptions of their efficacy in overcoming those obstacles. Crucially, according to Albert Bandura’s work, people learn to assess their efficacy based on past experiences: when we succeed at one task, we come to believe that we are capable of performing similar, but more difficult, tasks in the future. Thus, “partial mastery experiences” facilitate “subsequent performance of threatening tasks that [one has] never done before.”<sup>356</sup> This form of “efficacy learning,” moreover, applies at both the individual and the collective levels, suggesting that participation in successful collective endeavors—however modest—increases the prospects for participation in more robust forms of collective activity.<sup>357</sup>

What might the law do to facilitate efficacy learning in organizing? In a sense, all of our recommendations further this goal. After all, all of our recommendations are geared to increase the likelihood of organizational success, and thus all will hopefully make it more likely for participants to experience the kind of victories that fuel further organizing. But there are specific things law might do to make early-stage, tangible, and small-scale organizing victories possible.

First, the law can make small-scale tangible gains more likely by imposing bargaining obligations in each of our areas of focus. Thus, landlords could be legally required to bargain with tenants’ unions, welfare agencies with benefit-recipient unions, and employers with workers’ unions. The scope of the obligation should be crafted explicitly to allow unions to bargain for a wide range of

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353. FANTASIA, *supra* note 339, at 121-80.

354. *Id.* at 121, 145.

355. Sachs, *supra* note 203, at 2736 (citing Rachel Meyer, *The Irony of Power: Efficacy and Collective Action in Working-Class Struggle* 4 (2006) (unpublished manuscript) (on file with authors)).

356. Albert Bandura, *Self-Efficacy Mechanism in Human Agency*, 37 *AM. PSYCHOLOGIST* 122, 128 (1982).

357. See ALBERT BANDURA, *SELF-EFFICACY: THE EXERCISE OF CONTROL* 478 (1997) (stating that “efficacy beliefs have similar sources, serve similar functions, and operate through similar processes” and that perceptions of self-efficacy “affect how well group members work together and how much they accomplish collectively”).

goals. Thus, in the tenant context, the obligation could cover rent, terms of eviction, environmental standards, and the like, but it could also require landlords to bargain over details that tenants would find meaningful if not transformational. Similarly, in the labor context, the obligation should enable workers' organizations to bargain over wages, hours, and working conditions, but also over other aspects of the work relationship that matter to the workers – say, the availability of a water cooler or a coffee station.

This suggestion tracks, in part, the current obligation to bargain in good faith that federal labor law imposes on employers when a union represents that employer's employees.<sup>358</sup> Unfortunately, the NLRA's good-faith requirement has proven insufficient as a means of encouraging the parties to reach actual agreement.<sup>359</sup> Thus, a law designed to facilitate small-scale victories might need to go further than this requirement. The suggestions contained in this Article aimed at strengthening the right to protest and strike are one avenue to explore. Another direction worth considering would be to couple the bargaining obligation with the so-called "interest arbitration" of first agreements. Under an interest-arbitration procedure, the parties would attempt to conclude negotiations of a first agreement, but in the event they are not successful, the dispute would be resolved by a neutral arbitrator who could shape the contours of the first agreement. This process would thus help ensure that *some gains* for tenants, benefit recipients, or workers emerged from the bargaining process.<sup>360</sup> The magnitude of those gains would depend on how much power the union had built, but since the goal is to enable participants to have a first experience with organizing success, the fact of progress matters more than the degree of it.

While incremental small-scale victories are essential, a system designed to build countervailing political power among organizations of the poor and working class must also create structures that enable those groups to exercise effective economic and political power. Thus, the scope of the bargaining obligation ought to be crafted to track the relevant economic and political system in which the organizations operate. In the labor context, this approach would mean that bargaining would be required to occur at a sectoral level in addition to the

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358. See 29 U.S.C. § 158(a)(5) (2018) (providing that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees"); *id.* § 158(d) (providing that, in order to satisfy § 158(a)(5)'s collective-bargaining requirement, the employer and the employees' representative must, inter alia, "confer in good faith with respect to wages, hours, and other terms and conditions of employment").

359. See, e.g., Catherine L. Fisk & Adam R. Pulver, *First Contract Arbitration and the Employee Free Choice Act*, 70 LA. L. REV. 47, 56 (2009) ("Although . . . the NLRA imposes a duty to bargain in good faith, the United States Supreme Court long ago decided that the Board lacks the authority to force a recalcitrant – even an illegally recalcitrant – party to reach agreement.").

360. See *id.* at 64 (noting that mandatory arbitration of first collective-bargaining contracts aids the weaker bargaining party and thus "would strengthen nascent unions").



worksite level, and with entities that exercise financial power in a given industry or over a given supply chain, as well as with direct employers.<sup>361</sup> For student debtors, for example, bargaining would be required with for-profit colleges with exploitative debt practices, lenders, and government regulators.<sup>362</sup> And the topics of bargaining would not be limited by law to exclude, for example, entrepreneurial issues or broader political concerns; instead, these conditions would be reworked to allow organizations to bargain expansively and for the “common good.”

A related type of legal intervention would grant policymaking power to organizations of poor and working-class Americans through administrative processes at the local, state, or federal levels of government.<sup>363</sup> Beyond simply encouraging group participation, the law could give organizations the right to appoint representatives to public administrative bodies based on membership levels relative to the constituency as a whole. For example, housing law could require that housing authorities or rent-control boards add seats for each tenant union that meets a certain threshold number of members. The tenant union’s membership would then be entitled to elect a representative to the new seat. And labor law could require that workers’ compensation boards and occupational-health boards include members from unions that reach a certain density. Federal, state, or local government could also facilitate sectoral and regional bargaining using a tripartite approach, enabling worker organizations and employer

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361. See, e.g., Andrias, *supra* note 26, at 79 (advocating for “state-supported sectoral bargaining”); Mark Barenberg, *Widening the Scope of Worker Organizing: Legal Reforms to Facilitate Multi-Employer Organizing, Bargaining, and Striking*, ROOSEVELT INST. 3 (Oct. 2015), <https://rooseveltinstitute.org/wp-content/uploads/2015/10/RI-Widening-Scope-Worker-Organizing-201510-2.pdf> [<https://perma.cc/ET48-9NQ2>] (noting the “decentralization and fragmentation of collective bargaining,” and canvassing the “four patterns of contractual interconnection among multiple employers” that characterize that decentralized environment); Block & Sachs, *supra* note 283, at 3 (laying out the “three profound shortcomings” of “[o]ur current system of decentralized bargaining”).

362. See Hannah Appel, Sa Whitley & Caitlin Kline, *The Power of Debt: Identity and Collective Action in the Age of Finance*, SHUTTLEWORTH FOUND. & UCLA INST. ON INEQ. & DEMOCRACY 51-72 (2019), <https://challengeinequality.luskin.ucla.edu/wp-content/uploads/sites/16/2019/03/Appel-Hannah-THE-POWER-OF-DEBT.pdf> [<https://perma.cc/B7JN-TPX3>] (describing and drawing lessons from a movement of debtors to for-profit colleges who organized and achieved over one billion dollars in debt discharge as of early 2019).

363. For existing and historical examples of such administrative initiatives, see Andrias, *supra* note 67, at 683-92, which details the conflict over, and eventual demise of, industry committees established under the Fair Labor Standards Act; and Rahman, *Power-Building*, *supra* note 23, at 340-50, which provides the dual examples of post-2008 financial regulation at the national level and community-development commissions at the local level. See also Johnson, *supra* note 137, at 1369 (stating that attaching equality directives to numerous federal spending programs causes those spending programs to “continuously operate in ways that promote the robust participation and inclusion of varied groups”).

organizations – or tenant organizations and landlord organizations, debtors and banks – to establish employment conditions – or housing or lending standards – jointly throughout a given sector, subject to governmental oversight as required by constitutional delegation and due-process doctrines.<sup>364</sup>

Such administrative mechanisms would provide organizations concrete power in policymaking. To the extent the law conditioned participation on membership levels, it might also have the effect of encouraging organizations to establish federated membership structures in ways that enhance their long-term ability to exercise political power.<sup>365</sup> Moreover, in providing meaningful interim victories, such processes could contribute to members' sense of collective efficacy and thus to further organizing.<sup>366</sup>

#### *F. Contestation and Disruption*

Almost everyone agrees that when a political system offers a nondisruptive means for accomplishing change, such methods are preferable. In theory, the American pluralist system implies that everyone can engage through nondisruptive means. But a substantial body of sociology work suggests that a degree of disruption is necessary for movement success, particularly among poor people. As William A. Gamson observes, “Unruly groups, those that use violence, strikes, and other constraints, have better than average success” at achieving the movement's goals.<sup>367</sup> Charles Tilly has reached similar conclusions, studying movement actions dating back to food riots in Burgundy, France in the seventeenth century. Tilly explains that repertoires of contention vary depending on legal and social context – ranging from tax revolts to strikes to mass public meetings – but his study underlines the importance of contention over time and

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<sup>364</sup>. For discussions of contemporary and historical efforts at sectoral bargaining and the constitutional constraints on such efforts, see Andrias, *supra* note 67, at 659-95, which discusses early New Deal attempts at fostering sectoral bargaining through the Fair Labor Standards Act; and Andrias, *supra* note 26, at 46-70, 89-92, which discusses efforts of contemporary worker movements to engage in social bargaining in low-wage industries.

<sup>365</sup>. See SKOCPOL, *supra* note 50, at 92-93 (discussing the importance of federated membership organizations in a federal political system).

<sup>366</sup>. Government-authorized service provision, discussed in Section III.B.1, also has been shown to build organization. By providing critical services and benefits, such as unemployment insurance, organizations build connections with members while also demonstrating efficacy and value. See Dimick, *supra* note 265, at 356-59.

<sup>367</sup>. William A. Gamson, *The Success of the Unruly*, in READINGS ON SOCIAL MOVEMENTS: ORIGINS, DYNAMICS AND OUTCOMES 518, 526 (Doug McAdam & David A. Snow eds., 2d ed. 2010).

across contexts.<sup>368</sup> In work studying the Civil Rights movement, Doug McAdam similarly finds that movement success depended on disruptive tactics, though he finds that the most effective forms of disruption were temporary and involved constant innovation to respond to segregationist reprisals.<sup>369</sup>

In perhaps the most famous study of poor people's movements, Frances Fox Piven and Richard Cloward highlight how insurgent and defiant action is critical to movement success.<sup>370</sup> Protest takes different forms depending on institutional context and the ways in which individuals can withhold cooperation or services—workers can withhold labor, and tenants can withhold rent, whereas the unemployed must sometimes occupy workplaces and demonstrate en masse.<sup>371</sup> Protest is more likely to be effective if three conditions exist: (1) Protestors are central to institutions' functioning; (2) Powerful groups have a stake in those institutions; and (3) Protesters are able to protect themselves from reprisal.<sup>372</sup>

Research from historians and political scientists confirms the account offered in the sociological literature about the role of disruptive action in movement success. From the early- and mid-twentieth-century industrial-worker strikes and rent strikes to the 1960s student movements and civil-rights protests and boycotts, disruptive concerted action has been critical to movement success.<sup>373</sup> Contemporary examples tell a similar story. In the spring of 2012, for example, hundreds of thousands of students in Quebec protested a proposed seventy-five percent increase in tuition at public universities. Organized by their student unions, over 300,000 students went on strike, with several hundred thousand

368. See, e.g., Charles Tilly, *Getting It Together in Burgundy, 1675-1975*, 4 THEORY & SOC'Y 479, 485 (1977) (discussing the manner in which the "collective action of Burgundy's ordinary people [was] changing," including the seventeenth-century rise of food riots and eighteenth-century revolution).

369. Doug McAdam, *Tactical Innovation and the Pace of Insurgency*, 48 AM. SOC. REV. 735, 752 (1983).

370. See generally PIVEN & CLOWARD, *supra* note 41 (examining protest movements among the poor and working class in the United States in the middle of the twentieth century). According to Piven and Cloward, the hope for poor people's movements lies primarily in moments when large-scale changes undermine political stability, and the poor engage in insurgency. Following such protest, concessions are often withdrawn, but some become permanent. *Id.* at 34-35. This phenomenon does not mean, however, that formal organization is antithetical to movement success or that protest is the only means to achieve movement goals. Rather, there is a contingent relationship between protest politics and conventional political engagement. See Sanford F. Schram, *The Praxis of Poor People's Movements: Strategy and Theory in Dissensus Politics*, 1 PERSP. ON POL. 715, 716-18 (2003).

371. PIVEN & CLOWARD, *supra* note 41, at 21-22.

372. See *id.* at 24-26. Thus, poor people are in a weaker position to use disruption as a tactic for influence because they frequently do not perform roles on which major institutions depend, or those who manage their institutions often have little to concede. They also have less ability to protect themselves from reprisal. *Id.* at 25-26.

373. See *id.* at 222.

remaining on strike for months. By September, the government abandoned its proposed increase.<sup>374</sup> In Los Angeles, in recent years, incidents of tenant rent strikes have increased in the face of rising rents and deplorable housing conditions, with tenants, organized by the Los Angeles tenants' union, winning some significant victories in both local policy and private rent arrangements.<sup>375</sup> Meanwhile, in the last few years, hundreds of thousands of public-school teachers in the United States have engaged in mass strikes, winning substantial improvements in salaries, benefits, and education funding even in states with Republican legislatures and no formal union rights.<sup>376</sup> During the COVID-19 pandemic, strikes by essential workers at Amazon, Whole Foods, Target, FedEx, and elsewhere, and protests by nurses and other healthcare workers, forced attention to urgent health and safety concerns.<sup>377</sup>

Law can facilitate effective protest through several mechanisms. First, it can affirmatively provide the right to strike across domains. That is, law can and should explicitly grant the right of workers, tenants, and public beneficiaries to engage in concerted action, including protests and strikes. Simply creating a right is not enough, however. Second, law must also provide protection from both private and state reprisal – and protection must be meaningful and broad in scope. Thus, the law must not only prohibit employers from firing workers for striking (as private-sector labor law does, but much public-sector law does not); it also must prohibit permanent replacement of those who strike and

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374. See Bangs, *supra* note 328, at 48.

375. See Armando Aparicio & David Zlutnick, *These Tenants Are Leading the Largest Rent Strike in LA History*, NATION (Aug. 20, 2018), <https://www.thenation.com/article/these-tenants-are-leading-the-largest-rent-strike-in-la-history> [<https://perma.cc/34UA-BVL6>]; Rob Kuznia, *Los Angeles Tenants Increasingly Engaging in Rent Strikes amid Housing Crisis*, WASH. POST (June 2, 2018, 6:38 PM EDT), [https://www.washingtonpost.com/national/los-angeles-tenants-increasingly-engaging-in-rent-strikes-amid-housing-crisis/2018/06/02/6b91c340-65af-11e8-a768-ed043e33f1dc\\_story.html](https://www.washingtonpost.com/national/los-angeles-tenants-increasingly-engaging-in-rent-strikes-amid-housing-crisis/2018/06/02/6b91c340-65af-11e8-a768-ed043e33f1dc_story.html) [<https://perma.cc/8NFZ-V4VN>]; Tracy Jeanne Rosenthal, *101 Notes on the LA Tenants Union*, COMMUNE (July 19, 2019), <https://communemag.com/101-notes-on-the-la-tenants-union> [<https://perma.cc/VH6T-82RK>].

376. See Michael Sainato, *U.S. Teacher Strikes Generated Victories. So Why Are They Ready to Strike Again?*, GUARDIAN (Aug. 30, 2019, 2:00 AM EDT), <https://www.theguardian.com/education/2019/aug/29/us-teacher-strikes-generated-victories-so-why-are-they-ready-to-strike-again> [<https://perma.cc/X6SL-N39L>]; Andrew Van Dam, *Teacher Strikes Made 2018 the Biggest Year for Worker Protest in a Generation*, WASH. POST (Feb. 14, 2019, 11:22 AM EST), <https://www.washingtonpost.com/us-policy/2019/02/14/with-teachers-lead-more-workers-went-strike-than-any-year-since> [<https://perma.cc/WL6S-XU2F>]; see also Kate Andrias, *Peril and Possibility: Strikes, Rights, and Legal Change in the Age of Trump*, 40 BERKELEY J. EMP. & LAB. L. 135, 145-48 (2019) (describing collective action by teachers).

377. See Shirin Ghaffary, *The May Day Strike from Amazon, Instacart, and Target Workers Didn't Stop Business. It Was Still a Success*, VOX (May 1, 2020, 6:28 PM EDT), <https://www.vox.com/recode/2020/5/1/21244151/may-day-strike-amazon-instacart-target-success-turnout-fedex-protest-essential-workers-chris-smalls> [<https://perma.cc/2PZN-2HC6>].

provide strong penalties and enforcement mechanisms.<sup>378</sup> Similarly, the law must prohibit tenants from being evicted or harassed and beneficiaries from being cut off or having their benefits reduced.

Third, the law must protect the right to engage in *effective* concerted action, even when such action is disruptive. For example, the law should not only provide workers at a single employer the right to strike and to demonstrate peacefully in front of their employer, nor should it only provide tenants the right to protest their particular landlord. Rather, and in contrast to current labor law, the law could also offer some protection for secondary boycotts and sympathy strikes across multiple domains, and it could permit nontraditional strikes short of full or indefinite stoppages.<sup>379</sup> To be sure, limits ought to exist on the right to engage in disruptive protest. Protests must be peaceful, eschewing both destruction of property and violence against individuals. But the right to protest becomes ineffective if it is cabined to prevent disruption.

Finally, the law should protect protests and strikes that have the political process as a target and the “common good” as a goal.<sup>380</sup> Current labor law achieves this to a point: the Supreme Court has held that the NLRA protects workers’ concerted activity that occurs through political channels, but only insofar as the activity relates to employment issues.<sup>381</sup> The NLRB has also concluded that workers may not be protected if they strike for an exclusively political cause.<sup>382</sup> Despite these restrictions – and others present in public-sector labor law – workers have frequently struck to advance the common good and to influence political decisionmaking. Consider the 2019 Chicago Teachers’ strike, during which teachers demanded not only better wages and benefits and smaller class sizes, but also housing assistance for new teachers, staff to help students and families in danger of losing housing, and other steps to advance affordable housing in

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378. See *supra* Section III.D.

379. See Craig Becker, “Better than a Strike”: Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act, 61 U. CHI. L. REV. 351, 354 (1994) (describing how the courts and the NLRB “have sharply restricted the range of protected strike activity,” including restrictions on nontraditional strikes); Gourevitch, *supra* note 88, at 9–11 (arguing for a more expansive conception of the right to strike); Kate Andrias & Brishen Rogers, *Rebuilding Worker Voice in Today’s Economy*, ROOSEVELT INST. 37 (Aug. 2018), <https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Rebuilding-Worker-Voice-201808.pdf> [<https://perma.cc/9UKK-ZSQ4>] (“Congress should repeal the broad restrictions on secondary boycotts. These restrictions are in significant tension with First Amendment law as it has developed in recent years.”).

380. See, e.g., McCartin, *supra* note 175.

381. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 569–70 & n.20 (1978).

382. Memorandum from Ronald Meisburg, Gen. Counsel, NLRB, to All Reg’l Dirs., Officers-in-Charge, and Resident Officers, Memorandum GC 08-10, at 2 (July 22, 2008).

the city.<sup>383</sup> A law designed to reduce political inequality would grant protection to this kind of collective action.

For many, the preceding recommendations regarding strikes will be controversial, if not entirely objectionable. In a liberal society, traditional paths of political power—voting, lobbying, participation—remain preferred. Our recommendations aim to strengthen those channels and to make disruption and contestation less likely. But history and social-science research leaves little doubt that disruptive concerted action is also essential for working-class and poor people to have a reasonable chance of success at achieving a redistribution in political (and economic) power.<sup>384</sup>

## CONCLUSION

Skeptics will object that none of this is possible. If elites wield so much power in the political sphere, why would they ever permit reforms that would

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383. See Amanda Novello, Richard D. Kahlenberg & Andrew Stettner, *The Chicago Teachers Strike Is a Fight for the Common Good*, CENTURY FOUND. (Oct. 28, 2019), <https://tcf.org/content/commentary/chicago-teachers-strike-fight-common-good> [https://perma.cc/7ZXS-F5NH].

384. When law creates and empowers organizations, it also typically imposes duties and constraints on those organizations. Corporate law imposes duties of care, loyalty, and faith, as well as disclosure obligations. Charitable nonprofits operate under various disclosure and governance obligations; they are also constrained from engaging in political activity. Labor law imposes a duty of fair representation on unions, as well as significant disclosure requirements; obligations of democratic governance and nondiscrimination; restrictions on expression; and an obligation of independence from the employer, in what Cynthia Estlund has termed a *quid pro quo*. Estlund, *supra* note 153, at 171-77, 193-234.

A discussion of what duties law should impose on newly empowered social-movement organizations is beyond the scope of this Article. Different contexts will warrant different specific designs, and the question of constraints and duties implicates a vast body of organizational literature and difficult choices. But, at the very least, social-movement organizations ought to be independent from—in other words, free from domination by—those with whom their members bargain; they ought to be inclusive (i.e., prohibited from discriminating on the basis of race, sex, sexual orientation, gender identity, national origin, disability, religion, or other protected status); their leaders ought to operate under basic fiduciary duties to their members, with obligations of financial disclosure; and organizations ought to be required to maintain democratic governance structures. These requirements are consistent with good-governance guidelines generally. They also may help facilitate the organizational strength of social movements over time by minimizing “oligarchization, co-optation, and the dissolution of indigenous support.” MCADAM, *supra* note 41, at 56. At the same time, it is essential that duties imposed by law not work to defeat the very purpose of a law of organizing: to enable poor and working-class individuals to form organizations that can exercise effective political power. *Cf.* Estlund, *supra* note 153, at 225-28 (describing restrictions on labor picketing as indefensible under a *quid pro quo* analysis).

fundamentally weaken their power while strengthening countervailing forces?<sup>385</sup> The point is well taken. Reforms suggested in this Article will be difficult to achieve, particularly at the national level in the short term.

Yet the obstacles are not insurmountable. The power of the wealthy ebbs depending on circumstance and alignments, and several factors can enable economically progressive legislative change. First, government tends to respond to the concerns of poor and working-class voters when those concerns become particularly salient. Second, divisions among elites can create openings for redistributive reform, as can elite sympathy with the cause of less affluent fellow citizens—or worry that failure to act will produce even more radical change.<sup>386</sup> In addition, the federalized nature of our government creates openings for legislative change at the state and local level that can, in turn, increase the likelihood of reform at the national level.<sup>387</sup> Crucially, moreover, the growth facilitated by supportive laws in one locality can enable federated organizations to export their power to other localities and ultimately to the national level.<sup>388</sup>

There is reason to believe that several of these dynamics are present today. To state the obvious, the COVID-19 pandemic has made the economic plight of poor and working-class Americans highly politically salient. The resurgence of organizing among workers, tenants, and debtors that has occurred in response to the pandemic—and that has highlighted the inequities of how the pain of the pandemic is distributed—has only increased this salience, as have the extraordinary protests organized by Movement for Black Lives.<sup>389</sup> Voters are clearly

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385. Cf. Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers*, 75 *FORDHAM L. REV.* 631, 637 (2006) (“[A] self-defeating proposal is one whose diagnosis and prescription make inconsistent assumptions about agents’ desires, beliefs, or opportunities. . . . [I]t might offer a prescription that is motivationally inconsistent with the diagnosis. Given the diagnosis, the actors who have the ability to adopt the prescription have no desire to do so.”).

386. See GILENS, *supra* note 11, at 81 (describing the responsiveness of officials when elite and low-income preferences overlap).

387. See JAMILA MICHENER, *FRAGMENTED DEMOCRACY: MEDICAID, FEDERALISM, AND UNEQUAL POLITICS* 1-83 (2018) (describing federalism dynamics of Medicaid expansion); Jamila Michener, *Medicaid and the Policy Feedback Foundations for Universal Healthcare*, 685 *ANNALS, AM. ACAD. POL. & SOC. SCI.* 116, 125-30 (2019) (showing that well-designed laws enacted in progressive states and localities can demonstrate the efficacy and plausibility of reform, create administrative capacity, and expand supportive constituencies in ways that increase the likelihood of reform both in other states and at the national level).

388. See Andrias, *supra* note 26, at 51-57 (describing how the Fight for \$15 campaign leveraged early gains in progressive states to spread the campaign in other states).

389. See Hannah Appel, *There Is Power in a Debtors’ Union*, *DISSENT* (July 12, 2019), [https://www.dissentmagazine.org/online\\_articles/there-is-power-in-a-debtors-union](https://www.dissentmagazine.org/online_articles/there-is-power-in-a-debtors-union) [<https://perma.cc/X7BX-PRHX>]; Kate Logan & Shay Totten, *The Seeds of Rural Progressivism*, *DISSENT* (2019), <https://www.dissentmagazine.org/article/the-seeds-of-rural->

concerned about these issues and increasingly support bold policy initiatives to address them. For example, a huge majority of voters now say they would prefer the federal government take “major, sweeping action” – rather than “modest action” – to address the economic impact of the pandemic.<sup>390</sup> There is also strong support for the proposition that “[t]he devastation triggered by coronavirus means we have to both address the immediate economic needs and work to fix problems in our economy – like inequality and poverty – that made us all more vulnerable.”<sup>391</sup>

These trends extend political shifts that have been developing since the recession of 2008. Thus, majorities in both red and blue states now express support for minimum wage increases and for labor unions.<sup>392</sup> Elite opinion shows

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progressivism [<https://perma.cc/L8QE-ZZ2F>]; Karen Narefsky, *All of a Sudden, Housing Is on the Agenda*, JACOBIN (Nov. 13, 2019), <https://www.jacobinmag.com/2019/11/housing-bernie-sanders-elizabeth-warren-2020-presidential-election> [<https://perma.cc/PD35-2KK5>]; Scheiber, *supra* note 35; *The New Fight for Racial Justice*, NATION (Aug. 27, 2014), <https://www.thenation.com/article/archive/new-fight-racial-justice> [<https://perma.cc/EN26-YCZT>]; cf. DANA R. FISHER, AMERICAN RESISTANCE: FROM THE WOMEN’S MARCH TO THE BLUE WAVE 6-42 (2019) (discussing the rise of anti-Trump organizing). For legal analysis of some of these movements, see Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 446 (2018), which describes “[t]he contemporary wave of radical social movements” as “revisit[ing] and complicat[ing] the terrain of rights”; Andrias, *supra* note 26, at 70, which discusses the Fight for \$15 and related movements as embracing a “new, still embryonic, labor law . . . commit[ted] to collective power rather than individual rights”; Andrias, *supra* note 376, at 148, which argues that recent labor struggles, such as the 2018 West Virginia Teachers’ strike, are emblematic of a “labor law that moves away from narrow, bureaucratic, and legalistic forms of worker representation toward more sectoral, worker-driven, and political forms of organization”; Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1616 (2019), which presents the “abolitionist conception of justice” as one that “presents a formidable challenge to existing ideas of legal justice . . . [and] one where punishment is abandoned in favor of accountability and repair, and where discriminatory criminal-law enforcement is replaced with practices addressing the systematic bases of inequality, poverty, and justice”; and Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 394 (2016), which explores how organized cop watching provides the basis for “a critique of the prevailing notion of community participation in policing that privileges consensus over conflict.” See also sources cited *supra* note 44 (describing organizing efforts among workers, tenants, debtors, and recipients of public benefits).

390. *National Online Survey*, GROUNDWORK COLLABORATIVE 7 (Apr. 29, 2020), <https://groundworkcollaborative.org/wp-content/uploads/2020/04/Groundwork-Collaborative-Topline-Results-042920.pdf> [<https://perma.cc/N4X8-Y3AU>].

391. *Id.*

392. Leslie Davis & Hannah Hartig, *Two-Thirds of Americans Favor Raising the Federal Minimum Wage to \$15 an Hour*, PEW RES. CTR. (July 30, 2019), <https://www.pewresearch.org/fact-tank/2019/07/30/two-thirds-of-americans-favor-raising-federal-minimum-wage-to-15-an-hour> [<https://perma.cc/F4SX-S4FC>]; see also Alexia Fernández Campbell, *Missouri Voters Just Blocked the Right-to-Work Law Republicans Passed to Weaken Labor Unions*, VOX (Aug. 7, 2018,



similar changes: economists, once largely skeptical of both worker-organization and minimum-wage laws, are now increasingly expressing support.<sup>393</sup> From Medicare for All to a \$15 minimum wage, from student-debt relief to fundamental labor-law reform, redistributive policies are being seriously discussed by national political leaders in a way they have not been for at least a generation.<sup>394</sup>

This shift in opinion is already reflected in policy changes in progressive state and local jurisdictions. In California, for example, the governor has extended union-negotiated terms to the entire grocery industry to ensure that safety and health standards reach all the grocery workers in the state.<sup>395</sup> It is safe to say that such a move, with its suggestion of European-style tripartite sectoral bargaining, would have been unthinkable a short time ago. In fact, numerous progressive reforms – ranging from new rights for workers excluded from federal labor law to enhanced protections for tenants – have been enacted at the state and local level in jurisdictions with progressive majorities and active organizations among low- and middle-income residents.<sup>396</sup> The extent to which experimentation at the local level is legally permissible will vary based on the organizing context. In some cases, like labor law, significant federal-preemption hurdles exist.<sup>397</sup> In other areas, like tenant rights, preemption is not an obstacle. But in both contexts, and in others as well, some local and state experimentation is both possible and imperative, laying the groundwork for future federal reform.

Of course, once legislative majorities exist, backlash is a concern, as is conservative judicial resistance. Particularly in recent years, where progressive localities have engaged in innovative economic policymaking, conservative states have clamped down through aggressive preemption rules,<sup>398</sup> and courts have a

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11:55 PM EDT) <https://www.vox.com/2018/8/7/17655690/missouri-election-proposition-a-right-to-work> [<https://perma.cc/Q4PF-FZ6U>] (rejecting a “right-to-work” law through voter referendum).

393. See, e.g., Mark Thoma, *As the World Changes, So Does Economics*, CBS NEWS: MONEYWATCH (Feb. 5, 2016, 5:30 AM), <https://www.cbsnews.com/news/as-the-world-changes-so-does-economics> [<https://perma.cc/22R4-GAND>].

394. See Eric Levitz, *The Left-Wing Realignment of American Politics Has Already Begun*, N.Y. MAG.: INTELLIGENCER (Jan. 23, 2020), <https://nymag.com/intelligencer/2020/01/the-republican-party-is-moving-left-on-economic-climate-policy.html> [<https://perma.cc/3M5U-B2ZR>].

395. Cal. Exec. Order N-51-20 (Apr. 16, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/04/4.16.20-EO-N-51-20-text.pdf> [<https://perma.cc/5ZTK-B36V>].

396. For a discussion of worker organizations’ recent successful efforts to bring about law reforms at the state and local level, see Andrias, *supra* note 26, at 46-57. For recent tenant organizing efforts and housing-law reform, see sources cited *supra* note 375.

397. Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1154-55 (2011); see also Andrias, *supra* note 26, at 91 (describing the NLRA’s preemption regime).

398. Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1164-84 (2018).

long history of interpreting ambiguity in law against the interests of the poor and working class.<sup>399</sup> To some extent, legislation can be designed with this history in mind—for example, through the inclusion of clear purpose statements, unambiguous text, and provisions that limit courts’ injunctive power. And with respect to political backlash, as E. E. Schattschneider famously argued, “New policies create a new politics.”<sup>400</sup> That observation will have particular relevance in our context. After all, laws designed to enable organizing will be particularly effective at generating their own political durability precisely because they will—explicitly and intentionally—build constituencies with the power to ensure the laws’ survival.<sup>401</sup>

None of this is to suggest that enacting laws to facilitate organizing among the poor and middle class would be easy; none of it is to predict that such enactment would be likely. Of course, the kinds of laws we propose here would face intense opposition. Those who currently wield unrivaled power will vigorously object to laws that enable their power to be countervailed. Those who have had disproportionate—sometimes unfettered—influence over our politics will object to the diminishment of that influence. But, in a democracy, these objections must be overcome. And that is exactly what the reforms we propose are meant to enable.

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399. FORBATH, *supra* note 159, at 150–54; Kate Andrias, *Building Labor’s Constitution*, 94 TEX. L. REV. 1591, 1594 (2016); Kate Andrias, *The Fortification of Inequality: Constitutional Doctrine and the Political Economy*, 93 IND. L.J. 5, 10–12, 18–23 (2018); Klare, *supra* note 90, at 268–70.

400. E. E. SCHATTSCHNEIDER, POLITICS, PRESSURES AND THE TARIFF: A STUDY OF FREE PRIVATE ENTERPRISE IN PRESSURE POLITICS, AS SHOWN IN THE 1929–1930 REVISION OF THE TARIFF 288 (1935).

401. See Sarah F. Anzia & Terry M. Moe, *Do Politicians Use Policy to Make Politics? The Case of Public-Sector Labor Laws*, 110 AM. POL. SCI. REV. 763, 763–70 (2016) (describing how public-sector labor laws enacted in the 1960s and ’70s created a powerful new interest group favoring progressive causes and candidates); Patrick Flavin & Michael T. Hartney, *When Government Subsidizes Its Own: Collective Bargaining Laws as Agents of Political Mobilization*, 59 AM. J. POL. SCI. 896, 907–09 (2015) (arguing that collective-bargaining regimes function as agents of political mobilization); cf. Keith Gunnar Bentele & Erin E. O’Brien, *Jim Crow 2.0?: Why States Consider and Adopt Restrictive Voter Access Policies*, 11 PERSP. POL. 1088 (2013) (documenting how the Republican Party has used policy to demobilize their political adversaries); Alexander Hertel-Fernandez, *Asymmetric Partisan Polarization, Labor Policy, and Cross-State Political Power-Building*, 685 ANNALS AM. ACAD. POL. & SOC. SCI. 64, 65–69 (2019) (describing conservative policy elites’ effort to weaken unions in order to shift the balance of organized power and electoral strength in American politics). See generally Levinson & Sachs, *supra* note 27 (describing how political actors use functional legal changes to entrench their policies and positions).