

BENJAMIN I. SACHS

The Unbundled Union: Politics Without Collective Bargaining

ABSTRACT. Public policy in the United States is disproportionately responsive to the wealthy, and the traditional response to this problem, campaign finance regulation, has failed. As students of politics have long recognized, however, political influence flows not only from wealth but also from organization, a form of political power open to all income groups. Accordingly, as this Essay argues, a promising alternative to campaign finance regulations is legal interventions designed to facilitate political organizing by the poor and middle class. To date, the most important legal intervention of this kind has been labor law, and the labor union has been the central vehicle for this type of organizing. But the labor union as a political-organizational vehicle suffers a fundamental flaw: unions bundle political organization with collective bargaining, a highly contested form of economic organization. As a result, opposition to collective bargaining impedes unions' ability to serve as a political-organizing vehicle for lower- and middle-income groups.

This Essay proposes that labor law unbundle the union, allowing employees to organize politically through the union form without also organizing economically for collective bargaining purposes. Doing so would have the immediate effect of liberating political-organizational efforts from the constraints of collective bargaining, an outcome that could mitigate representational inequality. The Essay identifies the legal reforms that would be necessary to enable such unbundled "political unions" to succeed. It concludes by looking beyond the union context and suggesting a broader regime of reforms aimed at facilitating political organizing by those income groups for whom representational inequality is now a problem.

AUTHOR. Professor of Law, Harvard Law School. The author thanks David Barron, Cynthia Estlund, Catherine Fisk, Gerald Frug, Jack Goldsmith, Daryl Levinson, and Matthew Stephenson for helpful comments and discussion. The author is also grateful to the participants in the Harvard Law School Faculty Workshop. Nikolas Bowie, William Dreher, Anna Lvovsky, Joshua Segal, and Heather Whitney provided outstanding research assistance.



ESSAY CONTENTS

INTRODUCTION	150
I. REPRESENTATIONAL INEQUALITY	159
A. Income and Responsiveness	159
B. Addressing the Problem: From Finance to Organization	163
II. UNIONS AND REPRESENTATIONAL INEQUALITY	168
A. Unions and Politics	168
B. Organizing Through Work	171
C. Collective Bargaining and Union Decline	176
III. THE UNBUNDLED UNION: LIBERATING POLITICS FROM COLLECTIVE BARGAINING	182
A. Improving Prospects for Organizing: Diminishing and Altering Managerial Opposition	185
B. Political Organizing Without Collective Bargaining?	195
IV. LAW AND ORGANIZING: DESIGNING AN UNBUNDLED REGIME	198
V. BEYOND THE WORKPLACE	203
CONCLUSION	206

INTRODUCTION

It is a good time to be wealthy in America and a tough time not to be. This is true not only because of the well-known economic problems facing low- and middle-income Americans. It is true because the poor and middle class have a major political problem today. The problem is that the government is strikingly unresponsive to their views.¹ As Martin Gilens concludes in his study of contemporary American politics, “the preferences of the vast majority of Americans appear to have essentially no impact on which policies the government does or doesn’t adopt.”²

No government, of course, is perfectly responsive to its citizenry, and perfect responsiveness is not even an aspiration of our democratic order.³ But it remains a fundamental democratic commitment that policies enacted by the government reflect the preferences of the polity. To borrow Dahl’s formulation, “a key characteristic of a democracy is the continuing responsiveness of the government to the preferences of its citizens, considered as political equals.”⁴ The degree of representational inequality that currently defines American political practice is thus a matter of substantial concern.

The wealthy have disproportionate influence over public policy because, to state the obvious, they have more money.⁵ Because it is the wealthy who make campaign contributions, fund independent electoral expenditures, and pay for lobbyists, policy is more responsive to those with money than to those without

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1. See, e.g., LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2008); MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2012); JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS* (2010); KAY LEHMAN SCHLOZMAN, SIDNEY VERBA & HENRY E. BRADY, *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* (2012).
 2. GILENS, *supra* note 1, at 1; see also BARTELS, *supra* note 1, at 275 (“[L]ow-income citizens as a group seem to be getting *no* representation . . .”); SCHLOZMAN ET AL., *supra* note 1, at 599 (concluding that “inequalities of political voice characterize American politics”).
 3. See, e.g., Adrian Vermeule, *The Supreme Court, 2008 Term—Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4 (2009).
 4. ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* 1 (1971).
 5. As discussed below, both Bartels and Gilens consider and refute the argument that the wealthy’s disproportionate influence over policy stems from some other variable like higher levels of political participation. See *infra* text accompanying notes 53-55.

it.⁶ Given the political influence that wealth bestows, scholars and Congress have understandably focused political reform proposals on campaign finance.⁷ But these attempts to get money out of politics have devolved into a cat-and-mouse game in which political actors bent on avoiding regulation, and a Supreme Court bent on invalidating it, have rendered the reforms ineffectual.⁸ After all, the Court has now struck down all forms of independent expenditure limitations, and political actors have designed ways to frustrate even the most creative restraints on campaign spending.⁹

Fortunately, however, money is not the only source of influence in American politics. Political power also flows from political organization, and organization is a source of power available to all income groups.¹⁰ As this Essay will suggest, legal interventions designed to facilitate political *organizing* by the poor and middle class are thus a viable alternative to campaign finance reforms and a promising means of redressing representational inequality.

6. See, e.g., LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011); see also GILENS, *supra* note 1, at 10 (arguing that money “is the root of representational inequality”).
7. Some notable exceptions include Henry L. Chambers, Jr., *Enclave Districting*, 8 WM. & MARY BILL RTS. J. 135 (1999); Emma Greenman, *Strengthening the Hand of Voters in the Marketplace of Ideas: Roadmap to Campaign Finance Reform in a Post-Wisconsin Right to Life Era*, 24 J.L. & POL. 209 (2008); and Bertrall L. Ross II & Terry Smith, *Minimum Responsiveness and the Political Exclusion of the Poor*, 72 LAW & CONTEMP. PROBS. 197 (2009).
8. See, e.g., Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999). Michael Kang uses the “cat-and-mouse” metaphor as well. Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 53 (2012). Heather Gerken describes campaign finance reform efforts as “the regulatory equivalent of whack-a-mole.” Heather Gerken, *Keynote Address: Lobbying as the New Campaign Finance*, 27 GA. ST. U. L. REV. 1155, 1157 (2011). As discussed below, some campaign finance scholars are abandoning strategies that focus on campaign finance and advocating lobbying reform. See, e.g., Gerken, *supra*; Kang, *supra*. This Essay shares the view that more or better campaign finance regulation is not the solution to what ails our politics, but it proposes a different approach for moving forward. See *infra* Part III.
9. See, e.g., Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 125 & n.38 (2010); LESSIG, *supra* note 6, at 271 (admitting his proposal’s “Achilles’ heel” lies in the possibility for independent expenditures).
10. See GILENS, *supra* note 1, at 7 (describing interest groups as a “parallel channel of influence over government policy”). Walter Korpi offers an early and influential account of the importance of collective political organization for lower- and middle-class citizens. WALTER KORPI, *THE DEMOCRATIC CLASS STRUGGLE* 26 (1983) (“[T]he major power resources of the wage-earners are their organizations for collective action.”); see also Nathan J. Kelly, *Political Choice, Public Policy, and Distributional Outcomes*, 49 AM. J. POL. SCI. 865, 867 (2005) (“[T]he lower classes must organize in order for their collective voice to be heard and influence outcomes.”).

In the United States, the legal regime that has most successfully facilitated lower- and middle-class political organizing has been labor law, and the labor union has been a critical vehicle for lower- and middle-class political organization.¹¹ At the peak of union strength, more than twenty million Americans—nearly all within the income classes for whom representational inequality is now a problem—exercised collective political voice through the union form.¹² Unions have successfully mobilized their memberships to vote, and, by aggregating millions of small-dollar donations from these members, have built effective lobbying operations, led extensive independent electoral efforts, and positioned themselves as leading campaign contributors.¹³ At times and on certain issues, unions have been politically liberal; at other times and on other issues, they have taken conservative—even reactionary—positions.¹⁴ But,

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11. See HACKER & PIERSON, *supra* note 1, at 56-57; SIDNEY VERBA, KAY LEHMAN SCHLOZMAN & HENRY E. BRADY, *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* 384 (1995) (observing that unions “play a significant role in the political mobilization of those who, on the basis of their income and education, might otherwise not take part politically”). This is true internationally as well. See, e.g., KORPI, *supra* note 10, at 54 (noting that, internationally, “[a]mong citizens in the lower socio-economic strata with individually small resources, the availability of collective resources in the form of organizations—primarily trade unions and working-class parties—is of prime importance”).
 12. See *infra* text accompanying note 85. At many historical moments, however, unions have performed poorly as the political representative of minority subgroups within the poor and middle classes and of poor and middle-class women. See, e.g., PAUL FRYMER, *BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY* 44-69 (2008) (discussing the NAACP’s unsuccessful efforts to desegregate unions from 1940 to 1968). More recently, as unions have concentrated organizational efforts in sectors of the labor market dominated by racial minorities and women, they have improved along these lines. See, e.g., Kate Bronfenbrenner, *Organizing Women: The Nature and Process of Union-Organizing Efforts Among U.S. Women Workers Since the Mid-1990s*, 32 *WORK & OCCUPATIONS* 441, 443-47 (2005) (noting that new organizing among women has outpaced new organizing among men since the mid-1980s, but that those gains were highly uneven between sectors); Kate Bronfenbrenner & Dorian T. Warren, *Race, Gender, and the Rebirth of Trade Unionism*, 16 *NEW LAB. F.* 142, 143 (2007) (“[W]orkers of color, and especially black men and women, are organizing and organizing successfully at disproportionate rates, even though these workers have been the hardest hit by manufacturing job losses and the downsizing of the public sector.”); Dorian T. Warren, *The American Labor Movement in the Age of Obama: The Challenges and Opportunities of a Racialized Political Economy*, 8 *PERSP. ON POL.* 847, 853 (2010) (describing some recent examples of successful organizing that incorporated “racial and gender concerns,” which “represent[s] a significant shift in union strategy reflecting organized labor’s commitment to transforming racial and economic inequality”).
 13. See *infra* text accompanying notes 86-91.
 14. See, e.g., Janice Fine & Daniel J. Tichenor, *A Movement Wrestling: American Labor’s Enduring Struggle with Immigration, 1866-2007*, 23 *STUD. AM. POL. DEV.* 84 (2009) (tracing the

when they were active and strong, unions helped ensure that the government was responsive to the actual preferences of the poor and middle class.¹⁵

Today, however, labor unions face a major obstacle to their ability to organize workers politically. The obstacle derives from the fact that unions bundle political organization with a specific and highly contested form of economic organization. Under our labor law regime, that is, unionization requires workers to organize for the purpose of collective bargaining with their employers in order to organize for political action.

From the perspective of political organization, this is a problem, and for several reasons. First, in recent years, managerial opposition to collective bargaining has become widespread and highly effective, and this opposition has made traditional union organizing difficult and increasingly rare.¹⁶ Second, changes in the structure of markets and the way work is organized have made collective bargaining hard to sustain in the contemporary economy.¹⁷ And, third, at most, only about half of all workers now want to engage in collective bargaining, meaning that unions are not a viable political vehicle for approximately half of the labor force.¹⁸

American labor movement's position on immigration and pointing to periods in which unions pushed for restrictionist policies).

15. See, e.g., BARTELS, *supra* note 1, at 245; see also *infra* notes 100-103.
16. See, e.g., KATE BRONFENBRENNER, UNEASY TERRAIN: THE IMPACT OF CAPITAL MOBILITY ON WORKERS, WAGES, AND UNION ORGANIZING 43 (2000) (noting that managerial opposition is "extremely effective in reducing union election win rates"); Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 684 (2010) (reviewing data).
17. See, e.g., KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS (2004).
18. See RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 17-18 (updated ed. 2006) (reporting polls showing support for unionization ranging from 32%-53%); Richard B. Freeman, *Do Workers Still Want Unions? More than Ever* (Econ. Policy Inst. Briefing Paper No. 182, 2007), <http://www.sharedprosperity.org/bp182/bp182.pdf>. Freeman's most recent data suggest that 58% of workers would join a union under the right conditions. See Freeman, *supra*, at 6. Two Zogby polls conducted around the same time as Freeman's study found that only 36% of non-unionized workers would vote for a union, *The Attitudes and Opinions of Unionized and Non-Unionized Workers Employed in Various Sectors of the Economy Toward Organized Labor*, ZOGBY INT'L 33 (2005), http://www.psr.org/info/Nationwide_Attitudes_Toward_Unions_2005.pdf, while 45% of those surveyed would be "likely" to join one, *Nationwide Attitudes Toward Unions*, ZOGBY INT'L 14 (2004), http://www.psr.org/info/Nationwide_Attitudes_Toward_Unions_2004.pdf. The exact number is of little significance; the point is that a substantial percentage of workers does not desire unionization in its traditional form.

These obstacles that collective bargaining poses to the viability of unions have contributed to a sharp decline in unionization rates. From a peak of thirty-five percent in the mid-1950s,¹⁹ unions now represent less than seven percent of private sector workers.²⁰ And this decline in unionization rates has, in turn, contributed significantly to the declining responsiveness of American politics to the poor and middle class.²¹

For decades, scholars and policymakers have been proposing ways to reform labor law in order to better facilitate unionization.²² If our goal, however, is not to increase the prevalence of collective bargaining but, instead, to facilitate political organizing among politically underrepresented groups, then there is a new possibility for reform. Namely, we could *unbundle* the collective bargaining and political functions of unions and allow employees to organize politically through the union form without also organizing economically for collective bargaining.

In fact, there is nothing in the nature of unionization that requires the bundling of economic and political functions. Bundling is instead an artifact of history and, more to the point, of law. Workers who sought to improve workplace conditions through collective bargaining often turned to politics to achieve similar goals, and they found that their unions were well suited to act as collective political agents. Contemporary labor law reflects this historical practice of bundling and perpetuates it.²³ But, while bundling has made sense

19. GERALD MAYER, CONG. RESEARCH SERV., RL32553, UNION MEMBERSHIP TRENDS IN THE UNITED STATES 23 (2004).

20. The rate is eleven percent when public sector workers are included. *Union Members—2012*, BUREAU LAB. STATS. 1 (Jan. 23, 2013), <http://www.bls.gov/news.release/pdf/union2.pdf>.

21. See, e.g., HACKER & PIERSON, *supra* note 1, at 139-42; see also *infra* notes 130-131 (collecting sources).

22. See, e.g., Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009); WILLIAM B. GOULD IV, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW 166 (1993); Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 353-55 (1994); Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 75 (1993); Sachs, *supra* note 16.

23. In brief, the National Labor Relations Act enables workers to organize “for the purposes of collective bargaining” with management, 29 U.S.C. § 157 (2006), and it imposes a “mutual obligation” on the union and management to bargain collectively over “wages, hours, and other terms and conditions of employment,” *id.* § 158(d). Such a collective bargaining union may also serve as a vehicle for the workers’ collective political voice, but it is statutorily obligated to fulfill its collective bargaining role. Similar provisions in state labor laws have the same effect. See, e.g., CAL. GOV’T CODE § 3515 (West 2012) (stating that employees have the right to form organizations “for the purpose of representation on all matters of

in certain contexts, nothing in the history of the union movement suggests that collective bargaining and political action must go together. Moreover, the legal regime that has required a bundling of political and economic functions could just as well allow employees to organize unions for political purposes but *not* collective bargaining ones.

An unbundled labor law would allow workers engaged in new organizing efforts to form either a traditional union or what this Essay will name a “political union.”²⁴ Political unions would be barred by statute from engaging in collective bargaining, but they would be able to serve as a vehicle for collective political voice for workers who decided to join the union. Unlike traditional unions, political unions would—for reasons this Essay will discuss—represent *only* workers who affirmatively desired to join and support the union: mandatory membership or mandatory dues payment arrangements of any kind would be out of place in this context.²⁵

As this Essay will explain, the statutory work of unbundling would not be terribly complex. But an unbundled labor law would nonetheless have a critical role to play in facilitating the organization of political unions. In brief, traditional labor law has done four key things to enable workers to use the employment relationship as a locus for organizational activity and thereby to overcome what would otherwise be potentially insurmountable collective action problems.²⁶ First, labor law allows workers to use the workplace as a

employer-employee relations”); 5 ILL. COMP. STAT. 315/2 (2012) (stating that public employees have the right to organize “for the purpose of negotiating wages, hours and other conditions of employment or other mutual aid or protection”).

24. This Essay is concerned with ways to increase political organizing among the poor and middle class, and thus focuses on new organizing efforts among workers not currently in traditional unions. Of course, workers in traditional unions have the right to decertify their unions, and, in an unbundled regime, workers could decide to decertify a bundled union and then organize a political union. See 29 U.S.C. § 159(c)(1)(A)(ii). But such an action is unlikely to increase the political representation of those workers and is thus not part of the proposal here.
25. See *infra* Part III.
26. This Essay will use “labor law” to refer primarily to the federal statutes governing private sector unionization and labor-management relations, see, e.g., 29 U.S.C. §§ 151-187, and the analysis here will focus on the private sector. It is true that, in the respects relevant here, state labor laws—which govern state and local public sector employees and which are generally modeled on the federal statute—perform essentially the same functions and have had essentially the same effects as their private sector analogues. See RICHARD C. KEARNEY, *LABOR RELATIONS IN THE PUBLIC SECTOR* (4th ed. 2008); Joseph E. Slater, *The “American Rule” that Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL’Y J. 53, 83 (2007). Nonetheless, the ways in which particular state labor statutes diverge from the federal one are beyond the

geographic site for organizational activity, thereby significantly decreasing the coordination costs of organizing. Second, labor law allows unions to harness the employer's administrative capacity—in particular, its payroll function—to fund union operations.²⁷ Third, labor law allows unions to use the employer's informational resources—in particular, data about employees—for organizational purposes, thus dramatically reducing the information costs of organizing. And, fourth, labor law prohibits employers from retaliating against employees engaged in organizational activity, thereby preventing the employer's "rational predatory action" from impeding organizing efforts.²⁸ An unbundled labor law that offered these same four legal advantages to political unions could enable workers to overcome the hurdles to collective political action and take advantage of the union form as a vehicle for collective political voice.

However achieved, unbundling would expand employees' choice set in a critical way: it would allow employees to organize politically through the union form even if they oppose collective bargaining, and it would thereby expand the range of people for whom unionization is a viable form of political organization. Moreover, because workers would choose the political projects that each of these new unions would pursue—and because those projects would not have to be tied to any traditional union agenda—political unions might better capture the range of political preferences and views of their members than do traditional unions.²⁹

Significantly, political unions would also likely generate less managerial opposition than collective-bargaining unions do, and for several reasons. One, some political unions would devote themselves to policies—on social issues, for example—that firm management would consider non-threatening, or irrelevant, or might even favor. Two, political unions could exercise influence only in the political arena and not at the bargaining table, and thus their power *vis-à-vis* the individual firm would be more diffuse than the power of traditional unions. Operating at the level of the polity would also mean that political unions would generally be less able to place their firms at a competitive disadvantage *vis-à-vis* non-union firms. And, because of the

scope of this Essay, as is a discussion of other ways in which a public-sector analysis would diverge from the one offered here.

27. See *infra* Section II.B.

28. Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 994 (1984).

29. For a discussion of the choice implications of bundling in a related context, see Richard Craswell, *Tying Requirements in Competitive Markets: The Consumer Protection Issues*, 62 B.U. L. REV. 661, 667 (1982).

greater range of interests represented in the political arena than at the collective-bargaining table, politics-only unions would also be less likely to secure any anti-competitive demands that they might make. Last, and of equal importance, if and when management does oppose workers' efforts to organize political unions, unbundling would change the social resonance of that opposition.

Indeed, as the Essay will show, there is some preliminary evidence that organizing for politics but not collective bargaining is feasible. There are, to be sure, no extant models of the kind of political unions this Essay proposes. But, in emerging sectors of the labor market where labor law does not apply a bundling requirement, unions have succeeded in organizing workers exclusively for political purposes.

More broadly, identifying the ways in which labor law can facilitate political organizing among workers points us towards a more comprehensive set of reforms designed to enable organizing by politically underrepresented groups. Such an approach to political reform, moreover, has a significant advantage over traditional modes of regulation. No matter how creative the design, campaign finance law does nothing to alter the underlying conditions that produce political inequality.³⁰ To the contrary, traditional modes of political reform attempt to regulate the processes through which the power of wealth is exercised, but they leave in place the distribution of wealth that creates the problems for political equality in the first place. The result is the undoing of the reforms through repeated circumventions that have been aptly analogized to a hydraulic process.³¹ Legal interventions designed to facilitate organizing are fundamentally different because political organization, like wealth, is itself a source of political power.³² Thus, like wealth, the power that flows from organization can be exercised across processes of political participation—in elections, lobbying, media, and the rest. For this reason, reforms designed to facilitate political organizing are more likely to avoid the problems of circumvention that have undermined traditional modes of regulation.

Three brief words on the premises of the argument. First, the Essay assumes that, in light of the gross disparities in political influence currently enjoyed by different income groups, legal reforms designed to increase the political influence of lower- and middle-income groups are justified by a

30. See *infra* Section I.B (noting that the same is true for public financing of elections, for restrictions on lobbying activity, and for public financing of lobbyists).

31. See Issacharoff & Karlan, *supra* note 8.

32. See, e.g., KORPI, *supra* note 10.

commitment to political equality. An argument of this sort can be met with the objection that, to succeed, it must articulate the optimal level of political influence that the groups in question ought to enjoy, along with a way of measuring when and whether that optimal level is achieved. Otherwise, the objection goes, the argument cannot allow us to evaluate whether the proposals go too far, or not far enough, in redistributing political influence.³³ But, as Rick Pildes has written in a related context, “[i]n theory and in doctrine, we can often identify what is troublingly unfair, unequal, or wrong without a precise standard of what is optimally fair, equal, or right.”³⁴ Thus, rather than attempting to articulate such an optimal distribution of political power or a way to measure it, the Essay instead proceeds on the more tractable assumption that, in Rawls’s terms, all citizens in a democracy—irrespective of income level—ought to have an “approximately equal” chance of influencing political decisions.³⁵

Second, representational inequality among income groups is not the only type of representational inequality: policy may well be more responsive to different racial groups, or geographic groups, or age groups. Without adjudicating the priority of these different aspects of inequality, this Essay limits its attention to economic forms of political inequality and thus its proposals for intervention are similarly focused.

Third, this Essay suggests unbundling the union as a way to mitigate representational inequality: it is an Essay about political organizing. But the argument here does not imply that workers should not also have a collective voice in the workplace. To the contrary, such a voice is critical for a host of reasons, some of which I have pointed to elsewhere.³⁶ The proposal in this Essay is meant as a complement to, rather than a substitute for, efforts to rethink collective economic representation at work.³⁷

33. See, e.g., Bruce E. Cain, *Garrett’s Temptation*, 85 VA. L. REV. 1589, 1602-03 (1999) (making a similar objection in a related context).

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

35. JOHN RAWLS, *POLITICAL LIBERALISM* 327 (1993); see also Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 601 (describing Rawls’s view that persons are entitled to “roughly equal” influence in the electoral process).

36. See, e.g., Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL’Y REV. 375, 399-400 (2007) (noting that collective bargaining can have important redistributive effects and correct certain market failures that inhere in individual employment contracting).

37. It may be, perhaps for reasons this Essay will discuss, that traditional collective bargaining is no longer a viable means of securing that voice. In this respect, there is reason to hope that new approaches to collective bargaining or new models of worker organization—including

The Essay proceeds as follows. Part I briefly reviews the recent political science on representational inequality and describes the findings that point to substantial skew in policy responsiveness across income levels. The Part then discusses the failure of the traditional response to representational inequality—campaign finance regulation—and proposes an alternative: legal interventions designed to enhance the political-organizational capacity of low- and middle-income groups. Part II begins by identifying labor unions as an obvious source of organizational voice for such groups. It then identifies the advantages that the workplace offers to unions as a locus of organizational activity, and shows the ways in which labor law allows unions to harness these advantages. But the Part concludes by showing how the bundling of unions’ collective bargaining and political functions has impeded unions’ viability as a political-organizational vehicle. Part III argues that unbundling unions’ political and economic functions would increase their capacity to serve as a platform for political organization. It argues that political action would not replicate for political unions the impediments that collective bargaining has posed for traditional unions, and it shows why political organizing can succeed even when it is not grounded in the economic practice of collective bargaining. Part IV describes the statutory reforms necessary to unbundle unions’ political and collective bargaining functions, and Part V suggests other contexts in which the law might facilitate political organizing by lower- and middle-income citizens. The Essay then concludes.

I. REPRESENTATIONAL INEQUALITY

A. *Income and Responsiveness*

Political equality is a core feature of democratic governance. While the definition and appropriate scope of such equality is contested, there is general agreement that citizens in a democracy ought to have an approximately equal opportunity to influence the political process.³⁸ But theorists writing from a wide range of perspectives have long argued that economic inequalities threaten to subvert this democratic goal. Rawls, for example, was concerned

models borrowed from abroad—might offer ways of securing collective voice at work without the flaws of traditional collective bargaining.

38. See *supra* note 35; see also Task Force on Inequality & Am. Democracy, *American Democracy in an Age of Rising Inequality*, 2 PERSP. ON POL. 651, 651 (2004) (noting that “[e]qual political voice and democratically responsive government” are American political ideals and discussing how progress toward realizing these ideals has stalled).

that “those with greater property and wealth” would capture “the electoral process to their advantage.”³⁹ Schattschneider believed that economic inequality builds an “upper-class bias” into democratic politics,⁴⁰ and Walzer expressed concern that “the dominance of money in the sphere of politics” would render much of the populace politically powerless.⁴¹ In more contemporary work, Hall and Deardorff argue that the affluent can “distort[]” policymaking in their favor through lobbying.⁴²

Contemporary empirical research in political science confirms the theorists’ concerns. Most prominently, in a book published last year, Martin Gilens reports the findings of an analysis of two decades of U.S. public policy.⁴³ Gilens finds that as the gap between the preferences of the poor (those in the bottom income decile) and the preferences of the affluent (those in the top income decile) increases—that is, as the rich and poor disagree more—there is a major decline in the association between the poor’s preferences and policy outcomes.⁴⁴ Put plainly, “when 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.”⁴⁵

39. RAWLS, *supra* note 35, at 360.

40. E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA* 31 (1975). Schattschneider famously concluded that “[t]he flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent.” *Id.* at 34-35.

41. MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 310 (1983).

42. See, e.g., Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69, 81 (2006); see also *id.* at 70-72 (reviewing the literature on theories of lobbying). Campaign finance scholars share the view that wealth translates into representational inequality. Gerken, for example, writes that “money distorts political incentives,” by which she means that “money makes politicians pay less attention to average, everyday people and more attention to wealthy corporate interests.” Gerken, *supra* note 8, at 1156.

43. Gilens’s main data set is based on nearly two thousand public opinion surveys conducted between 1981 and 2002. GILENS, *supra* note 1, at 57. Gilens’s study was directed at discerning what he calls the “democratic responsiveness” of the U.S. Government where, by responsiveness, Gilens means a “positive association between the level of public support for a policy and the likelihood of that policy being adopted.” *Id.* at 70.

44. See *id.* at 79. But there is only a slight decline in the association between preferences and policy for the affluent. See *id.* In fact, on policy questions where the preferences of low- and high-income respondents diverge by more than ten percentage points, policy outcomes show a “strong association with the preferences of the affluent . . . but no association with the preferences of the poor at all.” *Id.*

45. *Id.* at 81.

These results might be consistent with democratic principles if the views of poor respondents are simply minority views. But Gilens finds that median-income earners fare no better than the poor when they part ways with the policy positions of the affluent. Where the preferences of these two income groups diverge by ten percentage points or more, policy responsiveness for the ninetieth income percentile holds steady and strong, but is statistically equivalent to zero for those at the fiftieth income percentile.⁴⁶ Most importantly, Gilens finds that even when the poor and middle classes agree with one another and together disagree with the affluent, it is still the views of the affluent that get translated into policy.⁴⁷ Gilens thus concludes that “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.”⁴⁸

Although Gilens’s findings are striking, his research confirms earlier work by Larry Bartels and others.⁴⁹ Bartels’s influential study found that U.S. senators are far more responsive to the policy preferences of their affluent constituents than they are to those of their lower- and middle-class constituents.⁵⁰ As Bartels put it, senators “were vastly more responsive to affluent constituents than to constituents of modest means,”⁵¹ and “the views of constituents in the bottom third of the income distribution received no weight at all in the voting decisions of their senators.”⁵²

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46. *Id.* The same is true irrespective of which income group is used as the comparison set: when the views of Americans in the tenth, thirtieth, fiftieth, or seventieth income percentile diverge from the views of those in the ninetieth, it is the views of the affluent that carry the day. *Id.* at 81-82 & fig.3.6.
47. As he puts it, even “when middle-class preferences align with those of the poor, responsiveness to the affluent remains strong while responsiveness to the poor and middle class is completely absent.” *Id.* at 84.
48. *Id.* at 83. Gilens considers but rejects the possibility that policy is influencing the preferences of the affluent rather than vice versa. *See id.* at 93-96.
49. *See* BARTELS, *supra* note 1, at 252-82; *see also* Task Force on Inequality & Am. Democracy, *supra* note 38, at 659 (summarizing similar research).
50. *See* BARTELS, *supra* note 1, at 253-60.
51. *Id.* at 253.
52. *Id.* at 254. Unlike Gilens, Bartels reports *some* political influence among the middle third of the income distribution. As he writes, “the views of constituents in the upper third of the income distribution received about 50% more weight than those in the middle third,” *id.* at 253-54, while those in the lower third, again, “were utterly irrelevant,” *id.* at 260.

Aside from the implications of representational inequality for democratic practice—which are the focus here—it is worth noting that representational inequality has concrete implications for policy development in the United States. That is, American public policy,

The fact that policy is more responsive to the affluent than to other income groups does not tell us why this is so, and it is possible that responsiveness follows not wealth, but voting rates or other measures of political activity that the affluent also happen to exhibit. Here too, though, Gilens and Bartels reach similar conclusions. Both investigate the possibility that policy is particularly responsive to the affluent because the affluent vote more or are otherwise more active in politics. Both reject this possibility. Bartels, for example, shows that while there are significant voting gaps between high- and low-income groups, the differences are not large enough to account for the skew in policy responsiveness.⁵³ In fact, Bartels concludes that accounting for differences in voting rates, political knowledge, and contact with public officials “reduces only modestly the substantial income-based disparities in responsiveness.”⁵⁴

It is important to clarify two things that Gilens’s and Bartels’s work does not imply. First, their conclusions do not mean that the affluent always do—or

across a wide range of subject areas, would be *different* if policy responsiveness were not skewed toward the affluent. To take just a few of the leading examples, there is significant preference divergence across income groups with respect to international trade, *see* GILENS, *supra* note 1, at 107-08; the progressivity of income taxes, *see id.* at 115-16; government regulation generally, *see id.* at 116; government regulation of corporations in particular, *see id.*; reproductive rights, *see id.* at 111; and government policy toward unemployment, *see id.* at 116. In some areas—economic policy in particular—the poor and middle class take recognizably more progressive positions than the affluent; in other areas—including social and moral questions like reproductive rights—the poor and middle class are notably more conservative than the rich. But, whatever the political valence of the effect, greater representational equality would lead to a set of policies different from those we have today. *See id.* at 117 (minimum wage, unemployment benefits, corporate regulation, and tax); *id.* at 108 (trade and foreign aid); *id.* at 113 (abortion).

53. BARTELS, *supra* note 1, at 275. As Bartels reports, in the 1988, 1990, and 1992 general elections, eighty percent of high-income earners reported voting while only sixty percent of low-income earners did. Thus, as he puts it:

Even with considerable allowance for overreporting of turnout, it is obvious that tens of millions of low-income citizens are showing up at the polls. Nevertheless, low-income citizens as a group seem to be getting *no* representation . . . Income-related disparities in turnout simply do not seem large enough to provide a plausible explanation for the income-related disparities in responsiveness documented here.

Id.

54. *Id.* at 279. Gilens, moreover, demonstrates that middle-income Americans vote and participate in politics at about the same rate as the affluent. In fact, Gilens points out, the only way in which political participation differs meaningfully between these income groups is with respect to financial contributions. *See* GILENS, *supra* note 1, at 239. Bartels adds that his data are consistent with the conclusion that “senators represented their campaign contributors to the exclusion of other constituents.” BARTELS, *supra* note 1, at 280.

always will—get their way. Government is highly responsive to the preferences of the affluent and more responsive to their preferences than to the preferences of the poor and middle class, but the government is not perfectly responsive to what the wealthy want. Indeed, some government policies are enacted despite the fact that majorities of all income groups—including the wealthy—oppose them, and many policies are not enacted despite the fact that broad cross-sections of the public—including the wealthy—support them.⁵⁵ Second, and more important, the Gilens and Bartels analyses do not mean that low- and middle-income citizens never do—or never will—get their way. To the contrary, there are many issues on which the preferences of the poor and middle class find expression in enacted policy. The problem is that the poor and middle classes’ preferences tend to get enacted into policy only when their preferences align with the preferences of the wealthy.⁵⁶

B. Addressing the Problem: From Finance to Organization

The traditional, and perhaps most obvious, response to representational inequality is campaign finance reform. If the wealthy have disproportionate influence over the political process because they are able to deploy their wealth to political ends, regulations that restrict the political uses of money make sense. And, for over a century, reformers in Congress have attempted to address the political influence of wealth by enacting restrictions on campaign spending.⁵⁷ The efforts began at the opening of the twentieth century with the Tillman Act, a law that responded to the popular movement for “elections free from the power of money.”⁵⁸ From 1907 on, legislative efforts at campaign finance regulation have followed a steady path forward, expanding to sweep in more spenders, more elections, and more forms of spending.⁵⁹

55. See GILENS, *supra* note 1, at 73 fig.3.2.

56. There is an additional context in which the preferences of the poor and middle class get translated into policy, even when those preferences diverge from the views of the affluent. With respect to the (quite narrow) range of issues on which interest group pressure aligns with the preferences of the poor and middle class and against the preferences of the wealthy, policy may well come to reflect the preferences of lower- and middle-income groups. This Essay takes up this important exception in Section I.B, *infra*.

57. See Adam Winkler, “Other People’s Money”: Corporations, Agency Costs, and Campaign Finance Law, 92 GEO. L.J. 871, 871 (2004).

58. *Id.* at 877 (quoting *FEC v. Beaumont*, 539 U.S. 146, 152 (2003)).

59. See generally Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 7, 7-48 (Anthony Corrado et al. eds., 2005) (providing a detailed history of campaign finance regulations); Kurt Hohenstein,

Despite multiple interventions of increasing complexity and scope, however, campaign finance regulation has, to put it mildly, not succeeded in curbing the role and influence of money in American politics. This failure is well documented in the literature. In *The Hydraulics of Campaign Finance Reform*,⁶⁰ for example, Issacharoff and Karlan showed that political actors adjust to campaign finance regulation by reorganizing and redirecting political spending in ways not reached by existing law.⁶¹ The election cycles since Issacharoff and Karlan's writing lend support to their thesis.⁶²

It is not only the ingenuity of political spenders that has stymied campaign finance reform, however. The Supreme Court, too, has limited the range of regulation permissible under the First Amendment. The Court's restrictive interventions began with *Buckley v. Valeo*,⁶³ which struck down limits on independent expenditures by individuals, and continue today, most notably with *Citizens United v. FEC*.⁶⁴ As Michael Kang explains, *Citizens United* effectively makes any type of meaningful campaign finance regulation (other than restrictions on direct contributions to candidates and certain disclosure requirements) unconstitutional.⁶⁵ The decision, in other words, "leaves virtually no constitutional space for new campaign finance regulation."⁶⁶

Given their view that campaign finance reform has reached a dead end, many election law scholars now argue that some other approach is needed to deal with the influence of wealth on politics. In Kang's view, the appropriate move is away from what he calls the *ex ante* regulation of campaign spending and toward the *ex post* regulation of the legislative process, especially through

"Clio, Meet Buckley—Buckley, Clio": *Re-Introducing History to Unravel the Tangle of Campaign Finance Reform*, 1 ALB. GOV'T L. REV. 63 (2008).

60. Issacharoff & Karlan, *supra* note 8.

61. As they observed, "[t]he money that reform squeezes out of the formal campaign process must go somewhere." *Id.* at 1713.

62. See Victoria S. Shabo, Comment, "Money, Like Water . . .": *Revisiting Equality in Campaign Finance Regulation After the 2004 "Summer of 527s"*, 84 N.C. L. REV. 221 (2005).

63. 424 U.S. 1 (1976).

64. 130 S. Ct. 876 (2010).

65. See Kang, *supra* note 8, at 6.

66. *Id.* at 52. Kang, moreover, is not alone in his assessment that *Citizens United* signals the terminal end—at least given the current composition of the Supreme Court—for campaign finance regulation. Gerken, for example, writes: "Whatever you think about the goal of taking money out of politics, *Citizens United* provides the latest, and perhaps the best, evidence that this goal is a dead end for reform, at least in the short term." Gerken, *supra* note 8, at 1156.

lobbying reform.⁶⁷ Although Kang’s account is helpful in moving the discussion beyond spending restrictions, lobbying regulation presents some of the same difficulties as campaign finance regulation. First, as Kang acknowledges, “lobbying reform faces its own constitutional challenges under the First Amendment.”⁶⁸ Second, and perhaps more importantly, it is not clear why the same kind of hydraulics that plagued campaign finance restrictions would not reproduce themselves in the context of lobbying restrictions. The political actors who found ways around spending restrictions would likely find ways of avoiding lobbying regulation as well.

Heather Gerken is also attracted to the idea of lobbying reform,⁶⁹ but rather than suggesting new restrictions on lobbying activity—an approach Gerken categorizes as leveling down—she suggests that we find ways to level up by expanding access to lobbyists. She thus characterizes her proposal as an analog to the public financing of elections: supplement privately funded lobbyists with publicly financed ones for those who otherwise would be locked out of the lobbying game.⁷⁰

Conceptually, the leveling-up strategy for legal intervention into the political process embodies what Bruce Cain calls the “more voice, not less” approach to reform.⁷¹ As Cain puts it, “another way to neutralize political advantage aside from capping and prohibiting is to support countervailing voices.”⁷² Cain locates this approach in the Madisonian idea of fighting faction with faction, and in the pluralist idea of “expand[ing] the number of players in a political area to offset the advantages of the dominant players.”⁷³ Like Gerken,

67. See Kang, *supra* note 8, at 56-63.

68. *Id.* at 60. And while Kang points to some recent cases in which the Supreme Court has been willing to uphold some regulation of the legislative process, other recent cases point in a decidedly different direction. See, e.g., *Skilling v. United States*, 130 S. Ct. 2896 (2010) (reading “honest services” statute narrowly).

69. Gerken, *supra* note 8, at 1155 (arguing, tentatively, that “lobbying is the new campaign finance”).

70. See *id.* at 1165-68. Gerken is careful to note that her proposal is tentative and at the “‘does this dog hunt?’ stage.” *Id.* at 1165. As she also notes, the proposal tracks one that Bruce Cain has made, calling for the creation of “public lobbyists along the model of public defenders in criminal proceedings.” Bruce E. Cain, *More or Less: Searching for Regulatory Balance*, in *RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY* 263, 278 (Guy-Uriel E. Charles, Heather K. Gerken & Michael S. Kang eds., 2011).

71. Cain, *supra* note 70, at 277.

72. *Id.*

73. *Id.*; cf. THE FEDERALIST NO. 10 (James Madison).

Cain sees public financing of both elections and lobbying as the primary way to instantiate this approach to reform.

But the democratic tradition in which Cain grounds his idea supports other approaches as well. In particular, the democratic norm of equal representation can be advanced by legal interventions designed to address inequalities in *organizational capacity*—interventions aimed at facilitating political organizing by underrepresented groups. Rather than intervening later in the political process by moving from elections to lobbying, that is, we can intervene earlier in the process by facilitating the organizational development of underrepresented groups. Writing in a related context, Joshua Cohen and Joel Rogers made the point this way:

[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 satisfy the norm of political equality.⁷⁴

Moreover, legal interventions designed to facilitate political organizing have an important advantage over both the type of leveling-down restrictions that Kang advocates and the leveling-up proposals of Cain and Gerken. Neither campaign finance restrictions (or lobbying restrictions) nor public financing of elections (or public financing of lobbying) address the underlying inequalities in political power that flow from wealth. Rather, such regulations change something about one or another of the multiple processes through which such political power is expressed. The regulations might restrict campaign spending, or they might equalize lobbying spending, but they do not alter the background conditions that produce political inequalities in the first place. Because the political power that comes from wealth is portable across political processes—because “[t]he sheer versatility of material power is what makes it so significant politically”⁷⁵—a circumvention problem plagues not only the leveling-down approach but these leveling-up approaches as well. If we succeed in equalizing election spending, either by leveling up or down, the

74. Joshua Cohen & Joel Rogers, *Secondary Associations and Democratic Governance*, 20 POL. & SOC'Y 393, 424 (1992). Such a move also finds theoretical grounding in the work of political scientists in the “power resource” school. See generally KORPI, *supra* note 10; JOHN D. STEPHENS, *THE TRANSITION FROM CAPITALISM TO SOCIALISM* (1979); David Bradley et al., *Distribution and Redistribution in Postindustrial Democracies*, 55 WORLD POL. 193 (2003).

75. JEFFREY A. WINTERS, *OLIGARCHY* 18 (2011).

political power that comes from wealth will be exercised through lobbying; if we succeed in equalizing lobbying spending, by leveling up or down, that power will be exercised through some other means.⁷⁶

While elections and lobbying are processes through which political power can be expressed, organization, like wealth, is itself a source of political power. This distinction matters enormously. As we have seen, political reforms that restructure processes of participation but that leave background power asymmetries untouched can be undone by circumvention. Political reform aimed at organizational capacity is less apt to suffer this problem because it enables groups to build political power that, like power derived from wealth, is portable across processes of participation. A well-organized political group can mobilize voters and influence elections; it can lobby and influence legislation; it can buy media time and influence public opinion; and so on. Organization can therefore countervail wealth's power irrespective of whether that power is expressed through elections, lobbying, media, or any other avenue.

An organizational approach to redressing representational skew is not only well grounded theoretically, but also recommended by the empirical realities of current democratic practice in the United States. Again, Gilens's study is illuminating. As discussed, Gilens finds skew in the responsiveness of policy to different income groups. But Gilens also finds an exception to this general rule when the balance of organized interest group power aligns with the policy preferences of the poor and middle class. Thus, unlike the other policy domains he studied, when it came to certain social welfare policies – including Social Security, Medicare, school vouchers, and public works spending – Gilens found no evidence that the policy preferences of the poor and middle-class suffered when those preferences diverged from those of the affluent.⁷⁷ The reason, Gilens suggests, is that on these questions “poor and middle-income Americans have powerful allies that tend to share their preferences.”⁷⁸ Those allies are organized interest groups.⁷⁹

Gilens thus observes empirically what the preceding discussion predicts theoretically: organization can compensate for the effects of wealth because it operates as an independent source of political power.⁸⁰ When the balance of

76. Cf. Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 146-49 (2005) (discussing similar hydraulic effects in the context of regulating political parties).

77. See GILENS, *supra* note 1, at 121-22.

78. *Id.* at 121.

79. See *id.* at 121, 157-58.

80. *Id.* at 7 (“Interest groups form an essentially parallel channel of influence over government policy.”).

organized interest group power aligns with the preferences of the wealthy, as it generally does, the affluent's preferences gain even more policy traction relative to the preferences of the poor and middle class. But where organized interests reflect the preferences of the poor and middle class, organization reduces representational inequality.

II. UNIONS AND REPRESENTATIONAL INEQUALITY

A. *Unions and Politics*

Among the interest groups operating in the United States today, the “strongest positive associations between [the] groups’ [policy] positions and the preferences of the less well-off” are found in labor unions.⁸¹ Across a range of issues, unions’ policy positions are highly correlated with those expressed by individuals in the bottom nine income deciles.⁸² This should come as no surprise: the income profile of union membership resembles the population that Gilens’s work reveals to be lacking in political influence. In fact, more than eighty-five percent of union members fall into the “non-affluent” income categories against which policy responsiveness is currently skewed.⁸³

Given that organization constitutes a non-wealth-dependent source of political influence, and given unions’ ability to organize and advocate for the policy preferences of the poor and middle class, unions are a clear source of political influence for these sectors of the polity. In fact, in the United States, unions have managed to organize lower- and middle-class Americans for

81. *Id.* at 157.

82. *Id.*

83. As of March 2011, approximately 85.8% of union members lived in households representing the lower nine income deciles for U.S. households. This estimate was calculated from a publicly available microdata set drawn from the Current Population Survey that was conducted jointly by the U.S. Census Bureau and Department of Labor in March 2011. See Miriam King et al., *Integrated Public Use Microdata Series, Current Population Survey: Version 3.0*, U. MINN. (2010), <http://cps.ipums.org>. The estimate is based on (1) the total money income during the previous calendar year of all adult household members and (2) whether, as part of his or her current job, at least one income earner is a member of a labor union. The household income data was further divided into deciles, which ranged from roughly \$12,000 to \$139,000 for all U.S. households in 2011. As outlined in the *IPUMS* documentation, individual survey weights were used to ensure that the estimates are as representative of the U.S. population as possible. (The author thanks Travis Coan for his assistance with these calculations.) As Gilens concludes, “poor and middle-class Americans would be even less likely to find their preferences reflected in federal policy were it not for unions.” GILENS, *supra* note 1, at 158.

political action in numbers unmatched by any other non-party actor. At their peak, unions represented more than one-third of wage-earners in the country,⁸⁴ and counted twenty-one million workers as members.⁸⁵

Historically, unions have mobilized their memberships for various forms of political action. They have, to start, done well registering and increasing voter turnout among lower- and middle-class workers. One early review of the literature concluded that union members were sixteen percent more likely to vote than unorganized workers with similar occupations, education, income, and status,⁸⁶ and subsequent studies agree that union members turn out for elections at disproportionately high rates.⁸⁷ Unions have also contributed substantial sums to candidates and parties,⁸⁸ built effective lobbying operations,⁸⁹ and engaged in extensive independent political advertising campaigns.⁹⁰ Unions, moreover, have funded this political activity with small-dollar voluntary contributions from members. To take just one example,

84. MAYER, *supra* note 19, at 12 (“As a percent of wage and salary employment . . . union membership peaked in 1954 at 34.8%.”).

85. *Id.* at 10 (“The number of union members peaked in 1979 at an estimated 21.0 million.”).

86. Harry M. Scoble, *Organized Labor in Electoral Politics: Some Questions for the Discipline*, 16 W. POL. Q. 666, 672 (1963).

87. See, e.g., John Thomas Delaney et al., *Unionism and Voter Turnout*, 9 J. LAB. RES. 221, 232 (1988) (finding that union members were 14.5% more likely than their peers to vote in the 1978 national general elections); Jan E. Leighley & Jonathan Nagler, *Unions, Voter Turnout, and Class Bias in the U.S. Electorate, 1964-2004*, 69 J. POL. 430 (2007) (attributing increased class bias in the U.S. electorate to decreased union membership and strength, in part because union members are more likely to get to the polls); Benjamin Radcliff, *Organized Labor and Electoral Participation in American National Elections*, 22 J. LAB. RES. 405, 411 (2001) (reporting that, among other things, regression analysis of voter turnout data for national elections from 1950 through 1994 showed a direct correlation between union membership and voter turnout); Richard B. Freeman, *What Do Unions Do . . . to Voting?* 3 (Nat’l Bureau of Econ. Research, Working Paper No. 9992, 2003), <http://www.nber.org/papers/w9992.pdf> (reporting that union members were 10-13% more likely to vote than non-members in general but only 4% more likely to vote than non-members with comparable characteristics).

88. See, e.g., Marick F. Masters & John T. Delaney, *Organized Labor’s Political Scorecard*, 36 J. LAB. RES. 365, 376-79 (2005) (documenting trends in union political contributions from 1990 to 2002).

89. See, e.g., WILLIAM FORM, *SEGMENTED LABOR, FRACTURED POLITICS: LABOR POLITICS IN AMERICAN LIFE* 300-04 (1995) (describing labor’s lobbying operations in the early 1990s).

90. See, e.g., Lili Levi, *Plan B for Campaign-Finance Reform: Can the FCC Help Save American Politics After Citizens United?*, 61 CATH. U. L. REV. 97, 167 (2011) (noting that labor unions are “taking an increased role” in funding political advertising); Ralph K. Winter, *The History and Theory of Buckley v. Valeo*, 6 J.L. & POL’Y 93, 101 n.34 (1997) (“Organized labor has recently engaged in heavy political advertising . . .”).

political contributions to the Service Employees International Union (SEIU)—perhaps the most politically active union in the nation and one that spent approximately \$23 million on the last election cycle—average seven dollars per month.⁹¹

Although it is difficult to measure with precision, it is also clear that union organization has had a significant impact on American policymaking.⁹² Numerous historical case studies support the point. In the 1940s, the Congress of Industrial Organizations (CIO) had such a significant role in policymaking that President Roosevelt is rumored to have instructed his advisors to “[c]lear it with Sidney [Hillman]”—the CIO’s political director—before moving on major political or policy initiatives.⁹³ In the 1960s, according to historian Nelson Lichtenstein, labor played a central role in shaping the Civil Rights Act of 1964,⁹⁴ in particular in ensuring that Title VII was included in the final bill.⁹⁵ Indeed, the Act’s passage depended in large measure upon labor’s power to turn out legislative votes.⁹⁶ As Representative Richard Bolling, one of the Act’s leading supporters, put it, “We never would have passed the Civil Rights Act without labor. They had the muscle; the other civil rights groups did not.”⁹⁷ The enactment of Medicare the following year obeyed a similar logic: labor was “the most powerful single source of pressure” among supporters in the legislative struggle.⁹⁸ And unions have been the primary force behind changes

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91. *Contribute to SEIU COPE*, SERV. EMP. INT’L UNION, <https://action.seiu.org/page/contribute/cope> (last visited Aug. 11, 2013); see also Ctr. for Responsive Politics, *Service Employees International Union*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/detail.php?cmte=Service%20Employees%20International%20Union&cycle=2012> (last visited Aug. 11, 2013) (reporting that SEIU spent \$23,011,004 on the 2012 federal election cycle, 83.8% of which was spent in the general election).
 92. Thus Harry Scoble, writing in 1963, reported that “the most fundamental postwar change in the structure and process of political parties has been the entrance of organized labor into electoral activity.” Scoble, *supra* note 86, at 666.
 93. STEVEN FRASER, *LABOR WILL RULE: SIDNEY HILLMAN AND THE RISE OF AMERICAN LABOR* 526 (1991); see also *id.* at 495-539.
 94. NELSON LICHTENSTEIN, *THE MOST DANGEROUS MAN IN DETROIT: WALTER REUTHER AND THE FATE OF AMERICAN LABOR* 387-88 (1995).
 95. NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 192 (2002).
 96. See TAYLOR E. DARK, *THE UNIONS AND THE DEMOCRATS: AN ENDURING ALLIANCE* 57 (1999); J. DAVID GREENSTONE, *LABOR IN AMERICAN POLITICS* 339-43 (1969).
 97. DARK, *supra* note 96, at 57.
 98. THEODORE R. MARMOR, *THE POLITICS OF MEDICARE* 18 (2d ed. 2000); accord DARK, *supra* note 96, at 57; TRACY ROOF, *AMERICAN LABOR, CONGRESS, AND THE WELFARE STATE, 1935-2010*, at 92-99 (2011).

in federal minimum wage policy since the enactment of the Fair Labor Standards Act in 1938.⁹⁹

Finally, quantitative data corroborate the case-study evidence of union influence. In one of the foundational studies in the field, Richard B. Freeman and James L. Medoff showed that federal legislators representing well-organized states in the 1970s were more likely to “vote union”—that is, vote in harmony with the expressed preferences of the AFL-CIO—than their peers from less well-organized jurisdictions.¹⁰⁰ Subsequent scholarship confirms this correlation between union density and legislative voting in favor of the unions’ policy positions.¹⁰¹ Further, in the states, relative union density accounts for significant variations in social welfare, education, and tax policy,¹⁰² and greater union density correlates with more rigorous state statutory protections for workers.¹⁰³

B. Organizing Through Work

There are numerous reasons why unions were successful in organizing low- and middle-income groups but one is particularly relevant to the analysis here: labor law enabled unions to take advantage of the workplace (in particular) and the employment relationship (more generally) as loci of organizational activity. As this Section will discuss, workplace organizing offers a number of

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99. BARTELS, *supra* note 1, at 240 (discussing union influence on minimum wage policy); *see also* Farrell E. Bloch, *Political Support for Minimum Wage Legislation*, 1 J. LAB. RES. 245 (1980) (finding that senators favoring the passage of minimum wage bills are more likely to come from states with high union membership); Farrell E. Bloch, *Political Support for Minimum Wage Legislation: 1989*, 14 J. LAB. RES. 187 (1993) (same).
100. RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 195-98 (1984).
101. Leo H. Kahane, *Congressional Voting Patterns on NAFTA: An Empirical Analysis*, 55 AM. J. ECON. & SOC. 395, 406 (1996) (concluding that union density affects senators’ votes but not representatives’ votes); Masters & Delaney, *supra* note 88, at 374 (citing Janet M. Box-Steffensmeier et al., *The Strategic Timing of Position Taking in Congress: A Study of the North American Free Trade Agreement*, 91 AM. POL. SCI. REV. 324 (1997)).
102. *See, e.g.*, Michael Patrick Allen & John L. Campbell, *State Revenue Extraction from Different Income Groups: Variations in Tax Progressivity in the United States, 1916 to 1986*, 59 AM. SOC. REV. 169 (1994) (finding that labor organization correlates with tax progressivity); Benjamin Radcliff & Martin Saiz, *Labor Organization and Public Policy in the American States*, 60 J. POL. 113 (1998) (finding that higher rates of unionization induce greater spending on Aid to Families with Dependent Children benefits, total per pupil expenditures in K-12 education, and state-level tax progressivity).
103. Richard B. Freeman, *Unionism and Protective Labor Legislation*, 39 PROC. INDUS. REL. RES. ASS’N 260, 262-65 (1987).

advantages that allowed unions to overcome what might otherwise have been insurmountable hurdles to collective action. And, as this Section will also discuss, labor law allowed unions to harness these advantages through several relatively modest, but critical, interventions.

First, interpersonal relationships and social networks are important facilitators of organizational and political activity.¹⁰⁴ Work often is a rich source of such relationships and networks,¹⁰⁵ and can serve as an especially viable platform for organizing.¹⁰⁶ In a similar vein, organizing depends on the development of a collective identity among participants.¹⁰⁷ Again, work can—and often does—provide the basis for such an identity. As Robert MacKenzie puts it, “[t]he shared experience of work is a strong influence over the creation of social collectivity. Work as a collective experience . . . may act as a basis for group identity.”¹⁰⁸

More tangibly, though no less importantly, the workplace is an important *geographic* site for organizing, a centralized location where employees gather as a group and where they can be reached as a group. Thus, the significant costs of identifying and contacting employees, who are otherwise dispersed across potentially large geographic areas, can be avoided when the workplace is available for organizational purposes.¹⁰⁹ Here, labor law has made an important contribution: the National Labor Relations Act (NLRA) allows employees to use the workplace as a centralized location for organizing by granting employees the right to speak with one another about unionization in non-work areas of the workplace and during non-work time.¹¹⁰ These same rules also enable employees to speak to one another about, and encourage each other to participate in, a certain range of political activity in the workplace.¹¹¹ For many

104. See, e.g., Chaeyoon Lim, *Social Networks and Political Participation: How Do Networks Matter*, 87 SOC. FORCES 961, 961 (2008) (collecting sources).

105. See, e.g., Diana C. Mutz & Jeffrey J. Mondak, *The Workplace as a Context for Cross-Cutting Political Discourse*, 68 J. POL. 140, 141 (2006).

106. See VERBA ET AL., *supra* note 11, at 145 (reporting that political recruitment requests made, inter alia, through the workplace have a “relatively high probability of success”).

107. See Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2725 (2008).

108. Robert MacKenzie et al., ‘*All that is Solid?*’: *Class, Identity and the Maintenance of a Collective Orientation Amongst Redundant Steelworkers*, 40 SOC. 833, 836 (2006).

109. When an employer does not have a single geographic home—homecare work is an excellent example—labor law cannot offer such a locus for organizational activity.

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

111. Thus, the Supreme Court has held that employers must permit employees to urge other employees to vote for or oppose certain candidates, and to support or oppose certain

years after the enactment of the NLRA, moreover, labor law also allowed non-employee union organizers to speak with employees at their worksites.¹¹²

Next, work has proved a fruitful locus for organizing because the employment relationship enabled unions to solve one of the more dogged problems in organizational development: the need for an administrable and sustainable financing mechanism. In short, the employer's payroll system provides a channel through which dues payments can be made by employees to the union automatically and on a recurring basis. Here, again, a modest legal intervention has been important: the NLRA makes payroll deductions for union dues a mandatory subject of bargaining¹¹³ and treats an employer's refusal to agree to payroll deduction as evidence of a failure to bargain in good faith.¹¹⁴ In some states, dues payments can be required as a condition of employment; in other states – so-called right-to-work states – dues can only be collected from employees who wish to join the union. But in either setting, the

legislation, so long as the issues around which the political organizing takes place implicate employees' status as employees. See *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). The point here is not that the current statute would protect all the types of political activity that political unions would engage in. See *Local 174, UAW v. NLRB*, 645 F.2d 1151, 1154 (D.C. Cir. 1981) (holding the distribution of a political leaflet to be unprotected because "the principal thrust of the leaflet was to induce employees to vote for specific candidates, not to educate them on political issues relevant to their employment conditions"); see also *NLRB v. Motorola, Inc.*, 991 F.2d 278, 285 (5th Cir. 1993) (holding that political activities in support of an "outside political organization" are not protected by the NLRA). The point, rather, is that the current statute requires employers to tolerate – during non-work time and in non-work areas of the workplace – employee speech about politics that are related to the underlying statutory protections. An unbundled regime would need to expand the range of political speech protected, but would not need to expand the times and places that such speech is permitted.

112. See *Babcock & Wilcox Co.*, 109 N.L.R.B. 485, 494 (1954), *enforcement denied sub nom.* *NLRB v. Babcock & Wilcox Co.*, 222 F.2d 316 (5th Cir. 1955), *aff'd*, 351 U.S. 105 (1956); see also *Estlund*, *supra* note 22, at 314-15. As discussed below, rights of access for non-employee organizers were essentially extinguished by *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).
113. See *Reed & Prince Mfg. Co.*, 96 N.L.R.B. 850 (1951), *enforced*, 205 F.2d 131 (1st Cir. 1953), *cert. denied*, 346 U.S. 887 (1953).
114. See *H.K. Porter Co.*, 153 N.L.R.B. 1370 (1965), *enforced*, 363 F.2d 272 (D.C. Cir. 1966). This is particularly true where the employer allows payroll deductions for other purposes. See *Farmers Coop. Gin Ass'n*, 161 N.L.R.B. 887 (1966). An illustrative example of the function played by dues checkoff is provided by *MTA Bus Co. v. Transp. Workers Union of Am.*, No. 2005-37468, 2005 WL 6242982 (N.Y. Sup. Ct.) (Affidavit of Roger Toussaint, Sept. 18, 2007), *cited in* Paul M. Secunda, *The Wisconsin Public-Sector Labor Dispute of 2011*, 27 ABA J. LAB. & EMP. L. 293, 297 n.21 (2012). For a discussion of public sector analogues, see, for example, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986).

statute permits unions to harness the employer's payroll system as a method of dues deduction.¹¹⁵

Employers also constitute a centralized source of information about employees, information that is important for organizing. Specifically, because it is often necessary for organizers to speak with employees outside of the workplace—particularly if there is no centralized geographic workplace—unionization requires that organizers be able to identify who the workforce is.¹¹⁶ Here, the NLRA grants union organizers the right to access the employer's list of employee names, addresses, and—potentially—phone numbers and email addresses.¹¹⁷ Particularly in larger bargaining units, this grant of access to the employer's informational resources reduces what could otherwise be prohibitive information costs.¹¹⁸

115. Importantly, moreover, unions are entitled to use dues deducted from payroll for both collective bargaining purposes and political purposes as long as employees consent to such use. See Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 811-19 (2012).

It should be said here that the contemporary significance of voluntary dues deduction is less clear than it was historically. Specifically, the availability of consumer credit cards and electronic debiting systems provides unions with a potential substitute for payroll deduction: with the employee's consent, unions can secure monthly payments from a credit card or a bank draft instead of from the employer's payroll. Although some unions have struggled to make such technology work in low-wage sectors of the economy, some union leaders see a potential advantage to automatic credit card or bank drafts over payroll deductions because of the way these newer forms of payment can reduce the union's need to rely on employer cooperation. See Email from Keith Kelleher, President, SEIU Healthcare Ill. & Ind. (July 19, 2012) (on file with author).

116. As discussed *infra* note 122, non-employee union organizers today almost never have the right to access company property for organizational purposes. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); see also Estlund, *supra* note 22 (discussing *Lechmere*).

117. Under the so-called *Excelsior* rule, when a union garners the support of thirty percent of the relevant workforce, it is entitled to the employer's list of contact information for all employees relevant to the organizing drive. See *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966). In a Notice of Proposed Rulemaking, the NLRB proposed to expand the information to which unions are entitled to include phone numbers and email addresses. See Representation—Case Procedures, 76 Fed. Reg. 36,812, 36,820, 36,837-38 (proposed June 22, 2011) (to be codified at 29 C.F.R. § 102.62). The proposed rule has been enjoined by a district court on the ground that the Board lacked a quorum to enact the rule. See *Chamber of Commerce of the U.S. v. NLRB*, 879 F. Supp. 2d 18 (D.D.C. 2012). A similar decision by the D.C. Circuit is currently before the Supreme Court. See *NLRB v. Noel Canning*, 133 S. Ct. 2861 (2013) (granting certiorari).

118. For a description of the costs involved in gathering employee contact information when an *Excelsior* list is not available, see, for example, Rafael Gely & Leonard Bierman, *Labor Law Access Rules and Stare Decisis: Developing A Planned Parenthood-Based Model of Reform*, 20 BERKELEY J. EMP. & LAB. L. 138, 180-81 (1999).

Finally, labor law compounds the advantages of the workplace as a site for organizing by making employer retaliation for such activity illegal. Section 7 of the NLRA gives employees the affirmative right to “form, join, or assist labor organizations,” and Section 8(a) makes it an unfair labor practice for an employer “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.”¹¹⁹ Accordingly, if an employee is penalized for union activity, the employer faces unfair labor practice liability and the employee is entitled to an appropriate remedy (including reinstatement and back pay). As Richard Posner explains: “The efforts of an employee to induce his fellows to [unionize] would often, in the absence of legal protection . . . be set at naught by the employer’s firing him.”¹²⁰ By making such actions illegal, the law denies the employer “the natural advantage that he would have, as one facing many, in fending off organizing activities.”¹²¹

With respect to both workplace access and anti-retaliation protections, the robustness of these legal rights has declined rather dramatically in recent years. For example, the Court has curtailed access rights for nonemployee union organizers,¹²² and the National Labor Relations Board’s ability to remedy anti-union retaliation has declined as a result of both Court intervention and inadequate enforcement resources.¹²³ The prevailing view is that the curtailment of these legal protections has contributed to the decline in unions’

119. 29 U.S.C. §§ 157, 158(a)(3) (2006). The statute similarly makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise” of employees’ Section 7 rights. *Id.* § 158(a)(1).

120. Posner, *supra* note 28, at 994.

121. *Id.* at 995.

122. At various times, the NLRB has upheld the right of such organizers to use employer property—generally in outside areas like parking lots—to discuss unionization with employees. *See, e.g.*, *Babcock & Wilcox Co.*, 109 N.L.R.B. 485, 485 (1954), *enforcement denied sub nom.* *NLRB v. Babcock & Wilcox Co.*, 222 F.2d 316 (5th Cir. 1955), *aff’d*, 351 U.S. 105 (1956); *Jean Country*, 291 N.L.R.B. 11 (1988). Such access rights were helpful to the organizational process because, as the Supreme Court explained, the right to unionize “depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others.” *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 492 n.9 (1978). In 1992, however, the Court curtailed the circumstances in which nonemployee organizers can access employees on company property, essentially limiting the right to remote logging camps or mines. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

123. *See Sachs, supra* note 107, at 2694-95.

organizational success.¹²⁴ The point here, however, is simply that the right to use the workplace and the employment relationship for organizational activity, along with protections against retaliation, help employees overcome impediments to collective action and serve as important facilitators of organizational activity. The stronger those rights, and the more robust their enforcement, the more effective they are at facilitating such activity.

A word is also in order here about a role that labor law does *not* play in facilitating organizational success. Among the traditional impediments to collective action, the problem of free riding is central.¹²⁵ Labor law does provide unions with a mechanism for dealing with part of the free-rider problem. Under the NLRA, collective bargaining agreements can require that all employees who are represented by the union pay dues to cover the union's collective bargaining and contract administration expenses.¹²⁶ But labor law's resolution of the free-rider problem is limited in a way that is relevant here: the law does not entitle unions to overcome free riding with respect to political activity.¹²⁷ This, of course, is the free-rider threat that political unions would face, and the success that workers historically have had in organizing for political action suggests that they have been able to overcome this free-rider threat even though labor law has not given them a mechanism for doing so.

C. *Collective Bargaining and Union Decline*

In part due to unions' ability to take advantage of the workplace as a locus of organizational activity, unions historically have been an effective political

124. See, e.g., PAUL C. WEILER, *GOVERNING THE WORKPLACE* 113-14 (1990) (discussing the debate over whether already illegal forms of employer resistance to union representation have affected the success of representation campaigns).

125. Indeed, in Mancur Olson's account of the free-rider problem, the labor union was the primary case study, and union organizing has long been understood to present a classic free-rider threat. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 66-91 (1971).

126. See 29 U.S.C. § 158(a)(3) (2006); see also *Comm'ns Workers of Am. v. Beck*, 487 U.S. 735 (1988) (interpreting 29 U.S.C. § 158(a)(3) in this way); Kenneth G. Dau-Schmidt, *Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court's Opinion in Beck*, 27 HARV. J. ON LEGIS. 51 (1990) (discussing *Beck* and union security agreements); Sachs, *supra* note 115, at 811-19 (same). In right-to-work states, such agreements are illegal.

127. Thus, although a collective bargaining agreement can require all employees to make dues payments, those mandatory payments may be used *only* for collective bargaining and contract administration expenses. See *Beck*, 487 U.S. at 745; Sachs, *supra* note 115, at 813-19. The rule is the same for public sector unions. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222-23 (1977).

voice for the poor and middle class. The problem, from the perspective of representational equality, is that unionization rates have been falling consistently across the last several decades and have now fallen to levels not seen since before the Wagner Act was passed in 1935.¹²⁸ Scholars have devoted significant attention recently to the consequences for American politics of this decline in unionization rates.¹²⁹ Nearly all—including Gilens, Bartels, Hacker and Pierson, and Schlozman et al.—point to the decline in union strength as a major explanation for the growth in representational inequality.¹³⁰ Hacker and Pierson summarize the consensus this way:

No group better captures the mid-century influence of voluntary organizations representing middle- and working-class Americans than

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128. Union density was 11.5% in 1934. See Richard B. Freeman, *Spirits in Union Growth: Defining Moments and Social Processes* 58 (Nat'l Bureau of Econ. Research, Working Paper No. 6012, 1997), <http://www.nber.org/papers/w6012.pdf>. In 2012, less than 7% of private sector workers were members of a labor union. *Labor Force Statistics from the Current Population Survey: Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry*, BUREAU LAB. STATS. (2012), <http://www.bls.gov/cps/cpsaat42.htm> (last updated Feb. 5, 2013). Membership levels in public sector unions have not, at least until recently, been on a similar decline. See *id.*
129. Labor scholars have been writing about union decline for decades. See, e.g., Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002) (“The ineffectuality of American labor law, and the shrinking scope of collective representation and collective bargaining, is partly traceable to the law’s ‘ossification.’”); Gottesman, *supra* note 22, at 61 (“[T]he system of collective bargaining that the NLRA promotes is invoked by an ever-shrinking percentage of American workers. At latest count, less than twelve percent of the workers covered by the NLRA are union-represented. ‘Our national labor policy’ is not serving eighty-eight percent of America’s workers.” (footnotes omitted)); Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769 (1983) (“Contemporary American labor law more and more resembles an elegant tombstone for a dying institution. While administrators, judges, lawyers, and scholars busy themselves with sophisticated jurisprudential refinements of the legal framework for collective bargaining, the fraction of the work force actually engaged in collective bargaining is steadily declining.”).
130. BARTELS, *supra* note 1, at 240 (attributing the failure of lawmakers to raise the minimum wage despite public support for doing so to, in part, the decline of organized labor); GILENS, *supra* note 1, at 158; HACKER & PIERSON, *supra* note 1, at 142; SCHLOZMAN ET AL., *supra* note 1, at 325-26; Radcliff & Saiz, *supra* note 102, at 122. Sociologists Bruce Western and Jake Rosenfeld similarly report that the decline in private sector union membership between 1973 and 2007—a period of time when membership rates fell from 34% to 8%—has led to a “dissipat[ion]” of unions’ political power. Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 513, 533 (2011); see also Steven Greenhouse, *Labor’s Decline and Wage Inequality*, N.Y. TIMES: ECONOMIX (Aug. 4, 2011, 11:30 AM), <http://economix.blogs.nytimes.com/2011/08/04/labors-decline-and-wage-inequality> (summarizing the Western and Rosenfeld study).

organized labor. . . . [But] as unions shifted from confident involvement in politics to embattled defense of their ever-smaller pocket of the workforce, they also ceased to be able, or always willing, to play the role as champions of the broad middle class they had carved out in their heyday.¹³¹

There is a long-running debate over the specific causes of this decline in unionization.¹³² The leading theories point to increasing competitiveness of product markets,¹³³ shifts in production methods and systems of work organization,¹³⁴ and managerial opposition to unionization.¹³⁵ Fortunately, we need not attempt to resolve this debate here because all of the leading theories place collective bargaining at the center of the story of union decline. It might be that collective bargaining raises wages and benefits above competitive levels and thereby puts unionized employers at a competitive disadvantage vis-à-vis non-union firms in newly competitive markets.¹³⁶ It might be that collective bargaining imposes a set of inflexible work rules that stand in the way of much-needed flexibility.¹³⁷ Or it might be that, given both of the above, collective bargaining inspires deep managerial hostility to the union project.¹³⁸

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131. HACKER & PIERSON, *supra* note 1, at 142; *see also id.* at 303 (“[T]he organizations that traditionally bolstered middle-class democracy have declined. Nowhere is this clearer or more fateful than with regard to American labor.”). These authors accordingly see a revitalized union movement as a way to remedy political inequality, but they despair of the prospects for such revitalization. For example, Gilens argues that unions “would appear to be among the most promising interest group bases for strengthening the policy influence of American’s poor and middle class,” but the decline in unionization rates leads him to conclude that “unions’ success in these efforts is likely to be fairly limited.” GILENS, *supra* note 1, at 158. Hacker and Pierson concur. They argue that “[a]n expanded role for unions would make a big difference” in remedying representational skew, but that “the reinvigoration of unions is unlikely to be the primary catalyst during the early stages of a renewed middle-class politics.” HACKER & PIERSON, *supra* note 1, at 303.
132. As noted *supra* note 128, public sector unions have fared far better than private sector unions over the last several decades. The following discussion thus tracks the decline in private sector unionization rates, a decline that accounts for the entire overall drop in unionization levels.
133. See Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 5 n.5 (1993); Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 581 (2007).
134. See STONE, *supra* note 17.
135. See WEILER, *supra* note 124, at 113-14.
136. See Estreicher, *supra* note 133, at 12-14; Wachter, *supra* note 133, at 585.
137. See STONE, *supra* note 17, at 196-216.
138. See WEILER, *supra* note 124, at 113-14.

But, whatever the mechanism, the consensus view is that unions are in decline—largely, if not entirely—because of their collective bargaining function.¹³⁹

To see this, take the concern about increasingly competitive markets. The argument is a plausible one and asserts that unions were able to thrive at a moment in U.S. history when markets were nearly oligopolistic.¹⁴⁰ As markets globalized and became increasingly competitive, however, collective bargaining—which drove up labor costs at unionized firms—undermined the ability of union employers to compete with non-union ones. The result was significant loss of market share for unionized companies and dramatic declines in unionization rates.¹⁴¹

139. Two caveats are worth noting. First, according to the “substitution hypothesis,” part of the decline in unionization rates is attributable to unions’ political success. The argument is that because of increasingly worker-friendly regulation of the economy—in part the product of past union political power—unions as collective bargaining agents are no longer as necessary as they once were. See, e.g., James T. Bennett & Jason E. Taylor, *Labor Unions: Victims of Their Political Success?*, 22 J. LAB. RES. 261, 261 (2001); Wachter, *supra* note 133, at 585. Whatever the plausibility of this argument, the substitution hypothesis still places collective bargaining at the center of the story of union decline. That is, the hypothesis holds that unions’ political success makes unions *qua* collective bargaining agents no longer necessary. But, relevant for our purposes, the hypothesis does not hold that unions’ past political success renders unions *qua* political agents obsolete.

Second, some scholars contend that cultural or intellectual shifts have contributed to the decline of unionization rates in the United States. Most prominent among these theories is the idea that the collectivism inherent in unionism is counter to the cultural ascendancy of individualism. See, e.g., Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 4 (1999) (discussing the effect of the ascendancy of individual over collective rights). Assuming there is truth to these arguments, however, it is difficult to know which aspect of unionism—the collective-bargaining function or the political one—has created these cultural problems. Qualitative accounts suggest that the problem may lie with the collective bargaining function. See, e.g., LAWRENCE RICHARDS, UNION-FREE AMERICA 93-124 (2008). Moreover, it would be something of a strange claim to assert that political action in the United States must be individualistic in order to enjoy cultural or popular support—strange because organization is in the nature of political action, and our primary political actors, parties, are collective ones. Finally, even if some degree of union decline can be explained by cultural opposition to unions’ political function, collective bargaining still clearly provides much of the explanation.

140. See, e.g., Daniel J. Gifford, *Labor Policy in Late Twentieth Century Capitalism: New Paradoxes for the Democratic State*, 26 HOFSTRA L. REV. 85, 89-91 (1997).

141. See Wachter, *supra* note 133. The classic example offered for this story is the U.S. auto industry. See, e.g., Thomas A. Piraino, Jr., *Regulating Oligopoly Conduct Under the Antitrust Laws*, 89 MINN. L. REV. 9, 66-67 (2004); Mark J. Roe, *Rents and Their Corporate Consequences*, 53 STAN. L. REV. 1463, 1467-68 (2001); Thomas Lifson, *Oligopoly and the Fall of*

Or take the concern about the changing nature of work. As Katherine Stone documents, the era of mass industrial production was one in which “[e]mployers sought uniformity in products and processes in order to achieve economies of scale.”¹⁴² These production processes lent themselves to narrow job definitions and long-term employment relationships.¹⁴³ In this setting, according to Stone’s account, collective bargaining agreements that enforced rigid job rules and strict seniority rights made sense. But because our economy is no longer defined by mass production industries organized in this fashion, Stone argues, unions’ insistence that collective bargaining agreements dictate work rules, seniority protections, and the like is out of place.¹⁴⁴

Finally, take managerial opposition to unionization. Although there is some debate about the specifics, the prevalence, ferocity, and effectiveness of managerial opposition to unionization is well established. In one prominent study, for example, employers engaged in anti-union efforts in 96% of the union organizing campaigns they faced;¹⁴⁵ in another study, the opposition rate was 98.4%.¹⁴⁶ In about half of all union campaigns, moreover, employers threaten to close the business should employees choose to unionize.¹⁴⁷ Employers also fire between 5% and 20% of active union supporters.¹⁴⁸ Not surprisingly, these tactics work: when management threatens to close the business or fires union supporters, union win rates decline significantly.¹⁴⁹ Even where there is a successful unionization campaign, moreover, management frequently engages in efforts to avoid concluding a collective bargaining agreement. These tactics, also often successful, have further

the American Automobile Industry, AM. THINKER (Nov. 19, 2008), http://www.americanthinker.com/2008/11/oligopoly_and_the_fall_of_the.html.

142. STONE, *supra* note 17, at 5.

143. *Id.*

144. *Id.* at 203. Stone provides a long list of collective bargaining clauses that are, in her telling, “antithetical” to the new “boundaryless” organization of work. *See id.* at 204-05.

145. Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, ECON. POL’Y INST. 10 tbl.3 (May 20, 2009), <http://www.epi.org/files/page/-/pdf/bp235.pdf>.

146. See Chirag Mehta & Nik Theodore, *Undermining the Right to Organize: Employer Behavior During Union Representation Campaigns*, AM. RTS. AT WORK 8 (Dec. 2005), <http://www.americanrightsatwork.org/dmdocuments/ARAWReports/UROCUEdcompressedfullreport.pdf> (reporting that sixty-one out of sixty-two representation campaigns had employer opposition).

147. Bronfenbrenner, *supra* note 145, at 10 tbl.3.

148. *See* Sachs, *supra* note 16, at 684.

149. *See, e.g., id.* at 684-85 (citing Bronfenbrenner, *supra* note 145, at 10-11 tbl.3).

contributed to the decline in unionization rates as initial union organizing victories fail to become institutionalized and lead instead to the decertification of the union as the employees' bargaining representative.¹⁵⁰

Managerial opposition to unionization has everything to do with collective bargaining. In fact, management opposes unions for two primary reasons: one, to secure competitive labor costs, and, two, to maintain control over the way work is organized and carried out.¹⁵¹ Collective bargaining agreements can impede both of these managerial objectives. First, collective bargaining often requires unionized firms to pay more in labor costs than their non-union competitors.¹⁵² Second, as Stone's work emphasizes, collective bargaining also often restricts managerial control over the workplace. Thus, for example,

150. See Catherine L. Fisk & Adam R. Pulver, *First Contract Arbitration and the Employee Free Choice Act*, 70 LA. L. REV. 47, 56 (2009). As Fisk and Pulver explain:

An employer determined to resist the lawful right of its employees to unionize and bargain collectively can thwart their rights simply by refusing to enter into a collective bargaining agreement. Eventually, after the employer drags out the negotiations for years and makes plain its refusal to enter into an agreement with the union, the employees or the union give up. The employer can then withdraw recognition and remain union-free.

Id.

151. See Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921, 946-64 (1993); John Logan, *The Union Avoidance Industry in the United States*, 44 BRIT. J. INDUS. REL. 651, 663 (2006).
152. Thus, collective bargaining brings with it a rather substantial "wage premium," which has been at about seventeen percent. See David G. Blanchflower & Alex Bryson, *What Effect Do Unions Have on Wages Now and Would Freeman and Medoff Be Surprised?*, in WHAT DO UNIONS DO? A TWENTY-YEAR PERSPECTIVE 79 (James T. Bennett & Bruce E. Kaufman eds. 2008); David Card, *The Effect of Unions on the Structure of Wages: A Longitudinal Analysis*, 64 ECONOMETRICA 957, 974 (1996).

Unionized jobs are also more likely to provide health insurance, defined-benefit pension plans, vacation pay, life insurance, and disability insurance. See John W. Budd, *The Effect of Unions on Employee Benefits and Non-Wage Compensation: Monopoly Power, Collective Voice, and Facilitation*, in WHAT DO UNIONS DO? A TWENTY-YEAR PERSPECTIVE, *supra*, at 160, 177-81. At times, and in certain industries, non-union firms will increase their compensation packages to avoid the likelihood that they too will become unionized. See Western & Rosenfeld, *supra* note 130, at 517 (reviewing the literature and concluding that the threat effect, which "results from nonunion employers raising wages to the union level to avert the threat of unionization," is supported by evidence that "nonunion wages are higher in highly unionized industries, localities, and firms"). This threat effect can reduce the competitive disadvantage of unionization, but it does not eliminate it. The effect, moreover, depends on the existence of an actual threat of unionization. As union strength declines, so too does the salience of the threat effect. See *id.* at 532 (attributing rising income inequality between 1973 and 2007, in part, to decreasing union density and the declining threat effect).

collective bargaining agreements generally include just-cause dismissal clauses that restrict management's ability to discharge employees and thereby to control how those employees behave.¹⁵³ The work rules contained in most collective bargaining agreements have a similar effect: rather than allowing management to determine how work at the firm is performed, these clauses specify which workers are to perform which tasks and set out with some precision how those tasks are to be performed. Seniority agreements, job-bidding systems, bumping rights, and analogous collective bargaining clauses likewise diminish managerial control over how the workplace is organized and thereby fuel managerial opposition.¹⁵⁴

Collective bargaining has significant merits. Over the last half century, the practice has been a key contributor to economic equality in the United States,¹⁵⁵ and collective bargaining helps correct market failures that plague individual employment contracting.¹⁵⁶ But, as the above discussion makes clear, collective bargaining is also a central factor in each of the primary explanations for the decline of unions.

III. THE UNBUNDLED UNION: LIBERATING POLITICS FROM COLLECTIVE BARGAINING

The last Part argued that collective bargaining has, for a number of reasons, made it difficult for traditional unions to thrive under contemporary conditions. But because unions' political and collective bargaining functions are bundled, all of the collective-bargaining-related reasons for unions' decline—that is to say, essentially all of the reasons for union decline—are also impediments to workers' ability to use unions as a vehicle for political organizing. Bundling, in short, holds unions' political-organizational capabilities captive to the fortunes of collective bargaining.

Because unions' political and collective bargaining functions are bundled, a resurgence of traditional unions would increase the political voice of lower- and middle-income groups.¹⁵⁷ But rehabilitating unions as a vehicle for political

153. See Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 594-95.

154. See STONE, *supra* note 17, at 204-05.

155. See Western & Rosenfeld, *supra* note 130. See generally FREEMAN & MEDOFF, *supra* note 100, at 43-60 (describing the ways in which unions contribute to economic equality).

156. See Walter Kamiat, *Labor and Lemons: Efficient Norms in the Internal Labor Market and the Possible Failures of Individual Contracting*, 144 U. PA. L. REV. 1953 (1996).

157. See, e.g., HACKER & PIERSON, *supra* note 1, at 303.

organizing does not require a resurgence of traditional unions.¹⁵⁸ To the contrary, political organizing can be advanced by unbundling the political and collective bargaining functions of the union.

This is true for a reason that will now be obvious. In an unbundled regime, the fact that collective bargaining can be incompatible with contemporary forms of work organization, that it can create problems for firms operating in modern markets, and that it inspires fierce managerial opposition would be irrelevant to workers' political efforts because those efforts could now proceed independently of collective bargaining. Unbundling, that is to say, would immediately insulate political organizing efforts from the vulnerabilities of collective bargaining. Unbundling would also expand the range of employees for whom political organizing through the union form is a viable option. As we have seen, employees who wish to organize politically through a union can do so only if they also choose to organize for collective bargaining. But a substantial portion of the U.S. labor force does not desire to bargain collectively with their employers.¹⁵⁹ An unbundled regime would thus allow the half of the labor force that does not want collective bargaining to take advantage of the union as a political vehicle.

The third reason to predict that unbundling will facilitate political organizing is the focus of this Part: namely, political unions would likely generate less managerial opposition than traditional collective bargaining unions generate. It is important to clarify at the outset, however, what this Part does and does not argue. The argument here is that unbundling the union would likely decrease—though not eliminate—*managerial* opposition to employee organizing efforts. There are groups other than firm management that oppose unions' political efforts. The Chamber of Commerce and the National Right to Work Committee are prominent examples.¹⁶⁰ More recently,

158. At least in the near term, such a resurgence is unlikely. The trends that have contributed to unions' decline continue unabated, and the types of legal reforms that might reverse the slide in union density have failed to secure the necessary support. The most recent example is perhaps the starkest: at a time when the Democratic Party controlled the White House and sixty seats in the Senate, a package of labor reforms designed to facilitate renewed union growth—a bill that unions and pro-union legislators had sought for years—still failed to pass. See Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009); Sheryl Gay Stolberg & Steven Greenhouse, *Pace of Change Under Obama Frustrates Unions*, N.Y. TIMES, Sept. 6, 2009, <http://www.nytimes.com/2009/09/07/us/politics/07labor.html>. Indeed, the most likely course for traditional unions in the coming years is further decline. See James J. Brudney, *Recrafting a Trojan Horse: Thoughts on Workplace Governance in Light of Recent British Labor Law Developments*, 28 COMP. LAB. L. & POL'Y J. 193, 195 (2007).

159. See Freeman, *supra* note 18, at 6.

160. See, e.g., Marick F. Masters, Raymond Gibney & Thomas J. Zagenczyk, *Worker Pay*

individuals like the Koch brothers have played a similar role, sponsoring a 2012 ballot initiative in California that would have prohibited even voluntary dues deductions for political purposes.¹⁶¹ Many elected officials also oppose unions' political efforts. Scott Walker, the Republican Governor of Wisconsin, is a leading contemporary example.¹⁶²

With respect to these groups and individuals, two points bear mention. First, whether groups that oppose traditional unions would also oppose political unions depends on what political unions end up doing. To the extent that political unions replicate the political agendas of traditional unions, groups like the Chamber of Commerce undoubtedly would continue their opposition. But in a world where politics is unbundled from collective bargaining, it is uncertain whether political unions would advance the same agendas as traditional unions. As this Essay has noted, some political unions might choose not to advance economic goals at all; in such cases, it is doubtful that the Chamber of Commerce and groups like it would focus much energy on opposing them.

The second point is that even if opposition by these groups remained undiminished, it is still relevant that *managerial* opposition is likely to decline. This is the case most generally because it would imply an overall decline in opposition. More particularly, this is true because non-managerial actors lack the set of resources that makes managerial opposition to union organizing so

Protection: Implications for Labor's Political Spending and Voice, 48 INDUS. REL. 557, 558 n.1, 562 (2009) (including the National Right to Work Committee among the “[k]ey proponents and instigators” of paycheck protection initiatives in the states); Gordon Lafer, *The ‘Paycheck Protection’ Racket: Tilting the Political Playing Field Toward Corporate Power and Away from Working Americans*, ECON. POLICY INST. 3 (Apr. 24, 2013), <http://www.epi.org/files/2013/paycheck-protection-racket-tilting-political.pdf> (“The nation’s largest corporate lobbies—including the U.S. Chamber of Commerce . . . —have been promoting [paycheck protection proposals] for at least the past 15 years in various states.”).

161. See, e.g., Adam Nagourney, *California Is Latest Stage for Election Battle over Unions*, N.Y. TIMES, Oct. 1, 2012, <http://www.nytimes.com/2012/10/02/us/politics/battle-over-unions-moves-to-california.html>; Andy Stern, *Analysis: Koch Brothers a Force in Anti-Union Effort*, REUTERS, Feb. 26, 2011, <http://www.reuters.com/article/2011/02/26/us-usa-wisconsin-koch-idUSTRE71P28W20110226>; Anthony York, *Prop. 32: Group Linked to Koch Brothers Gives \$4 Million*, L.A. TIMES, Sept. 14, 2012, <http://latimesblogs.latimes.com/california-politics/2012/09/group-with-koch-brothers-ties-gives-4-million-to-proposition-32.html>.
162. See, e.g., Steven Greenhouse, *G.O.P. Platform Seeks to Weaken Powers of Unions*, N.Y. TIMES: THE CAUCUS (Aug. 30, 2012, 10:58 AM), <http://thecaucus.blogs.nytimes.com/2012/08/30/g-o-p-platform-seeks-to-weaken-powers-of-unions> (“The 2012 [Republican Party] platform urges elected officials across the country to change their laws regarding public-sector unions and follow the lead of Wisconsin’s governor, Scott Walker, who spearheaded an effort to curb the ability of his state’s public employees to bargain collectively.”).

effective. Namely, these groups cannot fire employees who try to organize unions, and they cannot threaten to close firms in response to organizing drives. Only management can do that.

In addition to offering reasons to predict that unbundling will increase the prospects for political organizing, this Part also offers some very preliminary evidence that workers would organize political unions. The evidence consists of union organizing campaigns that have been restricted to political action. The Part also addresses more theoretically the question of whether union political organizing can succeed when it is not connected to collective bargaining.

A. Improving Prospects for Organizing: Diminishing and Altering Managerial Opposition

Management, to be sure, would sometimes oppose the formation of political unions. But political unions would likely generate less pervasive and less severe opposition than conventional unions do. The most basic reason for this prediction is that, while traditional unions have a legal obligation to bargain over wages, hours, and other terms and conditions of employment,¹⁶³ political unions might not choose to pursue public policies that impact the firm at all. For example, while a traditional union must engage the firm over economics, a political union would be entitled to focus entirely on social issues, international affairs, public education, and the like. And while individual managers might have positions on these issues, the union's advocacy of them would likely not threaten the economic interests of the firm. It is also the case that certain components of collective bargaining agreements that generate managerial opposition would be difficult, if not impossible, to replicate through political action: key examples are the work rules and job classifications contained in many collective bargaining agreements, which, as Section II.C explained, are understood to impede flexibility in work design.¹⁶⁴

But even if political unions took on policy issues that impact the firm directly, they would still likely engender less managerial opposition. This is the

163. See 29 U.S.C. § 158(d) (2006).

164. Indeed, scholars have argued that collective bargaining is superior to legislation for the reason that collective bargaining, but not legislation, can establish specific rules for specific firms. See, e.g., CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE* 136 (2010) ("Collective bargaining is decentralized and non-state-centered, and it is potentially flexible, responsive to local conditions and to changing needs, cooperative, and democratic. The New Deal proponents of collective bargaining proclaimed its superiority to centralized regulation of terms of employment . . .").

case because political unions would have less power vis-à-vis the individual firm than a collective bargaining union does. Collective bargaining unions exercise collective power directly against the firm: they translate their ability to threaten production—or to otherwise intervene in the firm's operations—into bargaining concessions that the firm itself must grant. By contrast, a political union would exercise its power through the political processes of some government. And, even if all the employees in a given firm join a political union, they would constitute only a small proportion of the voters in the relevant polity. The result is a diminution in the relative ability of a particular union to impact the individual firm where it is organized, a diminution that should lessen the intensity of managerial opposition.

Of course, if political union organizing is successful, and if unions formed at different firms were to affiliate, these unions could secure significant political power. But managerial opposition to political unionism on these grounds would be plagued by its own collective action problem. That is, even if it would be in the collective long-term interests of multiple firm managements to fight the development of individual political unions (because those unions might eventually unite and exercise significant political power), the incentives for individual managements to free-ride on the oppositional efforts of other firms would be significant. This collective action problem would thus reduce the likelihood that any particular firm's management would fight the organization of any particular political union.

Political unions are also likely to generate less managerial opposition because they are less likely to impose competitive disadvantages on their firms. This is the case, in part, because collective bargaining generally takes place at the firm level and political action by definition takes place at the level of a polity that will encompass multiple firms and, at times, entire markets.¹⁶⁵ To take a basic example: if a union, through collective bargaining, secures paid sick leave for the employees of a grocery store chain in a given state, that chain will face higher labor costs than, and be at a competitive disadvantage relative to, all the other chains in the state (and relative to any chains that move into the state to take advantage of the unionized firm's higher labor costs). If, on the other hand, the union helps secure legislation requiring all employers in the

165. Collective bargaining agreements can be extended to cover multiple firms, but these are the exception rather than the rule. See 1 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 712-20 (John E. Higgins, Jr. ed., 5th ed. 2006). It is also true that if unions successfully organize all the firms in a market, they can take labor costs out of competition through collective bargaining. But, as the above discussion showed, the increasing competitiveness of markets is making this more difficult to accomplish. See *supra* Section II.C.

state to provide paid sick leave, then the sick leave requirement produces no competitive disadvantage for any of the grocery stores in the state. In this scenario, employers are likely to vigorously oppose the formation of the collective bargaining union. They may also oppose the formation of a political union—a legislated sick-leave requirement imposes costs, even if those costs are borne by all the firms operating in the state. But because the political outcome takes sick-leave costs out of competition, managerial opposition is likely to be less intense.

Political action certainly can place firms at a competitive disadvantage relative to others. Indeed, any legislation that imposes costs on some firms in a market but not others—say, in-state manufacturers but not out-of-state manufacturers—will have this effect. Nonetheless, even where politics has the potential to impose competitive disadvantages on firms operating within the domestic political boundaries, there are many contexts in which politics is less likely to lead to these outcomes than is collective bargaining. This is so because a broader set of interests are represented in the political process than in the collective bargaining one. At the bargaining table, there are only two parties: the union and the employer. The union is accountable to its current membership, a dynamic that can lead the union to make bargaining demands that improve current conditions at the expense of long-term competitiveness.¹⁶⁶ Not given a place at the collective-bargaining table are the many constituencies that may be negatively impacted by anti-competitive demands made by the union: future employees who lose job opportunities, other firms whose fortunes are linked to the unionized employer's, community groups whose interests are connected to the success of the employer, and, indeed, the broader polity interested in the tax base to which the employer contributes.

In the political process, by contrast, there are multiple parties with multiple constituencies. When union political organizing is successful, unions can at most constitute one voice among these many others. Should a political union seek legislation that has anti-competitive effects, it will therefore be opposed not only by the firm but also by a host of other groups that would face the negative consequences of anti-competitive legislation. Where these interests

¹⁶⁶ Indeed, recent research in labor economics seems to confirm that collective bargaining leads to a reduction in normal profits and growth. See Richard B. Freeman, *What Do Unions Do? The 2004 M-Brane Stringtwister Edition*, in *WHAT DO UNIONS DO? A TWENTY-YEAR PERSPECTIVE*, *supra* note 152, at 607, 622-23.

can outvote the union, proposals that the union might have won at the bargaining table will fail to carry in the political environment.¹⁶⁷

In sum, then, political unions may not implicate the firms' economic interests at all. If they attempted to do so, their ability to negatively impact those interests would be tempered by the diffuseness of their organizational density (relative to the polity as a whole), by their need to build coalitions that would include groups less willing to compromise firm competitiveness, and by the fact that—should adequate coalitions be built—any political successes would likely impact multiple firms in the relevant market, thereby lessening anti-competitive effects.

It is worth addressing here the possibility that some firms would oppose political unions on the ground that they would constitute a first step towards the formation of a traditional union. For example, even though a political union could not itself engage in collective bargaining, it might contribute to the development of a collective identity among workers who previously lacked one and thereby make the arguments for collective bargaining more compelling.¹⁶⁸ A political union might also conceivably serve to whet the appetite of workers for collective bargaining, making the possibility of bargaining directly with management over terms and conditions of employment seem more appealing.¹⁶⁹ Or, more straightforwardly, the political union might make it easier for workers to deal with the coordination costs of organizing a collective bargaining union.

These arguments have some plausibility, but there are important rejoinders. First, employees form many types of collectives that do not elicit managerial opposition—and certainly not the type of opposition that management exhibits toward collective-bargaining unions. When employees

167. It is possible to imagine political contexts in which union political power would be sufficient to enact the same types of anti-competitive policies through legislation that would otherwise be secured at the bargaining table. It is also possible that the union would sometimes be joined in these efforts by certain constituencies, such as businesses that believed they would benefit from the increased spending power that would come from higher wages. But the dynamic described in the text likely helps explain why unions have been consistently unsuccessful in securing legislation that is strictly in the interests of union members—they have been unable to find coalition partners necessary to enact such legislation. See Freeman, *supra* note 166, at 624-25; Masters & Delaney, *supra* note 88.

168. See, e.g., Sachs, *supra* note 107, at 2725-29 (discussing the relationship between collective identity and collective action in the workplace context).

169. Mark Barenberg discusses these points in the context of so-called company unions—those dominated by management. Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 831-35 (1994).

form a book club or a softball team or a prayer group, we might predict that these groups would contribute to the development of a collective identity or make it easier to overcome the coordination costs of union organizing. Yet, management does not routinely fire workers who take a lead role in organizing these types of collectives. Second, while a political union might whet the appetites of employees for collective bargaining, it could also have precisely the opposite effect: it could satiate—or deflect—the workforce’s collective impulse, thereby making the formation of a collective bargaining union *less* likely.¹⁷⁰ Indeed, management itself often establishes forms of collective organization within the workplace—self-managing production teams, employee involvement committees, and the like—in an attempt to “deflect workers’ group choice over workplace governance modes . . . away from . . . full collective bargaining.”¹⁷¹

A recent study by John Godard and Carola Frege sheds light on this issue.¹⁷² Godard and Frege conducted a survey of a thousand U.S. workers and investigated, inter alia, whether the presence of certain non-union forms of employee representation in the workplace impacted the propensity of workers to join a traditional union.¹⁷³ The researchers asked workers whether “there [was] a nonunion, management-established system [in the workplace] where worker representatives meet with management,” and whether the worker was “a member of another type of association to assist with work related matters[, including an] association . . . based on your occupation, race, gender, or some other characteristic you identify with.”¹⁷⁴ Although the authors found relatively high levels of both types of non-union representation systems in U.S. workplaces, they found no evidence that the presence of either type of organization impacted workers’ propensity to vote for a union. That is, having a workplace organization other than a union neither increased nor decreased the likelihood that a worker would decide to support unionization.¹⁷⁵

170. *Cf. id.* at 827-28 (discussing this effect in the context of company unions).

171. *Id.* at 762; *see also id.* at 761 (quoting AFL-CIO President Lane Kirkland as stating that these forms of workplace organization are “sham organizations designed to prevent real worker empowerment”).

172. John Godard & Carola Frege, *Labor Unions, Alternative Forms of Representation, and the Exercise of Authority in U.S. Workplaces*, 66 *INDUS. & LAB. REL. REV.* 142 (2013).

173. *Id.* at 146.

174. *Id.* at 151.

175. *Id.* at 163. Other studies, based on far smaller samples, have found that non-union representation systems can encourage unionization, *see* Daphne Gottlieb Taras & Jason Copping, *The Transition from Formal Nonunion Representation to Unionization: A Contemporary Case*, 52 *INDUS. & LAB. REL. REV.* 22 (1998) (describing Canadian labor

It is not possible to predict with certainty how much managerial opposition would be generated by a concern about political unions as a precursor to traditional unionization. Given management's own willingness to experiment with non-union forms of collective workplace organization, the lack of managerial opposition to other types of employee organizations, and the evidence that non-union forms of workplace representation do not increase workers' propensity to support unions, however, it seems unlikely that opposition generated by this concern would be severe or pervasive.¹⁷⁶

Finally, and of equal importance, when management does oppose political unions—as it will in certain circumstances—its opposition will likely have a different social resonance than does opposition to traditional collective-bargaining unions. Employees' collective economic activity is sufficiently contested that management's decision to oppose union organizing does not generate much social contestation.¹⁷⁷ Perhaps the best piece of evidence for this is that although managerial opposition to unionization is intense and widespread, and quite often illegal, it produces essentially no public outcry. In 2010, for example, more than 1600 workers were offered reinstatement after being illegally fired for union activity, and more than 17,000 workers received

conditions), or discourage it, see A. Tarik Timur et al., '*Shopping for Voice*': Do Pre-Existing Non-Union Representation Plans Matter When Employees Unionize?, 50 BRIT. J. INDUS. REL. 214 (2012) (same).

176. If this concern did lead to substantial managerial opposition, the concern could be addressed in a number of ways. In some contemporary organizing campaigns, for example, unions contractually agree that they will restrict their future organizing efforts in exchange for a managerial pledge, for example, not to fight the union in the current campaign. See, e.g., *Patterson v. Heartland Indus. Partners*, 428 F. Supp. 2d 714, 716-17 (N.D. Ohio 2006). Political unions could likewise contractually agree not to engage in any efforts to organize employees into traditional unions. The effect of this pledge would be somewhat limited: employees themselves could not waive their right to engage in union organizing activity, see 29 U.S.C. § 103 (2006), and other unions would not be barred by the pledge of the contracting union. But the effect would not be nil. Going further, an unbundled labor law could—by statute—preclude the organization of a collective-bargaining union at any firm where a political union is organized. Such a provision would likely do more than dampen managerial opposition and might well encourage management to support political unions as a means of preventing traditional unionization. For just this reason, however, such a provision would pose a problem for future collective bargaining efforts that unbundling itself would not and is not intended to pose.
177. See THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON? TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK 5-8 (1991) (describing anecdotally the decline of support for labor interests).

back pay for illegal employer conduct related to union activity.¹⁷⁸ Despite the remarkable scope of this anti-union activity, no major newspaper in the country made more than passing reference to any of it. Most of the largest papers did not report on it at all.¹⁷⁹

While opposition to union organizing efforts fails to provoke public concern, managerial opposition to employee political activity would likely be viewed with greater skepticism. This is the case, in part, because political

178. The figures are for fiscal year 2010. See *Table 4. -Remedial Actions Taken in Unfair Labor Practice Cases Closed*, NAT'L LAB. REL. BOARD (2010), http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1696/table_4.pdf. As Gordon Lafer writes:

[E]ven the most serious type of illegal activity—actually firing, suspending, or cutting the hours of employees in retaliation for supporting the creation of a union—is extremely common. In 2004, an estimated 15,400 employees were illegally fired, suspended, or otherwise financially penalized for supporting a union in an election context. In that same year, the total number of potential voters in NLRB elections was approximately 260,000; by this count, one employee was illegally fired or suspended for every 17 eligible voters.

Gordon Lafer, *Neither Free nor Fair: The Subversion of Democracy Under National Labor Relations Board Elections*, AM. RTS. AT WORK 6 (July 2007), <http://www.americanrightsatwork.org/dmdocuments/ARAWReports/NeitherFreeNorFair.pdf> (footnotes omitted). In 2007, the House Committee on Education and Labor similarly reported as follows:

The numbers are staggering. Every 23 minutes, a worker is fired or otherwise discriminated against because of his or her union activity. . . . [B]etween 1993 and 2003, an average of 22,633 workers per year received back pay from their employers. In 2005, this number hit 31,358. A recent study . . . found that, in 2005, workers engaged in pro-union activism “faced almost a 20 percent chance of being fired during a union-election campaign.”

H.R. REP. NO. 110-23, at 8 (2007) (footnotes omitted).

179. This result was derived from a Lexis search of the ten newspapers with the largest circulations in the nation: the *Wall Street Journal*, *USA Today*, the *New York Times*, the *Los Angeles Times*, the *San Jose Mercury News*, the *Washington Post*, the *New York Daily News*, the *New York Post*, the *Houston Chronicle*, and the *Philadelphia Inquirer*.

It is also worth noting that the United States has a flourishing and sophisticated industry of “anti-union consultants” whose work is dedicated solely to helping management defeat unionization campaigns. See Logan, *supra* note 151. And while these consultants deploy a range of strategies to stop unionization, illegal discharges are part of the toolkit of “[t]he most ruthless.” John Logan, *Consultants, Lawyers, and the ‘Union Free’ Movement in the USA Since the 1970s*, 33 INDUS. REL. J. 197, 207 (2002); see also John Logan, *The Fine Art of Union Busting*, 13 NEW LAB. F. 76, 78 (2004) (“Recent studies have demonstrated that antiunion consultants are now part of standard operating procedure, with three-quarters of employers engaging their services when confronted by an organizing drive.”). A flourishing hundred-million dollar industry that encourages illegal opposition to unionization bespeaks at least some degree of social acceptance of management’s approach. See *id.*

organizing is far more culturally mainstream in American public life than union organizing.¹⁸⁰ A second factor is at work too. American social and legal culture largely accepts managerial control over employees' worklife—over the way that work is organized, carried out, and compensated. But there is greater discomfort when management tries to use its economic power to control noneconomic aspects of an employee's life, including the employee's political activities.¹⁸¹ During the latest presidential campaign, for example, a number of corporations encouraged their employees to vote a particular way. Some firms, in pressing employees to vote for the Republican nominee, suggested that an Obama reelection would threaten the employees' jobs. Analogous employer attempts to influence employee voting in union campaigns—including suggestions that voting for the union will threaten jobs—are routine and receive no attention. But the attempt by management to intervene in employees' political voting was covered extensively, and with strong notes of disapproval, in the media. Among other examples, the *New York Times* ran a full-length, front-page article on the subject, titled *Here's a Memo from the Boss: Vote this Way*.¹⁸² The *Houston Chronicle* published a condemnatory editorial arguing that “the boss has no business in your voting booth.”¹⁸³ And two

180. See GEOGHEGAN, *supra* note 177, at 8 (communicating how unions and union organizing are not culturally mainstream). Indeed, political organizing is central to the American constitutional scheme—it is at the heart of the First Amendment's protection of associational rights—and it remains a highly visible and celebrated component of political life. Over the past several years, to take some of the more prominent examples, the Tea Party and MoveOn.org have both engaged in incredibly successful organizing efforts and both been lauded—setting aside partisan differences—as examples of vigorous democratic politics. See, e.g., LAWRENCE LESSIG, *ONE WAY FORWARD* 13-14 (2012) (MoveOn.org); *id.* at 18-20 (Tea Party); Victoria Carty, *Multi-Issue, Internet-Mediated Interest Organizations and Their Implications for US Politics: A Case of MoveOn.org*, 10 SOC. MOVEMENT STUD. 265, 266 (2011) (MoveOn.org); Vanessa Williamson, Theda Skocpol & John Coggin, *The Tea Party and the Remaking of Republican Conservatism*, 9 PERSP. ON POL. 25, 26-27 (2011) (Tea Party).

181. The instinct behind this differential may be a kind of sphere separation principle according to which power derived in one sphere—the market, for example—is appropriately deployed within that sphere but not outside of it. Cf. WALZER, *supra* note 41; LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN* 44-45 (2006) (describing Walzer's theory of sphere separation).

182. Steven Greenhouse, *Here's a Memo from the Boss: Vote this Way*, N.Y. TIMES, Oct. 26, 2012, <http://www.nytimes.com/2012/10/27/us/politics/bosses-offering-timely-advice-how-to-vote.html>; see Mike Elk, *Koch Sends Pro-Romney Mailing to 45,000 Employees While Stifling Workplace Political Speech*, IN THESE TIMES, Oct. 14, 2012, http://inthesetimes.com/article/14017/koch_industries_sends_45000_employees_pro_romney_mailing; David A. Graham, *Can Your Boss Threaten to Fire You if You Don't Vote for Romney?*, THE ATLANTIC, Oct. 20, 2012, <http://www.theatlantic.com/politics/archive/2012/10/can-your-boss-threaten-to-fire-you-if-you-dont-vote-for-romney/263709>.

183. Editorial, *The Boss Has No Business in Your Voting Booth*, HOUS. CHRON., Oct. 30,

prominent law professors excoriated the practice, calling it one of the “worst pathologies of this second gilded age.”¹⁸⁴

The commitment to this kind of spheres separation is also reflected in the organizing principles of U.S. labor and employment law. Both legal regimes give management extensive control over how work is organized, performed, and compensated. Thus, the default rule in U.S. workplaces is individual employment contracting,¹⁸⁵ which, in practice, means that management generally sets the terms of the employment contract and employees choose whether or not to accept employment under those terms.¹⁸⁶ Even if employees unionize, thereby obligating management to bargain with the union over terms and conditions of employment, management nonetheless retains the ultimate right to refuse union proposals and implement its desired workplace policies.¹⁸⁷

While the law gives management substantial control over an employee’s worklife, it is more resistant to managerial attempts to control employees’ political activities. In fact, as Eugene Volokh has recently shown, legal protection against employer interference with employee political activity has a rich historical tradition in the United States.¹⁸⁸ Thus, “the very first American laws banning employment discrimination by private employers [were] voter protection laws, which barred employers from discriminating against employees based on how the employees voted.”¹⁸⁹ Such voter protection statutes have been on the books since the mid-1800s, but more recent legislation protects a far broader range of employee political activity from employer interference. To take just a few examples: Connecticut prohibits

2012, <http://www.chron.com/opinion/editorials/article/The-boss-has-no-business-in-your-voting-booth-3994653.php>.

184. Bruce Ackerman & Ian Ayres, *Election Bosses: How to Stop Employers from Telling Workers Whom to Vote for*, SLATE, Nov. 2, 2012, http://www.slate.com/articles/news_and_politics/jurisprudence/2012/11/how_congress_can_stop_employers_from_telling_workers_how_to_vote.html.
185. See WEILER, *supra* note 124, at 228; Sachs, *supra* note 16, at 672; Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 208 (2001).
186. Management’s ability to set particular terms, although generally not constrained by law, is constrained by market forces. And, at the upper ends of the labor market, there is more active bargaining over terms and conditions between firms and employees.
187. See Sachs, *supra* note 16, at 701-06. If management does impose its own terms, employees have a right to strike. But other legal rules – primarily one giving management the right to permanently replace striking workers – make the strike right a rather hollow one. See *NLRB v. Mackay Radio Tel. Co.*, 304 U.S. 333, 345 (1938).
188. Eugene Volokh, *Private Employees’ Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295 (2012).
189. *Id.* at 297.

employment discrimination based on the “exercise . . . of rights guaranteed by the First Amendment”; eight states prohibit employers from retaliating against employees for “engaging in political activities”; two states along with Puerto Rico and the District of Columbia prohibit discrimination based on employees’ political party membership; and three states prohibit discrimination against employees for “engaging in electoral activities.”¹⁹⁰ Unlike in the case of union organizing, moreover, there is no evidence that management violates these statutes repeatedly or with impunity.

Outside the mainstream of labor and employment doctrine, further support can be found in cases involving the tort of discharge against public policy. In *Novosel v. Nationwide Insurance Co.*,¹⁹¹ the employer instructed its employees to engage in political-organizing activity—including canvassing and signature gathering—in support of an insurance reform bill. The plaintiff-employee in the case objected to the firm’s political stand, refused to engage in the political work, and was fired for doing so. The Third Circuit held that the discharge was tortious because it was in violation of public policy. As the court put it, where an employer “conditions employment upon political subordination,” the employer has exceeded the scope of its legitimate managerial authority.¹⁹²

The point here is not that management discipline of employees for political-organizational activity would be illegal under existing law.¹⁹³ Rather, the point is that these strands of labor and employment law reflect a view that the exercise of managerial power is more acceptable with respect to the economic terms and conditions of employment than with respect to employees’ political activity. To the extent that these legal principles capture a socio-cultural view of the appropriate reach of managerial power,¹⁹⁴ they support the

190. See *id.* at 310, 313-19, 325-26 (discussing and collecting citations to state laws).

191. 721 F.2d 894 (3d Cir. 1983).

192. *Id.* at 900. This same judicial resistance to the export of managerial power beyond the workplace can be seen in cases where employers discipline employees for their personal relationships and personal activities. See, e.g., *Guardsmark v. NLRB*, 475 F.3d 369 (D.C. Cir. 2007); *Rulon-Miller v. Int’l Bus. Machs. Corp.*, 208 Cal. Rptr. 524 (Ct. App. 1984). *But see Brunner v. Al Attar*, 786 S.W.2d 784 (Tex. Ct. App. 1990) (upholding the termination of an at-will employee for her refusal to quit volunteer work with an AIDS organization).

193. Indeed, the legal protections necessary to facilitate the organization of political unions are not available under current law, and thus this Essay proposes statutory protection for such activity. See *infra* note 215 and accompanying text.

194. This is not the place to argue whether—or to what extent—law reflects cultural understandings. For some discussion of the question, see Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 211, 236-43 (2008).

proposition that managerial opposition to political unions would be met with a less forgiving response than is managerial opposition to traditional unions.

B. Political Organizing Without Collective Bargaining?

The preceding Section provided reasons to predict that unbundling the union's political and economic functions would increase the prospects for political organizing through the union form. Although there are no extant examples of the political unions this Essay envisions, this Section will offer some preliminary evidence that under an unbundled regime workers would in fact organize political unions. The evidence comes from recent organizing efforts in sectors of the labor market to which, for various reasons, traditional labor law does not apply. In these sectors, labor law does not require unions to bundle political and economic functions. Indeed, in some of these sectors, unions are legally *precluded* from collective bargaining but have nonetheless engaged in successful political organizing campaigns.

In the homecare sector, traditional collective bargaining has often been legally impossible because homecare workers are classified either as employees of the single clients for whom they work or as independent contractors.¹⁹⁵ Despite the legal impossibility of collective bargaining, unions have nonetheless led campaigns to organize homecare workers for political action. In Illinois, for instance, at a time when homecare workers were barred from collective bargaining, the homecare workers union led a campaign to enact a "Homecare Workers Bill of Rights."¹⁹⁶ Throughout the campaign, union members hosted meetings with state representatives, testified at legislative hearings, and lobbied on behalf of the bill.¹⁹⁷ The homecare union also took an active role in more traditional electoral politics, running the field operation for Mayor Harold Washington's reelection campaign in two key wards on Chicago's south and west sides.¹⁹⁸ Members participated in the union's door-

195. Sachs, *supra* note 36, at 383-84. Even if the NLRA had defined these independent contractors as "employees" covered by the Act, collective bargaining would be meaningless—that is, indistinct from individual bargaining—where each employer has only one employee.

196. Keith Kelleher, A History of SEIU Local 880, 1983-2005 at 58-59 (2005) (unpublished manuscript) (on file with author). The Service Employees International Union's homecare organizing in California followed a similar model. It was exclusively a political effort in its early stages, and it was similarly successful. See Linda Delp & Katie Quan, *Homecare Worker Organizing in California: An Analysis of a Successful Strategy*, 27 LAB. STUD. J. 1, 6 (2002).

197. See Kelleher, *supra* note 196, at 61-62.

198. See *id.* at 73.

to-door and onsite voter registration efforts, staffed phone banks that the union ran on Washington's behalf, and took a central role in the union's get-out-the-vote program on election day.¹⁹⁹

The Service Employees International Union's recent experience in the nursing home industry also offers some evidence of the potential of politics-only organizing. After years of unsuccessful attempts at traditional organizing campaigns in California nursing homes, the union sought to reorient its efforts away from collective bargaining and toward politics.²⁰⁰ This led the union to craft an agreement with several nursing home chains that granted the union access to employer property for the sole purpose of discussing political mobilization with the workforce.²⁰¹ The union's organizing efforts were thus strictly limited to political campaigns—ones designed to increase the state's financial support for nursing homes—but the efforts were nonetheless successful in generating worker support and participation.²⁰²

It is worth noting that there is a strand of labor research suggesting employees are more likely to participate in a union's political program if the union is successful at delivering economic goods through collective bargaining.²⁰³ This research indicates that a worker's "commitment" to her union predicts much about if, and how, the worker will participate in union activities.²⁰⁴ And, as Herbert Asher and his colleagues report, commitment is

199. See E-mail from Keith Kelleher, President, SEIU Healthcare Ill. & Ind., to author (Aug. 15, 2012) (on file with author). In the four years between 1986 and 1990, several thousand workers signaled their support for the union and about five hundred became dues-paying members. See Kelleher, *supra* note 196, at 57. To be sure, there are idiosyncratic pieces of the homecare story that would be absent for many political unions. For example, the homecare industry depends heavily on state funding, and thus the connection between political work and terms and conditions of employment in this industry is direct and clear. On the other hand, the union's early organizing work had to succeed without the legally conferred advantages that political unions would enjoy.

200. See, e.g., Erin Johansson, Labor-Management Partnerships as a Means to Employer Neutrality 12 (unpublished manuscript) (on file with author). For a general discussion of SEIU's nursing home organizing work in California, see Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1180-87 (2011). The author of this Essay worked in the SEIU legal department from 2002-2006.

201. See Johansson, *supra* note 200, at 15.

202. See *id.* at 16-17; Sachs, *supra* note 200, at 1184.

203. See HERBERT B. ASHER ET AL., AMERICAN LABOR UNIONS IN THE ELECTORAL ARENA 49-50, 107, 123-24 (2001).

204. See, e.g., E. Kevin Kelloway & Julian Barling, *Members' Participation in Local Union Activities: Measurement, Predication, and Replication*, 78 J. APPLIED PSYCHOL. 262 (1993); James W.

highly correlated with the union's *economic* performance: a worker who believes that her union has successfully improved wages and benefits is more likely to have a high level of union commitment than is a worker who has not benefitted from the union in these ways.²⁰⁵ Asher et al. also find that the relationship between union commitment and participation holds with respect to the union's political activities.²⁰⁶

Despite these findings, this literature does not imply that the loss of the collective-bargaining function would preclude worker support for political unions. To start, even if it is a union's economic performance that fuels worker support for the union's political program, this does not entail a conclusion that collective bargaining is a necessary predicate for political participation. To the contrary, the union's political program can itself generate economic returns for the membership.²⁰⁷ Next, Asher et al.'s work suggests that economic performance is important to union commitment because, traditionally, unions are formed for the purpose of securing economic goods. Thus, they write: "Unions came into being to deliver material benefits to their members: better wages and benefits, and better working conditions. Not surprisingly, union members judge their union based on how it delivers on these promises."²⁰⁸ Accordingly, a political union formed initially for non-economic purposes—for example, to expand gun rights—would not need to deliver economic goods in order to secure member commitment.

Moreover, while it is true that union commitment is related to political participation, commitment is not the only explanatory variable. Asher et al. themselves report that several other factors are significant correlates of political participation: workers' agreement with the political positions taken by the union, workers' views of what the authors call the "appropriateness of union political activity," and whether union membership is voluntary or

Thacker et al., *Union Commitment: An Examination of Antecedent and Outcome Factors*, 63 J. OCCUPATIONAL PSYCHOL. 33 (1990).

205. See ASHER ET AL., *supra* note 203, at 50-52.

206. See *id.* at 123-24.

207. Of course, in any union-organizing context, workers' *initial* commitment to the union must precede the actual delivery of returns. Thus, in a traditional union, workers must decide to participate in organizational and first-contract bargaining activity before they secure any economic goods from the collective bargaining agreement. The same would be true with political unions: an initial commitment would have to precede the union securing economic returns through political action. As the above discussion shows, we have a good evidentiary basis for believing that political unions could successfully generate this necessary level of initial commitment. See *supra* text accompanying notes 195-202.

208. ASHER ET AL., *supra* note 203, at 50.

mandatory.²⁰⁹ In fact, political agreement is as strong a predictor of participation as commitment is, and, when taken together, these three other factors have about three times stronger a correlation to participation than does commitment.²¹⁰ This is relevant to our analysis because workers who join a political union will do so voluntarily.²¹¹ They will accordingly be quite likely to agree with the union's politics and to view the union's political activities as appropriate.

IV. LAW AND ORGANIZING: DESIGNING AN UNBUNDLED REGIME

The last Part argued that unbundling the union would improve the prospects for unionization as a political-organizational vehicle. But an important design question remains: what statutory work is required to unbundle the union and make political unions viable? This Part describes these necessary statutory reforms.

But before doing that, it is important to reiterate that even an unbundled labor law would need to offer several types of affirmative protection to employees engaged in the project of organizing political unions. These protections would not be extensive, but would be critical. In Section II.B, this Essay described the ways in which labor law enables traditional unions to take advantage of the workplace as a locus of organizational activity. The law functions this way by prohibiting employers from banning employee speech about organizational activity in non-work areas of the workplace and during non-work time. The law also allows unions to use the employer's payroll system as a dues-deduction mechanism, gives unions access to the employer's informational resources about employees for organizational purposes, and offers anti-retaliation protection to workers engaged in organizational activity. To facilitate the successful organization of political unions, an unbundled labor law should offer the same kinds of guarantees. Thus, employers should be prohibited from banning employee speech about political unions in non-working areas of the workplace and during non-work time. Allowing political unions to use payroll deduction as a mechanism for collecting dues from those employees who consent to such payments would enable political unions to

209. See *id.* at 123-24.

210. See *id.* at 124 tbl.6.5.

211. See *infra* text accompanying note 228 (discussing why participation in a political union must be voluntary).

overcome the collective action costs involved in dues collection.²¹² Political unions should be provided access to information about the composition of the workforce, at least subsequent to a showing of support by some significant portion of the workforce. And, finally, employers should be prohibited from retaliating against employees based on the employees' support for or participation in political unions.²¹³

To be sure, every provision in the National Labor Relations Act that deals with union organizing rights—and all of the administrative and judicial interpretations of those provisions—would impact political unions' potential. Amending the statute to permit non-employee organizers to access company property, or to make punitive damages available against employers who discipline employees for union activity, or to add a private right of action, would all contribute to the success of organizational activity. But these avenues are beside the point. What matters here is that unbundling the union and

212. A statutory requirement that employers allow dues deduction for political unions could be subject to a compelled subsidization of speech challenge, but several points bear mention in this respect. First, the current statute effects a similar requirement by making the refusal to accept payroll deduction evidence of a refusal to bargain in good faith, *see supra* text accompanying notes 113-114, even though dues deducted from payroll can be used for political purposes. Second, under current law, requiring employers to allow payroll deduction is unlikely to amount to compelled *speech* because the employer is not actually required “to express a message he disagrees with” and because it is unlikely that the speech of a union—funded by employee dues that are voluntarily deducted from payroll—would be attributed to the employer. *See* *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 557 (2005). *See generally* Robert Post, *Compelled Subsidization of Speech: Johannis v. Livestock Marketing Association*, 2005 SUP. CT. REV. 195 (distinguishing First Amendment claims of compulsion from compelled subsidization cases). A claim that such a statutory requirement amounts to compelled *subsidization* of speech is more colorable but would constitute a significant expansion of current doctrine, given the minimal cost to the employer of allowing such a payroll deduction. In the event that a court were willing to expand the doctrine in this way, however, the problem likely could be alleviated by requiring the union to reimburse the employer for the administrative costs involved in allowing the deduction, which, again, would be minimal. Finally, given the availability of credit card and bank draft payment systems, the payroll deduction, while useful, may not be as critical as other legal interventions to the viability of political unions.

213. The match between those the NLRA defines as “employees,” *see* 29 U.S.C. § 152(3) (2006), and those in the bottom nine income deciles is close but not perfect. *See supra* note 83. Thus, although using the current NLRA definition of employees in an unbundled regime would permit some workers in the top income decile to organize political unions, the current definition is consistent with the overall goal of enhancing the organizational capacity of those in the bottom nine income deciles. An unbundled regime might narrow the definition of employee to account for income, but such an approach would produce significant administrability costs, and, given the close fit between the current definition and the target income groups, such costs are likely not worth the benefits they would produce.

preserving for political unions labor law's basic and extant protections would itself improve the prospects for unionization as a political-organizational vehicle.

The actual statutory work involved in unbundling would not be extensive or difficult. The National Labor Relations Act gives employees the right to "self-organization," which includes the right to "form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."²¹⁴ Amendments aimed at unbundling unions' twin functions would establish that the right to "form, join, or assist labor organizations" includes the right to "form, join, or assist organizations not for the purpose of collective bargaining." Concomitantly, amendments would clarify that the "concerted activities" protected by the law include concerted activities related to the range of political activities that a political union could undertake, whether or not such activities would qualify as "mutual aid or protection" under current law.²¹⁵

Next, under current law, once a group of employees forms a labor organization, that organization has a statutory obligation to "bargain collectively with [the] employer,"²¹⁶ and such collective bargaining must include bargaining over the economic terms of the employment relationship.²¹⁷ An amended statute would make clear that, as to the new non-collective bargaining organization, there would exist no "mutual obligation" on the part of either an employer or the union to bargain over terms and conditions of employment. The unfair labor practices section of the law would reflect this change by clarifying that an employer does not violate the law by refusing to bargain with such a union, and that such a union *does* commit an unfair labor practice by attempting to engage the employer in bargaining over terms and

214. 29 U.S.C. § 157. Again, this Essay focuses on the NLRA and private-sector labor law, but the moves necessary to amend state labor laws for public-sector workers would be largely analogous. Details, of course, would need to be worked out depending on the precise structure of each individual state statute, but those details are beyond the scope here.

215. See, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) (discussing the scope of mutual aid and protection with respect to political activities). To clarify, the statute would need to prohibit employer retaliation for the full range of activity that a political union would undertake, even though, of course, it would not need to permit all this activity to occur in the workplace. What would need protection in the workplace is, as described above, organizational activity related to the formation of political unions, not the carrying out of the union's political work once the union is formed.

216. 29 U.S.C. § 158(b)(3).

217. *Id.* § 158(d).

conditions of employment.²¹⁸ Finally, recall that the current regime requires the employer to negotiate—as part of its overall collective-bargaining obligation—dues checkoff provisions.²¹⁹ Because political unions will not engage in collective bargaining, an unbundled labor law would need to establish that a political union designated by employees is entitled to collect dues directly from the employer through a payroll deduction system.²²⁰

Beyond these straightforward statutory moves, unbundling would require addressing one important conceptual issue. Under current law, an employer is obligated to recognize a union if and when a majority of employees in a relevant “bargaining unit”—essentially, a subgroup of the workforce that shares a set of common interests—votes for union representation.²²¹ Moreover, under current rules, if a majority of workers votes to unionize, the union becomes the bargaining representative of all the workers in the unit, even those who opposed unionization.²²² This is the so-called rule of exclusive representation, and it is designed to ensure the efficacy of collective bargaining: by establishing that the union speaks for all the workers in the unit, exclusive representation aims to prevent employers from playing different factions of workers off each other to the detriment of the whole.²²³ At least in non-right-to-work states,²²⁴ the rule also permits the union to collect mandatory dues from all the workers in the unit, even those workers who voted against unionization, in order to prevent any workers from free riding off the financial contributions of others.²²⁵

With regard to political unions, however, there is no call for exclusive representation: because the union will not bargain over a contract with the employer, the threat of the employer exploiting factions to undermine the

218. These changes would be made to § 158(a)(5) and § 158(b)(3) respectively.

219. See *supra* text accompanying note 113.

220. Subject to the discussion *infra* accompanying notes 226–227.

221. See 29 U.S.C. § 159.

222. See *id.*

223. See, e.g., OFFICE OF THE GEN. COUNSEL, NLRB, ADVICE MEMORANDUM: DICK’S SPORTING GOODS, CASE 6-CA-34821, at 10 (June 22, 2006), <http://mynlrb.nlr.gov/link/document.aspx/09031d45800da97d,2006WL2992401> (“[M]inority representation could provide employers a ready method of precluding true collective bargaining by playing the different minority representatives off against each other.”).

224. See 29 U.S.C. § 164(b).

225. See *id.* § 158(a)(3); *Comm’ns Workers of Am. v. Beck*, 487 U.S. 735 (1988); see also Dauschmidt, *supra* note 126 (discussing *Beck* and union security agreements); Sachs, *supra* note 115, at 811–19 (same). In right-to-work states, mandatory dues requirements of this sort are prohibited. See Sachs, *supra* note 115, at 811–19.

union's bargaining strength is inapposite. Moreover, given the Supreme Court's jurisprudence in this area, mandatory dues collection would likely not be permissible in political unions, even in the private sector. As the Court has held, the NLRA permits unions to collect mandatory dues from all employees in a bargaining unit, but only for the purposes of collective bargaining and contract administration.²²⁶ With respect to the union's political program, all dues payments must be fully voluntary, and employees accordingly must be provided a right to opt out of funding any of the union's political expenditures. And although the Court's holding on this score with respect to private sector unions is formally based on its interpretation of the statute, it is clear that the Court's reasoning is either driven by the canon of constitutional avoidance or, at the least, informed by "constitutional values."²²⁷ With respect to public employees and public-sector unions, the rule is explicitly a constitutional one.²²⁸

Accordingly, a legal regime that permitted unions to collect dues for political purposes from employees who objected to paying those dues would be flatly unconstitutional in the public sector and it would face significant constitutional difficulties in the private sector.²²⁹ Even if constitutionally permissible, however, requiring employees to pay dues to support a political union would be undesirable as a policy matter. Indeed, for the same reasons that employer opposition to employee political activity would be viewed skeptically, a rule requiring employees to fund union political activity with which they disagreed would be viewed with similar skepticism. This hostility would produce not only political opposition to the statutory changes necessary for unbundling, but would also impede the organizational potential of political unions once authorized by statute. Thus, rather than serving as exclusive

226. See Sachs, *supra* note 115, at 813-19.

227. Roger C. Hartley, *Constitutional Values and the Adjudication of Taft-Hartley Act Dues Objector Cases*, 41 HASTINGS L.J. 1, 83 (1989); see James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 1028 & n.298 (1996).

228. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977).

229. For the public-sector rule, see, for example, *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277 (2012). To invalidate such a rule for private sector unions on First Amendment grounds, the Court would have to find state action in the private-sector union context. The Supreme Court has not addressed this question directly, and scholars are divided on whether there is sufficient government involvement in the mandatory dues context to trigger constitutional review. See Sachs, *supra* note 115, at 844-46, 849-51 (reviewing the doctrine and competing scholarly arguments). Compare Dau-Schmidt, *supra* note 126, at 125-32 (rejecting the presence of state action), with David H. Topol, Note, *Union Shops, State Action, and the National Labor Relations Act*, 101 YALE L.J. 1135, 1148-57 (1992) (arguing that state action is present).

bargaining agents, political unions should be designed to resemble the kind of “minority” or members-only unions that Charles Morris describes: employees could form a political union even if the union is supported only by a minority of the workforce, and the union, in turn, would represent and collect dues from only those workers who affirmatively desire to be members.²³⁰

V. BEYOND THE WORKPLACE

Because unbundling the political and economic functions of unions will better enable political organizing by those in the lower and middle classes, unbundling is justified by a commitment to representational equality. But the goal of representational equality invites us to think beyond unions to a more comprehensive set of reforms designed to facilitate organizing by underrepresented groups. A full discussion of such a program is beyond the scope of this Essay, but a few preliminary observations are in order.

As this Essay has argued, labor law has facilitated unions’ organizational success by providing a geographic locus for organizational activity, offering a mechanism for funding organizational activity, making available the information necessary for organizing, and protecting employees against retaliation. These same basic legal interventions could be deployed to facilitate organizing in other contexts. In particular, where the government provides services to constituencies in the relevant income groups, it could supplement the services it provides with legal rules designed to facilitate political organizing around the service. Importantly, such interventions would be substantively neutral as a matter of design: they would enable organizing but would take no position on—and indeed exert no influence over—the types of policies the groups would pursue once organized.

This suggestion may sound quite foreign, but it has historical roots. During the mid-1960s, as part of President Johnson’s war on poverty, Congress established Community Action Programs (CAPs) as part of the new Office of Economic Opportunity (OEO). The CAPs were charged with involving low-income community members in the design and implementation of the anti-poverty programs that were to serve them. In fact, the Economic Opportunity Act of 1964 dictated that CAPs were to be “developed, conducted,

230. See CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* 8–9 (2005).

and administered with the maximum feasible participation of the residents of the area and members of the groups served.”²³¹

Although the statutory charge of maximum feasible participation was a highly contested one, to those running the OEO and the CAPs, “participation” implied more than simple involvement in the bureaucratic and administrative operation of welfare programs. Under the OEO, community participation came to imply governmental support—including financial support—for political organizing by the poor. Thus, in the leading study of the CAPs, J. David Greenstone and Paul Peterson explain that community action “became an attack on *political poverty*, oriented toward increasing the political participation of previously excluded citizens, particularly black Americans.”²³² As Greenstone and Peterson describe:

In order to achieve the maximum in participation . . . CAPs were expected to redistribute political power through the mobilization of deprived groups. Techniques designed to achieve this goal included recruitment of issue-oriented community organizers, financial assistance to indigenous community organizations, formation of community corporations, voter registration drives, [and] sponsorship of protest demonstrations²³³

Indeed, the OEO itself suggested that local CAPs “assist the poor in developing autonomous and self-managed organizations which are competent to exert political influence on behalf of their own self-interest.”²³⁴

231. Pub. L. No. 88-452, § 202(a)(3), 78 Stat. 508, 516.

232. 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, 241 (Robert E. Haveman ed., 1977) (emphasis added); see also J. DAVID GREENSTONE & PAUL E. PETERSON, *RACE AND AUTHORITY IN URBAN POLITICS: COMMUNITY PARTICIPATION AND THE WAR ON POVERTY* 7 (1973) (“[T]he fundamental political objective was generally understood to be the organization and consequent institutionalization of black (and other minority group) interests . . .”).

233. Peterson & Greenstone, *supra* note 232, at 264.

234. GREENSTONE & PETERSON, *supra* note 232, at 5 (quoting OFFICE OF ECON. OPPORTUNITY, *COMMUNITY ACTION WORKBOOK*, at III.A.5 (1965)). Thus Richard Blumenthal concludes that the CAPs were to “finance community organizing as a kind of political antitrust measure.” Richard Blumenthal, *The Bureaucracy: Antipoverty and the Community Action Program*, in *AMERICAN POLITICAL INSTITUTIONS AND PUBLIC POLICY: FIVE CONTEMPORARY STUDIES* 129, 139-40 (Allan P. Sindler ed., 1969). And while political opposition gave the program a short lifespan, see *id.* at 132, the program nonetheless gave birth to significant political-organizational efforts. Historians, for example, credit CAPs with contributing to

In the contemporary setting, public assistance programs provide a promising context for expanding on the labor law model developed in this Essay.²³⁵ Following this model, revised public assistance statutes could, first, make welfare centers available for political-organizational activity.²³⁶ Welfare centers, like workplaces, provide natural gathering places for recipients and would offer a centralized location for organizing. Next, just as labor law allows unions to collect dues through authorized payroll deductions, this regime could enable benefits recipients to authorize dues payments directly from their benefits.²³⁷ As labor law gives unions the names and addresses of workers in the bargaining unit, revised benefits laws could give welfare organizers the names

the growth and institutionalization of black political power in certain cities, including Newark, *see* Peterson & Greenstone, *supra* note 232, at 272, and with generating political protest movements in a number of others, *see* Blumenthal, *supra*, at 130-33.

235. For an excellent review of welfare organizing efforts in the United States, see NICK KOTZ & MARY LYNN KOTZ, *A PASSION FOR EQUALITY: GEORGE A. WILEY AND THE MOVEMENT* (1977).
236. The National Voter Registration Act (NVRA) of 1993 provides some limited precedent for this type of program. Pub. L. No. 103-31, 107 Stat. 77 (codified at 42 U.S.C. § 1973gg (2006)). The NVRA mandates that all State offices providing public assistance serve as “voter registration agencies” and provide registration assistance to eligible voters. 42 U.S.C. §§ 1973gg-5(a)(1)-(4). The motivation behind this provision of the statute was to increase political participation by the poor by making the centralized location of the welfare center available for political activity. *See, e.g.*, H.R. REP. NO. 103-66, at 19 (1993) (explaining that requiring public assistance offices to serve as registration sites will “assure[] that almost all of our citizens will come into contact with an office at which they may apply to register to vote”); *see also* 139 Cong. Rec. 4845 (1993) (statement of Sen. Wellstone) (“[T]his piece of legislation is about expanding political participation in the United States.”). *See generally* Pedro De Oliveira, *Same Day Voter Registration: Post-Crawford Reform to Address the Growing Burdens on Lower-Income Voters*, 16 GEO. J. ON POVERTY L. & POL’Y 345, 353 (2009).
237. The state could also fund organizers directly, but organizing theory suggests that requiring members to pay dues is important for the development of organizational commitment. As such, direct government funding of organizational work may not be the most efficacious approach. *See* MARSHALL GANZ, *WHY DAVID SOMETIMES WINS: LEADERSHIP, ORGANIZATION, AND STRATEGY IN THE CALIFORNIA FARM WORKER MOVEMENT* 100 (2009) (quoting Cesar Chavez, who explained, “A union must have members who pay dues regularly. . . . Because they pay so much, they feel they are the important part of the organization; that they have a right to be served. They don’t hesitate to write, to call, to ask for things—and to reaffirm their position in the association. . . . [T]he idea that the members are, alone, paying the salary of a man who is responsible to them is very important.”); Howard S. Becker, *Notes on the Concept of Commitment*, 66 AM. J. SOC. 32, 35-38 (1960) (proposing that “side bets” increase commitment to an organization); Thomas W. Gruen et al., *Relationship Marketing Activities, Commitment, and Membership Behaviors in Professional Associations*, 64 J. MARKETING 34, 37 (2000) (“The membership’s prepayment of dues represents an initial economic investment in the relationship. As such, it creates a potency that motivates the members to recover their investment . . .”).

and addresses of benefits recipients.²³⁸ And, finally, the law would need to ensure that recipients who became active in political organizing efforts faced no negative repercussions for doing so.

Public education—one of the largest government-run programs in the United States²³⁹—is another context in which law might generate political organizing.²⁴⁰ By making public schools available for organizational purposes, providing information about parents to organizers, and allowing organizers to use the public schools' administrative capacity to facilitate dues collection from parents, the state could help build a political organization of public school parents. Public hospitals, libraries, and even public recreation centers could similarly be used to support political organizing among the poor and middle class.

CONCLUSION

The risk that economic inequalities will produce political ones, long a concern of democratic theorists and political scientists, has led to several generations of campaign finance regulation designed to get money out of politics. But these efforts have not succeeded. Rather than struggling to find new ways to restrict political spending by the wealthy, this Essay has argued that representational equality can be advanced by legal mechanisms designed to facilitate the organizational capacity of those for whom the current system has become unresponsive.

Historically in the United States, labor law has been the most important legal mechanism of this type, and the labor union a primary vehicle for the political organization of the poor and middle class. Accordingly, as this Essay

238. To address privacy concerns that might be heightened in the benefits context, such a regime could require recipient consent—perhaps in opt-out form to encourage participation—before disclosure.

239. As of the 2008-2009 academic year, state and local governments spent about \$862 billion on education and libraries. Nat'l Ctr. for Educ. Statistics, *Digest of Education Statistics*, INST. EDUC. SCI. tbl.30 (Oct. 31, 2011), http://nces.ed.gov/programs/digest/d11/tables/dt11_030.asp. Federal spending in fiscal year 2010 amounted to just under \$300 billion. *Id.* tbl.384, http://nces.ed.gov/programs/digest/d11/tables/dt11_384.asp.

240. Local political organizing among low-income public school parents has seen some success. See John Rogers, *Forces of Accountability? The Power of Poor Parents in NCLB*, 76 HARV. EDUC. REV. 611, 625-32 (2006); see also JEANNIE OAKES & JOHN ROGERS WITH MARTIN LIPTON, *LEARNING POWER: ORGANIZING FOR EDUCATION AND JUSTICE* 111-30 (2006) (reviewing the example of parent organizing).

has shown, labor law offers important lessons about how to construct a program of legal interventions designed to facilitate political organizing among currently underrepresented groups. The unbundled union, in which political organization is liberated from collective bargaining, constitutes one promising component of such a broader attempt to improve representational equality.