Summer 2023

Banding Together: Law Versus People Power in the United States

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Recommended Citation
Available at: https://digitalrepository.unm.edu/nmlr/vol53/iss2/4

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INTRODUCTION

To become a democratic society, the United States must respect the people’s right to associate. This does not sound like a radical principle—freedom of association is part of the First Amendment—but realizing this freedom requires serious changes in existing policy. State and federal laws obstruct the ability of people to band together to shape the type of society that they wish to live in. People face severe restrictions impeding their right to form and direct value-based, power-building, membership-driven organizations.

I begin with an examination of the democracy deficit in this country, explored in three dimensions. First, when there are conflicts over policy, concentrated wealth tends to trump the popular will. Second, most people relate to politics in a passive rather than participatory manner. And third, our politics are marked by a narrow range of possibilities, stopping most people from questioning foundational elements of the status quo, like the hours we must work or the supposed need for constant “economic growth” in an age of abundance on a planet of finite capacity.

I then explore how allowing popular participatory associations can help us work towards correcting these three dimensions of democracy deficit. Labor unions and other collective associations like tenants’ unions can challenge oligarchy. Membership-based political parties or democratic NGOs allow people to engage in politics in domains beyond voting as participants rather than spectators. And the general expansion of collective organizations is our best hope for enlarging the scope of both political discourse and political action, generating the possibility for radical change.

To achieve the aims of democratization, associations need certain features: they must be accountable to their membership, capable of acting in ways that challenges elite interests, and free to act in accordance with their values and not merely their narrowly defined “interests.” Unfortunately, existing laws de-democratize associations by depriving them of these essential features. This often occurs in undemocratic ways that distinguish the United States from supposedly comparable countries, like France or Canada, which, whatever their flaws, allow

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*Attorney at law in Washington D.C. I would like to thank John Douglas for his time and helpful suggestions, Zaineb Majoka for her brilliance and support, and the editors at the New Mexico Law Review for their diligent work in getting this piece ready for publication.

1. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”) (emphasis added).
more scope for participatory involvement.\(^2\) I examine this de-democratization in relation to four kinds of associations: (1) political parties; (2) labor unions; (3) nonworker economic cooperatives; and (4) nonprofit organizations.

Popular discourse in recent years has started to discuss undemocratic features of the United States political system, including the influence of wealth on politics\(^3\) and the undemocratic character of electoral institutions like the Electoral College.\(^4\) The restriction on the freedom to associate can be read as a third domain of anti-democracy, alongside private campaign financing and undemocratic electoral rules. There is growing literature on this third domain;\(^5\) I aim to contribute to that conversation.

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I will note that my argument will not concern itself with the common argument that “the United States was founded as a republic, not a democracy.” First, most countries in the world are officially known as “republics,” including ones that I argue have greater association rights than the U.S., like France and Germany. See United Nations, Official Names of the United Nations Membership, https://www.un.int/protocol/sites/www.un.int/files/Protocol%20and%20Liaison%20Service/officialnam esofcountries.pdf [https://perma.cc/YF6C-H2T7] (showing that out of 193 member nations, 128 are officially known as “republics”). Second, the point about the United States having been founded as “a republic, not a democracy” is historically dubious, at least in its common current invocations. See George Thomas, ‘America Is a Republic, Not a Democracy’ Is a Dangerous – And Wrong – Argument, the Atlantic (Nov. 2, 2020), https://www.theatlantic.com/ideas/archive/2020/11/yes-constitution-democracy/616949/ [https://perma.cc/NHU9-L9A7]. Third, it is not clear that originalism is the best method of interpreting the Constitution. See Erwin Chemerinsky, Worse Than Nothing: The Dangerous Fallacy of Originalism, at x–xiii (Yale Univ. Press, 2022). Fourth, and most foundationally, my argument is about how to build a more desirable society, not about the correct interpretation of the U.S. Constitution.


While my conclusions are somewhat unwelcome, I nevertheless find grounds for action and even optimism: if these legal obstacles are preventing participatory politics, changing the law of associations can promote democratic empowerment and participation. This is not merely critique but also a sketch of a program to remedy the problem. I begin the discussion with an examination of our current undemocratic reality.

I. DEMOCRACY DEFICIT

A. Introduction: This Is Not Democracy

In the United States, the majority of people have little meaningful control over their own lives. They lack a say in the decisions that govern their time and structure their surroundings. Many pay little attention to politics and know little about it.6 Most of those who do participate in politics do so as spectators rather than participants.

The following Section examines this problem in three dimensions before venturing into possible remedies. The first dimension is that elites effectively dictate policy, even when they stand opposite public opinion. The second dimension is popular ignorance and passivity. Contrary to those who treat this as a reason to be skeptical about the value of democracy, I argue that it is more accurately understood as a symptom of currently existing democracy deficits. The third dimension concerns the broader way in which people’s lives are shaped by powers outside their control. This includes not only the explicit policy conflicts discussed in the Introduction but also the background questions that do not get asked and the limitations of electoral democracy in an undemocratic economy.

B. Oligarchs Win Policy Fights

The majority of people want a society that is more economically equal and support policies that would help build greater equality, but they cannot achieve this because of elite power over the political process. In recent years this claim—formerly marginalized as “radical”—has become mainstream.7


7. This is necessarily something of a subjective judgment, based on perceptions that in recent years
there has been more space for left-wing views in liberal publications like The New Republic or Vox. However, there is some direct evidence to support it. The public has long supported campaign finance reform, but the perception that politicians are generally corrupt or unaccountable has increased. See David W. Moore, Public Dissatisfied With Campaign Finance Laws, Supports Limits on Contributions, GALLUP (Aug. 3, 2001), https://news.gallup.com/poll/4765/public-dissatisfied-campaign-finance-laws-supports-limits-contributions.aspx (2001 poll showing that voters mostly favor campaign finance restrictions but only 16% find the issue “extremely important”) [https://perma.cc/AE23-TQZH]; Justin McCarthy, In U.S., Trust in Politicians, Voters Continues to Ebb, GALLUP (Oct. 7, 2021), https://news.gallup.com/poll/355430/trust-politicians-voters-continues-eb.aspx (showing roughly consistent decline in faith in politicians) [https://perma.cc/FMY7-BUBU]; Beyond Distrust: How
There is empirical evidence to support it. A 2014 Princeton study indicated that when the wealthy oppose a policy it seldom passes, even if the majority of the non-wealthy public favors it. As the authors later noted, because their data set focused on the top 10% of income, rather than the extremely rich 1% or 0.1%, it likely understated its findings. The extremely wealthy tend to have more conservative economic views than the moderately wealthy and more disproportionate influence.

Specific cases further support the argument. According to a 2020 poll, 77% of voters, including 53% of self-identified Republicans, support a wealth tax on the extremely rich, but apart from some modest measures in the Inflation Reduction Act, even a Democrat-controlled Congress failed to achieve much in this regard. In a similar vein, the majority of the public, including 44% of self-described Republicans, believe that there is too much economic inequality generally. This is true even though most people across the political spectrum underestimate the current level of

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10. Id.


economic inequality. Despite these popular views, there is little action to rein in the ultra-rich.

The pandemic has vastly increased the ultra-wealthy’s share, with Elon Musk’s net worth increasing an estimated $184,800,000,000 and Jeff Bezos’s increasing $79,200,000,000 from March 18, 2020, to October 15, 2021. Most people believe that this is unfair. The conservative argument that earnings reflect merit has never been tenable, but when one man earns $184.8 billion in under nineteen months—that is over $220,000 per minute—even the most determined have a hard time pretending to believe that this is a product of hard work.

More remarkably, many billionaires and multi-national corporations pay extremely low taxation rates, often lower than those of low-to-middle-earning wage workers, and sometimes nothing at all. Polls sometimes explore whether billionaires ought to “pay more” in taxes. The question of whether they should be exempt from taxation is too obvious to ask.

Notwithstanding the overall tenor of public opinion on all of these questions, state and local governments are doing little to even try to alter this course and are often facilitating it. The reason is the power of economic elites, which works through a variety of channels. One is direct donations to politicians, as the candidate

19. See Schneider & Khan, supra note 11.
who spends the most in any race usually wins. The Supreme Court’s 2010 Citizens United decision liberated the wealthy to spend indefinitely large sums on political advertising, another source of influence. More generally, when private wealth is so immense, the state often finds itself compelled to placate the interests of the wealthy. Politicians from different states and cities openly compete to show how “pro-business” they are.  

This elite capture can also be called oligarchy. However, it would not work if the majority of the population could engage politically to challenge concentrated capital. Unfortunately, as argued in the next Section, the population is largely passive.

C. The People are Passive

As argued above, our politics often does a poor job of translating public opinion into policy. Part of the reason is that many people do not pay attention to politics or participate, even in narrow channels like voting. "The worst turnout since 1969.” Gregor Aisch et al., U.S. Trailed Most Developed Countries in Voter Turnout for Economic Cooperation and Development with available data. (May 7, 2017), https://www.nytimes.com/interactive/2017/05/07/world/europe/france-2017-election-saw-the-worst-turnout-since-1969. Gregor Aisch et al., How France Voted, N.Y. TIMES (May 7, 2017), https://www.nytimes.com/interactive/2017/05/07/world/europe/france-election-results-maps.html. However, the 74+% that they saw was much higher than the

20. Did Money Win?, OPEN SECRETS, https://www.opensecrets.org/elections-overview/winning-vs-spending [https://perma.cc/Q5BE-EJVT] (the data in the article is based on data released by the FEC on April 1, 2021). Of course, correlation is not causation, see Maggie Koerth, How Money Effects Elections, FIVETHIRTYEIGHT (Sept. 10, 2018, 5:56 AM), https://fivethirtyeight.com/features/money-and-elections-a-complicated-love-story/ [https://perma.cc/9JKF-H3PY]. But the likelihood of influence is evident enough to prohibit direct contributions in other contexts, like the judiciary. See MODEL CODE OF JUD. CONDUCT Canon 2.11(A)(4) (Am. Bar Ass’n 2020). In any case, most campaign donations are large contributions—by individuals or PACs—which can only be the work of rich people. See Where the Money Came From, OPEN SECRETS, https://www.opensecrets.org/elections-overview/where-the-money-came-from [https://perma.cc/5G2D-YP3A].


24. See Andrias & Sachs, supra note 5, at 551.

they undermine the idea that elected officials have any particular popular mandate. When coupled with undemocratic policies like the disproportionate distribution of electoral power in the Senate and the disenfranchisement of Washington, D.C., it is unclear what it means to refer to the system as electoral democracy. 27

The public is not only disengaged; they are also unaware. This is evidenced by a long-running series of surveys, indicating that 29% of the public could not name the Vice President,28 fewer than half can name the Chief Justice of the Supreme Court, 29 and over 40% cannot name all three branches of the government.30

These polls are sometimes accompanied by articles suggesting that democracy is doomed and analyses that portray the problem as a deficit in the electorate, rather than in the electoral system.31 However, this ignorance and apathy can be read, at least in part, as a symptom of impotence. Rather than being a reason to doubt democracy—do we trust people who know so little to make judgments about governance?—the public’s disengagement is itself a symptom of the democracy deficit. This hypothesis is bolstered by the fact that the least privileged are the most disengaged.32 One hypothesis is that because people are not tapped into politics, they do not pay attention to it. If they felt that participating in politics could increase their wages or lower their rent, they might view it quite differently.33 As Saul Alinsky put


27. See Mara Liasson, Democrats Increasingly Say American Democracy is Sliding Toward Minority Rule, NPR (June 9, 2021, 5:00 AM), https://www.npr.org/2021/06/09/1002593823/how-democratic-is-american-democracy-key-pillars-face-stress-tests [https://perma.cc/CP6X-SRHV].


33. Social movement theory describes this idea as response to “political opportunity.” See Doug McAdam, John D. McCarthy & Mayer Baird, Introduction: Opportunities, Mobilizing Structures, and Framing Processes — Toward a Synthetic, Comparative Perspective on Social Movements, in COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS 1, 1–20 (Doug McAdams et al. eds., Cambridge Univ. Press 1996); Sidney Tarrow, States and Opportunities: The Political Structuring of Social Movements, in COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS I, 41–61 (Doug McAdams et al.
it: “[i]f people feel they don’t have the power to change a bad situation, then they do not think about it.”

Even among those who are engaged in one sense, there is not necessarily more knowledge of current events, including politics. Polls indicate that watching sensationalist sources like Fox News correlates with less knowledge than consuming no news at all. An increasing number of people are turning to social media for their news, which also has a toxic impact on participants’ knowledge of current affairs and belief in misinformation.

It has become commonplace—for good reason—to lament the negative impact of social media on social and civic wellbeing; what is often overlooked is how anti-democratic the whole system is. In fact, the problem is often misdiagnosed as a matter of partisanship—even though the people arguing on Facebook are overwhelmingly not engaged in anything remotely resembling participatory party politics. They are not attending meetings, voting for party leaders, or debating resolutions about their party’s official policies. The anti-partisanship framing fits with a conventional narrative that factionalism is a principal scourge of democracy. However, it seems at least equally plausible that impotence exacerbates the human tendency to hate. Our political system appears to be generating more rancor as the public loses power. More dramatically, some of the ugliest sectarian hatreds in the world were born under brutal dictatorships like Tito’s Yugoslavia and Asad’s

eds., Cambridge Univ. Press 1996); Anthony Oberschall, Opportunities and Framing in the Eastern European Revolts of 1989, in COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS 1, 93–121 (Doug McAdams et al. eds., Cambridge Univ. Press 1996). Sidney Tarrow describes research by Eric Hobsbawm on Peruvian peasants in this light: “The peasants’ land grievances were age-old, dating back to barely remembered land usurpations after the Spanish occupation. But Hobsbawm finds that their decisions to take collective action against landlords co-occurred with struggles for power in the capital between elites who, exceptionally, sought support from sub-altern classes.” Tarrow, supra, at 55.

34. SAUL ALINSKY, RULES FOR RADICALS 105 (1989).


37. THE FEDERALIST NO. 9 (Alexander Hamilton), No. 10 (James Madison).
Suppressing freedom does not lead to less factionalism, even if it can mitigate its manifestations in the short term. In many ways, social media is the antithesis of participation in a democratic collective. The platform curates the user’s experience and sets each individual to compete against others for “likes,” friends, and followers. The people presiding over the system are profit-seeking businesses that cull users’ information to sell or to develop targeted advertising for profit. While there is much political discussion on these forums, it often takes the form of confrontation between absent, often anonymous strangers, rather than ongoing exchanges between people who will see each other again. These participants’ words are wholly divorced from the process of governing society, which fosters a sense of impotent rage and a license to say whatever comes to mind without concern for consequences or truth. The quest for commodified approval exacerbates natural human tendencies towards cliquishness and cruelty. There is some resemblance to politics, with its factions and power struggles, but it is mostly superficial. Social media warriors are less like warriors or rebels and more like gladiators, fighting for consumer amusement and the enrichment of the platforms’ owners.

Many political discussions, both on and off social media, focus on things that elites should have done: *If Trump had passed CARES 2.0, he would have won; Schumer should oppose arms sales to Saudi Arabia.* There is little pretense that the people speaking have any capacity to impact the decision at hand, even indirectly; they are simply commenting on what ought to be done from several levels of removal. It is akin to sports fans’ opining about what play the coach ought to run. No one thinks their musing will ever reach the coach, let alone change his mind.

In itself, this type of yelling at the television is perhaps inevitable. However, a problem arises when armchair opining ceases to connect with anything that can be classified as political action. Griping about Pelosi’s endorsement of Henry Cuellar, for instance, could take place at political meetings where participants discuss new strategies for protecting abortion rights. However, that is usually not what happens. Except for sporadic voting, political opinions continue to function like opinions about what the coach should have done.

There was a surge in popular participation and education in the long election of 2020.40 There are some indications this is a broader trend, as evidenced by the

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38. See generally JOHN MCHUGO, SYRIA: A HISTORY OF THE LAST HUNDRED YEARS (2015) (providing a broad background on Syria). I am not necessarily saying that authoritarianism caused sectarianism, but at the very least, the two can comfortably coexist.


2018 and 2022 midterms.\textsuperscript{41} However, even the 2020 “record high” turnout would be record low turnout in other electoral liberal states.\textsuperscript{42} Moreover, even if the trend (hopefully) sustains itself, it does not necessarily mean deeper or more regular engagement beyond voting. There remains little space between the roles of news consumer and voter in which people can participate in politics.

D. The Questions That Are Not Asked

The third dimension of the United States’ democracy deficit is the collection of decisions that are made by powerful actors without any popular input at all. The issue here is not that people have specific policy preferences that politicians disregard, as in the case of taxing billionaires. Nor is it that people do not know or do not care about the actions of their elected officials. Rather, these are matters that popular discourse artificially removes from the category of “politics,” meaning much of the public does not even think to form opinions.\textsuperscript{43} These are the questions that are not asked.

The length of the work week is one illustration. Most people at present accept as given that much of their waking life will be spent working, and a large portion of the remainder structured around their work. They may fantasize about retiring or winning the lottery, but they understand that they will work full-time—forty hours or, in many cases, much more—for most of their lives. However, there is nothing natural about this or any other work-week length; it is historically contingent and borne of long political struggle.\textsuperscript{44} Policies like the Fair Labor Standards Act push employers toward accepting these limitations on the workweek by forcing higher pay for hours worked over forty.\textsuperscript{45} Forty hours has already been superseded, at least officially, by 35 hours in France, and Japan’s leaders are entertaining a 32-hour work week.\textsuperscript{46} There is no reason to assume that this number—or even the broader framework in which most people toil as wage laborers—is natural or preordained; these questions are subject to contestation.

The list can continue to all social decisions. In addition to how much people work, there is no reason a priori to accept that a company’s owners or managers ought to decide what that work consists of or how it should be conducted. In the age

\textsuperscript{41} Monica Potts, Turnout Was High Again. Is This the New Normal?, FIVETHIRTYEIGHT (Nov. 15, 2022 11:46 AM), https://fivethirtyeight.com/features/turnout-was-high-again-is-this-the-new-normal/ [https://perma.cc/Q5MV-UUV7].

\textsuperscript{42} See DeSilver, supra note 26.

\textsuperscript{43} I will also add: I am not saying that people would reach any particular conclusion about these questions if they were asked. The issue is that our current political system and discourse are structured to exclude the questions, notwithstanding their obvious import.

\textsuperscript{44} See 1 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY, CH. 10 (Scots Valley, CA, 2010) (1867); PHILIP DRAY, THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA 122–66 (2011) (describing struggle for the eight-hour day).

\textsuperscript{45} 29 U.S.C. § 207(a).

of the mega-corporation, a business’s owners are often diffuse shareholders, many of whom do not even know of their ownership share (for instance, if it is part of a managed 401k) or who have no acquaintance with the line of business (as with professional investors). There is no reason to credit these people’s opinions on how the company’s work ought to be done. As a practical matter, managers make the decisions, but this is a product of a legal structure that can be changed. The extent to which workers themselves might direct or impact these decisions has largely been left out of the conversation.

We can apply the same reasoning about control over production to the use of space. Most of our everyday physical surroundings are privately owned locations used by their owners for either lodging or profit. Most of us accept this, as we must to get through our lives, but this hardly makes it more democratic.

To illustrate the point, consider a typical Monday morning workplace conversation. A person who is interested in “politics” in the narrow sense might talk about the latest statement by Senator Manchin or the prospects for a given bill in the state legislature. “Less political” coworkers would talk about other matters, such as what they did over the weekend or what is going to happen to an abandoned lot near the office. However, these questions are as political as the officially “political” ones. Politics, in the narrow, familiar sense, concerns the affairs of state—but state policies include those that make the weekend a reality, like the Fair Labor Standards Act, and those that govern land usage, from zoning to the very existence of alienable private property. Ultimately, the state sets the parameters of power, and these parameters determine who has control over space and time. If the worker spent the weekend working their second job to help cover debts or relaxing with friends, those are both outcomes of political struggle. The fate of the abandoned lot, in all likelihood, will be decided by the highest bidder, who will probably use it to try to accumulate more money. That, too, is a political fact—and one subject to political contestation.

It is beyond the scope of the present essay to speculate on what a maximally democratic society might look like or what level of democracy is ideal. My argument here is that in our society the balance is skewed heavily in one direction. Private, unaccountable power makes most of the decisions that affect most people’s lives,

47. Curiously, Marx described the establishment of such “joint-stock companies” as a natural step in the transition towards socialism, due to, among other things, this clear divorce of ownership from management, making clear the unproductive character of mere owning. Marx, supra note 17, at 569–72.


with minimal opposition or interrogation. The dominance of money seeps into the fabric of discourse, where an extremely narrow definition of “politics” excludes the most important political questions from consideration.

II. DEMOCRATIC DEFICIT AND PARTICIPATORY ORGANIZATIONS

A. Introduction: A Step Towards a Solution

If the problem is an oligarchically-induced democracy deficit, as outlined in three dimensions above, the present essay presents a step towards a solution: allowing people to band together these processes through democratic collective organizations. This is not a single proposal, let alone a silver bullet. The idea is more a sketch of criteria that can help discern when an organization has democratizing and emancipatory potential. The entities that have these criteria have capacity to challenge the three dimensions of oligarchy highlighted above.

Nearly all of the emancipatory criteria highlighted here are found in some already existing associations in the West. They are present to some extent in the United States. Nevertheless, in most cases, existing U.S. policy hampers associations from realizing their democratizing potential.

Freedom to associate in itself does not lead to democracy. To be effective, an association must be constituted by its members, who are able to build power and express their values through the association. Only organizations that allow these three features—membership, power-building, and value-expressing—can successfully address the democracy deficits outlined above. While that might sound unobjectionable to some, the current landscape of popular associations is fraught with legal obstacles that impede at least one of these elements.

B. Democratic Organizations and Policy

Democratic collectivities are essential to address the first dimension of democracy deficit—translating popular preferences into policy. If, as argued above, elites often win the day through their money, the only reliable weapon non-elites have to compete is greater numbers. This has long been a calling card of the radical left—“unite the many to defeat the few”\(^\text{50}\)—and it has gained traction recently in mainstream discourse through slogans like “We are the 99%.”\(^\text{51}\)


The rise of labor unions in the mid-twentieth century was essential to the increased domestic economic equality across the West at that time. Across the world, and especially in Europe, labor and socialist parties were at the forefront of fighting for expanded labor protections and welfare rights. Conversely, the increase in equality in the mid-twentieth century and the subsequent increase in inequality correlate with the ascent and descent of organized labor. This correlation does not necessarily mean causation, of course, but the relationship is significant in any case. In one account, the weakening of labor unions by judges, legislators, or union-busting firms, leaves the working class with fewer vehicles to secure better work contracts and more favorable policies. This weakening, in turn, makes policy tilt more heavily towards capital and against workers. On the other account, economic inequality increases due to non-labor-related reasons, which in turn gives business owners more leverage to shape public policy and more leverage in contract negotiations over increasingly precarious workers. In my estimate, both processes are at work, and they mutually reinforce each other: weakened unions increase


53. See GÖSTA ESPING-ANDERSEN, THE THREE WORLDS OF WELFARE CAPITALISM, 44–48 (Princeton Univ. Press 1990). As Andersen makes clear, this was not a straightforward process, but a heavily contested and alliance-based struggle.


55. See Karl E. Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941, 62 MINN. L. REV. 265, 301–04 (1978) (showing the policy tilt in the courts); see also IRVING RICHTER, LABOR’S STRUGGLES, 1945–1950: A PARTICIPANT’S VIEW, CH. 4 (1994) (providing an insider’s history of the push by business and Congress to roll back the Wagner Act’s empowerment of labor); see also LANE WINDHAM, KNOCKING ON LABOR’S DOOR: UNION ORGANIZING IN THE 1970S AND THE ROOTS OF A NEW ECONOMIC DIVIDE, 57–84 (Heather Ann Thompson & Rhonda Y. Williams eds., 2017) (discussing union-busting firms and their evolution). Windham situates the growth in union-busting in the broader context of global competition, which includes both employer weakness, in the form of competitive threats, but also leverage, through the threat of capital flight. Id. at 57, 75. However, she also notes that the “precipitous decline in union density [from 1973 onward] meant that the American working class had far less power to counter neoliberal policies and to maintain broadly shared prosperity in the face of globalization and other structural changes.” Id. at 6.

56. See Steve Lohr, Economists Pin More Blame on Tech for Rising Inequality, N.Y. TIMES (Jan. 20, 2022), https://www.nytimes.com/2022/01/11/technology/income-inequality-technology.html (summarizing study by MIT economist Daron Acemoglu, who underscores that labor-saving technological advances are themselves not natural, but often the product of corporate attempts to decrease labor costs). Thomas Piketty also argues that the devastation from the Second World War put capital in a uniquely weak position, and that the reconstruction of subsequent decades restored its temporarily weak position. PIKETTY, supra note 17.
employer political power and leverage, which in turn further creates less favorable conditions for worker organizing. Inequality increases accordingly.

A recent essay by Kate Andrias and Benjamin Sachs explores various ways legal rules inhibit or facilitate constructing power structures that can challenge concentrated capital. They focus specifically on opportunities for legalized organizations capable of collective action, including many beyond the domain of labor. Legal rules, often facially unimportant ones, inhibit or facilitate this type of organization. For instance, one (now largely dead) vision of U.S. labor law argued that union organizers should be able to access company property in certain circumstances. They argue that, in addition to enacting such a substantive right to organize in the labor context, similar principles should hold for tenant organizers. Similarly, in many states, private-sector unions can deduct dues from everyone in the bargaining unit they represent, akin to a tax for representation. They argue for something similar for tenant organizers. A collection of such rule changes offers opportunity for action that can ultimately have multiplying effects.

The question of countervailing power is essential given the unleashing of (already dominant) private dominance over politics in the Supreme Court’s 2010 *Citizens United* decision. The problem is not public opinion—as noted above, most of the public is on board with containing the power of money in politics. The question is how to translate public opinion into power. Some have discussed legal changes that can limit money in politics, like a constitutional amendment to overturn *Citizens United*. However, it is unclear how such a law is supposed to pass. If oligarchy is really so entrenched, passing a law to limit money in politics would be the least winnable battle. In contrast to political fights which only implicate some elites or which divide them, a fight over the role of money in politics would produce a 1% with unified interests.

I believe that the most important question in fighting oligarchy is how to build institutions that can harness popular power. The question is not the negative one of defeating money in politics—which proposes change without an agent—it is rather a positive question, what collective formations can we build to ensure government works for the people? The process necessarily involves defeating the

57. See Andrias & Sachs, * supra* note 5, at 551.
58. Id. at 551–52.
59. Id. at 555–62.
power of wealth, but the first and foremost question is who has the capacity to achieve it.

The present essay aims to build on the work of Andrias and Sachs in challenging the power of oligarchy. People already have an interest in joining forces to fight this system, and most people are displeased with the current state of affairs; what they lack are effective channels for turning their dissent into policy. Law plays a role in facilitating or inhibiting the creation of collective organizations that can be such effective channels. Changing law can facilitate the growth of such organizing.

My focus, however, is different from that of Andrias and Sachs, in focusing on the negative. Their essay discusses potential legal changes to promote organizing, while I focus on how existing collectivities prevent the construction of popular power in arenas where there already is association. Many of their suggestions are novel: for instance, a legal regime that enables self-described tenants’ unions to automatically deduct money from renters’ (meager) income. The model of automatic dues-deduction for labor unions is unheard of in most of the world, including countries with much stronger labor movements than the U.S.; exporting it to tenants’ unions would be a bold gamble. By contrast, most of the proposed ameliorations in the present piece have actually existing precedents; in some cases, the U.S.’s anti-collective rule is an outlier.

Andrias and Sachs make clear that they are entertaining possible policies, not hitching their general vision to any specific proposal. However, the examples selected present something of a paradox. Existing law makes our current social relations appear natural, particularly by making the rights of property owners of course a factory owner can decide who accesses his factory. Rules like those granting non-employee labor organizers the right to access company property preserve the natural aura of proprietary authority while carving out a narrow exception. This exceptionality appears inexplicable and unjustified. It helps the opponents of the rule present it as a “special privilege,” and by implication attack movements like labor—which in theory is the organizational voice of the majority of the population—as a “special interest.”

It should be noted that they also propose other default rules that seem like obvious prerequisites, like just cause requirements protecting tenants from eviction and workers from firing. Andrias & Sachs, supra note 5, at 622–23.

For instance, the section on parties calls for equal rules for ballot access for all parties, and for parties to be membership-based organizations—these are normal practices in liberal democratic nations like Canada and France. See infra Part III.B. Several European countries allow labor unions to engage in secondary boycotts and political boycotts. Infra Part V.D. The allowance of labor-style organizing for independent contractors is the basis for India’s Self-Employed Women’s Association. Infra Part VI.C. The nonprofit discussion is perhaps an exception—to my knowledge, at least—but even here, I am proposing a deviation from a current U.S. regime that is quite exceptional: the flourishing of foundation-funded entities, governed principally through tax instruments and structured much like for-profit corporations. Infra Part VI.B.
Collective organizations cannot challenge oligarchy unless they have the capacity to challenge powerful actors in material ways, rather than simply expressing opinions or sharing information. For instance, a labor union unites some set of workers in a business and grants them the potential to engage in actions that negatively impact the business owners. Because businesses enrich themselves through the use of many people’s labor, the power to withhold that labor collectively directly challenges their bottom line and their authority. Labor unions that do not strike, and merely express preferences or opinions, do not present a challenge to existing power.

The pattern holds across a variety of contexts. Tenants’ unions do the same thing as workers’ unions in this context: the tenants have a common interest which is in competition with the landlord, and they can pressure the landlord through collectively withholding rent. Some effective acts of civil disobedience—like draft refusal—perform a similar function in relation to non-monetary forms of power. The collective of potential soldiers, with a shared interest in not fighting and dying, threatens not to submit to the collective project of war sought by the political and military leaders. By contrast, many associations that fall under the heading of civil society are concerned with relatively vague associative virtues, like dialogue or socializing or, in one prominent political scientist’s account, “cross-class voluntary associations.” Whatever the other merits of these associations, they cannot deliver an effective challenge to oligarchy. In seeking a harmony of interests among the elites and the general public they abandon the possibility of building countervailing power.

C. Participatory Organizations and the Cultivation of Democratic Subjects

Democratic collectivities can also remedy the problems of apathy and ignorance. This is the counterpoint of Alinsky’s comment about apathy: if people feel they do have the power to change a bad situation, then they are more likely to start thinking about it. Insofar as power-building associations force their members to think through political questions as participants, rather than spectators, they further this process.

As de Tocqueville described the process:

If, then, there be a subject upon which a democratic people is peculiarly liable to abandon itself, blindly and extravagantly, to general ideas, the best corrective that can be used will be to make that subject a part of the daily practical occupation of that people. The people will then be compelled to enter upon its details, and the details will teach them the weak points of the theory.
John Dewey made this cultivation of citizenship a cornerstone of his unified theory of pedagogy and politics. Education, in Dewey’s view, is not a passive process of receiving information but rather an interactive and ongoing collective process of engaging with problems in creative ways and working to achieve solutions. This active and social process compels people to enter upon the details of an idea and interrogate their own preconceptions to refine their understanding of the world. Democratic politics, as the collective process of determining how we live our lives and distribute power and resources, is a process of constant education. Participation in democratic collectivity is a forum for such education.

Our current politics is marked by an absence of Deweyan engagement, and a concomitant extravagant abandonment to general ideas. This is best embodied in social media, where people opine freely and without inhibition on matters that they know little about and engage with counterarguments in a dismissive and uncurious manner. For the most part, the matters under discussion are things that never become “daily practical occupations” of those discussing. There is never any occasion where the social media user is compelled to delve into the details, and there is never any occasion for learning. Sensationalist media sources like Fox News and MSNBC exacerbate this tendency even more, as their viewers are more passive than social media users.

None of the above is to say that practical engagement is a reliable cure for human folly—nothing is. Our recent experience with COVID-19 has required people to make preventive and mitigating measures part of their “daily practical occupation.” Many have, of course, adjusted, but many others have learned remarkably little, despite visible, persistent, and extremely gruesome evidence of the cost of inaction. The social media style of dismissiveness has persisted even as the stakes have increased and come closer to home.

There are, however, some points to note about the case of COVID: first, most of the people resisting harm mitigation engage only as individuals, not as collectivities. In addition, they often start from an explicitly individualistic standpoint that treats public health matters like vaccines and masks as “personal choices.” It is true that they are nonconformists, but this does not mean they are engaged in collective action—any more than iPhone users are engaging in collective action by all purchasing and using the same product.

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74. Id. at Chpt. 3–4.
Second, the pandemic has isolated people, making offline interaction more rare and more difficult. As children learn better in person, so too do adults—and increased isolation has limited our capacity to learn from others. Third, the asymmetries of power that have created mass passivity have increased during the pandemic: a few corporations and billionaires have increased their economic power exorbitantly. Their enrichment is not directly responsible for the misinformation and irrationality—though some of these billionaires are owners of social media companies, and therefore have some share of responsibility. In any case, the context is one in which inequality is increasing, and democratic participation decreasing. The online experience is tailored not for user edification or even enjoyment, but for data collection and profit. COVID has been a trial run for Deweyian education from practical social necessity—our actions directly shape our health and that of our neighbors—but in an extremely un-Deweyian context of social isolation and extreme inequality.

An expanded role for democratic organizing would bring people into the fold of politics as process. In addition to its other virtues, this would be an educational process and an antidote to passive consumption of propagandistic media. However, in the Deweyian vision, association itself is insufficient for cultivating the virtue of civic engagement. To achieve the benefit of democratic education, associations must be participatory and membership-based, rather than creatures of elite guidance.

The current U.S. landscape is littered with organizations where people “engage” without any capacity to shape the organization’s agenda or purpose—as Theda Skocpol terms them, “associations without members.” The nonprofit sector is the easiest illustration. Human Rights Watch’s website contains a section to promote involvement in human rights advocacy, but this extends only to letter-writing and donating to the organization. The website presents friendly portraits of the organization’s leadership, but no indication of how, if at all, those “taking action” engage without any capacity to shape the organization’s agenda or purpose. As children learn better in person, so too do adults—and increased isolation has limited our capacity to learn from others. Theda Skocpol terms them, “associations without members.” The nonprofit sector is the easiest illustration. Human Rights Watch’s website contains a section to promote involvement in human rights advocacy, but this extends only to letter-writing and donating to the organization. The website presents friendly portraits of the organization’s leadership, but no indication of how, if at all, those “taking action” engage without any capacity to shape the organization’s agenda or purpose.


79. See supra Part I.B, C.

80. DEWEY, supra note 73, at 90 (“In order to have a large number of values in common, all the members of the group must have an equitable opportunity to receive and to take from others. There must be a large variety of shared undertakings and experiences. Otherwise, the influences which educate some into masters, educate others into slaves. And the experience of each party loses in meaning, when the free interchange of varying modes of life-experience is arrested. A separation into a privileged and a subject-class prevents social endosmosis.”)

81. See supra Part II.C; DEWEY, supra note 73, at Chpt. 7.


have any impact on their selection.\textsuperscript{84} Human Rights Watch’s “membership” may make condemning torture in Egyptian prisons part of their “daily practical occupation,” but the membership has little say in how to organize to oppose torture in Egyptian prisons. The members adopt the \textit{ends} as their own, but they relate passively to the \textit{means} chosen.

Labor writer Jane McAlevey describes three models of political engagement: advocacy, mobilizing, and organizing.\textsuperscript{85} The models are distinguished by, among other things, the relative passivity or activity of the affected population.\textsuperscript{86} In advocacy, a small engaged group of advocates seeks to champion the interests of a larger mass.\textsuperscript{87} The advocates speak on behalf of the population, which remains largely passive.\textsuperscript{88} In mobilizing, leadership reaches out to already sympathetic populations to take political actions, like letter-writing or calling representatives or attending a rally.\textsuperscript{89} However, the bulk of the population affected by the relevant policy does not meaningfully engage in the process.\textsuperscript{90} They may not even be on board with the cause, and they do not direct the mobilization.\textsuperscript{91} Finally, in organizing, the organizers recruit people and guide them to develop the capacity to lead themselves.\textsuperscript{92} The leaders respond to the demands of the affected population, rather than developing the agenda themselves.\textsuperscript{93} Organizing is the most democratic of the three, while advocacy is the most elitist.\textsuperscript{94} Only organizing forces people to make the issues at hand “part of their daily practical occupation,” and, therefore, it best cultivates the virtues of democratic citizenship.

The preference for advocacy over other forms of engagement is a structural feature, not a bug, in the world of nonprofit organizations. They are designed to have a strict barrier between benefactor and beneficiary, rather than a collection of participants to whom they are accountable. This ethos also infects both the Democratic Party and the Republican Party, discussed more below.

There is no cure for ignorance or apathy, but enhanced participation in political affairs can play an ameliorative role. The supposedly fearsome signs of mass ignorance that some people hold up as arguments against democratization are more accurately read as symptoms of democracy deficit.

The essence of civic engagement is activity; it is best achieved by forcing people to \textit{constitute} the organization rather than participate in some ancillary or

\textsuperscript{84} People, HUMAN RIGHTS WATCH, https://www.hrw.org/about/people [https://perma.cc/XJH2-WA5Y]. There is another helpful website noting that donors and fundraisers may join one of Human Rights Watch’s Councils, with added perks like meeting with senior staff and researchers. \textit{Council Membership Benefits}, HUMAN RIGHTS WATCH, https://www.hrw.org/legacy/community/council/benefits.htm [https://perma.cc/WN3F-XK82].

\textsuperscript{85} JANE F. MCALEVEY, NO SHORTCUTS: ORGANIZING FOR POWER IN THE NEW GILDED AGE 2–12 (2016).

\textsuperscript{86} Id., (describing the importance of the involvement of “ordinary people”).

\textsuperscript{87} Id. at 9–12.

\textsuperscript{88} Id.

\textsuperscript{89} Id.

\textsuperscript{90} Id.

\textsuperscript{91} Id.

\textsuperscript{92} Id.

\textsuperscript{93} Id.

\textsuperscript{94} Id.
supportive way. Some associations can help cultivate democratic citizenship; others hinder it, by keeping their “stakeholders” in positions of powerlessness. This, then, is another requirement for democratic association: freedom of association cannot deliver the benefit of civic education if the people involved associate passively.

D. Democratic Organizations and Radical Democracy

Enabling greater participation in collective organizations democratizes society, both in the sense of building countervailing power and in the sense of Deweyian democratic education. Associations need certain criteria to deliver these benefits: in particular, the capacity to exert real pressure to challenge concentrated power and oligarchy and a role for the associated individuals as the people who constitute the association, rather than passive observers. Without these elements the freedom to “associate” is hollow.

In addition to the above, the capacity to form democratic collectives also has serious implications for the third dimension of the democracy deficit, the domination of our social existence by unaccountable power structures, in particular property rights. This is a much different argument from the first two examples because it verges into conjecture about ideal possible worlds. Radical democracy in the sense discussed here is not something that has ever been realized anywhere. When we talk about oligarchic influence over public policy or citizen passivity, we can point to real-world examples of more democratic societies where the public has more influence over policy and more engagement. The history of social democracy in western Europe fits this description; arguably, the U.S. was closer to that ideal a generation ago. There is no shining city on a hill, but there are existing examples of how things could be better.

By contrast, the third dimension of democracy deficit is something more universal: in all liberal societies, private power dominates social life. For instance, Sweden may have a more associative democracy than the U.S., but its economy is still structured around private, hierarchically structured, profit-seeking entities. Membership-based organizations in the sense that I discuss here do not in themselves generate radical democracy; however, I believe that they open the possibility to move in that direction.

95. See supra notes 52–54 and accompanying text.

The paradox of utopian thinking is that we can find plenty of examples of things that occurred that seemed impossibly utopian before some countries made them reality, from socialized medicine to 100% national literacy.\(^97\) Just as collective participatory institutions played a crucial role in the generation of these radical demands in the past, they are essential for the possibility of future transformation of the existing system.

There are many arguments for deep transformation of our existing systems. The climate crisis is the clearest. Climate change has already become a major contemporary political subject as we see more frequent and severe crises, like California wildfires. However, the most credible approaches to the climate crisis are arguably at odds with foundational features of our existing system, which is rooted in growth for growth’s sake.\(^98\) The global system has actually emitted more carbon since the greenhouse effect was discovered than in the entirety of human history before then.\(^99\) And despite all this growth, we do not experience improvements in some of the basic joys of life. Increased productivity just delivers new types of work obligations, rather than more free time.\(^100\) It does not become easier for people to pay for basic necessities like shelter because the cost of housing grows faster than our capacity to pay\(^101\)—creating widespread precarity.

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98. JOHN BELLAMY FOSTER, *GLOBAL ECOLOGY AND THE COMMON GOOD 3* (Cultural Logic, 1999), https://ois.library.ubc.ca/index.php/clogic/article/download/192638/189192/222347 [https://perma.cc/VM83-95QN] (arguing that “[a] continuous 3 percent average annual rate of growth in industrial production, such as obtained from 1970 to 1990, would mean that world industry would double in size every twenty-five years, grow sixteenfold approximately every century, increase by 250 times every two centuries, 4,000 times every three centuries, etc. Further, the tendency of the present treadmill of production is to expand the throughput of raw materials and energy because the greater this flow, from extraction through the delivery of final products to consumers, the more opportunity there is to realize profits”); see also Oxford Smith School, *How to Save the Planet: Degrowth vs. Green Growth?*, YOUTUBE (Sept. 2, 2022), https://www.youtube.com/watch?v=YxJrBR0g6gs (debate between Professor Jason Hickel and Professor Samuel Fankhauser).


It is increasingly difficult to imagine a pleasant—or even livable—future without some serious alteration of our current trajectory. We need to meet human needs more effectively while consuming fewer resources. There are many people who agree, but the path forward is unclear. Voting cannot create change in a system where all dominant parties support expanding fossil fuel-based growth and more work for work’s sake.

The presence of democratic collectivities is one first step toward achieving this sort of change. Allowing people to band together enables people to make small challenges to existing practices that can pave the way for deeper objections. When powerless people join forces to make demands on the powerful, there is no a priori reason that their demands will remain confined to those that are deemed legitimate by existing conventions or laws—in fact, there is ample reason to suspect the contrary. This is true historically with regard to the franchise, from the Boston Tea Party to the Montgomery Bus Boycott. It is also true in relation to labor unions, which were once deemed “illegal combinations.”

Above all, an expansion of democratic collectivity presents an inherent challenge to the rule of property. Control is one of the defining aspects of property rights: people acquire factories and stores and buildings not only to reap profit but also to mold them and express their will through them. However, property in factories, stores, and buildings is necessarily part of a social project, and wholly worthless without factory workers, salesclerks, customers, tenants, and many others. If the workers, customers, and tenants have the capacity to make collective demands, they will be challenging the control of the proprietor. In one sense, these demands may not be radical at all—a modest pay increase or a temporary freeze in rent—but the act of making such demands is itself potentially transformative. It initiates a process of challenge to existing power structures that has no inherent limit.

The capacity to form democratic collectivities is a first step towards abandoning the quarantined concept of “politics” as what official politicians do and seeing the potential challenges to power present in everyday life. However, as above, collective organizations can only achieve this end if they are allowed to have certain features. They need to be constituted by their membership, rather than by some external force that serves the members. The collective has to be defined in terms that


do not obfuscate differences in power: the landlord has an objective interest in an undemocratic status quo, while the tenants have a shared interest in challenging it, so joining tenants and landlords together in one entity does not further democratization. ¹⁰⁴

Finally, to have radical potential, the collective has to have the ability to negotiate in terms of values and not merely interests. While the most immediate demands of workers, tenants, debtors, and the like may involve bread-and-butter demands relating to money, the capacity to transform the existing system depends on being able to use collective power for ends that do not fit neatly into our current concepts of well-being.

Some recent worker actions highlight the path by making demands regarding ethics. In 2019, a group of Wayfair employees walked out of the company’s headquarters to protest against their company’s supplying of beds to immigrant detention centers. ¹⁰⁵ In 2021, a large group of Google and Amazon employees publicly objected to their companies’ supply of surveillance-facilitating technology to the Israeli government. ¹⁰⁶ Labor unions played a crucial role in boycotting and isolating South African Apartheid. ¹⁰⁷ Such demands could continue even into domains that go far beyond the narrow confines of self-interest. Workers fighting for increased pay or decreased hours chip into the profitability of a firm; there is potential here to do so, even to the point of endorsing alternatives to growth itself.

There is something of a paradox here because the vision of radical democracy is a struggle against the existing system, but the call for the legalized expansion of free association seeks to establish these potential agents of change within the same system. Some have seen this paradox and argued that legal normalization inherently leads to the defanging and deradicalization of a democratic organization. ¹⁰⁸

¹⁰⁴ Of course, it is possible that this separate representation might be complemented by shared representation, like Works Councils in the European Union, or by German-style codetermination, in which workers participate in corporate governance alongside non-worker directors. See Blanpain et al., supra note 48, at 301–03, 396–97. However, my argument here stands: this cooperation across the divide only works if the parties on either side also have separate representation. Only having a union that includes management is not having a union at all.


¹⁰⁸ See generally FRANCES PIVEN & RICHARD CLOWARD, POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL (New York, 1978). Piven and Cloward argue that the “model” of “developing formally structured organizations with a mass membership drawn from the lower classes” has the “grave flaw” that “it is not possible to compel concessions from elites that can be used as resources
I cannot refute the deradicalization argument, but I will say that I do not see an alternative. It is theoretically possible that some underground illegal organization could launch a coup—this seems unlikely in the U.S.—but the result seems likely to be undemocratic, considering how such a plan would require concentration of power in a small number of people. Spontaneous popular upheaval can wrest concessions from the powerful, but it has a limited capacity to effect sustained change.109

History supports this skepticism about the range of spontaneous and illegal collectivity. There are incredible examples of populations engaging in spontaneous action and mutual support through prohibited organizations, like Catalonia in the 1930s or Palestine in the First Intifada.110 However, these are exceptions and only occur for short periods of time and among populations forced to work together by an acute hostile external threat. In both of these cases, the external threat crushed the popular movement after its initially successful mobilization.

Greater promise lies in legal stability. If the powerful can preserve their interests through legally enduring entities like corporations and trusts, associations of people engaged in sustained struggle against oligarchy need a similar institutional persistence—in fact, more so, because money can move through entities and reassemble much more easily than people can. Organizations must be somewhat established to challenge the establishment. The best way to achieve this is some form of legal personhood: registering as a formal entity to manage finances, receive donations, hire and pay capable managers, and formalize bylaws that ensure popular participation.

If we are to envision a much different future than the one that the current path offers, one of the most obvious questions is where the process should begin. We cannot build a house starting with the roof.111 Expanding the scope of participatory collective organizations is one step in the right direction. Collective associations are schools of democracy that highlight the spaces where the status quo shuts down democracy in favor of the prerogatives of property. They do not guarantee radical democratization, but they open the possibility. Democratization of existing laws is the first step towards a new social totality.

E. Conclusion

Our society suffers from a democracy deficit in multiple dimensions. Enabling people to band together for mutual gain is the first step towards a solution.

to sustain oppositional organizations over time,” and that therefore genuine oppositional politics only functions in spontaneous insurgent waves in “extraordinary times.” See id. at x–xii. But see Andrias & Sachs, supra note 5, at 558–59 n. 48 (rejecting Piven and Cloward’s argument that organization is often antithetical to movement success among poor people).


111. This is a paraphrase of a Spanish proverb, It is not necessary to start the house with the roof (‘No hay que empezar la casa por el techo’).
However, to achieve the above purposes, collective organizations must have certain features. First, they must be constituted by their members and not merely a creature of leaders acting on behalf of the public. Second, they need to have the tools at their command to challenge power in material and effective ways, not merely through speech. Finally, their objectives cannot be artificially confined to some concept of collective self-interest; they must be able to act on behalf of their members’ values too. In other words, they must represent their members as whole people, not merely *hominis oeconomici*.\(^{112}\)

Democratic organizations do not in themselves build beloved community, but they are essential for democracy and democratization. While some commenters are wary of “partisanship” and of the spread of factions in society, the evidence indicates that keeping people atomized and impotent is at least as likely to lead to acrimony. Ironically, Federalist #10, one of the most often-quoted arguments against the supposed scourge of factions, states plainly that the only modes of eliminating them are to eliminate liberty or impose uniformity of opinion, both of which it deems worse than the problem itself.\(^{113}\) Our existing laws do not wipe out freedom, but they do suppress it in myriad ways.

When people in this country wish to band together to exert power and realize their values in a membership-based organization, they face legal obstacles that strip them of their power, their values, or their capacity for democratic participation. Laws governing political parties are among the worst offenders.

### III. POLITICAL PARTIES WITHOUT MEMBERS

#### A. Introduction

Functioning democracies allow competition and contestation among a range of political parties that vie for popular support and power. These parties aim to represent the range of views found among the public, left to right and in between. Political parties are among the principal collective organizations that enable citizen participation in government.\(^{114}\)

Whatever the merits of this theory, this is not the system that we have in the United States. This is for two principal reasons. First, neither of our dominant political “parties” actually functions as a membership-based political party with a mandate to fulfill a popular agenda. Second, there are formidable obstacles to forming new parties.

These obstacles undermine much of the promise of political parties as democracy brokers. Freedom of association is the right of the people to band together to *constitute* collective organizations, not merely to indirectly influence its leadership or decision-making. A “party” that has no members is, by definition, not representative. It cannot deliver the benefits of democracy discussed above:

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113. See THE FEDERALIST NO. 10 (Alexander Hamilton).

empowering people to decide their own affairs and cultivating civic consciousness and capacity. By blocking people from joining “major parties,” and blocking non-major parties from an equal shot, the law in effect blocks the best of what democracy has to offer.

B. You are Neither Democrat nor Republican

It is fashionable in casual political conversation to refer to people, whether politician or civilian, as though they were members of the Republican or Democratic Party—as in, “he is a lifelong Republican” or “she has become a diehard Democrat.” This is misleading. Neither the Republican Party nor the Democratic Party has any members. People who refer to themselves as “Democrats” or “Republicans” would more accurately be described as “supporters of the Democratic Party” and “supporters of the Republican Party.”

The absence of party membership became starkly visible in 2016 when a group of Bernie Sanders supporters sued the Democratic National Committee (“DNC”), alleging unfair practices in the Democratic Primary Election. The DNC is the entity entrusted to the highest level of party management outside of conventions. Tellingly, these aggrieved Democratic voters could not appeal to internal party procedures to assert their grievances, which is why they took to the courts. They sought standing to sue by alleging a number of innovative theories, including the idea that the DNC had a fiduciary duty to registered Democratic voters—an argument that the court rejected. Most tellingly, the plaintiffs also asserted that the DNC had committed “consumer fraud” against its donors by not delivering the appropriate “product” in the form of impartial treatment of all candidates. The legal analysis the plaintiffs used to seek standing describe a relationship closer to shareholder and corporation than member and party.

In response to the lawsuit, the DNC’s lawyer stated unequivocally in court that the “party” has no obligation to be democratic:

115. See Seth Ackerman, A Blueprint for a New Party, JACOBIN (Nov. 8, 2016), https://www.jacobinmag.com/2016/11/bernie-sanders-democratic-labor-party-ackerman [https://perma.cc/3GSQ-GCL4] (describing the fact that the political parties have no members “the most fundamental fact about the Democratic Party: it has no members”).


118. See Wilding, 2017 U.S. Dist. LEXIS 137911.

119. Id. Of note, there is case law indicating that plaintiffs alleging undemocratic unfairness lack standing absent a clear showing of "injury in fact," a concept that erodes even the premise of social harm needed to address democracy-related complaints. See, e.g., Jacobson v. Fla. Sec’y of State, 974 F.3d 1236, 1245–48 (11th Cir. 2020). Both Wilding and Jacobson fit into a pattern of neoliberal jurisprudence in which courts reframe issues of social value in terms of individualized material gains or losses, or impact on human capital. See generally Benjamin Douglas, Antisocial Justice: Pathologies of the Standing Doctrine, 15 CHARLESTON L. REV. 37 (2020); E. Corinne Blalock, The Privatization of Protection: The Neoliberal Fourteenth Amendment 10 (2019) (Ph.D. dissertation, Duke University) (on file with author).
[W]e could have voluntarily decided that, Look, we’re gonna go into back rooms like they used to and smoke cigars and pick the candidate that way. That’s not the way it was done. But they could have. And that would have also been their right, and it would drag the Court well into party politics, internal party politics to answer those questions.\textsuperscript{120}

That is, in the Party’s own words, the word “Democratic” in the entity’s name does \textit{not} signify any commitment to internal democracy. Insofar as there is any democracy in the governance of the DNC or any of the State or County Party entities—that is, as discussed below, not much—that is at the sufferance of the institution’s controlling elites, by the organization’s own admission. The existence of primaries is, by their own theory, a concession to the voters that can be retracted at will.

The Democratic National Committee’s legal defense included an argument that it is not a membership-based organization, and therefore is not accountable to any constituency. To quote to the DNC’s attorney again:

You know, it’s kind of a misnomer even to speak in terms of members of the DNC. There is no national registration. Some states don’t even have party registration. Many states, in fact. I mean Virginia, when you register to vote, you don’t register as a [D]emocrat or a [R]epublican or whatever. So, as far as the party’s concerned, they are trying to encourage people to vote for [D]emocratic candidates and to support [D]emocratic policies and values.\textsuperscript{121} But that’s not a class of people that can be defined by the Court. And that changes with every election and possibly, and probably, more frequently than that.\textsuperscript{122}

The Federal District Court granted defendants’ motion to dismiss, even while it rejected the DNC’s own claim that it had no obligation to be fair.\textsuperscript{123} The court concluded that donors to the DNC are not “consumers” and “the DNC, through its charter, has committed itself to a higher principle” of fairness in nominee selection.\textsuperscript{124} Nevertheless, the court stated that the plaintiffs’ “redress is through the ballot box, the DNC’s internal workings, or their right of free speech”—with no serious exploration of those “internal workings” or whether they offered any suitable

\textsuperscript{120}. Transcript of Motion Hearing, Wilding v. DNC Servs. Corp., No. 16-61511-CIV-ZLOCH, 2017 U.S. Dist. LEXIS 137911, at 36–37 (S.D. Fla., Aug. 25, 2017) [hereinafter Transcript of Motion Hearing] (thank you to Jared H. Beck, Esq., for providing this transcript); see also Strether, \textit{What is the Democratic Party?}, supra note 5 (discussing the above cited passage).

\textsuperscript{121}. As Lambert Strether notes, the court reporter wrote “democratic” with a lower case “d,” but to all appearances, the attorney meant “Democratic,” relating these candidates and policies to the entity or entities called “the Democratic Party,” not to any concept of democracy. Strether, \textit{If You Want to Know What the Democratic Party Is}, \textit{supra} note 5. In fact, the words “Democratic” and “democratic” have nearly opposite meanings in this context.

\textsuperscript{122}. Transcript of Motion Hearing, \textit{supra} note 120, at 71.

\textsuperscript{123}. Wilding, 2017 U.S. Dist. LEXIS 137911, at 34. The Court did not say that the Party could ignore its own commitment to equal participation, but it did nevertheless dismiss the case due to lack of standing. \textit{Id.} at 19.

\textsuperscript{124}. \textit{Id.} at 19.
remedy.125 The 11th Circuit affirmed the dismissal, while also sidestepping the question of whether internal procedures were adequate.126

The three options for redress outlined by the District Court expose the absurdity of the Court’s position. The reason for the lawsuit was precisely that these other avenues do not work. There is no “ballot box” where everyday people can elect the leadership of the DNC. The DNC’s “inner workings” could certainly change the DNC’s practices, but that does plaintiffs no good since the DNC is not accountable to them.127 Finally, the “right of free speech” is not really a remedy: these plaintiffs, like most, were free to denounce the defendants, but that, in itself, would not change the defendants’ conduct. The lawsuit was a challenge to undemocratic inner workings, and the court nonsensically mandated the democratic process as a solution.

If the Democratic Party is neither substantively nor formally democratic, the point applies with greater force to the Republican Party. Like the Democratic Party, the Republican Party also does not have a membership structure.128 Its internal processes do not allow for popular participation in leadership selection or policy selection.129 Some leading Republican politicians publicly proclaim that the United States is “a republic, not a democracy.”130 In fact, the backroom candidate selection process is not a mere matter of rhetoric for the G.O.P.: in 2020, several state Republican Parties simply forwent Presidential primaries altogether, abandoning all pretense of fair participation, bequeathing the nomination to Donald Trump.131

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125. Id.

126. See Wilding v. DNC Servs. Corp., 941 F.3d 1116, 1133 (11th Cir. 2019). The appellate court quoted Tocqueville’s statement “[t]here is almost no political question in the United States that is not resolved sooner or later into a judicial question,” but without considering why the parties might have chosen this peculiar channel for resolution in this case. Wilding, 941 F.3d. at 1121. If there were internal party mechanisms to at least try to challenge these practices, the matter would not have resolved into a judicial question.

127. See D.N.C. Charter & Bylaws, supra note 117, at 3–5. The leadership of the DNC is a hodgepodge of elected officials, state party leaders, internal appointees, and leaders of various coordinating committees and coordinating councils (for seniors, Young Democrats, etc.). D.N.C. Charter & Bylaws, supra note 117, at art. 3, § 2. Many are indirectly elected, but even here they are elected to serve in government, not elected by party members in their function qua DNC leader.


129. See id. at 1–3, 8 (Rules 1, 2, 4, 5, 9).

130. See, e.g., Mike Lee, Of Course We’re Not a Democracy, MIKE LEE: US SENATOR FOR UTAH (Oct. 20, 2020), https://www.lee.senate.gov/2020/10/of-course-we-re-not-a-democracy [https://perma.cc/AV34-7FDE] (approving of the concentration of power in non-representative institutions such as the Senate, the Electoral College, and the Supreme Court as checks to democratic excess in a “constitutional republic”); Philip Bump, Rand Paul Offers an Accidentally Useful Jim Crow Analogy in Rationalizing His Party’s Illiberal Shift, WASH. POST (June 14, 2021, 10:12 AM), https://www.washingtonpost.com/politics/2021/06/14/rand-paul-offers-an-accidentally-useful-jim-crow-analysis-rationalizing-his-partys-illiberal-shift/ [https://perma.cc/N4ZJ-F93N] (quoting Senator Rand Paul as saying “[t]he idea of democracy and majority rule really is what goes against our history and what the country stands for . . . “ and then (bizarrely) attributing Jim Crow to democratic majoritarianism).

When we call someone a “lifelong Democrat” or “ardent Republican,” that does not refer to any formal membership in any national entity called “the Democratic Party” or “the Republican Party”; it may refer to a state party or to a voter registration status, but not to more than that—and often not even that. This distinguishes our two dominant “political parties” from the conventional concept of a political party as an entity that a person can join and which grants these members various opportunities to participate.

The contrast is made clearer by examining Canada, the country that in many regards most resembles the United States. Five parties are represented in Canada’s House of Commons: Liberals, Conservatives, New Democrats, Greens, and Bloc Québécois. All of these parties have rules for membership clearly laid out in their Constitutions or Bylaws.

For example, Canada’s New Democratic Party leaves membership questions to its provincial parties, which each have terms and conditions of membership. The British Columbia New Democrats, for instance, have a membership application available on their website, requesting a minimum donation


133. The Conservative Party has national membership, as laid out in Section IV.2 of its constitution: three weeks after paying dues, a member can participate fully in the direction of the party, including participating in electoral district associations and, upon payment of a fee, attending the convention. See CONSERVATIVE PARTY OF CAN., CONSTITUTION, §§ 4.1–4.2 (Mar. 18, 2021), https://cpcassets.conservative.ca/wp-content/uploads/2023/01/03165608/7829bf6eb9941f5.pdf [https://perma.cc/TY5V3EQ5]. The Liberal Party does not require dues to allow a Canadian to become a “registered Liberal,” but does specify a collection of attendant rights, including voting in a Leadership Vote, running as a candidate, and attending and voting at general meetings of the member’s Home District Association. See LIBERAL PARTY OF CAN., CONSTITUTION, § B (Apr. 11, 2021), https://liberal.ca/wp-content/uploads/sites/292/2021/04/The-Constitution-of-the-Liberal-Party-of-Canada.pdf [https://perma.cc/4Q94-W9BX]. Bloc Québécois invites visitors to their website to become members, with dues starting at $5 per year, and advises about paths to greater member involvement in shaping the party. Le Bloc Québécois, COMMISSION DES CIRconscriptionS ELOignees du Bloc Québécois, BLOC QUEBECOIS, https://www.blocquebecois.org/le parti/commission-des-circonscriptions-eloignees/ [https://perma.cc/49FD-QE35]; Le Bloc Québécois, DONNER, c’est VOTER, BLOC QUEBECOIS, https://contribution.bloc.org/informations.php [https://perma.cc/C5TQ-UH37]. Canada’s Green Party prescribes how members become eligible to vote for the Party’s Leader and Federal Council (30 days of membership with some caveats, payment of dues), and the appropriate procedures for these internal elections. See GREEN PARTY OF CAN., CONSTITUTION OF THE GREEN PARTY OF CANADA, Bylaws 1, 2 (July 2022), https://www.greenparty.ca/en/party/documents/constitution [https://perma.cc/6YL6-FCG7].

The New Democratic Party starts its Constitution with two rules:

(1) Individual membership shall be open to every resident of Canada, regardless of race, colour, religion, sex, gender identity or expression, sexual orientation, or national origin who undertakes to accept and abide by the constitution and principles of the Party and who is not a member or supporter of any other political party.

(2) Applications for individual membership shall be dealt with in accordance with the constitution of the appropriate provincial Party and shall be subject to the approval of that provincial Party.

134. See CONSTITUTION OF THE NEW DEMOCRATIC PARTY OF CANADA, supra note 133, at Art. III § 1, Art. IV § 2.
of $10, with hardship waivers, and a written signed commitment that the member
does not belong to another party and meets certain requirements. The application
notes member privileges, including voting at candidate nomination meetings. The
members can select or become delegates to the Party’s national convention, or
participate through their Electoral District Association in introducing resolutions at
the National Convention.

There is considerable diversity in Canadian party structure and certainly in
party aims—but two points stand out. First, all five of these Canadian parties are
premised on certain common assumptions about the party’s role and its relation to
its membership. Second, none of these shared Canadian assumptions applies to the
Democrats or Republicans. The Canadian parties are all voluntary organizations that
seek to recruit members to achieve a particular agenda. The word “member” in the
organizational documents of the DNC and RNC refers to committee members and
not to party members. The DNC Charter uses the word “member” repeatedly but
only once, at the onset, does it refer to “members of the Democratic Party”—a term
that the Charter does not attempt to define. The DNC bylaws similarly make only
passing reference to party membership as a passive body to whom the leadership
must appeal.

We may certainly debate to what extent parties in liberal countries like
Canada live up to their professed ideal of serving their membership’s goals. Nevertheless, the two “parties” we have in the U.S. are not only functioning
differently, they are playing a completely different game. The Canadian parties have
members and rules governing membership participation, which may or may not
translate into substantive democracy; the Republicans and Democrats do not have
members or internal democracy even at a formal level.

To return to the Democrats, the Democratic National Committee’s
membership comes from a variety of places, including federal elected officials and
state party leadership, but it is not selected by any body of people who can be
characterized as “Democrats.” The state Democratic Parties, in turn, have separate
sets of rules for selecting their own leaders, many of which are extremely
undemocratic. For instance, the Democratic Party of Florida, the third most populous

135. Membership Application, B.C. NEW DEMOCRATIC PARTY (July 2022),
https://secure.bcndp.org/sites/default/files/civicrm/persist/contribute/files/BC-NDP-Membership-
Form.pdf [https://perma.cc/JZC2-FYHF].

136. Id.

137. See CONSTITUTION OF THE NEW DEMOCRATIC PARTY OF CANADA, supra note 133, at Art. V §
6(a) (eligibility of delegates), Art. V § 6(b) (connecting delegates to members, suggesting that members
have a voice in resolutions introduced), Art. V § 7(b) (Electoral District Associations can introduce
resolutions at the National Convention).

138. See generally RULES OF THE REPUBLICAN PARTY, supra note 128. The Rules start referring to
“members” in Rule 1(a), but later refers to “[t]he members of the Republican National Committee.” There
are subsequent references to “members of the Executive Committee” (Rule 6(c)) and “incumbent
Republican members of the United States House of Representatives” (Rule 28(a)), but no indication of
any membership apart from leaders. See also D.N.C. Charter & Bylaws, supra note 115, at Art. I § 4.


140. See id. at Bylaws Art II. § 1(h)(iv).

141. See id. at Charter Art. 3 § 2.
state, is run by a State Executive Committee, whose leadership is a hodgepodge of appointments and selections from various directions:

Membership: The State Executive Committee shall be composed of the state committeeman and state committeewoman from each county, Democratic National Committee members from Florida, and automatic and appointed members of the Central Committee, including those automatic members as may be provided by Florida Statutes and which may be changed from time to time. The state committeemen and state committeewomen shall be elected at County Democratic Executive Committee organizational meetings from among those members who are elected from the precinct level. The term of office shall be four (4) years. The respective County Executive Committee shall fill any vacancy occurring in the position of county executive committee chair, state committeeman or state committeewoman.142

The State Party leadership thus depends on County-level party organizations. Turning to the County-level structure, one finds some measure of democratic participation but through the medium of state-run primary elections, not through anything internal to the organization.143 And even this is regularly truncated—for instance, the Miami-Dade County Democratic Executive Committee includes a mix of appointed, elected, and “automatic” members.144 The Broward County Democratic Party’s website includes bylaws, but the bylaws “of the Party” are the bylaws of the County Executive Committee—there is no differentiation.145 The bylaws include a loyalty oath for “Members of the Broward County Democratic Party, including Party officers, Party candidates, including candidates of all non-partisan races with the exception of judicial elections, elected Democratic officials, members of Party committees and commissions, officers and directors of clubs. . . .


144. See The Bylaws of the Miami-Dade Democratic Party, supra note 143, at Art II. § 1.

145. See generally By-Laws of the Broward County Democratic Executive Committee, supra note 143.
“Members” here refers to members of the Executive Committee; the vast majority of the people in Broward County who identify as “Democrats” do not figure into these bylaws at all.

This pattern is found in a number of states. The primary voters choose local leaders, who in turn choose a portion of the state leaders, who in turn cooperate with elected officials and the DNC to make decisions in relation to the Democratic Party’s national leadership. The state party leaders, however, are only one sector of DNC members; the Committee also includes a slew of elected officials and leaders of groups like the National Association of Democratic State Treasurers and the Young Democrats. This means that the closest the general public gets to selecting leadership is through (government-run) primaries, which themselves often involve selection, not of state leaders but of the county leaders who will choose the state leaders who will contribute to the decision of the national leadership. This indirectly elected leadership then chooses the party’s platform. The Democrats’ platform is thus chosen by these leaders who are selected at least three steps removed from most everyday people who identify as “Democrats.” This is in stark contrast to parties like Canada’s NDP, where individual party members elect delegates to a convention to decide questions of the party’s constitution and policies. Various Democratic state entities include more participatory subgroups, like College Democrat organizations or the California Democratic Council, but without decreasing the distance between Democratic Party registration and governance. This system evolved from something much more brazenly anti-democratic, in which, as the DNC’s lawyer stated, party leaders would “go into back rooms like they used to and smoke cigars and pick the candidate that way.”

The point is not only that elites control the agenda—that is arguably the case with many mass parties across the world. In the case of the parties in the U.S., the disconnect goes much further: everyday “Democrats” are not party participants whose will is disrespected by party elites. They are more accurately described as spectators to the Democratic Party’s operation. That is, the identification that many non-elites have with this organization, the Democratic Party, is not one of party and member, but more like corporation and loyal customer. “Being a Democrat” in the

146. Id. at Art. XVI, § 16.01.
148. See D.N.C. Charter & Bylaws, supra note 117, at Charter Art. III § 2(c), (b), and (n).
149. See CONSTITUTION OF THE NEW DEMOCRATIC PARTY OF CANADA, supra note 133, at Art. III § 1, Art. V §§ 5, 6.
150. See BY-LAWS & RULES OF THE CALIFORNIA DEMOCRATIC PARTY, supra note 147, Art. VII, § 2(f).
U.S. is not like “being a New Democrat” in Canada or “being a Labour Party member” in the U.K.; it is more akin to “being a Toys-“Я”-Us kid”\textsuperscript{152} or “being a member of the Pepsi generation.” It signifies a feeling of personal identification more than participation in any organization or process. The “party” leaders rule; they certainly want to placate their many consumers but without relinquishing control.

As stated above, the Republican Party is a still more egregious case. This is unsurprising, given the GOP’s public opposition to basic elements of democracy, like legislative representation for the District of Columbia and easier voter registration laws.\textsuperscript{153} With that caveat, the structure of the RNC is not too dissimilar from that of the DNC: leaving National Convention delegates to the state parties, which are themselves at best semi-democratic.\textsuperscript{154}

C. Outsider Challenges and Internal Party Politics

To illustrate the practical significance of the non-participatory structure, consider two outsider conquests of established political entities: the 2018 rise of Jeremy Corbyn in the U.K. Labour Party and the 2021 rise of a Democratic Socialist-aligned ticket in the Nevada Democratic Party. Of note, there cannot be a national popular challenge to the Democrats akin to Corbyn’s rise in the United Kingdom, because there is no national structure of the Democratic Party akin to that of Labour. The most visible political issues in the United States are national rather than local or state based. Voter turnout in local elections is much lower than in national elections and skews disproportionately affluent and white.\textsuperscript{155} Despite the fact that the most galvanizing and recognizable issues are national, activists who would want to change a party “from within” would have to focus on the state level. Even if Bernie Sanders had won the presidential nomination, that would not place him or his supporters with real control over the sprawling panoply of entities that constitute “the Democratic Party.”

\textsuperscript{152} I thank Kiren Gopal for this example.


\textsuperscript{154} The RULES OF THE REPUBLICAN PARTY, supra note 128, at r. 1, r. 2. There is some peculiar language with regard to basic minimum rules of democracy: Rule 15(c) notes that the Party favors open meetings in selecting delegates—“and all citizens who are qualified shall be urged to participate”—but also notes that there can be exceptions where law allows. Id. at r. 15(c). For state laws, California determines leadership through counties, see CAL. ELEC. CODE §§ 7400–7403 (West 2022), which often involve some participatory element. See, e.g., LAGOP, BYLAWS OF THE REPUBLICAN PARTY OF LOS ANGELES COUNTY, art. IV, § 3(A) (2021), https://www.lagop.org/lagop-bylaws [https://perma.cc/TND8-DACW]. Some state Republican Parties, like Texas’s, allow more room for participation. See REPUBLICAN PARTY OF TEXAS, STATE REPUBLICAN EXECUTIVE COMMITTEE 2022–2024 SREC BYLAWS, art. III, § 1 (2022), https://texasgop.org/srec-bylaws/ [https://perma.cc/PYS8-3QTZ] (noting that all members of State Republican Executive committee are to be elected at state convention).

With that caveat, Labour’s left flank and progressives in the Democratic Party share many similarities: both movements invoke similar disillusionment with the rightward drift of liberal politics starting in the 1980s, embodied in similarly named establishment movements, New Labour and the New Democrats. The rightward drift itself reflected a reshuffling of politics inaugurated in the 1980s, led by Thatcher and Reagan, respectively. Additionally, both Sanders’ presidential campaigns and the Corbyn leadership faced opposition from within the party bureaucracy and establishment.156

These outward similarities mask the internal differences, however. The path to change in Nevada looks nothing like the path to change in the United Kingdom. Corbyn was elected leader of the Labour Party in a Party Conference in September 2015, receiving 251,417 votes out of a total of 422,871 votes cast by Party members and supporters.157 The party held the election at its party conference, in contrast to the state-sponsored primary elections held in the United States for such positions.158 By contrast, the Nevada leadership selection was a process decided entirely by the state party’s Central Committee: the social democratic insurgent Judith Whitmer won by gaining only 248 votes, beating the runner-up Tick Segerblom’s 216.159 While Nevada’s progressives had to build support from the bottom up, like Labour, their attaining a position to seize leadership was not based on public outreach but rather securing support within the State Party’s leadership from among the leaders.


158. Id.; George Eaton, How Labour’s Proposed New Leadership Election System Would Work, THE NEW STATESMAN (Jan. 16, 2014), https://www.newstatesman.com/politics/2014/01/how-labours-proposed-new-leadership-election-system-would-work [https://perma.cc/UHY9-ESZW]. Although the Party had only recently adopted the one-person, one-vote system, see Labor Leadership Results in Full, supra note 155, the principle of leadership selection by membership was not new: the previous system worked partly through direct election and partly through trade unions and Members of Parliament. See Eaton, supra; see also Meg Russell, Corbyn’s Election Was an Organisational Phenomenon That Raises Profound Questions about Political Party Ownership, DEMOCRATIC AUDIT (Jan. 2, 2016), https://www.democraticaudit.com/2016/02/01/corbyns-election-was-an-organisational-phenomenon-that-raises-profound-questions-about-political-party-ownership [https://perma.cc/Q7KZ-FK2Z].

These elected and appointed officials vote for party leadership, not the party’s broader level of supporters.

On top of everything, it is unclear how much impact this leadership change will have, given the distribution of power across the many different entities that constitute “the Democratic Party.” The practical upshot is clear: while outsider factions in liberal and social democratic parties in other countries face immense obstacles, the prospect for “changing the Democratic Party from within” is incomparably greater. A Corbyn-style party takeover would have no popular convention at which their supporters could agitate or vote for a new path. The process would have to work through all the state and territory parties, overcoming antidemocratic local rules, organizing people who can never be members of the “party.”

D. Expelling Party Members

The distinction between party membership and “party” affiliation does not only apply to everyday citizens but also to elites and public officials. Parties around the world have mechanisms for expelling members when they are perceived to violate party values or norms. While these decisions are by nature contentious, and are certainly capable of abuse, they define the parties’ values by excluding certain positions.

By contrast, neither of the United States’ two national political entities has any measure for expulsion. The Republican National Committee (“RNC”) has no mechanism for terminating the membership of anyone. When Mitt Romney voted to convict President Trump in the 2020 impeachment, Trump’s followers rallied around calls to “expel” Romney from the party. But there is no such option under the RNC’s bylaws. The Democrats have procedures to remove individuals from the DNC, but not from the party itself—again, whatever that would mean in any entity with no defined membership.

At the state level, the picture is more convoluted but ultimately also lacking in accountability. Media widely reported in 2021 that the Wyoming Republican Party

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160. Paul Heideman, Behind the Republican Party Crack-up, 5 CATALYST: J. THEORY & STRATEGY, No. 2, Sept. 2021, at 45, 62–63, 68. From the perspective of many other capitalist democracies, American political parties don’t really exist. They have no membership lists, their platforms are largely built after their candidates are nominated, and, perhaps most important, the parties themselves have very little control over the nomination process. Thus, it is not unheard-of for a Holocaust denier, for example, to win a Republican primary in a deep-blue district in which the party invests no resources, or for a member of the LaRouche cult to win a Democratic nomination in a deep-red district. Though in such cases the party will often denounce the candidate, it has no power to prevent them from running on its ballot line.


162. THE RULES OF THE REPUBLICAN PARTY, supra note 128, passim.


164. See id.; see generally THE RULES OF THE REPUBLICAN PARTY, supra note 128.

had “expelled” or “ousted” Liz Cheney\textsuperscript{166}—the truth is that the state party’s State Central Committee voted not to recognize her as a Republican, a symbolic gesture.\textsuperscript{167} The Wyoming GOP Bylaws do refer to “membership” in the party, but that is a matter of how an individual voter chooses to affiliate when registering to vote.\textsuperscript{168} That membership is an individual right that no party organization can take away from anybody, whatever their views.\textsuperscript{169} On some occasions, parties have received legal blessing to deny primary ballot access to certain candidates, but these are rare, arguably ad hoc exceptions; in the main, the state-run primary system prevents parties from limiting which individuals choose to run for office under its banner.\textsuperscript{170}

The absence of such accountability mechanisms prevents a political organization from representing anything or anyone. To illustrate, Democratic candidates and leaders rallied voters for decades around the supposedly urgent need to secure liberal justices on an increasingly partisan Supreme Court to prevent the Court from overturning liberal decisions like \textit{Roe v. Wade}. However, the “party” did nothing when one of its own “leaders,” Senator Joe Manchin, effectively sabotaged this supposed point of consensus by voting to confirm Justice Kavanaugh.\textsuperscript{171}

By contrast, in a membership-based party, the members can agitate for new rules regarding discipline if they feel a party member or leader has violated party values without accountability. If they fail, they have the background option of


\textsuperscript{167} See Wyoming Republican Party, Rescinding Recognition of U.S. Representative Liz Cheney as “Republican” Representative, (State Central Committee Resolution 5, Nov. 13, 2021), https://www.wyoming.gop/_files/ugd/d885a1_3dcd7676e2440eb5ec82ec8f175fb6.pdf [https://perma.cc/8BZR-E7GK]. The resolution in fact recognizes that the Wyoming Election Statute lets an individual choose their party (through the primary registration system) as that individual wishes, with no one else having the prerogative to interfere.


\textsuperscript{170} For some great insight into this fascinating and complicating collection of ideas, see Black, supra note 169. Black notes that several cases involve GOP state party attempts to keep neo-Nazi David Duke off the ballot—and do not mesh well with dominant principles found elsewhere in the case law. \textit{Id.} at 129–35. Judge Kravitch, dissenting in the 11th Circuit, summed up one estimated reason for this exceptional conclusion as, “[t]he Republican Party of Georgia and the state seek to exclude Duke from the primary ballot because they believe that the party will suffer embarrassment and adverse publicity by virtue of his candidacy for the Republican nomination. No political body, however, has a constitutional right to freedom from embarrassment.” \textit{Id.} at 132, n.170 (quoting Duke v. Cleland, 954 F.2d 1526, 1539 (11th Cir. 1992) (J. Kravitch, dissenting)).

\textsuperscript{171} See CBS/AP, Joe Manchin Blasted by both Dems and GOP after Kavanaugh Vote, CBS NEWS (Oct. 8, 2018, 7:52 AM), https://www.cbsnews.com/news/joe-manchin-blasted-by-both-dems-and-gop-after-kavanaugh-vote/ [https://perma.cc/76UR-SH2W]. Democratic Senators could remove him from committees, but that is a far cry from the party doing anything. Democratic voters outside of West Virginia who would like to censure or remove him are powerless.
abandoning the party and ceasing to pay dues. Republican voters upset with Romney’s impeachment vote or Democratic voters upset with Manchin’s Kavanaugh vote, do not have this capacity.\textsuperscript{172}

The absence of party accountability mechanisms is not a mere formality. Because of their structure, neither the Republicans nor the Democrats can realize the benefits of democratic participation discussed above. These entities do not foster the development of civic consciousness, critical debate, and comfort with self-governance that membership-based organizations allow because they have no membership and few avenues for participation. Because they are not accountable to any portion of the public, they cannot build popular power and act as a countervailing weight to challenge elite dominance. Because they cannot hold any “members” or officials to any standard, they do not express values. The Democratic Party does not, as an entity, support the right to abortion, any plan to address climate change, or any other particular policy. Someone who opposes all these objectives can remain a public figure, or even a leading elected official, still fully identified with “the party.”

Neither of the two dominant political entities in this country meet the criteria of a democratic organization discussed above—indeed, as argued above, there is a good argument to be made that neither really meets the bare definition of a political party. This is not by happenstance but by design. The same laws that facilitate the Democrats’ and Republicans’ immunity to internal challenges also obstruct the capacity to form successful outside challenges. These rules mostly exist on the state level, but as the following subsection shows, the Supreme Court has validated them.

E. “Major Party” Laws and the “Liberal” Courts that Bless Them

On top of the absence of internal democracy in the two dominant political organizations in the United States, the external rules governing political parties and elections also thwart popular participation. They do so by strengthening the two-party system, even at the expense of formal due process. To quote Seth Ackerman:

The Council of Europe, the pan-European intergovernmental body, maintains a “Code of Good Practice in Electoral Matters,” which catalogs electoral practices that contravene international standards. Such violations often read like a manual of U.S. election procedure. In 2006, the council condemned the Republic of Belarus for violating the provision of the code proscribing signature requirements larger than 1 percent of a district’s voters, a level the council regards as extremely high; in 2014, Illinois required more than triple that number for House candidacies. In 2004, the council rebuked Azerbaijan for its rule forbidding voters from signing nomination petitions for candidates from more than

\textsuperscript{172} To be clear, I am not suggesting that these two values are in some way comparable—indeed, the Republican supporters’ adulation of Trump is inherently undemocratic, both because it is a cult of personality and because the personality in question is one that is actively hostile to egalitarian and tolerant values. The purpose here is merely to illustrate whether the “party” has a procedural mechanism for expulsion, which can, of course, be used for good or ill.
one party; California and many other states do essentially the same thing.

In fact, some U.S. electoral procedures are unknown outside of dictatorships: “Unlike other established democracies, the USA permits one set of standards of ballot access for established ‘major’ parties and a different set for all other parties.”

There is little media coverage and virtually no popular consciousness that the U.S. system is such an aberration.

The standard “major party” laws do not specify which parties can bypass the petition gathering process, but they nevertheless ensure that the protection extends to the Democrats and the Republicans. The most common format is to ensure automatic ballot access to any party that secured more than a particular percentage of votes in the preceding election. A survey of states shows that this bipartisanship is a bipartisan project, occurring in blue states as well as red ones. Even when one party is extraordinarily weak—in D.C. registered Democratic voters outnumber registered Republican voters more than 13-to-1—the dominant party does not extend the same efforts to keep them off the ballot that are used against third parties.

The courts have repeatedly blessed these party registration restrictions. As Benjamin Black summarizes the case law, two conflicting rights play out in the dominant jurisprudence.

The courts have repeatedly blessed these party registration restrictions. As Benjamin Black summarizes the case law, two conflicting rights play out in the dominant jurisprudence. On the one hand, the individual voters have a right


174. See, e.g., ALA. CODE § 17-13-40 (1975) (defining “political party” as any entity garnering more than 20% of the vote in the preceding election); ALA. CODE § 17-6-22 (1975) (specifying a massive signature requirement for non-major parties); MINN. STAT. § 200.02 subd. 7(a)(2) (2018) (making the cutoff 5% of votes); MINN. STAT. § 200.02 subs. 23, 23(b)(2) (2018) (defining “minor parties” and prescribing a cutoff of 1% of votes or 1% of signatures from participating voters in a county); 25 PA. CONS. STAT. § 1102 (2002) (defining “political parties” by a threshold cutoff of 2%); COLO. REV. STAT. § 1-1-104(22)-104(23) (2022) (defining “major political party” and “minor political party” with a cutoff percentage of 10% in the gubernatorial election). These examples are illustrative; I am not suggesting that these states are particularly egregious.

175. See ALA. CODE § 17-13-40; ALA. CODE § 17-6-22; MINN. STAT. § 200.02 subd. 7(a)(2); MINN. STAT. § 200.02 subs. 23, 23(b)(2); 25 PA. CONS. STAT. § 1102; COLO. REV. STAT. § 1-1-104(22)-104(23).


178. See Black, supra note 169, at 111.
meaningful participation in the political process. On the other hand, political parties have the right to define the terms by which they associate, including how they set up their internal structure and select their candidates. While neutral and reasonable-sounding on its face, the cases have allowed states to treat major and minor parties very differently. As Black aptly summarizes, the courts have allowed state legislatures to expand the associational rights of major parties even as they have allowed states to present a slew of obstacles to minor parties without violating the legal right to associate.

Courts did entertain some challenges in the mid-20th century. For instance, in 1968, the Court shot down an Ohio law that, in the Court’s own words,

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\ldots \text{made it virtually impossible for a new political party, even though it has hundreds of thousands of members, or an old party, which has a very small number of members, to be placed on the state ballot to choose electors pledged to particular candidates for the Presidency and Vice Presidency of the United States.}
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Ohio’s official reasons included a concern that having too many parties on the ballot might confuse voters.

Despite this precedent, however, subsequent cases retreated from this path and left only minimal constitutional requirements for state democracy. In 1971’s Jenness decision, the Court unanimously held that having two separate sets of rules for major and minor parties does not violate the Equal Protection Clause. They went on to provide a broad mandate for onerous antidemocratic state laws. Two 1974 decisions, American Party of Texas v. White, and Storer v. Brown are illustrative.

The ballot obstacles affirmed by American Party and Storer are immense. The Court allowed Texas to establish three tiers of ballot eligibility for parties based on their performance in the prior election; to subsidize some tiers and not others; and to impose criminal penalties for signing ballot access petitions after voting in a primary election for another party. The sole exception was that the Court rejected Texas’s practice of excluding third parties from absentee ballots after they had met the criteria to be on the ballot.

In Storer, the Court reviewed a California law requiring signatures from 5% of eligible voters for independent candidates to get on the ballot, in addition to prohibiting any primary voter from signing a petition for an independent candidate and only 24 days to secure the petitions. Despite these immense burdens, the Court noted that the burden “does not appear to be excessive.”

179. See id. at 153–56.
180. See id. at 129–60.
181. See id. at 175.
182. See id. at 175–81.
184. Id. at 33.
187. Id. at 794–95.
189. Id. at 738.
The Court conceded that if primary participation were high enough, the barrier could make it literally impossible for new parties to qualify because there would not be enough eligible voters who had not already voted, but it noted that this was “unlikely.” They remanded the matter to examine if primary participation rates were high enough to make the 5% threshold excessively burdensome. The United States traditionally has lower voter turnout than liberal-democratic states, but it is still an extraordinary step for a constitutional court to make low turnout the basis for legitimating anti-democratic laws.

The subsequent direction of the case law did not shift to ensure fair ballot access. In January 2022, the 11th Circuit still upheld a Georgia 5% petition requirement that no U.S. House candidate had ever met, relying heavily on Jenness. There is no reason to hope for a judicial remedy. Although liberal justices like Douglas and Brennan wrote partial dissents in American Party and Storer, respectively, their arguments concerned whether particular obstacles to ballot access were excessive; they did not include a single word suggesting that the basic premise of favoring “major parties” over newcomers might be unconstitutional. Tellingly, Jenness’s holding that double standards did not violate “equal protection” was unanimous.

The upshot is clear: although the Constitution mandates “equal protection” and requires that each state have a “republican form of government,” this preserves state leeway to preserve an unequal playing field for those who challenge the two-party system. There is virtually no chance of judicial remedy for this problem. The two memberless political entities that currently dominate the political world are free to impose transparently antidemocratic obstacles to their political rivals’ success.

F. Conclusion

Political parties are perhaps the most foundational membership-based, value-expressing, power-building organizations. A vibrant democratic society is one where people can establish these organizations and compete in elections to govern their society. When parties do poorly, they can lose members and lose votes to other, rival parties. Membership in a party allows the people to build power to challenge elites and to study democracy as a practical art and not merely an abstract slogan.

Our current regime of political parties stands in opposition to the values of democratic collectivity outlined in Subsection A, above. Liberals and conservatives identify with the Democratic Party and the Republican Party, respectively, but as consumers rather than participants. If they are displeased with the direction of their favored entity, they face innumerable obstacles to try to change it from within

190. Id. at 739.
191. Id. at 738.
192. See DeSilver, supra note 26.
193. See Black, supra note 169 passim, for a summary of the following decades.
because they are not, in any meaningful sense, within the “party.” If they want to form a rival party, the law in many states obstructs that as well. This is a situation where everyday people cannot build power, enjoy the educational benefits of citizenship, or fight to imprint their values and aspirations on the polity.

IV. LABOR UNIONS AND COLLECTIVITY

A. Introduction

Labor unions are another domain where U.S. law thwarts democratic value-expressing, power-building collective action. Most people spend at least a plurality of their waking hours working. In most cases, especially in the United States, the work environment is thoroughly undemocratic: a hierarchy within the firm decides what products are produced, who performs each task, and the slew of personnel decisions about promotions, demotions, hiring, and firing. Management does not owe a worker a justification even for a decision to terminate their employment.197 A union, even a relatively weak one, can change this dynamic by allowing workers to collectively negotiate the terms of employment. This can include a worker’s right to refuse certain types of work, to maintain control over their hours, or to exclusively use particular types of machinery.

In addition, labor unions have been at the forefront of democratization in most liberal societies, pushing to expand the franchise, provide workers with job security, and secure a welfare state.198 One principal aim of the labor movement is expanding democracy: to give workers a voice in their place of employment and, more broadly, in the economy. In most of these cases, the labor organizations banded together in parties labeled “labor” or “socialist” to achieve these goals—a possibility that never materialized in the United States, in part for the reasons outlined above.199 If people have representative collective organizations at their workplace, they can use their skills and energy to champion their aims and values—including beyond the individual workplace, like the Wayfair and Google workers noted in Part II above.

Unfortunately, U.S. labor law obstructs labor from turning spectator politics into participatory democracy, even in the (increasingly rare) circumstances in which workers have a union. There is abundant literature on the legal obstacles to building worker power in the United States.200 In this essay, I focus specifically on how law shapes unions in the direction of promoting members’ interests, rather than exerting


Democratic collectivity is embodied in the conjuncture of interests, values, participation, and education. Although unions, unlike our major electoral organizations, are membership-based, they nevertheless find themselves constrained to the domain of narrowly defined interests.

B. Two Visions of Labor and Democratic Participation

What is the purpose of a labor union? One common, legally informed answer in the United States would be to bargain for better wages, hours, and other terms and conditions of employment. Another equally venerable tradition holds that unions are vehicles for collective organization of the working class to challenge capital and to build a fairer, more democratic economy. These two visions are in obvious tension, not to say contradiction. In the first view, a union’s role is advocating a redivision of the resources within a given firm to favor workers rather than owners and management. In the second view, a union is part of a broader emancipatory project, which brings workers together to redefine and realize collective wellbeing, even at the expense of the members’ employer’s profitability. The second vision, as I argue below, is more consistent with the democratic theory outlined above: it facilitates value-informed, democratizing power-building.

While some people understandably argue that unions should prioritize member service and well-being, this becomes de-democratizing when union aims are limited to these narrow purposes. This limits unions’ capacity to build broad-based power. It also prevents unions from acting as Deweyian laboratories of democratic participation that encourage members to think beyond their immediate interests and towards the greater questions facing society. In addition, unions that broaden the scope of their issues are the only ones that can re-examine the existing order of social relations structured around property rights. Bread-and-butter unionism is designed to avoid raising these broader questions.

This process would not be simple or easy. The proliferation of issues that a union can address might result in a proliferation of conflicts. For instance, most union members are likely to agree on questions like pay raises and reduced hours, while delving into issues farther afield, like boycotting Israeli goods or promoting a

201. See 29 U.S.C. § 158(d) (“For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .”).


203. These two visions are in tension, not contradiction. “Bread-and-butter” unions still believe in solidarity, while “radical democratic unions” also believe in higher wages and benefits.
particular vision of policing, might increase conflict, inasmuch as they are less likely to produce consensus within a workplace.

This scenario may be more fraught, but the core point here is that it is more democratic. In addition, there are possible solutions to the problem. For one, there could be multiple unions with different aims and values negotiating in one workplace—this is possible in some other countries, and, by some counts, legally an option here. More pointedly, the present essay is about the union’s legal right to engage in collective action beyond the workplace; changing the laws to allow them to do so would not stop the membership from deciding that they do not want to do so.

My case for social justice unionism as a democratizing force operates in a context where parties are non-participatory and policy is beholden to private wealth. This calculation might change in a more democratic context where parties encompass the public and policy reflects popular preferences. In that context, there might be good arguments for narrowing union aims and encouraging them to “stay in their lane.” As it stands, expanding the aims of the labor movement is essential to building a more participatory society. Unfortunately, law obstructs this possibility.

C. Amoral Solidarity

Legal definitions and strictures in the United States push unions in the direction of advocating only for bread-and-butter issues, rather than the broader aims of social justice. As in the case of political parties, this is not merely a matter of an entity “selling out” or compromising: my argument is not an evaluation of labor leaders’ actions but rather a critique of the legal structure within which those leaders operate. Courts have interpreted labor law as concerned with pay and other individualized workplace benefits. Although law recognizes that collective action is the means for achieving these ends, the ends themselves are ones that sit comfortably within the existing order. The law envisions the worker as a particular type of homo oeconomicus, one that is capable of working collectively for certain ends but only for ends that are themselves self-interested. Law recognizes the collectivity of workers, but this collective is merely the sum of its component parts.

204. BLANPAIN, supra note 48, 448–53 (discussing basics of French labor law).
208. See Fischl, supra note 206, at 796, 811–12, 820.
This vision limits on many levels. While it is certainly true that self-interested people can band together to achieve ends that are themselves individualistic—like a pay raise—as a practical matter they will not do so unless they have some measure of trust and mutual concern. These are factors that the *homo economicus* model cannot adequately address. Since labor organizing regularly faces employer adversity and employer incentives to obstruct collective action, a rationally self-interested actor is not necessarily going to pursue a course of solidarity. While on the whole acting together is more rational, this does not pan out into actual collective action without some *moral* force discouraging self-interested defection. This point is illustrated by the voluminous literature on game theory, like the prisoner’s dilemma and the ultimatum game, in which an individual’s self-interest depends on the level of trust she can place in another’s actions. If there is trust, one course of action benefits both participants maximally; absent trust, each pursues action that does not reach that maximum benefit but avoids the worst outcome for herself.

The empirical evidence supports the centrality of morality to solidarity. People are more likely to form unions when they experience not only bad workplace conditions but moral outrage over racism, sexism, and other indignities. On a larger scale, writers like E.P. Thompson and Sembène Ousmane have illustrated how mass collective action depends on building a culture of common aspirations and principles. People may have a rational self-interest in working with others, as in the prisoners’ dilemma; in fact, people only realize this self-interest when they are bound together by thicker bonds.

Despite the inherently moral dimension of collective organization, U.S. labor law explicitly frames the aims of workers and unions in terms of *homo economicus* rather than democracy. The National Labor Relations Act of 1935 (the “Wagner Act”), the founding charter of U.S. labor law, emphasized collective rights and the importance to the country of collective bargaining. Despite these

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212. See LANE WINDHAM, KNOCKING ON LABOR’S DOOR: UNION ORGANIZING IN THE 1970S AND THE ROOTS OF A NEW ECONOMIC DIVIDE 70 (2017). Lane Windham quotes union busters saying as much, quoting a management consultant: “Danger: a union can muster a most potent campaign when it can take advantage of a ‘racial’ or ‘sexist’ theme.” *Id.*

213. See THOMPSON, supra note 196 (discussing the cultural origins of 19th-century English working-class self-perception and politicization); SEMBÈNE OUSMANE, GOD’S BITS OF WOOD (Francis Price trans., Heinemann, 1995.) (novelizing a railroad strike in French West Africa in 1947–1948).


215. See National Labor Relations Act of 1935, 74 Pub. L. 74-198, § 1, 49 Stat. 449, 449–50 (describing the importance of collective bargaining to industrial stability) and especially section 7 (stating famously that “Employees shall have the right to self-organization, to form, join, or assist labor
potentially radical elements, judges and legislatures progressively diluted and moderated it.\textsuperscript{216} Courts even use \textit{homo oeconomicus} framing to justify collective action.\textsuperscript{217} For instance, Section 7 of the Wagner Act grants workers the right “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . . \textsuperscript{218} In one of the most cited opinions in U.S. labor history, Judge Learned Hand noted that this mutuality is established even in contexts where behavior appears altruistic and not reciprocal: “The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping. . . . \textsuperscript{219} While having the effect of upholding the Act’s protection for collective action, the implication is that the objectives of the union are wholly encompassed by the self-interest of its various members, stripped of other values. The whole is nothing more than the sum of its parts.

This framing is not merely symbolic. Courts have used this reasoning to restrict unions from engaging in actions that would build a more democratic society.

\textbf{D. \textit{Political Speech Versus Political Action}}

Labor law recognizes that unions are political creatures. In the 1978 \textit{Eastex} case, the Supreme Court allowed a union to distribute a newspaper on employer property advocating opposing “right-to-work” legislation.\textsuperscript{220} They interpreted the Wagner Act’s allowance of bargaining for “mutual aid or protection” to extend beyond the immediate workplace and beyond the specific employer-employee contract, creating space for political action.\textsuperscript{221} This is political action with an obvious nexus to the union’s narrower aims, but the rule at least opens the door.

Private-sector unions have other protections for endorsing candidates and speaking out on issues of significance that do not fall within the ambit of collective bargaining.\textsuperscript{222} Unions exercise this role as part of their regular work. In particular,
labor organizations are regular major donors to and advocates for the Democratic Party.\(^{223}\)

Unfortunately, in many ways, law constrains this political action to speech and ancillary electoral support. Courts have used the *homo economicus* understanding of labor’s purpose to prevent unions from agitating for justice beyond an individual workplace. For instance, in the early 1980s when a group of carpenters’ unions attempted to use antitrust law to stop predatory practices by a collection of employers, the Supreme Court held that they did not even have standing to sue irrespective of whether the defendants were violating the laws in question:

> As a general matter, a union’s primary goal is to enhance the earnings and improve the working conditions of its membership; that goal is not necessarily served, and indeed may actually be harmed, by uninhibited competition among employers striving to reduce costs in order to obtain a competitive advantage over their rivals.\(^{224}\)

This wrongly narrows the aims of antitrust law—it is concerned with democracy and power as much as, or more than, “uninhibited competition”\(^ {225}\), but in terms of labor law, the holding is more constraining. The Wagner Act encourages the growth of one sort of democratic collectivity, the union, which can work to reshape the interests and values that the economy serves. Decisions like *Associated General Contractors*, and *International Longshoremen’s Association v. Allied International*, discussed below,\(^ {226}\) strip away the dimension of values and redefine unions as merely amoral vehicles for redistributing certain benefits within a given firm. In this instance, unions lose their relationship to democracy, both conceptually and practically.

If unions are not the sorts of entities that can sue over antitrust violations, they are also not the sorts of entities that can strike or boycott to achieve their vision of a better world. Since passage of the Taft-Hartley Act in 1947, U.S. labor law has prevented most private sector unions from engaging in secondary boycotts and other actions directed against businesses other than their immediate employer.\(^ {227}\)

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Congress’s aims at the time were weakening labor’s power (presented as employer-employee parity), facilitating commerce, and eliminating “corruption.” However, the judiciary has seen fit to expand these restrictions to prevent labor from using power to engage in “political actions”—meaning actions aimed at a more just society outside of the individual workplace.

Under Taft-Hartley, most unions cannot engage in boycotts and strikes against entities other than direct employers. This includes boycotts and strikes for political reasons. In one of the defining cases, the International Longshoremen’s Association refused to unload wood products being imported from the Soviet Union by a U.S. company called Allied International in protest against the Soviet invasion of Afghanistan. While consumers would be free to boycott Allied International, picket any stores selling its products, or picket the docks where longshore workers were unloading them, the Court held that the union had committed an unfair labor practice in so doing. This is because of the indirect nature of its demand:

The ILA has no dispute with Allied, Waterman, or Clark. It does not seek any labor objective from these employers. Its sole complaint is with the foreign and military policy of the Soviet Union. As understandable and even commendable as the ILA’s ultimate objectives may be, the certain effect of its action is to impose a heavy burden on neutral employers.

The term “neutral” is absurd here, as in many secondary action cases. In fact, U.S. foreign policy recognizes that ongoing trade is not “neutral” by regularly employer. For instance, pressuring an outside business not to purchase the goods from a struck employer—“hot cargo”—is deploying economic pressure against the target of the strike, not against the outside business. These “neutrals” are only being targeted because they are not neutral, and to the extent to which they are not neutral.


229. There have been several recent—longshot—attempts to at least partly repeal the prohibition. See e.g., H.R.842- Protecting the Right to Organize Act of 2021, https://www.congress.gov/bill/117th-congress/house-bill/842 [https://perma.cc/4SS2-GX62].


231. Int’l Longshoremen’s Ass’n, 456 U.S. at 212. Somewhat confusingly, the Court held two months later that the employers could not secure an injunction against the boycott, even if the union was engaged in an unfair labor practice and therefore liable for penalties. See Jacksonville Bulk Terminals v. Int’l Longshoremen’s Ass’n, 457 U.S. 702, 702–03 (1982).


233. For instance, in National Labor Relations Board v. International Rice Milling Co., 341 U.S. 665 (1951), the Court deemed it a violation for rice mill employees picketing for recognition to persuade a “neutral” customer of the rice mill not to enter to obtain products. But it is far from clear how continuing to do business with a company that is engaged in a labor dispute is neutral, while refusing to do so is not

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imposing sanctions on countries’ economic activities in opposition to particular policies: in that context, a U.S. company doing business with the sanctioned country is understood not to be “neutral.” The issue is not inflicting a “heavy burden” on commerce but rather who is inflicting it, and this right is not extended to labor unions.

The United States’ restrictions on secondary actions distinguish it from many other countries. For instance, James Atleson notes that unions in Italy, Spain, France, and Belgium can engage in secondary actions if they are protesting on behalf of their own interest in the primary dispute. In Denmark, the logic is reversed: the union has the right to engage in solidarity actions as long as they are acting altruistically and do not have an interest in the underlying dispute. This is in effect the opposite of U.S. labor law, which generally requires self-interest for collective action.

Restrictions on secondary actions not only weaken unions, they also have a depoliticizing effect. Historically, unions have been at the forefront of radical action precisely when they stepped outside of their bread-and-butter role and advocated a vision for the working class as a whole. This includes the 1936 general strike in France, which forced the elected left government to adopt a social charter that became the foundation of France’s social democratic system. It also extends to cross-border solidarity, like refusal to handle “scab goods” or commerce from Apartheid South Africa. Rules allowing solidarity action—and in particular, rules allowing purely value-based secondary actions—help unions function as democratic political entities, which can promote the aims of their members’ values as well as their interests.

The robust prohibition on secondary boycotts and political actions is striking when one considers the (welcome) pro-boycott tenor of First Amendment neutral. The two acts are different sides of the same coin. If abstaining is taking a side, so too is partaking. See also Houston Insulation Contractors Ass’n v. Nat’l Lab. Rel. Bd., 386 U.S. 664, 669 (1967); Boich Mining Co. v. Nat’l Lab. Rel. Bd., 955 F.2d 431, 432, 435 (6th Cir. 1992); Nat’l Lab. Rel. Bd. v. Gen. Truck Drivers, Local No. 315, 20 F.3d 1017, 1017 (9th Cir. 1994).

234. For instance, the Treasury Department stated in 2018 that: “These are the toughest U.S. sanctions ever imposed on Iran, and will target critical sectors of Iran’s economy, such as the energy, shipping and shipbuilding, and financial sectors. The United States is engaged in a campaign of maximum financial pressure on the Iranian regime and intends to enforce aggressively these sanctions that have come back into effect.” U.S. DEP’T OF THE TREASURY, Re-imposition of the sanctions on Iran that had been lifted or waived under the JCPOA (Nov. 4, 2018), https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/iran-sanctions/re-imposition-of-the-sanctions-on-iran-that-had-been-lifted-or-waived-under-the-jcpoa [https://perma.cc/A8ST-ETMY]. The stated purpose is pressure on the Iranian regime, but the operative assumption is that “energy, shipping and shipbuilding, and financial sectors” are, in full, legitimate targets.


236. Id. at 163 (citing LORD WEDDERBURN, EMPLOYMENT RIGHTS IN BRITAIN AND EUROPE, 293–94 (1991)).

237. See Fischl, supra note 206, at 811.

238. See JACKSON, supra note 198, at 50–51.

jurisprudence outside the labor context. For instance, the Supreme Court has recognized in other contexts that economic pressure is a form of protected speech. If some labor holdings allow unions collective power but deny them the capacity to express values, the free speech holdings on boycotts do the exact opposite: groups of people can use their purchasing decisions to express their values freely, but they lose that precisely when they are structured in a collective entity seeking to exert economic power in the workplace. The law here allows either power or values but not both.

**Conclusion: Labor’s Democratizing Potential in Shackles**

If people cannot change the two dominant political parties “from within” and cannot form a serious rival third party, it is natural that they should seek democratic association through other channels—including by forming collective associations in the workplace, where so many waking hours are spent. This is a more limited, but also more immediate, democratic collectivity than a mass political party.

Unfortunately, even if people succeed in forming a union—no small feat these days—they sacrifice many of the benefits of democratic collectivity in the process. This is partly because law constrains labor’s capacity to function as a democratic, value-expressing collective voice as outlined in Part III above. The ability to challenge concentrated capital is hampered by prohibitions on secondary boycotts. The capacity to cultivate civic engagement is hampered by laws narrowing mandatory subjects of bargaining and restrictions on political boycotts. And all of these factors combined prevent unions from acting as a vehicle for reimagining work in the radical sense noted above: challenging questions about who produces what, how the workplace is structured, and for what ends.

Law grants the right to form a union, though that has become considerably harder over the years. Even when unions do form, however, law tethers them to the undemocratic status quo.

**V. “OTHER ORGANIZATIONS INSTITUTED FOR MUTUAL HELP”**

**A. Introduction**

The mass party and the labor movement are two cornerstones of participatory democracy. One lets the public band together in hopes of changing state policy; the other allows workers to band together to democratize their daily life and to build a more equitable economy. The need for democratic organizing extends beyond these two domains, however, and unsurprisingly, our legal system’s antidemocratic structure extends to other organizations designed to shape our social world.

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241. Id.
242. See Andrias, supra note 200 at 41, 43.
The potential examples are numerous, from prison organizing\textsuperscript{243} to tenants’ unions.\textsuperscript{244} The domain I discuss here is antitrust, which often restricts the organization of economic actors who do not meet the legal definition of employees. These people often have a shared interest in collective organization, akin to a labor union, but are legally barred from collective action and collective bargaining. Despite the popular perception (and original intent) of antitrust as a tool against monopoly capital, courts and the state have often used it against these sorts of democratizing efforts.

B. Antitrust as Anti-Collectivity Weapon

Many people think of antitrust as far removed from questions of labor organizing and democracy. The popular myth is of trust-busting and Teddy Roosevelt, along with more recent, thus far unsuccessful actions to fight the power of Microsoft and Amazon.

However, at several stages in the history of antitrust law, including recent decades, it has been a tool against “collusion” and “restraints of trade” by people who must work for a living. As Sandeep Vaheesan describes it, the system has been “accommodating capital and policing labor.”\textsuperscript{245} This is despite a direct statement from Congress that exempted both labor organizations and other organizations “instituted for the purposes of mutual help.”\textsuperscript{246}

There is considerable literature on antitrust’s “labor exemption,” which aims to ensure that collective action by workers does not get enjoined as anti-competitive conduct.\textsuperscript{247} The exemption does not traditionally protect those who do not meet the definition of employee.\textsuperscript{248} These include some who are genuinely independent contractors, but who nevertheless negotiate from a position of weakness and therefore may need collective action to have enough power to secure a decent living.\textsuperscript{249} In effect, they operate under the same logic as a labor union: \textit{united we...}
bargain, divided we beg. Examples include piano teachers and ice-skating instructors. In other cases, like Uber and Lyft, the individuals who would band together are workers in all but name: contributing their labor for the enrichment of a single business under uniform terms imposed by that business. These independent contractors—whether truly independent or otherwise—are seriously hindered from engaging in collective action by modern antitrust law.

The problem reached high levels in the 2000s and 2010s, with the Federal Trade Commission’s bringing actions against a host of small-time actors for banding together to enhance their market position. Vaheesan lists “animal breeders, electricians, ice skating teachers, managers of commercial and residential properties, music teachers, organists, and public defenders. . . .” These people are obviously not elites and are not threatening monopoly in the familiar sense of the word. In fact, an estimated 8.4% of the U.S. population works as independent contractors, without the protections of formal employee status and without any command over means of production or the labor of others.

Apart from the egregious examples of antitrust abuse against these examples of collective bargaining, the threat of such enforcement also has a chilling effect on such efforts to band together. This is partly true even with a decrease in government enforcement actions because the antitrust laws allow for private enforcement and the vast majority of enforcement actions are by private plaintiffs not public authorities. Antitrust suits are extraordinarily expensive for both parties, making even the risk of a suit a potential deterrent.

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250. A search of the internet found no good account of the origin of this commonly used phrase.
255. See Accommodating Capital and Policing Labor, supra note 245, at 810–14.
257. From the plaintiffs’ side, the issue was discussed by the Supreme Court in American Express Co. v. Italian Colors Restaurant, 570 U.S. 228, 236–39 (2013). On expenses for the defendant, see R. Preston McAfee & Nicholas V. Vakkur, The Strategic Abuse of the Antitrust Laws, 2 J. STRATEGIC MGMT. EDUC. 37, 39–41 (2005).
One recent example is the 2017 case of jockeys in Puerto Rico, who held a work stoppage in order to secure an increase in their pay. The jockeys referred to their confederation as a union and their action as a strike. Nevertheless, the race track owner and horse owners filed for an injunction against their action, and the Federal District Court approved it, finding that their actions ran afoul of the Sherman Act because the jockeys were not employees. The court’s analysis did not make accommodations for the fact that the riders must live by their labor and that they occupy the same relation of vulnerability as workers if they cannot do so on favorable terms. The court emphasized that the riders’ direct payors are the horse owners, with rates set by the state, and that they were not directly negotiating pay with any of the numerous dominant interests in the horse-racing industry. Many employees and contractors face these indirect methods of control, which is part of why U.S. labor law defines “labor dispute” to include struggles over terms and conditions of employment and representation “regardless of whether or not the disputants stand in the proximate relation of employer and employee.” Despite this language, the District Court still granted the injunction and later summary judgment with fines that combined to exceed $1 million.

In this case, the First Circuit Court of Appeals reversed with an order to dismiss the complaint against the jockeys, finding their concerns about pay fell squarely within the labor exemption and could not be enjoined or sanctioned. Still, the extreme judgment of the District Court—a real threat of seven-figure damages—necessarily acts as a potential deterrent and an indicator that this area of law remains unsettled. Moreover, to qualify for the exemption, the jockeys had to demonstrate that their concerns were acting in their “self-interest” and not pursuing broader social

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261. See id. at 419–20. The Court added that “although jockeys are free to ride at other racetracks in the United States or other countries, the Camarero Racetrack can only operate in Puerto Rico, and the horse owners cannot run in other racetracks as Camarero is the only racetrack in Puerto Rico.” Id. at 422.

262. Id. at 419–20.


aims—similar to the restrictions on “political” boycotts by labor unions discussed above but backed by a larger threat of financial penalty. The implications of these antitrust questions for building power are immense: the same logic that applies to labor unions applies to jockeys and Lyft drivers and many others, but their legal protections are even weaker. The portion of the non-employee laboring population that wants to band together for mutual benefit face even greater obstacles than those who fall under labor law. The inequality that flourishes when unions die is poised to expand as capital restructures to expand the “gig economy.” The first dimension of our democratic deficit, oligarch control over policy outcomes, is accordingly poised to expand, and these rules governing collective action are as central to the project as the more notorious Citizens United decision.

C. Participatory Democracy, Radical Democracy, Non-Employee Collectives

Antitrust’s antidemocratic interpretation not only strengthens oligarchy, it also obstructs the capacity for building collective organizations that can act as radical schools of democracy. On its face, it may seem odd: some groups, like ranchers, farmers, and fishers, have exemptions to organize economic cooperatives. This is why some well-known companies like Ocean Spray and Land O’Lakes are collectively owned by producers. While more equitable in their internal structure, in other respects these entities look a lot like conventional corporations.

However, there is no a priori reason why this need be so. Cooperatives of non-workers can function like unions, including fighting for a social justice agenda, if given legal space to do so. In India, for instance, the Self-Employed Women’s Association (“SEWA”), a federation of individuals who mostly do not fall under the definition of “employee,” is recognized as a trade union. It has an estimated 2.1 million members and a structure of two-tier electoral representation. Its actions span across a wide range of activities, including electoral politics, lobbying for legislative change, education, training, aggregate litigation, empowerment, as well as forms of collective bargaining. Although its principal objectives are

266. Id. at 313, 316 (“[T]heir dispute with the defendants is a labor dispute because it centers on the compensation they pay the jockeys for their labor.”).

267. See supra Section V.D.

268. See Katz & Krueger, supra note 254; David Weil, The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It 2, 8 (2014) (discussing the growth in alternative work arrangements and that approximately 8.4% of the workforce are independent contractors).


270. Gig Workers Need Antitrust Reform, supra note 249.


273. RURAL EMP. AND DECENT WORK PROGRAMME, Chapter 7: Self-Employed Women’s Association (SEWA), India, in LEARNING FROM CATALYST OF RURAL TRANSFORMATION (Int’l Labour Org ed., 2014), https://www.ilo.org/wcmsp5/groups/public/pub_emp_policy/documents/publication/wcms_234890.pdf [https://perma.cc/9FTN-2FCK]. This chapter estimates SEWA’s membership at 2.5 million. Id. at 165. See also Ion Tycko, How “Rule of Law” Foreign
commercial, it also promotes a broader egalitarian vision for restructuring Indian society, including gender equity and economic empowerment.\footnote{274}

The members of SEWA have some but not all of the features that make unions valuable. Many do not work under a single employer or in a single workplace.\footnote{275} However, they are nevertheless forced by economic necessity into relations of dependence on powerful economic actors, who have a vested interest in paying them less.\footnote{276} In this sense, they are very similar to traditional unions: although self-employed, they have a shared interest in collective action—through strikes, boycotts, and agitation—to improve their lot. Under Indian law, they are a union.

SEWA also delivers the benefits of democratic education. Members must deliberate on appropriate strategies for achieving the organization’s aims and promoting its values. The organization supports large-scale internal education, including literacy programs.\footnote{277} The organization functions as a democratizing force capable of building power and expressing values for its members.

Despite the evident benefits of collective representation and bargaining, some of SEWA’s activities would be illegal or threatened with legal repression under U.S. antitrust law because self-employed people do not meet the technical definition of workers and because their demands cannot be confined to a narrow definition of a “labor dispute.”

D. Conclusion

Antitrust is another arena where legal obstacles prevent people from forming democratic collective membership-based organizations. This reinforces the existing inequalities in bargaining power and entrenches oligarchy. It also stifles the possibility of building democratic organizations like SEWA that can extend economic empowerment into broader democratization.

While at the time of writing there are some signs of change under a more progressive Federal Trade Commission,\footnote{278} the impact remains to be seen. For the time being, antitrust remains a significant roadblock for constructing power-building, value-expressing, collective organizations. Antitrust entrenches spectator politics.

\begin{footnotesize}
\footnote{274. See RURAL EMP. AND DECENT WORK PROGRAMME, supra note 273, at 154–63.}
\footnote{275. See id.}
\footnote{277. Id.}
\footnote{278. Current Federal Trade Commission Chair Lina Khan has consistently expressed views that challenge existing lax antitrust enforcement. See Lina Khan, Amazon’s Antitrust Paradox, 126 YALE L.J. 710 (2017).}
\end{footnotesize}
VI. NONPROFIT LAW

A. Introduction

The law governing nonprofit organizations, also known as non-governmental organizations ("NGOs"), also obstructs democratic association. Nonprofit law pushes NGOs to be hierarchical and dependent on wealthy donors, rather than democratic and membership-based. This has a depoliticizing effect on the public and reduces most of those involved to the role of spectators rather than participants.

The present section proceeds in two parts. First, I examine the ways in which the nonprofit sector differs from the ideals of democratic association as outlined above in Part III: that is, they do not build countervailing power, cultivate democratic subjects, or open possibilities for radical democracy. Second, I discuss how U.S. law structures nonprofits to have this undemocratic character.

B. The Structurally Undemocratic Nonprofit Sector

The nonprofit sector is a major player in U.S. politics, with assets in the trillions of dollars.279 Its most prominent examples are household names, from the American Civil Liberties Union ("ACLU") on the liberal side to the Christian Coalition on the right. Many people defer to the NGO world as the domain where issue-based advocacy takes place: if you cannot get elected officials to address your cause, forming a nonprofit advocacy entity focused on the issue is the natural next step. Some commenters have dubbed the nonprofit world "the third sector," following the "first sector" of government and the "second sector" of business.280

The nonprofit world diverges from the ideals of democratic participation as described in Part III, above. Democratic organizations are (1) membership-based, (2) value-expressing, and (3) power-building. NGOs can certainly achieve the second and to some extent, the third objective. However, on the first point, nonprofits fail almost completely. Most NGOs, like the two dominant "political parties," have no membership and are thus not beholden to any popular constituency. Even when they can build power or express values, the power and the values are those of their leaders and donors, not those of a broader public.

Nonprofits take a variety of forms: some can be established as trusts, others can be membership-based, and some are merely informal.281 However, the vast majority are established as corporations.282 These have a (non-coincidental) structural similarity to for-profit corporations. In this model, the organization has a Board of Directors with formal control over the organization and a Chief Executive

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280. Fong & Naschek, supra note 279.


282. Id.
Officer, or Executive Director, who manages the entity’s regular affairs. Anyone inside the organization is barred from benefiting directly from the operations of the entity, a rule called the non-distribution constraint. There are, however, legal ways for executives to benefit, including through high salaries. Many nonprofits engage with their supporters, but mostly in nonbinding ways. Members do not elect leadership or vote on organizational priorities; rather, nonprofit management consults with supporters about the aims of the organization.

Nonprofits have a wide array of funding sources, including government support, fees for service, and corporate partnerships. However, two important sources are donations by wealthy individuals and foundation grants, often from organizations named after their oligarch originators, like the Gates Foundation and the Ford Foundation. Since organizations need money to function, this inevitably creates dependency, which in turn shapes the entity’s agenda. In a democratic organization, dependency on membership dues is a method of ensuring that the entity is accountable to its members. In the case of NGOs, they are accountable principally to the ultra-wealthy, who often have agendas that are at odds with the majority’s interest.

If nonprofits are structurally undemocratic on the micro level, critics charge that they have a similar impact on the macro level. NGOs often perform roles, in particular pushing for policy changes, that could be performed by more democratic organizational alternatives. For this reason, Fong and Naschek argue, NGOs have expanded “in the very spaces that unions, mass membership organizations, and political parties once occupied.”

One illustration of how NGOs occupy space akin to membership-based organizing is the extraordinary surge in small donations to liberal nonprofits following the election and inauguration of Trump. Many of those most adamently

288. Id.
289. Fong & Naschek, supra note 279.
opposed to Trump’s stated agenda channeled their dissent into support for organizations like the ACLU and Planned Parenthood, who would lobby or litigate against the new administration. There was no comparable surge in belonging to labor unions, political parties, or any membership-based organization.

Given the absence of a membership, the internal hierarchical structure, and the dependence on elite donors, NGOs cannot act as democratic organizations. They are ill-positioned to challenge oligarchy since they depend on oligarchs for funding. They cannot promote democratic citizenship among their membership because they usually have no membership at all, but rather a small leadership that aims to advocate for a broader public. They are unlikely to challenge the undemocratic patterns in everyday life and reinforce spectator politics. This undemocratic reality is undergirded and reinforced by nonprofit law.

C. Law Promotes NGOism

Legal structures promote the undemocratic character of nonprofit organizations in two principal ways. First, U.S. nonprofit law is uniquely donation-centered and principally operates through tax law. Second, most state laws give strong incentives to nonprofit managers to set their entities up as hierarchical corporations rather than democratic membership organizations.

i. Tax Law and NGOism

The centrality of tax law to NGO structure is on the surface. Nonprofits are often referred to even in lay conversation by their relevant section of the tax code, as “501(c)(3)s” or “501(c)(4)s.” These sections ensure that nonprofits and, in the case of 501(c)(3)s, their donors, enjoy special tax benefits. These tax statuses facilitate dependence on elite donors and hamper organizations’ capacity to build popular power.

A common view of the tax-deductible status of 501(c)(3) organizations is to incentivize people to donate to entities that are supposed to serve the public.


291. See generally Walters, supra note 290.

292. There may be some objections to this statement, but the numbers support it. The Democratic Socialists of America did have a massive surge in membership, relative to pre-2016 levels; however, a surge of 17,000 members over 10 months is relatively modest. See generally Jeff Stein, 9 Questions About the Democratic Socialists of America You Were Too Embarrassed to Ask, Vox (Aug. 5, 2017), https://www.vox.com/policy-and-politics/2017/8/5/15930786/DSA-socialists-convention-national [https://perma.cc/3MW2-TPRQ]. As noted in THE GUARDIAN article cited above, Planned Parenthood received 80,000 donations in three days. See Walters, supra note 290.

293. This is not a causal theory of why the nonprofit sector is as important as it is; rather, whatever the cause, the nonprofit sector realizes its character through law. To understand how NGOs act undemocratically requires understanding how law enables these undemocratic features.

294. See I.R.C. § 501(c)(3); see also I.R.C. § 501(c)(4). Both categories of organizations are exempt from paying (most) taxes; 501(c)(3)s have the added benefit that their donors receive tax deductions for their donations (which is only true in a qualified way for 501(c)(4)s). As a corollary to this tax deductibility, 501(c)(3)s have their hands somewhat tied with regard to the forms of lobbying, though the rule is very unevenly enforced. See generally Lloyd Hitoshi Mayer, When Soft Law Meets Hard Politics: Taming the Wild West of Nonprofit Political Involvement, 45 J. LEGIS. 194, 198–200 (2018).
interest. As a practical matter, existing policy enables donors, especially extremely wealthy donors, to use NGOs as a major method of tax reduction. The result is a flood of money into these undemocratic organizations, which gives them an advantage over membership-based entities that aim to participate in the same debates but with more modest dues-based structures. More recently, the IRS changed rules to prevent donor entities from being easily accessible to the public, a further boon to the power of wealth.

As Alyssa Dirusso argues, U.S. nonprofit law is an international aberration in focusing on “the relationship between the nonprofit and its donors and leaders, rather than the relationship between the nonprofit and the government.” The tax policy regarding donations is not simply a regulation or even an incentive, but a “key motivator” needed in understanding NGOs and wealthy people’s relationship to the third sector as a whole.

In many other wealthy countries, tax status is at most a secondary element of nonprofit regulation. She notes that in France, NGOs are more likely to present their agenda as adverse to market forces rather than complementary to it; they are accordingly more reliant on the state and less dependent on private funding. This decreases the salience of tax deductibility. Sweden does not have any tax deduction incentive for nonprofit donations.

The U.S. nonprofit sector’s dependence on oligarch funding is one of its defining features and a persistent point of emphasis for critics. While there are other structural matters at play, the peculiar tax-based structuring of the NGO world plays a crucial role in preserving this undemocratic reality.

ii. The Law of Nonprofit Structure and NGOism

The law governing nonprofit organizations’ internal structure also prevents them from becoming democratic collectives. Apart from tax law, which operates principally at the federal level, most other nonprofit law operates at the state level, where NGOs must incorporate.

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299. Id. at 72.

300. See generally id. at 42–46, 65–75.

301. See id. at 79.

302. See generally id. at 50–52.
In general, nonprofits are free to form as unincorporated entities, trusts, or corporations.\textsuperscript{303} The vast majority choose the corporate form.\textsuperscript{304} In addition, in many states, and in the Revised Model Nonprofit Corporation Act, these corporations are given the option of establishing themselves as membership-based organizations.\textsuperscript{305} However, the vast majority do not.\textsuperscript{306} That is why the default structure is as noted above: an entity without membership, advocating on behalf of those outside the organization.

As Dana Brakman Raiser notes, the nonprofit model statute gives nonprofit managers free choice in granting or denying membership participation, but this choice ignores the background incentives that managers face.\textsuperscript{307} Because they are the ones who will be operating the organization, these managers have every incentive to prefer a model without members.\textsuperscript{308} The nonprofit managers’ decision is between relinquishing their own power or conserving it, and it is unsurprising that they almost always choose the latter. From their perspective the decision is sensible, and they are unlikely to perceive their preference for hierarchy as more efficient and effective at achieving the organization’s stated goals. The model statute is formally neutral in according the same protected nonprofit status to entities that are hierarchical as to those that are membership-based, but as a practical matter this formal neutrality overwhelmingly favors the corporate structure.

This practical endorsement of the nonprofit corporate form should also be read in light of the aims of nonprofit policy. As noted above, nonprofit law is openly aspirational, granting special status and tax perks to organizations that serve supposedly civic ends, like charity, social services, and education. By granting these perks to entities that are structured to be accountable to funders rather than members, law grants its imprimatur to this top-down model of civic engagement. Brakman Raiser entertains the idea of dubbing corporate-structured nonprofits a less noble-sounding title, like “nondistributing corporations.”\textsuperscript{309} This is, of course, only a symbolic step towards building a system that incentivizes democracy rather than wealth-protecting philanthropy; amending law to ensure participatory democratic ends is the broader aim.

D. Nonprofits Versus Democratic Organizations

In the realm of nonprofit law, as in the law of political parties, labor unions, and non-labor collective organizations, existing law disfavors the formation of membership-based, value-driven, power-building democratic organizations. Law is a key part of the puzzle behind the hierarchical, donor-driven character of the third sector.

Legal modifications cannot, in themselves, brush away the power of concentrated wealth over the agenda of the nonprofit world—that is a symptom of

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\textsuperscript{303} See generally Reiser, supra note 280, at 829–35.\\
\textsuperscript{304} See generally id.\\
\textsuperscript{305} See generally id. at 842–49.\\
\textsuperscript{306} See generally id.\\
\textsuperscript{307} See generally id. at 846–48.\\
\textsuperscript{308} See generally id.\\
\textsuperscript{309} Id. at 897.
\end{flushleft}
unequal power that cannot be easily redressed. However, law does shape how these entities form and the extent to which they are susceptible to democratization. As it stands, nonprofits occupy a central space in our political life. Unless and until they can be democratized, they will stand as an obstacle to a more democratic society.

CONCLUSION: CHANGING LAW TO TURN SPECTATORS INTO PARTICIPANTS

I wrote this essay about a general problem: across an array of domains, legal rules prevent the formation of participatory, value-expressing, power-wielding democratic organizations. These legal barriers to collectivity turn the people of the United States into political spectators rather than participants. This anti-collectivity is as foundationally anti-democratic as the prominence of big money in politics and the undemocratic electoral character of the Senate. Despite the mainstream media’s persistent lamentation of “partisanship,” there is actually very little partisanship in this country: people who watch Fox News or MSNBC, and argue with the rival camp on Facebook, are no more participating in party politics than Eagles fans are directing how the team will handle the next third and long.

The spectator character of our politics manifests in plain view as popular dissatisfaction with the status quo increases. The 2020 George Floyd protests were by some counts among the largest in U.S. history; however—and despite solid grassroots organizing—millions of people left the rallies with little idea of what can be done to achieve change beyond elections and persuasion. Bernie Sanders ran for president pledging to be an “organizer-in-chief” and gained a large and dedicated following; however, the campaign’s legacy is principally a discursive shift and a fairly conventional progressive 501(c)(4) organization, Our Revolution. People are displeased but see little way to achieve change.

Unfortunately, while the problem is a general one, the death comes from a thousand cuts: from county-level party bylaws to judicial distortion of anti-monopoly law to the Internal Revenue Code to the Taft-Hartley Act—and the examples presented here are by no means exhaustive. This presents a formidable challenge, as there is no nerve center for a mass movement to target the problem—if we manage to form such a mass movement despite these obstacles. In addition, and unsurprisingly, the very people with the greatest capacity to enact these changes are often the ones who would lose the most from so doing.

This involves turning progressive lawyers’ focus away from the courts and towards the operation of rules in building power in civil society. The efforts of


corporate lawyers are already oriented toward building power outside of courts,\textsuperscript{312} and it is past due that democratically-minded lawyers do the same. This is essential in an era when the idealized myth of the judiciary as a counter-majoritarian defender of vulnerable groups like criminal defendants and whistleblowers has given way to a harsh reality of the judiciary as a counter-majoritarian defender of corporate power and state-level political elites.

The obstacles to achieving these changes are formidable, and winning will take a long time. The legal obstacles in our way are real but not insurmountable. To build true democracy we need true partisanship: the right to band together with our fellows and form factions that can exert power and express values.