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PROP UP THE HEAVENLY CHORUS? LABOR UNIONS, TAX POLICY, AND POLITICAL VOICE EQUALITY

PHILIP T. HACKNEY[†]

“The function of democracy has been to provide the public with a second power system, which is an alternative power system, which can be used to counterbalance the economic power.”

E.E. Schattschneider

INTRODUCTION

Labor unions are weak politically and continue to decline in number and political power in the United States.¹ Many contend that this is a positive development for the country because they believe labor unions cause economic harm.² Others see this loss as unfortunate and harmful because the decline of labor comes

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¹ Craig Becker, *The Pattern of Union Decline, Economic and Political Consequences, and the Puzzle of a Legislative Response*, 98 MINN. L. REV. 1637, 1638, 1641 (2014); PHILIP YALE NICHOLSON, *LABOR'S STORY IN THE UNITED STATES* 279–36 (2004) (anecdotally detailing the declining power of unions from 1968–2004); KAY LEHMAN SCHLOZMAN ET AL., *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* 87–94 (2012) [hereinafter *UNHEAVENLY CHORUS*].

² MORGAN O. REYNOLDS, *MAKING AMERICA POORER: THE COST OF LABOR LAW* 187–88 (1987); F.A. HAYEK, *STUDIES IN PHILOSOPHY, POLITICS, AND ECONOMICS* 280–94 (1967).

with a reduction in working class benefits and opportunities, and also because it exacerbates economic inequality.³ These forces battle over policies focused on the ease of union organization and maintenance such as right to work laws and union shops. While these are important policies for labor union power,⁴ this Article examines labor union tax treatment instead. The Article focuses primarily on whether we should grant exemption from federal income tax to these interest groups, but also considers whether labor union members should be allowed to deduct labor union dues. In evaluating these questions, this Article focuses on the value of groups in our democracy in a social choice function model, rather than on the economic benefits of labor unions in a social welfare function model.⁵ A review of labor union tax treatment suggests that we systematically undermine the important voice of labor in our democracy. This Article proposes some changes to tax policy related to labor unions as a result of this review.

In this Article I consider two somewhat divergent income tax policies: the tax treatment of labor union income and the deductibility of labor union dues. The first raises the issue of whether we should tax the economic activity of a particular legal business entity. The second raises the issue of whether certain individual expenditures should offset income for tax purposes. Both issues raise, as a primary matter, whether the expenditures or income represent “real income.” I argue labor union revenue is real income, and that therefore its exemption should be justified by some policy goal.⁶ In other words, there is nothing special about the income earned by labor unions that makes it entitled on its face to exemption from income tax. Conversely,

³ Jordan Brennan, *United States Income Inequality: The Concept of Countervailing Power Revisited*, 39 J. POST KEYNESIAN ECON. 72, 72–73 (2016).

⁴ Patrick Flavin & Michael T. Hartney, *When Government Subsidizes Its Own: Collective Bargaining Laws as Agents of Political Mobilization*, 59 AM. J. POL. SCI. 896, 896 (2015).

⁵ See CHARLES R. BEITZ, POLITICAL EQUALITY: AN ESSAY IN DEMOCRATIC THEORY 20–21 (1989) (discussing the different possible constructions someone might mean by political equality, with one focused on maximizing a social welfare function, and another primary theory focused on maximizing a social choice function).

⁶ See generally Philip T. Hackney, *What We Talk About When We Talk About Tax Exemption*, 33 VA. TAX REV. 115 (2013) [hereinafter *Talk About Tax Exemption*] (arguing that all mutual benefit organizations, such as labor unions, should be presumed to be taxable unless there is a strong policy reason for subsidizing the activity).

because labor union member dues payments represent an amount that reduces income of the labor union member, we should allow the deduction in the ordinary course of business unless there is a legitimate reason for not allowing that deduction.⁷

In evaluating these two policies, I adopt a social choice function model. Under this model, we should maximize the number of individuals who have an opportunity to express their voice to influence our democracy. As a very simple and incomplete example, if there were 100 people in a particular democracy, and we said that only 25 had the ability to influence the final decisions, a policy that increased that number of individuals to 30 would improve the social choice function. The incompleteness of the example is the question of the quality of the voice. If the new five now speaking are only reiterating the voice of the 25 already speaking, then there is no real enhancement to social choice function. In this Article, I struggle to assess when social choice function is enhanced by this policy but do my best to suggest a way through the problem with the limited information at our disposal.

Importantly, the influence at issue in political voice is more than an opportunity to vote for representatives; it includes the opportunity to engage in policy discussions and influence final decisions on governmental policy. As I will develop in the Article, in a large and modern democracy, a polyarchy, the primary means of obtaining political voice for most citizens is through interest groups. Thus, the question becomes, where we can identify a group that suffers from a particularly weak political voice, should we and could we consider enhancing that political voice through public policy.

When viewed through this social choice function model, it becomes difficult to justify current policy regarding the deductibility of union dues. Under the tax law, an employee can only deduct unreimbursed business expenses to the extent they exceed two percent of her adjusted gross income. Because labor

⁷ Although labor union dues are generally considered a deductible trade or business expense under 26 U.S.C.A. § 162 (West 2014) of the Code, because labor union members are employees they are typically unable to deduct labor union dues either as an above the line deduction under 26 U.S.C.A. § 62 (West 2014), or as an itemized deduction under 26 U.S.C. § 67 (2012); instead they generally may deduct these expenses as miscellaneous itemized deductions only to the extent those amounts exceed two percent of the members adjusted gross income.

union dues are considered unreimbursed employee business expenses, union members are rarely able to deduct them. A business owner generally faces no such challenge in deducting his own association dues.⁸ Given the political voice inequality that exists between these two classic interests in favor of the businessman's political voice, it is hard to justify making that differential worse through the tax system. To improve the social choice function, we should at the least make the two deductions equivalent by denying or allowing both. I explore the pros and cons of these choices in Part VI.

The case of tax exemption for labor unions is more complex under this social choice function model. It depends on other policy choices made. For instance, if other interest groups are provided tax exemption—the current status quo—then the case for labor union tax exemption is overwhelming. It is only fair to extend the exemption to labor interests if business interests benefit from the policy. Denying labor exemption would decrease the social choice function by reducing the voice of labor in a relative sense, compared to other political voices that the policy would enhance, such as that of business.

However, labor interests are better off in a state where all interests are taxed. The problem of collective action makes it more difficult for large, relatively poor, and less skilled interests like labor to form, as compared to smaller, wealthier, more skilled interests, like those that form in the business context. In other words, exemption as a benefit is much more likely to be of assistance to business interests in any case than labor interests. Many business interests get a windfall from this exemption from tax. Taxation is likely to be more of a hindrance to the better capitalized business interests. Based on this, I argue the social choice function would be increased under this taxable state because labor interests, as a relative matter, would not experience the same type of reduction in voice as would other more powerful interests who would now have to pay tax on

⁸ Some have objected that this is a much broader problem. We widely make it difficult for all employees to deduct unreimbursed employee business expenses. The fact that labor union members are unable to deduct their dues is simply a narrow instance of this problem. I argue later in the Article that the labor union case is more significant because of its direct impact on political voice. In other employee business expense cases, this issue is not close to the fore.

income. Thus, we could improve our current tax policy simply by rescinding tax exemption for both labor and business interests, and maybe others as well.

Finally, the collective action challenge of labor in theory and practice is so severe that a policy of tax exemption for labor interests alone could be justified as a modest attempt at righting political voice equality in our democracy. In a social choice function sense, providing a subsidy to labor interests, while not providing the subsidy to others, like business interests, could bring more voices into the political debate. However, as will be developed below, the case for this is not strong. The policy instrument provides meager support and is not well-tailored to accomplish this purpose.

Our current tax-exemption system⁹ generally allows any group that wants to form a non-profit organization to form and obtain tax-exempt status.¹⁰ For instance, Congress exempts many special interests from federal income tax, such as trade associations, social welfare organizations, and labor unions.¹¹ No one has offered a strong theory supporting this policy to subsidize groups that work to influence our political system. Given the attempts we make to limit the ability of interest groups to influence our elections and policy generally,¹² this choice is odd. While providing charitable organizations a subsidy can be justified in part on the fact that they provide public benefits, labor unions are little involved in provision of direct public benefits. As mutual benefit organizations, they look to advance their members' interests through negotiating with management and seeking their wants through the political process.

To evaluate the idea of tax exemption generally as it applies to labor unions, I consider the major non-profit tax-exemption rationales. I find them important, but unsatisfactory, because

⁹ 26 U.S.C.A. § 501 (West 2014).

¹⁰ There are limits of course. A particular company cannot form a business league to support its own product. It must instead form to support a line of business. None of the tax-exempt interest group organizations can engage primarily in political campaign activity.

¹¹ 26 U.S.C.A. § 501(c)(4)–(6) (West 2014). These are respectively social welfare organizations, labor organizations, and trade associations. Although the Code refers to labor unions as labor organizations, I will refer to “labor unions” in the rest of the paper.

¹² ANTHONY CORRADO ET AL., *THE NEW CAMPAIGN FINANCE SOURCEBOOK* 2–6 (2005).

they all fail to consider the important value of political voice equality. Market-failure theory suggests we should subsidize organizations that offer goods or services subject to market failure.¹³ While we can show a market failure in the case of labor interests generally, the theory fails to tell us what type of market failure is necessary to justify the subsidy. Government failure theory suggests we allow nonprofits to provide collective goods and services that the government fails to provide.¹⁴ This theory focuses on goods and services that are not critical to the functioning and decision-making of the government itself. Interest groups, however, are fundamental to the government structure itself. Government failure theory fails to consider whether there might be a different quality and importance to such services. Pluralism theory considers the deeply political nature of much of our nonprofit tax exempt sector; it contends that we should exempt nonprofit organizations from tax to facilitate democracy. The central idea of this theory is the more political voices we highlight, the better off our democracy. The theory, however, fails to consider that many nonprofit interests face little to no collective action problem. Those organizations with greater wealth and skill are likely to face less of a collective action problem and also more likely to draw a greater return from the subsidy. Thus, the subsidy will work to enhance the voice of those already strong. This enhancement is likely to work to drown out weaker voices.

There are many theoretical or functional lenses through which we could view these nonprofit organizations. We could look at the impact they might have on our economy in a functional sense such as how the presence of labor unions impact the distribution of resources. We could then assess in a theoretical sense whether the presence of labor unions results in a more fair distribution of resources. However, I contend that viewing them through a functional lens, such as viewing them in

¹³ Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from the Corporate Income Taxation*, 91 YALE L.J. 54, 67–70 (1981) (most clearly articulating contract failure theory).

¹⁴ Burton Weisbrod, *Toward a Theory of the Voluntary Nonprofit Sector in a Three-Sector Economy*, in THE ECONOMICS OF NONPROFIT INSTITUTIONS 21 (Susan Rose-Ackerman ed. 1986) (most clearly articulating government failure theory).

their interest group role, and through a theoretical lens, such as the governance role they play in our democracy, provides the most significant and important insights to our tax policy.

I have previously examined tax-exempt business leagues through the lens of interest group literature.¹⁵ An interest group is “a collection of individuals or a group of individuals linked together by professional circumstance, or by common political, economic, or social interests” that satisfies three requirements: (1) the organization is not a political party, that is, the name of the organization does not appear on a ballot; (2) it uses some of its resources to try to influence legislative, judicial, or executive decisions at any level of government; and (3) it is organized outside of the government it intends to influence.¹⁶ Viewed as an interest group primarily, we can see that business leagues do not face significant collective action problems and cannot be shown to face some other significant market failure to warrant tax exemption.¹⁷ Just as a matter of its place in the marketplace, there is no indication that there is any general lack of business interest groups.

Labor interests are also interest groups, but they present a different case. Theory suggests a large, latent interest like that of labor should experience high difficulty in organizing to provide the collective goods of representation before government and bargaining with employers.¹⁸ Evidence shows that labor is highly underrepresented politically. In a study from 2001, labor made up only one percent of the interest group sector.¹⁹ That was compared to business nonprofit interest representation of twenty percent, and business corporations at thirty-five percent. There is, thus, evidence that a severe market failure hinders labor from representing itself in the market and before government in a comparative sense. This suggests that current tax exemption policy generally has it backwards. Instead of providing every group exemption we should tailor exemption only to those groups

¹⁵ Philip T. Hackney, *Taxing the Unheavenly Chorus: Why Section 501(c)(6) Trade Associations Are Undeserving of Tax Exemption*, 92 DENV. U. L. REV. 265, 269 (2015) [hereinafter *Taxing the Unheavenly Chorus*].

¹⁶ JOHN R. WRIGHT, INTEREST GROUPS AND CONGRESS: LOBBYING, CONTRIBUTIONS, AND INFLUENCE 22–23 (1996) (internal quotation mark omitted).

¹⁷ See *Taxing the Unheavenly Chorus*, *supra* note 15.

¹⁸ MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 57–59 (20th prt. 2002) [hereinafter COLLECTIVE ACTION].

¹⁹ UNHEAVENLY CHORUS, *supra* note 1, at 321 tbl.11.3.

that really need the assistance. Additionally, generally denying labor union members the ability to deduct union dues is likely to directly harm political voice equality where business interests so readily have access to that deduction.²⁰

This Article contributes to the tax legal literature by providing an analysis of labor unions and how we tax them. Although labor unions as a whole are a very small part of our economy and tax system, by looking at one narrow section of the tax-exempt sector we can shed light on the rest of the exempt sector. Additionally, although most tax policy scholarship focuses on one of three values—equity in an economic sense, efficiency in an economic sense, and administrability—I focus primarily on the value of equity in a governance sense.

I argue that, at least in the sphere of tax where tax choices directly impact our democracy, we should take into consideration values of democracy. In that sphere, we should not adopt tax policies that increase political voice inequality. Also, it is reasonable to adopt tax policies that increase the equality of political voice. Because I find that our current taxing system of interest groups broadly increases political voice inequality, I find our tax system wanting and make recommendations for change.

The Article proceeds as follows. Part I covers the tax treatment of labor interests. Part II begins to build a social choice function model by sketching the case for democracy and thereby political equality. Part III completes the social choice function model by highlighting the role of groups such as labor unions within a democracy and evaluates the role groups play in the matter of political equality. Part IV describes the history and tax law of labor unions. Some who are unfamiliar with the tax-

²⁰ When looking at a tax subsidy, it is important to consider whether the person who is named as the beneficiary of the deduction will be incentivized by that deduction. That question is the question of who receives the incidence of the subsidy. That question depends on the elasticity of a union member to paying union dues. Given the substantial challenge in organizing unions, it seems likely that, at least as an initial matter without the consideration of any other laws, labor union members are highly elastic as to whether they will pay union dues or not. Their return is unclear and is often unlikely to exceed the annual cost. Where there is a union shop, however, that requires union members to pay union dues whether they want to belong or not, the answer is obviously different. Nevertheless, the primary other party that might receive the incidence of the money gained through the deduction would be the union itself, meaning that the question of who gains the incidence of the deduction does not matter if all we care about is whether the policy would increase union activity or not.

exemption requirements of labor unions might want to jump to Part IV.B for a discussion of that area of the law first. Part V assesses theories regarding the rationale for exempting nonprofit organizations. Part VI analyzes the implications of democratic group theory for the tax treatment of labor interests.

I. PRACTICAL IMPLICATIONS OF TAX TREATMENT OF LABOR INTERESTS

This Part looks at the technical tax treatment of labor union income and the payment by members of labor union dues. There are three primary types of labor union income: (1) member income, (2) nonmember income, and (3) investment income.²¹ An initial question is whether the “income” exempted is “real income” that should in the ordinary course of an income tax be taxed. Because there appears to be a real transaction in a commercial space between individuals and a legal entity to acquire services or goods from that entity, the income exempted seems to be real income that should ordinarily be taxed in our economy; any decision to exempt that income should be supported by a policy intended to incentivize this activity. Labor union dues are considered at the end of this Part.

A. *Member Income*

Labor union members pay member dues to the union. Those dues entitle members to certain rights and benefits that have a value.²² For instance, in exchange for the dues, the union might engage in collective bargaining on behalf of the employees and might also defend an employee who has a dispute with management. In effect, the labor union provides services to its members in exchange for a fee just the way a health club provides services to its members in exchange for a fee. Because a labor union is a separate legal entity from its members, this transaction should result in income to the labor union for the purposes of the income tax.

²¹ *Taxing the Unheavenly Chorus*, *supra* note 15, at 268.

²² Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 354 (1976)

U.S. tax law treats a corporation as a legal entity that is separate and apart from its members.²³ Under that theory, when a member pays dues to a union in exchange for certain goods and services he is dealing with a legal entity that is separate from himself. Generally, our income tax law has treated such a moment as a moment to recognize income for tax purposes.²⁴ However, some do not accept member dues as income of the nonprofit.²⁵ They argue that the nonprofit corporation is no more than a place where nonprofit members are pooling income to do things nonprofit members could do on their own. The idea is that neighbors A, B, and C could pool money to construct a tennis court. A, B, and C would then each pay the costs of maintaining the court. We should not suddenly tax A, B, and C as an entity simply because they are carrying on activity together. Utilizing this characterization to describe a large complex organization like a union that is an interest group delivering collective benefits seems questionable. The key aspect of interest groups is that they form because no member could provide these collective goods and services on his own. The entity and collective action of members joined together is necessary for its power. There is a real difference between the member and the organization.

Even if you accept the pooling income argument, not all member income is easily placed into that category. When a union sells goods or services that are not core goods or services of the union, we might think of this income differently. Thus, where a union sells education, insurance, or death benefits to its members, we might think of it differently than when it sells collective bargaining with an employer. In the end, unions sell

²³ See *Moline Properties, Inc. v. Comm'r*, 319 U.S. 436 (1943).

²⁴ However, there is a real question as to why we would apply a tax to a corporate entity. A corporate entity is a legal fiction, after all. I take a look at that question in *Talk About Tax Exemption*, *supra* note 7. There I argue that the two best theories are the shareholder theory that holds we tax corporations to tax the shareholders, and the real entity theory that suggests the corporation is a thing that has power that can be regulated through taxation. Both of these theories could arguably apply to a labor union, making it a good subject of taxation.

²⁵ See, e.g., Bittker & Rahtert, *supra* note 22, at 343 (discussing the idea that we might view church congregations as only pooling resources rather than selling services); David S. Miller, *Reforming the Taxation of Exempt Organizations and Their Patrons*, 67 TAX LAW 451, 455, n.6 (2014) (discussing that legislators adopted the tax exemption scheme for social clubs in order to not impose harmful tax consequences on those who choose to pool their resources together to engage in recreation); Daniel Halperin, *Income Taxation of Mutual Nonprofits*, 59 TAX L. REV. 133, 134 (2006).

services that differ little from normal business activity that we apply the income tax to in most other situations. Members pay dues to acquire collective bargaining with an employer, magazine subscriptions, management grievance protection, and some lobbying and political activity. We should justify why we would diverge in income tax treatment for this type of financial arrangement.

B. Nonmember Income

A union generates nonmember income when an individual who is not considered to be a member pays the union for goods or services.²⁶ For instance, some unions sell health insurance to those who are not members of the union. This type of sale results in nonmember income to the union. The union realizes income to the extent the amount paid exceeds the costs of that good or service. Most theorists consider this income as income that should be taxed in a normal income tax system. Exemption of this income is effectively a subsidy to the union to the extent we do not tax it. With other mutual benefit nonprofits—social clubs, for instance—Congress rightly taxes such nonmember income.²⁷

C. Investment Income

Investment income is the return from stocks and bonds or other capital investments.²⁸ Most theorists also accept the exemption of this income as a subsidy to a nonprofit organization. An individual cannot generally invest income and avoid the income tax on the return from that investment. In effect, allowing tax exemption for a particular purpose allows the creation of a communal tax-free investment vehicle for that purpose in the same way we allow individuals to establish tax-free savings vehicles for retirement or education for their children.

²⁶ See Halperin, *supra* note 25, at 136.

²⁷ 26 U.S.C. § 513 (2012).

²⁸ *Taxing the Unheavenly Chorus*, *supra* note 15, at 293.

D. Impact of Tax Exemption

The regime of tax exemption encourages a nonprofit to hold earnings beyond a taxable period. This is because tax exemption only provides a subsidy to the extent there are earnings and those earnings are not immediately spent within a particular taxable year. Additionally, exemption primarily provides a benefit of the deferral of tax, rather than permanently exempting income from tax. Union expenses are generally deductible unless they are used for lobbying or political activity. To the extent that the union holds earnings from one year to the next, the main issue would be that the union was able to deduct the amount early. Of course, this does not take into consideration the different tax rates involved between union members and the corporation, or different tax rates over time, or the fact that union members change over time.

If a union were taxable, it could avoid tax, or at least lower its taxable income, by ensuring revenues and expenses closely match. This may be difficult for a union because they typically act in part as an insurance service to the extent they hold strike funds or provide other insurance-like benefits to members. Additionally, any organization that is looking for stability values maintaining some savings. Thus, many unions would likely hold some percentage of profits into a future year.

E. Taxation of Union Dues

A union member's payment of dues generally is a deductible business expense.²⁹ However, most union members are unable to deduct this amount. Union dues are a miscellaneous itemized deduction.³⁰ Such a deduction can only be deducted to the extent all similar deductions exceed two percent of the individual's adjusted gross income. For instance, a union member with \$60,000 in adjusted gross income can only deduct union dues along with other miscellaneous items to the extent all of those items exceed \$1,200. If that union member pays \$400 in union dues, but incurs no other miscellaneous itemized deduction, he will not be able to deduct the amount. Even if the union member gets past this hurdle in part, the standard deduction is likely

²⁹ 26 U.S.C. § 162 (2012). However, dues used for lobbying or political campaign activity are not deductible under § 162(e).

³⁰ 26 U.S.C. § 67 (2012).

greater than the union member's total itemized deductions, meaning, again, that the union member will not be able to deduct this business expense.

The comparison to the businessman's trade union dues is important. As a business expense, those dues are deductible immediately from gross income above the line. There is no itemizing for the businessman. His income in most instances reduces his gross income.

It is quite possible that because union members generally cannot deduct their union dues, labor interests are collectively overtaxed rather than undertaxed. I will return to this point in Part VI when I analyze the case for how to tax labor interests.

II. DEMOCRACY AND THE ROLE OF GROUPS THEREIN

Most normative income tax scholarship focuses upon either an economic efficiency or economic fairness dimension to model an ideal system or to critique the current one. It asks whether a tax system is the most economically efficient or the most economically fair to different groups and classes of people. Nevertheless, in this Article I primarily critique our tax system on the dimensions of democracy and political voice equality. On economic fairness, many utilize an entitlement or welfarist model to assess policy.³¹ On economic efficiency, scholars often use the Pareto—or Kaldor-Hicks—efficiency of a competitive market as a model to assess policy.³² We lack a model to assess political fairness in a democratic system.³³ This Part, thus, begins to sketch a model of an ideal democratic system so that we can better assess current policy. I return again to this modeling in Parts III.D and Part VI.

³¹ Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1915 (1987).

³² Eric M. Zolt, *The Uneasy Case for Uniform Taxation*, 16 VA. TAX REV. 39, 62 (1996).

³³ See, e.g., David Gamage & Darien Shanske, *Three Essays on Tax Salience: Market Salience and Political Salience*, 65 TAX L. REV. 19, 80 (2011) (discussing the lack of a baseline to assess a neutral political system); David Lowery et. al., *Images of an Unbiased Interest System*, 22 J. EUR. PUB. POLY. 1212, 1212–13 (2015) (discussing that individual participation can be modeled on one-person one-vote, but that a pluralist group system lacks any coherent baseline upon which to judge whether it is unbiased).

Many elements of our tax system directly impact our democracy. The choice to adopt a progressive tax, the choice to impose an estate tax, the choice to apply a corporate tax, and the choice to exempt some organizations from that tax all impact our democratic system by impacting the political voice of various citizens and entities. Thus, it is worthwhile to consider the tax system's impact on our democracy, even in one small part of the system, in order to evaluate the income tax impact on democracy more broadly.

Should political voice equality be the sole or primary driver of income tax policy? No. Imposing confiscatory taxes to try to ensure perfect political voice equality is likely both problematic from an efficiency standpoint and American norms of fairness. While striving towards democracy is critical to a fair society, there are other important factors critical to assessing a tax system, including its economic fairness and efficiency. The democracy-enhancing nature of a policy is only one factor in analyzing a tax system. In the case of tax exemption and interest group dues, though, it is a particularly important factor, and maybe even the defining factor.

This first part sketches the necessary conditions of democracy, discusses why democracy, and focuses closely on the element of political equality.³⁴ A model of an ideal democracy allows us to critique its current form in the United States and to assess whether our choices of taxation impact our democracy in a positive or negative way. Finally, it examines the role groups play within that system. Some might question the need to detail why democracy. However, many have different conceptions of what democracy might mean, and this effort will help clarify the terms of democracy. Additionally, some do not really believe in democracy after all. The Founders themselves, for instance, were highly distrustful of unfettered democracy and designed a system to combat against a majority taking complete control. Someone who does not believe democracy to be the right form of government may also not accept the conclusions of this Article.

³⁴ In sketching this account of democracy, I rely heavily upon the work of Robert Dahl. In particular, I rely upon: ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* (1989); ROBERT A. DAHL, *ON DEMOCRACY* (1998) [hereinafter *ON DEMOCRACY*]; ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION* (2d ed. 2003); ROBERT A. DAHL, *ON POLITICAL EQUALITY* (2006) [hereinafter *ON POLITICAL EQUALITY*].

A. *How and Why Democracy?*

The fundamental question in considering politics is how the group is going to decide what to do. In other words, who gets to determine what is in the best interest of the group, the association, the state? The simplest and most direct answer to this question is: “Among adults no persons are so definitely better qualified than others to govern that they should be entrusted with complete and final authority over the government of the state.”³⁵ To put it more positively, we can make the moral judgment that all people are of equal, intrinsic worth and, therefore, ought to have an equal say in deciding what the group is going to do. Professor Robert Dahl refers to this as the principle of “intrinsic equality.”³⁶ Once one accepts this moral judgment about individuals, there are a series of principles that lead to some form of democratic government. Democracy is an imperfect system that is littered with contradictions; and yet, if one accepts the basic principal of intrinsic equality, democracy appears to be the best choice.

What are the ideal requirements for a democracy? A democracy must allow all individuals an opportunity to participate in discussing options before a decision is final.³⁷ That opportunity must be equal and real. All individuals in the democracy must have an equal vote in any final decision.³⁸ All the members must have an equal and real opportunity to examine and understand both the policy being considered for a vote and all reasonable alternatives.³⁹ That understanding should include an appreciation of the consequences of the decisions. Similarly, all members must be involved in setting the agenda of the association.⁴⁰ Finally, all competent individuals in the association, which generally means all adults, must have these rights.⁴¹ To the extent any of these requirements are missing, political equality will be lacking.⁴²

³⁵ ON POLITICAL EQUALITY, *supra* note 34, at 4.

³⁶ *Id.*

³⁷ ON DEMOCRACY, *supra* note 34, at 37.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 38.

⁴¹ *Id.*

⁴² *Id.*

To highlight what this means it is useful to consider the two primary alternatives to democracy—*anarchism* and *guardianship*.⁴³ A theorist who falls into either of these camps is much less likely to be persuaded by the arguments in this Article, because the argument depends largely on an acceptance of the principles of democracy. They may still support the case in part because many of the principles are similar.

In a highly simplistic sense, an anarchist wants to maximize human freedom and believes that a state is the primary inhibitor of human freedom.⁴⁴ The fundamental principle of anarchism is that state coercion is evil.⁴⁵ Thus, even if a state employs a democratic process to make rules and to enforce those rules, the anarchist will find that state illegitimate because it also uses coercion. The anarchist believes the state should be run by voluntary organizations instead of through a democratic process.⁴⁶ Thus, an association or state following anarchist principles that wants to follow some form of democracy needs complete unanimity to take action.

The anarchist criticizes democracy by pointing to the harm of minority coercion. This is a problem for the democratic theorist because he likewise does not believe it right for someone else to make choices for another. Like the anarchist, he believes that coercion is wrong. Thus, the anarchist critique puts the democratic theorist in a bind. In a democracy, the majority makes the choice for a demos and thereby coerces a minority.⁴⁷ The anarchist critique calls into question whether majority rule is just.

How does democracy withstand this critique? The answer is twofold. First, the democratic theorist notes that anarchy is impractical and maybe impossible. Second, he accepts that the

⁴³ DEMOCRACY AND ITS CRITICS, *supra* note 34, at 37.

⁴⁴ *Id.* Anarchism is a very loosely held together system of thought. For a decent discussion of it as both a theory and a movement, see APRIL CARTER, THE POLITICAL THEORY OF ANARCHISM (1971), <http://www.ditext.com/carter/anarchism.html> (in particular, see Chapter 2, Anarchism and the State).

⁴⁵ DEMOCRACY AND ITS CRITICS, *supra* note 34, at 37.

⁴⁶ An anarchist would presumably fully support tax exemption for any nonprofit organization and would likely try to get as many aspects of our economy into that sector as possible, in order to erase as much of the state as possible. A libertarian would likewise be highly supportive of robust tax exemption for nonprofits. In both instances, though, they would expect those entities to be completely voluntary.

⁴⁷ DEMOCRACY AND ITS CRITICS, *supra* note 34, at 37.

coercion of the minority is problematic but argues that the democratic system, among governmental systems, results in the least amount of coercion.

There are significant problems to the practicality of the anarchist case. A key belief of the anarchist is that humans can successfully work together *solely* through voluntary organizations. They believe it is possible to operate a complex society with absolutely no coercion. However, there are no credible examples of such a government succeeding.⁴⁸ Additionally, there are two theoretical problems with the anarchist solution. First, anarchists must believe that without a state there would be no coercion.⁴⁹ If they are right, then they have a good case; but, based on almost all written history, it seems reasonable to conclude that coercion is ubiquitous among humanity. In a society without a state, the strong will almost certainly take advantage of the weak. If it can be shown that you are likely to have less coercion via a democratic state, then the anarchist argument under a utilitarian analysis should fail even under anarchist theory. Second, most anarchist approaches depend upon some form of coercion to overthrow the original state.⁵⁰ Thus, even anarchists accept the coercion of others to get to a better moral situation.

The democratic theorist uses the anarchist's acceptance of coercion to support democracy. If coercion is acceptable to get to a better state, presumably coercion might be just if it could be shown that this particular coercion allowed a state to maintain the least amount of coercion. The democratic theorist argues we achieve the least amount of coercion in a state where a majority controls the decisions of the state, and we also maximize the social choice function.⁵¹ Perhaps the most potent critique though remains that unless an anarchist's utopian vision of a society without coercion can exist, the anarchist vision is simply unworkable.

⁴⁸ *Id.* at 46.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 45.

Guardianship, unlike anarchism, is a practical alternative to democracy. Plato most famously proposed this form of government in *The Republic*.⁵² There he argued that we should establish a society that trains a class of people who are exceptional individuals in that they are both wise at governing and able to put the interests of the public ahead of their own interests. B.F. Skinner also, in a more modern sense, made a case for governance by psychologists.⁵³ A guardianship theorist holds two primary beliefs: (1) most people are incapable of governing, and (2) society can locate and train a small group of highly governance-capable people.⁵⁴ Guardianship thrives because many instinctively believe there is some class of people that is qualified to govern, and conversely, that most people are not capable of governing.

The guardianship theorist finds no problem supporting the first proposition. Any review of the voting records of citizens, their competence regarding basic civic facts, and their lack of an ability to think of more than their own self-interests makes a pretty powerful statement regarding the supposedly limited ability of most people to govern.⁵⁵ It is the second proposition that is problematic. Proponents of guardianship must be able to also make the case that there are individuals who we can identify and properly train to wisely rule. The proponent argues that because we already pick individuals to perform highly complex tasks there is no reason we cannot do the same for the task of governing.⁵⁶ For instance, we identify and train physicians to perform tasks that are very difficult and subject to matters of life and death. There is no reason to believe we could not do the same for our rulers argues the guardianship theorist.⁵⁷ However, to make the positive case, we must be able to find this small

⁵² See generally PLATO, *THE REPUBLIC* (Francis MacDonald Cornford trans., Oxford Univ. Press 1970) (n.d.).

⁵³ See generally B.F. SKINNER, *BEYOND FREEDOM AND DIGNITY* (2007).

⁵⁴ *DEMOCRACY AND ITS CRITICS*, *supra* note 34, at 59.

⁵⁵ See, e.g., BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* (2008) (making the case that most Americans are so ignorant of economic policy that they are not capable of governing on matters of economics); cf. MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* 13 (2012) (arguing that although the governing capabilities of most Americans are very low, they have enough capacity to govern themselves).

⁵⁶ *DEMOCRACY AND ITS CRITICS*, *supra* note 34, at 62.

⁵⁷ *Id.* at 62–63.

minority of individuals with the moral, instrumental, and practical knowledge to govern, and these special people must be able to genuinely put the public ahead of themselves. This seems highly implausible.

If we reject guardianship as impractical or impossible, can we justify the principle of intrinsic equality? It is the building block of the democratic idea. It justifies the ability for us to accept that all adults in the group are capable of governance. The formation of the United States as a democracy of course relied upon this principle in the Declaration of Independence. But as suggested above by those who advocate guardianship, it is by no means self-evident that all people are created equal. We all differ in ability both intellectually and physically. These differences might allow someone to reasonably conclude that there are individuals who should govern because they have particularly strong capabilities in that regard.

Nevertheless, there are still good reasons to accept the intrinsic equality principle. First, almost all religious traditions and ethical traditions operate on this principle.⁵⁸ Second, as explored in part when considering guardianship, all other principles are weaker.⁵⁹ Those who are in the glorified category of superior are almost certainly convinced they are correct, but the others who are not considered superior are likely to disagree. Third, the principle is supported by prudence.⁶⁰ It is the principle that best ensures we are treated as fair as possible. Finally, although perhaps guilty of circular reasoning, the principle is likely to be acceptable to more people than any other.⁶¹ Again, the principle maximizes the social choice function.

The principle of intrinsic equality leads to a conclusion that political equality or political voice equality are necessary to any just political system. Dahl labels this value “inclusion.”⁶² Political voice equality means everyone in the group must have the opportunity to discuss potential policies, set the agenda, and vote on final decisions. John Stuart Mill spoke clearly on this

⁵⁸ ON DEMOCRACY, *supra* note 34, at 66. *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 291 (expanded ed. 2005).

⁵⁹ ON DEMOCRACY, *supra* note 34, at 66.

⁶⁰ *Id.* at 67.

⁶¹ *Id.*

⁶² *Id.* at 76.

point within a representative governmental context when he chastised the British government for failing to include the workingman in the decision making. Mill said:

[D]oes Parliament, or almost any of the other members composing it, ever for an instant look at any question with the eye of the working man? When a subject arises in which the laborers as such have an interest, is it regarded from any point of view but that of employers of labor?⁶³

This critique still has powerful resonance today as we will see when we review what the political voice of labor looks like today in the United States.

Beyond the principle of intrinsic equality, the other fundamental matter to democracy is the decision-making process. A democracy operates based on majority rule to maximize possible political equality in final decisions. In a utilitarian sense, the procedural rule of decision making based on majority rule should insure that the greatest number of people get their way on a particular policy. The rule should maximize the amount of freedom of the individuals of an association or state to govern themselves. However, the challenge is what to do if the majority adopts a rule that hinders some of the identified necessary elements of a democracy.

Once a final decision is made by majority rule, there will be some who did not get their choice. This is fine in most cases. But, if the majority eliminates a fundamental right—or rights—of the citizens of a democracy, then we no longer have a democracy. The typical solutions to this problem are that we develop a populace that respects the norms of democracy, or we establish an undemocratic means of enforcing fundamental rights—a Supreme Court, for example.⁶⁴ This particular conundrum is not for this Article to solve. However, the other challenging but integrally related question is considered in the next Section. How should we operationalize the ideal democratic principles into a modern, large state? This, after all, is what we have in the United States and is the more relevant issue for considering the place of a labor union in our democracy.

⁶³ JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 67 (New York, Harper & Brothers Publishers 1869).

⁶⁴ *DEMOCRACY AND ITS CRITICS*, *supra* note 34, at 155, 173.

B. Application of Ideal Democracy to the Large Modern State—the Problem with Groups

Ideal democratic theory is utopian in nature. Once a group is too large, it is impractical to achieve ideal democratic conditions. Providing ten people a real opportunity to speak, consider, and decide is a much different proposition than providing such rights to one thousand people, much less one million people. In a large state, political voice equality simply becomes impossible. Many factors lead to this problem: (1) differing abilities and resources; (2) scarcity of time for individuals; (3) numerosity; (4) the fact that the market impacts so many decisions; (5) the existence of international systems that impact our democratic choices; and (6) the reality that crises will occur.⁶⁵ These factors mean that certain individuals or organizations with greater skill, money, or time will have greater capacity to influence the agenda, the information, and the final decision of a large state. It means that we will likely stray far from the ideals of democracy we have already identified. We will lack political voice equality among citizens.

Nevertheless, ideal democratic theory provides a model for large democratic states to develop institutions that mimic the goals of the ideal democratic state. To achieve something close to democracy in large, modern democratic states, or polyarchies⁶⁶: (1) elect representatives of the people; (2) conduct elections regularly with fairness and without coercion; (3) guarantee freedom of speech, particularly on matters of criticizing the political system; (4) provide robust “[a]ccess to alternative sources of information” outside of the governmental regime; (5) allow associations, including political parties and interest groups, to form with ease; and (6) allow all adults to fully participate in all of the five freedoms listed above.⁶⁷

These institutions seem self-evident. Because there is no way to operate a pure democracy in a polyarchy, electing representatives becomes the only functional way for the society to govern itself. To obtain accountability of representatives, a polyarchy must adopt frequent elections.⁶⁸ Perhaps, most critically, freedom of speech, information, and association become

⁶⁵ ON POLITICAL EQUALITY, *supra* note 34, at 50–51.

⁶⁶ DEMOCRACY AND ITS CRITICS, *supra* note 34, at 117.

⁶⁷ ON DEMOCRACY, *supra* note 34, at 85–86.

⁶⁸ *Id.* at 95–96.

the foundations of democracy. These measures ensure that everyone has at least an opportunity to participate in information-gathering and agenda-setting. While citizens will not generally get a say in final decisions made by their representatives, at least they are never shut out of the discussion if these institutions are maintained.

However, do these five fundamental rights identified above ensure political voice equality necessary in ideal democratic theory? No. While implicitly found throughout those rights, none of those rights mandates a right to political equality. Because of the large size of the demos and the number and complexity of issues before the demos, most citizens will have no opportunity to participate in understanding the issues before the demos or in developing the information about alternative policies. Critically, citizens who are not a representative get no vote on final decisions of the demos, and most citizens will have only limited opportunity to participate in the decision-making process. Political voice equality in its ideal sense simply cannot exist in a polyarchy.

Nevertheless, a natural solution might exist. Groups of individuals with political interests might speak to political representatives on behalf of citizens to equalize citizen voice. The pluralists of the 1940s and 1950s argued that interest groups solved the problem of political voice equality. In the pluralist view, interest groups form for every possible citizen interest and express the voice of those many interests to representatives.⁶⁹ Are they right?

While the pluralists present a relatively positive vision of group activity in a democracy, there is a distinctly negative vision of interest groups in American thought. Many say that the problem with the governance of the United States is that those interest groups are instead "special interests" that harm democratic equality. In this vision, special interests control our representatives and thus our government for the benefit of some elite. Interest groups cause harm to our democratic system

⁶⁹ See JOHN GAVENTA, *POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACIAN VALLEY*, 5–7 (1982) (discussing the one dimensional vision of power of the pluralists Robert Dahl and Nelson Polsby suggesting that the American political system allowed anyone who wanted to express their voice to express it). Cf. ROBERT A. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMIES VS. CONTROL* 207 (1982) (denying any pluralist actually ever held this facile of a notion of pluralist theory).

because they pursue selfish special interests rather than the common public interest.⁷⁰ Professor Jeffery Berry says “there is a widespread popular perception that interest groups are a cancer spreading unchecked throughout the body politic.”⁷¹

Group activity presents a challenge to a democracy. Each group may represent a common interest as to its members, but the group will present a selfish interest as to the demos. This group activity then destroys the ancient political goal of government seeking some common public good. In a polyarchy, it is rare that we can find a common good. This is the pluralist problem in a polyarchy. The principles of democracy require even greater suffrage, and yet as those additional members come into the demos, the irreconcilable conflicts become ubiquitous. The democracy becomes a battle of groups for power rather than a collective of people searching for a path to the common good.

In *Federalist 10*, James Madison warned of the dangers of factions, which he defined as groups of citizens organized to promote some common interest that is adverse to the rights of other citizens or the common good of the polity.⁷² Madison believed a minority faction was not to be feared because the majority could ensure through the simple power of numerosity that the minority could not control.⁷³ He feared that a majority faction threatened the public good and the rights of citizens,⁷⁴ and therefore thought pure democracy was susceptible to tyrannical abuse by a majority.⁷⁵ Madison recognized,⁷⁶ in a

⁷⁰ JEFFREY M. BERRY & CLYDE WILCOX, *THE INTEREST GROUP SOCIETY* 16 (5th ed. 2009).

⁷¹ *Id.*

⁷² *THE FEDERALIST NO. 10*, at 48 (James Madison) (Yale Univ. Press ed., 2009). This point is important. Madison believed that there could be a single common will or public interest. Today, most doubt the idea that a singular public interest exists. In a polyarchy, there is a vast diversity of opinion as to the right direction for the polity to take. ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 159 (expanded ed. 2006) [hereinafter *A PREFACE TO DEMOCRATIC THEORY*].

⁷³ *THE FEDERALIST NO. 10*, *supra* note 72, at 50.

⁷⁴ Although Madison was involved in forming our democratic constitution, he seemed a proponent of guardianship. He genuinely believed there were some better suited to govern than others, and thought that a Republic was the best way to go about identifying those individuals. *A PREFACE TO DEMOCRATIC THEORY*, *supra* note 72, at 159. Madison was primarily concerned, as were many of his generation, and prior governmental theorists, with the masses taking away property rights. *Id.* at 161.

⁷⁵ When making this claim, he likely thought of groups like Shays' Rebellion. DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* 4 (Knopf ed. 1951).

large country, some form of associational pluralism is necessary to governance.⁷⁷ He believed that these factions could be controlled by forming a large republic with elected representatives of the people.⁷⁸ He believed the large republic and representatives would work to disperse the power of a majority faction enough to protect the common public interest from the selfish faction.⁷⁹

Unlike the pluralists, Madison seems to have built his political theory on the assumption that a government should work to try to accomplish a singular common good.⁸⁰ In the pluralist vision, there is no such thing as a common good for a demos. The pluralist maintains that we should allow a diversity of groups to seek their interests through government.⁸¹ Rather than interest groups being the problem of polyarchy to solve, interest groups are the solution to the challenge of allowing all citizens' voices to be heard. The common good is found in the process of democracy, rather than in the results. In other words, the focus is on a social choice function, rather than a social welfare function.

Whether there is a common good or not, there are still real problems with the pluralist vision and solution. Pluralist scholars Arthur Bentley and David Truman, in their early writings, seemed to suggest that any interest that wanted to form a group could in fact form that group.⁸² An interest is a collection of individuals that holds an interest in the governmental provision of some good, service, or policy. Those citizens may hold that interest and never form a group. Or, they may hold that interest and organize into a group. That organization may be formalized legally, or it might stay relatively unorganized. In the simple version of pluralism, all interests

⁷⁶ THE FEDERALIST NO. 10, *supra* note 72, at 48 ("The latent causes of faction are thus sown in the nature of man.").

⁷⁷ DEMOCRACY AND ITS CRITICS, *supra* note 34, at 299; *see also* UNHEAVENLY CHORUS, *supra* note 1, at 270–71.

⁷⁸ THE FEDERALIST NO. 10, *supra* note 72, at 51.

⁷⁹ *Id.*

⁸⁰ A PREFACE TO DEMOCRATIC THEORY, *supra* note 72, at 160.

⁸¹ DEMOCRACY AND ITS CRITICS, *supra* note 34, at 295.

⁸² UNHEAVENLY CHORUS, *supra* note 1, at 276. *See Taxing the Unheavenly Chorus*, *supra* note 15, at 274–78 (discussing the pluralist vision); *see also* E. PENDLETON HERRING, GROUP REPRESENTATION BEFORE CONGRESS 22 (Johns Hopkins Press ed. 1929) ("Not only are almost all sorts of interests and classes represented but also all sides of most questions as well.").

face the same challenge in formation. Truman described interest formation and mobilization like waves.⁸³ One group, like veterans, might organize to successfully seek pension benefits from the federal government. Postal workers might see that and organize to generate similar benefits, and private employees might seek such benefits too. Employers might then organize to offset these new benefits. And so it goes.

Since the early work on pluralism, many have identified significant problems with the theory. E.E. Schattschneider criticized the pluralist vision stating that “[t]he flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent.”⁸⁴ What he meant is that when we look at the groups that organize and operate in our democracy, we find that those groups overwhelmingly represent wealthy interests. This is the collective action problem: Some interests, such as the wealthy, are far more likely to organize and are far more likely to be heard than the unorganized. This problem is discussed more below in Part III. Additionally, there is no way to ensure equality of political voice when citizen voices come through different size and power groups.⁸⁵ We will always come up short on democracy when we operate through groups rather than through all individual voices because groups do not equally represent all voices. The problems with the group vision of democracy do not stop there. Groups suffer from an agency problem. Association leaders often speak for themselves rather than for the will of the members. Finally, groups do not provide the only method through which policy is made. Both elected representatives and individual citizens can have a real impact on our government agenda and decisions.⁸⁶

C. *Thoughts on a Model Polyarchical Democracy*

The significant lack of clarity in what an ideal polyarchy might look like and the difficulty with using groups as a proxy for individual political voice makes it difficult to model a just

⁸³ TRUMAN, *supra* note 75, at 59.

⁸⁴ E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 35 (1960).

⁸⁵ See UNHEAVENLY CHORUS, *supra* note 1, at 271–75.

⁸⁶ See, e.g., Arthur T. Denzau & Michael C. Munger, *Legislators and Interest Groups: How Unorganized Interests Get Represented*, 80 AM. POL. SCI. REV. 89, 89–90 (1986).

political system. Building a model upon pure democracy would be the easiest. The principle of one person, one political voice could be implemented by ensuring certain processes are always followed to respect every citizen's right to participate in the polity's decision making. But such a basis may be too simple for a sophisticated model given the complexity of a polyarchy and the relationship of groups to a polyarchy. Nevertheless, modeled off of the one person, one political voice principle, we might make some rough judgments that we could legitimately act upon.

For one, it seems reasonable to assume that there should be some sense of balance in the interest group sector. To the extent there is a lack of balance we might reasonably conclude that our democracy is coming up short on political voice equality. This model will have significant flaws, but it seems a workable starting place to consider the difference in political voice equality among groups and among citizens. If we are trying to maximize a social choice function, we should not implement a policy that exacerbate the political voice disparities between interests. We might even try to enhance the political voice of some weaker groups.

With this model in mind, the challenges presented by groups in a democracy and the collective action problem in the specific context of labor interests is considered in Part III. What is the relative political voice capacity of labor as compared to business interests and other groups?

III. LABOR UNIONS: COLLECTIVE ACTION AND REPRESENTATIONAL PROBLEMS

Labor unions negotiate employment terms for all the employees of a bargaining unit, provide strike pay for union members on strike, and lobby and engage in politicking to obtain the best laws for its members. Labor unions are fundamentally an interest group that provides a collective good and service to people who are employees.⁸⁷ Labor union members tend to come from lower to middle income families. Because of the collective action problem discussed below there are reasons to believe labor interests have a hard time organizing to advance their political voice. The potential group of labor union members is large and the return from organizing to each potential union member is

⁸⁷ JAMES Q. WILSON, POLITICAL ORGANIZATIONS 119 (1973).

likely far less than the costs of joining. Furthermore, by law, to act on behalf of labor, a majority of employees in a bargaining unit must vote for a particular labor union. This means that labor unions face a severe collective action problem.⁸⁸

“[M]ovements by the ‘powerless’ require strong and sustained outside support.”⁸⁹ Hourly wage earners have long faced great challenges acting collectively. Additionally, they have little role or say in the acts taken by their corporate employers.⁹⁰ Businesses made up of a few organizations that possess money and skills tend to have a much easier time organizing and representing their interests before the government.⁹¹ Thus, we should expect our political balance to be skewed away from labor interests and towards business interests.

This Part examines the collective action imbalance and finds the political voice of labor as compared to some other interests within our democracy to be particularly weak. This Part also evaluates the composition of labor unions and finds that there is not significant diversity of voices among different labor interests or localities. Certain regions and occupations are much more represented through this system. Finally, it looks at evidence on whether unions represent a common will of their members. It finds that there is evidence that the representation is biased to a certain extent towards managers. This agency problem seems to be consistent across the interest group domain. Thus, this Part finds problematically that even if labor is representing some labor voices, there are lots of labor voices that are left out of the political system.

⁸⁸ *Id.*

⁸⁹ J. Craig Jenkins & Charles Perrow, *Insurgency of the Powerless: Farm Worker Movements (1946–1972)*, 42 AM. SOC. REV. 249, 251 (1977).

⁹⁰ Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 283 (1998).

⁹¹ *Taxing the Unheavenly Chorus*, *supra* note 15, at 279.

A. *Collective Action Problem and Labor Union Evidence*

The theory of collective action predicts that interests made up of a small number of individuals under circumstances where the return from the interest being fulfilled is high will be more likely to organize than those interests held by many where the return is small.⁹²

Citizens who have a shared interest in some good or service may desire to get their government to provide the good, service, or policy. If we assume that this citizen is the rational, economically interested woman, when she looks at the question of whether to seek from the government the provision of that good, service, or policy she will make an economic calculation. Will the return from her effort be greater than the cost? We can also refer to this sought good, service, or policy as a collective good. By that I mean that once the good is provided, it will be provided to everyone. Thus, there will be a couple of challenges. Generally, the return of these types of collective goods is going to be smaller than the costs. Additionally, because the good is available to all, there is a free rider problem.

Under Mancur Olson's theory, industries populated by few players should be successful in organizing to seek collective goods from the government while individuals with shared interests who are vast in quantity, like manufacturing workers, should generally not be successful in such organizing.⁹³ Similarly, we should expect to see differences in ability to organize based on human and capital resources. Those interests associated with wealth and education are much more likely to organize than those associated with poverty and lack of education. Evidence is strong that the basic contours of these predictions hold.⁹⁴ Small wealthy groups form organizations with greater ease than large disperse organizations with small value to each individual member. However, the theory is not perfect. There is evidence that some citizen movements organize more often than Olson's theory predicted.⁹⁵

⁹² COLLECTIVE ACTION, *supra* note 18, at 57–59.

⁹³ *Id.*

⁹⁴ See UNHEAVENLY CHORUS, *supra* note 1, at 319–20.

⁹⁵ Jack L. Walker, *The Origins and Maintenance of Interest Groups in America*, 77 AM. POL. SCI. REV. 390, 396 (1983).

Large groups seem to solve the collective action problem through three primary means: force of law, selective incentives, or purposive incentives.⁹⁶ Trade associations and unions are both sometimes able to overcome the collective action problem by force of law. For instance, a legislative body might pass a law forcing those interested in working in a particular profession to join a professional association, like a state bar, in order to work; in union parlance, this describes a “closed shop.” “[S]elective incentives” refer to selling a good or service that the seller can exclude others from acquiring, such as magazines or insurance.⁹⁷ Finally, “purposive incentives” refer to incentives that provide no value other than the moral value a member obtains because he believes in the cause of the particular group.⁹⁸

In his book, Olson considered labor unions and set forth his theory of collection action. He found evidence of the challenge of labor to organize in the history of the labor movement. Early U.S. labor unions mostly consisted of local “small-scale production” operations, like building trades, shoemakers, and printers, rather than fields characterized as large manufacturing operations.⁹⁹ Olson thought this state of affairs was a result of the fact that social benefits of the smaller unions were easier for members to see. Nevertheless, over time there was a tendency for the small unions to connect on a national level. Although unions start small, there is a natural tendency towards local unions organizing with a national union. Locals join national organizations because the connection to a larger groups provides real insurance effects. More importantly though, locals join a national organization for the simple fact that an employer finds it relatively easy to break a strike led only in one localized union.¹⁰⁰

As mentioned, one of the ways any interest can solve the collective action problem is to get a law passed mandating those interested in working in a particular job to join that organization. To Olson, the predominant means by which large unions overcame the collective action problem was by implementing closed shops. There were some closed shops in early U.S. history,

⁹⁶ *Taxing the Unheavenly Chorus*, *supra* note 15, at 277, 282.

⁹⁷ *Id.* at 277.

⁹⁸ *Id.* at 282.

⁹⁹ COLLECTIVE ACTION, *supra* note 18, at 66.

¹⁰⁰ *Id.* at 67–68.

including carters in the 1600s, shoemakers in the 1800s, and printers later in the 1800s.¹⁰¹ Problematically for unions, Congress banned the closed shop in the Taft-Hartley Act in 1947, as described in Part IV below.

Labor unions have also long offered various selective incentives, such as insurance-related benefits, to attract members. This might include death, unemployment, disability, or old age benefits.¹⁰² Only large unions today tend to offer significant benefits such as education, scholarships, and medical care.¹⁰³ The growth of government-provided benefits, such as social security and unemployment insurance, have likely cut significantly into the selective incentives a union can offer.

Finally, labor unions use “purposive incentives.” In the case of industrial, low-skilled, diverse workforces, it is thought that the only purposive incentive that is effective pre-union shop in organizing is “to be aroused by emotionally charged and comprehensive appeals to their lot as a dispossessed class.”¹⁰⁴ The Industrial Workers of the World represented many such individuals in pre-union shop situations, and its many efforts led to intense and often violent strikes.¹⁰⁵ These purposive incentives almost certainly continue to play a role in union development and maintenance in the United States today. This aspect of union organizing leads to one of the negative features of unions: They tend to come with violence both from laborers and employers.¹⁰⁶ Of course, to obtain any legal protections at all, a union first must overcome the collective action challenge.

How does labor’s political voice compare with other types of interest groups in the interest group sector today? In an analysis of the whole of the interest group sector at the Washington D.C. federal government level in 2001, labor unions made up only one percent of the interest group sector.¹⁰⁷ Comparatively, business interests towered over labor interests: Corporations made up 34.9%, trade and other business associations 13.2%, and

¹⁰¹ *Id.* at 69.

¹⁰² WILSON, *supra* note 87, at 124.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 128.

¹⁰⁵ *Id.*

¹⁰⁶ *See, e.g.*, PHILIP TAFT, ORGANIZED LABOR IN AMERICAN HISTORY 68–83 (1964) (discussing a particularly violent period of U.S. labor history).

¹⁰⁷ UNHEAVENLY CHORUS, *supra* note 1, at 321 tbl.11.3.

occupational associations 6.8%.¹⁰⁸ While there are many other types of interests in our government that diverge from capital versus labor, this suggests at least that something is out of balance in this representational system. A review of the interest group environment at the state level demonstrates this severe imbalance as well.¹⁰⁹

What if we look at political representation as compared to employment status? In 2001, the U.S. workforce comprised 64% of the population.¹¹⁰ Different roles were filled in the following ways: executives 9.6%, professionals 10.2%, white collar workers 18.4%, blue collar workers 24%, farm workers 1.5%, unemployed 3.2%, and not in workforce 33.1%.¹¹¹ How were each of these interests represented in the interest group sector? Executives 73.9%, professionals 17.3%, white collar workers 3.4%, blue collar workers 1.1%, farm workers 1.7%, unemployed 1.2%, and not in the workforce 1.4%.¹¹² Again, the degree of inequality in representation of organized interests compared to labor is intense.

For labor, the story looks worse when viewed over time. The decline over time of union political voice is significant. Labor unions saw its representation in the interest group sector shrink between 1981 and 2006.¹¹³ Meanwhile, the political interest with the least amount of increase increased in number by 32%, and the greatest sector increase was 883%, represented by health interests.¹¹⁴ Labor unions thus shrunk from an already low 1.6% of the interest group sector to just 0.8% of that sector.¹¹⁵ More worrisome yet for labor as a matter of political voice is the striking decline in labor union members in the workforce described below in Section B.

Union testimony before Congress and electoral success is also on the decline. The number of opportunities union staff has to testify in front of Congress is highly correlated with union

¹⁰⁸ *Id.*

¹⁰⁹ David Lowery & Virginia Gray, *The Population Ecology of Gucci Gulch, or the Natural Regulation of Interest Group Numbers in the American States*, 39 AM. J. POL. SCI. 1, 21 tbl.2 (1995) [hereinafter *Population Ecology*].

¹¹⁰ UNHEAVENLY CHORUS, *supra* note 1, at 329 fig.11.1.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 353 tbl.12.1.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 356 tbl.12.2.

density.¹¹⁶ Union congressional testimony has dropped consistently with membership declines.¹¹⁷ Likewise, scholars estimate that membership is the biggest determinant of electoral success for a union.¹¹⁸ Others show that a greater number of members means more voters and more opportunities for financial contributions.¹¹⁹ In a seminal lobbying study looking at the trajectory of 139 issues over the years 1999 to 2002, the authors described highly limited union representation before Congress.¹²⁰ They found that labor representation is quite shallow as compared with other interests.¹²¹

Studies show that corporations, business associations, and professional associations outspend labor unions in lobbying. Labor averaged under \$500,000 lobbying per union, while the other three averaged all over \$1,000,000.¹²² Additionally, while corporations and business associations are very likely to have highly connected lobbyists, labor unions seldom have such officials represent their interests.¹²³ Finally, while labor unions have a higher average in political activity committee spending, there are so many fewer of these unions that labor as a broad interest is well outspent in this arena too.¹²⁴

One other line of study that is disconcerting for labor unions is that interests trying to overcome the collective action challenge may face a crowding out problem.¹²⁵ Virginia Gray and David Lowery suggest that there is an ecosystem of interest groups that is determinative of the size and scope of that interest group

¹¹⁶ Kyle W. Albert, *An Analysis of Labor Union Participation in U.S. Congressional Hearings*, 28 SOC. F. 574, 587 (2013).

¹¹⁷ *Id.* at 586–87.

¹¹⁸ DEREK C. BOK & JOHN T. DUNLOP, LABOR AND THE AMERICAN COMMUNITY 153–55 (1970).

¹¹⁹ Marick F. Masters & John Thomas Delaney, *Union Political Activities: A Review of the Empirical Literature*, 40 INDUS. & LAB. REL. REV. 336, 344 (1987).

¹²⁰ FRANK R. BAUMGARTNER ET AL., LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY 9–10 (2009) [hereinafter LOBBYING AND POLICY].

¹²¹ *Id.* at 10.

¹²² *Id.* at 200. However, Baumgartner and co-authors do not find a strong connection between policy outcomes and resources. *Id.* at 203. Business seems to win slightly more often, but not at a significant rate that would suggest their lobbying expenditures caused the policy wins. *Id.* They do not argue this means money spent on lobbying does not matter to policy outcomes. Instead, they believe that policy wins of business and wealthy interests happened long ago and those advantages are now simply a part of our political system. *Id.* at 212–14.

¹²³ *Id.* at 200.

¹²⁴ *See id.*

¹²⁵ JEFFREY M. BERRY, THE NEW LIBERALISM 60 (1999).

sector.¹²⁶ Under population ecology theory, the number of a certain entity type is dependent upon things that allow the entity type to exist. Gray and Lowery state that “interest-group density is set at an equilibrium level by the environment.”¹²⁷ They find a positive relationship between interest group size and population, constituent interest in goods and services, the certainty of those interests, the age of the interest system, and the size of the government.¹²⁸ In the end, there are only so many organizations a certain population can support. Once it has filled its capacity, whether with environmental, business, and health organizations, or charities, trade associations, and social welfare organizations, the group system can run out of capacity to support more organizations. Thus, if a policy works to enhance one interest, that policy is simultaneously likely crowding out another group in the process.

There is a caveat to the collective action research project. The work must be understood in light of a problem present in all of these studies¹²⁹: It is impossible to know what an unbiased interest group sector would look like.¹³⁰ The Schattschneider vision of bias in the heavenly chorus is based on a baseline interest group sector that is isomorphic with society. As Scholzman suggests, a reasonable baseline for comparing organizational representation of interests is the one person, one vote standard.¹³¹ But, there is no reason to believe that groups would ever perfectly align in this manner. Because it is costly to organize, many interests will never organize. Also some factors, such as loss are far more powerful than other factors, such as gain, in fomenting organization.¹³² Thus the dynamics of need for organizational involvement should necessarily ebb and flow over time, such that it should never be expected that organizations exactly mirror individual interests.¹³³

¹²⁶ *Population Ecology*, *supra* note 109, at 1.

¹²⁷ *Id.* at 9.

¹²⁸ *Id.* at 12.

¹²⁹ David Lowery et al., *Images of an Unbiased Interest System*, 22 J. EUR. PUB. POL'Y 1212, 1221–25 (2015).

¹³⁰ David Lowery & Virginia Gray, *Bias in the Heavenly Chorus: Interests in Society and Before Government*, 16 J. THEORETICAL POL. 5, 6 (2004) [hereinafter *Bias in the Heavenly Chorus*].

¹³¹ Kay Lehman Scholzman, *What Accent the Heavenly Chorus? Political Equality and the American Pressure System*, 46 J. POL. 1006, 1008–09 (1984).

¹³² *Bias in the Heavenly Chorus*, *supra* note 130, at 10–11.

¹³³ *Id.* at 13.

B. *What Do Unions Look Like Today?*

Unionization makes a difference to the bottom line of workers. Union workers earn a premium, as compared to non-union workers. Non-union workers earned seventy-nine percent of the weekly median salary of a union worker.¹³⁴ But, unions are quickly shrinking and we do not find unionization equally across regions or job type.

In 2015, 14.8 million workers belonged to a union in the United States.¹³⁵ This made up 11.1% of the workforce. This is a significant decline from 1983, when 17.7 million workers belonged to a union, making up 20.1% of the workforce.¹³⁶ And, in 1954, 39% of the private sector workforce was unionized.¹³⁷ Public sector unions far outpace their private sector counterparts today. In 2015, over 35% of public sector workers were unionized, compared with only 6.7% of private workers.¹³⁸ In fact, at the local government level, 41.3% of the workforce is unionized.¹³⁹ The protective service industries—police officers, firefighters, education, and libraries—make up the largest sector of unions today.¹⁴⁰ Union membership rates are highly state-dependent, with New York exhibiting the highest rate of unionization at 24.7% and South Carolina the lowest rate at 2.1%.¹⁴¹

The Internal Revenue Service (“IRS”) tracks data regarding labor unions and other tax-exempt organizations, like business leagues exempt under Section 501(c)(6). While this data is not perfect because it only captures those organizations filing applications and annual tax returns with the IRS and it depends on the self-reporting of the entities, it does paint a relative picture to consider. In that data, one can see a similar reduction in labor unions particularly as compared to business leagues. In looking at the rate of formation, it appears that for every one labor union that forms, more than three business leagues have

¹³⁴ News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Union Members—2016 (Jan. 26, 2017), <https://www.bls.gov/news.release/union2.nr0.htm>.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Dan Clawson & Mary Ann Clawson, *What Has Happened to the US Labor Movement? Union Decline and Renewal*, 25 ANN. REV. SOC. 95, 97 (1999).

¹³⁸ News Release, Bureau of Labor Statistics, *supra* note 134, at tbl.3.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at tbl.5.

formed from 2005 to 2016.¹⁴² Additionally, the total number of unions registered with the IRS has continually shrunk from around 72,000 in 1990 to just under 47,000 in 2016.¹⁴³ Business leagues, on the other hand, increased in number from 1990 at 66,000 through 2010 at 92,000, then declined through 2016 at 64,000.¹⁴⁴ Total assets and revenue recorded with the IRS in Form 990 filings in comparison show a little cleaner picture. While labor held about 70% of the assets held by business leagues in 1990, it held only 54% in 2000, and then 46% in 2013.¹⁴⁵ Total assets for labor unions rose from a little more than \$13 billion in 1990 to almost \$37 billion in 2013. Assets just rose more for business leagues from \$19 billion to \$80 billion over the same period. Revenue of labor unions went from 67% of business league revenue to only 51% of business league revenue from 1990 to 2013.

Union demographics have changed significantly over the past 70 years. A study of the changing demographic trends in labor from 1952 to 1999 shows a change of unionized non-agricultural workforce percentage from 33.2% in 1955 to 13.9% in 1999.¹⁴⁶ In 2016, it was 10.7%. Although in the 1950s and 1960s the union workforce was over 80% blue-collar, by 1998, white-collar workers were the majority, making up 55% of the unionized workforce.¹⁴⁷ Although in 1952 almost 90% of union members were male, in 1998, over 40% of union members were female.¹⁴⁸ That number kept increasing. By 2016, women made

¹⁴² IRS Data Books maintain that information from 2005 to 2016 on Table 24a. See <https://www.irs.gov/statistics/soi-tax-stats-irs-data-book>. The rate is the author's own calculation.

¹⁴³ IRS Data Book 1990, tbl.25, <https://www.irs.gov/pub/irs-soi/90dbfullar.pdf>; IRS Data Book 2016, tbl.25, <https://www.irs.gov/pub/irs-soi/16databk.pdf>. As a result of Congress passing a law in 2006 that forced small tax-exempt organizations to file limited information with the IRS or lose their tax exempt status, the entire tax-exempt sector began declining in 2010. However, the rate of labor decline was almost continuous from 1990 to 2016.

¹⁴⁴ As a result of Congress passing a law in 2006 in the Pension Protection Act that forced small tax-exempt organizations to file limited information with the IRS or lose their tax-exempt status, the entire tax-exempt sector began declining in 2010. This makes the data a bit messier than it would otherwise appear.

¹⁴⁵ *SOI Tax Stats - Charities & Other Tax-Exempt Organizations Statistics*, IRS, <https://www.irs.gov/statistics/soi-tax-stats-charities-and-other-tax-exempt-organizations-statistics> (last updated Aug. 29, 2017).

¹⁴⁶ HERBERT B. ASHER ET AL., *AMERICAN LABOR UNIONS IN THE ELECTORAL ARENA* 26 (2001) [hereinafter *AMERICAN LABOR UNIONS*].

¹⁴⁷ *Id.* at 28–29.

¹⁴⁸ *Id.* at 30.

up 46% of union members.¹⁴⁹ Although in the 1950s almost no union members had any college experience, much less a college degree, in 1996, 25% of union members had some college or were college graduates.¹⁵⁰ By 2008, 37.5% of union workers held a college degree or greater.¹⁵¹ Although in 1952 90% of union members were white, in 1998, only 80% were white.¹⁵² The largest non-white group of union members in 1998 was comprised of Hispanics.¹⁵³ In 1999, black men had a higher rate of unionization at 17.2% than whites at 13.5%, or Hispanics at 11.9%.¹⁵⁴

Today, public sector unions are the dominant unionized employee sector. Teachers' unions, such as the National Education Association and the American Federation of Teachers, make up a large part of that public union force.¹⁵⁵ The American Federation of State, County, and Municipal Employees has also demonstrated significant growth, from 250,000 in the mid-1960s¹⁵⁶ to 1.6 million by 2016.¹⁵⁷ President Kennedy spurred the growth of federal unions in 1963 when he signed Executive Order 10,988, which allowed public employees to engage in collective bargaining. Public sector unions also vote at a much greater rate than other sectors in favor of union certification.¹⁵⁸

Although the legal environment in different states and changes in different occupations impact this unequal relationship,¹⁵⁹ there are likely other forces at work leading to different unions being succeeding in certain businesses. For one, it tends to be easiest to form unions where the employees sought bear significant likeness in position, skill-level, location, religion,

¹⁴⁹ News Release, Bureau of Labor Statistics, *supra* note 134.

¹⁵⁰ AMERICAN LABOR UNIONS, *supra* note 146, at 33. That percentage is apparently the same as the general population.

¹⁵¹ JOHN SCHMITT & KRIS WARNER, CENTER FOR ECONOMIC AND POLICY RESEARCH, THE CHANGING FACE OF LABOR 1983–2008, at 1 (2009), <http://cepr.net/documents/publications/changing-face-of-labor-2009-11.pdf>.

¹⁵² AMERICAN LABOR UNIONS, *supra* note 146, at 35.

¹⁵³ *Id.* at 35–36.

¹⁵⁴ *Id.* at 37.

¹⁵⁵ PETER L. FRANCIA, THE FUTURE OF ORGANIZED LABOR IN AMERICAN POLITICS 55 (2006).

¹⁵⁶ *Id.*

¹⁵⁷ *About AFSCME*, AM. FED'N OF STATE, CTY., AND MUN. EMPLOYEES, <http://www.afscme.org/union/about> (last visited Oct. 28, 2017).

¹⁵⁸ FRANCIA, *supra* note 155, at 56.

¹⁵⁹ Clawson & Clawson, *supra* note 137, at 97–101.

or ethnicity.¹⁶⁰ Associations that are formed around one occupation are more likely to form and survive than those of more diverse interests.¹⁶¹ Once one brings in a diverse population, the collective action problem becomes much more severe. In some countries, for instance, the union shop agreement is not the norm at all, but the exception. There, however, it appears that in many instances unions are held together via some other unionizing force such as religion—Catholic or anti-Catholic—or ideology—Marxist, socialist.¹⁶²

C. *Do Labor Unions Represent the Common Will of Membership?*

In an article focused heavily on democracy, it is important to discuss whether a union represents the interests of its members. This raises the question again of whether it is possible to generate some common good of a group. Whether unions represent the common interest of members or not should at least implicate whether we think of them as advancing the cause of democracy.

Not unlike the findings that our democracy is skewed towards wealthier interests,¹⁶³ within interest groups themselves, large patrons tend to sway the view expressed of many nonprofit institutions.¹⁶⁴ The wealthiest interests of business associations tend to be the dominate influence over the interests for which these groups decide to advocate.¹⁶⁵ I have not found evidence demonstrating that labor unions suffer from this problem. This

¹⁶⁰ WILSON, *supra* note 87, at 123; John Paul Ferguson, *Racial Diversity and Union Organizing in the United States, 1999–2008*, 69 I.L.R. REV. 53, 55 (2016) (“[W]ork groups that win union representation are less racially diverse than the population of work groups that initially filed the election petitions.”). Many have taken this basic fact to find that unions are antithetical to civil rights. However, there is good social science evidence that unions can and have provided important wins that foster civil rights, rather than hinder it. Charlotte Garden & Nancy Leong, “*So Closely Intertwined*”: *Labor and Racial Solidarity*, 81 GEO. WASH. L. REV. 1135, 1183–84 (2013).

¹⁶¹ WILSON, *supra* note 87, at 123; Shaun Bevan, *Continuing the Collective Action Dilemma: The Survival of Voluntary Associations in the United States*, 66 POL. RES. Q. 545, 548, 553 (2012); *see also* HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 22–23 (1996).

¹⁶² WILSON, *supra* note 87, at 121.

¹⁶³ GILENS, *supra* note 55, at 1.

¹⁶⁴ Walker, *supra* note 95, at 401–02.

¹⁶⁵ Michael L. Barnett, *One Voice, But Whose Voice? Exploring What Drives Trade Association Activity*, 52 BUS. & SOC’Y 213, 219 (2012).

may be because labor unions tend to be very dependent upon the union dues model; they may not be able to use a significantly increasing sliding scale fee schedule in the way that business associations tend to adopt. Labor unions directly represent individuals rather than institutions.

Does this mean that the leaders of unions are more likely to represent the individual median members? While there are indications that unions, at times, adopt relatively democratic means of representation, the stronger evidence is that leaders tend to diverge from the majority interest of union members, at least in part. Of course, it may be more accurate to state that the labor union members, like many people, are focused more on their own economic situation than any outside politics.

Although I describe labor unions as interest groups, most members do not join primarily for the interest group activities. They join because the union negotiates contracts with management and protects employees from unfair management actions.¹⁶⁶ One study suggests job security is the number one motivating factor for joining a union.¹⁶⁷ As Professor Moe states, union members “stress economic benefits, they place high value on selective incentives, their membership is not contingent upon political considerations, and their individual contributions have little political impact.”¹⁶⁸ This simple fact sets up an agency problem when union leaders represent union members before government. The interests of union leaders may not align with union members, and members may not pay close attention to this fact. Remember, though, this is not unique to labor unions. Business association leaders also diverge in representation of members, although they diverge toward the wealthier interests.

Leaders of unions tend to diverge in beliefs from their members. Leaders tend to believe strongly in the union as part of the labor movement.¹⁶⁹ In a study of members of Ohio unions, it was found that while a plurality of members stated they belonged to the Democratic Party, at the same time, the members believed approximately two-thirds of leadership identified with

¹⁶⁶ AMERICAN LABOR UNIONS, *supra* note 146, at 47; *see also* TERRY M. MOE, THE ORGANIZATION OF INTERESTS: INCENTIVES AND THE INTERNAL DYNAMICS OF POLITICAL INTEREST GROUPS 172 (1980).

¹⁶⁷ MOE, *supra* note 166, at 173.

¹⁶⁸ *Id.* at 174–75.

¹⁶⁹ *Id.* at 175.

the Democratic Party.¹⁷⁰ Anecdotal evidence supports this divergence as well. A labor attorney, Thomas Geoghegan, reports one union member expressing: “The guys who start out running for Union office? Don’t trust them. They’re out for themselves.”¹⁷¹ The union member suggests there are some good ones, but that most are motivated by self-interest.

Many labor scholars discuss the question of whether unions themselves are democratic. This issue relates directly to whether the union mirrors the will of those it represents. In the 1950s, at the height of union power, Lipset, Trow, and Coleman published a seminal study on union democracy by examining the International Typographical Union—the only union at the time with a two-party system.¹⁷² Lipset and coauthors were impressed with ITU’s democracy. However, they ultimately found it unlikely that democracy would prevail in most unions.¹⁷³ They believed that large organizations simply did not permit the pure democracy envisioned by theorists.¹⁷⁴ Despite this critical assessment of the possibility of democracy within unions, the authors still concluded that unions were important elements of maintaining some level of democracy in a polyarchy.¹⁷⁵

More modern studies have considered the same question and have found the Lipset determination too constraining on the definition of democracy and too pessimistic.¹⁷⁶ They have found that many unions use some important democratic features to make their decisions. Nevertheless, it is by no means clear that unions operate like the New England town democracy of Robert Dahl.¹⁷⁷ As is to be expected, a small group of individuals tend to make the decisions of these organizations and that small group of leaders’ ideology likely differs in some part from a large portion of the union’s membership. Nevertheless, labor union members

¹⁷⁰ AMERICAN LABOR UNIONS, *supra* note 146, at 47–64.

¹⁷¹ THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON?: TRYING TO BE FOR LABOR WHEN IT’S FLAT ON ITS BACK 183 (1991).

¹⁷² SEYMOUR MARTIN LIPSET ET AL., UNION DEMOCRACY: THE INTERNAL POLITICS OF THE INTERNATIONAL TYPOGRAPHICAL UNION 3 (1956).

¹⁷³ *Id.* at 403.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 413.

¹⁷⁶ Tom Langford, *Union Democracy as a Foundation for a Participatory Society: A Theoretical Elaboration and Historical Example*, 76 *LABOUR/LE TRAVAIL* 79, 82–83 (2015).

¹⁷⁷ See generally ROBERT A. DAHL, WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY (2d ed. 2005).

probably have more democratic rights than any other members of a nonprofit organization because of the Labor-Management Reporting and Disclosure Act.¹⁷⁸ That Act provides a Bill of Rights to union members ensuring them democratic procedures in the operation of the union.

D. Implications for a Model To Judge Political Voice Equality

I adopt the intrinsic equality principle as the basis of a model to assess current policy. There is no one better than each individual to decide for herself how her life should be governed. While many in our society today think of one person, one vote as the defining principle of a modern representative democracy, the intrinsic equality principle demands more.¹⁷⁹ A principle of one person, one political voice is more descriptive of that ideal model. As we assess our U.S. system, we should strive toward political voice equality. The key here is, in assessing political fairness, we should be maximizing a social choice function rather than a social welfare function. The question in political fairness is not whether a person realized a particular governance decision outcome, but whether her political voice was respected as a part of the political process. This model means that in evaluating the question of labor union tax policy we should care more about whether labor union tax policy enhances political voice equality than whether it results in a better economic environment for society.

Political voice equality in a small group would be relatively easy to assess. We could use some process like Robert's Rules of Order to ensure everyone in the group had her voice respected in decision making. However, in a polyarchy the question of political voice equality becomes much more difficult to determine.¹⁸⁰ In part, political voice equality is found in the exercise of the vote in free and fair elections to determine representatives who will discuss and determine final policy for our polity. However, elections do not provide complete political voice opportunities. Citizens depend largely upon interest groups to fulfill that function.¹⁸¹ Establishing an unbiased interest

¹⁷⁸ Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401–531 (2012).

¹⁷⁹ UNHEAVENLY CHORUS, *supra* note 1, at 36.

¹⁸⁰ *See supra* Part III.A.

¹⁸¹ *See* discussion *supra* Introduction.

system is difficult because it is hard to determine the different types of distinct interests in existence, who a group is acting for, how effective any group might be at having its voice heard, how representative of a group an interest group might be, and how to determine what that interest system should look like over time.

Nevertheless, we have many guideposts that can help us make a determination regarding political voice equality. For instance, collective action theory provides a way of assessing which interests will face the most severe collective action challenges. Additionally, extensive studies illustrate the ebb and flow of the interest group sector over time and we can compare that to the total population. While these various theoretical and empirical strategies do not allow us to be precise in any way in policy choices, they do help to sketch out the broad outlines of a biased system. That sketch should at least aid us in thinking about the public policy we adopt so that we can try to build a policy that does not exacerbate the bias of that system. We might even, under certain circumstances, work to ameliorate that bias where the considered judgment of theory and empirical evidence is that the bias is stark.

Thus, with labor unions, theory predicts labor interests will be underrepresented in our democratic system. Theory also predicts many wealthy business interests will not suffer such collective action problems such that there will be a bias in the interest system of business as compared to labor. The evidence suggests this bias is real, increasing, and stark.¹⁸² We could look deeper to see if in fact policy preferences indeed tilt away from the general interests of labor, but under the social choice function model adopted here, there is no need to further assess that matter. Based on the fact that labor is broadly left out of the political discussion, particularly when compared with that of business, we could embark on policy choices to change that reality.

¹⁸² See discussion *supra* Part III.B.

IV. LABOR UNIONS: HISTORY AND TAX LAW

A. *Very Brief History*

Labor associations in a sense have been a part of the United States since its inception. In examining this history, it is worthwhile to make a distinction between trade associations and trade unions. A trade association, which I have referred to above as a business association or business league, is typically made up of independent businessmen who are trying to protect the price of the goods or services that they sell.¹⁸³ Trade unions, which I have referred to here as labor unions, are made up of wage earners who organize to earn better wages and better working conditions.¹⁸⁴ Trade unions began forming in in the late 1700s.¹⁸⁵ In 1792, a society of Philadelphia shoemakers in 1792 formed the first trade union in the United States;¹⁸⁶ it did not last a year. The early unions were made up of trades such as cordwainers, printers, and tailors, and seemed to be associated with a growing ability to mass produce goods.¹⁸⁷

A major roadblock to forming trade unions at the time was that they were generally illegal under U.S. law. For instance, New York cordwainers were convicted of conspiracy to raise wages and operating a closed shop.¹⁸⁸ Journeymen tailors in Philadelphia were similarly convicted in 1827.¹⁸⁹ In 1840, though, the Massachusetts Supreme Court found that it was not illegal for laborers to so organize. This was a legal turning point for labor.¹⁹⁰

The United States was largely made up of farmers at the time.¹⁹¹ In 1820, farmers comprised 71.8% of our workforce.¹⁹² The growth of labor unions appears to be connected to industrialization in the North. Between 1860 and 1870, factory

¹⁸³ TAFT, *supra* note 106, at 3.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*; SIDNEY WEBB & BEATRICE WEBB, A HISTORY OF TRADE UNIONISM 1 (rev. ed., Longmans, Green & Co., 1920).

¹⁸⁶ TAFT, *supra* note 106, at 5.

¹⁸⁷ *Id.* at 3–5.

¹⁸⁸ *Id.* at 10.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 11.

¹⁹¹ RUSSELL O. WRIGHT, CHRONOLOGY OF LABOR IN THE UNITED STATES 4 (2003).

¹⁹² *Id.*

workers increased from 1.3 million to 2 million.¹⁹³ For the first time, there were more factory workers than farmhands.¹⁹⁴ At this point, there were a total of 5.5 million non-farm workers with a population of 35.2 million people in the country.¹⁹⁵ The country's first national labor union, called the National Labor Union, was organized in 1866.¹⁹⁶ Still, until the formation of the American Federation of Labor ("AFL") in 1886, national unionization efforts were neither cohesive nor effective.¹⁹⁷ The signal success of the union organization effort of the AFL was that it was based on organizing groups of skilled individuals that had commonality and who were interested in protecting their particular wage.¹⁹⁸

Labor unions saw their greatest rise in the period between 1897 and 1904. During that time union membership increased from 477,000 to 2,072,000 members.¹⁹⁹ This period also appears to be an apex of the fight for the closed shop.²⁰⁰ Business associations and the government reacted strongly to this effort and stemmed the tide starting in 1904 when Theodore Roosevelt and the National Association of Manufacturers led the effort against unions.²⁰¹ Union membership rates then remained relatively stable between 1935 and 1945.²⁰² Not insignificantly, Congress enacted the Wagner Act in 1935, making collective bargaining a policy of the United States.²⁰³ The United States Supreme Court found the Act constitutional in 1937; union membership increased by fifty-seven percent that year.²⁰⁴ The Act gave many protections to unions and included in its provisions the right to a closed shop.

¹⁹³ PHILIP DRAY, *THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA* 71 (2010).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 75.

¹⁹⁷ TRUMAN, *supra* note 75, at 4, 68.

¹⁹⁸ *Id.*

¹⁹⁹ *COLLECTIVE ACTION*, *supra* note 18, at 77.

²⁰⁰ *Id.* at 78.

²⁰¹ *Id.*

²⁰² *Id.* at 79.

²⁰³ *Id.*

²⁰⁴ *Id.*

In the 1950s, union membership achieved its greatest membership in relation to the workforce.²⁰⁵ However, as discussed above in Part III, union membership has had its most significant decline over the past thirty years. Many forces have played a role in this decline, including structural changes in our economy, bad political instincts of labor union leaders, aggressive employers successfully utilizing anti-union tactics, and even a lessening of support among workers for unions. Nevertheless, scholars have little agreement on the real cause.²⁰⁶ This trend does seem to be universal across nations, but the decline in the United States is particularly significant.²⁰⁷

B. *Tax Exempt Requirements for Labor Unions*

Congress exempted labor unions from tax first in the Tariff Act of 1909.²⁰⁸ In its initial drafting, the Senate Finance Committee did not include the phrase “labor organization.”²⁰⁹ After labor unions complained, however, Congress added the phrase “labor organization” to the statute.²¹⁰ It appears that labor unions complained in part because they were worried that the taxation of insurance companies would ensure that labor unions that engaged in some insurance activities would be subject to tax under the Code.²¹¹ Congress maintained the exemption of labor unions in the 1913 Income Tax Act and additionally added the terms we know today of labor, agricultural, and horticultural organizations.²¹² I focus only on the labor portion of the statute. Agricultural and horticultural organizations bear much more in common with trade associations exempt under Section 501(c)(6) of the Code.²¹³

To qualify under Section 501(c)(5), a labor union: (1) may not allow its earnings to inure to the benefit of its members, and (2) must “have as [its] objects the betterment of the conditions of those engaged in such pursuits, the improvement of the grade of

²⁰⁵ UNHEAVENLY CHORUS, *supra* note 1, at 87.

²⁰⁶ *Id.* at 89.

²⁰⁷ *Id.* at 91.

²⁰⁸ Tariff Act of 1909, ch. 6, 36 Stat. 11 (exempting “labor organization[s]”).

²⁰⁹ 44 CONG. REC. 4148–49 (1909) (statement of Sen. Burkett).

²¹⁰ *See, e.g.*, 44 CONG. REC. 4154 (1909); 44 CONG. REC. 4155 (1909).

²¹¹ James J. McGovern, *The Exemption Provisions of Subchapter F*, 29 TAX LAW. 523, 530–31 (1976) (citing 44 CONG. REC. 4149, 4154, 4155 (1909)).

²¹² Tariff Act of 1913, ch. 16, § II(G), 38 Stat. 172.

²¹³ Bittker & Rahdert, *supra* note 22, at 353 n.148.

their products, and the development of a higher degree of efficiency in their respective occupations.”²¹⁴ A labor union must serve individuals who are considered to be “labor.”²¹⁵ Thus, for instance, an organization of “drivers, trainers, and horse owners, most of whom are independent contractors or entrepreneurs,” did “not qualify for exemption as a labor [union].”²¹⁶

Courts have interpreted the term “labor organization” liberally to ensure the protection of labor interests.²¹⁷ In that vein, the IRS found an apprenticeship committee organized primarily to establish standards in skilled crafts, determine the qualifications necessary to become a journeyman, and aid in adjusting and settling disputes between the employer and the apprentice, qualified as a labor union.²¹⁸

Typical exempt activities of a labor union include collective bargaining,²¹⁹ publishing labor newspapers,²²⁰ allocating work assignments among union members,²²¹ and providing litigation support to controlling unions.²²² A teacher’s association that “sponsors seminars and courses for its members, participates in teacher conventions, bargains collectively and processes grievances, and keeps its members informed of its activities through regular meetings and a newsletter,” qualifies as a labor union.²²³

Under IRS guidance, a union can maintain a pension plan and qualify as a labor union.²²⁴ While IRS guidance prohibits a pension plan from qualifying as a labor union by itself, there is a

²¹⁴ Treas. Reg. § 1.501(c)(5)-1(a) (1997).

²¹⁵ Rev. Rul. 76-420, 1976-2 C.B. 153.

²¹⁶ Rev. Rul. 78-288, 1978-2 C.B. 179; *see also* Rev. Rul. 74-167, 1974-1 C.B. 134 (“[I]nclusion of some self-employed persons in the membership of a qualified labor [union] does not affect the organization’s exempt status.”).

²¹⁷ *Portland Coop. Labor Temple Ass’n v. Comm’r*, 39 B.T.A. 450 (1939).

²¹⁸ Rev. Rul. 59-6, 1959-1 C.B. 121.

²¹⁹ Rev. Rul. 77-154, 1977-1 C.B. 148 (Nurses’ association “whose primary activity is acting as a collective bargaining agent for its members qualifies . . .”).

²²⁰ Rev. Rul. 68-534, 1968-2 C.B. 217 (Labor union that publishes a newspaper providing information on union activity is performing an exempt function).

²²¹ Rev. Rul. 75-473, 1975-2 C.B. 213 (“[O]rganization, controlled and funded jointly by a labor union and an employer association, that operates a dispatch hall to allocate work assignments among union members and engages in other activities appropriate to a labor union qualifies . . .”).

²²² Rev. Rul. 74-596, 1974-2 C.B. 167 (Organization that provides supporting litigation activities, proper for any one of its member unions, directed to the betterment of conditions for public employees qualifies).

²²³ Rev. Rul. 76-31, 1976-1 C.B. 157.

²²⁴ Rev. Rul. 62-17, 1962-1 C.B. 87.

circuit split on the issue. The United States Court of Appeals for the Second Circuit recognized that a pension plan managed jointly by an employer and a union qualifies as an exempt labor union.²²⁵ The United States Court of Appeals for the D.C. Circuit, however, agreed with the IRS that a foreign pension fund similarly controlled by an employer and a union did not qualify.²²⁶ The court reasoned that the pension fund was neither controlled by nor represented traditional labor unions.

A labor union may not operate a business as an exempt purpose even if the business is there to solely employ members and turn over all profits to the labor union.²²⁷ Similarly, an organization controlled by private individuals that offers strike insurance does not qualify under Section 501(c)(5).²²⁸ Providing ministerial services for labor unions, such as creating an organization holding employment taxes,²²⁹ or establishing savings accounts²³⁰ for union members, are not validly exempt labor union activities.

The tax law does not impose significant restrictions or disclosure obligations on labor unions. Labor law, however, places significant restrictions and disclosure obligations that treat labor unions worse in many ways than business associations. Under tax law, labor unions may lobby before legislative bodies.²³¹ Like social welfare organizations and business leagues, tax law does not require labor unions to publicly disclose its donors.²³² However, the Labor-Management Reporting and Disclosure Act requires labor unions to disclose all

²²⁵ *Morganbesser v. United States*, 984 F.2d 560, 563–64 (2d Cir. 1993).

²²⁶ *Stichting Pensioenfonds Voor de Gezondheid, Geestelijke en Maatschappelijke Belangen (PGGM) v. United States*, 129 F.3d 195, 200 (D.C. Cir. 1997), *cert. denied*, 525 U.S. 811 (1998); *see also* *Tupper v. United States*, 134 F.3d 444, 444–45 (1st Cir. 1998) (finding that a pension plan controlled by an employer and a union did not qualify for exemption as a labor union).

²²⁷ Rev. Rul. 69-386, 1969-2 C.B. 123.

²²⁸ Rev. Rul. 76-420, 1976-2 C.B. 153; *cf.* Rev. Rul. 67-7, 1967-1 C.B. 137 ([O]rganization established by a labor union to provide strike and lockout benefits to its members is a labor union).

²²⁹ Rev. Rul. 66-354, 1966-2 C.B. 207.

²³⁰ Rev. Rul. 77-46, 1977-1 C.B. 147.

²³¹ Rev. Rul. 2004-6, 2004-1 C.B. 328.

²³² A labor union must file a Form 990 and attach a schedule B, Schedule of Contributors. That schedule requires a labor union to disclose its substantial donors, who are typically those who donate more than \$5,000. However, unlike the Form 990, which is publicly disclosed, the IRS does not publicly disclose labor union schedule B.

sources of income in excess of \$5,000.²³³ Under tax law, a labor union may intervene in a political campaign as long as it does not become a primary activity.²³⁴ Federal election law, though, prohibits a labor union from spending its treasury funds on such political campaigns.²³⁵ A labor union might owe a tax under section 527(f) for any expenditures it makes on political campaign activity.²³⁶ To avoid this tax and comply with federal election law, the union can set up a segregated fund that is effectively a Political Action Committee under Section 527.²³⁷

Most unions must file a Form 990 disclosing information regarding its financial activities.²³⁸ The Form 990 is disclosed publicly. Nevertheless, because labor unions must disclose so much to the Department of Labor, such as its donors, and to the Federal Election Commission, the Form 990 information is probably less important for the public than that form is for organizations like charities or even business associations.

As discussed in Part I above, labor unions receive a subsidy from the exemption from tax because they are able to defer taxes to a later year. While there is no charitable contribution deduction for union dues, dues are deductible under Section 162 as a business expense. Nevertheless, in many instances union members may not be able to deduct this expense. A union member in most instances is restricted in deducting dues because dues are an itemized deduction and also a miscellaneous itemized deduction subject to the two percent floor.²³⁹

V. RATIONALES FOR TAX EXEMPTION

Few scholars have considered the rationale for labor union tax exemption. One author suggests that the exemption of labor unions may have been built upon a principle of

²³³ 29 U.S.C. § 431 (2012). Extensive reports about the financial activities of labor unions are available on the Department of Labor website, at <https://olms.dol-esa.gov/query/getOrgQry.do> (last visited Oct. 29, 2017).

²³⁴ JOHN FRANCIS REILLY & BARBARA A. BRAIG ALLEN, IRS C.P.E., POLITICAL CAMPAIGN AND LOBBYING ACTIVITIES OF IRC 501(C)(4), (C)(5), AND (C)(6) ORGANIZATIONS L-1, L-2 (2003), <https://www.irs.gov/pub/irs-tege/eotopic103.pdf>; cf. Treas. Reg. § 1.501(c)(5)-1 (1960) (fails to list intervening in a political campaign as a valid purpose of a labor organization).

²³⁵ 11 C.F.R. § 114.4 (2015).

²³⁶ 26 U.S.C.A. § 527 (West 2014).

²³⁷ REILLY & BRAIG ALLEN, *supra* note 234, at L-6.

²³⁸ 26 U.S.C.A. § 6033 (West 2014).

²³⁹ Halperin, *supra* note 25, at 163; see Bittker & Rahdert, *supra* note 22, at 307.

nondiscrimination.²⁴⁰ After choosing to exempt trade associations, Congress may have felt compelled to provide a similar exemption to labor as well.²⁴¹ The general sense though is that exemption for labor unions is a divergence from normal tax law, such that to the extent there is income earned in the labor union that is not taxed, it is a subsidy to the union and its members.

The earliest consideration of labor union tax exemption appears to be by Neale M. Albert and Sanford I. Hansell, who expressed concern about providing a subsidy to an entity that was becoming particularly powerful and might cause harm to the economy.²⁴² They found that labor unions seemed to generally deserve exemption as a legal matter, at least under the system established by Congress. However, they worried that the power of labor was beginning to threaten our system of free enterprise and skew the labor versus capital collective-bargaining arrangement. Thus, they argued Congress should consider limiting the tax favorability of the labor union tax system. Although they thought taxing a union on union dues payments inequitable, they thought taxing either investment income broadly, or dividends more narrowly, could be supported.²⁴³

Lawrence Stone also believed that labor unions should not be exempt from tax.²⁴⁴ Stone suggested that while we may not miss the right normative tax result by too much, it probably would be easier to handle some thorny issues of taxation of these organizations under a cooperative model instead.²⁴⁵ David Miller more recently agreed with this basic assessment, and argued we should tax labor unions just like we tax social clubs: tax investment income and nonmember income.²⁴⁶

²⁴⁰ McGovern, *supra* note 120, at 531.

²⁴¹ *Id.*

²⁴² Neal M. Albert & Sanford I. Hansell, *The Tax Status of the Modern Labor Union*, 111 U. PA. L. REV. 137, 153 (1962).

²⁴³ *Id.* at 160.

²⁴⁴ Lawrence M. Stone, *Federal Tax Support of Charities and Other Exempt Organizations: The Need for a National Policy*, 20 U. SO. CAL. TAX INST. 27 (1968).

²⁴⁵ *Id.* at 58–60.

²⁴⁶ David S. Miller, *Reforming the Taxation of Exempt Organizations and Their Patrons*, 67 TAX LAW. 451, 452 (2014).

George Rahdert and Boris Bittker cursorily considered the rationale for labor unions.²⁴⁷ As a mutual benefit organization, established to support their members, they believed that any income earned by the organization should be allocated to the members and then taxed to them.²⁴⁸ They seemed little bothered by labor union tax exemption because almost all expenses of a labor union would be deductible to union members; the primary benefit of tax exemption would be a matter of deferral.²⁴⁹

Halperin reviewed the exemption of mutual benefit organizations and found that in the context of business related nonprofits, tax exemption provided a deferral benefit that should probably be eliminated.²⁵⁰ He believed that elimination should extend to labor unions even though they presented a more sympathetic claim for exemption.²⁵¹ He did not think the amount of money involved substantial because of the fact that almost all the money spent by a labor union would be a deductible amount.

With the exception of Albert and Hansell, who recommended changing policy because of the negative societal effects they perceived coming from labor unions, the above approaches focus on whether labor unions should be taxed based on whether the activity generates taxable income or not. A couple of economists have approached the rationale of tax exemption from an economic efficiency point of view. These analyses generally assume that tax exemption provides a subsidy.

Although neither has spoken directly on the issue of tax exemption for labor unions, their thought is instructive in thinking about the question. Henry Hansmann argues that the nonprofit sector tends to provide goods and services that are undersupplied in our economy because of contract failure.²⁵² Burton Weisbrod argued that we should not only expect underinvestment in collective goods by the private sector, but that we should also expect underinvestment from the public sector, and government as well.²⁵³ For Weisbrod, the nonprofit sector provides goods and services where there is government failure. For both Hansmann and Weisbrod, tax exemption is one possible,

²⁴⁷ Bittker & Rahdert, *supra* note 22, at 354–55.

²⁴⁸ *Id.* at 306.

²⁴⁹ *Id.* at 354.

²⁵⁰ Halperin, *supra* note 25, at 166.

²⁵¹ *Id.* at 163.

²⁵² Hansmann, *supra* note 13, at 67–69.

²⁵³ *See generally* Weisbrod, *supra* note 14.

if flawed, way of remedying the undersupply of these identified goods. Collective goods, sometimes called public goods, consist of those goods or services that once provided to one, cannot be excluded from any.²⁵⁴

Hansmann focuses on market failure. He argues that nonprofit firms are likely the most efficient provider of certain goods and services subject to significant contract failure.²⁵⁵ By contract failure, he means those goods or services whose provision does not happen at an optimal level because of some market failure, such as asymmetric information. For instance, the provision of goods or services to poor people on behalf of donors is subject to substantial contract failure because the purchaser—the donor—cannot easily confirm that the goods or services are delivered to the poor person. Thus, we should expect fewer donations to charitable organizations serving the poor than is optimal. Nonprofit firms, he suggests, are the most efficient providers in such contract failure situations.²⁵⁶ Finally, the subsidy provided by tax exemption is well matched to nonprofit needs because nonprofits do not have access to equity markets and the tax subsidy helps ease that burden.²⁵⁷

Hansmann does not claim that this rationale is a strong one, only a sufficient one.²⁵⁸ He believes that, on economic efficiency grounds, we should be slightly better off with the capital subsidy of tax exemption.²⁵⁹ Hansmann suggests that a useful method for assessing whether nonprofits make more sense within an industry is to observe whether there is a for-profit counterpart in that industry. That there is a large for-profit contingent in the industry is evidence that the nonprofit firm may not be the most efficient provider of the service or good. However, it is not conclusive evidence.

While Hansmann does not apply his theory to labor unions, he does consider its application to mutual nonprofits generally. He argues that social clubs, such as country clubs, likely do not face capital formation challenges.²⁶⁰ Country clubs and other such organizations are easily able to attract the funds they need

²⁵⁴ COLLECTIVE ACTION, *supra* note 18, at 14–15.

²⁵⁵ Hansmann, *supra* note 13, at 70.

²⁵⁶ *Id.* at 74.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 75.

²⁵⁹ *Id.* at 92.

²⁶⁰ *Id.* at 94.

for their operations. He also believes they do not really suffer from a contract failure. It is not clear how Hansmann would apply his analysis to labor unions. I will turn to this in my analysis towards the conclusion of the Article.

Weisbrod developed a simplistic model of a society with a private for-profit sector and a public governmental sector.²⁶¹ He assumes that in any society, for-profit firms will tend to provide a certain amount of private goods. The government, in turn, will provide a certain amount of collective goods.²⁶² Weisbrod assumes, though, that the government will never provide an optimal level of collective goods; it will only provide the level desired by the median voter. Although private firms may provide some private goods that are collective good substitutes, they will never be sufficient.²⁶³ He argues that public subsidy of voluntary behavior can work to supply collective goods that meet the needs of the non-median voter.²⁶⁴ This theory is typically referred to as the government failure theory. Weisbrod did not consider the impact of his theory on the question of labor unions.

In a political justification, some, including justices of the United States Supreme Court, have argued that nonprofits foster pluralism.²⁶⁵ There is a strong traditional sense that the nonprofit sector is a place for experimentation and the generation and dissemination of ideas that are critical to a healthy democracy. This American love of voluntary associations fulfilling this deeply democratic purpose was noticed by Alexis de

²⁶¹ Weisbrod, *supra* note 14, at 27.

²⁶² *Id.* at 23.

²⁶³ *Id.* at 11.

²⁶⁴ *Id.* at 30–32; *see also* John R. Brooks, *Quasi-Public Spending*, 104 *GEO. L.J.* 1057, 1078 n.87 (2016) (discussing the nature of public goods, collective goods, and private goods, and the lack of a clear-cut definition between these items).

²⁶⁵ BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* § 1.4 (11th ed. 2016); *Bob Jones Univ. v. United States*, 461 U.S. 574, 609–10 (1983) (Powell, J., concurring) (describing the “role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints”); *see also* LESTER M. SALAMON, *AMERICA’S NONPROFIT SECTOR: A PRIMER* 14 (2d ed. 1999); John W. Gardner, *The Independent Sector*, in *AMERICA’S VOLUNTARY SPIRIT* ix, xiii–xv (Brian O’Connell ed. 1983); Elizabeth T. Boris & Matthew Maronick, *Civic Participation and Advocacy*, in *THE STATE OF NONPROFIT AMERICA* 394 (Lester M. Salamon ed., 2d ed. 2012).

Tocqueville, who wrote with admiration of the American tendency to form associations to accomplish all sorts of objects that might typically have been left to the government.²⁶⁶

There are scholars who generally support a vibrant voluntary nonprofit sector. Theda Skocpol, for instance, believes that nonprofits of a voluntary membership nature serve an important democratic-enhancing role.²⁶⁷ Her work documents that through the 1950s, the United States was supported by cross-class voluntary associations that tended to make the United States a more democratic nation.²⁶⁸ However, since the 1960s, these cross-class voluntary associations have greatly diminished in favor of professionally-run associations supported by the money of elites and private foundations.²⁶⁹ This has resulted in a crowding out of the issues of middle class and poor citizens, she suggests.²⁷⁰

I have argued in the past that to determine whether a nonprofit should be exempt from the corporate income tax, we need a theory for why we would apply the income tax to a nonprofit corporation in the first place.²⁷¹ In order to find that there is any subsidy to the nonprofit, we must believe that a tax should apply to the entity. There are only two likely theories to support the taxation of nonprofits: (1) the shareholder theory, and (2) the real entity/regulatory theory. Neither theory provides significant support for taxing charitable organizations as currently constructed. However, both theories generally support applying a tax to mutual benefit organizations. In terms of other tax exempt interest groups, I previously argued that trade associations do not suffer substantial market failure, and are therefore undeserving of a subsidy.²⁷² In that article, I left open the possibility that labor unions might be deserving of the subsidy. In Part VI, I turn to analyze that matter.

²⁶⁶ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 489 (Gerald E. Bevan trans., Penguin Books 2003).

²⁶⁷ THEDA SKOCPOL, *DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE* 12 (2003).

²⁶⁸ *Id.* at 225–26.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 238–39.

²⁷¹ *Talk About Tax Exemption*, *supra* note 7, at 187–88.

²⁷² *Taxing the Unheavenly Chorus*, *supra* note 15, at 267.

VI. ANALYSIS: LABOR UNION TAX TREATMENT ASSESSED UNDER
A POLITICAL FAIRNESS MODEL

In addition to economic fairness and efficiency, we should consider the value of democracy and, particularly, political voice equality in assessing our income tax policy. Generally, political fairness should only be one of many factors for consideration in evaluating tax policy. On most matters of the definition of income, for instance, political voice equality should likely play a very limited role. It should play a greater role in a consideration of how much progressivity to adopt, as well as the proper rate of tax. However, where tax policy directly impacts political voice equality, it should be a major factor in the assessment. The principle of intrinsic equality should not be overridden by principles of economic fairness or economic efficiency in these circumstances. Furthermore, given the fundamental nature of this right to govern ourselves, we should consider ending any tax policy that directly exacerbates political voice inequality.

By “directly impacts political voice equality,” I mean a tax policy that immediately applies to an organization’s or an individual’s expression of political voice in our democracy. Thus, on one hand, the deduction of payments or receipts to or from political groups, or the taxation of the income of political groups, directly impacts political voice equality. Partnership taxation, on the other hand, would generally not directly impact political voice equality.

The taxation of interest group activity directly impacts political voice. Whether you look at the taxation of an individual’s payments or receipts to or from an interest group, or the taxation of the interest group itself, the choice will either encourage or discourage the activity of exercising political voice. Thus, on the issue of tax exemption for nonprofits generally, and taxation impacting labor unions specifically, I believe we should consider the important value of political voice equality.

In assessing the deductibility of labor union dues and the propriety of labor union tax exemption, there are two primary questions—one descriptive and one normative: (1) Does income tax policy incentivize the formation and maintenance of labor unions?; and (2) Should tax policy incentivize the formation and maintenance of labor unions? The second question can be broken into three branches: (a) In isolation, should we incentivize labor unions?; (b) If all other political interest groups are similarly

incentivized, should labor unions receive that incentive also?; and, finally, (c) Should we incentivize some interests more than others?

On the first question, as I discuss more below, we likely penalize the formation and maintenance of labor unions. As to the second question, tax policy should at least be neutral as to the matter of interest groups, and could be structured to provide additional incentives to labor unions. This means that if all other groups are provided tax exemption and the ability to allow their members to deduct dues payments, labor unions and their members should be extended the same treatment. However, political fairness would be enhanced by eliminating tax exemption for all interest groups and extending the deductibility of dues above the line to labor union members. Finally, although there are problems with the final case, we could justify eliminating tax exemption for business interests while extending it to labor interests.²⁷³

A. *Does Income Tax Policy Incentivize Labor Union Activity?*

Tax exemption for labor unions and the deductibility of labor union dues appear to be the only two tax policies that might directly impact labor interests in formation and maintenance. As developed in Part I, it appears that tax exemption provides a modest subsidy, but that the deduction of union dues leads to something of a penalty to the payment of union dues.

The government provides a small subsidy to labor unions through tax exemption based primarily on deferral of amounts that would be deductible in a future year.²⁷⁴ Although small, this subsidy is likely enhanced by other state and local tax benefits like property tax exemption that often flow from obtaining tax exempt status.²⁷⁵ Still, the benefit appears to be available only sporadically to the most successful labor unions. I say “sporadically” because unions likely rarely experience profits; it is likely that only larger unions are either able to sell products

²⁷³ I do not address here how to think about interest groups that are social welfare organizations or charitable organizations. The political fairness analysis constructed here based on collective action challenges is not as immediately applicable to an organization that is generally bankrolled by some wealthy individual. I hope to turn to this challenge in a later paper.

²⁷⁴ 26 U.S.C.A. § 162 (West 2014).

²⁷⁵ Basil Facchina et al., *Privileges & Exemptions Enjoyed by Nonprofit Organizations*, 28 U. S.F. L. REV. 85, 104–05 (1993).

like insurance to its members and nonmembers to generate profits, or are able to actually earn investment income. As tax exemption is constructed, the subsidy never reaches those interests that face the most severe collective action challenges because they never organize.

As for the deductibility of union dues, we penalize the payment of union dues rather than subsidize it. The normal income tax policy provides that the association dues one pays for one's job are deductible from income. Union dues are technically deductible under the Code as a business expense.²⁷⁶ However, our income tax treats union dues payments to the worst possible treatment, a miscellaneous itemized deduction.²⁷⁷ Given that in a normal income tax we would allow the deduction of union dues, to primarily deny the deduction is in effect to penalize the activity. In fairness, Congress adopted a generous standard deduction to eliminate the need of people to deduct many expenses such as union dues.²⁷⁸ However, the fact that union dues are considered a miscellaneous itemized deduction further penalizes the activity. Nevertheless, the result of this policy is that we do not incentivize the payment of union dues, and could be thought to penalize the payment of union dues. A laborer would be better off paying a mortgage and property taxes on his house or making a charitable contribution²⁷⁹ than paying union dues. This means that rather than subsidizing the formation of labor unions, we discourage the joining of labor unions and maintaining union membership.

The comparison of the labor interest tax treatment to the business interest tax treatment is instructive too. A businessman who wants to join a trade association will often be able to deduct the trade association amount above the line, thus

²⁷⁶ 26 U.S.C.A. § 162 (West 2014).

²⁷⁷ 26 U.S.C. § 67 (2012); Treas. Reg. § 1.67-1T(a)(1)(i).

²⁷⁸ John R. Brooks II, *Doing Too Much: The Standard Deduction and the Conflict Between Progressivity and Simplification*, 2 COLUM. J. TAX. L. 203, 205 (2011).

²⁷⁹ 26 U.S.C. § 67 (2012) treats interest deductions and charitable contribution deductions as itemized deductions, rather than miscellaneous itemized deductions.

guaranteeing the deduction in a large percentage of circumstances.²⁸⁰ Thus, we generally encourage the joining of business interest groups.

This comparison point is important in the tax exemption sense as well. We provide business interests the same tax exemption opportunity we provide to labor interests. Because the models of business interests can differ greatly from the labor interest, it is likely that business interests can make much better use of the tax exemption per capita. Unions primarily generate money from member dues. Those dues are not going to differ wildly in amount. Business interests, though, often charge sliding scale fees that allow them to generate particularly big contributions from wealthy members. Additionally, they can sell various products such as industry codes that allow them significant opportunities for profit. The American Medical Association ("AMA") for instance controls and sells the very profitable codes for medical billing associated with Medicare.²⁸¹ This means business interest's members are not penalized for making contributions to a trade association, and that business interests themselves are likely able to generate a larger more regular benefit from tax exemption. Thus, we incentivize business interests to form interest groups more than we do labor interests.

B. Should Tax Policy Incentivize Labor Union Activity?

That brings us to the second question. Should we use income tax policy to incentivize the formation and maintenance of labor unions? This question has three subquestions: (i) In isolation, should we incentivize labor unions?; (ii) If we incentivize other interest groups, should we incentivize labor interests too?; and (iii) Would we be better off with a neutral system where all interest groups face the same level of taxation or should, and can, we build a system where some interests are incentivized over others? In each instance, tax exemption is considered first, and then the case of the deductibility of union dues.

²⁸⁰ With many business interests being either entities or employers or small businessmen their right to deduct is found in 26 U.S.C.A. § 62 (West 2014), meaning they are ensured the deduction from gross income.

²⁸¹ *Taxing the Unheavenly Chorus*, *supra* note 15, at 321 (discussing the AMA's sale of Current Procedural Technology code (CPT Code) that determines how any medical procedure is reimbursed by Medicare).

1. Labor Union Incentives in Isolation

Labor union revenue appears to bear all the characteristics of taxable income. A union is a separately recognized, independent entity that carries on an activity that would be taxed like any other business. While some have argued that charitable organizations do not earn income in the sense we think of income within the income tax,²⁸² no one makes that claim as to a labor union. Thus, in absence of some good rationale, labor union income should generally be taxed. None of the current theories of tax exemption provide a strong case to support tax exemption for labor unions, or labor interests generally.

We could approach the question of whether a labor union deserves income tax exemption from an economic efficiency perspective. The best support for such a case in nonprofit tax exemption rationales is likely Hansmann's contract failure theory based in an economic efficiency rationale. Labor interests face a contract failure because of the collective action problem common to large groups where the return from joining is relatively small compared to the cost of joining. Additionally, labor unions are created in the nonprofit form such that they undergo some capital constraints. However, along with the fact that Hansmann's theory provides no real limiting principle,²⁸³ many explicitly make the case that labor unions are harmful in an economic efficiency sense.²⁸⁴ We could get into a battle over the economic efficiency impact of labor unions, but I believe there is a more satisfying rationale based in the political fairness of the matter.

Weisbrod's government failure theory has some promise too. Perhaps labor union services are services that the government does not provide, but are something a group of our society who are not a majority desires. This is not a perfect fit either. Labor unions are not an end good that might be provided by government, but more of a government process in and of itself. Even if we could find that labor unions provide a good that the government fails to provide, this theory offers no reason for why

²⁸² See, e.g., Bittker & Rahdert, *supra* note 22, at 307–14, 333.

²⁸³ Cf. Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 VA. L. REV. 2017, 2066–67 (2007) (arguing for-profit organizations deserve a subsidy for carrying out charitable works just like nonprofit organizations).

²⁸⁴ See *supra* note 2.

we should believe this good should be supported by government. Again, considering the situation from the political fairness angle should offer some greater support.

Perhaps we could try to build a case for labor unions based on a quid pro quo theory that labor unions provide some concrete economic benefits to society. The difficulty with this path is that there is evidence on the outcomes of unions on our society that point in different directions. Some say unions help in growth and in protecting laborers, while others find that they harm our economy while protecting only a select few laborers.

Finally, there may be something in the pluralist argument. Nonprofit organizations enhance the number of voices we find in our political system, and thereby improve the deliberations of our representative bodies by increasing the amount of political voices. However, the claim of pluralism has never been deeply developed.

The pluralist argument is based on a facile model of group-based democracy.²⁸⁵ This vision of pluralism suggests we encourage every interest to form to bring all possible voices to the government. However, that case ignores the collective action problem. Interests face varying levels of difficulty in organizing and maintaining status and action. This means the provision of a subsidy through exemption will likely never go to the groups that arguably need it the most. The pluralist rationale also ignores a lesser but important factor—whether groups represent the “true” interests of the group members. Both theoretical and empirical scholarship have shown that it is unlikely that groups fulfill this role in a way we might hope. Those who argue that we should support the entire nonprofit sector with tax exemption because it will enhance “pluralism” fail to acknowledge these deep imperfections.

Nevertheless, although the nonprofit pluralists are misguided in part, their instincts are right. Much of our nonprofit sector plays a significant role in our democratic structure. Social welfare organizations, labor unions, and business leagues are all arguably primarily involved in shaping our democracy as interest groups.²⁸⁶ Because of issues of numerosity, individual citizens are rarely able to participate in

²⁸⁵ *Taxing the Unheavenly Chorus*, *supra* note 15, at 270–72.

²⁸⁶ Charitable organizations do too, but do not typically do so in a primary sense.

setting the agenda in our democracy of items for final votes. As discussed above, interest groups tend to fill this important democratic role on behalf of citizens. Thus, getting policy right regarding these nonprofit organizations might be less about economic efficiency, and more about getting democracy right. I argue we should consider a neo-pluralist case for supporting interest groups through tax exemption.

A major assumption of this case is that we should strive for democracy rather than anarchy or guardianship. While this assumption may seem self-evident, it is anything but. Founding fathers, such as Madison and Hamilton, were deeply drawn to some form of guardianship as the best form of government. The Founders were particularly fearful of the laborers and farmers exercising majoritarian power and tried to design our system of representation to ensure mostly only “qualified individuals” represented our people. This is ultimately what *Federalist 10* is about. Many continue to distrust the poor and working class to participate in governing our democracy. This is seen in efforts to limit voting rights as well as arguments that voters are not educated well enough to vote. Additionally, while we may not think of the United States as a strong bastion of anarchism, there is a strong libertarian streak in this country that argues for as limited a government as possible. That libertarian streak is well expressed in those who would like to see the market control most matters of distribution of goods and services. If you support either of these cases, you are unlikely to agree with my case.

However, if you believe in the principle of intrinsic equality discussed in Part II—that most adults have more right to govern themselves than anyone else—then you should also generally believe in the case for democracy. Accepting the principle of intrinsic equality comes with a corollary that each of us should have a right to participate in the governance of our group affairs. Such a belief could lead to the idealistic notion of pure democracy. Under that system, to be true to the principle of intrinsic equality we would need to ensure that everyone impacted by a group decision had the right to help set the agenda of the group, receive information about the issues before the group, help to provide information about the decisions before the group, and have a right to vote on all final decisions. Obviously,

as discussed in Parts II and III, we know the world has never seen a pure democracy, and there are reasons to believe it is unrealistic.

Still, as discussed in Part III, our notion of a democracy is generally a polyarchy where certain critical rights such as freedom of speech, association, and the right to regular free and fair elections have become what we expect from democracy. Factors such as size of the country or population, and differences in wealth or ability, all create significant obstacles to pure democracy, but also to a polyarchy. Ensuring equal political voice becomes almost an impossibility under these circumstances. But this does not mean we should not strive for more political voice equality in our democracy.

While groups may not provide the perfect answer to this problem of political voice inequality, it seems at least that they are a part of a solution. For many people, groups provide their only real opportunity to have a seat at the agenda-setting table. And, the evidence is strong that labor interests are significantly underrepresented.²⁸⁷ For the most part, laborers do not have a seat at the agenda-setting table. Blue-collar workers and the poor are thoroughly outgunned in the interest group sector by the interests of executives and management and business generally.²⁸⁸ As demonstrated in Part III.A, this is true whether we look at interest group numbers, congressional hearing testimony, or money spent on lobbying.

Whether this representation identifies a disparity in result is beside the point. The political fairness model I propose focuses on maximizing a social choice function, rather than a social welfare function. In a democracy, we should strive to ensure actual representation at the table of government. Labor is not at the table. Under these circumstances, it is reasonable and just to ensure that our tax system is not operated in a way to hinder the formation of labor interests. Given the enormous disparity in representation, it also seems reasonable and just to try to subsidize such interests through the tax system.

Following this idea to its logical extreme might be unworkable, though. To push the idea further, where a distinct political interest faces substantial collective action problems, we

²⁸⁷ See *supra* Part III.

²⁸⁸ See *supra* Part III.B.

could strive to aid those interests to organize and maintain interest groups based on some sliding scale of collective action difficulty. The principle though is neither practical nor administrable. It suggests that Congress or an agency should assess the relative collective action challenge an interest faces before providing a subsidy. Depending on the size of the group, the education of interested parties, and the capital resources available, we might ratchet up and down some scale that the subsidy provided. We could even conceivably impose a tax on the activity of interests that face no collective action problem to hinder particularly powerful interests.

Adopting such a detailed system is likely to be less than optimal when administrability, complexity, and political matters are considered. In assessing an optimal commodity taxation system where tax rose and fell based on the relative elasticity of goods, Professor Eric Zolt concluded that such a system would have too many informational demands, too much added complexity, and likely political problems.²⁸⁹ A subsidy based on the relative collective action problem of interests would face similar problems. Given these constraints, if we wanted to build such a system, we are probably better off making calls based on rough justice regarding broad categories of groups, as Congress has in effect already done.

If we look at labor union tax exemption in isolation, under a rough justice, neo-pluralist view, the case for tax exemption for unions seems, at first glance, strong. Given that labor interests suffer a significant collective action problem and are poorly represented in the interest group eco-system, there would seem to be good reason to try to enhance their ability to organize and maintain unions.

However, if we are looking at labor interests in isolation, that is, not taking into consideration other interests such as business interests, we might find a more troubling picture. The subsidy of tax exemption is not targeted towards the interests that need it the most. We would assist from year-to-year a very narrow sector of the labor market. Even with the exemption, unions will likely be a highly selective group of employees that happen to be in sectors of the economy or country that are more conducive to unions than others. While it may help some

²⁸⁹ Zolt, *supra* note 32, at 66–67.

inchoate unions to organize and then maintain status, it probably works to provide greater aid to those organizations that were more likely to organize in the first place. Thus, standing in isolation without considering the role of other groups in our democracy and the incentives provided to them, it is hard to say one way or the other whether a subsidy should be provided to labor unions alone. I return to this question again in the final part of the analysis in considering whether we should provide the subsidy to labor when we take the subsidy away from business interests.

What about the case for allowing the deductibility of union dues? Because the basic income tax case for deductibility of union dues is so strong, it's hard to imagine another justification. However, given that union dues relate directly to political voice equality, denying the deduction should be expected to cause significant political unfairness. That inequality deepens when we recognize that laborers face significant collective action problems in organizing to protect their interests. The neo-pluralist case, thus, strongly backs up the case to provide a deduction for this expenditure. Perhaps, the ability to deduct does not give a tax benefit to all who we might like; however, it would seem odd to deny such a group of people this deduction.

2. Exemption to Unions When Other Interests Are Extended Exemption

In a world where other interests are subsidized through tax exemption—this describes current tax policy—the case for providing a similar tax exemption to labor interests becomes strong. For instance, it would be highly questionable to provide tax exemption to business and not to labor. Such a policy would exacerbate political voice inequality that exists naturally between business and labor. Thus, where business interests are provided tax exemption, the neo-pluralist case would mean we must provide the same right to labor. Failing to do so should be expected to decrease the social choice function by reducing the voice of laborers in our democracy.

Again, as in the prior case, it is hard to imagine an argument prohibiting the deduction of labor union dues. Where other interests may deduct such amounts, the case for allowing the deduction of labor union dues would seem inescapable. Doing otherwise would seem to be democratically suspect. Again, the

choice to enhance the voice of business interests but not labor interests should be expected to reduce the social choice function in our democracy by systematically reducing the voice of labor.²⁹⁰ Such an unequal subsidy for political representation seems antithetical to a balanced democracy.

Thus, if other interests receive tax exemption and deductibility of interest group dues, labor unions should receive the same treatment. This case may even provide a justification for prohibiting the deduction of business interest dues, along with any other interest that does not experience significant collective action challenges. We already deny the deduction of political contributions and explicit lobbying payments.²⁹¹ In a sense, a denial of business interest group dues could be an extension of that policy. I turn to this question in Section 3.

3. Incentivize Labor Interests While Denying the Incentive to Others

Where other interests are not subsidized through tax exemption and are unable to deduct interest group dues, how should we treat labor interests? To simplify this analysis, I compare only the case of business interests and labor interests. Under this scenario, we could either choose to deny tax exemption to labor too, or exempt labor alone. We are able to reasonably consider the taxing labor scenario in full in this simplified analysis. This is because it treats everyone the same by imposing the same taxing structure on all interest groups, their members, and their potential members. The simplified analysis for incentivizing labor and only comparing that to business does not give us a complete picture. I hope in a future article to consider more of the interest group sector in both social welfare organizations and charitable organizations to more fully consider this complex analysis. Finally, in each case, I assume we want to increase the social choice function and that we take political fairness in a democracy sense into consideration of this tax policy because it directly impacts political voice equality.

²⁹⁰ Obviously comparing only labor against business interests is a simplistic analysis. We would need to throw in all sorts of other issues in order to have a full sense of justice. However, the choices made in the Code are almost always some sort of rough justice, and comparing labor to business provides us a simplistic way at getting to this rough justice.

²⁹¹ 26 U.S.C.A. § 162(e) (West 2014).

If what we want is government neutrality on the matter of tax exemption, we should tax labor interests when business interests are taxed. This would mean all income used to support labor and business interests, whether those interests are organized or remain unorganized, would face the same tax structure choices currently offered by the Internal Revenue Code. Such a change would mean either that we treat such organizations as taxable corporations or treat them as cooperatives taxable under Subchapter T. Those that never organize would simply pay taxes on income that they might have put towards organizing.

The key to this neo-pluralist case is that it would be a positive democratic move to treat both interests as taxable rather than tax-exempt. On the one hand, the subsidy of tax exemption is given currently to business interests even though the vast majority of those interests are well-represented and face little in the way of collective action problems. They would organize whether there was a subsidy or not. The subsidy to them is a windfall and those interests are best placed to capture and use the subsidy. Labor, on the other hand, is not well represented in a political voice sense, and is little able to make use of the subsidy even when available. Taxing both interests would place both interests in the same relative position.

If we implemented such a change, labor unions would likely pay little to no tax because they likely have little to no earnings. Business interests would likely pay some tax associated with their activities. Treating business and labor interests alike in this way would be to treat the two in a tax neutral matter.

The neutral policy on dues would likely be to deny the dues deduction to labor interests when business interests are denied the deduction. Anyone engaging in interest group activity would bear tax on their individual or entity level tax they otherwise would owe. As it stands, the current policy primarily supports the interest of businessmen. As noted above, Congress already treats political campaign expenditures and lobbying expenditures as non-deductible personal ones. There is no reason we could not extend that notion into this very similar realm. Given that most laborers are unable to take this deduction anyway, this would do little to no harm to the labor union movement. It would also move the government to a more neutral stance by not incentivizing the business association interests over that of labor.

The more difficult question in a justice sense is whether to provide labor interests tax exemption and allow labor union members the ability to deduct union dues, while denying the same to business interests.

Although the subsidy for labor unions through tax exemption is neither great in amount nor well-tailored, even marginal improvements in the labor interest representation should enhance our democracy because it would likely increase the social choice function. If the modest subsidy administered in the absence of a business interest subsidy results in even a couple extra unions representing some group of laborers we would likely have more individuals with a seat at the table for agenda-setting and decision making. Still, denying the deduction to business interests would likely lead to fewer business interests obtaining representation as well, which would result in some lessening of the social choice function. How do we reconcile that?

While it seems difficult to compare the results of this change in policy, given the relative collective action problems of the two different groups, it seems likely that business interests would still be more generally represented before federal, state and local governments than labor interests even after losing tax exemption. Studies of the impact of removing exemption could be useful. Nevertheless, it seems reasonable to conclude that labor interests are so hampered, while business interests are so advantaged in comparison, that it is likely that providing the subsidy to labor and not business would be social choice function enhancing. Thus, I argue, we could legitimately maintain tax exemption for labor interests in this case. For the reasons set forth in Part VI.B.1 though, the case is not a strong one. There are many interests who will never obtain the benefit of the subsidy.

A stronger case can be made for allowing employees to deduct labor union dues above the line while simultaneously denying that right to business association members. Allowing a deduction for labor union dues would be targeted exactly to encourage membership in a union. This means this deduction would be tailored to the choice of an employee to join and stay in a labor union. Providing this subsidy while denying it to business interests could again increase the social choice function, although still with the caveats listed above. Still, providing the deduction to labor would not reach the interests that never

organize and this creates its own political voice equality problems. We may just be highlighting the voices of laborers who already had a voice in the first place.

If someone were still inclined to try to utilize the exemption and the deduction to enhance the social choice function, there is still one other area to at least consider. Can we constitutionally limit—or equalize—interest group expenditures through the tax system to limit the power of wealthy voices—or equalize the voices of everyone else?²⁹² As noted in Part III, while the fundamental rights—freedom of speech, free and fair elections—of a polyarchy are there to make political voice equality possible, they do not work to make it a reality. While our Constitution promises one person, one vote, and ensures freedom of speech and association, it does not explicitly speak to establishing a system to provide political voice equality. This is the debate we see in campaign finance. Those who advocate for campaign finance regulations often point out the harmful effect of wealth on our democracy because it makes wealthy individuals' voices so much more powerful than those of every day Americans. With that said, the Supreme Court does not recognize equality as a rationale for imposing campaign finance limitations.²⁹³

In *Buckley v. Valeo* the Court stated:

[T]he concept that the government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed “to secure ‘the widest possible dissemination of information from diverse and antagonistic sources’” and “‘to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”²⁹⁴

Whether this opinion and its progeny puts a roadblock on how the tax system is used to subsidize certain interests is an important question that needs examination. I provide here only initial thoughts.

²⁹² RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* 74–89 (2016); LAWRENCE LESSIG, *REPUBLIC LOST* 58–70 (1st ed. 2012) (considering this question with respect to campaign contributions within campaign finance law).

²⁹³ *Buckley v. Valeo*, 424 U.S. 1, 49 (1976).

²⁹⁴ *Id.* at 48–49 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964)).

The lesson of collective action theory and the empirical work on interest group structure is that not all interests are created equally. Neutrality as to these matters means that some interests will necessarily have a much louder voice at the table of government than others. Many will have no voice at all. The attitude of the *Buckley* Court on the First Amendment may very well be the intent of the Framers, but it fails miserably as a matter of achieving a stronger democracy and justice.²⁹⁵ How does this opinion impact deductions and exemptions from tax?

The Court's use of the limits on equality principle as a justification seems to be focused on provisions that either limit campaign expenditures or limit campaign contributions. Providing a deduction or not, and providing tax exemption or not, has not been seen by the Court as the type of limitation that campaign finance applies. In *Cammarano v. United States*, the Court found that denying a deduction for lobbying expenses harmed no First Amendment interest.²⁹⁶ Furthermore, in examining the question of whether a charitable organization could be limited in its ability to lobby, the Court in *Regan v. Taxation with Representation* again found no First Amendment interest violated by limiting tax exemption based on the activity of lobbying.²⁹⁷ The Court held that there was no equal protection issue in subsidizing one interest more than another, such as when Congress grants the benefit of accepting tax deductible charitable contributions to veterans organizations, but not to social welfare organizations.²⁹⁸ Thus, it appears that the Court has thus far willingly allowed tax exemption and tax deductions to be established with political activity in mind.

This suggests that if Congress chooses to treat all interests equally, it can. If it wants to subsidize some activity more than another, it can do that too. It seems like the most difficult issue

²⁹⁵ See, e.g., RAWLS, *supra* note 58, at 360 ("The Court fails to recognize the essential point that the fair value of the political liberties is required for a just political procedure, and that to insure their fair value it is necessary to prevent those with greater property and wealth, and the greater skills of organization which accompany them, from controlling the electoral process to their advantage.").

²⁹⁶ *Cammarano v. United States*, 358 U.S. 498, 512–13 (1959).

²⁹⁷ *Regan v. Taxation with Representation of Wash.*, 61 U.S. 540, 545–46 (1983).

²⁹⁸ *Id.* at 550–51; see also Lloyd Hitoshi Mayer, *Nonprofits, Speech, and Unconstitutional Conditions*, 46 CONN. L. REV. 1045, 1064, 1071 (2014) (noting that such a distinction is constitutional as long as the government has a rational basis, and further finding this *Taxation with Representation* distinction limiting speech is also constitutional because there is no lesser means of accomplishing the limitation).

is whether it could subsidize some interest greater than another.²⁹⁹ In other words, could it legitimately choose to subsidize labor more than business interests, or vice versa. Justice and democracy demand that Congress be allowed to give a helping hand to interests that face great challenges in projecting their voice in our democracy. I leave for another time whether the Constitution permits that choice. However, Congress has at its disposal the ability to make a political voice equality enhancing move by removing tax exemption from labor and business and by taxing the dues of both labor and interest. Another possible social choice function-enhancing move would be to provide labor union members a deduction above the line for union dues to equalize the treatment of business and labor interests that are now out of balance in favor of business interests. Under the neo-pluralist case current tax policy on labor interests come up wanting.

CONCLUSION

Although the focus of this Article is on one small sector of the tax world, laborers as an interest group, it uses that sector to argue we should consider political fairness as a factor in tax policy. It demonstrates that current policy on tax exemption likely harms social choice function by enhancing the voice of business and diminishing the voice of labor. Although traditionally we examine tax policy by considering its economic fairness and efficiency, I argue we should consider the value of political fairness when a tax policy directly implicates political voice. In the case of labor union activity the tax policy of tax exemption and the deduction of union dues directly impact political voice.

A fundamental tenet of this political fairness analysis I propose is that it focus on a social choice function. I contend that the social choice function is key in this analysis because our tax policy should be democracy enhancing rather than democracy detracting. The primary question to ask therefore is whether a particular policy increases political voice equality. Current policy

²⁹⁹ *Regan v. Taxation with Representation* suggests at least that this should pass constitutional muster. 61 U.S. at 548–49.

on both exemption and the deduction of union dues likely decreases political voice equality. We should therefore look to change tax policy towards labor unions.

This Article presents a neo-pluralist justification for the exemption from income tax provided for interest groups. The original pluralism justification suggested we should support any and all nonprofit organizations, no matter the cause, in order to enhance our democracy. The neo-pluralist justification recognizes the deep impact of the collective action problem on the interests in our society. In particular, those interests that are vast in number, poor in wealth, and limited in political skill are likely to face great difficulty in organizing to represent their interests before our governments. Conversely, those interests that are smaller, wealthy, and endowed with political skill are likely to face little difficulty in organizing to represent their interests. This collective action problem is a significant hindrance to advancing democracy. Interest groups are significant representatives of peoples' interests. We should not adopt policies that make that democratic failure worse.

Currently, the Code appears to treat business and labor interests exactly the same under tax-exemption. Business interests can form nonprofit tax-exempt organizations to further their interests, and labor interests and the poor can do the same. However, because of the problem of collective action, this system overwhelmingly helps out the business interests and leaves the interests of the workingman behind. We would enhance political voice equality by ending exemption generally for labor unions and trade associations. Although the case is not strong and is subject to problems, we could legitimately choose to maintain it for labor. Additionally, current policy that allows business interests to deduct dues, but limits labor interests from deducting the same, is unjust and harmful to our democracy. We should either allow labor union members to deduct their union dues above the line, or prohibit business interests from deducting these expenses like we do to most labor union members. Either choice would be preferable to current policy.