

University of Michigan Journal of Law Reform

Volume 53

2019

Making and Unmaking Citizens: Law and the Shaping of Civic Capacity

Tabatha Abu El-Haj

Drexel University Thomas R. Kline School of Law

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Law and Politics Commons](#), [Law and Society Commons](#), and the [Rule of Law Commons](#)

Recommended Citation

Tabatha A. El-Haj, *Making and Unmaking Citizens: Law and the Shaping of Civic Capacity*, 53 U. MICH. J. L. REFORM 63 (2019).

Available at: <https://repository.law.umich.edu/mjlr/vol53/iss1/3>

<https://doi.org/10.36646/mjlr.53.1.making>

This Article is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mjlr.repository@umich.edu.

MAKING AND UNMAKING CITIZENS: LAW AND THE SHAPING OF CIVIC CAPACITY

Tabatha Abu El-Haj*

American democracy is more fragile today than in recent memory. As evidence of stubborn imbalances in political influence grow, so too does public skepticism concerning the relative benefits of our democratic institutions. Scholars have taken note, and two dominant camps have emerged to offer proposals for restoring democratic accountability and responsiveness. The first, like the public, identifies the flood of money into electoral politics as the primary source of our troubles, whereas the second points to political parties as the root of the crisis. More recently, however, a nascent third approach has emerged. Looking beyond the usual suspects—money in politics or the state of our political parties—its focus is on legal reforms that would permit everyday Americans to exercise political power through organizations capable of providing a counterweight to the political influence of wealth.

This Article seeks to further develop the efforts of this third approach. It argues that a more nuanced understanding of the recursive relationship between governance and civil society—one that appreciates the ways that public policy, as instantiated in legislation, inevitably influences the trajectory of civil society—permits us to envision a broader conception of law’s role in democratic reform. This broader conception is particularly critical given that several traditional routes have been effectively foreclosed by the Supreme Court. Toward that end, this Article identifies opportunities for law and politics—nudged perhaps by good governance philanthropists and technological advances—to make considerable strides toward rebuilding a participatory civil society capable of demanding the recognition of elected officials.

* Associate Professor of Law, Drexel University Thomas R. Kline School of Law. I would like to thank Kate Andrias, Nicholas Bagley, John Ehrenberg, Deborah Gordon, Rob Field, Allison Hoffman, K. Sabeel Rahman, Norman Stein, and David Pozen. Their comments, as well as the discussions at the Columbia and Michigan Public Law Workshops and the faculty workshop at NYLS, were invaluable. Finally, I am grateful for the excellent research assistance of John Cannan, Anthony Beltrami, Kait O’Donnell, and Sydney Mellilo.

TABLE OF CONTENTS

INTRODUCTION.....	65
I. AN ACCOUNTING OF DEMOCRATIC VICES AND (LATENT) CIVIC VIRTUES	73
A. <i>Unequal and Unrepresentative Political Participation</i>	75
1. As Citizens	75
2. Of Organizations	81
B. <i>From Elks to Policy Wonks: The Shifting Structure of Civic Associations</i>	85
1. Participatory Civic Associations of the Mid- Twentieth Century.....	85
2. Contemporary Civic Associations as Professional Advocacy Groups	88
3. The Political Consequences of the New Configuration of Civil Society	92
II. LAW AND THE SHAPING OF CIVIC AND POLITICAL CAPACITY	98
A. <i>Virtuous Democratic Policy Feedbacks</i>	101
B. <i>Vicious Democratic Policy Feedbacks</i>	104
C. <i>Prescriptive Implications</i>	108
D. <i>The Affordable Care Act as a Contemporary Case Study</i>	111
III. NEW STRATEGIES FOR DEMOCRACY REFORMS	116
A. <i>Engaging a Broader Swath of the Electorate</i>	118
B. <i>Building Coalitions Across Existing Divides</i>	122
C. <i>Reducing Socioeconomic Segregation</i>	124
D. <i>Enlisting Philanthropists and Stimulating Participatory Mass-Membership Groups</i>	128
CONCLUSION	136

INTRODUCTION

American democracy is more fragile today than in recent memory.¹ The corrosion of essential democratic norms—from civility to judicial independence to freedom of the press—appears to be accelerating. Public faith in democracy is eroding, with a rising number of Americans reporting that they no longer feel confident in the relative benefits of democratic institutions.² Nonvoters frequently cite a lack of faith in the efficacy of voting to explain their decision to forego their democratic rights.³ Meanwhile, across the partisan divide, Americans express anxiety about the corrosive influence of money on politics.⁴

Too often, politicians seek to capitalize on this growing cynicism, rather than striving to restore faith in democratic institutions and the rule of law. Indeed, some have become increasingly brazen in their efforts to thwart democratic accountability. In Wisconsin, during the most recent round of redistricting, legislators flagrantly solicited experts for partisan electoral maps and then asked those experts to go back and assure them that the effect would last the entire decade.⁵ The attorney representing North Carolina recently went so far as to defend such practices as a legislative prerogative preserved by federalism.⁶ The North Carolina legislature stripped its governor of key executive powers when voters elected a gover-

1. See *No Jargon: Democracy in Decline*, SCHOLARS STRATEGY NETWORK (Mar. 7, 2018), <https://nojargon.libsyn.com/episode-119-democracy-in-decline>.

2. See Roberto Foa & Yascha Mounk, *Are Americans Losing Faith in Democracy?*, VOX (Dec. 18, 2015, 10:50 AM), <https://www.vox.com/polyarchy/2015/12/18/9360663/is-democracy-in-trouble>.

3. See Asma Khalid, *On the Sidelines of Democracy: Exploring Why So Many Americans Don't Vote*, MORNING EDITION (Sept. 10, 2018), <https://www.npr.org/2018/09/10/645223716/on-the-sidelines-of-democracy-exploring-why-so-many-americans-dont-vote>; Don Gonyea, *What Some West Virginia Residents Have to Say on Why They Don't Vote*, MORNING EDITION (Sept. 10, 2018, 5:39 PM), <https://www.npr.org/2018/09/10/646422511/what-some-west-virginia-residents-have-to-saynt-on-why-they-dont-vote>.

4. Bradley Jones, *Most Americans Want to Limit Campaign Spending, Say Big Donors Have Greater Political Influence*, PEW RES. CTR. (May 8, 2018), <http://www.pewresearch.org/fact-tank/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence/>.

5. *Whitford v. Gill*, 218 F. Supp. 3d 837, 849, 896 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018) (noting that Republican legislators specifically requested mapmakers produce “Assertive” and “Aggressive” maps favoring the party). Democrats acted similarly egregiously in Maryland. See also *Rucho v. Common Cause*, 139 S. Ct. 2484, 2510–11 (2019) (Kagan, J., dissenting) (“Events in Maryland make for a similarly grisly tale.”).

6. *Compare* Transcript of Oral Argument at 12–18, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (No.18-422) (defending prerogative of state legislatures to set explicit partisan targets for redistricting processes) *with* *Common Cause*, 139 S. Ct. at 2506 (holding that partisan gerrymandering claims are not justiciable even though “[e]xcessive partisanship in districting leads to results that reasonably seem unjust” and are “incompatible with democratic principles”) (internal citation omitted). See also *id.* at 2509 (Kagan, J., dissenting) (reflecting that “partisan gerrymanders . . . debase[] and dishonor[] our democracy, turning upside-down the core American idea that all governmental power derives from the people”).

nor of a different party, and legislatures in Wisconsin and Michigan followed suit after partisan losses in statewide races in 2018.⁷

While these examples are particularly egregious, the fact is that elected officials routinely seek to insulate themselves from accountability at the polls.⁸

When combined with partisan polarization, the demise of electoral competition and the salience of the party primary, these maneuvers render American elected officials only weakly accountable to their constituents.

Indeed, some political scientists argue that elected officials today are significantly more responsive to the interests of wealthy Americans, while responsiveness to the concerns and preferences of the general electorate is largely coincidental.⁹ Quantifying the inequalities in congressional responsiveness, Martin Gilens and Benjamin I. Page report that when support for a given proposal among affluent Americans reaches 75%, one can expect the policy will be adopted 46% of the time, whereas when 75% of middle-class Americans support a policy, it “is adopted only 24 percent of the time.”¹⁰

To be sure, no one expects legislative policymaking in the American system to simply follow the public’s orders (especially as measured by public opinion polls). Still, the persistent disregard of the public’s priorities—from delivering sensible gun control to providing permanent legal status to childhood immigrant arrivals

7. The legislation in Michigan was vetoed by the outgoing Republican Governor. See Miriam Seifter, *Judging Power Plays in the American States*, 97 TEX. L. REV. 1217, 1224–27, 1231–36 (2019) (offering a detailed description of recent efforts to “thwart . . . expressions of popular will,” while describing how most have been struck down by state courts).

8. See, e.g., Paul Krugman, Opinion, *Why It Can Happen Here*, N.Y. TIMES (Aug. 27, 2018), <https://www.nytimes.com/2018/08/27/opinion/trump-republican-party-authoritarianism.html?ref=collection%2Fsectioncollection%2Fopinion-columnists>.

9. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 573 (2014) (rigorously analyzing a data set that measured trajectory of 1779 policy issues between 1981 and 2002 and concluding that the United States has become a “democracy by coincidence”). It is worth emphasizing that none of the main critics of Professors Martin Gilens and Benjamin Page’s study substantially undermine their main findings or their conclusion that the United States is a “democracy by coincidence.” See, e.g., Omar S. Bashir, *Testing Inferences About American Politics: A Review of the “Oligarchy” Result*, 2 RES. & POL. 1, 1–2 (2015) (criticizing Gilens and Page’s quantitative method); Peter K. Enns, *Relative Policy Support and Coincidental Representation*, 13 PERSP. ON POL. 1053, 1058–61 (2015) (conceding that “[c]oincidental representation appears to be the norm” but rejecting the conclusion that this comes “at the expense of those in the middle”). For their responses to these criticisms, see Martin Gilens, *The Insufficiency of “Democracy by Coincidence”: A Response to Peter K. Enns*, 13 PERSP. ON POL. 1065 (2015) and Martin Gilens, *Simulating Representation: The Devil’s in the Detail*, 3 RES. & POL. 1 (2016).

10. Martin Gilens & Benjamin I. Page, *Critics Argued with Our Analysis of U.S. Political Inequality. Here Are 5 Ways They’re Wrong*, WASH. POST (May 23, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/05/23/critics-challenge-our-portrait-of-americas-political-inequality-heres-5-ways-they-are-wrong/> (noting further that opposition to a policy by 25% of affluent Americans results in a 4% chance of adoption, whereas a policy similarly opposed by the middle class has a 40% chance of adoption).

to raising the minimum wage—is unquestionably concerning.¹¹ Our republican Constitution was designed to create a space for elected officials to shape policymaking at a distance from the immediate preferences of constituents. The intent, however, was to prevent kneejerk majoritarianism, not to preclude responsiveness and accountability to the citizenry.

In legal circles, two camps dominate the academic discussion about how to restore accountability and responsiveness to our democratic institutions.¹² The first, like the public, identifies the flood of money into electoral politics as the primary source of our troubles. These scholars criticize the Supreme Court’s decision in *Citizens United v. FEC*, blaming it for the rise of Super PACs and similar independent expenditure groups and for the recent explosion of money in elections.¹³ They offer a variety of proposals aimed at reducing the influence of money in politics.

The second school points to political parties as the root of the crisis.¹⁴ Legislative dysfunction is attributed to polarization and the weakened position of party leaders relative to other partisan ac-

11. A large body of empirical research demonstrates that elected officials in both parties are largely unresponsive (sometimes stubbornly so) to the concerns of Main Street. *See, e.g.*, MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* 113–17, 102–03 figs. 4.2 & 4.3 (2012) [hereinafter GILENS, *AFFLUENCE AND INFLUENCE*] (demonstrating that legislators are most responsive to high-income Americans and least responsive to the poor and, further, that this differential responsiveness holds across all policy domains although it is starkest for economic policy); LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 173–75, 287–89 (2008) (concluding that as it currently functions, the American political system allows policymakers “considerable latitude” to pursue their own goals, even with respect to “issues on which public opinion seems to be especially firm and stable” and attributing this agency problem to the ideological and partisan commitments of elected officials). For current examples see Jennifer Rubin, Opinion, *Voters Are Running Out of Patience*, WASH. POST (Feb. 21, 2018), https://www.washingtonpost.com/blogs/right-turn/wp/2018/02/21/voters-are-running-out-of-patience/?utm_term=.c99910280042 and Noah Smith, Opinion, *Raise the Minimum Wage, Congress*, BLOOMBERG (Nov. 13, 2018, 11:15 AM), <https://www.bloomberg.com/opinion/articles/2018-11-13/new-congress-should-raise-the-minimum-wage>.

12. A final group of election law reformers focused on barriers to the vote, including redistricting. In general, however, these scholars ground their work in a rights framework rather than concerns about responsiveness or stubborn imbalances in power.

13. *See, e.g.*, RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* (2016); Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425 (2015); ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* (2014).

14. *See, e.g.*, Samuel Issacharoff, *Outsourcing Politics: The Hostile Takeovers of Our Hallowed Out Political Parties*, 54 HOUS. L. REV. 845 (2017); RAYMOND J. LA RAJA & JONATHAN RAUCH, *CTR. EFFECTIVE PUBLIC MGMT., BROOKINGS INST., THE STATE OF STATE PARTIES—AND HOW STRENGTHENING THEM CAN IMPROVE OUR POLITICS* (2016); Michael S. Kang, *The Brave New World of Party Campaign Finance Law*, 101 CORNELL L. REV. 531 (2016); IAN VANDEWALKER & DANIEL I. WEINER, *BRENNAN CTR. FOR JUSTICE, STRONGER PARTIES, STRONGER DEMOCRACY: RETHINKING REFORM* 3 (2015); Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804 (2014).

tors.¹⁵ Policy prescriptions frequently focus on further deregulation of campaign finance laws—hypothesizing that good governance will be restored when political power is returned to party leaders and the influence of Super PACs and other ideological donors is diminished.¹⁶

More recently, however, a nascent third approach to democratic reform has emerged in the legal literature. Looking beyond the usual suspects—money in politics, the state of our political parties, polarization, and the near extinction of competitive elections—it has focused on the ways that rising economic inequality has fed the stubborn imbalance in political influence.¹⁷ This third approach shares the progressive impulses of the first school. Objecting to its myopic focus on electoral spending, however, it seeks to extend the second school’s focus on organizations as a potential locus for democratic revival beyond political parties to civic associations as well.¹⁸

The central claim of this third school is that reversing the trend toward extreme political and economic inequality requires strategies focused on bolstering the organizational capacity of non-elite Americans to enable them to more effectively provide a counterweight to the political influence of wealth.¹⁹ Thus, Kate Andrias has argued that scholars should pay more attention to “facilitating the countervailing power of ordinary citizens and their organizations

15. For an overview of this analysis and critique of its policy prescriptions, see Tabatha Abu El-Haj, *Networking the Party: First Amendment Rights & the Pursuit of Responsive Party Government*, 118 COLUM. L. REV. 1225 (2018) [hereinafter Abu El-Haj, *Networking the Party*] (offering an alternative account of the weakness of our party system and the deficit in responsiveness).

16. The current dysfunction is attributed to structural changes and regulatory incentives that empower individual candidates and independent expenditure groups (including through the flow of money) and disempower parties and their leaders, who are viewed as having greater interest in governing through compromise and moderation. See, e.g., Issacharoff, *supra* note 14, at 864–70; Pildes, *supra* note 14, at 828–33.

17. See, e.g., Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419 (2015) [hereinafter Andrias, *Separations of Wealth*]; Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669 (2014); Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445 (2016).

18. See, e.g., Tabatha Abu El-Haj, *Beyond Campaign Finance Reform*, 57 B.C. L. REV. 1127, 1129–30, 1132–33 (2016) [hereinafter Abu El-Haj, *Beyond Campaign Finance Reform*].

19. See, e.g., K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 3, 142–44 (2017) (arguing that to the degree “our current economic pathologies are rooted in disparities of economic and political power,” the solution is to “build[] a more equitable, inclusive, and responsive democratic system”—one which activates civic associations by providing visible targets and levers for collective political action); see also K. Sabeel Rahman, *Policymaking as Power-Building*, 27 S. CAL. INTERDISC. L.J. 315, 354 (2018) [hereinafter Rahman, *Policymaking as Power-Building*] (“Altering the existing balance of power thus requires finding ways to bolster the underlying *capacity* of affected but relatively under-powered interests to exercise power and influence on decision-makers.”).

in governance.”²⁰ And previously, I made the case for why “those concerned about the outsized political influence of moneyed elites” should turn their attention to strategies for “undercut[ing] the influence money buys” by “enhanc[ing] the civic and political organizations of ordinary Americans,” rather than “wasting their limited resources chasing after campaign finance reforms aimed at taking money out of politics and doctrinal theories aimed at justifying those reforms.”²¹

The recognition that “organization, like wealth, is itself a source of political power” underlies this third approach.²² Unions offer a prime illustration of this point: during their heyday in the middle of the twentieth century, a period marked by prosperity and relative economic equality, unions routinely leveraged their ability to mobilize workers to gain access to elected officials of both parties, offsetting “the financial power of the business lobby.”²³

As such, this scholarship has focused on offering a range of discrete “interventions aimed at addressing inequalities in *organizational capacity*.”²⁴ These have included reforms to reduce legal barriers to collective action in the workplace²⁵ and suggestions for how to design government institutions to facilitate broader civic engagement.²⁶ Taking the latter approach, K. Sabeel Rahman has prioritized identifying ways to enhance the opportunities for everyday citizens to influence “the bureaucratic processes of governance and policy implementation.”²⁷

20. Kate Andrias, *Confronting Power in Public Law*, 130 HARV. L. REV. F. 1, 2 (2016); see also Andrias, *Separations of Wealth*, *supra* note 17, at 440–44.

21. Abu El-Haj, *Beyond Campaign Finance Reform*, *supra* note 18, at 1132–33 (arguing that the potential of campaign finance regulation to root out the political influence of the wealthy is significantly limited by the First Amendment’s requirement that there be ample routes for political influence).

22. Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148, 167 (2013) (noting further that organization “enables groups to build political power that, like the power derived from wealth, is portable across processes of participation”).

23. JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 157, 160–61, 181 (2014) (recounting that “[g]iven labor’s strength, politicians from heavily industrialized locales with a strong union presence simply had no choice but to court labor’s vote, regardless of their own party allegiances”); see also JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 140 (2010) (detailing ways unions were able to effectively counter the efforts of business on a variety of fronts, including the minimum wage).

24. Sachs, *supra* note 22, at 166.

25. See, e.g., *id.* at 198–203 (proposing various legal reforms that would enhance workers’ ability to organize); see also Dayne Lee, Note, *Bundling Alt-Labor: How Policy Reform Can Facilitate Political Organization in Emerging Worker Movements*, 51 HARV. C.R.-C.L. L. REV. 509 (2016).

26. K. Sabeel Rahman, *From Civic Tech to Civic Capacity: The Case of Citizen Audits*, 50 PS: POL. SCI. & POL. 751 (2017).

27. RAHMAN, *supra* note 19, at 15, 22–23, 160–63 (arguing that insofar as agencies have become the “‘front-line’ institutions of governance” administrative processes must be re-

Underappreciated to date, however, is that this third approach offers a critical intervention in the debates about how to reform our democracy. By drawing attention to the political role of civic organizations, it brings into relief that there are, in fact, three phases to democracy (civil society, governance, and elections)²⁸ and, further, that our democratic dysfunctions can stem from any of these three phases of democracy: civil society (political inputs), governance (policy outputs) or the electoral interface designed to underwrite that relationship. And it implies that there are three potential points of entry for democratic reform.

Without denying any of the other causes for the current state of democratic politics,²⁹ the third school thus lays the foundation for reimagining the entire project of democracy reform. To date, democratic reformers have largely focused on the electoral interface—identifying and redressing impairments such as redistricting, the state of political parties, ballot access, and campaign finance.³⁰ Little attention has been paid to potential impairments in political inputs themselves. This is a mistake. Elections and political parties represent only one point of entry into American democracy; civil society forms another.

As far back as the nineteenth century, social theorists have understood that civil society—particularly civic associations—play a critical role in underwriting the participation necessary for democratic responsiveness.³¹ The inverse, unfortunately, is equally true:

vamped in ways that “affirmatively enhance the countervailing power of ordinary citizens”); see also Rahman, *Policymaking as Power-Building*, *supra* note 19, at 376 (describing institutional designs with the potential to unleash “the (under-utilized) potential [of regulatory agencies] to house and foster a more inclusive, empowered form of participation and engagement” and to “mitigat[e] disparities of political power”).

28. Cf. K. Sabeel Rahman, *(Re)Constructing Democracy in Crisis*, 65 UCLA L. REV. 1552, 1558–61 (2018) (arguing that a recognition “that democracies require state institutions, civil society organizations, and interfaces to work well” allows us to focus on “(1) the problem of systemic inequalities in political power and influence, and (2) the problem of systemic political exclusion, particularly along lines of race and ethnicity”).

29. I have considered how these other causes might be addressed in other work. See Abu El-Haj, *Networking the Party*, *supra* note 15, at 1250–75; Abu El-Haj, *Beyond Campaign Finance Reform*, *supra* note 18, at 1162–63, 1175–83.

30. To a lesser degree, scholarship has attended to deficiencies in governance itself.

31. See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Phillip Bradley ed., Vintage Classics 1990) (1835). For similar claims about civil society in the modern era see ROBERT J. SAMPSON, *GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT* (2012) (reporting finding of study with Doug McAdam that shows civic participation is strongest in neighborhoods with the highest concentration of nonprofit organizations, other than Black churches); ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 91–99 (1994) [hereinafter PUTNAM, *MAKING DEMOCRACY WORK*] (reviewing evidence that better governance in more economically advanced regions of the country is attributable to the quality of local civil society, as measured by density in civic associations, levels of newspaper readership, and turnout for national referendum, among other things); ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 344–47 (2000) [hereinafter PUTNAM, *BOWLING ALONE*] (reviewing

the absence or weakening of civil society can prejudice the democratic process.³² Indeed, while the public has been preoccupied with *Citizens United v. FEC* and the flood of money it unleashed into electoral politics, political scientists have been attributing the increasing solicitude of government officials to affluent citizens to their organizational advantage relative to the middle class, while dating the phenomenon to well before *Citizens United*.³³

This Article seeks to develop the broader implications of the third school—and to do so at a moment when many of the traditional approaches to reform appear increasingly foreclosed. Toward that end, it begins with a comprehensive diagnosis of the weaknesses in civil society that currently undermine its ability to foster a virtuous democratic circle from political participation to policy responsiveness. It explains how changes in the form of civic associations since the 1970s have compounded the long-standing unrepresentativeness of political inputs. The Achilles' heel of American civil society is the form of civic representation. Civic associations representing Main Street interests today have largely stepped back from fostering active forms of civic and political participation, thereby becoming less capable of advancing democratic accountability and responsiveness.

Second, and more importantly, this Article offers reasons to believe that something can be done about these weaknesses, including through law. Legislation, it turns out, does far more than distribute or deny benefits and rights to individuals. It shapes civil society by influencing individuals' relationship to and participation in democracy, as well as the incentives that exist for building political organizations. Policies that distribute visible and generous (ideally universal) benefits in fair, non-arbitrary ways recognize individuals' citizenship and communicate the value of government. They create reasons to organize on the part of beneficiaries and incentives for political parties and elites to mobilize those same beneficiaries. Other forms of policymaking do the exact opposite.

This, then, is the central contribution of this Article. Civil society is neither independent of nor impervious to law.³⁴ Civil society, in-

evidence that communities with strong civic associations both demand and get better government); Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65 (1995) ("The norms and networks of civic engagement also powerfully affect the performance of representative government.").

32. PUTNAM, MAKING DEMOCRACY WORK, *supra* note 31, at 114–15.

33. Task Force on Inequality & Am. Democracy, Am. Political Sci. Ass'n, *American Democracy in an Age of Rising Inequality*, 2 PERSP. ON POL. 651, 657 (2004).

34. JOHN EHRENBERG, CIVIL SOCIETY: THE CRITICAL HISTORY OF AN IDEA 7, 189–92 (2d ed. 2017) (contrasting social theories that account for how "civil society is not an autonomous sphere of self-contained democratic activity" with Tocqueville's anti-statist conception of civil society, which views civil society as a space untouched by law, and remarking that the

cluding its potential as a source of democratic accountability or dysfunction, is instead deeply entwined with law. Indeed, changes in the form of federal policymaking since the Reagan era have at once contributed to income inequality and to the inequalities in political mobilization and organization that impede the ability of low- and middle-income Americans to resist the political sway of elites and super-elites today.³⁵ In this regard, the legal-institutional influence on civil society extends much further than the First Amendment and the political culture of tolerance that is necessary to protect the freedom of speech, association, and the press.³⁶

Once we recognize that public policy as instantiated in legislation *will* play some role in the trajectory of civil society and, hence, democracy, it is possible to move beyond the myopic focus on procedural reforms and to envision policies capable of motivating individuals to participate in our democracy and stimulating the reorganization of the interests of everyday Americans. It is possible, in other words, to begin to see a role for law in reversing the current weaknesses in civil society.

Ultimately, it is that project to which this Article turns. In doing so, it offers a model of what it would mean for lawyers (all lawyers, not just election lawyers) to begin to attend to the law's secondary effects on civil society. Like the erosion of democratic institutions and norms, the restoration will necessarily be an incremental and complex process. The pertinent task is, therefore, to identify the opportunities that exist, without ignoring the corresponding constraints that will inevitably shape and limit those efforts.

Make no mistake. There are no silver bullet policy prescriptions in what follows. Instead, this Article shows how law's role in democratic reform can be expanded even as the burden of restoring American democracy must be shared. In this regard, it identifies existing legislative opportunities to make considerable strides toward rebuilding a participatory civil society, but also the ways that project could be advanced by both technology and the funding decisions of good governance philanthropists.

The critical stance toward reform embodied in this Article is that restoration of a robust civil society capable of organizing and mobilizing ordinary Americans in ways that facilitate their ability to demand responsiveness and enforce accountability is by no means guaranteed. But it is also not foreclosed. Unlike in 2016 when I be-

latter continues to have a hold over contemporary American social theory); *see also* CIVIL SOCIETY AND GOVERNMENT (Nancy L. Rosenblum & Robert C. Post eds., 2002).

35. *See infra* notes 229–243 and accompanying text.

36. *Accord* Rahman, *Policymaking as Power-Building*, *supra* note 19, at 318–20 (arguing that it is time to recognize the “power-shifting dimensions of policy design” and the institutional features of their implementation).

gan this Article, it is no longer possible to *only* emphasize the abundant weakness of American democracy. The fact is that the election in 2016 gave birth to some more positive democratic narratives. The 2018 midterm elections witnessed the highest level of voter turnout in nearly a century. It also brought record numbers of women to office and presented a significant step forward in diversifying the membership of Congress. Most importantly, those outcomes, as we will see, were a product of a civic revival.

Part I identifies three critical weaknesses of contemporary civil society and the ways these weaknesses contribute to the stubborn imbalances in political influence in American politics. Part II explains the ways in which legislative and regulatory efforts have second-order effects on the political capacity of citizens in a democracy, and thus why legislation has a role to play in either reversing or reinforcing the current trend. Finally, Part III offers a template of what it might mean to expand the democratic reform agenda to reap the second-order effects on civil society of legislative policymaking.

I. AN ACCOUNTING OF DEMOCRATIC VICES AND (LATENT) CIVIC VIRTUES

American civil society today is not well positioned to facilitate democratic accountability and responsiveness. For one, it suffers from unequal and unrepresentative citizen participation in all stages and forums of politics.³⁷ For another, the differential organizational capacity of different publics creates a chorus of interest groups in Washington (but also in state capitols) in which some voices are better heard than others.³⁸ Most importantly, the decline since the middle of the twentieth century of both private-sector unionism and class-integrated, mass-membership associations has compounded the effects of this unequal and unrepresentative participation.³⁹ Taken together, these three dynamics significantly undercut the representativeness of political inputs into our democratic institutions, skewing policymaking in both legislatures and administrative agencies toward the interests of the wealthy.

The George W. Bush administration's failure to achieve the privatization of Social Security and Medicare—one of its signature

37. See KAY LEHMAN SCHLOZMAN ET AL., *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* 118 (2012) (previewing finding that “neither active individuals nor active organizations represent all politically relevant segments of society equally”).

38. *Id.*

39. See *infra* notes 130-173 and accompanying text.

campaign promises—nicely illustrates both the political vices and potential democratic virtues of American civil society. On the side of virtue, the invulnerability of Social Security and Medicare highlights the power of everyday Americans, when organized in effective civic associations, to achieve political responsiveness despite opposition from moneyed interests. The snag for the Bush administration (as for others since) has proved to be the AARP, whose political muscle derives from its 38 million members, who vote regularly in large numbers.⁴⁰

At the same time, the sacred status of Social Security and Medicare illustrates the political vices of contemporary civil society and their contribution to imbalances in political influence.⁴¹ The AARP's wins frequently come at the expense of the needs of younger Americans. Political participation of seniors (including those of middle to low socioeconomic status) is not matched by other groups.⁴² Meanwhile, civic associations with the AARP's ability to represent, mobilize, and educate its members are scarce in contemporary civil society.⁴³ As a consequence, the interests and perspectives of seniors are overrepresented in American politics.⁴⁴ Seniors reap the rewards while the competing interests of younger Americans—e.g., affordable college or daycare—are routinely ignored.

The real lesson then is that our democratic institutions govern poorly when citizens are *differentially* and *unequally* organized in civil society. And therein lies a fundamentally vicious political cycle: American policymakers are much more generous to those who are well-organized and participate (to seniors but more importantly to business and socioeconomic elites) than to those who remain un-

40. See Suzanne Mettler, *The Transformed Welfare State and the Redistribution of Political Voice*, in *THE TRANSFORMATION OF AMERICAN POLITICS: ACTIVIST GOVERNMENT AND THE RISE OF CONSERVATISM* 191, 211 (Paul Pierson & Theda Skocpol eds., 2007) [hereinafter Mettler, *Transformed Welfare State*] (noting constant activism of senior citizens in the face of threats of retrenchment of benefits); Jacob S. Hacker et al., *Inequality and Public Policy*, in *INEQUALITY AND AMERICAN DEMOCRACY: WHAT WE KNOW AND WHAT WE NEED TO LEARN* 200 (Lawrence R. Jacobs & Theda Skocpol eds., 2005).

41. Cf. David Weigel, *The Trailer: How Eight Years—and President Trump—Have Changed the GOP's Tune on Medicare*, WASH. POST (Oct. 9, 2018), https://www.washingtonpost.com/politics/paloma/the-trailer/2018/10/09/the-trailer-how-eight-years-and-president-trump-have-changed-the-gop-s-tune-on-medicare/5bbb9f691b326b7c8a8d18a8/?utm_term=.6495ca5c4f75.

42. ANDREA LOUISE CAMPBELL, *HOW POLICIES MAKE CITIZENS: SENIOR POLITICAL ACTIVISM AND THE AMERICAN WELFARE STATE* 14–15, 25–37, 54 (2003) (noting that the participation rates of lower and middle-class seniors are most marked when it comes to Social Security).

43. *Id.* at 78 (attributing finding that “[w]hen demographic characteristics and political interest are controlled for, AARP members are more likely than nonmembers to contact elected officials and to contact them about Social Security specifically”).

44. *Id.* at 15 (arguing that “the crucial feature of mass politics in the United States is . . . the participatory divergence of young and old”).

organized (young Americans, working families, or the poor) and on the political sidelines. This Part systematically lays out the inequalities in political participation that contribute to the imbalance in political influence, as well as the historic transformations in the form of our civic associations that compound the effect.

A. *Unequal and Unrepresentative Political Participation*

American democracy has long suffered from a well-documented problem of unequal and unrepresentative political participation at all stages of political activity.⁴⁵ But, unlike in the past, it is no longer tenable to dismiss the effect of unequal political participation on the grounds that those individuals who do participate are sufficiently representative to underwrite the legitimacy of the political inputs into the system.

1. As Citizens

Unequal and unrepresentative individual participation at all stages of political activity is well documented.⁴⁶ Apart from seniors,⁴⁷ the general rule is that individuals at the top of the socioeconomic ladder are much more likely to turn out on Election Day than those at the bottom. Since the early 1950s, approximately 90% of those in the highest quintile of socioeconomic status (SES) have participated in every election; by contrast, participation in the lowest SES quintile has only broken the 60% mark a handful of times.⁴⁸

Even when candidates and parties invest in mobilizing lower-income and minority voters, the class bias in the electorate remains. In 2008, for example, Americans with household incomes below the median made up only 38% of the electorate, despite representing 55% of the population; by contrast, individuals with incomes over \$100,000 constituted 26% of the electorate, despite the fact that only 16% of the population has a household income

45. SCHLOZMAN ET AL., *supra* note 37, at 147–262, 174 (noting that “[t]he ups and downs of participatory inequality do not seem to be related to other obvious factors—in particular, to growing economic inequality”).

46. *See id.* at 118.

47. Hacker et al., *supra* note 40, at 156, 189 (finding seniors to be “the one group for which a marked participatory bias favoring the affluent and educated does not exist”).

48. SCHLOZMAN ET AL., *supra* note 37, at 153 & fig. 6.1.

above \$100,000.⁴⁹ This class bias is significantly worse during midterms and in state and local elections.⁵⁰

Income is obviously not the only relevant characteristic when considering the representativeness of the electorate.⁵¹ That said, in recent years, the electorate has been significantly less racially unrepresentative.⁵² To the degree racial inequalities in rates of political participation persist, they are a product of disparities in education and income.⁵³ Indeed, African Americans, particularly women, vote at higher rates than their socioeconomic status would predict,⁵⁴ and African-American youth, despite lower levels of income and education on average, are more civically and politically engaged than their white counterparts.⁵⁵ Meanwhile, traditional differences in voter turnout by sex have dissipated, with voter turnout

49. See Joe Soss & Lawrence R. Jacobs, *The Place of Inequality: Non-participation in the American Polity*, 124 POL. SCI. Q. 95, 97 (2009).

50. See SCHLOZMAN ET AL., *supra* note 37, at 133; Adam Bonica et al., *Why Hasn't Democracy Slowed Rising Inequality?*, 27 J. ECON. PERSP. 103, 111 (2013); see also Asma Khalid, *On the Sidelines of Democracy: Exploring Why So Many Americans Don't Vote*, MORNING EDITION (Sept. 10, 2018), <https://www.npr.org/2018/09/10/645223716/on-the-sidelines-of-democracy-exploring-why-so-many-americans-dont-vote> (noting both that voter turnout is extremely and consistently low in midterm elections as well as the fact that those who do not turn out are significantly more likely to be lower income and less educated). It is worth acknowledging, however, that while the affluent are more likely to turn out in every state, the magnitude of participation gap varies significantly by state. See, e.g., Patrick Flavin, *Does Higher Voter Turnout Among the Poor Lead to More Equal Representation?*, 49 SOC. SCI. J. 405, 406, 410 (2012); Kim Quaille Hill & Jan E. Leighley, *The Policy Consequences of Class Bias in State Electorates*, 36 AM. J. POL. SCI. 351, 355 (1992).

51. See SCHLOZMAN ET AL., *supra* note 37, at 216 & fig. 8.4; Elaine Kamarck & Alexander R. Podkul, *The 2018 Primaries Project: The Demographics of Primary Voters*, BROOKINGS INST. (Oct. 23, 2018), <https://www.brookings.edu/research/the-2018-primaries-project-the-demographics-of-primary>.

52. U.S. Election Project, *Voter Turnout Demographics*, <http://www.electproject.org/home/voter-turnout/demographics> (depicting trends from 1984–2018); see also Jens Manuel Krogstad et al., *Historic Highs in 2018 Voter Turnout Extended Across Racial and Ethnic Groups*, PEW RES. CTR. (May 1, 2019), <https://www.pewresearch.org/fact-tank/2019/05/01/historic-highs-in-2018-voter-turnout-extended-across-racial-and-ethnic-groups/>; Jens Manuel Krogstad and Mark Hugo Lopez, *Black Voter Turnout Fell in 2016, Even as a Record Number of Americans Cast Ballots*, PEW RES. CTR. (May 12, 2017), <https://www.pewresearch.org/fact-tank/2017/05/12/black-voter-turnout-fell-in-2016-even-as-a-record-number-of-americans-cast-ballots/>.

53. SCHLOZMAN ET AL., *supra* note 37, at 231 (noting that “[t]he disparity in participation between African Americans and Anglo whites disappears when racial differences in education and income are taken into account”).

54. See Allison P. Anoll, *What Makes a Good Neighbor? Race, Place, and Norms of Political Participation*, 112 AM. POL. SCI. REV. 494, 495–96, 500 (2018) (reviewing studies that find “that when controlling for individual-level resources like income and education, Black Americans often outperform Whites in models of voting” and hypothesizing that this may be because African Americans value those who are politically active, as voters and protestors, significantly more than white Americans do).

55. Jonathan F. Zaff et al., *An Inequitable Invitation to Citizenship: Non-College-Bound Youth and Civic Engagement* at 10 PACE (Oct. 2009) (noting that “African-American youth . . . surpass whites on most measures of civic engagement, due, at least in some part, to traditions, norms, and institutions that promote participation in the Black community”).

rates for women, particularly African-American and Latino women, consistently higher compared to men.⁵⁶

Age, however, remains a critical source of bias in the electorate,⁵⁷ especially during midterm elections.⁵⁸ A recent review of validated voters in the 2016 election found that “compared with validated voters, nonvoters were more likely to be younger, less educated, less affluent, and nonwhite.”⁵⁹ Underscoring the significance of nonparticipation, the study also found that they were much more likely to affiliate with the Democratic Party.⁶⁰ This same study found that “[j]ust 13% of validated voters in 2016 were younger than 30” as compared to 33% of nonvoters.⁶¹

The 2018 midterms did mark a significant improvement, with the Center for Information and Research on Civic Learning and Engagement estimating that 31% of youth (ages 18 to 29) turned out to vote in the 2018 midterms.⁶² That said, optimism should be tempered because the youth share of the vote was 9%, as compared to 32% for those over 65.⁶³ Another reason for caution is that upticks in youth turnout are often disproportionately driven by the

56. Hannah Hartig, FACT TANK: *In Year of Record Midterm Turnout, Women Continued to Vote at Higher Rates than Men*, PEW RES. CTR. (May 3, 2019), <https://www.pewresearch.org/fact-tank/2019/05/03/in-year-of-record-midterm-turnout-women-continued-to-vote-at-higher-rates-than-men/>; see also Stephen Ansolabehere & Eitan Hersh, *Gender, Race and Voting: A Research Note*, 1 POL. & GOVERNANCE 132 (2013) (using a national sample of 1.9 million registrants to show that women registered and voted at higher rates than men, in 2008, and that black women voted at a higher rate than white men, in order to reveal methodological shortcomings of standard approaches to measuring rates of turnout); SCHLOZMAN ET AL., *supra* note 37, at 231 (explaining that “[t]he gap in activity between women and men can be fully explained by gender differences in education, income, civic skills, and political engagement”).

57. Asma Khalid, *Millennials Now Rival Baby Boomers as a Political Force, but Will They Actually Vote?*, NPR (May 16, 2016, 2:40 PM), <https://www.npr.org/2016/05/16/478237882/millennials-now-rival-boomers-as-a-political-force-but-will-they-actually-vote>.

58. CAMPBELL, *supra* note 42, at 29 (reviewing trends from 1959–1998 and showing that seniors, because of increases in participation, are now “more than twice as likely to vote in midterm elections as those under 35”).

59. *An Examination of the 2016 Electorate, Based on Validated Voters*, PEW RES. CTR. (Aug. 9, 2018), <http://www.people-press.org/2018/08/09/an-examination-of-the-2016-electorate-based-on-validated-voters/> (providing a visual graphic comparing demographics of voters and nonvoters).

60. *Id.*

61. *Id.*

62. *Young People Dramatically Increase Their Turnout to 31%, Shape 2018 Midterm Elections*, CIRCLE (Nov. 7, 2018), <https://civicyouth.org/young-people-dramatically-increase-their-turnout-31-percent-shape-2018-midterm-elections/>. In 2016, youth turnout was around 50%. William A. Galston & Clara Hendrikson, *How Millennials Voted this Election*, BROOKINGS INST. (Nov. 21, 2016), <https://www.brookings.edu/blog/fixgov/2016/11/21/how-millennials-voted/>.

63. Matthew Yglesias, *The 2018 Electorate Was Older, Whiter, and Better Educated Than in 2016*, VOX (Nov. 12, 2018), <https://www.vox.com/policy-and-politics/2018/11/12/18083014/2018-election-results-turnout>. See generally *Understanding Voting Data: Youth Turnout vs. Youth Share*, CIRCLE (Nov. 1, 2018), <https://civicyouth.org/understanding-voting-data-youth-turnout-vs-youth-share/>.

behavior of college-bound youth from higher-income families and communities.⁶⁴ Non-college bound youth, however, comprise about 50% of the population aged 15 to 29 years old.⁶⁵ Finally, differential turnout between age groups is partly attributable to the natural life-cycle,⁶⁶ posing a bona fide risk that over attention to the interests of older citizens is difficult to offset.⁶⁷

The unrepresentativeness of political participation is even more pronounced among volunteers and donors to political campaigns.⁶⁸ A 2016 study of campaign contributors documents that the bulk of money coming into campaign coffers is donated by individuals who are disproportionately wealthy, white, male, and old.⁶⁹ These statistics are troubling because the prevalence of uncompetitive elections creates significant pressure on elected officials to be particularly solicitous to the views of donors and campaign activists, above those of their constituents.⁷⁰

Finally, inequality is not limited to the electoral sphere: it shapes all aspects of political participation. From contacting members of Congress, to participating in political marches, lower-income Americans are significantly less likely to engage in American poli-

64. Cf. Zaff et al., *supra* note 55, at 6–7, 22 (reporting that “[i]ncreases in voting, volunteering, and other forms of civic engagement are driven disproportionately by young people from higher-income families and communities,” while lamenting that “[t]he bulk of get-out-the-vote efforts are focused on college campuses” or target low-income youth who are college-bound).

65. *Id.* at 7. The study’s figure is consistent with what we know about college completion despite the fact that the author’s suggestion that the high rate is driven by the fact that one in four students do not complete high school is not credible. Current census data shows the percentage of Americans without a high school degree at just under 10 percent, and others estimate high school drop out rates at about 4%. Compare U.S. Census Bureau, Press Release: *Highest Educational Levels Reached by Adults in the U.S. Since 1940* (Mar. 30, 2017), <https://www.census.gov/newsroom/press-releases/2017/cb17-51.html> (reporting that, in 2016, among those “25 years and older, 89.1 percent had completed high school (or equivalent) or more education”) with NAT’L CTR. FOR EDUC. STATISTICS, *Fast Facts: Dropout Rates*, <https://nces.ed.gov/fastfacts/display.asp?id=16> (lasted visited Nov. 18, 2019) (reporting that “[t]he overall . . . dropout rate [defined as “the percentage of 16- to 24-year-olds . . . who are not enrolled in school and have not earned a high school credential”] decreased from 9.7 percent in 2006 to 5.4 percent in 2017”).

66. SCHLOZMAN ET AL., *supra* note 37, at 209.

67. *Id.* at 209, 231 (“Life-cycle differences seem to persist even after controlling for a large number of factors.”).

68. *Id.* at 157–62.

69. See Sean McElwee, *Whose Voice, Whose Choice? The Distorting Influence of the Political Donor Class in Our Big-Money Elections*, DEMOS (Dec. 8, 2016), <https://www.demos.org/research/whose-voice-whose-choice-distorting-influence-political-donor-class-our-big-money>.

70. SCHLOZMAN ET AL., *supra* note 37, at 251 (noting the incentives elected officials have to keep “the activists who provide the volunteer labor and dollars that make campaigns possible” happy and the ways that “[t]he need to pay attention to high-SES opinionated campaign activists has the potential both to tilt public policy away from the needs of the median voter”).

tics as compared to wealthier citizens.⁷¹ Recent protest participation offers one measure: those who engaged in protest marches in the first two years of the Trump presidency were better educated and more affluent than their fellow Americans, on average.⁷²

The critical point, however, is that it is no longer tenable to dismiss these inequalities on the grounds that those who participate are sufficiently representative to underwrite the legitimacy of the political inputs into the system.⁷³ In their seminal 2012 study, Kay Lehman Schlozman, Sidney Verba, and Henry E. Brady found that as compared to active voters, inactive voters are not only much more likely to report struggling to pay bills, obtain healthcare, and find decent housing, but also much more likely to have utilized public benefit programs.⁷⁴ Similar differences are evident among individuals active in politics. Those with more “limited income and education . . . [are] considerably more likely” to raise concerns about basic needs such as “poverty, jobs, health, [and] housing.”⁷⁵

71. See Soss & Jacobs, *supra* note 49, at 97 (noting further that “[c]ompared to wealthier citizens, lower income Americans tend to vote at lower rates and to participate less in a variety of other political behaviors, including writing letters to members of Congress and protesting”).

72. Mary Jordan & Scott Clement, *In Reaction to Trump, Millions of Americans Are Joining Protests and Getting Political*, WASH. POST (Apr. 6, 2018), https://www.washingtonpost.com/news/national/wp/2018/04/06/feature/in-reaction-to-trump-millions-of-americans-are-joining-protests-and-getting-political/?utm_term=.8a283d45f4d5 (reporting that 44% of participants were at least 50 years old, 36% earned more than \$100,000, and a large portion lived in the suburbs); Sarah Kaplan, *A Scientist Who Studies Protest Says ‘The Resistance’ Isn’t Slowing Down*, WASH. POST (May 3, 2017), https://www.washingtonpost.com/news/speaking-of-science/wp/2017/05/03/a-scientist-who-studies-protest-says-the-resistance-isnt-slowing-down/?utm_term=.ae1c47a9f838 (reporting that “[m]ore than three-quarters of participants at [the Women’s March, the March for Science, and the People’s Climate March] had at least a bachelor’s degree” and “53 percent [of those at the Women’s March] had a graduate or professional degree”). Nationally, only about one in three Americans hold a bachelor’s degree. See U.S. Census Bureau, Press Release: *Highest Educational Levels Reached by Adults in the U.S. Since 1940* (Mar. 30, 2017), <https://www.census.gov/newsroom/press-releases/2017/cb17-51.html> (announcing 2016 Current Population Survey Annual Social and Economic Supplement found 33.4 percent of adult Americans hold a bachelor’s degree and report incomes approximately \$30,000 higher than Americans who hold only a high school diploma on average). That said, this generalization may not hold for African Americans and Latinos, who tend to value grassroots political participation, including protest participation, more than Whites. Whether viewing such practices as critical to gaining equal citizenship translates into higher rates of protest participation is, however, less clear. See Anoll, *supra* note 54, at 495, 498 (finding that Blacks and Latinos “are more likely than Whites to value political rallies, especially their ability to transform their communities for the better”).

73. See John D. Griffin & Brian Newman, *Are Voters Better Represented?*, 67 J. POL. 1206, 1213–14, 1221, 1223 (2005) (concluding that “[w]hether or not a conservatively biased electorate can help elect a Republican, it seems to move Senators’ roll-call votes in a conservative direction”). *But see* Emily Badger, *What if Everyone Voted? Or at Least Voted at Equal Rates.*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/2018/10/29/upshot/what-if-everyone-voted.html> (reporting on new data showing that even who is elected would likely change if the electorate were more representative).

74. SCHLOZMAN ET AL., *supra* note 37, at 126–29.

75. *Id.* at 132.

The result, as Schlozman and her colleagues note, is that “public officials are likely to “hear[] less about . . . matters” of significance to the socioeconomically disadvantaged because they are broadly inactive in politics.⁷⁶

Who participates in politics—and more importantly who does not—matters a great deal for policymaking.⁷⁷ A threshold level of representative political participation at the individual level is necessary not only to legitimize the system but to ensure a measure of accountability and responsiveness. Thus, the overrepresentation of socioeconomic elites among individuals who participate politically creates an electorate with views much closer to those of moneyed interests than those of the eligible electorate.⁷⁸ The fact is that even as Americans do not like to discuss class, Americans from different socioeconomic backgrounds exhibit different preferences with respect to economic policies (from welfare spending to taxes) and different cultural sensibilities.⁷⁹ The underrepresentation of young citizens creates similar problems. Young Americans by and large support gay marriage, hold a broad conception of sexual harassment, recognize the persistence of racial discrimination, embrace diversity, and generally have more liberal outlooks as compared to their elders.⁸⁰ Young Americans overwhelmingly identify with the Democratic Party, while older Americans are more evenly divided

76. *Id.*

77. *Id.* at 118 (previewing finding that “activity by both citizens and organized interests makes a difference for public policy, and, if anything, public officials are disproportionately responsive to the affluent and well-educated members of their constituencies”); *see also id.* at 141–44 (reviewing literature on relationship of public input to policy responsiveness). *But see* Stuart N. Soroka & Christopher Wlezien, *On the Limits to Inequality in Representation*, 41 PS: POL. SCI. & POL. 319, 321, 323–24 (2008) (arguing that the policy consequences of unequal representation are insignificant because only rarely—such as in relation to tax and welfare policy—do low and high-income Americans differ in their policy preferences).

78. *See* Benjamin I. Page & Cari Lynn Hennessy, What Affluent Americans Want from Politics 8–11 (Sept. 2–5, 2010) (APSA 2010 Annual Meeting Paper) (finding more differences between the political preferences of the top 4% of income earners and those of lower-income Americans, than between the top 33% of income earners and those of lower-income Americans, especially with respect to economic policy); *see also* Jeffrey A. Winters & Benjamin I. Page, *Oligarchy in the United States?*, 7 PERSP. ON POL. 731, 738 (2009).

79. *See, e.g.,* *Most See Inequality Growing, but Partisans Differ over Solutions* at 8, PEW RES. CTR. (Jan. 23, 2014), <http://www.people-press.org/2014/01/23/most-see-inequality-growing-but-partisans-differ-over-solutions/> (finding significant differences between the views of those with family incomes of less than \$30,000 and those with family incomes of at least \$75,000, especially with respect to redistributive policies).

80. Kim Parker et al., *Generation Z Looks a Lot Like Millennials on Key Social and Political Issues*, PEW RES. CTR. (2019), http://www.pewsocialtrends.org/wp-content/uploads/sites/3/2019/01/Generations-full-report_FINAL_1.18.pdf; *accord* PEW RES. CTR., *The Generation Gap in American Politics* (2018), <http://www.people-press.org/wp-content/uploads/sites/4/2018/03/03-01-18-Generations-release2.pdf> (noting, in particular, that Republicans in this generation differ from their older counterparts in being more aware of ongoing racial discrimination, valuing racial and ethnic diversity, seeking government solutions to social problems, and attributing climate change to human activity).

in their party allegiances.⁸¹ They also have different priorities with respect to government spending from older Americans, who (un-surprisingly) prioritize maintaining Social Security and Medicare over government spending on either K-12 or higher education.⁸²

2. Of Organizations

Unequal and unrepresentative participation in politics extends beyond individuals to organizations. Despite the plethora of public interest organizations, the chorus of interest groups in American politics is not representative of the full spectrum of interests. This skews political inputs once again. Its significance is magnified to the extent that individual political participation, even if representative, cannot create an effective counterweight to elite interests in the absence of organizations.

The most salient axis of organizational inequality in the New Gilded Age is economic. For one, business and other economic interests are much better organized than those of citizens.⁸³ For another, critical economic interests—those of part-time workers, parents of young children, and the beneficiaries of means-tested federal programs—essentially lack a presence in Washington.⁸⁴

Indeed, it is beyond dispute that “the voices of advocates for broad publics and the less privileged are . . . muted” in the chorus of American interest group politics.⁸⁵ In their 2012 longitudinal study of federal interest groups, Schlozman, Verba, and Brady document the various inequalities that shape the so-called “un-heavenly chorus” of interest group politics.⁸⁶ First and foremost, their work confirms what has been long recognized: the bulk of civic groups engaging with Congress represent American business interests.⁸⁷ Altogether, “more than half, 53 percent, [of all organi-

81. PEW RES. CTR., *Wide Gender Gap, Growing Educational Divide in Voters' Party Identification* (2018), <http://www.people-press.org/wp-content/uploads/sites/4/2018/03/03-20-18-Party-Identification-CORRECTED.pdf> (reporting that “nearly six-in-ten Millennials (59%) affiliate with the Democratic Party or lean Democratic, compared with about half of Gen Xers and Boomers (48% each) and 43% of voters in the Silent Generation”).

82. SCHLOZMAN ET AL., *supra* note 37, at 205–09.

83. See Gilens & Page, *supra* note 9, at 572.

84. See SCHLOZMAN ET AL., *supra* note 37, at 344.

85. *Id.* at 443.

86. The quantitative study is based on an analysis of organizations listed in the 1981, 1991, 2001, and 2006 *Washington Representatives* directory. *Id.* at 317. The data set does not include organizations that only have a presence in state and local politics. *Id.* at 318.

87. *Id.* at 657; Kay Lehman Schlozman et al., *Inequalities of Political Voice, in* INEQUALITY AND AMERICAN DEMOCRACY: WHAT WE KNOW AND WHAT WE NEED TO LEARN 19, 53 (Lawrence R. Jacobs & Theda Skocpol eds., 2005) (reviewing literature and concluding that “[t]he set of organized political interests continues to be organized principally around economic matters . . . and to be dominated by business and the professions”).

zations active in Washington] represent business in one way or another.”⁸⁸

Second, most of the groups engaged in politics in Washington represent institutional interests, not people.⁸⁹ Associations with individual (as opposed to organizational) members constitute only about an eighth of the groups engaged in Washington politics.⁹⁰ Despite their market share, such groups *are* disproportionately involved in critical policymaking debates.⁹¹ Still, with fewer resources they are often “spread thin” in their efforts and struggle to set the legislative agenda.⁹²

Third, these groups do not represent the full swath of citizens’ interests.⁹³ Indeed, the underrepresentation of the interests of low- to middle-income Americans among the citizen groups that do exist is one of the most troubling features of interest group politics today. Americans of lower socioeconomic status are significantly less likely to belong to an organization that takes a stand on public issues, as compared to their higher SES counterparts.⁹⁴

In this regard, two findings in the Schlozman study are particularly shocking from an equity and inclusion perspective. First, “unless they are members of unions, those whose work is unskilled have no occupational associations at all to represent their interests in Washington.”⁹⁵ The bulk of America’s low-skill workers—“bellhops, telemarketers, hotel desk clerks, laundry workers, bus drivers, bartenders, custodians, bank tellers, or tool and die makers”—have no means of influencing Washington politics, unless they happen to be unionized.⁹⁶ During the period of the study, “more than 90 million American workers [were employed] in nonprofessional and nonmanagerial occupations.”⁹⁷ To be sure,

88. SCHLOZMAN ET AL., *supra* note 37, at 322.

89. *Id.* at 265, 319 (noting that “the majority of organizations active in political life have no members in the usual sense of the word”).

90. *Id.* at 319–20 & tab. 11.2 (reporting that, in 2001, “only 12 percent of the organizations listed in the *Washington Representatives* directory were associations of individuals”).

91. FRANK R. BAUMGARTNER ET AL., *LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY* 10–11 (2009) (arguing that “[c]itizen groups are . . . more important to policy debates than simple numbers would indicate because, like unions, they tend to be active and recognized as major players on many issues”).

92. *Id.* at 11, 13.

93. *Id.*

94. HACKER & PIERSON, *supra* note 23, at 140 (reporting a one-third difference in likelihood).

95. SCHLOZMAN ET AL., *supra* note 37, at 328, 346.

96. *Id.* (noting that “other than unions, there are *no occupational associations at all* to organize those who labor at low-skill jobs”).

97. *Id.* at 328. In 2014, “about 10 percent of the active workforce . . . were self-employed” (approximately 14.6 million people) and an additional 29.4 million worked for self-employed individuals. Drew DeSilver, *10 Facts About American Workers*, PEW RES. CTR. (Sept. 1, 2016), <http://www.pewresearch.org/fact-tank/2016/09/01/8-facts-about-american-workers/>.

some of these low-skill workers are represented by unions. That said, the proportion of the American workforce that is unionized has declined to a mere 10.5%, with private-sector unionism falling to closer to 6.4%.⁹⁸

Second, organizations that advocate for the poor are virtually nonexistent.⁹⁹ In fact, during the time period under study, “there [was] not a single organization that [brought] together recipients of means-tested government benefits such as Medicaid [to] act[] on their own behalf.”¹⁰⁰ The over 70 million Americans who depend on Medicaid and CHIP must rely on professional organizations to advocate on their behalf—organizations that, by their own reports, are woefully inept at incorporating beneficiaries.¹⁰¹

The story is markedly different for higher SES Americans. Those whose work requires a college degree are much more likely to belong to a membership organization representing their profession.¹⁰² Indeed, professionals—whether “criminal defense lawyers, plant physiologists, landscape architects, [or] historians”—are extremely well organized.¹⁰³ Schlozman and her colleagues found half of the groups representing individuals on the basis of their occupation are associations of professionals.¹⁰⁴ Individuals with higher levels of educational attainment are also “much more likely than

98. Bureau of Labor Statistics, News Release: Union Members—2018 (Jan. 19, 2019) (noting that the percentage represents about 14.7 million Americans and constitutes a decline in nearly 10 percent and 3 million union workers since 1983, the closest year for which there are comparable figures).

99. SCHLOZMAN ET AL., *supra* note 37, at 325–26, 327.

100. *Id.* at 321 & tab. 11.3, 346 (study is of a twenty-five-year period using complete data on organizations in Washington directory for five discrete years).

101. JAMILA MICHENER, *FRAGMENTED DEMOCRACY: MEDICAID, FEDERALISM, AND UNEQUAL POLITICS* 1152–56 (2018) (reporting that “the role of actual beneficiaries in shaping the advocacy of professional organizations . . . was woefully limited”); *see also id.* at 11 (noting that “[a]s of 2017, more than 70 million Americans had health coverage through Medicaid”). For more recent statistics on Medicaid and CHIP see *October 2018 Medicaid & CHIP Enrollment Data Highlights*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/program-information/medicaid-and-chip-enrollment-data/report-highlights/index.html> (last visited Feb. 1, 2019). The significance of this lack of representation is magnified when one notes that, by some estimates, 40% of American children depend on means-tested federal programs for healthcare. *See* Rachel West & Katherine Gallagher Robbins, *Who Receives Medicaid? A State-by-State Breakdown*, CTR. AM. PROGRESS (July 20, 2017), <https://www.americanprogress.org/issues/poverty/news/2017/07/20/436243/receives-medicaid-state-state-breakdown/>; *see also* Nicki Lisa Cole, *Who Really Receives Welfare and Government Entitlements*, THOUGHTCO.COM (July 13, 2018), <https://www.thoughtco.com/who-really-receives-welfare-4126592>.

102. SCHLOZMAN ET AL., *supra* note 37, at 325–26, 327 (reporting that “those who do work that requires high levels of education—and, to a lesser extent, confers high levels of income—are very likely to be represented by an organization in Washington”).

103. *Id.*

104. *Id.* at 327 (noting further that a large proportion of groups organized around identity politics represent the interests of professionals from that group).

those lower down to be affiliated with a *political* organization”¹⁰⁵ and to report having taken an active leadership role within those political organizations.¹⁰⁶ All these facts “reinforce the upper-class accent of the heavenly chorus.”¹⁰⁷

Finally, and least surprisingly, the number of Americans involved in groups associated with public goods, such as clean water or safer streets, “is far smaller than the proportion who would benefit from those conditions.”¹⁰⁸ While it is not shocking that the interest groups that exist underrepresent broad but diffuse interests in public goods,¹⁰⁹ this too has obvious and unfortunate implications for policymaking.

In all, these associational inequalities significantly hamper the capacity of American civil society to demand responsiveness to the interests of everyday Americans. While the organizational advantages of business and economic interests do not guarantee their success, it does give them the upper hand when it comes to legislative priorities.¹¹⁰ Indeed, a seminal study questioning the dogma that moneyed interests inevitably prevail in Washington attributes the “conspicuous . . . paucity of issues relating to the poor and to the economic security of working-class Americans” on the legislative agenda to the fact that these groups lack an organizational seat at the table.¹¹¹

105. *Id.* at 377; *see also id.* at 378 & figs. 13.2 & 13.2 (emphasis added) (further summarizing that “[w]hen we restrict our purview to members of political organizations, we find that, compared to those in the lowest SES quintile, those in the highest quintile are nearly twice as likely to have attended a meeting, nearly three times as likely to have been active, and more than three times as likely to have served on the board or as an officer”).

106. *Id.* at 380 (“Not only are the well-educated and affluent more likely to be affiliated with political organizations, but, even among members, they are also more likely to be active in those organizations and to serve on the board or as officers.”).

107. *Id.* at 346, 380 (concluding that “the economically disadvantaged are underrepresented in pressure politics”).

108. *Id.* at 54.

109. It is well-established that classic collective action dilemmas, most particularly those associated with transaction costs and free-ridership, pose significant barriers to the formation of organizations to represent diffuse interests. *Id.* at 278, 316, 345 (noting, further, that the “formal presentation of the free rider problem often miss the differences among constituencies in their ability to bear those costs” and thus the ways that “resource constraints have a powerful impact on which voices are heard through the medium of collective advocacy”).

110. BAUMGARTNER ET AL., *supra* note 91, at 16, 25 (2009) (concluding that wealth is not a good predictor of policy success largely because of two factors: first, the status quo bias, and, second, the fact that most policies implicate competing economic interests); *see also id.* at 240 (acknowledging that the status quo “already” incorporates the substantial “biases . . . inherent in the system of interest-group mobilization”).

111. *Id.* at 255–58 (noting, further, the divergence between the issues that organizational interests seek to place on the legislative agenda through lobbying and the public’s priorities).

B. *From Elks to Policy Wonks:
The Shifting Structure of Civic Associations*

Everyday citizens must be organized to demand responsiveness.¹¹² Indeed, influencing legislative priorities and executive policymaking requires the presence of *powerful* civic associations.¹¹³ In this regard, the structural weakness of contemporary civil society goes well beyond uneven representation. It also lies in the form of that representation: for the most part, civic groups that represent the interests of ordinary Americans are no longer capable of sustaining civic engagement in ways that produce responsiveness and enforce accountability. This in turn reinforces the political distortion that arises out of the long-standing problem that not all interests in the United States participate equally as individuals or through organizations.

1. *Participatory Civic Associations of the Mid-Twentieth Century*

Understanding this claim requires a clear picture of what American civil society looked like before the great social movements of the twentieth century. Until the early 1970s, American civil society was dominated by unions but also by federated organizations with dues-paying members from working- and middle-class households.¹¹⁴ While formed for nonpolitical ends, unions and associations, from the American Legion and Knights of Labor to the National Congress of Mothers, fostered democratic participation and responsiveness in myriad ways. Without minimizing that most of these organizations partook of racial exclusion and sex-segregation, comprehending their political virtues is critical to any effort to rebuild the political muscle of ordinary Americans.

112. Cf. Kathleen Bawn et al., *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 PERSP. ON POL. 571, 577–78 (2012) (identifying a large “blind spot” with respect to information about official behavior, which renders ordinary voters incapable of holding politicians accountable through monitoring).

113. See GILENS, AFFLUENCE AND INFLUENCE, *supra* note 11, at 121–23 (noting that where “poor and middle-income Americans have powerful [civic] allies” they have been able to maintain social welfare programs).

114. THEDA SKOCPOL, DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIL LIFE 153–57, tbl. 4.3 (2003) (documenting the decline in membership in classic mid-twentieth-century federated civic associations—sex-segregated ones, such as the American Legion, the American Bowling Congress and the General Federation of Women’s Clubs, as well as those that were gender integrated, such as the PTO and the Scouts); *see also id.* at 163–71 (arguing that while the evidence is mixed, it is unlikely that membership has simply transferred to more locally oriented face-to-face groups); *accord* PUTNAM, BOWLING ALONE, *supra* note 31, at 30–35 (finding a drop off in small face-to-face civic organizations after the 1960s as fewer individuals opted to join such groups).

First, the face-to-face and personal quality of participation in the civic associations that dominated American civil society from the Civil War to the middle of the twentieth century fueled both civic engagement and political power. This is because relationships and social networks drive political recruitment and mobilization far more than ideology and belief.¹¹⁵ While money, education, civic skills, and political interest all play a significant role,¹¹⁶ empirical research consistently finds that individuals are much more likely to respond to calls for political action if they have a social connection—even a distant one—to the person making the ask.¹¹⁷ Indeed, some researchers attribute the higher rates of political participation among those with higher levels of educational attainment to the fact that they are more likely “to be located in the social networks through which requests for political activity are mediated.”¹¹⁸ Similarly, the exceptional political participation of seniors is partially attributable to the frequency with which they are mobilized by political parties and others.¹¹⁹

A second significant source of political strength for civic groups formed after the Civil War was that “virtually all [local] chapters included men or women of different occupational and class backgrounds.”¹²⁰ A study of veterans of World War II is revealing in this regard. It found that even among veterans with graduate education, only half of their civic memberships were in elite professional groups.¹²¹ The other half of the groups they joined, upon returning home, included members of various socioeconomic classes.¹²²

115. See Henry H. Brady et al., *Beyond SES: A Resource Model of Political Participation*, 89 AM. POL. SCI. REV. 271, 285 (1995) (concluding that “motivations such as interest in politics are not enough to explain political participation”).

116. For an overview of these individual factors as well as different approaches to explaining political participation, see *id.* at 271, and MICHENER, *supra* note 101, at 26–27, fig. 2.1.

117. See SIDNEY VERBA ET AL., VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 3–4 (1995) (finding that “[t]hose who have both the motivation and the capacity to become active are more likely to do so if they are asked” and further that motivation and capacity themselves arise out of social experiences, institutions, and associations); see also Florence Passy, *Social Networks Matter. But How?*, in SOCIAL MOVEMENTS AND NETWORKS: RELATIONAL APPROACHES TO COLLECTIVE ACTION 21, 24, 34 (Mario Diani & Doug McAdam eds., 2003) (reviewing literature showing that a primary path by which individuals disposed to take political action are connected to opportunities to do so is through social ties).

118. SCHLOZMAN ET AL., *supra* note 37, at 150.

119. CAMPBELL, *supra* note 42, at 74 (noting that “one reason they vote at high rates is that they are mobilized by political parties during election season”); see also *id.* at 78 (on mobilization effects of the AARP).

120. SKOCPOL, *supra* note 114, at 108; see also *id.* at 110 (noting further that biographies of prominent businessmen, politicians, professionals and wives often involved long accounts of their membership in the same civic associations that record numbers of ordinary Americans joined as well).

121. SUZANNE METTLER, SOLDIERS TO CITIZENS: THE G.I. BILL AND THE MAKING OF THE GREATEST GENERATION 129 (2005) [hereinafter METTLER, SOLDIERS TO CITIZENS] (reporting further that “[o]nly about 20 percent of veterans with college or graduate education were

The resulting socioeconomically integrated social networks provided breadth to potential social and political movements. In addition, membership in such groups served to ground political elites in the experiences of their fellow Americans. Because political success depended on building a broad political network, bound by personal ties, starting at home, “leaders and would-be leaders, no matter how privileged in the larger society” were forced “to interact with a wide range of their fellow citizens.”¹²³ In this way, the participatory structures of the associations of the past “encouraged a two-way linkage between members and leaders,” even as they were sex-segregated and racially exclusionary.¹²⁴

Third, most civic groups were democratically governed. Democratic governance served multiple civic-capacity building functions. It facilitated the development of important skills. Weekly and monthly meetings of the local chapter had to be organized. Individuals were asked to run for offices within the group, to vote, and to participate in the federated structure if elected. This too encouraged the development of civic habits. Equally important, given the socioeconomic inclusiveness of membership, these civic skills frequently accrued to individuals without high levels of educational attainment, and—since there were parallel groups—to women and African Americans as well.¹²⁵

Finally, the fact that internal governance structures were modeled on the U.S. Constitution meant everyday Americans were socialized into the representative, deliberative, and organizational practices of democracy as well as into its republican values.¹²⁶ It also meant that most organizations operated through a federated structure, thereby augmenting their political potential by providing both state-wide and national presence.

Unions, though neither socioeconomically integrated nor formally federated, achieved similar civic capacity by linking local units into a national operation. Organized around worksites, unions also capitalized on social ties to mobilize workers and to gain access to elected officials and party leaders.¹²⁷ Meanwhile, their internal governance structures fostered civic and political skills among non-college educated and lower middle-class members. As

active only in organizations with other elites, while fully 80 percent or more counted cross-class organizations among their memberships”).

122. *Id.*

123. SKOCPOL, *supra* note 114, at 108; *see also id.* at 113 (noting that, in the absence of the mass media, men aspiring to political power “necessarily participated in and . . . buil[t] extensive interpersonal networks not confined to particular occupational or social circles”).

124. *Id.* at 108.

125. *Id.*; *see also* SCHLOZMAN ET AL., *supra* note 37, at 48.

126. SKOCPOL, *supra* note 114, at 98–115.

127. ROSENFELD, *supra* note 23, at 157.

Jake Rosenfeld summarizes, “[unions] boosted the political participation of non-elites, giving voice to the policy preferences of the working and middle class.”¹²⁸

In all, the federated, membership-based, voluntary associations and unions that existed through the mid-twentieth century, despite their vices, offered an invaluable democratic virtue: they advanced a cycle of civic mindedness, political engagement, and policy responsiveness.¹²⁹

2. Contemporary Civic Associations as Professional Advocacy Groups

American civil society looks quite different today. Economic and social changes since the 1970s have radically shifted the structure and texture of our civic associations. National networks of membership-based associations that fostered an active form of civic and political engagement have largely been replaced by policy-shops located in major metropolitan areas, staffed by professionals, and focused on national politics. Meanwhile, economic and political changes have significantly reduced the scale and power of unions, especially in the private sector. These shifts have had profound political consequences.

Although the precise dynamics are contested,¹³⁰ membership levels in federated organizations fell precipitously starting in the 1970s.¹³¹ A key study by Theda Skocpol finds that membership in the federated, socioeconomically integrated associations long at the center of American civil society has dropped by 60%, as compared to a 28% drop among professional societies.¹³² Even veterans’ groups were not immune.¹³³

The tenor of contemporary civic associations is one of professional management and foundation support.¹³⁴ Typically, these

128. *Id.* at 181.

129. SKOCPOL, *supra* note 114, at 117–24.

130. The most prominent debate regarding the cause has been between Robert Putnam and Theda Skocpol. Putnam attributes the lion’s share of the change to generational replacement. *See* PUTNAM, BOWLING ALONE, *supra* note 31, at 266–73. Skocpol, however, is skeptical that generational change can account for the abruptness of the shift. In her view, change was due in significant part to social changes which made the racist and sex-segregated traditions of these groups increasingly off-putting to potential young members. *See* SKOCPOL, *supra* note 114, at 175, 178–82.

131. SKOCPOL, *supra* note 114, at 212–19, figs. 5.9 & 5.10.

132. *Id.*

133. *Id.* at 175, 178–82 (arguing that the nature of the conflict in Vietnam and the ambivalence about the war at home undercut the appeal of veterans’ associations to those returning from Southeast Asia).

134. SKOCPOL, *supra* note 114, at 224.

groups are heavily staffed and bureaucratically run even when they formally have members.¹³⁵ While some estimate that a quarter of local civic groups remain affiliated with federated national organizations,¹³⁶ members rarely have formal opportunities to choose leaders or decide policy priorities.¹³⁷ Instead, membership is largely confined to periodic monetary donations.¹³⁸

In part, this shift can be explained by changes in the political economy of civil society that undermined the incentives for organizations to invest in building a grassroots membership or cultivating leaders out of those members. Pulled toward litigating in the courts and lobbying in Washington, civic groups have moved away from both local community engagement and electoral politics since the 1970s.¹³⁹ Meanwhile, their legislative successes and the increased availability of grants to subsidize movement organizations spurred the professionalization of such groups.¹⁴⁰ Even those federated civic associations that have been founded since the 1970s, such as Mothers Against Drunk Driving, do not necessarily depend on local membership dues.¹⁴¹ Groups abandoned the practice of shared governance with regular meetings, volunteers, and locally cultivated leaders, and lost the socioeconomic integration of the membership base that remained. Indeed, a recent study of civic associations that engaged in Washington politics found that only one in eight was “a classic voluntary association.”¹⁴²

To be sure, participatory membership-based groups, including the National Lawyers Guild and the League of Women Voters, have persisted,¹⁴³ and new membership-based groups—such as the

135. PUTNAM, *BOWLING ALONE*, *supra* note 31, at 51 (remarking that “membership . . . means moving a pen, not making a meeting”).

136. John D. McCarthy, *Persistence and Change Among Nationally Federated Social Movements*, in *SOCIAL MOVEMENTS AND ORGANIZATIONAL THEORY* 193, 205–06 (Gerald F. Davis et al., eds., 2005) (estimating, based on a variety of sources, that approximately 25% of local social movement organizations founded in any given time period are affiliated with national groups, while acknowledging there has been “a trend toward the founding of nonmembership” civic groups since 1979).

137. *Id.* at 206–10; *cf. id.* at 214–19 (articulating the incentives and strategies to control local chapters that are available to the national headquarters of contemporary federated organizations).

138. PUTNAM, *BOWLING ALONE*, *supra* note 31, at 51.

139. SKOCPOL, *supra* note 114, at 200–02, 206–10.

140. *Id.*

141. See McCarthy, *supra* note 136, at 214–15, 222 (noting, for example, that local chapters of Mothers Against Drunk Driving generally sought only to secure the requisite number of members (20) to qualify as a chapter).

142. SCHLOZMAN ET AL., *supra* note 37, at 319–20 & tab. 11.2. Many of these organizations tend to be extremely important in policy debates.

143. Kenneth T. Andrews et al., *Leadership, Membership, and Voice: Civic Associations that Work*, 115 AM. J. SOC. 1191, 1193 (2010) (noting that “not all civic associations are in decline” and further that “an estimated 25% of all local social movement organizations in the United States” are affiliated with federated groups).

Kensington Welfare Rights Union—have been founded since the 1970s, particularly at the local level.¹⁴⁴ Still, these groups typically lack the numbers and national scale of their mid-twentieth century counterparts. The YMCA is one notable exception. The organization has maintained extensive membership and national scale, while maintaining significant face-to-face opportunities.¹⁴⁵ To date, however, its political potential has remained largely untapped. That said, a few local YMCA chapters have ventured into encouraging voter registration.

Those groups that have maintained a political presence at a national scale, such as the AARP, National Rifle Association (NRA), and Sierra Club, are often hybrids—combining a membership association that includes face-to-face participatory opportunities with a D.C. policy-based shop run by professional staff.¹⁴⁶ It is striking that, as with their predecessors, these groups generally include a recreational element.

The Sierra Club, for example, has two national offices and 27 regional offices.¹⁴⁷ In 2003, it had a membership of 750,000, organized in 62 chapters with 343 local groups.¹⁴⁸ Most distinctively, the national board of directors is elected by the membership at large, and each chapter is governed by an executive committee that includes representatives from each local group. Local groups, in turn, have their own elected executive committees. In all, there are 12,500 leadership posts, including 10,000 at the local level.¹⁴⁹ Even with proportionately low levels of face-to-face participation, the organization is able to cultivate civic leadership skills and to motivate a respectable number of members to participate in internal elec-

144. Founded in 1991, the Kensington Welfare Rights Union is a social justice group of, by, and for the poor and homeless in Philadelphia. *Kensington Welfare Rights Union*, ENV'T RES. FOUND., <http://www.rachel.org/?q=en/node/128> (last visited Feb. 20, 2019). The National Lawyers Guild, a democratically structured, member-driven, federated organization was founded in 1937. The League of Women Voters was founded in the wake of the 19th Amendment. It was originally a collection of suffrage groups. Currently, it has 50,000 members and leagues in all 50 states. Still, it has struggled to maintain active membership and recruit new members. See La Piana Consulting, *Assessment and Transformation Map: League of Women Voters* (2018), http://www.lwvgt.org/files/LWV_Transformation_Roadmap_1.8.17_rev.pdf.

145. GRACE BUDRYS, *HOW NONPROFITS WORK: CASE STUDIES IN NONPROFIT ORGANIZATIONS* 76–78 (2012) (profiling the social welfare work of the Chicago Y, including the provision of 1,500 single occupancy rooms, while noting that nationally, as of 2008, the YMCA had 20.9 million dues-paying members in 2,687 local chapters).

146. Cf. BAUMGARTNER ET AL., *supra* note 91, at 194 (noting that “organizations with many members may be heeded just as rapidly as organizations able to make large campaign contributions” insofar as membership at scale both confers legitimacy and poses an electoral threat).

147. Andrews et al., *supra* note 143, at 1203. The Sierra Club was founded in 1892, but its membership grew, in three main waves, after World War II.

148. *Id.* at 1204.

149. *Id.* at 1195, 1218–19.

tions.¹⁵⁰ Meanwhile, dues are distributed back to chapters based on their membership levels, and local groups have control over their programming.¹⁵¹

Unions are the only genuine exception to this trend. For one, despite significant declines in membership, they continue to be remarkably effective at boosting voter turnout, especially among low- and middle-income Americans.¹⁵² Indeed, “[a]mong high school drop outs in the private sector, union members’ probability of voting is 11 percentage points higher than for otherwise similar non-members.”¹⁵³ States with higher concentrations of union membership also tend to have higher voter turnout rates.¹⁵⁴ Additionally, union members tend to join more civic associations and to encourage nonunion family members to vote.¹⁵⁵

Unfortunately, the steep decline in unionism in the private sector undercuts unions’ ability to serve as a bulwark for non-college educated Americans’ political and economic interests. Changes in the American economy as well as legal policies have led to the concentration of union membership in the public sector.¹⁵⁶ This significantly undermines the equalizing political effect of unionism because public-sector workers are generally better educated and less in political need of the union-effect.¹⁵⁷

Until there is a revival in private-sector unionism or its equivalent,¹⁵⁸ the ability of contemporary unions to provide a political

150. *Id.* at 1204, 1218 (estimating that only about 20% of members partake in face-to-face opportunities and finding, *inter alia*, that member engagement is closely associated with the number of core activists as well as their choice of programming).

151. *Id.* at 1204–05.

152. Sean McElwee, *How Unions Boost Democratic Participation*, AM. PROSPECT (Sept. 16, 2015), <https://prospect.org/article/how-unions-boost-democratic-participation> (noting that 52% of union workers voted in the 2014 midterm, compared to 39% of non-union workers); ROSENFELD, *supra* note 23, at 163, 173 (noting that, other than churches, unions are the only organizations capable of drawing out non-elite voters on a large scale and further that union vote effects are largest for the least educated).

153. ROSENFELD, *supra* note 23, at 173 (noting that “[f]urther up the educational spectrum, the gap in turnout differentials shrinks” but that “the union vote premium among private-sector college graduates is nearly twice the public-sector premium”).

154. Benjamin Radcliff & Patricia Davis, *Labor Organizations and Electoral Participation in Industrial Democracies*, 44 AM. J. POL. SCI. 132, 135, 137 (2000) (finding an approximately 6.5% increase in turnout as levels of unionization become significant and reporting that this is approximately the same effect due to a higher educated electorate).

155. McElwee, *supra* note 152 (reporting that “individuals living in a union household are 2.5 points more likely to vote and register” after controlling for other factors).

156. *Cf.* ROSENFELD, *supra* note 23, at 64–67, 164–70 & fig. 7.1 (showing that in 1973, less than twenty percent of union members worked in the public sector whereas, by 2009, they comprised the majority); *see also id.* at 43–45, 67–68 (arguing that there are structural limits to how much growth is possible in public-sector jobs and how these limits also explain why the union-wage premium for public-sector members is 18%, significantly lower than in the private sector).

157. *Id.*

158. *See, e.g.*, *Rest. Law Ctr. v. N. Y. C.*, 360 F. Supp. 3d 192 (S.D.N.Y. 2019); *Chamber of Commerce v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018). *But see* Memorandum from Jayme

counterweight to the interests of economic elites is significantly limited. Public-sector unionism—even if it manages to survive the current Supreme Court’s interpretation of the First Amendment and the concerted attacks it is facing from conservatives—cannot serve these same equalizing functions because most public-sector union workers are significantly more privileged than the union members of the past.¹⁵⁹ The political effects of public-sector unions largely accrue to college-educated Americans—teachers, firefighters, and police. These middle and upper-middle class, college-educated workers also need organizational help in our current political environment, but their successes are unlikely to address the needs of non-college educated workers.¹⁶⁰

3. The Political Consequences of the New Configuration of Civil Society

Like unions, mid-twentieth-century civic associations drew political strength from their social networks and governance structures. Face-to-face participation created strong social ties, capable of generating time-consuming and substantial political action, while associational breadth derived from their socioeconomically integrated membership enhanced their capacity for effective political mobilization. Meanwhile, their governance structures solved a host of problems that modern grassroots community organizations face relating to scale and sustainability.¹⁶¹

L. Sophir, Associate General Counsel Division of Advice, to Jill Coffman, Regional Director Region 20 (Apr. 17, 2019); *see also* Lee, *supra* note 25.

159. Largely in recognition of the effectiveness of unions in politics, conservatives have been on a mission to undermine the ability of workers, particularly public-sector workers, to unionize. Funded by the Koch network and facilitated by the American Legislative Exchange Council, a host of state legislatures, including in states where public support for public-sector unions was high, have significantly curtailed their power. *See generally* Theda Skocpol & Alexander Hertel-Fernandez, *The Koch Network and Republican Party Extremism*, 14 PERSP. ON POL. 681, 693–94 (2016); Alexander Hertel-Fernandez, *Basic Facts: New Conservative Strategies to Weaken America’s Public Sector Unions*, SSN (Oct. 18, 2015), <https://scholars.org/brief/new-conservative-strategies-weaken-americas-public-sector-unions>. Not satisfied with these legislative wins, however, conservative interests constitutionalized their gains. *See* Janus v. Am. Fed’n of State, Cty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2484–86 (2018).

160. ROSENFELD, *supra* note 23, at 7 (arguing that given their membership unions are no longer capable of “providing [non-college educated workers] with resources and training to engage in politics and translating their political activity into support for policies that benefited average workers”).

161. *Cf.* HOLLIE RUSSON GILMAN & K. SABEL RAHMAN, BUILDING CIVIC CAPACITY IN AN ERA OF DEMOCRATIC CRISIS 3 (2017), https://na-production.s3.amazonaws.com/documents/Building_Civic_Capacity_in_an_Era_of_Democratic_Crisis.pdf (noting that any effort to increase civic capacity at the grassroots will need to address problems of scale and sustainability).

The political power of this organizational form is evident in the role played by such groups in the passage of the most generous redistributive federal programs in American policymaking, from Social Security and Medicare, to the Civil Rights Act and the Voting Rights Act.¹⁶² The G.I. Bill—the single greatest economic equalizer for white men and a critical catalyst for the leadership in the Civil Rights movement—was the brainchild of the American Legion, which was involved in its drafting after World War II.¹⁶³ Many such groups were also vital to growing and sustaining key social movements of the period.¹⁶⁴ At the same time, unions worked to counter the efforts of business on a variety of fronts, including the minimum wage.¹⁶⁵

The political consequences of the demise of this civic configuration have been profound. Newly professionalized and dependent on foundations for funding, national organizations have eschewed political mobilization in favor of litigation and lobbying.¹⁶⁶ Moreover, these policy shops frequently “gravitate toward upper-middle-class constituencies”¹⁶⁷ and their policy priorities, to the neglect of policies that would benefit disadvantaged constituents.¹⁶⁸

With these changes, everyday Americans have lost political power. In the absence of effective organization, their votes have become a weak counterweight to the political power money buys.¹⁶⁹ A significant factor in this regard has been the demise of meaningful membership. As previously discussed, recruitment is central to both individual mobilization and collective success. Moreover, as it

162. See Hacker et al., *supra* note 40, at 183–85 (reviewing the literature).

163. METTLER, *SOLDIERS TO CITIZENS*, *supra* note 121, at 18–22 (describing how the American Legion utilized its grassroots network to generate widespread support for its generous bill and to overcome modest ambitions of Roosevelt administration’s proposal).

164. Andrews et al., *supra* note 143, at 1192 (observing that a third of the 47 federated civic groups with membership of 1% or more of the U.S. population at any point between 1776 and 1940 were critical to major social movements of the period) (citing Theda Skocpol et al., *A Nation of Organizers: The Institutional Origins of Civic Volunteerism in the United States*, 94 AM. POL. SCI. REV. 527, 529 (2000)).

165. HACKER & PIERSON, *supra* note 23, at 140; Hacker et al., *supra* note 40, at 115; see also Sachs, *supra* note 22, at 169–71 (reviewing literature on historic political power of unions).

166. SKOCPOL, *supra* note 114, at 224 (noting decision to eschew civic education and political mobilization).

167. *Id.* at 224.

168. Dara Z. Strolovitch, *Do Interest Groups Represent the Disadvantaged? Advocacy at the Intersections of Race, Class, and Gender*, 68 J. AM. POL. 894, 904–05 (2006) (finding, in particular, that organizations consistently underestimate the benefits of policies that most affect disadvantaged subgroups).

169. Soss & Jacobs, *supra* note 49, at 120 (noting that organizations that “have no mass membership . . . to mobilize . . . do little to draw broader coalitions of middle- and lower-income citizens into electoral and legislative processes”); accord Sachs, *supra* note 22, at 167 (noting that “organization, like wealth, is itself a source of political power”).

happens, Americans are most likely to be recruited into politics through connections formed in civic associations.¹⁷⁰

Thus, in the absence of fraternity, contemporary civic groups, including those that remain federated, are at a significant disadvantage when they do seek to generate the kind of political activity that is necessary to hold elected officials accountable. Doug McAdam's seminal study of the Freedom Rides was probably the first to draw attention to this point: by comparing accepted applicants to the Freedom Rides, he found that prior personal connections, not ideological commitments, distinguished those who ultimately participated from those who applied but failed to turn up.¹⁷¹ More recently, in *The Making of Pro-Life Activists*, Ziad W. Munson shows how the path to pro-life activism (including the picketing of clinics) cannot be explained by either demographics or ideological beliefs, but is instead the product of "organizational and relational ties."¹⁷² Indeed, almost a quarter of the activists he interviewed con-

170. VERBA ET AL., *supra* note 117, at 144, 157 (concluding, more broadly, that nonpolitical institutions are significant generators of civic and political engagement, *inter alia*, "because those who are affiliated with these institutions develop the personal networks from which requests for activity often spring"); SCHLOZMAN ET AL., *supra* note 37, at 48 (reporting that those who participate in membership organizations, regardless of whether they are affirmatively political, are more likely to take part in politics); *see also* Chaeyoon Lim, *Social Networks and Political Participation: How Do Networks Matter*, 87 SOCIAL FORCES 961, 967–68, 970–71, 973 (2008) (finding that in second-wave Citizen Participation Study "[a]ssociational ties [were] the most common channels of recruitment" for the three types of political activities studied and that a direct, personal connection to a recruiter significantly explained decisions to contact government officials or participate in community politics, in particular, doubling the likelihood of successful recruitment); Dietlind Stolle & Thomas R. Rochon, *Are All Associations Alike? Member Diversity, Associational Type, and the Creation of Social Capital*, in BEYOND TOCQUEVILLE: CIVIL SOCIETY AND THE SOCIAL CAPITAL DEBATE IN COMPARATIVE PERSPECTIVE 143, 144, 151 (reporting findings that membership in leisure groups resulted in political participation 60% of the time but raising questions about whether groups organized around exclusion would do the same).

171. *See, e.g.*, Doug McAdam, *Recruitment to High Risk Activism: The Case of the Freedom Summer*, 92 AM. J. SOC. 64 (1986) (finding that notwithstanding similar levels of time and motivation, participants in the 1964 Freedom Summer had deeper personal and organizational connections to the Civil Rights movement); *see also* Doug McAdam & Ronnelle Paulsen, *Specifying the Relationship Between Social Ties and Activism*, 99 AM. J. SOC. 640, 656–60 (1993) (reanalyzing the data and concluding that political commitments had to be reinforced by social ties formed in organizations before it yielded high-risk activism, and further, that continued contact with activist friends from the Civil Rights movement sustained activism and political engagement over the long term).

172. ZIAD W. MUNSON, *THE MAKING OF PRO-LIFE ACTIVISTS: HOW SOCIAL MOVEMENT MOBILIZATION WORKS* 20, 44 (2008). Munson's findings are based on, *inter alia*, observations of and in-depth interviews with anti-abortion "activists and nonactivists" as his goal was to explain why many individuals with pro-life commitments "nonetheless remain uninvolved in any sustained way." *Id.* Summarizing his research for a popular audience, Munson explains: "pro-life activism begins not because of any epiphany . . . about the evils of abortion—but because [individuals] bump[] into someone already in the pro-life movement . . . a friend, neighbor, or work colleague in the course of an ordinary day" and accept their invitation to go to an anti-abortion activity. Ziad W. Munson, Key Findings Brief: *How People Become Pro-Life Activists*, SCHOLARS STRATEGY NETWORK (Feb. 8, 2016), <https://scholars.org/brief/how-people-become-pro-life-activists>; *see also* Valerie A Lewis et al., *Religion, Networks, and Neighbor-*

sidered themselves to be *pro-choice* at the time of their initial foray into the movement, while many more were ambivalent or unclear about their pro-life commitments.¹⁷³

Tellingly, the heavyweights among contemporary civic associations have largely held onto critical features that made mid-twentieth century associations so politically powerful: meaningful membership, opportunities for face-to-face association, federated structures, democratic governance, and socioeconomic integration. Most also include a significant recreational or nonpolitical draw. They are, however, the exceptions rather than the norm.

The AARP's political muscle derives from its nearly 38 million members, who contribute over \$295 million in membership dues each year and who vote regularly and at higher rates than other age groups on Election Day.¹⁷⁴ Equally importantly, its membership includes many non-elite seniors, enabling it to operate as "a mass membership organization . . . through which the influence of less well-off Americans flows."¹⁷⁵ While the vast majority of its members simply write a \$16 check to the organization to receive a variety of discounts as well as its magazine, which covers both lifestyle and political news, between 500,000 and 1.9 million members are active in its 1,300 local chapters.¹⁷⁶ These chapters advertise themselves as opportunities for newly relocated or widowed members to make new friends, while also pursuing civic-minded projects with others. In recent years, the organization has sought to increase its state and local presence in innovative ways. To that end, the AARP participated in rebuilding communities in New Orleans, including by training local activists and by organizing all-ages walking groups.¹⁷⁷ Although the AARP is a stalwart advocate for the interests of sen-

liness: The Impact of Religious Social Networks on Civic Engagement, 42 SOC. SCI. RES. 331, 339–40 (2013) (finding that "those who attend religious services more often are more likely to engage in civic activities and informal helping not because of belief, politics, or general sociability, but because they have strong religious social networks").

173. MUNSON, *supra* note 172, at 6 ("My data show that many individuals who become activists are at best ambivalent, and in many cases decidedly pro-choice, in their views on abortion before getting involved. Their views change during the actual process of becoming activists."); *see also id.* at 33–35, 43 (describing these individuals' representations about their prior beliefs and observing that "[a]lmost half of all activists in my sample did not hold pro-life beliefs prior to their involvement in the pro-life movement").

174. *See* Hacker et al., *supra* note 40, at 189. *See generally* MARK NOVAK, *ISSUES IN AGING* (4th ed. 2018).

175. Martin Gilens, *Policy Consequences of Representational Inequality*, in *WHO GETS REPRESENTED?* 247, 248, 272–74 (Peter K. Enns & Christopher Wlezien eds., 2011).

176. CHRISTINE L. DAY, *AARP: AMERICA'S LARGEST INTEREST GROUP AND ITS IMPACT* 41 (2017) (describing levels of active participation).

177. AARP, *Consolidated Financial Statements Together with Report of Independent Certified Public Accountants* (2016), https://www.aarp.org/content/dam/aarp/about_aarp/annual_reports/2017/form-990-2016-aarp.pdf (representing just under 20 percent of its annual operating revenue).

iors, its internal governance structures do not offer individual members much voice. Indeed, in 2001, the AARP, which in many respects operates as a large business, revised its bylaws to end elections for its Board.¹⁷⁸ Still, the AARP is an effective organization when it comes to both mobilizing seniors and, arguably more importantly, identifying legislative opportunities that benefit them.¹⁷⁹ Equally importantly, it is not the only organization working effectively on behalf of seniors.¹⁸⁰

Originally founded in 1871, the NRA did not grow its sizeable membership until the 1950s, despite significant and ongoing federal subsidies.¹⁸¹ Today, the NRA is well-known for having effectively integrated a lobbying-focused D.C. headquarters (heavily funded by gun manufacturers) with a network of local gun clubs present in every state. By some estimates, its membership tops 3 million.¹⁸² NRA membership comes with opportunities to socialize, complementary lifestyle and political magazines, effective voter guides, and political education.¹⁸³ Perhaps most conspicuously, NRA members have been found to be demonstrably more politically active than gun owners who do not belong to the NRA.¹⁸⁴ Like the AARP,

178. DAY, *supra* note 176, at 36, 41.

179. CAMPBELL, *supra* note 42, at 77–78 (noting, in particular, that “AARP members are more likely than nonmembers to contact elected officials and to contact them about Social Security specifically” and why this pattern is most likely the result of mobilization).

180. *Id.* at 76 (identifying the National Council of Senior Citizens as another key political advocacy).

181. ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 69–73 (2d ed. 1998) (recounting decades of direct and substantial federal financial support to the NRA, as well as the organization’s early efforts to affiliate with 2000 local sporting clubs, which grew its membership from 3,500 to 50,000, while noting that it was not until after the war that its membership exploded).

182. The NRA is notoriously unwilling to share reliable information about its membership, and although it reports having around 5.5 million dues paying members, it has been accused of exaggerating its numbers. See, e.g., Alex Yablon, *New NRA Tax Filing Shows Membership Revenues Dropped by \$47 Million Following Sandy Hook Surge*, TRACE (Jan. 23, 2016), <https://www.thetrace.org/2016/01/nra-membership-drop/> (explaining controversy about exact membership roll but also noting organization receives about \$175 million in membership dues annually); accord Christopher Ingraham, *NRA Membership Is Up Since Parkland Killings, Group’s Magazine Subscriptions Suggest*, WASH. POST: WONKBLOG (Sept. 19, 2019), <https://www.washingtonpost.com/business/2018/09/19/magazine-numbers-suggest-nra-has-added-hundreds-thousands-new-members/>.

183. See *Grades and Endorsements*, NRA-PVF: POL. VICTORY FUND, <https://www.nrapvf.org/grades/> (last visited Feb. 20, 2019) (announcing endorsements and candidate ratings in hundreds of federal and state races); NRA-ILA: INST. LEGIS. ACTION, <https://www.nraila.org/> (last visited Feb. 20, 2019) (providing up-to-date alerts on elected officials’ positions on gun-related issues and providing news regarding state and federal legislative activity); SPITZER, *supra* note 181, at 75 (noting NRA’s extraordinary expenditures as compared to other groups “on internal communication designed not only to buttress support for the NRA but to rally support for political candidates sympathetic to the NRA perspective”).

184. According to a 2017 Pew study, approximately 46% of gun owners in the NRA report having contacted a public official to express their opinion on gun policy; 24% said they had done so in the past 12 months. By contrast, only 15% of gun owners who do not belong

the NRA's political strengths are a product of the size of its membership, its organizational structure, and the connections it has developed to elected officials.¹⁸⁵ It does not, however, promote internal democratic governance, and it accepts significant donations from wealthy individuals.¹⁸⁶

* * *

In sum, the weakness of contemporary civil society as an engine for the broad interests of the electorate goes well beyond the absence of representation. It also lies in the form of that representation. The organizations that do exist to represent Main Street have grown weaker on the exact same axes that best support effective political participation: socioeconomic integration, interpersonal depth, and participatory federated governance structures.

Taken together, the three trends discussed in this section promote a vicious political cycle of disorganization, demobilization, and disengagement. The collapse of private-sector unions has further fed both the economic and political inequality of the New Gilded Age.¹⁸⁷ When combined with the atrophying of active membership in all forms, it has led to significant democratic disengagement—affecting both the sorts of policies that are adopted and, perhaps more importantly, who has a place at the table when those policies are conceived and prioritized. The result, as Skocpol explains, is a political configuration in which everyday citizens struggle to be heard:

If contemporary America's top-heavy civic world encourages doing-for rather than doing-with, it limits popular mobilization and promotes trivial polarizations in politics, and

to the NRA report they have ever reached out to a public figure regarding gun policy, and just 5% report having done so in the past 12 months. Kim Parker, *Among Gun Owners, NRA Members Have a Unique Set of Views and Experiences*, PEW RES. CTR. (July 5, 2017), <http://www.pewresearch.org/fact-tank/2017/07/05/among-gun-owners-nra-members-have-a-unique-set-of-views-and-experiences/>.

185. SPITZER, *supra* note 181, at 77–83 (naming the six Presidents and several congressional leaders who were members).

186. See Jay Willis, *Could the NRA Be Taken Over from the Inside?*, GQ (Feb. 23, 2018), <https://www.gq.com/story/nra-takeover-bylaws-leadership> (explaining how the organization has carefully used its “bylaws to restrict the franchise to a small, insular, and carefully-curated group of this country’s gun owners” in order to undermine the voice of its members, nearly three-quarters of whom, for example, support background checks).

187. ROSENFELD, *supra* note 23, at 183 (noting that demise of private-sector unions has “reconfigured the electorate by reducing the political voice of those lacking a college education”).

it also skews national politics and public policy making toward the values and interests of the privileged.¹⁸⁸

Similarly, Robert D. Putnam observes that as more “people skip the meeting[s]” where local policy decisions are made, these policies grow less and less reflective of median interests.¹⁸⁹

The political consequences have been particularly acute for the many working- and middle-class Americans who have concrete needs—from workers without a college degree, to working parents, to communities that depend on Medicaid and CHIP or bear the burdens of mass incarceration.¹⁹⁰ In the absence of effective organization, these individuals and communities are unable to penetrate the “upper-class accent” of the heavenly chorus of Washington interest groups.¹⁹¹

II. LAW AND THE SHAPING OF CIVIC AND POLITICAL CAPACITY

And still, the political tides appear to be changing. Writing in the early 2000s, Putnam lamented that a growing deficit in social capital had resulted in significant declines in all forms of political participation—from voter turnout, to attendance at political rallies and public meetings, to running for office.¹⁹² Schlozman, Verba, and Brady similarly bemoaned “an uninterrupted downward trend in overall activity” during the period from 1972 to 2002, including “attending a public meeting on town or school affairs,” “signing a petition,” “working for a political party,” and “holding or running for a political office.”¹⁹³ This has recently shifted.

Political engagement has been on the rise for the last decade. For a start, voter turnout has been steadily rising since 2008. Indeed, turnout during presidential elections is rapidly approaching that of the mid-twentieth century.¹⁹⁴ The trajectory of voter partici-

188. SKOCPOL, *supra* note 114, at 236.

189. PUTNAM, BOWLING ALONE, *supra* note 31, at 342 (“When most people skip the meeting[s] where local policy decisions are made, “those who are left tend to be more extreme, because they care most about the outcome.”).

190. SCHLOZMAN ET AL., *supra* note 37, at 344, 346 (noting the absence of groups for “parents of children in Head Start programs, women at home, office receptionists, Wal-Mart associates, criminal defendants awaiting trial, recipients of Temporary Assistance for Needy Families benefits or food stamps, [and] parking lot attendants”).

191. *Id.* at 346.

192. PUTNAM, BOWLING ALONE, *supra* note 31, at 35 (arguing that “[d]eclining electoral participation is merely the most visible symptom of a broader disengagement from community life”).

193. SCHLOZMAN ET AL., *supra* note 37, at 162–63.

194. Presidential election turnout peaked in 1960 at nearly 64%. The 2008 presidential election brought out almost 62% of the electorate. *National General Election VEP Turnout*

pations in midterm elections is harder to gauge: the 2014 midterm election saw the lowest levels of turnout since 1942 with an estimated 36.6% of eligible voters showing up to vote.¹⁹⁵ Turnout in the 2018 midterm, however, was the highest in nearly a century.¹⁹⁶

This fresh political energy extends beyond voting. The election of Donald Trump triggered an unexpected and unprecedented level of political engagement and organization.¹⁹⁷ A staggering and unexpected 3.2 million Americans joined in the Women's March to resist President Trump's messages of xenophobia, sexism, racism, scientific skepticism, and official corruption on the day of his inauguration—at least half a million in Washington, D.C. itself.¹⁹⁸ The Women's March turned out to be just the beginning. According to a 2018 Washington Post-Kaiser Family Foundation poll, one in five Americans report participating in a street protest or political rally since 2016.¹⁹⁹

Nor has recent political engagement been limited to demonstrations or confined to resisting President Trump's political agenda. Remarkably, over 6,000 grassroots political groups have been formed to oppose President Trump's policies, many organized by middle-class women.²⁰⁰ We have also seen a wave of teachers' strikes and protests in West Virginia, Oklahoma, Arizona, Colorado, North Carolina, and Kentucky.²⁰¹ This engagement followed on a

Rates, 1789–Present, U.S. ELECTIONS PROJECT, <http://www.electproject.org/national-1789-present> (last visited Feb. 20, 2019).

195. Editorial Board, Opinion, *The Worst Voter Turnout in 72 Years*, N.Y. TIMES (Nov. 11, 2014), <https://www.nytimes.com/2014/11/12/opinion/the-worst-voter-turnout-in-72-years.html>.

196. Mira Rojanasakul et al., *Americans Actually Voted in the 2018 Midterms*, BLOOMBERG (Dec. 20, 2018), <https://www.bloomberg.com/graphics/2018-midterm-election-turnout-shifts/>.

197. See Mark Blumenthal & Erin Pinkus, *Poll Finds Surge of Political Activism on the Left*, HUFFINGTON POST (Mar. 28, 2017), https://www.huffingtonpost.com/entry/poll-finds-surge-of-political-activism-on-the-left_us_58daad61e4b0ae61844c0706 (reporting on polls seeking to quantify the flurry of political activities in the early months of the Trump administration).

198. Erica Chenoweth & Jeremy Pressman, *This Is What We Learned by Counting the Women's Marches*, WASH. POST (Feb. 7, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/07/this-is-what-we-learned-by-counting-the-womens-marches/?utm_term=.3e94884961ca (noting marches took place in 653 locations).

199. Jordan & Clement, *supra* note 72.

200. See Peter Dreier, *The Anti-Trump Movement: Recover, Resist, Reform—The Profusion of Citizen Organizing as a Defense—and Offense*, AM. PROSPECT (Apr. 4, 2017), <https://prospect.org/article/anti-trump-movement-recover-resist-reform-0>; David Pozen, *The Tax-Code Shift That's Changing Liberal Activism*, THE ATLANTIC (Nov. 27, 2018), <https://www.theatlantic.com/ideas/archive/2018/11/501c3-501c4-activists-and-tax-code/576364/>.

201. E.g., Rivka Galchen, *The Teacher's Strike and the Democratic Revival in Oklahoma*, NEW YORKER (May 28, 2018), <https://www.newyorker.com/magazine/2018/06/04/the-teachers-strike-and-the-democratic-revival-in-oklahoma>; see also Valerie Strauss, *A New Public Education Movement Is Emerging in Wisconsin, a Rebuke to Gov. Walker's War on Labor and School Privatization*, WASH. POST (July 3, 2018), <https://www.washingtonpost.com/news/answer->

decade of grassroots mobilization around an array of issues ranging from income inequality, to police shootings as symbols of endemic racial bias, to the development and transportation of natural gas.²⁰²

Finally, several policies that would address the concerns of many working- and middle-class families have been placed back on the policy agenda. These include raising the minimum wage, government-guaranteed medical coverage, universal pre-K, and free college tuition.

The central question, then, is how to harness this newfound political energy to rebuild a civil society capable of providing an effective counterweight to the political power derived from economic capital. There is obviously no going back. Economic, social, and cultural transformations, along with advances in technology, preclude the possibility (and desirability) of returning to the past. The appeal of sex- and race-segregated membership-based civic associations has significantly waned (thankfully), and the route to political power no longer runs through ethnic, religious, and veterans' groups.²⁰³ Still, the fact that there is no way back does not mean that there is no way forward.

The critical first step in seeing the possibilities for positive change is to begin to understand the complex interface between law and civil society. The robust associational life of the mid-twentieth century was not happenstance: it was the product of New Deal policymaking. Indeed, the political energy of seniors today, including those of average socioeconomic status, like the political power of the AARP, is not simply fortuitous.²⁰⁴ It is a direct result of the fact that Social Security and Medicare—programs that are visible, generous, universal for those eligible, and well-managed—have not been scaled back, unlike many other New Deal programs.²⁰⁵ By the same token, the present participatory and organizational inequalities that impede the ability of low- and middle-income Americans to resist the political sway of elites and super-elites are a byproduct of the form that both regulation and deregulation have taken since the 1980s. In political science jargon, this phenomenon is known as a policy feedback.

sheet/wp/2018/07/03/a-new-public-education-movement-is-emerging-in-wisconsin-a-rebuke-to-gov-walkers-war-on-labor-and-school-privatization/?utm_term=.cb827bd1f883.

202. Tabatha Abu El-Haj, *Defining Nonviolence as a Matter of Law and Politics*, in LXII NOMOS: PROTEST AND DISSENT (Melissa Schwartzberg, ed. 2019) (forthcoming) (manuscript on file with author).

203. SKOCPOL, *supra* note 114, at 113.

204. See CAMPBELL, *supra* note 42, at 14–15, 32–37, 65–79.

205. See Soss & Jacobs, *supra* note 49, at 112–15 (noting the ways in which the repeal of social programs benefitting citizens of average to below average means “have worked to reverse their civic and political incorporation”).

The basic insight (empirically verified in study after study) is that policymaking has second-order effects on citizens' attitudes about and relations to democracy—effects that can either instill civic and political engagement or breed endemic apathy.²⁰⁶ The specific direction of the policy feedback depends not only on the quality (e.g., generous vs. stingy, universal vs. means-tested, equitable vs. preferential) but also on the form (visible vs. invisible, rational vs. arbitrary, well-managed vs. dysfunctional) of the policies implemented.²⁰⁷

The recognition of policy feedbacks, which has dominated certain sectors of political science, has important underappreciated implications for good governance reformers. Foremost, it suggests that public policy choices, as instantiated in legislation, will inevitably play a role in either reversing or reinforcing the current trajectory of civil society and, hence, democracy.

A. *Virtuous Democratic Policy Feedbacks*

The virtuous democratic circle from civic and political participation to policy responsiveness to the white middle-class in the mid-twentieth century was itself a byproduct of the form of New Deal governance.²⁰⁸ At the time—frequently at the behest of the very civic associations that fostered political engagement and participation—Washington chose to provide ample benefits to large swaths of American society. The Social Security Act, like the G.I. Bill, doled out generous benefits to many ordinary Americans in highly visible ways with significant democratic returns.²⁰⁹

Over the years, many have praised the generation that entered adulthood during World War II for their extraordinary civic and political engagement. Veterans of World War II liberally joined organizations and clubs over the course of their lives and have been extolled for their high levels of civic participation.²¹⁰ And yet, this

206. See *infra* notes 212–228 & 245–260 and accompanying text.

207. See Hacker et al., *supra* note 40, at 183–97 (reviewing studies of the policy feedbacks of a range of New Deal programs and identifying the War on Poverty as the least effective in empowering its beneficiaries over the long term).

208. See *id.* at 196–97.

209. See CAMPBELL, *supra* note 42, at 65–66, 92 (explicating the policy feedback cycle of the expansion of Social Security for seniors); Suzanne Mettler, *Bringing the State Back in to Civic Engagement: Policy Feedback Effects of the G.I. Bill for World War II Veterans*, 96 AM. POL. SCI. REV. 351, 359, 361 (2002) [hereinafter Mettler, *Bringing the State Back*] (summarizing how the G.I. Bill affected participants and why elevated levels of civic and political engagement among its beneficiaries cannot be attributed simply to their raised educational or socioeconomic status).

210. METTLER, *SOLDIERS TO CITIZENS*, *supra* note 121, at 107, 122 (finding veterans who had used the G.I. Bill reported 50% more memberships in civic and political organizations).

enhanced democratic engagement cannot be attributed simply to military service, as veterans of subsequent wars “have not been more active in civic affairs than [similarly situated] nonveterans.”²¹¹

What then explains the unique civic engagement of World War II veterans? The answer to this puzzle lies in the G.I. Bill itself. Suzanne Mettler, in her seminal work on the Servicemen’s Readjustment Act of 1943 (aka the G.I. Bill), finds that its education and training provisions had an overwhelmingly positive effect on male veterans’ civic involvement. The effect proved significant even after controlling for all sorts of individual attributes, most importantly, parental civic and political engagement and advanced education.²¹² The effect, moreover, was not reducible to the increased education or the enhanced socioeconomic status of beneficiaries resulting from their education.²¹³ And the effect was most pronounced for beneficiaries from lower socioeconomic backgrounds²¹⁴ and for those who took advantage of access to sub-college programs.²¹⁵

In sum, critical to the program’s success were three factors that communicated civic respect: generosity of benefits, virtually universal access for men, and smooth administration.²¹⁶ Mettler concludes:

and that despite the fact that most of these groups’ “primary purpose was not first and foremost political,” involvement “did help to politicize citizens and draw them closer to the political process”); Mettler, *Bringing the State Back*, *supra* note 209, at 357–59, 361 (reporting that “use of the G.I. Bill for education,” independent of attained educational level, “proved to be a significant positive determinant of . . . participation in a wide range of political organizational memberships and activities,” while emphasizing its “pronounced impact on civic engagement among veterans from less advantaged socioeconomic backgrounds”).

211. METTLER, *SOLDIERS TO CITIZENS*, *supra* note 121, at 5 (reviewing relevant studies comparing civic engagement of veterans to nonveterans).

212. *Id.* at 107 (finding that “veterans who used the G.I. Bill’s education and training provisions became especially active citizens in the postwar era,” where political activity was defined broadly to include membership in political organizations from clubs to party committees, as well as contacting officials, campaigns, running for local office, contributing money, and protesting).

213. *Id.* at 108 (finding that “the G.I. Bill’s effect on civic involvement was not reducible simply to the formal education or improved socioeconomic status that it promoted” given that “even among veterans who had the same level of education, those who had used the G.I. Bill became members of more such organizations”).

214. *Id.* at 112 (noting that G.I. Bill usage significantly boosted “the rate of joining civic organizations among those from low-medium and medium standards of living in childhood”).

215. *Id.* at 114 (noting that “use of the G.I. Bill for subcollege programs functioned as an especially powerful and significant determinant of both veterans’ civic memberships and their political involvement in the postwar era, even more so than use of the higher education benefits”).

216. *Id.* at 10, 59, 106. On universality, it is important to note that after World War II, 80% of men were military veterans and those veterans were broadly representative of the U.S. population because of the draft. *Id.* at 7. As such, 51% of young men took advantage of the program. *Id.*; *see also id.* at 6–7 (describing the generosity of the program, which included, among other things, stipends adjusted for marital status).

Through the program's *inclusive design*, its fair manner of *implementation*, and its transformative socioeconomic effects, it *communicated to beneficiaries* that government was for and about people like them, and thus it incorporated them more fully as citizens. Beneficiaries responded by embracing the duties and obligations of active citizenship. Such effects were most pronounced . . . among particular groups whose inclusion signified the expansion of social opportunity.²¹⁷

For African-American recipients, in particular, the G.I. Bill was their first positive experience with American government and stood in stark contrast to the rest of their experiences, including military service.²¹⁸ Many, in turn, became early leaders within the civil rights movement.²¹⁹

The G.I. Bill was not alone. In all, the visible and generous government programs of the mid-twentieth century communicated a sense that beneficiaries mattered as citizens while stimulating interest in government.²²⁰ In doing so, they promoted a positive policy feedback—one that fostered political participation and civic engagement,²²¹ while “elevat[ing] the collective political capacities of low- and middle-income Americans” in particular.²²² Even the means-tested Aid to Families with Dependent Children program, through its generosity, proved capable of building political capacity among its beneficiaries.²²³

Equally importantly, the New Deal programs created incentives to organize. These incentives existed both from the bottom up and the top down.²²⁴ The very existence of beneficiaries creates an incentive to form groups. It has long been recognized, for instance, that Social Security, like agricultural subsidies, incentivized the

217. *Id.* at 106 (emphasis added).

218. *Id.* at 11, 119.

219. *Id.*

220. Soss & Jacobs, *supra* note 49, at 111–12 (emphasizing the importance of the ways New Deal programs “presented citizens with visible evidence of their collective stake in government outputs and political processes”).

221. *See, e.g.,* CAMPBELL, *supra* note 42, at 46–55 (concluding that “Social Security both raises and democratizes senior participation; compared with that of the rest of the population senior citizens’ political participation is less unequal because of low-income seniors’ greater activity with regard to Social Security”). Similarly, farmers, as the beneficiaries of New Deal agricultural subsidies, have an unusually high turnout rate in elections. Mettler, *Bringing the State Back*, *supra* note 209, at 352.

222. Soss & Jacobs, *supra* note 49, at 111–12; *see also* Hacker et al., *supra* note 40, at 157–58.

223. Hacker et al., *supra* note 40, at 182.

224. *See, e.g.,* CAMPBELL, *supra* note 42, at 70–79 (providing an overview of the history of mobilization by political parties and interest groups in the wake of the passage and expansion of Social Security).

formation of the AARP, the American Farm Bureau Federation, and the National Farmers Union.²²⁵ The public participation built into various environmental statutes passed in the 1970s offers the most recent illustration of the creation of bottom up incentives.²²⁶ As for top down incentives, there is little question that existing political elites frequently find it in their interest to organize and mobilize beneficiaries of federal programs in their efforts to win office.²²⁷ Indeed, there is good reason to believe that the federated structure of civic associations in the nineteenth century was a product of the changed expanse of federal policymaking, particularly for veterans in the wake of the Civil War.²²⁸

B. Vicious Democratic Policy Feedbacks

By the same token, the vicious democratic circle in which disorganization breeds unequal political participation and even less policy responsiveness can be attributed to the policy feedbacks of lawmaking since the 1980s. Despite the rhetorical antipathy to government “handouts,” lawmaking in the post-Reagan era has not taken government out of the business of doling out largesse. It is just that the largesse is now undertaken through tax policy, rather than direct support, and is directed toward corporations, wealthy individuals, and home-owning professionals employed by large companies.

The new preference for distributing monetary benefits through tax incentives has been dubbed the “submerged” or “hidden” welfare state.²²⁹ Hidden in the complexity of the tax code, this form of

225. *Id.* at 75–79 (explaining how “senior interest groups are both effects and causes in the participatory cycle” and emphasizing that “[s]enior mass membership groups did not create Social Security policy” but “[r]ather, the policy helped create the groups”). *See generally* Soss & Jacobs, *supra* note 49, at 111–12 (summarizing evidence that “[t]he . . . welfare state . . . stimulated the growth of organizations that recruited people into politics”).

226. *See* Kenneth T. Andrews & Bob Edwards, *The Organizational Structure of Local Environmentalism*, 10 MOBILIZATION 213, 215 (2005) (noting that “[e]nvironmental advocacy has developed alongside the growth and transformation of state institutions”).

227. *See, e.g.*, CAMPBELL, *supra* note 42, at 74 (concluding analysis of evidence of political parties’ increased attention to seniors over the course of twentieth century by observing that “[w]ithout Social Security, there is no constituency to appeal to, just an age group . . . divided by other cleavages and interests”).

228. *See* Jocelyn Elise Crowley & Theda Skocpol, *The Rush to Organize: Explaining Associational Formation in the United States, 1860s–1920s*, 45 AM. J. POL. SCI. 813, 815 (2001); Theda Skocpol et al., *A Nation of Organizers: The Institutional Origins of Civic Voluntarism in the United States*, 94 AM. POL. SCI. REV. 527, 532–34 (2000).

229. Suzanne Mettler, *Reconstituting the Submerged State: The Challenges of Social Policy Reform in the Obama Era*, 8 PERSP. ON POL. 803, 804–05 (2010) [hereinafter Mettler, *Reconstituting the Submerged State*] (defining the “submerged state” as one in which “policies . . . lay beneath the surface of US [sic] market institutions and within the federal tax system”); *see also* Mettler, *Transformed Welfare State*, *supra* note 40, at 193, 202–03 (explaining how with one

policymaking renders its regressive qualities invisible to the public and its beneficiaries invisible to themselves. While legislators, public policy experts, and tax lawyers understand that the home-mortgage interest deduction and the Earned Income Tax credit constitute benefits with redistributive effects not unlike Social Security or Medicaid, most Americans are confounded by the tax code. As such, even the beneficiaries of the hidden welfare state (at least those who are not businesses) are unaware that government has done anything for them.²³⁰ The story for businesses, discussed below, is entirely different but in its own way exacerbates the vicious cycle.

The use of the tax code to make policy effectively obscures both the redistribution of benefits and the beneficiaries of redistribution. The results of the Social and Governmental Issues and Participation Study of 2008 (2008 SGIPS) are especially revealing in this regard. One thousand four hundred Americans were asked whether they had “ever used a government social program.”²³¹ These initial responses were compared to answers about usage of nineteen federal social policies, consciously chosen to include both entitlement and tax programs.²³² The vast majority of recipients of the most salient entitlement programs (e.g., Social Security Disability, Medicaid, Public Assistance, and Food Stamps) recognized that they had been the beneficiaries of a government social program.²³³ By contrast, over 50% of respondents who had used one of the six policies of the submerged state reported that they had never “used a government social program.”²³⁴ For example, 64.3% of those who reported taking advantage of a 529 College Savings Plan or Coverdell Education Savings Account denied having ever used “a government social program.”²³⁵ Other visible entitlement programs fell somewhere between these two extremes: 44.1% of recipients of Social Security Retirement benefits, 43.0% of Unemployment bene-

exception—the Earned Income Tax Credit—the hidden welfare state disproportionately benefits the wealthiest Americans).

230. See Mettler, *Reconstituting the Submerged State*, *supra* note 229, at 804 (noting that “such policies . . . shroud[] the state’s role, making it largely invisible to most ordinary citizens, even [the] beneficiaries of existing policies”).

231. The polling was conducted via a national telephone survey of a random sample of 1,000 Americans, with oversamples of 200 additional low-income Americans and 200 additional young Americans (aged 25–34). *Id.* at 808, 820 n.32.

232. *Id.* at 808.

233. *Id.* at 809 tbl.3 (noting that only 25.4%–28.7% of those who had used these entitlement programs failed to respond in the affirmative to the initial question).

234. The submerged state programs within the list included: 529 College Savings Plan or Coverdell Education Savings Account, Home Mortgage Interest Deduction, Hope or Lifetime Learning Tax Credit, Student Loans, Child and Dependent Care Tax Credit, and the Earned Income Tax Credit. *Id.*

235. *Id.*

fits, 40.3% of the G.I. Bill, and 39.8% of Medicare recipients reported not having received government benefits.²³⁶

This obfuscation would not matter if ordinary Americans did not care about distributional effects, but they do. The 2008 SGIPS found that when respondents received information explaining that the benefits of the home mortgage interest deduction largely accrue to affluent households, “*opposition grew sharply*, particularly among those with low to moderate incomes and among liberals and Democrats,” whereas “*support grew*” for the Earned Income Tax Credit when it was explained that it helped households with low to moderate incomes.²³⁷ Indeed, it may not be an accident that politicians have opted to implement policies that disproportionately benefit wealthier Americans through complicated tax incentives that render those benefits invisible.

Invisibility with respect to both beneficiaries and effects has one further democratic drawback: it makes it incredibly difficult to organize or be organized.²³⁸ As Joe Soss and Lawrence R. Jacobs observe, since the rise of neoliberalism in the 1980s, American policymaking has “fostered atomized publics with little sense of what they have in common [or] . . . what is at stake in politics and government.”²³⁹ The middle-class recipients of both the home-mortgage interest deduction and subsidized employer-sponsored health insurance do not see themselves as the beneficiaries of federal programs and are not organized to advocate on their behalf.

The corporations and industries that benefit from these programs are not, however, similarly blind. As Mettler observes, even as the policy implications of the submerged state “elude[] most ordinary citizens,” the submerged state “has fostered the profitability of particular industries and induced them to increase their political capacity . . . [in order] to maintain the status quo.”²⁴⁰ Indeed, the invulnerability of the subsidization of homeownership and employer-sponsored health insurance is a product of industry interest groups rather than the direct advocacy of the individual beneficiaries. In some cases, this virtual representation is adequate to protect individual interest, but in most, it diverges. For example, federal policy in the late twentieth century sought to make college more

236. *Id.*

237. *Id.* at 809.

238. *Id.* at 805; Mettler, *Transformed Welfare State*, *supra* note 40, at 212–17.

239. Soss & Jacobs, *supra* note 49, at 110, 113 (attributing reduced policy capacity to the increasingly prominent role of tax expenditures as the vehicle for social policy).

240. Mettler, *Reconstituting the Submerged State*, *supra* note 229, at 803; *see also id.* at 806–07, 811–13 (describing fights surrounding Obama’s early policy agenda and the economic stakes for the financial, insurance, and real estate sectors and the beneficiaries of regressive tax policies).

affordable for middle-class families through subsidized, private educational loans—rather than distributing government support directly.²⁴¹ The effect was to create an entrenched set of special interests opposed to any changes to the system, despite its well-known economic inefficiencies, including self-dealing between lenders and universities. In 2019, Congress changed the system to be more generous to beneficiaries by making the federal government the lender, but it was forced to make significant concessions to special interests: the new federal loans are originated by private lenders, who receive fees from the government for their services.²⁴²

Taken together, changes to the form of policymaking since the 1980s have exacerbated the *un*-heavenliness of the chorus of political interest. Neoliberal policymaking has exacerbated political inequality not only as a matter of first-order policy preferences but also because of its second-order effects on the democratic engagement and political capacity of ordinary Americans. The choice to distribute government largesse in a form that is invisible to most Americans has produced two effects that intersect to enhance the political power of corporate and moneyed elites: it has demobilized lower- and middle-income Americans, while simultaneously creating increased incentives for narrow business interests to mobilize. The result is that ordinary Americans have been disempowered just as the incentives for corporate beneficiaries to organize in defense of their wins have increased.

To make matters worse, the scaling back of New Deal entitlement programs over the last thirty years has been partial and uneven, thereby further contributing to differential and unequal political mobilization.²⁴³ Inroads into New Deal welfare policies as well as the expansion of the criminal justice system have contributed to the demobilization of the economically and racially marginalized, in particular. In this regard, it matters to our story that Social Secu-

241. In 1997, responding to the fact that federal grants were no longer keeping up with rising costs in higher education, Congress introduced the generous Hope Scholarship and Lifetime Learning Credit. In 2009, it upped the commitment appreciably with the adoption of the American Opportunity Tax Credit (“AOTC”), which made these credits available to significantly more households. See Scott A. Hodge & Kyle Pomerleau, *Is the Tax Code the Proper Tool for Making Higher Education More Affordable?* 220 TAX FOUND. 1, 3 (2014), <https://files.taxfoundation.org/legacy/docs/SR220.pdf> (reporting that, between 2008 and 2011, the number of taxpayers claiming educational tax credits jumped to 18 million from about 7.7 million, while approximately 8 million Americans received a tax refund pursuant to the AOTC).

242. See *id.* at 1–3, 6, 11 (arguing that education tax credits are too expensive and largely serve as a “windfall for universities” and recommending the expansion of Pell Grants and direct loans to those most in need of federal aid).

243. See, e.g., Soss & Jacobs, *supra* note 49, at 112 (arguing that the “complex and uneven” changes in welfare policies since the 1970s “have worked to reverse [the] civic and political incorporation” of low- and middle-income Americans, including veterans).

rity and Medicare are the only major New Deal entitlement programs to have survived the deregulatory turn intact—at once a product of a strong organization and an explanation for seniors' continued remarkable political engagement.

C. Prescriptive Implications

The critical prescriptive implication of this history of policy feedbacks is that legislative choices inevitably shape both individual political engagement and civil society. Without assuming that all civic associations *ipso facto* contribute to liberal democracy,²⁴⁴ we can thus take from the above discussion that legislative initiatives that are not directly focused on elections also constitute a critical point of entry for rebuilding the civic and political capacity of everyday Americans.

Generosity, visibility, and universality are key to whether legislation enhances democratic responsiveness or undermines it.²⁴⁵ Form, in other words, determines the character of the democratic cycle. The visibility of generous, non-means tested benefits influences individual participation by making the value of government apparent to the beneficiaries.²⁴⁶ When individuals experience the utility of government, they are more likely to recognize the importance of taking time to engage in politics.²⁴⁷ This, in turn, is likely to stimulate political solidarity and organizing.

By contrast, programs that recipients experience as harsh, paternalistic, or stigmatizing undermine civic and political participa-

244. The KKK was one of the largest federated associations in the mid-twentieth century, and its anti-democratic history, including physical vote suppression, is common knowledge. In this regard, it presents the most obvious illustration of the dilemma posed by illiberal and anti-democratic groups to arguments like mine that see robust civic groups as largely a source of democratic strength. That said, it is perhaps worth acknowledging that the rise of the KKK coincided with the rise of legislation that conferred benefits (civic and political) on whites, as well as election regulation that was specifically designed to break the interracial political coalitions that had formed in the wake of Reconstruction. See generally MICHAEL PERMAN, *STRUGGLE FOR MASTERY: DISENFRANCHISEMENT IN THE SOUTH, 1888–1908* (2001); J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS* (1974).

245. Soss & Jacobs, *supra* note 49, at 110 (arguing this is one of four major ways that public policies can affect political engagement); see also Suzanne Mettler & Joe Soss, *The Consequences of Public Policy for Democratic Citizenship: Bridging Policy Studies and Mass Politics*, 2 *PERSP. ON POL.* 55, 60–64 (2004) (identifying several axes of policy design that are likely to affect the structure of politics—including “visible versus hidden, targeted versus universal, obligation-oriented versus rights-oriented, participatory versus nonparticipatory . . . generous versus stingy, [and] privately provided versus publicly provided”).

246. Cf. Mettler, *Reconstituting the Submerged State*, *supra* note 229, at 809 tbl.4 (finding that “[t]hose who had used a greater number of visible [government] programs were significantly more likely to report that they paid their ‘fair share’ in taxes” as compared to those who benefit from valuable tax breaks such as the home mortgage interest); see also Mettler & Soss, *supra* note 245, at 62.

247. See, e.g., METTLER, *SOLDIERS TO CITIZENS*, *supra* note 121, at 12–13.

tion.²⁴⁸ The same is true for programs that are perceived as irrational or poorly administered.²⁴⁹ Thus, the rate of political participation amongst those who are subject to Temporary Assistance for Needy Families (TANF) is significantly lower than other groups.²⁵⁰ More importantly, the low rates of participation are not fully explained by lower SES status, as the figures were much less dramatic in the mid-twentieth century when welfare programs were more generous.²⁵¹

Jamila Michener's recent study of Medicaid is particularly revealing in this regard. As expected, she found that beneficiaries of the program are "significantly less likely to vote, register, and participate more generally" compared to similarly situated individuals.²⁵² However, she was able to demonstrate further that the magnitude of that effect differed in relation to differences in generosity and administration of the program between states.²⁵³ Summarizing her findings, she writes:

Beneficiaries living in states that expanded benefits in the previous year are significantly more likely to register and participate more generally; those living in states with a higher density of welfare employees are substantially more likely to register; those in states offering a wider scope of optional services are more likely to vote; [by contrast] those

248. Vesla M. Weaver & Amy E. Lerman, *Political Consequences of the Carceral State*, 104 AM. POL. SCI. REV. 817 (2010) (finding that those who have been incarcerated are significantly less likely to vote, even after controlling for income and race); see also Mettler & Soss, *supra* note 245, at 62 (contrasting evidence that attributes the political engagement of beneficiaries of Social Security Disability Insurance to their positive program experiences with evidence of the negative effects on political engagement of encounters with Aid to Families with Dependent Children and the criminal justice system).

249. MICHENER, *supra* note 101, at 61–70.

250. Soss & Jacobs, *supra* note 49, at 114–15.

251. *Id.* at 117.

252. MICHENER, *supra* note 101, at 79 ("The empirical support . . . is not incontrovertible, but it is strong evidence that Medicaid enrollment has an overall negative individual-level correlation with political participation."). Michener undertook a quantitative analysis comparing the political engagement of Medicaid beneficiaries to similarly situated individuals through the use of the Fragile Families and Child Well-Being Study (FFS), a longitudinal survey of 5,000 children born in U.S. cities. Even though the Medicaid beneficiaries (who constituted 53% of the sample) were somewhat better off than a representative sample of Medicaid beneficiaries, Michener found that "compared to the rest of the FFS sample, respondents who indicated being Medicaid beneficiaries are significantly less likely to vote, register, and participate more generally." *Id.* at 77 (reporting that they were about five percentage points less likely to vote or register and six percentage points less likely to undertake other forms of participation). This finding held steady even after controlling for an array of individual characteristics (age, sex, education, race, income) as well as factors that could affect mobilization (church attendance, incarceration, and health status, including depression and drug and alcohol dependence). *Id.* at 76–79.

253. *Id.* at 8 (explaining that "geographically differentiated political capacity" is a product of stark differences in the generosity of state program provision as well as the tenor of administration).

living in states that have recently reduced benefits are significantly less likely to participate, vote, and register.²⁵⁴

Put simply, Medicaid recipients “living in states offering a wide scope of services, fiscally equipped bureaucracies, and expanding Medicaid programs are significantly more likely to participate in politics,” while those living in states that had recently contracted services were significantly less politically involved.²⁵⁵ Michener notes, further, that how states treat so-called optional services (such as eye examinations and dental hygiene) proves among the most visible and communicative choices with respect to generosity or stinginess.²⁵⁶ Ultimately, she concludes that whether Medicaid is “a boom or a bust for political engagement” depends on the ways the program is formulated and implemented.²⁵⁷

Visibility of *beneficiaries* is similarly critical. Where the class of beneficiaries is evident, the incentives to mobilize and be mobilized, including by the socioeconomic elites capable of affording the transaction costs of organization, are much more pronounced.²⁵⁸ Once mobilized, such citizens are in a better position to demand responsiveness.²⁵⁹ In fact, some researchers attribute the recent decline in voter turnout among lower-income Americans not just to TANF but to the fact that political parties no longer feel the need to mobilize these voters.²⁶⁰

To be sure, visible beneficiaries provide a target for counter-mobilization and scapegoating. That said, this dynamic is most problematic where visibility is differential. The problem today is the recipients of visible government benefits become ready targets for backlash, while those who receive the most from the federal government are hidden and out of range.

254. *Id.* at 81.

255. *Id.* at 14; *see also id.* at 81–82 (“As shown, compared to beneficiaries living in states that did not reduce benefits, beneficiaries in states that had made the most reductions were between four and nine percentage points less likely to vote, register, or participate.”).

256. *Id.* at 52 (arguing that this is because vision and dental hygiene “are crucial for coping with everyday life and with the difficulties that affect low-income people”).

257. *Id.* at 14. Michener’s findings offer an additional basis to be wary of efforts to impose cumbersome work requirements on Medicaid recipients. *See* Amy Goldstein, *Kentucky Becomes the First State Allowed to Impose Medicaid Work Requirements*, WASH. POST (Jan. 12, 2018), https://www.washingtonpost.com/national/health-science/kentucky-becomes-the-first-state-allowed-to-impose-medicaid-work-requirement/2018/01/12/b7b56e3e-f7b4-11e7-b34a-b85626af34ef_story.html; *see also* Stewart v. Azar II, 366 F. Supp. 3d 125, (D.D.C. 2019) *appeal docketed*, 19-5095 (D.C. Cir. Apr. 11, 2019) (refusing to uphold reinstated policy on remand after striking initial requirements down as arbitrary and capricious).

258. Mettler, *Transformed Welfare State*, *supra* note 40, at 209–10 (noting that beneficiaries of visible and generous government largesse are much more likely to be represented by organizations and “much more likely to be mobilized by political parties and candidates,” regardless of income, as compared to “beneficiaries of . . . weak policies”).

259. *See, e.g.*, CAMPBELL, *supra* note 42, at 117–24, 138–39.

260. Mettler, *Transformed Welfare State*, *supra* note 40, at 204–12.

D. *The Affordable Care Act as a Contemporary Case Study*

The Affordable Care Act (ACA) and the various repeal and replace options that were discussed in August 2017 provide a contemporary illustration of the potential for substantive legislation to have positive democratic returns, while simultaneously illustrating the policy feedback analysis that Part III argues should inform democracy reformers' agendas.

The ACA is a hybrid of Reagan-era and more traditional New Deal policymaking. Certain elements of the law dispense direct government benefits and create visible beneficiaries, while others do not. The expansion of Medicaid and the ACA's protection against rate discrimination based on preexisting conditions as well as its requirement that insurers permit dependents under twenty-six to remain on their parents' employer-based policies create visible benefits and beneficiaries. The host of benefits accruing to individuals with employer-sponsored health insurance, by contrast, remain largely invisible to the public.

The ACA's expansion of Medicaid illustrates the democratic returns of the classic form of New Deal policymaking. Even with only thirty-one states and the District of Columbia adopting the expansion, over 10 million Americans were newly insured as a result.²⁶¹ The expansion was both visible and generous. Moreover, by simplifying eligibility criteria and enhancing state incentives to enroll eligible individuals, the ACA appears to have improved participants' experiences of program administration.²⁶² Consistent with the literature, early data suggests that both the expansion of Medicaid and the passage of the ACA more broadly have had positive effects on political participation.²⁶³ Michener, for example, found that Medicaid recipients in states that had adopted the expansion were sig-

261. Cf. KAISER FAM. FOUND., MEDICAID EXPANSION ENROLLMENT, <https://www.kff.org/health-reform/state-indicator/medicaid-expansion-enrollment> (last visited Aug. 2, 2019) (reporting that as of September 30, 2017, 32 states (including D.C.) had expanded Medicaid eligibility resulting in coverage for over 12 million Americans).

262. Cf. Tricia Brooks, *The ACA Transformed Medicaid Enrollment Processes. Rolling Them Back Would Wreak Havoc*, HEALTH AFF. BLOG (Jan. 4, 2017), <https://www.healthaffairs.org/doi/10.1377/hblog20170104.058223/full/> (explaining how the ACA has "transform[ed] Medicaid into an efficient, modernized data-driven program").

263. See, e.g., Joshua D. Clinton & Michael W. Sances, *The Politics of Policies: The Initial Mass Political Effects of Medicaid Expansion in the States*, 112 AM. POL. SCI. REV. 167, 168 (2018) (finding that "the expansion of Medicaid increased voter registration" in both 2014 and 2016, had a limited effect on voter turnout in 2014, but had no effect on turnout in 2016); Jake Haselswerdt, *Expanding Medicaid, Expanding the Electorate: The Affordable Care Act's Short-Term Impact on Political Participation*, 42 J. HEALTH POL. POL'Y & L. 667, 668, 681, 686 (2017) (finding that expanded enrollment in Medicaid as a result of the ACA "significantly correlated with higher voter turnout in 2014 US [sic] House elections," even after controlling for a wide range of variables, and hypothesizing that this is because the Act motivated "both beneficiaries and opponents" to vote).

nificantly more likely to have registered to vote or to have participated in some other way in the following election cycle.²⁶⁴

Not surprisingly, when repeal efforts began, beneficiaries and other mediating advocacy groups were well positioned to mobilize against the proposed repeal, attending hundreds of rallies and town hall meetings to share their personal stories.²⁶⁵ Indeed, Michener's qualitative research vividly depicts stories of individual activism giving birth to grassroots advocacy by beneficiaries of Medicaid during various stages of the ACA fight.²⁶⁶

Those 10 million, newly insured Americans knew exactly whom to thank for their eyeglasses and their prescriptions.²⁶⁷ Some likely even noticed the ease with which they were able to register for Medicaid coverage.²⁶⁸ Equally importantly, Democrats, state governors, and an array of other advocacy groups—including those of healthcare professionals—knew exactly whom to organize in their effort to save the Act.

The repeal of Medicaid expansion along with efforts to replace the system with block grants ultimately failed. Congressional Republicans retreated in the face of significant grassroots and elite opposition, including among Republican governors.²⁶⁹ In the face of mounting political opposition to the scaling back of a visible benefit, an array of compromises, including a delayed repeal of the ACA's expansion of Medicaid, were considered.²⁷⁰ None passed.

264. MICHENER, *supra* note 101, at 80–82.

265. *Id.* at 11–12.

266. *Id.* at 136–52 (describing the organizing efforts of one beneficiary, who not only orchestrated a bus for beneficiaries to attend hearings at the state legislature, but also trained others to be effective political advocates).

267. See, e.g., Nick Castele, *Meet the Republican Governors Who Don't Want to Repeal All of Obamacare*, NPR (Jan. 23, 2017, 4:53 AM), <https://www.npr.org/2017/01/23/510823789/meet-the-republican-governors-who-dont-want-to-repeal-all-of-obamacare>.

268. See Brooks, *supra* note 262 (noting that eligibility in some states is verified “immediately or overnight for more than 75% of applicants”).

269. See Thomas Kaplan & Robert Pear, *Republican Unity on Health Care Is Elusive, Despite Trump's Support*, N.Y. TIMES (Mar. 1, 2017), <https://www.nytimes.com/2017/03/01/us/politics/affordable-care-act-health-care-trump.html> (noting that “[l]awmakers from states that expanded Medicaid under the Affordable Care Act face pressure back home—in some cases, from Republican governors—to oppose its repeal); Castele, *supra* note 267 (noting that the eleven Republican governors from states that chose to expand Medicaid are lobbying to keep it and highlighting Governor Kasich's efforts on behalf of the 700,000 Ohioans who have received coverage through the expansion).

270. Amy Goldstein et al., *Health-Care Bill Changes: For Conservatives, Moderates and New Yorkers*, WASH. POST (Mar. 22, 2017); Margot Sanger-Katz, *G.O.P. Repeal Bill Would Cut Funding for Poor and Taxes on Rich*, N.Y. TIMES (Mar. 6, 2016), <https://www.nytimes.com/2017/03/06/upshot/gop-health-bill-would-cut-funding-for-poor-and-taxes-on-rich.html>; Timothy Jost, *A Look at Republican Intentions? Diving Into The Leaked ACA Replacement Bill*, HEALTH AFF. BLOG (Feb. 25, 2017), <https://www.healthaffairs.org/doi/10.1377/hblog20170225.058932/full/>; see also Amy Goldstein & Juliet Eilperin, *House GOP Plans to Keep Some Medicaid Expansion—And Steer Money to States that Never Bought In*, WASH. POST (Feb. 24, 2017), <https://www.washingtonpost.com/national/health-science/house-gop-plans-to-keep-some-medicaid-expansion—and-steer-money-to-states-that-never-bought->

To be sure, the expansion of Medicaid was so visible and perceived to be so generous that it created resentment—particularly, among individuals who felt that they had been forced to purchase more expensive, less generous coverage through the private exchanges.²⁷¹ Still, to the degree that this resentment bred activism, it was not, *per se*, a democratic drawback. Indeed, some supporters of repeal have expressed hope that the Act will be replaced with a broader expansion of Medicaid to offer “the working poor a chance at the same coverage the very poor receive.”²⁷²

In other respects, however, the ACA was a quintessential example of American policymaking in the post-Reagan era, with invisibility undermining political mobilization. Its least visible beneficiaries are the approximately 150 million Americans who receive coverage through employer-based health insurance plans. Even relatively informed citizens are unlikely to recognize the range of protections they received from the ACA: for example, the requirement that health plans cover preventative care services without patients either meeting plan deductibles or paying a co-pay; the introduction of out-of-pocket limits to cap the dollar amount individuals can be expected to pay in co-payments annually; and the prohibition on annual and lifetime benefit limits.²⁷³ These individuals are also largely unaware of the indirect benefits they have received from the ACA in the form of the lowest increases in health insurance premiums in decades. Most importantly, these individuals are unlikely to fully understand how the robust coverage, at relatively low costs, that they take for granted is subsidized by federal tax policy that long pre-dates the ACA.²⁷⁴ Not surprising-

in/2017/02/24/b23cb9f0-f9f7-11e6-be05-1a3817ac21a5_story.html (reporting that a Kaiser Family Foundation poll found 84% of respondents support Medicaid expansion and favor its preservation and, further, that support for the expansion was 87% in the sixteen states with Republican governors that expanded Medicaid under the ACA).

271. Sarah Kliff, *Why Obamacare Enrollees Voted for Trump*, VOX (Dec. 13, 2016), <https://www.vox.com/science-and-health/2016/12/13/13848794/kentucky-obamacare-trump> (reporting that, in interviews, Trump supporters enrolled through the exchanges expressed frustration that those on Medicaid are “getting even better, even cheaper benefits”).

272. *Id.*; see also Drew Altman, Opinion, *The Health Care Plan Trump Voters Really Want*, N.Y. TIMES (Jan. 5, 2017), <https://www.nytimes.com/2017/01/05/opinion/the-health-care-plan-trump-voters-really-want.html> (reporting similar findings from a Kaiser Family Foundation focus group-based study of Trump supporters enrolled in either Medicaid or private insurance through the exchanges).

273. JoAnn Volk, *Get Health Insurance Through Your Employer? ACA Repeal Will Affect You, Too*, HEALTH AFF. BLOG (Jan. 11, 2017), <https://www.healthaffairs.org/doi/10.1377/hblog20170111.058297/full/>.

274. See Chris Ladd, *Unspeakable Realities Block Universal Health Coverage in America*, FORBES (Mar. 13, 2017, 2:02 PM), <https://www.forbes.com/sites/chrisladd/2017/03/13/unspeakable-realities-block-universal-health-coverage-in-the-us/#399070f4186a> (describing the submerged state and the ways it benefits white Americans employed in the private sector, including by making their health insurance more affordable).

ly, then, there has been much less activism against the repeal of the ACA from healthy individuals who receive health insurance through work.

Between these two extremes was the ACA's introduction of government-run health insurance exchanges. A hybrid policymaking structure, the exchanges marry elements of the Reagan school with elements of the New Deal approach. The Act creates exchanges in which private insurers compete to provide health insurance to individuals who are unable to obtain coverage through their employers and are ineligible for Medicaid or Medicare. These private exchanges, like the ability of individuals to use them, are subsidized by the government. For individuals, subsidies are provided on a means-test basis through an array of tax credits.²⁷⁵

Despite the provision of subsidies through the tax code, the exchanges have been visible—but also confusing and fraught with administrative hiccups.²⁷⁶ Similarly, the so-called individual mandate, the requirement that individuals obtain health insurance or pay a penalty, which was meant to both encourage participation in the exchanges and stabilize insurance prices, also proved exceptionally visible.²⁷⁷

While an estimated 9.2 million Americans have been insured through these exchanges,²⁷⁸ the jury remains hung on the question of generosity and efficacy. And still, the policy feedback loop from these exchanges has surely been positive, where the measure is political engagement and mobilization. Those who have gained (or been required to obtain) health insurance through the exchanges know full well who to hold responsible and have made their voices heard loudly and often since 2010. Moreover, both political parties have been moved to organize Americans whose experiences of the exchanges comports with the party's platform.

275. In general, tax credits are significantly more universal than either tax deductions (which require itemization) or health savings accounts. These latter tax options tend to be used by higher-income Americans. Tax credits, especially when they are advanceable and refundable, are also more visible because they come to individuals as a sum of money from the government. In fact, Senator Rand Paul, during the repeal debate, objected: "I think refundable tax credits are just another word for subsidies." Kaplan & Pear, *supra* note 269.

276. Despite being visible, there has been a good deal of confusion about the ACA. See Jeff Lagasse, *Americans Are Still Confused About Healthcare Law, Survey Finds*, HEALTHCARE FIN. (Oct. 15, 2018), <https://www.healthcarefinancenews.com/news/americans-still-confused-about-healthcare-law-survey-finds>.

277. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 547–59 (2012) (describing the thrust of Congress's policy rationale for the individual mandate).

278. *ObamaCare Subsidies*, OBAMACARE FACTS (Aug. 8, 2014), <http://obamacarefacts.com/obamacare-subsidies/> (last updated Feb. 21, 2019) (reporting, in addition, that 85% of individuals who purchased health insurance through the private exchanges received some government subsidy).

The politics surrounding efforts to repeal the ACA in the fall of 2017 are a testament to the political power of visibility and generosity as well as the importance of giving political parties, and their civic allies, an incentive to help mobilize their constituents—to all the dynamics described above, that is.²⁷⁹ To be sure, the Act maintained and encouraged many vested interests, including hospitals, doctors, and insurers, all of whom were active during the debate. But special interest lobbying, as we know, looks different when individual activism and organizational advocacy is present.²⁸⁰ The end result was a fluid political contest with individuals showing up at town halls and rallies to plead their cases. The AARP's intervention was also critical to thwarting the repeal.²⁸¹

Ultimately, despite control of all three branches of government and a longstanding platform promising repeal, spearheaded by key donors, a Republican-led Congress was not able to repeal and replace the ACA.

Not only did the effort to scale back existing entitlements fail, but shortly after it tacked a repeal of the tax penalties associated with the individual mandate to the 2017 Republican tax bill, a Republican Congress was forced to concede to fully fund CHIP for a decade.

The story of the effort to repeal the ACA and its failure constitutes a significant political win for low- and middle-income Americans—a win that should not be underestimated even as the ACA remains vulnerable and our politics remains polarized and fluid. It stands as a tribute to the civic and political returns from visible entitlement programs. By the same token, it raises democratic alarms about efforts in some states to impose work requirements and other conditions on eligibility that are likely to subvert messages of inclusion and citizenship.

279. See, e.g., Abby Goodnough, *In Red-State Utah, a Surge Toward Obamacare*, N.Y. TIMES (Mar. 3, 2017), <https://www.nytimes.com/2017/03/03/health/utah-obamacare.html>; Thomas Kaplan, *Angry Town Hall Meetings on Health Care Law, and Few Answers*, N.Y. TIMES (Feb. 13, 2017), <https://www.nytimes.com/2017/02/13/us/politics/affordable-care-act-sensenbrenner-republicans.html>.

280. Robert Pear, *Repeal of Health Law Faces a New Hurdle: Older Americans*, N.Y. TIMES (Mar. 5, 2017), <https://www.nytimes.com/2017/03/05/us/politics/health-care-law-obamacare-repeal-older-americans.html>; Margot Sanger-Katz, *Why Even Some Republicans Are Rejecting the Replacement Bill*, N.Y. TIMES (Mar. 7, 2017), <https://www.nytimes.com/2017/03/07/upshot/why-even-some-republicans-are-rejecting-the-replacement-bill.html>; accord GILENS, AFFLUENCE AND INFLUENCE, *supra* note 11, at 121–22.

281. Pear, *supra* note 280 (reporting how, in the middle of the debate, the organization produced data showing, among other things, that seniors on the cusp of Medicare eligibility (i.e., between 50–55) would face a \$2,000–\$3,000 increase in premiums under Republican proposals).

* * *

Moving again from the details of policy feedbacks to their prescriptive relevance, the critical point is that legislation does far more than distribute or deny benefits and rights to individuals. It also shapes individual relationships to democracy, creates political constituencies, and stimulates civic organization.

Form matters. Policy ends can be achieved in ways that either enhance democratic responsiveness by “stimulat[ing] political organizations, solidarity, and accountability” or undermine it by fostering individual anomie and corporate rent-seeking.²⁸² In this way, legislative choices inevitably shape civil society and political engagement at both an individual and organizational level.

III. NEW STRATEGIES FOR DEMOCRACY REFORMS

Just as the demise of American democracy was not, and still is not, inevitable, its restoration is similarly neither inevitable nor foreclosed. Those interested in restoring functionality to our democratic institutions must, however, broaden our horizons.

The foundational insight from the previous section is that legislation, regardless of its substantive area, *will* play some role in the trajectory of civil society. Legislation can either engage citizens and incentivize the creation of civic groups, or it can breed political disengagement, demobilization, and anomie. Indeed, the present political incapacity of Main Street is importantly a product of the form and extent of deregulation over the past thirty years.

The task, therefore, is to identify those legislative policies that could tip the scale toward political empowerment and civic reorganization. Any effort to restore our democracy and fuel the recent signs of civic revival must include the pursuit of policies that will likely motivate individuals to participate in our democracy and stimulate the reorganization of the interests of everyday Americans. This appreciation is especially critical given mounting evidence that the Roberts Court is disinclined to maintain established approaches to good governance reforms, which have depended on judicial intervention to reinforce democracy by increasing ballot

282. Soss & Jacobs, *supra* note 49, at 110 (arguing this is one of four major ways that public policies can affect political engagement); *see also* Mettler & Soss, *supra* note 245, at 62–63 (arguing for further research into the ways public policies influence political organization and capacity).

access, limiting political entrenchment, and restricting the influence of money on elections.²⁸³

The analyses in the previous two sections provide yardsticks for the sorts of non-procedural policies that should be central to the broader democracy reform platform. In particular, they suggest that the priority should be legislative opportunities that would:

- Draw a broader, more representative, and diverse swath of Americans into politics, particularly individuals who are low- and middle-income or young.
- Spawn civic and political networks that span economic, racial, partisan, and geographic divides.²⁸⁴
- Offset the socioeconomic and racial segregation of contemporary life that undermines opportunities for individuals to associate across these axes of difference.
- Stimulate the growth of economically self-sustaining, membership-based civic associations that prioritize democratic governance structures and operate in every state (whether through a formally federated structure or otherwise).

Once specific legislative policies addressing these criteria have been identified, reformers must advocate forcefully to ensure that they are implemented in *generous*, *universal*, and *visible* ways and are *fairly and competently* administered.²⁸⁵ By the same token, versions of such policies that distribute government largesse in ways that obscure either the fact of the benefit or who benefits should be strongly opposed, as should policy choices and menus that lead to differential disempowerment.²⁸⁶

283. See, e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019); *McCutcheon v. FEC*, 572 U.S. 185 (2014); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

284. A goal of racially integrated social networks may not actually be a partisan-neutral goal, as the Republican Party's current agenda is increasingly associated with nostalgia for a period of white supremacy. See, e.g., Christopher Ingraham, *Nearly Half of White Republicans Say It Bothers Them to Hear People Speaking Foreign Languages*, WASH. POST (May 8, 2019). In early drafts, in deference to that reality, I emphasized socioeconomic integration, even as I personally favor the goal of pursuing racially and socioeconomically integrated social networks. That decision, however, consistently alienated many potential allies, so I have decided to abandon that aspect of partisan neutrality.

285. See *supra* notes 245–260 and accompanying text.

286. This is best conceptualized as a rebuttable presumption against disguised policymaking. The presumption could be rebutted when there are genuine policy reasons to prefer invisibility (as, for example, in 2010 when tax relief sought to stimulate economic growth) or when it is simply infeasible to gain support for a visible alternative. The latter justification should be undertaken with caution since, if exercised liberally, it would do significant harm to our democracy. In this regard, my view is that policymaking should be undertaken with two principles in mind: first, *do no harm*; second, *do good where opportunity exists*.

A. *Engaging a Broader Swath of the Electorate*

Let's start first with legislative proposals that could potentially draw young as well as low- and middle-income Americans into politics. These could include efforts to make college education free and to expand the availability of government health insurance. Felon re-enfranchisement as well as legislation offering paths to citizenship for undocumented immigrants could also further this goal.

The variety of efforts at the state and local level to make higher education more accessible nicely illustrate the promises of those reforms as well as what would be necessary to fully capture the potential civic returns. A college degree is currently the great dividing line when it comes to economic resilience and success over a lifetime.²⁸⁷ Indeed, some researchers argue that college access is an extremely effective anti-poverty strategy for poor and working parents insofar as it lifts families out of poverty and children out of the cycle of poverty.²⁸⁸ At the same time, the rising cost of higher education has put college out of reach for many families. It even burdens middle and upper-middle class families. Student debt constitutes the highest proportion of consumer debt in an era of declining household incomes.²⁸⁹

Starting with Tennessee, several states and localities have acted to address the college affordability crisis. In 2015, Tennessee became the first state to make community college free to high school graduates who complete eight hours of community service, attend mentorship meetings each semester, and maintain a minimum grade-point average.²⁹⁰ Since then, sixteen states have followed

287. BRAD HERSHBEIN ET AL., HAMILTON PROJECT, INCREASING EDUCATION: WHAT IT WILL AND WILL NOT DO FOR EARNINGS AND EARNINGS INEQUALITY 1 (Mar. 30, 2015), http://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/impact_of_education_earnings_inequality_hershbein_earney_summers.pdf (describing diverging earning trends for those with and without a college degree and noting “lifetime earnings of workers with a college degree are nearly twice as high as those without one”).

288. See *id.* at 3 (clarifying that while increasing educational attainment will not close “the gap between the rich and the middle—or between the exorbitantly rich and the merely rich,” it is likely to “improve the economic position of those around and below the middle of the current earnings distribution”).

289. See *No Jargon: The Cost of College*, SCHOLARS STRATEGY NETWORK (Sept. 5, 2017), <http://nojargon.libsyn.com/page/5/size/25> (noting student loan debt as the most significant form of consumer loan debt despite the fact that most individuals owe relatively small amounts given caps on the amount of debt available for an undergraduate degree); see also Hodge & Pomerleau, *supra* note 241, at 5 (noting that student loan debt, which averages just below \$25,000, “is now the largest single type of outstanding debt, larger than both credit card debt and auto loan debt”).

290. Katie Loboscho, *Tennessee Is Picking Up the Tab for Community College Students*, CNN (Sept. 18, 2015, 10:07 AM), <https://money.cnn.com/2015/09/18/pf/college/free-community-college-tennessee/> (estimating 15,000 students would take advantage of the

suit.²⁹¹ New York recently adopted a program that provides free college tuition at SUNY and CUNY to families earning up to \$125,000 a year. Nearly a million households will be eligible for the program, although policymakers assume that many fewer will use it.²⁹² Similar programs have been adopted at the local level.²⁹³

As the research described in Part II suggests, there is good reason to believe such programs hold the potential for positive civic returns. Not only will the beneficiaries of free community college be better educated (and thus more likely to participate in politics), but, like the beneficiaries of the G.I. Bill before them, they will likely be appreciative, and possibly even grateful, to the government. Once established, moreover, such programs are likely to stimulate the growth of organizations to maintain them. Political parties, meanwhile, will likely begin to attend to this new political constituency. These programs may have a lower civic impact, compared to the G.I. Bill, because many are structured to cycle participants every two years. Still, there is good reason to believe that a useful education, made possible by the support of the government, will promote trust as well as interest in government and politics.

But the same research comes with a critical caution: the civic returns of such programs will hinge on both generosity and implementation. The most significant problem with the design of many of these early programs—where the measure is generosity—is the requirement that individuals attend college as full-time students to qualify for the program. This renders the program inaccessible for many students who can only afford to attend college on a part-time basis.

An additional, but less obvious, limitation of most existing programs is their failure to offer comparable benefits to youth who are

program during its first year and explaining that the program is funded by the state lottery fund).

291. JEN MISHORY, *THE FUTURE OF STATEWIDE COLLEGE PROMISE PROGRAMS: A STATE GUIDE TO FREE COLLEGE*, CENTURY FOUND. 1 (2018), https://production-tcf.imgix.net/app/uploads/2018/03/16161350/Jen_PromiseFinal2-1.pdf.

292. See Editorial Board, Opinion, *A Promising Proposal for Free Tuition*, N.Y. TIMES (Jan. 5, 2017), <https://www.nytimes.com/2017/01/05/opinion/a-promising-proposal-for-free-tuition.html> (estimating that while 940,000 families could qualify, it is likely only 200,000 students would use the program if adopted); see also Governor Andrew J. Cuomo, Press Release, *Governor Cuomo Presents 1st Proposal of 2017 State of the State: Making College Tuition-Free for New York's Middle Class Families* (Jan. 3, 2017), <https://www.governor.ny.gov/news/governor-cuomo-presents-1st-proposal-2017-state-state-making-college-tuition-free-new-yorks> (explaining the program would cover costs remaining after federal and state TAP grants are applied).

293. See Farran Powell, *Which Cities Offer Tuition-Free College Programs*, U.S. NEWS (Sept. 19, 2018), <https://www.usnews.com/education/best-colleges/paying-for-college/articles/2018-05-02/see-which-cities-offer-tuition-free-college-programs> (noting that twenty-six of the fifty largest cities in the United States offer such programs).

not college bound.²⁹⁴ This coverage gap is likely to further political polarizations, similar to the response some Americans had to the limited expansion of Medicaid under the ACA.²⁹⁵ Where college is increasingly viewed as a badge of liberal elitism, rather than a known path to economic mobility and security, this civic risk should not be underestimated.²⁹⁶

In this regard, attention to the student debt crisis should not come at the expense of the broader need for affordable quality skills training.²⁹⁷ Indeed, the G.I. Bill's greatest civic returns came from its support of educational opportunities below a four-year college degree. Ultimately, given the difficulties of policing the quality of training programs, community college may be the appropriate venue for offering high-quality job training and a path to well-paying middle-skill jobs.²⁹⁸ But this will require state investment since many existing community college programs would need to be redesigned to offer high-quality job training and skills for the trades that are in demand.²⁹⁹ Virginia's New Economy Workforce grant to community colleges to provide training in certain high-demand fields, including healthcare and welding, may offer a model.³⁰⁰

294. See, e.g., Anne Kim, *Forget "Free College" How About "Free Credentials"?* 2017 PROGRESSIVE POL'Y INST. 1 (arguing that "the single-minded focus on college diminishes other, equally viable paths to middle-class security" and "sends the wrong message to the millions of Americans who opt out of college—not because they can't afford it but [because they] don't want it or need it to achieve their aspirations").

295. See *supra* notes 272–73 (discussing resentment towards the gap between cost and generosity of insurance available through Medicaid as compared to the state exchanges).

296. Thomas B. Edsall, Opinion, *The Closing of the Republican Mind*, N.Y. TIMES (July 13, 2017), <https://www.nytimes.com/2017/07/13/opinion/republicans-elites-trump.html> (reporting a stark rise, since 2016, in skepticism among Republicans about the value of college, with 58% now reporting a negative view of higher education).

297. JEN MISHORY, EXPANDING "FREE COLLEGE": HOW TO BUILD A JOB TRAINING GUARANTEE, CENTURY FOUND. (May 8, 2019), <https://tcf.org/content/report/expanding-free-college-build-job-training-guarantee/> (arguing that a "universally accessible training benefit would allow more workers to access higher-wage job opportunities"); PETER GRANVILLE, CALIFORNIA'S WORKFORCE NEEDS CAL GRANT REFORM, CENTURY FOUND. (Feb. 25, 2019), <https://tcf.org/content/commentary/californias-workforce-needs-cal-grant-reform/>.

298. Kim, *supra* note 294, at 8; see also Mishory, *supra* note 297 (identifying scale and quality control as significant impediments to scaling up quality skills training initiatives).

299. See, e.g., HARRY J. HOLZER, JOB MARKET POLARIZATION AND U.S. WORKER SKILLS: A TALE OF TWO MIDDLES, 2, 7 BROOKINGS INST. (2015), https://www.brookings.edu/wp-content/uploads/2016/06/polarization_jobs_policy_holzer.pdf (noting that "a majority of AA enrollees in recent years have concentrated in 'liberal studies' or 'general studies' with virtually no labor market return"); see also Anthony Walsh, *States Continue to Push Ahead on Free College*, CENTURY FOUND. (Mar. 11, 2019), <https://tcf.org/content/commentary/states-continue-push-ahead-free-college/> (noting that many state financial aid programs exclude community college vocational programs).

300. Kim, *supra* note 294, at 7. It is also likely that programs will need to be place-based to be valuable. Growing evidence points to regional differences regarding employers' willingness to offer non-college educated applicants middle-skills jobs. Cf. Mels de Zeeuw, *Uneven Opportunity: Variation in Employers' Educational Preferences for Middle-Skills Jobs*, FED. RES.

Additionally, programs need to address the economic realities of the individuals seeking to utilize these programs. First and foremost, they should cover non-tuition costs for low-income students who either cannot rely on family support or who have families to support (as the G.I. Bill did).³⁰¹ Programs like San Francisco's and Maine's are potential models in this regard. San Francisco offers free tuition to all city residents who enroll in the City College of San Francisco, regardless of age or income, while providing supplemental assistance to low-income students to cover books, health insurance, and other fees.³⁰² Similarly, Maine's 2017 Lift 2.0 program was carefully designed to address the known needs of working parents, including childcare and transportation costs (again, not unlike the G.I. Bill, which had a stipend for family members).³⁰³ On an encouraging note, a recent review suggests that, at least, some states may be working to address these issues.³⁰⁴

Finally, regardless of their generosity, such programs must attend to administrative implementation if they wish to secure long-term civic returns. As Michener's work on Medicaid demonstrates, programs that are implemented through rules that are perceived as arbitrary will not achieve second-order civic and democratic returns.³⁰⁵ In this regard, several concerns that have already been raised about the administration of the New York program are troubling. Critically, the New York program operates with exceedingly narrow criteria for determining which courses satisfy the full-time eligibility requirement. As such, meeting this requirement has been a significant source of anxiety for many students.

In sum, moves to make higher education more affordable and accessible have the potential to draw a wider swath of citizens into civil society and politics. So do programs aimed at providing uni-

BANK ATLANTA (Feb. 2017), <https://www.frbatlanta.org/community-development/publications/partners-update/2017/01/170125-uneven-opportunity-variation-in-employers-educational-preferences-for-middle-skills-jobs.aspx> (summarizing a study showing significant regional variation in "the availability and accessibility of well-paying jobs that do not require a bachelor's degree" and explaining that employers in regions with more educated workforces and higher wages tend to require a bachelor degree for middle-skills jobs, such as in computing and nursing).

301. Cf. METTLER, *SOLDIERS TO CITIZENS*, *supra* note 121, at 70, 88.

302. Dave Berndtson, *San Francisco Becomes First City to Offer Free Community College Tuition to All Residents*, PBS NEWS HOUR (Feb. 8, 2017, 9:52 PM), <https://www.pbs.org/newshour/education/san-francisco-becomes-first-city-offer-free-community-college-tuition-residents> (reporting that the Mayor estimates the program will assist between 28,000–30,000 students at a cost of about \$5.4 million annually).

303. See James Myall, *'Lift 2.0' Bill Will Pave the Way Out of Poverty for Many Mainers*, BEACON (Feb. 20, 2018), <http://mainebeacon.com/lift-2-0-bill-will-pave-the-way-out-of-poverty-for-many-mainers/>.

304. Walsh, *supra* note 299 (noting Massachusetts and Hawaii's expansion of debt-free college programs).

305. Cf. MICHENER, *supra* note 101, at 61–70.

versal access to quality healthcare and granting legal status to undocumented immigrants. However, legislators constructing these programs must take care to ensure that they are designed more like the G.I. Bill and less like Medicaid. The same analyses apply to felon re-enfranchisement. The imposition of administrative hurdles, such as requiring individuals to pay all fines associated with their conviction as a prerequisite to eligibility to vote, like cumbersome work requirements to receive Medicaid, or rigid full-time enrollment criteria, communicate unequal citizenship and undercut the potential of such policies to stimulate civic engagement among a broader, more representative swath of Americans.³⁰⁶

B. *Building Coalitions Across Existing Divides*

Democracy reformers should also identify legislative opportunities with the potential to create constituencies that span economic, partisan, and geographic divides. Such opportunities include providing free educational opportunities, paid family and medical leave, and access to quality affordable healthcare, including mental health and addiction care.

Postal banking, while not in the foreground for many people, offers an underappreciated opportunity to bridge the geographic divide between rural and urban communities with the added virtue that it is currently not a politically polarized issue.³⁰⁷ Many commercial banks have abandoned both rural areas and impoverished urban neighborhoods as a result of both deregulation and technological advances. Concerned about profit margins, these banks have also jettisoned critical products from these communities, including small loans to local businesses and low-income customers. The result according to a 2013 study is that 28% of households in the United States are “unbanked” (no formal relationship with a bank) or “underbanked” (no access to incremental credit).³⁰⁸ In low-income urban areas, “fringe lenders” have emerged to take the place of these regulated banks. Fringe lenders charge high interest rates and fees. Many perceive these lenders to be taking advantage of low-income customers.

306. See Patricia Mazzei, *Floridians Gave Ex-Felons the Right to Vote. Lawmakers Just Put a Big Obstacle in Their Way*, N.Y. TIMES (May 3, 2019), <https://www.nytimes.com/2019/05/03/us/florida-felon-voting-amendment-4.html>.

307. See also GILMAN & RAHMAN, *supra* note 161, at 3 (arguing that we need to seek out opportunities “to build multi-racial constituencies and alliances to make our democracy more inclusive”—a “type of ‘us’ populism” to replace a “‘them’ populism”).

308. Mehrsa Baradaran, *How the Poor Got Cut Out of Banking*, 62 EMORY L.J. 483, 485 (2013).

A number of legal academics have proposed that postal banking could step in to replace low-income families' reliance on check-cashing services, payday lenders, and title vendors, each of whom collect fees and interest far beyond what chartered banks may charge.³⁰⁹ Professor Mehrsa Baradaran, most prominently, has argued that post offices could offer the same services that fringe lenders currently offer, as well as depository accounts at much lower costs.³¹⁰ She defends postal banking as more efficient than imposing the responsibility for serving the needs of low-income customers on mainstream banks.³¹¹ For one, the Post Office already has offices in the low-income areas that commercial banks have vacated. For another, the Post Office is a highly familiar and trusted place in many American communities. In April 2018, Senator Kirsten Gillibrand introduced legislation that mirrors Baradaran's proposal.³¹²

Although there is a good deal of debate regarding the risks associated with the Post Office getting involved in micro-lending,³¹³ the provision of depository services (i.e., checking and savings accounts, debit cards, ATMs, and online banking and bill payment) through the Post Office may be a viable solution to the banking needs of individuals and businesses in both urban and rural communities.³¹⁴ This is because, while rural businesses mainly suffer from an inability to obtain credit lines and loans, they share with low-income urban communities the negative consequences that follow from the lack of access to depository accounts.³¹⁵

For our purposes, however, what is critical is that the potential second-order democratic consequences of postal banking should not be ignored in this policy debate. Postal banking would be a

309. See, e.g., Mehrsa Baradaran, *It's Time for Postal Banking*, 127 HARV. L. REV. F. 165 (2014).

310. *Id.* at 168–70 (emphasizing historical precedent for her proposal in the Postal Savings System, which was established to encourage individual saving and operated from 1910 to 1966).

311. *Id.* at 167–69.

312. Senator Kirsten Gillibrand, Press Release, *Gillibrand Announces Major New Legislation to Create a Postal Bank to Wipe Out Predatory Payday Lending Industry Practices, Ensure All Americans Have Access to Basic Banking Services* (Apr. 25, 2018), <https://www.gillibrand.senate.gov/news/press/release/gillibrand-announces-major-new-legislation-to-create-a-postal-bank-to-wipe-out-predatory-payday-lending-industry-practices-ensure-all-americans-have-access-to-basic-banking-services>.

313. Many who have expressed doubt about postal banking are wary of the risks associated with offering low-income people loans at rates well below those justified based on the risk of default.

314. Cf. Ruth Simon & Coulter James, *Goodbye, George Bailey: Decline of Rural Lending Crimps Small-Town Business*, WALL STREET J. (Dec. 26, 2017), <https://www.wsj.com/articles/goodbye-george-bailey-decline-of-rural-lending-crimps-small-town-business-1514219515>.

315. Cf. *id.* (emphasizing that rural businesses suffer from significant problems getting credit lines and loans, but noting they also suffer from the basic problem of not having easy access to depository accounts).

highly visible government program that many individuals would directly experience. More importantly, it would create a beneficiary class that spans urban-rural political divides, even if the legislation did not go so far as to permit the Post Office to undertake micro-lending. To the degree the experience was positive, it could instill renewed faith in the federal government and cross-regional alliances. Whenever an urban or rural individual or business owner used a Post Office to cash a check, deposit money, or take out a loan, they would unavoidably recognize and appreciate that they were interacting with the federal government. By contrast, the most prominent alternative solutions to the banking problem (administering federal banking through the Federal Reserve, federally subsidized credit unions, savings and loan associations, and Morris Banks) would not provide similar visibility and transparency and, therefore, are significantly less likely to create positive policy feedbacks. Similar considerations should inform the debates when policies with similar bridging potential are discussed.

C. Reducing Socioeconomic Segregation

The most intractable constraint that efforts to revitalize a robust civil society will have to navigate is the rise of pervasive socioeconomic segregation.³¹⁶ In recent decades, mixed-income neighborhoods have become increasingly rare, while “exclusively affluent and exclusively poor neighborhoods” have become the norm.³¹⁷ This socioeconomic segregation undermines the democratic virtues of civil society in a variety of ways and sets a third priority for good government reformers.

Socioeconomic segregation means that there are simply fewer opportunities to forge social ties across classes—and, in turn, rac-

316. See, e.g., SEAN F. REARDON & KENDRA BISCHOFF, THE CONTINUING INCREASE IN INCOME SEGREGATION, 2007-2012, 9–10, STANFORD CTR. FOR EDUC. POLICY ANALYSIS (2016), <https://cepa.stanford.edu/sites/default/files/the%20continuing%20increase%20in%20income%20segregation%20march2016.pdf> (reporting that the rise in residential income segregation, which began in the 1980s, continues to increase and that “rising income inequality continues to be a key factor leading to increasing residential segregation by income” in metropolitan areas); accord SEAN F. REARDON ET AL., HAS INCOME SEGREGATION REALLY INCREASED? BIAS AND BIAS CORRECTION IN SAMPLE-BASED SEGREGATION ESTIMATES, STANFORD CTR. FOR EDUC. POLICY ANALYSIS (2018), <https://cepa.stanford.edu/sites/default/files/wp18-02-201805.pdf>.

317. Robert J. Sampson, Opinion, *Division Street, U.S.A.*, N.Y. TIMES (Oct. 26, 2013), <https://opinionator.blogs.nytimes.com/2013/10/26/division-street-u-s-a/>; see also REARDON & BISCHOFF, *supra* note 316, at 8, 13 (finding that, between 2007 and 2012, “middle-class, mixed income neighborhoods became less common” and that working-middle- and upper-middle-class families have been increasingly sorted into distinct neighborhoods).

es.³¹⁸ When parents volunteer in their children's classrooms, attend parent-teacher association meetings, or coach Little League, they are unlikely to come into contact with parents from widely different socioeconomic backgrounds. Residential segregation by income also undermines the integrative potential of public schools.³¹⁹

Moreover, to the degree that political participation is importantly social, socioeconomic segregation exacerbates existing inequalities in civic and political participation.³²⁰ As Soss and Jacobs explain, the likelihood of "participat[ing] in politics depend[s] on the interactions" individuals have "in families, peer groups, neighborhoods, workplaces, religious organizations, and community groups."³²¹ When the politically disadvantaged are isolated from peers privileged in the political game by education, wealth, and political knowledge, the losses for those individuals multiply. Soss and Jacobs continue:

The advantages that flow from individual resources and skills are compounded by the returns that accrue from living in a community where political information is plentiful and organizations engage local residents. Conversely, living in deeply disadvantaged neighborhoods both imposes harsh conditions and removes critical communities and networks . . . that might bolster skills and opportunity for enterprising individuals. Political parties and candidates acutely evaluate these changes and community conditions and behave as rationale prospectors.³²²

In sum, "[a]s Americans have become more segregated by class, distinctive ecologies of political advantage and disadvantage have emerged in higher and lower income communities."³²³

Interestingly, residential racial segregation, at least in the absence of concentrated poverty, may not have such deleterious civic

318. See Thomas B. Edsall, Opinion, *How the Other Fifth Lives*, N.Y. TIMES (Apr. 27, 2016), <https://www.nytimes.com/2016/04/27/opinion/campaign-stops/how-the-other-fifth-lives.html> (summarizing recent studies demonstrating increased geographic and social isolation of economic elites and providing a clear graph of the significance of these changes since the 1970s).

319. Cf. ROBERT D. PUTNAM, *OUR KIDS: THE AMERICAN DREAM IN CRISIS* (2015).

320. See Soss & Jacobs, *supra* note 49, at 123 (reviewing evidence that residential class segregation along with educational, occupational, and marital economic segregation have been on the rise since the 1970s); see also AMY WIDESTROM, *DISPLACING DEMOCRACY: ECONOMIC SEGREGATION IN AMERICA* 113–40 (2015).

321. Soss & Jacobs, *supra* note 49, at 121.

322. *Id.*

323. *Id.* at 124 (explicitly contrasting contemporary patterns to the past, "[w]hen communities were more integrated along class lines [and] citizens with fewer political resources . . . benefit[ed] from their connections to the politically advantaged").

effects. A recent study found that Black neighborhoods foster political participation.³²⁴ Specifically, it found that “Black Americans living in mostly Black spaces tend to turn out at higher rates than their counterparts living in more diverse contexts.”³²⁵ That said, racially segregated residential patterns have other negative effects and may reinforce political disconnects between communities of color and political elites.³²⁶

Finally, socioeconomic isolation reinforces the political distance between elites and the rest of America. As Thomas Edsall recently remarked, a consequence of geographic sorting is that “[t]he well-to-do are isolated from the day to day struggles of the middle class and below”—from health care and education to unemployment and financial anxiety about retirement.³²⁷

For all these reasons, identifying policies capable of offsetting socioeconomic segregation is critical to revitalizing civil society. A variety of policies might make inroads at reversing this social isolation. The most direct approach would be for local governments to adopt successful inclusionary zoning policies, including ones focused on deconcentrating poverty, such as the one that has been in place in Montgomery County, Maryland since the 1970s.³²⁸ Montgomery County requires development projects that will result in at least thirty-five residential units to set aside between 12 and 15 percent of those units for sale at below-market rates, and gives the government the option to purchase up to one-third of those units.³²⁹

Local governments should also reconceive how children are restricted into publicly financed schools.³³⁰ Enrollment policies should

324. Anoll, *supra* note 54, at 504.

325. *Id.*

326. Cf. Black Futures Lab, *More Black than Blue: Politics and Power in the 2019 Black Census* (2009), <https://blackfutureslab.org/wp-content/uploads/2019/05/More-Black-than-Blue.pdf> (reporting on national survey of black political engagement and policy priorities).

327. Compare Edsall, *supra* note 319 (quoting Timothy Smeeding, a professor of Public Affairs and Economics at the University of Wisconsin), with METTLER, SOLDIERS TO CITIZENS, *supra* note 121, at 131 (observing that membership in socioeconomically integrated civic groups probably helped “highly educated” veterans “better understand the needs, concerns, and perspectives of citizens less well-off than themselves”).

328. *Exploring Inclusionary Zoning’s Effect on Affordable Housing*, PD & R EDGE, https://www.huduser.gov/portal/pdredge/pdr_edge_research_012513.html (last visited Sept. 20, 2019).

329. See HEATHER SCHWARTZ, HOUSING POLICY IS SCHOOL POLICY: ECONOMICALLY INTEGRATIVE HOUSING PROMOTES ACADEMIC SUCCESS IN MONTGOMERY COUNTY, MARYLAND 4–5, 13, CENTURY FOUND. (2010), <https://production-tcf.imgix.net/app/uploads/2010/10/16005437/tcf-Schwartz-2.pdf> (emphasizing the positive educational returns to low-income children that have accrued from the fact that the local housing authority owns about 700 scattered-site public housing units that it allocates by lottery).

330. See RICHARD D. KAHLENBERG, SCHOOL INTEGRATION IN PRACTICE: LESSONS FROM NINE DISTRICTS, CENTURY FOUND. (Oct. 14, 2016), <https://tcf.org/content/report/school-integration-practice-lessons-nine-districts/>; see also RICHARD D. KAHLENBERG, NEW HOPE FOR

affirmatively decouple residency (in segregated neighborhoods) from educational opportunity. Local governments could directly district elementary schools with an eye to socioeconomic integration. Alternatively, they could negotiate inter-districting plans.³³¹ Charter schools, similarly, could be required to adopt strategies to ensure socioeconomic integration—such as drawing from multiple districts within a metropolitan area or instituting a lottery weighted for family income.³³²

The policy feedbacks from integrated schools are likely to be multifold. Existing data already shows that individuals who attended integrated schools are more likely to develop relationships with individuals from different backgrounds and to seek out integrated neighborhoods and workplaces later in life.³³³ Public schools, as visible benefits, are also well known as sites for civic engagement and loci for organization. The key, therefore, is to promote school policies that produce democratic coalitions, rather than parochialism.

Another untapped site for policy intervention is the American workplace—one of the most diverse spaces of American life.³³⁴ Workplaces have the added advantage of being places rich in personal ties and common economic interests.³³⁵ Here, the task would be to channel existing workplace diversity and social ties into organizations capable of building civic and political capital that bridges critical gulfs in our society. One initial step that states and localities could take would be to require employers to facilitate payroll deduction to membership-based organizations that demon-

SCHOOL INTEGRATION IN NEW YORK CITY?, CENTURY FOUND. (Feb. 12, 2019), <https://tcf.org/content/commentary/new-hope-school-integration-new-york-city/>.

331. KIM BRIDGES, EDEN PRAIRIE PUBLIC SCHOOLS: ADAPTING TO DEMOGRAPHIC CHANGE IN THE SUBURBS, CENTURY FOUND. (Oct. 14, 2016), <https://tcf.org/content/report/eden-prairie-public-schools/>; KIM BRIDGES, JEFFERSON COUNTY PUBLIC SCHOOLS: FROM LEGAL ENFORCEMENT TO ONGOING COMMITMENT, CENTURY FOUND. (Oct. 14, 2016), <https://tcf.org/content/report/jefferson-county-public-schools/>.

332. Cf. RICHARD D. KAHLENBERG, THE GOOD KIND OF SCHOOL CHOICE: WHEN PUBLIC SCHOOLS INTEGRATE BY RACE AND CLASS, CENTURY FOUND. (May 23, 2018), <https://tcf.org/content/commentary/good-kind-school-choice-public-schools-integrate-race-class/> (noting additional strategies with respect to enrollment, staffing, and school culture for promoting both racial and socioeconomic inclusion in schools).

333. RICHARD D. KAHLENBERG ET AL., A BOLD AGENDA FOR SCHOOL INTEGRATION, CENTURY FOUND. (Apr. 8, 2019), <https://tcf.org/content/report/bold-agenda-school-integration/> (reviewing an array of policies capable of fostering socioeconomic integration of schools in the interest of better educational outcomes); accord THE NAT'L COAL. ON SCH. DIVERSITY, A SCHOOL INTEGRATION POLICY AGENDA FOR 2019 AND BEYOND (2019), https://school-diversity.org/wp-content/uploads/2019/02/NCSD_Policy-Doc_Final3.pdf.

334. Kate Tornone, *Jenny Yang's Final Days at the EEOC and Her Hopes for Its Future*, HRDIVE (Oct. 2, 2017), <https://www.hrdiver.com/news/jenny-yangs-final-days-at-the-eoc-and-her-hopes-for-its-future/506222/> (quoting former EEOC Commissioner Yang, "The workplace is really one of the only places where people from a wide variety of backgrounds get to know each other.").

335. Sachs, *supra* note 22, at 172.

strated sufficient levels of interest among their employees.³³⁶ New York City's 2017 Deductions Law, which requires fast food chains to create and maintain a payroll deduction system to facilitate employee contributions to selected non-profits, could provide a model.³³⁷ The ideal law, however, would not single out a particular sector but would apply to all employers of sufficient size. More importantly, it would be tailored to facilitate the paying of dues to membership-based organizations. Organizations, in other words, should not only have to demonstrate sufficient levels of employee interest,³³⁸ but also demonstrate critical features of active membership—such as opportunities for face-to-face interaction, internal democratic governance structures, and national scope.³³⁹

D. *Enlisting Philanthropists and Stimulating Participatory Mass-Membership Groups*

Thus far, the strategies discussed identify the sort of legislative policymaking that could offset the participatory weaknesses of contemporary civic life but do not get to the heart of the matter: the form of contemporary civic associations. Beyond scale, with respect to both people and places, the critical weakness of civil society today lies in the demise of self-funded democratically governed groups. Indeed, the remaining power of unions is unquestionably tied to their economic strength arising out of membership dues—a point fully recognized by those targeting the legal structures that facilitate this economic wealth.³⁴⁰ By the same token, commentators have observed how the absence of self-funding mechanisms (along with the choice not to promote internal democracy) limits the political potential of non-traditional labor movements such as the National Domestic Workers Alliance and the “Fight for 15.”³⁴¹ These critics argue that dependence on external funding from unions

336. To avoid a preemption challenge, such laws would have to explicitly exclude labor organizations which are governed by federal law. *Cf.* Rest. Law Ctr. v. N. Y. C., 360 F. Supp. 3d 192 (S.D.N.Y. 2019) (rejecting an array of First Amendment and preemption challenges to the statute).

337. *Id.* at 201–02.

338. *Id.* (noting that to be eligible for the benefit under New York City's law, nonprofits were required to demonstrate to the local commission that at least 500 employees had expressed interest in joining).

339. For a list of relevant features, see *infra* notes 366–369 and accompanying text.

340. Matthew Ginsburg, *Nothing New Under the Sun: The New Labor Law Must Still Grapple with the Traditional Challenges of Firm-Based Organizing and Building Self-Sustainable Worker Organizations*, 126 YALE L.J. F. 488, 494 (2016) (offering that “[a] plan for organizational self-sufficiency is . . . fundamental to any proposal for a new labor law or a new labor movement” and noting that, in recognition of this, “[t]he vast majority of the major attacks on unions in the last decade have focused on limiting the labor movement's sources of funding”).

341. Lee, *supra* note 25, at 512.

and foundations creates financial instability and undermines incentives to expand the membership.³⁴²

The final, and most critical, task for a broader democracy reform agenda, therefore, is to find ways to stimulate the growth of muscular civic associations—organizations capable of operating at sufficient scale, while also promoting social ties, active membership, and civic skills.³⁴³

This fourth benchmark rests at the limits of law. The fact is that it is much easier to see how legislation can stimulate political engagement and the formation of groups than envision how legislation can restructure the form of the civic groups that emerge. To be sure, one could follow the labor law model which requires unions to adopt democratic structures.³⁴⁴ Any effort to impose democratic governance structures on civic associations, however, is likely to raise considerable First Amendment concerns.³⁴⁵

The limits of law to shape the form of civic organizations are less discouraging when we appreciate that the burden of restoring American democracy can be shared. We are at a unique moment politically and technologically. With a good nudge from philanthropists, various strands of democratic renewal could well converge to make significant strides toward rebuilding, over the long haul, participatory civic associations capable of vindicating the interests of everyday Americans through their mass participation.

Recent years have witnessed a resurgence in political activism. The 2008 election was a high point for voter turnout. It was followed shortly thereafter with a series of protest movements draw-

342. Cf. Josh Eidelson, *Alt-Labor*, AM. PROSPECT (Jan. 29, 2013), <https://prospect.org/article/alt-labor> (questioning the long-term political potential of the Restaurant Opportunities Center, a New York City alt-labor group that has seen significant victories in recent years, given that it has a membership base of only 10,000 of the 200,000 workers in the city).

343. GILMAN & RAHMAN, *supra* note 161, at 3 (emphasizing the challenges to scaling up).

344. See 29 U.S.C. § 411 (2018) (requiring labor organizations to provide members equal rights and privileges and to adopt internal democratic governance structures).

345. The Supreme Court has held that the First Amendment shields certain civic associations (expressive associations and political parties) from state intervention in their internal governance structures. *E.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000) (holding forced inclusion of a homosexual member pursuant to state's antidiscrimination law violated the First Amendment right of the organization to determine membership rules for itself); *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (striking down as unconstitutional California's efforts to regulate the internal governance structures of its political parties). Not all civic groups are currently able to invoke these protections. However, several First Amendment scholars have questioned the existing doctrine's narrow conception of which organizations should be afforded protection. See, e.g., Tabatha Abu El-Haj, *Friends, Associates, and Associations*, 56 ARIZ. L. REV. 53, 54–68, 102 n.213 (2014) [hereinafter Abu El-Haj *Friends, Associates, and Associations*] (arguing that to the degree nonexpressive associations further an array of First Amendment goals, the doctrine's focus on expressive associations is misguided); JOHN D. INAZU, *LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 1–6, 20–62, 156* (2012) (criticizing current doctrine for being insufficiently protective of dissenting associations, and defending the need to provide robust protection for illiberal associations).

ing renewed attention to key concerns of the public, from income inequality and money in politics to racism in the criminal justice system. Then, there was the unexpected election of Donald Trump. Renewed grassroots engagement with democracy moved from the political fringes to the mainstream.³⁴⁶ Indeed, by a variety of measures, his presidency has marked a significant renewal in civic engagement, culminating in the highest midterm voter turnout in over a century.³⁴⁷

Most promisingly, much of the recent grassroots activism has been channeled into participatory political acts and associations. Opposition to the election and presidency of Donald Trump has brought Americans together in their neighborhoods to take both local and national action. Political participation has moved from being largely a matter of signing an online petition or making an online donation, to protesting at the Women's March or against family separation, sitting in at the offices of one's Senator, or creating a local chapter of Indivisible.³⁴⁸

These forays into partisan politics have bred still broader political engagement (as the social science literature would predict).³⁴⁹ Individuals (many of them women) have been motivated to run for office.³⁵⁰ Teachers across the country have been inspired to strike, including in right-to-work states.³⁵¹ Elsewhere, anti-Trump activism has been rechanneled into local concerns and projects.³⁵²

There has also been renewed interest in face-to-face forms of participatory civic engagement. The irony is that this has been made possible, in significant part, by advances in the digital age.

346. See, e.g., Dreier, *supra* note 200.

347. Rojanasakul et al., *supra* note 196.

348. Indivisible is a network of citizens groups launched to resist the policies of President Trump. It was facilitated by the publication of an online guide to effective political resistance at the grassroots level based on an analysis of what had driven the success of the Tea Party. See generally Osita Nwanevu, *Indivisible, an Early Anti-Trump Group, Plans for a Democratic Future*, NEW YORKER (Nov. 9, 2018), <https://www.newyorker.com/news/news-desk/indivisible-an-early-anti-trump-group-plans-for-a-democratic-future> (noting the authors were congressional aides during early years of the Obama administration).

349. Abu El-Haj, *Friends, Associates, and Associations*, *supra* note 345, at 81–82, 85–86 (summarizing empirical research showing how “[i]nitial forays into public life quickly turn into a habit, as individuals become part of social networks likely to encourage it” and thus how “civic participation breeds more participation”).

350. See, e.g., Alexis Sottile, *Meet the Women Inspired to Run for Office After the 2016 Election*, ROLLING STONE (Sept. 5, 2017, 7:34 PM), <https://www.rollingstone.com/politics/politics-features/meet-the-women-inspired-to-run-for-office-after-the-2016-election-112336/>.

351. See, e.g., Sean Rossman, *Teachers Are Striking All Over. What Is Going On?*, U.S.A. TODAY (Mar. 30, 2018).

352. See, e.g., Peter Slevin, *Anti-Trump Protests Gave Way to Local Fervor that Helped Turn Wisconsin Back to Blue*, WASH. POST (Nov. 23, 2018), https://www.washingtonpost.com/politics/anti-trump-protests-gave-way-to-local-fervor-that-helped-turn-wisconsin-back-to-blue/2018/11/23/ca2b672-edb7-11e8-baac-2a674e91502b_story.html (describing recent civic revival in Eau Claire, Wisconsin and range of local initiatives that individuals energized by the 2016 election have undertaken in small groups).

The potential for the internet to reduce the transaction costs associated with political organizing was quickly understood.³⁵³ With its maturation, however, activists have grasped that the political potential of social media is greatest when it capitalizes on rich relationships and then scales up by bridging between closer-tie groups.³⁵⁴ This has led to a rekindling of face-to-face politics through social media.

Indeed, more than 5,000 Indivisible chapters have been established since 2016, when an online guide was published by experienced Democratic congressional staffers.³⁵⁵ Even more unanticipated has been their participatory structures. Organized on social media, most operate through local chapters that have meetings in which attendees negotiate priorities and divide responsibilities.³⁵⁶

Still, such scaling up has not yet occurred for most organizations. Moreover, small donations rather than membership dues tied to participatory rights are, at the moment, the predominate alternative to large donor funding. Even those nonpartisan organizations that foster active forms of civic engagement have yet to eschew foundation funding.

Ironically, foundations could step in at the limits of law to correct these tendencies and to nurture the recent sparks of civic revival by using their control over money to foster a civic reorganization capable of significantly impacting electoral politics and policymaking in legislatures and administrative agencies. Philanthropy has had unintended negative effects on civil society, but it has also been a critical driver of egalitarian social movements since the mid-twentieth century. In this regard, the main problem with modern philanthropy has been that, like most progressives, it has overemphasized ideas and expertise and underemphasized the social foundations of politics. This, however, is changing. Foundations are learning.

353. See Ben McGuire, *Political Organizing in the Digital Age: Why Campaigns Need to Integrate Traditional and Digital Organizing*, KENNEDY SCH. REV. (Aug. 22, 2018), <http://ksr.hkspublications.org/2018/08/22/political-organizing-in-the-digital-age-why-campaigns-need-to-integrate-traditional-and-digital-organizing/>.

354. Dana R. Fisher & Marije Boekkooi, *Mobilizing Friends and Strangers: Understanding the Role of the Internet in the Step It Up Day of Action*, 13 INFO. COMM. & SOC'Y 193, 195 (2010) (reviewing research on ways internet has been used to “blend new and old forms of association” and how “rather than replacing personal contact, the Internet has been seen to supplement it”).

355. Nwanevu, *supra* note 348.

356. See, e.g., Brenda Schory, *Residents Organize with ‘Indivisible Guide’ to Counter Trump Policies*, KANE COUNTY CHRON. (Feb. 6, 2017), <https://www.kcchronicle.com/2017/02/05/residents-organize-with-indivisible-guide-to-counter-trump-policies/ajlyn8a/> (describing a coffee-shop meeting of an Illinois chapter of Indivisible); see also *About*, INDIVISIBLE, <https://indivisible.org/about> (last visited Oct. 8, 2019) (describing various forms of participation Indivisible prioritizes, such as “mak[ing] calls,” “show[ing] up,” “speak[ing] with . . . neighbors,” and supporting “civic education and leadership development”).

Indeed, several prominent foundations have been actively investigating new approaches to civic empowerment.³⁵⁷ Some have already pivoted to funding promising groups (rather than individual projects). Others have been actively soliciting studies about how best to spark more grassroots social change. There has been increased funding for coalition-building as well as longer grant cycles to enhance effectiveness and autonomy, and many are working to cultivate leaders and decisionmakers among the constituents most affected by inequitable policies. All these shifts have been a product of increased self-awareness on the part of foundations of the power that they wield in shaping civil society.³⁵⁸

Foundations could go further and restructure grants in ways that attend to the internal governance structures of civic groups. Grants could be structured to nudge the promotion of genuine social ties with and among members and the development of socioeconomically and geographically integrated memberships. Grants could also be structured to build up the capacity of such organizations to operate at a national scale through participatory governance structures.

Indeed, the Ford Foundation recently solicited a review of its programming with respect to its initiative, Promoting Electoral Reform and Democratic Participation.³⁵⁹ Among the challenges identified in the review was “the decline of democratic institutions that have the local infrastructure” necessary to grow a membership.³⁶⁰ The report recommended that the foundation prioritize the long-term value of investing to create “strong [federated] organizations that can continuously hold institutions [politically] accountable,” while themselves being organized to be accountable to their constituencies.³⁶¹ In this regard, the report specifically recommended revising internal metrics to assess not only the capacity of potential grantees to achieve tangible, near-term wins (profits) but also their capacity to build governance structures and membership levels (assets). Such assets, it argued, are vital insofar as they are critical to

357. For an illustration of these new approaches in the context of health policy, see MANUEL PASTOR ET AL., USC PROGRAM FOR ENVTL. & REG’L EQUITY, THERE’S SOMETHING HAPPENING HERE . . . A LOOK AT THE CALIFORNIA ENDOWMENT’S BUILDING HEALTHY COMMUNITIES INITIATIVE 21, 25, 30–31 (2014), <https://dornsife.usc.edu/assets/sites/242/docs/TCE-BHC-Narrative-PERE.pdf>.

358. This new awareness is on display in the USC Program for Environmental and Regional Equity Report on the California Endowment Initiative. See *id.* at 36–41.

359. HAHRIE HAN & LISA ARGYLE, A PROGRAM REVIEW OF THE PROMOTING ELECTORAL REFORM AND DEMOCRATIC PARTICIPATION (PERDP) INITIATIVE OF THE FORD FOUND. 3–4 (2016), <https://www.fordfoundation.org/media/2963/public-hanreport-apr2016.pdf> (analyzing “strategies for increasing civic participation” with a focus on identifying strategies for ensuring that democratic participation is “powerful, possible, and probable”).

360. *Id.* at 21.

361. *Id.* at 31.

the Foundation's longer-term goals of increasing democratic participation and engagement.³⁶²

The key, therefore, is to identify useful benchmarks for foundations wishing to assess and develop the capacity of civic associations to build governance structures and membership levels capable of fostering democratic participation and engagement at a politically powerful scale. The previous sections offer useful yardsticks. With respect to membership, measures might include:

- the size of membership (perhaps a goal of a minimum of 100,000 members);³⁶³
- diversity of membership, with particular attention to socioeconomic diversity;
- active membership (membership involving participation beyond writing checks);
- ratio of professionals to volunteers;
- regular opportunities for members to form relationships—blending of online and face-to-face opportunities, including periodic meetings, conferences, and conventions.³⁶⁴

With respect to participatory governance structures and the ability to operate at political scale, measures might include:

- democratic internal governance structures;
- financial reliance on membership dues to provide both engagement and a level of independence from foundations and private donors;³⁶⁵
- a federated structure of subchapters in different states or localities (on the order of 2,000 state or local chapters) or similar evidence of geographic spread.³⁶⁶

The purpose of these measures would be to nurture emerging civic groups and nudge existing organizations toward greater appreciation of the democratic value of active membership, social ties

362. *Id.* at 8, 22, 23, 27, 29–30 (defining assets as including “strengthen[ing] the relationship between the organization and its constituency and [] translat[ing] those relationships into elite lobbying power,” “having a robust infrastructure at the state and local level,” and advocating for policies that will have positive political “feedback loops”).

363. These figures are based on the membership levels and organizational infrastructure of the large voluntary associations that dominated the mid-twentieth century. *See* SKOCPOL, *supra* note 114, at 90–91.

364. There is good evidence that successful membership-based civic associations deepen the commitment of participants by creating a sense of community in the course of leadership development; however, those efforts do not require that the contact be in-person. Blended strategies work. *See* HARRIE HAN, *HOW ORGANIZATIONS DEVELOP ACTIVISTS: CIVIC ASSOCIATIONS & LEADERSHIP IN THE 21ST CENTURY* 17–23 (2014).

365. *See id.* at 5 n.8 (identifying a key structure of membership-based organizations as dependence on volunteers and governance through elected bodies).

366. SKOCPOL, *supra* note 114, at 90–91.

between members, and participatory democratic structures. With respect to the goal of nudging established civic groups toward different internal structures, it is worth noting that some civic associations, even before the recent political revival, had begun to take notice of the cost of operating without actual members. When the ACLU of Pennsylvania and the Public Interest Law Center of Philadelphia (PILCOP) sought to challenge Pennsylvania's voter identification law in 2012, they scrambled to identify individuals who lacked the requisite documentation proving their eligibility to vote. The NAACP presumably did not have to scramble in 1950s and 1960s to find plaintiffs. Similarly, when the Pension Rights Center sought to persuade the Department of Labor to adopt a rule that would make it easier for workers without access to employer-managed 401(k)s to save for retirement, it could not rely on its membership. It, ultimately, located seniors to testify to their retirement savings struggles through an affiliate that provides direct services to seniors. In both cases, the professionalized associations settled on a strategy of partnering with member-oriented groups. Such groups, however, are not available for large swaths of Americans—including consumers, millennials, and working parents.

Finally, it is worth noting that it might be in foundations' interest to take up this particular democratic reform agenda. Foundations are often looking for ways to wean the organizations that they fund without undermining the investments they have already made. In this regard, encouraging the development of dues-paying membership at scale (for example, as a condition of access to future funding) would provide a strategy for partially weaning groups off the foundation as the primary source of funding.

While foundations offer the most promising avenue for re-empowering civil society, the limits of law as a lever for rekindling membership-based civic associations organized through democratic governance structures should not be overstated. In addition to the payroll legislation discussed in the previous section, the federal tax code in principle could be used to reshape the form of civic associations by modifying the bases for offering such groups nonprofit status.³⁶⁷ That said, especially in the wake of the 2017

367. The Internal Revenue Code shapes civil society through two provisions—Chapter 501 and Chapter 170—and the intersection between them. Under Chapter 501, the tax-exempt status of an organization is defined by its ends. *See* 26 U.S.C. § 501 (2018). It has long been assumed that these provisions significantly contribute to the size and renown of the nonprofit sector in the United States. *See* David E. Pozen, *Remapping the Charitable Deduction*, 39 CONN. L. REV. 531, 533 (2006) (noting that “its generosity is widely seen as an engine of America’s [robust] nonprofit sector”). Some scholars, however, do question how much the charitable deduction induces more charitable giving, and the empirical claim is difficult to prove insofar as it depends on determining a counterfactual (i.e., how much giving would occur in the absence of the tax incentive?). Still, the above makes clear that the claim that

amendments to the tax code, there are at least three strikes against it as a route to reform. First, under the amended tax code, fewer and fewer Americans are likely to itemize deductions for charitable donations.³⁶⁸ Second, the line between 501(c)(3)s and 501(c)(4)s is salient for corporate lawyers and on Tax Day, but phenomenologically, it is fictitious. The NRA, Boy Scouts, NOW—indeed any nationally significant civic association that is likely to come to mind—operate as both 501(c)(3)s and (4)s. For members and the public, they are experienced as a single association—just as McDonalds is experienced as a single corporation. Finally, any changes to the current structure of the Internal Revenue Code will face significant resistance from its current beneficiaries. Thus, while tax reform offers a possible legal route to stimulate democratically governed, membership-based groups, its potential to nudge civil society in this direction seems much less promising than changing the conditions in foundation grantmaking.³⁶⁹

implementing social policy through the tax code renders government spending invisible in ways that undermine the vibrancy of civic associations and political participation does not tell the whole story.

368. The tax code's most-preferred tax status arises from tax breaks on both ends—i.e., where both donations to the entity and the entity's income are tax exempt. It is currently bestowed on the subset of tax-exempt organizations known as "public charities." 26 U.S.C. § 501(c)(3) (2018) (providing that to constitute a public charity, under 501(c)(3), the "[c]orporation[], . . . community chest, fund, or foundation" must be operated "exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals" on a not-for-profit basis) (emphasis added). Public charities, in return, must forgo, to a substantial degree, activities aimed at influencing legislation or elections. For example, a 501(c)(3) is limited with respect to the money it can spend engaging in either "grassroots expenditures" or "lobbying . . . for the purpose of influencing legislation," and it is entirely prohibited from "participat[ing] in . . . any political campaign on behalf of (or in opposition to) any candidate for public office." *Id.* § 501(c)(3), (h). In addition, "no part of the net earnings" of such associations may "inure[]" to the benefit of any private shareholder or individual." *Id.* § 501(c)(3). The recent tax reforms significantly limit the incentive for the average taxpayer to itemize deductions (including charitable deductions), thereby rendering this aspect of the tax code a less significant lever. The benefit of the tax code's allowance that individuals and corporations may deduct contributions to such organizations from their taxable income is that it permits high-income taxpayers to lower their marginal tax rate.

369. In principle, the Internal Revenue Code could be amended to provide additional tax relief to organizations that create meaningful civic opportunities for individual members. For the reasons explained above, the attributes to reward would include: dues-paying membership, socioeconomic and geographic diversity of membership, opportunities for face-to-face engagement, and participatory internal governance structures. In other words, a revised Code would be recalibrated so that tax-exempt status turned on both the purposes *and* the organizational structure of an association. To be clear, many civic associations that already exhibit these attributes, e.g., unions, are eligible for tax-exempt status under the current Code. *See id.* § 501(c)(4)–(12), (19), (23) (providing tax-exemption status to labor, agricultural and horticultural organizations, business leagues and chambers of commerce, recreational clubs, various types of fraternal benefit societies and orders, as well as veteran's associations). The problem is that they are not given preferential treatment, as compared to those organizations that are professionally run and foundation funded. Moreover, their tax-exempt status does not turn on their organizational structure per se, but rather on the purpose for which they are formed.

* * *

In sum, it is time to broaden the democracy reform agenda to include the pursuit of policies that are likely to motivate individuals to participate in our democracy, stimulate the reorganization of the interests of everyday Americans, and fuel the nascent signs of civic revival. Legislation offers a significantly underappreciated lever through which to do this, and it is encouraging that many of the proposals that are on the existing policy menu, if approached wisely, could start that process. Reforms that have not yet become polarized are particularly promising in this regard.³⁷⁰

Beyond identifying policy priorities, however, any bill that is being seriously considered should be subject to a rigorous policy-feedback analysis. The potential for positive collateral consequences ultimately depends on resisting the temptation to disguise the distribution of government largesse. We must learn from Obama's mistakes. During the Obama years, Democrats made significant efforts to reverse the trend toward directing the bulk of government social spending toward corporations and households in the very highest socioeconomic brackets. Unemployment benefits were extended during the Great Recession, the number of uninsured Americans substantially dropped, and the federal government took on a direct role in student lending. Unfortunately, many of these programs were distributed as tax incentives or by private actors, rendering invisible the myriad benefits the new government had conferred on middle-class Americans.³⁷¹

CONCLUSION

The path from political participation to policy responsiveness is not straightforward. Structural features of American democracy stand in the way—from the Senate and Electoral College to the fact that officials are elected in winner-take-all elections. As such, neither eagerly participating in the pluralist chorus nor electing one's preferred candidate guarantees the policy responsiveness that many Americans are craving. Still, there is a long way from where we are to a place where the gaps in policy attention can reasonably be attributed to these structural barriers to responsiveness.

370. It may be concerning to some that it appears that only progressive reforms have positive returns for political capacity and democratic responsiveness: Where does this leave a good government, economic conservative, firmly opposed to government redistribution of wealth in either direction, but equally concerned that elected officials are insufficiently responsive to the preferences of ordinary Americans?

371. Mettler, *Reconstituting the Submerged State*, *supra* note 229, *passim*.

The future of American democracy depends on broadening our conception of what good governance reform entails. We must acknowledge that democratic dysfunctions also stem from distortions in the political inputs (civil society). Only once we move beyond our myopic focus on procedural reforms will it be possible to appreciate the full array of opportunities that exist to rebuild our democratic institutions or to identify the allies capable of sharing that burden.

The path forward is sure to face significant obstacles—and not simply because the beneficiaries of the New Gilded Age will oppose challenges to their political power. The socioeconomic segregation of contemporary life poses a formidable challenge to efforts to reverse the vicious cycle of democratic politics today. But there are other obstacles.

While there are no silver policy bullets, we can take heart in the knowledge that the demise of American democracy was not inevitable, and its revival is similarly not foreclosed. Entrenched problems demand multifaceted interventions aimed at incremental change, but they also demand vision.

