THE FEDERALIST VIEW OF RIGHT-TO-WORK LAWS

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INTRODUCTION

The authors of the *Federalist Papers* (whom I will call “The Federalists,” collectively) sought a republican government that balanced stability and popular control. These two ideas are in constant tension, as the passions of the people fluctuate and their attention moves from issue to issue. The Federalists also wanted a government that would operate on reason and rationality rather than simple passions. America today is considerably more complicated and diverse than it

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In this Article, I discuss the need for representative organizations to channel the “cacophonous voices” of the people. In order for the voice of the people to be heard in today’s government, it is necessary that low-income Americans band together to pool their collective strength. Poor Americans face the largest impediments to political participation, and they participate less frequently in politics than other groups.

I use labor unions as an example of a collective group of citizens, and show that they have the ability to create this kind of large-scale organization and representation. Labor unions can be the voices of millions of Americans who otherwise have little say in government. By pooling their resources, American workers who are represented by unions are able to delegate to representatives who can go and be their voice—and a voice of reason. Rather than relying on emotional appeals to American workers, labor union leaders can become policy experts on the complicated issues that our government faces. This falls directly in line with the Federalist vision of government by reason.

But these groups are under attack by “right-to-work” laws, which make it difficult for labor unions to organize. In right-to-work states, unionization is markedly lower, meaning that the working class has one fewer method of organizing to gain political representation. Comparing this with the relative ease with which business interests can organize, we must worry about whether we are achieving the Federalist goal of diverse representation in our government.

Part I of this Article outlines and discusses the Federalists’ vision that our nation’s politics be organized, reasoned, and diverse. Part II discusses how labor unions promote this goal and how right-to-work laws undermine the Federalist vision.

I. THE VISION OF THE FEDERALISTS REQUIRES ORGANIZED, REASONED DISCUSSION

A. The Federalist Papers Advocate a Republican Government Influenced by the Popular Will

The Federalists sought to design a government that would lay a foundation for a stable and lasting nation. They recognized that government is necessary to overcome the Hobbesian state of nature, which is to say that government can provide stability in a world that is constantly changing. The tumultuous years of the Articles of Confederation left the Federalists with a strong sense that a government needs to be both stable and effective. By establishing a lasting government, the Federalists were creating a framework that would allow individuals to think
beyond their basic and immediate needs. Government would allow individuals to plan for the future and rely on the fruits of their labor.\textsuperscript{4}

Take, as a cognitive example, the idea that nobody washes a rental car.\textsuperscript{5} In the view of an economist, when an individual can get away with inaction (that is, when she can export the cost to another person), she will always do so. By the same logic, nobody builds a home in a lawless society when they lack the personal resources to defend it. Nobody invests the time and money to make anything of value when it can be easily stolen. In such a society, individuals could rationally choose to export the cost of production onto others by stealing what is valuable. Taken to its logical conclusion, individuals would produce very little in this type of society. This is part of the Hobbesian state of nature.\textsuperscript{6}

But in a society with laws and a powerful government to enforce them, individuals can be confident that their individual investments will be preserved. They can rest assured that there is a relatively low risk that their day’s work will be stolen—and, if it is stolen, that there will be some opportunity for compensation. Theft is but one source of the need for a strong government.

The Federalists’ vision of a stable society goes beyond simple theft prevention. The Federalists were concerned with the threat of popular insurrections.\textsuperscript{7} Perhaps because they had just led a popular insurrection, or perhaps because they were wealthy property-owners, the Federalists feared an angry mob that could take property by force.\textsuperscript{8} The Federalists also feared that such a mob could take action in a republic without resorting to force; the Federalists recognized that the ballot box was just as powerful as the pitchfork.\textsuperscript{9} This mob mentality was the epitome of the evils of pure democratization—the prime danger of giving power to the popular will.

This fear is most famously expressed in Federalist No. 10, in which James Madison explains the fundamental dangers of majority tyranny.\textsuperscript{10} Madison was concerned that confiscatory tax programs implemented by the mob would take from the rich and give to the poor in order to equalize the two groups.\textsuperscript{11} Today, this fear seems less relevant, considering the lack of such drastic action despite the vastly increased ability of the mob to participate in elections\textsuperscript{12} (but that

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\item[\textsuperscript{8}] See THE FEDERALIST NO. 9, supra note 7; THE FEDERALIST NO. 16, supra note 7; STEVEN H. JAFFE, WHO WERE THE FOUNDING FATHERS? TWO HUNDRED YEARS OF REINVENTING AMERICAN HISTORY 87 (1996).
\item[\textsuperscript{9}] See THE FEDERALIST NO. 10, at 72 (James Madison) (Clinton Rossiter ed., 2003) (warning against the “common impulse of passion” found in factions); THE FEDERALIST NO. 15, at 106 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("[T]he passions of men will not conform to the dictates of reason and justice without constraint.").
\item[\textsuperscript{10}] See generally THE FEDERALIST NO. 10, supra note 9.
\item[\textsuperscript{11}] See id. at 74.
\end{itemize}
is a topic for another article). But the theoretical argument made by the Federalists is still relevant: a government of the people rightly fears that groups with greater political representation will trample upon the rights of political minorities.

The Federalists sought to protect society from popular insurrections by delegitimizing rebellion. The Federalist view seeks to push individuals to seek change primarily through nonviolent means. The Federalists also recognized a fundamental truth about human nature: we are more dangerous in groups. Groups supply us with the comfort that others agree with us. Agreement is empowering, and it emboldens the members of the group.

American government, by and large, seeks to individualize. We do not bring criminal prosecutions against groups. Hauling the individual to stand before the power of the State reminds that individual that he does not have the sole authority to decide what is best. The State, in its collective capacity, represents the people. In the case of a rebellion, the individual’s appearance in court, separate from his co-rebels, sears into his mind that he is individually responsible for his own actions. The individual will not be in any way protected by the safety of the group’s agreement.

The process of individualization need not apply to one human being. A local government could blindly act in self-interest as easily as a mob. On various occasions, the Federalists propose that in a strong union, the states will be able to suppress the insurrection of one or two who choose to rebel. This reflects their expectation that even states would sometimes be caught up in the passions of the moment.

12 Progressive taxation is one example of wealth transfer, but a major wealth transfer has not been effected in a way that substantially reduces income inequality, which is higher than it has been in a century. Connie Stewart, Income Gap between Rich and Poor Is Biggest in a Century, L.A. TIMES, (Sept. 11, 2013), http://www.latimes.com/nation/nationnow/la-na-nn-income-inequality-20130910,0,5392493.story.

13 See THE FEDERALIST NO. 15, supra note 9, at 106 (“Regard to reputation has a less active influence when the infamy of a bad action is to be divided among a number than when it is to fall singly upon one.”).

14 See id.

15 See OSTROM, supra note 2, at 105 (“[N]o person can be a fit judge of his or her own cause in relation to the interest of others. Each person stands exposed to the actions and judgments of others; and each from an individual vantage point participates in the government of society.”).

16 There are several notable exceptions. Pinkerton liability for conspiracy is one area in which an individual can be punished for the crimes of the group. Pinkerton v. United States, 328 U.S. 640, 646-47 (1946). Another example is products liability, in which a manufacturer may be liable for its share of the market, regardless of actual wrongdoing. See, e.g., Sindell v. Abbott Laboratories, 607 P.2d 924, 936-38 (1980). But these are exceptions to the general rule that every individual’s actions will be judged independently. Allison Marston Danner & Jenny S. Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law, 93 Cal. L. Rev. 75, 82-83 (2005) (explaining that “[t]he most important [philosophical commitment of national criminal justice systems] is the focus on individual wrongdoing,” and explaining the move away from collective guilt); Joel Feinberg, Collective Responsibility, 65 J. PHILOSOPHY 674, 676 (1968) (describing vicarious criminal liability as “barbarous” if the actor acted independently).

17 See THE FEDERALIST NO. 15, supra note 9, at 107 (“All this will be done; and in a spirit of interested and suspicious scrutiny, without that knowledge of national circumstances and reasons of state, which is essential to a right judgment, and with that strong predilection in favor of local objects, which can hardly fail to mislead the decision.”).

18 OSTROM, supra note 2, at 117-18.
The government’s promotion of stability, however, was meant to do more than simply suppress rabble-rousers. Stability, as a goal, is meant to provide a framework for cooperation, not just authority. Cooperation will make the nation stronger, and it is required of a republican government in which the people are the last line of defense.\(^\text{19}\) Cooperation is especially necessary in a large nation, made up of states that frequently disagree. This idea is even more relevant in today’s diverse society, as I will discuss below.

The people are in the best position to serve as a check on federal power. Although the Federalists designed the Constitution to be self-limiting through checks and balances, they recognized that the system could not be perfect.\(^\text{20}\) So, as a last resort, the Federalists wanted the people to be the final check. Their voice was an important failsafe to prevent tyranny by the government.\(^\text{21}\) If the government is truly falling into corruption or some other vice, at least there will be some person who can alert the people to take action. This is an example of “alarm-bell constitutionalism,” a theory that comes up at various times throughout the Federalist Papers.\(^\text{22}\)

But the Federalists were also realistic in recognizing that an individual could never be powerful enough to lead an insurrection against a tyrannical government. In fact, they recognized that the people generally preferred to fight amongst themselves rather than achieve a collective goal. The Federalists explicitly avoided rule by popular assemblies because they recognized that such assemblies have a hard time agreeing on anything.\(^\text{23}\)

Instead, the people must be led to an effective government.\(^\text{24}\) Popular participation in government (either at the front-end through the ballot box or as a final check on a tyrannical government) could only happen if the people are organized. In other words, the Federalists believed that the people could not rule themselves, and that they would not want to anyway. But that does not mean the people are impotent. On the contrary, they recognized that the people have the greatest power of all: they can riot and use mass force to achieve their desired ends.\(^\text{25}\) The use of force by the masses would pose the greatest threat to government of all, because it threatens government’s preference for stability.

The Federalists needed to avoid such popular insurrections against legitimate

\(^\text{19}\) *The Federalist No.* 31, at 193 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (“Everything beyond this must be left to the prudence and firmness of the people; who, as they will hold the scales in their own hands, it is to be hoped will always take to preserve the constitutional equilibrium . . . .”).


\(^\text{23}\) *The Federalist No.* 15, *supra* note 9, at 107 (“Those who have been conversant in the proceedings of popular assemblies; who have seen how difficult it often is, when there is no exterior pressure of circumstances, to bring them to harmonious resolutions on important points, will readily conceive how impossible it must be . . . .”); see Richard Beeman, Plain, Honest Men: The Making of the American Constitution 28-29 (2009) (discussing Madison’s distrust of government which serves solely popular interests).

\(^\text{24}\) See *The Federalist No.* 28 (Alexander Hamilton) (arguing that the people will resort to rebellion and force if government is not strong enough to suppress rebellion).

\(^\text{25}\) *Id.*
government. They were acutely aware of the citizenry’s power to rise up and overthrow a government. In fact, they stated that one of the “principal purposes to be answered by union” was to preserve the public peace. They did not want America to look like Holland, which suffered from “popular convulsions.” The Federalists believed that preventing class division was an impractical goal; they saw that there would always be elites in society. Instead, they adopted an anti-utopian worldview: they realized that government cannot prevent conflict among groups, but it can provide a means for settling those conflicts amicably.

Society needs laws, which allow individuals to settle their differences, and it needs a powerful government to enforce those settlements. Such is the basic Hobbesian purpose of government: it removes the need for citizens to resort to destabilizing self-help remedies (such as rebellion). The Federalists were concerned with preventing the need for rebellion at all. The government must be strong enough to show a great deal of force. Only this show of force would truly eliminate the risk of rebellion.

B. The Federalists Recognized That Various Groups Should Be Represented

Despite the Federalists’ insistence that the “popular will” be a driving force in the republic, they also sought to avoid the dominance of self-interested passion. These two concepts are in tension. How do you listen to the voice of the people when they are rational, yet ignore them when they are not? The Federalists accepted this problem by recognizing that those who control government will consistently seek to defend their own interests. Politics is, at its most basic level, an assertion of passion and interest, which can arise easily from self-interest to cloud one’s judgment. From such a selfish perspective, politicians sometimes find evidence with rose-
colored glasses in support of a self-serving policy without seriously examining its wide-reaching effects. Yet at the same time, the Federalists believed that there must be a better way to run a country.

The Federalists wanted to devise a procedure that would prevent the use of passion and illegitimate arguments made with the purpose of advancing individual interest. To use political theorist James Harrington’s example, they wanted one child to cut the cake and the other child to decide which slice she gets. The Founders sought a government that reflexively represented opposing sides. This is emblematic of the Federalists’ theme: that it is possible to design the structure of government so that it systematically, automatically achieves better governance.

The Federalists believed strongly that our nation was a particular sort of experiment: they saw America as a common project. Each constituent part of the country has something to add to its goals. Of course, this falls directly in line with a political ideology that focuses on broad cooperation. The Federalists believed that if we all work together, we can accomplish more than we ever could on our own. Working together allows people to pool resources and divide labor, resulting in increased efficiency. Cooperation in a republic requires the participation of divergent interests in the governing process. This cooperation can be accomplished by the representation of various groups in government.

“irregular passion or illicit advantage” can lead to adoption of unwise policies).

36 See THE FEDERALIST NO. 1, supra note 32, at 29 (“[A] dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people, than under the forbidding appearance of zeal for the firmness and efficiency of government.”). This point appears repeatedly, including in a defense of the Senate’s design:

As the cool and deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the views of its rulers; so there are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn.

THE FEDERALIST NO. 63, supra note 35.


38 This is evident in the concept of separation of powers. See OSTROM, supra note 2, at 142-43, 165.

39 Cf. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (discussing the potential for a state to serve as a “laboratory”).

40 See, e.g., THE FEDERALIST NO. 11, at 84 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (referring to the construction of a navy, “different portions of confederated America possess each some peculiar advantage for this essential establishment”).


43 See C.H. HOEBEKE, THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT, 28 (1995) (“It defied ‘Reason’ and ‘the Laws of Nature’ that one citizen or group of citizens should have a greater voice politically than any of the others.”).
This can also be seen in a more cynical way: any government needs a certain degree of support from its people. For example, if a general does not have the support of her army, it will desert her. A government needs to please its constituents or the underrepresented portions rebel. To avoid this problem, the Federalists sought to include members of different societal classes in government. Thus, they crafted the House of Representatives in a way that they believed would represent the different “classes” or “trades” of society (indirectly).

The Federalists also wanted the door to the legislature to be open to anyone. Of course they limited this proposition to one house of the legislature, but the principle remains: every part of society has something to contribute to this common project, and it should be represented in our national government. This egalitarian principle is tempered by the opposing conceptual theme that we must prevent government from being a raw reflection of the shifting emotions of the people.

In addition to the government’s structure, the Federalists realized that politicians have a personal incentive to learn the interests of their constituents. Politicians’ jobs will depend on their ability to effectively represent their constituents’ interests. So it naturally follows that politicians will work their hardest to learn more about their constituents, on whom they depend for subsistence. Politicians will want to serve as a conduit for the local information, which is most beneficial to their constituents.

But the Federalists were not content to stop there. They put a safeguard in place for the representation of society’s interests: federalism. The advantage of having two governments is simple: if one government does not fully represent your views, you can change your allegiance to the other government. This structure allows the people to organize when it becomes necessary to

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44 See id. at 28-30 (explaining the tension between representing all groups and attaining social harmony without conflict). Hoebeke describes the “central dilemma” of the Federalist Papers as “secur[ing] the public good and private rights against the dangers of such a faction, and at the same time. . . preserv[ing] the spirit and the form of popular government.” Id. at 30 (quoting THE FEDERALIST NO. 10, supra note 9, at 75).


46 The Federalists did not believe that each class could literally be represented in the House of Representatives. Rather, they believed that those who were elected would serve as proxies for the interests of each class. See id. For example, artisans and manufacturers would be willing to vote for a merchant, who would represent the needs of the commercial class. Id. (noting that while actual representation by every class is “visionary,” certain classes would sufficiently represent the interests of others); OSTROM, supra note 2, at 99-100.

47 THE FEDERALIST NO. 36, supra note 42, at 213 (“The door ought to be equally open to all . . . .”); OSTROM, supra note 2, at 100.

48 U.S. Const. art. 1, § 3 (election of Senators by state legislatures), amended by U.S. Const. amend. XVII.

49 See supra Part I.A.

50 THE FEDERALIST NO. 35, supra note 45, at 212 (“Is it not natural that a man who is a candidate for the favor of the people . . . should take care to inform himself of their dispositions and inclinations and should be willing to allow them their proper degree of influence upon his conduct?”).

51 Id.

52 THE FEDERALIST NO. 35, supra note 45, at 212 (noting that representatives will want to learn about the “dispositions and inclinations” of the people they represent); OSTROM, supra note 2, at 99.

53 See THE FEDERALIST NO. 28, supra note 31, at 175. This change in allegiance can be seen even today. Following the election of Barack Obama, the media excitedly reported that various online petitions and resolutions
protect against an encroachment by the national government. This idea reflects an understanding by the Federalists that organization of society is necessary to keep the government in line. They put into action their belief that the people need leadership in order to keep the government in check. It is through this organization that people will be able to change their government. If the people have an organized way of expressing their opinions, they will be less likely to resort to the use of force.

C. The Founders Desired the Use of Reason in Political Debates, Which Requires an Organized Society

The Federalists wanted reason to be the driving force in American government; that is why they designed a republic instead of a democracy. A republic differs from democracy in a fundamental way: the people do not directly govern themselves. Rather, they are governed by representative leaders. Those leaders then use the power of group discussion to arrive at the best policy for the nation. This discussion relies on reason, rather than self-interested passion, to achieve the best result. This view is probably a direct outgrowth of the Enlightenment era views of the Federalists’ time.

This theory is at once elitist and egalitarian, depending on one’s degree of cynicism. It is elitist if one believes that only those voices belonging to the rich and powerful will be part of that discussion. But it is egalitarian if one believes that all voices will be heard. Put another way, the optimist believes that “[w]hen the cacophonous voice of the People is properly filtered through...

See THE FEDERALIST NO. 28, supra note 31, at 177 (“They can readily communicate with each other in the different States, and unite their common forces for the protection of their common liberty.”).

54. WHITE, supra note 3, at 58, 103-105; OSTROM, supra note 2, at 47 (noting that “constraint is requisite for the application of reason and justice in the conduct of human affairs”).


57. OSTROM, supra note 2, at 97-101; see id. at 98 (“Through the institutional device of elected representation, the government of a republic can extend to a larger number of people and to a larger region than a direct democracy can.”).

58. See OSTROM, supra note 2, at 160.

59. See THE FEDERALIST NO. 42, at 264 (James Madison) (Clinton Rossiter ed.,2003) (“But the mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned, before public bodies as well as individuals, by the clamors of an impatient avidity for immediate and immoderate gain.”). See also OSTROM, supra note 2, at 163-64 (describing how rival interests can work together for compromise).

60. See WHITE, supra note 3, at 3, 103-04.
the moderating influences of the republic, the voice is tempered, channeled, and made coherent.”62 The Federalists sought to strike a balance between a too-small constituency (which would be partial to local interests) and a too-large one (in which the representatives cannot be “acquainted with all their local circumstances”).63

We often forget this defining aspect of republican government today because we think of America as a democracy—that is, a nation in which the people decide policy questions for themselves. But this view obscures the important fact that governing by reason cannot be done by the people as a whole. The whole group of “the people” cannot at once engage in a reasoned discussion, which accounts for the varied interests represented in America.64 Even if it were possible for them to do so, the Federalists clearly did not support this as an option—they wanted the cream of the crop to head to Washington to talk things out and decide what was best for the nation.65 And they took measures to ensure that the elite would not abuse that structure, by implementing a system of separation of powers.66

The Federalist structure for government requires reason, but reason requires leadership.67 A republic can only be reasonable if it is made up of reasonable representatives—those who could engage in the Federalist ideal of government by discussion. Clearly influenced by Enlightenment thought, the Federalists took an empirical approach to government, looking at what has succeeded in the past and designing a system that would be effective in avoiding past failures.68

One of the salient aspects of the Federalist vision of reason is the importance of collective use of reason.69 It is easy to see why the Federalists, who had just thrown off the yoke of tyrannical monarchy, believed it was problematic for one person to make decisions. When one person has control over an entire government, she will sometimes make poor decisions.70 It is easy to make errors when one person receives no input from others.71 Once the error is made, that person’s pride makes it very difficult for her to admit that she was wrong, so the error will likely

63  The Federalist No. 10, supra note 9, at 77; Ostrom, supra note 2, at 98.
64  See Ostrom, supra note 2, at 139.
65  See The Federalist No. 48, supra note 57.
66  See Ostrom, supra note 2, at 164.
67  See The Federalist No. 10, supra note 9, at 76 (noting the need to delegate government to a small group of citizens who can best promote the public good).
69  See The Federalist No. 10, supra note 9, at 73 (noting that the “first object of government” is to protect the “diversity in the faculties of men.”).
70  Id. (“The reason of man continues fallible.”).
71  See Ostrom, supra note 2, at 43 (describing the assumption of the Federalists that human beings are fallible).
In a group, however, her rivals will be quick to point out when she has made a faulty decision. This is the beautiful thing about republican politics: even though there are strong incentives to be nasty and harsh toward your rivals, that same incentive protects the rights of the people. Rivals constantly will be on the lookout for errors, which they can use to their advantage. Put simply: our rivals are better at detecting our flaws than we are.

A republican government solves another aspect of this problem: it makes it possible for others to apologize for or recant our mistakes. For example, if a legislator sponsors a policy that turns out to be disastrous for the country, that individual legislator need not stand up and repeal it. Others (allies or rivals alike) can do so easily, sparing the original legislator a great degree of pain.

So it was obvious to the Federalists that government by discussion was essential to government. They wanted government to engage in calm and cool deliberation for the nation, not to be an angry mob of self-interested individuals. When this is combined with their view that government would include the interests of so many parts of American society, the system comes together as a complete picture. Under this idealistic (if unrealistic) system, if every interest is represented, and each engages in a totally rational discussion, we are bound to end up with the best policies.

This theory is deeply dependent on knowledge, which is consonant with the Federalist view that the national government would serve as a machine for transferring information to those who make decisions. If the federal legislature is conceived of as a way of making use of reason, it also depends on the transmission of knowledge. Full transmission of knowledge depends on an organization of society in which the varied interests of the people can be coherently organized for use by government representatives. Only within an organized society can all three Federalist goals—the popular will, reason, and representation of all interests—be accomplished.

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72 See The Federalist No. 10, supra note 9, at 73 (“As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves.”).
73 This Federalist viewpoint may not be universally accepted today. See Solomon E. Asch, Opinions and Social Pressure, Sci. Am., Nov. 1955, at 31.
74 See generally The Federalist No. 10, supra note 9 (describing the value of pitting one man’s ambition against another’s). For a modern example, see President Obama’s Truth Team, which sought to point out the flaws in the 2012 Presidential candidacy of Governor Mitt Romney. See David Nakamura, Obama’s ‘Truth Team’ Aims to Network Its Way to a Reelection Win, WASH. POST (Feb. 13, 2012), http://www.washingtonpost.com/politics/obamas-truth-team-aims-to-network-its-way-to-a-reelection-win/2012/02/10/gIQAGs5u9Q_story.html.
75 See, e.g., Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 Harv. L. Rev. 2311 (2006) (finding that the three branches of government are less competitive when they are controlled by the same party).
76 See The Federalist No. 3, at 39 (John Jay) (Clinton Rossiter ed., 2003) (explaining how individual pride can easily get in the way of effective governance, especially in the domain of international relations).
77 See White, supra note 3, at 109 (noting that “interest” designates a calm, deliberate, and general passion or desire for one’s own happiness”; this is contrasted with “passion”).
78 Federalist No. 36, supra note 42, at 214 (providing example that local tax information could be sent to the national government by way of elected representatives).
II. A STRATEGY FOR ACHIEVING THE THREE FEDERALIST GOALS

A. Large Representative Groups Are Necessary Today to Represent the Interests of the American People

At the time of the Federalist Papers, the American population was somewhere between three and four million people. Today, there are well over three hundred million Americans—an almost a hundredfold increase. At the same time, the size of the House of Representatives has increased from its original size of sixty-five (one representative for every 33,000 people) to only four hundred thirty-five, a sevenfold increase (one representative for every 700,000 people, with some districts as large as 958,000). The size of the Senate has gone from twenty-six original members to one hundred, which is only a fourfold increase. The number of decision-makers in today’s government is disproportionately small in comparison to the population than at the time of the Federalists.

It follows logically that individual legislators have a more difficult time ascertaining the needs of his or her individual constituents. It is simply not possible for a legislator with seven hundred thousand constituents to know their varied needs on her own. Rather, members of Congress depend on their staff to do a substantial amount of fact-finding. In fact, congressional staff has increased dramatically in the last hundred years. In 1955, Congress (excluding legislative agencies) employed 5,706 staff members. By 2005, this number had increased dramatically to 17,376. This increase occurred during a time when the size of the legislature itself did not change at all.

This increase has been met with a related increase in the presence of representative

79 The Federalist No. 55, at 340 (James Madison) (Clinton Rossiter ed., 2003) (“Estimating the Negroes in the proportion of three fifths, it can scarcely be doubted that the population of the United States will by that time, if it does not already, amount to three millions.”); John Peck, Facts and Calculations Respecting the Population and Territory of the United States of America, 1-2 (Boston, 1799) (predicting that, at the end of 1790, there would be four million Americans).


81 Peter Baker, Expand the House?, N.Y. Times (Sept. 17, 2009), http://www.nytimes.com/2009/09/18/us/politics/18baker.html; see Ostrom, supra note 2 at 101 (“If the United States had been organized as a simple unitary republic, one can reasonably infer that the republic long ago would have fallen victim to the constraint inherent in the size principle.”).

82 The original thirteen states have increased to fifty. Each state has two Senators.

83 It should be noted that this was part of the plan of the Federalists. They did not want the size of Congress to increase proportionally with the size of the population, because they feared that it would one day become too large to accomplish anything. The Federalist No. 55, supra note 79, at 338-39; Ostrom, supra note 2, at 92-97.


85 Id. at 4 tbl.1.

86 It should be noted here that the Federalists did not want a large legislature, fearing that it would turn into a “mob.” The Federalist No. 55, supra note 79, at 340; see John Burt, Tyranny and Faction in the Federalist Papers, Raritan Fall 1993, at 56, 79.
groups in Washington. American citizens rely on others to communicate their sides of the story to the government more efficiently. They rely on large, representative groups of individuals and organizations whose purpose is to effectuate that communication.87

Whereas it was once common for individuals to walk into the White House for a meeting with the President,88 only the most elite members of American society would dream of doing that today.89 It simply is not possible (nor would it be efficient) for government to work that way anymore. In this fundamental way, the structure of government has changed, and today government relies a great deal on representative leaders who have actual contact with government officials. Of course, we must ask: who are these elite? Which individuals are having contact with our government? Are there ways for the average American to be sure that her voice is being heard in that room? While it is not possible to answer all of these questions in this Article, I will explain why the Federalists would find them to be important.

Recall that the Federalists specifically mentioned that legislators would have an incentive to learn what their constituents want—and that they would be most effective in their representation if they depend on the people for their livelihood, because they would be forced to learn their constituents’ views.90 If a legislator ignores his constituents, he will not keep his job for long. This proposition makes perfect sense in light of the eighteenth-century viewpoint of the Federalists. It was (relatively) easy to keep track of a small constituency. A member of the House of Representatives needed only to know the viewpoints of some relatively small, homogenous group of citizens (less than 33,000), who were all white, male, property owners. Today, members of Congress need not learn the varied interests of every different group in their district—they need to learn from those who are most likely to participate and affect their election.91 As I discuss below, this means that certain classes of citizens (the wealthy, for example) are considerably more likely to have their views represented than those with little influence. Those who have access to government are represented.

Following a drastic increase in size, it is natural to observe a shift in government toward legislator interaction with the leaders of organizations, rather than individual constituents. Just as it is more efficient for a town to designate one person to bake all of the town’s bread (because they acknowledge that it is far easier for one person to bake one hundred loaves of bread than for one hundred people to each bake one), Americans find that it is sensible to delegate a large

87  FRANK R. BAUMGARTNER & BETH L. LEECH, BASIC INTERESTS: THE IMPORTANCE OF GROUPS IN POLITICS AND IN POLITICAL SCIENCE, 89 (1998) (“Most Americans are members of interest groups and many more have their interests represented by groups of which they are not formal members . . . .”).


89  However, it was possible to win a dinner with President Barack Obama during his campaigns if one donated to his campaign. “I’m Asking One Last Time,” BARACKOBAMA.COM (Sept. 25, 2012) https://www.barackobama.com/news/im-asking-one-last-time/.


91  See infra Part II.B.5.
portion of their political influence to groups who can more efficiently represent them.92 This has been the way American government has worked for a very long time.93 American politics have been largely about civic organizations for the past century.94 Even today, presidential candidates often begin their journey with stops at organizations like the Veterans of Foreign Wars or the Elks Lodge in small towns in New Hampshire.95

But group representation does not require that candidates come to the groups. Often, groups select a delegate who is able to go to the government. This allows one of the group’s members to become an expert in the policy area most important to that group. If one considers the fact that most legislation is too complicated or arcane for the average voter to fully understand,96 it makes sense that such legislation is passed into law with input mostly from experts. Individual citizens hear bits and pieces about major bills through the news media, but the citizenry certainly cannot be relied upon to dig into the details of complex legislation. The Federalists did not believe that citizens should be forced to make time to deal with the details of governing—they were expected to allow their representatives to do that work for them.97 We, too, should expect that our interests will only be represented in government indirectly.

The decreased proportion with which each American is represented in the federal government has left a gap in representational efficacy. In other words, we now depend on interest groups to do some of the fact-finding representation that the Federalists assumed could be done by members of Congress.98 It only makes sense that as each congressional member’s share of constituents rose from thirty-three thousand to seven hundred thousand, Americans would find the need to seek representation through other means. They would seek to have their voice heard by channeling it through representative groups.

What are representative groups? Definitions among political scientists vary, but for the purpose of this Article I assume that a “representative group” is an organization which represents the social, political, or economic interests of a specified group of people. Some representative groups form around issues, others around religion, and still more around employment status or myriad other characteristics. For the purpose of analyzing the Federalist vision, I do not distinguish sharply among these differences.

92 So large a portion, in fact, that groups spent some $2.6 billion on lobbying in 2006. Lloyd Hitoshi Mayer, What Is This “Lobbying” That We Are So Worried About?, 26 YALE L. & POL’Y REV. 485, 519 (2008).

93 See, e.g., E. PENDLETON HERRING, GROUP REPRESENTATION BEFORE CONGRESS, 13 (1929) (describing the importance of group leaders in the political process of Washington).


97 See THE FEDERALIST NO. 10, supra note 9, at 76.

98 See HERRING, supra note 93, at 240 (describing extra-legal interest groups as “an integral part of our representative system of government”).
This collective need for political representation is essential to fulfill the Federalists’ main goals of government: influence by the popular will, representation of all interests, and the use of reason. Large representative groups can accomplish all three. On the other hand, disproportionately powerful interest groups can destroy those goals.\footnote{B A U M G A R T N E R & L E E C H , \textit{supra} note 87, at 85.}

Take, for example, a political organization such as NARAL Pro-Choice America.\footnote{NARAL PRO-CHOICE AM., http://www.naral.org/ (last visited Apr. 30, 2015).} Americans who support abortion rights need not take the time to write to their member of Congress on every piece of abortion legislation that comes to the floor of the House. In fact, it would be exceedingly difficult to do so based on the legislative process that allows riders to be added to so many bills—abortion legislation could sneak into just about any bill. Instead, those citizens can join and fund NARAL, an organization which promises to research that legislation and provide representation on behalf of its citizen members.\footnote{See \textit{About Us}, NARAL PRO-CHOICE AM., http://www.prochoiceamerica.org/about-us/ (last visited Apr. 30, 2015).} The organization then becomes responsive to the needs of its citizen-benefactors, who provide funding and political support.\footnote{See \textit{id.} at 365 (quoting a chemical company’s senior lobbyist as stating “we’re doing a lot more providing of research results and technical information”).} NARAL, in return, becomes an expert on pro-choice arguments and abortion legislation and provides the most effective representation possible.\footnote{Such as NARAL, the National Rifle Association, the Human Rights Campaign, etc. \textit{But see Mayer, supra note 92, at 532.}} It is almost as if American citizens have outsourced their government participation to an organization.

By “hiring” NARAL to provide them with this representation, the people are ensuring that their version of the popular will is being heard by the federal government. Those who agree with the organization are ensuring that their interest is represented. Of course, America is a diverse nation with citizens whose interests vary widely. Thus, representation of the popular will requires a great degree of work. Because many interest groups are focused on specific issues,\footnote{Such as NARAL, the National Rifle Association, the Human Rights Campaign, etc. \textit{But see Mayer, supra note 92, at 532.}} groups exist to represent both sides of the debate.\footnote{Some of the authors who held this view are collected in B A U M G A R T N E R & L E E C H , \textit{supra} note 87, at 87 (referencing generally works of de Tocqueville; HERRING, \textit{supra} note 93; D A V I D B. T R U M A N, \textit{THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION} (1951); L E S T E R W. M I L B R A T H, \textit{THE WASHINGTON LOBBYISTS} (1963); and V.O. K E Y, JR., \textit{POLITICS, PARTIES, AND PRESSURE GROUPS} (5th ed. 1964)).} This situation has a long tradition in America. Opposing interest groups have coexisted since at least 1929, when Pendleton Herring wrote:

\begin{quote}
Not only are almost all sorts of interests and classes represented but also all sides of most questions as well. For example, the motorists have the American Automobile Association; the manufacturers are represented by the National Automobile Chamber of Commerce, while the distributors speak through the National Automobile Dealers Association. Makers and sellers of accessories, tires, batteries, and parts have their national associations. What of the poor
\end{quote}
pedestrian? There is the American Pedestrian Protective Association, organized in 1926, with national headquarters in Washington. There is the Lord’s Day Alliance on the one hand and the Association Opposed to Blue Laws on the other . . . . Instances could be multiplied indefinitely . . . .

But the reality is not so simple. Scholars have abandoned the view that all interests are equally represented, because interest groups face organizational hurdles in getting off the ground.107

The proliferation of interest groups promotes the Federalists’ principle that all interests should be represented in government.108 The Federalists wanted opposing sides to come together and, using reasoned discussion, come to a conclusion that takes those interests into account.109 Though sometimes these groups may not recognize that they are self-interested,110 “the primary purpose of these organizations is to guard the interests of their respective groups.”111 This mirrors the adversary legal system, which pits two sides against each other, with the hope that the most beneficial outcome will result. However, if one side of an issue has a disproportionate share of power, public policy will be skewed against the public interest.112

We must keep in mind the need for balance in such an adversary system. Just as the legal system debates how procedural rules will benefit or prejudice one side in the courtroom, the advantages given to certain groups will change how much our national political debate looks like the Federalist vision of multi-interest representation.

These interest groups also contribute to the Federalists’ goal of promoting the use of reason in political debate. An expert organization, which acts as a repeat player on the government stage, will be held to a high standard by the government. Members of Congress, who must make policy decisions, are more likely to pay attention to an organization that uses persuasive argumentation, rather than appealing to passion or false claims. Organizations that use unsavory tactics or skewed data quickly lose credibility.113

Of course, those groups might be influenced by factors we would consider undesirable for use in republican decision-making, such as campaign donations. And we must keep in mind that lobbyists present age-old opportunities for corruption and other unsavory activities. By and large, however, the interest groups that survive are those that promote the views of their members without breaking laws. Most importantly, they do so through the use of reason114—thus promoting the Federalist goal of government by discussion.

106 HERRING, supra note 93, at 22 (footnote omitted).
107 BAUMGARTNER & LEECH, supra note 87, at 87.
108 See Mayer, supra note 92, at 539.
109 See supra Part I.C.
110 HERRING, supra note 93, at 23 (“[I]t is difficult to find a forthright acknowledgement on the part of the group representatives that they are entirely self-interested.”).
111 Id.
112 Mayer, supra note 92, at 540.
113 See Schlozman & Tierney, supra note 102, at 365 (describing survey results which indicate “it was no longer sufficient just to know the right people[, n]ow they must also marshall complicated and well-reasoned arguments”).
114 See id.
However, this theory is subject to a flaw, which was unforeseeable by the Federalists. As social scientist Mancur Olson argued, special interest groups that promote laws that benefit certain individuals or businesses mobilize at a faster rate than public interest groups, which work for laws that benefit society generally. 115 These public interest groups seem to debunk the idea that all interest groups are self-interested. 116 Still, the theory that special interests “push government officials away from making decisions in the public interest” is “[a]n important scholarly and popular tradition.” 117 We know that individuals with social or economic power have an easier time representing their interests in government. 118 In other words, our political “adversary system” might unconsciously be putting a thumb on the scale in favor of special interests.

In fact, there is evidence which points to a deep division in representation by lower-class Americans in interest groups. 119 There is a long line of scholarly thinking that the wealthy are able to easily use the political process to maintain their wealth. 120 If this view is true, it presents an obvious problem for our government: how do we maintain the Federalist vision of government, which is influenced by the popular will?

The only hope lies in the ability of non-wealthy Americans to use their collective strength to defend their government from such negative influences. Given the difficulty attendant to political organization, the American people are left with a singular realistic option: rely on large, representative political organizations.

B. Labor Unions Are a Means for Representation of the Working Class in America, and Right-to-Work Laws Reduce Their Effectiveness

1. Labor Unions Provide a Means of Representation

Among other things, labor unions exist to give a voice to American workers. 121 While this mission is broad and includes a wide variety of activities (including collective bargaining, training, and much more), the focus of this section is on a union’s ability to collectively represent individuals. Since it is organizationally difficult for the working class to speak with one voice, it is crucial that they be able to work together to delegate their political representation to

116 Consider, for example, environmental groups, which stand to gain very little personally from any policy victory.
117 BAUMGARTNER & LEECH, supra note 87, at 86.
118 Id. at 89.
119 Id. at 92 (stating those with higher social status are much more involved than others).
120 See, e.g., E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA (Cengage Learning, 1975) (1960); C.M.A. Mc Cauliff, Didn’t Your Mother Teach You to Share?: Wealth, Lobbying, and Distributive Justice in the Wake of the Economic Crisis, 62 RUTGERS L. REV. 383, 425 (2010) (“Those without money, however, do not get the opportunity to present information about their lives to legislators nor do they get the chance to explain the impact that proposed legislation will have on their lives.”).
organizational interests. Most importantly, the broad base, which forms the membership of labor unions, creates a coherent voice for working Americans. Labor unions allow the working class to counteract the disproportionate influence of the wealthy. Thus, labor unions have the ability to promote the Federalist goal of political participation and representation of all classes.

Unions have a unique ability to perform this task because they have the ability to provide broad-based representation for their members, with little active responsibility required of individual members. While many interest groups work on a specific issue or two, labor unions represent vast and diverse swaths of the American population. For example, the AFL-CIO represents unions as diverse as the Air Line Pilots Association, the American Radio Association, the Guild of Italian American Actors, the Farm Labor Organizing Committee, the International Union of Police Associations, National Nurses United, and the Office and Professional Employees International Union. The individuals included in these groups likely have little in common except the economic issues they jointly face as members of the working class. In all, this group of AFL-CIO members includes more than twelve million Americans. Nationally, there are some 14.6 million workers who belong to unions, 11.1% of the population of wage and salary workers. This diversity allows a national union like the AFL-CIO to focus on the common interests of workers. It also allows for massive economies of scale—the larger the union, the less individual work is needed to accomplish the group’s goals.

Because their members are middle- and lower-class, labor unions represent the type of citizen who is unlikely to have her voice heard in government. In other words, labor unions fill an important gap in America’s republican form of government. They represent individuals who would otherwise have a very difficult time representing themselves in government. Because these individuals are the least likely to engage with political organizations, it is important that the group takes advantage of the economy of scale and asks relatively little of its individual members.

Americans, as a whole, are very involved with political associations. In 1995, seventy-nine percent of Americans were involved with a voluntary organization. Sixty-one percent of those were involved in an organization that takes a stand in politics, amounting to forty-eight percent.269

122 See supra Part II.A.
123 See What Unions Do, supra note 121.
125 Id.
127 The median weekly earning for a union member is $970, compared with $763 for a non-union employee. Id.
128 See BAUMGARTNER & LEECH, supra note 87, at 86, 89, 92 (discussing the tendency of interest groups to primarily benefit the wealthy).
129 See infra Part II.B.3 (regarding unions’ abilities to increase political participation).
130 See BAUMGARTNER & LEECH, supra note 87, at 86, 89, 92.
percent of Americans. However, more than half of those involved in voluntary organizations do not get involved beyond a monetary donation; in social services groups, nearly eighty percent of involvement is limited to a monetary contribution. American political participation is largely limited to those with discretionary income, as I discuss below.

Involvement in political organizations depends in large part on the ability of that organization to recruit—that is, to ask others to join. The high political participation rate of the rich stems largely from the fact that they are asked to participate. Although high-income earners are asked more often to participate in activities, they are not necessarily more likely to do so if asked. In other words, low-income individuals are just as likely to join an organization if presented with the opportunity. This is why it is so crucial for organizations to have the ability to actively recruit new members: it may make the critical difference in an individual’s decision to sit on the sidelines or get involved.

This difference matters a great deal, especially when one considers the fact that about half of respondents in one study could not recall being asked to participate in a political organization at all within the past year. This means that many individuals are unlikely to ever be solicited (let alone agree) to participate in politics. These individuals are more likely to be low-income Americans—exactly the ones who need representation the most, because they lack the capacity to participate in other ways (most notably with time and money). They are also the individuals who could potentially be represented by a labor union since they are likely to have jobs which could be unionized.

In fact, scholars have noted that labor unions fill a niche that is unique to American politics—the absence of a labor-focused political party. In many other nations, a labor party exists primarily to promote the views of the working class. This fits in with the Federalist vision of elected officials who represent specific trades or classes of people.

But labor parties do more than simply vote in a legislature. They “play a significant role in the political mobilization of those who, on the basis of their income and education, might otherwise not take part politically.” The American two-party system, however, has not allowed space for a large, labor-oriented movement. But workers have not allowed this to stop them

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132 Id.
133 Id. at 63, tbl.3.5.
134 Id. at 64.
135 Id. at 150.
136 But see id. at 158 (explaining that causality is not one-way—those who are asked are most likely to be active, and those who are active are most likely to be asked).
137 Id. at 156.
138 Id. at 384-85.
140 See THE FEDERALIST N0. 42, supra note 60, at 264; OSTROM, supra note 2, at 163-64.
141 VERBA, SCHLOZMAN & BRADY, supra note 131, at 384.
142 Id. at 384-85; id. at 385 (noting that “there are no working-class or peasant parties” in American
from being mobilized to ensure their representation—they have formed strong labor unions to attempt to fill this gap.

But it has not exactly worked. American labor unions represent a “relatively small proportion of the work force.”143 However, they offer an important resource: the development of “civic skills,” which increase the likelihood of political engagement.144 These skills—as general as education and language, and as specific as exposure to political issues—enable individuals with the basic competency necessary to participate in their government.

And while these unions do in fact offer opportunities for increased political mobilization and education,145 American labor unions do not totally fill the representation gap. American workers still do not have an effective and permanent way to engage with the political process.146 Only a minority of Americans are members of a labor union.147 But if we believe that we should preserve organizations which do some part to promote political participation, we should take the role of labor unions very seriously.

The idea of labor unions as political representatives is in harmony with the Federalist view that the different classes of society would choose to be represented in government by those who promote their interests.148 While the founders could not have foreseen the enormity of the industrial revolution and the resulting dominance of labor unions, they did recognize that different occupations had different concerns.149 They believed that artisans would choose those who best represented their interests: merchants.150 Today, however, workers are able to organize and vote for one of their own to represent them. Labor unions make possible what the founders thought impossible: the self-representation of individuals of lower classes in Congress. Labor unions allow workers to pool their resources together to jointly pay for one of their own to go to Washington to represent them (either officially as a member of Congress, or unofficially through lobbying).151

Labor unions were able to carry out this representation at maximum efficiency when they gained the ability to form a “closed shop,” which requires all workers at one business to be members of the appropriate labor union.152 The benefits of this arrangement to the vitality of the labor movement are obvious, and it results in the ability of labor to quickly amass political power

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143 VERBA, SCHLOZMAN & BRADY, supra note 131, at 385 (finding that American churches function to fill the gap in nurturing politically relevant skills); see also Union Members—2014, note 126 (finding only 11.1% of the population of wage and salary workers belong to unions).

144 VERBA, SCHLOZMAN & BRADY, supra note 131, at 304.

145 See id. at 386 (finding that labor unions offer a greater chance for political participation than American churches).

146 See id. at 384-85.

147 See Union Members—2014, supra note 126.

148 See supra Part I.

149 See OSTROM, supra note 2, at 163.

150 See THE FEDERALIST NO. 35, supra note 45, at 211-12.

151 HERRING, supra note 93, at 138.

to be used for the benefit of its members. It also allows labor unions to create the infrastructure to encourage individual participation by their members.\textsuperscript{153} As a result, even when individual workers do not agree with the union’s stance, they still benefit from the opportunities created by unions to learn political skills.\textsuperscript{154}

By providing a sort of automatic representation for the working classes, they provide a counterbalance to wealthy special interests. Business interests can very easily and quickly organize due to their greater resources and smaller numbers.\textsuperscript{155} The efficiency in recruitment and membership created by labor unions is critical because opposing wealthy interests have numerous advantages in organizing themselves politically. If labor unions are to be a counterbalance to the wealthy, they must be feasible to organize.

Historically, robust labor unions have been able to provide tangible economic benefits in addition to political organization. According to a study by the Congressional Research Service, “the wages of union workers are in the range of 10% to 30% higher than the wages of nonunion workers.”\textsuperscript{156} This amount includes wages and fringe benefits—union workers usually receive better fringe benefits than nonunion workers.\textsuperscript{157}

But, as with any other special interest which wields a large amount of power, bad actors were able to abuse the system of labor unions. As a result, the approval rating of labor unions has dropped from a high of 75% in the 1950s to 52% in 2011.\textsuperscript{158}

Of course, whether labor unions have ultimately been good for the economy is the subject of vigorous debate.\textsuperscript{159} Perhaps it is true that labor unions do not ultimately work best to protect the economic interests of their members. But I do not seek to address the larger question of the merits of union representation in this Article.

But the point remains today: in a society in which the wealth of the top one percent of wage earners is increasing quickly, labor unions provide a means for mass representation of low- and middle-income workers. They provide an avenue for individuals whose voices would otherwise be lost. They provide an infrastructure which channels those voices into organizational leaders. Because of these features, membership in labor unions might be the only way for the majority of Americans to effectively counteract the disproportionate influence of the richest Americans.

2. The Effect of Right-to-Work Laws

The ability of unions to organize has been undercut by recent movement toward so-

\textsuperscript{153} See infra Part II.B.3.

\textsuperscript{154} See infra Part II.B.3.

\textsuperscript{155} BAUMGARTNER & LEECH, supra note 87, at 94-95, 106, 107.

\textsuperscript{156} GERALD MAYER, CONG. RESEARCH SERV., UNION MEMBERSHIP TRENDS IN THE UNITED STATES 6 (2004), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1176&context=key_workplace.

\textsuperscript{157} Id. at 7.


called “right-to-work” laws. These laws “criminalize compulsory union membership and grant to workers individual freedom to join or refrain from joining labor unions.”160 In right-to-work states, workers are free to choose whether they will pay union dues or not, but “unions remain obligated to provide full services and benefits of union representation to all workers whether they pay dues or not.”161

The first right-to-work law was passed as a constitutional amendment in Florida in 1944.162 The right-to-work movement began in earnest in the South, where textile manufacturers saw the need to fend off potential unionization of their workers.163 Right-to-work laws were pursued on the state level due to a perception that the national labor policy would continue to favor unions.164 Between 1944 and 1946, Arkansas, South Dakota, Nebraska, and Arizona enacted right-to-work laws.165 In 1958, voters rejected similar measures in California, Ohio, Colorado, Idaho, and Washington—a right-to-work law was approved only in the agricultural state of Kansas that year.166 Over time, right-to-work laws were eventually passed in twenty-five states.167

During this time period, the federal government also enacted the Taft-Hartley Act, which guaranteed employees the right not to join unions.168 As a result, union shops are only allowed where state law permits, and only when a majority of workers vote for them.169 The Act also required advance notification if a union planned to strike, restricted union political contributions, and required union officers to deny any Communist affiliations.170

Proponents of right-to-work laws claim that these laws benefit society because they allow for optimal free-market transactions.171 If one sees union representation as a means for achieving only a contract, there is no reason why employment at a company should be dependent upon being a member of that union.172 In other words, the union can bargain for a contract, but it cannot exclude nonmembers from employment (as in a closed shop). The argument is based on the free-market right to contract for one’s own employment, to “improve fairness for workers who

160  Thomas, supra note 152, at 163.
161  Id.
164  Id. at 19.
165  Id. at 19.
166  DEMPSEY, supra note 162, at 1.
169  Id.
170  Id.
172  See DEMPSEY, supra note 162, at 3.
may or may not want to pay to join a union.”

Michigan Governor Rick Snyder argues that individuals will still want to join labor unions if they offer services that are good enough. This argument misses the obvious counterargument that such a system creates a major incentive for free-riding. Why would someone join a labor union if they could get all of its benefits without paying for any of the cost? Why buy the cow if you can get the milk for free?

The unions themselves, however, see the necessity of a closed shop as an essential means of survival. A closed shop dramatically changes the organizational hurdles faced by labor organizers. In fact, some scholars identify the primary “problem of the American labor movement” as the difficulty in getting and staying organized.

Naturally, the state of affairs under right-to-work laws makes it very difficult for labor unions to remain a viable option. Union members are forced to expend resources to actively engage their fellow workers to convince them to join and pay for representation in a union. Many of them simply do not want to pay. As a result, unionization has declined between 10% and 30% in right-to-work states.

In the United States, the number of unionized workers has decreased from a high of 28.3% of workers in 1954, to 11.5% in 2003. It is difficult to pinpoint the cause of this decrease. However, of the twenty-five states which enacted right-to-work laws, sixteen were enacted between 1944 and 1955. This fact, combined with research showing that right-to-work laws directly decrease union membership, is strong evidence that right-to-work laws are a significant cause of reduced unionization in America.

174 See id.
177 DEMPSEY, supra note 162, at 4 (citing Selig Perlman, Labor and the New Deal in Historical Perspective, in LABOR AND THE NEW DEAL 361, 363 (Milton Derber & Edwin Young, eds., 1957)).
179 Hogler & Shulman, supra note 175, at 930.
180 MAYER, supra note 156.
182 Hogler & Shulman, supra note 175, at 930.
3. Labor Unions Work to Achieve Political Representation for Their Members

Labor unions have the ability to organize a large number of individuals, acting as a sort of “special interest” to counter other organized special interests. They are under attack by Republican politicians who support right-to-work laws “to promote worker freedom and to promote greater economic liberty.” On the other hand, Democratic politicians continue their alliance with labor unions to promote collective bargaining as a “path to the middle class.” It is unsurprising that right-to-work laws have been promoted by Republicans. Democrats support labor unions at a rate of 78%, while Republican support was 26% in 2011.

The recent attacks on labor unions have mostly occurred in the Midwestern states of Ohio, Indiana, Michigan, and most recently, Wisconsin. Republican politicians have proposed them all. This makes sense given the opinion poll just mentioned, but it also underscores the theoretical basis for this Article. Labor unions give 92% of their funding to Democrats. Why do they do this? Labor union members are much more likely to be Democrats than Republicans. In other words, labor unions are being used by individuals to pool their resources and donate money to help elect the politicians they agree with. Even if a union member does not individually agree with every view of a candidate, the infrastructure of union membership encourages more participation, prompting all union members to participate, even if they vote

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183 See Part II.B; see generally GALL, supra note 163 (describing the rise of unions in politics as the development of a special interest).
185 MOVING AMERICA FORWARD: 2012 DEMOCRATIC NATIONAL PLATFORM, http://assets.dstatic.org/dnc-platform/2012-National-Platform.pdf; see GALL, supra note 163, at 8 (discussing the “labor-Democratic alliance”).
186 Jones, supra note 158.
193 Aaron J. Sojourner, Do Unions Promote Members’ Electoral Office Holding? Evidence from Correlates of State Legislatures’ Occupational Shares, ILR REV. J. WORK & POL’Y 467, (2013) (finding that unionization results in elected political leadership by individuals from working- and middle-class jobs). This has long been one of the goals of labor unions. See HERRING, supra note 93, at 138.
against the union’s preferences. 194 They are working together to promote the representation of
their views in government.

There is an obvious counterargument to this line of thought: about a quarter of union
members are Republicans. 195 Those Republicans should not be forced to donate to candidates
whom they do not support. But there are two important flaws in that argument. First, it falsely
assumes that registered Republicans never support Democrats. Second, it assumes that there is no
way for union members to opt out of political spending, but the Supreme Court has required such
an opt-out in its union security cases. 196

With this caveat, it is easy to see how labor unions form an organization that allows a
group of workers to elect representatives who agree with their views. Looking at labor unions
only from this view, they are an example of one way to give low-income Americans the boost
they need to counteract the organizational advantage of the wealthy. But labor unions have had to
fight tooth and nail for the rights they have today.

In fact, it was the battle over the very same right-to-work proposals that prodded labor
unions to begin their increased active participation in state politics. 197 Labor unions were forced to
fight for their participation in American government, and they met the challenge by resorting to
both electoral and lobbying activity. Today, they provide an opportunity for political involvement
and engagement that might not be available to a large segment of American citizens. 198

This organization and engagement provides something the Federalists would have
wanted: a means for political engagement at a time when it is extremely difficult for Americans to
be involved directly with government, due to the increasing size and diversity of the population.
The Federalists recognized the importance of organization in order to resist the encroachments of
overzealous government. 199 Today, unions provide that degree of organization for about eleven
percent of Americans. 200 This allows labor unions, as a group, to interact directly with the
government, 201 in furtherance of the Federalist vision of inclusion of interests.

If individual union members were asked to provide direct input on something as complex
as the federal budget (or even any of the fifty states’ budgets), they, like most people, would

(finding that unionization increases voter turnout, even though those voters did not always vote with pro-labor candidates).
195  See Newport, Witters, & Agrawal, supra note 192.
196  See Int’l Ass’n of Machinists v. Street, 367 U.S. 740, 768-69 (1961) (Douglas, J., concurring); Benjamin
(describing the history of the opt-out right and arguing that a similar right should exist for corporate shareholders). It is not
immediately apparent, however, that each employee should only have the choice of one labor union. If an alternate labor
union would better promote an individual’s interests, perhaps she should be able to join that other one.
197  GALL, supra note 163, at 9.
198  Zullo, supra note 194, at 22 (finding that unionization increases voter turnout for union members, even
though those voters did not always vote with pro-labor candidates).
199  See supra Part I.B.
200  See Union Members—2014, supra note 126.
201  See Jasmine Kerrissey & Evan Schofer, Union Membership and Political Participation in the United
States, 91 SOCIAL FORCES 895, 899 (2013) (indicating that labor unions’ encouragement of participation by their members
results in increased active participation in politics).
probably be at a loss. In truth, very few people understand such complex legislation. Labor unions allow individual members to have a delegated representative who can provide input on these complex issues through lobbying, or by providing the infrastructure for union members to engage in direct action such as protests.

4. Labor Unions Provide a Voice to Those Who Would Otherwise Not Participate in Government

Perhaps the most important aspect of this beneficial effect is that most individuals in labor unions would otherwise have no voice at all because it is difficult for an individual voice to be heard in today’s government. The union members would have an extraordinarily difficult time countering the well-organized business interests. If not for unions, many wageworkers would not participate at all in elections. If not for unions, they would have one fewer civic institution providing the needed skills to participate in democracy.

The Federalists emphasized the need for skilled, reasoned political debate. They did not want mobs with pitchforks deciding national policy. The Federalists recognized that government is simply too complex and too nuanced to be run by uneducated or unsophisticated individuals. The Federalists were writing before the true dawn of the Industrial Revolution, so they did not see society organized into the same structure we see today. If they did, they would recognize that their desire for reason and a government made of the best men would result in large segments of society (low-income and industrial workers especially) being virtually unrepresented. This stands in direct contrast with their desire for different interests to be represented.

Labor unions can solve this problem. The ability to delegate political representation means that even the least economically empowered among us can find a way to obtain direct representation in government. But that representation depends on the ability of the union to recruit members. Right-to-work laws force Unions to provide services even to non-members—essentially allowing free riders to get something for nothing. This is unsustainable in the long run. It will continue to weaken the power of unions, and therefore weaken individuals’ ability to have their voices heard in government.

5. Counterarguments: Are Labor Unions Really the Answer to the Federalist Vision?

There is no doubt that the Federalists were concerned about the harmful ability of factions to usurp the national governing process to serve their own interests. In fact, this is perhaps the part of the Federalist Papers which is most often remembered by politicians,

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202 See Somin, supra note 96, at 1294.
203 See BAUMGARTNER & LEECH, supra note 87, at 107.
204 See supra Part I.A.
205 See supra Part I.C.
206 This might seem contradictory today in light of the fact that they also granted the vote only to white, male property owners. However, they believed that such limited suffrage would in fact represent all interests—they just had a different idea about interests.
207 See supra Part II.B.3.
208 See, e.g., THE FEDERALIST NO. 9, supra note 7; THE FEDERALIST NO. 10, supra note 9; THE FEDERALIST NO. 16 (Alexander Hamilton).
attorneys, and judges who shape our laws today. Federalist No. 10 is the most famous explanation of this theoretical conundrum: how do you allow a popular government to exist without enabling unstable factions to form and control that very government?

Proponents of a right-to-work law could plausibly argue that unions are the prototypical form of faction: they organize a large mass of people around a single theme, and they have a substantial impact on the outcome of elections. Are labor unions not “united and actuated by some common impulse of . . . interest, adverse to the rights of other citizens,” as Madison warned? 209 Labor unions have been formed specifically for the purpose of uniting the class of workers against the class of management. If completely successful, might they represent a majority faction which imposes its will on the rest of the nation?

Furthermore, proponents of a right-to-work law would argue that labor unions do not rely on the use of reason—they are notorious for riling up the passions of their members for political purposes. 210 In fact, the “laboratory conditions” doctrine prohibits tactics that are not aimed at “reasoning faculties,” indicating an assumption in labor law doctrine that unions often rely on emotional appeals. 211 Unions are often required to wait during “cooling-off periods” before voting to unionize. 212 They have participated in events like Occupy Wall Street, 213 which specifically draw attention to an emotional aspect of their arguments: that the rich are taking advantage of the rest. Unions are taking advantage of emotions, rather than relying on the force of reason. The Federalists warned us against exactly this: allowing passion to creep in and poison the political process. 214 Labor unions, right-to-work advocates would say, are pushing us away from the Federalist vision of reasoned, open discussion in national government.

But these arguments would misrepresent the context in which Madison discusses faction in Federalist No. 10. 215 Madison explained why the national government deals with factions better than any previous government. Faction is inevitable. 216 He explained that the federal government’s structure would prevent faction by drawing in all of the interests of society. 217 Madison said that if the national government properly represents a wide range of views, no single majority will be able to prevail. 218 He said that the Constitution would accomplish this by

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209  THE FEDERALIST NO. 10, supra note 9, at 72.
211  Id. at 315.
212  Id. at 334.
214  See supra Part I.C.
215  It should also be noted that these references to passion relate to the act of unionizing or negotiating with management, not to political representation after formation of the union.
216  THE FEDERALIST NO. 10, supra note 9, at 73-75.
217  Id. at 74-78.
expanding the pool of citizens from which to choose representatives. This enlarged pool would permit only the most public-spirited individuals to achieve a position of influence in the government.

Labor unions make an important contribution to expanding the pool of citizens from which to choose representatives. They solve the collective action problem faced by millions of workers who could not individually obtain representation. By pooling their resources to provide for a group representative, labor unions can have some influence on policy, or may even actually run one of their own members for political office.

A thought experiment is helpful for understanding the importance of organized representation for low-income individuals. Imagine for a moment what a world without any organized labor would look like. It is a world in which many wage earners wake up, go to work early, come home late, and go to sleep. Some would probably be able to negotiate more favorable contracts with employers, but the most vulnerable—those with the least bargaining power—would be given the worst deal. Yet many would still choose to keep their employment for fear that they have no other options, or because the other options are equally bad.

In such a world, how would James Madison’s project of reducing factionalism work? The large number of congressional representatives would still be drawn from the far-flung reaches of the nation to represent the patchwork of interests inherent in America’s immensity. But, in such a world, can we realistically expect wage earners to be among those representatives?

Of course, Madison’s view must be altered somewhat to account for the fact that we no longer believe that only certain classes of individuals are qualified to participate in that choice. The trend in the United States since its founding has been toward more participation, and more inclusion in the electoral process (albeit with some significant setbacks). We have granted the right to vote to non-property-owners, and then African-Americans males, then women, then young people. In light of this history, it only makes sense to reinterpret Madison’s vision of broad inclusion as a mandate to represent the interests of these groups as well.

One might speculate that the Federalists would not have supported a requirement that a worker pay dues to a third party in order to engage in a contract with his employer. Such a counterargument fails to acknowledge, however, that large corporations did not exist at the time of our nation’s founding. If they had, the Federalists might have been forced to confront the question of whether labor laws fit their vision of government. But if we look solely to the issue of political representation, the Federalists’ views are quite clear: they wanted inclusion of different voices. So the question for the Federalist vision is whether labor laws promote or discourage participatory democracy.

219 THE FEDERALIST NO. 10, supra note 9, at 77.
220 KIRK HAROLD PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES 78-111 (Univ. Chi. Press 1918) (describing how states removed voting requirements of property ownership).
221 U.S. CONST. amend. XV.
222 U.S. CONST. amend. XIX.
223 U.S. CONST. amend. XXVI. However, we still deny electoral participation to significant groups—former convicts, and those without photo identification, for example. See Robert A. Levy, Voter ID Laws and Rights of Convicted Felons, CATO AT LIBERTY (May 10, 2014, 10:55 AM), http://www.cato.org/blog/voter-id-laws-rights-convicted-felons.
224 See supra Part I.B.
Low-income individuals face a significant disadvantage when it comes to participating in the political process. They lack the two most important resources needed to participate directly in the political process: time and money. A study conducted by Professors Sidney Verba, Kay Lehman Schlozman, and Henry E. Brady found that while the average citizen participates in 2.1 political acts per year, low-income individuals participated remarkably less. These “political acts” include the simple act of voting. Those who made between $15,000 and $34,999 participated in 1.9 acts per year. Those who made less than $15,000 participated in 1.3 acts per year. This disparity is especially poignant when compared to individuals who make above $125,000 per year, who participate 3.4 times per year, on average.

The act of voting was the only activity in which high-income earners did not double the participation rates of low-income individuals. But 86% of those with high income voted, still outpacing low-income voting, at 52%. This disparity is shocking given that voting is probably the least demanding form of political participation. Of course, we cannot know what causes this gap. It could be due to lack of resources, but it could also be due simply to the fact that there is a dearth of organization—that low-income Americans are simply less likely to be asked to participate. But it is not surprising if one considers the union-free world I described above. If an individual is left without even the time needed to cast a ballot, we certainly would not expect her to donate further time volunteering for a campaign.

This is a major problem for Madison’s vision. In order to achieve a broad representation of interests, those with diverse interests must be able to at least participate in the most basic level of political activity. To understand this point, it is useful to consider a hypothetical. Imagine that no low-income individuals were able to vote. In such a society, no portion of Congress would have a stake in representing the interests of poor people. This is the worst-case scenario for Madison’s Federalist No. 10. This is factionalism at its worst—a segment of society (the middle and upper classes) has effectively banded together and is able to ignore another class of society (the poor).

The representation of low-income individuals is not a promotion of factionalism or a repudiation of Madison’s plan in Federalist No. 10. Rather, Madison’s vision requires that some members of Congress represent the needs of low-income Americans. To exclude any portion of Americans would enable the very factional control he warned against. We can only adhere to Madison’s vision by ensuring representation of all interests, so that no single group can take control over the government. Large representative groups like labor unions advance this goal, and the more easily they can recruit, the easier they can represent their members.

225 VERBA, SCHLOZMAN & BRADY, supra note 131, at 289.
226 Id. at 188 fig.7.1.
227 Id. at 190 fig.7.2.
228 Id.
229 Id. at 188 fig.7.1.
230 Id.
231 Id.
232 Id. at 190 fig.7.2.
233 Id.
234 Id. at 150 fig.5.2.
So whose views actually do get represented in our government? Professors Verba, Schlozman, and Brady found that “[t]hose whose preferences and needs become visible to policymakers through their activity are unrepresentative of those who are more quiescent in ways that are of great political significance.”235 The government simply does not get as much information from those who face problems of “basic human needs.”236

Of course, one could argue that this has nothing to do with unions because union members are statistically better off than those who face these more drastic needs. But this argument misses the point. Labor unions are some of the only large organizations that focus on the needs of people at the lower end of the income spectrum. While they may not actually represent the absolute neediest, they come closer than many other organizations. And given the inherent advantages that business interests have, we should not let the imperfections of labor unions hinder the good they do. Further, unions are constantly seeking to expand and include new members so that they can pull more workers out of poverty. The goal of the labor movement is to help the poorest workers achieve their fair share of representation. Of course their members will be better off than the neediest—that means that they are successful in their mission.

An objection that labor unions do not represent the neediest is invalid because labor unions bring low-income Americans into the political process. Even though unions may not perfectly represent their members in every way, they have the ability and scale to bring large groups of people into the political process. So even if one believes that labor representatives are no better at representing the working class than political representatives, labor unions still serve a public good: inclusion of people in the political process. An important finding in the Verba, Scholzman, and Brady study is that “[o]nce active, . . . the poor are as generous with their time as those who are better off financially.”237 According to Professors Verba, Scholzman, and Brady, the poor’s “lack of financial resources does not appear to act as an impediment to the investment of ‘sweat equity.’”238 This suggests that low-income workers do not lack interest or ability to participate. They simply need to be “activated,” that is, they need a spark to ignite their flame of political participation.

This is something which unions can provide. Labor unions solve a collective action problem faced by workers. Since no individual has the time or resources to individually obtain representation in government, a collective group is necessary. This group can create a framework for carrying out that collective bargaining, but also a framework for political activism and effective representation in government. In other words, such a group is necessary to accomplish Madison’s view by ensuring the representation of the group’s members in government. Without a group to represent low-income Americans, the faction of upper-income Americans will take hold and be able to oppress.

III. CONCLUSION

The Federalist vision for American government has three prerequisites: the use of reason, the representation of all interests, and influence of the popular will. The Constitution was groundbreaking in its ability to blend these three contradictory interests. There is constant tension

235 Id. at 227.
236 Id. at 222.
237 Id. at 192.
238 Id.
between giving power to the people, and aiming for reasoned discussion by knowledgeable individuals.

Today, each government official represents more individuals than ever before. Yet we still rely on the same Constitution to ascertain the popular will. The Federalists could not have foreseen the upheaval caused by the Industrial Revolution, or the changes of the twentieth century. But we have come up with a way of accomplishing those three Federalist goals without changing our Constitution’s structure: using large organizations to represent the needs of Americans in our government.

In this Article, I take labor unions as one example of a large representative organization. Labor unions, and other similar organizations, provide the structural support necessary to organize lower- and middle-class Americans. This organizational benefit is critical to counteract the relative ease with which high-income and business interests are able to organize. Labor unions provide the simple ability to ask individuals to participate in their government. Whether that question is asked is often dispositive of whether a person will indeed have the ability to have her voice heard. But right-to-work laws work against this ability, because they undermine the structural benefit of unions, which is to solve a collective action problem.

Representative organizations achieve the Federalist vision by allowing massive numbers of individuals to delegate their representation to a small number of people who can become experts and participate in a reasoned discussion at the table of government. Given that the size of government has not increased at the same pace as the size of the nation, this is the only way for many individuals to ever have their voices heard.