

# ENHANCING WORKER LIVES THROUGH FAIRER LABOR AND WORKLIFE LAW IN COMPARATIVE PERSPECTIVE

Paul Weiler<sup>†</sup>

## I. INTRODUCTION

The principal, though not the only, focus of this essay is going to be labor law and the current state of labor unionism. I will view America's needs and my prescriptions through the prism of my Canadian experience. However, I am fully committed to the principle I have always applied to medical malpractice and other brands of tort reform. Our focus must be on the interests of workers, rather than the unions (or lawyers) who represent them or the companies that employ them. Just as I have said to be the case with patients, we all wear several hats in our role as workers. Some of these coincide with the interests of our union, some with our employer's interests, and sometimes with neither. Indeed, there often are cases where different groups of workers have interests that conflict with each other, thus requiring the same principled analysis for assessing them—epitomized by affirmative action on behalf of minorities.

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<sup>†</sup> Friendly Professor of Law, Harvard University. This article is also going to be an important part of my ongoing *Radically Moderate Law Reform* book project, the right way to be renovating our recreational crimes like using marijuana, or betting with a bookie on sports and the fair constitutional and democratic treatment of issues like abortion, affirmative action, and gay marriages. This particular article draws on my comparative experience as a native Canadian Chair on one of its labor boards, before coming to the Harvard Law School in 1978 to start teaching the Labor Law course at the request of my own teacher and mentor in this field, Archibald Cox, and then serve as General Counsel for President Clinton Commission about The Future of Worker-Management Relations, chaired by my other great Harvard mentor, John Dunlop. This article brings into the new millennium the views I started developing and expressing in books like *RECONCILABLE DIFFERENCES: NEW DIRECTION IN CANADIAN LABOUR LAW* (1980), and then *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* (1990) about American law, as well as, numerous law review articles. Here, I especially want to thank my two partners in our new Harvard Labor and Worklife Program, Richard Freeman and our Executive Director, Elaine Bernard, for their valuable advice about this work, and also our recently-deceased mentors, Archibald Cox and John Dunlop, who taught all of us so much about labor law and labor economics.

Sadly, labor law reform, even more than tort reform, has been log-jammed in Congress for many decades. That is why a tiny majority of five Justices on the Supreme Court have played the major role in creating American labor law, rather than our elected members of Congress and the President. I am not implying that the source of our problem here is that our lifetime-tenured justices have been regularly biased against the worker interests (though sometimes they have). The far bigger problem is they naturally are concentrating on the specifics of the cases brought before them, and rarely do they fully appreciate what is systematically happening in our real work lives. Thus, what we now have to hope for—and vote for—is our elected members of Congress who can be engaging in a truly systematic and principled appraisal of all these issues and then creating the appropriate law of the workplace for this new millennium.

## II. HOW ARE WORKERS FARING

Of course, I realize that many Americans believe there to be no problem at all in the current state of our labor law and its impact on both the prospects of employees unionizing and thus securing better pay and fairer treatment on the job. I shall be discussing this empirical issue shortly. First, though, I should address a concern felt by even a host of workers that unionization has been destroying our national pastime, baseball.

These feelings are in part generated by the national equivalents of my own situation at Boston's Fenway Park. Back in 1967, my top-priced seats cost \$5 apiece, but by 2004 they had risen to \$75. So many people believe the reason is because, in 1967 the average player made \$19,000 and the top-paid players, Hank Aaron and Willie Mays, each made \$125,000. In 2004, baseball's salary average had reached \$2.6 million, led by Alex Rodriguez at \$23 million. Thus, we are told, our ticket prices also have to be an order of magnitude higher.

Unionization is also singled out as the major culprit because, as we will see later, 1967 was the same year that the Major League Baseball Players Association (MLBPA) was finally transforming itself from an employer-run "company" union into a fully independent players union. In 1976, the MLBPA and its lawyer used labor arbitration and collective bargaining to transform the traditional sports "reserve system" into player free agency and set off spiraling player salaries. That was the same era in which general private-sector unionization was starting to decline to its current incredibly low level. Thus, whereas back in 1947 when the players had actually opted for

“company” rather than real unionism, the average MLB player made 4.5 times the average American worker, by 1967 this ratio had dropped to 3.5-to-1, but in 2004 it has soared to 79-to-1.

We will see shortly how and why unionization and free collective, rather than just individual, bargaining can make that kind of transformation in workers pay and lives. Here, though, we should understand the fallacy of the standard claim that it is those higher player salaries that mandate these higher ticket prices. For example, few people even knew, and none were lamenting the fact that, in his previous role as *Terminator III*, in 2003 (just before he embarked on his current career as California’s governor), SAG union member Arnold Schwarzenegger was paid \$29 million by his studio employer, Time Warner, and it cost fans an average of \$7 to watch that movie in theaters around the country. Even more interesting, not just the top star, but all six of our great “Friends,” and AFTRA union members, were being paid \$24 million a season by NBC, but we did not have to spend a penny to watch them on our home television screens.

The basic teaching of economic analysis is that labor market costs do not much shape consumer market prices, but rather vice versa. In other words, it is the relative popularity of a particular product or service among its user-purchasers, as well as the degree of market power of its owner-providers that shapes the consumer price level. By contrast, labor unionization shapes the division of the total corporate revenues among the owners-shareholders and its workers, and also among different groups of workers—such as the CEO and his secretary. The true accomplishment of unionizing baseball players was to raise the payroll share (benefits as well as salaries) from 19% in the 1967 era of Hank Aaron to 58% for Barry Bonds and his fellow union members.

Far more important is what has been happening in our labor market over the last half century to the status of ordinary workers employed by truly giant corporations. Back in 1947, when private sector unionization was flourishing (except in sports), the biggest employer was the General Motors automobile manufacturer, whose regular workers had been fully unionized by the United Auto Workers (UAW). Their collective agreements were producing steady pay increases and rising vacation times, and were also beginning to create valuable health insurance and sick leave time.

By 2003, though, by far our biggest employer was Wal-Mart, with over 1.4 million employees doing the work at its 4,700 stores to generate \$250 billion in sales and corporate revenues. However, this totally non-union Wal-Mart has been able to become a hugely

profitable force in our store market (now around 20%) by paying its clerks and other basic staff—largely female—an average of \$8.50 an hour, or \$15,500 a year, with only two weeks of paid vacation and no affordable health insurance.

This growth in Wal-Mart and their weak employment conditions is now posing a major threat to the 800,000 unionized supermarket members of the United Food and Commercial Workers Union whose collective agreements provide around \$10 an hour more in total compensation for the same staff as Wal-Mart has. What we will have to be investigating, though, is whether this surging labor market inequality is just a self-inflicted wound by the workers themselves freely choosing not to unionize, or (at least significantly) because our current labor law makes this choice so difficult.

This comparison of the General Motors and Wal-Mart corporate power provides a really visible illustration of how our labor market has been transformed over the past half century. From 1947 to 1973, the real (i.e., inflation-adjusted) earnings of the ordinary, non-supervisory workers rose by more than 100%. In part, that was because we were then experiencing an average annual productivity increase of around 3%. However, the union movement was actually expanding the median worker earnings at a somewhat faster pace than even their well-to-do CEOs.

By contrast, in the past three decades, from 1973 through 2003, the real median hourly earnings have gone up less than 10%. The bulk even of that modest real gain has gone to female and minority workers who are finally getting at least some of the benefits of the civil rights legislation that Martin Luther King, Jr. helped produce in the mid-1960s. However, among white, male, and just high school educated workers, their real hourly wages have actually declined a little.

Of course, total family income has gone up somewhat more, though nowhere near as much as it did from 1947 to 1973. The simple explanation for that higher family gain is that the total amount of hours worked by all their members has been surging—from an annual average of less than 3,000 in the late 1960s to around 4,000 in the early 2000s. The most visible reason is that the wives and mothers are spending much of their time earning money to support their children, rather than staying home to raise them as they used to do. But the other reason is because both female and male workers are having to spend so much more time on the job just to preserve the previous real annual income.

Just after World War II had been won, the United States had the smallest average hours worked each year among the major countries. Now, though, Americans are by far the leaders in this rather unfortunate role. In 2002, the average individual American labored for 1,994 hours, the traditional “workaholic” Japanese averaged 1,803, the British 1,693, the French 1,685, and the Germans 1,557 hours that year. While one part of the reason for this relative change is because daily work time has been going up some here, the key reason is because the amount of American vacation time has dropped, while rising in every other country, along with truly observed national holidays.

Of course, this would not be a public policy problem if the average American simply preferred to work longer to make their earnings rise even more substantially than in those other countries and in the prior era. We have seen, though, that exactly the opposite has taken place even in total family income. True, part of the problem here is the drop in average productivity growth from around 3% a year between 1947 and 1973 to under 1.5% a year from 1974 through 1989, and under 2% since then. Still, though, that total productivity growth of around 60% over the last three decades could have produced a substantial increase in hourly earnings, and a dramatic increase in total family earnings with the surge in total hours worked each year.

One major change that took place in the American labor market in that period, with an obvious effect on average working earnings, was the surge in immigrants. While a few came south from Canada or across the Atlantic from Europe, the bulk came from Mexico and South America, or across the Pacific from Asia. With around one million immigrants coming legally each year and another half million coming illegally, they now make up over 12% of the total population and the same percentage of the workforce. While most of the foreigners working illegally here are doing so in southern states like Texas, the same trend is true across the country, including a significant share of the staff in the World Trade Center on September 11, 2001.

This trend over the last thirty years has caused a major competitive problem for the legal workers whatever their citizenship, because the average illegal immigrant cannot level a claim for the minimum wage, let alone the right to unionize. Thus, if we are going to be securing fair treatment of the legal workforce group, we should definitely be tightening up, not loosening the enforcement of immigration law for the lower class, unskilled workers slipping across our borders, especially by more vigorously investigating and

prosecuting employers like those in the World Trade Center that were knowingly hiring and underpaying them rather than their legal worker competitors.

For our purposes, though, the other key reason why earnings of the ordinary native-born American worker—especially white males without a college degree—have not been going up at all is because of the dramatic drop in private sector unionization (except for professional stars like an Alex Rodriguez or our “Friends”), whose labor law implications we shall soon be investigating. The key beneficiaries, then, have been the general stockholders and the CEOs and other corporate executives of companies like Wal-Mart.

For example, back in 1973 the major Dow Jones stock market index was under 1,000, while now it is over 10,000. At that same time, the top 100 CEOs were averaging \$1.3 million in total pay, or 217 times the average worker salary of \$6,000, while by 2000 those CEOs were earning \$41.1 million, or 1,284 times the average worker salary of \$32,000. True, because much of those CEO earnings now comes in the form of corporate shares, this top average plunged along with Dow Jones going down from 11,500 to under 8,000 in 2002 (for reasons I explore in another *Radically Moderate Law Reform* chapter about “Renovating Our Recreational Crimes,” about how gambling in casinos, lotteries, and sports addicted many American investors to start gambling in the stock market). However, now that Dow Jones and other stock indices (except for the Internet Nasdaq) are closing in on their previous peaks, the CEO pay is doing so as well.

As yet another indicator of how well we have become the most unequal as well as hardest-working of any of the major democracies, whereas back in 1970 those CEOs earning anything close to \$100,000, let alone \$1 million, had to pay the top tax rate of 70% under President Richard Nixon, our current President, George W. Bush, has managed to reduce this top rate to 35% (and only 15% for the capital gain part) for the CEO earning a mere \$30 million. In Germany and Japan, as well as other major countries, while the average worker earns more, the top CEOs earn far less and pay significantly higher taxes, while their economies (and relative currency values) continue to grow.<sup>1</sup>

As was mentioned earlier, at the same time the real and relative earnings of the American workers began dropping, private sector

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1. Another revealing 2000 survey comparing CEO-worker ratio in large domestic companies around the world found the American ratio to be 531-to-1, Britain's 25-to-1, Canada's 21-to-1, France's 16-to-1, Germany's 11-to-1, and Japan's 10-to-1.

unionization and collective bargaining were steadily going down. However, there were two important exceptions to the latter trend. The most visible was professional sports where not only the players, but also the umpires and referees asserted their National Labor Relations Act (NLRA) right to unionize. The much more substantial one was in the public sector where lawmakers had begun in the late 1950s and early 1960s to extend to federal, state, and local government employees this same fundamental right. That is why approximately 40% of public employees—topped by teachers—are now bargaining collectively rather than just individually with their employers.

While that same percentage figure had previously been reached in the far larger private sector after World War II and the Korean War, it started to decline steadily during the Vietnam War era and ever since then. Now just 8.5% of American private sector workers are unionized—actually slightly less than the percentage when Franklin Roosevelt was being elected in the midst of the Great Depression and during which our federal labor law regime was created. Obviously, not just professional athletes but airline pilots, autoworkers, steelworkers, and a host of other traditional highly-organized worker groups are still enjoying the benefits of unionization. However, only a tiny fraction of the workforce in the rapidly-expanding service industries (e.g., Wal-Mart) and southern states (like Texas) have been able to engage in collective rather than simply individual dealings with their powerful employers.

Of course, the natural response to this situation is that it may simply be reflecting the actual wishes of these worker groups. If that were truly so, I want to emphasize that, even though I believe such a sentiment to be mistaken, it should not be the cause of labor law reform.

The same principle that I have been advocating for medical malpractice reform—that we must be focusing not on the interests of lawyers or doctors but rather the patients, while recognizing that the latter includes not just those being injured by their treatment but also those paying almost all the financial costs through health insurance—must also govern this labor setting. Thus our legislators should stop concentrating here just on the interests of either the unions or the employers, and instead on the true needs and wishes of the workers (the ordinary ones, not their CEOs). And all workers and their families do have an interest, not just in getting better pay on their jobs, but also securing better-quality goods and services in their other key role as consumers.

It certainly is the case, as my Harvard Labor and Worklife partner Richard Freeman and his fellow economic scholars have documented, that for essentially the same skills in the same industry, collective rather than individual bargaining lifts the average wage by about 20%, the variety of benefits by about 40%, and thus overall compensation by around 28%. These workers also gain the right to fairer treatment regarding employer discipline or discharge, in place of the common law, non-union standard of employment just being “at will” of the employer.

Professor Freeman also conducted an important national survey for President Clinton’s Commission on the Future of Worker-Management Relations (for which our joint Harvard mentor John Dunlop was Chair and I served as their Chief Counsel). He found that there are now more than 15 million American private sector, non-union workers who would like to be able to engage in collective bargaining with their employer, and more than 90% of those currently represented said they were pleased with this system and wanted to retain it. If that non-union worker wish were able to be satisfied, the overall percentage of private sector union representation would both match its previous total and the current public sector one. These data have been continued more recently and in the context of American-Canadian comparison.<sup>2</sup>

Why is that national wish not being satisfied? In part because that same poll found around 80% of American non-union workers saying that they felt their own employer would quickly fire a worker who was visibly advocating such unionization and 40% saying it would be happening to them personally. That is why we truly do need major labor law reform if we want to live up to President Roosevelt’s principle here.

### III. WHAT SHOULD WORKERS RIGHTS BE LIKE?

We shall begin with the easiest and most obvious brand for reforming our law of worker lives, relating to minimum wages. I should mention that this field is now labeled “employment” as opposed to “labor” law because it covers workers irrespective of whether they are or are wanting to be unionized. This Fair Labor Standards Act (FLSA) was signed by President Roosevelt in 1938 as the pioneering federal employment statute. This was three years after

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2. SEYMOUR M. LIPSET & NOAH M. MELTZ, *THE PARADOX OF AMERICAN UNIONISM: WHY AMERICANS LIKE UNIONS MORE THAN CANADIANS DO BUT JOIN MUCH LESS* (2004).

he had signed the NLRA creating the workers right to unionize and just one year after the Supreme Court made that famous “switch in time that saved nine” in *Jones & Laughlin Steel*,<sup>3</sup> where the Supreme Court finally upheld the constitutionality of federal lawmakers shaping the labor market across the entire nation.

In this new millennium, it is intriguing to realize that the first minimum wage set by Congress was what was considered a generous 25 cents an hour. This sum then rose steadily over the next three decades and reached its real peak in 1968 when President Lyndon Johnson signed a Congressional raise to \$1.60, which in current dollars would be worth around \$8.00. Then the real minimum rate started going down under political pressure from the business community, especially during the last fifteen years when it was raised only once, to \$5.15 in 1996, which is worth well under \$5.00 in current dollars. Obviously this drop has made some contribution to the decline we have witnessed in overall worker wages, and thence the surge in corporate profits and CEO salaries.

In appraising this legal policy issue, we should be aware of what I have always felt was a truly sensible brand of law reform achieved in another setting two decades ago by a former union president in Hollywood who had become our President in Washington, Ronald Reagan. In the early 1980s, Reagan persuaded Congress to reform our tax laws to have the income numbers where people move up on the graduated tax spectrum adjusted annually for inflation. Thus, if our federal government is going to be truly ethical, they should finally be applying the same economic principle to our minimum worker wage as we do for our wealthy taxpayers. Ideally this should be done by calculating what our FLSA minimum would now be if it had been adjusted every year since 1983 in tandem with our tax law, and thus at least bringing it up close to the current \$7 plus minimum north of the border in Canada.

Of all the current brands of employment law, this is the most obvious and simplest—but still significant—brand of reform. Later on we will be addressing one of the complex issues posed by our most litigious brand of employment law—affirmative action under our civil rights legislation. Here, though, we will focus on our original brand of worklife law, labor relations, and what can and should be done here to allow workers themselves to cure our major surge into financial inequality.

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3. NLRB v. Jones B. Laughlin Steel Corp., 305 U.S. 1 (1937).

Among the many pioneering things that the original NLRA (typically labeled the Wagner Act, in honor of its sponsor) did was to create the first legal remedies for discriminatory employer action—i.e., discharging or disciplining a worker for supporting a union. But after the Supreme Court Justices upheld its constitutionality in 1937 by finally reversing their traditional position that employers had a constitutional—not just a contractual—right to terminate “at will” employees (thus providing the federalism basis for the broader anti-discrimination legislation of the 1960s), they then began to read in a very restrictive fashion the remedies offered by Congress to the workers fired because of anti-union discrimination.

In monetary terms, the only damages an employee can secure is the net back pay lost for supporting the union, and to calculate this the Board must not only deduct the actual money the worker has earned from another job, but also calculate what would and should have been earned by that worker, taking all the reasonable steps needed to find an alternative job. The result is that, by 2002, the median award to employees under the NLRA was a mere \$2,750, and even that amount is deemed by another branch of our federal law to be a tax-deductible business expense. Interestingly, this “mitigation” doctrine (modeled on the traditional “no-fault” contract law) was created in *Phelps Dodge*<sup>4</sup> by Justice Felix Frankfurter who had drafted the Norris-LaGuardia Act and had been active in defense of labor interests while a member of the Harvard Law School faculty.

Frankfurter and his colleagues’ rationale for their ruling is that we did not need any meaningful financial sanctions against the employer because the Board was empowered to and was regularly reinstating the illegally fired employee in his or her job. In many situations, that is a more valuable instrument for protecting the real needs of the worker, not only by making up the net financial losses but also remedying the corresponding ramifications on his or her personal life. Equally if not more important, requiring the employer to take back a key union supporter during the midst of that organizing campaign would send the message to all of the fellow employees about both the need for and the value of group action under labor law to challenge the absolute authority of management under the traditional common law of employment.

Unfortunately, the “Achilles heel” that Frankfurter would not have realized back then is that the complex NLRB process and further need for federal circuit court endorsement and enforcement of such

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4. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

reinstatement means that the employer now does not face a legally-binding order until, on average, more than 1,000 days have passed since the original illegal firing. Even if the employer settles earlier, as they regularly do in order to reduce their total legal bills, almost invariably this occurs only after the workers who wanted to unionize have lost their organizing campaign and/or election. The overall result is that only one in three of the reinstated employees now even exercise the right to go back to work for the employer that fired them, and of those that do, nearly four out of five then feel compelled by their management treatment to quit those jobs within the next year.

The natural reform here would simply be finally extending to workers fired for supporting this unionization cause the same right to go to court and sue their employer for at-large damages for this brand of discrimination. As we have seen, it was labor law that produced the constitutional precedent that eventually allowed Martin Luther King, Jr. to produce the civil rights acts banning racial and gender discrimination. In this new millennium, we regularly get jury verdicts for well over \$1 million for such personal discrimination, and there have been some class action suits producing orders of magnitude higher amounts. If a black woman has been fired for leading a collective organizing effort among her fellow employees, she seems morally entitled to the same brand of legal relief as another one who, for example, felt bound to leave her job due to sexual harassment by her supervisor. And from the point of view of prevention of harm to future victims, not just compensating the previous ones, such a legal damage prospect would certainly give employers a much stronger incentive not to be violating these long-time worker legal rights.

However, my radically moderate brand of labor law reform here is to drastically enhance the speed and thence the effectiveness of the worker reinstatement remedy. The simple way to do that is to give the victim of such firing in the midst of a representation campaign the right to have the General Counsel of the NLRB go to court and get an injunction ordering the employer to reinstate the worker on her job until and unless a decision (or settlement) is reached that this firing was justifiable. One of the reasons why that is truly fair is because, in later additions and changes to the NLRA, Congress has given employers precisely that brand of legal relief when unions, typically for organizational purposes, set out to produce "secondary boycotts" of their business operations.

If we want to be truly ethical here and be extending equally fair treatment to both sides of the employment relationship, all our Congress has to do is give the workers who are illegally fired for their

organizational efforts the same immediate injunctive relief that their employers regularly use to block their unions from producing illegal boycotts of them. From the point of view of workers as a whole, quickly reinstating such an employee in her job while the representation campaign is still going on is the best way for the law to be restoring and preserving the feelings among fellow employees that they do have a “real” legal right to organize themselves and thus collectively advance everyone’s pay, benefits, and treatment on their jobs.

I have long felt, though, that even more important than having the law quickly undo the harms being inflicted on a worker leading such self-organization is to reshape the labor law setting to make such injuries far less likely to occur. We must be reforming the American tradition of protracted election campaigns in which some employers always feel tempted to engage in such illegal action because their potential gains from this far outweigh any legal damages.

I do not want the United States, though, to be adopting the Canadian tradition of having no secret ballot election at all and certifying the union as the exclusive bargaining agent once it has signed up a majority of the unit employees as its members. Instead, I have long favored a system developed in the province of Nova Scotia a quarter century ago—one that the employers were advocating and the unions opposing there—with the Labor Board conducting an “instant” election no more than one week after the union had applied with its special majority card membership (at least 55% of the unit). If there are any legal issues requiring a hearing, e.g., about whether a contested voter is actually an excluded supervisor, the ballots are simply sealed up to be counted only after the board decision is made.

This kind of election does give all the affected employees an opportunity to reflect on whether they really do want to have a union representing them, and then casting their ballots in the secrecy of the voting booth rather than simply signing the union authorization cards and handing them over to its official. However, a truly prompt election largely removes the opportunity for the less scrupulous employers to single out a couple of key union supporters to be discharged, disciplined, or demoted—to send out the message to the rest of the staff about how their working lives can be truly endangered if they take that crucial step.

There is a natural counter-argument by the employer movement, especially from those that would never engage in such an egregious violation of federal law. Understandably, they feel they would be deprived of an equal right to participate in an extended campaign for

the allegiance of the worker-voters, after the union has already been able to spend extensive time presenting their case to the workers while signing up their majority. The typical analogy given is that this would be a labor law equivalent of what we all believe would be an immoral as well as unconstitutional political election that allowed the Democratic party, for example, but not the Republicans, to campaign effectively for voter support.

There are two other analogies, though, that display why it is just an illusion to assume that when a union wins an NLRB election, it is then being certified to govern the employer or even the employees. The truth is that labor law just gives the victorious union the right—and also the duty—to fairly represent that unit of employees in an upcoming round of collective bargaining with their employer. For example, under employment law no one would ever dream of asserting that the employer should have an affirmative right and opportunity to campaign against an individual or group of its employees, deciding to hire a law firm to challenge the company's policies regarding sexual harassment or safety on the job. Similarly, the corporate lawyers and lawmakers have always firmly stood against any legislative effort to give employees the equivalent rights of shareholders in campaigning as well as voting about a proposed corporate merger or “downsizing” designed to enhance the company's revenues, stock prices, and CEO earnings.

Thus, if we want all of our worklife legal system to be truly principled, American labor law must finally be recognizing that employees alone are the relevant constituency to be making the arguments and the judgments about whether they really do need to be collectively organizing themselves into a union to press management to start enhancing rather than reducing their real pay and working conditions.

#### IV. HOW TO RESHAPE COLLECTIVE BARGAINING

We should be aware, though, that our current labor law—again largely fashioned by the Supreme Court, not Congress—also imposes some significant constraints on what the employer can do vis-à-vis its workers once they have voted in favor of representation by their union. Thus, to live up to my principle of advocating truly radically moderate, not just one-sided, reform here, I now must make my case for Congress also relaxing the obligations that the Board certifying the union is also imposing on the employer.

Back in 1935, when the NLRA was being fully debated in Congress, the Senate Labor Committee Chair, Senator Walsh, stated that, after the union had been certified, “all the bill proposed to do is to escort them to the door of their employers and say, ‘Here they are, the legal representatives of your employees.’ What happens behind these doors is not inquired into by this bill.” However, beginning in the 1950s, the Supreme Court Justices began reading the employer’s resulting section 8(a)(5) duty to bargain in good faith with the union as entailing not just a genuine willingness to reach and sign a collective agreement, but also to impose some real duties and limits on what the employer was doing on the way there. For example, in its 1956 decision involving *Truitt Manufacturing*,<sup>5</sup> the Supreme Court endorsed a ruling by the Eisenhower Labor Board that the employer had violated section 8(a)(5) by refusing to let the union’s accountant examine the company’s financial records in order to assess the truth of what the employer had said in rejecting the union’s demand of a ten cent an hour pay increase for its members: “this would break up the company.” The Supreme Court said that “good faith bargaining necessarily requires that claims made by either bargainer should be honest claims,” and so both sides have to open up their books to document this.

An even bigger move here was made in the *Katz* case in 1962,<sup>6</sup> when the Court again dramatically expanded this NLRA provision. The Eisenhower Board had found the employer violating this statutory provision by giving in the midst of collective bargaining overall pay increases to the employees that were lower than the union’s demand but higher than the employer’s offer, and also instituting a new “merit pay concept” for a few workers that had been discussed but not agreed to at the bargaining table. The Justices held that such employer action could not be taken unless the union had consented or an “impasse” had been reached in the collective bargaining. A vivid display of how such a legal impasse requires a true bargaining deadlock is that, in February 1995, the Clinton NLRB General Counsel told MLB Commissioner Bud Selig that the owners had not yet reached a deadlock in their bargaining with the players union about their proposed hard salary cap that they had presented to the union in June 1994, and after producing the World Series shutdown that fall, they had unilaterally implemented that winter for the next season.

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5. *Truitt Mfg. v. NLRB*, 351 U.S. 149 (1956).

6. *Katz v. NLRB*, 369 U.S. 136 (1962).

In an earlier part of my professional career as a labor board chair in my native Canada, I adopted instead the philosophy of the dissenting U.S. Supreme Court Justice Harlan in *Borg-Warner* (1958), that “the bargaining process should be left fluid, free from intervention of the Board.”<sup>7</sup> I regularly ruled that, as long as the employer was genuinely prepared to negotiate with the union a contract governing some conditions of employment in the unit, it should be under no legal obligation even to discuss any one particular topic, let alone have to give the union detailed information and its records about it and/or refrain from taking any action itself on these issues unless and until its lawyer could persuade the board that any more negotiations about it would be fruitless. Instead, both the employer and the union should feel the incentive to take or refrain from any such action because of the position or power on the other side of the bargaining table, rather than labor law. So as part of any full-blown reform of American labor law for this new millennium, I would definitely advocate Congress rolling back this section 8(a)(5) jurisprudence and restoring the principle that collective bargaining is supposed to be truly free.

However, in order to make such fully free collective bargaining actually effective in enhancing worker lives, we do need another major reform here. What should the employer be able and not able to do when its employees decide to act as a group by going on strike to try to persuade their management to offer them somewhat better pay and working conditions?

In their original 1935 NLRA, Congress conferred on workers, after they had organized themselves into a union and started to bargain collectively with their employer, and if they now felt it necessary to enhance the employees’ position at the negotiating table, the right to engage in “concerted action”—i.e., to go on strike. However, just three years later, in *Mackay Radio* where the Supreme Court was overturning a circuit court ruling that it was unconstitutional for this federal law to prevent the employer from forever refusing to take those legal strikers back, they said the employer still “was not bound to *discharge* those it had hired to fill the places of the strikers.”<sup>8</sup> Six decades later, that casual Supreme Court dictum remains as one of the most unfair features of the American law of the worklife, one that has not been followed in any other major nation around the world. *Mackay Radio* is actually an important

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7. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 358–59 (1958).

8. NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938).

reason why later Justices felt compelled to expand the scope of the employer's obligation to bargain in good faith. The major exception that the Court, in *Mastro Plastics*, carved out of the firm's freedom to permanently replace (rather than just discharge) its legally striking employees is when that work stoppage was in part initiated or has been prolonged by its bad faith bargaining.<sup>9</sup> That it is why it is crucial that our lawmakers are rolling back *Mackay Radio* at the same time they are doing that to *Katz*, *Truitt*, and the other mistaken judicial expansions of the employer's section 8(a)(5) obligation.

Viewing this issue by itself, though, I have always felt that a worker does not find there to be much real difference between being fired or permanently replaced in their jobs. Consider, for example, a woman who exercises her right under an important brand of federal employment law, the federal Family and Medical Leave Act (FMLA), to take unpaid leave from her job to give birth to her first child, the Supreme Court would never dream of ruling that her employer, while prohibited from discharging her, could be permanently, not just temporarily, replacing her. And one reason for applying that same principle to the woman exercising her legal right to strike is that it is much easier for one woman to look for and find another job at a different firm after giving birth to her baby than for an entire group of women who have rebelled and struck against their employer's low pay and then are all required to look for new jobs after having been permanently replaced in their long-time ones.

From the point of view of the employer, this permanent replacement prerogative gives the employer a major, but by no means essential, weapon in the labor battle with its staff. Even if that work stoppage does fully shut down the firm's operations, it also operates as a double-edged sword that is pressing the strikers to start reducing their bargaining demands and thence reach a settlement. After all, these workers are almost always left without any work or pay, with the financial impact on their family lives far greater than the economic costs being inflicted on the company's shareholders, let alone the still highly-paid executives sitting on the other side of the negotiating table.

Even more important, the employer is and should continue to be free to recruit temporary replacements in order to keep its business operations going. One of the most visible examples of the viability of this option—one that Hollywood eventually turned into a movie, *The Replacements*—was the football players' strike in the fall of 1987. The

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9. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956).

owners were able to keep the league schedule going by using replacements, most of whom had been beaten out for those roster positions in the summer training camps. I have always believed that the employer should have that freedom, and thus opposed those Canadian labor law statutes that have, and in some cases still do ban even temporary striker replacements—though never stopping the strikers from finding temporary jobs for themselves. The NFL owner-employers, though, would never have dreamed of permanently replacing such All-Star quarterbacks and future Hall-of-Famers as John Elway and Dan Marino. And just a year before, in *Harter Equipment*, the Reagan Board, while ruling that the employers were entitled to replace the workers whom they had locked out during their negotiating struggle with the union, said they could only do so temporarily, not permanently.<sup>10</sup>

Many American firms have regularly demonstrated their ability to recruit temporary replacements in strikes as well as lockouts, and their Canadian, German, Japanese, and other branches have always had to do that. Thus, we now have tangible evidence that the Supreme Court is giving the employer the further option of offering permanent status to its replacements is not that crucial in maintaining its operation, especially in what has generally become a much more “contingent” worklife in this new millennium.

Actually, the combination of both the bad faith bargaining ban on permanence fashioned by the Supreme Court in *Mastro Plastics* and the regular economic pressure generated by the strikes and resulting settlement terms means that the employer is not able to guarantee the replacements having permanent status on their jobs.<sup>11</sup> That is why, in *Belknap v. Hale*, the Justices actually advised future firms, if they wanted to insulate themselves from being sued for breach of contract by replacements who were let go, the “permanence” they were offering these “at will” replacements would be contingent on the strikers not being able to get their jobs back via either an unfair labor practice charge or a negotiated contract settlement.<sup>12</sup>

Our labor law also imposes some major restraints on what the union members can do when the employer is able to keep operating, whether with permanent or temporary replacements. The 1947 Taft-Hartley amendments to the NLRA did seek to impose a legitimate ban on secondary boycott efforts by unions (especially for organizing

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10. *Harter Equipment*, 280 NLRB 597 (1986).

11. *Mastro Plastics Corp.*, 350 U.S. at 270.

12. *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983).

efforts among reluctant workers). In *Tree Fruits*, the Supreme Court read this section 8(b)(4) properly as not prohibiting the union from stationing itself outside a store and asking consumers not to buy their struck product, as long as their signs were making it clear they were not asking people not to go into the store at all and buy the truly secondary goods.<sup>13</sup> However, in *Sand Door*, they had already (and mistakenly) ruled that when the union asked the store workers not to process and sell that struck primary product to customers who were ignoring their request, this was an illegal secondary, not a legal primary boycott.<sup>14</sup>

We shall see in a later section of this piece, how the Supreme Court has also read the NLRA as imposing major restraints on what a union can do to its own members when they choose to cross the picket lines and go back to work—as the NFL stars Joe Montana and Tony Dorsett did in that 1987 football strike. However, the key reform that I have long advocated here, along with overturning the *Katz* and *Truitt* restraints on the employer, is to do with the same thing with *Mackay Radio*. Employers should be free to use just temporary replacements of their striking as well as locked-out employees. American workers would then finally enjoy the same meaningful right to strike without being permanently replaced in their jobs as they now have with the FMLA right to leave work to care for a sick child, for example. Indeed, I would follow the FMLA model further, and state that this right to be on strike and free of permanent replacement should have a time limit—whether the twelve months of the FMLA or perhaps only the six months in the original Ontario labor law in this area.

I would suggest that Congress add this further legal feature to union strike action. Workers should become entitled to protection from permanent replacement when they go on a legal strike, because the union should be permitted to call such a strike only with secret ballot majority approval by the affected members. Certainly this condition would add to the political appeal of rolling back *MacKay Radio*. From a policy perspective, though, it would also ensure that union members, not just union leaders, have focused on whether the immediate paychecks they are giving up (even though they are no longer “gambling” their permanent jobs) really are necessary to extract a fairer settlement offer from their employer.

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13. NLRB v. Fruit Packers (*Tree Fruits*), 377 U.S. 58 (1964).

14. Local 1976, Brotherhood of Carpenters & Joiners v. NLRB (*Sand Doors*), 357 U.S. 93 (1958).

And that secret ballot feature to union strike decisions would reinforce a point I made earlier. Congress should feel comfortable about replacing protracted with prompt certification elections to make union representation more accessible to the fifteen million non-union employees who now want it, because the key decisions made by the union (including contract ramification) ultimately are made by the workers themselves. Indeed, there should be a similar right of employees to vote about whether to accept the employer's last contract offer or to ratify a negotiated settlement.

#### V. FREEING UP NON-UNION EMPLOYEE INVOLVEMENT

If we are finally reforming our labor law to give ordinary American workers the same right to organize themselves into a union and bargain effectively as well as freely with their employers, we should also be at least relaxing and ideally repealing another outdated feature of the NLRA. This is section 8(a)(2), whose wording and NLRB reading bans the employer itself from collectively organizing its workers into a body to deal with a host of their concerns on the job. As I noted earlier, my Harvard Labor and Work Life partner, Richard Freeman, has conducted a national survey that found around fifteen million currently non-union workers would like to have independent representation to help them improve their stagnant pay and benefits. However, this number was actually dwarfed by the approximately fifty million workers (some already unionized) who want to have a much stronger voice in what is happening in their day-to-day working lives.

This is not just a matter of what employees would like to experience and enjoy. There can be real economic gains from more cooperative employer-employee relationships, in which management gives employees a real say in their jobs. Employers (and the economy) can derive large benefits from employee insights and commitment to more efficient production of higher quality goods and services; and this at the same time as employees (and the society) are experiencing real involvement in, and influence upon, the quality of working lives. However, a key message I have derived from my scholarly colleagues in human resources management (e.g., M.I.T. Professor Tom Kochan) is that innovations such as work teams, worker-management committees, and the like will have a meaningful and enduring impact on production quality only if the employees involved see that the firm's program has a reciprocal focus on their concerns, as well as those of the firm's customers and shareholders.

Unfortunately, there is a major obstacle in present-day American labor law to such reciprocal treatment. In *Electromation, Inc.*, the working of the original NLRA ban on “company unionism” was definitively interpreted by the first Bush Administration Labor Board as barring such human resource practices.<sup>15</sup> It is now illegal for a company alone to fashion an “employee representation committee” that “deals with” the employer about any of the employee’s “working conditions.” That means that a nonunion firm is free to establish and administer an employee involvement program that focuses just on the employer’s productivity problems, but not on the employees’ concerns about job safety, fair discipline, benefit administration, and the like.

I have always been somewhat skeptical about the overall public benefits of this legal ban on “company unionism.” Perhaps this is because of what I have learned from teaching and writing about sports and entertainment law. Back in 1921, in order to fend off a unionization drive by Actors Equity, the infant Hollywood studios created the Academy of Motion Picture Arts & Sciences for their actors, writers, and directors. However, while that body did successfully create our Oscar Awards in 1928, they were not standing up to the 50% salary cut being ordered by the Motion Picture Association in 1933. That is why the stars, led by Eddie Cantor, organized themselves into a real union, the Screen Actors Guild, that easily recruited their bit players like Ronald Reagan (who eventually became their union leader) to sign up as members and block that cap.

All this happened before there was any NLRA banning any anti-union employer action, but that key self-help step is why union member Schwarzenegger was able to secure \$29M to star as our *Terminator*. Even after the NLRA was enacted with its section 8(a)(2), right after World War II everyone assumed that our National Pastime, baseball, was not covered by federal labor as well as antitrust law. Thus, in 1947, led by the New York Yankees, the baseball owners created another company union, the Major League Baseball Players Association (MLBPA), to fend off an organizing drive among the Pittsburgh Pirates (including Ralph Kiner). By the 1960s, though, concerned about their relative pay dropping, they decided to turn themselves into a real union, with MLBPA President Robin Roberts hiring two Steelworker Union officials, Marvin Miller and Dick Moss, to be their Executive Director and General Counsel. We all know what the effect that player unionization has had on player salaries. What few people know though is that the person who was told by

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15. *Electromation Inc. and International Brotherhood of Teamsters*, 309 NLRB 990 (1992).

Roberts in January 1967 that he had lost out to Moss as MLBPA Counsel then started a new career effort—to become our President Richard Nixon. Thus, these two employer-created company unions were turned by the members themselves into the highest-paid unionized workers, and also helped install two people in the White House as our Presidents.

I must acknowledge and address, though, the apparently plausible argument that the union movement has long made about why we should be preserving section 8(a)(2)—to avoid the dangers of conflict of interest. Certainly we would all consider it to be a serious breach of professional ethics as well as the law if a company was hiring and paying for the lawyer it then provided to represent its employees in settling, let alone litigating, a civil rights or employment lawsuit against the firm. Thus, an analogous conflict of interest is felt to exist when it is the employer that is creating and administering (e.g., selecting all the committee members) to deal, not just bargain, with the firm regarding the appropriate pay, benefits, and other “conditions of work.”

American workers also feel that same concern. The Freeman survey that discovered the huge, unsatisfied worker demand for more participation by them in determining what is taking place on their work site also found that more than 90% wanted the employees, not the managers, to be selecting who would be representing them on any such committee. However, the proper way for the workers to get all of their employee involvement wishes satisfied is not by enforcing a negative legal ban, but by following the lead of junior actor Reagan and organizing themselves into a full-blown union.

In sum, corporate management should again be made free to fashion whatever forms of employee representation that they think would make their firm more attractive in the labor market as well as more effective in the consumer market. However, employers should be given that full freedom by repealing section 8 (a)(2) only as part of a much broader labor law reform that makes full-blown and effective union representation available to those fifteen million American workers who would like to take that route, but now understandably feel intimidated against trying for it. This blend of radically moderate labor law reform would truly enhance the efficiency as well as the fairness of our overall economy.

## VI. LABOR AND POLITICS

In one of my earlier books, *Governing the Workplace*, I have actually advocated the law going even further here, and in some cases mandating, not just permitting, the employer to organize its employees into a body to address a key issue in their jobs—workplace safety (which I was able to help produce in Ontario).<sup>16</sup> Rather than just relying on the distant and not-so-effective regulation by the government—i.e., the federal Occupational Safety and Health Act (OSHA)—an elected body of nurses in the hospital or pilots on the planes should be playing a significant role in making their workplace settings safer for all of them (including discovering and recommending the disciplinary treatment of any of their colleagues who seem particularly careless).

There are a host of other areas of our law of the workplace that can and should be improved, either modestly or radically, but principally from the point of view of the workers as a whole, rather than their employers or unions. But since the latter bodies are understandably the more important forces in the legislatures and even courts, our political leaders should always be putting together their packages of reform. In particular, the union movement should be giving up their section 8(a)(2) ban on company unionism and the *Truitt* and *Katz* restraints on employer freedom in collective bargaining in order to be securing instant rather than protracted elections and a ban on the employer permanently replacing, not just officially discharging, its employees who have exercised their apparent “right” to strike to secure somewhat better pay for their work.

Of course, in order to secure any such meaningful law reform here, the workers have to go out to vote, and do so from the proper perspective. For example, in the fall of 2002, only 39% of the eligible Americans—and less than 10% of working class white males—took the time to go out and vote in the federal elections, thus producing a truly conservative Congress that reduced the top tax rate even more for the wealthy Americans (of whom more than 80% voted). However, that same fall 83% of the eligible Germans went out to vote, and so the legislature they elected has been raising their minimum wage to the world’s highest, rather than reducing their CEO tax rates. But vividly illustrating why the relative treatment of working class Americans is a largely self-inflicted wound, a recent Times-CNN News poll found that 19% of Americans believe they are

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16. PAUL WEILER, *GOVERNING THE WORKPLACE* (1990).

already in the top one percent of income earners and another 20% think they will eventually be there.

There is nothing that the law can or should be doing to make voting mandatory. It is true, though, that union members are far more likely to be doing so: while they make up only 13% of the national workforce, they account for nearly one quarter of the actual electoral vote. Thus, the final legal policy issue I shall be addressing here relates to the production of a more level political field—in particular, the shaping of union expenditures of membership money in campaigns.

As prelude, I should provide a brief synopsis of the legal treatment of collectively bargained union security clauses. These traditionally required every worker represented by the union in the unit certified by the NLRB to then join the union and pay its monthly dues that were spent not only representing these employees but also trying to organize both the units at other firms and the general electorate in political campaigns. Under the original 1935 Wagner Act, the NLRA imposed no restraints at all here, including the traditional “closed” shop in several industries. When the employer had agreed to such a term, it meant that its job applicants already had to be members of that union to be able to get a job there in the first place.

Governmental regulation of those and other union actions began in the 1947 Taft-Hartley Act. Congress properly wanted to start giving workers some rights vis-à-vis the union to emulate what they had done vis-à-vis the employer in 1935. In particular, closed shop contracts were banned in every industry except construction, where the typical project and employment time in each craft are very short and the workers are really employed by the entire industry. The only union security clause permitted was one that required employees to join the union within thirty days of being hired, and only if all unit members were given the right to full membership (i.e., being able to cast a vote in any elections and strike or contract ratification mandates).

An unprecedented further feature to Taft-Hartley, enacted by Congress over the attempted veto by President Truman, gave state legislatures the power to go even farther and ban contracts requiring an employee to join the union in order to keep his job. By now, twenty-one states—the vast majority in the south—have exercised this power to give their residents the “right to work” vis-à-vis the unions. Their laws apparently restricted the union to securing a contract from the employer that required the bargaining unit members to pay their

standard dues, not to join the union and thus become subject to discipline for violating its rules—e.g., crossing the line to go back to work during a lawful strike.

As seems to be the case in all of American law, especially about our worklife, the even bigger legal moves here were made by the Supreme Court rather than Congress. This took place in a pair of decisions rendered on the same day in 1963, sixteen years after Taft-Hartley had been enacted. One of them, *General Motors*, read this section's "membership" requirement as limited only to requiring the employee to pay the union its dues—i.e., an "agency" clause.<sup>17</sup> The other, *Schermerhorn*, then said that the dissident states could ban even those contractually mandated worker dues.<sup>18</sup> And twenty-five years later, in its *Beck* decision, the Justices expanded their legal standards even further by holding that in states like California and New York where an agency contract clause could require all unit members to pay their union representative its dues, anyone who had exercised their judicially-created freedom to choose not to join that union, now also had the right to secure repayment of any percentage share that was spent on politics (or organizing other bargaining units).<sup>19</sup>

These largely judicially-imposed restraints on the union security clauses that unions were previously freely negotiating with the employers were fashioned by the Supreme Court shortly after it had produced its greatest-ever labor law invention—fair representation by the union. This began back in 1944 in the *Steele* case where the Court accepted the position (advanced in a brief *amicus curiae* by an attorney who later became the first-ever African-American Justice, Thurgood Marshall), that the union owed such a duty to every employee in the bargaining unit, including these black railroad workers whom this union was then barring from membership.<sup>20</sup> This was done two decades before Martin Luther King, Jr. finally persuaded Congress to enact the Civil Rights Act that made such racial (and also sexist) discrimination illegal by employers as well. Since then, this labor law obligation has rightly been expanded by labor boards and courts to cover a host of positions taken by the union in negotiating and administering its contracts. And that duty is equally owed to every bargaining unit member, including those who

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17. NLRB v. General Motors Corp., 373 U.S. 734 (1963).

18. Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn, 375 U.S. 803 (1963).

19. Communications Workers v. Beck, 487 U.S. 735, 1233 (1988).

20. Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944).

have refused to join the union and exercised their “right to work” prerogative not to pay any dues.

However, unlike this duty of fair representation, which was then followed in Canada, the legislatively- and judicially-created constraints on union security contracts enhancing its collective authority and unity has not been imitated in any other major nation. Ironically, very few American states and none of the “right to work” ones have followed the lead of these other democracies and created a right to work vis-à-vis the employer. What I mean by that is imposing a legal requirement on the employer to prove “just cause” for firing one of its workers. That is why this protection now exists here only in union collective agreements and individual contracts negotiated by the high-priced executives, not their “at will” non-union work staff.

Here, though, all I shall be focusing on and spelling out my radically moderate views about is the labor and other areas of our law’s treatment of political expenditures. Many political figures, especially the Republicans, would like this branch of our law expanded further to give the same rights to full union members who are also political dissidents. A proposed Paycheck Protection Act of the late 1990s would have required every union to secure consent in writing from each and every one of its full members before any part of his or her dues could be spent in the political process (as actually is now required for direct union contributions to union candidates). President Clinton and his fellow Congressional delegates did accept the position of the AFL-CIO that the workers who have to be voluntarily joining the union should then be bound by these political as well as bargaining decisions made by their elected labor representatives. However, I do believe this issue should be revisited and, with one key addition, become our law.

After all, almost all the unionized workers, even in “right to work” states, feel they do have to join their union if they want to have a role in electing bargaining representatives and voting either to strike or to ratify the labor agreement covering all of their jobs. More important, if one views this from the perspective of employees as citizens, not as members of the labor organization that they belong to on their jobs, I have always felt we should be revising labor law along the lines that the Republicans have proposed. Giving full union as well as unit members the option to decide whether they want their dues money spent on the party supported by their union would entitle—and hopefully induce—workers and their families to start focusing serious attention on the position the union-supported

candidates have taken on the issues and then decide whether they actually agree with them.

There is, however, a crucial addition that should have been part of a truly principled Republican proposal. This opt-out rebate right should not only be available to the members of unions, but also to those who are part of such bodies as the American Association of Retired People (AARP), and most importantly, to the shareholder-members of all corporations. After all, a considerable number of ordinary workers—not just the wealthy—now own corporate shares, especially through their pension and retirement plans. Thus, it has always seemed to me that, as citizens, Americans should have exactly the same rebate right in their corporate dividends as in their union dues, reflecting the share of that money that is going to political campaigns they are choosing not to support.

By analogy, we would never dream of asking the union in our national pastime, baseball, or any other sport just to impose a hard “salary” cap on the smaller-market franchises like the formerly Montreal Expos or Pittsburgh Pirates in order to protect these teams and their owners from any pressure to spend money they cannot afford on their players, but exempt teams like the New York Yankees and Boston Red Sox because their owners (and high-paying fans) do not “need” any such protection. What we all must realize, though, is that creating a level political field is even more important. The same governing opt-out standards, then, must be applied to the parties on both sides of the table, protecting the politically dissenting rights not only of the citizens who are members of the Teamsters and Steelworkers Union, but also those who are shareholders in both the unionized General Electric and non-union Wal-Mart conglomerates. And giving each stockholder and union member and their families a notice of what their organizations were doing politically with their money, and then requiring that they mail or e-mail back a specific rebate request, would also draw their full attention to the elections (especially non-Presidential ones) and the issues and thus make it more likely they would also spend a little bit of time going out to vote and make the United States a truly democratic nation once more.