

# Solidarity and Rights: Two to Tango-A Response to Joseph A. McCartin

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Thanks to Joseph McCartin for advancing this debate with an insightful critique of the workers'-rights-as-human-rights framework and for his generous treatment of the series of Human Rights Watch reports in which I had a hand.<sup>1</sup> McCartin so fairly presents the human rights case, even while disagreeing with it, that it's hard to respond without simply borrowing from his framing of my own views. But I'll try.

Let's take the demise of the Employee Free Choice Act (EFCA) as a concrete point of departure. I have a different take than McCartin on the US labor movement's main advocacy pitch for EFCA. I participated in meetings and conference calls with union strategists who decided *not* to highlight a human rights case. They made a specific choice to downplay fundamental rights in favor of economic themes.

Based on polling and focus groups, union decision makers judged that a rights argument was too abstract, too soft, too armchair-liberal to sway Congress and public opinion. They opted for a hard-hitting call to build union power to raise wages and restore the middle class. They thought that this economic pitch would resonate more in the raging economic crisis of 2009, when corporations were on the defensive. Congress should make it easier for unions to organize not because organizing is a fundamental right, but because more unions will bring higher wages, greater purchasing power, and economic recovery.

The AFL-CIO's core EFCA briefing message for members of Congress at the height of its campaign in 2009 was titled "What the Freedom to Join Unions Means to America's Workers and the Middle Class," and captures this emphasis on the economic theme:

America cannot be a successful low-wage consumer society. Our country needs more money to go to America's workers and less to Wall Street speculators and CEOs. . . . Denying Americans the freedom to form unions is not just unfair, it is destructive economic policy. With deunionization, we have set off a long-term downward spiral of lower wages and fewer benefits. . . . As companies fight to cut costs, consumer demand falls, breeding recession and instability. . . . When workers have the right to form unions, their lives improve and the larger economy is healthier. . . . Unions and collective bargaining have been especially important in giving workers access to health insurance and defined-benefit pension plans.<sup>2</sup>

We see a couple of nods to workers' rights here, but the main focus is Keynesian, not Kantian.

Fair enough. I can't guarantee that an aggressive human rights strategy would have prevailed either, though I do think that public response in Wisconsin and other state battlegrounds over public-employee bargaining rights in early 2011 suggests that a rights argument can get good traction in disputes about labor policy. A national poll found that sixty-one percent of the public opposed taking away collective bargaining rights for public employees.<sup>3</sup> In any event, as McCartin fairly notes, my own argument is for a "skillful interweaving" of economic and rights arguments, not opting for one over the other.

What prevailed in EFCA really was politics. Even with sixty Democrats in the Senate in the first months of the new government, labor never had sixty votes for EFCA with card check (polling also indicated we shouldn't say "card check" but "majority sign-up"; it doesn't matter now). Instead of letting it go at "majority sign-up" as if it were self-explanatory, unions could have done a better job of explaining the card check system.

George McGovern was wrong when he said that card check opened the door to intimidation of workers to sign cards. Labor law invalidates union cards signed under pressure from organizers or coworkers, and the same rule would apply under EFCA. Indeed, had EFCA passed, employers would refuse to bargain, claiming that workers signed cards under pressure. They would force unions into litigation in which every worker would have to testify about the circumstances surrounding the card signing. But rather than explaining and anticipating these developments, unions thought that arguing over the intricacies of card check played to employers' advantage. Simpler to say "Majority sign-up will build unions and restore the middle class."

EFCA might have gotten to sixty Senate votes on a version without card check, like one with faster elections, "stronger remedies," "equal time" access for union representatives in the workplace, perhaps even first contract arbitration. But it never got to that point. Health care reform sucked up all the legislative energy of Congress and all the lobbying energy of liberals, except for union insiders.

### *EFCA and Original Sin*

In a way, EFCA supporters replicated the original sin of the 1935 National Labor Relations Act (NLRA), the bedrock labor legislation in the United States. The NLRA's Section 7 resoundingly affirmed workers' rights to organize and bargain collectively, but it grounded them in an economic foundation based on the Commerce Clause of the Constitution. That is, industrial strife resulting from workers' lack of organizing and bargaining rights created a "burden on commerce" that Congress could address by granting such rights.

That may have been needed at the time to get past a constitutional challenge. We'll never know for sure whether an NLRA grounded instead in First Amendment rights of association or Thirteenth Amendment strictures on

servitude would have gotten past the Supreme Court, though we can surmise that the general strikes and sit-down strikes and other mass mobilizations of the time might have swayed the court anyway.<sup>4</sup>

The commercial justification for the NLRA left unions vulnerable to changing economic and political winds. The time would come—and it did—when policy makers and courts would see unions and collective bargaining, not their lack, as a “burden on commerce.” This meant they could be restricted, not being fundamental rights that can withstand shifting passions.

The economic basis for workers’ organizing and bargaining rights opened the door for the antiunion Taft-Hartley reforms of 1947 and court decisions that curtailed them. The 1947 act stripped union rights from low-level supervisors and independent contractors, taking millions of employees out from even the possibility of collective bargaining. It let states adopt “right to work” laws to undermine union strength. It outlawed worker solidarity moves under the rubric of “secondary boycotts.” It added an “employer free speech” clause permitting managers openly and aggressively to campaign against employees’ organizing efforts in the workplace.

Court decisions went further. In the 1980s, when union membership fell and prevailing values shifted away from industrial democracy and social solidarity toward management control and global competitiveness, free market economic imperatives triumphed against workers’ organizing and bargaining. They were not seen as fundamental rights, but as policy choices that could be revoked. Strikebreaking with permanent replacements became widespread, signaled by Ronald Reagan’s treatment of the air traffic controllers.<sup>5</sup>

In landmark labor law decisions, the US Supreme Court decided that workers have no right to bargain over an employer’s decision to close their workplace. The Court said that employers need “unencumbered” power to make decisions speedily and in secret because collective bargaining “could afford a union a powerful tool for achieving delay, a power that might be used to thwart management’s intentions.”<sup>6</sup> In another case, the Supreme Court found that workers have no right to receive information from trade union organizers in a publicly accessible shopping mall parking lot because the employer’s private property rights outweigh workers’ freedom of association.<sup>7</sup> At one point, the Supreme Court said frankly that the rights to organize and bargain “are not protected for their own sake but as an instrument of the national labor policy of minimizing industrial strife.”<sup>8</sup>

When NLRA policy supposedly came in conflict with immigration policy under the Immigration Reform and Control Act (IRCA), the Supreme Court declared IRCA the winner. Denying a back pay remedy for undocumented workers unlawfully fired for union organizing, the Court decided that immigration policy trumps protections for workers organizing and bargaining. In effect, rather than viewing the NLRA as a guarantee of basic rights, the Court saw it as just another policy option, one that must yield to immigration policy.<sup>9</sup>

Fast-forward to the EFCA battle. Prioritizing economic arguments for union growth did two things. First, it left a partial vacuum into which employers

rushed with their own instant human rights organizations and phony case for “rights,” well described by McCartin. Second, it invited economic counterarguments about unions putting new costs and burdens on employers and making firms less competitive. Here’s how the Chamber of Commerce responded to the unions’ economic frame:

EFCA suddenly became economic pixie dust which when sprinkled by benevolent union leaders would raise wages, create jobs, and rebuild the middle class. Trust me, if rapidly increasing union membership was the key for recovery and shared prosperity I would be out there organizing. But this bill will make it more difficult for businesses to adapt and innovate. Increasing unemployment and stifling job growth is exactly the wrong prescription for our ailing economy.<sup>10</sup>

I don’t concede that “rights talk” gives employers an inherent advantage, any more than “economics talk” gives advantage to unions. Both are fields of contest, and labor advocates have to fight it out on each front. McCartin is correct that the human rights case is not a panacea for labor. But this is not a reason to drop it. Capitalism brooks no panaceas for workers and unions. They must struggle constantly, often defensively, and sometimes losing and coming back to fight another day.

### *The Importance of Alliance*

Building alliances is an important part of the fight. Organized workers cannot achieve their goals alone, even with high degrees of union strength and solidarity, in a political and economic system stacked against them. The human rights case reaches out to an important intellectual and social movement that can join civil rights, religious, feminist, immigrant rights, and other allied forces in support of labor’s struggles and labor’s goals.

As McCartin notes, the human rights argument resonates more forcefully in other regions of the world than it does in the United States. I know that it’s a struggle to have the Universal Declaration of Human Rights and core labor standards of the International Labor Organization (ILO) taken seriously in the United States. Even most labor partisans know little about them. But in most of the rest of the world, they are taken seriously inside and outside labor movements. Trade unions and allied groups are strongly attuned to human rights arguments and knowledgeable about ILO standards.

In a 2009 webinar with European “socially responsible investment” fund officials on US-style union busting by European firms, the fund managers wanted to know how US labor law failures and management abuses violate ILO standards and human rights norms. I put the analysis in those terms. But I do not think that we should compartmentalize arguments, stressing economics and solidarity and industrial democracy at home and human rights abroad. We should consistently make the whole case everywhere.

*Human Rights, Solidarity Rights, and US Labor Law*

A human rights argument defending individual rights does not preclude equally honoring a right to solidarity. Human rights advocacy for workers and unions goes beyond classic individual rights because freedom of association at work inherently takes on a collective character. The rights of individual workers can only be realized collectively.

US labor law on its face is consistent with this view of workers' human rights. To begin, the NLRA only protects "concerted activity" by two or more employees. An individual worker acting alone is unprotected. Second, the law grants unions exclusive representation—one union speaks for all workers in a defined bargaining unit, even where subgroups or individuals are antiunion or would prefer another union. Third, except in "right to work" states, the law permits "union security" fee payments in lieu of union dues for represented workers who choose not to join the union (and contrary to employers' propaganda, only where employers agree to such a clause—the law does not require it). "Compulsory union membership" is unlawful. No worker in the United States can be compelled to join a union. "Union shop" or "agency shop" clauses in collective bargaining agreements only require payments equal to union dues, and nonmembers are entitled to a rebate of sums not related to their representation by the union.

Furthermore, when a union is "designated or selected" (not "elected," which is nowhere in the law) by workers as their bargaining agent, the coercive power of the state forces unwilling employers to the negotiating table with a duty to bargain in good faith. I know, I know, employers are scofflaws, penalties are weak or nonexistent—the Human Rights Watch reports are all about that.

The human rights argument—and more specifically Human Rights Watch in its series of reports on how US labor law fails to meet international standards on freedom of association—does not call into question these solidarity-enforcing features of the American labor law system. They are compatible with freedom of association principles. The International Labor Organization, the authoritative body that sets and interprets international standards, allows great diversity in countries' labor law systems based on their particular histories and industrial relations traditions.

Countries can choose to have exclusive representation or multiple unionism; to permit union security clauses or "open shops" where no one must pay dues; to force unwilling employers to bargain or let them refuse to bargain (as long as workers are free to strike to compel bargaining—the pre-NLRA state of labor law in the United States). The ILO countenances the French system, for example, which has multiple unions in what we would call a bargaining unit and is entirely "open shop" in the American sense—fewer than ten percent of French workers represented by unions pay any union dues at all.

Employers, not Human Rights Watch or other human rights advocates inside or outside the labor movement, are pushing a rigidly individualistic

rights argument. Its logical conclusion would let management bribe workers to renounce union representation or refuse to bargain with unions altogether.

But because a human rights framework starts with the individual does not mean we should leave the field clear to employers to push their version of workers' rights. Human rights advocates have to push back, insisting that collective rights of workers in the employment context are also an exercise of fundamental human rights. Individual rights are a starting point, but these rights can only be exercised and realized as a group.

It is not a question of pitting one set of rights against another, but of pitting one version of rights embracing both individual and collective interests against a pinched, self-serving version that deprives workers of their right to defend themselves through organization and collective bargaining—the only way workers can vindicate their rights.

As McCartin explains and as I concede, the human rights argument is not a guaranteed winner. We can't just cry "human rights violations" and expect Congress and courts to fall over. Given the general lack of understanding of and familiarity with human rights discourse in the United States, we can't expect to prevail instantly in the court of public opinion, either. We do have to find ways to blend the human rights argument into frames of industrial democracy, solidarity, and the common good in the "recalibration" project signaled in McCartin's paper. All aboard.

### *Final Notes*

It's a little disjointed, but I have thoughts on a couple of other points. First, I don't agree with Nelson Lichtenstein's suggestion, seconded by McCartin, that the 1960s civil rights movement and the push for Title VII and other individual rights-oriented employment legislation caused the decline in union membership between then and now. It's a neat formula, but one based on coincidence, not causation.

Public sympathy for unions grew substantially from the 1990s to the mid-2000s (it fell after the 2008 economic crisis). Unions' "win rate" in NLRB elections rose for ten consecutive years between 1997 and 2007, from just below half to a two-thirds success rate. The rate of decline in union membership slowed during the same period, and it actually ticked up in 2008 from 12.1 to 12.4 percent before dropping again in the wake of the economic crisis. But I wouldn't argue that labor's gains during these years were because that's when the human-rights-are-labor-rights argument began gaining traction.

Most of the labor movement supported the individual rights movements of the 1960s and '70s, and they were right to do it. A web of individual employment protections underpins effective collective bargaining. Continued insistence on collective power rather than individual rights would have left unions in a narrower corner, even more vulnerable to attack as privilege-protecting special interests. The alliance-building that took place then still pays dividends for workers and their unions. Another lesson can be learned, too: We did not win

the Civil Rights Act of 1964 by insisting that it would help the economy. The rights argument was uppermost.

Other forces drove down union “density”: the shift away from long-term work in basic industries toward job-hopping service work; jobs shifts from the Rust Belt to the Sun Belt; management’s ability to thwart new organizing under weak labor laws; changes in the composition of the labor force that saw millions more “independent contractors” and fake managers and supervisors excluded from collective bargaining rights, and more.

Add to this mix 3.5 million temp agency workers and millions of public employees in states that prohibit public employee collective bargaining, and some forty million American workers don’t even have a choice to bargain collectively. Removing them from the numerator in calculating the percentage of workers in unions would double the union “density” rate, taking it over twenty percent of the “organizable” labor force. Indeed, tackling the problem of exclusions from collective bargaining rights would do more to restore trade union strength than almost any legislative reform.

Second, although McCartin is the historian and I am not steeped enough in original sources to be able to cite them, my impression is not the same as his, that “the concept of ‘workers’ rights’ did not play a significant role in the arguments of the labor reformers who laid the foundations for industrial unionism or the Wagner Act.” Like all persons, workers have an innate sense of “rights” that they invoke when they feel oppressed.

Seth Luther, in his famous 1832 “We have borne these evils by far too long” speech on Massachusetts sweatshops said, “We know the difficulties are great, and the obstacles many; but, as yet, ‘we know our rights, and knowing, dare maintain’ . . . we wish nothing but those equal rights which were made for us all.” I think that labor activists in the 1920s and 1930s argued a rights case alongside their industrial democracy case in a “skillful interweaving” of workplace democracy as a fundamental right—“lawful, constitutional, natural, and inherent rights,” as Samuel Gompers put it.<sup>11</sup> One need look no further than to Section 7 of the NLRA and its assertion of labor “rights”—not powers or abilities or capacities—to see that the “rights” concept was important.

Finally, and here I agree with McCartin, we have to tackle the problem of unions’ image in popular culture. It is certainly not helped by repeated episodes of labor leader venality, which is no worse or more frequent than corporate or government corruption, but reinforces negative impressions.

A deeper problem is the individualistic nature of mass entertainment. Most novels and TV shows and movies are about people with money. Even when they are not, they focus on central characters struggling alone against adversity. As McCartin notes, *On the Waterfront* is a classic of the kind. More recently, when Richard Linklater made a 2006 film based on Eric Schlosser’s *Fast Food Nation*, about abusive conditions in a meatpacking plant, the idea of union organizing never made it to the screen. The central character improved her lot by sleeping with her supervisor.

Novelists by definition work alone. Filmmakers need support teams, but they still see their work as *auteur*-ship. TV writers work in teams, but the dramatic hook of TV series is always individual characters and their crises. When union reps show up, it's the PBA lawyer representing the corrupt cop. We do need to find ways to weave the positive side of unions into popular culture. But with no Smartphone, no Facebook, no Twitter, and no Netflix, I'm the last person to figure out how.

## NOTES

1. Let me call readers' attention to a new HRW report published in September 2010, *A Strange Case: Violations of Workers' Rights in the United States by European Multinational Corporations*. It tells how high-profile German, British, French, and other European firms who loudly proclaim their support for workers' organizing and bargaining rights at home adopt American management-style union busting in their US operations. See <http://www.hrw.org/en/reports/2010/09/02/strange-case-0>.

2. See <http://www.aflcio.org/joinaunion/voiceatwork/efca/whyunion.cfm>.

3. See <http://www.gallup.com/poll/146276/Scaling-Back-State-Programs-Least-Three-Fiscal-Evils.aspx>.

4. James Pope at Rutgers Law School has done the most original work on the struggles over drafting, passage, and constitutional support for the NLRA. See James Gray Pope, "The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957," *Columbia Law Review* 102 (2002). He suggests that the Supreme Court was really responding to massive social pressures of workers' organizing and strikes, including sit-down strikes, and that "there is no *a priori* reason to believe that—had the justices been presented with an argument based on the Thirteenth Amendment instead of the Commerce Clause—they would not have chosen to uphold the Act on that ground."

5. See, for example, Jonathan D. Rosenblum, *Copper Crucible: How the Arizona Miners' Strike of 1983 Recast Labor-Management Relations in America* (1995).

6. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

7. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

8. See *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975).

9. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

10. Thomas J. Donohue, US Chamber of Commerce, Politico Debate: the Employee Free Choice Act, [www.politico.com/arena/archive/efca.html](http://www.politico.com/arena/archive/efca.html).

11. Samuel Gompers, May 28, 1920, as quoted in Dorothy Sue Cobble, "The Wagner Act at 75: The Intellectual Origins and Legacy of An Institutional Revolution," *ABA Journal of Labor and Employment Law* 26:2 (Spring 2011), forthcoming.