RECENT PUBLICATIONS


Since the inception of our great nation, no decade has ever brought as much change to our country’s social, economic and political landscapes as the 1960s. The emergence during this time of the civil rights and labor movements helped guide and shape the eventual enactment of the 1964 Civil Rights Act – an ever-changing historical piece of legislation, which to this day resonates with the progressive agenda of equal opportunity, social justice and economic equality. Over the past five decades, the Civil Rights Act has changed the face of America – regarding everything from social norms to political agendas – and yet the National Labor Relations Act, designed and passed into law in the 1930s to protect similar interests, has suffered great setbacks and today is viewed by many critics as a dying piece of legislation.

Richard D. Kahlenberg and Moshe Z. Marvit give great insight, analysis and thought into how, why, and where the NLRA has failed the American people. Specifically, the authors concentrate on questioning why the U.S. labor movement matters, why U.S. labor has declined, how U.S. labor laws fit into international norms, potential legislative labor law proposals, why the Civil Rights Act should be amended, and why there are political advantages to a civil rights approach over standard labor law reform. The authors are clear and upfront in their purpose in writing this book and the message they want to deliver. “[T]he Civil Rights Act should be amended to add protection for employees seeking to organize a union. Just as it is illegal to fire someone for race or gender or national origin or religion, it would be illegal under the Civil Rights Act to fire someone for trying to organize or join a union.”

Early on in the book, the authors argue why the labor movement collapsed and why the decline in union membership spells disaster for middle-class America. As a pretext to subsequent chapters, the authors present historical background information on unions, their roles, and ultimate goals envisioned since the 1930s. Here, the labor movement’s historic and

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2. Id.
contemporary goals are laid out, which include the improvement of living standards, hourly wage increases, and the gaining of employment benefits for its membership. Although unions seek out such goals for its members, not everyone is on board to allow such changes.

According to the analysis, business-backed political attacks against the labor movement have been present in the American socio-political landscape since the mid-1940s. For example, the Republican Party’s actions, from the 1947 Taft-Harley Act through Ronald Reagan’s 1981 executive decision to fire striking air traffic controllers, are just some of the various obstacles that labor has historically faced. In doing this, the authors emphasize that the Republican Party’s staunch anti-union, anti-labor stance creates a weaker society for all Americans when “the vibrancy of our democracy is blunting legislative efforts to promote economic and social equality.” Recent statistical data also shows labor at its lowest membership level in 97 years. By comparing specific statistics, the authors analyze changes in technology and the world economy as another type of attack on labor. Here, comparisons of labor statistics are used to analyze why countries with higher union membership levels tend to have a lower rate of economic inequality. The authors also focus on the problems of lengthy procedural delays at the NLRB and inadequate remedies under the NLRA. From this, the authors conclude that the current state of labor laws fail to adequately protect organizing workers.

The authors next present an analysis of why current American labor laws are weak when, historically speaking, the U.S. has typically been a global champion of labor rights. For example, the U.S. in 1944 convened a meeting of major world powers to champion the adoption of the Universal Declaration of Human Rights (“UDHR”), which implements pro-labor rights laws across the world. Similarly, the U.S. later joined the International Labour Organization (“ILO”), which also enhances international labor rights. However, the UDHR is not legally binding and the U.S. has failed to ratify most of the ILO’s core laws, making it in today’s society an “international outlier.” In response to these and other political inactions by the U.S., the authors blame politics, the legislative process and vying interests as other potential root causes for labor’s decline.

From this determination, the authors then present propositions and outlines for potential legislative amendments that may counteract labor’s decline.
decline. The authors first identify how the Equal Employment Opportunity Commission and its process work to significantly deter employers from violating employee rights by highlighting the usage of Title VII's means and incentives. Here, punitive remedies, a private right of action, the right to a jury trial and the right to full discovery are named as inaccessible tools under the current NLRA.7 Using Title VII's language and layout, the authors propose subsequent legislative amendments. Light is first shed on the minor differences between labor and civil rights law. They then show how placing current labor law under the Civil Rights Act would radically alter labor laws by acknowledging that the opportunity to organize or join a union is a civil right. This proposed legislative change would shift the basic right of an employee to join or organize a union and have it be recognized as an individual right, not a collective right. Only then, the authors argue, will the Civil Rights Act be "a well-suited vehicle for labor law reform."8

In making such changes, the authors then argue why the Civil Rights Act is the correct legislative tool or vehicle to use in protecting union organizing. First, they emphasize how an individual's action, such as joining a union, should be a fundamental right protected under anti-discrimination laws. Second, in strengthening labor laws, objectives of the Civil Rights Act, such as human dignity and equality, are promoted. Third, stronger unions are likely to reduce employer discretion and thereby reduce instances of discrimination based on race, gender, national origin, or religion. Here, labor law is not highlighted as its own body of controlling law, but is instead presented as having shared values and interest with the enacted civil rights laws of the 1960s. In doing this, they emphasize that unions, like individual Americans, help reduce discrimination in the workplace and workforce.

Lastly, the authors present opinions as to why framing labor organizing as a civil right is better given America's political landscape. The authors argue that in doing this, the discussion shifts from a "struggle over raw interests, to the higher realm of deeply held moral values."9 Failed situations of labor law reform are then highlighted. For example, Democrats, in four situations, controlled the White House, Senate and House, yet failed to augment America's labor laws. The question of why such attempts failed follow. As noted, the cause of these failures ranges from fierce and unified business opposition, to portraying labor law reform as a special interest issue between labor and business. The focus then shifts to why political labeling is a problem, and how concentrating such reform as a "basic civil right" versus a "labor law reform" makes a major political difference. Ultimately, the authors emphasize that presenting labor law reform as a civil right would

7. Id. at 67
8. Id. at 88.
9. Id. at 103.
raise basic principles about nondiscriminatory practices in the workplace, which may bring labor more political allies.

In sum, WHY LABOR ORGANIZING SHOULD BE A CIVIL RIGHT expresses the weaknesses found in America’s labor laws, weaknesses which become a great threat to America’s middle class, a middle class that to this day continues to shrink. With the continued shrinking of the middle class also comes the reality that the growing economic inequality between the wealthy and poor classes fundamentally alters the balance of our American society, a balance we cannot afford to shift. Speaking on March 18, 1963, to federal, state and municipal employees in Memphis, Tennessee, Dr. Martin Luther King, Jr. declared, “What does it profit a man to be able to eat at an integrated lunch counter if he doesn’t earn enough money to buy a hamburger and a cup of coffee?” I think Dr. King’s words perfectly capture the authors’ fundamental issue in failing to integrate labor with civil rights laws.10

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10. Id. at 101.

While the term “human rights” often evokes images of violations in foreign countries, Professor Ruben J. Garcia hopes to normalize the use of such framing in a different context: workers’ rights in the United States. In MARGINAL WORKERS: HOW LEGAL FAULT LINES DIVIDE WORKERS AND LEAVE THEM WITHOUT PROTECTION, Garcia explores why and how noncitizen workers, workers of color, female workers, and guest workers in the United States remain unprotected in the workplace despite a seeming plethora of twentieth-century laws tailored specifically to protect them. He calls for a paradigm shift, arguing that a human rights framework is essential to understanding and extending protections in the workplace for those who fall through gaps in the law.

In describing the experiences of “marginal workers,” Garcia refers to those who are “technically protected by labor and employment laws, but because of competing policy concerns or bodies of law, they lose full protection.” Such competing bodies of law include the National Labor Relations Act, Title VII of the Civil Rights Act (see Chapters 3-4), and guestworker statutes (see Chapter 5). Garcia uses these tensions as the framework for his book: each chapter focuses on different ways marginal workers can be caught between conflicting legal regimes.

Garcia first introduces the reader to the problem at hand by explaining why a human rights frame makes sense in the context of workers’ rights. The middle chapters then point to Supreme Court cases that demonstrate the lack of remedies available to marginal workers. Finally, in Chapter 6, Garcia provides concrete solutions for how to implement the workers’ rights framework through the incorporation of international laws into American courts.

Garcia’s initial discussion of workers’ rights as human rights in Chapters 1 and 2 provides reasons supporting the application of such a framework. Garcia points to “a growing body of scholarship” arguing that the Thirteenth Amendment, which prohibits slavery, can be a “powerful basis for the right to organize and bargain collectively” – although he acknowledges that it will

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be a “slow uphill climb” for courts to accept this constitutional argument. Garcia also analogizes his framework to that of critical race theorists and feminist theorists, who have argued that a human rights approach would more effectively protect marginalized women and people of color. By using other scholars’ reasoning to supplement his own assertion of applying a human rights framework, Garcia introduces his argument in an even-handed manner and ensures that the reader is already thinking within a human rights framework.

Garcia’s purpose in incorporating prominent labor cases seems twofold: to introduce the reader to a specific conflict between legal regimes, and to appeal to a broad range of audiences. Garcia begins Chapter 3 with a detailed summary of the 1975 Supreme Court case *Emporium Capwell v. Western Addition Community Organization*, Chapter 4 by telling the story of Cecilia Espinoza in the 1973 Supreme Court case *Espinoza v. Farah Manufacturing Co.*, and Chapter 5 by describing the Bracero program as a prime example of how United States guest worker programs reinforce the idea of workers as commodities. In each of these cases, the employees remain unprotected because courts read the competing laws in favor of the employers, or because the statutes simply fail to extend protection to workers in their position. By using these labor cases to illustrate the gaps in the law, Garcia helps both lawyers and laypeople connect to the topic: scholars of the topic will view familiar cases in a new light, while laypeople will better understand what problems currently exist within this subfield of labor law.

In Garcia’s concluding chapter, he asserts that the practical stepping point to viewing workers rights as human rights is to incorporate international law into American courts. He points to concrete evidence that this may reap results: the AFL-CIO has challenged unfavorable Supreme Court decisions in the International Labor Organization through its conventions, which have a much broader scope than current U.S. laws. Garcia proffers that filing in international fora is a practical way to change dialogue about the importance of workers rights. While this may initially seem idealistic, Garcia openly acknowledges the challenges to such an approach, such as impracticability due to the requirement of congressional legislation for proper execution, the allegedly anti-democratic nature of conforming American law to “the laws of the rest of the world,” and the difficulties in determining who will reinforce and decide when a country is not in compliance. Garcia continuously reiterates that “this [framework] is simply a starting point – not the end of the discussion.”

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2. *Id.* at 16.
3. *Id.* at 20.
4. *Id.* at 121 (citing *Roper v. Simmons*, 543 U.S. 551 (2005) (Scalia, J., dissenting)).
5. *Id.* at 128.
As further proof of the importance of a human rights frame, Garcia cites the work of cognitive scientist George Laogg. Laogg found that the way an issue is framed is crucial in changing opinions about the topic, such as the framing of global warming as the "climate crisis" and health care reform as "health insurance reform." Similarly, Garcia argues, workers' rights should be framed in terms of freedom in order to spur change: freedom "to associate, to be free from servitude, to be free from arbitrary discrimination, and to be free from retaliation for asserting rights." Because Garcia relies on other scholars' studies to help support his assertions, the reader is more willing to believe him.

Garcia ultimately calls for a movement to protect workers' rights on an international level, but he indicates that statutes themselves and judicial construction are also culpable in leaving workers unprotected. For example, Garcia suggests that Title VII should be amended to include immigration status. He uses the Espinoza case as an example to show that when there are multiple possible grounds of discrimination for a single plaintiff, the plaintiff can ultimately suffer because there are "blind spots" in statutes. In this particular case, the Supreme Court held that the category of "national origin" did not include being a noncitizen, so Espinoza was not protected under Title VII. In other words, amidst the Title VII statute, there was no acknowledgment that the two categories of citizenship and national origin often overlap. Garcia's solution is to revise the statute to prohibit employers from hiring and firing people for "irrational" reasons, or anything that is not performance related," rather than inclusion of new categories such as national origin. In this way, he argues, the law will remain flexible for future categories of workers who may again fall through the cracks of enumerated categories. But throughout his case analysis, Garcia is careful to continuously remind the reader of his main point: a human rights framework. For example, while describing Emporium Capwell v. Western Addition Community Organization, Garcia suggests that viewing this case in a "human rights frame might yield different results" by making it more likely that employers would follow the law in the first place.

While Garcia touches upon the practical effects of viewing workers rights as human rights throughout the book and in relation to each of the cases he discusses, he saves the deep discussion of such a framework for the beginning and last chapters of his book. By sandwiching cases between in-depth human rights discussion, he reinforces his call to action but also stirs passion in the reader by drawing a sympathetic portrait of employees. His suggestions to modify statutes and criticize court decisions make sense, but

7. Id. at 80.
8. Id. at 48.
he acknowledges the futility of simply hoping that courts will be more sympathetic to employees, and his use of cases serves to show the reader this futility as well. For example, to illustrate an instance of judicial misconstruction, Garcia points to *Emporium Capwell v. Western Addition Community Organization*, a Supreme Court case in which the court attempted to reconcile the National Labor Relations Act of 1935 (NLRA) and Title VII of the Civil Rights Act of 1964 (Title VII). Both statutes should have protected employees James Hollins and Thomas Hawkins for protesting the lack of promotions for black workers, but the court failed to recognize their claims for union solidarity and civil rights, interpreting the NLRA in favor of collective bargaining. After reading of such examples, when Garcia again reiterates that a human rights framework is crucial, the reader is much more willing to accept such an approach as the best option.

As a former union-side labor lawyer, Garcia saw first-hand situations in which employees had little recourse. He writes that such experiences sparked his desire to "use the law to further long-lasting social change." While the reader may initially wish for more discussion of other possible frameworks, ultimately, the reader is convinced by the human rights approach because Garcia imposes his passion for workers' rights on the reader, and also because he readily admits to the difficulties of achieving a paradigm shift. As such, this book seems meant not just for those interested in labor law, but rather for all advocates of human rights.

*Sarah Chai, J.D. 2015 (U.C. Berkeley)*

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9. *Id.* at vii.