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Review Essay

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REVIEW ESSAY

Melvyn Dubofsky, *The State and Labor in Modern America* (Chapel Hill and London, The University of North Carolina Press, 1994. 274 pp. $34.95).

reviewed by Daniel J. Gifford†

In *The State and Labor in Modern America*, Professor Melvyn Dubofsky has given us a comprehensive account of the development of American labor law from its period of gestation at the end of the nineteenth century to the present. Professor Dubofsky's concern is with the impact of law and regulatory agencies on labor unions, their power and their abilities to organize the work force. In adopting this focus, the author is fully aware of the impact of politics, not only on the incentives of Congress to enact legislation, but on the way in which existing legal institutions are administered. As a result, Dubofsky has given us a rich tapestry depicting the birth, struggles, dominance and ultimate decline of the labor-union movement over the course of a century in the context of shifting political allegiances and changing laws and legal institutions.

Because Dubofsky's subject is labor history, he quite properly does not address the economics of the labor movement, the wisdom of labor strategy or the differences between organized labor in the United States and its counterparts abroad. He does, however, reflect on the causes of the growth and latter-day decline of the labor movement in this country. Dubofsky accurately identifies government support—or the lack thereof—as critical to the success of the union movement. His decision to avoid commenting on the social and economic impact of organized labor's characteristic bargaining and political strategies is disappointing but not surprising. These strategies have affected not only the larger society, but have had unintended consequences for labor, as well. Yet they belong more to economic and political analysis than to history. Accordingly, while these matters are not integral to the historical

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narrative Dubofsky gives us, their inclusion would have made the book an even more valuable research tool.

Dubofsky leads us through the decades in which presidential power was employed to break strikes, often with soldiers, and in which the courts used the Sherman Act to issue sweeping injunctions against strikers. He reminds us of the pervasive judicial hostility toward labor unions throughout the late nineteenth and early twentieth centuries. That hostility destroyed the effectiveness of the congressional attempt in the Clayton Act to prevent the use of the antitrust laws against striking workers. As a result, the antitrust laws continued to provide the rationale for anti-strike injunctions into the 1920s. Indeed, the most sweeping and best known of the Sherman Act labor injunctions was issued by Judge James Wilkerson in 1922 against striking railroad workers.

As the title of his book indicates, Dubofsky's focus is on the power of the state to encourage or discourage unionization and on the power of politics to shape the direction of governmental policy. Government is, of course, only one major influence on unionization; another is the demand for labor. Dubofsky shows us the interplay between these two determinants. Union-organizing drives were successful during the World War I years, when the effects of full employment and labor scarcity were reinforced by political support from the Woodrow Wilson Administration. But this success was subsequently transformed into a decline when, in the post-war period, the labor market slackened and unions lost their political support. Yet in the Franklin Roosevelt period, despite the severe economic downturn, the Committee for Industrial Organization (CIO) successfully conducted the largest organizing drive in history, with the effective backing of the nascent National Labor Relations Board. Government is, in Dubofsky's view, a critical ingredient in the growth or decline of the union movement.

Dubofsky identifies leading officials from the Wilson Administration who either reentered government with Franklin Roosevelt in the 1930s or otherwise influenced his administration: Bernard Baruch, Louis Wehle, Felix Frankfurter and Hugh Johnson. The author shows us the conjunction of ideological commitment in many former Wilson Administration officials[1] with the political need of the New Deal to

1. Felix Frankfurter had served as secretary of President Wilson's Mediation Commission and as chair of the War Labor Policies Board. In both positions, Frankfurter sought ways to induce or to require employers to bargain with labor unions. Many former officials who had been influenced by him reentered government. So did numerous other ex-Wilson officials who had been influenced by Frank P. Walsh or John R. Commons of Wilson's Commission on Industrial Relations.

court labor as an essential element in its electoral base. He takes us through the legislative struggles culminating in the Wagner Act and leads us through the post-enactment period, marked by sit-down strikes and a massive organizing campaign of the CIO, the success of which restructured labor relations in American mass-production industry.

On the level of politics, Dubofsky demonstrates how Theodore Roosevelt, not particularly a union enthusiast, created political capital by supporting labor. The author shows us the conversion of Woodrow Wilson from an attitude of basic hostility to one sympathetic to unions, a conversion that coincided with his political advantage. Dubofsky takes us through the Wilson years that generated the official reports[2] and institutional frameworks that underlay most of the early labor policies of Franklin Roosevelt. The author shows us how Roosevelt's political base became dependent on labor union support and how, despite the necessary alliance between the president and organized labor, alterations in administration policy nevertheless reflected the shifting composition of Congress as well as overriding governmental imperatives. The National Labor Relations Act (NLRA) was enacted in 1935 when support for the New Deal ran high, but administration support for labor cooled after sit-down strikes in the automobile industry and Republican gains in the 1938 elections. Again, during the period leading up to American entry into World War II, the Roosevelt Administration felt compelled to rely on the expertise of industry executives to plan the war effort and intentionally relegated labor to secondary and advisory roles.

Yet some of the historical continuities remain unemphasized and, in this reviewer's view, underanalyzed. In the disastrous Pullman strike, President Grover Cleveland sent soldiers to enforce an injunction he thought necessary to protect essential arteries of transportation. A quarter century later, Judge Wilkerson gave President Warren G. Harding the sweeping injunction he requested against striking railroad shopmen for essentially the same reasons. President Ronald Reagan's notorious discharge of members of the Professional Air Traffic Controllers Organization (PATCO) occurred when the operations of major transport arteries were threatened.[3] Although Congress attempted to outlaw the labor injunction in the Clayton Act and was compelled by

2. Final Report of the U.S. Commission on Industrial Relations, S. Doc. No. 415, 64th Cong., 1st Sess. (1916) (Walsh Report) (recommending recognition of rights to organize and to collective bargaining).

3. The PATCO strike and its aftermath are described, *inter alia*, in Schapansky v. United States, 735 F.2d 477 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 1018 (1984).

judicial intransigence and evasion to enact further prohibitions on labor injunctions in the Norris-LaGuardia Act,[4] Congress also has repeatedly approved limitations on organized labor's power to threaten major interruptions to the economy. President Cleveland's actions against the Pullman strikers were endorsed in a Joint Resolution of Congress.[5] In the Transportation Act of 1920, Congress established the Railroad Labor Board with the apparent power to impose settlements on railroads and unions.[6] In the Taft-Hartley Act of 1947, Congress limited the right to strike in national emergencies. In these cases, strikes were prohibited for a "cooling off" period of sixty days, while the parties—with government encouragement—sought to reach an acceptable compromise.[7] And the air traffic controllers were forbidden to strike by law.

These presidential and congressional actions suggest an underlying social problem: the national interest in commerce and trade is, or sometimes is perceived as, jeopardized by strikes at important transportation arteries. Dubofsky's labor sympathies may have obscured the similarities in these events. All of them have involved government interference with strikes at important avenues of national transportation. Dubofsky does not ignore the particular government actions—the legislation or the injunctions or the governmental actions taken under them. Nor does he ignore all similarities. Indeed, he compares the language employed by Reagan against the air traffic controllers in 1981 to that used by Cleveland and Harding against railroad workers decades earlier. But Dubofsky does not examine the social and economic underpinnings of these events, nor does he provide us with criteria for sorting out the conflicting claims of workers, their employers and the public in these cases. Surely threats to major transportation arteries rise to the level of federal concern. Dubofsky is silent on the critical issue of whether society should respond to an actual or threatened disruption of major transportation arteries with passive tolerance, or whether it should exercise more imaginative options that would protect the national interest, yet afford room for labor and management to work out their differences.

At various places, Dubofsky refers to concepts like industrial pluralism, the politics of productivity, economic democracy and

4. 29 U.S.C. §§ 101-115 (1995).
5. 26 Cong. Rec. 7281-7284, 7544-7547 (1894).
6. Title III of the Transportation Act, 1920, ch. 91, 41 Stat. 456, 469-74 (repealed 1926). The year following the strike of the shopmen in 1922, the Supreme Court ruled that the Railroad Labor Board lacked the power to impose its decisions. Pennsylvania R.R. v. Railroad Labor Board, 261 U.S. 72 (1923).
7. 29 U.S.C. §§ 176-180 (1995).

corporatism. All of these concepts are pregnant with meaning, which he often fails to develop in this book, believing, perhaps, that his readers attribute the same meanings to them as he does.

Although Dubofsky appears to approve of "corporatism," he uses that term in the broad sense of interest-group bargaining and compromise under the general tutelage of the government. Indeed, he equates corporatism with "industrial pluralism," a phrase suggestive of an industrial analogue to the pluralist model of government that prevailed in the post-World War II era. Here he is adopting the usage of Charles Maier, who has employed the term "corporatism" to describe the process by which industry, labor and perhaps other interest groups separate themselves from parliamentary or other democratic government, working out their own accommodations with one another directly. Maier used the term in this sense to describe the changes in European political structures that occurred in the decade after World War I.[8] In Maier's usage, corporatism embraced Italian fascism, which formally allocated significant self-governing powers to industrial groups,[9] but also included the formal and informal structures in Weimar Germany and France in which industry and labor worked out their relations *inter se*. Maier's usage also describes the informal and nongovernmental interaction between organized labor and industry in the United States during the three decades following World War II, through which these institutions cooperatively governed the workplace. It is this usage, embodying interest-group bargaining and compromise, that Dubofsky intends to employ.

An array of corporatist structures have been in place on the European continent at least since the end of World War I. At that time, workers councils at the plant level were legislatively instituted in Germany, and such councils continue to this day.[10] Although these councils originally were purely advisory, they generally raised the level of participation felt by individual workers. Today, these councils provide for worker representation at both the plant and enterprise levels and provide a means for workers to participate, to a significant degree,

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8. CHARLES S. MAIER, RECASTING BOURGEOIS EUROPE (1975).

9. Maier's usage fits the classical conception of extra-parliamentary collaboration among the classes. *See generally* ZEEV STERNHELL ET AL., THE BIRTH OF FASCIST IDEOLOGY (David Maisel trans., 1994). Indeed, it also fits the position of early Italian fascism, under which the state was to limit its operations to the juridical and leave industry free to govern itself. *See id.* at 227-228.

10. *See* MAIER, *supra* note 8, at 160-64. *See also* Clyde W. Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 AM. J. COMP. L. 367, 375, 384 (1980) (discussing, *inter alia*, the Works Council Act of 1920 and the Codetermination Law of 1976).

in managerial decisions.[11] Tripartite structures involving unions, companies and government in policy decisions about output and operations also can fit a corporatist mode, as when they are designed to facilitate interest-group accommodation. Such structures were established in this country by the abortive National Industrial Recovery Act. Dubofsky's comprehensive history of U.S. government labor policy describes the creation and operation of numerous tripartite panels composed of representatives of capital, labor and the public, many of which earned the hostility of organized labor, as public members teamed with employer members to form permanent anti-labor majorities. Dubofsky's endorsement of corporatism, however, is not intended to endorse these formal tripartite structures. Indeed, tripartite panels of this type serve to impose conditions upon organized labor rather than act to facilitate negotiation and compromise between labor and industry.

Dubofsky's endorsement of industrial pluralism rests on the optimistic assumption that the government will assume a positive role in holding wage-rate increases to productivity growth, thereby protecting the public from inflation. In adopting this assumption, he places industrial pluralism within the broad parameters of what he refers to as a "politics of productivity." Although the author himself does not develop the latter concept in his book, he again relies on Charles Maier for his terminology. Maier, whom Dubofsky cites, used the term to describe a social arrangement in which class conflicts over redistribution are transformed into a shared focus on improving economic performance.[12] So long as a constantly increasing national income permits workers to share in a growing prosperity, redistributional issues become muted. In context, it appears that Dubofsky may be using the phrase as suggestive of a political relationship in which government support of organized labor is contingent on wage demands being held to productivity increases. Currently, European governments often exercise a restraining power over industry/union negotiations in order to keep wages and prices within socially acceptable, i.e., noninflationary, limits. During the period Dubofsky describes as the zenith of industrial pluralism, the John F. Kennedy Administration attempted to influence wage bargaining through wage-price guidelines and the "jawboning" of labor and management. Departures from such standards produced the economic disasters of the 1970s, from which the nation is still recovering. Although the American government no longer monitors

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11. *See* Summers, *supra* note 10, at 380.
12. Charles S. Maier, *The Politics of Productivity: Foundations of American International Economic Policy after World War II*, 31 INT'L ORG. 607 (1977).

wage agreements, it influences the general level of wage rates through the actions of the Federal Reserve.

Although Dubofsky sees "industrial pluralism" as a species of the "pluralist" politics of the post-war period,[13] he does not adequately face the deficiencies of this model. The pluralist model leaves out unorganized and diffuse interests. Similarly, the industrial pluralist model leaves out all of the unorganized workers, who go unrepresented and largely ignored in workplace governance. Indeed, the American model of labor organization—despite the rise of industrial unions—has operated on the craft-union paradigm in that it advances the interests of its own members at the expense of the class of nonmembers, a class that includes the most disadvantaged members of society. Indeed, Dubofsky recognizes that the industrial pluralist model he finds attractive was in fact undermined by the success of the civil rights movement. The resulting Title VII of the Civil Rights Act of 1964[14] imposed on unions and employers affirmative obligations to ensure that racial and ethnic minorities, women and immigrants were hired and promoted, thus undercutting organized labor's control of the manufacturing work force. Yet, although Dubofsky sees the conflict between organized labor and the civil rights movement, he tends to see that conflict as accidental or incidental, rather than as a necessary result of the focus of organized labor on the economic enhancement of part, rather than all, of the work force.

Dubofsky ignores the experience of cost-push inflation that was responsible for much of the U.S. economy's troubles in the 1970s. Economists have pointed out how organized labor's wage demands have interacted with federal monetary policy to impose ever higher money wages, with resulting inflationary effects.[15] Monetary policy combined with organized labor's excessive wage demands when the Federal Reserve reacted to unemployment created by high-money wage rates by increasing the money supply. This stimulation reduced unemployment temporarily, but at the expense of engendering another, higher round of the wage-price cycle. Indeed, Karen Orren, whom Dubofsky cites, poses a devastating critique of organized labor's political agenda. She suggests not only that organized labor has pursued a wage strategy in bargaining with employers that has incidentally resulted in cost-push

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13. *See generally* THEODORE J. LOWI, THE END OF LIBERALISM (1969).

14. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1995)).

15. *See, e.g.*, ROBERT J. GORDON, MACROECONOMICS 192 (1978).

inflation, but that organized labor's consistent political strategy has been directed toward expansionary monetary policies.[16]

Finally, because organized labor's focus has remained narrow, its wage objectives have undermined the long-term interests of unionized employers in international competition and have created substantial structural unemployment. Contrary to the policies of Swedish unions, which have sought to narrow wage differentials among industries,[17] U.S. industrial unions have successfully raised the wage rate in the most productive industries, transforming those industries from ones with comparative advantages in international trade into industries with the highest differential wage costs, a transformation that erodes or destroys their competitive advantages. The U.S. automobile industry, for example, bears differentially high wage costs vis-à-vis other U.S. manufacturing industries as compared to their Japanese competitors, who pay closer to the prevailing Japanese manufacturing wage rate.[18] Economy-wide differences among nations are sorted out in the currency markets. But differential costs among industries, including wage rates, are critical factors in international competition. These factors have been largely ignored by U.S. labor when it formulates its bargaining and lobbying strategies. Rather than look to the imaginative policies pursued in nations like Japan and Sweden for bettering labor's return, organized labor in the United States has focused on short-term aggrandizement and—as exemplified by its opposition to the North American Free Trade Agreement (NAFTA)—has lobbied for trade protection.

The negative impact the policies pursued by organized labor have had on the unorganized sectors of the work force and on society in general is largely due to labor's narrow vision—its focus on the short-term betterment of its members without regard to the consequences of its policies on nonmembers or the public generally. Such a narrow vision might have been appropriate in early years, but organized labor's success in mass-production industries called for a wider vision if it was to remain a major force in the economy. Had organized labor made an attempt to develop a vision of its place in a dynamic industrial society in which it possessed significant power, it would have inquired into how its behavior could affect the long-term position of its own members as

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16. Karen Orren, *Union Politics and Postwar Liberalism in the United States, 1946-1979*, *in* 1 STUDIES IN AMERICAN POLITICAL DEVELOPMENT, 215, 243 (Karen Orren & Stephen Skowronek eds., 1986).

17. *See* Robert J. Flanagan, *Efficiency and Equality in Swedish Labor Markets*, *in* THE SWEDISH ECONOMY 125, 131-133 (Barry P. Bosworth & Alice M. Rivlin eds., 1987).

18. *See* JUNICHI GOTO, LABOR IN INTERNATIONAL TRADE THEORY 61, 130 (1990).

well as the unorganized segment of the work force and the public generally. Attention to the long term would have brought issues of productivity and the welfare of the working class generally to the fore. Union concern with productivity would have encouraged unions to discard many imbedded "work rules" and to cooperate with employers in ways only recently manifested in places like General Motors' Saturn plant or New United Motors Manufacturing, Inc. (NUMMI), the General Motors-Toyota joint venture in Freemont, California.[19] A concern with the welfare of the entire working class would have moved organized labor in the direction of advocating a "manpower" policy whose objective—in Orren's words—is "matching labor demand and supply through such programs as job training."[20]

The focus of a manpower policy is on raising the return of all workers by enhancing their productivity through skills training or other means. Such a policy reduces conflict and spreads benefits throughout the working class. Indeed, a manpower policy unites concerns about enhancing productivity with concerns about enhancing the earnings of the working class. The entire society enjoys the rewards of a successful manpower policy. Had organized labor publicized its own belief in manpower goals and shaped its own policies in light of those goals during the last several decades, it would have earned widespread respect, instead of a growing society-wide disenchantment with its single-minded efforts to benefit its own members over the short term, regardless of the consequences to other groups and to society at large.

A manpower focus is peculiarly appropriate for organized labor, since its direct object is the economic enhancement of the working class, the class to which organized labor appeals. Labor unions should be directing their lobbying efforts in support of the adoption, by the federal government, of effective national manpower policies, and they should take into account how their own operational goals affect the working class generally. A manpower focus by the federal government and a manpower focus by unions in the formulation of their day-to-day operational policies would unite organized labor and government as cooperative participants with capital in bringing the unskilled and the underskilled into the economic mainstream. This kind of focus would reduce the sense of alienation felt by these less favored groups and would enlist them in a society-wide effort to increase productivity. Indeed, enhancing the productivity of the entire working class reduces

19. *See* WILLIAM B. GOULD IV, AGENDA FOR REFORM 123-31 (1993).
20. Orren, *supra* note 16, at 243.

social conflict and expands national income. It is, in a sense, a modern version of the politics of productivity. This kind of focus is urgently needed as technological change advances and U.S. industry becomes increasingly subject to global competition.

A number of European nations—such as Sweden, Austria and, to a lesser extent, Germany—as well as Japan have adopted manpower policies designed to enhance the skills of the work force and thus to enhance the economic return to labor overall. In Sweden, that policy has been promoted by organized labor, which has accepted the responsibility for promoting the welfare of workers generally, a responsibility perhaps more easily embraced by Swedish than American unions because of Sweden's high rate of union membership.[21]

Dubofsky's otherwise impressive book fails to recognize that the decline of the labor movement is critically related to the narrow policies that have been pursued by that movement's leaders, at a time when rapid technological and social change has mandated a broad vision. Labor's leaders have followed a craft-union paradigm when they needed to concentrate, at a minimum, on the long-term interests of the entire working class.

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21. *See generally* Flanagan, *supra* note 17.