A Review Essay

The evolution of fair labor standards: a study in class conflict

Using a rigorous, quantitative approach, one scholar tracks the growth of legislation designed to guarantee U.S. workers fair pay and hours of work, finding in these laws a history of attempts to balance the social power of labor and capital

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In a provocative new book entitled *Wages and Hours: Labor Reform in the Twentieth Century*,[1] economist Ronnie Steinberg reviews the uneven development of minimum wage and maximum hours legislation in the United States. On the basis of quantitative evidence at both the Federal and State levels, Steinberg concludes that such protective laws have arisen from an ongoing class struggle in which the social rights of workers are pitted against employers' legal claims of equality of bargaining power under freedom of contract. Thus, passage of the Fair Labor Standards Act in 1938 was an outgrowth of the political ascendancy of the worker during troubled economic times, as evident in the elections of 1936.

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A new theory and method

In perusing Steinberg's study, one cannot help contrasting it with the magisterial work by John R. Commons and John B. Andrews, *Principles of Labor Legislation*, which was last published in the thirties.[2] As its title suggests, Steinberg's book is more narrowly focused than the Commons-Andrews volume, which took the range of laws affecting labor conditions as its purview. Steinberg is concerned with the political forces that compelled the adoption of wage and hours legislation, while Commons and Andrews were primarily interested in the juridicial evolution of labor law and the social conditions that gave rise to it. Commons and Andrews presented their subject in terms of the historical record, while Steinberg develops a social-indicator, rigorously quantitative method to trace the course of protective

labor legislation and its link to broader political, economic, and demographic factors. She claims much merit for this method, arguing that it makes for more systematic treatment of the subject than the evolutionary approach of other authors, and she devotes much space to detailing it. In this, she has undoubtedly made an original contribution, if at the expense of researching the less quantifiable records of hearings, testimony, and reports, which permit intensive analysis of the forces underlying the adoption of legislation. (Such records and reports are, in fact, not listed in the otherwise extensive bibliograhy, except for certain U.S. Department of Labor and Bureau of the Census materials.)

In Steinberg's view (as well as in the view of Commons and Andrews and other authors), labor legislation is an attempt to remedy the unequal bargaining power of workers. Throughout the latter part of the 19th century and the early 20th century, the relation between employer and worker was seen as based upon a contract freely entered upon by both parties. During this period, wage and hour laws were repeatedly struck down by the courts "because judges believed that labor and capital bargained as equals and, therefore, that labor did not need state protection." This juridical position in effect favored the liberty of the employer over the protection of the worker.

Like Steinberg, Commons and Andrews rejected this position. Detailing the pressures that impinged upon workers' self-defense, they wrote, "Unemployment . . ., immigration, child labor, education, prison labor . . . are conditions which determine the bargaining power of the laborer." And . . . "[Labor] legislation goes beyond the legal face of things, and looks at the bargaining power which precedes the contract."

Steinberg's notion of what the remedy for unequal bargaining power has meant for the social balance of power between labor and capital is far more radical than that of the earlier authors. For Commons and Andrews, adoption of protective labor legislation was continuous in its legal philosophy with the freedom-of-contract doctrine; they broadened the precept of property rights to include the wage earner's "right to seek an employer and to acquire property in the form of wages." They thus sought to preserve the integrity of constitutional law. Steinberg rejects any such continuity. Protective labor laws, she writes, "require explicit government intervention, they run directly counter to the dominant freedom-of-contract norm guiding legal relations." Furthermore, "the division of interest groups during the almost continuous controversies surrounding the enactment and emendation of these laws facilitates . . . the use of a class-orientated conflict model to explain changes in the law." The worker is dependent for his livelihood upon the employer, but he also is a free citizen, able with proper organization to invoke the state's authority in advancing a new set of rights. Protective labor legislation thus becomes an arena of class struggle, the demand for social rights by workers being pitted against employer resistance fortified by juridical precepts of equality of bargaining power under freedom of contract.

The antithesis postulated by Steinberg has great explanatory potential. It remains true, nonetheless, that conservative elements have also at times favored protective labor laws and other social legislation as a means to safeguarding social peace and to repress the ascendancy of liberal or radical forces.

Today and yesterday

Steinberg confines her study to the social rights incorporated in the wage and hour standards of 28 States, and in Federal legislation. The laws examined govern wage payment and wage collection; minimum wages; equal pay; maximum hours; overtime; and nightwork. She focuses upon the adoption and coverage of these laws, and leaves aside evaluation of their enforcement and impact because of lack of data suitable to the social indicator method. Her findings are generally quite interesting and worth closer study, although only a few general observations can be offered here.

First, the passage of the Fair Labor Standards Act (FLSA) in 1938 spelled a historical breakthrough in employee coverage under all six types of wage-hour laws enumerated above. For example, the Federal minimum wage covered 39 percent of all employed male adults and 57 percent of all female adults in 1940, while in 1930 and earlier decennial census years, State laws had covered no men, and 12 percent of women, or fewer. (By 1970, 90 percent of all employed adults and minors were covered.) Overtime regulations, which extended to but 14 percent and 6 percent of employed men and women in 1930, covered 40 percent and 30 percent by 1940 (and 70 percent by 1970). Equal pay laws, which arose under the pressure from women workers who often substituted for men during World War II, had covered only 2 percent of employed women between 1920 and 1940, but swept 23 percent of all employees under their provisions by 1950, and 78 percent by 1970.

The comparatively high proportion of workers covered by FLSA soon after its passage contrasts with the large discrepancy between adoption of wage-hour legislation by the States, and coverage provided by these laws, especially prior to 1940. For example, by 1920, 76 percent of the States in Steinberg's sample regulated maximum hours and 92 percent regulated wage payments and collection. The laws, however, covered only 12 percent and 45 percent of employed workers. The data thus reveal both disparities between adoption and coverage of protective legislation, and differences in coverage among various kinds of such legislation.

Discrepancies between adoption and coverage may be explained by attempts to accommodate the conflicting interests and legal conceptions of capital and labor: Legislation is adopted, but restricted to a minority of employees. Variation in coverage among types of protection, which also came to pervade Federal wage-hour regulation, although in

a less pronounced manner than it did State regulation, was related to the degree to which a given law would be expected to interfere with work arrangements. Wage payment and collection laws do this least, if at all, while maximum hour and overtime provisions may compel unwelcome reordering of such arrangements. Even under FLSA, overtime coverage today remains significantly less than minimum wage and equal pay coverage.

Still another kind of discrepancy among worker protection laws exists, this one between Federal and State coverage of workers by wage-hour legislation. In 1970, only 21 percent of employed men had minimum wage protection under State laws, according to Steinberg, but 68 percent had it under FLSA. Overtime legislation covered 23 percent of employed men under the former, 50 percent under the latter.

There is no obvious explanation for this discrepancy. Historically, the State pioneered maximum hour legislation. In its early period, such legislation was meant to protect women and minors, and excluded men from its coverage. Because it was meant to protect health and the family, it was much less likely to be thrown out by the courts than State minimum wage laws. In fact, few minimum wage laws survived court challenge until FLSA supervened; some were repealed, and in 1930, only 3 percent of all employed persons were covered by them. "Minimum wage legislation marks a new stage in the long line of attempts to equalize the power of employer and employee in making the wage bargain," wrote Commons and Andrews. But the difficulty in obtaining broadly applicable minimum wage legislation did not arise merely from a resistant legal philosophy. It was surely rooted in economic conditions. Commons and Andrews cite a number of authoritative surveys conducted between 1915 and 1935, which showed that a large proportion of workers received wages falling well below standards of "simple decency and working efficiency," or a "living wage," as defined by such authorities as the Federal Women's Bureau, the N.Y. Industrial Commission, and the Texas Bureau of Labor Standards.

Perhaps the States could not readily overcome a legal philosophy that distinguished among the bargaining positions of different age and sex groups. But, as Steinberg notes, the Great Depression transformed notions of power relations in the labor market. ". . . [The] sex and age of the employee came to be seen as secondary to the more fundamental fact that all employees selling their labor in the free market bargained from a position subordinate to that of employers." As a result, while variations in the coverage of wage and hour legislation persist by industry, region, and demographic characteristics, they have consistently declined.

The FLSA revolution

In discussing the forces that underlay the passage of FLSA, Steinberg applies the previously mentioned model of class conflict. FLSA was, of course, an outcome of the great political upheavals brought on by the crisis of the thirties. Its passage was unquestionably facilitated by the results of the 1936 election. ". . . [The] transformation of the basis upon which each employee was accorded the right of government protection under the FLSA rested on nothing less than a national class conflict, as expressed in the 1936 elections." In a broad sense, I agree with this interpretation, but a difficulty must be confronted: Organized labor was anything but in the forefront of the struggle for FLSA. According to another analyst, Elizabeth Brandeis, ". . . [It] was not primarily responsible for the revolutionary gains in protective labor legislation achieved in the years of the New Deal," and ". . . [its] objections to one form after another of the [Roosevelt] administration proposal (added to the opposition of other groups) nearly caused final defeat of the measure."[3]

Considering that labor represents one of the antagonists in Steinberg's class conflict model, it is relevant to look briefly at the reasons why the unions appeared ambivalent at best about the Fair Labor Standards (FLS) bill. Labor probably feared that government regulation of wages and hours would remove these two core components of working conditions from collective bargaining. It was also concerned that minimum wages might become maximum wages in many industries, that skilled groups of workers could lose by comparison with unskilled workers, and that contracts currently calling for more than 40 or 44 hours per week might be invalidated, and thus reduce the earnings of covered workers. John L. Lewis, then the leading force in the newly founded CIO, objected to the FLS bill on grounds that it would interfere with collective bargaining, and would eventually compel a court decision "to determine whether after all American workmen are freemen or indentured servants."[4] These fears proved unfounded, of course. Still, the view that organized labor took of the FLS bill as having the potential to shackle organizing drives and collective bargaining efforts, qualifies the notion that FLSA resulted from class conflict. Also fresh in the labor leaders' minds may have been the fact that, but a few years before, Hitler had destroyed the trade unions in Germany, while leaving protective and other social legislation untouched. This experience could have reinforced their belief that the independence of trade union organization and action from the state must take precedence over the social rights conferred by the state.

Notwithstanding the reservations of the trade union leadership about the FLS bill, Steinberg finds a "strong positive relationship between the extent of unionization in [given] industry categories and the extent of coverage of employees under labor standards . . . ." Furthermore, she writes, "Coverage under labor legislation seemed to grow concomitantly with unionization." Unquestionably, the unions played an important role in advancing protective legislation, especially after the mid-thirties. But, as Elizabeth Brandeis wrote earlier, ". . . [Both] AFL and CIO State organizations have been apathetic toward raising State minimum wage

standards."[5] And Steinberg's own evidence on the lag of State protective legislation indicates that her statistics for the period after the mid-thirties are valid mainly for the relation between unionization and Federal legislation.

LIMITING HERSELF METHODOLOGICALLY to a quantitative approach has not prevented Steinberg from developing a challenging intellectual framework for understanding the evolution of workers' social rights in the United States. She also writes very well and with verve; few books in the field of labor economics and sociology are as readable and informative. This book is a worthy addition to the tradition of research in defense of the disadvantaged. □

FOOTNOTES

Ronnie Steinberg, *Wages and Hours: Labor and Reform in Twentieth Century America* (New Brunswich, N.J., Rutgers University Press, 1982).

[3] John R. Commons and John B. Andrews, *Principles of Labor Legislation* (New York, Harper and Brothers, 1936).

[4] Elizabeth Brandeis, "Organized Labor and Protective Labor Legislation," in Milton Derber and Edwin Young, eds., *Labor and the New Deal* (Madison, The University of Wisconsin Press, 1957), pp. 195-237.

[4] Brandeis, "Organized Labor," p. 223.

[5] Ibid.

Time for leisure

Throughout history the amount of time spent at work has never consistently been much greater than that spent at other activities. Even a workweek of 14 hours a day for 6 days still leaves half the total time for sleeping, eating, and other activities. Economic development has led to a large secular decline in the workweek, so that whatever may have been true of the past, today it is below 50 hours in most countries, less than a third of the total time available. Consequently, the allocation and efficiency of nonworking time may now be more important to economic welfare than that of working time; yet the attention paid by economists to the latter dwarfs any paid to the former.

—GARY BECKER
"A Theory of the Allocation of Time,"
in ALICE H. AMSDEN, ed., *The Economics of Women and Work*
(New York, St. Martin's Press, 1980), p. 52.