Context Matters:
A Reply to Professor Eisenberg

by Susan Bisom-Rapp

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CONTEXT MATTERS: A REPLY TO PROFESSOR EISENBERG

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Professor Deborah Eisenberg has produced a fine and important work, Regulation by Amicus, which assesses U.S. Department of Labor (DOL) efforts to influence statutory interpretation and effectuate public policy through the use of friend of the court briefs in private litigation.¹ Most notably, she focuses on the unconventional deployment of this strategy by the two most recent presidential administrations in the service of their interpretations of the Fair Labor Standards Act (FLSA),² the federal statute governing wage and hour law. Through the often aggressive submission of amicus curiae briefs, the administration of George W. Bush aimed to use the Supreme Court’s agency deference doctrine to eviscerate worker protections,³ while Barack Obama’s administration has employed the same tool to revive and expand interpretations protective of employees.⁴

Professor Eisenberg’s article is a significant empirical work because it sheds light on an agency practice that is changing over time, reveals the political and normative implications of that practice, and suggests a framework that would assist judges in understanding when agency deference is warranted and when it is not.⁵ She wisely argues that decisions to exempt a regulated party from statutory coverage, such as those pursued by the Bush DOL through its amicus strategy, should be left to Congress or effectuated through an agency’s notice and comment rulemaking rather than achieved by “furtive litigation strategies or amicus briefs.”⁶ In short, she reminds us that “context matters” in determining the weight, if any, that an agency’s statutory interpretation is due.⁷

This reply is written attentive to Professor Eisenberg’s injunction that “context matters.” Indeed, one might contextualize Regulation by Amicus by considering two key observations. Each observation contains a lesson for those writing about workplace law, and Professor’s Eisenberg’s article provides a springboard for its examination.

First, the practice Professor Eisenberg describes has emerged at a time of extreme political polarization and Congressional gridlock. This is an age of hyper-partisanship the likes of which have not been seen in

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3. Eisenberg, Regulation by Amicus, supra note 1, at 1228.
4. Id. at 1229.
5. See id. at 1276–80.
6. Id. at 1279.
7. Id. at 1236.
over a century.8 In such an environment, legislating through cross-party coalitions or very strong single party support is rare,9 leaving the dominant parties to enact their national political agendas through less conventional means. A paralyzed legislature serves as an enabler of the executive.10 Since the president controls the regulatory system, it is no surprise that Presidents Bush and Obama have pursued their political aims regarding workplace protection through the auspices of the DOL, among other agencies.

For labor and employment law scholars, these developments serve as an invitation for enhanced scrutiny of traditional and new approaches to regulation.11 Moreover, the Bush and Obama years serve as useful case studies. Each administration will have had eight years of control over regulatory policy by the end of 2016. The former, when it comes to workplace law, is an example of an administration wedded to principles of deregulation. The latter is an example of an administration with a decidedly more interventionist view of the role of government. Since the regulatory agencies devoted to workplace matters are traditionally sensitive to regime change in the White House,12 their records provide fertile sources to mine, as has Professor Eisenberg. Such work is essential as it reveals how, in this extraordinary political moment, power is deployed on the national level and on whose behalf. It may also, if it is done well, provide fodder for demands for greater political transparency and democratic accountability.

The second responsive observation relates to the changing nature of work, the increasingly uneasy fit between workplace law and the workplaces it is supposed to govern, and the complicity of our elected representatives in allowing that regulatory slippage to increase. In fact, the FLSA, the statute which provides the central focus of Regulation by Amicus, was designed to protect those in standard employment relationships. In the U.S., however, non-standard employment relationships are proliferating leaving millions13 without the protective

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9. Id. at 330.
10. Id. at 330–31.
11. Traditional regulation may be defined as regulation that is top-down, legalistic, and command-and-control in orientation. See Susan Bisom-Rapp, What We Learn in Troubled Times: Deregulation and Safe Work in the New Economy, 55 WAYNE L. REV. 1197, 1222–24 (2009) (defining and explaining the limitations behind traditional regulation). In contrast, new approaches to regulation may be characterized as those that “foster self-reflection by regulated parties, active participation of numerous stakeholders, the sharing of information through best practices . . . and cooperative engagement with public authorities.” Id. at 1224.
12. Id. at 1234.
13. A 2006 report, using a broad definition of contingent work—workers who do not have standard full-time employment—estimated contingent workers, including independent
mantle of workplace law.

Of particular concern is hiring individuals as independent contractors, a status that deprives them of the protections of the FLSA, among other important labor and employment laws. Congress’s indifference to these individuals goes beyond failing to legislate for their protection. Our national legislature is not even interested in how many of them exist. For the last several years, Congress has refused the Obama administration’s modest funding request to undertake a biennial count of non-standard workers, whose numbers many believe increased substantially during the Great Recession and its aftermath. The last Contingent Work Supplement was conducted by the U.S. Bureau of Labor Statistics in 2005, rendering available data out-of-date by close to a decade.

For those who labor as independent contractors, the issue is not whether they will be eligible for overtime or considered exempt employees under the FLSA—issues of interpretative importance in the FLSA case law analyzed by Professor Eisenberg. Rather, the concern is how, if at all, they will obtain payment from recalcitrant employers since the Department of Labor will not prosecute claims for independent contractors or the self-employed. Labor and employment law scholars toiling in the fields of America’s traditional regulatory


14. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-717, EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE PREVENTION AND DETECTION 5–6 (2009) (noting that some employers classify individuals as independent contractors to circumvent the protections provided to employees under labor and employment law).

15. Susan Bisom-Rapp, Navigating in a Snowstorm: Labour Market Regulation, the Changed Nature of Work, and the Grey Zone in the United States 9–10 (Jan. 16, 2014) (unpublished manuscript) (on file with the author). In fiscal years 2013 and 2014, the sum requested by the White House to fund the Bureau of Labor Statistic’s Contingent Work Supplement was $1.6 million. Id. at 10.


17. See id.

18. See, e.g., Eisenberg, supra note 1, at 1261–65 (noting examples of several cases interpreting the FLSA).

regime must remain mindful that lawmakers who avert their eyes from the disjunction between workplace law and work as actually performed are enabling, at least in part, the deregulation of segments of the American labor market.

Clearly, this second observation may engender despair in those workplace law scholars who believe that a certain amount of regulation is requisite to maintain fairness, promote economic equality and social justice, and prevent employer over-reaching. The antidote to that despondency requires focusing on reconceptualizing workplace legal regulation, both theoretically and empirically, through case studies of state and local efforts to craft protections for those vulnerable workers traditionally left out of the coverage of statutory law. Fortunately, that kind of scholarly work is well underway, providing hope that through experimentation viable solutions on a larger scale may one day be within reach.20 Ultimately, however, what is required to move Congress to action is a political movement that demands elected leaders legislate in light of reality.21 Until such a movement emerges, work such as that produced by Professor Eisenberg lays the groundwork toward that vitally necessary goal.

20. Recent scholarly anthologies in this vein include RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT (Katherine V.W. Stone & Harry Arthurs, eds., 2013); THE IDEA OF LABOUR LAW (Guy Davidov & Brian Langille, eds., 2011); and REGULATING LABOUR IN THE WAKE OF GLOBALIZATION: NEW CHALLENGES, NEW INSTITUTIONS (Brian Bercusson & Cynthia Estlund, eds., 2008).

21. See Michael J. Zimmer, Inequality, Individualized Risk, and Insecurity, 2013 WISC. L. REV. 1, 60–65 (2013) (explaining how a social movement can work to achieve necessary economic and social changes in society).