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# Swimming in the Crosscurrents of History: Labor and Employment Law Under the Obama Administration

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## Swimming in the Crosscurrents of History: Labor and Employment Law Under the Obama Administration

KENNETH G. DAU-SCHMIDT\* AND MATTHEW KELLEY\*\*

If there is anyone out there who still doubts that America is a place where all things are possible, who still wonders if the dream of our founders is alive in our time, who still questions the power of our democracy, tonight is your answer . . . . It's the answer spoken by young and old, rich and poor, Democrat and Republican, black, white, Hispanic, Asian, Native American, gay, straight, disabled and not disabled. Americans who sent a message to the world that we have never been just a collection of individuals or a collection of red states and blue states. We are, and always will be, the United States of America. It's the answer that led those who've been told for so long by so many to be cynical and fearful and doubtful about what we can achieve to put their hands on the arc of history and bend it once more toward the hope of a better day. It's been a long time coming, but tonight, because of what we did on this date in this election at this defining moment change has come to America.<sup>1</sup>

Given in Senator Barack Obama's election victory speech on November 4, 2008, in Grant Park in Chicago, Illinois.

Across the country right now, we are witnessing a repudiation of Washington, a repudiation of Big Government and a repudiation of politicians who refuse to listen to the people . . . . While our new majority will serve as your voice in the people's House, we must remember it is the president who sets the agenda for our government. The American people have sent an unmistakable message to him tonight, and that message is: "change course." . . . Let's start right now by recognising this is not a time for celebration. This is a time to roll up our sleeves and go to work . . . . We can celebrate when the spending binge in Washington has stopped. And we can celebrate when we have a government that has earned back the trust of the people it serves . . . when we have a government that honours our Constitution and stands

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1. *Transcript: "This Is Your Victory," Says Obama*, CNN (Nov. 4, 2008), <http://edition.cnn.com/2008/POLITICS/11/04/obama.transcript/>.

up for the values that have made America, America: economic freedom, individual liberty, and personal responsibility.<sup>2</sup>

From statement of Representative John Boehner in his victory speech upon the Republicans retaking the House, given in the Grand Hyatt Ballroom, Washington, DC, on November 2, 2010.

We live in complex and contentious times.

On November 4, 2008, Barack Obama decisively won the Presidency of the United States. Frustrated with incompetence under the Bush Administration, saddled with two costly foreign wars, and reeling from the most serious economic crisis in almost eighty years, the American people swept Barack Obama into office with almost fifty-three percent of the popular vote,<sup>3</sup> sixty-eight percent of the Electoral College,<sup>4</sup> a seventy-eight-seat Democratic working majority in the House,<sup>5</sup> and a brief twenty-seat Democratic majority in the Senate.<sup>6</sup> President Obama had campaigned on a platform of “Hope and Change,” and there was strong desire among the electorate for a new direction and new leadership.<sup>7</sup> The fact that the country had elected its first African American president, and the broadly recognized need for government intervention to stabilize the economy, reregulate financial markets, and promote job growth, all suggested a new era of broad and inclusive discourse among all Americans in which government could play a positive role in regulating markets and promoting economic growth. Analogies to the New Deal Era of the Great Depression were irresistible.<sup>8</sup> In this environment, it

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2. *Midterms 2010: John Boehner's Victory Speech in Full*, THE TELEGRAPH (Nov. 3, 2010), <http://www.telegraph.co.uk/news/worldnews/us-politics/8106711/Midterms-2010-John-Boehners-victory-speech-in-full.html>.

3. FED. ELECTION COMM'N, 2008 OFFICIAL PRESIDENTIAL GENERAL ELECTION RESULTS 2 (Jan. 22, 2009), available at [www.fec.gov/pubrec/fe2008/2008presgeresults.pdf](http://www.fec.gov/pubrec/fe2008/2008presgeresults.pdf) (stating that Obama received 52.92% of the popular vote).

4. *Id.* at 4 (confirming that Obama received 365 of 538 electoral votes).

5. HOUSE OF REPRESENTATIVES, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 4, 2008 at 75 (2009), available at [clerk.house.gov/member\\_info/electionInfo/2008election.pdf](http://clerk.house.gov/member_info/electionInfo/2008election.pdf) (256 Democrats and 178 Republicans were elected to the House of Representatives).

6. Once the protracted recount contest over Al Franken's win in Minnesota was settled, the Democrats briefly held a twenty-vote majority in the Senate. David Lightman, *Franken to Give Senate Democrats a Block-Proof Majority*, THE OLYMPIAN, June 30, 2009, available at <http://www.theolympian.com/2009/06/30/897210/franken-to-give-senate-democrats.html>. This “filibuster-proof” majority was shattered when Scott Brown won a special election to replace the deceased Senator Edward Kennedy of Massachusetts. *Senate Race 2010: The Special Election to Replace Senator Edward M. Kennedy in the US Senate*, BOSTON GLOBE, [http://www.boston.com/news/politics/2010/senate\\_race/](http://www.boston.com/news/politics/2010/senate_race/).

7. Adam Nagourney, *Obama: Racial Barrier Falls in Decisive Victory*, N.Y. TIMES, Nov. 5, 2008, at A1, available at <http://www.nytimes.com/2008/11/05/us/politics/05elect.html>.

8. See generally Kenneth R. Bazinet, *President-Elect Barack Obama Pushes for New Deal Program to Stem Unemployment*, NYDAILYNEWS.COM, Dec. 5, 2008,

was thought that employee interests and those of organized labor would do very well and a new balance would be struck in favor of those interests in our federal regulatory scheme and the enforcement of federal law. It was thought that Congress would finally pass some form of labor law reform—probably the Employee Free Choice Act—and perhaps even pass the Arbitration Fairness Act.<sup>9</sup> At a minimum, it was believed that the Obama Administration would have an unfettered hand to enforce existing federal laws on behalf of employees.

Just two years later, the American voters handed the Republicans impressive election victories, giving them a pickup of six seats in the Senate<sup>10</sup> and sixty-four seats in the House of Representatives—handing control of the House back to the Republicans and their new Speaker, John Boehner.<sup>11</sup> The Republicans campaigned on a platform of cutting federal spending and taxes and returning to “traditional conservatism” with a much smaller role for government in the economy.<sup>12</sup> They benefited from a motivated base and the “Tea Party” movement that formed as a reaction to the prospects of a larger role for government after the Obama victory.<sup>13</sup> The victory gave House and Senate Republicans the opportunity to block any major legislative reforms by the Obama Administration, place budgetary limitations on administrative enforcement of the law, and bargain for a new legislative balance in favor of employers. Instead of a “New Deal,” we now seem faced with the possibility of a Ronald Reagan redux. Thus, the American electorate has given quite contradictory mandates in the last two elections, reflecting a deeply divided electorate and very different voter turnout rates among various demographic groups in the two elections.<sup>14</sup> Exactly how President Obama and the congressional

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[http://www.nydailynews.com/money/2008/12/05/2008-12-05\\_presidenelect\\_barack\\_obama\\_pushes\\_for\\_n.html#ixzz1PvfpdnZS](http://www.nydailynews.com/money/2008/12/05/2008-12-05_presidenelect_barack_obama_pushes_for_n.html#ixzz1PvfpdnZS); Mike Allen & Jonathan Martin, *Obama Unveils 21st Century New Deal*, POLITICO (Dec. 6, 2008, 9:30 AM), <http://www.politico.com/news/stories/1208/16258.html>.

9. Interview by Neal Conan with Andy Stern, Service Employees International Union President, on NPR (Dec. 15, 2008), *available at* <http://www.npr.org/templates/story/story.php?storyId=98279333>; Seth Michaels, *Employee Free Choice Act Introduced in Congress*, PEOPLE’S WORLD (Mar. 11, 2009), <http://www.peoplesworld.org/employee-free-choice-act-introduced-in-congress/>.

10. HOUSE OF REPRESENTATIVES, STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 2, 2010, at 60 (2011), *available at* [clerk.house.gov/member\\_info/electionInfo/2010election.pdf](http://clerk.house.gov/member_info/electionInfo/2010election.pdf) (stating that forty-seven Republicans were elected to the Senate).

11. *Id.* (stating that 242 Republicans were elected to the House of Representatives).

12. Mark Halperin, *Countdown to the Coming Republican Tsunami*, TIME (Sept. 7, 2010), <http://www.time.com/time/nation/article/0,8599,2016303,00.html>; Julie Hirschfeld Davis, *GOP “Pledge to America”: Will It Help Republicans in 2010 Elections?*, CHRISTIAN SCI. MONITOR (Sept. 23, 2010), <http://www.csmonitor.com/USA/Elections/From-the-Wires/2010/0923/GOP-Pledge-to-America-Will-it-help-Republicans-in-2010-elections>.

13. *See, e.g.*, E.J. Dionne, *What Really Happened in the 2010 Election*, WASH. POST (Nov. 8, 2010, 9:15 AM), [http://voices.washingtonpost.com/postpartisan/2010/11/what\\_really\\_happened\\_in\\_the\\_20.html](http://voices.washingtonpost.com/postpartisan/2010/11/what_really_happened_in_the_20.html); Ed Stoddard, *Republican Win Doesn’t Excite U.S. Public—Poll*, REUTERS (Nov. 12, 2010, 5:43 AM), <http://in.reuters.com/article/2010/11/12/idINIndia-52852020101112>.

14. Dionne, *supra* note 13. *See generally* Chris Cillizza, *The Conventional Wisdom Is Mad About Anger, but . . .*, WASH. POST, June 28, 2010, at A2, *available at* <http://www.wash>

Republicans will accommodate these two mandates and fulfill the expectations of their respective constituencies during a time of significant economic crisis is yet to be seen.

This conference was planned with the hope that its papers would provide a basis for comprehending the nation's current problems and dilemmas in labor and employment law and how the Obama Administration might address these problems. Since the 2010 election, the conference has taken on the additional question of how the Obama Administration can address these problems in a contentious political environment. Care was taken not only to cover all of the major issues in labor and employment law, but also to provide a broad spectrum of perspectives, including employee advocates, employer advocates, government administrators, and academics. The resulting discourse did not disappoint.

The conference began with presentations by Professors Lonnie Golden and Robert J. Flanagan on the existing economic environment and the likely effects of various possible legislative or administrative initiatives by the Obama Administration. In his paper, Professor Golden focuses on the prospects for workers in the context of new and proposed labor legislation. He argues that broad general employment laws and reforms are far more likely to lead to improved worker conditions than specific reforms. He notes that the current employment trends that most plague U.S. workers are unemployment, underemployment, and increased income inequality. Golden then analyzes specific proposed legislation, including Workplace Flexibility 2010, the Gender Equality Act of 2010, and the Family Friendly Workplace Act, to determine which are likely to promote the stated labor policy goals of restoring labor standards, protecting incomes, expanding educational opportunities, and improving work-family balances.

Professor Flanagan's discussion of labor policy argues that the primary goal of the Administration's labor policy should be the promotion of full employment. He analyzes foreign attempts at reaching full employment through increased labor market regulation, and determines that none of these efforts have been especially successful in reaching full employment goals. Based on this analysis, Flanagan concludes that labor market deregulation is more likely to lead to employment growth rather than a policy of more extensive labor market regulation, although Flanagan also advocates a strong dose of government stimulus through direct government purchases to shore up aggregate demand.

In the second session, past National Labor Relations Board (NLRB or the "Board") Chair William B. Gould, IV and past Board member John N. Raudabaugh examined the current state of labor organizing in the United States and posed fundamentally different solutions to the problem of providing American employees a voice in the workplace. In his paper, Professor Gould and his coauthor Andrew J. Olejnik suggest that independent compliance monitoring programs—like the program initiated by FirstGroup, PLC—might provide a useful alternative to the traditional organizing mechanisms of the National Labor Relations Act (NLRA). The authors detail FirstGroup, PLC's conflict with unions and perceived antiunion policies throughout the early 2000s as well as the initiation and ultimate success of

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ingtonpost.com/wp-dyn/content/article/2010/06/27/AR2010062703155.html; Gary Langer, *Exit Polls: Economy, Voter Anger Drive Republican Victory*, ABC NEWS (Nov. 2, 2010), <http://abcnews.go.com/Politics/vote-2010-elections-results-midterm-exit-poll-analysis/story?id=12003775>.

FirstGroup PLC's Independent Monitor Program. The authors argue that an independent monitoring program is superior to the current statutory procedures in the NLRA in that the independent monitoring program is expeditious, voluntary, stresses transparency, and is not overly formalistic. Further, they conclude that such a program provides greater protection to employers and employees alike. In his paper, Mr. Raudabaugh explores current labor policies, focusing on the question of whether the current model of third-party majority representation through unions adequately serves the interests of workers and, therefore, the needs of the U.S. economy. He analyzes statistics regarding the number of election certifications over a span of thirty-seven years as well as statistics regarding the number of cases decided by the NLRB during that same period. Based on his analysis, Raudabaugh concludes that the current representation model is untenable, and notes that modern labor policies need to promote increased employee engagement and allow more opportunities for individual voices to be heard, outside the current model of unionism.

In the next session, Professors Paul Secunda and Richard Bales discussed likely future developments in Board doctrine under the Obama Administration on two hot topics in labor law: the future of employer captive audience speeches; and the increased use of neutrality agreements and card checks. In his article, Paul Secunda focuses on the likely future of NLRB doctrine on employer captive audience speeches. Secunda postulates that the Obama Board will seek to limit the number and frequency of captive audience speeches based on the broad theory that such conduct limits employee free choice. He discusses the history of the Board's treatment of captive audience meetings and segues into possible Board analyses curtailing these tactics through the regulation of practices that compromise the "laboratory conditions" of a union election or that constitute an unfair labor practice under Section 8(a)(1) of the NLRA. Secunda concludes that these are the two most likely vehicles for Board decisions limiting the employer's right to hold captive audience meetings during the Obama Board's tenure.

Richard Bales and his coauthor James Y. Moore examine the equally prescient and linked topics of neutrality agreements and card checks, and argue that these ideas should replace the secret ballot election in American labor law. The authors argue that neutrality agreements and card check recognition are more consistent with the concept of industrial democracy than the current secret ballot election system. At the outset, the authors engage in an overview of the current system and its historical association with the concepts of industrial democracy and its roots in American political theory. Once the theoretical basis of the industrial democracy concept has been discussed, the practical aspects of the union election and the weaknesses of the current system are presented. The authors present card checks and neutrality agreements as a better alternative to secret ballot elections outlining both the arguments for and against this policy change. In the end, the authors conclude that if American labor policy is supposed to ensure that only economic forces and the free choice of labor determine the outcome of organization efforts, then something must be done, concluding that employers have become experts in exploiting the traditional board election process. Card checks and neutrality agreements, not secret ballot elections, are consistent with the basic premises of industrial democracy, and represent a way to level the playing field and give full effect to the purpose of the NLRA.

Professor Joseph Slater conducted his own session on public-sector labor relations law. While most scholars and practitioners focus on private-sector unionization—overlooking public-sector bargaining—Professor Slater pointed out that public-sector unionization is one of the crown jewels of the labor movement, eclipsing private-sector unionization. Despite this success, the current economic climate and recent recession have increased scrutiny in public-sector organizing, giving rise to new challenges for public-sector unions. Professor Slater’s article focuses on four issues involving public-sector labor in the age of Obama. In discussing the political attacks on public-sector unions which have escalated during the economic crisis and certain bargaining and legal issues the economic crisis has created, Slater explains the broad impact these issues have had across the country. The third and fourth issues, concerning the continuing battle over whether employees of the Transportation Safety Administration (TSA) should have collective bargaining rights; a proposed statute that would grant all police and firefighters collective bargaining rights; and an interesting set of cases from Missouri interpreting its state constitutional requirement that employees have “the right to bargain collectively” focus on legal issues for discrete sets of workers that also raise important issues about all public-sector labor relations. Using both these broad trends and specific examples, Slater concludes that the age of Obama presents stark contrasts for public-sector unions. While union density rates remain high, budgetary crises—especially at the state level—have created a variety of threats from budget cuts to political threats in which public employees are painted as an unfairly privileged class.

In a session on individual employment arbitration, the panel included three academics with very different views on the efficacy and fairness of the process and thus the benefits of the proposed Arbitration Fairness Act. Professor David Schwartz provided the strongest argument for reform in his searing criticism of the current state of the law under the Supreme Court’s interpretations of the Federal Arbitration Act (FAA), describing current practices as “claim-suppressing arbitration.”<sup>15</sup> Schwartz outlines the issues facing consumers and employees when faced with arbitration clauses in adhesion contracts. Once defined, Schwartz examines the Supreme Court’s role over the past fifteen years in exacerbating the problems facing consumers and employees, navigating the reader through the confusing and, in Schwartz’s view, political and illogical decisions of the Court in the arbitration forum. Schwartz concludes his article by forecasting a bleak future for consumer and employee advocates in fighting mandatory arbitration clauses and seeking court review of the arbitrability of claim-suppressing arbitration agreements. As Schwartz foretells, the Supreme Court’s continued reliance on the FAA means that, in the future, arbitrability will be decided exclusively by people who have a vested interest in the success of arbitration as a dispute resolution mechanism, the arbitrators themselves.

Professor David Sherwyn emphasizes the positives of arbitration, finding real but fixable problems with the individual employment arbitration model. Sherwyn acknowledges that the Equal Employment Opportunity Commission’s (EEOC)

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15. See David C. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239 (2012).

current system of investigation and litigation is broken, incentivizing bad-actor employers and employees to utilize the current system to their respective advantages. However, he feels that the current problems could be addressed under the framework of what he proposes as a Mandatory Arbitration Act. Professor Sherwyn brings forth an often-discussed idea, the abolition of the employment-at-will doctrine, as a viable solution to the issues plaguing employment litigation. Professor Sherwyn sketches a novel tripartite program by which employees and employers would be held to a “just cause” standard. Employers who wish to avoid the just cause standard will simply pay a severance in return for a release of employment claims from the employee. The framework also discusses a new adjudication system for the claims not settled based on cause or for severance. In offering this alternative solution to the stale argument of alternative dispute resolution versus litigation, Sherwyn offers what he hopes to be a more productive focus and framing for the conversation. By focusing more on the incentives generated by the realities of the current system, he attempts to move the overarching conversation forward.

Professor Martin Malin provides an intermediate position on the pros and cons of individual employment arbitration and the need for the Arbitration Fairness Act (AFA). Professor Malin advocates for legislative reform to curb employer abuses and ensure fairness in employer-imposed predispute arbitration, yet takes great pains to debunk some of the rhetoric espoused by AFA proponents, citing statistics comparing arbitration awards and litigation outcomes. Professor Malin, while finding that employer motives for imposing predispute arbitration run the gambit from rational to totally unconscionable, concludes that there is no clear-cut answer regarding the fairness and justice of predispute arbitration. In the end, Professor Malin proposes legislative reforms to curb employer abuses and argues that such reforms are superior to the Arbitration Fairness Act’s absolute prohibition on employer-imposed predispute arbitration mandates. Like Professor Schwartz, Professor Malin postulates that reform is necessary because the judiciary has largely abdicated its oversight function.

The last session of the conference included presentations on current issues in employment discrimination by Professors Angela Onwuachi-Willig, Joel W. Friedman, and Michael Z. Green. In discussing antidiscrimination law under the Obama Administration, Professor Onwuachi-Willig and her coauthor Professor Mario L. Barnes first explore the significance of the election of an African American president in the enforcement of these laws. The authors conclude that Obama’s election had very little effect on enforcement and argue that it has facilitated the continuation of workplace discrimination and perhaps even increased such discrimination. Onwuachi-Willig and Barnes argue that Obama’s “strategic move toward racelessness”<sup>16</sup> and his refusal to emphasize issues of race during the campaign were so effective as campaign strategies that they removed any statement about race or the acceptance of a black president when people actually voted for Obama. They further note that, since the election, Obama’s name and likeness have been used as tools for racial harassment in the workplace. The article concludes that

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16. Angela Onwuachi-Willig & Mario L. Barnes, *The Obama Effect: Understanding Emerging Meanings of “Obama” in Anti-Discrimination Law*, 87 IND. L.J. 325, 332 (2012).



the election of an African American president who distanced himself from the issue of race during the campaign may deter improvements in the area of workplace discrimination or harassment.

In the same vein, Professor Friedman explores the impact of the Obama residency on the enforcement of civil rights laws, and concludes that there has been little effect. Professor Friedman argues that the election of an African American president does not mean that American society has developed a newfound respect for civil rights and diversity, noting the publicized racial slurs directed at the president and his family. Friedman briefly analyzes Obama's judicial and EEOC appointments, concluding only that while Obama appears to be attempting to diversify the judiciary and the EEOC, there is no way to tell what kind of impact that diversification will have. Friedman also briefly analyzes Obama's Justice Department and the legislative efforts of the Obama Administration, and concludes that Obama is attempting to reinvigorate the Justice Department's role in civil rights enforcement. Following his analysis, Friedman explains that it is impossible to tell what impact the Obama Presidency will have on civil rights enforcement, though it is clear Obama is trying to expand the government's role in civil rights enforcement.

Finally, in analyzing the impact of the first African American president on antidiscrimination law, Professor Green offers an interesting case study using interest convergence theory to get white and nonwhite members of unions to care equally about racial discrimination claims, and to present a united front in addressing racial discrimination claims against an employer. Green recognizes that there will be conflicts between white and nonwhite union members when allegations of racial discrimination arise, but proposes a postracial solution for unions in addressing these conflicts. He uses the example of the *Ricci v. DeStefano*<sup>17</sup> case to show that unions should not choose sides in racial discrimination matters, and further argues that since the *14 Penn Plaza, LLC v. Pyett*<sup>18</sup> case allows unions to waive an employee's right to pursue a discrimination action in court, that unions should utilize arbitration as the best forum for resolution of discrimination complaints. Green argues that unions need to unite the union members' similar economic interests to bridge racial gaps when discrimination disputes arise.

The symposium participants set out to illuminate the political and practical impacts of the historic election of President Barack Obama on the enactment and enforcement of labor and employment law. To some extent, the election results of 2010 have attenuated the initial promise of Obama's election by limiting his freedom to pursue legislation and policies as he sees fit. Nevertheless, President Obama is a skilled communicator who has already proven adept at working with or without the cooperation of the congressional Republicans. Moreover, it is impossible to treat the election of the country's first African American president as anything other than a watershed moment in American race relations, with implications for the workplace and labor and employment law. The symposium participants thoroughly explored the implications of Obama's Presidency for a

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17. 129 S. Ct. 2658 (2009).

18. 556 U.S. 247 (2009).

wide variety of aspects of labor and employment law. We hope that the readers will find these articles useful in considering these questions.

