

# DEMOCRACY AT WORK

Ruben J. Garcia\*

In the United States and throughout the world, democracy is the defining issue in the workplace today. Many issues in the workplace implicate democracy—from the participation of unions and employees in elections, to the political rights of people on and off the job, to the design of dispute resolution systems to enhance voice and due process. Thus, the theme for this Symposium issue of the *Nevada Law Journal* is democracy and the workplace. These compelling articles address the connections between democracy and the workplace today.

Since its founding, the Boyd School of Law at the University of Nevada, Las Vegas has been a leader in the study of law in the workplace and, through the Saltman Center for Conflict Resolution, new models of dispute resolution. These two strengths came together when the law school hosted a symposium on Democracy and the Workplace February 23-25, 2012. Saltman Professor and Center Director Jean Sternlight, Boyd Visiting Professor Lisa Blomgren Amsler (of the School of Public and Environmental Affairs at Indiana University-Bloomington), and I organized the Symposium.

“Democracy” is a contested concept even in the public sphere of voting for political candidates. Recent decisions of the Supreme Court involving the Voting Rights Act and money in politics continue to reverberate throughout the political system. In light of these cases, questions remain about whether all citizens have a meaningful chance to participate and elect candidates of choice for all segments of society, except for those who have huge sums of money to pump into the political system. There is little debate that “democracy” is good for our political system; the debate is over what constitutes “democracy.” Are voter identification rules consistent with democracy? Is an increasing divide in wealth consistent with a functioning democracy?

“Democracy” in the workplace is even more contested. The title of the symposium, however, raises the questions: Is there democracy in the workplace? Should there be? How? To address some of these questions, an explanation of the underpinnings for democracy in the workplace might be helpful.

Before 1935, democracy in the American workplace was indeed a contradiction in terms. The dominant legal framework in every state and the common law antecedents before 1935 was employment at will. As a default rule, employment at will is in place in forty-nine states. In those states, an employee can be fired for any reason or no reason, as long as the termination does not violate a constitution, statute, or public policy. In 1935, however, Congress passed the National Labor Relations Act (NLRA), which for the first time made protection for union organizing and collective bargaining a matter of federal

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\* Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas.

law.<sup>1</sup> One of the major premises of the law was to institutionalize a system of employee voice that had previously not existed. As the system of collective bargaining matured, scholars and the courts began to see the NLRA as foundational to a system called “industrial democracy.”

More than 70 years after its passage, however, many commentators believe the NLRA has not lived up to its promise to bring workplace democracy to many private sector employees, particularly with less than 7 percent of the private sector workforce currently represented by a union. Coexistent with the decline of collective bargaining, alternative dispute resolution systems have become more prevalent, perhaps providing some modicum of voice in nonunion workplaces. At the same time, mandatory pre-dispute arbitration is seen by many as anti-democratic, in that employees and consumers may feel coerced to waive access to a judicial forum and jury trial in order to get a job or a consumer product.<sup>2</sup>

For public employees, who are subject to different bargaining laws depending on the states in which they work, there has been a vigorous debate about the proper role and scope of collective bargaining and constitutional rights. At the same time, both employers and employees continue to participate in the broader system of democracy, though recent decisions of the United States Supreme Court may give employers a greater collective voice in the political system and the shaping of the workplace. These themes provided the impetus for the symposium.

The plenary speakers at the symposium were Professor Joel Rogers of the University of Wisconsin Law School and Cynthia Estlund of New York University School of Law, who both put the themes of the conference in the context of larger social forces. Professor Rogers introduced a then-nascent project to enhance democracy—the American Legislative and Issue Campaign Exchange (ALICE), which is an answer to the American Legislative Exchange Council (ALEC). Professor Rogers has continued work on the project, resulting in a new nonprofit that aims to aid legislators in crafting progressive legislation. Professor Estlund’s lecture, which she is publishing in this issue, powerfully raises some of the democratic implications of the lack of a “digestible norm” of worker participation, and the lessons that might be learned from the corporate diversity movement.<sup>3</sup> These two plenary lectures enhanced the over forty panelists and commentators from across the United States and Canada who presented their papers at the symposium in February 2012.

The other articles in this Issue span the many contours of democracy and the workplace. Ariana Levinson’s article describes one of the new models for democracy in the workplace — worker cooperatives — and links these cooper-

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<sup>1</sup> 29 U.S.C. §§ 151–169 (2012).

<sup>2</sup> See, e.g., Lisa Blomgren Bingham, *Emerging Due Process Concerns in Employment Arbitration*, 47 LAB. L.J. 108 (1996); Jean Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631 (2005).

<sup>3</sup> Cynthia Estlund, *Workplace Democracy for the Twenty-First Century? Rethinking a Norm of Worker Voice in the Wake of the Corporate Diversity Juggernaut*, 14 NEV. L.J. 309 (2014).

atives to social movement theory.<sup>4</sup> Several other articles touch on the relationship between unions, politics, and law. Charlotte Garden's work on unions and campaign finance litigation reveals much about the tensions inherent in that union participation in politics, in taking litigation positions that sometimes run counter to other goals and strategies.<sup>5</sup> My article also addresses the perils present for many unions in Supreme Court litigation, and, in particular for public sector unions who have recently been the subject of several important Court cases on democracy and the workplace.<sup>6</sup> Michael Wasser and J. Ryan Lamare's model of unions as conduits of democratic voice for non-elites effectively shows the direct impact that low union density can have on democratic voice.<sup>7</sup>

Several other articles engage the very timely debate over public sector labor law, which has been active recently in places as diverse as Michigan, Ohio, Wisconsin, and North Las Vegas, Nevada. Kenneth Dau-Schmidt and Mohammad Khan present an economic and empirical analysis of public sector collective bargaining.<sup>8</sup> Although there are many conceptions of the effect of unionization and public sector labor law on wages and public services, the authors successfully use data to shed light on preconceived notions. In the same vein, Eric Fink's article on worker self-management in public services powerfully contextualizes current debates about the privatization of public services.<sup>9</sup>

The impact of collective bargaining for democratic values and institutions such as unions and education are addressed in articles dealing with particular groups of workers. In *Women, Unions, and Negotiation*, Nicole Buonocore Porter highlights important issues that are current today as pay for women still averages 78 percent of what men earn.<sup>10</sup> The article *Teacher Working Conditions With and Without Collective Bargaining*, by a team of researchers led by Clifford Donn, challenges some of the perceptions about teacher voice.<sup>11</sup> Finally, Robert Hebdon broadens the scope of this Issue beyond the borders of the United States in looking at public sector labor policy using a human rights lens.<sup>12</sup>

On behalf of Professors Amsler and Sternlight, with whom I had the great pleasure of organizing the live program, I thank all the people who worked so

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<sup>4</sup> Ariana R. Levinson, *Founding Worker Cooperatives: Social Movement Theory and the Law*, 14 NEV. L.J. 322 (2014).

<sup>5</sup> Charlotte Garden, *Unions and Campaign Finance Litigation*, 14 NEV. L.J. 364 (2014).

<sup>6</sup> Ruben J. Garcia, *Citizenship at Work: How the Supreme Court Politically Marginalized Public Employees*, 14 NEV. L.J. 377 (2014).

<sup>7</sup> Michael Wasser & J. Ryan Lamare, *Unions as Conduits of Democratic Voice for Non-Elites: Worker Politicization from the Shop Floor to the Halls of Congress*, 14 NEV. L.J. 396 (2014).

<sup>8</sup> Kenneth G. Dau-Schmidt and Mohammad Khan, *Undermining or Promoting Democratic Government?: An Economic and Empirical Analysis of the Two Views of Public Sector Collective Bargaining in American Law*, 14 NEV. L.J. 414 (2014).

<sup>9</sup> Eric M. Fink, *Sewer Syndicalism: Worker Self-Management in Public Services*, 14 NEV. L.J. 444 (2014).

<sup>10</sup> Nicole Buonocore Porter, *Women, Unions, and Negotiation*, 14 NEV. L.J. 465 (2014).

<sup>11</sup> Clifford B. Donn et al., *Teacher Working Conditions With and Without Collective Bargaining*, 14 NEV. L.J. 496 (2014).

<sup>12</sup> Robert Hebdon, *Public Sector Labor Policy: A Human Rights Approach*, 14 NEV. L.J. 509 (2014).

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