ESSAY

Derailing Union Democracy: Why Deregulation Would Be a Mistake

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In a wonderfully provocative recent article, Deregulating Union Democracy, Professor Samuel Estreicher of New York University Law School argues that federal legislation aimed at promoting union democracy “is both ineffectual and counterproductive” and should be replaced by “a system where the law is indifferent to the form the bargaining agent takes—whether it be democratic or autocratic, nonprofit or for profit—as long as employees in the bargaining unit have low-cost opportunities to cast secret ballot votes on the economic decisions of critical importance to them.” Estreicher favors a regime where a variety of “service providers,” ranging from labor unions free to embrace democracy or abandon it, through nonprofit organizations of the non-membership variety, to for-profit corporations, and even individual entrepreneurs, would compete with each other to sell workers on a range of workplace representation schemes, at varying prices and levels of effectiveness, and with permissible forms of internal governance running from the democratic to the complete dictatorship, in a marketplace largely devoid of union democracy legislation like the Labor-Management Reporting and Disclosure Act of 1959 (the Landrum-Griffin Act).

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2. 21 J. LAB. RES. at 247.

3. 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (1994). Actually, at least one of the forms of representation Estreicher favors has been a legally sanctioned alternative since at least 1947. See National Labor Relations Act § 9(c)(1), 29 U.S.C. § 159(c)(1) (1994) (authorizing individuals to seek certified, exclusive representative status in NLRB-conducted elections). However, this alternative of
In this response to his proposal, I take issue with a number of Professor Estreicher’s basic assumptions about the nature and effectiveness of union democracy legislation. His view of unions as strictly economic entities overlooks their important political and social functions. He is also wrong when he dismisses the current scheme of regulating internal union affairs as completely ineffectual. The current approach has achieved much more than he gives it credit for. I further argue that even if Professor Estreicher’s assumptions about the present regime were valid, he fails to see that in order for his already somewhat utopian call for new forms of workplace representation to have any chance of success, it would have to provide far stronger guarantees of democracy and basic civil liberties, like freedom of speech, than he seems willing to support.

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Professor Estreicher is willing to sacrifice existing guarantees of union democracy for the sake of his new plan for workplace representation because he believes those guarantees have been totally ineffectual, and are therefore not worth much deference, especially since they stand in the way of the proposed changes in workplace representation that are Estreicher’s real focus. After more than forty years of regulation pursuant to the LMRDA, he contends:

[W]e are no closer to the democratic ideal of active membership involvement and contested elections, let alone two-party systems. . . . Unions are run as one-party states . . . with the only effective participation being the insider activists within the union. Decades of regulation since the 1959 Landrum-Griffin Act have not changed this basic story.4

No citations are offered for these assertions, but if Estreicher is referring to union governance on the national level, much in the record supports him,5 although I believe he overstates his case. Exhibit A for Professor Estreicher could be the International Longshoremen’s Association (ILA), which would have been, along with the Teamsters union, a primary “poster boy” for the problems of union corruption and labor racketeering that Congress was addressing with the LMRDA in 1959, had racketeering in the ILA not already been the target in 1953 of a special interstate compact, approved by Congress, to establish a Waterfront Commission to regulate the ports of New York and New Jersey.6 More than 30 years later, the President’s Commission on Organized Crime could still describe the

representation by an individual entrepreneur has rarely, if ever, been utilized, which is perhaps some indication of its viability in the real world.

4. Estreicher, supra note 1, at 247.
ILA as "virtually a synonym for organized crime in the labor movement." In the early 1990s saw the imposition of court imposed monitorships over several New York area ILA locals, obtained by federal prosecutors using civil RICO, and as recently as 1998, the Waterfront Commission of New York Harbor identified an ILA regional vice president as an "associate" of the Gambino crime family. In the ten election cycles for the ILA's 32 International offices that have passed since the LMRDA was enacted in 1959, out of the 320 possible races, only two were actually contested.7

The LMRDA's dismal impact on the ILA may support Estreicher's low opinion of the Act, but he ignores many of the LMRDA’s accomplishments. He too quickly dismisses as “the product of unusual circumstances” the important election victories of reformers in the United Mine Workers Union (UMW) in 1972 and in the International Brotherhood of Teamsters (IBT) in 1991. In fact, those two victories laid the foundation for the first successful insurgency against the incumbent leadership of the AFL-CIO in over 100 years, in 1995. True, the Sweeney slate’s victory was as much a palace coup as it was a popular revolt, but it was possible only because of the critical support it received from Rich Trumka of the Mine Workers and Ron Carey of the Teamsters. They were in positions to cast those deciding votes for Sweeney precisely because democracy had taken root in their unions, and in both cases, with substantial help from the LMRDA.2 Unfortunately, Carey’s administration ended with Carey’s removal from office as a result of illegal fundraising schemes in his 1996 reelection campaign, a scandal in which Rich Trumka, Sweeney’s running mate, was also implicated.13


11. Estreicher, supra note 1, at 251.


13. Carey was subsequently acquitted on related perjury charges. Steven Greenhouse, Former
The victory of Carey's reform slate in the 1991 Teamsters election may have been "a direct outgrowth of [an] extraordinary consent decree" obtained under threat of "federal criminal prosecution and massive civil RICO liability," but it would not have been possible without the existence of a small but courageous and well-organized movement of rank-and-file reformers that had been struggling to democratize the IBT for fifteen years before Carey's election. That group, Teamsters for a Democratic Union (TDU), was able to survive those years in the wilderness because of the protections afforded by the "union members' bill of rights" and other provisions of the LMRDA. By the time TDU's long sought goal of direct elections of national Teamster officers became a reality pursuant to the RICO consent decree, the LMRDA had facilitated the establishment of a nationwide network of experienced grass roots activists, which became in effect a ready-made campaign organization for the Carey slate. It may be true that the LMRDA provided insufficient weaponry to clean up the Teamsters before the RICO remedies were applied, but it is also likely that RICO remedies, by themselves, would have failed to reform the IBT. "Without a mobilized rank and file to take advantage of the democratic structures created by the consent decree, those remedies would have brought about a union democratic on paper but not in practice."

A comparison of the effects of the RICO consent decree in the Teamsters union with those of another consent decree attempting to clean up the Laborers International Union (LIUNA) supports this point. LIUNA had a long track record of corruption and labor racketeering similar to that of the Teamsters, and the LIUNA consent decree imposed similar reforms.
on the union, such as the direct membership elections of top LIUNA officers in elections closely supervised by outside monitors. The results were quite different, however. In the Teamsters, the twenty-five year presence of an organized rank-and-file reform caucus in the union, operating under the protection of the LMRDA, has brought that union closer to a true two-party system than any other major American union has been for a very long time. In the Laborers, on the other hand, the glaring absence of an organized opposition has resulted in largely empty reforms, and elections with little drama.

Even in the face of this somewhat discouraging outcome, it is worth noting that when LIUNA members were given the choice of voting for more rather than less democracy in their union, they voted overwhelmingly in favor of more. In the 1996 LIUNA election, members were given for the first time the opportunity to vote directly for the top national officers of their union, rather than have them elected by convention delegates populated overwhelmingly by members of the union’s inner circle. They were also given the opportunity to decide whether direct membership votes in future elections should be extended to the election of International Vice Presidents, instead of continuing to rely on the convention method. The membership voted for expanded direct elections by a margin of four to one, despite the fact that the union’s national leadership quietly opposed the change, the election monitors were neutral on the issue, and there was no organized effort to rally support for the proposal.

In addition to belittling the role of the LMRDA in the reform victories in the Teamsters and in the Mine Workers unions, Professor Estreicher questions whether those reform victories “produced more effective bargaining agents.” The Teamsters’ important strike victory over United Parcel Service in 1997 suggests they probably did in the case of the Teamsters. Indeed, a number of studies now suggest that democratic unions tend to fare better in organizing campaigns and at the bargaining table than autocratic ones.

At the level of union locals, the LMRDA has had a substantial impact

21. Estreicher, supra note 1, at 251.
that is largely ignored by Professor Estreicher. Some provisions of the LMRDA have been so effective, and their results so much a part of the existing landscape, that they are easy to overlook. For example, election of union officers at reasonable intervals is now so well established it is easy to forget that prior to the LMRDA, some unions went decades without holding elections or conventions. Similarly, one can forget how easy it was for incumbent national officers to cut the legs out from under emerging rivals by imposing trusteeships over their home locals and removing them from office. At the time of the LMRDA’s enactment, two-thirds of UMW districts were in trusteeships, some that had lasted more than twenty years. They were all lifted as a result of the new statute.24 Turnover of officers at the local level is quite common, even in some locals of a union as autocratic and racketeer-ridden as the ILA.25 In a study I conducted of local officer turnover in nearly 300 private sector union locals, the top offices of those locals changed hands at a rate of roughly eighteen percent per year.26

Professor Estreicher cites the apathy and low participation rates of union members as a justification for abandoning union democracy legislation. If “it is doubtful . . . that workers generally care about who holds office in the union,”27 why go to a lot of trouble protecting democratic processes the members don’t care about? The answer is, because union members are not always apathetic. Periodically, a convergence of factors that can range from an economic crisis in their industry, to a power struggle within the old guard of their union, to the right person being in the right place, the availability of affordable legal counsel, and just plain luck, does come together to create conditions in which union reformers can overcome not just membership apathy but often very real risks of economic or physical retaliation as well, to produce a genuine rank-and-file movement capable of winning back its union.28 That convergence of factors may come

25. In ILA Local 1694, in Wilmington, Delaware, for example, the top office has changed hands five times since 1988. Interview with Eddie Knight, Financial Secretary, Local 1694 (Oct. 22, 2001).
26. Michael J. Goldberg, Top Officers of Local Unions, 19 LAB. STUD. J. 3, 18 (1995). Where the top union offices were exclusively full-time positions, the annual turnover rate dropped to about 11 percent. Id. It should also be noted that the LMRDA’s impact goes beyond turn-over rates. A reform victory in one union can motivate even deeply entrenched incumbents in other unions to improve their representation of their members.
27. Estreicher, supra note 1, at 250.
28. The reform campaigns and legal battles of many of these challengers are recounted in the pages of Union Democracy Review, the newsletter of the Association for Union Democracy, and in the writings of AUD founder and longtime Executive Director, Herman Benson. See, e.g., Benson, supra note 24; Herman Benson, A Rising Tide in Union Democracy, in THE TRANSFORMATION OF U.S. UNIONS: VOICES, VISIONS, AND STRATEGIES FROM THE GRASSROOTS (Ray M. Tillman & Michael S. Cummings eds., 1999); Union Democracy in Action (a newsletter Benson published from 1960 through 1972, when it was superceded by the Union Democracy Review).
together less often than we would like, but for that reason it is all the more important that when it does, a level playing field, fair elections, freedom of speech, due process, and other basic safeguards of democracy are in place.

Moreover, apathy and low participation rates are typical not just in labor unions but throughout our society.\(^{29}\) If that trend is to be reversed, and progress made toward a more civil society with vibrant associations helping to mediate relations between the individual and the state,\(^ {30}\) democratic unions would almost certainly have an important role to play.\(^ {31}\) Participation is low in American political elections as well, but no one is campaigning for the repeal of the First Amendment and the protections of due process as a result. Unions provide a collective voice for workers not only in the workplace but also in the political arena.\(^ {32}\) "In a pluralistic democratic society, a labor movement that itself is democratic is better able to represent the interests of its members in the political arena and to serve as a training ground for members who might themselves become politically active in the larger community."\(^ {33}\)

Perhaps Professor Estreicher overlooked these considerations because his view of unions is so exclusively economic. He is certainly correct when he asserts that "most rank-and-file union members care more about their wages and working conditions than they do about their union's regard for procedural niceties."\(^ {34}\) Yes, for unions, perhaps even more than for presidents, "It's the economy, stupid!," but it's not necessarily only the economy. Economists' models may portray unions as purely economic actors and nothing more, but political scientists and sociologists recognize that unions play a much broader role in our society. It is important that the law recognize this as well, and continue to offer union members the protections of union democracy provided by statutes like the LMRDA.\(^ {35}\)

33. Goldberg, supra note 12, at 18-19.
34. Estreicher, supra note 1, at 252.
35. My defense of the LMRDA should by no means suggest I am satisfied with it. There are improvements to be made, for example, in the areas of trusteeships and direct election of joint council officers, see Goldberg, supra note 12, at 25, and in Department of Labor enforcement of the statute's election provisions, see Joseph L. Rauh, LMRDA—Enforce It or Repeal It, 5 Ga. L. Rev. 643 (1971).
Professor Estreicher is much more interested in the new forms of workplace representation his article promotes than he is in the internal affairs of labor unions. He is therefore willing to trade away a statutory requirement that the internal governance of "workplace representation service providers" must be democratic in form, in exchange for a deregulated marketplace in which unions and other "service providers" would compete for the right to represent workers at their places of employment. This competition would in theory spark innovations in both form and substance, and greater efficiencies in the delivery of workplace representation. Levels of effectiveness would vary, depending in significant part on the prices workers were willing to pay for the service. Presumably, the overall effect would be to provide more workers with more and better forms of workplace representation, and at less cost, than is the case under the current regime.

Estreicher's discussion of the cost of these representation schemes focuses almost exclusively on the monetary price to be paid for the workplace representation being purchased, i.e., dues, fees, and charges for services rendered. He barely acknowledges the other prices that workers often have to pay for an effective voice in the workplace, i.e., risks of employer retaliation ranging from petty harassment to lost jobs, wages lost during strikes, and long hours spent away from home at meetings, on picket lines, and mobilizing co-workers. Perhaps I am just having difficulty thinking outside the box—after all, these "prices" are all associated with traditional collective bargaining as engaged in by labor unions. But I am left wondering, what alternative sources of leverage the workplace representation providers in Professor Estreicher's model would utilize to extract from resistant employers the improved wages and working conditions their members (clients, customers?) are paying them for.

There are judicial interpretations to be overruled as well. I am in full agreement, for example, with Professor Estreicher's assessment of the Supreme Court's decision in United Steelworkers of America v. Sadlowski, 457 U.S. 102 (1982). See Estreicher, supra note 1, at 251.

I also agree with much of what Professor Estreicher says about the deficiencies of existing "exit" strategies for disenchanted union members, such as changing jobs, resigning from membership, or decertifying the union. See id. at 249-50. On the limits of decertification in particular, see Douglas E. Ray, Industrial Stability and Decertification Elections: Need for Reform, 1984 Ariz. St. L.J. 257.

36. Estreicher, supra note 1, at 256.

37. Professor Estreicher doesn't explore the possibility that adoption of his proposal could, at least in the short run, have quite different, and less desirable, effects. For example, inexperienced, incompetent, or fly-by-night operators competing in this market could collect millions of dollars in fees from workers they have sold on new and unproven forms of representation that might not even work. In the process, another nail would be driven in the coffin of an already struggling labor movement.

38. Another traditional source of leverage over employers is union solidarity in the form, for example, of Teamsters refusing to cross picket lines to make deliveries or pickups. I have some doubts whether Professor Estreicher's proposed forms of workplace representation would be able to garner such support from traditional unions.
In calling for these new forms of workplace representation, Professor Estreicher is willing to accept autocratic and dictatorial forms of workplace representation, so long as workers retain the right to fairly counted, secret ballot votes in a number of “critical voting opportunities”:

(1) whether to have a collective representation, who it should be, and whether to approve the dues proposed to be assessed by that representative;
(2) whether to reauthorize the bargaining agency within a defined period of time, say, two or three years; (3) whether to approve or disapprove of the employer’s final offer; (4) whether to authorize a strike; and (5) whether to ratify the proposed contract.39

“As long as workers are provided low-cost opportunities to cast secret ballot votes on the economic issues most directly of concern to them,” Estreicher argues, “the law should be indifferent as to the form, the internal structure of labor organizations.”40

I agree with Professor Estreicher that the voting opportunities he would preserve are “critical.” Although I might also include other voting opportunities less exclusively focused on economic questions, the votes identified by Estreicher certainly belong on any list of critical union votes. Estreicher is therefore right that for his plan to have legitimacy, these votes must be fair and honest votes. For that reason, he proposes:

The NLRB and the National Mediation Board would continue to... hold elections under current rules to determine whether workers in an appropriate unit desired collective representation. Laws restricting violence, fraud, association with criminal enterprise, and the like would continue unimpaired. In addition, state law would be available to enforce union constitutions or other contractual undertakings.41

Unfortunately for his plan, however, those procedures and protections, most of which are in place under the present system, and were already in place before the enactment of the LMRDA in 1959,42 would be insufficient to guarantee meaningful and fair votes in those six areas without the additional protections contained in the union members’ bill of rights and other provisions of the LMRDA.

The right to a secret ballot vote and a fair count of the ballots cast is certainly essential if these critical voting opportunities are to provide a true measure of the affected workers’ preferences on the questions before them. But without stronger guarantees of freedom of speech, greater access to information, and more effective protection against retaliation than Professor Estreicher calls for, those voting opportunities would embody little more

39. Estreicher, supra note 1, at 256.
40. Id. at 255.
41. Id.
42. See infra note 46; Goldberg, supra note 12, at 16-21. The new voting opportunity under Estreicher’s plan would be on the employer’s final contract offer.
than a formal but empty appearance of democracy, in much the same way that elections in the former Soviet Union had the appearance of democracy without the reality.

Consider, for example, a vote to authorize a strike. For that vote to be meaningful, the affected employees would presumably need information about the nature of the employer’s last offer and the union’s prospects for waging a successful strike. They would also need opportunities to discuss and debate these issues with their co-workers, and for a strike vote especially, opportunities to evaluate and build the strength of the membership’s commitment to the strike effort. Strikes would remain lawful exercises of economic pressure under Professor Estreicher’s plan, and strike authorization votes—because so much is at stake—could, as they often do now, take place in tense, divided, and angry political climates. Is a meeting held before the vote at which the pros and cons of the issue can be debated? Who chairs it? Who is entitled to attend? Who gets to speak? What remedies are available if anyone attempting to express a view contrary to the “party line” is excluded, or threatened, or otherwise silenced? What information, if any, would the incumbent leadership have to share with members before a vote could be considered an informed vote? What rights, if any, would a dissident group of workers have to meet with like-minded members and attempt to mobilize opposition to the representation provider’s policies or to the very choice of which (if any) provider of workplace representation should be retained? Without rights along the lines of those provided by Title I of the LMRDA, it would be all too easy for the leaders of the bargaining agent to both monopolize access to information and to silence potential dissenting voices.

The principal protections identified by Professor Estreicher appear to be those offered by the NLRB, presumably in some type of unfair labor practice proceeding. But the promise of meaningful enforcement by the NLRB is at best a mirage—at least if one is contemplating an agency as starved for resources and as short on effective remedies as is the present NLRB. Professor Estreicher also discusses common law causes of action, and the enforcement of contractual obligations to follow democratic procedures and provide certain rights to members. Assuming the preemptive effects of NLRB jurisdiction would not preclude the availability of these alternatives, there is little reason to believe they would be any more

43. See supra note 15.


45. Estreicher, supra note 1, at 255.
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effective than they were in the years before the enactment of the LMRDA.46 Contract remedies are limited in nature,47 fee shifting provisions are nonexistent, making it difficult if not impossible for dissenting members to find legal representation,48 and an explicit declaration of public policy in favor of union democracy would not only be sorely lacking, it would have been affirmatively stripped from the pages of the United States Code. Two years of extensive hearings by the U.S. Senate's Select Committee on Improper Activities in the Labor and Management Field (the McClellan Committee) demonstrated the inadequacy of remedies already on the books,49 and Professor Estreicher has not made a persuasive case that they would be any more effective in the context of his proposal.

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Professor Estreicher deserves enormous credit for venturing into fascinating and relatively uncharted territory in his article, and for challenging some of our most fundamental assumptions about the legal framework for collective bargaining and other forms of workplace representation.50 Certainly organized labor's ever dwindling share of the workforce cries out for explorations of new ways of protecting the interests of workers.51

In Deregulating Union Democracy, however, Professor Estreicher is much too quick to condemn current union democracy legislation as unnecessary and ineffective. Moreover, the key to his entire new scheme for workplace representation is his promise of fair votes on the five or six economic decisions most critical to workers' welfare. But fair elections require more than just secret ballots and accurate counts. They also require legal protections of the right to meaningfully organize and campaign on the

46. The common law remedies for violations of union members' rights were more extensive than commonly known, see, for example, Clyde W. Summers, The Law of Union Discipline: What the Courts Do in Fact, 70 YALE L.J. 175 (1960); Clyde W. Summers, Judicial Regulation of Union Elections, 70 YALE L.J. 1221 (1961), including even the possibility of court imposed monitorships and trusteeships, see Goldberg, supra note 8, at 931-38, 984-94. These remedies remain on the books courtesy of the LMRDA's non-preemption provisions, LMRDA §§ 403, 603, 29 U.S.C. §§ 413, 523 (1994).
47. For example, punitive damages are usually not available in contract actions. See JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 542 (4th ed. 1998).
48. The Supreme Court's authorization of fee shifting in LMRDA cases, Hall v. Cole, 412 U.S. 1 (1973), was a major factor contributing to the LMRDA's effectiveness.
issues at stake in these elections. Professor Estreicher's proposal is a provocative and welcomed addition to the debate about the future of workplace representation, but without appropriate guarantees of democratic procedures, freedom of speech, due process, and other basic civil liberties, it is a proposal I cannot support.