SOLIDARITY FOREVER? TOWARD A COMPETITIVE MARKET FOR ORGANIZED LABOR

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Since the 1950s, the major American labor unions have pursued a strategy of cooperation rather than competition. Under Article XX of the AFL-CIO Constitution and similar "no-raid" agreements, unions may not encroach on one another's established collective bargaining relationships. Some labor scholars have argued that these agreements likely harm unionized workers by diminishing union officials' incentives to lower dues payments, innovate, or otherwise provide the best possible services for their members. To varying degrees, scholars have also blamed the long-term decline in private-sector union membership on a lack of competitive pressure.

This Note analyzes Article XX and similar agreements from an antitrust perspective, analogizing them to anticompetitive market-division agreements. Unlike prior antitrust analyses of labor unions—which focus on the welfare of end consumers—I view workers as consumers of labor unions' services and consider only their welfare as relevant. Counterarguments based on union democracy and labor history have some merit, but the current status quo of zero antitrust enforcement seems difficult to justify when, in most industries, an agreement like Article XX could be considered illegal per se.

The federal antitrust agencies and classes of unionized workers might be able to challenge these agreements under the Sherman Act. Although labor's statutory exemption from the antitrust laws is sometimes said to generally protect "self-interest[ed]" union activities, a preliminary reading of the text and legislative history shows that the exemption might not protect activities that demonstrably harm workers. Although courts have not directly confronted the issue, at least some of the case law is compatible with this interpretation. In such cases, courts should balance any evidence of anticompetitive harm against evidence of benefits to workers, including benefits that are not normally cognizable in antitrust such as increased union density.

This Note is not intended to downplay the uphill battle that unions currently face nor to argue that interunion rivalry is always desirable. Nonetheless, I am confident that targeted and careful application of the antitrust laws in specific markets could help increase the dynamism of organized labor and make unionization look like a better bet for unorganized workers.

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INTRODUCTION

Since the Gilded Age, organized labor has rallied around "solidarity."[1] In perhaps its narrowest sense, solidarity can be understood

[1] *See* MELVYN DUBOFSKY & JOSEPH A. MCCARTIN, LABOR IN AMERICA: A HISTORY 3 (9th ed. 2017) ("[T]he future of American labor in the mid-1880s appeared to lie squarely

to exist amongst workers in the same factory or office: By banding together, they can demand higher wages and superior working conditions from their employer.[2] In a broader sense, it can refer to workers at multiple locations in the same labor market coordinating their bargaining tactics to gain greater leverage: The worst-case outcome (a strike) becomes more threatening when replacement workers are harder to find.[3] But over the past century, organized labor's notion of solidarity has come to mean much more than cooperation in particular labor markets for particular purposes. As of 2022, over 80% of unionized workers in the United States are represented by affiliates of a single federation: the AFL-CIO.[4] In the context of record-low union membership,[5] it might be worth considering whether this degree of solidarity results in the best outcomes for workers and, by extension, for the labor movement.

It was not always like this. In 1935, a group of labor leaders dissociated from the American Federation of Labor (AFL) over its reluctance to organize unskilled workers.[6] These leaders formed a competitor union, the Congress of Industrial Organizations (CIO), prompting charges of insurrection from the AFL.[7] While the AFL feared that this division and associated personal animosity would dilute the

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with the Knights of Labor [a major labor federation]. . . . [T]he Knights continually emphasized the solidarity of labor and looked toward a centralized association that would include workers in all industries and occupations."); *Solidarity Forever*, INDUS. WORKERS OF THE WORLD, https://archive.iww.org/history/icons/solidarity_forever [https://perma.cc/AU6V-SLGE] (describing "Solidarity Forever" as labor's "fighting them[e] song" and noting that it was written circa 1915).

2 *See infra* Part I.

3 *See infra* Part I.

4 *See* Off. of Mgmt. & Budget, *Form LM-2 Labor Organization Annual Report*, U.S. DEP'T OF LAB. OFF. OF LAB.-MGMT. STANDARDS (June 30, 2022), https://olmsapps.dol.gov/query/orgReport.do?rptId=844060&rptForm=LM2Form [https://perma.cc/8VRD-BEG3] (reporting that the AFL-CIO had 12,471,480 members on June 30, 2022); *Union Members—2022*, U.S. BUREAU OF LAB. STAT. (Jan. 19, 2023, 10:00 AM), https://www.bls.gov/news.release/archives/union2_01192023.htm [https://perma.cc/SN46-D2UA?type=standard] ("The number of wage and salary workers belonging to unions, at 14.3 million in 2022 . . . ."). This number includes both public- and private-sector workers. *Id.* AFL-CIO affiliates essentially function as separate organizations, with the central federation assisting with finances, coordinating organizing campaigns, training organizers, and doing research on relevant issues. *See infra* note 96. Importantly, and despite this minimal integration of management, affiliates may not infringe on one another's established collective bargaining relationships. *See infra* notes 16–17 and accompanying text.

5 *See* Eleanor Mueller, *Union Membership Dropped to Record Low in 2022*, POLITICO (Jan. 20, 2023, 2:10 PM), https://www.politico.com/news/2023/01/19/union-membership-drops-to-record-low-in-2022-00078525 [https://perma.cc/AZE2-J5J6] ("The percentage of U.S. workers who belong to a union dropped from 10.3 percent to 10.1 percent . . . . That's the lowest the figure has been since [the Bureau of Labor Statistics] first started tracking comparable data nearly four decades ago.").

6 DUBOFSKY & MCCARTIN, *supra* note 1, at 24.

7 *Id.*

power of the labor movement, the opposite turned out to be true. As two prominent labor historians explain: "[T]he failure of the AFL and CIO leaders to reconcile their differences actually benefited workers and the labor movement. Competition between the two union federations led to more vigorous organizing efforts and to an enormous increase in the size of organized labor."[8] The CIO's success spurred the AFL to organize unskilled workers, and both unions "continued to strive to build up their strength in jealous competition."[9] Of course, the AFL-CIO rivalry was not an unconditional positive for the labor movement. Jurisdictional disputes between AFL and CIO affiliates in the late 1930s were bitter, and the National Labor Relations Board (NLRB) suffered some collateral damage.[10] Correlation does not equal causation, and many other factors were certainly at play.[11] Even so, it seems difficult to argue that competition had net negative effects for the labor movement given the dramatic surge in the strongest indicator of union strength: union membership. Over the following ten years union membership rose from 10.8% in 1935 to an all-time peak of 33.4% in 1945.[12] Workers in newly organized workplaces could now act collectively to demand better terms and conditions of employment.

Labor's share of the workforce held relatively steady between 1945 and 1960 despite the enactment of the anti-labor Taft-Hartley Act in 1947.[13] During the latter half of this period, new leadership led to a rapid cooling of tensions between the AFL and CIO.[14] In 1953,

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[8] *Id.* at 32.

[9] *Id.* at 43.

[10] *See id.* at 43–44 ("AFL leaders accused [the NLRB] of favoring the CIO and of sheltering communists. . . . Before long, several AFL officials joined with leading industrialists to seek congressional restraints on the NLRB's power. Labor's civil war thus diluted the authority of a governmental agency created to foster union recognition.").

[11] *See, e.g.*, Walter Galenson, Trade Union Democracy in Western Europe 90–91 (1962) ("The great expansion of unionism during the 1930's was due to a complex of factors much more complicated than mere rivalry between [the] AFL and [the] CIO. Had there been different organizational and personality relationships, a successful campaign *might* have been waged by a single federation." (emphasis added)).

[12] Lawrence Mishel & Jessica Schieder, *As Union Membership Has Fallen, the Top 10 Percent Have Been Getting a Larger Share of Income*, Econ. Pol'y Inst. (May 24, 2016), https://www.epi.org/publication/as-union-membership-has-fallen-the-top-10-percent-have-been-getting-a-larger-share-of-income [https://perma.cc/H75C-U3K2?type=standard]. See *infra* Part II for a summary of quantitative evidence showing that interunion rivalry is generally associated with increases in union density.

[13] *See* Dubofsky & McCartin, *supra* note 1, at 47 ("The end result of the mounting agitation to redress the balance of power, which conservatives argued had gone too far to the side of labor, was the enactment in June 1947 of the Taft-Hartley Act."); Mishel & Schieder, *supra* note 12 (showing that union membership wavered between 29.6% and 33.4% from 1945 to 1960).

[14] *See* Dubofsky & McCartin, *supra* note 1, at 57 (describing the collaborative efforts between the AFL and the CIO in the early 1950s).

the AFL and CIO ratified a "no-raiding agreement," and in 1955, the two organizations agreed to a full-fledged merger.[15] Article XX of the AFL-CIO Constitution doubled down on the no-raiding principle,[16] instructing that "[n]o affiliate shall organize or attempt to represent employees as to whom an established collective bargaining relationship exists with any other affiliate . . . ."[17] These provisions are enforced via the AFL-CIO's internal dispute-resolution mechanisms, and violations can be punished via expulsion from the federation.[18] The consequent slackening of interunion competition enabled some affiliates to become increasingly bureaucratic and protective of their leadership, leading labor economist Richard Lester to accuse the nascent AFL-CIO of becoming a "sleepy monopoly."[19]

The AFL-CIO's performance during its first few decades seemed to corroborate these accusations, although this could also be chalked up to powerful exogenous factors (e.g., globalization).[20] Despite a lack of

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15 *Id.* at 62–63.

16 Samuel Estreicher, *Disunity Within the House of Labor: Change to Win or to Stay the Course?*, 27 J. Lab. Rsch. 505, 507 (2006) (quoting Am. Fed'n of Lab. & Cong. of Indus. Orgs., Constitution of the AFL-CIO art. XX, § 2 (2022) [hereinafter Constitution of the AFL-CIO]).

17 *Id.*

18 George W. Brooks, *Stability Versus Employee Free Choice*, 61 Cornell L. Rev. 344, 348 (1976). Although the AFL-CIO's prohibition on raiding may not be perfectly enforced, the precipitous decline in NLRB elections pitting an incumbent union against a challenger suggests that Article XX has had a significant impact. Over a two-year period from 1951–1952, an AFL-CIO analysis recorded 1,245 such elections, or an average of 622 elections per year. *AFL-CIO No-Raiding Agreement*, 8 Indus. & Lab. Rels. Rev. 102, 103 (1954) [hereinafter *AFL-CIO No-Raiding Agreement*]. Meanwhile, such elections averaged only 260 per year from 1964 to 1973 and 73 per year between 1984 and 1986. Stewart J. Schwab, *Union Raids, Union Democracy, and the Market for Union Control*, 1992 U. Ill. L. Rev. 367, 389 (1992). Additionally, Article XX enforcement proceedings have come up in court cases. *See, e.g.*, Davis v. Howard, 561 F.2d 565, 566 (5th Cir. 1977) (questioning if the factual issue in the arbitration goes beyond Article XX of the AFL-CIO Constitution); Santos v. Dist. Council of N.Y.C., 619 F.2d 963, 965 (2d Cir. 1980) (seeking enforcement for an arbitration award arising from Article XX of the AFL-CIO Constitution). The fact that Article XX enforcement proceedings are not an empty threat to a potential challenger union underscores Article XX's chilling effects on interunion competition.

19 Dubofsky & McCartin, *supra* note 1, at 65.

20 *See id.* at 66 ("[Labor advocates'] bright expectations [for the AFL-CIO] were not realized. . . . The merger of the AFL and the CIO disappointed the expectations of many of the advocates of labor unity."); Estreicher, *supra* note 16, at 509 ("Contrary to the widely held perception among unionists that rival unionism is bad for the cause of organized labor, the evidence points the other way. Labor's greatest period of growth was between 1935–1954 when there were two rival federations fighting for market share." (citing Irving Bernstein, Turbulent Years: A History of the American Worker 1933–1941 (1970); and then citing Walter Galenson, Rival Unionism in the United States (1940))). Of course, as with any anecdotal evidence, alternative causes cannot be ruled out. One such theory is that increased employer resistance to unions in the 1970s, spurred by globalization and antiunion pedagogy in business schools, made it harder for unions to organize workers and maintain members.

competition, which would presumably enable the AFL-CIO to funnel additional resources toward new organizing, the federation struggled to unionize white-collar office employees, farmers, service workers, and garment workers.[21] The first of these was particularly problematic as the American workforce was transitioning from blue-collar to white-collar jobs.[22] Frustration with AFL-CIO leadership led to the formation of the Change to Win (CtW) Coalition in 2005, but this added less competition to the picture than might be expected.[23] Many CtW unions promptly signed no-raiding agreements with their AFL-CIO counterparts, and the Coalition's guiding philosophy is even more opposed to interunion rivalry than that of the AFL-CIO.[24] Since 1960, union membership has consistently declined to its current all-time low of around 10%.[25]

Despite the AFL-CIO's disheartening performance, its position is unlikely to change given considerable barriers to entry for independent unions trying to get off the ground. First and foremost, modern labor unions are expected to provide a wide variety of services that would be very difficult for a union—particularly one representing employees of a small business[26]—to procure without assistance from a larger organization. These include "the administration of research, education, lobbying, strike and pension funds[,] and the union's publications."[27]

See, e.g., Econ. Pol'y Inst., Explaining the Erosion of Private-Sector Unions 3 (2020), https://files.epi.org/pdf/215908.pdf [https://perma.cc/5ARK-552H]. However, this theory struggles to account for the fact that the decline in union membership in the United States—though it accelerated in the 1970s—actually began around 1960. *See* Mishel & Schieder, *supra* note 12. More generally, a substantial labor literature supports the view that more interunion competition would ultimately lead to a stronger organized labor movement. *See infra* Part II.

21 Dubofsky & McCartin, *supra* note 1, at 66–67.

22 *See id.* at 66–68 (noting the decline in blue-collar workers from 40.7% to 36.4% and the rise in white-collar workers from 45.3% to 57% as a percentage of the total labor force between 1947 and 1963).

23 *See* Kye D. Pawlenko, *Reevaluating Inter-Union Competition: A Proposal to Resurrect Rival Unionism*, 8 U. Pa. J. Lab. & Emp. L. 651, 654 (2006) (noting that rivalry between the AFL-CIO and CtW was quickly dissolved through no-raid agreements); *see also* Rachel Aleks, *Estimating the Effect of "Change to Win" on Union Organizing*, 68 Indus. & Lab. Rels. Rev. 584, 589 (2015) ("Coordination in [CtW] is highly centralized, unlike in the AFL-CIO. . . . The constitution of [CtW] establishes that upon a union's affiliation with the federation, the appropriate [sector coordinating committee] (SCC) will review the union's jurisdictional boundaries and organizing plan . . . .").

24 Pawlenko, *supra* note 23, at 654–56.

25 *See* Mishel & Schieder, *supra* note 12 (visualizing trends in union density up to 2014); Mueller, *supra* note 5 (discussing more recent numbers, including the drop of the percentage of U.S. workers in a union to 10.1% in 2022).

26 The median size of a bargaining unit in an NLRB election wavered between twenty-three and twenty-six employees from 2013 to 2022. *Size of Bargaining Units in Elections*, Nat'l Lab. Rels. Bd., https://www.nlrb.gov/reports/nlrb-case-activity-reports/representation-cases/election/size-of-bargaining-units-in [https://perma.cc/G3DA-GCEU?type=image].

27 John L. Conant & David L. Kaserman, *Union Merger Incentives and Pecuniary Externalities*, 10 J. Lab. Rsch. 243, 244–45 (1989).

Smaller unions must use their generalist staff or purchase such specialized services on the free market.[28] Generalist staff may not have sufficient expertise to effectively provide these services, and transactions with law firms and fund managers can be costly, resulting in unattractively high dues payments.[29]

Moreover, labor law imposes some constraints on entry. Replacing a certified bargaining representative with a different union requires signatures from 30% of one's coworkers and majority support in an NLRB election,[30] and, for the first three years after negotiating a valid collective bargaining agreement (CBA), unions generally receive immunity from such challenges under the NLRB's "contract-bar doctrine."[31] Starbucks Workers United and the Amazon Labor Union might appear to be counterexamples since they are independent unions that have vigorously entered the market.[32] However, both of these unions actually involved cooperation with, not rivalry against, large-scale unions: "[T]he label [of 'independent union'] can get mushy as headlines tout campaigns and strikes. The Starbucks workers' union . . . is affiliated with the SEIU[]"[33] and, by extension, the CtW Coalition.[34] Meanwhile, "[t]he Amazon Labor Union received guidance from a handful of established unions[]"[35] and financial support from the

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28 *See id.* at 245 (explaining that union mergers are incentivized by the complexity of collective bargaining that may require special experts and additional employees).

29 *See id.*

30 *Decertification Election*, Nat'l Lab. Rels. Bd., https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/decertification-election [https://perma.cc/A2B9-964M].

31 Off. of Pub. Affs., *National Labor Relations Board Retains Longstanding Contract-Bar Doctrine*, Nat'l Lab. Rels. Bd. (Apr. 21, 2021), https://www.nlrb.gov/news-outreach/news-story/national-labor-relations-board-retains-longstanding-contract-bar-doctrine [https://perma.cc/JV36-93PB] (announcing that the National Labor Relations Board's decision in *Mountaire Farms, Inc.* retained the contract-bar doctrine, meaning "the Board ordinarily will not process any representation or decertification petition that is filed during the first 3 years of a valid collective-bargaining agreement, save for petitions filed during a specified 'window period' before the expiration date of the agreement").

32 *See, e.g.*, Max Zahn, *Amazon and Starbucks Workers Led a Union Resurgence in 2022. Will It Last?*, ABC News (Dec. 22, 2022, 7:30 AM) https://abcnews.go.com/Business/amazon-starbucks-workers-led-union-resurgence-2022/story?id=95090198 [https://perma.cc/37UZ-MER6] (discussing early successes by Starbucks Workers United and Amazon Labor Union).

33 Daniel Moore, *Worker-Led Organizing Efforts: Independent Unions Explained (1)*, Bloomberg L: Daily Lab. Rep. (Feb. 27, 2023, 2:56 PM), https://news.bloomberglaw.com/daily-labor-report/worker-led-organizing-efforts-independent-unions-explained [https://perma.cc/B6DL-953E?type=standard].

34 *See Change to Win*, InfluenceWatch, https://www.influencewatch.org/labor-union/change-to-win [https://perma.cc/H57Z-KEQG] (noting that the SEIU is "closely associated" with CtW).

35 Moore, *supra* note 33.

American Federation of Teachers (AFT),[36] an AFL-CIO affiliate.[37] If the Amazon Labor Union attempted to raid bargaining units currently represented by AFL-CIO affiliates, this support would presumably end.

To date, the NLRB has not attempted to challenge the status quo of minimal interunion competition, and if workers were to raise complaints, the Board would almost certainly decline to intervene. Under traditional labor law principles, the argument that the NLRB should preserve any level of interunion competition would be weak. Although grossly anticompetitive conduct could theoretically be considered "coerc[ive]" in the language of Section 8(b)(1)(A) of the National Labor Relations Act, the Supreme Court has interpreted this section of the Act very narrowly.[38] Moreover, stoking interunion rivalry is arguably at odds with Congress's declared policy in passing the National Labor Relations Act, which included a desire to promote industrial peace.[39] There would also be significant political obstacles. NLRB Board Members generally come from strictly management or union-side backgrounds,[40] and attempts to spark interunion competition would presumably upset union officials who benefit from the current arrangement as well as employers that prefer bargaining with docile unions.

To an antitrust lawyer, this story should sound all kinds of alarm bells: A group of competitors that might possess monopoly power if combined[41] have agreed not to infringe on one another's turf. In

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36 *See* Christina Batolomeo, *Amazon, Starbucks and New Frontiers in Labor Organizing*, Am. Fed'n Tchrs. (July 15, 2022), https://www.aft.org/news/amazon-starbucks-and-new-frontiers-labor-organizing [https://perma.cc/WPS3-4VXD] (noting that AFT donated $250,000 to the Amazon Labor Union for an office set up).

37 *Our Affiliated Unions*, AFL-CIO, https://aflcio.org/about-us/our-unions-and-allies/our-affiliated-unions [https://perma.cc/VTD3-FKXK].

38 *See* NLRB v. Drivers, Chauffeurs, Helpers, Loc. Union No. 639, 362 U.S. 274, 290 (1960) ("[W]e hold . . . that § 8(b)(1)(A) is a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof . . . .").

39 *See* 29 U.S.C. § 151 ("Experience has proved that protection by law of the right of employees to organize and bargain collectively . . . promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest . . . .").

40 *See* Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000*, 61 Ohio St. L.J. 1361, 1365 (2000) ("[S]ince 1970 a majority of the Board [M]embers appointed have come from management or union-side rather than neutral backgrounds.").

41 If we were to consider the national market for labor union representation as an antitrust market, the AFL-CIO affiliates' market share when measured by membership would be over 80%. *See supra* note 4 and accompanying text. Alternatively, if the market is defined at a local level, the affiliates' market share presumably exceeds 80% in at least some metropolitan areas. Assuming sufficient barriers to entry in any given geographic market (a significant assumption), the AFL-CIO, if treated as a single entity, would thus almost certainly possess monopoly power in that market. *See* Phillip E. Areeda & Herbert Hovenkamp, Antitrust

antitrust law, so-called "naked" agreements not to compete are per se illegal between *any* competitors, let alone all major competitors in a given market.[42] As I will explain, while there are historical reasons why competition can have negative impacts on the labor movement, this is not always the case.[43] Moreover, antitrust economics strongly suggests that Article XX and no-raid agreements have substantial anticompetitive effects and should be subject to some level of legal or regulatory scrutiny.[44] Competition pressures firms to cut costs, innovate, and better serve their customers. By banning and penalizing competition, agreements like Article XX likely prevent unionized workers from experiencing such benefits. Ideally, a regulatory regime would balance the benefits from competition—to already-unionized as well as nonunionized workers—with countervailing harms and take action in appropriate cases. Yet the AFL-CIO has very little to fear at the moment. Agreements between labor unions are generally understood as exempt from the antitrust laws so long as they involve employees and not independent contractors.[45]

Labor's distance from antitrust regulation is rooted in historical trauma. In the early days of antitrust, the federal government repeatedly attempted—and succeeded—at quelling worker organizing through the Sherman Act.[46] Congress responded multiple times via statute, and the Supreme Court interpreted these provisions to generally immunize activity by unions acting in their own self-interest and not involving combination with "non-labor groups."[47] Additionally, the Court has recognized a "non-statutory" labor exemption for conduct

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LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION § 801-801(a) (2023) (arguing that it is reasonable to presume the substantial market power needed for a Sherman Act § 2 violation, or monopoly power, from the existence of a defendant's share of a defined market with barriers that has exceeded sixty percent for five years).

[42] *See* DANIEL FRANCIS & CHRISTOPHER JON SPRIGMAN, ANTITRUST: PRINCIPLES, CASES, AND MATERIALS 212 (2023) ("The *per se* rule is not limited to literal fixing of sale and purchase prices. Naked agreements among competitors to simply refrain from competition with one another are equally unlawful.").

[43] *See infra* Part II.

[44] *See infra* Part I.

[45] *See* AREEDA & HOVENKAMP, *supra* note 41, § 255a (outlining exceptions to labor unions' antitrust immunity, all of which—apart from the exception for non-employees—concern agreements between unions and employers).

[46] *See, e.g.*, United States v. Workingmen's Amalgamated Council of New Orleans, 54 F. 994, 995 (C.C.E.D. La.), *aff'd*, 57 F. 85, 85 (5th Cir. 1893) (granting plaintiff United States' request for an injunction to halt a strike by members of defendant labor organizations because the court held it unlawful under the Sherman Act); United States v. Elliott, 62 F. 801, 801, 803 (C.C.E.D. Mo. 1894) (granting plaintiff United States' request for a preliminary injunction to halt a railroad strike that it alleged violated the Sherman Act).

[47] FRANCIS & SPRIGMAN, *supra* note 42, at 549–53 (citing United States v. Hutcheson, 312 U.S. 219, 232 (1941)) (listing Congress' passage of 15 U.S.C § 17, 29 U.S.C. §§ 52, 29 U.S.C.

growing directly from the collective-bargaining process.[48] For decades, the zeitgeist seemed to be that antitrust and labor policy are, in one scholar's words, "intrinsically incompatible."[49]

Nonetheless, recent scholarship and agency practice has highlighted ways in which antitrust can *benefit* workers. One widely-cited article by Naidu, Posner, and Weyl argued that the antitrust practice has failed to sufficiently police anticompetitive wage suppression in labor markets.[50] In 2021, the FTC hosted a workshop "explor[ing] recent developments at the intersection of antitrust and labor, as well as implications for efforts to protect and empower workers through competition enforcement and rulemaking."[51] And last year, the FTC took legal action against noncompete agreements—clauses in employment contracts that block workers from accepting jobs at competing employers or starting competing businesses—through both litigation[52] and rulemaking.[53] For its part, the DOJ has recently attempted to prosecute agreements between employers not to poach one another's employees, analogizing them to anticompetitive market-division agreements.[54] While the DOJ

§ 102, 29 U.S.C. § 104, 29 U.S.C. § 105, 29 U.S.C. § 113 and the Supreme Court's interpretation in *Hutcheson*).

48 *See id.* at 556 (discussing the Supreme Court's holding in *Brown v. ProFootball, Inc.*, 518 U.S. 231 (1996), that an agreement directly from the collective-bargaining process was not a violation of the Sherman Act § 1).

49 Theodore J. St. Antoine, Connell: *Antitrust Law at the Expense of Labor Law*, 62 Va. L. Rev. 603, 604 (1976).

50 Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 Harv. L. Rev. 537, 537–49 (2018) (arguing that employers, as buyers of labor, can wield and exploit "monopsony" power vis-à-vis workers and that this issue has not received sufficient attention from researchers and enforcers, who have focused on mergers and conduct involving sellers). It's worth noting that some scholars are not so optimistic regarding pro-worker antitrust enforcement. *See generally* Hiba Hafiz, *Labor Antitrust's Paradox*, 87 U. Chi. L. Rev. 381 (2020) (arguing that protecting workers from anticompetitive conduct by employers does not accord with antitrust doctrine and proposing a "regulatory sharing" approach in place of antitrust agencies and courts independently policing such conduct).

51 *Making Competition Work: Promoting Competition in Labor Markets*, Fed. Trade Comm'n, https://www.ftc.gov/news-events/events/2021/12/making-competition-work-promoting-competition-labor-markets [https://perma.cc/EP6S-FGPY] (event description).

52 *FTC Cracks Down on Companies that Impose Harmful Noncompete Restrictions on Thousands of Workers*, Fed. Trade Comm'n (Jan. 4, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers [https://perma.cc/JTV7-NHAY].

53 *Non-Compete Clause Rulemaking*, Fed. Trade Comm'n (Jan. 5, 2023), https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking [https://perma.cc/CK3Q-2JXP].

54 *See* Lauren Norris Donahue, Erinn L. Rigney & Brian J. Smith, *DOJ Jettisons Its Last Criminal No-Poach Prosecution, But Antitrust Scrutiny of Labor Markets Is Here to Stay*, K&L Gates (Dec. 21, 2023), https://www.klgates.com/DOJ-Jettisons-Its-Last-Criminal-No-Poach-Prosecution-but-Antitrust-Scrutiny-of-Labor-Markets-is-Here-to-Stay-12-21-2023 [https://perma.cc/4ASL-9LRG].

has struggled to secure convictions in these cases,[55] one court has green-lighted its interpretation of the law.[56]

In light of the burgeoning connections between antitrust and labor, I argue that Article XX of the AFL-CIO Constitution and no-raid agreements between unions anticompetitively harm workers in at least some contexts. Part I explains the law and economics behind antitrust law's per se condemnation of naked market-division agreements and argues that Article XX and no-raid agreements raise similar concerns. Part II considers three potential counterarguments: first, that unions are nonprofits and therefore will not exploit a lack of competitive pressure; second, that unions' democratic processes would act as a check on any exploitative conduct; and third, that interunion rivalry has historically had a negative impact on the labor movement, for instance by permitting employers to play emergent unions off of one another. This Part draws from quantitative studies and labor histories to show that, while these counterarguments justify caution when applying the antitrust laws to labor unions, they cannot justify *all* facially anticompetitive agreements between unions. Moreover, because Article XX insulates incumbent unions from competition while allowing affiliates to compete for unorganized workers, the protection it affords to nascent unions against hostile employers seems limited. Although a few scholars have come to similar conclusions regarding Article XX,[57] my basis in antitrust law and economics offers a novel theoretical foundation that complements these scholars' historical analyses.

Part III envisions a regime intended to strike a reasonable balance between competition and the countervailing concerns discussed in Part II. Under this regime, the antitrust agencies or classes of unionized workers could bring lawsuits scrutinizing Article XX and certain no-raid agreements, which courts would evaluate under an exceptionally deferential "rule of reason"[58] standard. While this could be most clearly accomplished via amendment of the statutory labor exemption, a

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55 *See id.* ("[The Antitrust Division's] prosecutorial victories have been overshadowed by the Division's failure to convince a jury that the no-poach or wage-fixing conduct alleged . . . was enough to criminally convict a defendant of anticompetitive conduct.").

56 *See id.* ("[T]he [Antitrust] Division secured an important victory in *United States v. DaVita*, where a Colorado federal judge ruled that the government's 'no-poach' allegation was a type of horizontal market allocation, and thus should be viewed legally as a *per se*, or automatic, violation of the antitrust laws if proven. . . .").

57 *See, e.g.*, Pawlenko, *supra* note 23.

58 In antitrust parlance, the "rule of reason" describes a framework in which a plaintiff bears the initial burden of showing *prima facie* harm to competition, at which point the defendant must show offsetting procompetitive benefits to avoid liability. Francis & Sprigman, *supra* note 42, at 172–73. The ultimate burden of showing that the harms outweigh the benefits remains with the plaintiff throughout. *Id.*

preliminary review of the existing statutory exemption's text, legislative history, and limited case law suggests that legislative action may not be necessary.

The goal of this Note is not to minimize the constraints currently facing unions or to argue that interunion competition is always or even usually desirable. I agree with the consensus of many labor scholars that unions currently face an uphill battle when trying to organize workers and that regulatory constraints on organizing should consequently be relaxed.[59] It would also be naïve to overlook the potential adverse impacts of interunion competition, particularly in spaces where nascent unions face significant employer opposition.[60] I in no way mean to suggest that competition is a panacea for all of labor's current ills, or that antitrust regulation is the best possible way to reinvigorate interunion competition.[61] Nonetheless, I am confident that targeted and careful application of the antitrust laws in spaces where unions face friendly employers and minimal pressure from one another could help increase the dynamism of organized labor and make unionization look like a better bet for unorganized workers. Ideally, courts, legislators, and the NLRB should be receptive to a wide variety of proposals aimed at revitalizing the American labor movement. This is but one such proposal.

I
Article XX and No-Raid Agreements Resemble Market-Division Agreements

This Part begins by explaining the legal and economic bases behind antitrust law's hostility toward "naked" agreements to divide a market. I then examine the AFL-CIO's structure and argue that Article XX of the AFL-CIO Constitution and certain no-raid agreements between unions raise similar concerns. Consequently, but-for the statutory labor

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[59] *See, e.g.*, Brian J. Petruska, *Adding* Joy Silk *to Labor's Reform Agenda*, 57 Santa Clara L. Rev. 97, 143–49 (2017) (arguing that the NLRB should overturn precedent which makes it difficult for a union organizing a previously nonunionized workplace to obtain a bargaining order from the NLRB).

[60] *See infra* Part II for a discussion of historically harmful interunion rivalries in the United States and Europe.

[61] With respect to other proposals to reinvigorate interunion competition, see, for example, Samuel Estreicher, *"Easy In, Easy Out": A Future for U.S. Workplace Representation*, 98 Minn. L. Rev. 1615 (2014); Aneil Kovvali & Jonathan R. Macey, *Toward a "Tender Offer" Market for Labor Representation*, CLS Blue Sky Blog (Feb. 23, 2022), https://clsbluesky.law.columbia.edu/2022/02/23/toward-a-tender-offer-market-for-labor-representation [https://perma.cc/NA5R-7XZR].

exemption,[62] a court would probably find that Article XX and similar no-raid agreements are unlawful under the Sherman Act.

A. Antitrust's Per Se Rule Against Naked Market-Division Agreements

Antitrust law is fundamentally motivated by an understanding that pressure from rivals motivates firms to better serve consumers.[63] For instance, the rivalry between Apple and Samsung in the smartphone space has pushed both firms to update their products with faster chips, better cameras, and higher-resolution screens.[64] Competition between automobile manufacturers during the past several decades has led to enormous improvements in efficiency, safety, and comfort for everyday drivers.[65] The average cost of air travel dropped considerably by about 50% between 1980 and 2005, in substantial part due to increased competition among airlines.[66] Competition drives firms to cut costs, innovate, and better serve their customers' needs.

To protect this competitive process, antitrust law polices relationships between competing firms. While certain types of coordination can benefit consumers, such as joint ventures which allow firms to scale production more efficiently,[67] other types of coordination are much more likely to harm consumers. For instance, competitors could agree to jointly raise prices, increasing profits at consumers' expense.[68]

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[62] *See infra* Part III for an analysis of the statutory labor exemption.

[63] *See* Francis & Sprigman, *supra* note 42, at 2 ("[A]lmost everyone who is professionally concerned with the federal antitrust laws agrees . . . our antitrust system can be understood as an effort to protect the process of competition . . . as part of an effort to promote the public interest."); *id.* at 1 (defining market power as "something like 'the ability of a supplier or purchaser to impose less desirable terms (price, quality, etc.) on trading partners by virtue of a lack of competitive pressure'").

[64] *See, e.g.*, Grazia Cecere, Nicoletta Corrocher & Riccardo David Battaglia, *Innovation and Competition in the Smartphone Industry: Is There a Dominant Design?*, 39 Telecomms. Pol'y 162 (2015) (analyzing hardware innovation in the smartphone industry, particularly the emergence and standardization of particular features due to competition amongst market leaders).

[65] *See, e.g.*, M. Berk Talay, Roger J. Calantone & Clay M. Voorhees, *Coevolutionary Dynamics of Automotive Competition: Product Innovation, Change, and Marketplace Survival*, 31 J. Prod. Innovation Dev. 61 (2014) (analyzing an "innovation arms race" among automotive manufacturers).

[66] Derek Thompson, *How Airline Ticket Prices Fell 50 Percent in 30 Years (and Why Nobody Noticed)*, Atlantic (Feb. 28, 2013), https://www.theatlantic.com/business/archive/2013/02/how-airline-ticket-prices-fell-50-in-30-years-and-why-nobody-noticed/273506 [https://perma.cc/YQK6-DJWP].

[67] *See* Areeda & Hovenkamp, *supra* note 41, § 2100(c) ("[J]oint ventures are calculated to enable firms to do something more cheaply or better than they did it before. For this reason, joint ventures are presumably efficient but not invariably . . . .").

[68] *See* Francis & Sprigman, *supra* note 42, at 53 ("The first mechanism of harm [in antitrust economics] is collusion: if the competitors in a market agree amongst themselves

This kind of collusive behavior not only harms consumers, but it harms consumers *more* than it benefits the colluding firms, leading to an overall loss of economic surplus.[69] Consequently, antitrust law is much friendlier to agreements between competitors, or "horizontal agreements,"[70] when the coordination appears "ancillary" to some broader pro-consumer objective, like creating a new product or service, than when their sole function is to restrict competition.[71] Restraints that solely function to restrict competition without redeeming procompetitive virtues are referred to as "naked" restraints.[72]

Antitrust law evaluates ancillary restraints under the deferential "rule of reason," whereas naked price-fixing is illegal per se. The rule of reason essentially requires courts to evaluate a given agreement's overall effect on consumer welfare; agreements that do not harm consumers on net are not unlawful.[73] As a prerequisite to finding that an agreement is harmful under the rule of reason, plaintiffs must generally define a market and prove that the defendants have the ability to inflict harm on trading partners in that market (called "market power").[74] *Broadcast Music, Inc. v. CBS, Inc.*[75] provides the paradigmatic example of an ancillary restraint that should be analyzed under the rule of reason. In that case, competing copyright holders agreed to jointly offer a "blanket license" to broadcasters as an alternative to individualized licensing arrangements with each copyright holder.[76] This was clearly desirable for consumers as it helped them avoid costly negotiations over each individual copyrighted work.[77] On the other hand, blackletter antitrust

about the prices and other terms they will offer, such that they are making competitive decisions jointly . . . the result can be that the participants act . . . like a single monopolist.").

69 *See id.* at 47; *id.* at 46–47 (explaining how monopoly pricing leads to "deadweight loss").

70 *Id.* at 7.

71 *See id.* at 206 ("The second [important distinction under Section 1 of the Sherman Act jurisprudence] is the distinction between 'naked' collusion, which is unrelated to any procompetitive purpose, and coordination that is related (or 'ancillary') to a broader procompetitive purpose or economic integration among the participants.").

72 *Id.* at 7.

73 *See* Francis & Sprigman, *supra* note 42, at 172–73 (describing the rule of reason as a burden-shifting framework where, first, the plaintiff must show anticompetitive effect, second, a defendant may counter by showing offsetting benefits, and third, the plaintiff can rebut the defendant's showing by demonstrating that the restraint is still harmful overall).

74 *See id.* at 69–70 (discussing agreements which are illegal per se as an exception to the general rule that plaintiffs in antitrust cases must define a market); *id.* at 1 (defining market or monopoly power as "something like 'the ability of a supplier or purchaser to impose less desirable terms (price, quality, etc.) on trading partners by virtue of a lack of competitive pressure'").

75 441 U.S. 1 (1979).

76 *See id.* at 20.

77 *See id.*

law states that standalone horizontal price-fixing agreements which do not provide such ancillary benefits (i.e., cartels) are illegal per se.[78] This is so regardless of whether the participants possess market power in a formally defined market.[79]

The same rationale for the per se rule against naked price-fixing applies to horizontal agreements to divide a market or allocate territories.[80] When competitors agree to stay out of each other's way, they no longer face the same pressure to cut prices, innovate, or otherwise improve their products or services. For instance, in *Palmer v. BRG of Georgia, Inc.*,[81] two bar review providers, BRG of Georgia, Inc. and Harcourt Brace Jovanovich Legal and Professional Publications, entered into an agreement where HBJ would not compete with BRG in Georgia and BRG would not compete with HBJ outside of Georgia.[82] Immediately after the agreement took effect, BRG's prices more than doubled.[83] Although the facts in *BRG* are damning, the Court was clear that evidence of price increases is not necessary to find such an agreement unlawful; rather, it held that naked market-division agreements are illegal per se.[84]

Accordingly, courts and commentators have stated that the per se rule against naked market-division agreements applies regardless of whether the participants possess market power. For instance, in *United States v. DaVita Inc.*,[85] the Department of Justice alleged that the defendants engaged in "a conspiracy to allocate the market through an agreement not to solicit the senior employees of co-conspirators."[86] In other words, the government alleged that defendants' agreement not to poach one another's senior employees functioned as a horizontal market-division agreement. In a subsequent decision in the same case, the court held that "[t]he government does not need to define the 'market' allegedly allocated," let alone show power in that market,

78 Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980) (per curiam) ("It has long been settled that an agreement to fix prices is unlawful *per se*. It is no excuse that the prices fixed are themselves reasonable.").

79 *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100 (1984) ("As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary . . . 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.'"(quoting Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978))).

80 Areeda & Hovenkamp, *supra* note 41, § 1509(a).

81 498 U.S. 46 (1990).

82 *Id.* at 47.

83 *Id.*

84 *Id.* at 49–50.

85 2022 U.S. Dist. LEXIS 16188 (D. Colo. Jan. 28, 2022).

86 *Id.* at *2.

"to carry its burden of proof."[87] Rather, the government need only prove that the agreement would lead to the cessation of "meaningful competition" between the participants.[88] The court suggested that evidence of nontrivial "employee allocation" due to the agreement would be sufficient to satisfy this burden.[89] Commentators seem to agree. Professors Areeda and Hovenkamp state that nakedly anticompetitive agreements—which they define to include market-division agreements like in *Palmer*[90]—are illegal even where "the participants . . . clearly lack any market power whatsoever."[91] They reason that, because naked restraints produce "few or no social benefits," the "cost of condemning" them is small even when they "cannot cause any competitive harm."[92]

While per se rules against nakedly anticompetitive agreements may be based on economic theory, they are also supported by robust empirical data. For instance, studies surveying thousands of anticompetitive cartels in different industries, countries, and time periods have consistently found cartels to be associated with price increases.[93] These studies vary considerably in their findings as to the size of such price increases, but all of them find a median price increase of over 10%.[94] While no studies to date have specifically examined the effects of naked market-division agreements, the notion that naked restraints on competition generally and substantially harm consumers—and, conversely, that policing and invalidating such restraints generally

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87 United States v. DaVita Inc., 2022 U.S. Dist. LEXIS 54544, at *7–8 (D. Colo. Mar. 25, 2022); *accord* Deslandes v. McDonald's United States, LLC, 81 F.4th 699, 703 (7th Cir. 2023) ("[M]arket power is not essential to antitrust claims involving naked agreements among competitors."); Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc., 61 F.3d 1250, 1256 (7th Cir. 1995) ("Some antitrust offenses do not depend on proof of market power. Price fixing and market allocation, for example, are illegal *per se* whether or not the firms have any hope of success." (citing Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990))).

88 *DaVita Inc.*, 2022 U.S. Dist. LEXIS 54544, at *9.

89 *See id.* at *9–10 ("This standard requires the government to prove actual employee allocation (or, in this case, a conspiracy to actually allocate), but it does not allow defendants to disprove the government's case by showing that switching employers is theoretically possible or occurred in a few exceptional cases.").

90 *See* Areeda & Hovenkamp, *supra* note 41, § 1509(a).

91 *Id.* § 1910(c)(2); *see also* Francis & Sprigman, *supra* note 42, at 206 ("[A]ntitrust doctrine punishes cartel agreements—and all 'naked' agreements not to compete—regardless of their success or economic effects. . . . [T]he underlying idea is that naked collusion . . . is so reliably harmful that the socially optimal rule is a flat ban.").

92 Areeda & Hovenkamp, *supra* note 41, § 1910(c)(2).

93 James Langenfeld, *The Empirical Basis for Antitrust: Cartels, Mergers, and Remedies*, 24 Int'l J. Econ. Bus. 233, 235–38 (2017) (surveying the empirical literature). Connor's work is particularly comprehensive. *See, e.g.*, John M. Connor & Robert H. Lande, *Cartel Overcharges and Optimal Cartel Fines*, *in* 3 Issues in Competition L. and Pol'y 2203 (2008) (compiling 674 observations of average overcharges between 1780 and 2004, including overcharges from cartels in Europe, North America, and Asia).

94 *See* Langenfeld, *supra* note 93, at 235–38; Connor & Lande, *supra* note 93.

and substantially helps consumers—is far from mere speculation. It is perhaps the most theoretically and empirically validated proposition in antitrust economics.

B. Article XX Resembles a Market-Division Agreement

Although the AFL-CIO might appear like a single firm to an outsider, the affiliated unions essentially function as separate organizations. While the AFL-CIO is run by two elected leaders and governed by an Executive Council consisting of the ten largest affiliates' presidents,[95] the AFL-CIO's actual control over affiliates' strategies and operations is quite limited. As industrial relations scholar and labor historian, Gary Chaison, put it:

> U.S. labor federations are only voluntary associations of unions[,] not organizations of workers or bargaining agents. Workers do not join federations; they join unions affiliated with federations. Organizing is the responsibility of national unions and their local and regional bodies. Federations might help coordinate affiliates' campaigns in specific regions (e.g., city-wide campaigns), offer some financial assistance (e.g., a partial refund of per capita dues), train organizers, and do research on the issues that may sway potential members. But ultimately, each union must decide how and where it wants to organize, and if it wants to organize at all. Strict orders from federation headquarters about organizing (e.g., setting organizing quotas or restricting organizing to certain industries) would be considered an inexcusable intrusion into affiliate autonomy.[96]

Consequently, in the language of antitrust, the AFL-CIO seems more like a joint venture or a trade association than a single merged entity.[97] The AFL-CIO conducts research on behalf of affiliates,

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[95] *Leadership*, AFL-CIO, https://aflcio.org/about-us/leadership [https://perma.cc/6DJU-FLDW].

[96] Gary Chaison, *The AFL-CIO Split: Does It Really Matter?*, 28 J. Lab. Rsch. 301, 302 (2007).

[97] *See* Areeda & Hovenkamp, *supra* note 41, § 1478(a) (describing the typical functions of joint ventures, including research and production of information); *Spotlight on Trade Associations*, Fed. Trade Comm'n, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors/spotlight-trade-associations [https://perma.cc/BN22-S7QR] ("[A] trade association may help establish industry standards that protect the public or allow components from different manufacturers to operate together. The association also may represent its members before legislatures or government agencies, providing valuable information to inform government decisions."); Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 184–85 (2010) (rejecting the argument that an arrangement among NFL teams to jointly develop, license, and market their intellectual property was "akin to a merger" rather than a joint venture).

coordinates affiliates' activities in certain markets, and lobbies for pro-worker legislation,[98] but the affiliates remain fundamentally autonomous entities with their own objectives and management.

The potential for competition between affiliates suggests that the agreements constituting the AFL-CIO are properly categorized as horizontal agreements. Horizontal agreements are agreements between actual or potential competitors.[99] While the major labor unions of the early twentieth century tended to stick to separate industries such as electricians or railroad workers, subsequent decades have witnessed a transition to a diversified or generalist approach among most national unions. For instance, the United Auto Workers (UAW) has organized far beyond its roots in the automotive industry.[100] The UAW's website currently boasts that "UAW-represented workplaces range from multinational corporations, small manufacturers and state and local governments to colleges and universities, hospitals and private non-profit organizations."[101] This transition suggests not only that many AFL-CIO affiliates would be competing absent Article XX, but also that unions can feasibly transition from representing workers in one industry to representing workers in other industries. In this sense, to whatever extent any two affiliates should not be considered "actual" competitors, there is at least some potential for meaningful competition between them.[102] Regardless of whether competition between affiliates is actual or potential, agreements between affiliates are horizontal agreements.

Viewing the agreements constituting the AFL-CIO as a series of horizontal agreements, Article XX resembles a market-division agreement. Article XX commands that "[n]o affiliate shall organize or attempt to represent employees as to whom an established collective bargaining relationship exists with any other affiliate."[103] An

> "established collective bargaining relationship" means any situation in which an affiliate . . . has either (a) been recognized by the employer . . . as the collective bargaining representative of the employees involved

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98 *See American Federation of Labor-Congress of Industrial Organizations (AFL-CIO)*, InfluenceWatch, https://www.influencewatch.org/labor-union/afl-cio [https://perma.cc/5259-DWRG] ("In the AFL-CIO's 2016 fiscal year, the [federation] reported $45,972,521 in political activities and lobbying (including $8,165,576 in deposits of employee-elected contributions to the union's political action committee).").

99 Francis & Sprigman, *supra* note 42, at 7.

100 *See* Cameron Molyneux, *United Auto Workers (UAW) Locals 1937–1949*, Mapping Am. Soc. Movements Project, https://depts.washington.edu/moves/CIO_UAW_locals.shtml [https://perma.cc/42TS-YKT6] (describing the UAW's founding).

101 *Who We Are*, UAW, https://uaw.org/about [https://perma.cc/H2BL-HPQN].

102 *See* Francis & Sprigman, *supra* note 42, at 54 (describing potential competition).

103 Constitution of the AFL-CIO, *supra* note 16, art. XX, § 2.

> for a period of one year or more, or (b) been certified by the [NLRB] or [an]other . . . agency as the collective bargaining representative for the employees.[104]

In short, affiliates are prevented from competing to represent workers that another affiliate currently represents. This strongly resembles the alleged no-poaching agreement at issue in *DaVita*;[105] instead of preventing employers from poaching each other's employees, Article XX prevents unions from poaching each other's members. Moreover, even with respect to workers whom *no* affiliate currently represents, Article XX prohibits the "circulat[ion]" of "any charge or report that is designed to bring or has the effect of bringing another affiliate into public disrepute or of otherwise adversely affecting the reputation of such affiliate or the Federation" for purposes of attracting these workers.[106] Even in the limited spaces where affiliates *can* compete, they thus cannot meaningfully draw attention to one another's weaknesses.

The Article also stipulates an enforcement mechanism, which consists of an initial hearing before an "Impartial Umpire" and an appeals process.[107] The Executive Council—which, as mentioned, consists of the leaders of the ten largest affiliates[108]—retains final authority on penalties, which can include expulsion from the Federation.[109] The significant decrease in NLRB elections between incumbent unions and challengers following the AFL-CIO merger, coupled with cases arising out of Article XX enforcement proceedings, strongly suggests that enforcement has been nontrivial.[110]

In making this analogy, I consider workers to be consumers of unions' services. Although perhaps unintuitive, this move accords with modern antitrust doctrine. The dominant view in antitrust today is that the antitrust laws should be applied to promote the welfare of consumers, and probably workers, by improving the efficiency of markets.[111] In perhaps the most natural sense, a "consumer" is someone making a purchase at a retail store, but antitrust defines the term much more broadly. Some

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104 *Id.*

105 *See* United States v. DaVita Inc., 2022 U.S. Dist. LEXIS 54544 (D. Colo. Mar. 25, 2022).

106 Constitution of the AFL-CIO, *supra* note 16, art. XX, § 5.

107 *Id.*

108 *See supra* note 95 and accompanying text.

109 Constitution of the AFL-CIO, *supra* note 16, art. XX, § 3.

110 *See supra* note 17 and accompanying text.

111 Francis & Sprigman, *supra* note 42, at 4–5. The disagreement over whether workers count is likely due to disagreement over whether "consumers" includes sellers, since workers sell their labor to employers. *See infra* notes 112–13.

commentators define "consumers" as "buyers,"[112] whereas others take it to mean buyers *and* sellers.[113] Moreover, "buyers" are generally defined to include firms at an intermediate level of the supply chain purchasing inputs, not just natural persons purchasing products for their individual consumption.[114] But even under the narrower definition of "consumer," workers are consumers of unions' services. Workers pay dues and, in return, receive an array of services such as representation during collective bargaining.[115] Workers are buyers of union representation in the same sense as law firm clients are buyers of legal representation.[116] Though not consumers in the intuitive sense, workers are consumers in the antitrust sense, and their welfare is an appropriate starting point for antitrust analysis of horizontal agreements between unions.

One section of Article XX permits affiliates to try and obtain exemptions, but the likelihood that any affiliate would seek an exemption and prevail appears minimal. The affiliate must prove, following a hearing and to the satisfaction of the Executive Council, that "such special and unusual circumstances exist that it would be violative of its basic jurisdiction or contrary to basic concepts of trade union morality or to the constitutional objectives of the AFL-CIO or injurious to accepted trade union work standards" to enforce the Article's provisions.[117] The notion that an affiliate would (1) desire to start a rivalry with another affiliate, (2) be willing to advocate for this position through a quasi-legal process, and (3) provide such compelling arguments that the Executive Council, which presumably includes at least one competitor, would allow for the rivalry under this tightly-worded language, seems far-fetched. Thus, the potential for exemptions does not change the primary effect of Article XX: dividing markets amongst affiliates.

C. Article XX is Not Ancillary to the AFL-CIO's Other Activities

The AFL-CIO performs various services for affiliates, such as conducting research, lobbying for pro-worker legislation, training advocates, and coordinating organizing campaigns in nonunionized

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112 *See, e.g.*, Steven C. Salop, *Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The* True *Consumer Welfare Standard*, 22 Loy. Consumer L. Rev. 336 (2010).

113 *See, e.g.*, C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 Yale L.J. 2078 (2018).

114 *See, e.g.*, Salop, *supra* note 112, at 336 n.3.

115 *See supra* note 26.

116 Lawyers are subject to the antitrust laws. *See, e.g.*, Blackburn v. Sweeney, 53 F.3d 825, 827 (7th Cir. 1995).

117 Constitution of the AFL-CIO, *supra* note 16, art. XX, § 4.

workplaces[118] that are undoubtedly helpful to the labor movement and to workers. If Article XX were a necessary condition to rendering such services—in antitrust terms, "ancillary" to a procompetitive joint venture[119]—it would be inappropriate to evaluate Article XX as a standalone agreement without accounting for all the benefits that the AFL-CIO brings to the labor movement.[120] That is to say, even if Article XX were a market-division agreement, it would not be "naked," and a per se rule would not make much economic sense. However, Article XX does not appear to be necessary for the provision of any services by the AFL-CIO and thus seems to resemble a naked market-division agreement.

With respect to research, lobbying, and training, firms can and frequently do work together for these purposes without agreeing to restrain competition amongst themselves. For instance, health insurance companies like Aetna, Kaiser Permanente, and various Blue Cross Blue Shield entities are members of a trade association known as America's Health Insurance Plans (AHIP).[121] AHIP publishes research framing the insurance industry in a positive light[122] and lobbies Congress on behalf of its members.[123] Regarding training, AHIP runs a series of professional development programs, including "year-long fellowships" for health insurance professionals through its "Executive Leadership Program."[124] Meanwhile, AHIP's members continue to compete for customers in health insurance markets.[125]

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118 *See supra* note 96 and accompanying text.

119 *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898), *aff'd in relevant part*, 175 U.S. 211 (1899); *see supra* note 97 (explaining why the AFL-CIO resembles a joint venture or trade association).

120 *See* Francis & Sprigman, *supra* note 42, at 206 (explaining that for non-naked agreements, procompetitive justifications can be considered under the rule of reason).

121 *See Our Member Organizations*, AHIP, https://www.ahip.org/members [https://perma.cc/Z8R3-2LU5] (listing AHIP's member organizations).

122 *See, e.g.*, AHIP, Health Coverage: State-to-State 2023 (2023), https://www.ahip.org/documents/202303-AHIP_StateDataBook-v06.pdf [https://perma.cc/X6CC-MXZY]; AHIP, Hospital Price Hikes: Markups for Drugs Cost Patients Thousands of Dollars (2023), https://www.ahip.org/documents/202304-AHIP_1P_Specialty_Pharmacy_report_update-v02.pdf [https://perma.cc/ETN3-JD2V].

123 *See Client Profile: America's Health Insurance Plans*, OpenSecrets, https://www.opensecrets.org/federal-lobbying/clients/summary?cycle=2022&id=D000021819 [https://perma.cc/PKW5-HLF5] (stating that AHIP spent over $13 million lobbying in 2022). Joint lobbying by competing firms is immune from antitrust scrutiny regardless of its competitive effects. Areeda & Hovenkamp, *supra* note 41, § 203(i).

124 *Executive Leadership Program (ELP)*, AHIP, https://www.ahip.org/executive-leadership-program [https://perma.cc/UHC9-Y3CS].

125 *See, e.g.*, Cal. Health Care Found., California Health Care Almanac 4 (2022), https://www.chcf.org/wp-content/uploads/2022/06/HealthInsurersAlmanac2022.pdf [https://perma.cc/P3ES-JRB5] (listing revenues of the largest health insurance providers in California, including Kaiser, Blue Shield, and Centene/Health Net).

As for organizing campaigns, Article XX by its terms does not regulate affiliates' efforts to organize nonunionized workers.[126] Furthermore, a restraint is not "ancillary" to a procompetitive object when substantially less harmful alternatives are available to achieve that object.[127] To the extent that two affiliates might find it difficult to compete for workers' favor in one shop while cooperating to organize nonunion shops in a nearby location, they could presumably agree to a restriction that is much narrower, geographically and temporally, than Article XX. For instance, the affiliates could agree not to compete at the already-unionized shop until the conclusion of the nearby organizing campaign, at which point rivalry could resume.

D. Article XX is Not Ancillary to the Prevention of Sweetheart Deals

So-called "sweetheart" deals—where employers extract under-the-table concessions from a union in exchange for support—are a common concern among workers.[128] Increased interunion rivalry would presumably give union officials greater incentive to make these kinds of illicit quid pro quos with employers. By reducing these perverse incentives, Article XX may enable labor unions to better meet members' demands. Though somewhat far afield from the typical joint venture, labor advocates might reasonably view this as a procompetitive benefit and argue that Article XX is "ancillary" to this benefit, such that it should be analyzed under the rule of reason and not condemned per se.[129] However, there are several problems with this line of reasoning.

First, at least from an outsider's perspective, substantially less anticompetitive means of discovering and penalizing sweetheart deals seem available. As mentioned, a restraint is not "ancillary" to a procompetitive object when substantially less restrictive alternatives are available to achieve that object.[130] In the case of the AFL-CIO, it's

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126 *See* CONSTITUTION OF THE AFL-CIO, *supra* note 16, art. XX, § 1.

127 *See, e.g.*, Blackburn v. Sweeney, 53 F.3d 825, 829 (7th Cir. 1995) (finding an agreement not ancillary to its purported procompetitive object because there was no "necessary relation" between the terms of the agreement and the object); *cf.* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2162 (2021) (rejecting, under the rule of reason, purported procompetitive benefits because their objectives could be achieved via a much less anticompetitive agreement).

128 *See, e.g.*, Mike Elk, *Sweetheart Deals Hurt Labor*, N.Y. TIMES, (Feb. 17, 2014, 11:53 PM) https://www.nytimes.com/roomfordebate/2014/02/17/organized-labors-future-in-the-south/sweetheart-deals-hurt-labor [https://perma.cc/4W5J-EK6R] ("Several unions have agreed to 'sweetheart deals' with employers to win neutrality, and in exchange, 'pre-agree' to employer sought contract concessions that cap wages before even organizing a single member.").

129 *See supra* notes 119–20 and accompanying text.

130 *See supra* note 127.

not obvious why, instead of punishing raiding through Article XX, the AFL-CIO couldn't ferret out and penalize sweetheart deals through something like a whistleblower program.[131] Whistleblowers could be handsomely rewarded, and violators could be severely punished. If this or a related program is in fact feasible and would likely achieve the same (or greater) benefits for members by disincentivizing sweetheart deals, Article XX could not properly be considered ancillary to such benefits. Article XX would remain subject to the per se rule because the harm it presumptively causes would be unnecessary to achieve its purported goal.

Second, it is not clear why increased interunion competition should result in more sweetheart deals to begin with. Although union officials would have greater incentives to negotiate sweetheart deals in exchange for employer support against a rival, workers unhappy with the deal would have more options to choose from in the future. A sweetheart deal could insulate union officials from competitors in the short-term, but it could also come back to bite them in the long run when replacement or decertification is on the table. In a competitive market, businesses that extort their customers may make a short-term profit, but they may also drive those and future customers away. Just ask Wells Fargo.[132]

Third, although its efficacy under today's NLRB precedent might be questionable, labor historian Walter Galenson seemed to think sweetheart deals could be effectively deterred through enforcement of the National Labor Relations Act.[133] Perhaps a revitalized interpretation of Section 8(a)(2) of the Act would provide a more effective means of deterring sweetheart deals in any event.[134]

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131 Multinational corporations frequently use internal whistleblower programs to streamline compliance with money laundering and corruption regulations. Perhaps the AFL-CIO could model a whistleblower program after examples in the international compliance literature. *See generally Mini-Roundtable: Effective Whistleblower Programmes and Their Impact on Ethics, Culture and Conduct*, Risk & Compliance, Oct.–Dec. 2017, at 5 (discussing such programs).

132 *See generally* Matt Egan, *Wells Fargo Customers Are Fed Up. They Could Yank Billions of Dollars in Deposits*, CNN Bus. (Oct. 10, 2018, 2:34 PM), https://www.cnn.com/2018/10/10/business/wells-fargo-bank-customers-scandal/index.html [https://perma.cc/6AU8-6AS5] (reporting a predicted movement of customers away from Wells Fargo due to scandals over unethical banking practices).

133 *See infra* notes 195–203 and accompanying text.

134 One might argue that a reduction in sweetheart deals, even if genuinely ancillary to Article XX and verifiable, is not a "cognizable" benefit under *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679 (1978), because the Sherman Act bars courts from entertaining arguments that unmitigated competition is harmful. However, I think *Professional Engineers* is distinguishable. The defendants in *Professional Engineers* relied on "public interest" arguments and failed to connect their reasoning to consumer demand, whereas labor unions could connect a reduction in sweetheart deals with better serving their members

E. But-for the Statutory Labor Exemption, Article XX Would Probably Be Unlawful

For the foregoing reasons, Article XX resembles a market-division agreement and does not appear ancillary to a procompetitive objective. Therefore, it is "naked" in antitrust parlance. One might counter that the limitation of Article XX's most restrictive provisions to "established collective bargaining relationship[s]"[135] reduces its anticompetitive effects relative to a situation like in *BRG*, where competitors agree to a virtually complete cessation of competition amongst themselves. Article XX's limited scope certainly *reduces* its anticompetitive effects and softens the analogy to the typical market-division agreement, but it nonetheless restricts competition to represent a substantial portion of American workers and, if considered in isolation, would probably be considered a per se violation of the Sherman Act.[136] Moreover, to whatever extent Article XX prompts affiliates to compete over representing workers outside of its scope—namely, workers with no preexisting union representation—instead of presenting a united front against management, this seems actively harmful to the labor movement. As I will explain in Part II, labor history suggests that interunion competition is best suited to situations where unions face docile employers that are accustomed to collective bargaining. Conversely, in environments of low union density and hostile employers, unions do best when they cooperate.[137] Yet the effect of Article XX may be to channel friendly fire from the former kinds of spaces into the latter.

While naked market-division agreements are illegal per se as a general matter, a court would probably be reluctant to apply such a hard-edged rule to Article XX. Courts are often unwilling to apply hard-edged per se rules in unusual or novel markets, particularly where some restraints on competition are "essential if the product is to be available at all."[138] As Professors Areeda and Hovenkamp explain, the per se rule

(i.e., meeting consumer demand). *See id.* at 684. In any case, applying a strict reading of *Professional Engineers* to conduct involving labor unions seems difficult to defend as a policy matter.

135 Estreicher, *supra* note 16 (quoting CONSTITUTION OF THE AFL-CIO, *supra* note 16, art. XX, § 2).

136 *See, e.g.*, United States v. Consol. Laundries Corp., 291 F.2d 562, 575 (2d Cir. 1961) ("Suppose for illustration, that appellants had allocated the Bronx to Consolidated, Brooklyn to General, and Queens to Modern Silver, reserving the right to compete with each other in Manhattan. Clearly this hypothetical division of markets would be unreasonable *per se*, notwithstanding the open competition in Manhattan.").

137 *See infra* Part II.

138 Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101 (1984); *see also* FRANCIS & SPRIGMAN, *supra* note 42, at 168 ("The rule of *per se* or automatic illegality applies to a small number of horizontal agreements that have been established,

"is explicitly driven by policies informed by judicial experience, the high cost of antitrust litigation, and our relative knowledge or ignorance of a particular practice. As these factors change, a judicial conclusion about a certain practice or set of practices may be subject to modification as well."[139] Given the near-complete lack of judicial experience in analyzing the impacts of interunion collusion on union members (as opposed to end consumers), a court probably would—and should—find the rule of reason or some intermediate level of scrutiny to be more appropriate.

Nonetheless, even under the more deferential rule of reason standard, Article XX would probably still be considered unlawful. First, a plaintiff can prove that parties to an allegedly anticompetitive agreement possess market power by showing that they have "a high share of a defined market protected by barriers to entry."[140] What qualifies as a high share might vary, but 80% is clearly sufficient to find market power and potentially sufficient to find *monopoly* power.[141] Given that AFL-CIO affiliates represent over 80% of unionized workers in the United States[142] and the aforementioned barriers to entry for prospective rivals,[143] a court would very likely find that the affiliates collectively possess market power in at least some markets regardless of how markets for union services[144] should be geographically defined or which affiliates should be included in each market. Furthermore, Article XX's resemblance to naked market-division agreements suggests that it has substantial anticompetitive effects.[145] For a court to find Article XX

by judicial experience, to be always or almost always harmful to competition." (emphasis added)).

139 Areeda & Hovenkamp, *supra* note 41, § 1511(e)(2).

140 Francis & Sprigman, *supra* note 42, at 116 (citing Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995)).

141 *See, e.g.*, *Rebel Oil Co.*, 51 F.3d at 1438 ("ARCO's market share of 44 percent is sufficient as a matter of law to support a finding of market power, if entry barriers are high and competitors are unable to expand their output in response to supracompetitive pricing."); FTC v. Facebook, Inc., 581 F. Supp. 3d 34 (D.D.C. 2022) (finding that the FTC plausibly alleged that Facebook exercises *monopoly* power using statistics showing a market share consistently above 60%, 70%, or 80% since 2011, depending on the precise metric).

142 *See supra* note 4.

143 *See supra* notes 26–37 and accompanying text.

144 While I don't want to get into the weeds of market definition here as the nuances can be somewhat technical, a potential counterargument could be that the relevant markets should be defined to include *non*unionized workplaces, where workers represent themselves in negotiations with employers and procure services independently or through their employers instead of through a union. Intuitively, this seems like a stretch, and courts have generally rejected "self-supply" substitutes from product markets. *See, e.g.*, United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 57–58 (D.D.C. 2011) (excluding manual tax preparation from a market including tax preparation services and citing cases where courts excluded "similar 'self-supply' substitutes from relevant product markets").

145 *See supra* notes 95–117 and accompanying text.

lawful under the rule of reason's balancing framework,[146] the defendants would need to provide evidence of significant countervailing benefits, and benefits don't count when they can be achieved via much less anticompetitive alternatives.[147]

F. No-Raid Agreements Raise Similar Concerns to Article XX

My discussion up to this point can generally be extended to no-raid agreements insofar as the unions involved possess market power. Some no-raid agreements are virtually identical to Article XX,[148] although others may be broader or narrower in scope. Assuming the parties to a given no-raid agreement compete or could compete with one another, that the agreement protects incumbent unions from challengers, that the agreement is not ancillary to some kind of joint organizing activity,[149] and that the parties to the agreement have market power, the agreement would raise analogous concerns to Article XX. Narrower agreements might restrain competition less than broader ones, but the analysis would not be categorically different. For this reason, I would conceptualize Article XX as a specific series of no-raiding agreements among AFL-CIO affiliates rather than as a separate type of agreement. Pawlenko seems to agree with this by referring to Article XX as a "no-raiding pact."[150]

In sum, and in accordance with economic theory, antitrust law is hostile to naked market-division agreements. Naked market-division agreements reduce firms' incentives to innovate, cut costs, and better serve their customers. Although weaker than the conventional market-division agreement in antitrust law, Article XX and certain no-raid agreements raise similar concerns and, but-for antitrust's labor exemption, would probably be illegal under the Sherman Act. This suggests that workers are being anticompetitively harmed by Article XX and certain no-raid agreements. The next Part unpacks counterarguments and explains why some net harm is still likely.

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146 *See* Francis & Sprigman, *supra* note 42, at 172–73 (describing the rule of reason as a burden-shifting framework where, first, the plaintiff must show anticompetitive effect, second, a defendant may counter by showing offsetting benefits, and third, the plaintiff can rebut the defendant's showing by demonstrating that the restraint is still harmful overall).

147 *See supra* note 127.

148 *See, e.g.*, Neil Ditchek, For Better or Worse: IBT No-Raiding Policies and Practices 2 (2018), https://teamster.org/wp-content/uploads/2018/12/tlc3092618topic4presenternditchek.pdf [https://perma.cc/J5LF-6VES] ("[T]here are several International Unions that are party to individual formal No-Raid Agreements with the [Teamsters]. For the most part, these agreements incorporate the rules, policy statements and precedent from Article XX of the AFL-CIO Constitution that were in place . . . in 2005.").

149 *See supra* notes 119–20.

150 Pawlenko, *supra* note 23, at 706.

II
Theoretical and Historical Counterarguments Cannot Completely Rebut the Antitrust Case

This Part considers three potential counterarguments to the notion that Article XX and similar no-raid agreements harm workers which would ordinarily not be cognizable under the antitrust laws.[151] First, I discuss the argument that unions are nonprofits and therefore will not exploit a slackening of competition to the detriment of the groups they purportedly serve. I find this argument unpersuasive given the literature on anticompetitive mergers between nonprofits. Second, I consider the argument that unions' democratic structures would act as a check on any exploitative conduct, preventing unions that are insulated from competition from taking advantage of their members. I find that, while elections over union leadership and votes on contract ratification probably provide some level of protection, they are far from sufficient to eliminate problems of agency costs. Third, I discuss the argument that interunion rivalry has historically had a negative impact on the labor movement. While I believe that the historical argument has some merit, historical evidence from the United States and abroad suggests that interunion rivalry is not always bad for labor. In fact, when facing relatively docile employers accustomed to collective bargaining, competition generally seems desirable as a means of increasing union density.

A. Nonprofits Exploit Reductions in Competition

If one were to believe that nonprofits are scrupulously faithful to their beneficiaries, Article XX and similar no-raid agreements would seem harmless. Although unions might face less pressure from one another, a selfless union would put pressure on itself to avoid becoming complacent or otherwise obtaining suboptimal results for its members. Alternatively, a union that is totally faithful to the labor movement—as opposed to its members—would channel any supracompetitive dues and resource savings toward activities that benefit the wider movement

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[151] *See infra* notes 161–64 and accompanying text (explaining why nonprofit status is generally irrelevant). For a discussion on consumer cooperatives under the antitrust laws, which seem analogous to unions in the sense that their democratic structures could act as a check against the exercise of market power, see *infra* note 168. A court would almost certainly consider higher union density to not be cognizable under *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), in which the Supreme Court held that purported benefits of a restraint which are not connected to promoting competition or satisfying consumer demand, such as effects on "public safety and health," are not cognizable under the Sherman Act. *Id.* at 693–95.

(e.g., by supporting organizing campaigns in industries with low union density). The AFL-CIO's original no-raid agreement appears to have been based on just that rationale, with the preamble stating that "[t]here are still millions of working men and women who do not have the benefit or organization or collective bargaining. The members of all unions would be benefited if the energies devoted to the raiding were devoted to the organization of those yet unorganized."[152] Because the AFL-CIO unions would no longer have to compete with one another, they could move resources into organizing campaigns that would otherwise not be worth the cost.

Analogous positions were taken by some courts and commentators with respect to nonprofit hospitals, particularly between the late 1980s and early 2000s.[153] If nonprofit hospitals operate in the interest of their patients, why should we be concerned about maintaining competitive pressure amongst them? However, further research has shown that nonprofit hospitals do *not* operate exclusively in the interest of patients; in fact, they behave much like for-profit hospitals in the absence of competition. According to a 2017 paper:

> [T]here are two possible rationales for more lenient antitrust treatment of nonprofit hospitals. The first . . . is that nonprofit hospitals would not exercise any market power they might gain. The second is that they will do so, but in ways that are socially valuable—for example . . . to raise the level of uncompensated care. The first rationale has been studied and, with the exception of Lynk (1995), rejected. Studies have found that nonprofits do charge higher prices in more concentrated markets . . . .[154]

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152 *AFL-CIO No-Raiding Agreement*, *supra* note 18, at 103.

153 *See, e.g.*, United States v. Carilion Health Sys., 707 F. Supp. 840, 849 (W.D. Va. 1989) ("Defendants' nonprofit status . . . militates in favor of finding their [merger] reasonable. Defendants' boards of directors both include business leaders who can be expected to demand that the institutions use the savings achieved through the merger to reduce hospital charges . . . ."); William J. Lynk, *Nonprofit Hospital Mergers and the Exercise of Market Power*, 38 J.L. & Econ. 437 (1995) (failing to find evidence from a sample of California hospital mergers that nonprofit hospitals systematically increase prices following mergers).

154 Cory Capps, Dennis W. Carlton & Guy David, *Antitrust Treatment of Nonprofits: Should Hospitals Receive Special Care?* 7 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23131, 2017); *see also* John Simpson & Richard Shin, *Do Nonprofit Hospitals Exercise Market Power?*, 5 Int'l J. Econ. Bus. 141 (1998); David Dranove & Richard Ludwick, *Competition and Pricing by Nonprofit Hospitals: A Reassessment of Lynk's Analysis*, 18 J. Health Econ. 87 (1999); Emmett B. Keeler, Glenn Melnick & Jack Zwanziger, *The Changing Effects of Competition on Non-Profit and For-Profit Hospital Pricing Behavior*, 18 J. Health Econ. 69 (1999); Michael G. Vita & Seth Sacher, *The Competitive Effects of Not-for-Profit Hospital Mergers: A Case Study*, 49 J. Indus. Econ. 63 (2001); Ranjani Krishnan, *Market Restructuring and Pricing in the Hospital Industry*, 20 J. Health Econ. 213 (2001); Deborah Haas-Wilson & Christopher Garmon, *Hospital Mergers and Competitive Effects: Two Retrospective Analyses*,

As to the second rationale—that nonprofit hospitals will exploit increased market power in "ways that are socially valuable"—the outlook is similarly bleak. The authors of the same 2017 paper "found only one study that empirically examines the effect of hospital competition on the provision of public benefits by nonprofit hospitals . . . . [The author of that study] concludes that competition and charity care are, 'if anything, [. . .] positively related.'"[155] The authors then engage in their own empirical analysis, finding "no evidence that nonprofit hospitals are more likely than for-profit hospitals to provide more charity care in response to an increase in market power."[156]

In other words, it seems that managers of nonprofit hospitals can't be trusted to funnel cost savings from reduced competition or profits from supracompetitive prices into socially valuable activities such as charity care. In economic terms, these hospitals' patients suffer from "agency costs"—i.e., costs arising from conflicts between management's self-interest and patients' interests.[157] Although managers of labor unions and nonprofit hospitals presumably have different incentive structures, one would expect to see the same problem with agency costs to the extent they both lack accountability for their internal financial decisions. The greater the agency costs, the fewer resources available to funnel into socially valuable purposes like new organizing.

While the bulk of research on nonprofits and competition issues focuses on hospitals,[158] other nonprofits do not seem selfless. For instance, researchers have found that dependency on donors is negatively associated with university presidents' compensation;[159] the less universities must compete for donations, the higher their

18 Int'l J. Econ. Bus. 17 (2011); Aileen Thompson, *The Effect of Hospital Mergers on Inpatient Prices: A Case Study of the New Hanover-Cape Fear Transaction*, 18 Int'l J. Econ. Bus. 91, 93 (2011) (citing Steven Tenn, *The Price Effects of Hospital Mergers: A Case Study of the Sutter-Summit Transaction*, 18 Int'l J. Econ. Bus. 65 (2011)). One of the cited studies criticized Lynk's methodology, and after correcting for potential biases, the researchers were unable to replicate Lynk's findings. Dranove & Ludwick, *supra*. Researchers were also unable to reproduce Lynk's results with a different sample and year. Simpson & Shin, *supra*.

155 Capps, Carlton & David, *supra* note 154, at 8–9 (quoting Chris Garmon, *Hospital Competition and Charity Care*, 12 Frontiers Health Pol'y Rsch., no. 1, art. 2, 2009, at 4).

156 *Id.* at 36–37.

157 *See generally* James Chen, *What Are Agency Costs? Included Fees and Example*, Investopedia (Mar. 28, 2021), https://www.investopedia.com/terms/a/agencycosts.asp [https://perma.cc/E775-72W3] (describing agency costs).

158 A Google Scholar search with the prompt "nonprofit antitrust market power" leads to a list of ten articles, five of which have the word "hospital" or "hospitals" in the title. *See* Search Using Query "Nonprofit Antitrust Market Power," Google Scholar, https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=nonprofit+antitrust+market+power&btnG= [https://perma.cc/UK3N-DAP7].

159 Brian Galle & David I. Walker, *Nonprofit Executive Pay as an Agency Problem: Evidence from U.S. Colleges and Universities*, 94 B.U. L. Rev. 1881 (2014).

presidents' salaries. More broadly, one study examining a massive dataset (n = 23,654) of various kinds of nonprofits such as museums, abuse prevention centers, food pantries and programs, and senior centers found that a higher number of nonprofits in the same sector and the same metropolitan statistical area was associated with "reduce[d] reported administrative expenses."[160] Competition thus appears to reduce agency costs among nonprofits generally, not just nonprofit hospitals.

Consistent with this research, antitrust law does not contain any generalized exemption for nonprofits.[161] In *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, the Supreme Court found that the NCAA violated the antitrust laws despite its nonprofit status, remarking, "There is no doubt that the sweeping language of § 1 [of the Sherman Act] applies to nonprofit entities . . . and in the past we have imposed antitrust liability on nonprofit entities which have engaged in anticompetitive conduct."[162] Parts of the decision implied that nonprofit status is not a sufficient basis for applying deferential "rule of reason" scrutiny to conduct that would normally be unlawful per se under the antitrust laws.[163] Although some lower courts have considered defendants' nonprofit status relevant in their decisions that a merger will not be anticompetitive, leading commentators have argued that some of these courts afforded it too much weight.[164] Simply put, we can't trust nonprofits to channel extra resources exclusively in the public interest.

B. Democratic Checks Do Not Prevent Exploitative Conduct

Unlike the typical nonprofit firm, labor unions are required by statute to give their members (i.e., their constituents) certain democratic rights. Under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), local union officers must be elected at least once every three years by secret ballot of the local's members, and higher-level officers must be elected at least once every four or five years by the

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160 Marco A. Castaneda, John Garen & Jeremy Thornton, *Competition, Contractibility, and the Market for Donors to Nonprofits*, 24 J.L. Econ. & Org., 215, 245; *see also id.* at 230–44 (detailing the study's findings).

161 *See* Areeda & Hovenkamp, *supra* note 41, § 261(a).

162 468 U.S. 85, 100 n.22 (1984).

163 Areeda & Hovenkamp, *supra* note 41, § 261(a) (citing Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984)).

164 *See, e.g.*, *id.* § 261(c) (citing United States v. Carilion Health Sys., 707 F. Supp. 840, 849 (W.D. Va. 1989), *aff'd mem.*, 892 F.2d 1042 (4th Cir. 1989); *id.* (citing FTC v. Butterworth Health Corp., 946 F. Supp. 1285 (W.D. Mich. 1996), *aff'd*, 121 F.3d 708 (6th Cir. 1997)).

members or through democratically-elected delegates.[165] Among other things, the LMRDA also stipulates that candidates must be free to distribute campaign material, and that members maintain equal rights to nominate candidates for office and participate in union meetings.[166] The Secretary of Labor enforces these provisions through the Office of Labor-Management Standards.[167] Given the threat to officials of being voted out, one might expect that unions would keep performing at their fullest regardless of the union's competition.[168]

While this argument certainly has some merit, labor scholarship suggests that the democratic checks mandated by the LMRDA are often ineffective. Writing in 1983, one advocate for union democracy observed that, "[d]espite the good intentions of the LMRDA and its ambitious language, it is not clear that the law has achieved its objectives."[169] This scholar cited political capture in the Department of Labor, a lack of clear standards for enforcers, incumbent officials' use of staff for campaigning purposes, and restrictions on who may donate to insurgent candidates' campaigns as reasons for the LMRDA's failures.[170]

Moreover, some labor scholars believe that the LMRDA's pursuit of union democracy was a futile exercise in the first place because members simply will not invest the requisite time and energy to learn about the relevant issues. Writing in 2000, Professor Estreicher remarked that "[t]he pursuit of union democracy is ineffectual because we know from decades of research . . . that union members do not treat internal union elections as salient elections requiring a claim on their

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165 *Labor Management Reporting and Disclosure Act*, Off. of Lab.-Mgmt. Standards (June 12, 2023), https://www.dol.gov/agencies/olms/compliance-assistance/fact-sheet/lmrda [https://perma.cc/2MBG-PR49].

166 *Id.*

167 *Id.*

168 This argument resembles discussions surrounding antitrust and cooperatives, which do not receive any generalized exemptions from the antitrust laws apart from a statutory exemption for "agricultural" and "horticultural" organizations. 15 U.S.C. § 17. Scholars have argued that cooperatives are less likely to exploit consumers than ordinary corporations and have urged that antitrust exemptions for cooperatives—which currently only cover agricultural cooperatives—be expanded partly on this basis. *See* Sandeep Vaheesan & Nathan Schneider, *Cooperative Enterprise as an Antimonopoly Strategy*, 124 Penn St. L. Rev. 1, 18 (2019) (noting REI, "Canada's Mountain Equipment Co-operative—and the natural foods co-ops that paved the way for the Amazon-owned giant Whole Foods" as examples of cooperatives); *id.* at 19 ("Since co-ops take such different forms, it is a flexible business structure that allows for diverse 'bottom lines' in lieu of the shareholder value that motivates typical investor-owned firms. Research suggests a similarly diverse set of social benefits, including . . . protection against exploitation . . . ."); *id.* at 41–46 (arguing that Congress should exempt certain non-agricultural cooperatives from the antitrust laws).

169 Herman Benson, *Union Democracy and the Landrum-Griffin Act*, 11 N.Y.U. Rev. L. & Soc. Change 153, 157 (1983).

170 *Id.* at 160–72.

scarce attention span for matters not directly affecting their material interests."[171] Professor Estreicher qualified, however, that while "some examples of contested union elections" do exist—the UAW provides a recent example[172]—"they are few and far between, and often the product of unusual circumstances."[173] Two prominent labor historians strike a more moderate tone: "As was the case with Taft-Hartley, the [LMRDA] satisfied neither the fondest wishes of its advocates nor the worst fears of its critics. Unions did not collapse, nor did the more autocratic ones become perfect democracies."[174] Given this range of viewpoints, it seems that the LMRDA provides, at best, a partial check against exploitative conduct by union officials.

One might argue that, despite issues with the LMRDA, officials remain sufficiently pressured to deliver for their members because, in many unions, affected members must vote to approve any negotiated collective bargaining agreements. However, many obstacles remain. First, these rights are not guaranteed by statute.[175] Therefore, even in unions that have enshrined these rights in their constitutions, they may be removed in the future, subject to internal procedural checks. Second, the aforementioned problems with elections over union leadership seem to apply—though with somewhat less strength—to elections over contract ratification as well. While rank-and-file members presumably care about key terms like salaries, leave, and dues payments, it seems unrealistic to think that the average member would dedicate their scarce attention and time to scrupulously analyzing employer and union financials to see if they're getting the best possible deal. Moreover, reduced competition can manifest itself in a variety of ways, some of which (e.g., reduced innovation) seem quite difficult to police.[176] Consequently,

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171 Samuel Estreicher, *Deregulating Union Democracy*, 21 J. Lab. Rsch. 247, 247 (2000).

172 *See* David Shepardson, *Challenger Wins UAW Labor Union Presidency, Vows Reforms*, Reuters (Mar. 25, 2023, 6:37 PM), https://www.reuters.com/business/autos-transportation/challenger-says-he-wins-united-auto-workers-presidency-2023-03-25 [https://perma.cc/69FD-BYFB].

173 Estreicher, *Deregulating Union Democracy*, *supra* note 171, at 251.

174 Dubofsky & McCartin, *supra* note 1, at 73.

175 *See* Alan Hyde, *Legal Support for Union Democracy*, 47 Lab. Studs. J. 160, 164 (2022) (noting that "[i]t can be challenging for lawyers to turn a claim of *unfair* treatment into a claim of *unequal* treatment" because the LMRDA cannot force a union to "hold[] meetings[] or contract ratification" and "[t]oday's federal judges are much more likely to demand proof that some members were informed while others weren't."); Peter Cappelli & W.P. Sterling, *Union Bargaining Decisions and Contract Ratifications: The 1982 and 1984 Auto Agreements*, 41 Indus. & Lab. Rels. Rev. 195, 196 (1988) ("Nothing in the law requires unions to have ratification procedures; even the [LMRDA] simply requires unions to follow their constitutions regarding this question, and as Lahne's 1968 study showed, less than a third of union constitutions then even required ratification of contracts.").

176 *See* Francis & Sprigman, *supra* note 42, at 172 (listing "increased prices, reduced output, lower quality, [and] reduced innovation" as examples of "competitive harm").

while democratic checks might deter officials from significantly hiking dues payments or caving to all of management's demands, it is doubtful that they would effectively deter other types of harm, such as increased administrative waste, a failure to develop innovative services, or suboptimal (but minimally adequate) representation.

C. Historical Evidence Shows that Interunion Rivalry Is Sometimes Desirable

In contrast to the longstanding view among American union officials that union monopoly is unconditionally preferable to union rivalry,[177] the few scholars who have studied rival unionism in-depth have found that rivalry can be preferable. Both quantitative and qualitative historical evidence suggest that competition pressures unions to keep costs down, deliver results, and/or innovate, which can sometimes override countervailing considerations. This is particularly so when unions face friendly employers accustomed to collective bargaining, reducing the need to present a united front against management.

This reading of the relevant literature is not novel. Prominent labor scholars have noticed a similar discrepancy between union officials' views and evidence of rival unionism's actual impacts on the labor movement.[178] Nonetheless, this position does not seem to have gained mainstream acceptance within the labor movement.

1. Quantitative Evidence: Stepan-Norris & Southworth

To my knowledge, the only in-depth quantitative analysis of interunion competition and its effects on the labor movement was conducted by Stepan-Norris and Southworth and published in the *American Sociological Review* in 2010.[179] The article separates American

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177 *See, e.g.*, Clark Kerr, *Preface* to GALENSON, TRADE UNION DEMOCRACY IN WESTERN EUROPE, *supra* note 11, at viii ("[I]t has been axiomatic among trade unionists in the United States that 'dual unionism' is a serious evil."); Estreicher, *supra* note 16, at 509 (noting a "widely held perception among unionists that rival unionism is bad for the cause of organized labor").

178 *See, e.g.*, Estreicher, *supra* note 16, at 508–09 ("As I and others have observed . . . the union movement can have no hope of making a dent in the ever-growing nonunion sector unless unions are required by a healthy competitive market for representation services to bid against each other for the hearts and minds of working people." (citing Estreicher, *Deregulating Union Democracy*, *supra* note 171; then citing Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3 (1993); then citing Pawlenko, *supra* note 23; then citing Schwab, *supra* note 18; and then citing Brooks, *supra* note 18)); *id.* ("Contrary to the widely held perception among unionists that rival unionism is bad for the cause of organized labor, the evidence points the other way.").

179 Judith Stepan-Norris & Caleb Southworth, *Rival Unionism and Membership Growth in the United States, 1900 to 2005: A Special Case of Inter-organizational Competition*, 75 AM. SOCIO. REV. 227 (2010).

labor history into four periods of significant rivalry: the ALU versus the AFL (1902–1904), the IWW versus the AFL (1905–1924), the TUUL versus the AFL (1928–1934), and the CIO versus the AFL (1937–1955), with the AFL or AFL-CIO dominant during all other periods.[180] These federations rivaling the AFL or AFL-CIO are termed "[c]ompetitor[s]," whereas smaller, unaffiliated unions are separately categorized as "[i]ndependent[s]."[181] The authors construct a regression model with the relative membership/number of competitor unions and relative membership/number of independent unions as independent variables.[182] The study attempts to explain the dependent variable—union density, or the percentage of the workforce that's unionized—over a time series consisting of each year from 1900 to 2005.[183]

After adding a sophisticated series of controls to the model,[184] the authors find a statistically significant and *positive* relationship between both independent variables—the relative number of competing unions and the relative membership of competing unions—and overall union density.[185] That is, rival unionism was associated with *higher* union density. Moreover, the authors run two additional regression models substituting AFL/AFL-CIO density for overall union density as the dependent variable, and they find, again, statistically significant relationships between the independent variables and the dependent variable. In other words, competition from rival federations was associated with *increased* membership in the AFL/AFL-CIO as a percentage of the American workforce.[186] On the other hand, the relative number of independent unions was not significantly associated with either dependent variable in any of the models, and independent

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180 *Id.* at 242 tbl.2.

181 *Id.*

182 Specifically, the authors use a Prais-Winsten regression with the ratio of unions in the competing federation versus unions in the AFL/AFL-CIO, the ratio of competitor unions' membership to the AFL/AFL-CIO's membership, the ratio of independent unions versus unions in the AFL/AFL-CIO, and the ratio of independent unions' membership to the AFL/AFL-CIO's membership as independent variables and overall union density as the dependent variable. *Id.* The competing unions' numerical ratio and the competing unions' membership ratio are each assessed using a separate regression model together with all other independent variables and controls. *Id.*

183 *Id.* at 243.

184 The authors control for the number of unfair labor practice cases filed against unions, the number of unfair labor practice cases favoring unions, the number of unfair labor practice cases favoring employers, inflation, core employment (defined as "the sum of jobs in construction, manufacturing, and mining industries . . . measured in a distributed lag model"), unemployment, the percentage of U.S. House members belonging to the Democratic party, and the percentage of votes in presidential elections for socialist or communist parties. *Id.* at 240.

185 *Id.* at 243 tbl.3.

186 *Id.*

unions' relative membership was only significantly associated with a *decrease* in AFL/AFL-CIO density in both of the models using AFL/AFL-CIO density as the dependent variable.[187] This suggests that large-scale interunion rivalry had positive effects on the labor movement, and independent unions chipped away at AFL-CIO membership but otherwise had negligible effects. In light of these results, the authors conclude:

> [D]irect competition in the form of rival unionism does not distract workers from their larger aim of self-organization; instead, competition enhances workers' representation vis-à-vis employers by increasing union density. That is, competition between rival federations increases workers' power as a class. One might argue that fragmentation among union federations is detrimental to workers' class power, but historically, every rival federation has been forward-looking and has stimulated the dominant federation to adapt to existing conditions. Although diffuse competition in the form of independent unionism implies membership growth at the expense of the dominant labor federation, it does not affect overall union density.[188]

In short, far from destroying the labor movement, interunion rivalry has historically been associated with positive results for labor.

2. *Qualitative Evidence: Galenson's Studies of Rival Unionism*

Probably the single greatest contributor to the literature on rival unionism was Walter Galenson, who in 1940 published a detailed study on the history, common law, legislation, and administrative action regarding interunion rivalry in the United States.[189] Although most of the book is light on normative commentary, Galenson's findings suggest that rival unionism can be, but is not always, desirable. For instance, Galenson describes the causes of rival unionism as coming from a variety of different sources, some good (e.g., dissociating from a corrupt union), some neutral (e.g., ideological differences), and some bad (e.g., employers stoking rivalry to weaken unions).[190] It is thus unsurprising that Galenson concludes by expressing his ambivalence toward interunion rivalry. Although he seems at some points to indicate

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187 *Id.*

188 *Id.* at 244.

189 *See* Walter Galenson, Rival Unionism in the United States (Russell & Russell 1966) (1940).

190 *See id.* at 30–39.

that eliminating rival unionism would be neutral, or even desirable,[191] the book's final paragraph notes that it is likely beneficial in certain contexts:

> One need not be possessed of a sixth sense, then, to foresee the continuation of rival union conflict in the United States. This would not be an unmitigated evil, however, if it were on a smaller scale. It is less easy for a complacent and corrupt union bureaucracy to maintain itself in power when challenged by vigorous opponents with appealing ideas. Their positions threatened, lethargic leaders must again don the mantle of crusading unionism. It has even been asserted that the secession of the C. I. O. was solely responsible for the spectacular gains of the A. F. of L. organizational campaigns in the last few years, although this is a hypothesis scarcely susceptible of verification. If the future does not hold forth promise of eternal peace and harmony, it at least offers the consolation of an antidote to arteriosclerosis in the American labor movement.[192]

Thus, Galenson seems to conclude that interunion competition provides certain benefits—such as reducing "complacen[cy] and corrupt[ion]"—which may outweigh associated costs depending on the context.[193]

As previously discussed, employers' ability to obtain sweetheart deals in exchange for supporting union officials is a common refrain among workers, and interunion rivalry might theoretically result in

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191 *See, e.g.*, *id.* at 294 ("But it is also optimistic to expect that unification of the C. I. O. and the A. F. of L. would eliminate rival unionism entirely.").

192 *Id.* at 295. I should mention that Galenson expresses hostility to the idea of federal courts declining to enjoin rival union activities on the grounds of preserving competition, remarking: "That human labor is not a commodity to be subjected to the vagaries of competition in the market has become axiomatic. . . . [C]ompetition between labor unions is not to be compared with competition between merchants." *Id.* at 69–70, 70 n.72. However, I do not think these criticisms should be read to apply to my proposal for two main reasons. First, the cases which Galenson criticizes were decided before labor received protections, such as exclusive representation, under the National Labor Relations Act. *See id.* at 70 nn. 69–70 (citing cases decided in 1906 and 1927); *1935 Passage of the Wagner Act*, Nat'l Lab. Rels. Bd., https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1935-passage-of-the-wagner-act [https://perma.cc/VSP5-JKHH] (noting that the Wagner Act "endorsed the principles of exclusive representation and majority rule" for labor unions). Consequently, these decisions' rationale would permit multiple unions to divide power within the same bargaining unit, something which I neither propose nor endorse. Second, Galenson was writing at a time when economics and its application in courts was much less sophisticated than it is today, giving him reason to suspect that judges would use economic language as a cover for anti-labor bias. Today, almost a century after *Lochner v. New York*, 198 U.S. 45 (1905), the notion that judges would unscrupulously appeal to laissez-faire economics seems anachronistic and unreasonable.

193 Galenson, Rival Unionism in the United States, *supra* note 189, at 295.

more sweetheart deals.[194] Consequently, it's worth noting that Galenson does not ignore the issue of employers exploiting interunion rivalry to their advantage. Such practices seem to have been commonplace at the time Galenson was writing. Specifically, he notes that, "[i]n the [AFL-CIO] struggle, the [AFL] appears to have the incalculable advantage of being favored by most business men" and cites to "flagrant" examples discussed during House of Representatives hearings.[195] But Galenson's concern with these situations seems to have been tempered by the newly created NLRB's ability to condemn practices that favor one union over another.[196] When he later discusses the NLRB's case law, Galenson writes that "[t]he [early National Labor Relations] Act envisions the employer as a stranger to the organizational activities of his employees."[197] With extensive citation to Board cases, Galenson explains that:

> [The NLRB's early rulings] have fortified the intent of the law and indicated that in rival union disputes the employer is best protected by an attitude of benevolent neutrality. . . . Discriminatory assistance to one of competing unions, whether by means of the grant of contracts conceding exclusive bargaining rights or the closed shop to unqualified organizations, discharge of the adherents of one of the competitors, electioneering by supervisory employees, denial of equal access to employees or discriminatory grant of plant facilities, or threats of shut-down in the event of the disfavored union's victory in an election have been castigated by the Board.[198]

Such cases are not unique to the early Board. Indeed, a similar attitude against employer interference has since become baked into the Board's doctrine under Section 8(a)(2) of the Act.[199] With some exceptions, Section 8(a)(2) states that it shall be an unfair labor practice for employers "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ."[200] Depending on the extent of employer involvement in a union's affairs, an employer which the Board finds to have violated

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194 *See supra* note 128 and accompanying text.

195 Galenson, Rival Unionism in the United States, *supra* note 189, at 49 & n.44. For instance, one employer, faced with a workforce desiring representation by the CIO, locked out employees and signed a collective bargaining agreement with the AFL. *See Hearing Before the Comm. on Lab.*, 76th Cong. 2091–93 (1939) (statement of J. Vernon Burke, State Secretary, Labor's Non-Partisan League of California).

196 *See* Galenson, Rival Unionism in the United States, *supra* note 189, at 49–50.

197 *Id.* at 268.

198 *Id.* at 268–69 (footnotes omitted).

199 *See* 29 U.S.C. § 158(a)(2).

200 *Id.*

Section 8(a)(2) may be required to withdraw recognition of its preferred union, or the union may be ordered to disband.[201] Granted, the fact that the NLRB does not generally award damages for Section 8(a)(2) violations[202] as well as case law permitting mere "cooperation" with an employer's preferred union[203] suggests that Section 8(a)(2) is far from a full check on employers meddling in interunion contests. Nonetheless, Section 8(a)(2) as currently interpreted by the Board seems to meaningfully restrain—if not prevent—employer interference in contexts of rival unionism.

Two decades later, Galenson published *Trade Union Democracy in Western Europe*, which compared union structure, politics, and rivalry across different European countries.[204] Whereas the United States, Great Britain, and Scandinavia had more-or-less unified labor movements at the time,[205] the situations in Italy, France, Belgium, the Netherlands, and Austria were different.[206] Unions in Italy and France engaged in a kind of toxic rivalry, battling each other instead of building up their institutional infrastructure.[207] At the same time, unions in Belgium, Holland, and Austria engaged in a kind of rivalry that Galenson found desirable:

> What is difficult for Americans to understand . . . is that union rivalry is accepted today in Belgium and Holland (and in Austria, [rivalry between different "fractions" of the same union]) as a virtue per se . . . . Before the war . . . the doctrine of unity was preached just as strongly as in the United States. But now there are few who will argue that competition among unions is any more unnatural than competition in the business world. And there is an impressive body of opinion which finds in plural unionism the best means of keeping the unions vital and democratic. Persons of this persuasion are by no means confined to intellectual bystanders, but include many highly placed union officials.[208]

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201 John E. Higgins, Jr., Bryan T. Arnault, Richard A. Bock & Amy Moor Gaylord, The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act ch. 8.IV.A. (2022) (ebook).

202 *See id.* ch. 8.VIII.

203 *Id.* ch. 8.VI.

204 Galenson, Trade Union Democracy in Western Europe, *supra* note 11.

205 *See id.* at xvi ("Our final category includes Great Britain and the Scandinavian nations, which are closest to the United States model."); *id.* at 42 (titling a chapter "The Strength of Unified Trade Unionism: Great Britain and Scandinavia").

206 *See id.* at 1 (titling a chapter "The Weakness of Rival Unionism: Italy and France"); *id.* at 17 (titling a chapter "The Strength of Rival Unionism: Belgium, Holland, and Austria").

207 *Id.* at 1–16.

208 *Id.* at 26.

Galenson theorizes that interunion rivalry is beneficial in these countries due to the relatively high institutional and legal "security" that unions enjoy there, including "immun[ity] to crippling attacks by employers" and "full acceptance" of "collective bargaining."[209] Applying his findings to the United States, Galenson asks whether "trade unions in the United States have attained a sufficiently high degree of security so that competition among them would act as a liberating influence rather than endanger their existence."[210] He responds that "American unionism appears to be somewhere between French and Italian unionism on the one hand, and Low Country-British-Scandinavian unionism on the other, *though much nearer the latter*."[211]

As a result of these findings, Galenson comes out stronger in favor of interunion competition than in his earlier work.[212] Although careful to qualify that "[t]he great expansion of unionism during the 1930s was due to a complex of factors much more complicated than mere rivalry between [the] AFL and [the] CIO," and that growth had slowed before the AFL-CIO merger,[213] Galenson argues that the government should refuse to recognize Article XX of the AFL-CIO Constitution:

> The question of union rivalry in the United States is worthy of discussion, in spite of [associated] difficulties . . . . It is likely to be far more effective than recent federal legislation in spurring internal democracy. Much of the force of the 'right to work' argument will be removed if there is a greater degree of voluntarism. Nor should the possibility of rivalry be dismissed as an academic matter. Governmental policy can foster it, for example, by refusing recognition to the validity of no-raiding pacts. Even more important would be the questioning of the ethical basis of antidualism within the labor movement itself. There have always been strong divisive forces within American labor, and there is enough to be gained out of raiding to bring about considerable rivalry if the idea should once again become respectable . . . .[214]

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209 *Id.* at 37.

210 *Id.* at 90.

211 *Id.* (emphasis added).

212 *See, e.g.*, GALENSON, RIVAL UNIONISM IN THE UNITED STATES, *supra* note 189, at 295 (concluding that, despite its costs, interunion rivalry in 1940 was not "an unmitigated evil").

213 *Id.* at 90–91.

214 *Id.* at 91.

Granted, Galenson wrote this at a time when union membership in the United States was near its all-time peak[215] and thus arguably at its most secure; today, labor is weaker than it once was and may obtain better results for workers if it generally sticks together. However, even if one federation should remain dominant in the American labor movement for purposes of increasing or maintaining union density—a premise that is in tension with Stephan-Norris and Southworth's quantitative study described above[216]—this in no way implies that greater rivalry to represent specific types of workers with union-friendly employers is not desirable. In the United States, labor unions are much more secure in certain markets than in others.[217] While employers like General Motors might accept collective bargaining as a fact of life, employers like Amazon might try to nip worker organizing in the bud with aggressive tactics and "union-avoidance" consultants.[218] If antitrust law were able to police Article XX and no-raid agreements on a case-by-case basis,[219] labor could get the best of both worlds: unity when organizing new industries and competition in stable markets with cooperative employers. As discussed, the status quo—minimal competition in stable markets with cooperative employers and unrestricted competition when organizing new industries—might do the opposite.[220]

In conclusion, the notion that unions, as nonprofits, would remain uncompromisingly faithful to the workers they serve when faced with reduced competitive pressure contradicts empirical research on competition among nonprofits. Democratic checks don't seem to fully solve the problem either. While labor history does suggest that interunion rivalry can go too far and weaken the labor movement, it also indicates that competition is sometimes good for labor by keeping unions agile and accountable to their members. This increased accountability could make unions look like a better bet to nonunionized workers and spark valuable innovation in organizing.

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215 *See* Mishel & Schieder, *supra* note 12.

216 *See supra* notes 179–88 and accompanying text.

217 *See, e.g.*, U.S. Bureau of Lab. Stat., Union Members—2022 (2023), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/R8XF-EZ24] (recording a rate of 37.3% unionization among employees in "[e]ducation, training, and library occupations" and a rate of 1.7% unionization among employees in "[f]ood services and drinking places").

218 *See* Karl Evers-Hillstrom, *Amazon Spent Unmatched $14 Million on Labor Consultants in Anti-Union Push*, Hill (Apr. 3, 2023, 12:40 PM), https://thehill.com/business/3931442-amazon-spent-unmatched-14-million-on-labor-consultants-in-anti-union-push [https://perma.cc/ZVS5-J8HC] (discussing Amazon's spending on union-avoidance consultants).

219 *See infra* Part III.

220 *See supra* note 136 and accompanying text.

III
Horizontal Agreements Between Unions May Be Unlawful Under the Antitrust Laws Where They Demonstrably Harm Workers

As explained in Part I, Article XX and similar no-raid agreements likely harm workers by depressing union leaders' incentives to cut costs, innovate, and better serve their members. Yet, as conventionally interpreted, antitrust law's statutory labor exemption insulates a union's self-interested activities regardless of the amount of harm they might inflict on members. Keeping in mind the countervailing considerations discussed in Part II, this interpretation seems difficult to justify as a matter of public policy. If union members suffer anticompetitive harm in a nontrivial number of cases, a flat ban on enforcement doesn't seem like the most effective means of protecting workers' interests.

This Part proceeds in two sections. First, I aim to undermine the conventional interpretation of the statutory labor exemption, laying the groundwork for future scholarship and/or litigation. I have already explained why workers are "consumers" of unions' services in the antitrust sense,[221] rendering "worker welfare" an appropriate perspective for antitrust analysis of labor unions. Now, I will briefly analyze the text, legislative history, and some of the case law surrounding the statutory labor exemption. Although my analysis is far from exhaustive, it provides reason to doubt that Article XX and no-raid agreements are categorically exempt from the antitrust laws. The statutory exemption might not protect conduct which harms workers as a class, and in particular conduct which *demonstrably* harms workers.

Second, I explain how this reading of the statutory exemption could fit within broader antitrust doctrine. When analyzing an agreement like Article XX, the statutory exemption would require courts to weigh anticompetitive effects against benefits that are ordinarily not cognizable in antitrust cases, such as positive effects on union density.[222] Plaintiffs—i.e., the antitrust agencies or classes of unionized workers[223]—would need to prove not only that a given

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221 *See supra* notes 111–16.

222 *See supra* note 151 for why effects on union density would not be cognizable.

223 The federal agencies and private plaintiffs may sue to prevent violations of the Sherman Act, and private plaintiffs may collect treble damages for past harm. *See* 15 U.S.C. § 4 (empowering the DOJ to sue over violations of the Sherman Act); 15 U.S.C. § 45(a) (empowering the FTC to challenge "unfair methods of competition"); Francis & Sprigman, *supra* note 42, at 658 ("Courts and commentators generally agree that the phrase 'unfair methods of competition' includes *at least* all the conduct prohibited by the antitrust laws . . . ."); 15 U.S.C. § 15(a) (empowering private plaintiffs to receive treble damages for injuries sustained as a result of violations of the antitrust laws).

agreement anticompetitively harms workers under the antitrust laws, but also that this harm exceeds *all* countervailing benefits to workers.[224] I refer to this as rule of reason "plus." This high bar for plaintiffs would prevent courts from inserting themselves into matters of interunion competition in all but the clearest cases, assuaging potential fears that reactionary judges could use the antitrust laws as a vehicle to deter valuable labor organizing.

I would, of course, prefer that Congress amend the statutory labor exemption to explicitly authorize such lawsuits under the standard—rule of reason "plus"—that I am proposing. But, given current congressional gridlock and the fact that labor and antitrust are both polarized policy spaces at the moment, I am not optimistic that this would be politically viable. Consequently, this Part is written with an audience of scholars and litigators in mind. Scholars may be able to develop this argument further, and litigators may be able to apply it in court.

A. The Statutory Exemption May Not Protect Conduct Which Demonstrably Harms Workers

Labor's exemption from antitrust scrutiny can be divided into a "statutory" and a "non-statutory" exemption. The Supreme Court has interpreted the statutory exemption to generally immunize activity by unions acting in their own self-interest and that do not involve combination with "non-labor groups."[225] As for the non-statutory exemption, the Court has immunized conduct growing directly from the collective-bargaining process, such as multi-employer coordination on wage offers to the same union.[226] Since agreements such as Article XX and no-raid pacts are negotiated between unions with no involvement by employers, the statutory exemption is the key issue and will be the focus of this Section.

The statutory labor exemption is a shorthand way of referring to several different statutes, two from the 1914 Clayton Act and several from the 1932 Norris-LaGuardia Act. As a matter of both text and legislative history, these statutes recognize that workers should be permitted to band together in furtherance of their collective interests, even at some cost to antitrust policy. However, protections for union officials are more conditional than protections for workers themselves, as union officials' actions may not necessarily serve workers' collective interests.

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224 *See supra* note 58.

225 Francis & Sprigman, *supra* note 42, at 554 (quoting United States v. Hutcheson, 312 U.S. 219, 232 (1941)).

226 *See generally* Brown v. Pro Football, Inc., 518 U.S. 231 (1996).

For instance, Section 6 of the Clayton Act states:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, *instituted for the purposes of mutual help* . . . or to forbid or restrain individual members of such organizations from lawfully carrying out *the legitimate objects thereof*; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.[227]

The italicized portions of the text—which appear to primarily protect "members" and not officials—suggest that labor's immunity under the antitrust laws is conditioned upon labor's pursuit of "legitimate objectives" such as "mutual help" among workers. The corresponding House Report similarly describes the provision as "guarantee[ing] to individual members of [labor] organizations . . . the right to pursue without molestation or legal restraint *the legitimate objects of such association*."[228]

Section 20 of the Clayton Act exclusively protects collective action such as strikes, and the legislative history also evinces a purpose to improve workers' welfare. The Section's first paragraph bars courts from issuing "restraining order[s] or injunction[s] . . . involving, or growing out of," disputes between employers and employees "unless necessary to prevent irreparable injury to property, or to a property right."[229] The relevant House Report describes this paragraph as a matter of "merely . . . good pleading and correct practice."[230] More to the point, the second paragraph explicitly protects employees when picketing and striking in response to a labor dispute:

> [N]o such restraining order or injunction shall prohibit any person or persons . . . from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means to do so; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining and communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or

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227 15 U.S.C. § 17 (emphasis added).
228 H.R. Rep. No. 62-627, at 1968 (1914) (emphasis added).
229 29 U.S.C. § 52.
230 H.R. Rep. No. 62-612, at 1980 (1912).

> withholding from, any person engaged in such dispute, any strike benefits . . . ; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute . . . .[231]

The legislative history suggests that these protections were based on the assumption that collective action furthers workers' interests. The relevant House Report supports the second paragraph with quotes from select pro-labor court cases,[232] summarizing some of them as expressing a "consensus . . . that workingmen may lawfully combine *to further their material interests* without limit . . . and may for that purpose adopt any means or methods which are lawful. It is the enjoyment and exercise of that right *and none other* that this bill forbids the courts to interfere with."[233] It concludes with a quote from *National Fireproofing Co. v. Mason Builders' Ass'n*,[234] part of which reads:

> A laborer . . . has the right to conduct his affairs in any lawful manner, even though he may thereby injure others. So several laborers . . . may combine *for mutual advantage*, and so long as the motive is not malicious, the object not unlawful nor oppressive, and the means neither deceitful nor fraudulent, the result is not a conspiracy . . . .[235]

Section 4 of the Norris-LaGuardia Act is textually similar to Section 20 of the Clayton Act:

> No court of the United States shall . . . issue any restraining order or . . . injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from . . . :
>
> Ceasing or refusing to perform any work . . . ;
>
> Becoming or remaining a member of any labor organization . . . ;
>
> Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other money or things of value;
>
> By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit . . . ;

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231 *See supra* note 229.
232 *See supra* note 230, at 1982–89.
233 *Id.* at 10 (emphasis added).
234 169 F. 259 (2d Cir. 1909).
235 *See supra* note 230, at 1988 (emphasis added) (quoting Nat'l Fireproofing Co. v. Mason Builders Ass'n, 169 F. 259, 265 (2d Cir. 1909)).

> Giving publicity to the existence of, or the facts involved in, any labor dispute . . . ;
>
> Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
>
> Advising or notifying any person of an intention to do any [such] acts . . . ;
>
> Agreeing with other persons to do or not to do any [such] acts . . . ; and
>
> Advising, urging, or otherwise causing or inducing without fraud or violence [such] acts . . . .[236]

The relevant House Report frames this text as a clarification of Section 20 of the Clayton Act.[237] Congress thought the clarification necessary given conservative judicial interpretations of the Clayton Act's provisions, including a decision finding that non-employee union agents assisting strikers were outside of the Act's protection.[238] Nonetheless, even this limited protection for union agents appears to rest on a concern for workers themselves, with the House Report remarking that "it is fundamental that a strike is generally an idle gesture if confined only to the immediate disputants."[239] Relatedly, the Senate Report does not describe the Norris-LaGuardia Act as providing unconditional support to labor unions. Rather, it describes the Act's "primary object" as "protect[ing] labor in the lawful *and effective* exercise of its *conceded rights*—to protect, first, the right of free association and, second, the right to advance *the lawful object* of association."[240] Interestingly, "labor dispute" is defined elsewhere in the Norris-LaGuardia Act to include disputes between different labor unions,[241] suggesting that the drafters envisioned—and wished to protect—interunion rivalry in at least some forms.[242]

Similarly, an earlier section of the Act declares that the "public policy of the United States" is to protect workers' ability to improve their terms and conditions of employment through collective bargaining:

> Whereas . . . the individual unorganized worker is commonly helpless . . . to obtain acceptable terms and conditions of employment, wherefore,

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236 29 U.S.C. § 104.

237 H.R. Rep. No. 72-669, at 7–8 (1932).

238 *Id.* (citing Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921)).

239 *Id.* at 8.

240 S. Rep. No. 72-163, at 10 (1932) (emphasis added).

241 29 U.S.C. § 113.

242 *See also* United States v. Hutcheson, 312 U.S. 219, 232–33 (1941) (holding that Section 20 of the Clayton Act immunizes "internecine struggle[s] between two unions seeking the favor of the same employer" to the same extent as employee-employer disputes).

> *though he should be free to decline to associate* with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing . . . and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives . . . or in other concerted activities for the purpose of collective bargaining *or other mutual aid or protection*; therefore, [the Norris-LaGuardia Act's] definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are enacted.[243]

The clause regarding workers' freedom "to decline to associate" suggests an intent to protect workers' choice over their representatives. Almost by definition, Article XX and no-raid agreements between competing labor unions shrink the universe of potential representatives, making a worker's choice to dissociate from a given union increasingly futile. Antitrust analysis of horizontal agreements between unions could be a means of harmonizing this policy goal with the broader objective of promoting union activity that benefits workers.

The common thread connecting these statutes is a recognition that workers should be permitted to band together in furtherance of their collective interests, even at some cost to antitrust policy.[244] Although certain provisions protect unions and their agents in addition to workers, this protection is restricted to specific types of conduct and premised on the belief that they will promote workers' interests. Conversely, horizontal agreements between unions in today's highly consolidated environment can harm workers overall[245] and seem qualitatively different from the types of conduct listed in Section 20 of the Clayton Act and Section 4 of the Norris-LaGuardia Act. Additional provisions from the Norris-LaGuardia Act evince a belief that interunion rivalry, insofar as it improves workers' options for representation, is desirable. These aspects of the text and legislative history appear to be in tension with an interpretation of the statutory exemption that would protect conduct which demonstrably harms workers.

My reading of the statutory exemption is compatible with some—though certainly not all—of the relevant case law. Older cases are

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243 29 U.S.C. § 102 (emphasis added).

244 Scholars have tried to determine precisely to what extent antitrust policy should yield to workers' collective interests. *See, e.g.*, Robert H. Lande & Richard O. Zerbe, Jr., *Reducing Unions' Monopoly Power: Costs and Benefits*, 28 J.L. & Econ. 297 (1985). However, I don't find it necessary here to determine the correct balance between worker welfare and antitrust policy because my proposal is restricted to cases where both considerations are essentially aligned.

245 *See supra* Parts I and II.

particularly problematic. For instance, in *United States v. Hutcheson*,[246] the Supreme Court stated that:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and illicit under § 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, [or] the selfishness or unselfishness of the end of which the particular union activities are the means.[247]

This seems to categorically reject federal court intervention in interunion affairs. Other cases from the era reiterated this language,[248] and some courts continue to do so.[249]

Nonetheless, I am unaware of any cases directly considering whether union conduct that demonstrably harms workers is immunized by the statutory exemption,[250] and a number of recent decisions seem to nibble around the edges of these opinions, considering the statutory exemption weak or nonexistent when union conduct bears a tenuous relationship to its members' interests. For instance, in *USS-POSCO Indus. v. Contra Costa County Building & Construction Trades Council*, the Ninth Circuit read Supreme Court precedent on the statutory exemption as immunizing union activity only if the union acts "in pursuit of its *legitimate* self-interest."[251] The court interpreted the "legitima[cy]" requirement as follows:

> Whether the [union's] interest in question is legitimate depends on whether the ends to be achieved are among the traditional objectives of labor organizations. Thus, if a union forces employers to funnel money into a commercial enterprise from which the union derives profits; or if it forces the employer to hire the union president's spouse; or if a union is involved in illegal activities unrelated to its mission, such as dealing drugs or gambling, those would not be objectives falling within

246 312 U.S. 219 (1941).

247 *Id.* at 232.

248 *See, e.g.*, Hunt v. Crumboch, 325 U.S. 821, 825 (1945) (quoting *Hutcheson*, 312 U.S. at 232).

249 *See, e.g.*, Hurley v. Nat'l Basketball Players Ass'n, No. 22-3038, 2022 U.S. App. LEXIS 35964, at *5 (6th Cir. Dec. 30, 2022) (quoting *Hutcheson*, 312 U.S. at 232).

250 While the *Hutcheson* opinion contains language suggesting that union conduct which can harm workers—e.g., "internecine struggle[s]"—is exempt from scrutiny under the antitrust laws, the government pled the case in the lower court on the theory that the conduct in question harmed retail consumers, not that it harmed workers. *See* United States v. Hutcheson, 32 F. Supp. 600, 601 (E.D. Mo. 1940), *aff'd*, 312 U.S. 219 (1941).

251 31 F.3d 800, 808 (9th Cir. 1994).

> the union's legitimate interest. In such cases, the unions "cease to act as labor groups."[252]

The court found certain activities, such as picketing to press the employer into entering into a collective bargaining agreement with the union, legitimate and remanded for further discovery regarding the union's other alleged activities, such as "pressing frivolous lawsuits."[253]

Similarly, a leading antitrust treatise instructs that, after identifying the underlying interest being promoted by union conduct, "that interest must be appraised for its legitimacy . . . . [This] inquiry would quickly end [if] it appeared that the interest being promoted was the personal business interest of a union official."[254] Although some cases appear to contradict this by stating that actions in pursuit of the union's "self-interest" and not involving combination with non-labor groups are categorically immunized from the antitrust laws,[255] such a broad reading of the statutory exception seems incompatible with the "well settled" principle that "exemptions from the antitrust laws are to be narrowly construed."[256] Moreover, Supreme Court precedent states that the application of this principle "is not limited to implicit exemptions from the antitrust laws, but applies with equal force to express statutory exemptions."[257]

The most recent Supreme Court decision analyzing the statutory exemption arguably lends support to my interpretation. In *H.A. Artists & Associates v. Actors' Equity Ass'n*,[258] the Court considered an arrangement whereby agents wishing to represent union actors were required to abide by the union's licensing regulations. These regulations included limitations on the agents' compensation when working with low-wage actors and the payment of regular "franchise fees" to the union.[259]

Critically, the Court found that the agents constituted a "labor group" because they performed functions analogous to unions in many industries.[260] Consequently, antitrust immunity for each aspect of the

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252 *Id.* (quoting Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n, 457 U.S. 702, 714 (1982)).

253 *Id.* at 809–10.

254 Areeda & Hovenkamp, *supra* note 41, § 255e(3).

255 *E.g.*, Phx. Elec. Co. v. Nat'l Elec. Contractors Ass'n, 81 F.3d 858, 860 (9th Cir. 1996) (quoting United States v. Hutcheson, 312 U.S. 219, 232 (1941)).

256 Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979).

257 *Id.* at 231.

258 451 U.S. 704 (1981).

259 *Id.* at 704.

260 *Id.* at 721.

licensing arrangement was conditional on whether it was designed to serve the union's legitimate self-interest.[261]

The Court found that, while the overall arrangement operated in pursuit of sufficiently "legitimate" ends, the franchise fees did not.[262] The Court acknowledged that the fees could benefit the union's members by lowering dues payments but nonetheless found them insufficiently related "to the basic purposes of [the union's] regulations: elimination of wage competition, upholding of the union wage scale, and promotion of fair access to jobs."[263] The Court did not elaborate on this point,[264] but it makes sense in context. The franchise fees essentially required the agents to artificially subsidize the union's activities. Although they might have resulted in lower dues payments, the agents would presumably have passed on these fees through higher commissions when permitted by the licensing arrangement. As such, the effect of the franchise fees might not have been to lower dues payments so much as to obscure them. The *union* would clearly have benefited from the fees, but their effect on the union's *members* was unclear and potentially negative.

Although my analysis of the text, legislative history, and especially the case law surrounding the statutory exemption is far from exhaustive, it again casts doubt on the notion that conduct which harms workers is immunized from the antitrust laws. If unions wish to protect their no-raid agreements from antitrust scrutiny, the burden should be on them to grapple with these considerations. Why should conduct which demonstrably harms workers be protected by a statute intended to improve workers' welfare? Scholars should wrestle with this question and perform a more fulsome analysis, laying the groundwork for future litigation.

B. Integration into Antitrust Doctrine: Rule of Reason "Plus"

While a complete ban on enforcement against anticompetitive conduct by unions seems normatively undesirable, full-fledged antitrust enforcement seems equally imprudent given the considerations discussed in Part II. First, although highly imperfect, democratic checks may limit risks of anticompetitive harm and should thus play some role in the analysis. More importantly, antitrust enforcement in the wrong places could have negative effects on union density, inflicting further damage on a beleaguered labor movement. Yet, under ordinary

261 *See id.* at 721–22.
262 *Id.*
263 *Id.* at 722.
264 *Id*.

antitrust doctrine, a court would be unlikely to account for democratic checks nor effects on union density.[265]

My interpretation of the statutory exemption—which includes most union conduct but excludes conduct that demonstrably harms workers—would strike a reasonable balance between the extremes of zero enforcement and over-enforcement. As I have explained, if it weren't for the statutory exemption, an agreement like Article XX would probably be evaluated under the "rule of reason."[266] The rule of reason is by no means an easy hurdle for plaintiffs. In fact, one empirical study found that courts dismiss 97% of rule-of-reason cases on the grounds that the plaintiff has failed to show any anticompetitive effect, rendering balancing unnecessary.[267] My interpretation of the statutory exemption would effectively broaden the scope of cognizable benefits under the rule of reason. Thus, a plaintiff would need to show not only that the anticompetitive harms outweigh *procompetitive* benefits, but also that the anticompetitive harms outweigh *all* benefits to workers as a class. When applying this rule of reason "plus," courts could also adopt a version of the balancing framework which shifts the burden of quantifying benefits to the plaintiff.[268] Given all of these constraints, the notion that antitrust enforcement against agreements like Article XX would fundamentally upend how unions do business or precipitate a return of anti-worker, *Lochner*-esque cases[269] seems untenable.

For instance, it is not inconceivable that some of the parties to a given no-raid agreement would be more dedicated to the cause than others, with these unions historically shifting an abnormally large percentage of dues payments from existing members into organizing funds. Because organizing tends to benefit workers as a class, these transfers would have to be factored into the rule-of-reason calculus and be balanced against evidence of anticompetitive harms to members. Consequently, a court might find the same agreement lawful when its parties consist of particularly scrupulous unions and unlawful when it involves relatively unscrupulous unions. A court could even slice up a single agreement binding many unions such as Article XX, finding it lawful as applied to certain unions and unlawful as applied to others.

In sum, the text of the statutory exemption may not immunize conduct which demonstrably harms workers. This interpretation of

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265 *See supra* note 151.

266 *See supra* notes 138–39 and accompanying text.

267 Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 Geo. Mason L. Rev. 827, 828 (2009).

268 *See* Francis & Sprigman, *supra* note 42, at 174 (discussing tension in the case law over a defendant's burden to show benefits under the rule of reason).

269 *See supra* note 46 for some such cases.

the statutory exemption would permit some enforcement but would provide robust limits against judicial overreach, striking a reasonable balance between the oft-conflicting policy considerations outlined in Parts I and II.

Conclusion

Article XX and similar no-raid agreements likely harm workers by reducing union officials' incentives to innovate, cut costs, and improve service to members. At the same time, these agreements may be beneficial in certain applications, such as when organizing in historically nonunionized industries with hostile employers. The statutory exemption's text, legislative history, and some relevant case law suggest that the exemption does not protect union conduct which demonstrably harms workers. Under this interpretation of the statutory exemption, enforcement agencies or classes of unionized workers could challenge agreements like Article XX under the Sherman Act, but they would have the ultimate burden of balancing anticompetitive harms against *all* countervailing benefits to workers as a class, including increases in union density. This standard would strike a reasonable balance among the foregoing policy considerations and protect against potential judicial overreach.

The past decade has witnessed a rapid expansion of pro-worker antitrust enforcement. While these efforts have focused on ways in which employers harm workers and labor market competition, organized labor's continued decline over the past several decades should make us question whether the status quo of minimal interunion competition is effective. In addition to mitigating anticompetitive harm among already-unionized workers, targeted increases in interunion rivalry could bolster organized labor's public reputation and lead to an uptick in union density overall. Antitrust *can* be pro-worker, not only through enforcement against employers but also by maintaining competition that keeps unions agile and accountable, making them look like a better bet to nonunionized workers. Both solidarity *and* competition deserve a place within the labor movement.