ARTICLE XX AND THE COMPETITION PROBLEM: HOW THE JUSTICE DEPARTMENT COULD REVIVE THE LABOR MOVEMENT BY SUING THE AFL-CIO

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January 2025 marked two milestones for the American labor movement. First, two of movement's largest institutional players, the Service Employees International Union ("SEIU") and the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), announced that after twenty years apart, they would reunite under a single banner.[1] The unions framed their merger as a step toward greater cohesion, which they said would allow them to refocus their energies on organizing America's vast unorganized workforce.[2] Second, only a few weeks later, the U.S. Bureau of Labor Statistics reported that national union density had fallen to a historic low.[3] The Bureau said that unions now represented only 9.9% of American workers and only 5.9% of workers in the private sector.[4] The latter figure was especially bracing, as it was not only the lowest number on

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1. *See* Press Release, AFL-CIO, SEIU Joins AFL-CIO to Build Unprecedented Worker Power, Win Unions for All Workers (Jan. 8, 2025), https://aflcio.org/press/releases/seiu-joins-afl-cio-build-unprecedented-worker-power-win-unions-all-workers [https://perma.cc/6CCP-QSEM] [hereinafter AFL-CIO Merger Press Release]; Alí Bustamante & Lena Bilik, *A United Labor Front: SEIU's Strategic Move to AFL-CIO*, ROOSEVELT INST. (Jan. 17, 2025), https://rooseveltinstitute.org/blog/a-united-labor-front [https://perma.cc/Y7B8-S4FQ].

2. *See* AFL-CIO Merger Press Release, *supra* note 1; Peyton Abrams, *SEIU Just Joined the AFL-CIO!*, SERV. EMPS. INT'L UNION (Jan. 8, 2025), https://www.seiu.org/blog/2025/1/seiu-just-joined-the-afl-cio [https://perma.cc/A2SF-TLPJ] (describing merger as an effort to ensure that "all workers who want a union can have one"); s*ee also* Bustamante & Bilik, *supra* note 1 (describing history of unions' split and circumstances of merger).

3. *See* News Release, Bureau of Lab. Stats., U.S. Dep't of Lab., Union Members—2024 (Jan. 28, 2024), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/3EYR-P7CP] [hereinafter BLS News Release].

4. *Id.*

record, but also lower than the number recorded in 1935, when the National Labor Relations Act was passed.[5] In other words, after nearly a century of federal policy favoring collective bargaining, the labor movement had lost ground.[6]

At first glance, it was natural to see the first milestone as a reaction to the second. After all, the SEIU and AFL-CIO had themselves described their tie-up as a way to help labor get back on its feet.[7] But that story had been told before, and the results were far from encouraging.[8] In 1955, the old AFL and CIO called off their own two-decade rivalry and reunited into a single federation.[9] This unification was also pitched as a way to concentrate resources on organizing new members.[10] What followed, however, was not growth, but decline.[11] In the year of the AFL-CIO merger, unions represented 24.4% of all civilian workers and 31.7% of non-farm workers.[12] That number had never been reached before, and it never would again.[13]

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5. *Compare id.*, *with* LEO TROY, NAT'L BUR. OF ECON. RSCH., TRADE UNION MEMBERSHIP, 1897–1962, at 2 (1965), https://www.nber.org/system/files/chapters/c1707/c1707.pdf [https://perma.cc/K88G-7K3G] (charting historical union densities in private-sector workforce).

6. *See* National Labor Relations Act, Pub. L. 74-198, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151–169; Eric Dirnbach, *State of the U.S. Unions 2025*, MEDIUM (Feb. 20, 2025), https://ericdirnbach.medium.com/state-of-the-u-s-unions-2025-34ad1e2974da [https://perma.cc/4Z5T-H9EU] (describing historically low union penetration as of 2025); *see also* 29 U.S.C. § 151 (pronouncing federal labor policy in favor of collective bargaining).

7. *See* AFL-CIO Merger Press Release, *supra* note 1; *see also* Bustamante & Bilik, *supra* note 1 (describing the AFL-CIO Merger Press Release).

8. *See AFL-CIO No-Raiding Agreement*, 8 INDUS. & LAB. REL. REV. 102, 102-03 (1954).

9. *See AFL-CIO Merger Agreement*, 9 INDUS. & LAB. REL. REV. 122, 122 (1955); *see also The Merger: AFL-CIO*, AFL-CIO: ORIGINS AND DIVISIONS, https://wp.nyu.edu/mappingnyclaborhistory/the-merger [https://perma.cc/VLA7-KNV8] (last visited Dec. 21, 2025) (setting out history of merger).

10. *See AFL-CIO No-Raiding Agreement*, *supra* note 8, at 103-04 (describing ban on raids as an effort to avoid wasting resources that could be better spent organizing unorganized new members); William Z. Foster, *The AFL-CIO Merger*, DAILY WORKER (N.Y.), Dec. 15, 1955, at 5 ("The united workers will be far better able to go ahead with the urgent tasks of organizing the unorganized, especially in the South."); *see also The Merger: AFL-CIO*, *supra* note 9 ("Member raids were frequented on both sides and new labor projects were left behind."); Joseph Krislov, *Raiding Among the "Legitimate" Unions*, 8 INDUS. & LAB. REL. REV. 19, 19 (1954) (observing that reduced raiding was a major goal of "most segments of the labor movement").

11. *See* Marty Manley, *To Honor Labor, Rethink Unions*, AM. COMPASS (Sept. 25, 2024), https://americancompass.org/to-honor-labor-rethink-unions [https://perma.cc/FH4N-QDZZ] (charting decline in union density following AFL-CIO merger).

12. *See* TROY, *supra* note 5, at 2, 5 (reporting that union density reached a high of 32.7% of nonfarm workers in 1953, two years before the AFL and CIO finalized their merger); *see also* PAUL D. ROMERO & JULIE M. WHITTAKER, CONG. RSCH. SERV., R47596, A BRIEF EXAMINATION OF UNION MEMBERSHIP DATA 4 (2023) (charting historical union-density rates).

13. *See* TROY, *supra* note 5, at 2, 5; ROMERO & WHITAKER, *supra* note 12, at 4; *see also* BLS News Release, *supra* note 3, at 1-2 (reporting that union density had sunk to new lows of 9.9% of all workers and 5.9% of private-sector workers).

Rather than climb even higher, labor's share of the workforce declined year over year, reaching a new nadir in 2025.[14] In short, the merger didn't presage a golden age of union growth; it dawned an era of waning union membership.[15]

That result might seem like a paradox. But in fact, it was basic economics. Industries grow faster when they are competitive: competing businesses push each other to improve; and as a byproduct, they expand aggregate demand for their services.[16] That dynamic also plays out in the market for unions.[17] Unions provide better service to their customers and employees, when they have to compete; and when they don't have to compete, they stagnate.[18] And no less than for-profit businesses, unions are subject to the inexorable laws of competitive economics.[19]

These same competitive laws help explain labor's post-1955 slide.[20] The centerpiece of the AFL-CIO merger was a ban on inter-union

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14. *See* Dirnbach, *supra* note 6; BLS News Release, *supra* note 3.

15. GERALD MAYER, CONG. RSCH. SERV., RL32553, UNION MEMBERSHIP TRENDS IN THE UNITED STATES 11, 22-23 (2004) (charting declining density); *see also* Hayley Brown & Emma Curchin, *Union Density Continues to Decline*, CTR. FOR ECON. & POL'Y RSCH. (Jan. 28, 2025), https://cepr.net/publications/union-density-continues-to-decline [https://perma.cc/MCM2-5U35] (describing decades-long fall in density rates); Diane Katz, *The Decline of the American Labor Union*, GEOPOLITICAL INTEL. SERVS. (Apr. 28, 2023), https://www.gisreportsonline.com/r/decline-american-union [https://perma.cc/PC8R-FF36] (same).

16. *See, e.g.*, HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY, THE LAW OF COMPETITION AND ITS PRACTICE § 12.1, at 630-31, 635 (6th ed. 2020) (describing economic view of effect of cartelization on growth); RICHARD POSNER, ANTITRUST LAW 19, 21 (2d ed. 2001) (observing that "there is some evidence that the competitive market is likely to be more successful" than a monopolized one).

17. *See* Samuel Estreicher, *"Think Global, Act Local": Employee Representation in a World of Global Labor and Product Market Competition*, 4 VA. L. & BUS. REV. 81, 92 (2009) (attributing poor union growth to lack of inter-union competition).

18. *See* Manley, *supra* note 11 (connecting lack of competition to decline in union density); Stewart J. Schwab, *Union Raids, Union Democracy, and the Market For Union Control*, 1992 U. ILL. L. REV. 367, 390 (1992) ("[W]ithout the threat of a raid, leaders are less concerned with providing optimal services to members."); Kye D. Pawlenko, *Reevaluating Inter-Union Competition: A Proposal to Resurrect Rival Unionism*, 8 U. PA. J. LAB. & EMP. L. 651, 680 (2006) ("[W]hen unions are exposed to market forces, there is an incentive for them to outdo, not undercut, each other."). *Compare* William R. Kerr, *Innovation and Business Growth*, *in* DESIGNING THE FUTURE: ECONOMIC, SOCIETAL, AND POLITICAL DIMENSIONS OF INNOVATION 137, 137 (Austrian Council for Rsch. & Tech. Dev. ed., 2015) ("Innovation and the pursuit of new business opportunities is essential for growth at the firm level . . . ."), *with* Bianca Miller Cole, *Innovate or Die: How a Lack of Innovation Can Cause Business Failure*, FORBES (Jan. 10, 2019), https://www.forbes.com/sites/biancamillercole/2019/01/10/innovate-or-die-how-a-lack-of-innovation-can-cause-business-failure [https://perma.cc/3NAH-N86V] (citing lack of innovation as cause of failures at enterprises such as Blockbuster and Toys "R" Us).

19. *See* Estreicher, *supra* note 17, at 92 ("Competition among union organizations is essential, for monopoly here, as in product markets, leads to nonresponsive agencies and dissatisfied consumers.").

20. *See* Manley, *supra* note 11.

"raiding"—where one union tries to recruit another union's members.[21] Without the risk of raiding, unions no longer had to worry about keeping their members happy.[22] That is, they no longer had to compete.[23] They were insulated from competitive pressure and shielded from outside rivalry.[24] The result was as predictable as it was disastrous: complacency, stultification, and decline.[25]

Indeed, this same ban on competition continues to plague the labor movement today. It lives on in Article XX of the AFL-CIO Constitution, which forbids affiliated unions from raiding each other's members.[26] In practice, the Article works like a giant "market division" agreement—it bans service providers (unions) from operating in each other's territory.[27] In the commercial world, such an agreement would be flatly illegal.[28] Market-division agreements are per se violations of the Sherman Antitrust Act, which forbids all "naked" restraints on

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21. *See* Joseph A. Loftus, *A.F.L., C.I.O. in No-Raiding Pact; Accord Held First Step to Merger; No-Raiding Accord Reached by Labor*, N.Y. TIMES (June 3, 1953), https://www.nytimes.com/1953/06/03/archives/afl-cio-in-noraiding-pact-accord-held-first-step-to-merger.html [https://perma.cc/77T4-QYB3]; *94 Unions Sign No-Raid Agreement as First Step Toward AFL-CIO Unity*, MACHINIST (D.C.), June 17, 1954, at 1; *see also* AFL-CIO, CONSTITUTION OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS art. III, § 4, at 6 (1973) (setting out prior version of the ban on raiding).

22. *See, e.g.*, Manley, *supra* note 11 (noting lack of incentive to improve absent competitive pressures); Pawlenko, *supra* note 18, at 679 ("[T]he threat of raid serves a useful purpose: it provides a mechanism to keep managers from straying too far from the interests of the organization's owners.").

23. *See* Manley, *supra* note 11; *see also* Krislov, *supra* note 10, at 20 (stating that "[t]he high percentage of victories" by raiding unions before merger may have been attributable to member dissatisfaction with performance of incumbent union).

24. *See* Schwab, *supra* note 18, at 391; *see also* Pawlenko, *supra* note 18, at 684 (noting that competition through raiding helped keep unions responsive to their members).

25. *See* Dirnbach, *supra* note 6 (describing the continuing decline in union density as "alarming" and "an ongoing existential crisis for the labor movement"); Estreicher, *supra* note 17, at 92-93 (attributing union growth to competitive pressure); Manley, *supra* note 11 (describing inert state of modern unions because of lack of competition and explaining "[m]ost [unions] are reluctant to seek new service and revenue models, and efficiency measures").

26. AFL-CIO, CONSTITUTION OF THE AFL-CIO art. XX, §§ 2, 5 (2022).

27. *Id.* art. XX, § 4; *see also* Schwab, *supra* note 18, at 391 (explaining that a chief purpose of the merger was to prevent raiding); Krislov, *supra* note 10, at 28 (discussing the effect of the AFL-CIO no-raiding agreement on jurisdictional raiding); *Market Division or Customer Allocation*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors/market-division-or-customer-allocation [https://perma.cc/FZ8V-LQTG] (last visited Dec. 21, 2025) (describing standard market-division agreements).

28. *See* United States v. Topco Assocs., 405 U.S. 596, 608 (1972) ("One of the classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition."); *see also Market Division or Customer Allocation*, *supra* note 27 ("Plain agreements among competitors to divide sales territories or assign customers are almost always illegal.").

competition.[29] But Article XX has persisted untouched by antitrust law, largely because most people assume that it is protected by the so-called statutory labor exemption.[30]

That assumption, however, is wrong. The statutory exemption applies only to traditional union tactics aimed at restraining competition in labor markets.[31] That is, it protects unions when they use their traditional methods (picketing, boycotts, strikes, etc.) to restrain competition over wages, hours, and other working conditions.[32] It does not protect unions when they restrain competition in ancillary markets disconnected from their traditional labor-market goals.[33] Yet that's just what Article XX does: it restrains competition not in any labor market,

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29. *See* 15 U.S.C. § 1; *Topco Assocs.*, 405 U.S. at 608; Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49 (1990) ("One of the classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition." (quoting *Topco Assocs.*, 405 U.S. at 608)); *see also* Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 292 (1975) ("Price fixing and market division are thus alternative methods for achieving the same thing—monopoly pricing and profits—with the choice governed by the circumstances facing the cartel.").

30. *See* AFL-CIO, *supra* note 26, art. XX, §§ 2, 5; Pawlenko, *supra* note 18, at 679 & n.187 (stating that "antitrust laws do not prohibit unions from agreeing not to raid each other" because of the statutory exemption). A separate "nonstatutory" exemption has been developed to protect collective-bargaining agreements. *See, e.g.*, Brown v. Pro Football, Inc., 518 U.S. 231, 235-38 (1996); Loc. Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689 (1965). Because that exemption applies to agreements between labor unions and employers, rather than among labor unions themselves, it has limited relevance for no-raid agreements like Article XX. *See Jewel Tea Co.*, 381 U.S. at 688-89.

31. *See* Am. Fed'n of Musicians v. Carroll, 391 U.S. 99, 106 (1968) (recognizing a union interest in restraining competition in labor markets); United Mine Workers v. Pennington, 381 U.S. 657, 666 (1965) (same); *see also* Allen Bradley Co. v. Loc. Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 805-06 (1945) (describing history and purpose of statutory exemption).

32. *See Carroll*, 391 U.S. at 106-09 (applying exemption to union restrictions on pricing for orchestra bookings because the price listings were tied to union's interest in restraining competition over wages, hours, and working conditions for union members); USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council, 31 F.3d 800, 808-09 (9th Cir. 1994) (applying exemption to picketing, handbilling, and work stoppages aimed at advancing union's interest in limiting competition over wages, hours, and working conditions); Confederación Hípica de P.R., Inc. v. Confederación de Jinetes Puertorriqueños, Inc., 30 F.4th 306, 314 (1st Cir. 2022) (applying exemption to boycott by independent jockeys when dispute centered on the jockeys' own wages and working conditions).

33. *See, e.g.*, H.A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704, 721-22 (1981) (refusing to apply statutory exemption to union restraint on representation services by booking agents unrelated to union's interest in protecting bargained-for wages, hours, and working conditions); Connell Constr. Co. v. Plumbers & Steamfitters Loc. Union No. 100, 421 U.S. 616, 625-26 (1975) (refusing to apply exemption to union's attempt to restrain general contractor's choices of subcontractors and noting that "[t]his kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions"); Apex Hosiery Co. v. Leader, 310 U.S. 469, 487-88 (1940) (explaining that there is no all-purpose exemption for labor unions; whether specific union activities are subject to liability is a matter of statutory interpretation).

but in the market for unions' own services.[34] It therefore falls outside the exemption and is fully subject to antitrust law.[35]

That conclusion may sound like a threat to American labor. But it is not: it is an opportunity.[36] It means that Article XX and its stultifying effects on the labor movement can be forcibly removed. And with Article XX gone, competition can return. Competitive forces can drive labor to once again play a vibrant, productive role in the American economy.[37]

But to make that happen, external intervention is necessary. Individual unions do not have an incentive to challenge Article XX.[38] They have become addicted to a low-competition environment and see further consolidation as the only way forward.[39] Nor are private employers or employees well suited to bring such a challenge.[40] They often lack the resources to bring such a challenge, much less the sophistication and incentive to see the challenge through.[41]

There is, however, at least one third party with the resources and incentives to do so: the U.S. Department of Justice. The Department of Justice is responsible for rooting out and eliminating anticompetitive

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34. *See* AFL-CIO, *supra* note 26, art. XX, § 2 (forbidding affiliated unions from competing for one another's members); Brian Petruska, *Choosing Competition: A Proposal to Modify Article XX of the AFL-CIO Constitution*, 21 HOFSTRA LAB. & EMP. L.J. 1, 3 (2003) (observing that Article XX "poses a significant obstacle to competition in union management by all but eliminating the possibility that unions will ever compete with each other to earn their members' endorsement").

35. *See H.A. Artists & Assocs.*, 451 U.S. at 722 (refusing to apply exemption to union's limitation on ancillary market for representation by booking agents); *cf.* Jackson K. Maxwell, Note, *Solidarity Forever? Toward a Competitive Market for Organized Labor*, 99 N.Y.U. L. REV. 1436, 1486 (2024) (concluding statutory exemption may not apply when harm of no-raid agreement outweighs competing benefits, such as higher union density).

36. *See* Pawlenko, *supra* note 18, at 685 (describing how increased competition could increase demand for labor's services); Petruska, *supra* note 34, at 4 (concluding that enhanced competition—in particular, by removing the checks on competition under Article XX—would benefit the AFL-CIO).

37. *See* Pawlenko, *supra* note 18, at 683-85, 683 n.208 (arguing that competition would not only boost union density but also push unions to be more transparent and democratic).

38. *See* George W. Brooks, *Stability Versus Employee Free Choice*, 61 CORNELL L. REV. 344, 347 (1976) (observing that union leaders have no incentive to open up competition and every incentive to avoid it).

39. *See* Manley, *supra* note 11 (observing that although the status quo has led unions to historic lows, many unions still find the idea of new, more competitive models "disconcerting"); *see also* Brooks, *supra* note 38, at 347 ("There are few, if any, full-time union personnel who wish to maximize the opportunities for employees to change unions, reject unions, or withdraw from the union of which they are members.").

40. *See infra* text accompanying notes 267-72.

41. *See infra* text accompanying notes 267-72.

agreements in national markets.[42] It has the knowhow and the resources to take on Article XX.[43] It can, and should, sue the AFL-CIO.

I. COMPETITIVE SPIRITS: RAIDING, GROWTH, AND THE AMERICAN LABOR MOVEMENT

Simply put, a union "raid" is an effort by one union to poach another union's members.[44] The effort usually starts with a discrete campaign to persuade members that a new union could do a better job.[45] When the new union feels like it has enough support, it will petition the National Labor Relations Board ("NLRB") to conduct an election.[46] Then, if the new union wins more votes in the election than the incumbent union, the new union supplants the old one as the employees' exclusive representative for collective bargaining.[47]

Raids can happen for many reasons. Most simply, the members may be unhappy with their union's performance.[48] They may think the union has negotiated a bad contract.[49] They may think it is mishandling

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42. *See Antitrust Division*, U.S. DEP'T OF JUST., https://www.justice.gov/doj/organization-mission-and-functions-manual-antitrust-division [https://perma.cc/W2AE-2UJ5] (last visited Dec. 21, 2025) ("The mission of the Antitrust Division is to promote competition in the U.S. economy through enforcement of, improvements to, and education about antitrust laws and principles.").

43. *See id.* (observing that antitrust laws "apply to virtually all industries" and "every aspect of business, including . . . labor"); *cf. In re* High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1122-23 (N.D. Cal. 2012) (concluding the Department of Justice plausibly alleged that certain no-poach arrangements between big tech companies—a restraint on competition in labor markets—violated antitrust law); *In re* Animation Workers Antitrust Litig., 123 F. Supp. 3d 1175, 1212-14 (N.D. Cal. 2015) (same in case involving non-solicitation agreements between employers).

44. *See What Is a No Raiding Agreement? A Comprehensive Legal Overview*, USLEGAL, https://legal-resources.uslegalforms.com/n/no-raiding-agreement [https://perma.cc/SFW6-RMFK] (last visited Dec. 21, 2025) ("This agreement prohibits them from attempting to recruit or enroll members from one another. The purpose is to protect the existing bargaining relationships that each organization has with its members.").

45. *See* Nick Driedger, *On Raiding*, ORG. WORK (May 31, 2019), https://organizing.work/2019/05/on-raiding [https://perma.cc/Z85L-CGNQ] (describing raiding process and reporting on experience in prior raids).

46. *See* 29 C.F.R. § 102.60 (2024) (setting out representation petition process).

47. *See* 29 U.S.C. § 159(a), (c); 29 C.F.R. § 102.69(a)–(b) (2024) (setting out election tally and certification procedures); *cf. Multiple*, UNION ELECTIONS, https://unionelections.org/data/union/multiple [https://perma.cc/MA5J-XE5Q] (last visited Dec. 21, 2025) (tracking results in representation proceedings in which more than one union was named).

48. *See* Krislov, *supra* note 10, at 20 (concluding that high percentage of wins by raiding unions resulted from dissatisfaction with incumbent union's performance).

49. *See* Schwab, *supra* note 18, at 386; Brooks, *supra* note 38, at 347-48, 351, 353-55 (explaining that raiders frequently win elections because employees have concerns about incumbent's performance).

their grievances.[50] They may even think it is just too chummy with the employer.[51] Whatever the reason, their discontent can attract a rival.[52]

Raids can also happen for more complicated reasons. For example, in the late 1940s, the United Mine Workers ("UMW") were legally disqualified under federal labor law because their president, John Lewis, refused an order to sign an affidavit saying he wasn't a communist.[53] Because UMW was disqualified, it couldn't appear on NLRB election ballots.[54] That weakness attracted dozens of raids from other unions, who saw an opportunity to snatch away the UMW's members.[55]

But whether the causes are simple or complex, raiding has long been unpopular with unions.[56] Unions have tended to see raiding as a wasteful zero-sum game: whatever the raiding union wins, the incumbent union loses.[57] Raids therefore force unions to devote resources fighting rear-guard actions against their brothers and sisters in the labor movement—resources that could be better spent, they think, on organizing employees with no union.[58]

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50. *See* Schwab, *supra* note 18, at 386; *see also* Brooks, *supra* note 38, at 347-48.

51. *See* Steve Early, *Principle and Power Plays: The Situational Ethics of Union 'Raiding'*, IN THESE TIMES (Sept. 18, 2009), https://inthesetimes.com/article/principle-and-power-plays-the-situational-ethics-of-union-raiding [https://perma.cc/A78J-6FXY]; *see also* Brooks, *supra* note 38, at 354-55.

52. *See* Krislov, *supra* note 10, at 20 ("The high percentage of victories suggests that the affiliated unions in these situations may have been doing a poor job of representation."); *see also* Pawlenko, *supra* note 18, at 680 (describing the role raids play in forcing unions to be accountable to their members).

53. *See* Krislov, *supra* note 10, at 23, 27 (explaining that, after the Taft-Hartley Act became law, the UMW could not appear on union ballots due to John Lewis's refusal to sign the oath); Louis Stark, *AFL Slated to Back Lewis on Affidavit; Spokesman Says Convention Is to Support Refusal to Sign Non-Communist Paper*, N.Y. TIMES (Sept. 26, 1947), https://www.nytimes.com/1947/09/26/archives/afl-slated-to-back-lewis-on-affidavit-spokesman-says-convention-is.html [https://perma.cc/M5PK-WKHG].

54. *See* Krislov, *supra* note 10, at 27.

55. *See id.*

56. *See* David L. Cole, *Arbitration of Jurisdictional Disputes: The AFL-CIO No-Raiding Agreement*, *in* ARBITRATION TODAY 149, 149-50 (Jean T. McKelvey ed., 1955) (describing union antipathy toward practice of raiding that ultimately presaged mid-century merger between AFL and CIO).

57. *See id.*; *see also* Press Release, United Steelworkers, Union Raiding Is a Blow to Solidarity Among Workers (Feb. 2, 2018), https://usw.ca/union-raiding-is-a-blow-to-solidarity-among-workers [https://perma.cc/Q47P-5ZKS] (excoriating raiding as an attack on union solidarity and noting "[r]esponsible unions long ago decided to give up on raiding").

58. *See* Press Release, AFL-CIO, Supporting AFL-CIO Unions in Raids by Independent Unions (Aug. 7, 2003) [hereinafter Exec. Council Raiding Statement], https://aflcio.org/about/leadership/statements/supporting-afl-cio-unions-raids-independent-unions [https://perma.cc/2DCY-H7WT] (arguing that "raiding weakens the ability of legitimate unions to establish and maintain wage standards, and undermines basic trade union solidarity"); *AFL-CIO No-Raiding Agreement*, *supra* note 8, at 103 (asserting that raids "create industrial strain and conflict

Unions have therefore long tried to tamp down on raiding. Historically, their weapon of choice was American Federation of Labor's principle of "exclusive jurisdiction."[59] In the early twentieth century, the AFL dominated the labor movement.[60] It collected over one hundred affiliate unions from across the country under a single federated umbrella.[61] To keep peace among these affiliates, it assigned some of them exclusive rights, or "jurisdiction," over specified professions.[62] If workers in these professions were assigned to an affiliate's jurisdiction, the other affiliates weren't supposed to organize them.[63] While the system wasn't exactly a ban on raiding, and it didn't always work, it mostly kept affiliated unions in their respective lanes.[64]

But the system started to break down in the mid-1930s when the AFL split over organizing philosophy.[65] It had started as a collection of craft unions, mostly from the skilled trades.[66] So naturally, it assigned jurisdiction along craft lines.[67] But as industrial-style production work became more prominent, some affiliates pushed for a new model.[68] Union leaders like the UMW's Lewis pushed for industry-wide organizing, which they saw as the only way to mobilize the new working

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and they do nothing to add to the strength and capabilities of the trade union movement as a whole").

59. *See* Krislov, *supra* note 10, at 28-29 (explaining that the exclusive-jurisdiction principle was supplanted after AFL-CIO merger with no-raiding agreements); John T. Dunlop, *Structural Changes in the American Labor Movement*, 80 MONTHLY LAB. REV. 146, 146-47 (1957) (describing exclusive-jurisdiction principle).

60. DEREK C. BOK & JOHN T. DUNLOP, LABOR AND THE AMERICAN COMMUNITY 189 (1970) (observing that AFL encompassed supermajority of labor movement); HAROLD C. LIVESAY, SAMUEL GOMPERS AND ORGANIZED LABOR IN AMERICA 99 (Oscar Handlin ed., 1978) (observing that after disintegration of the Knights of Labor, the AFL was "supreme among American labor organizations" for forty years); *cf.* WORKER ORG. RES. & KNOWLEDGE CTR., https://www.workcenter.gov [https://perma.cc/F963-T7RA] (last visited Dec. 21, 2025) (noting that more than half of all nonunion U.S. workers want to join a union).

61. *See* BOK & DUNLOP, *supra* note 60, at 189; *Welcome to AFL-CIO: Origins and Divisions*, AFL-CIO: ORIGINS AND DIVISIONS, https://wp.nyu.edu/mappingnyclaborhistory [https://perma.cc/R9YZ-JVRM] (last visited Dec. 21, 2025) (listing early constituent unions of AFL).

62. *See* Dunlop, *supra* note 59, at 146.

63. *See id.*

64. *Cf. id.* (explaining that while the AFL established a system of exclusive jurisdiction, "in actual practice, the degree of competition in the American labor movement was very high").

65. Frank Gattie, *What Is the CIO in the AFL-CIO?*, NAT'L EMP. L. PROJECT (Nov. 9, 2018), https://www.nelp.org/cio-1935 [https://perma.cc/S7FR-4M94] (describing history of the split).

66. *AFL-CIO*, BRITANNICA, https://www.britannica.com/topic/AFL-CIO [https://perma.cc/B86W-79UY] (last visited Dec. 21, 2025); *see also* DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR 4-5 (1987) (observing that the turn-of-century labor movement, which AFL dominated, drew largely on ranks of skilled craftsmen).

67. *See AFL-CIO*, *supra* note 66.

68. *See id.*

class.[69] That tension ultimately led to a split in 1935, when ten AFL unions left to form the CIO.[70] Unions in the new CIO were no longer subject to the AFL's rules, and they no longer had to respect the AFL's jurisdictional assignments.[71] They were free to raid their former brothers and sisters at will.[72]

What followed was two decades of fierce union rivalry. CIO unions raided hundreds of AFL workplaces, and vice versa.[73] By one count, from 1940 to 1952, there were more than 1,600 raids, about half of which were between AFL and CIO affiliates.[74] The rest of the raids were intra-federation raids (e.g., one CIO union against another) or raids by independent unions.[75] In all of these contexts, the raids were mostly successful.[76] In AFL vs. CIO raids, the raiding union won about half of the elections.[77] And in raids by independent unions, the raider won nearly two-thirds.[78] The result was a dynamic and shifting market for union services.[79]

At the same time, unionization overall surged. In 1935, just before the AFL-CIO split, unions represented about 13.3% of non-agricultural private-sector workers.[80] But two decades later, they represented almost 33%.[81] That growth was unprecedented in labor history: it marked the

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69. *Id.* (quoting CIO's unsuccessful resolution from 1935 AFL convention stating that "in the great mass production industries . . . industrial organization is the only solution"); *see also* MONTGOMERY, *supra* note 66, at 6 (noting that elements in the AFL believed craft organization was an impediment to organizing growing class of industrial workers).

70. *See* Gattie, *supra* note 65.

71. *See* Krislov, *supra* note 10, at 20-21, 28.

72. *See id.* at 20-21 (tracking raids of CIO unions on AFL unions and vice versa from 1940 to 1952); *cf.* MONTGOMERY, *supra* note 66, at 7 ("AFL officials who had once been vociferous reformers now believed they had to bide their time until a more favorable political climate would allow them to lead a union resurgence. As it turned out, when that time came, the petrified house of labor split in two.").

73. *See* Krislov, *supra* note 10, at 20-21; *see also* Estreicher, *supra* note 17, at 92 (describing the post-split period as a time of vigorous union competition); Pawlenko, *supra* note 18, at 660 (same).

74. Krislov, *supra* note 10, at 20.

75. *Id.*

76. *Id.* at 20-21.

77. *Id.* at 20-21 (explaining that the CIO "won slightly over half of their raids against AFL unions" while the AFL succeeded in 40%).

78. *Id.* at 20.

79. *See id.* at 20, 28; *see also* Estreicher, *supra* note 17, at 92 (connecting fast growth in union movement with vigorous competition among unions during this period); Brooks, *supra* note 38, at 348 (observing that employees who switched unions during raids presumably did so to get better union representation).

80. *See* TROY, *supra* note 5, at 2.

81. *See id.*

fastest period of growth on record—one that still has not been replicated.[82]

Scholars have long connected those two trends.[83] They have reasoned that inter-union competition led unions to pay closer attention to their members.[84] Unions had to satisfy their members and improve their services; otherwise, they risked being raided.[85] And by improving their services, they made themselves more attractive to new members.[86] The constant raiding may have threatened each union individually, but overall, it fostered a vibrant union market.[87]

Even so, unions continued to hate raiding. In fact, they hated it so much that it drove them back together.[88] In the early 1950s, the AFL and CIO decided to explore a merger, the main goal of which was to stop raiding.[89] In 1953, they signed a no-raiding agreement covering dozens

82. *See* Dirnbach, *supra* note 6 (describing seemingly endless decline of union density in the United States since the 1950s and charting union density by decade); Manley, *supra* note 11 (attributing the decline at least in part to lack of competition brought on by AFL-CIO merger).

83. *See, e.g.*, Estreicher, *supra* note 17, at 92 (stating that it is "not accidental" that the greatest period of union growth occurred during period of competition between AFL and CIO); Pawlenko, *supra* note 18, at 678-79, 681-85 (arguing that competition has a positive effect on union performance and growth).

84. *See* Pawlenko, *supra* note 18, at 679 (stating that the threat of a raid forces unions to pay closer attention to their members' interests).

85. *See, e.g.*, *id.* (comparing unions' incentives to the incentives of corporate managers who must also avoid raids by performing well); Petruska, *supra* note 34, at 55 (observing how threat of competition can incentivize unions to provide effective and law-abiding service to their members).

86. *See* Pawlenko, *supra* note 18, at 680 ("[C]ompetition results in a race-to-the-top seller's auction, in which competing unions are constantly trying to get their members a better deal."); Estreicher, *supra* note 17, at 91-92 (arguing that increased competition helps unions continue to offer desirable services in a changing market); Maxwell, *supra* note 35, at 1469-70 (concluding that increased competition led to a more vigorous union movement and greater union density).

87. *See* Seymour Martin Lipset, *The Law and Trade Union Democracy*, 47 VA. L. REV. 1, 12 (1961) ("[T]he existence of two unions with similar jurisdictions serves to make each of them more responsive to membership wishes."); Pawlenko, *supra* note 18, at 682 ("There is historical evidence that unions expend greater effort organizing new workers when another union is also vying to be the exclusive bargaining representative of those workers."); Maxwell, *supra* note 35, at 1469-70 (surveying literature and concluding that inter-federation rivalry contributed to union growth (reviewing 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, 240-44 (2010))).

88. *See* Brooks, *supra* note 38, at 348 ("It was unmistakably the major goal of the merger to put an end to raiding altogether."); Schwab, *supra* note 18, at 391 (observing that a main purpose of the merger was to end raiding).

89. *See* Cole, *supra* note 56, at 149-50 (describing the no-raid agreement as "a necessary first condition to the achievement of unity").

of large affiliates.[90] And when they fully merged the next year, they baked their no-raiding agreement into their new constitution.[91]

That ban remains in place today.[92] Under Article XX of the AFL-CIO Constitution, no affiliate union may try to organize employees for whom another affiliate has an "established collective bargaining relationship."[93] A union has an established bargaining relationship when it (a) has been recognized by the employer for at least a year, or (b) is certified by the NLRB or an equivalent agency as the exclusive bargaining representative.[94] In either scenario, the union is protected from raiding.[95] If another affiliate tries to raid its territory, that affiliate can be sanctioned, fined, or even suspended from the federation.[96] In short, the ban on raiding has become a basic principle of membership in the nation's largest collection of unions.[97]

II. ANTICOMPETITIVE CEASE-FIRES: MARKET DIVISION AND OTHER NAKED RESTRAINTS ON TRADE

Since the late nineteenth century, federal antitrust law has banned anticompetitive collusion between competing businesses.[98] The principal source of that ban is section 1 of the Sherman Antitrust Act.[99] Section 1 forbids all contracts, combinations, and conspiracies in restraint of trade.[100] Taken literally, this ban could extend to nearly any contract; to some extent, almost all contracts restrict the freedom to compete in some

90. *See AFL-CIO No-Raiding Agreement*, *supra* note 8, at 106-08 (listing affiliates that ratified the agreement); *see also* Loftus, *supra* note 21; *94 Unions Sign No-Raid Agreement as First Step Toward AFL-CIO Unity*, *supra* note 21, at 1.

91. *See* JOINT AFL-CIO UNITY COMMITTEE, CONSTITUTION FOR THE AFL-CIO art. III, § 4 (1955), https://umdlabor.weebly.com/uploads/2/9/3/9/29397087/1955_constitution.pdf [https://perma.cc/6Q6B-ADC5] ("Each such affiliate shall respect the established bargaining relationship of every other affiliate and no affiliate shall raid the established collective bargaining relationship of any other affiliate.").

92. AFL-CIO, *supra* note 26, art. II, § 9.

93. *Id.* art. XX, § 2.

94. *Id.*

95. *See id.*

96. *See id.* art. XX, §§ 6–20 (setting out compliance and penalty structure); *id.* art. X, §§ 8, 17 (establishing the punitive powers of the AFL-CIO Executive Council).

97. *See id.* art. II, § 9; *see also* Cole, *supra* note 56, at 150-52 (describing the 1953 no-raid agreement's process as establishing a principle among affiliated unions to "live and let live").

98. *See The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/6HTP-XQS9] (last visited Dec. 21, 2025); *Market Division or Customer Allocation*, *supra* note 27; *see also* HOVENKAMP, *supra* note 16, § 2.1a, at 69-73 (discussing the Sherman Act's legislative history, purpose, and differing interpretations thereof).

99. 15 U.S.C. § 1.

100. *Id.*

way.[101] But courts have never read section 1 that way.[102] Instead, they have understood it to forbid only "unreasonable" restraints on competition—i.e., restraints that harm competition more than they promote other pro-consumer values.[103]

This kind of balancing can be difficult in practice. It requires a court to examine the restraint's context, its history, its effect on industry, and other ways the parties could accomplish the same pro-consumer goals.[104] If courts had to do that kind of analysis in every case, antitrust law might collapse under its own weight.[105] So, as a shortcut, courts have set aside a subcategory of restraints that always violate section 1.[106] These restraints are typically those with no ancillary benefit or goal; they simply restrain competition for the sake of restraining competition.[107] In antitrust parlance, they are "naked" restraints on trade.[108]

One such "naked" restraint is a market-division agreement.[109] The paradigm market-division agreement is where two otherwise competing

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101. United States v. Topco Assocs., 405 U.S. 596, 606 (1972) ("Were § 1 to be read in the narrowest possible way, any commercial contract could be deemed to violate it."); Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918) ("Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.").

102. *See Bd. of Trade of Chi.*, 246 U.S. at 238 (rejecting rigid, literalistic application of section 1 and stating that "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition").

103. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 7-8 (1979) (contrasting per se violations of Sherman Act with "rule of reason" analysis); *Bd. of Trade of Chi.*, 246 U.S. at 238-40 (finding the questioned conduct "was a reasonable regulation of business consistent with the provisions of the Anti-Trust Law" and highlighting how the rule "helped to improve market conditions"); *see also* Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 83, 114, 137 (2018) (observing that "[c]ourts evaluate most antitrust claims under a 'rule of reason'" and noting "application of the per se rule depends critically on a judgment that certain practices are unreasonable").

104. *Bd. of Trade of Chi.*, 246 U.S. at 238 (setting out factors); Hovenkamp, *supra* note 103, at 132-33 (discussing *Chicago Bd. of Trade*'s formulation of the test).

105. *See* Hovenkamp, *supra* note 103, at 98-99 (describing the burdens the cost and complexity of heavy economic analysis place on generalist judges and juries in rule-of-reason litigation).

106. *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."); *see also* Hovenkamp, *supra* note 103, at 86 (describing development of per se rule as a category of restraints that courts had concluded were always anticompetitive).

107. *See N. Pac. Ry. Co.*, 356 U.S. at 5; *see also* United States v. Topco Assocs., 405 U.S. 596, 607-08 (1972).

108. *See Topco Assocs.*, 405 U.S. at 607-09 (explaining that restraints in the per se category are automatically treated as unreasonable, even if a court thinks they might be reasonable in the immediate context, as "courts are of limited utility in examining difficult economic problems").

109. *Id.* at 608-09; *see also* Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49 (1990) ("[A]greements between competitors to allocate territories to minimize competition are illegal . . . ." (citing *id.* at

businesses agree not to compete in each other's territories.[110] For example, one supplier might agree not to sell in Chicago, while another agrees not to sell in New York.[111] The agreement benefits both sides because it lets them sell in their "own" market without competition.[112] But for the same reason, the agreement hurts consumers by depriving them of the typical benefits of competition: product diversity, price cuts, and technological innovation.[113] In fact, the evidence tends to show that market-division agreements (as well as other naked restraints) hurt consumers more than they help the colluding businesses.[114] Because they make products and services less attractive overall, they cause fewer people to buy them.[115] That is, they impose a "deadweight" cost on total welfare.[116]

As a result, courts have had little trouble treating market-division agreements as per se invalid.[117] Nor have enforcement agencies hesitated to extend that approach to cover similar kinds of agreements.[118] For

608)); United States v. Sealy, Inc., 388 U.S. 350, 356-58 (1967) (condemning horizontal market-division scheme among mattress licensor and manufacturers).

110. *See Market Division or Customer Allocation*, *supra* note 27 (describing paradigm market-division agreement).

111. *See id.*; *see also* ANTITRUST DIV., U.S. DEP'T OF JUST., PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES: WHAT THEY ARE AND WHAT TO LOOK FOR 3 (rev. ed. 2021), https://www.justice.gov/d9/pages/attachments/2016/01/05/211578.pdf [https://perma.cc/X8HC-TFPW] ("Market division or allocation schemes are agreements in which competitors divide markets among themselves. In such schemes, competing firms allocate specific customers or types of customers, products, or territories among themselves.").

112. *See Topco Assocs.*, 405 U.S. at 610-12 (explaining that such agreements may benefit the parties—and might even make them more competitive vis-à-vis nonparties—while still being illegal per se).

113. *See* White Motor Co. v. United States, 372 U.S. 253, 262-63 (1963) (describing "horizontal territorial limitations" as naked restraints on competition with a "pernicious effect" on competition and no "redeeming virtue" (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958))); HOVENKAMP, *supra* note 16, § 12.1, at 631-32.

114. *See* HOVENKAMP, *supra* note 16, § 4.3, at 158-59 (describing economic harms collusive markets have on society, including "deadweight" costs).

115. *See id.* § 1.3a–b, at 17-20, § 4.3, at 158.

116. *See id.*; *see also* Thomas A. Piraino, Jr., *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. CAL. L. REV. 685, 721 & n.161 (1991) (observing that scholars typically equate the evils of horizontal market-division agreements with those of price-fixing).

117. *See, e.g.*, *Topco Assocs.*, 405 U.S. at 598, 610-12 (condemning territorial limitations adopted by grocers selling jointly-owned brand); Palmer v. BRG of Ga., Inc., 498 U.S. 46, 47, 49-50 (1990), (condemning agreement whereby one bar-prep service agreed to withdraw from state); United States v. Sealy, Inc., 388 U.S. 350, 351, 356-58 (1967) (condemning territorial division in sale of brand of mattresses).

118. *See, e.g.*, U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR BUSINESS ACTIVITIES AFFECTING WORKERS 4-5 (2025) [hereinafter DOJ-FTC WORKER GUIDELINES], https://www.ftc.gov/system/files/ftc_gov/pdf/p251201antitrustguidelinesbusinessactivitiesaffectingworkers2025.pdf [https://perma.cc/Q3CV-JZW7] (describing similar schemes in labor market);

example, the U.S. Department of Justice regularly targets "no poach" and "non-solicitation" agreements.[119] These agreements commit businesses not to recruit each other's employees.[120] That is, they divvy up labor markets just as classic market-division agreements divvy up commercial ones.[121] Just like their commercial counterparts, no-poach agreements are naked restraints on trade, per se illegal, and subject to prosecution under the antitrust laws.[122]

III. A COMPETITION CARVE-OUT: THE STATUTORY LABOR EXEMPTION

No-raid agreements would seem to slot into the same category.[123] In effect, they commit unions to not compete for each other's members—i.e., the consumers of unions services.[124] The agreements are no different from classic market-division agreements and no-poach agreements, which have been similarly treated as illegal per se.[125] And yet, no-raid agreements have never been seen in the same light.[126] They have persisted as the rare (and perhaps only) naked restraint that hasn't been condemned under the Sherman Act.[127]

Memorandum from Andrew N. Ferguson, Chairman, Fed. Trade Comm'n, Directive Regarding Labor Markets Task Force (Feb. 26, 2025) [hereinafter FTC Task Force Memo], https://www.ftc.gov/system/files/ftc_gov/pdf/memorandum-chairman-ferguson-re-labor-task-force-2025-02-26.pdf [https://perma.cc/YQZ9-Z5YE] (same); ANTITRUST DIV., U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCES PROFESSIONALS 3-4 (2016) (same).

119. *See, e.g.*, DOJ-FTC WORKER GUIDELINES, *supra* note 118, at 4-5, 4 n.11. (citing no-poach agreements as an example of a per se illegal restraint on competition); United States v. DaVita Inc., 592 F. Supp. 3d 970, 979 (D. Colo. 2022) (challenge by Department of Justice to alleged no-poaching scheme among competing employers); *see also* Maxwell, *supra* note 35, at 1450-51 (describing Department of Justice's prosecution of no-poaching schemes).

120. *See, e.g.*, *DaVita*, 592 F. Supp. 3d at 979 (describing agreement "to allocate the market for employees"); Matthew Gibson, *How Major Tech Firms Used Illegal "No-Poach" Agreements to Control Workers' Salaries*, EMP. RSCH., Apr. 2024, at 5, 5-6 (describing agreements and Department of Justice investigation).

121. *See* DOJ-FTC WORKER GUIDELINES, *supra* note 118, at 4-5.

122. *See id.* at 4-6; Gibson, *supra* note 120, at 5; *see also* FTC Task Force Memo, *supra* note 118, at 1 ("Courts have found these [no-poach] agreements can be so pernicious as to be a per se violation of the competition laws.").

123. *See* Maxwell, *supra* note 35, at 1452 (noting that Article XX resembles a market-division agreement).

124. *See* AFL-CIO, *supra* note 26, art. XX, § 2; *see also* Maxwell, *supra* note 35, at 1452-55 (analogizing union members to consumers affected by traditional market-division agreement).

125. *See* FTC Task Force Memo, *supra* note 118, at 1 (analogizing no-poach agreements to classic commercial restraints on competition); DOJ-FTC WORKER GUIDELINES, *supra* note 118, at 1, 4 (same).

126. *See* Maxwell, *supra* note 35, at 1459 (acknowledging that courts haven't treated no-raid agreements as illegal under the antitrust laws).

127. *See id.* (observing that although Article XX has similar anticompetitive effects to other naked market division agreements, it has persisted); *see also* Brooks, *supra* note 38, at 348-52,

That status likely stems from the so-called statutory labor exemption.[128] The statutory labor exemption is a vestige of the early twentieth century, when industrial strife wracked American labor markets.[129] In the post-Civil War era, the economy transformed under the pressure of technological advancement, urban concentration, and interstate trade.[130] Millions of Americans left their farms and workshops for jobs in mining, manufacturing, and transportation.[131] These new jobs were fundamentally different from what had come before: whereas farmers and craftsmen often owned their own tools and instruments, industrial workers owned nothing but their own labor.[132] In other words, labor was separated from capital.[133] And that separation created a power imbalance that, in the eyes of some, left workers more vulnerable.[134]

That perception produced an industrial struggle, often led by labor unions.[135] Unions protested what they saw as unfair working conditions by picketing jobsites, blacklisting employers, boycotting suppliers, and organizing strikes.[136] Employers, in turn, hit back by filing lawsuits,

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354-55 (describing anticompetitive effects and harm to workers caused in part by no-raid arrangements).

128. *See* Pawlenko, *supra* note 18, at 679 & n.187 (assuming that statutory exemption protects no-raid agreements).

129. *See* Alexander T. MacDonald, *From* Ratio *to* Auctoritas*: The Decline of Reason and the Rise of Authority in American and Roman Law*, 26 FEDERALIST SOC'Y REV. 219, 233-34 (2025) (describing post-Civil War economic and legal changes); MONTGOMERY, *supra* note 66, at 4-5 (describing "endemic conflict over wages and costs of production" in late-nineteenth, early-twentieth-century America).

130. *See* JAMES W. ELY, JR., THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY 147 (2016) (describing "sweeping" changes of the late nineteenth century, including industrialization and urbanization); JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 8 (3d ed. 2008) [hereinafter THE GUARDIAN OF EVERY OTHER RIGHT] (explaining that "by the late nineteenth century, urbanization and industrialization had transformed American society, creating novel pressures" aimed at private property); MONTGOMERY, *supra* note 66, at 54-55 (describing railroad industry's growth).

131. JAN LUCASSEN, THE STORY OF WORK: A NEW HISTORY OF HUMANKIND 293-94 (2021) (describing decline in agricultural and other forms of self-employment in favor of jobs in mechanized and industrial sectors in the United States and elsewhere); MONTGOMERY, *supra* note 66, at 49-55 (describing movement of workers from agricultural to production sectors).

132. *See* William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 802 (noting increasing separation of capital from labor that gave rise to industrial strife and ultimately the modern labor movement).

133. *Id.*

134. *See* Evelyn Atkinson, *Out of the Household: Master-Servant Relations and the Employer Liability Law*, 25 YALE J.L. & HUMANS. 205, 230 (2013) (describing tension between classical notions of labor as independent owner of labor and modern dependence on an employer, which in the eyes of some contemporaries left a gap in protection for the worker).

135. *See* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 82-83 (1991) (describing proliferating boycotts in the 1880s).

136. *See* MONTGOMERY, *supra* note 66, at 67, 92-93, 107, 269 (describing efforts by unions throughout late-nineteenth and early-twentieth centuries to affect wages and working conditions

thousands of which resulted in injunctions.[137] The most potent of these were issued under the Sherman Act, which courts applied to anticompetitive activity by both businesses and unions.[138] In fact, in the now-infamous *Danbury Hatters* case, the U.S. Supreme Court held that the Sherman Act applied even to conduct by individual union officers and members.[139] These individuals could be held liable for up to treble damages and even criminal sanctions—existential threats to the still tenuous American labor movement.[140]

Labor unions reacted in the only way they could—by asking Congress for help.[141] Then-AFL President Samuel Gompers broke from his longstanding aversion to politics and petitioned both parties for relief.[142] Congress responded with the Clayton Act of 1914,[143] which declared that "[t]he labor of a human being is not a commodity or article

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through strikes, boycotts, and blacklisting); Alex MacDonald, *Secondary Picketing, Trade Restraints, and the First Amendment: A Historical and Practical Case for Legal Stability*, 40 HOFSTRA LAB. & EMP. L.J. 1, 23-24 (2022) (discussing union tactics); *see also Labor Wars in the U.S.*, AM. EXPERIENCE, https://www.pbs.org/wgbh/americanexperience/features/theminewars-labor-wars-us [https://perma.cc/6HNT-MN56] (last visited Dec. 21, 2025) (listing major strikes and boycotts led by unions in early twentieth century).

137. *See* FORBATH, *supra* note 135, at 59, 61-62, 64 (reporting that antitrust injunction became the chief means of judicial intervention in labor markets).

138. *See id.* at 71, 76, 92-93; *see also* MacDonald, *supra* note 136, at 27-29, 31-33 (recounting early use of antitrust law to restrain labor activity by injunction).

139. *See* Loewe v. Lawlor (*Danbury Hatters'*), 208 U.S. 274, 306-09 (1908); *see also* Joseph L. Greenslade, *Labor Unions and the Sherman Act: Rethinking Labor's Nonstatutory Exemption*, 22 LOY. L.A. L. REV. 151, 162-65 (1988).

140. *See* MacDonald, *supra* note 136, at 32-33 (observing that interpretation adopted in the *Danbury Hatters'* case would render unions "presumptively illegal"); *see also* Greenslade, *supra* note 139, at 164-65 (noting that after *Loewe*, courts "routinely applied the [Sherman] Act to circumscribe labor union activities"); MELVYN DUBOFSKY & JOSEPH A. MCCARTIN, LABOR IN AMERICA: A HISTORY 165-66 (9th ed. 2017) (observing that *Loewe* threatened the basic right to organize, as under the old conspiracy law, union leaders could be jailed for engaging in the normal and fundamental activities of unions).

141. *See* LIVESAY, *supra* note 60, at 136-38 (describing struggles with existential threat of labor injunctions under Sherman Act); David J. Saposs, *Voluntarism in the American Labor Movement*, 77 MONTHLY LAB. REV. 967, 969 (1954) ("[I]t was the devastating issuance of injunctions in labor disputes which led the AFL to embark seriously on its early nonpartisan political action . . . ."); Michael Rogin, *Voluntarism: The Political Functions of an Antipolitical Doctrine*, 15 INDUS. & LAB. REL. REV. 521, 530-31 (1962); *see also* John R. Commons, *American Labour History*, *in* THEORIES OF THE LABOR MOVEMENT 136-38 (Simeon Larson & Bruce Nissen eds., 1987) (describing how labor movement turned to politics in early 1900s after industrial action failed to protect laborers from competitive pressures, including harsh business cycles and competition from immigrants).

142. *See* LIVESAY, *supra* note 60, at 136, 165-67 (describing AFL's attempts to lobby for a labor exception to stop the injunctions); *see also* BOK & DUNLOP, *supra* note 60, at 386-87 (citing opposition to labor injunctions as early exception to the AFL strategy of avoiding positions on broad social issues).

143. Clayton Act, Pub. L. 63-212, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53).

of commerce."[144] The Act also stipulated that nothing in federal antitrust law should be understood "to forbid the existence and operation" of a labor organization.[145] It then forbade federal courts from enjoining specified union tactics.[146] Those tactics included picketing, boycotting, and striking—the same tactics that had sparked the wave of labor injunctions in the first place.[147]

Though hailed as "labor's magna carta,"[148] the Clayton Act failed to stop the injunctions. Courts read it narrowly, applying it only when the disputing parties had a direct employment relationship.[149] In other words, unions were still exposed to liability for their "secondary" activities, such as boycotts or protests directed at an employer's customers or suppliers.[150]

Displeased with that narrow reading, Congress responded again in 1932 with the Norris-LaGuardia Act.[151] The Norris-LaGuardia Act stripped federal courts of jurisdiction to issue labor injunctions in many labor disputes.[152] It also listed the specific actions protected from

144. 15 U.S.C. § 17.

145. *Id.*

146. 29 U.S.C. § 52.

147. *See id.* (forbidding court from enjoining any person from, among other things, "terminating any relation of employment," "ceasing to perform any work or labor," or "recommending, advising, or persuading others by peaceful means to do so"); *see also* Allen Bradley Co. v. Loc. Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 806 (1945) (recognizing the tension between antitrust and labor policy that Congress sought to resolve in the Norris-LaGuardia Act and Clayton Act and noting that "[t]he one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining"); Bodine Produce, Inc. v. United Farm Workers Org. Comm., 494 F.2d 541, 548 (9th Cir. 1974) (observing that the Clayton and Norris-LaGuardia Acts were adopted to accommodate those interests of labor groups that "inevitably were conflicting" with antitrust law).

148. LIVESAY, *supra* note 60, at 168 (quoting Samuel Gompers, then-AFL president).

149. *See* Duplex Printing Press Co. v. Deering, 254 U.S. 443, 467-68, 473-74 (1921) (holding that Clayton Act did not exempt labor activities outside the immediate employment relationship, such as secondary boycotts); Greenslade, *supra* note 139, at 166-68 (describing judicial treatment of Clayton Act).

150. *See* MacDonald, *supra* note 136, at 32-33; *see also* Drabinsky v. Actors' Equity Ass'n, 106 F.4th 206, 212-13 (2d Cir.) (recounting history of statute's enactment), *cert. denied*, 145 S. Ct. 776 (2024).

151. Norris-LaGuardia Act, Pub. L. 72-65, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101–109).

152. *See* 29 U.S.C. §§ 104, 113.

injunctions—again, boycotts, picketing, strikes, and the like.[153] And it extended the ban on injunctions to cover secondary activities.[154]

This time, the injunction ban found a friendlier judicial audience. In *United States v. Hutcheson*,[155] the Supreme Court melded the Clayton Act and Norris-LaGuardia Act to create a broad statutory exemption for labor.[156] Though both statutes referred only to injunctions, the Court reasoned that Congress wouldn't have protected unions from injunctions while still exposing them to other kinds of antitrust liability.[157] So if a union engaged in any activity covered by the statutes, the union was wholly immune—from injunctions or from any other kind of antitrust liability.[158]

Hutcheson also made clear that the exemption did not depend on whether, in a court's eyes, the union acted rightly or wrongly.[159] Nor did it depend on the union's subjective motivations.[160] When the exemption applied, it was absolute:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.[161]

This passage has given birth to a two-part test. When applying the exemption, courts ask (a) whether the union acted in its self-interest, and (b) whether it combined with nonlabor groups.[162] Though facially

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153. *Id.* § 104 (forbidding court from enjoining a person from, among other things, "ceasing or refusing to perform any work or to remain in any relation of employment," "becoming or remaining a member of any labor organization," and "assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute").

154. *See id.* § 113 (defining "labor dispute" to mean specified disputes "regardless of whether or not the disputants stand in the proximate relation of employer and employee").

155. 312 U.S. 219 (1941).

156. *See id.* at 231.

157. *Id.* at 235.

158. *See id.* at 235-36.

159. *See id.* at 232.

160. *See id.*

161. *Id.*

162. *See, e.g.*, Am. Steel Erectors, Inc. v. Loc. Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, 536 F.3d 68, 76-77 (1st Cir. 2008) (applying two-part test derived from *Hutcheson*); Drabinsky v. Actors' Equity Ass'n, 106 F.4th 206, 213 (2d Cir.) (same), *cert. denied*, 145 S. Ct. 776 (2024); Intercontinental Container Transp. Corp. v. N.Y. Shipping Ass'n, 426 F.2d 884, 887 (2d Cir. 1970) (same); Mid-Am. Reg'l Bargaining Ass'n v. Will Cnty. Carpenters Dist. Council, 675 F.2d 881, 886 (7th Cir. 1982) (same); Home Box Off., Inc. v. Dirs. Guild of Am., Inc., 531 F. Supp. 578, 587 (S.D.N.Y. 1982) (same), *aff'd*, 708 F.2d 95 (2d Cir. 1983).

simple, neither part has been easy to apply in practice,[163] and the first has proven especially hard to nail down.[164] After all, in some sense, a union *always* acts in its self-interest.[165] Even when the union commits a flagrant crime, like selling drugs, it is theoretically doing what it thinks is best for itself.[166] And no one thinks Congress meant to turn labor unions into the mob.[167]

So to make sense of *Hutcheson*, courts have required a union's self-interest to be "legitimate."[168] Legitimate essentially means traditional: the union must be trying to achieve a goal traditionally pursued by unions in labor disputes.[169] For example, unions have traditionally tried to eliminate competition over wages, hours, and benefits—i.e., to restrain competition in labor markets.[170] That goal was the reason they came into conflict with antitrust law in the first place.[171]

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163. *See* Allen Bradley Co. v. Loc. Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 805-06 (1945) (observing that the statutory exemption leaves unions exempt from the "Sherman Act to some extent not defined" (quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 488 (1940))); *see also* Allied Int'l, Inc. v. Int'l Longshoremen's Ass'n, 640 F.2d 1368, 1380 (1st Cir. 1981) (discussing ambiguities in the *Hutcheson* test), *aff'd*, 456 U.S. 212 (1982).

164. *See Allied Int'l*, 640 F.2d at 1380 (observing that the test for "self-interest" has never been "precisely formulated" (quoting Adams, Ray & Rosenberg v. William Morris Agency, Inc., 411 F. Supp. 403, 410 (C.D. Cal. 1976)).

165. USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council, 31 F.3d 800, 808 (9th Cir. 1994) ("In the broadest sense, everything a union does serves its self-interest.").

166. *See Drabinsky*, 106 F.4th at 214 (citing crime as an "obvious example" of activity outside the exemption).

167. *See id*; *see also Apex Hosiery*, 310 U.S. at 487-88 (explaining that Congress "has passed no act purporting to exclude labor unions wholly from operation of the [Sherman] Act").

168. *See, e.g.*, *USS-POSCO Indus.*, 31 F.3d at 808; *Drabinsky*, 106 F.4th at 214; *Allied Int'l*, 640 F.2d at 1380; Home Box Off., Inc. v. Dirs. Guild of Am., Inc., 531 F. Supp. 578, 589 (S.D.N.Y. 1982), *aff'd*, 708 F.2d 95 (2d Cir. 1983).

169. *See Allied Int'l*, 640 F.2d at 1380 (equating a union's "legitimate" interests with union interests as "defined in American labor history and law"); *Drabinsky*, 106 F.4th at 214 ("Whether the interest in question is legitimate depends on whether the ends to be achieved are among the traditional objectives of labor organizations." (quoting *USS-POSCO Indus.*, 31 F.3d at 808)); *see also* Bodine Produce, Inc. v. United Farm Workers Org. Comm., 494 F.2d 541, 558 (9th Cir. 1974) (finding union exempt when it was pursuing its own interests in labor market rather than trying to restrain or block the plaintiff in product market).

170. *See Apex Hosiery*, 310 U.S. at 503 ("[A]n elimination of price competition based on differences in labor standards is the objective of any national labor organization."); *Drabinsky*, 106 F.4th at 214 ("A union acts in its self-interest when its conduct is reasonably related to legitimate union goals such as protecting members' wages and working conditions."); *see also* Intercontinental Container Transp. Corp. v. N.Y. Shipping Ass'n, 426 F.2d 884, 887 (2d Cir. 1970) (citing work preservation as a traditional, legitimate union interest).

171. *See* H.A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704, 713 (1981) (noting the "inherent tension" between labor policy, which aims to enable traditional union goals in labor market, and antitrust policy, which seeks to maximize competition); Allen Bradley Co. v. Loc. Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 807 (1945) (observing that Congress meant to apply the exemption to the "'specified acts' declared by § 20 [of the Clayton Act] not to be violations of federal law").

So it's natural to think of labor-market restraints as a "legitimate" union interest.[172] When a union restrains labor-market competition, it is simply doing what unions do.[173]

But outside the labor market, the union's interests are more attenuated.[174] When the union uses nontraditional tactics, like agreements that restrain business markets, it isn't behaving like the unions Congress was trying to protect.[175] And when it isn't pressing for better wages, hours, and working conditions, it's not even acting as a labor organization; it's acting as a normal marketplace participant with an interest in protecting itself from competition.[176] In other words, when the union is doing things unions didn't traditionally do for reasons unions didn't traditionally pursue, the exemption shouldn't apply.[177]

The difference can be seen in the Supreme Court's most recent decision on the statutory exemption, *H.A. Artists & Associates v. Actors' Equity Association*.[178] There, an actors' union created rules for booking

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172. *See Drabinsky*, 106 F.4th at 214-15 (boycott protected because it was aimed at promoting union's traditional interests in wages, hours, and other working conditions).

173. *Allen Bradley*, 325 U.S. at 809 (citing *Apex Hosiery*, 310 U.S. at 503) (describing certain restraints on competition in the labor market as the "natural consequence" of labor policy and the statutory exemption); *Apex Hosiery*, 310 U.S. at 487 (observing that the "natural and probable consequence" of traditional labor-union tactics, such as a sit-down strike, is to restrain commerce).

174. *See, e.g.*, *USS-POSCO Indus.*, 31 F.3d at 808-09 ("Where the union's activities are farther afield, the scrutiny is more searching."); *Drabinsky*, 106 F.4th at 214 ("The immunity lifts and the labor exemption is lost as soon as the union stops acting in pursuit of its legitimate self-interest and thus 'cease[s] to act as [a] labor group[].'" (alterations in original) (quoting *USS-POSCO Indus.*, 31 F.3d at 808)); Ramsey v. United Mine Workers of Am., No. 17878-79, 1969 WL 11142, at *1, *10 (6th Cir. Apr. 8, 1969) (declining to find union's conduct exempt when it conspired with coal producers to restrain competition in product market by suppressing small operators).

175. *See* United States v. Hutcheson, 312 U.S. 219, 229-30 (1941) (observing that section 20 of the Clayton Act "specifically enumerated practices of labor unions by prohibiting injunctions against them" and "also relieved such practices of all illegal taint"); Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1241 (E.D. Cal. 1985) (applying exemption when union's conduct, a boycott, was "specifically described and exempted by section 20" of the Clayton Act), *aff'd*, 810 F.2d 898 (9th Cir. 1987); *see also Drabinsky*, 106 F.4th at 212-13 (interpreting scope of exemption by reading actions listed in section 20 of Clayton and section 104 of Norris-LaGuardia Act as illustrative of the type of activity Congress meant to protect).

176. *See* Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n, 457 U.S. 702, 714 (1982) ("[T]he protections of [the Norris-LaGuardia] Act do not extend to labor organizations when they cease to act as labor groups or when they enter into illegal combinations with nonlabor groups in restraint of trade."); *USS-POSCO Indus.*, 31 F.3d at 808 n.6 (citing *Jacksonville Bulk Terminals*, 457 U.S. at 714).

177. *See USS-POSCO Indus.*, 31 F.3d at 808 (explaining that labor exemption does not apply when union ceases to act as a labor group and instead restrains competition in another capacity); Collins v. Nat'l Basketball Players Ass'n, 850 F. Supp. 1468, 1477 (D. Colo. 1991) (explaining that labor exemption does not apply when union conspires to block rival employers from the market or aids and abets businessmen when seeking to block new entrants to a market), *aff'd*, 976 F.2d 740 (10th Cir. 1992).

178. 451 U.S. 704 (1981).

agents who wanted to represent the union's members.[179] Among other things, the union required the agents to waive their commissions on a booking whenever an actor was paid only union-scale wages.[180] The union also required the agents to pay "franchise fees" as table stakes to represent the union's members.[181] The Supreme Court approved of the scale-wages rule, which was necessary to protect the union's negotiated wage system.[182] If actors had to pay commissions on scale bookings, they would have ultimately received less than the union bargained for.[183] But the Court disapproved of the franchise fees, which were unrelated to any legitimate union interest.[184] The fees didn't affect the actors' wages, benefits, or terms of employment.[185] Instead, they simply conditioned an agent's eligibility on a cash payment.[186] That is, they effectively restrained an ancillary market for representation services. They therefore fell outside the statutory exemption.[187]

Lower courts have extended that logic to other non-traditional restraints. They've held that the exemption does not apply when, for example, a union fixes the price of a commodity (e.g., fish),[188] protests development permits,[189] obstructs shipping for political reasons,[190] or files frivolous lawsuits.[191] These restraints go beyond the traditional

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179. *Id.* at 707.

180. *Id.* at 709.

181. *Id.* at 710.

182. *See id.* at 720.

183. *See id.* (describing scale-wages rule as a direct frontal attack on a practice thought to undermine the union's negotiated scales).

184. *See id.* at 722.

185. *See id.*

186. *See id.*

187. *See id.* at 722-34; *see also* USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council, 31 F.3d 800, 807-08 (9th Cir. 1994) (discussing this aspect of *H.A. Artists & Assocs.*); Maxwell, *supra* note 35, at 1483-84 (same); *cf.* Collins v. Nat'l Basketball Players Ass'n, 850 F. Supp. 1468, 1477-78 (D. Colo. 1991) (distinguishing *H.A. Artists & Assocs.* and applying exemption to union regulation of agents when union's regulations were developed "in response to agent abuses and to benefit its members"), *aff'd*, 976 F.2d 740 (10th Cir. 1992).

188. Hawaiian Tuna Packers v. Int'l Longshoremen's & Warehousemen's Union, 72 F. Supp. 562, 564-66 (D. Haw. 1947) (denying motion to dismiss when plaintiff alleged that defendant unions organized strikes to fix the price of fish sold to plaintiff).

189. Icon at Panorama, LLC v. Sw. Reg'l Council of Carpenters, No. 2:19-cv-00181-CBM(MRWX), 2019 WL 7205899, at *4 (C.D. Cal. Aug. 7, 2019) (denying motion to dismiss when union allegedly abused permit-protest process to prevent plaintiff from obtaining building permits); Evans Hotels, LLC v. Unite Here! Loc. 30, No. 18-CV-2763 TWR (AHG), 2021 WL 10310815, at *18 (S.D. Cal. Aug. 26, 2021) (same).

190. Allied Int'l, Inc. v. Int'l Longshoremen's Ass'n, 640 F.2d 1368, 1380-81 (1st Cir. 1981) (no exemption when union refused to load or unload ships to or from Soviet Union to advance political rather than labor-market goals), *aff'd*, 456 U.S. 212 (1982).

191. *USS-POSCO Indus.*, 31 F.3d at 809-10 (remanding for reconsideration of exemption as applied to "frivolous lawsuits" as well as automatic protests of permits sought by plaintiff).

tactics that unions once deployed in labor disputes.[192] Rather than restraining competition over labor, these tactics restrain competition in ancillary markets for goods and services.[193] They are therefore not "legitimate"—and fall outside the statutory exemption—unless the union can show that they are necessary to protect some traditional union interest.[194]

IV. A RESTRAINT BY ANY OTHER NAME: ARTICLE XX AS LIMIT ON COMPETITION

If we set the statutory exemption aside, Article XX would be flatly illegal.[195] It effectively bars affiliates from competing in each other's territory.[196] An affiliate union cannot recruit away members from another union by offering better or cheaper services.[197] Nor can it criticize another affiliate's performance to lure members away.[198] Members are effectively barred from doing anything to attract members already represented by other covered unions.[199] The restraint on their competition is nearly complete.[200]

From a pure antitrust standpoint, that kind of restraint would be illegal even though the affected people are workers. While antitrust law typically focuses on "consumers,"[201] in this context, consumers and

192. *See, e.g.*, *Allied Int'l*, 640 F.2d at 1380 (observing that statutory exemption applies only to "legitimate" union interests).

193. *See USS-POSCO Indus.*, 31 F.3d at 808 ("Whether the interest in question is legitimate depends on whether the ends to be achieved are among the traditional objectives of labor organizations.").

194. *See, e.g.*, *Allied Int'l*, 640 F.2d at 1379-81 (observing that Sherman Act applies to a limited extent to labor unions when they act outside labor market to pursue nontraditional interests).

195. Maxwell, *supra* note 35, at 1454, 1459, 1461 (concluding that Article XX would be illegal but for the statutory exemption); Pawlenko, *supra* note 18, at 679 & n.187 (suggesting that Article XX is legal solely because of the exemption).

196. *See* AFL-CIO, *supra* note 26, art. XX, §§ 2, 5 (barring recruitment or organizing by one affiliated union of another union's members when incumbent union has an established bargaining relationship); *see also* Petruska, *supra* note 34, at 45-47 (describing current operation of Article XX); Maxwell, *supra* note 35, at 1461 (explaining that Article XX effectively acts as an umbrella no-poach agreement for affiliated unions).

197. *See* AFL-CIO, *supra* note 26, art. XX, §§ 2, 5; *see also* Petruska, *supra* note 34, at 45-47 (describing operation of Article XX and restraint on inter-federation raiding).

198. *See* AFL-CIO, *supra* note 26, art. XX, § 5 (forbidding one affiliate from "bringing another affiliate into public disrepute" or "otherwise adversely affecting the reputation of such affiliate").

199. *See* Petruska, *supra* note 34, at 46-47 (describing operation of Article XX and its limits on competition among affiliates).

200. *See id.*; *cf.* Maxwell, *supra* note 35, at 1452-54 (comparing Article XX to a market-division agreement or a no-poach agreement).

201. *See* Allen Bradley Co. v. Loc. Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 806 (1945) (explaining that the Sherman Act's "purpose was to protect consumers from monopoly prices").

workers are one and the same.[202] Workers hire the union to represent them in collective bargaining, and they pay the union through their regular dues.[203] They could also benefit from an open market for union services through better performance, greater diversity, or lower prices.[204] In all important respects, they are the union's consumers.[205]

And as a union's consumers, workers are harmed by the union's anticompetitive conduct. When a union insulates itself from competition, it deprives the workers of choice.[206] Workers cannot choose among different unions offering different mixes of dues and services.[207] Nor can they easily hold their leaders accountable for lazy, ineffective, or even corrupt representation.[208] In fact, they cannot even compare the union's performance to other potential representatives.[209] The people best positioned to help them make that comparison—other unions—are barred from even trying.[210]

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202. Indeed, even if the workers were considered as workers, they would be fully protected by antitrust law. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 88-93 (2021) (applying antitrust laws to restraints on benefits for college athletes—a market in which the harmed consumers were suppliers of labor); FTC Task Force Memo, *supra* note 118, at 1 ("[T]he FTC's authority includes protecting the same American consumers in their roles as *workers*."); DOJ-FTC WORKER GUIDELINES, *supra* note 118, at 1 ("Just as vibrant competition for goods and services benefits consumers, competition among employers benefits workers through better wages, benefits, and other terms and conditions for working people.").

203. *See* Maxwell, *supra* note 35, at 1455 ("Workers pay dues and, in return, receive an array of services such as representation during collective bargaining. Workers are buyers of union representation in the same sense as law firm clients are buyers of legal representation." (footnote omitted)).

204. *See* Pawlenko, *supra* note 18, at 680 (describing how increased competition improves employee choice); Brooks, *supra* note 38, at 348 (observing that employees who vote for a raiding union theoretically do so because they will get better service).

205. *See* Maxwell, *supra* note 35, at 1455 ("But even under the narrower definition of 'consumer,' workers are consumers of unions' services.").

206. *See* Pawlenko, *supra* note 18, at 680 ("If employees have more than one union vying for their support, they would naturally select the representative who, in their opinion, would best serve their interests. There is no need for union leaders to make that choice for them.").

207. *See id.* at 680-81; Brooks, *supra* note 38, at 354-55 (observing how no-raid agreements limit employee choice).

208. *See* Petruska, *supra* note 34, at 51-52 (pointing out how a check on competition removes incentives for union leaders to "be responsive, law-abiding, and diligent representatives of their employees").

209. *See* Pawlenko, *supra* note 18, at 680 (describing how the ban on raids makes it harder for employees to evaluate a union's effectiveness).

210. *See* AFL-CIO, *supra* note 26, art. XX, §§ 2, 5 (barring not only raiding but also disparagement of another union); *see also* Brooks, *supra* note 38, at 349 ("[O]ne of the principal opportunities for freedom of choice among workers has been eliminated by the action of the unions in committing themselves not to interfere with the established representation of any other affiliate for any reason whatever.").

Nor can the workers easily solve the problem themselves.[211] The best they can do is file a "decertification" petition with the NLRB.[212] If the petition succeeds, it could free them of the incumbent union.[213] But it won't necessarily leave them better off. It won't give them a more attentive union; it will leave them with no union at all.[214] So unless they think they could cut a better deal with the employer directly, they're better off sticking with the status quo.[215]

But Article XX doesn't just harm workers who have unions now; it also harms workers who might want them in the future.[216] Antitrust economics predict that uncompetitive markets will perform worse, innovate less, and grow more slowly.[217] And so it has been for the unionization market under Article XX.[218] Again, union density hit its peak in the mid-1950s, just before the AFL-CIO merger.[219] Since then, density has declined steadily.[220] It has fallen in almost every year since

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211. *See* Brooks, *supra* note 38, at 362 ("The employee who is dissatisfied with his union because it is corrupt, negligent, careless, or insufficiently attentive to his personal views, will find that the obstacles within the union to organizing an opposition will always be formidable.").

212. *See* 29 C.F.R. § 102.60(a) (2024) (describing procedure for filing decertification election).

213. *Id.*; *Decertification Election*, NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/decertification-election [https://perma.cc/FEM9-XTTN] (last visited Dec. 21, 2025) (describing decertification process).

214. *See* Schwab, *supra* note 18, at 387-90 (describing limitations of decertification procedure as a substitute for union competition).

215. *See id.* at 388; *see also* Petruska, *supra* note 34, at 4, 51-52 (concluding that internal "union democracy has failed to provide adequate competitive pressure" absent inter-union competition prevented by Article XX); Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships, 84 Fed. Reg. 39930, 39932 (Aug. 12, 2019) (to be codified at 29 C.F.R. pt. 103) (explaining that decertification proceedings face other protentional delays and hurdles, such as the union's ability to file "blocking charges" to prevent the election from going forward).

216. *See* Brooks, *supra* note 38, at 365-67 (noting that the ban on raiding is potentially self-destructive in the long term because of the effects it has on labor unions, their services, and the consent of their members).

217. *See* HOVENKAMP, *supra* note 16, § 4.1a1–a2, at 189-91, § 4.2b, at 208, § 4.3, at 209 (describing "deadweight" problem of collusive markets and resulting social costs: decreased supply and decreased demand); Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 392-94 (1966) (describing negative effects on industries marked with pervasive horizontal restraints, including lower production and a transfer from consumers to producers); Sarah Lee, *Market Allocation in Antitrust*, NO. ANALYTICS (June 23, 2025), https://www.numberanalytics.com/blog/market-allocation-antitrust-guide [https://perma.cc/J26F-A673] (observing that "[r]educed competition can lead to stagnation, as companies lack incentives to innovate or improve" and that "[c]ompanies may become complacent, relying on allocated markets rather than competing on merit").

218. *See* Pawlenko, *supra* note 18, at 660 (noting that union density only started declining after the AFL-CIO merger and its ban on intra-federation competition).

219. *See* TROY, *supra* note 5, at 2.

220. *See* SEYMOUR MARTIN LIPSET & NOAH M. MELTZ, THE PARADOX OF AMERICAN UNIONISM: WHY AMERICANS LIKE UNIONS MORE THAN CANADIANS DO BUT JOIN MUCH LESS 41-42 (2004) ("The rivalry between the two former allies was regarded as divisive within the house

the merger, rising year-over-year only five times in the last sixty years.[221] And it hit a record low in 2024, when less than six percent of private-sector workers belonged to a union.[222] These declines have continued even though large majorities of American workers say they support labor unions in general.[223] The gap between demand and supply seems to widen every year—a classic symptom of restrained competition.[224]

V. CATEGORY ERROR: THE MISTAKEN ASSUMPTION THAT NO-RAID AGREEMENTS ARE EXEMPT

As a naked restraint, Article XX could survive scrutiny only if it were protected by the statutory exemption.[225] But it is not. The statutory exemption applies only when unions are protecting their legitimate, traditional interests in labor markets.[226] It does not apply when unions restrain competition in unrelated ancillary markets, such as the market

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of labor, but the competition surely spurred membership growth."); Pawlenko, *supra* note 18, at 660 ("This conclusion is bolstered by the fact that union density only began to decline immediately following the 1955 merger of the AFL and the CIO and the adoption of the no-raiding pact.").

221. Dirnbach, *supra* note 6.

222. *See* BLS News Release, *supra* note 3 (reporting that union density had declined to a new low); *see also* Maxwell, *supra* note 35, at 1440 (describing lack of competition as a drag on union growth and arguing that the labor movement has become a "sleepy monopoly").

223. *Labor Unions*, GALLUP, https://news.gallup.com/poll/12751/labor-unions.aspx [https://perma.cc/H225-YKQT] (last visited Dec. 21, 2025) (reporting that 70% of respondents in 2024 supported labor unions—a share that has steadily risen since 2010 but is slightly lower than the rate record in the mid-fifties before the AFL-CIO merger and adoption of Article XX).

224. *See* Bork, *supra* note 217, at 392-94 (describing negative effects on industries marked with pervasive horizontal restraints, including lower production and a transfer from consumers to producers); Lee, *supra* note 217 (describing how markets affected by market-division agreements and other oligarchic behavior produce more costs to consumers than gains to colluding producers and thus grow more slowly).

225. *See, e.g.*, Maxwell, *supra* note 35, at 1447-48 (concluding that Article XX would probably be illegal but for the statutory exemption).

226. *See, e.g.*, H.A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704, 720-22 (1981) (refusing to apply exemption to restraint on representation by booking agents unrelated to union's traditional interests in wages, hours, and working conditions); USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trade Council, 31 F.3d 800, 808 (9th Cir. 1994) (explaining that exemption applies only when union acts to advance "the traditional objectives of labor organizations").

for their own services.[227] Article XX is just such a restraint.[228] It cannot be justified under the statutory exemption.[229]

To see why, start with the statutory text: section 20 of the Clayton Act[230] and section 104 of the Norris-LaGuardia Act.[231] Those statutes list certain tactics in labor disputes that courts cannot enjoin.[232] To be sure, the statutes have been interpreted broader than their literal terms: the Supreme Court itself has extended them beyond injunctions to create a total antitrust immunity.[233] Yet even by that broad reading, the statutes are still limited to traditional tactics in labor disputes.[234] They do not extend to nontraditional restraints unconnected to wages, hours, or working conditions.[235] They do not convert unions into roaming cartels, free to restrain competition in any market they like.[236]

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227. *See H.A. Artists & Assocs.*, 451 U.S. at 722 (no exemption for restraint on market for representation services); Connell Constr. Co. v. Plumbers & Steamfitters Loc. Union No. 100, 421 U.S. 616, 624-25 (1975) (refusing to apply exemption to union restraint on general contractor's choice of subcontractors, even when union ultimately sought to ensure that all subcontractors used union labor).

228. *See* Maxwell, *supra* note 35, at 1453-54 (analogizing Article XX to a market-division agreement).

229. *See USS-POSCO Indus*., 31 F.3d at 809 (explaining that when union uses nontraditional tactics to restrain competition, its activity will qualify for the statutory exemption only when the union cannot otherwise advance a legitimate union goal (i.e., eliminating competition over wages, hours, and other working conditions)); *see also Connell Constr.*, 421 U.S. at 625 ("This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions.").

230. 29 U.S.C. § 52.

231. *Id.* § 104.

232. *See id.* §§ 52, 104; *see also* Drabinsky v. Actors' Equity Ass'n, 106 F.4th 206, 214 (2d Cir.) (using the listed actions as an interpretive guide to determine what other tactics might be protected and explaining that "Congress has made it easier for us to assess the legitimacy of the union's interest by specifying that certain labor actions, including strikes and boycotts, are presumptively protected from antitrust liability"), *cert. denied*, 145 S. Ct. 776 (2024).

233. *See* United States v. Hutcheson, 312 U.S. 219, 229-32 (1941); *see also* Jacksonville Bulk Terminals v. Int'l Longshoremen's Ass'n, 457 U.S. 702, 708 (1982) ("This Court has consistently given the anti-injunction provisions of the Norris-LaGuardia Act a broad interpretation, recognizing exceptions only in limited situations where necessary to accommodate the Act to specific federal legislation or paramount congressional policy.").

234. *See* 29 U.S.C. §§ 52, 104 (listing traditional union tactics such as picketing, boycotts, and strikes).

235. *See* USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trade Council, 31 F.3d 800, 808-09 (9th Cir. 1994) (limiting exemption under Clayton Act and Norris-LaGuardia Act to restraints aimed at advancing traditional ("legitimate") labor union goals); *see also* Apex Hosiery Co. v. Leader, 310 U.S. 469, 487-88 (1940) (explaining that Congress has never adopted an all-purpose exemption for labor unions).

236. *See USS-POSCO Indus*., 31 F.3d at 808 (observing that union would not be immune if it restrained competition in product markets or committed criminal acts unrelated to its interest in constraining competition over wages, hours, and working conditions); *cf.* ANTITRUST DIV., U.S.

Imagine if it were otherwise. If the exemption applied outside a union's traditional interests in labor markets, it would allow the union to impose even the baldest restraints on competition.[237] For example, the union could open a business selling pro-union merchandise, like t-shirts and buttons. It could then agree to divide the t-shirt market with other affiliated unions.[238] The result would be a naked restraint unfathomed by Congress and unjustified by any national policy.[239] So to avoid that result, courts have consistently refused to extend the exemption to restraints unconnected to any traditional union interest in the labor market.[240]

But Article XX isn't that kind of restraint. It does not restrain competition over wages, hours, or working conditions. Instead, it restrains competition in the market for union services.[241] It prevents affiliated unions from encroaching on each other's territory by offering better, cheaper, or more robust representation.[242] It is therefore less like the union tactics listed in the statutes and more like the franchise fees in *H.A. Artists & Associates*.[243] Like the franchise fees, Article XX

DEP'T OF JUST., ROUNDTABLE DISCUSSION SERIES ON COMPETITION & DEREGULATION, at iii (2018) (reporting consensus that antitrust exemptions should be read narrowly).

237. *See USS-POSCO Indus*., 31 F.3d at 808 (explaining that exemption applies only when a union acts as a labor group, as opposed to when it acts in some ancillary capacity); Maxwell, *supra* note 35, at 1483-84 (noting that statutory exemption doesn't apply when union operates in the business market as opposed to the labor market).

238. *Cf.* United States v. Topco Assocs., 405 U.S. 596, 610-12 (1972) (finding similar market-division scheme by grocery retailers to be an invalid horizontal restraint in commercial market).

239. *Cf.* Maxwell, *supra* note 35, at 1481 (concluding that horizontal no-raid agreements are "qualitatively different" from the unilateral labor-union activities aimed at protecting workers from competition in labor markets that Congress intended to protect with the statutory exemption).

240. *See USS-POSCO Indus*., 31 F.3d at 808 (explaining that a union does not qualify for exemption when it "cease[s] to act as a labor group," such as when it "forces employers to funnel money into a commercial enterprise from which the union derives profits"); H.A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704, 722 (1981) (refusing to apply exemption to restraint on representation services by booking agents when restraint had nothing to do with union's traditional goals in restricting competition over wages, hours, and working conditions in labor market).

241. *See* AFL-CIO, *supra* note 26, art. XX, § 2 (forbidding affiliates from competing for each other's members when an affiliate has an "established collective bargaining relationship"); Petruska, *supra* note 34, at 46 (explaining that Article XX forbids an affiliated union from competing for another union's members or work).

242. *See* Petruska, *supra* note 34, at 46 (describing operation of Article XX).

243. *See H.A. Artists & Assocs*., 451 U.S. at 722 (disapproving restraint on representation services by booking agents when restraint was unnecessary to achieve legitimate union goal of protecting negotiated wage structure).

restrains representation services with no obvious connection to a union's "legitimate" goals.[244]

Article XX also fits poorly with the statutory exemption's history. Originally, the Clayton and Norris-LaGuardia Acts were designed to get courts out of the business of policing labor disputes.[245] The statutes were written to protect well-known union tactics, like strikes and boycotts.[246] But no-raid agreements were not among those tactics at the time: when the statutes were passed, no-raid agreements were much less common.[247] The AFL kept the peace among its affiliates mostly through its system of exclusive jurisdiction.[248] It was only decades later, after years of back-and-forth raiding, that no-raid agreements became a fixture of the labor movement.[249] Article XX may have codified no-raid agreements as a matter of labor-movement principle,[250] but it did not and could not rewrite the statutory exemption. So, reading the exemption to protect Article XX would be at best anachronistic, at worst unfaithful to Congress's design.[251]

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244. *Cf.* Maxwell, *supra* note 35, at 1478-80 (explaining that Clayton Act was designed only to protect traditional union tactics aimed at "legitimate" union objectives in pursuit of protecting workers).

245. *See H.A. Artists & Assocs.*, 451 U.S. at 714 (explaining that Norris-LaGuardia Act has been "interpreted broadly as a statement of congressional policy that the courts must not use the antitrust laws as a vehicle to interfere in labor disputes").

246. *See* United States v. Hutcheson, 312 U.S. 219, 229-30 (1941) (examining statutory text, which lists specified union activities, and concluding that Congress meant to immunize "such practices"); Maxwell, *supra* note 35, at 1478-81 (examining legislative history and concluding that Congress was concerned with protecting traditional labor union tactics); *see also* Drabinsky v. Actors' Equity Ass'n, 106 F.4th 206, 214 (2d Cir.) (explaining that the exemption applies when union advances its legitimate interests, "such as protecting members wages and working conditions"), *cert. denied*, 145 S. Ct. 776 (2024).

247. *See* Dunlop, *supra* note 59, at 146-47; *see also* Krislov, *supra* note 10, at 23-24 (describing intrafederation raiding from 1940 to 1952 and noting the CIO's use of a "jurisdictional pact" to eliminate contests).

248. *See* Dunlop, *supra* note 59, at 146-47 (describing use of exclusive jurisdiction before split between CIO and AFL); Krislov, *supra* note 10, at 23-24 (describing raiding between AFL unions based on jurisdictional claims).

249. *See* Dunlop, *supra* note 59, at 147-48 (observing that no-raid agreements took on unprecedented importance in the years immediately following the merger and noting "[t]his is an age of bilateral agreements; at no time in the history of the labor movement have so many agreements between national unions been made").

250. *See* AFL-CIO, *supra* note 26, art. XX, § 2; *see also* Exec. Council Raiding Statement, *supra* note 58 (declaring that "the labor movement stands united in opposition" to raids by independent unions).

251. *See* Maxwell, *supra* note 35, at 1478-81 (concluding that limits on union competition adopted by Article XX are inconsistent with congressional intent, which was limited to protecting traditional union tactics); *see also* USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trade Council, 31 F.3d 800, 808-09 (9th Cir. 1994) (reading statutes to offer more protection to traditional union tactics in labor disputes and requiring proof that non-traditional tactics are necessary to advance a traditional union interest in labor markets).

To be sure, the Supreme Court has sometimes been willing to ignore both text and history. *Hutcheson* itself is a prime example: there, the Court discovered a broad exemption from liability—one that Congress never wrote—to achieve what it saw as the statutes' purpose.[252] But even accepting that purpose, Article XX still falls outside the statutes' scope. The statutes were never designed to protect unions for their own sake.[253] Instead, they were designed to protect employees.[254] Congress wanted employees to choose their own bargaining representatives free from undue interference.[255] And Article XX not only fails to promote that goal, but actually undermines it. The article chokes off inter-union competition, limiting employees' ability to choose a new union.[256] It also slows innovation, erodes services, and stultifies the entire labor movement.[257] It produces an enervated and ineffectual market for union services[258]—the opposite of what Congress intended.[259]

VI. MARKET CLEARING: LITIGATION AS A TOOL FOR REVIVING AMERICAN LABOR

At this point, the reader could understandably ask: If Article XX is so obviously illegal, and so obviously bad for workers and unions, why does it persist? Why don't unions get rid of it? The answer is both

252. *See* United States v. Hutcheson, 312 U.S. 219, 232 (1941).

253. *See* Maxwell, *supra* note 35, at 1479-81 (concluding from legislative history that congressional purpose centered on protecting employees' rights to collectively bargain).

254. *See id.*; *see also* Connell Constr. Co. v. Plumbers & Steamfitters Loc. Union No. 100, 421 U.S. 616, 622-23 (1975) (noting the "strong labor policy favoring the association of employees to eliminate competition over wages and working conditions" but concluding that "[c]urtailment of competition based on efficiency is neither a goal of federal labor policy nor a necessary effect of the elimination of competition among workers").

255. *See* Maxwell, *supra* note 35, at 1478-81.

256. *See id.* at 1454 (noting a "significant decrease" in elections involving two unions since adoption of Article XX, indicating decline in competition); Joseph Krislov, *Organizational Rivalry Among American Unions*, 13 INDUS. & LAB. RELS. REV. 216, 223 (1960) (describing similar decline post-merger).

257. *See* Estreicher, *supra* note 17, at 92 (observing the negative effects on the labor movement caused by a lack of competition brought on by Article XX); Manley, *supra* note 11 (same); *see also* Dirnbach, *supra* note 6 (tracking precipitous decline of labor-union density in second half of twentieth century).

258. *See* Brooks, *supra* note 38, at 349 (observing that because of no-raid agreements, "one of the principal opportunities for freedom of choice among workers has been eliminated by the action of the unions in committing themselves not to interfere with the established representation of any other affiliate for any reason whatever").

259. *See* James G. Paulsen, *Labor's Exemption from Federal Antitrust Law: The Diminishing Protection for Union Activity*, 28 FLA. L. REV. 620, 622-23 (1976) (noting the "clear expression of congressional intent" reflected in the Clayton Act to reject limits on protection of secondary activity and protect the union activities identified in Norris-LaGuardia Act).

systemic and practical. Systemically, individual unions have no incentive to challenge Article XX; they individually benefit more from protection than they would gain from competition. And practically, few outsiders have the wherewithal, incentive, or resources to challenge Article XX for them.

The systemic hurdle is a classic collective-action problem. As we've seen, the labor movement would be better off under a system of free competition.[260] The problem is that there is no such thing as the labor movement; there are only individual labor unions. And each individual union benefits from its insulation under Article XX.[261] It gains far more from the assured protection of a no-raid regime than it would from a growing labor movement.[262] The latter benefits are attenuated, long-term, and may not redound to the individual union.[263] So each union rationally agrees to restrain competition.[264] This restraint might mean worse services and slower growth down the road.[265] But in the meantime, the union gets to sit comfortably beneath an anticompetitive umbrella.[266]

The practical problem is nearly as difficult. Few parties have the incentive, standing, and resources to challenge Article XX from the outside. A determined employer might be willing to sue, but it's far from clear that any employer would have standing.[267] What harm, exactly, does an employer suffer from less competition for union services?[268] Likewise, while employees certainly suffer harms, few are organized and resourceful enough to sustain a challenge.[269] Nor are they likely to

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260. *See, e.g.*, Estreicher, *supra* note 17, at 92; Manley, *supra* note 11.

261. *See* Brooks, *supra* note 38, at 346-48.

262. *See id.* at 346-49 (observing that labor unions as institutions have different goals from their constituents and considering elimination of raiding as evidence of this divergence).

263. *See id.* at 344-48.

264. *See id.* at 348 (explaining the effort to end raiding succeeded "beyond the fondest expectations" of union leaders).

265. *See* Pawlenko, *supra* note 18, at 660 (indicating that limits on raiding likely contribute to worse union performance and thus lower union density overall); Estreicher, *supra* note 17, at 92 (making a similar point).

266. *See* Brooks, *supra* note 38, at 346 (explaining that a check on inter-union raiding is "very much in [the unions'] institutional interest").

267. *See* Blue Shield of Va. v. McCready, 457 U.S. 465, 473-75 (1982) (concluding that employees who paid out of pocket for coverage, rather than their employers, had sufficient antitrust injury to maintain suit against insurance provider for refusal to reimburse); *see also* Ill. Brick Co. v. Illinois, 431 U.S. 720, 734-35 (1977) (setting out general rule under antitrust law that only parties who suffer the direct anticompetitive injury have standing to sue, as opposed to downstream affected parties (e.g., indirect purchasers)).

268. *See* Brooks, *supra* note 38, at 349 (pointing out that employers may actually benefit from a low-competition environment because they enjoy more stable labor relations).

269. *See id.* at 362 (observing significant hurdles facing employees who want to oust union under current regime); *see also* LEGAL SERVS. CORP., THE JUSTICE GAP: THE UNMET CIVIL LEGAL

have the intensity of interest needed to sustain a lengthy lawsuit.[270] The harms they suffer are diffuse and sometimes hard to detect.[271] And they have no obvious reason to carry the water for all employees in general.[272]

There is, however, one entity with the resources and incentive to intervene: the U.S. Department of Justice. The Department of Justice is charged with promoting competition in all markets by finding and unblocking anticompetitive chokepoints.[273] Article XX is just such a choke point: it nakedly restrains competition in a major market for services.[274] The Department should use its position to free that market now. The Department of Justice should sue the AFL-CIO.

NEEDS OF LOW-INCOME AMERICANS 19 (2022), https://lsc-live.app.box.com/s/ueskoghtbipz71iy990r633gqzufffb9 [https://perma.cc/NH2K-4NF8] (reporting that low-income Americans could not get adequate legal support for ninety-two percent of their problems because of high costs).

270. *See* Jonathan B. Baker, *Competition Policy as a Political Bargain*, 73 ANTITRUST L.J. 483, 485, 524-25 (2006) (describing collective-action problems in antitrust litigation that may create barriers to suits by small producers or consumers).

271. *See id.*; *see also* Ken Green, *Dispelling Labor Myths: The Truth About Union Dues*, UNIONTRACK BLOG (June 29, 2023), https://uniontrack.com/blog/union-dues-myths [https://perma.cc/RN9R-XUSK] (reporting that union members spend on average only 1.5% to 3% of their paychecks on union dues).

272. *See* Baker, *supra* note 270, at 525 (describing collective-action problems in antitrust litigation and explaining that "[c]onsumers and producers are both viewed as large and diffuse interest groups, for which collective action problems may be particularly severe").

273. DOJ-FTC WORKER GUIDELINES, *supra* note 118, at 1.

274. *See id.* at 2 (promising to bring criminal charges to challenge similar naked restraints, including no-poaching agreements).