

# REEVALUATING INTER-UNION COMPETITION: A PROPOSAL TO RESURRECT RIVAL UNIONISM

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*[U]nions—like other institutions—need competition to keep them doing their best.*<sup>1</sup>

## I. INTRODUCTION

“Rival unionism is the coexistence of two or more unrelated labor organizations actively competing for the control of the workers employed or the work habitually performed within a particular trade or occupation.”<sup>2</sup> While there have been periods of intense rival unionism in the United States,<sup>3</sup> union rivalry is commonly thought to be a waste of union resources, and therefore, unions have continually attempted to eliminate, or at least reduce, incidences of rivalry.<sup>4</sup> Accordingly, since the merger of the American Federation of Labor (AFL) and the Congress of Industrial Organizations (CIO) in 1955, unions affiliated with the AFL-CIO have agreed not to “raid” other affiliate unions.<sup>5</sup> Moreover, AFL-CIO affiliates have agreed to procedures for resolving organizing competition for unorganized workers in lieu of allowing the unrepresented workers to

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1. RICHARD B. FREEMAN, *LABOR MARKETS IN ACTION* 214 (1989).

2. WALTER GALENSON, *RIVAL UNIONISM IN THE UNITED STATES* 1 (1940) [hereinafter GALENSON, *RIVAL UNIONISM*].

3. See generally *id.* (documenting rival unionism in the United States prior to 1940); WALTER GALENSON, *THE CIO CHALLENGE TO THE AFL* (1960) [hereinafter GALENSON, *THE CIO CHALLENGE*] (studying rival unionism in the United States from 1935 to 1941).

4. See, e.g., George W. Brooks, *Stability Versus Employee Free Choice*, 61 *CORNELL L. REV.* 344, 347 (1976) (noting that union leadership “was virtually unanimous in wanting to put an end to what they called ‘raiding’”).

5. See AFL-CIO CONST. art. XX, §§ 2, 3 (“No affiliate shall organize or attempt to represent employees as to whom an established collective bargaining relationship exists with any other affiliate . . . . Each affiliate shall respect the . . . work relationship of every other affiliate.”), available at <http://www.aflcio.org/aboutus/thisistheafclcio/constitution/art20.cfm>.

choose among competing affiliate unions.<sup>6</sup> The AFL-CIO no-raiding pact and rival union organizing procedures for unrepresented workers, codified in the federation's constitution, have largely been successful.<sup>7</sup> Union rivalry in the private sector is nearly extinct. In 94.3% of the National Labor Relations Board (NLRB or "Board") representation elections conducted in 2004, there was only one union on the election ballot.<sup>8</sup> In contrast, in 1955, the year the AFL and the CIO merged, 20.9% of NLRB representation elections had at least two unions on the ballot.<sup>9</sup>

In addition to the contractual restraints on rival unionism, the law also operates to stifle inter-union competition. One way the law does this is by discouraging new market entrants with high costs of doing business. For example, the antitrust laws erect high barriers to entry by requiring organizations that want to get into the collective bargaining business to take on a nonprofit form.<sup>10</sup> Moreover, the labor laws heavily regulate internal union operations, imposing substantial compliance costs that are unique to organizations providing collective representation services.<sup>11</sup> These barriers to entry distort the market for representational services by effectively preventing new market entrants from competing with incumbent unions.<sup>12</sup>

Another way in which the law restrains rival unionism is by regulating when unions may compete with each other. The National Labor Relations Act (NLRA)<sup>13</sup> does this by barring representation elections for one year following a valid election.<sup>14</sup> Furthermore, the NLRB has created additional restrictions on the utilization of its election machinery. For example, pursuant to the Board's "certification bar," the Board will not process

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6. See AFL-CIO CONST. art. XXI, § 2 ("Any AFL-CIO affiliate that is actively engaged in organizing a group of employees and seeking to become their exclusive representative may invoke this Procedure to seek a determination affirming its ability to do so without being subject to ongoing competition by any other AFL-CIO affiliate.").

7. See George W. Bohlander, *Keeping the Peace: AFL-CIO's Internal Dispute Plan*, 57 APR DISP. RESOL. J. 21, 22 (2002) (noting that "raiding disputes have declined significantly since the formation of the AFL-CIO in 1955").

8. See 69 NLRB ANN. REP. 234 (2004) [hereinafter 2004 NLRB Report]. Because the no-raiding pact only binds AFL-CIO affiliates, raiding still occurs among independent unions or between an affiliate and an independent.

9. See 20 NLRB ANN. REP. 171 (1955) [hereinafter 1955 NLRB Report].

10. The labor exemption to the Clayton Act is limited to labor organizations "instituted for the purposes of mutual help, and not having capital stock or conducted for profit . . ." 15 U.S.C. § 17 (2000). For an argument that the Clayton Act should be amended to permit for-profit unionism, see Samuel Estreicher, *Deregulating Union Democracy*, 2000 COLUM. BUS. L. REV. 501 (2000).

11. Unions must comply with the Labor-Management Reporting and Disclosure Act. 29 U.S.C. §§ 401-531 (1959). For an argument that these regulations are both ineffectual and counterproductive, see Estreicher, *supra* note 10.

12. Estreicher, *supra* note 10, at 515.

13. 29 U.S.C. §§ 151-169 (2000).

14. 29 U.S.C. § 159(e)(2).

election petitions for one year after a union is certified as the bargaining representative.<sup>15</sup> Similarly, the Board's "recognition bar" doctrine prevents the processing of election petitions for a "reasonable" period of time immediately after an employer voluntarily recognizes a union based on a showing of majority support.<sup>16</sup> Finally, the "contract bar" blocks election petitions filed during the term of a valid collective bargaining agreement for up to three years.<sup>17</sup> Moreover, the Board requires that challenges to the incumbent union be filed no more than ninety days and no less than sixty days prior to the expiration of the collective bargaining agreement.<sup>18</sup>

Board law also impedes inter-union competition by resisting the severance of craft units from established industrial units. While the NLRA expresses a policy favoring craft severance,<sup>19</sup> the Board has generally denied craft severance in order to preserve labor stability.<sup>20</sup> The NLRB's resistance to craft unit severance is anti-competitive because it forces potential rival unions to raid the entire bargaining unit rather than a smaller subset of the bargaining unit and thereby deters raidings of large heterogeneous bargaining units. This policy further distorts the market for representational services by effectively preventing craft unions from raiding larger industrial unions.

In addition to erecting high barriers to entry, insulating unions from competition most of the time, and resisting craft unit severance, the law also allows incumbent unions to employ opportunistic defensive tactics to thwart raid attempts.<sup>21</sup> For example, an incumbent union facing challenge from a raider may collude with the employer to kill the raid by promising

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15. See *Brooks v. Nat'l Labor Relations Bd.*, 348 U.S. 96 (1948) (upholding the Board's use of the certification bar).

16. See *Keller Plastics Eastern, Inc.*, 157 N.L.R.B. 583 (1966) (dismissing a complaint alleging that recognition was unlawful because the Union no longer had majority support three weeks after recognition).

17. See *General Cable Corp.*, 139 N.L.R.B. 1123 (1962) (holding that a valid collective bargaining agreement bars an election among employees covered by that agreement for the term of the agreement up to three years).

18. See *Leonard Wholesale Meats*, 136 N.L.R.B. 1000 (1962) (holding that petitions filed more than ninety days prior to the expiration of a collective bargaining agreement unduly disturb the collective bargaining relationship).

19. See 29 U.S.C. § 159(b)(2).

20. See *Mallinckrodt Chemical Works*, 162 N.L.R.B. 387 (1966) and *Kaiser Foundation Hospitals*, 312 N.L.R.B. 933 (1993) (denying craft severance because maintaining labor stability outweighed employee free choice); John E. Abodeely, *NLRB Craft Severance Policies: Preeminence of the Bargaining History Factor After Mallinckrodt*, 11 B.C. INDUS. & COMP. L. REV. 411 (1970) (noting the Board's apparent preference for the industrial unit over the craft unit).

21. See Stewart J. Schwab, *Union Raids, Union Democracy, and the Market for Union Control*, 1992 U. ILL. L. REV. 367, 412-14 (1992) (listing tactics such as "counterpromise[s]," "delaying raid elections," "white knight[s]," "golden parachute[s]," and "shark repellents").

to be less militant than the raider.<sup>22</sup> This defensive maneuver is analogous to corporations using a “white knight” to fend off a corporate takeover, with the employer serving as the “white knight” in the rival unionism context.<sup>23</sup>

The cumulative effects of these restraints have resulted in the absence of a competitive marketplace for collective representation services.<sup>24</sup> How have unions collectively fared in this marketplace? Not well. According to the Department of Labor’s Bureau of Labor Statistics, unions represented only 12.5% of the entire American workforce in 2005.<sup>25</sup> More troubling is that the 2005 percentage, while unchanged from 2004, was down from 12.9% in 2003 and 20.1% in 1983, the first year for which the Department of Labor has comparable data available.<sup>26</sup> The picture looks even bleaker when the data is allocated between the public and private sectors. While unions represented 36.5% of public sector workers in 2005, a rate that has generally remained at that level since 1983, unions represented a mere 7.8% of private sector workers in 2005, half of the percentage they represented in 1983.<sup>27</sup>

Convinced that the structure of the AFL-CIO is partly to blame for the erosion of union density in the private sector, union leaders from the Service Employees International Union (SEIU), the International Brotherhood of Teamsters, UNITE-HERE, the Laborers’ International Union, the United Food and Commercial Workers, the United Brotherhood of Carpenters and Joiners, and the United Farm Workers formed the Change to Win Coalition in 2005 as a rival federation to the AFL-CIO.<sup>28</sup> However, any rivalry between the two federations was short-lived as unions affiliated with the Change to Win Coalition entered into no-raiding agreements with their AFL-CIO counterparts.<sup>29</sup> Furthermore, a closer look at the circumstances surrounding the formation of the Change to Win Coalition reveals that the group splintered from the AFL-CIO not to create a more competitive marketplace for representational services, but rather to

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22. *See id.* at 413–14 (discussing the mechanics of the “white knight” in the union context).

23. *Id.* at 413. A “white knight” is “[a] person or corporation that rescues the target of an unfriendly corporate takeover . . . by acquiring a controlling interest in the target corporation or by making a competing tender offer.” BLACK’S LAW DICTIONARY 1627 (8th ed. 2004).

24. Estreicher, *supra* note 10, at 514–15.

25. BUREAU OF LABOR STATISTICS, UNITED STATES DEPARTMENT OF LABOR, USDL 06-99, UNION MEMBERS IN 2005 (Jan. 20, 2006), available at <http://www.bls.gov/news.release/union2.nr0.htm>.

26. *Id.*

27. *Id.*

28. *See* Steven Greenhouse, *Breakaway Unions Start New Federation*, N.Y. TIMES, Sept. 27, 2005, at A17.

29. *See* Daily Labor Report No. 15 at A-5, ISSN 1522-5968 (BNA Jan. 24, 2006).

further suppress inter-union competition. The Change to Win Coalition was born partly because the Executive Council of the AFL-CIO refused to amend the AFL-CIO constitution at the federation's quadrennial convention to consolidate the existing affiliate unions into fewer industry-wide unions and to further insulate the reconfigured unions from "wasteful" competition. The proposed amendments, which have their genesis in the New Unity Partnership, a now defunct organization that was led by SEIU,<sup>30</sup> are intended to reduce jurisdictional overlap between competing unions and to prevent weak unions from undermining strategic campaigns to establish industry standards. SEIU in particular complained that "general worker unions"<sup>31</sup> and "corner store unions"<sup>32</sup> have undermined efforts to "take wages out of competition"<sup>33</sup> because they are too weak to negotiate a standard wage rate in a given product market.<sup>34</sup> The Change to Win Coalition espouses this structural philosophy by: (1) creating exclusive Industry Coordinating Committees ("ICCs"), membership in which is restricted to unions with "significant membership density" in that particular industry;<sup>35</sup> (2) blocking unions not admitted into an ICC from organizing or attempting to organize workers within the "core jurisdiction" of that ICC;<sup>36</sup> and (3) "eliminating conflicts and duplications in organizations and jurisdictions through the process of . . . merger . . . ."<sup>37</sup>

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30. See Aaron Bernstein, *Can This Man Save Labor?*, BUS. WK., Sep. 13, 2004, at 80 (noting that SEIU attempts to transform AFL-CIO or build something stronger).

31. A general worker union is a union that represents small percentages of workers across numerous product markets.

32. A corner store union is a union that is too small to control the labor supply in a given product market.

33. A phrase coined by AFL leader Samuel Gompers, "taking wages out of competition," refers to the strategy of organizing all product market participants. Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 13 (1993). When wages are out of competition in a given product market, the costs of unionization are imposed on all product market participants and, consequently, unionized participants are not at a competitive disadvantage to non-unionized participants. *Id.*

34. See Service Emp. Int'l Union, *United We Win: A Discussion of the Crisis Facing Workers and the Labor Movement* (2003), available at <http://www.newcitizen.org/english/english.htm> (follow "United We Win" hyperlink) (discussing ways to change labor's culture and structure to give strength to working people); Stephen Lerner, *Three Steps to Reorganizing and Rebuilding the Labor Movement*, LAB. NOTES, Dec. 2002, available at <http://labornotes.org/archives/2002/12/e.html> (discussing the historic decline in union membership and building a new labor movement).

35. See Change to Win, *Amendments and Resolutions to Change the Federation to Win Better Lives for Workers and Their Families Through Organizing and Maintaining Contract Standards*, art. XIX, § 1, available at <http://www.changetowin.org> (follow "Resources" hyperlink; then follow "Amendments and Resolutions to Change the Federation to Win Better Lives For Workers and Their Families Through Organizing and Maintaining Contract Standards" hyperlink).

36. See *id.* at § 4(a).

37. See *id.* art. III, § 8.

Thus, even the minimal amount of inter-union competition that does exist today has been identified as having contributed to the erosion of union density in the private sector and has been slated for elimination by further contractual restraints on rival unionism.<sup>38</sup>

The advent of the Change to Win Coalition and its resolution to further restrain union rivalry makes this a ripe time to reevaluate inter-union competition. Accordingly, this Article examines the effects of rival unionism on organizing, something that most scholars have long assumed to be a negative variable. However, my research points to the opposite conclusion. I argue that the absence of a competitive marketplace among unions has contributed, at least in part, to the decline in union density in the private sector.<sup>39</sup> Therefore, I disagree with the premise of the Change to Win Coalition and the longstanding AFL-CIO principle that inter-union competition is a waste of resources and should be eliminated. To the contrary, I argue that a competitive marketplace for collective representation services is needed to spur membership growth, winnow out ineffective unions, and guard against union collusion with employers. I believe that increasing the amount of competition between unions is a better solution to declining union density than restructuring the federation to provide for exclusive jurisdiction, because competition, unlike added bureaucracy at the federation level, would produce more responsive collective bargaining agents and would hold ineffective unions accountable to their constituent members, rather than to their parent federation. In addition, I contend that inter-union competition is superior to union monopoly because market forces are needed to keep upward pressure on industry standards, to discipline ineffective unions, and to provide an incentive for unions to continually push for higher standards, efforts that a monopolist union has no incentive to exert continuously when insulated from competition. Finally, creating union monopolies strikes a blow at the heart of voluntary unionism, which I think should be about effectuating employee free choice through bottom-up solutions, not a top-down one-size-fits-all mandate.

In this Article I submit a counterproposal to the Change to Win Coalition's resolution to further restrain inter-union competition. Rather than beat back rival unionism, I propose that the AFL-CIO and the NLRB take steps toward creating a competitive market for union control. In support of my thesis that union rivalry is a positive variable that should be nurtured and not extinguished, I offer both historical and empirical

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38. The AFL-CIO has agreed to the ICC concept but does not require affiliates to create ICCs. See Daily Labor Report No. 130 at A-9, ISSN 1522-5968 (BNA July 8, 2005).

39. There can be no doubt that deregulation, global competition, and the country's transition from a manufacturing economy to a service economy, among other factors, have also contributed to the decline.

evidence. In Part II of this Article I study the impact of competition on union organizing by analyzing four historical examples: the battle between the Knights of Labor and the craft unions; the war between the AFL and the CIO; the recent challenge launched by the California Nurses Association against AFL-CIO nurses' unions; and the meteoric growth of public sector unions. In Part III, I turn to empirical data and examine the results of multi-union elections in both the private and public sectors. In Part IV, I debunk the theory that inter-union competition is necessarily a waste of union resources that drives down industry standards, and I suggest alternative theories for why unions generally oppose competition. In Part V, I offer three theories for how competition would result in membership gains. Finally, in Part VI, I propose that the AFL-CIO repeal the anti-competitive no-raiding pact (and rival union organizing procedures for unrepresented workers), and the NLRB soften the contract bar to allow for more competition, relax the requirements for craft unit severance, and require strict employer neutrality in all rival union situations.<sup>40</sup>

## II. HISTORICAL EVIDENCE

### A. *The Early Years: The Knights of Labor vs. The Craft Unions*

The end of the Civil War in 1865 marked the beginning of the Gilded Age in the United States, a period characterized by tremendous economic expansion spurred by the Industrial Revolution. It was during this period that American unions experienced their first growth spurt as well. Prior to the formation of The Noble and Holy Order of the Knights of Labor in the wake of the Civil War, the American workforce was organized into autonomous craft unions. The Knights of Labor envisioned a broader and more inclusive labor movement. "They believed . . . that the exclusiveness and narrowness of the craft unions weakened the labor movement, divided instead of uniting it, and made it unfit to oppose the industrial combinations that were growing up."<sup>41</sup>

Accordingly, the Knights began organizing skilled and unskilled workers. This organizing strategy resulted in substantial membership gains. Membership increased from 9287 in 1879 to a pinnacle of 729,677 in 1886.<sup>42</sup> While much of the net gain was undoubtedly due to the fact that unskilled workers were being organized for the first time, there is evidence

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40. It is important to note that this Article is not about statutory reform of the nation's labor laws, the subject of many articles but largely unrealistic in this political environment. This Article instead focuses on reform achievable by the AFL-CIO and the NLRB.

41. NORMAN J. WARE, *THE LABOR MOVEMENT IN THE UNITED STATES, 1860-1895* 162 (1929).

42. *Id.* at 66.

that many of the members were raided from the existing craft unions. Consider the following account of a May 18, 1886 conference of craft unionists:

Each representative went to the conference with his list of grievances against the Knights, and all of them were in the same vein: that the Order was organizing trade union members and capturing whole locals; that it was indiscriminate in its expansion, taking in "rats," and "black-legs"; that the general officers were opposed to trade unions and kept up the refrain, "the trade unions must go," "the day of the trade unions is over"; and, finally, that trade union officers were being snubbed by the general executive board.<sup>43</sup>

Indeed, the craft unions opposed the Knights precisely because "the unions were being invaded by the Order and raped of their strength . . . . The Knights were stepping perforce upon the toes of the unionists, good, bad, and indifferent."<sup>44</sup>

The benefits of competition did not accrue only to the Knights. To be sure, the Knights were adding new members to their ranks more rapidly than were the craft unions. Moreover, the Knights frequently raided the craft unions for new members. But even in the face of the threat of the Knights, the craft unions also managed to recruit new members. "In 1885-86, when the Knights of Labor were making their phenomenal gains, the national trade unions were adding to their numbers more slowly but more surely. At the same time all the national unions felt the effect of the expansion of the Order . . . ."<sup>45</sup> Indeed, the threat of the Knights' offensive not only drove the craft unions to organize more aggressively, but it also served as the impetus behind the formation of the AFL. In a defensive measure to stop the hemorrhaging of skilled workers to the encroaching Knights, the craft unionists convened in Columbus, Ohio, in 1886 to form the AFL. "The trade union leaders who gathered at Columbus, Ohio, in December of that year were prompted by fear of engulfment by the Noble Order of the Knights of Labor, an increasingly uncomfortable competitor."<sup>46</sup> It was precisely because "the rapidly expanding Knights began to step on the toes of the trade unions" that the AFL came into existence.<sup>47</sup> The threat of raid from the Knights of Labor prompted fear in the trade unions and "[t]he result was the final consolidation of the trade unions into the A.F. of L."<sup>48</sup>

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43. *Id.* at 281-82.

44. *Id.* at 70.

45. *Id.* at 280.

46. GALENSON, RIVAL UNIONISM, *supra* note 2, at 4.

47. *Id.*

48. *Id.* at 5.



The Knights and the AFL competed for members from 1887 until 1894, when the Knights of Labor disbanded due to lost strikes and poor leadership. The AFL continued to grow during this period after demonstrating that its affiliates could win concessions from employers in contract negotiations. While the growth of the AFL was not as dramatic as the remarkable gains achieved by the Knights in the first half of the 1880s, this is probably due to the fact that the AFL was more selective about who they organized and continued to exclude unskilled laborers from their ranks, whereas the Knights organized both skilled and unskilled laborers. Nevertheless, the AFL continued to organize new members, and by 1890 they had about the same number of members as did the Knights.<sup>49</sup> By 1896, the AFL had added another 40,000 members to its ranks.<sup>50</sup> The threat of raid by the Knights was directly responsible for the formation of the AFL and the federation's drive to organize new members. Thus, were it not for the Knights' poaching of craft unionists, the AFL might not have been created.

*B. A New Civil War: The CIO vs. The AFL*

Following the demise of the Knights of Labor, the AFL became the dominant national federation of labor unions, which remained craft-oriented. It retained this title until 1935, when a schism within the AFL about the effectiveness of craft unionism resulted in the formation of the CIO. Like the Knights who preceded them, the CIO contended that the craft union model adhered to by the AFL was under-inclusive and that unions should broaden their coverage to welcome the growing demand of unskilled workers for union services. The CIO believed that the craft union model was no longer an effective means of organizing in the industrial economy of the 1930s. This is illustrated by Irving Bernstein's critique of the application of the craft union model to the 1930s industrial economy:

The structure of the American Federation of Labor . . . was ill-suited to the organizational needs of the thirties. The AFL for years had granted charters of jurisdiction to unions that, with a few notable exceptions, were based on craft rather than industry. Thus, machinists in the railroad shop, the copper mine, and the machinery factory belonged to the same union; those with different skills who worked alongside them were members of other unions. This system reflected the industrial world of a half-century earlier: small shops, a simple technology, and the highly skilled workman. But by the thirties much of American industry had advanced into twentieth-century industrialism: great

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49. WARE, *supra* note 41, at 298.

50. *Id.*

corporations, large plants, a complex technology, division of labor, and dilution of skills. This was the pattern in steel, in automobiles, in rubber, in electrical equipment, in aluminum, in oil, in cans, in cement, among others. It was a significant fact that all these industries were virgin territory to unions and was much of the reason that craft unionism had no appeal to either the workers or the employers . . . .<sup>51</sup>

Led by John L. Lewis, president of the United Mine Workers of America, the CIO “insisted that industrial unions were required in the light of new technology and of great corporate power.”<sup>52</sup> On November 9, 1935, shortly after the AFL rejected industrial unionism at its 1935 convention, the CIO was officially formed as a rival federation to the AFL. For the next twenty years, the federations remained archrivals and vigorously competed for members.

The existing literature almost universally characterizes those two decades as a bad period in labor’s history. What the literature overlooks, however, is that union membership surged during those two decades. Indeed, “both federations actively competed in organizing workers, ultimately leading to a *doubling* of union membership.”<sup>53</sup> For example, when the CIO formed as a rival federation to the AFL in 1935, 13.2% of the nonagricultural workforce was unionized.<sup>54</sup> Five years later, the percentage doubled to 26.9%.<sup>55</sup> In 1945, the percentage increased to 35.5%.<sup>56</sup> The percentage remained above 30% through the 1955 merger.<sup>57</sup> These statistics led Seymour Martin Lipset and Noah M. Meltz to conclude that “[t]he rivalry between the two former allies was regarded as divisive within the house of labor, but the competition surely spurred membership growth.”<sup>58</sup> 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.<sup>59</sup> Lipset and Meltz found further statistical support for the benefits of union rivalry by noting that the 1956 merger of the Canadian branches of the AFL and the CIO similarly

51. IRVING BERNSTEIN, *TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933–1941* 352–53 (Houghton Mifflin Co. 1970) (1969).

52. GALENSON, *THE CIO CHALLENGE*, *supra* note 3, at 73–4.

53. Lea B. Vaughn, *Article XX of the AFL-CIO Constitution: Managing and Resolving Inter-Union Disputes*, 37 WAYNE L. REV. 1, 17 (1990) (emphasis added).

54. SAMUEL ESTREICHER & STEWART J. SCHWAB, *FOUNDATIONS OF LABOR AND EMPLOYMENT LAW* 401 (Foundation Press 2000).

55. *Id.*

56. *Id.*

57. *See id.*

58. SEYMOUR MARTIN LIPSET & NOAH M. MELTZ, *THE PARADOX OF AMERICAN UNIONISM: WHY AMERICANS LIKE UNIONS MORE THAN CANADIANS DO BUT JOIN MUCH LESS* 41 (Cornell University Press 2004).

59. ESTREICHER & SCHWAB, *supra* note 54, at 401–02.

marked the decline in union density in Canada. "Whether by coincidence or not, the mergers in each country were followed by declines in the union share of employment."<sup>60</sup>

Are these correlations merely coincidental? A look beyond the rhetoric and negative connotations of "raiding" suggests that competition between the AFL and the CIO contributed to union membership growth. The initial organizing successes of the CIO forced the AFL to commit more resources to organizing and to organize workers in new industries. When the CIO organized the auto workers at General Motors in February 1937 and the steel workers at United States Steel Corporation in March 1937, the AFL went on the offensive. The AFL authorized William Green, its president, "to organize workers in textile, coal mining, and other industries directly competitive with existing CIO unions and to issue temporary certificates of affiliation."<sup>61</sup> In May 1937, the AFL unanimously adopted the recommendation of its Executive Council that "[a]ll AFL affiliates would immediately begin aggressive organizing campaigns within their respective jurisdictions."<sup>62</sup> More money was invested in organizing. The payroll for AFL organizers increased from \$82,000 during the last four months of 1936 to \$466,000 for the same period in 1937.<sup>63</sup> The number of salaried organizers increased from 35 in February 1937 to 232 in February 1938.<sup>64</sup> The AFL contributed \$7500 a month for six months to organize workers on the West Coast.<sup>65</sup> "For the first time, the AFL displayed a willingness to allocate resources for organization on a scale equivalent to that which characterized the great CIO drives of 1936 and 1937."<sup>66</sup> The CIO threat transformed the AFL from a federation in retreat into a more aggressive and militant body.

Once insular AFL leaders such as Teamsters' president Dan Tobin and Carpenters' president William Hutcheson saw the CIO successfully campaigning within what they considered their jurisdictions, they began organizing the same workers they had previously scorned. The Machinists, the Boilermakers, and the International Brotherhood of Electrical Workers actually transformed many of their affiliated locals into industrial unions so as to compete directly with the CIO. And in meat-packing, food processing, shipbuilding, and the retail trades, the AFL more or less transformed itself into an industrial union competitor

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60. LIPSET & MELTZ, *supra* note 58, at 42.

61. GALENSON, *THE CIO CHALLENGE*, *supra* note 3, at 29–30.

62. *Id.* at 30.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* (footnote omitted).

to the CIO.<sup>67</sup>

According to Walter Galenson,

[t]he new organizational drive more than anything else that was done at the time marked the beginning of an AFL resurgence from the defensive decline which had set in with the formation of the CIO, and the infusion of a new vitality which soon made it clear that the AFL was to remain the dominant force on the American labor scene.<sup>68</sup>

The effect of the AFL's decision to form rival unions in industries dominated by the CIO is best illustrated by its entrance into the coal mining industry, a CIO stronghold. In 1938, the AFL chartered the Progressive Mine Workers of America as a rival union to the United Mine Workers of America, the CIO flagship steered by Lewis. Needless to say, the two organizations did not care for each other. As Galenson noted, "[r]elations between the two unions were exceedingly bitter; indeed, it is doubtful whether one can find in the annals of American trade unionism an instance of rivalry in which hatreds were more intense and competition more ruthless."<sup>69</sup> Under the stewardship of the AFL, the Progressives launched an organizing campaign to add to its 35,000 members.<sup>70</sup> The AFL committed \$50,000 to the Progressives organizing efforts.<sup>71</sup> Originally confined to Illinois, the Progressives infiltrated West Virginia, Kansas, and Kentucky.<sup>72</sup> Despite adverse rulings from the NLRB, the Progressives' organizing campaign netted 85,000 new recruits during the first eight months of 1939.<sup>73</sup>

While the Progressives were ultimately unsuccessful in dislodging the United Mine Workers' grip on the coal industry, the threat posed by the Progressives forced Lewis to be more militant in his contract negotiations with coal operators. Following the AFL's decision to charter the Progressives, in March 1939 Lewis presented the operators with the Union's demands in "the most comprehensive document of its kind ever prepared by the organization."<sup>74</sup> The Union demanded "a standard six-hour day; an increase of 50 cents a day in wage rates; double time for Sundays and holidays; a guarantee of 200 working days a year; vacations with pay; establishment of seniority rights; an improved hospitalization plan, and

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67. NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 66 (Princeton University Press 2002).

68. GALENSON, *THE CIO CHALLENGE*, *supra* note 3, at 31.

69. *Id.* at 208–09.

70. *Id.* at 209.

71. *Id.* at 209–10.

72. *Id.* at 209–11.

73. *Id.* at 211.

74. *Id.* at 212.

additional miscellaneous provisions.”<sup>75</sup> When Lewis became convinced that existing market conditions truly prevented the operators from agreeing to any proposal which would increase the costs of production, he demanded that the operators either agree to a union security provision that would require all workers to join the union or agree to rescind a clause authorizing operators to discipline workers for unauthorized strikes.<sup>76</sup> While Lewis had made and then abandoned demands for union security provisions in previous contract negotiations, this time Lewis was not willing to capitulate.<sup>77</sup> According to Galenson, the reason for his change of heart was the threat posed by the Progressives:

Lewis' motives are not difficult to appraise. In the first place, as already noted, economic concessions were out of the question, and he was determined not to go back empty-handed to his constituents. Secondly, the American Federation of Labor had but recently taken over the Progressive Mine Workers, and was attempting to build it into a rival to the UMW on a national basis.<sup>78</sup>

The operators rejected the union security proposal, testing Lewis's resolve. The New York Times reported that the operators did so because they refused “to act as recruiting sergeants to conscript for life all the mine workers of the Appalachian territory into Mr. Lewis's C.I.O. army for his war against . . . the A.F. of L.”<sup>79</sup> Perhaps the operators were under the impression that because Lewis had caved in prior negotiations, he would not now call a strike over the union security proposal. Indeed, “[p]rior to this year he had shown a considerable degree of circumspection in his dealings with the operators, either because of organizational weakness or unfavorable economic conditions. He had displayed sufficient flexibility in negotiation to avert the possibility [sic] of all-out economic warfare.”<sup>80</sup>

But, hearing the footsteps of the Progressives marching toward his members, Lewis surprised the operators by calling a strike.<sup>81</sup> The strike shut down the entire bituminous coal industry and prompted President Roosevelt to intervene.<sup>82</sup> The combined effects of the strike and government intervention resulted in Lewis securing union shop provisions with twenty-two operators' associations and the rescission of the penalty clause for unauthorized strikes with the sole remaining operators'

75. *Id.*

76. *Id.*

77. *Id.* at 212–13.

78. *Id.* at 213.

79. *Id.* (quoting N.Y. TIMES, Apr. 15, 1939, at 8).

80. *Id.* at 211.

81. *See id.* at 213 (describing how the Progressives attempted to sabotage the United Mine Workers).

82. *Id.*

association.<sup>83</sup> It was a tremendous victory for Lewis and the United Mine Workers, who were now contractually insulated from raid by the Progressives because, pursuant to the deal, while

[a]n employer may hire whomsoever he pleases to work in his mine . . . if the new employe [sic] is not already a member he must join the United Mine Workers of America. The new agreement makes it impossible for any rival organization to obtain a foothold in the bituminous mining industry of the country.<sup>84</sup>

The CIO countered the AFL's challenge to its dominant position in coal mining by rivaling the AFL in the building trades, which, unlike coal mining, were dominated by craft unions affiliated with the AFL.<sup>85</sup> In July 1939, the CIO formed the Construction Workers' Organizing Committee.<sup>86</sup> Headed by A.D. Lewis, John L. Lewis's brother, the Committee was formed to bring industrial unionism into the AFL's nest.<sup>87</sup>

Behind this move on the part of John L. Lewis was undoubtedly the intent to hit back at the AFL for its attempted harassment of the United Mine Workers through chartering of the Progressive Miners; invasion of the heart of the CIO was to be met by a thrust at the holy of holies in the American Federation of Labor.<sup>88</sup>

The Committee organized maintenance and repair workers in factories and residential buildings, and it organized road construction workers.<sup>89</sup> Although no membership data was produced, the Committee had organized 150 local unions in thirty states in the first year of the campaign.<sup>90</sup>

The CIO membership gains and the threat of raid forced the AFL affiliated building trades unions to change their organizing philosophy and to become more militant, which in turn caused them to expand. Galenson observed:

The AFL was clearly concerned with the CIO drive in construction, although . . . it did not materialize into a real threat . . . . Under the impact of the CIO drive, some of the building unions dropped their policy of craft exclusion and broadened their jurisdictions to cover semiskilled workers,

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83. See *id.* at 215 (describing how, initially, sixteen operators' associations agreed to grant a union shop and eventually six southern operators' associations decided also to capitulate to the UMW's demands).

84. *Id.* at 215-16 (quoting UNITED MINE WORKERS' J., May 15, 1939, at 3).

85. See *id.* at 521 (discussing the unions affiliated with the AFL and their considerable growth in membership during the period of 1936-41).

86. *Id.* at 521-22.

87. *Id.* at 522.

88. *Id.*

89. *Id.* at 523.

90. *Id.*

mainly in manufacturing . . . . The Carpenters, in addition to claiming lumber workers, also established a furniture worker department. The Electrical Workers went after workers in electrical manufacturing and public utilities . . . . The real significance of the period 1935-1941 for the building trades was the spread of unionism to new fields. The unions grew outward from the big metropolitan centers to smaller cities. They expanded their scope from commercial work to smaller operations. They began to capture industrial building, and, most important of all, they made a real dent in heavy and highway construction . . . . Most of the workers involved were unskilled and semiskilled men, and it may have been the threat of the CIO which induced the building unions to stake their claims in heavy and highway construction work.<sup>91</sup>

There are other examples of how the rivalry between the AFL and the CIO resulted in membership growth and/or increased militancy. For instance, in his study of the International Brotherhood of Teamsters, Thaddeus Russell argued that "competition from CIO unions was a principal determinant of the IBT's ascendancy from a tiny craft union to the largest and most powerful labor organization in the United States."<sup>92</sup> Noting that between 1935 and 1941, membership in the Teamsters increased from 146,035 to 544,247,<sup>93</sup> Russell concluded:

While it could be argued that the great midwestern over-the-road organizing campaign of 1938 was largely driven by the ideological motivations of the Trotskyist Teamsters from Minneapolis, most of the IBT's expansion, especially its growth in non-trucking industries, was compelled by competition from rival unions, in particular those affiliated with the CIO.<sup>94</sup>

Russell observed that between 1939 and 1941 "the Detroit Teamster locals experienced as much unmitigated struggle for survival as any animal observed by Darwin."<sup>95</sup> The organizing successes of the Teamsters led Russell to conclude that "[t]hough unrestrained competition between unions created difficult and often deadly circumstances for Hoffa and his opponents in labor's officialdom, it proved to be immensely profitable for workers and the labor movement as a whole."<sup>96</sup>

Jonathan Cutler reached a similar conclusion in his study of the United Auto Workers in the late 1930s and early 1940s. Cutler examined the

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91. *Id.* at 523, 528-29.

92. THADDEUS RUSSELL, *OUT OF THE JUNGLE: JIMMY HOFFA AND THE REMAKING OF THE AMERICAN WORKING CLASS* 59 (Alfred A. Knopf 2001).

93. *Id.* at 58.

94. *Id.* at 59 (footnote omitted).

95. *Id.* at 68.

96. *Id.*

UAW-CIO's organizing campaign at General Motors and Walter Reuther's initiative for a thirty-hour workweek at forty-hour pay.<sup>97</sup> Cutler argued that the UAW-CIO's campaign for a shorter workweek was spurred by the emergence of the UAW-AFL, a rival union.<sup>98</sup> "It was in the context of this battle [between the UAW-CIO and the UAW-AFL] that Reuther and his allies had initiated the drive for a shorter workweek."<sup>99</sup> Cutler suggested that while the threat from the UAW-AFL caused Reuther to initiate the campaign for a shorter workweek at General Motors, once the UAW-CIO was certified as the exclusive bargaining representative at General Motors, Reuther promptly abandoned the campaign for a shorter workweek and instead announced that the union would engage in constructive negotiations with General Motors.<sup>100</sup> When his union's rivalry with the UAW-AFL was eliminated, Cutler noted that "Reuther, already in retreat, was ready to test the limits of his newfound insulation from the challenges of rivals."<sup>101</sup> This led Cutler to conclude that "[a]ny prolonged rivalry might force union leaders to be as militant in delivering on contract demands as they had been in formulating those demands."<sup>102</sup>

### C. *Competition From Independents: The California Nurses Association*

The 1955 merger between the AFL and the CIO ended two decades of intense competition between the two federations and marked the beginning of the decline in union density in the private sector.<sup>103</sup> While the merger and the adoption of the no-raiding pact largely eliminated competition among the majority of unions, rivalries between independent unions and AFL-CIO affiliates survived. Because unions that are not affiliated with the AFL-CIO are not contractually bound to the no-raiding pact or the rival union organizing procedures for unrepresented workers, they sometimes compete with AFL-CIO affiliates for members.

The California Nurses Association (CNA) is a good case study because between 1995 and 2005 it has organized registered nurses in direct competition with other unions. Thus, it is possible to measure the effect that competition from the CNA has had on union organizing by comparing the data on union membership in the nursing industry from 1995 with the 2004 union membership data. The comparison suggests that inter-union

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97. JONATHAN CUTLER, *LABOR'S TIME: SHORTER HOURS, THE UAW, AND THE STRUGGLE FOR AMERICAN UNIONISM* 18–21 (Temple University Press 2004).

98. *Id.* at 18.

99. *Id.*

100. *See id.* at 20.

101. *Id.*

102. *Id.* at 19.

103. *See* ESTREICHER & SCHWAB, *supra* note 54, app. at 401–02 (exhibiting a chart showing the change in union members in the United States from 1930 to 1979).



competition has yielded membership gains.

Prior to October 1, 1995, the CNA was affiliated with the AFL-CIO's American Nurses Association. However, in 1995 the CNA voted to terminate its affiliation with the AFL-CIO, opting instead to become an independent union.<sup>104</sup> After disaffiliating, the CNA began an aggressive organizing campaign that resulted in unprecedented membership growth. In 1995, the year that the CNA divorced its AFL-CIO affiliate, it had just 20,000 members.<sup>105</sup> Ten years later the CNA had *tripled* its membership and now represents more than 60,000 members in 165 facilities in California.<sup>106</sup> CNA was not the only nurses' union that prospered during this ten-year period. More than 100,000 registered nurses gained union representation between 1995 and 2004, which was a 26% increase in the number of unionized nurses.<sup>107</sup> While union density among registered nurses increased only marginally from 15.4% in 1995 to 16.7% in 2004, this reflects the fact that more than 483,000 registered nurses were hired during that time period, a 24.7% increase in the total number of registered nurses.<sup>108</sup> Had the nurses' unions failed to organize these new hires, union density would have slipped to 12.4%.<sup>109</sup>

The CNA's growth spurt occurred in an environment of fierce competition with their former parent organization, the American Nurses Association, as well as SEIU and other unions. These unions jockeyed to win market share of registered nurses, and the intensity of the competition is reflected in the numbers. According to NLRB statistics, only 8.5% of the total number of representation elections in 1995 occurred in the health care industry.<sup>110</sup> By 2004, when the CNA had a decade of freedom from the no-raiding pact and the rival union organizing procedures for unrepresented workers, representation elections in the health care industry

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104. California Nurses Association, *About NNOC*, 2005, <http://www.calnurse.org/nnoc/about-nnoc.html>. The CNA voted to re-affiliate with the AFL-CIO on September 23, 2005. Workers Independent News, *California Nurses Association Votes to Join AFL-CIO*, Sept. 27, 2005, <http://www.laborradio.org/node/1555>.

105. See <http://www.calnurse.org/?Action=Content&id=920>.

106. California Nurses Association, *About Us*, 2005, <http://www.calnurses.org/about-us/>.

107. See Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database from the CPS*, table V, 1995 & 2004, available at <http://www.unionstats.com> (showing that in 1995, 300,931 registered nurses were union members, compared with 406,795 in 2004).

108. See *id.* (showing that the total number of employed registered nurses in 1995 was 1,949,020, and in 2004 it was 2,432,286).

109. See *id.* (showing data compilations for registered nurses in 1995 and 2004, including employment, union membership, union density, and union coverage, and the fact that if the number of union members had remained at 300,391 in 2004 despite new hires, then union density would be 12.4%).

110. See 60 NLRB ANN. REP. 152, 168 (1995) [hereinafter 1995 NLRB Report].

represented 16.2% of all representation elections conducted that year.<sup>111</sup> The number of representation elections in the health care industry increased by 52.2% between 1995 and 2004 whereas the total number of representation elections conducted by the NLRB declined by 20% during the same time period.<sup>112</sup> Moreover, unions won 65.2% of representation elections in the health care industry in 2004 but only 53.2% of all representation elections that year.<sup>113</sup> In 1995, unions won only 53.6% of representation elections in the health care industry.<sup>114</sup> This evidence suggests that competition from the CNA may have forced competing nurses unions to dedicate more resources to organizing and to campaign more aggressively.

#### *D. Inter-Union Competition in the Public Sector*

While the number of unionized workers in the private sector has continued to wane since 1955, the public sector has experienced the exact opposite fortune. Beginning in the 1960s, union membership in the public sector entered a growth spurt. In 2005, unions represented 36.5% of public sector workers.<sup>115</sup> Labor's organizing success in the public sector is largely credited to the fact that the government is a monopolist employer insulated from market forces and that the government is less resistant to union organizing efforts than private sector employers. But another fact that is often overlooked is that the public sector is one sector of the economy that has been, and continues to be, wrought with union rivalry. As Jack Stieber noted about public sector unionism in 1974, "[c]ompetition among organizations for members and exclusive representation of public employees is more widespread and more intense than at any time since . . . 1955. AFL-CIO unions compete with one another and with independents, as well as with associations and professional organizations . . ." <sup>116</sup> Stieber concluded that "[c]ompetition often results in more workers being organized."<sup>117</sup>

Why is it that there is more inter-union competition in the public sector than there is in the private sector? The answer is apparent in the evolution of public sector labor law. Government employees are expressly excluded from the NLRA, the statute that governs collective bargaining for

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111. See 2004 NLRB Report, *supra* note 8, at 234, 253.

112. See 1995 NLRB Report, *supra* note 110, at 152, 168; 2004 NLRB Report, *supra* note 8, at 234, 253.

113. See 2004 NLRB Report, *supra* note 8, at 234, 253.

114. See 1995 NLRB Report, *supra* note 110, at 152.

115. U.S. Dep't of Labor, Union Members Summary (Jan. 21, 2006), available at <http://www.bls.gov/news.release/union2.nr0.htm>.

116. Jack Stieber, *The Future of Public Employee Unionism in the United States*, 29 INDUS. REL. 825, 830 (1974).

117. *Id.*

most private sector workers.<sup>118</sup> Thus, public sector labor law was left largely to the states. Prior to the legalization of collective bargaining in the public sector by most states, there existed state and local employee associations and professional associations that were founded for the purpose of providing benefits to its members but that did not engage in collective bargaining. For example, the Fraternal Order of Police, the National Education Association, and the American Nurses Association were all associations of public employees formed to benefit their members by means other than collective bargaining. However, these organizations evolved into independent “unions” with the advent of collective bargaining rights in the public sector. Beginning in 1959, Wisconsin became the first state in the country to enact legislation authorizing public employees to bargain collectively.<sup>119</sup> In 1962, President Kennedy issued Executive Order 10988, which bestowed collective bargaining rights upon federal employees of the executive branch.<sup>120</sup> Pursuant to the Executive Order, bargaining units were established on a “building block” theory: unions representing less than ten percent of the employees in a bargaining unit were granted informal recognition; unions representing more than ten percent but less than fifty percent of the employees in a bargaining unit were granted formal recognition; and unions representing a majority of employees in a bargaining unit were granted exclusive recognition.<sup>121</sup> In 1969, President Nixon issued Executive Order 11491, which modified Executive Order 10988 by eliminating informal and formal representation rights and expanding the collective bargaining rights of federal executive branch employees.<sup>122</sup> During the 1960s, twenty-one states enacted comprehensive legislation granting public employees collective bargaining rights, fifteen states enacted separate statutes for public school teachers, and ten states enacted statutes for firefighters and/or police officers.<sup>123</sup> These legal developments resulted in a proliferation of unions in the public sector and set the stage for their inter-union conflict with the existing employee associations and professional organizations, who adapted into collective bargaining representatives not affiliated with the AFL-CIO. As Arvid Anderson, a former “chairman of the New York City Office of

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118. Section 2 of the Act defines “employer” to include “any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof.” 29 U.S.C. § 152(2) (2000).

119. Lee C. Shaw, *The Development of State and Federal Laws, in PUBLIC WORKERS AND PUBLIC UNIONS* 20, 23 (Sam Zagoria ed., 1972).

120. *Id.* at 24.

121. Arvid Anderson, *The Structure of Public Sector Bargaining, in PUBLIC WORKERS AND PUBLIC UNIONS, supra* note 119, at 37, 39.

122. Shaw, *supra* note 119, at 24.

123. *Id.* at 26–27.

Collective Bargaining and [] a former commissioner of the Wisconsin Employment Relations Board,<sup>124</sup> explained:

Units which were suitable for building block organizational purposes created enormous interunion rivalries when bargaining on wages, hours, and conditions of employment was mandated. Unions representing essentially the same job titles in different departments tried to outdo each other in bargaining. For example, locals of the Service Employees International Union, the Teamsters, and the American Federation of State, County and Municipal Employees (AFSCME) all represented similar clerical and maintenance titles in New York City.<sup>125</sup>

The success of the American Federation of State, County and Municipal Employees (AFSCME) is a good example of how competition from other unions contributed to its growth. AFSCME grew from 160,000 members in 1964 to approximately 1,400,000 members in 2004.<sup>126</sup> It did so under extremely competitive market conditions that have not existed in most private sector industries since the 1955 merger of the AFL and the CIO. AFSCME faced stiff competition from a host of unions and employee organizations, including SEIU, the Laborers' Union, the Teamsters, and the Communications Workers of America.<sup>127</sup> Between 1962 and 1970, AFSCME and SEIU had sixteen jurisdictional disputes that required resolution by the AFL-CIO, and AFSCME had fourteen such disputes with the Laborers' Union.<sup>128</sup> These numbers do not reflect the numerous jurisdictional disputes privately settled by the unions.<sup>129</sup> Jack Stieber captured the intense atmosphere in the following account:

In 1966, AFSCME's president accused SEIU of uniting with the Teamsters in Michigan against AFSCME. He also charged that the Laborers' Union, fortified by several former key staff members from AFSCME, was raiding AFSCME in Rhode Island and a few other states. Even the Communications Workers of America "suddenly decided that they wanted to organize clerical workers . . . . They are even changing the emblem of their union. They are taking off the telephone. I don't know what they are going to substitute, a typewriter or something."<sup>130</sup>

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124. Anderson, *supra* note 121, at 37.

125. *Id.* at 39.

126. Am. Fed'n of State, County and Mun. Employees, AFL-CIO, *The Organizing Challenge for Unions and the AFL-CIO* 1 (Feb. 24, 2005), available at [www.afscme.org/whatsnew/organ2005.pdf](http://www.afscme.org/whatsnew/organ2005.pdf) [hereinafter *AFSCME 2005 Report*].

127. See JACK STIEBER, PUBLIC EMPLOYEE UNIONISM: STRUCTURE, GROWTH, POLICY 91-96 (1973) (discussing the interunion competition of AFSCME).

128. *Id.* at 97, table 5-1.

129. See *id.* at 97 (noting that "[m]any more cases were settled through mediation").

130. *Id.* at 93 (quoting Am. Fed'n of State, County and Mun. Employees, AFL-CIO,

AFSCME continues to oppose infringement on its jurisdiction by other unions. In a 2005 AFSCME publication, the union recalled that the “Building Service Employees International Union became mostly a public employee union, and changed its name [to SEIU]” and that the “National Education Association became a union.”<sup>131</sup> Indeed, the rivalry with SEIU is even more pronounced today, as demonstrated by the recent struggle between AFSCME and SEIU to represent child-care workers in Illinois. In a March 29, 2005 article in the *American Prospect*, Harold Meyerson reported that “[h]undreds of organizers from both the Service Employees International Union (SEIU) and the American Federation of State, County and Municipal Employees (AFSCME) were pounding on doors in rival efforts to persuade the state’s 48,000 child-care workers to vote to join their respective unions.”<sup>132</sup> The magnitude of the organizing efforts of the rival unions led Meyerson to comment that

[f]or a while last week, Illinois was home to the kind of union-against-union labor war that America hasn’t seen since American Federation of Labor (AFL) unions and Congress of Industrial Organizations (CIO) unions used to clobber each other while fighting for new members, in the days before the two federations merged 50 years ago.<sup>133</sup>

According to its own account of its development, “AFSCME’s history is full of lessons regarding the impact of jurisdictional conflict.”<sup>134</sup> What lessons should be learned from AFSCME’s jurisdictional conflicts? While AFSCME concedes that “[o]ur greatest growth occurred in the 1970s and ‘80s, in the midst of intense conflicts . . . [when] [w]e grew by almost one million members” and “the public-sector labor movement as a whole grew by four million,”<sup>135</sup> the Union nevertheless argues that public sector workers would be better off with less inter-union competition. Of course, having established a dominant market share in the public sector, AFSCME now wants to maintain its share against attacks from rivals.

A historical examination of the rise of public school teacher unionism also suggests that competition between the American Federation of Teachers (AFT), an AFL-CIO affiliate, and the unaffiliated National Education Association (NEA) contributed to membership growth in both organizations. Indeed, Lipset and Meltz noted that “[c]ompetition between

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PROCEEDINGS OF THE 15TH INTERNATIONAL CONVENTION, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO 19 (1966)).

131. *AFSCME 2005 Report*, *supra* note 126, at 3.

132. Harold Meyerson, *Labor War in Illinois*, THE AM. PROSPECT ONLINE EDITION, Mar. 29, 2005, <http://www.prospect.org/web/page.ww?section=root&name=ViewWeb&articleId=9406>.

133. *Id.*

134. *AFSCME 2005 Report*, *supra* note 126, at 3.

135. *Id.*

the AFT and the NEA for new members has been intense” and argued that the “[o]rganizational rivalry also helps explain the rapid increase in unionism among teachers.”<sup>136</sup> As previously discussed, the NEA started out as a professional association of teachers that was initially opposed to collective bargaining. However, the NEA was forced to change its position on collective bargaining when the AFT began making inroads into the NEA’s monopoly and threatened to poach teachers from the NEA. “Faced with competition for members from the growing AFT, . . . the NEA became involved in collective bargaining, union representation elections and strikes, and by the end of the 1960s the NEA had become a full-fledged teachers’ union.”<sup>137</sup> Despite the strong correlation between competition and membership growth, the NEA and the AFT have taken the first steps toward protecting their market share by entering into a partnership agreement.<sup>138</sup>

### III. EMPIRICAL EVIDENCE

#### A. *Multi-Union Election Results in the Private Sector*

There is empirical evidence supporting the argument that inter-union competition spurs union membership growth. A study by Joseph Krislov on union rivalry in the United States showed that unorganized workers are more likely to vote union when there is more than one union on the election ballot.<sup>139</sup> Based on NLRB election results for the years 1951, 1954, and 1957, the study found:

In 1951 unions lost 31.5 percent of the one-union elections, but only 14.3 percent of the two-union elections. In 1954 unions lost 40.8 percent of the one-union elections, but only 31.9 percent of the two-union elections. In 1957 unions lost 42.2 percent of the one-union elections, but only 21.2 percent of the two-union elections. Both in 1951 and 1957, the proportion of defeats in two-union elections was about half of the proportion of defeats in one-union elections. In 1954 the proportion of defeats in two-union elections was also markedly lower than the proportion of defeats in one-union elections. On the basis of these data, there is little support for the view that unorganized workers completely rejected unionism when solicited by two competing unions.<sup>140</sup>

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136. LIPSET & MELTZ, *supra* note 58, at 134.

137. *Id.* at 135.

138. See “NEAFT Partnership,” available at <http://www.nea.org/aboutnea/NEAFTPartnership.html>.

139. See Joseph Krislov, *Organizational Rivalry Among American Unions*, 13 INDUS. & LAB. REL. REV. 216, 225 (1960).

140. *Id.*

The study concluded that although only one union won each election, collectively, unions won a higher percentage of elections when there was more than one union on the election ballot.<sup>141</sup> The study conceded that an individual union would need to win a greater percentage of two-union elections in order to maintain the same percentage of victories in one-union elections, and only those unions offering superior representational services would be capable of achieving this result.<sup>142</sup> “Few unions would be able to achieve this high percentage of victories [in two-union elections] unless they had some special appeal to the unorganized worker that other unions could not duplicate.”<sup>143</sup> Unions lacking that “special appeal” would thus be worse off under a system of competitive unionism than those unions that could achieve better results for their members. “Hence, individual unions are probably correct when they assert that competition from a second union reduced *their* opportunity for victory.”<sup>144</sup>

Krislov’s findings still hold true today. NLRB election results for 2004 show that unions won only 51.7% of the one-union representation elections but 79.3% of the two-union representation elections.<sup>145</sup> Similarly, in 2003, unions won 52.1% of the one-union representation elections and 86.1% of the two-union representation elections.<sup>146</sup> Unfortunately, due to the no-raiding pact and the rival union organizing procedures for unrepresented workers, there were far more one-union elections in 2003 and 2004 than there were two-union elections. In 2004, only 5.3% of representation elections were two-union elections.<sup>147</sup> Likewise, only 4.6% of representation elections in 2003 were two-union elections.<sup>148</sup>

The results are less consistent for representation elections involving three or more unions. In 2004, unions won 55.6% of the three-or-more-union representation elections, only slightly better than they fared in the one-union representation elections (51.7%).<sup>149</sup> But in 2003, when three or more unions were on the ballot, unions won 100% of the elections.<sup>150</sup> Three-or-more-union representation elections were even rarer than two-union representation elections in 2003 and 2004. Only 0.3% of representation elections had three or more unions on the ballot in 2004 and

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141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* (emphasis added).

145. 2004 NLRB Report, *supra* note 8, at 234.

146. 68 NLRB ANN. REP. 159 (2003) [hereinafter 2003 NLRB Report].

147. See 2004 NLRB Report, *supra* note 8, at 234 (dividing the total number of representation elections (2719) by the number of two-union elections (145)).

148. See 2003 NLRB Report, *supra* note 146, at 159 (dividing the total number of representation elections (2937) by the number of two-union elections (137)).

149. 2004 NLRB Report, *supra* note 8, at 234.

150. 2003 NLRB Report, *supra* note 146, at 159.

only 0.1% of representation elections had three or more unions on the ballot in 2003.<sup>151</sup>

In 1955, the year that the AFL and the CIO merged, 19.5% of representation elections were two-union elections.<sup>152</sup> Unions won 92.3% of the two-union representation elections in 1955.<sup>153</sup> Moreover, 1.4% of representation elections had three or more unions on the ballot in 1955 and unions won 93.4% of those elections.<sup>154</sup> The 1955 union win rate in one-union representation elections was 60.9%, better than unions fare today in one-union representation elections, but more than thirty percentage points lower than their win rate in multi-union representation elections that year.<sup>155</sup>

A study on union raids by Gary Chaison reinforces the benefits of competition.<sup>156</sup> Chaison looked at the union win rate of raids in addition to the win rate in multi-union and single-union elections for the years 1964 through 1973.<sup>157</sup> For purposes of the study, Chaison defined a “raid” as “an attempt by an organizing union to gain bargaining rights, through a representation election, for a unit of employees already represented by a bargaining agent.”<sup>158</sup> Chaison’s study differed from Krislov’s study in that Krislov looked at union rivalry only in unorganized units whereas Chaison looked at rivalry in both organized and unorganized units. Chaison’s findings are consistent with Krislov’s in that unions won a greater percentage of multi-union elections (74.4%) than single-union elections (53.9%).<sup>159</sup> In addition, Chaison found that the union win rate in raids was a remarkable 97.6%, with the incumbent union winning 51% of the elections and the raider union winning 46.6% of the elections.<sup>160</sup> Chaison’s findings suggest that unions resist raiding because they are afraid of losing to another union, not because they are afraid of losing to “no union.” This illustrates that union opposition to raiding is less about worker solidarity, the justification often asserted for the no-raiding pact, and more about incumbent union preservation.

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151. See 2004 NLRB Report, *supra* note 8, at 234 (dividing the total number of representation elections (2719) by the number of three (or more)-union elections (9)); 2003 NLRB Report, *supra* note 146, at 159 (dividing the total number of representation elections (2937) by the number of three (or more)-union elections (3)).

152. See 1955 NLRB Report, *supra* note 9, at 171 (dividing the total number of representation elections (4215) by the number of two-union elections (824)).

153. See *id.* (calculating the number provided in table 13A).

154. See *id.* (calculating the number provided in table 13A).

155. See *id.* (calculating the number provided in table 13A).

156. Gary N. Chaison, Research Notes, *The Frequency and Outcomes of Union Raids*, 15 INDUS. REL. 107, 109 (1976).

157. *Id.*

158. *Id.* at 107.

159. *Id.* at 109.

160. *Id.*



### B. *Multi-Union Election Results in the Public Sector*

Like the evidence in the private sector, there is also empirical data proving that inter-union competition led to organizing successes in the public sector. In their study of state and local public sector representation elections in 1991 and 1992, Kate Bronfenbrenner and Tom Juravich were surprised to find a high number of multi-union elections.<sup>161</sup> “There were 461 elections in 1991 and 1992 where one union challenged another for representation. Although these types of elections are quite rare in the private sector, approximately one out of every six elections in the public sector was a challenge election.”<sup>162</sup> More tellingly, they found that “[u]nions lost representation to ‘no union’ in only 1.5% of the challenge elections.”<sup>163</sup> Thus, the union win rate in elections with more than one union on the ballot was an astonishing 98.5%. However, the study revealed that the incumbent union lost to the challenger union in two-thirds of the multi-union elections.<sup>164</sup> The authors concluded that “[t]his high turnover rate points both to the costly nature of multi-union challenge elections and to the inability of unions to retain their high margin of support in the years after the election.”<sup>165</sup> This conclusion is bolstered by the study’s finding that public sector unions won only 45.1% of single-union decertification elections.<sup>166</sup> Thus, the study shows that when workers are not given a choice between a challenger union and their incumbent union, a majority of workers will vote “no union.” But when a challenger union is on the ballot, workers will overwhelmingly vote for the challenger instead of “no union.” Because the public sector is rife with inter-union competition, workers rarely vote “no union.”

### C. *Explanation for Higher Union Win Rates in Multi-Union Elections*

What explains the higher union win rates in multi-union elections? One possibility is that unions only compete in sectors that are pro-union or are likely to go union. However, this explanation was rejected by Michael Goldfield, who argued that “a careful analysis of detailed frequency tables shows neither a tendency toward more multi-union elections in those sectors where victory rates are especially high nor even significant variance

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161. KATE BRONFENBRENNER & TOM JURAVICH, *UNION ORGANIZING IN THE PUBLIC SECTOR: AN ANALYSIS OF STATE AND LOCAL ELECTIONS* 8 (1995).

162. *Id.*

163. *Id.* Bronfenbrenner and Juravich credit the extremely high union win rate to the fact that “no union” does not appear on the ballot in most states.

164. *Id.* at 8.

165. *Id.*

166. *Id.* at 7.

by union.”<sup>167</sup> As Goldfield noted,

[i]f multi-union elections possess higher union victory rates largely due to their taking place in the most pro-union units, we would expect to see more of them (and higher rates) in those areas where union victory rates are highest or where unions were growing quite rapidly. Yet this is not the case.<sup>168</sup>

Goldfield is correct in his observation that multi-union elections do not occur more frequently in pro-union units. As the Bronfenbrenner and Juravich study showed, multi-union elections are much more common in the public sector than they are in the private sector.<sup>169</sup> Yet, the study revealed that public sector workers are not more inclined to vote union than are private sector workers. This is illustrated by the similar union win rates in single-union decertification elections in both the private and public sectors. In 2003 and 2004, private sector unions won just 35.5% and 34.5% of single-union decertification elections, respectively.<sup>170</sup> Similarly, in 1991 and 1992, public sector unions won only 45.9% and 44.2% of the single-union decertification elections, respectively.<sup>171</sup> This suggests that public sector workers are not significantly more pro-union than private sector workers.

An examination of representation elections in the health care industry also refutes the theory that multi-union elections occur more frequently in pro-union industries. As discussed above, unions won 65.2% of representation elections in the health care industry in 2004, when the CNA and other unions were competing to organize nurses.<sup>172</sup> In 1995, when the CNA was bound by the no-raiding pact and the rival union organizing procedures for unrepresented workers, and there were fewer multi-union representation elections than in 2004, unions won only 53.6% of representation elections in the health care industry.<sup>173</sup> This evidence suggests that registered nurses are no more pro-union than other groups of workers.

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167. MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* 208 (1987).

168. *Id.* at 210.

169. See BRONFENBRENNER & JURAVICH, *supra* note 161, at 8 (stating that multi-union elections are rare in the private sector, but comprise about one-sixth of public sector elections).

170. 2004 NLRB Report, *supra* note 8, at 236; 2003 NLRB Report, *supra* note 146, at 161.

171. BRONFENBRENNER & JURAVICH, *supra* note 161, at 11.

172. See 2004 NLRB Report, *supra* note 8, at 253 (dividing the total number of elections (443) by the win number (289) in health care industry). The NLRB does not keep data on the percentage of multi-union elections by industrial sector.

173. 1995 NLRB Report, *supra* note 110, at 152.

#### D. Conclusion

As demonstrated by the above studies, the union win rate is substantially higher in multi-union elections than it is in one-union elections both in the private and public sectors. The data suggest that unions are more likely to win when two or more unions are on the election ballot. Thus, the frequency of multi-union elections in the public sector compared to the relative infrequency of multi-union elections in the private sector lends support to the argument that inter-union competition, and its absence from the private sector, have contributed, at least in part, to labor's greater organizing successes in the public sector. Furthermore, that there were many more multi-union elections in the private sector prior to the 1955 merger of the AFL and the CIO than there are today helps explain the tremendous surge in union membership in the private sector from 1935 to 1955, and the subsequent decline in union density after 1955.

#### IV. THEORY FOR RESTRICTING COMPETITION

There are two general theories for restricting inter-union competition. The first is that it is a waste of resources for unions to raid each other. The second is that rival unionism results in a buyer's auction that drives down industry standards. I address each theory in turn and then offer some alternative theories.

##### A. Competition Is a Waste of Resources

Labor's hostility to union rivalry can be traced back to the merger talks between the AFL and the CIO. In 1953, the Joint AFL-CIO Committee on Labor Unity conducted a study on the effects of rival unionism by reviewing NLRB statistics of raid elections between the AFL and the CIO in years 1951 and 1952.<sup>174</sup> During those years, there were 1245 cases of raiding that resulted in NLRB elections.<sup>175</sup> The Joint Unity Committee found that of the 366,470 employees involved in the raid elections, the raiding union managed to capture only 62,000 employees.<sup>176</sup> Of the 62,000 who switched their union affiliation, 35,000 went to an AFL union and 27,000 went to a CIO union.<sup>177</sup> The Joint Unity Committee noted that the net change in membership totals between the AFL and the CIO was 8000 employees, less than two percent of the 366,470 employees

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174. See AMERICAN FEDERATION OF LABOR, AFL-CIO NO-RAIDING AGREEMENT 5 (1954) [hereinafter NO-RAIDING AGREEMENT] (explaining the scope and target period of the study).

175. *Id.*

176. *Id.*

177. *Id.*

involved in the raid elections.<sup>178</sup> From this study, the Joint Unity Committee concluded that union raids are “a drain of time and money far disproportionate to the number of employees involved” and that raids “create industrial strain and conflict and they do nothing to add to the strength and capabilities of the trade union movement as a whole.”<sup>179</sup>

The AFL-CIO no-raiding pact arose from this single study of NLRB raid elections in the years 1951 and 1952. The study is faulty not only because of the limited data analyzed, but also because it failed to quantify the value that the threat of raid played during the period of union rivalry. George Brooks was quick to criticize the logic of the study:

This condition [(the 8000 employee net change in affiliation)] was apparently regarded by the members of the joint committee as conclusive proof that raiding was a waste of time and money. Nothing could dramatize more clearly the contrast between the interests of the unions as institutions and the interests of the members thereof. Is it not possible that every one of the 366,470 workers was better off as a result of the raids or attempted raids? The majority of workers that changed affiliations certainly thought they were better off. It is more than a possibility that the unions which retained their membership in the face of a raid did so after promising, and possibly achieving, a better record of representation in the eyes of their own membership. It is even more likely that millions of workers whose representation was not challenged were more conscientiously represented than they would have been if the possibility of the raid had not been present.<sup>180</sup>

At the signing of the no-raiding pact in 1954, the Joint Unity Committee gave its justification for the pact, a justification that labor continues to stand by today: “We have a solemn duty to organize the unorganized, instead of raiding each other’s members. The signing of the no-raiding agreement today will permit us to concentrate our energy and our effort on the basic trade-union goal.”<sup>181</sup> As Stewart Schwab has noted, this is identical to the justification that corporate managers assert when defending corporate takeover restrictions.<sup>182</sup> Schwab argued that restricting competition tends to make it more difficult for the organization to achieve its intended objective because it permits the organization to become less

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178. *Id.*

179. *Id.*

180. Brooks, *supra* note 4, at 347–48.

181. NO-RAIDING AGREEMENT, *supra* note 174, at 22.

182. See Schwab, *supra* note 21, at 390 (noting that corporate managers’ justification for restricting competition is that “corporate managers should concern themselves with making new and better products rather than worrying about reshuffling the ownership structure of companies”).

responsive to its constituents:

One problem with the no-raiding pact—like that with corporate antitakeover [sic] legislation—is that, without the threat of a raid, leaders are less concerned with providing optimal services to members. As long as the returns resulting from unionization exceed a nonunion environment, union leaders can pursue other interests without worrying about losing their positions to a raider.<sup>183</sup>

The corporate analogy is instructive. Corporations are entities owned by shareholders and controlled by managers. Ownership and management of unions is similarly bifurcated between members and leaders, respectively. Both corporate law and labor law address the gap between control and ownership by imposing duties on managers to act in the owners' best interests and by giving owners voting rights. Yet the concern is far less acute in corporate law because there is a market for corporate control that guards against slippage between the sometimes conflicting interests.<sup>184</sup> Indeed, while corporate managers may think that corporate raids are a waste of resources and that takeover restrictions are desirable,<sup>185</sup> the antitrust laws prohibit corporations from agreeing not to raid each other.<sup>186</sup> Implicit in the antitrust laws is the policy that the 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. Although antitrust laws do not prohibit unions from agreeing not to raid each other,<sup>187</sup> the same policy concerns are at play in the corporate and union contexts, because both involve a principal-agency relationship.<sup>188</sup> Therefore, in both the corporate and union contexts, the threat of raid is extremely valuable in that it is the most effective tool, certainly more effective than the positive law, in forcing managers to remain aligned with the interests of the organization's owners.

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183. *Id.*

184. *See id.* at 375 (explaining how the market for corporate control induces managers to work in the shareholders' interests).

185. *See id.* at 390 (stating the justification for corporate takeover restrictions).

186. The Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (2000).

187. Labor unions are generally exempt from the antitrust laws. The labor exemption to the Clayton Act provides that labor organizations shall not "be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 15 U.S.C. § 17 (2000).

188. *See Schwab, supra* note 21, at 390 (explaining that without the threat of a raid, union leaders can safely pursue interests other than providing optimal service to members, much like with corporate anti-takeover legislation).

### B. *Competition Drives Down Industry Standards*

A second theory for restricting competition is that rival unionism results in a buyer's auction in which competing unions undercut each other and prevent the establishment of a uniform wage rate in a given product market. This was one of the main arguments advanced by the New Unity Partnership in support of its proposal to consolidate AFL-CIO affiliates into fewer industry-wide unions and was presumably a driving force behind the formation of the Change to Win Coalition. For example, Stephen Lerner of SEIU argued that

[h]igh union density only helps if all unions and locals in the industry or labor market are working together and speaking with one voice. If unions can't hold each other accountable, then the decision of one union to go it alone, and negotiate lower standards undercut [sic] the ability to raise standards for everyone.<sup>189</sup>

While I agree with Lerner that in order for unions to "take wages out of competition"<sup>190</sup> in a given product market they must impose uniform labor costs on each product market participant, I disagree with his proposal to do so by contractually restricting which unions may compete in which product markets. The best way to get rid of ineffective unions that drive down industry standards is to increase inter-union competition, not eliminate it. A market for union control would quickly correct a buyer's auction by winnowing out unions too weak to raise standards above competitive market levels or meet the established union wage rate.<sup>191</sup> The threat of raid would ensure that each union remains accountable for its actions. More importantly, a marketplace in which unions are not insulated from raid would allow employees, not the AFL-CIO or the Change to Win Coalition, to make the determination about a union's effectiveness. 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.

Moreover, when unions are exposed to market forces, there is an incentive for them to outdo, not undercut, each other. Far from resulting in a race-to-the-bottom buyer's auction, competition results in a race-to-the-top seller's auction, in which competing unions are constantly trying to get their members a better deal. Competition would keep upward pressure on the union wage rate in a given product market and market discipline would

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189. Lerner, *supra* note 34.

190. *Id.*

191. Guarding against a buyer's auction also requires that existing Board law be reformed to prevent ineffective unions from being insulated from raid. See Part VI, *infra*.

prevent any union from “going it alone” and negotiating lower standards.

### C. *Other Theories*

If, as I contend, the no-raiding pact actually impedes labor’s ability to organize new members, and organizing the unorganized has been an objective of the AFL-CIO since its creation in 1955, then why does labor continue to defend it vigorously? Schwab offered a number of possibilities. One is that the no-raiding pact ensures that union leaders’ jobs remain secure.<sup>192</sup> However, this theory fails to account for the threat of trusteeships or mergers, which occur and are often accompanied by a change in leadership. A more plausible explanation is one of principle: raiding is seen as inconsistent with the goal of solidarity.<sup>193</sup> While raiding may be perceived to be inconsistent with solidarity, it is not necessarily so. As Schwab recognized, “[t]he aim of solidarity is for workers to present a united front against management. This united front can be maintained even if, among themselves, unions disagree with (and raid) each other.”<sup>194</sup> A final explanation for labor’s continued support of the no-raiding pact is that the benefits of raiding are external.<sup>195</sup> This explanation is supported by Krislov’s study of multi-union elections, which found that although union win rates are higher in multi-union elections than they are in single-union elections, “individual unions are probably correct when they assert that competition from a second union reduced *their* opportunity for victory.”<sup>196</sup> It is also supported by Bronfenbrenner and Juravich’s study of public sector elections, which found a 98.5% union win rate in multi-union elections but a 66.6% turnover rate when a challenger union was on the ballot alongside the incumbent union.<sup>197</sup> Thus, because other unions benefit from a successful raid, unions may think it is better to agree not to raid for fear of losing their members to a raider.<sup>198</sup>

## V. THEORY FOR INCREASING COMPETITION

Why does inter-union competition result in membership gains? There are at least three possible theories. The first is that unions try harder and are more militant when a rival union is competing to represent the same

192. Schwab, *supra* note 21, at 391.

193. *See id.* at 392 (stating that another reason no-raid pacts are so prevalent is that they “may further long-term solidarity among unions, a goal of the union movement”).

194. *Id.* at 392 n.123.

195. *See id.* at 392 (stating that “the policing benefits of raiding go to other unions”).

196. Krislov, *supra* note 139, at 225 (emphasis added).

197. BRONFENBRENNER & JURAVICH, *supra* note 161, at 11.

198. *See* Schwab, *supra* note 21, at 392 (concluding that in “ignoring [the] external benefits of raiding, [unions] may find it worthwhile to agree not to raid”).

unit. The second is that the threat of raid from a challenger union forces an incumbent union to be more responsive to the interests of its members. The third is that worker demand for union services increases when unions are jockeying for their loyalty. I will address each theory in turn.

#### A. *Competition Makes Unions More Militant*

In rejecting the theory that union win rates are higher in multi-union elections because they only occur in units that are pro-union, Goldfield argued that “the more likely conclusion is that unions are willing to exert a greater effort when competing with other unions.”<sup>199</sup> He concluded that unions

are more afraid of losing out to another union than in being beaten by the company. Losing an organizing campaign to the company merely deprives the union of new members; another attempt may be made after the lapse of year with a greater likelihood of success. If, however, the election is lost to another union, the constituency is for all practical purposes lost forever. Even more important, a jurisdictional competitor has gained strength, which might ultimately lead to the demise of the losing union itself. The implications of this latter explanation are, first, that even with their highly paid, institutionalized, more sedate organizing staffs, unions can put out the necessary effort to win when they have to; second, most of the time unions do not put out this sufficient effort.<sup>200</sup>

Richard Freeman reached a similar conclusion. He argued that in multi-union elections, “organizing effort is undoubtedly much higher than in elections that pit unions against management only.”<sup>201</sup> Freeman based his conclusion on the fact that multi-union elections fell from 23.7% of NLRB elections in 1953 to just 6.2% of elections in 1980 and that membership dipped during this period.<sup>202</sup> Freeman argued that the drop in the number of multi-union elections resulted in “less choice for workers (and employers) among unions and less organizing activity per election.”<sup>203</sup>

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. For example, as discussed above, the CIO’s organizing victories in the automobile and steel

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199. GOLDFIELD, *supra* note 167, at 208.

200. *Id.* (citation omitted).

201. Richard B. Freeman, *Why Are Unions Faring Poorly in NLRB Representation Elections?*, in CHALLENGES AND CHOICES FACING AMERICAN LABOR, 45, 51 (Thomas A. Kochan ed., 1985).

202. *Id.*

203. *Id.*



industries induced the AFL to commit more resources to organizing and to take on the CIO in industries dominated by the CIO, like coal mining. The CIO responded by forming a rival to the AFL in the building trades, forcing the craft unions to broaden their jurisdictions and organize more aggressively. Thaddeus Russell attributed the Teamsters' tremendous growth in the late 1930s to competition from CIO unions.<sup>204</sup> Likewise, as previously discussed, AFSCME experienced "huge growth, despite jurisdictional conflict"<sup>205</sup> with several other unions, and AFSCME continues to grow despite intense competition from SEIU and other unions.

### *B. Competition Makes Unions Act More Responsively*

A second theory for why competition results in membership growth is that competition forces unions to be more responsive to their members. Competition, whether between political parties, corporations, or labor unions, ensures that the agent will remain responsive to the interests of the principal. "Competition between parties for votes ensures that government policies reflect the preferences of a majority of voters."<sup>206</sup> Similarly, "[t]he threat of ouster during a corporate takeover encourages incumbent managers to work hard in their company's interest."<sup>207</sup> Without union rivalry, there is no mechanism to ensure workers that their unions will remain responsive to their interests and, thus, there is no great demand for union services.<sup>208</sup>

For example, in advocating for more inter-union competition, Stewart Schwab argued that "[t]he threat of a takeover . . . would induce union leaders to behave in the interests of their members for fear of being ousted."<sup>209</sup> Schwab noted:

Scholars have often remarked—usually in passing—on the value of the raid threat in inducing leaders to represent the interest of members. Thus, Professor Frank Pierson noted in his survey of the prospects for union democracy that "the rivalry between union organizations [is] a factor making for democracy in trade

204. See RUSSELL, *supra* note 92, at 59 ("[M]ost of the [Teamsters'] expansion . . . was compelled by competition from rival unions, in particular those affiliated with the CIO.").

205. AFSCME 2005 Report, *supra* note 126, at 3.

206. Schwab, *supra* note 21, at 374 n.32.

207. *Id.* at 375.

208. Union rivalry may also force unions to be more democratic, which could make unions an easier sell. For example, Herman Benson, Secretary-Treasurer of the Association for Union Democracy, has argued that "union democracy [] can be a spur to organizing by making the labor movement more attractive to recruits." Herman Benson, *The New Unity Partnership: Sweeney Critics Would Bureaucratize to Organize*, UNION DEMOCRACY REVIEW, Dec.-Jan. 2003, available at <http://www.uniondemocracy.com/UDR/52-New%20Unity%20Partnership.htm>.

209. Schwab, *supra* note 21, at 388.

unions. . . . [A] little competition between unions, just as in the world of private enterprise, is sometimes a very healthy influence.” Likewise, Bok and Dunlop have suggested that “the risk of being ousted [by raid] poses dangers that can spur the union to give closer attention to complaints or disaffection from particular groups within the membership.” And Seymour Lipset has recognized that “the existence of two unions with similar jurisdictions serves to make each of them more responsive to membership wishes.”<sup>210</sup>

Similarly, George Brooks reminded us that unions “are bureaucracies or oligarchies whose interests should under no circumstances be equated with the interests of the members of the union” and that “the primary goals of the union—wages and other conditions of employment—will never be the only goals of the union as an institution.”<sup>211</sup> Brooks argued that union rivalry makes “the essential machinery of representation [available to workers,] that is, the process of consent, dissent, repudiation of ineffectual representation, the constant search for good leaders, and all the rest.”<sup>212</sup> He concluded that “these, in turn, are meaningless without a wide range of choices available to the represented.”<sup>213</sup>

The value of the threat of a raid can be seen in the Progressive Mine Workers’ challenge to the United Mine Workers (UMW), discussed in more detail earlier. After the AFL chartered the Progressives as a rival to the CIO-affiliated UMW, John L. Lewis, president of the UMW, demanded greater concessions from the operators, including a wage increase, double time for work on Sundays and holidays, paid vacations, and a guarantee of two hundred working days a year.<sup>214</sup> When he realized that he could not win those concessions, he pushed for a union shop agreement, something he had used in prior negotiations as a bargaining chip.<sup>215</sup> But this time Lewis was not willing to trade it for other concessions. Instead, he called a strike when the operators refused to agree to his union shop proposal, employing for the first time economic and political pressure to force the operators to agree to his demands.<sup>216</sup> These actions “marked the beginning of a new epoch in Lewis’ collective bargaining tactics”<sup>217</sup> and “[were] a basic change in the relationship between employer and union in coal mining.”<sup>218</sup>

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210. *Id.* (alterations in original) (footnotes omitted).

211. Brooks, *supra* note 4, at 346–47.

212. *Id.* at 366–67.

213. *Id.* at 367.

214. GALENSON, THE CIO CHALLENGE, *supra* note 3, at 212.

215. *Id.*

216. *Id.* at 213.

217. *Id.* at 211.

218. *Id.* at 212.

Another good example of how competition forced unions and their leaders to be more responsive to their members is Jonathan Cutler's account of the United Auto Workers, discussed above.<sup>219</sup> Cutler argued that Walter Reuther's campaign platform for a thirty-hour workweek at forty-hour pay was undertaken because of the challenge posed by the UAW-AFL.<sup>220</sup> Cutler noted that once the UAW-CIO was certified as the exclusive bargaining representative, and the threat from the UAW-AFL eliminated, Reuther abandoned the campaign for a shorter workweek.<sup>221</sup> Had the competition not been eliminated, Reuther may have delivered on his promises.<sup>222</sup>

### C. Competition Increases Worker Demand

A third theory for why competition results in membership growth is that worker demand for union services increases when unions are constantly trying to outdo each other. In a study comparing the organizing failures of the 1920s with the dramatic successes of the 1930s, Bruce Kaufman attributed the erosion of union density to the combination of declining benefits and rising costs of unionization.<sup>223</sup> Kaufman argued that the benefits of unionization "have declined in recent years and are likely to remain of modest size, thus providing reduced incentive for unorganized workers to seek union representation and for policy makers to liberalize the nation's labor law."<sup>224</sup> One of the reasons cited by Kaufman for the decline in worker demand is that unions have been unable or unwilling to demonstrate that they can "deliver the goods" for members.<sup>225</sup>

Competition from a rival union may force unions to demonstrate that they can "deliver the goods," something that unions may not be willing to do absent the threat of a raid. For example, as earlier discussed, John L. Lewis was forced to demonstrate that he could get the coal operators to agree to his union security proposal when the AFL chartered the Progressive Mine Workers as a rival to the United Mine Workers. Prior to the AFL's entrance into coal mining, Lewis had repeatedly proposed and

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219. See CUTLER, *supra* note 97, at 18–21 (describing how the rivalry between the AFL and the CIO during the late 1930s and early 1940s led to a campaign for a shorter workweek by the UAW-CIO).

220. *Id.* at 18–19.

221. *Id.* at 20.

222. See *id.* at 19 (arguing that prolonged rivalry among unions would likely force union leaders to be as aggressive in delivering on contract demands as they are in creating them).

223. See Bruce E. Kaufman, *The Two Faces of Unionism: Implications for Union Growth*, in THE CHANGING ROLE OF UNIONS: NEW FORMS OF REPRESENTATION 61, 82–83 (Phanindra V. Wunnava ed., 2004).

224. *Id.* at 83.

225. *Id.* at 84.

conceded on union security in contract negotiations.<sup>226</sup> In those negotiations Lewis “had shown a considerable degree of circumspection in his dealings with the operators . . . [and] displayed sufficient flexibility in negotiation to avert the possibility [sic] of all-out economic warfare.”<sup>227</sup> But with the threat of raid from the Progressives, Lewis abruptly changed course and “demonstrated that he had both the will and the means to attain whatever objectives he regarded as crucial.”<sup>228</sup> For the first time Lewis called a strike and proved that he could “deliver the goods.”

The CIO threat also forced the Teamsters to demonstrate to their members that they could win concessions. In 1940, Jimmy Hoffa, under attack from the CIO-affiliated United Retail, Wholesale, and Department Store Employees, forced a strike by insisting on a twenty-five percent wage increase in negotiations with Detroit cartage companies.<sup>229</sup> Eighteen hundred Teamsters struck for three weeks in support of Hoffa’s ambitious wage proposal.<sup>230</sup> Freight shipments into and out of Detroit were shut down.<sup>231</sup> Hoffa was able to secure “a 10 percent [wage] increase, which was well under their original, pretentious demand but still comparable to the best contracts won by large CIO unions, including the Steelworkers and the UAW, allowing Hoffa to claim victory.”<sup>232</sup> While it is impossible to know if Hoffa would have struck for a twenty-five percent wage increase absent the CIO threat, it is likely that Hoffa would not have been as willing to demonstrate that he could “deliver the goods” absent competition from the CIO.

Kaufman also argued that low employee preference for unions has contributed to the weak worker demand for union services. “Employee preferences for union membership are also hurt by continued concerns over union corruption and nondemocratic [sic] practices, as well as a more general negative image of unions as stodgy, out-of-date institutions more relevant to a smokestack/blue-collar economy.”<sup>233</sup>

Competition has the added benefit of making unions more democratic and correcting union corruption. For example, Galenson observed that in addition to forcing unions to more vigorously represent their members, the rivalry between the AFL and the CIO “helped eliminate corrupt and undemocratic organizations.”<sup>234</sup> Thus, competition could improve employees’ preferences for union membership.

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226. GALENSON, *THE CIO CHALLENGE*, *supra* note 3, at 212.

227. *Id.* at 211.

228. *Id.* at 211–12.

229. RUSSELL, *supra* note 92, at 70.

230. *Id.*

231. *Id.*

232. *Id.*

233. Kaufman, *supra* note 223, at 85.

234. GALENSON, *THE CIO CHALLENGE*, *supra* note 3, at 615.

## VI. PROPOSAL

There is compelling historical and empirical evidence touting the benefits of inter-union competition on organizing. For these reasons, I propose to resurrect union rivalry. My research shows that all unions should be made to fear the threat of raid. A healthy market for union control would eliminate unions that are corrupt, grossly mismanaged, and neglectful, in addition to unions that are otherwise inefficient or ineffective relative to rival unions. Competition would force unions to more vigorously represent their members and to zealously recruit new ones. It would make unions demonstrate that they can “deliver the goods” and would force incumbent unions to remain responsive to the interests of their members. The sum of these effects would, in turn, increase worker demand for union services.

In order for unions to reap the benefits of competition, a market for union control must be created. Stewart Schwab offered a description of how such a market would work:

One can envision, then, a market for union control broadly analogous to the market for corporate control. . . . [U]nion raiders might be prowling around, looking for ill-managed locals that are not fully exploiting unionization’s potential gains for workers in that workplace. Although individual workers cannot effectively monitor leaders, experienced raiders can weigh the signals (e.g., the amount of grumbling, the company profits, and relative wages). Having spotted a target, perhaps a raider talks to the target’s leaders about a merger, or else attempts to convince members to “vote out” the incumbents. If enough support exists, the NLRB will hold a raid election. If the raider wins, new leaders will replace the incumbents. If the raider has perceived correctly that it can manage the local better than the incumbent leaders can, it will receive the benefits of a well-managed local. Union dues can be expected to rise as compensation and working conditions improve. Thus, the raider and current members benefit from the raid.<sup>235</sup>

Jeffrey Follett had a similar vision:

One can view unions as businesses supplying labor to employers, and employees as the shareholders in those businesses. Rather than certification elections, something akin to a corporate buyout or proxy contest would be the model, allowing representative status to be purchased by competitors. Unions would compete with one another on the basis of their value to the employees, and “union raiders” could promise packages of certain benefits,

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235. Schwab, *supra* note 21, at 387–88.

including democratic processes. If enough employees decided to sell, the new union would move in and acquire the status of exclusive bargaining representative. If this union was unable to fulfill its promises, employees would respond favorably to a takeover bid from another union.<sup>236</sup>

The creation of a truly competitive market for union control requires fundamental changes to our nation's antitrust and labor laws. Samuel Estreicher recognized this fact in his proposals to amend the antitrust laws to allow for-profit organizations to become bargaining agents,<sup>237</sup> to relax the labor laws so that unions may experiment with other models of unionism,<sup>238</sup> and to partially repeal the "company union" prohibition of the NLRA to permit firms to experiment with non-deceptive forms of employee involvement.<sup>239</sup> I agree with Estreicher's proposals and acknowledge that such legal reforms would foster a more competitive marketplace for collective representation services. This is especially so with respect to his argument that the law should be indifferent to the form that bargaining agents take and that for-profit unionism should be legalized.<sup>240</sup> This is because, as Estreicher observed, "the current system . . . produces a limited supply of bargaining agency service providers, and those that are produced are exclusively of the nonprofit membership form."<sup>241</sup> Estreicher is correct in concluding that due to legal restrictions "the market for representational services is distorted because regulations erect high barriers to entry, effectively insulating labor organizations from the traditional variety of competition."<sup>242</sup> Schwab, too, correctly identified the "muting" effect that the nonprofit requirement has on the market for union control:

The lack of profits, of course, dramatically mutes the incentives to take over a union. Raiders can hope for enhanced dues and leader salaries, as well as enhanced prestige and power of running a larger union. But they can not directly benefit from an increase in the residual share. This reduces the incentive to raid and increases the opportunities for incumbent leaders to shirk.<sup>243</sup>

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236. Jeffrey S. Follett, *The Union as Contract: Internal and External Union Markets After Pattern Makers*, 15 BERKELEY J. EMP. & LAB. L. 1, 42 (1994).

237. Estreicher, *supra* note 10, at 516.

238. Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 829 (1996).

239. Samuel Estreicher, *Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125, 127 (1994).

240. Estreicher, *supra* note 10, at 516.

241. *Id.* at 514.

242. *Id.* at 515.

243. Schwab, *supra* note 21, at 396 (footnotes omitted).

While I agree that in an ideal world for-profit unionism should be legal, the significant legal changes proposed by Estreicher, while certainly necessary, are not realistically achievable in today's political environment. The same goes for Estreicher's other proposals to relax the labor laws. Congress has not indicated a willingness to amend the NLRA. Achievable reforms cannot require congressional action; they must be won elsewhere. Therefore, my proposal is limited to reforms of the AFL-CIO and the NLRB, reforms that do not require congressional action and reforms that I believe can be achieved in the immediate future.

*A. Repeal Articles XX and XXI of the AFL-CIO Constitution*

The glaring barrier to a competitive market for union control is Article XX of the AFL-CIO Constitution, the so-called no-raiding pact. Section 2 provides that:

Each affiliate shall respect the established collective bargaining relationship of every other affiliate. No affiliate shall organize or attempt to represent employees as to whom an established collective bargaining relationship exists with any other affiliate. For purposes of this Article, the term "established collective bargaining relationship" means any situation in which an affiliate, or any local or other subordinate body thereof, has either (a) been recognized by the employer (including any governmental agency) as the collective bargaining representative for the employees involved for a period of one year or more, or (b) been certified by the National Labor Relations Board or other federal or state agency as the collective bargaining representative for the employees.<sup>244</sup>

Section 3(a) provides that:

Each affiliate shall respect the established work relationship of every other affiliate. For purposes of this Article, an "established work relationship" shall be deemed to exist as to any work of the kind that the members of an organization have customarily performed at a particular plant or worksite, whether their employer is the plant operator, a contractor, or other employer. No affiliate shall by agreement or collusion with any employer or by the exercise of economic pressure seek to obtain work for its members as to which an established work relationship exists with any other affiliate, except with the consent of such affiliate.<sup>245</sup>

By insulating "established collective bargaining relationships" and "established work relationships" from competition with another AFL-CIO

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244. AFL-CIO CONST. art. XX, § 2.

245. AFL-CIO CONST. art. XX, § 3(a).

affiliate, these rules prevent the establishment of a competitive market for union control.

I am not the first to recognize the negative consequences of the no-raiding pact. Brian Petruska has proposed that these rules be amended to permit competition “whenever the challenger can establish that the incumbent is corrupt, guilty of gross mismanagement, or neglectful.”<sup>246</sup> However, Petruska’s proposal does not go far enough. Notwithstanding the difficulty in, and costs associated with, proving that a union’s conduct falls within one of these vague categories, there is simply no legitimate justification for insulating unions from the threat of raid, even when they are not “corrupt, guilty of gross mismanagement, or neglectful.”<sup>247</sup> Petruska argued that “[w]ith their core membership base under threat from competition, bargaining representatives intent on broadening their organization will feel compelled to abandon its organizing efforts and dedicate resources to defensively preserving its domain.”<sup>248</sup> Thus, he concluded that “[t]he result of these competitive pressures is obvious: less organizing.”<sup>249</sup>

However, the overwhelming historical and empirical evidence demonstrates that competition in fact has the opposite result on organizing. A closer look reveals that Petruska’s proposal suffers from the same defect that invalidates the justification for a complete ban on inter-union competition. It assumes that competition is a waste of resources:

this proposal does not seek to disturb the idea that, in general, federation members should not waste their resources competing amongst themselves. It is not an argument in favor of unfettered competition between unions. Instead, the idea is that infighting should be permitted when the competition advances the AFL-CIO’s other substantive goals. This is why I propose to add exceptions to Article XX instead of advocating its abrogation.<sup>250</sup>

I now take Petruska’s proposal one step further and advocate for the abrogation of Article XX. I see no reason why the AFL-CIO should protect ineffective affiliates from market discipline merely because the affiliate’s actions do not rise to the level of corruption, gross mismanagement, or neglect. Unfettered competition advances the AFL-CIO’s perennial goal of organizing the unorganized by forcing unions to become more militant and responsive, and it eliminates unions too weak to compete. Unions that lack the strength to “deliver the goods” should not be

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246. Brian Petruska, *Choosing Competition: A Proposal to Modify Article XX of the AFL-CIO Constitution*, 21 HOFSTRA LAB. & EMP. L.J. 1, 47 (2003).

247. *Id.*

248. *Id.* at 42.

249. *Id.*

250. *Id.* at 51.



able to seek shelter behind the veil of the no-raiding pact simply because they have an “established collective bargaining relationship” or an “established work relationship.” Such unions make it harder for stronger unions or unions with a better organizing strategy to recruit new members because they give workers a bad taste of unionism and convey the message that the benefits of unionization are not worth the costs. An affiliate must be permitted to raid another affiliate that lacks the strength to compete. Through the threat of raid, each affiliate would have the ability to hold every other affiliate accountable for its actions or inactions. By repealing the no-raiding pact, the AFL-CIO could expose ineffective unions to healthy competition and make unions more responsive bargaining agents.

For these same reasons, I propose that Article XXI of the AFL-CIO Constitution be repealed. Article XXI establishes procedures for resolving organizing competition between AFL-CIO affiliates for unorganized workers; i.e., when there is no “established collective bargaining relationship” or “established work relationship” within the meaning of Article XX. Section 2 provides that “[a]ny AFL-CIO affiliate that is actively engaged in organizing a group of employees and seeking to become their exclusive representative may invoke this Procedure to seek a determination affirming its ability to do so without being subject to ongoing competition by any other AFL-CIO affiliate.”<sup>251</sup> Section 4 allows an umpire to award exclusive jurisdiction to one union over another union rather than simply allow the employees to choose between competing unions.<sup>252</sup>

Article XXI should be repealed because it allows an umpire to grant a union the exclusive right to organize a group of workers based on the *umpire’s* determination about which union is best for those workers. As explained above, no union should be granted a monopoly over a group of workers. Moreover, representation decisions should only be made by the workers that the competing unions seek to represent. Article XXI removes that choice from the workers and gives it to an umpire, allowing the federation to manage employee free choice through a top-down directive. There is simply no legitimate reason for this degree of bureaucracy and paternalism. Unions, as agents of the workers they represent, should be put to the task of making their case directly to the workers, the principals in the agency relationship. If the workers later decide that they chose wrongly, then they may correct their choice by ousting the incumbent union and electing a rival. But it should be the workers who make that decision for themselves, not a bureaucrat of any labor federation.

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251. AFL-CIO CONST. art. XXI, § 2.

252. *Id.* at § 2.

*B. Make the Contract Bar Rebuttable and Open the Challenge Period*<sup>253</sup>

While repealing the no-raiding pact in the AFL-CIO Constitution would be a good first step toward creating a market for union control, current law often insulates unions from competition when those unions are parties to a collective bargaining agreement. Under the NLRB's contract bar doctrine, rival unions are barred from seeking a representation election among employees covered by a collective bargaining agreement for the length of the agreement up to a maximum of three years.<sup>254</sup> The contract bar denies a rival union access to the Board's election machinery during the first three years of a collective bargaining agreement, even if one hundred percent of the employees in the bargaining unit support a petition to elect the rival union. In other words, the contract bar confers upon the incumbent union an irrebuttable presumption of majority support for a period of three years. Unions too weak to "deliver the goods" may thus seek shelter from raid under the contract bar, just like they can under the no-raiding pact.

A further legal restraint on competition is the short time frame in which election petitions challenging an incumbent union must be filed. The law requires that election petitions be filed no more than ninety days and no less than sixty days prior to the expiration of the collective bargaining agreement.<sup>255</sup> If no election petition is filed within this narrow thirty-day window period, the employer and the incumbent union are

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253. It is important to note that neither the contract bar nor the challenge period is mandated by statute. Rather, both are creatures of the NLRB. *See* *Deluxe Metal Furniture Co.*, 121 N.L.R.B. 995 (1958) (creating a time period in which challenges to unions protected by the contract bar must be filed); *Nat'l Sugar Refining Co. of New Jersey*, 10 N.L.R.B. 1410 (1939) (establishing that a valid collective bargaining agreement is a bar to an election for a "reasonable" period). Thus, no congressional action is required to modify their terms, which is why I consider them to be within the realm of achievable reform. More importantly, as I submit in this Article, neither doctrine enjoys strong statutory support so there is a persuasive argument that the NLRB should modify the doctrines accordingly. However, because modification of the doctrines does require NLRB action, it is necessary to demonstrate why they are inconsistent with the NLRA, which I do in this Article.

254. *See* *General Cable Corp.*, 139 N.L.R.B. 1123 (1962) (holding that a valid collective bargaining agreement bars an election among employees covered by that agreement for the term of the agreement up to three years). Conceived in 1939, the contract bar initially botched elections only during the first year of the contract. *See* *Lewis Steel Products Corp.*, 23 N.L.R.B. 793 (1940). In 1947, the Board extended the contract bar period to two years. *See* *Reed Roller Bit*, 72 N.L.R.B. 927 (1947). The contract bar period was lengthened to three years in 1962, in part to discourage union raiding. *See* *General Cable Corp.*, 139 N.L.R.B. 1123, 1126.

255. *See* *Leonard Wholesale Meats*, 136 N.L.R.B. 1000 (1962) (holding that petitions filed more than ninety days prior to the expiration of a collective bargaining agreement unduly disturb the collective bargaining relationship).

rewarded with a sixty-day insulated period. If the parties reach a successor agreement during the insulated period, the contract bar is revived to block any election petitions for another three years. Thus, once a deal is struck, the incumbent union cannot be raided outside of the narrow thirty-day window period that arises once every three years. Because of: (1) the lack of information among employees, (2) the absence of a strong market for union control due to the fact that the majority of unions have agreed not to raid each other, and (3) the sixty-day post window insulation period, it is not unlikely for the contract bar to perpetually insulate ineffective unions from the benefits of competition.<sup>256</sup>

The Board's justification for its contract bar doctrine and restricted challenge period is the need to maintain stable labor relations.<sup>257</sup> While this is a laudable goal, it is achieved at too high a cost because it subordinates employee free choice to labor peace without any statutory authority to do so. To be sure, industrial peace is the ultimate goal of the NLRA.<sup>258</sup> But the statute is designed to achieve this objective by safeguarding employee free choice, not suppressing it. Section 1 of the NLRA provides that labor peace is to be achieved "*by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . .*"<sup>259</sup> Nowhere does the statute say that labor peace is to be achieved at the expense of employee free choice or that the right to full freedom of association is waived when a collective bargaining agreement is struck.

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256. The recognition and certification bars do not pose the same problems because their durational scope is limited to the first year following recognition or certification and once they lapse, they cannot be revived. During this probationary period the relationship is in its infant stages and employees are still in the process of evaluating the union's effectiveness. Prior to the conclusion of the first year of the relationship, there is generally no contract for the union to tout or defend and employees are still waiting to see if the union is capable of delivering on its campaign promises. If, at the conclusion of the first year following recognition or certification, a majority of the employees decide that they no longer want the union to represent them, or they prefer that a rival union represent them, neither the recognition bar nor the certification bar will prevent them from effectuating their choice. However, if a collective bargaining agreement has been struck, the contract bar will prevent them from exercising their free choice.

257. See *General Cable Corp.*, 139 N.L.R.B. at 1125 (asserting that expanding the bar period to three years would introduce "a greater measure of stability of labor relations"); *Leonard Wholesale Meats*, 136 N.L.R.B. at 1001 (holding that reducing "the open period for the filing of representation petitions during the term of an existing bargaining contract" would "further promote the stability of collective bargaining agreements, without . . . lessening employees' freedom of choice").

258. See 29 U.S.C. § 171(a) (2000) (stating that "sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees").

259. 29 U.S.C. § 151 (emphasis added).

Admittedly, there must be some reasonable limits on the right to full freedom of association so that collective bargaining can have an opportunity to achieve its intended result of industrial peace. Thus, as the Supreme Court has held, “a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.”<sup>260</sup> However, given that the statute is aimed at safeguarding employee free choice, a union’s insulation period should be no greater than the time reasonably needed to negotiate an initial collective bargaining agreement. A one-year insulation period that is limited to newly recognized or certified unions is thus capable of reconciliation with the NLRA’s dual goals of achieving industrial peace while simultaneously protecting employee free choice. However, a three-year insulation period that continues to be effective even when the parties have a long bargaining history together cannot be reconciled with these statutory goals, because it operates beyond the time reasonably needed to give collective bargaining “a fair chance to succeed.”<sup>261</sup> This is especially true when one considers that the bar is revived with each new contract negotiated unless a petition is filed within the narrow window period. This degree of restraint on employee free choice is inconsistent with the overarching policy of the NLRA to achieve labor peace by effectuating employee free choice.

While I advocate reasonable limits on the right to full freedom of association when a union is initially recognized or certified in order to give collective bargaining a fair chance to succeed, the right of “full freedom of association,”<sup>262</sup> if it is to have any meaning, must allow employees to choose to disassociate and/or associate with another bargaining agent after the time needed to give collective bargaining a fair chance to succeed has lapsed. The statute reflects this policy by protecting the right of employees “to bargain collectively through representatives *of their own choosing*.”<sup>263</sup>

Yet the contract bar subverts this statutory policy by converting a one-time showing of majority union support, whether by election or card-check, into an irrevocable three year commitment of union support upon contract settlement—a commitment that cannot even be rebutted by a showing that the union no longer enjoys majority support or that the employees support a rival union. Even assuming that the Board is correct in its assertion that the contract bar promotes labor stability,<sup>264</sup> I fail to see how the doctrine can

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260. *Franks Bros. v. NLRB*, 321 U.S. 702, 705 (1944). In this case, the Supreme Court affirmed the Board’s use of a bargaining order to remedy the employer’s unfair labor practice despite the fact that the union no longer enjoyed majority support.

261. *Id.*

262. 29 U.S.C. § 151.

263. 29 U.S.C. § 157 (emphasis added).

264. Labor relations are not stable if a majority of employees desire to be represented by a rival union but are prevented from selecting the representative of their own choosing

be squared with the NLRA. Congress anticipated that a majority of employees in a bargaining unit might choose to associate with a union but later change their minds, and the statute addresses such a scenario. Section 9(c) provides that employees may seek an election upon a showing that the “labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative,” no longer enjoys majority support.<sup>265</sup> But the contract bar effectively prevents employees from exercising their statutory right to seek an election pursuant to section 9(c) while there is a contract in effect, because the Board does not entertain questions concerning representation during the bar period. Thus, the right to disassociate and/or associate with a rival union, a right implicit in the “full freedom of association” guaranteed by the statute,<sup>266</sup> is not available to employees during the contract bar period and, consequently, the employees are locked into their one-time choice for at least three years, well beyond the time reasonably necessary to give collective bargaining a fair chance to succeed.

Another policy that unnecessarily restrains employee free choice is the Board’s rule restricting the exercise of the right to disassociate and/or associate with a rival union to a narrow thirty-day window period that is no more than ninety days and no less than sixty days before the expiration of the agreement. This is especially troubling considering that employees may not know that they can seek to oust their union or elect a rival during this limited window period, and the law does not impose an affirmative duty on either the union or the employer to make them aware of it.<sup>267</sup> Thus, if out of ignorance of the law, employees fail to file an election petition within the window period, they are barred from seeking an election for another sixty days. If the parties reach a successor agreement during this insulated period, the contract bar is revived. In fact, if no election petition is ever filed within any subsequent window period, the contract bar continues to be revived each time a successor agreement is negotiated. This unreasonable degree of restraint on employee free choice is a far cry from the limited restraint on free choice inflicted by the recognition of certification bars, which operate only during the first year following recognition or certification and are not revived in successive years.<sup>268</sup>

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solely because a contract between the incumbent union and their employer is in effect. Moreover, in such situations, the contract bar may even make labor relations more unstable, because neither the employer nor the incumbent union may be in a position to control employee behavior.

265. 29 U.S.C. § 159(c)(1)(A)(ii).

266. 29 U.S.C. § 151.

267. The concern is less acute if a rival union is seeking to represent the workers, because it should be more familiar with the requirements of the law than the average employee.

268. It makes perfectly good sense to insulate a collective bargaining relationship from

To prevent the contract bar from infringing more than reasonably necessary on the right to full freedom of association, I propose that the doctrine be modified so that in the absence of any other bar, the presumption of majority support may be rebutted at any time during the contract whenever the Board has a reasonable belief that the union no longer enjoys majority support.<sup>269</sup> Absent rebuttal, the presumption of majority support would continue for the term of the contract up to three years. A thirty percent showing of support for a representation election would not give the Board a reasonable belief that a majority of employees in the bargaining unit no longer support the union.<sup>270</sup> However, a fifty percent plus one showing of support would clearly give the Board a reasonable belief that the union has lost support among a majority of unit employees.<sup>271</sup> When the Board has reason to believe that the majority of unit employees no longer support the union, it makes no sense to continue the fiction of majority support. Insulating the union from attack when the Board has reason to believe that a majority of unit employees do not support the union is inconsistent with the statutory objective of achieving labor peace by effectuating employee free choice.

The showing of support required to rebut the presumption of majority support during the contract term would not be the same as the showing of support required to rebut the presumption of majority support when the contract is nearing expiration. This is because the Board has less reason to

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attack in its embryonic stage. This is because collective bargaining takes time to bear fruit. However, this same concern is not present after the embryonic stage has lapsed. Thus, the justification for the certification bar and the recognition bar does not extend to the contract bar. Once the initial year following certification or recognition has lapsed, collective bargaining has been given a reasonable period of time to succeed and the employees are in a better position to decide whether or not they want the union to continue to represent them.

269. This proposal strikes a better accommodation between the NLRA's dual goals of achieving labor stability while simultaneously protecting employee free choice than does the Board's current contract bar doctrine. Labor stability is achieved by requiring a majority showing to rebut the presumption of union support before the contract bar can be lifted. On the other hand, employee free choice is safeguarded because, absent the application of any other election bar, the majority may exercise their right to disassociate from the incumbent union or associate with a rival union at any time, regardless of whether there is a contract in place.

270. The thirty percent threshold that the Board currently uses to determine if a question concerning representation exists is too disruptive to the ultimate goal of achieving labor stability to warrant rebutting the presumption of majority support during the term of a contract. This is because a sizeable minority faction could continually stymie collective bargaining even though the majority of unit employees still support collective bargaining. Thirty percent of the unit should not be allowed to force an election when a contract is in effect because it would prevent effectuation of the majority's choice to bargain collectively through their chosen representative and would unduly disrupt collective bargaining.

271. A fifty percent plus one showing of support requirement ensures that collective bargaining will only be disrupted when there is a reasonable basis for the Board to believe that a majority of the employees no longer support the union.

insulate the collective bargaining relationship from attack when there is no contractual bargaining relationship to protect. Thus, under my proposal, employees or rival unions could continue to challenge incumbent unions by filing a petition with only a thirty percent showing of support if the petition is filed no more than ninety days prior to contract expiration. I propose eliminating the sixty-day "insulated period" so that the window period for a challenge with a thirty percent showing of support is at least ninety days.<sup>272</sup> If employees are happy with the contract the union negotiated, there is no need for the law to provide an insulated period to negotiate a successor agreement. And if employees are not satisfied, then the law should not insulate the union from decertification or the threat of raid.<sup>273</sup>

### C. *Permit Easier Craft Unit Severance*

Current Board law is unnecessarily resistant to craft unit severance from an established larger bargaining unit. This resistance insulates industrial unions from raid by craft unions seeking to represent only a subdivision of the entire bargaining unit and, consequently, limits the

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272. I would require employers to post these rules in conspicuous places to put employees on notice of their legal rights to seek a representation election.

273. This proposal is also a better approach than alternative proposals, such as shortening the bar period to two years or having no contract bar. While a two-year bar period would certainly be less offensive to employee free choice than the current three-year bar period, the same concerns are implicated. Despite its shorter term, a two-year contract bar still extends the non-rebuttable presumption of majority support beyond the embryonic stage of collective bargaining and, therefore, may prevent a representation election after the probationary period has lapsed even if there is evidence that a majority of employees no longer support the union. As I argue above, any restriction on employee free choice after the embryonic stage of the collective bargaining relationship has lapsed cannot be irrebuttable if it is to be consistent with the NLRA. Because a two-year bar suffers from the same flaw as the three-year bar, it is not a viable alternative.

Nor is it a good idea to have no contract bar. Eliminating the contract bar entirely goes too far because it would allow a substantial minority faction to continually disrupt collective bargaining and veto the will of the majority of workers to bargain collectively by forcing elections every year. That would frustrate both of the statutory goals of achieving labor peace through effectuating the free choice of the majority of workers in a bargaining unit.

As to concerns that my proposal would lead to shorter contracts or would otherwise result in less stable labor relations, I contend that such concerns are overstated. My proposal conforms to current law in that the presumption of majority support continues for the life of the contract up to three years. Where my proposal diverges from current law is not in the length of the bar period, but in the rebuttability of the presumption. I argue that the bar should be rebuttable when there is evidence that the union no longer enjoys majority support. Thus, under my proposal, the contract bar would continue to block elections for the first three years of the contract unless the presumption is rebutted by an affirmative showing that at least fifty percent plus one of unit employees no longer support the incumbent union. Converting an irrebuttable presumption into a rebuttable presumption is not a radical departure from current law, especially given the high threshold required to be shown in order to rebut the presumption.

potential number of raiders in the marketplace. I propose that the Board permit easier craft unit severance in order to create a more competitive market for union control.

The Board announced its current approach to craft unit severance in the 1966 case of *Mallinckrodt Chemical Works*.<sup>274</sup> In *Mallinckrodt*, the Independent Union of Atomic Workers represented all production and maintenance employees at Mallinckrodt Chemical Works. The International Brotherhood of Electrical Workers filed a representation petition with the Board seeking to represent all instrument mechanics. Although the Board found that the instrument mechanics constituted an identifiable group of skilled journeymen, the Board nevertheless dismissed the representation petition because it found the proposed craft unit to be inappropriate. The Board held that

it appears that the separate community of interests which these employees enjoy by reason of their skills and training has been largely submerged in the broader community of interests which they share with other employees by reason of long and uninterrupted association in the existing bargaining unit, the high degree of integration of the employer's production processes, and the intimate connection of the work of these employees with the actual uranium metal-making process itself.<sup>275</sup>

The *Mallinckrodt* Board overruled its prior decision, *American Potash & Chemical Corporation*,<sup>276</sup> a 1954 case that permitted severance when the employees involved constitute a true craft or departmental group and the union seeking to represent the employees involved had traditionally represented workers in that craft. The *Mallinckrodt* Board thought the *American Potash* test was too narrow because it failed to take into consideration the interests of the existing unit employees outside of the craft proposed for severance or the interests of the employer. Thus, *Mallinckrodt* broadened the test for severance by requiring that the Board determine

[t]he history of collective bargaining of the employees sought and at the plant involved, and at other plants of the employer, with emphasis on whether the existing patterns of bargaining are productive of stability in labor relations, and whether such stability will be unduly disrupted by the destruction of the existing patterns of representation[.]<sup>277</sup>

as well as “[t]he degree of integration of the employer’s production

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274. 162 N.L.R.B. 387 (1966).

275. *Id.* at 399.

276. 107 N.L.R.B. 1418 (1954).

277. *Mallinckrodt Chemical Works*, 162 N.L.R.B. 387, 397 (1966).



processes, including the extent to which the continued normal operation of the production processes is dependent upon the performance of the assigned functions of the employees in the proposed unit.”<sup>278</sup> These additional factors have led the Board to generally deny craft unit severance petitions.<sup>279</sup>

*Mallinckrodt* stands on shaky statutory ground. Section 9(b)(2) of the NLRA provides that “the Board shall not . . . decide that any craft unit is inappropriate . . . on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation.”<sup>280</sup> Even if this provision only prevents the Board from giving controlling weight to a prior unit determination, as the Board has held,<sup>281</sup> it does not mean that the Board has carte blanche authority to veto the exercise of employee free choice. As discussed above, the NLRA is designed to achieve labor peace by safeguarding employee free choice, not suppressing it. Accordingly, if a group of employees would, absent their inclusion in an industrial bargaining unit, constitute a unit appropriate for collective bargaining, then the statute protects the right of those employees to bargain collectively in a unit separate from the larger unit. Indeed, the statute compels the Board to “decide in each case whether, *in order to assure to employees the fullest freedom in exercising the rights guaranteed by this [Act],* the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . .”<sup>282</sup> Nowhere does the statute say that the Board should make unit determinations based on the bargaining history or the degree of integration of the employer’s production processes. The glaring absence of such statutory authority led the *American Potash* Board to conclude that “the right of separate representation should not be denied the members of a craft group merely because they are employed in an industry which involves highly integrated production processes and in which the prevailing pattern of bargaining is industrial in character.”<sup>283</sup> Because the statute provides that the Board must make unit determinations based on assuring employees the “fullest freedom” of choice,<sup>284</sup> there is a good argument that *Mallinckrodt* is inconsistent with the NLRA and should, therefore, be overruled. I propose that the Board return to doctrine set forth in *American Potash*.

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278. *Id.*

279. See Abodecly, *supra* note 20.

280. 29 U.S.C. § 159(b)(2) (2000).

281. See National Tube Co., 76 N.L.R.B. 1199 (1948) (dismissing petitioner’s argument as inappropriate for the purposes of collective bargaining).

282. 29 U.S.C. § 159(b) (emphasis added).

283. American Potash & Chemical Corporation, 107 N.L.R.B. 1418, 1421 (1954).

284. 29 U.S.C. § 159(b).

D. *Require Strict Employer Neutrality Between Rival Unions*

The creation of a healthy market for union control also requires an employer to maintain strict neutrality between unions competing to organize its workers. Otherwise, the incumbent union may collude with the employer in an effort to ward off the raiding union, using the employer as a “white knight” to prevent a takeover.<sup>285</sup> The opportunistic use of such defensive tactics for the purpose of thwarting raid attempts was illustrated by Stewart Schwab:

An incumbent might agree with the company to keep out an aggressive raiding union by giving high immediate benefits followed by a tacit promise not to pursue aggressively worker interests in monitoring the contract. The employer, naturally, will be delighted by such an agreement. Cases are full of illustrations in which employers subtly favor the incumbent union. Such a possibility will discourage raiders from even attempting to conduct a raid. The ultimate consequence is a weaker market for union control.<sup>286</sup>

To prevent this type of opportunistic behavior, the NLRB should require an employer to remain neutral in a raid attempt.<sup>287</sup> Current Board law requires employer neutrality only when rival unions have filed valid representation petitions to represent the same group of unorganized workers.<sup>288</sup> In initial organizing situations involving two or more unions where no representation petition has been filed, an employer is free to recognize any union so long as that union has demonstrated that it has majority support.<sup>289</sup> Moreover, the Board has refused to extend the neutrality rule into rival situations involving a challenge to an incumbent union and has mandated that the employer continue to recognize, and bargain with, the incumbent union even if the rival union has filed a valid

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285. Schwab, *supra* note 21, at 412–14.

286. *Id.* at 413–14 (footnote omitted). For an example of collusion in the face of a raid, see, e.g., *North Hills Office Serv., Inc.*, No. 29-CA-25930, 2005 WL 123420 (N.L.R.B. Div. of Judges Jan. 14, 2005) (finding that the employer committed an unfair labor practice by agreeing to increase wage rates to dissuade employees from becoming members of SEIU, Local 32BJ and to induce them to remain members of the incumbent National Organization of Industrial Trade Unions).

287. For an argument that the law should require incumbent corporate managers to remain neutral in takeover attempts, see Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1161 (1981).

288. See *Bruckner Nursing Home*, 262 N.L.R.B. 955, 956 (1982) (stating employers presented with rival claims—in the form of representation petitions—should follow a course of strict neutrality with respect to the competing unions).

289. *Id.*

representation petition.<sup>290</sup> Like the deficiencies in its contract bar and craft unit severance doctrines, the Board's refusal to require strict employer neutrality in every rival union situation sacrifices employee free choice on the altar of industrial peace in contravention of the NLRA.

The Board was first called upon to rule on this issue in *Midwest Piping & Supply Company*,<sup>291</sup> a 1945 case involving an AFL affiliate versus a CIO affiliate. In *Midwest Piping*, the employer voluntarily recognized one of two competing unions after both had filed valid representation petitions with the Board.<sup>292</sup> The Board held that the employer's recognition violated the NLRA because the employer knew that a real question concerning representation between the two unions existed.<sup>293</sup> The Board found that "[u]nder [these] circumstances, the Congress has clothed the Board with the *exclusive* power to investigate and determine representatives for the purposes of collective bargaining."<sup>294</sup> The Board held that the employer had "elected to disregard the orderly representative procedure set up by the Board under the Act . . . and to arrogate to itself the resolution of the representation dispute . . ."<sup>295</sup> The Board concluded that "such conduct by the respondent contravenes the letter and the spirit of the Act, and leads to those very labor disputes affecting commerce which the Board's administrative procedure [was] designed to prevent."<sup>296</sup> *Midwest Piping* thus reflects the Board's judgment that, in its expertise, the NLRA requires strict employer neutrality in order to effectuate the statute's mandate of safeguarding employee free choice and that the Board's statutory election procedures are the exclusive means of ascertaining employee free choice in rival union situations.

For nearly forty years the Board adhered to its *Midwest Piping* doctrine in all rival union situations, involving both incumbents and non-incumbents,<sup>297</sup> with mixed results in the federal appellate courts.<sup>298</sup> Partly

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290. See *RCA del Caribe, Inc.*, 262 N.L.R.B. 963 (1982) (reasoning that prohibiting negotiations until the Board has ruled on the results of a new election might impose an undue hardship on employers, unions, and employees).

291. 63 N.L.R.B. 1060 (1945).

292. *Id.* at 1065.

293. See *id.* at 1069–70 (discussing the representation of the employees in question).

294. *Id.* at 1070 (emphasis added).

295. *Id.*

296. *Id.*

297. See *Shea Chemical Corp.*, 121 N.L.R.B. 1027 (1958) (extending the *Midwest Piping* doctrine to rival situations involving incumbents).

298. See, e.g., *Kona Surf Hotel*, 201 N.L.R.B. 139, *enforcement denied*, 507 F.2d 411 (9th Cir. 1974); *Playskool, Inc.*, 195 N.L.R.B. 560, *enforcement denied*, 477 F.2d 66 (7th Cir. 1973); *American Bread Co.*, 170 N.L.R.B. 85, *enforcement denied*, 411 F.2d 147 (6th Cir. 1969); *Pittsburgh Value Co.*, 114 N.L.R.B. 193, *enforcement denied*, 234 F.2d 565 (4th Cir. 1956). The courts of appeals disagreed with the Board that in a rival union context an employer who recognizes a majority union thereby commits an unfair labor practice, noting

because of its checkered success in getting such orders enforced, in 1982 the Board issued two decisions that greatly narrowed the scope of *Midwest Piping*. In *Bruckner Nursing Home*,<sup>299</sup> the Board reconsidered whether the *Midwest Piping* doctrine should extend to initial organizing situations involving rival unions where neither union has filed a valid representation petition. Mainly concerned that in such situations neutrality would allow a rival union to forestall the recognition of a union that enjoys majority support, the Board held that the *Midwest Piping* doctrine does not apply in such situations.<sup>300</sup> The Board distinguished *Midwest Piping* on the fact that in that case the two rival unions had each demonstrated substantial support by filing representation petitions and that, under those circumstances, “an employer’s grant of recognition may unduly influence or effectively end a contest between labor organizations.”<sup>301</sup> Despite retreating from the broad language of *Midwest Piping*, the *Bruckner* Board reaffirmed the principle that “where a labor organization has filed a petition, both the Act and our administrative experience dictate the need for resolution of the representation issue through a Board election rather than through employer recognition.”<sup>302</sup>

The companion case decided by the Board on the same day as *Bruckner* was *RCA del Caribe, Inc.*<sup>303</sup> In *RCA*, the Board reconsidered whether the *Midwest Piping* doctrine extends to situations where a rival union is challenging an incumbent. While there was precedent on point holding that it does extend to challenge incumbents,<sup>304</sup> the *RCA* Board reversed the earlier Board decision and held that it does not.<sup>305</sup> Furthermore, the Board held that the employer must continue to bargain with the incumbent union and that it commits an unfair labor practice if it withdraws recognition because a rival has filed a valid representation petition.<sup>306</sup> The Board held that if the incumbent loses the petitioned-for election, any contract negotiated would have no legal effect.<sup>307</sup>

Although the *RCA* Board stated that “our new rule does not have the effect of insulating incumbent unions from a legitimate outside challenge” because “[a]s before, a timely filed petition will put an incumbent to the test of demonstrating that it still is the majority choice for exclusive

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that in such a situation the employer has not “coerced or interfered” with employee free choice. See *Playskool, Inc.*, 477 F.2d at 70.

299. 262 N.L.R.B. 955 (1982).

300. See *id.* at 957.

301. *Id.* at 958.

302. *Id.* at 957–58.

303. 262 N.L.R.B. 963 (1982).

304. See *Shea Chemical Corp.*, 121 N.L.R.B. 1027 (1958).

305. 262 N.L.R.B. at 965.

306. *Id.*

307. *Id.* at 966.

bargaining representative[.]”<sup>308</sup> it is clear that the Board turned a blind eye to the real implications of its holding. As the Supreme Court was quick to point out nearly half a century before *RCA*, “once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of employees, and hence in preventing the recognition of any other.”<sup>309</sup> Indeed, Board Chairman Van De Water made precisely this point in his dissent in *RCA*, arguing that by mandating continued recognition of the incumbent, “the selection process of a bargaining representative is no longer reserved to employees, as the Act intended and provided, but instead is tainted by the employer’s choice and ability to influence employees in matters that concern their employment.”<sup>310</sup> Chairman Van De Water pointed out the perverse incentive that continued recognition creates for the employer and the incumbent to collude:

an employer may wish to retain the current union relationship in the face of a challenge by a rival union which the employer may consider a more powerful or effective employee representative—resulting in the employer’s giving up a past hard bargaining stance to gain employee favoritism for the incumbent as a means toward foreseeable longer term employer gain. Hence, the majority’s allowance of continuing incumbent bargaining after a rival petition has been filed, whether or not the incumbent is able to secure a majority of signatures requesting continuance of bargaining, places the employer in a position to maneuver employee sentiments.<sup>311</sup>

To guard against collusion and safeguard employee free choice, I propose that the Board reverse its decisions in *RCA* and *Bruckner* and return to a strict application of the *Midwest Piping* doctrine in all rival union situations.<sup>312</sup> While less offensive to employee free choice than *RCA*, which mandates continued recognition even in the face of a question concerning representation, *Bruckner* may similarly result in collusion because an employer has an incentive to use its recognition authority as an inducement for the union that will give the employer the best deal. “The elimination of the duty of neutrality when an employer is aware of rival

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308. *Id.* at 965–66.

309. *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 267 (1938).

310. 262 N.L.R.B. at 967.

311. *Id.* at 968.

312. For an argument that the narrowing of the *Midwest Piping* doctrine interfered with employee free choice in the 1995 labor dispute between the National Basketball Association and the National Basketball Players Association, see Mark S. Levine, *The Effect of a Narrow Application of the Midwest Piping Doctrine on Employees’ Section 7 Rights: An Analysis of the 1995 National Basketball Association Labor Dispute*, 51 WASH. U. J. URB. & CONTEMP. L. 303 (1997).

unions' organizational activities, but no petition has yet been filed, affords the employer a powerful tool with which to manipulate the choice of representation."<sup>313</sup> Under my proposal, the Board's statutory election procedures would be the exclusive means of ascertaining employee free choice whenever two or more unions are competing for representational rights. Furthermore, I would require an employer to withdraw recognition from an incumbent union whenever a rival union has rebutted the presumption of the incumbent's majority support by filing a representation petition with the requisite amount of employee support.<sup>314</sup>

As discussed above, the Board's earlier attempts to require strict employer neutrality in all rival union situations were sometimes greeted with judicial resistance in the federal courts of appeals, mainly because the courts were not persuaded that recognition of a majority union interferes with employee free choice simply because a second union is also seeking to represent the workers.<sup>315</sup> The courts did not agree with the Board that recognition which would otherwise be lawful in the single union context should be unlawful in the rival union context. Thus, it appears that the Board is foreclosed from enforcing my proposal through its statutory authority to prosecute employer recognition in such circumstances as an unfair labor practice in violation of section 8 of the NLRA.<sup>316</sup>

However, the Board may achieve the same result by exercising its statutory authority over the selection of collective bargaining representatives under section 9 of the NLRA.<sup>317</sup> For example, rather than prosecute the recognition of a rival union as an unfair labor practice, the Board should promulgate a rule pursuant to its exclusive authority to resolve questions concerning representation which provides that, in all rival union situations, representation questions may be resolved only through its election machinery and that recognition in rival union situations cannot create representational rights.<sup>318</sup> The Board should give this rule some

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313. Beth Z. Margulies, *Employees' Pipe Dream of Free Choice in Representation: Effectuated or Eradicated? (The Midwest Piping Doctrine Revised)*, 33 DEPAUL L. REV. 75, 103 (1983).

314. My proposal would not overturn current Board law with respect to decertification petitions filed where no rival union is seeking to represent the workers in the bargaining unit. In *Dresser Indus., Inc.*, 264 N.L.R.B. 1088 (1982), the Board held that an employer must continue to bargain with the incumbent union after a decertification petition has been filed. In such situations the employer is likely to support decertification and thus it is not likely that the employer would collude with the incumbent union because there is no rival union to ward off.

315. See, e.g., *Playskool, Inc.*, 195 N.L.R.B. 560, *enforcement denied*, 477 F.2d 66, 70 (7th Cir. 1973) (stating that the employer has not "coerced or interfered" with employee free choice).

316. See 29 U.S.C. § 158.

317. See 29 U.S.C. § 159.

318. The Board has rulemaking authority under section 6 of the NLRA, 29 U.S.C. § 156.

teeth by setting aside elections when an employer has recognized one of the rival unions or has failed to withdraw recognition from an incumbent union when the rival union has rebutted the presumption of the incumbent's majority support.<sup>319</sup> There is a good argument that the federal appellate courts could not deny enforcement of such a rule because the Supreme Court has held that Board orders made pursuant to section 9 of the NLRA are generally not subject to judicial review.<sup>320</sup> Thus, there is a strong case that the Board could implement my proposal without fear of rejection in subsequent enforcement proceedings if it does so via its section 9 powers.

## VII. CONCLUSION

Economists have long known the benefits of competition. Adam Smith, the father of modern economics, in 1776 recognized the central role that competition plays in driving innovation and creating wealth.<sup>321</sup> More recently, economists have credited increased competition with the unprecedented prosperity of the 1990s and have concluded that “[c]ompetition is what matters most . . . . [I]t will—as it always has—release the energies of the people and assure prosperity.”<sup>322</sup> Congress, too, has acknowledged the benefits of competition through the enactment of the Sherman Act and other federal antitrust statutes that seek to promote competition.<sup>323</sup>

Yet workers have not shared in the benefits of competition, largely because since 1955 most unions have agreed not to compete with each other and the NLRB has erected unnecessarily rigid barriers to inter-union competition. The absence of a market for union control has contributed, at least in part, to the dismal union density rates in the private sector. It is

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319. In *General Shoe Corp.*, 77 N.L.R.B. 124 (1948), the Board held that “[i]n election proceedings, it is the Board’s function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.” *Id.* at 126. “Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice.” *Id.* As discussed above, the Supreme Court has acknowledged that recognition gives a rival union “a marked advantage over any other in securing the adherence of employees” and thereby renders a free choice improbable. *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. at 267.

320. See *Leedom v. Kyne*, 358 U.S. 184 (1958) (holding that there is a right to judicial review of the Board’s exercise of its section 9 authority only when the Board violates a clear duty and there is no other remedy); *American Fed’n of Labor v. NLRB*, 308 U.S. 401 (1940) (holding that a Board order in representational proceedings under section 9 is not a final order subject to judicial review).

321. See generally ADAM SMITH, *THE WEALTH OF NATIONS* (Random House 1937) (1776).

322. PAUL A. LONDON, *THE COMPETITION SOLUTION: THE BIPARTISAN SECRET BEHIND AMERICAN PROSPERITY 197–98* (2005).

323. 15 U.S.C. § 1.

time to synchronize labor policy with proven economic principles. In industry after industry—automobiles, steel, transportation, communications, finance, retail—the injection of competition has resulted in increased efficiency, production, innovation and prosperity.<sup>324</sup> There is no reason to doubt that increased competition would not similarly benefit unions in their efforts to organize a greater percentage of the private workforce. Indeed, the limited historical and empirical evidence available suggests that increased inter-union competition has a positive impact on union organizing. Accordingly, I propose that rival unionism be resurrected by dismantling the overly protectionist barriers that stifle inter-union competition.<sup>325</sup>

While the creation of a truly competitive market for union control demands congressional action to reform the antitrust and labor laws, there are reforms that can and should be taken by the AFL-CIO and the NLRB to create a more competitive union environment. The AFL-CIO could start the reformation process by repealing the no-raiding pact (Article XX), which insulates incumbent unions from rival competition, and by repealing its rival union organizing procedures for unrepresented workers (Article XXI), which stifles inter-union competition for unorganized workers. The NLRB, for its part, could soften the contract bar by making it rebuttable upon a showing that the incumbent union no longer enjoys majority support and by enlarging the window period to challenge an incumbent union with a thirty percent showing that the employees want an election. The NLRB could also relax its resistance to craft unit severance, while ratcheting up its neutrality rules in all rival union situations. These reforms may not go far enough in creating a competitive marketplace for collective representation services. But the dismantling of these overly protectionist barriers to competition would be steps in the right direction.

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324. See generally LONDON, *supra* note 322.

325. While I advocate for increased inter-union competition, I do not mean to suggest that cooperation and collaboration between unions does not benefit workers. My only point is that workers should always have a low-cost means of ousting an incumbent union and electing a rival.