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Overhauling the Good Faith Reasonable Doubt Test: Unions Should Be Obligated to Provide Annual Mandatory Polls to Determine Continuing Union Majority Status, 36 J. Marshall L. Rev. 377 (2003)

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OVERHAULING THE GOOD FAITH REASONABLE DOUBT TEST: UNIONS SHOULD BE OBLIGATED TO PROVIDE ANNUAL MANDATORY POLLS TO DETERMINE CONTINUING UNION MAJORITY STATUS

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INTRODUCTION

Labor unions have a renewed arrogant attitude, even though membership rosters are continually dropping and the economy is lagging.[1] Indeed, after recent victories in the latest high profile strikes,[2] unions have become more fearless, more certain, and more belligerent.[3] These strikes reveal an emerging trend that unions are more zealous in waging war against employers.[4] However, as unions appear to be more actively protecting employees from employer abuses today than in recent history, unions today are also more prone to perpetrate abuses, including embezzlement.[5] For instance, union dues from some of the lowest-earning union workers in the nation paid for a three million dollar jet airplane used by the president of the Hotel Employees and Restaurant Employees International Union, an armada of Cadillacs for the union's directors, and a $100,000 motor home for

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1. Steven Greenhouse, *Unions, Growing Bolder, No Longer Shun Strikes*, N.Y. TIMES, Sept. 7, 1998, at A12; Frank Swoboda, *A Matter of Organization*, WASH. POST, Sept. 8, 1998, at D9.

2. Greenhouse, *supra* note 1, at A12. The president of the A.F.L.-C.I.O., John J. Sweeney, declares that the escalation in labor strikes is caused by greater labor assurance and its obstinate demeanor. *Id.*

3. Swoboda, *supra* note 1, at D9. The group of major strikes include "United Parcel Service . . . General Motors . . . Bell Atlantic . . . and Northwest Airlines . . . ." *Id.*

4. *Id.* Union president John J. Sweeney contends that organized labor is more active today than any time in recent history. *Id.*

5. Cam Simpson, *High Life of Union's Top Brass Revealed*, CHI. SUN TIMES, Sept. 24, 1998, at A1.

a union official.[6]

Despite these abuses, the current law regulating employee polling to determine whether a union still holds majority support among employees still heavily favors labor unions[7] over employers.[8] However, the scales may be tipping back toward the employer as the good faith reasonable doubt test, which the employer must demonstrate before polling its employees, has come under fire recently from the Supreme Court.[9] This Article examines the different standards for union polling of employees and for employer polling of employees. Part I explains the legislative history and purpose of the National Labor Relations Act, which governs employee polling. Part I explores the failures of the National Industrial Recovery Act as well as the passage of the Wagner Act, and the Taft-Hartley Act, which amended the Wagner Act. Part I also explains the concept of union and employer polling and the good faith bargaining requirement, which places too high a burden on employers.

Part II discusses the most recent developments and the labor board's proposals regarding employer polling. Moreover, Part II establishes that the Taft-Hartley Act provides different standards for employee polling that favor unions over employers. Part II argues that any determination of union majority status should be made from the employers' and employees' perspective, rather than the unions'. Finally, Part III proposes a uniform system regarding employer and union polling, which includes less restrictions on

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6. *Id.* On the list of purported abuses by then-union president Edward T. Hanley Sr. and his son, Thomas W. Hanley, included the following: embezzlement of union funds; leasing vehicles for more than $500,000 per year which were used by senior bosses (who had no apparent duties), their wives and family members; compensation to consultants who provided little or no work, including payment to the son of an alleged top-ranking Chicago mafioso and political boss. *Id.*

7. *See* Springfield Discount, Inc., 195 N.L.R.B. 921, 921-23 (1972), *rev'd on other grounds*, 82 L.R.R.M. (BNA) 2173 (7th Cir. 1973) (explaining that the Labor Board is within its discretion to apply different standards when a union polls the employees prior to an election).

8. Louis-Allis Co. v. NLRB, 463 F.2d 512, 517 (7th Cir. 1972). The court held that an "employer occupies a far different position with regard to the coercive impact of its action upon employees than does a Union." *Id.* "The [Labor] Board, recognizing this difference, has frequently applied different standards to the actions of the employer than it has to similar actions of unions." *Id.*

9. Bernard Mower, *NLRB: Supreme Court Probes Agency Policy Limiting Polling of Workers on Union Support*, 200 DLR AA-1 (1997). The Supreme Court stated that "the [B]oard uses the term doubt to mean disbelief, rather than uncertainty." *Id.* Skeptical of the test, Chief Justice William Rehnquist "declared that the agency's test is an empty thing . . . [and is considered] 'almost a fiction' to say that an employer could ever meet the [B]oard's reasonable good faith doubt standard." *Id.*

employer polling and the imposition of mandatory annual polls conducted by unions.

I. EVOLUTION OF THE NATIONAL LABOR RELATIONS ACT

Federal government investigations into unfair labor practices shortly after World War I eventually led Congress to pass a series of Acts designed to protect the American worker. The first Act came during the height of the Great Depression when Congress passed the National Industrial Recovery Act of 1933 (NIRA). Congress passed the Act in response to industry trends of cutting wages and laying-off senior employees. The Act, however, would last only two short years before the United States Supreme Court struck it down as unconstitutional, forcing Congress back to the drawing board. Congress then enacted the Wagner Act, allowing employees to, among other things, freely organize and join unions. And in 1947, Congress extended the Wagner Act's protections from unfair labor practices by passing the Taft-Hartley Act amendments, which included protection from union unfair labor practices.

Section A analyzes the NIRA, its immediate effects, and its ultimate demise at the hands of the Supreme Court. Sections B and C examine the Wanger and the Taft-Hartley Acts respectively, focusing on the union protections Congress afforded employees. Finally, Section D describes the procedures required for a union to be recognized by an employer as the bargaining representative of a majority of its employees, and the evidence an employer may show to refute the union's majority status.

A. The National Industrial Recovery Act's Failure

The Great Depression of 1929 radically changed the worker's perspective in the United States.[10] The heavy costs to industry caused by the Depression motivated many large companies to renounce the "welfare capitalism" approach of the 1920s and to lay off senior employees and cut wages.[11] In response, President Franklin Delano Roosevelt embarked on an aspiring tentative plan

10. IRVING BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY 14-15 (Univ. of Cal. Press 1950). The national income plunged from eighty-one billion dollars in 1929 to forty-nine billion dollars in 1932, with earnings carrying most of the losses. *Id.* There were over fifteen million unemployed in 1933. *Id.*

11. SANFORD M. JACOBY, EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN AMERICAN INDUSTRY, 1900-1945 219-21 (Columbia Univ. Press 1985). Many companies tried to forestall wage reductions for a time but, in the fall of 1931 U.S. Steel cut its wages, and the automobile, textile, and rubber tire industries quickly agreed to do the same. *Id.* at 217.

called the National Industrial Recovery Act of 1933.[12]

Many saw the NIRA as a way to bring the economic cataclysm of the Great Depression to a close and provide protection to the workers from abusive employers.[13] Soon after its enactment there was an explosion of organizing and strikes as workers felt a feigned perception of strength. Among the upheaval were fierce strikes occurring in 1934 among automobile parts workers in Toledo, longshoremen in San Francisco, and truckers in Minneapolis.[14] Such violence continued because unions, lacking faith in the labor board's ability to resolve labor disputes, favored an immediate response by striking.[15] Furthermore, many employers persisted that they would only bargain with in-house employee representation plans, even where the autonomous union held the majority support of the employees.[16]

Eventually, on May 27, 1935, the Supreme Court struck down the NIRA as an unconstitutional commission of legislative authority in *Schechter Poultry Corp. v. United States*.[17] The

12. *Id.* at 223. Companies were to coordinate themselves, eradicate cut-throat rivalry and secure costs in order to increase buying power and decrease unemployment, which included the founding of the minimum wage and maximum hours criterion in every industry. *Id.*

13. *Id.* at 223-24. *See also* IRVING BERNSTEIN, TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER 1933-1941 40-41 (Houghton Miffin Co. 1969) (1970) (discussing the growth of the United Mine Workers); JAMES A. GROSS, THE MAKING OF THE NATIONAL RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS AND THE LAW, VOL. 1 (1933-1937) 62 (Univ. of New York Press 1974) (chronicling violent strikes in the 1930s).

14. GROSS, *supra* note 13, at 62. *See generally* BERNSTEIN, TURBULENT YEARS, *supra* note 13, at 40-41.

15. BERNSTEIN, TURBULENT YEARS, *supra* note 13, at 217. *See also* BERNSTEIN, NEW DEAL, *supra* note 10, at 86 (explaining that unions were correct in their fear because the Labor Board had no enforcement authority was unable to provide any form of assistance regarding dispute resolution).

16. *See, e.g.*, Edward G. Budd Mfg. Co. v. NLRB, 138 F.2d 86, 90 (3d Cir. 1943) (stating in-house employee representation plans were set up by employers as a means of warding off organization drives).

17. 295 U.S. 495 (1935). The facts of the case involved a company whose business dealt with "wholesale poultry slaughterhouse markets in Brooklyn, New York." *Id.* at 520. The company purchased poultry and sent it to slaughterhouses and shortly afterwards, the poultry was resold to retail poultry merchants and meat dealers, who then sold it to the public. *Id.* at 521. The company never sold poultry in interstate commerce. *Id.* The petitioners argued that, among other allegations, the company violated the requirements regarding minimum wages and maximum hours of labor. *Id.* at 520. The Supreme Court held that the NIRA, which was to regulate wages and hours, was not within the congressional power of regulation and therefore, an unconstitutional delegation of legislative power. *Id.* at 541. "[P]rovisions . . . to fix the hours and wages of employees of [the company] in their interstate business was not a valid exercise of federal power." *Id.* at 550. Furthermore, since the company was not involved in interstate commerce, the Congress had no authority to intervene. *Id.* at 543.

NIRA's demise led the way for new labor relations legislation, called the National Labor Relations Act (Labor Relations Act or Wagner Act),[18] championed by Senator Robert F. Wagner of New York, an organized labor supporter.[19]

B. Legislative History of the Wagner Act

The Wagner Act's centerpiece was section 7, which provided various employee protections.[20] As a means of giving content to section 7 rights, the Wagner Act specified certain unfair employer labor practices.[21] Nevertheless, believing that the Wagner Act exceeded Congress' legislative authority, many companies continued to resist the new law[22] until the Supreme Court upheld its constitutionality in 1937.[23] Although one of the primary policy

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18. 29 U.S.C. §§ 151-169 (2000).

19. Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 296 (1987).

20. 29 U.S.C. § 157 (2000). This section provides that:

> [e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment.

Id.

21. 29 U.S.C. § 158 (2000). Employer unfair labor practices include: Section 8(a)(1) of the Act, which states that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of this title." 29 U.S.C. § 158(a)(1) (2000). Section 8(a)(2) states that "[i]t shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ." 29 U.S.C. § 158(a)(2) (2000). Section 8(a)(3), which states in relevant part: "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3) (2000). Section 8(a)(4) notes that "[i]t shall be an unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." 29 U.S.C. § 158(a)(4) (2000). Section 8(a)(5) declares that "[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . . ." 29 U.S.C. § 158(a)(5) (2000).

22. Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 266 (1978). *See also* GROSS, *supra* note 13, at 89-103 (explaining that the NIRA experience presented the necessity for an effective and forceful administrative agency with enforcement authority [which the Wagner Act provided], rather than a bureau whose main purpose was to assist in regulating disputes).

23. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). The case

reasons for the Wagner Act[24] was to deter industrial conflict, some academics denounced the Act for outlawing the kind of labor activity they theorized was necessary to reconstruct society during the 1930s.[25]

After World War II, a swell of lengthy and persistent strikes overwhelmed many key industries and aroused extensive public support for suppressing the power and alleged abuses of organized labor.[26] Moreover, there was a need to provide a balance of power

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involved an employer who was the fourth largest steel producer in the United States, and operated mines and quarries. *Id.* at 26. The employer produced raw materials in many states, and transported those materials in interstate commerce. *Id.* The employer discharged certain employees for engaging in union activities in violation of the Wagner Act. *Id.* at 22. The employer argued the Act was unconstitutional because it attempted to regulate labor relations between employers and employees, a subject matter outside the scope of Congress' commerce clause power. *Id.* at 25. The Supreme Court rejected that argument and held that the Wagner Act was constitutional. *Id.* at 47. Under the Commerce Clause, Congress can regulate internal affairs of an employer, such as the discharge of an employee, where the business affects interstate commerce. *Id.* at 31. Because the employer's vast transportation system constituted interstate commerce, any strike, lockout, or disruption of peaceful relations between employer and its employees was bound to affect interstate commerce. *Id.* The Court took judicial notice of the fact that steel strikes had not only affected interstate commerce, but they also had a devastating effect on the economy. *Id.* at 43.

24. Section 1 of the Act discusses "[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of business association," and how this "affects the flow of commerce" as well as the discouraging consequence such disparity has had on "wage rates and the purchasing power of wage earners in industry. . . ." 29 U.S.C. § 151 (2000). Lloyd Ulman, *Why Should Human Resources Managers Pay High Wages?*, 30 BRIT. J. INDUS. REL. 177, 205 (1992). As Ulman noticed, "[t]he union organization was in part a response to the breaking of many implicit contracts, after early attempts by employers to hold limits on wages, [and] to stabilize employment . . ." and such "breaking of implicit contracts (albeit under duress) generated worker demands . . . for organizations that could negotiate and enforce them." *Id.*

25. *See* Klare, *supra* note 22, at 266 (explaining that the Wagner Act destroyed the unions chance to develop their own criteria for protecting labor rights). *But see* GROSS, *supra* note 13, at 89-103 (stating that one of the reasons the NIRA was ineffective (besides being unconstitutional) was due to the need for a powerful agency that possessed enforcement authority to resolve disputes, which was provided by the Wagner Act). Furthermore, such a radical approach, which looks upon the power of violence to achieve cooperation between employer and employee creates only hostility and resentment and thus, cannot rationally be seen as enhancing a successful working relationship. *Id.*

26. *See* Daniel J.B. Mitchell, *Inflation, Unemployment and the Wagner Act: A Critical Reappraisal*, 38 STAN. L. REV. 1065, 1071 (1986) (asserting that the subject-matter concerning the strike was substantially more serious than the industrial concept of consolidated negotiations).

between unions and the rights of employers and employees.[27] Such union power (and abuse of power) contributed to the enactment of the Taft-Hartley amendments and the Labor-Management Relations Act of 1947 (Taft-Hartley Act or the LMRA).[28]

C. *Taft-Hartley Act Incorporated with the Wagner Act*

In 1947, the Taft-Hartley Act amended the Wagner Act to protect employees from union abuses.[29] The objective of the amendments was to compensate for certain preferences granted to unions under the Wagner Act by compelling analogous obligations on unions.[30] The preliminary Hartley bill would have prohibited economic negotiations, rationalizing that such bargaining would cause a financial crisis because it increased income expenses.[31] However, Senator Taft was more deliberate than Congressman Hartley in the House of Representatives, and therefore, Taft, wanting to preserve the wage-buying authority of the Wagner Act, was unwilling to prohibit economic negotiations.[32] However, these debates, as well as a veto attempt by President Truman, would not prevent the Act's passage.[33]

In addition to protections from union abuses, the Taft-Hartley Act gives employees tremendous control over choosing their union representatives. Most importantly, the Act authorizes employees to: 1) petition the National Labor Relations Board ("Labor Board") for union elections to select a majority representative,[34] and 2)

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27. *See* PATRICK HARDIN, THE DEVELOPING LABOR LAW 39-40 (1992) (describing how unions accumulated enormous power with no method available in supplying a review or inspection on such intensity and expansion).

28. 29 U.S.C. §§ 141-144, 151-167, 171-187 (2000).

29. The Taft-Hartley Act prohibits unions from "restrain[ing] or coerc[ing]" employees while exercising their statutorily protected rights. 29 U.S.C. §158 (b)(1)(A) (2000). It is the union's obligation under this section to provide representation to all employees in the bargaining unit equitably and impartially. Section 8(b)(1)(B) explains that "[i]t shall be an unfair labor practice for a [union] . . . to restrain or coerce . . . an employer in the selection of [its] representatives for the purposes of collective bargaining or the adjustment of grievances." 29 U.S.C. § 158(b)(1)(B) (2000). Section 8(b)(2) asserts that "[i]t shall be an unfair labor practice for a [union] . . . to cause or attempt to cause an employer to discriminate against an employee . . . ." 29 U.S.C. § 158(b)(2) (2000). Section 8(b)(3) states that "[i]t shall be an unfair labor practice for a [union] . . . to refuse to bargain collectively with an employer . . . ." 29 U.S.C. § 158(b)(3) (2000). Sections 8(b)(4) and 8(b)(7) place limitations on union picketing and boycotts. 29 U.S.C. § 158(b)(4) and 29 U.S.C. § 158(b)(7) (2000).

30. HARDIN, *supra* note 27, at 39-40.

31. H.R. REP. NO. 80-245 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 33 (1948).

32. *Id.* at 1649.

33. *Id.*

34. Section 9(c)(1)(B) permits an employer to file a representation petition

Petition the Labor Board for election to de-certify a union as a majority representative.[35]

The Act also permits unions, seeking recognition as the bargaining representative for a majority of an employer's employees, to file a petition with the Labor Board requesting representation elections.[36] The union can seek such elections when an employer fails to acknowledge it as the employees' bargaining delegate,[37] or when the employer has recognized it as the bargaining representative, but wishes to be legally acknowledged.[38]

Whether filed by a union or an employee, a petition must illustrate that thirty percent of the employees endorse a representation election.[39] In an election, the union prevails if it has acquired over fifty percent of the authentic votes cast. The Labor Board then produces a certificate of representation appointing the union as the employees' exclusive bargaining representative.[40] Following a union's certification, the union holds an irrebuttable presumption of majority support for one year.[41] Once certified,

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when an exclusive agent seeks recognition. 29 U.S.C. § 159(c)(1)(B) (2000); United States Gypsum Co., 90 N.L.R.B. 964, 966 n.4 (1950).

35. 29 U.S.C. §§ 141-44, 151-67, 171-81 (2000). Under the Taft-Hartley Act, section 9(c)(1)(A)(ii) was amended to uphold employees' right to petition for decertification elections. 29 U.S.C. § 159 (c)(1)(A) (2000). *See also* Steven E. Abraham, *How the Taft-Hartley Act Hindered Unions*, 12 HOFSTRA LAB. L.J. 1, 29 (1994) (explaining that under the NLRA, decertification elections by employees were not allowed and therefore, the sole manner a union who had been certified could be forced to relinquish its privilege to act as representative and protector of the employees was if another union had concrete and tangible support of the employees).

36. Section 9(c)(1) provides for an official inquiry to be submitted in order to ascertain if a majority of employees want to be represented by a specific union. 29 U.S.C. § 159(c)(1)-(3) (2000).

37. 29 U.S.C. § 159(c)(1)(A)(i) (2000).

38. 29 U.S.C. § 159 (c)(1)(B) (2000).

39. NLRB Rules and Regulations, 29 C.F.R. § 101.18(a)(4) (2002).

40. 29 U.S.C. § 159(c)(1)(B)(3) (2000); NLRB Rules and Regulations, 29 C.F.R. § 102.69(b) (2002). *See also* ROBERT GORMAN, BASIC TEXT ON LABOR LAW 40 (1976) (writing that a union may be chosen the bargaining delegate by the free-will of the employer or by a Labor Board directed election complying with conditions set forth in section 9 of the Labor Relations Act).

41. Brooks v. NLRB, 348 U.S. 96, 99-100 (1954). The Court reasoned that such a requirement encourages unity in bargaining associations, strengthens the gravity of the election procedure, grants the union a gauge to accomplish its commission without an urgency thereby resulting in rapid and careless decisions, assures good-faith bargaining by the employer, and decreases industrial conflict. *Id.* Additionally, the Court specified exceptions to the rule that extends a year-long presumption of majority support to a certified union including; if the certified union has disintegrated or become obsolete; as a result of division, essentially all of the members of a certified union have shifted their alliance to a different union; or the size of the bargaining unit has

employees can terminate the bargaining relationship by filing a decertification petition, indicating that at least thirty percent of the employees in a bargaining unit want an election to decide the current standing of their bargaining representative.[42]

The Labor Board also permits employers to contest an incumbent union's majority status when the employer has an objectively reasonable doubt as to the union's majority position. Evidence such as swift reductions in union checkoffs;[43] union immobility, such as neglecting to take affirmative action regarding employee complaints;[44] and employee assertions of discontent can all give rise to an employer's reasonable doubt as to a union's majority status.[45] Once an employer has a reasonable doubt about a union's majority status the employer can pursue one of three options: 1) the employer may revoke its recognition of the union; 2) the employer may petition the Labor Board for a decertification election;[46] or 3) the employer can poll its employees to measure union support.[47]

Historically, the Labor Board applied the same reasonable doubt standard regardless of which option an employer chose to pursue.[48] However, the Supreme Court's decision in *Allentown*

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had significant and continuous oscillation within a short period of time. *Id.* at 98-99.

42. 29 U.S.C. § 159(c)(1)(A)(ii) (2000); NLRB Rules and Regulations, 29 C.F.R. § 101.18 (2002).

43. *See* GORMAN, *supra* note 40, at 670-71 (explaining that a dues checkoff is a freely approved deduction by the employer of union contribution from the earnings of a union member, which is comparable to a reduction for taxes or insurance and thus, the employer pays the sum deducted to the union).

44. Star Mfg. Co. v. NLRB, 536 F.2d 1192 (7th Cir. 1976). The employer failed to comply with a provision in the union/employer contract which dictated that overtime be divided uniformly among employees. *Id.* at 1194. Nevertheless, the union never filed a grievance opposing the employer because the union negligently failed to designate a union steward to dispense with such matters. *Id.*

45. Thomas A. Seger, *The Majority Status of Incumbent Bargaining Representatives*, 47 TUL. L. REV. 961, 992 (1973). Other implications of loss of support involve: the registration of a representation petition by an external union; employee turnover; the union's perimeter of success in the certification election and other numerous forms of evidence used by employers to demonstrate union loss of support. *Id.* at 990-96.

46. 29 U.S.C. 159(c)(1)(B) (2000).

47. Struksnes Constr. Co., Inc. and Int'l Union of Operating Eng'rs, Local No. 49, AFL-CIO, 165 N.L.R.B. 1062 (1967). An employer polling of its employees violates section 8(a)(1) of the Act unless the employer assures its employees they will not suffer retaliation, the poll is conducted by secret ballot, and the employer does not engage in any unfair labor practices. *Id.* at 1063.

48. *See Montgomery Ward & Co.*, 210 N.L.R.B. at 724 (1974) (holding that a poll, taken by the employer to ascertain union status, is not appropriate when there is no basis for doubting majority support).

Mack Sales & Services, Inc. v. NLRB brings into question whether reasonable doubt has the same meaning when applied to employee polling as it does when an employer withdraws union recognition or requests representation elections.[49] Under that opinion, while an employee must still demonstrate reasonable doubt before polling its employees, the Court seemingly applied a less stringent standard than necessary to justify withdrawing union recognition or requesting elections.[50] Thus, although employers have rarely resorted to employee polling in recent history, employers may soon begin exercising this option more frequently when challenging an incumbent union.

II. ANALYZING EMPLOYER AND UNION POLLING: THE EXISTING DOUBLE STANDARD

The Court recognized in *Allentown Mack* that it is an extremely arduous task for employers to demonstrate that a union no longer has majority support among its employees.[51] Section A of Part II begins with an in-depth inquiry into the Court's decision, its repercussions, and the implications for future employer polling disputes. Section B discusses the Labor Board's response to the Supreme Court's ruling, illustrating the unfair benefits the Board affords unions over employers and its negative impacts. Section C illustrates the considerable hardship employees face when they seek to terminate union representation by voluntarily filing a decertification petition. In particular, section C chronicles the harassment and violence union members inflict on union employees who resign from the union. Section C further explains that judicial challenges to union status and labor disputes harm all parties involved including the employer, union, and employee. Finally, section C addresses the necessity for employee participation regarding the enforcement of their union rights.

A. Supreme Court Analyzes Employer Polling

In *Allentown Mack*, seven of Allentown Mack's thirty-two employees told company executives that they no longer supported their union, the International Association of Machinists and Aerospace Workers.[52] To test support for the union among its

49. Allentown Mack Sales & Srv., Inc. v. NLRB, 118 S. Ct. 818, 822-24 (1998).

50. *Id.*

51. Curtis H. Allen III, Note, *Judicial Review Gone Awry: The Supreme Court Rewrites the NLRB's Unitary Standard in Allentown Mack Sales & Service, Inc. v. NLRB*, 77 N.C. L. REV. 1925, 1927 (June 1999).

52. Allentown Mack Sales & Serv., Inc. v. NLRB, 83 F.3d 1483, 1487 (D.C. Cir. 1996).

employees, Allentown Mack conducted a poll by secret ballot.[53] Workers voted nineteen to thirteen against continued union representation.[54] In response, the company withdrew its recognition of the union.[55]

The Labor Board ruled that Allentown Mack's actions violated the Labor Relations Act because the company did not have a sufficient basis to doubt the union's majority status before conducting the poll.[56] The Federal Circuit Court of Appeals affirmed the Labor Board's decision, adhering to the Board's reasonable doubt evidentiary standard.[57]

On appeal to the Supreme Court, Allentown Mack argued that because the Labor Board required the same reasonable doubt standard for employee polling as it did for withdrawing union recognition, the Labor Board had rendered polling allowable only when it was formally senseless to conduct such a poll.[58] Justice

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53. *Id.* at 1484. The circuit court summarized that only seven of Allentown Mack's thirty-two employees in the bargaining unit had made declarations prior to the poll rejecting union representation. *Id.* at 1487. That number, according to the Labor Board, was "far short of the number needed to raise doubts about the union's majority support." *Id.* Allentown Mack argued that the Labor Board also had been mistaken in disregarding several employees from the number of employees disapproving the union. *Id.* The Labor Board discounted three employees by reasoning that they were not members of the bargaining unit on the day Allentown Mack made known to the union by letter that it would cease recognizing the union and would direct a poll. *Id.* The Labor Board also had disregarded statements made by employees during job interviews, as well as unconfirmed reports of employee discontent with the union. *Id.* at 1487-88. The Federal Circuit Court of Appeals agreed with the Labor Board that the agency was not required to consider those anti-union sentiments in determining whether Allentown Mack had sufficient evidence of the union's loss of majority support to conduct a poll. *Id.* at 1488. *But see* Struksnes Constr. Co., Inc. and Int'l Union of Operating Eng'rs, Local No. 49, AFL-CIO, 165 N.L.R.B. 1062, 1063 (1967) (showing that the employer must comply with five essential criteria to be allowed to poll employees, and no criteria mentioned a specific percentage of employee anti-union statements that must be met to be considered reasonable doubt by the employer).

54. *Allentown Mack*, 83 F.3d at 1485.

55. *Id.*

56. *Id.* The Labor Board contended that an employer, who without adequate indication of a union's loss of majority support, directed a poll and thereafter declined to recognize that union breached section 8(a)(1) and 8(a)(5) of the Act. 29 U.S.C. §§ 158(a)(1)-(5) (2000).

57. *Allentown Mack*, 83 F.3d at 1487.

58. *Allentown Mack*, 118 S. Ct. at 819-20. The Court further asserted that the standard for polling should be less severe than for an employer who desires to withdraw recognition because there were several reasons why an employer might request a poll of its employees. *Id.* Instead, the Labor Board imposed a greater evidentiary standard, which is "puzzling" for "the [Labor] Board irrationally permits employers to poll only when it would be unnecessary and legally pointless to do so." *Id. See also Allentown Mack*, 83 F.3d at 1486 (admitting that the Labor Board's approach of requiring

Scalia, writing for the majority, acknowledged the Labor "Board's adoption of a unitary standard for polling, RM elections, and withdrawals of recognition is in some respects a puzzling policy,"[59] but deferred to the Labor Board because the standard was "rational and consistent with the [Labor Relations] Act."[60]

However, despite the Court's seeming adherence to the Labor Board's reasonable doubt standard,[61] the majority questioned the Labor Board's definition of "doubt." The Court found that the Labor Board interpreted "doubt" in polling cases as "disbelief," which it found too harsh.[62] Instead, the Court concluded that it was good enough that an employer be "uncertain about . . . the union's retention of majority support" before conducting an employee poll.[63] Thus, while the Court affirmed the Labor Board's reasonable doubt standard, it reduced the employer's evidentiary burden.[64]

In one part of its opinion, the Court seemingly agreed with the Labor Board's view that employer polling is "potentially disruptive to establishing bargaining relationships and unsettling to employees," insisting that "polling should be tolerated only when the employer might otherwise simply withdraw recognition and refuse to bargain."[65] However, in the second part of its opinion, the Court stated, "[g]iving fair weight to Allentown's circumstantial evidence," a jury could conclude that Allentown Mack had a rational and credible foundation to disbelieve that the union possessed majority support by the employees.[66] Justice Scalia stated that an employer may use "unsubstantiated assertions" by employees to establish its good faith reasonable

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employers to meet the same evidentiary burden for polling as for a simple withdrawal of recognition made polling only slightly worthwhile).

59. *Allentown Mack*, 118 S. Ct. at 822.

60. *Id.*

61. *Id.* at 823.

62. *Id.* The Court emphasized that "'[d]oubt' is precisely that sort of 'disbelief' (failure to believe) which consists of an uncertainty rather than a belief in the opposite." *Id.* Thus, the Court stressed that "[a] doubt is an uncertain, tentative, or provisional disbelief." *Id.*

63. *Id.* at 825.

64. *Id.* at 822.

65. *Id.*

66. *Id.* at 825. The Supreme Court harshly criticized the Labor Board for disregarding various statements made by employee, which "would cause anyone to doubt that degree of support." *Id.* at 819. The high Court further admonished the Labor Board and the Administrative Law Judge for failing to explain the types of "evidence that [the employer] should have weighed on the other side" and that the Labor Board cannot slyly alter its speculation of continuing majority support into a working postulation that all of a union's employees support the union until confirmed differently. *Id.*

doubt for the union's majority support.[67] After the Court's ruling in *Allentown Mack*, an employer simply needs to show that it is unsure about the union's majority status, rather than producing sufficient evidence to disbelieve the union's majority status.[68]

B. The Labor Board's Proposed Rules Gives Unions an Unfair Edge

Shortly after the Court's decision in *Allentown Mack*, the Labor Board responded by giving notice it was considering modifying its regulations so that an employer could only revoke union recognition after a Labor Board sponsored decertification election.[69] The Labor Board's proposed modifications would prevent employers from both polling its employees and unilaterally withdrawing its union recognition even if it has reasonable doubt of the union's majority status.[70] The Labor Board also stressed that it was considering whether to structure any new standard retroactively, making the rule applicable to pending cases.[71]

These modifications could create considerable dangers for employers seeking to challenge union representation by a method other than petitioning the Labor Board for representative elections. For instance, employers who conduct employee polling may perpetuate an unfair labor practice despite their strict compliance with the Court's ruling in *Allentown Mack*.[72]

At the same time, under the proposed modifications, certified unions still enjoy a presumption of majority status, even if the union admits lacking employee membership.[73] Moreover, even if a

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67. *Id.* at 824. The Court stated that uncorroborated statements by employees do not, by themselves, demonstrate disapproval of the union. *Id.* Yet, the point is not the dissatisfaction, since that is the purpose of the poll, but rather, the question is whether a reasonable uncertainty exists regarding lack of union majority status. *Id.*

68. *Id.* at 821.

69. Chelsea Indus., Inc. and Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. (UAW), AFL-CIO, 165 L.R.R.M. (BNA) 1118 n.2 (2000).

70. *Id.*

71. *Id.*

72. Allen, *supra* note 51, at 1927.

73. *See* NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 307 n.62 (9th Cir. 1978) (holding that the union's admissions to lack of membership were not damaging to the union's position because the admissions concerned only membership and not union support). However, the contradiction is that employee membership would determine union support. The possible interpretation to the controversy is that if employees are content – even with low union membership – it is presumed that the union is supported. This interpretation is analogous to government and low voter turnout. If voter turnout is low, it is assumed that people are relatively content, for if they were not satisfied, they

union uses illegal tactics or engages in activity unprotected by the Labor Relations Act, the union will not be bargaining in bad faith.[74] Thus, notwithstanding the current double standard governing union and employer good faith bargaining,[75] the Labor Board seeks to impose more restrictions on employers, creating a greater unfair advantage for unions.[76]

C. Challenging the Union's Status by Employer and Employee

Another disturbing labor policy involves employee decertification. The Taft-Hartley Act permits employees who are no longer satisfied with union representation to file a decertification petition with the Labor Board.[77] In contrast to the employer's high burden of proof when challenging an incumbent union's status, employees must satisfy a much less strict burden of proof.[78] The Act simply requires at least thirty percent of the employees in a bargaining unit to sign the petition in order to force elections to determine the union's status.[79]

Critics of the Taft-Hartley Act contend that permitting employees to file a decertification petition hinders unions.[80] However, employee decertification is not always a feasible choice.[81] First, employees challenging union status must assemble the

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would vote for reforms.

74. *See* NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 492-96 (1960) (stating that the use of economic coercion by the union as well as other union activity, even if it is illegal or unprotected by the Act, is not viewed as bargaining in bad faith).

75. *Id. See also* Cheney Cal. Lumber Co. v. NLRB, 319 F.2d 375, 378-80 (9th Cir. 1963) (explaining that a union strike during negotiations while a contract is in effect in violation of a no-strike clause, does not indicate that the union has bargained in bad faith).

76. *See* Allen, *supra* note 51, at 1947-48.

77. Section 159(c)(1)(A)(ii) of the Act grants employees' the right to pursue a decertification election. 29 U.S.C. § 159(c)(1)(A)(ii) (2000). *See also* NLRB v. Silver Spur Casino, 623 F.2d 571, 578 (9th Cir. 1980) (reasoning that employees who are discontent with their representative have other remedies at their control).

78. Pioneer Inn Assoc. v. NLRB, 578 F.2d 835, 840 (9th Cir. 1978). The court stressed that the Labor Board may look more favorably upon the union when the union's position is confronted by the employer rather than by the employees. *Id. See also* Retired Persons Pharmacy v. NLRB, 519 F.2d 486, 491 (2d Cir. 1975) (stating that if an employer ceases to bargain, justification requires a high standard of proof for such actions).

79. *See generally* J. FEERICK, ET AL., NLRB REPRESENTATION ELECTIONS - LAW, PRACTICE & PROCEDURE 83-115, 236-47 (1980) (explaining Labor Board presumptions, election procedures, and voting procedures).

80. Abraham, *supra* note 35, at 29.

81. Joel B. Toomey, Comment, *Application of the Good-Faith-Doubt Test to the Presumption of Continued Majority Status of Incumbent Unions*, 1981 DUKE L.J. 718, 730 (1981).

requisite thirty percent to endorse the petition.[82] Second, most employees are unaware of the statutory requirements for filing a decertification petition.[83] Finally, even if the employees understand the procedure in filing a decertification petition, employees may not want to anger the union, fearing retribution.[84]

To be sure, most employees do not understand that only by enrolling as union members are they bound by the union's rules and policies.[85] In fact, employees often mistakenly presume union membership is a mandatory prerequisite for employment.[86] Thus, most employees are unaware that they cannot be compelled to become or continue as a member of a union as a requirement of employment.[87]

It may be argued that if an individual is dissatisfied with the union he may simply resign.[88] An employee has the right to renounce his affiliation with the union and dissolve this relationship, thereby avoiding union fines and discipline.[89] However, resignation may expose the employee and his or her

82. *Id.*

83. *Id.*

84. Rossie D. Alston, Jr. & Glenn M. Taubman, *Union Discipline and Employee Rights, at* http://www.nrtworg.RDA.htm (last visited Jan. 23, 2003). An overwhelming number of employees do not comprehend that a union's rules usually supply unions with the power to penalize members by discharging fees against employees who do not "toe the union line." *Id.* Also, unions have the authority to file suit against those same employees to obtain the prescribed penalty fees. *Id.*

85. *See* Wegscheid v. Local Union 2911, 117 F.3d 986, 990 (7th Cir. 1997) (declaring that employees were plainly informed that complete union membership and the expense of full union dues was ordered as a prerequisite of employment).

86. Buzenius v. NLRB, 124 F.3d 788, 792 (6th Cir. 1997). The union erroneously told employees that they were required to participate as full union members, including payment of union dues, in order to remain employed. *Id.*

87. *But see* C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 202-20 (1962) (explaining that according to Canadian tradition, individual workers are relatively powerless in their dealings with individual employers, so they combine with fellow workers in order to gain a competitive advantage). *See also* DAVID M. BEATTY, PUTTING THE CHARTER TO WORK 116-32 (1987) (stating that labor unions in Canada claim complete authority regarding the right to work, to withhold that work, or otherwise, to dispose of the "property" rights that are derived from the personal industry of each individual member of those unions).

88. V Pattern Makers' v. NLRB, 473 U.S. 95, 115 (1985). The Court held that employees have the prerogative to resign from a union during any period, and that union rules barring resignations are unlawful. *Id.* In International Bd. of Boilermakers v. Local Lodge D129, 910 F.2d 1056, 1060 (2d Cir. 1990), the court stated that each employee is granted "the right to refrain from any or all" activities. Thus, the court affirmed that each employee has the right to resign from union membership at any time. *Id.*

89. *Pattern Makers'*, 473 U.S. at 115.

family to harassment and violence by other union members.[90] Therefore, resignation is not a viable option. At the same time, an employer will not be apprehensive in contesting the union's status and, unlike the employee, possesses the requisite information in filing a petition.[91]

Furthermore, there can be vital time delays in litigation when a decision of the Labor Board is challenged in the courts.[92] This suspension has fatalistic implications for the union and the employees.[93] During this time, the union cannot represent its employees because the employer refuses to bargain.[94] Union members may become discouraged with the union's ineptitude and their inability to do anything on the employees' behalf.[95] Additionally, newly hired employees may not support the union with the same intensity as longtime employees who have had the benefit of prior and continuous union representation.[96]

Moreover, in order for any regulatory plan regarding polling to operate effectively, the employees must know their rights. If there is to be meaningful participation between employer and employee, there is a significant and separate benefit in having the employees themselves be involved in an important capacity in order to initiate, supervise, and enforce their rights in the

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90. *See Your Legal Rights: Railway or Airline Employee, at* http://www.nrtw.org/a/a_7_r.htm (last visited Jan. 23, 2003) (listing recommendations for employees seeking protection from harassment and violence upon resignation during a union strike). These guidelines are as follows:

> Whatever your decision with regard to resigning and working during the strike, you should keep as low a profile as possible and attempt to maintain existing cordial relationships with your fellow workers on both sides of the picket line. Avoid the zealots! Should you return to work, keep in close touch with other employees who are working during the strike and give each other support and share information. Also, if you work during the strike, you should get an unlisted telephone number, keep a diary of all strike-related threats and incidents of harassment and violence (who, where, what, when, names of witnesses, etc.), and take photographs of your private property, such as home and car, so that you can document any damage should you become a victim of union violence. If you begin to receive harassing phone calls, you should consider installing Caller-ID on your home phone. You should report all threats and incidents of harassment and violence to your employer and, if threats of actual violence are involved, the local police.

Id.

91. Toomey, *supra* note 81, at 730.

92. *See generally* NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990) (providing an eleven year time delay).

93. Douglas E. Ray, *Withdrawal of Recognition after Curtin Matheson: A House Built upon Sand*, 25 U.S.F. L. REV. 265, 280-81 (1991).

94. *Id.* at 281-82.

95. *Id.*

96. *Id.*

workplace. Surprisingly, informed employees who file decertification petitions and succeed in eliminating union representation are boosting the economy.[97] However, realistically, employees probably desire representation because they do not want the burden of dealing with detailed policies and labor procedures. Therefore, the next best alternative is a system which implements a mandatory yearly employee poll.

III. UNIFORM SYSTEM ELIMINATES DOUBLE STANDARD

A uniform system of mandatory annual employee polls would redress many of the above-mentioned concerns. Section A of Part III discusses why employer polling, in contrast to employee polling, is the preferable approach for determining union status. Section B proposes a mandatory annual union poll. Section B further illustrates how a mandatory annual poll would eliminate the good faith bargaining requirement currently posed on employers thus establishing an impartial system for determining union majority status.

A. Employer Polls Protect Employees

Because employers know the process for challenging union status and are less likely to fear union reprisals, employers are better equipped to challenge union majority status than uninformed employees who face union retaliation.[98] A consistent practice regarding union and employer polling would ultimately benefit the employees, or at the very least, discover if a majority of employees continue to support the union.

Employer polling is a protective measure for the employees. A union claims to protect all employees, requiring only a majority of employee support for its establishment.[99] If employees no longer support the union, for whatever reason, and the employer is aware of this lack of support, the law should not burden employers with strict and severe guidelines for polling its employees.

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97. Stephen G. Bronars & Donald R. Deere, *Union Representation Elections and Firm Profitability*, 29 INDUS. REL. 15-17 (Winter 1990). Data was provided which demonstrates that successful employee decertification petitions increase shareholder wealth, while failed employee decertification petitions decrease shareholder wealth. *Id. See also* Steven E. Abraham, *The Impact of the Taft-Hartley Act on the Balance of Power in Industrial Relations*, 33 AM. BUS. L.J. 341, 343 (Spring 1996) (noting decline in earnings due to unionism and circumstances identified with unions is immense when the strength of unions is prominent). It is union domination that is the origin of their capability to influence the occurrences that have been demonstrated to diminish business revenues. *Id.*

98. Toomey, *supra* note 81, at 730.

99. A union triumphs in an election if it obtains a majority (over fifty percent) of the verified votes cast. 29 U.S.C. § 159(a) (2000).

The Labor Board should not expect the employer to show evidence that a majority of employees are dissatisfied with the union.[100] After all, the purpose of the poll is to determine if the union does in fact retain a majority of member support.[101] Lessening the strict guidelines of employer polling not only assists the employer in determining if employees still support the union, but also allows employees to seek other representation if they so prefer.

Admittedly, such a polling system may not be feasible because of the Labor Board's broad discretion, which is reflected in its inconsistent rulings.[102] The Labor Board's contradictory and whimsical tactics generate serious drawbacks for all parties involved. An employer is compelled to demonstrate that the union does not have majority support, which is a very difficult feat.[103] Also, in trying to accumulate evidence, an employer is in danger of committing an unfair labor practice. Employers who ask employees about union attitudes may violate section 8(a)(1) of the Labor Relations Act, which forbids an employer from pressuring employees in the performance of their privileges under the Labor Relations Act.[104]

On the other hand, a union has the advantage over the employer in polling its employees.[105] The law permits unions to

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100. *See Curtin Matheson Sci.*, 494 U.S. at 799-800 (Blackmun, J., dissenting) (emphasizing that the Labor Board seems to demand that good faith reasonable doubt be proved by explicit declarations of specific employees). *See also Allentown Mack*, 83 F.3d at 1487 (stating that only seven of Allentown Mack's thirty-two employees in the bargaining unit had made assertions prior to the poll rejecting union representation and that number, according to the Labor Board, was not enough to foster doubts about the union's majority status).

101. *See Allentown Mack*, 118 S. Ct. at 836 (stating that the employer's burden is not to prove overwhelming union dissatisfaction, since that is the reason for polling, instead the employer's burden is to show whether a reasonable uncertainty exists regarding lack of union majority status).

102. *See Allentown Mack*, 83 F.3d at 1488 (agreeing with the Labor Board that only seven of Allentown Mack's thirty-two employees in the bargaining unit had told the employer before the poll was held that they no longer favored the union). *Cf. Curtin Matheson*, 494 U.S. at 797 (Rehnquist, C.J., concurring) (emphasizing that some Labor Board results order an employer to only disclose that employees have notified their wish to reject union representation to prove the employer's good faith reasonable doubt).

103. Joan Flynn, *A Triple Standard at the NLRB: Employer Challenges to an Incumbent Union*, 1991 WIS. L. REV. 653, 678-80; Toomey, *supra* note 81, at 723.

104. *See* Struksnes Constr. Co., Inc. and Int'l Union of Operating Eng'rs, Local No. 49, AFL-CIO, 165 N.L.R.B. 1062, 1063 (1967) (stating that an employer will violate section 8(a)(1) of the Labor Relations Act unless the employer complies with five elements required to poll its employees).

105. Toomey, *supra* note 81, at 736.

conduct inquiries of employees without violating the employees' independent preference of union management.[106] Although a union has some power over the employees, they cannot terminate the employees, while the employer can.[107]

B. Imposing Mandatory Union Polls

A mandatory poll conducted annually by the union would provide an impartial and unbiased system, which would eradicate the unclear good faith reasonable doubt test. Furthermore, regulating union polling would compel unions to continue vigorous and competent representation of its members as well as abolish the double standard that currently exists regarding union and employee polling.[108] The proposed annual union poll would be regulated by an independent entity. If that annual poll should reveal that at least thirty percent of the employees in the bargaining unit no longer wish to be represented by the union, an election would be conducted.[109] If more than fifty percent of the votes cast reveal that the employees no longer want union representation, the union's position as the bargaining representative would be revoked.[110]

CONCLUSION

Within unionized employment, a cultural climate emphasizing democratic values must be created. To foster such a climate, union employees must be committed to supplanting the current national labor system with one that promotes equality and protects the employees' freedom to choose, or not to choose, union representation.

The current system severely restricts employers' rights to poll their employees, even if employees express their dissatisfaction with the union. As a result, this system frequently suppresses the employees' true desires. The history of labor procedures illustrates the problems that exist including contradictory decisions by the Labor Board, perplexity over the burden of proof,[111] and profound disadvantages to employers and employees.

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106. *Id.*

107. *Id.*

108. *See* Pioneer Inn Assoc. v. NLRB, 578 F.2d 835, 840 (9th Cir. 1978) (determining that the Labor Board may view the union more favorably when challenged by the employer, rather than the employees).

109. *See* 29 U.S.C. § 159(c)(1)(A)(ii) (2000) (setting out employee decertification procedures).

110. *Id.*

111. *See Allentown Mack*, 118 S. Ct. at 829 (approving the Labor Board's procedure in permitting polling in cases where the employer exhibits good faith reasonable doubt, but decreasing the evidentiary criterion which

The ultimate solution to these problems is for the Labor Board to treat unions and employers equally. Because this is quite unlikely, the best approach is for the Labor Board to impose a mandatory poll,[112] conducted annually by the union, to determine if the union still enjoys majority status. Such a procedure would abolish the good faith reasonable doubt test, and all the biases that are included in this test. Employee rights are best guarded by the election procedure, and protection of employee rights was the basis for the original establishment of the National Labor Relations Act.[113]

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instructs the employer to demonstrate that doubt).

112. The Labor Relations Act provides the Labor Board with the power to "make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act." 29 U.S.C. § 156 (2000).

113. The Labor Management Relations Act provides that:

> [e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment.

29 U.S.C. § 157 (2000).