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How Legal Authorities Allowed Tyranny Of The Minority To Subvert Worker Enfranchisement

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JUNE 2025


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EXECUTIVE SUMMARY

For almost a century, private sector unions have been elected based on the majority support of the employees who voted in the union election. In these elections, groups of employees facing unionization are offered the opportunity to vote on whether a union should represent them and, if so, which union. If a majority of the employees who voted in the election choose a union, that union gains the authority to speak on behalf of all employees in the group, which is known as a bargaining unit.

There's a problem with this approach: It is contrary to the plain language of the National Labor Relations Act, the federal law that governs private sector unions.

The relevant text of the Act is clear:

> Representatives designated or selected for the purposes of collective bargaining **by the majority of the employees in a unit** appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment [...].[1] (Emphasis added.)

As drafted, the Act could be interpreted as permitting unions to be elected in one of two ways. A strict reading of the statute would allow unions to represent employees only when a majority of the employees in a bargaining unit eligible to vote voted in favor of unionization. This could be considered the "absolute majority standard." A less strict but still plausible approach is to require a majority of the employees in the bargaining unit to vote, with the union being elected if a majority of this quorum approves of it. This "quorum majority standard" would allow a union to represent employees after winning the majority support of just those employees who voted in the election, so long as a quorum of employees voted.

The logic behind these approaches is plain: The decision to unionize should be representative of the opinion of a majority of the employees who will be affected by it. Yet for almost 90 years, unions have been selected not by a majority of those eligible to vote or by the majority of a quorum of employees, but instead only by a majority of those who actually voted. This has resulted in unions representing bargaining units even when the majority of employees in those units did not vote in favor of the union.

This report shows how the plain language of the National Labor Relations Act was misinterpreted by the National Labor Relations Board and the courts in the 1930s and 1940s to accomplish what the judiciary determined was the Act's "purpose." Such judicial activism coincided with President Franklin Roosevelt's infamous threats to pack the Supreme Court, which until that point had acted as a "an active check on progressive legislation."[2] The Court's approach to statutory interpretation during this period stands in stark contrast to the current Supreme Court's adherence to textualism. This legal doctrine holds that the text of a statute, rather than its perceived legislative intent, is the superior method of interpreting laws.

Given the current Court's preference for textualism, it is unlikely these initial interpretations of the Act would be decided in the same manner today. Amendments that have been made to the Act since its inception, however, may have undermined such a textualism-based legal challenge by inadvertently supporting these initial interpretations.* It will likely require an act of either Congress or the National Labor Relations Board to reverse these flawed legal interpretations and restore the original purpose of the Act by establishing a new majority standard for union elections.

Such action would be welcome. Recent data from the National Labor Relations Board shows that 20% of private sector unions were elected with less than a quorum of the collective bargaining unit voting, and 40% were elected without majority support from all employees eligible to vote.[3] Of the approximately 74,000 employees collectively eligible to vote in these elections, only 32,000, or 43%, actually did.[4] In one extreme case, a union was elected with only 11% of a unit voting in its favor, after 85% of the unit chose not to cast a vote.[5] Despite this, the union will represent 100% of the employees. Under a proper interpretation of the National Labor Relations Act, this would no longer happen.

Amending the voting requirements of the Act would return labor law to its intended state without drastically changing how union elections are currently conducted. Roughly 60-80% of bargaining units won elections that would be consistent with a textualist interpretation of the statute, depending on whether an absolute majority or quorum standard is applied. Under such a standard moving forward, unions should expect to win a similar portion of elections. For approximately 20-40% of cases, unions would either have to work harder to achieve majority support, or those employees would not be subject to unionization. This approach would return union elections to the standards originally passed by Congress and ensure that, moving forward, workers are only represented by unions selected by a majority of those who would be subject to unionization.

HISTORICAL BACKGROUND

1. Interpretation of the Railway Labor Act

The groundwork for the misinterpretation of the National Labor Relations Act was laid by the 1926 Railway Labor Act, which governs employees of railroads, airlines and freight companies. The statute's text about union elections formed the basis for similar language found in the National Labor Relations Act. It reads:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for purposes of this chapter.[6]

Although this language on its face appears to call for elections by a majority of the employees in a bargaining unit, courts quickly determined otherwise. The National Mediation Board, which was responsible

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* The Railway Labor Act, a precursor to the NLRA governing primarily transit employees, contains a substantially similar requirement for an election to be decided by a majority of eligible employees. In fact, questionable interpretations of the RLA lie at the heart of courts' determinations that the NLRA allows the selection of a union by the majority of those voting. See Section 3(b) *infra*.

for administering elections under the Railway Labor Act, was asked in 1934 to review a case in which a union had won a majority of votes cast but not a majority vote of all employees eligible to vote. The board certified that the union had won the election. The employer refused to bargain, and the union subsequently sued.

The Eastern District of Virginia initially heard the case. When analyzing the issue of a sub-majority election, the court concluded that the results would be valid only when a quorum of eligible employees voted. The court stated:

> It is also contended by the Railway [employer] that the election is void because one of the rules under which it was held was in violation of the act (§ 2, par. 4) among other things, that the 'majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class,' etc. It seems to me that this defense is also without merit. A reasonable interpretation of the act is that the election must be open to each craft or class with full untrammeled opportunity to each eligible employee in such craft to vote, although he may not be compelled to exercise that right.
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> But in the craft (carmen and coach cleaners) where less than a majority of those eligible to vote, actually voted, it would seem to follow that there was no election by that craft, and as to that craft the certificate of the Board is without force or effect.[7]

Without analyzing the language of the governing statute, the district court relied on an analogous understanding of other laws to conclude that only the majority support of a quorum of eligible voters was required to elect a union. This departure from the plain text of the law would soon become a trend, with more and more courts straying from standard interpretations of statutory language in favor of reviews based on the broader animating principles believed to be behind the adoption of federal labor laws.

The case eventually made its way to the Fourth Circuit Court of Appeals, which issued its opinion in *Virginian Railway Co.* on June 18, 1936. The court determined that the union would represent the employees, despite not having been selected by a majority of all employees eligible to vote. It reasoned, "Where a majority of the craft participated in the election, we think that a majority of votes cast was sufficient to determine a choice of representatives, even though these did not constitute a majority of all those eligible to vote."[8]

The court's reasoning was not primarily based on a textual analysis of the Railway Labor Act, but instead a more general discussion of the Act's purpose and the consequences of an alternative ruling:

> If a majority of those qualified to vote is required, elections must frequently fail as a result of the failure of those qualified to vote to participate in them. If the employees are already represented, the failure to vote will be a vote against change; and where the employer, as in the case at bar, is opposed to change, the effect of the secret ballot will be in large member nullified. In the case of the blacksmiths' election which is before us, for example, it appears that, of 46 members qualified to vote, 22 voted for the Federation [union challenger], 8 for the Association [incumbent union], and 16 did not vote. If a majority of those qualified to vote be necessary to a choice in such election, the action of the 16 in not voting will be given the same effect as though they had voted for the Association, the existing representative; and the fact that they had abstained from voting and thereby favored the plan of the employer would be known to him. If there had been no existing representative, the voting would have resulted in no representative being chosen, and the purposes for which the act was so carefully drawn, so far as this craft is concerned, would have been impossible of attainment.*

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* *Virginian Ry. Co. v. Sys. Fed. No. 40, Ry. Emp. Dep't of Am. Fed'n of Labor*, 84 F. 2d 652-653 (4th Cir. 1936). It is worth noting that while *Virginian Railway Co.* formed the basis for the current "majority of those voting" approach, the Court's core contention regarding the success of elections is simply incorrect, at least for elections held under the NLRA. A full 80% of union elections conducted under the NLRA in 2022 would have succeeded even under the stricter textual standard.

> While the court did briefly review the language of the Railway Labor Act, its interpretation was less focused on what the text of the Act meant and more on its broader "reason and spirit:"
>
> We do not think the act should be given an interpretation leading to such results, if any other interpretation is possible; and we think that such other interpretation is not only possible, but is required by the language of the statute and by its reason and spirit. The clause of the act which we have quoted does not in terms require a majority vote of the craft.*

It is unclear precisely how the court came to this conclusion, given that the language of the Railway Labor Act specifically states that elections were to be based on "[t]he majority of any craft or class of employees."[9] Without discussing that conflict, the court relied on general principles of election law to justify its position:

> The clause of the act which we have quoted does not in terms require a majority vote of the craft. It merely prescribes the political principle of majority rule. Another section of the act provides the means of determining the majority, the political device of the secret election. Nothing is said as to whether the choice at such election shall be by a majority of the qualified voters, or merely by a majority of the votes cast; but the act clearly does not contemplate that there shall be such a failure of election as could easily result if the obtaining of a majority of the qualified voters were required. The universal rule as to elections of officers and representatives is that a majority of the votes cast elects, and that those not voting are presumed to acquiesce in the choice of the majority who do vote.[10]

This logic is flawed. While the court correctly summarized general principles of political elections, it relied on those principles, rather than the language of the Railway Labor Act, as its core reasoning. While the Act's language is susceptible to this interpretation, and the court's final holding was arguably reasonable, its failure to rely on the actual text of the statute was not. This departure from the text would later allow other courts to further depart from the plain statutory language.

The court's position is also undermined by the fact that it is inconsistent with how the Railway Labor Act is administered in other contexts. As an example, a union can be recognized as the representative of a bargaining unit through either a secret ballot election or through a process known as card check. Recognition through card check requires more than 50% of employees sign a card indicating their approval of a union to represent them.† Thus, under card check, unions must show the support of a majority of the entire unit, not just a majority of those who were presented cards to sign.

This argument was raised by the employer in *Virginian Railway Co.*, but it was summarily dismissed by the Court, stating, "We have carefully considered these arguments, but are of the opinion, for the reasons above stated, that the act should not be given so strict a construction, and that if a majority of the craft participate in an election, the majority of those voting

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* *Virginian Ry. Co. v. Sys. Fed. No. 40, Ry. Emp. Dep't of Am. Fed'n of Labor*, 84 F. 2d 653 (4th Cir. 1936). Interpretations such as this, which rely on the practical outcomes of a particular statutory interpretation as opposed to the plain meaning of a statute's text are now heavily disfavored. See, *Niz-Chavez v. Garland*, 593 U.S. 155, 171 (2021).

† See, "Overview & FAQ" (National Mediation Board), https://perma.cc/YG22-MLEQ. While outside the scope of this paper, it should be noted that card check is generally an inferior gauge of support for a union. Because cards are signed in public, there is significant opportunity for an employee to face fraud, coercion, or intimidation. An in-depth discussion of these issues can be found here: F. Vincent Vernuccio, "Protecting the Secret Ballot: The Dangers of Union Card Check" (Mackinac Center for Public Policy, 2019), https://www.mackinac.org/s2019-09.

Additionally, card check is less reliable than a secret ballot election. According to the NLRB, unions that presented cards demonstrating the support of between 50 and 70% of employees in a bargaining unit only won their certification election 48% of the time. "Decisions of the National Labor Relations Board: Dana Corporation and Metaldyne Corporation" (National Labor Relations Board, September 29, 2007), https://perma.cc/QCX5-4UHB.

is sufficient."[*] Essentially, this early interpretation endorsed a quorum approach to union elections.[†]

In short, the court did not meaningfully analyze what the text of the Railway Labor Act required and reached a conclusion based on its interpretation of the law's intent and generalized principles borrowed from election law. While the court's quorum interpretation does express one reasonable policy position, it ignores the fact that Congress may well have considered this option but chose to adopt a policy requiring the support of a true majority of those who would be represented by a union to be the requirement for winning union elections. Under a strict textualist interpretation, the court should have instead focused on finding the objective meaning of the Railway Labor Act based on the language that was actually passed by Congress. Its failure to do so would ultimately undermine the legitimacy of elections under both the Railway Labor Act and the National Labor Relations Act, with future courts going well beyond a reasonable interpretation of the text.[‡]

It would not take long for the effects of the 1936 *Virginian Railway Co.* case to be felt on labor law more broadly. The Seventh Circuit Court of Appeals heard a similar challenge the same year, and the court adopted the Fourth Circuit's reasoning to reach the same conclusion.[11] Shortly thereafter, the United States Supreme Court accepted the Virginian Railway Co. case for consideration on petition for certiorari. The Court upheld the Fourth Circuit's decision, adopting its reasoning wholesale.[§]

Like the Fourth Circuit before it, the Supreme Court based its decision on an analogy to election law and the Act's purpose, rather than the strict statutory language. The court did not explain why preventing a minority from exercising a pocket veto by not voting is inherently more unreasonable than allowing a different

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* *Virginian Ry. Co. v. Sys. Fed. No. 40, Ry. Emp. Dep't of Am. Fed'n of Labor*, 84 F. 2d 654 (4th Cir. 1936). It should be noted that the Court reserved the question of whether an election would be valid where a majority of those voting approved the union, but a majority of eligible voters did not participate in the election.

† Strictly speaking, the *Virginian Railway Co.* line of cases did not definitively conclude that a quorum approach was permissible, as a majority of eligible voters had, in fact, voted in that case. *Air Trans. Assoc. of Am. v Nat. Mediation Bd.*, 663 F. 3d 476 (D.D.C. 2010). As such, neither the Fourth Circuit nor the Supreme Court were asked to evaluate whether a quorum approach was consistent with the law. Thus, while these courts' endorsement of a quorum approach are dicta, they are nevertheless compelling evidence of how they were likely to approach a challenge to union representation based on the quorum theory.

‡ Interestingly, while the Supreme Court's language in *Virginian Railway Co.* endorsed a quorum theory, the National Mediation Board (the body responsible for administering the Railway Labor Act) did not. Despite the Court's interpretation, the NMB continued to require unions be recognized pursuant to a true majority standard and rejected the quorum approach. The NMB did not adopt an alternative approach until 2010, when it did so through the issuance of an administrative rule. *Air Trans. Ass'n of Am., Inc. v. Nat. Mediation Bd.*, 663 F. 3d 476 (D.D.C. 2011). Under this new rule, only the majority vote of employees who voted was necessary to elect a union. A subsequent challenge to this rule failed, with the D.C. Circuit ultimately adopting many of the same arguments advanced in *Virginian Railway Co.* This opinion is flawed and repeatedly characterizes the new rule as a "quorum" standard, which it was not, as the dissenting opinion astutely identifies. Id. at 491-492.

The D.C. Circuit's opinion also relied on *Chevron* deference, a legal principle that is no longer valid, and can be challenged on that basis. *Loper Bright v. Raimondo 603 US (2024)*, available at: https://www.oyez.org/cases/2023/22-451. Congress later attempted to require the NMB to return to a true majority standard through legislation, but that attempt was removed from the final version of the relevant legislation. "House Approves Measure that Places Restrictions on NMB Representation Election" (Littler Mendelson, Feb. 21, 2012), https://perma.cc/R63N-K3RK.

§ "Section 2, Fourth, of the Railway Labor Act provides: 'The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for purpose of this act (chapter).' Petitioner construes this section as requiring that a representative be selected by the votes of a majority of eligible voters. It is to be noted that the words of the section confer the right of determination upon a majority of those eligible to vote but is silent as to the manner in which that right shall be exercised. Election laws providing for the approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election. Those who do not participate 'are presumed to assent to the express will of the majority of those voting.'

We see no reason for supposing that section 2, fourth, was intended to adopt a different rule. If, in addition to participation by a majority of a craft, a vote of the majority of those eligible is necessary for a choice, an indifferent minority could prevent the resolution of a contest, and thwart the purpose of the act, which is dependent for its operation upon the selection of representatives. There is the added danger that the absence of eligible voters may be due less to indifference than to coercion by the employer." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 560-61 (1937) (citations omitted).

minority to choose who represents all employees. There are plenty of reasons, discussed in greater detail below, why requiring a union to demonstrate the support of a majority of eligible voters prior to being recognized as their bargaining representative is a better choice.* Ultimately, however, the Court's policy error is not as significant as its improper choice to rely on a nebulous understanding of legislative intent, rather than the text of the Railway Labor Act.

This Supreme Court opinion would form the basis upon which courts would ultimately conclude that the National Labor Relations Act requires unions to be selected by a majority of those voting, rather than a majority vote of all eligible employees or the quorum approach adopted by the early railway cases. Only the latter two options are even arguably supported by the text of the underlying law.

2. Interpretations of the National Labor Relations Act

While these railway cases were being litigated, Congress passed the original version of the National Labor Relations Act, commonly known as the Wagner Act. Like the Railway Labor Act before it, Wagner contained language regarding union elections:

> Representatives designated or selected for the purposes of collective bargaining *by a majority of the employees in a unit* appropriate for such purposes shall be the exclusive representatives of all the employees in such a unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.[12]

After the 1935 passage of the Wagner Act, employers began challenging elections where less than a majority of employees eligible to vote favored unionization. Initially, the National Labor Relations Board interpreted this language as requiring a true majority of all voters, consistent with the statutory language quoted above. In 1936, the Board decided *In the Matter of Chrysler Corp. and Society of Designing Engineers*, in which Chrysler challenged whether a union claiming to represent a majority of employees within a bargaining unit had demonstrated such support. The Board ordered a secret ballot election, in which only 125 ballots were cast out of an eligible voting pool of 700 employees. The vast majority of these ballots were cast in favor of unionization — 121 out of 125. Despite the union winning the majority of ballots cast, the Board denied the union's petition for representation.

The Board would reverse course only months later with its decision in *In the Matter of the Associated Press and American Newspaper Guild*. In doing so, the Board explicitly acquiesced to the reasoning applied by the Fourth Circuit in Virginian Railway Co.:

> A majority of those eligible voted; a majority of those voting, though less than a majority of those eligible, voted for the American Newspaper Guild. In certifying the Guild, we are following the rule established by the Circuit Court of Appeals for the Fourth Circuit in *Virginian Railway Co. v. System Federation No. 40*, decided June 18, 1936. The Court had before it the provision in the Railway Labor Act, 45 U.S.C. § 131 et seq., that: 'The majority of any craft or class shall have the right to determine who shall be a representative of the class or craft." It decided that where a majority of the eligibles voted, a majority of those voting, though less than a majority of those eligible, determined the representative.

The Board, quoting the Fourth Circuit's language regarding political elections, adopted that reasoning wholesale.† It then proceeded to certify the Newspaper

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* See Sections 3(c), 4 *infra*.

† "Section 2, Fourth, of the Railway Labor Act provides: 'The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for purpose of this act (chapter).' Petitioner construes this section as requiring that a representative be selected by the votes of a majority of eligible voters. It is to be noted that the words of the section confer the right of determination upon a majority of those eligible to vote but is silent as to the manner in which that right shall

Guild, despite it not having received a majority of all eligible votes. Importantly, however, a majority of all eligible voters had voted — thus, this decision reflects the first switch from a true majority standard to a quorum standard.*

The Board would further liberalize the majority requirement that same year, in 1936, in *In the Matter of R.C.A. Manufacturing Company, Inc. and United Electrical and Radio Workers of America*. There, the Board squarely addressed the three possible interpretations of the National Labor Relations Act's majority requirement — true majority, quorum, or majority of those voting. After explicitly recognizing that *Virginian Railway Co.* had upheld a quorum standard for purposes of the Railway Labor Act, the Board recognized that the court had not expressly addressed the issue of a sub-quorum vote.† The Board ultimately held that Congressional intent necessarily required the Board to adopt a majority of those voting standard, as an alternative holding would defeat the Board's understanding of the purpose of the Act. To do so, the Board relied heavily on consequential proclamations relating to the practical impacts of a more stringent standard, without significant textual analysis. The Board's reasoning is worth quoting at length:

> [A quorum] interpretation defeats the purpose of the Act by placing a premium upon tactics of intimidation and sabotage. Minority organizations merely by peacefully refraining from voting could prevent certification of organizations which they could not defeat in an election. Even where their strength was insufficient to make a peaceful boycott effective, such minority organizations by waging a campaign of terrorism and intimidation could keep enough employees from participating to thwart certification. Employers could adopt a similar strategy and thereby deprive their employees of representation for collective bargaining.
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> In all such situations, the purpose of the Act would be thwarted. One of its basic policies is to encourage 'the practice and procedure of collective bargaining' between an employer and his employees. Section 9(a), and especially the election procedure, is designed to promote collective bargaining by means of a prompt determination of the representative of the employees to carry on that bargaining. The object of the whole procedure is the elimination of obstructions to the free flow of commerce caused by the refusal to accept the procedure of collective bargaining. The realization of that object thus depends upon the efficacy of the election device as a peaceful means of settling disputes between contesting labor organizations. If an election is allowed to fail on account of the causes mentioned above, the results will be the continuation of unrest and strife consequent upon the doubt as to which organization is entitled to represent employees.
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> The 'quorum' interpretation thus introduces a qualification that places in the hands of employer and rival labor organizations a weapon which may easily defeat the collective bargaining sections of the Act.
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be exercised. Election laws providing for the approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election. Those who do not participate 'are presumed to assent to the express will of the majority of those voting.'

We see no reason for supposing that section 2, Fourth, was intended to adopt a different rule. If, in addition to participation by a majority of a craft, a vote of the majority of those eligible is necessary for a choice, an indifferent minority could prevent the resolution of a contest, and thwart the purpose of the act, which is dependent for its operation upon the selection of representatives. There is the added danger that the absence of eligible voters may be due less to indifference than to coercion by the employer." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 560-61 (1937) (citations omitted).

* The Board would subsequently affirm its commitment to the quorum standard in *Matter of New England Transportation Co. and International Association of Machinists*, 1 N.L.R.B. 130 (1936).

† In *Virginian Railway Co.*, a majority of eligible employees had voted, so the Fourth Circuit reserved the question of whether even that was a necessary requirement for recognition under the NLRA. ("Whether the choice of a majority of those voting would also be valid even if a majority of eligible voters do not participate in the election is a question we need not now decide." 84 F. 2d, at 653).

> It is an accepted cannon of statutory construction than an unwise and unworkable interpretation is to be rejected if another, and sensible, interpretation is at hand. Consequently, we feel that the third interpretation mentioned above, a majority of the eligible employees voting in the election, is required if the intent of Congress in enacting the Act is to be fulfilled.[13]

In adopting a majority-of-those-voting standard, the Board looked to results, while simultaneously adopting the position that the Act was inherently designed to promote collective bargaining. Conspicuously absent from the Board's reasoning, however, was the type of textual analysis that is now the routine method courts use in statutory interpretation.

Perhaps unsurprisingly, employers eventually challenged representation proceedings that fell short of a true majority in court. One of the first courts to do so was the Fifth Circuit, in *N.L.R.B. v. Whittier Mills Co.*[14] There, the Court adopted the quorum standard, relying almost entirely on the reasoning of *Virginian Railway Co.*[*]

The Seventh Circuit Court of Appeals quickly expanded the Fifth Circuit's reasoning in the 1940 case of *New York Handkerchief Mfg. Co. v. N.L.R.B.*[15] There, a union had been elected by a majority of the 56 employees who voted in a representation election. That number was significantly smaller than the 225 employees eligible to vote, but of those voting, only three voted against the union. The court ultimately recognized the union, but did so reluctantly, focusing on the need for the newly created National Labor Relations Board to rely on special rules needed to address the coercive actions taken by the employer in that case.[†]

While it adopted the reasoning of *Virginian Railway Co.*, the court did so reluctantly, stating that it was "not as confident concerning the plain language of the [National Labor Relations Act] as is the [National Labor Relations Board]," but agreed that *Virginian Railway Co.* provided strong persuasive authority in favor of interpreting the Railway Labor Act and the Wagner Act consistently with one another. The court also recognized that the Board could not approve every election where less than a quorum of the unit approved of unionization.[‡]

> Other circuit courts rapidly followed the Fifth and Seventh Circuit's lead and allowed unions to be elected without the support of an absolute majority.[§] This is true even when the court in

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* "There is no express provision as to what sort of majority shall control the results of such an election. The general rule, in the absence of a clear provision otherwise, is that voters who could have voted in a formal election but do not are considered to assent to the will of the majority of those who do vote; so that if those who do vote make up a majority of all, the will of all is expressed by those who vote. This rule was applied to different language, but of the same general import, used in the Railway Labor Act, 45. U.S.C.A. § 151 et seq., in *Virginia Railway Co. v. Federation No. 40*, 300 U.S. 515. It should be applied here. Where with fair opportunity to all members of the unit to vote, a majority do vote, they are, so to speak, a quorum to settle the matter, and the majority of that quorum binds those not voting and suffices to select the bargaining representative of the unit." *N.L.R.B. v. Whitter Mills Co.*, 111 F. 2d 474, 477-78 (5th Cir. 1940).

† "The authority of the Board to certify the Union under such circumstances presents an important question, not free from doubt. In this connection, it must be kept in mind that we have sustained the Board's finding to the effect that petitioner was guilty of coercion and intimidation against its employees, which, no doubt, prevented many of them from participating in the election." *N.Y. Handkerchief Mfg. Co. v. N.L.R.B.*, 114 F. 2d 144, 148 (7th Cir. 1940). The employer in this case had engaged in coercive acts, including not posting notice of the election until 4:30PM on the day it was scheduled (when polls had been officially opened since 3:00PM), placing company representatives in front of the polling place to observe how employees voted and allowing company representatives to observe while employees publicly circulated a pro-company position while urging employees not to vote. See: *New York Handkerchief Co.*, 7 N.L.R.B. 624 (N.L.R.B-BD 1938) (available at: https://perma.cc/JQP4-YNG6).

‡ "It does not follow, however, that the Board could justify itself in the exercise of such authority in every case regardless of the number who participated in the election. Like any other authority, it must not be employed arbitrarily. In the instant case, as found by the Board, petitioner, by its unlawful conduct, interfered with the right of its employees to participate in the election and, no doubt, was responsible for the small proportion of its employees voting. Under such circumstances, we are of the opinion that the Board not only was within its authority but was justified in concluding that the Union was the proper representative. To hold otherwise would place a premium upon the unlawful conduct of an employer and enable it to frustrate one of the major purposes of the Act—that is, the determination of a proper bargaining agent." *N.Y. Handkerchief Mfg. Co. v. N.L.R.B.*, 114 F. 2d 144, 149 (7th Cir. 1940).

§ See, for example, *Marlin-Rockwell Corp. v. N.L.R.B.*, 116 F. 2d 586, 588 (2d Cir. 1941).

> question had reservations about the language of the Wagner Act. The Second Circuit, as an example, admitted that "[r]ead literally, section 9(a) of the Act, 29 U.S.C.A. § 159(a), seems to require [election by a majority of those eligible to vote]; but it is so generally the custom in elections to permit a majority of those voting to decide the result, that we think the argument cannot be accepted."*

It had become generally accepted by 1944 that general election law principles, and a quorum standard, applied to the Wagner Act. Subsequent courts proceeded to stretch the logic even further. In *N.L.R.B. v Central Dispensary & Emergency Hospital*, the D.C. Circuit Court of Appeals limited the caveat established by the Seventh Circuit in *N.Y. Handkerchief*. After quoting portions of the Seventh Circuit's opinion, the court stated:

> It does not follow from this, however, that any rigid rule requiring the vote of the majority of all employees, in the absence of employer coercion, should be adopted. The real test is whether the election is actually representative. This is always a question of fact in the particular case. The Board has recognized this principle by an administrative ruling that in minority elections it will investigate and determine whether the election was actually representative.[16]

Thus, the D.C. Circuit expanded the circumstances under which a minority election could result in a union's recognition. The prior rule permitted recognition via quorum, with minority election results allowed only in circumstances where an employer's coercive actions impacted the fairness of the election. *Central Dispensary*, meanwhile, required only that the Board determine the minority election was "actually representative." Under *Central Dispensary*, the Board now had discretion to reach its own conclusion as to whether an election was representative. The court reasoned:

> This interpretation seems to be within the spirit of the warning given by the court in the New York Handkerchief case, supra, and we think should be approved. While the standards by which the Board determines whether a minority election is truly representative are necessarily vague, they may still be subject to judicial examination and review in case the judgment of the board is arbitrary.[17]

To summarize, *Central Dispensary* modified and loosened the standard for union elections. It handed the Board the authority to certify results from any minority election, despite recognizing the standards for making these decisions are "necessarily vague." The only stipulation was that the Board's decision could not be arbitrary.

For all intents and purposes, *Central Dispensary*'s approach to the National Labor Relations Act is now the generally accepted position.† The U.S. Supreme Court has never considered whether the logic of *Virginian Railway Co.* should apply to the Act and has rejected several opportunities to do so.‡ The Court should revisit that question, which does not appear to have been posed to it in almost a century.

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* *Marlin-Rockwell Corp. v. N.L.R.B.*, 116 F. 2d 586, 588 (2d Cir. 1941). It should be noted this holding was more consistent with Virginian Railway Co.'s quorum requirement than *N.Y Handkerchief*'s authorization of a true minority election.

† See generally, *N.L.R.B. v. Standard Lime & Stone Co.*, 149 F. 2d 1945 (4th Cir. 1945), *N.L.R.B. v. Deutsch Company*, 265 F. 3d 473, 481 (9th Cir. 1959); *N.L.R.B. v. Singleton Packing Corp.*, 418 F. 2d 275, 279 (5th Cir. 1969). (It should be noted that in *Standard Lime* a portion of the opinion concluded *Virginian Railway Co.* applied to the NLRA in light of congressional report indicating the NLRA was intended to amplify and clarify the principles of the RLA, and a separate, subsequent Senate Report that highlighted the application of the *Virginian Railway Co.* decision to RLA elections).

‡ *Central Dispensary*, *N.Y. Handkerchief*, *N.L.R.B. v. National Mineral Co.*, 134 F. 2d 424, 426-28 (7th Cir. 1943) (applying *N.Y. Handkerchief* to another election in which the employer committed unfair labor practices) and *Marlin-Rockwell Corp.* were each appealed to the Supreme Court, which declined to hear them.

3. A textualist analysis of the National Labor Relations Act's voting provisions

A. Basics of textualism

A better approach to interpreting both the Railway Labor Act and the National Labor Relations Act would be to analyze the actual meaning of the text of those statutes. This would be consistent with a method of statutory interpretation known as textualism. Under this approach, judges attempt to understand the best objective interpretation of the text of a law as written.* Championed by Justice Antonin Scalia, this approach is now the dominant theory of legal interpretation, with Justice Elena Kagan declaring in 2015, "We're all textualists now."†

The general principle of textualism is that legal interpretations should be "guided by the text and not by intentions or ideals external to it, and by the original meaning of the text, not by its evolving meaning over time."[18] The logical underpinning of this approach is that laws are passed by specific people, at specific points in history, and the words chosen should be interpreted based on what a reasonable person at that time would understand a particular piece of legislation to do.‡

Textualism generally rejects reliance on legislative history — documents and other information created when a proposed law is considered by Congress — as a means of interpreting the law.§ It acknowledges that the language of a law often reflects compromises that may not be captured in an Act's legislative history but are in its final language. Further, legislative bodies consist of several representatives, who have their own opinions about what a statute means and how it should be applied. Attempts to discern an entire legislature's intended meaning of a law are practically impossible. Interpreting the statutory text as it was understood at the time is the best method for determining how a law should be applied.

Textualists fear that alternative approaches allow judges to insert their own bias into interpreting law. As Justice Scalia described: "[T]he main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law."[19] Textualism attempts to prevent this by focusing on the language of the statute as it would have been understood when lawmakers enacted it. Under a textualist approach, the meaning of laws does not change with evolving societal standards — statutes exist as they were passed. If standards have since changed, it's up to elected officials to change them — it is not a job for the courts.

B. Textualism as applied to the National Labor Relations Act

A proper textualist analysis of the National Labor Relations Act's section on union certification elections requires a 1935 dictionary.¶ Despite this, the plain meaning of the Act is relatively straightforward. The Act states:

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* An in-depth review of the theories of statutory interpretation is beyond the scope of this study. Nevertheless, a basic understanding of textualism is necessary to understand why prior decisions interpreting the NLRA are inconsistent with the Supreme Court's modern approach to statutory analysis.

† Harvard Law School, "The 2015 Scalia Lecture Series: A Dialogue with Justice Kagan on the Reading of Statutes," YouTube, at 08:29 (Nov. 24, 2015), http://youtu.be/dpEtszFT0Tg. Justice Kagan later repudiated this position when arguing that a majority of the court had engaged in nontextual judicial activism. *West Virginia v. E.P.A.*, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting).

‡ Strictly speaking, pure textualism is only concerned with discerning the objective meaning of a statutory text. A corollary, originalism, further narrows a textualist review to an attempt to understand the objective meaning of a statutory text as it would have been understood at the time it was passed. For purposes of this study, we assume a textualist review through that lens.

§ Legislative history looks to contemporaneous accounts regarding what the intent of a legislature was in passing a law. To do so, courts will look to congressional reports, statements and correspondence of individual legislators, and similar documents to put the adopted legislation into context. Textualism rejects these sources as less reliable and reflecting only the intent of these secondary source's authors, rather than the intent of the legislature as a whole.

¶ Textualism looks to the meaning of a word at the time the statute in question was adopted, as that would have been the meaning intended by the drafters. Definitions far removed from the date of drafting, and future definitions in particular, are significantly less helpful in interpreting a statute's intended meaning under this approach.

> Representatives designed or selected for the purposes of collective bargaining by a majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such a unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.[20]

The text is clear that representatives are to be selected "by a majority of the employees in a unit," but it does not define the term "unit." Subsequent sections of that Act give some context to what "unit" means:

> The Board shall decide in each case, whether, in order to assure 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.[21]

Based on this context, it is clear that the authors of the Act contemplated discrete groups of employees acting in concert. Today, the Board applies this language as generally requiring a subset of employees who are similarly situated, known as a bargaining unit. Those units can be based on employers, crafts (or professions), or facilities or plants. This is consistent with other portions of the Act, which specifically prohibit organizing different professions or types of employees into a bargaining unit, absent special exceptions.*

The remainder of the relevant language of the Act requires little interpretation. Once an appropriate group of employees has been identified by the Board, the question of unionization is to be decided "by a majority of the employees" in that unit. Under the plain language of that requirement, unions could only organize if a majority of employees in a bargaining unit voted in their favor. This could be called the absolute majority standard.

An argument could be made, however, that the text allows for a union to be elected without the support of a majority of the employees. The text — "[r]epresentatives … selected … by a majority of the employees in a unit" could be read as only requiring that a majority of the employees in a bargaining unit do the selecting, or voting. If so, unions could be elected when a majority, or quorum, of employees vote, and a majority of that quorum selects the union. Under this interpretation, when a majority of a unit votes, a majority has selected its representative, even if only a minority of employees vote for the union. The text of the statute — "a majority of the employees in a unit" — is arguably ambiguous enough to allow for a quorum of employees to select a union, as long as at least a majority of all eligible employees cast a vote on the question. This was essentially the position adopted in *Virginian Railway Co.* Had that decision been reached based on the text of the Railway Labor Act, rather than a generalized understanding of that Act's "reason and spirit," the Court's conclusion would have been significantly strengthened.

The current jurisprudence has not resolved this ambiguity and goes beyond allowing a quorum of employees to elect a union. The *Central Dispensary* test only asks the Board to determine if an election is "actually representative" and defers to the Board so long as its interpretation is not arbitrary. This interpretation, as shown in *Central Dispensary* itself, permits a union to be appointed as a collective bargaining representative even when less than a majority of the employees vote. It is difficult to square this interpretation with the Act's requirement that unions be selected "by a majority of employees in a unit."

Judge Karen Henderson makes exactly this point in her compelling dissent in *Air Trans. Ass'n of Am., Inc. v. Nat. Mediation Bd.* In that case, the National Mediation Board, which is responsible for administering the Railway Labor Act, adopted a rule that recognized unions based only on the majority vote of employees who had cast a vote. Prior to this change, the Board required unions to be elected by a true majority of employees. The rule was challenged, but the D.C. Circuit Court of Appeals upheld the rule.

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* As an example, it is generally inappropriate for security guards to be included in the same bargaining unit as non-guard employees, giving their disparate job duties and hours.

Judge Henderson's dissent in the D.C. Circuit case argues that the majority's interpretation runs counter to the text of the Railway Labor Act. She stated:

> Section 2, Fourth provides: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class...." Were I writing on a clean slate—that is, without knowing the background of section 2, Fourth's enactment, without reading the Supreme Court's decision in *Virginian Railway v. System Federation No. 40*, and, most important, without using the *Chevron* invention—I would conclude, as urged by Appellant American Transport Association of America, Inc., that section 2, Fourth means the majority of the relevant craft/class must vote for, or otherwise endorse, unionization. While the overlay created by the provision's background, by the Supreme Court's reading of it and even by the *Chevron* sequence has complicated otherwise straightforward language, what it has *not* done is to replace "majority" participation with a lesser number.[22]

Judge Henderson continued, explicitly noting that the language of the Railway Labor Act requires, at least, a quorum approach:

> While *Virginian Railway* addresses many other issues, its resolution of the section 2, Fourth issue makes one critical point unmistakably clear: the majority of the craft/class *must participate in* any unionization election. That majority participation is a condition precedent is manifested by the fact that the carmen and coach cleaners election in which the majority of the craft did *not* participate was declared invalid and, although the declaration was not appealed, the Court saw fit to note the declaration in its six-paragraph discussion of section 2, Fourth. Moreover, in adopting its majority-of-votes-cast-*with*-majority participation interpretation, the Court expressly described majority participation as "necessary" when it declined to make, "in addition," the majority of those eligible to vote necessary to choose a representative. And its use of the phrase "indifferent *minority*" makes clear that "majority participation" is required; otherwise the "indifferent" (i.e., non-participating) members of the craft/class could have just as easily comprised a majority.[23]

Thus, Judge Henderson's position appears to be consistent with the position being advanced by this study: The best interpretation of the Railway Labor Act requires a true majority standard, or, at minimum, requires the majority vote of a quorum of employees. Given that much of the National Labor Relations Act's jurisprudence is based on *Virginia Railway Co.*'s interpretation of similar language from the Railway Labor Act, a nearly identical argument can be made that the National Labor Relations Act also includes a majority or at least quorum requirement.

The strongest argument in favor of the *Central Dispensary* interpretation is, ironically, one relying on statutory interpretation. In 1947, Congress amended the National Labor Relations Act by enacting what is commonly known as the Taft-Hartley Act. These amendments — backed with broad, bipartisan support — attempted to better balance U.S. labor relations, which had become too favorable to unions. Via Taft-Hartley, Congress provided that a union-shop agreement — where employers agreed to only hire dues-paying union members — could not be entered into if "a majority of the employees eligible to vote in such election" rescind the union's authority to enter into such an agreement.[24] As noted in a letter by Attorney General Tom Clark to President Truman, this language was passed after the *Central Dispensary* test had been decided, but Congress did not modify the Wagner Act's "majority of the employees in a unit" language.* General Clark's letter stated:

> Moreover, it is clear that when the Congress desires that an election shall be determined by a majority of

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* Attorney General Tom Clark was later Justice Clark of the United States Supreme Court.

> those eligible to vote rather than a majority of those voting, the Congress knows well how to phrase such a requirement. For example, in section 8(a)(3)(ii) of the National Labor Relations Act, [as amended by Taft-Hartley], the Congress has required that before any union shop agreement may be entered into, the National Labor Relations Board must certify 'that at least a *majority of the employees eligible to vote* in such election have voted to authorize such labor organization to make such an agreement." (Italics supplied.) It is worth noting that this language was enacted by the Congress in the very act in which it readopted section 9 (a) of the National Labor Relations Act which, as shown above, contains language similar to that in section 2, Fourth, of the Railway Labor Act.[25]

In short, Attorney General Clark argued that had Congress wished to clarify the National Labor Relations Act's election language to correct *Central Dispensary*, it had the ability to do so, as shown by its adoption of the above language regarding union-shop agreements. Congress' failure to do so arguably shows its tacit endorsement of the *Central Dispensary* standard.

While this is the most compelling argument against an interpretation that a union can be certified only by an absolute majority employees eligible to vote, it is not entirely dispositive. The "majority of the employees in a unit" language remains unchanged. While Congress could have amended this language to make it more precise, its inaction does not necessarily mean that Congress intended to support, much less cement in statute, the courts' interpretation of the Act's election requirements. While courts will presume that the decision not to clarify these requirements reflect Congress' tacit endorsement of how the Act had been interpreted by courts, that presumption may not reflect reality.*

Given Congress' use of alternative language in Taft-Hartley, a legal challenge to the initially flawed interpretation of the National Labor Relations Act becomes more difficult. While a compelling case can be made that the decisions highlighted above improperly interpreted the Act's language, the subsequent amending language used in the statute can be used to argue otherwise. This would likely be a significant hurdle in any legal challenge to how the Act's election provisions are currently interpreted. Thus, the best way to correct the issue would be for Congress to clarify that the statute specifically requires a union to be approved by "a majority of the employees eligible to vote." Barring congressional action, the National Labor Relations Board should return to its earliest interpretations of the statute as requiring either an absolute majority vote, or a quorum, as either approach is more consistent with the statutory language of the Act.

C. Policy considerations

One significant issue with the various courts' conclusions regarding the purpose of the National Labor Relations Act is that the application of general election law makes little sense in a union context. In political elections, it would be far more difficult to determine whether the winner of an election had obtained majority support from all eligible voters. In those contexts where the total number of those eligible to vote is known and relatively finite, quorum requirements are far more common. By way of example, the Constitution requires a quorum of both the House of Representatives and the Senate for either body to conduct business.† The National Labor Relations Act imposes a quorum requirement for the National Labor Relations Board.[26] The Railway Labor Act similarly restricts the National Mediations Board from acting

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* Nevertheless, courts reviewing the National Labor Relations Act's election-related language must presume knowledge on Congress' behalf. Without perfect knowledge of what every individual legislator was thinking, any attempt to read into motive is impossible. Thus, courts must assume that any amendments were undertaken with full knowledge of how the Act had been interpreted at the time those amendments were passed.

† U.S. Const., art. 1, § 5. Although certain procedures have weakened the quorum as an absolute requirement, legislators maintain the ability to suggest an absence of a quorum and thereby prevent further business until a quorum is established. See, *Voting and Quorum Procedures in the Senate*, Congressional Research Service, March 26, 2020, available at: https://perma.cc/WE33-52KP.

absent a quorum.[27] Thus, in most instances, a quorum is necessary for policymakers to conduct business.

Perhaps more importantly, political elections are of a significantly different character than unionization elections. If political candidates needed the support of a majority of eligible voters to get elected, not enough candidates would get elected for governments to function. In other words, political elections must allow for a majority those voting to elect representatives because an absolute majority standard is unworkable. Furthermore, political elections are cyclical and held on a regular basis, allowing the outcome of one election to be easily reversed by the next. Eligible voters who failed to vote in the last election are guaranteed another opportunity to exercise this right after only a short period.

Union elections differ in important ways. First, they are not regular. Once a union is elected, it maintains its position as an exclusive representative for all employees in the bargaining unit indefinitely, or until it is decertified in a special election. Decertification elections of incumbent unions are rare, so most employees will only ever get one chance to vote for or against unionization. In fact, one study estimates that 95% of union members have never voted for a union.[28]

Second, the stakes are different for employees in union elections. Whether or not they are unionized impacts employees' salaries, working conditions, job safety, access to health care, retirement planning and more. While the decisions of elected officials obviously affect voters, the impacts of those decisions are often drawn out over time and occur less frequently than the impacts of unionization to the individual workers involved. Policy decisions at the local, state and federal level, such as minimum wage, health and safety requirements, overtime pay, and similar topics certainly have an impact on individuals, but a union contract not only directly addresses these topics, it dictates almost everything about an individual's working environment. The outcome of these elections are likely to be felt quite deeply by workers, who experience the consequences day in, day out. In a union election where only a minority of employees vote, one voter or a small group of voters can have an outsized impact on the livelihoods of many employees.

The stakes are even higher in states that permit unions to force all employees, under threat of losing their job, to pay them. Twenty-four states currently allow this, while the other 26 have right-to-work laws on the books that prohibit unions from doing so. This coercive practice is of such concern that the U.S. Supreme Court banned it for public employees in 2018, reasoning that forcing these employees to pay a union against their will violates their First Amendment rights.[29]

Given these realities, requiring an absolute majority standard in union elections is not only supported by a plain reading of the statutory text but also employees' reasonable expectations. The power to gain a monopoly in representing employees and negotiate indefinitely on their behalf should not be easily won. It is a significant authority that should only be permitted when it has passed a substantial test of approval, such as winning the support of a majority of the employees eligible to vote.

The consequential reasoning used by the Board in *RCA* to justify a lesser standard is flawed. Even assuming that the Board's concerns about employers being able to quash unionization campaigns through "intimidation and sabotage" were valid in the context of labor relations in the 1930s, they are significantly less relevant today.[30] The National Labor Relations Act, as currently constituted, provides robust protections against intimidation and coercion, with Section 9 clearly prohibiting both employers and unions from interfering with, or otherwise restraining or coercing employees in the exercise of their labor rights.[31] Those rights expressly include the right 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." Employees also have the right to refrain from any of those activities. Any employer (or union) engaging in "a campaign of terrorism and intimidation" is almost certain to run afoul of an unfair labor practice. And, to the extent that unfair labor practice charges are insufficient to purge the taint of otherwise

impermissible behaviors, it would still be possible for the Board to apply either a quorum or true majority approach except in cases where misconduct makes the administration of a fair election impossible. This was the approach adopted in *New York Handkerchief*.

The Board's concerns regarding the risk of empowering minorities are equally unavailing. In *RCA*, the Board was concerned that minority groups would prevent certifications of unions that they could not otherwise defeat in an election, and that this concern helped to justify a majority-of-those-voting standard for representation. In doing so, the Board enshrined an opposite tyranny of the minority — namely, allowing a true minority of employees to speak for the entire majority. The consequences are significant, particularly given the difficulties of removing a union once one has been established in a workplace.

If the majority of workers represented by a union wish to remove their union, they must do so via a process known as decertification. Decertification, however, is an extremely difficult process. Once a union is recognized, workers are prohibited from even attempting to decertify it for a one-year period. If the union can negotiate a final collective bargaining agreement during that year, the prohibition on decertification is extended for up to three years in what is known as a contract bar. Thus, if a majority of employees find themselves unionized by a minority of their coworkers, they can nevertheless be forced to accept unionization for a period of up to four years. Even employees who wait out these prohibitions on decertification must clear additional hurdles. Employees seeking decertification have only a 45-day window to file a decertification with the Board.

By allowing unions to be recognized by only a majority of those voting, the Board has allowed that minority to exercise far more control than what it feared from competing unions in *RCA*. Under the current standard, a majority of employees can not only be bound by the decision of a minority but are also largely prohibited from overruling that majority for years.

4. Textual application of the National Labor Relations Act is a superior approach

A textualist approach would result in a more reasonable application of the National Labor Relations Act. Under the current system, a minority of employees can determine who speaks for all employees. If the "majority of the employees in the unit" language is applied properly, however, unions could only speak for all employees in a bargaining unit when either an absolute majority, or a majority of a quorum, of employees have voted for union representation.

An illustrative example can be found in the case of a Starbucks in Riverside, California. In 2022, employees at that Starbucks were given the opportunity to vote on union representation.[32] There were 28 employees eligible to vote in the election but only four of them did. Of the four who voted, three voted in favor of the union and one opposed it. Starbucks challenged the results of the election, and it is unclear whether the store has been unionized at time of writing.* Under the *Central Dispensary* standard, however, the National Labor Relations Board could certify this result if it finds it "actually representative" and no court finds this decision to be arbitrary. If this result prevails, it would mean that a group representing just over 10% of the employees will force a union on the 90% of employees who either abstained from voting or opposed unionization.

Results like these undermine the democratic principles underlying employees' rights to choose their representatives. Employees working under a collective bargaining agreement do not have the right to negotiate terms or conditions of employment on their own behalf. Instead, unions act as the "exclusive bargaining representative" for a group of employees, and all issues related to an employee's working conditions must be negotiated through the union alone. To prevent this arrangement from disenfranchising dissenting

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* The NLRB docket reflects that objections to an election were filed but does not indicate that the matter has been resolved. See, *Starbucks Corp. and Workers United a/w Serv. Emp. Int'l Union*, 21-RC-296247, available at: https://www.nlrb.gov/case/21-RC-296247.

employees, these powers should only be bestowed on a union following a vote of a substantial portion of the affected employees.

This position could be defended theoretically as the most democratic when the majority of employees for whom the union speaks has consented to their representation. But when a majority of employees do not vote, the unit has not expressed a strong opinion on whether a union should represent it. In the Starbucks example above, three employees decided how the other 25 will engage with their employer with respect to their terms and conditions of employment, at least for now. The current interpretation of the National Labor Relations Act is flawed because it assumes the opposite — that silence essentially equates to implied consent. It is unlikely that those who choose not to vote do so because they do not care about how their wages, hours, and working conditions are determined. It is just as likely that employees who chose not to vote are implicitly endorsing the status quo of a nonunionized workplace.

In short, the current interpretation of the National Labor Relations Act allows for scenarios where a majority of employees do not support a union but are nevertheless forced to accept its representation. If those same employees decide that unionization is not what's best for them, they have little practical ability to decertify their union. In states without right-to-work protections, these employees could also be forced to financially support the union in their workplace. Requiring unions to receive the support of a majority of those they represent better ensures that employees are not trapped into being represented by, and forced to pay, a union they disapprove of.

5. Restoring a Proper Understanding of the National Labor Relations Act

Restoring a proper application of the National Labor Relations Act is challenging. A purely textualist interpretation of the statute's election requirements must overcome both the additional ramifications presented by the Taft-Hartley amendments and what is now almost a century's worth of legal precedent. While it is certainly possible for an employer to challenge a minority union election by filing a lawsuit attacking the long-standing interpretation of the statute, that lawsuit would face an uphill battle. There are at least two other approaches to restoring the Act's original meaning that should be considered.

The first and most obvious solution would be for Congress to amend the election language in Section 9(a) of the Act. It should mirror the language added by Taft-Hartley in Section 8(a)(3) and thereby require union representation to be decided by "a majority of the employees eligible to vote in such election." Such a solution, while consistent with basic constitutional principles and well within congressional authority, is unlikely to occur. The relevant language of both sections has remained untouched by Congress since 1947. Further, given the large divide in how the two dominant political parties view labor relations, a legislative solution would almost certainly fail to overcome a filibuster. Thus, while amending the Act through legislation would be the ideal solution, it is not likely to succeed in the near future.*

An approach with a greater chance of success would be for the National Labor Relations Board to reinterpret its statutory authority to be consistent with the plain language of the statute. The Board's initial interpretation of its authority, eventually upheld by the court in *New York Handkerchief*, was extremely sparse. After noting the impact of the employer's

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* The difficulties associated with a legislative solution can be clearly seen in the dispute over Railway Labor Act elections. There, the NMB adopted a quorum approach through administrative rulemaking, which was ultimately upheld by the D.C. Circuit. *Air Trans. Ass'n of Am., Inc. v. Nat. Mediation Bd.*, 663 F. 3d 476 (D.D.C. 2011). Congress subsequently tried to amend the Railway Labor Act to require a true majority standard, but the realities of political compromise resulted in that provision being removed from final legislation. "House Approves Measure that Places Restrictions on NMB Representation Election" (Littler Mendelson, Feb. 21, 2012), https://perma.cc/R63N-K3RK.

coercive activity, the Board conducted no analysis of its underlying statutory authority, instead concluding that the union had been selected as the exclusive representative despite not having even a quorum of employees voting:

> The Board has carefully considered the Intermediate Report on the secret ballot, the exceptions filed by the Company; and an additional report made by the Regional Director relative to said election. Upon such consideration the Board finds that the employees of the Company had adequate knowledge relative to the holding of the election and that the majority of employees within the appropriate unit have selected and designated the [union], as their bargaining representative.[33]

Remarkably, in reaching this decision, the Board offered no other justification. A textualist approach could re-examine this question and conduct a more thorough analysis of the Act's text to establish a new absolute majority or quorum requirement.

While the longstanding nature of the Board's approach to determining whether a union election has been "actually representative" poses an obstacle to an administrative reinterpretation of the statue, it is far from disqualifying. The Board is a partisan entity, and its priorities typically reflect those of the political party in power. The end result is that the Board is well known for reversing positions on major policy questions when the presidency swaps from one political party to another.* This includes, at times, precedent which stretches back decades.† A reversal, even on an issue that has not been addressed for a significant period of time, would hardly be shocking to labor law practitioners.

Admittedly, that interpretation will be subject to greater judicial scrutiny than has been the norm in recent decades. In *Loper Bright Enterprises v. Raimondo*, the United States Supreme Court reversed the administrative law principle known as *Chevron* deference.[34] Under that rule, courts were required to defer to agency interpretations of law unless the agency interpretation was clearly contrary to statute. This strengthened agency rulemaking by insulating it from extensive judicial review. *Loper Bright*, meanwhile, lays the duty to interpret the meaning of law to the courts. Under such a review, a textualist interpretation of the National Labor Relations Acts would result in an absolute majority standard, or, at the very least, a quorum standard.

Ultimately, however, *Loper Bright* presents an opportunity for the Board to restore a textualist interpretation of the National Labor Relations Act. As noted above, multiple courts have acknowledged that the text of the Act seems to require either an absolute majority or quorum standard. While courts have traditionally deferred to the Board's interpretations, *Loper Bright* now requires courts to determine the best meaning of the law, without undue deference to the agencies that administer them. If the Board were to reinterpret the Act to restore its original, correct ruling that the law requires an absolute majority, courts would be forced to address that conclusion by evaluating the best meaning of that statute's text. A textualist court, such as the current U.S. Supreme Court, is unlikely to view the evolution of this standard favorably, given the plain language of the National Labor Relations Act.

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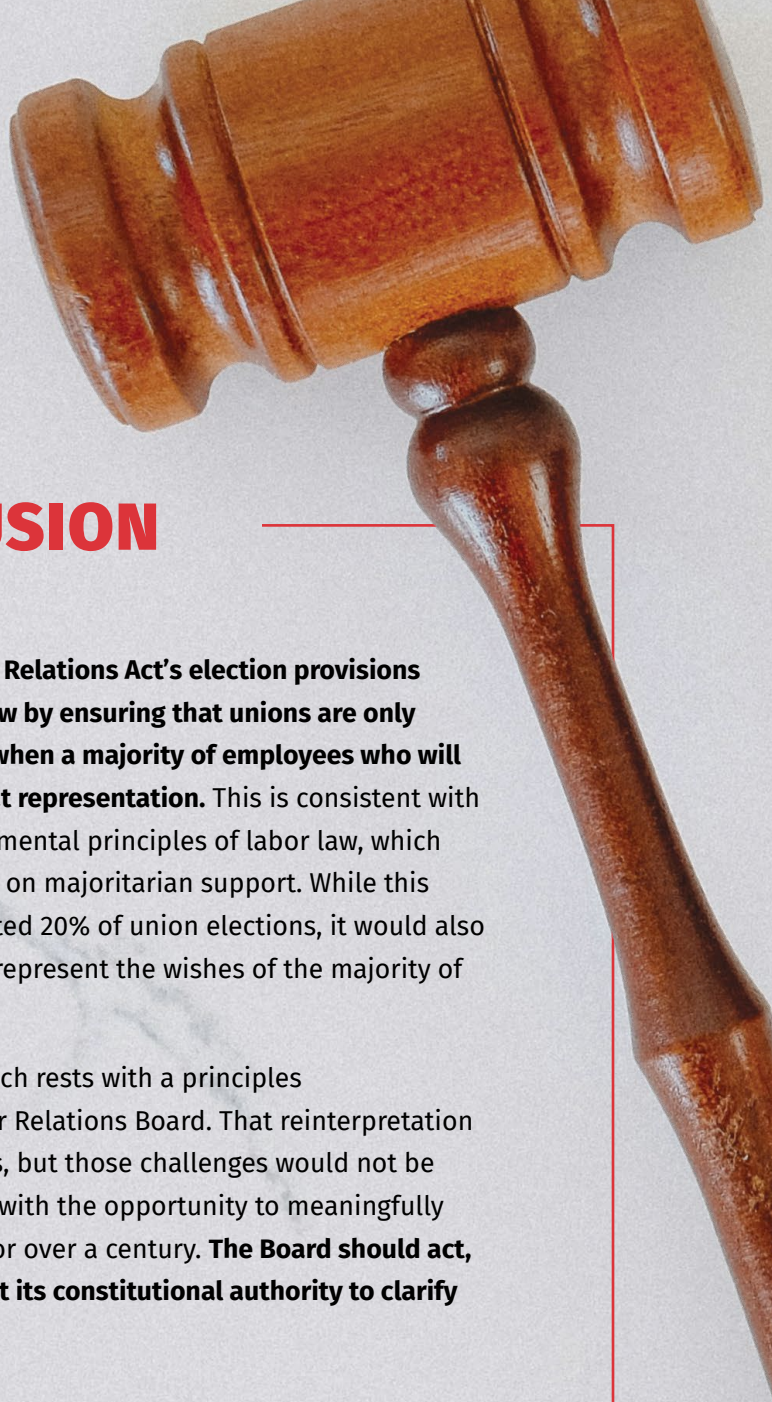
* For example, see: George J. Miller, "The NLRB 'Flip-Flops' Again" (Wyatt, Tarrant & Combs, September 17, 2011), https://perma.cc/JN3F-ASAE; Paul Galligan and Jade M. GIlstrap, "Flip-Flops, Not Just For the Beach or Boardwalk: NLRB (Again) Buries Consent Requirement for Bargaining Units with Temps" (Seyfarth, July 14, 2016); Peter L. Albrecht and Christine L. McLaughlin, "Important Flip-Flop: NLRB Changes Course on Confidentiality and Non-Disparagement Provisions" (Godfrey & Kahn, February 23, 2023), https://perma.cc/HXM2-Q6L6. July 14, 2016.

† *The Atlanta Opera, Inc v. Make-Up Artists and Hair Stylist Union, Loc. 798 IATSE*, NLRB Case No. 10-RC-276292 (available at: https://www.nlrb.gov/case/10-RC-276292). The amicus brief of the House Republican Study Committee specifically notes that the legal standard which was eventually overturned by the NLRB had existed for over 70 years and had survived numerous prior lawsuits. That brief is available at: https://perma.cc/BN6G-ES6F.



CONCLUSION

The proper interpretation of the National Labor Relations Act's election provisions would restore balance to private sector labor law by ensuring that unions are only vested with the power to speak for employees when a majority of employees who will be represented by the union vote in favor of that representation. This is consistent with both the language of the statute, and the fundamental principles of labor law, which intend for collective representation to be based on majoritarian support. While this change would be impactful, affecting an estimated 20% of union elections, it would also be a workable solution and ensure that unions represent the wishes of the majority of employees in a workplace.

The most likely avenue for restoring this approach rests with a principles reinterpretation of the Act by the National Labor Relations Board. That reinterpretation would almost undoubtedly face legal challenges, but those challenges would not be unwelcome. Instead, they would present courts with the opportunity to meaningfully consider language that has been glossed over for over a century. **The Board should act, and if it refuses to do so, Congress should assert its constitutional authority to clarify the statute.**

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ENDNOTES

1. 29 U.S.C. § 159(a).
2. John Q Barrett, "Attribution Time: Cal Tinney's 1937 Quip, 'A Switch in Time'll Save Nine,'" *Oklahoma Law Review* 73, no. 2 (2021): 229–243.
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