WORKPLACE POWER AND COLLECTIVE ACTIVITY: THE SUPERVISORY AND MANAGERIAL EXCLUSIONS IN LABOR LAW

George Feldman*

INTRODUCTION

The National Labor Relations Act gives "employees" the right to form unions, and requires employers to bargain with them. The original law, the Wagner Act, was passed in 1935 during a grave economic and social crisis, and excluded very few categories of workers from coverage. Congress added "supervisors" to the excluded categories twelve years later, in the Taft–Hartley amendments. In 1974, the Supreme Court decided that all "managerial employees" were also excluded. Six years after that, the Court said that the faculty of a university exercised the kind of authority that made them the management of the institution and, thus outside the Act's coverage. In 1994, the Court held that a group of ordinary workers, licensed practical nurses, were supervisors and therefore not protected by the Labor Act.

These decisions raise important doctrinal questions. What workers will be protected from employer retaliation when they decide to act collectively? Must the exercise of authority disqualify a worker from this protection? What does it mean to act "in the interest of the employer?"

Beyond these, however, are fundamental questions about the premises of the American labor law regime. What is the nature of workplace relationships and of industrial organization that the regime is meant to promote? Are these decisions necessary to maintain workplace hierarchy and, if so, is that goal consistent with the premises of labor law?

American labor law "simultaneously expresses both workers' democratic aspirations and elite efforts to reinforce hierarchy and domination in the workplace."[1] The Wagner Act rejected outright repression of those aspirations, instead endorsing a strategy that "legitimates and even promotes collective bargaining so as to channel and institutionalize industrial conflict, thereby containing and defusing it."[2] It was "intended both to force employers to recognize unions and bargain with them, and to limit the scope of union activity to 'industrial disputes.'"[3]

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* Assistant Professor of Law, Wayne State University.

1. Karl E. Klare, *The Bitter and the Sweet: Reflections on the Supreme Court's Yeshiva Decision*, 1983 SOCIALIST REV. 99.

2. *Id.* at 99.

3. *See* George Feldman, *Unions, Solidarity, and Class: The Limits of Liberal Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 187, 198 (1994).

There are doctrinal areas where the empowerment of workers threatens to destroy the accommodation represented by the Wagner Act, where collective activity breaches the constricting boundaries of collective bargaining. As I have argued elsewhere,[4] these involve union efforts to play a social role beyond representing the employees of a particular employer. Union activity of this sort is indeed a threat to the Wagner Act accommodation because it expands industrial disputes into confrontations implicitly based on class allegiance. In these areas, judges who normally support collective bargaining and greater union power impose legal limitations on its exercise.

In one sense, extending legal protection to the unionization of supervisory or managerial employees also expands the social role of unions, by enlarging the definition of the class for whom it is permissible for them to speak.[5] But this expansion remains within the confines of the employer's own employees and any resultant conflict remains an "industrial dispute." In my view, the essence of the accommodation on which the Wagner Act is premised is allowing the partial empowerment of workers through unionization, while limiting the social role of unions. Extending legal protection to the collective actions of employees now classified as supervisory or managerial is compatible with these premises.[6] The position of the liberal wing of the Court, which has consistently argued for inclusion, indicates that this is so.

While collective activity by supervisory and managerial employees does not fundamentally alter the social role of unions, it does raise questions about their proper role within the enterprise itself. To what degree can the industrial relations system accept the exercise of power by unionized workers—that is, power exercised by workers collectively? Modern labor law is replete with doctrines that limit unions' ability to exert their economic power to expand employee participation in running the enterprise.[7] But insofar as the extension of collective bargaining to employees in these categories would threaten hierarchical relations in the workplace beyond the regime's ability to tolerate, this danger would be adequately controlled by a much narrower exclusion, based on a finding of a direct conflict of interest between union membership and job responsibilities. That was the standard devised by the National Labor Relations Board and supported by the liberal Justices.

The distinction between this liberal position and that of the majority of the Court in these cases may be viewed as a dispute over the degree of employee power in the workplace that can be accepted without jeopardizing employer control. In this sense, neither the conservative majority nor the

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4. Feldman, *supra* note 3.

5. *See id.* at 229–30, 256.

6. *See* Marion Crain, *Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment*, 74 MINN. L. REV. 953 (1990).

7. *See* Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 86–120 (1988). Professor Stone's analysis strongly supports her view that "where the legal doctrines seem incompatible with participation, it is because [they] embody certain outdated and misleading assumptions about the nature of labor and management, the production process, and the contemporary corporation." *Id.* at 82; *see id.* at 138–161.

For an exhaustive and multi-dimensional analysis of the relationship between legal doctrines concerning worker participation and the assumptions to which Professor Stone refers, *see* Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COL. L. REV. 753 (1994).

liberal dissenters need be understood as questioning the basic principles of the Wagner Act, but only its appropriate borders. Seen this way, the decisions discussed here were not an inevitable result of the tension within the Wagner Act between its simultaneous commitment to worker empowerment and employer control. Rather, these cases were "wrongly decided" as measured by traditional criteria: they misconstrue the language of the statute, misunderstand legislative history, misinterpret precedents.

It should now be clear, however, that the internal tensions in the regime the Act established may prove only marginally relevant. The Court's reasoning in these cases, even more than the results, approaches a readiness "to redefine entirely the industrial relations system,"[8] to reject some of the fundamental tenets of American labor law as insufficiently protective of employer control of workplace decisions. While these cases directly question only the limits of legal protection of unionization, their logic is directed at the principle itself.

It may seem paradoxical that the Wagner Act's accommodation of limited worker empowerment should seem unacceptably threatening in a period when union political and economic power is probably lower than at any time since the Act was passed. American employers' acceptance of collective bargaining has, however, always been reluctant. Their belief in the right of their employees to unionize, even when honestly held, was almost invariably also a result of necessity. As that necessity disappears, as repressive strategies are successful and unions weaker, the need for accommodation disappears. Whatever the co–opting and channeling functions of labor law, most American businesses would prefer not to share *any* power with unions.

The rejection of the historic accommodation is part of the spirit of the times; it should not surprise us that its expression in the actions of business executives will be accompanied by its reflection in legal opinions. This article examines the Supreme Court's cases that have dealt with the issue of whether the Labor Act protects collective action by employees who exercise power on the job. These decisions show a progressive rejection of the limited empowerment of workers. My purpose here is not to demonstrate that these decisions are contrary to Congressional intentions (although they are). Still less is my aim to show that they interfere with a sound regime of labor relations—for one's judgment on that issue, it should be clear, depends on the value one places on worker empowerment, or conversely, on the need to maintain workplace hierarchy. These decisions are bad for workers, I believe; but they are bad for the country only if one identifies society's interests in a particular way. This article is an attempt to analyze how the Court has thought about these questions or, perhaps more accurately, to understand what reasoning necessarily underlies the decisions it has made.

Part I of this article discusses the Supreme Court's extension of the supervisory exclusion to licensed practical nurses in an important recent case, *NLRB v. Health Care & Retirement Corp of America.*[9] The Court's decision depended on the meaning of acting "in the interest of the employer," and I analyze the implications of this phrase, and the Court's interpretation of it, on the exercise of employee discretion and of union authority in the workplace. I then show that the debate in *Health Care* recreated the dispute that occurred half

8. Klare, *supra* note 1, at 100.
9. 114 S. Ct. 1778 (1994).

a century earlier in *Packard Motor Car Co. v. NLRB*,[10] which led to the Congressional enactment of the supervisory exclusion. I examine the positions in *Packard*, the rationales advanced to support removing legal protection from the collective action of supervisors, and assess their applicability to employees such as licensed practical nurses.

Part II is concerned with the judicially created managerial exclusion. After a brief description of the contexts in which the questions arise, I explore the Court's stated justifications for the exclusion in *NLRB v. Bell Aerospace Co.*[11] In the next two sections, I analyze the Court's premise that Congress' failure to exclude managers when it passed the supervisory exclusion was motivated by the assumption that they would nonetheless be excluded. The first part of this analysis is historical, to see if Congress would have made such an assumption based on prior law; the second examines the ideological foundations on which such an assumption would be based. The last section of Part II describes the application of the managerial exclusion to faculty members in the *Yeshiva* case,[12] and shows that the Court's reasoning was based on a desire to maintain employer control over the workplace.

PART I: THE MEANING OF A PHRASE

In *NLRB v. Health Care & Retirement Corp.*,[13] the Supreme Court decided that the concerted activity of a group of licensed practical nurses was not protected by the National Labor Relations Act.[14] The nurses could legally be fired for protesting their working conditions, for picketing, or striking. The LPNs' duties included directing nurses' aides in administering patient care in a nursing home. According to the Court, this made them "supervisors," rather than "employees."

The Taft–Hartley amendments excluded supervisors from the definition of employees covered by the Labor Act,[15] and defined supervisors as including those who have authority to perform twelve listed activities, including "responsibly to direct" or to "assign" employees "in the interest of the employer."[16] The decision is purportedly based on interpreting the single phrase "in the interest of the employer." The Board and the dissenters argued that when professional employees, as part of their professional responsibilities, direct others employees, this does not constitute acting "in the interests of the employer." Under this analysis, when health care professionals such as nurses

10. 330 U.S. 485 (1947).
11. 416 U.S. 267 (1974).
12. NLRB v. Yeshiva University, 444 U.S. 672 (1980).
13. 114 S. Ct. 1778 (1994).
14. National Labor Relations Act (NLRA), 29 U.S.C. §§ 151–169.
15. § 2(3): "The term 'employee'...shall not include...any individual employed as a supervisor...." 29 U.S.C. § 152(3).
16. § 2(11) states:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11).

"direct" other employees in the course of providing patient care, they are therefore not acting "in the interest of the employer."

The Court disagreed: "Patient care is the business of a nursing home, and it follows that attending to the needs of the nursing home patients, who are the employer's customers, is in the interest of the employer."[17]

But if that is so, any employee who engages in any of the twelve activities listed in the definition of supervisor—including "responsibly...direct[ing]" and "assigning" other employees—will automatically become a supervisor. The phrase "in the interest of the employer," which limits the definition, would have practically no meaning. Indeed, the Court could provide only one example where, under its interpretation, the phrase would make any difference: a shop steward who adjusts grievances would not thereby become a supervisor.[18] As the dissent noted, however, the phrase modifies all twelve of the activities that indicate supervisory status.[19]

The dissent warned of the effect of the decision on other professional employees: "If any person who may use independent judgment to assign tasks to others or direct their work is a supervisor, then few professionals employed by organizations subject to the Act will receive its protections."[20] The Board had similarly argued that under the Court's interpretation, Congress' explicit protection of professional employee unionization[21] "would be a virtual nullity."[22]

The Court however maintained that the Board's incorrect interpretation of "in the interest of the employer" was primarily confined to nurses and that the decision "will have almost no effect" in other industries, or indeed, outside the nursing profession.[23]

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17. 114 S. Ct. at 1782.
18. 114 S. Ct. at 1783.
19. 114 S. Ct. at 1791 (Ginsburg, J., dissenting).
20. 114 S. Ct. at 1792–93 (Ginsburg, J., dissenting). The dissent was joined by Justices Blackmun, Stevens, and Souter.
21. § 9(b)(1) of the Act, added by the Taft–Hartley amendments, provides that professional employees may not be placed in a bargaining unit that includes other employees without the consent of the professional employees. 29 U.S.C. § 159(b)(1). *See* Leedom v. Kyne, 358 U.S. 184 (1958).

§ 2(12) defines a "professional employee" as:

> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or
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> (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

29 U.S.C. § 152(12).

22. Brief for NLRB 27, *quoted in* 114 S. Ct. at 1793 n.17 (dissenting opinion).
23. 114 S. Ct at 1785.

A. Authority and Discretion

The Court's prediction may prove correct, as union lawyers, and probably the Board, cite dictum from the case in an attempt to limit the holding to its narrowest application.[24] Even if they are successful, the legal barrier that the Court has erected will prevent many nurses who wish to unionize from doing so,[25] and will allow employers to refuse to bargain with nurses who are already organized.[26] Even if this were the decisions' only consequence, its importance should not be underestimated.[27]

The reasoning of the decision, however, extends well beyond the application of a single phrase in the statute to the particular circumstances of one occupation in one industry. Indeed, the logic of the Court's broad interpretation of the Act's supervisory exclusion is not limited to professional employees, as the case itself shows. Licensed practical nurses are in fact not "professional employees" within the meaning of the Act;[28] the Board recognized this when it placed them in a category separate from professional employees in creating presumptively appropriate bargaining units in acute–care hospitals.[29] In the context of the *Health Care* case, the Board had treated the licensed practical nurses as if they were registered nurses, because their duties were essentially identical.[30] This is a perfectly sensible way of handling the matter, and neither the majority nor the dissent discusses it at any length. But

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24. *But see NLRB Review of Supervisory Status May Extend Beyond Health Care*, LAB. REL. WK. (BNA) Nov. 2, 1994, at 1080 (debate during oral argument suggests "Board may broaden its inquiry into other industries involving highly skilled workers.").

25. Unions of supervisors are not illegal, but they are unprotected by the Act. In addition, while § 14(a) of the Act, 29 U.S.C. § 164(a), explicitly preempts any state law that offers protection to private–sector supervisory unions, *see* Beasley v. Food Fair of North Carolina, Inc., 416 U.S. 653 (1974), it allows states to restrict concerted activity by such unions, Hanna Mining Co. v. District 2, Marine Engineers Beneficial Ass'n., 382 U.S. 181, 189–90 (1965).

While supervisory unions can, and do, exist without the protection of law, both the history of foremen's unions, *see* Nelson Lichtenstein, *The Man in the Middle: A Social History of Automobile Industry Foremen, in* ON THE LINE, ESSAYS IN THE HISTORY OF AUTO WORK (Nelson Lichtenstein & Stephen Meyer eds., 1989) and the current lack of success of private sector organizing even with the (often ineffective) protection of the NLRA, *see generally* PAUL C. WEILER, GOVERNING THE WORKPLACE (1990), it is safe to assume that in many bargaining units where a majority of nurses wish to join or remain in unions, they will be unable to do so.

26. *See Full Impact of High Court Ruling on Status of Nurses Still Unclear*, LAB. REL. WK. (BNA) Sept. 7, 1994, at 855 (reporting decision of a Montana hospital to cease recognizing union of nurses at expiration of current contract).

27. *See id.* at 855-86 (in first three months following Health Care decision, many nursing homes seeking to exclude LPNs from bargaining units; while this is less true for hospitals, challenges to nurses' status in hospitals have occurred in eight states and District of Columbia); *see also NLRB Schedules Oral Argument on Supervisory Role of Nurses*, LAB. REL. WK (BNA) Sept. 28, 1994, at 935 (challenges involving charge nurses, LPNs).

28. § 2(12) states that the work of a "professional employee," among other conditions, must "(iv) requir[e] knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital." 29 U.S.C. § 132 (12). *See* full text *supra* note 21.

29. *See* American Hospital Ass'n. v. NLRB, 499 U.S. 606 (1991) (approving the Board's authority to create these categories). The categories include "doctors," "registered nurses," and "all other professional employees." Licensed practical nurses, however, are included in the "technical employee" category. While these presumptive categories are limited to acute care hospitals, and the Board might justifiably include LPNs and RNs in the same bargaining unit in other contexts, it is clear that under § 9(b)(1), the registered nurses, but not the LPNs, would have the right to veto such a mixed bargaining unit. *See supra* note 21.

30. 114 S. Ct. at 1786 (dissenting opinion).

the reasonableness of treating them the same indicates an important social reality to which the Court has now attached legal consequences. The duties of the LPNs that determined the outcome of the case, direction of employees, were the same as the duties of RNs who worked for the employer—but this had little to do with the fact that RNs are professionals. Similar duties are increasingly shared by rank and file workers: in both union and non–union settings, the functions of responsibly directing and of assigning work are now commonly exercised by employees in various "quality circles," "quality of work life" programs, and other "participation plans," all of which have proliferated.[31]

The reason the Board has rarely had occasion to interpret the phrase in other situations is not because the concept that it embodies is theoretically irrelevant outside health care. Instead, for specific historic reasons that may now be changing,[32] it has usually been unnecessary to apply the "interest of the employer" standard to determine supervisory status because the principle for which it is meant to stand is demonstrated in other ways. In the normal case in American industrial practice, anyone "having authority" to engage in most of the twelve listed supervisory functions derived that authority wholly from the employer's delegation, and incontestably was acting "in the interest of the employer" when exercising it. If such a person did not act in the employer's interest, as the employer conceived it, the delegation of authority would cease. The unusual case of a shop steward "adjusting...grievances" to which the Court pointed is significant precisely because it is an example of "supervisory" authority that does not derive from such a unilateral delegation. It arises instead from the union's success in wresting a degree of authority from the employer; that is why an employer dissatisfied with a steward's handling of grievances cannot remove the steward's authority and replace her with another who will act in the employer's interest.

None of the twelve listed functions need be exercised wholly as the instrument of the employer. When a strong union is present, two of these functions are typically no longer "supervisory" at all: the authority to lay off and recall other employees usually does not require, in the statutory phrase, "the use of independent judgment."[33] Rather, "such authority is...of a merely routine or clerical nature,"[34] controlled by the terms of the collective agreement with the union. An individual who administers the layoff and recall provisions of the contract does not become a "supervisor" by doing so,[35] and if his status as an employee were challenged, the decision would not raise the question of whether he was acting "in the interest of the employer." Instead, it

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31. *See Fact Finding Report Issued by the Commission on the Future of Worker–Management Relations (Dunlop Commission Report)*, 1994 Daily Lab. Report 105 (BNA) June 3, 1994, *available in* LEXIS at *39; Barenberg, *supra* note 7. The literature describing it has proliferated as much as the phenomenon itself. DONALD M. WELLS, EMPTY PROMISES: QUALITY OF WORKING LIFE PROGRAMS AND THE LABOR MOVEMENT (1987) contains a useful but increasingly outdated annotated bibliography at 157–67. For early and insightful examinations of these developments from a rank and file perspective, *see* MIKE PARKER, INSIDE THE CIRCLE: A UNION GUIDE TO QWL (1985) and MIKE PARKER AND JANE SLAUGHTER, CHOOSING SIDES: UNIONS AND THE TEAM CONCEPT (1988).

32. *See* Dunlop Commission Report, *supra* note 7, *available in* LEXIS at *8–*35; Barenberg, *supra* note 31, at 879–904.

33. *See supra* note 16.

34. *See supra* note 16.

35. Though she may not be a statutory employee for other reasons. *See* discussion of managerial exclusion *infra* Part II.

would rest on the determination that independent judgment was not involved, and on the "routine and clerical" nature of the function. The lack of independent judgment, the fact that the decision about whom to lay off or recall can be characterized as routine and clerical, is a result of the employer's having ceded unilateral power in this sphere. The decision to lay off remains with the employer, is made in his interest, and the persons empowered to make it will be excluded from statutory protection. But the decision as to which employees are affected is not made, or at least not entirely, "in the interest of the employer." In other words, this situation is in reality the same as the example of a steward who has authority to adjust grievances, either independently or in collaboration with the employer. In the case of grievance adjustments, all or part of the authority to exercise discretion no longer belongs to the employer, but to the steward. In the case of layoffs and recalls, all or part of that authority has been eliminated and the decision must be made according to a formula set forth in the contract. In both circumstances, the limitation on the employer's ability to exercise discretion in the particular area results from the union's acquisition of that authority.

Similarly, the employer's unilateral authority to hire employees may also be removed by contract. Hiring halls that severely limit the employer's ability to choose whom to hire are legal unless they discriminate on the basis of union membership or activity.[36] An employer may be required to hire only those additional employees dispatched by a union–run hiring hall, based solely on seniority.[37] A union official whose administration of a hiring hall requires her to dispatch applicants to employers is clearly not a supervisor, and no one is likely to claim that she is. Whether this is because the activity does not require the use of independent judgment or because it is not exercised in the interest of the employer is, in this situation, the same substantive inquiry.

There is nothing inherent in any of the other listed activities, functions that define the governance of the workplace, that would prevent them from being exercised by a union. Nor are there any legal barriers to a union demanding such powers and using its economic strength to attain them: workplace governance issues are conditions of employment.[38] The logic of the

36. *See* Local 357, International Brotherhood of Teamsters v. NLRB, 365 U.S. 667 (1961). The extent to which a union may legally control hiring is not clear. The banning of the closed shop by the Taft–Hartley Act was clearly intended to restrict this control, even where the union has the economic power to enforce it. The Board had held that hiring halls such as that in the Local 357 case were illegal in large part because "[t]he Employers here have surrendered all hiring authority to the Union;" 365 U.S. at 671 (quoting Mountain Pacific Chapter, 119 NLRB 883, 896 (1958)). The Board position was that in order for a hiring hall agreement to be legal, it had to reserve the right of employers "to reject any job applicant referred by the union." 365 U.S. at 672 (quoting 119 NLRB at 897). The Court rejected this requirement.

37. *See* Local 357, International Brotherhood of Teamsters v. NLRB, 365 U.S. at 668, where the Court upheld a hiring hall agreement that included the following language: "Casual employees *shall*...be employed only on a seniority basis...No casual employee shall be employed...in violation of seniority status." (emphasis added). If an employee had previously been fired, presumably for cause, that was grounds for removal from the seniority list. *Id.*

38. Because the twelve functions involve conditions of employment, most of them are self–evidently mandatory topics of bargaining, which means that either side may insist on its position and exercise economic weapons to attain them. *Cf.* Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 214 (1964) (Stewart, J., concurring); First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). Apart from the authority to "assign" and "responsibly to direct" other employees, discussed in text, and to "hire" them, *see supra* note 36, questions might arise in one specific context involving the other activities. For example, if the authority to

Court's interpretation of "the interest of the employer," however, is that any time workers achieve control over any of these areas, they will—by definition—be acting in the employer's interest and become supervisors. Realistically, they can achieve this degree of control only through a powerful union—but a workforce that achieves such control will thereby effectively lose its union.[39]

This seemingly absurd result had already occurred, although not in the context of the supervisory exclusion.[40] Until the *Health Care* decision, it appeared that losing employee status as a consequence of exercising too much power would be confined to those professional employees such as university faculty who, because of the nature of their professional responsibilities, exercise a degree of control over the workplace that is significantly greater than that of almost any other employees. This greater control allowed the Supreme Court to view them, not as supervisors, but as the management of the institution, and therefore outside the Act's definition of protected "employees" under a judicially created "managerial exclusion."[41] The Board soon extended this doctrine to include those faculties whose control did not derive from the historical evolution of the university, but from success in collective bargaining.[42] Incredibly, it even said that if, as a result of the Board's decision, the employer successfully regained the control it had lost to the union, the faculty would again be eligible to unionize under the Act.[43]

Before *Health Care*, it seemed that these effects would not reach rank and file workers, not only because they usually have much less power over the workplace than a university faculty, but also because of the way their control is exercised. Workplace control achieved by most workers, especially industrial workers, has usually taken the form of structured contractual restrictions on the employer's discretion. The examples of hiring halls and requirements that layoffs be by seniority are typical. A transfer of the authority to use discretion to individual workers, as in the situation of the shop steward adjusting grievances, is exceptional. Because of this difference, it is extremely unlikely that industrial workers, or employees such as LPNs, could ever be subject to the managerial exclusion.[44] They would not only need to gain the sort of

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"promote" employees included the right to decide on promotions to positions that involved collective bargaining or grievance adjustment, demanding such a provision might violate § 8(b)(1)(B) of the Act, which makes it an unfair labor practice for a union to "restrain or coerce...an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." 29 U.S.C. § 158(b)(1)(B). If the right to promote or "effectively to recommend" promotion was confined to promotion within the bargaining unit, this concern would not arise. The same would be true regarding the authority to engage in most of the other functions listed.

39. *See supra* note 25 (referring to the legality, but unliklihood of unprotected unions).

40. College of Osteopathic Medicine and Surgery (COMS), 265 NLRB 295 (1982).

41. NLRB v. Yeshiva University, 444 U.S. 672 (1980). The *Yeshiva* decision and the managerial exclusion are discussed more fully in Part II, *infra*.

42. College of Osteopathic Medicine and Surgery (COMS), 265 NLRB 295 (1982).

43. "If the College removes sufficient authority from its faculty members so that they revert to the status of nonmanagerial employees, the Board will process a proffered representation petition at that time." College of Osteopathic Medicine and Surgery (COMS), 265 NLRB 295 (1982).

44. Like any other employees, they might be considered sufficiently aligned with management to be excluded from bargaining for reasons other than their job duties, such as family ties to the owners. *See* NLRB v. Action Automotive, Inc., 469 U.S. 490 (1985). The case of worker-owned companies is a more complex situation, but the degree of workplace

control exercised by the faculty in the *Yeshiva* case, but would have to exercise that control in a similar manner. The employees themselves would have to be able to exercise discretion, for example by voting on decisions, rather than merely by restricting or eliminating the employer's discretion by contractually mandating procedures.[45] While there is nothing in principle that prevents the development of these forms of control,[46] and indeed of similarly exercised control over entrepreneurial issues such as investment decisions,[47] these kinds of situations are simply not on the American horizon.[48]

Now, however, while industrial workers are still safe from being considered the management of their enterprise, even if they have a strong union, they may find themselves defined as supervisors.[49] The result in *Health Care* manifests a deep ambivalence in American labor law about workers' control of the workplace, an ambivalence reflected in the phrase "in the interest of the employer."

B. Workers and Supervisors

This ambivalence can be seen by tracing the debate over the phrase. The *Health Care* majority asserted that it meant the same as when the Court first construed it in *Packard Motor Car Co. v. NLRB*,[50] a case decided before the Taft–Hartley Act and the supervisory exclusion were passed. The decision in *Packard* was the reason for that exclusion, but the Court maintained that Congress reversed only the holding of the case, and left the interpretation of the phrase intact.[51]

The debate over "in the interest of the employer" thus repeats the dispute over the meaning of the same phrase, in a closely related context, nearly half a century earlier. In *Packard*, the Supreme Court upheld the Board's certification of a union of foremen in the auto industry. The Court declined to create a supervisory exclusion in the face of the sweeping definition of "employee" in

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control possessed by worker–shareholders has not been the reason the Board has excluded them from bargaining units. *See, e.g.*, Brookings Plywood Corp., 98 NLRB 794 (1952), discussed *infra* note 104 and accompanying text.

45. It is difficult to articulate the distinctions between the factors that allowed the Court to view the Yeshiva faculty as the management of the university and those that would, unquestionably, lead to the opposite result in the case of industrial workers. This is because the Yeshiva decision is both internally inconsistent and depends on a picture of the academic workplace that is barely recognizable to most of its inhabitants. If the Court were to view the industrial workplace through an equally distorted lens, it might indeed decide that assembly line workers with a strong enough union are truly the management of the factory. Luckily, the intent of the Act to protect the unionization of industrial workers is rather clear.

46. *See* Michael C. Harper, *Reconciling Collective Bargaining with Employee Supervision of Management*, 137 U. PA. L. REV. 1 (1988).

47. The latter would, in theory, have to be ceded voluntarily by management, since a union is forbidden from using economic power in these areas. *See* Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

48. *Cf.* Clyde Summers, *Workers Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 AM. J. COMP. L. 367 (1980); WILLIAM B. GOULD IV, AGENDA FOR REFORM 117 (1993).

49. They also run this risk in a non–union setting if they take part in various "participation plans," or, in a unionized company, if their union does so. *See supra* text accompanying note 31.

50. 330 U.S. 485 (1947).

51. NRLB v. Health Care & Retirement Corp. of America, 114 S. Ct. 1778, 1782 (1994).

the statute.[52] The case is now remembered chiefly for the indignation it caused in Congress and for Justice Douglas' powerful dissent, which argued that the whole philosophy of American labor relations, as exemplified by the Wagner Act, precluded protecting the unionization of foremen. The decision, he argued, was based on a desire to develop "an industrial system in which cooperation rather than coercion was the dominant characteristic."[53] In a famous passage, he claimed that by protecting "unionization at all levels of the industrial hierarchy," the Court's decision

> tends to obliterate the line between management and labor.... It tends to emphasize that the basic opposing forces in industry are not management and labor but the operating group on the one hand and the stockholder and bondholder group on the other. The industrial problem as so defined comes down to a contest over a fair division of the gross receipts of industry between these two groups. The struggle for control or power between management and labor becomes secondary to a growing unity in their common demands on ownership.[54]

The employer in *Packard* made a statutory argument as well. While it is true that the term "employee" was broadly defined, the Act specified that the term "employer" included "any person acting in the interest of an employer, directly or indirectly."[55] A foreman, then, was an "employer," and not an "employee." The *Packard* Court found the company's construction of the phrase far too broad: "Every employee, from the very fact of employment in the

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52. The original § 2(3) stated: "The term employee shall include any employee..." The only exceptions were for agricultural workers, domestic servants, and persons employed by a parent or spouse. National Labor Relations Act § 152(3) (1935).

53. *Packard*, 330 U.S. at 493 (Douglas, J., dissenting) (ascribing these views to Louis Brandeis).

54. *Id.* at 494 (Douglas, J., dissenting). One implication of Justice Douglas' view has received little attention. As the quoted passage shows, he believed the Act was intended to allow unionized workers to engage in the "struggle for control or power," rather than limiting them to "a contest over a fair division of the gross receipts of industry."

The dissent emphasized the historical role of foremen as the perpetrators of management's anti-union policies:

> The truth of the matter is, I think, that when Congress passed the National Labor Relations Act in 1935, it was legislating against the activities of foremen, not on their behalf. Congress was intent on protecting the right of free association—the right to bargain collectively—by the great mass of workers, not by those who were in authority over them and enforcing oppressive industrial policies. Foremen were instrumentalities of those industrial practices. They blocked the wage earners' path to fair collective bargaining.

Id. at 499 (emphasis in original); *see also id.* at 496 (management expressed its hostility to unionism through foremen).

Implicitly then, one reason that Congress could not have wanted to protect the unionization of foremen was the possibility that an alignment of "the operating group" in industry against the ownership group would blunt or eliminate the struggle over workplace governance, over "control or power," and this would be contrary to the Wagner Act's policy of promoting industrial democracy.

I do not want to make too much of this implication; Justice Douglas also seemed to reject the idea that the Act is compatible with "allowing labor greater participation in policy decisions." *Id.* at 493. It does indicate, however, that even a position as seemingly clear as Douglas' in Packard, was affected by the ambivalence of American labor law towards workers' control of the workplace.

55. Old § 2(2), 29 U.S.C. § 152(2) (1935). The Taft-Hartley amendments of 1947 changed the wording to "any person acting as an agent of an employer, directly or indirectly..." and added §2(13) which indicated that "agent" was to be given its common law meaning. This was apparently to insure that agency in regard to unions was not to be narrowly interpreted in light of the restrictive language of the Norris-LaGuardia Act. *See* 29 U.S.C. § 103 (1932).

master's business, is required to act in his interest."[56] The phrase was included simply to insure that the principle of *respondeat superior* would be applied to the commission of unfair labor practices.[57] Behind the statutory argument, the Court recognized, was the real point of the dispute. It addressed this point in a passage whose continued relevance is obvious if the word "nurses" is substituted for "foremen:"

> The company's argument is really addressed to the undesirability of permitting foremen to organize. It wants selfless representatives of its interest. It fears that if foremen combine to bargain advantages for themselves, they will sometimes be governed by interests of their own or their fellow foremen, rather than by the company's interest. There is nothing new in this argument. It is rooted in the misconception that because the employer has the right to wholehearted loyalty in the performance of the contract of employment, the employee does not have the right to protect his independent and adverse interest in the terms of the contract itself and the conditions of work. But the effect of the National Labor Relations Act is otherwise....[58]

The Court concluded that it is was up to Congress to exclude categories of employees from the protection of the Act, a course that Congress immediately undertook in Taft–Hartley. The most important rationale for the supervisory exclusion, as the legislative history makes clear,[59] was the fear of divided loyalties. The Taft–Hartley Congress disagreed with the Court's dismissal of this concern; Congress' disagreement with the *Packard* case, indeed its outrage over the decision, was the main reason for the supervisory exclusion, and Congress was fully aware of the Court's reasoning. Yet Congress included the phrase "in the interest of the employer," which the Court had construed narrowly, in its new definition of supervisors.

The inclusion reflects great uncertainty about the underlying question to which the Court pointed in *Packard*: does the divided loyalty argument apply to any employee, or just to supervisors? The philosophy of the Wagner Act, as the Court correctly concluded, requires accepting what employers view as "divided loyalty" as normal and even desirable, at least for rank and file workers. Justice Douglas' dissent did not question this premise, but argued that it was never meant to apply to those who are the "arms and legs" of management.[60] He made the point that on the Court's reasoning there was nothing to stop any employees from unionizing, even vice–presidents; only actual owners, or in the case of corporations, members of the board, would be exempt.

As a practical matter, the Court's dismissal of Justice Douglas' warning was entirely sufficient: "If a union of vice presidents, presidents or others of like relationship to a corporation comes here claiming rights under this Act, it will be time enough then to point out the obvious and relevant differences between the 1,100 foremen of this company and corporate officers elected by

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56. Packard Motor Car Co. v. NRLB, 330 U.S. 485, 488 (1947).
57. *Id.* at 489.
58. *Id.* at 490.
59. *See* Beasley v. Food Fair of North Carolina, Inc., 416 U.S. 653, 661–62 (1974) (reviewing legislative history and concluding that "Congress' dominant purpose" in excluding supervisors was to avoid putting them "in the position of serving two masters with opposed interests.")
60. *Packard*, 330 U.S. at 496 (Douglas, J. dissenting).

the board of directors."[61] It is true that any distinction, short of ownership, that the Court might make between the status of foremen and that of higher levels of management could not be based on the fact that members of upper management are employers because they act in the interest of the employer. Justice Douglas' dissent was right that like all employees, upper management acts in the interest of the employer when fulfilling its job responsibilities, but has interests adverse to the corporation or owner as to its pay and benefits. No one would claim, then or now, however, that an individual executive who demands market value for services has divided loyalties. Like foremen in Justice Douglas' view, and as a matter of law after Taft–Hartley, and like LPNs after *Health Care*, he must do so individually, not collectively.[62] In each case, the employee is subject to dismissal, and his fellow employees are not protected if they act to support him.

This can be justified in the case of corporate vice–presidents without questioning the basic principles of American labor law. Members of upper level management have the market power to bargain successfully on an individual basis; in the language of the Wagner Act, they possess "actual liberty of contract."[63] But the premise of the Act was that "protection by law of the right of employees to organize and bargain collectively" is necessary to overcome "[t]he inequality of bargaining power between employees...and employers."[64] It is simply ludicrous to believe that this rationale does not apply to the licensed practical nurses in a nursing home.

The same might be said about foremen, yet Congress excluded their collective activity from protection, despite the possibility that foremen too had no "actual liberty of contract" if they acted individually, and certainly despite—indeed, because of—convincing evidence that increasing numbers of foremen *believed* that this was so.[65] Perhaps for that reason, the Taft–Hartley Congress sought to justify the supervisory exclusion not only by referring to the danger of "divided loyalties" but also by pointing to a theory of social psychology, however inaccurate, that placed foremen, sociologically and ideologically, on the other side of the class line from "workers." Supervisors, the House Report said, "are management people" who had reached that position by "distinguish[ing] themselves in their work."

> They have demonstrated their ability to take care of themselves without depending on the pressure of collective action. No one forced them to become supervisors. They abandoned the "collective security" of the rank and file voluntarily, because they believed the opportunities thus opened to them to be more valuable to them than such "security." It seems wrong, and it is wrong, to subject people of this kind, who have demonstrated their initiative and their ability to get ahead, to the leveling processes of seniority, uniformity and standardization that the Supreme Court recognizes as being fundamental principles of unionism. J.I. Case Co. v. NLRB, 321 U.S. 332 (1944). It is wrong for the foremen, for it

61. *Id.* at 490 n.2.
62. I will return to this point in Part II C, *infra*.
63. *See* § 1 of the Wagner Act, codified as 29 U.S.C. § 151 (1988).
64. *Id.*
65. *See* Virginia A. Seitz, *Legal, Legislative, and Managerial Responses to the Organization of Supervisory Employees in the 1940's*, 28 AM. J. LEGAL HIST. 199 (1984); Lichtenstein, *supra* note 25 at 167–72.

> discourages the things in them that made them foremen in the first place...[I]t discourages those best qualified to get ahead.[66]

At first glance, this view seems obviously self–contradictory: protecting supervisors' right to choose "collective security" does not "subject" them to anything. Foremen who have confidence in their individual ability to get ahead will not vote to unionize.[67] As for the argument that foremen were not forced to accept their jobs, it applies equally to employment in general.[68] But as the reference to the landmark *J.I. Case* decision indicates, the House Report's objection is to the imposition of majority rule on foremen. The Report instead favored "protecting" the right of each to bargain individually with the employer. In *J.I. Case*, the Court rejected the argument that "some employees may lose by the collective agreement, that an individual workman may sometimes have, or be capable of getting, better terms than those obtainable by the group....The practice and philosophy of collective bargaining looks with suspicion on such individual advantages."[69]

Both the House Report and the Court echo views Selig Perlman expressed long before the passage of the Wagner Act. The experience of manual workers, according to Perlman, teaches them they are living in a world of limited economic opportunity:

> The economic pessimism of the manual group is at the bottom of its characteristic manner of adjusting the relation of the individual to the whole group.... If...opportunity is believed to be limited...it then becomes the duty of the group to prevent the individual from appropriating more than his rightful share, while at the same time protecting him against oppressive bargains. *The group then asserts its collective ownership over the whole amount of opportunity....* Free competition becomes a sin against one's fellows, anti–social...and obviously detrimental to the individual as well.[70]

In the Taft–Hartley Act, Congress decided that foremen should be excluded from the Act because they were people who wanted—or in Congress' view, ought to want—to compete with their colleagues to get ahead, rather than to collectivize opportunity and share it. Whatever the real differences in their bargaining power, Congress likened foremen to vice–presidents or

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66. H.R. Rep. No. 245, 80th Cong., 1st Sess., 16–17 (1947). *See also* SELIG PERLMAN, A THEORY OF THE LABOR MOVEMENT 238-39 (1928):

> In an economic community, there is a separation between those who prefer a secure, though modest return—that is to say, a mere livelihood—and those who play for big stakes and are willing to assume risk in proportion. The first compose the great bulk of the manual workers of every description...while the latter are, of course, the entrepreneurs and the big business men....The manual worker is convinced by experience that he is living in a world of limited opportunity. He sees, to be sure, how others, for instance business men, are finding the same world a storehouse of apparently unlimited opportunity. Yet he decisively discounts that, so far as he himself is concerned. The business man, on the contrary, is an eternal optimist. To him the world is brimful of opportunities that are only waiting to be made his own.

Quoted in LEROY MERRIFIELD, ET AL., LABOR RELATIONS LAW 315 (9th ed. 1984).

67. *See* CRAIN, *supra* note 6 at 996.

68. *See* § 3 of the Norris–Laguardia Act of 1932, making the "yellow–dog" contract unenforceable, codified as 29 U.S.C. § 103 (1988), and § 8(a)(3) of the NLRA, prohibiting discrimination in hiring on the basis of union membership, 29 U.S.C. § 158(a)(3) (1988).

69. 321 U.S. at 338.

70. PERLMAN, *supra* note 66 at 241-42 (emphasis in original).

entrepreneurs in this respect.[71] It is hard to see how this rationale could be applied to groups such as LPNs without challenging the premises of the Wagner Act itself.

Did the exclusion of supervisors itself contradict those premises? The House Report's assertion that foremen could "take care of themselves without...collective action" was as much prescriptive as a description of empirical fact. Foremen were to share the entrepreneurial spirit of competition as a matter of law. But, as the Court had recognized in *J.I. Case*, the Act was meant to provide legal protection for the decision of groups of workers to eliminate competition among themselves. Even the *Packard* majority would not have extended the Act's protections to all "employees" who made that decision: it would have excluded "a union of vice presidents, presidents or others of like relationship to a corporation."

Both the *Packard* majority and Justice Douglas shared the Wagner Act's underlying assumption that the American workplace was, and would continue to be, organized hierarchically; that those who made basic decisions were, and ought to be, ranged against those who carried out the work. The Justices disagreed about where the dividing line ought to be drawn. The majority thought the Wagner Act was capable of accommodating the inclusion of much higher strata of employees—of employees who had much greater discretion and initiative in their work—than Justice Douglas believed. The Taft–Hartley Congress took Douglas' view—but not unequivocally. It ensured that not all employees with wide discretion and control were outside the protections of the Act by explicitly including professional employees, and indeed by emphasizing their use of independent judgment in defining them.[72] It made it clear in the legislative history that the supervisory exclusion was to apply to those of foremen rank and above, and not to "straw bosses, leadmen, set–up men, and other minor supervisory employees."[73] And it limited the supervisory exclusion by including the phrase "in the interest of the employer."

The *Health Care* Court emphasized this inclusion, and claimed that Congress, while overturning *Packard*, had accepted the *Packard* Court's interpretation of the phrase. A careful reading of the *Packard* decision shows that if this is true, it indicates precisely the opposite of what the *Health Care* Court says it does. It defies logic to think that the *Packard* Court understood the *statutory meaning* of the phrase to be that "[e]very employee, from the very fact of employment in the master's business, is required to act in his interest."[74] The Court was saying the opposite: since the "ordinary" meaning of the phrase would make all employees into employers, the statutory meaning had to be different.

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71. "Basically, the business man is an economic individualist, a competitor par excellence. If opportunity is plentiful, if the enterprising person can create his own opportunity, what sane object can there be in collectively controlling the extent of the individual's appropriation of opportunity.... Nor will this type of individual submit to group control, for he is confident of his ability to make good bargains for himself." PERLMAN, *supra* note 66 at 241.

72. *See supra* note 21 (definition of professional employee in §2 (12)).

73. S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947). While the House version of the bill might have excluded these categories from protection, "[a]s to these persons the Senate's view prevailed." NLRB v. Bell Aerospace Co., 416 U.S. 267, 283 (1974).

74. Packard Motor Car Co. v. NLRB, 330 U.S. 485, 488 (1947).

The *Packard* majority clearly indicated that when used in the definition of employer the phrase meant *more* than simply that the person was engaged in the employer's business. If the phrase means the same now, then performing one of the twelve supervisory functions as part of one's job is not sufficient to satisfy the requirement that the function be exercised in the interest of the employer. Under the old definition, the phrase created a greater limitation on inclusion as an employer than merely doing the employer's business. In the same way, under the new definition the phrase creates a greater limitation on inclusion as a supervisor. If the phrase means the same as the Court construed it in *Packard*, then its inclusion in the definition of supervisor is related to the rationale of *respondeat superior*—only that authority that derives *from* the employer is held, and can be exercised, in the employer's interest. As the *Packard* Court understood the phrase in the definition of employer, where it applied to all employee activities, it was intended to allow attributing an employee's *actions* to the employer whenever those actions involved the subject-matter of the Act—that is, when the employee's actions, if committed directly by the employer, would be an unfair labor practice. The phrase was not meant to include actions undertaken by employees in their own interests, for their own purposes, even if undertaken in the course of their job. The *Packard* Court thought that foremen who fired employees for union organizing would be acting in the interest of the employer, but that the same foremen, when demanding better pay, were not.[75]

The *Health Care* dissent also seems to have misunderstood the effect of accepting the *Packard* majority's view of "in the interest of the employer," apparently conceding that such a construction would support the result in *Health Care*. The dissent instead questioned whether Congress had adopted this position at all, thinking it more likely that Justice Douglas' views had prevailed on this issue as well as on the holding.[76] Douglas believed that the Act "put in the employer category all those who acted for management not only in formulating but also in executing *its labor policies*."[77] The crucial question was "whether the employees in question represent or act for management on labor policy matters."[78] Douglas' disagreement with the Court on the meaning of "in the interest of the employer" was very narrow, as the quoted language shows. He agreed with the Court that the phrase was not intended to reach everyone engaged in the employer's business, but thought it went beyond those who formulate employer policy to encompass those who implemented the employer's *labor policy*.[79] If Douglas' hypothetical union of vice-presidents had indeed come to the Court seeking recognition, the Court would have said they were employers, outside the protection of the Act, because they formulated management policies. Justice Douglas would have said the same, but he also

75. Since the issue here is what was the *Packard* Court's understanding that Congress supposedly adopted in 1947, it is not relevant whether this reading of the phrase is what Congress meant when it included it in the Wagner Act in 1935, and whether Congress intended to exclude supervisors then. But whatever the answer to the last question, surely *Packard* is right that Congress did not mean the phrase to apply to all activities.

76. NRLB v. Health Care & Retirement Corp. of America, 114 S. Ct. 1778, 1791 n.15 (Ginsburg, J., dissenting).

77. *Packard*, 330 U.S. at 496 (Douglas J., dissenting) (emphasis added).

78. *Id.* at 500 (Douglas J., dissenting).

79. "The Act was not declaring a policy of vicarious responsibility of industry. It was dealing solely with labor relations." *Id.* at 496 (Douglas, J., dissenting).

would have excluded any employee who carried out the employer's labor policy.

Whether Congress intended the reading given the phrase either by the *Packard* majority or by Justice Douglas, it means that an employee is not a supervisor unless her authority to perform a listed function is given her by the employer in order to implement the employer's labor relations policies. Until the *Health Care* decision, this is exactly how the Board had applied the supervisory exclusion to professionals. A professional employee who performed "supervisory" functions in the normal course of carrying out his professional duties was not held to be a supervisor. It is true, as the Court pointed out in *Health Care*,[80] that the decisions outside nursing often do not depend on the "interest of the employer" standard.[81] The Court distinguished the Board's application of that standard in nursing from situations where the Board rejected supervisory status on the grounds that "authority arising from professional knowledge" is different from "authority encompassing front-line management prerogatives."[82] But the Court's distinction misconstrues the policy of the Act and in the process distorts its own precedents.

Authority that derives from professional knowledge does not derive from the employer, and this means that acts performed pursuant to that authority cannot be for the purpose of effectuating the employer's labor policies: they are not "in the interest of the employer." That is the only meaning of the phrase that explains the Court's own example of a steward who adjusts grievances,[83] and the only meaning that is consistent with *Packard*. It is also the meaning consistent with the Court's approving description in the *Yeshiva* case[84] of the Board's practice:

> The Board has recognized that employees whose decisionmaking is limited to the routine discharge of professional duties...cannot be excluded from coverage....Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management."[85]

The "routineness" of a professional employee's decisionmaking to which the Court referred cannot, of course, be equated to authority whose exercise is "of a merely routine or clerical nature,"[86] within the meaning of the Act. The supervisory exclusion counterposes this to "the use of independent judgment,"[87] and the duties of a professional employee, by statutory definition, must

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80. *Health Care*, 114 S. Ct. at 1785.

81. The Court overstates this, however. Many of the Board's decisions outside nursing do find that the authority in question was not being exercised "in the interest of the employer." As the dissent noted, the Board had so held in regard to retail pharmacists, social workers, and lawyers. *See id.* at 1789 & nn. 8, 10, and 11 (Ginsburg, J., dissenting) (collecting cases).

82. *Id.* at 1785.

83. *See supra* text accompanying note 18.

84. NLRB v. Yeshiva University, 444 U.S. 672 (1980).

85. 444 U.S. at 690. While it seems clear that this passage is inconsistent with *Health Care*, it is difficult to view this fact as indicating a significant departure from the Court's precedents, since the passage is also inconsistent with the holding in *Yeshiva* itself. That holding is compatible with *Health Care*, and indeed foreshadowed it; the passage reflects the law's confusion in dealing with workplace governance. Among other things, the reasoning of the passage assumes that no evolution towards greater workplace control by professionals—and by extension, other employees—is possible. *Yeshiva* is discussed in Part II C, *infra*.

86. *See supra* note 16.

87. *See supra* note 16.

"involv[e] the consistent exercise of discretion and judgment...."[88] Lawyers supervising the trial preparation of junior associates, surgeons directing the work of anesthesiologists, are not performing routine or clerical duties. What the highly individualized and discretionary work of these professionals does have in common with the clerk who posts work assignments and the steward who adjusts grievances is that none of them is using her discretion to carry out the employer's labor policy.

For both the conservative majority and the liberal dissenters in *Health Care*, as for the majorities and dissenters in *Packard* and in the cases developing the managerial exclusion,[89] the dispute concerned the degree of discretion, and the areas over which that discretion is exercised, that an employee may possess before she is excluded from the protections of the Act. All agree that at some point, if only at the level of decision–making exercised by corporate vice–presidents, an employee's authority becomes too great to protect his decision to act collectively.

The fact that the LPNs in the *Health Care* case were regarded as equivalent to professional employees allowed the Court's liberal bloc to attempt to include them within the Act's protection of collective actions by professionals, just as the dissenters had attempted to except professionals from the managerial exclusion in *Yeshiva*.[90] These attempts are not unjustified in view of the legislative history, and indeed the statutory language, which strongly support the view that Congress intended to include at least professional employees even if they responsibly direct other employees. The Conference Committee Report stated that "professional employees" meant "such persons as legal, engineering, scientific and medical personnel *together with their junior professional assistants*."[91] Congress was surely aware not only that professionals often have junior colleagues, but that part of a professional's duties is "responsibly to direct" them. The statute itself includes as professional employees those whose completion of their professional qualification involves "performing related work *under the supervision of a professional person*...."[92] It is hard to believe that Congress meant to exclude all such "supervisory" professionals from employee status.[93]

Both in *Yeshiva* under the management exclusion, and in *Health Care* under the supervisory exclusion, the liberals' position would have preserved the class line between direction and execution for all other employees. This was their solution to the tension the Justices have attributed to the Taft–Hartley amendments' simultaneous exclusion of supervisors and inclusion of professionals.[94] But, as *Packard* shows, this tension is inherent in the Wagner Act's premise that the law should protect collective action to achieve workplace

88. 29 U.S.C.A. §152 (12)(a)(ii); the text of § 2(12) is set forth *supra* note 21.
89. These cases are discussed in Part II, *infra*.
90. *See infra* discussion Part II.
91. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 36 (emphasis added).
92. 29 U.S.C.A §152(12)(b)(ii) (emphasis added); *see supra* note 21.
93. Concededly, the use of the term "professional person" rather than "professional employee" also means that not every professional person is an employee. But this only indicates that the professional–in–training retains her employee status even if her supervisor is not an employee; it does not mean that the fact of supervising is itself a disqualification.
94. NLRB v. Yeshiva University, 444 U.S. 672, 686 (1980); NLRB v. Health Care & Retirement Corp., 114 S. Ct. 1778, 1788 (Ginsburg, J., dissenting).

power, and the simultaneous, though implicit, premise that the hierarchical nature of the workplace would be maintained.[95]

The Court's rejection of this solution was not absolute. Its insistence that the Board had applied a special standard to nurses, while dubious as a matter of fact, allowed it to claim that its holding was limited to the interpretation of the phrase "in the interest of the employer," and, if the Board uses careful language, may allow it to distinguish nurses from all other professionals in the future.

But the fact that the duties of the LPNs that disqualified them from employee status are not confined to professionals, since these nurses were clearly outside the statutory definition,[96] is what makes the case important. It is based on deep–seated assumptions about the organization of work and the role of the national labor policy in maintaining that organization. The case rests ultimately on the idea that the workplace must remain hierarchical, that workplace hierarchy requires a strict separation of those who direct the work from those who carry it out, and that these two groups may not be permitted to make common cause.

PART II: WORKERS AND MANAGERS

In Part I, I briefly mentioned the managerial exclusion, and the *Yeshiva* case.[97] In contrast to the explicit denial of statutory protection to supervisors, the managerial exclusion was judicially implied. Because of this, its development more directly reveals the Court's views of basic labor policy than does the interpretation of specific language in the Act. The treatment of managerial employees and of related issues allows us to see the principles that were at stake in both *Packard* and *Health Care*. The debate these questions engendered on the Court provides insight into the differing approaches the Justices have taken in attempting to resolve the tension between the Wagner Act's protection of employee's attempts to gain greater workplace power and the desire to maintain the hierarchical organization of work.

After a brief survey of the contexts in which these issues arise, I will discuss the cases and the interrelationship of the doctrines they developed.

A. Categories of Exclusion

When Congress excluded foremen from the class of employees in 1947, the definition of "supervisors" that it added to the Act explicitly reached only employees who have authority to perform one of the listed activities.[98] Whether the Act covers employees who might be considered "managerial," but are

95. *See* Klare, *supra* note 1. While industrial democracy was one of the goals of the Wagner Act, *see* Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–41*, 62 MINN. L. REV. 265 (1978), I doubt that Congress' conception of industrial democracy went much further than the limited scope represented by the positions of the liberal wing of the Court in cases such as First National Maintenance Corp. v. NLRB, 452 U.S. 666, 688 (1981) (Brennan, J., dissenting).

If the possibility of workers' control of industry was in Congress' contemplation in 1935, it passed the Wagner Act to prevent, not to advance, its realization. *See* Feldman, *supra* note 3.

96. *See supra* note 21.

97. NLRB v. Yeshiva University, 444 U.S. 672, 686 (1980).

98. *See supra* note 16.

clearly not "supervisory," was thus left open. Related to this question are the issues of whether employees who are for some reason "allied with management" may, or must, be excluded, and whether these exclusions are from all protections of the Act. There are several types of these employees, and issues involving them arise in differing contexts.

The most obvious category includes people who are very high in the organizational hierarchy, but whose job responsibilities have no connection with labor relations. The chief financial officer of a corporation, unless he is also a member of the corporate board, is an example. Such persons are indisputably "managerial," but they are also employees. Their decision to band together would incarnate Justice Douglas' hypothetical union of vice-presidents.[99] Not surprisingly, no case involving this type of organization has ever reached the Board; presumably no such case has ever arisen. However, because of the degree and type of authority they possess, executives are the paradigmatic example of the theoretical difficulties of including management in the Act. The Court used these difficulties to justify applying the management exclusion to a university faculty in *Yeshiva*.[100]

In contrast, the Board has often been called upon to make decisions concerning a second category, perhaps because it includes large numbers of employees in traditionally unionized industries. This group consists of people such as buyers, who have authority to exercise discretion in making purchasing decisions. Two questions may arise in cases involving employees of this kind: whether they are "managerial" at all, and, if so, whether they are therefore necessarily entirely outside the Act's protections. The first question has always been a matter for the Board to determine on the basis of the particular facts of the many cases that have reached it. The Supreme Court decided the second question in *NLRB v. Bell Aerospace Co.*,[101] a case involving buyers, but not limited to them. The Court held that *all* managerial employees are excluded from the Act as a matter of law.

Another category concerns confidential employees. Again, both the fact and the consequence of managerial status might be at issue, but after *Bell Aerospace*, a finding of managerial status must lead to exclusion. However, not all confidential employees need be managerial. Some personal secretaries and employees who have knowledge of trade secrets are examples. While it might seem that the resolution of the status of non-managerial confidential employees is doctrinally separate from the managerial exclusion, the issues are in fact closely connected, as the Court's decision in *NLRB v. Hendricks*[102] shows.

A fourth situation is when particular employees, whose job duties are neither managerial nor supervisory, have some special relationship to the employer, such as family ties. As is typical in this circumstance, the question for the Court in *NLRB v. Action Automotive*[103] was the inclusion of these employees in the same bargaining unit with others, rather than whether the Act protects them from the employer.

99. *See supra* text accompanying note 16.
100. 444 U.S. 672 (1980).
101. 416 U.S. 267 (1974).
102. NLRB v. Hendricks Cty. Rural Elec. Membership Corp., 454 U.S. 170 (1981).
103. 469 U.S. 490 (1985).

A final category is related to, but more complex than the issue of family affiliation: the effect of employee ownership on statutory coverage, especially when not all employees have ownership stakes in the enterprise. While the Court has never decided a case directly involving this question, in the course of developing the managerial exclusion it has often cited a series of Board decisions beginning with the *Brooking Plywood*[104] case, and has apparently approved the Board's reasoning.

These cases together indicate a split on the Court concerning the level of employee discretion that can be accepted without fundamentally undermining workplace hierarchy, a split that directly echoes the dispute in *Packard*. One wing of the Court, generally more liberal, argued with some consistency for inclusion in the Act of all employees whose union membership would not result in a direct conflict of interest with their job responsibilities. This was also the Board's traditional position. Depending on the context, this standard was sometimes phrased in terms of whether employees are "allied with management," or whether their duties include a "labor nexus." Whatever the wording, this standard attempts to define the Act's coverage in the same way as "the interest of the employer" standard was meant to draw a class line between employees and employers in *Packard*, and as the dissent in *Health Care* used the same inquiry to distinguish between employees and supervisors. It is in substance the same as the "interest of the employer" standard.

The rationale for exclusion from the Act was less clearly articulated by the Court's conservatives; some of the arguments they made contradicted others. Analysis of the cases, especially of *Bell Aerospace* and *Yeshiva*, leads to the conclusion that the key criterion for including an employee in the Act is her lack of control over defining the work, how it is to be done, or by whom. This is the same standard that the Court applied in *Health Care*, but without the cloak of the statutory language. Discretion in carrying out one's job, to the conservatives, is a disqualification from engaging in protected collective action.

B. Bell Aerospace: The Exclusion Implied

The difference in approach is clearest in *Bell Aerospace*, which concerned a group of twenty–five buyers in the purchasing and procurement department of a plant making aerospace products, mainly the Minute Man missile.[105] The department's job was to fill all requisitions received from other departments. In purchasing parts and supplies from outside vendors, the buyers, at least in some circumstances, had authority "to select prospective vendors, draft invitations to bid, evaluate submitted bids, negotiate price and terms, and prepare purchase orders."[106]

When the UAW sought to represent the buyers, the company opposed the petition on the grounds that the buyers were managerial employees and therefore excluded from the Act. After the union won the subsequent Board election and was certified as the buyers' representative, the company refused to bargain. The Board's position was that even if the buyers were managerial, they were not excluded unless they were involved with the "formulation and

104. Brookings Plywood Corp., 98 NLRB 794 (1952).
105. The background from which this description is drawn is set forth at 416 U.S. at 269–70.
106. 416 U.S. at 270.

implementation of labor relations policies,"[107] a standard identical to that of Justice Douglas' *Packard* dissent.[108] This "labor–nexus" test was a way of identifying the presence of the real issue: "whether the duties and responsibilities of any managerial employees do or do not include determinations which should be made free of any conflict of interest which could arise if the person involved was a participating member of a labor organization."[109]

While the dissent endorsed the Board's test, the Court rejected it as too narrow. Instead, the Court held that all "true management" employees were excluded. Although the Court never articulated its own definition of this term, it seemed to accept that of the Board as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer,"[110] noting that this had "been approved by courts without exception."[111] It also quoted the language of the Court of Appeals, which it was affirming,[112] that the Act excluded an employee "who is 'formulating, determining and effectuating his employer's established policies or has discretion, independent of his employer's established policy, in the performance of his duties.'"[113]

There is an important distinction between these two formulations. The Board's language, by limiting managerial status to those who make operative "the decisions of their employer," effectively means that exercising discretion will be considered managerial only when the authority to exercise it is conferred by the employer. The Court of Appeals, however, goes much further: the possession of discretion, from whatever source, is sufficient to confer managerial status.

For the Board, exclusion therefore effectively required two conditions. First, in order for an employee to be considered managerial, he had to possess authority that was derived from the employer. Second, in order for the employee's managerial status to exclude him, his authority had to involve labor relations, or for some other reason had to present the possibility that union membership could create a conflict of interest. In the context of *Bell Aerospace*, only the second test was relevant to the Board since the authority of the buyers clearly derived from the employer; if a buyer did not exercise it to

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107. 196 NLRB 827, 828 (1972).

108. The Act "put in the employer category all those who acted for management not only in formulating but also in executing its labor policies." Packard Motor Car Co. v. NLRB, 330 U.S. 485, 496 (1947) (Douglas, J., dissenting). Justice Douglas, nonetheless, joined the majority in *Bell Aerospace.*

109. 196 NLRB 827, 828. The Board's choice of language indicates that even in the case of a managerial employee whose job would exclude her from being a "participating member" of a union, the possibility remained that as a statutory "employee" she would not be wholly outside the Act's protections. *See infra* note 196 and accompanying text.

110. 416 U.S. at 288 (quoting Palace Laundry Dry Cleaning, 75 NLRB 320, 323 n. 4 (1947)).

111. 416 U.S. at 288.

112. Although the decision below was reversed in part, that holding, which was unanimous, concerned only the Court of Appeals' determination that the Board would have to proceed through rule–making, rather than adjudication, if it wished to change its long–standing position that buyers were managerial employees. *See* 416 U.S. at 290; *Id.* at 295 (White, J., dissenting in part).

113. 416 U.S. at 273 (quoting Bell Aerospace v. NLRB, 475 F.2d 485, 494 (2d Cir. 1973) (quoting Illinois State Journal–Register v. NLRB, 412 F.2d 37, 41 (7th Cir. 1969))).

the employer's liking, the employer was obviously free to remove the authority.[114] The Court's rejection of the conflict of interest requirement determined the outcome in *Bell Aerospace*. Ignoring the first aspect of the Board's analysis however led to the result in *Yeshiva*, and ultimately in *COMS*;[115] the reasoning that underlies the Court of Appeals' statement is at the heart of the *Health Care* decision, and may lead to wider consequences in the future.[116]

The Court's justification for its holding in *Bell Aerospace* was that excluding managerial employees was necessary for the same reasons that had led Congress to pass the supervisory exclusion. In analyzing this justification, three questions need to be answered. First, what are these reasons? Second, do these reasons actually apply to managerial employees as a category, or only to some? And third, why didn't Congress pass a managerial exclusion itself? The answers the Court gave, sometimes incomplete and implicit, are interrelated; I will begin with the last issue.

1. Justifying the Exclusion: Or, What the Court Said About How Congress Believed the Board Acted

The absence of a managerial exclusion in the Taft–Hartley amendments, according to the Court, does not indicate Congress' intention to include any managers in the Act, but rather that it believed an explicit exclusion unnecessary.[117] The Court relied heavily on what it claimed was Congress' understanding of the legal status of managerial employees at the time it passed the supervisory exclusion. Congress knew that the Board had regularly refused to place managerial employees in the same bargaining units as non–managers, and that it had never certified a separate unit consisting only of managers. This was in contrast to the situation of supervisors, where the Board had vacillated,[118] and where its then–current view, ratified by the Court in *Packard*, was to allow foremen bargaining units. Thus, Congress found it necessary to act in order to exclude supervisors, but could exclude managers by leaving the status quo undisturbed.

As the dissent pointed out, however, the Board had never held that managerial employees were not "employees" within the meaning of the statute.[119] Rather, despite some ambiguity, the cases decided before Taft–Hartley indicated that the Board's refusal to allow managerial employees in rank and file units was based on its responsibility to designate appropriate bargaining units,[120] and was an application of its usual "community of interests" test in exercising that authority.[121] Indeed, as the dissent said, "the Board, in one decision excluding buyers and expediters from a unit of office and clerical employees, pointedly expressed the caveat" that its decision did not mean that

114. *See supra* text accompanying note 32
115. *See supra* note 40 and accompanying text.
116. *See* Dunlop Commission Report, *supra* note 31, Lexis at *58 (delegation of greater autonomy to work–teams may lead to a finding of supervisory or managerial status). Health Care was decided ten days before the Dunlop Commission issued its report.
117. 416 U.S. at 283-84.
118. *See* 416 U.S. at 277–78; Packard Motor Car Co. v. NRLB, 330 U.S. 485, 492 & n.3.
119. 416 U.S. at 299 (White J., dissenting in part).
120. NLRA § 9, 29 U.S.C. §159 (8) (1988).
121. *See* ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW 69 (1976).

these employees "'are to be denied the right to self-organization and to collective bargaining under the Act.'"[122] Insofar as Congress' silence was "intended to codify prior Board practices," the dissent maintained, "then the unavoidable fact is that Board decisions had not held that managerial employees were unprotected by the Act."[123]

The majority seems to have ignored this distinction between the appropriateness of including managerial employees in particular bargaining units, or even in any bargaining unit, and the question of whether they were statutory "employees."[124] This is a bit odd, since in its vacillations concerning supervisors, the Board had held for a while that there was no appropriate bargaining unit for foremen, while reiterating that they were statutory employees.[125] As such, they would still be protected against employer unfair labor practices.[126] To have accepted this distinction in regard to managers, however, would have meant that the determination of managerial status by the Board would not have precluded it from according bargaining rights in the proper circumstances. Bargaining rights, which is to say unionization, would depend both on applying the community of interests test in regard to the

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122. 416 U.S. at 299 (White, J., dissenting in part) (quoting Dravco Corp., 54 NLRB 1174, 1177 (1944)).

123. 416 U.S. at 305 (White, J., dissenting in part). As the dissent summarized the situation:

> When Congress undertook to amend the Act following this Court's decision in *Packard* upholding the Board's inclusion of supervisors as employees under the Act, it was acting in light of a renewed Board policy to permit supervisory employees to organize in separate units under the mantle of the Act's protection, an enduring Board policy not to exclude supervisors from the statutory definition of employees, and a further policy which excluded managerial employees from rank-and-file units but had never denied them the right to establish separate bargaining units or placed them outside the Act's definition of "employee."

Id. at 301–02. Congress then acted to reverse the first two Board policies mentioned, but was silent as to the third.

124. In a footnote, the Majority criticized the dissent saying:

> Surprisingly, the dissent maintains that the Board "actually held only twice" that "managerial employees" were not covered by the Act. This is difficult to reconcile with the undisputed fact that until its decision in *North Arkansas* (in 1970) the Board had never even certified a separate unit of "managerial employees" and had stated in case after case that managerial employees were not to be accorded bargaining rights under the Act.

416 U.S. at 287, n.14 (citation to the dissent omitted).

In fact, the dissent is quite correct. While the Board had often held that managerial employees could not be included in a particular bargaining unit, it had held that bargaining rights were unavailable to managerial employees as a category only in American Locomotive Co., 92 NLRB 15 (1950) and in Swift & Co., 115 NLRB 752 (1956). In *Swift*, the Board had gone even further, stating that managerial employees were entirely outside the coverage of the Act. Both of these cases, of course, were decided after the Taft-Hartley amendments. *Swift* was overruled by North Arkansas Electric Cooperative, Inc., 185 NLRB 550 (1970).

125. The Board said it was "no longer convinced that from the mere determination that a supervisor is an employee it follows that supervisors may constitute appropriate bargaining units." Maryland Drydock Co., 49 NLRB 733, 738 (1943).

126. The distinction is elementary and obvious in other contexts: an employee in a bargaining unit that has rejected unionization continues to be protected by the statute, even if, as now generally assumed, she has no right to bargain collectively. *See* Clyde Summers, *Unions Without Majority—A Black Hole?*, 66 CHI.-KENT L. REV. 531 (1990).

Virginia Seitz, *supra* note 65, at 221, believes that *Maryland Drydock* meant "the Board would accept neither certification petitions nor unfair labor practice cases from supervisors or their organizations." I think the case supports the view that individual foremen were still protected.

appropriateness of the bargaining unit, and determining the possibility of conflict of interest. Thus, in *Maryland Drydock*, the decision in which the Board denied bargaining rights to foremen, it explained that "the benefits which supervisory employees might achieve through being certified as collective-bargaining units would be outweighed not only by the dangers inherent in the commingling of management and employee functions, but also in its possibly restrictive effect upon the freedom of rank and file employees."[127]

There are several noteworthy aspects to this passage. First, the fact that the Board balanced the benefits to supervisors of allowing them to bargain collectively, though it decided the benefits were outweighed, necessarily means that it considered them statutory employees. Second, the primary reason not to accord bargaining rights is the danger of conflict of interest. Third, the Board's consideration of the effect on rank and file rights of allowing foremen to bargain indicates its appreciation of the historical role of foremen that Justice Douglas would later emphasize in *Packard*,[128] and the possibility that when Congress passed the Wagner Act, "it was legislating *against* the activities of foremen, not on their behalf."[129] This concern is the other face of the fear that a foreman who is a union member will be insufficiently loyal to the employer. Unionized foremen might allow their loyalty to the employer to compromise their solidarity with the labor movement, or might even act as the employer's agents within it.

The Board had always perceived the interests of supervisors before Taft-Hartley, and of managerial employees both before and after, as sufficiently distinct from that of the rank and file to prevent their inclusion in the same bargaining units.[130] The fear that they might have divided loyalties vis-a-vis the rank and file is a particular case of the general goal of creating a bargaining unit that minimizes internal conflicts among its constituents, an aim embodied by the requirement of community of interest.[131]

As the quotation from *Maryland Drydock* shows, the Board believed that this concern could under some circumstances support the decision to bar certain employees from inclusion in any bargaining unit. Presumably, the Board then thought that the unionization of foremen, whose job interests might directly conflict with those of the workers they supervised, would give them greater power to achieve their demands at the expense of the workers.[132] In addition, the danger that a managerial union could be destructive of the statutory rights of the rank and file would be heightened when it was composed of employees whose interests most diverged from those of the rank and file as measured by

127. Maryland Drydock Co., 49 NLRB 733, 740 (1943).

128. *See supra* note 54.

129. 330 U.S. at 499 (Douglas, J., dissenting) (emphasis in original). In fact, the success of supervisory unionization in most industries depended almost entirely on the support, or at least the benevolent neutrality of the rank and file unions. *See* Seitz, *supra* note 65.

130. Compare § 9(b)(1) and 29 U.S.C. § 158(b)(1), where Congress' perception of divergent interests caused it to mandate separate bargaining units for professional employees, unless a majority of them agree to a mixed unit.

131. The concerns raised by allowing representatives of the employer to participate in the union are also closely related to the prohibition on employer domination or support of a labor organization in § 8(a)(2), 29 U.S.C. § 158(a)(2). *See* Barenberg, *supra* note 7.

132. Except for the possibility of employer influence through mixed bargaining units, I am skeptical of this argument, which is directly contrary to the much more widely expressed fear that foremen would not be sufficiently loyal to the employer.

the usual Board criteria, such as rate of pay and similarity of work.[133] It is by these standards that the Board would have been able, had the occasion ever arisen, to dispose of the union of vice-presidents that haunts the discussion. Whatever the likelihood that an International Brotherhood of Executives would form and be used as the employers' Trojan Horse in the House of Labor, the danger is almost entirely irrelevant to the issue of whether buyers can unionize. While employees like buyers have important differences from the rank and file in regard to the factors that constitute the Board's community of interest standard, they differ even more significantly from executives. The subjective desire for unionization reflects this. Executives' almost complete divergence in interests from those of the rank and file simultaneously makes it at least plausible that their decision to unionize might pose a genuine danger to employees' rights, and highly implausible that they would ever make that decision; buyers, as in *Bell Aerospace* itself, do choose collective activity over individual competition.

Once again, the same could be said about supervisors in the period immediately preceding the Taft-Hartley Act,[134] but the difference is that Congress made their subjective desire to unionize legally irrelevant. In the absence of a managerial exclusion, the decision in *Bell Aerospace* can be justified only by the claim that the rationale of the supervisory exclusion requires similar treatment of the buyers' subjective choices.

2. Justifying the Exclusion: Discretion and Control

The discussion of the Board's reasons for treating managerial employees differently from rank and file workers returns us to one of the first two questions raised by the decision: what were the reasons that Congress excluded supervisors? It is true that the evidence to support the Court's claim about Congress' perception of Board law regarding the treatment of managers at the time of Taft-Hartley seems inconclusive at best.[135] But this argument was intended only to strengthen the Court's underlying claim: that Congress did not pass a managerial exclusion because it *assumed* there should be no management unions. For this contention to be correct despite the weakness of the supporting arguments explored thus far, there must be something that justifies the exclusion of supervisors the application of which to managerial employees is so

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> In making judgments about "community of interest" in these different settings, the Board will look to such factors as: (1) similarity in the scale and manner of determining earnings; (2) similarity in employment benefits, hours of work and other terms and conditions of employment; (3) similarity in the kind of work performed; (4) similarity in the qualifications, skill and training of the employees; (5) frequency of contact or interchange among the employees; (6) geographic proximity; (7) continuity or integration of production processes; (8) common supervision and determination of labor-relations policy; (9) relationship to the administrative organization of the employer; (10) history of collective bargaining; (11) desires of the affected employees; (12) extent of union organization.

GORMAN, *supra* note 121 at 69.

134. *See supra* text accompanying note 65.

135. *See* David Rabban, *Distinguishing Excluded Managers from Covered Professionals Under the NLRA*, 89 COL. L. REV. 1775, 1795, & 1814, n.174 (1989) (hereinafter Rabban, *Distinguishing Professionals*) (claiming that the dissent misread the legislative history of Taft-Hartley amendments). I believe that like the Court, Professor Rabban has ignored the distinction between exclusion from bargaining units and exclusion from employee status.

obvious that it requires no articulation. And if such justification exists, it may also answer the last problem of *Bell Aerospace*: do those reasons apply to all managerial employees?

As everyone agrees, the main reason for the supervisory exclusion was the fear of divided loyalties. As I have pointed out, a second reason involved the belief that supervisors were, or ought to be, individualistic and competitive.[136] A final possibility is the danger that supervisory unionization might pose to the rights of the rank and file. I have already discussed the inapplicability to buyers of the last concern, which in any case realistically poses a problem only in the context of mixed bargaining units.[137]

As for the second reason, it would seem to apply even more forcefully to managers than to foremen. After all, one reason the House Report gave that foremen should act individually rather than collectively, competitively rather than cooperatively, is that they were "management people."[138] But this argument is circular: the reason managers should be individualistic is that they are like foremen, who should be individualistic because they are like managers. While the House Report therefore adds some support to the argument that Congress, or at least the House of Representatives, thought that there were "management people" who should not be protected by the Act, it is hardly relevant to the question of a categorical exclusion.[139] The House Report is more reasonably read as equating supervisors with entrepreneurs and executives, not people such as buyers. As pointed out earlier, the empirical accuracy of this equation is irrelevant in the case of supervisors, because Congress mandated their exclusion.[140] Justifying the extension of this rationale to managers, however, requires showing that the equation, even if inaccurate in the case of supervisors, does in fact apply to managerial employees as a category. As I suggested a moment ago, the subjective desire of some managers to unionize goes far to indicate that they are not like entrepreneurs or executives. That Congress wanted them excluded anyway is what must be shown, not assumed.

The House Report, however, seemed to object particularly to imposing the decision of a majority of supervisors to bargain collectively on the minority who opposed it.[141] Does not this aspect of the argument for individualism apply equally to all managerial employees? The language of the Report does not support this broad reading. The unwillingness to subject supervisors to the principle of majority rule and exclusivity seems predicated on the argument that they are people "who have demonstrated their initiative and their ability to

136. *See supra* text accompanying note 67.

137. *See supra* text accompanying note 129.

138. H.R. Rep. No. 245, 80th Cong., 1st Sess., 16–17 (1947). *See supra* text accompanying note 67.

139. There is little dispute that Congress indeed assumed that a union of vice presidents would not be protected. *See* Rabban, *Distinguishing Professionals*, *supra* note 135 at 1795.

The dissent does not quite concede this, although it comes close. While pointing out that most executives would be excluded as "'super' supervisors," confidential employees, or because they otherwise meet the Board's labor–nexus test, it implies that some would be included as professional employees. "If there are remaining executives outside these categories who should also be excluded, the Board should be told to exclude that particular group, rather than...the ...'hundreds of thousands' of buyers and other relatively low–level management employees...." 416 U.S. at 307 & n.3 (White, J., dissenting) (citation omitted).

140. *See supra* text accompanying note 134.

141. *See supra* text accompanying note 70.

get ahead," who "abandoned the 'collective security' of the rank and file voluntarily, because they believed the opportunities thus opened to them to be more valuable to them than such 'security.'" The "leveling processes" of unionization "discourages the things in them that made them foremen in the first place."[142] None of these reasons justifies a categorical exclusion of managers. These statements no more apply to the *Bell Aerospace* buyers than they do to a skilled worker with a good job. Indeed, insofar as a skilled worker may have risen from the ranks of the unskilled through personal initiative, it may more accurately describe him than it does the buyers.

The argument for individualism as the House Report applied it to supervisors is in reality inextricably combined with the divided loyalty rationale for exclusion and does not have much independent weight when divorced from it. It is because foremen are "the arms and legs" of management in labor relations that Congress wanted them to think and act individualistically. Collective activity on the part of supervisors was too likely to bring them into alliance with the rank and file. Foremen could not be allowed to unionize without jeopardizing the hierarchical structure of mass-production industries. The specter that haunted Congress was not the union of vice presidents but Packard's 1,100 organized foremen, and the massive strike wave launched by foremen during World War II.[143]

Does the danger of divided loyalty sufficiently apply to a particular category to justify exclusion? The Board's labor-nexus test was a means of determining that issue without undermining the most fundamental tenet of the accommodation on which the Labor Act is based: that while "the employer has the right to wholehearted loyalty in the performance of the contract of employment, the employee [has] the right to protect his independent and adverse interest in the terms of the contract itself and the conditions of work" through collective activity.[144]

The buyers in *Bell Aerospace*, along with many managerial employees, would not be excluded under the Board's labor-nexus standard. Is there any other reason to believe that the unionization of buyers poses the danger of divided loyalties?

The cases involving employee-shareholders present an example of such other reasons. These cases excluded employee-shareholders from rank and file bargaining units because their interests were too divergent.

In *Brookings Plywood Corp.*,[145] the Board found that the challenged employees—their exclusion was sought by the unions, while the employer argued for inclusion—had a "divergency of employment interests" illustrated by different pay schedules and their apparent ability to "bump" non-shareholders for the most desirable jobs. "[S]hareholders, who are interested in maximizing profits, would favor minimizing costs, including that of the

142. H.R. Rep. No. 245, 80th Cong., 1st Sess., 16–17 (1947). *See supra* text accompanying note 72.

143. *See* Seitz, *supra* note 65, at 224–25.

144. *Packard*, 330 U.S. at 490. *Cf.* NLRB v. IBEW Local 1229 (Jefferson Standard Broadcasting Co.), 346 U.S. 464 (1953).

145. 98 NLRB 794 (1952).

nonshareholder labor, whereas the representative of the latter would constantly seek to obtain higher wages for its members."[146]

Similarly, in *Red and White Airway Cab Company*,[147] the shareholder–drivers elected the board of directors, could be disciplined only by the board, and received preferential shift assignments. "This divergence of proprietary and bargaining interests between stockholders and other drivers requires that the former be excluded from a bargaining unit of employees."[148]

In *Sida of Hawaii, Inc.*,[149] as in *Brookings Plywood*, it was the employer who sought inclusion. The shareholder–drivers, 115 of 250 employees, held almost all the company's shares,[150] and again received preferential treatment. The Board concluded that "to have included stockholders in the unit would be inappropriate because of the considerable adverse impact on the nonshareholder drivers."[151]

Family ties to the employer also presents the danger of divided loyalty unrelated to a labor–nexus. *NLRB v. Action Automotive*[152] was another situation where the union, rather than the employer, favored exclusion. The Court held that excluding from a bargaining unit the close relatives of the owner of a closely–held corporation, even if they did not enjoy job–related privileges, was a reasonable application of the Board's community of interests standard. The Board "could reasonably conclude that [the challenged employees'] interests are more likely to be aligned with the business interests of the family than with the interests of the employees."[153] The decision makes it clear that exclusion from the bargaining unit was appropriate under this standard even though the relatives "are statutory 'employees' otherwise protected by the Act."[154]

Are any of these dangers present in the case of the buyers? The employer in *Bell Aerospace* argued that in exercising their discretion the buyers might sometimes decide not to buy supplies from outside in order to create more work for their sister unions in the plant, and might favor unionized outside

146. *Id.* at 799.
147. 123 NLRB 83 (1959).
148. 123 NLRB at 85.
149. 191 NLRB 194 (1971).
150. Each shareholder driver held one share of the 142 shares outstanding; the other 27 shares were held by former drivers no longer employed by the company. *Id.* at 195.
151. *Id.* at 195. *Sida* is the only one of these cases that lends even the remotest support to the holding in *Yeshiva*; *see infra* Part II C. The Board explained that the shareholders "had an effective voice in determining policy as well as their terms and conditions of employment through their selection of directors." *Id.* But as the quotation in the text shows, this led to the conclusion that they did not meet the community of interests standard, not that the exercise of the authority, however acquired, is incompatible with employee status. The "divided loyalty" basis of the Board's reasoning is bolstered by its further observation that inclusion could lead to a situation where the representatives of the employer would be bargaining with people who could fire them. *Id.*
152. 469 U.S. 490 (1985). The case was decided well after *Bell Aerospace*, but I discuss it here because it sustained a long–standing exercise of Board authority.
153. *Id.* at 498–99.
154. 469 U.S. at 498. In explaining this, the Court said that the employer's "extensive reliance on § 2(3) of the Act is misplaced. Section 2(3) excludes from the Act's definition of 'employee' 'any individual employed by his parent or spouse.' Such a person is completely outside the scope of the statute and may not invoke its protection. Family members who fall within the Act's broad definition of 'employee,' however, have no statutory right to be included in collective–bargaining units under § 9(b)." *Id.* at 497 (citations and footnote omitted).

suppliers.[155] The Board dismissed this danger as too speculative and easily controlled by the employer, and there is no indication that the Court relied on the employer's argument in the form it was made; given its decision that neither a labor nexus nor any other indication of divided loyalties was required to exclude managerial employees, there is no reason why it should have.

On its face, the Court's rejection of the labor–nexus test was not based on a belief that the test insufficiently guards against the danger of divided loyalties.[156] Rather, it seemed to reject the idea that divided loyalty is relevant at all.[157] The Court, apparently approving both the Board's definition of managerial employees as "those who 'formulate and effectuate management policies by expressing and making operative the decisions of their employer,'"[158] and the Court of Appeals' addition of any employee who "'has discretion, independent of an employer's established policy, in the performance of his duties,'"[159] found that this was sufficient to exclude them.

We can accept the Board's definition; it is probably as good as any other. And for the sake of argument, we can accept the Court of Appeals' formulation as well.[160] But despite sixteen pages of analysis, the Supreme Court never explained *why* an employee whose job involves these functions, whatever label is given her, should be excluded. And without an explicit managerial exclusion, the mere identification of an employee as managerial was simply not a sufficient justification to exclude her. After *Bell Aerospace*, the very fact of having authority to formulate or effectuate policy, of whatever nature, disqualifies an employee from protection. The exercise of discretion or judgment in the performance of one's duties makes the decision to act collectively unprotected.

We have seen that this decision cannot be supported by the three justifications that have been mentioned to explain the supervisory exclusion. The fear of a detrimental effect on the protection of rank and file workers is not applicable to non–executive managerial employees whose jobs do not remotely involve labor relations. The argument that managers ought to be individualistic when the empirical evidence is that some of them want to unionize is simply question–begging: why should the law insist that they be individualistic? The most important consideration in the supervisory exclusion was the fear of divided loyalty. The Court seemingly rejected this concern as a

155. 416 U.S. at 271.

156. This possibility is implied in *Yeshiva*, although in such a confused way that it is hard to understand whether the Court was accepting or rejecting divided loyalties as the key to the managerial exclusion. *See infra* text accompanying note 182.

157. In *Health Care*, the Court went so far as to suggest that consideration of divided loyalties in determining supervisory status was not only irrelevant but impermissible: "The Act is to be enforced according to its own terms, not by creating legal categories inconsistent with its meaning, as the Board has done in nurse cases." *Health Care*, 114 S. Ct. at 1783. Although the Court apparently meant only that the supervisory exclusion was unambiguous and therefore that no consideration of its underlying policy was warranted, the implication that the divided loyalty standard is inconsistent with the meaning of the exclusion is nonetheless startling.

158. 416 U.S. at 288 (quoting Palace Laundry Dry Cleaning, 75 NLRB 320, 323 & n.4.(1947)).

159. 475 F.2d 485, 494 (2d Cir. 1973) (quoting Illinois State Journal–Register v. NLRB, 412 F.2d 37, 41 (7th Cir. 1969)).

160. *See supra* text accompanying note 112.

necessary condition of exclusion when it rejected the labor–nexus standard; nor did it rely on the employer's version of such a danger.[161]

In a fundamental way, however, the Court accepted the same reasoning as was implied by the employer's argument. The collective activity of those who exercise discretion cannot be protected because they are the employees over whom it is difficult for a superior to exercise direct control and supervision. Like the Board's labor–nexus test, the Court's "discretion" criterion is also a form of a divided loyalty standard—but one that comes very close to rejecting the premises of the Wagner Act. It implies that the use of any independent judgment, about any subject, creates the possibility that an employee will not act in the employer's interest, and that excluding such an employee from the Act's protections is necessary to maintain the employer's control over all workplace decisions. It implies that the law must not be allowed to hinder the employer's ability to maintain that control.

But "the effect of the National Labor Relations Act is otherwise."[162] As Justice Douglas' *Packard* dissent recognized, protecting organized workers' "struggle for control or power" is one of the goals of the Act.[163] In *Bell Aerospace*, *Health Care*, and, as we shall soon see, *Yeshiva*, the Court fashioned rules that make the exercise of power and the right to organize mutually exclusive.

The alternative to a categorical exclusion of managerial employees would have necessitated considering the specific dangers of including a particular group, such as divided loyalties, and would have required the Justices to articulate the appropriate criteria by which these dangers could be determined. Judging by the absence in the majority opinion of any serious analysis of the rationale for excluding managers, the Court's categorical exclusion may well have been caused as much by the Justices' inability, rather than unwillingness, to articulate these criteria.

A categorical exclusion, of course, does not mean that all buyers, or other employees who *might* be considered managerial, are in fact excluded. The Board is still required to determine whether they are in fact managers, and this does not depend on the label that the employer attaches to the position. It might seem then that the Court's adoption of a categorical exclusion, rather than a labor–nexus or other criterion based on divided loyalty, is only a semantic difference. Instead of deciding whether the policies of the Act justify excluding employees, the Board now must decide whether the duties performed justify being considered a manager. While this decision is subject to judicial review, so would the application of the labor–nexus test, though perhaps under a more deferential standard.

The categorical nature of the exclusion does make a significant difference, however, for reasons that go beyond the degree of deference the Board's decision receives. First, of course, there are employees who are indisputably managerial but who would have been included under the labor–nexus test and are now excluded. Second, the Board's task will tend to be more quantitative—to attempt to discern the amount of power an employee possesses,

161. *See supra* text accompanying note 155.
162. *Packard*, 330 U.S. at 490.
163. 330 U.S. at 494 (Douglas, J., dissenting). *See supra* note 54.

rather than the nature of that power. It might have to decide, for example, whether the dollar amount of a buyer's discretionary authority is sufficient to make her a "true" manager. Finally, there is an ideological difference: discretion, authority, power, cannot be exercised by union members.

C. Yeshiva: Not Having Your Cake and Not Eating it Either

In a few situations, employees seem to have the sort of authority usually associated with upper management, and in fact do have a degree of control over their work lives that is significantly greater than most workers. The Supreme Court faced this situation in *NLRB v. Yeshiva University*,[164] and decided that a university faculty, at least in a "mature" university, were the management of the institution, their collective activity was unprotected, and the employer was not required to bargain with their union.

The *Yeshiva* case has received extensive attention from academic commentators,[165] in part because of the importance of the concepts implicated, and perhaps in part because those concepts are directly related to the daily experience of the authors.[166] Like the dissent in *Yeshiva*,[167] academics have been quick to point out how unrealistic the Court's description of the modern university is.[168] Some have not hesitated to excoriate the Court's legal conclusions.[169]

Here, I want to focus only on the central rationales the Court presented, which apparently contradict each other, in order to examine the assumptions underlying the Court's decision and the contrary views of the dissent. Others have discussed *Yeshiva* similarly,[170] but I hope the duplication of their efforts is justified by the somewhat different conclusions at which I arrive.

From the time it asserted jurisdiction over private universities in 1970,[171] the Board had held that faculty members were non–managerial professional employees. The Board distinguished faculty from management for three reasons: "(i) faculty authority is collective, (ii) it is exercised in the faculty's own interest rather than in the interest of the university, and (iii) final authority

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164. 444 U.S. 671 (1979).

165. Among the works focusing on the issues involved in Yeshiva are Marina Angel, *Professionals and Unionization*, 66 MINN. L. REV. 383 (1982); Crain, *supra* note 6; Rabban, *Distinguishing Professionals*, *supra* note 135 and David Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees*, 99 YALE L.J. 689 (1990) (hereinafter, Rabban, *Collective Bargaining*). *See also* Stone, *supra* note 7, at 131–38.

166. Similarly, legal decisions involving freedom of the press tend to receive greater media coverage.

167. "[T]he Court's perception of the Yeshiva faculty's status is distorted by the rose–colored lens through which it views the governance structure of the modern–day university." 444 U.S. at 702 (Brennan, J., dissenting).

168. *See e.g.*, Klare, *supra* note 1, at 110 ("The idyllic portrait of academic life...is...far distant from the real world of higher education, indeed from the reality of life as Yeshiva University itself.").

169. "[T]he *Yeshiva* decision is an appalling and disingenuous judicial performance. It abuses precedent, legislative history, and the factual record, violates the accepted canons of legal analysis, and contains passages that defy reasoned examination." Klare, *supra* note 1, at 103.

170. *See e.g.*, Crain, *supra* note 6, at 983–88; Klare, *supra* note 1; Stone, *supra* note 6, at 134–38.

171. Cornell University, 183 NLRB 329 (1970). This late assertion was because universities had originally been considered "nonprofit institutions which did not 'affect commerce.'" 444 U.S. at 679–80.

rests with the board of trustees."[172] In *Yeshiva*, the Board effectively "abandoned the first and third branches of this analysis."[173]

Instead the Board relied on the second reason which, in the context of professional employees such as faculty, rested on a distinction between authority exercised as part of the employee's independent professional judgment and authority exercised in furtherance of the employer's policies. The Board's standard applied to faculty the first condition of what had effectively been a two–pronged test for exclusion as a manager: that an employee's authority would not be considered managerial unless it derived from the employer.[174] The second condition, that a managerial employee would be excluded only if her authority involved labor relations, or if union membership presented some other danger of conflict of interest, was rejected in *Bell Aerospace*;[175] in *Yeshiva*, the Court rejected the first condition.

The Court found that the Board's distinction between faculty authority exercised in its own interests, and managerial authority exercised in the university's interest, was meaningless. "The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial."[176]

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172. 444 U.S. at 685.

173. 444 U.S. at 685. The Court went on to say that these standards were in any case contrary to the Board's precedents, and pointed out in a footnote that:

> The "collective authority" branch has never been applied to supervisors who work through committees. Nor was it thought to bar managerial status for employees who owned enough stock to give them, as a group, a substantial voice in the employer's affairs. Ultimate authority, the third branch, has never been thought to be a prerequisite to supervisory or managerial status. Indeed, it could not be since every corporation vests that power in its board of directors.

Id. at 685, n.21 (citations omitted).

The lack of validity of the first argument is not as obvious as the Court assumes, though the Board could have been clearer in articulating its reasoning. The fact that some supervisors may work through committees is indeed immaterial in determining their status, if they have authority to perform the supervisory functions listed in § 2(11), non–routinely, and in the interests of the employer. *See supra* Part I. But this has little bearing on the question of managerial status, which has no statutory counterpart either to § 2(3)'s exclusion or to § 2(11)'s list of activities. How the supervisory exclusion is applied can guide the Board in determining managerial status only if the exclusions have the same purposes, which *Bell Aerospace* held, and if we know what those purposes are, which that case certainly never revealed.

The Court's second point, concerning employee–shareholders, has little to do with the "collective authority" argument the Board had made in regard to faculty. The Court cited three Board decisions, which are discussed *supra* Part II B 2. These cases all involved the issue of inclusion in a rank and file bargaining unit, and all were decided on the basis of the Board's community of interests test. *See supra* note 133 and accompanying text. If these cases had held solely that an individual employee–shareholder should be excluded from the bargaining unit because she has sufficient authority to be managerial, even though that authority could only be exercised collectively, they would support the Court's argument. Even then, the difference between exclusion from a mixed bargaining unit and exclusion from employee status is significant. *See supra* text accompanying note 126.

But that is not what these cases held. All depend on a finding that the employee–shareholders' interests, such as the maximization of profits, were different from those of the non–shareholder employees. *See, supra* note 151.

In sum, if the Board's "collective–authority" argument is invalid, that is not because it is "flatly inconsistent with its precedents." 444 U.S. at 685.

174. *See supra* text accompanying note 35.

175. *See supra* text accompanying note 114.

176. 444 U.S. at 686.

> Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated....To the extent the industrial analogy applies, the faculty determines...*the product to be produced, the terms upon which it will be offered, and the customers who will be served.*[177]

"[T]he faculty's professional interests—as applied to governance at a university like Yeshiva—cannot be separated from those of the institution."[178] The *Packard* Court distinguished between the employer's "right to wholehearted loyalty in the performance of the contract of employment" and the employee's "right to protect his independent and adverse interest in the terms of the contract itself and the conditions of work."[179] It had viewed this distinction, correctly, as basic to the philosophy of the Labor Act. The *Yeshiva* Court saw the nature of the faculty's authority as necessarily destroying this distinction. If they had acquired the power—whether by traditions of academic governance, or the requirements of accrediting institutions, or by contract—to decide "the product to be produced, the terms upon which it will be offered, and the customers who will be served," then the faculty's interests would be defined as inseparable from those of the employer.[180]

Yet, immediately after pronouncing the problem of conflicting interests nonexistent, the Court said that "[t]he problem of divided loyalty is particularly acute for a University like Yeshiva."[181] Since professional expertise, possessed only by the faculty, is "indispensable to the formulation and implementation of academic policy....[t]he large measure of independence enjoyed by faculty members can only increase the danger that divided loyalty will lead to those harms that the Board traditionally has sought to prevent."[182]

The Court never identified those harms. It cannot mean, in this context, that faculty unionization will be detrimental to the rights of other employees, since, unlike supervisors, faculty members' workplace interests are no more likely to be adverse to those of the "rank and file" than are the interests of skilled craftsmen to unskilled production workers.[183] Nor can the Court be referring to the possibility that the faculty's special interests might be ignored in a union that includes other employees. As professional employees, the faculty would enjoy special consideration of their bargaining unit determination.[184] As for the issue of imposing collective decisions on those faculty members who would prefer to bargain individually,—what I earlier called the "argument for individualism"[185]—it appears inconsistent with the emphasis on collegial decision-making that typifies faculty authority in governance issues.

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177. *Id.* at 686 (emphasis added).
178. *Id.* at 688.
179. Packard, 330 U.S. at 490; *see supra* text at note 58.
180. Whether faculty power at Yeshiva was anywhere near as extensive as the Court seemed to believe, *see* Klare, *supra* note 1, at 110, is not central to the Court's reasoning; the nature of that power was more important.
181. 444 U.S. at 689.
182. *Id.* at 690–91.
183. *See supra* text accompanying note 127.
184. *See supra* note 21.
185. *See supra* note 67 and accompanying text.

In one sense, the harm of divided loyalty which the Court feared is the same as that feared by every employer whose workers unionize. The union will not only raise costs directly, it will challenge the employer's right to control the workplace. It will demand that the decision to discharge workers be justified, often to a third party; that layoffs and recalls be governed by some formula that the employer would be unlikely to choose on his own; it will attempt to limit the employer's discretion to change job responsibilities and even to control the pace of production itself. The National Labor Relations Act requires that employers accept these "harms."

But, in most settings, the Act also channels those dangers, in ways that do not fully apply to a university faculty. There are two related aspects to this difference. First, a union's ability to restrict management power in the industrial setting is almost entirely through the formal imposition of contractual limitations or the informal compulsion of prior practice and custom.[186] These can be achieved or maintained only through economic power, and the Act allows the employer to exercise his own power in opposition.

A faculty's control over academic matters, however, cannot be eliminated by an economically powerful employer, at least not without destroying the academic reputation and possibly the accreditation of the institution—that is, not without destroying the "product" that the employer produces.[187] Faculty authority is, as the Court says, "indispensable to the formulation and implementation of academic policy."

The second aspect of the difference between faculty and other employees, as what has already been said implies, and as others have pointed out,[188] is that in the university setting it is nearly impossible to separate "conditions of employment" from issues "at the core of entrepreneurial control."[189] While a limitation on class size or teaching load is easily analogized to demands made in an industrial setting, deciding what to teach and how to teach it looks very much like decisions about what to produce and the best way to produce it—determinations over which the Act prohibits workers from using economic power.

Bell Aerospace, I argued earlier, implies that an employee's ability to use independent judgment on the job creates an unacceptable danger that he will not act in the employer's interest.[190] The vastly greater ability of the Yeshiva faculty to use such judgment, indeed the necessity that they do so, enormously expands the danger that they will exercise their authority in ways that the university administration does not like. The Court drew from this the apparently contradictory conclusions that the faculty *is* the university and therefore can have no interests separate from it, and that faculty unionization would divide its loyalties between these inseparable interests.

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186. *See supra* text accompanying note 32.

187. Obviously, there can be degrees of faculty control. University administrators might reserve admissions decisions to themselves without destroying the educational process entirely. But could they determine course contents, grading, and the quality of scholarship?

188. *See e.g.*, Rabban, *supra* note 135, at 1822.

189. Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

190. *See supra* text accompanying note 161.

What explains the Court's otherwise baffling logic is that the identity of the faculty's interest with that of the university was a command rather than a description. Just as foremen, by legislative mandate, were required to identify with executives and entrepreneurs,[191] so faculty would be required, by judicial pronouncement, to view themselves as the management of the university.[192]

The Court's rejection of the "independent professional judgment" criterion in *Yeshiva* complemented its rejection of the labor–nexus test in *Bell Aerospace*.[193] The two facets of the Board's managerial exclusion standard

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191. *See supra* text accompanying note 72.

192. Professor Rabban suggests a possible reconciliation of the contradiction. Justice Powell, he conjectures,

> may have believed that collective bargaining undermines distinctive qualities of important professionals that are essential to their employers. The danger...is not so much that there will be a direct conflict of interests between the professional's obligation to the employer and his loyalty to the union as that the very process of engaging in collective bargaining will turn a professional into a different kind of employee. And this transformed employee, by sacrificing the professionalism for which he was hired to the collective security and adversarial posture of the union movement, is in a significant sense disloyal to the organization.

Rabban, *Distinguishing Professionals*, *supra* note 135, at 1817.

I believe this is an insightful description of the Court's reasoning, but I do not understand why it should not apply to all workers. (Substituting the words "craftsman" and "craftsmanship" for "professional" and "professionalism," makes the reasoning no less—or more—compelling.)

Professor Rabban believes that professional employees pose special problems because of the "tensions between labor law doctrines and professional values," Rabban, *Collective Bargaining*, *supra* note 165, at 691, and suggests ways in which unionization and professionalism can be reconciled. But the labor law doctrines that conflict with professional values of independent judgment and collegiality are themselves not questioned. The distinction between mandatory and permissive topics of bargaining, for example, "allows an employer to refuse even to discuss significant policy issues that are enormously important to many professional employees." *Id.* at 693. I do not see why this harm is more significant to professionals than the legal right of the employer "to refuse even to discuss" his decision to terminate their jobs is to rank and file workers.

The difference, as I suggest in the text, is not that it is more justified to apply the mandatory/permissive distinction to the rank and file, but that it is nearly impossible to apply it to many professional employees.

It is necessary to reconcile labor law doctrines with professionalism only if one agrees that the assumptions on which those doctrines rest ought to apply to "ordinary" workers, but not to professionals. To a degree, the Court's liberals were attempting this reconciliation in the cases discussed here. But even they, and indeed some Justices not identified with the liberal wing, never accepted all the assumptions on which doctrines like the mandatory/permissive distinction are based. *See, e.g.*, NLRB v. Wooster Division of Borg–Warner Corp., 356 U.S. 342, 352 (356) (Harlan, J., concurring in part and dissenting in part).

The other two areas of labor law doctrine that Professor Rabban believes are in tension with professional values are exclusivity and company domination. Although a discussion of Professor Rabban's views would require too great a discursion, I believe that they are similarly based on the assumption that these doctrines, although harmful to professionals unless modified, adequately serve the interests of other workers.

193. The Court's liberal bloc was able to muster a 5–4 majority to sustain the labor–nexus test as the criterion for exclusion of non–managerial employees who have access to confidential business information in NLRB v. Hendricks Cty. Rural Elec. Membership Corp., 454 U.S. 170 (1981). The decision relied heavily on the fact that Board law at the time of the Taft–Hartley amendments had excluded only those employees whose confidential information had a labor–nexus as well as on the amendments' inclusion of professional employees, many of whom would possess such information.

Since the Court found no labor nexus existed, it had no reason to decide whether, as the Board argued, confidential employees would be excluded only from collective bargaining, but not from the Act's protections, even if they a had a labor nexus. *See id.* at 197 (Powell, J., concurring in part and dissenting in part). The Court's conservatives, although they agreed that

were each part of an effort to manage the same intrinsic tension that the interpretation of "the interest of the employer" had demonstrated in *Packard*, and would again in *Health Care*. That tension arises from the fragility of the separation between employees' efforts to determine the terms of the labor contract, which the Act protects, and the requirement of loyalty in carrying out the employer's decisions concerning the purpose and content of work. The separation is impossible to maintain consistently in many contexts, involving "ordinary" workers.[194] But its artificiality is immediately apparent in the case of professional employees, such as faculty. When a professor decides independently of her employer what areas her course will cover, is she appropriately advancing her adverse interest in the terms of employment, or is she breaching her "duty of loyalty" as employers understood it before the passage of the Act—and may understand it still?

But even the most dogmatically anti-union employer would not view efforts of employees, including those who, like executives, have broad discretionary authority, to advance their own interests in regard to pay, benefits, and working conditions as breaching this ideological duty of loyalty. Instead, the employer's contention is that such action must be taken individually. It is the employees' claim of collective protection that constitutes disloyalty, their claim that they may band together against him that endangers the principles of hierarchy.

CONCLUSION: THE ACCOMMODATION REJECTED

This is the assumption that the Court accepted in regard to managerial employees in *Bell Aerospace*, faculty in *Yeshiva*, and licensed practical nurses in *Health Care*. In doing so, it threatened the balance between the Act's explicit protections and its implicit acceptance of hierarchical work relations that the Board's standard was meant to preserve. The Board, and the dissenting Justices, attempted to create a workable distinction between those employees whose "divided loyalty" it was necessary to accept, and those whose unionization posed

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"employees in the possession of proprietary or nonpublic business information are not for that reason excluded," *Id.* at 192, thought that the Board's position "would be a major departure from the basic philosophy of the Act." *Id.* at 197. Their analysis strongly suggests that they believed the Act protects only union-represented employees. *See id.* at 199 ("[It seems nonsensical] to exclude [a confidential secretary] from membership in the bargaining unit and then extend to her the same protection for the same concerted activity that she would have enjoyed if a union member.") (quoting NLRB v. Wheeling Electric Co., 444 F.2d 783, 788 (1971) (emphasis omitted)).

The dissent stressed that the Act's policy was "to assure that those employees allied with management were not included in the ranks of labor," *Id.* at 193, and that the "'confidential employee' exclusion and the labor nexus...must be viewed as part of this larger effort to keep the line between management and labor distinct." *Id.* at 194. Under the Court's decision, said the dissent, "confidential employees, who are privy to the daily affairs of management, who have access to confidential information, and *who are essential to management's operation* may be subject to conflicts of loyalty when the essence of their working relationship requires undivided loyalty." *Id.* at 200 (emphasis added). While some of these reasons may apply uniquely to confidential secretaries, they do not apply to professional employees such as university faculty. It is only the emphasized language that explains the reasoning of both *Yeshiva* and the *Hendricks* dissent.

194. *See* Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981) (liberal theory is incoherent in its inability to draw a principled distinction between those areas reserved to management and those in which workers, through their unions, should share in decision-making).

too great a risk to employer control. The Board's solution successfully accommodated, though it did not resolve, the tension inherent in the partial empowerment of workers.

In all three cases, the Court instead chose to "solve" the problem by placing the employees involved on the side of the employer, regardless of their subjective wishes or their social reality. Its willingness thus to "obliterate the line between management and labor,"[195] and thereby to jeopardize the Act's entire accommodationist framework, did not go unremarked. As Justice Brennan argued in dissent, the decision undermined "the Act's objective of funneling discussion between employers and employees into collective bargaining...and contributes to the possibility that recurring disputes [will] fester outside the negotiation process until strikes or other forms of economic warfare occur."[196]

The Court either had less confidence than the dissenters and the Board in the degree of employee power that the Act could successfully accommodate, or it saw less need for such accommodation.[197] Perhaps this should not be surprising in an era when, it appears, none of the Act's protections are meaningful, when its promise of worker empowerment, however limited, has receded into memory. The channeling capacity of the Act, in which Justice Brennan still had faith, was only attained by ceding real gains to workers, even if, in the long run, the price that workers paid was too high. Employers will not make those concessions now; they no longer need to. The state that originally imposed this accommodation on unwilling employers to protect them from their own intransigence will no longer defend it; the recurrence of the crisis that required the Wagner Act and that permitted its imposition[198] is a danger that no one believes in. The inheritors of the New Deal, the liberal Justices, were willing to allow within "the ranks of labor" those whose control over their jobs might be a model of the limited empowerment the Act foresaw. It was too much.

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195. Packard Motor Car Co. v. NRLB, 330 U.S. 485, 494 (Douglas, J., dissenting).

196. NLRB v. Yeshiva University, 444 U.S. 672, 705 (Brennan, J., dissenting) (internal quotation marks omitted, alteration by Justice Brennan).

197. Professor Klare points out that the Court's "repressive strategy...seems consistent with other recent manifestations of elite disenchantment with co–optation," though he believes that the "overall rightward drift in government and business labor policy" is an inadequate explanation of *Yeshiva*. Rather, he thinks that "*Yeshiva* is as much a derivation as it is a deviation from the hierarchical assumptions that inform liberal attitudes toward the workplace." Klare, *supra* note 1, at 105. While it should be clear from the text that I am in general agreement with Professor Klare, I place greater emphasis on the willingness of "modern" liberalism, represented by Justice Brennan (as distinct from classical liberalism from which both modern "liberals" and "conservatives" are descended), to embrace some aspects of social policy that are theoretically inconsistent with the assumptions on which the remainder of that policy rests. This inconsistency or tension, even incoherency, remains acceptable as a necessary accommodation to the concrete tensions or contradictions in society so long as its manifestations remain theoretical. *See* Feldman, *supra* note 3, at 202–04. The New Deal, and especially the Wagner Act, were examples of these social policies. *See id.* at 195–99.

198. *See* Feldman, *supra* note 3, at 197–99.