Professionals and Unionization

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Marina Angel*

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I. INTRODUCTION: THE CHANGING AMERICAN WORKPLACE

On February 20, 1980, the United States Supreme Court declared faculty members at Yeshiva University to be managerial employees and therefore not entitled to organize under the National Labor Relations Act.1 On May 13, 1980, Lee A. Iacocca, President of Chrysler Corporation,2 announced the appointment of Douglas A. Fraser, President of the United Automobile Workers,3 to the Board of Directors of Chrysler Corporation.4 These two events are symptomatic of the fundamental transformation occurring in the relationship between employees and their employers in the American workplace. The working conditions, and therefore the interests, of professionals and blue-collar employees seem to be converging. Many professionals,5 such as doctors and lawyers, are exchanging their traditional autonomous status for positions within large, hierarchical


3. The United Automobile Workers has 1,500,000 members. 1 ENCYCLOPEDIA OF ASSOCIATIONS 1216 (15th ed. 1980).


5. For the purposes of this article, a professional will be defined as in section 2(12) of the NLRA. 29 U.S.C. § 152(12) (1976). See text accompanying note 256 infra.
bureaucratic organizations. At the same time, blue-collar workers are beginning to perceive themselves as professionals, and, their employers are allowing them greater control over their work environment. In an attempt to attain the prestige and greater autonomy traditionally enjoyed by professionals, workers have increasingly tended to label themselves professionals. We are now in an era of professional salespersons, professional secretaries, and professional police officers.6

Moreover, job opportunities in our advanced technological society have increased for professional and white-collar employees, including those with secretarial and clerical skills, and have decreased for blue-collar employees.7 These trends are expected to continue.8 With the emergence of a large class of professional and white-collar employees operating on different principles from the theoretical blue-collar model, and with the decrease of blue-collar workers who were traditionally unionized, the percentage of the total work force under union contract has fallen dramatically.9

A transformation in the composition of the employing entities themselves has paralleled and in some instances precipi-

7. In 1958, for example, 40.9% of a total work force of 68,213,000, or 27,899,000 workers, were classified as white-collar or professional. U.S. BUREAU OF LABOR STATISTICS, DEPT OF LABOR, BULL. NO. 2070, HANDBOOK OF LABOR STATISTICS 21 (1980) [hereinafter cited as LABOR STATISTICS]. In 1978, 49.1% of a total work force of 99,552,000, or 48,880,000 workers, were classified as white-collar or professional. Id. In 1958, 41.7% of the total work force, or 28,445,000 workers, were classified as blue-collar. In 1978, only 35.1% of the work force, or 34,943,000 workers, were classified as blue-collar. Id. The number of white-collar workers has been computed by combining the number of professional, technical, managerial, administrative, sales, and clerical workers. Id. Blue-collar workers include craft and kindred workers, operatives, nonfarm laborers, and private household workers. Id.

Nearly half the increase in white-collar and professional workers is attributable to an increase in clerical workers, who comprised 17.8% of the total work force in 1978, as compared with 14.0% in 1958. Id. Secretaries comprise the largest single group of clerical workers. Their numbers are increasing at an even faster rate than the number of clerical workers generally. While the number of clerical workers increased from 14,247,000 in 1972 to 16,904,000 in 1978, at a growth rate of 18.7%, the number of secretaries for the same period increased from 2,949,000 to 3,590,000 exhibiting a growth rate of 21.7%. U.S. BUREAU OF THE CENSUS, DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 417 (100th ed. 1979) [hereinafter cited as STATISTICAL ABSTRACT].
tated these changes in the work force. Private, nonprofit institutions have experienced, and are continuing to experience, extraordinary growth in size and importance. Higher education and health care have become major industries in recent years. Although the NLRA, either explicitly or as interpreted, excluded the employees of hospitals and universities from its coverage, the law now allows many of these employees to unionize. Recognizing the transformation of education into big business, the National Labor Relations Board took jurisdiction over private colleges and universities in 1970. In 1974, in response to the growth of the health care industry into one of the largest businesses in the United States, Congress amended the NLRA to include the employees of private, nonprofit hospitals within its coverage. Significantly, a large number of the employees of nonprofits are professionals and white-collar workers.

Notwithstanding these developments, professional employees and white-collar workers have been reluctant to unionize,


11. Government employees are still excluded from the NLRA under section 2(2), and the constitutionality of bringing state and local government employees within the coverage of the NLRA has seriously been called into question by National League of Cities v. Usery, 426 U.S. 833 (1976). These workers are, however, increasingly covered by public employment laws. Many government employees are white-collar, service, and professional employees. During the 1960s and 1970s, many states enacted public employment relations acts that extended legal protections to their employees. Thus, in the area of government employee relations, serious issues of supervisory and managerial status and subjects of bargaining have arisen. See generally Anderson, The Impact of Public Sector Bargaining, 1973 WIS. L. REV. 986; Edwards, The Emerging Duty to Bargain in the Public Sector, 71 MICH. L. REV. 885 (1973); Summers, Public Employee Bargaining: A Political Perspective, 93 YALE L.J. 1156 (1974); Weisberger, The Appropriate Scope of Bargaining in the Public Sector: The Continuing Controversy and the Wisconsin Experience, 1977 WIS. L. REV. 685; Wellington & Winter, Jr., The Limits of Collective Bargaining in Public Employment, 76 YALE L.J. 1107 (1969). The issues raised by state law coverage of public employees are beyond the scope of this Article.

12. In 1978, Americans spent $141,200,000,000 on education, comprising 7.1% of the Gross National Product (GNP). This includes public and private sector spending at all educational levels. Of this, $49,700,000,000 was spent on higher education. STATISTICAL ABSTRACT, supra note 7, at 136. Education expenditures increased from 3.3% of the GNP in 1950 to 7.1% in 1978, a growth rate of 115%. Id.

14. 29 U.S.C. §§ 152, 158, 169 (1976). In 1980, the health care industry was the sixth largest in terms of growth, and the sixteenth largest in terms of profitability. FORBES, Jan. 5, 1981, at 258. In 1978, health care expenditures totaled $192,400,000,000, comprising 9.1% of the GNP. STATISTICAL ABSTRACT, supra note 7, at 100. Health care expenditures increased from 4.5% of the GNP in 1950 to 9.1% in 1978, a growth rate of 102%. Id.
viewing unionization as a form of collective action appropriate only for rank and file blue-collar employees. Professionals have, however, acted collectively. They have tended to work coarchically,15 in a collegial or team fashion, seeking collective strength through their professional associations. In recent years, however, the Supreme Court's antitrust decisions have severely limited the economic power of the professional trade associations.16 The Supreme Court's opinion in *Yeshiva* may now block collective union activity for most professionals. The professionals' traditional collective associations can no longer protect their economic interests, and the Supreme Court's narrowed construction of the NLRA's coverage in *Yeshiva* may leave professionals without any forum for collective action. Similarly, many more employees may find themselves excluded from coverage by the NLRA as increasing numbers of workers seek to operate in a professional model and as employers functioning under changed organizational structures and management techniques give traditional blue-collar employees broader responsibilities.

The labor laws of the United States were written for rank and file employees employed by a typical hierarchically organized employer.17 They were not written for employees operating coarchically. Under the NLRA as it developed in the industrial context, individuals having the power to make decisions regarding the quality of products or employees were categorized as either supervisors or managers and excluded from the statute's coverage. The exclusion of managers and supervisors reinforced the adversary nature of the traditional industrial model. Recently, the changed composition of the labor force has drawn the validity of the traditional industrial model into question. Bringing labor policy into line with current realities for professional workers and for nontraditional blue-collar workers requires recognition of the massive changes in the way the economy and business structures operate. The first important cases have arisen in the professional area and the course taken in these cases will establish how the NLRB and the courts will deal with changed employment relationships.

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15. Throughout this Article the word "coarchical" is contrasted with the word "hierarchial." "Hierarchial" refers to a system of association marked by the existence of superior and inferior levels of authority; "coarchical" refers to a system of association in which each member has approximately equal power and authority. "Coarchical" is similar to "collegial," but in common usage "collegial" is usually limited to a university context.
16. See text accompanying notes 165-69 infra.
17. See text accompanying notes 19-23 infra.
This Article attempts to place the changes in the work force into perspective by examining four alternatives to the hierarchical, bureaucratic model of traditional business organizations. The coarchical, collegial structure used by professionals, as well as developments in industrial democracy, job enrichment, and worker codetermination will be examined. The Article describes how each alternative provides employees with a greater voice in the operations of the economic entity than they possess under the hierarchical model. Elaborating on the problems currently confronting professional employees, the Article explores the institutional and legal environment in which doctors and university professors work. Because the legal issues raised by the unionization efforts of professional employees involve definitions under the Act and judicial constructions of covered employees and excluded managers and supervisors, the statutory framework is analyzed. The Article explores the legislative history of the 1935 Wagner Act and the 1947 Taft-Hartley amendments and demonstrates that the Supreme Court's exclusion of all managerial employees from the coverage of the Act is inconsistent with that history. Finally, the Article discusses the Board's attempt to reconcile the tension inherent in the Act's definitions of included and excluded employees with the reality of a professional employee's role in the work force. The Article suggests that the Board's independent professional judgment test is the appropriate resolution to this tension. The Article concludes by criticizing the Supreme Court's decision in *NLRB v. Yeshiva University* for its refusal to recognize that professional employees do not assume excluded supervisory or managerial functions when they exercise their independent professional judgment.

II. COARCHICAL, COLLEGIAL ALTERNATIVES TO THE HIERARCHICAL, BUREAUCRATIC MODEL

American business and labor laws are based on the hierarchical, bureaucratic model of business organizations which prevailed in the late 19th and early 20th centuries. As Berle and Means noted fifty years ago, this model fails to describe the actual divisions of power and interests within modern business entities. It is therefore questionable whether these laws, based on an outmoded model, are responsive to the economy today.

Nevertheless, as John Meynard Keynes observed, "[p]ractical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist."  

The historical model consists of a tripartite division of functions between capital, management, and labor. The model is basically adversarial, with the owners' and managers' interests inherently at odds with those of the workers. Authority is delegated by the owners to the managers and supervisors, who in turn run the business. Consistent with this hierarchical, bureaucratic model, management theory advocated the parsing of work into its simplest components. According to Frederick Taylor's theory of "scientific management," managers, as the agents of the shareholders, had the right to control the enterprise and determine what work should be done and who should do it. Under this scheme, management could employ unskilled labor, and could readily interchange or replace workers as it deemed necessary.

Modern labor laws continue to reflect the outmoded business and management models. The law allows rank and file workers to unionize, but precludes supervisory and managerial employees from unionizing. Although workers have a right to bargain collectively over their own wages, hours, and terms and conditions of employment, collective bargaining does not reach questions concerning the organization of the enterprise, what it should produce, and how it should produce it. The system thus draws clear adversarial lines between the supervisory and managerial employees and the rank and file employees.


21. Stockholders provide the capital to establish a business entity, and an elected board of directors represents the stockholders' interest in receiving a maximum investment return. The board of directors appoints the supervisory-managerial group. With the interests of the stockholders as its motivating factor, the supervisory-managerial group runs the business, deciding what to produce and how. But see A. BERLE & G. MEANS, supra note 19, at 119-25 (noting that in practice, the interests of the stockholders and the supervisory-managerial group are different and often conflicting). The third group in the enterprise, labor, is composed of workers who are told what to do and how to do it by managers and supervisors. Labor's sole function is to produce goods.

22. Because the model is based on the assumption that the stockholders desire the maximum amount of work from the employees at the lowest possible wages and employees wish to do the minimum amount of work for the highest possible wages, conflict is inevitable.

23. See generally F. TAYLOR, SCIENTIFIC MANAGEMENT (1947) (comprising Shop Management (rev. ed. 1911); The Principles of Scientific Management (1911); Taylor's Testimony Before the Special House Committee (1912)).
In contrast to, and existing concurrently with the above hierarchical, bureaucratic model, there were two counter-models: professionalism and industrial democracy. In recent years, management consultants have developed a third model, job enrichment. Finally, a fourth model, worker codetermination, predominates in the industrial nations of western Europe.

A. PROFESSIONALISM

Professionals and skilled craft workers historically organized themselves differently from the hierarchical model described above. After selection by older members of their profession or craft and a period of extensive, specialized training, decisions regarding their competence were made by these same people. Once found fully competent, professionals or craft workers could operate autonomously. Notwithstanding their status as self-employed individual entrepreneurs, professionals and craft workers operated in a collective fashion. Their selection, training, certification, and work occurred within the framework of collective entities that took the form of associations established to develop and preserve proper standards for the practice of the profession or craft.

24. Although professionals and craft workers share many values and methods of operating, there are important differences. Whereas the craft worker operated according to custom, often proceeding by trial and error, the professional mastered and applied a systematic and often esoteric body of abstract knowledge. B. BLEDESTEIN, THE CULTURE OF PROFESSIONALISM 86-88 (1976).

As Bledstein observes:
The craftsman traditionally handled a series of individual objects, according to the custom of his work, varying his own specific practices by trial and error. The professional excavated nature for its principles, its theoretical rules, thus transcending mechanical procedures, individual cases, miscellaneous facts, technical information, and instrumental applications.

Id. at 88.

25. For a description of the actual mode of operation of skilled craft workers and a discussion of the first "strike" in the United States, that of the Philadelphia Cordwainers' Association, see Nelles, The First American Labor Case, 41 YALE L.J. 165 (1931).

There are three ways wages and conditions of employed workers can be established: they can be unilaterally established by the employer; they can be unilaterally established by the employees; or they can be bilaterally established. In the United States, collective bargaining is the primary bilateral method of establishing conditions of employment. See U.S. BUREAU OF LABOR STATISTICS, DEPT. OF LABOR, BULL. NO. 2079, DIRECTORY OF NATIONAL UNIONS AND EMPLOYEE ASSOCIATIONS 56, 66 (1979).

The second method, unilateral establishment by the employees, was the normal mode used by most workers' organizations until the 20th century. Feller, A General Theory of the Collective Bargaining Agreement, 61 CAL. L. REV. 663, 726 (1973). This method was used by the Cordwainers' Association.
Professional associations, such as the American Medical Association (AMA), the American Bar Association (ABA), and the American Association of University Professors (AAUP), first came into formal existence during the 19th and early 20th centuries. The associations were originally geared to members who were independent entrepreneurs, not to professionals who were salaried employees. These associations, although not labeled unions, established a monopoly for their members by limiting entry into and practice of their respective professions, and engaged in price fixing by setting and enforcing recommended fee schedules. They justified their operations on the ground that only members of the profession could set appropriate standards; laypersons such as consumers or government officials could not. A theory of objective right supported the exclusive retention of control by fully certified members of the profession.

Beginning in the 19th century and continuing into the 20th century, the universities became the focal point of professionalism. Licensure after achievement of a university degree became the norm for most professions. The universities thus became the depositories of collective wisdom and the road to status and economic security in American society. The profes-

[They] did not attempt to negotiate wage scale agreements with employers. Instead, they met with each other in secret societies, determined an appropriate "bill of prices," and agreed that none would work for any employer who did not recognize the scale thus unilaterally adopted. The rules adopted by these early labor organizations included not only fairly complex schedules of piece work rates, but also regulations governing such matters as security of employment, apprenticeship rules, rotation of available work, and, of course, the closed shop. Those who worked contrary to the rules were fined.

Id. at 725 (footnotes omitted). It is still a method used effectively by some labor organizations, notably those representing skilled craft and professional employees. Id. at 726-27.

26. The AMA was founded in 1847. 1 ENCYCLOPEDIA OF ASSOCIATIONS 820 (15th ed. 1980).
27. The ABA was organized in 1878. Id. at 317.
28. The AAUP was established in 1915. Id. at 529.
29. See B. BLEDESTEN, supra note 24, at 80-92.
30. For a discussion of the history, structure, purposes, activities, and success of the AMA as a professional trade association, see Comment, The American Medical Association: Power, Purpose, and Politics in Organized Medicine, 63 YALE L.J. 938 (1954). For a description and discussion of the ABA and the American Association of Law Schools (AALS), the two most powerful trade associations in the legal profession, see First, Competition in the Legal Education Industry, (pts. I & II), 53 N.Y.U. L. Rev. 311 (1978), 54 N.Y.U. L. Rev. 1049 (1979) [hereinafter cited as First (when referring to both articles), First, Legal Education I, and First, Legal Education II].
31. B. BLEDESTEN, supra note 24, at 90.
32. Id. at 297.
sional associations, however, gained control through accreditation standards dealing with entry into and graduation from the professional schools, and retained control through licensure standards regarding entry into and continuing membership in the profession.33

The universities themselves, modeled on the medieval colleges, usually operated as collective professional entities. As Judge Cardozo observed in 1925, "[b]y practice, and tradition, the members of the faculty are masters, and not servants . . . . They have the independence appropriate to a company of scholars."34 Nevertheless, from the earliest times in America, the actual power collectively exercised by the professoriat did not totally conform to legal norms. Chief Justice Marshall's 1819 description of the powers of the trustees of Dartmouth College demonstrates that a lay board of trustees has always retained final and total authority to govern American colleges and universities.35

By the late 19th century, professionalism clearly meant more than status, prestige, and money. One commentator recently observed:

Professionalism was also a culture which embodied a more radical idea of democracy than even the Jacksonian had dared to dream. The culture of professionalism emancipated the active ego of a sovereign person as he performed organized activities within comprehensive spaces. The culture of professionalism incarnated the radical idea of the independent democrat, a liberated person seeking to free the power of nature within every worldly sphere, a self-governing individual exercising his trained judgment in an open society. The Mid-Victorian as [a] professional person strove to achieve a level of autonomous individualism, a position of unchallenged authority heretofore unknown in American life.36

Ever increasing groups of people wanted the status, prestige, money, and perceived autonomous individualism associated with professionalism. Because a university education was the prerequisite to professionalism in American society, as the uni-

33. See generally sources cited in note 30 supra.

There is currently a heated debate regarding proposals to accredit foreign medical schools. The Association of American Medical Colleges is opposed to such accreditation because it would downgrade the quality of medical care. Proponents believe it is a means of increasing the available pool of doctors. See N.Y. Times, Feb. 12, 1981, § B at 10, col. 3.


versities were opened up to a more diverse population, more people were capable of fulfilling their ambitions.

Professionalism is now a key factor in the entire work force, and the rhetoric and theoretical independence of professionalism appeals to growing numbers of workers. The group to whom the title "professional" applies has expanded from the traditional areas of law and medicine to engineering and management. It has expanded from true professionals to include related craft groups and ever increasing groups of blue-collar workers. Furthermore, many previously self-employed professionals have become employees of large organizations. They make up a large percentage of the employees of nonprofit organizations, such as hospitals and private universities, sectors of our economy that have undergone astonishing growth in the last thirty years.

While professionals were changing from independent, autonomous entrepreneurs to employees of nonprofit organizations, the administrative structure of these nonprofit entities was also changing. Traditionally the members of the profession ran the nonprofits: doctors ran the hospitals; professors ran the universities. Professional administrators and bureaucrats, however, have increasingly gained administrative control of these economic entities. The new prominence of professional administrators may engender conflicts among professional employees regarding the mission of their institutions. Traditional professionals and administrators who rose from their ranks are primarily concerned with maintaining the quality of professional services. The new professional administrators are more willing to balance quality against competing economic factors. With final authority resting in a lay board of trustees, the traditional professionals are increasingly meeting opposition.

The rhetoric of professionalism is now being used against

37. See Ross, supra note 36, at 1364-65.
38. Id. at 1364. The American system of free, compulsory public education has resulted in a highly literate public. Extensive networks of public communications, including television, radio, and newspapers, have exposed the public to current social, political, and economic issues and have created a society of relatively well informed individuals. The democratic political system, based on "one man, one vote," Reynolds v. Sims, 377 U.S. 533 (1964), has created citizens who believe their opinions are worthy of consideration. Many blue-collar workers, however, are still employed in nonresponsible, nonimaginative, predetermined, confined work roles. Professionals are increasingly finding that they are losing their traditional prerogatives.
40. For a discussion of these conflicts in the area of higher education, see notes 121-35 infra and accompanying text.
the traditional professionals. Professional administrators and bureaucrats with degrees in business administration claim greater expertise than university professors to run universities, and those with degrees in hospital administration claim greater expertise than doctors to run hospitals.

The law has failed to keep pace with these developments. In the early years of its existence, the NLRB was faced with few cases involving professional employees. Two factors account for the paucity of these cases: the traditional industrial sector of the economy employed relatively few professionals, and those professionals who were employees generally did not accept unionization as an appropriate form of collective activity for themselves. In the few cases the Board did decide, it readily found that professionals were covered employees. Not until the 1960s and 1970s did a substantial number of cases challenge basic assumptions about the employment relation-

41. The rhetoric of professionalism viewed professionals as the elite, above the need for the type of collective action allowed by labor laws. That rhetoric kept many white-collar and professional employees from seeking the protection of the labor laws. Unionization became attractive only when economic conditions worsened and when loss of status became obvious. The need for collective action by professionals can result from either economics or loss of control. The loss of control can involve either traditional labor issues, such as hours and terms and conditions of employment, or professional issues concerning the quality of performance and product. Economics and lack of control over hours and terms and conditions of employment are reasons why any employee would seek collective strength in unionization. Lack of control over quality, however, has a uniquely professional aspect.

It seems inconsistent when professionals seek to organize collectively to maintain their individual autonomy. Some persons may argue that collective organizations would allow those at the lower rung to gain greater power over the decisions of the group or that they would lead to mediocrity. It could be argued that collective action through professional associations did not allow this, because the associations purportedly honored quality, expertise and merit above all. In reality, however, the associations used these standards to exclude women, blacks, and other minority groups, building biases into the professional association system. See notes 139-41 infra and accompanying text.

42. The number of Master's degrees in business increased from 5,303 in 1962, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 137 (85th ed. 1964), to 46,545 in 1977, STATISTICAL ABSTRACT, supra note 7, at 283.

43. See generally Ross, supra note 36.

44. Id.

45. In Spicer Mfg. Corp., 55 N.L.R.B. 1491, 1494 (1944), the Board stated that "we shall adhere to our customary practice, finding that the interests of the employees involved herein can best be served by representation within separate units, one consisting of office and clerical employees, and the other of technical and professional workers." See, e.g., Air Line Pilot's Ass'n, 97 N.L.R.B. 929 (1951) (lawyers); Standard Oil Co., 80 N.L.R.B. 1022 (1948) (nurses); Lumberman's Mut. Cas. Co., 75 N.L.R.B. 1132 (1948) (lawyers); American Steel & Wire, 58 N.L.R.B. 253 (1944) (nurses); Hudson Motor Car Co., 45 N.L.R.B. 55 (1942) (nurses).
ship and NLRA coverage of professionals.\textsuperscript{46}

Because many professionals are uncertain of their own status, this legal response is not surprising. Many professionals refrain from enthusiastically embracing a trade union model because notions of the old professionalism create the misconception that unions are for nonprofessional, blue-collar, uneducated employees. Ironically, although professional employees need collective action now more than at any other time, their traditional form of collective action through trade associations has been limited. Not only have court antitrust decisions curtailed the power of professional associations to restrict membership and fix fees,\textsuperscript{47} but society now questions whether professionals alone have the ability to judge the quality of their services.\textsuperscript{48}

Professionals seeking to convert their trade associations to labor unions face additional problems. The AAUP is a classic example. As it changed from a pure professional association to a labor union, its moral influence decreased.\textsuperscript{49} Academic sanctions such as censure had little effect after others perceived the AAUP as merely another labor union.\textsuperscript{50}

B. INDUSTRIAL DEMOCRACY

Since the early days of the American republic, industrial democracy has represented an alternative to the bureaucratic, hierarchical model.\textsuperscript{51} The oldest American reference to industrial democracy is attributed to Albert Gallatin, Secretary of the Treasury under Presidents Jefferson and Madison, who in 1797 stated that "the democratic principle on which this nation was founded should not be restricted to the political process

\textsuperscript{46} See notes 304-414 infra and accompanying text.
\textsuperscript{47} See notes 165-69 infra and accompanying text.
\textsuperscript{48} For a discussion of increased public control of the medical profession, see R. Stevens, \textit{American Medicine and the Public Interest} 529 (1971) and the sources cited in the notes therein. For a similar study of the legal profession, see Morgan, \textit{The Evolving Concept of Professional Responsibility}, 90 Harv. L. Rev. 702 (1977). In our colleges and universities even students have "insisted upon and received a voice in decisions regarding admissions, curriculum and faculty." Kirp, \textit{Collective Bargaining in Education: Professionals as a Political Interest Group}, 21 J. Pub. L. 323, 333 (1972).
\textsuperscript{50} See id. at 165.
but should be applied to the industrial operation as well."\textsuperscript{52} Industrial democracy may take the form of ownership of the economic enterprise by the employees themselves. Cooperatives have existed for many years in American industry. The first major American labor union, the Knights of Labor, advocated the widespread establishment of cooperatives in the nineteenth century.\textsuperscript{53}

In the 1930s, however, American labor attempted to establish industrial democracy through collective bargaining. Senator Wagner, the author of the 1935 National Labor Relations Act, used terms reminiscent of Gallatin to justify the requirement that employers recognize and bargain with the representatives of the majority of their employees: "[D]emocracy in industry must be based upon the same principles as democracy in government. Majority rule, with all its imperfections, is the best protection of workers' rights, just as it is the surest guaranty of political liberty that mankind has yet discovered."\textsuperscript{54} Congress decided that employee participation in industrial life would take place within a model of worker-owner negotiations regarding those issues which directly concern employees: wages, hours, and terms and conditions of employment.\textsuperscript{55} Furthermore, these negotiations would take place on a company-by-company basis. Congress then implicitly rejected large scale governmental regulation of wages, hours, and terms and conditions of employment, along with direct governmental or worker ownership. Unfortunately, the scheme of industrial democracy envisioned by Senator Wagner has not been realized. Collective bargaining agreements do not cover seventy percent of the American work force.\textsuperscript{56} Furthermore, covered employees have limited protection under the labor laws due to the narrow scope given to mandatory subjects of bargaining.\textsuperscript{57}

Some trends indicate major changes in the actual operation, as opposed to the formal organization, of American businesses. In many companies, an increasingly large portion of stock is either owned by the employees themselves under employee stock purchase plans or by labor union pension plans.\textsuperscript{58}

\textsuperscript{52} M. DERBER, supra note 51, at 6.
\textsuperscript{53} \textit{Id.} at 46.
\textsuperscript{54} 79 CoNG. REC. 7571 (1935), \textit{reprinted in} M. DERBER, supra note 51, at 321.
\textsuperscript{55} \textit{See} notes 268-72 \textit{infra} and accompanying text.
\textsuperscript{56} Summers, supra note 51, at 36.
\textsuperscript{57} \textit{See} notes 266-72 \textit{infra} and accompanying text.
\textsuperscript{58} \textit{See} sources cited in notes 88-89 \textit{infra}. 
In addition, although union representation on the Chrysler board is unique, many commentators have advocated greater employee participation on the boards of directors of traditional industrial sector companies.59

These developments represent a shift from the traditional model of directors and managers who represent only shareholders desiring a maximum return on the capital they contribute to a corporate enterprise. Now directors may also represent the interests of employees and consumers. As employee interests are directly represented on the top governing body of an enterprise, the adversarial relations between the employer and the employees will likely decrease.

C. JOB ENRICHMENT

In both the United States and in other industrial nations, large, hierarchical, bureaucratic entities have generally replaced small, individual entities. This is true of public and private businesses as well as other organizations.60 As a result, the individual worker feels unable to control his or her job or work environment.61 In the past, this has caused alienation and apathy.62 Recent attempts to gain control of larger entities indicate a movement to assert control over one's existence.63 Because most workers are no longer self-employed, they seek

59. Employees of a corporation are an easily identifiable group having a strong interest in the operation of a corporation. In recognition of the impact corporate decisions have on consumers, public directors have also been appointed to corporate boards. See Blumberg, Reflections on Proposals for Corporate Reform Through Change in the Composition of the Board of Directors: "Special Interest" or "Public Directors," 53 B.U. L. Rev. 547 (1973); Bonanno, Employee Codetermination: Origins in Germany, Present Practice in Europe, and Applicability to the United States, 14 Harv. J. Leg. 947 (1977); Grossfeld & Ebke, Controlling the Modern Corporation: A Comparative View of Corporate Power in the United States and Europe, 26 Am. J. Comp. L. 397 (1978); Vagts, Reforming the "Modern" Corporation: Perspectives from the German, 80 Harv. L. Rev. 23 (1966).

There is also a trend toward the election of employees to public boards and to the boards of private nonprofit corporations. The election of school teachers to school boards is an example. In New York City, Albert Schanker's union, The United Federation of Teachers, has for many years run successful teacher slates in local school board elections. Chambers, Political Sway of Teachers Union Now Pervasive in Most Districts, N.Y. Times, June 26, 1980, § A, at 1, col. 1.

60. See generally Grossfeld & Ebke, supra note 59.
61. See notes 69-76 infra and accompanying text.
63. See notes 77-89 infra and accompanying text.
identity and satisfaction within the structure of the employing enterprise.

The theory of "scientific management," based on the idea that it is the right of management to design and assign work to rank and file employees and that such work should be broken down to its simplest components so that workers can be easily trained, interchanged, and replaced,⁶⁴ has fallen into disrepute with today's management experts.⁶⁵ The emphasis today in both the academic literature and at the workplace is on quality of work life,⁶⁶ which is described as the process an organization uses "to unlock the creative potential of its people by involving them in decisions affecting their work lives."⁶⁷ The primary method of achieving this goal is job enrichment. One commentator observed that "[i]f early Taylorism is likened to cracking an eggshell into its smallest pieces, then job enrichment—the process of redesigning jobs to provide a greater degree of employee responsibility—would be putting Humpty Dumpty together again."⁶⁸ In seeking to enrich employees' jobs, modern management therefore seeks to involve the worker in the most basic policy decisions.

Professor Argyris, probably the most influential American currently writing in the field of management, stated that the purpose of his 1964 landmark study⁶⁹ was to theorize "how organizations might be redesigned to take into account . . . the energies and competences that human beings have to offer."⁷⁰ According to Argyris, although the pyramidal structure of traditional organizations gives "the greatest influence over persons, information and instrumentalities to the higher level positions,"⁷¹ all employees, even lower level employees, aspire to psychological success.⁷² Psychological success comes from individual responsibility, self-control, internal commitment to

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⁶⁴. See note 23 supra and accompanying text.
⁶⁵. See note 76 infra.
⁶⁶. Since 1965, more than 450 articles and books have been written on the "quality of worklife" movement. See Guest, Quality of Worklife—Learning from Tarrytown, HARV. BUS. REV., July-Aug. 1979, at 76. For a description of how the concept of quality of worklife is actually integrated into the workplace, see Walton, Work Innovations in the United States, HARV. BUS. REV., July-Aug. 1979, at 88-98.
⁶⁷. Guest, supra note 66, at 76-77.
⁷⁰. Id. at viii.
⁷¹. Id. at 39.
⁷². Id. at 83-85.
meaningful work, and full utilization of employees' abilities.\textsuperscript{73} Argyris found alienation throughout the workplace due to the absence of psychological success,\textsuperscript{74} and suggested that these problems could be reduced by giving rank and file workers more influence within the organization.\textsuperscript{75} Such a coarchical model has long existed among professionals and now forms the basis for job enrichment for traditional blue-collar employees.\textsuperscript{76}

The major changes occurring thus far have been pragmatic, nonideological changes instituted by management alone or by management and labor together. These changes have not involved alterations in the ownership of the means of production.\textsuperscript{77} In job enrichment, whether by team organization of

\begin{itemize}
\item \textsuperscript{73} Id. at 39-40.
\item \textsuperscript{74} Id. at 65. Argyris points out that "employees are increasingly coupling job satisfaction with alienation and withdrawal, and simply asking to be paid fairly. Satisfaction and low productivity can become a new moral virtue." C. ARGYRIS, ON ORGANIZATIONS OF THE FUTURE 24 (Professional Papers in Administrative and Policy Studies, No. 08-066) (1973).
\item \textsuperscript{75} C. ARGYRIS, supra note 69, at 169.
\item \textsuperscript{76} Argyris suggested in 1964 that the organization of the future will also strive to enlarge the jobs. The enlargement will not tend to be limited to the "doing" or "motor" abilities. It will include expanded use of the individual's intellectual and interpersonal abilities. Wherever possible the jobs will be redesigned to include responsibility for larger and larger meaningful segments of the product and for its quality. Id. at 274.
\item \textsuperscript{77} See, e.g., P. WARR & T. WALL, WORK AND WELLBEING (1975); WORK AND THE QUALITY OF LIFE (O'Toole ed. 1974); Davis, Enhancing the Quality of Working Life: Developments in the United States, 116 INT'L LAB. REV. 53 (1977); Guest, supra note 66; Kuper, Developments in the Quality of Working Life, 23 LAB. L.J. 752 (1977). See generally C. GOLD, EMPLOYER-EMPLOYEE COMMITTEES AND WORKER PARTICIPATION (1976); STRAUSS & ROSENSTEIN, WORKERS PARTICIPATION: A CRITICAL VIEW, 9 INDUS. REL. 197 (1970); Symposium: Workers Participation in Management, An International Comparison, 18 INDUS. REL. 247 (1979); Walton, supra note 65, at 88. There are disagreements, however, regarding the rationale for requiring improvements in the quality of worklife and the ways to implement the necessary changes. Kuper, supra, at 752, 759-61; Scobel, supra note 68, at 14-15. At least three objectives underlay change in the work place: increased productivity, increased worker satisfaction regardless of its affect on productivity, or fundamental change in the basic business structure by transferring ownership to the employees themselves.
\item \textsuperscript{77} Argyris argues that these problems are not unique to capitalist economies:

We do not believe that the problems would be solved by changing the ownership of the organizations. . . . Thus ownership does not seem to be a crucial variable as long as the basic security and physiological needs are satisfied. Indeed, under these conditions we suggest that those who require that the worker own the impoverished work world in which he exists presently may well be adding insult to injury. . . . There is informal evidence available from studies in England, Poland, and Russia to show that the transfer of ownership of the
work or by the establishment of joint labor-management com-
mittees, the particular job is expanded to include intellectual
input from each employee. In team organization of work, a
small group of employees may be given responsibility for de-
design, production, quality control, and possibly even market-
ing. Labor-management committees, existing either within or
without a collective bargaining structure, provide a forum for
joint discussions and problem solving at the plant, department,
or unit levels.

Although increased worker satisfaction and increased pro-
ductivity have followed changes in the American work environ-
ment, reorientation within the existing industrial and legal
framework has resulted in adjustment problems. Business
Week reported on an attempt to use job enrichment at one
plant of a traditional industrial enterprise:
The problem has been not so much that the workers could not manage
their own affairs as that some management and staff personnel saw
their own positions threatened because the workers performed almost
too well. One former employee says the system—built around a team
concept—came squarely up against the company's bureaucracy. Law-
yers, fearing reaction from the National Labor Relations Board, op-
posed the idea of allowing team members to vote on pay raises.
Personnel managers objected because team members made hiring de-
cisions. Engineers resented workers doing engineering work.

Such transitional problems are not unsolvable, however, given
the high degree of management and labor acceptance of job
enrichment.

The almost obsessive nature of American business's con-
cern with Japanese management techniques demonstrates
management's acceptance of job enrichment. Unlike the traditional American hierarchical system of decision making, Japanese industry is highly decentralized with lower level employees encouraged to participate in decisions relating to their work. Employees at the lowest levels often recommend changes; employees at each succeeding level review and agree upon these changes. Although the process is slow in achieving agreement, once agreement is reached implementation is rapid because all those involved in implementing the change have already achieved a consensus.

In addition to job enrichment innovations, basic changes have occurred in the ownership structure of our traditional hierarchical, bureaucratic corporate enterprises. There are three primary means of structural change. The first, a direct outgrowth of one type of industrial democracy in the United States, is cooperative ownership of an enterprise. Another method is worker ownership through employee stock option plans. Although top level managers have long received shares of stock in addition to salaries, recently there has been recognition of plans allowing individual rank and file employees to directly purchase stock and of stock purchases by union pension funds. The final method includes employee representation on corporate boards. To understand this method of em-

84. See Moran, supra note 83, at 17-19.
85. See Johnson & Ouchi supra note 83, at 65-66.
86. Id.
89. "[S]ome analysts expect pension funds [will] hold more than 50% of all common stock traded on the New York Stock Exchange [within a decade]." Embattled Unions Strike Back at Management, Bus. Week, Dec. 4, 1978, at 63. See also K. Frieden, supra note 80 at 8; Bonanno, supra note 59, at 994.
ployee participation it is best to examine it in its European context.

D. EUROPEAN CODETERMINATION

The legal systems of continental Europe have considered the relationship between employee and employer under both their labor laws and their corporate laws. Since the German system of codetermination has been the most influential in Europe, and the one most commented upon in the American literature, it will be used as a prototype.

Under German law, workers are entitled to representation on a company's supervisory board or Aufsichtsrat. The representation is substantial, essentially giving workers parity with shareholders in companies in the coal, iron, and steel industries employing more than 1,000 workers, and in other firms with a work force of more than 2,000. Representation equals one-third of the board in companies employing fewer than 2,000 workers. The supervisory board has the power "to appoint and supervise the managing board [Vorstand] and to make major decisions concerning the goals and objectives of the firm." Thus, substantial worker representation on supervisory boards gives German workers the control over the destiny of their firms and their lives that management often denies to the majority of American workers.

German law also entitles workers to substantial participation in the operations of their employer at the local or plant level. Each firm employing more than five workers must have a works council composed of employee representatives who have an equal voice with management in deciding issues such as wage structure, work schedules, staffing policies, training,

91. Comment, supra note 90, at 215-16.
92. Kovach, Sands & Books, supra note 82, at 52.
93. Id. at 52.
hiring, firing, and promotion. Because workers and their representatives possess great power at both the local and corporate levels, one might ask what negotiation is left for a labor union. Collective bargaining takes place largely at the industry level between large national unions and multi-employer associations and seldom includes more than the setting of minimum wage rates. Works councils resolve the specifics at the plant level.

In addition to their tremendous power at the plant and enterprise level, German workers also exert greater political power than American workers. Strong and often dominant labor parties throughout Europe have enacted legal protections, such as prohibitions against unjust dismissals. Most American workers, however, receive such protections only if they are members of a labor union which has managed to include such protections in a collective bargaining agreement.

Commentators note that the successful functioning of the German system of codetermination depends on a substantially different view of the relationship between workers and employers than that prevalent in America—the German system depends on a spirit of cooperation between labor and management rather than an adversary relationship. In return for labor's substantial contribution to basic corporate policy and to the total plant operations, it must be willing to work with the representatives of the company and to accept responsibility for decisions.

European workers have accepted this responsibil-

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96. Kovach, Sands & Books, supra note 82, at 51. See also Summers, supra note 9, for a description of worker representation at four levels of German life: government, industry, enterprise, and plant.


98. Id.; Schoenbaum & Lieser, supra note 94, at 116; Summers, supra note 9, at 380.

99. Bok, supra note 90, at 1406-11.

100. Summers, supra note 9, at 369.


103. See Murphy, Workers on the Board: Borrowing a European Idea, 27 Lab. L.J. 751, 752-53 (1976); Simitis, Worker's Participation in the Enterprise—Transcending Company Law?, 38 Mod. L. Rev. 1, 19-21 (1975); Summers, supra note 9, at 383.

104. Generally, American labor leaders have not been willing to do so. Bonanno, supra note 59, at 998-99; Summers, supra note 9, at 369-71; Vagts, supra note 59, at 77.
ity, thus enabling the Germans to keep the number of hours lost through strike activity at an extremely low level despite major dislocations in German industry requiring the creation of new jobs and massive retraining.\(^{105}\)

In contrast to the European system of codetermination, America in the 1930s adopted a system of collective bargaining. One writer noted, however, that "[w]hile collective bargaining is undoubtedly itself a form of codetermination, it is a form which is reactive and adversarial rather than participatory and cooperative."\(^{106}\) Under the American system of collective bargaining, employee codetermination reaches only a limited number of issues concerning wages, hours, and terms and conditions of employment. As originally envisioned, collective bargaining would have allowed American workers and industry to reach pragmatic solutions to problems of the workplace with a minimum of governmental intervention.\(^{107}\) This has not occurred; only thirty percent of our workforce participates in codetermination through collective bargaining.\(^{108}\)

Two of the leading American writers in the field of labor law, Derek Bok and Clyde Summers, reached similar conclusions regarding the reasons why American employees have not achieved the same degree of control over their work lives as their European counterparts.\(^{109}\) They observe that American society emphasizes notions of classlessness, individual initiative, and opportunity.\(^{110}\) American workers accordingly do not perceive themselves as members of a lower working class oppressed by an elite ownership class. They adopt instead a middle class model and seek to improve their positions within an enterprise on an individual basis.\(^{111}\) Many workers reject the labor movement and collective action within a labor union context as a lower class phenomenon. Moreover, labor representation evolved differently in the United States and Europe. At the turn of the century, informal systems of joint worker-management committees developed in both societies.\(^{112}\)

\(^{105}\) Bonanno, supra note 59, at 960. See also Vagts, supra note 59, at 70-71; Simitis, supra note 103, at 20-21.

\(^{106}\) Bonanno, supra note 59, at 988.


\(^{109}\) Bok, supra note 90; Summers, supra note 9.

\(^{110}\) Bok, supra note 90, at 1403. See also Summers, supra note 9, at 379.

\(^{111}\) Bok, supra note 90, at 1400-04.

\(^{112}\) C. Gold, supra note 76, at 15-19.
First World War these arrangements were supported by legislation in Europe, but stifled in the United States under the 1935 Wagner Act’s prohibition against company unions.113 Finally, employers in the United States have historically resisted collective action by employees,114 and this resistance appears to be increasing.115 Thus, these factors led to laws establishing decentralized and adversarial labor relations in the United States.

III. PROFESSIONAL EMPLOYEES AND THE WORKPLACE

Congress’s first attempt at comprehensive labor legislation, the 1935 Wagner Act, did not mention professionals, managers, or supervisors. Congress apparently gave little, if any, consideration to the Act’s application to such employees or to workers operating in nontraditional, nonhierarchical structures. Moreover, problems involving professional employees did not arise, probably because most of them were not employed within the industrial labor force. Indeed, the few early cases dealing with professionals who wished to unionize under the Wagner Act treated them as employees.116

A large number of professionals have entered the work force since the Second World War as employees of both traditional industrial sector companies and nonprofit institutions, particularly hospitals and universities.117 An examination of hospitals and universities illustrates the problems these employees face.118

114. Bok, supra note 90, at 1409-11; Summers, supra note 9, at 376.
115. See, e.g., Wortman & Jones, Remedial Actions of the NLRB in Representation Cases, 30 LAB. LJ. 281, 282 (1979).

Between 1969 and 1979, the number of unfair labor practice charges filed with the NLRB more than doubled. 41 NLRB ANN. REP. 22 (1979). The great bulk of these charges were filed by unions, not employers. Id. at 265-67. A comparison of the percentage of filings of unfair labor practice cases for the years 1936 through 1979 shows that unfair labor practice charges have reached the 1936 level when employer resistance was at its peak. Id. at 23. The percentage of filings of representation cases was highest in 1945 and has been gradually decreasing to the 1936 level. Id. at 23. There is, however, increased interest in instituting decertification proceedings. See Krupman & Rasin, Decertification: Removing the Shroud, 30 LAB. LJ. 231 (1979).
116. See cases cited in note 45 supra.
117. See note 7 supra.
118. Although the Article focuses on professors and doctors, other groups of professionals are facing similar problems. See generally Arian, Some Problems of Collective Bargaining in Symphony Orchestras, 22 LAB. LJ. 676 (1971); Fraser & Goldenberg, Collective Bargaining for Professional Workers: The Case of the Engineers, 20 MCGILL LJ. 456 (1974); Roberts & Powers, Defining the Rela-
A. COLLEGES AND UNIVERSITIES

Colleges and universities currently confront severe fiscal problems largely caused by the end of the post-World War II baby boom.119 During the late 1950s and 1960s, colleges and universities experienced a tremendous expansion in the size of student body, faculty, and administration. The expansion started in the schools of education which trained elementary and high school teachers to teach the “babies” while they were young, it occurred next in the graduate schools training college professors for the same “babies” when they went to college; it also occurred in the colleges the “babies” attended when they graduated from high school. At the end of the baby boom enrollment dropped substantially in the schools of education, the graduate schools, and the colleges of arts and sciences. In response to significantly diminishing university revenues, colleges and universities have reduced or completely denied


salary increases to faculty, curtailed the hiring of new faculty, postponed promotions, denied tenure, and fired some tenured faculty.120

The prominent role of nonfaculty administrators in mandating retrenchment is also a recent development. Until the late 1950s and early 1960s, the professoriat had primary control over institutions of higher education.121 Although lay members of a board of trustees retained final legal authority over all matters within the university,122 their authority was often hidden during the boom period since few issues arose to challenge the mythology of an independent professoriat controlling its own destiny on the basis of objective standards.123 Academic deci-


121. Colleges and universities originated in the Middle Ages as self-contained units, controlled almost exclusively by the professors. University professors are unique because they are the only large professional group that has always operated within a corporate structure. The professoriat needed the university to practice its profession. One observer relates the degree of control, and even arrogance, exercised by the medieval professoriat in the history of a murder case at Oxford University:

In 1209, the faculty at Oxford—together with the students—put on an epic demonstration of power. The issue was not pay but prerogative: namely, in the relations between town and gown, who was the boss? Some typically unruly scholars had killed a townswoman. The town retaliated by seizing and executing two scholars. The university—both masters and scholars—countered with a suspendium clericorum, a cessation of classes and a relocation to other places, including Cambridge. In 1214, the Pope himself intervened and ordered the town to do penance: barefoot they had to parade to the graves of the executed scholars and rebury them in a cemetery; they had to distribute forty-two shillings to poor scholars every year; they had to make a feast for one hundred poor scholars every St. Nick’s Day; they had to freeze their rents for twenty years and then remit one half the rent for the first ten years. Finally, the masters who “scabbed” were suspended from teaching for three years.

Tyler, The Faculty Joins the Proletariat, in COLLECTIVE NEGOTIATIONS IN HIGHER EDUCATION: A READER 32-33 (C. Hughes, R. Underbrink & C. Gordon eds. 1973). Tyler stated: “The reason the professors are so late [in unionizing] is that in a true sense they were the first.” Id. at 31. Many students and professors during the college disturbances of the late 1960s also displayed a disregard for civil authority. See, e.g., FACT-FINDING COMMISSION ON COLUMBIA DISTURBANCES, CRISIS AT COLUMBIA (1968).

122. See note 35 supra and accompanying text.

123. The extent to which this mythology prevails today is apparent from the persistent quotation of Judge Cardozo’s “company of scholars” language in Hamburger v. Cornell Univ. See note 34 supra and accompanying text. See, e.g., NLRB v. Yeshiva Univ., 582 F.2d 666, 698 (2d Cir. 1978); McHugh, Collective Bargaining with Professionals in Higher Education: Problems in Unit Determinations, 1971 WIS. L. REV. 55, 70.

Because authorities rely heavily on Cardozo, it is important to note the context of his statement. Hamburger was a tort suit against Cornell University by a student injured in a chemistry lab explosion. The main issue was the “ex-
sions were made by the professors at the department, school, and university senate levels. During the baby boom, institutions of higher education grew from small nonprofit entities into major institutions. This expansion created a need for increased administration and for greater central control.

Al-
tent of the defendant's immunity as a charitable institution." 240 N.Y. at 331, 149 N.E. at 539. Judge Cardozo based his decision finding no liability on the part of the university, on the traditional view of hospitals and colleges as small, local, nonprofit, "charitable" institutions, with immunities not shared by institutions organized for profit. Id. at 335-36, 148 N.E. at 541.

The law applicable to tort suits against hospitals and universities in 1925 is not the law today. Cardozo established the doctrine of a hospital's nonliability for the negligent medical acts of its employee physicians in Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 105 N.E. 92 (1914), a case he cited and relied upon in Hamburger v. Cornell Univ., 240 N.Y. at 335-36, 148 N.E. at 541. Schloendorff was overruled by the New York Court of Appeals in Bing v. Thunig, 2 N.Y.2d 656, 667, 143 N.E.2d 3, 9, 163 N.Y.S.2d 3, 12 (1957), where the court rejected Cardozo's concept that all of a hospital's "professional personnel, such as doctors, nurses and interns, should be deemed independent contractors, though salaried employees [as] inconsistent with what they have been held to be in every other context." 2 N.Y.2d at 663-64, 143 N.E.2d at 6-7, 163 N.Y.S.2d at 9. It noted that "today's hospital is quite different from its predecessor of long ago; it receives wide community support, employs a large number of people and necessarily operates its plant in businesslike fashion," id. at 664, 143 N.E.2d at 7, 163 N.Y.S.2d at 9, and that there had been widespread rejection by the courts of the immunity rule. Id. at 665, 143 N.E.2d at 7, 163 N.Y.S.2d at 9-10. Hospitals are regularly held liable for the negligence of doctors who are their employees, see Zaremski & Spitz, Liability of a Hospital as an Institution: Are the Walls of Jericho Tumbling?, 16 FORUM 225, 227-29 (1980), and, increasingly, even for the negligence of those who are not. Id. at 236-40.

The members of the professoriat themselves demonstrate a degree of schizophrenia regarding their status as masters or servants. The mythology of an independent professoriat satisfies their egos, but current realities have created problems.

The relationship between the professor and his college or university has varied greatly from time to time and place to place and has never been easy to define. He is at the same time a practitioner of a profession, an employee of an organization, and a manager who helps set and administer the organization's policies and programs. This threefold status is largely a pragmatic condition; it has never received a widely accepted rationalization. Thus, in their roles as professionals and managers, faculty members assert, particularly in times of crisis at their institutions, "We are the university." At the same time they also speak of themselves as "hired" by their institutions and readily condemn "the administration" for treating them badly.


124. Colleges and universities in the United States actually enjoyed a growth period for over 100 years. M. Ross, THE UNIVERSITY: THE ANATOMY OF ACADEME 48 (1976). There was "a tenfold expansion of enrollments between the years 1900 and 1950." Id. at 51.

On the growth of nonprofits generally and the failure of our legal system to fully readjust, see Hansmann, supra note 10.

125. E. LADD & S. LIPSET, supra note 119, at 4; Garbarino, supra note 120, at 11. See also J. WEISBERGER, supra note 119, at 2.
though presidents and provosts, themselves distinguished academicians, traditionally administered colleges and universities, the postwar boom era brought both a new centralization and a new type of professional—the professional administrator.\textsuperscript{126}

From their inception, colleges and universities operated under a dual authority structure consisting of a bureaucratic and a professional network.\textsuperscript{127} Ultimate authority over the bureaucratic network vested in the trustees; the professional network included the formal collegial systems of faculty self-government.\textsuperscript{128} Although legal power has always remained in the bureaucratic structure, real power, until very recently, was in the collegial professional structure.\textsuperscript{129} There are two primary, related reasons why the professionals wielded the actual power. First, academics occupied key positions in both structures, and typically engaged in both administrative functions and teaching.\textsuperscript{130} Second, because a university's output is education and research, the faculty necessarily made basic decisions concerning the institution's work product. Drawing an analogy to industrial organizations, one commentator noted that "[c]ontrol over the 'product' (education) is centered in the production employees (faculty). The role of the administration is not to control the final product but rather to serve as a custodian of the material resources necessary to perform the primary educational tasks of the institution."\textsuperscript{131} The faculty members typically were involved in establishing standards for admissions, curriculum, hiring, and promotion.\textsuperscript{132}

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126. See note 40 supra and accompanying text.
128. Kahn, supra note 119, at 73. Kahn explains that "the parallelism between the bureaucratic and the professional authority structures ensures that professional goals will have strong advocates in the decision-making councils. Duality of authority and ambiguity of power are the price of ensuring that faculty expertise will have its say." Id. at 73 (quoting J. BALDRIDGE, POWER AND CONFLICT IN THE UNIVERSITY 114-15 (1971)).
129. See M. Ross, supra note 124, at 179-80.
130. See notes 40 & 42 supra and accompanying text; Kahn, supra note 119, at 68-69.
131. Id. at 67 n.5.
132. Id. at 68. An authority structure almost unique to the university is the senate. It is a body composed of faculty members elected by their peers within their departments or schools, administrators appointed by the president, and, in recent years, students. This collegial body has traditionally had great power over all aspects of the academic life of the university, from hiring and promo-
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Although the potential for a clash between the two authority structures always existed, as late as 1966 the AAUP, the American Council on Education, and the Association of Governing Boards of Colleges and Universities still could agree on a principle of shared authority.\textsuperscript{133} By the late 1960s and 1970s, however, professional administrators began to dominate the new centralized bureaucracy.\textsuperscript{134} Financial difficulties mandated that universities consider the economic feasibility as well as the academic value of the programs they offered. The potential clash always existing between the hierarchical, bureaucratic structure and the coarchical, professional structure became real during the fiscally lean years of the 1960s and 1970s.\textsuperscript{135}

B. THE HEALTH CARE INDUSTRY

An understanding of America’s health care industry must begin with a discussion of the AMA.\textsuperscript{136} One article stated:

No other voluntary association commands such power within its area of interest as does the AMA. It holds a position of authority over the individual doctor, wields a determining voice in medical education,
controls the conditions of practice, and occupies a unique position of influence in shaping government health policies.\textsuperscript{137} In fact, because the AMA has been so successful in controlling the practice of medicine in the United States other professional trade associations used it as a model.\textsuperscript{138} The AMA controlled medical education and limited entry into the profession,\textsuperscript{139} claiming that only those properly initiated into the profession were capable of setting standards of education and practice.\textsuperscript{140} Some of the standards established by the AMA, however, limited entry into the profession in order to screen out those considered undesirable\textsuperscript{141} and to maintain doctors' status and incomes.\textsuperscript{142}

Although surgeons and apothecaries formed guilds during the Renaissance that set standards for entry into and practice within the profession,\textsuperscript{143} doctors until the mid-20th century practiced medicine individually.\textsuperscript{144} As late as 1954 the AMA's "Principles of Medical Ethics"\textsuperscript{145} were basically "geared to the typical unit of medical practice in America—the individual practitioner, remunerated on the basis of a fee for service rendered."\textsuperscript{146}

Recent developments in the health care industry have derogated the role of the individual practitioner, while promoting the growth and expansion of hospitals. As health care became hospital-based, and the number of medical specialties and the concomitant need for professional training increased, hospitals changed from small, local, charitable institutions to major industries.\textsuperscript{147} The role of doctors within hospitals changed correspondingly.\textsuperscript{148} The modern medical complex now contains a

\textsuperscript{137} Id. at 1018.
\textsuperscript{138} Cf. First, Legal Education I, supra note 30, at 353-55 (ABA and AALS attempted to imitate the AMA by gaining control over standards of legal education and consequently over size of law school classes).
\textsuperscript{139} See Comment, supra note 30, at 963-76.
\textsuperscript{140} See notes 31 & 41 supra and accompanying text.
\textsuperscript{141} The most obvious such exclusion was that of black doctors from state medical societies, Comment, supra note 30, at 941 & n.22, thus limiting the ability of such doctors to obtain hospital privileges and gain status within the profession. Id. at 939-40. See also note 41 supra.
\textsuperscript{142} Id. at 965, 969-74.
\textsuperscript{143} D. Guthrie, A History of Medicine 150-51 (1946).
\textsuperscript{144} See generally V. Bullough, The Development of Medicine as a Profession (1966); R. Stevens, American Medicine and Public Interest (1971).
\textsuperscript{145} AMA, Guide to Medical Services 101 (1952).
\textsuperscript{146} Comment, supra note 30, at 976.
\textsuperscript{147} See note 14 supra and accompanying text; Comment, The Hospital and the Staff Physician—An Expanding Duty of Care, 7 Creighton L. Rev. 249, 250-51 (1974).
\textsuperscript{148} Traditionally an attenuated relationship existed between a private phy-
large number of interns and residents who are medical school graduates engaged in advanced medical training through specialty practice. These physicians work 100 hours a week, often in thirty hour shifts, gaining specialized medical training,
treat patients in emergency rooms, in out-patient clinics, and in the hospital's normal and intensive care units.\textsuperscript{150}

The number of physicians now working in hospitals has grown in other ways. Hospitals have traditionally operated with voluntary staffs of attending physicians; only chiefs of service received direct remuneration from the institution.\textsuperscript{151} Today, however, hospitals directly employ paid chiefs of service, paid associate and assistant chiefs, and paid attending physicians, all of whom spend major portions of their work time in service to the institution.\textsuperscript{152} Hospitals have also tightened restrictions on the qualifications and activities of voluntary attending physicians.\textsuperscript{153}

Furthermore the administrative structure of hospitals has

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mandatory' statutory requirement creating rights under the Act." Id., slip op. at 24.

Upon rehearing en banc, a majority of the Court of Appeals for the District of Columbia, found that
in order to qualify for the Leedom v. Kyne exception a plaintiff must be
able to identify a specific provision of the Act which, although it is
"clear and mandatory" . . . , has nevertheless been violated by the
Board. That the Board may have made an error of fact or law is insuffi-
cient; the Board must have acted without statutory authority.

Physicians Nat'l House Staff Ass'n v. Fanning, 642 F.2d 492, 496 (D.C. Cir. 1980) (en banc), cert. denied, 450 U.S. 917 (1981). Since the Supreme Court has de-

nied certiorari, this decision thus leaves a very large group of physicians working at hospitals without the protections of the Act. One may ask why the Board excluded them, despite the similarity of this group to traditional apprentices who are within the protection of the Act. See, e.g., The Deming Co., 59 N.L.R.B. 526 (1944); E.W. Bliss Co., 58 N.L.R.B. 171 (1944); Newport News Shipbuilding and Dry Dock Co., 57 N.L.R.B. 1053 (1944). An explanation may lie in the unus-

usual bargaining concerns of this group of young physicians.

On March 17, 1975, the Committee of Interns and Residents of New York, a
union representing 3,000 housestaff officers, struck twenty-one private hospitals in New York City "in the country's first major work stoppage by doctors." N.Y.
Times, March 18, 1975, at 1, col. 4. The strike lasted for four days and finally
resulted in a settlement regarding excessive hours which the housestaff
claimed adversely affected not only them but also the quality of care which their patients were receiving. N.Y. Times, March 21, 1975, at 1, col. 1. It may have been that the Board, worried about unusual collective bargaining de-

mands that this group would raise once they were certified, chose the easy

course of prohibiting them from organizing under the Act in the first place.

See Malin, Student Employees and Collective Bargaining, 69 KY. L.J. 1 (1980); Note, Student-Workers or Working Students? A Fatal Question for Col-

lective Bargaining of Hospital House Staff, 38 U. PITT. L. REV. 762 (1977); Note, Labor Problems of Interns and Residents: The Aftermath of Cedars-Sinai, 11

151. See generally Comment, supra note 147, at 249-50.
152. Id. at 250-51. See Craver, supra note 148, at 65.
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changed. Like universities, dual systems of authority existed: a professional, collegial model and a bureaucratic model. Under the professional model, final control over medical matters rested with the hospital's medical board, usually composed of the chiefs of service. Indeed, the AMA required this arrangement. Legal control, however, has always vested in a board of trustees. As hospitals have attempted to respond to the administrative and fiscal concerns accompanying rising medical costs, a new group of professionals—professional hospital administrators—has challenged the physicians' historical supremacy. The health insurance industry and professional standards review organizations are imposing restrictions on fees and medical treatment. An individual physician's traditional autonomy is also limited by group practices such as health maintenance organizations. Finally, doctors, like other professionals, are becoming employees of large, bureaucratic organizations or are otherwise limited by the collective realities of such organizations.

C. LEGAL LIMITATIONS ON PROFESSIONAL ASSOCIATIONS

As professionals came to be controlled by larger organizations, and as many professionals became employees rather than individual entrepreneurs, they took collective action to protect their interests. Traditionally, professionals had successfully used their professional associations to establish minimum standards for compensation and working conditions. More recently, some recognized the advantages of unionization. Court decisions, however, threaten to limit the efficacy

154. See notes 128-29 supra and accompanying text.
155. See Craver, supra note 148, at 69.
156. See generally Comment, supra note 30.
157. See note 129 supra and accompanying text.
159. See generally VIRGINIA MEDICAL COLLEGE, SCHOOL OF HOSPITAL ADMINISTRATION, CONTINUING EDUCATION DEPARTMENT, LAW INSTITUTE ON HOSPITALS AND MEDICINE (1971).
160. See Craver, supra note 148, at 56-57.
161. Id. at 58.
162. Physicians also believe that they are under attack from other sources. See Craver, supra note 148, at 56-59. For a response to Professor Craver's generally sympathetic view, see Glantz, supra note 158; Comment, supra note 153.
163. Standards originally focused on the autonomous professional dealing with individual clients. Recently, as professionals became employees, professional associations have attempted to adapt the standards to professionals employed by large organizations.
164. The AAUP is an example of a professional association whose member-
of either course of action. The antitrust laws\textsuperscript{165} and the first amendment\textsuperscript{166} may inhibit the activities of professional associations. In \textit{Goldfarb v. Virginia State Bar},\textsuperscript{167} the Supreme Court found that lawyers were not exempt from the limitations of the antitrust laws simply because their business was a learned profession.\textsuperscript{168} Thus, publication by the Virginia State Bar Association of a recommended fee schedule violated the antitrust laws.\textsuperscript{169} In \textit{Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council}\textsuperscript{170} and \textit{Bates v. State Bar of Arizona},\textsuperscript{171} the Court found first and fourteenth amendment\textsuperscript{172} limitations on the protective activities of professional associations.\textsuperscript{173} \textit{Virginia State Board of Pharmacy} held that commercial speech was protected by the Constitution, striking down a Virginia statute allowing the Virginia State Board of Pharmacy to discipline a licensed professional pharmacist who truthfully advertised prescription drug prices.\textsuperscript{174} \textit{Bates} similarly held that a rule of the Supreme Court of Arizona prohibiting advertising by lawyers and providing for disciplinary measures against those who violated the rule, could not stand under the first amendment.\textsuperscript{175} If the antitrust laws\textsuperscript{176} and the first amendment

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   \textsuperscript{165} See note 49 supra and accompanying text. The American Nurses' Association (ANA) is also a traditional professional association that now engages in collective bargaining. See \textit{French & Robinson, Collective Bargaining by Nurses and Other Professionals: Anomaly or Trend?}, 11 LAB. L.J. 903 (1969); \textit{Kleingartner, Nurses, Collective Bargaining and Labor Legislation}, 18 LAB. L.J. 236 (1967).
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   \textsuperscript{168} U.S. CONST. amend. I.
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   \textsuperscript{169} Id. at 787.
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   \textsuperscript{170} Id. at 791-92.
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   \textsuperscript{171} 425 U.S. 748 (1976).
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   \textsuperscript{172} U.S. CONST. amend. XIV.
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   \textsuperscript{173} 433 U.S. at 381-82; 425 U.S. at 770.
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   \textsuperscript{174} 425 U.S. at 770.
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   \textsuperscript{175} 433 U.S. at 381-82.
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prevent professionals from acting collectively in their traditional mode of professional associations, an interpretation that professionals cannot organize under the NLRA may leave them without any effective group power.

IV. INTERPRETING THE NATIONAL LABOR RELATIONS ACT

A. THE STATUTORY FRAMEWORK

Congress drafted the NLRA to ameliorate the problems of rank and file workers employed by hierarchical, bureaucratic organizations. The composition of the work force, however, has changed significantly in recent years as the number of white-collar and professional employees has increased. Recognizing these changes, the Board in 1970 took jurisdiction over nonprofit colleges and universities, and Congress in 1974 passed the Health Care Amendments which eliminated the exclusion of nonprofit private hospitals from the NLRA. With the legal impediments removed, many professionals have attempted to unionize. Their efforts raise basic issues of representation and collective bargaining long thought settled in the industrial sector. It is not surprising that the Board and the courts have encountered difficulties in attempting to apply laws written for traditional, industrial sector workers to this new and functionally different class of employees. The source of the difficulties becomes evident with an examination of the statutory framework itself.

1. The Wagner Act

Section 2(3) of the 1935 Wagner Act states that "[t]he term 'employee' shall include any employee," and only excludes "any individual employed as an agricultural laborer, or in the

177. See note 17 supra and accompanying text.
178. See note 7 supra and accompanying text.
domestic service of any family or person at his home." 182 Although violating the most basic rule of statutory drafting by defining a term, employee, with the same term, it is clear that Congress meant to interpret the term broadly in light of the Act's purpose. The purpose of the Act was to redress the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership associations" 183 by allowing workers to organize and collectively bargaining for "the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions." 184

Section 2(3) of the Wagner Act expansively defines an employer as "any person acting in the interest of an employer." 185 Both the theoretical antagonism between rank and file workers and management, 186 and Congress's distrust of company-dominated unions, 187 underlay this broad definition. During the First World War, labor-management committees were formed to achieve the cooperation and increased production required by the war effort. 188 After the war, many of these committees continued as company-dominated unions, growing in number and strength under the auspices of the National Industrial Recovery Administration. 189 Such company-dominated unions were anathema to organized labor, and the Wagner Act there-

182. Id.
184. Id.
185. Id.
186. See Note, New Standards for Domination and Support Under Section 8(a)(2), 82 YALE L.J. 510, 515 (1973); notes 21-22 supra and accompanying text.
188. These committees were organized under the auspices of the War Production Board. See S. PERLMAN & P. TAFT, HISTORY OF LABOR IN THE UNITED STATES, 1896-1932, at 409 (1936). Other national emergencies generated a similar response. During the Great Depression, Congress enacted the National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195 (1933), at the request of the Roosevelt administration. The National War Labor Board was founded during World War II. See Exec. Order No. 9017, 7 Fed. Reg. 237 (1942). These three developments represented pragmatic responses to the need for a coordinated and intensive response to national emergencies. During each of these periods, cooperation to achieve increased production was essential.
189. For early articles discussing company unions, see Crager, Company Unions Under the National Labor Relations Act, 40 MICH. L. REV. 831 (1942); Note, Employer-Dominated Unions—Illusory Self-Organization, 40 COLUM. L. REV. 278 (1940). For articles discussing more recent developments, see Jackson, supra note 132; Miller, Professional Associations and Supervisor Members: When Does an Employer Dominate and Interfere? 30 LAB. L.J. 31 (1979);
fore barred them. Since employers had used supervisors to organize and control company unions, the Wagner Act defined employer broadly to preclude this practice. Consistent with this definition, early cases found unfair labor practices if supervisory personnel were involved in the organization or formation of a union.

During the period between the Wagner Act and the 1947 Taft-Hartley Amendments, the Board interpreted sections 2(2) and 2(3) to determine whether specific classes of workers were covered by the NLRA. Largely in the context of representation cases, the Board gradually developed definitions and rules regarding confidential, supervisory, and managerial employees. Exercising its discretion to determine appropriate bargaining units, the Board adopted a policy excluding confidential, supervisory, and managerial employees from rank and file units.

From its earliest cases, the Board defined confidential employees as those employees whose work is connected with the employer's labor relations activities. The Board excluded confidential employees not only from rank and file units but also totally excluded them from the coverage of the NLRA. This exclusion, however, did not extend to employees with ac-


191. Id. § 8, 49 Stat. at 452.
192. See Crager, supra note 189, at 840-42, and cases cited therein; Note, supra note 189, at 283-80, and cases cited therein.
194. See notes 195-230 infra and accompanying text.
195. We take notice of the fact that in negotiating and in other dealings concerning grievances, the interests of a union and the management are ordinarily adverse. The nature of a personal secretary's work is such that much of the confidential material pertaining to the management passes through his or her hands. We believe that the management should not be required to handle such material through employees in the unit represented by the union with which it is dealing.

Brooklyn Daily Eagle, 13 N.L.R.B. 974, 986 (1939) (secretaries to the managing editor and editor excluded as confidential employees); accord, In re The Hoover Co., 55 N.L.R.B. 1321, 1323 (1944) (stenographers and clerical workers who had access to confidential information regarding grievances and other labor relations matters excluded as confidential employees); Creamery Package Mfg. Co., 34 N.L.R.B. 108, 110 (1941) (stenographer excluded from unit of office employees as a confidential employee).
cess to other kinds of confidential information. In 1946, in *In re Ford Motor Co.*, the NLRB further “limit[ed] the term ‘confidential’ to embrace only those employees who assist and act in a confidential capacity to persons who exercise ‘managerial’ functions in the field of labor relations.” The NLRB has continued to apply this definition of confidential employees.

In *Ford*, the Board also attempted to precisely define managerial employees as “executive employees who are in a position to formulate, determine, and effectuate management policies.” Although the Board considered the status of managerial employees prior to the *Ford* case, its position was not well developed. These early cases involved only the exclusion of specific employees from rank and file units. They did not consider whether managerial employees were entitled to organize their own bargaining units.

The status of supervisors under the Wagner Act was more problematic. The Board initially recognized that the Act protected supervisory employees against unfair labor prac-

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197. See, e.g., NLRB v. Armour Co., 154 F.2d 570, 574 (10th Cir. 1946), aff’d 49 N.L.R.B. 688 (1943) (included clerks had access to knowledge which might injure their employer if disclosed to competitors); Micamold Radio Corp., 58 N.L.R.B. 880, 891 (1944) (payroll clerks with access to confidential information regarding rates of pay and wages included); *In re Chrysler Corp.*, 58 N.L.R.B. 233, 243-44 (1944) (cost clerks having access to confidential business records included); *In re Consolidated Vultee Aircraft Corp.*, 54 N.L.R.B. 103, 113 (1943) (clerks who handled confidential information such as production schedules and employment and personal records included).

198. 66 N.L.R.B. 1317 (1946).

199. *Id.* at 1322.

200. See notes 247-50, 333-34 infra and accompanying text.

201. 66 N.L.R.B. at 1322.

202. See, e.g., *In re The Elec. Controller & Mfg. Co.*, 69 N.L.R.B. 1242, 1246 (1946) (buyer excluded from unit of clerical employees as “managerial employee”); *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322 (1946) (Board “customarily excluded from bargaining units of rank and file workers executive employees who are in a position to formulate, determine, and effectuate management policies”); *In re Barrett Div.*, 65 N.L.R.B. 903, 905 (1946) (assistants to buyer excluded from unit of office clerical employees as “exercis[ing] a function closely allied to management”); *Spicer Mfg. Corp.*, 55 N.L.R.B. 1491, 1498 (1944) (expediters excluded from unit because “authority... to exercise their discretion in making commitments on behalf of the Company stamps them as managerial”); *In re Hudson Motor Car Co.*, 55 N.L.R.B. 509, 512 (1944) (buyers excluded from clerical unit as “their duties are closely allied to management, differing materially from those of the other clerical employees”); *In re Julien P. Friez & Sons*, 47 N.L.R.B. 43, 47 (1943) (expediters excluded from a unit as “closely related to the management”).

203. In *In re Dravo Corp.*, 54 N.L.R.B. 1174, 1177 (1944), the Board excluded buyers and expeditors from an office and clerical unit, but disclaimed any opinion regarding the right of these employees to self-organization under the Act.

204. See, e.g., *Warfield Co.*, 6 N.L.R.B. 58 (1938) (employer unfair labor practices against the chief engineer, *id.* at 61-64; creation of a separate bargaining
tices,205 and the courts of appeals enforced these orders.206 In
1942, in Union Collieries Coal Co.,207 the NLRB considered for
the first time in a representation case whether supervisors
were entitled to their own bargaining unit as covered employ-
ees. The NLRB, noting both Congress’s intent regarding the
definition of covered employees208 and the Supreme Court’s
broad treatment of the term,209 held that the supervisors at is-
sue, assistant mine foremen and fire bosses, were entitled to
their own bargaining unit.210 The NLRB did not find it inco-
sistent to consider the supervisors representatives of the em-
ployer relative to lower level employees under the section 2(2)
deinition of employer and yet covered employees in their own
right under section 2(3).211 In 1943, a divided Board in Mary-
land Drydock Co.212 reversed Union Collieries, but within two
years Maryland Drydock was itself reversed by Packard Motor
Car Co.,213 a case the Supreme Court later affirmed.214

unit of engineers, id. at 69); Star Publishing Co., 4 N.L.R.B. 498 (1937) (em-
ployer unfair labor practices against district and branch managers who were
supervisors, id. at 501-05).

205. The unfair labor practice cases, see note 204 supra, involved violations
of sections 7, 8(1), and 8(3). Section 7 provided: “Employees shall have the
right to self-organization, to form, join, or assist labor organizations, to bargain
collectively through representatives of their own choosing, and to engage in
concerted activities for the purpose of collective bargaining or other mutual aid
or protection.” National Labor Relations Act of 1935, Pub. L. No. 74-198, § 7, 49
an unfair labor practice for an employer—(1) To interfere with, restrain, or co-
erce employees in the exercise of the rights guaranteed in section 7; . . . (3) By
discrimination in regard to hire or tenure of employment or any term or condi-
tion of employment to encourage or discourage membership in any labor or-
mization . . . .” Id. at § 8, 49 Stat. at 452 (current version at 29 U.S.C. § 158(a)
(1976)).

206. See Maryland Drydock Co., 49 N.L.R.B. 733, 738 n.3 (1943); Union Col-
lieries Coal Co., 41 N.L.R.B. 961, 965 n.2 (1942) and cases cited therein.

207. 44 N.L.R.B. 165 (1942), enforcing Union Collieries Coal Co., 41 N.L.R.B.
961 (1942).

208. 44 N.L.R.B. at 167-68.

209. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 182, 191-93 (1941), cited in 44
N.L.R.B. at 167-68.

210. 44 N.L.R.B. at 169.

211. Id. at 167-68.

A foreman, in his relation to his employer, is an employee, while in
his relation to the laborers under him he is the representative of the
employer and within the definition of section 2(2) of the Act. Nothing
in the Act excepts foremen from its benefits nor from protection
against discrimination nor unfair labor practices of the master.

NLRB v. Skinner & Kennedy Stationery Co., 113 F.2d 667, 671 (8th Cir. 1940),
cited in 44 N.L.R.B. at 167 n.3.

212. 49 N.L.R.B. 733 (1943).

213. 61 N.L.R.B. 4 (1945), enforced, 157 F.2d 80 (6th Cir. 1946).


The Packard case must be understood in light of the significant problems
The NLRB distinguished Packard from Maryland Drydock on the ground that the petitioning foremen's organization in Maryland Drydock had also been the representative of the company's rank and file workers. The Board in Packard found that no dangers, such as illegal domination or support of a rank and file union, could exist when the foremen were represented by an independent and unaffiliated foremen's union. Furthermore, it found that it could adequately police the certification to guard against future affiliation. The Board dismissed the employer's contention that unionization of foremen would be incompatible with their duties, observing that, "[s]uch an assumption is not only repugnant to the basic democratic philosophy upon which this Act is founded, but it has never proved valid in our experience under the Act."

The Supreme Court decided Packard Motor Car Co. v. NLRB on a five to four vote, sustaining the Board's finding supervisors faced during and after World War II. Legislation applicable during the Second World War discouraged economic struggles between management and labor. See Levinson, Foremen's Unions and the Law, 1950 Wis. L. REV. 79, 79-82 (1950); Updegraff, War-Time Arbitration of Labor Disputes, 29 IOWA L. REV. 328, 335 (1944). In addition, to promote a high level of wartime production, the salaries and hours of rank and file workers were increased. Packard Motor Car Co., 61 N.L.R.B. at 12-13. Although foremen assumed they were aligned with management and not with rank and file employees, the combination of the rise of "scientific management," see Packard Motor Car Co., 61 N.L.R.B. at 9-10; note 23 supra and accompanying text, and "the presence of strong unions of rank and file," id., affected their status. In addition, the failure of their wages and hours to keep pace with those of rank and file employees caused them to recognize that lack of collective action had put them in a disadvantageous position. See Comment, Rights of Supervisory Employees to Collective Bargaining Under the National Labor Relations Act, 55 YALE L.J. 754, 754-56 (1946). Today's white collar and professional employees have problems similar to those of foremen during the 1940s. See note 41 supra; notes 134-35 supra and accompanying text.

For early articles discussing supervisors, see Cooper, The Status of Foremen as "Employees" Under the National Labor Relations Act, 15 FORDHAM L. REV. 191 (1946); Daykin, The Status of Supervisory Employees Under the National Labor Relations Act, 29 IOWA L. REV. 297 (1944); Petro, True Supervisory Status, 1 LAB. L.J. 754 (1950); Comment, supra.

215. Although the Board in Packard admitted that it had dismissed the petitions of independent and unaffiliated supervisory unions on the authority of Maryland Drydock, it stated in Packard that it had done so on the basis of potential, not actual dangers. 61 N.L.R.B. at 17.

216. Id. at 16.
217. Id. at 17.
218. Id. at 19.
that the supervisors at issue in Packard were employees within the meaning of section 2(3) and therefore entitled to the protections of the Act. They rejected the employer's argument that the supervisors came within the section 2(2) definition of employer on the ground that "[e]very employee, from the very fact of employment in the master's business, is required to act in his interest."221 The majority recognized that although the foremen acted on behalf of the employer, their interests were adverse "when it comes to fixing [their] own wages, hours, seniority rights or working conditions."222 Thus, the foremen's need for collective action in their own interests was consistent with, and sanctioned by, the Act. Deferring to the expertise of the Board,223 the majority also emphasized the large number of employees involved, distinguishing this large group of low-ranking supervisors from high-ranking corporate officials.224

Justice Douglas's dissent foreshadowed Congress's specific exclusion of supervisors in the Taft-Hartley Amendments enacted later that year.225 Justice Douglas refused to draw a distinction between corporate officials and lower level supervisors, arguing that foremen, as well as vice presidents, played a supervisory role within the enterprise.226 Thus, he speculated that if foremen were allowed to unionize, all supervisory personnel would have the same right.227 Justice Douglas took a strong ideological position regarding the proper organization of business entities and the relationships between its owners, managers, and workers. Once unionized, he observed, "management and labor will become more of a solid phalanx than separate factions in warring camps."228 Such an arrangement would be contrary to the adversarial relationship between workers and supervisors that Justice Douglas regarded as the proper organization of a business entity.229 If Congress had

221. 330 U.S. at 488-89.
222. Id. at 489.
223. Id. at 491-93.
224. 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 the board of directors.

Id. at 490 n.2.
227. Id.
228. Id.
229. Id.
meant to include all supervisory personnel within the definition of employees protected under the NLRA and to thereby bring about a major change in the operation of our business entities, Justice Douglas believed Congress would have made its intent clear.\textsuperscript{230}

The Supreme Court previously held that independent contractors were included within the Act's definition of employees. In \textit{NLRB v. Hearst Publications},\textsuperscript{231} the Court deferred to the Board's broad reading of the statutory term "employee" in finding that newspaper boys who sold newspapers at fixed spots were employees of the Hearst Publishing Company.\textsuperscript{232} In \textit{Hearst}, as in \textit{Packard}, both the Board and the Court looked to economic realities to determine if the individuals at issue were subject to the kind of "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers"\textsuperscript{233} that Congress sought to redress with its passage of the Wagner Act.

2. \textit{The Taft-Hartley Amendments}

Although the Congress that passed the Taft-Hartley Amendments in 1947 has been widely recognized as conservative and pro-management,\textsuperscript{234} the legislative process necessitates compromise. A comparison of the House\textsuperscript{235} and Senate\textsuperscript{236} bills as reported with the House\textsuperscript{237} and Senate\textsuperscript{238} bills as passed, reveals that the House was considerably more pro-management than the Senate. In the representation area, Congress was most concerned with legislatively overruling \textit{Hearst}\textsuperscript{239} and \textit{Packard}.\textsuperscript{240} The House bill excluded independent contrac-

\textsuperscript{230} \textit{Id.} at 495, 498.  
\textsuperscript{231} 322 U.S. 111 (1944).  
\textsuperscript{232} \textit{Id.} at 130.  
\textsuperscript{234} \textit{See} Cox, \textit{supra} note 107, at 44-49 (pt.1), 314-15 (pt.2).  
\textsuperscript{236} S. 1126, 80th Cong., 1st Sess. (1947), \textit{reprinted in} Legislative History, \textit{supra} note 235, at 99.  
\textsuperscript{237} H.R. 3020, 80th Cong., 1st Sess. (1947), \textit{reprinted in} Legislative History, \textit{supra} note 235, at 159.  
\textsuperscript{240} \textit{Id.} at 13, \textit{reprinted in Legislative History} at 304; S. Rep. No. 105, 80th
tors, and both the House and Senate bills excluded supervisors from the definition of employee. However, the two bills differed drastically in their definitions of excluded supervisors. The Senate bill contained the definition of supervisor that was finally enacted and remains the law today. In the 1947 Taft-Hartley Amendments the supervisor excluded from the definition of covered employees in section 2(3) is defined in section 2(11) as

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 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.

The House bill contained similar language but included two additional sections, which excluded from the coverage of the

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244. Id. § 2(11), reprinted in LEGISLATIVE HISTORY, supra note 235, at 232.
246. The term "supervisor" means any individual—
   (A) who has authority, in the interest of the employer—
      (i) to hire, transfer, suspend, lay off, recall, promote, demote, discharge, assign, reward, or discipline any individuals employed by the employer, or to adjust their grievances, or to effectively recommend any such action; or
      (ii) to determine, or make effective recommendations with respect to, the amount of wages earned by any individuals employed by the employer, or to apply, or to make effective recommendations with respect to the application of, the factors upon the basis of which the wages of any individuals employed by the employer are determined, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the exercise of independent judgment.
247. The House bill also defined a supervisor as any individual
   (B) who is employed in labor relations, personnel, employment police, or time-study matters or in connection with claims matters of employees against employers, or who is employed to act in other respects for the employer in dealing with other individuals employed by the employer, or who is employed to secure and furnish to the employer information to be used by the employer in connection with any of the foregoing; or
   (C) who by the nature of his duties is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer.
Act broad categories of employees, such as guards, time-study persons, personnel employees, and persons other than those engaged in labor relations who possessed confidential information. The House report explained the exclusion of foremen and discussed the extensive exclusions of other employees in the House bill.

The Conference Committee rejected the House bill's expansive definition of excluded supervisors in favor of the Senate bill's more limited definition. To understand the degree of rejection the House proposals met it is important to note the section of the Conference Report discussing supervisors.

Both the House bill and the Senate amendment excluded supervisors from the individuals who are to be considered employees for the purposes of the act. The House bill defined as "supervisors", however, certain categories of employees who were not treated as supervisors

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Act broad categories of employees, such as guards, time-study persons, personnel employees, and persons other than those engaged in labor relations who possessed confidential information. The House report explained the exclusion of foremen and discussed the extensive exclusions of other employees in the House bill.

The Conference Committee rejected the House bill's expansive definition of excluded supervisors in favor of the Senate bill's more limited definition. To understand the degree of rejection the House proposals met it is important to note the section of the Conference Report discussing supervisors.

Both the House bill and the Senate amendment excluded supervisors from the individuals who are to be considered employees for the purposes of the act. The House bill defined as "supervisors", however, certain categories of employees who were not treated as supervisors
under the Senate amendment. These were generally (A) certain personnel who fix the amount of wages earned by other employees . . ., (B) labor relations personnel, police, and claims personnel, and (C) confidential employees. The Senate amendment confined the definition of "supervisor" to individuals generally regarded as foremen and persons of like or higher rank.

The conference agreement, in the definition of "supervisor," limits such term to those individuals treated as supervisors under the Senate amendment. In the case of persons working in the labor relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the act. This is the prevailing Board practice with respect to such people as confidential secretaries as well, and it was not the intention of the conference to alter this practice in any respect.250

The Report notes, however, that some employees might qualify for inclusion in separate bargaining units under the provisions of the Senate bill dealing with professional employees.251

Thus, the 1947 Congress, by specifically excluding independent contractors from the section 2(3) definition of employee, legislatively overruled Hearst. By specifically excluding supervisors from the section 2(3) definition, Congress overruled Packard. The NLRB had been responsive in these decisions to the economic realities of employees. Congress, however, reinforced the traditional hierarchical, pyramidal structure of economic entities by excluding supervisors, and further limited access to collective action by excluding independent contractors.252 Congress chose to affirm as to these two groups of workers a view of the economy that was less valid in 1947 than in 1935, and which is invalid today. Significantly, however, the legislative history never mentions managerial employees and contains only five references to confidential employees.253

The same 1947 Congress that specifically excluded supervisors specifically included professional employees. In adopting

251. Id.
252. Archibald Cox called the exclusion of foreman and other supervisors in the 1947 Taft-Hartley Amendments "[t]he [Act's] most important limitation." Cox, supra note 107, at 4. He stated:
   If top management has learned from its recent experience that the foreman's problems are its own, and accords foremen a status and measure of individual dignity commensurate with the functions that it theoretically assigns them, there should be little occasion to seek recognition and bargaining rights by economic strength.
   Id. at 5.
253. See notes 337-40 infra and accompanying text.
the Senate's definition of a "professional employee," Congress legitimized under the Act their coarchical, collegial mode of operation. Section 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

(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).

Furthermore, recognizing the professional employees' unique community of interest, Congress in section 9(b)(1) gave them the right to a separate bargaining unit. Thus, the generally conservative 1947 Congress not only allowed professionals to organize, but also recognized that they "exercise[d] discretion and judgment" in their work and supervised others in their professional capacity.

The similar definitions of excluded supervisors and included professionals has created the inevitable tension of ap-
parent inconsistency in the scope of the Act’s coverage. Excluded supervisors, by definition, are those who have authority “not of a merely routine or clerical nature, but requir[ing] the use of independent judgment” to “responsibly . . . direct” other employees. Included professionals, by definition, “engag[e] in work . . . intellectual and varied in character as opposed to routine[,] . . . involving the consistent exercise of discretion and judgment.” Under section 2(12)(b), professionals “superv[ise]” those “performing related work . . . to qualify . . . to become a professional.” The major representational issue involving professional employees is whether they are included professionals or excluded by either the specific statutory exclusion of supervisors or the nonstatutory exclusion of managers.

Congress apparently gave little thought to the Act’s conflicting definitions as they apply to professional employees. Although Congress specifically included professional employees within the coverage of the Act and granted them their own bargaining units in recognition of their unique common interests, the NLRA itself is based on a hierarchical, bureaucratic model of traditional industrial organizations. The collegial, communal method of operation used by professional employees, however, presents problems when the Board and the courts attempt to apply the Act to professional employees’ representation efforts. Similar problems emerge in cases involving professional employees’ attempts at collective bargaining.

The major problems in the collective bargaining area involve the definition of mandatory subjects of bargaining. Although Congress granted professionals the right to a separate bargaining unit, when boards and courts have examined subjects of bargaining, they have declared that many professional issues are nonmandatory. Under an industrial model, professionals’ traditional concerns fall under the heading of management prerogatives.

260. See note 347 infra.
267. See note 272 infra and accompanying text.
Under the NLRA an employer must bargain about "wages, hours, and other terms and conditions of employment." The Act has been interpreted to impose no duty to bargain about nonmandatory subjects—subjects not directly related to wages, hours, and terms and conditions of employment. The closing of one factory in a multi-factory operation normally would not be a mandatory subject of bargaining although it is difficult to see how the complete elimination of jobs would not be directly related to wages, hours, and terms and conditions of employment. Questions of direct or indirect relationship may, however, merely camouflage the actual issue: preservation of the traditional model of the enterprise. Under the traditional model, whether an enterprise will exist at all, the form in which it will exist, and what it will manufacture are the sole prerogatives of the stockholders through their representatives on the board of directors and management, not the concern of the employees. Given the primary interests of professional employees, they would seek to expand the definition of mandatory subjects of bargaining beyond that developed in the traditional industrial context. Because these bargaining concepts are novel, however, there is a reluctance to allow even the possibility of such bargaining. The easiest way to avoid problems involving subjects of bargaining is to prevent groups interested in


271. An uneasy compromise has been reached regarding the notion of "impact bargaining." Although employees may not have the right to bargain about a basic decision itself, they do have the right to bargain about the impact of such a decision on their wages, hours, and terms and condition of employment. In reality, impact bargaining may be expanded to include the basic decision itself.

In European countries, labor has an important voice in such issues. This is accomplished through a system of "company laws" providing for employee representation on supervisory boards dealing with basic issues involving the economic entity. See notes 90-94 supra and accompanying text. The latest American management techniques advocate involving rank and file workers, not merely professionals, in this type of basic decision. See notes 66-86 supra and accompanying text.

such expansive issues from coming within the scope of the labor laws at the representation stage.

B. THE ROLES OF THE NLRB AND THE COURTS

The NLRA provides the standard for judicial review of NLRB determinations. The Act states that "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be . . . conclusive."273 The Supreme Court interpreted this standard to require a very high degree of deference to NLRB findings of fact,274 but the Act sets no specific standard for reviewing questions of law. Although it is hard to envision pure questions of fact as opposed to pure questions of law, the courts exhibit greater deference to Board decisions characterized as factual, as opposed to legal.275 Regarding legal issues,276 the Supreme Court has stated that NLRB rules may be judicially reviewed only "for consistency with the Act, and for rationality."277 Such a standard is sensible when courts are reviewing a Board interpretation of the NLRA. Since the Board is the specialized agency charged with the administration of the Act, it constantly deals with the interpretation of that statute in the context of the realities of the American workplace. As the Court noted, "[i]t is the Board on which Congress conferred the authority to de-

275. Frequently, courts determine that a statement is factual or legal as a justification for the greater or lesser vigor they use to review Board decisions.
R. GORMAN, supra note 193, at 13.
276. Some authorities have stated:
One may question how much actually turns on formal distinctions between questions of law, questions of fact, and mixed questions of law and fact. . . . The degree of deference accorded by the courts has not seemed to turn necessarily on any formal definition regarding the nature of the question involved. Instead, though it is difficult to generalize on the question, courts have tended to assume greater responsibility in passing upon issues of law where (1) they require a weighing of other statutes or policies not confined to the special jurisdiction of the Board; (2) they involve common-law or constitutional considerations rather than "technical" matters requiring administrative expertise; (3) they involve controversial questions which demand the prestige of judicial resolution; or (4) they require the interpretation of statutory language in the light of legislative history rather than specialized judgments of a kind which the agency is peculiarly qualified to make.
velop and apply fundamental national labor policy."\textsuperscript{278}

In addition, the organization of the NLRA clearly indicates that limited review of Board decisions regarding representation issues, such as the status of a particular type of employee, is required. No direct review of a Board decision exists in such cases since the Board’s determination is not a “final order.”\textsuperscript{279} An employer may contest a representation decision in court only by refusing to bargain, thereby creating an unfair labor practice.\textsuperscript{280} Because the statute specifically provides for very limited review of representation issues, the standard of judicial review in an unfair labor case based on a representation issue should be even narrower than the limited review normally allowed.\textsuperscript{281}

In formulating labor policy, the Board can proceed by either case-by-case adjudication or by administrative rulemaking.\textsuperscript{282} The Board’s decision to proceed by adjudication in the university cases may be due to Congress’s failure to consider the status of university professors under the NLRA. Neither the 1935 nor the 1947 Congress was concerned about the application of the NLRA to university professors,\textsuperscript{283} because of the widely held belief that nonprofit institutions, such as hospitals and colleges and universities, were small, local charitable institutions that would rarely come within the reach of the Commerce Clause. The 1947 House bill would have excluded all such nonprofit organizations from the definition of employer,\textsuperscript{284} but on this issue also the more conservative House lost. The Conference Committee agreed to exclude only nonprofit hospitals.\textsuperscript{285}

\begin{itemize}
    \item \textsuperscript{278} Beth Israel Hosp. v. NLRB, 437 U.S. 493, 500 (1978).
    \item \textsuperscript{279} Under subsections 10(e) and (f) only “final orders” may be appealed. Labor Management Relations (Taft-Hartley) Act § 10(e) & (f), 29 U.S.C. § 160(e) & (f) (1976). In Leedom v. Kyne, 358 U.S. 184 (1958), the Supreme Court did allow limited district court review under 28 U.S.C. § 1337 (1976), in cases where the Board’s decision was ultra vires.
    \item \textsuperscript{280} Unless a union comes within the very limited Leedom v. Kyne exception, there is no way for it to appeal an adverse decision in a representation case. See note 149 supra.
    \item \textsuperscript{282} See R. Gorman, supra note 193, at 15-18.
    \item \textsuperscript{283} See Grenig, The Implications of NLRB v. Yeshiva University, 9 J.L. & Ed. 479, 483 n.17 (1980).
    \item \textsuperscript{284} H.R. 3020, 80th Cong., 1st Sess. § 2(2) (1947), reprinted in LEGISLATIVE HISTORY, supra note 235, at 160-61.
\end{itemize}
When the Board was first faced with a representation petition from nonprofit professional employees in *Trustees of Columbia University* in 1951, it refused to exercise its jurisdiction. The legislators and courts, however, could not continue to ignore education's growth as a major industry. In 1966, Congress amended the Fair Labor Standards Act to bring nonprofit private universities within its coverage. In 1968 the Supreme Court recognized in *Maryland v. Wirtz* that schools affect commerce. Finally, in 1970, the Board in *Cornell University* overruled *Columbia* and asserted jurisdiction over private colleges and universities. Later that same year, the Board outlined by rulemaking the minimal characteristics that would cause it to take jurisdiction over an individual school. The next year, in *C.W. Post Center of Long Island University*, the Board, for the first time, established a unit of college professors which included all full-time and part-time faculty but excluded deans and department chairs.

Notwithstanding the deferential standard of review, the courts have resisted the Board’s holding that college and university professors are covered employees. *Yeshiva* is the latest example of a pattern of criticism by the courts and the commentators regarding the Board’s use of an ad hoc adjudicative approach and its failure to rationalize its decisions.

In defense of the Board, the Supreme Court has recognized that “[t]he responsibility to adapt the Act to changing patterns
of industrial life is entrusted to the Board." Because of the novelty of faculty unionization and the unusual nature of the professional employees involved, it made sense for the Board to proceed on a case-by-case basis, developing parameters as it came to understand the nature of the employees and their employment relationship. For these reasons, one commentator has recently suggested that it is preferable for the Board to proceed through adjudication rather than rulemaking. If it proceeds by adjudication, however, the Board should, as it learns more about a new field, carefully explain the rationale for its decisions. Although the Board developed through case adjudication a consistent and rationally explained position in professional unionization cases, it did not spell out that position in any one university case. For this, the Board can be faulted.

Nevertheless, the Board's decisions reveal a preference for including employees within the coverage and protections of the Act. Although the courts and Congress have not always agreed, the Board has found newspaper boys, lower level supervisors, buyers and university professors within the definition of covered employees. In Hendricks County Rural Electric Membership Corp. v. NLRB, the Board reaffirmed its limitation of the definition of confidential employees to those who "assist and act in a confidential capacity to persons who formulate..."
late, determine, and effectuate management policies in the field of labor relations. In each of these cases, the Board extended the Act's coverage to redress the workplace disabilities which the NLRA sought to remedy.

V. THE PROFESSIONAL CASES

A. NLRB v. BELL AEROSPACE CO.—MANAGERIAL EMPLOYEES

_NLRB v. Bell Aerospace Co._ laid the foundation for the Supreme Court's _Yeshiva_ opinion. Justice Powell authored both majority opinions and both cases were decided by five-to-four votes. Justice Powell's opinions in both cases reveal a strong, traditional view of the proper organization of an economic entity and the appropriate relationship between labor and management. In _Bell Aerospace_, the Court held that all managerial employees were excluded from the coverage of the NLRA. The opinion is noteworthy because it contains the seeds for the exclusion of virtually all professional and white-collar employees through expansive definitions and applications of the managerial and confidential employees exceptions. A careful examination of _Bell Aerospace_ is therefore essential to the understanding of _Yeshiva_.

Because neither the Act nor its legislative history refers to managerial employees, Justice Powell based his decision on three other factors: longstanding agency interpretations of the statute, congressional reenactment of the Act without pertinent change, and subsequent legislation declaring the congressional intent. Justice Powell's analysis omitted, however, the cardi-

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305. 444 U.S. 672 (1980). Justice Powell's majority opinion was joined by Chief Justice Burger and Justices Stewart, Stevens, and Rehnquist. Justice Brennan's dissenting opinion was joined by Justices White, Marshall, and Blackmun.
306. 416 U.S. at 289-90.
307. See note 253 __supra__ and accompanying text.
308. 416 U.S. at 274-75. Justice Powell's analysis is undermined by his failure to distinguish between holding and dictum in the cases he cites in support of his arguments. Justice Powell cites the Board's holdings that managers do not belong in, and are therefore excluded from, rank and file units in support of his assertion that managers cannot unionize because they are excluded from the NLRA. Justice Powell does agree, however, that prior to the Taft-Hartley Amendment in 1947, all of the Board's decisions on managerial employees dealt only with their exclusion from rank and file units. See 416 U.S. at 282 n.14.
nal rule of statutory construction—reference to the words of the statute itself. As Justice White's dissent observed, the Act by definition applies to any employee. Where Congress intended to exclude certain classes of employees, such as supervisors, from the Act's coverage, it did so in an enumerated exception to the statutory definition. Relying on accepted principles of statutory construction, Justice White correctly argued that because neither the Act nor its legislative history contains any language to the contrary, Congress did not intend to exclude managerial employees from the Act's coverage.

The Court should therefore have deferred to Congress's implicit inclusion of managerial employees within the statutory definition. Moreover, Justice Powell's three factors supporting the exclusion of managerial employees are not persuasive. First, the Board's relevant decisions regarding managerial employees do not represent a longstanding administrative interpretation requiring exclusion. Justice Powell acknowledged that until the passage of the 1947 Taft-Hartley Amendments all of the Board's decisions on managerial employees dealt only with the issue of whether they should be excluded from rank and file units. The Board never stated prior to the Taft-Hartley Amendments that managers were not entitled to the protection of the Act in an appropriate unit. Since 1947, the Board has held in only two cases—American Locomotive Co. and Swift & Co.—that managerial employees were not entitled to the protections of the Act. Swift was overruled by the Board in 1970 in North Arkansas Electric Cooperative, Inc. There the NLRB noted that "the 'managerial employee' category is Board

311. The maxim expressio unius est exclusio alterius "operates as a double negative to produce the opposite of its usual exclusionary effect in the case of exceptions, provisos, saving clauses or other negative provisions. The enumeration of exclusions from the operation of a statute indicates that it should apply to all cases not specifically excluded." 2A C. Sands, supra note 309, at § 47.23.
312. 416 U.S. at 304.
313. Id. at 275-77. For a list of the cases relied on by Justice Powell, see notes 202-03 supra and accompanying text.
315. 115 N.L.R.B. 752, 753-54 (1956) (procurement drivers).
Other post-1947 cases cited by Powell, 416 U.S. at 285-87, held that the employees at issue were not managers or were managers and therefore excluded from rank and file units. Compare Justice Powell's analysis of these cases, id., with that of Justice White, id. at 308-10.
created, not established by the Act."317 This decision limited
the managerial exclusion to cases where there was "an incon-
sistency or conflict of interest between [the employee's] per-
formance of his job and the implementation of his right to
engage in or refrain from engaging in concerted activity."318
From 1970 until the decision in Bell Aerospace the Board did
not qualify its North Arkansas holding that, with a limited ex-
ception, managerial employees were entitled to coverage.
Thus, the requirements of Justice Powell's first factor were not
satisfied, and the Court should have deferred to the Board's
interpretation.319

Justice Powell's second factor, congressional reenactment
without change, is normally entitled to little weight in statutory
interpretation.320 Among the many reasons for congressional
inaction are the political difficulties associated with attempts to
amend the NLRA.321 In addition, Justice Powell does not
clearly indicate which reenactment he is discussing. In 1947,
Congress specifically excluded only supervisors.322 The 1959
Labor Management and Reporting Act "dealt with secondary
boycotts and picketing, and . . . nothing suggest[ed] that the
attention of Congress at that time was directed to or focused on
the question whether managerial employees were covered or
excluded in the statute."323 In 1974, the Health Care Amend-
ments deleted the exclusion of private nonprofit hospitals from
the section 2(2) definition of employer and added sections re-
lating to nonprofit hospitals. Actually, the legislative history of
the 1974 Health Care Amendments indicates that Congress ac-
cepted the Board's inclusion of professional employees.324

Finally, Justice Powell used Taft-Hartley's exclusion of su-
ervisors to document a legislative intent to exclude manage-
rial employees.325 As previously demonstrated,326 however, the
Conference Committee intentionally narrowed the definition of
supervisor to avoid this result. Justice Powell consistently mis-
used the legislative history of the 1947 Taft-Hartley Amend-
ments. Although the 1947 Congress was generally conservative,

317. Id. at 550.
318. Id. at 551.
319. See notes 273-81 supra and accompanying text.
320. 2A C. SANDS, supra note 309, at § 49.10.
321. Note, supra note 296, at 987-89.
322. See note 245 supra and accompanying text.
323. 416 U.S. at 310 (White, J., dissenting in part).
324. See note 387 infra and accompanying text.
325. 416 U.S. at 279-83.
326. See notes 250-51 supra and accompanying text.
the House was clearly more pro-management than the Senate. The House bill would have excluded under the definition of supervisor several categories of employees not excluded under the Senate bill. In conference, the House version was rejected, and the carefully tailored Senate definition of an excluded supervisor was enacted. Nonetheless, Justice Powell relies almost totally on the House bill, which was not enacted, and the House report supporting the bill which was not enacted. To support his economic views, Justice Powell cited extensively from Justice Douglas's dissenting opinion regarding supervisors in the Packard case. Congress, however, considered that opinion when it enacted the specific exclusion of supervisors.

Justice Powell cited the House's definition of confidential employees, rejected in conference, in support of his own non-statutory definition excluding all managerial employees. Under the House definition, all employees privy to any nonpublic information "of a confidential nature" would have been excluded from the Act. Prior Board decisions, however, did not support the exclusion of confidential employees who had access to information unrelated to the employer's labor relations policies. In Ford Motor Co., the Board clearly explained its prior decisions and narrowed its definition of confidential employee even within the category of those with access to labor relations information. Justice Powell misread the Board's decisions and the intent of Congress when he stated:

In 1946 in Ford Motor Co., . . . the Board had narrowed its definition of "confidential employees" to embrace only those who exercised "managerial functions in the field of labor relations." The discussion of "confidential employees" in both the House and Conference Committee

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327. See id.
328. 416 U.S. at 279-84.
329. Id. at 278-79.
330. Id. at 283 n.12.
332. See note 197 supra.
333. We have also excluded from units of rank and file employees persons who, in the regular course of their duties, have access to confidential data bearing directly upon the employees' labor relations, designating them as "confidential." However, upon reappraisal, we are of the opinion that this definition is too inclusive and needlessly precludes many employees from bargaining collectively together with other workers having common interests. Consequently, it is our intention to limit the term "confidential" so as to embrace only those employees who assist and act in a confidential capacity to persons who exercise "managerial" functions in the field of labor relations.
Reports, however, unmistakably refers to that term as defined in the House bill, which was not limited just to those in "labor relations." Thus, although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover "confidential employees" even under a broad definition of that term.\footnote{334}

Justice Powell's characterization of these authorities is disingenuous. His citation to Board decisions excluding managerial employees from rank and file units\footnote{335} demonstrates his awareness of the Board's requirement of a labor relations nexus for exclusion of confidential employees.\footnote{336} Justice Powell's reliance on the House Report is similarly misplaced. There are five references in the legislative history of the Taft-Hartley Amendments to "confidential employee": one in the House bill as reported,\footnote{337} one in the House bill as passed,\footnote{338} two in the House Report,\footnote{339} and one in the Conference Report.\footnote{340} The Conference Report is the only source which deals with the legislation actually enacted.\footnote{341} Justice Powell, however, adopted the House bill's discarded definition. Thus, by misreading the legislative history of the Taft-Hartley Amendments and misstating prior Board decisions, Justice Powell justified the exclusion of all managerial employees and laid the groundwork for the exclusion of large groups of white-collar employees. Most professionals have confidential information about clients that is "not available to the public, to competitors, or to employees generally."\footnote{342} Many, if not most, secretaries, an underpaid and largely unrepresented group, also have ac-

\footnote{334}{416 U.S. at 1283 n.12 (citation omitted).}
\footnote{335}{Id. at 276.}
\footnote{336}{Id. at 276.}
\footnote{337}{In Hudson Motor Car Co., 55 N.L.R.B. 509 (1944), the Board said:
Although it appears that the work of the employees hereinabove discussed has its confidential aspects, it is not concerned with labor relations. The possession of information which the Company regards as secret, however, is not of itself sufficient to justify depriving these employees of the right to collective bargaining. We shall, in accordance with our usual practice, include these employees within the unit. Id. at 511. Accord, Barrett Division, Allied Chem. & Dye Corp., 65 N.L.R.B. 903, 905 (1946).}
\footnote{338}{H.R. 3020, 80th Cong., 1st Sess. § 2(12)(c) (1947), reprinted in Legislative History, supra note 235, at 41. See note 247 supra for exact language.}
\footnote{339}{H.R. 3020, 80th Cong. § 2(12)(c), 1st Sess. (1947), reprinted in Legislative History, supra note 235, at 168. The language in the House bill as reported and as passed is the same. See note 247 supra.}
\footnote{341}{See note 250-51 supra and accompanying text.}
\footnote{342}{416 U.S. at 283 n.12.}
cess to such information.\textsuperscript{343}

The Supreme Court recently rejected Justice Powell's dictum in \textit{NLRB v. Hendricks County Rural Electric Membership Corporation}.\textsuperscript{344} Writing for the majority, Justice Brennan stated that the \textit{Bell Aerospace} footnote was "error . . . in light . . . of the legislative history of the Taft-Hartley Act."\textsuperscript{345} Justice Brennan noted that "the Taft-Hartley Act's express inclusion of 'professional employees' under the Act's coverage negates any reading of the legislative history as excluding confidential employees generally from the definition of employee in § 2(3)."\textsuperscript{346} The decision removes an obstacle that had presented substantial problems to professional organization under the Act.

B. THE "INDEPENDENT PROFESSIONAL JUDGMENT" TEST

1. Derivation of the Test

During the last two decades the Board dealt with large numbers of representation petitions from employed professionals. Consequently, it faced the tension\textsuperscript{347} created by the Taft-

\textsuperscript{343} For discussions of attempts of secretaries to organize, see Women's Group Set to Organize Office Workers, N.Y. Times, Mar. 4, 1981, § A, at 12, col. 1, Groups Seek to End Wage Lag of Women, N.Y. Times, May 4, 1980, § 1, at 28, col. 1. See also note 7 supra.

\textsuperscript{344} 102 S. Ct. 216 (1981). The NLRB has, since the 1946 \textit{Ford Motor Co.} decision, consistently defined "confidential employees" as those who "assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations." Ford Motor Co., 66 N.L.R.B. at 1322. See also B.F. Goodrich Co., 115 N.L.R.B. 722, 724 (1956). Other circuit courts reviewing the Board's definition have accepted it. See Union Oil Co. of Calif. Inc. v. NLRB, 607 F.2d 852 (9th Cir. 1979); NLRB v. Allied Prods. Corp., Richard Bros. Div., 548 F.2d 644 (6th Cir. 1977). Nevertheless, the Seventh Circuit, relying on Justice Powell's dictum in \textit{Bell Aerospace}, had used the wording of discarded H.R. 3020 to give a broad construction of "confidential employees." Hendricks County Rural Elec. Membership Corp. v. NLRB, 603 F.2d 25, 30 (7th Cir. 1979) rev'd, 102 S. Ct. 216 (1981).

\textsuperscript{345} 102 S. Ct. at 227.

\textsuperscript{346} Id. at 225.

\textsuperscript{347} This tension was noted in both the majority and dissenting opinions in \textit{Yeshiva}. Justice Powell in his majority opinion stated: "There may be some tension between the Act's exclusion of managerial employees and its inclusion of professionals, since most professionals in managerial positions continue to draw on their special skills and training." 444 U.S. at 686.

Justice Brennan in his dissent noted:

Indeed, the statute evidences significant tension as to congressional intent in this respect by its explicit inclusion, on the one hand, of "professional employees" under § 2(12), 29 U.S.C. § 152(12), and its exclusion, on the other, of "supervisors" under § 2(11), 29 U.S.C. § 152(11). Similarly, when transplanted to the academic arena, the Act's extension of coverage to professionals under § 2(12) cannot easily be squared with the Board-created exclusion of "managerial employees" in the industrial context.
Hartley Amendments' specific inclusion of professional employees\textsuperscript{348} and specific exclusion of supervisors.\textsuperscript{349} Both the section 2(11) definition of excluded supervisors and the section 2(12) definition of included professionals use the term "judgment". Excluded supervisors use "independent judgment";\textsuperscript{350} included professionals "consistent[ly] exercise . . . discretion and judgment."\textsuperscript{351} The tension between these two sections of the statute, however, is minor when compared with the tension between the statutory definition of a professional as an "employee engaged in work . . . predominantly intellectual and varied in character as opposed to routine mental . . . work . . . [and] involving the consistent exercise of discretion and judgment in its performance,"\textsuperscript{352} and the nonstatutory exclusion of managerial employees, defined as "those who formulate and effectuate management policies . . . and who have discretion in the performance of their jobs independent of their employer's established policy."\textsuperscript{353}

The Board, using basic concepts of statutory construction,\textsuperscript{354} sought to reconcile the specific statutory inclusion of professionals with the specific statutory exclusion of supervisors and the nonstatutory exclusion of managers. Unless interpreted carefully to effectuate the Act's purposes\textsuperscript{355} and to recognize Congress's express intent to include professionals, the exclusions could deprive all or almost all professional employees of the Act's protections.\textsuperscript{356} The Board resolved the tensions by recognizing, in both the university cases\textsuperscript{357} and other

\begin{footnotes}
\footnotetext[348]{444 U.S. at 692 (Brennan, J., dissenting).}
\footnotetext[353]{352. \textit{Id.}}
\footnotetext[355]{354. "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section should not destroy another unless the provision is the result of obvious mistake or error." 2A C. \textsc{sands}, \textit{supra} note 309, at \$ 46.06.}
\footnotetext[356]{355. \textit{See} notes 183-84 \textit{supra} and accompanying text.}
\footnotetext[357]{356. \textit{See Managerial Employee, supra} note 118, at 439.}
\footnotetext[357]{357. Northeastern Univ., 218 N.L.R.B. 247 (1975); University of Miami, 213 N.L.R.B. 634 (1974).}
\end{footnotes}
cases involving professional employees, that such employees normally operate under dual authority structures: a hierarchical, bureaucratic management structure and a coarchical, professional structure. The Board’s specific solution to the problem was the independent professional-judgment test, which provides that employees exercising their independent professional judgment are not excluded supervisors.

The Board developed three arguments supporting its determination that faculty members were neither supervisors nor managers: “(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 rests with the board of trustees.” All three justifications help to reconcile the tension inherent in the statutory inclusion of professionals, the statutory exclusion of supervisors, and the nonstatutory exclusion of managers. Moreover, the Board’s interpretation, developed over years of dealing with professional units, is consistent with the wording of the supervisory exclusion and the reality of dual authority structures. The statutory definition of supervisor includes “any individual.” On its face, and consistent with the coarchical, collegial methods of professionals, this definition would not include professional group decision making and recommendations because such activities are conducted collectively, not individually. Furthermore, the definition requires the exercise of authority “in the interest of the employer.” Professional judgment is concerned primarily with quality, not quantity or costs. Professionals exercise authority in the interest of quality, which may not always be the employer’s primary interest. Finally, under the dual authority systems existing for many employed professionals, the collective authority they wield is subject to final managerial authority exercised in the interest of the employer.


359. 444 U.S. at 685 (citing Northeastern Univ., 218 N.L.R.B. 247, 250 (1975); University of Miami, 213 N.L.R.B. 634, 634 (1974)). This was the rationale the Board used to decide Yeshiva. 221 N.L.R.B. at 1054.


362. Id.

363. In Yeshiva, Justice Powell claimed that “the Board’s lawyers have abandoned the first and third branches of this analysis, which in any event were flatly inconsistent with its precedents, and have transformed the second into a theory [the “independent professional judgment” test] that does not ap-
2. Application of the Test

The Board was first presented with a representation petition requesting a unit of university professors in the 1971 case of C.W. Post Center of Long Island University. The employer argued for the exclusion of all faculty members from the Act on the ground that they were all supervisors or managers. Thus, the Board dealt with the tension created by the specific statutory inclusion of professionals and the specific statutory exclusion of supervisors and the nonstatutory category of managers. The Board rejected the employer’s contention because faculty members who effectively recommend action on matters which the Board would normally consider to be managerial did not exercise their authority individually but rather collectively.365

Acknowledging that it was dealing with an employment relationship largely outside its prior experience, the Board observed that “the policymaking and quasi-supervisory authority which adheres to full-time faculty status but is exercised by them only as a group does not make them supervisors within the meaning of Section 2(11) of the Act, or managerial employees who must be separately represented.”366 The Board did exclude deans and department chairpersons because they individually had supervisory authority.367 In later cases, the Board continued to demonstrate a sophisticated understanding of the problems raised by the application of the NLRA to the coarchial, collegial structure of professional relationships in a university setting as opposed to its application to the hierarchi-

365. Id. at 905.
366. Id.
367. Id. at 906. Board decisions regarding chairpersons have varied depending on the degree of individual authority they possessed. See, e.g., Trustees of Boston Univ., 235 N.L.R.B. 1233 (1978), enforced, 575 F.2d 301 (1st Cir. 1978), cert. granted, judgment vacated, case remanded for further consideration in light of Yeshiva, 445 U.S. 912 (1980). See notes 385-98 infra and accompanying text.
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The professional and bureaucratic structure of the traditional pyramidal industrial setting. Thus, when the Board decided the Yeshiva case in 1975, it was fully familiar with the workings of universities and the relationship between the rank and file employees of the higher education industry, the professors, and their employer.

Like university professors, professional engineers work under dual authority structures, one hierarchical and bureaucratic and the other coarchical and collegial. The Board has consistently found that engineers holding positions in the hierarchical, bureaucratic structure are supervisors or managers, but those in the coarchical, collegial professional structure are not unless they individually exercise supervisory or managerial authority. At issue in Westinghouse Electric Corp. was the status of six manufacturing engineers who determined whether and at what cost a product could be manufactured, and then oversaw its production. Although they had no authority to change or stop operations, they could recommend changes. The Board refused to preclude the manufacturing engineers from organizing in a professional unit, reasoning that the engineers' advisory duties were common to all professional employees. The Board indicated that only an extraordinary alliance

368. In Adelphi Univ., 195 N.L.R.B. 639 (1972), the Board recognized and gave effect to collegial principles despite its statement that "[b]ecause authority vested in one's peers, acting as a group, simply would not conform to the pattern for which the supervisory exclusion of our Act was designed, a genuine system of collegiality would tend to confound us." Id. at 648. In its decision in New York Univ., 205 N.L.R.B. 4 (1973), the next year, it explained, "Adelphi does not imply that the exercise of true collegial authority would divest a faculty of coverage by the Act . . . . That decision merely noted that certain difficulties might be attendant upon applying the Act to a true collegial system." Id. at 5.

369. 221 N.L.R.B. 1053 (1975).
371. See notes 377-87 infra and accompanying text.
373. Id. at 338.
374. The Board stated:

While manufacturing engineers make recommendations on matters which are of great importance to management, that factor is usually present in the work of all professional employees, and does not in and of itself make them part of management so as to preclude their inclusion in a professional unit. Indeed, this common factor, in our opinion, was one of the reasons why Congress specifically provided for the establishment of separate professional units. To justify the exclusion of individuals otherwise qualified for inclusion in a professional unit upon the ground that they are too closely allied to the employer to be regarded as employees under the Act, we believe that it must be established that the individuals in question have interests and duties not shared by the other professionally engaged employees.
with management would justify the exclusion of otherwise qualified professional employees from an appropriate bargaining unit. Later, the Board affirmed this rationale in a 1967 case involving the same employer.

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In a long and carefully drafted opinion, the Board again drew a distinction between professional and managerial or supervisory discretion and judgment. Despite the vast powers of the senior engineers who functioned as proposal managers, proposal team members, and project leaders, the Board found that they were neither managers nor supervisors. The employees were not managers since they did not create or implement management policies or "have discretion in their job performance independent of their Employer's established policy." The Board observed that their "[e]mployer's established policy [was] based on directional change rather than on status quo." Furthermore, the Board found they were not excludable as supervisors because the limited discretion they exercised was "directly related to a professional responsibility for the quality of work performed on the projects to which they [were] assigned. They merely [were] providing professional direction and coordination primarily for other professional employees." Recognizing the dual authority structures under which professionals operate, the Board concluded that the authority and discretion possessed by professionals and the direction which they provided was exercised in conformity with their independent professional judgment and not in a traditional managerial or supervisory sense.

Recent legislation indicates that Congress has granted its imprimatur to the independent professional judgment test. In 1974, Congress amended the NLRA to delete the nonprofit hospital exclusion from the Act. The Health Care Amendments brought the large number of professional employees in the health industry within the Act.

382. Id. at 857-58.
383. Id. at 858.
384. Id.
385. Id.
386. Id. at 858-59.
387. Congress was concerned that many professionals, however, would be excluded from the Act's coverage as supervisors on the basis of their professional supervision. Both houses recognized that the exercise of professional judgment is not the exercise of supervisory authority.

Various organizations representing health care professionals have urged an amendment to Section 2(11) of the Act so as to exclude such professionals from the definition of "supervisor". The Committee has studied this definition with particular reference to health care profes-
C. THE JUDICIAL RESPONSE TO FACULTY UNIONIZATION

1. The Courts of Appeals

Only three courts of appeals cases have discussed faculty unionization under the NLRA. The First Circuit in NLRB v. Wentworth Institute\(^3\)\(^8\) and Trustees of Boston University v. NLRB\(^3\)\(^9\) enforced the Board's orders. The Second Circuit in NLRB v. Yeshiva University\(^3\)\(^0\) did not.

In Wentworth, the Board, in keeping with its prior decisions, rejected the employer's contention that all faculty were supervisors or managers.\(^3\)\(^9\)\(^1\) Wentworth may have presented a unique fact situation because it did not seem to be a typical mature college.\(^3\)\(^9\)\(^2\) It operated a two-year engineering technology program at an “Institute” with about one hundred faculty members and a third and fourth year program leading to a B.S. degree at a smaller “College” with about fourteen full-time faculty members. All faculty were employed under one-year contracts. The First Circuit sustained the Board’s finding that the faculty were neither supervisors nor managers but stated that in the future it would “focus . . . upon each particular institution.”\(^3\)\(^9\)\(^3\) Nevertheless, the holding of Wentworth may be broader than it appears since the faculty participated in the institution’s governance through a faculty senate.\(^3\)\(^9\)\(^4\)

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\(^3\)\(^8\) NLRB v. Wentworth Institute, 515 F.2d 550 (1st Cir. 1975).

\(^3\)\(^9\)\(^1\) The term “mature” college was first used by Matthew Finkin, former Associate Counsel to AAUP, to describe college and universities with “dual-track” decisional systems. See Finkin, supra note 127, at 615.

\(^3\)\(^9\)\(^2\) Id. at 555.

\(^3\)\(^9\)\(^3\) Id. at 552.
In *Trustees of Boston University*, the employer claimed only department chairpersons should be excluded as supervisors or managers. The court, deferring to the expertise of the administrative agency, said, "the Board was entitled to find that the chairperson’s recommendations were not ‘effective’ or that he/she was acting in the ‘interest’ of the faculty, not of the employer." If the court was prepared to recognize an “independent professional judgment” rationale for the inclusion of chairpersons at a mature university, the same rationale would certainly be applicable to faculty members. In fact, the court clearly stated that “the selection process for department chairpersons is such that they represent the interests of the tenured professors of the department rather than the University.”

In 1974, the Yeshiva University Faculty Association filed a representation petition with the Board seeking an election in a unit composed of the full-time faculty members at ten of Yeshiva University’s thirteen schools. The University raised the basic argument, long thought settled, that all faculty members were supervisors or managers. The Board held hearings on the issue for five months, compiling an extensive record. In its opinion it cited its prior decisions on the issue, and dealt with the issue succinctly, stating that the role and authority of the faculty . . . with respect to hiring, promotion, salary increases, the granting of tenure, and other areas of govern-

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395. 575 F.2d at 302.
396. Id. at 305.
397. Id. at 306.
398. Id.
399. 444 U.S. at 674-75.
400. Id. at 696 n.5 (Brennan, J., dissenting). Both the opinion of the Second Circuit denying enforcement, 582 F.2d at 686, and the opinion of the Supreme Court affirming the Second Circuit, 444 U.S. at 691, extensively outlined the internal organization of Yeshiva University, citing facts indicating involvement by the faculty in the school’s administration and acceptance of the faculty’s recommendations. This was a one-sided reading of the voluminous record compiled by the Board. The Yeshiva University Faculty Association’s petition for certiorari outlined numerous instances where the administration acted contrary to the desires of the faculty. Benson, *To Bargain or Govern: The Impact of Yeshiva on Private and Public Sector Collective Bargaining in Higher Education*, 7 Ohio N.U.L. Rev. 259, 269 n.76 (1980). See also Brief for Intervenor-Petitioner at 24-26, NLRB v. Yeshiva Univ., 582 F.2d 686 (2d Cir. 1978). Yeshiva had no university senate. This was one indication that Yeshiva was not a “mature” university where the faculty had a substantial voice in governing the institution, 444 U.S. at 676.
ance are not significantly different from what they were in the cited cases, wherein the same arguments were rejected. At Yeshiva University, faculty participation in collegial decision making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than "in the interest of the employer," and final authority rests with the board of trustees. As in the earlier decisions, we find that the faculty members are professional employees under the Act who are entitled to vote for or against collective-bargaining representation.\(^{402}\)

The opinion of the Second Circuit, written by Judge Mulligan,\(^{402}\) granted little deference to the NLRB's role as fact-finder or its role as the administrative agency charged with the interpretation and implementation of the National Labor Relations Act.\(^{404}\) Noting "the tension between exclusion from the Act of supervisors under section 2(11) and the inclusion of professional employees under section 2(12),"\(^{405}\) and "conced[ing] that if read literally the statutory definition [of section 2(11)] can be construed not to cover the full-time faculty,"\(^{406}\) Judge Mulligan nevertheless concluded that "this Board interpretation is not the only reasonable reading of the language of section 2(11)."\(^{407}\)

Given normal standards of judicial deference to the decisions of an administrative agency, the especially high standards of deference due a Board decision in the representation area,\(^{408}\) and Congress's failure to consider the application of the Act in a university setting,\(^{409}\) one would have expected the court to defer to the Board's reasonable and literal resolution of the tension between the two sections. Judge Mulligan did not defer to the Board, however. Refusing to decide the case on the basis of the specific statutory exclusion of supervisors, in one short paragraph he ruled that faculty came under the

\(^{402}\) 221 N.L.R.B. at 1054 (footnotes omitted).
\(^{403}\) 582 F.2d at 688. William H. Mulligan was Dean of Fordham Law School from 1956 to 1971. Who's Who in America 2400 (41st ed. 1980). Thus, he was Dean in 1971 when the AAUP sought to unionize the faculty at Fordham. The Law School was excluded from the overall unit, but an independent union, the Law School Bargaining Committee, sought to represent a separate unit of full-time and regular part-time faculty of the Law School. Fordham Univ., 193 NLRB 134, 134 (1971). The Board approved both units and directed elections. Id. at 140. The university and Judge Mulligan as Dean of the Law School had opposed the petitions on the grounds that all faculty members were supervisors. Id. at 134.
\(^{404}\) See, e.g., 582 F.2d at 698-700.
\(^{405}\) Id. at 695 n.10.
\(^{406}\) Id. at 699.
\(^{407}\) Id.
\(^{408}\) See text accompanying notes 273-81 supra.
\(^{409}\) Judge Mulligan recognized that "[t]he history of section 2(11) indicates that such collective supervision simply was not actively considered by Congress at the time." 582 F.2d at 699.
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nonstatutory exclusion of managers. In support of his conclusion, he cited Bell Aerospace, and three inapposite Board decisions excluding employee-shareholders of corporations from bargaining units.

Judge Mulligan relied on an out of date view of the nature of a university and its relationship to its faculty. Rather than recognizing the size and impact of the education industry today and the changed circumstances of faculty within the university context, Judge Mulligan preferred to quote Justice Cardozo's 1925 opinion in Hamburger v. Cornell University. Cardozo stated: "By practice and tradition the members of the faculty are masters not servants . . . . They have the independence appropriate to a company of scholars." Whatever the relevance of Justice Cardozo's statement to the decision of the 1925 case, it would not be applicable if the same case arose today.

2. The Supreme Court—Yeshiva

Yeshiva was decided by a five-to-four vote of the Supreme Court, with Justice Powell writing the majority opinion and

410. We need not resolve this point, however, since there is no such "individual" statutory restriction in the Board's own concept of "managerial employees." In fact, in NLRB v. Bell Aerospace Co., Division of Textron, Inc., . . . the managerial personnel found not to be within the collective bargaining unit exercised their managerial functions as a "team." Logically, we see no reason that the fact that the policies of a company are created by a group (as indeed they usually are by the Board of Directors) rather than by an individual should be of significance in determining whether an individual has managerial status, and the Board has advanced no satisfactory rationale for the weight it has given this factor.

Id. at 699-700 (footnote and citations omitted).

411. Id. at 699. Bell Aerospace, however, did not discuss this point. The Supreme Court noted briefly that, among the other duties performed individually, the buyers at issue in Bell Aerospace also "serve[d] as team [chairmen] and sign[ed] the purchase order" for the company's Minute Man missile project. 416 U.S. at 270. It did not discuss the relevance of this observation anywhere in the opinion.


413. 582 F.2d at 698 (citing Hamburger v. Cornell Univ., 240 N.Y. 328, 336-37, 148 N.E. 539, 541 (1925)).

414. See note 123 supra.

415. 444 U.S. 672 (1980). Justice Powell was joined by Chief Justice Burger, and Justices Stewart, Rehnquist, and Stevens. See generally Benson, supra note 400; Bethel, Private University Professors and NLRB v. Yeshiva: The Second Circuit's Misconception of Shared Authority and Supervisory Status, 44 Mo. L. Rev. 427 (1979); Fenton, University Faculty and the Institution of Collective Bargaining, 69 Ky. L.J. 37 (1980); Grenig, supra note 283; Menard & Morrill, Are Faculty Members Scholars or Managers? The Yeshiva Case, 30 Lab. L.J. 754
Justice Brennan writing the dissent. Both the majority opinion and the dissent recognized the tension between the Act's inclusion of professionals and the exclusion of supervisors and managers; both recognized that the status of university professors was an issue which Congress had not considered, and both recognized that the coarchical, collegial authority structure of a university was totally unlike the hierarchical, bureaucratic structure traditionally found in the industrial sector. The two opinions, however, contain significantly different views of the role of judicial review in an administrative law context and the role of faculty members within the realities of American higher education.

The majority affirmed the Second Circuit's opinion, refusing to sustain the Board's representation decision. It labeled the issue "a mixed one of fact and law," claimed the Board had made no findings of fact and found no reason to reject the "different view" of the court of appeals. The dissent, applying normal standards of judicial review and noting the

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(1979); Ripps, The Professor as Manager in the Academic Enterprise, 29 CLEV. ST. L. REV. 17 (1980).

416. Justice Brennan's dissent was joined by Justices White, Marshall, and Blackman. 444 U.S. at 691.
417. See note 347 supra.
418. 444 U.S. at 679-80 (Powell, J.); id. at 692 (Brennan, J., dissenting).
419. Justice Powell acknowledged that modern universities are characterized by a system of shared authority evolving "from the medieval model of collegial decisionmaking." Id. at 680. For this reason he concluded that the statutory scheme of the NLRA was ill-suited to university faculties' organization attempts. Id. at 680-81. Justice Brennan's dissent also recognized that faculties operate collegially within the university's dual authority structure. Id. at 696-98. He emphasized that this arrangement was "[u]nlike the purely hierarchical decisionmaking structure that prevails in the typical industrial organization." Id. at 696. Justice Brennan recognized, however, that the faculty exercised a merely advisory role regarding fiscal or managerial matters. Id. at 697.
420. 444 U.S. at 691.
421. Id.
422. Id.
423. Primary authority to resolve these conflicts and to adapt the Act to the changing patterns of industrial relations was entrusted to the Board, not to the judiciary. The Court has often admonished that "[t]he ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." Through its cumulative experience in dealing with labor-management relations in a variety of industrial and nonindustrial settings, it is the Board that has developed the expertise to determine whether coverage of a particular category of employees would further the objectives of the Act. And through its continuous oversight of industrial conditions, it is the Board that is best able to formulate and adjust national labor policy to conform to
Board's extensive experience in the university context\textsuperscript{424} and the voluminous record in the \textit{Yeshiva} case itself,\textsuperscript{425} deferred to the Board's decision as "neither irrational nor inconsistent with the Act."
\textsuperscript{426} The dissent also questioned the majority's assertion that the interests of the faculty and the administration were congruent. It cited numerous instances of disagreement between the two,\textsuperscript{427} noting that "[t]he university administration has certain economic and fiduciary responsibilities that are not shared by the faculty, whose primary concerns are academic and related solely to its own professional reputation."\textsuperscript{428} The dissent buttressed this contention, observing that education had become a big business,\textsuperscript{429} that professional administrators had replaced academic professionals, and that financial difficulties had tended to erode traditional faculty prerogatives and security.\textsuperscript{430}

Although the majority noted that the administration had vetoed faculty recommendations due to fiscal concerns, it dismissed such economic realities as "in no way detract[ing] from the institution's primary concern with the academic responsibilities entrusted to the faculty."\textsuperscript{431} Ignoring the political realities of university life, the majority believed that it was dealing with a "system of 'shared authority' evolved from the medieval model of collegial decisionmaking in which guilds of scholars were responsible only to themselves."\textsuperscript{432} The majority stated that "traditional systems of collegiality and tenure insulate the professor from some of the sanctions applied to an industrial manager who fails to adhere to company policy."\textsuperscript{433} In response to this assertion, the dissent offered a substantially different characterization of university life.\textsuperscript{434}
In addition to Justice Powell's questionable conclusions regarding judicial review of Board decisions and the role of the faculty within the university, the majority opinion violates one of the elementary rules of statutory construction. Statutory analysis generally begins with an examination of the language of the statute itself. The NLRA contains a broad definition of employee and a narrow, specifically defined exclusion of supervisors. Instead of determining how university professors fit within these statutory definitions, Justice Powell found that they were excluded under his own judicially created, nonstatutory definition of managerial employees developed in *Bell Aerospace*. In that case, Justice Powell rejected the Board's narrow definition of managerial employee in favor of a more expansive reading of the phrase. Justice Powell relied on this easily expandable definition again in *Yeshiva*.

Although he purported to decide the case under the managerial, not the supervisory, exclusion, Justice Powell attempted to bolster his position by stating that "[t]he Board has held repeatedly that professionals may be excluded as supervisors." In support, he cited two cases. The Board in *University of Vermont* approved a unit of all full-time university faculty members, but excluded department chairpersons because they individually exercised supervisory authority. In *Presbyterian Medical Center*, the employer hospital objected to the inclusion of head nurses, charge nurses, and team leaders in a unit of registered nurses sought by the Colorado Nurses' Association. The Board excluded head nurses on the ground that they individually exercised supervisory authority, but included charge nurses and team leaders because "their duties are generally limited to giving directions in the performance of their professional duties and, as such, are not responsibilities

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435. 2A C. Sands, *supra* note 309, at § 47.01.
439. 444 U.S. at 682 n.13.
440. *Id.*
441. 223 N.L.R.B. 423 (1976).
442. "The record shows that the recommendations of the chairmen based upon these evaluations are highly effective in determining promotions, tenure, reappointments, and salary increases, and are generally accepted without question by the university authorities." *Id.* at 426.
443. 218 N.L.R.B. 1266 (1975).
444. *Id.* at 1268.
445. These employees operated in the collegial fashion typical of professionals. *Id.*
considered supervisory within the meaning of Section 2(11) of the Act." Thus, the cases cited by Justice Powell do not support the exclusion of all university faculty members as supervisors, but only those who individually wield supervisory authority. Justice Powell, by refusing to decide *Yeshiva* under the specific supervisory exclusion, by using the nonstatutory managerial exclusion, and by refusing to apply the managerial exclusion as the Board had applied it, was able to circumvent the limitations which Congress itself had placed on exclusions.

In its argument before the Supreme Court in *Yeshiva*, the Board emphasized the independent professional judgment test that it had developed and applied in earlier professional cases. Although Justice Powell apparently understood the test, he rejected it. Justice Powell stated that he could find "no authority suggesting that that tension [between the exclusion of managerial employees and the Act's inclusion of professional employees] can be resolved by reference to the 'independent professional judgment' criterion." The cases he cited in support of this assertion, however, demonstrate the efficacy of the test. *Sutter Community Hospitals of Sacramento*, cited by Justice Powell, involved professional employees in the health care industry. In a long list of disputed professionals, the Board found that only assistant area supervisors and two clinical supervisors were excluded. Both groups exercised authority in the interest of the employer. Justice Powell also cited *Westinghouse Electric Corp.* and *General Dynamics Corp.* As already dis-

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446. Id. at 1288-89.
447. 444 U.S. at 684.
448. See notes 347-87 supra and accompanying text.
449. See 444 U.S. at 683-84.
450. Id. at 686-87. Justice Powell inaccurately states that the Board had not applied the independent professional judgment test in its *Yeshiva* decision. Id. at 684.
451. Id. at 686-87.
454. Id. at 191-92.
455. Id. at 193.
cussed, although the engineers in both cases had total responsibility for the projects they headed, the Board held that they were neither supervisors nor managers. The cases cited by Justice Powell thus demonstrate that the Board has only excluded those professional employees who exercise authority in the interest of their employer; the independent professional judgment test effectively insulates from exclusion professional employees who exercise collective authority based on their professional interests and judgments.

Although the Board's collective authority construction matches the wording of section 2(11) and had been applied by the Board in prior professional cases, Justice Powell dismissed the Board's construction with the statement that it "has never been applied to supervisors who work through committees." In support of this broad statement, he cited the Board's decision in *Florida Southern College*. This case seems particularly inapposite. *Florida Southern College* was a typical college faculty case, in which the Board created a broad unit of all full-time and regular part-time faculty including departmental executive officers but excluding the Dean of Students. Moreover, the Board's decisions regarding colleges and universities have routinely excluded deans as supervisors.

At the conclusion of his decision in *Yeshiva*, Justice Powell observed:

> We certainly are not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them. The Board has recognized that employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty. 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. We think these decisions accurately capture the intent of Congress, and that they provide an appropriate starting point for analysis in cases involving professionals alleged to be managerial.

Although the first sentence disclaims an intent to exclude all professionals as managers, given the collegial method of operation used by most professionals, that is the probable effect of

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458. See notes 372-96 *supra* and accompanying text.
459. 444 U.S. at 685 n.21.
460. *Id.* Justice Powell also cited three cases involving employee stockholders who held majority control of three small companies: two taxi companies and a plywood company.
462. See note 367 *supra* and accompanying text.
463. 444 U.S. at 690 (footnotes omitted).
Justice Powell's prior analysis and actual decision in *Yeshiva*.

The Board never assumed, as Justice Powell states, "that the professional interests of the faculty and the interests of the institution are distinct, separable entities with which a faculty member could not simultaneously be aligned." On the contrary, as he acknowledges, academic excellence is the goal of both the faculty and the employer. As the independent professional judgment test recognizes, the employer of professionals depends on their judgment and professional excellence. It is, however, inherent in the nature of professionalism that professionals seek professional excellence above all other goals and that the university, as an economic entity increasingly administered by professional administrators, balances academic excellence against economic realities. Indeed, it is clear that fiscal problems have created substantial changes in university life, a fact Justice Powell chose to disregard.

464. In support of his second sentence, Justice Powell cites General Dynamics Corp., 213 N.L.R.B. 851 (1974), and two Board decisions, Wurster, Bernardi & Emmons, Inc., 192 N.L.R.B. 1059 (1951), and Skidmore, Owings and Merrill, 192 N.L.R.B. 620 (1971), involving architects who had "substantial planning responsibility and authority to direct and evaluate team members." 444 U.S. at 690 n.30. Since the routine discharge of professional duties in these cases was in the context of the "[e]mployer's established policy . . . based on directional change rather than on status quo," General Dynamics Corp., 213 N.L.R.B. at 858, the facts and actual holdings of these cases would support the inclusion of most professional employees. See notes 376-86 supra and accompanying text. Justice Powell also mentions that Congress "expressly approved" the test of "whether the decisions alleged to be managerial or supervisory are 'incidental to' or 'in addition to' the treatment of patients" when it passed the 1974 Health Care Amendments. 444 U.S. at 690 n.30. See note 397 supra and accompanying text.

465. Id. at 688.

466. In such a university, the predominant policy normally is to operate a quality institution of higher learning that will accomplish broadly defined educational goals within the limits of its financial resources. The "business" of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions. Faculty members enhance their own standing and fulfill their professional mission by adhering to such decisions. But there can be no doubt that the quest for academic excellence and institutional distinction is a "policy" to which the administration expects the faculty to adhere, whether it be defined as a professional or an institutional goal. It is fruitless to ask whether an employee is "expected to conform" to one goal or another when the two are essentially the same.

Id. at 688 (citation omitted).

467. At Yeshiva, administrative concerns with scarce resources and University-wide balance have led to occasional vetoes of faculty action. But such infrequent administrative reversals in no way detract from the institution's primary concern with the academic responsibilities entrusted to the faculty. The suggestion that faculty interests depart

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VI. CONCLUSION

Today's professionals have joined the rank and file. Professors are the employees of universities; doctors and nurses are the employees of hospitals. As professionals they exercise discretion and judgment in their work and have responsibility for matters of great importance to their employers. Their exclusion from the coverage of the NLRA would leave only clerical and maintenance workers free to organize as covered employees under the Act. This would ignore common definitions of university and hospital employees and would also be contrary to Congress's specific intent to extend coverage of the NLRA to professional employees and to nonprofit organizations.

Because large groups of professionals have become employees and thereby have lost the autonomy they enjoyed as self-employed individuals, they need collective protection more than ever before. The courts' antitrust and first amendment decisions, however, have eroded the traditional protection afforded by their professional trade associations, and *Yeshiva* may block attempts at unionization.

The NLRB, attuned to the trends and realities of the American workplace, adopted an interpretation of the NLRA which recognized the coarchical, professional model of labor relations. By carefully construing the specific supervisory exclusion and the nonstatutory managerial and confidential employee exclusions, it effectuated Congress's intent to broadly define the term "employee" to specifically include professionals and to include the employees of nonprofit entities.

A majority of the Supreme Court, however, led by Justice Powell, has precluded at least some of these employees from unionizing by adopting an interpretation of the NLRA based on an outmoded view of the American workplace. Employers have thus won from the Supreme Court what they did not succeed in winning from the conservative 1947 Congress. The Taft-Hartley Amendments specifically defined and included professionals; they defined and excluded only supervisors. Despite employer pressure, nonprofits generally were not excluded and the specific exclusion of nonprofit hospitals was deleted in 1974.

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from those of the institution with respect to salary and benefits is even less meritorious. The same is true of every supervisory or managerial employee. Indeed, there is arguably a greater community of interest on this point in the university than in industry, because the nature and quality of a university depend so heavily on the faculty attracted to the institution.

*Id.* at 688-89 n.27.
The 1947 Congress never mentioned managerial employees and considered excluded only those employees having confidential information regarding labor relations.

The Court's decision in *Yeshiva* has ramifications not only for employed professionals but for the entire work force. Jobs for blue-collar workers are decreasing while those for white-collar and professional workers are increasing. Blue-collar employees historically have unionized, but employer opposition to even blue-collar unionization is growing. White-collar and professional employees historically have not unionized and, after *Yeshiva*, they may be prevented from doing so. *Yeshiva* may also prevent blue-collar employees who work in nontraditional job programs from unionizing. Moreover, an expansive definition of confidential employees may result in the exclusion of many secretarial and clerical employees from NLRA coverage. Thus, perhaps the only employees who are still entitled to enjoy the NLRA's promise of industrial democracy through collective bargaining are the fast shrinking group of traditional blue-collar workers.