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Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment

Marion Crain*

Three bulls for a long time pastured together. A Lion lay in ambush in the hope of making them his prey, but was afraid to attack them while they kept together. Having at last by guileful speeches succeeded in separating them, he attacked them without fear as they fed alone, and feasted on them one by one at his own leisure.

Union is strength.¹

INTRODUCTION

American labor law² is in crisis. The dramatic decline in the proportion of the labor force that is unionized³ is a testament to the fact that labor law no longer serves the interests of workers. Union leaders have called for the abolition of labor law,⁴ scholars have suggested its reform,⁵ and Congress has

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1. *The Lion and the Three Bulls*, in AESOP'S FABLES 159 (G. Townsend trans. 1882).

2. The phrase "labor law" throughout this Article refers to the National Labor Relations Act of 1935 (NLRA), 29 U.S.C. §§ 151-69 (1988), and the body of interpretive decisional law the National Labor Relations Board (NLRB or "the Board") and the courts have developed under the NLRA.

3. The proportion of the working population that is unionized has declined dramatically over the last four decades. *Union Membership Declines to 16.8% of Workers in 1988, BLS Survey Shows*, Daily Lab. Rep. (BNA), No. 18, at B-13 (Jan. 30, 1989) [hereinafter *Membership Declines*]. In 1975, unionized workers comprised 28.9% of the nonagricultural workforce. STATISTICAL ABSTRACT OF THE UNITED STATES 1987 (Table No. 692) 408. By 1982, that percentage had dropped to 21.9%. *Id.* In 1988, unionized workers constituted only 16.8% of the workforce. *Membership Declines, supra*, at B-13.

4. See, e.g., Trumka, *Why Labor Law Has Failed*, 89 W. VA. L. REV. 871, 871, 877 (1987) (UMWA President argues that labor law has become a "danger-

held oversight hearings on the issue of labor law reform.⁶ Although the decline in union membership is both cause and effect of organized labor's lack of power,⁷ the drop in union membership is more directly attributable to the law's inability to adapt to our nation's shift to a service sector economy and corresponding changes in the demographics of labor force participation.⁸ More fundamentally, however, today's labor law crisis is the inevitable consequence of the structural components of labor law that operate to ensure the continued hierar-

ous farce" and should be abolished, and that labor should wage its battles instead in the state courts and in political arenas); *Kirkland Says Many Unions Avoiding NLRB*, 132 Lab. Rel. Rep. (BNA) 13 (Sept. 4, 1989) (reporting that AFL-CIO President Lane Kirkland would prefer no law because current labor law "forbids us to show solidarity and direct union support").

5. See, e.g., Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U.L. REV. 1, 2 (1988) [hereinafter *Workplace Democracy & Market Reconstruction*]; Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 HARV. C.R.-C.L. L. REV. 39, 39 (1988) [hereinafter *The Labor-Management Cooperation Debate*]; Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 79 (1988); see also Getman, *Is Labor Law Doing Its Job?*, 15 STETSON L. REV. 93, 93-94 (1985) (reporting widespread disillusionment with labor law in the academic community).

6. See SUBCOMM. ON LABOR-MANAGEMENT RELATIONS OF THE HOUSE COMM. ON EDUCATION AND LABOR, 98TH CONG., 2D SESS., REPORT ON THE FAILURE OF LABOR LAW — A BETRAYAL OF AMERICAN WORKERS 1-26 (Comm. Print 1984) [hereinafter *THE FAILURE OF LABOR LAW*]; *Senate Labor Committee Holds Hearing on Organizing Rights under Taft-Hartley Act*, Daily Lab. Rep. (BNA), No. 20, at A-11 (Feb. 1, 1988) (reporting the Senate Labor Subcommittee hearings on how the NLRA operates as an impediment to union organizing efforts). In addition, the Department of Labor initiated a five year project entitled *U.S. Labor Law and the Future of Labor-Management Cooperation*, B.L.M.R. REPT. NO. 134 (1989), which examines whether labor law's adversarial underpinnings conflict with emerging forms of management-worker cooperation.

7. Because labor unions no longer possess strength in numbers, see *supra* note 3, they lack financial support, economic power, and political clout.

8. A number of interacting forces have thwarted union organizing efforts. First, some have suggested that a general decline in union strength was inevitable once supervisors were excluded from NLRA coverage in the Taft-Hartley Act of 1947. See, e.g., Seitz, *Legal, Legislative, and Managerial Responses to the Organization of Supervisory Employees in the 1940's*, 28 AM. J. LEG. HIST. 199, 202 (1984) (noting that the Taft-Hartley Act's exclusion of supervisors' unions from NLRA protection was a vital element in the reassertion of capital's control of the shop floor). The growth of the service sector and consequent increase in white collar workers — many of whom are ineligible for union membership because of their mid-level supervisory roles — have exacerbated the problem for unions. See *Unions Vow to Regain Strength Despite 1987 Slip in Membership*, Daily Lab. Rep. (BNA) No. 26, at A-9 (Feb. 9, 1988) [hereinafter *Unions Vow*].

Second, labor's image problem has hampered its efforts to organize white collar and professional employees. Many white collar employees view union

chical organization of the workplace, stratification of the laboring class, and disempowerment of workers.⁹

The distribution of power in our society now rests almost entirely in the hands of a cadre of "elite" capital owners and the managers who function as their ciphers.¹⁰ The concentration of power and capital in fewer hands has facilitated a shakeout in the economy, evidenced by the takeover mania of

membership as an impediment to advancement with their companies. *Id.* at A-10.

Third, unions traditionally have been less successful in organizing women, who are entering the workforce in increasing numbers. See *Membership Declines*, *supra* note 3, at B-13 (stating that in 1988, union membership rates for women were 13% as compared with 20% for men).

Finally, the restructuring of the economy has caused employer "insecurity." Firms that were willing to play "softball" with unions have now "switched to hardball." *Unions Vow*, *supra*, at A-11. Simultaneously, employers have become increasingly aggressive in fighting off unionism. *Id.*; see Weiler, *Promises to Keep: Securing Workers' Rights To Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1780-81 (1983) (documenting sharp rise in number of unfair labor practices committed by employers, particularly terminations for union support during organizing drives). The rapid growth of the anti-union consultant industry is further evidence of increased management resistance to unionization. See THE FAILURE OF LABOR LAW, *supra* note 6, at 4-9; SUBCOMM. ON LABOR-MANAGEMENT RELATIONS OF THE HOUSE COMM. ON EDUCATION AND LABOR, 96TH CONG., 2D SESS., REPORT ON PRESSURES IN TODAY'S WORKPLACE 25-50 (Comm. Print 1980) [hereinafter PRESSURES IN TODAY'S WORKPLACE]. The increased sophistication of employers in warding off the threat of unionization has had some benign effects, including the development of more enlightened management practices (i.e., due process systems and better communications with employees). *Unions Vow*, *supra*, at A-11. The impact of these practices on union organization efforts, however, is powerful: "Unions have to convince employees that management is the bad guy, and that's tough to do today." *Id.* (quoting Brian Gill, president of the non-union division of the Printing Industries of America).

9. See Atleson, *Reflections on Labor, Power, and Society*, 44 MD. L. REV. 841, 842 (1985). Most legal scholars "would probably agree that labor law helps shape the reality it reflects." Sockell, *The Future of Labor Law: A Mismatch Between Statutory Interpretation and Industrial Reality?*, 30 B.C.L. REV. 987, 989 n.7 (1989).

10. Half of the wealth assets in this country are owned by the top 6% of the population. P. KING, K. MAYNARD & D. WOODYARD, *RISKING LIBERATION: MIDDLE CLASS POWERLESSNESS AND SOCIAL HEROISM* 82 (1988). Further, ownership of the means of production — the wealth assets that confer economic power — is even more concentrated. Sixty percent of the productive assets are owned by 1% of the population, and 90% of the population owns no assets of this type at all. *Id.* at 61, 82. Because ownership of the means of production is accomplished through the corporate form of organization, and corporations are run by a small cadre of top-level corporate management, an extremely small segment of the population has control over many aspects of our lives. *Id.*; see also Hacker, *Introduction: Corporate America*, in THE CORPORATION TAKEOVER 9-10 (A. Hacker ed. 1964) (asserting that "the fulcrum of corporate power is the investment decision" that a small handful of corporate owners make).

the 1980s and attendant corporate restructuring and liquidation of assets.¹¹ In recent years, unionized and non-unionized employees alike have become painfully aware of their vulnerability to unilateral management action.¹²

In short, the centralization of power in the hands of capital owners has resulted in an unhealthy level of economic dependence of all employees on their employers. More than twenty years ago, Lawrence Blades pointed out that this concentration of employer power poses a serious threat to individual freedom in a "nation of employees" dependent upon their employers for "the substance of life."¹³

Workers have always been vulnerable to abuses of employer power because the workplace has traditionally assumed a hierarchical structure in which workers are subordinate to capital owners. The law reflected this structure from its early days, when the work relation was characterized as a master-servant relationship.¹⁴ In recognition of the servant's vulnerability to discharge, the early English law developed a rule that introduced some measure of employment security to the master-servant relationship. The "English rule," articulated by Sir William Blackstone, provided that all employment was presumed to be for one year.¹⁵ American law rejected the English

11. See Trevor, *Hostile Takeovers in Perspective*, 55 VITAL SPEECHES OF THE DAY 550, 551 (1989) (describing in numerical and statistical terms the scope of merger and acquisition activity in the United States since 1986).

12. See *supra* note 3; Blum, *Prospects for Organization of White-Collar Workers*, 87 MONTHLY LAB. REV. 125, 126 (1964) (arguing that non-unionized white collar workers are increasingly aware of their lack of protection from unilateral management action); Munro, *Takeovers*, in VITAL SPEECHES OF THE DAY, *supra* note 11, at 470, 473 (discussing the harmful effects of takeovers on the careers of middle managers); *Unions Vow*, *supra* note 8, at A-10 (reporting that job security is needed for white collar employees faced with potential termination as a result of takeovers and mergers).

13. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404 (1967) (quoting F. TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951) (emphasis omitted)).

14. See 1 W. BLACKSTONE, COMMENTARIES *410 (describing the master-servant relationship); see also Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 272-311 (1979) (characterizing Blackstone's view of all relationships between persons as restricted to relations of formal inequality, and criticizing Blackstone's assumption that a hierarchically ordered society was necessary to uphold valued institutions such as royalty, the church, and the family).

15. 1 W. BLACKSTONE, *supra* note 14, at *415. The rule provided:

If the hiring be general without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him

rule in favor of the employment at will doctrine.¹⁶ With the introduction of employment at will in American jurisprudence, employees were placed at the mercy of the employer's absolute power to terminate employment.¹⁷

Eventually, courts and legislatures took an interest in protecting employees against some of the troubling consequences of the imbalance of power between employers and employees. The harsh impact of the at will doctrine has resulted in an increasing judicial preoccupation with the problem of abusive terminations of workers by employers.¹⁸ Legislative attention has

throughout all the revolutions of the respective seasons, as well as when there is work as when there is not

Id. The English rule was further augmented by limitations imposed by the Statute of Labourers, 1562, 5 Eliz. ch.4. The Statute of Labourers introduced the concept of "just cause" termination to Anglo law, and provided an additional limitation to the employer's power to discharge. *Id.*; 1 W. BLACKSTONE, *supra* note 14, at *426; see also Note, *Unjust Dismissal of Employees at Will: Are Disclaimers a Final Solution?*, 15 FORDHAM URB. L.J. 533, 537-38 (1986-87) (discussing historical foundations of employment at will doctrine).

16. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1878), *cited in* Note, *supra* note 15, at 538 n.41 and accompanying text. The New York Court of Appeals first adopted the rule in 1895. See *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 121, 42 N.E. 416, 417 (1895).

17. Attempts to protect workers from discharge and other workplace abuses were rejected in favor of the legal doctrine of liberty of contract. This doctrine assumed a market in which employers bargained individually with workers to arrive at employment contracts that served the interests of both parties. See, e.g., *Adair v. United States*, 208 U.S. 161, 172-73 (1908) (striking down statute making it a criminal offense for an employer to discharge an employee because of membership in a labor union, reasoning that it was the employer's right to set the terms of service and to refuse business relations with any employee regardless of whether the "refusal rests upon reason, or is the result of whim, caprice, prejudice or malice"); *Lochner v. New York*, 198 U.S. 45, 53 (1905) (striking down state law proscribing maximum hours for labor in bakeries because the right to contract for the purchase of labor is a liberty right the fourteenth amendment protects). Some scholars viewed the liberty of contract notion as a blatant legal fiction, a form of "mechanical jurisprudence" that camouflaged a view of the employer-employee relationship that had become outdated with the social changes wrought by the industrial revolution. See, e.g., Pound, *Liberty of Contract*, 18 YALE L.J. 454, 463 (1909). Pound argued in particular:

Legislation designed to give laborers some measure of practical independence, which, if allowed to operate, would put them in a position of reasonable equality with their masters, is said by courts, because it infringes on a theoretical equality, to be insulting to their manhood and degrading, to put them under guardianship, to create a class of statutory laborers, and to stamp them as imbeciles.

Id. (footnotes omitted).

18. Judicial creativity produced the wrongful discharge doctrine. Predicated on tort and contract theories, wrongful discharge forms of action provide modern employees with a means of redress for discharge, although they do not

been directed primarily toward improving the working conditions of employees.¹⁹ These judicial and legislative efforts, however, are predicated upon a hierarchical workplace structure; they assume the need of dependent, vulnerable employees for protection from abusive exercises of power by employers.

The sole attempt to alter the hierarchical structure of the workplace directly, through law, is the National Labor Relations Act (NLRA).²⁰ The NLRA purported to establish a system of industrial democracy that would, through the vehicles of worker collective organization and bargaining, offer workers the opportunity to empower themselves.²¹ Employees covered

address other abusive exercises of power by employers. *See, e.g.*, *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 317, 329, 171 Cal. Rptr. 917, 919, 927 (1981) (holding that discharge of 32-year employee who had been promised a "secure future" if he did a good job, and who had received consistent raises and positive evaluations, was grounds for breach of implied contract action); *Petermann v. Teamsters Local 396*, 174 Cal. App. 2d 184, 189-90, 344 P.2d 25, 27-28 (1959) (holding that discharge for employee's refusal to perjure himself before a state legislative committee as instructed by his employer gave rise to a tort-based action for wrongful discharge); *see generally* M. ROTHSTEIN, A. KNAPP & L. LIEBMAN, *EMPLOYMENT LAW* 738-802 (1987) (examining limitations case law engrafted on an employer's right to discharge employees); Lopatka, *The Emerging Law of Wrongful Discharge*, 40 BUS. LAW. 1, 6 n.30 (1984) (listing states that recognize a public policy theory of liability for wrongful discharge and discussing other theories of wrongful discharge); Annotation, *Modern Status of Rule that Employer May Discharge At-Will Employee for Any Reason*, 12 A.L.R.4TH 544, 553 (1982) (discussing case law that recognizes public policy-based and contractual limitations on discharge).

19. *See, e.g.*, Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19 (1988) (regulating wages and hours); Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1988) (establishing safety requirements in the workplace); Equal Pay Act, 29 U.S.C. § 206(d) (1988) (prohibiting gender discrimination in the establishment of wage rates); Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (1988) (providing protection for employee interests in retirement and benefit plans); Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. §§ 2101-2109 (1988) (requiring notification of plant closings); Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001-2009 (1988) (restricting polygraph testing of employees); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-17 (1982 & Supp. V 1987) (forbidding employment discrimination on the basis of race, color, gender, religion, or national origin). State legislatures have been equally active in regulating the employment relationship. *See Role of the States in Labor Relations*, 4 Lab. Rel. Rep. (BNA) No. 708 at 1:1 (Mar. 14, 1988).

20. 29 U.S.C. §§ 151-69 (1988).

21. *See* NLRA, 29 U.S.C. § 151 (stating that "protection by law of the right of employees to organize and bargain collectively . . . restor[es] equality of bargaining power between employers and employees"). The use of the word "restores" here is troubling. Its usage assumes a mythical time when such equality really did exist; equality of bargaining power obviously cannot be "restored" if it was never present. The notion probably harkens back to the previously rejected "liberty of contract" theories. *See supra* note 17.

by the NLRA, however, have not experienced the empowerment that the Act promised. Difficulty in organizing workers has severely hobbled union efforts to enlarge or equalize bargaining power.

A major legal barrier to union organizing efforts is the exclusion of middle-level employees²² from NLRA coverage. Apparently, "Congress . . . did not intend for the lot of the supervisor to be an easy one."²³ The NLRA does not protect middle-level employees; it excludes from its definition of a covered "employee" supervisors,²⁴ managers,²⁵ and confidential employees with a labor nexus.²⁶ Protection against discharge is available under other federal statutes only on specified discrimination grounds,²⁷ and it appears unlikely that a federal "just cause for discharge" statute will be enacted anytime soon.²⁸

22. The phrase "middle-level employees" refers to supervisors, managers, and confidential employees with a labor nexus, as the Act defines those categories of employees. See *infra* notes 24-26 and accompanying text. For a statistical summary by occupation of the employees who fall within that group, see Sockell, *supra* note 9, at 995-98.

23. *Rasmussen v. NLRB*, 875 F.2d 1390, 1393-94 (9th Cir. 1989) (holding that NLRB properly upheld union discipline of supervisor-member for performing bargaining unit work during strike; court recognized supervisor's dilemma — he could be fired for honoring the picket line, but union could discipline him for crossing it).

24. NLRA 29 U.S.C. § 152(3). See *infra* notes 93-105 and accompanying text.

25. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289 (1974). See *infra* notes 106-49 and accompanying text.

26. *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 190 (1981). See *infra* notes 150-68 and accompanying text.

27. See, e.g., The Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1988) (forbidding employment discrimination on the basis of age); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1982 & Supp V 1987) (forbidding employment discrimination on the basis of race, color, gender, religion, national origin).

28. The proposed "Employment Termination Act" (ETA), which the National Commissioners on Uniform State Laws continues to consider, is under heavy attack by plaintiff and management lawyers alike. *Employment Termination Law*, 5 Ind. Emp. Rts. (BNA) (9A Lab. Rel. Rep.) No. 3, at 4 (March 13, 1990) [hereinafter *Termination Law*]. The Act would impose just cause standards for termination following a one-year probationary period, and calls for arbitrators to enforce the standard, rather than courts or administrative tribunals. *Draft Uniform Employment Termination Act*, 9A Lab. Rel. Rep. (BNA) No. 62, at 540:21 (May 1990). One commentator, plaintiff's attorney Joseph A. Golden, has said that "everyone hates" the Act, and that "no uniform or model law will pass." *Pros and Cons of Wrongful Discharge Legislation, National Labor Policy, Are Weighed by ABA Panelists*, 131 Lab. Rel. Rep. (BNA) 554, 556 (Aug. 28, 1989) (commenting on an earlier draft).

Alternatively, former NLRB Chairman Edward Miller has proposed an amendment to the NLRA that would make unjust discharge an unfair labor

Court-developed wrongful discharge doctrine provides, at best, protection for employees at the highest end of the earnings scale²⁹ who fit within one of the recognized theories of wrongful discharge law, and are fortunate enough to live in a jurisdiction that recognizes the particular theory.³⁰

The shift from an industrial to a service economy has dramatically increased the proportion of middle management jobs in the workforce.³¹ Simultaneously, the working class has experienced a loss of power.³² As more and more employees work in areas other than direct production, bureaucracy has taken over, further stratifying workers through impersonal "company policies" and division of labor into specialized positions circumscribed by complex rules.³³ Hierarchical workplace

practice. *Termination Law, supra*, at 4. To be meaningful, such an amendment also requires a change in the definition of "employee" to include managers, supervisors, and confidential employees — but only for the limited purpose of protection under the proposed unjust discharge provision. This proposal drew sharp criticism from the ABA's Developing Labor Law Committee. *Id.*

29. See Note, *Protecting Employees At Will From Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1940 (1983) (arguing that managerial employees who bring wrongful discharge claims are those who possess greater resources). The wrongful discharge remedy has limited utility for women, minorities, and others in protected classes, whose average wage is likely to be at the lower end of the earnings scale; the size of the typical award in a wrongful discharge case is directly related to the plaintiff's pre-termination salary. See *Rand Study Suggests Employers Would Be Wise to Settle Wrongful Discharge Suits Before Trial*, Daily Lab. Rep. (BNA) No. 182, at A-10 (Sept. 20, 1988) (summarizing results of J. DERTOUZOS, E. HOLLAND & P. EBENER, *THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION* (1988)). Plaintiffs' lawyers in wrongful discharge suits typically charge a 40% contingency fee. *Id.* There thus exists little financial incentive for plaintiffs' attorneys to take wrongful discharge cases for plaintiffs at the low end of the earnings scale, whose awards are likely to be quite small.

30. See *Employment At Will: State Rulings Chart*, 9A Lab. Rel. Rep. (BNA) No. 50, at 505:51-52 (August, 1989) (summarizing state adoption of various theories of wrongful discharge law); see also *infra* notes 258-60 and accompanying text (discussing wrongful discharge law).

31. Sockell, *supra* note 9, at 995-96.

32. *Id.*; see Barkin, *The Decline of the Labor Movement*, in *THE CORPORATION TAKEOVER* 233-42 (A. Hacker ed. 1964) (discussing the growing number of white-collar professional and technical workers who are resistant to unionization; as the number of these white-collar workers rises in proportion to blue-collar workers, the bargaining power of existing unions is correspondingly weakened).

33. See P. KING, K. MAYNARD & D. WOODYARD, *supra* note 10, at 32; see also J. GALBRAITH, *THE NEW INDUSTRIAL STATE* 59-71 (1967) (arguing that the technostructure of the modern corporation has created a large class of mid-level professionals and technicians who are both, and yet neither, boss nor employee in the strict sense).

organization is reinforced by bureaucratization. The law's alignment of middle-level employees with capital owners and the corresponding isolation of middle-level employees from the rank and file maintain this structure.³⁴

This Article argues that collective organization and collective bargaining offer the most promising avenue for the empowerment of all workers, both rank-and-file and middle-level employees. Statutory protection schemes and wrongful discharge doctrine are inadequate responses to the need of middle-level employees for protection from the abusive exercise of employer power. Because neither ensures worker participation in workplace governance, neither serves as more than a band-aid for the continuing problem of unequal bargaining power.

Furthermore, these remedies, available on an individual basis, only maintain the stratification of workers and ensure their ultimate powerlessness. With powerlessness comes alienation.³⁵ Worker alienation is a direct consequence of the hierarchical organization of the workplace and the corresponding lack of opportunity for meaningful employee input into the control and direction of the enterprise.³⁶

I therefore add my voice to those who have proposed reforms of labor law that support workplace democracy as the means to worker empowerment,³⁷ and propose an amendment to the NLRA that would expand its coverage vertically to include all supervisory, managerial, and confidential employees.³⁸

34. J. GALBRAITH, *supra* note 33, at 59-71.

35. See *infra* notes 310-13 and accompanying text.

36. See *infra* note 322 and accompanying text; *Workplace Democracy & Market Reconstruction*, *supra* note 5, at 4 (contending that collective bargaining promotes employee participation and autonomy, and, hence, self-determination); Harper, *Reconciling Collective Bargaining with Employee Supervision of Management*, 137 U. PA. L. REV. 1, 46-47 (1988) (citing research indicating that employees who have a higher degree of participation in a firm's decision-making processes are more productive and motivated in their work).

37. See, e.g., *Workplace Democracy & Market Reconstruction*, *supra* note 5, at 3 (proposing an agenda for the next generation of labor law reform, founded upon the expansion of democracy in the workplace and accomplished, in part, through market reconstruction supporting collective bargaining). See also *infra* notes 68-74 and accompanying text (discussing the injection of democracy into the workplace as the Wagner Act's implicit goal).

38. I characterize my proposal as a proposal for "vertical" expansion because I suggest that the NLRA be expanded to cover employees who hold positions that are "higher" in the workplace hierarchy than those currently covered by the NLRA. I also favor horizontal expansion of NLRA coverage to workers who occupy positions in the workplace hierarchy that are comparable in status to those covered employees hold, including agricultural laborers and domestic workers, who are nevertheless explicitly excluded from coverage by

My proposal is intended as a first step toward the goal of empowering workers; even were it implemented, the NLRA contains many other barriers to worker empowerment.³⁹ Restructuring the way we define "labor" so as to diminish worker stratification is critical, however, if a redistribution of power — both economic and political — is to be achieved.⁴⁰ The vast gap in power and function that exists between those who control capital and those who labor suggests that middle-level employees and rank-and-file employees are in fact part of one larger class.⁴¹ A shift in the law's focus to recognize the similarities among categories of workers, rather than a continuing preoccupation with the differences between them, would revitalize unions, and enhance the possibility of achieving the joint control over business enterprise that the Wagner Act envisioned.⁴²

Part I of the Article lays out the goals of labor law as they

§ 2(3) of the NLRA, 29 U.S.C. § 152(3) (1988). Horizontal expansion of coverage, like vertical expansion, promotes solidarity and ultimately, worker empowerment. See Lewin, "Representatives of Their Own Choosing:" *Practical Considerations in the Selection of Bargaining Representatives for Seasonal Farmworkers*, 64 CALIF. L. REV. 732, 733 n.4 (1976) (stating that "agricultural unions may provide the only effective political voice and social community for people who are often transient and powerless vis-a-vis the dominant institutions of the society they feed"). The hierarchical organization of the workplace and the increase in bureaucratization, however, make vertical expansion a priority.

39. See, e.g., *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 260-61 (1939) (stating that sit-down strike is not protected concerted activity); *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938) (holding that permanent replacement of economic strikers is lawful). See generally Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 301-03, 322-25 (1978) [hereinafter *Judicial Deradicalization*] (discussing the Supreme Court's limitation of the Wagner Act).

40. Although my proposal contains a deceptively simple alteration to the existing structure of labor law, if adopted it has the potential to alter the inequalities of wealth and power that existing labor law legitimates. Cf. Stone, *supra* note 5, at 81 (examining the prospects for true worker participation within the present regulatory scheme). The existing structure of the NLRA, which excludes middle-level employees from coverage, serves to make the status quo in the workplace and in society look natural, inevitable, and even benign, and makes fundamental change seem impossible. Our reluctance to discuss inequalities of economic and political power and to recognize problems of capital structure is itself a major barrier to worker empowerment. See Atleson, *supra* note 9, at 841 (stating that concentration of capital in fewer hands seriously alters the underlying assumptions of federal labor policy, and reluctance to discuss the problem exacerbates it).

41. See *infra* notes 173-202 and accompanying text.

42. See *infra* notes 270-332 and accompanying text.

were originally conceived by the proponents of the Wagner Act.⁴³ Part II details the attempt, by Congress and the Supreme Court, to distinguish between "employees" covered by the NLRA and those to whom its protections are not extended, and who therefore become aligned with the employer by default.⁴⁴ Part III provides a critique of those judicial and legislative line-drawing efforts in light of the rationales identified in Part II.⁴⁵ Part IV examines the impact that excluding middle-level employees from coverage of the NLRA has on federal labor policy.⁴⁶ Finally, Part V discusses and defends my proposed solution. That solution includes statutory amendments deleting the existing exemption of supervisors from coverage under the NLRA, eliminating the requirement that professionals be segregated in separate units from the rank and file, and an explicit overruling of the judicial doctrines that exclude managerial employees and confidential employees with a labor nexus from the Act's coverage.⁴⁷

I. THE WAGNER ACT: CREATION OF A STRUCTURE FOR WORKER EMPOWERMENT

The Wagner Act, passed by Congress in 1935,⁴⁸ was the first in the triumvirate of major legislation that together comprise the NLRA.⁴⁹ The Wagner Act was the product of more than a century of struggle by workers to improve their working conditions. At the time, the Act was viewed as an industrial Magna Charta for labor, an innovation that "brought American workers out of the industrial state of nature,"⁵⁰ and secured for workers "the right of freedom of competition in a competitive economy."⁵¹ The Wagner Act's two explicit goals were reduction of industrial strife, and improvement of the bargaining,

43. See *infra* notes 48-80 and accompanying text.

44. See *infra* notes 81-168 and accompanying text.

45. See *infra* notes 169-269 and accompanying text.

46. See *infra* notes 270-335 and accompanying text.

47. See *infra* notes 336-83 and accompanying text.

48. 29 U.S.C. §§ 151-169 (1988).

49. The other two statutes are the Taft-Hartley Act of 1947, codified as 29 U.S.C. § 141 (1988), and the Landrum-Griffin Act of 1959, codified as 29 U.S.C. §§ 153, 158-60, 164, 186, 187, 401 (1988).

50. Lynd, *Government Without Rights: The Labor Law Vision of Archibald Cox*, 4 INDUS. REL. L.J. 483, 483 (1981).

51. W. OBERER, K. HANSLÖWE, J. ANDERSEN & T. HEINSZ, *CASES AND MATERIALS ON LABOR LAW: COLLECTIVE BARGAINING IN A FREE SOCIETY* 100 (3d ed. 1986).

and therefore purchasing, power of employees.⁵² In addition, the Act's one unstated goal was the maintenance and enhancement of political democracy through the injection of democracy into the workplace.⁵³ The Act's drafters concluded that these goals could best be attained through collective organization and collective bargaining.⁵⁴

The goals of the NLRA are laudable and were achievable

52. NLRA § 1, 29 U.S.C. § 151 (1988). Section 1 states, in pertinent part:

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 association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

For a more detailed description of the goals of the Wagner Act, see J. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 40-43 (1983).

53. Senator Wagner, sponsor of the Wagner Act, believed: "[D]emocracy in industry must be based on 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." 79 CONG. REC. S7571 (daily ed. May 15, 1935)(statement of Senator Wagner). Commenting later on the underlying rationale of the NLRA, Senator Wagner elaborated:

The principles of my proposal were . . . founded upon the accepted facts that we must have democracy in industry as well as in government; that democracy in industry means fair participation by those who work in the decisions vitally affecting their lives and livelihood; and that the workers in our great mass production industries can enjoy this participation only if allowed to organize and bargain collectively through representatives of their own choosing.

N.Y. Times, Apr. 13, 1937, at 20, col. 1.

54. Section 1 of the Act embodies this conclusion:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

....

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

NLRA § 1, 29 U.S.C. § 151 (1988).

under the Wagner Act as originally drafted.⁵⁵ However, the potential under the Wagner Act for collective organization of *all* workers — including supervisors, managers, and confidential employees — is central to the achievement of the Act's goals. The exclusion of supervisory, managerial, and confidential employees accomplished by the Taft-Hartley Act and subsequent Supreme Court decisions ensures that the NLRA will fail to keep its promise to workers.⁵⁶ Consequently, the NLRA now perpetuates the existing hierarchical social structure, both in the workplace and in our political system.⁵⁷

A. INDUSTRIAL PEACE

The primary goal of the Wagner Act was to ensure industrial peace, which in turn would avoid interruptions of commerce attendant to industrial strife.⁵⁸ This goal was central to the Act for two reasons. It was the "Constitutional hook upon which Congressional jurisdiction was hung."⁵⁹ Concern with the constitutionality of the Wagner Act arose because the Supreme Court had declared its predecessor statute, the National Industrial Recovery Act (NIRA), unconstitutional in 1935.⁶⁰ The Wagner Act's exposition of the industrial peace goal in its statement of purpose saved that statute from being

55. See *Judicial Deradicalization*, *supra* note 39 (stating that the Wagner Act's radical possibilities were not realized). Most labor law scholars today remain committed to collective organization and collective bargaining. See, e.g., *Workplace Democracy & Market Reconstruction*, *supra* note 5, at 4 n.1 (discussing the commitment of even the critical school of labor law scholars to collective bargaining).

56. See Willborn, *Industrial Democracy and The National Labor Relations Act: A Preliminary Inquiry*, 25 B.C.L. REV. 725, 742 (1984) (arguing that the NLRA model fails as democracy because of its exclusion, in part, of supervisors, managers, and confidential employees, for whom it does not provide representation).

57. See Klare, *Labor Law As Ideology: Toward A New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450, 452 (1981) (contending that labor law articulates an ideology that aims to legitimate and justify hierarchy and domination in the workplace, and has evolved an institutional architecture that reinforces this hierarchy) [hereinafter *Labor Law as Ideology*]. A law fashioned by the elite is bound to reinforce the status quo. E. ROGERS & F. SHOEMAKER, *COMMUNICATION OF INNOVATIONS: A CROSS-CULTURAL APPROACH* 340-41 (2d ed. 1971).

58. Section 1 of the Act makes this clear. See *supra* note 52.

59. W. OBERER, K. HANSLOWE, J. ANDERSEN & T. HEINSZ, *supra* note 51, at 116.

60. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935). The Wagner Act was passed in July 1935. See W. OBERER, K. HANSLOWE, J. ANDERSEN & T. HEINSZ, *supra* note 51, at 115.

declared unconstitutional.⁶¹ In addition, this goal made the Act politically feasible because of its appeal to employers.

The Act appealed to employers because it was designed to reduce the incidence of strikes. The Act provided employees with an outlet for their frustrations by sanctioning collective bargaining through their representative, the union. In addition, the Wagner Act endowed unions with sufficient leverage to enable them to press successfully some of their demands by imposing on employers a duty to bargain in good faith, and by preventing employers from committing unfair labor practices.⁶²

If industrial peace is defined simply as the absence of strikes, the NLRA has been extremely effective in achieving the goal of industrial peace. In 1988, there were only forty major work stoppages in the United States, the lowest number in four decades.⁶³

B. EMPOWERMENT OF WORKERS

The second explicit goal of the Act was to increase the bargaining power of employees. This was in fact the impetus behind the Act.⁶⁴ Independent unions, which would insist on a more equitable distribution of profits, would enhance worker

61. In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Supreme Court stated:

When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?

Id. at 41.

62. See A. COX, D. BOK & R. GORMAN, *CASES AND MATERIALS ON LABOR LAW* 84-85 (10th ed. 1986). Whether the Act actually reduced the incidence of strikes is a matter of some debate. Compare *id.* (stating that the Act reduced strikes and other forms of industrial unrest through establishment of collective bargaining) with J. ATLESON, *supra* note 52, at 43 (stating that "New Deal legislation seems to have encouraged rather than lessened the incidence of strikes").

63. Geoghegan, *Glory Days*, *THE NEW REPUBLIC*, May 29, 1989, at 18. Geoghegan's assertion is apparently based on statistics the U.S. Department of Labor's Bureau of Labor Statistics compiled. The Department now only collects data on "major" work stoppages (strikes or lockouts that involve 1000 or more workers and last a full shift or longer). See, e.g., 112 *MONTHLY LAB. REV.* 64, 90 (Table No. 30) (Dec. 1989). Geoghegan attributes this decline to the risk of permanent job loss that strikers face under the NLRB's interpretation of the Act. Geoghegan, *supra*, at 19.

64. Cf. A. COX, D. BOK & R. GORMAN, *supra* note 62, at 82 (discussing the impetus behind the NLRA).

purchasing power, and ultimately strengthen the economy.⁶⁵ In short, the Act was seen by some as an anti-Depression device by which unions would raise wage rates and pump money into the economy.⁶⁶

James Atleson has also theorized that the Wagner Act was Congress's attempt to simultaneously revive the economy and enhance government power over capital owners, who were becoming increasingly powerful as wealth became more concentrated. Atleson views the Act as an attempt to harness employee power as a tool in the state's effort to restrict corporate power.⁶⁷

Whatever Congress's motive in enacting it, the Wagner Act did present workers with a route to economic empowerment. Unionized workers have achieved dramatic improvements in wages and in their standards of living.⁶⁸

C. INDUSTRIAL DEMOCRACY

The implicit goal of the Wagner Act — to inject democracy into the workplace — renders labor law a mini-model of a representative democracy that “promises the same rewards and confronts the same problems as its parent and archetype, liberal democracy.”⁶⁹ The Wagner Act's vision of workplace democracy was premised on collective representation of workers. Such collective representation is critical to the creation of a fair “private law” through collective bargaining.⁷⁰ Many have

65. Atleson, *supra* note 9, at 841 n.2.

66. J. ATLESON, *supra* note 52, at 41 (footnotes omitted).

67. *See id.* at 41, 43. According to Atleson, economic crises trigger pressure from workers on capital at a time when capital is least equipped to resist such pressure; the state naturally takes advantage of this circumstance to expand its power. *Id.* at 43. An unfortunate byproduct of the government's initial support of collective bargaining was that labor's postwar success in creating a private welfare system through collective bargaining exacerbated the problems of standard minimalism and market segmentation; unions, because of their success, saw less need to press government for a universal welfare system. *Workplace Democracy & Market Reconstruction*, *supra* note 5, at 38.

68. *See Workplace Democracy & Market Reconstruction*, *supra* note 5, at 38.

69. Willborn, *supra* note 56, at 725.

70. *See, e.g., Workplace Democracy & Market Reconstruction*, *supra* note 5 at 3-4; Harper, *supra* note 36, at 4, 10; *The Labor-Management Cooperation Debate*, *supra* note 5, at 70; *cf. Labor Law as Ideology*, *supra* note 57, at 452 (arguing that collective bargaining law has been systematically fashioned to allow workers only a modicum of democratic participation, thereby eliciting worker consent to the non-democratic, hierarchical structure of the work-

praised collective bargaining, both because a democratic ordering of the workplace is seen as more "fair," and because workplace democracy supports political democracy.⁷¹

For centuries, political thinkers have promoted the establishment of industrial democracy as a means of advancing political democracy.⁷² In 1797, Albert Gallatin, President Jefferson's Secretary of the Treasury, asserted that "[t]he democratic process on which this nation was founded should not be restricted to the political process, but should be applied to the industrial operation as well."⁷³ Alexis de Tocqueville expressed similar views in the mid-nineteenth century. He believed that meaningful participation in the "minor affairs" of life was necessary if democracy was to retain its meaning.⁷⁴ Modern writers also have defended collective bargaining and the concept of workplace democracy because these institutions contribute to political democracy.⁷⁵

Contemporary scholars also defend the democratic aspects of collective bargaining because it promotes worker self-actualization.⁷⁶ A corollary to this idea is the notion that participatory

place); Willborn, *supra* note 56, at 742 (arguing that NLRA model has failed to promote industrial democracy).

71. J. ATLESON, *supra* note 52, at 41. Atleson notes, however, that Senator Wagner's devotion to workplace democracy must be viewed with some skepticism. Wagner was interested in preserving political democracy in the face of the "great peril" that Communism was believed to pose to American democracy in 1935. *Id.* at 42.

72. The apparent disinterest of a large portion of the population in the selection of our leadership is cause for considerable concern by supporters of democracy. Voter turnout during the 1988 Presidential election hit its lowest point in 64 years: only 50.1% of the population cast votes. Cook, *Turnout Hits 64-Year Low in Presidential Race*, 47 CONG. Q. WKLY. REP. 135 (1989). The decline of institutions that have spurred turnout, such as organized labor, has been specifically identified as a cause of the sparse turnout. *Id.* Democratic consultant Mark Mellman explains voter cynicism and apathy about the political process this way: "There's a sense that the political system is out of [voters'] control on one hand and not responsive on the other." *Id.*

73. J. CORT, CHRISTIAN SOCIALISM 331 (1988) (quoting Albert Gallatin).

74. See J. MARITAIN, MAN AND THE STATE 66-67 (1951) (quoting DE TOCQUEVILLE, DEMOCRACY IN AMERICA 341-42 (1862)).

75. See, e.g., *Workplace Democracy & Market Reconstruction*, *supra* note 5, at 4.

76. See, e.g., *The Labor-Management Cooperation Debate*, *supra* note 5, at

44. Karl Klare describes the role of work in self-actualization as follows:

Where once work was seen as a religious duty . . . it is now increasingly understood as one of the central opportunities in life to grow, to experience autonomy from and connectedness with others, and to acquire respect . . . [T]he goal is active self-realization in work, an experience of work that is developmental, that enables one freely to actualize one's abilities to the fullest extent possible.

democracy combats feelings of alienation and apathy.⁷⁷ The ultimate consequence of reducing feelings of alienation is to increase productivity and efficiency.⁷⁸ Employees who feel personally invested in the enterprise because they have a real voice in its operation will be more productive.⁷⁹ Ultimately, labor's share of the pie may increase without diminishing capital's share.⁸⁰

Id.

77. See E. FROMM, *THE SANE SOCIETY* 270-86 (1955) (stating that worker alienation can be overcome if workers have influence over the individual work situation and over the entire enterprise).

78. See Crain, *Expanded Employee Drug Detection Programs and the Public Good: Big Brother At the Bargaining Table*, 64 N.Y.U. L. REV. 1286, 1294 (1989). Worker self-actualization and worker self-esteem seem inextricably intertwined. Affording workers opportunities to self-actualize at work is likely to augment their self-esteem. Correspondingly, self-esteem is dependent on being capable of influencing one's environment. See W. RYAN, *BLAMING THE VICTIM* 159 (1971). The exercise of power, in other words, is a condition for self-esteem and full humanity. *Id.* at 159-60. Ryan notes that a number of reports suggest that acting as a group in one's own behalf tends to increase feelings of confidence, effectiveness, and well-being. *Id.* at 160.

79. Harper, *supra* note 36, at 47. Harper cites research indicating that employees who have a higher degree of participation in a firm's decision-making process are more productive, more satisfied, and motivated in their work. *Id.* at 46-47 nn.146-52.

80. Harper also suggests that employee control over a firm might alter the culture of the workplace, particularly the desires of the workers. *Id.* at 47-48. Harper explains:

[D]emocratic employee control of the firm can nurture ideals of equality among laborers. It can also generate firm loyalty, resulting in an emphasis on job security rather than maximum pay. Perhaps most significantly, democratic employee control could eventually result in the redesign of jobs to give more workers greater discretion over their own work effort. This discretion, in turn, could teach employees to place more value on work satisfaction than on their monetary compensation. In sum, a collective choice of employee control may constitute a decision by employees to change themselves and their desires as human beings.

Id. at 47-48 (footnotes omitted).

Although I agree with many of Harper's predictions concerning the positive consequences of increased worker participation in decision-making, my philosophical base differs fundamentally from Harper's. Although I believe that productivity will increase as a result of increased participation by workers in decision-making, the potential for increased profit for capital is not a predicate to my advocacy of worker participation. For example, I disagree with Harper's implicit assumption that there exists a particular "share" of the profits to which capital is entitled. See *id.* at 47.

II. DRAWING THE LINE BETWEEN CAPITAL AND LABOR

A. WHO WAS PROTECTED BY THE WAGNER ACT?

The Wagner Act did not discriminate between rank-and-file workers and their supervisors. The Act conferred privileges and benefits principally on "employees."⁸¹ Section 2(3) of the Act adopted a terse and circular definition of the term "employee": "[t]he term 'employee' shall include any employee . . ."⁸² However, section 2(2) defined an "employer" as "any person acting in the interest of an employer, directly or indirectly . . ."⁸³ Thus, the issue early arose whether foremen, who were responsible for administering discipline and initiating recommendations for promotions and demotions, were "employees" within the protective scope of the Act.

After some vacillation over whether supervisory employees were entitled to organize,⁸⁴ the NLRB determined that foremen *were* entitled to organize and thus could constitute a unit appropriate for the purposes of collective bargaining.⁸⁵ The Supreme Court affirmed the Board's decision in *Packard Motor Car Co. v. NLRB*.⁸⁶

The *Packard* Court reasoned that the context of the Wagner Act left "no room for a construction . . . [that would] deny the organizational privilege to employees because they act in the interest of an employer."⁸⁷ The Court acknowledged the adoption of the doctrine of respondeat superior in section 2(2), but pointed to the reality of the conflict that exists for all employees between their obligation to further the interests of

81. Section 7, the heart of the NLRA, provides: "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 other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." NLRA § 7, 29 U.S.C. § 157 (1988).

82. NLRA § 2(3), 29 U.S.C. § 152(3) (1988).

83. NLRA § 2(2), 29 U.S.C. § 152(2) (1988).

84. Compare *Union Collieries Coal Co.*, 41 N.L.R.B. 961, 968 (1942) (holding that supervisory employees may organize in an independent union) and *Godchaux Sugar, Inc.*, 44 N.L.R.B. 874, 879 (1942) (holding that supervisory employees may organize in a union affiliated with a larger rank-and-file union) with *Maryland Drydock Co.*, 49 N.L.R.B. 733, 741-42 (1943) (finding no unit appropriate for the organization of supervisory employees). The Board at no time suggested that supervisors were not "employees" covered by the NLRA. See *Soss Mfg. Co. & Republic Steel Corp.*, 56 N.L.R.B. 348, 349 (1944).

85. *Packard Motor Car Co.*, 61 N.L.R.B. 4, 26 (1945), *enforced*, NLRB v. *Packard Motor Car Co.*, 157 F.2d 80 (6th Cir. 1946), *aff'd*, 330 U.S. 485 (1947).

86. 330 U.S. 485 (1947).

87. *Id.* at 488.

their employer and their very human commitment to advancing their own individual interests as employees.⁸⁸ The Court also refused to adopt the employer's argument that unionization of foremen was especially troublesome because it created a division of loyalty for foremen and forced them to serve "two masters" — the union and the employer — resulting ultimately in poor labor-management relations.⁸⁹

Justice Douglas authored a powerful dissent.⁹⁰ He worried that the majority's decision obliterated the line between management and labor.⁹¹ In an oft-quoted passage from that dissent, he wrote:

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

. . . .

. . . [I]f foremen are 'employees' within the meaning of the National Labor Relations Act so are vice-presidents, managers, assistant managers, superintendents, assistant superintendents - indeed, all who are on the payroll of the company, including the president; all who are commonly referred to as the management, with the exception of the directors. . . . [O]nce vice-presidents, managers, superintendents, foremen all are unionized, management and labor will become more of a solid phalanx than separate factions in warring camps. Indeed, the thought of some labor leaders that if those in the hierarchy above the workers are unionized, they will be more sympa-

88. *Id.* at 489-90. The Court gave this example:

Though the foreman is the faithful representative of the employer in maintaining a production schedule, his interest properly may be adverse to that of the employer when it comes to fixing his own wages, hours, seniority rights or working conditions. He does not lose his right to serve himself in these respects because he serves his master in others.

Id. This argument, said the Court, was predicated on the erroneous notion that "because the employer has the right to wholehearted loyalty in the performance of the contract of employment, the employee does not have the right to protect his independent and adverse interest in the terms of the contract itself and the conditions of work." *Id.* at 490.

89. *Id.* at 493.

90. *Id.* at 493 (Douglas, J., dissenting).

91. Justice Douglas asserted that the majority's decision was a step in the direction Justice Brandeis had foreshadowed more than 30 years previously. 330 U.S. at 494. Justice Brandeis had urged, Justice Douglas argued, narrowing the gap between management and labor, and the development of an industrial system emphasizing cooperation and affording labor participation in policy decisions. *Id.* at 493.

thetic with the claims of those below them, is a manifestation of the same idea.⁹²

In short, Justice Douglas was concerned that allowing supervisors to organize would confer too much power on labor. Worse, permitting supervisor organization would begin a slide down a slippery slope with few discernable stopping places, as the courts would be pushed, by the force of logic, to continue to augment labor's power. This theme, articulated best by Justice Douglas, was later to become a familiar refrain in the Court's decisions concerning the Act's definition of "employee."

B. THE EXCLUSION OF SUPERVISORY EMPLOYEES

In 1947, Congress heeded Justice Douglas's words and passed the Taft-Hartley Act, which statutorily excluded supervisory employees from the NLRA's definition of "employee".⁹³ The Taft-Hartley Act modified section 2(3) of the Wagner Act to provide that "[t]he term 'employee' . . . shall not include . . . any individual employed as a supervisor."⁹⁴ Section 2(11) was added, defining the term "supervisor":

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.⁹⁵

During the debates on Taft-Hartley, the legislators focused on management's need for faithful agents.⁹⁶ Congress was clearly

92. *Id.* at 494-95 (footnote omitted).

93. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, ch. 120, § 101, 61 Stat. 136, 137-38 (1947) (codified at 29 U.S.C. § 152 (1988)), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1-30 (1948) [hereinafter LEGISLATIVE HISTORY]. Congress relied heavily on Justice Douglas' dissent in *Packard* in enacting Taft-Hartley. See H.R. REP. NO. 245, 80th Cong., 1st Sess. 13-16, *reprinted in* LEGISLATIVE HISTORY, *supra*, at 305-08; S. REP. NO. 105, 80th Cong., 1st Sess. 3-5, *reprinted in* LEGISLATIVE HISTORY, *supra*, at 409-11.

94. NLRA § 2(3), 29 U.S.C. § 152(3) (1988).

95. NLRA § 2(11), 29 U.S.C. § 152(11)(1988).

96. See H.R. REP. NO. 245, 80th Cong., 1st Sess. 16 (1947), *reprinted in* LEGISLATIVE HISTORY *supra* note 93, at 307. The House Report on Taft-Hartley, for example, contains the following statement:

[J]ust as there are people on labor's side to say what workers want and have a right to expect, there must be in management and loyal to it persons not subject to influence or control of unions, not only to assign people to their work, to see that they keep at their work and do it well, to correct them when they are at fault, and to settle their complaints and grievances, but to determine how much work employ-

proceeding on the assumption that hierarchical workplace organization, with capital "bossing" supervisors and supervisors "bossing" the rank and file, was best. Congress was concerned that foremen's unions, even when nominally separate from rank-and-file unions, would be vulnerable to influence by the rank and file union.⁹⁷ Such vulnerability to influence by rank and file workers, Congress believed, would undermine the workplace hierarchy.⁹⁸

In addition, the legislators articulated a concern that allowing supervisors to unionize would threaten capitalistic values that honored individualism and fostered competition between workers.⁹⁹ Supervisors, who presumably had risen to their station in life by virtue of individual merit, neither needed the protection of unions, nor wanted them.¹⁰⁰ Congress did not want to subject supervisors, who had demonstrated initiative, ambition, and ability to get ahead, to the levelling processes of seniority, uniformity, and standardization.¹⁰¹ Congress believed that these "fundamental principles of unionism" would tend to discourage individual achievement and ultimately would impair the country's productivity.¹⁰²

The current state of the law, then, is that supervisor unionization is not protected by law. This does not mean that unionization by supervisors is illegal. Section 14(a) of the Act explicitly protects the right of supervisors to organize collec-

ees should do, what pay they should receive for it, and to carry on the whole of labor relations.

Id.

97. *Id.* at 14, reprinted in LEGISLATIVE HISTORY, *supra* note 93, at 305.

98. *Id.*

99. *See id.*

100. The House Report stated: "No one forced [supervisors] to become supervisors. They abandoned the 'collective security' of the rank and file voluntarily, because they believed the opportunities thus opened to them to be more valuable to them than such 'security.'" *Id.* at 16-17, reprinted in LEGISLATIVE HISTORY, *supra* note 93, at 307-08.

101. *See* H.R. REP. NO. 245, 80th Cong., 1st Sess. 16-17, reprinted in LEGISLATIVE HISTORY, *supra* note 93, at 307-08.

102. *See id.* The Report does not explain how the Wagner Act "subjected" foremen to the principles of unionism. The Report should have, because unionization was, of course, at their option. Virginia Seitz describes Congress' view of supervisors as "distorted." Seitz, *supra* note 8, at 240. Congress, argues Seitz, ignored the phenomena of twentieth century foremanship — including falling wages relative to unionized employees, arbitrary discharge, loss of authority and prestige — that were discussed widely in the major business periodicals. *See id.* at 240-41. Seitz concludes that "Congress attempted to legislate its conception of ideal supervisors into existence." *Id.* at 241.

tively.¹⁰³ They may not, however, claim protection under the Act for organizing activities, nor may they require the employer to recognize and bargain with their unions once formed.¹⁰⁴ Thus, the "new" industrial division between capital and supervisors that Congress, employers, and Justice Douglas had feared was avoided. Foremen were "back on the team" with capital.¹⁰⁵

C. THE EXCLUSION OF MANAGERIAL EMPLOYEES

Prior to passage of the Taft-Hartley Act,¹⁰⁶ the National Labor Relations Board had excluded employees from rank-and-file bargaining units if they were "closely related to management,"¹⁰⁷ or when their authority "stamp[ed] them as manage-

103. NLRA § 14(a), 29 U.S.C. § 164(a) (1988). Section 14(a) was added at the same time supervisors were excluded from coverage. Section 14(a) preempts state statutes that attempt to protect supervisors who seek to unionize against employer retaliation (usually in the form of discharge). See *Beasley v. Food Fair of North Carolina, Inc.*, 416 U.S. 653, 662 (1974) (holding state law affording remedy to supervisors preempted and thus, employer retains self-help weapon of discharge).

104. See Klare, *The Bitter and the Sweet: Reflections on the Supreme Court's Yeshiva Decision*, 1983 SOCIALIST REV. 99, 106 n.* (1983) (describing limitations on rights of non-covered employees under the NLRA) [hereinafter, *The Bitter and the Sweet*]. Indeed, a union's efforts to pressure an employer to maintain pension benefits for its supervisor-members may furnish the basis for RICO charges against the union. See *Domestic Linen Supply & Laundry Co. v. Central States, Southeast & Southwest Areas Pension Fund*, 722 F. Supp. 1472, 1474 (E.D. Mich. 1989).

Furthermore, supervisors enjoy an increasingly limited "derivative" protection under the Act. In *Automobile Salesmen's Union Local 1095 v. NLRB (Parker-Robb Chevrolet, Inc.)*, 711 F.2d 383 (D.C. Cir. 1983), the D.C. Circuit upheld the Board's ruling that an employer may discharge a supervisor who complains about discharges of rank-and-file employees covered by the NLRA. *Id.* at 385. In *Parker-Robb*, the Board overruled 15 years of precedent holding that discipline of supervisors designed to instill fear in rank-and-file employees that their own protected organized activities would subject them to a similar fate violated the NLRA. See *id.* at 385. The D.C. Circuit approved the Board's new balance that favored the employer's right to demand loyalty from supervisors over the employee's right to be free from unfair labor practices that the employer funnels through a supervisor. *Id.* at 386-88. The discharge of a supervisor is now unlawful only if it *directly* interferes with the Section 7 rights of statutorily protected employees. *Id.* at 387.

105. Seitz characterizes the Taft-Hartley Act as an attempt by employers - which ultimately proved successful - to regain control over the loyalty of low-level supervisors, a necessary first step in the "salvage operation of managerial prerogatives which had appeared to slip away during the war." Seitz, *supra* note 8, at 243.

106. See *supra* note 93.

107. See *Friez & Sons*, 47 N.L.R.B. 43, 47 (1943) (excluding expeditors, who are charged with the duty of expediting the completion of orders and ensuring

rial."¹⁰⁸ The Board's policy regarding the exclusion of managerial employees from rank-and-file bargaining units was best stated in *Ford Motor Company*.¹⁰⁹ There, the Board characterized as managerial all employees "who are in a position to formulate, determine and effectuate management policies . . . [because] they express and make operative the decisions of management."¹¹⁰

Although the 1947 Taft-Hartley amendments referred explicitly only to supervisors, the NLRB expanded its practice of excluding managerial employees from rank-and-file bargaining units. The Board ruled that managerial employees were not covered under the Act for any purpose.¹¹¹ The Board reasoned that Taft-Hartley's statutory exclusion of supervisors indicated that Congress had intended to exclude employees who exercised a significant degree of authority over the rank and file.¹¹²

In 1970, the NLRB departed from its previous position that the NLRA did not cover managers. In *North Arkansas Electric Cooperative, Inc.*,¹¹³ the Board established a presumption that the Act entitled managerial employees to bargaining rights unless it could be shown that they were involved in shaping or implementing labor relations policies for their employers.¹¹⁴ In *NLRB v. Bell Aerospace Co.*,¹¹⁵ the Supreme Court refused to accept the Board's new rule as an accurate reflection of Congressional intent, and reinstated the Board's former rule.¹¹⁶

The *Bell Aerospace* Court began by noting that neither the language of the Taft-Hartley Act nor its legislative history ad-

adherence to production time schedules, from a proposed unit of production and maintenance workers).

108. See *Spicer Mfg. Corp.*, 55 N.L.R.B. 1491, 1498 (1944) (excluding expeditors, who contact vendors, place orders, keep records of their progress or deliveries, and have authority to reassign orders, from a unit containing office, technical, clerical, and professional employees; expeditors' authority to exercise their discretion in making commitments on behalf of the company "stamps them as managerial").

109. 66 N.L.R.B. 1317 (1946).

110. *Id.* at 1322.

111. See *Denver Dry Goods Co.*, 74 N.L.R.B. 1167, 1175 (1947) (excluding assistant buyers because their interests were "closely identified with those of management"); *accord* *Denton's, Inc.*, 83 N.L.R.B. 35, 37 (1949); see also *Swift & Co.*, 115 N.L.R.B. 752, 753-54 (1956) (finding that individuals allied with or acting as representatives of management are not employees under the Act).

112. See *Palace Laundry Dry Cleaning Corp.*, 75 N.L.R.B. 320, 323 n.4 (1947).

113. 185 N.L.R.B. 550 (1970).

114. *Id.* at 550-51.

115. 416 U.S. 267 (1974).

116. *Id.* at 289.

dressed the status of managerial employees.¹¹⁷ The Court reasoned that because managerial employees were higher in the authority structure than supervisors, they were "regarded as so clearly outside the Act that no specific exclusionary provision was thought necessary."¹¹⁸ The Court concluded that "the inference is plain that 'managerial employees' were paramount among this impliedly excluded group."¹¹⁹

Justice White, writing for three other members of the Court, dissented.¹²⁰ He argued that the specific exemption of supervisory employees from the Act's coverage, particularly given the Act's explicit *inclusion* of professional employees in section 2(12), indicated that Congress had intended to exclude only supervisors.¹²¹ Furthermore, he pointed out, the Board had never held managerial employees to be outside the scope of the Wagner Act prior to Taft-Hartley.¹²² In fact, the Board had two distinct categories of decisions regarding the Act's coverage of managerial employees, which the majority opinion had effectively collapsed into one. In the first category were decisions refusing to include managerial employees within bargaining units of rank and file employees on the traditional ground of a lack of community of interest, and in the second were decisions concerning the rights of managerial employees to organize into discrete bargaining units.¹²³ Justice White concluded that Congress's silence, particularly in light of Board practice treating supervisory and managerial employees differently, suggested that Congress had not intended to exclude managerial employees from the protections of the Act.¹²⁴

At the core of the divergence of opinion on the Court was the basic question originally raised in Justice Douglas' dissent in *Packard Motor Car*.¹²⁵ The majority in *Bell Aerospace* was concerned with the "fundamental change in industrial philosophy" that the inclusion of managerial employees within the Act's coverage would accomplish.¹²⁶ Surely, the majority rea-

117. *See id.* at 279-83.

118. *Id.* at 283.

119. *Id.* at 284.

120. 416 U.S. at 295 (White, J., dissenting). Justices Brennan, Stewart, and Marshall joined in the dissent.

121. *Id.* at 297-99.

122. *Id.* at 299-300.

123. *Id.*

124. 416 U.S. at 302-03 (White, J., dissenting).

125. 330 U.S. 485, 493-95 (1947). *See supra* notes 90-92 and accompanying text.

126. 416 U.S. at 284 (quotation omitted). The *Bell Aerospace* majority reit-

soned, Congress would not have attempted to obliterate the traditional distinction between labor and management in such an indirect fashion.¹²⁷ The dissent's position was simply that the majority's interpretation was overinclusive because it would reach "not only vertically, but laterally, to deny 'hundreds of thousands' of . . . relatively low-level management employees the . . . protections of the Act."¹²⁸ Thus, the dissent did not take issue with the basic proposition that traditional lines should continue to exist between management and labor. Rather, the dissent argued the line should be drawn in a different place.

In 1980, the Supreme Court revisited the parameters of the managerial class of employees in *NLRB v. Yeshiva University*.¹²⁹ In *Yeshiva*, the Court dealt with the tension between the National Labor Relations Act's implied exclusion of managerial employees and its explicit inclusion of professionals. The Board argued that the managerial exclusion could not be applied in a straightforward fashion to exclude university faculty, because as professional employees they often appear to be exercising managerial authority when they are merely performing

erated the view expressed by Justice Douglas in his *Packard* dissent: "[T]he Wagner Act was designed to protect 'laborers' and 'workers,' not vice presidents and others clearly within the managerial hierarchy. Extension of the Act to cover true 'managerial employees' would indeed be revolutionary, for it would eviscerate the traditional distinction between labor and management." *Id.* at 285 n.13.

127. *Id.* at 284 n.13 and 289 n.18. The majority, again echoing Justice Douglas' "slippery slope" argument in *Packard*, speculated about the "far-reaching results" of the dissent's view:

Although a shop foreman would be excluded from the Act, a wide range of executives would be included. A major company, for example, may have scores of executive officers who formulate and effectuate management policies, yet have no supervisory responsibility or identifiable conflict of interest in labor relations. If Congress intended the unionization of such executives, it most certainly would have made its design plain.

Id. at 289 n.18. Justice White responded to this argument:

The majority expresses concern that extending organizational and bargaining rights to managerial employees would permit the extension of the Act to vice presidents and other high level executives, thereby blurring the distinction between management and labor. The concern is overblown; for most, if not all, executives will obviously be "super" supervisors, confidential employees, professionals or within the Board's definition of those employees whose organization would result in a conflict of interest with respect to the company's labor policies.

Id. at 307 n.3 (White, J., dissenting).

128. *Id.* at 307 n.3 (citation omitted).

129. 444 U.S. 672 (1980).

routine job duties.¹³⁰ The Board contended that faculty, as independent professionals who are rewarded for pursuing professional values, present no problem of divided loyalty despite their substantial role in academic governance.¹³¹

The Court rejected the Board's argument, ruling that faculty members who possess absolute authority in academic matters are managerial employees outside the protection of the Act.¹³² Although acknowledging the tension between the Act's inclusion of professionals and the judiciary's exclusion of managerial employees, the Court nevertheless refused to sanction the Board's inquiry into whether the decisions made were exercises of professional judgment rather than exercises of managerial power.¹³³ Instead, the Court found that, precisely because faculty do possess a large measure of professional independence, the university's reliance on its faculty to shape and implement its policies created an acute danger of divided loyalty.¹³⁴ The Court proceeded on the assumption that "[t]he Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry,"¹³⁵ and analogized the university to private industry.¹³⁶

Justice Brennan, joined by three other members of the Court, dissented.¹³⁷ He argued that the majority had blindly applied to academic institutions principles developed in the context of the authority structure of the industrial setting.¹³⁸ Justice Brennan pointed out that the bureaucratic foundation of most "mature" universities is characterized by dual authority systems: a hierarchical administrative network, and a parallel professional network, created to bring the expertise of the faculty into the decision-making process.¹³⁹ Faculty members, whose involvement in university decision-making occurs only through the second system, offer recommendations based on expertise as professional educators, not because of any manage-

130. *Id.* at 683-84.

131. *Id.* at 684.

132. *See id.* at 686.

133. *Id.* at 686-87.

134. 444 U.S. at 689-90.

135. *Id.* at 680.

136. *Id.* at 680-81.

137. *Id.* at 691 (Brennan, J., dissenting). Justices White, Marshall, and Blackmun joined in the dissent.

138. *See id.* at 694.

139. 444 U.S. at 696-97 (Brennan, J., dissenting).

rial or supervisory prerogative.¹⁴⁰ Because faculty do not serve as the representatives of management, they do not fit within the category of employees traditionally excluded by the Board as managerial.¹⁴¹ There is, argued Justice Brennan, no danger of divided loyalty.¹⁴²

The Board took the final step shortly thereafter in *College of Osteopathic Medicine and Surgery (COMS)*,¹⁴³ ruling that a faculty that had gained its authority to influence institutional policy solely through collective bargaining was managerial, and therefore outside the protection of the Act.¹⁴⁴ To the union's argument that employees should not be able to "bargain [themselves] out of the protections of the Act,"¹⁴⁵ the Board responded that neither the *Yeshiva* decision nor the Act itself distinguished between situations in which managerial authority was present originally and circumstances in which such authority was gained through employer concessions at the collective bargaining table.¹⁴⁶ Consequently, the Board revoked the union's certification.¹⁴⁷

In effect, then, *COMS* stands for the proposition that once employees achieve, through collective bargaining, the real ability to participate fully with the employer in decision-making, they lose the Act's protection.¹⁴⁸ As one judge put it in a post-*COMS* case: "If managerial employees are powerful enough to 'effectively control' policy, then they *are* the employer. Consequently they can no more divide loyalties between the em-

140. *Id.* at 697.

141. *Id.*

142. *See id.* at 698-99. Justice Brennan argued that employers judge faculty members on the quality of their teaching and scholarship, not on whether they agree with administration policy. *Id.* at 699-700. The latter notion, he argued, would be antithetical to the concept of academic freedom. *Id.* at 700.

143. 265 N.L.R.B. 295 (1982).

144. *Id.* at 298.

145. *Id.* at 297. The union was concerned that if the faculty were unprotected by a collective bargaining agreement, the university unilaterally could, and would, strip the faculty of whatever managerial authority it had achieved through collective bargaining. *Id.*

146. *Id.* at 297-98.

147. *Id.* at 298.

148. Scholars have roundly criticized the *Yeshiva* decision and its ultimate progeny *COMS*. *See, e.g.,* Angel, *Professionals and Unionization*, 66 MINN. L. REV. 383, 388 (1982); Bixler, *Industrial Democracy and the Managerial Employee Exception to the NLRA*, 133 U. PA. L. REV. 441, 442 (1985); *The Bitter and the Sweet*, *supra* note 104; Rabban, *Distinguishing Excluded Managers from Covered Professionals Under the NLRA*, 89 COLUM. L. REV. 1775, 1779 (1989); *see generally* Bixler, *supra*, at 449 n.66, 450 n.67 (collecting sources critical of *Yeshiva*).

ployer and the union than they could between *themselves* and the union."¹⁴⁹

D. THE EXCLUSION OF CONFIDENTIAL EMPLOYEES

Another group of employees not specifically excluded by the Act is confidential employees.¹⁵⁰ The Board initially rejected the notion that the Wagner Act contained any implied exclusion of employees who had access to confidential information of their employers.¹⁵¹ As it had done with managerial employees, however, the Board excluded confidential employees from rank-and-file bargaining units, at least when they had access to confidential labor relations information of the employer.¹⁵² Subsequently the Board decided to exclude confidential employees with access to labor relations information from bargaining units composed solely of confidential employees.¹⁵³ The Board reasoned that it was unfair to require an employer to bargain and deal with a union that would possess inside information about the company's positions on labor matters because its members were employed in confidential posi-

149. *NLRB v. Lewis Univ.*, 765 F.2d 616, 632 (7th Cir. 1985) (Swygert, J., dissenting) (citation omitted) (emphasis in original).

150. A "confidential employee" is one who may have access to information the employer considers confidential. See *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 171-72 (1981).

151. See *Bull Dog Elec. Prods. Co.*, 22 N.L.R.B. 1043, 1046 (1940). The company sought to exclude from the bargaining unit employees of the engineering department by arguing that "they are entrusted with confidential matters; and as they act in the interest of the management and exercise considerable discretion and judgment in their work, they are not 'employees' within the meaning of the Act." *Id.* The Board rejected the company's argument and held that there is "no warrant under the Act to deprive these employees of the benefits accruing from their right to self-organization." *Id.*; see also *Creamery Package Mfg. Co.*, 34 N.L.R.B. 108, 110-11 (1941) (noting that the company argued that employees who have access to material, production, labor costs and payroll records are confidential employees and should be excluded from the bargaining unit). In *Creamery Package* the Board held that "possession of important information [which does not relate directly to the problem of labor relations] is of itself insufficient to justify exclusion from the right to collective bargaining." 34 N.L.R.B. at 111.

152. *Creamery Package*, 34 N.L.R.B. at 110 (excluding a stenographer from the rank-and-file bargaining unit because the stenographer's work involved dictating reports that related to labor problems in the company); *Brooklyn Daily Eagle*, 13 N.L.R.B. 974, 986 (1939) (excluding personal secretaries from the rank-and-file bargaining unit based on the confidential nature of their work and their access to information bearing on labor negotiations and labor grievances).

153. See *Hoover Co.*, 55 N.L.R.B. 1321, 1323 (1944); *Electric Boat Co.*, 57 N.L.R.B. 1348, 1349 (1944).

tions.¹⁵⁴ This became known as the Board's "labor-nexus" test. Under the test, confidential employees were those who in the "normal performance of their duties may obtain advance information of the [c]ompany's position with regard to contract negotiations, the disposition of grievances, or other labor relations matters."¹⁵⁵

The Board modified its position in 1946 in *Ford Motor Co.*,¹⁵⁶ limiting the term "confidential" to include only those employees who assist or act in a confidential relation to persons exercising managerial functions in the field of labor relations.¹⁵⁷ Although Taft-Hartley made no explicit reference to confidential employees, the Supreme Court's decision in *Bell Aerospace*¹⁵⁸ cast doubt on the protected status of confidential employees who did not fit within the Board's narrow definition of excluded confidential employees.¹⁵⁹ Dictum in *Bell Aerospace* suggested that Congress, in enacting the Taft-Hartley Act, believed that all employees with access to confidential information of their employers had been excluded from the Wagner Act by prior NLRB decisions, and that Congress intended to freeze into law that interpretation of the Wagner Act.¹⁶⁰

In *NLRB v. Hendricks County Rural Electric Membership Corp.*,¹⁶¹ a divided Supreme Court approved the Board's "labor-nexus" test as set out in *Ford Motor Co.*, stating that the dictum in *Bell Aerospace* was "in error."¹⁶² The Court concluded that the labor-nexus test was "rooted firmly in the Board's understanding of the nature of the collective-bargaining process," and that Congress had accepted the Board's practice of excluding from bargaining units only those confidential employees satisfying the labor nexus test.¹⁶³ In one of the two consolidated cases before it, the Court approved the Board's order reinstating a personal secretary to the general manager and chief executive officer of the employer, who had been discharged for engaging

154. *Hoover Co.*, 55 N.L.R.B. at 1323.

155. *Id.* at 1323.

156. 66 N.L.R.B. 1317 (1946).

157. *Id.* at 1322.

158. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

159. *See Ford Motor Co.*, 66 N.L.R.B. 1317, 1322 (1946); *supra* text accompanying note 156.

160. *See NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 186-87 (1981) (quoting *Bell Aerospace*, 416 U.S. at 283 n.12).

161. 454 U.S. 170 (1981).

162. *Id.* at 187-90.

163. *Id.* at 190.

in concerted activity protected by section 8(a)(1) of the Act.¹⁶⁴ In the other case, the Court approved the Board's finding that none of the employees included in a unit for certification were confidential employees under the labor-nexus test.¹⁶⁵

Justice Powell's dissenting opinion repeated the familiar refrain that inclusion of confidential employees with no involvement in labor relations matters is erroneous because it "tends to obliterate the line between management and labor."¹⁶⁶ Likening confidential employees to supervisory and managerial employees because they tend to be aligned with management by virtue of "their duties, knowledge, or sympathy," Justice Powell argued that confidential employees should not be permitted to join rank-and-file unions or take advantage of the Act's protections.¹⁶⁷ Justice Powell believed it unfair to force on either management or labor a potentially disloyal "fifth column."¹⁶⁸

III. CRITIQUE OF THE JUSTIFICATIONS FOR RESTRICTING NLRA COVERAGE TO THE RANK AND FILE

As the discussion above demonstrates, supervisory, managerial, and confidential employees with a labor nexus have been denied NLRA protection for reasons that fall essentially into one of four categories: 1) the characterization of these workers as "employees" protected by the Act would blur the traditional lines between management and labor, thereby undermining the hierarchical structure of the workplace upon which our labor laws are premised;¹⁶⁹ 2) supervisors, managers, and confidential employees owe a duty of loyalty to capital, and in effect act as its representatives; hence, they face a conflict of

164. *Id.* at 172-73, 190-91. Hendricks had discharged Mary Weatherman for signing a petition seeking reinstatement of a fellow employee who was dismissed after losing his arm in the course of his employment. *Id.* at 172. The Board's finding that Weatherman did not assist in a confidential capacity with respect to labor relations policies was not challenged. *Id.* at 191. Although Weatherman shared a partitioned office with the general manager, there was no evidence that Weatherman's duties concerned confidential matters of any description. *Id.* at 174 n.5; *id.* at 192 n.2 (Powell, J., dissenting).

165. 454 U.S. at 175, 191.

166. *Id.* at 192 (Powell, J., dissenting) (quoting Packard Motor Car Co. v. NLRB, 330 U.S. 485, 494 (1947) (Douglas, J., dissenting)). Justices Burger, Rehnquist, and O'Connor joined Justice Powell's dissent.

167. *Id.* at 193-95.

168. *Id.* at 193.

169. *See supra* text accompanying notes 96-97.

interest when required to discipline fellow union members;¹⁷⁰ 3) supervisors and managers should not be subjected to the levelling processes of unionization because this flies in the face of capitalistic values;¹⁷¹ and 4) supervisors and managers are sufficiently powerful that they do not need protection.¹⁷² I turn now to a critique of these justifications.

A. THE BLURRING OF TRADITIONAL LINES BETWEEN MANAGEMENT AND LABOR

Perhaps the most basic objection to the inclusion of supervisors, managers and confidential employees within the Act's coverage is the argument, first raised by Justice Douglas in *Packard*, that lending the sanction of federal law to unionization by these employees "tends to obliterate the line between management and labor."¹⁷³ The majority opinion in *Bell Aerospace* reiterated this concern about the "fundamental change in industrial philosophy" that would be wrought by inclusion of managerial employees within the Act's coverage.¹⁷⁴ The dissent in *Hendricks County* echoed the same theme, urging that even confidential employees with no involvement in labor relations matters should be excluded from the Act's protections.¹⁷⁵

This argument is troubling for two reasons. The assumption that our labor laws are necessarily founded on a hierarchical model of workplace organization operates to ensure that the workplace continues to be organized that way. Continuation of the hierarchical model makes true adversarial collective bargaining impossible. "Labor" as defined under the current structure of our labor laws is not sufficiently powerful to pose a meaningful threat to employer control.¹⁷⁶ Moreover, attempts to create cooperative workplace structures only serve to further

170. See *supra* notes 88, 96 and accompanying text.

171. See *supra* notes 100-01 and accompanying text.

172. See *supra* note 100 and accompanying text.

173. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 494 (1947) (Douglas, J., dissenting).

174. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 284 n.13 (1974).

175. *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 194-95 (1981) (Powell, J., dissenting).

176. See Atleson, *supra* note 9, at 841-42 (contending that judicial rhetoric reflects an assumption that labor has evolved into a "substantial equalizer" to capital; arguing that such rhetoric "is painfully ironic today and has always been mythical"); Stone, *supra* note 5, at 164 (stating that workers and employees are not truly "partners in production" because management retains discretion to establish most conditions of employment, including job tenure and compensation, unless it explicitly bargains away these rights).

co-opt workers, who are too powerless to "cooperate" in any meaningful sense.¹⁷⁷

The second reason that this argument is troubling is that ideal forms of workplace democracy entail cooperation between capital and labor.¹⁷⁸ Because cooperation is a synonym for co-optation in a system in which labor does not possess equal power with capital, the Court's paradigm of the labor laws precludes achievement of industrial democracy.¹⁷⁹ Worse, the situation is likely to deteriorate. The presently unfolding implications of workplace reorganization foreshadow the possibility that more and more workplaces, including those in industry, will begin to look the way the Supreme Court believed Yeshiva University was organized.¹⁸⁰ As a consequence of the Court's *Yeshiva* decision, therefore, a growing segment of workers will be unable to unionize, and instead will be co-opted through worker participation/cooperation programs.¹⁸¹

177. Although many have embraced labor-management cooperative programs because of the appeal that they hold for liberals with idealistic visions of the workplace, many more have attacked them as a new form of co-optation — one of the "last tricks of capitalism." See Stone, *supra* note 5, at 168-69; see also *id.* at 170-71 (positing that for worker participation through cooperative programs to be other than a false promise, power must be redistributed to the benefit of workers, and until that occurs, the cooperative vision of the workplace is heuristic at best).

178. See Bixler, *supra* note 148, at 441-42; *The Labor-Management Cooperation Debate*, *supra* note 5, at 50-51. Klare notes that if democratic values are to be served, adversarial collective bargaining must coexist with labor-management cooperation. *Id.* Klare concludes that "[h]ealthy, productive cooperation requires the existence of autonomous, collective organization of workers, a central feature of adversarialism." *Id.* at 60.

179. Bixler, *supra* note 148, at 450.

180. See *supra* notes 129-36 and accompanying text; *The Bitter and the Sweet*, *supra* note 104, at 120-21. The change in the technostructure to a service-oriented economic system will further underscore the significance of deciding where the line between capital and labor should be drawn. John Kenneth Galbraith has described the existence of a visible line between owners and employees in the entrepreneurial corporation. J. GALBRAITH, *supra* note 33, at 268. In the mature corporation, however, the line tends to disappear as the location of decision moves in the direction of the body of white-collar workers. Thus, distinguishing between those who make decisions and those who carry them out — that is, between employer and employee — becomes almost impossible. *Id.*

181. The Court assumed in *Yeshiva* (ultimately carried to its extreme in *COMS*) that once employees have attained a voice in workplace decisions, they are on an equal footing with management and can dispense with the protection of labor laws. That assumption is seriously flawed. The interests of labor and management are never identical, and individual employees will need the representation of the union when they are forced into a conflict with the rest of the collective or are championing a minority position. See Bixler, *supra* note 148, at 466. As former Secretary of Labor Ray Marshall observed: "[A]s long

Several writers have suggested that the idea that our labor laws depend on maintaining a distinction between management and labor is predicated on Tayloristic notions of workplace organization, which were themselves developed to ensure the continuation of a hierarchical workplace structure with capital at the top.¹⁸² "Taylorism" or "scientific management" refers to a workplace organization approach that achieved popularity during the first half of the twentieth century.¹⁸³ Frederick Winslow Taylor and his followers advocated the application of "scientific" methods to the problem of controlling labor.¹⁸⁴ The core tenets of Taylorism are: 1) management assumes the task of gathering all of the traditional knowledge possessed by workers, and then of classifying, tabulating, and reducing the knowledge to rules;¹⁸⁵ 2) all possible "brain-work" is removed from the shop and centered in the planning department, so as to wrest control of the labor process from the worker and to cheapen labor;¹⁸⁶ 3) management plans out the work of every employee, specifying each day what tasks are to be done, the way in which they should be done, and the time allotted for completing them.¹⁸⁷

as there are workers in a democratic market setting, there will be a need for organizations to represent their interests. Trying to have industrial or economic democracy without unions would be like trying to have political democracy without political parties." Marshall, *The American Industrial Relations System in a Time of Change*, 48 U. PITT. L. REV. 829, 837-38 (1987).

182. See, e.g., *The Bitter and the Sweet*, *supra* note 104, at 114; Stone, *supra* note 5, at 143-44.

183. *The Labor-Management Cooperation Debate*, *supra* note 5, at 57.

184. As Harry Braverman points out in his oft-cited and thorough explication of the principles of Taylorism, "scientific management" is far from scientific; it enters the workplace as the representative of management, masquerading in the trappings of science. H. BRAVERMAN, *LABOR AND MONOPOLY CAPITAL* 86 (1974).

185. *Id.* at 112. Braverman refers to this principle as the "dissociation of the labor process from the skills of the workers." *Id.* at 113. The idea was to break the hold that skilled workers possessed over the production process. See Stone, *supra* note 5, at 141.

186. H. BRAVERMAN, *supra* note 184, at 113. This is the heart of Taylorism; Braverman calls it the principle of the "separation of conception from execution." *Id.* at 114. The effect of this tactic is to dehumanize the labor process, to reduce workers almost to the level of labor in its animal form. *Id.* at 113. Breaking the unity of the labor process and separating execution from conception is crucial if management is to enforce on workers the methodological efficiency and working pace desired. *Id.* at 113-14. A basic premise of this principle is that the systematic study of work and the fruits of this study are a management prerogative; workers thus lose control over their own labor and the manner of its performance. *Id.* at 116.

187. *Id.* at 118. Braverman calls this the "use of [management's] monopoly over knowledge to control each step of the labor process and its mode of exe-

Taylor's scientific management movement was designed to abolish the power workers exercised over the direction of the production process during the nineteenth century.¹⁸⁸ The source of workers' power lay in their superior knowledge about the production process.¹⁸⁹ Taylorism was characterized by fear of that power.¹⁹⁰ Taylorism thus originally represented a systematic effort to undermine union strength by depriving workers of the knowledge that lies at the root of their power.¹⁹¹

Over the years, Taylorism has become so embedded in our concept of the employment relationship that its application today is almost unconscious. The continuing influence of Taylorism in the law is evidenced by the NLRA's definition of "supervisor." The NLRA's definition refers to the use of "independent judgment" by supervisors,¹⁹² reflecting the Tayloristic view that the execution of work should be separated from its conception. Thus, "employees" covered by the NLRA provide the "brawn", while supervisors provide the "brains" and are aligned with capital. The Board's determinations regarding who is a "supervisor" within the meaning of section 2(11) provide further evidence of this Tayloristic influence, as well as demonstrating the arbitrariness of drawing lines in this fashion.¹⁹³

cution." *Id.* at 119. This tenet of Taylorism gave birth to time and motion studies, and to the establishment of different piece rate systems, which gave faster workers an incentive to out-perform others. Stone, *supra* note 5, at 141. See generally J. ATLESON, *supra* note 52, at 103-04 (discussing Taylorism); H. BRAVERMAN, *supra* note 184, at 85-123 (same); *The Labor-Management Cooperation Debate*, *supra* note 5, at 57 n.49 (same); Stone, *supra* note 5, at 140-44 (same).

188. See D. MONTGOMERY, *WORKERS' CONTROL IN AMERICA* 9 (1979).

189. *Id.*

190. As Taylor himself wrote, "[T]raditional knowledge may be said to be the principle [sic] asset or possession of every tradesman . . . [The] foremen and superintendents know, better than anyone else, that their own knowledge and personal skill falls far short of the combined knowledge and dexterity of all the workmen under them." F. TAYLOR, *THE PRINCIPLES OF SCIENTIFIC MANAGEMENT* 31-32 (1967). William Haywood aptly summarized the reason for ownership's fear when he wrote, "The manager's brains are under the workman's cap." W. HAYWOOD & F. BOHN, *INDUSTRIAL SOCIALISM* 27 (1911).

191. Cf. D. MONTGOMERY, *supra* note 188, at 27 (discussing how advocates of scientific management sought to discredit industrial practices that placed responsibility in employees' hands).

192. NLRA § 2(11), 29 U.S.C. § 152(11) (1988); see *supra* text accompanying note 94.

193. See, e.g., Detroit College of Business, 132 L.R.R.M. (BNA) 1081, 1083 (1989) (rejecting "shorthand" approach that an individual who supervises non-bargaining unit employees less than 50% of his time is not a supervisor, in favor of making "a complete examination of all the factors present to deter-

Similarly, the Court's treatment of "supervisors" as aligned with ownership is grounded in Taylorism. In his dissent in *Packard*, Justice Douglas wrote: "I find no evidence that one personnel group may be both employers and employees within the meaning of the Act,"¹⁹⁴ and "[t]rade union history shows that foremen were the arms and legs of management in executing labor policies."¹⁹⁵ Katherine Stone has examined the role Taylorism has played in shaping the decisions of the Court and the Board, and argues that the often perplexing insistence on maintaining boundaries or "lines" between management and labor can be traced to Tayloristic conceptions of the employment relationship.¹⁹⁶ Stone explains that the Tayloristic, or functionalist approach assumes that such boundaries are essential to production.¹⁹⁷ She concludes that such functionalism is "constructed and contingent, rather than natural and necessary" and was in fact "an ideological construct [applied] with the explicit aim of reconstructing and recreating the industrial world."¹⁹⁸

There is evidence, moreover, that the adversarial nature of American industrial relations, and in particular the hostility many unions express for employers, is also the result of Taylorism. Klare notes that the adversarial spirit of American industrial relations was triggered by employers' application of scientific management techniques in a deliberate effort to sap

mine the nature of the individual's alliance with management"). See generally Annotation, *Who Are Supervisors within Meaning of National Labor Relations Act in Service Operations*, 49 A.L.R. FED. 230, 230-310 (1980) (surveying determinations of supervisory status in service industries).

194. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 495 (1947) (Douglas, J., dissenting).

195. *Id.* at 496.

196. Stone, *supra* note 5, at 146.

197. *Id.*

198. *Id.* Klare also has argued that labor law doctrines such as the managerial exclusion articulated in *Yeshiva* are bottomed on scientific management theories. See *The Bitter and the Sweet*, *supra* note 104, at 115. Klare posits that the Court's decisions reflect its belief that current industrial organization does not rely on or encourage the workers' ability to disseminate, generate, or apply new information about their work, nor exercise independent judgment regarding the organization of their work or the direction of the enterprise; such judgment is the responsibility — the sole prerogative — of management. *Id.* at 114-15. He points out that there is no "scientific" or technical reason why the workplace must be organized around an assumption of employee powerlessness and intellectual incapacity; nor has the Court examined the assumption that hierarchy and control are essential preconditions of industrial efficiency. *Id.* at 115.

organized labor's strength.¹⁹⁹ Adversarialism persists today, he argues, in part because Taylorism has become embedded in American labor law.²⁰⁰

It is time to uncouple functionalist, Tayloristic notions from our labor laws. The Tayloristic approach taken by the 80th Congress in enacting Taft-Hartley, and by the Supreme Court in its *Bell Aerospace* and *Yeshiva* decisions, has shaped our present vision of the workplace.²⁰¹ More fundamentally, it has limited the "universe of possibilities in our imagination" for workplace restructuring.²⁰²

B. CONFLICT OF INTEREST/DIVIDED LOYALTY

Another oft-repeated justification for the exclusion of supervisors, managers, and confidential employees is the argument that, as adversaries under our labor laws, management and workers have conflicting interests. If middle-level employees who represent the interests of the employer align with workers, employees will face an insurmountable division of loyalties. Summarized in this way, the conflict of interest rationale is tautological: because they are adversaries, management and labor have conflicting interests, and because they have conflicting interests, they must remain adversaries.

Conflict of interest as a basis for excluding middle-level employees from NLRA coverage has two separate aspects. First, a conflict is said to exist between actions that would further the interests of labor as a collective (i.e., the union) and actions that further capital's interest.²⁰³ This alleged conflict of interest can be traced to an "entity" view of the corporation that envisions the corporation as a whole, separate from its constituent parts.²⁰⁴ According to the entity conception of the corporation, unions represent the narrow interest of labor, while those in power, such as owners, managers, and board members,

199. *The Labor-Management Cooperation Debate*, *supra* note 5, at 65.

200. *Id.*; accord Stone, *supra* note 5, at 147.

201. Stone sometimes refers to this as a "naturalist" approach. See Stone, *supra* note 5, at 144 n.306. Her label refers to the idea that the status quo — hierarchical workplace organization with the concomitant separation of functions between management and labor — is "natural" and therefore inevitable. See *supra* note 39.

202. Stone, *supra* note 5, at 144 n.306.

203. See *supra* notes 96-98 and accompanying text. The *Parker-Robb* case is a typical example of application of a conflict of interest rationale. *Automobile Salesmen's Local 1095 v. NLRB (Parker-Robb Chevrolet, Inc.)* 711 F.2d 383 (D.C. Cir. 1983); see *supra* note 104.

204. See Stone, *supra* note 5, at 150.

are charged with the duty of furthering the general interest of the enterprise as a whole.²⁰⁵ In short, management owes a fiduciary duty to ownership, which is to bring together ownership's capital and employees' labor to produce profit for the benefit of ownership.²⁰⁶ To discharge that duty, management must remain separate from labor.²⁰⁷

This paradigm of the corporation itself reflects several assumptions about the role of labor in corporate decision making. It assumes that the corporation is a unified entity run by a board of directors and a day-to-day management team devoted to pursuing the owners' interests. In addition, decision-making power in the corporation is understood as being linked to ownership. Finally, the paradigm reflects a belief that labor, a mere supplier to the enterprise, has no role to play in corporate decision-making.²⁰⁸ These views stem from a fear that organized labor will pursue interests antithetical to those of ownership, and to society, if allowed to have a substantial voice in policy-making for the enterprise.

Expressions of that fear appear in *Packard Motor Car Co. v. NLRB*²⁰⁹ and in the debates on Taft-Hartley. The majority in *Packard* characterized the company's argument as reflecting a fear that foremen would be governed by interests of their fellow foremen rather than by the company's interest.²¹⁰ Justice Douglas worried that management and labor would combine and assert demands on ownership, and that if allowed to unionize, management would be more sympathetic to the claims of those below them.²¹¹ The House Report on Taft-Hartley expressed concern that unionized foremen would be "subject to

205. *Id.* Ultimately, capital's interest is seen as synonymous with society's interest — the promotion of commerce — while labor is charged with impeding commerce and therefore ignoring the public's interest. This narrow conception of interests is a powerful propaganda tool; the public is taught to think of unions as selfish, greedy, and unconcerned with the impact which their actions have on the public.

206. *Id.* at 151 (quoting *NLRB v. Lewis Univ.*, 765 F.2d 616, 632 (7th Cir. 1985) (Swygert, J., dissenting)).

207. *Id.*

208. *Id.* at 151. To illustrate the hold that these embedded notions of the corporation have over our conception of workplace structure and labor's role therein, Stone explores two intriguing alternative theories of the corporation that leave room for a substantial labor voice. See *id.* at 152-61.

209. 330 U.S. 485 (1947); see *supra* notes 85-88 and accompanying text.

210. *Id.* at 490.

211. *Id.* at 494-95 (Douglas, J., dissenting).

influence and control by the rank and file union."²¹²

The fear that labor will represent only its narrow interests if permitted a voice in policy decisions is reflected in many areas of labor law.²¹³ That fear, and the paradigm of the workplace that it spawns, pose significant barriers to the achievement of workplace democracy. Because labor cannot be trusted to consider the good of the enterprise or the good of society, capital requires a cushioning layer of loyal representatives - middle-level employees - to keep labor in its place.

If labor were entrusted with a significant role in corporate decision-making, such a front-line "guard" would not be necessary. As one writer points out, the concept of "shared authority" characteristic of a truly democratized workplace would entitle employees to an equal voice in decision-making.²¹⁴ Affording all workers an equal collective voice in decision-making would render irrelevant the inquiry whether some employees are "managerial instruments" of the employer, whose job it is to keep the rank-and-file in line.²¹⁵

A second and separate aspect of the conflict of interest rationale is the personal conflict that managers supposedly experience between serving ownership and serving themselves. This "conflict" has its roots in the master-servant conception of the employment relationship, in which the servant owes an absolute duty of loyalty to the master.²¹⁶ This conception of the work relationship ignores the reality that people ordinarily do their work (serve their masters) and retain their loyalty to themselves. Worse, the master-servant paradigm, because it conceives of the worker as uninterested in her own work and how it fits together with the output of the enterprise,²¹⁷ ignores the worker's dignity and sentences her to alienation.²¹⁸

212. H.R. REP. NO. 245, 80th Cong., 1st Sess. 14, reprinted in LEGISLATIVE HISTORY, *supra* note 93, at 292, 305.

213. See, e.g., Crain, *supra* note 78, at 1339-40 (arguing that the law reflects assumption that unions, if permitted a voice on the issue of establishing employee drug detection programs, would oppose such programs; assumption is unfounded as voluntarily developed Operation Red Block programs demonstrate).

214. Bixler, *supra* note 148, at 466.

215. *Id.* at 465-66.

216. See *supra* notes 14-15 and accompanying text.

217. Here another vestige of Taylorism rears its ugly head. Taylorism, because it limits the worker to execution and separates the worker from conception, leaves no room for the possibility that a worker might take pride in the ultimate product of her labor.

218. Clearly, self-realization is impossible if the worker is not even considered to be master of her own work and time. As Klare puts it, "[o]ur labor law

This second aspect of the "conflict of interest" rationale is not, of course, unique to managers. However, it comes into sharper focus because of the overlap between the professional and managerial aspects of the jobs that many middle-level employees fill. In addition to their personal interests, many managers have professional interests to serve. The injection of this independent interest into the workplace severely threatens the undivided loyalty that a servant owes to her master. For example, a manager's professional code of ethics may conflict with the requirements of her employer.²¹⁹ A manager who is unionized will likely possess job security under her collective bargaining agreement. Consequently, ownership is forced to accommodate that independent interest in the running of the enterprise. By contrast, a non-unionized, at-will manager faced with the choice between unethical conduct and discharge will tend to be coerced by economic exigency into loyalty to her master.²²⁰

This second aspect of the conflict of interest rationale for the exclusion of middle-level employees from NLRA coverage is perhaps the most telling of all the explanations advanced to support the exclusion. It paints a bleak picture of managers as subservient ciphers of management who are not even deemed to have their own interests regarding the purpose or direction

is founded on the assumption that employee status and self-determination in work are incompatible." *The Bitter and the Sweet*, *supra* note 104, at 111 (emphasis omitted).

219. The Court refused to recognize this problem in *Yeshiva*. In that case, the Court asserted that the faculty's professional interests could not be separated from those of the institution. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 688 (1980). The Court's opinion on this point is, however, hopelessly contradictory. *The Bitter and the Sweet*, *supra* note 104, at 119. As Klare points out, the Court simultaneously asserts that faculty have no professional interests distinct from those of the institution, and that the "independence" of faculty creates an "acute" danger of divided loyalty. *Id.* (quoting *Yeshiva*, 444 U.S. at 689-90).

220. Manager/professionals who refused to behave in an unethical and often illegal manner and were discharged as a result, initiated the wrongful discharge doctrine, particularly the tort-based public policy strain. See *infra* notes 258-59, 265-69. Wrongful discharge is not a satisfactory solution to the problem because it generally redresses employer retaliation only for refusal to engage in illegal conduct, as distinguished from unethical conduct. In its narrowest form, public policy must be derived from some clear public policy mandate, preferably embodied in legislation. See Bastress, *A Synthesis and a Proposal for Reform of the Employment At-Will Doctrine*, 90 W. VA. L. REV. 319, 331 (1988). See generally Annotation, *Modern Status of Rule That Employer May Discharge At-Will Employee For Any Reason*, 12 A.L.R.4TH 544, 582-98 (1982) (discussing tort-based public policy wrongful discharge doctrine).

of their work.²²¹ The avalanche of scholarly interest and criticism²²² directed at the *Yeshiva* decision is thus quite understandable; the Court's decision made clear that the law was not even prepared to recognize that college faculty were capable of possessing independent interests in their work.

The conception of the worker/manager as a servant who owes an undivided duty of loyalty to his master persisted for decades before the courts imposed any reciprocal obligation on capital. For many years the law adhered to the rule that employers could dismiss employees at will "for good cause, for no cause, or even for cause morally wrong," without violating the law.²²³

C. MIDDLE-LEVEL EMPLOYEES SHOULD NOT BE SUBJECTED TO THE LEVELING PROCESSES OF UNIONISM

A third justification advanced for the exclusion of middle-level employees from the Act's coverage is that it was "wrong" to subject them to the leveling processes of unionism, which include seniority, uniformity, and standardization.²²⁴ The first fallacy of this justification for the blanket exclusion of middle-level employees developed by Congress and the Court, is that middle-level employees could never be "subjected to" the leveling processes of unionism except on their own initiative and authorization.²²⁵ If middle-level employees made that choice, then they must have weighed their options and concluded that the potential collective benefits outweighed the potential indi-

221. See *The Bitter and the Sweet*, *supra* note 104, at 117. Klare writes that *Yeshiva*, in particular, exposes the law's view of employees as individuals (1) who are powerless and therefore to be directed by others; (2) whose inherent, human capacity to learn and to generate knowledge is largely irrelevant to their productive functions; and (3) who possess no autonomous interest in or distinct perspective on workplace governance except a narrow self-interest in wage and benefits improvement.

Id. at 111.

222. See *supra* note 148.

223. *Blades*, *supra* note 13, at 1405 (citing *Payne v. Western & A.R.R.*, 81 Tenn. 507, 519-20 (1884), *overruled on other grounds sub nom. Hutton v. Waters*, 132 Tenn. 527, 179 S.W. 134 (1915)(emphasis added)).

224. See H.R. REP. NO. 245, 80th Cong., 1st Sess. 16-17 (1947), *reprinted in* LEGISLATIVE HISTORY, *supra* note 93, at 307-08. The Report states, in relevant part: "Supervisors are management people . . . It seems wrong, and it is wrong, to subject people of this kind, who have demonstrated their initiative, their ambition and their ability to get ahead, to the levelling processes of seniority, uniformity and standardization that [are fundamental to unionism]." *Id.*; see also *supra* notes 99-102 and accompanying text (discussing supervisors).

225. See *supra* note 102.

vidual losses.²²⁶

The objection that middle-level employees might be pressured into joining already established units of rank-and-file workers is easily met. If middle-level employees are in fact sufficiently self-motivated that they should not be subjected to or even need unionism, it follows that they will possess the strength of will to resist unionism if that is their desire. Further, if the interests of middle-level employees and the rank and file are truly divergent in a particular workplace, the Board's unit determination processes could be utilized to prevent middle-level employees from being included in units with rank-and-file workers.²²⁷

Moreover, the notion that unionism of middle-level employees necessarily entails standardization and leveling is self-limiting and ignores the experience of professional unions. For example, although engineering unions have experienced some leveling effect when pursuing the types of benefits traditionally sought by industrial unions (such as wage increases, seniority for layoff, job security provisions, and non-wage financial benefits)²²⁸ the attainment of other demands that are often of equal or more importance to employees entails very little "leveling" and actually encourages individual achievement. The opportunity for unions to serve individual interests is particularly great when the employee's individual professional objectives are in potential conflict with those of the organization.²²⁹ In this situ-

226. Cf. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 702 (1980) (Brennan, J., dissenting) (arguing that the fact that Yeshiva faculty voted for unionization indicates that it did not perceive its interests as aligned with those of management).

227. Under NLRA § 9(a), 29 U.S.C. § 159(a) (1988), the Board may certify a union as the exclusive representative of all the employees in a unit only when a majority of the employees in a unit "appropriate" for collective bargaining select the union. The Board interprets this as requiring that it group together only employees who possess substantial mutual interests in wages, hours, and other conditions of employment. See, e.g., *Gustave Fisher, Inc.*, 256 N.L.R.B. 1069, 1073 (1981). In most cases, the Board inquires into whether the employees share a similar community of interests. See, e.g., *Brown & Root, Inc.*, 258 N.L.R.B. 1002, 1004 (1981). The Supreme Court has approved the Board's "community of interest" standard. See *NLRB v. Action Automotive*, 469 U.S. 490, 496 (1985); *Leedom v. Kyne*, 358 U.S. 184, 185-87 (1958).

228. *Levitan & Gallo, Collective Bargaining and Private Sector Professionals*, 112 MONTHLY LAB. REV. 24, 29-30 (1989).

229. See *Strauss, Professional or Employee-Oriented: Dilemma for Engineering Unions*, 17 INDUS. & LAB. REL. REV. 519, 527 (1964). For example, although a scientist values the advancement and dissemination of knowledge for its own benefit, her employer may direct the scientist to areas that are likely to yield the highest profit. In addition, where the scientist may wish to

ation, the union may pursue the interests of the collective without fear of any leveling effect. Some common items on the bargaining agenda for professional unions include persuading the employer to: provide opportunities for attending professional meetings and for educational leave, pay dues for membership in professional societies, authorize the publication of research concerning matters that arguably are not trade secrets, permit the reading of professional literature on company time, and supply competent support services.²³⁰

More fundamentally, the "leveling" justification for excluding middle-level employees from NLRA coverage does not ring true. Masquerading as a concern for the welfare of middle-level employees themselves, the argument in reality is bottomed on a fear that unionism threatens capitalistic values because it discourages individual achievement.²³¹ After all, the leveling argument is not unique to middle-level employees; it is equally applicable to rank-and-file workers.²³² Restricting

publish, her employer may preclude publication to protect trade secrets. Finally, where the worker may think of her supervisors as senior colleagues and accordingly feel free to criticize those seniors, the employer usually expects the subordinate to obey the supervisor without question. *Id.*; see also Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees?* 99 YALE L.J. 689, 691 (1990) (stating that professional employees also seek protection for traditional professional values, including participation in policy making, the establishment of professional standards, and the commitment of organizational resources to professional goals).

230. Strauss, *supra* note 229, at 527-28.

231. See *supra* text accompanying note 99; see also Rabban, *supra* note 148, at 1778, 1791 (arguing that the NLRA and key decisions interpreting it are predicated on the assumption that conflicts of interest and divided loyalties could impair job performance of the most crucial employees, and ultimately destroy the structure of American capitalism).

232. To the extent that Congress and the Court believe that middle managers are unique, it is because they are "those best qualified to get ahead." See H.R. REP. NO. 245, 80th Cong., 1st sess. 16-17 (1947), reprinted in LEGISLATIVE HISTORY, *supra* note 93, at 307-08. This notion — a vision of "Superman" the supervisor emerging from the common herd of workers — appears to be a form of social Darwinism. The workplace naturally assumes a hierarchical structure, with that class of workers who are less intelligent or lazy at the bottom of the pyramid, while those at the middle and top possess talent and energy. See Axelson & Dail, *The Changing Character of Homelessness in the United States*, 37 FAM. RELAT. 463, 464 (1988) (describing philosophers' adoption of Darwin's theory of natural selection, its adaptation to a socioeconomic philosophy, and its use in the Protestant work ethic philosophies of Max Weber). This is certainly one of the least attractive features of capitalism, reflecting class bias and existing in considerable tension with the constitutional value of equality. See Atleson, *supra* note 9, at 841 & n.1 (positing that our reluctance to acknowledge or discuss issues of economic or political power may stem in part from our commitment to constitutional values of equality). For a

unionization to the rank and file does, however, tend to check the spread of unionism. Middle-level employees are likely to be among the most educated and articulate members of the employee pool. Further, because Taylorism has not yet robbed them of all knowledge and power over their work product,²³³ and because they have been socialized to believe they are powerful,²³⁴ they are the most likely to feel sufficiently confident to assert their interests vigorously.

Finally, the exclusion of middle-level employees from NLRRA protection as a means of defending capitalistic values may simply be a smokescreen the elite use to maintain their stranglehold on wealth in American society. Some have argued that the New Deal, including the Wagner Act, represented a strategy by the elite to *strengthen* and *revitalize* American capitalism rather than to undercut it.²³⁵ The Communist Party opposed the Act, as did the American Civil Liberties Union, on the grounds that the Act was designed to discourage strikes and to preserve the status quo by channeling conflict into more socially acceptable systems.²³⁶ The exclusion of middle-level employees from the Act's coverage is thus more consistent with an attempt by capital to maintain control over the working class than it is with an effort to promote capitalism among the ranks of middle-level employees.

perceptive and disturbing discussion of the liberal values that lie at the bottom of the urge to protect rather than to empower the underclass and thereby preserve the status quo, see W. RYAN, *supra* note 78, at 6-11, 26-30.

233. See *supra* notes 182-90 and accompanying text.

234. See *infra* notes 346, 370-73 and accompanying text.

235. See, e.g., Block, *Beyond Corporate Liberalism*, 24 SOC. PROBS. 352, 352 (1976-77). Atleson describes this view as follows:

Business opposition [to the Act] is viewed as basically a small-firm phenomenon, while large corporations are seen as proponents of greater state intervention in an economy threatened by economic collapse as well as by working class militancy. This view is based on a reversal of perception about twentieth-century liberalism; it is, under this view, a "movement of enlightened capitalists to save the corporate order."

J. ATLESON, *supra* note 52, at 42-43 (footnote omitted) (quoting Block, *supra*, at 352). Atleson himself does not support this view. Although acknowledging that business leaders supported the New Deal legislation, he asserts that the primary support for the Act came not from business or from labor, but from within government. Further, a number of large businesses actively opposed the legislation, represented by the National Association of Manufacturers. He concludes that the New Deal was not the result of a careful strategy by corporate leaders to control the political process. *Id.* at 43.

236. See J. ATLESON, *supra* note 52, at 196-97 n.44.

D. MIDDLE-LEVEL EMPLOYEES DO NOT NEED PROTECTION

The final justification — that middle-level employees do not need the protection of the NLRA because they are sufficiently powerful to protect their own interests — is the most illogical. The two interrelated components of this argument are that middle-level employees have demonstrated their ability to take care of themselves without the necessity of relying on collective action, and that middle-level employees voluntarily abandoned the security of the collective and assumed the risk of non-coverage.²³⁷

Even in 1947, when Congress passed Taft-Hartley, supervisors were telegraphing their willingness to rely on collective action for protection by joining supervisors' unions.²³⁸ With the rise of scientific management during the 1940s, supervisors who saw their autonomy being threatened manifested a growing union-consciousness.²³⁹ The War Labor Board reported a major upsurge in union activity by supervisors at this time.²⁴⁰ By 1945 the Public Opinion Index for Industry revealed that seventy-one percent of foremen favored the idea of unionization.²⁴¹

Concern about the need of middle-level employees for protection, particularly job security protection, made its way into the legal literature during the 1960s. In 1964, Andrew Hacker addressed the assumption of risk argument.²⁴² He worried about the seduction of America's "corporate middle class" by illusory promises of future gains that were not backed by enforceable promises of job security.²⁴³ He was particularly concerned about the effect this phenomenon had on a democratic society founded on a pluralist model that assumed a wide dispersion of power among many groups. Hacker reasoned that, unlike the "old middle class," the new corporate middle class lacked the defenses of union representation or the oppor-

237. See H.R. REP. NO. 245, 80th Cong., 1st sess. 16-17, reprinted in LEGISLATIVE HISTORY, *supra* note 93, at 307-08. See *supra* text accompanying note 99.

238. See Seitz, *supra* note 8, at 202.

239. *Id.* at 204-05. Unionization of the rank and file posed a substantial threat to supervisors' power; as unionized workers gained more control over their futures in the enterprise, the supervisors' discretion over the rank and file slipped away. *Id.* at 205-06.

240. *Id.* at 209 (citing *Report of the War Labor Board's Foremen's Panel*, 16 L.R.R.M. (BNA) 2511 (1945)).

241. *Id.* at 211 (citing *Foremen Warm Up to Union*, BUS. WEEK, May 4, 1957, at 57).

242. See Hacker, *supra* note 10, at 8-9.

243. *Id.*

tunity for meaningful political input, leaving it totally dependent on the continued goodwill of employers.²⁴⁴ Hacker voiced the suspicion that the economy could not long continue to support so many layers of management and staff, or "white collar employees," and predicted: "Were all the white-collar water to be wrung out of the corporate world the task of blotting it up might well be insurmountable, and there would be every likelihood of political repercussions that would test the viability of democracy."²⁴⁵

Hacker also expressed the view that white-collar employees are more vulnerable to the loss of security, status, and self-esteem that follow job termination than are blue-collar employees.²⁴⁶ Hacker's concern for the psychological state of middle-level employees echoed that of the well-known humanist Erich Fromm.²⁴⁷ Fromm, concerned that the "new middle class," composed primarily of managers, supervisors, and professionals, was increasingly separate from ownership interests, focused on the alienation this group experienced.²⁴⁸ Separated from ownership by principles of scientific management, the manager's job was to use profitably the capital others invested.²⁴⁹ Fromm recommended involvement in decision-making to combat feelings of alienation.²⁵⁰

In 1969, Lawrence Blades pointed out that middle-level employees typically were protected neither by collective bargaining agreements nor by individual contracts.²⁵¹ The relative lack of employee mobility made employees vulnerable to discharge,

244. *Id.*

245. *Id.* at 9.

246. *Id.*

247. See E. FROMM, *supra* note 77, at 99-100.

248. *Id.* at 124-27. A federal government task force also recognized the syndrome of "white collar woes" and the growing discontent among managers. See SPECIAL TASK FORCE TO THE SECRETARY OF HEALTH, EDUCATION AND WELFARE: WORK IN AMERICA xvi-xvii (1973).

249. E. FROMM, *supra* note 77, at 124-27; H. BRAVERMAN, *supra* note 184, at 57 (arguing that the new relations of production, introduced by the capitalist, force workers to surrender their interest in the labor process, which has become "alienated").

250. E. FROMM, *supra* note 77, at 299-307, 322-23. Fromm's conclusions are echoed by the observations of a more contemporary writer, Gail Sheehy. Sheehy notes that the most "dispirited" employees are in middle management, while the most "satisfied" hold decision-making positions. G. SHEEHY, PATH-FINDERS 19 (1981).

251. Blades, *supra* note 13, at 1411-12. Because only the unusually valuable employee had sufficient bargaining power to obtain a guarantee in an individual contract that he would be discharged only for cause, Blades concludes that individually-negotiated limitations on the employer's right of discharge were

employer coercion in its quintessential form.²⁵² Moreover, even employees who were not discharged remained subject to less drastic threats, short of discharge, which the employer might utilize to "bend the will of his employee to his own."²⁵³ Thus, the non-union employee became a "docile follower of his employer's every wish."²⁵⁴

Blades lamented the law's failure to close the gap in protection for non-union workers created by the exclusion of middle-level employees from NLRA coverage.²⁵⁵ Blades argued that there existed a continuing imbalance of power between the middle-level employee and his employer — the same imbalance that produced unionism. The increasing concentration of power in the hands of fewer employers aggravated this imbalance.²⁵⁶ Blades recommended establishment of a damage remedy for abusive discharge.²⁵⁷

Blades's writings were prophetic. At least thirty states have judicially created exceptions to the employment at-will doctrine.²⁵⁸ These exceptions have become the body of law generally referred to as "wrongful discharge law." The three exceptions to the rule that an employer may discharge employees at will include the public policy exception, the implied contract exception, and the implied covenant of good faith and fair dealing.²⁵⁹ Experience has shown that these exceptions are much more likely to support a cause of action by a middle-level employee than by an employee whose wage is not high enough to justify such an action.²⁶⁰

not a promising means of solving the problem of employer coercion. *Id.* at 1412.

252. *Id.* at 1405-06.

253. *Id.*

254. *Id.* at 1405.

255. *Id.* at 1404-05 (footnotes omitted).

256. *Id.*

257. *Id.*

258. See Annotation, *supra* note 18, at 552-604. There may be as many as 46 states that have recognized the doctrine, at least in dicta. See *Employment at Will: State Rulings Chart*, *supra* note 30, at 550: 51-52.

259. For a description of these forms of action, see Note, *Hybrid Employees: Defining and Protecting Employees Excluded from the Coverage of the National Labor Relations Act*, 41 VAND. L. REV. 601, 622-24 (1988).

260. See Note, *supra* note 29, at 1940 (arguing that despite their supposedly greater bargaining power, many plaintiffs in public policy cases are from upper management; reporting that a 1982 study of 46 public policy cases revealed that a majority of plaintiffs were managerial); Steiber, *Recent Developments in Employment-At-Will*, 36 LAB. L. J. 557, 558 (1985); see also Geyelin, *Fired Managers Winning More Lawsuits*, Wall St. J., Sept. 7, 1989, at B-1, col. 3. The *Wall Street Journal* noted:

The argument that middle-level employees do not need protection because of their superior bargaining power is belied not only by the fact that wrongful discharge law developed, but by its dramatic growth in the last decade.²⁶¹ The number of at-will employees terminated unjustly has been estimated to be between 50,000 to 200,000 per year.²⁶² In late 1989, more than 25,000 wrongful discharge cases were pending in state and federal courts.²⁶³

Moreover, a sampling of the reported cases indicates that employers have not hesitated to discharge middle and upper level managers and supervisors for reasons that would have been protected as "concerted activity" had the discharged worker been a covered employee under the NLRA.²⁶⁴ The motivations for the discharges in these cases run the gamut, in-

All kinds of white-collar workers are filing these suits, whether they're making \$30,000 or \$300,000 a year"

Money is a big reason. With high salaries, lucrative stock options, hefty bonus plans and retirement packages and other benefits on the line, white-collar workers have more to lose by being fired and more resources with which to pay lawyers. A Rand study released last year surveyed 120 wrongful discharge cases that went to trial in California between 1980 and 1986. The average salary of fired employees was \$36,254.

Id. at B-1, col. 4-5.

261. According to a Bureau of National Affairs study, wrongful discharge cases more than doubled between 1982 and 1987. Geyelin, *supra* note 260, at B-1, col. 4.

262. Lopatka, *supra* note 18, at 2 (citing Steiber, *The Case for Protection of Unorganized Employees Against Unfair Discharge*, 32 PROC. ANN. MEETING INDUS. REL. RES. ASS'N 160-61 (1980)). Steiber estimates that of 2 million workers discharged annually who aren't covered by employment contracts or collective bargaining agreements, 150,000 are fired annually without just cause. Steiber, *supra* note 260, at 558.

263. Geyelin, *supra* note 260, at B-1, col. 4.

264. NLRA Section 8(a)(1) provides a remedy for employer conduct which interferes with, restrains or coerces employees in the exercise of Section 7 rights; Section 7 protects employees' rights to engage in concerted activities for mutual aid or protection. NLRA, 29 U.S.C. §§ 158(a)(1), 157 (1988). "Concerted activity" by a single employee in the context of the assertion of statutory rights is limited to activity engaged in "with, or on the authority of, other employees, and not solely by and on behalf of the employee himself." *Meyers Indus., Inc.*, 268 N.L.R.B. 493, 497 (1984), *rev'd sub nom.* *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir.), *cert. denied*, 474 U.S. 971 (1985), *on remand*, 281 N.L.R.B. 88 (1986), *aff'd sub nom.* *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert denied*, 487 U.S. 1205 (1988). By contrast, Section 7 protects a single employee's assertion of a right contained in a collective bargaining agreement as a "concerted activity" because it is considered an extension of the concerted activity that produced the agreement, and thus the assertion of such a right affects the rights of all employees the agreement covers. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 837 (1984).

cluding such varied reasons as a refusal to cooperate with the employer in its violation of local health and safety regulations,²⁶⁵ a store manager's attempt to protect the lives of the employees he supervised,²⁶⁶ a black supervisor's involvement in a class action suit for race discrimination,²⁶⁷ a manager's decision to file an EEOC claim against the employer in which the discharged manager sought and obtained the support of other employees,²⁶⁸ and engaging in union organizing activity.²⁶⁹

Finally, if middle-level employees have "assumed the risk" of individual rather than collective action, the real question is whether it is only middle-level employees who are at risk. Pitting middle-level employees against the rest of the laboring class penalizes individual middle-level employees, who bear the risk of loss of employment. In addition, the polarization of middle-level employees hurts the rank and file, who lose the support of the middle-level employee class. Finally, pitting middle-level employees against the rest of the laboring class penalizes society as a whole, risking decreased productivity, alienation, increased burdens on the unemployment, welfare and judicial systems, and a political system that is democratic in

265. See *Balog v. LRJV, Inc.*, 204 Cal. App. 3d 1295, 1298-99, 250 Cal. Rptr. 766, 767 (1988) (noting that supervisor's complaint for retaliatory discharge was based on his report that the employer was not complying with minimum safety standards, his refusal to assign employees to jobs exposing them to the risks resulting from failure to meet safety standards, his refusal to cooperate in the illegal disposition of toxic waste, his refusal to falsify accident reports, and his refusal to manufacture false reasons supporting the discharge of probationary employees to prevent them from joining the union).

266. See *Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, 922-23, 436 A.2d 1140, 1143-44 (1981) (holding that manager who allowed employees to leave company funds in the safe overnight, resulting in substantial loss during a burglary, was improperly terminated for negligence in following company policy; contending that manager furthered public policy by attempting to protect employees who were fearful of making deposits after defendant suspended police protection for them).

267. See *Taitt v. Chemical Bank*, 849 F.2d 775, 778 (2d Cir. 1988) (holding that black bank manager discharged after 24 years of employment in retaliation for his resistance to a proposed settlement of Title VII action brought by black professionals at the bank established prima facie case under 42 U.S.C. § 1981 (1982)).

268. See *Jones v. Flagship Int'l*, 793 F.2d 714, 729 (5th Cir.) (finding that EEOC manager may not maintain Equal Pay Act claim against employer who discharged her in retaliation for filing EEOC claim, for encouraging others to do so, and for seeking to maintain a class action against the employer), *cert. denied*, 479 U.S. 1065 (1986).

269. See *American Diversified Foods, Inc. v. NLRB*, 640 F.2d 893, 897 (7th Cir. 1981) (holding that discharge of shift managers at fast food restaurant for engaging in union organizational activity did not violate NLRA because employees were "supervisors" not covered by the Act).

name only. These questions should prompt a reexamination and restructuring of our labor laws. The next section attempts that.

IV. CONSEQUENCES OF THE EXCLUSION OF MIDDLE-LEVEL EMPLOYEES FROM NLRA COVERAGE FOR FEDERAL LABOR POLICY

A. ACHIEVEMENT OF THE GOALS OF LABOR LAW IS FRUSTRATED

1. Industrial Peace

Neither Congress nor the Court has ever sought to justify the exclusion of middle-level employees from NLRA coverage by direct reference to the Act's goal of industrial peace.²⁷⁰ Indeed, the Court has been extensively criticized because its exclusion of managerial employees is incompatible with the goal of achieving industrial peace.²⁷¹ In his dissent in *Yeshiva*,²⁷² Justice Brennan noted that the *Yeshiva* decision undermined the goal of funneling industrial disputes into collective bargaining, leaving non-covered managerial employees to self-help remedies.²⁷³ Similarly, one commentator has pointed out that because *Yeshiva* did not hold that faculty unionization is illegal, the employer's ability to ignore any union formed or to fire faculty members for joining it depends entirely on the union's economic and political clout.²⁷⁴ Thus, "[a]n ironic consequence of *Yeshiva* is that it invites faculty and potentially other employees to go outside the legal process to protect their interests."²⁷⁵

Nevertheless, the congressional exclusion of supervisors and the Court's exclusion of managers and certain confidential employees proceed on the unstated assumption that exclusion

270. See *supra* text accompanying notes 58-63.

271. See *supra* note 148.

272. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 691 (1980) (Brennan, J., dissenting). See *supra* notes 129-42 and accompanying text.

273. *Id.* at 705 (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 499 (1979)).

274. *The Bitter and the Sweet*, *supra* note 104, at 106 n.*.

275. *Id.* Klare refers here to the possibility that middle managers who cannot resort to the Board's processes, collective bargaining, or arbitration of employee grievances, may be forced to use strikes, sit-down strikes, slowdowns, and other forms of peaceful economic pressure to advance their demands. *Id.* Klare notes that although this may be a positive development in the long run because it encourages non-covered employees to rely on their own group strength, that possibility provides "small consolation" in view of the tremendous defeat in *Yeshiva*. *Id.*

will ultimately produce industrial peace. "Industrial peace," however, is not defined in its ideal sense. Instead, it refers to a peace based on middle-level employees' domination of the rank and file. By subduing the workers beneath them, these non-unionized front line workers aid in maintaining "peace," which really means avoidance of profit-interrupting strikes. For example, the 80th Congress believed that owners must have on their side loyal, non-union men "to assign people to their work, to see that they keep at their work and do it well, to correct them when they are at fault, and to settle their complaints and grievances."²⁷⁶ Similarly, the *Yeshiva* Court asserted that universities were entitled to "rely on their faculties to participate in the making and implementation of their policies."²⁷⁷

This conception of industrial peace is premised on the notion that the workplace must be organized in a hierarchical fashion to be productive and efficient. It assumes that chain-of-command forms of organization cannot coexist with cooperation between workers rather than subordination of one class of workers to another, and ultimately the subordination of all classes of workers to the capital-controlling elite. Placement of rank-and-file workers at the bottom of the hierarchy has been justified because workers who execute work as opposed to conceiving it do not possess learning and knowledge-generating capabilities, or, at best, those abilities are not relevant to their productive functions. Such conceptual functions belong solely to management.²⁷⁸

Klare persuasively argues that labor law reinforces these hierarchical notions by cloaking worker domination in the more acceptable garb of majority rule, which occurs through collective bargaining.²⁷⁹ The NLRA induces worker consent to the hierarchical, authoritarian nature of the workplace, and to the prerogative of private capital to control the production process and dispose of the products of labor.²⁸⁰ Klare asserts

276. See H.R. REP. NO. 245, 80th Cong, 1st sess. 16, reprinted in LEGISLATIVE HISTORY, *supra* note 93, at 307.

277. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 689 (1980) (footnote omitted).

278. See *The Bitter and the Sweet*, *supra* note 104, at 114.

279. *Labor Law as Ideology*, *supra* note 57, at 458-59. Klare argues that collective bargaining thus takes on a "law making" function. *Id.*

280. Klare explains: "Collective bargaining law is only marginally concerned with worker input or participation in significant industrial decisions. Its real preoccupations are with efficient management of the enterprise, with establishing a governance process that 'promote[s] industrial stabilization,' 'achieve[s] industrial peace,' and maintains 'uninterrupted production'" *Id.* at 459-60 (quotations omitted).

bluntly that, under current law, collective bargaining operates as "a system for inducing workers to participate in their own domination by managers and those whom managers serve."²⁸¹

Nonlegal observers also have noticed the co-opting effect of worker participation schemes, such as the NLRA, in a capitalistic society. Jacques Ellul has argued persuasively that the provision for worker input is part of a technique that has as its ultimate goal the reduction of worker hostility.²⁸² He concludes that labor unions only operate to aid workers in submitting to the conditions from which unions had originally hoped to free them.²⁸³ Christopher Lasch scorns illusions of democracy and participation as forms of "therapeutic authority" that ultimately undermine the self-sufficiency of the individual.²⁸⁴

Moreover, labor law doctrine has strayed even from the NLRA's original co-optation function.²⁸⁵ Klare notes that the Court departed abruptly from its policy of labor co-optation in *Yeshiva*, in which it "bluntly and unceremoniously extinguished the legal rights of hundreds of thousands of employees."²⁸⁶ Klare fears that the collective bargaining system is ripe

281. *Id.* at 459-61 (footnotes omitted). Another legal scholar describes the co-optation effect of labor law in gentler terms: "[American labor law] institutionalizes and constricts the struggles of workers, helping them accept their own subordinate role in a capitalist society." Abraham, *Individual Autonomy and Collective Empowerment in Labor Law: Union Membership Resignations and Strikebreaking in the New Economy*, 63 N.Y.U. L. REV. 1268, 1277 (1988).

282. J. ELLUL, *THE TECHNOLOGICAL SOCIETY* 351-52 (1967).

283. *Id.* at 358. Ellul believes that labor unions, like human relations experts and industrial psychologists, serve a tranquilizing function for workers and give them illusions of possessing some control when, in fact, machines and the push toward productivity are in the driver's seat. *Id.* at 356. Ellul reasons that productivity can be improved by reducing the human factor of hostility and the randomness that it injects into the workplace. Because a hostile worker will not work as hard or as efficiently as one who is made to feel a part of the community of interest, capital must concern itself with worker morale and related problems of social and psychological well-being. *Id.* at 351-52. Unions, supposedly the champions of the workers, in fact occupy themselves searching for solutions in ways which do not seriously disrupt the system. They, too, are devoted to maintaining the status quo. *Id.* at 82.

284. C. LASCH, *CULTURE OF NARCISSISM* 315 (1979).

285. See, e.g., *The Bitter and the Sweet*, *supra* note 104, at 99 (arguing that collective bargaining is a means to "channel and institutionalize industrial conflict, thereby containing and defusing it").

286. *Id.* at 104. Klare asserts that *Yeshiva* signals a change in the ideology of collective bargaining away from an integrative, co-optative approach, and toward repression. *Id.* Klare's reference to "repression" refers to his earlier description in the same work of the two elite approaches to labor law. The first is "basically repressive", and therefore grudging toward recognition of employee rights, while the second is the co-optation model of labor law. *Id.* at 99.

for and vulnerable to reforms that will bolster productivity and channel dissension by providing an illusion of democracy.²⁸⁷ Several writers have suggested such reforms.²⁸⁸

In short, the NLRA is "simultaneously liberating and cooperative" for workers.²⁸⁹ Although providing unions with a foothold in basic industries that had previously been successful in fighting them off, the Act also has operated to establish a new avenue through which the rank and file can be controlled.²⁹⁰ In other words, industrial peace has been achieved through domination. The Act functions as the opiate for the masses, operating to keep workers just satisfied enough so they will not revolt, but stopping short of conferring any real power upon them.

Our industrial "peace" is not the sort of peace the drafters of the Wagner Act envisioned. They foresaw a peace born of a compromise of power between the two forces in industry, capital and labor.²⁹¹ Congress' premise was that the Wagner Act would operate to restore power to labor and thus to equalize the bargaining power of the two forces.²⁹² This balance of power would prevent employers from dominating workers and would lead ultimately to fair bargaining and to the attainment of labor contracts acceptable to both capital and labor.²⁹³ In short, it would be possible to attain labor peace in a democratic fashion, without paying the high price of worker domination.

Critical to the attainment of industrial peace in a democracy, then, is bargaining between two equally powerful forces. Because these forces have conflicting interests, their relation-

287. *Id.* at 124. In other words, a version of collective bargaining might evolve which would enable workers to have input into capital's decisions where the interests of labor and capital converge (e.g., increasing productivity), but not where those interests diverge (e.g., improvements in wages or working conditions which diminish capital's share of the profits or decrease productivity).

288. See, e.g., Gregory, *Lessons from Publius for Contemporary Labor Law*, 38 ALA. L. REV. 1, 20 (1986) (stating that workplace hierarchy recognizes the "legitimate distinction" between ownership and labor); Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C.L. REV. 499, 518 (1986) (contending that participatory models, as distinguished from collective bargaining, leave ultimate control of the order of the employment relationship with management; their goal is organizational effectiveness, not employee self-determination).

289. D. MONTGOMERY, *supra* note 188, at 165.

290. *Id.*; see *Labor Law as Ideology*, *supra* note 57, at 463.

291. See *supra* note 58.

292. See *supra* note 21 and accompanying text.

293. See *supra* note 53 and accompanying text.

ship will necessarily be adversarial, at least in the short term.²⁹⁴ The adversarial nature of the relationship, and the displays of power that are likely to accompany a struggle for control between two roughly equal forces, are not necessarily inconsistent with achieving industrial peace. "Power" need not connote hierarchy and oppression. It is not always relative, and need not be purchased through coercion, at another's expense.²⁹⁵ The exercise of power without domination, in the context of adversarial bargaining will likely produce interest-based bargaining²⁹⁶ and, ultimately, will result in labor contracts that benefit both parties.²⁹⁷ The line between the adversaries, however, must be clear because the adversarial system of collective bargaining assumes the existence of mutually exclusive groups of employers and employees.²⁹⁸

The line between capital and labor has become increasingly blurred since enactment of the Wagner Act.²⁹⁹ The ideal of a true labor peace has become a fantasy. As more "hybrid" workers are shunted across the line separating covered from non-covered employees because they are "aligned with management,"³⁰⁰ industrial peace becomes more a matter of domination of rank-and-file employees by their "superiors." These superiors are no longer confined to capital, but now are composed primarily of middle-level workers. Hence, the industrial peace that reigns today is indeed the product of co-optation. Worse still, the remnants of the adversarial underpinnings of the NLRA remain, leaving us with the worst of both worlds:

294. See Gregory, *supra* note 288, at 16 (arguing that labor relations historically have been premised on good faith, although they have been conducted in essentially adversarial, arms-length collective bargaining). Over the long haul, however, the interests of capital and labor may converge. See *infra* note 297.

295. See N. HARTSOCK, MONEY, SEX, AND POWER 210-26 (describing the views of several feminist scholars who urge the reconsideration of assumptions that power is equivalent to domination, and argue instead that power is associated with capacity, competence, and energy).

296. See generally R. FISHER & W. URY, GETTING TO YES (1981) (describing process of interest-based bargaining that focuses on the merits and looks for mutual gains, without posturing).

297. For example, a powerful union with strong support from its members might concede on many issues at the bargaining table in an effort to aid ownership in fighting off foreign competition. The union concedes, then, not because it is weaker than ownership, but instead because it is in the joint interests of capital and labor for it to do so.

298. See Note, *Hybrid Employees: Defining and Protecting Employees Excluded from the Coverage of the National Labor Relations Act*, 41 VAND. L. REV. 601, 602 (1988).

299. See *supra* notes 81-168 and accompanying text.

300. See Note, *supra* note 298, at 602.

hierarchy and domination, combined with structural barriers to cooperation in the workplace.³⁰¹

2. Worker Empowerment

The exclusion of middle-level employees from NLRA coverage is patently inconsistent with the goal of worker empowerment.³⁰² The stratification of labor into workers and management is simply "a cover for the forcible 'alignment' (read: subordination) of [managers to capital]."³⁰³ Indeed, as *Yeshiva* and *COMS* make clear,³⁰⁴ the goal of the NLRA is to empower workers only to the point where they have, by effective political mobilization, achieved a modicum of democratic power on the job, at which time they lose the Act's protections.³⁰⁵ Thus, the labor laws penalize employees for successful collective bargaining and ensure that the most powerful employees are alienated and isolated from the remainder of the laboring class.

Further, the decline in the strength of organized labor relative to ownership means that because of its superior power, capital can take a larger share of the economic pie relative to labor as a whole. Union gains, then, are achieved at the expense of non-unionized workers rather than at the expense of ownership.³⁰⁶ Pitting worker against worker engenders hostility between classes of workers, exacerbates problems of alienation and isolation, and reinforces the stratification of labor.

301. See generally Stone, *supra* note 5 (discussing barriers to worker participation in the NLRA).

302. See *supra* text accompanying notes 64-68.

303. *The Bitter and the Sweet*, *supra* note 104, at 119.

304. See *supra* text accompanying notes 129-49.

305. *Id.* at 113. Klare points out that *Yeshiva* creates a paradox for employees: if they are successful enough through collective bargaining to achieve a measure of workplace power, they may have simply bargained themselves out of the legal impetus that the employer has to bargain, namely, NLRA protections. *Id.*

306. See *Plant v. Woods*, 176 Mass. 492, 505, 57 N.E. 1011, 1016 (1900) (Holmes, C.J., dissenting). As Holmes observed:

It [is] pure phantasy to suppose that there is a body of capital of which labor, as a whole, secures a larger share [by means of organization and strikes] Organization and strikes may get a larger share for the members of an organization, but, if they do, they get it at the expense of the less organized and less powerful portion of the laboring mass. They do not create something out of nothing.

Id.

3. Industrial Democracy

Industrial democracy, one of the foremost goals of the NLRA,³⁰⁷ is assuredly not served by denying hundreds of thousands of workers a voice in the arena in which their voice would sound loudest: the workplace. Middle-level employees are disenfranchised. They cannot be represented by unions, and their interests are not congruent with those of capital.³⁰⁸ As their numbers grow, and as the proportion of the labor force that they constitute increases, the NLRA model increasingly fails to satisfy the element of democracy that requires representation of all or most of those governed.³⁰⁹

Moreover, the problem of worker alienation, which the NLRA's injection of democracy into the workplace was to redress, is still with us. Most workers today do not find fulfillment in the world of work; the phenomenon of alienation Karl Marx identified more than a century ago³¹⁰ is more entrenched than ever.³¹¹ One observer writes:

A profound malaise of spirit afflicts many workers. Misery, meaninglessness, deep dissatisfaction, and often inarticulate impoverishment of purpose plague even many of the most "successful," especially if "success" is measured only by conventional norms of monetary remuneration in late capitalist society. It has long been axiomatic that most persons who work for a living . . . dread Monday morning. This poignantly simple description of the world of work encapsulates much of the contemporary tragedy of labor.³¹²

Although alienation has always been a problem among unionized, rank-and-file workers,³¹³ it was not perceived as a concern for middle-level employees until recently. The changing economy, and its concomitant bureaucratization, automation and technological changes, tends "to turn the white collar

307. See *supra* text accompanying notes 69-80.

308. See Willborn, *supra* note 56, at 734.

309. *Id.* at n.85 & accompanying text.

310. Karl Marx noted that alienation is the single most enduring problem afflicting the working world. K. MARX, ECONOMIC AND PHILOSOPHICAL MANUSCRIPTS OF 1844, COLLECTED WORKS 110-11 (D. Strunk ed. 1964).

311. See Gregory, *Catholic Labor Law Theory*, 45 WASH. & LEE L. REV. 119, 123 (1988).

312. *Id.* at 122.

313. Alienation continues to plague organized labor, despite some recent signs of resuscitation. See Gregory, *supra* note 311, at 124 ("More often than not, unionized workers continue to be cruelly deceived by the false promise of employee profit sharing and participatory workplace democracy. . . . Most of these ownership-initiated schemes of supposed workplace democracy have thus far deceived workers and have failed to halt the continued impoverishment of workers' spirits" (footnote omitted)).

gray."³¹⁴ Middle-level employees, like unionized workers, suffer from alienation.³¹⁵ Non-unionized middle-level employees are victims of their own individualistic philosophy. They are especially vulnerable to alienation and to the potential psychological devastation accompanying job loss because their expectations of achieving a meaningful work life are much higher than those of their blue collar brothers and sisters.³¹⁶

As white collar workers confront their inability to control their destinies,³¹⁷ they have turned to the courts for help rather than to their fellow workers.³¹⁸ Resort to the individual remedy of wrongful discharge has done little to combat the feelings of powerlessness and alienation that middle-level employees and the rank and file alike share.

The social costs of alienation at work are high.³¹⁹ They include drug abuse, absenteeism, and decreased productivity.³²⁰ The byproducts of alienation, however, are not confined to the workplace. Some have linked the increase in violence in American society to alienation.³²¹ The antidote for worker alienation

314. Blum, *supra* note 12, at 126 (positing that change in collar color will come about as the clerk's dream of upward mobility takes on a greater sense of unreality, as fears mount concerning job security, and as the clerk recognizes the lack of protection from unilateral management action).

315. See Gregory, *supra* note 311, at 138.

316. *Id.* at 138; see also Hacker, *Introduction: Corporate America*, in THE CORPORATION TAKEOVER, *supra* note 10, at 8-9 (arguing that when resources for middle manager positions and salaries become scarce, an inevitable wave of middle management terminations will have serious personal ramifications because white collar employees are psychologically unprepared for the loss of status which accompanies the loss of a job).

317. See P. KING, K. MAYNARD & P. WOODYARD, *supra* note 10, at 57. The authors note that although income rewards for middle managers are still extensive, middle managers have obtained these rewards by consenting to a trade-off in job security; moreover, even the material rewards are being eaten away by the drive for cost reductions and increased profit. *Id.* at 58.

318. See *supra* notes 258-69 and accompanying text. The typical wrongful discharge plaintiff is

a middle-aged, mid-level, mid-career, male manager who has spent the majority of his adult life with the former employer. His psychological devastation is often irreparable Once cast adrift by the now disembodied corporate abstraction, to which they had pledged their working lives as an almost filial act, these former managers can be the most pathetic and helpless of victims.

Gregory, *supra* note 311, at 124.

319. See generally E. FROMM, MARX'S CONCEPT OF MAN (1961) (detailing the tragic consequences of alienation).

320. See Crain, *supra* note 78, at 1286-1345.

321. See, e.g., R. MAY, LOVE AND WILL 30-31 (1969). May equates alienation with apathy. *Id.* at 29; see *infra* note 322. He describes a dialectical relationship between apathy and violence. Violence is a reaction to feelings of apathy.

is participatory decision-making, a remedy largely unavailable for middle-level employees under current law.³²²

B. MOST MIDDLE-LEVEL EMPLOYEES REMAIN VULNERABLE TO DISCHARGE

1. The Inadequacies of Wrongful Discharge

The principal existing method of protecting the job security of middle-level employees is wrongful discharge doctrine.³²³ Wrongful discharge, however, poses problems from the worker's point of view for several reasons. First, availability of redress depends on the state in which the worker resides because not all states currently recognize the doctrine.³²⁴ Second, not all of the states that recognize the doctrine will entertain all of the currently existing theories on which relief may be available.³²⁵ Third, only workers in the upper echelons of management possess sufficient resources to pursue relief through litigation.³²⁶ Finally, wrongful discharge is an individual remedy, which operates to pit the middle manager against not only his employer, but other members of the workforce whose continuing employment ensures their "loyalty."³²⁷

Wrongful discharge doctrine also is disadvantageous from

When the inability to affect or even genuinely touch another person becomes overwhelming, "violence flares up as a daimonic necessity for contact, a mad drive forcing touch in the most direct way possible." *Id.* at 30-31 (footnote omitted). In short, "[v]iolence is the ultimate destructive substitute which surges in to fill the vacuum where there is no relatedness." *Id.* at 30 (footnote omitted).

322. Erich Fromm writes: "The worker can become an active, interested and responsible participant only if he can have influence on the decisions which bear upon his individual work situation and the whole enterprise. His alienation from work can be overcome only if . . . he becomes a responsible subject who employs capital." E. FROMM, *supra* note 77, at 281. Fromm's analysis should not surprise any student of human nature. Alienation is synonymous with apathy, or the absence of caring. *See* R. MAY, *supra* note 321, at 29 (stating that alienation, anomie, and apathy express a condition in which men and women experience a distance between themselves and the objects that used to excite their affection and their will). We naturally tend to ignore things that are out of our control, while we tend to care — that is, feel responsible for — things that we experience as being within our control. *See* R. MAY, *MAN'S SEARCH FOR HIMSELF* 24-25 (1953).

323. *See supra* note 18.

324. *See supra* note 258 and accompanying text.

325. *See supra* note 30 and accompanying text.

326. *See supra* note 260 and accompanying text.

327. I use the term "loyalty" here very narrowly, to refer to the willingness of current employees to align themselves with the employer in this particular situation.

the employer's perspective. Litigation is costly, time-consuming, and often destroys the morale of the remaining employees working in the terminated plaintiff's department. It can produce very large damage awards³²⁸ and, because of the vagaries of juries, its outcome and costs are unpredictable. More fundamentally, wrongful discharge perpetuates management by force, by which the manager's "loyalty" to the enterprise is obtained by threatening discharge. Loyalty and cooperation are the result of trust, not coercion. Owners thus do not receive the best work from their managers under a force-based management style.

Finally, protecting middle-level employees through wrongful discharge doctrine is costly to society. It is costly in a direct economic sense because wrongful discharge cases occupy a considerable portion of judicial time, clogging the courts, and preempting or delaying resolution of other issues of concern. In addition, because they are remedial rather than preventative, wrongful discharge awards result in a drain on our welfare and unemployment compensation systems.³²⁹ Wrongful discharge is also costly in an indirect economic fashion because wrongful discharge remedies exacerbate the problem of worker alienation, resulting ultimately in a decrease in efficiency and productivity.³³⁰

Leaving the protection of middle-level employees to the vagaries of wrongful discharge also is costly to society in a moral sense. The burgeoning public concern with corporate ethics and our desire to ensure honest corporate practices, particularly in a society controlled by corporations, is inconsistent with the at-will status of most middle-level employees. Although it is true that the "public policy" strain of wrongful discharge provides some protection to society from unethical corporate prac-

328. See *infra* note 374.

329. By excluding from union membership the relatively powerful middle-level employees, labor law doctrine ensures that those remaining in the unionized work force (or in the unionizable work force that unions have thus far lacked the power to organize) will continue to lack job security and financial resources. In addition to the prospect of unemployment, the certainty of low-paying wages carries with it the threat of homelessness: 20% to 30% of the homeless population work, but cannot afford a place to live in the area where they work. National Coalition for the Homeless, *Homelessness in the United States: Background and Federal Response — A Briefing Paper for Congressional Candidates*, in PRACTICING LAW INSTITUTE, THE RIGHTS OF THE HOMELESS 65, 72 (1988); see also Axelson & Dail, *supra* note 232, at 465 (stating that the subpopulation of homeless known as "working poor" is growing).

330. See *supra* note 77 and accompanying text.

tices, it is precious little protection.³³¹

2. Federal Regulation Other Than the NLRA Provides Scant Solace

Federal regulation of the workplace outside the NLRA typically has been concerned with working conditions rather than with the most vital employee concern — job security.³³² To the extent that federal legislation does concern itself with job security, remedies are available only to employees in protected classes.³³³ The only federal regulation that would ostensibly deal with the issue of employment security for most non-organized workers is the proposed Employment Termination Act (ETA).³³⁴ Widely criticized on other grounds, the ETA itself explicitly would exclude many categories of employees, including those who have responsibility for policy-making decisions or for directing significant divisions within an enterprise.³³⁵ Thus, middle-level employees can expect little protection from federal regulation outside the NLRA.

V. A PROPOSAL FOR REFORM: NLRA COVERAGE FOR THE ENTIRE LABORING CLASS

A. PREMISES OF THE PROPOSAL

The thesis of this Article is that the similarities between the working class (rank-and-file employees) and middle-level employees (supervisory, managerial, and confidential employees) are far more important than the differences. The rise of

331. *See supra* note 220.

Some writers have suggested an addendum to wrongful discharge doctrine that would prompt employers voluntarily to institute arbitration systems. These proposals would provide employers with a defense against a wrongful discharge action if the employer had provided the employee with an opportunity to arbitrate the termination decision, using a "just cause" standard for discharge. *See, e.g.,* Bastress, *supra* note 220, at 346-50. Despite their good intentions, such proposals are thinly disguised co-optation schemes: they have the effect of channeling employee termination cases into a system from which they will rarely, if ever, emerge victorious. Paid for by the employer, the arbitrator can hardly be said to be impartial. And without a union to represent her, how will the discharged worker be informed of her rights, or be represented at the arbitration hearing?

332. *See supra* note 19 and accompanying text. Furthermore, governmental regulation of working conditions is undesirable because it is paternalistic in character and therefore does nothing to enhance worker empowerment. *See* Crain, *supra* note 78, at 1290-1301.

333. *See supra* note 27 and accompanying text.

334. *See supra* note 28.

335. *Id.*

bureaucratic control has broken down the traditional Tayloristic barrier between "head work" and "hand work."³³⁶ The work of technical and professional workers, characterized by the performance of highly specialized, routine tasks, may differ little from the assembly line.³³⁷ The commonality between all classes of labor has at no time been more pronounced than it is today. The various fractions of the laboring class³³⁸ all lack control over their labor; all have to work for others and are, consequently, dependent on those others.³³⁹ Although the jobs held by middle-level employees may seem on the surface to distinguish them from the "working poor," or the "proletariat," this difference is due primarily to the higher wages that middle-level employees receive.³⁴⁰ The economic position of all fractions of the laboring class thus is essentially identical: they are dependent, powerless, and inherently subject to economic instability.³⁴¹

Today's middle class is beginning to face the same chronic insecurity of finances, jobs, and lifestyle that has troubled the working class for decades.³⁴² Of particular concern to middle sector information managers is the development of new technology that allows jobs to be done more efficiently and more cheaply, leaving less room for the unskilled or semi-skilled worker.³⁴³ The technology, however, is not at the root of the problem. It is instead a symbol of the powerlessness that arises from an inability to control the means of production.³⁴⁴

336. See P. KING, K. MAYNARD & D. WOODYARD, *supra* note 10, at 33.

337. *Id.*

338. For purposes of this discussion, I adopt the terminology found in P. KING, K. MAYNARD & D. WOODYARD, *supra* note 10. The authors identify three different "fractions" in labor: 1) the working poor (found in jobs with simple control); 2) the traditional proletariat (manual workers, clericals, and factory operatives, often ethnically based); and 3) the middle layers (who stand between all lower-level administrative and production workers on the one side, and capitalists on the other, and are usually white males). *Id.* at 34 (citing R. EDWARDS, *CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY 191-92* (1979)). The authors refer to these fractions collectively as "the laboring class." *Id.* at 34.

339. *Id.*

340. *Id.*

341. *Id.* at 34.

342. P. KING, K. MAYNARD & D. WOODYARD, *supra* note 10, at 55.

343. *Id.*; see also J. ATLESON, *supra* note 52, at 105 (suggesting that technology has sometimes been used to control the work process or to eliminate skilled labor, and that this use often has been overlooked).

344. P. KING, K. MAYNARD & D. WOODYARD, *supra* note 10, at 55; see also J. ATLESON, *supra* note 52, at 105 (positing that technical control — designing machinery and the production process to maximize efficiency — means that

The similarities between middle-level employees and the rank and file, however, have not proved to be a sufficient stimulus to all labor to organize collectively. There are three reasons for this. First, low-level participation in corporate decision-making on an individual level leads to middle sector cooperation in the oppression of both the working class and the poor, which tends to be divisive.³⁴⁵ The second reason why all labor has not been stimulated to organize collectively is that the structural powerlessness of the middle sector as employees, and their acceptance of the ideology of individualism, create a sense of isolation, meaninglessness, and ultimately, alienation.³⁴⁶ Finally, the labor laws themselves actively discourage solidarity among classes of workers.³⁴⁷

Elimination of the final factor could go far toward breaking down the other two barriers to worker solidarity. Some argue that both the exclusion of supervisors³⁴⁸ and managerial employees³⁴⁹ was deliberately intended to isolate these groups from the more traditional constituencies of organized labor.

worker anger is addressed to the speed of the line rather than to the supervisor; thus, work itself becomes more alienating).

345. P. KING, K. MAYNARD & D. WOODYARD, *supra* note 10, at 61.

346. *Id.* Capital's efforts to impart an ideology of individualism to white-collar employees have been quite successful. In the 1940s, to combat organization by supervisors, owners mounted a publicity campaign designed to "reeducate foremen to their management status and role." Seitz, *supra* note 8, at 236 & n.125 (citing examples of business articles and advertisements). The idea was "to so develop the attitudes of the foreman . . . — to so identify him psychologically with the management team — that the mere suggestion of organization would outrage his sense of loyalty and obligation." *Id.* (quoting D. LEVINSON, WARTIME UNIONIZATION OF FOREMEN 447 (1949)(unpublished thesis in University of Wisconsin Library).

Effects of the campaign still linger. Unions have, for example, experienced considerable difficulty in organizing professional employees because white-collar employees identify with the enterprise. In a 1957 study, more than three-fourths of the white collar employees characterized themselves as "belonging more with management than with production workers." Blum, *supra* note 12, at 126 (citing OPINION RESEARCH CORP., WHITE COLLAR EMPLOYEE LOYALTY A-8 (1957); see also *Decline in Union Membership*, 127 (News/Analysis) L.R.R.M. (BNA) 210, 211 (Feb. 15, 1988) (reporting that a labor economist questions whether unions can attract young professional employees because "white collar employees feel uncomfortable with traditional labor unions").

347. See *supra* notes 93-168 and accompanying text.

348. See, e.g., Seitz, *supra* note 8, at 199-200, 242-43 (arguing that employers deliberately attempted "to return foremen to the status of management's ideal, reliable agents, as part of an overall offensive by ownership to regain control of the workplace").

349. See *The Bitter and the Sweet*, *supra* note 104, at 116. Klare expresses the hope that the *Yeshiva* decision will startle professors into considering

This isolation creates a hostile environment between middle sector employees and labor, inhibits the achievement of industrial democracy by preventing labor from having a voice in decision-making, and ultimately fosters alienation.

There must, of course, be a line drawn to separate those covered by the NLRA and those not covered.³⁵⁰ That line should be loyal to the original assumptions underlying the Wagner Act,³⁵¹ a line between capital and labor, rather than between management and labor.³⁵² I recognize that my proposal may be viewed as radical.³⁵³ For example, it stands in stark contrast to proposals that, by calling for a redefinition of the excluded class of supervisory and managerial employees, suggest drawing the line between labor and management in a different place.³⁵⁴ I suggest instead that what is required is a

whether they have more in common with industrial workers than they had believed. *Id.*

350. See *supra* notes 81-168 and accompanying text.

351. See *supra* notes 49-80 and accompanying text.

352. A debate would assuredly arise over who fits within the category of "capital" or "owner." Constructing a line between ownership and labor will be a considerably more manageable task than our attempts to distinguish between management and labor. Ownership, because it devolves from property law, is a concept with which we are very familiar. Moreover, it is black-and-white: either one possesses an ownership interest in an enterprise, or one does not.

The difficult questions would concern the *extent* of ownership necessary to exclude one from the category of labor. Some might argue that ownership of one share of stock would be sufficient. If that were the case, companies might establish stock ownership plans for employees so as to preempt unionization. I would propose a test based upon ownership in combination with control. Although there is obviously further work to be done in refining this test, guidance is available in the securities law area. See, e.g., 17 C.F.R. § 230.405 (1989) (interpreting the Securities Act of 1933, 15 U.S.C. § 77a (1982)). Rule 405 defines "control" as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise").

353. There is some precedent in state public sector bargaining laws and in the labor laws of other countries (particularly Western Europe and Canada) for the notion that managerial and supervisory employees should be afforded the right to bargain with their employers. See Rabban, *supra* note 148, at 1781 nn.13 & 14; Rabban, *supra* note 229 at 692 n.7. An extended discussion of these analogous laws is beyond the scope of this Article.

354. See, e.g., Rabban, *supra* note 148, at 1781 (accepting incorporation of divided loyalty theories into positive law and acknowledging the need for division between managers and workers, but proposing that distinction be made between managerial and non-managerial professionals on the basis of scholarly analysis indicating that line should be drawn to include professionals who perform operational rather than bureaucratic functions); Osborne, *The Need for Legislation After Yeshiva*, 9 J. L. & EDUC. 465, 476-77 (1980) (arguing that a decision by Congress to simply return to pre-*Yeshiva* assumptions—that

complete rethinking of our conception of the composition of "labor," a restructuring of the labor laws and, ultimately, the workplace.³⁵⁵ The hierarchical organization of the workplace, which reflects the class hierarchy in society generally, has been reinforced and legitimated by the NLRA.³⁵⁶ Attempts to draw the line between "employees" and "supervisors," or between "professionals" and "managers," have resulted in such a stratification of the laboring class that labor no longer has any real power. Restructuring the workplace to make room for industrial democracy thus requires a new definition of "employee" that will allow unions to regain a foothold.

In sum, if we are to begin to close the vast gap that presently exists between workers and the elite, we must construct a new dividing line between capital and labor that reconstitutes the laboring class and maximizes the capability of collective strength. As the statistics discussed earlier in this Article suggest,³⁵⁷ there exists such a concentration of wealth among the capital-owning class that even if all who labor organized, there still would be greater power on the owners' side. Furthermore, the concentration of wealth, especially when taken in combination with a failure of industrial democracy, seriously under-

faculty may bargain collectively where a majority of the faculty members are in favor — would reap big dividends by avoiding expensive litigation, clarifying and instilling certainty in the law, and affording employees the benefits of the NLRA through collective bargaining); Grenig, *The Implications of NLRB v. Yeshiva University*, 9 J. L. & EDUC. 479, 487 (1980) (calling for congressional action to overrule *Yeshiva*); Comment, *NLRB v. Yeshiva University: Faculty As Managerial Employees Under the NLRA*, 19 AM. BUS. L.J. 63, 72-73 (1981) (arguing that Congress should amend the definition of "supervisor" in the NLRA to exclude faculty).

Some writers, although critical of the assumptions underlying the legal boundaries between labor and management, have stopped short of suggesting where, exactly, the line should be drawn. See, e.g., Stone, *supra* note 5, at 172-73. Like Stone, I embrace the "constitutive" effect of the NLRA that facilitates the creation of the entity known as organized labor and empowers workers. See *id.* at 82-85, 172. I, too, question the assumptions in the constitutive features of the labor laws that limit worker participation. See *id.* at 121. Unlike Stone, however, I have chosen to focus on one of the structural barriers in the NLRA to worker participation — the exclusion of middle managers — and to suggest a concrete step toward eliminating that barrier.

355. Because my proposal is of a restructuring nature, rather than a new idea that would affect only the functioning of the system, some may view it as "dangerous." See E. ROGERS & F. SHOEMAKER, *supra* note 57, at 340 (contending that the elite, who maintain a vested interest in the status quo, sometimes characterize structural innovations as "dangerous" to influence public opinion against change).

356. See *supra* notes 93-168 and accompanying text.

357. See *supra* note 10.

mines our system of political democracy.³⁵⁸ The increasing concentration of control by the wealthy over the avenues of communication, including the electronic and print media³⁵⁹ exacerbates the problem because the media is "a primary factor in determining the significance of events and the bounds of political discourse."³⁶⁰

B. THE PROPOSAL

Three deceptively simple amendments could eliminate the NLRA's reinforcement of the stratification of the laboring classes. First, the Act's definition of the term "employee" should be amended to delete the exclusion of "supervisors."³⁶¹ Second, Congress should legislatively overrule three troublesome Supreme Court cases interpreting the NLRA: *Bell Aerospace*³⁶² (excluding managerial employees from coverage), *Yeshiva University*³⁶³ (refining this definition), and *Hendricks County*³⁶⁴ (excluding confidential employees with a labor nexus from coverage).

Finally, to promote solidarity at the most basic level, section 9(b)(1) should be eliminated from the Act.³⁶⁵ Section 9(b)(1) provides that the Board shall not certify a unit of professional and nonprofessional employees unless a majority of the professional employees vote for inclusion.³⁶⁶ Instead, the

358. See Willborn, *supra* note 56, at 742 (stating that industrial democracy has failed; any new approach to labor relations must begin with the assumption that the broader political process and labor relations are intimately connected).

359. See Atleson, *supra* note 9, at 863 (arguing that the media, accessible only to those with deep pockets, is controlled by fewer and fewer owners with more and more similar values).

360. *Id.* The elite are constantly engaged in the process of "screening out" innovations entailing consequences that threaten to disturb the status quo, and so threaten a loss of position for the elite. E. ROGERS & F. SHOEMAKER, *supra* note 57, at 340. The media is a powerful tool in this process.

361. See NLRA § 2(3), 29 U.S.C. § 152(3) (1988). This could be accomplished by deleting the words "or any individual employed as a supervisor" in section 2(3) of the Act. *Id.* Section 2(11) of the Act, defining the term "supervisor," would then no longer be necessary.

362. 416 U.S. 267 (1974). See *supra* notes 115-28 and accompanying text (discussing *Bell Aerospace*).

363. 444 U.S. 672 (1980). See *supra* notes 129-42 and accompanying text (discussing *Yeshiva University*).

364. 454 U.S. 170 (1981). See *supra* notes 161-68 and accompanying text (discussing *Hendricks County*).

365. Section 2(12) of the Act, defining the term "professional," would then not be necessary either.

366. NLRA § 9(b)(1), 29 U.S.C. § 159(b)(1) (1988). Nor should any new

Board should be permitted to apply its usual "community of interest" standard to determine unit composition.³⁶⁷ Restrictions on the Board's authority to perform this task embody assumptions that there is something ontologically unique about certain classes of laborers. Perpetuation of this notion of difference would operate as a continuing barrier to labor solidarity.

Capital is, of course, entitled to representatives at the bargaining table who will pursue ownership's interests zealously. To ensure loyalty at the deepest level and avoid conflicts of interest where they affect most directly the collective bargaining process, owners could utilize "hired guns," or independent contractors,³⁶⁸ to bargain on their behalf with the unions representing their employees. Day-to-day management of labor relations matters could still be accomplished by employees, because there is simply no reason to assume that workers will become poor supervisors or managers if they are encouraged to unionize. If supervisors and managers were disloyal or failed to perform their jobs, they — like any other employee — could be disciplined or discharged under existing law for just cause.³⁶⁹

The remaining pages address in more detail the ways in which my proposal would enhance worker solidarity, and pave the way for workers to empower themselves.

C. DRAWING A NEW LINE WOULD ENCOURAGE WORKER SOLIDARITY

Current law encourages middle-level employees to continue to accept their categorization as separate from the rank

provisions be inserted requiring a majority vote by supervisors, managers, or confidential employees for inclusion in a unit. Such provisions would simply underscore the segregation of middle-level employees from the rank and file without any showing of an actual difference in their interests in that particular workplace.

367. See, e.g., *Leedom v. Kyne*, 358 U.S. 184, 185-87, 191 (1958) (applying community of interest standard, Board included 9 nonprofessional employees in unit with 233 professional employees; Board's order exceeded its statutory authority because it failed to adhere to requirements of section 9(b)(1)). See *supra* note 227.

368. The "hired guns" could be either professional negotiators or attorneys. In fact, many large employers currently utilize a professional collective bargaining staff. See *PRESSURES IN TODAY'S WORKPLACE*, *supra* note 8, at 26, 28; see also Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 441 n.16 (1984) (describing employers' use of consultants and noting most are lawyers).

369. See *NLRB v. Local Union No.1229, International Bhd. of Elec. Workers*, 346 U.S. 464, 472 (1953) (holding that employee's disloyalty to employer is grounds for discharge).

and file by affording them a separate remedy (wrongful discharge) not generally available to unionized workers. Thus, middle-level employees remain isolated, "cling[ing] to a sense of being an educated elite rather than [being] workers."³⁷⁰ They have internalized the law's conception of the unionized worker as helpless, not possessing any capacity to learn or generate knowledge, and possessing no autonomous interest in work as a means of fulfillment and self-realization.³⁷¹ Rejecting the role of the "employee" for themselves, they assume the mutually exclusive role of manager, adopting the more attractive "ideology of individualism," which teaches that a good education, hard work, and careful saving should result in success at work and in life.³⁷² Under this ideology, poverty and powerlessness are the result of individual failures, not collective traps.³⁷³ Consequently, individual action, rather than collective action, is the means for escaping those traps.

Furthermore, developing wrongful discharge doctrine, which was once necessary only to fill the gap in protection left by the NLRA, now threatens to undermine collective bargaining. Unionized employees who observe the damage remedies available on an individual basis to successful wrongful discharge plaintiffs³⁷⁴ attempt in increasing numbers to take advantage of state law remedies in addition to seeking redress under their collective bargaining agreements.³⁷⁵ The Supreme

370. See P. KING, K. MAYNARD & D. WOODYARD, *supra* note 10, at 62; see also Feldman Book Review, 84 MICH. L. REV. 1079, 1080 (1986) (reviewing T. KOCHAN, CHALLENGES AND CHOICES FACING AMERICAN LABOR (1985)) (presenting essay's argument that professional workers are less organized because of a lack of desire to join unions).

371. See *The Bitter and the Sweet*, *supra* note 104, at 117. As Rabban has pointed out, even labor law scholars assumed that the NLRA was designed to cover only those employees who are essentially powerless and exploited at work. Rabban, *supra* note 147, at 1791 n.62.

372. See P. KING, K. MAYNARD & D. WOODYARD, *supra* note 10, at 37. Furthermore, because the middle fraction of the laboring class lives in relative economic comfort, it remains committed to the preservation of the status quo. *Id.* at 62.

373. *Id.* at 37.

374. A 1988 Rand Corporation study of 120 wrongful discharge cases that went to trial in California between 1980 and 1986 revealed that 67.5% of plaintiffs prevailed; they were awarded an average of \$646,855. Approximately 40% of the awards were for punitive damages. Geyelin, *supra* note 260, at B-1, col.3.

375. See, e.g., *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 401 (1988) (holding union member's claim for retaliatory discharge not preempted); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 388-91, 396 (1987) (holding that managers demoted to non-management positions covered by collective bargaining agreement may sue for breach of independent promises made while

Court has retreated significantly from its earlier stance on preemption to allow this.³⁷⁶ Worse, recent cases evidence a trend toward employee reliance on state law remedies to the exclusion of collective bargaining.³⁷⁷

My proposed solution breaks down the legal barriers between middle-level employees and the rank and file, encouraging them to rely on one another for support. In my paradigm of the workplace, hierarchy would be minimized, and the hostility of many middle-level employees for those laboring "beneath" them would be replaced with respect. There would again be room for workers to create the cooperative work ethic that predated Taylorism.³⁷⁸

In addition, organized labor would receive a sorely needed injection of resources. The symbolic value of encouraging managers and supervisors to organize would be tremendous. Professional employees and other white-collar workers would observe first-hand the benefits of unionization, and could contribute financial resources and knowledge to the collective effort. Further, unionization efforts directed at the rank and file would receive a needed boost. This is particularly true in the service industries that currently dominate our economy.³⁷⁹ Rank-and-file service employees are now in the same position as were blue collar workers several decades ago. The low-skilled nature of many service industry jobs ensures low pay and minimal job security. Consequently, rank-and-file turnover rates are high, and unions have been largely unsuccessful in or-

they were in managerial positions). See generally Yonover, *Preemption of State Tort Remedies for Wrongful Discharge in the Aftermath of Lingle v. Norge: Wholly Independent or Inextricably Intertwined?*, 34 S.D.L. REV. 63 (1989).

376. See Yonover, *supra* note 375, at 92.

377. See, e.g., *Overby v. Chevron USA*, 884 F.2d 470, 471, 474 (9th Cir. 1989) (finding employee's state law claim for wrongful discharge not preempted when collective bargaining agreement had expired). *Contra* *Derrico v. Sheehan Emergency Hosp.*, 844 F.2d 22, 28-29 (2d Cir. 1988) (finding that employee's implied contract claim based upon expired collective bargaining agreement is preempted, because exposing employer to liability at state law for breach of contract would alter the balance of power in the labor-management relationship following expiration of the labor agreement).

378. See D. MONTGOMERY, *supra* note 188, at 9-27 (noting that early industrial workers were autonomous craftsmen who assumed collective control over productive processes; they operated as a unit that contracted with the employer to do the whole job).

379. See *Excerpts from Pastoral Letter on Economic Affairs Adopted by National Conference of Catholic Bishops*, Daily Lab. Rep. (BNA) No. 221, at F-1 (Nov. 17, 1986) (stating that by 1990, service industries will employ 72% of the labor force).

ganizing service employees.³⁸⁰ In contrast, managers — who are likely to stay longer because of the higher pay commensurate with their greater responsibilities, might be more receptive to unionization efforts.

Finally, industrial and political democracy might at last be within the grasp of workers. As power in this country becomes more centralized, the major political decisions are made by a handful of elite, most of whom are entirely inaccessible to us as individuals. As a collective, however, workers might have a strong enough voice to grab a share of the decision-making power — first in the workplace, and ultimately in the larger political arena. Such collective strength, however, requires solidarity of all employees, not merely those at the bottom of the hierarchy.

CONCLUSION

The decline of unionism is undeniable.³⁸¹ As unionism has declined, stratification of the laboring class has increased. Labor's diminished ability to protect the interests of workers is apparent. The ramifications of labor's decline have been camouflaged, however, by the development of wrongful discharge doctrine and the enactment of limited federal statutory protections for workers not covered by the NLRA. I have argued that these methods of protecting middle-level employees operate only to further undermine collective bargaining and the utilization by workers of their collective strength. Because of their individual character, they serve to promote the individualistic ideology the elite has marketed to workers.

The immediate result of the failure of collective bargaining is the perpetuation of a workplace that is organized in a hierarchical fashion. That hierarchical structure, founded in Tayloristic conceptions of "management" and "employees," breeds alienation in the workplace and frustrates the achievement of NLRA goals, which include industrial peace, worker empowerment, and industrial democracy.

The NLRA's system of collective organization and bargaining is the best means for combatting alienation, achieving worker empowerment, and advancing industrial democracy. Collective representation and bargaining, because of its poten-

380. *See id.*; *see also* M. REYNOLDS, POWER AND PRIVILEGE: LABOR UNIONS IN AMERICA 260 (1984) (stating that unions have been largely unsuccessful in organizing high-technology service area employees).

381. *See supra* note 3 and accompanying text.

tial to respond immediately to the needs of particular workers in a particular workplace,³⁸² provides the most effective route to ensure meaningful worker participation in workplace decision-making. A narrow definition of the "employee" eligible for NLRA protection, however, limits the effectiveness of collective organization and bargaining under current labor law doctrine. Consequently, I have proposed a restructuring of the NLRA that would eliminate this legal barrier to unification of the laboring class. If my proposal were implemented, Congress would pave the way for a resurgence in labor strength and in the vitality of collective organization and collective bargaining.

The execution of the legal blueprint I have suggested rests, ultimately, with workers. It is up to labor unions to find new, more effective ways of persuading us to think about our similarities as laborers, rather than about our differences. Collective strength — deployed through the vehicles of the labor union and collective bargaining under the NLRA — provides the best hope for "escaping our perpetual search for identity, economic security, and control,"³⁸³ and ultimately, for ensuring worker empowerment.

382. See St. Antoine, *Federal Regulation of the Workplace in the Next Half Century*, 61 CHI.-KENT L. REV. 631, 661-62 (1985).

383. P. KING, K. MAYNARD & D. WOODYARD, *supra* note 10, at 206.

