

Toward a Robust Conception of “Independent Judgment”: Back to the Future?

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Progress then consists in progressive de-humanization—A busy, pointless, and, in the end, suicidal submission to technique.[¹]

.....

When workers are organized, they are complying with the law of technical progress which requires all forms of human life to become organized.

.....

The worker through his unions is intensifying his own thralldom to techniques, augmenting their powers of organization, and completing his own integration into that very movement from which, . . . unionism had originally hoped to free him.²

GIVEN THE CHANGES in the composition of the American workforce, given the increased levels of education, experience, and technical ability possessed by contemporary management and rank and file workers, it is inevitable that conflict will arise concerning the statutorily required separation between those individuals who are eligible to unionize within the meaning of the National Labor Relations Act (“NLRA”) and those workers who are justifiably excluded from union bargaining units. The United States Supreme Court’s recent

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1. Robert K. Merton, *Foreword* JACQUES ELLUL, *THE TECHNOLOGICAL SOCIETY* viii. In “Ellul’s conception, then, life is not happy in a civilization dominated by technique. Even the outward show of happiness is bought at the price of total acquiescence.” *Id.*

2. JACQUES ELLUL, *THE TECHNOLOGICAL SOCIETY* 358 (John Wilkinson trans. 1964).

decision in *NLRB v. Kentucky River Community Care, Inc.*³ provides an additional opportunity to continue a persistent conversation about the need to separate supervisors from rank and file workers. Inescapably, this Supreme Court decision supplies a framework to assess whether adjudication by the courts grounded in either textualism or legislative history or whether policy driven analysis engaged in by the National Labor Relations Board (“NLRB” or the “Board”) enhances human progress.

It has been suggested that the Wagner Act of 1935⁴ was enacted in response to the “growing distrust of market solutions to social and economic problems”⁵ and the perceived “inability of the courts to provide viable solutions to the problems presented by the labor movement.”⁶ Legal theorists emphasized that the emerging “process of case-by-case adjudication was an inadequate instrument for the formulation of a cohesive policy or rational substantive norms of conduct.”⁷ Thus, “[t]he industrial revolution, and the combinations of capital and of labor that it called to life, presented problems that called for broad legislative solutions.”⁸ In response to this movement, Senator Wagner of New York conceived “the National Labor Relations Act to be more than a weapon against the disruption of industry by labor-management disputes.”⁹ Indeed the NLRA was envisioned as a mechanism to “lessen the inequality of bargaining power between labor and management”¹⁰ and as “‘an affirmative vehicle’ for economic and social progress.”¹¹ Hence, it was maintained:

Caught in the labyrinth of modern industrialism and dwarfed by the size of corporate enterprise, [the employee] can attain freedom and dignity by cooperation with others of his group.¹²

3. No. 99-1815, 2001 U.S. LEXIS 4119 (U.S. May 29, 2001).

4. 49 Stat. 449 (1935).

5. DOUGLAS E. RAY ET AL., UNDERSTANDING LABOR LAW 13 (1999) [hereinafter RAY ET AL.].

6. THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 3 (Patrick Hardin ed., 3d. ed. 992) [hereinafter THE DEVELOPING LABOR LAW].

7. *Id.* at 4.

8. *Id.*

9. *Id.* at 27; see RAY ET AL., *supra* note 5, at 13. But see Kenneth Casebeer, *The Workers' Unemployment Insurance Bill*, in LABOR LAW IN AMERICA 231, 253 (1992).

10. Bryan M. Churgin, Comment, *The Managerial Exclusion Under the National Labor Relations Act: Are Worker Participation Programs Next?* 48 CATH. U. L. REV. 557 (1999).

11. THE DEVELOPING LABOR LAW, *supra* note 6, at 27–28.

12. 79 CONG. REC. 7565 (1935) (statement of Senator Wagner) (quoted in THE DEVELOPING LABOR LAW, *supra* note 6, at 28).

The question of whether the elusive goals of freedom and dignity for workers have been achieved or are even achievable within the confines of innovative and visionary New Deal labor legislation has spawned a continuing and perhaps irresolvable debate. Despite the NLRA's alleged innovative and visionary character, it seems far from clear that the aspirational objectives of industrial democracy,¹³ allegedly embedded within the Act, have been completely achieved; on the contrary, unions are experiencing hard times.¹⁴ One account as to why unions in the private sector have continued to lose ground is that they no longer "provide their membership with benefits that exceed their costs."¹⁵ On the other hand, while the overall rate of unionization has declined substantially during past decades "the rate of unionization among professional employees has substantially increased,"¹⁶ animated in part by the desire to participate in both the development of employer policy and personnel decisions about fellow professionals.¹⁷ Some observers view this development "as a primary hope for the future of the American labor movement."¹⁸ Still, a number of scholars are in such despair that they propose starting over,¹⁹ as they stress that the United States has entered "a time of great risks to [its] fragile institutions of workplace democracy."²⁰ Those scholars who are

13. See Ray ET AL., *supra* note 5, at 13 (stating collective bargaining, it was thought, would restore an element of fairness and industrial democracy to the workers and redistribute income).

14. See, e.g., Paul C. Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 58 U. CHI. L. REV. 1015, 1016–21 (1991); see also Barry T. Hirsch & Edward J. Schumacher, *Private Sector Union Density and the Wage Premium: Past, Present, and Future*, (working paper) available at http://papers.ssrn.com/paper.taf?abstract_id=283203, at 1 (2001) ("At the end of the century, the percentage of private wage and salary workers who were union members was less than 10 percent, not greatly different from union density prior to the [passage of the] NLRA.").

15. Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L. J. 1357, 1407 (1983).

16. David M. Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees?* 99 YALE L. J. 689, 690 (1990) [hereinafter Rabban, *Can American Labor Law Accommodate Coll. Barg.*]. Often unions representing professional employees stress that they seek legal protection for traditional professional values, which include developing organizational policy, significant responsibility for personnel decisions about fellow professionals, and the commitment of organizational resources to professional goals. See *id.* at 691.

17. See *id.* at 691.

18. *Id.* at 690.

19. See Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI-KENT L. REV. 59, 59–96 (1993).

20. Karl Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 2 (1988) [hereinafter Klare, *Workplace Democracy & Market Reconstruction*].

enthralled by the wistful dream of radical class consciousness emphasize the need for redoubled efforts at unionization, as they argue that “we need to enlarge our conceptions of workplace democracy . . . [and] be ready to experiment and take conceptual and practical risks to seize the opportunities and potential of the times.”²¹ Progress on this front will apparently have to await the success of these new efforts. In contrast, Jacques Ellul’s global assessment emphasizes that “[l]abor and trade unions made their appearance as the great human protest against the inhuman character of capitalism However, in all countries labor unionism has completely lost its original character and become a purely technical organization.”²² While it is true that union density in the private sector continues to decline in the United States²³ and in many other countries,²⁴ and while it is likely that American labor unions have lost some of their original character and vitality, it is also true that the nature and character of work and working life both in the United States and the larger world have changed and continue to metamorphose. Hence, the drafters of the NLRA “could not have contemplated the composition of the nation’s current labor force.”²⁵ Still, it may not be obvious that Ellul is entirely correct about the deficiencies of labor unions in light of the transformation of the

21. *Id.*

22. ELLUL, *supra* note 2, at 357. By “technical organization,” Ellul means a process by which appropriate tasks are assigned to individuals or groups so as to attain an efficient and economic method and by a process of coordination and combination of all their activities the objectives “agreed” upon are achieved. This leads to standardization and to the rationalization of economic and administrative life. Society and labor unions then attempt to resolve in advance all the problems that might impede the functioning of an organization. This dampens the need for ingenuity, inspiration or even intelligence to find a solution at the moment some difficulty arises. Standardization then relies on methods and instructions, which create impersonality as opposed to individuality and human vitality. *See id.* at 11–12. For at least partial agreement from a radical perspective, see CHRISTOPHER L. TOMLINS, *THE STATE AND UNIONS: LABOR RELATIONS, LAW AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960* xiii (1985) (arguing that the American state, largely through its legal institutions, has conditioned the legitimacy of labor activity and collective bargaining on their effectiveness as “means to higher productivity and efficient capital accumulation” (cited in David M. Rabban, *Has the NLRA Hurt Labor?*, 54 U. CHI. L. REV. 407, 408 (1987) (book review))).

23. *See* Charles Craver, *Rearranging Deck Chairs on the Titanic: The Inadequacy of Modest Proposals to Reform Labor Law*, 93 MICH. L. REV. 1616, 1616 (1995) (predicting that the private sector union density rate may fall to five percent by the end of the 1990s) (citation omitted).

24. *See, e.g.*, G. Cella & T. Treu, *National Trade Union Movements*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES* 305, 329–30 (R. Blanpain & C. Engels eds., 1998) (many indicators of union crisis are visible, including the decline of union membership and density in most market economies).

25. Churgin, *supra* note 10, at 560.

workforce and workplace. While some labor unions have come to be dominated by agendas that are not necessarily congruent with the needs of all the workers they claim to represent,²⁶ while it is possible that unions have “used their bargaining power to destroy black workers’ jobs or to advance the interests of their white membership at the expense of black workers,”²⁷ while labor unions can often be seen as instruments of hierarchical power and even subordination that concentrate their energies less on the disadvantaged among us and more on demands of distant union leadership,²⁸ and while it is possible that a case can be made for scrapping New Deal labor legislation entirely,²⁹ it is conceivable that some unions continue to represent the interests of workers. Nonetheless, Ellul seems very close to the mark with his contention that human progress, not to mention human individuality, is becoming eviscerated by an increasingly technological society consumed by increasingly technical adjustments and arguments.

Since the NLRA was enacted to reduce the role of courts, and since there is some debate about the goals of the NLRA, the implementation of the aspirational objectives of the NLRA increasingly depend on legal and administrative technicians located within the NLRB. Nor has the NLRA completely eliminated the role of the courts. On the contrary, the NLRA, through its enforcement mechanism, relies on the courts to resolve increasingly technical arguments that are often regurgitated in the form of additional legislation, litigation, or NLRB analysis. This approach seems to mirror Justice Frank-

26. See Molly S. McUsic & Michael Selmi, *IOWA L. REV.* 1339, 1346–49; see also Harry G. Hutchison, *Reclaiming the Labor Movement Through Union Dues?* 33 *UNIV. OF MICH. J. OF L. REFORM* 447, 457, 494–95 (2000) [hereinafter Hutchison, *Reclaiming the Labor Movement Through Union Dues?*] (explaining that while union members have largely opposed the use of union dues for political and ideological purposes, union expenditures for political purposes per union member continue to rise); DENNIS C. MUELLER, *PUBLIC CHOICE II* 309 (quoting MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 29 (1965)) (there is a systematic tendency for “exploitation” of the larger group or the group as a whole by smaller segments of the group).

27. Stephen Plass, *Dualism and Overlooked Class Consciousness in American Labor Laws*, 37 *HOUS. L. REV.* 823, 829 (2000).

28. See, e.g., Harry Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes: Exploding the Power of Myth, Fantasy and Hierarchy*, 34 *HARV. J. ON LEGIS.* 93, 125–29 (1997) [hereinafter Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*] (often American labor leaders, like those in South Africa, support minimum wages and thus continued the subordination of black workers).

29. See Epstein, *supra* note 15, at 1357 (arguing that “New Deal legislation is largely a mistake that if possible, should be scrapped in favor of the adoption of a sensible common law regime relying heavily upon tort and contract law.”). Such an approach would not eliminate labor unions but might limit the bilateral monopoly power associated with mandatory bargaining contained within the NLRA. See *id.* at 1404.

furter's observation about the hyper-technical "process of litigating elucidation."³⁰

The point of departure for these musings is the judgment by the United States Supreme Court in *NLRB v. Kentucky River Community Care, Inc.*,³¹ decided in the 2000 term. The decision in *Kentucky River* continues a persistent dialogue that preceded³² the Supreme Court's decision in *Packard Motor Car Co. v. NLRB*.³³ In *Packard*, decided shortly before the Taft-Hartley Act, and which provided additional impetus for the enactment of the Taft-Hartley Act, the Supreme Court enforced an NLRB judgment that questioned whether foremen "are entitled as a class to the rights of self-organization, collective bargaining, and other concerted activities."³⁴ *Kentucky River* once again places nurses and health care workers at the center of a continuing debate over the coverage of professionals and the exclusion of supervisors.³⁵ The *Kentucky River* Court, relying principally on the statutory text, affirmed the denial of the NLRB's request for an enforcement order because it determined that the employer effectively met its burden³⁶ by proving at the certification stage that six registered nurses ("RNs") who had been included in the proposed bargaining unit were supervisors.³⁷ While the Court's decision focused on the meaning of the phrase "responsibly to direct,"³⁸ the case primarily turns on the meaning of the phrase "independent judgment."³⁹ Independent judgment

30. *Int'l Ass'n of Machinists v. Gonzalez*, 356 U.S. 617, 619 (1994).

31. No. 99-1815, 2001 U.S. LEXIS 4119 (U.S. May 29, 2001).

32. *See, e.g., Maryland Drydock Co.*, 49 N.L.R.B. 733 (1943).

33. 330 U.S. 485 (1947).

34. *Id.* at 486.

35. *See, e.g., NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571 (1994); *Evergreen Healthcare, Inc. v. NLRB* 104 F.3d 867 (6th Cir. 1997); *Nymed, Inc. v. United Indus. Workers Local 424*, 320 N.L.R.B. 806 (1996); *Beverly Cal. Corp. v. NLRB*, 970 F.2d 1548 (6th Cir. 1992).

36. There is an apparent statutory ambiguity concerning who has the burden of proving or disproving a challenged employee's supervisory status. "The Board therefore has filled the statutory gap with the consistent rule that the burden is borne by the party claiming that the employee is a supervisor." *Ky. River Cmty. Care, Inc.*, No. 99-1815, slip op. at 4 (U.S. May 29, 2001); *see also Masterform Tool Co.*, 327 N.L.R.B. 1071, 1071-72 (1999).

37. Approximately 110 professionals and nonprofessionals were apparently included in the bargaining unit. The NLRB had already excluded roughly twelve others (managers and supervisors). *Ky. River Cmty. Care*, No. 99-1815, slip op. at 2 (U.S. May 29, 2001).

38. Brief for the *Ky. River Cmty. Care, Inc.* at 13-16, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001).

39. The Board took the position in its brief that the case is limited solely to the interpretation of "independent judgment" and disavows any claim that the term "responsibly to direct" is implicated. *See* Brief for the NLRB at 21-22, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001); Brief for the *Ky. River Cmty. Care, Inc.* at 13-16, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001).

is an ambiguous term with respect: (1) to the degree of discretion required, and (2) to the degree (or kind) of judgment necessary for supervisory status.⁴⁰ In essence, the case implicates issues previously litigated in *NLRB v. Health Care & Retirement Corp. of America*⁴¹ in which the Court rejected the NLRB's patient care analysis to find that RNs were supervisors. Similarly, in *NLRB v. Yeshiva University*,⁴² the Court found that faculty members were managerial employees. These cases "indicate a split on the Court concerning the level of employee discretion that can be accepted without fundamentally undermining workplace hierarchy."⁴³

This split had its genesis in *Packard. Kentucky River* lays the foundation for a renewed debate about the proper scope of the NLRA as amended by the Taft-Hartley Act. It also offers a venue for, once again, reviewing Supreme Court jurisprudence in this contested arena. This arena is made all the more poignant by virtue of the proportionate reduction in blue collar/industrial workers and the rise in professional and technical workers within the United States' workforce.⁴⁴

In the NLRA there are "two broad areas of employee exemptions: (1) persons specifically exempted from the definition of employee and the Act's coverage, and (2) persons who work for persons defined by the Act as 'non-employers.'"⁴⁵ The exclusion of supervisors from coverage by the Act was approved, *inter alia*, to "further the interest[s] of employers in the undivided loyalty of supervisors and the interest of employees in organizing free of supervisory interference"⁴⁶ This

40. See *Ky. River Cmty. Care, Inc.*, No. 99-1815, slip op. at 6 (U.S. May 29, 2001). ("Many nominally supervisory functions may be performed without the 'exercis[e] of' such a degree of . . . judgment or discretion . . . as would warrant a finding' of supervisory status under the Act.") (citations omitted).

41. 511 U.S. 571 (1994).

42. 444 U.S. 672 (1980); see also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974) (defining the test for managerial employees as "those [employees] who 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.'"); Churgin, *supra* note 10, at 559-60.

43. George Feldman, *Workplace Power and Collective Activity: The Supervisory and Managerial Exclusions in Labor Law*, 37 ARIZ. L. REV. 525, 545 (1995) [hereinafter Feldman, *Workplace Power*].

44. See David M. Rabban, *Distinguishing Excluded Managers from Covered Professionals Under the NLRA*, 89 COLUM. L. REV. 1775, 1776 (1989) [hereinafter Rabban, *Distinguishing Excluded Managers*].

45. THE DEVELOPING LABOR LAW, *supra* note 6, at 1608. "Personnel excluded from the Act are not prevented from voluntarily organizing and from being voluntarily recognized." *Id.*

46. RAY ET AL., *supra* note 5, at 21.

exclusion, accordingly, constitutes a form of employer protection from distracted and divided management. In *Health Care*, Justice Ginsburg stressed that the supervisory exclusion was adopted “to bind to management those persons ‘vested with . . . genuine management prerogatives’ . . . *i.e.*, those with the authority and duty to act specifically ‘in the interest of the employer’ on matters as to which management and labor interest may divide.”⁴⁷

The *Kentucky River* decision implicates section 2(11) of the NLRA⁴⁸ under which some “employees are deemed to be ‘supervisors’ and thereby excluded from the protections of the Act”;⁴⁹ and section 2(12), which defines professionals as employees for purposes of inclusion within the NLRA. Consistent with section 2(11) workers are:

Supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions [such as to responsibly direct], (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,” and (3) their authority is held “in the interest of the employer.”⁵⁰

Since many nurses are professionals, or at the very least technical personnel, and since “most professionals supervise to some extent,”⁵¹ the Board can evidently claim, consistent with section 2(12) of the Act, that “the judgment even of employees who are permitted by their employer to exercise a sufficient *degree* of discretion is not ‘independent judgment’ if it is a particular *kind* of judgment, namely ‘ordinary professional or technical judgment in directing less-skilled employees to deliver services.’”⁵² It is conceivable that the proper scope of the supervisory exclusion is constrained by Board interpretations, which affirm that professionals are covered employees. One argument in favor of this assertion is that a broad interpretation of the language which defines “supervisor” might serve to nullify or narrow the statutorily mandated inclusion of professionals.⁵³ The Board, therefore, has

47. NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 597 (Ginsburg, J., dissenting).

48. 29 U.S.C. §§ 151–164 (1994).

49. NLRB v. Ky. River Cmty. Care, Inc., No. 99-1815, slip op. at 1 (U.S. May 29, 2001); *see also* National Labor Relations Act, 29 U.S.C. § 152 (11) (1994).

50. *Ky. River Cmty. Care, Inc.*, No. 99-1815, slip op. at 7 (U.S. May 29, 2001) (citing *Health Care*, 511 U.S. at 573–74).

51. *Health Care*, 511 U.S. at 588 (Ginsburg, J., dissenting).

52. *Ky. River Cmty. Care, Inc.*, No. 99-1815, slip op. at 7 (U.S. May 29, 2001) (citing Brief for Petitioner at 11).

53. *See Health Care*, 511 U.S. at 585 (Ginsburg, J., dissenting) (“If the term ‘supervisor’ is construed broadly, to reach everyone with any authority to use ‘independent judgment’ to assign and ‘responsibly . . . direct’ the work of other employees, then most professionals would be supervisors, for most have *some* authority to assign and direct others’ work.”); *see*

drawn a distinction between those nurses who directed aides on the basis of the RNs' highly developed professional skills, which it concluded did not constitute an exercise of supervisory authority in the interest of the employer, and those nurses who, in addition to their professional duties, possessed the authority to make effective recommendations as to job status and pay.⁵⁴ The Board maintains its authority in this arena despite judicial rebuke and contrary adjudication by the courts.⁵⁵ This has led one court to state:

The Board's biased mishandling of cases involving supervisors increasingly has called into question our obeisance to the Board's decisions in this area.

.....

Recognizing that the NLRB earns and forfeits deferential judicial review by its performance, [recent supervisor] cases hold in substance that the Board's manipulation of the definition of supervisor has reduced the deference that otherwise would be accorded its holdings.⁵⁶

Kentucky River "presents two questions: [first,] which party in an unfair-labor-practice proceeding bears the burden of proving or disproving an employee's supervisory status; and [second,] whether judgment is not 'independent judgment' to the extent that it is informed by professional or technical training or experience."⁵⁷ Only the latter question is of interest here. In *Kentucky River*, the Supreme Court resolved the latter tension in favor of the employer and against the Board. It should be obvious that one ground for dissent is quite elementary: the Board's approach to resolving the tension between excluded supervisors and included professionals (impelled by alleged statutory ambiguity) was both "rational and consistent with the Act"⁵⁸

also *Ky. River Cmty. Care, Inc.*, No. 99-1815, Stevens, J., dissenting at 4 (U.S. May 29, 2001). On the other hand, an expansive reading of the term "professionals" gives rise to the possibility that the Board's interpretation will eliminate professionals as supervisors. See Brief for *Ky. River Cmty. Care, Inc.* at 17-21, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001).

54. Edwin A. Keller, Comment, *Death by Textualism: The NLRB's "Incidental to Patient Care" Supervisor Status Test for Charge Nurses*, 46 AM. U. L. REV. 575, 587 (1996).

55. See G. Roger King, *Where Have All the Supervisors Gone?—The Board's Misdiagnosis of Health Care & Retirement Corp.* 13 LAB. LAW. 343, 356 (1997).

56. *Spentonbush/Red Star Co. v. NLRB*, 106 F.3d 484, 492 (2d Cir. 1997) (internal citations omitted).

57. *Ky. River Cmty. Care, Inc.*, No. 99-1815, slip op. at 1 (U.S. May 29, 2001).

58. *Health Care*, 511 U.S. at 599 (Ginsburg, J., dissenting) (quoting *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 796 (1990)); see, e.g., RAY ET AL., supra note 5, at 22-23.

If any person who may use independent judgment to assign tasks to others or direct their work is a supervisor, then few professionals employed by organizations subject to the Act will receive its protections. The Board's endeavor to rec-

and is, accordingly, entitled to judicial deference. The majority of the Court, on the contrary, grounded its ruling in its own understanding of the text, concluded that the Board's "interpretation [would] insert a startling categorical exclusion into [a] statutory test that does not suggest its existence."⁵⁹ Moreover, the Court was alarmed that the Board's eradication of professional judgment from the statutory delineation of supervisors "would virtually eliminate 'supervisors' from the Act."⁶⁰ The Supreme Court, as a result, refused to enforce the Board's order and thus the six RNs were excluded from NLRA coverage. The dissent, by contrast, concentrated on the text as informed by the following: 1) its understanding of the statutory purpose and legislative history; 2) its earlier expressed fear that "if any person who may use independent judgment to assign tasks to others or direct their work is a supervisor, then few professionals employed by organizations subject to the Act will receive its protections";⁶¹ and 3) the Board's "familiar" interpretation "which has been routinely applied"⁶² to find the NLRB's interpretation of the term "independent judgment" to be "rational and consistent with the Act."⁶³ Hence, the dissent believes that the Board is entitled to deference.

This dispute between the majority and the dissent in *Kentucky River* revolves around the proper understanding of the meaning of terms such as "supervisor," "professional," "independent judgment," and "rational and consistent" under the Act. Although any resolution of this debate may ultimately prove to be unworkable, this Article proposes a possible line of attack. Premised on a reconsideration of the past in light of current and future changes in the structure and composition of the workforce, this Article outlines workplace alterations

oncle the inclusion of professionals with the exclusion of supervisors, in my view, is not just "rational and consistent with the Act," . . . it is required by the Act.

Id. at 23; see also Hilary Jewett, Note, *Professionals in the Health Care Industry: A Reconsideration of NLRA Coverage of Housestaff*, 19 *CARDOZO L. REV.* 1125, 1128-29 (1997); Kristin Hay O'Neal, Comment and Note, *NLRB v. Health Care & Retirement Corporation of America: Possible Implications for Supervisory Status Analysis of Professionals Under the National Labor Relations Act*, 47 *BAYLOR L. REV.* 841, 845-46 (1995) (distinguishing supervisors from professionals).

59. *Ky. River Cmty. Care, Inc.*, No. 99-1815, slip op. at 7 (U.S. May 29, 2001).

60. *Id.* at 8.

61. *Health Care*, 511 U.S. at 598 (Ginsburg, J., dissenting). Significantly, the Court rejected the Board's claims that its approach was necessary to preserve the NLRA's explicit protection of professional employees because the Board had no authority to manipulate the language of the Act in the manner proposed by the Board. See *id.* at 581.

62. *Ky. River Cmty. Care, Inc.*, No. 99-1815, Stevens, J., dissenting at 4 (U.S. May 29, 2001).

63. *Id.* (citations omitted).

since the 1940s in order to effect a principled reconsideration of *Packard*, as well as a critical examination of subsequent Supreme Court cases as an instrument for examining *Kentucky River*. While this Article reviews judicial opinions, extracts from the legislative history and scholarly commentary, this Article scrutinizes the tension described above largely in light of the *Packard* decision and dissent. This approach develops from an inspection of the contentious and relatively recent debate between the Supreme Court majority opinion and dissent in *Health Care*, as well other cases.⁶⁴ The clash in *Health Care* was grounded in both a controversy over textualism,⁶⁵ as well as the precedential value of *Packard*⁶⁶ as a vehicle for understanding both the “interest of the employer” and the concept of divided loyalty within the meaning of the original NLRA. The *Health Care* discussion ultimately determined whether the individuals at issue excluded supervisors or included professionals.

The NLRB’s *Kentucky River* holding might be entitled to deference on technical grounds if the contested term was an entirely ambiguous one and if the Board construed the statute within its statutory purpose. However, this Article argues that a constrained conception of the NLRA’s animating purpose, derived from Justice Douglas’s *Packard* dissent, as engaged by a proper appreciation of the contemporary workplace, supports the approach taken by a majority of the Court in *Kentucky River*. This Article maintains that lawyers should take seriously Justice Douglas’s perceptive contention that broadening the NLRA’s protective umbrella to include supervisors, although potentially warranted on policy grounds, “lends the sanctions of federal law to unionization at all levels of the industrial hierarchy.”⁶⁷ Such broadening radically contradicts the fundamental purpose of the original statute aimed at separating working people as a group from manage-

64. See, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 267–311 (1974).

65. See generally Keller, *supra* note 54, at 576–623 (reviewing the textualist dispute as derived from *Health Care*). Textualism evidently seeks objectivity in interpreting statutes by not focusing on the legislative intent but rather on what an ordinary reader would have understood the words to mean. It is a largely futile task to attempt to read into the author’s mind, which is compounded when there are several authors of a given text. Textualists do concede that words are not self-defining, natural or original, but acquire meaning from their background principles, perspectives and relevant culture. See *id.* at 609–12.

66. See *Health Care*, 511 U.S. at 596–98 (Ginsburg, J., dissenting). Notably in *NLRB v. Bell Aerospace*, the Supreme Court majority “when reviewing the same relevant history of the NLRA, chose to look to the *Packard* dissent.” O’Neal, *supra* note 58, at 852–53.

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

ment.⁶⁸ Given the degree of discretion and the kind of judgment required of an ever growing cadre of contemporary workers⁶⁹ within an increasingly decentralized economy, efforts aimed at broadening the application of the NLRA via a strained conception of “independent judgment,” which concurrently ignores the full text and the context of the statute, remain problematic. This is especially true given that the Taft-Hartley amendments placed additional limits on the statute’s animating purpose. This analysis leads unmistakably toward a robustly inclusive conception of “independent judgment” that is consistent with, and revives, a narrow interpretation of the NLRA.

Part I supplies argument, analysis, and background for reconsidering *Packard* as a means of grappling with “independent judgment.” Part II surveys the environment for the persistent debate over the supervisor exclusion and the parameters of both statutory and judicial explications and limitations of the supervisory exclusion. This Article also inspects the NLRB’s attempt to bring clarity to this contested arena. Part III examines the *Kentucky River* decision itself. Part IV applies *Packard* as implicated by contemporary changes in the workplace to the *Kentucky River* case. This Article concludes by contending that given the contemporary transformation of the workplace through decentralization, professionalism, and post-industrialization, hands-on workers including registered nurses who inescapably make discretionary independent judgments grounded in their professional experience and training should be excluded from the protective umbrella of the NLRA because to do otherwise would expose their employers to the threat of divided loyalty.

I. The Way Forward? A Reconsideration of *Packard*

The importance of *Packard* was revitalized by the Supreme Court’s *Health Care* discussion. The *Health Care* majority concluded that the *Packard* majority accurately defined a vital element of the supervisory exclusion when it examined the phrase “in the interest of the employer”⁷⁰ under the terms of the original Act. The *Health Care* Court determined that there is no indication that Congress intended

68. See *id.* at 495–96.

69. See Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2212–21 (1998).

70. *Health Care*, 511 U.S. at 578 (citations ommitted). To be sure, when the *Packard* opinion defined “in the interest of the employer” it was examining that phrase as contained within the definition of employer. See *Packard*, 330 U.S. at 488. This phrase has been deleted from the definition of employer. See 29 U.S.C. § 152(2) (1988); see also O’Neal, *supra* note 58, at 841.

any different meaning when it included the phrase in the statutory definition of supervisor later in 1947.⁷¹ Justice Ginsburg, writing for the dissent, plainly and perceptively disagreed. She argued that the dissenting views of Justice Douglas on the meaning of “in the interest of the employer” were more applicable because Congress enacted a definition excluding supervisors in response to *Packard*.⁷² According to Justice Ginsburg, this implied that Congress embraced Justice Douglas’s perspective that “acting in the interest of the employer” only fits employees who act for management either in the formulations or execution of its labor policies.⁷³

The debate in *Packard* is implicated by contentions surrounding (1) the largely outmoded notion of class conflict grounded in the tension between capital versus labor in light of workplace alterations; (2) possible divergences in interests between mid-ranked employees and those at the lower ranks in light of the original NLRA’s expressed and implied objective of allowing rank and file workers to organize free of supervisory interference; (3) the gradual movement of workers up the ranks of the hierarchy as engaged by employer concern for divided loyalties of individuals who might be plausibly classifiable as supervisory, managerial, or professional personnel—who putatively work in the interest of the employer and yet seek the protection of concerted action; and (4) the current textualism versus legislative history debate⁷⁴ as illuminated by a similar debate with a dissimilar conclusion in *Packard*. Before reconsidering *Packard* in light of these questions, it is appropriate to review the decision itself.

A. The *Packard* Decision

Before 1947, the Board generally excluded supervisors from bargaining units that included employees subject to their supervision—unless the case involved an established history within the industry of including supervisors in such units.⁷⁵ In *Packard*, the NLRB estab-

71. See *Health Care*, 511 U.S. at 578.

72. *Id.* at 596.

73. *Health Care*, 511 U.S. at 596 n.15 (Ginsburg, J., dissenting).

74. See, e.g., Keller, *supra* note 54, at 576–77 (contending, among other things, that the “extreme form” of textualism, which largely disregards legislative history as the preferred method of statutory interpretation could potentially threaten the separation of powers doctrine).

75. See THE DEVELOPING LABOR LAW, *supra* note 6, at 1608–09; see also *Packard Motor Car Co.*, 61 N.L.R.B. 4 (1945).

lished a bargaining unit composed entirely of supervisors.⁷⁶ The Supreme Court accepted the Board's conclusion that highly paid foremen and other supervisory employees are entitled as a class to organize as a unit of the Foremen's Association of America and engage in other concerted activities.⁷⁷ The Foremen's Association was an unaffiliated organization that exclusively represented supervisory employees.⁷⁸ The Board held that "all general foremen, foremen, assistant foremen, and special assignment men employed by the Company at plants in Detroit, Michigan constitute a unit appropriate for the purposes of collective bargaining within the meaning of section 9(b) of the Act."⁷⁹ The employer disagreed and refused to bargain with the union. The Board countered with an unfair labor practice charge and a cease and desist order.⁸⁰ The appellate court enforced the NLRB order.⁸¹ In reviewing the appellate decision, the Supreme Court determined that "[the appellate court's] only function is to determine whether the order of the Board is authorized by the statute."⁸²

Before probing the Court's holding and its dissent, it is important to examine the Court's summary of the role of foremen:

The function of these foremen in general is typical of the duties of foremen in mass-production industry generally. Foremen carry the responsibility of maintaining quantity and quality of production, subject, of course, to the overall control and supervision of management. Hiring is done by the labor relations department, as is the discharging and laying off of employees. But the foremen are provided with forms and with detailed list of penalties to be applied in cases of violations of discipline, and initiate recommendations for promotion, demotion and discipline. All such recommended actions are subject to the reviewing procedure concerning grievances provided in collectively-bargained agreement between the Company and the rank-and-file union.⁸³

Foremen are charged with the execution of management prerogatives in the direction of laborers and working men pursuant to discretionary authority vested in them by their employer. But, the question becomes: are they employees within the meaning of the Act? Section 2(3) "provides [t]he term 'employee' shall include *any* em-

76. See THE DEVELOPING LABOR LAW, *supra* note 6, at 1608-09; see also *Packard Motor Car Co.*, 61 N.L.R.B. 4 (1945).

77. See *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 487-90 (1947).

78. See *id.* at 487.

79. *Id.* at 487-88 (citations omitted).

80. See *id.* at 488.

81. See *id.*

82. *Id.*

83. *Packard*, 330 U.S. at 487.

ployee”⁸⁴ The Supreme Court majority avoided the policy implications on which the dissent dwells and maintained that “these foremen are employees both in the most technical sense at common law as well as in common acceptance of the term.”⁸⁵ The Court rebuffed the employer’s contention that the statutory “term ‘employer’ ‘includes any person acting in the interest of an employer, directly or indirectly . . .’ . The context of the Act . . . leaves no room for a construction of this section to deny the organizational privilege to employees because they act in the interest of the employer.”⁸⁶ The Court declared, “[e]very employee, from the very fact of employment in the master’s business, is required to act in his interest.”⁸⁷ Relying extensively and questionably on the doctrinal confines of *respondeat superior*, the Court implied that Congress was plainly “creating a new class of wrongful acts to be known as unfair labor practices, and it could not be certain that the courts would apply the tort rule of *respondeat superior* to those derelictions.”⁸⁸ Perforce those who act in the interest of the employer, nonetheless, retain their own interest in better working conditions and higher wages.⁸⁹ Foremen are not “forbidden the protection of the Act when they take collective action to protect their collective employment interests.”⁹⁰ The company conceded that foremen have the right to organize; but it denied that the NLRA compels it to recognize the union.⁹¹ From the *Packard* Court’s perspective, the employer’s opposition to placing foremen within the protection of the Act is putatively rooted in a fundamental “misconception that because the employer has the right to wholehearted loyalty in the performance of the contract of employment, the employee does not have the right to protect his independent conditions of work.”⁹² The Court dismissed the employer’s concern for potential divided loyalty and instead argued that its power of review is circumscribed by statute and thus it only retains the power “to determine whether there is substantial evidence to support the Board, or its order oversteps the law.”⁹³ Finding such evidence, the Court determined that “the order insofar

84. *Id.* at 488 (citations ommitted) (emphasis added).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 489.

89. *See Packard*, 330 U.S. at 489.

90. *Id.* at 490.

91. *See id.*

92. *Id.*

93. *Id.* at 491.

as it depends on facts is beyond our power of review."⁹⁴ Foremen, accordingly, constitute an appropriate bargaining unit within the meaning of the NLRA.

This holding was not without controversy. Justice Douglas issued a blistering dissent that "poignantly illustrated the fallacies inherent in the majority's opinion."⁹⁵ Douglas argued that the majority decision: (1) obliterated the line between management and labor;⁹⁶ (2) failed to reach a principled conclusion as to the meaning of "employee" and that its holding on that term is contrary to the Act which "put in the employer category all those who acted for management[,] not only in formulating but also in executing its labor policies;"⁹⁷ (3) declined to recognize that the evil at which the Act was aimed was the failure or refusal of industry to recognize the right of working men, as a distinct socioeconomic class, to bargain collectively;⁹⁸ (4) refused to consider the Act's legislative history, which is devoid of any Congressional concern for the problems of supervisory personnel;⁹⁹ (5) failed to comprehend "that when Congress desired to include managerial officials or supervisory personnel in the category of employees, it did so expressly";¹⁰⁰ and (6) rejected Congress's objective which was aimed at "legislating *against* the activities of foremen, not on their behalf."¹⁰¹

Since firms and employers are often bureaucratic organizations, it is important to note that one leading English observer, Hugh Collins, implies that bureaucracies impose subordination through hierarchical social structure and disparities in economic power.¹⁰² If true, this dual source of subordination has the capacity to lead to worker

94. *Id.* The NLRB has held that supervisory employees may organize in a number of early decisions. See, e.g., *Union Collieries Coal Co.*, 41 N.L.R.B. 961 (1942) (supervisors may organize in an independent union); *Godchaux Sugars, Inc.*, 44 N.L.R.B. 874 (1942) (supervisors may organize in an affiliate union). On the other hand, the Board held in a number of decisions that there was no unit appropriate to the organization of supervisory employees. See, e.g., *Maryland Drydock Co.*, 49 N.L.R.B. 733 (1943); *Boeing Aircraft Co.*, 51 N.L.R.B. 67 (1943).

95. Keller, *supra* note 54, at 580.

96. See *Packard*, 330 U.S. at 494 (Douglas, J., dissenting).

97. *Id.* at 496.

98. See *id.*

99. See *id.* at 498.

100. *Id.* at 499.

101. *Id.*

102. See Hugh Collins, *Market Power, Bureaucratic Power, and the Contract of Employment*, 15 INDUS. L. J. 1, 1-3 (1986) (the benefits of freedom of contract in the avowed equality of bargaining power between workers and employers based on a concern for individual autonomy); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 948-55 (1984).

abuse and to arbitrary employer action.¹⁰³ Assuming *arguendo* the Collins thesis, Justice Douglas's dissent bears additional analysis. First, if the *Packard* decision obliterates the line between management and labor, and if it lends sanction to the unionization at all levels of the industrial hierarchy, then the term "employee" must surely mean that "vice-presidents, managers, assistant managers, superintendents, assistant superintendents—indeed, all who are on the payroll of the company, including the president"¹⁰⁴ must be subject to the protection of the Act. Hence, the majority opinion could be seen as a broad interpretation of the statute that is radicalized by the presumed conflict between capital and labor as opposed to a less-radicalized view that is focused on the possible conflict between management and labor. The majority's approach ignores the employer's hierarchical social structure and evident differences in power and wealth between those located at the higher end of the hierarchy and those at the bottom. Congress, on the contrary, left no evidence of such a "basic change in industrial philosophy."¹⁰⁵ Second, if Congress primarily aspired to improve the lot of those at the lowest economic rung—the workingmen, the laborers, and others whose disputes with employers led to economic strife,¹⁰⁶ it remains doubtful that unionizing the middle and upper rungs¹⁰⁷ will result in a redistribution of income which favors those at the bottom level. Douglas stated that while "employee" can be defined to include "any employee," the very context of the Act suggests that it is not an all embracing term.¹⁰⁸ Douglas also observes that while "employer" includes "any person acting in the interest of an employer," the term must *a fortiori* include the employer and some employees—separation must occur where an individual (employee or not) acts on behalf of "management not only in formulating but also in executing its labor policies."¹⁰⁹ The phrase "'any person . . . act[ing] in the interest of [an] employer' was meant to distinguish between certain workers"¹¹⁰ and not, as the majority opinion suggests, "to create a new system of vicarious liability for [all] those involved in

103. See *Packard*, 330 U.S. at 497 (Douglas, J., dissenting).

104. *Id.* at 494.

105. *Id.* at 495.

106. See, e.g., *id.* at 487–96 (Douglas, J., dissenting); see also H. REP. NO. 969 (1935); H. REP. NO. 972 (1935); H. REP. NO. 1147 (1935); S. REP. NO. 573, at 6–7 (1935).

107. See *Packard*, 330 U.S. at 497 (Douglas, J., dissenting). Justice Douglas points out the "problems of those in the supervisory categories of management did not seem to have been in the consciousness of Congress." *Id.* at 497.

108. See *id.* at 495 (Douglas, J., dissenting).

109. *Id.* at 495–96.

110. Keller, *supra* note 54, at 580 (citing Justice Douglas's dissent in *Packard*).

industry."¹¹¹ Lastly, Justice Douglas alleged that foremen and supervisors were seen as instruments of oppression that largely blocked laborers' attempts to organize.¹¹² In his dissent, he stated, "I have used the terms foremen and supervisory employees synonymously. But it is not the label which is important; it is whether the employees in question represent or act for management on labor policy matters."¹¹³

In summary, while both the majority and the dissent in *Packard* concede that many, if not most, employees are "acting in the interest of an employer,"¹¹⁴ there is disagreement as to the importance of the language of section 2(2). The majority's concern with *respondeat superior* is more than counterbalanced by the dissent's argument that the Act was not declaring a policy of general vicarious responsibility of industry. Instead, the statutory language focused on acting in the interest of the employer dealt primarily with labor relations responsibility, including accountability of manager and supervisors to direct others. Neither opinion speaks directly to the concept of "independent judgment" which evidently separates "labor" from "management," but Justice Douglas implies that an analysis of several factors is valuable in both determining who is a supervisor, and for excluding such employees from union coverage. He suggests looking at the industry's operations and/or the disputed employee's place in the company hierarchy,¹¹⁵ examining who has the capacity to implement management's labor policy,¹¹⁶ and being wary of concluding that the term "employee" is an all embracing term which obliterates the line between management and labor.¹¹⁷

Fundamentally, the view expressed by Justice Douglas reflects a limited conception of the purpose of the NLRA. The NLRA was an unadventurous statute designed to channel labor dissatisfaction and protests in an appropriate way. This conclusion was largely confirmed by congressional reaction to this decision as well as other events, and by Justice Ginsburg's dissent in *Health Care*. Congress placed greater limits on labor unions and granted more rights to individual workers

111. *Id.* at 580 (citing Justice Douglas's dissent in *Packard*).

112. *See Packard*, 330 U.S. at 499 (Douglas, J., dissenting).

113. *Id.* at 500.

114. *Id.* at 489 (majority opinion); *id.* at 495-96 (Douglas, J. dissenting).

115. *See Id.* at 496 (Douglas, J., dissenting) (stating that "Trade union history shows that foremen were the arms and legs of management in executing labor policies Management indeed commonly acted through them").

116. *See id.* at 496 (Douglas, J., dissenting).

117. *See id.* at 494.

and employers when it passed the Taft-Hartley Act¹¹⁸ shortly after the issuance of the *Packard* decision. On the other hand, if Congress enacted the Taft-Hartley Act to overturn the reasoning in *Packard*, not just the decision, then the opinion and dissent require additional analysis.

B. Analysis

Packard sets the stage for the development of the supervisory exclusion from the NLRA, and thus subsequent decisions and subsequent workplace changes must be illuminated by an examination of *Packard's* dialogue.

1. Radical Class Consciousness? The Assumed Conflict Between Capital and Labor as Implicated by Both Statutory Purpose and Workplace Changes

Packard supplies the locus of an intense dispute between Justice Jackson for the majority and Justice Douglas for the dissent, encapsulating two starkly different perspectives of appropriate limits of labor law. These different perspectives affect (1) the concern for the possibility that supervisory/management interest might trump the interest of workers; (2) anxiety over the possibility that those who in engage in discretionary decision making might be subject to divided loyalties as articulated in subsection b(3); and (3) the last subsection's debate over whether legislative history and statutory purpose should trump the text. The contrasting outlooks of Justice Douglas and Justice Jackson in the *Packard* case have reappeared in more recent commentary.¹¹⁹ The two viewpoints are grounded in two basic competing notions about the purpose of labor protection: The rationalization of the relationship between capital and labor perspective,¹²⁰ which ap-

118. 61 Stat. 137 (1947).

119. See, e.g., Theodore J. St. Antoine, *How the Wagner Act Came to Be: A Prospectus*, 96 MICH. L. REV. 2201, 2203-07 (1998) (a number of the key players viewed the NLRA as a conservative measure designed to channel protest and defuse rebellion); Klare, *Workplace Democracy & Market Reconstruction*, *supra* note 20, at 2-16 (stating the apparently progressive values and assumptions which support Market reconstruction and that have been embodied in labor law since the New Deal have been and are under threat, which prevents the necessary broadening of labor's collective power).

120. Magruder, an early proponent of the capital versus labor perspective provides this elegant summary:

We seem to be moving slowly toward a more rational relationship between capital and labor. For the better part of the past half century, the law tended, on the whole, to retard this consummation. In the latter years its influence, decisively, has been in the right direction. Such progress as we have made has been at need-

parently identifies labor rights as a radical mass movement to transform the structure, operation, and management of the workplace;¹²¹ or the intra-workforce perspective, which views protection of organizational rights largely as a rather “conservative” measure aimed at reducing economic inequality while providing protection for the working/lower economic class against the demands of employer controlled management prerogatives.¹²² The radical class oriented capital versus labor perspective seeks to extend legal protection to the unionization of supervisory or managerial employee and hence to expand the social role of unions by enlarging the definition of the class for whom it is permissible for them to speak.¹²³ While those captivated by this outlook appear traumatized by the “decline of union membership and density, and reduced capacity to mobilize industrial conflict . . . the declining appeal to the public of union ideals”¹²⁴ and, although this outlook is highly focused on largely outmoded notions of class-wide consciousness and class-based solidarity,¹²⁵ the capital versus labor

less cost of blood and tears, and economic wastage. If employers would now accept with right goodwill the principles of the National Labor Relations Act, as the carriers generally have accepted its sister Act, it would mean: Away with yellow dogs, company unions, blacklists, deputy sheriffs in the pay of employers, barricades, tear gas, machine guns, vigilante outrages, espionage, and all that miserable brood of union-smashing detective agencies. Can anyone doubt the cordial response labor would make to such a gesture? The old ways will not work, could not work, really. It is time for an act of faith.

Calvert Magruder, *A Half Century of Legal Influence Upon the Development of Collective Bargaining*, 50 HARV. L. REV. 1071, 1117 (1937).

121. See, e.g., Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 265-66 (1978) [hereinafter Klare, *Judicial Deradicalization of the Wagner Act*].

122. See, e.g., St. Antoine, *supra* note 119, at 2202-07 (noting it is possible to claim that the Act was aimed primarily at assisting labor organizations and the working class generally).

123. See Feldman, *Workplace Power*, *supra* note 43, at 526.

124. Cella & Treu, *supra* note 24, at 330. For evidence of trauma, see generally Craver, *supra* note 23, at 1616-44; Gottesman, *supra* note 19, at 59-96; Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?*, 47 CATH. U. L. REV. 763, 763-88 (1998).

125. See Marion Crain & Ken Matheny, “Labor’s Divided Ranks” *Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1542-43, (1999) (the labor movement assumes a class-based solidarity that does not exist). Crain & Matheny acknowledge that American unionists have embraced the united front ideology because they fear that acknowledging divisions within the “working class” [broadly speaking] grounded in race and gender would assist employers in their efforts to undermine working class solidarity by pitting one group against another. This claim assumes but does not prove the existence of working class solidarity. Working class solidarity may also be eviscerated by virtue of the fact that an increasing number of employees (working class or not) fail to see the employer as the enemy. In fact, some workers want employee organizations to be staffed and funded by the employer. See Sameul Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, 12 LAB. LAW. 118 n.2 (1996) [hereinafter Estreicher, *The Dunlop Report*].

perspective, which obscures significant conflicts of interest within the working class, may not be reflected in American statutory labor law.¹²⁶

The far reaching capital versus labor perspective, rooted in the world of mass production, may be attached to the assumption that workers who are engaged in similar “work at a common worksite share common class and economic interest.”¹²⁷ This perspective implies that all workers, as well as the society at large, will benefit from adversarial collective bargaining aimed at reducing this putative disparity in return to capital and labor and by the extension of labor’s independent and collective power in managing the employer. This viewpoint is made all the more ironic when one considers that most economic or monopoly rents¹²⁸ in the United States already accrue to labor as opposed to capital.¹²⁹ It is doubtful that the adversarial capital versus labor approach is attractive to all workers in a post-industrial society.

Workers’ current views often seem contrary to union solidarity and may reflect persistent changes in the workplace and in education among workers. As I have argued elsewhere, the attractiveness of unions may reflect differences in the cultural and civilizational context in which unions and unionism germinates. See Harry G. Hutchison, *The Semiotics of Labor Law, Trade Unions and Work in East Asia: “International Labor Standards” in the Mirror of Culture?* 14 EMORY INT’L L. REV. 1451, 1467 (2000) [hereinafter Hutchison, *The Semiotics of Labor Law*]. Thus changes in the cultural milieu may vitiate union attractiveness. The appeal of unionization may also reflect the level of economic advancement of the society as well. Dani Rodrik, *Labor Standard in International Trade: Do They Matter and What do We do About Them?* in EMERGING AGENDA FOR GLOBAL TRADE: HIGH STAKES FOR DEVELOPING COUNTRIES 36 (Robert A. Lawrence et al. eds., 1996) (“Countries with different sets of values and at different levels of income will naturally choose different labor-market policies”). Is it inevitable, therefore, that economic, material, and technological progress creates an inevitable need for statutory protection of collective representation at all ranks within the workforce? On the other hand, it is possible to argue that the “NLRA cements the adversarial model by mandating a united front on labor’s side of the table: it obligates the employer to bargain with the duty certified labor organization representing a majority of its employees . . . [a] duty of fair representation which the Supreme Court imposes in an effort to deter discrimination by majority unions against minority interests within unions, mediates the majority-rule and exclusivity doctrines.” Crain & Matheny, *supra* note 125, at 1555.

126. According to two observers, the “National Labor Relations Act addresses itself only to the presumed class conflict among employers and employees, ignoring and downplaying conflicts among employees themselves.” Crain & Matheny, *supra*, at 1543.

127. *Id.* at 1543.

128. Elementary economic theory posits that economic rent or monopoly rents are the amount paid to a resource in excess of the resource’s opportunity costs. This excess amount does not induce an increase in supply and likely reflects that the resource possess market or monopoly power. See generally ARMEN A. ALCHIAN & WILLIAM R. ALLEN, EXCHANGE & PRODUCTION, COMPETITION, COORDINATION, & CONTROL 293 (1983).

129. See Lawrence F. Katz & Lawrence H. Summers, *Industry Rents: Evidence and Implications*, in BROOKINGS PAPERS ON ECONOMICS ACTIVITY: MICROECONOMICS 209–10 (1988) (suggesting that capital owners in the United States economy receive few monopoly [economic] rents. Most economic rents, perhaps 80–85%, apparently accrue to labor.).

This is likely to be exceptionally true of highly educated or trained workers. Many professional employees, including many who have joined unions, share the concern of employers, managers, and members of the public that collective bargaining is not only incompatible with professional values but that unionization governed by principles of American labor law will impair collegial participation in organizational decisionmaking.¹³⁰ By a significant majority, workers prefer an employee organization run jointly by employers and management rather than an independent employee-run organization.¹³¹ Thus, efforts aimed at broadening worker representation grounded in an adversarial view must confront the disquieting prospect "that collective bargaining [as a form of group action] has become an anachronistic means of promoting employee interests"¹³² While it is impossible to know fully whether legal and judicial actions are a cause or an effect of the diminution of union appeal, when taken together with the other developments, one conclusion seems likely: the "loss [or reduction] of legitimacy for unions as the enablers of group action."¹³³

The primary alternative to the capital versus labor view implies that the NLRA is premised on conservative as opposed to radical objectives. This conception of the NLRA is vitally enhanced by understanding Taft-Hartley's effect in constraining collective activity, while concurrently prohibiting activities that were based on class or worker solidarity.¹³⁴ This view implies that the original intent of the NLRA was attained by simply limiting employers' common law discretion to fire workers who engaged in an effort to organize, and that the NLRA was merely designed to lessen putative bargaining disparities between employers and managers on the one hand, and working class laborers and other working men and women located at the bottom end of the hierarchy on the other. If this perspective is correct, efforts aimed at broadening the coverage of the statute must confront the following quandary: Are inclusive interpretative standards defensible on statutory purpose, contextual, or merely aspirational grounds? Justice Douglas argued that the NLRA separates "workingmen" from manage-

130. See Rabban, *Can American Labor Law Accommodate Collective Bargaining*, *supra* note 16, at 691.

131. See Estreicher, *The Dunlop Report*, *supra* note 125, at 118.

132. James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1564 (1996) (arguing that both the legislative and judicial branches of government have weakened collective bargaining within the workplace).

133. *Id.*

134. See JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 47 (1983).

ment.¹³⁵ On the other hand, Justice Jackson, in writing for the majority, indicated that the purposes of the statute could best be attained through a relatively *broad* conception of who “employees” are and a *narrow* conception of who is an “employer.”¹³⁶ This approach separates most employees from capital but not from management. If sustained, this conclusion makes all or most employees (even those with discretion) apt for unionization. Yet, this technique seems impossible to square with either the statute or its legislative history. As Justice Douglas demonstrates:

When we turn from the Act to the legislative history, we find no trace of Congressional concern with the problems of supervisory personnel. The reports and debates are barren of any reference to them, though they are replete with references to the function of the legislation in protecting the interests of “laborers” and “workers.”¹³⁷

As one observer correctly notes: “Justice Douglas . . . believed that to consider foremen or managerial employees as ‘employees’ under the act would lead to a perception that the crucial battle is between workers and owners. This would mean that the basic conflict between these two groups is one over profits”¹³⁸ as part of a class oriented struggle.

As one commentator deftly demonstrates, while worker and perhaps labor union “class-consciousness was ever present when responding to the activities of black workers,” it was “obviously missing when responding to the practices of capital [or management].”¹³⁹ Thus, expansive class oriented interpretations, which seek to broaden the application of the Wagner Act, are dubious. Contemporary workplace alterations and accompanying worker attitudes place *Packard* in a light that reaffirms the absence of a radical class consciousness. Given the workplace changes since *Packard* and the absence of support for the capital versus labor perspective within the statutory language and its legislative history that Justice Douglas illumines, one should be suspicious of efforts aimed at extending the coverage of the Wagner Act as part of an ineluctable expansion of class consciousness aimed at imperiling management prerogatives. Consequently, if Justice Douglas’s view best captures the prevailing mood of Congress and the animating purpose behind the enactment of the Taft-Hartley Act, interpretative

135. See *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 496 (1947) (Douglas, J., dissenting); see also Jewett, *supra* note 58, at 1128.

136. See *Packard Motor Car Co.*, 330 U.S. at 489–90.

137. *Id.* at 498 (Douglas, J., dissenting).

138. ATLESON, *supra* note 134, at 174.

139. Plass, *supra* note 27, at 830.

efforts aimed at extending coverage by limiting the meaning of the term "independent judgment" should be met with justifiable skepticism. Contemporary worker attitudes, which conceive of a limited role for adversarial unions, reinforce this view.

2. Organizing Rank and File Workers Without Supervisory Interference: Establishing Divergences in Worker Interest?

The *Packard* majority broadly and inclusively construes the term "employee" to encompass all who act in the interest of the employer¹⁴⁰ despite the fact that the statutory language in section 2(2) defines the "term 'employer' [to include] any person acting in the interest of an employer, directly or indirectly"¹⁴¹ Evidently, individuals who can be defined as *both* employers and employees are included within the Wagner Act's organizational privileges.¹⁴² Consequently, the Court in *Packard* declined to accept a distinction between foremen and rank and file workers. More importantly, the majority failed to recognize that foremen might be governed by interests that are both distinct and adverse to the interest of the rank and file.

Contemporary changes in the workplace emphasize that many workers are mounting the hierarchical ladder. These changes strengthen and re-emphasize the Act's implicit concern for possible divergences in interest between workers located at different ranks in light of the statutory goal of allowing the rank and file to organize without supervisory interference. Justice Douglas brought this concern to life. He suggested that Congress sought to maintain a proper line between management and labor and the accompanying divergence in interest, which, among other things, recognizes that supervisory personnel can be an instrument of oppression against working women and men.¹⁴³ Justice Douglas argued that the basic opposing forces in industry are management and labor, and not capital and labor.¹⁴⁴ This perspective diminishes the radical class conscious viewpoint discussed in the previous subsection as well as the *Packard* majority's approach that is grounded in the assumed yet unproven

140. See *Packard*, 330 U.S. at 488 (citations omitted).

141. *Id.*

142. See *id.* at 495-96 (Douglas, J., dissenting).

143. See *id.* at 499 (Douglas, J., dissenting).

144. See *id.* at 494 (Douglas, J., dissenting).

“unity [between management and rank and file workers] in their common demands on ownership.”¹⁴⁵ Relying on his uncontroverted understanding of both the legislative history and the animating purpose of the statute, Justice Douglas rejected the majority’s approach. Instead, “[t]he term ‘employee’ must be considered in the context of the Act.”¹⁴⁶ Thus those who act for management in formulating and executing its labor policies are excluded from the Wagner Act’s coverage.¹⁴⁷

The last sixty years of global¹⁴⁸ and American workplace history have witnessed enormous economic and structural changes.¹⁴⁹ These changes include decentralized management styles and more flexible production systems coupled with a significant alteration in the characteristics of the labor force. These alterations are exemplified by an ascendant managerial, professional, and technical middle class¹⁵⁰ whose status, goals, and objectives likely diverge sharply from those of industrial “workingmen [and workingwomen] and laborers”¹⁵¹ of the 1930s and 1940s and their contemporary counterparts.

145. *Id.*

146. *Id.* at 495.

147. *See id.* at 496.

148. *See, e.g.,* Henrietta L. Moore, *The Future of Work*, 33 BRITISH J. OF INDUS. REL. 657, 657 (1995). The article states:

Any observer asked to describe the most significant changes of the last three decades would probably cite the increase in the number of women in the waged labour force, flexible specialization and work from home based on information technology Technological innovations have had a dramatic effect on the nature and practice of work in many different contexts, and the increasing integration and globalization of capital are frequently linked to the enhanced ability to manage information and execute tasks at distance.

Id.

149. *See, e.g.,* Cella & Treu, *supra* note 24, at 330.

150. *See, e.g., id.*; HERBERT STEIN & MURRAY FOSS, *THE NEW ILLUSTRATED GUIDE TO THE AMERICAN ECONOMY* 86–88 (1995) (as the industrial composition of jobs has changed in the United States, blue collar jobs have declined in importance, while white collar jobs have increased. In addition, over the past thirty years agricultural employment as share of total employment fell sharply in the United States and much more in other industrialized countries.).

151. *See Packard*, 330 U.S. 496–98 (Douglas, J., dissenting).

Management and bureaucratic power¹⁵² are evidently being pushed further and further down the employment ranks.¹⁵³ Professionals are not only animated by professional criteria but also by professional standards in the supervision and management of staff. Whether professional criteria and standards can be intelligibly distinguished from management prerogatives remains a contentious question. Significantly, one observer declares,

American labor law developed in response to industrial sector collective bargaining and reflects basic assumptions that deviate from professional values.

.....

The distinction between mandatory and permissive subjects of bargaining translates into law the traditionally limited role of workers in the development of organizational policy.¹⁵⁴

If true, this claim presents a potential quandary, not only for the ever-growing number of individuals who can be located within the professional/supervisory/technical combination and who direct lesser-skilled workers, but also for those who advocate NLRA protection for the concerted activity of such individuals alongside the rank and file.

Those who advocate for NLRA protection for the concerted activity of the professional/supervisory/technical combination alongside the rank and file likely fail to comprehend that the Act was aimed at the failure of industry to recognize the right of working class individuals to bargain collectively.¹⁵⁵ This position is intensified by the possibility that "the NLRA establishes a representational structure in which [often] a single union—a 'united front'—represents all workers in that unit and speaks with a single voice on their behalf."¹⁵⁶

The "union" interest itself is no unitary whole, but instead a complex amalgam of the individual interests of the many actors who

152. Hugh Collins, a leading British labor authority, argues that contracts of employment produce a dual source subordination, depending upon both market power (economic) and social power, and possibly including bureaucratic power (or rule book power). Bureaucracies impose subordination through hierarchical social structure and disparities in economic power. See Hugh Collins, *Market Power, Bureaucratic Power, and the Contract of Employment*, 15 *INDUS. L. J.* 1, 1-3 (1986); see also OTTO KAHN-FREUND, *LABOUR & THE LAW* (1977); Harry Hutchison, *Subordinate or Independent, Status or Contract, Clarity or Circularity: British Employment Law, American Implications*, 28 *GEORGIA J. INT'L & COMP. L.* 55, 65 n.73 (1999).

153. See, e.g., Churgin, *supra* note 10 at 560-61.

154. Rabban, *Can American Labor Law Accommodate Coll. Barg.*, *supra* note 16, at 691-93. Rabban argues that assumptions derived from the industrial sector limit the eligibility of professional employees to bargain under the NLRA. He suggests modifications of certain doctrines that inhibit the ability of professionals to organize. See *id.* at 692.

155. See *Packard*, 330 U.S. at 494 (Douglas, J., dissenting).

156. Crain & Matheny, *supra* note 125, at 1543.

play on the expanded stage. It is no accident that extensive administrative procedures are needed to determine the contours of an "appropriate bargaining unit" and to enforce fiduciary duties for the protection of minority interests.¹⁵⁷

It is possible that the "united front ideology, enshrined in labor law through the exclusivity and majority rule doctrines, obscures significant material conflicts of interest within the [broadly conceived] working class"¹⁵⁸ If these above-referenced claims are true, and given the likely divergence in interest among those who direct lesser-skilled employees and those who are subject to such direction, the question becomes: whose interest prevails and/or whose should prevail? The inclusion of professionals who responsibly direct others within the bargaining unit may increase the risk that the interests of working women and men, as opposed to mid-ranked staff, may suffer. This is a risk that the Board has apparently recognized. As Professor Feldman avers,

the Board had always perceived the interests of supervisors before Taft-Hartley, and of managerial employees both before and after, as sufficiently distinct from that of the rank and file to prevent their inclusion in the same bargaining units. The fear that they might have divided loyalties vis-a-vis the rank and file is a particular case of the general goal of creating a bargaining unit that minimizes internal conflicts among its constituents, an aim embodied by the requirement of community of interest.¹⁵⁹

3. The Gradual Movement of Workers Up the Ranks of the Hierarchy in the Mirror of Concern for Possible Divided Loyalties

From an employer perspective, the possibility of divided loyalties appears to be among the foremost grounds for opposing statutory coverage of supervisors, actual or alleged. While not everyone admits the impact of this issue on the terms of the dispute, virtually all observers, including the NLRB, concede its broad importance.¹⁶⁰ The *Packard* majority asserts that "[e]very employee, from the very fact of employment in the master's business . . . owes to the employer faithful performance of service in his interest, the protection of the employer's property in his custody or control"¹⁶¹ The majority is stranded by

157. Epstein, *supra* note 15, at 1398.

158. Crain & Matheny, *supra* note 125, at 1543.

159. Feldman, *Workplace Power*, *supra* note 43, at 549.

160. See, e.g., Brief for NLRB at 24, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815, 2001 U.S. LEXIS 4119 (U.S. May 29, 2000).

161. *Packard*, 330 U.S. at 488-89.

its claim that the purpose of the statutory definition of employers was to establish "*respondeat superior*, by which a principal is made liable for the tortious acts of his agent and the master for the wrongful acts of his servants."¹⁶² As Justice Douglas thoughtfully avers, Congress, in enacting the Wagner Act, failed to consider the conspicuous question of divided loyalties among foremen primarily because it declined to bring them within the parameters of the Act.¹⁶³ Perceptively, he contends that some labor leaders believed "that if those in the hierarchy above the workers are unionized, they will be more sympathetic with the claims of those below them"¹⁶⁴ as part of a solid phalanx against capital.¹⁶⁵ In other words, mid-ranked staff, who direct lesser-skilled workers and who represent management's interest might give their loyalty to those workers as opposed to their employer.

Anxiety over divided loyalties becomes more insistent in the context of the contemporary reordering of the workplace. Critical workplace changes include increased labor participation by women,¹⁶⁶ despite historic and persistent union opposition to their interest;¹⁶⁷ higher levels of education and schooling among employees generally; and a general rise and differentiation in the expectations of workers.¹⁶⁸ These changes are coupled with innovative management prac-

162. *Id.* at 489.

163. *See id.* at 498 (Douglas, J., dissenting).

164. *Id.* at 495 (Douglas, J., dissenting).

165. *See id.* at 495.

166. *See, e.g.,* Cella & Treu, *supra* note 24, at 330; STEIN & FOSS, *supra* note 150 at 82-83.

167. *See* Molly S. McUsic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339, 1351 (1997) ("The ill fit between the collective bargaining regime and the identities of women . . . [has] led some to conclude that unions did not, and perhaps, cannot, represent their interest.")

168. *See* Cella & Treu, *supra* note 24, at 330. One study of American workers implies that they do not accept conventional unions as the best vehicle for the advancement of their interest.

In their preferences for how an ideal employee organization should be structured, workers diverge sharply from the union model in some respects—again reflecting their perceptions that management cooperation is essential. By an overwhelming 86% to 9% margin, workers want an organization run jointly by employers and management, rather than an independent, employee-run organization. By a smaller, but still sizable margin of 52% to 34%, workers want an organization to be staffed and funded by the company, rather than independently through employee contributions.

Estreicher, *The Dunlop Report*, *supra* note 125, at 118 n.2 (1996) (citing PRINCETON SURVEY RESEARCH ASSOCIATES, WORKER REPRESENTATION AND PARTICIPATION SURVEY: REPORT ON THE FINDINGS 49 (1994)). One additional source of changed worker expectations is arguably the rise of "expressive" individualism, which holds that each person has a unique core of feelings and intuition that unfolds or is expressed for individuality to be actualized. *See* Sharon Rabin Margalioth, *The Significance of Worker Attitudes: Individualism as a Cause of*

tices in human resources, greater employee involvement in the joint handling of organization and technological innovation, which have found union representatives ill-equipped to react.¹⁶⁹ Thus, a larger percentage of workers today occupy higher ranks in the company hierarchy than typical workers sixty years ago.¹⁷⁰ Workers certainly populate higher and more skilled ranks than Congress conceived of when it wrote the NLRA in 1935.¹⁷¹ Indeed, contemporary individuals who might not necessarily be considered “foremen” sixty years ago are placed within categories that combine responsibilities requiring some discretion with responsibilities requiring judgment—professional or not—that “foremen” rarely possessed sixty years ago. Moreover, this picture is complicated by the fact that professional/managerial employees are often subjected to a hands-on work requirement (e.g., RNs who participate in patient care while directing lesser-skilled Licensed Practical Nurses (“LPNs”)), which continues to blur the traditional line between management and labor as highly trained, highly educated, and highly skilled employees evidently traverse this ancient divide.

Undeniably, “[t]he percentage of workers who [can] be deemed managerial has grown significantly over the last ten years, since there has been a move away from traditional blue-collar [and mass-production related] jobs towards those positions that require managerial skills”¹⁷² located within service oriented industries. Another development that blurs the historical distinction between management and labor is the creation and increasing deployment of worker participa-

Labor's Decline, in EMPLOYEE REPRESENTATION IN THE EMERGING WORKPLACE: ALTERNATIVES/SUPPLEMENTS TO COLLECTIVE BARGAINING: PROCEEDINGS OF NEW YORK UNIVERSITY 50TH ANNUAL CONFERENCE ON LABOR 41, 41–49 (Samuel Estreicher ed., 1998). Among other things, Estreicher asserts that the principal cause of labor's decline lies in the fact that “model of employee organization promoted by the labor laws has failed to keep pace with the unleashing of competitive forces in product markets as a result of deregulation, technological advances, and global competition.” Estreicher, *The Dunlop Report*, *supra* note 125, at 118. By contrast, there is torrent of academic and media demands for re-unionization. See Leo Troy, *Commentary On Freeman & Rodgers, What do Workers Want?* in EMPLOYEE REPRESENTATION IN THE EMERGING WORKPLACE: ALTERNATIVES/SUPPLEMENT TO COLLECTIVE BARGAINING (PROCEEDINGS OF NEW YORK UNIVERSITY 50TH ANNUAL CONFERENCE ON LABOR) 33–34 (Samuel Estreicher ed., 1998).

169. See Cella & Treu, *supra* note 24, at 335.

170. By 1985, fifty-five percent of the workforce was composed of managerial and professional workers. See Churgin, *supra* note 10, 561.

171. See, e.g., *id.*

172. Churgin, *supra* note 10, at 560–61. Churgin states that “[b]etween 1970 and 1985, there was a seventy percent growth in the managerial and professional workforce; as a result, by 1985, managerial and professional workers comprised fifty-five percent of the total workforce.” *Id.* at 561.

tion programs.¹⁷³ Taken as a whole, workforce changes and workplace developments intensify both the vigorous debate between Justice Jackson and Justice Douglas about the precise location of the class divide¹⁷⁴ and the loyalties of those who act in management's interest. The debate about the location of divided loyalties among workers is surely more urgent today given that more and more workers are sufficiently skilled, educated, and trained, and who by virtue of such skill, education, and training, exercise judgment in the interest of the employer.

"Labor relations and labor law . . . have been shaped by underlying assumptions about organizational hierarchies and adversarial relationships between management and labor in the industrial work place."¹⁷⁵ Hence, the NLRA "posits a fundamental dividing line between labor and management. Both the legislative history of the NLRA and key decisions interpreting it assert that collective bargaining by people on the management side of that line would create intolerable divided loyalties."¹⁷⁶ This remains true despite claims by some commentators, which imply that unions comprised of professionals, even supervisory ones, may provide "a way for employees to voice their concerns and obtain improvements in working conditions, [which] might actually increase employee loyalty to an organization."¹⁷⁷ By contrast, both the NLRB and the courts have conceded "that the assumptions underlying the NLRA apply at best imperfectly to many of the organizations in which professionals work."¹⁷⁸ This determination attaches greater weight to the framework that Justice Douglas supplies.

Since workplace changes signify that a larger proportion of workers are located at a higher level in the hierarchy today than during the 1930s and 1940s, the fundamental dividing line between labor and management materializes differently today than it did sixty years ago. "Since there has been a move away from traditional blue-collar jobs towards those positions that require managerial skills,"¹⁷⁹ employers

173. See *id.* at 561. Worker participation programs "are designed to provide workers with more authority, flexibility, and satisfaction in the performance of their jobs." *Id.* at 562.

174. See *Packard Motor Car. Co. v. NLRB*, 330 U.S. 485, 493-500 (1947) (Douglas, J., dissenting).

175. Rabban, *Distinguishing Excluded Managers*, *supra* note 44, at 1778.

176. *Id.*; see also *id.* at 1781-1812.

177. *Id.* at 1779.

178. *Id.* at 1778.

179. Churgin, *supra* note 10, at 561.

likely have increased concern that “management objectives” are carried out by these professional and technical workers without being impeded by divided or arguably divided loyalties. On the other hand, the *Packard* majority declined to accept the possibility that “if foremen combine to bargain advantages for themselves, they will sometimes be governed by interests of their own or their fellow foremen, rather by the company’s interest.”¹⁸⁰ Despite that assertion, Justice Douglas’s dissent, grounded in his inspection of both the Act’s legislative history and purpose, breathes life into the notion that the statute excludes and should exclude those who participate in implementing and carrying out workplace objectives.¹⁸¹ To do otherwise would expose employers to the risk of divided loyalties. The enactment of the Taft-Hartley Act makes this determination explicit.

4. Should Congressional Intent Be Found Through Textualism or Legislative History? Back to the Future

While any reassessment of *Packard* likely fails to afford sanctuary from disputes that may have predetermined outcomes, and while it is impossible to profess “neutrality,” it is useful to reconsider the *Packard* majority’s attachment to textual purity in the mirror of the dissent’s examination of both the statute’s legislative history and purpose. This Article offers the hypothesis that the 1947 United States Supreme Court provides a perceptive framework for critical review of subsequent attempts to interpret or reinterpret the NLRA. The textualist, statutory purpose, and legislative history assumptions, which are implanted in the *Packard* majority and dissenting opinions, supply a richly ironic setting for assessing the Supreme Court’s decisionmaking in *Kentucky River*. This technique allows us to reconsider the “conservative” versus “liberal” posture of the majority and dissent in *Kentucky River* in light of the *Packard* Court’s determination that “it is for Congress, not us, to create exceptions on qualifications at odds with [the Act’s] plain terms.”¹⁸² The *Packard* Court explicitly refused to “make a lengthy examination of views expressed in Congress while this and later legislation was pending . . . [as] [t]here is . . . no ambiguity in this Act to be clarified by resort to legislative history.”¹⁸³ This verdict enlarged the coverage of the Act, despite “a long record of inaction,

180. *Id.* at 490.

181. *See Packard Motor Car Co. v. NLRB*, 330 U.S. at 493–500 (Douglas, J., dissenting).

182. *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 573 (1994) (citing *Packard*, 330 U.S. 485, 490 (1947)).

183. *Packard*, 330 U.S. at 492.

vacillation and division of the NLRB in applying the Act to foremen.”¹⁸⁴ This approach denies the effect of legislative history and finds a faint but perhaps unrelated echo in the textualist arguments that the conservative majority opinion used to narrow NLRA coverage in both *Health Care*¹⁸⁵ and in *Kentucky River*.¹⁸⁶

In *Packard*, the liberal majority—those who favored broad NLRA coverage—established a textualist methodology which explicitly ignored the legislative history and the statutory purpose¹⁸⁷ and the NLRB’s record of inconsistency.¹⁸⁸ On the other hand, the dissenting “conservatives,”—those who conceived the NLRA in narrow terms—favored an examination of the legislative history as informed by the contextual purpose of the Act.¹⁸⁹ Justice Douglas determined that the language of the statute is “consistent with a restriction of the Act to workingmen and laborers”¹⁹⁰ and therefore fails to include foremen. The NLRA was modified in 1947 and therefore its statutory context and text have changed. Current liberals, adopting the definition of a supervisor as described in the dissent in *Health Care*, have embraced Justice Douglas’s earlier dissent on the meaning of relevant elements of the definition of a supervisor—“in the interest of the employer”—to determine the current meaning of that phrase,¹⁹¹ as it interacts

184. *Id.*

185. *Health Care*, 511 U.S. at 573 (“[I]t is for Congress, not us to create exceptions or qualifications at odds with [the Act’s] plain terms.”) (citing *Packard*, 330 U.S. at 490).

186. *Ky. River Cmty. Care, Inc. v. NLRB*, No. 99-1815, slip op. at 13 (U.S. May 29, 2001) (stating:

What is at issue is the Board’s contention that the policy of covering professional employees under the Act justifies the categorical exclusion of professional judgments from a term, “independent judgment” that naturally includes them. And further, that it justifies limiting this categorical exclusion to the supervisory function of responsibly directing other employees. These contentions contradict both the text and structure of the statute)

187. *See generally Packard*, 330 U.S. at 493–500 (Douglas, J., dissenting) (arguing that this decision altered the industrial philosophy behind the Congressional intent by shifting the focus from a balancing of management and labor to operating group and stock and bond holders ownership now will weigh heavily in the labor negotiation process).

188. *See id.* at 492.

189. *See generally id.* at 493–500 (Douglas, J., dissenting) (highlighting the act passed in 1935 was written expressly to protect the workers rights of free association and collective bargaining from repercussions by those in authority over them, therefore its intention was never to include foreman or supervisors).

190. *Id.* at 500.

191. *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 573, 596 n.15 (1994). Feldman contests this view. *See Feldman, Workplace Power*, *supra* note 43, at 540 (stating:

The *Health Care* dissent also seems to have misunderstood the effect of accepting the *Packard* majority’s view of “in the interest of the employer,” apparently conceding that such a construction would support the result in *Health Care*. The dis-

with the phrase “independent judgment.” But they refused to embrace Justice Douglas’s narrow conception of the Act that was derived from its legislative history.¹⁹²

Justice Douglas’s *Packard* dissent thoroughly illustrates that the legislative history of the original statute is devoid of any purpose to bring supervisors within the Act.¹⁹³ Evidence from other related legislation that Justice Douglas marshaled demonstrated that when Congress desired to include managerial officials or supervisory personnel in the category of employees, it did so explicitly. Further, the legislative history is replete with evidence of Congressional angst for “workers” and “laborers.”¹⁹⁴ The legislative history and a perceptive understanding of the NLRA’s purpose provide Justice Douglas with ample ammunition to demonstrate that a narrow conception of the NLRA is consistent with the statute. Given Justice Douglas’s determination that when Congress desired to include managerial or supervisory personnel in the category of individuals subject to statutory coverage, it did so explicitly, it would be highly ironic, today, to implicate employees with discretionary authority within the amended statute when they have been explicitly excluded from such coverage. The NLRA, as altered by the Taft-Hartley Act, should be construed in light of Justice Douglas’s powerful dissent. This gives rise to the possibility that professional employees who act for management in the execution of its labor policies and in the responsible direction of others, even when they also exercise judgment animated by professional standards may, be justifiably excluded from the statute’s coverage.

II. Who is a Supervisor in Light of the Purposes and Objectives of the NLRA and LMRA?

The modern proliferation of laws can also be explained by the legal technician’s complete antipathy to the notion of a doctrinal law For that reason he finds it advisable to enclose the judge or the administrator in a tighter and tighter technical network¹⁹⁵

sent instead questioned whether Congress had adopted this position at all, thinking it more likely that Justice Douglas’s views had prevailed on this issue as well as on the holding. Douglas believed that the Act “put in the employer category all those who acted for management not only in formulating but also in executing *its labor policies*.”)

192. See *Packard*, 330 U.S. at 498 (Douglas, J., dissenting).

193. See *id.* (Douglas, J., dissenting).

194. See *id.* (Douglas, J., dissenting).

195. ELLUL, *supra* note 2, at 297–98. For an incandescently accessible explication of Ellul’s concept of law, see Andrew Goddard, Short Abstract, *The Life and Thought of Jacques Ellul With Special Reference To His Writings on Law, Violence, The State and*

A. Genesis of the Debate Over Supervisors

The Act withdrew its protection for supervisors by virtue of the 1947 amendments to the Wagner Act. The NLRB, “now lacks authority either to include supervisors in bargaining units with other employees or to establish units composed entirely of supervisory personnel.”¹⁹⁶ Presumably, “the status of supervisor under the Act is determined by an individual’s duties, not by title or job classification.”¹⁹⁷

The *Kentucky River* judgment takes place against a backdrop of insistent claims about the diminution of union power rooted in either statutory mandates or judicial inspiration.¹⁹⁸ This decision cannot be seen as an isolated event. How one views this decision may depend on the underlying values and assumptions that are brought to the table. For instance, some observers, captivated by the romance of collective action, conceive labor unions and the labor movement as a “robust engine of collective insurgency against globalization, hierarchy, [and] unwarranted management power.”¹⁹⁹ This approach can be seen as part of a radical,²⁰⁰ inevitable, and historically driven movement, which inescapably leads to progressive human advancement in the form of “egalitarianism and solidarity,”²⁰¹ and “market reconstruction.”²⁰² While this vision has appeal to some, we should also be cogni-

Politics (1995) (unpublished Doctoral Thesis, University of Oxford) (on file with the Bodleian Library, University of Oxford). As Goddard illumines, the

“droit naturel” [natural law] is a truly human work in which man spontaneously constructs a system of law even though he lacks explicit theoretical principles to guide him [But] [o]nce conscious of this ‘natural law’ man begins to develop *juridical* theories of natural law to account for it This consciousness of the phenomenon of natural law is the beginning of its destruction.

Id. at 171–72.

196. THE DEVELOPING LABOR LAW, *supra* note 6, at 1609. To be sure, “supervisors may organize although they are not protected by the Act, and employers are not forbidden to engage in voluntary bargaining with such organizations.” *Id.*

197. *Id.*

198. See, e.g., George Feldman, *Unions, Solidarity, and Class: The Limits of Liberal Labor Law* 15 BERKELEY J. EMP. & LAB. L. 187, 193 (1994) [hereinafter Feldman, *Unions, Solidarity, and Class*] (citing cases reflecting the liberal doctrine that labor law only protects unions insofar as they limit their role to that of representative of employees of an individual employer and not of all workers in the fight for national class-based justice).

199. Hutchison, *Reclaiming the Labor Movement Through Union Dues?*, *supra* note 26, at 448–49 (reviewing such observers).

200. See Klare, *Judicial Deradicalization of Wagner Act*, *supra* note 121, at 265 (viewing the Wagner Act of 1938 as “perhaps the most radical piece of legislation ever enacted by the United States Congress”).

201. Klare, *Workplace Democracy & Market Reconstruction*, *supra* note 20, at 2.

202. *Id.* at 16 (“the New Deal represents a watershed in American law, its validation of the concept of market reconstruction is one of its most significant contributions”).

zant of the possibility that Fukuyama, like Nietzsche and Kojève before him, is worried not simply about the end of history, but ending the romance of history,²⁰³ which thus diminishes our “ability to use history as an object around which we intellectuals can wrap our fantasies.”²⁰⁴ Thus labor unions, as instruments of human progress in general and collective bargaining in particular, must often face thorny facts²⁰⁵ that are inconsistent with the presumed benefits of unionism. On the other hand, some observers come to the table, after reviewing the evidence, with the view that the NLRA in both its original conception and as amended, is a fairly “conservative” document with limited ambition and bereft of radical potential.²⁰⁶ Still others suggest it was simply a mistake that could be corrected by repeal.²⁰⁷

All observers, radical or not, must acknowledge that ascendant union power in the 1930s and 1940s faced an employer²⁰⁸ and Con-

203. See RICHARD RORTY: TRUTH AND PROGRESS: PHILOSOPHICAL PAPERS 231 (1998).

204. *Id.*

205. Among the thorniest facts is the dramatic decline in union density coupled with worker attitudes that are not conducive to unionization and group action within the parameters of collective bargaining.

206. A number of academics have suggested that the NLRA in its original conception was simply too timid a vehicle for the implementation of progress—which provides grounds to challenge the viability of the NLRA as a vehicle for societal transformation and human progress. As thus conceived, the NLRA was merely a reform vehicle, which was necessary to save the country from more radical solution such as communism. See, e.g., Feldman, *Unions, Solidarity and Class*, *supra* note 198, at 197. Whether this conception has any continuing viability remains a debatable question. See Epstein *supra* note 15, at 1406 (arguing against the special privileges and immunities that New Deal legislation confers on union and further arguing that where union are necessary, they can emerge in any voluntary situation in a form less formal and less adversarial than it is today). See also *id.* at 1407–08 (arguing for a theory of individual self-interest under which we can predict that unions and their members (like employers) will press for their maximum advantage after the passage of the Act as well as before). Other observers contend that the Wagner Act was simply an important effort to appropriately channel labor protests in a way that would preserve the existing political and economic order. See Patrick M. Kuhlmann, Comment, *The Enigma of NLRA Section 2(11): The Supervisory Exclusion and the Case of the Charge Nurse*, 2000 WIS. L. REV. 157, 161 (2000). In reality, Kuhlmann accessibly “simplifies a considerable body of nuanced and challenging scholarship working from the premise that the NLRA was an effort to deflect labor insurgency and stabilize the social order.” *Id.* at 161 n.25.

207. See, e.g., Epstein, *supra* note 15, at 1388–95 (arguing against the soundness of the statute itself which radically changed the nature of labor negotiations).

208. As one perceptive observer avers: “Buoyed by their success in organizing and by the erosion of the business community’s moral authority, unions sought not only a bigger piece of the economic pie, but also a voice in decisions regarding personnel policies, technology, capital disposition, and the process of production—traditionally the sole prerogative of management.” Kuhlmann, *supra* note 206, at 162.

This vision of expansive labor union power reached its apex when John L. Lewis conducted two prolonged and devastating strikes among coal miners during World War II, when, in response to the postwar deregulation of wages and prices

gressional backlash against both the Board and court decisionmaking which ostensibly enlarged union power.²⁰⁹ The success of this employer-led reaction coupled with the decline in union density has sparked still another reaction whose embers continue to burn. Academic fire²¹⁰ is tenaciously aimed at what has been called the "slave" labor act.²¹¹ No rational observer can contend that the Taft-Hartley Amendments were designed to strengthen unions or broaden the scope of coverage despite the LMRA's guarantee of protection for professionals. The 1947 amendments reflect Congressional and employer opposition to the growing militancy and strength of organized labor in the late 1930s and 1940s.²¹² Congress shifted the emphasis of federal labor law from a circumscribed, even conservative,²¹³ scheme that concentrated on the protection of employees' rights to organize and engage in concerted economic activities, while simultaneously constraining the power of employers to a more balanced approach, which placed certain restrictions on unions while guaranteeing certain freedoms of speech and conduct to employers and individual workers.²¹⁴ Driven by a desire to secure the undivided loyalties of minor supervisory employees, employers in a number of industries

in August 1945, major unions immediately demanded huge raises, thirty percent and more . . . [and] union leaders . . . threatened to shut the country down.

Hutchison, *Reclaiming the Labor Movement Through Union Dues?*, *supra* note 26, at 451.

209. See, e.g., *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947).

210. See, e.g., Craver, *supra* note 23, at 1620; Lichtenstein, *supra* note 124, at 764; Feldman, *Unions Solidarity, and Class*, *supra* note 198, at 193. Academic fire is also aimed at the courts. See, e.g., Brudney, *supra* note 132, at 1564. Among the court decisions, which have inspired the most passion, are: *Lechmere Inc. v. NLRB*, 502 U.S. 527, 531-41 (1992) (holding that nonemployee union access rights need not be accommodated unless the workplace is otherwise inaccessible); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 106-12 (1956). See, e.g., ATLESON, *supra* note 134, at 93 (condemning court decisions which stress property rights by limiting union access to workers). *But cf.* Harry G. Hutchison, *Through the Pruneyard Coherently: Resolving the Collision of Private Property Rights and Nonemployee Union Access Claims*, 78 MARQ. L. REV. 1, 5-7 (1994) (arguing in favor of access limitations).

211. See Lichtenstein, *supra* note 124, at 765 (stating:

Proponents of the Taft-Hartley Act sought to achieve far more than the mere reform of the labor law; instead the law was part of a larger contestation in which the entire structure . . . was involved. The Taft-Hartley law stands like a fulcrum upon which the entire New Deal order teetered. Before 1947 it was possible to imagine a continuing expansion and vitalization of the New Deal impulse. After that date, however, labor and the left were forced into an increasingly defensive posture.)

212. See Kuhlmann, *supra* note 206, at 162.

213. See St. Antoine, *supra* note 119, at 2205.

214. See Hutchison, *Reclaiming the Labor Movement Through Union Dues?*, *supra* note 26, at 451 (citations omitted).

sought,²¹⁵ and successfully persuaded Congress to exclude “supervisors from coverage by the Act.”²¹⁶

Two provisions are placed at the center of this firestorm: “section 2, defining ‘employee’ to exclude supervisors, and section 14(a), exempting employers from the duty to consider supervisors as employees under any law relating to collective bargaining.”²¹⁷ One commentator avers that the “task of identifying supervisors has been described as an ‘aging but . . . persistently vexing problem.’”²¹⁸ “Whether or not a person enjoys supervisory status will determine, among other matters, that person’s right to vote in a union election, entitlement to section 7 rights, and ability to bind the employer by statements and actions.”²¹⁹ Whether supervisors and managers are excluded is critical because if every employee is a bargaining unit member within the meaning of the NLRA, then who personifies the employer’s prerogatives and interests?

Section 14(a) provides: “Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization,”²²⁰ but “no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.”²²¹ While the statute excludes supervisors, it offers limited guidance on *who are* supervisors,²²² and

215. See Kuhlmann, *supra* note 206, at 162 (citation omitted).

216. THE DEVELOPING LABOR LAW, *supra* note 6, at 1608. Before the 1947 Amendments, the NLRB “excluded supervisory personnel from bargaining units that included employees subject to their supervision. An exception was made in cases involving an established history in the industry of including supervisors in such units.” *Id.* (citing *Packard Motor Car Co.*, 61 N.L.R.B. 4 (1945)), *enforced*, 157 F.2d 80 (6th Cir.1946), *aff’d* 330 U.S. 485 (1947). The Board did establish bargaining units composed entirely of supervisory workers and required employers to bargain with the representatives of such units. See *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947).

217. THE DEVELOPING LABOR LAW, *supra* note 6, at 1608.

218. *Id.* (citing *NLRB v. Security Guard Serv.*, 384 F.2d 143 (5th Cir. 1967)).

219. THE DEVELOPING LABOR LAW, *supra* note 6, at 1608.

220. LMRA, 29 U.S.C. § 164(a) (1974). The LMRA is the Labor Management Relations Act which is commonly referred to as the Taft-Hartley Act.

221. LMRA, 29 U.S.C. § 152(11) (1974).

222. The statute states:

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

LMRA, 29 U.S.C. § 152(11) (1974).

accordingly, the actual determination of supervisory status seems subject to endless technical determination and “inconsistent treatment of supervisors under the Wagner Act.”²²³

B. Triggering the Supervisory Exclusion Pursuant to NLRB Criteria

The “status of supervisor under the Act is determined by an individual’s duties, not by title or job classification.”²²⁴ Compliance with all of the listed criteria in section 2(11) is not essential in order to be classified as a supervisor. Compliance with one factor is sufficient. While the “enumerated functions of a supervisor are listed disjunctively, the statute expressly insists that a supervisor (1) have authority (2) to use independent judgment (3) in performing such supervisory functions (4) in the interest of management.”²²⁵ It seems vital that a “supervisor” must have “the power to act as an agent of the employer in relations with other employees and to exercise independent judgment of some nature.”²²⁶ One pertinent question is whether the definition of supervisor was meant to exclude only those individuals who are “vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such actions”²²⁷ or whether the definition also excludes those who responsibly direct lesser-skilled workers.

The “separation of ‘supervisors’ excluded from the Act’s compass, from ‘professionals’ sheltered by the Act is a task Congress committed to the National Labor Relations Board . . . in the first instance.”²²⁸ Conspicuously, as Professor Rabban demonstrates,

NLRB decisions under the original Wagner Act and the legislative history of the Taft-Hartley Amendments clearly reveal what many recent scholars and jurists surprisingly claim is false or unprovable: the managerial exclusion, derived from the assumption of a divi-

223. Churgin, *supra* note 10, at 574–75. This inconsistency is compounded or abetted by virtue of the existence of section 2(12), which affirms that professionals are “employees” and thus serves as the basis of their right to organize within the meaning of the NLRA. Section 12 states in pertinent part: “The term ‘professional employee’ means—(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine . . . (ii) involving the consistent exercise of discretion and judgment.” LMRA, 29 USC § 152(12) (1974).

224. THE DEVELOPING LABOR LAW, *supra* note 6, at 1609.

225. *Id.* at 1610 (citing NLRB v. Security Guard, 384 F.2d, 143, 145 (5th Cir. 1967)).

226. THE DEVELOPING LABOR LAW, *supra* note 6, at 1610.

227. S. REP. NO. 105, at 4 (1947) (quoted in NLRB v. Security Guard Serv., 384 F.2d 143, 147 (5th Cir. 1967)).

228. NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 585, 599 (1994) (Ginsburg, J., dissenting).

sion between management and labor in a capitalist system, is built into the NLRA.²²⁹

“The treatment of supervisors became the focus of this debate from the initial interpretations of the Wagner Act through the passage of the Taft-Hartley Amendments. By excluding supervisors while covering professionals, the Taft-Hartley Amendments produced substantial litigation over when professional employees may become excluded managers or supervisors.”²³⁰ For some time, the Board has experienced “difficulty in developing appropriate distinctions among these categories of employees.”²³¹

When, and if, the Board’s approach to resolving the tension between excluded supervisors and included professionals is both rational and consistent with Act, its decision is entitled to deference.²³² In judging whether the Board’s decision meets this standard, it is useful to briefly inspect the Board’s current technique. Presently, the Board concentrates on “the individual’s authority to hire or discharge in determining his or her status as a supervisor.”²³³ “Presence of such authority establishes supervisory status.”²³⁴ On the other hand, where RN team leaders, for example, do not assign, direct, discipline, or evaluate using independent judgment, they are not supervisors according to the Board.²³⁵ Licensed Practical Nurses have been found to be supervisors where they engage in an evaluation of nursing assistants and where such evaluations are used as the basis of merit increases.²³⁶ Moreover, LPNs at a nursing home have been found to be supervisors where they are frequently the most senior staff present and they are responsible for maintaining the overall operations of the home,²³⁷ while LPNs who primarily engage in direct patient care with limited “charge” duties that are routine and which do not require “independent judgment” are not supervisors according to the NLRB.²³⁸

229. Rabban, *Distinguishing Excluded Managers From Covered Professionals Under the NLRA*, *supra* note 44, at 1781.

230. *Id.* at 1782.

231. *Id.*

232. *See Health Care*, 511 U.S. at 598–99.

233. THE DEVELOPING LABOR LAW, *supra* note 6, at 1610.

234. *Id.*

235. *See Vencor Hospital-Los Angeles*, 328 N.L.R.B. 1136 (1999) (*cited in* THE DEVELOPING LABOR LAW 2000, ONE-YEAR SUPPLEMENT 144–45 (Christopher T. Hexter et. al. eds., 2000)).

236. *See Beverly Enterprises-Mass. Inc. dba Cape Cod Nursing & Retirement Home*, 329 N.L.R.B. No. 28 (1999) (*citing* THE DEVELOPING LABOR LAW, *supra* note 6, at 144).

237. *See Beverly Enterprises, W. Va., Inc. v. NLRB*, 165 F.3d 307 (4th Cir. 1999) (*citing* THE DEVELOPING LABOR LAW, *supra* note 6, at 144).

238. *See Beverley Enterprises, Va., Inc. v. NLRB*, 136 F.3d 361 (4th Cir. 1998).

Outside of the health care field, the Board has concentrated on whether the independent judgment is sourced in technical skills²³⁹ or experience,²⁴⁰ both of which lead to the exercise of limited discretion to direct other employees in accordance with employer specified standards.²⁴¹ Without “independent judgment,” the employee fails to trigger supervisory status.²⁴² The Board has evidently applied these principles to professional employees in a variety of fields. In *Golden West Broadcasters-KTLA v. Directors Guild of America, Inc.*,²⁴³ the Board found that “‘directors’ at remote television broadcasts were not supervisors.”²⁴⁴ This determination was premised on the conclusion “that supervisory status ‘turns not only on whether [an employee has] the authority, in the interest of the employer, *inter alia*, responsibly to direct other employees, but also on the nature and extent of that authority.’”²⁴⁵ “Thus, ‘an employee with special expertise or training who directs or instructs another in the proper performance of his work for which the former is professionally responsible is not thereby rendered a supervisor’”²⁴⁶ “This is so,” the Board explained, “even when the more senior or more expert employee exercises some independent discretion where, as here, such discretion is based upon special competence or upon specific articulated employer policies.”²⁴⁷ Whether such an expansive conception of professionals and such a cramped conception of independent judgment are defensible is taken up more directly in the next section.

If we return to the health care arena, it seems plain that the Board is predisposed to hold that nurses in particular “are not supervisors and may, therefore, organize with the protection of the

239. See, e.g., *Arlington Elec., Inc.*, 166 L.R.R.M. 1049 (2000) (“electrician did not exercise ‘independent judgment’ where he provided direction and guidance to other employees based on his experience and craft skill and pursuant to a [a statutory supervisor’s] project plans”) (*cited in* Brief for Ky. River Cmty. Care, Inc. at 18 n.5, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001)).

240. See, e.g., *Somerset Welding & Steel, Inc.*, 291 N.L.R.B. 913, 914 (1988) (employees who have “responsibility to direct the work” “based on their higher level of skill and greater seniority” “do not exercise independent judgment” when they “make sure [assignments] are completed to predetermined specification”) (*cited in* Brief for Ky. River Cmty. Care, Inc. at 18 n.6, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001)).

241. See Brief for Ky. River Cmty. Care, Inc. at 18, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001).

242. See *id.*

243. 215 N.L.R.B. 760, 762 & n.4 (1974).

244. Brief for National Labor Relations Board at 19, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001).

245. *Id.* at 19–20.

246. *Id.*

247. *Id.* at 20.

NLRA.”²⁴⁸ As Motley suggests, the NLRB seems driven by the “policy concerns behind [section] 2(12) and its inclusion of professionals, while in turn ignoring the policy concerns of [section] 2(11) and its exclusion of supervisors.”²⁴⁹ This is especially true where the personnel at issue are all technically equal and have similar training and education.²⁵⁰ On the other hand, “the [United States] Courts of Appeals have split on the question of how much deference should be accorded to NLRB determinations Whether certain kinds of nurses and LPNs are supervisors within the meaning the NLRA ‘continues to be a highly contentious and fact-intensive issue.’”²⁵¹ In *Health Care*, the Supreme Court concentrated on the NLRB’s “patient care” technique for determining whether the individual at issue acted in the interest of the employer.²⁵² The Supreme Court rejected this technique, which was evidently designed to maximize the number of employees eligible for coverage, but invited additional NLRB attempts to limit the reach of the supervisory exception. Following its reversal in *Health Care*, the NLRB insisted that nurses were not supervisors chiefly on grounds that nurses in particular failed to exercise independent, as distinguished from professional judgment. Whether this tactic constitutes a principled distinction from the analysis and judgment provided by *Health Care* remains doubtful. Before inspecting the Board’s post-*Health Care* independent judgment analysis, this Article concentrates on the *Health Care* decision itself.

C. *Health Care* as a Precursor to the Focus on “Independent Judgment” Analysis?

At issue in *Health Care* was the Board’s false dichotomy between authority exercised “in the interest of the patient” and authority exercised “in the interest of the employer.” The Taft-Hartley Act excludes

248. Jennifer Claire Leisten, Note, *Independent Judgment Day: The Fourth Circuit Deems Nurses to be Supervisors in Glenmark Associates v. NLRB*, 78 N.C. L. REV. 508 (2000).

249. Jonathan Edward Motley, Note, *Grandmothers and Teamsters: How the NLRB’s New Approach to the Supervisory Status of Charge Nurses Ignores the Reality of the Nursing Home*, 73 IND. L. J. 711, 738 (1997).

250. See *id.*

251. THE DEVELOPING LABOR LAW, *supra* note 6, at 143; see, e.g., *Integrated Health Servs. Mich. v. NLRB*, 191 F.3d 703 (6th Cir. 1999) (stating that staff nurses who have the authority to responsibly direct and discipline nursing assistants were supervisors); *NLRB v. Hilliard Dev. Corp.*, 187 F.3d 133 (1st Cir. 1999) (stating that charge nurses are not supervisors where judgment exercised by them in assigning and directing employee is indistinguishable from judgment that professional nurses routinely exercise).

252. See *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 577–78 (1994).

from NLRA coverage “any individual employed as a supervisor.”²⁵³ The Court accepted the Board’s three part test.²⁵⁴ To restate, supervisor status requires affirmative answers to three questions: (1) Does the employee possess authority to engage in any one of the twelve listed activities? (2) Does the use of such authority require independent judgment as opposed to authority that is routine or clerical in nature? and (3) Does the employee hold authority in the interest of the employer?²⁵⁵ The *Health Care* decision only addresses the third question.²⁵⁶

In managing this third question, the Board’s technique was problematic. The Board “admits that it has interpreted [in the interest of the employer] in a unique manner The Board has held that a ‘nurse’s direction of less-skilled employees, in the exercise of professional judgment incidental to the treatment of patients, is not authority exercised in the interest of the employer,’”²⁵⁷ but rather is authority exercised in the interest of the profession. This finding apparently builds on prior cases where the Board suggested that

[n]urses who incidentally direct or assign aides while providing care to patients . . . derive their authority from their status as professionals.^[258] As such, the danger of divided loyalties is not present in such cases [Because] [t]heir professional responsibility to provide adequate care gives nurses an independent interest in seeing that patients are treated well so they are not [therefore, obligated] to choose between their interests and the interests of their employer.²⁵⁹

No statutory language supports this technique. On the contrary, the fear of divided loyalty relates less to “professional judgment” and more to supervisory responsibility, including the direction of lesser-skilled, less experienced subordinates. In fact, “[t]he Board’s interpretation . . . is similar to an approach the Board took, and [the Supreme Court] rejected in *NLRB v. Yeshiva University*”²⁶⁰ In *Yeshiva University*, the Court discarded the contention that faculty members who formulate and effectuate management policies were nonetheless included within the contours of NLRA coverage by virtue of the allegation that “faculty authority was ‘exercised in the faculty’s own interest rather

253. 29 U.S.C. § 152(3) (1995).

254. See *Health Care*, 511 U.S. at 574.

255. See *id.*

256. See *id.*

257. *Id.* (citation omitted).

258. Kuhlmann, *supra* note 206, at 169.

259. *Id.* at 169–70.

260. *Health Care*, 511 U.S. at 576. (citations omitted).

than in the interest of the university.’”²⁶¹ The NLRB’s reasoning fared no better in *Health Care* than it did in *Yeshiva*.

As in *Yeshiva*, the Board has created a false dichotomy—in this case, a dichotomy between acts taken in connection with patient care and acts taken in the interest of the employer. That dichotomy [made] no sense. Patient care is the business of a nursing home, and it follows that attending to the needs of the nursing home patients, who are the employer’s customers, is in the interest of the employer.²⁶²

Consequently, the Court rejected the Board’s definition “of ‘in the interest of the employer.’” because it rendered portions of the statutory definition in section 2(11) meaningless, specifically, the phrase ‘responsibly to direct.’”²⁶³

While the Court’s ultimate holding remains justifiable, it drifts from the defensible textual logic of its position to assert that *Packard Motors* provided a definitive explication of the meaning of the phrase “in the interest of the employer” as contained in the Wagner Act.²⁶⁴ The Court upholds the *respondeat superior* logic of the *Packard Motors* decision. It stated “[c]onsistent with the ordinary meaning of the phrase, the Court in *Packard Motor* determined that acts within the scope of employment or on the authorized business of the employer are ‘in the interest of the employer.’”²⁶⁵ That determination arguably includes all employees including, for instance, the vice-president of production, the chief executive officer as well as other employee activity. Finding that Congress left no indication that it intended a different meaning of “in the interest of the employer” when it defined supervisors in 1947, the definition of “in the interest of the employer,” which is derived from the *Packard Motors* majority, prevails.

This conclusion is dubious, as Justice Ginsburg points out in her dissent. The better view is that section 2(11) of Taft-Hartley was intended to overturn and not sustain the *Packard Motors* majority’s conception of employment within the meaning of the NLRA. “Thus it is more likely that Congress was taken by Justice Douglas’s dissenting view that ‘acting in the interest of the employer’ fits employees who act for management ‘not only in formulating but also in executing its labor policies.’”²⁶⁶ On the other hand, while Justice Ginsburg is surely

261. *Id.* at 577.

262. *Id.* at 577.

263. Brief for Ky. River Cmty. Care, Inc. at 12, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001).

264. See *Health Care*, 511 U.S. at 578.

265. *Id.*

266. *Id.* at 596 n.15 (Ginsburg, J., dissenting).

right in claiming that the phrase “in the interest of the employer” was intended to narrow, not to expand the category “supervisor,”²⁶⁷ she, like the Board, ignores the fact that the supervisory exclusion was meant to narrow, not broaden coverage under the Act. Language meant to narrow the NLRA confers an affirmative obligation upon the NLRB and the courts to construe the germane language (section 2(11)) consistent with both the text of the statute as well as its animating spirit. The Board’s difficulty is further compounded by the dissent’s admirable common sense admission that “most professionals supervise to some extent,”²⁶⁸ while simultaneously asserting that “the . . . definition of supervisor had been framed with a view to assuring that ‘the employees . . . excluded from the coverage of the act [would] be truly supervisory.’”²⁶⁹ The *Health Care* majority, in effect, vindicates both components of the dissent’s assessment without agreeing with the dissent’s conclusion—thus, true supervisory authority exercised in connection with patient care is “in the interest of the employer.” Those who exercise such authority cannot use the statutory language which protects professionals to convert exclusionary supervisory status into inclusionary professional standing.

The Board consequently was without statutory authority to resolve the “tension between the Act’s exclusion of [supervisory and] managerial employees and its inclusion of ‘professionals.’”²⁷⁰ Correspondingly, the court rejected the Board’s claim that it is best situated to ascertain the danger of divided loyalty, as nonstatutory.²⁷¹ On the contrary, “the statute gives nursing home owners the ability to insist on the undivided loyalty of its nurses notwithstanding the Board’s impression that there is no danger of divided loyalty.”²⁷² The Court determined that “[w]hether the Board proceeds through adjudication or rulemaking, the statute must control the Board’s decision, not the other way around.”²⁷³ Since the NLRB’s technique was inconsistent with the statute, its technique remains unenforceable. Parenthetically and crucially, the Court maintained

that the use of independent judgment is distinct from a mere exercise of professional expertise. Thus, when an employer grants to an employee the authority to use judgment in the management or

267. *Id.*

268. *Id.* at 588.

269. *Id.* at 587.

270. *Id.* at 581.

271. *See id.* at 580–81.

272. *Id.* at 581.

273. *Id.* at 580.

evaluation of other employees, that judgment is independent judgment under the NLRA, not [merely] the exercise of professional expertise.²⁷⁴

In sum, the United States Supreme Court “held that the Board had mistakenly applied a special test of supervisory status for the health care industry based on an incorrect interpretation of the phrase ‘in the interest of the employer.’”²⁷⁵

D. The Board’s Nimble Response to *Health Care*

As one observer adroitly notes, “[d]espite its emphatic rejection of the Board’s . . . analysis, the Court emphasized the limited nature of its holding. The decision was confined to the Board’s application of the statute in nursing cases.”²⁷⁶ The Court issued an invitation to the Board for further innovative adjudication in the form of this statement: “In applying [section] 2(11) in other industries, the Board on occasion reaches results reflecting a distinction between authority arising from professional knowledge and authority encompassing front-line management prerogatives.”²⁷⁷ The Court maintained its holding “casts no doubt on Board or court decisions interpreting parts of [section] 2(11) other than the specific phrase ‘in the interest of the employer.’”²⁷⁸ This judgment and accompanying dicta imply that a decision premised on the absence of “independent judgment” by either nurses or other professionals would not foreclose the Board from concluding “supervisory status has not been demonstrated.”²⁷⁹

The NLRB has continued to exclude nurses from the category of supervisors,²⁸⁰ as the Board maintains “its commitment to keeping charge nurses within the purview of the NLRA.”²⁸¹ The Board achieved this policy driven result by applying “its ‘traditional analysis’ to the nursing profession. . . . [This analysis supplies] two rhetorical formulations of the ‘independent judgment’ prong.”²⁸² The Board first classified “certain types of duties as ‘routine’ and ‘clerical’ and not requiring the use of ‘independent judgment.’” Second, it decreed

274. *Beverly Enters., Va., Inc. v. NLRB*, 165 F.3d 290, 295 (4th Cir. 1999) (quoting *Health Care*, 511 U.S. at 583).

275. Brief for Ky. River Cmty. Care, Inc. at 3, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001).

276. Kuhlmann, *supra* note 206, at 171.

277. *Health Care*, 511 U.S. at 583.

278. *Id.* at 583.

279. *Id.*; see also Kuhlmann, *supra* note 206, at 171.

280. See Kuhlmann, *supra* note 206, at 172.

281. *Id.*

282. *Id.*

that an employee does not exercise 'independent judgment' if his authority to supervise subordinates derives from his professional expertise rather than his identification with management."²⁸³ In essence, the Board substantially narrowed the reach of the supervisory exclusion premised on its deduction that "Congress had taken 'great care' to ensure that employees excluded from coverage 'be truly supervisory.'"²⁸⁴ Congress essayed, so we are told, to differentiate between true supervisors who are vested with "genuine management prerogatives," and "straw bosses, lead men and set-up men" who are protected by the NLRA even though they perform "minor supervisory duties."²⁸⁵ Plainly, professionals who direct less-skilled workers in the performance of their duties cannot exercise genuine management prerogatives.

The Board's technique may allow, but does not compel, its determination that LPNs who direct certified nurses aides in terms of the assignment and reassignment of work are not supervising within the meaning of section 2(11); instead, they are *incidentally* directing the work of less skilled employees. In *Glenmark Assoc. v. NLRB*,²⁸⁶ for instance, the Board asserted the following justification for its distinction: "Skilled workers cannot be regarded as supervisors simply because they make decisions about their work that might also define what needs to be done by their assistants."²⁸⁷ The NLRB adheres to this claim despite conceding that some aspects of supervision were present. For example, clear evidence exists that the charge nurses ensured that staff coverage per shift was adequate by either calling in non-scheduled staff or by reorganizing the coverage of the staff that was present at a facility and held disciplinary responsibilities.²⁸⁸ Highly skilled employees who are professionals and who also responsibly direct others cannot be supervisors within the meaning of the NLRA because their judgment, regardless of however independent or managerial, is grounded in professional standards. According to the Board,

283. *Id.* See Brief for the National Labor Relations Board at 3, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001) (stating under "its 'traditional analysis' an employee does not exercise the independent judgment that triggers supervisory status under the Act when the employee exercises ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards.").

284. *Providence Hosp.*, 320 N.L.R.B., 717, 725 (1996).

285. *Id.* (citing S. REP. NO. 105, at 4-5 (1947)); See also Brief for the NLRB at 31, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001).

286. 147 F.3d 333 (4th Cir. 1998).

287. *Id.* at 340 (citation omitted).

288. See *id.* at 337.

they are “merely sharing their knowledge and expertise with their lesser skilled co-workers.”²⁸⁹ Sharing knowledge, expertise, and direction with lesser skilled coworkers, who are commonly referred to as subordinates, apparently cannot constitute supervision as the Board conceives the term. This industry is simply part of the “NLRB’s continuing effort to modify the plain language of [section] 2(11).”²⁹⁰

Significantly, *Glenmark* catalogs the Board’s, post-*Health Care* efforts to escape the language of the Taft-Hartley Act.²⁹¹ Such a record implies a controlling predisposition. To be sure, “[p]rofessionals are by definition highly skilled employees whose jobs require the use of independent judgment”²⁹² and “[n]ot all professionals . . . are supervisors. Professionals routinely use their skills and exercise independent judgment in the performance of their own responsibilities.”²⁹³ The Court nonetheless reverses the Board because the charge nurses exercise *management* prerogatives.²⁹⁴ This decision vindicates the dissent of Board Member Cohen in two other post-*Health Care* cases,²⁹⁵ which arise out of similar facts. In one of them, Cohen “contended, ‘. . . that the individual’s actions are based on the thought processes of that individual, rather than on some outside force or person.’ Thus, the [Board] majority’s dichotomy between authority derived from identification with management and authority stemming from professional training had no basis in the statutory definition.”²⁹⁶ While Cohen’s argument remains sound, and despite “repeated admonitions to the contrary,”²⁹⁷ the Board has persistently applied its policy bias (its so-called traditional analysis)²⁹⁸ in favor of excluding charge nurses from the category of supervisors²⁹⁹ to post-*Health Care* adjudication.³⁰⁰ The *Kentucky River* case supplies an additional rebuke.

289. *Id.* at 340.

290. *Id.* at 339 n.8.

291. *See id.* (*See, e.g.,* *Beverly Enters., Va. v. NLRB*, 165 F.3d 290 (4th Cir. 1999); *Caremore, Inc. v. NLRB*, 129 F.3d 365 (6th Cir. 1997); *Beverly Enters., Penn. v. NLRB*, 129 F.3d 1269 (D.C. Cir. 1997); *Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548 (9th Cir. 1997)).

292. *Glenmark Assocs. v. NLRB*, 147 F.3d at 340 (4th Cir. 1998).

293. *Id.*

294. *See id.*

295. *See Providence Hosp.*, 320 N.L.R.B. 717, 736 (1996) (Cohen, Member, dissenting); *Nymed, Inc.*, 320 N.L.R.B. 806, 814 (1996) (Cohen, Member, dissenting).

296. *Kuhlmann, supra* note 206, at 176 (citing *Nymed*, 320 N.L.R.B. 806, 815 (1996) (Cohen, Member, dissenting), and *Providence*, 320, N.L.R.B. 717, 736–37 (1996) (Cohen, Member, dissenting)).

297. *Caremore*, 129 F.3d at 371.

298. *See Kuhlmann, supra* note 206, at 172.

299. *See id.* at 179.

III. Toward a Critical Analysis of *Kentucky River*

A. The Argument

The National Labor Relations Board's *Kentucky River*³⁰¹ decision is unexceptional. The employer cheerfully "admits its refusal to bargain but attacks the validity of the certification on the basis of the Board's determination in the representation proceeding that the Respondent is an employer within the meaning of the section 2(2) of the Act."³⁰² Since the employer refused to bargain with the Board-defined bargaining unit, the NLRB sought enforcement before the court of appeals.³⁰³ The court responded directly:

This is another in an increasing number of cases involving the question whether nurses are supervisors within the meaning of the National Labor Relations Act, 29 U.S.C. § 152 (11), in which we are required to direct the National Labor Relations Board to apply the law as this court has announced it, and not as the Board would prefer it to be.³⁰⁴

Factually, the Board maintains that the employer is a nonprofit organization that operates mental health facilities in Kentucky.³⁰⁵ One facility, the Caney Creek Rehabilitation Center operates as a transitional residential center for mentally ill individuals as they attempt to develop sufficient skills for independent living.³⁰⁶ This center employs twenty rehabilitation counselors, forty rehabilitation assistants, six registered nurses and three licensed practical nurses.³⁰⁷ Each of the four treatment units is staffed with five rehabilitation counselors and ten rehabilitation assistants.³⁰⁸ The RNs and LPNs supply medical services to residents throughout the units.³⁰⁹ Two RNs and one LPN generally work on each of three shifts, although occasionally only one RN works on the third shift.³¹⁰ The Caney Creek unit establishes a treatment plan for each resident that contains rehabilitative goals and specifies

300. *See id.* at 177.

301. *Ky. River Cmty. Care, Inc. v. NLRB*, No. 99-1815 (U.S. May 29, 2001).

302. *Ky. River Cmty. Care, Inc., and Ky. State District Council of Carpenters*, 156 L.R.R.M. 1159 (1996).

303. *See Ky. River Cmty. Care, Inc. v. NLRB*, 193 F.3d 444 (6th Cir. 1999).

304. *Id.* at 447.

305. *See* Brief for the National Labor Relations Board at 3, *NLRB v. Ky. River Cmty. Care Inc.*, No. 99-1815 (U.S. May 29, 2001).

306. *See id.*

307. *See id.* at 4.

308. *See id.*

309. *See id.*

310. *See id.*

activities designed to accomplish those objectives.³¹¹ Because all of the residents receive some form of medication, the treatment plan includes a medical component.³¹² The rehabilitation counselors and RNs participate in the formulation of the plans, but the unit coordinator and the resident's psychiatrist must approve each resident's treatment plan.³¹³ The RNs work with and, according to the NLRB, only occasionally direct less-skilled employees to deliver services in accordance with the employer specified plans.³¹⁴ Thus they fit within the post-*Health Care* framework in which the Board decides that highly skilled individuals who direct lesser skilled workers in conjunction with professionally mandated standards could not be supervisors within the meaning of the NLRA. Even if supervision or the responsible direction of lesser-skilled employees occurs, such activity must be seen as routine and customary and not independent.

While the NLRB's brief concedes that during part of the second and the entire third shift and on weekends neither the administrator nor any other stipulated supervisor is physically present at Caney Creek, the Board stresses that a stipulated supervisor is always "on call" at those times.³¹⁵ The NLRB presumes that the availability of on call persons deprives RN building supervisors of supervisory functions since the Board stresses that the

same RN may be an ordinary nurse on one day of the week and the building supervisor on another day of the week. Moreover, the RNs on the second shift are not notified as to when during the shift they assume their building-supervisor responsibilities. When serving as building supervisor, an RN receives no extra compensation.³¹⁶

The Board concedes "[a]s building supervisors, the RNs have some additional duties."³¹⁷ But the Board concentrates on the RNs' power or responsibility to obtain "needed help if for some reason a shift is not fully staffed."³¹⁸ This includes pulling employees from one unit to another, seeking volunteers to work an extra shift (since they lack authority to compel employees to work under the threat of disci-

311. See Brief for the National Labor Relations Board at 4, *NLRB v. Ky. River Cmty. Care Inc.*, No. 99-1815 (U.S. May 29, 2001).

312. See *id.*

313. See *id.*

314. See *id.* at 4-5.

315. See *id.* at 6.

316. *Id.* (citations omitted).

317. See Brief for the National Labor Relations Board at 6, *NLRB v. Ky. River Cmty. Care Inc.*, No. 99-1815 (U.S. May 29, 2001).

318. *Id.*

pline), telephoning off duty employees, and writing up employees who do not comply with a decision to shift staff between units.³¹⁹ Apparently, such activities either are routine in nature or arise out the RNs professional remit and thus do not qualify as independent judgment pursuant to NLRB analysis.

Predictably, the employer's (Kentucky River Community Care's) view of the facts³²⁰ differs radically from the Board's perspective. The employer emphasized that the "LPNs are supervised by and must comply with directions of the RNs, particularly with respect to administering medication to residents and ensuring that proper documentation is done."³²¹ Notably, this case differs from a hospital setting in which the Board often asserts that there is little difference in training, experience, or education between charge nurses and staff nurses.³²² Here, the six RNs possess greater skill and more responsibility in directing lesser skilled individuals. At all times between 3:30 P.M. and 7:00 A.M., Monday through Friday, "[t]he RNs also direct the 40 rehabilitation assistants on how to deal with unusual situations that arise when the rehabilitation counselors are not present."³²³ "[W]henver residents go on home visits or leave the building, the rehabilitation assistant must report their departure and return to the RN."³²⁴ In addition, "whenever a resident starts acting up or appears out-of-sorts or feels ill, the rehabilitation assistant involved must report the situations directly to the RN on duty and follow the RN's instructions as to what action to take."³²⁵ The employer's argument that the six RNs must responsibly direct using independent judgment is buttressed by the proof that:

During the second and third shifts, throughout each weekend, on holidays, and in all emergencies, the RNs are designated Building Supervisors. This amounts to 75% of the total hours in a week. As Building Supervisors, the RNs are in charge of the entire facility and are the only persons on the premises charged with that responsibility.³²⁶

319. *See id.* at 6-7.

320. *See* Brief for Respondent, Ky. River Cmty. Care, Inc. at 3, NLRB v. Ky. River Cmty. Care, Inc., No. 99-1815 (U.S. May 29, 2001).

321. *Id.* at 2.

322. *See* Motley, *supra* note 249, at 738-39.

323. Brief for Respondent, Ky. River Cmty. Care, Inc. at 2, NLRB v. Ky. River Cmty. Care, Inc., No. 99-1815 (U.S. May 29, 2001).

324. *Id.*

325. *Id.*

326. *Id.* at 2-3.

The duties and responsibilities of building supervisors as listed in the “Procedure for Building Supervision” and a memorandum to all nurses “clearly communicate[s] to all staff the fact that during the times when other [s]ection 2(11) supervisors are not at the facility, the RN Building Supervisor has overall responsibility at the facility, and the staff are accountable and answerable to the Building Supervisor.”³²⁷ The purpose of the building supervisor designation was to “centralize and coordinate building coverage, safety, and other activities.”³²⁸ “Building Supervisors’ primary responsibility is that of senior medical staff in the building at all times.”³²⁹

The employer concentrates on the power of building supervisors to increase staffing levels, to call in additional staff, to arrange staffing levels, as well as their express authority to write up an employee who fails to comply with a decision to shift between units and their authority to send employees home for misconduct.³³⁰ The building supervisor exercises her independent judgment to determine if any of the actions are warranted. Additionally, such authority extends over all staff, including nursing staff, rehabilitation staff, and maintenance staff, provided the building supervisor subsequently informs the employee’s immediate supervisor.³³¹

The Board’s interpretation of section 2(11) is centered on the assertion that “an employee’s exercise of professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards does not constitute the exercise of ‘independent judgment.’”³³² The employer contends that this interpretation is: (1) irrational and inconsistent; (2) contravenes the Congressional purpose of including “responsibly to direct” in the definition of supervisor under the Act in 1947; (3) contravenes the Congressional purpose behind the supervisor exclusion—Congress excluded supervisors from the Act to restore the balance of power between employers and union and to avoid conflicts of interest between management and rank and file employees; (4) eliminates professionals as supervisors; (5) is part of a history of inconsistent rulings in supervisor cases which amount to manipulation of the statute to

327. *Id.* at 3.

328. *Id.* “Building Supervisors visit the units to check the coverage and, if necessary, determine in their judgment which employees to move from one unit to another.” *Id.*

329. *Id.*

330. See Brief for Respondent, *Ky. River Cmty. Care, Inc.* at 4, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001).

331. See *id.* at 4–5.

332. *Id.* at 5.

accomplish its biased policy objectives; (6) is a disguised attempt to revive the patient care analysis and creates a false dichotomy between professional judgment and independent judgment.³³³ Assuming the soundness of these arguments, the Board cannot be entitled to deference in interpreting the term independent judgment. On the contrary, its interpretation is irrational and inconsistent with the Act.

In its defense, as explicated by its brief, the NLRB relies initially on the text of the statute. It states that the

use of both the limiting phrase “not of a merely routine or clerical nature” and the adjective “independent,” suggests that in order to be considered a supervisor, an employee must exercise judgment beyond that involved in regular or customary activities and which is not controlled or significantly constrained by outside sources.³³⁴

If the Board’s approach is correct, then

whenever an employee is promoted due to his or her superior training, experience, or skills, he or she is not to be considered a supervisor, but instead should still be considered a professional employee whose work objective has merely been altered [T]herefore, whatever direction takes place is merely done to accomplish his or her professional objectives.³³⁵

Since more and more contemporary workers are skilled professionals with extensive experience, the professional inclusion contained in section 2(12), if interpreted consistent with the NLRB’s view will increasingly trump the supervisory exclusion within the meaning of section 2(11). Since many contemporary workers are professionals, fewer of them qualify as supervisors no matter how much direction and discretion they exercise. In addition, the claim that all or perhaps most “assignment and direction necessarily involves independent judgment”³³⁶ is dismissed by the Board as inconsistent with the realities of the contemporary workplace. The NLRB argues, in general, that the

Board’s view reflects Congress’s intent to adopt the Board’s practice under the Wagner Act of excluding from supervisory status employees who, in addition to doing their own work, provided limited direction for others based on technical skills or employer-specified standards [T]he Board’s interpretation of “Independent Judgment” harmonizes Section 2(11)’s exclusion of supervisors with

333. See *id.* at 5–7.

334. Brief for Petitioner National Labor Relations Board at 12, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001).

335. Motley, *supra* note 249, at 738.

336. Reply Brief for the National Labor Relations Board at 7 n.5, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001).

Section 2(12)'s inclusion within the Act of "professional employees," who, by definition, exercise "discretion and judgment."³³⁷

Since the RNs at issue fail to exercise "significant" discretion with respect to supervisory powers, and since the discretion accompanying the duties was so circumscribed by limitations as to negate the use of independent judgment, they are apparently not supervisors.³³⁸ At its core, the NLRB's approach is similar to the majority view taken in *Packard* mandating that NLRA coverage protections be broadly construed.

One argument in favor of the Board's approach is that given the level of increased technical skill and professional expertise possessed by average contemporary workers, the deployment of such skill and expertise as the position requires can be presumed to be routine and customary. If this technique remains defensible, then professional skill and judgment would justifiably be seen as merely routine, thus disallowing the application of the supervisory exclusion. But, by relying "on broad 'guiding principles'" and "[b]y assuming that exercising professional judgment is always routine, the Board ignores the well-recognized principle that the analysis of whether an individual is a supervisor is fact-specific."³³⁹ The Board's approach "leaves very little room for meaningful factual analysis and leaves few activities that would be deemed supervisory under its analysis."³⁴⁰ Strangely, as Senator Flanders explained in 1947, one fact is of particular interest—the "basic act of supervising."³⁴¹ The addition of the phrase "to responsibly direct" was placed within the language excluding supervisors because

under some modern management methods, the supervisor might be deprived of authority for most of the functions enumerated and

337. Brief for the National Labor Relations Board at 12, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001).

338. *See id.* at 16–20.

339. Brief for Respondent, *Ky. River Cmty. Care, Inc.* at 11, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001).

340. Motley, *supra* note 249, at 738. Evidently one such guiding "principle is that workers whose direction of other employees reflects the director's 'superior training, experience, or skills' should not be deemed supervisors but instead professional utilizing professional discretion." *Id.* (citing *Providence Hosp.*, 320 N.L.R.B. 717, 729 (1996)).

341. 93 CONG. REC. S1126, 4677–78 (daily ed. May 7, 1947) (statement of Sen. Flanders). This language was accepted by Senator Taft and added to the definition of "supervisor." *Id.* at 4678 (cited in Brief for Respondent, *Ky. River Cmty. Care, Inc.* at 14, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001)). *See* Reply Brief for National Labor Relations Board at 8–9, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001).

still have a large responsibility for the exercise of personal judgment based on personal experience, training, and ability.

....

Such men [and women] are above the grade of "straw bosses, lead men, set-up men, and other minor supervisory employees" as enumerated in the report. Their essential managerial duties are best defined by the words "direct responsibly" ³⁴²

This is in reliance on the exercise of personal judgment based on personal experience, training, and ability.³⁴³ If this riposte is defensible,³⁴⁴ it turns out to be highly likely that the six RNs are supervisors.

On the other hand, the Board assumes "the position that this case is limited solely to the interpretation of 'independent judgment' and disavows any argument that the term 'responsibly to direct' is implicated in the analysis."³⁴⁵ At the same time it concedes that the "Board also has elected not to develop a full analysis of the term 'responsibly to direct' in the abstract."³⁴⁶ Despite the fact that registered nurses engage in some supervisory activities such as ensuring coverage, performing as building supervisors, exercising authority as the only supervisor present, and directing the forty rehabilitation assistants on how to deal with unusual situations that arise when counselors are not present, the Board evidently believes that "whatever direction takes place is merely done to accomplish [their] professional objectives."³⁴⁷ This is because the RNs' activities are partially grounded in professional expertise and professional experience, skills, and training on the one hand; or on the other hand, they only possess "minor supervisory re-

342. 93 CONG. REC. S1126, 4677-78 (daily ed. May 7, 1947) (statement of Sen. Flanders) (*cited in* Brief For Respondent, *Ky. River Cmty. Care, Inc.* at 14, No. 99-1815 (U.S. May 29, 2001)).

343. *See id.*

344. In actuality, the employer provided a number of arguments in support of its conclusion that the Board's order remains unenforceable because the Board's interpretation of "independent judgment" is irrational, arbitrary, and inconsistent with the Act. The employer argues that (1) the Board's interpretation is a disguised attempt to revive the patient care analysis and creates a false dichotomy between professional judgment and independent judgment; (2) the Board's interpretation frustrates the legislative intent behind both the phrase "responsibly to direct" and the Act's exclusion of supervisors; (3) the Board's interpretation will eliminate professionals as supervisors; (4) deference to the Board is not required because the Board has engaged in blatant manipulation of the statute to further policy rather than following the text and intent of the statute. *See* Brief for Respondent, *Ky. River Cmty. Care, Inc.* at 1-14, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001).

345. Reply Brief for National Labor Relations Board at 8 n.6, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001).

346. *Id.* at 8.

347. Motley, *supra* note 249, at 738.

sponsibilities . . . [and] do not exercise true managerial power.”³⁴⁸ Consequently, the NLRB classifies the six RNs as professionals who must be included within NLRA coverage.

B. The Decision and Holding

In deciding that the Board’s interpretation “goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear,”³⁴⁹ the Supreme Court disagrees fundamentally with the Board’s determination that employee judgment cannot be independent if it is significant yet professional or technical in nature, or based on greater experience or formal training and only loosely constrained by the employer.³⁵⁰ The Court rather easily dismisses the NLRB’s claim by demonstrating that virtually any supervisory judgment worth exercising must rest on professional or technical skill or experience.³⁵¹ Acceptance of the Board’s policy would largely eviscerate the supervisory exclusion unless limited. The Board offers this limitation: “Only professional judgment that is applied ‘in directing less-skilled employees to deliver services’ is excluded from the statutory category of ‘independent judgment.’”³⁵² This restriction is equally problematic and

is directly contrary to the text of the statute. *Every* supervisory function listed by the Act is accompanied by the statutory requirement that its exercise “require the use of independent judgment” before supervisory status will obtain, but the Board would apply its restriction upon “independent judgment” to just 1 of the 12 listed functions: “responsibly to direct.” There is no apparent textual justification for this asymmetrical limitation, and the Board has offered none.³⁵³

If the Board wished to be consistent, then concededly, managerial and supervisory functions such as termination, demotion, and suspension, which often depend on professional judgment and expertise, could not result in exclusion from the Act, since the judgment exercised could not be “independent” because it was professional.³⁵⁴ As in prior cases, the Board ultimately rests its defense of its interpretation of “independent judgment” on policy concerns surrounding its intent to

348. Brief for Petitioner National Labor Relations Board at 24, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001).

349. *Ky. River Cmty. Care, Inc.*, No. 99-1815, slip op. at 7 (U.S. May 29, 2001).

350. *See id.*; *see also* Reply Brief for Petitioner at 3.

351. *See Ky. River Cmty. Care, Inc.*, No. 99-1815, slip op. at 7 (U.S. May 29, 2001).

352. *Id.*

353. *See id.*

354. *See id.*

maximize NLRA coverage for professionals³⁵⁵ while expressing no policy concern for the Taft-Hartley Act's animating purpose to eliminate supervisors from NLRA coverage. This turns the notion of supervision on its head. The Board's technique categorically excludes "professional judgment" from the term "independent judgment" and radically contradicts the text of the statute.³⁵⁶ While it is possible to argue that the term "independent judgment" is indisputably ambiguous,³⁵⁷ and while it is possible to argue that the scope of nursing practice routinely involves the exercise of judgment and the supervision of others,³⁵⁸ the logic of those contentions fails to vitiate the view that the exercise of independent judgment in responsibly directing less-skilled subordinates constitutes the application of management prerogatives. Since the statute unambiguously excludes employees who exercise "independent judgment" pursuant to a "sufficient degree of discretion,"³⁵⁹ and since there is no statutory ambiguity in the fact that exercising a sufficient degree of discretion in "responsibly directing" others constitutes statutorily protected and excluded activity, the RNs are supervisors.

IV. *Kentucky River in the Mirror of Packard*

We shall cease not from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time.³⁶⁰

The dissent in *Packard* presents factors that significantly enrich our understanding of *Kentucky River*. These factors include concern for evaluating the outmoded notion of class conflict which has led some observers to seek an expansive conception of NLRA coverage; the divergence in interests between mid-ranked employees and those at the lower ranks, given the objective of allowing rank and file workers to organize free of supervisory interference; the increased likelihood of divided loyalties in the mirror of the gradual movement of workers up the ranks of the hierarchy as more and more contemporary workers possess professional and technical skills coupled with

355. See *id.* at 8.

356. See *id.* at 9.

357. See *Ky. River Cmty. Care*, No. 99-1815, Stevens, J., dissenting at 3 (U.S. May 29, 2001).

358. See Brief of Amici Curiae, American Nursing Ass'n at 2-6, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001).

359. *Ky. River Cmty. Care, Inc.*, No. 99-1815, slip op. at 7 (U.S. May 29, 2001).

360. T.S. Elliot, *Little Gidding* (1942).

training and experience; and the possibility that *Packard's* discussion supplies a vehicle for lacerating and reordering the ongoing textualism versus legislative history debate.

Before reconsidering *Kentucky River* as informed by these four factors, it is important to note that the NLRB has argued,

Congress essentially adopted the definition of supervisor that the Board had employed in administering the original NLRA, known as the Wagner Act. Under that definition, as under its current practice, the Board did not class as supervisors employees who, in addition to doing their own work, provided limited direction for others based on technical skills or employer-specified standards.³⁶¹

This claim apparently ignores the logical force of the amendments defining supervision under the Taft-Hartley Act, as well as the Board's vacillation under the Wagner Act as originally enacted. Taft-Hartley fails to limit the term "supervision" simply, as the Board contends, to those "who supervise or direct the work of employees [in the bargaining unit], and who have authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of such employees, or whose official recommendations concerning such action are accorded effective weight."³⁶² The statute defines Supervisor more broadly as:

Any individual having authority in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.³⁶³

Thus, unless any of twelve listed tasks implicated in the exercise of authority fail to require independent judgment and are therefore merely routine or clerical, such authority constitutes grounds for exclusion from NLRA coverage and protection.

A. Radical Class Conflict and the Demand for an Expansive Conception of NLRA Coverage

As discussed earlier, a number of commentators, animated by a radical, class oriented, capital versus labor perspective have expressed a longing to extend legal coverage and protection to concededly supervisory or managerial employees and hence to expand the social role of unions by enlarging the definition of the class for whom it is

361. Brief for Petitioner National Labor Relations Board at 24, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001).

362. *Id.* at 25.

363. 29 U.S.C. § 152 (11) (1994).

permissible for them to speak. This outlook apparently dismisses as irrelevant management's concern for divided loyalty and management's desire to minimize the number of workers who possess discretionary authority that are covered by the NLRA. This approach apparently attempts to accelerate the implementation of "workplace democracy" as part of an initiative to diminish the power and financial returns that accrue to capital. This far reaching capital versus labor view finds expression in Justice Jackson's opinion in *Packard*. He suggested that the NLRA's statutory purpose derived from the text is found in a relatively broad definition of employees and a narrow definition of employers. The statute, in his view, embraces an unconstrained view of who is eligible for coverage by the Wagner Act. While this approach effectively separates all or most employees from capital but not from management, as Justice Douglas plainly demonstrates, Congress was animated by the desire to protect the interest of laborers and low-ranked workers by "defining who is to be considered an employer and who is to be deemed an employee,"³⁶⁴ as opposed to the provision of legal protection for a nascent conflict between capital and labor. He confirms the legislative history that is replete with references to laborers as opposed to foremen and others within the middle-rank of the hierarchy.³⁶⁵

On the contrary, the NLRB believes that the purposes of the Act, despite the additional constraints imposed by the Taft-Hartley Act, are best vindicated by an expansive conception of the NLRA's coverage and application. This is not necessarily a recent development.

In language which presaged contemporary circuit court decisions, the House report [on the Taft-Hartley Act] found in 1947 that the NLRB tended to expand its interpretation of the Act to maximize coverage of the statute. The report noted that Congress intended that the Act should always have been construed to exclude "supervisors," but that "the Labor Board in the exercise of what it modestly calls its 'expertness,' changed the law"³⁶⁶ [and expanded its constituency].

If these various contentions are true, they imply that the Board may have been infected with a degree of class consciousness that, however laudable, is inconsistent with the statutory text and intent. The Board in fact asserts its conviction in its *Kentucky River* brief by declaring:

364. Keller, *supra* note 54, at 580 (citing Justice Douglas's dissent in *Packard*).

365. See *Packard*, 330 U.S. 498.

366. Brief of Amici Curiae, Am. Health Care Ass'n at 15, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001) (in support of Respondent citing H. REP. NO. 245 (1974), reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 308 (Comm. Print 1974)).

Congress's intent to cover nurses and other professionals would be frustrated, however, if the "consistent exercise of discretion and judgment" under Section 2(12) also constitutes "the use of independent judgment" under Section 2(11), because many professional employees (such as lawyers, doctors, and nurses) customarily give judgment-based direction to the less-skilled employees with whom they work.³⁶⁷

Thus "a professional does not exercise 'independent judgment' to the extent that her judgment is 'indistinguishable from the professional judgment exercised by all [professionals in the same field].'"³⁶⁸ Since an increasing percentage of workers can be classified as professionals who exercise discretion and judgment, an increasing percentage of workers cannot be classified as supervisors within the meaning of the NLRA because, however many lesser-skilled individuals they direct, however much authority they possess (including participation in the discipline process), however independent their judgment may be, however discretionary it is, it is indistinguishable from judgment similarly exercised by professionals in the same industry. In effect, inclusion of section 2(12) therefore voids the exclusion of section 2(11) by defining professionals as employees who are either incapable of supervision or merely minor supervisors. This constrained conception of both independent judgment and management prerogatives drives us closer to the claim that the pertinent divide can be found in the chasm between capital and labor, not management and labor.

In fact, the Taft-Hartley Amendments, while safeguarding the interests of professionals, were clearly designed to protect the interest of employers in retaining the undivided loyalties of supervisors, which, among other things, led some to classify this Act as a "slave labor" law. Therefore, it is possible to argue, "that 'supervisory status' is not an exemption from the Act, but an additional protected classification under the Act."³⁶⁹ Protection accrues not to employees but to employers. Admittedly, neither the NLRB nor the courts have been inclined to explicitly and fully embrace the largely outmoded and far reaching capital versus labor view that Justice Douglas rightly rejected. Instead, Justice Stevens's dissent forcefully contends that the "definition of 'supervisor' was intended to apply only to those employees with 'genuine

367. Brief of the National Labor Relations Board at 33, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001).

368. *Id.*

369. Brief of Amici Curiae, *Am. Health Care Ass'n* at 16, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001).

management prerogatives’³⁷⁰ without understanding that the contemporary workplace often places genuine management prerogatives in the hands of skilled, hands-on employees, called professionals precisely because they can handle both responsibilities. Significantly, the ongoing “decentralization of workplaces and the resulting expansion of worker participation in the management and control of the workplace”³⁷¹ likely mean most genuine management functions are placed in the hands of individuals whose work cannot be solely cabined within Justice Stevens’s proposed limits. Nurses, for instance, “increasingly perform critical supervisory functions related to the provision of patient care that require independent judgment,”³⁷² something nursing associations admit.³⁷³ The “increasing demand for nursing services, [the] decreasing numbers of nurses, and mounting economic pressures require employers to depend upon nurses’ supervisory powers.”³⁷⁴ While an expansive conception of the class of workers to which the NLRA applies may appeal to commentators taken by a radical capital versus labor analysis, it is doubtful that such a conception comports with either the statutory language or its purpose.

B. Possible Divergence in Interest Between Mid-Ranked and Lower-Ranked Employees

In *Packard*, the foremen as a group were highly paid, and unlike the workmen they supervised, received longer paid vacations and were given severance upon termination by the company.³⁷⁵ Foremen were responsible for maintaining quantity and quality of production.³⁷⁶ Given that they were situated in a separate bargaining unit, the possibility that any divergence in interest between foremen and workmen would adversely affect the concerted activity of the rank and file was limited. Still, it must be acknowledged that interests that are adverse to the interest of the rank and file might govern foremen. If the basic opposing forces in industry are management and labor as Justice Douglas asserts, then the inclusion of individuals who possess manage-

370. *Ky. River Cmty. Care, Inc.*, No. 99-1815, Stevens, J., dissenting at 6 n.8 (U.S. May 29, 2001).

371. Keller, *supra* note 54, at 620–21.

372. Brief of Amici Curiae, Soc’y of Human Res. Mgmt. and Am. Soc’y for Healthcare Human Res. Admin. at 5, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001).

373. *See id.* at 5–7.

374. *Id.* at 8.

375. *See Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 487 (1947).

376. *See id.*

ment prerogatives within the same bargaining unit may be problematic. That is especially true if we conclude that "individuals make material sacrifices for group welfare Groups achieve solidarity and elicit loyalty beyond what economic analysis conventionally predicts"³⁷⁷

One observer, assessing an early NLRB decision³⁷⁸ denying NLRA protection to foremen, characterized the potential problems in extending the protections of the NLRA as follows: unionization of individuals with management responsibilities gives rise to the

danger that a managerial union could be destructive of the statutory rights of the rank and file . . . when it was composed of employees whose interests most diverged from those of the rank and file as measured by the usual Board criteria, such as rates of pay and similarity of work.³⁷⁹

This fear, justified or not,³⁸⁰ cannot be limited to disquiet for the interest of rank and file workers within the industrial and blue collar sectors. Allowing health care workers, technical workers, and others who participate in the formulation, implementation, or enforcement of policies, even where their participation is driven largely by professional criteria, to unionize may risk the destruction of the statutory rights of the rank and file. New life is breathed into this fear by perceiving that professionals for example, "retain sufficient technical autonomy to preserve a qualitatively better position than most other [lower ranked] workers."³⁸¹

American and global developments, which alter the composition of the workforce and which restructure the workplace, likely augment interest divergence between those located at the middle ranks of the hierarchy³⁸² (such as charge nurses and RNs) and those located at the

377. Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1007 (1995). As McAdams, perceptively argues: "Groups use intra-group status rewards as a non-material means of gaining material sacrifice from members, but the attendant desire for inter-group status causes inter-group conflict." *Id.*

378. See *Maryland Drydock Co.*, 49 N.L.R.B. 733 (1943).

379. Feldman, *Workplace Power*, *supra* note 43, at 549-50.

380. See Rabban, *Distinguishing Excluded Managers*, *supra* note 44, at 1780-81 (the assumption that unionization of managerial and supervisory employees presents an intolerable threat of divided loyalties has never been justified theoretically).

381. *Id.* at 1835-36.

382. An illustration of nursing hierarchy in a hospital setting is in order.

Within hospitals, a hierarchy exists among nursing personnel ranging from nursing administrators to nursing supervisors, charge nurses, and staff nurses. In the hospital setting, unions and employers most often dispute the supervisory status of those nurses who serve at least a portion of their time as a charge nurse. The

bottom rank (such as nurses aides or rehabilitation assistants). This state of affairs gives rise to the possibility (within a unionized setting) that the interests of middle-rank employees will trump the interest of less skilled workers. While this Article concedes that possible variations in interest are not necessarily always problematic,³⁸³ especially in situations where a separate union represents those located within the middle ranks, this Article contends that the placement of mid-ranked employees in the same bargaining unit with lower-ranked workers, constitutes a tangible threat to the interest of lesser-skilled, lower-ranked workers. This Article offers the intuitive, yet not fully proven, observation that workplace alterations intensify interest divergence. This conclusion, inspired by the background and history associated with the enactment of the Wagner Act, the background associated with the Taft-Hartley Act, as well as the dissent in *Packard*, provides a basis for skepticism about attempts to extend coverage to contemporary workers who exercise "judgment" premised on professional or technical expertise which may extend beyond the parameters of discretion exercised by foremen in the 1940s.

The *Packard* majority rejected the above-referenced concerns grounded, as they were, in industrial policy and in the animating purpose of the statute. Instead, underpinned by its concern for textual purity, it found the provisions of the statute plain and therefore not subject to dispute.³⁸⁴ Intended or not, this conception of the NLRA evidently "ignores or downplays conflicts among employees themselves."³⁸⁵ Justice Douglas, on the other hand, luminously sustained the notion that the statute as conceived through its legislative history and stated purpose was largely intended to protect and cover working men and women as opposed to mid-ranked workers. While relatively unskilled laborers occupy a shrinking percentage of today's work force, we should not lose sight of the conclusion that it was their welfare and not the welfare of *directors* of lesser-skilled employees that was the prime object behind the passage of the Wagner Act. In light of not only the rejection of an expansive conception of the NLRA by Con-

charge nurse's duty consists primarily of "coordinating" patient care within the assigned area of his or her department.

Motley, *supra* note 249, at 715.

383. Indeed, Justice Douglas indicates that some labor leaders thought, "if those in the hierarchy above the workers are unionized, they will be more sympathetic with the claims of those below them." *Packard Motor Car. Co. v. NLRB*, 330 U.S. 485, 495 (1947) (Douglas, J., dissenting).

384. *See id.* at 493.

385. Crain & Matheny, *supra* note 125, at 1543.

gress in 1947 and the incontrovertible evidence which shows that Congress intended to further constrain the NLRA through its passage of the LMRA, it is possible to contend that the Taft-Hartley Amendments, including the statutory definition of supervisors in general and the concept of independent judgment in particular, imply that Congress meant to limit, not expand, the already limited coverage of the NLRA. This assessment not only affects the contemporary meaning of "independent judgment," it leads to the conclusion that independent judgment, however difficult to define, should be interpreted to narrow rather than expand the Act's coverage. While the NLRB disagrees with this claim,³⁸⁶ the debate over the statutory amendment's application to the six RNs who acted as building supervisors as well as hands-on nurses in the *Kentucky River* case can be further illuminated.

The Caney Creek facility provides an excellent illustration of the evolution of work and the workplace in the United States. While the six RNs are clearly professionals who supply medical services to residents, and while the RNs participate in the formulation of the medical component that comprises part of the rehabilitation plan, the RNs also direct less-skilled employees. Lesser-skilled workers who are subject to RN direction on a fairly consistent basis include LPNs. They are supervised and must comply with directions of the RNs with respect to administering medication and ensuring proper documentation. That conclusion is consistent with statements made by nursing associations, and in the case of home based health care, directives issued pursuant to federal Medicare regulations and the typical conduct of nursing homes.³⁸⁷ Furthermore, the RNs direct forty rehabilitation assistants on how to deal with unusual situations that arise when the rehabilitation counselors are not present. The RNs also act as building supervisors during seventy-five percent of the total hours in a week pursuant to the management goal of centralizing building coverage, safety and other activities. In other words, they responsibly direct others. According to this analysis, grounded on an expansion in the participation of RNs in the management and control of the workplace, it is likely that the interests of RNs differ fundamentally from the interests of lesser skilled LPNs, rehabilitation assistants and others who are not empow-

386. See Brief for National Labor Relations Board at 23-24, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001) (arguing that the Board's interpretation is both consistent with and furthers the purpose of the supervisory exclusion while concurrently accommodating the Act's coverage of professional employees).

387. See Brief of Amici Curiae, Soc'y of Human Res. Mgmt. and Am. Soc'y for Healthcare Human Res. Admin. at 5, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001).

ered, to move employees from one unit to another and must submit to the RNs authority on a consistent basis. If the central objective of the NLRA was to ensure that the interest of the most vulnerable working women and men are protected through coverage by the NLRA, it is doubtful that this goal progresses by the placement of highly skilled and professionally trained RNs who exercise judgment in the interest of the employer in the same bargaining unit with lesser-skilled individuals. Potential conflict between those who direct and those who are members of the lesser-skilled cohort imply that *Kentucky River's* six RNs should be separated from their lesser-skilled colleagues.

C. Divided Loyalties in the Mirror of the Movement of Workers Up the Ranks of Hierarchy

Employer dread about actual or potential divided loyalties often echoes through discussions of why supervisors ought to be excluded from NLRA coverage. Such apprehension, as implicated by the increasingly decentralized workplaces and the rising percentage of mid-ranking employees within the hierarchy helpfully hints at a principled way to approach the six RNs at issue in *Kentucky River*. The NLRB admits, or at a minimum virtually concedes, that the RNs engage in supervisory activity in "occasionally" directing lesser-skilled subordinates. More generally, many Board members and some judges evidently favor a definition of "employee" that includes supervisors. They assert the possibility that unionized supervisors might refrain from duties that might alienate their subordinates is not only empirically unfounded, but is also "repugnant to the basic democratic philosophy of the NLRA."³⁸⁸

However repugnant, as *Yeshiva University* illustrates,³⁸⁹ claims and counterclaims of actual or potential divided loyalty echo throughout disputes over whether supervisors ought to be excluded and who ought to be considered a supervisor. Indeed, in its *Kentucky River* brief, the Board explained that "the exclusion of supervisors from NLRA coverage was designed to ensure that management could rely on the undivided loyalty of its representatives, but Congress intended to preserve the Act's protections for those employees . . . who do not exer-

388. Rabban, *Distinguishing Excluded Managers*, *supra* note 44, at 1786.

389. See *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 682 (1980) (acknowledging that the Act's exclusion of supervisors grows out the concern that employers are entitled to the undivided loyalty of its representatives).

cise true managerial power.”³⁹⁰ The right to exclude, a protected right that inheres with the employer,³⁹¹ ensures that management is not required to negotiate with itself about policy matters. Since more and more contemporary workers are engaged in discretionary policy implementation presumably in the interests of the employer, it is crucial to note that in at least one case, the Supreme Court denied a union demand which would require mandatory negotiations about policy issues because to do so would make the union “an equal partner.”³⁹² While this view has not gone unchallenged,³⁹³ the Supreme Court’s conclusion about the correct limits to be placed on collective labor power has beneficial implications for the loyalty demands employers place on workers located within the middle of the hierarchy. This is because the “view that issues of fundamental policy are managerial prerogatives underlies the distinction that derives from assumptions about the limited role of industrial employees.”³⁹⁴

Apparently many commentators have difficulty conceiving supervision outside of the context of industrial foremen. They necessarily assume that professionals in a decentralized workplace who both participate in hands-on work as well as in the management and control of the workplace, cannot be supervisors because they fail to look like foremen. For instance, “[p]rofessional employees, particularly those who do not work in industrial settings, have more autonomy from hierarchical control and more involvement in organizational decision-making than the workers for whom the statute was initially intended.”³⁹⁵ This clarifying determination grounded in contemporary workplace alterations, justifies and fortifies an employer’s fear of divided loyalties, despite sociological claims to the contrary.³⁹⁶ If

390. Brief for National Labor Relations Board at 24, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001). This claim is cabined by the NLRB’s assertion that “Congress intended to preserve the Act’s protections for those employees with minor supervisory responsibilities who do not exercise true managerial power.” *Id.*

391. This conception of section 2(11) as an employer right is grounded in the legislative history of the Taft-Hartley Act. *See, e.g.*, H. REP. No. 245, at 8 (1974) (stating that the evidence further shows that management must have agents who are entirely loyal, just as representatives of the workers must be undivided in their loyalty to the workers).

392. *First Nat’l Maintenance Corp. v. NLRB*, 452 U.S. 666, 676 (1981).

393. *See, e.g.*, Rabban, *Can American Labor Law Accommodate Collective Bargaining*, *supra* note 16, at 712.

394. *Id.*

395. *See* Rabban, *Distinguishing Excluded Managers*, *supra* note 44, at 1778.

396. *See id.* at 1831–36. Professor Rabban provides a rich background of sociological scholarship that posits a distinction between managerial professionals and practicing professions. Managerial professionals allegedly have positions of bureaucratic power within an organization’s formal hierarchy while practicing professionals have positions of bureau-

union members were engaged in a slowdown of work, the charge nurse who engages in both hands-on work and the direction of lesser-skilled employees would likely be required to report such activity, which could result in discipline. If the charge nurse were a fellow union member, she would likely feel pressure not to report the action.³⁹⁷ Thus, the charge nurses may be exposed to divided loyalty that might compromise the employer's need for swift discipline that is unimpeded by other considerations.

Similarly, let us assume that the determination of whether the six RNs in *Kentucky River* are supervisors remains an ambiguous proposition. In this case, unionized building supervisors who, in addition to hands-on activity, direct LPNs with respect to the administration of medication and documentation, direct forty rehabilitation assistants when rehabilitation counselors are not present, and are often in charge of the entire facility, would likely feel group pressures not to fully report collective bargaining related conduct or misconduct engaged by fellow union members. While the NLRB stresses that a stipulated supervisor is always on call during the times that RNs act as building supervisors, potential, if not actual, divided loyalty may plausibly induce RNs who are active members of the union to decline to make the call to a supervisor in an effort to avoid adverse work implications for fellow union members. As Justice Douglas illuminated earlier:

If foremen were to be included as employees under the Act, special problems would be raised—important problems relating to the unit in which the foremen might be represented. Foremen are also under the Act as employers [or as representatives of employers]. That dual status creates serious problems. An act of a foreman, if attributed to the management, constitutes an unfair labor practice; the same act may be part of the foreman's activity as an employee.³⁹⁸

Likewise, RNs as building supervisors, and as part of their exercise of discretion, direct lesser skilled workers. RNs also direct LPNs in resident care. If RNs are included as covered employees within the bar-

cratic power. *See id.* at 1833–35. Whether these claims, if true, have any relevance or should have any relevance to either the text of the NLRA as amended, employer fears of divided loyalty and judicial decisions about the scope of the supervisory exclusion, depends of course on the statute itself.

397. *See Motley, supra* note 249, at 738. The author suggests that the issue of divided loyalty may differ depending on whether the situation arises in a nursing home or in a hospital. *See id.* at 736.

398. *Packard Motor Car Co. v. NLRB*, 330 U. S. 485, 497 (1947) (Douglas, J., dissenting).

gaining unit under the protection of the NLRA, special problems may arise. For instance, since they act as building supervisors, it is plausible that such activity, which could be justifiably attributed to their employer, constitutes an unfair labor practice. Since they are also members of the union, their misconduct can result in an unfair labor practice charge, which benefits them as a member of the bargaining unit. It is doubtful that such a result can be squared with the either the text or the purpose of the statute.

Examining some of the specific factors which Justice Douglas proposed for determining who ought to be excluded³⁹⁹ from the statute's coverage, confirms that doubt. First, an inspection of the industry's operations and the disputed employee's place in the company and the industry's hierarchy finds that few individuals are more important than RNs, especially in circumstances where they act as building supervisors with responsibility for the entire facility during two-thirds of its operational time. In addition, they consistently direct lesser-skilled workers in administering and documenting the medical component of resident care. Second RNs have the capacity to participate in the implementation of the employer's labor policies. They direct the LPNs, ensure resident care, and often direct the entire facility and accordingly they are often the only people who have the capacity to implement management's labor policy. Third, given their place within the hierarchy, and given their responsibility to responsibly direct, including RNs within the bargaining unit would tend to blur the line between management and labor. Taken as a whole, these factors warrant a high degree of skepticism when and if the Board insists on placing RNs within the bargaining unit.

Comparatively speaking, like typical professionals who engage in the direction of lesser-skilled individuals, *Kentucky River's* six RNs, despite participation in hands-on activity concerning resident care, have more responsibility and exercise more judgment than the foremen in *Packard* had more than fifty years ago. The foremen in *Packard* carried the responsibility of maintaining quantity and quality of production subject to the overall control and supervision of management. While the foremen neither hired nor discharged workers, they were provided with forms and with a detail of penalties to be applied in cases of violations of discipline. They also made recommendations for promotion, demotion, and discipline.⁴⁰⁰ In *Kentucky River*, acting as building supervisors, the RNs have authority, even if unexercised, to "write up

399. See *id.* at 496–97 (Douglas, J., dissenting).

400. *Id.* at 487.

an employee who does not comply with a decision to shift that employee between units.”⁴⁰¹ “They also have authority to send an employee home whenever that employee engages in misconduct”⁴⁰² and they also have the right to reassign workers.⁴⁰³ In addition, as part of their non-building supervisory role, RN’s direct LPNs with respect to the administration of medicine and proper documentation. The RNs accordingly ensure the quality of resident patient care. Unlike the foremen in *Packard*, all of these indicia of authority “extend[] over the entire staff (except stipulated supervisors), including nursing staff, rehabilitation staff, and maintenance staff provided that the RN subsequently informs the employee’s immediate supervisor.”⁴⁰⁴ RNs acting as building supervisors participate in the process of discipline through the write up process and engage in actual discipline by virtue of their authority to send someone home, and this authority extends to all employees at the facility. Taken together, indicia of supervision give rise to justifiable employer apprehension concerning the loyalty of RNs.

The NLRB, on the other hand, argues that the duties of Registered Nurses are less than comparable to those of foremen largely because, unlike foremen, RNs “perform hands-on medical treatment and give limited direction to other members of their teams, based on their experience and special competence pursuant to the requirements of the residents’ treatment plans.”⁴⁰⁵ The approach of the Board effectively means that workers who gain special competence and experience even if they participate in the development of resident treatment plans and effectuate policies and conduct to implement them, are deprived of supervisory status because they, unlike industrial foremen, actually participate in the work (the medical treatment of residents) of the unit. RNs, unlike foremen, are often the only individuals who can personify management prerogatives. The Board evidently has little concern for the employer’s right to the undivided loyalty of such employees.

To be sure, “employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union mem-

401. Brief for Respondent Ky. River Cmty. Care, Inc. at 4, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-8815 (U.S. May 29, 2001).

402. *Id.*

403. *See id.*

404. *Id.* at 5.

405. Reply Brief for National Labor Relations Board at 9–10, *NLRB v. Ky. River Cmty. Care, Inc.*, No. 99-1815 (U.S. May 29, 2001).

bership arguably may involve some divided loyalty.”⁴⁰⁶ Nonetheless, a careful reading of the facts and an understanding of the concept of divided loyalty, employer trepidation in general, particularly with respect to the RNs in *Kentucky River*, has been justifiably confirmed. It is true that many conflicting⁴⁰⁷ claims about divided loyalties surface when contemporary individuals with professional, technical and/or supervisory responsibilities, who perform tasks requiring some degree of discretion and judgment (professional or not), claim to be protected by the NLRA. However, the pertinent question becomes: Can tasks, which require independent judgment in the sense that section 2(11) requires in order to exclude supervisors as employers demand, be separated from judgment located in professional standards as stated in section 2(12)? If not, in which direction should the Board and the courts tilt? This dispute is grounded in the “degree of employee power in the workplace, that can be accepted without jeopardizing employer control”⁴⁰⁸ as well as the degree to which provision of the statute should be given priority other the other. Those commentators who remain unhappy with the current level of employer control and the absence of both employee power and workplace democracy may search for ways to change the parameters of control and hence the terms of debate by redefining, or attempting to redefine, the statute itself. On the other hand, if Justice Douglas’s dissent proves correct, the policy, purpose, and legislative history of the original Act foreshadow the text and purpose of the amended Act. Taken together, these factors imply that the statute remains a conservative, as opposed to expansive, device which expresses a concern for divided loyalties of those who act on behalf of management. This concern fundamentally underpins the conclusion that the six RNs should be classified as supervisors and therefore excluded from NLRA coverage.

406. NLRB v. Yeshiva Univ., 444 U.S. 672, 690 (1980).

407. See, e.g., Rabban, *Distinguishing Excluded Managers*, *supra* note 44, at 1786 (arguing that

[b]oard members and judges who favored a definition of “employee” that included supervisors dismissed the concern about divided loyalties. They viewed the image of unionized supervisors refraining from duties that might alienate their subordinates not simply as empirically unfounded, but also as “repugnant to the basic democratic philosophy of the NLRA.”)

408. Feldman, *Workplace Power*, *supra* note 43, at 526. The Supreme Court, thus far has refused Board-sponsored invitations to expand the groups of “employees” who are protected by the LMRA. Thus supervisors and managerial employees as defined are outside of the scope of the Wagner Act’s protective umbrella and, accordingly, one can argue that the employer’s domain of control remains fairly broad. See, e.g., *id.* at 527–28.

D. Reordering the Textualism Debate

Technique exists because it is Technique.⁴⁰⁹

It is surely possible that decisions like *Kentucky River*, and *Health Care* before it, "present a clear and growing threat to all federal administrative agencies."⁴¹⁰ Indeed, it might be possible that textualism, "[i]n its extreme form . . . threatens to violate the separation of powers doctrine."⁴¹¹ But these doubtful claims are rarely aimed at the *Packard* decision that stands as the quintessential example of textualism in the labor law arena. Yet, in the wake of *Health Care*, we are told, "[p]rompt action is needed to stop the spread of this destructive form of statutory interpretation"⁴¹² which if unchecked will "exact great financial, economic, and social costs, wreaking havoc in an already less-than-efficient federal administrative system."⁴¹³ Judge Patricia Wald has entered the dispute with this claim: "The issue of whether and how to use legislative history in determining the meaning of statutes ought to be a pressing concern to all of us who care about how laws are made and interpreted; it implicates the respective roles of legislators and judges in our constitutional system."⁴¹⁴ Reportedly, the entire doctrine of judicial deference to administrative agencies is menaced by textualism.⁴¹⁵ Resolving these claims exceeds the scope of this enterprise. These claims may simply reflect, and are likely congruent with a predisposition to favor expansive interpretations of the National Labor Relations Act, if not bureaucratic, and administrative power.

While references to legislative history and statutory purpose on the one hand, and textualism⁴¹⁶ on the other, may not always provide a sound basis for interpreting statutes, they are unavoidable. Thus, the *Packard* majority found the intent of Congress in the literal text of the Act. As Hilary Jewett elegantly summarizes:

In *Packard*, the NLRB found, and the Supreme Court affirmed, that foremen on an assembly line at a Packard auto plant could be con-

409. ELLUL, *supra* note 2, at 436.

410. Keller, *supra* note 54, at 576.

411. *Id.* at 576-77.

412. *Id.* at 577.

413. *Id.*

414. Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 279 (1990).

415. See Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L. Q. 351, 354 (1994).

416. See Keller, *supra* note 54, at 619-20 (analyzing the debate between the Board and the Supreme Court and concluding that Board distinctions are both inherently unworkable and indefensible in light of opposition from textualist-minded courts).

sidered employees under the NLRA because the Act contained no explicit exclusion for supervisory employees. In the five-to-four decision, the majority interpreted the statute literally, finding no language specifically excluding employees such as foremen, and “no ambiguity” in the wording of the statute which would require a “resort to legislative history.”⁴¹⁷

The dissent, however, relies on both the statutory text, coupled with its understanding of both the legislative history and statutory purpose to deny the conclusion that the majority asserts.⁴¹⁸

Kentucky River revitalizes the *Packard* debate with opposite effects. The *Kentucky River* majority concedes that “independent judgment” is an ambiguous term both with respect to the degree of discretion required and with respect to the kind of judgment needed for supervisory status.⁴¹⁹ What is not ambiguous is the Board’s attempt to attach a different weight to a nurse’s judgment in directing less-skilled workers to take care of a resident than to her judgment in acting as a building supervisor. The Board argues that the judgment of employees who are permitted to exercise a sufficient degree of discretion cannot exercise independent judgment if it constitutes a particular kind of judgment termed “ordinary professional judgment” in directing less-skilled employees.⁴²⁰ This interpretation inserts, Justice Scalia insists, a “startling categorical exclusion into the statutory text that does not suggest its existence.”⁴²¹ Admittedly, the degree of discretion required by section 2(11), as amplified by such words as “‘clerical’ or ‘routine’ as opposed to ‘independent judgment,’ falls within the Board’s discretion to resolve.”⁴²² However, the Board’s categorical exclusion, which turns on factors having nothing to do with the admittedly ambiguous degree of discretion, goes beyond the limits of what is ambiguous and contradicts what is clear.⁴²³ The Board asserts that when an employee exer-

417. Jewett, *supra* note 58, at 1128 (citing *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492 (1947)).

418. One observer elegantly summarizes Justice Douglas’s dissent:

The dissent, by contrast, emphasized the animating spirit of the NLRA, arguing that the Court and the NLRB should not look solely at the strict definition within the context of the purpose of the Act as a whole. The NLRA, the dissent argued, sought to separate and empower employees or “workingmen” as a group distinct from management; to include supervisors in a bargaining unit contradicts this fundamental purpose.

Id. at 1128.

419. *See Ky. River Cmty. Care, Inc. v. NLRB*, No. 99-1815, slip op. at 6 (U.S. May 29, 2001).

420. *Id.* at 7.

421. *Id.*

422. *Id.* at 6–7.

423. *See id.* at 7.

cises significant judgment that is only loosely constrained by the employer, if it amounts to “professional judgment,” it fails to be independent. The Supreme Court relies on the text to deny this conclusion. Its textual analysis limits the Board’s capacity to construe “professional judgment” to nullify the term “independent judgment,” “that naturally includes them.”⁴²⁴ The Court’s technique precludes the Board from *narrowing* the employer’s statutory right to exclude supervisors from NLRA protection.

On the other hand, the *Kentucky River* dissent principally relies on its understanding of the Act’s legislative history, the perceived need to balance the statutory tension that arises because of the inclusion of professionals with the exclusion of supervisors,⁴²⁵ and its preference for current Board policy to effect a broadened interpretation of the Act’s coverage. Still, the dissent declines to ignore textual issues completely with its assertion that the majority’s decision to disallow the Board from attaching “a different weight to a nurse’s judgment that the employee should take a patient’s temperature, even if nurses routinely instruct others to take a patient’s temperature but do not ordinarily reassign or discipline employees . . . finds no support in the text of the statute.”⁴²⁶ There may be an intuitive argument in favor of both the Board’s and the dissent’s conclusion. One could argue that the defining difference is “that one form of judgment is more closely linked to management prerogatives than the other.”⁴²⁷ This argument is subject to a straightforward rebuttal, which reveals a potential fallacy in the Board’s conception of the relevant test of independent judgment. As Member Cohen’s lucid dissent in a prior case illustrates: The NLRB, in its determination to replace one misinterpretation with another, ignores the fact that the core of independent judgment is that the individual’s conduct and direction are based on the thought processes of the individual, rather than on some outside force or person.⁴²⁸ Plainly, an individual who makes personal judgments based on education, experience, training, and ability is making independent judgment.⁴²⁹

424. *Id.* at 14.

425. *See Ky. River Cmty. Care, Inc.*, No. 99-1815, Stevens, J., dissenting at 5 (U.S. May 29, 2001).

426. *Id.* at 6 (Stevens, J., dissenting).

427. Keller, *supra* note 54, at 619.

428. *See Providence Hosp. and Alaska Nurses’ Ass’n*, 320 N.L.R.B. 717, 736 (1996) (Cohen, Member, dissenting) (*cited in* Keller, *supra* note 54, at 619).

429. *See id.* at 1196–97.

In contrast to the *Kentucky River* dissent, the *Packard* dissent relies on legislative history and its appreciation of the statute's fundamental purpose to *narrow* the interpretation of the Act. Justice Douglas's approach, undergirded as it is by both the statute's legislative history and purpose can be linked inescapably to the amended text of the statute to constrain its coverage of professionals and other skilled personnel who possess independent judgment when they responsibly direct others. This nominal debate over textualism versus legislative history and statutory purpose is, in reality, simply a debate over the proper conception of the NLRA and its attendant policy objectives. Is the NLRA a radical statute designed to maximize workplace coverage by all workers including professionals and those with management expertise or is it a rather unadventurous law designed to provide a limited opportunity for collective action by a limited number of employees located primarily within the "working class" who fail to possess any indicia of management prerogatives?

Paradoxically, one keen opponent of textualism vividly clarifies the true nature of the debate; he states:

The Board cannot escape the fact that the true distinction between professionals and supervisors, close alignment with management prerogatives, is not articulable using the existing components of the statutory definition of supervisor . . . [t]wisting the phrase "independent judgment" does not work . . . [g]iven that the NLRB's distinction between professional judgment and supervisory independent judgment is insupportable by the Act's statutory language.⁴³⁰

This determination applies with equal force to any future efforts by the NLRB's effort to amend, if not nullify, *Kentucky River's* robust conception of "independent judgment." The NLRB's current policy bias excludes responsible direction of others, when grounded in professional expertise and experience in determining who is an excluded supervisor within the meaning of the NLRA. This technique drives labor policy in a direction that is similar to the *Packard* majority's (1) obliteration of the proper line between management and labor,⁴³¹ (2) failure to reach a principled and limited determination of who is covered by the Act, (3) inability to recognize that lower ranked, lower skilled workers were the proper object of the statute, and (4) powerlessness to understand that Congress enacted the original NLRA to obtain limited objectives. Although the *Packard* Court's deficiencies

430. Keller, *supra* note 54, at 619–20.

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

were grounded in its concern for textual purity and its failure to consider the Act's legislative history, and although the *Kentucky River* dissent and the NLRB are nominally driven by respect for legislative history, the Board's argument seems largely driven by the conclusion that the NLRA should cover more employees. This is facilitated by an expansive conception of section 2(12) even if employees exercise discretionary judgment in the direction of lesser-skilled employees that remains indistinguishable from the "independent judgment" contemplated by section 2(11). This procedure, actually ignores or discounts much legislative history, in general, and Senator Flanders in particular.⁴³² That legislative history indicates that the objective of section 2(11), like both the NLRA generally and the Taft-Hartley Amendments in particular, was to limit employee coverage by excluding those who engage in the basic act of supervision based on the exercise of their personal judgment as informed by experience, training and ability. The Board's technique suggests "unequal treatment of the statutory sections [and] goes against long-standing principles of statutory interpretation."⁴³³ When courts and justices accept this analysis, they further current Board policy over the plain language of the Act and fail to further stability or equality of bargaining.⁴³⁴ Instead they only provide incentive for gamesmanship and litigation⁴³⁵ and not the purposes, legislative history, and text of the statute.

While the paradoxes inherent in the debate over the text, statutory purpose, statutory context, and the meaning of legislative history reinforce, previous conclusions that attempt to resolve disputes about (1) whether the statute should be seen as a radical class conscious attempt to reify the conflict between capital and labor; (2) the likely conflict in interest between individuals who direct and less-skilled workers; and (3) employer fears concerning potential divided loyalty

432. As Member Cohen demonstrates in his *Nymed* dissent, the legislative history demonstrates that the addition of "responsibly to direct" in section 2(11)'s definition of supervisor was designed to cover individuals who exercise professional judgment when directing other employees. *Nymed, Inc.*, 320 N.L.R.B. 806, 815 (1996) (Cohen, Member, dissenting). Senator Flanders states:

As an employer for many years past . . . I can say that the definition of "supervisor" in this Act seems to be me to cover adequately everything except the basic Act of supervising In fact, under some modern management methods, the supervisor might be deprived of authority for most of the functions enumerated and still have a large responsibility for the exercise of personal judgment based on personal experience, training, and ability.

93 CONG. REC. S1126, 4677-78 (1947).

433. Motley, *supra* note 249, at 738.

434. *See id.* at 739.

435. *See id.*

adverse to their interest, and while *Kentucky River*, like *Health Care*, is another in a series of reprimands offered to the National Labor Relations Board, and while the distinctions between Justice Scalia's and Justice Stevens's analyses confirm that the dispute is "largely over the degree of employee power in the workplace that can be accepted without jeopardizing employer control,"⁴³⁶ it is doubtful that the Supreme Court analysis and technique will render commentators speechless. To the contrary, its decision was achieved through a bare majority of the Court, which provides a rich basis for condemnation. Even if the holding were unanimous, those observers captivated by a radical conception of both the NLRA and inclusion of professionals in section 2(12) could only concur at the risk of incoherence. One is left with the enduring prospect of endless elucidation. This leads inexorably to technique in search of further technique as experts at the NLRB attempt to reverse what the Court finds clear. While Justice Douglas's *Packard* dissent richly illustrates that the legislative history is devoid of any purpose to bring supervisors within the original Act, and absent any trace of congressional concern with the problems of supervisory personnel, whilst the Taft-Hartley Amendments deepen that conclusion, and while it is possible to argue on both textualist and other grounds (including long-standing principles of statutory interpretation) for a restrained conception of the NLRA, those arguments, however persuasive, will not end the dispute. On the contrary, the dissatisfaction of the NLRB with the *Kentucky River* outcome will likely inspire additional efforts to find the legislative history upon which to articulate technically, what from its perspective remains at best ineffable and at worst statutorily impermissible—the distinction between professional as opposed to independent judgment. To do otherwise, amounts to its concurrence in the diminution of its power and authority. The Board's most recent effort either constitutes an insupportable distinction without a difference or a clear effort to manipulate the statutory language in a manner that violates its text and its animating purpose.

Conclusion

We are often the captives of our pictures of the world, and in the end, if the world does not look *just* like them, their influence on our perceptions is nevertheless profound.⁴³⁷

436. Feldman, *Workplace Power*, *supra* note 43, at 526.

437. JERRY L. MASHAW, GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 1 (1997).

Law is an *artificial creation of man* and not something given to man in nature.⁴³⁸

The fact that the drafters of the NLRA could not have imagined either the present composition or the contemporary transformation of the workplace seems obvious. As the workplace continues its metamorphosis through decentralization, professionalism, and post-industrialism, hands-on workers who are transformed by education, experience, skills, and training inevitably make personal judgments in directing lesser-skilled workers and thus transcend ancient boundaries between workers and foremen. In its 1947 Amendments to the Wagner Act, Congress defined supervisors as individuals who responsibly direct others through the exercise of independent, uncabined discretion grounded in their own thought processes. Such individuals are to be excluded from the protective umbrella provided by the NLRA because to do otherwise would expose employers (a newly protected class) and management to the threat of both divided loyalty and the necessity of negotiating with itself. While it must be admitted that even Supreme Court pronouncements are subject to Ellul's cautionary notion that law is an artificial creation,⁴³⁹ the Court appropriately vindicates a robust conception of independent judgment in responsibly directing others and thus diminishes these threats. It rightly rejects attempts to constrain section 2(11)'s supervisory exclusion through strained interpretations of the language of section 2(12).

Whether the NLRB is provoked by radical class consciousness, a misunderstanding of contemporary management and the present workplace, or by pictures of the labor world as it ought to be, one may never know. In any case, Justice Douglas's cautionary explication of the original NLRA implies that hermeneutic doubts should be resolved in favor of a narrow conception of NLRA coverage. The Supreme Court's *Kentucky River* judgment vindicates this approach and limits the power of the NLRB. Doubtlessly, this decision will spur the Board to refine its technique. That prospect is an unavoidable feature of modern life. It remains to be seen whether such efforts, in conjunction with the Court's likely response, will result in human "progress" or confirm Jacques Ellul's prophecy that modern society will largely consist of increasing submission to "de-humanization" through indeterminate yet expansive technique.

438. Andrew Goddard, *supra* note 195, at 179 (summarizing the writings of Jacques Ellul).

439. *See id.*