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THE MANAGERIAL EXCLUSION UNDER THE NATIONAL LABOR RELATIONS ACT: ARE WORKER PARTICIPATION PROGRAMS NEXT?

Bryan M. Churgin⁺

The National Labor Relations Act¹ (“the Act”) guarantees workers the right to form, join, and assist labor organizations of their own choosing, free of employer interference.² The Act sought to reduce industrial unrest by establishing peaceful means of dispute resolution between employees and employers and lessen the inequality of bargaining power between labor and management.³ Initially, the Act statutorily defined cer-

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1. National Labor Relations (Wagner) Act, Pub. L. No. 74-198, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1994)). The NLRA or the Act, is the 1935 statute as amended at various later dates. See James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1563 n.1 (1996).

2. See 29 U.S.C. §§ 151-169 (1994). See generally 1 THE DEVELOPING LABOR LAW 28 (Patrick Hardin et al. eds., 3d ed. 1992) (describing the “triad of rights—(1) the right to organize, (2) the right to bargain collectively, and (3) the right to engage in strikes, picketing, and other concerted activities”). Shortly after the passage of the NLRA, a steel manufacturer challenged the constitutionality of Congress’s authority to enact legislation granting workers the right to self-organization and bargain collectively in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 25 (1937). In upholding the constitutionality of the NLRA, the Court found that the NLRA “purports to reach only what may be deemed to burden or obstruct [interstate or foreign commerce]” and, therefore, could be interpreted to be within constitutional limits. *Id.* at 31.

3. See Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 281-83 (1978). See generally F. Ray Marshall, *The Act’s Impact On Employment, Society, and the National Economy*, in AMERICAN LABOR POLICY: A CRITICAL APPRAISAL OF THE NATIONAL LABOR RELATIONS ACT 16, 17 (Charles J. Morris ed., 1987) (hereinafter AMERICAN LABOR POLICY) (commenting that the labor relations and economic policies of the 1930s, 1940s, and 1950s promoted a growth in productivity, industrial output, and the income of workers).

Congress specifically addressed the Act’s goals in the preamble to the Act, where Congress concluded that

The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamen-

tain individuals as “employees” (otherwise known as statutory employees) who were entitled to its protections.⁴ Individuals employed as agricultural laborers, domestic servants, or by their parent or spouse were not statutory employees and were therefore excluded from the Act.⁵ The current state of labor law, however, has narrowed the Act’s coverage even further.⁶ For example, in addition to an explicit exclusion of super-

tal to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

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

National Labor Relations (Wagner) Act, ch. 372, § 1, 49 Stat. at 449-50 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1994)).

Ultimately, these disputes between labor and management were to be brought before “an independent agency with self-contained enforcement capacity and authority.” Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 292 (1987).

4. See National Labor Relations (Wagner) Act, ch. 372, § 2(3), 49 Stat. at 450 (1935) (codified as amended at 29 U.S.C. § 152(3) (1994)). Prior to the 1947 Taft-Hartley amendments, the NLRA defined an employee to include

[A]ny employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, 3271 (1985) [hereinafter 2 NLRB LEGISLATIVE HISTORY, 1935] (codified as amended at 29 U.S.C. § 152(3) (1994)); see also *infra* notes 107-11 and accompanying text (discussing statutory protection for individuals defined as employees).

5. See National Labor Relations (Wagner) Act, ch. 372, § 2(3), 49 Stat. at 450 (1935) (codified as amended at 29 U.S.C. § 152(3) (1994)); see also David M. Rabban, *Distinguishing Excluded Managers From Covered Professionals Under the NLRA*, 89 COLUM. L. REV. 1775, 1782 (1989) (commenting that the Wagner Act initially protected all individuals defined as statutory employees).

6. See Brudney, *supra* note 1, at 1578-80 (describing how over the years, individuals possessing managerial or supervisory positions have been denied employee status and the protections of the Act); see also Scott Kafker, *Exploring Saturn: An Examination of the Philosophy of “Total” Labor-Management Cooperation and the Limitations Presented by the NLRA*, 5 LAB. LAW. 703, 729-31 (1989) (explaining how employees fitting the definition of supervisor or manager are excluded from the NLRA and not entitled to protected collective bargaining).

visory employees,⁷ managerial employees have been implicitly excluded from the Act's coverage.⁸ This managerial exclusion, compared to the statutory supervisory exclusion, developed strictly as a result of the decisions of both the Supreme Court and the National Labor Relations Board ("the Board").⁹ As a consequence of this implied exclusion, managerial employees are denied "the right to self-organization . . . [and] to bargain collectively through representatives of their own choosing."¹⁰

In *National Labor Relations Board v. Bell Aerospace Co.*,¹¹ the Supreme Court defined the test for managerial employees as "those [employees] who 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.'"¹² This

7. See Labor Management Relations (Taft-Hartley) Act, ch. 120, § 2(3), Pub. L. No. 80-101, 61 Stat. 136, 137-38 (1947) (codified at 29 U.S.C. § 152(3) (1994)). The Act states that "[t]he term 'employee' shall include any employee . . . but shall not include . . . any individual employed as a supervisor." 29 U.S.C. § 152(3) (1994).

8. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289 (1974); see also William P. Murphy, *Establishment and Disestablishment of Union Representation*, in AMERICAN LABOR POLICY, *supra* note 3, at 61-62 (commenting that after the Board had been unclear in its treatment of managerial employees, the Supreme Court "gratuitously excluded" managerial employees from the Act's protections). For a general overview of the collective bargaining rights of managerial employees after the Wagner Act, see E. V. Wahn, *Collective Bargaining Rights of Managerial Employees in the United States and Canada*, 27 LAB. L.J. 343, 345-46 (1976).

9. See, e.g., *Bell Aerospace*, 416 U.S. at 289 (concluding that "the Board's early decisions, the purpose and legislative history of the [Act], the Board's subsequent and consistent construction of the Act for more than two decades, and the decisions of the courts of appeals all point unmistakably to the conclusion that 'managerial employees' are not covered by the Act") (footnote omitted); Barbara A. Lee, *Collective Bargaining and Employee Participation: An Anomalous Interpretation of the National Labor Relations Act*, 38 LAB. L.J. 274, 275-76 (1987) [hereinafter Lee, *Collective Bargaining Part II*] (noting that although the Act does not protect either supervisory or managerial employees, the statute excludes supervisors, the Board read in a managerial exclusion); Rabban, *supra* note 5, at 1787-88 (noting that based on Board opinions, managers would not be protected under the Act).

10. 29 U.S.C. § 157 (1994) (noting some of the rights of employees who are covered by the NLRA); see also Ben M. Germana, *Protecting Managerial Employees Under the National Labor Relations Act*, 91 COLUM. L. REV. 405, 405 (1991) (noting that managerial employees are excluded from the right to organize under the Act).

11. 416 U.S. 267 (1974).

12. *Id.* at 288 (quoting *Palace Laundry Dry Cleaning Corp.*, 75 N.L.R.B. 320, 323 n.4 (1947)); see also *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 682-83 (1980) (holding that the managerial employees also must exercise independent discretion when effectuating management's policies). Both the Board and the courts have approved of two related tests for managerial status. See Matthew W. Finkin, *The NLRB in Higher Education*, 5 U. TOL. L. REV. 608, 614-15 (1974). These tests accord managerial status to individuals "closely aligned with management whose inclusion in a bargaining unit would create a conflict of interest with rank-and-file workers; and those who formulate, determine, and effectuate the employer's policies." *Id.*

determination, however, has not resulted in a clear distinction between managerial employees and rank-and-file workers.¹³ The Court's decision endorsed the Board's definition of managerial employee and its test for managerial authority.¹⁴ This holding did not ensure, however, that the strict dichotomy between employees, who are protected by the Act, and managers, who are not protected by the Act, would be maintained.¹⁵

The drafters of the Act could not have contemplated the composition of the nation's current labor force.¹⁶ The percentage of workers who

13. See Donna Sockell, *The Future of Labor Law: A Mismatch Between Statutory Interpretation and Industrial Reality?*, 30 B.C. L. REV. 987, 988-89 (1989) (noting that societal forces have blurred the dissimilarities between supervisors/managers and nonmanagerial employees); see also Stephen I. Schlossberg & Steven M. Fetter, *U.S. Labor Law and the Future of Labor-Management Cooperation*, 3 LAB. LAW. 11, 21 (1987) (noting that an attempt to distinguish between those who do work for an organization and those who decide how to run the organization would lead to suspect results because many labor-management cooperation programs deliberately blur the line between manager and worker); Carol A. Glick, Note, *Labor-Management Cooperative Programs: Do They Foster or Frustrate National Labor Policy?*, 7 HOFSTRA LAB. L.J. 219, 220 (1989) (noting how the use of labor-management cooperative programs have blurred the line between employees and management).

14. Compare *supra* note 12 and accompanying text (noting Court's definition of managerial employee in *Bell Aerospace* as "those [employees] who 'formulate and effectuate management policies by expressing and making operative the decisions of their employer'"), with *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322 (1946) (stating that managerial employees are those individuals "who are in a position to formulate, determine, and effectuate management policies") (footnote omitted); see also Shaun G. Clarke, Note, *Rethinking the Adversarial Model in Labor Relations: An Argument for Repeal of Section 8(a)(2)*, 96 YALE L.J. 2021, 2042 (1987) (commenting that management's role, as a result of the Supreme Court's decision in *Bell Aerospace*, is to make discretionary decisions that effectuate management policy).

15. See Sockell, *supra* note 13, at 994-95 (noting that the task of distinguishing between workers is more difficult currently than in the past); see also Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 HARV. L. REV. 1662, 1677 (1983) (declaring that the industrial system implicit in the Act depends on the existence of a clear division between labor and management for collective bargaining purposes).

16. See Marina Angel, *Professionals And Unionization*, 66 MINN. L. REV. 383, 416 (1982) ("Congress drafted the NLRA to ameliorate the problems of rank and file workers employed by hierarchical, bureaucratic organizations. The composition of the work force, however, has changed significantly in recent years.") (footnote omitted). The Act developed in the context of the industrial model, characterized by an adversarial system, where management's interests were inherently at odds with those of labor. See *id.* at 387, 389. The industrial model of labor relations is a situation in which employees "explicitly understand[and] that the firm will adjust the size of the labor force in response to product conditions or technological change." Mark Berger, *Unjust Dismissal and the Contingent Worker: Restructuring Doctrine for the Restructured Employee*, 16 YALE L. & POL'Y REV. 1, 12 n.52 (1997); see also John Hoerr, *America's Labor Laws Weren't Written for a Global Economy*, BUS. WK., Jan. 13, 1986, at 38 (noting how at the time of its passage, the Act was intended to deal only with the "all-out warfare" between labor and management).

could be deemed managerial has grown significantly over the last ten years,¹⁷ since there has been a move away from traditional blue-collar jobs¹⁸ towards those positions that require managerial skills.¹⁹ Between 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.²⁰ The continuance of this trend may lead to further difficulties for the Board and courts in distinguishing among workers who will be afforded the Act's protections.²¹

The increasing use of worker participation programs²² in recent years, which could blur the distinction between labor and management,²³ illustrates the problem with the implied managerial exclusion.²⁴ Worker par-

17. George T. Silvestri, *Occupational Employment to 2005*, reprinted in 240 Daily Lab. Rep. (BNA) E-3, E-4 (Dec. 14, 1995) (noting that workers in managerial, executive, and administrative positions are expected to grow by 17%, or 2.2 million workers, between 1994 and 2005).

18. See Peter D. DeChiara, *Rethinking the Managerial-Professional Exemption of the Fair Labor Standards Act*, 43 AM. U. L. REV. 139, 151 (1993) (stating that, by 1989, managerial employees outnumbered blue-collar workers in the U.S.).

19. See Sockell, *supra* note 13, at 995-96. Statistics show that, "between 1970 and 1985, the managerial and professional workforce has grown . . . from 48 to 55 % of the employed labor force." See *id.* at 995.

20. See *id.* at 995.

21. See *id.* In 1985, for example, 55% of those employed in the workforce held jobs requiring the use of managerial, professional, or technical skills. See *id.* This is compared to 33% of workers holding similar jobs in 1940. See *id.*

22. See generally Note, *Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act*, 83 MICH. L. REV. 1736, 1738-40 (1985) [hereinafter *Participatory Management*] (noting how these various programs generally emphasize "increased employee involvement" in the organizational decision-making process). These programs have been "classified in general terms into several categories." H.R. REP. NO. 104-248, at 6 (1995). Some of the more common forms of these employee involvement programs are quality circles, quality of work-life programs, productivity gainsharing, and self-directed work teams. See *id.* at 6-7; see also Robert B. Moberly, *New Directions in Worker Participation and Collective Bargaining*, 87 W. VA. L. REV. 765, 775-80 (1985) (discussing characteristics of quality of work-life programs, quality circles, and productivity gainsharing plans). The desired result of these programs is to increase employee job satisfaction and organizational performance. See *id.*

23. See Germana, *supra* note 10, at 421-22 (noting that proponents of the managerial exclusion, express concern that "elimination of the . . . exclusion would blur the line between management and labor").

24. See Charles B. Craver, *The Vitality of the American Labor Movement in the Twenty-First Century*, 1983 U. ILL. L. REV. 633, 673 (noting that traditionally, employees have only had indirect involvement in American industry via the collective bargaining process). Initially management was suspicious that as these worker participation programs expanded, workers would use them to take over traditional management functions and prerogatives. See *id.* at 675. These fears turned out to be unfounded, as cooperative programs have led to new methods of problem solving and resulting increases in efficiency

ticipation programs, strongly favored by both labor and management,²⁵ are designed to provide workers with more authority, flexibility, and satisfaction in the performance of their jobs.²⁶ The actual level of authority and power afforded employees in these groups, though, differs from program to program.²⁷ As worker participation programs move away from merely furnishing information to management, and towards allowing workers to make decisions traditionally managerial in nature,²⁸ however, "employees" with increased participation in the management decision-making process may not be considered statutory employees under the Act.²⁹ As a result, these individuals would no longer be protected

and harmony in the workplace. *See id.* For an overview of the current state of labor law, see Samuel Estreicher, *The Dunlop Report and the Future Of Labor Law Reform*, 12 LAB. LAW. 117 (1996). The Dunlop Commission, instituted in March 1993 by Secretary of Labor Robert B. Reich, set out to reexamine American labor law and evaluate changes to help enhance productivity and labor-management cooperation. *See id.* at 120. The commission recommended that individuals who participate in work teams should not be deemed managers or supervisors and be denied the Act's statutory protections. *See id.* at 123-24; *see also* Lee, *Collective Bargaining Part II*, *supra* note 9, at 275 (commenting on the inconsistent development of the managerial exclusion).

25. *See* Craver, *supra* note 24, at 675. One poll indicated that 70% of union and business officials strongly favored the increased use of labor-management cooperative programs, while 50% reported "significant movement" towards the use of such programs in the near future. *See id.*; *see also* Shannon Browne, Note, *Labor-Management Teams: A Panacea for American Businesses or the Rebirth of a Laborer's Nightmare?*, 58 OHIO ST. L.J. 241, 243 (1997) (stating how the underlying consideration of worker participation programs is the benefit of mutual respect and cooperation over the traditional confrontation between management and labor).

26. *See* Joseph B. Ryan, Comment, *The Encouragement of Labor-Management Cooperation: Improving American Productivity Through Revision of the National Labor Relations Act*, 40 UCLA L. REV. 571, 587 (1992); *see also* Craver, *supra* note 24, at 676-77 (describing the widespread use of labor-management cooperation in many Japanese companies and the resulting success of the programs); Chris Doucouliagos, *Worker Participation and Productivity in Labor-Managed and Participatory Capitalist Firms: A Meta-Analysis*, 49 INDUS. & LAB. REL. REV. 58, 58-59 (1995) (stating how supporters of worker participation schemes also believe that these programs strengthen workers' commitment to the organization, reduce the need for monitoring worker performance, and increase overall efficiency and productivity of the organization).

27. *See* Moberly, *supra* note 22, at 778 (noting that the success of these programs, where there is a divergence of worker authority, depends upon the extent to which management assigns authority to those who have the greatest role in the job).

28. *See* RICHARD N. BLOCK ET AL., LABOR LAW, INDUSTRIAL RELATIONS AND EMPLOYEE CHOICE 29-31 (1996) (noting that during the 1980s, labor-management cooperation gave workers the opportunity to become involved "in product design, marketing, and other management prerogatives, often making changes in the production process" and that production decisions were made by operating teams of workers, reducing supervisory personnel requirements).

29. *See* Browne, *supra* note 25, at 266-67 (commenting that one pitfall of cooperative programs is that workers exercising managerial power may lose the Act's protections); *cf.* Marley S. Weiss, *Innovations In Collective Bargaining: NUMMI-Driven to Excellence*, 13

by the Act.³⁰

This Comment first examines the various types of worker participation plans currently being used by corporations in the United States. In Part II, this Comment traces the history of the National Labor Relations Act, specifically focusing on the evolution of the implied managerial exclusion and the express supervisory exclusion. In Part III, this Comment analyzes the *Bell Aerospace* decision and its extension of the implied managerial exclusion. Finally, this Comment addresses the implications of the *Bell Aerospace* decision, namely in the context of extending the managerial exclusion to employees involved in worker participation schemes. Specifically, this Comment discusses the potential problem with the managerial exclusion by examining the use of a worker participation program at the Saturn division of the General Motors automobile company. This Comment concludes that the vague language adopted by the Supreme Court in *Bell Aerospace* could likely have unintended far-reaching effects, namely, that the implied managerial exclusion could cause rank-and-file workers to be treated as managerial employees ineligible for the protections of the Act. To correct these shortcomings, this Comment suggests that the Board engage in rule making to explicitly protect employees participating in worker participation programs as well as create an express definition of managerial employees and how they should be treated under the Act.

I. WORKER PARTICIPATION PROGRAMS—AN OVERVIEW

Worker participation schemes, which have been in existence since 1871, have had an enduring legacy.³¹ Participatory programs generally represent an effort by management³² to enhance an employee's involve-

HOFSTRA LAB. L.J. 433, 484-85 (1996) (commenting that as a result of the broad definition of managerial employees, those individuals who assume more authority within the decisionmaking hierarchy risk being transformed into managers or supervisors under the Act). These plans, which are a type of worker participation scheme, could transform unionized employees into managers or supervisors, not protected by the Act. See *id.* The guiding philosophy behind NUMMI type programs contains the element "every employee as a manager." *Id.* at 484.

30. See *infra* notes 297-302 and accompanying text (discussing how the managerial exclusion could exclude individuals in worker participation programs from the Act's protections).

31. See Raymond L. Hogler, *Worker Participation and Representation in the United States and the European Union: A Comparative Legal Analysis*, 47 LAB. L.J. 586, 589 (1996).

32. See *Participatory Management*, *supra* note 22, at 1737 n.11 (noting that management is more likely than employees to suggest changes in workplace organization in non-unionized settings); cf. Lori M. Beranek, Comment, *The Saturnization of American Plants: Infringement or Expansion of Workers' Rights?*, 72 MINN. L. REV. 173, 192 (1987) (noting

ment in the organizational decision-making process.³³ Management, in addition to using internal and external consultants, often relies on the organization's formal corporate policy or philosophy statements in implementing a worker participation scheme.³⁴ These cooperative programs comprise a broad range of methods in which employers and employees work together to improve an organization's overall performance.³⁵ Workplace participatory schemes have the potential to "increase productivity, quality, and employee commitment and allow American business[es] to regain a competitive position in the global marketplace."³⁶

The structure of a corporation's participatory scheme is based on the firm's style or theory of management³⁷ in conjunction with the method in which workers commonly communicate ideas and concerns with management.³⁸ Employee participation plans "attempt[] to provide a channel

that labor unions have traditionally opposed these various worker participatory programs).

33. See Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499, 504 (1986) (noting that the use of worker participation programs may increase worker morale and job satisfaction); see also Glick, *supra* note 13, at 233-34 (noting how worker participation programs initially developed as an effort to enlist employee suggestions regarding efficiency and quality control within the workplace). By 1997, an estimated 30,000 workplaces, comprising 80% of the United States largest employers, utilized employee involvement programs. S. 295, 105th Cong. § 2(a)(3) (1997); H.R. 634, 105th Cong. § 2(a)(3) (1997).

34. See Sandra L. Nunn, Comment, *Are American Businesses Operating Within the Law? The Legality of Employee Action Committees and Other Worker Participation Plans*, 63 U. CIN. L. REV. 1379, 1393 (1995).

35. See Wilson McLeod, *Labor-Management Cooperation: Competing Visions and Labor's Challenge*, 12 INDUS. REL. L.J. 233, 241 (1990). The methods of cooperation may include

participation at the strategic level, including decisions about marketing, research and development, and long-term investment; at the collective bargaining level, including the negotiation of basic agreements that fix the terms and conditions of employment; and most commonly, the workplace level, which involves the day-to-day work lives of employees and their relationships with management.

Id.

36. Devki K. Virk, Note, *Participation with Representation: Ensuring Workers' Rights in Cooperative Management*, 1994 U. ILL. L. REV. 729, 730; see also David W. Orlandini, Comment, *Employee Participation Programs: How to Make Them Work Today and in the Twenty-First Century*, 24 CAP. U. L. REV. 597, 597 (1995) (noting how American business, since the late 1970s, has gradually implemented employee participation programs to enhance both productivity and communication with management).

37. See Kohler, *supra* note 33, at 501. These schemes usually involve joint consultation between management and workers, where management ultimately makes the final decision or delegates greater responsibility to the workers. See *id.* at 503.

38. See *id.* For example, advocates of a socialist ideology structure communication in a formal manner. See *id.* at 501 n.5. The use of representatives to deal with worker concerns is characteristic of this model. See *id.* The human relations tradition, on the other hand, focuses on cooperation and partnership between management and labor. See *id.*

of employee influence outside the collective bargaining arena.”³⁹ Workers utilize these newly formed channels of communication “to advise management on those decisions [directly] affecting their work environment.”⁴⁰ The use of these participatory programs can be found in numerous sectors of the economy, including the automobile, airline, and paper industries.⁴¹

The types of participatory programs are diverse and involve a wide range of employee involvement in the decision-making process.⁴² The least participative programs consist of employee surveys and questionnaires, while programs at the other end of the spectrum involve profit sharing and employee ownership.⁴³ The three most commonly used plans, and the most troublesome to define,⁴⁴ are quality circles (QCs), semi-autonomous work groups, and labor-management committees.⁴⁵

39. Andrew A. Lipsky, Comment, *Participatory Management Schemes, the Law, and Workers' Rights: A Proposed Framework of Analysis*, 39 AM. U. L. REV. 667, 673 n.27 (1990).

40. Susan Gardner, *The National Labor Relations Act and Worker Participation Plans: Allies or Adversaries?*, 16 PEPP. L. REV. 1, 5 (1988) (footnote omitted).

41. See John Calhoun Wells, *Conflictive Partnership: A Strategy for Real World Labor-Management Cooperation*, 47 LAB. L.J. 484, 485-86 (1996); see also Barbara A. Lee, *Collective Bargaining and Employee Participation: An Anomalous Interpretation of the National Labor Relations Act*, 38 LAB. L.J. 206, 206 (1987) [hereinafter Lee, *Collective Bargaining Part I*] (noting that even though most formal worker participation programs are found in the manufacturing sector, use of these programs have expanded to other sectors such as health care, service, and technical). But cf. Nunn, *supra* note 34, at 1397 (noting that participation programs are rarely found in segments of the service sector other than the telecommunications and insurance fields).

42. Cf. Martin T. Moe, *Participatory Workplace Decisionmaking and the NLRA: Section 8(a)(2), Electromation, and the Specter of the Company Union*, 68 N.Y.U. L. REV. 1127, 1156-57 (1993). In addition to the utilization of diverse types of programs, there are various definitions regarding what is an employee involvement program. See David Lewin, *The Future of Employee Involvement/Participation in the United States*, 40 LAB. L.J. 470, 470 & n.1 (1989).

43. See Ryan, *supra* note 26, at 579 (noting that employee ownership and profit sharing allow employees more input in operating the business); see also LLOYD L. BYARS & LESLIE W. RUE, *HUMAN RESOURCE MANAGEMENT* 366, 376-79 (4th ed. 1994) (describing various types of incentive pay systems, such as Scanlon-type plans, productivity-based profit-sharing plans, and employee stock ownership plans, all of which “attempt to relate pay to performance in an endeavor to reward above-average performance”); Edward M. Dicato, *Employee Involvement Teams Under the National Labor Relations Act: Do They Inherently Conflict?*, 1990 DET. C.L. REV. 691, 697 (commenting that employee surveys allow for a limited form of employee involvement); Kohler, *supra* note 33, at 508 (describing the use of opinion surveys).

44. See Lipsky, *supra* note 39, at 675 (noting the difficulty in categorizing these worker participation programs because of their hybrid nature). These programs, however successful they may be, have received mixed reactions from labor groups, management, the National Labor Relations Board, and the courts. See *id.*

45. See Kohler, *supra* note 33, at 509; see also Stephen M. Bainbridge, *Participatory*

However, worker participatory schemes all “represent efforts to involve workers in the overall operation of an enterprise for the simultaneous purposes of improving productivity, competitiveness, and job satisfaction.”⁴⁶ As a result, “[t]here is no single dominant arrangement of participatory and cooperative schemes.”⁴⁷ This fact makes defining these various programs troublesome.⁴⁸ For purposes of this Comment, the terms “worker participation scheme” and “participatory scheme” refer generally to all of these various committees that exist within the workplace.⁴⁹

A. Quality Circles

Generally, a quality circle [QC] consists of a small group of workers meeting regularly, on a voluntary basis, to analyze shop floor concerns and recommend solutions to management.⁵⁰ This small group may include workers, supervisors, and managers, which may help overcome

Management Within a Theory of the Firm, 21 J. CORP. L. 657, 685 (1996) (noting that quality circles are the most discussed form of worker participation schemes). Quality circles operate through a small group of employees (from five to fifteen) meeting regularly during work time to discuss issues of workplace performance. *See id.* The main focus of the quality circle is to reduce the “us versus them mentality,” using group effort and feedback from management regarding the workers’ efforts. *See id.* Quality circles are unique in that members often come from one department within the organization. *See id.* Semi-autonomous workgroup programs are comprised of teams that are responsible for a specific aspect of the production process. *See Kohler, supra* note 33, at 507-08; *see also* Clarke, *supra* note 14, at 2025 (describing general characteristics of semi-autonomous work teams).

46. Jonathan B. Goldin, Comment, *Labor-Management Cooperation: Bath Iron Works’s Bold New Approach*, 47 ME. L. REV. 415, 434 (1995); *see also* Electromation, Inc. v. NLRB, 35 F.3d 1148, 1156 (7th Cir. 1994) (noting that “many United States companies have developed employee involvement structures which encourage employee participation in the design of workplace policies and procedures to improve the efficiency and effectiveness of the corporate organization and to create a workplace environment which is satisfactory to employees”).

47. Goldin, *supra* note 46, at 433.

48. *See* McLeod, *supra* note 35, at 234 (noting that the difficulty in defining these programs is based on the fact that various types of programs often are described as quality of worklife initiatives or quality circles); *see also* BLOCK, *supra* note 28, at 35 (noting that “[a]lthough there is no legally accepted definition of an [employee participation plan], it may be defined as a structure or program under which firms solicit suggestions or input from employees on workplace issues”).

49. *See* Kristine Price, Comment, *Tearing Down the Wall: The Need for Revision of NLRA § 8(a)(2) to Permit Management-Labor Participation Committees to Function in the Workplace*, 26 TEX. TECH L. REV. 1393, 1393-94 (1995).

50. *See* Kohler, *supra* note 33, at 506. These programs are patterned on Japanese schemes and “turn[] over to workers the responsibility to identify and solve product quality and production problems.” *Id.*; *see also* Bainbridge, *supra* note 45, at 686 (describing how elements of QCs point to their “information gathering function”).

“traditional status distinctions and job definitions.”⁵¹ Participatory schemes, such as QCs, have evolved as employers responded to decreasing productivity and foreign competition.⁵² Some programs have evolved based on unilateral actions of management, while others are established through a collective bargaining agreement.⁵³ QCs typically have a dual purpose.⁵⁴ First, QCs aim to improve productivity by increasing workers’ attention to the quality of the product.⁵⁵ Second, QCs “enhanc[e] working conditions by allowing workers to exert . . . influence over the work environment.”⁵⁶ The overall goal of a QC is to enhance employee working conditions.⁵⁷ QCs, which have been widely used, usually involve the least delegation of power to employees.⁵⁸ Overall, workers involved in QCs are able to provide recommendations to management, but do not possess “substantial decision-making authority.”⁵⁹

At Ford Motor Company, for example, an employee involvement plan helped implement QC concepts.⁶⁰ The employees are trained in various problem-solving methods and are monitored by a steering committee.⁶¹ These employees make their recommendations to management with a

51. Goldin, *supra* note 46, at 434 (footnote omitted).

52. See Sockell, *supra* note 13, at 1002 (explaining that aside from financial concerns, employers have turned to these participatory programs to satisfy employees’ desires for input into organizational decision-making and to avoid unionization of their workforce).

53. See Robert B. Moberly, *The Worker Participation Conundrum: Does Prohibiting Employer-Assisted Labor Organizations Prevent Labor-Management Cooperation?*, 69 WASH. L. REV. 331, 331-32 (1994).

54. See Ryan, *supra* note 26, at 581; see also Kohler, *supra* note 33, at 506 (stating that QCs provide a mechanism for workers to influence the method of product design and how their work is performed).

55. See *Participatory Management*, *supra* note 22, at 1740-41.

56. Ryan, *supra* note 26, at 581 (footnote omitted); see also Kohler, *supra* note 33, at 506 (noting that QCs enable workers to have an influence in product design and how they perform their job).

57. See Ryan, *supra* note 26, at 581. *But see* Bainbridge, *supra* note 45, at 686 (noting that critics of quality circles observe that QCs allow management to maintain its decision-making power and control).

58. See Nunn, *supra* note 34, at 1390-91 (noting that quality circles, along with survey feedback, are based on suggestion-oriented, problem-solving approaches).

59. *Id.* at 1391.

60. See Ryan, *supra* note 26, at 581. The QC element of the program involves a weekly session between management and labor. See *id.* At these sessions, management solicits suggestions from team members with the goal of improving production. See *id.*; see also Dicato, *supra* note 43, at 700-01 (detailing the use of the employee involvement plan at the Ford Motor Company).

61. See Ryan, *supra* note 26, at 581. At Ford, this steering committee consists of both union and management representatives that monitor the team to ensure the successful operation of the program. See *id.* at 581 n.40.

large percentage of the suggestions being implemented.⁶²

B. Semi-Autonomous Work Groups

Semi-autonomous work group participatory plans organize workers into teams, each with its own supervisor elected by the team or provided by the employer.⁶³ These employees make suggestions on how to improve production and they independently decide which suggestions to implement.⁶⁴ The team's authority includes the ability to decide how work will be performed, selection of new team members, and scheduling of overtime for team members.⁶⁵ The team members are responsible for production of a final product or the performance of a major operational function.⁶⁶ The use of semi-autonomous work groups often results in the greatest delegation of power to workers "involving 'substantial changes in the basic structure of the organization . . . aimed at moving important decisions into the hands of individuals and teams performing the basic manufacturing or service work of the company.'"⁶⁷ This approach, however, requires the diffusion of authority and decision-making power throughout the organization.⁶⁸ As a consequence, the level of supervision over the team members is reduced.⁶⁹

One successful example of a semi-autonomous work group participatory plan is the GM-Toyota New United Motor Plant joint venture.⁷⁰

62. *See id.* at 581-82 (illustrating two specific cases at Ford where employee involvement resulted in increased performance and greater worker satisfaction). The QC program at Ford has led to a decrease in the number of employee grievances and an increase in productivity and overall product quality. *See id.* at 582.

63. *See id.* at 583. The teams usually consist of between eight to ten employees and are assembled from workers in the same department. *See Dicato, supra* note 43, at 698. Worker autonomy is increased so individuals learn how to perform the jobs of co-workers. *See id.*

64. *See Ryan, supra* note 26, at 583. The effect of this independence is the delegation of increased responsibility to workers. *See id.*

65. *See id.*

66. *See Kohler, supra* note 33, at 507. The teams may have the responsibility for interviewing and selecting applicants pre-determined by management, appraising the performance of team members, preparing budgets, and monitoring costs related to the team's duties. *See id.* at 508.

67. Nunn, *supra* note 34, at 1391-92 (footnote omitted).

68. *See Kohler, supra* note 33, at 508. This method of workplace organization is in direct contradiction to the traditional assembly line. *See Ryan, supra* note 26, at 583. Instead of workers being responsible for only a singular task or function, team members may have the responsibility to produce a finished product. *See id.*

69. *See Kohler, supra* note 33, at 508. The decreased supervision serves to diminish the distinction between management and labor. *See id.*

70. *See Ryan, supra* note 26, at 584. For a detailed discussion of the Toyota and GM joint venture, see Weiss, *supra* note 29, at 450-60.

This program uses teams consisting of five to ten employees, with one team leader.⁷¹ The team determines the most efficient manner to perform a certain task.⁷² Once this determination is made, other individuals in the plant perform the job in the same manner.⁷³ The team leader, who is appointed by management, has the ultimate responsibility for implementing the decisions of the team.⁷⁴ The large percentage of employees satisfied with their jobs,⁷⁵ the low absenteeism rate among employees,⁷⁶ and the attainment of high levels of productivity and quality⁷⁷ demonstrate this program's success.

C. Labor-Management Committees

QCs and semi-autonomous work groups offer all employees the opportunity to participate directly in the decision-making process.⁷⁸ In contrast, a labor-management committee is composed of management officials and workers who may be "elected, volunteered, or selected by management."⁷⁹ The labor-management committee does not deal with specific issues, but often addresses a wide variety of issues at the department or plant level.⁸⁰

Labor-management committees limit the amount of direct involvement that workers have in organizational decision making.⁸¹ The structure of the committee itself limits the employees' involvement.⁸² The representatives, who may be chosen by employees or management, meet directly with upper level management to discuss the employees' concerns.⁸³ Despite the limited degree of employee involvement, this type of

71. See Ryan, *supra* note 26, at 584.

72. See *id.*

73. See *id.*

74. See *id.*

75. See Weiss, *supra* note 29, at 459 (stating that "[t]he proportion of employees declaring themselves satisfied or very satisfied with their employment has risen steadily, from 76% in 1987, to 85% in 1989, to 90% in 1991").

76. See *id.* at 434 (finding that the absenteeism rate remained consistent at 3%).

77. See *id.* (noting that the production and quality levels at the Freemont, California plant matched the standards set in Toyota's Japanese plants).

78. See Ryan, *supra* note 26, at 586.

79. See Moe, *supra* note 42, at 1157.

80. See *id.*

81. See Ryan, *supra* note 26, at 586; see also A.B. Cochran, III, *We Participate, They Decide: The Real Stakes in Revising Section 8(a)(2) of the National Labor Relations Act*, 16 BERKELEY J. EMP. & LAB. L. 458, 463 (1995) (discussing the general elements of labor-management committees).

82. See Ryan, *supra* note 26, at 586.

83. See *id.*

participation plan has had a successful track record, based in part on the plan's ability to "improv[e] productivity, solv[e] production-related problems, and prevent[] labor strife by boosting employee morale."⁸⁴

Overall, labor-management committees provide employees the opportunity to discuss a wide range of issues directly with high-level management representatives.⁸⁵ Unlike QCs and semi-autonomous work-groups, the issues are not limited only to "immediate production responsibilities of those present, or to the conditions in which a particular group conducts its work."⁸⁶ Committees often focus on soliciting employee concerns relating to all aspects of employment and improving overall organizational performance.⁸⁷

Characteristics of this plan generally include: (1) an equal proportion of management and labor representatives on the team; (2) a team set agenda; (3) team leaders that are composed of one representative from management and labor respectively; (4) team meetings that occur on a regular basis; and (5) a large number of employees who are exposed to the worker participation process through a rotating employee membership.⁸⁸

At AT&T, the implementation of a labor-management committee eventually developed into an extensive cooperative program.⁸⁹ This committee at AT&T led to increased cooperation and interaction between labor and management.⁹⁰ In one instance, the AT&T committee instituted a QC with professional employees, that "led to an increase in productivity and a decrease in absenteeism for the group involved."⁹¹

There are a wide range of benefits that flow to both management and labor from the use of worker participation schemes.⁹² Management gains include enhanced efficiency in production and the potential to compete with foreign firms more effectively.⁹³ Labor achieves increased control of

84. *Participatory Management*, *supra* note 22, at 1738-39 (footnote omitted).

85. *See Ryan*, *supra* note 26, at 586.

86. *Id.*

87. *See id.* at 586-87 (describing also the successful use of a joint labor-management committee at AT&T).

88. *See Moe*, *supra* note 42, at 1157-58.

89. *See Ryan*, *supra* note 26, at 587.

90. *See id.*

91. *Id.* (footnote omitted).

92. *See id.* at 587-88.

93. *See id.*; *see also Moberly*, *supra* note 22, at 778-79 (explaining how at Lockheed, savings from the use of a worker participation scheme were almost four times the operating cost of the program); *cf. Lee*, *Collective Bargaining Part I*, *supra* note 41, at 206 (noting how the interest and use of employee participation plans has heightened, in part, due to increased foreign competition).

their workplace and an overall increase in job satisfaction.⁹⁴

The use of these participation plans, however, is not without potential legal problems.⁹⁵ The NLRA, in defining what individuals are covered, never expressly comments on the status of managerial employees.⁹⁶ Additionally, defining a managerial employee's role is the more difficult task.⁹⁷ An organization, by granting an employee nominal decision-making authority, may unintentionally place that employee in a managerial position.⁹⁸ The struggle by the Board and courts in defining who is a managerial employee is a significant obstacle in determining when the use of certain participation plans will force statutory employees outside the coverage of the Act.⁹⁹

II. THE DEVELOPMENT OF THE MANAGERIAL EXCLUSION

A. History of the Wagner Act

Enacted in 1935 during the height of the Great Depression, the Wagner Act, which comprised the NLRA prior to its amendment,¹⁰⁰ was a direct response to the weaknesses of section 7(a) of the National Industrial Recovery Act (NIRA).¹⁰¹ NIRA, enacted by Congress in 1933, "attempted to persuade industry to recognize employee rights to organize

94. See Ryan, *supra* note 26, at 587.

95. See Lipsky, *supra* note 39, at 685-86 (describing how the status of a statutory employee depends on the duties and authority an employee is granted upon joining a worker participation program); see also Clarence R. Deitsch, *Participatory Management And Labor Law: A Collision Course?*, 38 LAB. L.J. 786, 789-90 (1987) (commenting that the Court's *Yeshiva* decision could lead to the development of a test for determining an individual's status when that individual is involved in a worker participatory scheme).

96. See Lipsky, *supra* note 39, at 683 (noting that it is the Board and the courts who have created the managerial exclusion); see also Lee, *Collective Bargaining Part II*, *supra* note 9, at 275 (asserting that the managerial exclusion is not statutory).

97. See Lee, *Collective Bargaining Part II*, *supra* note 9, at 275 (commenting that neither the Act nor Board decisions have created a clear standard of managerial or supervisory authority).

98. See Harold J. Krent, Note, *Collective Authority and Technical Expertise: Reexamining the Managerial Employee Exclusion*, 56 N.Y.U. L. REV. 694, 730 (1981) (stating how a broad interpretation of the *Yeshiva* decision "might exclude groups of blue-collar workers exercising minor managerial functions from the protections of the Act").

99. See Deitsch, *supra* note 95, at 790 (stating that workers, if deemed managerial due to their involvement in the participation scheme, would no longer be considered an employee within the Act's definition).

100. See Marion Crain, *Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment*, 74 MINN. L. REV. 953, 963 n.48 (1990).

101. See S. REP. NO. 74-573, at 4-6 (1935) (stating that problems existing with current law included its ambiguity, excessive diffusion of administrative responsibility, and lack of enforcement power vested in the National Labor Relations Board).

and to bargain collectively.”¹⁰² The lack of an enforcement mechanism limited NIRA’s effectiveness, as management ignored unions’ efforts to establish collective bargaining agreements.¹⁰³ The Wagner Act thus sought to accomplish two major goals: (1) to reduce industrial strife, and (2) to balance bargaining power between management and labor to improve economic opportunities and allow more freedom of choice in employer-employee relationships, thus resulting in economic recovery.¹⁰⁴ These goals could be attained through the use of labor-management collective bargaining in the workplace.¹⁰⁵ By establishing the use of collective bargaining, the Wagner Act gave workers the right to unionize and bargain collectively over the terms and conditions of their employment.¹⁰⁶

The Wagner Act set forth certain definitions, declaring who or what entities were to be afforded statutory protections.¹⁰⁷ The statute granted certain protections to employees and defined them as “any employee, . . . not . . . limited to the employees of a particular employer.”¹⁰⁸ The definition of employee did not, however, differentiate between various types of individuals employed within an organization.¹⁰⁹ The only clear exclusions from the definition of employee were “individual[s] employed as . . . agricultural laborer[s], or in the domestic service of any family or person at [their] home, or . . . individual[s] employed by [their] parent[s] or

102. 1 THE DEVELOPING LABOR LAW, *supra* note 2, at 25-26.

103. *See id.* *See generally* IRVING BERNSTEIN, *TURBULENT YEARS 172-85* (1970) (discussing the failure of section 7(a) of the NIRA).

104. *See* S. REP. NO. 74-573, at 1-3. The Senate Committee on Education and Labor calculated that, “[d]uring the period from 1915 through 1921 there were on the average 3,043 strikes per year, involving the vacating of 1,745,000 jobs and the loss of 50,242,000 working days every 12 months.” *Id.* at 1-2. The Committee also explained how a disparity in workers’ wages “did not permit the masses of consumers to relieve the market of an ever-increasing flow of goods.” *Id.* at 3.

105. *See* Crain, *supra* note 100, at 964; *see also* HARRY A. MILLIS & EMILY CLARK BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY, A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS* 31 (1950) (describing the history behind the passage of the Wagner Act); Casebeer, *supra* note 3, at 290-91 (noting that state-supported collective bargaining power would help ameliorate the inequitable distribution of bargaining power and, in turn, redistribute wealth and improve consumption).

106. *See* 29 U.S.C. § 157 (1994) (granting to workers the right “to bargain collectively through representatives of their own choosing”).

107. *See id.* § 152 (definitions section).

108. *Id.* § 152(3). Congress granted employees “the right to self organiz[e], to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” *Id.* § 157.

109. *See* Crain, *supra* note 100, at 970; *see also* Rabban, *supra* note 5, at 1782 (noting that employers argued for the exclusion of managerial and supervisory employees from the Act based on those employees’ relationship with management).

spouse.”¹¹⁰ The Act’s coverage, therefore, was intended to extend only to those workers properly classified as “employees.”¹¹¹

B. Early Determinations of the Wagner Act’s Scope of Protection

Soon after the passage of the Wagner Act, the Board faced challenging issues of interpreting its legislative intent¹¹² and establishing appropriate bargaining units for statutory employees.¹¹³ Initial Board decisions, however, produced no definitive standards regarding the appropriateness of creating bargaining units consisting only of managerial employees.¹¹⁴

1. Excluding Managerial Employees from Rank-and-File Employee Bargaining Units

The Board’s early decisions, although not explicitly excluding managerial employees from the Act, prohibited placement of managerial employees in bargaining units containing rank-and-file workers.¹¹⁵ In *Ford Motor Co.*,¹¹⁶ for example, the Board declared that managerial employees should be excluded from bargaining units consisting of rank-and-file workers.¹¹⁷ This exclusion applied to a broad range of employment rela-

110. National Labor Relations (Wagner) Act, ch. 372, § 2(3), Pub. L. No. 74-198, 49 Stat. 449, 450 (1935) (codified as amended at 29 U.S.C. § 152(2) (1994)).

111. See *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 488 (1947) (stating that the privileges and benefits of the Act are conferred upon employees as defined by section 2(3) of the NLRA).

112. See *Krent*, *supra* note 98, at 697 (stating that the Board faced two competing interests in interpreting the Act: safeguarding workers’ rights and the need to protect management’s right to the undivided loyalty of its workers).

113. See NLRA § 9(b), 29 U.S.C. § 159(b); see also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275-76 (1974) (noting that the Board first developed the concept of “managerial employee” in the course of determining the appropriateness of bargaining units).

114. See *Angel*, *supra* note 16, at 419 (describing the Board’s practice of only excluding employees deemed managerial from bargaining units consisting of rank-and-file workers).

115. See *Spicer Mfg. Corp.*, 55 N.L.R.B. 1491, 1498 (1944) (excluding expeditors from a unit consisting of clerical, office, technical, and professional employees due to the managerial nature of the expeditors’ power); *Country Life Press Corp.*, 51 N.L.R.B. 1362, 1364 (1943) (stating that the Board’s policy has been to exclude general foremen that appear to possess managerial authority); *Julien P. Friez & Sons*, 47 N.L.R.B. 43, 47 (1943) (holding that expeditors, because they were closely related to management, were to be excluded from a bargaining unit consisting of clerical employees); *Chicago Rotoprint Co.*, 45 N.L.R.B. 1263, 1267 (1942) (excluding general foremen from a bargaining unit because they appeared to possess managerial authority); *Goodyear Tire & Rubber Co.*, 3 N.L.R.B. 431, 437 (1937) (excluding “squadron men” from a unit of production workers because of their “intimate” relationship with management, even though they were not supervisory).

116. 66 N.L.R.B. 1317 (1946).

117. See *id.* at 1322; see also *Barrett Div.*, 65 N.L.R.B. 903, 905 (1946) (stating that assistants to a buyer who exercised a management-like function could not be included in a

tionships¹¹⁸ including expeditors,¹¹⁹ assistant buyers,¹²⁰ a circulation department manager,¹²¹ and a public relations person.¹²²

The Board's decision to exclude managerial employees from rank-and-file units was in part a response to employer concerns.¹²³ Employers believed that they were entitled to the undivided loyalties of their management.¹²⁴ They argued that, because of their special relationship with management, managerial employees should be excluded from the Act's coverage.¹²⁵ They feared that the organization of managerial employees potentially could divide workers' loyalties "between the competing interests of unions and management."¹²⁶

Decisions such as *Ford Motor Co.* produced little guidance,¹²⁷ as the Board never conclusively determined whether managerial employees were outside the scope of the Act's protections.¹²⁸ In *Dravo Corp.*,¹²⁹ the Board even expressly refused to address the issue.¹³⁰

2. *The Inconsistent Treatment of Supervisory Employees Under the Wagner Act*

The Board's inconsistent treatment of supervisors under the Wagner

bargaining unit consisting of office clerical employees); *Hudson Motor Car Co.*, 55 N.L.R.B. 509, 512 (1944) (excluding buyers from clerical unit as "their duties are closely allied to management, differing materially from those of the other clerical employees").

118. See *NLRB v. North Ark. Elec. Coop., Inc.*, 412 F.2d 324, 326 n.4 (8th Cir. 1969).

119. See *Julien P. Friez & Sons*, 47 N.L.R.B. at 47.

120. See *J.L. Brandeis & Sons*, 54 N.L.R.B. 880, 884, *enforcement denied on other grounds*, 145 F.2d 556 (8th Cir. 1944).

121. See *Garden Island Publ'g Co.*, 154 N.L.R.B. 697, 701 (1965).

122. See *Fresno Auto Auction, Inc.*, 167 N.L.R.B. 878, 879 (1967).

123. See *Rabban*, *supra* note 5, at 1782 (noting that employers were concerned about the loyalty of managerial employees if these employees became part of a rank-and-file unit).

124. See *id.* at 1778, 1782.

125. See *id.* at 1782.

126. *Id.*

127. See Andrew J. Stites, Comment, *Will the Real Managerial Employees Please Stand Up?*, 9 LOY. L.A. L. REV. 92, 96 (1975) (arguing that the Board's interchangeable use of the terms supervisor, manager, and confidential employee led to confusion).

128. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 276 (1974). The issue of whether an employee should be excluded from a bargaining unit is a separate consideration from whether an employee may, along with other like employees, form their own bargaining unit. See *Germana*, *supra* note 10, at 407-08. Determining an appropriate bargaining unit for an employee "rests upon the relationship between the employee and the other employees in the group." *Id.* at 408. "[I]n contrast, the decision to exclude an employee from the NLRA altogether because she is managerial rests upon the relationship between the employee and the employer." *Id.* (footnote omitted).

129. 54 N.L.R.B. 1174 (1944).

130. See *id.* at 1177.

Act was just as problematic.¹³¹ Prior to the Taft-Hartley amendments in 1947, which expressly excluded supervisors from the NLRA's protections,¹³² the Board, in unfair labor practice proceedings, extended the Act's protections to workers that possessed certain indicia of supervisory authority.¹³³ In the 1942 *Union Collieries Coal Co.*¹³⁴ decision, the Board, for the first time, considered whether supervisors were entitled to form their own bargaining unit.¹³⁵ The Board stated that Congress's exclusion of only three types of employees from the Act's coverage was a signal that all other employees, including supervisors, were protected by the Act.¹³⁶ The Board ultimately concluded that the supervisors in question were within the Act's protections and could therefore, organize into their own bargaining unit.¹³⁷ The Board did note, however, that its decision did not signal an approval of allowing supervisors and their subordinates to organize into the same collective bargaining unit or as separate bargaining units affiliated with the same union.¹³⁸

Despite the limitation the Board placed on supervisors in its *Union Collieries* decision, that same year the Board, in *Godchaux Sugars, Inc.*,¹³⁹

131. See Krent, *supra* note 98, at 697; cf. Stites, *supra* note 127, at 95 (noting that, based on the broad definition of employee under § 2(3) of the Act, the Board acted with "caution, uncertainty, and abrupt change" in its policy of excluding supervisors from bargaining units). The Board, in determining the composition of a particular bargaining unit, often deferred to union determinations of appropriate bargaining units. See *id.* These union determinations led to the exclusion of numerous categories of workers, such as maintenance employees, outside employees, clerical and office workers, and technical and professional employees. See *id.* at 95 n.22.

132. See 29 U.S.C. § 152(3) (1994); see also Daniel Rhodes Barney, *Bell Aerospace and the Status of Managerial Employees Under the NLRA*, 1 INDUS. REL. L. J. 346, 353-54 (1976) (discussing how both the House and Senate excluded supervisors, but defined the term supervisor differently).

133. See, e.g., *Warfield Co.*, 6 N.L.R.B. 58, 64 (1938) (describing the Board's traditional protection of a union comprised of highly skilled employees, here engineers, "entrusted with greater responsibilities than most other employees"); *Star Publ'g Co.*, 4 N.L.R.B. 498, 501, 505-06 (1937) (holding that employees who served as district and branch managers, with supervisory duties over the carrier boys, retained status as employees under section 2(3) of the Act and were protected against retaliatory actions of their employer).

134. 44 N.L.R.B. 165 (1942), *overruled by Maryland Drydock Co.*, 49 N.L.R.B. 733 (1943).

135. See *id.* at 167. The Board stated that the supervisors in question (mine foremen and fire bosses) were "employees" under section 2(2) of the Act. See *id.*

136. See *id.* at 167-68; see also *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 191 (1941) (noting that Congress was aware of the problems faced by workers not entitled to a legal remedy).

137. See *Union Collieries*, 44 N.L.R.B. at 169.

138. See *id.*

139. 44 N.L.R.B. 874 (1942).

determined that a unit of foremen, considered supervisors by the employer, was entitled to the protections of the Act.¹⁴⁰ The Board held that these foremen could affiliate with the same parent labor union representing rank-and-file workers, but as a separate bargaining unit consisting only of supervisors.¹⁴¹

The Board, in 1943, reevaluated its recognition of a bargaining unit of supervisors in *Maryland Drydock Co.*¹⁴² The Board expressly overruled its earlier decisions by denying certification to a bargaining unit consisting of supervisors.¹⁴³ The Board noted that, although a supervisor may still be considered an "employee" under the Act, it was no longer appropriate to sanction a bargaining unit composed entirely of supervisors.¹⁴⁴

In 1945, the Board reversed itself once again in *Packard Motor Car Co.*¹⁴⁵ The Board declared that the foremen employed at Packard Motor Car could form a separate bargaining unit.¹⁴⁶ The Board reasoned that foremen could bargain collectively with their employer and still perform their duties effectively and loyally.¹⁴⁷ In a five to four decision, the Supreme Court affirmed the Sixth Circuit's enforcement of the Board's ruling.¹⁴⁸ The Court determined that the foremen at Packard Motor Car were entitled to the Act's protections when taking concerted action to protect their common interests.¹⁴⁹ The majority held that a bargaining unit comprised solely of foremen was appropriate under section 9(b) of

140. *See id.* at 877 (stating that supervisory employees are protected by statute in exercising their organizational and collective bargaining rights).

141. *See id.* at 878.

142. 49 N.L.R.B. 733 (1943).

143. *See id.* at 741-42 (stating that establishment of a unit composed of supervisors would make collective bargaining difficult and be inconsistent with the policies of the Act).

144. *See id.* at 738.

145. 61 N.L.R.B. 4 (1945), *enforced*, 157 F.2d 80 (6th Cir. 1946), *aff'd*, 330 U.S. 485 (1947).

146. *See id.* at 26.

147. *See id.* at 19. The employer believed that a foreman's allegiance to management would become divided, or possibly lost, if the company was obligated to bargain collectively with these workers. *See id.* at 18. The Board responded that "the foreman owes no duty of loyalty to his employer, for in this aspect of his employment relationship, he deals with management at arms length and must rely ultimately upon his own bargaining power to gain concessions just as any rank and file employee." *Id.* at 19.

148. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 493, 501 (1947), *superseded by* 29 U.S.C. § 152(3) (1994). Justice Jackson wrote the majority opinion. *See id.* at 486. Justice Douglas's dissent was joined by Chief Justice Vinson and Justice Burton. *See id.* at 493. Justice Frankfurter joined in Justice Douglas's dissent except for the first section. *See id.* at 501.

149. *See id.* at 490.

the Act.¹⁵⁰

In a strong dissent, Justice Douglas criticized the majority for its failure to maintain the bright line distinction between management and labor.¹⁵¹ Justice Douglas expressed concern that the majority's decision allowed for the unionization of virtually all employees within an organization.¹⁵² According to Justice Douglas, the majority did not understand the hierarchical structure of labor relations.¹⁵³ As a result, Justice Douglas argued, the majority's decision permitted the unionization of upper management.¹⁵⁴

C. Congressional Response to Packard Motor Car: The Taft-Hartley Amendments

In response to the Court's decision in *Packard Motor Car*, Congress enacted the Taft-Hartley amendments to the Wagner Act in 1947.¹⁵⁵ The Taft-Hartley amendments explicitly excluded supervisory employees¹⁵⁶

150. See *id.* at 491. The Court noted that section 9(b) of the Act gave the Board broad discretion in fashioning appropriate bargaining units. See *id.*

151. See *id.* at 494 (Douglas, J., dissenting). The most important consideration for Justice Douglas was the maintenance of the traditional separation between labor and management, a fundamental element of United States industry. See *id.*; see also Krent, *supra* note 98, at 698 n.33. Justice Douglas stated

Over thirty years ago Mr. Justice Brandeis, while still a private citizen, saw the need for narrowing the gap between management and labor, for allowing labor greater participation in policy decisions, for developing an industrial system in which cooperation rather than coercion was the dominant characteristic. In his view, these were measures of therapeutic value in dealing with problems of industrial unrest or inefficiency.

The present decision may be a step in that direction. It at least tends to obliterate the line between management and labor.

Packard Motor Car, 330 U.S. at 493-94 (Douglas, J., dissenting) (footnote omitted).

152. See *Packard Motor Car*, 330 U.S. at 494. Justice Douglas explained that "if foremen are 'employees' within the meaning of the National Labor Relations Act, so are vice-presidents, managers, assistant managers, superintendents, assistant superintendents—indeed, all who are on the payroll of the company . . . with the exception of the directors." *Id.*

153. See *id.* at 493-94; see also Krent, *supra* note 98, at 698 n.33.

154. See *Packard Motor Car*, 330 U.S. at 494 (Douglas, J., dissenting). Justice Douglas concluded that as a result, "management and labor will become more of a solid phalanx than separate factions in warring camps." *Id.*

155. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 279 (1974) (noting that *Packard Motor Car* was a catalyst for the enactment of the Taft-Hartley amendments); Crain, *supra* note 100, at 972 (stating that Congress responded to the *Packard* dissent by enacting Taft-Hartley in 1947).

156. See 29 U.S.C. § 152(3) (1994). Supervisory employees are defined as individual[s] having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effec-

from the coverage of the Act.¹⁵⁷ Congress limited the supervisory exclusion, however, by requiring the employee to act “in the interest of the employer” before being deemed a supervisor.¹⁵⁸ The Taft-Hartley amendments did include professionals as statutory employees, thus ensuring that not all workers exercising independent judgment and discretion were outside the Act’s protections.¹⁵⁹ The amendments, however, did not mention the term “managerial employee” within the statutory definition of employee.¹⁶⁰

Congress, in response to the *Packard Motor Car* decision, determined that the Board’s interpretation of the term “employee,” which included individuals exercising managerial authority, may have been too broad.¹⁶¹

tively 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.

Id. § 152(11).

157. Labor Management Relations (Taft-Hartley) Act, ch. 120, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187). The House and Senate versions of the supervisory exclusion differed in the amount of authority an individual could exercise before being deemed a supervisor. See *Bell Aerospace*, 416 U.S. at 279-80. The Senate bill established a narrower category of duties that would classify an individual as a supervisor. See *id.* at 280. The Senate version reflected the belief “that employees such as ‘straw bosses,’ who had only minor supervisory duties, should be included within the Act’s protections.” *Id.* at 281. The Conference Committee adopted the Senate version, thus limiting the scope of the supervisory exclusion. See *id.* at 282.

158. 29 U.S.C. § 152(11).

159. See Rabban, *supra* note 5, at 1797-99 (noting that inclusion of professionals within the Taft-Hartley amendments was a compromise between the desires of unions to organize professionals, who they thought were no different from other white collar employees, and the desires of professional associations, which sought to distinguish professionals from clerical and industrial workers). Section 152(12) defines a “professional employee” as

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

29 U.S.C. § 152(12).

160. See 29 U.S.C. § 152(3).

161. Cf. S. REP. NO. 80-105, at 3-4 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 407, 409-10 (1985) [hereinafter 1 NLRB LEGISLATIVE HISTORY, 1947] (noting that the Board’s definition of

As a result, Congress expressly excluded supervisory employees.¹⁶² The language suggests, however, that Congress also may have believed that the need for an express “managerial exclusion” was unnecessary, because individuals exercising less responsibility than managerial employees were already ineligible for the Act’s protections via the supervisory exclusion.¹⁶³

D. The Implied Managerial Exclusion

Taft-Hartley’s ambiguous treatment of managerial employees forced the Board to determine the scope of the explicit supervisory and implicit managerial exclusions.¹⁶⁴ After the passage of the Taft-Hartley amendments in 1947, the Board, in *Denver Dry Goods Co.*,¹⁶⁵ excluded from bargaining units workers whose interests were “more closely identified with those of management.”¹⁶⁶ Following its decision in *Denver Dry Goods*, the Board again reiterated its pre-1947 policy of excluding “managerial employees” from bargaining units composed of other employees.¹⁶⁷ The Board, however, did not completely deny managerial

employee could “be used to unionize even vice presidents since they are not specifically exempted from the category of ‘employees’”); see also *Bell Aerospace*, 416 U.S. at 281.

162. See 29 U.S.C. § 152(2).

163. Cf. H.R. REP. NO. 80-245, at 13-17 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY, 1947, *supra* note 161, at 292, 304-08; S. REP. NO. 80-105, at 3-5 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY, 1947, *supra* note 161, at 407, 409-11. In discussing the exclusion of confidential employees from the protections of the Act, Congress noted “[m]ost of the people who would qualify as ‘confidential’ employees are executives and are excluded from the act in any event.” H.R. REP. NO. 80-245, at 23, reprinted in 1 NLRB, LEGISLATIVE HISTORY, 1947, *supra* note 161, at 292, 314 (emphasis added); see also *Bell Aerospace*, 416 U.S. at 283-84.

Congressional oversight or an implicit approval of the Board’s prior treatment of managerial employees may have been some of the reasons for the omission of an express managerial employee exclusion. See Krent, *supra* note 98, at 699.

164. See Krent, *supra* note 98, at 700 (noting how Taft-Hartley required the Board to first determine who was a managerial employee and then to decide what protections these managerial employees were afforded under the Act); see also *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944) (holding that “the Board’s determination that specified persons are ‘employees’ under this Act is to be accepted if it has ‘warrant in the record’ and a reasonable basis in the law”).

165. 74 N.L.R.B. 1167 (1947).

166. *Id.* at 1175.

167. See Barney, *supra* note 132, at 357 (discussing Supreme Court cases that reviewed post-1947 Board decisions). For example, in *Palace Laundry Dry Cleaning Corp.*, 75 N.L.R.B. 320, 323 & n.4 (1947), the Board stated that it had, “in the past, and before the passage of the recent amendments to the Act, recognized and defined as ‘managerial’ employees, executives who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and ha[d] excluded such managerial employees from bargaining units.” *Id.* (citations omitted). The Board said in reference to the Taft-Hartley Act, that “[w]e believe that the Act, as amended, contemplates the con-

employees the protection of the Act; rather, it only excluded them from bargaining units consisting of non-managerial employees.¹⁶⁸

In *Swift & Co.*,¹⁶⁹ however, in 1956, the Board declared that a separate bargaining unit of individuals representing management was inappropriate.¹⁷⁰ Such individuals, the Board concluded, “cannot be deemed to be employees for the purposes of the Act.”¹⁷¹ The Board, over the next fourteen years, consistently applied the managerial exclusion, denying managerial employees bargaining rights under the Act.¹⁷² During this time period, the federal courts of appeals also approved the Board’s construction of the managerial exclusion.¹⁷³

tinuance of this practice.” *Id.*; see also *Denton’s Inc.*, 83 N.L.R.B. 35, 37 (1949) (excluding buyers and assistant buyers from a bargaining unit because their “interests . . . [we]re more closely identified with management than with the other employees in the store”).

168. See *Barney*, *supra* note 132, at 357-58 (stating that the Board did not definitively exclude managerial employees from the Act’s coverage); see also *Titeflex, Inc.*, 103 N.L.R.B. 223, 225-26 (1953) (excluding from a bargaining unit a buyer deemed managerial because of his authority to commit the employer’s credit by placing orders with a vendor from an approved list); *Western Elec. Co.*, 100 N.L.R.B. 420, 423 (1952) (concluding that a buying assistant who had the authority to commit the employer for purchases of materials was managerial and could not be included in the bargaining unit); *East Coast Fisheries, Inc.*, 97 N.L.R.B. 1261, 1263-64 (1952) (holding that long distance truck drivers who have the power to pledge their employer’s credit are managerial employees excluded from a bargaining unit of other employees). *But see Wilson & Co.*, 97 N.L.R.B. 1388, 1393 (1952) (reasoning that certain assistant managers, who had freedom to exercise considerable discretion, were not managerial employees because their decisions had to conform “to the Employer’s established policies” and they were not able to formulate or effectuate management policy).

169. 115 N.L.R.B. 752 (1956), *overruled by* *North Ark. Elec. Coop., Inc.*, 185 N.L.R.B. 550 (1970), *enforcement denied*, 446 F.2d 602 (8th Cir. 1971).

170. See *id.* at 753. The Board concluded that Congress clearly intended to exclude employees with management-like duties from the Act’s protections. See *id.* at 753-54.

171. *Id.* at 754. The Board went on to reaffirm its position, saying “that representatives of management may not be accorded bargaining rights under the Act.” *Id.*; cf. *American Locomotive Co.*, 92 N.L.R.B. 115, 116-17 (1950) (determining that buyers, as representatives of management, would not be included in a unit of clerical workers nor “be accorded bargaining rights under the Act”).

172. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 287-89 (1974) (noting that the Board has stated its understanding of the Act as denying managerial employees any bargaining rights, whether in a separate unit or otherwise).

173. See, e.g., *Westinghouse Elec. Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970) (applying the Board standard to determine managerial status for purposes of excluding such employees); *Retail Clerks Int’l Ass’n. v. NLRB*, 366 F.2d 642, 645 (D.C. Cir. 1966) (stating the standard used by the Board in determining what is a managerial employee has been based upon “the reasonable belief that Congress intended to exclude from the protection of the Act those who comprised a part of ‘management’ or were allied with it on the theory that they were the one from whom the workers needed protection”) (emphasis added); *International Ladies’ Garment Workers’ Union v. NLRB*, 339 F.2d 116, 123 (2d Cir. 1964) (noting that, even though the Act does not expressly exclude managerial employees, “under a Board policy of long duration, this category of personnel has been ex-

In practice, though, the Board held only twice during this same period "that managerial employees could not be afforded protection under the Act."¹⁷⁴ More often, the Board excluded these employees from the proposed bargaining units because, as managerial employees, they were not part of a "community of interest" with the rank-and-file employees.¹⁷⁵

This "community of interest" test became a tool for the Board in determining the appropriateness of placing managerial employees within the same bargaining unit as rank-and-file workers.¹⁷⁶ It enabled the Board, when it decided *North Arkansas Electric Cooperative, Inc.*¹⁷⁷ in 1970, to alter once again its position regarding managerial employees.¹⁷⁸ The Board determined that, although an employee was deemed to be managerial, he was still within the statutory protections of the Act because he was not considered to be an employer.¹⁷⁹ The Board noted that it had created the managerial employee category and that it was not expressly provided for by the Act; thus, the Board had more latitude in defining the exclusion's parameters.¹⁸⁰ The Board stated that managerial employees would be entitled to the protections of the Act unless it could

cluded from the protection of the Act").

174. See *Bell Aerospace*, 416 U.S. at 309 (White, J., dissenting); see also Angel, *supra* note 16, at 435 (stating that the Board held managerial employees were excluded from the Act only twice; in *American Locomotive, Inc.* and *Swift & Co.*); *supra* notes 169-72 and accompanying text (discussing two cases during the fourteen year period completely denying managerial employees the protections of the Act).

175. See, e.g., *North Ark. Elec. Coop., Inc.*, 185 N.L.R.B. 550, 550 (1970), *enforcement denied*, 446 F.2d 602 (8th Cir. 1971) (holding that managerial employees are not protected by Act at all); cf. *Kearney & Trecker Corp.*, 121 N.L.R.B. 817, 822 (1958) (determining that buyers, as managerial employees, were to be excluded from bargaining units of technical employees, without commenting on the extension of the Act's protections to them); *Diana Shop, Inc.*, 118 N.L.R.B. 743, 745 (1957) (excluding credit managers, as managerial employees, from unit of part-time employees without determining whether managerial employees could potentially organize into their own bargaining unit), *overruled by* *North Ark. Elec. Coop., Inc.*, 185 N.L.R.B. 550 (1970), *enforcement denied*, 446 F.2d 602 (8th Cir. 1971); *Mack Trucks, Inc.*, 116 N.L.R.B. 1576, 1577-78 (1956) (holding merely that buyers, as managerial employees, were to be excluded from a bargaining unit of office clerical employees without discussing whether they were protected by the Act). For a discussion detailing the application of the "community of interest" test applied by the Board, see ROBERT A. GORMAN, *BASIC TEXT ON LABOR LAW* § 2, at 68-69 (1976).

176. See *North Ark. Elec. Coop.*, 185 N.L.R.B. at 550.

177. 185 N.L.R.B. 550 (1970), *enforcement denied*, 446 F.2d 602 (8th Cir. 1971) (holding that managerial employees are not protected by Act at all).

178. See *id.* at 550. The Board noted that in bargaining unit cases involving a determination of whether an individual is a managerial employee, the "concern has been whether certain nonsupervisory employees have a sufficient community of interest with the general group or class of employees constituting the bulk of a unit so that they may appropriately be considered a part thereof." *Id.*

179. See *id.* at 550-51.

180. See *id.* at 550.

be shown that they participated "in the formulation, determination, or effectuation of policy *with respect to employee relations matters*."¹⁸¹

E. Resolving the Managerial Exclusion under Bell Aerospace

The ability of managerial employees' to organize was finally rejected in *Bell Aerospace*, when the Supreme Court declared that these individuals clearly were outside the protection of the Act.¹⁸² Initially, the Board determined that buyers in the company's purchasing and procurement department, even if managerial employees, were protected by the Act.¹⁸³ Under the Board's exclusionary test, two requirements needed to be met:

First, in order for an employee to be considered managerial, he had to possess authority that was derived from the employer. Second, in order for the employee's managerial status to exclude him, his authority had to involve labor relations, or for some other reason had to present the possibility that union membership could create a conflict of interest.¹⁸⁴

In denying a motion for reconsideration, the Board stated that when there is only a minimal opportunity for divided loyalties and conflicts of interest, managerial employees would not be denied the right to organize and collectively bargain.¹⁸⁵

The Supreme Court rejected the Board's narrow reading of the managerial employee exclusion.¹⁸⁶ The Court began by stating that Congress

181. *Id.* at 551. The Board, in an attempt to clarify its method of bargaining unit determination, noted that an employee's exclusion from a bargaining unit, because of his lack of community of interest, is not determinative of his status as an employee protected by the Act. *See id.* at 550.

182. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289 (1974).

183. *See Bell Aerospace Co.*, 190 N.L.R.B. 431, 431-32 (1971). The Board, based on its decision in *North Arkansas Electric*, determined that, even if the buyers in question were "managerial employees," still they were entitled to the protection and full benefits of the Act. *See id.* at 431.

184. George Feldman, *Workplace Power and Collective Activity: The Supervisory and Managerial Exclusions in Labor Law*, 37 ARIZ. L. REV. 525, 546 (1995).

185. *See Bell Aerospace Co.*, 196 N.L.R.B. 827, 828 (1972). The Board made this determination even after considering the Eighth Circuit's decision to reject the Board's extension of coverage to managerial employees in *North Arkansas Electric*. *See id.* at 827.

186. *See Bell Aerospace*, 416 U.S. at 289. The case came before the Supreme Court on appeal, after the Second Circuit denied enforcement of the Board's ruling which had required the company to bargain with the unit of buyers. *See Bell Aerospace Co. v. NLRB*, 475 F.2d 485, 497 (2d Cir. 1973), *aff'd*, 416 U.S. 267 (1974). The Second Circuit's formulation of managerial authority, in contrast to the Board's formulation, excluded employees 'so closely related to or aligned with management as to place the employee in a position of conflict of interest between his employer on the one hand and his fellow workers on the other' but also one who is 'formulating, determining and effectuating his employer's policies or has discretion, independent of an em-

clearly had intended to remove from statutory protections all employees deemed managerial.¹⁸⁷ The majority then discussed the legislative history of the Taft-Hartley amendments.¹⁸⁸ Next, the majority noted Congress's belief that an express exclusion was unnecessary for certain employees who were so clearly outside the protections of the Act.¹⁸⁹ The Court concluded that based on the history of the Act and the Board's prior decisions, managerial employees were not protected under the Act.¹⁹⁰

The dissent¹⁹¹ argued that the Board never had held managerial employees to be outside the protection of the Act during the period prior to the Taft-Hartley amendments.¹⁹² The dissent concluded that relying on congressional silence and a single Board decision excluding managerial employees was an insufficient reason for the majority to extend the exclusion to all managerial employees in the future.¹⁹³ Despite the dissent's argument, the holding in *Bell Aerospace* has had far-reaching effects.¹⁹⁴

F. The Professional Employee: Determining Their Status Under the Act

The decision in *Bell Aerospace*, which dealt specifically with managerial employees, has also affected the status of individuals classified as professionals.¹⁹⁵ The Taft-Hartley amendments specifically defined a

ployer's established policy, in the performance of his duties.'

Id. at 494 (quoting *Illinois State Journal-Register, Inc. v. NLRB*, 412 F.2d 37, 41 (7th Cir. 1969)).

187. *See Bell Aerospace*, 416 U.S. at 275.

188. *See id.* at 283-84.

189. *See id.* at 284 (quoting the statement from the Court of Appeals decision that "Congress failed to enact the portion of Mr. Justice Douglas's *Packard* dissent relating to the organization of executives, not because it disagreed but because it deemed this unnecessary").

190. *See id.* at 289-90; *see also* Feldman, *supra* note 184, at 554 (stating that the decision in *Bell Aerospace* disqualified any employee from the Act's protections because of their ability to formulate and effectuate policy).

191. *See Bell Aerospace*, 416 U.S. at 295 (White, J., dissenting in part). Justice White was joined by Justices Brennan, Stewart, and Marshall. *See id.*

192. *See id.* at 300.

193. *See id.* at 310-11.

194. *See infra* notes 213-37 and accompanying text (describing the extension of the managerial exclusion to professional employees and those individuals who expressly bargain for more authority in the workplace).

195. *See* Rabban, *supra* note 5, at 1814-15 (noting how the dissent in *Bell Aerospace* triggered the holding in *Yeshiva*, where the majority identified professionals as managerial employees and excluded them from the Act's coverage). Professional employees are defined as engaging in work that "is 'predominantly intellectual' and . . . involves 'the consistent exercise of discretion and judgment.'" *Id.* at 1799. This definition distinguishes professionals from managers because of the *Bell Aerospace* decision. *See, e.g.*, Shayne Bros., Inc., 213 N.L.R.B. 113 (1974). The Board stated:

The Board has generally sought to exclude from employee units those em-

professional employee.¹⁹⁶ This definition responded to the congressional concern that professional and nonprofessional employees remain in separate bargaining units and “not whether professional employees performed managerial duties.”¹⁹⁷ As a consequence of Congress statutorily defining professional employees, the Board faced the challenge of differentiating between managerial, supervisory, and professional employees.¹⁹⁸

This difficulty arose because professional employees, defined as those who exercise independent judgment in performing their jobs, were granted the protections of the Act.¹⁹⁹ Moreover, Board decisions illustrating this view have held that even professional employees possessing certain indicia of managerial authority, in the course of their professional duties, were not necessarily excluded as managerial or supervisory em-

ployees who, while not supervisory, were so closely allied or identified with management that their interests warranted exclusion from the protection of the Act. Those employees who formulate, determine, and effectuate an employer's policies, and who exhibit sufficient discretion in the performance of their duties to indicate that they are not merely following established employer policy have been held by the Board to be managerial employees.

Id. at 113-14 (footnotes omitted). This test is applied in the conjunctive, in that all elements must be met before an individual will be deemed a managerial employee. *See id.* Thus, a professional that does not participate in policy making may not be a managerial employee, even though he exercises significant independent judgment and discretion in his work. *See Rabban, supra* note 5, at 1797-1801.

196. 29 U.S.C. § 152(12) (1994).

197. *See Lee, Collective Bargaining Part II, supra* note 9, at 279; *see also Rabban, supra* note 5, at 1797-98.

198. *See, e.g., Sutter Community Hosp., 227 N.L.R.B. 181, 193 (1976)* (stating that “professional employees are not the same as management employees merely because their professional competence necessarily involves a consistent exercise of discretion and judgment in a manner which may affect an employer's business direction or established policy”).

199. *See Feldman, supra* note 184, at 539 (discussing the professional employee category). In *Sutter Community Hospitals*, the Board laid out the test for professional status. 227 N.L.R.B. at 193. The Board stated that “[t]he touchstone in a given case is whether or not a professional employee either exercises the type of discretion indicative of managerial status or, having some responsibility for authorship, participates directly in the employer's policymaking process.” *Id.*; *cf. Sockell, supra* note 13, at 993 (explaining how the language used to define a professional, who is covered by the Act, is “remarkably similar” to the language used in describing a supervisory employee, who is not protected by the Act). The Board addressed the treatment of professional employees who exercised independent discretion in making professional judgments in *General Dynamics Corp., 213 N.L.R.B. 851 (1974)*. The Board conceded that work performed in a professional manner “necessarily involves a consistent exercise of discretion and judgment.” *Id.* at 857. The Board continued, however, by declaring that professional employees are not managerial employees, “either by definition or in authority,” as managerial authority does not necessarily follow with the exercise of discretion. *Id.*

ployees.²⁰⁰ The Taft-Hartley amendments, however, prevented the Board from placing professional and nonprofessional employees in the same bargaining unit “unless a majority of such professional employees vote[d] for inclusion in such unit.”²⁰¹ Further, even though technically within the protection of the Act, the managerial exclusion has been used to prevent the organization of individuals classically termed “professional”.²⁰²

Within the academic setting, faculty members exercise professional authority by acting as a group in making decisions regarding student admission, curriculum, academic standards, and matters of faculty status.²⁰³ This professional authority “derives from expertise and ‘tends to be advisory or recommendatory.’”²⁰⁴ If faculty members, however, make these collective decisions individually, the faculty members might be vulnerable to being deemed as exercising managerial authority.²⁰⁵ As a result, faculty who make these collective decisions may acquire managerial or supervisory status based on their collective exercise of authority, and thereby be excluded from the protections of the Act.²⁰⁶

In 1971, the Board asserted jurisdiction over a private university in determining whether faculty who exercised collective authority were managerial or supervisory employees.²⁰⁷ “In *C.W. Post Center*, the university

200. See, e.g., *General Dynamics*, 213 N.L.R.B. at 857-58 (finding that “managerial authority is not vested in professional employees merely by virtue of their professional status”); *Lumberman’s Mut. Cas. Co.*, 75 N.L.R.B. 1132, 1134, 1136 (1948) (holding that some attorneys, even when acting for management, do not lose protections of the Act nor the right to self-organization).

201. 29 U.S.C. § 159(b) (1994).

202. See *infra* notes 213-16 and accompanying text (describing the extension of the managerial exclusion to professionals in the academic sector). See also Sockell, *supra* note 13, at 994 (noting that in addition to academics, other professionals, such as nurses, architects, and engineers, could be excluded from the Act under the approach used in *Yeshiva*); cf., e.g., *FHP, Inc.*, 274 N.L.R.B. 1141, 1141-42 (1985) (holding that full-time staff physicians and dentists, who served on staff committees, were managerial employees based on their possession and exercise of authority to formulate and effectuate management policies). But see *Montefiore Hosp. & Med. Ctr.*, 261 N.L.R.B. 569, 570 (1982) (holding that “[o]nly if the activities of professional employees fall outside the scope of the duties routinely performed by similarly situated professionals will they be found aligned with management”).

203. See, e.g., *C.W. Post Ctr.*, 189 N.L.R.B. 904, 905 (1971).

204. See Rabban, *supra* note 5, at 1809.

205. See *id.* at 1807.

206. See Sockell, *supra* note 13, at 993-94; see also Finkin, *supra* note 12, at 613 (noting that the Board, in *Cornell University*, referred to the faculty’s role as a group, in making decisions dealing with “curriculum, admissions, degree requirements, and other matters of the educational program”, as being “quasi-supervisory”).

207. See *C.W. Post*, 189 N.L.R.B. at 905.

challenged the creation of a faculty bargaining unit, claiming that faculty members exercised sufficient authority to qualify them as supervisors or managerial employees under the Act.²⁰⁸ The Board determined that, because the faculty members exercised only their policy-making and supervisory authority as a group, they were not supervisory or managerial employees, but rather professional employees entitled to the Act's protections.²⁰⁹

Other Board decisions supporting faculty organization relied on a similar justification.²¹⁰ Eventually, the Board applied a three-step test to university faculty cases in determining the status of the individuals who sought to bargain collectively.²¹¹ The Board's three-step test asked whether "(i) faculty authority is collective, (ii) it is exercised in the faculty's own interest rather than in the interest of the university, and (iii) final authority rests with the board of trustees."²¹²

The Supreme Court reversed this Board precedent by extending the managerial exclusion into the academic professional sector in *NLRB v. Yeshiva University*.²¹³ In *Yeshiva*, a unit of full-time faculty members at a private university sought certification as a bargaining unit.²¹⁴ The university refused to bargain with this faculty unit on the grounds that the faculty members were managerial employees and outside the Act's statutory protections.²¹⁵

208. Albert G. Bixler, Comment, *Industrial Democracy and the Managerial Employee Exception to the National Labor Relations Act*, 133 U. PA. L. REV. 441, 446 (1985).

209. See *C.W. Post*, 189 N.L.R.B. at 905; *accord Adelphi Univ.*, 195 N.L.R.B. 639, 648 (1972) (finding that faculty members with some measure of quasi-collegial authority still are entitled to the protection of the Act); *Fordham Univ.*, 193 N.L.R.B. 134, 135 (1971) (holding that faculty members who exercise their role in school policy determinations as a group are protected by the Act). In both *C.W. Post* and *Fordham*, the Board decided that the faculty collectively exercising authority removed them from the managerial and supervisory categories. *NLRB v. Yeshiva University*, 444 U.S. 672, 684 n.18 (1980). For a list of factors that the Board used in determining if faculty members were managerial employees in light of union organizing campaigns see *Yeshiva*, 444 U.S. at 684-85.

210. See Rabban, *supra* note 5, at 1806 (noting that the Board traditionally treated faculty as covered professionals because the faculty exercised decisionmaking authority "on a collective rather than individual basis"); see also, e.g., *Northeastern Univ.*, 218 N.L.R.B. 247, 250 (1975) (holding that faculty members would be permitted to bargain collectively under the protections of the Act because the "faculty participation in collegial decision-making is on a collective rather than individual basis"); *University of Miami*, 213 N.L.R.B. 634, 634 (1974) (same); *Syracuse Univ.*, 204 N.L.R.B. 641, 643 (1973) (same).

211. See *Yeshiva*, 444 U.S. at 684-85.

212. *Id.* at 685.

213. 444 U.S. 672, 688-91 (1980). There was an outpouring of criticism following the *Yeshiva* decision. See Sockell, *supra* note 13, at 994 & n.26.

214. See *Yeshiva*, 444 U.S. at 674.

215. See *id.* at 675.

The Supreme Court rejected the Board's contention that the Yeshiva faculty, as professionals, were not managerial employees.²¹⁶ According to the Court, the faculty's interest in advancing their professional careers through collective authority could not be separated from the interests of the university.²¹⁷ This collective authority, the Court found, was exercised by individual faculty members who served on faculty welfare committees that determined "curriculum, [the] grading system, admission and matriculation standards, academic calendars, and course schedules."²¹⁸ The Court analogized the faculty's duties to those of managers in an industrial setting.²¹⁹ The Court reasoned that Yeshiva University was a mature institution, with the faculty collectively sharing in the determination and implementation of management policy.²²⁰ The Court concluded that the situation at the university could lead to the problem of divided loyalties, a harm that the Board traditionally sought to avoid.²²¹

Justice Brennan, dissenting in *Yeshiva*, argued that the Board, not the Court, must evaluate the changing nature of industrial relations in determining the scope of the Act's coverage.²²² Justice Brennan believed that, unlike the Board, the majority did not recognize how a university's authority structure differs greatly from an industrial setting where managerial employees are clearly identifiable.²²³ He noted further that an employee's status rests on the determination of whether the employee is acting in his own interest or in the interests of his employer.²²⁴ Next, Jus-

216. *See id.* at 688.

217. *See id.*

218. *Id.* at 676 (footnote omitted).

219. *See id.* at 686. The Court believed that the controlling consideration was that the faculty at Yeshiva exercised authority which was unquestionably managerial in nature and scope. *See id.*

220. *See id.* at 680 (noting that Yeshiva adhered to a system of shared authority, where the faculty maintained the tradition of collegiality). The decision, however, limited the reach of the faculty exclusion only to those institutions similar in structure to Yeshiva University. *See id.* at 690-91 n.31; *cf.* *Ithaca College*, 261 N.L.R.B. 577, 578-79 (1982) (holding that full-time faculty at a private university were managerial employees based on their extensive authority in formulating and effectuating academic policy, as well as on their ability to control the hiring of other faculty).

221. *See Yeshiva*, 444 U.S. at 689-90. The divided loyalty argument was first mentioned in *Packard*, where Justice Douglas spoke of the dangers of the employer's "arms and legs" being sympathetic to workers in the union, while at the same time directing them. *See Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 495-97 (1947) (Douglas, J., dissenting).

222. *See Yeshiva*, 444 U.S. at 692-93 (Brennan, J., dissenting).

223. *See id.* at 694.

224. *See id.* at 695-96. Justice Brennan explained it this way:

tice Brennan noted how universities are characterized by two formal decision-making structures, where one chain of command implements university policy, while the other system allows separate faculty input into administrative decisions.²²⁵ It is within this system that faculty, although acting collectively, seek to further their professional interest and not that of their employer.²²⁶ Justice Brennan concluded that the Court did not evaluate Yeshiva's faculty in light of the unique authority structure that exists in the modern university.²²⁷

G. Career Enhancement Resulting in Exclusionary Effects on Workers

The ability to have a greater voice within the workplace is a benefit that workers value highly.²²⁸ This increased responsibility, however, could potentially cause an individual to lose his or her "employee" status under the Act,²²⁹ because managerial status is premised on the duties and authority that an individual possesses in carrying out a job.²³⁰ Underlying

If his actions are undertaken for the purpose of implementing the employer's policies, then he is accountable to management and may be subject to conflicting loyalties. But if the employee is acting only on his own behalf and in his own interest, he is covered under the Act and is entitled to the benefits of collective bargaining.

Id. at 696.

225. *See id.* at 696-97. Justice Brennan characterized this system as containing parallel decision-making structures, with primary authority vested in the administration and a secondary network of professional expertise. *See id.*; *see also* Kenneth Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 UCLA L. REV. 63, 70 (1973) (noting how higher education in the United States is characterized by a system of shared authority between faculty and university administrators); Krent, *supra* note 98, at 709 n.103 (commenting that some sociologists argue that faculty and university administrators exercise effective authority through a shared power structure).

226. *See Yeshiva*, 444 U.S. at 697 (Brennan, J., dissenting) (concluding that faculty make recommendations "to serve [their] own independent interest[s] in creating the most effective environment for learning, teaching, and scholarship"); *see also* Bixler, *supra* note 208, at 449 (commenting that the dissent in *Yeshiva* believed that the faculty furthered its own professional interest, not the administration's, by exercising its collective authority).

227. *See Yeshiva* at 702-03. Justice Brennan noted that education today is "big business" which has resulted in the "erosion of the faculty's role in the institution's decision-making process." *Id.* at 703.

228. *See Kafker, supra* note 6, at 710 (arguing that benefits to the organization include "a more flexible, responsible and productive workforce").

229. *See* John Hoerr, *The Payoff From Teamwork: The Gains in Quality are Substantial—So Why Isn't it Spreading Faster?*, BUS. WK., July 10, 1989, at 56. One reason that use of employee involvement programs may be limited is that managers are hesitant to share power with employees. *See id.* at 57. American use of these programs often leads to employees "tak[ing] over managerial duties, such as work and vacation scheduling, ordering materials, and hiring new members." *Id.* at 58.

230. *See Yeshiva*, 444 U.S. at 682-83 (concluding that "an employee may be excluded as managerial only if he represents management interests by taking or recommending dis-

this assumption, however, is the belief that an employee would not knowingly bargain away his protection under the Act in return for greater management participation.²³¹

Although not specifically addressed by *Yeshiva*, the potential exists for faculty members, not ordinarily exercising managerial authority, to effectively bargain themselves out of the Act's coverage by seeking more input in the policymaking decisions of the university.²³² In *College of Osteopathic Medicine and Surgery (COMS)*,²³³ the Board said that the manner in which a faculty bargaining unit acquired managerial power was irrelevant to an exclusion determination.²³⁴ The Board held that once faculty gained managerial authority, regardless of the manner in which it was acquired, the faculty who possessed it would be excluded from the protections of the Act.²³⁵

This holding demonstrated the Board's consistent policy of ignoring the source of managerial authority in applying the *Yeshiva* test.²³⁶ Under this analysis, worker participation schemes, in which employees actively bargain for more authority in the workplace, could result in individuals correspondingly losing the Act's protections.²³⁷

The potential for employees, normally protected by the Act, to lose the Act's protections due to the nature of their relationship with management was illustrated in *Anamag*.²³⁸ Here the Board had to determine whether individuals serving as team leaders for a worker participation scheme in an industrial setting were excludable under the Act as supervisors.²³⁹ The employer utilized six teams to organize its production employees.²⁴⁰ The Board concluded that the team leaders were not supervi-

cretionary actions that effectively control or implement employer policy").

231. See Natalie Marshall, *Labor-Management Cooperation and the NLRA*, 45 LAB. L.J. 539, 553 (1994) (stating that collective bargaining over issues such as employee participation schemes is entirely voluntary, where either side can end the discussions if they choose).

232. See Bixler, *supra* note 208, at 454.

233. 265 N.L.R.B. 295 (1982).

234. See *id.* at 298.

235. See *id.*

236. See Bixler, *supra* note 208, at 453.

237. See Lee, *Collective Bargaining Part II*, *supra* note 9, at 283 (noting that "the more power a group of unionized professional employees has to recommend or make important decisions, the more likely the employees are to be found managerial").

238. 284 N.L.R.B. 621 (1987).

239. See *id.* at 621.

240. See *id.* The team consists of rank-and file employees, who serve as team members. See *id.* These team members, by a majority vote, elect one individual to serve as the team leader for an indefinite time period. See *id.* Management did not interfere with the team leader selection process and allowed the team leader to serve solely at the will of the

sors for purposes of the Act and were eligible for inclusion in an appropriate bargaining unit.²⁴¹

The Board found that the degree of power and authority exercised by the team leaders did not qualify them as supervisors under section 2(11) of the Act.²⁴² The Board noted that the team, not just its leader, participated in the implementation of company policy.²⁴³ The Board held that the team's power to reject a decision or the explicit guidelines set forth by the employer acted to balance the power of a team leader to implement a decision.²⁴⁴ Even though the team leaders in *Anamag* were found to be "statutory employees" under the Act, however, the broad scope of the managerial exclusion still presents the potential to exclude a large number of rank-and-file workers from the protections of the Act.

III. THE SCOPE OF THE MANAGERIAL EXCLUSION

The managerial exclusion has a broad range of potential applications.²⁴⁵ It has been implicated not only in the typical industrial setting,²⁴⁶ but also in an academic setting to disqualify professional employees from the Act's coverage.²⁴⁷ This exclusion, which Congress may never have con-

members. *See id.* The teams' duties involved deciding on personnel functions, such as discipline, job and overtime assignments, and employee evaluations. *See id.*

241. *See id.* at 621.

242. *See id.*

243. *See id.* at 622.

244. *See id.*

245. *See* David P. Twomey, Comment, *NLRB v. Yeshiva University: Faculty as Managerial Employees Under the NLRA*, 19 AM. BUS. L.J. 63, 71 (1981). The *Yeshiva* decision could provide employers with the ability to exclude a wide range of professional employees from collectively bargaining under the Act. *See id.* Professionals who might be affected "include engineers, physicians, lawyers, reporters, editors, and symphony orchestra musicians." *Id.*; *see also* *Wichita Eagle & Beacon Publ'g Co. v. NLRB*, 480 F.2d 52, 55 (10th Cir. 1973) (holding that an editorial writer was a managerial employee because of her active participation in "formulating, determining and effectuating" the newspaper's journalistic policies"); *But see* *Northeast Utils. Serv. Corp. v. NLRB*, 35 F.3d 621, 626 (1st Cir. 1994) (holding that Senior Pool Coordinators, who are in charge of shifts by monitoring electricity needs, were not managerial employees); *Noranda Aluminum, Inc. v. NLRB*, 751 F.2d 268, 269-70 (8th Cir. 1984) (holding that nurses were not managerial employees and, therefore, entitled to the Act's protections); *Loretto Heights College v. NLRB*, 742 F.2d 1245, 1252 (10th Cir. 1984) (concluding that faculty members, who participated in a wide range of decision-making, were not managerial employees because their role did not "rise to the level of 'effective recommendation or control,'" therefore, they were entitled to the Act's protections).

246. *See* *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289-90 (1974) (holding that buyers might fall into the managerial employee definition).

247. *See* *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 686 (1980) (concluding that "the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial").

templated,²⁴⁸ will impact the current status of labor-management relations because of the advantages and increasing popularity of worker participation programs.²⁴⁹

As the effectiveness and popularity of worker participation schemes grows, so may the scope of the managerial exclusion.²⁵⁰ Application of the managerial exclusion to these programs could hinder the effectiveness of participatory programs, as well as the legal protections enjoyed by workers involved in these programs.²⁵¹ The Constitution, which assigned Congress, not the courts or the Board, the duty to create a federal labor policy might allow Congress to prevent such an extension.²⁵² Such intervention may be unlikely, as the Board and the courts, not Congress, have created the managerial exclusion.²⁵³

Additionally, Board decisions regarding managerial employees have

248. See *Bell Aerospace*, 416 U.S. at 297, 299 (White, J., dissenting) (stating that “[w]ithout more, it could not be concluded that Congress meant to exclude a whole category of employees in addition to those expressly excepted in [section] 2(3) . . . at least where Congress was careful to define precisely what employees were within the scope of the supervisory exclusion”).

249. Cf. Schlossberg & Fetter, *supra* note 13, at 13 (noting how the Department of Labor has embarked on a study to determine the potential conflict between the use of worker participation programs and federal labor laws).

250. See Kenneth O. Alexander, *Worker Participation and the Law: Two Views and Comment*, 36 LAB. L.J. 428, 432 (1985) (noting that after the *Yeshiva* decision, individuals involved in worker participation schemes may be considered managerial employees); see also BLOCK, *supra* note 28, at 58 (noting that at the Ford Sharonville transmission plant, “[t]he company has been quite willing to share its management prerogatives with the union” which has blurred “the line between hourly workers and supervisors”).

251. See William B. Gould IV, *Reflections on Workers’ Participation, Influence, and Powersharing: The Future of Industrial Relations*, 58 U. CIN. L. REV. 381, 386-87 (1989); see also David J. Woolf, *The Legality of Employee Participation in Unionized Firms: The Saturn Experience and Beyond*, 27 COLUM. J.L. & SOC. PROBS. 557, 579 (1994) (commenting how the high level of worker participation at General Motors’ Saturn Plant has resulted in more union members assuming management positions).

252. See 29 U.S.C. § 141(b) (1994). Section 141(b) states:

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Id.

253. See John William Gergacz & Charles E. Krider, *NLRB v. Yeshiva University: The End of Faculty Unions?*, 16 WAKE FOREST L. REV. 891, 894 (1980) (noting how the managerial exclusion, which was not mentioned in the Act or its legislative history, is based on the Court’s decision in *Bell Aerospace*).

been inconsistent, in part due to a lack of legislative history expressly excluding managerial employees.²⁵⁴ Furthermore, even if Congress intended this exclusion to apply in certain settings,²⁵⁵ based on the Board's precedent, a larger percentage of the workforce could be excluded as managerial employees.²⁵⁶ As a result, the decision in *Yeshiva* has set back the future use of collective authority and decision making by diminishing the amount of authority needed before an individual is considered a managerial employee.²⁵⁷

A. *The Managerial Exclusion Under Bell Aerospace*

In *Bell Aerospace*, the Supreme Court resolved a long-standing debate over whether the Act covered managerial employees.²⁵⁸ Although the Court held that all true management employees were excluded, it never actually defined managerial employee.²⁵⁹ The Court accepted the Board's definition of managerial employee,²⁶⁰ but left open the possibility

254. See Lee, *Collective Bargaining Part II*, *supra* note 9, at 275 (stating "[t]he Board has been hampered in its attempts to ascertain employees' managerial status because the managerial exclusion is not statutory").

255. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 283-84 (1974) (noting that "[t]he legislative history strongly suggests that there also were other employees, much higher in the managerial structure, who were likewise regarded as so clearly outside the Act that no specific exclusionary provision was thought necessary . . . [w]e think the inference is plain that 'managerial employees' were paramount among this impliedly excluded group").

256. See Sockell, *supra* note 13, at 995-96 (noting how, since the passage of the Act, the composition of the current workforce has shifted towards more managerial and professional positions, making the Act's coverage of certain groups difficult to determine).

257. See Lee, *Collective Bargaining Part II*, *supra* note 9, at 282 (commenting that the *Yeshiva* decision "suggest[s] that professional employees who participate in decisions that are outside the scope of their individual work responsibilities . . . are performing a management function"); cf. Gergacz & Krider, *supra* note 253, at 913 (noting how the *Yeshiva* decision misapplied the managerial exclusion doctrine to the faculty-university setting because Congress designed the doctrine for use in an industrial setting).

258. See *Bell Aerospace*, 416 U.S. at 289. The Court held that based on Board decisions, the legislative history of the Taft-Hartley amendments, and subsequent Board decisions interpreting the amendments, "all [factors] point unmistakably to the conclusion that 'managerial employees' are not covered by the Act." *Id.*

259. See *id.* at 288.

260. See *supra* note 12 and accompanying text (stating the Court's definition of managerial employee); see also *supra* note 186 (discussing the Second Circuit's expanded definition of managerial employee). Following this decision, the Sixth Circuit also held the managerial employee exclusion to "depend[] upon the extent of [the individuals] discretion, although even the authority to exercise considerable discretion does not render an employee managerial where his decision must conform to the employer's established policy." *NLRB v. Retail Store Employees Union*, 570 F.2d. 586, 592 (6th Cir. 1978) (quoting *Eastern Camera & Photo Corp.*, 140 N.L.R.B. 569, 571 (1963)).

that Congress never truly intended the exclusion.²⁶¹

1. The Ambiguous Legislative History

The Court in *Bell Aerospace* was quick to rely on Congress's implicit exclusion of managerial employees from the Taft-Hartley amendments.²⁶² As the dissent argued, this reaction may have been unwarranted.²⁶³ Congress had responded to the Board's uncertain treatment of supervisory employees with the Taft-Hartley amendments.²⁶⁴ Noticeably absent from these amendments was any mention of the term "managerial employee" and its status under the Act.²⁶⁵ Congress was aware of the Board's prohibition against including managerial employees in the same bargaining unit as rank-and-file workers.²⁶⁶ Also, though Congress carefully defined the scope of the supervisory exclusion, it did not mention the managerial exclusion.²⁶⁷ Congress's failure to create a managerial exclusion, after amending the Wagner Act twice, did not necessarily signal its intent to exclude managerial employees from the Act's coverage.²⁶⁸

The Court based its justification for the exclusion upon a misreading of the statute.²⁶⁹ The Act guarantees its protections to those employees as defined by the Act,²⁷⁰ with certain enumerated exceptions.²⁷¹ The Court believed incorrectly that the absence of an express managerial exclusion was not due to a congressional oversight, but was based on a belief that expressly stating the exclusion was unnecessary.²⁷² The Court, attempting

261. See *Bell Aerospace*, 416 U.S. at 304 (White, J., dissenting) (noting that "there is no warrant for the assumption that groups of employees, which the statute, or express legislative statements, do not address, are to be excluded from the Act").

262. See *id.* at 275 (stating that "Congress intended to exclude from the protections of the Act all employees properly classified as 'managerial'").

263. See *id.* at 297 (White, J., dissenting).

264. See *supra* notes 156-58 and accompanying text (describing the supervisory exclusion as a response to Board decisions that often vacillated on the protection of supervisory employees).

265. See Feldman, *supra* note 184, at 547.

266. See *id.*

267. See *Bell Aerospace*, 416 U.S. at 297 (White, J., dissenting).

268. See Germana, *supra* note 10, at 415 (arguing that, in light of the Board's failure to decide whether managerial employees could organize, Congress could not be said to have deemed an explicit exclusion provision unnecessary).

269. See *id.* (arguing that Justice Powell misinterpreted the legislative history, as he believed that Congress's specific exclusion of supervisory employees indicated that it saw no need to exclude those with even more authority and more susceptibility to divided loyalties).

270. See 29 U.S.C. § 152(3) (1994).

271. See *id.* (excluding supervisors, but not managers, from the Act's coverage).

272. See *Bell Aerospace*, 416 U.S. at 283-84; see also Feldman, *supra* note 184, at 547.

to defend the implicit exclusion, relied on decisions that uniformly excluded individuals above the supervisory level.²⁷³ However, congressional failure to expressly exclude managerial employees could also mean that Congress did not seek to exclude them, because the drafters' of the Act were so careful to expressly exclude supervisory employees.²⁷⁴

2. Board Treatment of Managerial Employees Reveals No Intent to Exclude Them

Prior to the Taft-Hartley amendments, contrary to the Court's belief in *Bell Aerospace*, the Board did not expressly exclude managerial employees from the Act's coverage.²⁷⁵ The subtle distinction that the *Bell Aerospace* Court overlooked was the determination of whether managerial employees could be included in particular units versus whether, as managerial employees, they were excluded completely from the Act's coverage.²⁷⁶ Post Taft-Hartley decisions by the Board determined only that it would be inappropriate to include certain employees associated with management and rank-and-file workers within the same bargaining unit.²⁷⁷ As the majority correctly pointed out, Board decisions never involved the certification of a separate bargaining unit consisting of managerial employees.²⁷⁸ Previous Board cases addressed only whether managerial employees had a "community of interest" with rank-and-file employees in determining appropriate bargaining units.²⁷⁹ Board decisions, however, never held that managerial employees, in their own bargaining unit, were unprotected by the Act.²⁸⁰

273. See Rabban, *supra* note 5, at 1814.

274. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 297 (1974) (White, J., dissenting).

275. See *id.* at 299 (White, J., dissenting) (noting how prior to 1947, the Board never completely excluded managerial employees from the Act's protections).

276. See Feldman, *supra* note 184, at 548; *cf.* *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 179-80 (1981) (describing the Board's approach to exclusion of confidential employees from proposed bargaining units without determining whether the Act covered these "confidential employees").

277. See, e.g., *Denton's, Inc.*, 83 N.L.R.B. 35, 37 (1949) (holding that buyers and assistant buyers were to be excluded from proposed bargaining unit because their interests "are more closely identified with management"); *Denver Dry Goods Co.*, 74 N.L.R.B. 1167, 1175 (1947) (excluding assistant buyers from a unit of clerical employees because their interests were "more closely identified with those of management"); *Dravo Corp.*, 54 N.L.R.B. 1174, 1177 (1944) (excluding buyers from a clerical unit without determining the bargaining rights of buyers, as managerial employees).

278. See *Bell Aerospace*, 416 U.S. at 276.

279. See *id.* at 299-300 (White, J., dissenting).

280. See *id.* at 301-02 (White, J., dissenting) (stating that the Taft-Hartley amendments were passed "in light of a renewed Board policy . . . which excluded managerial employees from rank-and-file units but had never denied them the right to establish separate bar-

The Court stated that it was bound to pay deference to both the legislative history and administrative interpretation of the Act.²⁸¹ In light of the Board's recent treatment of managerial employees, however, the Court clearly ignored this statement. For example, in *North Arkansas Electric Cooperative, Inc.*,²⁸² the Board determined that managerial employees could collectively bargain under the Act.²⁸³ The Court subsequently ignored the deference it previously had paid to Board decisions.²⁸⁴ In *Bell Aerospace*, the Court determined that, regardless of the Board's decision in *North Arkansas*, prior decisions had not recognized any separate unit of managerial employees.²⁸⁵ Thus, the Court's analysis simply disregarded the Board's new interpretation and instead determined that prior Board rulings signaled the intent to exclude managerial employees from the protections of the Act.²⁸⁶

3. *The Divided Loyalty Argument Is No Longer Relevant to the Managerial Exclusion*

Justice Powell's opinion in *Bell Aerospace* reflected his desire to maintain a sharp dividing line between labor and management, as demonstrated previously in the *Packard Motor Car* decision.²⁸⁷ The *Bell Aerospace* Court determined that an employer is entitled to the undivided loyalty of its managerial employees.²⁸⁸ The decision was in part an effort to extend this principle by sweeping all managerial employees into the

gaining units or placed them outside the Act's definition of "employee").

281. See *id.* at 274-75.

282. 185 N.L.R.B. 550 (1970).

283. See *id.* at 550-51; see also Crain, *supra* note 100, at 975. These managerial employees would be excluded, though, only if it could be shown that they had a part in shaping or implementing labor policy for their employer, and therefore did not belong in a unit of workers who merely carried out the employer's policy. See *North Arkansas*, 185 N.L.R.B. at 550-51.

284. See *Bell Aerospace*, 416 U.S. at 287-88.

285. See *id.*

286. See Crain, *supra* note 100, at 975 (stating that the Court felt that the managerial exclusion applied to those, in the Board's estimation, who "were involved in shaping or implementing labor relations policies for their employers").

287. See Germana, *supra* note 10, at 416. Justice Powell quoted the dissenting opinion in *Packard Motor Car*, in which Justice Douglas stated, "once vice-presidents, managers, superintendents, foremen all are unionized, management and labor will become more of a solid phalanx than separate factions in warring camps." *Bell Aerospace*, 416 U.S. at 278. In *NLRB v. Hendricks County Rural Electric Membership Corp.*, Justice Powell once again echoed his belief that the Act clearly intended to create a dividing line between employees and management, a line that was "fundamental to the industrial philosophy of the labor laws in this country." See 454 U.S. 170, 193 (1981) (Powell, J., dissenting) (footnote omitted).

288. See *Bell Aerospace*, 416 U.S. at 281, 284 n.13.

exclusion.²⁸⁹ The Court, however, failed to address the issue of whether the managerial exclusion resulted from a concern about a managerial employee's divided loyalties.²⁹⁰ Instead, the Court's decision implied that divided loyalty is not even an issue in determining a worker's status.²⁹¹ This somewhat inconsistent view of the "fundamental . . . industrial philosophy" emphasized in the majority's reasoning could not have been intended to create an across-the-board managerial exclusion.²⁹²

In *Bell Aerospace*, the Court ignored the divided loyalty argument, which had served as the foundation for the managerial exclusion.²⁹³ In a similar fashion, the Court in *Yeshiva* ignored the need for workplace cooperation between management and labor.²⁹⁴ The decision in *Yeshiva* may restrain the use of collective authority through workplace cooperation, which is endorsed by even the Department of Labor.²⁹⁵

B. The Extension of the Managerial Exclusion to Worker Participation Schemes

The Court in *Bell Aerospace* and *Yeshiva* failed to anticipate that there would be a growth of "collective action" in the workplace, where labor and management would intentionally work together.²⁹⁶ Workers in some

289. See *Barney*, *supra* note 132, at 348 (noting how the Court's decision could result in thousands of white collar workers losing the Act's protections). *But see* *Sockell*, *supra* note 13, at 992 (noting how "[t]he language of the NLRA, and the cases interpreting it, would seem to imply that supervisors, professionals, managers, and nonmanagers can be clearly distinguished from one another"). The distinctions that the courts and Congress tried to draw were not an answer, however, because these distinctions were never easy to apply. *See id.* at 994.

290. See *Feldman*, *supra* note 184, at 554 (explaining how the Court did not respond to the Board's belief that the "divided loyalties" argument, by the employer in *Bell Aerospace*, was too speculative).

291. *See id.*; *see also* *Germana*, *supra* note 10, at 418-20 (describing the analysis by the Eighth Circuit in *Noranda Aluminum, Inc. v. NLRB*, 751 F.2d 268 (8th Cir. 1984), that discounted the possible issue of divided loyalties unless the evidence showed that such a division actually existed).

292. See *Crain*, *supra* note 100, at 976-77.

293. See *Bell Aerospace*, 416 U.S. at 281 & n.11 (noting that the House Reports of the Taft-Hartley amendments expressed a concern "that unionization of supervisors had deprived employers of the loyal representations to which they were entitled").

294. See *Crain*, *supra* note 100, at 984. The Court's desire to maintain the clear division between labor and management would preclude any form of workplace democracy from being achieved, a central theory behind the Wagner Act's passage. *See id.*

295. See *Schlossberg & Fetter*, *supra* note 13, at 12 (noting that "[t]he Department of Labor has taken a strong position in support of labor-management cooperation").

296. See *Beranek*, *supra* note 32, at 189-92 (discussing the growing popularity of worker participation programs); *see also* Steven M. Fetter & Joy K. Reynolds, *Labor-Management Cooperation and the Law: Perspectives From Year Two of the Laws Project*,

participatory schemes actually are taking on traditional management responsibilities and duties.²⁹⁷ With the increasing use of participatory management schemes, there is the looming issue of how much authority a worker may acquire before he is excluded from the Act as a managerial employee.²⁹⁸

The extension of this managerial exclusion is based in part on the Court's decision in *Yeshiva*.²⁹⁹ Employees who are authorized to act on behalf of management while serving on the team could potentially be stripped of the Act's protections.³⁰⁰ This situation may occur even though the employees do not exercise ultimate decision-making authority.³⁰¹ Thus, as the success and approval of worker participation plans grows, more managerial type duties may be allocated to workers, thereby making them vulnerable to exclusion from the Act's coverage.³⁰²

C. The Saturn Experience: Illustrating the Potential to Extend the Managerial Exclusion

One place that the extension of the managerial exclusion has arisen is at Saturn Auto Works.³⁰³ The Saturn project was a result of a joint effort

23 HARV. C.R.-C.L. L. REV. 3, 11-12 (1988) (explaining the growth of labor-management cooperation in the auto industry, public utility field, and steel manufacturing industry).

297. See Schlossberg & Fetter, *supra* note 13, at 11-12 (noting how, at Pontiac Motors, workers are beginning to share responsibility in areas that traditionally have been left to the exclusive control of management); Woolf, *supra* note 251, at 578-79 (describing how the Saturn plan has enabled workers at every level of the operation to take an active role in organizational decision making).

298. See Ryan, *supra* note 26, at 611 (noting that as worker participation plans become more successful, workers may take on more authority, thereby increasing the possibility that they will lose the Act's protections as managerial employees). *But see* Kohler, *supra* note 33, at 541 (stating that the proposition that rank-and-file workers could become managerial through their inclusion in participatory schemes is "fundamentally unsound"). Even though worker participation schemes might eliminate the need for some levels of supervision, it is unlikely that these workers would resemble upper level management. *See id.* Ultimately, the team's decisions must conform to the established policy of management, leaving little room for the team to effectuate its own policies or beliefs. *See id.* at 541-42.

299. See Lipsky, *supra* note 39, at 685 (noting how employees who act in concert with the employer in participatory schemes may be excluded from the Act's coverage).

300. *See id.* at 686.

301. See Alexander, *supra* note 250, at 432.

302. See Ryan, *supra* note 26, at 611. These added responsibilities could come in the form of greater acceptance by management of the teams suggestions or recommendations. *See id.*

303. See Jim Hilton, *Participatory Management and the NLRA: Does the Act Cover Saturn's Autoworkers?*, 73 B.U. L. REV. 673, 684-87 (1993) (detailing the specific types of authority that the workers at Saturn are granted and which could serve as a basis for their exclusion from the protections of the Act); Maralyn Edid, *How Power Will Be Balanced*

between General Motors (GM) and the United Auto Workers (UAW).³⁰⁴ The parties created a full partnership between management and labor in the planning and production stages of manufacturing.³⁰⁵ All policy decisions regarding Saturn's production are designed to be a product of joint efforts by GM and the UAW.³⁰⁶

The terms of the agreement encompass numerous areas of traditional labor-management relations.³⁰⁷ Most importantly, the agreement limits the number of job classifications at the Saturn plant, with one category for operating technicians and three to five other categories for skilled technicians.³⁰⁸ The driving force behind the limited number of positions was to help integrate all employees into the production process and the ultimate success of the organization.³⁰⁹ As a result, the agreement eliminated many traditional barriers between management and labor, which in the past contributed to worker dissatisfaction and reduced quality.³¹⁰ The workers are organized into work units, consisting of between six to fifteen workers, each possessing increased authority and responsibilities over inventory quality control and other traditional management functions.³¹¹

on *Saturn's Shop Floor*, BUS. WK., Aug. 5, 1985, at 65 (noting that the basic groups in the Saturn plant will be work teams, which "will decide who does which job [and] will also maintain equipment, order supplies, and set the relief and vacation schedules of its members").

304. See Gregory J. Hare, *Employee Participation Programs: A Great Idea, But Are They Lawful?*, 1991 DET. C.L. REV. 973, 985 (explaining the history of General Motors's efforts which led to the development of the Saturn Project). Planning for this project involved the use of new methods of both production and labor relations, where "[a]ll decisions [between labor and management] must be reached by consensus." James B. Treece, *Here Comes GM's Saturn: More Than a Car, It Is GM's Hope for Reinventing Itself*, BUS. WK., Apr. 9, 1990, at 59.

305. See Edid, *supra* note 303, at 65; see also Schlossberg & Fetter, *supra* note 13, at 39 (describing the origin of the joint effort between GM and the UAW).

306. See Kafker, *supra* note 6, at 711 (noting that "UAW presence at every level is particularly significant because of the consensus decisionmaking philosophy at Saturn"). In these more advanced and meaningful worker participation programs, there is commonly a shift from a hierarchical to a shared decision-making system. See Alexander, *supra* note 250, at 432.

307. See Kafker, *supra* note 6, at 705-15 (detailing the various provisions that will govern the relationship between GM and the UAW). GM and the UAW designed the agreement to contain "broad guiding principles for the parties to follow in fulfilling the mission of Saturn." *Id.* at 706.

308. See *id.* at 708.

309. See *id.* at 708-09 (noting how the agreement "set out Saturn's People Philosophy, which was 'that all people want to be involved in decisions that affect them'").

310. See *id.* at 709.

311. See *id.* at 709-10. The units have responsibility for such things as quality and cost control, machinery maintenance, job assignment and training, and communication both within and outside the group. See *id.*

Based on the Supreme Court's interpretation of the Taft-Hartley amendments, however, the amount of power possessed by the workers at Saturn may result in their classification as managerial employees.³¹² Although the work teams reside at the bottom of the managerial structure, the teams are still empowered to share in the decisionmaking process.³¹³ No action can be taken without joint approval by labor and management.³¹⁴ The high level of worker participation at Saturn has resulted in more workers occupying management positions at Saturn than at other auto manufacturers.³¹⁵ The agreement between GM and the UAW removed many of the symbolic distinctions between management and workers.³¹⁶ Workers and managers, for example, eat in the same dining rooms, are both paid by salary, and do not punch time clocks.³¹⁷

The manner in which the Saturn workers gained their increased authority is analogous to the *COMS* decision, in which the Board denied faculty members the protections of the Act.³¹⁸ In both situations, the workers bargained with the employer for increased authority in the workplace.³¹⁹ Also, in each situation management gave workers responsibilities that could be construed as "managerial" in nature.³²⁰ As a result, the Saturn workers, like the employees in *COMS*, may have unknowingly become managerial employees, stripped of the Act's

312. See *id.* at 730-31 (discussing the uncertainty in the application of the managerial exclusion to the individuals employed at the Saturn auto plant); see also Price, *supra* note 49, at 1395 (noting that the idea at the Saturn plant "was that if workers took on more responsibility, fewer managers would be needed").

313. See Kafker, *supra* note 6, at 711-12 (stating that the degree of worker participation in the decision-making process at Saturn is unprecedented).

314. See *id.*

315. See Woolf, *supra* note 251, at 579.

316. See Kafker, *supra* note 6, at 709. Blurring the distinction between management and labor may be one factor that will lead to the exclusion of the Saturn workers as managerial employees. See generally Sockell, *supra* note 13, at 992.

317. See Kafker, *supra* note 6, at 709.

318. See College of Osteopathic Med. & Surgery, 265 N.L.R.B. 295, 297 (1982); cf. Hilton, *supra* note 303, at 687 (commenting that the exercise of collective bargaining rights should not be the basis for being removed from the coverage of the Act).

319. See College of Osteopathic Med., 265 N.L.R.B. at 297; Kafker, *supra* note 6, at 705-10. One difference, however, was that the Saturn agreement was reached in a more cooperative manner and the *COMS* agreement was reached in a more adversarial manner. See *id.* at 705.

320. See College of Osteopathic Med., 265 N.L.R.B. at 296-97 (finding that the faculty, inter alia, had the authority to formulate the College's academic policy, hiring policy, and student academic standards); Woolf, *supra* note 251, at 578-79 (noting that each work unit at Saturn "is responsible for hiring its own [team] members and making various production-related decisions") (footnote omitted).

protections.³²¹

There is some doubt, though, as to whether the UAW workers at the Saturn plant actually could be considered managerial employees.³²² The most obvious distinction between the Saturn workers and “managerial employees” is that the workers at Saturn “are at the bottom level rather than a high level in the firm ‘managerial structure’ and their interests are aligned with labor,” not with management.³²³ As the Court found in *Yeshiva*, a prerequisite to being declared a managerial employee is that the individual’s interests are aligned with management’s interests.³²⁴ Thus, the Saturn workers might not even fit the definition of a managerial employee, as defined currently by the Court.

Additionally, the Saturn workers only participate in the enterprise “through the instrumentality of their union.”³²⁵ The workers do not “formulate and effectuate management policies by expressing and making operative the decisions of their employer.”³²⁶ Instead, the “workers’ ideas filter up through management.”³²⁷ The structure at Saturn consists of three to six work units, each of which is overseen by a company work unit advisor.³²⁸ The next level consists of business units, “which are integrated groups of work units” and are staffed by “all work unit advisors, a plant manager, . . . and a UAW advisor elected from the business unit at large.”³²⁹ The highest management level at Saturn is the “Strategic Advisory Committee, which is responsible for business planning and Saturn’s relationship with dealers, suppliers, stockholders, and the public at large.”³³⁰ As a result of this hierarchical structure, it is arguable that the Saturn workers are not managerial employees because they may not sat-

321. See *College of Osteopathic Med.*, 265 N.L.R.B. at 297. The Board stated: [T]he COMS faculty currently has almost plenary authority in academic matters and significant input into important nonacademic matters. The faculty is instrumental not only in the day-to-day operation of the College but also in its long-range policy planning. Moreover, faculty members have considerable influence over their colleagues’ job security and advancement. In sum, the COMS faculty clearly has managerial authority as outlined in *Yeshiva*

Id.

322. See Kafker, *supra* note 6, at 729.

323. *Id.* at 731.

324. See *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 682-83 (1980) (holding that a managerial employee “must exercise discretion within, or even independently of, established employer policy and must be aligned with management”) (citation omitted).

325. See Hare, *supra* note 304, at 985-86.

326. *Yeshiva*, 444 U.S. at 682 (citations and internal quotations omitted).

327. Kafker, *supra* note 6, at 710.

328. See *id.* at 711.

329. *Id.*

330. *Id.* (footnote omitted).

isfy the *Yeshiva* definition.³³¹

The situation at Saturn admittedly is unique,³³² but may be a model for other industries. Businesses may be moving away from the hierarchical system of management and toward the increased use of participation programs.³³³ The newness of this program makes determining the workers' status very difficult.³³⁴ This ambiguous possible result of being excluded or protected by the Act depending on the amount of authority a worker possesses, combined with the fact that the Department of Labor encourages the use of cooperative programs, is problematic. Ultimately, the transformation of rank-and-file workers into managerial employees may serve as a disincentive to future use of these programs.

IV. THE PROBLEM WITH THE MANAGERIAL EXCLUSION: THE NEED TO ADAPT CURRENT LAW TO THE CHANGING WORKFORCE

Participatory schemes, which often are implemented through collective bargaining, may result in workers abrogating their statutory rights.³³⁵ Therefore, as an initial step in clarifying the managerial exclusion and encouraging the further use of participatory schemes, the Board should utilize its authority³³⁶ to promulgate rules, pursuant to the Administrative Procedure Act (APA).³³⁷

331. See generally *Yeshiva*, 444 U.S. at 682.

332. See Woolf, *supra* note 251, at 581-82 (stating that the problem with determining the effects of the Saturn program is that this program is like none ever challenged in the past).

333. See Hilton, *supra* note 303, at 676 (discussing the potential for expansion of the Saturn model).

334. See Woolf, *supra* note 251, at 581-82.

335. See, e.g., *College of Osteopathic Medicine & Surgery*, 265 N.L.R.B. 295 (1982). The Board in *COMS* determined that the extent, and not the source, of the managerial authority was the determining factor in an exclusion question. See *id.* at 298. The Board, relying on *Yeshiva*, stated that the "decision does not expressly or impliedly distinguish situations in which managerial authority was gained through collective bargaining from situations in which [it] was more freely granted, and we do not believe that such a distinction is required by the Act." *Id.* In denying the faculty protection under the Act, the Board, in essence, approved a situation where employees could lose their statutory protection by exercising it to gain more authority. See *id.*

336. See 29 U.S.C. § 156 (1994). Section 156 authorizes the Board "to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of this subchapter." *Id.*

337. See *id.*; see also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (stating that "the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion"); Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 277-78 (1991) (noting that the Board's authority to promulgate such rules was reaffirmed by the Taft-Hartley Act of 1947).

Rule making by the Board, as opposed to case-by-case adjudication, would be a better method of proceeding for numerous reasons. Rule making would provide the Board with gains in administrative efficiency, while at the same time offering the affected parties and public more participation in the process of drafting regulatory standards.³³⁸ Additionally, enforcement could be advanced through the use of rule making by eliminating the need for factual based adjudications.³³⁹ The Board has utilized notice and comment rule making already in other areas of labor-management relations.³⁴⁰ Furthermore, the use of rule making by the Board has been upheld already by the Supreme Court,³⁴¹ and resulted in achieving the primary goal of rule making; namely, lots of empirical data, broad participation by affected parties, a clear policy, and stability.³⁴²

As a result, the Board could promulgate a rule defining managerial status based on the duties performed by the employees in question, not on the employer's characterization of the position.³⁴³ To alleviate some of the ambiguities in the legislative history,³⁴⁴ the Board needs to establish a formal definition of managerial authority.

The next step in clarifying the managerial exclusion is a clear definition, within the rule, distinguishing those individuals covered and those excluded by the Act.³⁴⁵ This definition should define clearly what are managerial duties or responsibilities.³⁴⁶ This definition would notify

338. See Grunewald, *supra* note 337, at 278.

339. See *id.* at 282.

340. See, e.g., *Appropriate Bargaining Units in the Health Care Industry*, 29 C.F.R. § 103.30 (1998).

341. See *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609-610 (1991) (finding that section 6 of the NLRA is "unquestionably sufficient to authorize" the promulgation of a rule by the Board); see also Grunewald, *supra* note 337, at 316 (noting that the decision in *American Hospital Association* put to rest the question of "the power of the Board to use rule making generally").

342. See Grunewald, *supra* note 337, at 320-21 (listing benefits that have resulted from the Board's use of rule making); see also Richard K. Berg, *Re-examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 ADMIN. L. REV. 149, 163-64 (1986) (listing advantages of use of rule making instead of adjudication by an agency).

343. See Feldman, *supra* note 184, at 555.

344. See, e.g., Crain, *supra* note 100, at 976-77 (discussing the disagreement in the *Bell Aerospace* decision regarding whether Congress had intended to exclude managerial employees from the Act's protections).

345. See *id.* at 1014 (explaining that the line must be redrawn not to separate labor and management, but to separate labor and capital); cf. Barney, *supra* note 132, at 380 (suggesting specific language that could be inserted into the existing definition of "employee" under section 2(3) of the NLRA so that managerial employees might be included).

346. See Ryan, *supra* note 26, at 611 (stating that "[a]uthority to decide what to produce, at what price, and for what markets" could be used in defining the scope of the managerial employee's authority); see also Barney, *supra* note 132, at 381 (proposing that

workers as to the degree of authority they could attain before losing the Act's protections as a managerial employee.³⁴⁷ This definition would serve also to help distinguish, within an organization, managerial employees from rank-and-file employees, who currently may differ only because of the higher wages received by managerial employees.³⁴⁸

In the alternative, the Board could formulate a rule similar to the "community of interest" test that is used in determining the appropriate composition of bargaining units.³⁴⁹ If the Board determined that managerial and rank-and-file employees shared a "similar economic situation," the Board appropriately could include both groups within the same bargaining unit and not have to exclude managerial employees from the Act's protections.³⁵⁰

These steps are applicable also in seeking to protect those workers involved in participatory schemes, whether the "scheme is formal or informal, or established by the employer or the employees."³⁵¹ A rule, clarifying or specifically defining the managerial exclusion, should be enacted to specifically protect those employees involved in worker participation schemes.³⁵² This rule would cover employees regardless of the manner in which they gained managerial authority, or the lack or presence of certain managerial-like authority or responsibilities within the

a definition of managerial employee could state that the term included "any individual having the authority to exercise considerable discretion, independent of both a superior's approval and the employer's established policies and regulations, in formulating, determining, or effectuating the employer's policies").

347. Cf. Hilton, *supra* note 303, at 692 (offering a proposed revision to the "supervisor" definition in the NLRA that would prevent workers in a Saturn-type unit from losing employee status under the Act). *But see* College of Osteopathic Med. & Surgery, 265 N.L.R.B. 295, 298 (1982) (demonstrating how workers can have this authority foisted upon them and still lose their statutory protections).

348. See Crain, *supra* note 100, at 1012.

349. See *id.* at 1016-17.

350. See *supra* notes 175-76 and accompanying text (discussing "community of interest").

351. See Lipsky, *supra* note 39, at 688.

352. See *id.* at 687. This goal would be accomplished also with the passage of the TEAM Act, which would legitimize the use of QCs in the workplace and avoid any unfair labor practice charges under the Act. See Rafael Gely, *Whose Team Are You On? My Team or My TEAM?: The NLRA's Section 8(A)(2) and the TEAM Act*, 49 RUTGERS L. REV. 323, 394-95 (1997). The TEAM Act, which was vetoed, would have protected employers from unfair labor practice charges when they established workplace participatory programs. See *id.* In addition to legalizing the use of employer supported cooperative programs, the TEAM Act would have included language excluding participants from the managerial employee exclusion. Cf. Alexander, *supra* note 250, at 432 (noting how the managerial exclusion could be applied to individuals involved in worker participation schemes).

participatory scheme.³⁵³

V. CONCLUSION

Congress intended the National Labor Relations Act to protect American workers both in the workplace and at home by providing employees with more meaningful collective bargaining rights.³⁵⁴ The Act imposed various affirmative duties on employers and guaranteed workers the right to free association. The protected class of individuals under the Act initially was very clear.³⁵⁵ As case law developed, and Congress acted, the changing nature of the workplace increased the uncertainty between covered and uncovered workers. Board and Supreme Court decisions interpreting congressional intent proved to be just as ambiguous.

As the U.S. workforce grows and explores new avenues of cooperation and production, the distinctions between covered and uncovered workers are even more important. Management and labor, working side-by-side, may both be included or excluded from the Act's protections. An individual's protection under the Act could depend on the exact duties and responsibilities that each worker possesses, both individually and as a group. The need to determine clearly who plays on management's team and who is on labor's team cannot be understated. The collapse of the distinctions between workers can serve only to hinder the type of labor-management cooperation that was at the heart of the National Labor Relations Act.

353. Cf. Lipsky, *supra* note 39, at 688; Hilton, *supra* note 303, at 689 (stating how an amendment to the Act could focus its protections on those managerial employees who gained their authority through collective bargaining).

354. See *supra* Part II.A. (describing the intent of the Act and the goals it sought to achieve).

355. See *supra* note 110 and accompanying text (noting how the initial definition of employee under the Act had only three clearly defined exclusions).