THE CHANGING NATURE OF SUPERVISION: IMPLICATIONS FOR LABOR-MANAGEMENT RELATIONS IN THE TWENTY-FIRST CENTURY

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I. INTRODUCTION

A core principle in labor organization has been the notion that unions are for workers and not for management and that the interests of labor and the interests of management must be kept

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separate by excluding the latter from the ranks of the former.[1] While this principle was not expressed in the Wagner Act of 1935, it was clarified more than a decade later in the Taft-Hartley Act of 1947, in which the concept of *supervisor* was formally defined. In this Act, those persons deemed to be supervisors were comprehensively deprived of the right to organize, which was given to all other employees under Section 7 of the National Labor Relations Act ("NLRA").[2]

Like other statutory definitions, the term supervisor has been subject to interpretation over the last six decades. The agency charged with formulating these interpretations, the National Labor Relations Board ("NLRB"), has displayed a concerning lack of consistency in regard to the supervisor exemption over the same time period. Another factor that also has been absent from the NLRB calculus is the changing nature of work itself. During the six decades in which the legislative, executive, and judicial branches have wrestled with what it means to be a supervisor, the stratum upon which this definition is built has undergone a substantial metamorphosis. Work in the twenty-first century is less about the repetitive performance of an algorithm, and much more about teamwork, creativity, and flexibility. The Industrial Era gave birth to the union movement. But has the self-directed knowledge worker of today's Information Age, who replaced the ubiquitous factory worker of that Industrial Era, made organized labor irrelevant?

This Article first examines the historical foundation of labor law in the United States. It then outlines the struggle of the NLRB and the courts to define that class of managerial employees deemed to be supervisors—those excluded from the ranks of

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[1] This distinction is codified in the National Labor Relations Act, which defines a labor organization as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 152(5) (2004). Such organizations must neither be dominated nor supported by management. N.L.R.B. v. Cabot Carbon Co., 360 U.S. 203, 218 (1959). Labor organizations must be separate and distinct from management, must have unfettered independence of action, and may not function in a representative capacity for issues concerning conditions of employment. Electromation v. N.L.R.B., 35 F.3d 1148, 1170 (7th Cir. 1994).

[2] *See* discussion *infra* notes 10-34 and accompanying text.

organized labor. It next examines the relevancy of that categorical definition to the dynamic environment of the American workplace. Finally, the Article's analysis of the supervisory exemption concludes with the uneasy realization that the nature of supervision has changed in unforeseeable, yet fundamental ways, and that this change cannot be fully accommodated under the current statute. If the protections given to millions of American workers under the Act are to continue safely into this new century, a legislative remedy may be required. Such legislation could reconcile the differences between the changing nature of American work and the true intent of the NLRA.

II. HISTORICAL PERSPECTIVE

The year 1935 found the United States in the depths of the Great Depression, and after five straight years of hard times, dents and rips were beginning to show in the fabric of society. Just three years previously, in 1932, the American birth rate had declined for the first time in the history of the nation.[3] Popular resentment against the government and the rich had reached an all-time high and had found voices in both Huey Long and Father Coughlin, who were consistent in their calls for the nation to "share the wealth."[4] Unemployment had reached levels in early 1932, that saw ten million Americans unemployed and thirty million citizens (representing almost one-fourth of the entire population) without any income whatsoever.[5] It seems almost inconceivable today, but it is important to remember that this was a time in which it was possible to see gangs of unemployed men fighting for scraps of discarded food outside restaurants.[6] In that time-honored tradition of American politics, President Roosevelt sought to co-opt the positions of his rivals, and through assimilation, to tone

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[3] FREDERICK ALLEN, SINCE YESTERDAY: THE 1930S IN AMERICA 132 (1940). Interestingly, while the birth rate was down, the marriage rate was up. Allen contends that this was because divorce was simply too expensive. *Id.* at 116.

[4] *Id.* at 158.

[5] PIERS BRENDON, THE DARK VALLEY: A PANORAMA OF THE 1930S 86 (2000).

[6] LOUISE ARMSTRONG, WE TOO ARE THE PEOPLE 10 (1938). The author describes this scene in 1932 Chicago: "One vivid gruesome moment of those dark days we shall never forget. We saw a crowd of some fifty men fighting over a barrel of garbage which had been set outside the back door of a restaurant. American citizens fighting for scraps of food like animals!" *Id.* at 10.

them down sufficiently to make them palatable to a wider spectrum of the citizenry.[7] President Roosevelt's first hundred days in office produced an unprecedented quantity of legislation,[8] and to complete this New Deal portfolio, Roosevelt signed into law the Wagner Act in July of 1935.[9]

A. *The Wagner Act*

The Wagner Act defined, for the first time, exactly what constituted an unfair labor practice for management.[10] It gave both employers and unions strict guidelines and rules for organization.[11] It also established a new federal agency, the National Labor Relations Board, to investigate claims of unfair labor practices and ensure fair union elections.[12] Perhaps most importantly, Section 7 of the Act gave American workers the basic right of association and of self-organization.[13] The revolutionary impact of the Act was that it provided a peaceful, orderly mechanism by which laborers could organize which was unlike the previously preferred tool of labor— the strike—which was chaotic, costly, and often, quite violent. Nonetheless, this impact was not immediate.[14] The role of the Wagner Act in protecting the rights of employees to organize was "far from effective."[15] However, in

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[7] *See generally* ARTHUR SCHLESINGER, THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL 4-23 (1958) (discussing Roosevelt's early New Deal reforms).

[8] *Id.* at 20.

[9] *Id.* at 405-06.

[10] These Section 8 prohibitions are now codified at 29 U.S.C. § 158(a) (2004). For example, it is an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." § 158(a)(3).

[11] For example, during an organizing campaign, the "expressing of any views, argument, or opinion" may constitute an unfair labor practice if such expression contains a threat of reprisal or force or promise of benefit. § 158(c).

[12] 29 U.S.C. § 153 (2004).

[13] Section 7 of the National Labor Relations Act provides that: "employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157 (2004).

[14] Other classic Roosevelt reforms had been dismissed by the Supreme Court as being unconstitutional, including the National Recovery Administration. ARTHUR SCHLESINGER, THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL 279-80 (1960).

[15] HARRY MILLIS & ROYAL MONTGOMERY, ORGANIZED LABOR 192 (1945).

1937 the Supreme Court in *N.L.R.B. v. Jones & Laughlin Steel*,[16] held that intrastate activity could be regulated by Congress because it might have serious implications interstate commerce.[17] That decision solidified the efforts of Congress to define and support the labor movement.

In the first decade of its existence, the Wagner Act, if judged solely by the membership of workers on the union rolls, represented an unqualified success. Union membership, beginning at approximately 3.5 million members, or about 8.5% of the total work force in 1935, had skyrocketed to approximately 14.3 million members in 1945, which represented about 27% of the nation's total workforce and approximately 35% of all non-agricultural workers in the United States.[18] Ironically, this dramatic growth in union membership had been accomplished without any reference in the legislation to the role of supervisors or to the exact definition of a supervisor. It seemed as if Section 7 rights could be extended to practically anyone in a corporation below the level of director. This seemingly limitless grant of Section 7 rights would come to haunt the NLRB in the late 1940s in a case involving the Packard Motor Company.

The union at Packard had enrolled 32,000 members by the mid-1940s,[19] although about 1,100 employees who held the rank of "foreman" initially were not part of the UAW union.[20] The NLRB subsequently recognized their right to organize, and Packard refused to bargain.[21] The core dispute in this case was how exactly to classify the foremen under the NLRA—as employees or, alternatively, as employers.

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16 Samuel R. Olken, *Book Review: Historical Revisionism and Constitutional Change: Understanding the New Deal Court*, 88 VA. L. REV. 265, 266-68 (2002).

17 N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36-41 (1937).

18 Gerald Mayer, *Union Membership Trends in the United States*, Congressional Research Service, The Library of Congress (2004), *available at:* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1176&context=key_workplace (last visited April 10, 2009).

19 Packard Motor Car Co. v. N.L.R.B., 330 U.S. 485, 487 (1947).

20 These foremen were obviously supervising rank-and-file workmen and were treated more like management. They had access to paid vacation and sick leave and were also responsible for disciplining the workers in their units, although ultimate decisions on firing (or hiring) were made by other departments. *Id.*

21 *Id.* at 487-88.

The Supreme Court rejected Packard's argument that the foremen were more employer than employee. The Court observed that, while both arguments had relatively equal merit, it must defer to the Board's judgment, concluding that the Board's determination was neither unreasonable nor arbitrary.[22] Further, the Court noted that it was not within its power to set policy, but rather to interpret what it concluded was unambiguous legislation.[23] Justice Douglas, in a scathing dissent, identified the basic flaw in the NLRA legislation, asserting that without a firm definition of supervisor, workers like the Packard foremen could be legitimately placed in either camp.[24] Nevertheless, after *Packard*, the basic right to organize would be seen as a right belonging to every wage-earning employee, no matter how closely his or her duties were aligned with company management. This decision not only acknowledged the logical contradictions, but also noted that unless Congress amended the Act to account for the problem of defining supervisors, there was no action the Court could take to remedy this flaw. It would not be long before Congress took action.

B. The Taft-Hartley Act and the Supervisor Exemption

Again, history must color the analysis. By 1947, Democrats had controlled the executive branch for fifteen straight years. Labor unrest had been rising since the end of the war. Employers desired to reduce the work week from the wartime standard of forty-eight hours to the peacetime standard of forty hours, while unions sought to maintain the forty-eight hour wage structure for a reduced work week.[25] This friction led to a number of strikes in 1946, which led to an increased resentment of organized labor by segments of the population.[26] While repealing the Act seemed

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[22] *Id.* at 491-92.

[23] *Id.* at 493 ("However we might appraise the force of these arguments as a policy matter, we are not authorized to base decision of a question of law upon them. *They concern the wisdom of the legislation; they cannot alter the meaning of otherwise plain provisions.*") (emphasis added).

[24] *Id.* at 497 (Douglas, J., dissenting). Further, if foremen could be classified as employees, so too could every corporate employee, up to the level of vice-president. *Id.* at 494.

[25] BERT COCHRAN, LABOR AND COMMUNISM 249 (1985).

[26] *Id.* at 254.

politically inadvisable, amending it to be more equitable for both employers and employees appealed to politicians seeking to change the balance of power in the workplace.[27] Introduced by Republican Senator Robert Taft and formally known as the Labor-Management Relations Act, Taft-Hartley passed contentiously in June of 1947, over Democratic President Truman's veto.[28] Taft-Hartley was not well received by the members and leadership of organized labor,[29] and in the years immediately following Taft-Hartley's enactment, union membership remained steady, at around the 1.4 million mark, or about 24% of all employed workers.[30]

The Taft-Hartley Act coupled with the Wagner Act is known collectively as the National Labor Relations Act ("NLRA"). Just like the Wagner Act, the Taft-Hartley Act defined a slate of "unfair labor practices," but while the Wagner Act used this term to define unfair employer practices against the employee, Taft-Hartley defined unfair practices by labor against management.[31] Where the Wagner Act granted workers the right to organize, the Taft-Hartley Act gave employers the right to oppose union organization by permitting states to pass right-to-work statutes, requiring unions to give notice prior to striking, prohibiting closed shops, outlawing secondary boycotts and, as an artifact of the era, requiring that union leaders file an affidavit affirming that they had never been a member of the Communist Party.[32] Most importantly, the Taft-Hartley Act responded to the plaintive cry of the Supreme Court by including a specific definition of the

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27 HARRY MILLIS & EMILY BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 314-15 (1950).

28 Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 101, 49 Stat. 445 (1947) (codified at 29 U.S.C. §§ 151-161 (2004)).

29 Typical of the response is the following quote from the National Maritime Union: "The crippling and destruction of the trade union movement is the first order of business on the agenda of the National Association of Manufacturers which wrote [the Taft-Hartley law]." NATIONAL MARITIME UNION, IN THE BACK: ANALYSIS OF THE TAFT-HARTLEY LAW 6-7 (1947).

30 Mayer, *supra* note 18 (noting that union membership as a percentage of the total workforce would peak in 1960, with 37% of the workforce on the union rolls, amounting to almost 18 million American workers).

31 These Section 8 prohibitions are now codified at 29 U.S.C. § 158(b) (2004).

32 MILLIS & BROWN, *supra* note 27, at 537-38.

term supervisor, and excluding employees classified as such from the right to organize. The statutory definition provides that:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[33]

Of course, it would be the responsibility of the NLRB, and ultimately the courts, to interpret the exact parameters of the exemption. The statutory language presumes the three-part supervisory test employed by the Board and courts: (1) employees must engage in at least one of the twelve supervisory acts defined by statute (i.e., the power to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, direct and adjust grievances); (2) their authority must be held in the "interest of the employer"; and (3) their authority must be exercised through the "use of independent judgment."[34] If these three conditions are met, the employee is a supervisor and without Section 7 rights. But the application of these criteria is anything but a litmus test.

III. THE STATUTORY DEFINITION INTERPRETED

A. Evolving Standards: The "Community" or "Conflict of Interest" Test

In *Denver Dry Goods*, one of the first cases decided after the passage of Taft-Hartley, the NLRB decided to specifically exclude from bargaining workers whose interests were more aligned with the interests of management than the interests of the rank-and-file.[35] This exclusionary standard was further expanded in 1956 in *Swift & Company*.[36] The NLRB not only excluded managerial

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[33] 29 U.S.C. § 152 (2004).

[34] *See* Michael Hawkins & Shawn Burton, Oakwood Healthcare*: How Textualism Saved the Supervisory Exemption*, U. PA. J. LAB. & EMP. L. 1, 5-6 (2006) (discussing the test and its application).

[35] Denver Dry Goods, 74 N.L.R.B. 1167, 1172 (1947).

[36] Swift & Co., 115 N.L.R.B. 752, 753-54 (1956).

employees from a union composed of rank-and-file workers, but refused to acknowledge these same managerial employees as having any Section 7 rights.[37] Subsequently, the Board focused upon the "community of interest" prong. If a group of employees was found to share interests of management over the interests of the rank-and-file, such employees would be deemed managerial or supervisory and excluded from a union of the rank-and-file in most cases, but allowed to unionize on their own, as *managerial employees.*[38]

In 1970, the Board made an effort to clarify its position regarding such managerial employees in *North Arkansas Electric Cooperative.*[39] At issue was the fate of a supervisory employee who was terminated for expressing a favorable opinion of the union during a hotly-contested union election against direct orders from management not to express any opinion, pro or con, during negotiations. Initially, the NLRB ruled for reinstatement, arguing that the employee fell into a protected classification under the Act.[40] The Eighth Circuit rejected the Board's rationale.[41] In response, the NLRB attempted to define the level at which an employee could be excluded from Section 7 organization rights.[42] This level, according to the Board, was reached when the employee participated in the "formulation, determination or effectuation of policy with respect to employee relation matters."[43] The Board further acknowledged that such determinations were not based on any part of the NLRA, but were solely a creation of the Board.[44] To make matters even more confusing, the Board declined to set a comprehensive standard, and reserved the right to make such determinations on a case-by-case basis.[45] This new formulation was also rejected by the Eighth Circuit, which

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37 *Id.*

38 *See* Bryan M. Churgin, *The Managerial Exclusion Under the National Labor Relations Act: Are Worker Participation Programs Next?*, CATH. U. L. Rev. 557, 579-82 (1999) (discussing the community of interest test and the concept of managerial employees).

39 N. Ark. Elec. Coop., 185 N.L.R.B. 550, 550 (1970).

40 N. Ark. Elec. Coop., 168 N.L.R.B. 921 (1967).

41 N.L.R.B. v. N. Ark. Elec. Coop., 446 F.2d 602, 610 (8th Cir. 1971).

42 *N. Ark. Elec.*, 185 N.L.R.B. at 550.

43 *Id.* at 551.

44 *Id.* at 550.

45 *Id.*

upbraided the Board for trying to read legislative intent into an area where no clear intent could be found.[46] Thus, the order to reinstate the employee was rejected, and the stage was set for a new conflict over who was and was not protected under the NLRA.

The relevant case involved a dispute in the early 1970s at Bell Aerospace, where company buyers had organized their own union.[47] Bell executives refused to bargain with the union, citing the buyer's status as managerial employees and their exclusion from Section 7 rights.[48] However, the Board recognized the buyer's union as a legitimate one, ordered Bell to bargain with it, and attempted to articulate a new standard for managerial employees. The Board morphed the older "community of interest" test into a "conflict of interest" test, in which the employee-manager line was crossed if, and only if, the employee's membership in a union created a clear conflict of interest with the employee's role as an agent of the company.[49] Finding no such clear conflict with the Bell buyers, the Board certified their union.[50] The Board concluded that all employees, no matter how much managerial or supervisory responsibility they possessed, had the protected right to organize or join a union, unless such membership created an obvious and significant conflict of interest with the company. Again, the Board's ruling was rejected at the appellate level[51] and in 1974, *Bell Aerospace* made its way to the Supreme Court.[52]

The Supreme Court ruled in favor of the employer, determining that the legislative history of Taft-Hartley, prior court decisions, and the Board's previous, albeit inconsistent, rulings

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46 *N. Ark. Elec.*, 446 F.2d at 610 ("For the foregoing reasons, we conclude that it was not the intent of Congress to provide managerial employees with protection from being discharged for refusing to obey instructions to remain neutral in a union election, and we deny enforcement of the Board's order."); *Id.* at 609-10 ("We find nothing in the Act or its legislative history to indicate Congress intended the word 'employee' to have one definition for the purpose of determining a proper bargaining unit and another definition for the purpose of determining which employees are protected from being fired for union activity.").

47 Bell Aerospace Co.,197 N.L.R.B. 209, 209 (1972).

48 *Id.*

49 *Id.*

50 *Id.* at 211.

51 Bell Aerospace Co. v. N.L.R.B., 475 F.2d 485, 494-95 (2d Cir. 1973).

52 N.L.R.B. v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974).

collectively pointed to an exclusion of managerial employees from coverage under the Act.[53] Justice Powell, writing for the majority, further enforced a textual interpretation of the Act upon the Board, admonishing that it was "not now free to read a new and more restrictive meaning into the Act."[54] Although the Court defined managerial employees "as those employees who 'formulate and effectuate management policies by expressing and making operative the decisions of their employer,'"[55] the Court stopped short of articulating a crystal-clear standard for what constituted managerial activity[56] and refrained from drawing a clear line demarcating where Section 7 rights ended in the case.[57] Justice White recognized this gap in his dissenting opinion. "The Board's decisions in this area have not established a cohesive and precise pattern of rulings."[58] Still, Justice White opined that the Act gave the Board broad power to interpret the meaning of the NLRA, and found no good reason in *Bell Aerospace* to hamper the Board's power or overturn their ruling.[59] Nevertheless, *Bell Aerospace* put an end to "community of interest" or "conflict of interest" touchstones; seemingly the NLRB would now be confined to an increasingly textual and specific interpretation of the Act, especially in regards to employee versus supervisor versus manager distinctions.

Subsequently, the Board seemed primarily occupied with answering questions involving the extension of union

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[53] *See* George Feldman, *Workplace Power and Collective Activity: The Supervisory and Managerial Exclusions in Labor Law*, 37 ARIZ. L. REV. 525, 545-56 (1995).

[54] *Bell Aerospace*, 416 U.S. at 289 (quoting *Bell Aerospace*, 475 F.2d at 494).

[55] *Id.* at 288 (quoting Ford Motor Co., 66 N.L.R.B. 1317, 1322 (1946)).

[56] *Id.* at 290. Instead, Justice Powell merely acknowledged the obvious, that a manager or supervisor was one who "formulate[d] and effectuate[d] management policies by expressing and making operative the decisions of their employers." *Id.* at 288 (quoting *Ford Motor*, 66 N.L.R.B. at 1322). This tautology is certainly true for any employee and was of no real help in defining the precise supervisory boundary where Section 7 rights were lost.

[57] *Id.* at 294. "We express no opinion as to whether these buyers fall within the category of 'managerial employees.'" *Id.* at 290. *Bell Aerospace* was a partial win for the Board because the Court upheld the right of the NLRB to set new standards through adjudication of cases rather than through a formal rule-making process. *Id.* at 294. One may interpret the decision as the Court deferring to the Board's judgment in most matters, except for those where the Board's judgment is wrong.

[58] *Id.* at 311 (White, J. dissenting).

[59] *Id.*

organization to places it had never gone previously, such as the hallowed halls of academe . . . .[60] Such consideration of the professional employee also coincided with the high-water mark of union activity in America. In the 1970s and 1980s, organized labor enter a period of steady decline until by the turn of the new century, fewer than 15% of the workforce would belong to a union—down from a high of about 28% of all employed workers reached during the mid-1950s.[61] Labor and management would wait until the early 1990s for the next major development in the definition of supervisor, which would emerge from the health care industry.

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[60] *See* N.L.R.B. v. Yeshiva Univ., 444 U.S. 672, 679 n.6 (1980) (answering the question as to whether school faculty are professionals or managers. The court held that when faculty teaches, they should be classified as professional employees and covered under the Act, but when faculty meets to make any sort of recommendation, they transform into managers and are thus excluded from protection). For an examination of the issues surrounding academic unions in institutions of higher education, see JUDITH WAGNER DECEW, UNIONIZATION IN THE ACADEMY: VISIONS AND REALITIES (2003).

[61] Mayer, *supra* note 18. In 1995 just less than 15% of American workers belonged to unions, a figure considerably lower than the 1954 high of 34.7% in the non-agricultural sector. Kathleen Sheil Scheidt, Comment, National Labor Relations Board v. Town & Country Electric, Inc.*: Allowing a Trojan Horse to Trample Employer Rights*, 24 IOWA J. CORP. L. 89, 89 (1998) (noting that the decline in union membership since the 1980s is arguably attributable to the change in the economy's base from manufacturing to service, the global expansion of facilities, and the effects of mergers, consolidations and downsizing); Diane E. Gwin, *Paid Union Organizers Within the Definition of "Employee":* NLRB v. Town & Country Electric, Inc., *1995-96 Annual Survey of Labor and Employment Law: Labor Law*, 38 B.C. L. REV. 303, 311 n.79 (1997) (stating that in 1995 just less than 15% of American workers belonged to unions, a figure down considerably from the 1945 high of 35.5% in the non-agricultural sector). Other observers contend that the failure of unions to recognize and respond accordingly to the changing face of labor, as evidenced by the increased number of women, people of color, and new ethnic groups and immigrants in the workforce, contributed to the decline in membership as well. Victor J. Bourg & Ellyn Moscowitz, *Salting the Mines: The Legal and Political Implications of Placing Paid Union Organizers in the Employer's Workplace*, 16 HOFSTRA LAB. & EMP. L.J. 1, 50 (1998); Charles B. Craver, *The Labor Movement Needs a Twenty-First Century Committee for Industrial Organization*, 23 HOFSTRA LAB. & EMP. L.J. 69, 81-82 (2005).

B. A New Standard or False Dichotomy?

1. Nurses as Supervisors

The NLRA recognizes the Section 7 rights of *professional employees* to organize and engage in concerted activities.[62] It is no easy task, however, to differentiate a covered professional employee from an excluded managerial employee.[63] For example, in the health care industry, professional duties and supervisory duties overlap; so when does a nurse lose Section 7 rights as a professional employee?[64] How much supervision is routine, and how much involves the exercise of independent judgment as

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[62] The term 'professional employee' means—(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 filed of science of 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 . . . .

29 U.S.C. § 152 (12) (2004).

These professional employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining . . . ." 29 U.S.C. § 157 (2004).

[63] For an excellent analysis of the issue, see David M. Rabban, *Distinguishing Excluded Managers From Covered Professionals Under the NLRA*, 89 COLUM. L. REV. 1775, 1833-44 (1989) (proposing a test which would focus on the bureaucratic responsibilities of managerial professionals in order to distinguish between covered professional employees and excluded managers and supervisors); *see also* Marion Crain, *The Transformation of the Professional Workforce*, 79 CHI.-KENT. L. REV. 543, 611 (2004) (contending that the law should protect professional employees who organize to protect their livelihood, and that to the extent that professionals have become "commodified," they lack sufficient independent judgment to be characterized as supervisors anyway).

[64] For a robust discussion of this perplexing issue see Teresa R. Laidacker, *The Classification of the Charge Nurse as a Supervisor Under the National Labor Relations Act*, 69 U. CIN. L. REV. 1315, 1337 (2001) (concluding that Congress or the Supreme Court should take the initiative to decide whether nurses fall under one exception to the supervisory exclusion or if the NLRB's conclusion that nurses are not supervisors is correct); Patrick M. Kuhlmann, Comment, *The Enigma of NLRA Section 2(11): The Supervisory Exclusion and the Case of the Charge Nurse*, 2000 WIS. L. REV. 157, 186-203 (calling for Congressional intervention on the resolution of the distinction which is critical for the labor movement, the health care industry, and the economy).

required under the supervisor exclusion? To further complicate the matter, should licensed practical nurses ("LPNs") be treated differently from registered nurses ("RNs"), since they have a subordinate professional status as compared to the more highly-trained RNs, but are often in positions in which they supervise other health care employees?[65]

In the twenty-something years prior to 1994, the NLRB employed a test for when the supervisory distinction applied to health care professionals which examined when they acted in the interest of their employer, in contrast to when they acted in the interest of their patients.[66] In *Health Care and Retirement Corporation of America,*[67] a case involving the organization of nursing home personnel in Ohio, the corporation terminated three nurses for engaging in what the nurses claimed was protected activity under the Section 7 of the Act.[68] The Board concluded that their collective behavior was protected under Section 7 and ordered the three nurses reinstated.[69] Because Health Care and Retirement Corporation argued that the nurses were not protected employees because they were supervisors, the Board also embarked upon an exhaustive examination of what it means to be a nursing

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65 *See* Jonathan Edward Motley, Note, *Grandmothers and Teamsters: How the NLRB's New Approach to the Supervisory Status of Charge Nurses Ignores the Reality of the Nursing Home,* 73 IND. L.J. 711, 714-21 (1998) (discussing the distinction between RNs in hospital settings and LPNs in nursing home settings).

66 In its struggle to define the extent of the supervisor exemption in the health care industry, the NLRB examined whether or not the direction, which was given by health care employees to other employees in the exercise of their professional judgment, was incidental to the professional's treatment of patients, or instead, in the interest of the employer. For a discussion of this "incidental to patient care" test, and the split of authority it generated in the circuit courts, see Edwin A. Keller, Jr., Comment, *Death by Textualism: the NLRB's "Incidental to Patient Care" Supervisory Status Test for Charge Nurses,* 46 AM. U.L. REV. 575, 578-98 (1996); R. Jason Straight, Note, *Who's the Boss?: Charge Nurses and "Independent Judgment" After* National Labor Relations Board v. Health Care & Retirement Corporation of America, 83 MINN. L. REV. 1927, 1939-42 (1999).

67 Health Care & Ret, Corp. of Am., 306 N.L.R.B. 63, 63 (1992).

68 Three nurses from the corporation's Urbana, Illinois nursing home had traveled together to speak to their regional director about a series of grievances, including low wages and inconsistent enforcement of absentee policies and were soon thereafter terminated by the Health Care and Retirement Corporation of America. *Id.* at 68.

69 *Id.* at 64.

supervisor in a health care facility under the statute.[70] The Board decided that, even though the nurses were referred to as supervisors on paper, their duties did not meet the standards articulated for supervision as the Board interpreted the exemption.[71] The Board also determined that the direction given by the nurses in the facility were given in the interest of the patients, not the employer, and thus did not meet the standard of "responsible direction."[72] The Sixth Circuit overturned the Board's ruling[73] and the Supreme Court agreed to consider the appeal.[74]

Justice Kennedy, writing for the majority, summed up the Court's prevailing opinion of the Board's test for employer interest quite succinctly: "That dichotomy makes no sense. Patient care is the business of a nursing home, and it follows that attending to the needs of the nursing home patients, who are the employer's customers, is in the interest of the employer."[75] At the heart of the Court's opinion was the rejection of the Board's method of deciding the case. Rather than analyzing the facts, the Board chose to formulate a standard, which the Court rejected as having no basis in either the legislation or legislative intent. Yet,

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[70] *Id.* at 69-72.

[71] *Id.* at 72 ("But Section 2(11)'s definition of supervisor is different from Webster's. And as I understand the meaning of that provision, [the] nurses were not supervisors . . .").

[72] *Id.* at 70.

[73] Health Care & Ret. Corp. of Am. v. N.L.R.B., 987 F.2d 1256, 1261 (6th Cir. 1993) (concluding that the Board's test for determining the supervisory status of nurses was inconsistent with the statute).

[74] N.L.R.B. v. Health Care & Ret. Corp. of Am., 510 U.S. 810, 810 (1993).

[75] N.L.R.B. v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 578 (1994). For a discussion of the case, see Ann M. Benedetto, Note, NLRB v. Health Care and Retirement Corp. of America: *Analysis and Disapproval of the National Labor Relations Board's Determination of Supervisory Status of Nurses*, 12 J. CONTEMP. HEALTH L. & POL'Y 701 (1998); Daniel D. Barker, Note, NLRB v. Health Care & Retirement Corp.: *Erosion of NLRA Protection for Nurses and Other Professionals?*, 1996 WIS. L. REV. 345 (1996); Frederick J. Woodson, NLRB v. Health Care & Retirement Corp. of America: *Signaling the Need for Revision of the NLRA*, 14 J.L. & COM. 301 (1995); Kathryn L. Hays, NLRB v. Health Care & Retirement Corporation of America: *A "Narrow" Decision?*, 55 LA. L. REV. 987 (1995); Judy Prutzman Osgood, NLRB v. Health Care & Retirement Corporation of America: *A Setback for Nurses' Unions?*, 46 SYRACUSE L. REV. 135 (1995); Angela R. Freeman, Note, Health Care & Retirement Corp. of America: *A Potential Broadening of the Test for Supervisory Status under the NLRA*, 31 TULSA L.J. 323 (1995); Laura Bailey, Note, NLRB v. Health Care & Retirement Corp. of America—*"In the Interest of the Employer": Broadening the Scope of the Supervisor Exclusion under the NLRA*, 4 WIDENER J. PUB. L. 533 (1995).

while the Court may have indeed proven its point regarding the logical flaws in the Board's standard concerning employer interest, it left unanswered the larger issue of defining precisely that long-elusive boundary between the duties of an employee and the duties of a supervisor in situations where these duties overlapped. While Justice Kennedy opined that the Court's decision would have no impact beyond the healthcare industry,[76] Justice Ginsburg, in her dissent, felt that the Court's actions could lead to a situation in which few professionals in any industry could ever hope to receive their Section 7 rights.[77]

In 1947, following the heady days of *Packard*, it seemed as if every employee had the right to organize. In the aftermath of the 1994 decision, at least as far as Justice Ginsburg was concerned, it now seemed as if very few employees still had their Section 7 rights.[78] A few more years would elapse before the Board tried to define the employee-supervisor boundary. Again, it would involve a situation in the health-care industry, but the Board would look to the independent judgment requirement instead to craft a new test.

2. Independent Judgment: *Kentucky River*

The case that would become known as *Kentucky River* began at a nursing home for the mentally challenged in Pippa Passes, Kentucky, known as the Caney Creek Developmental Complex.[79] Caney Creek employed about one hundred workers, of which twelve were managers of one form or another.[80] In 1997, the

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[76] "Any parade of horribles about the meaning of this decision for employees in other industries is thus quite misplaced." *Healthcare & Ret. Corp. of Am.*, 511 U.S. at 584.

[77] *Id.* at 598 (Ginsburg, J. dissenting). For a discussion of this quandary in the music industry, see Molly Eastman, Note, *Orchestrating an Exclusion of Professional Workers from the NLRA: Has the Supreme Court Endangered Symphony Orchestra Musicians' Collective Bargaining Rights?*, 15 WASH. U. J.L. & POL'Y 313, 313 (2004) (arguing that the supervisory exclusion of the NLRA as construed puts orchestral musicians in danger of losing their collective bargaining protections); Rochelle Gnagey Skolnick, Note, *Control, Collaboration or Coverage: The NLRA and the St. Paul Chamber Orchestra Dilemma*, 20 WASH. U. J.L. & POL'Y 403, 404-05 (2006) (discussing the potential for shared governance to transform musicians to supervisors).

[78] *Healthcare & Ret. Corp. of Am.*, 511 U.S. at 598 (Ginsburg, J. dissenting).

[79] N.L.R.B v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 708 (2001).

[80] *Id.*

employees at Caney Creek unionized, with six RNs being included in the union.[81] The owners of Caney Creek refused to negotiate with the union, insisting that the RNs were supervisors under the Act who did not have Section 7 rights.[82] Some of these RNs served as building supervisors, the highest-ranking employee level in the building, who shifted personnel from one unit to another as demand dictated, attempted to adjust work schedules in the event of a shortage of staff, and "wrote-up" employees for noncompliance.[83] The Board compelled Kentucky River Community Care (KRCC) to bargain with the newly-formed union and included the RNs at KRCC within the appropriate bargaining unit.[84] In interpreting the second part of the statutory definition of supervisor, the exercise of independent judgment,[85] the Board reiterated its position[86] that employees, such as nurses, do not use independent judgment when they exercise "ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards."[87] In other words, the Board considered judgment that was informed by professional or technical training or experience as being non-supervisory in nature, excluding judgment applied "in directing less-skilled employees to deliver services" from its interpretation of independent judgment as used in the statutory exclusion.[88]

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[81] *Id.* at 709. The union they sought to represent them was the Kentucky State District Council of Carpenters. *Id.* at 708.

[82] *Id.* at 709.

[83] Ky. River Cmty. Care, Inc. v. N.L.R.B., 193 F.3d 444, 453 (6th Cir. 1999). An administrator, however, always remained "on call." *Id.*

[84] Ky. River Cmty. Care, Inc., 323 N.L.R.B 209 (1997).

[85] 29 U.S.C. § 152 (11) (2004).

[86] "The NLRB's position generally has been that supervisory status is almost never to be accorded nurses whose supervisory authority is exercised over less-skilled professionals in the interest of patient care." Caremore, Inc. v. N.L.R.B., 129 F.3d 365, 371 (6th Cir. 1997); *see also* N.L.R.B. v. Beacon Light Christian Nursing Home, 825 F.2d 1076, 1079-80 (6th Cir. 1987) (rejecting Board's conclusion that LPNs were not supervisors because their duties involved "mere patient care"); Grancare, Inc. v. N.L.R.B., 137 F.3d 372 (6th Cir. 1998) (rejecting Board's classification of charge nurses as employees); Mid-America Care Found. v. N.L.R.B., 148 F.3d 638 (6th Circuit, 1998) (rejecting NLRB's conclusion that LPNs were not supervisors because their exercise of authority was routine).

[87] *Ky. River Cmty. Care*, 532 U.S. at 713 (referencing Board's position).

[88] *Id.* at 714-15 (summarizing Board's position).

In reversing the Board, the Sixth Circuit, characterized the NLRB's definition of independent judgment as stubborn, narrow and wooden,[89] and concluded that the nurses were in fact supervisors, not employees.[90] The Sixth Circuit had previously held that nurses became supervisors when they engaged in any one of three acts: directing other employees to give patient care to rectify staffing shortages; filling out any sort of evaluation on the employees they were directing; or acting as building supervisors.[91] Noting that the Board had not accounted for any of the Sixth Circuit's prior decisions in articulating its independent judgment standard,[92] the court summarily stated: "[T]his [supervisory] definition is a substantially binding rule of law in this court that is no longer open to question."[93] It further rejected the Board's long-standing practice of placing the burden of proving supervisory status upon the party disputing such status, finding that in any supervisory-status dispute, the burden of proving that status lay with the Board.[94]

On appeal, the Supreme Court was quick to point out that *Kentucky River* was first and foremost about the way in which the Board had interpreted the Act beyond the Act's original textual boundaries.[95] The questions concerning who bore the burden of proof and how to interpret independent judgment in relation to supervision were not comprehensively addressed by the Act. Justice Scalia, writing for the majority, determined that the Board's interpretation of independent judgment lacked any consistency with either the stated text of the statutory exclusion or the Board's previous decisions on the matter.[96] He further noted that the Board had overstepped its authority in this vexing matter of the nature of independent judgment, since it was the Board's

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89 Ky. River Cmty. Care, Inc. v. N.L.R.B., 193 F.3d 444, 454 (6th Cir. 1999).

90 *Id.* The dissent instead concluded that that the Board had more than met the substantial evidence standard for the judicial review of Board decisions by proving that the RNs received no extra compensation for their building supervisor duties, nor were they able to hire or fire employees. *Id.* at 464 (Jones, J. dissenting)

91 *Mid-America Health Care,* 148 F.3d at 641.

92 *See* cases cited *supra* note 86.

93 *Ky. River Cmty. Care,* 193 F.3d at 453.

94 *Id.*

95 N.L.R.B. v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 713-15 (2001).

96 *Id.* at 714.

role to decide matters of degree, not invent categorical exclusions unsupported by the Act.[97] In short, the Board had once again failed to find a standard to measure supervision that would meet the approval of the Supreme Court.[98] On the other hand, the Court concurred with the Board's position on the burden of proof issue, concluding that, although no clear textual imperative for the practice was contained within the Act, the Board's decision was consistent and congruent with the Act.[99]

It is perhaps more interesting to examine what was *not* resolved by *Kentucky River* than what was decided. There was still no clear definition of supervisor that was readily understood and accepted by both labor and management, and more importantly, there was no definition of supervisor that was articulated by the courts. The Board requested amicus briefs from the stakeholders in this area of labor law in July 2003 on issues raised specifically by *Kentucky River*, including the substantive difference between *assigning and directing*, as well as the meaning of *responsibly to direct* and *independent judgment* in the statutory exclusion.[100] Ultimately, the stage was set for the culmination of the long legislative and judicial history of the supervisory exemption.

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97 *Id.* ("The Board's policy concern regarding the proper balance of labor-management power cannot be given effect through the statutory text. Because this Court may not enforce the Board's order by applying a legal standard the Board did not adopt, the Board's error precludes the Court from enforcing its order.").

98 *See also* Laura Brown, *War of the Nurses: The Struggle for a Voice in* National Labor Relations Board v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001), 43 S. TEX. L. REV. 885, 910 (2002) (calling for judicial deference to the decisions of the Board and recognition that the term professional does not equate to supervisor); Nikhil Shanbhag, Comment, *Responsible Direction and the Supervisory Status of Registered Nurses:* NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001), 112 YALE L.J. 665 (2002) (suggesting that the distinction between supervisors and others should focus on whether or not the employee responsibly directs other employees rather than exercises independent judgment or advances the interests of the employer); Jeffrey M. Smith, Note, *The Prospects for Continued Protection for Professionals Under the NLRA: Reaction to the Kentucky River Decision and the Expanding Notion of the Supervisor*, 2003 U. ILL. L. REV. 571 (2003) (concluding that the Board's exercise of its rulemaking authority is needed to provide Section 7 protections for professionals).

99 *Ky. River Cmty. Care*, 532 U.S. at 711-12.

100 Hawkins & Burton, *supra* note 34, at 11-12.

3. The *Kentucky River* Trilogy

By the autumn of 2006, the Board had several cases from previous years that involved some interpretation of the supervisory exemption. Armed with the data and opinions from the amicus briefs of and the Court's decision in *Kentucky River*, the Board issued three landmark decisions on September 29, 2006, which were intended to articulate a new vision of the supervisory exemption that was true to the legislative intent of Taft-Hartley, and that squared with *Kentucky River*. These three decisions—*Croft Metals, Golden Crest Healthcare* and *Oakwood Healthcare*—became known as the *Kentucky River Trilogy*, and provided what former Board Chairman William Gould would call a "seismic shift" in statutory interpretation.[101]

Oakwood Healthcare involved a hospital in in Taylor, Michigan, that employed almost 200 RNs spread out over ten patient units at the hospital.[102] While the RNs reported to various levels of stipulated supervisors, they also directed other hospital employees in the performance of routine patient care tasks, such as feeding, cleaning, bathing and walking.[103] Similar to the situation in *Kentucky River*, the nurses spent part of their time acting as employees and following direction from doctors and titled supervisors, and spent the rest of their time in a more supervisory capacity, directing less-skilled employees.[104] Additionally, charge nurses oversaw various patient care units and assigned other employees, including RNs, LPNs, nursing assistants and technicians, to minister to specific patients within the hospital.[105] While the charge nurses did not assign employees to shifts, a function that was performed by the hospital's Staffing Office, the charge nurse assigned employees to patients within a unit.[106] Such charge nurses received an extra level of compensation (about

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101 Steven Greenhouse, *Board Redefines Rules for Union Exemption*, N.Y. TIMES, Oct. 4, 2006, http://www.nytimes.com/2006/10/04/washington/04labor.html?_r=1&pagewanted=2.

102 112 nurses rotated through the charge nurse position, while twelve employees were found to be permanent charge nurses. Oakwood Healthcare, 348 N.L.R.B. 686 (2006).

103 *Id.* at 686-87.

104 *Id.*

105 *Id.* at 687.

106 *Id.* at 687 n.7.

$1.50 per hour) for these additional duties.[107] While approximately 10% of the Oakwood RN staff members were designated as permanent charge nurses, the majority of the remaining RNs took turns rotating as temporary charge nurses.[108]

The questions presented were whether or not the permanent charge nurses in the context of a unionization campaign should be included in the bargaining unit, as well as whether or not the designation given to the permanent charge nurses affected the status of the rotating charge nurses.[109] The Regional Director for the NLRB found in favor of the union, and included the RNs in the unit for the election.[110] The subsequent Board decision sought to define the nature of supervision at a level of clarity unprecedented in previous Board decisions the previous five decades. The result was a three-prong test to determine the meaning in Section 2(11) of "assign," "independent judgment," and "responsibly to direct them."

The Board made a connection between the ordinary meaning of the word *assign* ('to appoint to a post or duty') and the list of functions in Section 2(11) that share a commonality involving a term or condition of employment.[111] Specifically, the Board found that the act of "assigning" occurred when a charge nurse assigned an employee to a specific location or place, to a specific time or shift, or to specific tasks or duties.[112] In short, the Board concluded that "assigning" occurs when one employee tells another to go to a certain place, at a certain time to perform a certain task; therefore, the charge nurses were indeed engaging in *assignment* as defined under the exclusion.[113]

For such direction to be *responsible*, the Board determined that the responsible employee must bear some burden or carry

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107 *Id.*

108 Of the 112 nurses, only twelve nurses were classified as permanent charge nurses (about 10%). The others were considered rotating charge nurses. *Id. at* 699.

109 *Id.* The conflict occurred along traditional lines. The union (UAW) sought to include all charge nurses (permanent and rotating) within the RN unit, while the corporate owners of Oakwood Hospital sought to exclude all charge nurses on the basis of their supervisory duties. *Id.* at 686.

110 *Id.*

111 *Id.* at 703 (Lieberman and Walsh, concurring in part and dissenting in part).

112 *Id.* at 695.

113 *Id.* at 695. Specifically, it was the assignment of other nurses to specific locations by the charge nurses that met the assignment test. *Id.* at 694.

some risk of adverse consequences if the directed employee fails to perform properly.[114] This characterization necessitates a two-part inquiry to evaluate: (1) if the supervisor has the authority to both assign an employee and take corrective action if required; and (2) if the supervisor would suffer an adverse consequence if the employee failed to perform as directed.[115] As applied, the Board determined that the hospital failed to prove that the charge nurses bore any true accountability for the actions of the employees whom they were directing, and thus did not meet the "responsible direction" standard.[116]

Finally, the Board considered the notion of *independent judgment*, which it defined as the ability to act independently on the basis of decisions made by comparing available data, free from outside control.[117] While most of the permanent charge nurses were found to meet this qualification, the charge nurses in the emergency room were not found to meet the independent judgment criteria.[118] The difference in the emergency room was that the charge nurses did not take into account outside factors in making their decisions, but operated solely on the basis of pre-set policy.[119] This difference was defined by the Board as the "discretionary" component of independent judgment.[120]

Finally, the Board evaluated the rotating charge nurses and relied on past precedent to determine that rotating supervisors would be considered supervisors if a "regular and substantial" portion of their work-time was spent in supervisory activities.[121] *Regular* is defined as "according to a pattern or schedule" and

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114 *Id.* at 692.

115 *Id.* at 707 (Lieberman, and Walsh, concurring in part and dissenting in part).

116 *Id.* at 695 ("This evidence, however, shows the charge nurses are accountable for their *own* performance or lack thereof, not the performance of *others* and consequently is insufficient to establish responsible direction.") (emphasis added).

117 *Id.* at 698. "In our view, where the charge nurse makes an assignment based on the skill, experience and temperament of other nursing personnel . . . that charge nurse has exercised the requisite discretion to make the assignment *a supervisory* function . . . ." *Id.* (emphasis added).

118 *Id.*

119 Emergency room charge nurses did not evaluate patients in making patient care assignments to the nursing staff; instead, the nursing staff rotated to geographic areas of the emergency room without evaluative input from the charge nurse. *Id.*

120 *Id.*

121 Brown & Root, Inc., 314 N.L.R.B. 19, 20-21 (1994).

"substantial" could mean as little as 10-15% of the total work-time.[122] Since the rotation of charge nurses at Oakwood was accomplished without the use of a regular, structured schedule, but rather in an irregular, ad hoc manner, the Board easily excluded the rotating charge nurses from the supervisory exemption.[123]

As the dust settled, the Board's majority articulated three new standards for supervision: assignment (place, time, duty); responsibility (accountable for the actions of those being assigned) and independence of judgment (the discretion to make judgments free of outside influences). As for the Oakwood Hospital RNs, the Board found that most (but not all) of the permanent charge nurses were supervisors under the Act and thus excluded from union membership, while none of the rotating charge nurses met the supervisory criteria and thus could be included in the bargaining unit.[124]

These standards were then applied to the other two cases in the *Kentucky River Trilogy—Golden Crest* and *Croft Metals, Inc. Golden Crest* involved a unionization campaign targeting RNs and LPNs at a nursing home facility in Minnesota.[125] The employer refused to bargain with the constituted union based on its contention that the RNs and LPNs in the union were actually supervisors as defined by the Act.[126] The primary argument of the company was that the nurses met the supervisory criteria of Section 2(11) through their authority to assign nursing assistants to specific floors of the facility, to send nursing assistants home if the facility was perceived to be overstaffed, and to call assistants at home to report to work if conditions warranted such staffing.[127] The Board then considered "responsible direction," or the accountability of the nurses for the direction of their assistants.[128] Despite evidence that such ability to direct was an integral part of the nurse's yearly

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122 Archer Mills, Inc., 115 N.L.R.B. 674, 676 (1956).

123 *Oakwood*, 348 N.L.R.B. at 699.

124 *Id.* at 699-700.

125 Golden Crest Healthcare Ctr., 348 N.L.R.B. 727, 727-28 (2006).

126 *Id.* at 727. The union was formed as a unit of the United Steelworkers of America in early 1999. As in *Oakwood*, the Board's regional director issued a ruling that the nurses were employees and not supervisors. *Id.*

127 *Id.* at 728-29.

128 *Id.* at 731.

evaluation process, the Board found that the employer had not met the required burden of proof since the accountability was prospective rather than actual when it came to the direction of subordinates.[129] Yes, the nurses received ratings on their perceived ability to direct subordinates, but because these performance ratings had no real effect and did not culminate either in raises for nurses who directed well, or in termination for those nurses who directed poorly, there was no proof of accountability under the newly minted *Oakwood* standard.[130] Without meeting the responsibility test, the employer's claim of supervisory status failed.

The employer in *Croft Metals* also failed to prove supervisor status on the part of "lead employees" at an aluminum and vinyl door and window factory in Mississippi.[131] These lead employees were responsible for telling other employees how to perform their tasks, where to perform their tasks, and the specific order in which to perform their tasks; as a result, they comfortably met the "place, time, duty" piece of the "assign" test under *Oakwood.*[132] However, the employer failed the "independent judgment" test by not establishing the proof necessary for the exercise of judgment to rise above the routine and clerical, and into the area of independence and discretion.[133] The evidence showed that the lead employees made their decisions on the basis of prior routines or standard patterns, and that any evidence of independence or discretion on the part of the supervisors was lacking.[134] With the company failing to meet all three prongs of the *Oakwood* test, the Board concluded that the lead employees at Croft were employees, not supervisors, under Section 2(11).[135]

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129 *Id.* "Thus, we find that the 'prospect of adverse consequences' for the charge nurses here is merely speculative and insufficient to establish accountability." *Id.* at 731 (citing *Oakwood*, 348 N.L.R.B. at 692).

130 *Id.* at 731.

131 Croft Metals, Inc., 348 N.L.R.B. 717 (2006).

132 *Id.* at 722.

133 *Id.*

134 *Id.* at 722. "The Employer's own witnesses, to the extent that they testified about the lead persons' judgment involved in directing the crews, described such directions as 'routine.'" *Id.*

135 *Id.* at 726.

The strong negative reaction by organized labor to the *Kentucky River Trilogy* was based more on the implications of the decisions rather than on their immediate impact on the parties involved.[136] Labor leaders feared that the *Oakwood* test would leave millions of Americans powerless to engage in concerted activities through unionization.[137] AFL-CIO President John Sweeney referred to the decision as "outrageous and unjustified," noting with dismay that employees could be considered excluded when as little as 10% of their time was spent supervising.[138] Other commentators called into question the way in which the decision split along political lines, with the three Republican members of the Board in the majority and the two Democratic members of the Board in dissent.[139] The dissent in *Oakwood* was particularly stinging, with Board members Liebman and Walsh both citing the risk that the decision would, by the year 2012, deprive as many as thirty-four million employees of their Section 7 rights under the Act.[140] Other observers fear that employers will be able to manipulate the duties of workers so as to maximize that exclusion.[141] Moreover, the effect of the decision on union campaigns could be devastating since supervisors can be conscripted to participate in the employer's efforts to prevent workers from forming a union.[142]

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136 The board resolved in the trilogy of cases that the permanent charge nurses at Oakwood were indeed supervisors, while the charge nurses at Golden Crest and the lead employees at Croft were not supervisors.

137 James Parks, *Labor Board Ruling May Bar Millions of Workers from Forming Unions*, AFL-CIO NEWS, Oct. 3, 2006, http://blog.aflcio.org/2006/10/03/labor-board-ruling-may-bar-millions-of-workers-from-forming-unions/; *see also* Scott T. Silverman & Jennifer L. Watson, *Labor and Employment Law: The Impact of Recent NLRB Decisions on Supervisory Status*, 81 FLA. BAR J. 37, 39 (2007) (noting that others speculated that the union rights of over 30% of workers in at least twenty-four professions could be significantly affected by these decisions).

138 Parks, *supra* note 137.

139 Greenhouse, *supra* note 101.

140 Oakwood Healthcare, 348 N.L.R.B. 686, 700 (2006) ("Most professionals have some supervisory responsibilities in the sense of directing another's work—the lawyer his secretary, the teacher his teacher's aide, the doctor his nurses, the registered nurse her nurse's aide and so on.").

141 G. Phillip Shuler, *NLRB Clarifies When Employee is 'Supervisor'; Recent NLRB Cases Have Resulted in Guidelines for Determining if an Individual is a Supervisor Under the National Labor Relations Act*, SO. CENTRAL CONSTRUCTION, Dec. 1, 2006, http://southcentral.construction.com/opinions/law/archive/12.asp.

142 *Are NLRB and Court Rulings Misclassifying Skilled and Professional Employees as*

In 1935, when the Wagner Act was passed, the notion of what constituted management and what constituted employee seemed so self-evident that the drafters did not bother inserting precise definitions. *Packard* demonstrated the need for a definition of supervisor, which was then promptly supplied by Taft-Hartley and the creation of the supervisory exemption. Yet, in the sixty or so years that span the creation of the exclusion and the *Kentucky River Trilogy*, there has been no consistent application or interpretation of what it means to be a supervisor, an issue that seemingly still must be resolved on a case-by-case basis with little predictability. More importantly, while the Board has wrestled with this question over the last six decades, dramatic economic changes have occurred with respect to the nature of employment, which unfortunately have escaped the Board's careful consideration.

IV. THE CHANGING NATURE OF SUPERVISION

Working for a wage is a comparatively recent phenomenon in the world in general and in America in particular. This manner of keeping body and soul together was so novel that Adam Smith found it a worthy way of introducing his book, *The Wealth of Nations*, to the public in 1776.[143] Prior to the creation of large concerns employing hundreds (or thousands) of individuals, the working folks in the Western world earned their daily bread by making and selling small crafts or simply by farming. Multi-unit businesses administered by a professional managerial class, and containing a distinct class of wage-earning employees, did not exist in America in the eighteenth and nineteenth centuries.[144] By

Supervisors?: Hearing on H.R. 1644 Before the H. Subcomm. on Health, Education, Labor and Pensions of the H. Comm. on Education and Labor, 110th Cong. (2007), *available at* http://edlabor.house.gov/hearings/2007/05/are-nlrb-and-court-rulings-mis.shtml (testimony of Sarah M. Fox, labor attorney). Since they have no Section 7 rights to engage in concerted activity, supervisors also can be terminated for their refusal to comply or for their participation in organizational efforts. *Id.*

143 ADAM SMITH, THE WEALTH OF NATIONS 4-5 (Barnes and Noble Books 2004) (1776). Smith begins his great work by discussing the heretofore-unimaginable productivity of wage-earning laborers at a pin factory who practiced division of labor. *Id.*

144 ALFRED CHANDLER, THE VISIBLE HAND: MANAGERIAL REVOLATION IN AMERICAN BUSINESS 3 (1977). "Such enterprises *did not exist* prior to 1840." *Id.* (emphasis added). Chandler goes on to discuss what he considers the primary economic

the early nineteenth century in America, as the Industrial Revolution spread across the country from its genesis in the eastern seaboard cities, wage work was often seen as little better than slavery.[145] These tensions, caused primarily by the transition of the American economy from agriculture to industry, erupted in the large levels of labor unrest seen in the United States in the decades following the Civil War.[146] This unrest did not stop the rapid transformation of America's workforce from a position of relative self-sufficiency to one of wage dependence.

Between 1870 and 1910, the American population doubled, although the number of wage-workers quadrupled.[147] These tensions acted upon the American body politic, forcing policymakers to come to terms with a new demographic and its demands. Child labor prohibitions and minimum wage laws were passed, overtime compensation rules were established, and the culmination of this process of accommodation between wage-workers and management was reached in 1935 with the passage of the Wagner Act, which established the right to organize for labor and imposed the obligation to bargain in good faith for management.[148]

Human social evolution is not, of course, a process with a beginning or an end. The continuing transformation of the American workforce did not cease with the adoption of the Wagner Act in 1935. To see how dramatically conditions have shifted, consider what former Secretary of Labor Robert Reich refers to as the "Three Rules of Employment" that were established in the decades following the adoption of the Act.[149]

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revolution of the late nineteenth century and the transition of the U.S. economy from an agricultural one to an industrial economy. *Id.* at 6.

145 ROBERT REICH, THE FUTURE OF SUCCESS 90 (Vintage Books 2002) (2000). Reich cites an 1840 tract: "[W]ages are a cunning device of the devil for the benefit of tender consciences who would retain all the advantages of the slave system without the expense, odium and trouble of being slave holders." *Id.* (quoting ORESTES BROWN, THE LABORING CLASSES (1840), *reprinted in* JOSEPH BLAU, SOCIAL THEORIES OF JACKSONIAN DEMOCRACY 306-07 (Reprinted Edition 1954)).

146 *Id.* at 90-91 (Reich cites the Pullman Strikes of 1894 as an example, in which federal troops were deployed, martial law was declared in Chicago, and the leaders of the strike were beaten and jailed.).

147 *Id.* at 91.

148 *See* discussion *supra* notes 10-24 and accompanying text.

149 REICH, *supra* note 145, at 93-97. Reich argues in part that there is a time delay between problem and action in political endeavors, which frustrates an appropriate

These rules are: (1) work is steady with predictable pay-raises (the "job-for-life" or "salary man" mentality); (2) effort is limited (work consists of eight-hour days, five days a week); and (3) a steady job of any kind is a ticket to the middle class.[150] These rules form the backbone of America's Golden Age of the 1950s and 1960s, immortalized in many television shows from the same period.[151] But do these rules transition well into the first decade of the twenty-first century?

Work now seems anything but steady. The employee who begins and ends a career with the same company is so rare as to be practically nonexistent.[152] The days of the "company man" appear to be over, as the "freelancer" is now at center stage in the workplace. Incomes also have become unreliable, as paychecks are increasingly tied to variable money sources, such as sales results or grant funding.[153] Moreover, as of 1999, fully one-third of the workforce was employed in some sort of temporary capacity.[154] The concept of "limited effort" also seems to be nonexistent. As boundaries between home and work vanish, the last few decades have seen the introduction and absorption of more American women into the workforce, as well.[155] This process has caused a vicious circle of sorts. As Americans of both sexes are working longer, more unpredictable hours, families must run their vital household errands at all hours of the day and night.[156] This necessity creates a 24-7 economy that demands 24-7 workers, which further increases the length and relative unpredictability of the workweek.[157]

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reaction to current conditions.

150 *Id.* at 91. It is also instructive to note the compression of wages between those at the top of the corporation and those at the bottom. Such income disparities were at low levels in the decades following World War II. *Id.* at 96-97.

151 Ward Cleaver from the television series *Leave It to Beaver* serves as the perfect illustration of these three rules in action.

152 REICH, *supra* note 145, at 98.

153 *Id.*

154 *Id.* Reich defines *temporary* as including part-timers, freelancers, and independent contractors and temp employees.

155 *Id.* at 100-01.

156 *Id.*

157 REICH, *supra* note 145, at 101; *see also id.* at 112 (Such unlimited effort is apparently an American phenomenon. While the average workweek of European employees has been on the decline since the 1980s, the typical American workweek has continued to increase over the same time period, with Americans working more

"Under siege" might be the best way to describe the trends of the last few decades for the middle class. For Americans with only a high-school education, absolute earnings reached a high-water mark in 1973 and since have been on the decline.[158] For many years, only those without a college degree seemed to feel this pinch, but since 2000, the relative incomes of all Americans, except for those in the top 1% of earnings, have lost ground in absolute terms.[159] To summarize, in the early twenty-first century, wage work is transient, time-consuming and, in terms of absolute income, terrible. The rules of work that reigned supreme in the 1950s and 1960s have not just been broken but trampled, thrown out and forgotten. Yet this vastly different workplace is still governed by the NLRA, which was designed for a much different time period.

One aspect of wage work during the golden years of the rules was its algorithmic nature. An algorithm merely means a step-by-step process that is used to accomplish a task or solve a problem.[160] In the workplace, algorithms lend themselves to automation. Yet the complex, but sequential, process that turns a hunk of steel into a wrench can easily be programmed into a computer or an industrial robot, while the same productivity gains that Adam Smith saw with the human division of labor can be further increased by removing the human factor entirely and replacing it with a machine.[161]

A 2007 report from the National Center on Education and the Economy predicts that any algorithmic or routine work that can be automated will be automated, and that any algorithmic work that cannot be automated will be outsourced overseas.[162] The

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than 300 hours more per year than their Continental counterparts.).

158 Martin Hutchinson, *America's Disappearing Middle Class,* ASIA TIMES, Nov. 15, 2007, at A1.

159 *Id.* ("[T]he American dream, in which hard work can propel ordinary people into a comfortable, even affluent lifestyle, is becoming ever more distant . . . .").

160 "Wash, rinse, repeat" is an algorithm for hair washing and "heat at 350 degrees for thirty minutes" is an algorithm for cooking a frozen pizza.

161 Arnold H. Packer & Gloria K. Sharrar, *Linking Lifelong Learning, Corporate Social Responsibility and the Changing Nature of Work,* 5(3) ADVANCES IN DEVELOPING HUMAN RESOURCES, 3332, 3335-36 (2003) (on file with author).

162 *Tough Choices or Tough Times,* NAT'L CENTER ON EDUC. & THE ECONOMY, *available at* http://www.skillscommission.org/pdf/exec_sum/ToughChoices_EXECSUM.pdf (executive summary).

steel industry, a quintessentially algorithmic industry, in which tasks are defined by slavish adherence to protocol and procedure, and in which deviation from the rules can cost workers their limbs or even their lives, provides an example of how industries defined by algorithmic work are affected by automation. In 1980, a ton of steel required ten man-hours to produce; by 2000, the number of required man-hours per ton fell to two, and the number of steel-industry jobs in the United States fell by a quarter-million over the same time period.[163] An interesting corollary is the fact that as of 2000, the market value of the entire steel industry in the United States was less than half the stock market value of the online giant, Amazon.com.[164]

To accurately predict the future of the American economy and the continuing evolution of work in America, it is instructive to look at various secondary school curriculum initiatives designed to help the next generation of graduates secure jobs. One of the most popular is Route 21,[165] an initiative in which businesses, such as Apple, Adobe, Cisco and Intel team with various national educational organizations to create curriculum goals for the nation's secondary schools.[166] The career skills valued revolve around flexibility in the workplace, and are grouped into five categories: (1) *adaptability*, characterized by "working effectively in a climate of ambiguity and changing priorities;" (2) *self-direction*, described as "defining, prioritizing and completing tasks without direct oversight;" (3) *social skills*, defined as "working appropriately and productively with others;" (4) *accountability*, explained as "diligence" and "setting and meeting high work standards;" and (5) *leadership*, defined as "using interpersonal . . . skills to influence and guide others towards a goal."[167]

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[163] REICH, *supra* note 145, at 77 ("As recently as 1980 . . . America had 400,000 steelworkers. Two decades later . . . less than 150,000 steelworkers remained.").

[164] *Id.* Further, as jobs featuring routine work declined, so has union membership, with less than 10% of the workforce being members by the year 2000. *Id.* at 78.

[165] Route 21 was created by the Partnership for 21st Century Skills. Welcome to Route 21, http://www.21stcenturyskills.org/route21/ (last visited May 19, 2008).

[166] Welcome to Route 21, About Route 21, http://www.21stcenturyskills.org/route21/index.php?option=com_content&view=article&id=48&Itemid=44 (last visited May 19, 2008).

[167] Welcome to Route 21, Life and Career Skills, http://www.21stcenturyskills.org/route21/index.php?option=com_content&view=article&id=11&Itemid=11 (last

When these five curriculum goals are compared to the three-part supervision test as defined in the *Kentucky River Trilogy*,[168] independent judgment seems to be satisfied by the goal of self-direction, while leadership seems to cover assignment. Only responsibility is left unmet by the curriculum, and certainly employers can create conditions in which negative consequences will occur if the assignment actions of employees fail to meet employer-defined standards. Clearly, if Route 21 and similar curricular initiatives are successful in their efforts to re-engineer the next generation of employees, the boundary between supervisor and worker will be blurred beyond recognition. The conclusion, thus, is inescapable. Society is entering an era in which algorithmic work will be a small piece of an evolved American economy, one in which the overwhelming majority of workers will be self-directed, vacillating between leading work-groups one week and being members the next week.

Yet, the core of labor law was drafted in the 1930s, a time as distant to today as the Civil War was to the drafters of the NLRA. Predictably then, there is a disconnection between the law which currently governs labor management relationships and the realities of the modern economy, which frustrates its goals of economic justice and shared governance.[169] It took six decades for the Board to enunciate a functional interpretation for Section 2(11), but that effort seems increasingly meaningless in a workplace where everyone will share some measure of supervisory duties. In such a world where everyone is a supervisor, will *anyone* have Section 7 rights under the Act? In a fascinating, ironic turn of events, labor law has come full circle from the days of *Packard* where even vice-presidents had the right to organize.[170] Now it

visited May 19, 2008).

[168] *See* discussion *supra* notes 125-42 and accompanying text.

[169] For a critical analysis of this disconnection, see Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1611 (2002) (examining the function of labor law in a modern world); William B. Gould IV, *Independent Adjudication, Political Process, and the State of Labor-Management Relations: The Role of the National Labor Relations Board*, 82 IND. L.J. 461, 496 (2007) (evaluating the reasons why labor law has become dysfunctional and the threat that condition poses); Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 572 (2007) (discussing the decline of worker rights and calling for the reconsideration of labor policy).

[170] *See supra* notes 19-24 and accompanying text.

seems that in a self-directed twenty-first century workplace, *no one* may have a clear, undeniable right to join a union, free of challenge by employers.

V. THE RESPECT ACT—A POSSIBLE REMEDY?

The Supreme Court's narrow and limiting interpretation of the statutory terms in the supervisory exclusion of the NLRA has resulted in an increasing number of employees being denied the right to organize and to share in the economic empowerment intended by the drafters of the Wagner Act. The Court in *Kentucky River* recognized that, while the Board's interpretation of the exclusion was based on a sound policy argument, the policy could not be realized given the actual text of the statute.[171] Therefore, one solution is to change the text of the statute to provide for more inclusion.[172]

In the spring of 2007, a bill was introduced in Congress entitled the Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers Act ("RESPECT").[173] The bill, sponsored by Senator Christopher Dodd and Representative Robert Andrews, seeks to gut the *Kentucky River Trilogy* by amending, ever so slightly, the language of the supervisor exclusion.[174] This proposed legislation would strike the word "assign" from Section 2(11), eliminate the phrase "or responsibly to direct them," and finally, would insert a phrase stating that the remaining supervisory duties must occupy a majority of an individual's work time for that individual to be considered a supervisor.[175]

This bill, if passed, would solve the sixty years of agonizing over Section 2(11) in one fell, legislative swoop. The Act proposes to eliminate the contentious terms and phrases discussed in the *Kentucky River Trilogy*—that is, assign and responsibly to direct.[176]

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171 N.L.R.B. v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 720 (2001).

172 *See* Eric J. Wiesner, Note, *Voices from the Workplace: Oakwood Healthcare, Inc. and the Rollback of Labor Rights Under the Current National Labor Relations Board*, 42 U.S.F. L. REV. 457, 495-96 (2007) (calling for legislative action to better reflect the purpose of the NLRA).

173 H.R. 1644, 110th Cong. (2007); S. 969, 110th Cong. (2007).

174 H.R. 1644; S.969.

175 H.R. 1644; S.969.

176 H.R. 1644; S.969.

Moreover, the Act would eliminate the "10 percent standard" for supervision articulated in *Oakwood.*[177] The proposed legislation would amend Section 2(11) to read as follows:

The term "supervisor" means any individual having authority, in the interest of the employer and for a majority of the individual's worktime, to hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[178]

Hiring, firing, transferring, suspending, recalling, laying off, promoting, rewarding or disciplining are all prerogatives long associated with management in general, or supervision in particular. In testimony before the House, various hospital employers and employees pointed out that in reality, supervision carries three basic attributes: (1) the individual is involved in rating performance or in setting compensation; (2) the individual has the capacity or is directly involved in hiring and firing decisions; and (3) the individual is also involved in making schedules.[179] The RESPECT Act would shift the focus to these traditional supervisory prerogatives, and away from the ambiguous areas of the *Kentucky River Trilogy*—such as assigning or responsibly directing—and also clarify the definition with which the Board has struggled for the better part of six decades. Additionally, such a legislative response would help de-politicize this important question, so that the answer to the question of what workers are afforded Section 7 protections no longer hinges on the political composition of the Board.[180]

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177 *See* discussion *supra* notes 117-19, and accompanying text.

178 H.R. 1644; S. 969.

179 *Testimony on RESPECT Act of 2007: Hearing on H.R. 1644 Before the Subcomm. on Health, Employment and Labor of the H. Comm. on Education and Labor*, 110th Cong. (2007), *available at* http://edlabor.house.gov/testimony/050807BillTambussi testimony.pdf (last visited May 19, 2008) (statement of William Tambussi, Labor Counsel, Cooper University Hospital) (Tambussi asserted that the RESPECT Act would provide "clarity to the current situation in light of recent conflicting decisions by the NLRB.").

180 The consensus among human resource professionals is that, if passed now, RESPECT would face a Bush veto. Society for Human Resources Management, *Washington Scorecard*, http://www.shrm.org/government/scoreboard_published/

Finally, in an inevitable future that is bereft of traditional, algorithmic work, the RESPECT Act would allow self-directed and flexible employees the right to organize under the Act. That right should remain a fundamental one, and its importance must not be diminished. For while the relevant skill set for a twenty-first century employee requires self-direction in order to achieve organizational goals in an information age, such an ability is separate and distinct from requisite managerial personnel aptitudes, which necessitate an ability to craft strategic goals and direct the enterprise. A failure to recognize this distinction condemns new-century workers to an intolerable purgatory, aptly described by the dissenting members in *Oakwood* as "workers who have neither the genuine prerogatives of management, nor the statutory rights of ordinary employees."[181]

VI. CONCLUSION

As originally crafted, the Wagner Act made no provisions for the exclusion of supervisors from the right to organize. This oversight was remedied by the adoption of the Taft-Hartley Act, which created a supervisory exemption that over time became the nexus of many a crisis for the NLRB. Ultimately, the Board's decisions in the *Kentucky River Trilogy* established a three-part test for supervisory status, involving direction (place, time, duties), responsibility (real and serious consequences for the failures of subordinates) and independent judgment. The *Kentucky River Trilogy* also articulated a low time-based standard for supervision, in which as little as 10% of an employee's time sufficed in order for the exclusion to apply. Concurrently, routine manufacturing work, the staple of union membership in the middle of the twentieth century, is fast disappearing. Such algorithmic work is increasingly being automated or outsourced. The "Rules of Employment" articulated by former Secretary of Labor Robert are no longer viable.[182] Today's workers will work for multiple employers, put in longer hours, and have no guarantee of a middle-class income, all work–related realities that demand

(last visited May 19, 2008).

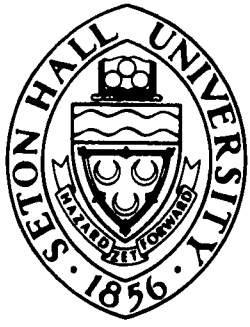
[181] Oakwood Healthcare, 348 N.L.R.B. 686, 700 (2006) (Liebman and Walsh, dissenting in part and concurring in part).

[182] *See* discussion *supra* notes 149-51 and accompanying text.

attention from a labor policy perspective. Twenty-first century workforce skills emphasize the ability of self-directed employees to lead small work groups from one task to the next, forming and re-forming, with no clear boundary between employer and supervisor.

The nature of the workforce in general, and the nature of supervision in particular, evolved at a pace much faster than the relevant interpretations of the NLRA. Unfortunately, the uncertainty and ambiguity concerning to whom the supervisory exclusion applies, hinders labor-management cooperation, which was the original focal point of the NLRA[183] If the true intent of the NLRA is to be realized in today's economy, then the reasoning in the *Kentucky River Trilogy* must be abandoned, since, in reality, every self-directed employee will spend some time directing others. As other viable options appear to be exhausted after six decades of effort, a legislative remedy is required. RESPECT would permit Section 7 rights to persist into the next century, and justifiable so, since the economic contributions of workers, who realistically are powerless to direct the enterprise, nevertheless, should be *respected.*

[183] Churgin, *supra* note 38, at 604.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