

Note

Voices from the Workplace: *Oakwood Healthcare, Inc.* and the Rollback of Labor Rights Under the Current National Labor Relations Board

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Introduction

AT AN ACUTE CARE HOSPITAL in Taylor, Michigan, a group of approximately 181 registered nurses (“RNs”) took initial steps towards organizing a union with the United Auto Workers of America (“UAW”).¹ The RNs and the UAW filed a petition with the National Labor Relations Board (“Board” or “NLRB”) to form a single bargaining unit for the purpose of bargaining collectively with the RNs’ employer over wages, hours, and other conditions of employment.² Soon after, the employer challenged the inclusion of twelve charge nurses in the bargaining unit, claiming that the nurses were supervisors and

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1. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. No. 37, 2006 NLRB LEXIS 448, at *1–6 (Sept. 29, 2006). According to their website, “[t]he UAW represents a large and growing number of technical, office and professional workers . . . in the public sector, health care, schools and universities, telecommunications and news media.” UAW Homepage, <http://www.uaw.org/about/members.html> (presenting a “profile of the UAW membership by sector”) (last visited Sept. 10, 2007).

2. *See Oakwood*, 2006 NLRB LEXIS 448, at *1–6; *see also* 29 U.S.C. § 159(a)–(b) (2000) (defining purposes of collective bargaining and setting out procedures for determining bargaining unit composition).

therefore excluded from coverage under the National Labor Relations Act ("Act").³

The twelve charge nurses in question were RNs just like all of the other nurses in the proposed bargaining unit.⁴ In addition to their normal RN duties, however, these charge nurses also matched other members of the nursing staff with particular patients or locations within the hospital.⁵ Besides their ability to distribute work amongst their coworkers in this way, the charge nurses did not have any managerial authority. They had no formal role in the employee grievance procedure and did not represent management in other matters relating to employee status.⁶

The charge nurses sat nearly at the bottom of the hospital's chain of command. Each charge nurse answered directly to a clinical manager who had responsibility for the budget, work schedules, and policy of the nursing unit, and also did all of the hiring, firing, and disciplining of employees.⁷ The clinical managers, in turn, reported to clinical supervisors who made daily rounds of all the nursing units and took responsibility for adequate unit staffing.⁸ At the top of the nursing hierarchy was the nurse site leader.⁹

On September 29, 2006, in *Oakwood Healthcare, Inc.*,¹⁰ the Board announced its decision that these twelve charge nurses were statutory supervisors under the Act and therefore did not fall under the Act's coverage.¹¹ The Board held that the charge nurses' assigning their coworkers to particular patients or hospital locations constituted an exercise of supervisory authority that required independent judgment.¹² This exercise of authority brought the nurses within the Act's

3. *Oakwood*, 2006 NLRB LEXIS 448, at *1-2. The National Labor Relations Act consists of the original Wagner Act, ch. 372, 49 Stat. 449 (1935), the Taft-Hartley Amendments (Labor Management Relations Act), ch. 120, 61 Stat. 136 (1947), the Landrum-Griffin Amendments (Labor-Management Reporting and Disclosure Act), Pub. L. No.86-257, 73 Stat. 519 (1959), and the Health Care Amendments Act, Pub. L. No. 93-360, 88 Stat. 395 (1974). See 29 U.S.C. §§ 151-169 (2000) for the current codified version of the Act. The Act also created and empowered the Board to carry out the Act's mandates. See *id.* § 153 and *infra* Part I.B for a discussion of the structure and procedure of the Board.

4. *Oakwood*, 2006 NLRB LEXIS 448, at *6-7.

5. *Id.*

6. *Id.* at *112 (Members Liebman & Walsh, dissenting).

7. *Id.* at *111.

8. *Id.*

9. *Id.* at *110-11. The nurse site leader is "a position comparable to a director of nursing in other hospitals." *Id.*

10. 348 N.L.R.B. No. 37, 2006 NLRB LEXIS 448 (Sept. 29, 2006).

11. *Id.* at *4.

12. *Id.* at *48-64.

supervisory exemption and therefore excluded them from the bargaining unit.¹³

In *Oakwood*, the Board incorrectly held that this group of charge nurses, with only minor supervisory duties, fell within the Act's supervisory exemption.¹⁴ By creating a definition of supervisor that relies on dictionary definitions of the statutory text rather than on contemporary workplace realities, the Board subverted Congress's intent in passing the Act—to encourage collective bargaining as a means of creating industrial peace and promoting fuller worker participation in the larger society.¹⁵

This decision is both an illustration of and the result of the Board's increasing political polarization and isolation from the industrial relations environment that Congress charged it with regulating. Congress should remedy this situation, and avoid stripping possibly millions of American workers of their collective bargaining rights,¹⁶ by amending the Act's definition of supervisor to more accurately reflect the dynamics of the modern workplace.

Although Congress expressly covered professional employees under the Act,¹⁷ the Act's ambiguous definition of supervisor combined with the Supreme Court's narrow textual interpretation of that definition have seriously constricted the Board's ability to certify bargaining units containing workers with professional skills or training. Further, the recent trend of highly partisan presidential appointments to the Board spurred a series of Board decisions that have considerably dampened workers' ability to exercise the broad organizing and collective bargaining rights granted by section seven of the Act.¹⁸ In the current atmosphere in which the Board has faltered in its ability to carry out the national labor policy of encouraging unionization and

13. *Id.* at *4. See 29 U.S.C. § 152(3), (11) (2000) for the text of the Act's supervisory exemption.

14. *Oakwood*, 2006 NLRB LEXIS 448, at *4.

15. See *infra* Part I.A for a discussion of Congress's goals in passing the Act.

16. See ROSS EISENBREY & LAWRENCE MISHEL, ECONOMIC POLICY INSTITUTE, SUPERVISOR IN NAME ONLY: UNION RIGHTS OF EIGHT MILLION WORKERS AT STAKE IN LABOR BOARD RULING (2006), available at <http://www.epinet.org/issuebriefs/225/ib225.pdf> (demonstrating that the Board's decision in *Oakwood* "would strip 8 million more workers of their right to participate in a union and bargain collectively, adding to the approximately 8.6 million first-line supervisors that the GAO estimates have already been excluded by prior interpretations of the NLRA").

17. 29 U.S.C. § 152(12).

18. *Id.* § 157. See *infra* notes 219–21 and accompanying text for a discussion of recent Board decisions restricting labor rights under the Act.

collective bargaining,¹⁹ the proper forum for enforcing the rights of workers is the legislative branch.

Part I of this Note will provide background information on the origins and purposes of the two major pieces of labor legislation at issue—the Wagner Act of 1935²⁰ and the Taft-Hartley Act of 1947²¹—as well as the major Supreme Court decisions interpreting them. Part II will explain and analyze both the majority and dissenting opinions in *Oakwood*, especially in terms of their respective interpretations of the statutory terms “assign,” “responsibly to direct,” and “independent judgment.”²² Part III will argue that the *Oakwood* majority’s expansive interpretation of the Act’s supervisory exemption contradicts congressional intent and the national labor policy of encouraging collective bargaining. Part IV will argue further that the *Oakwood* majority’s misinterpretation of the statutory language both stems from and illustrates the Board’s increasing alienation and political polarization. The Note concludes by advocating for congressional action to amend the Act as the best means to bring the statutory definition of supervisor in line with modern workplace realities.²³

I. The Statutory Bases for the National Labor Relations Act’s Supervisory Exclusion

A. The Twin Purposes of the Act: Industrial Peace & Worker Empowerment

In 1935, Congress passed legislation that to this day remains the underlying basis of United States labor law.²⁴ As the centerpiece of the

19. See 29 U.S.C. § 151.

It is hereby declared to be the policy of the United States to encourag[e] the practice and procedure of collective bargaining and . . . protect[] 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 and protection.

Id.

20. Ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–166 (2000)).

21. Ch. 120, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–166 (2000)).

22. These statutory terms are found in the Act’s definition of “supervisor.” 29 U.S.C. § 161.

23. In writing this Note, I have consciously decided not to propose specific statutory language to fix the Act’s definition of “supervisor” to better reflect the increasing professionalization and flattening hierarchies of the contemporary workplace. Because a contextually-accurate definition of that term must be rooted in the on-the-ground realities of workers, I am in no better a position than the courts or the Board to propose language that would reflect these realities. The thesis of this Note is simply that the proper forum for deciding what constitutes a supervisor in the modern economy is the legislative branch.

24. See 49 Stat. 449.

New Deal, the Wagner Act established the basic right of workers to unionize and bargain collectively with their employers.²⁵ Two basic policy considerations motivated the Act's supporters in Congress: (1) encouraging collective bargaining as a means of managing labor relations to achieve greater industrial peace²⁶ and (2) promoting unionization as a vehicle for allowing workers to participate more fully in the sociopolitical life of the nation.²⁷ While political expediency caused the first purpose to feature more prominently in the eventual statutory text, both purposes were of critical importance to the Act's supporters.²⁸

1. Industrial Peace

The legislative goal of industrial peace resonated strongly with conservative politicians and business interests that the bill's supporters had to appease to win passage.²⁹ Supporters of the Act argued that allowing workers to organize would reduce friction between labor and management and therefore remove a central cause of strikes.³⁰ As the opening paragraph of the Act states:

The denial by some employers of the right of employees to organize and the refusal by some 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 commerce³¹

By expressly adopting a national labor policy of encouraging union organization and collective bargaining, Congress intended to provide an administrative vehicle through which workers and their employers could amicably resolve disputes.

In fact, the Act gained passage in the wake of an enormous wave of strikes, many of them violent, across the country.³² According to

25. REBECCA ZIETLOW, *ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS* 63 (2006).

26. *See* 29 U.S.C. § 151.

27. Unionization promotes a form of social citizenship that Rebecca Zietlow refers to as "rights of belonging." ZIETLOW, *supra* note 25.

28. *Id.* at 64 (stating that "supporters of the Wagner Act in Congress . . . framed the act in two different registers: as a means of protecting human freedom and of regulating interstate commerce").

29. Business interests, including the National Association of Manufacturers, feared the Wagner Act's "collective view of labor relations" and undertook a major lobbying campaign to defeat it. ZIETLOW, *supra* note 25, at 74.

30. *Id.* at 79.

31. 29 U.S.C. § 151 (as amended by the Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947)).

32. In 1934, 1.47 million workers, or 51.5% of the nation's workforce, participated in 1856 strikes. IRVING BERNSTEIN, *A HISTORY OF THE AMERICAN WORKER (1933-1941)*: TURBU-

supporters of the Act, denial of employees' right to organize caused many of these strikes, which in turn interfered with interstate commerce.³³ Allowing workers to organize into unions would have a beneficial effect on the economy by reducing the number of strikes and decreasing the militancy of labor.³⁴ In the words of then Board chief Lloyd Garrison in testimony before the Senate Labor Committee, the Act was the nation's "chief bulwark against communism and other revolutionary movements."³⁵

2. Worker Empowerment

In contrast to this conservative view of labor rights, American labor leaders had long viewed the right to unionize as necessary to allow workers to participate fully in a democratic society.³⁶ Union membership not only provided workers with collective leverage to make concrete changes in their immediate working environments, but also gave them a vehicle with which to influence policy at all levels, especially as unions began to grow more powerful politically.³⁷ These labor leaders saw the right to unionize not only as a fundamental human right,³⁸ but also as a constitutional right.³⁹

Senator Wagner, the Act's namesake and chief sponsor, adopted this "version of popular constitutionalism" when he advocated for the bill on the floor of the Senate.⁴⁰ Wagner and the bill's other sponsors, however, were highly cognizant of the fact that, in addition to garnering political support for a statutory right to unionize, the legislation had to pass muster with the conservative Supreme Court.⁴¹ While New Deal members of Congress spoke about the bill as a means of promoting basic human rights and freedom, they framed the actual language

LENT YEARS 217 (1969); R.W. Fleming, *The Significance of the Wagner Act, in* LABOR AND THE NEW DEAL 123, 131 (Milton Derber & Edwin Young eds., 1957).

33. ZIETLOW, *supra* note 25, at 79.

34. *See id.*

35. *National Labor Relations Board: Senate Hearings Before the Committee on Education and Labor on S. 1958, 74th Cong.* 125 (1935).

36. *See* ZIETLOW, *supra* note 25, at 67.

37. *See id.* at 65.

38. *Id.* at 64-65.

39. Labor leaders saw collective bargaining rights as rooted in the Fourteenth Amendment's guarantee of equality, the Thirteenth Amendment's guarantee of freedom from involuntary servitude, and the free speech and expression rights guaranteed by the First Amendment. This constitutional philosophy of labor rights became known as "labor's constitution of freedom." ZIETLOW, *supra* note 25, at 65 (citing James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941 (1997)).

40. *Id.* at 75.

41. *Id.* at 76.

of the bill in terms of removing burdens to interstate commerce to survive inevitable constitutional challenges.⁴²

In contrast to the business-friendly narrative that congressional advocates used to shepherd the bill to passage, Senator Wagner spoke explicitly about the Act as a mechanism to promote industrial democracy and, by extension, greater participation of workers in the civic life of the nation.⁴³ Many cosponsors made the direct connection between choosing one's representatives in the workplace and choosing one's representatives in government.⁴⁴ In the words of one House member, "The worker's right to form labor unions and to bargain collectively is as much his right as his right to participate through delegated representatives in the making of laws which regulate his civic conduct. Both are inherent rights."⁴⁵ Although the Act's worker empowerment purpose was not ultimately incorporated into the statutory text, the legislative history clearly indicates that giving workers a stronger voice in national politics was a central goal of the Act's primary sponsors.

B. National Labor Relations Board: Structure and Procedure

In addition to granting employees the basic rights to organize themselves into unions and bargain collectively with their employers, the Act also created an administrative agency charged with overseeing representation elections and adjudicating disputes arising within its purview.⁴⁶ Currently, the Board consists of five members who are appointed by the President of the United States for five-year terms.⁴⁷ One member of the Board, chosen by the President, serves as its Chair.⁴⁸ The Act also provides for a General Counsel of the Board, also appointed by the President, who has authority to investigate all charges brought under the Act, and to issue and prosecute complaints based on those charges.⁴⁹

The Board administers the broad organizing and bargaining rights granted to employees in section seven of the Act through two basic types of cases: representation cases and complaint (or unfair la-

42. *Id.* (citing William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 198 (2001)).

43. *Id.* at 78.

44. *Id.*

45. 79 CONG. REC. 9061 (1934) (statement of Rep. Carpenter).

46. 29 U.S.C. § 153 (2000).

47. *Id.* § 153(a).

48. *Id.*

49. *Id.* § 153(d).

bor practice) cases.⁵⁰ The procedure for these cases is laid out by the Act in sections nine and ten respectively.⁵¹ Representation cases occur when one of the parties involved files a petition to determine whether a particular labor organization should be certified as the exclusive representative of the employees in a particular bargaining unit.⁵² The Board's Regional Director then decides whether to dismiss the petition or order a secret ballot election of the bargaining unit employees.⁵³

Complaint cases occur when one party files a "charge" that another party has engaged in an unfair labor practice.⁵⁴ Individuals and organizations covered by the Act do not have a private right of action in unfair labor practice cases but must go through the Board's administrative procedures.⁵⁵ If the Board's Regional Director finds that the charge has merit, he or she will issue a complaint.⁵⁶ A Board attorney will prosecute the charge in a hearing before an Administrative Law Judge ("ALJ").⁵⁷ The ALJ then submits a recommended decision to the Board, which becomes the decision of the Board if neither party files exceptions to the decision within twenty days.⁵⁸ In the event of such exceptions, the Board will issue its own decision based on the ALJ's recommendation, the exceptions and briefs of the parties, and the hearing record.⁵⁹ The Board may also hear oral argument.⁶⁰ The Board may seek enforcement of its orders, and aggrieved parties may obtain judicial review of those orders in appropriate circuit courts of appeals.⁶¹

50. WALTER E. OBERER ET AL., *LABOR LAW: COLLECTIVE BARGAINING IN A FREE SOCIETY* 192 (5th ed. 2002).

51. *Id.*

52. *Id.* at 192-93.

53. *Id.* at 193.

54. *Id.* at 194.

55. While covered parties do not have direct access to federal courts in unfair labor practice cases, the Act does provide a private right of action in a federal district court for the breach of a collective bargaining agreement. 29 U.S.C. § 185 (2000).

56. OBERER ET AL., *supra* note 50, at 194.

57. *Id.*

58. *Id.* at 195.

59. *Id.*

60. *Id.* For a discussion of the role of oral argument in *Oakwood*, see *infra* notes 254-63 and accompanying text.

61. 29 U.S.C. § 160(e)-(f) (2000).

C. The Taft-Hartley Amendments and Exclusion of Supervisors from Statutory Protection

The explosive growth of union membership after passage of the Act, and the dramatic increase in union political strength which followed, caused significant blowback from the business community.⁶² Many business leaders and conservative politicians believed that unions began to abuse their newfound bargaining power to make unfair demands on employers.⁶³ In response, Congress amended the Wagner Act with the Taft-Hartley Act in 1947.⁶⁴ The Taft-Hartley Act placed new and significant limits on workers' statutory right to form unions.⁶⁵ One of the most significant of these limits was Congress's exclusion of "supervisors" from protection under the Act.⁶⁶

The original Wagner Act did not expressly exclude any particular categories of employees. The only distinction made by the Act was between employers, defined as "any person acting in the interest of an employer, directly or indirectly,"⁶⁷ and employees, defined in circular terms as "any employee."⁶⁸ Employees enjoyed broad organizing and collective bargaining rights under the Act, codified in section seven as the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."⁶⁹ Because the Act expressly granted protection only to employees, much turned on whether a particular worker or group of workers fell within that statutory category.

62. FOSTER R. DULLES & MELVYN DUBOFSKY, *LABOR IN AMERICA* 343-48 (4th ed. 1966).

63. *Id.* at 343.

64. Ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-166 (2000)).

65. Some of the Taft-Hartley Act provisions aimed at scaling back union bargaining power included banning the closed shop, secondary boycotts, jurisdictional strikes, and union political contributions, in addition to permitting individual states to pass "right-to-work" laws which ban the union shop. DULLES & DUBOFSKY, *supra* note 62, at 344-45. Labor leaders at the time called the legislation a "deliberate and monstrous movement . . . to cripple if not destroy, the labor movement." *Id.* at 344.

66. See Taft-Hartley Act, sec. 101, § 2(3) (codified as amended at 29 U.S.C. § 152(11) (2000)); Marley S. Weiss, *Kentucky River at the Intersection of Professional and Supervisory Status: Fertile Delta or Bermuda Triangle?*, in *LABOR LAW STORIES* 353, 356 (Laura J. Cooper & Catherine L. Fisk eds., 2005).

67. National Labor Relations (Wagner) Act, ch. 372, § 2(2), 49 Stat. 449, 450 (1935) (codified at 29 U.S.C. § 152(2) ("in the interest" language replaced with "as an agent")).

68. Wagner Act § 2(3) (codified as amended at 29 U.S.C. § 152(3)).

69. 29 U.S.C. § 157.

1. Manufacturing Foreman Organizing Efforts: An Early Test for the Wagner Act

Manufacturing foremen, who acted as front-line supervisors in the industrial context, did not fit neatly into either the statutory definition of employer or employee.⁷⁰ When faced with the issue of where to place foremen under the Act, the Board initially adopted a dual-role approach, categorizing them as employers when they committed violations of the Act in relation to subordinate employees but as employees when they themselves attempted to form unions.⁷¹ In fact, foremen began to unionize in large numbers in the early 1940s, largely in response to the tremendous gains they witnessed factory workers achieve through collective bargaining.⁷²

Employers feared the rise in foreman unionization efforts for several reasons. Unionizing had the potential to shift the loyalties of foremen away from management and towards their union sisters and brothers.⁷³ Employers depended on foremen to act on their behalf to promote a disciplined and well-ordered working environment, and a shift in foreman loyalty could significantly interfere with that goal.⁷⁴ Relatedly, a foreman's union would likely honor the picket lines of other striking unions, or could even go on strike itself.⁷⁵ Business had a strong interest in working to deprive foremen of the organizing and collective bargaining rights that the Board had granted them based on the Act's broad definition of "employee."

2. Taft-Hartley's Changes to the Act's Definition of "Employee"

Largely in response to the Board's expansive view of the statutory definition of "employee," which by that time encompassed not only foremen but also plant guards and independent contractors,⁷⁶ the newly Republican Congress enacted the Taft-Hartley Act in 1947.⁷⁷ The new law expressly excluded supervisors—along with independent

70. A foreman is "a chief and often specially trained workman who works with and commonly leads a gang or crew" or "a representative of an owner or management in authority over a group of workers, a particular process or operation, a section of a plant or an entire organization." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 889 (3d ed. 1993).

71. See *NLRB v. Skinner & Kennedy Stationary Co.*, 113 F.2d 667, 671 (8th Cir. 1940).

72. See Weiss, *supra* note 66.

73. *Id.*

74. *Id.*

75. *Id.*

76. *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416, 422 (1947) (plant guards); *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398 (1947) (plant guards); *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111 (1944) (independent contractors).

77. See Weiss, *supra* note 66, at 359.

contractors—from the Act’s definition of employee, and in so doing removed their statutory organizing and collective bargaining rights.⁷⁸ Taft-Hartley’s constricted definition of employee encouraged businesses to “label even low-level workers as supervisors and to reorganize job responsibilities for reasons unrelated to economic performance simply to maximize statutory exclusions.”⁷⁹

While Congress excluded supervisors from coverage under the Act, it maintained protection for “professional” employees.⁸⁰ The Taft-Hartley Act expressly granted collective bargaining rights to professionals, whom Congress defined explicitly in the new section 2(12),⁸¹ although it provided that professionals and non-professionals must have separate bargaining units unless a majority of the professionals voted for a single combined unit.⁸²

Congress’s concurrent exclusion of supervisors and inclusion of professionals would soon cause significant interpretive difficulties for both the Board and the courts. The significant potential for overlap between the two classifications created a danger that one category could come to engulf the other, subverting Congress’s intent in the process.

78. “The term ‘employee’ . . . shall not include . . . any individual having the status of an independent contractor, or any individual employed as a supervisor” 29 U.S.C. § 152(3) (2000).

79. See Weiss, *supra* note 66, at 361.

80. Congress rejected an earlier bill seeking to amend the Act which would have expressly excluded professionals. Smith Bill, H.R. 1996, 78th Cong. (1943); see also H.R. 2239, 78th Cong. § 3 (1943).

81. 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 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).

82. *Id.* § 159(b)(1).

D. The Health Care Amendments Act of 1974

In addition to exempting supervisors from statutory protection, the Taft-Hartley Act also removed much of the protection that the Wagner Act had provided to employees of health-care institutions.⁸³ Most private-sector health-care employees went without statutory protection for organizing and collective bargaining until Congress passed the Health Care Amendments of 1974, which expressly brought all health-care institutions under the Act's coverage.⁸⁴ Congress took this action in response to a wave of recognitional strikes⁸⁵ in exempt non-profit hospitals that seriously disrupted patient care.⁸⁶

Legislators believed that by restoring an administrative forum for seeking union recognition and resolving workplace disputes, health-care workers would have less impetus to engage in recognitional strikes which interrupted delivery of care.⁸⁷ Congress also sought to allow health-care workers to organize in order to remedy the deteriorating pay and working conditions in the industry, which were draining top talent from the field and negatively impacting patient care.⁸⁸

Once health-care employees regained statutory protection under the Act, and the Court affirmed the Board's rules concerning the composition of health-care bargaining units, union organizing in the industry began to increase steadily.⁸⁹ Because of the unusually large proportion of state-licensed professionals in the health-care field, that industry soon became the locus of much litigation over the Taft-Hartley Act's supervisory exemption.⁹⁰

E. Taft-Hartley's Definition of Supervisor

Section 2(11) of the Taft-Hartley Act defined a "supervisor" as:
[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, as-

83. Weiss, *supra* note 66, at 361. The Taft-Hartley Act "amended the § 2(2) definition of 'employer' to exempt non-profit hospitals." *Id.*

84. Pub. L. No. 93-360, 88 Stat. 395 (1974) (codified as amended at 29 U.S.C. §§ 152(14), 158(d), (g)).

85. Recognitional strikes generally use economic coercion to pressure an employer to recognize a union as the exclusive bargaining agent of a group of employees without going through the Board election procedure. See OBERER ET AL., *supra* note 50, at 379.

86. Weiss, *supra* note 66, at 397. According to congressional testimony at the time, recognitional strikes accounted for ninety-five percent of the strikes in non-profit hospitals. *Id.* at 362.

87. *Id.* at 397.

88. *Id.*

89. *Id.* at 363.

90. See *id.* at 362-63.

sign, 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.⁹¹

This definition creates a three-part test to determine whether a particular worker is excluded from coverage under the Act due to supervisory status.⁹² A worker is a supervisor if: (1) the worker possesses at least one of the twelve types of personnel authority enumerated in § 2(11); (2) the worker exercises that authority “in the interest of the employer”; and (3) the worker’s exercise of that authority “requires the use of independent judgment” and “is not of a merely routine or clerical nature.”⁹³

In formulating its definition of what constitutes a supervisor under the Act, Congress intended to exclude foremen from the Act’s protection.⁹⁴ Unlike “straw bosses, leadmen, set-up men, and other minor supervisory employees,” whom Congress intended to cover under the Act, foremen were “supervisor[s] vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action.”⁹⁵ The Act’s legislative history expressly distinguished between “minor supervisory employees” and bona fide supervisors with real management authority.⁹⁶ This distinction demonstrates that Congress did not intend to exclude broad categories of workers with little power to affect the terms and conditions of employment from coverage under the Act.

F. Supervisor or Professional? The Supreme Court’s Expansive Interpretation of Taft-Hartley’s Definition of Supervisor

A persistent challenge in interpreting the Act’s definition of “supervisor,” a category expressly excluded from coverage, stems from its apparent overlap with the Act’s definition of “professional employee,” an expressly covered category. While the Act excludes workers as supervisors if they use “independent judgment”⁹⁷ in exercising author-

91. 29 U.S.C. § 152(11) (2000).

92. *See id.*

93. *Id.*; *see* NLRB v. Health Care Ret. Corp. of Am. (*HCR*), 511 U.S. 571, 573–74 (1994) (citing *Nw. Nursing Home*, 313 N.L.R.B. 491, 493 (1993)).

94. S. REP. NO. 80-105, at 4–5 (1947). Senator Taft expressed the concern that “management will be deprived of the undivided loyalty of its foremen.” *Id.* at 5.

95. *Id.* at 4.

96. *Id.*

97. 29 U.S.C. § 152(11).

ity, its coverage of professional employees turns on “consistent exercise of discretion and judgment.”⁹⁸ The centrality of “judgment” in both definitions presents a danger that a broad interpretation of one term could remove all meaning from the other.

1. Background: Seminal Supreme Court Decisions

The inherent tension between these definitions has given rise to a string of Board and Supreme Court decisions placing various groups of workers into one or the other of the two categories—and either denying or granting the right to unionize accordingly.⁹⁹ Contrary to Congress’s intent in passing the Taft-Hartley Act, these decisions have tended towards excluding ever-increasing categories of professional employees as statutory supervisors. This trend has come to the fore most prominently in the health-care context, a setting in which a high proportion of employees have some degree of professional background and training.¹⁰⁰

While Congress expressly granted professional employees statutory protection under the Act, the Court has read the Act’s exclusion of supervisors broadly and excluded several new categories of workers from coverage on that basis.¹⁰¹ The Court rationalized these decisions on the grounds that the “employer is entitled to the undivided loyalty

98. *Id.* § 152(12)(a)(ii).

99. *See, e.g.,* *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706 (2001) (finding six Registered Nurses fell within the supervisory exclusion); *NLRB v. Health Care & Ret. Corp. of Am. (HCR)*, 511 U.S. 571 (1994) (finding four Licensed Practicing Nurses fell within the supervisory exclusion); *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 682 (1980) (finding university faculty fall within supervisory exclusion); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974) (finding workers with “managerial” responsibilities fall within the supervisory exclusion). “There may be some tension between the Act’s exclusion of managerial employees and its inclusion of professionals, since most professionals in managerial positions continue to draw on their special skills and training.” *Yeshiva*, 444 U.S. at 686.

100. For example, “[i]n all States and the District of Columbia, students must graduate from an approved nursing program and pass a national licensing examination . . . in order to obtain a nursing license.” BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK (2008-09), available at <http://www.bls.gov/oco/ocos083.htm#training> (last visited Dec. 20, 2007). “All four advanced practice nursing specialties require at least a master’s degree. . . . In some States, certification in a specialty is required in order to practice that specialty.” *Id.* The supervisory or non-supervisory status of nurses has been the subject of much litigation. *See, e.g., Ky. River*, 532 U.S. 706; *HCR*, 511 U.S. 571.

101. *See Ky. River*, 532 U.S. at 706 (registered nurses); *HCR*, 511 U.S. 571 (licensed practical nurses); *Yeshiva*, 444 U.S. at 682 (university faculty); *Bell Aerospace Co.*, 416 U.S. 267 (managerial employees).

of its representatives,”¹⁰² which, in its view, justified an implied exclusion of “managerial” employees.¹⁰³

Although the Board initially interpreted the supervisory exclusion to cover only those managers involved directly in labor relations, the Supreme Court rejected that interpretation in *NLRB v. Bell Aerospace Co.*¹⁰⁴ The *Bell Aerospace* Court interpreted the supervisory exclusion much more broadly to cover any “executives who formulate and effectuate management policies by expressing and making operative decisions of their employer.”¹⁰⁵

In *NLRB v. Yeshiva University*,¹⁰⁶ the Court used the broad managerial exclusion that it created in *Bell Aerospace* to exclude university faculty from coverage under the Act.¹⁰⁷ The Court viewed the power of faculty to determine the day-to-day operations of the educational environment of the university as managerial in nature.¹⁰⁸ The *Yeshiva* Court justified its exclusion of university faculty on the grounds that “the faculty determines . . . the product to be produced, the terms upon which it will be offered, and the customers who will be served,” all of which it saw as part of the decision-making power of management.¹⁰⁹

While the Court construed the managerial exclusion broadly, it made clear that the statutory coverage of professionals remained intact, as Congress mandated in section 2(12).¹¹⁰ The *Yeshiva* decision explicitly distinguished the university faculty context from the health-care context, where the Board had previously held that nurses were professionals covered under the Act “despite substantial planning responsibility and authority to direct and evaluate team members.”¹¹¹ The *Yeshiva* Court positively referenced the Board’s practice of asking “in each case whether the decisions alleged to be managerial or supervisory are ‘incidental to’ or ‘in addition to’ the treatment of patients.”¹¹²

102. *Yeshiva*, 444 U.S. at 682.

103. *Bell Aerospace Co.*, 416 U.S. at 275, 286.

104. *Id.*

105. *Id.* at 86 (quoting *Palace Laundry Dry Cleaning Corp.*, 75 N.L.R.B. 320, 323 n.4 (1947)).

106. 444 U.S. 672 (1980).

107. *Id.* at 686.

108. *Id.*

109. *Id.*

110. *See id.* at 690 & n.30.

111. *Id.* (citing *Doctors' Hosp. of Modesto, Inc.*, 183 N.L.R.B. 950, 951–52 (1970), *enforced*, 489 F.2d 772 (9th Cir. 1973)).

112. *Id.*

In *NLRB v. Hendricks County Rural Electric Membership Corp.*,¹¹³ a case decided soon after *Yeshiva*, the Court narrowed its managerial exclusion to encompass employees with access to the business's private labor-relations records, without excluding employees with access only to non-labor-relations information.¹¹⁴ In justifying its tempering of the managerial exclusion, the *Hendricks County* Court pointed to the legislative history of the Taft-Hartley Act, which indicated that Congress intended to "confine[] the definition of supervisor to individuals generally regarded as foremen and employees of like or higher rank."¹¹⁵ In adopting legislative language that explicitly covered professionals, the conference committee rejected the House bill's more expansive definition of "supervisor," which would have reached many confidential and professional employees.¹¹⁶ Quoting the legislative history of the Act, the Court stated that "[i]t would . . . be extraordinary to read an implied exclusion for confidential employees into the statute that would swallow up . . . the professional-employee inclusion."¹¹⁷

In *NRLB v. Health Care and Retirement Corp. of America* ("HCR"),¹¹⁸ the Court faced the question of whether the Act covered a particular group of nurses as professionals or excluded them as supervisors.¹¹⁹ The Board found that the employer retaliated against four licensed practical nurses ("LPNs") for protected concerted activities.¹²⁰ The Board concluded that the nurses were not supervisors under section 2(11) because their "direction of less-skilled employees, in the exercise of professional judgment incidental to the treatment of patients, is not authority exercised 'in the interest of the employer.'"¹²¹

In reversing the Board's decision, the *HCR* Court made clear that the Board could no longer rely on the "in the interest of the employer" prong of section 2(11) alone to differentiate between professional and supervisory workers in the health-care context.¹²² The

113. 454 U.S. 170 (1981).

114. *Id.* at 189-90.

115. *Id.* at 183 n.15, 184-85 (quoting H.R. REP. NO. 80-510, at 36 (1947) and 93 CONG. REC. 6442 (1947) (statement of Sen. Taft)).

116. *Id.* at 184-85.

117. *Id.* at 185.

118. 511 U.S. 571 (1994).

119. *Id.* at 573-74.

120. *Id.* at 574-75.

121. *Id.* at 574 (citing Petition for Writ of Certiorari at 15, *HCR*, 511 U.S. 571 (No. 92-1964)).

122. *Id.* at 579 ("The Board . . . has placed exclusive reliance on the 'in the interest of the employer' language in § 2(11). . . . The interpretation of the 'in the interest of the

Court warned the Board against reading the “in the interest of the employer” prong in a way that removed any meaning from the “responsibly to direct” prong.¹²³

2. The Supreme Court’s Last Word on the Supervisory Exemption: *NLRB v. Kentucky River Community Care, Inc.*

The Court’s jurisprudence on the statutory exclusion of supervisors culminated in 2001 with its decision in *NLRB v. Kentucky River Community Care, Inc.*¹²⁴ In that case, the employer challenged the Board’s inclusion of six RNs in a bargaining unit that won union representation at a psychiatric rehabilitation and long-term care facility.¹²⁵ The Board found that the nurses were covered professional employees under section 2(12) of the Act and were not supervisors under section 2(11) of the Act.¹²⁶ The *Kentucky River* Court overturned the Board’s decision, rejecting the Board’s conclusion that “employees 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.’”¹²⁷

The *Kentucky River* Court did acknowledge the validity of two important elements of the Board’s position: (1) “the statutory term ‘independent judgment’ is ambiguous with respect to the *degree* of discretion required for supervisory status”; and (2) “the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer.”¹²⁸ The Court, however, took issue with the Board’s interpretation of the “independent judgment” prong of section 2(11) where it allowed a particular kind, rather than degree, of judgment to fall outside the supervisory exclusion—specifically, the “ordinary professional or technical judgment in directing less-skilled employees to deliver services.”¹²⁹ Because nearly all supervisory judgment is based on “professional or technical skill or experi-

employer’ language mandated by our precedents and by the ordinary meaning of the phrase does not render the phrase meaningless in the statutory definition.”).

123. *Id.*

124. 532 U.S. 706 (2001).

125. *Id.*

126. *Id.* at 709.

127. *Id.* at 713 (quoting Brief for Petitioner at 11, *Ky. River*, 532 U.S. 706 (No. 99-1815)).

128. *Id.* at 713–14.

129. *Id.* at 714.

ence,” the Court warned that adopting the Board’s rule would have the effect of eliminating the supervisory exception altogether.¹³⁰

The Court also criticized how the Board applied the “independent judgment” requirement to the “responsibly to direct” clause differently than it did to the other eleven enumerated supervisory functions.¹³¹ The Board’s placement of professional and technical judgment outside the statutory supervisor category occurred only where it applied “in directing less-skilled employees to deliver services.”¹³² The Court found “no apparent textual justification for this asymmetrical limitation” and required the Board to apply the “independent judgment” requirement in the same manner to all twelve listed supervisory functions.¹³³

Despite its critique of the Board’s statutory interpretation, the Court affirmed the soundness of its underlying labor policy.¹³⁴ Because “[p]rofessional employees by definition engage in work ‘involving the consistent exercise of discretion and judgment,’” a definition of supervisor that turns on such judgment will frustrate Congress’s intent to cover professional employees under the Act.¹³⁵ The Court’s problem lay not with the Board’s policy of “preserving the inclusion of ‘professional employees’ within the coverage of the Act,” but with its failure to reconcile that policy with the statutory text.¹³⁶ The Court also provided the Board with a possible way out of its quandary—the Board could limit the supervisory exclusion for responsible direction by “distinguishing employees who direct the manner of others’ performance of discrete tasks from employees who direct other *employees*.”¹³⁷ Regardless, the *Kentucky River* decision forced the Board to revisit, and ultimately reshape, its interpretation of the supervisory exemption.

II. The NLRB Goes Back to the Drawing Board: *Oakwood Healthcare, Inc.*

On September 29, 2006, the Board issued three decisions which laid out its new guidelines for determining supervisory status under

130. *Id.* at 715.

131. *Id.* at 715–16.

132. *Id.* at 715.

133. *Id.* at 716.

134. *Id.* at 719–20.

135. *Id.* at 720 (quoting 29 U.S.C. § 152 (12)(a)(ii) (2000)).

136. *Id.*

137. *Id.*

the Act, taking into account the Court's instructions from *Kentucky River*.¹³⁸ The leading case of the three, *Oakwood Healthcare, Inc.*, held that a group of charge nurses at an acute care hospital were excluded supervisors under section 2(11) of the Act.¹³⁹ In a decision that broke down squarely along party lines, the deeply divided Board found that the nurses exercised supervisory authority in assigning patients to other nursing personnel.¹⁴⁰

A. The Majority Opinion

The *Oakwood* majority established new interpretations of the statutory terms "assign," "responsibly to direct," and "independent judgment," that amount to a major expansion of the Act's supervisory exclusion.¹⁴¹ While the *Oakwood* majority claimed that its opinion merely adhered to the dictates of *Kentucky River*, the real-world consequence of the decision will likely be to strip potentially millions of workers with minor supervisory duties of their right to organize and bargain collectively.¹⁴² As the dissent presciently pointed out, the decision "threatens to create a new class of workers under Federal labor law: workers who have neither the genuine prerogatives of management, nor the statutory rights of ordinary employees."¹⁴³ Such a large-scale loss of collective bargaining rights is likely to drastically alter the fragile balance between labor and management interests that Congress achieved through the Act.

1. Assign

In order to qualify as a supervisor under section 2(11) of the Act, the worker must perform one of twelve enumerated supervisory functions.¹⁴⁴ One of those functions is to "assign . . . other employees."¹⁴⁵ In interpreting the statutory meaning of "assign," the *Oakwood* majority began with the dictionary definition of the word: "to appoint to a

138. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. No. 37, 2006 NLRB LEXIS 448 (Sept. 29, 2006); *Golden Crest Healthcare Ctr.*, 348 N.L.R.B. No. 39, 2006 NLRB LEXIS 445 (Sept. 29, 2006); *Croft Metals, Inc.*, 348 N.L.R.B. No. 38, 2006 NLRB LEXIS 444 (Sept. 29, 2006).

139. *Oakwood*, 2006 NLRB LEXIS 448, at *4. The basic facts of the *Oakwood* case are explained in the introductory section of this Note.

140. *Id.*

141. *Id.* at *14.

142. See EISENBREY & MISHEL, *supra* note 16.

143. *Oakwood*, 2006 NLRB LEXIS 448, at *70 (Members Liebman and Walsh, dissenting in part and concurring in part in the result).

144. 29 U.S.C. § 152(11) (2000); see *infra* note 188 and accompanying text (listing the twelve supervisory functions).

145. 29 U.S.C. § 152(11).

post or duty.”¹⁴⁶ The opinion went on to define the term as “the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.”¹⁴⁷ The ability to affect the place, time, or work of other workers is supervisory, the majority reasoned, because those factors constitute terms and conditions of employment.¹⁴⁸ Further, the majority explicitly included “the charge nurses’ responsibility to assign nurses and aides to particular patients” within its definition of “assign.”¹⁴⁹

The majority opinion found that “the charge nurses’ assignment of patients to other staff and assignment of nurses to specific geographic locations within the emergency room fall within [the majority’s] definition of ‘assign’ for purposes of Section 2(11).”¹⁵⁰ These assignments of staff to particular patients or places “determine what will be the required work for an employee during the shift, thereby having a material effect on the employee’s terms and conditions of employment.”¹⁵¹ Because the charge nurses used “independent judgment” in making these assignments, as discussed in greater detail below, the majority concluded that they were supervisors and excluded them from coverage under the Act.¹⁵²

2. Responsibly to Direct

Another enumerated supervisory function that can qualify a worker for supervisory status is “responsibly to direct” other employees.¹⁵³ The *Oakwood* majority derived its definition of “responsibly to direct” largely from a narrow reading of the legislative history of the Act.¹⁵⁴ In the words of Senator Flanders, who introduced the amendment to add the term as one of the enumerated supervisory functions in section 2(11), a worker responsibly directs when there are “men

146. *Oakwood*, 2006 NLRB LEXIS 448, at *17 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 132 (1981)).

147. *Id.* at *18.

148. *Id.*

149. *Id.* The majority was careful to distinguish “the charge nurse’s designation of significant overall duties to an employee” from “the charge nurse’s ad hoc instruction that the employee perform a discrete task,” the latter of which would not fall within the definition of “assign.” *Id.* at *19.

150. *Id.* at *49.

151. *Id.* at *49–50.

152. *Id.* at *51.

153. 29 U.S.C. § 152(11) (2000).

154. *Oakwood*, 2006 NLRB LEXIS 448, at *26.

under him” and “[h]e determines under general orders what job shall be undertaken next and who shall do it.”¹⁵⁵ The majority, however, openly acknowledged that Senator Flanders did not intend the phrase to include “minor supervisory functions performed by lead employees, straw bosses, and set-up men.”¹⁵⁶

The majority also required that to qualify as a supervisory function, direction of other employees must be “responsible” and “carried out with independent judgment.”¹⁵⁷ The majority identified “responsibly” with accountability, requiring that “the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.”¹⁵⁸

The Board decided that the charge nurses did not “responsibly direct the nursing staff within the meaning of Section 2(11).”¹⁵⁹ Although the nurses were able to delegate their job duties to other employees working the same shift, the employer could not show that it held the nurses accountable for the performance of those duties when performed by other employees.¹⁶⁰ Additionally, the nurses did not have authority to correct any errors made by those employees.¹⁶¹ Therefore, the nurses did not meet the accountability standard for the “responsible” aspect of responsible direction.¹⁶²

Even though the majority found that the charge nurses did not responsibly direct other employees, the charge nurses were still excluded as supervisors because they “assigned” tasks to their coworkers. A worker only needs to perform *one* of the twelve enumerated supervisory functions to fall within the supervisory exclusion.¹⁶³

Although the majority’s definition of “responsibly to direct” did not encompass the charge nurses in this case, there is a significant danger that the majority’s interpretation of the term could exclude employees with only minor supervisory duties in future cases. Unlike

155. *Id.* at *27 n.27

156. *Id.* at *26.

157. *Id.* at *27.

158. *Id.* at *31.

159. *Id.* at *47.

160. *Id.* at *47–48. The employer carries the burden of proof when seeking to exclude workers as supervisors. *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 711–12 (2001).

161. *Oakwood*, 2006 NLRB LEXIS 448, at *47.

162. *Id.*

163. The list of supervisory functions in the statute is disjunctive, therefore a worker who fulfills only one of the functions falls within the supervisory exemption. *See* 129 U.S.C. § 152(11) (2000).

the dissent, which requires that the worker responsibly directs an entire work unit, the majority definition encompasses workers who merely responsibly direct one other employee. As the dissent explained, this broad definition contradicts Senator Flanders's intent of excluding only workers with supervisory duties on par with those of foremen.¹⁶⁴

3. Independent Judgment

In order to qualify as a supervisor under section 2(11), the worker must perform one of the enumerated supervisory functions while using "independent judgment."¹⁶⁵ In construing an interpretation of the statutory definition of "independent judgment" that hewed to the mandates of *Kentucky River*, the *Oakwood* majority again began its analysis by turning to the dictionary definitions of the term at issue.¹⁶⁶ Utilizing "the ordinary meaning of the term" that it garnered from *Webster's Dictionary*, the majority set out that "to exercise 'independent judgment' an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data."¹⁶⁷

After relying on the dictionary to establish a baseline definition of "independent judgment," the majority went on to "consider the Act as a whole, its legislative history, policy considerations, and judicial precedent" in order to further define the term.¹⁶⁸ First, the majority stated that it must "interpret 'independent judgment' in light of the contrasting statutory language, 'not of a merely routine or clerical nature.'"¹⁶⁹

Second, the majority cited *Kentucky River* in declaring that it "must assess the *degree* of discretion exercised by the putative supervisor" when analyzing "independent judgment" under the Act.¹⁷⁰ In following what it viewed as the Court's mandate, the majority found "that a judgment is not independent if it is dictated or controlled by de-

164. *Oakwood*, 2006 NLRB LEXIS 448, at *100-04 (Members Liebman & Walsh, dissenting).

165. 29 U.S.C. § 152(11).

166. *Oakwood*, 2006 NLRB LEXIS 448, at *36 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1148, 1223 (1981)). Webster's defines "independent" as "not subject to control by others" and "judgment" as "the action of judging; the mental or intellectual process of forming an opinion or evaluation by discerning and comparing." *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at *36-37.

170. *Id.* at *37-38 (citing *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 713-14 (2001)).

tailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.”¹⁷¹

The majority stated that some of the charge nurses exercised “independent judgment” in assigning staff to particular patients, and therefore fell within the statutory definition of supervisor.¹⁷² Because of the variety of staff available for each shift,¹⁷³ the charge nurse had to exercise meaningful discretion in matching the skills of a particular nurse to the “condition and needs of a particular patient.”¹⁷⁴ The majority found the degree of discretion required to make these kinds of staffing decisions greater than that “exercised by most leadmen” and therefore sufficient to exclude the charge nurses from the Act’s protection.¹⁷⁵

B. The *Oakwood* Dissent: A Better Reflection of Congressional Intent and the Underlying Policies of the Act

The two Clinton-appointed members of the Board issued a scathing dissent to the majority’s expansive interpretation of section 2(11) supervisory status.¹⁷⁶ The dissent criticized the majority opinion as contrary to Congress’s express intent to cover professional employees under the Act.¹⁷⁷ With professionals comprising a rapidly growing

171. *Id.* at *38 (citing *Beverly Enters. v. NLRB*, 148 F.3d 1042, 1047 (8th Cir. 1998); *NLRB v. Meenan Oil Co.*, 139 F.3d 311, 321 (2d Cir. 1998); *Dynamic Sci., Inc.*, 334 N.L.R.B. 391, 391 (2001)).

172. *Id.* at *50–51. The majority distinguished the role of emergency room charge nurses from that of the other charge nurses. “[T]he emergency room charge nurses do not take into account patient acuity or nursing skill in making patient care assignments. Whereas the record contains evidence of situations in other units in which the charge nurses must assess individual professional or personal attributes of the nursing staff, there is no similar evidence for the charge nurses in the emergency room.” *Id.* at *63. For that reason, the majority included the emergency room charge nurses in the bargaining unit. *Id.* at *64.

173. “In addition to the charge nurse, there are two to six RNs on each shift, depending on the time of day and the unit, and many of the units also have licensed practical nurses or other licensed staff working on each shift.” *Id.* at *50.

174. *Id.* at *50–51.

175. *Id.* at *51.

176. *Id.* at *70–146 (Members Liebman & Walsh, dissenting in part and concurring in part in the result). President Clinton first appointed Member Liebman to the Board, and the Senate confirmed her for a five-year term that expired on December 16, 2002. President Bush reappointed her, and she is now serving her third term. President Clinton appointed Member Walsh to a term that ended on December 20, 2001. President Bush reappointed him, and he is now serving his third term. NLRB, http://www.nlr.gov/About_Us/Overview/board (last visited Mar. 28, 2007).

177. *Oakwood*, 2006 NLRB LEXIS 448, at *70–71.

proportion of the nation's workforce,¹⁷⁸ the majority failed to adequately consider the "real world consequences" of its broad interpretation of the supervisory exclusion.¹⁷⁹ Because "most professionals have some supervisory responsibilities in the sense of directing another's work," the dissent called for "significantly narrower interpretations of the ambiguous statutory terms 'assign . . . other employees' and 'responsibly to direct them' than the majority adopts."¹⁸⁰

The dissent assailed the majority for relying on dictionary definitions to interpret ambiguous statutory language. Quoting the Supreme Court, the dissent pointed out that:

[T]he definition of words in isolation . . . is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.¹⁸¹

Contrary to the statutory interpretation that the majority gleaned largely from the dictionary, the statutory text as a whole, the context and purpose of the Act, and the legislative history all point to a more constricted definition of supervisor.¹⁸²

According to the legislative history, Congress "exercised great care, desiring that the employees . . . excluded from the coverage of the [A]ct be *truly* supervisory."¹⁸³ The majority neglected to sufficiently take into account Congress's distinction between "minor supervisory employees" and "the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action."¹⁸⁴ The dissent offered its own interpretations of "assign," "responsibly to direct," and "independent judgment" that were consistent with the statutory text and Supreme Court precedent, while better reflecting Congress's intent and serving the "policy interests underlying the Act."¹⁸⁵

178. *Id.* at *70. According to the dissent, professionals may number thirty-four million and make up 23.3% of the workforce by 2012. *Id.*

179. *Id.* at *71 (Members Liebman & Walsh, dissenting).

180. *Id.* at *70-71.

181. *Id.* at *74 (quoting *Dolan v. U.S. Postal Ser.*, 546 U.S. 481, 486 (2006)).

182. *Id.*

183. *Id.* at *80 (quoting S. REP. NO. 80-105 (1947), reprinted in NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 425 (1985)).

184. *Id.* at *79 (quoting S. REP. NO. 80-105, at 4-5 (1947), reprinted in NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 410-11 (1985)).

185. *Id.* at *81.

1. Assign

In contrast to the majority, the dissent “would limit the phrase ‘assign employees’ to a significant employment decision on the order of determining (1) an employee’s position with the employer (in most settings, identified by job classification); (2) designated work site (i.e., facility or departmental unit), or (3) work hours (i.e., shift).”¹⁸⁶ The dissent would allow the term to encompass only assignment of employees themselves and would not allow it to extend to assignment of tasks, as did the majority.¹⁸⁷

When viewed alongside the other eleven supervisory functions in section 2(11),¹⁸⁸ all of which “speak either to altering employment tenure itself . . . or to actions that affect an employee’s overall status or situation,” it becomes clear that “‘assign’ must denote authority to determine the *basic* terms and conditions of an employee’s job, i.e., position, work site, or work hours.”¹⁸⁹ The mere act of assigning tasks does not affect the basic terms and conditions of employment, especially when those tasks already fall within the employee’s job duties.¹⁹⁰

Turning to the real-world consequences of the majority’s opinion, the dissent pointed out that “the majority’s interpretation of ‘assign’ as encompassing the daily assignment or distribution of tasks (or, in the healthcare context, patients) threatens to sweep almost all staff nurses outside of the Act’s protection.”¹⁹¹ This result is likely because “most nurses—as well as other professionals who work with assistants or as team leaders—routinely play a role in assigning out the day’s work.”¹⁹² The scale of such a broad exclusion of nurses would likely be massive—the Department of Labor counted 2.4 million RNs

186. *Id.* at *85–86.

187. *Id.* at *86.

188. Those enumerated functions are “to hire, transfer, suspend, lay off, recall, promote, discharge, . . . reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances.” 29 U.S.C. §152(11) (2000).

189. *Oakwood*, 2006 NLRB LEXIS 448, at *88–89 (Members Liebman & Walsh, dissenting).

190. *Id.* at *89. The majority only required that the supervisory functions affect a term or condition of employment, i.e., place, time, or overall tasks. *Id.* at *18 (majority). This is a much lower bar than the dissent’s requirement that the function affect the “*basic* terms and conditions of an employee’s job, i.e., position, work site, or work hours.” *Id.* at *88–89 (Members Liebman & Walsh, dissenting). The dissent explained that its more rigorous standard was “consistent with the Board’s traditional approach in defining supervisors, which the Taft-Hartley Congress endorsed.” *Id.* at *88.

191. *Id.* at *94.

192. *Id.*

and 720,000 LPNs in 2006¹⁹³—and clearly contradicts Congress’s purpose in expressly including professionals in section 2(12) of the Act.¹⁹⁴

The dissent would have held that the charge nurses did not “assign” under the Act, because they “have no authority to determine an employee’s job classification, designated nursing unit, or work shift.”¹⁹⁵ The work distributed by the charge nurses to other staff all fell within their predetermined job duties, and it therefore did not rise to the level of a supervisory function.¹⁹⁶

2. Responsibly to Direct

The dissent took issue with the majority’s interpretation of “responsibly to direct” and advocated alternatively for the Board General Counsel’s proposed definition of the term:

An individual responsibly directs with independent judgment within the meaning of Section 2(11) when it is established that the individual: a. has been delegated substantial authority to ensure that a work unit achieves management’s objectives and is thus “in charge”; b. is held accountable for the work of others; and c. exercises significant discretion and judgment in directing his or her work unit.¹⁹⁷

The critical difference between the dissent’s test and the majority’s test is that the dissent’s test requires “oversight with respect to a work unit” while the majority’s test does not.¹⁹⁸ Senator Flanders, who introduced the statutory phrase “responsibly to direct” on the floor of the Senate, directly alluded to the importance of authority over an entire work unit rather than over mere individual employees.¹⁹⁹ In describing the type of worker he intended to exclude with the phrase, Senator Flanders stated that “[h]e is charged with the responsible direction of his department and the men under him.”²⁰⁰

193. Bureau of Labor Statistics, U.S. Dep’t of Labor, Occupational Employment and Wages, Registered Nurses (May 2006), <http://www.bls.gov/oes/current/oes291111.htm>; Bureau of Labor Statistics, U.S. Dep’t of Labor, Occupational Employment and Wages, Licensed Practical and Licensed Vocational Nurses (May 2006), <http://www.bls.gov/oes/current/oes292061.htm>.

194. *Oakwood*, 2006 NLRB LEXIS 448, at *95 (Members Liebman & Walsh, dissenting).

195. *Id.* at *113.

196. *Id.*

197. *Id.* at *101–02.

198. *Id.* at *102.

199. *Id.* at *98–99.

200. *Id.* (quoting S. REP. NO. 80-105 (1947), reprinted in NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 1303 (1985)).

The majority's interpretation of "responsibly to direct," which only requires that the first two prongs of the General Counsel's proposed definition are met, but not authority over an entire work unit, will exclude many employees with only "minor supervisory" duties.²⁰¹ Under the majority's definition, an employer may exclude an employee from statutory coverage by simply giving that employee authority to instruct co-workers to perform particular tasks, allowing the employee to exercise independent judgment in relation to his or her instruction, and then holding the employee accountable for his or her co-workers' performance.²⁰² The majority's definition gives no relevance to how minor the assigned tasks may be.²⁰³

Although the dissent provided a narrower definition of "responsibly to direct" than the majority by requiring the direction to be over a work unit rather than merely over another employee, the dissent's definition remains within the confines of the Court's interpretation of the supervisory exclusion in *Kentucky River*.²⁰⁴ In fact, the definition of "responsibly to direct" was not at issue in that case, and the Court only commented on it in dicta.²⁰⁵ The Court merely pointed to a possible way that the Board could narrow the supervisory exclusion by requiring responsible direction to be of other employees and not merely of "the manner of others' performance of discrete *tasks*."²⁰⁶

The *Oakwood* majority and dissent both took the Court's advice, requiring that responsible direction be of other employees and not merely of tasks. The dissent's definition, however, which required that the direction be not only of other employees but of an entire work unit, better reflected the congressional intent to exclude only workers with substantial supervisory authority.²⁰⁷

The charge nurses in *Oakwood* did not have oversight over work units: "[T]hey do not decide staffing, scheduling or budgets that de-

201. *Id.* at *107.

202. *Id.*

203. *Id.* In one of the other decisions issued on the same day as *Oakwood*, the Board found that nurses who instruct assistants "to clip residents' toenails and fingernails, to empty catheters, or to change an incontinent resident" qualify as statutory supervisors as long as the instruction is responsible and entails "independent judgment." Golden Crest Healthcare Ctr., 348 N.L.R.B. No. 39, 2006 NLRB LEXIS 445, *20 (Sept. 29, 2006).

204. *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 720 (2001) ("Perhaps the Board could offer a limiting interpretation of the supervisory function of responsible direction by distinguishing employees who direct the manner of others' performance of discrete *tasks* from employees who direct other *employees*, as § 152(11) requires.")

205. *Id.* at 720-21.

206. *Id.* at 720.

207. *See supra* notes 183-85 and accompanying text.

termine the overall direction and functioning of the unit. They are not held accountable for the overall performance of their unit.”²⁰⁸ Under the dissent’s definition, the nurses do not exercise the authority to responsibly direct and cannot be classified as statutory supervisors on that basis.²⁰⁹

3. Independent Judgment

The dissent, for the most part, accepted the majority’s two-prong test for “independent judgment”: (1) “to exercise ‘independent judgment’ an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data”; and (2) “the individual’s action or effective recommendation must not be ‘of a merely routine or clerical nature.’”²¹⁰ The dissent went on, however, to admonish that locating the threshold of discretion necessary to constitute “independent judgment” must “be guided not by the dictionary or abstract considerations, but by practical realities viewed in light of the Congressional intent to exclude foremen and their equivalent, but not minor supervisory employees, from the Act.”²¹¹

Both the dissent and the majority definitions of “independent judgment” followed *Kentucky River’s* mandate that the term refer only to a degree, and not a type, of judgment, and that the term apply equally to all twelve enumerated supervisory functions.²¹² The dissent made clear, however, that the determination of the degree of judgment necessary to constitute supervisory status should be based on the realities of each particular workplace and not on acontextual formulas.²¹³

208. *Oakwood*, 2006 NLRB LEXIS 448, at *114–15 (Members Liebman & Walsh, dissenting).

209. *Id.* at *115.

210. *Id.* at *108 (quoting the words of the Act).

211. *Id.* at *110.

212. See *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 714–15 (2001).

213. See *Oakwood*, 2006 NLRB LEXIS 448, at *71 (Members Liebman & Walsh, dissenting) (“[T]he reasonableness of the majority’s interpretation can surely be tested by its real-world consequences.”).

III. Why the Dissent Got it Right: Expansion of the Act's Supervisory Exclusion Is Out of Line with Congressional Intent and Underlying National Labor Policy

As the *Oakwood* dissent trenchantly stated, the majority's interpretation of section 2(11) will potentially exclude many professional workers, who Congress expressly covered in section 2(12), from the Act's protection.²¹⁴ Not only does the legislative history of the Taft-Hartley amendments strongly indicate that Congress did not intend to exclude workers with only minor supervisory duties, but the text and legislative history of the Wagner Act itself also militate against an expansive view of the supervisory exclusion. Despite this strong evidence of congressional intent, and without consideration of the national labor policy of encouraging collective bargaining, the *Oakwood* majority adopted an interpretation of section 2(11) that largely engulfs the Act's express inclusion of professional employees.

The Wagner Act declares that it is the "policy of the United States to . . . encourag[e] the practice and procedure of collective bargaining and . . . protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing."²¹⁵ Although Congress amended the Act in 1947 to exclude workers with true supervisory authority, Congress left in place the national labor policy of encouraging collective bargaining that it so forcefully enunciated in the Wagner Act.²¹⁶

Far from encouraging collective bargaining and protecting the statutory right of workers to unionize, the *Oakwood* decision may encourage employers to rearrange job duties to maximize statutory exemptions. By merely giving more workers some independent authority to distribute tasks or assignments to other employees, employers can seriously dilute the bargaining strength of unions in their workplaces. Allowing employers to shuffle job duties in order to exempt their employees from the Act's protection gives an unfair advantage to businesses who seek to avoid unionization.

A. Collective Bargaining to Achieve Industrial Peace

The *Oakwood* decision undermines the Act's underlying purpose of creating "industrial peace" and avoiding strikes that harm the na-

214. *Id.* at *70.

215. 29 U.S.C. § 151 (2000).

216. *See id.*

tional economy.²¹⁷ The Wagner Act clearly states Congress's intent to "promote[] the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes."²¹⁸ By offering government protection and regulation of organizing and collective bargaining, the Act provides strong incentive to workers to settle their grievances through administrative processes rather than through militant action.

Contrary to this goal, taking away the statutory right to unionize and resolve grievances through the process of collective bargaining is likely to lead to greater industrial unrest and more strikes. As Professor Marley Weiss noted, "[d]epriving [workers] of the right to organize does not guarantee their loyalty, and it does not prevent them from taking collective action—it merely moves the activity outside the regulation of the NLRA."²¹⁹ By removing the primary mechanism through which workers and employers can resolve their grievances peacefully, excluding broad groups of workers from coverage under the Act invites the kind of industrial unrest that Congress sought to alleviate through the Act.

The *Oakwood* decision also runs counter to the industrial peace goal behind the Health Care Amendments Act of 1974: stabilizing labor relations in the health-care industry in order to improve patient care.²²⁰ Stripping health-care workers of the Act's protection may lead to a return to the abysmal pre-1974 labor relations environment in the health-care industry. Consequently, this is likely to cause more disruptions in care due to recognitional strikes.²²¹ As the Board makes it more difficult for health-care workers to improve their wages and working conditions through the administrative processes provided by the Act, workers in that industry become more likely to turn to increasingly militant methods of achieving their goals. Even before the Board announced its decision, over 30,000 RNs signed pledges with their union to strike if their employers attempt to "exploit" the *Oak-*

217. *See id.*

218. *Id.*

219. Weiss, *supra* note 66, at 397.

220. *See supra* Part I.D (discussing Congress's reasons for restoring statutory coverage under the Act to private-sector health-care employees in the Health Care Amendments of 1974).

221. Weiss, *supra* note 66, at 397.

wood rules.²²² Additionally, hundreds of RNs protested the forthcoming decision by stopping midday traffic in front of the national headquarters of the American Hospital Association in downtown Chicago.²²³ These demonstrations show that nurses understand how relatively subtle changes in the Board's interpretation of statutory language can impact their day-to-day lives, and that they are willing to disrupt their employers' businesses when pushed.

And it is not only nurses who are closely monitoring the Board's actions. On October 13, 2006, hundreds of union members representing a broad spectrum of industries rallied in front of the Board's Nashville, Tennessee offices to protest the *Oakwood* decision.²²⁴ Rallies such as this one indicate that workers are willing to act outside of the Board's processes when the Board itself threatens to push them outside of the protection of the Act.

B. Worker Empowerment and Rights of Belonging

The *Oakwood* decision also undermines the goal of many of the proponents of the original Wagner Act to encourage fuller participation of workers in a democratic society. For the New Deal Members of Congress responsible for passing the Act, whose views were rooted in "labor's constitution of freedom,"²²⁵ unionization was a vehicle through which workers could act collectively not only to positively impact their employment relationship, but also to act more effectively in the political realm to influence public policy generally.²²⁶

Broadly speaking, the rights of free association and collective action guaranteed by the Wagner Act fall into the category identified by Rebecca Zietlow and Denise Morgan as "rights of belonging."²²⁷ Zietlow defines "rights of belonging" as "those rights that promote an inclusive vision of who belongs to the national community of the United States and that facilitate equal membership in that commu-

222. Press Release, Cal. Nurses Ass'n, Nurses Denounce Bush Labor Board Ruling on Union Rights as Fundamental Assault on Democracy, Patient Safety—RN's Prepared to Strike to Defend Their Rights (Oct. 3, 2006) (on file with author).

223. Frank Borgers, *RNs Confront Hospital Industry on Supervisor Issue in Chicago*, REGISTERED NURSE, Aug. 2006, at 4.

224. James Parks, *Working Families Rally in Tennessee: Labor Board Decision 'Pure Politics'*, AFL-CIO WEBLOG, Oct. 13, 2006, <http://blog.aflcio.org/2006/10/13/working-families-rally-in-tennessee-labor-board-decision-%e2%80%98pure-politics%e2%80%99/>.

225. See ZIETLOW, *supra* note 25, at 75.

226. See *id.* at 76–79.

227. *Id.* at 6, 64; Denise C. Morgan & Rebecca E. Zietlow, *The New Parity Debate: Congress and Rights of Belonging*, 73 C.IN. L. REV. 1347 (2005).

nity.”²²⁸ According to Zietlow, “[t]he right to organize into a union and bargain collectively is arguably the quintessential right of belonging because it facilitates the formation of communities of workers who benefit both economically and socially.”²²⁹

The ideals of industrial democracy inherent in the union election and collective bargaining processes can also transfer to participation in the larger society. Workers who participate in a democratic process to choose representatives to advocate for their interests in the workplace are more likely to engage in the process of choosing representatives in a democratic government.²³⁰ Senator Wagner himself echoed this sentiment when he stated, “let men know the dignity of freedom and self-expression in their daily lives, and they will never bow to tyranny in any quarter of their national life.”²³¹

Although the Board’s interpretation of the Act’s supervisory exemption may be one fair reading of the text of section 2(11) and Supreme Court precedent, the *Oakwood* decision contravenes the spirit of inclusion and democratic principles that are at the heart of the Wagner Act. A recent report estimated that the Board’s ruling could result in up to eight million workers losing their statutory right to unionize and bargain collectively with their employers.²³² Such a drastic reduction in potential bargaining power will not only render unions substantially less effective in advocating for their members in the workplace, but also less able to exert political strength to effectuate public policies that benefit workers across the board.

Workers excluded from the Act do not have statutory protection when they “engage in . . . concerted activities for the purpose of col-

228. ZIETLOW, *supra* note 25, at 6.

229. *Id.* at 64.

230.

It is not a surprise that citizens who spend eight or more hours a day obeying orders with no rights, legal or otherwise, to participate in crucial decisions that affect them, do not engage in robust, critical dialogue about the structure of our society. Eventually, the strain of being deferential servants from nine to five diminishes our after-hours liberty and sense of civic entitlement and responsibility.

ELAINE BERNARD, *YOUNG DEMOCRATIC SOCIALISTS, WHY UNIONS MATTER*, available at http://www.ydsusa.org/statements/why_unions_matter.pdf (last visited Dec. 21, 2007).

231. *Interview with Senator Wagner*, N.Y. TIMES MAG., May 9, 1937, at 23, cited in HARRY A. MILLIS & EMILY CLARK BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS* 7 (1950). In the same interview, Senator Wagner presciently stated, “Let men become the servile pawns of their masters in the factories of the land and there will be destroyed the bone and sinew of resistance to political dictatorship. Fascism begins in industry, not in government.” *Id.*

232. EISENBREY & MISHEL, *supra* note 16, at 2.

lective bargaining or other mutual aid or protection”²³³ and therefore must risk their jobs when they form communities of common interest with other workers. Because the Board excluded the twelve *Oakwood* charge nurses as supervisors, their employer may legally terminate them if they attempt to form a union or ask for improvements in wages, hours, or working conditions. The *Oakwood* decision delivered a significant blow to Senator Wagner’s vision of giving workers a greater voice in society.

On the other hand, the *Oakwood* dissenters demonstrated how the Board could have stayed true to both the industrial peace and worker empowerment goals of the Wagner Act, while effectuating the statutory language of the Act and the Supreme Court’s interpretations of that language. The dissent succeeded in adhering to *Kentucky River’s* instructions regarding the statutory terms “independent judgment” and “responsibly to direct,” while providing a narrowing interpretation of these terms that adequately considered the structure of the Act as a whole, its legislative history, and the national labor policy and underlying goals of the Wagner Act. Given the increasing politicization of the Board,²³⁴ however, it came as a surprise to no one that the Bush-appointed majority instead chose to roll back labor protections for possibly millions of workers.

IV. The *Oakwood* Decision Reflects and Results From the Board’s Increasing Alienation From Shop-Floor Realities and Political Polarization

The *Oakwood* decision is only the latest in a string of decisions that have excluded increasing numbers of workers from coverage under the Act²³⁵ and restricted the scope of protected activities under the Act.²³⁶ Other recent Board decisions have greatly increased the

233. 29 U.S.C. § 157 (2000).

234. See *infra* Part IV.

235. See, e.g., *Brown Univ.*, 342 N.L.R.B. 42 (2004) (barring graduate student teaching assistants from coverage under the Act); *Brevard Achievement Carr*, 342 N.L.R.B. 101 (2004) (barring disabled workers employed as janitors from coverage under the Act); *Pa. Acad. of the Fine Arts*, 343 N.L.R.B. 93 (2004) (barring artists’ models from coverage under the Act).

236. See, e.g., *Waters of Orchard Park*, 341 N.L.R.B. 93 (2004) (holding that nursing home employees fired for calling state patient care hotline to report excessive heat not engaged in protected activity); *Holling Press, Inc.*, 343 N.L.R.B. 45 (2004) (holding that employee who solicited coworker to testify before state agency to support her sexual harassment claim not engaged in protected activity); *IBM Corp.*, 341 N.L.R.B. 148 (2004) (holding that non-union employees do not have right to accompaniment of coworker when participating in meeting with employer that may result in discipline or termination).

ability of employers to intimidate and threaten employees who seek to unionize.²³⁷ These decisions collectively demonstrate the hostility of the current Board's Bush-appointed majority towards the national labor policy of "encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing."²³⁸ Rather than effectuating Congress's mandate to protect and encourage collective bargaining, the Board has in these cases acted as an impediment to that goal.

The *Oakwood* majority's unwillingness to consider the underlying purposes of the Act and the real-world consequences of its decision is evidence of what James J. Brudney refers to as the Board's increasing isolation and politicization.²³⁹ All administrative agencies must adapt to changing circumstances while remaining within the confines of the statutory schemes they are charged with implementing.²⁴⁰ The Board's recent rulings, however, have largely ignored the rapidly changing nature of the workplace and the everyday reality of American workers. Rather than effectively adapting to the changing labor relations environment, the Board's isolation and politicization have contributed to the Act's "diminished relevance or applicability to the modern American workplace."²⁴¹

The Board's isolation has rendered it less effective when attempting to vindicate the organizing and collective bargaining rights of workers.²⁴² While the conservative ideological bent of many Supreme Court justices has certainly played a role in the Court's rejection of several recent Board efforts to protect workers, "the Board's isolated

237. See, e.g., *Aladdin Gaming, LLC*, 345 N.L.R.B. 41 (2005) (holding that managers who listened in on conversations among off-duty employees about unionization and then interrupted to offer the employer's anti-union stance did not commit an unfair labor practice); *Crown Bolt, Inc.* 343 N.L.R.B. 86 (2004) (holding that an employer's threats to close its facility if union won representation election are not presumed to be disseminated throughout the bargaining unit).

238. 29 U.S.C. § 151.

239. James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 223 (2005). Brudney attributes the Board's isolation to several key factors: congressional inaction in the area of labor relations, the Act's restrictive right of access to federal courts, the Board's reliance on adjudication rather than rulemaking to set policy, and the Board's refusal to acquiesce to applicable appellate court precedent. See *supra* note 55 and accompanying text (discussing the limited access to federal courts under the Act).

240. Brudney, *supra* note 239, at 223–24.

241. *Id.* at 224.

242. *Id.* at 241–42.

status and less than transparent decision-making approach appear to have contributed to its lack of success.”²⁴³

The current Board’s failure to protect the interests of workers also results from the politicization of the selection of its members.²⁴⁴ Although the framers of both the Wagner and Taft-Hartley Acts envisioned a nonpartisan and impartial Board, a trend of appointing individuals with extensive management backgrounds began to emerge during the Eisenhower administration.²⁴⁵ While early Republican appointees to the Board demonstrated a basic level of recognition and respect for the advantages of collective bargaining, President Reagan appointed members with a staunchly anti-union outlook.²⁴⁶ This ideological shift in the Board’s composition prompted union leaders to forcefully advocate for the selection of pro-union members to the Board.²⁴⁷

During the recent period of Republican dominance of national politics, the political polarization of the Board has amplified.²⁴⁸ The magnified influence of avowedly conservative interest groups, like the National Right to Work Committee, in the selection of Board members has created an atmosphere in which organized labor has lost faith in the ability of the Board to protect or vindicate statutory rights.²⁴⁹ Rather than turning to the Board’s procedural assistance in organizing and bargaining,²⁵⁰ now unions increasingly rely on non-Board mechanisms such as card-check neutrality agreements.²⁵¹

243. *Id.* at 242.

244. *Id.* at 243.

245. *Id.* at 243–45.

246. *Id.* at 248 (citing Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000*, 61 OHIO ST. L.J. 1361, 1384–85 (2000) (describing strong anti-union backgrounds of nominees Van de Water, Dotson, and Hunter)).

247. *Id.* at 249 (quoting AFL-CIO President Lane Kirkland, who stated, “For the first time, appointments to the NLRB have been of a character that represents the perversion of that board into an instrument of anti-union employers,” warning that labor would from that point forward seek the appointment of union partisans to the Board).

248. *Id.* at 251.

249. *Id.*

250. *See supra* Part I.B (discussing the Board’s administrative procedures relating to union recognition through a secret ballot election).

251. Brudney, *supra* note 239, at 251 (citing a study reporting that of 64,000 workers in one leading union’s newly-organized bargaining units, less than 15,000 came through Board elections). The Board has recently indicated a willingness to revisit its long-time acceptance of the validity of card-check recognition. *Id.* at 222. Neutrality agreements generally state that the employer will not interfere with or communicate opposition to a union’s campaign to organize its workforce. David Sherwyn & Zev Eigen, *Card-Checks and Neutrality Agreements: How Hotel Unions Staged a Comeback in 2006*, CORNELL HOSPITALITY REP., Apr. 2007, at 10 & n.22. “Card check” provisions “require [] the employer to recog-

The Board's increased isolation and politicization underlies and explains its decision in *Oakwood*. The Board's isolation from the legislative branch in particular has caused a disconnect between the text of the Act and the Board's ability to interpret that text in a manner that reflects the realities of the contemporary workplace.²⁵² According to Brudney, "agencies renew their vitality and contribute to the development of national policy . . . by being forced to respond to directives from Congress."²⁵³ Congress, however, has not passed major legislation in the area of labor relations since the Landrum-Griffin amendments of 1959.²⁵⁴ And more importantly to the case at hand, Congress has not revisited its statutory definitions of "supervisor" or "professional employee" since the 1947 Taft-Hartley Act.²⁵⁵

The composition of the workforce and the labor relations environment have changed dramatically since Congress last amended the Act. By 2012, professionals may account for more than twenty-three percent of the United States workforce,²⁵⁶ a phenomenon that Congress may not have foreseen when it defined "professional employee" in 1947. Because "[m]ost professionals have some supervisory responsibilities in the sense of directing another's work,"²⁵⁷ Congress also may not have realized the extent to which its supervisory exclusion would impinge on its express coverage of professional employees. While the Board has attempted with mixed success to give effect to the statutory language under rapidly changing circumstances, it has not received guidance from Congress in fifty years as to how best to go about that task.

nize the union if a majority of the bargaining-unit employees sign authorization cards," therefore bypassing the need for a Board election. *Id.* at 11. A union's chance of gaining recognition under a card-check neutrality agreement (78.2%) is more than thirty percent greater than in a traditional Board election (46%). *Id.*

252. Brudney, *supra* note 239, at 227–29.

253. *Id.* at 227.

254. *Id.* at 228; see also Labor-Management Reporting and Disclosure Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. §§ 401–531 (2000)). On March 1, 2007, the House of Representatives passed the Employee Free Choice Act, which would remove some of the obstacles that workers face when they attempt to organize into unions. Steven Greenhouse, *House Passes Top Priority of Unions*, N.Y. TIMES, Mar. 2, 2007, at A-14. This indicates that the current Democratic Congress may pass major labor law reform legislation.

255. See Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141–166).

256. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL PROJECTIONS AND TRAINING DATA (Table III-1) 72 (2006–07), available at http://www.bls.gov/emp/optd/optdtabii_1.pdf.

257. *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1465 (7th Cir. 1983) (opinion by Posner, J.).

The *Oakwood* decision illustrates the Board's isolation not only from the other branches of government, but also from the workers whom its decisions most directly impact. While the dissent heavily weighed the severe consequences of the Act on potentially millions of workers,²⁵⁸ the majority dismissed such concerns as "results-oriented" decision making and instead relied on acontextual dictionary definitions to shape its interpretations.²⁵⁹ While the dictionary may provide some insight into the plain meanings of statutory terms, context is critically important in defining the contours of the employment relationship—the Supreme Court itself has acknowledged the validity of the "common law of the shop" in adjudicating labor disputes.²⁶⁰

The Board's consistent refusal to hear oral arguments, despite repeated requests from labor organizations and legal scholars to allow them, is another clear indication of the Board's willful alienation from the concerns of workers.²⁶¹ Not only did the Board deny oral argument in *Oakwood*, the Board has not heard oral arguments in any case since the Bush Board took over in 2001.²⁶² This was not always the Board's practice—" [t]he Board has historically held oral argument in cases of this degree of importance, including in the two nurse supervisor cases it designated as lead cases All prior Boards in the last 25 years have granted oral argument in significant cases."²⁶³

Although the Board did invite briefs from interested amici, and asked amici to address specific questions in their briefs relating to how the Board should interpret supervisory status,²⁶⁴ oral arguments play a fundamentally different role than briefs in the adjudication process.

258. See EISENBREY & MICHEL, *supra* note 16, at 2.

259. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. No. 37, 2006 NLRB LEXIS 448, at *69 (Sept. 29, 2006).

260. See, e.g., *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579–80 (1960) ("Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective bargaining process demand a common law of the shop which implements and furnishes the context of the agreement.").

261. See, e.g., Order Denying Motion to Reconsider Denial of Oral Argument, *Oakwood Healthcare, Inc.*, 348 N.L.R.B. No. 37, 2006 NLRB LEXIS 448, Case 7-RC-22141 (Aug. 21, 2006); Letter from Thirty Law Professors from Around the Country Urging the Board to Hear Oral Arguments in Supervisor Cases (July 13, 2006) [hereinafter Fisk Letter] (calling the cases "among the most important in the 71 years of Board jurisprudence" because "the determination of employee status is critical to all rights under the NLRA"), available at http://www.aflcio.org/joinaunion/upload/fisk_letter.pdf.

262. Fisk Letter, *supra* note 261.

263. *Id.*

264. NLRB Notice and Invitation to File Briefs: *Oakwood Healthcare, Inc.*; *Beverly Enterprises-Minnesota, Inc.*; *Croft Metals, Inc.*, Daily Lab. Rep. (BNA) No. 144, at E-1 (July 28, 2003).

In its Motion to Reconsider Denial of Oral Argument in *Oakwood*, the AFL-CIO quoted Chief Justice William Rehnquist who wrote, “[O]ral argument offers an opportunity for a direct exchange of ideas between court and counsel.”²⁶⁵ In oral argument, “[c]ounsel can play a significant role in responding to the concerns of the judges, concerns that counsel won’t always be able to anticipate in preparing the briefs.”²⁶⁶ The AFL-CIO brief argued, to no avail, that “[i]n cases as important as these, the Board should seek guidance through all available means, including both briefing and oral argument.”²⁶⁷

A letter to the Board from Duke Law School Professor Catherine Fisk and twenty-nine other law professors reiterated the AFL-CIO’s position, stating that “[w]ritten briefs are no substitute for the searching, interactive exchange possible in oral argument The short additional delay needed to hold oral argument will be fully justified by making sure that the Board is in a position to consider all the ramifications of its decisions.”²⁶⁸

Although the Board is not bound to hear oral argument in any case, its refusal to do so in a case potentially impacting millions of workers is unjustifiable. Even if oral argument would not have ultimately changed the outcome of *Oakwood*, it would have at least given the affected workers an opportunity to voice their concerns and added a measure of credibility to the decision.²⁶⁹ Holding oral arguments allows the Board “to invite participants into the process of how the Board makes decisions.”²⁷⁰ Given the intent of the congressional supporters of the Wagner Act to increase the participation of workers in the larger political forces that shape their lives, the Board’s denial of the affected workers’ day in court is particularly egregious.

V. Conclusion: The Way Forward—Congressional Action

The *Oakwood* decision is a clarion call for Congress to clarify the ambiguous language in section 2(11) of the Act, as well as to resolve the seeming cross purposes of the supervisory exclusion in section

265. Motion to Reconsider Denial of Oral Argument, *Oakwood Healthcare, Inc.*, 348 N.L.R.B. No. 37, 2006 NLRB LEXIS 448, Case 7-RC-22141 (July 13, 2006) (quoting William H. Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 MERCER L. REV. 1015, 1021 (1984)).

266. *Id.*

267. *Id.*

268. Fisk Letter, *supra* note 261.

269. *Oakwood* dissenter Dennis Walsh stated that hearing oral argument in the case would help add to the credibility of the Board. *Bush Board, State of Labor Law Debated by Members, Practitioners*, BUREAU OF NATIONAL AFFAIRS, 180 L.R.R. 28 (2006).

270. *Id.*

2(11) and the express coverage of professional employees in 2(12).²⁷¹ The Supreme Court itself acknowledged the ambiguity of the term “independent judgment,” one of the three basic requirements for the supervisory exemption.²⁷² In many ways, the Court’s decision in *Kentucky River* raised more questions than it answered. The difficulty of the Board’s interpretative task is especially evident in the extensive list of questions that it put forward in advance of the *Oakwood* decision regarding the scope and interrelationships of the various statutory terms relating to supervisory and professional status.²⁷³

Although the legislative history of the Act strongly indicates that Congress only intended to exclude workers with the power to effect the terms and conditions of employment of their co-workers, “the statutory language does not lend itself to an easy effectuation of this intent.”²⁷⁴ Unless Congress amends the Act to better reflect its underlying purpose, the Board will continue to struggle to carry out congressional intent within the existing statutory framework.

Congress should act to amend section 2(11) to end the isolation of the Board in interpreting the Act’s supervisory exclusion and to initiate a broader national dialogue on the role of collective bargaining in the contemporary workplace. Congress occupies a much better position than either the Board or the courts to carry out extensive fact-finding as to the realities on the ground for American workers, and how to adapt the language of the Act to a labor relations environment vastly different than the one that existed in 1947.

In fact, much of the initial impetus to pass the Wagner Act came in reaction to the refusal of courts to protect workers’ rights in the early Twentieth Century.²⁷⁵ During the *Lochner* era, the courts struck down many of the Labor Movement’s efforts to enact legislation protective of workers’ interests as interfering with the “right to con-

271. 29 U.S.C. § 152(11)–(12) (2000) (defining “supervisor” and “professional employee” status, respectively).

272. *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001) (“[I]t is certainly true that the statutory term ‘independent judgment’ is ambiguous with respect to the *degree* of discretion required for supervisory status.”). In his separate opinion, Justice Stevens identified the term “responsibly to direct” as equally ambiguous. *Id.* at 726 (Stevens, J., concurring in part and dissenting in part).

273. See Notice and Invitation to File Briefs, *supra* note 264.

274. Weiss, *supra* note 66, at 396 (quoting AFL-CIO Associate General Counsel Craig Becker).

275. See, e.g., ZIETLOW, *supra* note 25, at 83 (citing the Court’s overturning of the National Industrial Relations Act as unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), as “one of the most important factors in the success of the Wagner Act”).

tract.”²⁷⁶ Federal courts of that period frequently issued injunctions as weapons to prevent workers from organizing or engaging in political action.²⁷⁷ Unions could not look to the judicial system to protect the rights of workers, so they instead turned to the legislature and worked towards the passage of anti-injunction legislation.²⁷⁸

Similarly today, workers and the organizations that represent them cannot rely on the Board or the Court to protect their interests. As the Board becomes increasingly mired in its own isolation and political polarization, workers should turn to their elected representatives in Congress to redefine what it means to be a “supervisor” or a “professional employee” in today’s society. Congress can counter the Board’s isolation by holding hearings to give voice to a broad spectrum of workers representing every sector of the economy. In contrast to the Board, which refused to even hear oral arguments in a case potentially affecting millions of workers, members of Congress are directly accountable to their constituents. Many, if not most, of these constituents are themselves workers, and have intimate knowledge of the flattening hierarchies and increasing professionalization of the workplace. By bringing those workers into the legislative process, Congress can make the statutory definitions of “supervisor” and “professional employee” relevant and applicable to the present time.

276. *Id.* at 67–68 (citing the Court’s rejection of labor’s efforts to adopt safety regulations, restrict the number of hours an employer could require employees to work, and prohibit antiunion practices such as “yellow dog” contracts).

277. *Id.* at 68.

278. *Id.* These efforts culminated in the passage of the Norris-Laguardia Federal Anti-Injunction Act of 1932, ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–115 (2000)), “depriving federal courts of jurisdiction to issue injunctions in cases ‘involving or growing out of a labor dispute.’” ZIETLOW, *supra* note 25, at 71.