Orchestrating an Exclusion of Professional Workers from the NLRA: Has the Supreme Court Endangered Symphony Orchestra Musicians' Collective Bargaining Rights?

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INTRODUCTION

The American Federation of Musicians ("AFM") represents the musicians in America's major orchestras.[1] Unionized orchestral musicians are highly trained, artistic professionals. In recent years, the United States Supreme Court has classified many professional workers as managers or supervisors.[2] In so doing, the Court has diminished professional workers' right to unionize because managers and supervisors are not protected by the National Labor Relations Act ("NLRA").[3] One interpretation of this jurisprudence is that collective bargaining agreements currently covering certain orchestral musicians actually violate the NLRA. By endangering orchestral musicians' collective bargaining rights, the Court may inadvertently have placed American orchestras in jeopardy.

This Note challenges the Court's broad exclusion of managers and supervisors from NLRA coverage. Part I examines the history of the NLRA and the Court's historical treatment of managers and supervisors and outlines the basic structure of American orchestras and their relationship with the AFM. Part II analyzes the Court's broad interpretation of the managerial and supervisory exclusions and

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1. AMERICAN FEDERATION OF MUSICIANS, WAGE SCALES AND CONDITIONS IN THE SYMPHONY ORCHESTRA 1 (2002).

2. *See, e.g.*, NLRB v. Yeshiva Univ., 444 U.S. 672 (1980); NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571 (1994); NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706 (2001).

3. *Yeshiva*, 444 U.S. at 681–82.

the potential loss of bargaining rights for certain orchestral musicians. Finally, Part III proposes that orchestras may protect their musicians' bargaining rights by narrowly defining orchestral musicians' roles in governance committees and as principal players.

I. HISTORY

In 1935, Congress passed the NLRA in an effort to protect industrial workers' rights.[4] The NLRA established collective bargaining as the mechanism for workers to negotiate employment terms with their employers.[5] Although the NLRA protected all statutorily defined "employees," employers urged Congress to exclude workers exhibiting managerial and supervisory qualities from NLRA coverage.[6] Debate over such exclusions led, in part, to the passage of the Taft-Hartley Amendments in 1947.[7]

A. Defining Covered and Excluded Workers

Because the National Labor Relations Board (the "Board"), not the judiciary, retains the "primary authority" to resolve NLRA conflicts,[8] the Board found itself in the middle of a definitional debate.[9] Opponents of coverage for managerial-type workers relied on the Board to define an appropriate bargaining unit in a way that would not "undermine the [NLRA's] basic purposes."[10] Meanwhile,

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4. THOMAS A. KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 22 (1994).

5. *See id*. at 25 ("The key choice, however, was that collective bargaining would serve as the cornerstone of labor-management interactions.").

6. David M. Rabban, *Distinguishing Excluded Managers from Covered Professionals Under the NLRA*, 89 COLUM. L. REV. 1775, 1782 (1989) ("[P]rofessional, supervisory, managerial, and confidential employees should be excluded from the Act's definition of an employee. . . .").

7. *Id*. at 1783.

8. *See Yeshiva*, 444 U.S. at 692–93.

9. *See, e.g.*, Rabban, *supra* note 6, at 1784 ("These disputes about supervisors foreshadowed subsequent debates, extending through the Supreme Court's decision in *Yeshiva*, about the potentially overlapping categories of managerial, supervisory, professional, and confidential employees.").

10. *Id*. Opponents further argued that the integration of labor and management is against NLRA policy. *Id*. at 1785. "Opponents of including supervisors within the NLRA's definition of 'employee' stressed the essential 'dividing line' between labor and management and warned

proponents of coverage for managerial-type workers argued that the NLRA's enumerated exclusion of certain workers[11] precluded the exclusion of those workers not enumerated in the statute.[12] The opponents of coverage, however, ultimately won the debate when Congress formally excluded supervisors from NLRA coverage through the Taft-Hartley Amendments.[13]

Although the NLRA statutorily excludes supervisors, the Board and courts have established a common law managerial exclusion.[14] Traditionally, the Board utilized a case-by-case analysis to exclude managers from NLRA coverage.[15] However, in *NLRB v. Bell Aerospace Co.*,[16] a sharply divided Supreme Court held that the NLRA excludes all managerial employees from collective bargaining benefits.[17] The Court defined managerial employees as those who implement company policy.[18] Ultimately, the Court emphasized

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against [the] 'commingling' [of] their respective functions. Because supervisors . . . retain significant responsibilities . . . they are 'an instrumentality of management in dealing with labor.'" *Id.*

11. *See* 29 U.S.C. § 152(3) (2000).

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse . . . or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

Id. (brackets in original).

12. Rabban, *supra* note 6, at 1784. Proponents further argued that "frustrating supervisors' expressed desire for collective bargaining . . . would be a 'policy of negation' likely to increase industrial unrest and to promote more disloyalty than could conceivably result from collective bargaining." *Id.* at 1787.

13. *Id.* at 1794; *see also* 29 U.S.C. § 152(3) ("The term 'employee' . . . shall not include . . . any individual employed as a supervisor. . . ."). For the NLRA's definition of "supervisor," see *infra* note 67.

14. *See* Rabban, *supra* note 6, at 1787 ("Board opinions excluding managers from other bargaining units and distinguishing managers from supervisors signalled [sic] that managers, despite the lack of any specific exclusion, would not be permitted to bargain under the NLRA.").

15. *See, e.g.*, NLRB v. Bell Aerospace Co., 416 U.S. 267, 276–77 (1994).

16. *Id.*

17. *Id.* at 268–69.

18. *Id.* at 288. "The Board's exclusion of 'managerial employees' defined as those who

divided loyalty concerns as a key reason for the complete managerial exclusion.[19] Today, the courts use various methods to determine whether a worker is a manager, but most emphasize that the decisive factor is a particular worker's alignment with management.[20] The Board has outlined various factors used to ascertain alignment with management, such as a worker's ability to determine policies, wages, budgets, and production techniques.[21]

The Taft-Hartley Amendments retained professional workers' coverage; by also excluding supervisors, however, the Amendments introduced ambiguities surrounding professional workers' status under the NLRA.[22] Although the NLRA explicitly covers professionals, recent legal developments focus on the judiciary's inability to distinguish included professionals from excluded managers and supervisors.[23] Making such a distinction is difficult because there is no dispositive criterion.[24]

'formulate and effectuate management policies by expressing and making operative the decisions of their employer' has also been approved by courts without exception." *Id.* The Court equated managerial employees as "representatives of management" or "allied with management." *Id*. at 286–87. The test to determine whether "employees are 'managerial' must be answered in terms of the employees' actual job responsibilities, authority, and relationship to management." *Id*. at 290 n.19. It is important to note that the Court emphasized that professional employees are not the same as managerial employees. "In contrast to 'managerial employees,' [professional employees] are not defined in terms of their authority 'to formulate, determine, and effectuate management policies.'" *Id*. at 284 n.13 (citation omitted).

19. *See, e.g.*, *id.* at 271 ("[B]uyers would be more receptive to bids from union contractors and would also influence 'make or buy' decisions in favor of 'make,' thus creating additional work for sister unions in the plant."); *see also id*. at 285–86 ("[B]uyers . . . were excluded by the Board on the ground that 'the interests of these employees are more closely identified with those of management.").

20. *See, e.g.*, NLRB v. Yeshiva Univ., 444 U.S. 672, 695–96 (1980) ("The touchstone of managerial status is thus an alliance with management, and the pivotal inquiry is whether the employee in performing his duties represents his own interests or those of his employer."); *see also id.* at 690 ("Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management."). *Cf. id.* at 683 (citing *Bell Aerospace*, 416 U.S. at 274, 286–89; Sutter Cmty. Hosps. of Sacramento, 227 N.L.R.B. 181, 193 (1976)) ("Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.").

21. Rabban, *supra* note 6, at 1788.

22. *See id*. at 1794. "These amendments introduced significant ambiguities by defining both excluded supervisors and included professionals as employees who exercise independent judgment in their work." *Id.*

23. *Id*. at 1778; *see also id*. at 1792 ("[L]itigation about professionals has focused on their

Typically, professional workers are trained, skilled, and well paid; they retain responsibility, autonomy, and discretion.[25] Such characteristics have led to the managerial and supervisory exclusion of some professional workers from NLRA coverage.[26] The NLRA defines "professional employee,"[27] but it fails to provide a generally accepted list of covered professions.[28] Rather than relying upon a list of covered professional workers, the Board designates professional workers as covered when their "decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned. . . ."[29]

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placement in appropriate bargaining units.").

24. *See id.*

25. *Id.*; *see also id.* at 1776 n.1 ("[P]rofessionals have special knowledge and skills, based on training with an intellectual component, which allow them a substantially greater degree of autonomy at work than other employees.").

26. *Id.* at 1792.

27. The statute reads:

> The term "professional employee" means—
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> (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 process; 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) (2000).

28. Rabban, *supra* note 6, at 1860 n.1. *But see* H.R. REP. NO. 80-510, at 36 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1135–41 (listing professional employees covered by the NLRA).

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

1. Defining Professionals as Managers: *NLRB v. Yeshiva University*

Soon after the controversial *Bell Aerospace* ruling that the NLRA excludes all managers from coverage, the Supreme Court went on in *NLRB v. Yeshiva University* to define which professional workers the NLRA excludes as managers. In *Yeshiva*, the Court addressed whether full-time university faculty fell within the managerial exclusion under the NLRA.[30] In 1974, the Yeshiva Faculty Association, the faculty's union, sought certification from the Board.[31] The University opposed the faculty's certification, claiming that the members of its faculty who exercised managerial responsibilities were not "employees" within the NLRA's definition.[32]

The Board hearings resulted in extensive fact-finding regarding the nature of the faculty's participation in university-wide governance.[33] Subsequently, the Board reviewed the faculty's petition and approved the faculty's proposed bargaining unit.[34] In ordering elections, the Board denied the University's contention that its faculty members were managerial.[35] Because the Board concluded that the faculty's participation in decisionmaking resulted from its members' "independent professional judgment," the Board deemed the faculty to be protected against the NLRA's managerial exclusion.[36]

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30. *Id*. at 674.
31. *Id*. at 674–75.
32. *Id*. at 675.
33. *See, e.g., id.* at 675–76. The hearing officer found that the University's Board of Trustees was ultimately responsible for university-wide policies, including "general guidelines dealing with teaching loads, salary scales, tenure, sabbaticals, retirement, and fringe benefits." *Id*. at 675. However, he also found that the faculty directly participated in University governance through a number of faculty committees. *Id*. at 675–76. The hearing officer also established that the faculty determined its "curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules." *Id*. at 676.
34. *Id*. at 678. The bargaining unit also included "assistant deans, senior professors, and department chairmen, as well as associate professors, assistant professors, and instructors." *Id*. However, "deans and directors were excluded." *Id*.
35. *Id*. The Board's previous decisions regarding the positive coverage of university professors guided its decision in *Yeshiva*. "[T]he board referred generally to the record and found no 'significant' difference between this faculty and others it had considered." *Id*.
36. *Id.* at 684 ("The Board argues that the Yeshiva faculty are not aligned with management because they are expected to exercise 'independent professional judgment' while

The faculty union won the election, but the University refused to bargain.[37] In the ensuing unfair labor practice case, the Board again denied the University's contentions.[38] After the University's continued refusals to negotiate, the Board sought reinforcement from the United States Courts of Appeals for the Second Circuit ("Second Circuit").[39] The Second Circuit, ruling in favor of the University, found that the faculty members should be excluded as managers.[40] The faculty members appealed and the Supreme Court granted certiorari.[41]

In affirming the Second Circuit's decision,[42] the Supreme Court focused on the faculty members' various managerial duties. The Court found that the faculty authorized curricula, course schedules,

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participating in academic governance, and because they are neither 'expected to conform to management policies [nor] judged according to their effectiveness in carrying out these policies.'"). The Board further stated:

> [T]he faculty are professional employees entitled to the protection of the Act because "faculty participation in collegial decision making is on a collective rather than individual basis," it is exercised in the faculty's own interest rather than "in the interest of the employer" and final authority rests with the board of trustees.

Id. at 678 (citations omitted). Additionally, the Board found that divided loyalty remained a non-issue:

> Because of [the faculty's] independence[,] . . . there is no danger of divided loyalty and no need for the managerial exclusion. . . . [U]nion pressure cannot divert the faculty from adhering to the interests of the university, because the university itself expects its faculty to pursue professional values rather than institutional interests.

Id. at 684. Ultimately, the Board concluded that "application of the managerial exclusion to such employees would frustrate the national labor policy in favor of collective bargaining." *Id*.

37. *Id*. at 679.

38. *Id*.

39. *Id*.

40. *Id*. Although the Second Circuit found that the faculty were professional employees under 29 U.S.C. § 152(12), it criticized the Board for its failure to acknowledge the managerial aspects of the faculty's positions. *Id*.

> [The lower] court found that the Board had ignored "the extensive control of Yeshiva's faculty" over academic and personnel decisions as well as the "crucial role of the full-time faculty in determining other central policies of the institution." The court concluded that such power is not an exercise of individual professional expertise. Rather, the faculty are endowed with "managerial status" sufficient to remove them from the coverage of the Act.

Id. (citations omitted).

41. *Id*.

42. *Id*.

teaching methods, grading policies, matriculation standards, size of the student body, and tuition.[43] Noting that such decisions have managerial characteristics,[44] the Court further emphasized the faculty's significant strength in determining the above policies.[45] In finding that the NLRA excluded the faculty as managers, the Court disagreed with the Board's "independent professional judgment standard."[46] The Court stated that the Board's emphasis on independent professional judgment actually undermined the NLRA's policy of protecting the workplace from divided loyalties.[47] Although

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43. *Id*. at 686. Further, the Court indicated that the record showed faculty playing "a predominant role in faculty hiring, tenure, sabbaticals, termination and promotion." *Id*. at 686 n.23. Some faculty also made "final decisions regarding the admission, expulsion, and graduation of individual students . . . . Others have decided questions involving teaching loads, student absence policies, tuition and enrollment levels, and in one case the location of a school." *Id*. at 677.

44. *Id*. at 686 n.23. However, the Court noted that these characteristics are not an exhaustive list of factors:

> We recognize that this is a starting point only, and that other factors not present here may enter into the analysis in other contexts. It is plain, for example, that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research. There thus may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominately nonmanagerial. There also may be faculty members at Yeshiva and like universities who properly could be included in a bargaining unit.

Id. at 690 n.31.

45. *Id*. at 677 ("[T]he overwhelming majority of faculty recommendations are implemented."). Throughout the hearings, various University personnel attested to the strength of faculty decisions:

> One Dean estimated that 98% of faculty hiring recommendations were ultimately given effect. Others could not recall an instance when a faculty recommendation had been overruled . . . [One] Dean in six years has never overturned a promotion decision. The President has accepted all decisions of the Yeshiva College faculty as to promotions and sabbaticals, including decisions opposed by the Dean.

Id. at 677 n.5 (citations omitted).

46. *See id.* at 687.

47. *Id*. at 687–88. The Court found that faculty and University interests were actually aligned:

> [T]he Board assumes that the professional interests of the faculty and the interests of the institution are distinct, separable entities with which a faculty member could not simultaneously be aligned. . . . In fact, the faculty's professional interests—as applied to governance at a university like Yeshiva—cannot be separated from those of the institution.

Id. at 688.

the courts traditionally give great deference to Board decisions, the Court found no rational basis for the Board's decision in *Yeshiva*.[48]

On the other hand, the four dissenting justices who approved of the Board's decision, found its ruling "neither irrational nor inconsistent with the Act."[49] The dissent emphasized that the Board, not the judiciary, retained the primary authority to interpret the NLRA.[50] Moreover, the dissent did not endorse the majority's attempt to determine a "definitive limitation" of the definition of "employee."[51]

The dissent admonished the majority's decision to exclude the faculty as managers.[52] Disagreeing with the majority's "aligned with management" test,[53] the dissent stated its test as a determination that the employee acts "on behalf of management."[54] The dissent noted that the professional faculty in this case did not fall within the managerial exclusion, finding that the professional workers' ability to influence institutional policy does not, by itself, make such workers

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> It is clear that Yeshiva and like universities must rely on their faculties to participate in the making and implementation of their policies. The large measure of independence enjoyed by faculty members can only increase the danger that divided loyalty will lead to those harms that the Board traditionally has sought to prevent.

Id. at 689–90.

48. *Id.* at 691. "As our decisions consistently show, we accord great respect to the expertise of the Board when its conclusions are rationally based on articulated facts and consistent with the Act. In this case, we hold that the Board's decision satisfies neither criterion." *Id.* (citations omitted).

The Court further noted that the standard employed by the Board was too broad. "Since the Board does not suggest that the 'independent professional judgment' test is to be limited to university faculty, its new approach would overrule *sub silentio* this body of Board precedent and could result in the indiscriminate recharacterization as covered employees of professionals working in supervisory and managerial capacities." *Id*. at 687.

49. *Id*. at 691–92 (5–4 decision) (Brennan, J., dissenting).

50. *Id*. at 692–93.

51. *Id*. at 693 n.1 ("[The task of defining employee] has been assigned primarily to the agency created by Congress to administer the Act.").

52. *See id*. at 701.

53. *Id*. at 690. "The National Labor Relations Act does not condition its coverage on an antagonism of interests between the employer and the employee." *Id.* at 700–01.

54. *Id*. at 698 ("The premise of a finding of managerial status is a determination that the excluded employee is acting on behalf of management and is answerable to a higher authority in the exercise of his responsibilities."). The dissent stated that the proper test to determine which employees are managerial is to establish "who retains the ultimate decisionmaking authority and in whose interest the suggestions are offered." *Id*. at 701 n.11.

managers.[55] Furthermore, the dissent criticized the majority for extending the managerial exclusion to professionals who did not demonstrate the potential to create divided loyalty problems.[56] Finally, the dissent blamed the majority for failing to recognize the differences between the industrial setting, to which the NLRA directly speaks, and the academic setting.[57]

Ultimately, *Yeshiva* mandates that if a professional worker is "aligned with management," the worker is a manager and is excluded from NLRA coverage.[58] However, the majority was careful to limit its rule: if a professional worker's responsibilities are "routinely performed by similarly situated professionals," then the professional worker is not aligned with management.[59]

2. Defining Professionals as Supervisors: "In the Interest of the Employer" and *NLRB v. Health Care & Retirement Corp*.

Following *Yeshiva*, the Supreme Court justified concerns that its broad interpretation of the NLRA managerial exclusion would inevitably extend to professional workers in nonacademic settings.[60] The Court upheld its interpretation of the managerial exclusion in

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55. *Id*. at 697–98. The dissent explained the inherent traits of professional workers:

> As the Board has recognized, due to the unique nature of their work, professional employees will often make recommendations on matters that are of great importance to management. But their desire to exert influence in these areas stems from the need to maintain their own professional standards, and this factor—common to all professionals—should not, by itself, preclude their inclusion in a bargaining unit. In fact, Congress clearly recognized both that professional employees consistently exercise independent judgment and discretion in the performance of their duties, and that they have a significant interest in maintaining certain professional standards. Yet Congress specifically included professionals within the Act's coverage.

Id. at 697 n.7 (citations omitted).

56. *See, e.g.*, *id.* at 696 n.6 ("The anomaly of such a result demonstrates the error in extending the managerial exclusion to a class of essentially rank-and-file employees who do not represent the interests of management and who are not subject to the danger of conflicting loyalties which motivated the adoption of that exemption.").

57. *Id*. at 694. "Unlike industrial supervisors and managers, university professors are not hired to 'make operative' the policies and decisions of their employer." *Id*. at 699–700.

58. *Id.* at 690 (majority opinion).

59. *Id.*

60. *See* Rabban, *supra* note 6, at 1779.

NLRB v. Health Care & Retirement Corp. of America[61] (*"Health Care"*) and construed an even broader supervisory exclusion. In *Health Care*, the Board found that a group of staff nurses comprised a valid bargaining unit under the NLRA.[62] The Board determined that the nurses' responsibilities to staff, monitor, counsel, and evaluate aides did not rise to the level of being "in the interest of the employer" and, therefore, were not in conflict with the NLRA.[63] However, the United States Court of Appeals for the Sixth Circuit and the Supreme Court reversed the Board's holding.[64]

Justice Kennedy, writing for the majority, reasoned that the Board overstepped its authority in creating a "false dichotomy" between the duties performed "in the interest of the employer" and those performed in furtherance of professional responsibilities.[65] According to the Court, any act completed during the course of employment is "in the interest of the employer."[66] The Court held that the Board has the authority to determine only whether the professional worker performs one of the twelve supervisory activities outlined in the NLRA.[67] Upon finding that the worker performs one of the twelve

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61. NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571 (1994).

62. *Id*. at 575.

63. *Id*. In fact, Board court found such responsibilities as merely incidental to professional skills, reasoning that the nurses spent "only a small fraction of their time exercising that authority." *Id.* at 593 (citation omitted).

64. *Id*. at 575–76.

65. *Id*. at 577–78. The majority responded to the Board with a three-step analysis:

> [T]he Board must first determine whether the individual possesses any of the 12 indicia of supervisory authority and, if so, whether the exercise of that authority entails "independent judgment" or is "merely routine." If the individual independently exercises supervisory authority, the Board must then determine if that authority is exercised "in the interest of the employer."

Id. at 590 (quoting Northcrest Nursing Home, 313 N.L.R.B. 491, 493 (1993); 29 U.S.C. § 152(11) (2000)).

66. *Id*. at 578.

67. *Id*. at 573. Congress defined "supervisor" as:

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

29 U.S.C. § 152(11).

listed activities, the Court ruled that the Board must exclude the professional worker from NLRA coverage based on the supervisory exclusion.[68] Finally, the majority recognized the tension between the statutory inclusion of professionals and the statutory exclusion of supervisors,[69] but disapproved of the Board's attempt to alleviate the tension by "distorting the statutory language" regarding its construction of "in the interest of the employer."[70]

Four dissenting justices disagreed, arguing that the Board must limit the meaning of the phrase "in the interest of the employer" to protect the NLRA's explicit inclusion of professional workers.[71] The dissent found that the NLRA's legislative history indicated that Congress did not intend for the supervisory exclusion to obliterate the professional inclusion.[72] The dissent found that the Board had effectively reconciled the statutory tension by first determining that the nurses had performed one of the twelve supervisory activities, but then finding that the nurses' authority came from the superior skill of professionals, and not from management.[73] Ultimately, the dissent concluded that the majority's broad interpretation of the supervisory

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68. NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 578–79 (1994).

69. *Id.* at 581. The majority countered the dissent's "parade of horribles" accusation that the majority's definition construes "supervisory" so broadly that there is no longer a professional inclusion by reiterating that the Board has the power to determine whether the worker performed one of twelve supervisory activities. *Id.* at 583–84.

70. *Id.* at 581.

71. *Id.* at 584–99 (5–4 decision) (Ginsburg, J., dissenting). Whether an employee is a professional worker protected under the NLRA depends upon the scope of the managerial and supervisory exclusions. *Id.* at 585. When there is an overlap, such as when a professional is also a manager, the NLRA excludes professionals from coverage. *Id.* However, Congress granted the Board the power to determine whether a worker is an included professional or an excluded manager or supervisor. *Id.*

72. *Id.* at 587–88 (quoting S. REP. NO. 80-105, at 19 (1947)). When Congress enacted the supervisory exclusion, it was careful to write in a professional inclusion. *Id.* at 588. "The inclusion of [the professional] . . . together with an amendment to § 9(b) of the [NLRA] limiting the placement of professionals and nonprofessionals in the same bargaining unit, confirm that Congress did not intend its exclusion of supervisors largely to eliminate coverage of professional employees." *Id.* (citation omitted).

73. *Id.* at 590–91. The dissent emphasized, "[A]uthority does not fit within the 'interest of the employer' category if it is 'exercised in accordance with professional rather than business norms,' i.e., in accordance with 'professional standards rather than . . . the company's profit-maximizing objectives.'" *Id.* at 590 (citing Children's Habilitation Center, Inc. v. NLRB, 887 F.2d 130, 134 (7th Cir. 1989)).

exclusion had destroyed the NLRA's express inclusion of professional workers.[74]

3. Defining Professionals as Supervisors: "Independent Judgment" and *NLRB v. Kentucky River Community Care*

After the Supreme Court rejected the Board's treatment of professional workers in *Health Care*, the Board began to utilize a different approach to professional workers and the managerial and supervisory exclusions. In *NLRB v. Kentucky River Community Care, Inc.*,[75] the Kentucky State District Council of Carpenters sought to represent all 110 employees at Caney Creek, a facility caring for mentally ill patients.[76] Caney Creek objected to the inclusion of six registered nurses in the bargaining unit, alleging that the nurses were supervisors under the NLRA and, therefore, were not properly within the bargaining unit.[77] The Board's Regional Director ruled that the bargaining unit was appropriate, and the Board denied review of the Regional Director's decision.[78] Caney Creek sought indirect review from the Sixth Circuit by committing an unfair labor practice.[79]

During the Sixth Circuit hearing, the Board emphasized the three-part test that the Supreme Court had outlined in *Health Care*.[80] Using the test, the Board adopted a rule that workers do not use "independent judgment" when they utilize "ordinary professional or technical judgment" in directing other workers.[81] The Sixth Circuit found the rule invalid, however, and held that the Board erred in

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74. *Id*. at 598–99.
75. 532 U.S. 706 (2001).
76. *Id.* at 708–09.
77. *Id.* at 709.
78. *Id.*
79. *Id.* at 709–10. Direct judicial review of representation determinations is not available. *Id.* at 709. Therefore, employers must commit an unfair labor practice to induce the General Counsel of the Board to file an unfair labor practice complaint under the NLRA. *Id.* In *Kentucky River*, the Board heard the General Counsel's unfair labor practice complaint and granted summary judgment to the General Counsel. *Id.* It reasoned that a bargaining unit determination may not be relitigated in an unfair labor practice hearing. *Id.* at 709–10 (citing Magnesium Casting Co. v. NLRB, 401 U.S. 137, 139–41 (1971)).
80. *Id.* at 712–13; *see also supra* note 65 (describing *Health Care's* three-part test).
81. *Id.* at 713.

including the nurses in the bargaining unit because the nurses were supervisors.[82]

In yet another 5–4 decision,[83] the Supreme Court upheld the Sixth Circuit's ruling[84] by finding the Board's rule inconsistent with the text of the NLRA.[85] The majority reasoned that the Board's rule turned on factors that had little to do with a worker's "independent judgment" and more with the worker's status as a professional.[86] The majority recognized that the Board's rule was driven by the policy concern that too many workers—particularly professional workers—fall within the Court's broad interpretation of "supervisor."[87] Nonetheless, the majority admonished the Board for utilizing a strained interpretation of "independent judgment" to accomplish the Board's policy goals.[88]

The majority suggested alternative means for the Board to accomplish its goal of narrowing the supervisory exclusion. First, the majority indicated that the Board has the power to determine the scope of discretion that a worker must exercise to be a supervisor under the NLRA.[89] Second, the majority noted that the Board may find that the degree of judgment that a worker exercises is

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82. *Id.* at 710 ("[The Sixth Circuit] rejected the Board's interpretation of 'independent judgment,' explaining that the Board had erred by classifying 'the practice of a nurse supervising a nurse's aide in administering patient care' as 'routine simply because the nurses have the ability to direct patient care by virtue of their training and expertise, not because of their connection with management.'").

83. In an opinion similar to that in *Health Care*, the dissenting justices in *Kentucky River* criticized the *Kentucky River* majority's reading of the NLRA. *Id.* at 727 (Stevens, J., concurring in part and dissenting in part). The dissent found that the majority nullified Congress's explicit inclusion of professional workers under the NLRA by construing "supervisor" too broadly. *Id.* at 726–27.

84. *Id.* at 722 (majority opinion).

85. *Id.* at 720.

86. *Id.* at 714 ("Let the [worker's] judgment be significant and only loosely constrained by the employer; if it is 'professional or technical' it will nonetheless not be independent.").

87. *Id.* at 719.

88. *Id.* at 717.

89. *Id.* at 713.

> [I]t is certainly true that the statutory term "independent judgment" is ambiguous with respect to the *degree* of discretion required for supervisory status. Many nominally supervisory functions may be performed without the "exercise of such a degree of . . . judgment or discretion . . . as would warrant a finding" of supervisory status under the [NLRA].

Id. (emphasis in original).

insufficient to make a worker a supervisor.[90] Third, the majority suggested that the Board could distinguish "non-supervisory workers," who direct other workers in "discrete tasks," from "supervisory workers," who direct other workers generally.[91] However, the Board has not yet tested these alternative methods before the Supreme Court, as the Court has yet to hear such a case.[92]

B. The History of Unionization in American Orchestras

American musicians of all sorts established the first musicians' union in America, the American Federation of Musicians ("AFM"), in 1896.[93] By 1904, all American symphony orchestras, except for the Boston Symphony Orchestra,[94] operated as union shops.[95] However, until the 1960s, the AFM did not effectively represent orchestral musicians because of the numerous non-orchestral musicians with whom the AFM dealt.[96] The AFM's inattention to orchestral musicians' needs led to union militancy in the 1950s.[97]

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90. *Id.* at 713–14. "[I]t is also undoubtedly true that 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." *Id.*

91. *Id.* at 720.

92. The Board has taken up one of the Supreme Court's suggested alternative methods. In one post-*Kentucky River* case before the Board, the Board held that workers who led other workers in the testing of military equipment were not supervisors. Dynamic Sci., Inc., 334 N.L.R.B. No. 57 (2001). The Board reasoned that the workers' ability to direct other workers was limited by the employer's rules. *Id.*

93. Lauren W. Lavine, A Force for Democracy Within the Orchestral Setting: The International Conference of Symphony and Opera Musicians, at A-3 (1983) (unpublished M.A. thesis, Columbia University) (on file with author).

94. The Boston Symphony Orchestra became a union shop in 1942. *Id.*

95. *Id.*

96. *Id.* at A-2. "A problem that has plagued the musicians' unions since their inception and has had substantial bearing upon shaping their historically weak relationship with symphony musicians is that of their broad range of professional quality." *Id.*

> Another aspect unique to the labor-management relationship within the performing arts context—one that has direct bearing upon symphony musicians is: unions consisted of a membership largely dominated by a profit-oriented 'entertainment' setting. Symphony musicians were therefore a minority group, viewing themselves as artists who, among a broader spectrum of professional musicians, were concerned only with the unique work environment and lifestyle of the classical musician.

Id. at A-5.

97. *Id.* at A-6.

The International Conference of Symphony and Opera Musicians ("ICSOM") provided an organization through which orchestral musicians could address their union problems.[98] Formally established in 1962, ICSOM resulted from meetings in Chicago of orchestral musicians from a number of orchestras, which ultimately grew to include delegates from many orchestras.[99] ICSOM's purpose was to promote "a better and more rewarding livelihood for the skilled performer. . . ."[100] After the formation of ICSOM, the AFM could no longer ignore the plight of symphony orchestra musicians, who now constituted a united front demanding recognition.[101] ICSOM lobbied for, and finally received, the Symphonic Services Division ("SSD") of the AFM.[102] Today, the SSD is an integral part of the AFM, and ICSOM operates as a strong conference affiliated with the Union.[103]

After ICSOM's formation, orchestral musicians' job stability drastically improved.[104] ICSOM's member orchestras grew in number, the orchestral season length increased, and musicians' pay also increased substantially.[105] ICSOM then turned to work toward the advancement of orchestral musicians' quality of work life.[106]

> Within the ranks of the Federation, symphony players, by the 1950's, felt very much like second class citizens. The failure on the part of the union leadership, both locally and nationally, to understand the symphony players' special problems and to support and promote their interests as aggressively as possible, was a crucial factor that contributed to the symphony musicians' intransigent attitude towards their unions.

Id. Further, U.S. census wage data provided evidence of the orchestral musicians' plight. In 1960, musicians earned an average of $4,757 per year, whereas the median wage of all professionals was $6,778. *Id*. The figures indicated that orchestral musicians' salaries ranked fortieth out of forty-nine professional groups. *Id*. The orchestral musicians' high level of training and education further exacerbated their ill feelings toward the AFM. *Id*.

98. *Id*. at 4–5.

99. *Id*.

100. *Id*. at 5.

101. *Id*.

102. *Id*. at 6–10.

103. *Id*. at 10.

104. *Id*. at 6–7.

105. For example, in 1952, no orchestra ran a fifty-two week season, and the annual wage for a New York Philharmonic section musician was $4,200. *Id*. at 6. In 1983, seventeen orchestras had fifty-two week seasons, and the annual wage for a New York Philharmonic section musician was $36,000. *Id*. at 6–7.

106. *Id*. at 11–19. In its beginning, ICSOM "respond[ed] to labor and form[ed] a labor point of view, the 'myth of the artist had to be destroyed'—in effect, the musician as artist had to be played down in order to think of the musician as worker." *Id*. at 11 (citation omitted).

1. Development of Musician Governance-Type Committees

In response to cries for quality-of-work-life improvements, ICSOM worked to effect changes in the structure of the orchestra that would provide musicians with more input into their artistry.[107] Today, major U.S. orchestras (ICSOM orchestras)[108] offer their musicians a variety of committees on which they can participate. The major musician governance committees include artistic advisory committees, audition committees, music director search committees, and dismissal committees.[109] Many orchestras have seats on the orchestra board for one or two of their musicians.[110]

Artistic advisory committees, audition committees, and music director search committees work to improve artistic conditions in

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However, after achieving success in traditional union contention areas such as wages, ICSOM realized that it could use its newly found "credibility" with the AFM to "[address] the needs of its constituents . . . [and] extend to some of the broader and less tangible issues confronting the artist in today's society." *Id.*

107. *Id*. at 13, 15.

108. For the 2001–2002 symphonic season, there were fifty-one ICSOM orchestras comprising the countries largest and most reputable symphonic bodies. AMERICAN FEDERATION OF MUSICIANS, *supra* note 1, at 1. The following symphony, ballet, and opera orchestras comprise ICSOM: Alabama Symphony, Atlanta Symphony, Baltimore Symphony, Boston Symphony, Buffalo Philharmonic, Charlotte Symphony, Chicago Lyric Opera, Chicago Symphony, Cincinnati Symphony, Cleveland Orchestra, Colorado Symphony, Columbus Symphony, Dallas Symphony, Detroit Symphony, Florida Orchestra, Florida Philharmonic, Fort Worth Symphony, Grant Park Symphony, Honolulu Symphony, Houston Symphony, Indianapolis Symphony, Jacksonville Symphony, Kansas City Symphony, Kennedy Center Orchestra, Los Angeles Philharmonic, Louisville Orchestra, Metropolitan Opera, Milwaukee Symphony, Minnesota Orchestra, Nashville Symphony, National Symphony, New Jersey Symphony, New York City Ballet Orchestra, New York City Opera, New York Philharmonic, North Carolina Symphony, Oregon Symphony, Philadelphia Orchestra, Pittsburgh Symphony, Phoenix Symphony, Rochester Philharmonic, Saint Louis Symphony Orchestra, Saint Paul Chamber Orchestra, San Antonio Symphony, San Diego Symphony, San Francisco Ballet, San Francisco Opera, San Francisco Symphony, Syracuse Symphony, Utah Symphony, and Virginia Symphony. *Id*.

109. *Id*. at 12–15.

110. *Id*. at 15. Of the forty-eight ICSOM orchestras reporting data, twenty-four orchestras included their musicians on their boards. *Id*. Twenty of the orchestras reporting musicians as board representatives allow the musicians a vote. *Id.* For example, although the St. Louis Symphony Orchestra (SLSO) did not report data to the AFM, the SLSO does include two orchestra musicians on its board. Interview with Carla Johnson, General Manager, St. Louis Symphony Orchestra, in St. Louis, Missouri (Sept. 11, 2002). Generally, however, musicians sitting on symphony boards have only symbolic positions. *Id.* For example, the SLSO allows two musicians to sit on a board of approximately thirty-eight members. *Id.*

orchestras.[111] For the most part, the committees perform exactly the functions that their titles suggest: artistic advisory committees consult with the music director and advise management as to the orchestra's artistic season (e.g., repertoire, engaging guest conductors, and promoting new composers);[112] audition committees hear auditions from potential members desiring vacant orchestral seats and cast votes;[113] and music director search committees consider and recommend conductors to fill vacant directorships.[114] The weight given to such committees' opinions depends upon the nature of a specific orchestra's collective bargaining agreement.[115] For example, when conducting final round auditions, the Baltimore Symphony Orchestra affords its audition committee members[116] one vote per committee member, whereas the Cleveland Orchestra merely allows its audition committee musician members to advise the Music Director.[117]

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111. *See, e.g.*, BOSTON SYMPHONY ORCHESTRA, TRADE AGREEMENT OF THE BOSTON SYMPHONY ORCHESTRA, INC.: 1998–1999, 1999–2000, 2000–2001, 2001–2002 SEASONS 1–2, 54–63 (1998) (on-file with author).

112. *Id*. at 1. The Boston Symphony Orchestra ("BSO") states that its Artistic Advisory Committee will "meet with Corporation representatives and act in an advisory and consultative role, providing meaningful input into artistic matters . . . [and will] be free to discuss and consider any and all matters of artistic implication considered in the broadest sense." *Id.*

113. *Id.* at 54–65. At the BSO, each section (e.g., strings, winds, brass, etc.) has its own separate audition committee, which includes musicians and the Music Director (principal conductor). *Id.* at 56–59. Every orchestra uses its own audition procedure, but the BSO offers a four-round audition, through which candidates may advance either by committee vote or by the Music Director's choice. *Id.* at 57–58. However, during the final round, the Music Director merely considers the musicians' votes. The decision ultimately rests with the Music Director. *Id.* at 59.

114. In the past few years, musicians have played a greater role in the selection of music directors. Doreen Carvajal, *Musicians Are Gaining Bigger Voice in Orchestras*, N.Y. TIMES, Feb. 6, 2001, at E1. The BSO, which named James Levine as its new Music Director in 2001, utilized its Conductor Search Committee to "advise the Corporation's Board in the search for a new Music Director." BOSTON SYMPHONY ORCHESTRA, *supra* note 111, at 1. The BSO Conductor Search Committee's specific duties include developing a list of qualified candidates and soliciting rank-and-file opinions as to qualified candidates. *Id.*

115. AMERICAN FEDERATION OF MUSICIANS, *supra* note 1, at 12–15. Musician-friendly collective bargaining agreements allow musician votes on committees and boards. *Id*. Compromise collective bargaining agreements contain mixed musician votes and advisory mechanisms. *Id.* Finally, management-friendly orchestras, such as the BSO, allow musicians merely to engage in advisory participation. *Id*.

116. Audition committees traditionally comprise a contractually stipulated number of rank-and-file musicians from the section with a vacancy plus the music director. *Id*. at 13.

117. *Id.* The data from the 2001–2002 orchestral season offers a perspective as to the

Finally, dismissal committees (peer review committees) review rank-and-file musicians' artistic and non-artistic termination proceedings.[118] Most orchestras allow musicians to conduct artistic dismissal proceedings.[119] However, in the 2001-2002 orchestral season, final authority for artistic dismissal rested with musician committees in only six ICSOM orchestras.[120]

2. Characteristics of Principal Players

Principal players are the lead players of each orchestral section, playing solo parts designated to their respective sections. The extent of each principal player's supervisory duty depends on the conductor's taste, which is not consistent amongst every ICSOM orchestra.[121] In many orchestras, the music director and principal players collaborate to determine who plays which part for a given piece.[122] Hence, principal players potentially have two supervisory duties: scheduling (i.e., determining who plays in which pieces) and casting (i.e., determining who plays which of the different parts within a section).[123] Principal players' duties are becoming more supervisory.[124] Traditionally, the music director tuned and artistically disciplined section players.[125] Recently, however, principal players

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degree of musician influence on governance-type committees. Of the forty-one orchestras reporting, all forty-one possess an artistic advisory committee. *Id*. at 12. Of the forty-nine orchestras reporting, all forty-nine had an audition committee comprising rank-and-file musicians and the music director. *Id*. at 13. Musicians on eighteen audition committees advised the music director on his final decision. *Id*. Sixteen audition committees employed a weighted vote system, which is skewed in favor of the music director's decision. *Id*. Eight audition committees used a system demanding mutual agreement between musician committee members and the music director. *Id*. Finally, seven audition committees allowed one vote per person (with equal weight for the votes of musician and the music director). *Id*.

118. *Id*. at 14–15.

119. *Id*. All forty-six orchestras reporting, indicated that musicians sit on artistic review dismissal committees. *Id*. at 14. However, only fourteen orchestras allowed musicians to sit on non-artistic review dismissal committees. *Id*. at 15.

120. *Id*. at 14–15. Final review generally rests with arbitrators or management. *Id*.

121. Interview with Carla Johnson, *supra* note 110.

122. *Id*. However, Johnson noted that more managerial conductors, such as Kurt Maser, assign players without the aid of principal players. *Id*. These conductors also tend to set the schedule by informing the principal player as to who will play in what piece. *Id*.

123. *Id*.

124. *Id*.

125. *Id*.

have begun to work with their sections to make them qualitatively better by tuning and offering technical suggestions and artistic direction.[126]

II. ANALYSIS

The Supreme Court's recent interpretations of the managerial and supervisory exclusions significantly narrow the NLRA's inclusion of professional workers. While the *Health Care* decision dispelled any prospect of the Court retreating from its sweeping managerial and supervisory exclusions,[127] the *Kentucky River* decision at least offered suggestions as to how the Board, employers, and workers may maintain professionals' status as non-supervisory workers.[128] Nonetheless, these controversial cases have rendered the NLRA's inclusion of professional workers nearly meaningless.

A. Expansive Reading of Yeshiva, Health Care, and Kentucky River

The breadth of the *Yeshiva*, *Health Care*, and *Kentucky River* exclusions facilitate the application of the managerial and supervisory exclusions to most professional workers. The Supreme Court in *Yeshiva* failed to expressly limit its holding, thus inviting a broad expansion of the managerial exclusion to other academic and non-academic arenas.[129] The *Yeshiva* decision clearly applies to the faculty at any "mature educational institution," and not just to the Yeshiva University faculty.[130] In fact, any professional worker participating in a governance-type committee system may be subject to the *Yeshiva* exclusion, even where the employer sets up the committee.[131] The extraordinarily broad implications of *Yeshiva* may

126. *Id.*

127. NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 571–72 (1994).

128. *See supra* notes 89–91 and accompanying text.

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

130. JULIUS G. GETMAN ET AL., LABOR MANAGEMENT RELATIONS AND THE LAW 25 (2d ed. 2000).

131. *See id.* at 27.

> [Yeshiva] indicates, however, that now groups other than those with a special history of institutional governance may be made managers because of a committee system in which less than half of the group takes part. The implication is that, at least as to

promote an effective union-avoidance scheme for employers, through which they may encourage their professional workers to sit on governance-type committees without alerting such workers that this may exclude them from collective bargaining rights.[132]

The reasoning behind the broad exclusion of managerial workers in *Yeshiva* extends further to the supervisory workers addressed in *Health Care* and *Kentucky River*.[133] Broadly construed, the supervisory exclusion reaches professionals "with any authority to use independent judgment to assign and responsibly direct the work of other employees."[134] Most professionals use their inherent skill to direct other employees.[135]

B. Disregard for Congressional Intent

Because Congress explicitly included professionals, the Supreme Court, working through *Yeshiva*, *Health Care*, and *Kentucky River*, has potentially denied many professional workers their statutory right to collectively bargain.[136] In 1947, when Congress created the supervisory exclusion under the NLRA, it also wrote the professional inclusion.[137] It plainly was not the intent of Congress to eliminate

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> professionals, a committee system may be an alternative to unionism, even if established unilaterally by the employer. The concept of employer-established committees replacing unionization was at one time clearly rejected under the NLRA as a technique for thwarting employee choice, but it is reemerging today in a variety of different contexts with court and Board approval.

Id.

132. *Id*. at 28.

> In the course of this process a major new technique for union avoidance may have been created for some employers. Resolving the limits of this technique is certain to involve considerable litigation, serious efforts at amendment, and continued diversion of union efforts from organizing and collective bargaining to legal and legislative programs. Thus the issue of coverage shows movement from a broad labor policy favorable to unionization to a technical approach recognizing managerial interests and traditional ways of doing things.

Id.

133. NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 576–77 (1994); *Kentucky River*, 532 U.S. 706 (2001).

134. *Health Care*, 511 U.S. at 585 (citing 29 U.S.C. § 152(11)).

135. *Id*. at 588–89.

136. *See* 29 U.S.C. § 152(12).

137. *Health Care*, 511 U.S. at 587.

professional workers' coverage under the NLRA.[138] Nonetheless, the Court's expansive reading of the common law managerial and statutory supervisory exclusions has thwarted Congress's protection of professional workers.

C. Orchestral Musicians Risk Loss of Collective Bargaining Rights

Since the seminal *Yeshiva* decision, the Board has been obligated to apply the managerial exclusion "whenever there [is] even the appearance of collegial governance."[139] Orchestral musicians sitting on governance-type committees run the risk of managerial exclusion from NLRA coverage.[140] The degree of this risk depends upon how much weight an orchestra's management gives to committee opinions and how much managerial authority musicians actually exercise.[141]

For example, musicians merely sitting on artistic advisory committees most likely would not come under the *Yeshiva* managerial exclusion.[142] Musicians created such committees in an

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138. *Id.*

139. GETMAN ET AL., *supra* note 130, at 26. However, one should note that the Board did not apply the managerial exclusion when faculty responsibility did not "approach the standards of faculty governance described by the Court in *Yeshiva*." *Id*.

140. Upon finding that certain orchestral musicians are managers or supervisors, a court may reach one of two outcomes. First, a court may exclude individuals from a bargaining unit. *See* Rabban, *supra* note 6, at 1857. "The NLRB has previously approved of 'popcorn' units; employees 'pop' out of the unit when they assume supervisory or managerial responsibilities." *Id*. On the other hand, a court may deem an entire bargaining unit inappropriate, even if only a few members fall under the managerial or supervisory exclusion. Telephone Interview with Leonard Leibowitz, Counsel for ICSOM and the AFM Symphonic Services Division (Oct. 25, 2002). ICSOM's head counsel believes that the second outcome is more likely. *Id*.

141. Susan Grody, Note, NLRB v. Yeshiva University*: The Professional-Managerial Overlap*, 32 HASTINGS L.J. 659, 684 (1981). However, different orchestras give their committees' opinions various degrees of weight. *See, e.g.*, AMERICAN FEDERATION OF MUSICIANS, *supra* note 1, at 13–14; Telephone Interview with Leonard Leibowitz, *supra* note 140.

A serious issue arises in cooperative orchestras, such as the Colorado Symphony and the Louisiana Symphony Orchestra. Interview with Carla Johnson, *supra* note 111. In such orchestras, musicians constitute the administrators and management, yet the AFM protects them under a collective bargaining agreement. Telephone Interview with Leonard Leibowitz, *supra* note 140. For example, a recent arbitration arose when the Colorado Symphony transitioned from the Denver Symphony, and the orchestra committee fired the concertmaster. *Id.* In this case, a court would likely uphold the *Yeshiva* exclusion if it heard a complaint regarding the composition of the bargaining unit. However, few large regional orchestras follow a cooperative structure. *Id*.

142. Telephone Interview with Leonard Leibowitz, *supra* note 140.

attempt to create an ongoing dialogue with artistic management personnel.[143] The goals of musicians serving on artistic advisory committees are: (1) to gain information on the upcoming artistic season; and (2) to provide input upon management's request as to how plans will affect musicians' quality-of-work-life.[144] Musicians sitting on artistic advisory committees neither "formulate and effectuate management policies by expressing and making operative the decisions of their employer," nor do they "exercise discretion."[145] Musicians cannot take control of artistic management because they merely advise the artistic administration.[146]

However, musicians sitting on dismissal or peer review committees face a high risk of managerial exclusion under the NLRA.[147] *Yeshiva* specifically cites the ability to terminate as a key managerial feature.[148] Many orchestras allow musicians sitting on dismissal committees to uphold or reject the music directors' decisions to terminate their peers.[149] Clearly, the authorization of such power to musicians comes very close to "effectuat[ing] management policies."[150]

Likewise, the supervisory exclusion, as construed by the Supreme Court in *Health Care* and *Kentucky River*, may bar principal players from NLRA coverage. Principal players in an orchestra where they have the power over scheduling and casting responsibilities are subject to the broad *Health Care* and *Kentucky River* supervisory exclusion.[151] Such principal players arguably have the authority to

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143. *Id.*

144. *Id.*

145. NLRB v. Bell Aerospace Co., 416 U.S. 267, 286–88 (1994) (citation omitted).

146. Telephone Interview with Leonard Leibowitz, *supra* note 140. Furthermore, the interests of musicians and artistic management serving on artistic advisory committees do not align in the *Yeshiva* sense. *Id.* Musicians desire participation on such committees to prevent poor working conditions, but they also care deeply about the quality of the orchestra. *Id.* Orchestral management, particularly boards of directors are not so committed to quality. *Id.* Boards' interests lie in the community service of providing an orchestra to a city. *Id.*

147. *Id.*

148. NLRB v. Yeshiva Univ., 444 U.S. 672, 686 n.23 (1980).

149. Telephone Interview with Leonard Leibowitz, *supra* note 140.

150. *Bell Aerospace*, 416 U.S. at 288.

151. In *Health Care*, the Court held that the Board's determination that the nurses were not performing their duties "in the interest of the employer" was invalid because the Board's distinction was inconsistent with *Yeshiva*. NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 576 (1994). In *Yeshiva*, the Court denied any distinction between

"assign," "discipline," or "direct" other employees.[152] If a principal player has the authority to engage in one of these activities, then the player's inclusion in his bargaining unit is questionable under *Health Care* and *Kentucky River*.

III. PROPOSAL

Without union protection, American orchestras as cultural institutions are in jeopardy.[153] Orchestral management would have no obligations to its musicians, who most likely would lose all rights to bargain over job security, benefits, and wages.[154] These rights cultivated the incredible quality of today's orchestras by ensuring that highly trained musicians winning a spot in an orchestra received one of the best jobs in town.[155] To protect America's orchestras—and professional workers generally—the Supreme Court should more narrowly construe the managerial and supervisory worker exclusions under the NLRA.

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professional and institutional interests. *Id.* (citing *Yeshiva*, 444 U.S. 672). Similarly, in *Kentucky River*, the Court denied the Board's ability to narrow the supervisory exclusion by merely stating that professionals do not exercise "independent judgment" when they use ordinary professional judgment. NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 713 (2001).

152. 29 U.S.C. § 152(11).

153. Telephone Interview with Leonard Leibowitz, *supra* note 140.

154. *Id*.

155. *Id*. "The successful use of the NLRA-protected collective bargaining mechanism has been a factor in maintaining relatively stable labor relations among symphony orchestra members and their managements. If orchestra members are denied NLRA protection because of the *Yeshiva-Bell* test, the stability that has been so painstakingly achieved might be destroyed." Grody, *supra* note 141, at 685. Gunther Schuller, an American composer and musician, emphasizes:

> If the symphony orchestra is to survive, musicians, management, and the trustees must collaborate seriously on their *collective* future, must develop a respectful, serious, substantive dialogue rather than yell at each other from entrenched positions. They must work out a common future based on a common process (and progress) that will deal realistically with the real 'common enemy': those millions of people in our society—and their political representatives—in whose lives 'classical music' plays no part whatsoever.

Everette J. Freeman, *Research Issues in Orchestra Labor Relations*, 2 HARMONY 27, 30 (1996) (citation omitted).

A. The Dissenting Opinions Properly Construe the Managerial and Supervisory Worker Exclusions

The *Yeshiva*, *Health Care*, and *Kentucky River* Courts all reached a 5-4 split.[156] In each of these cases, by narrowly interpreting the managerial and supervisory exclusions,[157] the dissenting opinions would protect professional workers who do not actually exercise managerial authority.[158] At the same time, the dissenting justices would exclude from NLRA coverage professionals who exercise managerial authority.[159] The balance that the dissents strike upholds the NLRA's professional inclusion, while also protecting management from the divided loyalty dilemma that led to the adoption of the managerial and supervisory exclusions.[160]

B. Better Protection for Professional Workers from the Board

The NLRA assigned the task of distinguishing excluded supervisors from included professionals to the Board.[161] Moreover, Congress intended courts to defer to the Board's determination and to review Board decisions only for rationality and consistency.[162] Nonetheless, the *Yeshiva*, *Health Care*, and *Kentucky River* majorities exhibited little regard for the Board's determination in cases involving the professional worker inclusion.[163]

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156. *See* NLRB v. Yeshiva Univ., 444 U.S. 672, 691 (Brennan, J., dissenting); *Health Care*, 511 U.S. at 584 (Ginsburg, J., dissenting); *Kentucky River*, 532 U.S. at 722 (Stevens, J., concurring in part and dissenting in part).

157. *See Yeshiva*, 444 U.S. at 705–06; *Health Care*, 511 U.S. at 598–99; *Kentucky River*, 532 U.S. at 722.

158. *See* Rabban, *supra* note 6, at 1859. Professor Rabban classifies professional workers as either managerial professionals or practicing professionals. *Id*. Because practicing professionals do not exercise managerial authority, such professionals should enjoy NLRA coverage. *Id*. "This scholarly distinction should become the legal criterion for determining when professionals are no longer employees covered by the NLRA." *Id*.

159. *See supra* note 156.

160. Rabban, *supra* note 6, at 1859.

161. *Health Care*, 511 U.S. at 585–86.

162. *Yeshiva*, 444 U.S. at 692–94. "Through its cumulative experience in dealing with labor-management relations in a variety of industrial and nonindustrial settings, it is the Board that has developed the expertise to determine whether coverage of a particular category of employees would further the objectives of the Act." *Id*. at 693.

163. In each of these cases, the Court overruled the Board's determination that the professional workers were neither managers nor supervisors. *See id.* at 674–91; *Health Care*,

Because the Supreme Court is unlikely to adopt such a test, the Board must narrowly construe the managerial and supervisory exclusions at the agency level. The Board may narrow *Yeshiva's* managerial exclusion somewhat through a case-by-case approach, distinguishing *Yeshiva* in each instance.[164] Similarly, the Board may effectively narrow the supervisory exclusion through a case-by-case analysis utilizing the twelve activities enumerated in the NLRA's definition of a supervisor. Such an analysis must focus on narrowly construing each of the twelve activities. Additionally, the Board may follow the *Kentucky River* majority's suggestion of finding that a professional worker's exercised degree of discretion and judgment is below the threshold of supervisory status.[165] Finally, the Board may determine that a professional worker directs others in discrete, as opposed to general, tasks.[166] By focusing on these measurements of supervisory status, the Board can effectively include many professional workers in bargaining units.

C. Preemptive Measures for Orchestras

Since the *Bell Aerospace* decision in 1974, the Supreme Court has demonstrated its unwillingness to afford professional workers real NLRA protection.[167] A dispute over the collective bargaining rights of musicians sitting on governance-type committees, or of principal players, has never made it into the federal courts, but the managerial and supervisory exclusions construed under *Yeshiva*, *Health Care*, and *Kentucky River* constitute a present threat to many orchestral musicians.[168] How orchestras choose to address these concerns will

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511 U.S. at 572–84; *Kentucky River*, 532 U.S. at 711.

164. The *Yeshiva* majority hints at such an out:

> We recognize that this a starting point only, and that other factors not present here may enter into the analysis in other contexts. It is plain, for example, that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research.

Yeshiva, 444 U.S. at 690 n.31.

165. *See supra* notes 89–90 and accompanying text.

166. *See supra* note 91 and accompanying text.

167. *See, e.g.*, NLRB v. Bell Aerospace, 416 U.S. 267 (1974); *Yeshiva*, 444 U.S. 672; *Health Care*, 511 U.S. 571; *Kentucky River*, 532 U.S. 706.

168. Telephone Interview with Leonard Leibowitz, *supra* note 140.

significantly affect the overall labor relations structure that shapes American orchestras today.[169]

1. Maintaining Advisory-Type Committees

Audition committees, artistic advisory committees, and music director search committees are generally considered advisory-type committees, providing a forum for management to consult musicians for their musical expertise.[170] Musicians sitting on such committees have no managerial-type duties[171] and run little risk of managerial exclusion from NLRA coverage.[172] However, some orchestras permit their governance-type committees, particularly audition committees, to wield more decisionmaking power.[173] For example, the Baltimore Symphony Orchestra allows their audition committee, comprising seven to eleven musicians and the Music Director, one vote per committee member in the final round of auditions.[174] Musicians in this orchestra are effectively hiring their peers because the Music Director, with only one vote, does not have the power to overrule the musicians' vote. Because *Yeshiva* lists hiring duties as a significant factor in finding managerial status,[175] musicians sitting on audition committees modeled on the Baltimore Symphony Orchestra run a significant risk of *Yeshiva*-type managerial exclusion from NLRA coverage.[176]

In orchestras adopting Baltimore-type audition committees, management may have ceded to musicians the authority to hire for

169. *Id*.

170. Telephone Interview with Leonard Lebowitz, *supra* note 140.

171. *Id*. The Supreme Court in *Yeshiva* focused on the faculty's managerial duties. *Yeshiva*, 444 U.S. at 686–90. Among other things, the faculty decided curriculum, scheduled classes, determined proper teaching methods, established grading policies, set matriculation standards, determined the size of the student body, and set tuition rates. *Id*. at 686. Unlike the *Yeshiva* faculty, orchestral musicians sitting on most artistic advisory and audition committees merely advise management. Telephone Interview with Leonard Leibowitz, *supra* note 140. These musicians do not possess the authority to make *Yeshiva*-type decisions. *Id*.

172. *Id*.

173. AMERICAN FEDERATION OF MUSICIANS, *supra* note 1, at 12–15.

174. *Id*. at 13.

175. *Yeshiva*, 444 U.S. at 686 n.23.

176. Telephone Interview with Leonard Leibowitz, *supra* note 140. Similarly, musicians sitting on dismissal committees run a *Yeshiva*-type risk of managerial exclusion from NLRA coverage if these musicians have the ultimate decision as to a musician's dismissal. *Id*.

financial reasons: such concessions are an inexpensive means to meet musicians' demands for better working conditions.[177] However, orchestra committees accepting such concessions during contract talks most likely were unaware of the risk of NLRA managerial exclusion for those musicians sitting on Baltimore-type audition committees.[178] To protect at-risk musicians, orchestras with Baltimore-type audition committees should revert to advisory-type audition committees in an effort to preserve NLRA coverage for all musicians.[179] Moreover, it would behoove all musicians sitting on governance-type committees to review their committee duties using a *Yeshiva*-type analysis, remedying the situation if they deem their committee participation potentially managerial.[180]

2. Maintaining the Traditional Roles of Principal Players

Traditionally, principal players have been responsible for playing solos and, depending on the music director under which they are playing, casting and scheduling.[181] Today, it is more common for principal players to expand their traditional duties by leading their section through artistic and technical advice.[182] Exercising such "quality control" over their section may bring principal players within the definition of a supervisor.[183] Because a court may view

177. *See* Lavine, *supra* note 93, at 15–17.

178. Telephone Interview with Leonard Leibowitz, *supra* note 140.

179. Likewise, orchestras allowing musicians sitting on dismissal committees to possess final authority over musician dismissals should revert to giving such musicians only preliminary authority over dismissals.

180. Musicians should look to the *Yeshiva* factor list for guidance. *See Yeshiva*, 444 U.S. at 686; *see also supra* note 171. Because *Yeshiva* ultimately turns on whether professional workers are aligned with management interests, musicians should determine if the committee on which they sit possesses interests aligned with management. *Yeshiva*, 444 U.S. at 683.

181. Interview with Carla Johnson, *supra* note 110. If a music director allows principal players to schedule and cast other section members, principal players may be subject to the *Health Care* supervisory exclusion because principal players "assign" other musicians to pieces and parts. *See Health Care*, 511 U.S. at 573–74. However, even when principal players schedule and cast their section members, such duties are more incidental to the principal's main duty of playing the solos. Telephone Interview with Leonard Leibowitz, *supra* note 140. Moreover, such supervision is incidental to professional nature—it is not supervision in a labor relations sense. *Id*. Hence, principal players staying within their traditional roles may avoid the supervisory exclusion under the NLRA.

182. *Id*.

183. 29 U.S.C. § 152(11).

principal players' exercise of these duties as disciplining or directing other musicians, a court may exclude such principal players as supervisors under the NLRA.[184]

To retain NLRA coverage, principal players must ensure that their duties do not fall under the supervisory exclusion. Principal players may avoid exclusion by limiting their duties to scheduling and casting, which are incidental to their primary responsibilities. Additionally, these duties are discrete tasks. Keeping principal players within their traditional roles should not be detrimental to orchestral quality because music directors can effectively control quality without principal players' assistance.[185]

3. *Yeshiva*, *Health Care*, and *Kentucky River* as Vehicles to Resolve Divided Loyalty Concerns in American Orchestras

Some commentators believe that governance-type committees and authoritarian principal players actually may harm the rank-and-file musician.[186] In orchestras, reverse divided loyalty is present.[187] Musicians sitting on governance-type committees, as well as principal players, may actually be "sucked" into management-side loyalty. For example, management may influence musicians sitting on boards to side with management through dismal financial reports at board meetings. If some musicians side with management, the lack of musician solidarity may damage the stability of current labor relations provided by a strong musicians' union.[188]

Ironically, the Supreme Court may have inadvertently encouraged a labor stronghold through its broad managerial and supervisory exclusions in *Yeshiva*, *Health Care*, and *Kentucky River*. Due to the musicians' increased risk of exclusion from NLRA coverage, these

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184. *Id*. Further, the Supreme Court in *Health Care* and *Kentucky River* has effectively determined that it is the first prong of 29 U.S.C. § 152(11), defining the twelve supervisory activities, that applies in supervisory questions. *See supra* note 153 and accompanying text.

185. In fact, music directors have traditionally been responsible for quality control. Interview with Carla Johnson, *supra* note 110.

186. Telephone Interview with Leonard Leibowitz, *supra* note 140.

187. Divided loyalty is typically a management concern. The managerial and supervisory exclusions protect employers from the danger of their supervisors and managers siding with the rank-and-file. *See* Rabban, *supra* note 6, at 1778.

188. *See* Grody, *supra* note 141, at 685.

cases work together to deter musicians from serving on governance-type committees and to discourage principal players from excessively supervising their sections. Ultimately, the Supreme Court's broad interpretation of the managerial and supervisory exclusions may present the vehicle to solve alleged reverse divided loyalty in American orchestras, while strengthening the American Federation of Musicians as a union.[189]

CONCLUSION

The NLRA's managerial and supervisory exclusions, as construed by the Supreme Court, put many orchestral musicians in danger of losing their collective bargaining protections. In particular, courts following the rationale in *Yeshiva*, *Health Care*, and *Kentucky River* may determine that musicians serving on governance-type committees and principal players are excluded managers and supervisors under the NLRA. These cases create an unstable labor relations environment in American orchestras. The *Bell Aerospace* and *Yeshiva* holdings construe as an excluded manager any worker who formulates and effectuates workplace policy in a manner aligned with management. At the same time, the *Health Care* and *Kentucky River* holdings limit the Board's ability to find professional workers as non-supervisory workers. Practicing professionals, including orchestral musicians, inherently exercise some managerial and supervisory authority as a by-product of their professional training. However, this exercise of authority is not management in a labor relations sense. The implications reach far beyond university faculty, nurses, and orchestral musicians. After the sweeping *Yeshiva*, *Health Care*, and *Kentucky River* opinions, few professionals will qualify for bargaining protection under the NLRA.

189. Telephone Interview with Leonard Leibowitz, *supra* note 140.