COMMENTS

INDUSTRIAL DEMOCRACY AND THE MANAGERIAL EMPLOYEE EXCEPTION TO THE NATIONAL LABOR RELATIONS ACT

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When Congress passed the National Labor Relations Act in 1935 (the Act),¹ it created a powerful device to regulate the relationship between labor and management. The congressional intent to foster peaceful settlements of disputes between workers and their employers² was based upon the establishment of industrial democracy:³ the relationship between workers and their employers was to be a microcosm of the larger representative democracy of American society.⁴

Industrial democracy comprehends two distinct elements. First, it describes the idealized relationship between individuals and their bargaining representatives and those representatives and management.⁵ This is democracy in the structural sense, a process by which employees deal with their union representatives and those representatives in turn work out agreements with employers. Second, it includes the concept that can also be called workplace democracy: the ability of employees through their representatives to shape the form and content of their employment.⁶ In this sense, industrial democracy entails worker participation in the decisions that mold their employment. In its most idealized form, workplace democracy means that employees cooperate with

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¹ National Labor Relations (Wagner) Act, Pub. L. No. 74-198, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982)).

² See *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257 (1939); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

³ One of the general objectives of the Act was "to encourage, by developing the procedure of collective bargaining, that equality of bargaining power which is a prerequisite to equality of opportunity and freedom of contract." S. REP. NO. 573, 74th Cong., 1st Sess. 3 (1935). See also *infra* text accompanying notes 108-14.

⁴ See Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1514-15 (1981).

⁵ See J. WITTE, *DEMOCRACY, AUTHORITY, AND ALIENATION IN WORK* 3 (1980) ("Industrial democracy implies . . . a set of decision-making mechanisms based on a reasonable assumption of political equality.").

⁶ See *infra* notes 115-22 and accompanying text.

management in running the company.⁷ Since the Act's passage in 1935, interpretations of the Act by both the courts and the National Labor Relations Board have seriously eroded the foundation of both of these aspects of industrial democracy.⁸

A recent decision by the Board, *College of Osteopathic Medicine and Surgery*,⁹ emerging from the judicially created managerial employee exception of the Act's coverage,¹⁰ threatens further to vitiate the concept of industrial democracy. The Board, following the logic of recent Supreme Court decisions,¹¹ held in effect that once employees have attained the real ability to influence the policies of their employer through the process of collective bargaining, they can no longer be considered employees under the Act. Once employees have attained the democratic goals of the Act, they lose the Act's protections. Although the Board's decision concerned a faculty in an institution of higher education, it is not logically limited to such contexts.¹² Its implications for the ideal of industrial democracy are thus profound.

This Comment considers the recent expansion of the managerial employee exception, the framework from which it developed, and its implications. Part I outlines the growth of the managerial employee exclusion, in both the industrial and higher education contexts, and examines *College of Osteopathic Medicine* against this background. Part II explores the impact of the managerial employee exclusion and the *College of Osteopathic Medicine* doctrine both on faculty collective bargaining and on industrial democracy in general, and asserts the incompatibility of that doctrine with the goal of industrial democracy. Part III suggests a resolution of this conflict.

⁷ See Sartori, *Democracy*, in 4 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 114 (1968) ("In its ultimate form, industrial democracy calls for self-government by the workers in a plant . . .").

⁸ See Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 292-93, 318-25 (1978).

⁹ 265 N.L.R.B. 295 (1982), discussed *infra* text accompanying notes 81-107.

¹⁰ See *infra* text accompanying notes 14-39; see also Asher, *Determination of "Employee" Status: A Recurring Problem in Representation Cases*, 34 PROC. N.Y.U. NAT'L CONF. LAB. 171, 173-184 (1981).

¹¹ See *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), *overruled on other grounds*, *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 186-88 (1981).

¹² See *infra* text accompanying notes 152-55.

I. THE MANAGERIAL EMPLOYEE EXCLUSION

A. Background of the Exception

Managerial employees are defined as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer."¹³ Although the Act does not specifically exclude managerial employees from its protection,¹⁴ both the National Labor Relations Board and the courts have long felt the exclusion of such employees to be appropriate.¹⁵ Before the 1947 Taft-Hartley amendments to the Act, the Board's treatment of managerial employees was inconsistent and confused.¹⁶ In these early decisions, the Board consistently blurred the distinction, later to become quite important, between managerial and supervisory employees, often using the two terms interchangeably.¹⁷

As the Supreme Court later recognized, supervisors are employees such as foremen who "use independent judgment in overseeing other employees in the interest of the employer."¹⁸ Unlike managerial employees, they are not "involved in developing and enforcing employer policy."¹⁹ After vacillating on the issue whether supervisory employees were included within the Act's coverage,²⁰ the Board in 1945 decided

¹³ Palace Laundry Dry Cleaning Corp., 75 N.L.R.B. 320, 323 n.4 (1947).

¹⁴ See 29 U.S.C. § 152(3) (1982).

¹⁵ See, e.g., NLRB v. Yeshiva Univ., 444 U.S. 672 (1980); NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974), *overruled on other grounds*, NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 186-88 (1981); Palace Laundry Dry Cleaning Corp., 75 N.L.R.B. 320 (1947).

¹⁶ See Bell Aerospace Co. v. NLRB, 475 F.2d 485, 488-93 (2d Cir. 1973), *aff'd in part & rev'd in part*, 416 U.S. 267 (1974), *overruled on other grounds*, NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 186-88 (1981); H.R. REP. NO. 245, 80th Cong., 1st Sess. 13-14 (1947); S. REP. NO. 105, 80th Cong. 1st Sess., 3-5 (1947). Compare Maryland Drydock Co., 49 N.L.R.B. 733, 738 (1943) ("[W]e are no longer convinced that from the mere determination that a supervisor is an employee it follows that supervisors may constitute appropriate bargaining units.") with Packard Motor Car Co., 61 N.L.R.B. 4, 26 (1945) (recognizing unit of foremen).

¹⁷ See, e.g., Chicago Rotoprint Co., 45 N.L.R.B. 1263, 1266 (1942) (general foreman excluded from bargaining unit because he possessed "managerial authority"); Julien P. Friez & Sons, 47 N.L.R.B. 43, 47 (1943) (excluding expeditors from bargaining units because they are "closely related to the management"); Country Life Press Corp., 51 N.L.R.B. 1362, 1364 (1943) ("Although it has been the Board's policy to recognize collective bargaining rights which have been traditionally exercised by foremen in the printing trades, it has, nevertheless, excluded such general foremen as appear to possess managerial authority.") (footnotes omitted); Lord Baltimore Press, Inc., 73 N.L.R.B. 811, 815 (1947) ("Foremen and supervisory employees in the printing industry are customarily included in rank and file units unless their supervisory authority is so extensive that they may be considered as managerial employees.") (footnote omitted).

¹⁸ NLRB v. Yeshiva Univ., 444 U.S. 672, 682 (1980) (footnote omitted).

¹⁹ *Id.* (footnote omitted).

²⁰ See *supra* note 16.

that they were: in *Packard Motor Car Co.*,²¹ the Board held that foremen could constitute an appropriate bargaining unit.

The Supreme Court narrowly approved the Board's position in *Packard*,²² but its decision was short-lived. The Court was "overruled" when Congress amended the Act specifically to exclude supervisors from the definition of covered employees.²³ In thus denying supervisory employees the protection of the Act, Congress was motivated by a desire to insure that rank and file employee bargaining units remain free from domination by supervisors,²⁴ as well as by the conviction that employers were entitled to the undivided loyalty of their agents and that such loyalty was threatened by the unionization of supervisors.²⁵

Although the 1947 amendments referred specifically only to supervisors,²⁶ the Board continued to recognize that a category of managerial employee was also excluded from the coverage of the Act.²⁷ Because these employees were even more closely aligned to management than were supervisors, the Board reasoned that exclusion of supervisors necessarily compelled exclusion of managerial employees. Congress must have regarded this class of employees as "so clearly outside the Act that no specific exclusionary provision was thought necessary."²⁸

In 1972, however, the Board attempted to limit the application of its managerial employee concept to those employees associated with the

²¹ 61 N.L.R.B. 4, 26 (1945), *aff'd*, 330 U.S. 485 (1947).

²² *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 490-91 (1947) (5-4 decision).

²³ See Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, ch. 120, § 101, 61 Stat. 136, 137-38 (1947) (codified at 29 U.S.C. § 152 (1982)). The *Packard* decision figured prominently in Congress's decision to exclude supervisors. See H.R. REP. NO. 245, 80th Cong., 1st Sess. 13-14 (1947); S. REP. NO. 105, 80th Cong., 1st Sess. 3-5 (1947).

²⁴ H.R. REP. NO. 245, 80th Cong., 1st Sess. 14 (1947).

²⁵ *Id.* at 16.

²⁶ See *supra* note 23.

²⁷ See, e.g., *Swift & Co.*, 115 N.L.R.B. 752, 753-54 (1956) (holding that procurement drivers were not employees under the Act because they were "allied with management"); *American Locomotive Co.*, 92 N.L.R.B. 115, 117 (1950) (excluding buyers from bargaining unit because they were "representatives of management"). See also *Palace Laundry Dry Cleaning Corp.*, 75 N.L.R.B. 320, 323 n.4 (1947):

The determination of "managerial," like the determination of "supervisory," is to some extent necessarily a matter of the degree of authority exercised. We have in the past, and before the passage of the recent amendments to the Act, recognized and defined as "managerial" employees, executives who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and have excluded such managerial employees from bargaining units. . . . We believe that the Act, as amended, contemplates the continuance of this practice.

²⁸ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 283 (1974), *overruled on other grounds*, *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 186-88 (1981).

"formulation and implementation of labor relations policies."²⁹ This shift in the treatment of managerial employees met with strong disapproval from both the courts of appeals³⁰ and the Supreme Court.³¹ Again by a narrow majority, the Court held that the Board's previous interpretation of the managerial exception, as well as the purpose and history of the Taft-Hartley amendments, prevented it from reading a "new and more restrictive meaning into the Act."³² The Court thereby ratified a broad definition of managerial employees.

This expansive definition of managerial employees³³ presented severe problems when applied to professional employees³⁴ who, because their particular skills, often perform tasks bordering on the managerial. To compound the problem, professionals were specifically included in the definition of "employee" by the 1947 amendments.³⁵ Could professionals ever lose the protection of the Act because of the managerial nature of their roles?

The Board confronted this problem in *General Dynamics Corp.*³⁶ Although it did not deny that some professional employees may exercise managerial authority, the Board noted that "managerial authority is not vested in professional employees merely by virtue of their profes-

²⁹ Bell Aerospace Co., 196 N.L.R.B. 827, 828 (1972). See Brief for the National Labor Relations Board at 23, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

³⁰ See *Bell Aerospace Co. v. NLRB*, 475 F.2d 485, 494-95 (2d Cir. 1973).

³¹ See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289 (1974) (5-4 decision), *overruled on other grounds*, *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 186-87 (1981).

³² *Id.* at 289. But see *id.* at 304-05 (White, J., dissenting) (disagreeing with majority's readings of Board practice and legislative history); Angel, *Professionals and Unionization*, 66 MINN. L. REV. 383, 434-39 (1982); Barney, *Bell Aerospace and the Status of Managerial Employees Under the NLRA*, 1 INDUS. REL. L.J. 346, 348-63 (1976).

³³ The Board has consistently used the definition formulated in *Palace Laundry Dry Cleaning Corp.*, 75 N.L.R.B. 320, 323 n.4 (1947). See *supra* text accompanying notes 13 & 27.

³⁴ Professional employees are defined in 29 U.S.C. § 152(12)(a) (1982) as: 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

See generally Angel, *supra* note 32, at 383.

³⁵ See Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, ch. 120, 61 Stat. 136, 138-39 (1947) (codified at 29 U.S.C. § 152(12) (1982)).

³⁶ 213 N.L.R.B. 851 (1974).

sional status, or because work performed in that status may have a bearing on company direction."³⁷ The Board instead decided to include within the scope of the Act professional employees who have "discretion in their job performance independent of their Employer's established policy."³⁸ In contrast, managerial employees have job functions "aligned with managerial authority rather than with work performance of a routine, technical, or consultative nature."³⁹

The Board's assessment of the role of professionals in *General Dynamics* left an opening for another attempt to expand the definition of managerial employee. Faculty members who set policy for their colleges and universities can be described as "aligned with managerial authority." Not surprisingly, the next major development in this area was the evaluation of the status of faculty at institutions of higher education.

B. *University and College Faculty and the Managerial Employee Doctrine*

The Board first asserted jurisdiction over the faculty of a private university in 1970.⁴⁰ Shortly thereafter, faculty unionization was challenged on the basis of the managerial employee doctrine. In *C.W. Post Center*,⁴¹ the university challenged the creation of a faculty bargaining unit, claiming that faculty members exercised sufficient authority to qualify them as supervisors or managerial employees under the Act. The Board rejected this challenge.⁴² It concluded that the faculty had authority only when it acted collectively and that authority so exercised was not managerial.⁴³ The Board also noted that analysis of the case

³⁷ *Id.* at 857-58.

³⁸ *Id.* at 858. *See also* Sutter Community Hosps., Inc., 227 N.L.R.B. 181, 193 (1976) (defining managerial employee as one who "participates *directly* in the employer's policymaking process") (emphasis added).

³⁹ *General Dynamics Corp.*, 213 N.L.R.B. at 858.

⁴⁰ *Cornell Univ.*, 183 N.L.R.B. 329, 334 (1970). This reversed the position taken by the Board in *Trustees of Columbia Univ.*, 97 N.L.R.B. 424 (1951).

⁴¹ 189 N.L.R.B. 904 (1971).

⁴² *Id.* at 905; *accord* *Adelphi Univ.*, 195 N.L.R.B. 639, 648 (1972) (collective authority does not render faculty supervisory); *Fordham Univ.*, 193 N.L.R.B. 134, 135 (1971) (same).

⁴³ *C.W. Post Center*, 189 N.L.R.B. at 905; *see* *Syracuse Univ.*, 204 N.L.R.B. 641, 643 (1973) ("[R]eliance on industrial models alone is not appropriate and cannot serve all the legitimate interests of employees in what, until recently, was *terra incognita* for the Act and for this Board."); *Adelphi Univ.*, 195 N.L.R.B. 639, 648 (1972) ("Because authority vested in one's peers, acting as a group, simply would not conform to the pattern for which the supervisory exclusion of our Act was designed, a genuine system of collegiality would tend to confound us."). The Board had, however, examined systems of collective authority before. *See* *Cab Services, Inc.*, 123 N.L.R.B. 83, 84-85 (1959); *Mutual Rough Hat Co.*, 86 N.L.R.B. 440, 444 (1949); *Alderwood Products Corp.*, 81 N.L.R.B. 136, 138 (1949); *Olympia Shingle Co.*, 26 N.L.R.B. 1398, 1413-

was difficult because management at a college or university differed in structure from that found in the traditional industry context.⁴⁴ Undaunted by this "*terra incognita*," however, the Board continued to certify units of faculty, adding new rationales for doing so to its "collective authority" theory.⁴⁵

By finding faculty to be more professional than managerial, the Board in effect recognized that they exercised "discretion in their job performance independent of their Employer's established policy."⁴⁶ At stake in such a decision was not merely the characterization of certain employees as included or excluded, but the delimiting of the Act's coverage in a far broader sense. If a narrow definition of "professional" is chosen, the ability of employees to "professionalize" their work is limited by the broadening managerial employee exclusion towards which the Board is presently moving. Thus, the inclusion or exclusion of faculty, although certainly significant, is but one manifestation of a larger redefinition of "worker" and "management" that has far broader implications.⁴⁷

In 1980 the issue of faculty status under the Act reached the Supreme Court in *NLRB v. Yeshiva University*.⁴⁸ The Board rejected the university's claim that the potential faculty unit was composed solely of supervisory or managerial employees by concluding that faculty participation in decisionmaking was collective, that it was exercised in the faculty's own professional interest rather than in the employer's interest, and that the faculty lacked final authority in decisionmaking.⁴⁹ The Court of Appeals for the Second Circuit denied enforcement of the Board's order, chastising the Board for undertaking no analysis of the

15 (1940). All these cases concerned the status of stockholder-employees in enterprises owned largely or totally by the workers.

⁴⁴ Syracuse Univ., 204 N.L.R.B. 641, 643 (1973).

⁴⁵ See, e.g., Fairleigh Dickinson Univ., 227 N.L.R.B. 239, 241 (1976) (final decisionmaking authority is vested in hands other than the faculty); Syracuse Univ., 204 N.L.R.B. 641, 643 (1973) (faculty decisions made out of the faculty's own professional interests rather than interest of administration; issue was whether law faculty should be included in same unit as other faculty). For other cases in which the Board certified faculty units, see Salem College, 245 N.L.R.B. 1129 (1979); Drury College, 244 N.L.R.B. 747 (1979); Ithaca College, 244 N.L.R.B. 517 (1979), *enforcement denied*, 623 F.2d 224 (2d Cir. 1980); Stephens College, 240 N.L.R.B. 166 (1979).

⁴⁶ General Dynamics Corp., 213 N.L.R.B. 851, 858 (1974).

⁴⁷ See *infra* text accompanying notes 108-23; see also Klare, *The Bitter and the Sweet: Reflections on the Supreme Court's Yeshiva Decision*, 13 SOCIALIST REV., Sept.-Oct. 1983, at 99, 111 (*Yeshiva* decision is based on the assumption that "employee status and self-determination in work are incompatible").

⁴⁸ 444 U.S. 672 (1980).

⁴⁹ See *Yeshiva Univ.*, 221 N.L.R.B. 1053, 1054 (1975), *enforcement denied*, 582 F.2d 686 (2d Cir. 1978), *aff'd*, 444 U.S. 672 (1980).

university's arguments.⁵⁰ The Supreme Court narrowly affirmed, finding that the Yeshiva faculty exercised managerial authority.⁵¹

The Board dropped its "collective authority" and "lack of final authority" theories before the Supreme Court, relying instead only on the theory that the faculty members exerted decisionmaking power in their own professional interest rather than in the interests of their employer.⁵² The Court rejected this argument,⁵³ noting that the faculty at Yeshiva wielded authority "which in any other context unquestionably would be managerial."⁵⁴ The Court concluded that the decisionmaking structure at Yeshiva was collegial, with the faculty making and implementing management policies.⁵⁵ In such a context, the Court concluded, the interests of faculty and administration were indistinguishable: any attempt to separate them would divide faculty loyalties.⁵⁶

In reaching this conclusion, the Court relied on several policy statements in works on faculty participation in academic governance as evidence that such collegiality did exist.⁵⁷ The Court determined that at "mature" institutions, decisionmaking was based on a system of collegiality or "shared authority."⁵⁸ When authority was thus "divided between a central administration and one or more collegial bodies,"⁵⁹ the faculty exercised managerial authority within the Board's previous defi-

⁵⁰ NLRB v. Yeshiva Univ., 582 F.2d 686, 702-03 (2d Cir. 1978), *aff'd*, 444 U.S. 672 (1980).

⁵¹ *Yeshiva*, 444 U.S. at 691 (1980) (Brennan, White, Marshall, and Blackmun, JJ., dissented).

⁵² *Id.* at 685; see Brief for the National Labor Relations Board at 36-40, *Yeshiva*, 444 U.S. 672.

⁵³ See 444 U.S. at 686-90.

⁵⁴ *Id.* at 686.

⁵⁵ See *id.* at 680 ("[A]uthority in the typical 'mature' private university is divided between a central administration and one or more collegial bodies. . . . [T]raditions of collegiality continue to play a significant role at many universities, including Yeshiva.") (footnote omitted).

⁵⁶ See *id.* at 688-89.

⁵⁷ The Court cited AMERICAN ASSOCIATION FOR HIGHER EDUCATION, FACULTY PARTICIPATION IN ACADEMIC GOVERNANCE 22-24 (1967) and Kadish, *The Theory of the Profession and its Predicament*, 58 A.A.U.P. BULL. 120, 121 (1972). See *Yeshiva*, 444 U.S. at 689 n.28. The Court also cited an article highly critical of the Board's ability to regulate faculty administration relations: Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 UCLA L. REV. 63 (1973). See *Yeshiva*, 444 U.S. at 680 n.10. There were, however, differing views to be found. See, e.g., Finkin, *The NLRB in Higher Education*, 5 U. TOL. L. REV. 608, 615 (1974) ("Mature colleges and universities . . . tend to have a dual-track decisional system whereby authority in a hierarchical sense is lodged in the administration . . . while a recommendatory authority is lodged in the faculty . . .").

⁵⁸ 444 U.S. at 680. In a system of shared authority, decisionmaking authority is divided between the administration and the faculty. See J. BALDRIDGE, *POWER AND CONFLICT IN THE UNIVERSITY* 11-15 (1971).

⁵⁹ 444 U.S. at 680.

nitions of that authority.⁶⁰ Yeshiva University, the Court concluded, was such an institution.⁶¹ The majority was therefore careful to limit the reach of its opinion to those institutions that, like Yeshiva, were "mature."⁶²

Justice Brennan, writing for the dissenters, disagreed with the Court's rejection of the Board's "independent professional interest" argument.⁶³ Although he agreed with the majority that faculty members command considerable power, he concluded that this power is employed in furtherance of faculty members' own professional interest rather than in pursuit of the administration's interests. On a broader scale, Brennan concluded that the majority had transferred the managerial exception to a context in which it is inappropriate, and was viewing the real nature of university governance through a "rose-colored lens."⁶⁴ The faculty at a modern university does not enjoy as much authority as the Court supposed. Education today is not based on a collegial decisionmaking system, he concluded, but is rather a "big business" that no longer resembles the medieval model utilized by the majority.⁶⁵ Possession of considerable discretion in running certain limited aspects of a university's affairs does not render a faculty managerial in the same sense that certain employees in industrial contexts are "managerial."

The *Yeshiva* decision triggered an avalanche of commentary, most of it highly critical of the position taken by the majority.⁶⁶ Undoubt-

⁶⁰ 444 U.S. at 686. The Court reaffirmed the correctness of the definition of managerial employee developed in *Palace Laundry Dry Cleaning Corp.*, 75 N.L.R.B. 320 (1947), cited in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974). See *Yeshiva*, 444 U.S. at 682-83.

⁶¹ See 444 U.S. at 690 n.31.

⁶² See *id.* at 680, 690. For a definition of "mature," see *infra* note 157 and text accompanying notes 98-100.

⁶³ See 444 U.S. at 695-703 (Brennan, J., dissenting).

⁶⁴ *Id.* at 702 (Brennan, J., dissenting).

⁶⁵ *Id.* at 702-03 (Brennan, J., dissenting).

⁶⁶ See, e.g., Benson, *To Bargain or Govern: The Impact of Yeshiva on Private and Public Sector Collective Bargaining in Higher Education*, 7 OHIO N.U.L. REV. 259 (1980); Bethel, *Private University Professors and NLRB v. Yeshiva: The Second Circuit's Misconception of Shared Authority and Supervisory Status*, 44 MO. L. REV. 427 (1979); Gergacz & Krider, *NLRB v. Yeshiva University: The End of Faculty Unions?*, 16 WAKE FOREST L. REV. 891 (1980); Lee, *Faculty Role in Academic Governance and the Managerial Exclusion: Impact of the Yeshiva University Decision*, 7 J.C. & U.L. 222 (1980-81); Zirkel and Pease, *Beyond Yeshiva: The Case for a Coordinated Approach to Faculty Bargaining*, 11 STETSON L. REV. 51 (1981); Comment, *The Supervisory Status of Private University Faculty Members Under the NLRA: NLRB v. Yeshiva University*, 43 ALB. L. REV. 162 (1978) [hereinafter cited as Comment, *Supervisory Status*]; Comment, *NLRB v. Yeshiva University: Faculty as Managerial Employees Under the NLRA*, 19 AM. BUS. L.J. 63 (1981); Note, *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 77, 251-61 (1980); Note, *NLRB v. Yeshiva*

edly, the *Yeshiva* Court did to a large degree view the modern university through a rose-colored lens. Commentators were quick to point out that the system of decisionmaking in most modern universities was not one of collegial authority but rather something quite different.⁶⁷ The *Yeshiva* Court thus failed to recognize that the purpose behind the supervisory exception, and by extension that behind the managerial employee exception, is simply not served by excluding faculty members from the protection of the Act.⁶⁸

More serious than the Court's failure correctly to assess the realities of the distribution of authority in universities is the questionable legal premise on which the *Yeshiva* decision rests. The paradigm of collective bargaining that underlies the decision—collective bargaining as incompatible with, or destructive of, a cooperative system of decision-making⁶⁹—is a betrayal of one of the fundamental purpose of the Act: peaceful labor relations through industrial democracy.⁷⁰ The goal of industrial democracy is defeated by denying the protection of the labor laws to workers at the most nearly democratic institutions. Moreover, the *Yeshiva* decision is not limited to the academic context. The Court recognized that the Board's "independent professional judgment" test

University: *The Professional-Managerial Overlap*, 32 HASTINGS L.J. 659 (1981); Note, N.L.R.B. v. *Yeshiva University: The Demise of Academic Collective Bargaining?*, 32 MERCER L. REV. 907 (1981); see also *infra* note 67 (collecting sources).

⁶⁷ See Finkin, *Regulation by Agreement: The Case of Private Higher Education*, 65 IOWA L. REV. 1119, 1159 (1980); Suntrup, NLRB v. *Yeshiva University and Unionization in Higher Education*, 4 INDUS. REL. L.J. 287, 298-99 (1981); Sussman, *University Governance Through a Rose-Colored Lens: NLRB v. Yeshiva*, 1980 SUP. CT. REV. 27, 43-48; Note, *Collective Authority and Technical Expertise: Reexamining the Managerial Employee Exclusion*, 56 N.Y.U. L. REV. 694, 709 & n.103 (1981). The fact that modern universities do not fit the medieval model of collegiality has been pointed out by at least one member of the Board:

As I view the decision-making structure at most major colleges and universities . . . faculty members do not formulate or effectuate administration policies, nor are the senior faculty members so closely aligned with the administration that their inclusion in a unit with junior faculty members would give rise to a conflict of interest.

Northeastern Univ., 218 N.L.R.B. 247, 257 (1975) (Member Kennedy, concurring in part and dissenting in part). See also Baldridge & Kemerer, *Academic Senates and Faculty Collective Bargaining*, 47 J. HIGHER EDUC. 391, 393 (1976) (faculty senates are "dependent bodies" granted power through the "grace" of the administration).

⁶⁸ See *infra* note 164; see also *infra* text accompanying notes 168-70.

⁶⁹ In a very real way, reliance on a model of collective bargaining as a strictly adversarial relationship between labor and management only serves to reinforce that model. By eliminating employees from the Act's coverage because they are aligned with management, the Court has emphasized and widened the rift between labor and management while obscuring the real conflict (between labor and capital). See *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 493-501 (1947) (Douglas, J., dissenting).

⁷⁰ See *infra* notes 108-12 and accompanying text.

could be applied to other areas of employment.⁷¹ Likewise, the Court's exclusion of workers who share authority with management can extend to all areas of employment.

Yet, despite the potentially broad sweep of its decision, the *Yeshiva* Court attempted to narrow its holding by explicitly limiting its scope to mature institutions.⁷² The Court did not categorically exclude all university faculty from the Act's protection, but effectively required that the Board undertake detailed fact-finding in each case to determine if the faculty in question possesses managerial authority like that exercised by the *Yeshiva* faculty.⁷³ The Board was quick to note this fact,⁷⁴ as were the courts of appeals enforcing Board orders in this area.⁷⁵ Of necessity, the course mandated by *Yeshiva* has resulted in a patchwork of decisions, some holding that the institution involved is like *Yeshiva*,⁷⁶ others holding to the contrary,⁷⁷ based on an ad hoc determination of the amount of decisionmaking power vested in the faculty in question.⁷⁸

The effects of *Yeshiva* were felt quickly. Not unexpectedly, *Yeshiva* defenses to unionization efforts and unfair labor practices charges have become important weapons in the arsenal of employer

⁷¹ See 444 U.S. at 686-87.

⁷² See 444 U.S. at 680, 690 n.31. For a definition of maturity, see *infra* note 157; see also *infra* text accompanying notes 98-100.

⁷³ See 444 U.S. at 690 & n.31, 691.

⁷⁴ See, e.g., Pratt Inst., 256 N.L.R.B. 1166, 1167 (1981). ("*Yeshiva* was meant to apply only to a mature university, where the faculty, acting in a collegial capacity, governed the school in all its major aspects.").

On April 10, 1981, the NLRB General Counsel issued a memorandum detailing the treatment to be given to cases involving faculty unionization. The General Counsel isolated a number of factors to be considered: faculty participation in decisionmaking, the interests furthered by that participation, and their accountability for the decisions they make. See 4 LAB. L. REP. (CCH) § 9254 (1981).

⁷⁵ See, e.g., *Berry Schools v. NLRB*, 627 F.2d 692, 699 n.6 (5th Cir. 1980) ("[T]he Supreme Court held [in *Yeshiva*] that in a college truly run on a collegial basis, all faculty members are managerial employees . . ."); *Stephens Inst. v. NLRB*, 620 F.2d 720, 727 (9th Cir.) ("In *Yeshiva*, the Court applied the managerial employee exception to a 'mature' university."), *cert. denied*, 449 U.S. 953 (1980).

⁷⁶ See, e.g., *Duquesne Univ. of the Holy Ghost*, 261 N.L.R.B. 587, 589 (1982); *Thiel College*, 261 N.L.R.B. 580, 586 (1982); *Ithaca College*, 261 N.L.R.B. 577, 578 (1982).

⁷⁷ See, e.g., *Lewis Univ.*, 265 N.L.R.B. 1239, 1241 (1982); *Fundacion Educativa Ana G. Mendez*, 265 N.L.R.B. 72, 75 (1982); *Florida Memorial College*, 263 N.L.R.B. 1248, 1252-53 (1982); *New York Medical College*, 263 N.L.R.B. 903, 906-07 (1982); *Montefiore Hosp. & Medical Center*, 261 N.L.R.B. 569, 571-72 (1982); *Bradford College*, 261 N.L.R.B. 565, 566 (1982).

⁷⁸ The Board's approach imposes heavy burdens of proof on the parties because of the individualized nature of the inquiry. This heavy burden may, in fact, have a disproportionate impact on economically weaker parties. See Klare, *supra* note 47, at 101. Klare comments on the expense to the employer of bringing a *Yeshiva* challenge to unionization. However, the threat of a *Yeshiva* challenge may lead a union to decertify voluntarily rather than incur large litigation costs.

universities.⁷⁹ Such defenses have not been limited to "mature university" settings and have in fact spread beyond the context of higher education.⁸⁰ The next section discusses an expansion of the *Yeshiva* rule that poses an even greater threat than did *Yeshiva* to the attainment of industrial democracy.

C. College of Osteopathic Medicine and Surgery: *The Logical Conclusion*

One unanswered question lurking behind the *Yeshiva* doctrine was the treatment to be accorded faculty (and other employees) who exercised sufficient authority to be considered managerial within *Yeshiva* but did so only because such power had been vested in them by a collective bargaining agreement. The Board first faced this problem in *College of Osteopathic Medicine and Surgery*⁸¹ [COMS], in which it found that the amount of authority exercised by the faculty was enough to qualify them as managerial employees.

The parties in COMS had entered into collective bargaining agreements in 1976 and in 1978.⁸² In 1981 the college, claiming that its faculty had attained managerial status, petitioned the NLRB to clarify⁸³ the unit to exclude all employees within it and to revoke the union's certification.⁸⁴ As a defense to this claim, the union asserted that such decertification was improper because the faculty's authority had been gained solely through collective bargaining.⁸⁵ After evaluating the nature of faculty authority in light of *Yeshiva*,⁸⁶ the Board con-

⁷⁹ As of May 1, 1981, 37 institutions of higher education had exercised *Yeshiva* claims. Douglas, *The Yeshiva Case: One Year Later*, in *THE LEGAL AND ECONOMIC STATUS OF COLLECTIVE BARGAINING IN HIGHER EDUCATION* 14, 16 (J. Douglas ed. 1981) (table 1) [hereinafter cited as J. DOUGLAS]. These statistics do not include instances where *Yeshiva* may have exerted a chilling effect on faculty bargaining. In 1981, there were three union decertifications as a result of successful *Yeshiva* claims. J. DOUGLAS & S. KRAMER, *DIRECTORY OF FACULTY CONTRACTS AND BARGAINING AGENTS IN INSTITUTIONS OF HIGHER EDUCATION* 56 (1982); see also Sheppard & Moran, *The Future of Faculty Collective Bargaining at Private Universities*, 9 J.C. & U.L. 41, 49 (1982-83).

⁸⁰ See, e.g., *Walla Walla Union-Bulletin v. NLRB*, 631 F.2d 609, 612-13 (9th Cir. 1980); *Florence Volunteer Fire Dep't, Inc.*, 265 N.L.R.B. 955, 957 (1982); District No. 1, Pac. Coast Dist., *Marine Engineers Beneficial Ass'n*, 259 N.L.R.B. 1258, 1265-66 (1982).

⁸¹ 265 N.L.R.B. 295 (1982).

⁸² *Id.* at 295.

⁸³ See R. GORMAN, *BASIC TEXT ON LABOR LAW* 50-52 (1976) (explaining the process of "clarification" of bargaining units).

⁸⁴ 265 N.L.R.B. at 295.

⁸⁵ *Id.* at 295-96.

⁸⁶ See *id.* at 296-97.

cluded that the COMS faculty members were managerial employees.⁸⁷

The COMS faculty did in fact exercise considerable authority in the areas of curriculum, academic policies, admissions policies, student academic standards, hiring of faculty, promotion decisions, and tenure decisions.⁸⁸ It exercised this authority, however, through a series of committees established pursuant to the initial collective bargaining agreement.⁸⁹ The union contended that authority obtained as a result of collective bargaining was not within the definition of managerial authority comprehended by *Yeshiva*.⁹⁰ In rejecting this argument, the Board relied mechanically on *Yeshiva*: it saw no explicit grounds in that decision to support the union's position.⁹¹

The COMS decision was not an aberration. Since COMS the Board has reaffirmed its willingness to disregard the source of faculty authority in its *Yeshiva* analysis. In *Lewis University*,⁹² the Board again confronted this issue and reached a similar conclusion. The faculty at Lewis was certified as a bargaining unit in 1975 and entered into a collective bargaining agreement shortly thereafter.⁹³ When the agreement expired in 1980, the university and its faculty reached a tentative agreement. The university repudiated this agreement after the *Yeshiva* decision, proposing to replace it with a faculty handbook.⁹⁴ The university argued that its faculty members were managerial; the emanation of at least part of their authority from the collective bargaining agreement was not a material consideration. Although a majority of the Board disagreed that the faculty was managerial,⁹⁵ it seemed willing to accept the university's argument regarding the immateriality of the source of the faculty's authority.⁹⁶ On this point, the majority and dissent were in agreement.⁹⁷

Although the Board's conclusions in COMS and *Lewis* are logically related to *Yeshiva*, they are troubling in several respects. COMS is inconsistent with *Yeshiva* in a very important sense. *Yeshiva* was care-

⁸⁷ See *id.* at 297.

⁸⁸ *Id.* at 296-97.

⁸⁹ *Id.* at 296.

⁹⁰ *Id.* at 297.

⁹¹ See *id.* at 297-98.

⁹² 265 N.L.R.B. 1239 (1982).

⁹³ *Id.* at 1242.

⁹⁴ *Id.*

⁹⁵ See *id.* at 1249-50.

⁹⁶ See *id.* at 1242 ("[W]e do not view authority which faculty members exercise pursuant to the master contract as *ipso facto* nonmanagerial.").

⁹⁷ See *id.* at 1253 (Member Hunter, dissenting) ("[T]he origins of a faculty's authority are irrelevant to the question of whether that authority establishes the faculty as managerial.").

fully limited by its terms to mature institutions.⁹⁸ Such institutions are those characterized by a sharing of authority between the administration and one or more collegial bodies.⁹⁹ These systems of decisionmaking evolve quite differently from systems in which managerial authority is secured solely through the terms of a collective bargaining agreement.¹⁰⁰ Because mature institutions distribute decisionmaking power along lines determined over long periods of time, such systems are sounder in a structural sense than the decisionmaking systems developed under a collective bargaining agreement. This may be particularly true where the present distribution of power under a collective bargaining agreement has resulted from conflicting faculty and administration interpretations of the agreement that were resolved through arbitration.

COMS, of course, treats authority developed through both means as equivalent. However, the difference in the genesis of the shared authority makes the *Yeshiva* decision inapplicable to the *COMS* situation, even if *Yeshiva* was decided correctly on its own facts.¹⁰¹ The faculty at a "mature" institution might have decisionmaking power sound enough to make the protection of the labor laws unnecessary. If the faculty's decisionmaking power has been gained through the bargaining process, depriving the faculty of its status as a bargaining unit could undermine the structure of shared authority.

The *COMS* doctrine will no doubt also be attractive to administrations that wish to terminate present collective bargaining relationships.¹⁰² At present, there are over 350 collective bargaining agreements in two- or four-year institutions of higher education,¹⁰³ many of which contain provisions that may be grounds for faculty status reconsideration under *COMS*.¹⁰⁴ Moreover, incorporation of faculty constitutions into collective agreements or inclusion of the faculty senate within the agreement¹⁰⁵ may threaten the status of the union. Of course, such con-

⁹⁸ See *supra* text following note 57.

⁹⁹ *Yeshiva*, 444 U.S. at 680.

¹⁰⁰ This is not meant to imply that *Yeshiva* was decided correctly. See *infra* note 157; see also *infra* text accompanying notes 160-62.

¹⁰¹ See *infra* notes 156-59 and accompanying text.

¹⁰² There is a strong argument that such will be the case in light of events following *Yeshiva*. See *supra* notes 79-80 and accompanying text.

¹⁰³ J. DOUGLAS & S. KRAMER, *supra* note 79, at 61 (table 4).

¹⁰⁴ In a study of 89 collective bargaining agreements at four-year institutions, "most" require faculty contributions in consideration of initial appointment, promotion evaluations, and discharge decisions. R. JOHNSTONE, *THE SCOPE OF FACULTY COLLECTIVE BARGAINING: AN ANALYSIS OF FACULTY UNION AGREEMENTS AT FOUR-YEAR INSTITUTIONS OF HIGHER EDUCATION* 34, 40 (1981).

¹⁰⁵ Johnstone reports that out of 89 institutional agreements surveyed, 15 incorporated a faculty constitution of some kind and 19.1% included the academic or faculty senate within the agreement. R. JOHNSTONE, *supra* note 104, at 119, 126.

stitutions are enforceable only as long as they remain a part of the larger collective bargaining agreement.¹⁰⁶

In addition to the threat posed to the development of workplace democracy, *COMS* also promises unfavorable effects for the collective bargaining process. On the most practical level, faculties undoubtedly bargain away something to induce administrations to delegate authority to them. In effect, the Board's decisions could result in the loss of this bargain, for once a faculty loses the protection of the labor laws, a college can remove the authority the faculty had gained through collective bargaining without making concessions in return. In a puzzling bit of dictum, the Board recognized that the faculty might lose its contract-based authority and suggested that the faculty reorganize at that time: "If the College removes sufficient authority from its faculty members so that they revert to the status of nonmanagerial employees, the Board will process a proffered representation petition at that time."¹⁰⁷

The labor laws insure a democratic process of bargaining. To strip a party of the gains it has made through collective bargaining is to undermine the process itself. Recertification is hardly the answer if development of workplace democracy will only lead once more to decertification. The following section will explore the ramifications of the *COMS* decision on the democratic process of collective bargaining, as well as on the evolution of workplace democracy.

II. THE *COMS* DOCTRINE AND COLLECTIVE BARGAINING

A. *The Ideal of Industrial Democracy*

The animating objective behind the National Labor Relations Act was to insure the peaceful resolution of disputes between labor and management through the establishment of a system of industrial democracy.¹⁰⁸ The concept of industrial democracy,¹⁰⁹ developed well before

¹⁰⁶ University administrators may have independent reasons for honoring such documents, such as the desire not to alienate the faculty. These reasons will, however, be strongly related to the innate power or prestige of the faculty. In situations where faculty members are easily replaceable, such as at small nonprestigious institutions, faculty constitutions may, in fact, carry no weight.

¹⁰⁷ 265 N.L.R.B. at 298.

¹⁰⁸ See Klare, *supra* note 8, at 281-84; Summers, *Industrial Democracy: America's Unfulfilled Promise*, 28 CLEV. ST. L. REV. 29, 34 (1979); see also *supra* note 2 and accompanying text.

¹⁰⁹ Milton Derber suggests that industrial democracy rests on the following principles: representation, participation, equality of rights and opportunities, right of dissent, due process, responsibility, standards of minimum employment terms and conditions, information availability, and personal dignity. M. DERBER, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY 1865-1965*, at 19-20 (1970).

the 1935 Wagner Act,¹¹⁰ has consistently been considered a primary goal of the Act.¹¹¹ The Act's sponsor, Senator Wagner, stated during the congressional debate on the Act that "democracy in industry must be based upon the same principles as democracy in government."¹¹² The attainment of industrial democracy through collective bargaining is one of the cornerstones of federal labor law.

One aspect of industrial democracy concerns the ability of employees to unite and, through a collective representative, bargain with their employers over the terms and conditions of their employment.¹¹³ Implicit in the nature of the bargaining system contemplated by the Act is the idea that the exact content of the bargain eventually reached is to be left to the parties with little or no outside regulation.¹¹⁴ The parties should be able to determine for themselves the economic and noneconomic aspects of the bargain. Under *COMS*, the noneconomic aspects of the parties' bargain are vulnerable. Too much success in achieving noneconomic goals (for example, decisionmaking authority), or in attaining workplace democracy, could lead to decertification.

Another aspect of industrial democracy concerns the sharing of decisionmaking authority between labor and management.¹¹⁵ In some workplaces, management has given employees authority in order to in-

¹¹⁰ See FINAL REPORT OF THE U.S. COMMISSION ON INDUSTRIAL RELATIONS, S. DOC. NO. 415, 64th Cong., 1st Sess. (1916); see also C. SUMMERS, H. WELLINGTON & A. HYDE, *CASES AND MATERIALS ON LABOR LAW* 13-24 (2nd ed. 1982).

¹¹¹ See Klare, *supra* note 8, at 284.

¹¹² 79 CONG. REC. 7571 (1935) (remarks of Sen. Wagner). In discussing his proposal, Senator Wagner also stated:

The principles of my proposal were surprisingly simple. They were founded upon the accepted facts that we must have democracy in industry as well as in government; that democracy in industry means fair participation by those who work in the decisions vitally affecting their lives and livelihood; and that the workers in our great mass production industries can enjoy this participation only if allowed to organize and bargain collectively through representatives of their own choosing.

M. DERBER, *supra* note 109, at 321 (citing N.Y. Times, Apr. 13, 1937, at 20, col. 1).

¹¹³ See 29 U.S.C. § 159(a) (1976).

¹¹⁴ Certain provisions of collective bargaining agreements may later fail as illegal. See, e.g., *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974) (contract language limiting the right of employees to distribute union literature in the plant did not stand). Nothing prevents the discussion of such provisions in bargaining sessions.

It is true, however, that the Board and the courts have developed doctrinal shields that allow certain aspects of the management of a business to be removed from discussion if management so decides. See, e.g., *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965) (employer's decision to shut down not a mandatory subject of bargaining).

¹¹⁵ An extreme example is the election of Douglas Fraser to the Board of Directors of the Chrysler Corporation. See generally Note, *supra* note 67; Comment, *An Economic and Legal Analysis of Union Representation on Corporate Boards of Directors*, 130 U. PA. L. REV. 919, 927 (1982).

crease efficiency or decrease costs. Many firms have received economic concessions from their unionized employees by giving them increased voice in the governance of the enterprise.¹¹⁶ Many others, in an effort to increase worker satisfaction and productivity,¹¹⁷ have attempted to inject additional worker participation in the shaping of their employment. The value of reshaping management structures in these ways has been widely chronicled,¹¹⁸ and it can be expected that the trend towards in-

¹¹⁶ There has been increasing recognition of the problems and ramifications of worker alienation both at the personal and national level. In 1972, a bill was introduced in Congress to provide funding for research into the problem; it never passed. See S. 3916, 92d Cong., 2d Sess., 118 CONG. REC. 27,999 (1972); see also *Worker Alienation*, 1972: *Hearing on S. 3916 Before the Subcomm. on Employment, Manpower, and Poverty of the Sen. Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. (1972); *Quality of Production and Improvement in the Workplace: Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 96th Cong., 2d Sess. (1980) (examination of various ways of increasing productivity including increasing amounts of "worker involvement").

¹¹⁷ For a discussion of the benefits of increasing worker participation, see Long, *The Effects of Employee Ownership on Organizational Identification, Employee Job Attitudes, and Organizational Performance: A Tentative Framework and Empirical Findings*, 31 HUMAN REL. 29, 39 (1978) (most employees felt that their job performance improved, and most experienced increases in job satisfaction, after employee ownership began); Zimbalist, *The Dynamic of Worker Participation*, in ORGANIZATIONAL DEMOCRACY 49, 56 (G. Garsen & M. Smith eds. 1975) (noting increases in productivity, job satisfaction, and employee investment after expropriation of industries and institution of worker participation). But see E. RHENMAN, INDUSTRIAL DEMOCRACY AND INDUSTRIAL MANAGEMENT 90 (1968) (increases in productivity may be illusory because the period of measurement may be too short).

¹¹⁸ See, e.g., SELF MANAGEMENT: NEW DIMENSIONS TO DEMOCRACY (I. Adizes & E. Borgese eds. 1975) (descriptions of industrial democracy experiments from Yugoslavia, Israel, and Norway); SELF-MANAGEMENT AND WORKERS' PARTICIPATION (K. Sethi, A. Sengupta, S. Grozdanic & V. Stambuk eds. 1981) (discussions of Indian and Yugoslavian examples); E. STEPHENS, THE POLITICS OF WORKERS' PARTICIPATION (1980) (discussion of Peruvian example); D. ZWERDLING, DEMOCRACY AT WORK (1978) (examples from the United States and Europe); see also INDUSTRIAL DEMOCRACY AND LABOUR MARKET POLICY IN SWEDEN (J. Fry ed. 1979); D. TOSCANO, PROPERTY AND PARTICIPATION (1983) (discussion of Vermont Asbestos Group, Bates Fabrics, and Colonial Cooperative Press, three employee-owned firms in the United States).

The trend toward increased worker participation is not without its critics, however. On the broadest level, discussions of workplace democracy are often underlaid by a strong ideological position that may obscure the strictly industrial-relations aspects of such a system. See K. WALKER, WORKERS' PARTICIPATION IN MANAGEMENT: CONCEPTS AND REALITY (1970). But see J. VANEK, THE PARTICIPATORY ECONOMY 18-19 (1971) (the transition to a participatory economy is easier "from the right" than from the left partly because the motivational forces necessary for such an economy are already recognized and fostered by the market capitalist right). From a more technical point of view, it has been suggested that there are a number of constraints on the development of true workplace democracy. See J. WITTE, *supra* note 5, at 152-156 (suggesting constraints based on problems of communication, apathy, and other organizational factors). Suggestions have also been made that, in spite of the democratic values invoked, systems of worker participation may result, not in the creation of a participatory worker democracy, but in the creation of a "ruling worker elite." See S.

creased democratization of the workplace will continue. As workers gain more control of the workplace, however, their ability to unionize under the Act becomes more vulnerable to attack under the *COMS* doctrine. Moreover, a small but growing number¹¹⁹ of firms are owned by their workers in whole¹²⁰ or in part.¹²¹ The decision in *COMS* presents very difficult obstacles to the unionization of such employee-owners, who may have acquired their positions through collective bargaining.¹²²

The system of shared authority existing in mature institutions of higher education advances both aspects of industrial democracy. Shared authority is a system in which both faculty and administration exercise effective influence on decisionmaking.¹²³ It vests considerably more decisionmaking power in the faculty than is accorded employees in other, more traditional management systems. Moreover, shared authority is a system in which faculty and administrators can shape the terms and

DEWITT, *WORKER PARTICIPATION AND THE CRISIS OF LIBERAL DEMOCRACY* 155-66 (1980); see also C. PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (1970); cf. H. WACHTEL, *WORKERS' MANAGEMENT AND WORKERS' WAGES IN YUGOSLAVIA* 186 (1973) (when market-related concerns such as efficiency conflict with social concerns, the former tend to prevail). Moreover, there is a strong intuitive appeal to the idea that democratic institutions are less efficient than bureaucratic ones. For a discussion of this concern, see B. ABRAHAMSSON, *BUREAUCRACY OR PARTICIPATION* (1977).

¹¹⁹ See Note, *Worker Ownership and Section 8(a)(2) of the National Labor Relations Act*, 91 YALE L.J. 615, 615 nn.3-4 (1982).

¹²⁰ There has been a recent rise in the number of employee buyouts of their workplaces, particularly when those plants are faced with shutdown. See generally N. STERN, K. WOOD & T. HAMMER, *EMPLOYEE OWNERSHIP IN PLANT SHUTDOWNS* (1979).

¹²¹ Workers may attain partial ownership in a variety of ways, including employee stock ownership plans. See Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (1982) (found unconstitutional in part, *Shelter Framing Corp. v. Carpenters Pension Trust*, 543 F. Supp. 1234 (1982)); see also I.R.C. § 4975 (1982).

¹²² Enterprises in which workers participate in management present troublesome problems under this nation's labor laws as presently construed for a variety of reasons. See, e.g., *Sida, Inc.*, 191 N.L.R.B. 194 (1971) (excluding stockholder-employees from unit of taxicab drivers); *Brookings Plywood Corp.*, 98 N.L.R.B. 794 (1952) (holding that 113 stockholder-employees were excluded from the Act's coverage), *dismissed*, 100 N.L.R.B. 431 (1952); see also Markham, *Restrictions on Shared Decision-Making Authority in American Business*, 11 CAL. W.L. REV. 217 (1975); Note, *Collective Authority and Technical Expertise: Reexamining the Managerial Employee Exclusion*, 56 N.Y.U. L. REV. 694 (1981); Note, *Worker Ownership and Section 8(a)(2) of the National Labor Relations Act*, 91 YALE L.J. 615 (1982).

¹²³ AMERICAN ASSOCIATION FOR HIGHER EDUCATION, *FACULTY PARTICIPATION IN ACADEMIC GOVERNANCE* 17 (1967) [hereinafter cited as AAHE REPORT]; see also American Association of University Professors, *Statement on Government of Colleges and Universities*, 52 A.A.U.P. BULL. 375, 376 (1966) ("The variety and complexity of the tasks performed by institutions of higher education produce an inescapable interdependence among governing board, administration, faculty, students and others. The relationship calls for adequate communication among these components and full opportunity for appropriate joint planning and effort."); *supra* note 111. Collective bargaining has been described as a variant of shared authority. See AAHE REPORT, *supra*, at 15.

and conditions of employment in a way that is vastly different from, and more nearly democratic than, the process that exists in most industries. Not surprisingly, attaining such a democratic workplace is a goal of many collective bargaining agreements executed in the higher education context. By threatening the existence of such university power structures, the COMS decision has undermined a model of industrial democracy.

B. *The Present State of Faculty Collective Bargaining*

The potential impact of COMS can be fully appreciated only when set against the backdrop of the present state of faculty collective bargaining. Ideally, collective bargaining in any context should respond to the concerns of the employees involved by accommodating the often conflicting interests of management and labor. When compared to this ideal, faculty collective bargaining fares well. It has responded to the concerns of the employees in a way that, at least partially, accommodates faculty and administration interests. Furthermore, it has responded to faculty concerns regarding their role in the administration of their workplace in a way that moves the university closer to a true system of industrial democracy.

Faculties, like other groups of workers, organize for a variety of reasons. Among these reasons are, of course, economic motives,¹²⁴ but faculties are also deeply concerned with increasing their voice in university governance¹²⁵ and with insuring "due process" in personnel decisions affecting them.¹²⁶ Such concerns are often reflected in the provisions of collective agreements between faculties and administrations.¹²⁷ An examination of faculty collective bargaining reveals that, despite early apprehensions, it has operated to secure for faculty a voice in areas that affect them and has responded to their particular needs.

During the early days of faculty unionization, fears of dire conse-

¹²⁴ See R. CARR & D. VAN EYCK, *COLLECTIVE BARGAINING COMES TO CAMPUS* 52 (1973) (in a survey of 35 institutions that had entered into collective bargaining in 1972, 23 had average compensation below the national average); Lindeman, *The Five Most Cited Reasons for Faculty Unionization*, 102 *INTELLECT* 85, 85 (1973) ("The most common reason for faculty interest in collective bargaining cited in recent literature is the dissatisfaction with compensation.").

¹²⁵ See R. CARR & D. VAN EYCK, *supra* note 124, at 55-57; Lindeman, *supra* note 124, at 185; Zeller, *Why Faculties Organize*, in *COLLECTIVE BARGAINING IN HIGHER EDUCATION—THE DEVELOPING LAW* 81, 82 (J. Vladek & S. Vladek eds. 1975) [hereinafter cited as J. VLADEK & S. VLADEK].

¹²⁶ Zeller, *supra* note 125 at 82.

¹²⁷ See R. JOHNSTONE, *supra* note 104, at 32-42, 119-26; Begin, Settle & Berke-Weiss, *Patterns of Faculty Collective Bargaining in Community Colleges*, 9 *RUT.-CAM. L.J.* 699, 705 (1978).

quences abounded. Many believed that collective bargaining would lead to the destruction of the unique nature of university governance¹²⁸—that is, that the nature of collective bargaining would necessarily lead to an adversarial relationship between faculty and administration inimical to the maintenance of a system of shared authority.¹²⁹ Another important concern of the early critics of faculty bargaining was the perceived negative effect that collective bargaining, and more particularly grievance arbitration, would have on tenure decisions and the process of peer review.¹³⁰

These concerns were based on two preconceptions, neither of which is necessarily true. The first is that collective bargaining creates an essentially adversarial relationship in all contexts;¹³¹ the second, that an adversary process would destroy university governance¹³² (implying that present relationships between faculty and administration are nonadversarial).¹³³

In practice, faculty collective bargaining has demonstrated that the fears of its early critics were unwarranted. Faculties have progressed

¹²⁸ Several unfair labor practice cases before the Board suggest that in at least some instances the "unique" nature of university governance was rather illusory. See *Philander Smith College*, 246 N.L.R.B. 499 (1979) (finding violation of § 8(a)(1) of the Act where two faculty members were discharged after appearing before the Board of Trustees and voicing grievances and complaints about the administration of the school); *Stephens Inst. v. NLRB*, 620 F.2d 720 (9th Cir.) (administration fired union instructors, two for having underenrolled classes and one for making critical remarks about the school), *cert. denied*, 449 U.S. 953 (1980).

¹²⁹ See Finkin, *Collective Bargaining and University Government*, 1971 *Wis. L. Rev.* 125, 136-37; Kahn, *supra* note 57, at 81; McHugh, *Effects of Bargaining on Tenure and Other Academic Policies*, in *FACULTY BARGAINING IN THE SEVENTIES* 113, 120 (T. Tice ed. 1973) [hereinafter cited as T. TICE]; Wollett, *Self-Governance and Collective Bargaining for Higher Education Faculty: Can the Two Systems Coexist?*, in J. VLADEK & S. VLADEK, *supra* note 125, at 33, 35.

¹³⁰ See McHugh, *supra* note 129, at 124; Wollett, *The Status and Trends of Collective Negotiations for Faculty in Higher Education*, 1971 *Wis. L. Rev.* 2, 20-21. Interestingly, concern has also been voiced over the exclusion of topics such as tenure decisions from the governance-arbitration procedure. See Benewitz, *Grievance and Arbitration Procedures*, in T. TICE, *supra* note 129, at 143, 154-56; Benewitz, *Contract Provisions and Procedures*, in J. VLADEK & S. VLADEK, *supra* note 125, at 275, 276-79.

¹³¹ See Finkin, *supra* note 129, at 136-37; Wollett, *supra* note 129, at 35 ("Collective bargaining is an adversarial, not a collegial system."). But see R. CARR & D. VAN EYCK, *supra* note 124, at 14-16 (collective bargaining is neither fully adversarial nor fully cooperative).

¹³² The very fact that university faculties desire unionization belies this second assumption: a collegial decisionmaking system will not give rise to widespread faculty concern over their university's governance. See *supra* notes 124-27 and accompanying text; see also R. HARTNETT, *COLLEGE AND UNIVERSITY TRUSTEES: THEIR BACKGROUND, ROLES AND EDUCATIONAL ATTITUDES* 33 (1969) (table 8) (of 5180 trustees surveyed, 64% felt that tenure decisions should be made only by trustees or administration).

¹³³ See Zeller, *supra* note 125, at 82-85.

toward resolution of some of their basic concerns through collective bargaining without causing the destruction of higher education. Collective bargaining has enabled faculty units more effectively to influence those aspects of their employment that troubled them and that gave rise to their desire to unionize. For example, most collective agreements reflect some progress toward assuring individual faculty members that they will be accorded "due process" in personnel decisions¹³⁴ through the inclusion of grievance arbitration provisions.¹³⁵ A number of studies indicate that such provisions have operated successfully.¹³⁶ Although they have altered the processes employed, grievance arbitration provisions have not occasioned the demise of academic peer review or collegiality.¹³⁷ The available evidence suggests that standards for promotion and tenure have not dropped precipitously.¹³⁸ What has evolved is a formalization not only of procedures, but also of standards.¹³⁹

¹³⁴ Concern for due process in personnel decisions is an important reason for faculty unionization. See Zeller, *supra* note 125, at 82; see also Mintz, *The CUNY Experience*, 1971 Wis. L. Rev. 112, 121-22 (most grievances processed involved concerns of job security or application of academic judgment to tenure decisions).

¹³⁵ R. JOHNSTONE, *supra* note 104, at 25-29 (only two of 89 agreements studied did not have grievance-arbitration procedures; 18 had provisions that allowed grieving of violations of faculty handbooks or other printed policies; 13 provided for a faculty grievance committee; 84% had provisions for binding arbitration).

¹³⁶ See, e.g., Betten & Oldson, *Living Under the Contract I: The Techniques of Collective Bargaining Contract Administration in Higher Education*, in J. DOUGLAS, *supra* note 79, at 43 (State University of Florida experience); D'Amico & Stupak, *Living Under the Contract II: The University of Maine Experience*, in J. DOUGLAS, *supra* note 79, at 51.

¹³⁷ See M. Bersi, *The Impact of Collective Bargaining on Selected Aspects of College Operations: A Comparison of the Perceptions of Management/Labor Participants in a State College System* 103 (1979) (unpublished Ph.D. dissertation, University of Connecticut) (large majority of management and labor representatives surveyed at Connecticut State College system agreed that the contract grievance-arbitration procedures protected faculty against arbitrary decision) [copy on file with the *University of Pennsylvania Law Review*].

¹³⁸ See M. Bersi, *supra* note 137, at 124; J. Jimenez, *Faculty Collective Bargaining in Higher Education: Antagonism or Cooperation in the Academic Enterprise* 97 (1979) (unpublished Ed.D. dissertation, University of Oregon) [copy on file with the *University of Pennsylvania Law Review*].

¹³⁹ See Betten & Oldson, *supra* note 136, at 45; Morand, *Collective Bargaining and Collegiality: A Pennsylvania View*, 9 RUT.-CAM. L.J. 715, 728 (1978); M. Bersi, *supra* note 137, at 71.

Related to the assurance of due process in personnel decisions is the more general concern over job security, see Zeller, *supra* note 125, at 83-84, which is also reflected in many agreements. See R. JOHNSTONE, *supra* note 104, at 42-46 (47.2% of 89 agreements studied contained provisions dealing with dismissal of faculty; only three of these did not mandate faculty input; 82% contained provisions dealing with retrenchment; in 43 agreements, faculty dismissal was handled through a seniority system.); see also Veazie, *University Collective Bargaining: The Experience of the Montana University System*, 9 J.C. & U.L. 51, 58 (1982) (contracts have had a beneficial effect on procedures of tenure and discharge); C. Gilmore, *The Impact of Faculty Collective Bargaining on the Administration of Public Education in the United States with Particular*

On a larger scale, collective agreements have not crippled or destroyed the mechanisms for faculty governance that antedated them.¹⁴⁰ Some agreements protect or formalize existing governance structures,¹⁴¹ and some reserve certain areas of decisionmaking to these structures.¹⁴² Although generalizations may be difficult, collective bargaining seems to strengthen faculty governance mechanisms where they were weak originally.¹⁴³ In a more general sense, recent studies suggest that both management and faculty representatives perceived collective bargaining as generally increasing the strength of faculty in decisionmaking.¹⁴⁴

In short, faculty unionization, far from destroying shared authority, seems to be moving many institutions toward that form of management structure.¹⁴⁵ Although faculty employment is perhaps the best example of shared authority, such a structure could be adopted in any employment setting. Shared authority is, in many ways, equivalent to a system of industrial democracy,¹⁴⁶ the creation of which is one of the primary purposes of the Act.¹⁴⁷ The attainment of this goal is

Emphasis on the New England Region 251-52 (1979) (unpublished Ph.D. dissertation, University of Massachusetts) (job security provisions have become increasingly significant) [copy on file with the *University of Pennsylvania Law Review*].

¹⁴⁰ In some cases, faculty senates have disbanded after collective bargaining was instituted. Of 14 campuses in the Pennsylvania state university system, two disbanded faculty senates after the institution of collective bargaining. In one instance, the union and the senate created an "interlocking directorate." In another, the union under the agreement delegated authority to the senate. See Morand, *supra* note 139, at 726. Interestingly, one survey shows that a large majority of the faculty (79.2%) felt that collective bargaining had strengthened collegial governance, while only 44.4% of management representatives reached that conclusion. M. Bersi, *supra* note 137, at 75; see also J. Jimenez, *supra* note 138, at 97.

¹⁴¹ See Lee, *Contractually Protected Senates at Four-Year Colleges*, in J. DOUGLAS, *supra* note 79, at 56, 58.

¹⁴² See Veazie, *supra* note 139, at 60. This system bears a strong resemblance to the system of codetermination found in West German labor relations. See generally Summers, *Codetermination in the United States: A Projection of Problems and Potentials*, 4 J. COMP. CORP. L. & SEC. REG. 155 (1982) (discussing the elements of codetermination as it might be constructed in the United States, in comparison with the existing systems in other countries). Lee, *supra* note 141, at 57-58, reports the development of "dual-track" systems that delegate academic concerns to faculty senates and economic concerns to unions. See also Baldrige & Kemerer, *supra* note 67, at 398 (fig. 1) (survey of the relative influence of union and senate power); M. Bersi, *supra* note 137, at 84 (85% of management and faculty representatives surveyed agreed that collective bargaining had not modified faculty senate jurisdiction at Connecticut state colleges).

¹⁴³ See Baldrige & Kemerer, *supra* note 67, at 396-97, 400; J. Jimenez, *supra* note 138, at 97-98.

¹⁴⁴ See M. Bersi, *supra* note 137, at 69; J. Jimenez, *supra* note 138, at 98.

¹⁴⁵ See J. Jimenez, *supra* note 138, at 99-100.

¹⁴⁶ See *supra* text accompanying note 123.

¹⁴⁷ See *supra* notes 108-12 and accompanying text.

threatened by the *COMS* doctrine,¹⁴⁸ both directly and indirectly.

C. *COMS and Industrial Democracy*

The most direct effect of *COMS* is that once employees have attained a degree of industrial democracy through collective bargaining, the employer may refuse to negotiate a successor agreement or may move to clarify the existing bargaining unit out of existence. Thus, under *COMS*, a faculty that is considered to have achieved managerial authority through collective bargaining loses the assurance of democratic process provided by the labor laws. With this loss may come a repossession of faculty decisionmaking power, for once the faculty is outside the Act's protection, any concessions of authority made to it by the administration may be unilaterally revoked. Although the faculty may then reunite,¹⁴⁹ the sisyphian nature of this endeavor is all too obvious.

The indirect result of *COMS* is potentially more unsettling than the loss of the democratic bargaining process. Employees interested in other than economic benefits of collective bargaining must face the prospect that any successful campaign to secure some degree of control over their workplace could lead to losing the protections of the Act. This realization will chill unionization efforts where such efforts are motivated primarily by noneconomic concerns. It may also have the unfortunate effect of encouraging employees to pursue primarily economic gains and to eschew more meaningful decisionmaking concessions. The lesson becomes clear: if industrial democracy is your goal in unionization, you cannot pursue it for fear of attaining it.

COMS conceives of the goals of collective bargaining as purely economic in spite of the tantalizingly broad language of the Act.¹⁵⁰ So to restrict the range of possible outcomes of collective bargaining is to defeat attempts to achieve democracy in the workplace. The American labor laws have been criticized for "articulat[ing] an ideology that aims to legitimate and justify unnecessary and destructive hierarchy and domination in the workplace."¹⁵¹ After *COMS*, the fears of some of the harshest critics of the development of American labor law appear all

¹⁴⁸ See *supra* text accompanying notes 82-87.

¹⁴⁹ See *supra* text following note 107.

¹⁵⁰ The Act states that employees may choose representatives to bargain for them with management over "rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. § 159(a) (1982) (emphasis added).

¹⁵¹ Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450, 452 (1981). See also Stone, *supra* note 4, at 1513-14.

too real.

Moreover, nothing about the *COMS* doctrine limits its application to institutions of higher education. Indeed, the managerial exclusion itself was developed in an industrial context¹⁵² and was transferred into the context of university employment in *Yeshiva*. Just as *Yeshiva* has been held applicable in noneducation managerial employee cases,¹⁵³ *COMS* may be extended to other situations where employees attain authority solely through the operation of the collective bargaining process.¹⁵⁴ Although *COMS* rests upon *Yeshiva* for specific support, its real basis is in the general managerial employee exception. Indeed, it includes within the managerial employee category any employee who possesses "managerial" authority regardless of the source of that authority. "Nontraditional" management structures are, therefore, also threatened by the *COMS* doctrine.¹⁵⁵

III. RESOLUTION OF THE *COMS* DILEMMA

The problem with the *COMS* doctrine lies in the fact that it operates effectively to suppress industrial democracy as a goal of collective bargaining and by extension as a goal of the Act. One simple way to resolve this problem is to recognize *COMS* as an improper extension of *NLRB v. Yeshiva University*¹⁵⁶ that should be overruled. *Yeshiva*, upon which *COMS* rests, was not intended to reach beyond the limited realm of "mature" universities.¹⁵⁷ As detailed above, mature institutions pre-

¹⁵² See *infra* notes 164-65 and accompanying text.

¹⁵³ See *supra* note 80 and accompanying text.

¹⁵⁴ For example, should employees who are elected into positions of authority by fellow employees pursuant to the provisions of the collective agreement be precluded from being employees under the Act? See *generally*, *Cooperativa de Credito y Ahorro Vegabajena*, 261 N.L.R.B. 1098 (1982) (election of two employees to "assembly of delegates," which exercised power over the enterprise, did not render them managerial; the Board characterized the exercise of power as "rare and insignificant").

¹⁵⁵ See *generally* Note, *supra* note 67 (suggesting that the goals of nontraditional management structures may be frustrated by application of managerial employee doctrine); Markham, *supra* note 122, at 235 (modification of Act may be required to implement a real shared decisionmaking system); Note, *supra* note 119, at 626-27 (suggesting natural tension exists between the Act and unionization of worker-owned firms).

¹⁵⁶ 444 U.S. 672 (1980).

¹⁵⁷ "Maturity" as an analytic concept is less than precisely defined. The only real touchstone available for giving it content is a factual comparison of the institution in question with a model institution. This is the course followed by the Board and the courts after *Yeshiva*. See *supra* notes 76-77 and accompanying text. The approach advocated in this Comment adds a new element to this examination: the nature of the evolution of faculty-administration power relationships.

This solution to the problem presented by *COMS* will be limited, as will any solution that accepts as a baseline the correctness of *Yeshiva*. That decision stands for the limited proposition that faculty at "mature" universities are managerial for the

sumably are characterized by stabilized power relationships developed over a substantial period of time, and are therefore significantly different from those institutions in which authority is gained solely through collective bargaining.¹⁵⁸

Power distributions created through collective bargaining, in contrast, are subject to significant and abrupt shifts at regular intervals as contracts are renegotiated or interpreted by arbitrators. Although the definition of maturity outside the university setting may prove difficult, the recognition of the differences between institutions that are "mature" in the *Yeshiva* sense and those that are not would prevent the spread of COMS-like doctrine.¹⁵⁹

On a more fundamental level, however, the difficulty with COMS is that it, like *Yeshiva*, is rooted in the poorly conceived doctrine of "managerial employee." The exclusion of such employees does not rest on the language of the Act. It rests instead partially on the 1947 exclusion of supervisors and partially on Board-created doctrine antedating those amendments.¹⁶⁰ Pre-1947 board decisions did not draw a fine line between supervisors and managerial employees, but instead treated employees described as supervisors in the 1947 amendment (for example, foremen) as excluded because they possessed managerial authority.¹⁶¹ The Court has consistently interpreted the 1947 amendments as manifesting a broad desire on the part of Congress to exclude a large class of employees: all those excluded by the Board as supervisory or managerial prior to *Packard Motor Car Co. v. NLRB*.¹⁶²

The modern managerial employee exclusion serves to lock federal labor policy and law into acceptance of a model of labor relations based on conventional industrial hierarchies. As such, it is unresponsive to changes in the nature of the American economy and is destructive of the core policy values of the Act. Moreover, even the purpose behind the 1947 amendments is not served by exclusion of those employees who possess their authority only as a collective.¹⁶³ The supervisory exception was passed to exclude from the Act's protection those individu-

purposes of the Act. Although one can argue that this result may be correct if true collegiality of decisionmaking exists, the faculty's desire for union representation proves that such collegiality did not exist at Yeshiva University. Moreover, even in a "mature" institution, employees need the protection of the Act. See *supra* text accompanying notes 69-73; *infra* note 167 and accompanying text.

¹⁵⁸ See *supra* notes 98-101 and accompanying text.

¹⁵⁹ See *supra* text accompanying notes 58-62.

¹⁶⁰ See *supra* text following note 14.

¹⁶¹ See *supra* note 17; see also Lee, *supra* note 66, at 237.

¹⁶² 330 U.S. 485 (1947).

¹⁶³ See *supra* note 24-25 and accompanying text; see also Comment, *Supervisory Status*, *supra* note 66, at 185-86 & n.136; Note, *supra* note 67, at 721-30.

als who possessed certain types of authority within the shop,¹⁶⁴ in order to prevent such supervisors from dominating rank and file unions or, conversely, from being dominated by rank and file unions.¹⁶⁵ This purpose presupposes an adversarial labor-management structure in which the two groups have distinct roles and differing interests. The managerial exclusion is based on an extension of the same reasoning: managerial employees' functions align them so closely with their employer that they cannot bargain with other employees. In a system of shared authority, however, the exercise of decisionmaking authority does not make employees managerial instruments of the employer. In such a system, employees have a voice in decisionmaking because the workplace has been democratized: they are a distinct group participating with management in running a democratic workplace. The *COMS* decision misses this distinction.

Authority vested in a collective is not susceptible to the abuses feared by those who drafted the 1947 amendments. An individual in this type of system does not possess sufficient authority to dominate or influence rank and file unions, nor does the individual acting alone possess sufficient authority "to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees . . . or to effectively recommend such action"¹⁶⁶ without the approval and consent of fellow workers. Moreover, because management does not consider such an individual to be its agent, it does not expect, nor is it entitled to, her undivided loyalty.

It is also erroneous to assume that once employees have attained a voice in workplace decisions, they are on an equal footing with management and therefore can dispense with the protection of the labor laws. Although the interests of labor and management overlap more in a system of shared authority than they otherwise do, they are never identical. Even in a truly collegial setting, individual employees need the representation of a union when they are forced into conflict with the whole or are championing a minority position.¹⁶⁷ Especially where the structure of shared decisionmaking has been achieved through collective bargaining, employees need the continued support of the Act to preserve the democratic nature of their workplace.

¹⁶⁴ The legislative history of the supervisory exception is heavily tied to examples drawn from the context of heavy, mass production industries and is also heavily tied to the exclusion of such employees as foremen. See H.R. REP. NO. 245, 80th Cong., 1st Sess. 13 (1947).

¹⁶⁵ See H.R. REP. NO. 245, 80th Cong., 1st Sess. 14 (1947); S. REP. NO. 105, 80TH CONG., 1ST SESS. 4 (1947).

¹⁶⁶ 29 U.S.C. § 152(11) (1982).

¹⁶⁷ See J. Witte, *supra* note 5, at 152-53.

When these considerations are brought to the university context, it is obvious that the purposes of the 1947 amendments are not served by excluding faculties. The 1947 amendments reflected two concerns of Congress.¹⁶⁸ Congress wished to prevent the domination of rank and file unions by supervisory employees,¹⁶⁹ and it wished to prevent the division of supervisory employees' loyalty between employer and union.¹⁷⁰ The exclusion of employees who, like faculty members, are in a real sense rank and file serves neither of these purposes. Faculty, if able to unionize, would not be able to dominate rank and file units. They are the rank and file themselves. Moreover, if the exclusion of faculty members at present is based on the amount of independence they have, the "loyal agent" theory also loses much of its force. Faculty members much more closely resemble regular employees than supervisors upon whom management relies to direct the rank and file. Thus, a strong argument can be made that the managerial exclusion should not be applied to faculty at all, whether or not their university is "mature."

Faculties that exercise decisionmaking authority are but one group to whom the managerial exclusion should be inapplicable. No employee who works in a system of shared authority should be denied the protection of the Act on the ground that she performs a managerial function. If industrial democracy is a goal of the Act, it hardly furthers this purpose to remove from the purview of the labor laws the most democratic working situations. When a structure of shared authority has been achieved by means of the democratic process of collective bargaining, depriving employees of the protection of the Act will seriously undermine the goal of industrial democracy. To accept this argument, one need not assume that Congress, in passing the labor laws, intended to bring about industrial democracy in the fullest sense: joint authority exercised by labor and management. The more limited form of industrial democracy is also endangered by misapplication of the managerial exclusion. Democracy in this sense encompasses the relationship between workers and their representatives and between those representatives and management, as well as the process by which labor and management come to an agreement on the terms and conditions of employment. When the Act's protection is denied to workers who are not agents of management, this democratic structure is weakened.

¹⁶⁸ See *supra* text accompanying notes 23-28.

¹⁶⁹ H.R. Rep. No. 245, 80TH CONG., 1ST SESS. 14 (1947).

¹⁷⁰ *Id.* at 16.

CONCLUSION

In *College of Osteopathic Medicine and Surgery*, the Board fashioned a new and enormously powerful doctrine. This doctrine vitiates much of the policy behind the National Labor Relations Act, and will produce untoward results in a variety of labor-management settings. The Board, in reaching its holding that managerial authority attained solely through the operation of a collective bargaining agreement was sufficient to warrant exclusion of the employees concerned as managers, misapplied the perceived doctrinal basis of its decision and neglected to consider its potential impacts. "Managerial" authority, if an appropriate ground for excluding employees at all, cannot be attained solely through the exercise of the right to bargain collectively created by the Act. The logic of the Board's decision threatens to transform the Act into a device for the protection only of economic bargaining. Such a transformation would be a betrayal not only of the plain meaning of the Act, but also of the purpose and intent of the Act at its passage in 1935.