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THE SIGNIFICANCE OF THE SUPERVISORY AND MANAGERIAL DEFINITIONS IN THE ILLINOIS EDUCATIONAL LABOR RELATIONS ACT AND THE PUBLIC LABOR RELATIONS ACT OF ILLINOIS

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THE “SUPERVISORY” AND “MANAGERIAL” EXCLUSIONS OF THE ILLINOIS ACTS

In 1983, the Illinois General Assembly enacted two significant pieces of legislation which address public employee collective bargaining; the Illinois Educational Labor Relations Act (“IELRA”), and the Public Labor Relations Act of Illinois (“PLRA”). These Acts follow a pattern set by the 1947 Taft-Hartley Amendments to the National Labor Relations Act in dividing the work force between supervisory employees, who are “unprotected” by the Acts’ provisions, and other employees who are “protected.”

The IELRA effective January 1, 1984, covers all public educational systems and institutions in the State. The IELRA exempts “supervisors” from the Act’s coverage. A supervisor is defined as:

[A]ny individual having authority in the interests of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, reward or discipline other employees within the appropriate bargaining unit and adjust their grievances, or to effectively recommend such action if the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment. The term ‘supervisor’ includes only those individuals who devote a preponderance of their employment time to such exercising authority.

The IELRA also exempts “managerial employees” in addition to supervisors. The distinction made in the legislation between these two exempt classes follows a history of decisionmaking by the National Labor Relations Board (“NLRB”) and recent decisions of the Supreme Court of the United States in applying the supervisory exclusion of Taft-Hartley.

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1. 29 U.S.C. §§ 141-188 (1982). The definition of “supervisor” is at § 152(11).
In *NLRB v. Bell Aerospace Company*, the Supreme Court of the United States sustained the NLRB's decision to include managerial employees within the concept of excluded supervisory personnel, although such employees may not have a direct command responsibility for personnel within an enterprise's structure. The Supreme Court held that the Board, therefore, was within its statutory authority in removing this additional class of employees from the coverage of the Labor-Management Relations Act ("LMRA", the generally used title of the National Labor Relations Act, as amended by Taft-Hartley). In 1980, the Court applied its *Bell Aerospace* categorization of managerial employees in *NLRB v. Yeshiva University* to a private university's faculty by excluding the faculty from the coverage of the LMRA on the basis of their collective extensive control over the curriculum and academic affairs of the institution.

Against the backdrop of the Supreme Court decisions, the IELRA specifically exempts managerial employees, as well as supervisors. The IELRA defines a managerial employee as:

[A]n individual who is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of such management policies and practices.

The PLRA, effective July 1, 1984, covers most public employees in the State, aside from those in public education, police and fire personnel, and those in small units of government. The PLRA also divides the work force between supervisors and managerial employees on the one hand, and other employees, on the other.

The PLRA exempts supervisors from the Act's coverage, defining this class of employees in a similar fashion as the IELRA:

"Supervisor" is an employee whose principal work is substantially different from that of his subordinates and who has authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, or discipline employees, or to adjust their grievances, or to effectively recommend such action, if the exercise of such authority is not of a merely routine or clerical nature, but requires the consistent use of independent judgment. The term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority.

The exempted managerial employee under the PLRA is defined as:

5. 444 U.S. 672 (1980).
[A]n individual who is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of such management policies and practices.9

Both the IELRA and the PLRA contain qualifications in the definitions of supervisor which demonstrate the intent to limit the scope of the exclusion as compared to the definition in the LMRA. The Taft-Hartley Amendments defined a 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 responsibility 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.10

The LMRA lists the indicia of supervisory status. The NLRB has consistently held that if an employee, in the course of the employee’s usual work, performs in only one of the supervisory functions specified in the statutory definition of supervisor, the individual is excluded from coverage.11 The IELRA does not include within the definition the authority to “direct” employees and, most significantly, includes “only those individuals who devote a preponderance of their employment time” to exercising the supervisory authority set forth in the Act.12

The PLRA also underscores the requirement that the supervisory exemption was intended to be applied to a more limited class of employees than in the private sector under the LMRA. The PLRA contains the same limitation as the IELRA to those “who devote a preponderance of their employment time to exercising such authority.” Additionally, the PLRA contains the proscription that a supervisor’s principal work must be “substantially different from that of his subordinates.”13 This caveat in the Act may be seen as a cautionary signal to the fact that the PLRA does include “direct” among the list of indicia of supervisory status.

The IELRA and PLRA definitions of managerial employee are

13. ILL. REV. STAT. ch. 48, § 1603(q) (1984) (emphasis added). There is also the ambiguous reference in the definition to “State supervisors notwithstanding”. We need not dwell upon this qualification given the subject matter of this paper. A fair interpretation of the qualification is the intent not to include State employees having the word “supervisor” in their civil service title as, therefore, being automatically excluded “supervisors” within the meaning of the PLRA. As an example, employees holding titles within the Mental Health Supervisor civil service series would unlikely exercise significant authority over personnel or meet the “preponderance of their employment time” requirement.
identical. It is less clear than in the case of supervisors whether the Governor and the legislature intended to depart from the private sector. There is no statutory definition for managerial employees in the LMRA, nor a set definition established by the NLRA. Justice Powell, writing for the majority in Bell Aerospace, noted, with approval, prior Board decisions referring to managerial employees as those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer.” The Board and the Supreme Court did not limit “management policies” to personnel matters. Justice Powell cited NLRB decisions defining employees as managerial because they are more closely identified with those of management or representatives of management, although their work did not generally entail the supervision of bargaining unit employees.

It is fair to say that the language with respect to managerial employees in the IELRA and the PLRA is partially a pickup from NLRB decisions and the definitions employed by Justice Powell. Given that assumption, it is also reasonable to conclude that the Illinois Acts intend to avoid administrative decisions which would exclude any sizeable group of employees. The Acts require, as in the case of supervisors, that a person be predominantly engaged in executive and management functions and charged with directing the effectuation of management policies and practices. The Illinois Acts, by emphasizing the quantity and quality of management functions, appear to specifically focus their exclusion on those persons who are at or near the top of an administrative pyramid, rather than excluding employees based upon a perception that they have interests identical with the interests of those in control.

The simplest way of viewing the supervisory and managerial exclusions of the Illinois Acts is to assume that they represent a political


15. Id. at 285-86. Justice Powell cited various NLRB decisions, including those excluding buyers and assistant buyers, from coverage following the passage of Taft-Hartley. See Denver Dry Goods, 74 N.L.R.B. 1167 (1947); and Denton’s Inc., 83 N.L.R.B. 35 (1949).

16. Both the IELRA and PLRA exclude “confidential employees” from the Acts’ coverage. This paper does not specifically address this group of employees. Note that the exclusion relates to functions in connection with “management policies with regard to labor relations.” ILL. REV. STAT. ch. 48, § 1603(c) (1984) [PLRA]; ILL. REV. STAT. ch. 48, § 1702(n) (1984) [IELRA]. The definition for “confidential employees”, by referring to management only “with regard to labor relations” supports the view that the legislative intent was to restrict the “managerial” exclusion only to those generally in control of personnel policies.
compromise between a so-called pro-employer interest to limit the number of employees guaranteed collective bargaining and the right to strike and organized labor's interest in maximizing the number. According to that logic, the supporters of labor were required to accept the Taft-Hartley supervisory amendments, but were successful in narrowing the breadth of the exemption. The contrary view is advanced that the public's general interest is co-existent with that of the employer's; that those parts of the Acts which strengthen labor's ability to engage in collective action result inevitably in a diminution of public services and higher taxes to pay for increased wages. This view may accept the right to collective bargaining in principle, but it equates the public with the employer when one addresses labor relations in the

17. There is little reported legislative history with respect to the supervisory and managerial exclusions. In the Senate discussions of May 27, 1983, of Senate Bill 536 (the PLRA) prior to the Governor's amendatory veto, supervisory employees were not exempt from coverage but were required to be in separate bargaining units from non-supervisory personnel. The following exchange from the transcript of Senate proceedings of that date is instructive:

SENATOR KEATS:
[T]his bill states that supervisory and nonsupervisory personnel may not be joined in the same bargaining unit, why is that?

SENATOR COLLINS:
Because we could not arrive at agreeable language and so we did as the Federal Government that allowed them to be organized as a separate body . . . . To avoid conflict of interest.

SENATOR KEATS:
By this same token, would the board, in your estimation, act by rule to prevent unions representing supervisors from also representing nonsupervisory personnel?

SENATOR COLLINS:
No, because I think . . . the intent is that they would be one separate unit . . . . If the language need tightening up to make certain that . . . it doesn't happen, we will . . . tighten up the language.

Pages 301-02, May 27, 1983, Transcript of Senate proceedings. Following the Governor's amendatory veto of SB 536 and HB 1530, excluding supervisory and managerial personnel, the following exchange took place in the Senate:

SENATOR LUFT:
Managerial employee, the definition, is it determined by his title or by the role of the individual?

SENATOR BRUCE:
On . . . managerial employees, Senator Luft, I believe the Governor in . . . his definition made it very clear that it is . . . not the title. It is the question of the preponderance of time that the employee will spend in the question of management, and those people who would be excluded from management are only those people who would be limited to what is known as the central management team. So, I would believe that . . . it is not the title.

SENATOR LUFT:
Okay. As a managerial employee, is that normally the central management team?

SENATOR BRUCE:
I believe that we will be using NLRA decisions, the National Labor Relations Act, [which] have very narrowly defined managerial employees, and I believe that that will be here . . . that that function of management would be limited to and kept within a central management team. We're not talking about excluding everyone, just those very limited people who are central management, at the very highest level.

Transcript of Senate Proceedings, Reel Two, on House Bill 1530, Lines 77-117, November 2, 1983.
public sector.18

CIVIL SERVICE—A DIFFERENT APPROACH TO CATEGORIZING EMPLOYEES

The supervisory and managerial exemptions are founded upon a premise that there are divided loyalties within the work force. Statutorily exempting certain classes of employees from any collective bargaining rights strengthens employee loyalty beyond the immediate work force, dividing employees in all work forces into two basic classes—the "employer" and the "employed". Collective conduct and goals are deemed appropriate only for one group. This distinction is of a different order than legislative or administrative decisions which separate employees by appropriate bargaining units or even require supervisors to be in different local labor organizations than those employees over whom they have direct or indirect authority.19

The division of the work force in the private sector into two classes was mandated by Congress with the Taft-Hartley Amendments. The history of labor relations in industry prior to the National Labor Relations Act and the period between the Wagner Act of 1935 and the Taft-Hartley Amendments does not include any significant events in the public sector. Legislation addressing the working conditions of government employees in the twentieth century was not in response to or defined in terms of inherently divergent interests between employer and employee classes. Reform legislation at the turn of the century in Illinois and elsewhere was adopted to constrain perceived conflict between the public and its employees, on the one side, and the interests of political professionals and party organizations. The idea behind civil service systems was to immunize practically all of a government's employees from political favoritism, and award merit and efficiency. With that goal in mind, civil service legislation in Illinois followed a very different approach to employee exemptions from collective bar-

18. The Report of Advisory Commission on Intergovernmental Relations, GERR RF-1, 51:101, published March, 1970, strongly recommended that the states draw a distinct line between supervisory and managerial employees from the rank-and-file in legislating collective bargaining rights "in order to protect the position of public employers." Then Mayor Lugar dissented from the majority position because of the preexisting community of interest among "supervisors and professional workers . . . with the rank and file they supervise." 51:104-105.

19. Police Ass'ns v. Barrett, 111 L.R.R.M. (BNA) 2728 (N.D. Ga. 1982), upholding the constitutionality of a county resolution prohibiting police sergeants from being in the same local labor organization as the patrolmen for collective bargaining purposes. The court confirmed that the two groups of employees could belong to the same local fraternal order of police as long as the organization did not aspire to be a bargaining representative. See also Elk Grove Firefighters v. Willis, 539 F.2d 714 (7th Cir. 1976).
gaining than did the recent public employee collective bargaining legislation.

The employees of the State of Illinois have been and remain subject to the Personnel Code, the civil service system for most of the employees under the Governor's executive authority. The comparable provisions for supervisory and managerial exemptions are contained in the "general and partial exemptions" sections of the Code.21 The relevant provision of the "general exemption" excludes from civil service coverage:

Directors of Departments, the Adjutant General, the Assistant Adjutant General, the Director of the State Emergency Services and Disaster Agency, members of boards and commissions, and all other positions appointed by and with the consent of the Senate.

In the "partial exemption" section, one or two private secretaries and one confidential assistant to each of the individuals excluded in the "general exemption" are excluded from coverage. Also excluded are the resident administrative head of each State charitable, penal and correctional institution.

The State's optional civil service system, which may be adopted by local governmental units, contains similar limited exemptions.24 The key provision of the Municipal Code exempts from collective bargaining the heads of any principal department of the municipality, the chief librarian of the public library, police officers above the grade of captain, a health officer, one private secretary of each of the elected municipal officials and the municipal manager, and administrative assistants to the mayor or municipal manager.

The supervisory and managerial exemptions in the University Civil Service System for the State's colleges and universities are restrictive. Principal administrative employees of each institution and agency as determined by the Merit Board, a civil service commission, are exempted.

The legislatures early aim of reducing conflict between government employees and political organizations, and the public's interest behind civil service reform, were supported by the Illinois Supreme Court.

In *Akin v. Kipley*, the court validated the civil service legislation, and rejected the idea that public officials could create a myriad of departments or principal administrators and, thereby, increase the number of exempt employees. The court was concerned with limiting the power of elected officers and political parties to utilize their control over public employment in contravention to the public's interest in merit and efficiency. The opinion of the supreme court, in relevant part, observed:

The construction thus contended for would prevent the fulfillment of the object contemplated by the act itself. If it be once held, that there can be other "heads of any principal department" than those existing in the ordinances at the time the act was passed, then new "heads" may from time to time be created by the common council, or the appointing officers; and every foreman, who has a squad of men at work under him, will be considered the head of a department. The object of the law is to provide for appointment to office upon the basis of merit and fitness, as ascertained by competitive examinations which are open and free to all. But if the doctrine is to prevail, that new heads of any principal department may be created whenever the exigencies of politics or the demands of partisan service require it, appointments upon the basis of merit and fitness will soon cease to be made.

In the years that followed, the Illinois courts allowed some erosion of the strict merit concept. Illustrative are cases from the City of Chicago, sanctioning the creation of new exempt positions through the establishment of additional departments and the transfer of work functions from classified job titles to exempt personnel.

This paper does not attempt to evaluate whether civil service in Illinois has actually worked as envisioned. The system certainly did not attempt to address the economic concerns of public employees. Rather, the paper looks at the historical antecedents to collective bargaining with respect to supervisory personnel within the conceptual framework that developed prior to passage of the IELRA and the PLRA and still exists.

Civil service legislation characteristically has frequently attempted to deal not only with the classification, selection and promotion of employees, but also with an objective procedure for handling employee complaints and grievances. This point is interesting in that a grievance procedure within a civil service system may require the interaction of

28. 171 Ill. 44, 49 N.E. 229 (1898).
29. *Id.* at 81-82, 49 N.E. at 241-42.
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classified personnel at different stages of the complaint process. Such procedures do not contemplate that divided loyalties exist between employees in the supervisory and subordinate positions, although all are a part of the same system. Even the question of such employees being part of the same labor or employee protective organization appears only to have been challenged when the prospect of collective bargaining appears.\(^3\)

An example of a grievance procedure within a civil service system is the one which has been in place for the State's employees, as mandated by the Personnel Code.\(^3\)2 The Personnel Rules for classified State employees have provided for a four step procedure by which the complaining employee presents a grievance. First, it is presented to the immediate supervisor, then to the next higher supervisor. In step 3, the employee first reaches an exempt supervisor, the head of the operating agency,\(^3\)3 if the grievance remains unresolved.

Civil service systems, as they relate to standards for the classification, selection and advancement of employees, still exist for state employees and within the public educational systems for non-academic personnel. The Collective Bargaining Acts did not supplant civil service.\(^3\)4

PRE-TAFT-HARTLEY: A LESS STRATIFIED VIEW OF THE WORK FORCE

The Wagner Act was borne on the winds, or more accurately, the

\(^3\)1 Police Ass'ns v. Barrett, 111 L.R.R.M. (BNA) 2728 (N.D. Ga. 1982); Elk Grove Firefighters v. Willis, 539 F.2d 714 (7th Cir. 1976). As a matter of constitutional law, public employees, regardless of their employment status, unlike private sector employees excluded from the LMRA, enjoy the right of free association, including labor organizations. Thomas v. Collins, 323 U.S. 516 (1945); McLaughlin v. Tilenidis, 398 F.2d 287 (7th Cir. 1968); American Federation of State, County & Mun. Employees v. Woodward, 406 F.2d 137 (8th Cir. 1969).

\(^3\)2 The Personnel Code directs the Director of Central Management Services (formerly the Director of Personnel) to establish "a plan for resolving employee grievances and complaints, excluding compulsory arbitration." ILL. REV. STAT. ch. 127, ¶ 63b108c(1) (1983).


\(^3\)4 The IELRA and PLRA contain provisions that collective bargaining may "supplement, implement, or relate to the effect of... provisions in other laws [relating to hours, wages and working conditions]." ILL. REV. STAT. ch. 48, ¶ 1607 (1984) [PLRA]. A similar provision is in the IELRA, ILL. REV. STAT. ch. 48, ¶ 1710(b) (1984). Governmental bodies other than state government and education may be "home rule units" under the Constitution of the State of Illinois with the authority to adopt, revoke or modify a civil service system. Local and county governments which are not home rule units may or may not have adopted civil service, as provided by state statutes. ILL. CONST. art. 7, ¶ 6. See Stryker v. Village of Oak Park, 62 Ill.2d 523, 343 N.E. 2d 919, cert. denied, 429 U.S. 832 (1976), affirming right of municipality to modify, by ordinance, its civil service system, at variance with the provisions of the state statute, adopted by the municipality prior to the adoption in 1970 of the new Illinois Constitution.
flames of economic and social conflict. Much of the turmoil preceding passage of the NLRA centered on overt economic and, at times, physical battles between employers in the private sector and those who were employed or sought jobs. The preamble to the Wagner Act recited the need for legislation to legitimize and protect collective bargaining in response to "strikes and other forms of industrial strife or unrest" because of the "denial by employers of the right of employees to organize." The preamble asserted that collective bargaining would provide two fundamental benefits for workers: (1) the opportunity for equality of bargaining power with employers who are organized in the corporate or other forms of ownership association; and (2) protecting their full freedom of association, self-organization, and designation of representatives of their own choosing.  

Clyde Summers has stressed that one of the primary goals of the Wagner Act was to democratize the workplace. The preamble to the Act reflects a legislative intent to translate the established institutions of a democratic political state to the workplaces of the industrial age.

During the twelve years between the Wagner Act and Taft-Hartley, the NLRB drew distinctions between supervisory (including managerial) personnel and other employees. However, this categorization of employees by the NLRB was principally in the context of unit determinations. One of the primary functions of the NLRB has been the designation of appropriate bargaining units as part of the process of conducting representation elections and certifying an exclusive representative for a defined group of employees. The Boards under the IELRA and PLRA have the same authority within their jurisdictions as the NLRB.

The NLRB, during the Wagner Act era, had developed a policy of placing supervisory personnel in separate bargaining units, while extending to them the Act's protection. The landmark decision of the Supreme Court of the United States in Packard Motor Car Company v. NLRB, in 1947, is a benchmark between the Wagner and Taft-Hartley eras. In a 5-4 decision, the Supreme Court upheld the decision of the NLRB that general foremen and foremen of a major auto manufac-

turer were "employees" within the meaning of the NLRA and entitled to a representation election to select a bargaining representative.\textsuperscript{39}

Justice Jackson, writing for the majority in \textit{Packard Motor Car}, held that the Wagner Act made no exception to the definition of "employee" which could justify the exclusion of a class of employees from coverage. Justice Jackson went on to criticize the employer's efforts as contrary to policies underlying the Act. The Justice rejected the argument that the work force should be divided by a strict line of competing loyalties:

Even those who act for the employer in some matters, including the service of standing between management and manual labor, still have interests of their own as employees. Though the foreman is the faithful representative of the employer in maintaining a production schedule, his interest properly may be adverse to that of the employer when it comes to fixing his own wages, hours, seniority rights or working conditions. He does not lose his right to serve himself in these respects because he serves his master in others. And we see no basis in this Act whatever for holding that foremen are forbidden the protection of the Act when they take collective action to protect their collective interests.

The company's argument is really addressed to the undesirability of permitting foremen to organize. It wants selfless representatives of its interest. It fears that if foremen combine to bargain advantages for themselves, they will sometimes be governed by interests of their own or of their fellow foremen, rather than by the company's interest. There is nothing new in this argument. It is rooted in the misconception that because the employer has the right to wholehearted loyalty in the performance of the contract of employment, the employee does not have the right to protect his independent and adverse interest in the terms of the contract itself and the conditions of work. But the effect of the National Labor Relations Act is otherwise, and it is for Congress, not for us, to create exceptions.\textsuperscript{40}

Justice Douglas' dissent in \textit{Packard Motor Car} was based upon a different view of congressional history. The dissent contended that Congress had not considered the question of bargaining rights for supervision and, therefore, policy judgments should be deferred to the legislative body. Justice Douglas, by extensive footnoting of law review articles and philosophical works, noted that his disagreement with the majority is not on the basis of policy since much could be said to

\textsuperscript{39.} The United Automobile Workers, CIO (UAW) was the bargaining representative for the "rank and file workmen". The ratio of the UAW bargaining unit to the group sought to be represented by the Foremen's Association was approximately 32-1. This figure includes "assistant foremen" and "special assignment men" (troubleshooters) who may not have been "supervisors", as that term was defined in Taft-Hartley.

\textsuperscript{40.} 330 U.S. at 489-90.
support the majority view. Although he would deny foremen coverage under the Wagner Act, Justice Douglas reassured the foremen that irrespective of his position, the dissent does not mean that foremen have no right to organize for collective bargaining. And some states have placed administrative machinery and sanctions behind that right.

**TAFT-HARTLEY—LEGSILLATING DIVIDED LOYALTIES**

*Packard Motor Car* was a major stimulus to passage of Taft-Hartley. The amendments to the NLRA directly evolved from the definitions of supervisors which had been used by the NLRB in treating unit determinations, as the basis for defining those employees to be excluded under the Act in the future.

The division of the work force imposed by Congress was reflected in the Taft-Hartley Amendments to the preamble of the NLRA. The prior references to policies favoring freedom of association by workers was eliminated. The new preamble delineates three groups, each of which should "recognize under law one another’s legitimate rights in their relations with each other." The three distinct groups are employers, employees, and labor organizations.

Following *Packard Motor Car* and the enactment of Taft-Hartley, the next most significant development in the law to reinforce stratification within the work force was *NLRB v. Bell Aerospace Company* in 1974. Justice Powell, for the majority, stressed the congressional concern in 1947 that there had been a weakening of employer loyalty brought on by the blurring of an appropriate line between management and labor by the earlier decisions of the NLRB. In turn, it had been decided that the lack of a clear distinction within the work force had affected industrial output and efficiency. Justice Powell’s reference to policy considerations and their impact upon production had come full circle from the policies described by Justice Jackson a generation earlier. Justice Powell cited Congress’ rejection of *Packard Motor Car* and the policy premises of the majority opinion:

41. *Id.* at 500.
42. *Id.* at 500-01.
44. See, e.g., L.A. Young Spring & Wire Corp., 65 N.L.R.B. 298 (1946).
Significantly, both the House Report and the Senate Report voiced concern over the Board's broad reading of the term "employee" to include those clearly within the managerial hierarchy. Focusing on Mr. Justice Douglas' dissent in *Packard*, the Senate Report specifically mentioned that even vice presidents might be unionized under the Board's decision. It is also noted that unionization of supervisors had hurt productivity, increased the accident rate, upset the balance of power in collective bargaining, and tended to blur the line between management and labor. The House Report echoed the concern for reduction of industrial output and noted that unionization of supervisors had deprived employers of the loyal representations to which they were entitled. And in criticizing the Board's expansive reading of the Act's definition of the term "employees," the House Report noted that "[w]hen Congress passed the Labor Act, we were concerned, as we said in its preamble, with the welfare of 'workers' and 'wage earners,' not of the boss."47

The division of the work force following Taft-Hartley has been reinforced by other key decisions of the NLRB and the Supreme Court of the United States.

Shortly after the enactment of Taft-Hartley, the NLRB held that it is sufficient that an individual possess a single indicium of supervisory status, including only the authority "responsibly to direct" other employees, to be exempted from coverage of the Act.48

The fact that a "supervisor" may also perform work functions that are not managerial does not change the individual's exempt status. The employer may be obligated to negotiate with a certified or recognized bargaining representative concerning the transfer of work functions from the bargaining unit to supervisory personnel; but, may not be compelled to reach agreement.49

The Supreme Court's decision in 1974 in *Beasley v. Food Fair, Inc.*50 unequivocally invalidated Justice Douglas' observation in the *Packard Motor Car* dissent that supervisors under the Wagner Act had reserved rights to participate in labor organizations or seek protection under state laws. A unanimous Court concluded that the Taft-Hartley Amendments had preempted the right of state legislatures to pass or enforce protective labor legislation for supervisors and, presumably, managerial employees in the private sector.51

47. *Id.* at 281-82 (citing H.R. REP. No. 245, 80th Cong., 1st Sess. 13 (1947) (footnotes omitted)).
51. See also Florida Power & Light v. IBEW, 417 U.S. 790 (1974), holding it not to be a
In recent years, the Supreme Court has held that a supervisor remains unprotected by the LMRA if dismissed from employment because of union membership or support of a labor organization. The fact that the employer's action was motivated as a demonstration to the rank-and-file that the employer opposed unionization of all the work force does not afford protection. 52

THE EFFECTS OF THE SUPERVISORY AND MANAGERIAL EXCLUSIONS IN THE PRIVATE SECTOR

The effects of the division of the work force since Taft-Hartley has received little public attention following 1947 and has not been a matter of general political debate. There are certain broad conclusions which are apparent. For those opposed to collective bargaining within our economic system or the growth of labor organizations, then legislation which enables employers to reserve part of its work force from protected organizing activity, negotiations and concerted economic and political activity is in a positive direction.

One would assume that the proponents of unionization oppose the exclusion of supervisors or managerial employees from protected labor activities. Nevertheless, this aspect of Taft-Hartley has not been in the forefront of labor's political efforts in Congress since 1947. It is difficult to determine whether labor's lack of initiative in this regard is a result of assessment of political realities or ambivalence toward organizing those who have been part of a different class within the private sector work force as compared to those who constitute the predominant membership of unions. It appears that the reality of this unprotected part of the work force is most keenly felt by labor when faced with an employer's threat or ability to maintain operations in the face of an economic strike.

Apart from the direct impact of the exclusions embodied in Taft-Hartley on labor relations, one may speculate to what extent there has been an effect upon industrial organization and the culture of the society, in general. The Bureau of Labor Statistics does not regularly publish data on the number or ratio of supervisors, or other personnel violation of Section 8(b)(1)(B) of the LMRA for a union to fine a supervisor-member for crossing a picket line.

excluded by the LMRA by enterprise or industry.\textsuperscript{53}

There are important questions which are not generally considered: (1) would the cost of management and supervision have followed a different curve if the Taft-Hartley exclusions had not been adopted; and (2) would private concerns have continued to develop pyramidal organizations with multiple levels of management to administer the work force, or would there have been a thrust toward a minimum of expert supervision? One encounters few private operations with collective bargaining agreements that do not provide a higher salary for the front line supervisor than the top negotiated wage rate for the rank and file under them. It follows that the salary for the lowest supervisor in the pyramid becomes the base from which the ascending order of management is compensated.

The cost of supervision is compounded by the fact that in organized industries a line is usually drawn between bargaining unit work and supervision. Except in the crafts, the era of the working foreman in industry which existed prior to Taft-Hartley is vanishing. The first line supervisor may now be a low level young executive who is likely to be inexperienced in the work functions of those that he supervises.

It is even more difficult to ascertain the extent to which the line drawn between those inherently loyal to the employer and those for which collective action was deemed to be appropriate has permeated members of the work force's view of their own relative worth and status, whether or not organized. It is arguable that groups of employees reject unionization because their self-esteem is threatened, regardless of their actual or relative economic and social condition in the society.

Within the last ten years, we are witnessing a growing concern that the structure of the work force that has developed in the post Taft-Hartley era is impeding industrial efficiency and the American ability to compete in the marketplace. Much of that concern centers upon the collective bargaining system and the legal framework established under the Wagner Act and Taft-Hartley. The supervisory—rank-and-file dichotomy built into the LMRA has direct implications to changes taking place in the structure of the work force. One approach has been to attempt to accommodate the collective bargaining process to a less rigidly divided work force. The other is in the direction of expanding the

\textsuperscript{53} Unpublished employee census data has placed the ratio of "exempt personnel" to those covered by collective bargaining agreements, in one of the largest corporations in the country, at one to four.
relative number of employees who are exempted from coverage under the LMRA, utilizing the "managerial" classification.

The first approach aims to foster management and labor joint decisionmaking in the productive process through various forms of committees or representative bodies drawn from different elements within the total work force of an enterprise. The legal problem with engineering this approach has been the restrictions of the LMRA against employer interference with worker organizations and the definition of supervisor in the LMRA. In 1959, the Supreme Court of the United States in *NLRB v. Cabot Carbon Company*,\(^5\) held it was violative of the Act for an employer to establish employee committees of union eligible personnel to review work practices and conditions.\(^5\)

In 1978, Congress passed the Labor-Management Cooperation Act as an amendment to the LMRA.\(^6\) The stated purpose of the Act was to provide a mechanism by which employers and workers could engage in joint efforts in "achieving organizational effectiveness" and "to encourage free collective bargaining." Joint committees organized by employers and labor organizations representing employees in a particular plant, area, or industry are sanctioned and may receive support and financial assistance from the Federal Mediation and Conciliation Service. The Service is prohibited from assisting any joint group which is found "to have as one of its purposes the discouragement of the exercise of rights contained in Section 7 of the [NLRA], or the interference with collective bargaining in any plant, or industry."\(^5\)

The Supreme Court's decision in *NLRB v. Yeshiva University*\(^5\) reflects the other approach. Justice Powell, writing for the majority in a 5-4 decision, reasoned that the commitment of the faculty at a private university to their professional calling was so intertwined with the basic

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54. 360 U.S. 203 (1959). Cf. *NLRB v. Streamway Div. of the Scott & Fetzer Co.*, 691 F.2d 288 (6th Cir. 1982), rejecting the NLRB's determination that an employer organized in-plant committee to obtain employee attitudes concerning working conditions was violative of the LMRA. The Sixth Circuit held that inasmuch as the membership of the committee rotated, it was not really a representative body, but direct communications with the employees, an allowable action by an employer under § 185(b)(2) of the Act.

55. § 158(a)(2) of the LMRA subjects an employer to an unfair labor practice "to dominate or interfere with the formation or administration of any labor organization." For discussion of the interplay between the legal constraints of the LMRA and worker participation in traditional "management" decisionmaking, see Behrens & Sollenberger, *The National Labor Relations Act: A Potential Legal Constraint Upon Quality Circles and Other Employer-Sponsored Employee Committees*, 34 LAB. L.J. 776 (1983); Nowak, *Worker Participation and Its Potential Application in the United States*, 35 LAB. L.J. 148 (1984).


57. Id.

58. 444 U.S. 672 (1980).
purposes of the employing institution that their loyalties must be assessed as fundamentally managerial in nature. Citing the Court's early decision in *NLRB v. Bell Aerospace Company*, the majority concluded, therefore, that the entire faculty of the university was excluded from coverage under the LMRA under the supervisory exclusion, rather than included pursuant to the definition of "professional" in the Act.\textsuperscript{59}

Under the *Yeshiva* approach, the closer there is a convergence within an enterprise between the services offered or sold and the employees providing the service, the more likely the employees can fall within the managerial exemption. This result is most likely when the employees are determined to have the characteristics of "professionals". The more enterprises are geared to providing services rather than industrial output, and the more enterprises rely upon persons having received academic training, the greater the percent of the work force which will likely fall into the managerial exclusion.\textsuperscript{60} In a sense, *Yeshiva* represents a full circle back to the Wagner Act, with a different result. Professor Summers articulates the view that it is unfortunate that the vision of the Wagner Act—greater democratization of the workplace through collective bargaining—has not been achieved. In *Yeshiva*, because the workplace was found to be saturated with employee participation and decisionmaking, the employees are exempted from the protections and rights provided by legislation.

**The Future for the Supervisory and Managerial Exclusions Under the IELRA and PLRA**

The definitions for "supervisor" and "managerial employee" in the Illinois Acts were drawn to avoid State administrative and judicial rulings which might parallel the decisions of the NLRB and the Supreme Court of the United States. The concepts of supervisory and managerial exclusions were accepted, but the definitions carefully drafted to limit the number in a work force who would qualify for the exception.

The civil service systems which preceded the IELRA and PLRA provided a framework by which employees, through promotional examination, experience and training, could advance from jobs with no

\textsuperscript{59} § 152(12) of the LMRA defines the term "professional employee", an included employee under the LMRA, but entitled to the option of selecting a separate bargaining unit and representative from other employees. Similar provisions are contained in the IELRA and PLRA, at § 1603(l) and § 1702(k), respectively.

\textsuperscript{60} For a criticism of the *Yeshiva University* decision, see Gray, *Managerial Employees and the Industrial Analogy: NLRB v. Yeshiva University*, 33 Lab. L.J. 390 (1982).
supervisory responsibilities to the higher echelons of management. There is no line in that system above which positions are characterized as inherently loyal to the employer. They are all public servants. Whether or not civil service has actually worked free of political interference, based upon merit and produced efficiency is another question. The structure of civil service exists and will likely be less subject to political influence in the selection and promotion of employees with the intervention of a collective bargaining representative.\(^6\)

The definitions of "supervisor" and "managerial employee" in the IELRA has particular significance to academic institutions, in light of *Yeshiva*. The requirement that an individual be devoted predominantly to supervising or major policy functions effectively eliminates the possibility that any of the teaching faculty would be excluded from a bargaining unit.

Similarly, the restrictive language in both Acts works against administrative decisions by the Boards under the IELRA and PLRA that would tend to equate the exercise of professional discretion with exempt managerial functions. A typical part of state and local government operations in which there is a continuing and substantial interaction between professional, technical, and other classes of employees is in institutions devoted to health care.

There are also many situations in the public sector in the State where the working foreman still functions, particularly in work associated with the crafts and labor, dealing with building maintenance, street repair, and parks and recreational areas. A comparable situation exists in many of the larger institutions for corrections and mental health where many individuals perform work functions, routinely, while having some supervisory responsibilities over other employees; for example, correctional officers (various classifications of prison guards) and mental health technicians (employees directly concerned with the housing, food, and recreation of mental patients). It is unlikely that any of these employees would be denied coverage under

\(^6\) The Illinois Acts protect covered "employees" from employer retaliation in response to employee "concerted activities" that are work related. This guarantee has been basic in all collective bargaining legislation since the Wagner Act. Although public employees enjoy the additional constitutional guarantee of freedom of association, those employees who are excluded from the Illinois Acts as supervisors or managers may be significantly more restricted in the exercise of such rights in light of the decision of the Supreme Court of the United States in *Connick v. Myers*, 103 S.Ct. 1684 (1983). The Supreme Court held that a public employee was subject to dismissal for soliciting involvement of other employees concerning work assignments in a local state district attorney's office. The Supreme Court held that the issue of work assignments for the lawyers in the office was not of sufficient public concern to override the elected officer's right to control employee conduct which is viewed as fostering disharmony and inefficiency.
either Act, either because of the absence of directing other employees among the indicia of a supervisor under the IELRA or the requirement that employees be principally devoted to supervisory or managerial activities.

The significant question is what will be the response of the principal executives and administrators and the governing bodies of government to the Acts. A substantial number of professionals and employees with administrative responsibilities among the present work force in governmental units and in public education do not spend a predominant amount or preponderance of their employment time solely exercising supervisory functions or with exercising the responsibility of directing the effectuation of management policies, as delineated in the Acts. Will there be the tendency to accept the present makeup of the work force within a collective bargaining system, or will there be an increase in the number of personnel who perform functions that fit within the statutory definitions of a supervisor or managerial employee? If the latter portends the future, then one can also expect that the salary base for the exempt class will be at a point above the highest rate negotiated in the collective bargaining agreement for those who are supervised or managed.

A different future is more likely. Given the limited resources of state and local government and the restricted supervisory and managerial exceptions allowed by the Illinois Acts, it is more reasonable to predict that the effect of the new laws should be to reduce inclinations toward growth in bureaucracies which resemble pyramids.