THE PROSPECTS FOR CONTINUED PROTECTION FOR PROFESSIONALS UNDER THE NLRA: REACTION TO THE *KENTUCKY RIVER* DECISION AND THE EXPANDING NOTION OF THE SUPERVISOR

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The National Labor Relations Act (NLRA) provides employees a number of protections. The statutory definition of "employee," however, excludes some classes of workers, such as supervisors. At the same time, the term "professional" has been interpreted to fall within the protective scope of the NLRA. The exclusion of supervisors from the protections of the NLRA, coupled with the inclusion of professionals, has created a growing tension that has threatened the protections afforded to professionals. Two recent Supreme Court decisions, NLRB v. Health Care & Retirement Corp. of America *and* NLRB v. Kentucky River Community Care, Inc.*, have increased these tensions.*

This note argues that employers, Congress, or the National Labor Relations Board (NLRB) can resolve the tension created by the NLRA and the recent restrictions on the rights of professionals. The author contends that employers, potentially the most responsive group, will utilize tests set forth in the Kentucky River *decision to further restrict the ability of professionals to organize under the NLRA. Similarly, Congress, although capable of taking decisive action, will continue to remain inactive. Therefore, the author argues that the most likely source of relief for professionals will be the NLRB. This note concludes, however, that the NLRB will address the issue through adjudication rather than rulemaking so that a definitive resolution will not be achieved.*

I. INTRODUCTION

Section 7 of the National Labor Relations Act (NLRA or Act) grants employees the rights "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[1] Based upon definitions contained within the NLRA and the interpreta-

1. 29 U.S.C. § 157 (2000).

tion of the Act by the courts, the term "employee" has been defined in such a way that some workers are granted the protections of the statute, whereas others are explicitly or implicitly excluded.[2] While any group of employees may organize, employers are only statutorily compelled to bargain with those explicitly covered by the Act.[3] Because the NLRA affords some protections only to statutory employees, the threshold question in determining who is granted the protections provided in section 7 is whether or not a group of workers are designated employees under the statute.[4] Primary among the controversies over which workers are classified as protected employees under the NLRA is the continuing debate over how to alleviate the tension between the definition of "supervisors,"[5] who are excluded from the protections provided to statutory employees, and "professionals,"[6] who are protected under the Act. Recent Supreme Court decisions, such as *NLRB v. Health Care & Retirement Corp. of America*[7] and *NLRB v. Kentucky River Community Care, Inc.*,[8] have considered the question of whether a group of employees (in both cases nurses) should be considered supervisors or employees. The Court's holdings in these two cases have constricted the protections given to professionals by formulating an expansive notion of who qualifies as a supervisor under the NLRA and by limiting the avenues available to professionals when attempting to avoid a finding of supervisory status.[9]

Despite the Court's recent decisions, there are opportunities for professionals to maintain protection under the Act and to potentially restore their status as protected employees to some degree. This note will explore how the context has changed for professionals seeking protections under the NLRA, particularly after the *Kentucky River* decision, and what can be done in the future to ward off continuing diminution of these protections. Although particular focus will be placed on the health care industry, the potential ramifications of the *Kentucky River* decision

2. *Id*. § 152(2) (setting forth the general definition of an "employee" under the statute which excludes *inter alia* agricultural workers, independent contractors, and supervisors); *id*. § 152(12) (defining professionals as a protected group under the NLRA); NLRB v. Bell Aerospace Co., 416 U.S. 267, 283–84 (1974) (citing the legislative history of the Taft-Hartley Amendments of 1947 as including managers among the employees that are an "impliedly excluded group" under the NLRA).

3. *See* NLRB v. News Syndicate Co., 365 U.S. 695, 699 n.2 (1961) (citing both section 14(a) of the National Labor Relations Act and Senator Taft's comments in the Senate Report to the Taft-Hartley Amendments that supervisors could organize and employers could recognize and bargain with them, but that this process would be completely voluntary).

4. *See* Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992) ("By its plain terms . . . the NLRA confers rights only on *employees* . . . ."); ABA SECTION OF LABOR & EMPLOYMENT LAW, THE BUREAU OF NAT'L AFFAIRS, 2 THE DEVELOPING LABOR LAW 1608 (Patrick Hardin et al. eds., 3d ed. 1992) [hereinafter THE DEVELOPING LABOR LAW].

5. 29 U.S.C. § 152(11).

6. *Id*. § 152(12).

7. 511 U.S. 571 (1994).

8. 532 U.S. 706 (2001).

9. *See id.* at 720–21; *Health Care*, 511 U.S. at 583–84.

extend far beyond the health care industry.[10] To determine the effect of the decision, a number of questions must be addressed. Will the effect of *Kentucky River* be broader than that of previous decisions addressing the tension between professionals and supervisors under the NLRA? What has been the initial response to *Kentucky River*? What action is likely to be taken after the decision? Will the probable response to the decision adequately protect professionals and, if not, what should be done? An analysis of these questions indicates that, despite the opportunities available to retain protections for professionals, *Kentucky River* will ultimately restrict the ability of professionals to organize due to the National Labor Relations Board's (NLRB) penchant to utilize the adjudicative process rather than its rulemaking power.

To determine how professionals can retain protections under the NLRA, it is necessary to review both the history of professionals under the Act and contemporary developments. Part II of this note will trace the historical treatment of both supervisors and professionals under the NLRA and how Congress, the NLRB, and the courts have struggled with the inherent tension arising from a statutory framework that excludes supervisors from the protections of the Act while simultaneously extending protections to professionals. Part III will analyze the impact of *Kentucky River*, focusing primarily on: (i) the initial reaction to the *Kentucky River* decision within the health care industry and beyond; (ii) the openings that were identified in the *Kentucky River* opinion that could potentially be used to halt further erosion of protections for professionals; (iii) the initial application of the *Kentucky River* holding and the NLRB's course of action following the decision in light of reactions to previous decisions; and (iv) the probable direction of labor policy in this area based on an examination of the actions that could be taken by the NLRB, Congress, and employers in the wake of the decision. Finally, part IV sets forth how the NLRB can maintain protections for professionals in the future by using their rulemaking power and focusing on the remaining openings identified by the Court in *Kentucky River*.

10. During this examination, special attention will be paid to the health care industry to show how the application of the statute has been applied to a particular industry in the past and to highlight the immediate impact of the decision. A focus on the health care industry is also necessary because both *Health Care* and *Kentucky River* deal with the classification of nurses. Although application of the rules regarding professionals with supervisory status may vary slightly according to the profession, these decisions have the potential to be felt across professions. For a detailed analysis of the historical development of the case law applicable to particular professions and any nuances therein, see John F. Gillespie, Annotation, *Who Are Professional Employees Within Meaning of National Labor Relations Act (29 U.S.C.S. § 152(12))*, 40 A.L.R. FED. 25 (1978).

II. HISTORICAL SURVEY OF THE SUPERVISOR AND PROFESSIONAL CONCEPTS UNDER THE NLRA

A. Original Protections Under the Wagner Act and Packard Motor*—1935 to 1947*

The Wagner Act[11]—which serves as the foundation for the modern NLRA—was passed in 1935.[12] Senator Wagner, the driving force behind the Wagner Act, not only secured the passage of a bill that gave workers the "triad of rights" to organize, collectively bargain, and engage in strikes and other concerted activities,[13] he strived to establish "effective protection of the right of workers to organize which would not be destroyed by court decisions."[14] One decision that would be left to the courts, however, was whether supervisors were protected under the statute's provisions. The Wagner Act had not specifically identified whether supervisors or professionals were covered.[15] Rather, the Wagner Act had granted protection simply to "employees."[16]

In *Packard Motor Car, Co. v. NLRB*, the Supreme Court ruled that supervisors were covered by the protections offered to statutory employees under the Wagner Act.[17] *Packard Motor* involved the efforts of foremen, who were responsible for a number of supervisory duties at the company's plants, to organize under the Foremen's Association of America.[18] Initially, the NLRB found that the foremen, even in light of their supervisory duties, were entitled to protection under the Act.[19] The Court agreed, focusing on the definitions of employee and employer and discounting the company's contention that the foremen were employers because they were "acting in the interest of an employer."[20] In addressing the company's argument, the Court noted that all employees by their very employment were required to work "in the interest of [the] employer."[21] The majority held that this language was a manifestation of Congress's intent to codify the respondeat superior principle in the context of the NLRA and was inserted to ensure that this principle would be

11. Except when explicitly noted, references in this paper will refer to the NLRA as currently amended. References to previous versions of the act and to specific amendments to the act will be noted as such.

12. Leon H. Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199, 200–01 (1960).

13. 1 THE DEVELOPING LABOR LAW, *supra* note 4, at 28.

14. HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 27 (1950).

15. *Compare* Wagner Act, Pub. L. No. 74-198, § 2(3) (1936) (original text of the National Labor Relations Act), *with* Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, § 2(3) (1947) (codified at 29 U.S.C. § 152(11)) (amended language to the National Labor Relations Act).

16. Wagner Act § 2(3) (original text of the National Labor Relations Act).

17. 330 U.S. 485, 490 (1947).

18. *Id.* at 487.

19. *Id.* at 487–88.

20. *Id.* at 488–89.

21. *Id.*

utilized when examining claims of unfair labor practices by the employer.[22] The language was not a signal of congressional intent to exclude supervisors as employers.[23] By including foremen within the purview of the Wagner Act, the Court specifically recognized the need to give deference to the NLRB's classification of the workers in question and noted that the statute's terms did not create an ambiguity that necessitated review of the legislative history.[24]

Aside from the immediate impact of *Packard Motor*, the decision is notable for a number of reasons that are reflected in future decisions determining the coverage of the Act in terms of professionals and supervisors. First, the Court contended that it did not have the power to exclude groups of employees under the Act.[25] To exclude employees, the Court required that Congress specifically exclude them from the Act.[26] Second, the Court provided an interpretation of the phrase "in the interest of the employer" that would later be used in the *Health Care* decision as the basis for an expansive notion of supervisor that limited the protections for professionals.[27] Finally, the decision exemplified the Court's deference to the NLRB when determining whether workers are covered by the NLRA, a consideration the Court does not focus on in subsequent decisions.[28] These themes recur throughout the evolution of the standards governing professionals and supervisors.

B. Congressional Response to Packard Motor*: The Taft-Hartley Amendments*

Congress took note of the Supreme Court's invitation to explicitly exclude classes of employees from the NLRA and reacted swiftly to *Packard Motor*.[29] In 1947, Congress enacted the Taft-Hartley Amendments.[30] One of the purposes of these amendments was to explicitly exclude supervisors from the protections of the Act.[31] In addition to setting forth the definition of "supervisors," who were no longer covered under

22. *Id.*; *see also* George Feldman, *Workplace Power and Collective Activity: The Supervisory and Managerial Exclusions in Labor Law,* 37 ARIZ. L. REV. 525, 539 (1995) (stating that "since the 'ordinary' meaning of ['in the interest of the employer'] would make all employees into employers, the statutory meaning had to be different").

23. *See Packard Motor Car*, 330 U.S. at 488–89.

24. *Id.* at 491–93.

25. *Id.* at 490.

26. *Id.*

27. *Id*. at 488–89; *see also* NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 578 (1994) (utilizing the definition of "in the interest of the employer" as originally determined in *Packard Motor*).

28. *Packard Motor*, 330 U.S. at 491.

29. *Id.* at 490 (noting that Congress apparently took heed of the Court's statement that "it is for Congress, not for us, to create exceptions").

30. Taft-Hartley Act, ch. 120, § 101, 61 Stat. 137–38 (1947) (current version at 29 U.S.C. § 152(11) (2000)).

31. *See id.*

the NLRA,[32] the Amendments also defined the term "professional."[33] While the provision excluding supervisors was added in response to pressure from business interests and in reaction to the Court's decision in *Packard Motor*,[34] the definition for professionals was added to ensure that professionals and nonprofessionals were not included in the same bargaining units.[35]

An examination of the definition of "professional" indicates that Congress intended professionals to retain protections under the NLRA. The scope of the Act's coverage, however, was unclear. Indeed, there is a degree of protection for professionals implicit in the definition, including those who supervise other employees.[36] The definition itself recognizes not only that professionals may have supervisory duties, but also that a professional undertakes work "involving the consistent exercise of discretion and judgment."[37] Comparing this language to the definition of a supervisor, which requires that an employee must exercise "independent judgment" to be considered a supervisor, it is evident the two definitions are not mutually exclusive. At some point the supervisory duties of professionals or the judgment they exercise would be of a nature that is inherently more supervisory than professional. As such, the Taft-Hartley Amendments created a statutory tension with no guidance as to how the two definitions should be reconciled.[38] What remained to be seen after

32. 29 U.S.C. § 152(11) defines 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 responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

33. 29 U.S.C. § 152(12) defines a "professional employee" as:

> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical process; or (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

34. Matthew W. Finkin, *The Supervisory Status of Professional Employees*, 45 FORDHAM L. REV. 805, 807–08 (1977).

35. 29 U.S.C. § 159(b)(1).

36. *See* 29 U.S.C. § 152(12) (noting that a person is considered a professional when they have the requisite training and are "performing related work *under the supervision of a professional person*" (emphasis added)).

37. *Id.; cf.* 29 U.S.C. § 152(11) (requiring that the judgment exercised by an employee in order to be found a supervisor be "independent judgment" rather than "merely routine or clerical").

38. Although the Supreme Court justices have not agreed on where the statutory balance should be struck, both sides agree there is a tension in the statute. As the majority stated in *Health Care*, "[t]o be sure, as recognized in *Yeshiva*, there may be 'some tension between the Act's exclusion of [supervisory and] managerial employees and its inclusion of professionals.'" NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 581 (1994) (quoting NLRB v. Yeshiva Univ., 444 U.S. 672, 686 (1980)).

these Amendments was how the NLRB and the courts would strike the balance.[39]

C. *The Board's Search for a Standard: From* Adelphi University *to* Detroit College

The NLRB struggled for quite some time after the Taft-Hartley Amendments formulating tests regarding what activities constituted supervisory authority.[40] One of the NLRB's first attempts at what could be considered a bright-line test in this area was set forth in *Adelphi University*.[41] The *Adelphi* rule set a standard by which professionals retained their protections under the NLRA so long as they did not spend more than fifty percent of their time performing supervisory duties over nonunit employees.[42] After *Adelphi* was handed down, the rule was applied in a number of cases involving health care employees.[43] Although the fifty percent rule from *Adelphi* did receive some support in subsequent NLRB decisions,[44] the courts took a somewhat more skeptical view regarding the rule's validity.[45]

Eventually, this skepticism found its way to the NLRB. The wavering support *Adelphi* garnered for nearly two decades ended when the Board handed down its decision in *Detroit College*.[46] In *Detroit College*, the Board first noted what it perceived to be an expansion of the original *Adelphi* holding and rejected the "shorthand approach" provided for by the fifty percent rule.[47] Rejecting an approach that only considered the

39. Finkin, *supra* note 34, at 805.

40. *See* Gillespie, *supra* note 10.

41. *See* Adelphi Univ., 195 N.L.R.B. 639, 644 (1972); *see also* Finkin, *supra* note 34, at 805, 818 (laying forth the Board's formulation for determining if a professional employee is a supervisor and characterizing it as the "'*Adelphi* Rule'").

42. *Adelphi*, 195 N.L.R.B. at 644–45.

43. *See* Northwoods Manor, Inc., 260 N.L.R.B. 854, 855 (1982) (citing *Adelphi*, but finding the nurses supervisory duties to be "substantial and regular" rather than "sporadic or irregular" as required in *Adelphi*'s progeny); McAlester Hosp. Found., Inc., 233 N.L.R.B. 589, 590 (1977) (finding that nurses were not supervisors as they "spend the greater, by far, percentage of their worktime in functions not colorably related to 'supervision'"); Oak Ridge Hosp. of the United Methodist Church, 220 N.L.R.B. 49, 50 (1975) (holding that clinical instructor who was a registered nurse did not perform enough supervisory duties to be a supervisor under section 2(11) of the NLRA following *Adelphi*).

44. *See, e.g.,* Cooper Union for the Advancement of Sci. & Art, 273 N.L.R.B. 1768, 1830 (1985) (citing "small fraction of . . . time" does not meet the requirements to find supervisory status under *Adelphi*); Goddard Coll., 234 N.L.R.B. 1111, 1113 (1978) (noting that "faculty members spend over fifty percent of their time on . . . academic matters" and, therefore, are not statutory supervisors); New York Univ., 205 N.L.R.B. 4, 8 (1973) (citing *Adelphi* for the proposition that "[w]here professional employees have spent less than 50 percent of their time supervising nonunit employees, they have been included in the unit").

45. *See* Trs. of Boston Univ. v. NLRB, 575 F.2d 301, 306 n.4 (1st Cir. 1978) (stating that the employee was not a supervisor when spending only "'five to ten percent'" of their time on supervisory duties but leaving open the question in cases that were closer to fifty percent); NLRB v. Mercy Coll., 536 F.2d 544, 550 (2d Cir. 1976) (calling into question the legal validity of the fifty percent rule as applied to supervising).

46. Detroit Coll. of Bus., 296 N.L.R.B. 318 (1989).

47. *Id.* at 321.

time spent in supervisory duties, the Board settled on a rule that required a multifactor analysis that sought to "determine the nature of the individual's alliance with management."[48] Thus, one of the NLRB's first attempts to specifically define how much supervisory authority was required to come under the ambit of the statutory definition of "supervisor" was set aside in favor of a more comprehensive analysis.[49]

Adelphi and *Detroit College* represent seminal NLRB decisions during the evolution of the professional-supervisor standard. Both decisions represented broad standards that have been applied across industries.[50] The application of these standards in the health care field serves as an example of how this standard was applied in a particular industry and provides useful background for the subsequent Supreme Court decisions discussed below.[51] In the health care field, the "patient care analysis" was applied from 1974 until the *Health Care* decision.[52] Under this analysis, the Court first determined whether the health care worker was responsible for any of the tasks designated as supervisory in section 2(11) of the NLRA and then determined whether these acts were done "in the interest of the employer" or in "the interest of the patient."[53] Although the Court in *Health Care* describes this as a "unique" application of the supervisor test,[54] the test effectively answers the core question that the *Detroit College* test asked: whether the employees' interests were "'so allied with management as to establish a differentiation between them and other employees in the unit.'"[55] Significantly—particularly in light of the later treatment of this rule by the Supreme Court in *Health Care*—the Senate gave explicit approval of this test in the Senate Report to the

48. *Id.* at 320–21. The court found the following factors relevant:

> [T]he business of the employer, the duties of the individuals exercising supervisory authority, . . . the particular supervisory functions being exercised, the degree of control being exercised over the nonunit employees, and the relative amount of interest the individuals at issue have in furthering the policies of the employer as opposed to those of the bargaining unit in which they would be included. We will continue to view time spent in performance of supervisory duties relevant, but not controlling, to our analysis.

Id. at 321.

49. *See id.*

50. *See* NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 590–92 (1994) (Ginsburg, J., dissenting) (noting professions for which the Board had applied their "general approach" toward professionals).

51. Due to nature of the *Kentucky River* and *Health Care* decisions, much of this Note will focus on the development of the supervisor-professional standard in the health care field. Although both *Health Care* and *Kentucky River* involved the supervisory status of nurses, it will be argued that the effect of these decisions will be felt beyond the health care field. However, allowing the development of the standards used for nurses in the health care field serves as a helpful framework within which to examine the interplay between the NLRB, Congress, and the courts.

52. *See* Northcrest Nursing Home, 313 N.L.R.B. 491, 493–97 (1993) (providing a brief history of the "patient care analysis" and courts' treatment of the standard).

53. *Id.* at 493.

54. *Health Care*, 511 U.S. at 574 (asserting that the NLRB interprets the phrase "in the interest of the employer" in a "unique manner" when dealing with the supervisory status of nurses).

55. Detroit Coll. of Bus., 296 N.L.R.B. 318, 321 (1989) (quoting Adelphia Univ., 195 N.L.R.B. 634, 641 (1972)).

NLRA's 1974 amendments.[56] In its report, the Senate explained its decision not to amend the statute to exclude health care professionals from the definition of supervisor:

> [T]he Board has carefully avoided applying the definition of "supervisor" to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is *incidental [to]* the professional's treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer. The Committee expects the Board to continue evaluating the facts of each case in this manner when making its determinations.[57]

D. The Supreme Court Responds: The Health Care & Retirement Corporation of America *and* Kentucky River Community Care *Decisions*[58]

1. The Health Care *Decision*

Despite congressional support for the Board's approach and the persistent application of the standard set forth by the NLRB, the Supreme Court overruled the Board's decisions in cases involving the supervisory status of nurses in two decisions: *Health Care* and *Kentucky River*.[59] The Court's decision in *Health Care* began the Court's trend of expanding the definition of supervisors to exclude more professionals from the protections of the Act. In *Health Care*, the Court was faced with the question of whether four licensed practical nurses should be given protection under the NLRA as professionals or whether they were excluded under the statutory definition of supervisors.[60] The NLRB, accepting the administrative law judge's application of the "patient care analysis," had determined that the nurses were not statutory supervisors and were protected under the NLRA.[61] In a five-to-four decision, the Court, led by Justice Kennedy, rejected the patient care analysis—despite the balance of support for the test in the circuit courts[62]—and framed a three-part test to determine supervisory status based on the

56. S. REP. NO. 93-766, at 6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 3946, 3951.

57. *Id*. (emphasis added).

58. An analysis of the Court's decision in *Health Care* is beyond this Note's scope; however, some analysis is useful in exhibiting the weakening of protections for professionals. For a more detailed treatment of the Court's decision in *Health Care*, see one of the following analyses: Feldman, *supra* note 22; Edwin A. Keller, Jr., *Death by Textualism: The NLRB's "Incidental to Patient Care" Supervisory Status Test for Charge Nurses*, 46 AM. U. L. REV. 575 (1996); Joseph A. Stegbauer, *Form over Function: The Supreme Court Eviscerates the National Labor Relations Act's Protection for Professionals*, 63 U. CIN. L. REV. 1979 (1995).

59. NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706 (2001); *Health Care*, 511 U.S. at 583–84.

60. *Health Care*, 511 U.S. at 574–75.

61. *Id.* at 575.

62. Northcrest Nursing Home, 313 N.L.R.B. 491, 495 (1993) (discussing support for the patient care test in the Second, Seventh, Eighth, Ninth, and Eleventh Circuits and the rejection of the test by the Sixth Circuit).

statutory definition of supervisors.[63] The test identified three questions: "First, does the employee have authority to engage in one of the twelve listed activities [listed in section 2(11)]? Second, does the exercise of that authority require 'the use of independent judgment?' Third, does the employee hold the authority 'in the interest of the employer?'"[64] The specific issue presented in *Health Care* was the appropriate interpretation of the test's third prong.[65] The third prong centered on the same question that the patient care analysis and the *Adelphi* and *Detroit College* decisions focused on—when do employees' job responsibilities make them so aligned with management that they are denied protection under the NLRA due to the supervisory nature of their job?[66]

In overruling the Board's decision, the Court first found the Board had "created a false dichotomy . . . between acts taken in connection with patient care and acts taken in the interest of the employer."[67] The Court felt that a nurse's duties concerning patient care were inseparable from his or her employer's interest.[68] The Court then went on to note that, although the holding in *Packard Motor* had been nullified by Congress in the Taft-Hartley Amendments, the *Packard Motor* Court's interpretation of the phrase "in the interest of the employer" was still applicable.[69] The Court endorsed the interpretation put forth in *Packard Motor* that anything done in "the scope of employment or on the authorized business of the employer [is] 'in the interest of the employer.'"[70] The Court then discarded the Board's arguments that the "conflicting loyalties that the supervisor exception was designed to avoid" were not present in this case and that the broad definition of supervisor would swallow the protection for employees.[71] Finally, the Court dismissed the Board's reliance on the language in the Senate Report to the Act's 1974 Amendments supporting the NLRB's application of the patient care analysis.[72]

63. *Health Care*, 511 U.S. at 573–74.

64. *Id.* at 574.

65. *Id.*

66. *See Northcrest Nursing Home*, 313 N.L.R.B. at 493 (identifying the "patient care analysis" as examining "whether the alleged supervisory conduct . . . is the exercise of professional judgment incidental to patient care or the exercise of supervisory authority in the interest of the employer."); *see also* Detroit Coll. of Bus., 296 N.L.R.B. 318, 320 (1989) ("'The issue of supervisory status usually arises where authority is regularly exercised on the employer's behalf.'" (quoting Adelphi Univ., 195 N.L.R.B. 634, 644 (1972))). Justice Kennedy also noted the Board's "exclusive reliance" on the phrase and characterizing the interpretation of "in the interest of the employer" as "the underpinning of the Board's test." *Health Care*, 511 U.S. at 579.

67. *Id.* at 577.

68. *Id.* at 577–78.

69. *Id.* at 578 (internal citations omitted).

70. *Id.* (internal citations omitted).

71. *Id.* at 580–81.

72. *Id.* at 581–82.

In a vigorous dissent, Justice Ginsburg noted that the Court's decision departed not only from the longstanding Board standard,[73] but also from prior Court decisions that seemingly gave blessing to the Board's standard used in the health care profession.[74] Acknowledging the statutory tension between the supervisor and professional statutory definitions, Justice Ginsburg recognized that "the Act's term 'supervisor' determines the extent to which professionals are covered."[75] In light of the broad interpretation given to the term supervisor in the decision, she forewarned the potential widespread implications of the decision for all professionals, not just those in the health care industry.[76]

2. The Kentucky River *Decision*

After giving the statutory phrase "in the interest of the employer" a broad statutory meaning in *Health Care*, Justice Scalia led the Court in further expanding the definition of supervisors in *Kentucky River*. Here the Court addressed the second prong of the three-part test laid out in *Health Care* to determine supervisory status: whether judgment "informed by professional or technical training or experience" should be considered "independent judgment," thereby placing many professionals within the purview of the supervisor exclusion.[77] The Court answered this question in the affirmative, determining that the registered nurses in question were supervisors.[78] Prior to examining the test utilized by the NLRB for determining whether nurses exercised "independent judgment," the Court determined that the Sixth Circuit had incorrectly placed the burden of proof on the NLRB.[79] As had been the longstanding policy of the NLRB,[80] the Court found that the burden of proof should be borne by the party claiming that the party is a supervisor.[81]

The NLRB had held that the supervisory authority of the nurses arose not from a "connection with 'management,'" but rather out of their professional training.[82] The Court acknowledged the Board was correct both in finding the phrase "independent judgment" vague as to the de-

73. *Id.* at 591 n.7 (Ginsburg, J., dissenting) (citing the *Detroit College* decision as part of the approach taken by the Board in distinguishing between "authority arising from professional knowledge, on one hand, and authority encompassing front-line management prerogatives on the other").

74. *Id.* at 597–98 (Ginsburg, J., dissenting) (noting that the Court had previously noted the Board's standard "accurately capture[d] the intent of Congress") (quoting NLRB v. Yeshiva Univ., 444 U.S. 672, 690 (1980)).

75. *Id.* at 585 (Ginsburg, J., dissenting).

76. *Id.* at 598 (Ginsburg, J., dissenting).

77. NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 713 (2001).

78. *Id*. at 720–22 .

79. *Id.* at 710–12.

80. Memorandum from the Office of the General Counsel, to All Regional Directors, Officers-In-Charge, and Resident Officers (Aug. 24, 1999), *at* http://www.nlrb.gov/ommemo/om99-44.html [hereinafter Supervisory Issue Memo] (acknowledging the NLRB's placement of the burden of proof and the Sixth Circuit's alternative view prior to the *Kentucky River* decision).

81. *Ky. River*, 532 U.S. at 710–11.

82. *Id*. at 710.

gree of judgment required for supervisory status and in finding that detailed management guidelines limiting the exercise of supervisory authority can place the employee outside the scope of a statutory supervisor.[83] However, the Court criticized the Board's standard and claimed that essentially all supervisory judgment exercised by professionals is professional or technical in nature and, therefore, application of the NLRB's standard would effectively eliminate the supervisory exclusion.[84] According to the Court, the NLRB's test improperly found that "a sufficient *degree* of discretion is not 'independent judgment' if it is a particular *kind* of judgment, namely 'ordinary professional or technical judgment in directing less-skilled employees to deliver services.'"[85] The Board's test for determining whether a professional exercised independent judgment was seen by the majority as utilizing a "startling categorical exclusion" for professionals from the definition of supervisor.[86] Reminiscent of the arguments made by the dissenting opinions in both *Kentucky River* and *Health Care*, which claimed that the majority's characterization of the supervisor exception would take away protections from professionals,[87] the Court asserted that the NLRB's approach would have the same effect on supervisors, "virtually eliminat[ing] 'supervisors' from the Act."[88] The Court, however, did recognize the fact that the NLRB had discretion in determining what degree of judgment had to be exercised for a professional to be considered a supervisor.[89] The Court noted that the Board's standard focused on independent judgment in only one of the twelve tasks listed in the supervisor definition, "responsibly to direct."[90] Although the majority paid heed to the ambiguity of the term "responsibly to direct,"[91] it characterized the NLRB's test as one that mistakenly required that there be direction of employees plus one of the other twelve functions listed, rather than just one of the twelve functions as required by the statute.[92] After finding that the NLRB applied an unlawful standard, the Court, without further examining the facts and in spite of the incorrect application of the burden of proof at the circuit court, affirmed the Sixth Circuit's finding of supervisory status.[93]

Justice Stevens offered a harsh dissent, describing the majority's treatment of the issue as a "*tour de force* supported by little more than

83. *Id.* at 713–14.
84. *Id.* at 715.
85. *Id.* at 714 (emphasis in original) (internal citation omitted).
86. *Id.*
87. *See id.* at 726–27 (Stevens, J., dissenting); NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 585 (1994) (Ginsburg, J., dissenting).
88. *Ky. River*, 532 U.S. at 715.
89. *Id.* at 714.
90. *Id.* at 715–16.
91. *See id.* at 720.
92. *See id.* at 715–17.
93. *Id.* at 721–22. Justice Scalia claims that it is unimportant that the lower court erred in where it placed the burden of proof, so long as they reached a correct result. *Id.* at 722 n.3. "The basis for remand to an agency is the *agency's* error on a point of law, not the reviewing court's." *Id.*

ipse dixit."[94] After an examination of the case's facts,[95] the dissent argued that the bare facts alone were enough to support the NLRB's conclusion and found it unnecessary to look at the Board's interpretation of "independent judgment."[96] Nonetheless, Justice Stevens found that "[t]he Board's interpretation is a familiar one" and that the application of the Board's standard would not have the apocalyptic effect on the supervisor exclusion the majority claimed.[97] Justice Stevens went on to note the lack of deference given to the Board's reading of an admittedly ambiguous term and, like Justice Ginsburg in the *Health Care* dissent, claimed the expansive definition of a supervisor would effectively exclude professionals from the Act's protections.[98] Finally, Justice Stevens claimed that, even if the NLRB applied the wrong test, the case should be remanded rather than affirmed based on the lower court's decision, which had misplaced the burden of proof.[99]

III. THE EFFECT OF *KENTUCKY RIVER* ON PROFESSIONALS: THE IMPACT OF THE DECISION AND THE FUTURE OF PROFESSIONAL PROTECTIONS UNDER THE NLRA

The historical evolution of the term supervisor outlined above highlights the increasing limitations placed upon professionals seeking protection under the Act, particularly if they have any level of supervisory authority. As Justice Ginsburg noted in her *Health Care* dissent, the breadth of the supervisory exclusion will determine the number of professionals protected:

> [T]he scope accorded the Act's term 'supervisor' determines the extent to which professionals are covered. If the term 'supervisor' is construed broadly . . . then most professionals would be supervisors, for most have *some* authority to assign and direct others' work. If the term 'supervisor' is understood that broadly, however, Congress' inclusion of professionals within the Act's protections would effectively be nullified.[100]

The trend toward an expansive definition of the supervisor exclusion continued in the Court's *Kentucky River* decision and could have profound effects on the organizing efforts of professional workers.

This part will analyze the initial reaction to *Kentucky River* and the avenues that the Court left available for the future development of the law in this area. The potential impact of the decision will then be explored in light of the response to *Health Care*. Part III will conclude with

94. *Id.* at 727 (Stevens, J., dissenting).
95. *Id.* at 722–24 (Stevens, J., dissenting).
96. *Id.* at 725–26 (Stevens, J., dissenting).
97. *See id.* at 724 & nn.3–4 (Stevens, J., dissenting).
98. *Id.* at 726 & n.6, 727 (Stevens, J., dissenting).
99. *Id.* at 728–29 (Stevens, J., dissenting).
100. NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 585 (1994).

an examination of what actions can and should be taken by either employers, Congress, or the NLRB.

A. The Scope of Kentucky River

1. The Initial Reaction to Kentucky River *in the Health Care Field*

The effect of *Kentucky River* was felt immediately, particularly in the health care field.[101] Physicians for Responsible Negotiations (PRN), a labor organization affiliated with the American Medical Association (AMA), decided to halt organizing activities as a result of the decision.[102] In June 2001, in a report at the AMA Annual Meeting shortly after *Kentucky River*, the PRN charted a course in which it vowed to continue protecting those employees that were already organized.[103] In regard to all future organizing activities, the group was not as proactive, stating that it "remain[ed] confidant [sic] that the pendulum will swing back and will, ultimately, insure unencumbered physician collective bargaining."[104] Employers in the health care industry welcomed the decision with open arms, claiming the decision "could give [employers] an edge in union organizing campaigns."[105] They noted that the decision came "as a welcome boost to the health care industry."[106] These initial feelings regarding the impact of *Kentucky River* appeared to be well founded, particularly when an NLRB spokesman claimed that as many as sixteen NLRB decisions involving nurses would be remanded to the Board in light of *Kentucky River*.[107] The initial reaction, although largely negative concerning the prospects of expanding labor campaigns in the health care industry, was not categorical or, in all cases, long-lasting. One health care lawyer was quoted shortly after the decision as saying that the AMA was overreacting and that the NLRB would find ways around the Supreme Court's decision.[108] The PRN eventually also realized that defeat was not complete, recognizing that viable arguments remained that could

101. *See, e.g.*, Bruce Japsen, *AMA Backs Off Union Plans Ruling Impedes Organizing at Private Hospitals*, CHI. TRIB., June 7, 2001, at 1; Rebecca Lentz, *On Hold: AMA Halts Union Efforts in Wake of Supreme Court Ruling*, MODERN PHYSICIAN, July 1, 2001, at 6 (noting that the union arm of the AMA plans on halting organizing activities in private hospitals).

102. Japsen, *supra* note 101, at 1.

103. *Who is a Supervisor? The NLRB v. Kentucky River*, PRN LATEST NEWS (PHYSICIANS FOR RESPONSIBLE NEGOTIATION), *at* http://4prn.org/kriver.html (last visited Oct. 14, 2002).

104. *Id.*

105. John E. Lyncheski & Ronald J. Andrykovitch, *Who's a Supervisor*, 46 HR MAGAZINE, Sept. 2001, at 159.

106. Felharber, Larson, Fenlon and Vogt, P.A., *Supreme Court Issues New Guidelines on When Nurses Are Supervisors*, MINN. EMP. L. LETTER, Aug. 2001, at 7.

107. Susan J. McGolrick, *Labor Law: Eighth Circuit Directs NLRB to Reconsider Supervisory Status of Nursing Home Nurses*, DAILY LAB. REP., Oct. 4, 2001, at A12.

108. Lentz, *supra* note 101, at 6.

potentially allow professionals to continue organizing without being classified as supervisors.[109]

2. *Glimmers of Hope for Professionals in* Kentucky River

The reason for the renewed hope on the part of labor organizers and the corresponding guarded optimism of employers can be traced to openings left by Justice Scalia in the *Kentucky River* decision. There are two areas identified in the majority's *Kentucky River* opinion that could be the basis for protecting professionals from being classified as supervisors in future decisions. First, the majority left it to the Board to determine "the question of degree of judgment" required for employees to be considered supervisors due to the exercise of "independent judgment."[110] The NLRB's standard was not found unlawful because it allowed some degree of independent judgment to be exercised by professionals; rather, it was unlawful because it excluded an entire type of judgment from the supervisor exclusion—professional or technical.[111] In addition, the Court left open the possibility that the Board could develop a revised definition of the term "responsibly to direct" that would make a distinction between the supervision of tasks and the supervision of employees.[112] The opportunity to further define these ambiguities has not gone unnoticed. The NLRB has noted that *Kentucky River* did not resolve the issue completely.[113] In a memo to Regional Directors, the General Counsel's office identified *Kentucky River* as a developing area of the law in which cases should be submitted to the Board for review.[114] The General Counsel's recognition of the unsettled nature of this area of the law indicates that the NLRB sees the supervisory status of professionals as an area in which it still may be able to shape the law.

3. *Comparing the Reaction to* Health Care *and* Kentucky River*: Diminishing Protections for Professionals*

The question remains, however, whether the "invitation" to the NLRB and lower courts offered by the Court in *Kentucky River*—to refine the relevant standards—will have any substantive impact on curbing the trend toward finding that professionals are excluded as supervisors or

109. Thom Wilder, *Health Care Employees: AMA Bargaining Unit Awaits NLRB Ruling; Observers Differ on Group's Future Impact*, DAILY LAB. REP., Jan. 2, 2002, at A5.

110. NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 721 (2001).

111. *Id.* at 714–15.

112. *Id* at 720 ("Perhaps the Board could offer a limiting interpretation of the supervisory function of responsible direction by distinguishing employees who direct the manner of others' performance of discrete *tasks* from employees who direct other *employees*, as § 152(11) requires.").

113. *See* Memorandum from Arthur F. Rosenfeld, General Counsel, to all Regional Directors, Officers-in-Charge and Resident Officers, CG 02-03 (Dec. 17, 2001), *at* http://www.nlrb.gov/gcmemo/gc02-03.html (last visited Jan. 27, 2002).

114. *Id.*

whether the areas identified in *Kentucky River* can be clarified to retain protections for professionals. To determine what the potential effect of the decision will be, two inquiries are useful. First, an examination of what occurred in the period following the *Health Care* decision is helpful in determining how the courts and the NLRB have reacted to previous decisions interpreting the statutory tension. Second, the initial reaction of the NLRB and the courts to *Kentucky River* will be examined to determine how this reaction compares to the decisions following *Health Care*. These two inquiries will help in determining the impact of *Kentucky River* and in formulating a framework that will allow for the continued protection of professionals with supervisory authority.

While exploring these questions, it is important to keep in mind one of the primary worries on the part of labor organizers: that *Kentucky River* will not be limited to the health care industry and will expand the use of the supervisory exclusion in other professions as well.[115] This fear stems from two sources. First, similar fears regarding the potential expansion of a decision in the health care field into other industries were felt after *Health Care*.[116] Second, the test in question in *Kentucky River*, which excluded professional and technical judgment from independent judgment, was not used in the health care industry alone.[117] The standard used for nurses had been used for a number of other professions including doctors,[118] engineers,[119] architects,[120] and television broadcast directors.[121] Therefore, the warnings voiced by labor organizers in the health care industry regarding the potential impact of *Kentucky River* are not industry-specific worries regarding the ability of nurses to organize, but represent concerns that are felt by organizers across a number of industries.

115. *See* Lyncheski & Andrykovitch, *supra* note 105, at 159 (recognizing that *Kentucky River* may have "significant and far-reaching implications for all professional and technical employees who direct the work of less skilled employees").

116. NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 598 (1994) (Ginsburg, J., dissenting) ("The Court's opinion has implications far beyond the nurses involved in this case.").

117. Petitioner's Brief at 19–20 & n.8, *Ky. River*, 532 U.S. 706 (No. 99-1815), 2000 WL 1724970 ("The Board has applied the same principle to professional employees in a variety of fields.").

118. Int'l Ctr. for Integrative Studies/The Door, 297 N.L.R.B. 601, 602 n.7 (1990) (finding that a doctor who also served as laboratory director was not a supervisor simply because she exercised "routine direction of employees based on a higher level of skill or experience").

119. Gen. Dynamics Corp., 213 N.L.R.B. 851, 858 (1974) ("Such discretions as the professional engineers may have in work assignment and direction, moreover, are exercised in a professional sense . . . .").

120. Skidmore, Owings & Merrill, 192 N.L.R.B. 920, 921 (1971) (finding that architects that served as project managers were not supervisors, but "merely provide professional direction and coordination for other professional employees").

121. Golden West Broadcasters-KTLA, 215 N.L.R.B. 760, 762 n.4 (1974) ("[A]n employee with special expertise or training who directs or instructs another in the proper performance of his work for which the former is professionally responsible is not thereby rendered a supervisor.").

a. Lessons from the *Health Care* Decision

One of the primary worries after *Health Care* was how it would be viewed in cases involving professionals outside the health care industry.[122] Although the case specifically examined the phrase "in the interest of the employer" in the context of the "patient care analysis," many believed the impact would not be so limited. Writing for the majority, Justice Kennedy tried to alleviate any such fears, stating:

> Because the Board's interpretation of "in the interest of the employer" is for the most part confined to nurse cases, our decision will have almost no effect outside that context. Any parade of horribles about the meaning of this decision for employees in other industries is thus quite misplaced; indeed, the Board does not make this argument.[123]

To determine the validity of this claim it is necessary to focus on two areas: application of the holding in cases immediately after the decision and the long-term effects of the holding based on the course of action taken by the courts and the NLRB following the decision. Analyzing the application of the holding in cases immediately following the decision does not provide a complete depiction of the decision's long-term effects. The broader effects of the decision can only be determined based upon the course of action taken by the courts and the NLRB in reaction to the decision's immediate impact. If one looks at the initial evidence available after *Health Care* and an examination of cases between the 1994 *Health Care* decision and the 2001 *Kentucky River* decision, the evidence seemingly indicates that Justice Kennedy was correct in determining that the application of the holding in *Health Care* would be limited to the health care field.[124] However, while the application of the holding in subsequent cases was limited to the health care industry, the broader effect of the case was to shift the focus of adjudication from one prong of the test used to determine supervisory status to another. By instigating this course of action, the decision effectively nullified the effect of the limiting language in the decision and the industry-specific nature of the test struck down in *Health Care*.

Although the case was cited in numerous decisions involving the status of health care professionals,[125] there was no evidence of widespread application of the holding to find supervisory status of profession-

122. *See supra* note 117.

123. NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 583–84 (1994).

124. *See infra* notes 126–30 and accompanying text.

125. *See, e.g.*, Desert Hosp. v. NLRB, 91 F.3d 187, 191 (D.C. Cir. 1996) (refusing to use the standard brought down in *Health Care* to support a finding of supervisory status of nurses); Wash. Nursing Home, Inc., 321 N.L.R.B. 366, 381 (1996) (finding that nurses were employees, not supervisors, after reviewing the case in light of *Health Care*); Robert Greenspan, D.D.S., P.C., 318 N.L.R.B. 70, 75 (1995) (noting that the decision in *Health Care* was applicable to the case at hand involving dentists and dental assistants).

als in other industries.[126] This result may be surprising, particularly in light of the warnings made by Justice Ginsburg in her dissenting opinion in *Health Care* and the consensus of the commentary following the decision.[127] There are two reasons why the holding in *Health Care* initially had a limited impact. First, *Health Care* contained language limiting the decision's scope to the health care field and involved an industry-specific standard.[128] Second, an examination of the approach taken by the NLRB after *Health Care* shows that it did not rely on the prong of the supervisor test regarding employee actions "in the interest of the employer."[129]

The most readily apparent distinction between the *Kentucky River* and *Health Care* decisions is the lack of any limiting language in *Kentucky River*. Rather than dampening the impact of *Kentucky River* by claiming it was limited to the health care industry as Justice Kennedy did in *Health Care*,[130] Justice Scalia's opinion contained no language limiting the decision's scope.[131] Rather, he was shocked by the breadth of what he considered a "categorical" exclusion of professional judgment from the reach of the independent judgment prong of the supervisor test.[132] The *Kentucky River* decision left open the possibility that the NLRB could undertake further clarification of the standard for professionals with supervisory status, however, this language does not limit the application of the holding itself to the health care industry.[133] Thus, there is no basis in *Kentucky River* by which courts can justify limiting the decision's impact to a particular industry when applying the decision in subsequent cases.

126. Initial attempts at examining subsequent case law discovered that Justice Kennedy was correct regarding the limited nature of the holding. *See* Kristin Hay O'Neal, Comment and Note, NLRB v. Health Care & Retirement Corporation of America*: Possible Implications for Supervisory Status Analysis of Professionals Under the National Labor Relations Act*, 47 BAYLOR L. REV. 841, 850–51 & n.56 (1995) (finding that shortly after the case came down it was cited in a number of cases, but never in an industry outside of health care to make a finding of supervisory status). A subsequent search of cases citing to *Health Care* found that nearly all cases involved health care employees. *See supra* note 125 and accompanying text. Only two decisions were found citing to *Health Care* that did not involve the health care professions. One case involved a nonprofessional, but did extend the reasoning of *Health Care* to docking pilots. Cooper/T. Smith, Inc. v. NLRB, 177 F.3d 1259, 1263 (11th Cir. 1999) (stating that the same logic used in *Health Care* to find nurses acted in the interest of the employer could be "extrapolated" to the case of docking pilots). Of some significance in the other case, the court examined the supervisory status of an insurance salesperson by generalizing the holding in *Health Care*, but found the employee was not a supervisor. Allstate Ins. Co., 332 N.L.R.B. No. 66 (2000), 165 L.L.R.M. 1293, 1296 (2000) (finding that insurance agents were not acting "in the interest of the employer" when they hired assistants).

127. *See Health Care*, 511 U.S. at 590–91; *see also* Keller, *supra* note 58, at 576; Stegbauer, *supra* note 58, at 2014; Laura Bailey, Note, NLRB v. Health Care & Retirement Corp. of America—*"In the Interest of the Employer:" Broadening the Scope of the Supervisor Exclusion Under the NLRA*, 4 WIDENER J. PUB. L. 533, 579–80 (1995).

128. *Health Care*, 511 U.S. at 583–84.

129. *See infra* notes 135–41 and accompanying text.

130. *Health Care*, 511 U.S. at 583–84.

131. *See* NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 714 (2001) (classifying the exclusion of professional and technical judgment as "a startling categorical exclusion").

132. *Id.*

133. *See supra* Part III.A.2.

Despite the limited application of the holding in subsequent cases, the concerns persisting after the *Health Care* decision were warranted. An examination of the NLRB's strategy following the decision indicates that, rather than trying to argue cases based on the notion of "in the interest of the employer," the NLRB simply began to apply alternative standards that focused on a prong of the supervisor test not addressed by the Court in *Health Care*.[134] It is uncertain how the courts would have accepted a revised notion of "in the interest of the employer." Despite the limiting language in *Health Care*, however, the breadth of the Court's interpretation of the phrase indicates that any such attempts would have been futile.[135]

The most comprehensive statement of the NLRB's approach towards alleviating the tension between the supervisor and professional clauses in the NLRA after *Health Care* was put forth in a memorandum from the General Counsel's office.[136] The memorandum focused on the supervisory status of nurses, and contained a detailed statement of the General Counsel's construction of "independent judgment."[137] It stated that the post-*Health Care* standard for determining whether nurses are supervisors was as follows: "An employee's exercise of routine technical judgment in directing less-skilled employees, for the purpose of delivering services in accordance with the employer's standards, does not constitute the excuse of 'independent judgment' that would make the employee a 'supervisor' under Section 2(11)."[138] The General Counsel's office gave two justifications for the standard. First, it noted that this definition helped to ensure that exemptions from the Act's coverage were not read too broadly.[139] Second, the General Counsel explained that the standard acknowledged "limited discretion is not enough to establish the kind of independent judgment necessary for Section 2(11) supervisory status."[140] The effect of this new standard was clear. Rather than attempting to retain protections for professionals by arguing that they did not meet the "in the interest of the employer" prong of the test for supervisory status, the NLRB developed a standard based on an alternative prong of the test. The standard set forth in the health care field, as espoused in the General Counsel memorandum, was essentially the standard the Court struck down in *Kentucky River*.[141]

The *Health Care* decision had an immediate impact on the health care industry in particular, as the limiting language in the decision pre-

134. *See* Supervisory Issue Memo, *supra* note 80.

135. *Health Care*, 511 U.S. at 580 ("[T]he statutory dichotomy the Board has created is no more justified in the health care field than it would be in any other business where supervisory duties are a necessary incident to the production of goods or the provision of services.").

136. *See* Supervisory Issue Memo, *supra* note 80.

137. *Id.* at 4–5.

138. *Id.*

139. *Id.*

140. *Id.*

141. *See* NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 713 (2001).

dicted. In practice, however, the result was to halt attempts to retain protection by relying on similar tests by professionals in all industries. Even though the decision contained language limiting its impact, the NLRB recognized that the decision would likely be applied in other industries and instead sought to concentrate on an alternative method of preserving coverage under the Act. The decision thereby had a broader impact than claimed by the majority in *Health Care*, as it effectively foreclosed one of the avenues available to protect professionals.

b. The Initial Treatment of *Kentucky River*

A comparison of the Court's holdings in *Kentucky River* and *Health Care* is necessary to determine whether *Kentucky River* will have a more widespread impact than *Health Care*. While the immediate application of *Kentucky River* on industries outside of the health care field was broader than the application of the *Health Care* decision, the long-term effects of *Kentucky River* are less clear. As seen after *Health Care*, the long-term impact of *Kentucky River* will be determined by the course of action taken by the NLRB after the decision. NLRB regional directors initially have proven to be receptive to using the openings identified in *Kentucky River* to maintain protections for professionals. However, the reception shown by the regional directors to clarify these areas in favor of professionals has not been uniformly shared by the circuit courts after *Kentucky River*. Rather than embracing arguments the NLRB has set forth based upon these openings, most of these courts have been hesitant to affirm new standards. These decisions may be a harbinger of continued expansion of the supervisor definition, but the regional directors' decisions and a minority of circuit courts leave open the possibility that more professionals will not lose protections under the Act as a result of being designated supervisors.

The impact of *Kentucky River* on industries outside the health care field can be gleaned from comparing the language of the two decisions and by determining which industries were immediately affected by the reversal of the "professional judgment" test. The primary difference between the two decisions, as noted above, is the difference in the nature of the tests involved in the two cases. Broadly speaking, *Health Care* addressed the prong of the test for supervisory status focusing on actions taken "in the interest of the employer."[142] More specifically, however, the case revolved around the "patient care analysis" as applied in the health care field and contained language meant to expressly limit the decision's scope.[143] *Kentucky River*, on the other hand, dealt with a more broadly stated test, which had been applied in numerous industries. The test advocated by the Board in *Kentucky River* categorically placed all

142. NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 574 (1994).
143. *Id.* at 574–84; *see also id.* at 590 (Ginsburg, J., dissenting).

"professional or technical judgment" outside of what could be considered independent judgment necessary for an employee to be considered a supervisor.[144] Furthermore, there was no limiting language in *Kentucky River*, as there was in *Health Care*.[145] Whereas the cases following *Health Care* focused almost exclusively on the health care industry, the cases applying *Kentucky River* show that labor organizations' use of "professional and technical judgment" as a defense against a finding of supervisory status had been used in a cross-section of industries.[146] In the months immediately following *Kentucky River*, circuit courts remanded a number of cases to the NLRB for subsequent proceedings in light of the decision. These cases represented professionals, primarily in the health care industry,[147] but there are indications the decision will be applied to professionals in a wider variety of fields.[148] The contrasting application of the two decisions indicates that a combination of the limiting language contained in *Health Care* and the narrow focus of the test overturned in that decision may have had an effect on the decisions' application immediately after it was handed down. This analysis, however, shows little more than how cases currently under consideration at the time of the decision were affected.

As was shown after *Health Care*, the immediate application of a holding is not determinative of its long-term impact.[149] An examination of the course of action taken by the NLRB and labor organizations following *Kentucky River* is indicative of the long-term impact of the decision. As noted above, labor organizations and the NLRB were cognizant that *Health Care* only addressed one prong of the supervisor test and began to focus their attention on other prongs.[150] Following *Kentucky*

144. *Ky. River*, 532 U.S. at 713.

145. *Compare id.* at 714 (noting the "categorical exclusion" that was being overturned), *with Health Care*, 511 U.S. at 583–84 (noting that the standard being overturned was "for the most part confined to nurse cases").

146. *See infra* notes 148–49 and accompanying text.

147. Beverly Enters.-Minn., Inc. v. NLRB, 266 F.3d 785, 787 (8th Cir. 2001) (remanding case in light of *Kentucky River* because Board "employed an improper legal standard").

148. Multimedia KSDK, Inc. v. NLRB, 303 F.3d 896, 900 (8th Cir. 2002) (incorporating the *Kentucky River* decision into analysis of television producers, whom the court classified as professionals). The decision has also been applied to a number of industries outside the professional ranks. Pub. Serv. Co. of Colo. v. NLRB, 271 F.3d 1213, 1220–21 (10th Cir. 2001) (applying the *Kentucky River* decision to public utility transmission employees and finding that the NLRB employed a test that came "within the umbrella of *Kentucky River*"); Entergy Gulf States, Inc. v. NLRB, 253 F.3d 203, 211 (5th Cir. 2001) (applying the *Kentucky River*, decision to operations coordinators and discounting the same precedent used in *Public Service Co.* as "no longer viable" after *Kentucky River*); NLRB v. Quinnipiac Coll., 256 F.3d 68, 78 (2d Cir. 2001) (using *Kentucky River* decision as basis for finding that the judgment campus security officers used in directing other employees was not routine); Coastal Lumber Co. v. NLRB, Nos. 01-1144, 01-1230, 2001 WL 1334194, at *1 (4th Cir. Oct. 30, 2001) (remanding case involving lumber production employees in light of *Kentucky River*).

This widespread application of the *Kentucky River* decision was not seen after *Health Care*. *See supra* notes 125–26 and accompanying text. Although these cases do not involve professional employees, they do indicate a wider application of the holding than occurred following *Health Care*.

149. *See supra* notes 135–41 and accompanying text.

150. *See supra* notes 142–43 and accompanying text.

River, there are signs that a similar course of action is being taken by labor organizations and the NLRB as they seek alternative grounds to retain protections for professionals under the Act. Although the number of decisions available for analysis is limited, the information available is helpful in determining the alternatives being pursued and how the alternative arguments being put forth have been perceived.

The openings for protection identified by the court in *Kentucky River* have been acknowledged in a number of proceedings before NLRB regional directors and circuit courts.[151] Some of the first decisions interpreting the supervisory status of professionals in the health care field were those of the NLRB regional director in Newark, New Jersey.[152] Although these cases are not final adjudications and have no binding precedential value, they are significant because they address the health care industry, which has been at the forefront of this debate, and serve as a guide to the course the NLRB may take in the future. In the four decisions—three involving nurses and one involving physicians—the regional director's decisions focused on the Court's invitation to develop the definition of "responsibility to direct" and to determine the degree of independent judgment.[153] In three of the cases, the regional director placed primary emphasis on the fact that the physicians or registered nurses did not use a sufficient degree of independent judgment in assigning or responsibly directing the work being done by lower-level professionals to be considered supervisors.[154] In *Occupational Health Centers* and *Madison Center Genesis Eldercare, Inc.*, the regional director made particular reference to the fact that the physicians and registered nurses were directing other employees and assigning work within guidelines set by the employer.[155] The employer determined which tasks were assigned to the employees and the professionals involved merely "ask[ed] another employee to do those tasks that were already assigned."[156] In *Meridian Home Care Services, Inc.*, the regional director characterized the plans the professionals followed as "a recipe of discrete tasks to be performed by an aide who is adequately trained in performing the work defined in the recipe."[157] In focusing on the standards set forth by the employer, the regional director paid heed to the Court's acknowledgment that the NLRB was still entitled to determine the degree of judgment exercised by the professionals.[158]

151. *See infra* text accompanying notes 152–80.

152. Susan J. McGolrick, *Representation Elections: NLRB Regional Director Issues Four Rulings on Supervisory Status of Physicians, Nurses*, DAILY LAB. REP., Feb. 4, 2002, at A8.

153. *See id.*

154. *See id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

Although most circuit court cases were remanded to the NLRB in light of *Kentucky River*,[159] a few circuit court decisions have addressed both avenues left open in *Kentucky River*.[160] In *NLRB v. Quinnipiac College*, the Second Circuit rejected the Board's findings and found that campus security officer shift supervisors were statutory supervisors under the NLRA.[161] Despite the fact that the shift supervisors were "in charge" during their shift, the NLRB had found that policies and procedures put in place by the college directed the officers in their duties.[162] The Board's argument in this case followed the invitation made by the *Kentucky River* Court to determine the degree of independent judgment, which could be "reduced below the statutory threshold by detailed orders and regulations issued by the employer."[163] While the court seemingly acknowledged the possibility of such a limitation on independent judgment, it rejected the workers' claim based on its examination of the record, which revealed that the officers made "independent decisions directing security guards in non-routine, atypical situations."[164] The court went on to note that the supervisors "both direct the other security employees and are held accountable for those employees' performance."[165]

Further evidence of the wary reception met by the NLRB and labor organizations as they attempt to clarify the standards was evidenced in *Public Service Co. of Colorado vs. NLRB*, where, in light of *Kentucky River*, the Tenth Circuit found that a public utility's transmission operators[166] were statutory supervisors.[167] In this case, the union sought to distinguish the test it was using from *Kentucky River* by making a distinction "between the act of directing employees as they go about their tasks and that of directing the tasks themselves."[168] The court characterized the test as one in which employees do not exercise "'independent judgment' in connection with 'responsible direction' of 'other employees' regardless of the amount of independent judgment that went into the solution of the actual problem."[169] In finding that the employees were supervisors, the court did not explicitly strike down the test set forth by the union.[170] The

159. *See supra* note 107 and accompanying text.

160. Many of the cases to follow do not involve professional employees, but rather focus on the supervisory status of nonprofessionals. Although these cases do not specifically involve determinations of the supervisory status of professionals, the cases do serve as a helpful guide to understanding how parties have tried to limit the further expansion of the supervisory exclusion. As Justice Ginsburg noted in her *Health Care* dissent, the extent to which the supervisor definition is expanded is determinative of the coverage granted to professionals. *See supra* note 100 and accompanying text.

161. NLRB v. Quinnipiac Coll., 256 F.3d 68, 71 (2d Cir. 2001).

162. *See id.* at 77–78.

163. NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 713–14 (2001).

164. *Quinnipiac Coll.*, 256 F.3d at 78.

165. *Id.*

166. *See supra* note 160.

167. Pub. Serv. Co. of Colo. v. NLRB, 271 F.3d 1213, 1214–15 (10th Cir. 2001).

168. *Id.* at 1219.

169. *Id.*

170. *See id.* at 1219–20.

issue on review was the interpretation of independent judgment as set forth in a previous Tenth Circuit case that was overruled by *Kentucky River*, not the "responsibly to direct" language.[171] The court noted that the new standard proposed by the union was not a standard for determining independent judgment, but rather a standard used to determine whether the employee had exercised his or her authority "responsibly to direct" other employees.[172] As such, it did not need to reach the question presented by the union's proposed standard.

In *Multimedia KSDK, Inc. v. NLRB*, the Eighth Circuit initially found that producers and assignment editors of a television station were not statutory supervisors.[173] Although this holding was eventually vacated and a rehearing en banc granted,[174] the case does provide insight into one of the more unique arguments that has been put forth following *Kentucky River*. In *Multimedia KDSK, Inc.*, the Board conceded that the employees "responsibly direct[ed]" the work of others, but that they did not do so with the "requisite degree of 'independent judgment.'"[175] The court originally agreed with the Board's application of the collaboration theory finding that there was not a sufficient degree of independent judgment exercised for the producers and assignment editors to be considered supervisors.[176] The court affirmed the Board's finding that the producers were "part of a sophisticated team" and that the employees they allegedly supervised "[carried] out their substantive work in a highly independent manner."[177] The producers were said to be "enmeshed in an integrated team . . . [that] facilitates the overall . . . process."[178] Analogizing to King Arthur, the court found that the producers occupied "the head chair at a round table."[179] Even though the Board's petition for enforcement was ultimately denied on other grounds, the court's decision maintains the viability of alternative theories such as the collaboration theory.[180]

An examination of the cases following *Kentucky River*, seen in light of the reaction following the *Health Care* decision, confirms that *Kentucky River* will have a similar impact on professionals if the NLRB continues its current course. After *Health Care*, the NLRB was able to effectively frame a new test that withstood judicial scrutiny for a short time, but this standard was ultimately overturned. Following *Kentucky River*, the cases indicate that the NLRB and labor organizations are fo-

171. *Id.* at 1220.
172. *Id.* at 1220–21.
173. Multimedia KSDK, Inc. v. NLRB, 271 F.3d 744, 746 (8th Cir. 2001), *vacated*, *reh'g en banc granted*, 285 F.3d 759 (8th Cir. 2002), *rev'd on other grounds*, 303 F.3d 896 (8th Cir. 2002).
174. *Id.*
175. *Id.* at 749.
176. *Id.* at 751.
177. *Id.* at 750.
178. *Id.*
179. *Id.* at 751.
180. *See* Multimedia KSDK, Inc. v. NLRB, 303 F.3d 896 (8th Cir. 2002).

cusing on the same options they did in trying to restrain the expansion of the supervisory exclusion via adjudication. These options include either formulating new tests based on the openings identified in *Kentucky River* or using tests previously approved by the Court that attempt to "redefine" the standard used to defend professionals. It does not appear that all courts are sympathetic to the continued efforts of the NLRB to formulate new tests following adverse decisions. If the NLRB continues on its current path, the ability of professionals to organize will continue to diminish. However, it is not a foregone conclusion that professionals must continue to lose protections. What follows is an examination of whether there are other options available that can protect professionals under the NLRA—aside from the course the NLRB appears destined to choose—and whether there is any prospect for success in choosing these alternative options.

B. Who Can Resolve the Tension? Analyzing the Likely Role of Employers, Congress, and the NLRB

The nature of the modern workforce underscores the importance of maintaining protections for professionals under the NLRA and emphasizes the significance of the course taken after *Kentucky River*. Entering the twenty-first century, professional workers constituted the largest single occupational category, comprising over 15% of the American workforce.[181] Most of the fastest growing occupations are in the professional and technical fields, with much of the growth in the health services field.[182] Although professional workers have the highest median weekly pay in the U.S. workforce,[183] they are not immune from the problems faced by blue-collar workers employed in jobs more commonly associated with union membership. The AFL-CIO's Department of Professional Employees has noted:

> Not only do professional and technical workers face many of the problems that plague workers in general—such as periods of unemployment, underemployment and technological displacement but the dual forces of privatization and conglomeration of employing institutions in the so-called "new economy" threaten to undermine their professional autonomy, working conditions and dignity, as well.[184]

181. DEP'T FOR PROF'L EMPLOYEES, AFL-CIO, THE PROF'L AND TECHNICAL WORK FORCE: A NEW FRONTIER FOR UNIONS 1 fig.1 (2000) [hereinafter PROF'L WORK FORCE] (citing the number of professional specialty workers). The category of professional specialty workers includes "a wide range of highly skilled and educated workers, such as architects, engineers, lawyers, doctors, scientists, artists, teachers, etc." *Id.* at 2. Of the 20 million professionals, 5.3 million are school teachers, who are primarily employed in the public sector and are not covered by the NLRA. *Id.*

182. DEP'T FOR PROF'L EMPLOYEES, AFL-CIO, CURRENT STATISTICS ON WHITE COLLAR EMPLOYEES 16 (2000) [hereinafter WHITE COLLAR EMPLOYEES].

183. PROF'L WORK FORCE, *supra* note 181, at 2–4.

184. *Id.* at 4.

As of 1999, unions represented 22.5% of the nearly nineteen million professionals.[185] This compares with only 15.3% of the total work force that is represented by unions.[186] It should be noted that these numbers include public employees, who are not covered by the NLRA. While 14.9% of the general population is represented by unions, only 9% of private sector employees belong to unions.[187] Given the large number of professionals that are not organized within unions, the status of professionals as supervisors will be determinative of how many of the remaining nonunion professionals may be organized.[188]

In light of the *Kentucky River* and *Health Care* decisions, labor organizers are in search of answers as to whether they will be able to tap into the resources provided by unorganized professionals. Due to the growing presence of professionals in the workplace, the future viability of the labor movement is dependent, at least partially, on the ability of unions to effectively organize professionals.[189] Not only do unions need professionals, but professionals, especially those in the health care field, need unions as the workplace changes. Generally, "the characteristics which once distinguished professional workers from other employees are being diluted, especially influence over job content and authority to exercise discretion."[190] These problems are particularly endemic within the health care field. Physicians, besieged by the growth of managed care

185. WHITE COLLAR EMPLOYEES, *supra* note 182, at 41.

186. *Id*. These numbers, however, do not provide an accurate portrayal of the ability of professionals to organize because of the large number of publicly employed teachers represented in the statistics. *See* PROF'L WORK FORCE *supra* note 181, at 4.

187. U.S. Census Bureau, Statistical Abstract of the United States: 2001 tbl.637, *at* http://www.census.gov/prod/2002pubs/olstatab/labor.pdf (last visited Nov. 21, 2002).

188. *See* NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 585 (1994) (Ginsburg, J., dissenting); *see also* PROF'L WORK FORCE, *supra* note 181, at 6 (recognizing that "there is ample opportunity for continuing union growth" among professionals).

189. The importance of professionals in future union organizing was recognized by AFL-CIO President John Sweeney when he stated, "'If the labor movement is to grow as it should—and as it must—it will be organizing millions more professional and technical workers.'" WHITE COLLAR EMPLOYEES, *supra* note 182, at viii. It is important to note, however, that getting past the hurdle of the supervisory definition is only one of the problems that face union organizers in gathering the support of professionals. A number of commentators have questioned whether unions properly address the problems of white-collar employees. *See* William B. Gould IV, *Some Reflections on Fifty Years of the National Labor Relations Act: The Need for Labor Board and Labor Law Reform*, 38 STAN. L. REV. 937, 943 (1986) ("[U]nions today seem unwilling or unable to organize developing industries in 'high tech' and other recent growth areas."); Leo Troy, *Will a More Interventionist NLRA Revive Organized Labor?*, 13 HARV. J.L. & PUB. POL'Y 583, 619–22 (1990) (analyzing the effect of the change from "a labor market dominated by employment in goods industries to one dominated by services"); Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and The New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 581 (1992) (noting that some attribute union decline to "the shift in the economy away from blue collar manufacturing jobs . . . toward white collar and service jobs").

190. Richard W. Hurd, *Professional Workers, Unions and Associations: Affinities and Antipathies* 1, *at* http://www.shankerinstitute.org/Downloads/hurd.doc (last visited July 29, 2002).

and tighter guidelines from insurance companies, have lost much of the influence they once had over their daily responsibilities.[191]

The ability of unions to organize these workers has diminished after the *Kentucky River* and *Health Care* decisions. These concerns are most immediately evidenced in the health care field.[192] However, the effects of *Kentucky River* extend beyond the health care industry alone.[193] The following section outlines the prospective roles of employers, Congress, and the NLRB in moving forward after *Kentucky River*.[194] Based on past experiences and the developments following *Kentucky River*, the ultimate solution to the problem, which will most likely consist of fleeting protections provided by the NLRB's efforts via the adjudicative process, is not likely to contain the expanding notion of supervisor. Unless the usual course of action is discarded and an exceptional course of action is taken, professionals will continue to be faced with dwindling opportunities to maintain rights under the NLRA. The most immediately responsive group, employers, is inclined to resist professionals having the ability to organize under the NLRA.[195] The group most capable of a definitive response on the issue, Congress, is the least likely to act.[196] The group most likely to have a long-term impact, the NLRB, will likely choose the less effective path available to them—adjudication, rather than rulemaking.[197] Rather than any group taking the exceptional course of conduct necessary to provide a definitive resolution to the statutory tension, the same course of conduct following the *Health Care* decision is likely to repeat itself, led by the ultimately futile attempts of the NLRB to maintain professional coverage under the Act.

1. "Relief" from Employers After Kentucky River

The most immediate "relief" for professionals in the workplace came from employers attempting to ensure that their professional workers qualify as supervisors under the Act. Shortly after the *Kentucky River* decision was rendered, employers began receiving guidance as to how they should treat professionals to better ensure professionals fell

191. K. BRUCE STICKLER, 2 THE LABOR LAW HANDBOOK § 20.14 (Ill. Inst. of Cont. Legal Educ. ed., 2002) (noting the AMA has changed its long-standing opposition to physician unions in "an effort to strengthen the profession's declining influence in the managed-care era, advocate antitrust exemptions for physicians, organize national negotiating units, and fight for patients' rights"); *Id.*

192. Japsen, *supra* note 101, at 1; Lentz, *supra* note 101, at 6.

193. *See supra* notes 118–22 and accompanying text.

194. The position of labor organizers is not being viewed separately from that of the NLRB. The NLRB has traditionally been viewed as attempting to limit the application of the supervisory exclusion and allow for the continued protection of professional employees. Unlike employers who can affect the rights of professionals through their human resource practices, labor organizers are primarily dependent on the adjudicative process for fashioning remedies in this area of labor law.

195. *See infra* Part III.B.1.

196. *See infra* Part III.B.2.

197. *See infra* Part III.B.3.

within the "supervisor" classification.[198] These recommendations include a number of suggestions for employers designed to enhance the appearance of professional employee participation in the workplace and to give a clearer impression of worker empowerment.[199] The recommendations made to employers mirror the language of the test for supervisory status in *Kentucky River* and *Health Care*.[200] For instance, the recommendations call for employers to make professionals' job descriptions explicitly list supervisory functions, give professionals "as much authority as possible" in the twelve powers listed in the definition of supervisors, and to "[e]nsure that these individuals have the independence to act in as many matters affecting employees as feasible . . . [avoiding] the temptation to limit authority by strict adherence to 'employer-specified' standards . . . that reduce the need for the exercise of independent judgment."[201] Employers are further encouraged to "seriously consider [professional-supervisor] recommendations" and "[r]esist the temptation to second-guess, review or independently investigate the authorities exercised," while making certain to compensate the professionals in question for their increased responsibilities and to designate them with management titles.[202]

It is too early to tell how effectively employers will implement these recommendations. However, the potential effect of the proposals can be analyzed under the backdrop of the purpose of the NLRA and professionals' concerns for developing a better workplace. One of the NLRA's primary goals is to encourage "practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions . . . ."[203] One researcher has found that professionals consider "freedom to exercise professional judgment"

198. Lyncheski & Andrykovitch, *supra* note 105, at 167 (giving employers suggestions on how to "increase the odds that the NLRB would agree that these employees truly are supervisors"). To the extent these changes are superficial, they will not have the intended effect. Merely changing a job description is not adequate to maintain a finding of supervisory status. W. Union Tel. Co., 242 N.L.R.B. 825, 826 (1979).

199. *See* Lyncheski & Andrykovitch, *supra* note 105, at 167.

200. *Compare id.*, *with* Ky. River Cmty. Care, Inc., 532 U.S. 706, 712–13 (2001) (setting forth a three-part supervisory test).

201. Lyncheski & Andrykovitch, *supra* note 105, at 167.

202. *Id.* at 167–68. It should be noted that while the tactic espoused by management periodicals may cause some employees currently on the cusp of supervisor status to lose their ability to organize, employers will not be able to use this course of action to take away the rights of currently organized employees. For professionals currently represented by unions, any change to a job description would be considered a mandatory subject of bargaining that cannot be changed unilaterally by the employer. Cellu Tissue Corp., 2000 WL 33664364 (N.L.R.B. Div. of Judges 2000) (stating in Part II.B of the decision, "The Board has routinely found 8(a)(5) violations based on changes such as the establishment of job descriptions . . . ."); Dickerson-Chapman, Inc., 313 N.L.R.B. 907, 942 (1994) (finding the unilateral issuance of new job descriptions without prior bargaining with the union a violation of section 8(a)(5) of the NLRA). Therefore, the effect of this tactic on professionals currently organized is limited to a degree.

203. 29 U.S.C. § 151 (2000).

the most important working condition.[204] At first glance, these recommendations appear to have a positive influence over the "wages, hours, and working conditions" of the professionals that labor organizations desperately wish to represent.[205] They explicitly call for more supervisory control for professionals, increased exercise of independent judgment, and higher wages to compensate for newly appointed supervisors.[206] It appears that professionals are getting precisely what they most desire via these employer led changes. However, nowhere do these recommendations provide for benefits such as job security,[207] which is primary among the benefits union membership may provide.[208]

The benefits of the employer-initiated proposals are inadequate for a number of reasons. First, these initiatives are explicitly designed to create evidence of supervisory status and keep professionals from enjoying the protections afforded them under the NLRA.[209] Without the potential benefits of union representation, professionals cannot organize within unions that can further their objectives, such as increased job security.[210] Second, because their primary goal is to avoid the application of the NLRA, employers will have an incentive to do the bare minimum necessary under the supervisor test to ensure such a classification. This is still a gray area of the law as the Supreme Court left the degree of independent judgment and the nature of "responsible direction" of other employees to be refined in further adjudications.[211] Given the progressive constriction of protections for professionals, it is not likely that the standards will be set high. Employers will want to maintain as much control over their employees as possible. Therefore, employers' response to *Kentucky River* will result in short term gains, but employers will keep these gains to a minimum over the long haul. If professionals want to have more than a modicum of protection, action will have to be taken by Congress or the NLRB.

204. Hurd, *supra* note 190, at 7. Professor Richard W. Hurd notes in his study of "the work-related issue of highest importance" that the ability to exercise professional judgment was of the most importance to professionals. He goes on to cite additional authority for this finding. For example, a study by Richard Hackman showed that pilots and musicians noted a "surprisingly limited latitude for exercising professional judgment." *Id.* at 1. Support for this prospect is not limited to researchers in the labor area. Sandra Feldman, President of the American Federation of Teachers, also noted, "Professionals . . . want to maximize their ability to exercise their professionalism." *Id.* at 6.

205. *See supra* note 186 and accompanying text.

206. *See* Lyncheski & Andrykovitch, *supra* note 105, at 167

207. *See id.*

208. *See* Hurd, *supra* note 190, at 2.

209. Lyncheski & Andrykovitch, *supra* note 105, at 167–68 (urging employers to "keep records and document the exercise of supervisory functions" and to "be proactive when it comes to establishing supervisory status").

210. *See* Hurd, *supra* note 190, at 4–6 (analyzing the mission statements and charters of various unions, many of which recognize and provide for the concerns of professional employees).

211. NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 720 (2001).

2. The Likelihood of Definitive Action by Congress

Congress is the actor that could most definitively settle the issue of professional protection under the NLRA; however, given the current situation, it is unlikely to do so. Congressional action in the area of health care would not be without precedent as Congress has acted in this area before. Most notably, Congress reacted to *Packard Motor*, which originally established supervisors as protected employees, by enacting the 1947 Taft-Hartley Amendments excluding supervisors from the coverage of the NLRA.[212] More recently, Congress specifically acted in the health care field by passing the 1974 Amendments to the NLRA.[213] These amendments repealed the exemption for private, nonprofit hospitals, added a more broadly stated definition of "health care institution," and created new notification procedures when strikes or pickets were anticipated at these health care institutions.[214] Congress explicitly refused to clarify the interpretation of supervisors and urged the NLRB to continue using the now overturned "patient care analysis" standard.[215] Furthermore, labor issues are not completely off the congressional radar as Congress has currently considered a number of labor issues, including some specific to the health care field.[216]

Despite the scattered congressional responses in the past, it is unlikely that Congress will act. It should be remembered that the initial formulation of the supervisor and professional classifications left an inherent tension in the Act, which Congress left for the NLRB and the courts to resolve.[217] Over the past half century, the Board has undertaken the challenge to resolve this dilemma by formulating a number of standards to alleviate the tension. The standards developed by the Board have faced continued scrutiny and ultimate defeat at the hands of the courts.[218] Congress has the power to act and has been called on be-

212. *See* discussion *supra* Part II.B.

213. Although the efforts of the health care professionals were not successful in having Congress clarify the supervisor-professional tension in the Act, the Senators considered professionals outside the scope of the supervisor exemption so long as their supervisory functions were "incidental to the professional treatment of patients." *See* S. REP. NO. 93-766, at 6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 3946, 3951.

214. *Id.* at 3946–47; *see also* 29 U.S.C. § 152(14) (2000) (creating a new definition of health care institution); *id*. § 158(g) (setting forth procedures when there is an intention to strike or picket at a health care institution).

215. *See* S. REP. NO. 93-766, at 6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 3946, 3951.

216. The Department for Professional Employees of the AFL-CIO noted in their review of proposed labor law legislation a number of measures introduced in Congress. DEP'T FOR PROF'L EMPLOYEES, AFL-CIO, DPE 2000 Legislative and Public Policy Report, *at* http://dpeaflcio.conceptfoundry.com/policy/reports/rep_2000.htm (last visited Oct. 14, 2002). The measures included a measure directed at the health care industry to add an antitrust exemption that would facilitate bargaining by health care employees and a measure directed at revising the definition of professional employees under the Fair Labor Standards Act; however, there were no proposals dealing specifically with the tension between the supervisor and professional sections of the NLRA. *See id.*

217. Finkin, *supra* note 34, at 805.

218. *See supra* Part.II.D.

fore to take action on this specific issue.[219] However, Congress has refrained from taking any definitive action. During the debate over the 1974 Amendments to the NLRA, Congress gave tacit approval of the then current standard applied in the health care industry for determining supervisory status, but declined to codify the standard.[220] When this standard was overturned in the *Health Care* decision, there was no congressional response. More recently, during congressional hearings following *Kentucky River*, Congress was made aware of the problems faced by professionals in organizing.[221] Again, nothing was done in response. Most notably, the Dunlop Commission on the Future of Worker-Management Relations (Dunlop Commission), set up by the Clinton Administration to study current labor-management relations,[222] recognized the need for "[u]pdating the definitions of supervisor and manager."[223] The Dunlop Commission noted that thirty-five percent of workers surveyed reported some degree of supervisory responsibility[224] and that courts had failed to recognize "the degree to which supervisory and managerial tasks have been diffused throughout the workforce."[225] In light of the workforce's changing nature, the Dunlop Commission recommended that Congress "simplify and restrict the supervisory and managerial employee exclusions of the NLRA" to protect professionals who may want the ability to bargain collectively.[226] Congress took no action.

Although there remains some attention to labor issues in Congress, there is no sign that the issue of protection for professionals under the NLRA is a priority in Congress and amendments to the NLRA have proven few and far between.[227] Furthermore, there is no indication that the decisions handed down in *Health Care* or *Kentucky River*, or the cumulative effect of both decisions, is so repugnant to Congress that it will find it necessary to amend the statute based upon a perceived lack of judicial discretion or deference to the NLRB.[228] Most important, however,

219. *See supra* note 215 and accompanying text.

220. *See supra* note 215 and accompanying text.

221. *The Nursing Shortage: Causes, Impact, and Innovative Remedies, Hearing Before the House Comm. on Educ. and the Workforce*, 107th Cong. 85–98 (2001) (written statement of Mary Foley, RN, MS, President American Nurses Association) ("ANA believes that the broad definition of supervisor contained in the National Labor Relations Act will continue to prompt unnecessary litigation and will interfere with the ability of many staff RNs to organize. We look forward to working with this Committee to craft a definition that contains a more appropriate definition of supervisor.").

222. DUNLOP COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FINAL REPORT 3–6 (1994) [hereinafter DUNLOP REPORT], *available at* http://www.ilr.cornell.edu/library/e_archive/gov_reports/dunlop/DunlopFinalReport.pdf (last visited Mar. 31, 2002).

223. *Id.* at 9.

224. *Id.* at 24–25.

225. *Id.* at 29.

226. *Id.* at 27.

227. 1 THE DEVELOPING LABOR LAW, *supra* note 4, at 66 ("As the paucity of these changes [to the NLRA] indicates, legislative stability has been the prevailing rule in the development of the Act since 1959.").

228. *See supra* notes 217–26 and accompanying text.

may be the perception that unionization among health care employees, particularly physicians, will lead to increased health care costs.[229] Given the congressional proclivity to react rather than take initiative, Congress's inaction in light of specific calls to change the statutory framework and the fear of increased health care costs, it is unlikely that any action will be taken on the matter until protections for professionals are more completely foreclosed. Despite Congress's ability to settle this issue, it cannot realistically be looked upon to take action following *Kentucky River*.

3. The Most Likely Remedy: The NLRB

In the absence of congressional action, the most likely relief for professionals will come from the NLRB. The past standards formulated by the Board evidence that it has traditionally paid more credence to the protections afforded professionals under the Act and has tried to protect professionals from an ever-expanding notion of supervisor under the NLRA.[230] The question is not whether the NLRB will respond to *Kentucky River*, but rather how effective its response will be. The NLRB has two avenues by which it can form labor policy: rulemaking and adjudication.[231] Professionals would be better served by an exercise of the NLRB's rulemaking power, as it would provide for a more definitive, well-informed decision-making process. This path is not likely to be followed because the NLRB is likely to follow the same course it has after previous adverse decisions to professionals and develop rules by adjudication. These rules will be formed in light of the openings identified in *Kentucky River* and standards that have previously passed muster with the courts. By following this course of action, the NLRB will hasten the demise of professional protections under the NLRA and squander a fleeting opportunity to contain the dismantling of these protections.

229. 146 CONG. REC. H5627, H5635 (daily ed. June 29, 2000) (statement of Rep. Thiahrt) ("A CBO study shows that the increased costs to health insurance companies as a result of physician collective bargaining will surely be passed on. . . . The costs will not go toward patient care but towards sustaining doctor unionization and salary hikes.") These fears are fueled from claims by insurance and managed care companies that collective bargaining by physicians would increase health care costs. *See, e.g.*, *Quality Health Care Coalition Act of 1999, Hearing on H.R. 1304 Before the House Comm. on the Judiciary*, 106th Cong. 122–30 (1999) (statement of Donald Young, N.D., Chief Operating Officer and Medical Director, Health Insurance Association of America).

230. In this Part of the Note, labor organizers are not treated separately as are employers. There is little labor organizers can do outside of lobbying Congress, which was discussed in Part III.B, or outside of the NLRB's rulemaking or adjudicative process. The NLRB, rather than the courts, has traditionally been the party that has developed and endorsed standards that tend to protect the interests of professional employees. *See* discussion *supra* Part II.C.

231. 29 U.S.C. § 156 (2000).

a. Adjudication

The most likely response to *Kentucky River*, outside of the reaction of employers, which is designed to keep professionals beyond the protections of the NLRA, is for the NLRB to provide protections to professionals by refining standards via the adjudicative process.[232] History shows that this is the course of action the NLRB has chosen in the past and will most likely choose in the future. The rulemaking power of the NLRA has been used to formulate rules with marked rarity.[233] On the specific issue of the tension between supervisors and professionals, adjudication was the approach taken by the NLRB after the *Health Care* decision.[234] After *Health Care*, union organizers turned their attention away from the test they had used to define "in the interest of the employer" and sought a new test that focused on the "independent judgment" prong of the test for supervisory status.[235] The test they chose was based upon standards that had won approval with the NLRB and the courts.[236] Ultimately, however, it met with disapproval from the Supreme Court.[237] If the NLRB chooses to follow the path of adjudication following *Kentucky River*, they are likely to find defeat again. Further defeat will foreclose another opportunity for professionals to stem the tide of an expanding notion of the supervisor under the NLRA.

Attempts at formulating an alternative test began almost immediately following *Kentucky River*.[238] True to form, labor organizers and the NLRB are relying on standards that have been accepted to some degree in the past and are attempting to clarify the openings identified in the *Kentucky River* decision.[239] Examining examples of both approaches highlights the ineffectiveness of the approach followed by the NLRB and labor organizers as well as the shortcomings of the adjudicative process.

Following *Kentucky River*, the NLRB quickly showed an inclination to react to negative decisions by searching its inventory of previously ac-

232. Lawyers representing employers have recognized the likelihood of the NLRB acting through adjudication and reacted to the prospects of further refinement of the standards with a degree of disdain. They have noted that "when the NLRB has been reversed by the Supreme Court, it has attempted to find creative ways around the court's directives" and that the NLRB "may attempt to achieve the same result as in the past by construing supervisory criteria in a manner that results in supervisory status being denied." *See* Lyncheski & Andrykovitch, *supra* note 105, at 163, 167.

233. Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 274–75 & n.2 (1991) (noting the rare circumstances in which the Board has used its rulemaking powers under section 6 of the NLRA).

234. *See supra* Part III.A.3.a.

235. *See* Supervisory Issue Memo, *supra* note 80.

236. *Id.* at n.10 (citing a number of pre–*Health Care* cases from other industries that stand for the proposition that the exercise of professional or technical judgment is not tantamount to exercising independent judgment).

237. NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 712–14, 721–22 (2001).

238. *See supra* Part III.A.3.b.

239. *See id.*

cepted standards for a viable replacement.[240] Throughout the *Multimedia KDSK, Inc.* proceedings, the NLRB set forth the "collaboration theory" as a workable standard after *Kentucky River*.[241] In its *original* decision, the court emphasized that the professionals in question were "part of a sophisticated team" that were "enmeshed in an integrated team . . . [that] facilitates the overall . . . process."[242] The court had used the test before and explicitly recognized it as an alternative to the standard used in *Kentucky River*.[243]

Taking a different approach, labor organizations and the NLRB have attempted to develop standards explicitly based on the areas in *Kentucky River* that Justice Scalia identified as open to further clarification. One example of such an attempt is found in *Public Service Co. of Colorado v. NLRB*.[244] In *Public Service Co.*, rather than utilize previously adopted standards, the union proposed an alternative standard to determine whether an employee "responsibly directed" other employees.[245] The union argued that supervisory status should only be found "where the independent judgment is with reference to the problem of directing employees or carrying out one of the other 11 tasks enumerated in § 2(11) rather than solving concrete technical problems on which coworkers might be working."[246] This standard was not explicitly rejected by the court, but was deemed irrelevant to the particular issue in question.[247]

These attempts at refining the standard by way of adjudication have fallen short. Although the courts' decisions regarding the NLRB's attempts to refine the relevant standard in this manner led to mixed results, these two cases in particular point out the ramifications of using ad-

240. 271 F.3d 744 (8th Cir. 2001), *vacated, reh'g en banc granted*, 285 F.3d 759 (8th Cir. 2002), *rev'd on other grounds*, 303 F.3d 896 (8th Cir. 2002).

241. The court's original decision contends that "*Kentucky River* leaves the collaboration theory unscathed." Multimedia KDSK, Inc. v. NLRB, 271 F.3d 744, 751 (8th Cir. 2001). The dissent takes an alternative view, referring to the collaboration theory as a "now-rejected test." *Id.* at 752–53 (Wollman, J., concurring and dissenting). Amending its prior decisions, the court found that the Board's order could not be enforced. Multimedia KDSK, Inc. v. NLRB, 303 F.3d 896, 899–900 (8th Cir. 2002). In denying enforcement, the court did not explicitly strike down the collaboration theory. *Id.* Rather, the court found that it could not remand the case to the NLRB unless such an "alternative theory" was originally put forth. *Id.* at 900. The court determined that the collaboration theory was not originally put forth. *Id*.

242. *Multimedia KDSK, Inc.*, 271 F.3d at 750.

243. *Id.* at 750–51.

244. 271 F.3d 1213 (10th Cir. 2001). For examples of similar attempts by the NLRB regional directors and the NLRB itself, see Part III.A.3.b.

245. While the union stated that this test applied to the "independent judgment" prong of the supervisor test, the court noted that this standard actually addressed the "responsibly direct" language of the supervisor definition. *Pub. Serv. Co. of Colo.*, 271 F.3d at 1219–20. It should also be noted that this "new" standard was an attempt by the union to propose an alternative reading of a standard used in a previous case, which the court found was overturned by *Kentucky River*. *Id.*

246. *Id.* at 1219.

247. *See id.* at 1220–21. The court chided the NLRB for not directly confronting the issue at hand, stating, "[i]f the Board wishes to introduce a new standard for interpreting when a person responsibly directs employees, it should do so forthrightly and explicitly." *Id.* at 1221.

judication to define the post-*Kentucky River* standards. Adjudication over this issue in particular is looked upon with suspicion by the court. This suspicion is exacerbated by both the confusion engendered in the formulation of these standards and the inherent limitations in the adjudicative process.

First, the persistent application of new standards by the NLRB—particularly regarding the definition of supervisor—is met with reservations by the court. In *Multimedia KDSK, Inc.*, the Eighth Circuit acknowledges the "frustration . . . shared by many" regarding the NLRB's "infinite manipulations of the term 'supervisor.'"[248] Meanwhile, the Tenth Circuit in *Public Service Co.* chides the NLRB for not bringing forth new standards "forthrightly and explicitly."[249] These two cases make clear that courts approach this subject guardedly. The courts' skepticism hinders any attempts to fashion a new standard by adjudication. The standard has changed over the preceding fifty years with regularity, particularly in the recent past. By continually changing their course, the NLRB appears to be unsure about the current standard, and therefore, the courts may not be prone to give these standards the deference they may otherwise.

This skepticism is compounded by another weakness of the adjudicative process in this area: apparent confusion in applying standards to the areas the Court left open for further clarification in *Kentucky River*. In *Public Service Co.*, the court notes the confusion encountered by the union in determining to which prong of the test their proposed standard applied.[250] Similar problems were encountered when a previously accepted test was used to circumvent *Kentucky River*. In *Multimedia KDSK, Inc.*, the "collaboration theory" was originally analyzed in light of the "independent judgment" prong of the supervisor test.[251] However, in Fifth Circuit precedent, the concept of an "integrated production team" is applied to the "responsibly direct" language of the supervisor definition.[252] It does not appear that the issues in this area are being appropriately explored within the adjudicative process.[253] Confusion over the application of the standards to the appropriate aspects of the supervi-

248. *Multimedia KDSK, Inc.*, 271 F.3d at 749.

249. *Pub. Serv. Co. of Colo.*, 271 F.3d at 1221.

250. *Id.* at 1219–21.

251. "[T]he Board reasonably concluded that employees engaged in a largely collaborative enterprise do not exercise 'independent judgment.'" *Multimedia KDSK, Inc.*, 271 F.3d at 751.

252. "After carefully reviewing the record, we conclude [a finding that the alleged supervisors did not 'responsibly direct' other employees] is supported by substantial evidence in the record. The Regional Director could have reasonably concluded that the disputed classifications . . . 'are part of integrated production team.'" NLRB v. KDFW-TV, Inc., 790 F.2d 1273, 1278 (5th Cir. 1986).

253. For instance, in cases such as *Anamag*, the NLRB has found that the leaders of team based employee structures are not supervisors in all instances. Anamag, 284 N.L.R.B. 621, 621 (1987). There the court determined that the team leaders did not possess the necessary "degree of authority" to be considered a supervisor. *Id.* The Board applied their finding to the independent judgment prong of the supervisor test, rather than the responsibly direct prong, as in *KDFW-TV*. *Compare id.*, *with KDFW-TV, Inc.*, 790 F.2d at 1278.

sor definition is found in both the NLRB's and courts' interpretations of the standards. The lack of clarity exacerbates the reservations held by the courts when reviewing new standards supported by the NLRB. A clear, informed understanding of the issue is particularly important as more avenues are closed for professional protections by adverse court decisions.

Finally, there are inherent limitations in the adjudicative process. Although a standard could win the approval of the courts, it may not be applicable beyond the particular facts of the case at hand. This result could preclude expansion of a standard outside the industry in question. Such a result could await any attempts at expanding application of alternatives such as the "collaboration theory." When this theory has been applied in the past, special emphasis has been placed on facts such as the lower relative income of the supervisors when compared to the employees they supervised.[254] This language, undoubtedly inserted to bolster the holding based on a set of particular facts, could prevent expanded use of an otherwise applicable doctrine to other fields. This limitation is a danger inherent in adjudication. Courts decide the case before them based on the facts in the record. When application of a standard is attempted outside the realm of facts similar to the original case, the court can inhibit expanding the application of a doctrine. Just as the *Health Care* decision contained language meant to limit the effects to the health care industry,[255] courts could use the same approach to limit the application of a standard favorable to professionals to an industry.

The preceding issues highlight the ineffectiveness of the adjudicative process. The suspicion shown by the courts is based upon the NLRB's history of instantly applying "new" theories to limit the effects of decisions that have discarded previously used theories and expanded the notion of supervisory status. The confusion shown in proposing application of new standards exacerbates the judicial suspicion of these new standards. If a new standard set forth by labor organizations or the NLRB is to successfully allow for continued protection of professionals, it must do more than merely work within the adjudicative process using either past standards that have garnered judicial approval or ineffective attempts at formulating new standards. To be certain, precedent serves as the proper and necessary starting point to any attempt at resolving the statutory tension. However, rather than merely recycle past decisions in adjudicatory proceedings, and subject accepted standards to the scrutiny of skeptical courts, the NLRB must consider utilizing the more measured approach available in their rulemaking power.

254. "It is particularly telling that many of the other professionals earn more than producers." *Multimedia KDSK, Inc.*, 271 F.3d at 750.

255. NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 583–84 (1994).

b. Rulemaking

The NLRB is granted rulemaking authority in section 6 of the NLRA.[256] In spite of this explicit grant of rulemaking authority, the Board has undertaken major rulemaking proceedings in very few instances.[257] Aside from the painstaking rarity with which the NLRB has utilized its rulemaking authority, there are no statutory limitations causing it to refrain from further use of the power. Commentators have asserted the benefits of the rulemaking powers in numerous instances to no avail.[258] Among the benefits of rulemaking identified by commentators are the flexibility of the procedures involved,[259] increased participation of interested parties,[260] increased amounts of data,[261] and the increased likelihood that the courts will give deference to the decision.[262]

In his examination of the circumstances surrounding the NLRB's first rulemaking endeavor, Professor Mark Grunewald identified a number of considerations and issues regarding the use of the rulemaking process.[263] Among the factors included were whether the empirical data gathered would be any more useful than that received in adjudication, whether this data would be reliable, the propensity of all interested parties to participate, and the stability and clarity of the policy.[264] Grunewald found that the Board, in deciding to use the rulemaking power, determined that empirical data would be useful and that the Board's previous experiences in adjudication had shown, based on the "commonality" of the industry involved—health care—that there was a "basis for proposing a specific rule for consideration."[265] In reviewing the NLRB's first undertaking with the rulemaking process, Grunewald found that the purposes of the rulemaking proceedings were met.[266] The issues consid-

256. 29 U.S.C. § 156 (2000) ("The Board shall have authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of this subchapter.").

257. *See supra* note 234 and accompanying text.

258. *See* Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure* Act, 79 YALE L.J. 571 (1970); Grunewald, *supra* note 233, at 274–75 n.3 (citing authorities calling for greater use of the rulemaking power); Carl S. Silverman, *The Case for the National Labor Relations Board's Use of Rulemaking in Asserting Jurisdiction*, 25 LAB. L.J. 607 (1984); *cf.* Joan Flynn, *The Costs and Benefits of "Hiding the Ball:" NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 445–46 (1995) (arguing that the current methods of the NLRB's rulemaking via adjudication more effectively shields them from interventionist courts than would the alternatives).

259. David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 929–30 (1965).

260. *Id.* at 930.

261. Charles J. Morris, *The NLRB in the Dog House—Can An Old Board Learn New Tricks?*, 24 SAN DIEGO L. REV. 9, 29 (1987).

262. *Id.* at 34–35.

263. *See* Grunewald, *supra* note 233, at 281–82, 293.

264. *See id.*

265. *Id.* at 293–94.

266. First, the Board accumulated an enormous volume of empirical data that simply had not been available to it in adjudications; it thoroughly digested that information and used it effectively in formulating the final rule. Second, the process provided a degree of openness and

ered by the Board, its rationale for undertaking the rulemaking process, and the lessons learned from this previous experience provide a useful framework when determining whether the rulemaking process is appropriate in resolving the tension between professionals and supervisors.

The benefits achieved during the Board's previous foray into rulemaking could be realized in the context of the tension between the protections afforded to professionals and supervisors. First, the NLRB used the rulemaking process to gather a wider array of useful data than it would have obtained in adjudication.[267] The NLRB found the information it used was both useful and reliable.[268] Similar results could be realized in resolving the tension between supervisors and professionals. In this area, there is a plethora of data that could be mined to document both the nature of the work performed by modern professionals and the changing nature of the twenty-first century workforce. As David M. Rabban noted, "The [NLRB] and the courts have realized that the assumptions underlying the NLRA apply at best imperfectly to many of the organizations in which professionals work."[269] The need for relevant, up-to-date information is even more important, as the NLRA did not contemplate the current professional work environment. Among the information the NLRB could gather regarding modern professionals is data on the number of professionals ripe for union organization, the nature of modern professional work within the framework of management-employee relations, the working conditions that modern professionals seek in their workplace, and the changing configuration of the American workforce. Much of this data is currently available from reliable sources and could be supplemented with industry specific data from both management and labor organizations.[270] By their very nature, adjudicative proceedings are not able to collect the same amount of information as the NLRB could in rulemaking proceedings. Given the drastic changes in the workforce since the inception of the Taft-Hartley Amendments, reliance on such data is imperative to strike a balance in the statutory tension.

> broad-scale participation simply unmatched by [adjudications]. Third, the product of the rulemaking is a model of clarity as expression of policy in an area that had historically been consumed by excessive subtlety and complexity. Finally, the rule promises a degree of stability for a policy area that had been overwhelmed by change.

Id. at 320–21.

267. *Id.* at 320.

268. *See id.*

269. David M. Rabban, *Distinguishing Excluded Managers from Covered Professionals Under the NLRA*, 89 COLUM. L. REV. 1775, 1778 (1989).

270. *See supra* notes 181–88 and accompanying text. Two such studies include THE PROF'L AND TECHNICAL WORKFORCE: A NEW FRONTIER FOR UNIONS and CURRENT STATISTICS ON WHITE COLLAR EMPLOYEES: 2000 EDITION. These studies give a broad statistical overview of the professional in the American workplace and useful information on individual industry segments of professionals. Both of these studies were performed by the AFL-CIO's Department for Professional Employees based upon information from the United States Department of Labor. *See* PROF'L WORK FORCE, *supra* note 181; WHITE COLLAR EMPLOYEES, *supra* note 182.

Second, it is necessary that the interests of all parties be considered within the context of the rulemaking process. Professor Grunewald found that labor organizations showed greater interest than management representatives during the NLRB's first attempt at rulemaking.[271] Given that management was not pleased with the rule promulgated by the NLRB in the prior rulemaking proceedings,[272] they would be certain to be involved in future proceedings. Furthermore, the interest of management and labor organizations in resolving the specific questions raised by the statutory tension between the definitions of professional and supervisor is evident. Some have voiced their complaints over the NLRB's current approach in tackling this issue, claiming that the NLRB is constantly seeking illusory justifications for not finding supervisory status for professionals.[273] Labor organizations, on the other hand, are dependent in part on their ability to organize professionals to maintain future viability.[274] The interest of these groups in the specific topic at hand and the rulemaking process in general would serve to not only increase the amount of quality information received, but would also lend credibility to any rule that was promulgated.[275] The NLRB is more likely to "provide the courts with evidence of genuine agency expertise to which they should be more likely to defer" if well-reasoned rules are derived from "broad public input."[276]

Finally, the rulemaking process would add stability and clarity to an area of the law that is fraught with change and confusion. When Congress enacted the amendments setting forth the supervisor and professional definitions, it left to the NLRB the power to resolve the resulting tension in the statute.[277] Rulemaking provides the vehicle by which the NLRB can resolve this tension definitively.[278] This has not been a stable area of the law. The standard in this area has evolved over the past sev-

271. *See* Grunewald, *supra* note 233, at 300.

272. *Id.* at 301 ("[T]he very uniqueness of the proceeding for the Board undoubtedly encouraged speculation on both sides as to the significance of the undertaking, and thus may have affected the vigor of participation.").

273. *See* Lyncheski & Andrykovitch, *supra* note 105, at 163, 167; *see also supra* note 108 and accompanying text.

274. *See supra* note 187 and accompanying text.

275. As it currently stands, the only "relief" professionals are certain to receive will come from employers. *See supra* Part III.B.1.

276. Morris, *supra* note 261, at 34–35.

277. NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 585 (Ginsburg, J., dissenting) ("The separation of 'supervisors,' excluded from the Act's compass, from 'professionals,' sheltered by the Act, is a task Congress committed to the [NLRB] in the first instance.").

278. A number of Seventh Circuit cases have contended that more deference may be given to standards promulgated via the rulemaking process. *See* NLRB v. GranCare, Inc., 170 F.3d 662, 669 (7th Cir. 1999) ("[L]ess deference is afforded when agencies act outside their rulemaking authority."); NLRB v. Res-Care, Inc., 705 F.2d 1461, 1466 (7th Cir. 1983) (This case was identified by Professor Grunewald in his rulemaking article. The court contends, "[W]hile the Board is entitled to some judicial deference in interpreting its organic statute as well as in finding facts, it would be entitled to even more if it had awakened its dormant rulemaking powers for the purpose of particularizing the application of section 2(11) to the medical field.").

enty-five years with particularly important decisions being handed down the past ten years.[279] *Kentucky River* did nothing to make this area of the law more stable due to areas of the law left open for clarification and the decision's potentially broad impact. Confusion over the relevant standards and the extremely fluid nature of the NLRB's interpretation of the term "supervisor" has frustrated both the courts and employers. By promulgating a rule in this area, the NLRB could help alleviate the confusion and frustration.

IV. RESOLUTION: THE NEED FOR DRASTIC ACTION BY THE NLRB

Professionals cannot expect relief from either employers or Congress. As one would expect, employers are being encouraged to utilize the *Kentucky River* decision by taking action that will intentionally exclude professionals from the Act's protections. Meanwhile, Congress is likely to remain on the sidelines despite explicit calls to resolve this very issue. If protection for professionals under the NLRA is to be forthcoming, it will come from the NLRB. By utilizing its rulemaking power, the NLRB can provide a basis for a more informed standard based on the realities of the modern workplace. Furthermore, by taking such rare action, the NLRB would be able to focus attention on the gravity of the situation faced by professionals struggling to gain protection under the NLRA.

The adjudicative process has done little to maintain the protections of professionals afforded under the NLRA. Rather, it has accomplished nothing more than delaying the continual expansion of the supervisory exclusion under the Act. Despite the shortcomings of adjudication, history has shown—and the practice of the NLRB after *Kentucky River* has proven—that the NLRB will likely rely on adjudication again to outline the next manifestation of this ever-evolving standard. If this mode of developing new standards continues, the remaining avenues available to protect professionals will be foreclosed and the tension inherent in the Act will be resolved to the detriment of professionals. If a proper balance is to be struck in the statutory tension, the NLRB must utilize its long-neglected rulemaking powers. By utilizing these powers, a clear standard, based on full input from all interested parties can be formulated. A unique, almost unprecedented, use of the rulemaking power providing a well-reasoned rule that resolves the statutory tension in light of modern realities is more likely to withstand judicial scrutiny than have the past and present attempts at formulating rules by adjudication. In light of the factors identified by Professor Grunewald as important in deciding to implement its rulemaking power initially, it has been shown that the protection of professionals is an area ripe for the use of the NLRB's

279. *See supra* Part II.

rulemaking powers.[280] While rules that have been used previously may be a starting point for a proposed rule, the NLRB should consider a number of factors in formulating a new standard.[281]

First, the NLRB should be cognizant of the nature of the standard it proposes. The NLRB should attempt to develop as close to a bright-line test as it can. This would be particularly helpful in clarifying the degree of independent judgment exercised by a professional before they are considered a supervisor. Caution should be exercised in this regard, as the bright-line standard set forth in *Adelphi* met with disapproval from the NLRB despite support for a number of years prior to the decision in *Detroit College*.[282] Therefore, any rule that approaches *Adelphi's* fifty percent standard may be met with reservations by the courts as this standard was set aside by the NLRB itself when it moved to a new standard in *Detroit College*.[283] In light of the Dunlop Commission's report, however, the NLRB has support for granting professionals a high degree of independent judgment before they are considered supervisors.[284] A "checklist" of pertinent factors to consider, such as that used in the General Counsel's memorandum issued in the wake of the *Health Care* decision delineating the standard eventually overturned in *Kentucky River*, should also be considered.[285] Although the NLRB's approach of clearly setting forth a standard in a General Counsel's Operation-Management Memorandum, as it was applied in *Kentucky River*, did not withstand judicial scrutiny, the same factors set forth in a rulemaking proceeding may withstand judicial scrutiny due to the deliberative nature of the rulemaking process and the broad base of information available in such proceedings. As courts themselves have noted, this calculated, deliberative effort on the NLRB's part will be more likely to be afforded deference under the *Chevron* doctrine.[286]

Second, the standard must stress the modern realities of professional work. While the protections for professionals are determined by the scope of the supervisory exclusion, the NLRB must focus its proceedings on the nature of professional work. A renewed emphasis on these characteristics would help to strike a balance that recognized the need to protect professionals under the Act as the tensions between the definitions in the NLRA are resolved.

280. *See supra* Part III.B.3.b.

281. One such rule could be the collaboration theory discussed earlier, which recognizes to a limited extent the nature of the modern workplace. *See supra* notes 173–79 and accompanying text.

282. *See supra* Part II.C.

283. *See supra* notes 46–49 and accompanying text.

284. *See supra* notes 221–26 and accompanying text.

285. *See* Supervisory Issue Memo, *supra* note 80. Courts have noted, "while the Board is entitled to some judicial deference in interpreting its organic statute as well as in finding facts, it would be entitled to even more if it had awakened its dormant rulemaking powers for the purpose of particularizing the application of Section 2(11) to the medical field." NLRB v. Res-Care, Inc., 705 F.2d 1461, 1466 (7th Cir. 1983).

286. *See, e.g.*, *supra* note 278.

Finally, there must be a discussion of the rule's substantive provisions. Admittedly, without the benefits of rulemaking, such as increased participation and information, any attempt to propose a rule in this note is largely futile.[287] However, any rule should take into account specific substantive considerations, which at the very least should designate what activities commonly undertaken by professionals are not supervisory functions. These considerations should focus on the invitation made by the courts to clarify the degree of judgment that can be exercised before a professional is deemed a supervisor and the invitation to clarify responsible direction.[288] Most importantly, any rule should make clear that detailed instructions and strict guidelines governing the conduct of professionals take them outside the purview of the supervisor designation. Furthermore, the rule should make clear that supervision of tasks rather than employees does not render a professional a supervisor. These considerations not only explicitly recognize that such instructions and guidelines take away a large degree of judgment, but also recognize what many professionals have identified as the reason they seek representation: the decreasing amount of discretion they are permitted at the workplace.

The importance of using the rulemaking process is relevant now more than ever as the concept of supervisors under the NLRA continues to expand amidst dwindling opportunities to maintain the protections for professionals. By taking this action, the NLRB would stress both the need to resolve the statutory tension and difficulties of formulating a standard under the auspices of the NLRA in light of the modern workforce. If the NLRB takes such drastic action and the resulting rule is overturned, Congress may be forced to awaken and heed the calls to modernize the NLRA in this area.

V. CONCLUSION

The tension between the protection afforded to professionals under the NLRA and the exclusion of supervisors from the Act's protections has been marked by a constant evolution in the standards applied. Despite initial projections that *Health Care* would be a death-knell for professional protections, history showed that the standard for determining the supervisory status of professionals continued to evolve. Although the standard utilized subsequent to *Health Care* was struck down in *Kentucky River*, the Court acknowledged that viable avenues remain for professionals to carve out protection from the expanding notions of who is a supervisor under the Act.[289] Despite the historical resilience of labor organizers in fashioning new standards to maintain protections for profes-

287. *See supra* Part IV.
288. *See supra* notes 250–55 and accompanying text.
289. *See supra* Part III.A.2.

sionals,[290] the adjudicative process cannot effectively be used to continue the protection of professionals under the NLRA. As the avenues for protection slowly dwindle, first by *Health Care*,[291] then by *Kentucky River*,[292] the task of maintaining protection for professionals becomes more urgent. Although numerous actors exist who can facilitate the protection of professionals, the NLRB is the candidate most likely to undertake an effort to retain or reinvigorate the protections and safeguards of the NLRA. To do so, the Board must utilize its rulemaking power rather than following the familiar course of adjudication. Only through the rulemaking power can the Board adequately quantify the characteristics of the changing workforce and modern professional, and strike a balance in the tension between the supervisor exclusion and the inclusion of professionals under the Act. If the NLRB continues using the adjudicative process, allowing the courts ample opportunity to continue to eat away at the protections of professionals, the future protection of professionals under the auspices of the NLRA is not promising.

290. *See supra* Part II.C.
291. *See supra* Part III.A.3.
292. *See supra* Part III.A.3.