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Cover Page Footnote
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Ohio SB5 and the Attempt to "*Yeshiva*" Public University Faculty

Mary Ellen Benedict[1] & Louis M. Benedict[2]

Introduction

After the 2010 national and state elections ended with a more conservative set of Republican politicians making public policy, particularly in state governorships and legislatures, several individual states became battlegrounds over the collective bargaining rights of public sector workers. In Wisconsin, Governor Scott Walker and the Republican legislature pushed through a bill that limits the collective bargaining power of state and local municipality employees (exceptions were made for firefighters and police) and required higher payment by employees for health care and pensions (Reuters, 2011). A failed attempt to recall Governor Walker in 2012 leaves Walker's law in place as of the writing of this article (The New York Times, 2012). Other new laws across the country include those that lead to severe cuts to health care and pension funds to public sector workers in New Jersey (The New York Times, 2012), a right-to-work law in place in Indiana (Davey, 2012), and a voter-approved reduction to city workers' pensions in San Diego and San Jose (Semuels, 2012). However, none of the states that changed public sector bargaining included the unique attack on faculty collective bargaining using the 1980 *Yeshiva* decision as the Ohio Senate Bill 5 (SB5) did.

In 2011, the introduction of SB5 attempted to drastically curtail public sector collective bargaining in Ohio. The bill included language that appeared to classify public university faculty as managers (or supervisors) and exclude them as employees eligible to bargain collectively. Although the original bill as introduced abolished all public employee collective bargaining, the final amended version of SB5 indirectly eliminated public sector faculty from collective bargaining by classifying faculty as management level employees (or supervisors), not eligible to bargain collectively. The underlying legal reasoning that resulted in the final version of SB5 was proposed by the president of

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the state's association of public universities (Berrett, 2011a). The Inter-University Council of Ohio (IUC), an organization of top administrators from the state universities in Ohio, proposed an amendment to the legislation under the guise of applying the United States Supreme Court's decision in *National Labor Relations Board v. Yeshiva University* (1980). Under *Yeshiva*, faculty can be determined to be managers and therefore excluded from collective bargaining. The *Yeshiva* decision applies only to faculty at private colleges and universities, which are covered by federal labor law. An initial question then is, does SB5 accurately reflect the *Yeshiva* decision?

Although SB5 was revoked by voter referendum, two additional questions are left unanswered: (1) If SB5 had gone unchallenged by voter referendum, what would the immediate effect be on faculty collective bargaining? (i.e., would faculty at public institutions of higher education automatically be ineligible to bargain collectively?); and, (2) If SB5 was not revoked by referendum, could SB5 be successfully challenged by faculty in its application to faculty collective bargaining? Answers to these questions not only provide insight into future issues for higher education faculty in Ohio, but also in other states that attempt similar legislative maneuvering.

Public Sector Collective Bargaining in Ohio

Public employee collective bargaining at the state and local level is not regulated by federal labor law. Section 2 (2) of the National Labor Relations Act (NLRA) (2008) specifically exempts public employees of a state and its political subdivisions from coverage under the Act. However, the federal constitutional right of public employees to join a union is well-established. The First Amendment of the United States Constitution protects faculty members at public institutions of higher education to speak freely, to associate with others, and to petition the government for redress of grievances. It also protects the right of associations, such as unions, to engage in advocacy on behalf of its members (*Smith v. Arkansas State Highway Commission, Local 1315*, 1979). Thus, faculty are protected from government retaliation in joining unions. However, the United States Supreme Court, in *Smith v. Arkansas State Highway Commission, Local 1315* (1979), held that the First Amendment does not impose any affirmative duty on the government to listen to, to respond to, or to recognize a union association and bargain with it. Consequently, faculty are free to join unions and unions can attempt to bargain with the government, but the government is not obligated by the United States Constitution to bargain with a faculty (or any) union. Thus, it is up to state law to determine the level of obligation, if any, of state and local government to bargain collectively with its public employees.

Although the U.S. Constitution does not obligate government to bargain with public employee unions, some state constitutions, such as those of Florida (Fla. Const.) and

Hawaii (Haw. Const.), provide explicit protection for the right of public employees to bargain collectively. A provision in a state constitution that establishes the right of public employees to bargain collectively provides much more protection than a state statute, because constitutions are much more difficult to change or amend than legislative statutes. State constitutions also supersede any state or local legislation. Ohio has no such state constitutional protection for public sector collective bargaining.

In the absence of state constitutional protection, there are four different types of state and local legal protection regarding the right of public employees to bargain collectively: (a) some states authorize public sector bargaining by statute (either for all or specific occupations); (b) some states specifically outlaw public sector bargaining; (c) in some states, bargaining is authorized by executive order or local ordinance; and (d) in some states, there is no legislation either authorizing or prohibiting bargaining. Kearney (2009) found that legislation or other policies imposing a duty to bargain or meet and confer with at least one group of public workers are in effect in approximately 43 states. Although there are many variations in state policies regarding public sector collective bargaining, the trend has been to extend comprehensive coverage to all state and local government workers (Kearney, 2009). Most of the state public employee bargaining laws were enacted over a period of about 10 years, from the mid-1960s through the mid-1970s (Kearney, 2009). However, Ohio did not enact a state public bargaining law until 1983, after years of long political battles. Saltzman (1988) found that "before 1983, Ohio's public sector labor relations were largely unregulated by law" (p. 42). Kearney (2009) noted that only four states have passed major collective bargaining laws since the 1970s—Ohio, Illinois, New Mexico, and Washington. Thus, Ohio had years of public sector bargaining legislation and experiences from other states, as well as the federal government, in order to write its own comprehensive public sector collective bargaining legislation.

Ohio also had its own unique experiences with public sector bargaining prior to the passage of its public sector collective bargaining statute. There were some statutes and court decisions that regulated particular aspects of public sector labor relations in Ohio, as well as a number of bills that failed to be enacted. The issue of public sector bargaining in Ohio was continually discussed and debated in state and local government and public sector concerted activity existed without formal legislative authorization.

In January, 1947, the Ohio Supreme Court decided the case of *Hagerman v. Dayton* (1947), which held that municipal governments could not permit voluntary deduction of dues from their public employee's paychecks and declared that there is no authority for the delegation of any powers or functions of either a municipality or its civil service appointees to any organization (in this case, a union). The court found that there was no

municipal purpose or benefit served by the dues check-off of wages of civil service employees, except as a means of maintaining union membership, and therefore, the action was "contrary to the spirit and purpose of the civil service laws of the state" (*Hagerman v. Dayton*, 1947, p. 328). On June 14, 1947, Amended Senate Bill No. 261 (SB261), referred to as the Ferguson Act, was passed by the legislature and approved by Governor Thomas Herbert on June 20, 1947. Section 2 of SB261 prohibited any government employee of the state or any political subdivision of the state from striking. Under Section 4 of SB261 any striker who was rehired would receive no pay increase for one year and would be on probation for two years.

In 1959, a watered down version of a bill that would have protected the rights of public employees to join a union and informally negotiate resulted only in overturning part of the 1947 *Hagerman* court ruling that outlawed dues check-off provisions (Saltzman, 1988). However, in the 1960s, there was frequent non-enforcement of anti-union provisions of the law (Saltzman, 1988). By 1968, despite the *Hagerman* ruling that declared public sector bargaining was an improper delegation of governmental authority, the cities of Cincinnati, Akron, Columbus, Dayton, Toledo, and Youngstown had all signed contracts with the American Federation of State, County, and Municipal Employees (AFSCME) (Saltzman, 1988). Also by 1968, the Ferguson Act's severe strike penalties were rarely invoked against public employees (Saltzman, 1988).

Further support of public sector collective bargaining agreements was provided by the courts. In 1975, the Ohio Supreme Court, in *Dayton Classroom Teachers Association v. Dayton Board of Education*, held that "a board of education is vested with the discretionary authority to negotiate and enter into a collective bargaining agreement with its employees" (p. 132). The court also held that a binding arbitration clause contained in such agreement must be honored by the board where the grievance involves the application or interpretation of a valid term of the agreement and the arbitrator is specifically prohibited from making any decision that is inconsistent with the terms of the agreement or contrary to law (*Dayton Classroom Teachers Association v. Dayton Board of Education*, 1975). Saltzman (1988) found that this ruling reflected de facto acceptance of public sector bargaining during the early 1960s and 1970s. Despite popular acceptance of public sector bargaining, then Ohio Governor James F. Rhodes vetoed public sector bargaining bills in 1975 and 1977 (Saltzman, 1988). However, by 1983, Democrats controlled both the Ohio House and Senate and the governor's office (Troy, 2011). Amended Senate Bill No. 133 was passed on June 30, 1983 and Governor Richard F. Celeste signed SB133 into law (Public Employees' Collective Bargaining Act) on July 6, 1983, effective October 6, 1983.

Although not a single Republican voted for SB133 (Troy, 2011), "Republicans controlled the governor's office and both houses of the legislature for 12 years from 1995 to 2006, but did not try to throw out the 1983 law" (Hershey, 2011, p. 3). Part of the reason may be the stabling effect it had on employment relations. "According to the State Employment Relations Board, there were 183 public employee strikes from 1978 to 1980, with no data available for 1981-1983" (Hershey, 2011, p. 3). However, "from 1984-2010, there have been 211 strikes including none last year [2010]" (Hershey, 2011, p. 3). Thus, in the years prior to SB5, the Public Employees' Collective Bargaining Act appears to have decreased disruption of public service caused by strikes.

Faculty at public higher education institutions in Ohio were involved in collective bargaining long before Ohio officially protected public sector collective bargaining. Two public institutions of higher education, Youngstown State University and Northwest State Community College, negotiated faculty collective bargaining agreements that began in 1973 (Hurd, Bloom, & Johnson, 1998), ten years before the Ohio's Public Employees' Collective Bargaining Act became law. By 1983, nine additional public institutions of higher education elected faculty collective bargaining agents (Hurd et al., 1998). The trend continued during the 1980s and 1990s as many of the two-year Ohio public institutions elected bargaining agents and voted for contracts. Four-year institutions also moved toward collective bargaining, and the American Association of University Professors (AAUP) was elected at Kent State University and the University of Cincinnati in 1975 and at the University of Toledo and Cleveland State University in 1993 (Hurd, et al., 1998). More recent additions to faculty unionization include Akron State University (American Association of University Professors, 2004) and Bowling Green State University (Nichols, 2010). Today Miami University of Ohio, Ohio University, and Ohio State University are the only four-year Ohio public institutions that have not yet elected a faculty collective bargaining agent (State Employee Relations Board, 2012).

Prior to SB5, Section 4117.03 of the Public Employees' Collective Bargaining Act (2010) gave Ohio public employees the right to form unions and bargain collectively in regard to wages, hours, terms, and other conditions of employment. On February 2, 2011, the initial Ohio Senate Bill 5 (S.B. No. 5) was introduced. Its stated intent was that sections of the Ohio Revised Code be amended, enacted, or repealed to prohibit the state entities, including state institutions of higher education, and their employees from collective bargaining. After considerable opposition, the bill was amended to allow public sector collective bargaining but with significant restrictions and the substitute bill (Sub. Bill No. 5) was passed by the Ohio Senate on March 2, 2011. Further amendments were made and the final bill, Amended Substitute Senate Bill Number 5 (Am. Sub. S.B. 5), was passed (subsequently referred to as Senate Bill 5 or SB5) by the Ohio General Assembly (both the Ohio House and Senate) on March 30, 2011. The bill was signed by

Governor Kasich on March 31, 2011 (to be effective July 1, 2011). SB5 greatly limited public sector collective bargaining rights, including prohibiting "public employees" from striking (reminiscent of the 1947 Ferguson Act) and it required the public employer to deduct from the compensation of a striking employee an amount equal to twice the daily rate of pay for each day or part thereof that the employee was engaged in a strike. It expanded the list of subjects that are inappropriate for collective bargaining. It also eliminated the ability of the parties to submit disputes to agreed-upon dispute resolution process.

With specific regard to faculty at state institutions and the focus of the remainder of this paper, SB5 expanded the definition of "supervisor" and "management level employee" in an attempt to reclassify faculty as one or both and thereby make faculty ineligible to bargain collectively. However, SB5 was repealed by Voter Referendum on November 8, 2011. Nevertheless, this attempt to prohibit collective bargaining by faculty at public institutions is of vital concern as it may be used again in the future, not only in Ohio but in other states.

SB5 and Higher Education Faculty as Supervisors or Managers

The legal reasoning that underpinned the final amended version of SB5 "that seeks to scuttle collective bargaining for faculty unions in Ohio's public colleges came from the president of the state's association of universities" (Berrett, 2011a, para. 1). "Bruce E. Johnson, president of the association, Inter-University Council of Ohio, confirmed [to the *Chronicle of Higher Education*] in an interview on Tuesday [March 8, 2011] that he had suggested the measure to members of the state Senate" (Schmidt, 2011b, para. 2). In testimony before the Ohio Senate Insurance, Commerce, & Labor Committee, chaired by Senator Kevin Bacon, Inter-University Council (IUC) President Bruce Johnson testified on the objective of the proposed legislative amendments:

> The IUC supports the changes to law that relate to higher education as recommended in Senate Bill 5. For employees of institutions of higher education, the bill is fairly straightforward – it expressly states that employees of any state institution of higher education do not have collective bargaining rights. (Inter-University Counsel of Ohio, February 22, 2011 testimony of B. Johnson).

The participation of the IUC was much stronger than mere oral support for the elimination of faculty collective bargaining, as it involved drafting legislative language that was designed for that specific purpose:

> Bruce Johnson, head of the IUC, said that he first proposed during a Senate hearing the use of language from the 1980 U.S. Supreme Court case National Labor Relations Board vs. Yeshiva, which ruled that private university faculty are

> ineligible for collective bargaining. Johnson does credit BGSU General Counsel Sean Fitzgerald for helping to draft the language that was submitted to Ohio Sen. Kevin Bacon early this year. (Sentinel-Tribune, 2011, para. 2)

Prior to the introduction of SB5, the Ohio Public Employees' Collective Bargaining Act (2010) specifically excluded both "management level employees" (Section 4117.01 (C) (7)) and "supervisors" (Section 4117.01 (C) (10)) from the definition of public employees eligible to bargain collectively. The proponents of SB5 attempted to exclude faculty from collective bargaining by adding specific language that would effectively re-classify all faculty as supervisors or managers. The existing definitions of supervisor and manager passed by the Ohio legislature in 1983 (SB 133) (Ohio Public Employees Collective Bargaining Act) were based directly on the federal definitions, with some extensions that classified heads of departments and divisions as supervisors, but without a specific determination as required for private enterprises under the federal law.

The definition of supervisor in Section 4117.01 (F) of the Public Employees' Collective Bargaining Act (2010) followed the same definition that is used in Section 2 (11) of the National Labor Relations Act (2008). Therefore, there would be considerable experience and guidance on interpreting the application of this section both by the Ohio State Employment Relations Board (SERB) and the National Labor Relations Board (NLRB). Section 4117.01 (F) of the Ohio Public Employees' Collective Bargaining Act (2010) defined supervisor:

> "Supervisor" means any individual who has authority, in the interest of the public employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other public employees; to responsibly direct them; to adjust their grievances; or to effectively recommend such action, if the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Ohio legislature provided additional specific guidance for interpretation in applying the term "supervisor" to faculty at state higher education institutions. Prior to SB5, Section 4117.01 (F) of the Public Employees' Collective Bargaining Act (2010), in defining a Supervisor with regard to faculty, stated:

> (3) With respect to faculty members of a state institution of higher education, heads of departments or divisions are supervisors; however, no other faculty member or group of faculty members is a supervisor solely because the faculty member or group of faculty members participate in decisions with respect to courses, curriculum, personnel, or other matters of academic policy;

This section of the Ohio code did not eliminate faculty from being classified as supervisors, but eliminated faculty being classified as supervisors based solely on

academic-related criteria associated with faculty as professionals. Even without this clause faculty may not be considered supervisors under the existing law because participation in these activities may be part of the professional duties of faculty. Nevertheless, this subsection does clarify what is to be considered in determining whether a faculty member is a supervisor or is simply a professional non-supervisor eligible to bargain collectively. Thus, the legislature was simply proscribing specific guidance and instructions to SERB.

This section of the Act also specifically designated all heads of departments and heads of divisions as supervisors regardless of whether chairs at a specific institution actually meet the Act's definition of a supervisor. If this language were not inserted, some heads of department may otherwise be determined to be supervisors, but others may not be found so. Likewise, some heads of divisions may have that position by title alone and may not meet the Act's definition of a supervisor. If heads of departments or divisions actually had supervisory duties or managerial authority, then there would be no need to specifically exclude them. They would meet one (or both) of the definitions and be excluded from bargaining collectively.

The proposed IUC amendment of Section 4117 (F) stated (with proposed deletions and additions):

> (3) With respect to faculty members of a state institution of higher education, heads of departments or divisions are supervisors; however, ~~no other faculty member or group of faculty members is a supervisor solely because the faculty member or group of faculty members participate in decisions with respect to courses, curriculum, personnel, or other matters of academic policy~~; <u>in addition, any faculty member or group of faculty members that participate in decisions with respect to courses, curriculum, personnel, or matters of academic or institutional policy shall be deemed supervisors or managers,</u> (Johnson, B., Johnson to K. Bacon, February 25, 2011)

The final version of SB5 regarding Section 4117.01 (F) (3) was essentially the same as that proposed by the IUC (the word "however" was eliminated completely and the word "managers" was changed to "management level employees") (Amended Substitute Senate Bill No. 5 As Passed by the Senate, 2011).

Prior to SB5, Section 4117.01 (C) (7) of the Public Employees Collective Bargaining Act (2010) provided that "Management level employees" were specifically excluded from the definition of "public employee" and, therefore, not eligible to bargain collectively. Section 4117.01 (L) defined "Management level employee" and included specific instructions in applying this exclusion to faculty:

> "Management level employee" means any individual who formulates policy on behalf of the public employer, who responsibly directs the implementation of policy, or who may reasonably be required on behalf of the public employer to assist in the preparation for the conduct of negotiations, administer collectively negotiated agreements, or have a major role in personnel administration. Assistant superintendents, principals, and assistant principals whose employment is governed by 3319.02 of the Revised Code are management level employees. With respect to members of a faculty of a state institution of higher education, no person is a management level employee because of the person's involvement in the formulation or implementation of academic or institutional policy. (Public Employees' Bargaining Act, 2010)

The first sentence of this definition was essentially derived from decisions interpreting the National Labor Relations Act, which does not contain a definition of managerial employee or a statutory exclusion for managerial employees. The next two sentences are specific inclusions and exclusions made by the Ohio legislature. In many states, the exclusion of managerial employees from statutory coverage is read narrowly (Malin et al., 2011).

The IUC requested that the legislature change Section 4117.01 (L) to their proposed amendment language (with changes underlined):

> (L) "Management level employee" means an individual who formulates policy on behalf of the public employer, who responsibly directs the implementation of policy, or who may reasonably be required on behalf of the public employer to assist in the preparation for the conduct of negotiations, administer collectively negotiated agreements, or have a major role in personnel administration. Assistant superintendents, principals, and assistant principals whose employment is governed by 3319.02 of the Revised Code are management level employees. With respect to members of a faculty of a state institution of higher education, <u>any faculty who, individually or through a faculty senate or like organization, participate in the governance of the institution, are involved in personnel decisions, selection or review of administrators, planning and use of physical resources, budget preparations, and determination of educational policies related to admissions, curriculum, subject matter and methods of instruction and research are management level employees.</u> (Johnson, B., Johnson to K. Bacon, February 25, 2011)

The IUC believed that these changes to the definition of supervisor and manager to the Public Employees Collective Bargaining Act would exclude all full-time faculty from collective bargaining. Because Section 4117.01 (C) (13) specifically excluded part-time faculty from the definition of public employee and SB5 did not change this clause, the legislation as written was intended to end collective bargaining on Ohio public university campuses.

Yeshiva and its Misapplication

The IUC's rationale in suggesting the language to members of the state Senate was that the bill extends to the faculty of public institutions the same reasoning that was used by the United States Supreme Court in the *NLRB v. Yeshiva University* (1980). As noted earlier, the IUC assumed that all public university faculty would be excluded as managers and/or supervisors under the *Yeshiva*-like language of SB5 and thereby excluded from collective bargaining. "Bruce Johnson, president and CEO of the Inter-University Council of Ohio, acknowledged that he suggested the language to the members of the state Senate, which was later reflected in Senate Bill 5" (Berrett, 2011a, para. 2). The IUC letter to Ohio State Senator Kevin Bacon, which included the proposed amendment changes to include faculty in the definition of managers and supervisors, explained the *Yeshiva* basis:

> In *Yeshiva*, the court held that faculty members at "mature" private colleges and universities are managerial employees and may not organize and bargain under the provisions of the NLRA. The IUC believes the same thinking should apply to public universities. (Johnson, B., Johnson to K. Bacon, February 25, 2011)

The allegation was not only that this was simply applying *Yeshiva* to public universities, but also that by its mere inclusion public university faculty would automatically be considered managers (or supervisors) and thereby excluded by law from collective bargaining. This interpretation of *Yeshiva* was also fostered by the media. *Inside Higher Ed* stated:

> The legal reasoning used in the bill essentially cites the premise used in *NLRB v. Yeshiva University*, which applies only to private college professors, and brings it to those working at public universities. The 1980 Supreme Court decision barred faculty members at private colleges from bargaining collectively on the grounds that they enjoyed managerial status because of their role in shared governance. (Berrett, 2011b, para. 7)

The Chronicle of Higher Education discussed the classification provision defining "management-level employees" in SB5:

> Such language echoes a distinction the U.S. Supreme Court drew in 1980 in its landmark *National Labor Relations Board v. Yeshiva University* decision, which dealt solely with private institutions and had the effect of making it harder for most faculty members at private colleges to unionize. If signed into law, the provision in Ohio is expected to have a similar impact on public colleges in that state, effectively denying the right to engage in collective bargaining to those faculty members who want to continue to play a significant role in the governance of their institutions. (Schmidt, 2011b, para. 9).

The characterization of the IUC proposed language as applying a straightforward application of *Yeshiva* or being "*Yeshiva*-like" was not only interpreted by university administration representatives and the media, but also by faculty representatives. The Ohio Conference of the American Association of University Professors, in *Ohio Academe* ("The Fight Against Senate Bill 5," 2011), expressed this interpretation:

> Of particular concern for faculty is the **Yeshiva-like language** in the Amended Substitute Bill that defines full-time college and university faculty as managerial employees. Under this sweeping definition, conceivably **every faculty member could be labeled a manager**, and thus be **denied the right to collectively bargain**. If this language remains in the legislation, and the bill takes effect, professors would essentially have the right to make the decision of whether they want to participate in a shame of a collective bargaining process or continue to have a mere advisory say in matters like curriculum, subject matter and other areas of collective bargaining. (pp. 3-4)

Sara Kaminski, the executive director of the Ohio Conference AAUP, sent a newsletter to members in the state "asking 'why are Ohio's university faculty being *Yeshiva'd,*' referring to the 1980 Supreme Court decision" (Jascik, 2011, para. 8). Thus, SB5 was viewed as directly applying *Yeshiva* or *Yeshiva*-like language to public university faculty, with the clear result that faculty would be ineligible to bargain collectively. The goal of the Ohio AAUP was to prevent SB5 from passing, or after SB5 passed, to revoke it by referendum. The analysis of the language of the proposed legislation and its application by SERB and the courts were generally ignored.

Faculty were being "*Yehsiva'd*." The focus was on the intended application of the proposed amendments to classify public university faculty as managers or supervisors. It was assumed (a) that the language of SB5 with regard to faculty accurately reflected the *Yeshiva* guidance regarding managerial and supervisory exclusions, (b) that the application of *Yeshiva* would automatically make faculty managers (and/or supervisors) under law, and (c) that *Yeshiva* applied in the same way to faculty at public universities and colleges as it does to private colleges and universities. However, these assumptions are mistaken. First, the Supreme Court did not examine whether faculty were supervisors in *Yeshiva*. Second, the Supreme Court in *Yeshiva* did not conclude that all university faculty are managers, but only that some university faculty in some circumstances could be managers. Third, Yeshiva was a private university, which has a greatly different managerial structure than that of a government entity.

The IUC letter of February 25, 2011 to Senator Kevin Bacon, cited the supervisor exemption of Section 4117.01 (F) (3) to conclude that faculty were legally permitted to bargain collectively in Ohio solely by this section, which, the IUC alleged, was designed to nullify the application of *Yeshiva*:

> States like Ohio are an anomaly in that faculty at Ohio's public universities have been afforded both "shared governance" and faculty bargaining by virtue of this lone "sentence" in Ohio's collective bargaining law (R.C. 4117.01(F)(3). . . . That language was inserted when the law was originally passed in 1983 to expressly obviate the import of the U.S. Supreme Court decision in *NLRB v. Yeshiva (1980).* (Johnson, B., Johnson to K. Bacon, February 25, 2011)

However, in *National Labor Relations Board* (*NLRB*) *v. Yeshiva University* (1980), the U.S. Supreme Court did not analyze whether the faculty in *Yeshiva* were supervisors. The Court stated:

> Because the Court of Appeals found the faculty to be managerial employees, it did not decide the question of their supervisory status. In view of our agreement with that court's application of the managerial exclusion, we also need not resolve that issue of statutory interpretation. (*NLRB v. Yeshiva*, 1980, p. 682)

Because the Ohio Public Employee Collective Bargaining Act based its supervisor exclusion directly on the supervisor exclusion language of the NLRA and the fact that the judicially created managerial exclusion (*NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974)) and the *Yeshiva* (1980) case had been decided years prior to the Ohio act, it is unlikely that the Ohio legislature would insert language into the supervisor exclusion section to specifically obviate the managerial exclusion in *Yeshiva*. If anything, this subsection automatically removes the potential benefit of *Yeshiva*'s guidance in relation to heads of departments because it defines them as supervisors ineligible to bargain collectively by virtue of their title. Ohio had created the separate management level employee exclusion section after *Yeshiva* was decided.

The analysis of whether an individual is a supervisor or a manager is dependent on the interpretation of two different laws, both in federal labor law and in Ohio public employee labor law. In federal labor law, the analysis involves the interpretation and application of the National Labor Relations Act (Section 2 (11) of the NLRA) for supervisor analysis and federal court cases (this exemption is not statutory but was judicially established) for managerial exclusion analysis. *Yeshiva* only addresses the managerial exclusion in federal labor law. In Ohio, this determination involves statutory interpretation and application for both supervisor exclusion analysis (Section 4117.01 (C) and (F) of the Ohio Revised Code) and management level employee exclusion analysis (Section 4117.01 (C) and (L) of the Ohio Revised Code). Although an individual may be both a supervisor and a manager, the decision must be determined by two distinct analyses. The U.S. Supreme Court in *Yeshiva* specifically declined to address the supervisor exclusion issue as applied to university faculty. Thus, faculty could not be *Yeshiva'd* into being considered supervisors.

Second, including *Yeshiva* or *Yeshiva*-like language in a bill does not automatically result in faculty being considered managers. In *Yeshiva,* the U.S. Supreme Court found that the existence of managerial status must depend on the facts of each case and not on conclusory rationales (*NLRB V. Yeshiva,* 1980). The Court recognized that faculty are professionals and their participation in decisions may be related to their professional duties and not because they are managers. Public university faculty are clearly professionals under federal and Ohio law, as defined in Section 2 (12) of the National Labor Relations Act (NLRA) (2009), which is similar to the Ohio definition in Section 4117.01 (I) (Section 40117.01 (J) in Am. Sub. S. B. No. 5, 2011) of the Ohio Public Employee Collective Bargaining Act (2010). Professionals can bargain collectively under federal and Ohio law. The United States Supreme Court in *Yeshiva* explained that not all professionals are managers:

> We are certainly not suggesting an application of the managerial exclusion that would sweep all professionals outside of the Act in derogation of Congress' intent to protect them. The Board [NLRB] has recognized that employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage if union membership may involve some divided loyalty. Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management. (*NLRB v. Yeshiva*, 1980. p. 690)

Therefore, university faculty involvement in activities must be analyzed in regard to duties routinely performed by similarly-situated faculty professionals. The *Yeshiva* Court expressed some of the potential limits to the managerial exclusion with regard to faculty as professionals:

> It is plain, for example that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research. There thus may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominantly nonmanagerial. There may also be faculty members at Yeshiva and like universities who properly could be included in a bargaining unit. (*NLRB v. Yeshiva*, 1980. p. 690)

SB5 stated just the opposite. SB5 stated that a faculty member is a supervisor or management level employee if that faculty member participates in decisions with respect to courses or curriculum. SB5 does not exclude faculty's own courses or curriculum or their own research. In addition, heads of departments and heads of divisions are specifically excluded as supervisors, without analysis of whether they fit the statutory definition of supervisor (or management level employee). Further, the retention of the categorical exclusion of part-time faculty under Section 41117.01 (C) (13) of the Public Employees' Bargaining Act (2010) is antithetical to the holding in *Yeshiva*. Under

Yeshiva, part-time faculty, except in rare instances, would clearly not fit the definition of a management level employee (It would also be rare that part-time faculty would fit the definition of supervisor.). If the true purpose of this legislation was to actually apply *Yeshiva*, then both of these clauses should have been eliminated. Being "*Yeshiva*'d" would result in decisions regarding the eligibility of heads of departments and divisions as well as part-time faculty determined by analysis of the actual functional activities of the individual employees.

As noted above, The IUC letter to Ohio State Senator Kevin Bacon characterized the legislative intent of the original 1983 legislation to "expressively obviate the import of the U.S. Supreme Court decision in *NLRB v. Yeshiva (1980)* [*sic*]." (Johnson, B., Johnson to K. Bacon, February 25, 2011). However, the *Yeshiva* decision only applies to federal labor law and to private universities covered by the NLRA. Although similar in many ways, the managerial structures of public entities are much different than that of private institutions. Public entities tend to be more bureaucratic and are subject to more control and influence by more constituencies. More people have control over decision-making in public universities, including more individuals outside of the university. For example, in Ohio, state universities cannot raise tuition without obtaining official state approval even if the president and board of trustees agree to do so. New majors or programs in state universities cannot obtain government financial support without the submission to and approval of the Ohio Board of Regents, even if the university administration approve the major or program. Section 3333.07 (C) mandated that no state university can offer a new degree or establish a new degree program without the approval of the chancellor of the state system (Restrictions on state institutions, 2012). Boards of trustees and university presidents have to answer to state executive and legislative officials, which results in the faculty having much less authority than private university faculty. Additionally, many non-university-specific state requirements, such as purchasing, hiring, and administration must be utilized. Government bureaucracy and increased accountability result in much less managerial authority and discretion to make decisions. In *NLRB v. Yeshiva University* (1980), the United States Supreme Court found that a private university's faculty had such extensive control over academic and personnel decisions and such a crucial role in determining other central policies of the university that the faculty were endowed with managerial status sufficient to remove them from coverage under the National Labor Relations Act (NLRA).

Application of SB5

If SB5 had Gone Into Effect, Would Faculty Collective Bargaining Rights be Automatically Affected?

It was assumed by the IUC that once SB5 was effective, any public university administration would be immediately and directly prohibited from recognizing and/or negotiating with any faculty union. However, SB5 did not directly or specifically state that faculty are supervisors or management level employees. Consequently, university administration could not just use SB5 to prohibit faculty from collective bargaining. University administration must first perform an analysis and provide an explanation to justify its classification of specific faculty as supervisors or management level employees. In those universities where faculty are already included in a bargaining unit, this would result in a change in a classification. If the classification or re-classification of some (or all) faculty is opposed by the faculty member or union, this issue must be determined by SERB. SERB's decision may be challenged and decided in court before finally determined (Public Employees' Collective Bargaining Act, 2010).

Because there is no general exclusion of all public university faculty in SB5, the burden of proof that a faculty member is a supervisor or management level employee is on the university administration. Further, unless a faculty member was already determined to be a supervisor or management level employee by SERB or the courts because of work duties and authority, any attempt to re-classify a former eligible faculty member as a supervisor or management level employee based on the expanded definition of SB5 must be proven by the administration.

Additionally, this analysis and determination must be done with regard to faculty at each higher education institution. In Ohio, each higher education institution has its own internal administration and governance policy and practice. There is no statewide contract with state university faculty. Faculty may have different authority and/or duties at different institutions. Not only must the faculty body at each higher education institution be evaluated, but individual faculty members must also be evaluated to determine whether that faculty member actually meets the criteria for classification as a supervisor or management level employee.

The United States Supreme Court in *Yeshiva* recognized that whether specific faculty are managers will depend on the circumstance of each case. The *Yeshiva* Court noted that there may be some faculty at Yeshiva and other universities where some faculty are managerial and some are not and a rational line may be drawn between faculty members. In an attempt to define *manager* to include any and all faculty, the language in SB5 does not specifically draw any line or provide any rational guidance for drawing any

line between managerial and non-managerial faculty. Consequently, without an agreement by the faculty union, university administration must make their argument to SERB and the courts to decide if and where any line could be drawn. Thus, SB5 does not give administration the right to automatically classify or re-classify faculty as supervisors and managers or refuse to bargain with faculty without first justifying such changes as required under the statutes.

If SB5 was Not Revoked by Referendum, Could SB5 be Successfully Challenged in its Application to Faculty?

As noted, the definitions in SB5 of what constitutes supervisor or management level employees with regard to faculty are extremely broad and vague. SB5 was intended to eliminate all faculty from collective bargaining by the drafters, but they did not provide specific language to that end. This vagueness of SB5 results in a problem with application and interpretation by SERB and the courts when determining whether specific faculty are supervisors or management level employees. The plain language of the statute does not eliminate faculty from collective bargaining. For example, when defining manager, SB5 states any faculty member who participates through any faculty senate or "like organization" would be classified as a manager and excluded from collective bargaining. What type of organization does that phrasing include? Would a faculty group chatting about general education during lunch be a "like organization?" What if the group is off campus? A more basic problem is that simply calling an organization of faculty a faculty senate does not describe the actual managerial attributes of the organization. Faculty senates have varying degrees of power on different issues. Often they have no more power or authority than any individual employee. Thus, calling a faculty organization a faculty senate means nothing. As the guidance from *Yeshiva* shows, it is the real managerial power and authority that the group actually has, and not the title that is important.

This language is especially problematic in that it must be analyzed in conjunction with the basic definitions of supervisor and management level employee in the statute. SB5 does not go so far as to directly eliminate faculty from collective bargaining, nor does it make the statutory definitions of supervisor or management level employee inapplicable to faculty. Reading it in conjunction with the definition of supervisor results in a faculty member who participates in decisions regarding course, curriculum, or other matters, and must have the "authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other public employees; to responsibly direct them or to adjust their grievances; or to effectively recommend such action, if the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment" (Public Employee's

Bargaining Act, 2011). The additional language in SB5 does no more than could be achieved by simply removing the existing language in the same sections that stated that faculty could not be found to be supervisors or management level employees solely because of this participation.

The SB5 amendment of the supervisor exclusion in Section 4117.01 (F) (3) provided that "any faculty member or group of faculty members that participate in decisions with respect to courses, curriculum, personnel, or other matter of academic or institutional policy are *supervisors* ***or*** *management level employees* [emphasis added]" (Am. Sub. S.B. 5 as passed by the Senate, 2011). None of these terms found in this subsection are used in the basic definition of "Supervisor" in the main section (Section 4117.01 (F)) of the statute, consequently this language in SB5 is confusing and provides no guidance for determining whether an individual or group is excluded because they are a supervisor or because they are a management level employee. This subsection amendment language is in the supervisor section, yet stated that if the criteria is met, it could make an individual either a supervisor "or" a management level employee, with no way to determine which criteria applies to which exclusionary category. Ohio has two separate and different statutes: one defines supervisor and one defines management level employee. These definitions are not the same statutorily.

Additionally, the language "participate in decisions with respect to" the enumerated categories is not defined. What does "to participate in" mean? If a faculty member suggests to the Dean that the university should offer a course, is that participating in the decision about course or curriculum? That faculty member "participated" in the decision, but does any participation in a decision make that person a supervisor or manager? If a faculty member states to the Dean or department chair that a candidate is qualified in the field, did that faculty member thereby participate in a personnel decision? Under the plain meaning of "participate," the faculty member has participated and is now a supervisor. *Merriam-Webster's Collegiate Dictionary* (2012) defined "participate" as "to take part."

This is a fairly low standard to meet and would make almost anyone a supervisor. If a secretary were asked about a candidate by the administration and made a comment, this could qualify as taking part or participating in the decision. Is the secretary now a supervisor? We do not think so, and we doubt whether SERB or the courts would also make this broad leap. There needs to be some rational distinction between an employee and a supervisor. Thus, it would be up to SERB or the courts (if appealed) to decide what amount and type of participation in a decision would result in making the faculty member a supervisor. Because the basic definition of *supervisor* has existed prior to SB5 and that basic definition was not changed, it would be likely that SERB and the courts would read the SB5 amendment dealing with faculty "participation" in decisions in combination with

the basic definition of supervisor to determine whether a faculty member is a supervisor under SB5. Thus, faculty would have need to have the requisite authority to take the enumerated actions (for example, to hire, transfer, or suspend), that action would have to shown to be in the interest of the public employer, the exercise of that authority could not be of a merely routine or clerical nature, and it must require the use of independent judgment.

SB5 attempted to drastically expand who may be a supervisor in regard to faculty. However, in the public sector, even nominal supervisors do not have the same authority as do similar titled employees in the private sector. Much of the authority to make personnel decisions are not given to lower level personnel who in private industry would have much more authority. Because the lines of distinction between supervisory and rank-and-file employees are not as clear as in the private sector, there are cases where employees who may otherwise fit the definition of supervisor are permitted to collectively bargain in the public sector (Malin et al., 2011).

In the private sector, supervisors are expressly excluded from coverage under the National Labor Relations Act (NLRA) (2010). However, some public sector states allow supervisors to bargain collectively, defining supervisors more narrowly than the NLRA. This is because supervisors in the public sector generally have much less discretion than private sector supervisors. Likewise titles of employees in the public sector are more likely not to have true managerial authority and power. In many states, the exclusion of managers from the definition of employees eligible to bargain collectively is also read narrowly, requiring managers to have a significant high level of policy-making authority (Malin et al., 2011). For example, SERB and the Ohio courts determined that Assistant Fire Chiefs in Cincinnati were not management level employees under Ohio law (City of Cincinnati v. State Employment Relations Board, 2009).

SB5's amendment to the definition of "Management level employee" with regard to faculty is equally vague and broad. Again, the language "participate in the governance" is not defined anywhere in the statute. If faculty were asked about their opinions (even if ignored) on one issue of governance by the university administration, this could be considered participation in governance. Involvement in the enumerated activities is not defined. Could mere meeting and providing comments in personnel decisions, such as input into faculty selection by the department, input (but not authority) in the selection or review of administrators fit the broad and vague definition of involvement? The type or level of planning is also not defined. In any organization, planning usually involves all members of the organization. Even janitorial staff may be involved in planning for the use of janitorial supplies, as who better to estimate the usage of cleaning materials and supplies than those using the products. Anyone using the physical resources would have

to be involved to some extent in the planning of those resources. All employees at all levels in an organization are usually involved in the budgeting process. This language in SB5 applying the management level employee exclusion to faculty conflicts with the basic definition of management level employee already in the law.

Conclusion

Using voter referendums to revoke legislation that curtails collective bargaining rights for public sector workers is only one method available to labor to curtail the assault on bargaining rights. In Wisconsin, this option was not available, so strategy involved seeking a recall election of Governor Walker (Stein, 2012). Regardless of the method, attempts to revoke legislation are both expensive and time-consuming for labor supporters. Secter and Lauter (2012) found that more than $60 million was spent overall in the Walker recall election in Wisconsin, with Walker and groups supporting him having close to a 3-to-1 financial advantage. Labor groups helped to gather more than 900,000 valid signatures to force the recall election (Stein, 2012). Tavernise (2011) found that *We Are Ohio*, the main group that opposed the Ohio law, poured about $30 million into the campaign and had about 17,000 volunteers. Tremendous amounts of money and volunteer hours need to be available to overturn legislation by voter referendum or recall election.

The level of support needed to overturn anti-collective bargaining legislation depends to a large extent on the scope and extent of the legislation's limitations on labor. Ohio's anti-union law was much tougher than Wisconsin's (Greenhouse, 2011). Ohio law largely eliminated bargaining for police and firefighters, while Wisconsin's law left those two groups' bargaining rights largely untouched (Greenhouse, 2011). Consequently, Ohio's law affected a large number of public employees and essential services in almost all areas of the state. Ohio public university faculty were only a very small number of those affected by SB5. Some reporters have noted that the law was highly controversial in Ohio even among groups like firefighters and police officers that have traditionally voted Republican (Tavernise, 2011). Additionally, options may be limited in some states. Wisconsin had to resort to a recall election because it did not have the much narrower option of striking down the law through a referendum (Stein, 2012). Although many Wisconsin voters might have disliked the law and may have revoked it directly by referendum, many of these same voters appeared to have distaste for recall elections and would not vote to recall a sitting governor (Secter & Lauter, 2012). Thus, unlike in Ohio, the anti-union legislation in Wisconsin was not as onerous to as many people and the legislation could not be specifically targeted by voter referendum, but involved the recall of an elected governor.

Legislation that only affects a relatively small group of labor in distinct areas of the state will face almost insurmountable odds in revoking the law by referendum or recall efforts. It is unlikely that voters in Ohio would have shown such large support for revoking SB5 if it only involved reclassifying public university faculty as managers or supervisors by invoking *Yeshiva*-type language. Inserting *Yeshiva*-type language does not appear as onerous to the general public than language the simply states that faculty cannot bargain collectively, even though the intent is the same. Thus, the public would not be as motivated to vote in a referendum or recall elected officials if the law stated directly that university faculty could not bargain collectively. Additionally, revoking a piece of legislation by voter referendum or recall election requires involvement of huge levels of money and people. The amount of money and the number of people assembled to revoke legislation that only affected public university faculty reclassification would be probably be insufficient to make a change. Consequently, in an attempt to be *Yeshiva*'d, faculty response should also examine the specific language of the statute and on the proper interpretation and application of *Yeshiva*. This may be the only option if referendum or recalls fail or are not feasible.

SB5, by employing language to restrict public sector collective bargaining for some and to eliminate the right to bargain for faculty, was rightfully revoked by the Ohio electorate just eight months after it was signed into law. In relation to the sections of the law concerning public institutions of higher education, the proponents of SB5 did not correctly apply *Yeshiva*, and they failed to connect the faculty definitions of manager and supervisor to other sections of the public collective bargaining law.

While the *Yeshiva* decision did limit the number of private institutions with faculty unions since 1980 (Rabban, 1989; Saltzman, 1998), *Yeshiva* makes it clear that restricting or permitting collective bargaining on a private university's campus is determined by that faculty's level of involvement in the actual governance of the institution. In fact, in recent years, several private institutions now have faculty collective bargaining (for example, Carroll College, University of Great Falls) and the courts used *Yeshiva* for guidance in making such determinations (Benedict, 2007). The IUC of Ohio and others incorrectly assumed that by declaring the purpose behind the language of SB5 is to re-classify faculty members as managers or supervisors automatically means the declaration is true. However, *Yeshiva* asserts that faculty duties, not titles, determine which faculty can bargain collectively and who are excluded.

Further, the inconsistency within the law would have caused long term problems, not only for Ohio's institutions, but also for the general population. If SB5 had survived the recall vote, it is very likely that many of Ohio's public universities w€ould have been

mired in long legal battles because of the lack of conformity in definitions for managers and supervisors, costing both taxpayers and Ohio college students.

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