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1980

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## Recommended Citation

Stephen R. Ripps, *The Professor as Manager in the Academic Enterprise*, 29 Clev. St. L. Rev. 17 (1980)  
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# ARTICLE

## THE PROFESSOR AS MANAGER IN THE ACADEMIC ENTERPRISE

STEPHEN R. RIPPS\*

### I. INTRODUCTION

**I**N ENACTING THE NATIONAL LABOR RELATIONS ACT,<sup>1</sup> Congress was intent upon resolving labor disputes in the industrial sector of the economy through employee organization and collective bargaining.<sup>2</sup> The structure and design of this statute, however, creates problems for entities which do not conform to an industrial model of organization and operation, but still fall within the jurisdictional ambit of the NLRA. Although the legislative history of the NLRA indicates that Congress never seriously considered how the Act would be applied to institutions of higher education or their faculties,<sup>3</sup> in 1970 the National Labor Relations Board (NLRB) assumed jurisdiction over private colleges and universities.<sup>4</sup> As a result of this assumption of jurisdiction, subsequent application of the Act to these institutions has threatened to undermine the very foundations upon which colleges and universities rest, and raises serious questions about whether the NLRA should be applied by

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<sup>1</sup> The National Labor Relations Act [hereinafter referred to as NLRA] is actually the product of three congressional acts promulgated over a 24 year period. See National Labor Relations (Wagner) Act, 49 Stat. 449 (1935), as amended by Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) and Labor Management Reporting and Disclosure (Landrum-Griffin) Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified at 29 U.S.C. §§ 151-168 (1976)).

<sup>2</sup> See National Labor Relations Act § 301(a), 29 U.S.C. § 185(a) (1976); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960) (Steelworkers Trilogy).

<sup>3</sup> See Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 U.C.L.A. L. REV. 63, 84-85 (1973). See also NLRB v. Yeshiva Univ., 444 U.S. 672, 680 n.9 (1980) and committee reports cited therein.

<sup>4</sup> Cornell Univ., 183 N.L.R.B. 329, 74 L.R.R.M. 1269 (1970). This discussion is limited to faculties at private post-secondary institutions. The National Labor Relations Act does not regulate public sector collective bargaining. See 29 U.S.C. § 152(2) (1976). Public sector collective bargaining, which includes colleges and universities, is usually regulated by state-collective bargaining statutes.

the Board to institutions which do not conform, either in terms of governance or management-employee relations, to "the traditional authority structures with which [the] Act was designed to cope. . . ."<sup>5</sup>

This article will examine the problems which arise when the NLRA is applied to institutions of higher education, and how the decisions by the NLRB have not been appropriately sensitive to these problems—particularly in the area of faculty organization. By focusing upon the issue of the faculty's right to organize and collectively bargain with the institution under the NLRA, the difficulties in the application of the Act to these institutions, without modification, becomes apparent. Insight is also provided through an examination of the role the faculty plays in an institution's governance system under traditional theories of higher education administration, and comparing this with the management system in an industrial corporation. In this regard, Board decisions that declare that faculties at various schools were neither "managerial employees"<sup>6</sup> nor "supervisors"<sup>7</sup> under the Act, and therefore able to organize and collectively bargain with the institution, demonstrates how the Board's approach does not square with traditional theories of university governance.<sup>8</sup>

This article will also discuss the Supreme Court's decision in *NLRB v. Yeshiva University*<sup>9</sup> which held that faculty members at the university were "managerial employees" and thereby excluded from coverage under the Act. This discussion will show that the Board's approach to this problem has been irrational and further demonstrates why the NLRB should never have assumed jurisdiction over institutions of higher education.

## II. GOVERNANCE AND DECISION-MAKING IN INSTITUTIONS OF HIGHER EDUCATION

All institutions of higher education have basically the same system of governance.<sup>10</sup> In fact, these institutions have structures similar to those

<sup>5</sup> *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 680 (1980) (quoting *Adelphi Univ.*, 195 N.L.R.B. 639, 648, 79 L.R.R.M. 1545, 1556 (1972)).

<sup>6</sup> See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974) ("managerial employees" defined and excluded from the scope of NLRA).

<sup>7</sup> See Labor Management Relations (Taft-Hartley) Act § 2(11), 29 U.S.C. § 152(11) (1976) ("supervisor" defined).

<sup>8</sup> See notes 29-62 *infra* and accompanying text.

<sup>9</sup> 444 U.S. 672 (1980).

<sup>10</sup> See J. BRUBACHER & W. RUDY, *HIGHER EDUCATION IN TRANSITION* 409 (3d ed. 1976). Public and private colleges also have the same characteristic form of governance. See also R. Healy & V. Peterson, *Trustees and College Failure: A Study of the Role of the Board in Four Small College Failures* 52 (October, 1976) (unpublished study in the Center for the Study of Higher Education, The University of Toledo, Ohio). This study of small, liberal arts colleges revealed that the colleges that were "dying" lacked concern or involvement in daily operations by the Board of Trustees.

of private corporations in the industrial sector. The system is organized like a pyramid, with the Board of Trustees sitting at the apex. The Board is entrusted with the legal authority to operate the institution, and has the final say over all institutional decisions including policy-making, financial planning and review, budgetary matters and control over faculty appointments. As is common in industrial corporations, the Board usually delegates the day-to-day operation of the school to their chief administrator, the president. The president in turn delegates his authority to a staff of academic vice-presidents, deans, department chairmen and other administrators. Within each department or college, the faculty members sit on committees which make recommendations to the administration on matters of academic policy, research, hiring, promotion and tenure. In addition, the faculty exercises authority in the school's governance system through the faculty senate and university-wide committees which also made recommendations to the administration regarding institutional decisions.<sup>11</sup>

Again, this organizational structure resembles that of most private industrial corporation: both are organized in a pyramid-like structure with the president managing the day-to-day operations, and a board of directors or trustees entrusted with the ultimate responsibility over institutional decisions.<sup>12</sup> Despite this structural resemblance with industrial corporations, institutions of higher education are in fact operated in a totally different manner. A corporation in the industrial sector is governed through a bureaucratic chain of command system in which decisions are made at or near the top of the pyramid and implemented by subordinates. A university, on the other hand, functions under a collegial model of governance or "shared authority."<sup>13</sup> The faculty and the administration *jointly* govern the institution. This system enables the faculty to play a more meaningful and important role in the institution's decision-making process.

The concept of "shared authority," is based upon the presumption that both administrators and professors are officers of the college or

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<sup>11</sup> J. CORSON, *THE GOVERNANCE OF COLLEGES AND UNIVERSITIES* 242-43 n.7 (1960). Faculty autonomy and academic control rests within each academic department. *Id.* See also J. BALDRIDGE, D. CURTIS, G. ECKER & G. RILEY, *POLICY MAKING AND EFFECTIVE LEADERSHIP* (1978); J. MILLETT, *DECISION-MAKING AND ADMINISTRATION IN HIGHER EDUCATION* (1968). These authors contend that the most powerful governing body in which the faculty participates is the academic department's standing committees. Examples of standing committees would be admissions, curriculum, faculty affairs (which can include salary determinations), budget, academic policy and personnel. For a description of the typical faculty senate, see P. DRESSEL & W. FAIRCY, *RETURN TO RESPONSIBILITY* 127 (1972).

<sup>12</sup> See Kahn, *supra* note 3, at 66-67 n.5.

<sup>13</sup> See *THE UNIVERSITY AS AN ORGANIZATION* 58 (J. Perkins ed. 1973) and Baratz, *Shared Authority and Collective Bargaining*, 12 *ACADEMIC: THE BULLETIN OF A.A.U.P.* 1 (1977). *A.A.U.P.* 1 (1977).

university and thus they must *jointly* decide all matters of concern.<sup>14</sup> "Shared authority," a product of the medieval university where the professors in fact govern the institution, embodies a theory that "the university is above all else a collection of specialized scholars. Their scholarship gives them a primacy in the determination on educational policy on such subjects as who shall be educated in what knowledge for which utility."<sup>15</sup> Through this system of joint, shared control, the faculty in effect governs the institution along with the administration through a political process in which conflicts between the two groups are resolved in the committees by debate and compromise.<sup>16</sup>

Since the university must rely on the faculty to implement the institution's goals and perform its educational functions, the decisions and recommendations of the faculty carry considerable weight. The power that is vested in the faculty is exercised through the various committees, departments and a faculty senate which have jurisdiction over the major areas of concern at the institution. Consequently, the faculty actually plays a managerial role in the governance of the institution. The power, authority and influence the faculty exerts on policy in the central decision-making process of the academic enterprise has been acknowledged by many noted experts in education administration.<sup>17</sup> The faculty not only has primary jurisdiction over academic questions, but it also rules on the hiring, promotion and tenure of its peers.<sup>18</sup> Within the constraints of available funds, the faculty typically determines what research will be undertaken and what public service projects will be initiated. Their power also extends to establishing admissions standards, course offerings, tuition rates, and participation in the selection of

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<sup>14</sup> *Id.*

<sup>15</sup> Meeth, *Administration and Leadership*, in POWER AND AUTHORITY 40 (H. Hodgkinson & L. Meeth eds. 1971). Meeth describes the collegial method of governance as a system that is unique to American higher education. The partnership between the faculty and the administration, he notes, has produced great strength and diversity in colleges and universities.

<sup>16</sup> See J. BALDRIDGE, POWER AND CONFLICT IN THE UNIVERSITY (1971). For discussions of the collegial model and other forms of governance, see J. BALDRIDGE, D. CURTIS, G. ECKER, & G. RILEY, *supra* note 11, at 31-41; P. DRESSEL & W. FAIRCY, *supra* note 11, at 119-20; J. MILLETT, NEW STRUCTURES OF CAMPUS POWER 12-19 (1978); McConnell, *Faculty Governance*, in POWER AND AUTHORITY 99 (H. Hodgkinson & L. Meeth eds. 1971). See also Brousseau, *Collective Bargaining and Private University Governance: A Look From the Law Schools*, 29 U. FLA. L. REV. 625, 627 (1977).

<sup>17</sup> See, e.g., ACADEMIC GOVERNANCE (J. Baldrige ed. 1971); J. BALDRIDGE, D. CURTIS, G. ECKER, & G. RILEY, *supra* note 11; J. CORSON, *supra* note 11; P. DRESSEL & W. FAIRCY, *supra* note 11; J. MILLETT, *supra* note 11; POWER AND AUTHORITY (H. Hodgkinson & L. Meeth eds. 1971).

<sup>18</sup> See, e.g., NLRB v. Yeshiva Univ., 444 U.S. 672, 686-90 (1979). Faculty members tend to see themselves as educational experts (professionals), and therefore, the only ones qualified to evaluate their peers.

academic administrators.<sup>19</sup> Although the faculty's committee recommendations are subject to veto by upper-level administrators, including the board of trustees, their decisions are in practice rarely vetoed. In sum, the faculty plays a far greater role in the governance system of a university than do the employees in a private industrial corporation.

The faculty's influence and control in institutional decisions is in part attributable to the fact that they share common goals and interests with administrators. Many of the faculty's immediate supervisors, such as department chairmen or academic deans, are active or former professors. Department chairmen, for example, are usually full-time professors who continue to teach while performing the chairman's administrative duties.<sup>20</sup> Often the chairmanship is alternated among several professors in the department for designated periods of time due to the fact that most professors prefer to teach, write or research rather than perform administrative duties. In addition, many upper-level administrators, including deans and presidents, are former professors. Consequently, the two groups which share authority in the university's governance system also typically share certain attitudes, ideas and goals.

As the preceding discussion reveals, institutions of higher education are operated in a totally different manner from private industrial corporations. Decisions are not made at the top of the pyramid and implemented through various managers, but rather the opposite situation exists. The effective control by the faculty over major decisions in post-secondary educational institutions creates a governance system resembling an *inverse* pyramid. The faculty decisions, subject rarely to vetoes by the board of trustees or administrators, become the policies of the institution. Kenneth Kahn aptly describes the difference between non-profit colleges and universities and corporations operated for profit:

Behind the superficial structural similarity between a profit-making and a non-profit corporation, however, is a significant structural difference. . . . [I]n the private sector the entire organization works as a team to produce a product which in turn returns a profit on the investment. Responsibility for product quality and production is vested in the president and executives

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<sup>19</sup> See J. CORSON, *supra* note 11, at 239-42. In essence, the faculty is responsible for the academic policy and academic personnel in the institution as well as other areas of concern. Authorities on education administration generally agree on this governance structure of post-secondary institutions. See ACADEMIC GOVERNANCE, *supra* note 17; J. CORSON, *supra* note 11; P. DRESSEL & W. FAIRCY, *supra* note 11; J. MILLETT, *supra* note 11; and POWER AND AUTHORITY, *supra* note 17.

<sup>20</sup> Academic deans are also often former professors who teach courses in addition to their regular duties. In some schools, deans often return to full-time teaching after a period of service. See Kahan, *supra* note 3, at 68-69.

of the corporation, not in the production employees. In the college or university, the line of authority is quite different. Control over the "product" (education) is centered in the production employees (faculty). The role of the administration is not to control the final product but rather to serve as a custodian of the material resources necessary to perform the primary educational tasks of the institution. The fundamentally different roles of the private sector management and the college or university administrator are reflected in the actual decision-making structure of the institution. When decisions are made which affect the primary purpose of the institution, the faculty prevails.<sup>21</sup>

In essence, the faculty members are not merely employees of the university or college, "they *are* the college."<sup>22</sup>

### III. SHARED AUTHORITY IN PRACTICE

The shared authority model of government prevalent at colleges and universities as described above is affected by factors that vary according to the type of institution involved. Managing a college or university is a complex task. The varied nature of educational goals and techniques, power and authority conflicts among personnel, and financial constraints make these institutions particularly difficult to govern. Moreover, the autonomy traditionally associated with institutions of higher education has steadily eroded during the last decade due in part to a decline in enrollments, financial problem and judicial intervention.<sup>23</sup> Decisions by trustees, administrators and faculties which determine the character of the educational institution are no longer free from outside control, such as intervention by a centralized state board of regents.<sup>24</sup>

In addition, the degree of faculty power under the shared authority concept varies with the type of university involved. The faculty generally exercises greater managerial (or as educators prefer, administrative) influence at four-year colleges and universities than at two-year colleges or community colleges.<sup>25</sup> Similarly, faculty at institutions granting doctoral degrees (where professors are judged more on the basis of their research and publication qualities than their teaching performance) maintain a high-degree of shared authority in the university's

<sup>21</sup> *Id.* at 66-67 n.5.

<sup>22</sup> *Id.* at 70 n.16 (emphasis in original). The Supreme Court in *NLRB v. Yeshiva Univ.*, 444 U.S. at 672 (1980), also took note of this comment. *Id.* at 680 n.10.

<sup>23</sup> J. CORSON, *supra* note 11, at 52. For the specifics of this erosion of academic decisions, program decisions, research decisions, financial decisions and judicial intervention, see *id.* at 52-56.

<sup>24</sup> *Id.* at 52.

<sup>25</sup> Dougherty, *Collegiality, Governance, and Collective Bargaining in the Multi-Campus State University of New York*, 28 LAB. L.J. 645 (1977).

governance system. Thus, the concept of shared authority may be a total myth at community colleges where the faculty carries heavy course loads, where there is less time or demand for research and where the school may lack a national academic reputation.<sup>26</sup>

The lack of faculty participation or control leads to diminished power under the system of shared authority and results in administrative dominance. Consequently, under these conditions, the faculty may be forced to seek unionization and collective bargaining as a means of influencing their working environment.<sup>27</sup> This trend has already been documented in two-year community colleges and state universities where faculty governance has been least assertive.<sup>28</sup>

#### IV. COLLECTIVE BARGAINING IN HIGHER EDUCATION: THE NLRB'S APPROACH

The National Labor Relations Act (NLRA) seeks to resolve disputes between labor and management through organization and collective bargaining.<sup>29</sup> The Act was initially designed to deal with the problems in the manufacturing sector of the economy—an area where there was a clear distinction between labor and management.<sup>30</sup> An examination of the legislative history of the NLRA reveals that Congress never considered applying it to college or university faculty.<sup>31</sup> In fact, Congress specifically used the college professor to illustrate the type of relationship

<sup>26</sup> *Id.* at 647.

<sup>27</sup> See Baratz, *supra* note 13; Obewahn & Spritzer, *University Administrator's Attitudes Toward Collective Bargaining: A Comparative Analysis*, 27 LAB. L.J. 763, 772 (1976). See also Krishnan & Krishnan, *An Appraisal of Faculty Sentiments on Collective Bargaining Institution*, 8 ARK. BUS. & ECON. REV. 56 (1977); McHugh, *Faculty Unionism and Tenure*, 1 J. COLL. & U.L. 46 (1973); Pottitt & Thompson, *Collective Bargaining on the Campus: A Survey Five Years After Cornell*, 1 IND. REL. L.J. 191 (1976).

<sup>28</sup> J. BALDRIDGE, D. CURTIS, G. ECKER, & G. RILEY, *supra* note 11, at 14, 154.

<sup>29</sup> See notes 1-2 *supra* and accompanying text.

<sup>30</sup> The purpose of the NLRA is to encourage the practice and procedure of collective bargaining and protect workers in order to allow the negotiating of terms and conditions of their employment or other mutual aid or protection. National Labor Relations (Wagner) Act § 1, 49 Stat. 449 (1935). The Act does not expressly include faculty members at postsecondary institutions, but does provide coverage to "professional employees" under section 2(12) and excludes a "supervisor" under section 2(11).

<sup>31</sup> See Finkin, *The NLRB in Higher Education*, 5 U. TOL. L. REV. 608 (1974); Kahn, *supra* note 3, at 79-83; Sherman & Black, *The Labor Board and the Private Non-profit Employer: A Critical Examination of the Worthy Cause Doctrine*, 83 HARV. L. REV. 1323, 1331-37 (1970). Kahn argues that if the NLRB wants to include non-profit institutions of higher education within its jurisdiction, it should be done by rule-making rather than adjudication. See Kahn, *supra* note 3, at 102, and authorities cited therein.



between employer and employee which the Act was not intended to cover.<sup>32</sup>

For many years, the NLRB avoided the problems of applying the Act to colleges or universities by refusing to assert jurisdiction over these institutions. In *Columbia University*,<sup>33</sup> the Board recognized that, while the university had a significant effect upon commerce and was thus clearly within the requisite statutory and Board established jurisdictional requirements, it did not believe that the policies of the NLRA would be effectuated by asserting its jurisdiction over private colleges or universities. In adopting this discretionary test, the Board examined the legislative history of section 2(2) of the Act, which exempted non-profit hospitals from its coverage.<sup>34</sup> The Senate version of section 2(2) excluded only charitable hospitals from the Act's coverage while the House version additionally excluded non-profit educational institutions.<sup>35</sup> In opting for the Senate version, the conference report stated that non-profit educational institutions were "not specifically excluded in the conference agreement."<sup>36</sup> Congress had apparently felt that only under "exceptional circumstances and in connection with [the] purely commercial activities of such organizations . . ." would the activities of educational institutions "affect commerce" and therefore bring them within the coverage of the NLRA.<sup>37</sup>

In 1970, almost 20 years later, the Board reversed its decision in *Columbia University* and asserted jurisdiction over private colleges and universities in *Cornell University*.<sup>38</sup> Noting that universities had undergone considerable change since 1951, the NLRB held that it was sometimes appropriate to assert jurisdiction over private institutions of higher education because of the "overwhelming impact and effect" of a university's activities on interstate commerce.<sup>39</sup> The impact on com-

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<sup>32</sup> This occurred during the initial discussions about the Act in 1935, prior to the 1947 amendments. S. Rep. No. 573, 74th Cong., 1st Sess. 7 (1935). Only slight consideration was given to whether colleges or universities were employers under the Act. No mention was made regarding whether their faculty members were employees having the right to organize and engage in collective bargaining. *Id.*

<sup>33</sup> 97 N.L.R.B. 424, 29 L.R.R.M. 1098 (1951).

<sup>34</sup> Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, § 2(2), 61 Stat. 137 (1947). This exemption was later deleted and presently, health care institutions are covered under the Act. Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395 (1974).

<sup>35</sup> Compare S. 1126, 80th Cong., 1st Sess., 93 CONG. REC. 3753 (1947) with H.R. 3020, 80th Cong., 1st Sess., 93 CONG. REC. 3400 (1947).

<sup>36</sup> H.R. REP. No. 510, 80th Cong., 1st Sess. 32 (1947), reprinted in 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947 at 505 (1948).

<sup>37</sup> *Id.* at 536.

<sup>38</sup> 183 N.L.R.B. 328, 332, 74 L.R.R.M. 1269, 1273 (1970).

<sup>39</sup> *Id.* See also *NLRB v. Wentworth Univ.*, 515 F.2d 550 (1st Cir. 1975). In *Wentworth*, the First Circuit reviewed the legislative history of the NLRA and

merce was evidenced by the commercial nature of some of the university's enterprises, e.g., the book store, cafeteria and its various investments. Further, the Board noted an increased "federal interest" in the activities of higher educational institutions evidenced by federal grants and the previous application of the Fair Labor Standards Act to these institutions.<sup>40</sup> Thus, the NLRB concluded, the facts revealed that colleges and universities do engage in activities which substantially affect commerce.<sup>41</sup> Therefore, in the interest of achieving orderly resolution of labor disputes, the Board chose to assert jurisdiction over these institutions, but left the jurisdictional dollar-volume requirements to be developed through legislative rule making.<sup>42</sup> While recognizing that they were not accustomed to dealing with these types of institutions, the Board still decided to apply the tests developed in the industrial sector for determining what constituted an appropriate bargaining unit for employees of a multi-facilitied organization rather than simply adapting those principles to the unique situation existing at an institution of higher education.<sup>43</sup>

The NLRB first considered the issue of faculty unit determinations under the NLRA in *C. W. Post Center*.<sup>44</sup> Since the faculty members were clearly "professional employees" as defined by the Act,<sup>45</sup> the only real issue was whether they were excluded from its coverage because the functions they performed made them either "supervisors" or "managerial employees." A "supervisor" is defined in section 2(11) of the Act as a person having power over matters associated with management, such as hiring, firing, disciplining or adjusting grievances. In ad-

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concluded that, while there was no specific authority in the legislative history for the NLRB to assert jurisdiction over higher education, it was nevertheless appropriate for the NLRB to do so.

<sup>40</sup> Fair Labor Standards Act, § 3(r)(1), 29 U.S.C. § 201(r)(1) (1976).

<sup>41</sup> Cornell Univ., 183 N.L.R.B. 329, 334, 74 L.R.R.M. 1269, 1275 (1970).

<sup>42</sup> See 29 C.F.R. § 103.1 (1979). The rule states:

*Colleges and Universities:* The Board will assert its jurisdiction in any proceeding arising under Sections 8, 9 and 10 of the Act involving any private nonprofit college or university which has a gross annual revenue from all sources (excluding only contributions which, because of limitation by the grantor, are not available for use for operating expenses) of not less than \$1 million.

*Id.*

<sup>43</sup> 183 N.L.R.B. at 336, 74 L.R.R.M. at 1276.

<sup>44</sup> 189 N.L.R.B. 904, 77 L.R.R.M. 1001 (1971).

<sup>45</sup> A professional employee is defined as any employee engaged in work of a predominantly intellectual character, or who has completed a course of specialized intellectual instruction or training. 29 U.S.C. § 152(12) (1976). Professional employees are covered by the Act and may organize and select a collective bargaining representative. Absent a majority vote of the professionals, however, they cannot be combined in the same bargaining unit as non-professional employees. 29 U.S.C. § 159(b)(1) (1976).

dition, a supervisor is one who exercises that power in his employer's interest and in a manner that "requires the use of independent judgment."<sup>46</sup> An employee can be a supervisor whether he has actual authority to exercise any of the powers enumerated in the statutory provision, or where he can "effectively recommend" such action. Supervisors can organize their own unions and collectively bargain with their employer, but they are not covered or protected by the NLRA.<sup>47</sup> This statutory exclusion is based upon the rationale that supervisors are an arm of management and thus cannot act in the employer's interests if they are also members of the same union as the employees they supervise.

"Managerial employees," on the other hand, are not excluded from coverage by the statute itself. Instead, this exemption is a product of a series of Board and judicial decisions reasoning that these employees are so much higher in the corporate structure than even supervisors that Congress "regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary."<sup>48</sup> These employees "formulate and effectuate management policies by expressing and making operative the decisions of their employer."<sup>49</sup> Since these employees are in effect part of the management team, the dangers presented by divided loyalty between union and employer necessitate their exclusion from bargaining unit status.<sup>50</sup>

<sup>46</sup> 29 U.S.C. § 152(11) (1976) defines "supervisor" as follows:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

*Id.* Under § 14(a) of the Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 164(a) (1976), the Board cannot "compel" an employer to include supervisors in a collective bargaining unit with employees who are not supervisors, nor can the Board order the establishment of separate "supervisor" unions. Supervisors, however, are not prohibited from organizing a separate union or joining a union composed of non-supervisors if the employer permits it. The Board cannot compel an employer to adopt such a policy. Due to their status, "supervisors" are generally not covered by the protection of the Act. *See R. GORMAN, BASIC TEXT OF LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 34-35 (1976)*. This result occurs because the protective provisions of the statute, such as § 7 of the Act which grants rights to employees, 29 U.S.C. § 157 (1976) and § 8 of the Act which deals with unfair labor practices, 29 U.S.C. § 158 (1976), are keyed into the term "employee" as defined in § 2(3). 29 U.S.C. § 152(3) (1976).

<sup>47</sup> *See note 46 supra*.

<sup>48</sup> *NLRB v. Yeshiva Univ.*, 444 U.S. 672,682 (1980) *NLRB v. Bell Aerospace Co.*, 416 U.S. 267,283 (1974)).

<sup>49</sup> *Id.* (quoting *Palace Laundry Dry Cleaning Corp.*, 75 N.L.R.B. 320, 323 n.4 (1947)).

<sup>50</sup> *See R. GORMAN, supra note 46, at 37-39; W. OBERER, K. HANSLOWE & J. ANDERSON, CASES AND MATERIALS ON LABOR LAW: COLLECTIVE BARGAINING IN A*

The Board applied these definitions to an academic environment in *C. W. Post Center*.<sup>51</sup> The faculty at C. W. Post University had exercised considerable power over academic policy, admissions, hiring, firing, promotion and tenure of professors, subject only to a rare veto by the chancellor or the Board of Trustees. While admitting that they were "entering into an uncharted area,"<sup>52</sup> the Board found that the faculty members were neither supervisors nor managerial employees. The fact that the faculty exercised their authority as a group was not sufficient to exclude them from coverage.<sup>53</sup> The Board gave no further explanation for its decision and held that the C. W. Post faculty were professional employees and thus entitled to the rights and benefits of collective bargaining.<sup>54</sup>

The Board reiterated this "collective action test" in *Fordham University*.<sup>55</sup> Applying the test developed in *C. W. Post*, the NLRB rejected the university's contention that the faculty members were supervisors on the basis of their collegial authority, despite the fact that they had the power to "effectively recommend" decisions.<sup>56</sup>

In *Adelphi University*,<sup>57</sup> the Board added two more elements beyond collectivity in regard to the collegiality standard. Rather than operating under a typical shared authority governance system, Adelphi University maintained a refined system in which a personnel committee comprised of eleven professors and a grievance committee of three tenured professors, all elected by the faculty, determined matters relating to the employment of fellow faculty members. The Board held that these faculty members were not "supervisors" under the Act because they exercised their authority collectively.<sup>58</sup> They made decisions in their own interests rather than the university's and were therefore not acting as representatives of management. Moreover, the ultimate authority to approve or veto committee recommendations rested with the Board of Trustees. The committees' recommendations, according to the Board, were merely treated by management as advisory. While admitting that

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FREE SOCIETY 215, 216 (1979). See also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974) (employees coming within the definition of a "managerial employee" are not covered by the Act and thus not entitled to its rights or protections).

<sup>51</sup> 189 N.L.R.B. 904, 77 L.R.R.M. 1001 (1971).

<sup>52</sup> *Id.* at 905, 77 L.R.R.M. at 1003.

<sup>53</sup> *Id.* 77 L.R.R.M. at 1003.

<sup>54</sup> *C. W. Post Center*, 189 N.L.R.B. 904, 905, 77 L.R.R.M. 1001, 1003 (1971). See *NLRB v. Yeshiva Univ.*, 582 F.2d 689, 698-99 (2d Cir. 1978), *aff'd*, 444 U.S. 672 (1980), for the Second Circuit's theory about the Board's "collective authority" test. Section 2(11) of the NLRA only refers to "individuals." 29 U.S.C. § 152(11) (1976).

<sup>55</sup> 193 N.L.R.B. 134, 78 L.R.R.M. 1177 (1971).

<sup>56</sup> See notes 46-47 *supra* and accompanying text.

<sup>57</sup> 195 N.L.R.B. 639, 79 L.R.R.M. 1545 (1972).

<sup>58</sup> *Id.* at 648, 79 L.R.R.M. at 1556.

the committee members exercised some "quasi-collegial authority," the Board did not think it sufficient to justify excluding them from the faculty collective bargaining unit.<sup>59</sup>

In reaching its decision, the Board discussed the problems which a true collegial system of governance posed regarding the application of the NLRA. The Board noted that "the concept of collegiality . . . does not square with the traditional authority structures with which this Act was designed to cope . . ." since the term "supervisor" contemplated an organizational structure where "authority [was] normally delegated from the top of the organizational pyramid in bits and pieces to individual managers and supervisors who in turn direct[ed] the work of the larger number of employees at the base of the pyramid."<sup>60</sup> Although the Board admitted that such a true system of collegiality would not "square" with the definition of "supervisor" or the basic labor law principles of organization and representation, it did not deal with these problems in *Adelphi* because it felt that a true system of collegiality did not exist at that university. The Board did note, however, that if it ever encountered a true collegial system,

. . . [the] delegation by the University to such elected groups (the committees) of a combination of functions, some of which are in the typical industrial situation, normally more clearly separated as managerial on the one hand and as representative of employee interests on the other, could raise questions both as to the validity and continued viability of such structures under [the] Act, particularly if an exclusive bargaining agent [was] designated.<sup>61</sup>

The *Adelphi* decision thus establishes a three-pronged theoretical basis for future faculty cases. The faculty must act (1) collectively, (2) in their own interests and (3) with the ultimate authority resting with the board of trustees. The fulfilling of these elements indicates that the members are not managers or supervisors.

The application of these principles, however, has not been so clear-cut. In one case, the NLRB used the "ultimate authority" test to exclude two professors who were members of a religious order which controlled the university from the collective bargaining unit. The Board considered these professors to be "part of the employer," a status which conflicted with their interests as non-managerial faculty.<sup>62</sup> This case indicates the

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 648, 79 L.R.R.M. at 1555-56.

<sup>61</sup> *Id.* at 648 n.11, 79 L.R.R.M. at 1556, n.11.

<sup>62</sup> *Niagara Univ.*, 227 N.L.R.B. 313, 94 L.R.R.M. 1001 (1976). See also *NLRB v. The Catholic Bishop of Chicago*, 440 U.S. 490 (1979). The United States Supreme Court held that secondary schools operated by a church to teach both religious and secular subjects are not within the jurisdiction granted by the NLRA, and to allow such jurisdiction would violate the first amendment. While this issue was not addressed in *Niagara*, it may well be developed in future post-secondary

general trend of the Board to employ this test to reject arguments that college or university professors were not managers or supervisors under the Act and therefore were entitled to organize into a collective bargaining unit.

V. *NLRB v. Yeshiva University*: THE SUPREME COURT SPEAKS  
ON THE QUESTION OF FACULTY ORGANIZATION UNDER THE ACT

In *Yeshiva University*,<sup>63</sup> the Board continued to address the question of the supervisory or managerial status of university faculty in the same manner as the cases previously discussed. Yeshiva University, a private sectarian institution chartered under the laws of New York, contained six undergraduate colleges, four graduate schools, a law school and a medical school.<sup>64</sup> The administration of the university was organized in a traditional framework; final authority rested with a self-perpetuating Board of Trustees. Each school or college enjoyed considerable autonomy in determining its own curriculum, grading system and academic standards. Within this structure, the faculty exercised extensive control over the management of the institution. Deans and vice-presidents for academic affairs at each school gave considerable deference to faculty decisions concerning appointment and tenure. The university had a history of faculty domination not only in academic affairs (admissions, curriculum, grading and personnel decisions), but also in other matters such as budget (within each school, senior professors determined the budget in their subject area) and even the site of facilities. As a result, the faculty influenced both the central policies of the individual units and the whole of the university.

In 1974, the Yeshiva University Faculty Association filed a representation petition<sup>65</sup> with the NLRB seeking to hold an election and establish a collective bargaining unit composed of all full-time faculty at named schools within the university. Hearings were held before a Board agent or hearing officer appointed by the Board. On the basis of facts taken at the hearing, the Board held that the faculty members were professional employees covered by the Act and not managers or supervisors.<sup>66</sup> This holding was in spite of evidence that faculty academic "initiatives" had not been vetoed in several years, that 98% of all faculty hiring recommendations were accepted at one school, and statements by various

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<sup>63</sup> 221 N.L.R.B. 1053, 91 L.R.R.M. 1017 (1975) (determination of bargaining unit); 231 N.L.R.B. 597, 96 L.R.R.M. 1601 (1977) (university administrators guilty of unfair labor practice for failure to bargain).

<sup>64</sup> The case did not involve faculty who worked for "theological programs affiliated with the university," nor those at the medical sciences graduate school, the medical school, the law school or the Yeshiva High School. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 675 n.2 (1980).

<sup>65</sup> 29 U.S.C. § 159 (1976).

<sup>66</sup> 221 N.L.R.B. 1053, 91 L.R.R.M. 1017 (1975).

deans and other administrators that emphasized a great degree of faculty control.<sup>67</sup> In reaching its decision, the Board employed the same reasoning used in earlier cases: the faculty participated in the decision-making process on a collective rather than an individual basis, the faculty acted in its own interests rather than that of the university-employer and final decision-making authority rested with the Board of Trustees.<sup>68</sup>

An election to establish a bargaining unit was subsequently held pursuant to the Board's direction, in which the Faculty Association won by a substantial margin. Following the election, Yeshiva University refused to bargain with, or recognize, the Association despite its certification as the unit's exclusive bargaining agent. The Board issued complaints against the University on the basis of the Association's charges under sections 8(a)(1) and 8(a)(5) of the NLRA.<sup>69</sup> The Board rejected Yeshiva's objections to the propriety of the Board's unit determination, found the University to be in violation of sections 8(a)(1) and 8(a)(5) of the Act, and ordered Yeshiva to bargain with the Association.<sup>70</sup>

When Yeshiva continued to refuse to recognize or bargain with the Association, the NLRB sought judicial enforcement of its order under Section 10(e) of the Act in the Second Circuit Court of Appeals.<sup>71</sup> The

<sup>67</sup> NLRB v. Yeshiva Univ., 444 U.S. at 676-77 nn.4 & 5.

<sup>68</sup> See notes 44-62 *supra* and accompanying text.

<sup>69</sup> Section 8(a)(5) of the NLRA states "[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representative of his employees, subject to the provisions of Section 9(a)." 29 U.S.C. § 158(a)(5) (1976). Section 8(a)(1) of the Acts states "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." 29 U.S.C. § 158(a)(1) (1976). Section 7 addresses the rights of employees to organize and bargain collectively. 29 U.S.C. § 157 (1976).

<sup>70</sup> 231 N.L.R.B. 597, 96 L.R.R.M. 1601 (1977).

<sup>71</sup> NLRB v. Yeshiva Univ., 582 F.2d 686 (2d Cir. 1978), *aff'd*, 444 U.S. 672 (1980). The Act makes no express provision for direct judicial review of Board decisions in the course of representation proceedings. It does provide for review of a "final order of the Board" in unfair labor practice matters through the Board petitioning a designated federal court of appeals under § 10(e), 29 U.S.C. § 160(e) (1976), a petition by the aggrieved party under § 10(f) of the Act, 29 U.S.C. § 160(f) (1976). Board decisions in election cases relating to the determination of the bargaining unit were held not to be "final orders" directly reviewable by the courts of appeals. See *American Federation of Labor v. NLRB*, 308 U.S. 401 (1940). The Court held that the basis for review was under NLRA section 10, 29 U.S.C. § 160 (1976), prevention of unfair labor practices, in which the Board's decision was challenged in a representation proceeding under section 9(d):

Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree

court engaged in an exhaustive examination of the representation hearing record and found that the faculty "in effect, substantially and pervasively operat[ed] the enterprise."<sup>72</sup>

The Second Circuit reviewed the NLRB's ruling and noted that each school, college and program at Yeshiva had autonomy in academic policy, as well as in other matters. Judge Mulligan, writing for the circuit court panel, was not persuaded by the NLRB's reasons for determining that the full-time Yeshiva faculty were neither supervisors nor managerial personnel, "[t]hus, without any analysis the Board found that Yeshiva's full-time faculty were neither supervisors nor managerial personnel simply by stating that the substantive authority of the faculty was wielded in their capacity as professionals and by invoking three doctrines promulgated in earlier Board rulings."<sup>73</sup>

Judge Mulligan's discussion of prior Board decisions pointed to the inconsistent NLRB interpretation of Section 2(11) of the Act regarding collective decision-making, and stated that the logical and realistic interpretation of that section includes "individuals who exercise supervisory functions as part of a group or committee . . . since group action is so frequently encountered in modern corporate decision-making."<sup>74</sup> The court then found that the Yeshiva faculty had power and primary jurisdiction over academic questions, and that faculty decisions in academic policy matters were not merely advisory, but were definitive: "The faculty [had] initiated, and the administration [had] repeatedly accepted, major policy determinations which constitute[d] the essence of the University's educational venture."<sup>75</sup> Since the faculty exercised their authority in conjunction with the trustees and administrators, and not for themselves alone, they acted in the best interests of the *institution*.

The court found the argument that faculty decisions were subject to the ultimate authority of the Board of Trustees to be particularly unconvincing, noting that if this factor alone precluded full-time faculty members from being managers, even the university president would be excluded from managerial status. The court therefore found that the

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of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

29 U.S.C. § 159(d) (1976).

In effect, the employer receives judicial review of a section 9 representation issue by committing an unfair labor practice and using the representation issues as a defense to the unfair labor practice charge. When the Board seeks enforcement of its unfair labor practice charges in a court of appeals, the Supreme Court can review the record of the representation hearing as part of the record of the unfair labor practice hearing.

<sup>72</sup> NLRB v. Yeshiva Univ., 582 F.2d 686, 698 (2d Cir. 1978), *aff'd*, 444 U.S. 672 (1980).

<sup>73</sup> *Id.* at 696.

<sup>74</sup> *Id.* at 699.

<sup>75</sup> *Id.* at 701.



NLRB had failed to use its investigative expertise to make factual determinations relating to each Yeshiva faculty unit that appeared before it, and had applied unjustified and arbitrary standards to the facts.<sup>76</sup> On the basis of these findings, the court refused to enforce the NLRB's order and instead found that the Yeshiva faculty members were "managerial employees."<sup>77</sup>

#### A. NLRB v. Yeshiva University: *The Supreme Court's Decision*

On appeal, the Supreme Court in a five-to-four decision affirmed the Second Circuit's opinion.<sup>78</sup> The Court, through Justice Powell, exhibited a marked sensitivity for the differences between industry and institutions of higher education. According to the Court, the danger of divided loyalty between employer and union which the managerial employee exemption was designed to prevent necessitated applying the exclusion to the faculty in the present case. The holding was also due in part to the University's reliance upon decisions made by the faculty on the basis of their independent professional judgment.

The Court illustrated the danger of divided loyalty between union and management by citing the case of an employee who had to make decisions to either formulate or implement his employer's policies.<sup>79</sup> The Court determined that such an employee could only be considered a managerial employee since he "exercise[d] discretion within or even independently of established employer policy and . . . [was] aligned with management. . . ."<sup>80</sup> Alignment with management could be found to exist "only if [the employee] represent[ed] management interests by taking or recommending discretionary actions that effectively control[led] or implement[ed] employer policy."<sup>81</sup>

In light of these considerations, the Court addressed the arguments presented by the NLRB in support of its position.<sup>82</sup> The fact that the

<sup>76</sup> *Id.* at 703.

<sup>77</sup> *Id.*

<sup>78</sup> NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).

<sup>79</sup> See NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); notes 48-50 *supra* and accompanying text.

<sup>80</sup> NLRB v. Yeshiva Univ., 444 U.S. at 683.

<sup>81</sup> *Id.*

<sup>82</sup> The NLRB did not argue that its three theories should be applied only to private colleges or universities and their faculty. As a result, the Court presumed that the Board meant to apply these tests to all work environments, a presumption which damaged the Board's position because these rationales conflicted with their own past precedents. *Id.* at 687.

"The NLRB also apparently limited their 'lack of ultimate authority' and 'collective authority' rationales to footnotes in their brief to the High Court, and merely argued that these rationales were not independent tests, but facts which supported their argument that the faculty act in their own interests, not their employers." *Id.* at 685 n.20.

university administration held a veto power over faculty decisions at Yeshiva was not relevant according to the Court. This "ultimate authority" theory, applied outside the environment of an institution of higher education, would seemingly preclude finding managers or supervisors in any company where the Board of Directors had ultimate authority over all decisions made by the corporation. Since the Board did not indicate that this theory should only apply in the special case of colleges and universities, the Court found the theory "flatly inconsistent with [the Board's] own precedents."<sup>83</sup> Furthermore, in the present case the administration's veto power was "rarely" exercised, hence ultimate authority was not considered a "relevant" factor. Instead, the focus of the inquiry was seen to center on whether the faculty exercised "effective control" over management decisions.<sup>84</sup> As the record indicated, the evidence clearly established that the Yeshiva faculty did exercise "effective control" over major institutional decisions.<sup>85</sup>

Secondly, the contention that the faculty members were not managers or supervisors because they exercised their control collectively rather than individually was held to be without merit.<sup>86</sup> This theory was in fact "flatly inconsistent" with Board precedents that involved supervisors who acted "through committees" or involved employees who owned sufficient stock in a corporation to exert considerable influence upon company policy.<sup>87</sup> Additionally, neither this theory, nor any other rationale advanced by the NLRB in its *Yeshiva* opinion had been "supported by a single citation to the record."<sup>88</sup>

Consequently, the only theory propounded by the Board which had even "colorable validity," according to the Court, was its contention that the faculty acted in their own independent professional interests rather than in their employer's interests.<sup>89</sup> The Board argued that the Yeshiva faculty was not "aligned with management" because of this independent interest. Since the faculty did not have to "conform to management policies [or be] judged according to their effectiveness in carrying out those policies,"<sup>90</sup> union pressure would not affect their deci-

<sup>83</sup> *Id.* at 685.

<sup>84</sup> *Id.* at 678 n.8. The Court applied the language from the statutory supervisor exclusion, 29 U.S.C. § 152(11) (1976), to the judicially-created managerial exemption since the Court felt that the rationales behind both exemptions were the same.

<sup>85</sup> 444 U.S. at 676-79.

<sup>86</sup> *Id.* at 685 n.21 (citing *Florida Southern College*, 196 N.L.R.B. 888, 889 (1972)); *Sida of Hawaii, Inc.*, 191 N.L.R.B. 194, 195 (1971); *Red and White Airway Cab Co.*, 123 N.L.R.B. 83, 85 (1959); *Brookings Plywood Corp.*, 98 N.L.R.B. 794, 798-99 (1952)).

<sup>87</sup> 444 U.S. at 685 n.21. See note 86 *supra* and cases cited therein.

<sup>88</sup> 444 U.S. at 678-79 n.8.

<sup>89</sup> *Id.* at 685 n.22.

<sup>90</sup> *Id.* at 684.

sions because the faculty was expected to act in their own and not the university's interests. This "independent professional judgment test," the Board argued, removed any danger of divided loyalty or the necessity of invoking the managerial exclusion.<sup>91</sup>

The Court refused to accept this argument. Not only had this "professional expertise—management policy" distinction never been applied to other professional employees, but it had been "implicitly rejected" on two previous occasions in other contexts.<sup>92</sup> The Board's intent to apply this test to all professional employees would have overruled these prior decisions, and thus affected the status of countless professionals presently considered managers or supervisors. Further, requiring a manager to conform to management policy in order to come within this exemption was inherently inconsistent with the responsibilities of a manager: a person who must use his own judgment and discretion within the confines of the policy set by management.<sup>93</sup>

This "independent professional judgment" test, the Court noted, would only increase the danger of divided loyalty which the managerial exclusion seeks to prevent.<sup>94</sup> In reality, faculty and administration are not "distinct separable entities" with inherently contradictory values and goals. The university strives to maintain a quality institution that carries out its basic goals within budgetary constraints. Since the real product offered by any academic institution is education, the university must rely upon its faculty's "professional expertise" to develop and implement academic policies which produce a quality product within the broader confines of the institution's goals.<sup>95</sup> On the other hand, the faculty seeks to fulfill their individual professional goals in a manner that will increase their stature within their particular field of specialization. In striving for excellence, therefore, the faculty simultaneously increases the stature of the university because institutions are judged in large part by the quality of its faculty.

Consequently, the goals of the university and its faculty members are "essentially the same."<sup>96</sup> Not only does the university depend upon the faculty to carry out its objectives and increase its standing among higher educational institutions, but the faculty member's professional standing depends upon the quality of his work and the stature of his

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 687 n.26, citing Sutter Comm. Hospitals of Sacramento, 227 N.L.R.B. 181, 193 (1976); Univ. of Chicago Library, 205 N.L.R.B. 220, 221-22, 229 (1973), *enforced*, 506 F.2d 1420 (7th Cir. 1974).

<sup>93</sup> *Id.* at 678 n.8. According to Justice Powell, the argument of the Board, and Justice Brennan in his dissent, that the faculty performs its role in the governance system in their own interest, "assumes a lack of responsibility that is not reflected in this record." *Id.*

<sup>94</sup> *Id.* at 686.

<sup>95</sup> *Id.* at 688.

<sup>96</sup> *Id.*

employer. As a result, the Court explained that the faculty's interests were identical to, and "[could not] be separated from," the university's goals when they were performing their functions within the school's governance system.<sup>97</sup> While some conflict over wages and benefits may exist, this was deemed inherent in any manager-employer relationship. In fact, noted the Court, the conflict over wages might be less severe in a higher education environment because a school desires favorable wages in order to attract a quality faculty and maintain its own standing.<sup>98</sup>

Under these circumstances, decisions recommended by a faculty are almost always implemented. According to Justice Powell, "this is an inevitable characteristic of the governance structure adopted by universities like Yeshiva."<sup>99</sup> Since an institution's fate rests in large part upon the faculty's independent judgment, the danger posed by divided loyalty is great. Therefore, the Court held that application of the managerial employee exclusion was necessary in order to prevent these dangers since the faculty "exercise authority which in any other context unquestionably would be managerial."<sup>100</sup> In fact, "[w]hen one considers the function of a university, it is difficult to imagine decisions more managerial than [those made by the Yeshiva faculty]."<sup>101</sup> On this basis, the Court found that the Yeshiva full-time faculty members were managerial employees and affirmed the decision of the Second Circuit Court of Appeals.

The Court cautioned, however, that this decision would not radically broaden the managerial employee exemption. An employee cannot be considered a manager unless his "activities fall outside the scope of the duties routinely performed by similarly situated professionals. . . ."<sup>102</sup> From this starting point, the Court indicated it would consider a variety of factors besides those present in the *Yeshiva* case. Faculty members would not be considered managers, for example, when they were merely responsible for "the content of their own courses, evaluat[ing] their own students, and supervis[ing] their own research."<sup>103</sup> The Court also suggested that a distinction could be made between tenured and non-tenured professors, depending upon the structure of the school's governance system.<sup>104</sup> While this implied that the Court did not wish to apply a blanket exclusion for college or university faculty at every institution of higher education, the tenor of the entire opinion implied that the Court wanted the NLRB to determine this question of a case-by-case basis.

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 688 n.27.

<sup>99</sup> *Id.* at 689 n.28.

<sup>100</sup> *Id.* at 686.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 690.

<sup>103</sup> *Id.* at 690 n.31.

<sup>104</sup> *Id.*

This attitude was also reflected in the Court's rejection of the Board's plea for deference to its initial decision since it came within its areas of administrative expertise.<sup>105</sup> The Court noted that the NLRB had made no "relevant findings of fact" in the present case.<sup>106</sup> The "absence of factual analysis apparently reflects the Board's view that the managerial status of particular faculties may be decided on the basis of conclusory rationales rather than examination of the facts of each case." Since the Board's ruling was neither "rationally based on articulated facts," nor "consistent with the Act," the Court did not defer to the NLRB's judgment.<sup>107</sup>

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<sup>105</sup> *Id.* at 684. See *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 504 (1978).

<sup>106</sup> *Id.* at 691.

<sup>107</sup> *Id.* In dissent, Justice Brennan joined by Justices Marshall, Blackmun and White, argued that the Board's decisions attempting to adapt the Act to the various labor environments coming within its jurisdiction should be given deference. Not only had the Court failed to accord the Board that deference, but it had also reached the wrong conclusions on the merits. According to Justice Brennan, a "dual authority" system of governance exists at "mature universities." This system incorporated a typical hierarchical chain of command structure with a system designed to incorporate the faculty's "collective expertise as professional educators" into the decision-making process. *Id.* at 697 (Brennan, J., dissenting). As with any employer, Justice Brennan argued, the administration may accept or reject their employees' suggestions as they see fit on the basis of budgetary matters or other policy concerns. Therefore, the administration had the ultimate authority over all decisions. See *id.* at 701 n.11 (indicating problems with repeated employer acquiescence in employee suggestions, especially from managerial employees and their net effect if applied across the board to all industries).

Further, Brennan explained that the faculty acts in its own professional interests. It is not held accountable for its recommendations nor evaluated on the basis of advice given. Instead, their jobs depend upon teaching ability and scholarship. Therefore, no danger of divided loyalty exists. "Indeed, the notion that a faculty member's professional competence could depend upon his undivided loyalty to management is antithetical to the whole concept of academic freedom." *Id.* at 700. As the faculty vote in favor of unionization indicated, the professors did not consider themselves "aligned with management." Even if their interests did coincide with the administration's on most issues, they normally did not agree on such issues as wages, benefits and terms and conditions of employment. These disagreements were precisely the kind of disputes with which the NLRA was designed to deal.

Finally, Brennan contended that the model theory of academic governance, emphasized by the Court in its opinion as the reason for applying the managerial exclusion, no longer exists in today's society. Higher education has become a "big business" run by the administration. Due to financial problems and other factors, the faculty's power in the decision making process has been considerably eroded. In fact, faculty members actually organized in order to preserve the status quo and to protect their waning power, not to gain greater power. Application of the managerial exclusion removes this potential countervailing power and also removes any incentive for an administration to deal reasonably with the faculty, especially since the Act no longer exists as a "deterrent."

## B. NLRB v. Yeshiva University and the NLRA in Higher Education

The *Yeshiva University* case exemplifies the kind of problems produced when the NLRA is applied to institutions of higher education which function on the basis of the "shared authority" doctrine. The Supreme Court's decision in *Yeshiva*, although acknowledging the power of the NLRB to assert its jurisdiction over such institutions, demonstrates why the NLRA cannot be rationally applied to the field of higher education. The NLRA simply was not designed to deal with a system of governance where the faculty and the administration share authority over what is in effect, a joint enterprise. The administrators, many of whom are active or former professors themselves, do not deal with the faculty members as employees, but as colleagues. In this environment no sharp line divided by adversarial interests exists as it does in an industrial corporation. Yet, the NLRA is designed to deal with, and in fact to produce, this exact type of adversarial relationship.

As the *Yeshiva* case demonstrates, the NLRA is not equipped to deal with a governance system that is radically different from the bureaucratic, hierarchical management system which exists in industrial corporations. The Board itself noted in *Yeshiva* that "the activities of the full-time faculty at Yeshiva might suggest managerial or supervisory status in other contexts, but not in the case of an institution of higher learning."<sup>108</sup> While the Board has the right to develop special rules for specific working environments, the Board's rules in the higher education field were almost totally contrary to the decisions handed down in other contexts—a fact the Supreme Court pointed out on more than one occasion in its *Yeshiva* opinion.<sup>109</sup> This inconsistency with past precedent not only shows the irrationality of the Board's decisions on the faculty question, but also demonstrates that the Board had to virtually turn the Act around to make it applicable to the university faculty. Perverting the NLRA to reach a desired result only proves that the NLRA was not designed to deal with a shared authority system of governance.

The Supreme Court's decision in *Yeshiva* represents a step in the right direction for colleges and universities.<sup>110</sup> The Court recognized the fundamental differences between universities and industry, while being sensitive to their needs and concerns. However, merely leaving future conflicts to a case-by-case determination by the Board on the basis of the factual circumstances is not sufficient. The problem is not just

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<sup>108</sup> NLRB v. Yeshiva Univ., 582 F.2d 686, 697 n.13 (2d Cir. 1978), *aff'd*, 444 U.S. 672 (1980).

<sup>109</sup> See NLRB v. Yeshiva Univ., 444 U.S. at 682 n.13, 685-86 nn.21-22, 687 n.26.

<sup>110</sup> The Supreme Court's *Yeshiva* decision could have far-reaching consequences both in private and public higher educational institutions. The Court's ruling that the Yeshiva faculty members were managerial employees could prompt Boards of Trustees in both organized and non-organized institutions to use the *Yeshiva* decision to refuse to recognize or bargain with faculty unions.

whether faculty members are covered by the Act, but rather, the main concern is what effect application of the Act will have on the institution's governance system.<sup>111</sup> Injecting an adversarial system into this environment could endanger its continued existence. This would pose serious problems since most authorities consider the shared authority system of governance "an essential ingredient in a university's striving for excellence."<sup>112</sup>

The NLRA, with its requirement that negotiations between labor and management be conducted only through the elected collective bargaining agent, would seem to preclude any system of joint faculty-administration committees or even a faculty senate.<sup>113</sup> Similarly, a system where the faculty aids in selecting deans, academic vice presidents and presidents would appear to be inconsistent with this adversarial relationship of labor and management.

Unionization by faculty has "generally result[ed] in the transformation of academic policy to employment conditions."<sup>114</sup> During collective bargaining, economic matters often take precedence over academic matters, and faculty control over these academic matters may be bargained away for greater benefits. The end result, many fear, will be an end to the system of shared authority brought about by both the loss of faculty power and prestige through bargaining and the necessity of weakening or abolishing the committee system and the faculty senate in order to comply with the NLRA. Application of the NLRA to such institutions and their faculties, therefore, could either destroy the system of joint governance or prevent it from ever developing.<sup>115</sup>

The dangers which could result from faculty collective bargaining are perhaps best described in the following quote from a former President of the American Association of University Professors:

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<sup>111</sup> See Kahn, *supra* note 3 (discussing the problems of applying the NLRA to colleges or universities).

<sup>112</sup> Amicus Curiae Brief of Johns Hopkins University, New York University, Northeastern University and George Washington University at 11, NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).

<sup>113</sup> *Id.* at 8-16. See also Kahn, *supra* note 3; Adelphi Univ., 195 N.L.R.B. at 648 n.31, 78 L.R.R.M. at 1556, n.31.

<sup>114</sup> Amicus Curiae Brief of the National Society of Professional Engineers at 22-23, NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).

<sup>115</sup> The application of the NLRA to private institutions of higher education also raises questions concerning the academic freedom of the faculty members in a union. See NLRB v. Catholic Bishops of Chicago, 440 U.S. 490 (1979); Comment, *Union Waiver of Constitutional Rights: Academic Freedom as a Bargaining Chip in Union Contracts*, 49 U. COLO. L. REV. 299 (1978); Note, *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045 (1968). Although this question was not discussed by the Court in *Yeshiva*, it may have had an influence upon the Court. See, e.g., Amicus Curiae Brief of the National Society of Professional Engineers at 28-32, NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).

The process of collective bargaining itself, which has been gaining increased ground in higher education, raises problems even apart from the strike. In dividing the university into worker-professors and manager-administrators and governing boards, it imperils the premise of shared authority, encourages the polarization of interests and exaggerates the adversary concerns over interests held in common. In placing the professor in the position of bargainer seeking to exact his demands from the university's managers and owners, the process of collective bargaining heavily burdens the professor's role as primary governor of the educational enterprise. Moreover, the process itself as it functions tends to remit issues which faculty should themselves determine to outside agencies such as state and federal boards, arbitrators, and union bureaucracies. In addition, since unions rest on continued support of their constituency, the process becomes susceptible to essentially political rather than essentially academic decision-making.<sup>116</sup>

The problem is, however, that no one, including faculty, really knows what will result from collective bargaining as employed in the university setting. Whether the NLRA or a state labor relations law applies, the danger of collective bargaining by faculty still exists and should be recognized for what it actually represents: the replacement of a system of shared authority with an adversarial relationship.

## VI. CONCLUSION

As this discussion demonstrates, the true error was for the Board to assert jurisdiction over colleges and universities in general and over their faculties in particular. In fact, the very adversarial relationship between labor and management upon which the NLRB predicates its jurisdiction is not present in the higher education system of governance insofar as the faculty is concerned. The Board has not been sensitive to the different environment which exists in a higher educational institution, nor has it carefully considered the facts in each case before it has attempted to apply the Act. *NLRB v. Yeshiva University* represents judicial recognition of the Board's inability to understand the role of the faculty in the operation of the academic enterprise and demonstrates the inapplicability of the Act in this environment.

In light of the Board's problems in this field and its tendency in past decisions to adopt conclusory decisions without proper consideration of the facts, having the NLRB interpret the Supreme Court's *Yeshiva* decision in future cases may not be a sufficient solution.

The problems and dangers presented by faculty collective bargaining to a shared authority governance system militates against any type of

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<sup>116</sup> Kadish, *The Theory of the Profession and Its Predicament*, 58 AM. A.U. PROF. BULL. 120, 121 (1972).



faculty organization. Considering the lack of Congressional consideration of these problems and the dangers posed by application of the NLRA, the Board should stay its hand, or at least act with appropriate sensitivity to the problems which its decision to assert jurisdiction over institutions of higher education has raised. Before faculty collective bargaining is adopted at any higher educational institution, whether public or private, all parties concerned should heed the lessons of *NLRB v. Yeshiva University* and recognize the fundamental questions it has raised about the compatibility of faculty unionization and shared authority.