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ABSTRACT

The impact of the Supreme Court decision in the National Labor Relations Board v. Yeshiva University case is considered in this literature analysis. This landmark decision held that the full-time faculty members at the private Yeshiva University exercised supervisory and managerial functions and were therefore not entitled to the benefits of collective bargaining under the National Labor Relations Act (NLRA). The immediate effect of the Supreme Court's ruling on Yeshiva University itself was to suspend, if not terminate, the unionization of the faculty. Although a total of over 20 private colleges and universities have broken off negotiations or refused to bargain with faculty unions, there has not been a widespread movement by college administrations to claim immunity from collective bargaining under the NLRA. The most likely course for the future is judicial rather than legislative or administrative, and the most likely result of this case-by-case approach is a fairly narrow and gradual application of the Supreme Court's holding in Yeshiva. There is not likely to be very much impact of the decision on public colleges and universities. It is suggested that the significant role of faculty in academic affairs, and their relatively minor influence upon economic matters is congruent with a dual track approach. Under this approach shared authority and faculty senates can be preserved in the academic area, and faculty collective bargaining units are allowed, but the scope of bargaining is strictly limited. The role of the professional literature in the legal decisions is considered. (SW)

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In search of the meaning of *Yeshiva*

Perry Alan Zirkel

In February 1980 the Supreme Court decided the case of *National Labor Relations Board v. Yeshiva University*, 444 U.S. 672 (1980). It is generally agreed that *Yeshiva* is a landmark decision concerning collective bargaining in higher education (see *The Chronicle of Higher Education*, March 3, 1980). Although more than a year has passed since the decision, controversy continues over the meaning of *Yeshiva*. This issue of "Research Currents" addresses current questions about the impact of this important court decision.

1. What did the Supreme Court say in *Yeshiva*?

The decision was issued by a closely divided (5 to 4) Court. The majority opinion, written by Justice Lewis Powell, held that the full-time faculty members of the private Yeshiva University exercised supervisory and managerial functions and were therefore not entitled to the benefits of collective bargaining under the National Labor Relations Act (NLRA). Rejecting the National Labor Relations Board's (NLRB) arguments, the majority cited the standard from the Court's previous decisions in the industrial arena: that "managerial employees" are those who develop and implement employer policy. The majority found that Yeshiva's faculty met this standard by exercising (1) absolute authority in the academic area (e.g., by deciding what courses would be offered, when they would be scheduled, and to whom they would be taught, as well as by determining teaching methods, grading policies, and matriculation standards); and (2) significant authority in other central policies of the institution (e.g., by effectively deciding which students would be admitted, retained, and graduated and by occasionally determining the size of the student body, the location of a school, and the tuition to be charged).

The majority did not say whether Yeshiva's full-time faculty members fall within the NLRA's explicit exclusion for supervisory employees. They declined to decide this issue, having found the managerial exclusion to be determinative (444 U.S. at 682). Nor did the majority extend its decision to all private colleges and universities, or even to all faculty members at Yeshiva University, noting:

> 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[ies] are entirely or predominantly nonmanagerial. There also may be faculty members at Yeshiva and like universities who properly could be included in a bargaining unit. It may be that a rational line could be drawn between tenured and untenured faculty members, depending upon how a faculty is structured and operates. But we express no opinion on these questions, for it is clear that the unit approved by the [NLRB] was far too broad. (444 U.S. at 690 n.31)

The dissenting opinion by the four remaining Justices objected to the "blind transplanting" of principles developed in the industrial sector into the academic arena and found the majority's "vision clouded by its failure fully to discern and comprehend the nature of the faculty's role in university governance" (Id. at 696). Judging the analysis of the NLRB to be accurate, the minority opinion concluded that Yeshiva's faculty members do not fit either the supervisory or managerial exclusions. Noting the economic exigencies in higher education today, the minority warned that "[r]ather than promoting the Act's objective of funneling dissension between employers and employees into collective bargaining, the Court's decision undermines that goal and contributes to the possibility that 'recurring disputes [will] fester outside the negotiation process until strikes or other forms of economic warfare occur.' " (672 U.S. at 705)

2. What were the immediate effects of *Yeshiva* on private institutions of higher education?

The immediate effect of the Supreme Court's ruling on Yeshiva University itself was to suspend, if not terminate, the unionization of the faculty. The University's counsel (Bodner 1980) noted that the putative faculty union had considered challenging the application of the Court's decision to current circumstances by asserting that the facts had changed significantly since the *Yeshiva* case first began over six years ago. A report in *The Chronicle of Higher Education* (Watkins, June 9, 1980) indicated that the faculty's consideration of another representation petition to the NLRB has been put aside pending the administration's response to a faculty request for greater participation in University affairs. A subsequent issue of the *Chronicle* (Sept. 15, 1980) reported that Yeshiva University has adopted a debt-restructuring plan to allow the institution to discharge most of its approximately $61 million debt by 1982. However, faculty participation in developing this plan was not mentioned.

The immediate effect of the Court's decision on other private institutions of higher education has received more extensive attention. The result has been delay for institutions already in litigation as well as for those in less crystallized conflict about unionization (Fiske 1980). In the Boston University case, the Supreme Court vacated the judgment of the First Circuit Court of Appeals that department chairpersons were employees covered by the NLRA and remanded the case for further consideration in light of *Yeshiva (Trustees of Boston University v. NLRB*, 445 U.S. 913 [1980]). When the First Circuit in turn remanded the case to the NLRB, the Board began hearings to determine the status of department chairpersons and faculty members in light of *Yeshiva* (Watkins, Sept. 22, 1980; *Chronicle*, Jan. 19, 1981). The NLRB has ordered similar hearings to determine the status of faculty members at Daemen College in New York and at the University of New Haven.

At the request of the NEA-affiliated union at Salem College, the NLRB recently dismissed a case involving that private institution in West Virginia. The union had concluded that the managerial exclusion clause would apply to the department chairpersons. Although the decision effectively eliminated collective bargaining at Salem College, it did not bar the union from seeking to organize faculty members into a new unit that would meet the *Yeshiva* criteria (*Chronicle*, Jan. 19, 1981). The AFT-affiliated union at Ithaca College in New York has petitioned the Supreme Court to review a decision by the Second Circuit Court of Appeals, which dismissed their lawsuit against the College for refusing to negotiate (*Chronicle*, Oct. 6, 1980). The College had maintained that the faculty were not covered by the NLRA. While the Second Circuit did not definitively back the issue, the Court dismissed the

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case on procedural grounds because the NLRB had refused to hold additional hearings on the faculty's status following the *Yeshiva* decision (*Ithaca College v. NLRB*, 623 F.2d 224 [2d Cir. 1980]).

Other post-*Yeshiva* suits charging unfair labor practices under the NLRA for failure to bargain involve Catholic University School of Law in Washington, D.C., (*Chronicle*, March 31, 1980), Drury College in Missouri (*Chronicle*, Oct. 6, 1980), and Adrian College in Michigan (Maeroff 1980). Institutions that have terminated negotiations to renew expired contracts with faculty unions in the wake of *Yeshiva* include Stevens Institute of Technology (*Chronicle*, April 28, 1980), Cottey College, Florida Memorial College, Lorretto Heights College, Polytechnic Institute of New York, and the C.W. Post Center of Long Island University.

Other institutions that have broken off negotiations for first contacts with newly certified unions include Curry College, Duquesne University Law School, and the University of Albuquerque. A faculty election to select a bargaining representative was called off at Villanova University (Watkins, June 9, 1980). A regional director for the NLRB recently ruled that the faculty at Stephens College in Missouri met the Yeshiva test and therefore were not entitled to coverage under the NLRA. The faculty union at Stephens is reportedly appealing the ruling to the full NLRB (*Chronicle*, March 9, 1981). Although a total of over 20 private colleges and universities have broken off negotiations or refused to bargain with faculty unions, there has not been a widespread rush by college administrations to claim immunity from collective bargaining under the NLRA. Thus, the overall picture shows a slowing, rather than a cessation, of unionization and bargaining activities at private colleges and universities (Stetson 1980).

3. What will be the eventual effects of *Yeshiva* on private institutions of higher education?

Judicially, there are three alternatives for determining the eventual effects of *Yeshiva* on private institutions of higher education. A broad interpretation of the Supreme Court's decision by the federal judiciary will amount to what Harvard Professor David Kuechle has called "the death knell for faculty unions in private colleges and universities in the United States" (1980). On the other extreme, Yale Professor Julius Getman, the general counsel for the American Association of University Professors, predicts that the Supreme Court will reverse the *Yeshiva* decision as a result of the litigative strategy being developed by the AAUP in concert with the AFT, NEA, and NLRB (*Chronicle*, June 30, 1980).

An intermediate and more likely alternative is that the federal courts will interpret the *Yeshiva* decision somewhat narrowly, limiting its applicability to other institutions that show that their faculty members have virtually absolute authority in academic affairs and significant authority in other institutional policies. Although the decisions interpreting *Yeshiva* have been infrequent and peripheral thus far, they seem to support this conservative prediction. For example, in a case decided less than three months after the Supreme Court's *Yeshiva* decision, the Ninth Circuit Court of Appeals refused to excuse the failure of Stephens Academy of Art (in California) to raise the managerial employee exclusion in earlier hearings before the NLRB. The basis for the Ninth Circuit's ruling was its finding that the Supreme Court's decision applied only to "mature" universities where faculties have a significant policy-making role (*Stephens Institute v. NLRB*, 620 F.2d 720 [9th Cir. 1980]). In another case decided almost eight months after *Yeshiva*, the Fifth Circuit Court of Appeals indicated in a footnote: "Yeshiva University was a holding based to a great part on the extended particular facts of that case. Yeshiva University is run on a truly collegial basis. As a group, the Yeshiva faculty truly manages its school" (*Berry Schools v. NLRB*, 627 F.2d 692, 705 n. 10 [5th Cir. 1980]).

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Beyond the courts, there are two legislative and administrative actions that could play a role in determining the eventual effect of *Yeshiva* on private institutions of higher education. The more dramatic alternative is legislative: an attempt to amend the NLRB so as to place faculty members expressly within the purview of the NLRA, and thus outside its managerial and supervisory exclusions. The AAUP launched a legislative campaign in mid-1980 for this purpose (*Chronicle*, June 30, 1980), but the proposed amendment languished in the last term of the 96th Congress. Its passage may be hampered by the Reagan administration, which has promised less government interference in the private sector.

In the absence of an amendment, constraint and clarity could also be achieved through the NLRB's rarely used rule-making powers. The suggestion that the NLRB apply a rule-making procedure for university faculties, like the one it used for symphony orchestras, was proffered by legal commentators prior to *Yeshiva* (Kahn 1973; Menard and DiGiovanni 1970). Such a procedure offers the advantage of securing informed opinions and relevant data from a wide array of interested parties. In 1971, the Board rejected the AAUP's request to use rule making to determine the criteria for faculty bargaining units. However, in the previous year the NLRB had exercised this function when it decided to assert jurisdiction over private colleges and universities with annual revenues totaling one million dollars or more (Kahn 1973).

Kahn's article (1973) was cited in the lower court's opinion in the *Yeshiva* case to lend support to the view that "[a]bsent a legislative amendment, it would seem that an appropriate method to explore fully the special problems created by the Board's assumption of jurisdiction here would be by rule making" (582 F.2d at 703 [2d Cir. 1978]). In the same year, a sister circuit acknowledged that "some of the problems in academia might better be addressed by rule making than by an ad hoc, case-by-case determination" (*Trustees of Boston University v. NLRB*, 575 F.2d 301, 305 [1st Cir. 1978]). Such an approach still is feasible, though improbable; at this point the resulting rules would have to fit within the boundaries of *Yeshiva* and could be challenged in the federal courts.

In sum, the most likely route is judicial rather than legislative or administrative, and the most likely result of this case-by-case approach is a fairly narrow and gradual application of the Supreme Court's holding in *Yeshiva*. In any event, private colleges and universities remain within the jurisdiction of the NLRA. Collective bargaining remains mandatory for many employees in non-faculty positions, and it is at least voluntary for those in faculty ranks.

4. What will be the likely effects of *Yeshiva* on public institutions of higher education?

Since public colleges and universities do not fall within the coverage of the NLRA, these institutions have experienced no immediate or direct effects of the *Yeshiva* decision. However, there may be some indirect effects. In the approximately 26 states where public institutions of higher education are not covered by a collective bargaining statute (Henkel 1980), there may be some delay in providing statutory protection to faculty members at such institutions.

In those other states where faculty members of public institutions are covered by legislation modeled after the NLRA and where public employee relations boards are amenable to private sector developments, *Yeshiva* may well have some impact (*Chronicle*, March 3, 1980; Flygare 1980). However, the significantly greater duration and extent of collective bargaining in public higher education has established an overall momentum which is likely to limit these effects.

5. Are there any effects of *Yeshiva* common to both public and private institutions of higher education?

Although the climate of collective bargaining in higher education

is partially clouded by *Yeshiva*, opposing interest groups are certain to continue litigation and efforts to enact legislation. Commentators have speculated about other possible outcomes. For example, Maeroff (1980) suggests that one result could be more faculty involvement in governance, as colleges and universities seek either to meet the *Yeshiva* criteria or to avoid its conflict. Another observer suggests that "mature" universities may develop new structures as an alternative to collective bargaining (Stamato 1980).

6. What role, if any, did the professional literature play in the *Yeshiva* litigation?

The initial judicial decision in the *Yeshiva* case, which was rendered by the Second Circuit Court of Appeals (583 F.2d 686), contained some references to the professional literature. The court cited several secondary sources in the legal literature, especially Kahn's (1973) law review article mentioned above. To a lesser extent, the Second Circuit referred to the literature of higher education, such as Kadish's articles in the *AAUP Bulletin* (1972). The latter references were limited to an illustration of the divergent views surrounding the issue of collective bargaining in higher education and an explanation of the collegial concept of "shared authority."

The majority and dissenting opinions of the Supreme Court in *Yeshiva* made more frequent use of the literature of higher education. These references were attributable at least in part to the sources cited in the briefs of the parties and the amici curiae. The majority opinion, for example, cited four books and the Kahn (1973) article in its historical exposition of the "shared authority" concept, including a 1971 volume by Baldridge which was referred to in the briefs of the NLRB and AAUP. The majority similarly cited three books, including Mortimer and McConnell (1978), to support its finding that the faculty's professional interests are the same as the university's. Finally, the majority cited other references from the literature of higher education, including the American Association for Higher Education's (1967) report, which had been mentioned in the briefs for Yeshiva University and the NEA. While acknowledging the dissent's "citing [of] several secondary authorities" in rebuttal, the majority retreated along traditional and narrow lines by asserting: "In any event, our decision must be based on the record before us. Nor can we decide the case by weighing the probable benefits and burdens of faculty collective bargaining . . . That, after all, is a matter for Congress, not this Court" (444 U.S. at 690 n.29).

The dissenting opinion refers to many of the same books as the majority but interprets them differently. Moreover, it buttresses its interpretation with position papers by union advocates. Thus, the minority says that Baldridge characterizes the "mature" university as having dual authority, with parallel hierarchical and professional networks, rather than shared authority, and it supports this view with a law review article by Matthew Finkin (1974), former counsel for the AAUP. Similarly, the dissent sees faculty collective bargaining as a protective rather than offensive activity and confirms its view with an article in the *Chronicle* (Nielsen and Polishook 1979) which is an advertisement paid for by the AFT.

7. Does the professional literature support the Supreme Court's majority view or its dissenting opinion in *Yeshiva*?

Although both the majority and minority cited Baldridge's (1971) theoretical perspective on university governance, they neglected his subsequent empirical studies. His initial study, combining extensive survey research with selected case studies, was reported in successive books (Baldridge and Kemerer 1975, 1978). The follow-up study was previewed recently in a periodical article (Kemerer and Baldridge 1980). Among the findings of the follow-up study are: (1) that faculty senates and unions have apparently reached a stable level of coexistence at most campuses where collective bargaining has been in operation for five or more years; (2) that very little expansion of contractualized governance items has occurred at institutions with a history of bargaining; and (3) that union chairpersons are less convinced today than they were in 1975 that collective bargaining has democratized university decision making.

Similarly, the majority and dissenting opinions both cited Mortimer and McConnell's (1978) portrait of university governance but they ignored the empirical studies of this subject summarized in the same book. For example, AAHE (1967) found in a survey of 34 institutions of higher education that approximately 75 percent of the institutions were characterized by administrative dominance or privacy. Mortimer and McConnell (1978) similarly summarized early studies by AAUP and Gunne and Mortimer which found that when faculty members exercised shared or primary authority, their influence was limited to academic matters. A more extensive study by Garbarino (1975) indicated that faculty members had a significant role in academic affairs, a less clearly effective role in personnel matters, and a negligible role in economic matters. Baldridge and Kemerer (1975) had similar findings about the perceived influence of faculty senates at private liberal arts colleges. While these results generally confirmed the majority opinion's view of academic decision making, they also supported the dissenting Justices' focus on economic matters—which, after all, is at the core of the mandatory area of collective bargaining.

8. Is there a legal approach in closer agreement with the empirical findings of the professional literature?

Yes. The significant role of faculty in academic affairs, and their relatively minor influence upon economic matters is congruent with what Baldridge and Kemerer (1975, p. 228) called a "dual track" approach. Under this approach traditional virtues and vehicles of the collegial system, such as shared authority and faculty senates, are preserved in the academic area; however, the more modern mechanism of collective bargaining is protected in the economic area. Faculty units are allowed, but the scope of bargaining is strictly limited. Thus, the dual role of faculty members is recognized (Mortimer and McConnell 1978, p. 56), but they may not have it both ways on the same issues at the same time (Corson 1975, p. 201).

The dual track approach is exemplified in practice at the University of Hawaii (Baldridge 1975, p. 28). Similarly, when the chancellor of Long Island University was asked what his institution intended to do in light of *Yeshiva*, he said that when the current contract expires his board may seek to limit the scope of collective bargaining to salary and related matters (Fiske 1980). The dual approach has also been adumbrated in the elements of Kahn's (1973) proposed amendment to the NLRA and in some state court decisions involving public colleges and universities. In *Keene State College Education Association*, 411 A.2d 156 (1980), the Supreme Court of New Hampshire ruled that the doctrine of exclusivity—which allows only the elected bargaining agent to represent the faculty's interests—need not bar the existence of advisory faculty committees. Citing decisions by New Jersey's Supreme Court and the New York Public Employment Relations Board, the dissenting Justices of Michigan's Supreme Court in the *Central Michigan University* case (273 N.W. 2d 21 [Mich. 1978]), argued for a restrictive interpretation of the mandatory area of bargaining. The California and Montana statutes which specifically protect the shared governance system in higher education also follow from this approach. Douglas (1979) concluded that dual governance models merit further exploration.

A somewhat similar solution was formulated by the Carnegie Commission (1973) concept of "codetermination." Under this approach, which is illustrated by West Germany's system of employee relations and Great Britain's model of academic unionism, negotiations are conducted on a multi-institutional level with respect to economic issues and by internal governance mech-

anisms with respect to academic matters. This two-tiered approach seems to have particular possibilities for multi-campus university centers. In any event, such suggestions demonstrate the need to determine the scope of bargaining units in tandem with the scope of mandatory bargaining.

9. What role can professional literature play in post-*Yeshiva* legal deliberations?

Although courts must rely on the particular facts of the individual case, they—and even more, legislatures and administrative agencies—can benefit from more general data. Institutions of and individuals in higher education should be a prime source of such background data, not only because of their direct stake in the outcome but also because of their unique capabilities and responsibilities. Colleges and universities should be the forum for informed and creative debate. More importantly, they should be the source of more extensive research about collective bargaining in higher education.

Courts need to go to school—the meaning, after all, of *Yeshiva*—to better understand the milieu of their decision making in this area. Justice Powell's concept of limiting collective bargaining to non-tenured faculty at Yeshiva-like universities does not take into account the current complexities of higher education. In order to avoid such misconceptions, more current empirical and ethnographic studies of collective bargaining in higher education should be added to the educational and judicial record.

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