LABOR LAW—CONSTITUTIONAL LAW—PRIVATE UNIVERSITY FACULTY EXCLUDED FROM NLRA COVERAGE UNDER MANAGERIAL EXEMPTION—*NLRB v. Yeshiva University*, 100 S. Ct. 856 (1980).

University faculty members have shown increasing interest in organizing for collective bargaining and in receiving certification as a bargaining unit[1] under the National Labor Relations Act (NLRA or Act).[2] The growth in faculty unionization at private institutions of higher education is attributable to the current financial crisis which has resulted in curtailment of academic programs and reduction of staff.[3] Faculty members have expected unions to protect their interests.[4]

This recent development of collective bargaining has given rise to a number of legal issues[5] because the traditional industrial categories of the Act do not encompass university faculty.[6] In *NLRB v. Yeshiva University*,[7] the Supreme Court substantially restricted faculty unionization by upholding the right of Yeshiva University to refuse to negotiate with a faculty bargaining unit approved by the National Labor Relations Board (NLRB or Board).[8] The Court emphasized that the full-time faculty make decisions on curriculum, standards for admission, grading, degree requirements, and courses, as well as recommendations on hiring, tenure, promotions, and sabbaticals.[9] Consequently, a sharply divided court held that the members of the faculty at that institution were managerial employees not entitled to unionize under the NLRA.[10]

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[1] *See* C.W. Post Center of Long Island Univ., 189 N.L.R.B. 904 (1971). In 1978, 382 campuses had bargaining units, 251 at two year public community colleges, 51 at public institutions of higher education, and 80 at private colleges and universities. NATIONAL CENTER FOR THE STUDY OF COLLECTIVE BARGAINING IN HIGHER EDUCATION, DIRECTORY OF FACULTY CONTRACTS AND BARGAINING AGENTS IN INSTITUTIONS OF HIGHER EDUCATION i-ii (1979).

[2] National Labor Relations Act, 29 U.S.C. §§ 151-168 (1976). The Act authorizes "[e]mployees . . . to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing." *Id.* § 157.

[3] *See* Hansen, *An Era of Continuing Decline: Annual Report on the Economic Status of the Profession, 1978-1979*, 65 Academe: Bulletin of the AAUP 319, 323-24 (1979).

[4] *Id.* at 327.

[5] Sands, *The Role of Collective Bargaining in Higher Education*, 1971 WIS. L. REV. 150, 159-66.

[6] *See* 29 U.S.C. § 152(3) (1976) (employee); 29 U.S.C. § 152(11) (1976) (supervisor).

[7] 100 S. Ct. 856 (1980).

[8] *Id.* at 861.

[9] *Id.* at 859-60.

[10] *Id.* at 861. The managerial exclusion has been judicially created in the last six years. *See* note 24 *infra* and accompanying text.

The Yeshiva University Faculty Association (Union) filed a petition with the NLRB to represent the full time faculty members at ten of the thirteen schools of Yeshiva.[11] In December, 1975, after an extensive hearing, the NLRB granted the petition and directed an election.[12] The Union won the election and was certified as a bargaining unit by the Board.[13]

Contending that the faculty were managerial employees not covered by the Act, the University refused to bargain with the Union.[14] An unfair labor practice complaint filed by the Union resulted in a Board finding that the University had violated the Act, and an order was issued compelling the University to bargain with the Union.[15] Subsequently, the Board appealed to the court for enforcement.[16] The Court of Appeals for the Second Circuit applied the managerial exclusion and did not decide whether the Yeshiva faculty could be excluded from the jurisdiction of the NLRA as supervisors.[17] Instead, the appellate court found that the Yeshiva full-time faculty were "substantially and pervasively operating the enterprise," and were thereby excluded from NLRA coverage as managerial employees.[18]

On certiorari, the United States Supreme Court affirmed.[19] A majority opinion authored by Justice Powell, expressing the view of five members of the Court,[20] held that the NLRB had no power to order Yeshiva University to bargain with the faculty union.[21]

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[11] Yeshiva Univ., 221 N.L.R.B. 1053, 1053 (1975).

[12] *Id.* at 1057.

[13] 100 S. Ct. at 860.

[14] Yeshiva Univ., 231 N.L.R.B. 597, 599 (1977).

[15] *Id.* at 600. In the unfair labor practice proceeding, the Board found that the University had violated the section of the Act which provides in pertinent part:

> It shall be an unfair labor practice for an employer—
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
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> . . . .
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> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title;
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> . . . .

29 U.S.C. §§ 158(a)(1) & (5) (1976).

[16] NLRB v. Yeshiva Univ., 582 F.2d 686 (2d Cir. 1978), *cert. granted*, 440 U.S. 906 (1979).

[17] *Id.* at 703.

[18] *Id.* at 698. The court concluded that the full-time faculty were managerial because they played a "crucial role . . . in determining . . . central policies of the institution including, *inter alia*, the curriculum, admission and graduation requirements, [and] tuition." *Id.*

[19] 100 S. Ct. at 861.

[20] *Id.* at 858. Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens joined in the majority opinion.

[21] *Id.* at 861.

Acknowledging the authority of the Board to include university faculty members within the purview of the Act,[22] the Court agreed with the Board's characterization of the faculty as professional employees.[23] Professional employees, however, may be excluded from NLRA coverage under supervisory or managerial exemptions.[24] The Supreme Court disagreed with the Board's contention that the participation of the faculty was merely advisory,[25] and emphasized faculty authority and control in academic matters.[26] Furthermore, the majority endorsed the determination of the appellate court not to resolve the issue regarding the supervisory status of the faculty.[27]

By examining faculty cases, Justice Powell determined that the NLRB did not apply the managerial exclusion when: "(i) faculty authority [was] collective, (ii) it [was] exercised in the faculty's own in-

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[22] *Id.* at 860-61. Although the Act did not originally cover college professors, its jurisdiction was extended to full-time university faculty in 1971. C.W. Post Center, 189 N.L.R.B. 904, 905 (1971). When Congress amended the Act in 1974, it noted and approved the policy of the Board in asserting coverage over educational institutions. *See* H.R. REP. NO. 93-1051, 93d Cong., 2d Sess. 4 (1974); 120 CONG. REC. 12938 (1974) (remarks of Sen. Williams).

[23] 100 S. Ct. at 860-61. Section 152(12)(a) defines a professional employee as:

> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes;
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> . . . .

29 U.S.C. § 152(12)(a) (1976).

[24] 100 S. Ct. at 861. Two distinct exceptions exist, a statutory exclusion for supervisors and a judicially implied exclusion for managers. Supervisors are defined as persons who exercise "authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees." 29 U.S.C. § 152(11) (1976). The supervisory exception has been applied repeatedly to professional employees. *See, e.g.*, University of Vermont, 223 N.L.R.B. 423, 426 (1976); Presbyterian Medical Center, 218 N.L.R.B. 1266, 1267-69 (1975).

The Board defined managerial employee in Palace Laundry Dry Cleaning, 75 N.L.R.B. 320 (1947), as those "who formulate and effectuate management policies by expressing and making operative the decisions of their employer." *Id.* at 323 n.4. The Supreme Court held in NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974), that such employees must be excluded from NLRA coverage. *Id.* at 289. The managerial exception has only been applied by the Board, however, to employees, both professional and non-professional, who serve "management's interests in making their decisions, [or] are . . . advised that they are management's representatives in making them." Adelphi Univ., 195 N.L.R.B. 639, 648 (1972). *See, e.g.*, Sutter Community Hosp., 227 N.L.R.B. 181, 193 (1976); General Dynamics Corp., 213 N.L.R.B. 851, 857 (1974).

[25] 100 S. Ct. at 865. *See id.* at 863 n.17.

[26] *Id.* at 864.

[27] *Id.* at 862.

terest rather than in the interest of the university, and (iii) final authority rest[ed] with the board of trustees."[28] The majority found that the Board abandoned the collective authority and final authority branches in the present case and considered merely the interest analysis.[29] In its application of this analysis, the Court rejected the contention relied on by the Board that Yeshiva faculty were not aligned with management because they exercised independent professional judgment.[30] Perceiving the goals of the University and the goals of the faculty as the same, the Court disparaged the Board's concept of faculty members acting in their own interest and emphasized the danger of divided loyalty.[31]

Justice Powell maintained, however, that the holding was limited to the facts, and he denied that the decision precluded unionization under NLRA for all professional employees.[32] The majority proposed that the case serve merely as "an appropriate starting point for analysis in cases involving professionals alleged to be managerial."[33] The Court discarded the Board's argument that deference was due its decision, stating that the decision was not "rationally based on articulated facts [or] consistent with the Act."[34]

Justice Brennan filed a dissenting opinion in which three other Justices joined.[35] Arguing "that the Board's decision was neither irrational nor inconsistent with the Act," Justice Brennan stressed the concept of deference to the Board and asserted that the Board, not the judiciary, has the primary authority to resolve conflicts.[36] Justice Brennan emphasized that universities have two coexisting organizational structures.[37] The first is similar to the hierarchical structure in

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[28] *Id.* at 863. *See* Northeastern Univ., 218 N.L.R.B. 247, 250 (1975); University of Miami, 213 N.L.R.B. 634, 634 (1974); Tusculum College, 199 N.L.R.B. 28, 30 (1972).

[29] 100 S. Ct. at 864.

[30] *Id.*

[31] *Id.* at 865. Furthermore, the Court stated that "the faculty's professional interests—as applied to governance at a university like Yeshiva—cannot be separated from those of the institution." *Id.*

[32] *Id.* at 866.

[33] *Id. See id.* at 866-67 n.31.

[34] *Id.* at 867. The Court based its determination of deference to the Board on the criteria formulated in Beth Israel Hosp. v. NLRB, 437 U.S. 483, 501 (1978). 100 S. Ct. at 867. This standard was developed from the statutory provision which states: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." 29 U.S.C. § 160(e) (1976).

[35] 100 S. Ct. at 867-74 (Brennan, J., dissenting). Justices White, Marshall, and Blackmun joined in the dissenting opinion.

[36] *Id.* at 867-68 (Brennan, J., dissenting). *See* note 34 *supra* and accompanying text.

[37] *Id.* at 870 (Brennan, J., dissenting).

industry.[38] The second, however, has no parallel in industry and consists of a "professional network, in which formal mechanisms have been created to bring the expertise of the faculty into the decision-making process."[39] The dissent concluded that the faculty at Yeshiva and like universities effectively participate in administration but do not dominate university policy.[40]

In addition, the dissent disagreed with the majority's finding that the faculty, in university governance, exercised their decision-making authority in the interest of the employer.[41] Rather, Justice Brennan contended that the faculty influence on academic affairs was "attributable solely to its collective expertise as professional educators, and not to any managerial or supervisory prerogatives."[42] Noting that the interests of Yeshiva's faculty and administration did not always coincide, the dissent discounted the requirement of the faculty's "undivided loyalty to management [as] antithetical to the whole concept of academic freedom."[43] Furthermore, Justice Brennan interpreted the faculty vote for union representation to ensure negotiations with the university as indicative of a divergence of interests.[44]

The central issue addressed by the Supreme Court in *Yeshiva* was whether the full-time faculty can be excluded from the coverage of the National Labor Relations Act because of their role in university governance.[45] The decision, illustrating the basic tension between the Act's purposes of including professional employees and excluding supervisors and managers, also demonstrates the difficulty in applying the classifications and exceptions of a statute designed for industry to the structure of a university.[46]

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[38] *Id.* (Brennan, J., dissenting). In this structure, "a formal chain of command runs from a lay governing board down through university officers to individual faculty members and students." *Id.* (Brennan, J., dissenting).

[39] *Id.* (Brennan, J., dissenting). *See generally* J. BALDRIDGE, POWER AND CONFLICT IN THE UNIVERSITY 114 (1971); Finkin, *The NLRB in Higher Education*, 5 U. TOL. L. REV. 608, 614-18 (1974).

[40] 100 S. Ct. at 870 (Brennan, J., dissenting). The dissent determined that the university "retain[ed] the ultimate decisionmaking authority." *Id.* (Brennan, J., dissenting).

[41] *Id.* at 871-72 (Brennan, J., dissenting).

[42] *Id.* at 870 (Brennan, J., dissenting).

[43] *Id.* at 871 (Brennan, J., dissenting). Justice Brennan also stated: "Faculty members are judged by their employer on the quality of their teaching and scholarship, not on the compatibility of their advice with university policy." *Id.* (Brennan, J., dissenting).

[44] *Id.* at 872 (Brennan, J., dissenting).

[45] *Id.* at 858.

[46] *Id.* at 864. Justice Brennan commented: "[T]he Court's perception of the Yeshiva faculty's status is distorted by the rose-colored lens through which it views the governance structure of the modern-day university." *Id.* at 872 (Brennan, J., dissenting). *See* Finkin, *supra* note 39, at 612.

Solutions to these problems cannot be found simply by examining the statutory language. On its face, the statute covers professional employees.[47] No dispute existed on this issue and the majority opinion was based on the premise that full-time faculty were professional employees within the meaning of the Act.[48]

Any employee whether professional or not, however, may be exempted from coverage under the statutory exclusion for supervisors.[49] The NLRA provides that "[t]he term 'employee' . . . shall not include . . . any individual employed as a supervisor."[50] As previously stated, the Court in *Yeshiva* did not decide the question of supervisory status.[51] Instead, the Court found the faculty to be managerial employees and held that as such they were excluded.[52]

While the supervisory exception is clearly stated in the statute, the managerial exception is judicially implied.[53] Consequently, managerial employees are exempted from coverage under the Act.[54] Earlier decisions of the NLRB did not expressly exclude managerial employees but found that those who develop and enforce decisions of management were inappropriate for inclusion in a bargaining unit with other employees.[55] In a 1974 landmark decision, the Supreme Court held in *NLRB v. Bell Aerospace Company, Division of Textron* that Congress intended to exclude all employees properly classified as managerial—"those who 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.' "[56]

The distinction between managerial and professional employees is often blurred because professional employees acting in their professional capacity frequently make judgments of great importance to

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[47] 29 U.S.C. § 152(12) (1976). Section 152 (12) reflects the congressional intent that these professional employees be covered by the NLRA. H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 36 (1947), S. REP. NO. 105, 80th Cong., 1st Sess. 19 (1947).

[48] 100 S. Ct. at 860-61. *See* note 23 *supra*.

[49] NLRB v. Yeshiva Univ., 582 F.2d 686, 695 (2d Cir. 1978). *See* Finkin, *The Supervisory Status of Professional Employees*, 45 FORDHAM L. REV. 805, 807 (1977).

[50] 29 U.S.C. § 152(3) (1976).

[51] 100 S. Ct. at 862.

[52] *Id.* at 861.

[53] *See* note 24 *supra*.

[54] NLRB v. Bell Aerospace Co., 416 U.S. 267, 289 (1974).

[55] *See* Ford Motor Co., 66 N.L.R.B. 1317, 1322 (1946) (summary of policy on managerial employees). *See, e.g.*, Spicer Mfg. Corp., 55 N.L.R.B. 1491, 1498 (1944); Freiz & Sons, 47 N.L.R.B. 43, 47 (1943).

[56] NLRB v. Bell Aerospace Co., 416 U.S. 267, 288 (1974) (quoting Palace Laundry Dry Cleaning, 75 N.L.R.B. 320, 323 n.4 (1947)). *See, e.g.*, Westinghouse Elec. Corp. v. NLRB, 424 F.2d 1151, 1158 (7th Cir.), *cert. denied*, 400 U.S. 831 (1970); Continental Ins. Co. v. NLRB, 409 F.2d 727, 730 (2d Cir.), *cert. denied*, 396 U.S. 902 (1969).

management.[57] In industry, "managerial authority is not vested in professional employees merely by virtue of their professional status, or because work performed in that status may have a bearing on company direction."[58] However, professionals may be excluded from the coverage of the Act when they have significant managerial responsibility.[59] Medical personnel,[60] engineers,[61] and librarians[62] were excluded when they acted in the interest of the employer under the vague standard of being "closely aligned with management as true representatives of management."[63]

In the university context, the line between professional and managerial employees is even less clear because of the authority structure of a university and the fact that essentially all employees of a university are professionals.[64] Different views of university governance were espoused by the majority and the dissent in *Yeshiva*.[65] As Justice Brennan correctly pointed out in his dissent, universities have two coexisting organizational structures.[66] This dual system permitted the exercise of influence by faculty members without the possession of control.[67]

The majority, however, perceived university governance to be a system of collegiality in which a community of scholars is identical with and in control of the university.[68] Arguing that the "traditions of collegiality continue to play a significant role" at Yeshiva and like universities,[69] the majority concluded that these universities must rely on their faculty members to develop and implement administrative policies.[70] The determination of managerial status will depend upon which view of university governance is adopted.

The majority's conclusion that the faculty were managerial employees rested on the premise that the university was a self-

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[57] *See* Westinghouse Elec. Corp., 113 N.L.R.B. 337, 339 (1955).

[58] General Dynamics Corp., 213 N.L.R.B. 851, 857-58 (1974).

[59] *Id.* at 859.

[60] Presbyterian Medical Center, 218 N.L.R.B. 1266, 1267-69 (1975).

[61] General Dynamics Corp., 213 N.L.R.B. 851, 858-59 (1974).

[62] University of Chicago, 205 N.L.R.B. 220, 221 (1973), *enforced*, 506 F.2d 1402 (7th Cir. 1974).

[63] General Dynamics Corp., 213 N.L.R.B. 851, 857 (1974).

[64] Finkin, *supra* note 39, at 613-14.

[65] *See* 100 S. Ct. at 861 (majority view); *id.* at 870 (Brennan, J., dissenting).

[66] *Id.* at 870 (Brennan, J., dissenting). *See* notes 37-40 *supra* and accompanying text.

[67] 100 S. Ct. at 870 (Brennan, J., dissenting).

[68] *Id.* at 861. *See* N. FEHL, THE IDEA OF A UNIVERSITY IN EAST AND WEST 36-46 (1962); D. KNOWLES, THE EVOLUTION OF MEDIEVAL THOUGHT 164-68 (1962).

[69] 100 S. Ct. at 861.

[70] *Id.* at 861 n.10.

governing community of scholars.[71] This perception overlooked the fact that in a modern university like Yeshiva, the task of operating the university has shifted from the faculty to the administration.[72] Acceptance of this modern concept was acknowledged by the charter granted to Yeshiva by the Board of Regents of the New York State Education Department. The charter granted to the Board of Trustees and the President provided for governance by a self-perpetuating Board of Trustees.[73] No provision was made for control by any other institution or body.[74] Although faculty members may participate in decision-making, they are not required to do so by the charter and such participation does not indicate that they are serving as representatives of management.[75] Clearly the Court did not recognize these provisions as an accurate representation of governance at Yeshiva.

In addition to relying on the concept of collegiality, the Court imposed industrial standards in the academic area, although it claimed to recognize that the authority structure of a university is not the same as in industry.[76] In applying the NLRA, the Court ignored the differences and determined that the faculty were managerial because the authority they exercised would be managerial "in any other context."[77] The dissenting opinion of Justice Brennan is especially pertinent in emphasizing that the differences between "industrial and academic institutions . . . preclude the blind transplanting of principles developed in one arena onto the other."[78]

In order to determine how the Court should have imposed industrial standards in a university context, the underlying purpose of the National Labor Relations Act must be examined. As previously described by the Court, a primary purpose of the Act was to "promote peaceful settlement . . . by subjecting labor-management controversies to the mediatory influence of negotiation."[79] In amending the Act, Congress extended the statute's protection to professional employees, clearly intending that professionals should have the right

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[71] *See* note 68 *supra* and accompanying text.

[72] 100 S. Ct. at 872-73 (Brennan, J., dissenting).

[73] NLRB v. Yeshiva Univ., 582 F.2d 686, 689-90 (2d Cir. 1978).

[74] 100 S. Ct. at 859.

[75] Yeshiva Univ., 221 N.L.R.B. 1053, 1054 (1975).

[76] 100 S. Ct. at 861.

[77] *Id.* at 864.

[78] *Id.* at 868 (Brennan, J., dissenting).

[79] Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 211 (1964). The Supreme Court has also described a purpose of the Act as the promotion of peaceful settlement of disputes between employers and employees by providing legal remedies for the invasion of employees' rights of self-organization and collective bargaining. NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 255 (1939). *See* Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 389-90 (1950).

to organize and bargain collectively.[80] The goal to be achieved was greater cooperation between management and employees.[81] Managerial and supervisory exclusions from the Act were based on the right of management to have the undivided loyalty of its representatives.[82] Dual loyalty was an evil to be avoided.[83]

Consistent with the purpose of the Act, faculty members in a university should not be excluded from a union unless they are specifically hired as representatives of administration or act expressly to implement management's policies.[84] Mere participation in university decision making through committee activities is a duty routinely performed by university faculty, and should be insufficient to convert a faculty member into a managerial employee.[85]

Although the *Yeshiva* Court ultimately concluded that an employee would be classified as managerial when his "activities fall outside the scope of the duties routinely performed by similarly situated professionals,"[86] this standard was not employed in the instant case. Ironically, the suggested standard of comparison with like professionals, if applied literally, would afford a reconciliation of professional and managerial status in a specific arena. Applying the managerial status in a flexible manner based on activities for similarly situated professionals would lessen the likelihood of confusion, litigation, and disruption by providing clear standards for each group of professionals to determine when their activities are deemed to be managerial.

The consequence of the *Yeshiva* holding is uncertain with regard to full-time faculty,[87] because the opinion contains two seemingly distinct rationales. Under the first and more predominant rationale, *Yeshiva* may be interpreted to stand for the broad proposition that if faculty at a private university act collectively and their decisions are

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[80] 29 U.S.C. § 152(12) (1976). During the hearings on the Taft-Hartley amendments, however, management representatives argued that professional employees were part of management and should be excluded under the supervisory exception. *Amendments to the National Labor Relations Act: Hearings on H.R. 8, etc. Before the House Comm. on Education and Labor*, 80th Cong., 1st Sess. 1225 (1947); *Labor Relations Program: Hearings on S.55 & S.J. Res. 22 Before the Senate Comm. on Labor and Public Welfare*, 80th Cong., 1st Sess. 694 (1947).

[81] Labor Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42-43 (1936).

[82] General Dynamics Corp., 213 N.L.R.B. 851, 857-58 (1974).

[83] Finkin, *supra* note 49, at 810.

[84] Beasley v. Food Fair of N.C., 416 U.S. 653, 661-62 (1974).

[85] 100 S. Ct. at 871 (Brennan, J., dissenting).

[86] *Id.* at 866.

[87] Included in the Yeshiva University classification of full time faculty are the following: "professor, associate professor, assistant professor, instructor, or any adjunct or visiting thereof, department chairmen, division chairmen, senior faculty and assistant deans." Yeshiva Univ., 221 N.L.R.B. 1053, 1057 (1975). The collective bargaining agreement of Yeshiva University

generally followed,[88] the faculty members participating in the collective action are excluded from unionization under the NLRA.[89] " 'Perfunctory' " approval of recommendations is equated to exercise of authority.[90] This control criterion was utilized by the Court for determining " 'managerial status' sufficient to remove [faculty] from the coverage of the Act."[91]

The extent of the application of this proposition is uncertain because of two remaining questions. First, it is unclear whether faculty are excluded if they do not control all those areas enumerated by the *Yeshiva* Court.[92] The second ambiguity concerns how often the faculty recommendations must be rejected in order to remove faculty from managerial status and make them eligible for an acceptable unit.[93]

In the alternative to the exercise of authority rationale, the Supreme Court opinion may be interpreted for the more restrictive holding that only limited categories of faculty must be excluded from the bargaining unit. The Court divided the faculty that had been included in the Yeshiva unit into "assistant deans, senior professors, and department chairmen, as well as associate professors, assistant professors, and instructors."[94] The implication was that only the first three groups were considered to exercise supervisory or managerial authority by the *Yeshiva* Court and thus were ineligible for inclusion in any bargaining unit.

Furthermore, a possible procedural question might have precluded the Court from reaching the merits of the Yeshiva faculty's NLRA claim. The National Labor Relations Act provides that "[t]he findings of the Board with respect to questions of fact if supported by

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excluded deans, acting deans, directors, and principal investigators of research and training grants. *Id.* at 1057. It has been a general policy that these categories are not and should not be included. *See, e.g.*, University of Vermont, 223 N.L.R.B. 423, 426 (1976) (excluding principal investigators); University of Miami, 213 N.L.R.B. 634, 638 (1976) (excluding deans); Florida S. College, 196 N.L.R.B. 888, 890 (1972) (excluding directors).

[88] 100 S. Ct. at 859. The approval of faculty decisions need not be absolute; infrequent rejections do not detract from the exercise of faculty authority. *Id.* at 865 n.27.

[89] *Id.* at 864. Decisions classified as managerial by the *Yeshiva* Court concerned offerings, scheduling, and teaching of courses, and grading policies, matriculation standards, student admission, retention and graduation, size of student body, tuition, and location of a school. *Id.* The Court noted, however, "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." *Id.* at 866-67 n.31.

[90] *Id.* at 859 n.3. *See id.* at 859-60 nn.4-6.

[91] *Id.* at 861.

[92] *See* note 89 *supra* and accompanying text.

[93] *See* note 88 *supra* and accompanying text.

[94] 100 S. Ct. at 860.

substantial evidence on the record considered as a whole shall be conclusive."[95] Under this statutory provision, the Board has the primary responsibility of deciding questions of fact.[96] The standard developed by the courts for applying this provision is that the Board's decision may be reviewed for rationality and consistency with the Act.[97] Although the majority found the conclusion of the Board to be neither rationally "based on articulated facts [nor] consistent with the Act,"[98] the dissent, in sharp contrast, found the decision to be both rational and consistent and within the zone of reasonableness.[99] In *Yeshiva*, the Court "substitute[d] its own judgment for that of the Board."[100]

The exclusion of faculty members as managerial employees by the *Yeshiva* Court may seriously disadvantage all professional employees, the very group the NLRA was amended to protect.[101] When professionals "exercise authority which in any other context . . . would be managerial," they will most likely be barred from the protection of the Act.[102] The *Yeshiva* rationale, if broadly applied in future judicial opinions, may remove the incentive for employers of all professionals to resolve disputes through collective bargaining, thereby defeating the basic congressional purpose of promoting prompt settlement of labor disputes.[103]

The *Yeshiva* holding will threaten all universities because the administration, by unilaterally determining the amount of authority available to the faculty, can control the faculty's ability to unionize. If

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[95] 29 U.S.C. § 160(e) (1976).

[96] Beth Israel Hosp. v. NLRB, 437 U.S. 483, 501 (1978).

[97] *Id.*

[98] 100 S. Ct. at 867.

[99] *Id.* (Brennan, J., dissenting). In support of the dissenting opinion, rationality should be presumed from the expertise developed by the Board through its long experience in labor management relations. NLRB v. Hearst Publications, 322 U.S. 111, 130 (1944).

[100] 100 S. Ct. at 868 (Brennan, J., dissenting). It is interesting to note that Justice Powell, who authored the majority opinion, commented on "the undesirability of [the] assumption by the Judicial Branch of the legislative function" in his dissenting opinion in another recent case, Cannon v. University of Chicago, 99 S. Ct. 1946, 1975 (1979). Emphasizing in *Cannon* that "overlapping judicial and administrative enforcement of . . . policies" relating to the entire higher educational system "inevitably will lead to conflicts and confusion," *id.* at 1985, Justice Powell noted that the Court has tended to stray from the separation of power principle of limited jurisdiction. *Id.* In *Cannon*, Justice Powell concluded that "respect for our constitutional system dictates that the issue should have been resolved by . . . Congress," and not by "relatively uninformed federal judges who are isolated from the political process." *Id.* at 1975.

[101] Finkin, *supra* note 49, at 807-09.

[102] 100 S. Ct. at 864. Note the Court's supposed claim to the contrary: "We certainly are not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act . . . ." *Id.* at 866.

[103] *See* note 79 *supra* and accompanying text.

they transfer enough academic issues to faculty recommendation, the administration can justify a refusal to bargain on the mandatory collective bargaining subjects of "wages, hours, and other terms and conditions of employment."[104] Such a result would subvert the congressional purpose of protecting professionals engaged in professional activities from unfair labor practices.[105]

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[104] 29 U.S.C. § 158(d) (1976) provides that these are the subjects of collective bargaining.

[105] *See* note 79 *supra* and accompanying text. The limited growth of bargaining in universities since the extension of the Act to professionals may indicate that the alternative of collective bargaining offered to the faculty had the effect of encouraging the administration to greater cooperation with the faculty. Finkin, *supra* note 39, at 611-12.