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**UNIVERSITY FACULTY AS
MANAGERIAL EMPLOYEES —
NLRB v. YESHIVA UNIVERSITY**

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This article examines the Supreme Court's recent decision in NLRB v. Yeshiva University, which precludes many private college and university faculty from collective bargaining pursuant to the National Labor Relations Act. The author discusses the Court's characterization of faculty who make curricular recommendations that are normally determinative as managerial employees without collective bargaining rights. He concludes that this decision requires faculty members to choose between bargaining collectively and maintaining their fully professional role in the operation of the university.

I. INTRODUCTION

"Inflation, threats of entrenchment, and the prospect of collective bargaining legislation in several states have stimulated a new surge of interest in collective bargaining by college and university faculty."¹ Whatever the collective bargaining interests of college and

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1. *Report of Committee N on Representation of Economic and Professional Interests: 1978-79*, ACADEME, BULL. AAUP, October, 1979, at 410. The report of the committee went on to relate:

At present it is estimated that one third of full-time faculty members are organized formally for the purposes of collective bargaining.

As the economic crisis deepens, as the pool of high school graduates decreases, and as public doubt about the worth of the baccalaureate degree increases, faculty members can increasingly be expected to work collectively for solutions to their common problems.

Id.

For more than sixty years, the American Association of University Professors (A.A.U.P.), a national voluntary, non-profit association of faculty at institutions of higher education, has worked for acceptance, by the national academic community, of standards of academic freedom, tenure, and responsible professional practice. Today the Association is regarded by faculty as an authoritative voice of the academic profession.

For a general overview of the history of collective bargaining in higher education and the relevant federal and state laws and issues, see R. CARR & D. VAN EYCK, *COLLECTIVE BARGAINING COMES TO THE CAMPUS* (1973); P. HOLLANDER, *LEGAL HANDBOOK FOR EDUCATORS* 137-52 (1978); and W. KAPLAN, *THE LAW OF HIGHER EDUCATION* 95-107 (1978).

university faculty, the United States Supreme Court in *NLRB v. Yeshiva University*² effectively denied many college faculties the statutory right under the National Labor Relations Act (NLRA)³ to organize for purposes of collective bargaining and to compel their employers to bargain in good faith over wages, hours, and other terms and conditions of employment. The Supreme Court held that when full-time faculty members at a private, non-profit institution of higher education develop and implement, through faculty recommendations, the institution's policies, those faculty members are "managerial employees"⁴ of the school and as such have no right to bargain collectively under the provisions of the NLRA. This decision represents a reversal of the position taken by the National Labor Relations Board (NLRB) since 1971 and is an invitation to endless litigation unless Congress acts to resolve the substantive issue of whether, or which, college faculties are protected by the NLRA.⁵

II. THE NLRB AND COLLEGES

In 1951, the NLRB refused to assert jurisdiction over a private, non-profit college in the *Columbia* case.⁶ The Board reversed its position nineteen years later and asserted its jurisdiction over such an institution in *Cornell University*.⁷ *Cornell* and *Columbia* both involved the unionization of non-academic employees. In 1971, in

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2. 100 S. Ct. 856 (1980). Justice Powell, writing for the court, was joined by Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens. Justice Brennan was joined by Justices White, Marshall, and Blackmun in dissent.
 3. 29 U.S.C. § 151 (1976).
 4. Managerial employees are "those who 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.'" *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)).
 5. Since the *Yeshiva* decision on February 20, 1980, the university administration at Villanova, which earlier had agreed to forego NLRB hearings and hold a union-representative election, has changed its mind on the grounds that under *Yeshiva* its faculty are not entitled to bargain collectively under the NLRA. The University of New Haven has terminated contract negotiations with the faculty union. See *THE CHRONICLE OF HIGHER EDUCATION*, March 17, 1980, at 2.
 6. *Columbia*, 97 N.L.R.B. 424 (1951). In *Columbia*, the threshold question was whether the NLRB should assert jurisdiction over non-profit, private colleges. The Board decided that it would not "assert its jurisdiction over a non-profit, educational institution where the activities involved are noncommercial in nature and intimately connected with charitable and educational activities of the institution." *Id.* at 427. The Board declined jurisdiction over clerical employees of the Columbia University libraries.
 7. 183 N.L.R.B. 329 (1970). See R. CARR & D. VAN EYCK, *COLLECTIVE BARGAINING COMES TO THE CAMPUS* 25-26 (1973). The NLRB decided to exercise its discretionary jurisdiction over these employers in *Cornell* because of the significant change in impact that institutions of higher education had on interstate commerce since *Columbia* nineteen years earlier.

The Board set the jurisdictional standard for cases coming from private institutions at an annual gross operating revenue of at least one million dollars. See 29 C.F.R. § 103.1 (1979).

C.W. Post Center of Long Island University,⁸ the NLRB indicated in dictum that college faculty were eligible under the NLRA for inclusion in a collective bargaining unit.⁹ This set the stage for the United States Court of Appeals for the First Circuit decision in *NLRB v. Wentworth Institute*,¹⁰ the initial judicial confirmation of the NLRB's position that faculty at private institutions have the right to organize under the NLRA for purposes of collective bargaining.¹¹

The *Wentworth* court rejected the Institute's argument that its full-time faculty were not employees covered under the NLRA.¹² The court reasoned that the faculty members would be excluded from the Act's coverage if they were supervisors¹³ or managerial employees. Because the faculty were not members of either category,¹⁴ the court ordered the Institute to bargain with the union.¹⁵

The basis of the statutory exclusion of supervisory employees from the collective bargaining unit lies in the threat of the employees' divided loyalties. To allow supervisors to be included in a collective bargaining unit or organized in a separate union would create the danger of divided loyalties threatening the integrity of the

8. 189 N.L.R.B. 904 (1971).

9. *Id.* at 905. "Mindful that we are to some extent entering into an unchartered area, we are of the view that the policy-making and quasi-supervisory authority which adheres to full-time faculty status but is exercised by them only as a group does not make them supervisors . . . or managerial employees . . ." *Id.*

10. 515 F.2d 550 (1st Cir. 1975).

11. *Wentworth* affirmed the NLRB's position that a non-profit, private institution of higher education is an "employer" under the NLRA. The First Circuit stated: [W]e are unable to convince ourselves that all faculties of all private non-profit institutions of higher learning in the nation are so situated as to fall outside the ranks of "employees" under the Act. Given wide differences in terms of service and responsibility, the focus must be upon each particular institution.

NLRB v. Wentworth Inst., 515 F.2d 550, 556 (1st Cir. 1975). The court continued, however:

[W]e do not comment on the Board's developing views on the significance of a substantial faculty role in decisions on curricula, admissions, hiring, degree requirements and other educational policy matters. . . . Neither do we suggest that faculty members with different relationships and status than those herein are necessarily included employees under the Act.

Id. at 557-58.

12. *Id.* at 556-58.

13. Section 2(11) of the NLRA, 29 U.S.C. § 152(11) (1976), defines "supervisor" as: any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

14. *NLRB v. Wentworth Inst.*, 515 F.2d 550, 556 (1st Cir. 1975).

15. *Id.* at 557-58.

union, or that of management, or both. Presumably, a supervisor's union membership influences, at least subtly, his recommendations concerning product and market decisions because of the implications of those decisions for his union colleagues. Conversely, the loyalty of a supervisor to management could weaken the union's strength.¹⁶ The courts have relied on a similar rationale to exclude managerial employees from the collective bargaining process under the NLRA.¹⁷

III. FACTUAL BACKGROUND OF *YESHIVA*

The Yeshiva University Faculty Association petitioned the NLRB in 1974, seeking certification as the bargaining agent for most of the school's full-time faculty.¹⁸ After five months of hearings at which the University opposed the petition on the grounds that the faculty were not "employees" within the meaning of the NLRA because they were managerial or supervisory personnel,¹⁹ the Board granted the Association's petition and ordered elections.²⁰ The NLRB concluded that the faculty were neither managerial nor supervisory employees, but professional employees explicitly covered under the Act.²¹

16. *NLRB v. Yeshiva Univ.*, 100 S. Ct. 856, 868-69 (1980) (Brennan, J., dissenting). See *Beasley v. Food Fair, Inc.*, 416 U.S. 653, 661-62 (1974).

17. *NLRB v. Yeshiva Univ.*, 100 S. Ct. 856, 862 (1980). See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

18. *NLRB v. Yeshiva Univ.*, 100 S. Ct. 856, 858 (1980). Full-time faculty included professors, associate professors, assistant professors, instructors, department chairmen, division chairmen, senior faculty, and assistant deans. Part-time faculty, lecturers, principal investigators, deans, acting deans, and directors were excluded from the petition. Only 10 of the 13 schools at the University were included in the Association's petition. *Id.* at 860 n.7.

19. *Id.* at 858. Managerial employees, defined at note 4 *supra*, and supervisory personnel are not included in the NLRA's provisions granting employees the right to bargain collectively. Supervisors are explicitly excluded by the Act. See 29 U.S.C. § 164(a) (1976). The courts have interpreted the Act to exclude managerial personnel. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

20. *NLRB v. Yeshiva Univ.*, 100 S. Ct. 856, 860 (1980).

21. *Id.* Section 2(12) of the NLRA, 29 U.S.C. § 152(12) (1976), defines "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; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

After the Association won the union election, the University refused to sit down at the negotiating table.²² As a result of this refusal, the union brought and prevailed in an unfair labor practice proceeding. When the University again refused the Board's order to bargain with the Association, the NLRB sought enforcement in the United States Court of Appeals for the Second Circuit.²³

IV. THE DECISION OF THE COURT OF APPEALS

The Second Circuit denied the Board's petition.²⁴ Although the Second Circuit agreed that the faculty at Yeshiva were professional employees, the court ruled that the significant part the faculty played in deciding the University's policies went beyond their role as professional employees.²⁵ By "pervasively operating" the institution, the faculty had acquired the status of managerial employees.²⁶

Through its decision in *Yeshiva*, the Second Circuit dramatically challenged the position taken by the NLRB since *C.W. Post* that college faculty are protected under the NLRA. The court totally rejected the rationale used by the NLRB to justify including faculty of private institutions of higher education within the protective coverage of the Act.²⁷ According to the court, the NLRB had summarily decided the issue without any analysis "simply by stating that the substantial authority of the faculty was wielded in their

22. *NLRB v. Yeshiva Univ.*, 100 S. Ct. 856, 860 (1980).

23. *Id.* See *NLRB v. Yeshiva Univ.*, 582 F.2d 686 (2d Cir. 1978).

24. *Id.* at 688.

25. *Id.* at 697-98.

26. *Id.* at 688.

27. The Second Circuit in *Yeshiva* considered *Wentworth*, but declared that decision inapposite:

Although the Board has, on a number of occasions, considered the question whether full-time faculty at a mature university are supervisors or managers under the Act, no court of appeals has squarely determined the issue. In *NLRB v. Wentworth Institute . . .* the First Circuit simply rejected the Institute's argument that *all* faculty at *all* institutions of higher learning must be excluded from the Act's coverage. Limiting itself to the institution at hand, the court found that at *Wentworth* there was "no evidence of an instance of significant faculty impact collectively or individually on policy or managerial matters."

NLRB v. Yeshiva Univ., 582 F.2d 686, 695 n.9 (2d Cir. 1978) (emphasis in original) (quoting *NLRB v. Wentworth Inst.*, 515 F.2d 550, 557 (1st Cir. 1975)).

The Second Circuit's construction of *Wentworth* was that it stands not for the proposition that all faculties at all private, non-profit institutions of higher education have rights under the NLRA, but that faculties that have no substantial authority and no significant impact have rights under the NLRA. Based on this construction, the Second Circuit concluded: "Given the great diversity in governance structure and allocation of power at such universities, it is appropriate to address ourselves solely to the situation at the institution involved in this proceeding." 582 F.2d at 696.

capacity as professionals and by invoking three doctrines promulgated in earlier board rulings."²⁸

The NLRB first contended that full-time faculty are "professional employees" as defined in section 2(12) of the NLRA.²⁹ Accepting this argument, the court asserted that, on the basis of the Board's own prior decisions, "the fact that employees are professional does not preclude them from also being categorized as supervisory or managerial employees ineligible for inclusion in a bargaining unit."³⁰ The court distinguished the individual professor's teaching activities from the faculty's extensive control over curricular and faculty status matters. Although a professor's authority to determine course content, teaching methods, and student evaluation should not be characterized as managerial or supervisory, the collective authority of the professors at Yeshiva University was seen to extend far beyond the classroom. Citing faculty control over course offerings, teaching assignments, faculty course-loads, salaries, and tenure, as well as student admissions, curriculum, tuition, and graduation requirements, the court refused to equate the input of a full-time university faculty which is responsible for the conduct and direction of the university with that of professionals in a commercial enterprise whose advice may occasionally influence management decisions.³¹ "This is not the case of a company which hires an occasional scholar to guide it in making engineering, legal, or accounting decisions which have an impact on its business; this is the 'company of scholars' itself."³²

The NLRB's second argument was that "since the faculty's supervisory and managerial functions are exercised 'on a collective basis' rather than by individual faculty members, they must be denied status as supervisory or managerial personnel."³³ The Second Circuit rejected the NLRB's "collective exercise" argument for three reasons. First, the Board had never adequately explained this rationale to the court's satisfaction.³⁴ Second, the court rejected a

28. *Id.*

29. See note 21 *supra*.

30. 582 F.2d 686, 697 (2d Cir. 1978).

31. *Id.* at 698.

32. *Id.*

33. *Id.*

34. The collective exercise doctrine first appeared in *C.W. Post Center of Long Island Univ.*, 198 N.L.R.B. 904, 905 (1971) and *Fordham Univ.*, 193 N.L.R.B. 134 (1971). In both cases the NLRB failed to support the "collective exercise" doctrine with analysis, cited precedent, or legislative history. The Board admitted, in *Adelphi Univ.*, 195 N.L.R.B. 639 (1972), that they created the doctrine in an attempt to apply the terms of the NLRA, which are designed for the business world, to the administrative setting of a university. *NLRB v. Yeshiva Univ.*, 582 F.2d 686, 698-99 n.14 (2d Cir. 1978).

The Second Circuit found no merit to the Board's contention that the

literal construction of section 2(11) of the NLRA, which defines supervisor, because such a construction would restrict application of that section exclusively to an individual.³⁵ Moreover, the court saw no need to resolve the issue of the construction of section 2(11) "since there is no such 'individual' statutory restriction in the Board's own concept of 'managerial employees.'"³⁶

In addition, the NLRB contended that the faculty acts on their own behalf and not in the interest of the employer. Rejecting this argument as conclusory and unsupported either by facts in the record or by the Board's reasoning, the court noted:

[T]he fact that the administration and Board of Trustees of Yeshiva so rarely interfered in the faculty decisions indicates that the interests of the faculty and of the University were almost always co-extensive. . . . The full-time faculty . . . have not in fact acted simply in an advisory capacity [n]or have they merely made recommendations which were accorded substantial weight; their decisions on major policy issues have, for the most part, proved definitive.³⁷

Taking a realistic assessment of the way in which a university such as Yeshiva functions, the court concluded that the NLRB's "interest of the faculty" analysis was inapplicable.³⁸

The NLRB's next argument, that the faculty is not managerial or supervisory because it is subject to the ultimate authority of the

faculty were not managers because they make recommendations as a group rather than as individuals. The court noted that company boards of directors also create policies as a group, rather than individually, even though the board members are managerial. *Id.* at 699-700.

35. See note 13 *supra* for the NLRA definition of supervisor. Explaining that the NLRA's legislative history indicates that the collective exercise of authority was not actively considered by Congress, the court determined that a literal reading of the Act was unrealistic "since group action is so frequently encountered in modern corporate decision making." 582 F.2d 686, 699 (2d Cir. 1978).

36. *Id.* The court explained: "[I]n other holdings by the Board . . . the collective exercise of authority was not grounds for exclusion from supervisory status." *Id.*

37. *Id.* at 700.

38. *Id.* The Second Circuit's own "realistic assessment" of the way a university functions was based on Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 U.C.L.A. L. Rev. 63 (1973), in which Kahn argues that "in higher education there is no sharp dividing line between the employer and the employee" and that "the university is, ideally, a professional community in which common educational interests supersede all potential divisions between the faculty and the university." *Id.* at 68. The court also relied on *Statement on Government of Colleges and Universities*, 52 A. A. U. P. BULL. 375 (1966) (jointly formulated and approved by the American Association of University Professors, the American Council on Education, and the Association of Governing Boards of Universities and Colleges), which asserted the principle of shared authority among the board of trustees, the administration, and the faculty.

Board of Trustees, was rejected as "particularly unconvincing."³⁹ The court compared the University's Board of Trustees to a board of directors of a corporation. Just as the corporation's managerial and supervisory employees are under the direction of the corporate board, so too might Yeshiva's faculty be managerial and supervisory employees, even though they are under the direction of the University's Board.⁴⁰ Indeed, this is the very position occupied by the clearly managerial president, vice-presidents, and deans at Yeshiva University.⁴¹

Finally, the NLRB urged that its factual findings as to employee status were entitled to great weight and should not lightly be set aside. Although the court agreed with that principle, it found that the Board's decision not to classify the Yeshiva faculty as managerial or supervisory had neither factual basis nor persuasive rationale.⁴² The court therefore refused to affirm the Board's finding. In support of its conclusion that Congress did not intend to grant collective bargaining power to faculties of private universities, the court referred to the NLRA's legislative history, noting that the governance of university faculties "is unique and has no counterpart in the commercial business models the Act was designed to regulate."⁴³

V. THE SUPREME COURT DECISION

The Supreme Court agreed with the Second Circuit's conclusion that Congress probably did not contemplate extending the NLRA to university faculties,⁴⁴ but asserted that "[t]he absence of explicit congressional direction . . . does not preclude the Board from reaching any particular type of employment."⁴⁵ Resolving the issue of college faculty status under the NLRA, the Supreme Court held that, even if the Yeshiva faculty were professional employees as defined in the Act,⁴⁶ they were also managerial employees.⁴⁷ As professionals

39. 582 F.2d 686, 701 (2d Cir. 1978).

40. *Id.* at 701-02.

41. *Id.* at 701. The university president, vice-presidents, and deans were not included in the full-time faculty seeking collective bargaining rights. *Id.* at 688 n.1.

42. *Id.* at 702.

43. *Id.* at 703.

44. *NLRB v. Yeshiva Univ.*, 100 S. Ct. 856, 861 (1980).

45. *Id.* (citing *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 124-31 (1944)).

46. See note 21 *supra*.

47. 100 S. Ct. 856, 864 (1980). See note 4 *supra*. Although the Second Circuit's opinion included a lengthy discussion of the statutory category of supervisory employee, the Supreme Court deliberately refrained from discussing and applying that category. Both the majority and dissent restricted their analyses to the faculty's role concerning curricular matters and did not analyze the faculty's role concerning faculty status matters (*i.e.* recommendations regarding the appointment, re-appointment, promotion, and tenure of faculty

the faculty would have been included in the collective bargaining procedures under the NLRA, but as managerial employees they were excluded from that protection.

A. *The Tension*

Both the majority and the dissent acknowledged the tension created by the NLRA's inclusion of professional employees and exclusion of managerial employees. The Court had to determine in whose favor this tension was to be resolved. The Court considered the Board's contention that "the managerial exclusion cannot be applied in a straightforward fashion to professional employees because those employees often appear to be exercising managerial authority when they are merely performing routine job duties."⁴⁸ Nevertheless, the majority was able to apply the managerial exclusion in a straightforward manner to the professional employees on the Yeshiva University faculty.

The majority acknowledged that a full-time college faculty member, as an individual instructor who teaches courses, evaluates the academic performance of his students, and conducts research, is a professional employee entitled to collective bargaining rights.⁴⁹ But when the individual professor leaves his classroom or his office and meets with his colleagues at the program-, department-, college-, or university-wide level to discuss and make curricular recommendations, he ceases to be a mere professional and becomes a member of a

colleagues). The Court seemed to distinguish these two roles, associating curricular matters with the category of managerial employee and faculty status matters with that of supervisory employee.

48. 100 S. Ct. 856, 863 (1980).

49. The Court, considering college faculty members generally, noted:

It is plain . . . that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research. There thus may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominantly nonmanagerial. There 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 Board was far too broad.

Id. at 866 n.31.

Apparently, Wentworth Institute is an example of an institution of higher education where full-time faculty are "merely professional" since they only teach courses, evaluate students' academic performance, and conduct their own individual research. See *NLRB v. Wentworth Inst.*, 515 F.2d 550, 556 (1st Cir. 1975). A line can be drawn between tenured and non-tenured faculty by restricting one or the other of these two groups to "merely professional" responsibilities, but no self-respecting faculty, especially those who support the American Association of University Professors Standards and Guidelines, would accept such a division within the faculty.

managerial group, no longer entitled to NLRA protection.⁵⁰ The majority resolved the tension between these two roles played by one and the same individual faculty member in favor of exclusion from NLRB coverage, even though the average full-time faculty member spends at most twenty to forty percent of his time with his colleagues on curricular matters.

Justice Powell, writing for the majority, defined full-time faculty at Yeshiva as managerial employees for two reasons: the nature of the decisions the faculty make coupled with the extent of the authority they exercise. The majority relied on an analogy to the business world. To decide the curriculum is to decide the "academic product" and to decide admission and retention standards is to decide the "academic market."⁵¹ Product and market decisions are properly management decisions and not rank-and-file labor decisions. Further, when the faculty's recommendations regarding the academic product and the academic market are normally determinative, then those recommendations effectively take on the managerial attributes of absolute policy decisions.⁵² Because the decisions are those that, in a business setting, would be management decisions and because the faculty's recommendations are normally determinative, the faculty are managerial.⁵³

B. *The Dissent*

Justice Brennan's dissenting opinion stressed the uniqueness of the faculty's role in the governance structure of a university and the difference between the academia and industry.⁵⁴ Brennan conceded that product and market decisions may be management functions in a business context and that corporate employees who effectively recommend such decisions should be excluded from NLRB coverage as managerial employees. The dissent contended, however, that a university faculty could not be compared to corporate employees

50. Faculty do not characterize, nor would they accept a characterization of, their role in these terms. Most faculties would consider any restriction of their activities to the "merely professional" as creative of a semi-professional status in which they are not being allowed to exercise the full scope of their professional responsibilities. Faculties probably read the *Yeshiva* decision as saying that semi-professional faculties have a statutory right, but fully professional faculties do not.

51. 100 S. Ct. 856, 866 (1980).

52. Noting the faculty's control over course offerings, scheduling, teaching methods, grading policies, matriculation standards, and admission and graduation requirements, the Court asserted: "When one considers the function of a university, it is difficult to imagine decisions more managerial than these." *Id.*

53. *Id.* at 864.

54. *Id.* at 867 (Brennan, J., dissenting).

because the hierarchical decision-making structure of the business world differs so much from that of the university.⁵⁵

Brennan rejected the majority's view that the managerial status of an employee should be judged by the nature of the decisions he makes. Instead, the employee's status should be judged by examining on whose behalf the employee makes the decision.⁵⁶ Only if the employee "is acting on behalf of management and is answerable to a higher authority in the exercise of his responsibilities"⁵⁷ should the employee be ruled managerial. Brennan found that the Yeshiva faculty offered its recommendations "in order to serve its own independent interests in creating the most effective environment for learning, teaching, and scholarship."⁵⁸ In Brennan's view, because they were neither acting solely in their employer's interest nor accountable to their employer for exercising their professional judgment, the Yeshiva faculty were not managerial employees.⁵⁹

Brennan further argued that the exercise of independent professional judgment does not create the danger of divided loyalties.⁶⁰ Curricular recommendations are based on academic standards, are an exercise of academic freedom, and are not binding on the administration or the governing board.⁶¹ Because the faculty act independently, seeking the best environment for teaching and research, union membership would not influence their recommendations. In addition, these recommendations are made from the faculty's professional viewpoint rather than the administration's perspective, and the faculty are not accountable to the administra-

55. *Id.* at 870 (Brennan, J., dissenting). Brennan described the dual authority structure common to most universities. On one hand, the Board of Trustees issues orders to the school administrators, who in turn command the faculty. On the other hand, a parallel professional network acts to bring faculty expertise into the decision-making process. These professionals relay their suggestions to the school administrators, one rung up the formal ladder of authority. *Id.*

56. *Id.* at 870-71 (Brennan, J., dissenting).

57. *Id.* at 870 (Brennan, J., dissenting).

58. *Id.*

59. Brennan rejected the majority's position that employees are managers if the employer agrees with their recommendations most of the time. According to Brennan,

[T]he pertinent inquiries are who retains the ultimate decisionmaking authority and in whose interest the suggestions are offered. A different test could permit an employer to deny its employees the benefits of collective bargaining on important issues of wages, hours, and other conditions of employment merely by consulting with them on a host of less significant matters and accepting their advice when it is consistent with management's own objectives.

Id. at 872 n.11 (citing *Stop & Shop Companies, Inc. v. NLRB*, 548 F.2d 17, 19 (1st Cir. 1977)).

60. 100 S. Ct. 856, 868-69 (1980) (Brennan, J., dissenting). See text accompanying note 16 *supra*.

61. *Id.* at 870-71 (Brennan, J., dissenting).

tion for the worth of the recommendation.⁶² Therefore, Brennan saw no danger that the faculty would weaken the union. Finding no threat of divided loyalties, the dissent concluded that the faculty should not be excluded from coverage under the NLRA.⁶³

VI. EVALUATION OF THE DECISION

Given the present and reasonably foreseeable dismal economic situation of full-time faculty at private institutions of higher education, the need for the right to bargain collectively is, according to the majority, an issue for congressional legislation and not for judicial action.⁶⁴ This is the classic and legitimate response of a philosophy of judicial restraint. The irony is that the majority *did* reach the substantive issue. Rather than remand the case to the NLRB for a factual analysis adequately supporting a rational decision, the Court substituted its own resolution of the tension by including the Yeshiva faculty within the provisions of the NLRA as professionals, but excluding them from collective bargaining rights because they are managerial employees.

The majority and dissenting opinions in *Yeshiva* characterized the role of university faculty differently. The majority viewed the faculty member as simultaneously both a professional and a managerial employee.⁶⁵ As a professional, the faculty member uses his special skills and training to teach his students and conduct research. As a managerial employee, that same person is a contributing member of the group that effectively recommends or decides academic product and academic market, the policies most central to any academic enterprise. The subject matter of their collective decisions is managerial and their recommendations are normally decisive. The majority therefore viewed the faculty as

62. *Id.*

63. *Id.* Brennan noted that:

The premise of a finding of managerial status is a determination that the excluded employee is acting on behalf of management and is answerable to a higher authority in the exercise of his responsibilities. The Board has consistently implemented this requirement — both for professional and non-professional employees — by conferring managerial status only upon those employees “whose interests are closely aligned with management *as true representatives of management.*” (Emphasis added.) E.g., *Sutter Community Hospitals of Sacramento*, 227 N.L.R.B. 181, 193 (1976); *Bell Aerospace*, 219 N.L.R.B. 384, 385 (1975); *General Dynamics Corp.*, 213 N.L.R.B. 851, 857 (1974). Only if the employee is expected to conform to management policies and is judged by his effectiveness in executing those policies does the danger of divided loyalties exist.

Id. (footnote omitted).

64. *Id.* at 866 n.29.

65. *Id.* at 864.

being in control of curricular policies with rare dissent from the administration.

The dissent considered the majority's characterization of university faculty "an idealized model . . . a vestige of the great medieval university."⁶⁶ According to Brennan, the majority's understanding of the realities of the faculty role was "distorted by the rose-colored lens through which it views the governance structures of the modern-day university."⁶⁷ Brennan especially disputed the majority's conclusion that faculty recommendations are usually determinative. He described an increasingly impotent faculty trying to organize to insure that academic ideals are actually practiced, while administrators rarely consider themselves bound by faculty recommendations and make decisions based on fiscal and management policies.⁶⁸ From these contrasting caricatures evolved the differing opinions as to whether the faculty at Yeshiva University should be covered by the NLRA.

Yeshiva stands for the proposition that, when the faculty controls curricular matters, it has no statutory right to bargain collectively. After all, it is in command and can insure that the ideals of the academic community are actually practiced. Conversely, when the full-time faculty simply teach their courses, evaluate their students, conduct their own research, and do not control curricular matters, they have a statutory right to bargain collectively. For then, even while exercising independent professional judgment, they are rank-and-file professionals "whose decision-making is limited to the routine discharge of professional duties in projects to which they have been assigned."⁶⁹ In essence, the majority sees full professionalization as a bar to the statutory right to collective bargaining.

A particularly troubling aspect of the majority opinion is that it fails to consider that the average faculty member probably spends far less than twenty percent of his or her time as a managerial employee. The majority resolves the tension between eighty percent of the faculty's time as professional employees and twenty percent of the faculty's time as managerial employees in favor of exclusion from coverage under the NLRA, and does so without giving a reason for this resolution. According to *Yeshiva*, even if only a minor part of the faculty's responsibilities are managerial, the faculty has no statutory bargaining right under the NLRA.

The stance of judicial restraint requires the recognition that Congress' basic intent in creating the NLRB was for that agency to exercise its discretionary judgment and for that judgment to be

66. *Id.* at 872 (Brennan, J., dissenting).

67. *Id.*

68. *Id.* at 870 (Brennan, J., dissenting).

69. *Id.* at 866.

accepted by reviewing courts when it is rationally based upon factual findings and analysis. The Supreme Court not only refused to accept the NLRB's decision that the Yeshiva faculty had a right to bargain collectively, but also informed the Board that when facing a similar situation in future cases, the Board must examine whether the decision-making process in question is properly a management function and whether the recommendations made are normally determinative. College faculty who make such recommendations are to be considered managerial and outside the protection of the NLRA. This is so even when the individual professor makes his recommendations in his independent role as a fully professional member of the college faculty, unaligned with his employer, the college administration.

VII. CONCLUSION

After *Yeshiva*, being fully professional precludes the university faculty from collective bargaining. *Yeshiva* stands for the proposition that Congress intended collective bargaining only for semi-professional faculty members. This decision creates a cruel dilemma for faculty at many American colleges and universities. Unless Congress explicitly expands the NLRA to include college faculty,⁷⁰ faculty members must choose between being semi-professional with a statutory collective bargaining right or being fully professional without that right. They must choose either to continue their historic insistence on full faculty professionalism or to be members of a labor organization for semi-professional faculties.

70. In direct response to the *Yeshiva* decision, Representative Frank Thompson of New Jersey introduced in Congress a bill which would amend the definition of supervisory personnel in section 2(11) of the NLRA to prevent college faculty members from being deemed supervisors or managers solely on the basis of the faculty's participation in decisions regarding courses, curriculum, personnel, or other matters of educational policy. See H.R. 7619, 96th Cong., 2d Sess. (1980). The bill is pending before the Labor Management Subcommittee. No action is expected before the next legislative session.