NLRB v. Yeshiva University and Unionization in Higher Education

Edward L. Suntrup†

The recent Supreme Court decision on the managerial status of faculty at Yeshiva University reflects, the author argues, theoretical assumptions about the decision-making structure of higher educational institutions which fail to account for the diversity of such structures in higher education. The author suggests more sophisticated structural models provide a more accurate perspective on the behavioral issue of faculty alignment with management. The author suggests that the Act was intended to cover a certain proportion of higher educational institutions which fall within the category of hierarchical, bureaucratic organizations.

I

INTRODUCTION

Although the National Labor Relations Act (the Act)1 was patterned to fit the needs of unionization in the manufacturing and service industries, it has been applied, with some difficulty, to emerging unionization in private education. Ten years ago, the National Labor Relations Board (the Board) assumed jurisdiction over private, nonprofit colleges and universities.2 Since then, in grappling with the issues related to the collective organizing efforts of both professional and non-professional employees at such institutions, the Board has found no problem more trying than determining the composition of faculty bargaining units.

Since the Act provides little guidance regarding the university work setting, the Board has had to develop ad hoc policies with regard to both unit scope and composition and the supervisory or managerial status of departmental heads and deans. The Board's thorniest problem has been the question of the status of faculty. Recognizing that the university tradition of collegiality, or shared authority, "does not square with the traditional authority structures with which this Act was

† Assistant Professor of Management and Labor Relations, College of Business Administration, University of Illinois at Chicago Circle; Ph.D., 1975, University of Minnesota; M.A., 1972, University of Nebraska; Ph.L., 1964, A.B., 1962, University of Louvain. The author is a member of the state neutral panels for the public sector in Indiana and Illinois and is a member of the Governor's Grievance Panel (civil service) of the State of Illinois.


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designed to cope in the typical organizations of the commercial world, the Board has held that faculty in higher educational institutions are professionals, but not managers or supervisors, thereby falling within the protection of the Act. Indeed, the question of managerial versus nonmanagerial status of faculty in private higher education goes to the heart of their legal right to establish units under the protection of the law. Consequently, this issue determines whether institutional management can be brought to the bargaining table.

On February 20, 1980, the Supreme Court, rejecting the Board’s established position, ruled that the faculty of Yeshiva University were managerial employees. Although the Court’s decision applies only to Yeshiva, the consequences of this case will be far-reaching. The decision not only presents great obstacles for further organizing efforts in private colleges and universities but also encourages institutions already under contract to refuse to bargain with labor organizations in the future. Some have gone so far as to suggest that this decision signals the end of unionization of faculty in private higher education.

This article does not resolve the controversy raised by Yeshiva nor does it resolve similar conflicts in higher education that will undoubtedly emerge as a consequence of this decision. Rather, this author offers a number of theoretical considerations to re-orient thinking about public labor policy as it applies to this and similar cases of higher education unionism. The first section discusses the factual background and holdings of Yeshiva. The second section proposes a framework for analyzing management structures in higher education; this framework differs from approaches used by either the Board or the Court.

4. Id. at 648, 79 L.R.R.M. at 1556.
7. An empirical study of unit determination in higher education (in both the private and public sectors) points to the successful representation efforts by both associations and unions of private higher educational professionals. For example, the American Association of University Professors (AAUP), the National Education Association (NEA), and the American Federation of Teachers (AFT) have all represented faculty units. Bognanno and Suntrup, Occupational Inclusions in Faculty Bargaining Units, 14 INDUS. REL. 358, 360-63 (1975).
8. See Court Rules Law Does Not Protect Faculty Unions at Private Colleges, N.Y. Times, Feb. 21, 1980, at A 1, col. 1, and Justices’ Decision May Let Private Colleges Refuse to Bargain With Faculty Unions, Wall St.J., Feb. 21, 1980, at 8, col. 2. Robert N. Nielson, Director of the College and University Department, AFT, referring to such (and other) journalistic headlines after the Yeshiva decision adds: “[I]f the headings of the articles were not severe enough, the texts generally gave the gratuitous journalistic opinions that after a decade of successes, it was now all over for the faculty union movement.” Nielson, AUnion View: Initial Reaction to Yeshiva, PUB. EMPLOYMENT REL. INFORMATION BULL., March-April 1980, at 14.
II
BACKGROUND OF NLRB v. YESHIVA

As a result of a petition filed by the Yeshiva University Faculty Association (YUFA) in October 1974, the Board, on December 5, 1975, directed an election at Yeshiva University, a private institution with four campuses in New York City. In its decision, the Board concluded that the employer was engaged in interstate commerce and that the petitioner was a "labor organization" within the meaning of the Act.

The Board's decision on the composition and scope of the unit largely followed the YUFA petition, holding that an appropriate collective bargaining unit would include:
- all full-time members appointed to the University in the titles of professor, associate professor, assistant professor, instructor, or any adjunct or visiting thereof, department chairmen, division chairmen, senior faculty and assistant deans
- The Board also ruled that part-time faculty, deans, acting deans and directors be excluded from the unit. In addition, the decision excluded from the unit "all other administrative and support personnel; guards, and supervisors as defined in the Act." This last phrase, as well as the Board's policy position on section 2(11) of the Act, which a fortiori excludes "managers," is of paramount importance in the history of Yeshiva; the Board was attempting to make clear its rejection of the employer's argument that "no faculty bargaining unit can be appropriate because all faculty members—by virtue of their group participation in faculty governance—are supervisory or managerial and are, thereby, not employees within the meaning of the Act." The Board likewise refused to distinguish the situation at Yeshiva from those in earlier cases in which the Board ruled that the faculties were nonmanagerial.

9. Yeshiva is comprised of twelve schools and colleges, including Yeshiva College, the Graduate School of Humanities and Social Sciences, the James Striar School of General Jewish Studies, the Wurzweiler School of Social Work, the Belfer Graduate School of Science, the Albert Einstein School of Medicine, the Sue Golding Graduate School of Medical Sciences, and several other schools and programs devoted primarily, but not exclusively to religious studies. Yeshiva Univ., 221 N.L.R.B. 1053, 1053 n.1 (1975).
10. 221 N.L.R.B. 1053, 1057, 91 L.R.R.M. 1017, 1021. The Board disagreed with the petition of the YUFA only on the question of whether faculty members administering grants under awards by government or private agencies were supervisors under the Act. Id. at 1056-57, 91 L.R.R.M. at 1021; see also Rensselaer Polytechnic Inst., 218 N.L.R.B. 1435, 89 L.R.R.M. 1844 (1975).
12. See Part IIIA and note 27 infra for references to the Board's policy on managerial employees. Section 2(11) provides: "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, . . . if the foregoing exercise of authority . . . requires the use of independent judgment." 29 U.S.C. § 152(11) (1976).
We find from our examination of the record . . . that the role and authority of the faculty herein with respect to hiring, promotion, salary increases, the granting of tenure, and other areas of governance are not significantly different from what they were in the cited cases, wherein the same arguments were rejected. At Yeshiva University, faculty participation in collegial decision making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than "in the interest of the employer," and final authority rests with the board of trustees. As in the earlier decisions, we find that the faculty members are professional employees under the Act who are entitled to vote for or against collective bargaining representation.\(^{15}\)

In the election held between December 16 and 20, 1976, pursuant to the Board's direction, the YUFA was certified as the exclusive bargaining agent of the employees in the unit. The employer, however, refused to bargain with the YUFA. YUFA filed an unfair labor practice charge on February 2, 1977;\(^{16}\) in subsequent hearings, the Board rejected the University's argument that it reconsider its original position and instead ordered the employer to bargain with the YUFA.\(^{17}\) The University still refused to bargain with the YUFA, so the Board sought enforcement of its order in the Court of Appeals for the Second Circuit. The circuit court denied the petition of the Board and upheld the University's position.\(^{18}\) The court agreed, in effect, with the University's contention that full-time faculty are managerial employees within the meaning of the Act and are, therefore, excluded from the coverage of the Act. The Board appealed the case to the Supreme Court.\(^{19}\) The Court affirmed, in a 5-4 vote, the decision of the Court of Appeals in an opinion written by Justice Powell, joined by Chief Justice Burger and Justices Stewart, Rehnquist and Stevens.\(^{20}\)

III

THE REASONING OF THE COURT

The Supreme Court approached the question on appeal as a "mixed one of fact and law"\(^{21}\) and based its decision on an analysis of the institution's decision-making structure. The "controlling considera-


15. 221 N.L.R.B. at 1054, 91 L.R.R.M. at 1018 (footnotes omitted).
18. NLRB v. Yeshiva Univ., 582 F.2d 686 (2d Cir. 1978).
21. Id. at 691.
tion” was whether the “faculty at Yeshiva University exercise[d] authority which in any other context unquestionably would be managerial.”

After alluding to the model of a “mature” university, the Court bypassed an examination of whether faculty at Yeshiva were “supervisors” in favor of an analysis of Board and Court tests of managerial status. Applying those tests, the Court decided that the decision-making authority of faculty at Yeshiva, as typical of a mature university, qualified them for managerial status, and, thus excluded them from the protection of the Act. Although questions about the nature of Yeshiva's decision-making structure and about its faculty's managerial status are intertwined, they can, for analytical purposes, be considered separately.

A. The Structure of a “Mature” University

The Court contrasted the pyramidal, hierarchical management structure typical of the commercial world with the “shared authority” characteristic of the “mature” university. The opinion noted that the “authority in a typical ‘mature’ private university is divided between a central administration and one or more collegial bodies.”

At Yeshiva, university-wide policy is formulated by an Executive Council of deans and administrators who make recommendations to the President, who sits on the Board of Trustees. All recommendations must receive the Trustees’ approval. Policy guidelines relating to teaching loads, salary scales, tenure, sabbaticals, retirement and fringe benefits are decided in this manner. Faculty input into university-wide governance is through its representatives on an elected student-faculty council and by means of a Faculty Review Committee which informally negotiates grievances and makes formal recommendations either to the appropriate dean or to the University President. Faculty votes on both the student-faculty council and the Faculty Review Committee are advisory.

Within individual colleges, faculty members meet formally and informally with the dean or director to decide matters of institutional and professional concern: curriculum, the grading system, admission stan-

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22. Id. at 686.
23. Id. at 680 (quoting J. BALDRIDGE, POWER AND CONFLICT IN THE UNIVERSITY 114 (1971)).
24. Id. at 675-76. While faculty input in university-wide government is advisory at Yeshiva, it is not always so on the departmental level. At Yeshiva college, for example, budget requests proposed by senior professors in each subject area receive “perfunctory” approval by the deans “99 percent” of the time and “have never been rejected by the central administration.” At Ferkauf College, “a council of elected department chairmen . . . approves the school’s budget allocations when discretionary funds are available.” Id. at 675-76 n.3.
dards, academic calendars, course schedules, as well as personnel issues such as faculty hiring, tenure, sabbaticals, termination and promotion. Faculty also decide issues relating to the admission, expulsion and graduation of individual students, teaching loads, student tuition and enrollment levels, and "in one case, the location of a school."²⁵ In some of the colleges, the deans regard faculty actions on academic affairs as binding, and in at least one other, "[a]ll decisions regarding academic matters . . . are made by faculty consensus."²⁶

B. The Managerial Status of the Yeshiva Faculty

From prior Board and Court decisions, the Yeshiva court fashioned a framework for considering the question of the managerial status of employees.²⁷ The Court noted that managerial employees "formulate and effectuate management policies by expressing and making operative the decisions of their employers,"²⁸ and "take or recommend discretionary actions that effectively control or implement employee policy."²⁹ The hallmarks, thus, of managerial status for the Court were the exercise of discretion regarding employer policies and the resulting necessary alignment of a group of employees with management.³⁰

Having examined the Board's prior policy and decisions on the managerial status of employees in various industrial concerns, the

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²⁵. Id. at 677.
²⁶. Id. at 676 n.4. The Supreme Court opinion neglects to mention other situations where such faculty recommendations are considered "binding." The circuit court decision states that "the record here discloses that in many instances the full-time faculty of the schools at Yeshiva effectively recommend" action in a variety of areas. 582 F.2d at 696 (emphasis added). In personnel matters: hiring, promotions, tenure and sabbaticals, almost all recommendations of the faculty are accepted. 444 U.S. at 677 n.5. A member of the YUFA Executive Committee has disputed this contention in a letter to this author; in September 1978, the "administration fired five tenured faculty members" unilaterally for reasons related to "departmental reorganization" without consulting the faculty. Letter from Prof. Ralph E. Behrends to Edward L. Suntrup (February 5, 1979).
²⁷. Although the Board has never established specific criteria to be used in determining if an employee is aligned with management, it has ruled in a number of cases that the managerial designation applies, for example, to buyers who make substantial purchases on the employer's behalf, American Locomotive Co., 92 N.L.R.B. 115, 116-17, 27 L.R.R.M. 1064, 1064 (1950), personnel investigators who make hiring recommendations, Western Elec. Co., 100 N.L.R.B. 420, 423, 30 L.R.R.M. 1306, 1306 (1952), lecturers who train new employees regarding company policies, Peter Kiewit Sons' Co., 106 N.L.R.B. 194, 196, 32 L.R.R.M. 1438, 1439 (1953), and production schedulers, Firestone Tire and Rubber Co., 112 N.L.R.B. 571, 573, 36 L.R.R.M. 1052, 1052-53 (1955).
³⁰. 444 U.S. at 683.
Court observed that the Board had never contended that Yeshiva's faculty could not fall under the managerial rubric. The Board had, rather, argued that the apparent managerial authority exercised by the faculty could not be considered solely on its face since faculty members are professionals. By the very nature of their work, professionals routinely exercise independent judgment. While such discretionary action might appear to align the faculty with management, the Board found that such acts, performed within the university setting, are in the faculty's self-interest. The Yeshiva court found such reasoning wanting in several ways.

First, the Court argued that the Board had never presented an empirical test for the presence of "independent professional judgment" which removed this particular faculty from alignment with management. Instead, the Board had relied on precedent, citing earlier cases dealing with this issue at other universities. Second, the Board's legal theory was not consistent with the precedents it cited. The Board had argued that the faculty, as professionals, were not aligned with management only because their decision-making was exercised on their own behalf rather than in the interest of the University. The Board had abandoned two other arguments used in prior cases to show faculty nonalignment with management: the collective nature of their decision-making authority; and the ultimate authority of the Board of Trustees. In effect, the Court noted that what had been a three-pronged argument in the various cases that the Board cited had been reduced to a single argument.

The Supreme Court was not sufficiently persuaded, therefore, that the Board had sufficiently developed its case for the nonmanagerial status of the faculty at Yeshiva. The Supreme Court reasoned as follows:

[T]he faculty of Yeshiva University exercise authority which in any

31. Id.
32. See note 14 supra for the cases cited by the Board.
35. With respect to the above two rationales, the Supreme Court makes two observations. First of all, "Although the Board has preserved the [two points above] in footnotes to its brief, it no longer contends that 'collective authority' and 'lack of ultimate authority' are legal rationales. They are now said to be facts which, respectively, 'fortify' the Board's view that faculty members act in their own interest, and contradict the premise that the university is a 'self-governing community of scholars.' " 444 U.S. at 685 n.20. Second, the Court observes that "collective authority" has never been applied to supervisors who work through committees. See, e.g., Florida S. College, 196 N.L.R.B. 888, 889, 80 L.R.R.M. 1160, 1163 (1972), nor has this argument been used to bar managerial status for employees who owned enough stock in a company to give them, as a group, a substantial voice in an employer's affairs. See Sida, Inc., 191 N.L.R.B. 194, 195, 77 L.R.R.M. 1376, 1378 (1971); Red & White Airway Cab Co., 123 N.L.R.B. 83, 85, 43 L.R.R.M. 1392, 1393 (1959); Brookings Plywood Co., 98 N.L.R.B. 794, 798-99, 29 L.R.R.M. 1410, 1411-12 (1952).
other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.36

The Court further examined the relationship between faculty self-interest and the goals of the institution and concluded that they coincided at Yeshiva.

In such a university, the predominant policy normally is to operate a quality institution of higher learning that will accomplish broadly defined educational goals within the limits of its financial resources. . . . Faculty members enhance their own standing and fulfill their professional mission by ensuring that the university's objectives are met. But there can be no doubt that the quest for academic excellence and institutional distinction is a "policy" to which the administration expects the faculty to adhere, whether it be defined as a professional or an institutional goal.

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. . . . The university requires faculty participation in governance because professional expertise is indispensable to the formulation and implementation of academic policy . . . . It is clear that Yeshiva and like universities must rely on their faculties to participate in the making and implementation of their policies.37

The underlying basis for the Court's decision was the Board's failure to make any findings of fact, leaving an interpretation of the Board's analysis to be made on bare "conclusionary rationales."38 Thus, the Court did not defer to the Board's expertise because the Board's conclusion was not rationally based on articulated facts and was inconsistent with the Act.39

36. 444 U.S. at 686.
37. Id. at 688-89.
38. Id. at 691.
39. Id. The Court's analysis implies that the biggest problem with the Board's opinion was not its result and reasoning, but rather that it treated Yeshiva as the routine application of a settled problem. The Court repeatedly criticized the Board for failing to make findings of fact and instead relying on its prior decisions. Id. at 678, 679, 691.
IV
THE MINORITY OPINION

Justice Brennan opened the dissent by making three points: first, he noted the application of “the broad directives of a statutory scheme designed for the bureaucratic industrial workplace [to] the altogether different environment of the academic community” has been one of the “procrustean tasks” of the Board in this and similar cases. Next, he argued that congressional intent, as applied to circumstances like those at Yeshiva, is clouded. While the Act explicitly includes professional employees, it excludes supervisors and, by extension, managerial employees. Third, he stated that the judiciary should not substitute its opinion for that of the Board, charged by statute with establishing national labor policy; a court’s role is limited to reviewing the Board’s decisions for rationality and consistency with the Act. Unable to find either a lack of rationality or a lack of consistency in the Board’s decision in this case, Justice Brennan concluded that the majority exceeded its role in reversing the Board’s decision.

The dissenters noted that Congress, when it passed the Act, did not “contemplate [its application] to private universities.” Therefore, in such cases the controlling consideration should be whether the supervisory and managerial employee exclusion is applicable to the professional faculty at a particular university. The answer to this question hinges on the decision-making structure of the university in question, and on the corollary question of the alignment of the faculty’s interests with those of management.

With respect to the decision-making structure at Yeshiva, Justice Brennan disagreed with the majority’s view of this university as a mature “community of scholars” or as “a vestige of [a] great medieval university” where the professional interests of the faculty are indistinguishable from those of the administration. He argued, rather, that Yeshiva, like most “mature” universities, is characterized by a dual authority structure. On the one hand, there is a primary decisional chain of command running from the governing board to the officers of the

40. 444 U.S. at 691 (White, Marshall & Blackmun, JJ., joining the dissent).
41. Id. at 692.
43. 444 U.S. at 693-94.
44. Id. at 692.
45. Justice Brennan limited his remarks to the category of “managerial employees,” as the majority decided the case on this basis, although he states that he would have resolved the question of supervisory status in a similar fashion. Id. at 694 n.2.
46. Id. at 702.
university; this structure is hierarchical like that in most industries. Another structure exists to bring forward the faculty's recommendations regarding teaching and educational issues within their areas of expertise. No managerial prerogatives are exercised and their influence in academic affairs is limited by the final authority of the University. Thus, the minority saw the structural issue as inseparable from the alignment-with-management issue.

Justice Brennan noted that conformance to management policies and evaluation based on such conformance are the keynotes to distinguishing managerial status. He found that the record made clear that faculty interests and administrative policy did not coincide. They diverged on "such fundamental issues as the hiring, tenure, promotion, retirement, and dismissal of faculty members, academic standards and credits, departmental budgets, and even the faculty's choice of its own departmental representative." Such evidence should have made clear to the Court that

Yeshiva's faculty . . . is not accountable to the administration in its governance function . . . . When the faculty . . . participates in university decisionmaking . . . it does not serve as the "representative of management." . . . Unlike industrial supervisors and managers, university professors are not hired to "make operative" the policies and decisions of their employer . . . . [T]he notion that a faculty member's professional competence could depend on his undivided loyalty to management is antithetical to the whole concept of academic freedom.

The fact that the faculty voted for the union demonstrated their perception that the administration's interests opposed their own, Justice Brennan found. This does not mean that when the facts indicate that certain faculty actually serve as management's representatives, that they should not be excluded from the protection of the Act. Such

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47. *Id.* at 696-97.
48. *Id.* at 699.
49. *Id.* at 701-02.
50. *Id.* at 699-700 (footnote omitted). The minority opinion quoted Board Member Kennedy's statement in a similar case:

[T]he influence which faculty exercises in many areas of academic governance is insufficient to make them "managerial" employees. Such influence is not exercised "for management" or "in the interest of the employer," but rather is exercised in their own professional interest. The best evidence of this fact is that faculty members are generally not held accountable by or to the administration for their faculty governance functions. Faculty criticism of administration policies, for example, is viewed not as a breach of loyalty, but as an exercise in academic freedom. So, too, intervention by the university administration in faculty deliberations would most likely be considered an infringement upon academic freedoms. Conversely, university administrations rarely consider themselves bound by faculty recommendations.

*Id.* at 700, quoting Northeastern Univ., 218 N.L.R.B. 247, 257, 89 L.R.R.M. 1862, 1874 (1975) (Kennedy, Member, concurring in part and dissenting in part) (footnote omitted).
51. 444 U.S. at 702.
faculty have been excluded by the Board when they have served in the capacity of department chairmen or deans. In the present case, a number of such positions held by faculty members were excluded from the unit by the Board.

The dissenting opinion concluded by noting agreement with the Board's determination that the faculty were professional rather than managerial employees. Justice Brennan claimed that while the "interest/alignment analysis" is key to the determination, two other aspects of Yeshiva's decisionmaking process were relevant: i.e., faculty influence was only collectively exercised and the administration retained ultimate authority. Justice Brennan finally noted that "even were I to have reservations about the specific result reached by the Board . . . I would certainly have to conclude that the Board . . . arrive[d] at a decision well within the zone of reasonableness."

V

COMMENTARY

Yeshiva is of considerable importance to the American labor movement since unionization of faculty, as of health care workers and public employees, has been one of the major frontiers of orga-

54. See note 10 supra. The majority found the Board's determination of the composition of the unit to be overbroad. One can speculate that a closer examination of the factual record by the Court would have provided a basis for excluding those faculty members properly deserving managerial status. This would have made clear what functions were being relied upon as indicating managerial status and would have avoided the blanket holding that all faculty at a "mature" university are managerial. 444 U.S. at 699 n.10.
55. Id. at 705 n.19.
56. Id. at 706.
57. By 1979, "80 private and 302 public institutions of higher education had engaged in collective bargaining with the faculty, and over 130,000 academic personnel had been unionized." National Center for the Study of Collective Bargaining in Higher Education, Director of Faculty Contracts and Bargaining Agents in Institutions of Higher Education i-ii (1979), quoted in Burton, The Extent of Collective Bargaining in the Public Sector in Industrial Relations Research Association, Public-Sector Bargaining 13 n.13 (1979). Various issues of Industrial Relations have updated figures on faculty unionization. The exact number of faculty presently under contract is not known. The above figure is most likely somewhat high since many of the units, as Bognanno & Suntrup, supra n.7, have found, include other occupational titles, which some researchers call staff. One 1979 study found that "about 141,000 faculty and professional staff are represented. . . . And about two-thirds of all faculty organized are employed in four-year institutions." Garbarino & Lawler, Faculty Union Activity in Higher Education—1978, 18 Indus. Rel. 244 (1979). A recent update put the number of faculty "and staff" in four-year colleges and universities presently under contract at 86,344. Garbarino, Faculty Unionization: The Pre-Yeshiva Years, 1966-1976, 19 Indus. Rel. 221, 222 (1980).
nized labor in the past two decades. The decision may have little immediate effect on public institutions since these are not covered by the Act. The potential impact of Yeshiva on the private sector is that institutional administrations, prior to the determination of units or upon expiration of contracts, may attempt to thwart faculty unionization by means of this precedent. This decision also portends an increased case load for the Board, especially in the area of unfair labor practices, as the parties begin to argue their positions case by case on the managerial versus nonmanagerial status of faculty.

While inducing further legal argument by labor organizations and educational institutions, Yeshiva also promotes inquiry into various theories of university organization. The remainder of this article focuses on the weaknesses of the models of university organization used by the Court and offers alternative views of educational organizations, with special emphasis on the particular model that fits the Yeshiva circumstances.

A. Structures of a "Mature" University: Fact or Fiction?

Both the majority and dissenting opinions viewed the "controlling consideration" or "pivotal inquiry" as whether the faculty exercised authority which aligned them with management. Since "the authority structure of a university does not neatly fit within the statutory scheme [which the Court is] asked to interpret," the acceptance of differing theories of university authority structure by the majority and minority leads to differing conclusions. The majority visualized the structure of educational institutions as one in which the faculty and administration have similar decision-making goals. Justice Brennan, on the other hand, writing for the dissenters, stressed a dual authority system: a hi-

59. 29 U.S.C. § 152(3) (1976). Administrations of public institutions in states without bargaining statutes may simply cite Yeshiva as justification for refusing to bargain. The potential expense of litigation to resolve this issue would, no doubt, greatly diminish the vitality of any organizing drive. For a management view with respect to the potential impact of Yeshiva on public institutions in states that do have statutes, see the recent comments of Caesar J. Naples, Associate Vice Chancellor, State University System of Florida:

The actual precedent effect of Yeshiva extends only to private universities, but the impact of the high court's decision will be felt throughout higher education. In those states where public sector collective bargaining statutes stemmed from a desire to extend NLRB-like benefits to public employees, courts may determine that Yeshiva persuasively removes university faculty from the category of employees covered by the state statutes. Legislatures may amend their laws to conform to the private sector. In this way, the Supreme Court's reasoning in Yeshiva may extend into the public sector.


60. 444 U.S. 672-86.
61. Id. at 695 (Brennan, J., dissenting).
62. Id. at 680.
63. Id. at 688.
erarchical power structure and a professional network where faculty make nonadministrative decisions. Rather than focusing on the managerial aspects of the behavior of a professional faculty, however, the Court should have searched for a particular theoretical perspective or structural assumption about where decision-making occurs in organizations.

Few organizational theorists would be as comfortable in relying on the theoretical assumption of a mature university as either faction of the Court appeared to be in Yeshiva. Recent research suggests that there is a variety of decision-making structures in American higher education. Neither the Board nor the courts dealing with the case cite such theory directly as they develop their assumptions.

Twenty years ago, theoretical research suggested that professional organizations, including universities, are characterized by a dual authority structure: an administrative level organized hierarchically or bureaucratically, and a professional level distinguished by professional autonomy. The dissenters adopted this basic description. Later researchers refined this theory with respect to colleges and universities through empirical study. They extended the dual authority paradigm by characterizing higher educational institutions as dual decision-making sub-systems. The academic department, and not the faculty as a whole, was seen as the basic professional sub-system of a college or university, while the administrative hierarchy was described as the bureaucratic sub-system. Specifically, the researchers were modelling large, prestigious universities, where faculty members on the departmental level wield power through prestige derived from national or international reputations.

Three types of more specific structures, with emphasis on such variables as the professional prestige of the faculty, various historical factors, and the perceived goals of the institution, have subsequently

64. Id. at 696-97 (Brennan, J., dissenting).
65. This line of reasoning is generally consistent with that of Roomkin and Abrams, who contend that both the Board and the courts have, in the past, used unverified assumptions to justify rules of labor law. See Roomkin & Abrams, Using Behavioral Evidence in NLRB Regulation: A Proposal, 90 HARV. L. REV. 1441 (1977).
66. Kemerer and Baldridge, in their nationwide study of academic governance, generated a detailed list of factors that promote or hinder faculty unionization. See F.R. KEMERER & J.V. BALDRIDGE, UNIONS ON CAMPUS (1975) [hereinafter KEMERER & BALDRIDGE].
67. See Etzioni, Authority Structure and Organizational Effectiveness, 4 AD. SCI. Q. 43, 52 (1959).
68. 444 U.S. at 696-98 (Brennan, J., dissenting).
70. These historical factors include whether the institutions are public or private and whether they are low status branches of larger educational systems historically devoted, for example, to the education of teachers.
71. One such goal is whether the institution strives to be a teaching-oriented or a research-oriented university.
been hypothesized:72

Model I large, high-quality, research-oriented institutions which are structurally highly differentiated in their decision-making with primary authority concentrated on the department level;

Model II small, teaching-oriented institutions which have strong administrative control with little authority on the departmental level;

Model III institutions, including many private schools and regional branches of state systems, characterized by decision-making conflict between administrative control and departmental units.73

Some research suggests that these models mirror the structures of higher educational institutions to be found in fact.74 Darkenwald, from whose work these models were refined, found a higher level of conflict between departments and administration in Model III institutions.75

Thus, one basis for distinguishing institutions is by the degree of conflict. One can further distinguish by reference to a broader range of factors such as: size of the institution, salary level, research or teaching orientation, job security, degrees of morale, job satisfaction and trust in the administration, effectiveness of academic senates, degree of peer judgment, degree level of faculty, age of faculty, as well as whether administrators come from the faculty or from without, and whether the institution focuses on liberal arts and social sciences or physical sciences and professional fields.76

Using such considerations, each model exhibits various groups of attributes. An ideal Model I institution, for example, would evince a research orientation, high salaries, stable economic conditions, older

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73. The above models represent this author's condensation of Darkenwald's discussion of the characteristics of the three different types of decision-making structure in higher education. See Darkenwald, supra note 72, at 408.

74. Id.

75. Assuming that such structures existed, Darkenwald found considerable substantiation for them by analyzing a sample of 54 colleges and universities from the point of view of the degree of conflict between professional and administrative sub-systems. Specifically, he found the greatest degree of conflict to exist in Model III type structures. See Darkenwald, supra note 72, at 409-11, for a discussion of empirical procedures and results. Interestingly enough, Darkenwald found a lower degree of conflict in Model I and Model II institutions. Such results appear reasonable if the administration plays a lesser decision-making role in Model I institutions, and if the professional faculty is unaccustomed, by tradition, to engaging in decision-making in Model II institutions.

76. See KEMERER & BALDRIDGE, supra note 66.
faculty (most with doctoral degrees), good job security, high morale, and an administration drawn from the faculty. These factors encourage stability and minimize conflict; the faculty, because they are older and more established in their fields, are more able to influence the policies of the institution through the power that comes from reputation and from bringing in research monies.

On the other hand, the degree of conflict typical of the Model III institution would occur most often where the faculty are younger with less developed reputations, in universities that focus on teaching undergraduate students, concentrate on the liberal and social sciences, and are characterized by poor morale and insufficient job security.

Model II is distinguished from Model III by virtue of the greater degree of control vested in the administration, a potentially higher degree of economic and employment security, and superior institutional prestige.77

In addition to these conflict characteristics, each model features a different system of governance. Model I institutions function on the collegial system, characterized by: (1) consensus within the academic community as to the goals and purposes of the institution; (2) faculty participation in governance because only the faculty has the necessary experience; (3) common interests among faculty and administration which transcend their differences; and (4) a secondary role for the administration as a support system for the faculty.78

Institutions fitting Model II operate on a bureaucratic pattern, consisting of: (1) a formal organizational hierarchy specifying power and role relationships; (2) formal lines of communication; (3) governance by specific rules and policies, including deadlines, record-keeping, periodic reports, etc.; and (4) formalized processes for decision-making.79

Finally, Model III describes a complex miniature political system, where policymaking is the focal point for various interest groups. It is characterized by: (1) dynamic, on-going conflict among fragmented interest groups; (2) decision-making by the conflict winners; (3) the limitation of formal authority by political pressure resulting in (4) compromise between competing groups; and (5) more pronounced effects on internal governance by the external environment.80

Unionization is more likely in some models than others. For instance, faculty at a Model III institution might find that unionization offers one solution to the conflict experienced in those schools. At

77. Id. at 38-69.
78. Id. at 14-15.
79. Id. at 16.
80. Id. at 16-17.
Model II institutions, faculty might unionize in order to share decision-making with the administration. However, a Model I institution would tend to unionize only when it begins to convert, for whatever reason, into a Model III format.

These three models blur into one another at any given time, in any given institution. But, they serve as a focus when examining the decision-making structure of a particular institution, i.e., in applying rules of law to a set of facts.

In addition, it is empirically possible that certain institutions have a "mixed" structure which is a combination of Model I and one of the other models. Both the Board and the Court appear to recognize this implicitly. Indeed the Board, arguing from the perspective of community of interest, excluded faculty from the Yeshiva medical schools. Moreover, the Court noted that

[there] thus may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominantly non-managerial. There also may be faculty members at Yeshiva and like universities who properly could be included in a bargaining unit . . . but we express no opinion on these questions, for it is clear that the unit approved by the Board was far too broad.81

Therefore, these theoretical considerations of "mixed" structures should not only be of interest to formulators of national policy, but also to labor organizations who file unit determination petitions.

This tripartite theory of decision-making leads to a number of further questions about national labor policy as it applies to the unionization of professional faculty not only at Yeshiva, but at other institutions as well: (1) to what degree do either the majority's or the dissenting justices' assumptions about a mature university actually approximate any of the three models and (2) to what extent do the Board's arguments on faculty alignment with management reasonably coincide with the structural characteristics of any of these models? The following two sections deal with these questions.

B. Similarities Between the Court's Results and Behavioral Models

The Court's assumption that a mature university implies a congruence of decision-making goals between the faculty and the administration, which the dissenting justices characterized as the "'community of scholars' of yesteryear,"82 approximates Model I. Answers to the following empirical questions would reveal whether the Court was correct

81. 444 U.S. at 690-92 n.31.
82. Id. at 702 (Brennan, J., dissenting). On at least one occasion, the Board has acknowledged that "a genuine system of collegiality would tend to confound us." Farleigh Dickinson Univ., 195 N.L.R.B. 239, 241, 94 L.R.R.M. 1044, 1046 (1976). See also Adelphi Univ., 195 N.L.R.B. 639, 648, 79 L.R.R.M. 1545, 1556 (1972).
in such an assumption: (1) is Yeshiva a large, high-quality research-oriented institution? (2) does the administration acknowledge and accept its secondary support role? (3) is faculty decision-making lodged on the departmental level? and (4) is faculty decision-making *de facto* (a) binding on the administration, (b) only advisory, or (c) completely disregarded in questions of both academic and personnel policies?

In arriving at its holding, the majority also focused on the concept of "alignment to management." This is insufficient in that national labor policy has not recognized that faculty decision-making authority is a social and departmentally based phenomenon, as suggested in the models. Instead of "alignment to management," it is preferable to discuss the degree of conflict within dual-authority sub-systems by stressing the "binding", "advisory", or "non-existent" characteristics of faculty decision-making authority.

The dissenting justices' assumption that a mature university is characterized by a dual-authority system appears closest to Model III, even though they do not stress explicitly that the locus of decision-making is on the departmental level, nor do they emphasize the conflict inherent in the decision-making structure of this model,\(^8\) except by alluding to the presence of unionization itself at Yeshiva.\(^4\)

In arguing from the perspective of a dual-authority system, the dissenters should have addressed the following empirical questions which would reveal the features of a Model III system: (1) is Yeshiva one of the many private or emerging branches of state systems to which the model refers? (2) does the administration offer overt resistance to departmentally based faculty decision-making authority? and (3) are these overt acts related to the *de facto* (a) advisory, (b) binding, or (c) non-existent decision-making authority by the faculty in the area of academic and personnel policies?

Finally, although the majority and dissenters concentrate on Model I and Model III institutions, there is a theoretical and empirical possibility\(^8\) that a Model II institution would fit "neatly within the statutory scheme the Court was asked to interpret."\(^6\) If an empirical

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83. 444 U.S. at 691 (Brennan, J., dissenting).
84. *Id.* at 702.
85. The Court stated: "[t]here] thus may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominantly non-managerial." 444 U.S. at 691 n.31. It is open to question whether the Court, at least based on the *Yeshiva* decision, is theoretically equipped to consider such a possibility both (1) from its structural assumptions concerning a "mature" university, and (2) from its apparent understanding of the relationship between the intent of the Act, and higher educational institutions in general.
86. The Court has stated: "the Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchy of private industry . . . [and] in contrast, authority in the typical "private" university. . . ." 444 U.S. at 680 (emphasis added), *quoting Adelphi Univ.*, 195 N.L.R.B. 639, 648, 79 L.R.R.M. 1545, 1556 (1972). That such *pyramidal*,
assessment of the evidence suggests that the administration holds primary decision-making authority in academic and personnel policies (a characteristic of teaching-oriented Model II institutions) and that the departmentally based decision-making authority of the faculty is either only advisory or non-existent, the Act may apply to such an institution. The decision-making structure of such teaching-oriented universities would closely approximate that of highly centralized organizations in the industrial workplace.

C. Faculties' Alignment with Management: The Relationship Between Faculty Behavior and Structural Assumptions

Faculty decision-making vis-a-vis university authority structure can be analyzed using the models suggested. In the context of unionization, the alignment-with-management question can be framed as follows:

1. Whether sufficient evidence suggests that decision-making polarization is due to the structural conflict characteristic of Model III;
2. Whether sufficient evidence suggests that the collegial model of decision-making characteristic of Model I is or is not breaking down to exhibit characteristics of Model III;
3. Whether sufficient evidence suggests that the institution follows the Model II pattern.

Such a framework can assist the development of an argument for or against applying the Act to a particular university setting. Applying the second question to Yeshiva, for example, brings to the fore a consideration only alluded to in the dissenting opinion: if, as the Court suggests, Yeshiva was truly collegial in structure, then why did polarization occur leading to an organizing drive and, finally, to a successful unit determination election?

This line of reasoning suggests that an examination of faculty be-

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87. 444 U.S. at 702.
88. In an analysis of the structural “profile” of unionized four-year colleges and universities up to 1975 (N = 40 units), this author concluded that few, if any, of the institutions that had unionized possessed the structural characteristics of what Darkenwald calls high-quality, research-oriented institutions. They fell, rather, into the profile of Models II and III. Exceptions to this were “accidental” in the sense that these individual institutions were branches of larger units which encompassed total university systems such as the State University of New York (SUNY) and the City University of New York (CUNY). There representation rights were won because of the preponderance of faculty in branches that did not exhibit Model I characteristics. “The organizational picture of the unionized institutions which emerges is one where there is a degree of conflict between a bureaucratic sub-system and departmental ones ‘which have more permeable . . . boundaries’. It is also one which stresses a teaching rather than research orientation of the professional staff.” E. Suntrup, Unionism in Higher Education: A Study in the Sociology of Law and Organizations (1975) (unpublished doctoral thesis, Univ. of Minn.) and Darkenwald, supra note 72, at 408. If the faculty of Model I institutions turn to unionism, this would indicate that this
behavior will lead to a set of theoretical assumptions about the decision-making structure of the institution and that those assumptions will inform labor policy concerning faculties' coverage by the Act. Structural and behavioral issues are, thus, theoretically and empirically intertwined.89

The Board has argued that the behavioral issue of alignment with management should be decided on three criteria: (1) the decision-making self-interest of the faculty; (2) the collective nature of faculty decision-making; and (3) the final authority of the boards of trustees.90 There is some disagreement between the Court and the dissenting justices as to whether the Board in *Yeshiva* actually used all three criteria, or only the first.91 Nevertheless, all three should be considered for analytical purposes. Special emphasis should be given to the first two criteria for they are intimately related to the question of a faculty's manager status if the behavioral and structural viewpoints are considered together.

The Board has argued that since faculty decision-making authority involves independent professional judgment, faculty exercise that authority in their own, rather than their employer's, interest. According to the proposed structural models, however, the behavioral question is not whether faculty exercise decision-making authority using independent professional judgment, but how they do this. This question is meaningful only within the context of collective action.92 The structural models suggested earlier refer to faculty departments as social sub-systems of decision-making: either the faculty have decision-mak-

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89. In addition, any view of how faculty actually behave as decision-makers is related to the legal issue of the divided interests potential unit members have with respect to the employer and the union. 444 U.S. at 704.


91. *See supra* notes 35 & 55.

92. The dissenting justices recognized this when they stated the following: "[T]he faculty's influence is exercised collectively—and only collectively—[which] indicates that the faculty's recommendations embody the view of the rank and file rather than those of a select group of persons charged with formulating and implementing management policies." 444 U.S. at 705 n.19. The dissenting justices, however, neglected to consider the structural *locus* at which this collective decision-making takes place.
ing authority on the departmental level (Model I), or they had it and are potentially losing it (Model I changing to Model III), or they have only very limited authority and want to increase it (Model III), or they never had it in the first place (Model II).

Self-interested faculty decision-making may therefore always be collectively exercised at the department level or through collective bargaining. But how the faculty exercise their independent professional judgment—departmentally or as a university-wide group—is a crucial and yet unstressed aspect of faculty collective bargaining. Faculty unionism can be seen as a group behavioral process which moves the exercise of independent professional judgment from the department to the total system level. Yet, neither the Board nor the Court has resolved the problems in this regard by their simple references to "academic freedom."93

Lastly, the final authority of the board of trustees—the third Board criterion for showing faculty nonalignment—is arguably irrelevant since, as the Court noted: "ultimate authority . . . has never been thought to be a pre-requisite to supervisory or managerial status. Indeed, it could not be since every corporation vests that power in its board of directors."94

93. Both the Board and the dissenting justices attempt to argue that "academic freedom" is a *sine qua non* of "independent professional judgment" in the context of higher education. The dissenting justices state that "undivided loyalty to management is antithetical to the whole concept of academic freedom." 444 U.S. at 700. The weakness of this argument is that academic freedom is a principle that applies to *individual* faculty behavior, and as such, resort to this principle does not clarify the group or collective dynamics inherent in the structural displacement of decision-making that occurs during a faculty organizing drive. See the 1940 Statement of Principles on Academic Freedom and Tenure which was first promulgated by the joint representatives of the American Association of University Professors and the Association of American Colleges in 1940. It reads:

The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to assure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom of learning. It carries with its duties correlative with rights.

AAUP Bull. Autumn 1970, at 324. In fact, it has been common for higher educational union contracts to contain "academic freedom" clauses and they invariably refer to the *individual* welfare of faculty, either (1) to have freedom to teach or research the truth according to their own lights, or (2) as a principle related to tenure, in order to preserve individual job security. For an empirical analysis of such clauses in four-year colleges and university contracts, see Bognanno, Estenson & Suntrup, *Union-Management Contracts in Higher Education*, 17 Indus. Rel. 189, 190-91 (1978).

94. 444 U.S. at 685 n.21.
VI

CONCLUSION

The foregoing analysis suggests that in the absence of legislation\textsuperscript{95} future labor policy concerning faculty unionization in higher education would be better developed by reference to more sophisticated assumptions and to a theory based on the variable decision-making strutures of the institutions themselves.\textsuperscript{96} Models such as those suggested in this article could serve as a framework from which to evaluate the narrower behavioral and legal issue of the alignment of faculty with management. Such a reorientation could move labor policy thinking beyond the present, suspect notion that faculty and administrative decision-making processes are either congruent or disparate. Indeed, a major empirical question to be resolved is whether such a reworking of the theoretical framework will reveal that many higher educational institutions are structurally close to organizations of the industrialized bureaucratic workplace. If so, the issue of faculty alignment with management becomes moot. While neither the Court nor the dissenters accepted such a possibility in \textit{Yeshiva}, such structures may well exist at other private institutions where the faculty have or are contemplating collective bargaining.

\textsuperscript{95} The Board has suggested that Congress tacitly approve the formation of faculty units when the Act was amended in 1974 to eliminate the exemption of nonprofit hospitals. There is nothing on the record, however, to indicate that this was the case, despite the fact that private universities and some hospitals are nonprofit institutions that affect commerce. \textit{See} H.R. \textit{Rep. No. 93-1051, 93rd Cong., 2d Sess.,} 4 (1974); 120 \textit{Cong. Rec. 12938} (1974) (remarks of Sen. Williams), alluded to in \textit{Yeshiva}, 444 U.S. at 681 n.11.

Last year, in direct response to the \textit{Yeshiva} decision, Rep. Frank Thompson (D.-N.J.) introduced a bill which would have amended § 2(11) of the Act by adding the following language: \textit{"except that no faculty member or group of faculty members in any educational institution shall be deemed to be managerial or supervisory employees solely because the faculty member or group of faculty member participate in decisions with respect to courses, curriculum, personnel, or other matters of educational policy."} H.R. 7619, 96th Cong., 2d Sess. (1980). \textit{Summary information on Rep. Thompson’s bill may be found in Daily Lab. Rep. (BNA),} June 20, 1980, at A-5.

\textsuperscript{96} Roomkin and Abrams suggest that the Board should establish a research unit to uncover behavioral assumptions related to “recurrent regulatory problems.” The present concern with theoretical, structural assumptions as they relate to faculty alignment with management is an excellent area for such research. \textit{See} Roomkin & Abrams, \textit{supra} note 65, at 1442 n.7, 1459.