

FACULTY UNIONS: WE NEED A NATIONAL EDUCATIONAL LABOR LAW

By

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INTRODUCTION

It has been almost three decades since the Supreme Court decision in *National Labor Relations Board v. Yeshiva*¹ effectively halted the spread of collective bargaining among fulltime faculty at private colleges and universities. Those intervening years have been difficult for labor unions, as the United States saw an overall decline in union membership from its peak years in the 1950s when roughly one third of the workforce was unionized through 2007 when the Bureau of Labor Statistics reported 12.4 percent of employed workers were unionized.² Organized labor shifted its focus from its central core in the manufacturing and mining industries to the no-longer marginal service industries.

In the public sector, unionization took hold and expanded. Unions represented roughly 13% of public employees in the early 1960s; by the 1990s, close to forty percent of public employees were unionized.³ Indeed, when union membership rose in 2008, for the first time in decades, the growth was largely attributable to public-sector unions.⁴

A similar picture is evident in academia where estimates of the number of faculty and librarians working at colleges, junior colleges, universities, professional and technical schools range from 1,100,000 to 1,300,000.⁵ Efforts to unionize tenure track faculty at private colleges and universities have been effective only sporadically since the *Yeshiva* decision; organizers focused instead on the more vulnerable contingent (part-time) faculty, graduate students, and medical school interns and residents. In contrast, unionization of fulltime, tenure-track faculty at public schools and institutions continued unabated.⁶ For faculty at public colleges and universities, this has been true largely because their unions are governed by state law, rather than the National Labor Relations Act as interpreted by the Supreme Court in *Yeshiva*.

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¹ NLRB v. Yeshiva, 444 U.S. 672 (1980).

² Peter Whoriskey, *American Union Ranks Grow After "Bottoming Out"*, WASHINGTONPOST.COM, January 29, 2009, Met 2 Edition, Page A08.

³ Joseph Slater, PUBLIC WORKERS: GOVERNMENT EMP. UNIONS, THE LAW AND THE STATE, 1900-1962 at 1 (2004).

⁴ *Id.*

⁵ The Bureau of Labor Statistics occupational and wage estimated 1,104,080 in 2008 at http://www.bls.gov/oes/2008/may/naic4_611300.htm#b25-0000. (Cite visited May 26, 2009). The National Center for Educational Statistics reported 1,371,390 faculty in 2007, at http://nces.ed.gov/programs/digest/d08/tables/dt08_243.asp. (last visited October 2, 2009).

⁶ According to the AFL-CIO, 44% of the nearly seven million public school employees were unionized in 1998; union density in postsecondary education ranged from a low of 10.4% among foreign language teachers to a high of 27% for math and computer science teachers, "Teachers and College Professors" at <http://www.dpeaflcio.org/pros/workplace/teachers.htm>, citing Bureau of National Affairs, "Union Membership and Earnings Data Book: Compilations from the Current Population Survey," (1999) (site visited October 2, 2009).

The election of President Obama, who won the union vote by wide margins⁷, has been widely heralded as a new day for labor. The early months of the Obama administration have already brought changes: a new Secretary of Labor with deep links to the union movement; the signing of the Lily Ledbetter Fair Pay Act;⁸ new executive orders designed to promote union organizing in the construction trades;⁹ and ongoing commitment by the President to one of organized labor's highest priorities, the Employee Free Choice Act.¹⁰ At least one commentator has argued that the labor provisions of the 2009 federal economic stimulus bill— including \$80 billion for the enforcement of worker protection laws, expanded unemployment insurance benefits and re-employment assistance for older workers—are a harbinger of a fundamental social change in labor and employment law.¹¹ With a president who sees a relationship between the rights of workers, unionizations and economic growth, this is a good time to consider changes to the national labor laws.

This article explores state law governing organization and collective bargaining of faculty in the public sector to support proposed changes to federal labor law that would restore the right of private-college faculty to unionize. Its ideological underpinning is that faculty unions are a positive good. There is strong evidence that unions, in general, improve the social economic system by reducing overall earnings inequality and by contributing to economic and political freedom.¹² In addition to the wage premiums¹³ and higher employee benefit levels associated with unionization,¹⁴ unions amplify the collective political voice of those who are represented through lobbying and political work.

Moreover, faculty unions are a means of strengthening the role of the faculty, and thereby, the institution itself. The faculty is, in the words of one authority who has served as trustee of several private universities over a period of thirty years “not merely one more stakeholder in a university. It is the mandarin class of every great American university, governing (with or without unions, with or without faculty senates) because it is indispensable and because members of the faculty are the only stakeholders who are permanent.”¹⁵ A recent study found that unionized faculties have a significantly higher percentage of courses taught by tenured or tenure-track faculty members, as opposed to

⁷ The 2008 American National Election Survey reports that 70% of people who are members of unions who have someone in the household that are union members voted for Obama. American National Election Study, 2008: Pre- and Post-Election Survey (computer file). ICPSR25383-vi. Ann Arbor, MI: Inter-University Consortium for Political and Social Research (distributor), 2009-06-10. Doi: 10.3886/ICPSR25383.

⁸ LILLY LEDBETTER FAIR PAY ACT of 2009, Pub.L.No. 111-2, 123 Stat. 5 (2009).

⁹ Michael D. Malfitano, *The Impact of New Executive Orders on Government Contracting*, ASPATORE 2009 WL1428104.

¹⁰ H.Res. 1409, 111th Cong. (2009); S.Res. 560, 111th Cong. (2009).

¹¹ Mitchell H. Rubinstein, *Obama's Big Deal; the 2009 Federal Stimulus; Labor and Employment Law At the Crossroads*, 33 RUTGERS L. REC. 1 (2009).

¹² Richard Freeman and James Medoff, WHAT DO UNIONS DO? 19-20 (1984); WHAT DO UNIONS DO? A TWENTY-YEAR PERSPECTIVE (James T. Bennett Bruce E. Kaufman, eds. 2007).

¹³ David D. Blanchflower & Alex Bryson, *What Effect Do Unions Have on Wages Now and Would Freeman & Medoff Be Surprised?* in WHAT DO UNIONS DO? A TWENTY-YEAR PERSPECTIVE 103-04 (James T. Bennett, Bruce E. Kaufman, eds. 2007).

¹⁴ John W. Budd, *The Effect of Unions on Employee. Benefits and Non-Wage Compensation: Monopoly Power, Collective Voice, and Facilitation* in WHAT DO UNIONS DO? A TWENTY-YEAR PERSPECTIVE 185 (James T. Bennett, Bruce E. Kaufman, eds. 2007).

¹⁵ Jose A. Cabranes, *Myth and Reality of University Trusteeship in the Post-Enron Era*, 76 FORDHAM L. REV. 955 (2007).

adjuncts,¹⁶ a benefit that would seem to adhere to not only faculty but to the students who are more likely to interact with and be successfully mentored by fulltime than contingent faculty.

Finally, one can identify another source of evidence that faculty unions are of value: despite the absence of a legal protection for faculty unions at private colleges, there are some institutions that have voluntarily recognized them¹⁷

Part I reviews the *Yeshiva* case in the context of labor law in the United States. Next, Part II argues for federal legislative changes in light of post-*Yeshiva* case law and NLRB rulings that limit the rights of faculty in the private sector to unionize. This is followed by an exploration of state laws governing public faculty labor rights in Part III. It concludes with a recommendation for a Federal Educational Labor Relations Act based largely on the models provided by state public employee statutes.

PART I: THE NATIONAL LABOR RELATIONS ACT and *NLRB v. YESHIVA*

The National Labor Relations Act of 1935 was signed into law at the height of the Great Depression, with the stated goals of furthering industrial peace and restoring equality of bargaining power between labor and management. Collective bargaining was to serve as a cure for the strife and economic upheaval of the times.¹⁸ The law broadly authorized “any employee,” excluding agricultural laborers and domestic servants, to organize a union. There was no discussion of its potential application to university faculties. Indeed, as the Supreme Court later noted, the assumption was that the NLRA, premised on congressional power to legislate under the interstate commerce clause, did not extend to those who worked for not-for-profit colleges and universities because those institutions did not “affect commerce.”

When the Supreme Court ruled that even supervisors enjoyed the protection of the NLRA,¹⁹ Congress moved quickly to amend the language to remove supervisors from the Act’s protection.²⁰ The Taft-Hartley Amendments of 1947²¹ excluded supervisors from the right to organize for two reasons: to protect employees by preventing management representatives in the union from exercising undue influence over rank and file members, and to ensure that employers were not deprived of the undivided loyalty of their supervisory foremen who might have difficulty disciplining and controlling fellow-union members.²² However, Congress explicitly left professional employees within the reach of the Act.

¹⁶ Scott Jaschik, *New Impacts Seen for Faculty Unions*, INSIDE HIGHER ED, March 28 2008, reporting on a study by Marc Stein and David Stuit presented at the annual meeting of the American Educational Research Association.

¹⁷ Matthew M. Bodah, *Significant Labor and Employment Law Issues in Higher Education During the Past Decade and What to Look for Now: The Perspective of an Academician*, J. LAW & EDUC. (July 2000). Alison Schneider, *Goddard College Allows Faculty to Unionize*, THE CHRON. OF HIGHER EDUC., Dec. 4, 1998, at A14.

¹⁸ NATIONAL LABOR RELATIONS ACT, ch. 371, 49 Stat. 449, (1935) (codified as amended at 29 U.S.C. §§ 151-69 (2006)).

¹⁹ *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947).

²⁰ LABOR MANAGEMENT RELATIONS (TAFT-HARTLEY) ACT of 1947, c.120, title 1, §101, 61 Stat.137, (1947) (codified as amended at 29 U.S.C. §242-144 (2006)).

²¹ Section 2 (11) of the TAFT-HARTLEY ACT requires, as a condition of supervisory status, that authority be exercised “in the interest of the employer 29 U.S.C. §152 (11).

²² See H.R.Rep. No. 245, 80th Cong., 1st Sess., 14 (1947):

“The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is

In 1974, however, the Supreme Court created an additional exception to the law's coverage when it ruled that those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer" were "managerial employees," whether or not they exercise supervisory powers.²³ Such employees therefore were not entitled to unionize under the NLRA. Because they were "much higher in the managerial structure" than those explicitly mentioned by Congress, the Court assumed that Congress "regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary."²⁴ Indeed, the Court believed that because they must exercise discretion within, or even independently of, established employer policy, managerial employees must be aligned with management.²⁵ This judicial exclusion of "managerial employees" has been reinforced and expanded over the years.²⁶

From the time the NLRB first asserted jurisdiction over a university's faculty union in 1971 the Board considered faculty members at institutions of higher learning to be "professional employees" whose union activities were protected by the Act.²⁷ All that would change, however, in 1980. When full-time faculty at Yeshiva University, a private university in New York formed a Faculty Association and sought recognition as the faculty's collective bargaining agent, Yeshiva University objected. The grounds: faculty members were managerial or supervisory employees without rights to organize under the NLRA.

After hearings spread over five months, the NLRB ruled in favor of the Faculty Association. On appeal to the Second Circuit, the University prevailed, denying the union's certification petition.²⁸ Then, in a decision that would shut down most efforts to unionize faculty at private colleges and universities, a closely-divided Supreme Court ruled that "an employee may be excluded as managerial...if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy."²⁹ Yeshiva faculty met that definition according to a majority of the Court.

The Board had identified a potential split between Yeshiva's faculty and its central administrative hierarchy, which was headed by a Board of Trustees empowered to approve University-wide policies. The Supreme Court, however, saw things differently. Writing for the majority, Justice Powell viewed faculty power as extending "beyond strictly academic concerns" into faculty hiring, tenure, sabbaticals, termination and promotion where the overwhelming majority of faculty recommendations were implemented by the central administration. In some of Yeshiva's schools, Powell noted, faculties make final decisions regarding admission, expulsion and graduation of

inconsistent with the purpose of the act . . . It is inconsistent with the policy of Congress to assure to workers freedom from domination or control by their supervisors in their organizing and bargaining activities. It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, but when the foremen unionize, even in a union that claims to be 'independent' of the union of the rank and file, they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them." See also S.Rep. No. 105, 80th Cong., 1st Sess., 3-5 (1947).

²³ NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

²⁴ *Id.* at 283.

²⁵ 416 U.S. at 286-87.

²⁶ NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571 (1994); NLRB v. Kentucky River Cmty. Care Inc., 532 U.S. 706 (2001). See, also, *infra*, notes 37-43 and accompanying text.

²⁷ Point Park University v. NLRB, 457 F.3d 42, 46 (D.C.Cir.2006).

²⁸ NLRB v. Yeshiva, 582 F.2d 686 (2d. Cir. 1978).

²⁹ NLRB v. Yeshiva, 444 U.S. 672, 683 (1980).

individual students; in others faculty have determined teaching loads, tuition and enrollment levels and the location of the school.

Importantly, Powell, reasoned, neither supervisors who use independent judgment in overseeing other employees in the interests of the employer nor managerial employees who are involved in developing and enforcing employer policy are considered employees under the NLRA. “Both exemptions grow out of the same concern: That an employer is entitled to the undivided loyalty of its representatives.” As “managerial employees” of Yeshiva, then, faculty could not organize in the face of objection from the university.³⁰

Both sides understood that universities are not like automobile plants. The majority did not disagree with the Board that the concept of collegiality “does not square with the traditional authority structures with which th[e] Act was designed to cope in the typical organizations of the commercial world.”³¹ All felt constrained to fit into the industrial model. Powell wrote:

The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any 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.*³²

The majority could find no distinction between a faculty’s professional interests and those of a university like 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. The “business” of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions....³³

Writing for the dissent, Justice Brennan emphasized a different vision of the academic tradition of shared governance:

What the Board realized—and what the Court fails to apprehend—is that *whatever influence the faculty wields in university decisionmaking is attributable solely to its collective expertise as professional educators, and not to any managerial or supervisory prerogatives.* Although the administration may look to the faculty for advice on matters of professional and academic concern, the faculty offers its recommendations in order to serve its own independent interest in creating the most effective environment for learning, teaching, and scholarship. And while the administration may attempt to defer to the faculty’s competence whenever possible, it must and does apply its own distinct perspective to those recommendations, a perspective that is based on fiscal and other managerial

³⁰ *Id.*, at 686.

³¹ *Id.*, 690.

³² *Id.*, (emphasis added).

³³ *Id.*, at 688.

policies which the faculty has no part in developing.³⁴

As the dissent saw it the managerial exemption, based on the risk of divided loyalties, should apply only to employees who were expected to conform to management policies. Faculty, on the other hand, were neither expected to so conform nor held accountable for their independence:

Unlike industrial supervisors and managers, university professors are not hired to “make operative” the policies and decisions of their employer. Nor are they retained on the condition that their interests will correspond to those of the university administration. Indeed, the 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. Faculty members are judged by their employer on the quality of their teaching and scholarship, not on the compatibility of their advice with administration....³⁵

Finally, Justice Brennan dissented from the majority’s “idealized” vision of a medieval university. In its place, he saw a university that “bears little resemblance to the “community of scholars” of yesteryear. Education has become “big business,” and the task of operating the university enterprise has been transferred from the faculty to an autonomous administration, which faces the same pressures to cut costs and increase efficiencies that confront any large industrial organization....”³⁶ The faculty ought to be able to bargain collectively, the dissent argued, because of the erosion of its role in the institution’s decision-making process.³⁷

The Court’s ruling in *Yeshiva* was the subject of a much commentary in the 1980’s, most of it critical,³⁸ in particular for the Court’s failure to adequately distinguish between professional autonomy and managerial authority.³⁹ Despite the fact that this critique has re-emerged in recent years,⁴⁰ the Court has not retreated from its ruling in *Yeshiva*.

PART II: FEDERAL LAW DEVELOPMENTS SINCE *YESHIVA* REQUIRE A CONGRESSIONAL RESPONSE

The *Yeshiva* Court left open the possibility that some or all faculty members at other institutions might be entirely or predominantly “nonmanagerial,” suggesting that the determination was one that required particularized analysis of the faculty role beyond freedom to determine the “content of their own courses, evaluate their own students, and supervise their own research.”⁴¹ In practice, however, few attempts to unionize faculty at private institutions of higher learning have survived challenges from the administration of those schools.

³⁴ *Id.*, at 696 (Brennan, J., dissenting).

³⁵ *Id.*, at 699 (Brennan, J., dissenting).

³⁶ *Id.*, at 702- 03 (Brennan, J. dissenting).

³⁷ *Id.*

³⁸ See, e.g. Albert G. Bixler, *Industrial Democracy and the Managerial Emp. Exception to the National Labor Relations Act*, 133 U.P.A. L.REV. 441 (1985); David M. Rabban, *Distinguishing Excluded Managers From Covered Professionals Under the NLRA*, 89 COLUM. L.REV. 1775 (1989) [Hereinafter, Rabban]; Comment, *The Managerial Status of Faculty Members Under the National Labor Relations Act: NLRB v. Yeshiva University*, 94 HARV.L.REV. 251 (1980).

³⁹ Rabban, *supra*, note 38.

⁴⁰ Peter D. DeChiara, *The Judicial Rejection of Professional Ideology in Labor and Employment Law*, 33 RUTGERS L.REC. 16 (2009); Risa L. Lieberwitz, *Faculty in the Corporate University: Professional Identity, Law and Collective Action*, 16 CORNELL J.L. & PUB.POL. 263 (2007).

⁴¹ *Yeshiva*, 444 U.S. at 691.

While the NLRB has made efforts to distinguish managerial from non-managerial faculty, it has more often than not found faculty to be managerial.⁴² This is so even when it would appear to be a stretch to conclude that faculty exercise managerial authority, as in the case of Elmira College. There, a finding by an outside accrediting agency, the Middle States Commission on Higher Education, commending the College on the ‘participatory processes now in place’ to insure faculty participation in governance proved dispositive, despite the fact that the Elmira faculty did not participate in promotion decisions and had only a limited voice in administrative decisions involving salary or benefits or the budget price.⁴³

Moreover, the courts have been even less favorable to faculty unions than has the Board. Generally, they have acquiesced to findings by the Board that faculty have too much managerial power to be protected by the NLRA or sidestepping the issue on appeal.⁴⁴ But Board findings in favor of faculty unions have been upheld by the courts in only a very few cases—none recent-- in which faculty have little collective voice in their institutions.⁴⁵ Faculty at Florida Memorial College, for example,

⁴² For decisions finding faculty to be non-managerial see: University of Great Falls, 325 NLRB No. 3 (1997); St. Thomas University 298 NLRB No. 32 (1990) (Faculty found to be non-managerial where administration proposed, drafted, and adopted vast majority of academic policy and curriculum changes, including unilaterally establishing a law school and eliminating entire degree programs); Kendall School Of Design, 279 NLRB No. 42 (1986); Cooper Union For the Advancement of Science and Art 273 NLRB No. 214 (1985); Bradford College, 261 NLRB 565 (1982); Thiel College, 261 NLRB No. 84, (1982); Stephens College, 260 NLRB No. 143 (1982); Milton Coll., 260 NLRB No. 47 (1982).

Decisions finding faculty to be managerial: Lewis And Clark Coll., 300 NLRB No.20 (1990); (faculty plays a major and effective role in the formulation and effectuation of academic policy); University Of Dubuque, 289 NLRB No. 34 (1988); Livingstone Coll., 286 NLRB No. 124 (1987); (faculty members have “substantial authority in formulating and effectuating policies in academic areas”); American International Coll., 282 NLRB No. 16 (1986) (Faculty through their participation on faculty committees, as departmental chairpersons, and as members of the faculty as a whole, effectively determines the curriculum and academic policies and standards of the Coll. and exerts significant influence in decisions regarding hiring, tenure, and evaluation of their fellow faculty members); Boston University; 281 NLRB No. 115 (1986); Lewis University, 265 NLRB No. 157 (1982); Coll. Of Osteopathic Medicine And Surgery, 265 NLRB No. 37 (1982); Duquesne University of the Holy Ghost, 261 NLRB No. 85 (1982); Ithaca Coll., 261 NLRB No. 83 (1982) (Finding faculty to be managerial after remand from the Second Circuit to reconsider in light of *Yeshiva*).

⁴³ *Elmira Coll.*, 309 NLRB No. 137 (1992).

⁴⁴ See, e.g., *NLRB v. Lewis Univ.*, 765 F.2d 616 (7th Cir. 1985) (overturning NLRB ruling that faculty can unionize);

NLRB v. Boston Univ. Chapter, AAUP, 835 F.2d 399, 402 (1st Cir. 1987) (affirming an NLRB finding that faculty are managerial because “in the promulgation of the University’s principal business, which is education and research, the faculty’s role is predominant, and “in any other context unquestionably would be [considered] managerial”). Two recent cases have set aside petitions by faculty union on the grounds that the NLRB lacks jurisdiction over church-related schools, *NLRB v. Carroll Coll.*, 558 F.2d 568 (D.C. Cir. 2009) and *NLRB vs. Univ. of Great Falls*, 278 F.3d 231 (D.C. Cir. 2002), citing *Catholic Bishop of Chicago v. NLRB*, 440 U.S. 490 (1979).

⁴⁵ *Loretto Heights Coll. v. NLRB*, 742 F.2d 1245, 1253 (10th Cir. 1984); *NLRB v. Cooper Union for the Advancement of Science and Art*, 783 F.2d 29 (2d Cir. 1986) (affirming Board finding that faculty are nonmanagerial because faculty “did not exercise effective recommendation or control in academic and nonacademic areas policies, course and programs to be offered and policies and curriculum); “the

were found to have no collective decision-making body, no control over curriculum, were not offered tenure and exercised no influence over sabbaticals.⁴⁶ At Loretto Heights College, faculty governance through committees was not enough to earn the label managerial where there was “little evidence of direct, meaningful involvement by the Forum in College governance, and any input it has is primarily of an advisory nature.”⁴⁷ But these cases are exceptional.

Most recently, the NLRB reversed its own initial finding and concluded that faculty at LeMoyne-Owen College were indeed managerial employees after being directed by the courts to explain its use of a multi-factor test and failure to adhere to precedent.⁴⁸ A similar remand in a case involving a small college in Pennsylvania, Point Park College, has not been acted on since 2006. There, too, the Labor Board found that faculty were non-managerial, but the appellate courts were not satisfied with the Board’s explanation as to which factors were more or less significant in reaching that conclusion.⁴⁹ Only time will tell if Obama appointees to the National Labor Relations Board will be more generous in finding faculty to be “nonmanagerial” employees entitled to bargain collectively.

In short, although the National Labor Relations Act is intended to provide broad coverage to those in the private workforce,⁵⁰ fulltime faculty at private institutions remain, for the most part, deprived of their right to organize into unions. This is so despite the fact that other employees at their schools are covered by the NLRA: Contingent faculty,⁵¹ along with a wide range of staff who work at nonpublic postsecondary schools—including programmers, custodial and maintenance staffs and those on the campus security force—are unionized.⁵²

Clearly, Congress could restore the rights of non-public faculty to unionize by adopting statutory amendments to the NLRA that overturn the judicially created exception for managerial employees. State laws covering public employees, discussed below, might provide guidance for a new definition of “covered employee” that would clearly cover fulltime faculty.

However, merely revising the NLRA to cover fulltime faculty would be an oversimplified response to a complex issue. As commentators on the *Yeshiva* decision and its progeny have noted, the academy is both similar to any other business or industry in the United States, and distinct. In the almost twenty years since Justice Brennan warned that “[e]ducation has become ‘big business,’ and the

faculty as a whole is responsible for the formulation of all major educational policies of the Coll.); NLRB v. Fla. Mem’l Coll., 820 F. 2d 1182 (11th Cir. 1987).

⁴⁶ *Fla. Mem’l. Coll.*, 278 NLRB No. 163 (1986), *aff’d* NLRB v. Fla. Mem’l. Coll., 820 F. 2d 1182 (11th Cir. 1987).

⁴⁷ *Loretto Heights Coll. v. NLRB*, 742 F.2d 1245, 1253 (10th Cir. 1984) enforcing decision of the Board in *Loretto Heights Coll.*, 264 NLRB No. 149 (1982).

⁴⁸ *LeMoyne-Owen Coll.*, 345 NLRB No. 93 (2005), *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, (D.C. Cir. 2004) (remanded for explanation of multi-factor test and apparent departure from precedent).

⁴⁹ *Point Park Univ.*, 344 NLRB No. 17 (2005), *rev’d* *Point Park Univ. v. NLRB*, 457 F.3d 42, 46 (D.C. Cir. 2006) (remanded because NLRB failed to explain “which factors are significant which less so, and why” in their determination that the faculty at Point Park were not “managerial employees”).

⁵⁰ “Unless a category of workers is among the few groups specifically exempted from the [NLRA]’s coverage,” or there is no relationship between the workers and the purported employer reflecting common-law agency, the workers, by default are “employees” under the NLRA.” *New York University*, 332 N.L.R.B. 1205 (2000).

⁵¹ Adjuncts and part time faculty have been unionizing since the early 1980s. See, *Univ. of San Francisco*, 265 N.L.R.B. 1221 (1982) and *Parsons School of Design*, 268 N.L.R.B. 1011 (1984).

⁵² Daniel B. Klaff & Ronald G. Ehrenberg, *Collective Bargaining and Staff Salaries in American Colleges and Universities*, 57 INDUS. & LAB. REL. REV. 92 (2003).

task of operating the university enterprise has been transferred from the faculty to an autonomous administration, which faces the same pressures to cut costs and increase efficiencies that confront any large industrial organization”⁵³ the academy has become increasingly corporatized. This can be seen in the adoption of policies and practices that expand academic involvement in private market research activities and the implementation of corporate model, including an increased use of contingent faculty.⁵⁴ Particularly in times of budgetary constraints, it is clear that faculty members—like employees in general—are “not aligned with management” regarding wages, hours, and other working conditions that are the subjects of mandatory bargaining under the NLRA.⁵⁵

At the same time, faculty roles and power remain distinct from those of other employees. Universities themselves are similarly unlike entities in the for-profit business world. Academic freedom in both teaching and research continues to be a widely shared norm that allows individual and collective faculty autonomy over their work.⁵⁶ This, along with the norm of shared governance, memorialized in the “Statement on Government of Colleges and Universities” jointly issued by the Association of American University Professors (AAUP), the American Council on Education (ACE), and the Association of Governing Boards of Universities and Colleges (AGB) in 1966, assures faculty a significant role in overseeing the curriculum, instruction, faculty status and aspects of student life related to the educational process at most institutions of higher learning.⁵⁷ While industrial workers rarely determine the type of products their employer will produce, faculty indeed are major players in determining the academic “product” of their institutions.

The NLRA, then, is not a perfect fit. Moreover, an examination of state public employee statutes reveals a careful balancing of individual and public interests. States have not only redefined employees to permit faculty at public institutions to bargain collectively, they have considered other aspects of educational labor relations—ranging from the scope of bargaining to default procedures when collective bargaining fails. Indeed, as set forth in Part III, state laws provide a model that invites a federal law focused on those who labor in the educational world.

PART III: STATE PUBLIC EMPLOYEE LABOR LAWS

The Supreme Court’s ruling in *Yeshiva*, while effectively stopping faculty at most private institutions of higher learning from organizing in the face of administrative opposition, has had little impact on public university unions.⁵⁸ To the contrary, such unions have expanded under state laws that generally take a more positive view of collective bargaining by faculty, teachers and other professionals. Indeed, public education is said to be the most heavily unionized occupation in the

⁵³ *Yeshiva*, 444 U.S. at 703 (Brennan, J. dissenting).

⁵⁴ Lieberwitz, *supra*, note 39 at 301. Lieberwitz notes that university and industry ties were cemented by the enthusiasm with which universities embraced federal legislation giving them the right to patent and license federally funded research results *id.* at 263.

⁵⁵ *See*, Rabban, *supra*, note 38 at 1820.

⁵⁶ Lieberwitz, *supra*, note 40 at 4.

⁵⁷ The full 1966 statement, as revised, is available at <http://www.aaup.org/AAUP/pubsres/policydocs/contents/governancestatement.htm> (last visited October 1, 2009).

⁵⁸ Gordon B. Arnold, THE POLITICS OF FACULTY UNIONIZATION: THE EXPERIENCE OF THREE NEW ENGLAND UNIVERSITIES, 45 (2000).

United States, and the National Education Association (NEA) the largest and arguably the most powerful union in the country.⁵⁹

During the two decades leading up to *Yeshiva*, organizing efforts by what are today the major faculty unions—the American Federation of Teachers (AFT), the Association of American University Professionals (AAUP) and the National Educational Association (NEA)⁶⁰—coincided with the passage of state laws that opened up collective bargaining to public employees. Faculty at four-year institutions began organizing in the mid 1960's,⁶¹ spurred on by the success of teacher's unions and a widely publicized AFT-style United Federation of Teachers strike in New York City in defiance of New York's tough anti-strike laws.⁶² By the end of the 1970's more than 250 units collectively bargained for faculty at colleges and universities across the country.⁶³ Today, more than 250,000 faculty members are unionized in over 500 collective bargaining units.⁶⁴

In 1959, Wisconsin became the first state to adopt legislation to authorize collective bargaining in the public sector.⁶⁵ Three years later, President Kennedy's Executive Order 10988 extended the right to collective bargaining to federal employees of executive agencies, providing a model for state laws.⁶⁶ By 1974, the vast majority of the states had adopted some kind of collective bargaining for public employees.⁶⁷

Today, in California, Illinois, Maine and Washington special legislation addresses the union rights of faculty at state supported colleges and/or universities.⁶⁸ All but a handful of the remaining states have comprehensive legislation that allows public employees to bargain collectively.⁶⁹

⁵⁹ Todd A. Mitchell & Casey D. Cobb, *Commentary, Teacher As Union Member and Teacher as Professional: The Voice of the Teacher*, 220 EDUC. LAW REP. 25 (2007).

⁶⁰ As an affiliate of the AFL-CIO, the AFT was the first to adopt the labor union model. The NEA, founded in 1857 to advance education and the teaching profession began to function as a labor union during the 1960s. Although identifying itself as an independent professional body when it was founded in 1915, the AAUP embraced collective bargaining for the first time in 1972, a decade after it had begun to publish annual "salary surveys." Marjorie Murphy, *BLACKBOARD UNIONS: THE AFT AND THE NEA 1900-1980*, 209-31 (1990).

⁶¹ Faculty at the United States Merchant Marine Academy organized in 1966; those at Bryant College of Business Administration in Rhode Island became the first to unionize at a traditional four-year institution. Slater, *supra* note 3 at 42.

⁶² Murphy, *supra* note 60 at 209-18.

⁶³ Slater, *supra* note 3 at 43.

⁶⁴ See, Kenneth P. Mortimer & Colleen O'Brien Sahre, *THE ART & POLITICS OF ACADEMIC GOVERNANCE*, 32 (2007).

⁶⁵ Joan Weitzman, *THE SCOPE OF BARGAINING IN PUBLIC EMPLOYMENT* 40-41 (1975).

⁶⁶ Slater, *supra* note 3 at 158.

⁶⁷ For a history of the formation of public employee unions see generally, Slater, *supra* note 3.

⁶⁸ CAL. GOV'T. CODE §§3560-3599 (HIGHER EDUC. EMP.-EMP. REL. ACT) (2008); 115 ILL. COMP. STAT. 5/1 TO 5/21 (EDUC. LAB. REL. ACT) (2009); ME. REV. STAT. ANN., tit. 26 §§1020-1036 (UNIV. OF ME SYSTEM LAB. REL. ACT) (2008); WASH. REV. CODE §§ 28B.52, 41.06.150, 41.56.010-90, (2009).

⁶⁹ See, e.g., ALASKA STAT. §§23.40.070 TO 23.40.260 (2009); CAL. GOV'T. CODE §§3500-3524 (2009); CONN. GEN. STAT. §§5-270 TO 5-280 (2008); DEL. CODE ANN. Tit. 19, §§1301-1319 (2009); FLA. STAT. §§ 447.201 to 447.609 (2009); HAW. REV. STAT. § 89-1 to 89-23 (2008); 5 ILL. COMP. STAT. 315/1 to 315/27 (PUB. LAB. REL. ACT) (2009); IOWA CODE §§20.1-20.3 (2008); KAN. STAT. ANN. §§75-4321 TO 75-4338 (2008); MD. CODE ANN., STATE PERS. & PENSIONS §§3-101 TO 3-602 (LEXISNEXIS 2009); MASS. GEN. LAWS ch. 150E, §§1-15 (2009); MICH. COMP. LAWS §§423.201-423.217 (2009); MINN. STAT. §§ 179A-01 TO 179A-40 (2008); MO. REV. STAT. §§105-500 to 105-530 (2009); 1 MONT. CODE

Commonly, those statutory rights extend to public institutions of higher education either explicitly,⁷⁰ or by case law,⁷¹ although Maryland, Missouri and Oklahoma specifically exclude faculty/teacher unions from the collective bargaining rights guaranteed to other public employees.⁷² The state constitutions of Florida, Hawaii, Missouri and New Jersey guarantee the right of public employees to organize.⁷³ Only

ANN. §§39-31-101 to 39-34-101(2007); NEB. REV. STAT. §§81-1369 to 81-1390 (2008); NEV. REV. STAT. ANN. §§288.140-288.280 to 288.140-1371 (2009); N.H. REV. STAT. ANN. §§273-A:1-273-A:17 (2009); N.J. STAT. ANN. §§34.13A:1-34.13A:17 (West 2009); N.M. STAT. §§7E-1 to 7E-26 (2009); N.Y. CIV. SERV. LAW §§200-214 (McKinney's 2009); N.D. CENT. CODE §§34-11.1-01 to 34-11.1-08 (2009); OHIO REV. CODE ANN. §§4117.01-4117.24 (West 2008); OR. REV. STAT. §§243.650-243.782 (2009); 43 PA. CONS. STAT. §§ 1101.101-2301 (2008); R.I. GEN. LAWS §§ 28-9.1-1 to 28-9.7-117 (2009); S.D. CODIFIED LAWS §§3-18-1 to 3-18-17 (2009); VT. STAT. ANN., tit. 3, §§ 901-1007 (2009); WIS. STATS. §§111.80-111.90 (2008). Some state laws cover municipal and/or local employees, but not state employees. *See, e.g.* NEV. REV. STAT. ANN. §288.150(2) (PUB. OFF. & EMP. LAW) (2009); OKLA. STAT. tit.11, §§51-200 to 51-220 (West 2009) (MUNICIPAL EMP. COLLECTIVE BARG. ACT).

A few states extend such rights only to named professions. *See, e.g.*, IDAHO CODE § 33-1271 (teachers) and §§ 44-1801 to 44-1821 (2008) (firefighters); IND. CODE ANN. (COLLECTIVE BARG. FOR TEACHERS) § 20-29-1-1 (West 2007); KY. REV. STAT. ANN. §§345-010 to 345.130 (2009) (firefighters), §§67A.6901-67A.6911 (police and firefighters) and §70.262 (deputy sheriffs); TENN. CODE ANN. §§49-5-601 to 49-5-613 (2009) (teachers); UTAH CODE ANN. §§34-20A-1 to 34-20A-9 (2008) (firefighters); WYO. STAT. ANN. §§27.10-101 to 27.10-109 (2008) (firefighters). *See, also*, OKLA. STAT. tit.11, §§ 51-101- 113 (FIRE AND POLICE ARBITRATION ACT) (West 2009).

⁷⁰ *See, e.g.*, CONN. GEN. STAT. ANN. § 5-270 (a) (“Employer” defined to include any board of trustees of a state-owned or supported college or university and branches thereof); *See, following*: FLA. STAT. § 447.203(2) (2008); MINN. STAT. §179A.03 (15) (b) (2008); N. M. STAT. ANN. § 10-7E-4 (O) (West 2009); OR. REV. STAT. §§243.650(20) (2009); 43 PA. STAT. & CONS. STAT § 1101.301(1) (West 2008); VT. STAT. ANN., tit.3 §902 (2009).

⁷¹ *Bd. of Control E. Mich. Univ. v. Labor Med. Bd.*, 184 N.W.2d 921 (Mich. 1971), “It is well settled that Michigan's institutions of higher education are public employers subject to the provisions of the PERA”; *Regents of the Univ. of Mich. v. Emp't. Rel. Comm.*, 204 N.W.2d 218 (Mich. 1973); *Regents of the Univ. of New Mexico v. N.M. Fed. of Teachers*, 962 P.2d 1236 (N.M.1998) invalidating UNM policy prohibiting faculty unions as inconsistent with state Public Employees Bargaining Act.

⁷² MD. CODE ANN., STATE PERS. & PENSIONS §3-102(b)(9)(iii) (Lexis-Nexis 2009), excluding faculty from covered employees under collective bargaining law; MO. REV. STAT. §105.510 (2009) (Excepting “all teachers of all Missouri schools, colleges and universities” from right to collective bargaining, but allowing representative of faculty to present proposals relative to salaries and other conditions of employment); OKLA. STAT. tit. 51 §203 (West 2009), excepting university faculty from MUNICIPAL EMPLOYEES COLLECTIVE BARGAINING ACT.

⁷³ FLORIDA CONST. Art 1, § 6, “The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees by and through a labor organization, to bargain collectively shall not be denied or abridged. Public Employees shall not have the right to strike.” HAW. CONST. art. XIII, § 2, Persons in public employment shall have the right to organize for the purpose of collective bargaining as provided by law.; *Independence-Nat. Educ. Ass'n v. Independence Sch. Dist.*, 223 S.W.3d 131 (Mo. 2007), holding MO. CONST. art I, §29 providing “Employees shall have the right to bargain collectively,” applies to public as well as private employees; N.J. CONST. art I, § 1, “Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to

Alabama, North Carolina, Virginia, Texas and Wyoming specifically bar collective bargaining by public employee unions generally.⁷⁴ Laws in Arkansas and Louisiana leave recognition of public employee unions to the discretion of the public employer.⁷⁵

A. Purposes and Public Policy of State Public Employee Relations Laws

The specifics of state laws—including the definitions of eligible and exempt public employees, the subjects of collective bargaining, rights/procedures upon impasse and the right to strike—vary widely. There are, however, generally common understandings of the underlying reasons for allowing public sector collective bargaining. In part, the intent of state public-employee labor laws mirrors that of the National Labor Relations Act: to foster peaceful employer-employee relations and to minimize disputes and work stoppages⁷⁶ and to promote improved personnel management.⁷⁷ Not surprisingly state laws concern themselves, as well, with protecting the public by ensuring the orderly and uninterrupted operation of government,⁷⁸ sometimes identifying the public interest as paramount.⁷⁹ Moreover, in at least some states, the value of joint decision-making and employee input into government operations is made explicit.⁸⁰ Importantly, those states that have adopted legislation that specifically addresses collective bargaining in higher education recognize the unique nature of higher education with its long tradition of joint-governance.⁸¹

organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing”.

⁷⁴ See, *Nicols v. Bolding*, 277 So.2d 868 (Ala.1973); N.C. GEN. STAT. § 95-98 (2009), Government contracts with labor unions or organizations of public employees declared illegal; TEX. GOV'T. CODE ANN. § 617.002 (Vernon 2007), collective bargaining by public employees prohibited; VA. CODE ANN. §40.1-57.2 (2009), prohibiting recognition of collective bargaining with state, county, municipal or governmental bodies; *Retail Clerks Local 187 v. Univ. of Wyo.*, 531 P.2d 884, (Wyo. 1975), Absent legislation, no right of public employees to bargain collectively.

⁷⁵ *City of Fort Smith v. Arkansas State Council No. 38*, 433 S.W.2d 153 (Ark. 1968); *AFSCME v City of Benton*, 2005 WL 2244257 (E.D. Ark. 2005); *Louisiana Teachers' Ass'n. v. Orleans Parish School Bd.*, 303 So.2d 564 (La. Ct. App.1974), *writ denied* 305 So.2d 541(La. 1974); La. Op. Atty. Gen., No. 92-432, Oct. 30, 1992. “La. is one of the few states that permits public employee unions although there is no specific statutory authority for them.” *Contra*: *Bd. of Trustees of Univ. of Ky. v. Pub. Emp. Council No. 51*, 571 S.W.2d 616 (Ky. 1978). Board of Tr. of university has no duty to recognize, negotiate or bargain with a union, other authorized bargaining agent, or with individual employees.

⁷⁶ See, e.g. ALASKA STAT. §23.40.070 (2009); CAL.GOV'T CODE §3512 (2008); IOWA CODE (PUB.EMP.REL.) § 20.1 (2008); and N.J. STAT. ANN. § 34:13A-2 (EMP-EMP. REL. ACT) (2009); N.Y. CIV. SERV. LAW § 200. (McKinney's 2009).

⁷⁷ E.g. CAL. GOV'T. CODE § 3512 (2008);

⁷⁸ DEL.CODE ANN. Tit. 19, §§1301(2009); FLA. STAT. §447.201 (2009); IOWA CODE § 20.1 (2008); N.Y. CIV. SERV. LAW § 200 (McKinney's 2009).

⁷⁹ PUBLIC EMP. LABOR RELATIONS ACT at, MINN. STAT. § 179A.01 (2008), “This policy is subject to the paramount right of the citizens of this state to keep inviolate the guarantees for their health, education, safety, and welfare.”

⁸⁰ ALASKA STAT. § 23.40.070 (a) (2009); CAL.GOV'T. CODE § 3512 (West 2009); HAW. REV. STAT. § 89-1 (2008).

⁸¹ WASH. REV. CODE § 28B-52-010 (2009), “It is the purpose of this chapter to promote cooperative efforts by ...procedures... designed to meet the special requirements and needs of public employment

B. State Laws and the NLRA

Not surprisingly, where the state public employee labor laws track the precise language of the NLRA, courts generally rely on judicial interpretations of federal law in interpreting state law. This is not the case, however, where state law deviates from the language or intent of the NLRA⁸² or otherwise invites courts to distinguish interpretations of the NLRA by explicitly recognizing that public employee relations differ from private-employee relations in significant ways.⁸³ Typically, state laws recognize the strength of the public interest in continued government operations, and the budgetary constraints on local and state governments. Some, such as the statute in Indiana go further.

Indiana, for example, prefaces its law empowering collective bargaining by teachers with findings that both recognize the public interest in avoiding major interference with the normal public educational process, and the unique relationship between school employers and teachers, one that is “not comparable to the relationship between private employers and employees for the following reasons”:

(A) A public school corporation is not operated for profit but to ensure the citizens of Indiana rights guaranteed them by the Constitution of the State of Indiana.

(B) The obligation to educate children and the methods by which the education is effected will change rapidly with: (i) increasing technology; (ii) the needs of an advancing civilization; and (iii) requirements for substantial educational innovation.

(C) The general assembly has delegated the discretion to carry out this changing and innovative educational function to the governing bodies of school corporations, composed of citizens elected or appointed under applicable law, a delegation that these bodies may not and should not bargain away.⁸⁴

Some state courts respond to these legislative differences with a willingness to stretch the inclusiveness of their public employee laws in ways that federal courts have not done with the NLRA to allow faculty at public educational institutions to organize to bargain collectively.⁸⁵

in higher education.”

⁸² See, e.g., *County of Cook v. Illinois Labor Relations Bd. Local Panel*, 813 N.E.2d 1107 (Ill. App. Ct. 2004), *app. denied* 824 N.E.2d 283 (2004). Federal cases are of limited use in determining whether employees are managerial employees within meaning of PUBLIC LAB. REL. ACT where Act’s definition of managerial employee is narrower than that employed by United States Supreme Court in interpreting NLRA.

⁸³ See, e.g., KAN STAT. ANN. (PUB. EMP.-EMP. REL.) § 75-4321(a) (2008), “The legislature hereby finds and declares that: (4) there neither is, nor can be, an analogy of statuses between public employees and private employees, in fact or law, because of inherent differences in the employment relationship arising out of the unique fact that the public employer was established by and is run for the benefit of all the people and its authority derives not from contract nor the profit motive inherent in the principle of free private enterprise, but from the constitution, statutes, civil service rules, regulations and resolutions; and (5) the difference between public and private employment is further reflected in the constraints that bar any abdication or bargaining away by public employers of their continuing legislative discretion and in the fact that constitutional provisions as to contract, property, and due process do not apply to the public employer and employee relationship.”

⁸⁴ IND. CODE ANN. (COLLECTIVE BARGAINING FOR TEACHERS) § 20-29-1-1 (West 2007).

⁸⁵ See, e.g., *infra*, note 96 and accompanying text

C. Faculty as Professionals, Supervisors, Managers

In general, states have not erected the major legal barrier to faculty unions, i.e. *Yeshiva's* application of the judicially-created “managerial employee” exclusion from the NLRA to faculty at private institutions. State law permission for private faculty to bargain collectively has come about through a range of approaches—from the careful language of state laws specifically governing higher education⁸⁶ to judicial interpretations of more general language in public employee labor laws.

A handful of states have adopted legislation that clearly identifies university faculty as having collective bargaining rights. In Hawaii, Nebraska and New Jersey, for example, legislative definitions of public sector bargaining units specifically include faculty,⁸⁷ and Illinois does so by administrative rule.⁸⁸ Oregon achieves the same result by barring managerial employees from collectively bargaining, while making clear that “faculty members at a community college, college or university” are excluded from its definition of managerial employees.”⁸⁹ Since they are *not* excluded from collective bargaining as “managers,” Oregon public faculty members thus have the same rights as other public employees. Ohio distinguishes department chairs from other faculty thereby making it clear that ordinary faculty members are not managerial employees.⁹⁰

However, most states laws are less targeted, using general language to permit “public employees” to organize to bargain collectively, and adding a laundry list of categories of employees who are *not* so protected. Most often, those categories (managerial, supervisory, etc.) are defined in the law itself. Legislatures that are most open to public employee bargaining are most likely to adopt narrow statutory definitions of those managers excluded from bargaining rights.⁹¹ Connecticut's

⁸⁶ *Supra*, note 68.

⁸⁷ HAW. REV. STAT. § 89-6 (a) (7) (2008); MINN. STAT. §§ 179A-11 (2008); NEB. REV. ST. § 81-1373 (2008); N.J. STAT. ANN. § 34:13A-5.10 (b.) (1) (2009).

⁸⁸ 80 ILL. ADMIN. CODE § 1135.20 (2009).

⁸⁹ OR. REV. STAT. § 243.650 (16) (2009).

⁹⁰ OHIO REV. CODE ANN. §§ 4117.03-4117.24 (West 2008), “With respect to faculty members of a state institution of higher education, heads of departments or divisions are supervisors; however, no other faculty member or group of faculty members is a supervisor solely because the faculty member or group of faculty members participate in decisions with respect to courses, curriculum, personnel, or other matters of academic policy.”

⁹¹ MASS. GEN. LAWS ch. 150E, § 1 (2009) ([Public] Employees shall be designated as managerial employees only if they (a) participate *to a substantial degree* in formulating or determining policy, or (b) assist to a substantial degree in the preparation for or the conduct of collective bargaining on behalf of a public employer, or (c) have a substantial responsibility involving the exercise of independent judgment of an appellate responsibility not initially in effect in the administration of a collective bargaining agreement or in personnel administration. (effective 2007) (emphasis added); N.Y. CIV. SERV. LAW § 201.7(a) (2009), “Employees may be designated as managerial only if they are persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment”; S.D. CODIFIED LAWS § 3-18-1 (2009), “Public Employee” does not include directors, or chief executive officers of a public employer or major divisions thereof as well as chief deputies, first assistants, and any other public employees having authority in the interest of the public employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other public employees or the responsibility to direct them, or to adjust their grievances, or to effectively recommend such action, if in connection

definitions of “managerial employees,” first added to the state’s public employee laws in 1981, after the decision in *Yeshiva*, and amended several times since then, is typical:

“Managerial employee” means any individual in a position *in which the principal functions are characterized by not fewer than two of the following*, provided for any position in any unit of the system of higher education, one of such two functions shall be as specified in subdivision (4) of this subsection: (1) Responsibility for direction of a subunit or facility of a major division of an agency or assignment to an agency head's staff; (2) development, implementation and evaluation of goals and objectives consistent with agency mission and policy; (3) participation in the formulation of agency policy; or (4) a major role in the administration of collective bargaining agreements or major personnel decisions, or both, including staffing, hiring, firing, evaluation, promotion and training of employees.⁹²

New Mexico’s definition of management would not include faculty who participate in shared governance.⁹³ (“an employee who is engaged primarily in executive and management functions and is charged with the responsibility of developing, administering or effectuating management policies. An employee shall not be deemed a management employee *solely because the employee participates in cooperative decision-making programs on an occasional basis.*”)

Of course, ambiguities in language are left to the courts to be resolved. This is potentially a problem for faculty, whether the ambiguity is caused by a definition of excluded managers that is too vague or general, or by a detailed list of excluded titles that may or may not be seen as “exclusive.” The latter, of course, is what happened when the Supreme Court determined that managers were excluded from the protections of the NLRA, despite the fact that there was no reference to managers in the NLRA’s list of exclusions.⁹⁴ Some state courts take their direction from the *Yeshiva* Court’s interpretation of the NLRA, disallowing faculty at public institutions to bargain on the grounds that they are managerial employees, even if the state statute does not specifically exclude faculty.⁹⁵ Others have found either legislative intent or statutory language to support a narrower definition of “manager” under state law than the one adopted by the Supreme Court in *Yeshiva*.⁹⁶ A middle ground has also been forged by state courts that exclude department chairs as managerial employees, but allow other faculty to collectively bargain.⁹⁷ Of course, general statutory language can be made less ambiguous

with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

⁹² CONN.GEN.STAT. § 5-270 (g) (2008).

⁹³ N.MEX. STAT. ANN. §10-7E-4 (O) (West 2009).

⁹⁴ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

⁹⁵ Iowa, for example, has a list of exclusions similar to the NLRA. IOWA CODE § 20.4 (2008), and it has been similarly interpreted in *State, Dept. of Personnel v. Iowa Pub. Employment Rel. Bd.*, 560 N.W.2d 560 (Iowa 1997), Definition of “supervisory employee” in statute excluding supervisory employees from provisions of statute governing collective bargaining by public employees was taken from NLRA, and federal interpretations of NLRA thus are persuasive as to interpretations of statute; while the long list of exclusions does not include “managerial,” the court relies on federal law to find such an exclusion.

⁹⁶ *See, e.g., School Comm. of Wellesley v. Labor Rel. Comm’n*, (1978) 379 N.E.2d 1077 (Mass. 1978), intent of statutory definition of ‘managerial employees’ precluded from collective bargaining, is “to include as managerial employees *only those with significant responsibilities in decision-making process*”.

⁹⁷ *Miami-Dade Comity Coll. Dist. Bd. of Trustees. v. Florida Pub. Emp. Relations Commission*, 341 So.2d 1054 (Fla.Dist.Ct.App. 1977), finding college chairpersons to be managerial employees.

where the task of identifying managerial/supervisory workers is delegated to an administrative agency, as it is in Maryland,⁹⁸ New Jersey,⁹⁹ and Vermont¹⁰⁰.

The most labor-friendly approach paints with a broad brush to allow public employees to bargain collectively regardless of their status as supervisors or managers. In union-friendly Michigan, for example, the court compared the definition of “public employees” to that of “employee” under the Michigan law regarding private employees. The latter specifically excluded “any individual employed as an executive or supervisory.” Since the public employee law had no similar exclusion, the court found that the public employee law allowed even supervisors to unionize.¹⁰¹

There is little indication that faculty unions at public institutions have led to the kinds of problems anticipated by the majority in *Yeshiva*. In part, this may be due to laws designed to address those concerns. First, some states specifically prohibit managerial and confidential employees from *holding elective* office in an employee organization, which also represents other state employees,¹⁰² thereby preventing managerial employees from dominating the union.

Another common provision is one that guarantees professional employees the right to be represented by a professionals-only bargaining unit.¹⁰³ Toward that end, statutory definitions of professional workers are common. Typically, such definitions emphasize the specialized knowledge and skills and the kind of work (intellectual, non-repetitive, discretionary) done by professionals, and sometimes specifically name teachers or faculty members.¹⁰⁴

D. Scope of Collective Bargaining

Under the NLRA, collective bargaining is mandated for wages, hours and “other terms and conditions of employment.” While some state public employee laws adopt the general language of the NLRA model,¹⁰⁵ others decline to do so. Instead, those states enumerate topics subject to

⁹⁸ See, e.g., MD. CODE ANN., STATE. PERS. & PENSIONS §3-102(a) (11) (Lexis-Nexis 2009), empowering governing board of higher education institutions to define supervisory, managerial or confidential employees.

⁹⁹ N.J.STAT.ANN. 34:13A-5.2 (2009). But see, *N.J.Turnpike Auth. v. AFSCME, Council 73*, 696 A.2d 585 (N.J. 1997), overturning a definition of “managerial employees” by the New Jersey Public Employee Relations Commission as too restrictive in violation of the statute.

¹⁰⁰ VT. STAT. ANN., tit. 27, §§ 902,906 (2009), “Managerial Employee is an individual finally determined by the board as being in an exempt or classified position which requires the individual to function as an agency, department, or institution head, a major program or division director, a major section chief or director of a district operation.”

¹⁰¹ *Int’l Union, United Auto., Aerospace and Agr. Implement Workers of America, v. City of Sterling Heights* 439 N.W.2d 310 (Mich.1989).

¹⁰² See, e.g., CAL.GOV.CODE § 3518.7(2008), Managerial Employees and confidential Employees shall be prohibited from holding elective office in an Employee. organization which also represents “state Employees”.

¹⁰³ See, e.g. CAL. GOV. CODE §3507.3 (2008); MASS. GEN. LAWS Ch. 150E, § 3 (2009); N.H. REV. STAT. ANN. § 273-A: 8 (2009); VT. STAT. ANN. tit. 3, § 907 (2009); *Petition of VSEA, Inc.* 471 A.2d 230 (Vt. 1983).

¹⁰⁴ See, e.g. CAL. GOV’T. CODE §3507.3 (2008); KAN. STAT. ANN. § 75-4322 (d) (2008); 26 ME. REV STAT ANN tit. 26, § 962 (5) (2008); MINN. STAT. § 179A.03 (13) (c) (2008), broad definition then identifies teacher.

¹⁰⁵ ALASKA STAT. § 23.40.250 (2009); CONN.GEN.STAT. §§ 5-271to 5-272 (2008); 115 ILL.COMP. STAT.

collective bargaining, sometimes adding a general clause for permissive bargaining, as Iowa does in allowing “other matters mutually agreed upon.”¹⁰⁶ In recognition of the need of “politically responsible officials to manage public bodies and establish the broad contours of public policy,”¹⁰⁷ many states also adopt a management provision that preserves exclusive public management powers in traditional areas. Kansas law, for example, preserves the right of public employers to, *inter alia*, maintain the efficiency of governmental operation, take actions necessary to carry out the mission of the agency in emergencies, and to determine the “methods, means and personnel by which operations are to be carried on.”¹⁰⁸ Not surprisingly, the catchall phrases calling for negotiation of the “employer’s personnel policies affecting the working conditions of the employees” but not “the general policies describing the function and purposes of a public employer” invite litigation.

State laws specifically authorizing teacher unions often have expanded lists of mandatory¹⁰⁹ or permissible subjects for negotiation bargaining¹¹⁰ and may invite or require¹¹¹ discussion on those matters that are not specifically negotiable. Statutes can be similarly specific in prohibiting bargaining over some subjects that concern teachers.¹¹² Some recurring teacher/faculty concerns—

ANN. 5/4.5 (2009); KAN.STAT. ANN. § 75-4322 (2008); *Van Buren Pub. School Dist. v. Wayne Cir. Judge* 232 N.W.2d 278 (Mich. 1975), “Following the Federal courts' approach, Michigan has adopted a broad view of "other terms and conditions of employment"; MONT. CODE ANN. § 39-31-305 (2007); N.M. STAT. § 10-7E-17 (2009); OR. REV. STAT. § 243.650 (2009).

¹⁰⁶ IOWA CODE § 20.9 (2008).

¹⁰⁷ *Waterloo Educ. Ass'n v. Iowa Pub. Empl't Rel.*, 740 N.W.2d 418, 421 (Iowa 2007).

¹⁰⁸ KAN. STAT. ANN. §75-4326 (2008). *Cf.*, N. M. STAT. §10-7E-6 (2008).

¹⁰⁹ IOWA CODE § 20.9 (2008), mandatory subjects of negotiation include in-service training; MASS. GEN. LAWS ch. 150E, § 6 (2009), class size and workload as subjects of mandatory negotiation; NEV. REV. STAT. ANN. §288.150(2) (Pub. Off. & Emp. Law) (2009), Mandatory subjects for bargaining include: Teacher preparation time, Materials and supplies for classrooms; policies for the transfer and reassignment of teachers.

¹¹⁰ Restrictive interpretation of mandatory bargaining topics in statute does not inhibit voluntary bargaining and agreement on permissive topics. *Iowa City Cmty. Sch. Dist. v. Iowa City Educ. Ass'n*, 343 N.W.2d 139 (Ia.1983).

¹¹¹ IND. CODE ANN. §20-29-6-7 (West 2007) provides: School Employees “shall discuss” but are “not required to bargain collectively, negotiate, or enter written agreements on the following:

- (1) Working conditions, other than those provided in section 4 of this chapter.
- (2) Curriculum development and revision.
- (3) Textbook selection.
- (4) Teaching methods.
- (5) Hiring, promotion, demotion, transfer, assignment, and retention of certificated employees, and changes to any of the requirements set forth in IC 20-28-6 through IC 20-28-8.
- (6) Student discipline.
- (7) Expulsion or supervision of students.
- (8) Pupil/teacher ratio.
- (9) Class size or budget appropriations....

¹¹² *E.g.*, MICH. COMP. LAWS § 423.215 (2009), Prohibited subjects of bargaining include, among others: setting the starting day for the school year; whether or not to provide or allow interdistrict or intradistrict open enrollment opportunity in a school district; whether or not to contract to organize and operate public school academies; granting of a leave of absence to an employee of a school district to participate in a public school academy; the use of volunteers in providing services at its schools; the

procedures for tenure and promotion, for example—would seem to be clearly “terms and conditions of employment;”¹¹³ others, such as teacher preparation and in-service training,¹¹⁴ workload,¹¹⁵ and evaluation,¹¹⁶ are more contentious. Of growing importance to faculty at colleges and universities is the issue of ownership class materials, patents, and other forms of intellectual property, a subject not mentioned in any state statutes on the scope of bargaining but one that has become increasingly contested as the value of patents and copyrighted distance-learning materials increases.¹¹⁷ Other contentious educational issues whose negotiability has been litigated include class size,¹¹⁸ teacher preparation and in-service training, curriculum changes.¹¹⁹ When not

use of experimental or pilot programs and staffing of experimental or pilot programs; the use of technology to deliver educational programs and services and staffing to provide the technology; OR. REV. STAT. §243.650 (2009), “For school district bargaining, “employment relations” *excludes* class size, the school or educational calendar, standards of performance or criteria for evaluation of teachers, the school curriculum, reasonable dress, grooming and at-work personal conduct requirements respecting smoking, gum chewing and similar matters of personal conduct, the standards and procedures for student discipline, the time between student classes, the selection, agendas and decisions of 21st Century Schools Councils...”

¹¹³ *See, e.g.,* Kansas Bd. of Regents v. Pittsburg State Univ. Ch. Kan.NEA, 667 P.2d 306 (Kan.1983), salary allocation, retrenchment procedures, and right to review personnel files and criteria, procedures or methods by which candidates for promotion are identified and for screening candidates for summer employment were mandatorily negotiable; other aspects of promotions, summer employment, tenure or retrenchment were not.

¹¹⁴ *See, e.g.,* Kenai Peninsula Borough School District v. Kenai Peninsula Educ. Ass’n, 572 P.2d. 416 (Alaska 1977), class size, pupil-teacher ratio, teacher evaluation of administrators, school calendar, election of instructional materials, teacher preparation and planning and representation on school board advisory committees are nonnegotiable subjects.

¹¹⁵ *See, Grand Rapids Community College Faculty v. Grand Rapids Community College*, 609 N.W.2d 835 (Ct.App.Mich. 2000), cap on number of total teach hours faculty could accept as overload was mandatory subject of bargaining; *Metropolitan Tech. Comty. Coll. Educ. Ass’n v. Metropolitan Tech. Comty College*, 281 N.W.2d 201 (Neb. 1979), instructional contact hours not negotiable because involves managerial policy.

¹¹⁶ *Central Michigan Univ. Faculty Ass’n v. Central Michigan Univ.* (Mich.1978), use of student evaluations in evaluating teaching effectiveness is not “within educational sphere” hence mandatory subject of CB; *Appeal of Pittsfield School District*, 744 A.2d 594 (N.H. 1999) (new teacher evaluation plan negotiable).

¹¹⁷ *Cf., Pittsburg State Univ. v. Kansas Bd of Regents*, 122 P.3d 336 (Kan. 2005); *Rutgers Council of AAUP Chs.s v. Rutgers the State Univ.*, 884 A.2d 821 (N.J. Sup. Ct. App.Div.2005); *Prof. Staff Congress-CUNY v. New York State Public Employment Relations Bd.*, 799 N.Y.S.2d 7 (N.Y. App.Div. 2005).

¹¹⁸ Several courts have found class size to be a mandatory subject of negotiation. *See, e.g.,* *West Hartford Educ. Ass’n v. DeCourcy*, 295 A.2d 526 (Conn. 1972); *Decatur Bd. of Education v. Illinois Educational Labor Relations Bd.*, 536 N.E.2d 743 (Ill.App.Ct. 1989); *Boston Teachers Union, Local 66 v. School Comm. of Boston*, 350 N.E.2d 707 (Mass. 1976); *Clark County School Dist. v. Local Gov’t Emp. Mgmt. Relations Bd.*, 530 P.2d 114 (Nev. 1974).

¹¹⁹ *State System of Higher Education v. Ass’n. Pennsylvania State College & University Faculties*, 834 A.2d 1235 (Pa. Commw. Ct. 2003), implementation of new chemical biotechnology curriculum without approval of Association was management prerogative, and not subject to collective bargaining.

addressed by state legislation, the negotiability of school calendars has been litigated by both K-12 teachers and faculty in higher education.¹²⁰

Some states have relied on the political arena to decide touchy issues by legislating in areas that might otherwise be collectively bargained¹²¹, or by delegating such power to a Board of Regents or another state agency, a practice upheld by the United States Supreme Court.¹²²

E. Impasse and the Right to Strike

The most powerful tool available to labor is the right to strike. The NLRA generally protects this right, with some limitations, for private employees. Public employees, including public faculty, on the other hand, are most frequently denied the right to strike.¹²³

States generally identify the “public” as a key stakeholder and reference “the public interest” to justify limitations on the right to strike even in otherwise labor-friendly states like California, Massachusetts, Michigan, New York and Pennsylvania.¹²⁴ Still, Hawaii, Illinois and Oregon permit public employees after notice of intent, generally after impasse has been reached.¹²⁵ Alaska, Minnesota

¹²⁰ *Montgomery County Educ. Ass’n, Inc. v. Bd. of Educ. of Montgomery County*, 534 A.2d 980 (Md. 1987), no permissive subjects of collective bargaining in Maryland; calendar not mandatory subject; *Univ. Educ. Ass’n v. Regents of the Univ. of Minn.*, 353 N.W.2d 534 (Minn. 1984), academic calendar negotiable because not inherent management policy; *Rutgers v. Troy*, 774 A.2d. 476 (N.J. 2001), change from calendar year appointments to academic year appointments was negotiable; *West Central Educ. Ass’n v. West Central School Dist.* 49-4, 655 N.W.2d. 916 (S.D. 2002), School calendar is an inherently managerial subject that is not a mandatory subject for collective bargaining; *Racine Education Assn. v. Wisconsin Employment Relations Comm.*, 571 N.W.2d 887 (Ct. App. Wis. 1997), year round school calendar not subject to mandatory bargaining.

¹²¹ Nevada, for example, empowers the Board of Regents to prescribe the course of study, commencement, duration of terms, and length of vacation for the state’s higher education system. *NEV. REV. STAT. §396.440* (2008).

¹²² *Central State Univ. v. AAUP, Central State Univ. Chapt.*, 526 U.S. 124 (1999), upholding right of Ohio Board of Regents to develop standards for instructional work loads to be adopted by Boards of Trustees of state universities without bargaining.

¹²³ *See, e.g., AFSCME v. City of Benton*, 2005 W.L. 2244257 (E.D. Ariz. 2005); *Potts v. Hay*, 318 S.W.2d 826 (1958), and *City of Ft. Smith v. Arkansas State Council No. 38*, 433 S.W.2d 153 (Ark.1968); *CONN. GEN STAT ANN. § 10-153e*; *DEL. CODE ANN. tit.14, § 4016* (2009), *DEL. CODE ANN. tit.19, §1316* (2009); *FLA.STAT. §447.505 (Pub. Emp. Law)* (2009); *IOWA CODE §20.12* (2008); *ME. REV. STAT. ANN. tit. 26, § 1027* (2008), prohibits work stoppages, slowdowns, strikes, and the blacklisting of the university, academy or community colleges for the purpose of preventing them from filling employee vacancies; *Head v. Special School Dist. No.1*, 182 N.W.2d 887 (Minn. 1971), *cert. den.* 404 U.S. 886 (1971), Public employees do not have a common-law right to strike and can require the right only through legislation; *MISS. CODE ANN. § 25-1-105* (2008); *NEV.REV. STAT. § 288.230* (2009); *XXII Rev.Stat.Ann.of State of NH 273-A: 13*; *95 N.C. GEN. STAT. ANN. § 95-98.1* (2009); *S.D. CODIFIED LAWS 3-18-10* (2009); *TENN. CODE ANN. § 49-5-609* (2009); *TEX. GOV’T. CODE ANN. § 617.003* (Vernon 2007); *VA.CODE ANN. §4-1-55* (2009); *WASH. REV. CODE § 28B.52.078* (2009); *WIS.STATS. §111.89* (2008).

¹²⁴ *MASS. GEN. LAWS, CH. 150E § 9A* (2009); *Labor Relations Com’n v. Chelsea Teacher’s Union*, 507 N.E.2d 1051 (Mass. 1987); *MICH. COMP. LAWS § 423.202* (2009), strikes by teachers and other public employees prohibited; *N.Y. CIV. SERV. LAW § 210* (McKinney’s 2009); *43 PA. CONS. STAT. § 215.2* (2008).

¹²⁵ *HAW. REV. STAT. § 89-12* (2008), Strikes by members of bargaining units involved in an impasse

and Ohio classify public employees into different groups and prohibit all strikes only by those who provide essential services (police, fire, corrections).¹²⁶ In Alaska educational institutions are considered “services the public can live without for only a limited time” so that courts may enjoin a strike that poses harm to public health, safety or welfare.¹²⁷ In Ohio, strikes by teachers while permitted, can only be enjoined upon a finding that they present a clear and present danger to public health, safety or welfare.¹²⁸

Where there is no right to strike, states generally provide for mediation and/or fact-finding/arbitration procedures in the event of impasse.¹²⁹ The nature of such impasse procedures vary. In some cases they may be invoked by either party.

In some states, the parties must accept the findings of the arbitrator.¹³⁰ Where findings are not binding, the parties may nonetheless be pressured to accept the resolution by provisions that require findings to be made public after a certain period of time.¹³¹ Unions will feel additional pressure in states where the employer’s last best offer may be implemented¹³² or the existing contract—without raises or “steps” continues in effect until the parties get past the impasse.¹³³ Nebraska law provides for a more balanced approach, calling for a Special Master to hold hearings and choose the “most reasonable final offer on each issue in dispute,” taking into account relevant factors, including comparable worth.¹³⁴

In several states final resolution—after mediation and/or special magistrate has failed to satisfy both parties—explicitly rests with the legislative body.¹³⁵ Iowa’s approach to impasse honors collective bargaining by directing the parties to negotiate an impasse procedure as the first step in fulfilling their duty to bargain. If they fail to do by statutory deadlines a legislated default procedure—mediation and binding arbitration—kicks in,¹³⁶

F. Special Provisions Relating to Higher Education

Several states recognize students as important stakeholders in higher education, and provide for that status by allowing a student representative to attend and observe meetings between the public

after good faith attempts to resolve the dispute and exhaustion statutory proceedings have been exhausted, are lawful when a contract has expired, provided ten-day notice of strike is given; 115 ILL. COMP. STAT. ANN. 5/13 (2009); 80 ILL. ADMIN. CODE § 1130.40, requiring 10-day Notice of Intent to Strike (2009); Davis v. Henry, 555 So.2d 457 (La. 1990); OR.REV.STAT. § 243.726 (2009).

¹²⁶ ALASKA STAT. §23.40.200 (2009); MINN. STAT. §§179A.18-179A.19 (2008); OHIO REV. CODE ANN. §4117.15 (West 2008).

¹²⁷ ALASKA STAT. §23.40.200 (2009).

¹²⁸ OHIO REV. CODE ANN. §4117.15 (West 2008).

¹²⁹ ME. REV.STAT.ANN tit. 26, §565 (2008); MONT. CODE ANN. §39-31-307 (2007); N.H. REV. STAT. ANN. § 273-A:12 (2009); N.M.STAT.ANN. § 10-7E-18 (2009).

¹³⁰ See, e.g., OR. REV. STAT §243.742 (2009).

¹³¹ N.H. REV, STAT. ANN § 273-A:12 (2009).

¹³² MICH. COMP.LAWS §423.207a (2009).

¹³³ N.H. REV, STAT. ANN § 273-A:12 (2009)

¹³⁴ NEB. REV. STAT. §81-1382 (2008).

¹³⁵ FLA. STAT. § 447.403 (2009), either party may declare impasse after a “reasonable period of negotiation” and secure a mediator or submit unresolved issues to a special magistrate, (effective 2007); See, also: N.H. REV, STAT. ANN. § 273-A:12 (2009); N.Y. CIV. SERV. LAW §209(f) (McKinney’s 2009).

¹³⁶ IOWA CODE §§ 20.19-20.21 (2008). See also, KAN. STAT. ANN. § 75-4332 (2008).

employer and the faculty union.¹³⁷ In a similar vein, some laws governing K-12 teachers explicitly recognize the unique nature of education by inviting teachers and other stakeholders are invited to engage in shared decision making.¹³⁸

Part IV: CONCLUSION: TOWARD A NATIONAL EDUCATIONAL LABOR LAW

For the past half-century, state public employee laws have served as a laboratory for collective bargaining for faculty in higher education. The fear of dire consequences has not been warranted, evidenced in part by the expansion of such rights at the University of Wisconsin in the spring of 2009.¹³⁹ The time has come for the federal government to adopt a National Educational Labor Law that would extend protections to faculty at private institutions. The parameters of such a law could draw on the experience under state laws, by defining covered employees to include both full and part time faculty, tenured and contingent, as well as graduate teaching and research assistants, and medical interns.¹⁴⁰ In academia, there is little need for the line represented by *Yeshiva's* “managerial employee” exclusion, given the evidence that shared faculty governance can co-exist with collective bargaining.

The scope of collective bargaining in education ought to be broader than the “terms and conditions of employment” that governs the NLRA. Academic policies that impact on the quality of education—from class size to the implementation of technological innovations in the classroom; from the academic calendar to faculty workload—ought to be determined at least in part by those whose deeply rooted professional interest is in furthering quality education and scholarship, the faculty. Traditionally, this is recognized by those who give more than lip service to the value of shared academic governance, and ought to be central to any National Educational Labor Law by opening academic policy to collective bargaining. In “mature institutions,” where the collective faculty truly plays that role, the faculty collective bargaining agent will often agree to relegate such decisions to a Faculty Senate or Assembly.

¹³⁷ ALASKA STAT. § 23.40.245 (2009); CAL. GOV'T. CODE §3597 (2008); FLA. STAT. § 447.301 (5)(2009), student representatives have a right to comment to the parties and the public upon the impact of proposed agreements on the educational environment, but have no voting or veto power); ME. REV. STAT. tit. 26, §1024-A6 (2008) (student representative to meet and confer; MONT. CODE ANN. §39-31-302 (2007), student's right to confer with both board of regents and faculty bargaining agent, observe, and participate in caucuses as part of the public employer's bargaining team; OR. REV. STAT. §243.778 (2009), student representatives' right to meet and confer with the union and university; to attend and observe meetings and to comment in good faith upon matters under consideration.

¹³⁸ See, e.g., DEL. CODE ANN. tit.14, §§ 801-802 (2009).

¹³⁹ Deborah Ziff, *UW Faculty, Staff Can Unionize; Right Will Come With a Price Tag*, WIS. STATE J., July 3, 2009.

¹⁴⁰ Much has been written about unionization of graduate students, interns, and contingent faculty. See, Robert A. Epstein, *Breaking Down the Ivory Tower Sweatshops: Graduate Student Assistants and Their Elusive Search for Employee Status on the Private University Campus*, 20 ST. JOHN'S J.LEGAL COMMENT. 157 (2005); Gerilynn Falasco, *The Graduate Assistant Labor Movement NYU and Its Aftermath: A Study of the Attitudes of Graduate Teaching and Research Assistants at Seven Universities*, 21 HOFSTRA LAB. & EMP. L. J. 753 (2004); Neal H. Hutchens & Melissa B. Hutchens, *Catching the Union Bug: Graduate Student Employees and Unionization*, 39 GONZ. L. REV. 105 (2003-2004); Sara J. Bannister, *Note, Low Wages, Long Hours, Bad Working Conditions: Science and Engineering Graduate Students Should be Considered Employees Under the National Labor Relations Act*, 74 GEO. WASH. L. REV. 123 (2005).

Evolving ideas of labor's role make this less radical than it might at first seem. In the 1990s, under President Bill Clinton, government agencies were encouraged to build more cooperative relationships via labor-management partnerships,¹⁴¹ although revoked by President Bush, there is discussion of reinstating labor-management partnerships under President Obama.¹⁴² The willingness to do so would seem to signal openness to less hierarchal decision-making not unlike shared academic governance.

Finally, the law would need to address impasse procedures. The Iowa model of giving the parties the opportunity to negotiate their own impasse procedure would best recognize the diversity of college cultures. In the absence of such agreement, however, a default procedure is needed. In recognition of the gains to faculty represented by legal protection for a more meaningful voice in actually setting academic policy, it would not be unreasonable to ask faculty to give up something. An impasse procedure that included mandatory mediation followed by mandatory arbitration—rather than legal recognition of a right to strike—would seem to be a fair compromise. To ensure that there is no stacking of the deck to favor either faculty or administration, however, provisions should invite equal consideration of proposals from both sides of the table.

¹⁴¹ Executive Order 12871 (1993).

¹⁴² Joe Davidson, *Labor Management Partnerships Poised to Revive*, THE WASHINGTON POST, Apr. 15, 2009; A-17 http://111.washingtonpost.com/wp-dyn/content/article/2009/04/14/AR2009041403008_pf (viewed 5/2/2009).