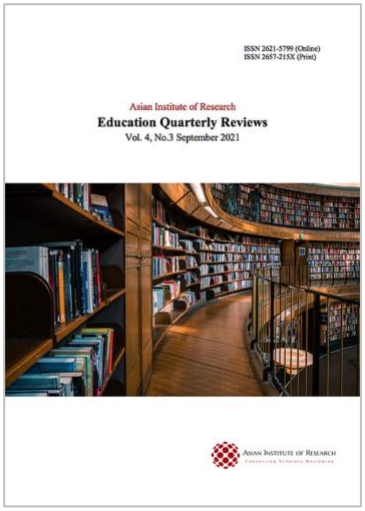

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A Tale of Seven Cases – Faculty Unions in the United States – From Yeshiva To Elon: Is It Time to Review Yeshiva and the Positions of Church-Sponsored Colleges and Universities As Well?

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Abstract
This article is a summary discussion of the main issues faced by faculty at private, often church-sponsored, universities who sought to be represented by a union in collective bargaining with their employers. The discussion begins by tracing the origins of the rule that faculty at private universities are managers and not employees under the aegis of the National Relations Act in the Supreme Court case of Yeshiva University. The summary then follows developments over the years up to the most recent decision of the National Labor Relations Board that sanctioned the efforts of adjunct professors at Elon University to seek union representation. In examining these two book-end cases, the article discusses issues relating to the effect of the religion clauses of the First Amendment in the context of the National Labor Relations Board's shifting views on the topic. Last, the authors discuss unionization in the context of church-sponsored colleges and universities. Is it now time for the Supreme Court to review its seminal decision in Yeshiva University and for church-sponsored colleges and universities to rethink their positions as well?

Keywords: National Labor Relations Act, National Labor Relations Board, Managerial Employees, Religious Exemption, Contingent Faculty, Adjunct Faculty

1. Introduction

The National Labor Relations Act of 1935, which created the National Labor Relations Board of NLRB, was enacted b Congress to "protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy" (National Labor Relations Board, 2021). In order to safeguard employees' rights to organize and to determine whether to have a union as their bargaining agent, the NLRB recognizes that an "appropriate bargaining unit is any group of two or more employees who share a community of interest and may reasonably be grouped together for purposes of collective bargaining (Society for Homan Resource Management, 2021). The NLRB ordinarily has full discretion to determine what is an appropriate unit for each

purpose. Daykin (1959) notes that "the statutory provisions in section 9(b) of the Taft-Hartley Act give to the National Labor Relations Board the power or the exclusive jurisdiction to determine the appropriate unit for collective bargaining purposes when such a decision is required in a representation case or an unfair labor practice case brought before it." In 2019, the NLRB's decision in *The Boeing Company* (2019) clarified a three-step approach for determining an appropriate bargaining unit under the traditional community-of-interest test.

- "First, the NLRB will determine whether the proposed unit has an internal community of interest.
- Next, the NLRB will weigh the interests of those within the proposed unit against the shared and distinct interests of those being excluded. The excluded employees must have meaningfully distinct interests in the context of collective bargaining that outweigh the similarities to unit members.
- Finally, the NLRB will take into account the Board's established guidelines for specific industries (Faegre Drinker, 2019).

The NLRA, however, excludes certain individuals, "such as agricultural laborers, independent contractors (Rosen, Bloom, & Ryan, 2019), supervisors and persons in managerial positions, from the meaning of 'employees.'" Some of these exclusions were very controversial when they were enacted into the law (see Churgin, 1999; Perea, 2010). In addition, the NLRB, as a matter of policy, has excluded from collective bargaining employees who act in a confidential capacity to an employer's labor relations officials.

1.1. Definitional Considerations

Under the NLRA:

- A *supervisor* is defined as someone who uses *independent judgment* to make personnel decisions or to recommend personnel decisions. Personnel decisions include "hiring, promoting, transferring, rewarding and terminating employees" (see, e.g., *American League of Professional Baseball Clubs and Association of National Baseball League Umpires* (1969); Hudson, 2012; Mayer & Shimabukuro, 2012)
- A *managerial employee* is defined as someone who makes, executes, and exercises independent judgment about management policies (Germana, 1991).
- The National Labor Relations Act defines professional employee as "any employee engaged in work predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work" (see Bixler, 1985).
- A *confidential employee* is defined as someone who assists and acts in a confidential capacity to the management personnel who make and implement labor relations policies, or as someone who has regular access to confidential information about future bargaining strategy or changes that the employer anticipates may result from collective bargaining (see Brown & Kerrigan, 1995, citing Meeks v. Grimes, 1985).

  The California Higher Education Employer-Employee Relations Act (HEERA) (1979) defines a confidential employee as "any employee who is required to develop or present management positions with respect to meeting and conferring or whose duties normally require access to confidential information which contributes significantly to the development of those management positions. Positions usually are considered confidential if the employee: a) regularly types grievance responses and maintains the grievance files; or b) is directly involved with system-wide or campus meet and confer sessions, including participating in management caucuses to evaluate information and determine the campus' position."

- Other employees who are excluded from the bargaining unit include domestic workers, people employed by a parent or a spouse, and public employees.

Are faculty members "employees" within the meaning of the NLRA or Wagner Act, eligible to form a union (Herbert & Apkarian, 2017), or they excluded from being able to form a union on the ground that they are

"managerial"? The answer may depend on the faculty member's employer or perhaps even the composition of the NLRB.

2. The *Yeshiva* Case: Managerial or Professional Employees?

The seminal case in the discussion of faculty unions at private American universities is *National Labor Relations Board v. Yeshiva* (1980) (see Denslow, 1981; Metchick & Singh, 2004). The Faculty Association (faculty union) at Yeshiva University filed a representation petition with the NLRB, seeking certification as the bargaining agent for the full-time faculty members of 10 of thirteen schools of Yeshiva University. Yeshiva University is a private university, located primarily in New York City.

Yeshiva University (2021) on its website self-describes as follows:

> "Yeshiva University has grown from a small yeshiva offering some secular education to Jews on the Lower East Side of Manhattan in 1886 to a prestigious, multifaceted institution that integrates the knowledge of Western civilization and the rich treasures of Jewish culture."
>
> "Yeshiva University today supports three undergraduate schools (including honors programs and Torah studies programs), seven Yeshiva graduate and professional schools, renowned affiliates such as the Albert Einstein College of Medicine and the Rabbi Isaac Elchanan Theological Seminary, a diverse multitude of scholarly centers and institutes, and several libraries, a museum and a university press, located on campuses both in the United States and Israel."

The University opposed the petition on the ground that *all* of its faculty members were *managerial or supervisory* personnel, and hence not "employees" within the meaning of the National Labor Relations Act (Metchick & Singh, 2004; Guiler, Kelly, & Mills, 2018). Under the procedures of the NLRB, the petition was heard by a hearing officer (e.g., DiGiovanni, 2014) "who held hearings over a period of five months, generating a voluminous record." The evidence adduced at the hearings showed that a central administrative hierarchy at Yeshiva serves all of the University's schools, with University-wide policies formulated by the central administration upon approval of the University Board of Trustees, whose members, other than the University President, hold no administrative positions at the University.

> "An Executive Council of Deans and administrators makes recommendations to the President on a wide variety of matters. University-wide policies are formulated by the central administration with the approval of the Board of Trustees, and include general guidelines dealing with teaching loads, salary scales, tenure, sabbaticals, retirement, and fringe benefits. The budget for each school is drafted by its Dean or Director, subject to approval by the President after consultation with a committee of administrators. The faculty participate in University-wide governance through their representatives on an elected student-faculty advisory council. The only University-wide faculty body is the Faculty Review Committee, composed of elected representatives who adjust grievances by informal negotiation and also may make formal recommendations to the Dean of the affected school or to the President. Such recommendations are purely advisory."

However, the individual schools within the University are "substantially autonomous," and the faculty members at each school effectively determine its curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules. The hearing officer determined that the "overwhelming majority of faculty recommendations" relating as to faculty hiring, tenure, sabbaticals, termination, and promotion are implemented by the University.

Summarily rejecting the University's contention that its faculty members were managerial, the Board held, however, that the faculty members were *professional employees* under Section 2(12) of the Act, entitled to the Act's protection because "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."

Acting upon the findings of the hearing officer, a three-member panel of the Board granted the union's petition in December 1975, and directed an election in a bargaining unit consisting of all full-time faculty members at the affected schools. The unit included Assistant Deans, senior professors, and department chairmen, as well as associate professors, assistant professors, and instructors. Deans and Directors were excluded from the bargaining unit as managerial.

After the union won the election and was certified as the bargaining agent for the unit, the University refused to bargain with the union, “reasserting its view that the faculty are “managerial.” The union filed an unfair labor practice charge (see McDowell & Huhn, 1976; Guerin, 2021) against the University. In the subsequent unfair labor practice proceedings, the Board refused to reconsider its determination made in the representation hearing and ordered the University to bargain with the union, The Board sought enforcement of its order in the Court of Appeals for the Second Judicial Circuit, which denied the petition.

The Court of Appeals agreed that the faculty members were professional employees under Section 2(12) of the Act. However, the Court of Appeals found that the Board had ignored "the extensive control of Yeshiva's faculty" over academic and personnel decisions, as well as its "crucial role . . . in determining other central policies of the institution." The Court of Appeals determined that the faculty are in effect “substantially and pervasively operating the enterprise," holding that the faculty are endowed with "managerial status" sufficient to remove them from the coverage of the Act.

2.1. The Decision of the United States Supreme Court

The United States Supreme Court granted certiorari and held that the University's full-time faculty members were managerial employees, excluded from the Act's coverage. In so doing, the Supreme Court found the following:

(a) “The authority structure of a university does not fit neatly into the statutory scheme, because authority in the typical ‘mature’ private university is divided between a central administration and one or more collegial bodies. The absence of explicit congressional direction does not preclude the Board from reaching any particular type of employment, and the Board has approved the formation of bargaining units composed of faculty members on the ground that they are ‘professional employees’ under Section 2(12) of the Act. Nevertheless, professionals may be exempted from coverage under the judicially implied exclusion for ‘managerial employees’ when they are involved in *developing and implementing employer policy”* (*Yeshiva*, pp. 679-682 (italics added)).

> The Supreme Court wrote (*Yeshiva*, pp. 683-684):
>
> “Managerial employees are defined as those who ‘formulate and effectuate management policies by expressing and making operative the decisions of their employer.' These employees are ‘much higher in the managerial structure’ than those explicitly mentioned by Congress, which ‘regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary."
>
> “Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.”

(b) "Here, application of the managerial exclusion to the University's faculty members is not precluded on the theory that they are not aligned with management because they are expected to exercise 'independent professional judgment' while participating in academic governance and to pursue professional values, rather than institutional interests. *The controlling consideration is that the faculty exercises authority which in any other context unquestionably would be managerial, its authority in academic matters being absolute.* The faculty's professional interests—as applied to governance at a university like Yeshiva which depends on the professional judgment of its faculty to formulate and apply policies—cannot be separated from those of the institution, and thus it cannot be said that a faculty member exercising independent judgment acts primarily in his own interest, and does not represent the interest of his employer" (*Yeshiva,* pp. 682- 690 (italics added)).

(c) "The deference ordinarily due the Board's expertise does not require reversal of the Court of Appeals' decision (see Kopp, 2018; Hessick, 2019). This Court respects the Board's expertise when its conclusions are rationally based on articulated facts and consistent with the Act, but here the Board's decision satisfies neither criterion."

The core rationale for the decision of the United States Supreme Court relating to the role that faculty play at Yeshiva University may be summarized as follows:

> "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" (*Yeshiva*, p. 687).

The decision of the Court of Appeals was thus affirmed, establishing the principle that faculty members at a private university were *de facto* managerial and therefore were not entitled to the protections afforded to employees under the National Labor Relations Act with respect to forming collective bargaining units.

3. *Pacific Lutheran:* A Further Exemption

In *Pacific Lutheran University and SEIU* (2014), the NLRB was called upon to once again wade into the debate about the organizing rights of certain private-sector faculty members (Parker & Park, 2015). The Board was called upon to resolve two important questions: First, whether certain institutions and their faculty members are exempted from coverage of the Act due to their religious activities or affiliations? Second, whether, in fact, faculty members at these institutions are managerial, who are excluded from protection of the Act?

The profile of Pacific Lutheran University (2021a) reveals the following:

> "Pacific Lutheran University educates 3,100 students for lives of thoughtful service, leadership, inquiry and care. We purposefully integrate the liberal arts, professional studies, and civic engagement through 40+ majors and 50+ minors. Students take part in student-faculty research, internships, lab work, field studies and numerous other hands-on learning experiences, and work closely with professors who are experts in their fields."
>
> "Located in Tacoma, WA, PLU is the closest university to Mt. Rainier National Park and a short drive from Seattle, with multiple opportunities for internships at world-class organizations, and many ways to enjoy the beautiful Pacific Northwest. As a national leader in global education, PLU was the first American university to have classes on all seven continents and over half of

> all students study abroad. Graduates are prepared for success – 90% of recent graduates were either employed or accepted into graduate school within six months of graduating."

Although not found on the University's "official" website, the following information may prove helpful in understanding the religious character of the University (Pacific Lutheran, 2021b):

> **"**Pacific Lutheran University (PLU) is a private Lutheran university in Parkland, Washington. It was founded by Norwegian Lutheran immigrants in 1890. PLU is sponsored by the 580 congregations of Region I of the Evangelical Lutheran Church in America. PLU has approximately 3,100 students enrolled. As of 2017, the school employs approximately 220 full-time professors on the 156-acre woodland campus."
>
> "PLU consists of the College of Arts and Sciences (including of the Divisions of Humanities, Natural Sciences, and Social Sciences), the School of Arts and Communication, the School of Business, the School of Education and Kinesiology, and the School of Nursing."

The case began when certain faculty members at Pacific Lutheran University petitioned for a union representation election. Pacific Lutheran objected to holding the election, claiming that some or all of the faculty members were *managers* and therefore ineligible for union representation. The NLRB Regional Director found in favor of the union and found that the faculty in question did not possess sufficient "managerial authority" to be precluded from unionizing. Pacific Lutheran objected to the determination made by the Regional Director and asked the full NLRB to overturn the ruling of the Regional Director.

In March of 2014, the AAUP submitted an *amicus brief* urging the NLRB to consider the full context of university governance issues when determining whether faculty at private colleges and universities are managers (adapted from *Pacific Lutheran*, 2014). The AAUP brief pointed to significant changes in university "hierarchical and decision-making models" since the United States Supreme Court's decision in *Yeshiva University*, which held that faculty at Yeshiva University were managerial employees and thus ineligible to unionize. The AAUP brief urged the NLRB to consider factors such as:

- The nature of university administration hierarchy in terms of governance;
- The extent to which the administration makes academic decisions based on market-based considerations;
- The degree of consultation by the administration with faculty governance bodies;
- Whether the administration treats faculty recommendations as advisory rather than as effective recommendations;
- Whether the administration routinely approves nearly all faculty recommendations without independent administrative review; and
- Whether conflict between the administration and the faculty reflects a lack of alignment of administration and faculty interests (*Pacific Lutheran*, 2014).

In its decision, the NLRB ruled that it had jurisdiction over the petitioned-for faculty members, even though they were employed at a religious institution, and also decided that the faculty members in question were not managers.

3.1. Is There a Larger Question? A Reprise of Catholic Bishop (1979)

The question of whether faculty members at religious institutions are subject to the jurisdiction and coverage of the NLRA has been long-debated. The decision of the United States Supreme Court's in *National Labor Relations Board v. Catholic Bishop* (1979) has served as the foundation for any analysis (Gaul, 2007; Serritella, 1980; Stabile, 2013).

In *Catholic Bishop*, the National Labor Relations Board (NLRB) had certified unions as bargaining agents for lay teachers in schools operated by the Catholic Bishop of Chicago, a corporation sole, and another group of schools operated by the Diocese of Fort Wayne-South Bend, Inc., both of which refused to voluntarily recognize or bargain with the unions. The NLRB issued cease-and-desist orders against respondent religious entities, finding that it had properly assumed jurisdiction over the schools. The exercise of jurisdiction was asserted to be in conformity with the policy of the Board to decline jurisdiction only when schools are "completely religious" not just "religiously associated," as the NLRB found to be the instant case, because the schools taught secular as well as religious subjects.

In interpreting the meaning of *Catholic Bishop*, the Board had established a two-part test for determining jurisdiction. First, whether "as a threshold matter, [the entity or institution] *holds itself* out as providing a religious educational environment"; and if so, then, second, whether "it holds out the petitioned-for faculty members as performing a *specific role* in creating or maintaining the school's religious educational environment."

The respondents challenged the NLRB orders in the Seventh Circuit Court of Appeals. The Seventh Circuit denied enforcement, holding that the NLRB standard "failed to provide a workable guide for the exercise of its discretion," and perhaps more importantly, that the NLRB's assumption of jurisdiction was foreclosed by the Religion Clauses of the First Amendment. The United State Supreme Court granted certiorari.

The United States Supreme Court held that schools operated by a church or other religious institution which taught both religious and secular subjects are not within the jurisdiction granted by the National Labor Relations Act, and the NLRB was therefore without authority to issue the orders against respondents. The Court noted:

> "We find the standard itself to be a simplistic black or white, purported rule containing no borderline demarcation of where `completely religious' takes over or, on the other hand, ceases. In our opinion the dichotomous `completely religious - merely religiously associated' standard provides no workable guide to the exercise of discretion. The determination that an institution is so completely a religious entity as to exclude any viable secular components obviously implicates very sensitive questions of faith and tradition" (citing *Wisconsin v. Yoder* (1972, p. 1118).

The Court reasoned:

(a) "There would be a significant risk of infringement of the Religion Clauses of the First Amendment if the Act conferred jurisdiction over church-operated schools" (citing *Lemon v. Kurtzman* (1971).

(b) "Neither the language of the statute nor its legislative history discloses any affirmative intention by Congress that church-operated schools be within the NLRB's jurisdiction, and, absent a clear expression of Congress' intent to bring teachers of church-operated schools within the NLRB's jurisdiction, the Court will not construe the Act in such a way as would call for the resolution of difficult and sensitive First Amendment questions."

3.2. Applying Catholic Bishop (see Benedict, 2013)

Pacific Lutheran University and those who supported its position argued that only the threshold question of whether the university was a *bona fide religious institution* was relevant. In that case, argued Pacific Lutheran, the Act would not apply to *any faculty members* of the institution. The Board had responded that this argument "overreaches because it focuses solely on the nature of the institution, without considering whether the petitioned-for faculty members act in support of the school's religious mission." Instead, the Board had established a standard that examines whether faculty members play a role in supporting the school's religious environment.

In so doing, the Board acknowledged concerns that inquiry into faculty members' individual duties carried out in religious institutions may involve examining the institution's religious beliefs, which could intrude impermissibly

on the institution's First Amendment rights. To avoid the negative implications of this inquiry, a new standard would focus on what the institution *"holds out"* with respect to faculty members. The Board explained, "We shall decline jurisdiction if the university 'holds out' its faculty members, in communications to current or potential students and faculty members, and the community at large, as performing a specific role in creating or maintaining the university's religious purpose or mission," such as integrating the institution's religious teachings into coursework or engaging in religious indoctrination. This new standard would not be satisfied by general statements that faculty are to "support religious goals," or that they must adhere to an institution's commitment to diversity or academic freedom. The faculty members must perform a specific religious function.

Applying this standard to Pacific Lutheran University, the Board found that while the University held itself out as providing a religious educational environment, the petitioned-for faculty members were *not* performing a specific religious function. Therefore, the Board asserted jurisdiction and then turned to the question whether certain of the faculty members were managerial employees.

This second question arises squarely from the Supreme Court's decision in *Yeshiva*, where the Court found that in certain circumstances, faculty members may be considered "managers" who would thus be excluded from the protections of the Act. The Board noted that the application of *Yeshiva* previously involved an "open-ended and uncertain set of criteria" for making decisions regarding whether faculty were or were not managers.

In addition, in explaining the need for a new standard, the Board specifically highlighted, as had the AAUP in its *amicus brief*, the increasing corporatization (possibly meaning secularization) of the university. The Board stated, "Indeed our experience applying *Yeshiva* has generally shown that colleges and universities are increasingly run by administrators, which has the effect of concentrating and centering authority away from the faculty in a way that was contemplated in *Yeshiva*, but found not to exist at Yeshiva University itself. Such considerations are relevant to our assessment of whether the faculty constitute managerial employees."

3.3. The New Standard

In seeking to create a simpler and more direct framework for determining whether faculty members served as managers, the Board explained that under the new standard, "where a party asserts that university faculty are managerial employees, we will examine the faculty's participation in the following areas of decision making: *academic programs, enrollment management, finances, academic policy, and personnel policies and decisions.*" The Board will give greater weight to the first three areas, as these are "areas of policy making that affect the university as whole." The Board "will then determine, in the context of the university's decision- making structure and the nature of the faculty's employment relationship with the university, whether the faculty actually *control* or *make effective recommendations* over those areas. If they do, we will find that they are managerial employees and, therefore, excluded from the Act's protections."

The Board emphasized that to be found as managers, and thus not eligible to form a union, faculty must *in fact* have actual *control or make effective recommendations* over policy areas. This requires that "the party asserting managerial status must prove actual—rather than mere paper—authority. . . . A faculty handbook may state that the faculty has authority over or responsibility for a particular decision-making area, but it must be demonstrated that the faculty exercises such authority *in fact*." Proof requires "specific evidence or testimony regarding the nature and number of faculty decisions or recommendations in a particular decision-making area, and the subsequent review of those decisions or recommendations, if any, by the university administration prior to implementation, rather than mere conclusory assertions that decisions or recommendations are generally followed." Perhaps most importantly, the Board defined "*effective*" as meaning that "recommendations must almost always be followed by the administration" or "routinely become operative without independent review by the administration."

4. Then Came *Bethany College and Thomas Jorsch and Lisa Guinn* (2020)

> **"Bethany College,** established by Swedish Lutheran immigrants in 1881, is a college of the Evangelical Lutheran Church in America. The mission of Bethany College is to educate, develop, and challenge individuals to reach for truth and excellence as they lead lives of faith, learning, and service" (e.g., Bethany College, 2021).

The membership of the NLRB had dramatically changed with the election of Donald Trump (Hogler, 2020)—as did the position of the NLRB's General Counsel (Starich, 2018). The reconstructed Republican majority on the NLRB determined that it would not exercise jurisdiction over the faculty of Bethany College because exercising jurisdiction would inevitably involve an inquiry into its religious tenets in violation of the First Amendment to the Constitution. The decision effectively overruled the NLRB's 2014 ruling in *Pacific Lutheran,* as "defying the risks of First Amendment infringement rather than avoiding them" and called its previous two-part, *holding-out test* "fatally flawed," involving "an impermissible inquiry into what does and what does not constitute a religious function," and into the religious tenets of the institution that would result in a significant risk that the First Amendment rights of the employer might be infringed. The Board noted that that even the *inquiry* leading to findings about the good faith of the positions asserted by university administrators, not merely the conclusions reached, would impinge on the Religion Clauses of the First Amendment and give rise to *entangling church-state relationships* (see Macri, 2014).

4.1. Great Falls: Reprised and Reaffirmed

Instead, the Board reaffirmed the three-part, "bright-line" test established (again under a Republican majority) in *University of Great Falls v. NLRB* (2002) in order to determine whether it may assert jurisdiction.

1. Does the institution "hold itself out" to the public as a religious institution?
2. Is the institution nonprofit? and
3. Is the institution religiously affiliated?

The NLRB summarized its views:

> "Because the Supreme Court has clearly decided this matter, and because we find the rationale set forth in *Catholic Bishop* and in the circuit court decisions interpreting that seminal case to be persuasive, we now hold that the Board does not have jurisdiction over matters concerning teachers or faculty at *bona fide* religious educational institutions."

The manner in which the *bona fides* of a religious institution may be tested by the NLRB in the wake of *Bethany College* would now be restricted to the three-part *Great Falls* "bright-line" test.

The Court took specific note of the mission statement of the University of Great Falls [which was later renamed as the University of Providence] which:

> "… does not just speak of general morality, but rather of 'offer[ing] students a foundation for actively implementing Gospel values and the teachings of Jesus within the Catholic tradition.' The mission statement further explains that the University 'provides students with the opportunity to obtain a liberal education for living and making a living,' '[a]s an expression of the teaching mission of Jesus Christ.' To that end, the University 'offers students a foundation for actively implementing Gospel values and the teachings of Jesus within the Catholic tradition.' It fills its campus, indeed, every classroom and office with Catholic icons, not merely as art, but it claims as an expression of faith."

Later, in *Carroll College v. NLRB* (2009), a case involving a private Roman Catholic-affiliated college located in Helena, Montana, the Court invalidated an NLRB order requiring the college to engage in collective bargaining as patently beyond the Board's jurisdiction as found in *Great Falls*.

In its decision in *Bethany College,* the NLRB identified what it felt was the flaw in the reasoning in the Board's decision reached in *Pacific Lutheran.* Despite finding that the University held itself out as "creating a religious educational environment," the NLRB had invented an additional *holding-out test* under which the institution must also show that "it holds out the petitioned-for faculty members themselves as performing a specific role in creating or maintaining the college or university's religious educational environment, as demonstrated by its representations to current or potential students and faculty members, and the community at large."

Interestingly, the dissent in *Pacific Lutheran* by Board members Philip Miscimarra and Harry Johnson, who had been nominated by President Trump, presaged the Board's later reversal in *Bethany College*. Members Miscimarra and Johnson had objected to the decision of the Board and stated that the test enunciated by the majority "not only fails to avoid the First Amendment questions, it plows right into them at full tilt" by demanding that the NLRB "judge the religiosity of the functions that the faculty perform." Ambash (2015) noted: "The board's majority decision, issued in the face of powerful dissents, will inevitably spark controversy and ongoing litigation both about the legality of NLRB intrusion into the operation of religious institutions and the proper interpretation of the 'managerial' status of faculty under the U.S. Supreme Court's historic Yeshiva University decision."

5. … And *Duquesne University* (2020)

The case arose from the refusal of Duquesne University to recognize a group of adjunct faculty who were teaching in the McAnulty College of Liberal Arts who had been granted the right to form a union. After the faculty overwhelmingly voted in favor of the union, Duquesne refused to deal with or recognize the union, asserting that requiring it to do so would constitute "government entanglement" in its religious activities in violation of the First Amendment to the United States Constitution (*Duquesne University v. NLRB,* 2020).

Here is the Duquesne University description taken from "Colleges of Distinction" (2021):

> "Duquesne University is a private Catholic institution in the center of Pittsburgh, Pennsylvania, a vibrant and safe city that is home to a welcoming environment and plenty of professional opportunities. With a tight-knit community, students can choose from over 250 recognized student organizations, access one-on-one tutoring and other engaging resources, and make lifelong friendships."
>
> "The University Core Curriculum incorporates the liberal arts into each students' intellectual and ethical development in order to expand their self-understanding and knowledge of the world. Students are exposed to a wide range of experiences and opportunities with regional corporations, high-tech businesses, health systems, and nonprofits that recognize the exceptional quality of Duquesne's academic programs. Students can also work with their professors and take part in transformative research opportunities that impact local and global communities alike."

The NLRB applied the test it had established in *Pacific Lutheran*, inquiring whether Duquesne "holds out the petitioned-for faculty members themselves as performing a specific role in creating or maintaining the college or university's religious educational environment," and particularly, whether the faculty were "held out as performing a specific religious function" (citing *Pacific Lutheran,* pp.1410-1411). The NLRB found that other than faculty in the Department of Theology, Duquesne did not hold out its adjunct faculty as performing a "specific religious function." The Board determined that Duquesne committed an unfair labor practice by refusing to bargain with the union. Duquesne appealed the decision of the NLRB to the District of Columbia Circuit Court of Appeals.

On January 28, 2020, the United States Court of Appeals for the District of Columbia Circuit issued a decision finding that adjunct faculty did not have the right to unionize at a religiously affiliated university under the NLRA. The core issue before the Circuit Court was whether in applying the NLRA to the adjunct faculty of Duquesne University, the NLRB and the courts would risk interfering in the religious affairs of Duquesne, thereby violating the Religion Clauses of the First Amendment. In reaching its decision, the NLRB had employed the test it had enunciated in *Pacific Lutheran University*, and found there was no danger of an unconstitutional entanglement because the faculty in question did not perform a specific role in creating or maintaining Duquesne's religious educational environment. However, in a 2 to 1 decision, the District of Columbia Circuit rejected the *Pacific Lutheran* test, and applied the narrower bright-line test enunciated in *Great Falls*. The Court of Appeals held that the NLRB did not have jurisdiction and therefore the adjunct faculty were not entitled to unionize under the NLRA.

The Court once again reflected on the rule established in *NLRB v. Catholic Bishop of Chicago* where the Court held that the Board could not assert jurisdiction over the petitioned-for lay teachers because to do so would create a "significant risk" that First Amendment religious rights would be infringed.

In dissent, Judge Pillard pointed out that the NLRB's approach in *Pacific Lutheran* appropriately balanced the desires of the university to maintain its religious autonomy and the expression of the adjunct faculty to organize under the protection of the NLRA.

Have the Courts in fact provided that "bright line" that it had intended (see Garvey, 2020), or would the issue recur depending on the presentation of new facts or perhaps based upon the changing composition of the NLRB itself?

6. One More "Wrinkle": "Part Time" or "Contingent" Faculty: *Elon University* (2021)

> "Elon University is a private university in Elon, North Carolina. Founded in 1889 as Elon College, Elon is organized into six schools, most of which offer bachelor's degrees and several of which offer master's degrees or professional doctorate degrees."
>
> "Elon College was founded by the Christian Connection, which later became a part of the United Church of Christ. An institution that for many years enrolled mostly North Carolina residents, Elon began to enroll significant numbers of students from the mid-Atlantic states in the mid-1970s, and began to improve its academic standards for admission. By the start of the 21st century, about 68 percent of Elon's students came from out-of-state and were only accepted if they met high academic standards. Elon became known as a selective university and, by 2013, 82% of incoming students were from out of state."
>
> "Elon is no longer affiliated with the United Church of Christ. Elon's mission statement states that the university "embraces its founders' vision of an academic community that transforms mind, body, and spirit and encourages freedom of thought and liberty of conscience," and emphasizes its commitment to "nurture a rich intellectual community characterized by student engagement with a faculty dedicated to excellent teaching and scholarly accomplishment.""

On February 19, 2021, the NLRB modified its test for determining whether faculty at private colleges and universities should be excluded as managerial employees from the right to union representation under the National Labor Relations Act. The case turned on the nuances of "shared governance."

In *Elon University and SEIU* (2021) the NLRB, ironically still with a Republican majority, unanimously affirmed the decision of a Regional Director that the petitioned-for non-tenure-track faculty members ("contingent employees") constituted an appropriate bargaining unit under the NLRA. Contrary to the University's assertion, the Board held that the non-tenure-track faculty members, consisting principally of adjunct professors, are not managerial employees who did not possess collective bargaining rights under the

Act (see Herbert & Apkarian, 2017). The Board determined "that the University failed to meet its burden of establishing that the petitioned-for non-tenured faculty members serve on any of the University's shared governance committees that oversee academic programs, enrollment management policies, personnel policies, or financial considerations" (Dailey, Porzio, & Salvatore, 2021). According to Olson (2009), "Shared governance is not a simple matter of committee consensus, or the faculty's engaging administrators to take on the dirty work, or any number of other common misconceptions. Shared governance is much more complex; it is a delicate balance between faculty and staff participation in planning and decision-making processes, on the one hand, and administrative accountability on the other."

The Board found that, for a number of these shared governance committees, adjunct faculty members were explicitly restricted from participating. In those limited circumstances where adjunct faculty could at least in theory serve on a collegial faculty body, Elon failed to show that adjunct faculty in fact served on these committees. In addition, the Board found that the adjunct faculty members were not "structurally included" in Elon's core managerial bodies where the contingent or short-term nature of their employment status (in many cases, no more than on a semester-to-semester basis) makes service on the shared governance committees problematic. As Gottschalk, Jones, and Moschel (2021) stated: "Under that framework, managerial status of a subgroup of faculty will be determined by examining two distinct inquiries. "First, 'whether a faculty body exercises effective control' over areas of decision-making…, and second, 'whether, based on the faculty's structure and operations, the petitioning subgroup is included in that managerial faculty body.'" If both inquiries are satisfied, then the faculty members in the subgroup (adjunct or contingent faculty) "constitute managerial employees, regardless of whether they exert majority control within specific faculty bodies."

In adopting the "structural inclusion" test, the Board noted the deficiencies of the "subgroup majority" status test of *NLRB v. USC* (2019) (Hamilton & Dumbacher, 2019), including that a "bright-line rule solely focused on committee and assembly makeup incentivizes strategic division of faculties, ignores the frequent fluctuations in committee memberships, and fails to account for instances when faculty who clearly hold managerial authority and shared interests with the university may be in the minority on committees." Moreover, the Board found that subgroup majority status test could not be reconciled with the Supreme Court's decision in *NLRB v. Yeshiva University,* because the test ignores the possibility that subgroups may share common interests and may participate together as a body on issues relevant to managerial status (Gottschalk, Jones, & Moschel, 2021).

Applying the new standard, the Board in *Elon* held that the employer did not meet its burden in proving that petitioned-for *non-tenure-track faculty members* were structurally included in its faculty bodies and, as such, failed to establish that they were managerial employees excluded from the Act.

7. Concluding Comments: What These Cases May Mean for Private Universities

The decision in *Elon,* although limited to non-tenure track, adjunct, and other contingent faculty, recognizes the fact that colleges and universities increasingly rely upon the services of these employees (Metchick & Singh, 2004) in delivering instruction to students. Various reports indicate that between 70 to 77% of all university courses are now been taught by faculty on non-tenure tracks (e.g., Flaherty, 2020). Flaherty (2020) further reported that "Colleges and universities are increasingly granting adjuncts' requests for yearlong or multiyear contracts, but 41 percent of adjuncts still said they struggle with job security and don't know if they'll have a teaching job until one month prior to the start of the academic year. Three-quarters of professors said they only get semester-to-semester or quarter-to-quarter contracts." Flaherty (2020) also reported that most adjuncts earn less than $3,500 per course which means that "nearly 25 percent of all adjunct faculty members rely on public assistance, and 40 percent struggle to cover basic household expenses."

In revisiting the criteria adopted by the Board in its *Elon* decision, is it possible that there may be a shift in the NLRB's treatment of full-time tenured faculty as well (see Julius & DiGiovanni, 2019)? In the larger sense, *Elon* reinforces the principle that the NLRB will continue to exclude full-time tenured faculty and adjunct or

other contingent faculty from the right to organize based on their "shared interests" with their respective institutions and their "structural inclusion" in critical university committees.

Interestingly, newly-appointed Democratic NLRB Chair Lauren McFerran concurred in the decision in *Elon* with her three Republican colleagues, Marvin Kaplan, William Emanuel, and John Ring. In the concurrence, McFerran did draw a distinction between tenured and tenure-track faculty and "contingent" faculty members (adjunct and other non-tenure track faculty) (see Halverson-Cross, 2017) because contingent faculty are often "poorly integrated into university structures and communities." Might these same criteria be applied to full-time tenured and tenure-track faculty as well?

Clearly, institutions seeking to avoid the unionization of adjuncts or other non-tenure track faculty should weigh the feasibility of more fully integrating these individuals into shared governance committees *and* to assessing the status of all faculty under the seminal *Yeshiva* decision. Although unintended, based on *Elon*, private universities should assess their "shared governance" decision-making structures and processes, including the composition of those bodies. Under *Yeshiva*, this analysis should address whether faculty members exercise *actual control* or exercise a "*significant influence*" over university decision-making.

There is one more consideration. The list of Catholic colleges and universities which have voluntarily recognized faculty unions is miniscule. [See Table I]. Concerning unionization efforts at Catholic colleges and universities for their adjunct faculty (see Moreland, 2019), the Catholic Labor Network (2021) raises an interesting point and writes:

> "In recent years adjunct faculty in colleges across the United States — who have been assigned increasing amounts of the college teaching load — have sought to organize in unions. A growing number of Catholic colleges have recognized unions of adjunct instructors, but a handful are refusing to recognize the unions their adjuncts have chosen and invoking first amendment religious freedoms to seek exemption from the Labor Board's jurisdiction. Whatever one thinks of the merits of their legal case, Church teaching is perfectly clear on workers' right to form unions and bargain collectively through representatives of their choice. One would expect that an institution with a strong commitment to its Catholic identity would recognize and bargain with the union chosen by their employees WHETHER OR NOT the NLRB has jurisdiction. The position these schools have adopted — we are TOO CATHOLIC to be subject to US Labor Law but NOT CATHOLIC ENOUGH to adhere to honor Catholic social teaching on principle alone — arguably courts scandal."

In refusing to recognize and then bargain collectively with a faculty union by university administrators at Catholic Universities (and perhaps at other church-sponsored or religiously affiliated institutions of higher education (Carroll, 2018) that share in similar views on social issues), although permissible under Court and NLRB precedents, does such a stance fly in the face of *Catholic Social Teaching* (U.S. Conference of Catholic Bishops, 2021)? Professor McCartin (2018) of Georgetown University offers this perspective:

> "American Catholic higher education finds itself increasingly ensnared in a contradiction. On the one hand, Catholic colleges and universities, 'born from the heart of the church,' continue to play an indispensable role in the promotion of Catholic Social Teaching. At the same time, institutions of Catholic higher education are fighting to survive and remain relevant amid rapacious economic trends that are reorganizing all of higher education — secular and Catholic alike — in ways that contradict essential principles of Catholic Social Teaching, such as the dignity of labor and the centrality of solidarity to a just social order. Put more bluntly, Catholic colleges and universities find themselves increasingly entangled in what Pope Francis has called 'an economy of exclusion and inequality, an economy that 'kills.'"

It may be time to reevaluate *Yeshiva and the position of church-sponsored colleges and universities—most especially those affiliated with the Catholic Church*—in light of the new realities as well.

Table 1: Catholic Higher Education Institutions with Collective Bargaining, By State

California
- University of San Francisco, San Francisco
  - Faculty, AFT Local 4269
- St. Mary's College of California, Moraga
  - Non-Tenured Faculty, SEIU 1021
- Notre Dame de Namur, Belmont
  - Non-Tenured Faculty, SEIU 1021

Connecticut
- Fairfield University, Fairfield
  - Faculty, AAUP

D.C.
- Georgetown University
  - Adjunct faculty, SEIU 500
- Trinity Washington University
  - Adjunct Faculty, SEIU Local 500

Florida
- St. Leo University, St. Leo
  - Faculty, AFT/NEA United Faculty of Florida St. Leo

Illinois
- Loyola University Chicago
  - Adjunct Faculty, SEIU Local 73
- St. Xavier University*
  - Tenured Faculty, Independent Union

Massachusetts
- Laboure College, Milton MA
  - Faculty, NEA-Massachusetts Teachers' Association

Michigan
- University of Detroit, Mercy
  - Faculty, NEA/Michigan Education Association

Missouri
- St. Louis University, St. Louis MO
  - Adjunct Faculty, SEIU Local 1

New York
- Fordham University
  - Adjunct Faculty, SEIU Local 200
- St. Francis College, Brooklyn
  - Adjunct Faculty, AFT 7965
- St. John's University, Queens
  - Faculty, AAUP
- D'Youville College, Buffalo
  - Faculty, AAUP
- LeMoyne College, Syracuse
  - Adjunct Faculty, AFT 7967

Pennsylvania
- University of Scranton, Scranton
  - Faculty, AAUP

Vermont
- St. Michaels College, Colchester
  - Adjunct Faculty, SEIU 200

Source: The Catholic Labor Network, https://catholiclabor.org/catholic-employer-project/catholic-higher-education/

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