Yeshiva Update: Administration 8, Union 0

Michael A. Foley

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The *NLRB v. Yeshiva University* decision, in which the Supreme Court ruled that faculty at Yeshiva University were managerial employees and, hence, not subject to the protections of the National Labor Relations Act ("Act" or "NLRA"), is now more than four years old. Since the decision, numerous labor relations cases involving faculty have been decided by using *Yeshiva* as precedent. The greatest fear concerning *Yeshiva*—that it sounded the death knell for faculty unionization in higher education—has virtually come to pass. Only in the most unusual of circumstances are faculty able to organize with the support of the National Labor Relations Board ("NLRB" or "Board"). In those cases in-
volving well-developed, 4-year traditional colleges, the record is clear: in light of Yeshiva, university administrations have prevailed eight times without suffering a loss. However, Yeshiva may not be the only reason in the 1980's for the decline of faculty to organize successfully for purposes of collective bargaining.

The purpose of this Article is threefold: (1) to review the Yeshiva decision and the Court's rationale (sections I and II); (2) to critically analyze the majority opinion (section III); and (3) to indicate the nature, scope and impact of the decision by discussing recent cases based on Yeshiva (sections IV and V).

I

On February 20, 1980, the Supreme Court decided Yeshiva by a 5-4 margin, holding that the faculty members of Yeshiva University are not covered by the Act because of their managerial status. The immediate and direct effect of the decision was to force the Board to re-examine the 10-year period (1970-1980) during which its interpretations of the scope of the Act had widened to include private, non-profit institutions of higher education. During this period, the application of the Act to such institutions was justified on two grounds: (1) higher education impacts significantly on interstate commerce; and (2) the distinction between commercial and non-commercial activities is no longer clear.

Justice Powell delivered the majority opinion, in which Chief Justice Burger, and Justices Stewart, Rehnquist, and Stevens joined. Justice Brennan, with whom Justices White, Marshall, and Blackmun joined, dissented.

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5 444 U.S. at 679. Yeshiva University opposed the effort by the Yeshiva University Faculty Association to become the bargaining agent for the full-time faculty members at 10 of the University's 13 schools. Id. at 674-75. A hearing officer appointed by the NLRB held hearings at which evidence was proffered showing that the Board of Trustees possessed ultimate authority while policy formulation lay in the hands of the central administration subject to the approval of the Trustees. Id. at 675. Faculty participation in university-wide government occurs through representatives on an elected student-faculty advisory council. Id. at 675-76. The Faculty Review Committee, which is the only university-wide faculty body, makes purely advisory recommendations to the dean of a specific school or to the president. Id. at 676. Faculty within each school make decisions regarding academic policy. Id. In addition, faculty involvement extends to making "recommendations to the Dean or Director in every case of faculty hiring, tenure, sabbaticals, termination and promotion." Id. at 677. Some faculties make binding decisions affecting the matriculation, expulsion, and graduation of individual students. Id. Others have resolved issues relating to teaching loads, student absenteeism, tuition and enrollment levels and location of a school. Id.

6 For a clarification of the factors upon which the Board based its decision to extend the
Thus, by the time the Yeshiva faculty sought to unionize, the Board had extended the Act’s coverage to full-time faculty members, consistently holding during the 1970’s that such personnel are neither supervisory nor managerial and hence are protected by the Act. The Board, then, following these earlier decisions, rejected the claim of managerial status and permitted a vote at Yeshiva University based on a bargaining unit composed of regular full-time faculty members, department chairmen, and assistant deans, but excluding deans and part-time or nontenure-track teachers.

Adhering to the position that the personnel in the designated bargaining unit were supervisory and managerial and hence not protected by the Act, Yeshiva refused to bargain. Claiming unfair labor practices, the Board ordered the University to bargain and sought enforcement in the Second Circuit Court of Appeals. The Second Circuit refused to enforce the Board’s order, concluding that the faculty played an important role in determining many integral policies of the University and thus should be accorded managerial status. The Supreme Court granted certiorari and

Act to private, nonprofit colleges and universities, see Cornell Univ., 183 N.L.R.B. 329, 330-33 (1970). In Cornell, the first case to extend the Act’s coverage to such institutions, the court based its jurisdiction on a need for federal regulation of union organization on college campuses. The Board noted the lack of state activity in the area and held that the need for a uniform system of dispute resolution warranted the extension of its jurisdiction. Id. at 334. See, e.g., Northeastern Univ., 218 N.L.R.B. 247, 250 (1975) (faculty decisionmaking on collective basis illustrates faculty’s non-managerial status); University of Miami, 213 N.L.R.B. 634, 634 (1974) (collective decisionmaking exercised in faculty’s interest, not employer’s); New York Univ., 205 N.L.R.B. 4, 5 (1973) (infrequent exercise of supervisory authority does not align faculty with management).

A principle focus in Yeshiva, to be discussed shortly, see infra notes 18-58 and accompanying text, is whether faculty members are managers.

* Yeshiva Univ., 221 N.L.R.B. 1053, 1054 (1975), rev’d, 582 F.2d 686 (2d Cir. 1978), aff’d, 444 U.S. 672 (1980).

* Full-time faculty include those “appointed to the University in the titles of professor, associate professor, assistant professor, instructor, or any adjunct or visiting thereof, department chairmen, division chairmen, senior faculty and assistant deans.” Id. at 1057. The prerequisites for “full-time faculty” are that they possess appointment letters from the president, and are eligible for tenure and sabbatical leave. See id.

10 Id.


12 NLRB v. Yeshiva Univ., 582 F.2d 686, 703 (2d Cir. 1978), aff’d, 444 U.S. 672 (1980). The Second Circuit found that the faculty at Yeshiva University were not merely “exercising individual professional expertise,” but instead were “substantially and pervasively operating the enterprise.” 582 F.2d at 698. The court emphasized that the faculty exercised control over courses taught, placement of teachers, teaching hours required, and the rank, salary, and tenure status of faculty members. Id. In addition, Judge Mulligan, writing for the court, stressed that full-time faculty participate in the determination of the institution’s central
upheld the Second Circuit decision.\textsuperscript{15}

\section*{II}

Yeshiva is a decision that offers two clear and distinct positions. In this section, these two conflicting views (the majority and minority opinions) will be discussed.

The majority noted at the outset that prior to 1970\textsuperscript{16} the prevailing view regarding collective bargaining in higher education had been that university faculties could not organize for collective bargaining under the Act since "they were employed by non-profit institutions which did not 'affect commerce.'"\textsuperscript{17} The Court also stated that "the authority structure of a university does not fit neatly within the statutory scheme,"\textsuperscript{18} and that the scope of the Yeshiva decision is limited to consideration of managerial rather than supervisory status.\textsuperscript{19} The context, then, within which a conclusion would be reached was clear; first, what is meant by "managerial" employees, and, second, does the university's authoritative structure entail faculty members serving managerial functions? The Court's first task, then, was to define and clarify the term "managerial employee."

Citing NLRB v. Bell Aerospace Co.,\textsuperscript{20} Justice Powell, writing for the majority, defined managerial employees as "those who 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.'"\textsuperscript{21} More specifically, managerial employees must be in alignment with management and must exercise discretion within policy guidelines established by the employer.\textsuperscript{22}
Clearly, the determination of employees as part of management is a judgment call. In making that call, the Board had relied on four criteria:

(1) Is the individual a “professional” within the Act’s section 152(12) definition?
(2) To the extent that he exercises authority which in other contexts might be considered managerial, does he exercise that authority collectively with his peers rather than individually?
(3) Does he, in exerting that authority, act in his own interest rather than that of management?
(4) Are his decisions subject to reversal by a higher authority?²³

Affirmative responses to these questions indicate that employees are rank and file rather than managerial.²⁴ In Yeshiva, the Board, after considering these criteria, contended that although the faculty “appear to be exercising managerial authority,” they are, in fact, “merely performing routine job duties.”²⁵ The controlling consideration was the third, or so-called “alignment with management” criterion.²⁶ According to the Board, faculty members of Yeshiva University were not aligned with management because they exercised “independent professional judgment” in academic areas, and because they were not expected to be guided by management policies or evaluated as to how well those policies were effectuated.²⁷ The Board asserted that this “independence” removed the danger of divided loyalty (a major goal of the Act)²⁸ and therefore eliminated the need to apply the managerial exclusion.²⁹

The Yeshiva majority responded to the Board’s arguments by stating that the four criteria employed in faculty cases had “transformed . . . into a litany to be repeated in case after case: (i) faculty authority is collective, (ii) it is exercised in the faculty’s own interest rather than in the interest of the university, and (iii) final authority rests with the board of trustees.”³⁰ This “litany” had no basis in law³¹ and, the Court noted, the employer’s established policies.

Id.  
²³ Casey, Judicial Interference with the NLRB: Yeshiva University and the Definition of “Managerial,” 14 AKRON L. REV. 591, 603 (1981); see also Recent Development, Full-Time Faculty Held Not To Be “Employees” Under the National Labor Relations Act, 47 FORDHAM L. REV. 437, 440-41 (1978) (discussing derivation of criteria for classification).
²⁴ Casey, supra note 23, at 603.
²⁵ 444 U.S. at 683-84.
²⁶ Id. at 684-85.
²⁷ Id. at 684.
²⁸ Id.
²⁹ Id.; see NLRB v. Bell Aerospace Co., 416 U.S. 267, 290 n.20 (1974) (Board may exclude employees from bargaining unit if their participation in union would result in “conflict of interest with their job responsibilities”).
³⁰ 444 U.S. at 685 (citations omitted).
³¹ See Recent Development, supra note 23, at 442-43; Recent Decision, A University
Board "ha[d] never explained the reasoning connecting the premise with the conclusion" that in each case the faculty were not managerial employees.35

Due to this patent weakness, the Court quickly dismissed the first and third of the aforementioned Board arguments.35 Justice Powell observed that the Board, after acknowledging that these rationales were not legal rationales, had abandoned both in its oral arguments before the Court.34 Furthermore, the Court noted that the third point—that faculty members are not managers because final authority is vested in the board of trustees—was simply unsound since "[u]ltimate authority . . . has never been thought to be a prerequisite to supervisory or managerial status. Indeed, it could not be since every corporation vests that power in its board of directors."35 As one commentator has noted, "[t]he NLRB and the courts have never held that to be a managerial employee one must be at the very pinnacle of corporate power. The exclusion applies to persons exercising managerial, although not necessarily final, authority."36

The primary focus of the majority decision rests on a finding that the faculty exercises authority in the university rather than in their own interest, and that, if it were unionized, its loyalty would be divided between employer and union.37 The fundamental argument advanced by the Court in support of this view is as follows:

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

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Faculty with a Record of Managerial Activity May Be Managerial Personnel and Therefore Excluded From the Coverage of the National Labor Relations Act, 13 Ga. L. Rev. 313, 316 (1978).
35 444 U.S. at 685 n.19.
34 Id. at 685.
34 Id. Justice Powell observed that "[a]lthough the Board has preserved the [first and third] points in footnotes to its brief, it no longer contends that 'collective authority' and 'lack of ultimate authority' are legal rationales." Id. at 685 n.20.

Furthermore, the first argument was correctly rejected since it rests on the unsound rationale that managerial authority cannot be undertaken by groups. The Supreme Court, 1979 Term, The Managerial Status of Faculty Members Under the National Labor Relations Act, 94 Harv. L. Rev. 251, 257 (1980).
35 444 U.S. at 685 n.21.
36 The Supreme Court, 1979 Term, supra note 34, at 257.
37 444 U.S. at 686-88.
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.  

Finally, in response to the fourth argument proffered by the Board—that the faculty exercised independent professional judgment—the Court argued that such a determination was inconsistent and unjustified. Justice Powell noted that the Court had been directed to no authority suggesting that the tension between the Act's inclusion of professionals and exclusion of managers could be resolved by deciding whether a given employee had exercised independent professional judgment.

The Court, then, rejected all Board arguments, and found, essentially, that faculty members at Yeshiva were managerial and hence not subject to the Act's protection because "the faculty's professional interests... cannot be separated from those of the institution." The majority concluded its opinion by acknowledging the respect owed to the Board "when its conclusions are rationally based on articulated facts and consistent with the Act." In this case, the Court asserted, neither condition—rationality or consistency—was met.

In a vigorous dissent, Justice Brennan maintained that the Board's decision was rational and consistent with the Act as evidenced by the following observations:

(1) Since the Act does not address the issue of faculty status, the Board, in its discretion, may determine applicable standards.

(2) Although the majority found that the faculty's authority, if exercised "in any other context," would be managerial in nature, Justice Brennan observed that "the academic community is simply not 'any other context.'"

Justice Brennan acknowledged that extensive hearings had

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38 Id. at 686.
39 Id. at 688; see Comment, NLRB v. Yeshiva University, 19 Duq. L. Rev. 369, 373 (1981). The Court identified the independent professional judgment argument as incompatible with prior decisions of the Board. 444 U.S. at 687. Those prior decisions had not inquired into the managerial element of the decisions made, but rather used the managerial and supervisory exclusions in the treatment of professionals. Id. Since the Board in Yeshiva had not confined the test to university faculty, the Court deduced that the Board's approach would overrule Board precedent and characterize supervisory professionals as nonmanagerial. Id.
40 444 U.S. at 686-87.
41 Id. at 688.
42 Id. at 691.
43 Id.
44 Justice Brennan was joined by Justices White, Marshall, and Blackmun.
45 444 U.S. at 692 (Brennan, J., dissenting).
46 Id. at 692-94 (Brennan, J., dissenting).
47 Id. at 696.
48 Id. at 694 (Brennan, J., dissenting). Justice Brennan noted that even though the majority
been conducted by the Board to determine whether the faculty represented their own interests or those of their employer. After noting that the Board had decided that the faculty represent their own interests, Justice Brennan concluded that the findings of the Board were consistent with the Act.

(3) Rejecting the industrial analogy, Justice Brennan, after examining the structure of the modern university, concluded that educators act in their "own independent interest in creating the most effective environment for learning, teaching, and scholarship." In addition, while the university may defer to the faculty in formulating academic policy, the administration nevertheless applies its own perspective "based on fiscal and other managerial policies which the faculty has no part in developing." Continuing, Justice Brennan argued that faculty members are managerial only if they are answerable to some higher authority. Faculty members, however, are not subject to a higher authority as are their counterparts in industry, since they are not hired to carry out the employer's policies and decisions. Rather, faculty members are hired and retained on the basis of teaching ability and scholarly contributions.

recognized that the authority structures of the industrial and academic institutions are inherently and fundamentally different, Justice Powell declined to apply this fact to his analysis. Id. (Brennan, J., dissenting). Indeed, the Court's approach has been denounced as "causing faculty members to be treated not as a group entitled to unique standards, but as typical professional employees." Recent Decision, supra note 31, at 380. Clearly, in the "shared-authority system" of a university, industrial authority standards should not be applied. Id.

444 U.S. at 696 & n.5 (Brennan, J., dissenting).
46 Id. at 694-96 (Brennan, J., dissenting). The major consideration in defining managerial status is whether the interests of the employee or the employer are being represented by the actions of the employee. Id. at 695-96 (Brennan, J., dissenting). If an employee is acting on his own behalf, he is not subject to conflicting loyalties and is therefore covered by the Act. Id. at 696 (Brennan, J., dissenting).
47 Id. at 697 (Brennan, J., dissenting). While the hierarchical nature of a university places authority with the administration, there is also "a parallel professional network" which uses the faculty's expertise in the decisionmaking process. Id. (Brennan, J., dissenting).
48 Id. at 697-98 (Brennan, J., dissenting). Justice Brennan's view has been lauded as an approach which focuses on the faculty member's participation in the decisionmaking process. The Supreme Court, 1979 Term, supra note 34, at 259.
49 444 U.S. at 699-700 (Brennan, J., dissenting).
50 444 U.S. at 700 (Brennan, J., dissenting). University professors, unlike industrial managers and supervisors, are not hired to implement the policies and decisions of their employer. Id. at 699-700 (Brennan, J., dissenting). Furthermore, a faculty member's employment is not conditioned upon the possession of interests which correspond to those of the administration. Id. at 700 (Brennan, J., dissenting). Instead, the dissent observed, university professors must exhibit competence in teaching and scholarship. Id. (Brennan, J., dissenting). It has been noted that "a teacher's role in making recommendations or formulating policy gives no indication of his orientation toward or away from management." The Supreme Court, 1979
In addition, coincidence of interest on any number of issues does not preclude the right to collective bargaining.\textsuperscript{(4)} Justice Brennan disagreed with the majority's perception of the modern university as a remnant of the great medieval universities.\textsuperscript{(7)} As he observed, "[e]ducation has become 'big business,' and the task of operating the university enterprise has been transformed from the faculty to an autonomous administration . . . ."\textsuperscript{(8)} Given this observation, Justice Brennan concluded that the collective bargaining process could result in peaceful resolution of disagreements, which in turn would serve the original intent of the Act.\textsuperscript{(9)}

Thus, argued Justice Brennan, given the Board's discretionary power, the rejection of the industrial analogy, the finding that faculty overwhelmingly represent their own interests, and the autonomy of modern university administrations, the Board's decision was rational and consistent with the Act, and should have been sustained.

III

An examination of the soundness of any legal decision commits the
logical fallacy of complex question. The initial question that should be answered is whether the courts have a legitimate interest in this area. Should they be deciding the contested issue at all? This Article assumes that the Court had a legitimate right to intervene in this area. It should be kept in mind, however, that intervention may have been unwarranted.80

A critical review of the majority opinion raises several important issues, five of which will be examined.

The first is the relationship between the facts of the case and the interpretation proffered by the majority. The faculty, so the argument goes, effectively governs the university by its participation on committees which recommend policy regarding the school’s “curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules,” as well as salary and conditions of employment.81 In addition, “the faculty make recommendations to the Dean or Director in every case of faculty hiring, tenure, sabbaticals, termination and promotion,”82 and “the overwhelming majority of faculty recommendations are implemented.”83 In fact, over 90% of all recommendations are given effect.84 These assertions of fact, unfortunately, commit two fallacies: *ignoratio elenchi* and *post hoc ergo propter hoc*. First, what is the relevance of the 90% test to the claim of managerial status (*ignoratio elenchi*)?85 Second, what is the proper causal relationship between the faculty recommendations and the administrative action (*post hoc ergo propter hoc*)?86 The Court has erred here in that it assumes what it needs to prove. In addition, the majority is guilty of the precise violation that it

80 See Casey, supra note 23, at 587-608.
81 444 U.S. at 676.
82 Id. at 677.
83 Id.
84 Id. at 677 n.5.
85 The fact that a high percentage of faculty recommendations are accepted and implemented by the administration of Yeshiva can not, of itself, transform employees into management. If such were not the case, absurd hypotheticals would abound. For example, as the United States Court of Appeals for the First Circuit stated in 1977, “a janitor does not become a supervisor merely because his superior invariably indulges his requests for assistance.” Stop & Shop Cos. v. NLRB, 548 F.2d 17, 19 (1st Cir. 1977); see Benson, supra note 56, at 271.
86 An example of the failure of the Court to examine the causation underlying administrative actions is the following quotation from the majority opinion: “[t]he Director of Teacher’s Institute for Women once recommended that the school move to Brooklyn to attract students. The faculty rejected the proposal and the school remained in Manhattan.” 444 U.S. at 677 n.6. It is too simplistic to attach to one—the faculty rejection of the proposal—the tag of proximate cause while ignoring other possible reasons for the school remaining in Manhattan.
has accused the Board of committing; namely, the failure to examine the facts of the case. Thus, a double standard has been introduced that allows the Court to arrive at conclusions without evaluating the underlying facts.

For one example of the failure of the Court to examine the relevant facts, consider the following comment addressed to the Court's contention that faculty are involved in establishing admission standards: "Anyone who knows how a college or university functions is aware of the subtle differences between letting faculty members serve on an admission committee, for instance, and having the admissions staff solicit applications from students with low SAT scores and enough money to pay tuition." Although financial standards invariably override academic standards, the Court never analyzed this or any other factual issue. To use the Court's own language, it would not be indefensible to hold that the Court reached its decision "on the basis of conclusory rationales rather than examination of the facts of each case."

The second consideration is that the Court made no attempt to explore "the reasons why these deans and directors felt compelled to adopt faculty committee and departmental recommendations most of the time." A correct decision could have been arrived at only if an examination had been made into the reasons for acceptance and rejection of faculty recommendations. For example, faculty morale, not managerial status, may have led the administration to accept faculty recommendations.

Third, the Court erred when it asserted that faculty speak for management rather than for themselves as employees. The following comments are directed to this point: (1) "The conclusion [that faculty speak for management] is erroneous because in the process of reaching a recommendation, the faculty draw upon their professional, not their managerial, judgment." (2) "Although patterns of authority in private industry may support the presumption that policymaking responsibility automatically translates into alignment with management, a teacher's role in mak-

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47 Id. at 691. Justice Powell stated that the issue to be decided was a mixture of law and fact. Id. The Board, the majority added, did not include any relevant findings of fact in its opinion, thus "reflect[ing] the Board's view that the managerial status of particular faculties may be decided on the basis of conclusory rationales rather than examination of the facts of each case." Id.
48 Maerhoff, Taking Stock After Yeshiva, EDUC. REC. 17 (Summer 1980); see Benson, supra note 56, at 271.
49 444 U.S. at 691. For a discussion of the Court's failure to evaluate the facts underlying its rationale in Yeshiva, see Benson, supra note 56, at 267-70.
50 Benson, supra note 56, at 269.
51 Id.; See Casey, supra note 23, at 606.
52 Benson, supra note 56, at 270.
ing recommendations or formulating policy gives no indication of his orientation toward or away from management." 73 (3) "The majority of the Supreme Court really did not understand the functioning of a modern-day university and how the governing structure works. . . . The Court said in the Yeshiva decision that the authority of the faculty was absolute. It is really very hard to believe that there are any academic matters in which this is true and I say that as one who has worked in a university for a long time." 74 (4) "The very fact that Yeshiva's faculty has voted for the Union to serve as its representative in future negotiations with the administration indicates that the faculty does not perceive its interests to be aligned with those of management." 75

A fourth consideration is that one of the roles of the faculty (at Yeshiva or any other university) is to secure for themselves better wages, hours, and terms and conditions of employment. This role is contrary to managerial responsibility in either higher education or industry. Here, Justice Brennan is on target: "Indeed, on the precise topics which are specified as mandatory subjects of collective bargaining—wages, hours, and other terms and conditions of employment—the interests of teacher and administrator are often diametrically opposed." 76 Reinforcing this dichotomy is the relevant observation by Joel M. Douglas:

The decision of the Court is difficult to reconcile with the management axiom that the primary responsibility for decision-making be centralized in an administrative hierarchy and not with the entire work force. Therefore, it is difficult to understand how faculty, both individually and collectively, can be precluded from seeking to influence management to improve their own work place. 77

A fifth observation was made by Dena Benson:

[If the faculty operate an enterprise, they don't need a union. They have the power and the right, if they truly operate the enterprise, to grant to themselves whatever they would have chosen to negotiate at the bargaining table. It is inconceivable that the Court could have intended such a conclusion. 78

While there are additional difficulties with the decision, 79 these are

73 The Supreme Court, 1979 Term, supra note 34, at 258.
74 Maerhoff, supra note 68, at 17.
75 444 U.S. at 702 (Brennan, J., dissenting).
76 Id. (Brennan, J., dissenting).
78 Benson, supra note 56, at 272.
79 Other criticisms of the decision include:
(1) Application of the Yeshiva standard will entail undue expense and delay. See Benson, supra note 56, at 273; Osborne, supra note 56, at 466.
among the most serious flaws in the Court’s reasoning. The problems will persist until such time that *Yeshiva* is overruled legislatively or judicially. Meanwhile, one must recognize that labor law in the area of higher education has changed radically as a result of *Yeshiva*. In a recent case, for example, the Board wrote: “We conclude that the Supreme Court’s decision in *Yeshiva* constitutes a substantial change in the state of the law regarding the supervisory and/or managerial status of faculty members . . . .” The nature and scope of that change will now be addressed by examining recent decisions in light of *Yeshiva*.

**IV**

The disposition of cases that have considered *Yeshiva* in one manner or another may be divided into three categories: (1) resolution through negotiation; (2) *Yeshiva* claims rejected; and (3) *Yeshiva* considered as controlling precedent. Superficially, it appears that the effects of *Yeshiva* are not great, for, after all, ten such claims have been rejected and only eight upheld, with another eight resolved through negotiation. Careful scrutiny of these cases, however, reveals a much dimmer outlook for the future of faculty unionization in higher education, as the following comment underscores: “‘Yeshiva-watchers’ will note that the quantitative record thus far is mixed, while the qualitative record clearly comes down in favor of management. The unions have not won a single case that may be considered controlling in any manner.” A brief look at these categories will reveal that the greatest fear about *Yeshiva*—that unionization in higher education is dead—is not unfounded. To appreciate fully the nature of decisionmaking in light of *Yeshiva*, the cases will be examined in the following order: (1) *Yeshiva* claims rejected; (2) *Yeshiva* claims resolved through negotiation; and (3) *Yeshiva* claims upheld.

In the ten years in which results similar to those reached in *Yeshiva* were rejected by the NLRB, the courts or state labor agencies have not

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(2) The Court created a dichotomy between bargaining and governance. Benson, *supra* note 56, at 272. The possible ramifications of such a dichotomy include the administration’s delegation of authority to faculty boards merely to avoid collective bargaining. *Id.* at 273. Similarly, institutions desirous of maintaining administrative autonomy might devise strategies to avoid collective bargaining and, in so doing, increase academic friction. *Id.* at 274. Moreover, the faculty might withdraw from active committee participation for fear of losing their bargaining rights. *Id.*

(3) The decision forces the Board to develop new criteria for determining faculty status. Recent Decision, *supra* note 31, at 380.

(4) *Yeshiva*’s usefulness is limited to closely related factual situations. *See* Casey, *supra* note 23, at 604.


clarified the scope and impact of Yeshiva for faculty at private, 4-year traditional colleges. For example, both University of Alaska and Wichita State University deal with public, not private, institutions. The potential impact of Yeshiva on the public sector will be discussed briefly later, but for private sector purposes, the cases are irrelevant and nondispositive. Pratt Institute also is irrelevant, as it addresses the issue of the managerial status of non-faculty administrative employees. The remaining cases are equally uninformative and irrelevant. Montefiore Hospital and Medical Center concerns the managerial status of hospital staff doctors. In Stephens Institute v. NLRB, which dealt with a proprietary art school, the United States Court of Appeals for the Ninth Circuit maintained that Stephens Institute is not a “mature” university comparable to Yeshiva University and that the instructors at the academy do not share a policy-making role. Similarly, Florida Memorial College involved a faculty that did not exercise managerial authority and English...

82 Stephens Inst. v. NLRB, 620 F.2d 720, 727 (9th Cir. 1980) (Yeshiva does not apply to instructors who do not engage in management level decisionmaking), cert. denied, 449 U.S. 953 (1980); Florida Memorial College, 263 N.L.R.B. 1248, 1254 (1982) (faculty not considered managerial employees because they exercise no control and do not make effective recommendations); Wordsworth Academy, 262 N.L.R.B. 438, 443 (1982) (Yeshiva not applicable since the teachers are simply professional employees with decisionmaking limited to routine professional matters); Bradford College, 261 N.L.R.B. 565, 566 (1982) (faculty not comprised of managerial employees since their recommendations are consistently ignored); Montefiore Hosp. and Medical Center, 261 N.L.R.B. 569, 571-72 (1982) (staff doctors with faculty appointments are not managerial employees since department chairmen exercise managerial functions); Pratt Inst., 256 N.L.R.B. 1166, 1167 (1981) (Yeshiva-like managerial status rejected because of employees’ routine function of carrying out decisions that have been already decided by higher authority); English Language Inst. of Am. Univ., 5-RC-11743 (1982); University of Alaska, UA-80-2 (1980); Wichita State Univ., 75-UD-1 (PERB 1980).

84 75-UD-1 (PERB 1980).
86 261 N.L.R.B. 569 (1982).
87 620 F.2d 720 (9th Cir. 1980).
88 Id. at 727 (1980). The court in Stephens also distinguished the role of the faculty at the art school from that of the faculty at Yeshiva. Id. The faculty at Stephens had no input into policy decisions or any other managerial decision making. Id.
89 263 N.L.R.B. 1248 (1982). In Florida Memorial, the faculty was found to be “not responsible for the formulation or effectuation of management policies.” Id. at 1249. Indeed, meetings of committees composed of faculty members were used simply as a vehicle for faculty announcements. Id. Furthermore, not all committees had faculty on them, and many which did met infrequently and were not empowered to make decisions. Id. Faculty recommendations were considered by the administration and adopted if they seemed “sound.” Id. In distinguishing Yeshiva, the court noted that the Yeshiva faculty exercised absolute authority in academic matters, and that faculty authority extended beyond purely academic concerns. Id; see Douglas, Distinguishing Yeshiva: A Troubling Task for the NLRB, 34 LAB. L.J. 108 (1983).
Language Institute of American University was concerned with a special institute. What it means for a faculty to exercise no managerial authority is best exemplified by Bradford College, which concerned a junior college with somewhat paleolithic working conditions including alterations of students' grades by the administration without notice to the faculty and demotions of full-time faculty to part-time status "despite contrary recommendations from the division chairs."

An examination of the rejected Yeshiva claims reveals a pattern of irrelevant, unique, unusual, or abnormal conditions surrounding employees alleged to be managerial. Thus, one looks in vain to these cases to discover the meaning, scope, and impact of Yeshiva on the majority of private, 4-year traditional colleges. A clearer picture of the impact of Yeshiva begins to emerge from those cases that were resolved through negotiation. Nevertheless, the eight Yeshiva claims that have been resolved in such a manner leave the question of union status in higher education unresolved.

In three of these cases—Curry College, Daemen College, and Ashland College—the AAUP used its certification status (granted respectively in 1979, 1972, and 1979) as a bargaining chip to achieve new agreements. However favorable the short-term gain was, the chip has been played and is no longer available for bargaining purposes.

The remaining cases in this category are as interesting as they are confusing. In Cottey College, a 2-year successor agreement was negotiated. While the administration in that case withdrew its Yeshiva claim, the long-term status of the union remained uncertain. In Drury College, the Yeshiva decision was clearly avoided when a settlement was reached "which incorporated a 'philosophy of governance' and also implemented a 'meet and confer' policy . . . result[ing] in both parties dropping all Yeshiva-related court actions."

The C.W. Post and Southampton decisions included the "sign[ing] [of] multi-year agreements in which the em-

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80 5-RC-11743 (1982).
82 Id. at 566. Among other things, the dean of Bradford College engaged in faculty evaluation without consulting department chairs. Id. Similarly, the dean cancelled programs despite faculty protests, and transferred items from the academic budget to the academic dean's budget. Id.
83 See Milton College, 260 N.L.R.B. 399 (1982); Drury College, 244 N.L.R.B. 747 (1979); Ashland College, 8-CA-13 (1981); Daemen College, 3-CA-92-11 (1981); Curry College, 1-CA-17 (1980). For the Cottey College, C.W. Post College and Southampton College decisions, see Newsletter, supra note 81, at 12.
84 See Ashland College, 8-CAS-13 (1981); Daemen College, 3-CA-94-11 (1981); Curry College, 1-CA-17 (1980).
85 See Newsletter, supra note 81, at 12.
86 Douglas, supra note 77, at 106.
ployers voluntarily recognized that unions acknowledged no NLRB jurisdiction over the faculty. Finally, Milton College, which had unionized in 1979, closed in May, 1982, leaving the legal status of the union moot.

While no clear and distinct conclusions can be drawn from these cases, two points merit attention. First, it is possible for unionized faculty to use their status as a bargaining chip to negotiate new working agreements. Second, institutions may continue to engage in the process of collective bargaining if such an agreement is viewed as mutually advantageous and beneficial. It should be noted, however, that the continuation of collective bargaining at these institutions, as well as at others where the union enjoys continued health, appears to be contingent upon administrations realizing that collective bargaining is salubrious. As one commentator has observed, "unions are, of course, still free to organize and bargain collectively. However, they can no longer do so under the protection of the NLRA. Nor can they use the Board as an organizing weapon."99 In this regard, Yeshiva has contributed to a weakening of union strength, for colleges may now make veiled threats to invoke Yeshiva in the bargaining process. In the long run, such a relationship is not conducive to collective bargaining, for the veiled threats are available to only one party. Accordingly, it appears that the existence of the unions at these colleges is in jeopardy. This conclusion is reinforced by considering the last group of cases that illustrate the real impact of Yeshiva.

There have been eight cases decided along the lines of Yeshiva. In terms of clarifying the nature, scope and impact of Yeshiva, the most instructive of the cases is Ithaca College. The Board in Ithaca observed that in Yeshiva, the faculty possessed complete discretion to shape the academic structure of the university. Furthermore, the faculty played a significant role in formulating institutional policies of the university; the administration's ultimate authority to make policy decisions did not ob-

97 Id.
99 Douglas, supra note 77, at 117. The Yeshiva decision casts doubt on the right of faculty to bargain collectively, Osborne, supra note 56, at 465; The Supreme Court, 1979 Term, supra note 34, at 252, and poses a severe threat to unionization at private universities where faculty members routinely engage in some policy making through the giving of advice, id. at 260. Although it does not entirely foreclose the employees' ability to bargain, the Yeshiva decision significantly impairs this ability. Osborne, supra note 56, at 476.
102 Id. at 578.
scure the faculty's role in this process. Therefore, the Board concluded, the faculty in Yeshiva was properly characterized as a managerial body and thus beyond the purview of the National Labor Relations Act.

The Board, turning to the facts at hand, found that the faculty at Ithaca College exercised authority of a substantially similar nature to that exercised by the faculty at Yeshiva University. Examples, cited by the Board, of the pervasive control possessed by the Ithaca faculty included the “extensive authority to formulate and effectuate policies” at the college's respective schools; the faculty's “absolute authority as to the curriculum;” and the fact that “the faculty possesses substantial authority in spheres beyond the strictly academic” such as the hiring of faculty and deans, the controlling of budgetary matters and the planning of faculties. Similar findings were made in Thiel College and Duquesne University of the Holy Ghost.

Given the disposition of these Yeshiva-based claims at institutions that are more representative of the modern-day university (such as those envisioned by Justice Brennan), it can safely be concluded that future union organization at most private, 4-year colleges is without legal standing and is, therefore, dead. Rarely, if ever, will a college be encountered that follows the “immature” managerial model of Bradford College.

The nature of the Yeshiva decision, then, is that it radically alters faculty status under NLRA guidelines. The scope of that change covers most, and, for all practical purposes, all, modern 4-year private colleges. Moreover, the impact of Yeshiva is that it brings collective bargaining for faculty in higher education to a virtual stop. These conclusions, however, are general. In the next section, seven specific consequences of the Yeshiva decision will be presented.

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103 Id.
104 Id.
105 Id.
106 Id.
107 Id.
108 261 N.L.R.B. 580 (1982). In Thiel, the Board made frequent reference to Yeshiva, noting that the kind and sweep of authority which was possessed by the Yeshiva faculty, and which was dispositive in that case, was present at Thiel in nearly identical form. Id. at 586. Although acknowledging that the board of trustees was vested with ultimate authority, the Board found that the professional interests of the faculty, like those of the Yeshiva faculty, were closely aligned with the employer's interests, thus removing the faculty members from the Act's coverage. Id. The Board was therefore constrained by Yeshiva to dismiss the petition. Id.
109 261 N.L.R.B. 587 (1982). The Board in Duquesne found that the authority exercised by the law school faculty was “nearly identical to that possessed by the faculty in Yeshiva,” and thus found the faculty members to be managerial employees. Id. at 589.
110 See 444 U.S. at 702-03; supra text accompanying notes 57 & 58.
111 See supra note 92 and accompanying text.
V

Some of the more noteworthy consequences of the *Yeshiva* decision include the following:

First, *Yeshiva* has rendered the inclusion of faculty under the Act, if not improper, at least ambiguous. This, in turn, could have deleterious consequences. One commentator has noted that the rejection of assumptions formed during ten years of Board decisions “assures—at least in contested cases—an expensive and frequently perplexing fact-finding process prior to Board certification of a faculty union. After *Yeshiva* it will not be possible, in most cases, to know in advance whether or not an institution’s faculty are covered by the . . . Act.” Another commentator has noted that “many private-sector colleges have come to realize that challenges to *Yeshiva* cost too much in terms of time and money.”

The undesirable consequences, then, include the following possibilities: (1) the process to achieve faculty bargaining rights will be unnecessarily burdensome; (2) the expense and delay of certification may well prove prohibitive; (3) the principles of the Act are frustrated due to delaying tactics that prohibit speedy elections for majority status; and (4) elections may prove ephemeral.

Second, despite the oft-quoted footnote 31 in *Yeshiva*, which was designed to limit the scope of the decision, any “evidence of a collegial structure of authority” will compel the Board “to exclude such faculty

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112 Osborne, *supra* note 56, at 466. The result of the *Yeshiva* Court’s rejection of the Board’s use of a “ritualistic formula” in adjudicating faculty unionization cases will be to require an expensive and lengthy inquiry in each case. *Id.* at 467.


114 See generally Benson, *supra* note 56, at 272-86 (implications of the *Yeshiva* rule); Osborne, *supra* note 56, at 474-77 (*Yeshiva* resulted in hazy criteria for determining applicability of the Act).

115 444 U.S. at 690-91 n.31. At the close of the majority opinion, Justice Powell stated that the application of the managerial exclusion as applied in *Yeshiva* should not be viewed as excluding all faculty at all colleges and universities from the protection of the Act. *Id.* at 690. Rather, as the Court continued:

We recognize that this is a starting point only, and that other factors not present here may enter into the analysis in other contexts. It is plain, for example, that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research. There thus may be institutions of higher learning unlike *Yeshiva* where the faculty are entirely or predominantly nonmanagerial. There also may be faculty members at *Yeshiva* and like universities who properly could be included in a bargaining unit. It may be that a rational line could be drawn between tenured and untenured faculty members, depending upon how a faculty is structured and operates. But we express no opinion on these questions, for it is clear that the unit approved by the Board was far too broad.

*Id.* at 690-91 n.31.
from the protection of the Act.” Indeed, most, if not all, private sector faculties will be excluded from the Act’s coverage. In this regard, it is important to note that the NLRB has no specific rule to which one can look to help determine, in an objective fashion, managerial status. In Ithaca College, for example, managerial status is declared, as it was in Yeshiva, if an “overwhelming majority of faculty recommendations” are followed. Faculty are also managerial if they possess “substantial authority.” How are we to define an “overwhelming majority”? In Duquesne University, the non-technical and undefinable criterion for managerial status was that the faculty possessed managerial authority “nearly identical” to that possessed by the Yeshiva faculty. These nebulous criteria merely exacerbate the problems of applying Yeshiva and leave faculties all the more confused about their status.

Third, the existence of certified bargaining units currently present at universities will be jeopardized once current collective bargaining agreements expire. Such a possibility has become reality for Curry, Ashland, and Daemen Colleges and may soon be faced by institutions such as Cottey, Drury, C.W. Post, and Southampton. With administrations now in possession of the ultimate trump card, Yeshiva, current union certification is in a precarious position.

Fourth, the Yeshiva decision may lead to an interesting question regarding faculty status: If faculty at a given university do not at first meet the managerial test and thus escape exclusion, but then unionize and, subsequently, improve terms and conditions of employment, may the university then claim that new duties and responsibilities preclude the

116 Comment, NLRB v. Yeshiva University: Faculty as Managerial Employees Under the NLRA, 19 Am. Bus. L.J. 63, 70 (1981); see The Supreme Court, 1979 Term, supra note 34, at 260. One commentator has observed that the Yeshiva decision has established a potentially blanket exclusion of all faculty members at an institution where faculty share governing authority with the administration. Id.; see also Bethel, Private University Professors and NLRB v. Yeshiva: The Second Circuit’s Misconception of Shared Authority and Supervisory Status, 44 Mo. L. Rev. 427, 430 (1979) (faculty at mature institutions may be precluded from bargaining collectively).

117 See Daponte, Practical Implications of the Yeshiva Decision, 31 C. & U. Personnel A.J. 45 (Summer 1980). Daponte notes that “[u]nder the managerial exclusion standards set down by the Court, it is unlikely that few, if any, private sector faculties will be able to be viewed as not engaging in policy-making.” Id.

118 261 N.L.R.B. at 578.

119 Id.

120 Id. at 589.

121 See Douglas, supra note 77, at 35. Shortly after the Yeshiva decision, Douglas stated that “[w]hile existing agreements will not be placed in jeopardy if Yeshiva stands, there is the possibility that unionized institutions may refuse to negotiate successor agreements on the basis of Yeshiva.” Id.

122 See supra note 94 and accompanying text.

123 See supra notes 96-97 and accompanying text.
faculty's right to collective bargaining?124 A provoking paradox occurs: Unionization nullifies unionization; collective bargaining precludes collective bargaining. Such a scenario has become reality in the case of Wagner College.125 Due to the collective bargaining between the employer and the union, the terms and conditions of employment were altered. This in turn altered faculty status, prompting the following observation by the Board: "Thus, where there is a collective bargaining history, it might also come to pass that the faculty union, by virtue of its own 'success,' has gained such authority for its faculty through the bargaining process so as to have bargained itself out of 'mandatory' bargaining, and, indeed, out of coverage under the Act."126

Fifth, the impact of Yeshiva will extend to the public sector. Following Yeshiva, collective bargaining rights for higher education personnel may be rescinded, especially since state labor boards and state legislators are influenced by Board and Supreme Court decisions.127 In addition, "state legislatures that have not enacted legislation specifically allowing for collective bargaining for public university teachers may be most reluctant to enact such legislation if the private sector has no comparable right."128 In fact, it may be in the public arena where we will witness the greatest impact of Yeshiva. Since the two public sector claims, University of Alaska129 and Wichita State University,130 are not very critical in this

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124 Another possible consequence of the Yeshiva decision is that it may be used outside the academic arena by employers who wish to deny "professional" employees union representation based on managerial claims. See Comment, supra note 116, at 71. Many professional occupational groups, including "engineers, physicians, lawyers, reporters, [and] editors" will be vulnerable to the attack that they exert an inordinate amount of influence on broad policy decisions. Id.; cf. Osborne, supra note 56, at 477 (decision has placed in doubt bargaining rights of all employees seeking to influence employer's policy). Such a scenario should not be taken lightly. Recently, for example, owners of a drive-in restaurant, on the basis of Yeshiva, refused to bargain with the employees' bargaining agent. See 20 CHRON. HIGHER EDUC. 3 (June 9, 1980). The owners claimed that new duties and responsibilities made the workers managerial employees. Id. Thus, it can be seen that the largely undefined contours of Yeshiva's legal conclusions make predictions as to its extension beyond its particular facts problematic. Osborne, supra note 56, at 474.

125 29-UC-147 (1982).

126 Douglas, supra note 89, at 116.

127 Benson, supra note 56, at 276; Comment, supra note 116, at 71. The decisions of the National Labor Relations Board are not binding upon state authorities. Benson, supra note 56, at 275. However, many states have drafted collective bargaining legislation patterned after the National Labor Relations Act. Id. at 275-76. Moreover, National Labor Relations Board decisions have great precedential value in state adjudication of private sector cases. Id. Also, states contemplating the enactment of collective bargaining statutes may reevaluate the wisdom of granting such rights to public sector teachers in light of the Supreme Court's failure to confer such rights on their private colleagues. Id.

128 Comment, supra note 116, at 71; see Kuechle, supra note 113, at 278-79.

regard, the impact of *Yeshiva* upon claims must await future decisions.

Sixth, the educational goals of higher education could be frustrated as a result of *Yeshiva*. Benson makes this point persuasively:

> What the *Yeshiva* decision will mean to the educational goals of institutions of higher learning is a possible loss of needed faculty guidance in matters affecting educational policy and faculty conditions of employment. In reality, neither the institutions nor the faculty have won. Administrators will have to decide whether to govern and bargain or to relinquish governance to the faculty and avoid bargaining. The faculty will have to decide whether to govern or to bargain. The institution, designed to serve students, will suffer regardless of which choice is made. Administrators need the professional judgment and recommendations of faculty on all matters reviewed by the Court in *Yeshiva*. Students need teachers who feel their rights are protected—undistracted from academic concerns.

A foreseeable development, then, could be the withdrawal of faculty from all committees and advisory organizations on campus. While non-tenured faculty could be “compelled” to serve on committees as a condition for tenure, the experience and knowledge of tenured faculty would be lost. Faculty morale, and consequently institutional morale, would be low; academic factions could proliferate. It is important to realize that faculty may have to make a decision about what they want to be, about how they want their employment defined. Whatever the decision, it could be costly, and the only reasons why the decision has to be made at all are directly attributable to *Yeshiva*.

Seventh, faculty are being denied the right to bargain collectively at a time when it is most needed.

> The irony of *Yeshiva* is that it threatens collective bargaining at private universities at precisely the moment when the faculty is most in need of the

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130 75-UD-1 (PERB 1980).
131 See Douglas, supra note 89, at 117-18.
132 The claim that the public sector is ripe for *Yeshiva*-like cases is supported by David Kuechle:

> [The] effects of the *Yeshiva* case will continue to be felt for years, especially in states where public-sector collective bargaining laws are similar to the NLRA. There is no prospect in the near future of new legislation that would protect faculty members under the NLRA. Instead, *Yeshiva*-related action is most likely to take place in the states, where the stakes for unions are far higher. State collective bargaining laws that do not specifically include college and university faculty and other professionals as protected employees will most likely be the focus of *Yeshiva*-like challenges. There will be efforts in these states to incorporate provisions spelling out the unique characteristics of faculty as employees.

Kuechle, supra note 113, at 278-79.
133 Benson, supra note 56, at 286.
protections of the Act. Declining enrollments, a fall-off in contributions to American colleges and universities, accelerating voter resentment toward public spending, and the glut of teachers on the market have combined to impede an individual professional’s ability to bargain successfully. Educators today are in fact subject to the evils the Act was designed to eradicate. In a glutted job market, individual bargaining is a sham. . . . The Court’s refusal to consider the faculty’s actual impotence to bargain individually reveals a substantial disregard for the purpose of the Act.134

While numerous additional ramifications of the Yeshiva decision could be cited, these seven serve to demonstrate that the impact of Yeshiva is, and will continue to be, substantial.

VI

Unquestionably, the full impact of the Court’s ruling is not yet known. In fact, it has been noted that the ruling may have some positive effects. For example, “not having to engage in collective bargaining could spell the difference between life and death for a few small colleges near the brink of [financial] disaster.”135 As more universities remain in operation, there will be greater employment opportunities for teachers.136 Such reasoning, however, reflects the human ability to discover the proverbial silver lining in every cloud. Based on the considerations in section V, the Yeshiva decision will prove to be quite devastating. Not only are faculty bargaining rights called into question, but also there will be an enormous expense in trying to overturn the decision. Furthermore, the ability of the Board to make determinations based on their tasks as set forth in the Act is placed in jeopardy. The effects of Yeshiva, then, are potentially long-range and negative. The following comment summarizes the scope of the impact most clearly:

The Yeshiva decision threatens to end collective bargaining at private colleges and universities. Since at most private colleges faculty members serve some policymaking functions and exercise some advisory influence, the broad application of the managerial exclusion will make it difficult for faculty members to unionize. Thus, the managerial exclusion may emasculate the professional inclusion. If the Court seriously intends that anyone who “formulates” or “effectuates” policy be considered a managerial employee, the implication is that the Act will be largely unavailable to professional employees, in the university and other contexts. The Court should have adopted the analysis of the dissent.137

134 Casey, supra note 23, at 607.
135 Maerhoff, supra note 68, at 16.
136 Id.
137 The Supreme Court, 1979 Term, supra note 34, at 260-61.