Contested Terrain: Developments in Labor Law Affecting Higher Education Since 2012

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Labor law can significantly affect the ability of employees to organize unions and win improvements in terms of employment through collective bargaining. As a previous edition of this Almanac reported, many anti-union statutes were introduced in 2011, and some were enacted.1 This chapter summarizes the major labor law developments affecting higher education in 2012 and later.

Three states in the industrial Midwest—Indiana, Michigan, and Wisconsin—passed “right-to-work” (RTW) statutes since 2012. But the most important recent labor law developments affecting higher education came from the U.S. Supreme Court and the National Labor Relations Board (NLRB). There is a stark divergence between the current anti-union majority on the U.S. Supreme Court and the pro-union majority on the NLRB. Supreme Court rulings in 2012 and 2014 restricted fair share (agency shop) provisions in the public sector; in 2016 the Court may declare public-sector fair share agreements unconstitutional. By contrast, a 2014 NLRB ruling made it much easier for faculty at private colleges and universities to unionize. The Board now seems poised to extend protection under the National Labor Relations Act (NLRA) to teaching assistants (TAs) at private universities.

NEW “RIGHT-TO-WORK” STATUTES

Many states, mostly in the South, Great Plains, and Mountain West, have RTW laws. These laws prohibit union shop or fair share/agency shop contract clauses requiring bargaining unit members to pay union dues or service fees to cover their fair share of the cost of union representation. RTW supporters chose the name “right-to-work” for these laws because the normal enforcement mechanism for union or agency shop clauses is dismissal of those who refuse to pay union dues or service fees. Opponents sometimes call RTW “right-to-work-for-less” laws because these laws weaken labor unions. A 1987 study showed that RTW laws
reduce the number of workers in newly organized bargaining units by 46 percent in the first five years after the law is passed and by 30 percent in the next five years, ultimately reducing union membership by five to ten percent.3

Indiana passed an RTW law in 1957 but repealed it in 1965.4 Union opponents in Ohio sought an RTW law through a referendum in 1958. This action proved disastrous for the Ohio Republican Party. The referendum mobilized the labor vote, and the RTW proposal was defeated. That year, Ohio Democrats won the governorship and simultaneous control of both houses of the legislature for the first time since their victory in the 1948 elections.5

RTW returned to the industrial Midwest when Indiana and Michigan enacted RTW statutes in 2012.6 Republican Governor Rick Snyder of Michigan was re-elected in 2014, despite “intense attacks from the labor movement.” Snyder signed a right-to-work law, albeit reluctantly—a body blow to the union movement in a state that, perhaps more than any other, is associated with organized labor. When Snyder signed the bill, critics said that he was signing his political death warrant. Quite obviously, Snyder was able to survive—just like Scott Walker was able to take on the unions and win reelection as governor of Wisconsin.7

In 2015, Republican Governor Scott Walker signed an RTW law in Wisconsin.8 Some unions delayed the impact of the recent RTW laws by signing long-term collective bargaining contracts with fair share clauses before these laws took effect. Existing contracts remained in force until their expiration date. But the Indiana, Michigan, and Wisconsin RTW laws were still defeats for labor.

**FRIEDRICHS V. CALIFORNIA TEACHERS ASSOCIATION**

The U.S. Supreme Court may soon apply RTW nationwide for public employees. In June 2015, the Court agreed to hear an appeal in a case about the legality of fair share provisions in public-sector union contracts. The ruling in this case, *Friedrichs v. California Teachers Association*, is expected by June 2016. A ruling against the CTA could significantly weaken public-employee unions, including those representing employees at colleges and universities.

*Friedrichs* revisits an issue previously addressed by the Court: does use of union funds for political activities infringe on the constitutional rights of dissenting bargaining unit members required to pay union dues or service fees by a union or agency shop provision? In *Machinists v. Street*, the Court upheld the constitutionality of a private-sector union shop but required the union to refund the portion of a member’s dues used for political activities if a member filed a complaint.9 In *Abood v. Detroit Board of Education*, the Court similarly upheld fair share in the public sector but required refunds upon request of the portion used for political activities.10

In *Knox v. SEIU*, the Court required public-sector unions to obtain affirmative consent before charging nonmembers special fees for the union’s political fund, rather than allow unions to charge those fees unless the nonmembers opted out.11 Justice Samuel Alito’s majority opinion—supported by the five Republican appointees but none of the Democrats—seemed to invite a future case seeking the overturn of *Abood*:

Acceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly—one that we have found to be justified by the interest in furthering “labor peace”.... But it is an anomaly nevertheless. Similarly, requiring objecting nonmembers to opt out of paying the nonchargeable portion of union dues—as opposed to exempting them from making such payments unless they opt in—represents a remarkable boon for unions.12
In *Harris v. Quinn*, Alito’s five-member majority went further, stating, “a critical pillar of the *Abood* Court’s analysis rests on an unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop.”13

The petitioner in *Friedrichs* asked the Court to overrule *Abood* and declare public-sector fair share agreements invalid under the First Amendment. If the Court is unwilling to go that far, the petitioner asked that the Court replace the opt-out procedure with an opt-in requirement before unions can charge non-members for political activities.

The United States submitted an *amicus* brief supporting the respondents in *Friedrichs*. The “policy of exclusive representation,” argued the brief, serves the government’s basic interest as an employer in bargaining with a single employee representative... But it also gives rise to the free-rider problem that could, paradoxically, render the elected union a less effective bargaining counterparty and foster resentment among employees forced to bear the costs of supporting benefits for others.14

The brief argued that the free-rider “problem is not merely that employees who object to the union’s bargaining positions will ‘free ride’ on the union’s efforts. Rather, even the employees who favor the union’s positions will have no incentive to fund the union if they can reap the benefits of the union’s work without spending a dime.”15 Once “a [duty-of-] fair-representation requirement is imposed, it is impossible to tell who is a true objector and who just wants a free ride.”16 The brief continued, “in no other context could it be defensibly maintained that those who benefit from something available for free—be it public infrastructure, police protection, or music downloads—must invariably be counted on to voluntarily pay for it.”17

If the Supreme Court upholds fair share in the public sector but changes the default option from presumed consent for union political spending to presumed lack of consent, which bargaining unit members would likely be affected? According to a study of the default option for organ donation, “if preferences concerning organ donation are strong, we would expect defaults to have little or no effect.”18 But the study found drastic variation in organ donation rates according to whether the default policy was opt-in or opt-out. Most people, that result suggests, had weak preferences regarding donations of their organs after death.

Similarly, the default option in the case of union political spending likely has little or no effect on decisions of bargaining unit members with strong objections. Changing the default to presumed lack of consent thus would affect free riders, not political dissidents. “Free riders” have no strong objections to union political activities but would rather shirk paying their fair share of the cost of union representation. The mantle of political liberty for dissenting bargaining unit members is a convenient cloak for those whose true goal is to weaken labor unions and their political allies—mostly in the Democratic Party—by reducing union revenues.

If the Supreme Court uses *Friedrichs* to change the default to presumed lack of consent for union political spending, or if it overrules *Abood*, public-sector unions must devote more effort to persuading bargaining unit members to join the union voluntarily.

**PACIFIC LUTHERAN UNIVERSITY**

Thanks to the Obama majority on the NLRB, unions in higher education have had recent legal victories to celebrate. The NLRB’s December 2014 decision in *Pacific Lutheran University* made unionization significantly easier for faculty at private colleges and universities.19 Anticipating a precedent-setting decision, the Board solicited *amicus* briefs on the issues in this contingent faculty case. The ruling formulated new tests for (a) when the NLRB has jurisdiction...
over employees at religiously affiliated institutions, and (b) determining the managerial status of faculty members. These tests, if upheld in court, will limit the extent to which two U.S. Supreme Court rulings—\textit{NLRB v. Catholic Bishop of Chicago},\textsuperscript{20} and \textit{NLRB v. Yeshiva University}\textsuperscript{21)—hinder faculty unionism.

\textbf{NLRB Jurisdiction}

In \textit{Catholic Bishop}, the U.S. Supreme Court ruled that the First Amendment to the Constitution precluded the NLRB’s assertion of jurisdiction over lay teachers at Catholic high schools. In \textit{University of Great Falls v. NLRB}, the U.S. Court of Appeals declined to enforce an NLRB order, citing \textit{Catholic Bishop}.\textsuperscript{22} The Appeals Court proposed a three-part test to determine when the NLRB had jurisdiction over religiously affiliated colleges and universities. In \textit{Pacific Lutheran}, a 3-2 NLRB majority argued that a test excluding fewer employees from collective bargaining rights than the test proposed by the Appeals Court could address the Supreme Court’s Constitutional concerns in \textit{Catholic Bishop}.\textsuperscript{23}

The \textit{Pacific Lutheran} ruling asserted NLRB jurisdiction unless the institution demonstrated, first, “that it holds itself out as providing a religious educational environment” and, second, “that it holds out the petitioned-for faculty members as performing a religious function.”\textsuperscript{24} The first test is identical to part of the Appeals Court test in \textit{Great Falls}, but the second test is new and significantly limits the ability of anti-union employers to avoid NLRB jurisdiction.

To avoid “the type of intrusive inquiry into a university’s religious beliefs and practices which was rejected by the Supreme Court in \textit{Catholic Bishop},” the Board declined to “examine whether faculty members actually perform a religious function.”\textsuperscript{25} Instead, the Board safeguarded First Amendment rights by “examination only of a university’s public representations of itself” when determining if faculty members perform a religious function.\textsuperscript{26} “We rely on the institution’s own statements about whether its teachers are obligated to perform a religious function, without questioning the institution’s good faith or otherwise second-guessing those statements,” the Board stated.

If the evidence shows that faculty members are required to serve a religious function, such as integrating the institution’s religious teachings into coursework, serving as religious advisors to students, propagating religious tenets, or engaging in religious indoctrination or religious training, we will decline jurisdiction. Likewise, if the college or university holds itself out as requiring its faculty to conform to its religious doctrine or to particular religious tenets or beliefs in a manner that is specifically linked to their duties as a faculty member, we will decline jurisdiction. However, general or aspirational statements, without specificity as to how the requirement affects actual job functions, will not suffice.\textsuperscript{27}

The Board claimed jurisdiction because Pacific Lutheran University (PLU) did not make public representations that their contingent faculty performed a religious function. Using this standard, the NLRB would also have jurisdiction in many other cases involving employees at religiously affiliated institutions.

\textbf{Managerial Status of Faculty}

In \textit{Yeshiva}, the U.S. Supreme Court ruled that faculty at Yeshiva University were managers and thus were not “employees” for purposes of NLRA coverage. The NLRB determined in several cases that faculty at other institutions had little managerial authority, so that \textit{Yeshiva} did not apply.\textsuperscript{28} The NLRB majority in \textit{Pacific Lutheran} adopted a new test for managerial status that could extend a protected right to organize and bargain to many faculty members at private colleges and universities.

The union at PLU applied for a bargaining unit of 176 contingent faculty members, but the administration asserted that the 39 of these who worked full time were managers...
not protected by the NLRA. The Board unanimously rejected the claim that full-time contingent faculty at PLU were managers, though the two Republican members dissented from the new test for managerial status. The three Democrats on the Board argued that differences between universities and corporations had diminished since Yeshiva:

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.

A common manifestation of this “corporatization” of higher education that is specifically relevant to the faculty in issue here is the use of “contingent faculty,” that is, faculty who, unlike traditional faculty, have been appointed with no prospect of tenure and often no guarantee of employment beyond the academic year.29

The new test for managerial status is based on the faculty role in five policy areas:

[W]here a party asserts that university faculty are managerial employees, we will examine the faculty’s participation in the following areas of decisionmaking: academic programs, enrollment management, finances, academic policy, and personnel policies and decisions, giving greater weight to the first three areas than the last two areas. We 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 recommendation over those areas. If they do, we will find that they are managerial employees and, therefore, excluded from the Act’s protections.30

The Board stated that “the party asserting managerial status must prove actual—rather than mere paper—authority…. A faculty handbook may state that the faculty has authority or responsibility for a particular decision-making area, but it must be demonstrated that the faculty exercises such authority in fact…. [T]o be ‘effective,’ [faculty] recommendations must almost always be followed by the administration.”31 The “almost always” language makes it difficult to prove that faculty are managers.

The factual situation in Pacific Lutheran was easy: PLU contingent faculty had little or no role in decisions about any of the five areas listed by the NLRB; hence, they were not managers. A dissenting opinion noted that Pacific Lutheran did not address more difficult fact situations. “For instance, if no primary factors are established, but one secondary factor is, is that sufficient to establish managerial status? If no primary, but two secondary factors? Is one primary factor alone sufficient?”32

Tenured and tenure-track faculty often have a significant role in decisions about academic programs and a limited role or no role in decisions about enrollment management or finances. Future NLRB cases will likely determine the managerial status of faculty who make curriculum decisions but have little say about the size or composition of the student body or financial matters such as budgets, tuition, or financial aid.

AFTERMATH OF PACIFIC LUTHERAN

A dissenting Republican NLRB member predicted the U.S. Court of Appeals would overturn the Pacific Lutheran decision on grounds of NLRB jurisdiction.33 The employer could not bring this case directly to the Court of Appeals because NLRB representation decisions are not “final orders” of the NLRB. To appeal a representation decision, an employer must refuse to
bargain with an exclusive bargaining representative certified by the NLRB. The employer can appeal a bargaining order issued by the Board if the union files an unfair labor practice (ULP) charge alleging unlawful refusal to bargain.

But the union at PLU withdrew the representation petition less than a month after the ruling, when the vote count showed the union losing the representation election 30 to 54, with 38 contested ballots. Thus, the NLRB did not certify the PLU union as an exclusive representative, and the PLU administration could not use the indirect means of refusing to bargain to bring the underlying decision on representation to the Court of Appeals. An appeal to the courts of the Board’s new policies on NLRB jurisdiction and managerial status would have to come from a different case to which the Pacific Lutheran policies are applied.

The administration of Point Park University had an early opportunity to bring the managerial status portion of Pacific Lutheran to the U.S. Court of Appeals, but it chose not to appeal. Point Park, a secular institution to which Catholic Bishop does not apply, fought faculty unionization for over a decade. In February 2015, the Board applied the Pacific Lutheran standard for determining managerial status to Point Park. In March, the Point Park administration asked the Board to reconsider, but the Board denied this request in May. In July 2015, the Point Park administration announced that they would not appeal and recognized the faculty union.

Pending cases could still bring Pacific Lutheran to the Court of Appeals. In 2015, NLRB regional directors applied the Pacific Lutheran principles on NLRB jurisdiction to representation cases at four Catholic institutions: Duquesne University, Manhattan College, St. Xavier University, and Seattle University. All four employers filed appeals with the NLRB in 2015, arguing that NLRB assertion of jurisdiction violated their First Amendment rights as religiously affiliated institutions. Duquesne has fought unionization of their adjuncts since 2012. The Duquesne administration’s June 2015 appeal to the NLRB included text interpreted by the union as a threat to fire two adjuncts for testifying before the NLRB. It is not unusual for employers to make illegal threats of reprisals for union activity, but putting such a threat in an appeal document that the employer files with the NLRB Board was extraordinary. If the Duquesne administration sought an expedited opportunity to bring the NLRB jurisdiction portion of Pacific Lutheran before the U.S. Court of Appeals, committing a ULP via an employer NLRB filing would be a good way to do it.

In October 2015, Duquesne’s English department informed ten of their 11 adjunct faculty members, including one who testified before the NLRB, that they would be laid off at the end of the semester.

MANAGERIAL STATUS OF FACULTY AT PUBLIC UNIVERSITIES

The NLRA does not cover state and local public employers, so Yeshiva does not apply to faculty at public universities. But an anti-union law passed in Ohio in 2011, overturned later that year by popular referendum, attempted to define faculty at public universities in Ohio as managers with no protected right to organize and bargain. The April 2015 budget bill submitted to the Ohio House Finance Committee included language that would revive the Yeshiva-like provisions of the 2011 law, though not provisions affecting public employees other than university faculty. Faculty unions persuaded the committee to remove this language from the bill before it was passed.

TEACHING ASSISTANTS AT PRIVATE UNIVERSITIES

The NLRB has ruled inconsistently on whether the NLRA covers teaching assistants (TAs) at private universities. A Democratic NLRB majority ruled in 2000 that New York University TAs have a protected right to organize and
bargain. A new Republican NLRB majority overturned this precedent in the 2004 *Brown University* decision, ruling that TAs and resident assistants were primarily students, not employees.

The current Democratic NLRB majority will likely overrule *Brown University* in 2016, using one of two current cases where the United Auto Workers (UAW) seeks to represent TAs at Columbia University and the New School. In February 2015, the NLRB regional director dismissed both representation petitions, citing the *Brown* precedent. The UAW appealed to the NLRB in Washington, asking the Board to overrule *Brown*. The Board agreed to hear both appeals and announced its intention to solicit *amicus* briefs in the Columbia case on December 23, 2015.

**CONCLUSION**

Labor law affecting higher education is contested terrain. Laws and their interpretation often change, depending on who is in power. Republican legislators, governors, and appointees to the U.S. Supreme Court and the NLRB have become ever more anti-union as the political parties have polarized. Some Democratic politicians may disappoint unions, but Democratic appointees to the NLRB have been consistently pro-union. Those with a stake in labor law should remember this when casting their votes in the 2016 elections.

**NOTES**

1 Saltzman, 2012.
2 Some public sector bargaining laws protect the right to work of dissenting bargaining unit members by changing the enforcement mechanism to automatic payroll deduction of union service fees. But the anti-union Taft-Hartley Act of 1947 prohibits this mechanism in the private sector. Saltzman, 1998.
4 Waldron, 2012.
7 Cohn, 2014.
8 Davey, 2015.
13 134 S.Ct. 2618 (2014) at 2634.
14 Brief for the United States (2015) at 23.
15 Ibid. at 9. Emphasis in the original.
16 Ibid. at 20.
17 Ibid. at 21.
18 Johnson and Goldstein (2003) at 1339.
21 444 U.S. 672 (1980).
22 278 F.3d 1335 (D.C. Cir. 2002).
23 The two Republican members dissented.
24 *Pacific Lutheran* at 1.
25 Emphasis in original.
26 Ibid. at 6.
27 Ibid. at 9.
29 *Pacific Lutheran* at 19.
30 Ibid. at 20.
31 Ibid. at 18. Emphasis in original.
32 Ibid. at 39.
33 Ibid. at 27.
38 Flaherty, March 4, 2015.
REFERENCES


Cohn, J. “You Know Unions Are Weak When Disgruntled Autoworkers Can’t Oust a GOP Governor.” New Republic, November 4, 2014.


_____. “Professor Manager.” Inside Higher Education, April 17, 2015.


Marvit, M.Z. “Duquesne’s NLRB Filing Reads as a Brazen Threat To Adjunct Union Organizers.” In These Times, August 3, 2015.

_____. “In the Midst of Union Battle, Duquesne University Just Laid Off All but One of Its English Adjuncts.” In These Times, October 28, 2015.


