

Rights Revoked: Attacks on the Right to Organize and Bargain

By Gregory M. Saltzman

Gregory M. Saltzman is E. Maynard Aris Professor of economics and management at Albion College and adjunct research scientist at the Institute of Labor and Industrial Relations, University of Michigan. He previously taught at Brandeis University and Ohio State University.

Saltzman's recent articles have addressed federal regulation of work hours of truck drivers, public-sector labor law in Michigan, and faculty and staff participation in college and university governance. His work has been published in Industrial and Labor Relations Review, Transportation Journal, and a National Bureau of Economic Research conference volume.

He holds a Ph.D. in economics from the University of Wisconsin-Madison, where he was a member of the bargaining team and chair of the grievance committee of the Teaching Assistants' Association.

Collective bargaining normally arises in colleges or universities only when labor law protects the right to organize and bargain.¹ Extensive governmental regulation of procedural issues in labor relations accompanies this legal protection. Labor law governs union organizing activity, employer recognition of unions, the bargaining process, the conduct of strikes, and the union's duty to represent fairly all employees in the bargaining unit. Labor law can also affect substantive terms of employment by fostering or hindering unions. A recent study showed, for example, that collective bargaining coverage raises staff salaries in higher education by an average of nine to 11 percent.² Practitioners whose actions are regulated and scholars who analyze employment outcomes in higher education must therefore know labor law.

The *NEA 1998 Almanac* surveyed labor law issues related to colleges and universities, the *2000 Almanac* addressed legal issues affecting organizing among part-time faculty and graduate teaching assistants (TAs), and the *2001 Almanac* updated those reviews.³

This chapter addresses important changes in labor law since 2000. It focuses on attacks on the right to organize unions and bargain collectively, particularly in higher education but also in other sectors because precedents may spill over to higher education.

Labor law varies by jurisdiction:

- The National Labor Relations Act (NLRA) regulates nonprofit or proprietary colleges and universities, while state bargaining laws may regulate public institutions.
- Laws in most Northeast, Midwest, and Pacific states protect the right to organize and bargain in the public sector; Ohio even grants the right to strike. In contrast, Southern and Rocky Mountain states—except for Florida, Montana, and New Mexico—have no public-sector bargaining laws or expressly prohibit public sector bargaining.
- The NLRA protects bargaining rights of educational support staff but has been interpreted to exclude TAs and most faculty members. Some state laws exclude faculty or TAs. Different bargaining laws often cover employees of public

colleges and universities and public employees in K-12 education, non-educational state agencies, or local police or fire departments.

Determining applicable labor law provisions therefore requires knowledge of institutional control and location, and of occupational group.

Labor law remained stable for most employees after enactment of public-sector bargaining laws in the 1960s and 1970s. But the 1980 *Yeshiva* decision crippled faculty organizing in private colleges and universities; its consequences still reverberate. In 2004, the right to organize unions and bargain collectively was abruptly revoked for TAs and certain research assistants (RAs) at private universities and for certain public employees. National Labor Relations Board (NLRB) rulings eroded other employee rights in 2004 and 2005. This chapter reviews these developments and then analyzes political party support for pro-union labor law.

NLRB v. YESHIVA: OLD CASE, RECENT DEVELOPMENTS

Unions in higher education suffered a major legal setback in 1980 when the U.S. Supreme Court decided, in *NLRB v. Yeshiva University*, that faculty in private universities with strong faculty governance do not have a protected right to organize unions and bargain collectively under the NLRA.⁴ The anti-union Taft-Hartley Act, passed over President Truman's veto in 1947, formed the statutory basis for *Yeshiva* by revoking protection of the bargaining rights of supervisors.⁵ In 1974, the U.S. Supreme Court interpreted the Taft-Hartley supervisory exclusion to mean that non-supervisory managers had no protected right under Section 7 of the NLRA to organize and bargain because they were not "employees."⁶ *Yeshiva* extended this managerial exclusion to faculty in private colleges and universities with significant authority in academic matters. The emerging drive to unionize faculty in private colleges and universities halted after *Yeshiva*, with rare exceptions.

Yeshiva has recent fallout. In two cases, unionization led to attacks on faculty governance. The American Association of University Professors (AAUP) won bargaining rights at Emerson College prior to *Yeshiva*. In 2003, the president of Emerson—a strong supporter of Emerson's AAUP chapter in 1975 when she was a faculty member—demanded that professors give up collective bargaining or faculty participation in college governance.⁷

After University of Akron faculty voted to unionize in 2003, the Board of Trustees "took away professors' say in the selection of deans and department chairs... eliminated the Faculty Senate's planning-and-budget committee...[and] altered the rules governing a financial crisis, substantially reducing the faculty's role."⁸ Ohio's public-sector bargaining statute governs the University of Akron, a public institution, so the NLRB's *Yeshiva* precedent is not binding. Still, concepts from private-sector labor law may spill into the public sector.

A 2002 Circuit Court of Appeals ruling put forth a new legal argument to eliminate union rights: religious freedom. The ruling reversed a 1997 union victory, the NLRB's *University of Great Falls* (UGF) decision. The Board had eroded *Yeshiva* by upholding the regional director's decision that UGF faculty members are managers only if "nearly all" of their policy "recommendations are routinely approved by the administrative hierarchy, without independent review."⁹ The Board agreed with the regional director's determination that UGF faculty were not managers by this criterion and ordered a representation election. The NLRB, this decision suggested, might determine that faculty members at many private institutions lacked sufficient authority to be classified as managers under *Yeshiva*.

The American Federation of Teachers (AFT) won the election, but UGF refused to bargain, and the NLRB returned to the case in 2000 as an unfair labor practice complaint.¹⁰ UGF, a Catholic-affiliated university, claimed exemption from NLRB jurisdiction, citing the 1979 U.S. Supreme Court ruling in *Catholic Bishop* that the NLRB could not assert jurisdiction over lay teachers at Catholic parochial schools because NLRB regulation could infringe on First Amendment rights of religious freedom.¹¹ The Board upheld the regional director's factual finding that UGF "does not have a 'substantial religious character' as did the schools involved in" the 1979 Supreme Court case.¹² The Board ordered UGF to cease and desist from refusing to bargain with the AFT.

The Circuit Court of Appeals overturned the Board's order in 2002, agreeing with UGF that it is exempt from NLRB jurisdiction under *Catholic Bishop*.¹³ The Circuit Court wrote, "the nature of the Board's inquiry boils down to 'is it sufficiently religious?'...This is the *exact* kind of questioning into religious matters which *Catholic Bishop* specifically sought to avoid."¹⁴ The Court directed the NLRB to

make a less intrusive factual inquiry: “Instead, in determining whether an institution is exempt from the NLRA under *Catholic Bishop*, the Board should consider whether the institution (a) holds itself out to the public as a religious institution; (b) is non-profit; and (c) is religiously affiliated. If so, then the Board must decline to exercise jurisdiction.”¹⁵ The Court found that UGF met these tests and ruled that the NLRB lacked jurisdiction.

The Court of Appeals, because it ruled on jurisdiction, did not discuss whether the NLRB correctly applied the *Yeshiva* decision to the factual situation at UGF. But many private colleges and universities have religious affiliations—intense or vestigial. *Catholic Bishop* offers a second line of defense for anti-union administrators at religiously affiliated colleges who cannot demonstrate that faculty members have sufficient authority to be classified as managers under *Yeshiva*. In January 2005, an NLRB regional director rejected a claim of exemption from NLRB jurisdiction by Carroll College, which argued that its faculty members were managers and that it had a Presbyterian affiliation.¹⁶ He ordered a representation election to determine whether the United Auto Workers (UAW) should represent the faculty. In May 2005, the Board agreed to hear the college’s appeal of the decision. “And precisely because Carroll isn’t the most religious college around,” noted one observer, “a victory for the college could preclude union campaigns at many institutions.”¹⁷

A recent *Yeshiva*-related decision may portend how U.S. Supreme Court Justice John Roberts, Jr., will vote on labor issues. In 2002, faculty at Le Moyne-Owen College petitioned for an NLRB representation election. The college objected, stating that the faculty were managerial employees not protected by the NLRA. The NLRB regional director, noting “the faculty’s lack of control over any facet of the school’s operations,”¹⁸ concluded that Le Moyne-Owen faculty were not managers under *Yeshiva* criteria. The union won the election, but the college refused to bargain, and the union filed an unfair labor practice charge. A unanimous NLRB quickly granted a motion for summary judgment ordering the college to bargain with the union.¹⁹

The college appealed to the U.S. Circuit Court of Appeals, and John Roberts wrote the opinion for a three-judge panel of the Circuit Court.²⁰ Roberts, noting examples given by the college of faculty participation in governance, refused to enforce the NLRB

bargaining order. He ruled that the regional director’s decision—affirmed by the terse Board decision—discussed only those post-*Yeshiva* NLRB rulings in which faculty members were found not to be managers. Roberts, in remanding the case, directed the NLRB to explain “how its disposition is consistent with its contrary holdings in the post-*Yeshiva* cases that appear to have presented similar facts.”²¹ The Board responded a few months later with an order stating:²²

We are mindful of the Court of Appeals for the District of Columbia’s decision...that, in deciding the managerial status of the faculty here, we must consider how our disposition of this case is consistent with precedent. We find that the Regional Director’s decision, which includes a thorough discussion of the facts and precedent, addresses the court’s concerns.

The NLRB did not publish this order, but quoted from it in an NLRB decision in another case in which the employer cited the Circuit Court ruling. This response to the Roberts opinion suggests that even the two Board members generally unsympathetic to unions felt Judge Roberts was missing an obvious point that needed no further elaboration.

TAs AND RAs IN PRIVATE UNIVERSITIES: THE *BROWN* DECISION

In 2004, higher education unions suffered a legal setback comparable in magnitude to *Yeshiva*: the NLRB revoked the union rights of TAs and certain RAs in private universities in the *Brown University* decision.²³ In 2000, a unanimous NLRB ruled in *New York University (NYU)* that TAs at private universities had a protected right to organize and bargain. The board also ruled that the NLRA protected RAs with nonacademic duties, such as keeping track of their work hours or performing services unrelated to their academic achievement.²⁴

But the new Republican majority on the NLRB overturned this precedent in *Brown*. *Yeshiva* turned on the managerial status of faculty members; *Brown* turned on the student status of TAs and RAs. By a 3-2 party-line vote, the NLRB determined that TAs and RAs were primarily students, and therefore not statutory employees for purposes of the NLRA. TAs and RAs at private universities no longer can win union recognition through NLRB elections and are no longer protected against employer unfair labor practices, such as discrimination for union activity or refusing to bargain with unions with majority support.

The NLRB majority in *Brown* argued that the 2000 NYU decision inappropriately violated NLRB precedents involving TAs, RAs, and medical house staff:

- The 1972 *Adelphi University* decision that TAs and RAs did not have sufficient community of interest with faculty to be included in a faculty bargaining unit.²⁵
- The 1974 *Leland Stanford* decision that RAs in physics at Stanford University conducted research to meet a degree requirement and thus were not statutory employees under the NLRA.²⁶
- The 1976 *Cedars-Sinai Medical Center*²⁷ and 1977 *St. Clare's Hospital*²⁸ decisions that medical interns, residents, and fellows performed services as part of their medical education and thus were not statutory employees.

The NLRB, acknowledged the *Brown* majority, overruled *Cedars-Sinai Medical Center* and *St. Clare's Hospital* in its 1999 *Boston Medical Center*²⁹ decision. But it noted that TAs and RAs, unlike medical house staff, had not yet completed their academic degrees.

Unionizing graduate assistants, the *Brown* majority claimed, may harm educational quality and even academic freedom. The scope of bargaining under the NLRA, unlike some state law provisions for public academic employees, does not exclude educational policy issues such as “admission requirements for students... content and supervision of courses, curricula, and research programs,”³⁰ the majority noted. “Academic freedom includes the right of a university ‘to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study’.... The imposition of collective bargaining on the relationship between a university and its graduate assistants...would limit the university’s [academic] freedom to determine a wider range of matters.”³¹ “Our decision,” stated the majority,

turns on our fundamental belief that the imposition of collective bargaining on graduate students would improperly intrude into the educational process...[T]here is a significant risk, and indeed a strong likelihood, that the collective-bargaining process will be detrimental to the educational process.... We decline to take these risks with our nation’s excellent private educational system.³²

The *Brown* majority saw university payments to graduate assistants as financial aid. “Although these TAs (as well as RAs and proctors) receive money from the Employer, that is also true of fellows who

do not perform any services. Thus, the services are not related to the money received.”³³ The “money is not ‘consideration’ for work. It is financial aid to a student.”³⁴ As financial aid recipients, “graduate student assistants are not employees within the meaning” of the NLRA.³⁵ Common-law concepts of employees do not necessarily define statutory employees. A “managerial employee may perform services for, and be under the control of, an employer.... And yet, the [Supreme] Court held that these persons were not statutory employees.”³⁶

The bottom line for the *Brown* majority: “It is clear to us that graduate student assistants, including those at Brown, are primarily students and have a primarily educational, not economic, relationship with their university. Accordingly, we overrule *NYU* and return to the pre-*NYU* precedent.”³⁷

The two dissenters in *Brown* challenged the majority’s view of NLRB precedents:

- They asserted that “until today, the Board has never held that graduate teaching assistants (in contrast to certain research assistants and medical house staff) are not employees under the Act.... Nothing in the Board’s [*Adelphi University*] decision suggests that graduate assistants could not have formed a bargaining unit of their own.”³⁸
- *Leland Stanford* concerned only RAs, and the decision that they were not statutory employees “turned on the particular nature of the research assistants’ work.”³⁹ The *Brown* dissenters quoted the *Leland Stanford* statement that the “relationship of the RAs and Stanford is not grounded on the performance of a given task where both the task and the time of its performance is designated and controlled by the employer.”⁴⁰ *NYU*, they noted, applied *Leland Stanford* to exclude RAs from the NYU bargaining unit who “are performing the research required for their dissertation, which is the same research for which the professor has obtained an outside grant. No specific services are required of these RAs—the students are simply expected to progress towards their dissertation.”⁴¹
- *Boston Medical Center* overruled *Cedars-Sinai Medical Center* and *St. Clare's Hospital*; the latter cases were no longer binding precedents since the *Brown* majority had not overruled *Boston Medical Center*.

The *Brown* dissenters argued that the majority decision in *Brown*—not the unanimous NLRB decision in *NYU*—broke with precedent.

Would unionization intrude into the educational process? A dispute over whether the scope of bargaining would include educational policy issues led to a protracted strike in 1969, when the Teaching Assistants' Association (TAA) negotiated America's first TA contract at the University of Wisconsin-Madison. In 1980, as a TAA executive board member, I believed the Chancellor used "educational policy" as a pretext to prevent TAA jurisdiction from extending to TAs in the College of Agriculture. An NEA attorney told me at the time that management anti-unionism is manifested in disputes about the scope of bargaining when outright opposition to unionization is politically unacceptable.⁴²

To counter the majority's academic freedom argument, the *Brown* dissenters described the collective bargaining agreement negotiated by the NYU graduate assistants immediately after the 2000 *NYU* ruling. The agreement

addresses such matters as stipends, pay periods, discipline and discharge, job posting, a grievance-and-arbitration procedure, and health insurance. It also contains a 'management and academic rights' clause, which provides that: 'Decisions regarding who is taught, what is taught, how it is taught and who does the teaching involve academic judgment and shall be made at the sole discretion of the University.'⁴³

This agreement, the dissenters contended, focused appropriately on terms and conditions of employment, not the educational process. Academic studies of collective bargaining with graduate assistants at public universities, they noted, "show that collective bargaining has not harmed mentoring relationships between faculty members and graduate students."⁴⁴ The dissenters offered a narrower definition of academic freedom: "academic freedom properly focuses on efforts to regulate the 'content of the speech engaged in by the university or those affiliated with it.'⁴⁵ "[T]he AAUP (a historical champion of academic freedom)" filed an amicus brief in *Brown* supporting union rights for graduate assistants, demonstrating that "collective bargaining and academic freedom are not incompatible."⁴⁶ Dismissing concerns about intrusions into the educational process, the *Brown* dissenters asserted that the "majority's policy concerns are not derived from the Act at all, but instead reflect an abstract view about what is best for American higher education—a subject far removed from the Board's expertise."⁴⁷

The dissenters rejected the characterization of payments to graduate assistants as financial aid. They quoted the NLRB regional director's findings that Brown TAs "perform services under the direction and control of Brown;" Brown RAs in the bargaining unit "have expectations placed upon them other than their academic achievement, in exchange for compensation;" and Brown proctors are "performing services not integrated with an academic program."⁴⁸ Members of the Brown bargaining unit, the dissenters noted, were considered employees for purposes of income tax withholding and requiring proof of eligibility for employment under immigration laws.

Employee status under the NLRA, asserted the *Brown* minority, "requires merely the existence of such an economic relationship, not that it be the only or the primary relationship between a statutory employee and a statutory employer."⁴⁹ "Absent compelling indications of Congressional intent, the Board simply is not free to create an exclusion from the Act's coverage for a category of workers who meet the literal statutory definition of employees. As the *NYU* Board observed, there is no such exclusion for 'students.'⁵⁰ The *Brown* majority, concluded the dissenters, "errs in seeing the academic world as somehow removed from the economic realm that labor law addresses—as if there was no room in the ivory tower for a sweatshop."⁵¹ "[E]ven those who live the life of the mind must eat."⁵²

The *Brown* dissenters thus claimed that (a) *Brown*, rather than *NYU*, violated precedent; (b) concerns about the scope of bargaining did not justify denial of the right to organize; and (c) graduate assistants can be both students and statutory employees. The NLRA, claimed the dissenters, protects the right of graduate assistants at private universities to organize unions and bargain collectively. Two months after their Republican colleagues outvoted the *Brown* dissenters, a senator asked one of them, "What had changed between the *NYU* ruling in 2000 and the board's decision in the *Brown* case this summer. She said that the composition of the board had changed. 'That's not necessarily a very good reason,' the senator replied."⁵³

Brown made the legal situation of TAs in private universities identical to the status of private employees in the U.S. at the end of Herbert Hoover's administration in 1932. No law prohibits TAs from organizing unions and bargaining collectively, but they have no legal protection. Like faculty members

subject to *Yeshiva*, TAs at private universities can probably unionize only if they win a recognition strike. Simultaneous TA strikes at Columbia and Yale Universities in April 2005 showed some TA militancy.⁵⁴ But it is unclear that TAs have sufficient muscle to win recognition by striking in institutions deriving substantial revenues from research grants and endowment income—sources unaffected by a TA strike. Also, these institutions could, over time, increase employment of non-tenure track faculty to reduce reliance on TAs for undergraduate instruction.

Brown was an important loss. In the period between *NYU* and *Brown*, TA unions were not assured of victory in representation elections. The UAW lost an NLRB election for TAs at Cornell University by a 2-1 vote in October 2003.⁵⁵ After *Brown*, TA unions could not even reach the election stage. *Brown* was expected to thwart TA organizing drives at George Washington University, Rensselaer Polytechnic Institute, and the University of Southern California.⁵⁶ *Brown* also led NLRB regional directors to reverse a previous order to hold a union representation election for TAs at Tufts University,⁵⁷ and to dismiss a representation petition for TAs and RAs at the University of Pennsylvania though an NLRB representation election had taken place.⁵⁸ *Brown* also directly challenged an established TA union. The UAW negotiated a contract after winning the NLRB-ordered union representation election for TAs in the *NYU* ruling. But in June 2005, after *Brown*, the *NYU* administration announced plans to end collective bargaining when the contract expired in August.⁵⁹ A strike to regain union recognition began in November 2005.⁶⁰

Brown may also have indirect consequences. Experience in the long TA organizing drive led Yale doctoral students to teach in labor studies programs or to write scholarly works sympathetic to progressive social movements.⁶¹ Graduate assistant unions have been schools for some union leaders and staff in a manner reminiscent of Karl Marx's maxim, "The trade unions are the schools for Socialism, the workers are there educated up to Socialism by means of the incessant struggle against capitalism which is being carried on before their eyes."⁶² An active TAA member at the University of Wisconsin-Madison became president of the Wisconsin AFL-CIO;⁶³ others later staffed positions in the Michigan Education Association, the Michigan Federation of Teachers, the UAW, the Teamsters, and the union-funded

Economic Policy Institute. After *Brown* labor unions may experience greater difficulty in tapping the support of talented young intellectuals.

Brown is not binding on public-employment labor boards. But most state legislatures pattern public sector bargaining statutes after the NLRA, minus the right to strike. The *Brown* precedent may influence state labor boards that have yet to decide whether state law grants TAs and RAs at public universities the right to organize and bargain.

BARGAINING RIGHTS FOR PUBLIC EMPLOYEES

The Taft-Hartley Act and *Yeshiva* demonstrated long ago the vulnerability of private-sector unions to loss of established bargaining rights. But many observers had a different view of the public sector. Two decades ago, I described the decision to grant collective bargaining rights to public employees as difficult to reverse, even when environmental conditions became less favorable to unions.⁶⁴ But since 1999, several groups of public employees—mostly not in higher education—lost their rights to organize unions and bargain. Workers in public colleges and universities should note any loss of public employee bargaining rights; a shifting tide may also affect public higher education.

In summer 2002, the Bush administration demanded that the bill creating the federal Department of Homeland Security give the President the authority to exclude Homeland Security employees from collective bargaining.⁶⁵ Democrats and some moderate Republican senators resisted this demand for over three months. But this resistance, believed many observers, contributed to the defeat of two Democratic Senators running for re-election.⁶⁶ The Democrats conceded the point shortly after the Republicans won the 2002 Congressional elections, and Homeland Security employees lost legal protection of their right to bargain.⁶⁷

In Kentucky, Democratic Governor Paul Patton supported bills in 1998 and 2000 that would have given state employees collective bargaining rights. These bills died in the legislature, but Patton issued an executive order in May 2001 giving state employees the right to choose unions to represent them on an advisory council that would meet with the governor.⁶⁸ In December 2003, within a week of taking office, Republican Governor Ernie Fletcher abolished the union council.⁶⁹

In Missouri, Democratic Governor Bob Holden issued an executive order in 2001 giving state employees collective bargaining rights. On his first day in office in January 2005, Republican Governor Matt Blunt rescinded this order, eliminating bargaining rights.⁷⁰

In Indiana, three Democratic governors bargained collectively with state employee unions for 15 years prior to 2005. Existing union contracts ran through mid-2007. But on his second day in office in January 2005, Republican Governor Mitch Daniels canceled the contracts and rescinded the executive order giving state employees bargaining rights.⁷¹

New Mexico experienced a rare recent victory for employee rights to concerted activity. A 1992 statute granted bargaining rights to state employees, including workers in colleges and universities, but unions had to accept a “sunset” provision to get the bill passed. The law expired automatically in 1999 after Republican Governor Gary Johnson vetoed three bills passed by the Democratic-controlled legislature to extend it.⁷² But Democrat Bill Richardson, elected governor in 2002, signed a bill in March 2003 restoring to New Mexico state employees the right to organize unions and bargain collectively. The 2003 statute has no sunset provision, making a second revocation of bargaining rights difficult.⁷³

The federal Department of Homeland Security case is the most important indicator of recent public sector anti-union political tides. Union rights in Indiana, Kentucky, Missouri, and New Mexico were revoked by a single person (the governor) in each state. Revoking union rights in the Department of Homeland Security, in contrast, resulted from actions by Congress and the President. The Homeland Security case may be an ominous portent for all public-sector unions.

OTHER BUSH NLRB ANTI-UNION DECISIONS

Brown University exemplifies the Bush NLRB’s anti-union decisions that often overturned precedents from the Clinton NLRB. Several other decisions in cases not involving higher education could directly affect employees in private colleges and universities, and indirectly affect employees in public higher education by influencing state labor boards.

Bringing coworkers to investigatory meetings: In 1975, the U.S. Supreme Court ruled in the *Weingarten* case that the right of employees to engage

in concerted activity for mutual protection means that employees can insist on the presence of a union representative when they believe that discipline will result from a meeting with management.⁷⁴ The growing frequency of sexual harassment investigations raised a key issue: do nonunion employees have a similar right to bring a co-worker to an investigatory meeting?

NLRB policy has shifted with the political winds. An NLRB majority—appointed by presidents prior to Reagan—said “yes” in 1982.⁷⁵ The Reagan NLRB said “no” in 1985.⁷⁶ The Clinton NLRB said “yes” in 2000.⁷⁷ The Bush NLRB said “no” in 2004.⁷⁸ *Weingarten* rights now apply only to employees in established collective bargaining units.

Mutual aid and protection: Fabozzi, a female employee, reported to her union steward and to management that a male coworker sexually harassed her. The union and management determined the allegation was unfounded. Fabozzi filed a discrimination complaint with a state agency and asked a female coworker to testify, warning the female coworker that she could be subpoenaed. The employer fired Fabozzi “for purportedly ‘attempt[ing] to coerce coworkers into corroborating an unsubstantiated charge of sexual harassment.’”⁷⁹ The discharge did not violate the NLRA, ruled the NLRB majority, because Fabozzi’s conduct “was uniquely designed to advance her own cause, and thus, that it was not engaged in for the purpose of mutual aid or protection.”⁸⁰ The majority, claimed the dissenters, “treats sexual harassment at work as merely an individual concern, even when victims seek help from coworkers.”⁸¹ They “have let their understandable lack of sympathy for some of Fabozzi’s behavior lead them to make bad law for all workers...[T]he majority’s decision today places an arbitrary roadblock in front of all employees who join together to resist unlawful discrimination.”⁸²

Work rule prohibiting abusive language directed toward a supervisor: A nursing home employee alleged that her employer adopted work rules that interfered with her right to engage in protected concerted activity under Section 7 of the NLRA. The NLRB unanimously decided that the nursing home violated the NLRA by imposing a ban on “Selling or soliciting anything in the building or on company property (the premises) whether you are on duty or off duty, unless you have been given written permission by the Administrator.”⁸³ But the Board divided

3-2 over another rule prohibiting abusive language directed toward a supervisor. The majority allowed the abusive language ban; the dissenters argued it could interfere with protected rights to concerted activity. According to the dissenters,

employees might reasonably be uncertain whether vehemently condemning a supervisor's perceived unfair treatment of a co-worker would be 'abusive' in the unexplained sense of the rules. Or an employee might reasonably fear that using words like 'scab' in the course of union activity would result in discipline, although such language is clearly protected under the Act.⁸⁴

"Expressions of displeasure, and even anger," according to the dissenters, "are protected means of Section 7 communication."⁸⁵

Including temporary employees in a bargaining unit with permanent employees: Agencies such as Kelly Services provide temporary employees who often do the same work as, and work side-by-side with, an employer's regular employees. This aspect of contingent employment became more common in recent years. The Clinton NLRB specified conditions under which regular employees and temps could be combined into a single bargaining unit, even if the employer or the agency objects.⁸⁶ In 2004, the Bush NLRB reversed the Clinton NLRB ruling. The employer or the temp agency can prevent inclusion of regular employees and temps in the same bargaining unit, thereby making it harder for temps to unionize.⁸⁷ The ruling may encourage employers to shift work to temps to undermine the jurisdiction of unions representing regular employees.

Double standard for supervisor conduct during representation elections: The NLRB initially required employer neutrality during union representation elections in the first years after enactment of NLRA in 1935. Taft-Hartley later added NLRA Section 8(c) that permitted employers to express their views during representation campaigns provided there was no threat of reprisal or promise of benefit. The NLRB then allowed supervisors to campaign vigorously against unionization. According to a study of over 400 representation elections during 1998 and 1999, two-thirds of private employers had supervisors hold weekly meetings with each employee to urge a "no union" vote.⁸⁸ But in 2004, the NLRB overturned a union victory in a representation election because a nurse later found to be a supervisor campaigned *for* the union.⁸⁹ Accusing the NLRB

majority of an "arbitrary double standard,"⁹⁰ the Democratic dissenters argued,

Contrary to the majority's view, the law does not apply more harshly to prounion supervisors expressing personal views about the benefits of unionization, in conflict with the views of their employer, than to antiunion supervisors, who may bring to bear not only their own day-to-day authority, but also the absolute authority of an openly antiunion employer.⁹¹

Solicitation rules and representation elections: When unions lose a representation election, especially by a narrow margin, they may seek a new election by arguing that employer unfair labor practices—an overly broad employer rule restricting solicitation, for example—may have affected the outcome. In 2005, the NLRB refused to order a new representation election, though the employer had an unlawful no-solicitation rule.⁹² The union, the majority asserted, had the burden of proof and had not presented "any evidence that the Employer enforced the rule or that any employee was in fact deterred by the rule from engaging in any Section 7 activity."⁹³ The dissenter wrote, "Until today, under Board law, it was well settled that an employer's mere maintenance of an unlawful rule is not only objectionable conduct, but also sufficient grounds to set aside an election."⁹⁴

Illegal threats and representation elections: An employer violates the NLRA by threatening to shut down the plant if workers vote to unionize. But must a union prove dissemination of this threat to overturn a union loss in a representation election? In 1972 and 1977, NLRB rulings presumed dissemination of such threats, absent evidence to the contrary.⁹⁵ But the Reagan NLRB refused to order a new election despite an illegal plant closure threat, claiming that the union had not proved dissemination of the threat.⁹⁶ The Clinton NLRB returned to the pre-Reagan policy, presuming dissemination of plant closure threats and ordering a new election.⁹⁷ In 2004, the Bush NLRB overruled all previous NLRB "decisions in which the Board has presumed dissemination of plant-closure threats or other kinds of coercive statements."⁹⁸ By a party-line vote of 3-2, the Board returned to the Reagan NLRB policy that the union must prove dissemination to obtain a new election.

Union access to employees during a representation campaign: Private employers frequently make anti-union statements during representation campaigns, sometimes at "captive audience" meetings.

Yet private employers may legally bar non-employee organizers from the employer's premises. Access to the premises is often restricted on urban college or university campuses where crime is a major concern. Unions argue that it is unfair for only one side to have access to the voters prior to an election. The 1966 *Excelsior* ruling partially addressed this concern by requiring employers to give the union the names and addresses of eligible employee voters within seven days after the NLRB has scheduled a union representation election.⁹⁹

A 2004 NLRB ruling dealt with inaccuracies in an *Excelsior* list.¹⁰⁰ The union stated that the employer provided incorrect addresses for 87 of the 306 employees and that the union could not find the addresses of 28 employees. The NLRB unanimously agreed that the employer had engaged in unfair labor practices during the election campaign, including illegally threatening employees with the loss of their jobs if they voted to unionize and "making comments that employees who choose to wear pronoun apparel were 'cutting their own throats' or 'putting their heads in a noose.'"¹⁰¹ But by a 2-1 vote, the NLRB decided that the inaccuracies in the *Excelsior* list did not justify a new representation election, despite the illegal employer campaign tactics. The majority wrote, "The Union had the opportunity to communicate with at least 90% of the unit employees at their homes. In addition, there is no evidence or contention that the inaccuracies on the *Excelsior* list were the result of bad faith or gross negligence" by the employer.¹⁰² A new election should be held, argued the dissenter, because the votes of the 28 non-contacted employees could have affected the outcome. The union's lack of timely access to correct addresses "interfered with the purpose behind the *Excelsior* rule of ensuring that all employees are fully informed about the arguments concerning representation."¹⁰³

Ban on off-duty fraternization: Guardsmark, a company that provides uniformed security guards, adopted a rule that prohibited employees from complaining about their jobs to Guardsmark's customers. Guardsmark also told employees not to "fraternize on or off duty, date or become overly friendly with the client's employees or with co-employees."¹⁰⁴ In 2005, the NLRB unanimously ruled that the ban on job complaints violated the NLRA. But two of the three Board members allowed the ban on off-duty fraternization with co-employees. The dissenting

Board member noted the employer's "rule already bars dating and becoming 'overly friendly' with those individuals, so a reasonable employee might well conclude that the prohibition on fraternizing must apply to something else...[E]mployees could reasonably understand the rule to trench upon their right under Section 7 to join together for mutual aid and protection."¹⁰⁵

Voluntary recognition as a bar to decertification:

Some unions recently sought neutrality agreements, in which employers promise (1) to grant voluntary recognition without an NLRB election if a majority of employees sign union authorization cards and, (2) to refrain from campaigning against unionization. An ongoing NLRB case concerns neutrality agreements between the UAW and two auto parts suppliers who depend on orders from unionized "Big Three" auto companies. About a month after the UAW received voluntary recognition at two plants based on card checks, the National Right to Work Legal Defense Foundation helped workers at these plants file decertification petitions.¹⁰⁶ Abiding by a long-standing NLRB precedent,¹⁰⁷ NLRB regional directors dismissed the petitions on the grounds that voluntary recognition bars decertification petitions for a reasonable period of time. In 2004, a majority of the NLRB agreed to hear the National Right to Work Legal Defense Foundation appeal, which argued against voluntary recognition bars to decertification.¹⁰⁸ The NLRB dissenters opposed hearing the appeal, asserting that the Board majority "contemplates a radical change in the law" that would thwart the increasingly successful union tactic of seeking voluntary recognition.¹⁰⁹ An NLRB decision on eliminating the voluntary recognition bar to decertification was pending at press time.

Advance agreement to card-check recognition:

A related case concerns a challenge to neutrality agreements binding on an employer's future acquisitions. In 1999, David Stockman, former budget director for President Reagan, established a leveraged buyout firm that sought to take over established Midwest industrial companies. He signed a neutrality agreement with the Steelworkers Union covering companies his buyout firm might acquire. The National Right to Work Legal Defense Foundation, perhaps unimpressed by Mr. Stockman's conservative credentials, provided legal representation for a unfair labor practice charge against this agreement,¹¹⁰ and the regional director of the NLRB agreed to issue a

unfair labor practice complaint. In 2005, an NLRB administrative law judge dismissed the complaint, noting “There is nothing in the law that requires an employer to mount an anti-union campaign.”¹¹¹ At press time, the Board had not decided whether to hear an appeal of this dismissal.

Political Party Support for Pro-Union Labor Law

In 1932, two Republicans—Senator George Norris and Representative Fiorello LaGuardia—sponsored the Norris-LaGuardia Act restricting anti-union court injunctions. Even today, a few Republican politicians continue to support unions. Senator Lincoln Chafee, for example, opposed the 2002 Bush proposal to strip the collective bargaining rights of Homeland Security employees, and Senator Arlen Specter criticized the 2004 *Brown* decision revoking the union rights of TAs.

But elected official support for employees’ rights to organize and bargain increasingly correlated with political party. Franklin Roosevelt’s New Deal began the alignment between labor unions and the Democratic Party. This alliance continued for decades as the Norris progressive wing of the Republican Party withered while conservative Southerners abandoned the Democrats. By 1979–80, political party was a key predictor of pro-union votes on labor issues in the U.S. House of Representatives.¹¹² Enactment of state public-sector bargaining laws in the 1960s and 1970s frequently followed immediately after electoral gains by Democrats.¹¹³ Passage of Ohio’s strong pro-union public-sector bargaining law in 1983 occurred because the Democrats in 1982 won control of the governorship and both houses of the legislature for the first time since 1958.¹¹⁴

Recent labor policy changes by elected officials demonstrate the adverse consequences for unions of Republican electoral victories. I earlier noted the revocation of union rights for state employees by Republican governors in Indiana, Kentucky, Missouri; the vetoed renewal of the expiring public-sector bargaining law by a New Mexico Republican governor; and revocation of union rights for federal Homeland Security employees after Republican Senate victories. Political swings also affect important NLRB decisions, though many routine NLRB decisions remain unanimous. Democratic members tend to favor unions; Republican members tend to favor management.

Compounding the problem for unions: the limited influence in Board decisions of the legal doctrine of *stare decisis*—to stand by things decided. William Gould IV, a labor law professor at Stanford and former NLRB chair, said that changes in party control of the Presidency lead more often to precedent reversals in the NLRB, where members serve relatively short terms, than in federal courts, where judges have lifetime appointments.¹¹⁵

Custom somewhat obscures the link between the President’s party and votes by Board members—no more than three of the NLRB’s five members come from the same political party. Thus, Reagan appointed some pro-union Democrats, and Clinton appointed some anti-union Republicans. One strong pro-union Democrat, Wilma Liebman, now serves on the Board. First appointed in 1997 by Clinton, George W. Bush reappointed her in 2002. The Senate confirmed the reappointment along with four other Board members—one Democrat and three Republicans.¹¹⁶ A Republican former member of the Board says that Bush has submitted Liebman’s nomination for another term after her current term expires in August 2006.¹¹⁷ But Bush, like his predecessors, will likely ensure that his party maintains a majority on the Board; Liebman will therefore cast many votes in dissent.

Political bias in NLRB decisions was present in the pre-Reagan years. One study of NLRB decisions noted that Eisenhower and Nixon tended to appoint Board members sympathetic to management, though Eisenhower appointed one pro-union Board member and Nixon reappointed two. Between 1948 and 1979, the study showed, Board members were most likely to favor labor over business during the Kennedy and Carter administrations and least likely to favor labor over business during the administrations of Nixon and, especially, Eisenhower.¹¹⁸

Another study of NLRB decisions from 1954 to 1977 considered the political party of the Board member and of the President who appointed the Board member. The probability of a pro-union vote in a unfair labor practice decision, the study found, was 32 percent higher for a Democratic Board member appointed by a Democratic president than for a Republican Board member appointed by a Republican President.¹¹⁹

These political swings intensified once Reagan became president in 1981. Joan Flynn, a law professor who previously served as staff counsel to an anti-union Republican Board member, wrote:¹²⁰

Reagan broke with mainstream Republican tradition in his NLRB appointments. Whereas his predecessors had appointed management lawyers from well-known law firms—solid members of the labor-management “club”—Reagan went wholly outside the mainstream labor relations community in his early appointments. His first choice for Board chair, John Van de Water, was not a management lawyer at all—but rather, a management consultant who specialized in defeating union campaigns.

Donald Dotson, Reagan’s second appointee as Board chair, was almost reflexively anti-union. Dotson’s Board votes favored management over unions 97 percent of the time, notes an analysis of NLRB voting from 1985 to 2000 conducted by a management-side labor law firm.¹²¹ Presidents prior to Reagan appointed Board members who made case-by-case decisions.

House Speaker Newt Gingrich further departed from the relative moderation of Eisenhower, Nixon, and Ford in July 1995 by securing passage of an appropriation bill that cut NLRB funding by 30 percent and that included a rider aimed at weakening NLRB enforcement powers.¹²² The rider prohibited the NLRB from investigating unfair labor practice charges brought by union “salts”—union staffers or loyalists taking jobs to organize their new employer. It also limited the NLRB’s ability to use Section 10(j) of the NLRA to seek temporary injunctions ordering reinstatement of workers allegedly fired for union activity, while NLRB adjudication of a unfair labor practice charge was pending. In August 1995, the House rejected an amendment by Democrat Nancy Pelosi to eliminate the rider. House Republicans voted 212 to 15 against Pelosi’s amendment, while Democrats voted 181 to 17 in favor.¹²³

William Gould IV, NLRB Chair from 1994 to 1998, did not support unions reflexively: his votes favored unions 78 percent of the time.¹²⁴ But, he noted, House Republicans in the mid-1990s viewed him as an “enemy.”¹²⁵ He asserted, “the Republican attacks on our budget were motivated by their hostility to the NLRA and the Board itself.... Only repeal of the National Labor Relations Act and, perhaps, its replacement with repressive legislation would have satisfied” the House Republicans.¹²⁶

Sharp polarization prevails at the NLRB. Board votes split along party lines in all divided NLRB decisions from 2004 and 2005 cited here. Republicans had a majority, so unions lost. Prominent labor law

experts noted the NLRB’s recent anti-union tilt. Cornell University professor James Gross characterized the decisions of the Bush NLRB in 2004:¹²⁷

These decisions come close to or even match the Reagan board in their intensity and vigor in promoting employer powers. They are pressing the outer limits of what could be a reasonable or legitimate interpretation of the balance between employer prerogatives and worker rights. In my mind, this is fundamentally inconsistent with the purpose of the National Labor Relations Act, which is to encourage the practice and procedures of collective bargaining.

Charles Craver, a professor at George Washington University, stated, “We have a labor board as conservative as any time since the Reagan board. It really troubles me because we’re revisiting a lot of cases that have been fairly well settled.”¹²⁸ Theodore St. Antoine, former dean of the University of Michigan Law School, said, “Taken one by one, I do not think these are the kinds of decisions that make one sit back and say, ‘This is outrageous.’ At the same time, I have to concede that once more we’re in the nibbling process. While none of them consist of a great big bite, the cumulative effect is to decrease the capability of unions to organize.”¹²⁹

The pronounced hostility of the Bush administration and the NLRB towards unions was only one reason for labor’s opposition to Bush’s reelection in 2004. For example, an Associated Press reporter cited education issues—not labor law—in explaining NEA’s July 2004 recommendation that its members vote against Bush. These education issues included private-school vouchers, federal funding for education, reliance on standardized student tests in assessing school progress, and the statement by Bush’s Secretary of Education that NEA was a “terrorist organization.”¹³⁰ But AFL-CIO President John Sweeney—criticized in 2005 for “spending too much on politics and not enough on organizing”—justified AFL-CIO political spending by noting the large impact of government policy on union organizing.¹³¹

This is not the place to resolve the debate between Sweeney and his critics—a debate leading to a rift in the AFL-CIO. But recent decisions by the Bush administration, Bush’s Republican NLRB appointees, and Republican governors have made labor law less favorable to labor unions. And these labor law changes have made union organizing more difficult.

NOTES

The author thanks Theodore St. Antoine for comments on a draft of this chapter.

- ¹ Rare exceptions include faculty in the Chicago City Colleges, who won a recognition strike in 1966; teaching assistants at the University of Wisconsin-Madison, who won union recognition in 1969 from a chancellor whose previous work as a professor of labor relations established his personal acceptance of collective bargaining as a matter of principle; and faculty at Goddard College, where NEA won recognition in 1998.
- ² Klaff and Ehrenberg, 2003.
- ³ Saltzman, 1998; Saltzman, 2000; Saltzman, 2001.
- ⁴ 444 U.S. 672 (1980).
- ⁵ Shister, 1958.
- ⁶ *NLRB v. Bell Aerospace Company*, 416 U.S. 267 (1974).
- ⁷ Gravois, 2005.
- ⁸ Smallwood, 2003.
- ⁹ 325 NLRB 83 (1997) at 93.
- ¹⁰ "University of Great Falls," 331 NLRB 1663 (2000).
- ¹¹ "NLRB v. Catholic Bishop of Chicago," 440 U.S. 490 (1979).
- ¹² *University of Great Falls* (2000) at 1666.
- ¹³ *University of Great Falls v. NLRB*, 278 F.3d 1335 (DC Cir., 2002).
- ¹⁴ *Ibid.* at 1343. Emphasis in the original.
- ¹⁵ *Ibid.* at 1347.
- ¹⁶ *Carroll College*, NLRB Case 30-RC-6594, Regional Director's Decision (January 13, 2005).
- ¹⁷ "Separation of Church and Union," *Inside Higher Education* (May 13, 2005) accessed online on July 19, 2005 at <http://insidehighered.com/news/2005/05/13/carroll>.
- ¹⁸ *Le Moyne-Owen College*, Decision and Direction of Election, NLRB Case 25-RC-10120 (August 6, 2002) at 2.
- ¹⁹ *Le Moyne-Owen College*, 338 NLRB No. 92 (January 17, 2003).
- ²⁰ *Le Moyne-Owen College v. NLRB*, 357 F.3d 55 (DC Cir., 2004).
- ²¹ *Ibid.* at 60.
- ²² *Le Moyne-Owen College*, unpublished NLRB Order (June 23, 2004), quoted in *Park Point University*, 344 NLRB No. 17 (February 17, 2005) at 2.
- ²³ 342 NLRB No. 42 (2004), 175 LRRM 1089 (2004).
- ²⁴ 332 NLRB 1205 (2000).
- ²⁵ 195 NLRB 639 (1972).
- ²⁶ 214 NLRB 621 (1974).
- ²⁷ 223 NLRB 251 (1976).
- ²⁸ 229 NLRB 1000 (1977).
- ²⁹ 330 NLRB 152 (1999).
- ³⁰ *Brown University* at 10, note 31.
- ³¹ *Ibid.* at 8, footnote 26, quoting a 1957 definition of academic freedom by the U.S. Supreme Court.
- ³² *Ibid.* at 11.
- ³³ *Ibid.* at 3.
- ³⁴ *Ibid.* at 6.
- ³⁵ *Ibid.* at 8.
- ³⁶ *Ibid.* at 9.
- ³⁷ *Ibid.* at 5.
- ³⁸ *Ibid.* at 13.
- ³⁹ *Ibid.*
- ⁴⁰ *Leland Stanford* at 623, quoted in *Brown* at 13.
- ⁴¹ *NYU* at 1214.
- ⁴² Telephone interview with Don Wollett, January 11, 1980.
- ⁴³ *Brown* at 17, quoting the September 1, 2001 to August 31, 2005 collective bargaining agreement between NYU and the UAW.
- ⁴⁴ *Ibid.* at 17-18.
- ⁴⁵ *Ibid.* at 18, quoting a 1990 U.S. Supreme Court definition of academic freedom.
- ⁴⁶ *Ibid.* at 18.
- ⁴⁷ *Ibid.* at 15.
- ⁴⁸ Quoted in *Brown* at 15.
- ⁴⁹ *Ibid.* at 15.
- ⁵⁰ *Ibid.* at 14.
- ⁵¹ *Ibid.* at 13.
- ⁵² *Ibid.* at 16.
- ⁵³ Smallwood, October 8, 2004.
- ⁵⁴ "TA Strike Impact," *Inside Higher Education* (April 19, 2005), accessed online on July 19, 2005 at <http://insidehighered.com/news/2005/04/19/strike>.
- ⁵⁵ Dullea, 2003.
- ⁵⁶ Smallwood, July 23, 2004.
- ⁵⁷ *Tufts University*, NLRB Case 1-RC-21452, Regional Director's decision dated September 23, 2004.
- ⁵⁸ *University of Pennsylvania*, NLRB Case 4-RC-20353, Regional Director's decision dated August 26, 2004.
- ⁵⁹ <http://www.nyu.edu/provost/ga/communications-061605.html>.
- ⁶⁰ "Graduate Assistants Strike at NYU," *Chronicle of Higher Education*, November 18, 2005, A13.
- ⁶¹ Glenn, 2005.
- ⁶² Quoted in Kautsky, 1909.
- ⁶³ http://www.wisaficio.org/who_we_are/officers/newby/dnewby.htm.
- ⁶⁴ Saltzman, 1985.
- ⁶⁵ Becker, 2002.

- ⁶⁶ Firestone, October 16, 2002, and November 20, 2002.
- ⁶⁷ Firestone, November 13, 2002.
- ⁶⁸ Wolfe, 2001.
- ⁶⁹ Wolfe, 2003.
- ⁷⁰ Hoover, 2005.
- ⁷¹ Corcoran and Schneider, 2005.
- ⁷² *Government Employee Relations Report*, 37 (1820) (July 12, 1999), 834-835.
- ⁷³ Andersen, 2003.
- ⁷⁴ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).
- ⁷⁵ *Material Research Corporation*, 262 NLRB 1010 (1982).
- ⁷⁶ *Sears, Roebuck*, 274 NLRB 230 (1985).
- ⁷⁷ *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000).
- ⁷⁸ *IBM Corp.*, 341 NLRB No. 148 (June 9, 2004).
- ⁷⁹ Termination letter from employer to Fabozzi, quoted in *Holling Press*, 343 NLRB No. 45 (October 15, 2004) at 1.
- ⁸⁰ *Holling Press* at 1.
- ⁸¹ *Ibid.* at 4.
- ⁸² *Ibid.* at 6.
- ⁸³ *Lutheran Heritage Village-Livonia*, 343 NLRB No. 75 (November 19, 2004) at 10.
- ⁸⁴ *Ibid.* at 5-6.
- ⁸⁵ *Ibid.* at 4.
- ⁸⁶ M.B. Sturgis, 331 NLRB 1298 (2000).
- ⁸⁷ *H.S. Care L.L.C., d/b/a Oakwood Care Center and N&W Agency, Inc.*, 343 NLRB No. 76 (November 19, 2004)
- ⁸⁸ Bronfenbrenner, 2000.
- ⁸⁹ *Harborside Health Care, Inc.*, 343 NLRB 100 (December 8, 2004).
- ⁹⁰ *Ibid.* at 14.
- ⁹¹ *Ibid.* at 16.
- ⁹² *Delta Brands*, 344 NLRB 10 (February 10, 2005).
- ⁹³ *Ibid.* at 2.
- ⁹⁴ *Ibid.* at 3.
- ⁹⁵ *General Stencils*, 195 NLRB 1109 (1972); *Coach & Equipment Sales*, 228 NLRB 440 (1977).
- ⁹⁶ *Kokomo Tube Co.*, 280 NLRB 357 (1986).
- ⁹⁷ *Springs Industries*, 332 NLRB 40 (2000).
- ⁹⁸ *Crown Bolt, Inc.*, 343 NLRB No. 86 (November 29, 2004) at 4.
- ⁹⁹ *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).
- ¹⁰⁰ *Washington Fruit and Produce Co.*, 343 NLRB No. 125 (December 16, 2004).
- ¹⁰¹ *Ibid.* at 1.
- ¹⁰² *Ibid.* at 8.
- ¹⁰³ *Ibid.* at 14.
- ¹⁰⁴ *Guardsmark*, 344 NLRB No. 97 (June 7, 2005) at 1.
- ¹⁰⁵ *Ibid.* at 5.
- ¹⁰⁶ National Right to Work Legal Defense Foundation, Inc. (December 22, 2003).
- ¹⁰⁷ *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966).
- ¹⁰⁸ *Dana Corp. and Metaldyne Corp.*, (June 7, 2004).
- ¹⁰⁹ *Ibid.* at 2.
- ¹¹⁰ National Right to Work Legal Defense Foundation, Inc. (August 5, 2003).
- ¹¹¹ *Heartland Industrial Partners, LLC and United Steelworkers of America*, NLRB Case 34-CE-9, Administrative Law Judge Decision (June 16, 2005) at 3.
- ¹¹² Saltzman, 1987.
- ¹¹³ Saltzman, 1985.
- ¹¹⁴ Saltzman, 1988.
- ¹¹⁵ Smallwood, July 30, 2004.
- ¹¹⁶ "National Labor Relations Board Members," accessed online on August 3, 2005 at <http://www.nlr.gov/nlr/about/structure/fbmembers.asp>.
- ¹¹⁷ Interview with John Raudabaugh, member, NLRB 1990-1993, Ann Arbor, Mich., July 13, 2003.
- ¹¹⁸ Moe, 1985.
- ¹¹⁹ Cooke and Gautschi, 1982. Democratic Board members appointed by a Republican president and Republican Board members appointed by a Democratic president fell in between.
- ¹²⁰ Flynn, 2000 at 1384.
- ¹²¹ *Ibid.* at 1408. Dotson served as Board chair from 1983 to 1987, so this analysis does not cover the first part of his term. But including Board votes from 1983 and 1984 would not change the qualitative conclusion that Dotson almost always voted against unions.
- ¹²² Lewis, 1995.
- ¹²³ Vote 612 on August 2, 1995, *Congressional Quarterly Weekly Report* 53 (31) (August 5, 1995), 2400.
- ¹²⁴ Flynn, 2000, at 1408.
- ¹²⁵ Gould, 2000, at 255.
- ¹²⁶ *Ibid.* at 193.
- ¹²⁷ Quoted in Greenhouse, January 2, 2005.
- ¹²⁸ *Ibid.*
- ¹²⁹ *Ibid.*
- ¹³⁰ Feller, 2004.
- ¹³¹ Greenhouse, July 26, 2005.

REFERENCES

- Anderson, S. "Bargaining Law Back on Books with No Sunset." *Albuquerque Tribune* (March 8, 2003), A3.
- Becker, E. "Administration Insists on Control over New Agency's Labor Rules." *New York Times* (August 1, 2002), A18.
- Bronfenbrenner, K. "Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing." U.S. Trade Deficit Review Commission, Washington, D.C. 2000.
- Cooke, W.N. and F.H. Gautschi, III. "Political Bias in NLRB Unfair Labor Practice Decisions." *Industrial and Labor Relations Review* 35 (4) (July 1982), 539-549.
- Corcoran, K. and M.B. Schneider. "Indiana Gov. Daniels Cancels Union Contracts for 25,000 State Workers." *Indianapolis Star* (January 12, 2005).
- Dullea, H.N. "How Cornell Beat a Union by Letting TAs Vote." *Chronicle of Higher Education* 49, (19) (January 17, 2003), B16.
- Feller, B. "NEA, the Nation's Largest Union, Endorses Kerry for President." *Associated Press State and Local Wire*, July 5, 2004.
- Firestone, D. "Homeland Security Fight Returns to Fore." *New York Times* (October 16, 2002), A13.
- _____. "Stalemate Ends in Bush Victory on Terror Bill." *New York Times* (November 13, 2002), A1.
- _____. "Senate Votes, 90-9, to Set Up a Homeland Security Department Geared to Fight Terrorism; 170,000 Employees; U.S. Bureaucracy Faces its Biggest Overhaul in Half a Century." *New York Times* (November 20, 2002): A1.
- Flynn, J. "A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000." *Ohio State Law Journal* 61 (2000), 1361-1455.
- Glenn, D. "Look For the Union Label: Veterans of Yale's Graduate-Student Strikes are Forging their Experiences into Scholarship." *Chronicle of Higher Education* 51 (35) (May 6, 2005), A14-A17.
- Gould, W.B., IV. *Labored Relations: Law, Politics, and the NLRB—A Memoir*. Cambridge, Mass.: MIT Press, 2000.
- Gravois, J. "From Friend to Foe: At a Private Boston College, a Professor-Turned-President Wants Her Former Colleagues to Give Up Their Union." *Chronicle of Higher Education* 51, (44) (July 8, 2005): A8.
- Greenhouse, S. "Labor Board's Detractors See a Bias Against Workers." *New York Times* (January 2, 2005): A12.
- _____. "Ambitions Are Fueling a Division of Labor." *New York Times* (July 26, 2005): A1 and A 17 at A17.
- Hoover, T. "Missouri Governor's First Act Is to Repeal State Workers' Bargaining Rights." *Kansas City Star* (January 12, 2005).
- Kautsky, K. "Sects or Class Parties." 1909. Accessed online on July 29, 2005 at <http://www.marxists.org/archive/kautsky/1909/07/unions.htm>.
- Klaff, D.B. and R.G. Ehrenberg. "Collective Bargaining and Staff Salaries in American Colleges and Universities." *Industrial and Labor Relations Review* 57 (1) (October 2003), 92-104.
- Lewis, A. "Abroad at Home: The New Priorities." *New York Times* (August 7, 1995), A13.
- Moe, T.M. "Control and Feedback in Economic Regulation: The Case of the NLRB." *American Political Science Review* 79 (4) (December 1985), 1094-1116.
- National Right to Work Legal Defense Foundation, Inc. "Autoworkers Challenge National Agreement Mandating Acquired Companies to Help Unionize their Own Employees." News release (August 5, 2003). Accessed online on July 29, 2005 at <http://www.nrtw.org/b/nr.php?id=246>.
- _____. "Metaldyne Workers Petition to Throw Out UAW Union After Abusive Top-Down Organizing Drive." News release (December 22, 2003). Accessed online on July 29, 2005 at http://www.nrtw.org/b/nr_284.php.
- _____. "Dana Corp. Workers Petition to Throw Out Unwanted UAW Union." News release (January 12, 2004). Accessed online on July 29, 2005 at http://www.nrtw.org/b/nr_286.php.
- Saltzman, G.M. "Bargaining Laws As a Cause and Consequence of the Growth of Teacher Unionism." *Industrial and Labor Relations Review* 38 (3) (April 1985), 335-351.
- _____. "Congressional Voting on Labor Issues: The Role of PACs." *Industrial and Labor Relations Review* 40 (2) (January 1987), 163-179.
- _____. "Public-Sector Bargaining Laws Really Matter: Evidence from Ohio and Illinois." In R. B. Freeman and C. Ichniowski, eds., *The Public Sector Look of American Unions*. Chicago, Ill.: University of Chicago Press, 1988, 41-78.
- _____. "Legal Regulation of Collective Bargaining in Colleges and Universities." In *NEA 1998 Almanac of Higher Education*. Washington, D.C.: National Education Association, 1998, 45-63.
- _____. "Union Organizing and the Law: Part-Time Faculty and Graduate Teaching Assistants." In *NEA 2000 Almanac of Higher Education*. Washington, D.C.: National Education Association, 2000, 43-55.

- _____. "Higher Education Collective Bargaining and the Law." In *NEA 2001 Almanac of Higher Education*. Washington, D.C.: National Education Association, 2001, 45-58.
- Shister, J. "The Impact of the Taft-Hartley Act on Union Strength and Collective Bargaining." *Industrial and Labor Relations Review* 11 (3) (April 1958): 339-351.
- Smallwood, S. "Union In, Governance Out: The U. of Akron's Board Reacts to a Union by Taking Away Faculty Powers." *Chronicle of Higher Education* 50 (7) (October 10, 2003), A10.
- _____. "Labor Board Rules Against TA Unions: Decision is Major Blow to Organizing Efforts at Private Colleges." *Chronicle of Higher Education* 50 (46) (July 23, 2004), A1.
- _____. "The NLRB's Ruling on Collective Bargaining: What It Means For Graduate Students' Unions." *Chronicle of Higher Education* 50 (47) (July 30, 2004), A10.
- _____. "Pay or Financial Aid? Senators Hear Debate Over Unions for Teaching Assistants." *Chronicle of Higher Education* 51 (12) (October 8, 2004), A12.
- Wolfe, C. "Patton Would Let State Workers Pick Unions for Council." Associated Press State and Local Wire, May 18, 2001.
- _____. "Fletcher Abolishes Union Council for State Employees." Associated Press State and Local Wire, December 17, 2003.