Legal Regulation of Collective Bargaining in Colleges and Universities

by Gregory M. Saltzman

Gregory M. Saltzman *is professor of economics and management at Albion College and adjunct associate research scientist at the Institute of Labor and Industrial Relations, University of Michigan. He holds a Ph.D. in economics from the University of Wisconsin-Madison.*

One of Saltzman's recent publications deals with efforts by a Japanese-owned auto parts plant in the United States to screen out union sympathizers during hiring. He has also written on the U.S. and Canadian health insurance systems, the impact of managed care on mental health services for women, and how social class affects public opinion concerning striker replacement.

Saltzman's earlier publications dealt with teacher unionization, public-sector labor law, and how political action committee contributions influence Congressional votes on labor issues.

Does labor law substantially affect union-management relations in higher education and elsewhere? In the past some scholars have asserted that laws had a modest impact, but recent studies have challenged those assertions.

- A 1959 study claimed that right-to-work legislation, which prohibits the union shop and the agency shop, had minimal effects on union growth in Texas.[1] But a 1987 study found that right-to-work laws substantially hindered union organizing.[2]
- A 1976 study concluded that legal restrictions on employer campaigning during private-sector union representation elections had little effect on election outcomes.[3] But a re-analysis of the raw data found that legal restrictions on employer campaigning *did* affect representation election outcomes.[4]
- A 1979 study argued that public-sector bargaining laws "were no more important than several other factors" in explaining the growth public-sector bargaining.[5] But studies in 1985 and 1988 found that bargaining laws were the key factor leading to the spread of bargaining beyond large cities[6] and that laws themselves had a large impact independent of the climate of public opinion.[7]

Labor laws, most scholars now conclude, are not just symbols of public sentiment. They affect substantive outcomes.

Because labor laws make a difference, those affected by these laws must know their content. This chapter reviews several aspects of the laws governing collective bargaining by employees of colleges and universities:[8]

- the right to organize and bargain collectively.
- definition of the bargaining unit.
- scope of bargaining
- enforceability of collective bargaining contracts.
- union use of employer's internal mail and E-mail systems.
- duty of fair representation.
- agency shop and union shop provisions.

The applicable rules vary with the following factors:

- employer sector (public / private).
- employee group (faculty / teaching assistants / staff).
- for faculty in private nonprofit institutions, strength of the faculty governance system.
- for public employers, type of institution (two- or four-year) and state in which it is located.

This chapter does not address the distinctive legal rules governing bargaining in hospitals, though many hospital employees work in academic medical centers.

PROTECTED RIGHT TO ORGANIZE AND BARGAIN COLLECTIVELY

Before 1933, no Americans other than railroad workers had a protected right to organize unions and bargain collectively. Workers used strikes to unionize in the absence of legal protection; some craft unions won employer recognition by controlling the supply of trained labor. In 1933, the National Industrial Recovery Act (NIRA) provided legal protection of the right to organize and bargain. When the NIRA was declared unconstitutional, its collective bargaining provisions were revived by the National Labor Relations Act of 1935 (NLRA, often called the Wagner Act). The NLRA also prohibited employers from engaging in unfair labor practices that interfered with the right of employees to organize and bargain. In addition, it established the National Labor Relations Board (NLRB), an administrative agency, to enforce the ban on unfair labor practices and to conduct secret ballot union representation elections.

In the early years of the NLRA, a few employees of private, nonprofit colleges and universities won bargaining rights. The dining hall and maintenance workers at Yale University, for example, have been unionized since the 1940s.[9] But the NLRA excluded public employees from coverage. Furthermore, in 1951, after enactment of the 1947 Taft-Hartley amendments to the NLRA, the NLRB ruled that the NLRA did not protect employees of private, nonprofit colleges and universities.[10] For the next 19 years, the NLRA covered only the few college or university employees engaged in purely commercial activities not closely connected with education or employed by private, for-profit institutions.

State, not federal, legislation gradually extended legal protection of union organizing and bargaining rights to many public-sector college and university employees. A 1951 Illinois law, for example, *authorized*, but did not require, the state's University Civil Service System to negotiate with organizations representing nonacademic employees on wages and other conditions of employment.[11] In 1965, Michigan passed one of the first laws *requiring* public employers to bargain with unions having majority support. The law, said the Michigan Attorney General, applied to the University of Michigan.[12]

Within five years, Hawaii, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island, and South Dakota also enacted public-sector bargaining laws giving union rights to college and university employees.[13] The U.S. Supreme Court subsequently upheld the constitutionality of a state bargaining law establishing exclusive representation in the public sector, even when this arrangement limited the ability of faculty who were not union members to participate in academic policy discussions.[14]

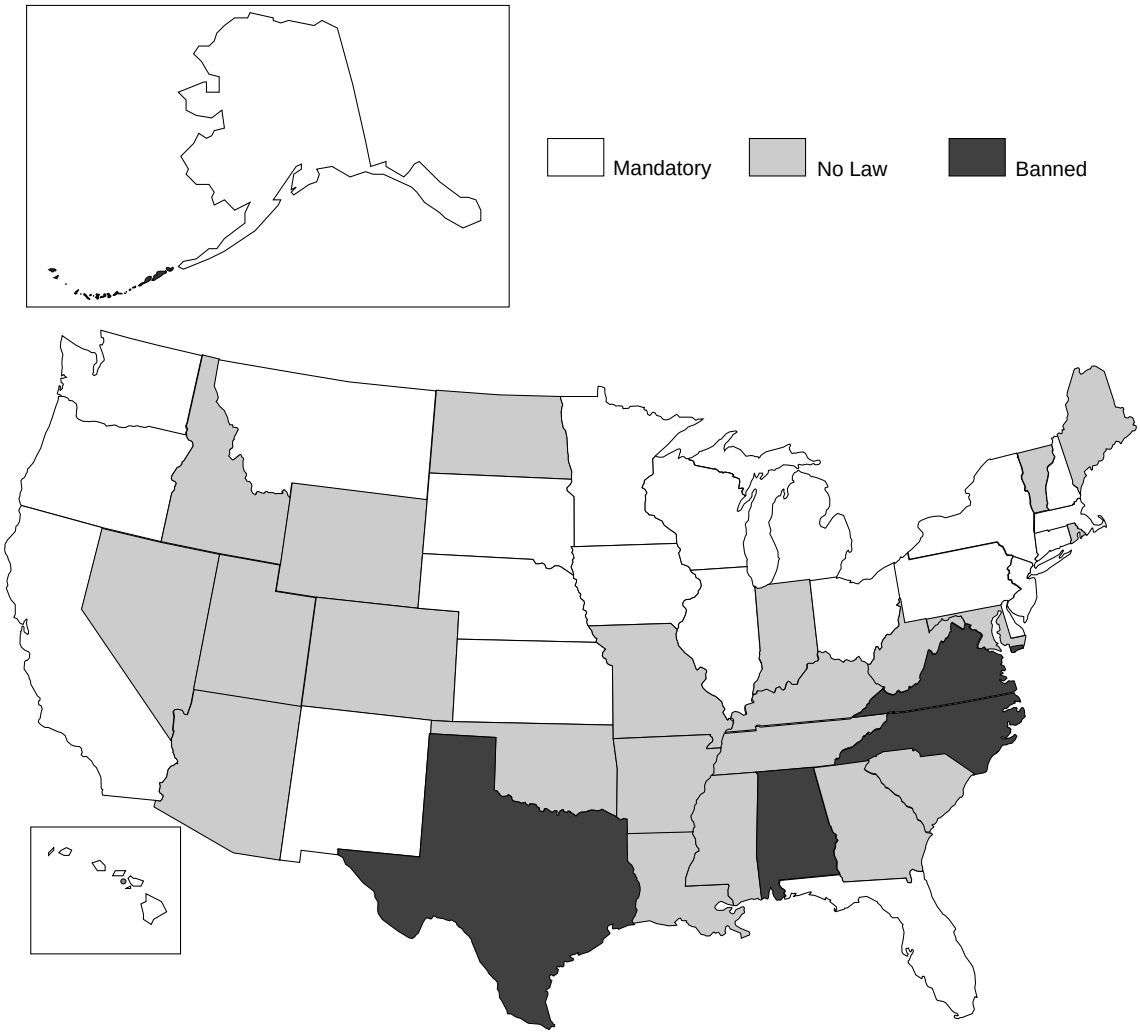
By 1997, most Northeastern, Great Lakes, and West Coast states had enacted mandatory bargaining laws (Indiana the notable exception). Nationally, approximately half the states and the District of Columbia established a duty of employers to bargain with unions representing employees of public-sector colleges or universities (Figures 1, 2, and 3).

Some states granted bargaining rights only to some types of institutions or to some categories of employees. In Wisconsin, for example, faculty members at two-year technical colleges, clerical and blue-collar staff at all institutions, and teaching assistants at the University of Wisconsin have bargaining rights; faculty and academic staff at the University of Wisconsin do not.[15]

In some regions, however, state laws do not provide bargaining rights in public colleges and universities. Seven states in the Rocky Mountains or Great Plains lack such laws. In the South and the Border states, only Florida mandates bargaining for a broad range of college and university employees, while Maryland mandates bargaining for community college employees in two counties. Ten Southern or Border states have no laws requiring public-sector colleges and universities to

FIGURE 1

BARGAINING RIGHTS: COMMUNITY COLLEGE FACULTY AND STAFF



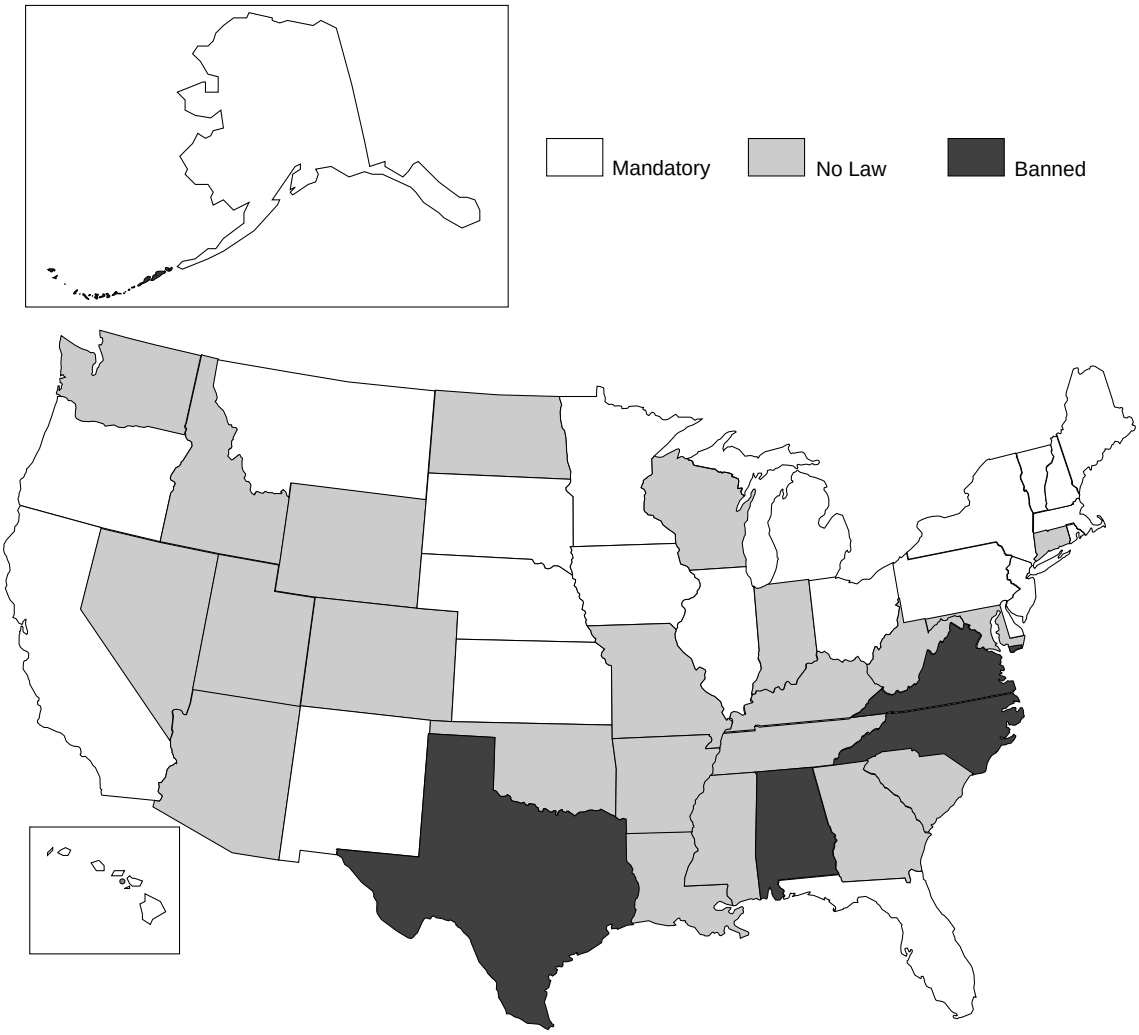
bargain collectively; Alabama, North Carolina, Texas, and Virginia have statutes or court rulings *prohibiting* such bargaining.

Even in states that prohibit public-sector bargaining, the federal Constitution protects the right of public employees to join and participate in unions. In 1969, a U.S. district court declared unconstitutional North Carolina's ban on union membership by public employees.[16] A recent case arose when the University of the District of Columbia (a public institution) banned faculty union officers from participating in the UDC University Senate. The union sued, alleging a violation of the First Amendment right of freedom of association. The court denied the university's motion to dismiss the suit, and the university settled out of court, dropping the ban.[17]

In the private sector, the law governing bargaining in colleges and universities has zigzagged. In 1970, the NLRB overturned its 1951 decision by asserting jurisdiction over private, nonprofit colleges and universities.[18] A year later, the NLRB claimed that its jurisdiction included faculty members, as well as blue-collar and clerical staff.[19] Faculty at a number of private colleges and universities, including Yeshiva University in New York City, voted to

FIGURE 2

BARGAINING RIGHTS: HIGHER EDUCATION FACULTY



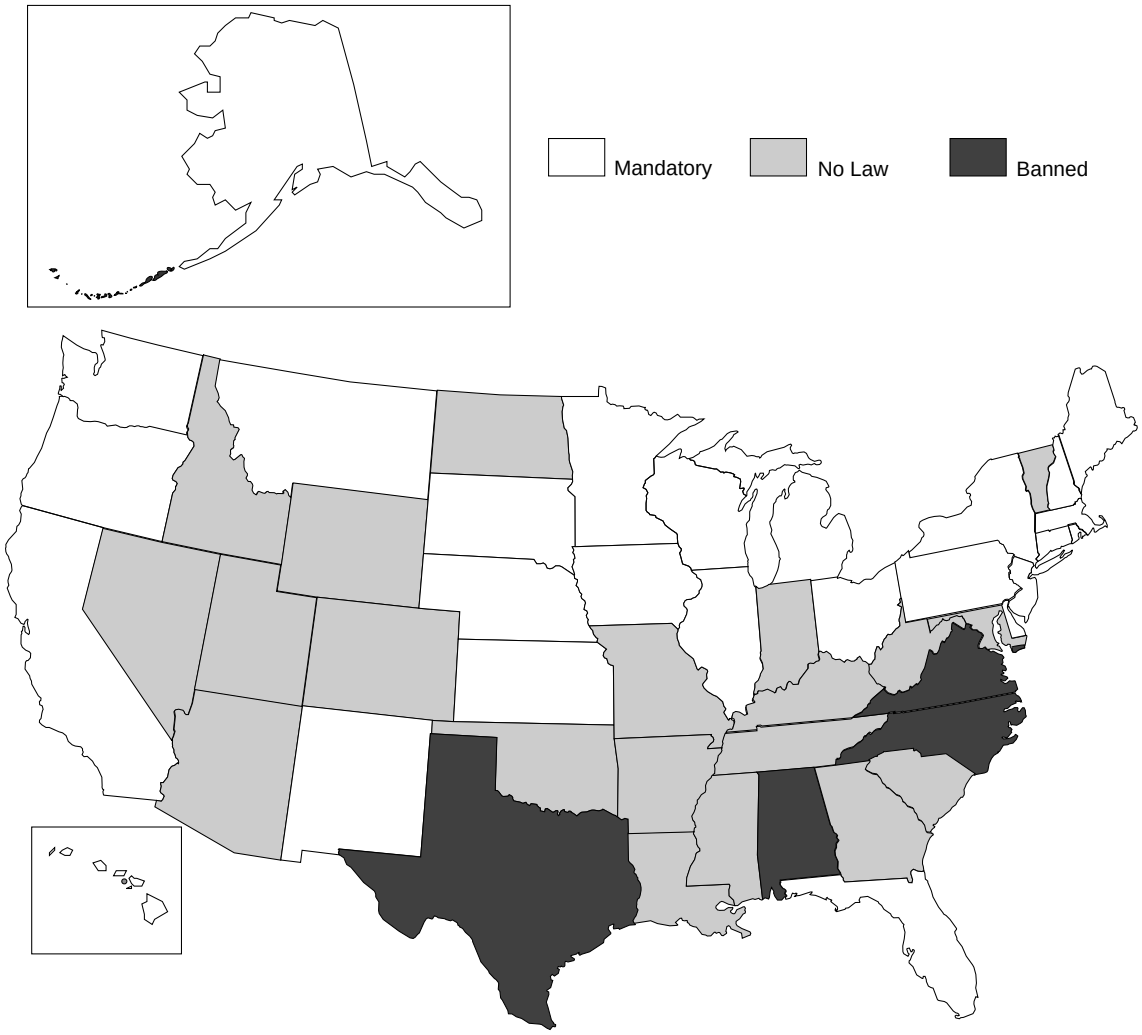
unionize during the 1970s.[20] But, in 1980, the U.S. Supreme Court ruled that the professors at Yeshiva were bosses, not workers, because they participated in decisions about academic affairs and personnel. As bosses, they were not "employees" under the NLRA and thus did not have a protected right to organize and bargain.[21] This was the first time that the Supreme Court excluded a large group of professional employees for having managerial responsibilities.[22]

Attorneys for faculty unions, such as the American Association of University Professors (AAUP), the American Federation of Teachers (AFT), and the NEA, attempted to limit the impact of the *Yeshiva* ruling by arguing that faculty in other institutions had less managerial authority. But these arguments succeeded only in unusual cases, such as Loretto Heights College[23] and the Kendall School of Design, where the administration attempted to terminate established collective bargaining relationships after the *Yeshiva* ruling,[24] and Bradford College.[25] Bradford College, noted former AAUP attorney David Rabban:

> did not have a tenure system. A report by an accrediting association, the [National

FIGURE 3

BARGAINING RIGHTS: HIGHER EDUCATION SUPPORT STAFF



Labor Relations] Board emphasized, documented the absence of faculty participation in academic decision-making and the administration's violations of the college's stated procedures. The Board also found that the administration unilaterally altered faculty grades and demoted faculty members from full-time to part-time status. If this degree of powerlessness was necessary to qualify for the protections of the NLRA, faculty collective bargaining had an extremely limited future.[26]

Even after *Yeshiva*, support staff at private colleges and universities, including clerical, technical, food service, housekeeping, and maintenance employees, retained a protected right to organize and bargain under the NLRA. And even without legal protection, faculty at private colleges and universities could still bargain collectively if their militancy and power forced their employers to the table. But faculty members at research universities, who often had considerable power, generally were not militant, and the faculty at less prestigious institutions, who might be militant, generally were not powerful. Hence, *Yeshiva* eroded

faculty unionism. Of the 88 private colleges or universities that bargained with a faculty union prior to *Yeshiva*, 26 discontinued bargaining within nine years of the ruling, and faculty at only two private colleges unionized subsequent to *Yeshiva*.[27]

The administration of the University of Pittsburgh attempted to expand the managerial exclusion under *Yeshiva* to public-sector faculty. In 1987, a hearing examiner for the Pennsylvania Labor Relations Board agreed that University of Pittsburgh faculty were managers under Pennsylvania law—the first time that the reasoning in *Yeshiva* was accepted in the public sector.[28] But on appeal, the Pennsylvania Labor Relations Board ruled in 1990 that the University of Pittsburgh faculty were not excluded as managers from coverage under the state bargaining law, though faculty members serving on university governance committees engaged in managerial decision-making.[29] In other states, public-sector bargaining statutes expressly *included* faculty among the groups of covered employees. Thus, although the *Yeshiva* ruling has limited faculty unionism in private colleges and universities and is unlikely to be overturned any time soon by new legislation, the decision seems unlikely to spread to the public sector.

Faculty were not the only group whose employee status was questioned. A concurrent debate took place over whether teaching assistants (TAs) were workers or students. The NLRB set precedent for private universities when it ruled in 1972 that TAs at Adelphi University were primarily students, and, hence, should not be included in a faculty bargaining unit.[30] But in January 1997 the general counsel of the NLRB accepted that TAs were employees for purposes of the NLRA and charged Yale University with engaging in unfair labor practices in an effort to thwart a union-recognition drive by Yale TAs.[31] When the Yale hearing began in April, the administrative law judge rejected Yale's motion to dismiss the case on the grounds that TAs were not employees.[32] In August, 1997, the judge granted Yale's motion to dismiss the case on other grounds—that the TAs withholding of grades was a partial strike, and thus not protected by the NLRA.[33] Decades earlier, a U.S. Court of Appeals had ruled that employees could lawfully be discharged for partial strikes, noting that employees "could not continue to work and remain at their positions, accept the wages paid them, and at the same time select what part of their allotted tasks they cared to perform."[34] But even if withholding grades was unprotected, the TAs will have won an important victory if the NLRB Board rules on appeal that they are employees. Such a ruling could lead to the unionization of TAs at Yale and at many other private universities.[35]

Some TA organizations in the public sector won recognition without legislative protection—the Teaching Assistants' Association (TAA) at the University of Wisconsin-Madison (1969), for example.[36] The TAA and the university negotiated several contracts between 1970 and 1978, but the university withdrew recognition in 1980 after an unsuccessful strike. The bargaining relationship was re-established six years later, after the TAs secured a state law protecting their right to organize and bargain.[37]

In September 1996, an administrative law judge of the California Public Employment Relations Board (PERB) ruled that TAs at UCLA were employees for purposes of the California Higher Education Employer-Employee Relations Act of 1979 and therefore had collective bargaining rights. The University of California administration, asserting that TAs were primarily students, refused to recognize the union and appealed the decision to the PERB board. TAs at UCLA and the University of California campuses at Berkeley and San Diego responded by striking for recognition in November 1996; TAs at Berkeley went on strike again in April and May 1997.[38] Depending on the outcome of the appeal, many TAs in the University of California system could win bargaining rights.

DEFINITION OF THE BARGAINING UNIT

The definition of the bargaining unit determines who gets to vote in a union representation election. If the union wins, the definition also determines who is covered by the union contract. Early law review articles by NEA and AAUP attorneys identified the main questions in unit determination:[39]

- Are teaching faculty and nonteaching professionals, such as librarians and psychological counselors, included in the same unit?
- Are part-time and full-time faculty included in the same unit?

- Are department chairs, as supervisors, excluded from the faculty unit?
- Is there a single bargaining unit for an entire multi-campus university, or are there separate units for each campus?
- Are there separate units for faculty in law, medical, and other professional schools, where better nonacademic job opportunities may reduce community of interest with colleagues in the liberal arts?

Rulings provided contradictory answers. The Vermont state labor board, for example, combined full-time and adjunct faculty in a single unit, but the Vermont Supreme Court overturned this ruling on appeal.[40] In the private sector, the NLRB excluded department chairs from a faculty unit in the 1972 *Adelphi* case because the authority of chairs to hire part-time faculty and to allocate merit increases made them supervisors. But the NLRB included the director of admissions in the unit, though he supervised a secretary, because he spent less than half of his time in supervisory functions.[41] In 1989, the NLRB overturned this 50 percent rule, finding that department coordinators who spent only 25 percent of their time supervising nonbargaining unit employees were supervisors and should be excluded from the unit.[42]

"Wall-to-wall" units that include teaching staff and nonprofessional support staff are less common in colleges and universities than in elementary and secondary education, mainly because of differences in unit size.[43] Labor laws balance a presumption that professional and nonprofessional employees lack sufficient community of interest to be in the same bargaining unit—reflected in Section 9(b)(1) of Taft-Hartley, which gave professionals the right to veto being placed into a bargaining unit with nonprofessionals—against a concern that a proliferation of small bargaining units could result in excessive contract negotiation and administration costs.

Combining all nonsupervisory employees into a single wall-to-wall unit may substantially reduce these costs per bargaining unit member for a very small college or school district. But while some states with bargaining laws have many small unionized school districts, relatively few colleges and universities are both small and unionized.

One unit determination dispute that twice went to the Board of the NLRB involved the clerical and technical employees at Harvard University.[44] Clerical and technical workers began an organizing drive on the Harvard medical campus in Boston, about three miles from the main campus in Cambridge, in the 1970s. In 1977, the union requested an election confined to the Harvard medical campus, where it had organized actively. The Harvard administration challenged the union's proposed bargaining unit, requesting a university-wide unit instead. The NLRB sided with the union, and the 1977 and 1981 representation campaigns were confined to the medical campus.[45]

The union was defeated in the 1977 and 1981 NLRB elections. Harvard President Derek Bok was a labor law professor who had, in the past, asserted that unions benefited the public. In 1970, Bok wrote:[46]

> Unions have made what is perhaps their greatest contribution in securing fairer treatment for their members at the workplace. In particular, they have made enormous strides to eliminate error, malice, favoritism, and other human failings in the discipline, promotion, and preferment of employees … [I]n the United States, at least, … few knowledgeable observers would suppose that government tribunals would match the flexibility and competence already achieved through the system of private arbitration established by collective bargaining.

But Bok became personally involved in opposing the unionization of clerical and technical employees during the 1981 campaign.[47]

In 1983, the union again sought an election with the unit confined to the medical campus, and the Harvard administration renewed its objection. Harvard's tradition of highly decentralized operations tended to reduce the community of interest among employees of its different campuses. But, by 1983, anti-union Reagan appointees dominated the NLRB, and the NLRB sided with the Harvard administration.[48]

This ruling delayed the election for five years, while the union organized on the main Harvard campus. In 1988, however, there was a third NLRB election, this one covering the clerical and technical workers on all Harvard

campuses. President Bok again campaigned against the union, but this time the union won.[49] Thus the university's unit strategy delayed unionization but ultimately resulted in more unionized employees.

THE SCOPE OF BARGAINING

The scope of bargaining refers to the subjects that must be negotiated. Private-sector labor law distinguishes among *mandatory* subjects (for which there is a duty to bargain), *permissive* subjects (over which the parties may bargain, if both the employer and the union agree), and *prohibited* subjects (over which the parties may not bargain, even if they so desire).[50] Compensation, hours, and employment conditions are typically mandatory subjects of bargaining.[51] Professional employees, such as college and university faculty, often wish to negotiate on policy issues not directly related to compensation, hours, and employment conditions, such as the right of the faculty to determine the curriculum.[52] These issues are typically permissive subjects.

Employers are prohibited from making unilateral changes regarding mandatory subjects without first negotiating with the union, even if no contract language currently governs that subject.[53] But, in the absence of relevant contract language, employers are not prohibited from making unilateral changes regarding permissive subjects. Finally, labor laws, such as right-to-work laws, exclude some subjects from negotiations; so do laws outside the field of labor relations. The Fourteenth Amendment to the U.S. Constitution, for example, was interpreted as rendering unenforceable a public-sector contract provision mandating leave in the seventh month of pregnancy.[54]

The scope of bargaining in higher education varies by jurisdiction. The Minnesota Supreme Court, for example, ruled that criteria for tenure, promotion, and faculty evaluation were non-negotiable matters of inherent managerial policy.[55] In contrast, the Vermont Supreme Court ruled that tenure and promotion were mandatory subjects of bargaining, and the Kansas Supreme Court ruled that the length of time a faculty member must serve before being considered for tenure and the criteria and procedures for promotion review—but not whether a particular individual deserved promotion—were mandatory subjects.[56] Courts have also ruled differently on whether the academic calendar is negotiable. The Minnesota Supreme Court ruled that the starting date for each academic term and whether to base the academic calendar on a quarter or a semester system were prohibited subjects, but a New Jersey court ruled that calendar was a permissive subject.[57]

Wages are the quintessential mandatory subject of bargaining, but some disputes over whether particular wage issues were mandatory subjects have been litigated. In 1992, the University of Maine unilaterally discontinued the annual step increase in wages required by a recently expired collective bargaining agreement. The university's duty to maintain the status quo following the expiration of the contract, the union argued, included a duty to provide annual step increases included in the old contract. The state Labor Relations Board agreed with the union, but the Maine Supreme Judicial Court did not. The duty to maintain the status quo, the court ruled, entailed only the duty to maintain wages at their level at the time the agreement expired, and not a duty to continue raising wages at the rate specified in the old agreement.[58]

Another wage dispute arose in Iowa. A two-year contract signed in 1989 by the University of Northern Iowa (UNI) and its faculty union provided an average of $775 per faculty member—approximately $450,000 overall—in merit increases, adjustments for market conditions, and promotions, effective in 1990-91. The contract gave UNI discretion over the distribution of these funds. In 1990, the annual appropriations bill passed by the Iowa legislature required UNI to use $275,000 of its funds for teaching excellence awards. An administrative law judge found that UNI breached its duty to bargain when UNI refused a union request that it negotiate the distribution of this $275,000. But the Iowa Public Employment Relations Board and the Iowa Supreme Court ruled that UNI had no duty to bargain since the $275,000 was part of the $450,000 in salary adjustments included in the 1989-91 contract.[59]

Must a college or university bargain with a union over employment policies adopted to comply with a legislative or regulatory mandate? In 1989, the University of Hawaii adopted an antidrug policy statement to comply with the federal Drug-Free Workplace Act. The university had a duty to bargain over this

statement, asserted the University of Hawaii Professional Assembly, the faculty union. The Hawaii Supreme Court ruled that the university's compliance with federal statutes was not negotiable, but the duty to bargain applied to the extent that statutes gave the university discretion over their implementation. Mandatory subjects of bargaining included the nature and funding of required drug treatment programs, the places of treatment, and the disciplinary actions imposed for drug policy violations.[60]

Restrictions on the scope of bargaining in public colleges and universities sometimes appeared in nonbargaining legislation. Here are some examples:

- In 1997, the Michigan House and Senate passed community college funding bills prohibiting community colleges from approving collective bargaining agreements that included health care coverage for abortion services, except to prevent the death of the woman upon whom the abortion is performed.[61] A similar provision in Michigan's 1996-97 higher education funding bill was deleted from the 1997-98 bill.[62]

- In 1993, the Ohio legislature amended the state's education code to require the trustees of each state university to adopt a faculty workload policy that increased the amount of time faculty spent teaching undergraduates.[63] The legislature also adopted a temporary provision specifying that, pursuant to this amendment, undergraduate teaching activity at public universities should increase by at least 10 percent statewide no later than the fall term of 1994.[64] The amendment prohibited bargaining of faculty workload policies, notwithstanding Ohio's public-sector bargaining law, and made these policies prevail over any conflicting provisions of any collective bargaining agreement.[65]

- In Florida, the 1993 state appropriations act provided $5,000,000 to be used to create a Teaching Incentive Program (TIP) giving $5,000 increases in base pay to faculty productive in teaching.[66] Wages were a mandatory subject of bargaining under Florida's public-sector bargaining law, but the 1993 appropriations act excluded pay increases given as part of TIP from coverage. The United Faculty of Florida, the faculty union, sued to require the Board of Regents to bargain collectively over TIP. Using an appropriations act to change state policy about the scope of bargaining, argued UFF, was unconstitutional.[67] In 1994, once TIP was already established, the legislature appropriated TIP funds without the language excluding TIP from bargaining. The faculty union, winning contract language governing the criteria for distribution of TIP awards, dropped its lawsuit.[68]

Considerable controversy often accompanies hiring outside contractors to provide services previously offered by employees of the college or university—often known as "privatization" in the public sector.[69] In the private sector, the contracting out of work performed by unionized employees is a mandatory subject of bargaining if employees of the contractor perform the work in the same site under similar employment conditions.[70] Moreover, contract language excluding from arbitration "matters which are strictly a function of management" is not sufficiently specific to exclude disputes about contracting out from court-enforceable, binding arbitration.[71]

Public sector unions, in contrast, may not always have the right to bargain over privatization. An Illinois court ruled in 1987 that subcontracting bargaining unit work was a mandatory subject of bargaining under that state's Educational Labor Relations Act.[72] But a 1995 amendment to this act provided that, for the Chicago public schools, subcontracting was a management right outside the scope of bargaining, even if the practice led to layoffs of bargaining unit members.[73] The legislature has not yet excluded subcontracting from the scope of bargaining for other educational employees in Illinois.

ENFORCEABILITY OF COLLECTIVE BARGAINING AGREEMENTS

What happens if a collective bargaining agreement is violated? For employees covered by the NLRA, collective bargaining agreements are enforceable in federal district court. Normally, however, disputes about contract violations are resolved through the grievance and arbitration procedure established in the contract. Federal courts will issue injunctions to force arbitration if a private employer

refuses to comply with a contractual arbitration procedure.[74] Furthermore, based on the Supreme Court's Steelworkers Trilogy rulings, federal courts only rarely will hold that a grievance is not arbitrable or reverse an arbitrator's decision.[75]

For employees covered by state public-sector bargaining laws, enforcement procedures generally are similar to those in the private sector; disputes about contract violations go to arbitration and, if necessary, to state court. Two cases stemming from the fiscal effects of the 1990-91 economic recession indicate the limits on the authority of even the state legislature to abrogate a collective bargaining contract:

- In Florida, the state legislature agreed to a contract giving state employees a 3 percent raise effective January 1, 1992. But state officials subsequently projected a shortfall in public revenues, and the legislature unilaterally eliminated the raises just before they took effect. The Supreme Court of Florida ruled that, before moving unilaterally, the legislature must demonstrate that no other reasonable source could provide the funds to close the budget deficit. The Supreme Court ordered the state government to provide the contractually agreed-upon raises because the legislature had not made this demonstration.[76]

- In 1991, the Massachusetts legislature addressed a fiscal crisis by imposing mandatory furloughs on state employees. Asserting that the furlough statute violated current collective bargaining agreements, the unions won a court order submitting the dispute to arbitration. The arbitrator's ruling favored the unions. But the state, arguing that the furlough statute took precedence over the contracts, asked the Massachusetts Supreme Judicial Court to vacate the arbitration awards. The court held that the state had to honor the contracts, despite the fiscal crisis and the furlough statute.[77]

Public-sector collective bargaining agreements, once ratified, were thus generally binding even on state legislatures.

But public-sector unions sometimes have difficulty enforcing their contracts in court, particularly if they negotiated contracts in the absence of express statutory authorization. Before enactment of the Illinois Educational Labor Relations Act in 1983, for example, two disputes concerning arbitration arose among The City Colleges of Chicago, a system of seven community colleges.[78]

- In the first case, the administration did not renew the contracts of eight nontenured faculty members after their one-year appointments expired. The administration had not first obtained the prior, advisory faculty evaluation and recommendation required by the collective bargaining agreement. The union requested arbitration. But before the case went to an arbitrator, the parties argued in court about the arbitrator's authority. The Illinois Supreme Court ruled that the arbitrator lacked the authority to order, as a remedy, renewal of a faculty member's contract, and that the arbitrator could not require compliance with the evaluation procedures specified in the contract.

- In the second case, the union grieved the administration's decision to deny promotion to several faculty members. The Illinois Supreme Court upheld an injunction obtained by the administration barring arbitration of these grievances.

In both cases, the Illinois Supreme Court considered certain management powers—the authority to decide employment or promotion, for example—nondelegable, and hence, not subject to arbitration. The court would not enforce contract language infringing on its view of managerial rights, even if management had agreed to a required faculty evaluation prior to nonrenewal decisions. In the private sector, in contrast, courts leave it to employers to defend management rights by negotiating appropriate contract language.

UNION USE OF EMPLOYER'S INTERNAL MAIL AND E-MAIL SYSTEMS

Unions often seek low-cost ways of communicating with employees whom they represent or seek to represent. Established unions, for example, often secure contract language giving them the right to post union notices on bulletin boards on the employer's premises, and some unions have won contract language giving them the right to use the employer's internal mail system.[79] But unions attempting

to organize a workplace by definition have no such contractual rights. Further, in the 1992 *Lechmere* ruling, the U.S. Supreme Court upheld the legality of an employer policy banning nonemployee organizers from coming onto employer premises to solicit employees. The Court allowed exceptions only in rare cases where the employees were beyond the reach of reasonable union efforts to communicate—when the employees resided on the employer's property, for instance.[80] The *Lechmere* ruling forced unions to use other, more costly, ways of communicating with employees whom they are trying to organize, though the open nature of most college and university campuses makes bans on outside organizers difficult to enforce.

In 1988, the U.S. Supreme Court ruled that a union could not use the University of California internal mail system for organizing purposes unless the union paid postage.[81] The California Court of Appeals had ruled that the state Higher Education Employer-Employee Relations Act required the university to carry the union's letters, but the U.S. Supreme Court reversed the ruling, citing the Private Express Statutes that created the monopoly of the U.S. Postal Service. These statutes, the Supreme Court ruled, prohibited the university from carrying in its internal mail system any unstamped letters unrelated to the university's business. The Court ruled that union organizing materials were not university business.

This Supreme Court ruling had no effect on union use of an employer's electronic mail (E-mail) system, since the Private Express Statutes did not mention E-mail. The NLRB, in a recent ruling, protected the right of employees to use their employer's E-mail system to engage in concerted activities.[82] A nonunion employee sent an E-mail message to all fellow employees criticizing the employer's new vacation policy. The employer discharged the employee for this action. But the NLRB declared the discharge unlawful, stating that the employer permitted employees to post E-mail messages "to each other, to make personal telephone calls, and otherwise to spend some working time in nonwork pursuits."[83]

The NLRB, this ruling suggests, may apply a test similar to the Supreme Court's ruling in *Babcock & Wilcox* that an employer could not discriminate against a union by selectively enforcing a no-solicitation rule.[84] The employer may not be able to prohibit employees from using its E-mail system to engage in concerted activities protected by the NLRA unless the employer bans *all* nonbusiness use of the E-mail system.

Unions used E-mail in recent campaigns, including NEA's successful campaign to organize the Southern Illinois University faculty in 1996.[85] Speed, low cost, and widespread access make E-mail a convenient means for unions to communicate with college and university employees whom they represent or seek to represent. But E-mail is subject to employer monitoring. No federal legislation and little state legislation protects the privacy of employee E-mail messages.[86]

Particularly in an organizing situation, where union supporters may fear reprisals if the employer discovers their involvement in union activity, lack of privacy may limit the usefulness of E-mail. But unions with representation rights can negotiate contract language protecting the privacy of employee E-mail and voice mail messages.

THE DUTY OF FAIR REPRESENTATION

France and Italy have traditions of multiple unionism: Rival unions—typically, one Communist, one socialist, and one Catholic—negotiate on behalf of the same group of employees. But the U.S. generally adopted a system of exclusive representation—a union winning majority support in a secret ballot representation election has the sole right to negotiate on behalf of employees in that bargaining unit.[87]

In 1944, the U.S. Supreme Court ruled that exclusive representation rights established by statute implied a duty of fair representation.[88] A union whose constitution excluded Blacks from membership won exclusive representation rights for a bargaining unit that included a substantial number of Black workers. In 1940, the union proposed new contract language that would ultimately have excluded Blacks from employment on the 21 railroads covered by the contract. The union did not inform the Black workers about the proposal or give them a chance to be heard.

The Supreme Court ruled that a union could negotiate contracts favoring some members of the bargaining unit over others, if the favoritism were based on seniority, the type of

work performed, or individual skill. But the union could not discriminate on the basis of race in contract negotiations, and the employer was not bound by, nor entitled to benefit from, a contract that violated the union's duty of fair representation.

In 1964, the U.S. Supreme Court ruled that the duty of fair representation applied to enforcement of an existing collective bargaining agreement as well as contract negotiation.[89] But three years later, in *Vaca v. Sipes*, the U.S. Supreme Court declared, "Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual has an absolute right to have his grievance taken to arbitration."[90]

"A breach of the statutory duty of fair representation," the Court ruled, "occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."[91]

The Court also ruled that an individual suing an employer for breach of the collective bargaining contract must first establish that the union breached its duty of fair representation in failing to bring the case to arbitration or argue the arbitration case effectively.

Duty of fair representation cases involving college or university employees have been litigated under the NLRA and state public-sector bargaining laws. In one NLRA case, a research assistant named Katir was fired for falsifying time sheets.[92] The union took the case to arbitration, but the arbitrator upheld the discharge.

> When the Union did not challenge the arbitrator's award on Katir's behalf, Katir . . . [sued to overturn] the arbitration award on the grounds of partiality, corruption, fraud and misconduct on the part of the arbitrator. Notably, Katir did not allege that the Union breached its duty of fair representation.[93]

The U.S. Court of Appeals ruled that:

> If there is no claim that the union breached its duty of fair representation, an individual employee represented by a union generally does not have standing to challenge an arbitration proceeding to which the union and the employer were the only parties.[94]

The Court of Appeals refused to consider Katir's argument that the union breached its duty of fair representation because she had not first raised the point before the district court.

In *Hughes v. University of Maine*,[95] the Supreme Judicial Court of Maine ruled that employees could not sue their employer over disputes that the union refused to take to arbitration if the union had not breached its duty of fair representation. The university had provided a tenured faculty member with a $10,000 advance to cover expenses for trips to the Soviet Union and Australia. The university disallowed some claimed expenses, but the faculty member refused to return the disallowed portion of his advance. The university then suspended him without pay for 6.5 days, recovering the approximate amount that it claimed he owed.

The union grieved the suspension but decided not to pursue the case to arbitration. The faculty member then brought a small claims action against the university in court. The Maine Supreme Judicial Court ruled that the court should have dismissed his small claims action since, one, he had not exhausted his contractual remedies and, two, the union had not breached its duty of fair representation when it decided not to pursue his grievance to arbitration.

In *Anderson v. California Faculty Association*,[96] faculty members sued the university *and* the union, alleging a breach of contract by the employer for violating the collective bargaining agreement and a breach of the duty of fair representation by the union. The case arose when Humboldt State University laid off three tenured professors who had taught there for 10 to 22 years, and the union refused the request of the professors to file grievances against the university on their behalf. The California Court of Appeals ruled that the California Higher Education Employer-Employee Relations Act gave the state PERB exclusive jurisdiction over claims that a union had breached its duty of fair representation. The Court stayed the suit until PERB ruled on the duty of fair representation issue.

The duty of fair representation was first established in a contract negotiation case, but most duty of fair representation litigation has involved contract administration. In negotiating a new contract, reasonable people can easily disagree about the priority to be placed on

different union demands. But in contract administration the existing contract language provides an objective standard against which the union's grievance handling decisions can be measured. The existence of this standard may limit the degree of discretion that courts and labor boards are willing to allow to unions.

AGENCY SHOP AND UNION SHOP PROVISIONS

The duty of fair representation requires a union to represent all bargaining unit members, regardless of whether they pay union dues. One consequence is that even pro-union bargaining unit members may be tempted to be "free riders," receiving all benefits of union representation without paying any of the union's operating costs. Unions have sought the agency shop or the union shop to address the free rider problem.

Agency shop provisions require all members of a bargaining unit to pay a service fee to the union for its representation services. Called "fair share agreements" by supporters and "forced unionism" by critics, these provisions require each bargaining unit member to pay a proportionate share of the union's cost of negotiating and administering the contract.

Closely related to the agency shop is the union shop, which requires all members of a bargaining unit to join the union, and pay union dues, soon after hiring. There may be little legal difference between the union and agency shops, since the NLRB and the courts seem unwilling to enforce any requirements of the union shop other than tendering initiation fees and dues.[97] Union shop provisions may not be used, for example, to prevent bargaining unit members from working during a strike, so long as the strike breakers tender union dues.[98] In practice, the term *union shop* is mainly confined to the private sector; public employers call it *agency shop* or *fair share agreement*.

"Union bosses," warned early critics, would impose union shops on bargaining unit members against their will. The Taft-Hartley Act of 1947 therefore required secret ballot elections by the bargaining unit members before a union could even *ask* an employer for a union shop. But four years later, Senator Robert Taft sponsored an amendment to the act bearing his name eliminating the union-shop election requirement, probably because these elections demonstrated that bargaining unit members overwhelmingly backed the demands of union leaders for a union shop.[99]

Even if a large majority of bargaining unit members supported a union shop or agency shop, employers did not have to agree. But if the employer agreed, individual bargaining unit members sometimes objected to paying union dues or union service fees. In the private sector and in most public-sector jurisdictions, the enforcement mechanism for the union shop or agency shop compounded concern about the rights of dissenters.

Before 1947, some union shop employers automatically deducted union dues from the pay of all bargaining unit members, regardless of whether an employee signed a dues checkoff authorization. But section 302(c)(4) of the Taft-Hartley Act prohibited private-sector employers from withholding union dues unless the employee authorized dues checkoff in writing. Instead, Taft-Hartley and many public-sector laws required employers to enforce union or agency shop clauses by dismissing bargaining unit members who failed to pay union dues or service fees.

The Wisconsin public-sector bargaining laws, in contrast, adopted the pre-1947, automatic payroll deduction enforcement mechanism.[100] Wisconsin thus avoided the need to dismiss an otherwise satisfactory employee for nonpayment of union dues or service fees. Widespread adoption of this provision would probably make the union shop and the agency shop less controversial.

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? Several court cases addressed this issue:

- *Machinists v. Street*. In 1961, the U.S. Supreme Court held that a private sector union shop was not unconstitutional merely because a union used part of the dues for political activities.[101] But the union, the court majority ruled, had to refund the portion of a member's dues used for political activities if a member filed a complaint. Conversely, the union had no obligation to refund dues used for political activities if the individual member had not objected.

Justice Felix Frankfurter, a leading labor law expert before his appointment to the Court, argued in his dissent that expenditures on political activities could constitutionally be charged to all union members. "If higher wages and shorter hours are prime ends of a union in bargaining collectively," Frankfurter wrote, "these goals may often be more effectively achieved by lobbying and the support of sympathetic candidates."[102]

- *Abood v. Detroit Board of Education*. In 1977, the U.S. Supreme Court ruled that the agency shop in the public sector was constitutional, provided that the union used agency shop fees only to defray the costs of collective bargaining, contract administration, and grievance adjustment. Unions, the Court held again, had to refund the portion of dues spent on political activities only to bargaining unit members who filed complaints.[103]
- *Robinson v. New Jersey* and *Champion v. California*. Public-sector unions, ruled two U.S. Courts of Appeals in 1984, could constitutionally use agency shop fees of dissenters for lobbying and other political activities if these activities pertained to the union's duties as bargaining representative.[104]
- *Chicago Teachers Union, Local 1 v. Hudson*. In 1986, the U.S. Supreme Court required unions to provide a procedure, such as arbitration by an impartial decision maker, to resolve disputes over the amount of agency shop fees used for political or ideological purposes unrelated to collective bargaining. The arbitrator would determine the amount of the rebate or the advance reduction of dues to bargaining unit members who objected to the union's political expenditures.[105]
- *EEOC v. University of Detroit*. A professor at the University of Detroit objected on religious grounds to the pro-choice positions on abortion of the Michigan Education Association (MEA) and of NEA.[106] The professor "became aware of the MEA's position when it mounted a petition drive to remove a Michigan state probate judge who compelled an 11-year-old ward of the court to carry her pregnancy, the result of a rape, to term."[107] The professor informed the union that he would pay only the portion of his agency shop service fee allocated solely to the union's local responsibilities—the local took no position on abortion—and that he would donate to charity the portion of the agency shop fee that would normally be sent to MEA and NEA.

  The union asked the university to terminate the professor for refusing to pay the contractually required agency shop service fee, but the university, a Catholic institution, insisted that the union first attempt to accommodate the professor's religious beliefs. The union then offered to reduce his agency shop service fee by an amount proportional to the percentage of the union budget spent on political activities to which he objected. The professor rejected the offer, asserting that a portion of this reduced service fee would still be used for purposes to which he objected. The university terminated the professor, who then filed a religious discrimination complaint against the university and the union.

  The U.S. district court held that the union's rebate offer was a reasonable accommodation of the professor's religious beliefs. But the U.S. Court of Appeals remanded the case, directing the district court to determine whether the union and the university could provide more extensive accommodation without enduring undue hardship. The Appeals Court suggested that "one reasonable accommodation may be for Roesser [the professor] to pay all of the agency fee, including the amount normally forwarded to the MEA and NEA, to the local union to be used solely for local collective bargaining purposes."[108] The case was settled out of court in 1991 on the terms the Appeals Court suggested, and the university rehired the professor.[109]
- *Lehnert v. Ferris Faculty Association*. In 1991, a divided U.S. Supreme Court ruled on which expenditures public-sector unions may constitutionally charge to dissenting bargaining unit members.[110] The Court accepted the argument of NEA General Counsel Robert Chanin that a local union could charge dissenting agency shop fee payers (1) for otherwise chargeable activities of its state and national affiliates, even if those activities did not relate directly to the objecting employees' bargaining unit; (2) for lobbying to secure

ratification of, or fiscal appropriations for, their collective bargaining agreement; and (3) for preparations for a strike, though state law made a strike illegal.

But the Court ruled that, if the union actually engaged in an illegal strike—as opposed to threatening a strike to put pressure on the employer during negotiations—then it could not compel dissenters to pay for strike expenses.

Eight Justices—Thurgood Marshall was the exception—voted to restrict the ability of unions to charge dissenters for lobbying or electoral activities. Justice Blackmun, joined by Justices Rehnquist, Stevens, and White, argued that unions could constitutionally charge dissenters for only those political expenditures directly related to the ratification or funding of the collective bargaining agreement. Justice Scalia, joined by Justices Kennedy, O'Connor, and Souter, argued that unions could charge for only those expenses required by the union's duty of fair representation.

Scalia's standard presumably would allow lobbying to secure contract ratification and funding, and perhaps other lobbying. But neither the Blackmun standard nor the Scalia standard permitted the local union at Ferris State University to charge dissenting bargaining unit members for an MEA program to gain greater funding for public education in Michigan, since the program was not focused specifically on funding to implement the collective bargaining contract at Ferris State.

The Court also restricted the ability of unions to charge dissenters for litigation expenses, but that restriction might have been more severe if Blackmun's opinion commanded an outright majority rather than only four votes. Unions, Blackmun argued, could charge only for litigation expenses that concerned the bargaining unit of the dissenters. Scalia, unlike Blackmun, did not distinguish between litigation and collective bargaining services with respect to expenditures outside the bargaining unit, and Kennedy's opinion concurring with Scalia explicitly rejected Blackmun's distinction between litigation and collective bargaining expenses.

Outside-the-bargaining unit expenses for litigation, according to one interpretation of *Lehnert*,[111] were included in Scalia's assertion that it is constitutional to charge for having the services of NEA, the national affiliate, available on call, even if, in any given year, the bargaining unit to which the dissenters belonged did not use NEA's services. But Scalia's duty of fair representation restriction would still apply to chargeable litigation expenses.

The Court majority—Marshall, Blackmun, Rehnquist, Stevens, and White—said it was constitutional to charge for litigation expenses directly related to the bargaining unit of the dissenters, regardless of whether these expenses were incurred as part of the union's duty of fair representation. At least two Justices—Marshall and Kennedy—and probably an additional three—Scalia, O'Connor, and Souter—agreed it was constitutional to charge for litigation expenses not directly related to the dissenters' bargaining unit but still incurred as part of the union's duty of fair representation.

Thus, unions cannot constitutionally charge the cost of litigation unrelated to the duty of fair representation—litigation based on statutory or constitutional rights, rather than the collective bargaining contract, for example—to dissenters who are not part of the bargaining unit directly affected by the litigation.

- *Weaver v. University of Cincinnati*. In 1992, a U.S. Court of Appeals confirmed the previously established policy that dissenting employees bear the burden of objecting to a union's political and ideological expenditures.[112] "The plaintiffs [the National Right to Work Legal Defense Foundation]," the court noted,

  > argue that nonunion employees' silence cannot be construed as a waiver of their right to dissent from paying for the union's ideological expenditures with their agency shop fees. Hence, employees should be required to pay only those union costs related to collective bargaining unless they affirmatively consent to pay for the union's political and ideological expenditures.[113]

  The Appeals Court rejected the National Right-to-Work Foundation's argument.

In Great Britain, Justice Frankfurter noted in his dissent in the *Machinists v. Street* case 31 years earlier,

> The fear instilled by the general strike in 1926 caused the Conservative Parliament to amend the 'contracting out' procedure by a 'contracting in' scheme, the net effect of which was to require that each individual give notice of his consent to contribute before his dues could be used for political purposes.[114]

When the Labour Party won control of the government in 1945, Frankfurter added, Britain returned to a system whereby unions could use the dues of members for political purposes unless they took the initiative to object, and the Conservative Party retained this legislation after the Labour Party lost power. The U.S., like Britain, is subject to shifting political tides, and an anti-union reaction could lead to restrictions on the ability of unions to raise funds for lobbying and political action. But, as Frankfurter noted, even a self-described conservative party has accepted, for almost a half century, a requirement that those who object to union political expenditures must affirmatively state their objections to get a rebate or dues reduction.

CONCLUSION

Some distinctive elements of labor law apply to colleges and universities, mainly because of the role of the faculty in governance. Most notably, many faculty members in private institutions are excluded from NLRA coverage, based on the *Yeshiva* doctrine that faculty who participate in decisions about academic affairs and personnel are managers rather than "employees." The traditional role of faculty in institutional governance is sometimes reflected in a broad scope of bargaining in public-sector institutions where faculty have a protected right to organize and bargain under state laws.

Nevertheless, support staff in private colleges and universities, and faculty and support staff in public colleges and universities, are largely covered by the same statutes and court rulings that regulate collective bargaining by employees in other sectors, and are affected by the broader social forces that shape labor law for all employees in the United States.

NOTES

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[1] Meyers, 1959.

[2] Ellwood and Fine, 1987.

[3] Getman, Goldberg, and Herman, 1976.

[4] Dickens, 1983.

[5] Burton, 1979, 36-37.

[6] Saltzman, 1985.

[7] Saltzman, 1988.

[8] See Kaplin and Lee, 1995, 169-197 for a reference guide to laws concerning collective bargaining in colleges and universities.

[9] Chu and McCormick, 1988, 2.

[10] *Trustees of Columbia University,* 97 N.L.R.B. 424 (1951).

[11] Wagner, 1967, D21.

[12] *Government Employee Relations Report* [hereafter, *GERR*], No. 117 (December 6, 1965), B-2 to B-3.

[13] Wollett, 1971, 6.

[14] *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984).

[15] In 1988, Wisconsin's governor vetoed a bill that would have given bargaining rights to University of Wisconsin academic staff, including researchers, counselors, student services personnel, and librarians. *GERR* 26 (No. 1262), (May 2, 1988), 675.

[16] *Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C. 1969).

[17] GERR 35 (No. 1712), (April 28, 1997), 564-565.

[18] *Cornell University,* 183 N.L.R.B. 329 (1970).

[19] *C. W. Post Center of Long Island University,* 189 N.L.R.B. 904 (1971).

[20] The union representation election at Yeshiva had to be conducted *twice* because muggers stopped the NLRB election agent on a New York City street and, thinking that the locked box containing representation election ballots must have contained something valuable, stole the ballot box. "Faculty Members at Yeshiva University Voting on Independent Association," *White Collar Report,* No. 1024, November 26, 1976 (Washington, D.C.: Bureau of National Affairs), A-9.

[21] *NLRB v. Yeshiva University,* 444 U.S. 672 (1980).

[22] Rabban, 1989, 1778.

[23] *Loretto Heights College vs. NLRB,* 742 F.2d 1245 (10th Cir. 1984).

[24] *David Wolcott Kendall Memorial School v. NLRB*, 866 F.2d 157 (6th Cir. 1989).

[25] *Bradford College*, 261 N.L.R.B. 565 (1982).

[26] Rabban, 1989, 1826.

[27] Douglas, 1990, 3.

[28] Ibid., 20.

[29] *National Public Employment Reporter*, 13 (1991), case PA-21203.

[30] *Adelphi University*, 195 N.L.R.B. 639 (1972).

[31] Available online at http://www.nagps.org/nagps/GESO/yale-GESO-NLRB-charges.html.

[32] Lafer, 1997.

[33] Strosnider and Wilson, 1997; *Yale University and Graduate Employees and Students Organization (GESO)*, 1997 NLRB Lexis 619.

[34] NLRB *v. Montgomery Ward*, 157 F.2d 486 (8th Cir. 1946) at 496.

[35] "Joe Hill Takes on Joe College: Feeling Squeezed, Professors and Grad Students Turn to Unions," *Business Week* (December 23, 1996), 60-62.

[36] Feinsinger, N.P., and Roe, E.J., 1971.

[37] *GERR* 23 (No. 1149), (February 3, 1986), 140-141.

[38] *GERR* 34 (No. 1691), (November 25, 1996), 1630-1631; *GERR* 35 (No. 1709), (April 7, 1997), 461; and *GERR* 35 (No. 1713), (May 5, 1997), 586-587.

[39] Wollett, 1971, and Finkin, 1974.

[40] *Vermont State Colleges Faculty Federation v. Vermont State Colleges*, 566 A.2d 955 (Vt. 1989).

[41] *Adelphi University*, 195 N.L.R.B. 639 (1972).

[42] *Detroit College of Business and Detroit College of Business Faculty Association*, 296 N.L.R.B. 318 (1989).

[43] For an exception, see *Sandburg Faculty Association, IEA-NEA v. Illinois Educational Labor Relations Board*, 144 LRRM 2543 (Illinois Appellate Court, 1993), in which the court supported the union's petition for an election to enlarge an existing collective bargaining unit of 50 community college faculty members and counselors by adding 45 clerical, maintenance, housekeeping, and other nonfaculty employees.

[44] See Palmer, Heckscher, and Friedman, 1990, for background information.

[45] *The President and Fellows of Harvard College*, 95 LRRM 1390 NLRB (1977).

[46] Bok and Dunlop, 1970, 465.

[47] Palmer, Heckscher, and Friedman, 1990, 4.

[48] *The President and Fellows of Harvard College*, 115 LRRM 1290 NLRB (1983).

[49] Palmer, Heckscher, and Friedman, 1990, 10-11.

[50] *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958).

[51] But many public-sector statutes provide that pensions provided as part of the public employee retirement system are outside the scope of bargaining. See, for example, Hawaii Revised Statutes Section 89-9(d).

[52] Rabban, 1990, 693.

[53] This prohibition was established for the private sector in *NLRB v. Katz*, 369 U.S. 736 (1962).

[54] *Driessen v. Freborg*, 431 F. Supp. 1191 (D.N.D. 1977).

[55] *University Education Association and Minnesota Education Association v. The Regents of the University of Minnesota*, 353 N.W. 2d 534 (Minn. 1984).

[56] *Hackel v. Vermont State Colleges*, 438 A.2d 1119 (Vt. 1981); *Kansas Board of Regents v. Pittsburg State University Chapter of Kansas-National Education Association*, 667 P.2d 306 (Kan. 1983).

[57] *University Education Association and Minnesota Education Association v. The Regents of the University of Minnesota*, 353 N.W. 2d 534 (Minn. 1984); *Burlington County Faculty Association v. Burlington County College*, 311 A.2d 733 (N.J. 1973).

[58] *Board of Trustees of the University of Maine System v. Associated COLT Staff of the University of Maine System*, 659 A.2d 842 (Me. 1995).

[59] *UNI-United Faculty v. Iowa Public Employment Relations Board*, 153 LRRM 2089 (Iowa 1996).

[60] *University of Hawaii Professional Assembly v. Tomasu*, 900 P.2d 161 (Hawaii 1995).

[61] Michigan House of Representatives, Substitute for House Bill 4305 (as passed by the House, May 13, 1997), Section 220; and Michigan Senate, Senate Substitute for House Bill 4305 (as passed by the Senate, June 5, 1997), Section 220.

[62] Michigan Public Act 295 of 1996, Section 208; E. Jeffries, "FY 1997-98 Higher Education Budget: SFA Bill Analysis," (Michigan Senate Fiscal Agency, June 5, 1997).

[63] Ohio Revised Code, Section 3345.45 (enacted by Amended Substitute House Bill 152, effective 7-1-93).

[64] Ohio Amended Substitute House Bill 152, effective 7-1-93, Section 84.14.

[65] The temporary provision specified that existing collective bargaining agreements would continue in effect until their expiration dates.

[66] Laws of Florida, Ch. 93-184 (S.B. 1800), 1343.

[67] *GERR* 31 (No. 1529), (August 30, 1993), 1141-1142.

[68] Telephone interview with Kristine Dougherty, former President, United Faculty of Florida, June 26, 1997.

[69] See, for example, Mercer, 1995.

[70] *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964).

[71] *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

[72] *Service Employees International Union Local No. 316 v. IELRB*, 505 N.E.2d 418 (Ill. App. 4 Dist. 1987).

[73] 115 Illinois Compiled Statutes 5/4.5, added by Illinois Public Acts 89-15 Section 10 effective May 30, 1995.

[74] *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

[75] *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[76] *Chiles v. United Faculty of Florida*, 615 So.2d 671 (Fla. 1993).

[77] *Massachusetts Community College Council v. Commonwealth of Massachusetts*, 649 N.E.2d 708 (Mass. 1995).

[78] *Board of Trustees of Jr. College District No. 508 v. Cook County College Teachers' Union*, 343 N.E. 2d 473 (Ill. 1976).

[79] The U.S. Supreme Court upheld the constitutionality of a public school collective bargaining agreement that granted the incumbent union access to the interschool mail system and teacher mailboxes but denied this access to a rival union. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983).

[80] *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

[81] *Regents of the University of California v. Public Employment Relations Board*, 485 U.S. 589 (1988).

[82] *Timekeeping Systems, Inc.*, 154 LRRM 1233 NLRB (1997).

[83] Ibid., at 1236.

[84] *NLRB v. Babcock and Wilcox*, 351 U.S. 105 (1956).

[85] *GERR* 34 (No. 1692), (December 2, 1996), 1664.

[86] Gan, 1997.

[87] Members-only agreements covering some but not all employees in a given job category occasionally arise where there is bargaining in the absence of statutory authorization. The Washington state Attorney General, for example, determined in 1994 that four-year institutions of higher education were authorized but not required to bargain collectively regarding terms and conditions of employment for those faculty members choosing to be represented by a bargaining agent. 94 Att'y Gen. Op. No. 16, cited in *Annotated Revised Code of Washington*, Section 41.56.150.

[88] *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944). This case arose under the Railway Labor Act, but subsequent court rulings established that the duty of fair representation also arises under the NLRA and state public-sector bargaining statutes.

[89] *Humphrey v. Moore*, 375 U.S. 335 (1964).

[90] Vaca *v. Sipes*, 386 U.S. 171 (1967) at 191.

[91] Ibid., at 190.

[92] *Katir v. Columbia University*, 15 F.3d 23 (2nd Cir. 1994).

[93] Ibid., at 24.

[94] Ibid., at 24-25.

[95] 652 A.2d 97 (Me. 1995).

[96] 146 LRRM 2468 (Cal. 1994).

[97] *Union Starch and Refining Co.*, 87 N.L.R.B. 779 (1949), enforced, 186 F.2d 1008 (7th Cir. 1951), *cert.* denied, 342 U.S. 815 (1951).

[98] *Hershey Foods Corp.*, 207 N.L.R.B. 897 (1973) But if the strikers are union members, rather than nonmembers who tendered union dues, the union can impose legally enforceable fines on them for breaking a strike. See *NLRB v. Allis-Chalmers*, 388 U.S. 175 (1967).

[99] Taylor and Whitney, 1983, 388-389.

[100] Wisconsin Statutes Annotated, Section 111.70(1)(h) for local government employees, Section 111.81(6) for state government employees.

[101] *Machinists v. Street*, 367 U.S. 740 (1961).

[102] Ibid. at 814 (Frankfurter, J., dissenting).

[103] *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

[104] *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), *cert.* denied, 469 U.S. 1228 (1985); and *Champion v. California*, 738 F.2d 1082 (9th Cir. 1984), *cert.* denied, 469 U.S. 1229 (1985).

[105] *Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. 292 (1986).

[106] *EEOC v. University of Detroit*, 904 F.2d 331 (6th Cir. 1990).

[107] Ibid. at 332.

[108] Ibid. at 335.

[109] *Chronicle of Higher Education* 37 (26), (March 13, 1991), A20.

[110] *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991). The ruling was drawn from four separate opinions.

[111] Darko and Lapointe, 1993.

[112] *Weaver v. University of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992).

[113] Ibid. at 1531.

[114] *Machinists v. Street*, 367 U.S. 740 at 817 (1961) (J. Frankfurter, dissenting).

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