

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PACIFIC LUTHERAN UNIVERSITY,  
Employer

and

19-RC-102521

SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 925,  
Petitioner

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BRIEF AMICUS CURIAE OF SOCIOLOGY  
OF HIGHER EDUCATION RESTRUCTURING SCHOLAR  
IN RESPONSE TO INVITATION FROM NLRB TO FILE BRIEFS

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[Institutional Affiliation for Identification  
Purposes Only]

## **INTEREST OF AMICUS**

Amicus is a Full Professor (and Director of the University of Arizona's Center for the Study of Higher Education) and sociologist of higher education long engaged in researching the restructuring of academic professions and institutions. The brief will address the issues put by the Board from the perspective of neither "labor" nor "management" as organized interests, but rather as an independent scholar in the academic field of Higher Education. The amicus is distinctively qualified by virtue of over three decades of research and professional experience in the matters at hand to assist the Board in accommodating the Labor Act to three key developments in higher education since the *Yeshiva* decision that bear on questions #10 and #11 of the questions posed by the NLRB regarding developments and distinctions in categories of faculty, changes in managerial models and interpretations of shared governance, and changes in managerial practices of decision making that have accompanied significant restructuring in higher education since 1980.

## SUMMARY OF ARGUMENT

As indicated by the *Yeshiva Court*, context is important: “We recognize that this is a starting point only, and that other factors not present here may enter into the analysis in other contexts.” 444 U.S. 672, 690 n.31 (1980). Along these lines, questions #10 and #11 posed in the “Notice and Invitation to Briefs” issued by the National Labor Relations Board in regard to the case of Pacific Lutheran University and SEIU Local 925 point to the possible significance of “developments in models of decision making” (question #10) and “useful distinctions to be drawn between and among different job classifications within a faculty” (question #11) as they relate to the determination of whether faculty are managerial employees, which the *Yeshiva Court* held them to be.

This brief addresses three different changes in context since the *Yeshiva* decision in 1980, as they apply to the larger landscape of not-for-profit colleges and universities in the United States, as well as to Pacific Lutheran University. Each of the developments that have emerged in higher education over the past three decades points to the fact that full-time non-tenure-track, so-called “contingent” faculty, do not have effective control of college and university operations, including in key areas of educational decision-making, and therefore are not managerial employees. Two of the changes support the same point with regard to tenure stream faculty as well, and should be considered by the Board in making the determination of tenure stream faculty’s status as managerial employees. All three developments support the findings of the Regional Director that the full-time non-tenure-track faculty members whose status is at issue in the Pacific Lutheran University case are not managerial employees.

First, the significant growth and emergence of categories of contingent faculty, including full-time, non-tenure-track faculty, has dramatically changed the structure of the academic

profession since *Yeshiva*. Over the past three decades, the growth areas of faculty employment in higher education have been in segments of non-tenure eligible, including full-time, contingent faculty. The growth has been such that now those two categories of contingent faculty represent the substantial majority of the instructional workforce, whereas at the time of *Yeshiva* contingent faculty were the substantial minority. Indeed, the category of full-time non-tenure-track (FTNTT) faculty, the category of employee in question in the Pacific Lutheran University case, has only even emerged as a significant category of academic employment in the last twenty years, whereas at the time of *Yeshiva* it was largely unaddressed in the academic literature and was insignificant to non-existent in practice as a category of faculty employee. Nationally, the role of FTNTT faculty members in institutional governance is quite distinct from and substantially lesser than that of tenure stream faculty, as it is at Pacific Lutheran University. FTNTT faculty are clearly not managerial employees who exercise effective control of policy and practice.

Second, there has been a change in the normative, prevalent managerial definition and interpretation of institutional governance offered by the Association of Governing Boards of Universities and Colleges (AGB), which has 1,250 member institutions, including Pacific Lutheran University. The AGB issued new statements on institutional governance in 1998 and then in 2010 that relegate faculty to a less significant role than the type of “shared authority” invoked by the *Yeshiva Court* and embedded in a 1966 policy document of the American Association of University Professors (AAUP), “Statement on Government of Colleges and Universities.”<sup>1</sup> Moreover, assessments of changes in and challenges to institutional governance from the university managerial perspective address the growth of contingent faculty as a share of the academic workforce and emphasize that, at present, contingent faculty are not sufficient

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<sup>1</sup> American Association of University Professors, “Statement on Government of Colleges and Universities” (1966).

participants in institutional governance. Thus, the prevailing management models and accounts of institutional governance clarify that the emergent (since *Yeshiva*) category of full-time non-tenure-track faculty do not qualify as managerial employees, nor, given the re-conceptualization of shared governance by management since *Yeshiva*, do tenure stream faculty.

Third, since the *Yeshiva* decision there has been a change over time in managerial practices as colleges and universities have restructured in response to fiscal constraints, heightened external demands for accountability, and technological changes in the delivery of education. That restructuring has involved increased managerial discretion in applying the logic of the market to academic decision-making. Such discretion has meant reducing and, not uncommonly, overriding the role and wishes of faculty in decisions about academic and educational matters, clarifying that faculty are not managerial employees. The trend line since 1980 of increased exercise of managerial discretion accelerated a pattern that was already evident at the time of *Yeshiva* in many institutions of higher education.

In sum, in response to question #10 of the NLRB's "Notice and Invitation to Briefs," there have been developments in models of decision-making in private universities since the issuance of *Yeshiva* that are relevant to the factors the Board should consider in making the determination of faculty managerial status. Moreover, in response to question #11, there are useful distinctions to be drawn between and among different job classifications within a faculty—between, on the one hand, "contingent" faculty, and on the other hand, "regular" or "permanent" faculty (in the terms utilized in official institutional documents, including those of Pacific Lutheran University). Further, the category of full-time non-tenure-track faculty has emerged and expanded (as have the numbers of faculty in part-time positions), in ways the *Yeshiva Court* could neither have known nor anticipated. The distinctively lesser role of FTNTT

faculty in matters of institutional governance—and indeed, their limited to non-existent role in many cases—clarifies that these faculty are not managerial employees in the sense defined by the *Yeshiva Court*. Thus, the Regional Director was correct in finding that the full-time non-tenure-track faculty at Pacific Lutheran University are not managerial employees.

## ARGUMENT

### **I. The growth of contingent faculty, including the post-*Yeshiva* category of full-time non-tenure-track faculty, has changed the structure of the academic profession such that contingent faculty cannot be managerial employees.**

Question #11 of the NLRB’s “Notice and Invitation to File Briefs” asks: “As suggested in footnote 31 of the *Yeshiva* decision, are there useful distinctions to be drawn between and among different job classifications within a faculty—such as between professors, associate professors, assistant professors, and lecturers or between tenured and untenured faculty—depending on the faculty’s structure and practices?” The answer is yes.

The structure of the academic profession has changed dramatically since the *Yeshiva* decision, in ways that the *Yeshiva Court* could hardly have known about or anticipated. Significant segments of a non-tenure-track professoriate have emerged that would have been almost unrecognizable then—in their scale, the nature of their temporary relationship with the employing institution, and constricted role in the university. The status of both full- and part-time contingent members of the academic workforce is qualitatively different from tenure stream faculty, including untenured faculty who are on the tenure track. Contingent faculty members are accorded and take on, in practice, a far lesser to non-existent role in institutional governance relative to tenure stream faculty. The fundamental fault line in the academic workforce is between contingent and regular faculty status, which reflects the essentially at-will status of contingent faculty. And that fault line clarifies the non-managerial status of contingent faculty generally, including of full-time, non-tenure-track faculty. The terms and conditions of

employment for full-time non-tenure-track faculty at Pacific Lutheran University fall well within this national pattern.

**A. Part- and full-time non-tenure-track faculty have dramatically increased as a proportion of the academic workforce.**

The U.S. professoriate has gone from being over three-quarters tenure-track faculty in the 1970s to over two-thirds contingent faculty currently.

Of the two segments of this contingent faculty workforce, faculty in part-time positions are the largest proportion. Whereas in the 1970s they accounted for less than one-quarter of the profession, they now constitute 49.3% of all faculty members nationally.<sup>2</sup> As far back as the late 1970s, part-time faculty have been the focus of academic research and policy deliberations by both labor and management. Among the earliest studies was an analysis based on a national survey of part-time faculty conducted by the AAUP that appeared in its official publication and an academic journal.<sup>3</sup> Several other scholars in this time period wrote about part-time faculty in publications more targeted to and read by academic managers.<sup>4</sup> Thus, just prior to and around the time of the *Yeshiva* decision, part-time faculty were not only a subject of academic study, they—and their working conditions—were a recognized policy issue. Indeed, scholars were speaking already of being at a “crossroads.”<sup>5</sup>

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<sup>2</sup> National Center for Education Statistics, *The Condition of Education 2012* (2012).

<sup>3</sup> Tuckman, H.P., “Who is Part-time in Academe?”, *AAUP Bulletin*, 64, 305-15 (1978); Tuckman, H.P., et al., “Part-timers and the academic labor market of the eighties,” *The American Sociologist*, 13(November), 184-95.

<sup>4</sup> For example, a 1978 issue of the *CUPA Journal* (now *College and University Professional Association for Human Resources*) focused on the contract language for part-time faculty in collective bargaining agreements (Leslie and Ikenberry, 1978), with another major publication in the early 1980s by one of those authors (Leslie et. al., 1982). There were books on personnel management policies for part-time faculty (Biles and Tuckman, 1986). And a longtime academic administrator, Judith Gappa, also wrote some defining works about part-time faculty in the 1980s and early 1990s (Gappa, 1984; Gappa and Leslie, 1993), focusing on improving the working conditions of these faculty members.

<sup>5</sup> Gappa, J.M., *Part-time faculty: Higher education at a crossroads*, ASHE/ERIC Higher Education Research Report No. 3, (1984).

The same cannot be said about full-time non-tenure-track faculty. At the start of the 1970s, FTNTT faculty represented a mere 3.2% of the faculty workforce.<sup>6</sup> At the time of the *Yeshiva* decision, FTNTT faculty were, for all practical purposes, a non-relevant category of academic employment.<sup>7</sup> Faculty members in this category did not come to be recognized as a significant issue until the late 1990s<sup>8</sup> and early 2000s<sup>9</sup>. This category of faculty has only recently gained some traction as a policy issue with works such as that of the Delphi Project at the University of Southern California.<sup>10</sup>

Just as the proportion of part-time faculty as a share of the academic workforce has nearly doubled since the 1970s, as will be detailed in a section below, so the proportion of full-time non-tenure-track faculty nearly doubled from the 1980s to the 1990s. FTNTT faculty are a more recently emergent and yet now quite significant category of academic employment, constituting about one-fifth of faculty. Yet they almost entirely postdate the *Yeshiva Court*.

### **B. Contingent status is the categorical fault-line in the academic workforce.**

Although there are many variations in aspects of employment, the fundamental categorical break in members of the academic workforce is between those who are in tenure-track (also known as tenure-eligible) positions and those who are in non-tenure-track (also known as non-tenure-eligible) positions. That is why, whether they are full- or part-time, faculty

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<sup>6</sup> Schuster, Jack H. & Finkelstein, Martin J., *The American Faculty: The Restructuring of Academic Work and Careers* (2006).

<sup>7</sup> In fact, of the three defining studies of the academic profession in the 1980s of the academic profession, two (Clark, 1987; Finkelstein, 1984) did not address the existence of full-time non-tenure-track faculty, and the third (Bowen and Schuster, 1986) mentioned them in one sentence in passing, as they discussed the two-thirds of faculty on the tenure track.

<sup>8</sup> Finkelstein, M.J., et al., *The new academic generation: A profession in transition*, (1998).

<sup>9</sup> Baldwin, R.G., & Chronister, J.L., *Teaching without tenure: Policies and practices for a new era* (2001).

<sup>10</sup> The Delphi Project on the Changing Faculty and Student Success, University of Southern California, <http://www.thechangingfaculty.org>. See also the research of Adrianna Kezar and colleagues (Kezar, 2012; Kezar and Sam, 2013), which addresses both full-time and part-time non-tenure-track faculty.

in non-tenure-track positions are commonly referred to as “contingent” faculty.<sup>11</sup> Their employment is contingent on the will of the employer, with limited due process provisions, let alone any possibility of the prospect and security of tenure. As the gallows humor mantra that circulates among contingent faculty goes, they are one student complaint or one unsupportive academic administrator away from non-renewal, a decision which involves little to no due process for the faculty member in question.

Contingent faculty members are in a very real legal and practical sense “temporary.” They have limited terms and conditions of employment. Even if they serve for many years in such positions colleges and universities are explicit about the fact that these faculty have no expectation of future employment beyond the limited term of their contract. For FTNTT faculty those contracts often run year-to-year, and generally no more than three years. Employers, faculty handbooks, and collective bargaining agreements are explicit as to the fact that time in contingent positions does not accrue as credit for gaining access to tenure-track positions. The tenure eligible and non-tenure eligible tracks of employment are separate and unequal.

In this regard, full-time and part-time contingent faculty members share much common interest. Indeed, the leading advocacy group for contingent faculty, the “New Faculty Majority,” advocates for contingent faculty in both full- and part-time positions.<sup>12</sup> Although there are differences in their employment conditions and roles, the common status of contingency sets them apart from tenure stream faculty. They are relegated to a second-class status of faculty

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<sup>11</sup> The defining consideration is whether faculty are tenure eligible or tenured, not their status in terms of part- or full-time. For example, although the numbers are very limited, there are part-time tenure eligible and tenured faculty. Their conditions of employment are fundamentally different from those of part or full-time contingent faculty.

<sup>12</sup> New Faculty Majority, <http://www.newfacultymajority.info/equity>.

with a level of insecurity in employment that ensures uncertainty and can ingrain substantial fears about non-renewal that undermines their role in institutional governance.<sup>13</sup>

**C. Full-time contingent faculty are not like tenure track faculty in many regards.**

Full-time non-tenure-track faculty have fundamentally different expectations about work, levels and types of involvement in governance activities (indeed, it is often a limited or non-existent role), and levels of due process protections that adversely affect their ability and willingness to engage in any governance work. Consider the following excerpt from a national analysis of the terms and conditions of employment for full-time, non-tenure-track faculty:

“For institutions with a commitment to instruction, research, and service, setting maximum ratios of full-time non-tenure-track faculty is also a way of preserving a large enough core of ‘regular’ faculty with instruction, research, governance, and other service role commitments to fulfill the multiple responsibilities inherent in their mission statement.”<sup>14</sup>

Their empirical analysis demonstrates the general pattern of FTNTT faculty *not* having the same role as tenure stream faculty in governance and in other matters, clarifying that they are *not* managerial employees. The analysis explicitly contrasts the condition of these faculty with that of “regular” faculty. Indeed, as Baldwin and Chronister note, these contingent faculty are sometimes called “subfaculty.”<sup>15</sup>

Something of the same point has been made in recent years by the American Council on Education (ACE), an association of university and college presidents, focusing on the potential pool of academic managers in higher education. An ACE “issue brief” expressed serious concern about the future of academic leadership in higher education, which has historically come

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<sup>13</sup> Berry, J., and Hoffman, E., “Including contingent faculty in governance,” *Academe*, 94(6), 29-31 (2008).

<sup>14</sup> Baldwin, R.G., & Chronister, J.L., *Teaching without tenure: Policies and practices for a new era* (2001).

<sup>15</sup> *Id.* at 3.

from the faculty.<sup>16</sup> The brief opens with the following: “There is a dearth of young permanent faculty who will have the time and opportunity to advance up the academic career ladder into positions of administrative leadership at colleges and universities.”<sup>17</sup>

Two points stand out in the above statement. First, there is a clear distinction between the “permanent” faculty, referring to tenure-eligible faculty, and to the rising numbers of part-time and non-tenure-line faculty, who are not “permanent.” Second, it is clear that ACE does not regard even tenure-line faculty as academic administrators or managers engaged in “leadership” positions, and that it does not regard non-tenure-track faculty, whether in full or in part-time positions, as being in the “leadership pipeline” or positioned to climb the “traditional administrative ladder from department chair, to dean, to chief academic officer . . . .”<sup>18</sup>

This is the perspective of the management association, which represents presidents of over 1,800 member institutions (including Pacific Lutheran University), and conducts policy relevant research, provides training for new presidents and provosts, and advocates and lobbies for higher education executives on a range of policy matters. The underlying reason ACE sees the current configuration of faculty as problematic is that it does not provide them with a sufficient pool for future “leadership” as academic administrators and managers.

This data and trend line identified in the ACE issue brief is consistent with an earlier analysis of national survey data by leading scholars in the study of the profession in which they found:

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<sup>16</sup> American Council on Education, “Too many rungs on the ladder?: Faculty demographics and the future leadership of higher education,” *ACE Issue Brief 2* (September, 2008).

<sup>17</sup> *Id.* at 1.

<sup>18</sup> The accompanying figure in the brief shows that in 2004 (the last year of the National Postsecondary Education survey of faculty) slightly less than half of all faculty (48%) at four-year institutions are either not tenured or at a campus at which there is no tenure.

“More recently, full-time faculty term appointments that entail no probationary period and do not lead to tenure have become increasingly common. In the early 1980s, about 12 percent of all faculty held such appointments.<sup>19</sup> By 1992, about one-fifth of full-time faculty in American colleges and universities worked in a non-tenure track position<sup>20</sup>, and that percentage is probably still rising.”<sup>21</sup>

The growth of the full-time non-tenure-track category is particularly evident in the younger cohorts of faculty in the 1990s and early 2000s. Schuster and Finkelstein found that in the 1990s the proportion of new full-time hires off the tenure track exceeded the full-time hires on the tenure track.<sup>22</sup> For the last cohort of faculty for which comprehensive national survey data is available from NCES (2003), 58.6% of new full-time hires were off the tenure track. Currently, a little over 19% of all faculty are full-time non-tenure-track, indicating that the pattern seems to have stabilized.

The limited involvement of FTNTT faculty in governance holds true nationally, including in private colleges and universities, even though formally there is some provision for their involvement in departmental committees or senates.<sup>23</sup> Part of the reason contingent faculty do not participate is fear. As one such faculty member said: “We have a vote, but I would say not a voice in the department,” she observed, “I would even hesitate to express my opinion at a faculty meeting.”<sup>24</sup> Another contingent faculty member said, “We do not have the same kind of voice [as tenure-eligible faculty.] We have a lower voice.” The summation of the national study speaks to

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<sup>19</sup> AAUP, “On the status of non-tenure-track faculty. A report of Committee G on part-time and non-tenure-track appointments,” *Academe*, 80(6), 39-48 (1992).

<sup>20</sup> Chronister, J.L., et al., “Full-time non-tenure-track faculty: Current status, conditions, and attitudes,” *The Review of Higher Education*, 15(4), 383-400 (1992); NEA, “Full-time non-tenure track faculty,” *Research Center Update*, 2(5), 1-4 (1996).

<sup>21</sup> Finkelstein, M.J., et al., *supra* note 7, at 54-55.

<sup>22</sup> Schuster & Finkelstein, *supra* note 6.

<sup>23</sup> Baldwin, R.G., and Chronister, J.L., *supra* note 14.

<sup>24</sup> *Id.* at 59.

the overriding pattern. “In general, however, we observed a casual neglect of the governance role of these [FTNTT] faculty at the vast majority of the campuses we visited.”<sup>25</sup>

With non-tenure-track status comes different expectations even about the educational work of the faculty member. For example, Baldwin and Chronister found that in 44% of the universities they studied, FTNTT faculty were hired just to teach: “In those cases, no workload time is allocated or released to support research, service, or governance activities.”<sup>26</sup> But they also found substantial differences in the types of classes that FTNTT faculty were assigned to teach, compared to tenure stream faculty, such as being assigned introductory and lower division classes, or non-priority for graduate classes). They also found much unevenness and variation institutionally by department or college. Significantly, course loads are assigned to FTNTT faculty; they are not managerial employees determining and allocating their own teaching load. Further, Baldwin and Chronister found key distinctions between full-time contingent and tenure stream faculty in terms of their due process right to certain levels of notice, for example, when they are not renewed due to enrollment decline or financial considerations.<sup>27</sup> Not only are FTNTT faculty distinct from and lesser than tenure stream faculty in their employment rights, they clearly are not managers making these sorts of academic program and personnel decisions.

**D. The full-time non-tenure-track faculty at Pacific Lutheran University fall well within the national pattern.**

A review of Pacific Lutheran University’s (PLU) faculty handbook indicates that there are fundamental differences between the contingent employment of full-time non-tenure-track faculty and the employment of tenure stream faculty, including in the formal governance role accorded them. PLU follows the national pattern in this regard. Moreover, the recent report of

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<sup>25</sup> *Id.* at 60.

<sup>26</sup> *Id.* at 53-54.

<sup>27</sup> *Id.*

an ad hoc task force of PLU (appointed by the Provost) regarding contingent faculty evidences that many are afraid to participate significantly in institutional governance for fear of not having their employment renewed.<sup>28</sup> Again, this too follows a national pattern noted earlier.

Article IV of the PLU Faculty Handbook provides for full-time contingent faculty to “enjoy all the rights of regular faculty within the Faculty Assembly, including both voice and vote.”<sup>29</sup> But elsewhere, the handbook makes clear that FTNTT faculty, who are “contingent” and are not regular faculty, do not enjoy significant rights of the regular faculty, either in key matters of institutional governance or relatedly in their terms and conditions of employment. Indeed, full-time contingent faculty cannot serve as Chair of the Faculty. Nor can they serve on standing faculty committees: “Members elected or appointed to faculty standing committees must be regular faculty. Full-time contingent faculty are not eligible to serve on faculty standing committees.” Moreover, “Contingent faculty may not vote on matters of personnel recommendations (e.g., the election of chair and dean, and hiring of new faculty).”<sup>30</sup>

The bright line difference between contingent and regular faculty is evident in the faculty handbook’s categories and section in which it defines faculty. One aspect of that definition is that “Contingent Faculty status applies to those persons who are appointed to non-tenure-eligible lines to teach specific courses for which they are academically qualified. They may be full-time or part-time.”

Categorical differences between regular and contingent faculty, between those on and off the tenure track are also evident in the dramatically different ways in which the faculty handbook addresses evaluation and reduction in positions. For tenure stream faculty there are pages and

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<sup>28</sup> Recommendations of Ad Hoc Task Force on Contingent Faculty (May 31, 2013), available at <http://www.plu.edu/provost/misc/Contingent%20Faculty%20Task%20Force%20Recommendations%205%2031%2013.pdf>.

<sup>29</sup> Pacific Lutheran University, *Faculty Handbook* (updated Jan. 21, 2014) (*see* section 1f).

<sup>30</sup> *Id.* (*see* definition of faculty).

pages of detail about review, about the different ranks, and about the criteria for evaluation. For contingent faculty the section consists of a few paragraphs. The differences are even more stark with regard to “reduction and reallocation of faculty positions” and to “reductions in load.” Again, there are pages and pages of detail about the handling of this matter when it comes to tenure track faculty. Yet there is no mention of contingent faculty’s rights in these situations. They clearly are at-will employees.

The above context is useful in reviewing the findings of the 2013 Ad Hoc Task Force on Contingent Faculty. Significantly, the task force, like the faculty handbook, sees contingent faculty as a meaningful and separate category of faculty needing attention. Its charge was “to identify those issues that are unique to contingent faculty at PLU and to make recommendations, where appropriate, on administrative and/or policy related matters such that our contingent faculty might be better served on those issues.” The task force’s recommendations regarding governance clarify the non-managerial status of contingent faculty in institutional governance, formally and in actual enactment of and participation in governance activities. One of the umbrella recommendations of the task force is that there is a need to “find effective means of consulting Contingent Faculty.” The subsequent sentence of the recommendation is equally important: “Because Contingent Faculty may not feel able to speak freely about work-place issues, efforts should be made to provide them with safe venues or mechanisms for expressing their experiences and opinions.” In a later discussion of “rights” the task force raises the significant issue of Contingent Faculty members’ restriction from serving on faculty standing committees. Clearly, then, contingent faculty at PLU are not managerial employees in the sense determined by the *Yeshiva Court*.

The full-time, non-tenure-track faculty at Pacific Lutheran University act as fillers for the university, and are quite clearly contingent and distinct from tenure stream faculty in ways that demonstrate they have no “managerial” responsibilities comparable to those identified in *Yeshiva*. They are “temporary” professionals, hired at will to do specified work, not to effectively govern the enterprise. Indeed, an official task force of the university recognizes that such faculty may be afraid to speak their minds freely about institutional matters, for fear of not having their employment renewed.

## **II. The changed managerial interpretation of “shared authority” has reduced tenured faculty’s role and limited full-time non-tenure-track faculty’s role.**

Question #10 of the NLRB’s “Notice and Invitation to File Briefs” asks: “Have there been developments in models of decision-making in private universities since the issuance of *Yeshiva* that are relevant to the factors the Board should consider in making a determination of faculty managerial status? If so, what are those developments and how should they influence the Board’s analysis?” The answer is yes. Since *Yeshiva*, the managerial interpretation of “shared authority” and “shared governance” have changed in ways that ultimately reduce the primary and co-equal role of tenured faculty while explicitly acknowledging the limited to non-existent role of contingent faculty in institutional governance, which, in turn, clarify that faculty generally and contingent faculty in particular are non-managerial employees.

Question #11 of the NLRB’s “Notice and Invitation to File Briefs” asks: “As suggested in footnote 31 of the *Yeshiva* decision, are there useful distinctions to be drawn between and among different job classifications within a faculty—such as between professors, associate professors, assistant professors, and lecturers or between tenured and untenured faculty—depending on the faculty’s structure and practices?” The most useful distinction is along tenure-track lines.

In the past three decades, official management statements about and interpretations of “shared governance” have changed, to adapt to several changes experienced by and challenges confronting colleges and universities in the U.S. The role of faculty in “shared authority” in a “typical ‘mature’ private university,” *Yeshiva*, 444 U.S. at 680 has been substantially re-conceptualized and reduced such that it is neither the primary nor co-equal “effective control” embedded in the *Yeshiva* decision. As part of the changes, the management statements explicitly refer to the rise of new categories of contingent academic employees that have emerged and expanded and that are not sufficiently included in current structures and practices of institutional governance.

**A. The Supreme Court in *Yeshiva* Described an Aspirational Conception of Shared Governance that Sometimes Existed and Applied Only to Tenure Stream Faculty.**

The idea of “shared authority” invoked by the Supreme Court in *Yeshiva* refers to a conception that at the time was encouraged as an aspiration but that very often was not realized in the practice of “joint effort” in college and university government, and that is even less realized in the decades since *Yeshiva*, as will be discussed in the third section of argument in this brief. That conception historically was articulated and most authoritatively promulgated by the AAUP.<sup>31</sup> Moreover, it is the conception that is most widely referenced in studies and surveys of governance practices, both by scholars and by management associations.

At the heart of the AAUP’s “Statement on government of colleges and universities” is the idea of “joint effort.” That concept is defined in terms of the “initiating capacity and decision-making participation of all the institutional components” (which include the board, administration, faculty, and students).<sup>32</sup> With respect to decision-making authority, “[t]he

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<sup>31</sup> AAUP, *supra* note 1.

<sup>32</sup> *Id.*

faculty has primary responsibility for such fundamental areas as curriculum, subject matter, and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process.”<sup>33</sup>

In *Yeshiva*, the Supreme Court expanded the idea of primary responsibility, saying of the faculty that: “Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. ... They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school.” 444 U.S. at 686.

By contrast, the statement of the AAUP, the association that is the leading advocate for faculty in shared governance, sets a lower bar for faculty involvement in institutional governance. For example, it indicates that in the “determination of general educational policy” the goal itself can be set by the board or president and that the role of the faculty is that “When an educational goal has been established, it becomes the responsibility primarily of the faculty to determine the appropriate curriculum and procedures of student instruction.”<sup>34</sup> Later, the statement empowers the president “at times, with or without support, [to] infuse new life into a department,” as part of a larger license to initiate change: “As the chief planning officer of an institution, the president has a special obligation to innovate and initiate. The degree to which a president can envision new horizons for the institution, and can persuade others to see them and to work towards them...”<sup>35</sup>

Moreover, in the eyes of both the AAUP and the two managerial associations (Association of Governing Boards and the American Council on Education) with which the

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

AAUP “jointly formulated” the governance statement, that conception of shared authority referred exclusively to tenure stream faculty (the collective authority of which was to be exercised through various collegial bodies to which faculty were to be selected by the faculty). For at the time of the statement, they were the only faculty recognized and accepted as full members of the academic profession.

The point of drawing these distinctions between the Supreme Court’s definition of shared authority and the AAUP’s definition of shared governance is not to suggest that one is right and one is wrong. Rather, it is useful to establish this comparative baseline because subsequent management statements and interpretations of shared governance, which started with the AAUP definition, have re-conceptualized shared governance in ways that both reduce the role of tenured faculty and speak to the challenge of including the voices of new contingent segments of the faculty.

**B. Numerous Factors, Including the Growth of the Non-Tenure-Track Workforce Influenced the Reconceptualization of the Role of Shared Governance.**

The Association of Governing Boards, the major association articulating preferred and best practices for governing boards, issued subsequent statements about institutional governance in 1998 and 2010.<sup>36</sup> Although the AGB commends, rather than endorses, the AAUP’s statement, AGB’s interpretation is consequential due to its sphere of influence in higher education. The AGB, of which Pacific Lutheran University is a member, trains new board members, conducts orientations and workshops for boards, and disseminates research, policy statements, and publications, such as *Trusteeship Magazine*.

The standing of AGB is part of why it was so important for the AAUP to develop its statement in concert with them (the membership association for boards as well as presidents) and

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<sup>36</sup> The Association of Governing Boards, <http://agb.org/>.

the American Council on Education (the presidents' membership association). There is a level of legitimacy, of normative suasion and practical influence that these management associations have on management policies and practices out in the world of colleges and universities.

The 1998 and 2010 AGB statements on institutional governance were each premised on the need to modernize the AAUP's 1966 model of shared governance due to "changes in the landscape of American higher education."<sup>37</sup> The rationale provided for the managerial reconceptualization of shared governance has to do with new developments and factors in higher education that are important in determining whether faculty are managerial employees. First, the statements foreground the changing structure of the academic profession—the growth and emergence of new categories of faculty whose structure and practices in governance are categorically distinct from and lesser than the role of the faculty articulated in the *Yeshiva* decision. Second, the statements feature new factors that are relevant in determining tenure stream faculty's status as managerial or as non-managerial employees.

Both the 1998 and 2010 AGB statements feature the growth of non-tenure-track faculty as a fact necessitating a revised model of institutional governance. Although the 1998 statement acknowledges the rapid growth of the proportion of part-time faculty, it does not mention full-time-non-tenure-track faculty, whose status were not yet a prominent part of the policy discourse. The 2010 AGB statement, on the other hand, identifies the following "challenge":

The proportion of full-time tenured and tenure-track faculty has declined to about one-third nationally, and the number of full-time non-tenure track, part-time, and contingent faculty has increased.<sup>38</sup>

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<sup>37</sup> AGB, *AGB Board Statement on Institutional Governance* (1998); AGB, *Board Responsibility for Institutional Governance* (2010), <http://agb.org/sites/agb.org/files/u3/Statement%20on%20Institutional%20Governance.pdf>.

<sup>38</sup> AGB, *Board Responsibility for Institutional Governance 2* (2010), <http://agb.org/sites/agb.org/files/u3/Statement%20on%20Institutional%20Governance.pdf>.

The emergence of these groups is important because they are not part of the traditional governance model:

Historically, higher education governance has included three principal internal participants: governing boards, senior administrators, and the full-time tenured and tenure-track faculty. In fact, other campus constituencies exist, and in increasing numbers. For example, the nonacademic staff substantially outnumbers the faculty, but this group rarely has a formal voice in governance. The same is true of the non-tenure-eligible, part-time, and adjunct or contingent faculty.<sup>39</sup>

More than changes in the structure of faculty employment, the two statements also speak similarly to changing perceptions of faculty's commitment to the institution, and changing reward structures (which is to say, less reward) among faculty for governance work. The language of the 1998 statement is adapted verbatim in 2010:

There is a widespread perception that faculty members, especially in research universities, are more loyal to their academic disciplines than to the welfare of their own institutions.<sup>40</sup>

But the 2010 statement goes on to add,

eschewing, therefore, a commitment to institutional citizenship. In addition, participation in institutional governance is not always recognized or rewarded on par with other faculty work.<sup>41</sup>

Faculty, then, are cast as not particularly committed to the institution, and as not valuing colleagues' participation in governance as important work. The latter point has been empirically validated as characterizing the faculty reward system in every sector and institutional type.<sup>42</sup>

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<sup>39</sup> *Id.* at 5.

<sup>40</sup> AGB, *AGB Board Statement on Institutional Governance 2* (1998).

<sup>41</sup> AGB, *supra* note 38, at 2.

There are some other new trends identified in the 1998 and 2010 statements that have resulted in the reformulation of shared governance in a way that reduces faculty authority. Among these are the following:

1. Many institutions, including independent colleges and universities, have had to downsize or significantly reallocate resources.<sup>43</sup>
2. Persistent national and global financial difficulties have intensified the already challenging economic circumstances of all segments of American higher education.<sup>44</sup>
3. The public demands greater accountability—particularly regarding student learning outcomes and escalating tuition and fees—and elected officials at both state and national levels have intensified their scrutiny of higher education.<sup>45</sup>
4. Scholars, think-tanks, and a variety of commissions project a major transformation of higher education as a result of a revolution in information technology, the reorientation of the focus of education from teaching to learning, and the new competition from corporate, for-profit and online enterprises in the higher education market.<sup>46</sup>

**C. The Reconceptualized Role of Shared Governance has Reduced the So-Called “Shared Authority” of Tenure-Track Faculty.**

In the face of these changes, the task force that generated the 2010 AGB statement “urged presidents and governing boards to embrace ‘integral leadership’ in which the president ‘exerts a presence that is purposeful and consultative, deliberative yet decisive, and capable of course corrections as new challenges emerge.’”<sup>47</sup> In a significant choice of words, the task force called for a “collaborative spirit in governance” that “called on presidents and governing boards to

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<sup>42</sup> Fairweather, J., *Faculty work and public trust: Restoring the value of teaching and public service in American academic life* (1994).

<sup>43</sup> AGB, *supra* note 40.

<sup>44</sup> AGB, *supra* note 38.

<sup>45</sup> *Id.*

<sup>46</sup> AGB, *supra* note 40.

<sup>47</sup> AGB, *supra* note 38, at 1.

partner in leadership, with the support and involvement of the faculty.”<sup>48</sup> That reads very differently than faculty having a “shared authority” role or being the “absolute authority” in educational matters that the Supreme Court referred to in *Yeshiva*. Times have changed.

The changes in the managerial interpretation of governance did not go unnoticed by AAUP leaders. As has been observed in reference to the AGB 1998 statement, “The difference between the viewpoints of AAUP and AGB quickly erupted into pointed debate.”<sup>49</sup> In citing two pieces by current and future AAUP presidents, one of which was entitled, “The war against the faculty,” the authors noted, “Both writers perceived the AGB statement as further erosion of faculty influence in the decision-making process in higher education.”<sup>50</sup>

In a four-year institution, for instance, it is illustrative to note that the typical tenure track faculty workload consists of no more than a 20% commitment to service overall. Much of that work does not relate to institutional governance; rather, it includes service to and involvement in national professional associations such as disciplinary associations. Indeed, scholars who study surveys of time allocation estimate that institutional governance accounts for less than 10% of a typical faculty member’s workload. In sum, the reconceptualized managerial definition of shared governance bears on questions #10 and #11, posed by the NLRB in its “Notice and Invitation to File Briefs.” With regard to question #11, the statements highlight the emergence of new categories of contingent faculty employment, one of which (FNTT faculty) was effectively non-significant at the time of *Yeshiva* and remained unrecognized. The statements make it clear that these new categories of faculty do not fit within the historical conception of shared governance embedded in the 1966 AAUP statement, and particularly not with regard to

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<sup>48</sup> *Id.*

<sup>49</sup> Gayle, D.J. et al., *Governance in the twenty-first century university: Approaches to effective leadership and strategic management* 33 (2003).

<sup>50</sup> *Id.*

the conception of shared authority articulated in *Yeshiva*. With regard to question #10, the AGB statements identify several new trends that bear on the question of faculty's managerial status. Each of these trends, along with the new managerial interpretation of institutional governance relegate tenure stream faculty to a lesser status and role than what is characterized either in the 1966 AAUP statement or by *Yeshiva*. The new categories of faculty employment, corroborating the argument in the first section of the brief, along with the new factors meriting consideration in regard to models of decision-making in private universities both lead to the conclusion that full-time non-tenure-track faculty are not managerial employees.

### **III. The changes in academic decision-making towards a market-oriented logic has transformed university decision-making practices.**

As colleges and universities restructure in response to fiscal constraint, heightened demands for accountability, and technological changes in the delivery of education, managerial practices have changed. That change has taken the form of increased managerial discretion in applying the logic of the market to academic decision-making, thereby reducing—and not uncommonly, overriding and replacing, on some issues—the role and wishes of faculty in decisions about academic and educational matters. This trend clarifies that faculty are not managerial employees.

In maintaining that “authority in the typical ‘mature’ private university is divided between a central administration and one or more collegial bodies” the *Yeshiva* Court referenced J. Victor Baldridge’s book, *Power and Authority in the University*. *Yeshiva*, 444 U.S. 672, 680 (1980). That book focused empirically on one such private university, New York University. Distinct from what the *Yeshiva* majority determined to be the case at Yeshiva University, Baldridge’s case study of actual managerial practices at NYU actually supported the observation of the Brennan dissent that colleges were being run like a business, and not by faculty:

Education has become ‘big business,’ and the task of operating the university enterprise has been transferred from the faculty to an autonomous administration, which faces the same pressures to cut costs and increase efficiencies that confront any large industrial organization. 444 U.S. at 703.

In support of that pattern, Baldrige found that at NYU:

Without doubt, it was a small group of top administrators who took the major leadership roles and made the critical decisions. To view it from one side in the conflict, there were strong complaints that the decisions were sometimes arbitrarily made by top officials with little faculty consultation. Many of the persons interviewed felt that these decisions were carried out with a firm hand.<sup>51</sup>

It is noteworthy, then, that even prior to the *Yeshiva* decision, evidence drawn from the reference that the *Yeshiva* majority cited indicated that the formal existence of shared governance structures, of collegial bodies such as academic senates, does not necessarily translate into the faculty’s effective control of the organization. The *Yeshiva* Court recognized that such a pattern existed but held that: “The shift, if it exists, is neither universal nor complete.” 444 U.S. at 690 n.29.

The early trend line noted by the Brennan dissent, and acknowledged by the *Yeshiva* majority which determined that it did not to apply to *Yeshiva*, has accelerated and dramatically extended throughout higher education in the decades since *Yeshiva*. Those changes reflect a shift in the logic of decision-making. And significantly, they speak to changes not just in managerial policies, but in terms of on-the-ground managerial practices that significantly reduce, override, and in some cases bypass the shared authority role of faculty that the *Yeshiva* Court held made them managerial employees.

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<sup>51</sup> J. Baldrige, *Power and Conflict in the University* 45 (1971).

As indicated by the *Yeshiva* Court, the deciding factor in determining whether faculty are managerial employees is not whether ultimate authority resides with the board (e.g. not just the formal structure), but rather whether, in actual practice, faculty exercise authority by “formulating and effectuating management policies.” 444 U.S. at 682. As the D.C. Circuit Court of Appeals noted in the case of *Point Park University v. NLRB*, 457 F.3d 42, 48 (D.C. Cir. 2006): “In *Yeshiva*, the Court looked repeatedly to the actual role of faculty in the academic affairs of the university. . . . The key inquiry is, ‘how a faculty is structured and operates.’”

One very important way that a faculty operates is in the hiring of new faculty. Here the very growth of increased proportions of contingent faculty is itself one of the significant changes since *Yeshiva* that speaks to faculty’s reduced role in institutional governance. Tenure-track faculty are always looking to hire more tenure-track colleagues in their academic unit and in the university. The logic of the market and of management, however, in looking for increased levels of flexibility have driven the growth of contingent faculty numbers to their current levels and proportions. Indeed, tenure-track faculty generally do not participate in nor have a role in the hiring of contingent faculty as they do in the case of tenure stream faculty.

**A. Changing pressures have shifted the logic of decision-making, and in turn, managerial practices.**

Starting in the 1970s, but accelerating particularly in the 1980s and beyond, decision-making in U.S. colleges and universities has been increasingly driven by changing pressures, and by changing logics of decision-making that foreground bottom-line, business considerations in various educational matters. Such “academic capitalism” has involved a change in managerial practices in the post-*Yeshiva* academy.<sup>52</sup> Whatever one thinks of this pattern, whether it is cast in

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<sup>52</sup> Slaughter, S., and Leslie, L. (1997). *Academic capitalism: Politics, policies, and the entrepreneurial university*. Baltimore: The Johns Hopkins University Press; Slaughter, S., and Rhoades, G. (2004). *Academic capitalism and the new economy: Markets, state, and higher education*. Baltimore: The Johns Hopkins University Press.

a pejorative light as “corporatization” or seen as sound strategic management, the move to the market and to academic capitalism is an empirically documented phenomena that is widespread in various sectors of the academy.

One of the triggers for the change has been serious fiscal pressures and constraints that emerged around the time of the *Yeshiva* decision.<sup>53</sup> One higher education sector that has been most subject to these fiscal pressures is the independent institution. Non-selective, private, not-for-profit liberal arts colleges and universities are under particular pressure. Pacific Lutheran University is of this type, admitting nearly three-quarters of its applicants, and having quite a small endowment relative to its peers.<sup>54</sup> These institutions admit the considerable majority of students who apply, they are largely dependent on tuition monies for their revenues, and thus, a small shift in enrollment can have a major effect on their financial viability. As a result, many of these institutions have shifted their programs more towards business and vocational fields to attract more students, despite their continued claims to be liberal arts institutions, and certainly not at the behest of their tenure track faculty.<sup>55</sup>

However, liberal arts colleges and universities not only were changing their programs to survive, many were actually not surviving. Over a three decade period, there was a considerable amount of organizational “mortality” in the liberal arts sector of higher education, with a substantial portion of non-selective institutions going out of business.<sup>56</sup>

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<sup>53</sup> The year before *Yeshiva*, one of the authors cited by both Justice Brennan and the *Yeshiva Court*, had co-authored a book entitled, *The Three R's of the 1980s: Reduction, Reallocation, and Retrenchment* (Mortimer & Tierney, 1979).

<sup>54</sup> See <http://www.plu.edu/advancement/endowment/home.php>.

<sup>55</sup> Delucchi, M. (1997). ‘Liberal arts’ colleges and the myth of uniqueness. *The Journal of Higher Education*, 68(4), 414-26; Kraatz, M., and Zajac, E.J. (1996). Exploring the limits of the new institutionalism: The causes and consequences of illegitimate organizational change. *American Sociological Review*, 61(5), 812-36.

<sup>56</sup> Jaquette, O., Porter, S.O., and Parkman, A. (unpublished). Gone and forgotten: An ecological analysis of organizational death in postsecondary education.

At the very least, the decade of the 1980s, with its fiscal and other constraints, triggered a management revolution, with a much greater focus on “academic strategy.”<sup>57</sup> Being more strategic because of a range of pressures meant presidents and administrations took on more initiative and exercised more direct authority over a range of educational policy and academic planning decisions. Keller draws on various cases to describe and flesh out the emerging models of decision-making that are radically different than the joint authority model of the past, and that are warranted by what he opens his book calling, “the specter of decline and bankruptcy” given that “[e]xperts predict that between 10 percent and 30 percent of America’s 3,100 colleges and universities will close their doors or merge with other institutions by 1995.”<sup>58</sup>

At the core of such strategic leadership was a push to make tough choices about academic programs, as it was believed that institutions could no longer afford to continue to do everything. Management was oriented to finding strategic focus and to reallocating resources accordingly, in planning processes that not uncommonly led to program closures. One leading study of program elimination revealed that the logic underlying the decision making that led to closures was a sort of “action rationality” based *not* on data that may have been gathered and evaluations that may have been done by various committees, in which faculty participated, but by the sense of academic managers of what actually could be done, often against the advice of the faculty committees.<sup>59</sup> Such a logic of political expediency, exercised with much discretion by managers, despite input provided by faculty, substantially reduces faculty’s role in institutional governance, and makes it clear that they are not effectively controlling the educational decision making of the

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<sup>57</sup> Keller, G. (1983). *Academic strategy: The management revolution in American higher education*. Baltimore: The Johns Hopkins University Press.

<sup>58</sup> *Id.* at 3.

<sup>59</sup> Eckel, P.D. (2002). Decision rules used in academic program closure: Where the rubber meets the road. *The Journal of Higher Education*, 73(2), 237-62.

organization (perhaps partly because in times of fiscal constraint, the separation between financial and academic decisions is not realistic).

Over the subsequent decades, that pattern and exercise of managerial control in academic decision making has only intensified. Thus, studies of academic retrenchment of individual faculty in the 1970s and 1980s demonstrate a couple of important patterns. First, cuts in the 1980s were driven by a “politics of prestige” that involved a targeting of fields not seen as close to the private sector market.<sup>60</sup> Second, in addition to these sorts of cuts, that stemmed from financial exigency and program restructuring cuts in the 1970s and 1980s, another type of retrenchment constituted “dirty little cases” in which “faculty were dismissed merely for being openly critical of the administration.”<sup>61</sup> These cases were of tenure stream faculty, drawn from investigations conducted by the AAUP in exploring summary dismissals of tenure stream faculty in higher education.

During this time period, managerial strategies for justifying such layoffs of tenure track and tenured faculty shifted. And in that shift, the discretion and flexibility of managers increased, even as the potential for faculty to delimit and contain program cuts was substantially reduced. One of the major principles supporting a strong faculty voice in protecting academic programs was that faculty should be laid off only in the case of institutional financial exigency, an imminent threat to the financial viability of the entire institution. This concept was particularly important in the financially stressed times of the 1970s. But management adapted its strategy in the 1980s to enhance its ability to act more strategically and independently:

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<sup>60</sup> Slaughter, S. (1993). Retrenchment in the 1980s: The politics of prestige and gender. *The Journal of Higher Education*, 64(3), 250-82.

<sup>61</sup> Slaughter, S. (1994). ‘Dirty little cases’: Academic freedom, governance, and professionalism. *New Directions for Higher Education*, no. 88, Winter 1994. New Jersey: A. Wiley Company.

The 1980s mark the emergence of managerial strategies for effecting not just retrenchment but reorganization. Strategic planning and programmatic restructuring came to be principal mechanisms of retrenchment, superseding claims of institutional financial exigency.<sup>62</sup>

The more market-based and strategic logic of restructuring affords management greater prerogative in effecting organizational change even when it involves laying off tenure stream faculty. It is not surprising then, and indeed not uncommon to read more recently of situations in which not only are faculty not involved in any decisive way in determining what programs will be cut, and not only are they not consulted, but they are unaware of decisions until they have been made.<sup>63</sup>

Such managerial strategic initiative and prerogative has extended beyond the academic realm of programs to the educational realm of recruiting students and making admissions and financial aid decisions in admitting them. A new field within college and university admissions offices of strategic enrollment management emerged. The purpose of this field and set of practices is to more efficiently recruit students and to leverage greater net tuition revenue through the recruitment of students able to afford more and requiring less financial aid. In the currently highly competitive, market-oriented context of higher education, student aid has come to be seen as a way of leveraging new revenue for the institution, with that logic influencing decisions about academic standards and student bodies.<sup>64</sup>

Part of the logic of institutions moving to the market is that they expand managerial capacity, not just in terms of numbers of employees, but also in terms of the license to act. The

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<sup>62</sup> Rhoades, G. (1998a). *Managed professionals: Unionized faculty and restructuring academic labor*. Albany, New York: State University of New York Press. P85

<sup>63</sup> Flaherty, C. (2014). Blindsided by layoffs. *InsideHigherEd*, March 18, 2014 (two cases of private institutions).

<sup>64</sup> McPherson, M.S., and Shapiro, M.O. (1998). *The student aid game: Meeting need and rewarding talent in American higher education*. Princeton: Princeton University Press.

above paragraphs offer but a few examples of new decision-making practices and models that have involved a substantial reduction in the role of tenure stream faculty in institutional governance. With regard to the last paragraph, for instance, the admissions process is managed by a range of non-faculty professionals, and overseen by a range of senior administrators, from vice-presidents of enrollment management to provosts and presidents. Indeed, one of the shifts that McPherson and Shapiro point to in detailing “the student aid game” and the rise of strategic enrollment management is that enrollment managers are increasingly structured such that they report directly to the president, for their roles are very strategic.<sup>65</sup>

Although some of the push for the increased market logic and the rise of non-faculty professionals stems from fiscal constraints, it stems as well from heightened pressures for accountability and greater efficiency, and for improvement in student learning outcomes, as well as from the search for technological solutions to higher education’s “cost disease” (the high cost of labor that is not easily replaced by technology). Each of these realms has seen the rise of managerial practices and of managerial professionals with responsibilities in academic and educational realms in which faculty once had a more central role.<sup>66</sup>

In some respects, nowhere is the above pattern more clear than in the case of the infusion of technology into classrooms and its use in the delivery of education. From the standpoint of models of decision making and institutional governance, what is particularly important about the dramatically expanded provision of distance education, and the almost total infusion of high tech course management systems and tools into classrooms is that faculty have had no real say over

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<sup>65</sup> *Id.*

<sup>66</sup> Rhoades, G. (1998b). Reviewing and rethinking administrative costs. In J.C. Smart (Ed.), *Higher education: Handbook of theory and research*, v. 13. New York: Agathon Press; Rhoades, G., and Sporn, B. (2002). New models of management and shifting modes and costs of production: Europe and the United States. *Tertiary Education and Management*, 8(1), 3-28.

most of these developments. The emergence and rapid expansion of new modalities for delivering education, and embedding them as well into traditional classrooms have not been decisions in which faculty generally have had much say. These are key academic and educational matters, not just of the curriculum, but even more centrally, of pedagogy. And in these matters, faculty, even tenured faculty, but especially contingent faculty, do not enjoy anything approximating “absolute authority” in key curricular matters identified in *Yeshiva*. The limited to non-existent role of faculty in deliberations let alone decisions about these matters clarifies that they do not meet the test of being managers in this most central educational realm.

To a considerable extent, this could be said to make perfect sense. After all, many faculty, especially more senior, tenured faculty, have no particular (or any) expertise in these high tech matters. Indeed, they need to be trained on these modalities and in the use of instructional and learning technologies. In the core area of the classroom, the professional jurisdiction of even tenure stream faculty is being renegotiated and dramatically reduced.<sup>67</sup>

The impact of high tech instruction on the role of faculty in institutional governance is in some sense even greater in the case of distance education. For the model of faculty employment that fits the modality of delivering education at a distance is contingent faculty. And the instructional programs that are run at a distance are not uncommonly run through separate colleges with decision-making structures that lie outside the traditional governance structures.

Again, the result is that faculty, even tenured faculty, should not be considered as managers with effective control in key realms of institutional policy, including educational matters. This is so because their role in a whole range of educational and academic decisions,

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<sup>67</sup> Rhoades, G. 2011. Whose educational space?: Negotiating professional jurisdiction in the high-tech academy. In J.C. Hermanowicz (Ed.), *The American academic profession: Transformation in contemporary higher education*. Baltimore: The Johns Hopkins University Press.

and even their control over the central, core space of the classroom, has been substantially reduced since *Yeshiva*.

To bookend this section on changing managerial practices and logics of decision making, it may be useful to come full circle to NYU. Last year, the Arts and Sciences faculty of NYU approved a vote of “no confidence” in the president.<sup>68</sup> One of the core issues underlying the faculty vote was a sense that the president was committed to a top-down management style and was too quick to undertake entrepreneurial ventures locally in New York City and globally with insufficient consultation with the faculty. At some level, the vote is indicative of faculty frustration with changes in managerial practices of decision-making that have been in place for some time. It is also indicative of their sense that effectively there are no other channels for being involved in institutional governance. In any event, it is an action of a constituency that is not acting out of “absolute authority” and “effective control” but rather out of a sense of not even being sufficiently consulted about important institutional decisions.

## CONCLUSION

In response to the Board’s questions #10 and #11, there have been three major changes that bear on the question of whether, as the *Yeshiva* Court held, faculty in private universities are managerial employees: (1) the emergence and expansion of new contingent categories of academic employee unforeseen by the *Yeshiva* Court; (2) changed managerial interpretations of shared governance that backed off a commitment to shared authority with faculty, and that identified the emergent contingent categories of faculty as being insufficiently considered in shared governance; and (3) changed decision-making practices driven by a changed logic driving decision-making. All three support the view that full-time non-tenure-track faculty, so-called

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<sup>68</sup> Kaminer, A. “No confidence” vote for head of N.Y.U. *New York Times*, March 15, 2013.

contingent faculty, are qualitatively distinct from and lesser than tenure stream faculty in their role in institutional governance and are not managerial employees; all three suggest as well the very strong sense that over three decades after *Yeshiva*, tenure stream faculty also are not managerial employees.

Respectfully submitted,

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/s/

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