

FACULTY IN THE CORPORATE UNIVERSITY: PROFESSIONAL IDENTITY, LAW AND COLLECTIVE ACTION

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INTRODUCTION

Over the past two decades, major social and legal developments have made an enormous impact on U.S. universities' core functions of research and teaching, leading to a move away from the traditional "public interest" model of the university towards a "corporate" model of higher education. Such trends toward "corporatization" include the commercialization of academic research, as universities have enthusiastically embraced federal legislation giving them the right to patent and license federally funded research results, thereby cementing university-industry ties. Universities have cut back on tenured faculty lines, which provide lifetime job security, and have instead expanded nontenure-track faculty, including teaching by adjunct faculty and graduate assistants. Universities have created for-profit corporations offering distance education courses. In each of these developments, faculty have played key roles in either promoting or resisting the changes. This article seeks to explain these responses, in two parts: first by studying the faculty's professional identity, and second, by addressing the question of whether the faculty's professional identity shapes their responses to these important changes in universities.

This article's discussion begins with a description of faculty professional identity. While there can be no one definition of faculty professional identity that fits all university faculty members, it is possible to identify certain core norms that all faculty would agree are central to the profession. In particular, all would agree that academic freedom in their teaching and research is essential to defining their professional identity. Developed outside the legislative and judicial context, professional norms of academic freedom were built on the foundation of collective faculty demands in the early 20th century for independence from university administration, trustees, and financial supporters. Prior to 1980, the legal identity of university faculty under the National Labor Relations Act¹ (NLRA) was consistent with these professional norms, as the National Labor Relations Board (NLRB) defined faculty as employees with rights to unionize, through which they could promote employment-related interests independent from their university employers. In the 1980 decision of *National Labor Relations Board v. Yeshiva University*,² though, the United States Supreme Court rejected the NLRB's view, holding that most tenure-track faculty in private universities are "managerial" employees aligned with the interests of the university administration.³ As such, faculty defined as managers under the NLRA have no

¹ 29 U.S.C. § 151-169 (2000).

² 444 U.S. 672 (1980).

³ Although the Supreme Court did not limit its holding to tenure-track faculty, the impact of the Court's analysis is most significant for tenure-track faculty, who generally exercise

statutory rights to unionize and collectively bargain with their university employer.

This article explores the tension between these differing professional and legal norms as representing opposing visions of university faculty identity. While the professional norms of academic freedom stress the faculty's autonomy as central to their distinctive role in the university, the legal norms of *Yeshiva* ignore academic freedom, emphasizing only the alignment of interests between university administrators and faculty as part of management. This article analyzes the tension between professional and legal norms, not as an abstract phenomenon, but as forces that have shaped the individual and collective identity of current faculty.

The second major subject of this article addresses the impact of faculty identity on the actions of faculty members, which includes a focus on faculty responses to the trends of university "corporatization." These trends began to take shape at roughly the same time as the *Yeshiva* decision. Analyzing these developments through the lens of faculty identity reveals the way that the norms and values that form faculty identity shape faculty resistance to, or acceptance of, such corporate trends. This is a study of a dynamic and uneven process, as faculty identity is formed by multiple factors, including professional norms of academic freedom and legal definitions of employment status, which simultaneously pull faculty to resist and to accept university corporatization. Adding to this dialectic, the recent corporate trends and the broader economic context of privatization shape faculty identity at the same time that faculty identity influences their responses to these historical developments. This broader context includes specific legal developments in the sphere of intellectual property that add force to the gravitational pull of faculty toward university market activities.

This article also illustrates the connection between faculty professional identity and university corporatization by comparing collective faculty responses to three issues relevant to corporate trends in teaching and research: university for-profit distance learning corporations; commercialization of academic research through patenting and licensing of

the sort of workplace autonomy that led the Court to conclude that the faculty were managerial. See *1940 Statement of Principles on Academic Freedom & Tenure*, in AAUP POLICY DOCUMENTS & REPORTS 3 (B. Robert Kreiser ed., 9th ed. 2001) [hereinafter *1940 Statement of Principles*]; J. Peter Byrne, *Academic Freedom: A "Special Concern" of the First Amendment*, 99 YALE L.J. 251, 278-79 (1989); RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 473 (1955); Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1276-78 (1988) [hereinafter Metzger, *Profession and Constitution*]; ELLEN W. SCHRECKER, *NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES* 25-27 (1986) [hereinafter SCHRECKER, *NO IVORY TOWER*].

publicly and privately funded research; and graduate teaching and research assistant unionization campaigns. Much of the data for these examples are drawn from the author's experiences at Cornell University, in addition to academic analyses and journalistic reports of trends in U.S. universities.⁴

The article begins with an analysis of the historical and social factors contributing to the formation of faculty professional identity. Part I describes traditional professional norms of academic freedom, historically rooted in the early 20th century "Declaration of Principles" of the American Association of University Professors (AAUP). This Declaration, set forth in 1915, promotes faculty commitment to foundational professional norms of faculty autonomy and independence from third parties, including university administrators, corporate financial contributors, and legislators. Additionally, the Declaration describes faculty members' individual autonomy through their teaching and research activities, and collective autonomy through their control over institutional academic matters such as curriculum and faculty hiring and promotion. This section of the article analyzes the ongoing importance of the norms of academic freedom in forming the core of faculty professional identity and in distinguishing the faculty role in the university from the function of administrators and trustees.

Part II addresses legal definitions of faculty identity, contrasting faculty professional identity with the legal definition of faculty identity as "managerial," which was judicially imposed by United States Supreme Court in its 1980 *Yeshiva* decision. This section critiques *Yeshiva* as a misreading of the NLRA and an inaccurate assessment of class relations between faculty and the university administration. The critique addresses the importance of considering both objective and subjective factors in defining the class division between employers and employees. These factors are relevant both to legal interpretations of the NLRA and to sociological analysis of class relations within an institution.

⁴ While much of the analysis is applicable to academic employees in the public sector, a study of public universities is beyond the scope of this article, given the differences in their histories and the regulation of public sector employees under state rather than federal legislation. Public university faculty have the right to unionize under public sector collective bargaining statutes in more than half of the states. RICHARD HURD & AMY FOERSTER, 23 *Directory of Faculty Contracts and Bargaining Agents In Institutions of Higher Education* 135 (1997) (listing thirty-four states with public sector collective bargaining legislation covering higher education faculty, including one state without legislation but with collective bargaining permitted by State Governing Board policy). Hurd and Foerster state that unionization in "faculty higher education remains geographically limited and almost exclusively a phenomenon of public sector institutions," with "seven states, four in the northeast and two on the west coast, account[ing] for 65.5 percent of the unionized professorate" and "[p]ublic colleges and universities employ[ing] 239,815 or 95.7 percent of the unionized professorate." *Id.* at ix-x. Unionized faculty at public colleges and universities are evenly divided between four-year and two-year institutions. *Id.* at x.

Part III evaluates the relationship between faculty professional identity and recent institutional trends in the university. This section uses the examples of for-profit distance learning, commercialization of academic research, and graduate assistant (GA) union organizing to analyze the way that faculty professional norms shape faculty responses to corporate trends in the university. Each of these examples raises a different aspect of university corporatization. University-owned for-profit distance learning corporations apply a corporate business model of marketing education as a profitable commodity. Commercialization of academic research also uses a corporate model to patent and license research results in the private market. This shift away from the traditional academic model of placing research in the public domain poses conflicts of interests for faculty members, who now have the potential to share in financial profits. GA union organizing campaigns represent responses to universities' cut backs of tenure-track lines, which have resulted in a corresponding shift to low-paid contingent teaching faculty, including GAs and adjunct faculty. This section of the article will evaluate both the successes and failures of the GA union campaigns in terms of tenure-track/tenured faculty professional identity, as well as the development of GAs' professional identities as future tenure-track faculty.

I. FACULTY PROFESSIONAL IDENTITY: THE ROLE OF ACADEMIC FREEDOM

To describe university faculty identity is to tell a tale of two sets of conflicting norms, one of historically developed professional academic freedom and the other of the more recently created legal status of faculty as managerial employees. The first norm, professional academic freedom, grew out of collective faculty resistance to university administrators and trustees in the early 1900s, at the height of capitalist industrialization. The resulting faculty victory – their gain of academic freedom – provided faculty members with independence from their university employer through individual and collective faculty autonomy over their work. Academic freedom has held its place ever since at the core of faculty professional norms. The broad acceptance by university employers of academic freedom as a basic faculty right is noteworthy as having been established through faculty activism outside of the courts or legislatures.

The second set of norms also resulted from collective faculty resistance to university administrators and trustees, but more than half a century later. This time, faculty resistance was unsuccessful when the Supreme Court held that most private university tenure-track faculty members were managerial employees with no statutory right to unionize. Omitting any discussion of academic freedom, the Court created a legal

definition of faculty that denied their independence from their university employer. Instead, the Court paradoxically described faculty autonomy over their work as evidence of faculty alignment with the interests of administrators and trustees.

This section of the article explores the first set of norms, which created a distinct professional identity revolving around the core of academic freedom. The discussion will describe the historical foundation of the current norms of academic freedom in a social movement at the turn of the twentieth century, when faculty made collective demands for autonomy over their research, teaching, and professional self-governance. Their demands for academic freedom were directly related to the historical moment, as faculty asserted their need for independence from growing corporate influence over universities during the industrialization period of the early 1900s. Academic freedom, which is essential to faculty working conditions and professional identity, is thus part of an analysis of both the objective interests and subjective consciousness of university faculty.

Describing faculty identity is complicated by the existence of objective conditions and subjective factors that simultaneously pull faculty toward class identification with labor as well as with their employer. While academic freedom creates faculty interests independent from the university employer, the privileged labor position of faculty, like other professionals, creates objective conditions similar to those of members of the employer class. Further, while the faculty victory in winning academic freedom created a strong set of distinct professional interests, it also included a compromise that has weakened faculty independence from administrators and trustees. As a result, faculty professional identity has always drawn together some elementally conflicting values. As a result, faculty have simultaneously asserted autonomy from, while claiming alignment with, university administrators and trustees. As will be discussed in Section III, the contest between faculty's conflicting values has become especially relevant at the turn of twenty-first century, which presents strikingly similar social issues as those confronting faculty in the 1900s. As in the earlier period of industrialization, current corporate power and influence over universities is on the rise, this time in the context of global capitalism.

A. HISTORICAL ROOTS OF THE PROFESSIONAL NORMS OF ACADEMIC FREEDOM

Current faculty working conditions are rooted in the successful collective demands by early twentieth century faculty for academic freedom and independence from the university administration and financial sup-

porters of the university.⁵ In its 1915 Declaration of Principles,⁶ the newly formed American Association of University Professors (AAUP) described rights for faculty that were unheard of for other types of employees. The Declaration described academic freedom as providing individual faculty members with a broad scope of freedom of speech in teaching, research, and extramural speech.⁷ To ensure the protection of academic freedom, the Declaration calls for the lifetime job security of tenure, with due process rights prior to discipline or dismissal of a faculty member.⁸ The Declaration also makes the case for collective rights of academic freedom through faculty self-governance, including peer review to evaluate faculty competence and qualifications for hiring and promotion to a tenured status.⁹ The Declaration justifies these workplace demands as essential to fulfilling the public mission of the university, which requires disinterested and nonpartisan teaching and research.¹⁰ These goals, the Declaration asserted, can be achieved only if faculty are free from the influence or pressure of interested third parties, including administrators, trustees, politicians, or corporate donors.¹¹

The AAUP demands for faculty academic freedom were largely successful. The AAUP *1940 Statement of Principles on Academic Freedom and Tenure*,¹² restating the basic principles of the 1915 Declaration, was endorsed by the Association of American Colleges and over subsequent decades by over 170 academic professional organizations and universities.¹³ The AAUP academic freedom principles have been internalized by the academic profession and academic institutions, as re-

⁵ Risa L. Lieberwitz, *The Corporatization of the University: Distance Learning at the Cost of Academic Freedom?* 12 B.U. PUB. INT. L.J. 73, 77-81 (2002) [hereinafter Lieberwitz, *Distance Learning*].

⁶ AAUP 1915 Declaration of Principles, in ACADEMIC FREEDOM AND TENURE: A HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS 155, 166-67 (Louis Joughin ed., 1967) [hereinafter *1915 Declaration of Principles*] ("But if the universities are to render any such service toward the right solution of the social problems of the future, it is in the first essential that the scholars who carry on the work of universities shall not be in a position of dependence upon the favor of any social class or group, that the disinterestedness and impartiality of their inquiries and their conclusions shall be, so far as is humanly possible, beyond the reach of suspicion.").

⁷ The 1915 Declaration describes faculty academic freedom as "compris[ing] three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extra-mural utterance and action." *Id.* at 158.

⁸ See *id.* at 169.

⁹ *Id.*

¹⁰ *Id.* at 162, 166-67.

¹¹ *Id.*

¹² See 1940 Statement of Principles, *supra* note 3, at 3.

¹³ ACADEMIC FREEDOM AND TENURE: A HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS 157 (Louis Joughin, ed., 1967) [hereinafter ACADEMIC FREEDOM]; 1940 Statement of Principles, *supra* note 3, at 1; see generally Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, 53 LAW & CONTEMP. PROBS. 2 (1990). The AAUP has continued to issue policy statements, investigate alleged breaches of

flected in university policies and practices. Faculty members exercise rights of academic freedom in their research, in teaching a wide range of courses across the curriculum, in criticizing university policies, and in speaking out on local, national, and international issues.¹⁴ Faculty self-governance includes collective autonomy through the peer review process for tenure and through the deliberations of faculty senates over academic policy.

The AAUP's victory in winning faculty rights of academic freedom in the early 1900s and their continued long-term existence is, in part, a testament to the AAUP's success in presenting the merits of its case. That is, that academic freedom is necessary for universities to fulfill their social role of promoting the public good by educating future leaders, employees, and participants in civil society and by engaging in research that contributes to progress in the sciences and the humanities. This social role requires university and faculty independence from powerful vested interests that may seek to influence academic agendas and results. Such undue influence would not only appropriate universities for private gain rather than the public good, but would harm research quality, which relies on the scientific method of disinterested research open to public scrutiny.¹⁵ Thus, society benefits by trusting faculty to use their disciplinary expertise and professional standards in ways that will ultimately contribute to the public interest.

The AAUP's argument was especially persuasive in the late 1800s and early 1900s, when major changes were occurring in the universities' institutional structure and functions. In the post-Civil War era, the influence of Darwinism and the acceptance of the scientific method of inquiry in the natural sciences provided a vehicle for a major break from the

academic freedom in higher education, and more recently, represent university and college faculty in collective bargaining. See *1940 Statement of Principles*, *supra* note 3, at 215.

¹⁴ For commentary that is critical of the practice of academic freedom in its narrow scope and reinforcement of the status quo, but which also recognizes the importance of academic freedom for providing room for free speech and institutional change in teaching and research, see Craig Kaplan, *Introduction*, in *REGULATING THE INTELLECTUALS: PERSPECTIVES ON ACADEMIC FREEDOMS IN THE 1980s* 1 (Craig Kaplan and Ellen Schrecker, eds. 1983); Frances Fox Piven, *Academic Freedom and Political Dissent*, in *REGULATING THE INTELLECTUALS*, at 17; Bertell Ollman, *Academic Freedom in America Today: A Marxist View*, in *REGULATING THE INTELLECTUALS*, at 4.

¹⁵ See *AAUP 1915 Declaration of Principles*, *supra* note 6, at 166-67 (The scientific method, applied in both the natural sciences and the social sciences, requires "disinterestedness and impartiality" free from the influence of either "vested [private] interests" or legislators); see generally ROBERT K. MERTON, *THE SOCIOLOGY OF SCIENCE* (1973); THORSTEIN VEBLEN, *THE HIGHER LEARNING IN AMERICA: A MEMORANDUM ON THE CONDUCT OF UNIVERSITIES BY BUSINESS MEN* (2d ed. 1918); Rebecca S. Eisenberg, *Proprietary Rights and the Norms of Science in Biotechnology Research*, 97 *YALE L. J.* 177, 183-84 (1987); Arti Kaur Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 *Nw. U. L. REV.* 77, n.67 (1999).

antebellum era model of the religious college.¹⁶ By the late 1800s, higher education had evolved from a religious undertaking to a secular system.¹⁷ The post-Civil War era also marked the beginnings of the modern research university, characterized by faculty research and training of graduate students in specialized academic fields.¹⁸

Unlike the German university, the American university combined this newer graduate education with undergraduate college education.¹⁹ As a result, university faculty duties consisted of undergraduate teaching and graduate training of new Ph.D.'s, as well as faculty research. In all areas of faculty duties, the scientific method played a central role, with its focus on using rational methods in the search for truth.²⁰ At the heart of the scientific method was the importance of continual testing of hypotheses for verification of research results, with the recognition that knowledge is an evolving process based on new hypotheses and findings undermining prior understandings.²¹

The acceptance of the scientific method in faculty research and the development of the university to train future professors in specialized fields of science created favorable conditions for successful demands for faculty autonomy. The initial faculty demand was for autonomy from ecclesiastical boards of trustees and college officials in teaching and research.²² The faculty persuasively argued that the clergy holding these positions were in no way trained to judge the competence of the natural scientists on the faculty. With the shift to a secular university system, this argument could be modified to identify a similar lack of expertise of lay members of secular boards of trustees and college officials, typically drawn from professionals in the fields of business and law.²³ Instead, faculty called for autonomy to rely on judgments of competence by their peers in each specialized field, whose training and research equipped them with the expertise to assess the merits of their colleagues.²⁴ The ability of faculty to communicate with their colleagues across universities was enhanced by the formation of professional organizations of

¹⁶ HOFSTADTER & METZGER, *supra* note 3, at 341-53.

¹⁷ *Id.* at 350-52.

¹⁸ *Id.* at 277, 316-17.

¹⁹ Due to the large numbers of students who studied there in the nineteenth century, the German university was used as a model, sometimes followed and sometimes modified, for the development of the modern American university. *Id.* at 366; Metzger, *Profession and Constitution*, *supra* note 3, at 1269. For an extensive discussion of the influence of the German university on the development of the American modern university and on the development of the concept of academic freedom, see HOFSTADTER AND METZGER, *supra* note 3, at 367-412.

²⁰ HOFSTADTER & METZGER, *supra* note 3, at 363-66; Byrne, *supra* note 3, at 269-73.

²¹ HOFSTADTER & METZGER, *supra* note 3, at 363-66.

²² *Id.* at 350-51.

²³ *Id.*

²⁴ *Id.* at 365.

scholars in specialized fields, including the rapidly growing social sciences, during the late 19th century and early 20th century.²⁵

While faculty in the natural sciences may have been able to gain academic freedom without a collective struggle, extending these rights to the social sciences required a more contentious campaign. As in the natural sciences, the demand for academic freedom rested on the social scientists' expertise, which could properly be judged for competence only by their peers. Social science disciplines had become more cohesive through newly formed professional organizations, such as the American Economic Association and the American Sociological Society.²⁶ This demand for autonomy from interference of boards of trustees and university officials was harder to sustain, though, for the social scientists than in the natural sciences. Social scientists also relied on the scientific method, with its reliance on stated values of "objectivity" and "neutrality" of the researcher. The role of values, ethics, and politics in analyzing social institutions was, however, more obvious than in the natural sciences.²⁷ In particular, the work of some social scientists clashed with the interests of large corporate donors, whose financial support of private universities had grown from thousands to millions of dollars during the period of industrialization.²⁸ Social scientist faculty were engaged in the study of the society of their time, a society in the throws of industrialization, with the development of the capitalist class structure, the exploitation of the working class, and accompanying class struggles. In several well-known cases, social science faculty were discharged or forced to resign by university presidents, under pressure from corporate financial supporters.²⁹

This experience of faculty vulnerability led to the founding of the AAUP in 1915 to fight for faculty academic freedom and autonomy from third parties, including university administrators and trustees.³⁰ The AAUP founders counted in their numbers faculty who had been personally involved in cases of discharged social science faculty. Seven of the thirteen committee members were social scientists,³¹ including University of Wisconsin economist Richard Ely, who had been under attack by

²⁵ Byrne, *supra* note 3, at 271, n.79.

²⁶ See, e.g., *id.* at 276.

²⁷ *Id.*

²⁸ See Lieberwitz, *Distance Learning*, *supra* note 5, at 78 (noting that "as universities became more financially dependent on funding from private corporations, the corporations gained leverage and the power to interfere with the academic freedom of professors").

²⁹ *Id.* at 80 (referring to the resignation of economist E.A. Ross from Stanford University and the dismissal of economist Edward W. Bemis from the University of Chicago).

³⁰ See *id.* at 80-81.

³¹ HOFSTADTER & METZGER, *supra* note 3, at 407; Ellen Schrecker, *Academic Freedom: The Historical View*, in REGULATING THE INTELLECTUALS, *supra* note 14, at 25-27 [hereinafter Schrecker, *Academic Freedom*].

a Board of Regents member for his labor-related writings and actions.³² These prior conflicts were reflected in the AAUP's *1915 Declaration of Principles*, which asserted that the greatest threat to academic freedom had shifted from the earlier ecclesiastical interference with the philosophy and natural science disciplines to the more recent threat to the political and social sciences by powerful industrialist benefactors and boards of trustees.³³

Several factors particular to the nature of professional work and especially important to the academic profession also help explain the successful demands for academic freedom. Like other employers, universities seek effective tactics to extract the maximum amount of labor effort from their employees.³⁴ In the case of non-skilled or non-expert employees, employer tactics often consist of coercive monitoring and surveillance tactics accompanied by the threat of discipline or discharge.³⁵ As Professor Erik Olin Wright has explained, such tactics may be counterproductive for skilled or expert employees, whose "control over knowledge and skills frequently renders the labor effort of skilled workers difficult to monitor and control."³⁶

Of all expert employees, the labor effort of tenure-track faculty may be the most difficult to monitor and control, given the individualized and solitary nature of much of the work involved in teaching and research.³⁷ Evaluating the quality of teaching and research products is especially

³² HOFSTADTER & METZGER, *supra* note 3, at 426. The accusations against Ely charged that he supported "strikes and boycotts, justifying and encouraging the one while practicing the other," and that he "had entertained a union organizer in his home." Schrecker, *Academic Freedom*, *supra* note 31, at 27.

³³ See HOFSTADTER & METZGER, *supra* note 3, at 412; See, e.g., *1915 Declaration of Principles*, *supra* note 6, at 165-66. The impetus for the AAUP formation has also been linked to the political climate of the Progressive Era, a less political and socially traumatic time than the late 19th century, and an era promoting the link between expertise and public service. Schrecker, *Academic Freedom*, *supra* note 31, at 17; David M. Rabban, *A Functional Analysis of 'Individual' and 'Institutional' Academic Freedom Under the First Amendment*, 53 *Law & Contemp. Prob.* 227, 232 (1990) [hereinafter Rabban, *Functional Analysis*].

³⁴ ERIK OLIN WRIGHT, *CLASS COUNTS* 14 (Student Ed. 2000).

³⁵ *Id.*

³⁶ *Id.* In discussing the class location of such employees, Wright also describes the "loyalty rent" that employers pay to ensure maximum labor effort from skilled/expert employees who hold a strategic advantage in the labor market. *Id.*

³⁷ See George Feldman, *Workplace Power and Collective Activity: The Supervisory and Managerial Exclusions in Labor Law*, 37 *ARIZ. L. REV.* 525, 559 (1995) (discussing the relationship between faculty control over academic matters and the university's reputation); DEREK BOK, *UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION* 21-23 (2003) (contrasting the popular view that tenured faculty have no incentives to work with the reality of incentives for faculty to use their professional autonomy to produce scholarly research). See also Rabban, *Functional Analysis*, *supra* note 33; see generally George Feldman, *Workplace Power and Collective Activity: The Supervisory and Managerial Exclusions in Labor Law*, 37 *ARIZ. L. REV.* 525 (1995); Marina Angel, *Professionals and Unionization*, 66 *MINN. L. REV.* 383 (1981).

difficult to do in a systematic and consistent manner given the nature of scholarship, which is carried out through experiments and inquiries that often fail or lead to “dead ends.” The amount of time and effort that faculty devote to teaching and research will vary, depending on the project involved and the stage of the work. Respecting faculty rights of academic freedom, therefore, serves the needs of the university employer, as faculty autonomy is instrumental to producing high quality academic teaching and research. Autonomy is also one of the major benefits of academic work – to the point where faculty control over their time and work product attracts experts to academia despite their ability to gain higher salaries in a non-academic job.

B. FACULTY PROFESSIONAL IDENTITY, CLASS LOCATION, AND CLASS CONSCIOUSNESS

Academic freedom, as a fundamental element of faculty professional identity, is also a central factor in describing faculty class location and class consciousness. At first glance, it might strain credulity to apply the concept of class consciousness to current university tenure-track faculty, who are often portrayed as privileged, self-absorbed individuals narrowly focused on their particular disciplinary area of specialization. This image may not lend itself to the view that tenure-track faculty’s decisions and choices are influenced by beliefs with class content and class-pertinent effects. The origins and content of academic freedom, though, reflect objective and subjective factors that are elements of faculty class interests and consciousness. Academic freedom, as an objective condition distinguishing faculty interests from their employer, is central to locating faculty within the ranks of labor – on the opposing side of the class line from the university administration and board of trustees. Born out of labor conflict between faculty and their employers, academic freedom is based on the objective reality and the subjective beliefs distinguishing faculty’s individual and collective interests from those of the administration, trustees, and third party financial donors. The justification of academic freedom, to enable faculty to engage in academic work that serves the public good, describes faculty interests as independent from private interests of capital. The content of academic freedom, which provides faculty with protection from retaliation for controversial teaching and research, the job security of tenure, and self-governance authority, creates the objective conditions for establishing this independence.

The collective faculty demand for academic freedom also reflects a group consciousness that faculty identity is distinctive from university administrators and trustees. Moreover, the interaction between these ob-

jective and subjective aspects of academic freedom shows the dynamic relationship of class location and class consciousness.

Objective material conditions determine class consciousness, but consciousness can also shape material conditions.³⁸ For example, the objective working conditions of faculty in the early 1900s did not include faculty autonomy over teaching and research agendas, leading to labor conflict when social science faculty's work clashed with the economic interests of the university employer and corporate benefactors. Faculty effected change in these objective conditions of work through collective action based on a shared set of beliefs that faculty interests were distinctive from those of university administration, trustees, and other third parties. These new faculty working conditions included the right to control their work, participate in university governance processes, and speak freely on intramural and extramural matters, with these rights protected by the job security of tenure. Instituting these objective working conditions, in turn, developed and reinforced a faculty identity – or class consciousness – as expert employees independent from the university employer. An important component of this faculty class consciousness related to the goal of academic work, as expressed in the *1915 Declaration*, to promote the public good rather than serving private interests. Faculty's subjective self-image – their class consciousness – included independence from the private corporate interests that could seek to influence their academic work.

The origins and current practice of academic freedom add complexities to this class analysis, which must account for objective and subjective factors that also align faculty interests with those of the employer. As professional employees, faculty hold a privileged labor position in relation to other employees.³⁹ Like other professional or skilled employees, the distribution of wealth and power create privileged faculty working conditions that are closer to university administrators than to rank and file employees. The differences include economic issues of salary, benefits, physical working conditions, and work schedules. Even more significantly, the degree of faculty autonomy over their work processes, work product, and even hiring and promotions of their colleagues provides working conditions normally enjoyed only by employers. The similarities between faculty and administrators are reinforced by the revolving nature of faculty in and out of administrative positions, from

³⁸ See WRIGHT, *supra* note 34, at 200-03 (discussing the dynamic relationship among class location, class practices, and class consciousness); J. Craig Jenkins & Kevin Leicht, *Class Analysis and Social Movements*, in *REWORKING CLASS* 369, 371-73 (John R. Hall, ed. 1997) (discussing the role of both objective and subjective factors in class formation).

³⁹ See Marion Crain, *The Transformation of the Professional Workforce*, 79 CHI-KENT L. REV. 543, 543-54, 597-99 (2004) (discussing the privileged class position of professionals and the use of collective action to protect professional autonomy over their work).

the level of department chairs, to college deans, to university provosts and presidents. Further, recent increases in faculty stratification have created a gulf between the working conditions of tenure-track faculty and nontenure-track faculty and graduate student teachers.⁴⁰

Against this background of privileged working conditions, academic freedom might be viewed as yet another objective condition placing faculty closer to the employer's side of the class line. Two aspects of academic freedom, however, reveal its objective role in placing faculty in a class location with the rest of labor. The first, the core value of academic freedom, requires faculty independence in their research, teaching, and self-governance. The second aspect, restrictions limiting faculty self-governance, also distinguishes faculty from their employer, but in ways that maintain the power of the university administration and trustees.

While such restrictions on self-governance undermine the role of academic freedom in guarding faculty autonomy, they also confirm that faculty and the administration are in opposing classes. In its early formative period, the AAUP explicitly rejected the goal, advocated by a syndicalist faction of the AAUP, of restructuring higher education into a public system with faculty control over appointments of administrators and university officers.⁴¹ Instead, the AAUP chose a more limited tactic of carving out a position of faculty autonomy within the existing institutional structure of a largely private system of higher education run by powerful administrators.⁴²

Professor Ellen Schrecker has criticized the resulting peer review structures as being "self-policing," rather than self-governing, as faculty will avoid interference in their decisions only by making judgments that are acceptable to the administration and trustees.⁴³ The *1915 Declaration* states that the profession will avoid laypersons' interference only if faculty are willing "to purge its ranks of the incompetent and the unworthy, [and] to prevent the freedom which it claims in the name of science from being used as a shelter for inefficiency, for superficiality, or for uncritical and intemperate partisanship."⁴⁴ Given the subjectivity of professional standards applied through peer review, the academic profes-

⁴⁰ See *infra* notes 143-147 and accompanying text.

⁴¹ See Byrne, *supra* note 3, at 279; HOFSTADTER & METZGER, *supra* note 3, at 473; Metzger, *Profession and Constitution*, *supra* note 3, at 1276-78; SCHRECKER, NO IVORY TOWER, *supra* note 3, at 25-27.

⁴² See HOFSTADTER & METZGER, *supra* note 3, at 473; SCHRECKER, NO IVORY TOWER, *supra* note 3, at 25-27; Byrne, *supra* note 3, at 278-79; Metzger, *Profession and Constitution*, *supra* note 3, at 1276-78.

⁴³ The concept used here of "self-policing" to retain the autonomy of the academic profession from outside intervention relies heavily on the work of Ellen Schrecker. See Schrecker, *Academic Freedom*, *supra* note 31, at 25-27.

⁴⁴ *1915 Declaration of Principles*, *supra* note 6, at 170.

sion's willingness to "purge its ranks" leaves politically unpopular or controversial faculty vulnerable to judgments of "partisanship" and "incompetence."⁴⁵ As Professor Schrecker has observed, this definition of peer review standards creates a dichotomy between scholars, who are portrayed as unbiased and responsible, and social activists, who are viewed as overly partisan and unworthy of faculty status. A definition of academic freedom that separates social activists and scholars may also be more acceptable to third party corporations, who might disapprove of their financial contributions supporting activist curricula or research.

This limitation on faculty self-governance provides faculty academic freedom while simultaneously maintaining significant employer control over its results. In this way, faculty self-governance promotes the interests of the university employer and third party corporate funders to maintain faculty productivity while limiting faculty challenges to employer power.⁴⁶ This restriction of academic freedom strengthens the argument that faculty's objective working conditions place them in a class

⁴⁵ *Id.* The history of peer review systems in universities in the United States includes many instances of the realities of such vulnerability, including the dismissals of faculty during the McCarthy era, faculty targeted for their politics during the Civil Rights movement and the Vietnam War, and more recently, tenure denials of faculty viewed as overly partisan in their teaching and research aimed at social reform. See Milton Fisk, *Academic Freedom in Class Society*, in *THE CONCEPT OF ACADEMIC FREEDOM* 11 (Edmund L. Pincoffs, ed., 1972); SCHRECKER, *NO IVORY TOWER* *supra* note 3, at 31-32; Howard Zinn, *The Politics of History in the Era of the Cold War: Repression and Resistance*, in *THE COLD WAR AND THE UNIVERSITY: TOWARD AN INTELLECTUAL HISTORY OF THE POSTWAR YEARS* 35, 52-71 (1997); Dr. Jack R. Stauffer, *Remarks to Joint Committee on Charges Against Certain Officers at Harvard University*, in *THE UNIVERSITY CRISIS READER* 462-78 (Immanuel Wallerstein and Paul Starr, eds. 1971); Chester Hartman, *Uppity and Out: A Case Study in the Politics of Faculty Reappointments (and the Limitations of Grievance Procedures)*, in *HOW HARVARD RULES* 287 (John Trumpbour, ed. 1989); Lawrence S. Lifschultz, *Could Karl Marx Teach Economics in the United States*, in *HOW HARVARD RULES*, at 279; Jamin B. Raskin, *Laying Down the Law: The Empire Strikes Back*, in *HOW HARVARD RULES*, at 341.

⁴⁶ While academic freedom relies on faculty independence from the university administration, trustees, and third party interests, public policy affecting universities also envisioned faculty research and teaching as benefiting business. The role of land grant institutions in the United States created universities for the public good, defined as including education and research that benefit private corporate interests. The federal Morrill Act of 1862, ch. 130, 12 Stat. 503 (1862) (codified at 7 U.S.C. § 304 (1982)), created land-grant colleges with the goal of providing education and training for students who would enter the growing industries, including manufacturing and commercial agricultural ventures. The land-grant colleges would also provide applied research for industry and agriculture performed by faculty in new departments such as agriculture, mechanical arts, commerce, and business administration. Non-land grant colleges added such departments as well. The Morrill Act provided land grants to states for colleges,

where the leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts . . . in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life.

Morrill Act, 12 Stat. at 504, *quoted in* Byrne, *supra* note 3, at 270, n.71.

location with labor. Similar to other professional employees, faculty exercise discretion and autonomy in their work, subject to the ultimate power of their employer.

Ironically, however, this "self-policing" function of peer review may also reduce faculty's class consciousness as part of labor. By exercising self-regulation in self-governance, faculty increase the probability that the administration and trustees will accept faculty recommendations concerning promotions or academic policy decisions. This consensus can lead to a subjective view that faculty and the administration have the same interests. Further, this subjective view may become a reality through faculty self-governance that "purges" the faculty of individuals whose teaching, research, or public activities challenge the interests of administrators, trustees, or third party foundations.

Faculty ambivalence about class identity is expressed by the 1915 Declaration analogy between faculty and judicial "appointees" rather than "employees." This description portrays faculty as occupying an employment category that is neither labor nor employer. Similar to judges, whose independence is required to ensure impartial decision-making, the Declaration presents faculty independence from all other groups as necessary to ensure unbiased research and teaching. It is possible that the AAUP chose this analogy as a tactic to improve its chances to gain workplace autonomy and job security by distinguishing faculty from other employees who might be inspired to demand similar treatment. Regardless of the motivation for this analogy, though, the description of faculty's objective working conditions may both reflect and shape faculty consciousness. In describing faculty working conditions as inherently different from other employees, the AAUP interpreted the objective conditions of work as removing faculty from the category of labor.

It is no simple matter, then, to neatly summarize the nature of university faculty class location and class consciousness. Like other professional employees, faculty are subject to opposing gravitational social forces pulling them toward labor and capital. University faculty's privileged labor position, given their social status, higher salaries, and desirable working conditions, create objective material conditions that pull toward an alignment with the interests of the university administration and trustees. Academic freedom, as an objective condition further separating faculty from other employees, could be viewed as evidence of faculty class interests aligned with the administration. Yet, academic freedom, won through labor conflict, provides faculty with independence from the administration. The limitations on faculty governance reinforce the objective reality of employer power over faculty as part of labor.

Faculty's objective material conditions shape their class consciousness, while their consciousness also shapes their objective material con-

ditions. In this dynamic process, subjective factors also influence consciousness, some pulling faculty towards identifying with labor, and others toward identification with capital. Academic freedom, as an objective condition creating faculty independence from their employer, shapes a subjective consciousness that faculty identity is distinctive from university administrators and trustees. The content of academic freedom includes faculty autonomy over their work, as well as values of communalism and openness in faculty relations concerning teaching and research. These values are consistent with the faculty's social role of promoting the university's public mission in education and research. The values at the core of academic freedom thus create a distinctive academic culture that is implemented in the daily practice of teaching and research and in faculty governance processes. At the same time, though, the objective material conditions of faculty's privileged labor status highlights their similarities with university administrators. Further, faculty may believe that their consensus with the administration on many issues is strictly a product of faculty-administration common interests rather than being, at least in part, an inevitable and unconscious result of faculty's self-imposed restrictions on self-governance to avoid employer interference.

It is important to describe faculty class location and class consciousness to better understand the functions of the university on a regular basis and at critical historical moments. In the daily functioning of the university, faculty exercise autonomy over teaching, research, and academic self-governance as a routine matter, without conflicts with deans, central administrators, or trustees. In many situations, therefore, faculty interests may coincide with the interests of the university administration and trustees. In times of conflict, however, a class analysis of faculty and administration actions will help explain the choices and actions of faculty, administrators and trustees. In some instances the faculty will face off with the administration in ways that reveal their different interests, as in faculty committees that oppose the administration's decisions in tenure cases, faculty collective opposition to university financial investment decisions, or faculty governance resolutions seeking to influence the administration's policies. In other instances, divisions among faculty reveal internal conflicts over faculty interests, as in controversies during the McCarthy era or during campus activism of the 1960s.⁴⁷

Equally important, an accurate analysis of class location is essential to creating a foundation for action, including faculty choices for action at the current crucial moment in the history of the university. Similar to the social and economic conditions of the early twentieth century, corporate

⁴⁷ See *supra* note 45 and accompanying text.

power has reached a new zenith at the turn of the twenty-first century. During the period of industrialization of the late 1800s and early 1900s, the demands for academic freedom were aimed at protecting faculty independence from university administrators who were subject to pressure from powerful corporate benefactors. Faculty collective action at that time was carried out to further the cause of the academic profession and the university's role in serving the public good, rather than private interests. In the current age of global capitalism, university corporatization trends present modern iterations of similar challenges to the academic profession and the social role of the university.

Faculty consciousness of their class interests as professional academics will shape their responses to the multiple facets of current university corporatization, which pose fundamental questions about the core functions of the university. How will faculty respond to universities' increased market activities in education and research, including for-profit spin off corporations and the growth in patenting and licensing of academic research results? Will faculty view these activities as being in conflict with their independence from private economic interests? Tenure-track and tenured faculty must respond to the "proletarianization" of the faculty, with the enormous growth of nontenure-track faculty and graduate student teachers. Will tenure-track and tenured faculty view themselves in alliance with the growing ranks of lower status faculty, or as more aligned with university administrators' interests in altering the status of teaching faculty? These questions will be addressed in Part III, evaluating the role of faculty's professional identity in shaping faculty responses to university corporatization trends. First, though, the discussion turns to the legal context, where the Supreme Court has played an important role in shaping faculty professional identity through its definitions of the class relations between faculty and the university employer.

II. FACULTY LEGAL IDENTITY: FACULTY AS MANAGERIAL EMPLOYEES

Part I of this article began by describing university faculty identity as a tale of two sets of conflicting norms. That section analyzed the first set of norms, which placed academic freedom at the center of faculty identity. These professional norms were created by faculty collective action outside the legal context. Part II of this article focuses on the second set of norms, which also originated with faculty collective action, when the faculty of Yeshiva University voted to unionize. These norms, however, were ultimately determined in the legal context when the Supreme Court held that private university faculty with significant workplace autonomy are "managerial employees," and therefore excluded from the protection of the right under the National Labor Relations Act (NLRA)

to form and join unions. Omitting any mention of academic freedom, the Court described faculty governance as evidence of faculty alignment with the interests of administrators and trustees.

This section of the article analyzes and critiques *Yeshiva* on two levels. First is a critique of *Yeshiva's* reasoning and holding within the university context. Second is an analysis of *Yeshiva* as part of the broader context of Supreme Court decisions interpreting professional employee status under the NLRA. Both levels of analysis are concerned with the Supreme Court's manipulation of the class line to expand the ranks of the employer and correspondingly reduce the ranks of labor. Although the Court did not explicitly use class analysis, the cases deal with fundamental questions of class in making legal determinations of whether professional employees have rights under the NLRA to unionize and engage in collective bargaining. Similar to the class analysis of faculty professional identity presented in Part I, the analysis of the NLRA and relevant judicial decisions will focus on the objective and subjective factors considered by Congress and the courts.

A. YESHIVA'S APPLICATION OF THE MANAGERIAL EMPLOYEE EXCLUSION

The legal issue presented in *NLRB v. Yeshiva University*⁴⁸ was the employment status under the NLRA of Yeshiva's tenured and tenure-track faculty, who had voted to unionize. Only "employees," defined by Section 2(3) of the NLRA, receive the protections of Section 7 of the Act, including the right to form and join unions, engage in collective bargaining with their employer, and participate in protected concerted activity such as strikes.⁴⁹ Section 2(3) broadly defines "employee" as

⁴⁸ 444 U.S. 672 (1980). The union petitioned to represent a bargaining unit consisting of the full-time faculty members at ten of the thirteen schools of Yeshiva University. *Id.* at 674-75. "Full-time faculty" were defined in the bargaining unit as faculty with the titles of "professor, associate professor, assistant professor, instructor, or any adjunct or visiting thereof, department chairmen, division chairmen, senior faculty, and assistant deans." *Id.* at n.7. The bargaining unit excluded "part-time faculty; lecturers; principal investigators; deans; acting deans and directors." *Id.* The employer, Yeshiva University, opposed the petition on the ground that the faculty members were managerial or supervisory personnel. The NLRB found that the faculty were entitled to protection under the NLRA as professional employees. At an NLRB directed election, the faculty voted to unionize. For discussions of *Yeshiva*, see Marina Angel, *supra* note 37; Feldman, *supra* note 37, at 525; Karl E. Klare, *The Bitter With the Sweet: Reflections on the Supreme Court's "Yeshiva" Decision*, 13 SOCIALIST REVIEW NO. 71:99 (Sept.- Oct. 1983); David Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees*, 99 YALE L.J. 689 (1990) [hereinafter Rabban, *American Labor Law*]; Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L.REV. 73, 132-39 (1988).

⁴⁹ Section 7 of the NLRA states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or

“includ[ing] any employee.”⁵⁰ “Employers,” who are not protected under Section 7, are defined by Section 2(2) to include “any person acting in the interest of an employer, directly or indirectly.”⁵¹ Prior to 1947, the NLRA did not further define the class line between employers and employees. Reacting to a Supreme Court decision affirming the NLRB’s inclusion of foremen as employees, Congress passed the 1947 Taft-Hartley Act,⁵² which added Section 2(11) to the NLRA, excluding “supervisors” from the category of “employee.”⁵³ This broadly worded exclusion defined supervisors as individuals exercising any one of twelve supervisory duties carried out “in the interest of the employer” and “requir[ing] the use of independent judgment.”⁵⁴ The Taft-Hartley amendments also added Section 2(12),⁵⁵ which explicitly defines and includes “professional employees” as employees covered by the NLRA. Professional employees are defined as those engaged in “predominantly intellectual and varied” work involving “discretion and judgment,” and which requires knowledge normally gained through higher education.⁵⁶

As the *Yeshiva* Court noted, Yeshiva University did not dispute that the faculty were professional employees under Section 2(12), but argued

other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

29 U.S.C. § 157 (2000).

⁵⁰ 29 U.S.C. § 152(3).

⁵¹ 29 U.S.C. § 152(2).

⁵² Labor-Management Relations (Taft-Hartley) Act of 1947, ch. 120, sec. 101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-88 (2000)).

⁵³ Section 2(11) of the NLRA states:

The term ‘supervisor’ means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). Section 2(3) was amended to state that supervisors are excluded from the definition of employees under the NLRA. 29 U.S.C. § 152(3).

⁵⁴ *Id.*

⁵⁵ Section 2(12) of the NLRA states:

The term “professional employee” means – (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving consistent exercise of discretion and judgment in its performance; . . . (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes[.]

29 U.S.C. § 152(12).

⁵⁶ *Id.*

that they should be excluded from the protection of the NLRA either as Section 2(11) supervisors or as “managerial employees.”⁵⁷ Unlike the statutory supervisor exclusion, managerial employees are not explicitly excluded by the Taft-Hartley Act. In 1974, in *NLRB v. Bell Aerospace*,⁵⁸ the Supreme Court implied the exclusion of managerial employees, defined as those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer.”⁵⁹ Although the *Bell Aerospace* Court did not provide a clear rationale for excluding employees engaged in policy-making,⁶⁰ the Court concluded that Congress had assumed that managerial employees, like supervisors, would be excluded from NLRA protection.⁶¹ The Court applied the same policy underlying the Section 2(11) supervisory exclusion, which was motivated by the fear of “divided loyalties” by employees carrying out supervisory authority.⁶² In the case of managerial employees, this concern was focused on the possibility that managerial employees might divide their loyalty between the union and the employer in carrying out the discretion entailed in their work.⁶³

In *Yeshiva*, the NLRB had held that the faculty were professional employees, covered under Section 2(12) of the NLRA, but were not managerial employees.⁶⁴ The Court of Appeals disagreed, holding that the faculty were managerial employees as they “‘in effect, substantially and pervasively [operate] the enterprise.’”⁶⁵ The Supreme Court affirmed the Court of Appeals, based primarily on the evidence of faculty autonomy over academic matters, including curriculum, teaching methods, grading policies, and student admissions, which the Supreme Court found to be managerial duties carried out by the faculty in the interest of the university.⁶⁶ The Court concluded that as managerial employees, faculty “must be aligned with management”⁶⁷ and that the “faculty’s professional interests – as applied to governance at a university like *Yeshiva* – cannot be separated from those of the institution.”⁶⁸

⁵⁷ *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 679, 681-82 (1980).

⁵⁸ 416 U.S. 267 (1974).

⁵⁹ *Id.* at 288.

⁶⁰ Feldman, *supra* note 37, at 554.

⁶¹ *Id.* at 547-48.

⁶² *Id.* at 551, 554.

⁶³ *Id.* at 554-55.

⁶⁴ *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 678, 696 (1980).

⁶⁵ *Id.* at 691.

⁶⁶ *Id.* at 686-88. The Court noted that it did not rely “primarily” on the faculty role in “faculty hiring, tenure, sabbaticals, termination and promotion” to reach its decision on managerial status, as the Court did not reach the question of faculty supervisory status and “[t]hese decisions clearly have both managerial and supervisory characteristics.” *Id.* at 686, n.23.

⁶⁷ *Id.* at 683.

⁶⁸ *Id.* at 688.

The Court rejected the NLRB's theory that such collective faculty autonomy in "academic governance" was not managerial authority. The NLRB had concluded that faculty exercised "'independent professional judgment'" in the professional interest of faculty, not in the institutional interests of the university.⁶⁹ The Court disagreed, holding that "[t]he controlling consideration . . . is that the faculty . . . exercise authority which in any other context unquestionably would be managerial."⁷⁰ Similar to statutory supervisors, the Court found that the university administration "is entitled to the undivided loyalty of its representatives."⁷¹ The Court found that the danger of divided loyalties of the faculty is particularly acute, given their "independence" in using their professional expertise in policy-making in "the governance structure adopted by universities like Yeshiva."⁷² Faculty have the right to unionize under the NLRA only in private universities where they do not exercise this degree of autonomy.⁷³

The *Yeshiva* decision mandates that private university faculty who exercise significant collective governance authority belong on the employer's side of the class line. This judicial exclusion of faculty from the ranks of labor reflects a broader problem of the Court's class analysis

⁶⁹ *Id.* at 678, 685.

⁷⁰ *Id.* at 686.

⁷¹ *Id.* at 682.

⁷² *Id.* at 689-90, n.28.

⁷³ The Court explained that "[i]t is plain . . . that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research." *Id.* at 690, n.31. Under the case-by-case approach adopted in *Yeshiva*, the NLRB and the lower federal courts have occasionally found private sector university faculty to be non-managerial. *Compare* Boston University, 281 N.L.R.B. 798 (1986), *enfd*, 835 F.2d 399 (1st Cir. 1987); Elmira College, 309 N.L.R.B. 842 (1992); Lewis and Clark College, 300 N.L.R.B. 155 (1990) (all finding faculty managerial status) *with* University of Great Falls, 325 N.L.R.B. 83 (1997) (certification), 331 N.L.R.B. No. 188 (2000) (employer refusal to bargain); Cooper Union, 274 N.L.R.B. 1768 (1985), *enfd*, 783 F.2d 29 (2d Cir. 1986); Loretto Heights College, 264 N.L.R.B. 1107 (1982), *enfd*, 742 F.2d 1245 (10th Cir. 1984) (all finding faculty to be non-managerial). The Regional Director of Region 2 of the NLRB found the faculty at Manhattan College to be non-managerial, concluding that "while the record clearly establishes that the Manhattan College faculty have a substantial role in the development of policy in academic and other spheres . . . this role is fundamentally advisory in nature." Manhattan College, 2-RC-21735, at 79 (Nov. 9, 1999). Although a three-member panel of the NLRB denied Manhattan College's appeal of the Regional Director's decision, the NLRB did not address the merits of the case, stating only that the appeal "raises no substantial issues warranting review." Courtney Leatherman, *NLRB Lets Stand a Decision Allowing Professors at a Private College to Unionize*, CHRON. HIGHER EDUC., Jul. 7, 2000, at A14. The significance of the Regional Director's decision is uncertain, given the continued precedent of *Yeshiva* and its progeny and the outcome of the election at Manhattan College, where the union lost the election. *See id.*, at A14; Scott Smallwood, *NLRB Rules Against Faculty Union at Sage Colleges*, CHRON. HIGHER EDUC., Aug. 17, 2001, at 9. For discussion of the influence of *Yeshiva's* reasoning on public sector collective bargaining legislation and interpretation, *see* Patrick Nagle, Note, *Yeshiva's Impact on Collective Bargaining in Public-Sector Higher Education*, 20 J.C. & U.L. 383, 393-403 (1994).

related to professional employees. The next section of the article analyzes this problem by placing *Yeshiva* in the broader legal context of the Court's creation of the managerial employee exclusion and its overly broad interpretations of the NLRA statutory exclusion of supervisors. Even accepting the Court's creation of the managerial employee exclusion, however, a separate critique of *Yeshiva*, presented below, analyzes the Court's mischaracterization of the faculty's class position in the university.

Yeshiva was a hotly contested case, decided by a closely divided Court in a 5-4 split.⁷⁴ The record in the case consisted of more than 4600 pages of testimony, and 200 exhibits from hearings held over a five-month period.⁷⁵ The level of investment in this litigation reveals the parties' stake in the outcome, which would determine the future of faculty organizing in most private universities. This case was about class location of faculty, raising the fundamental question under the NLRA of whether faculty were professional employees with the right to unionize or whether they were unprotected as supervisors or managerial employees.⁷⁶ The decision rested on the issue of class interests, with the majority and dissenting justices reaching opposite conclusions about whether faculty interests were more closely aligned with the university employer or with the academic profession.

The Court majority's application of the managerial employee category to faculty in "mature universities"⁷⁷ excludes faculty from NLRA protection on the basis of governance activities within the traditional scope of academic freedom. In concluding that faculty governance made the faculty's interests inseparable from their employer's interests, the Court mischaracterized both the objective conditions of faculty governance and the subjective identity of faculty. While the Court acknowledged that the "shared authority" governance structure of universities differed from typical industrial settings, the Court omitted any use of the term "academic freedom." In failing to evaluate collective faculty governance as inseparable from academic freedom, the Court erroneously described such governance as authority delegated by the employer to the faculty and conditioned on faculty alignment with the administration's interests.⁷⁸

With this omission of academic freedom, the Court ignored the historical basis of faculty self-governance as an objective working condition

⁷⁴ Justice Powell wrote the opinion of the Court, joined by Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens. Justice Brennan wrote the dissenting opinion, joined by White, Marshall, and Blackmun. 444 U.S. 672, 673 (1980).

⁷⁵ *Id.* at 696, n.5 (Brennan, J., dissenting).

⁷⁶ *Id.* at 678.

⁷⁷ *Id.* at 680.

⁷⁸ Feldman, *supra* note 37, at 541, 546, 558.

intended to protect faculty independence from administrators. The Court also failed to consider academic freedom as critical to forming the consciousness of faculty professional identity, which influences choices to unionize. The Yeshiva faculty were concerned with the administration's repeated unilateral decisions overriding faculty governance recommendations on issues such as hiring, promotions, dismissals, and retirement.⁷⁹ By unionizing, faculty attempted to retain their collective influence on university governance through the legally enforceable obligation of the university employer to collectively bargain over conditions of work.

In contrast to the majority, the four dissenting justices recognized academic freedom as central to an accurate understanding of the objective and subjective factors creating faculty identity. The dissent emphasized that faculty governance is part of academic freedom, which sets boundaries in the relationship between the university administration and the faculty. The dissent described the actual practice of faculty governance, which does not include any expectation that faculty act as representatives of management. As the dissent explained:

Indeed, the notion that a faculty member's professional competence could depend on his undivided loyalty to management is antithetical to the whole concept of academic freedom. Faculty members are judged by their employer on the quality of their teaching and scholarship, not on the compatibility of their advice with administration policy.⁸⁰

Academic freedom means that faculty can criticize the administration's policies and attempt to influence university policy to promote the distinct interests of the academic profession. This concept goes beyond the general abstraction that faculty and administration have a common interest in high quality education and research. As the dissenting justices explained, faculty and administration agree on the general goal of quality education but may have diverging interests over "exactly how to devote the institution's resources to achieve those goals."⁸¹ These differences are exemplified by the facts of *Yeshiva*, where the administration rejected faculty recommendations on the basis of "fiscal constraints or other managerial policies."⁸²

The diverging interests between Yeshiva's faculty and administration also reveal the interaction of the objective and subjective factors that form class identity. As the dissent noted, the disputes between the

⁷⁹ 444 U.S. at 701-02 (Brennan, J. dissenting, describing the Yeshiva administration's numerous rejections of faculty recommendations on such issues).

⁸⁰ *Id.* at 699 (Brennan, J., dissenting).

⁸¹ *Id.* at 701.

⁸² *Id.*

faculty and administration concerned a wide range of “fundamental issues,” from hiring and firing to academic programs to department budgets and faculty choices of departmental representatives.⁸³ The dissent highlighted these subjective factors in observing that the faculty’s subsequent decision to unionize demonstrate that “the faculty does not perceive its interests to be aligned with those of management.”⁸⁴ The dissent sets the Yeshiva faculty’s actions in the context of the growing phenomenon of education as “big business,” which has widened the divergence between the faculty’s interests in promoting educational goals and the administration’s fiscal concerns.⁸⁵ These changes have also been manifested, the dissenting justices noted, by increased unilateral action by the administration and corresponding reduction in faculty collective influence over university decision-making.⁸⁶ As a result, faculty have sought a range of means to recapture their collective influence, from informal processes of negotiation to legally enforceable collective bargaining through unionization.⁸⁷

As this analysis shows, the *Yeshiva* majority and dissent both engaged in class line drawing, with each placing the line at a different level in the university. The majority drew the line to place most private university faculty in the employer class, based on its view that faculty collective governance made them managerial employees, and thus, representatives of the employer. This class division places faculty on the labor side of the class line only if they are excluded from the university governance structure.⁸⁸ The majority therefore viewed faculty class identity as part of labor as being incompatible with faculty participation in university governance. The dissent, however, drew the class line to include all faculty as part of labor, with the potential for specific exclusions of individual positions where the evidence shows that they “actually do serve as management’s representatives,” such as department chairs or deans.⁸⁹ Thus, the dissent viewed a labor class identity to be consistent with faculty governance processes.

A key element in explaining the different placement of the class line by the majority and dissent is the role of academic freedom. By ignoring academic freedom as the source of faculty governance, the majority de-

⁸³ *Id.*

⁸⁴ *Id.* at 702.

⁸⁵ *Id.* at 702-03.

⁸⁶ *Id.* at 702-04.

⁸⁷ *Id.* at 704-05.

⁸⁸ The Court noted that not all the *Yeshiva* faculty may fall into the category of managerial employees, speculating that upon further review, the NLRB might draw “a rational line . . . between tenured and untenured faculty members, depending upon how a faculty is structured and operates.” 444 U.S. at 690, n.31.

⁸⁹ *Id.* at 700, n.10.

scribed faculty participation in university policy-making as an employer delegation of managerial authority that could be exercised only to promote employer interests. The majority asserted that this alignment of the faculty with the administration is inherent in their common goal of quality education.⁹⁰ By omitting any mention of academic freedom in faculty governance, however, the majority avoided examining the differences between faculty and administration priorities in implementing the general goal of providing quality education. In contrast, the dissent examined the objective conditions of academic freedom as practiced in the form of faculty governance. This analysis takes into account the source of academic freedom as a bottom up phenomenon, protecting faculty assertion of their distinct professional interests through collective faculty governance. The dissent recognized that faculty and administration class interests have diverged more as higher education has become big business. With the accompanying erosion of their influence in university governance, faculty have chosen from a spectrum of collective actions to protect their professional academic interests, ranging from informal negotiations within shared authority structures to formal unionization and collective bargaining.

Yeshiva adds a significant element to the formation of university faculty class identity. Positive law, in the form of legislation and judicial decisions, creates objective conditions that influence subjective consciousness. The NLRA, as judicially interpreted prior to 1947, formed a part of the objective material conditions determining a working class location of foremen and other supervisors. In drawing this class line, the NLRB and the Supreme Court also influenced and reinforced a subjective consciousness of supervisors that their class interests were part of labor. With the enactment of Taft-Hartley in 1947, Congress redrew the statutory class line to exclude supervisors as defined in Section 2(11) of the Act. Similarly, in the 1974 decision of *Bell Aerospace*, the Supreme Court redefined the class division by excluding managerial employees from labor, followed by the 1980 *Yeshiva* decision that faculty in "mature universities" are managerial. The *Yeshiva* Court's inaccurate description of faculty interests and power relations in the university thus creates its own objective reality from a judicial decision with the power of the Supreme Court behind it. *Yeshiva* creates objective material conditions in multiple aspects: the Court describes faculty governance as authority delegated by the employer rather than authority that is part of academic freedom; equates faculty and university employer interests; and excludes most private sector tenure-track faculty from the status of employee under the NLRA.

⁹⁰ *Id.* at 688.

Even though the Court's description of the university was at odds with the objective and subjective conditions experienced by the Yeshiva faculty, who had voted to unionize, the Court's decision can influence future perceptions of faculty/administrative relations. Given the dynamic interaction of objective and subjective factors, the perception that faculty and their employer have the same class interests may influence faculty to conduct themselves in a way that confirms this class alignment. As a result, the objective material conditions of faculty-administration relations may eventually be changed to coincide with the Court's description.

The positive law is not, of course, the only objective material condition determining class location and consciousness. Other objective conditions include the professional norms of academic freedom, the actual power relations in the university, and the divergent expression of faculty and administration interests through university governance. Still, the Supreme Court's *Yeshiva* decision strengthens the effects of the factors that already support a view that faculty are not part of labor. In particular, *Yeshiva* reinforces a view that separates a faculty academic identity from a faculty labor identity. *Yeshiva* has been reduced, in common parlance, to a statement that "faculty can't unionize because they are managers." This statement is not accurate. The lack of NLRA protection does not prohibit any faculty from unionizing. Also, the holding applies only to private universities with significant faculty governance processes. Finally, even faculty at these "mature universities" are employees under the NLRA if they are excluded from participating in faculty governance.

Despite its inaccuracy, however, the shorthand statement of the *Yeshiva* holding has an impact on faculty consciousness by reinforcing the perception that faculty governance is inconsistent with a faculty identity as part of labor. Thus, the misconception that faculty *cannot* unionize becomes transformed into a normative view that faculty *should not* unionize. Through this lens, unionization is viewed as qualitatively different from faculty governance, rather than being a more formal and legally enforceable system of collective faculty governance. This perspective may also have an impact on public university faculty, who may have the right to unionize under state public sector collective bargaining statutes. Even if such faculty unionize, they may view collective bargaining as limited to a narrow scope of employment issues, rather than as an extension of faculty governance over academic policy.

Yeshiva also has important implications for defining the scope of academic freedom. In eliminating academic freedom from its consideration of faculty governance, the Court effectively reduces academic freedom to an individual right. As the dissenting justices recognized, academic freedom is the source of collective faculty governance author-

ity. The independence of the collective expression of faculty interests is integrally related to the protection of individual faculty autonomy underlying academic freedom in teaching, research, and extramural speech.

B. PLACING YESHIVA IN THE BROADER CONTEXT OF CLASS UNDER THE NLRA

The Supreme Court's application of the judicially created managerial employee exclusion in *Yeshiva* fits into a broader context of changing legal definitions of class relations under the NLRA. Through legislative amendments and judicial interpretations of the NLRA, Congress and the Supreme Court have redrawn the class line to increase the power of employers and reduce the ranks of labor. This process began in 1947 with the Taft-Hartley Act addition of the Section 2(11) supervisory exclusion from employees protected under the NLRA. The Supreme Court's interpretations of Section 2(11), along with the judicially created managerial employee exclusion, broadened these exclusions. Beginning in 1980 with *Yeshiva*, and continuing over the next two decades in its decisions interpreting Section 2(11), the Court has steadily expanded the definition of the employer in a way that threatens to eliminate unionization by professional employees. As in *Yeshiva*, the Court's decisions defining supervisors under Section 2(11) fail to consider the interaction between the objective working conditions of professional employees and their subjective professional identity. Placing *Yeshiva* in this broader legal context of the NLRA shows the class-related issues that are common to university faculty and other professional employees. This critique will also show that the Supreme Court's redrawing of the class line in universities is part of its broader vision of the relationship between class and power in the workplace.

The enactment of the NLRA in 1935 reveals a legislative understanding of the objective and subjective factors that define class differences. The "Findings and Policies" in Section 1 of the NLRA describes the statutory purpose of protecting employees' freedom of association to redress the inequality of bargaining power between employers and employees.⁹¹ The NLRA protection of rights and prohibitions of unfair labor practices recognize that meaningful freedom of association requires that employees have the ability to act collectively in their own interests, as expressed by the employees through independent unions of the employees' own choosing.⁹²

⁹¹ 29 U.S.C. § 151 (2000).

⁹² In the 1920s, prior to the passage of the NLRA, employers had set up company unions – often in the form of "employee representation committees" – to create the appearance that employee interests were being represented at the workplace, with the reality that the employer's interests ultimately dominated the committees' agendas. In Wagner's view, the elimi-

The right of “self-organization” protected by Section 7 of the NLRA⁹³ entails respect for at least three different sorts of subjective choices: employees’ view of their own interests; employees’ decision of whether unionization is in their interests; and employees’ choice of a union that will best represent their interests. After employees unionize, their subjective sense of group identity may be solidified and may also change through their interaction with each other, which will, in turn, shape their choices of demands in collective bargaining for objective conditions in the workplace. In fundamental ways, the purposes of the NLRA mirror the concerns that led university faculty to make collective demands for academic freedom in order to protect their independence from their employers. In 1915, the AAUP demanded the right of self-determination and independent collective faculty governance to protect their professional interests. In distinguishing their interests from the administration and trustees, the faculty also defined a subjective consciousness that, in turn, influenced their objective conditions of work.

As discussed in Section II.A., prior to the passage of the Taft-Hartley Act in 1947, the Supreme Court interpreted the NLRA as placing foremen on the labor side of the class line. The NLRB initially addressed this issue in *Packard Motor Car Co.*,⁹⁴ holding that foremen were included as “employees” under the NLRA, based on both objective and subjective evidence of their interests. The NLRB analyzed the objective factors of the duties and functions of the foremen as they had developed under scientific management techniques adopted in industrial mass production and the growth of unionization of the rank and file workers. As application of these new management techniques and collective bargaining had standardized employee wages, hours, and working conditions, the NLRB concluded that the foremen’s status had changed from being part of the employer class to being appropriately included with employees.⁹⁵

Although foremen might still assign and direct the work of the rank and file, they had largely lost authority to participate in decisions concerning wage setting, promotions, layoffs, or discipline of rank and file

nation of such sham unions was at the heart of the NLRA, with the Section 8(a)(2) prohibition of employer-dominated labor organizations essential to creating a meaningful Section 7 right of employees to choose their own independent collective representatives. See William B. Gould, *Reflections on Workers’ Participation, Influence and Powersharing: The Future of Industrial Relations*, 58 U. CIN. L. REV. 381, 383-84 (1989) (“Senator Wagner viewed [Section 8(a)(2)] as a cardinal element of the Act, indeed its most important provision” to address employer creation of employee representation committees and other forms of company unions.)

⁹³ 29 U.S.C. § 157 (2000).

⁹⁴ 61 N.L.R.B. 4 (1945).

⁹⁵ *Id.* at 9-12.

workers.⁹⁶ Thus, the NLRB recognized that the power relations between owners and supervisors were similar to owner-employee relations, giving supervisors an interest in engaging in collective action to improve their working conditions. The Board found that the foremen's subjective view of their common interests with rank and file employees, evidenced by the foremen's union activities, was relevant to interpreting the objective elements of the foremen's actual authority.⁹⁷ As the objective conditions of their work had increasingly aligned their interests with other employees, the foremen envisioned their interests in common with employees and in opposition to the employer. The Supreme Court ultimately affirmed the NLRB's decision.⁹⁸

Congress responded quickly to the Supreme Court's 1947 decision in *Packard* by excluding "supervisors" from the category of "employee," as part of the Taft-Hartley Act. The new statutory exclusion of supervisors under Section 2(11) was based largely on Congress' view that employers should be able to demand undivided loyalty from individuals employed to carry out supervisory duties.⁹⁹ The scope of the Section 2(11) exclusion, though, was very broad, defining supervisors to be any employees whose job fulfills three criteria: first, that the employee exercises any one of twelve supervisory duties, including assignment or responsible direction of work; second, that such supervisory duty or duties are carried out "in the interest of the employer;" and third, that the supervisory duty "requires the use of independent judgment."¹⁰⁰

The Section 2(11) exclusion of supervisors from coverage as employees legislatively shifts the class line to expand the ranks of the employer by including all levels of management on the employer's side of the line. As Professor Marion Crain has explained, Section 2(11) replaced the NLRA's original definition of class, which was based on the opposing interests of capital and labor, with a class division between management and labor.¹⁰¹ While a class analysis based on the division between capital and labor is consistent with drawing a class line that places the highest level of management on the employer's side of the

⁹⁶ Virginia A. Seitz, *Legal, Legislative, and Managerial Responses to the Organization of Supervisory Employees in the 1940's*, 28 AM. J. LEGAL HIST. 199, 205-207, 230 (1984).

⁹⁷ 61 N.L.R.B. at 12-15.

⁹⁸ *Packard Motor Car Co. v. N.L.R.B.*, 330 U.S. 485 (1947).

⁹⁹ This legislative change, decreasing the ranks of labor, was consistent with the anti-union motivation underlying the Taft-Hartley Act. Seitz, *supra* note 96, at 241-42.

¹⁰⁰ 29 U.S.C. § 152(11) (2000).

¹⁰¹ See Marion Crain, *Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment*, 74 MINN. L. REV. 953, 1012-21 (1990) [hereinafter Crain, *Blueprint*] (proposing an amendment to the NLRA to include all supervisors and managerial employees as employees under Section 2(3), which would redraw the class "line between capital and labor, rather than between management and labor" to more accurately recognize common class interests).

class line, the class interests of mid- and lower-level managers and supervisors – like the foremen in *Packard Motor* – would more likely be aligned with other employees.

As discussed in Part I, defining class location is always difficult at the edges of the class line, where objective material conditions create interests that pull employees in opposing directions. Like university faculty, mid- or low-level managers or supervisors may have higher wages and exercise greater authority than other employees, which places them in a privileged labor position. Although their working conditions may create interests in common with the employer, such managers or supervisors also have interests in common with labor. The broad scope of supervisory duties listed in Section 2(11), however, threatens to resolve the tension between the contradictory class interests of supervisors in a way that overstates the common interests of supervisors and the employer. To avoid a wholesale exclusion from coverage of low-level supervisors whose interests are strongly aligned with labor, judicial interpretation of other Section 2(11) criteria becomes crucial. In particular, the Section 2(11) criterion that a supervisory duty be carried out “in the interest of the employer” states a central class-based distinction.

Further, Congress limited the scope of Section 2(11) by simultaneously adding Section 2(12), which explicitly defines and includes “professional employees” within the category of “employees” covered by Section 2(3) of the NLRA.¹⁰² The definition of supervisors under Section 2(11) and professional employees under Section 2(12) overlap in significant ways, including the definition of professional employees’ exercise of discretion and independent judgment in their work. Thus, Sections 2(11) and 2(12) recognize that the objective working conditions of authority, autonomy, and discretion do not, by themselves, define individuals as supervisors excluded from exercising Section 7 rights. Where employees’ objective conditions of work overlap with Section 2(11) supervisory duties, additional objective and subjective factors must be carefully evaluated in defining whether these duties are carried out in the interest of the employer.

In a series of cases beginning with *Bell Aerospace*, however, the Supreme Court reached decisions that failed to fully consider the objective and subjective factors relevant to determining the line between Section 2(11) supervisors and Section 2(3) employees, including professional employees under Section 2(12). The first two cases in this series, *Bell Aerospace* and *Yeshiva*, created and expanded the managerial employee exclusion from the NLRA. As discussed in Part II.A., the Court concluded that Congress had assumed that managerial employees

¹⁰² See *supra* note 55 and accompanying text.

were not included in the definition of employee, making an explicit statutory exclusion unnecessary. Relying on the "divided loyalty" rationale underlying the Section 2(11) supervisory exclusion, the Court decided that the authority and discretion given to managerial employees could only align them with the interests of the employer. The Court discounted the significance of Section 2(12) by omitting the role of professional norms and identity as creating the objective and subjective conditions distinguishing professional employees' interests from those of their employers.

In the case of the Yeshiva faculty, by ignoring academic freedom as the source of faculty governance, the Court re-interpreted collective faculty autonomy as authority delegated by the university to faculty to exercise in the interest of the employer. The Court concluded, paradoxically, that faculty had the same interests as the administration, but that faculty unionization created the possibility that faculty governance would be carried out against the employer's interests.

More recently, the Supreme Court has decided health care cases interpreting Section 2(11) to broaden the scope of nursing professionals who will be considered supervisors excluded from NLRA coverage and protection. As in *Yeshiva*, these health care cases were decided by a closely divided Court. For example, in *NLRB v. Health Care & Retirement Corp. of America*,¹⁰³ the Court split 5-4,¹⁰⁴ with the majority concluding that staff nurses' performance of Section 2(11) duties, including "responsible direction" of work of other employees could be a sufficient basis for finding supervisory status.¹⁰⁵ Similar to its view of faculty governance in *Yeshiva*, the Court concluded that any nursing employees carrying out such duties necessarily perform them "in the interest of the employer," fulfilling a criterion of Section 2(11).¹⁰⁶ Again, as in *Yeshiva*, the Court rejected the NLRB's reasoning that direction of work by professional employees would normally be carried out in the employees' professional interests, as distinguished from the interest of the employer.¹⁰⁷

The four dissenting justices would have accepted the Board's reasoning to distinguish nurses who carry out traditional supervisory duties, such as determining or effectively recommending wages or discipline, from nurses who engage solely in supervisory duties, such as assigning or directing work, which are an inherent part of the professional em-

¹⁰³ 511 U.S. 571 (1994).

¹⁰⁴ Justice Kennedy wrote the opinion for the Court, joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas. Justices Ginsburg, Blackmun, Stevens, and Souter dissented. *Id.*

¹⁰⁵ *Id.* at 579.

¹⁰⁶ *Id.* at 577-78.

¹⁰⁷ *Id.* at 576-78.

ployee's work.¹⁰⁸ As the dissenting opinion explained, an employer may rationally expect that traditional supervisory duties will be carried out in the employer's interests in control and profit-making.¹⁰⁹ The dissent recognized, however, that nurses will assign and direct other employees' work according to professional standards of nursing, even where they conflict with the employer's interest in profits.¹¹⁰ By distinguishing duties more aligned with the employer's interests from those aligned with the interests of the profession, the dissenting justices could retain a meaningful interpretation of Congress's intent in coverage and protection of professional employees under Section 2(12) of the Act.¹¹¹

The contrast between the Court majority's analysis and the NLRB's and Supreme Court dissenters' reasoning demonstrates the importance of considering both objective and subjective factors to determine supervisory status. The Supreme Court majority considered the objective factors listed in Section 2(11) as supervisory duties, including assignment and responsible direction of work. The Court, however, treated the Section 2(11) requirement that these duties are carried out in the interest of the employer as if it were a single-dimension objective determination, rather than also including multiple objective and subjective factors. Similar to its reasoning in *Yeshiva*, the Court concluded that since the employer's business and the nurses' profession are both health care, the nurses must be acting in the employer's interest.¹¹²

By omitting consideration of employees' subjective views of their common professional interests, the Court failed to engage in a meaningful analysis of the statutory element of the "interest of the employer." In equating employees' interests and employers' interests, the Court ignored the central policy of the NLRA – to protect employees' right to act collectively in their own interests. Even the Taft-Hartley drafters had distinguished between employer and labor interests by adding Section 2(12), which explicitly defines and includes "professional employees" within the category of "employees" covered by the NLRA.¹¹³ Given the overlap between the objective conditions of work of Section 2(12) professional employees and Section 2(11) supervisors, the two categories should be distinguished, at least in part, by determining whether the work at issue is done in the interest of the employer or of the profession.

With its excision of the employees' distinctive interests, though, the *Health Care & Retirement* Court misinterpreted the objective conditions

¹⁰⁸ *Id.* at 592, 599 (Ginsburg, J., dissenting).

¹⁰⁹ *Id.* at 589-90.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 585, 588.

¹¹² *Id.* at 576-78.

¹¹³ 29 U.S.C. § 152(12) (2000).

of the nurses' job duties. The Court failed to appreciate the ways in which the objective conditions of employees' work and profession shaped their consciousness of their professional group interests, and in turn, how their group consciousness contributes to the way in which they carry out their work and profession. Instead, the Court evaluated the professional employees' working conditions only in terms of the employer's interests in expanding control over low-level management, supervisors, and professional employees.

Following on the heels of *Health Care & Retirement*, the Supreme Court decided *NLRB v. Kentucky River Community Care, Inc.*¹¹⁴ In another 5-4 decision, the Court rejected the NLRB's finding that the nurses did not exercise the Section 2(11) criterion of "independent judgment" in carrying out supervisory duties of responsibly directing other employees.¹¹⁵ Similar to its approach in *Health Care & Retirement*, the Court majority concluded that the importance of such supervisory duties to the professional work of nurses was not an adequate basis for ignoring the authority given by the employer to nurses to exercise their independent judgment in assigning or directing work of other employees.¹¹⁶ The Court would require specific evidence that such duties were carried out in a routine manner or as discrete tasks without the use of independent judgment.¹¹⁷

After the Court rejected its test in *Kentucky River*, the NLRB delineated a new test for defining Section 2(11) supervisors, particularly in relation to the meanings of "assign," "responsibly to direct," and "independent judgment." In *Oakwood Healthcare, Inc.*,¹¹⁸ again dealing with the issue of the supervisory status of nurses, the NLRB defined these terms in ways that will exclude many professional employees from exercising Section 7 rights. The Board majority defined "assign" as "the act of designating an employee to a place . . . time . . . , or giving [an employee] significant overall duties."¹¹⁹ The Board found that the key to defining "responsibly to direct" is whether the putative supervisor is "accountable for the performance of the task by the other" employee."¹²⁰ "Independent judgment" "must involve a degree of discretion that rises

¹¹⁴ 532 U.S. 706 (2001). For discussion of the Supreme Court's decisions in *Health Care & Retirement* and *Kentucky River*, see Jeffrey M. Smith, Note, *The Prospects For Continued Protection For Professionals Under The NLRA: Reaction To The Kentucky River Decision And The Expanding Notion Of The Supervisor*, 2003 U. ILL. L. REV. 571 (2003).

¹¹⁵ *Kentucky River*, 532 U.S. at 715-16.

¹¹⁶ *Id.* at 715-17.

¹¹⁷ *Id.* at 720-21.

¹¹⁸ 348 N.L.R.B. No. 37 (2006). NLRB Chairman Battista and members Schaumber and Kirsanow joined in the majority opinion.

¹¹⁹ *Id.* at 4.

¹²⁰ *Id.* at 10.

above the 'routine or clerical.'"¹²¹ Board members Liebman and Walsh, dissenting from these definitions, concluded, "Today's decision threatens to create a new class of workers . . . who have neither the genuine prerogatives of management, nor the statutory rights of ordinary employees. Into that category may fall most professionals."¹²²

As in *Packard Motor*, *Bell Aerospace*, and *Yeshiva*, class dimensions are central to analyzing the Supreme Court's recent supervisory interpretations in *Health Care & Retirement* and *Kentucky River* and the NLRB's application of these decisions in *Oakwood*. Although Section 2(11) shifted the class line from dividing capital and labor to dividing management and labor, Congress did leave professional employees on the labor side of the class line by enacting Section 2(12). In *Health Care & Retirement* and *Kentucky River*, however, the Supreme Court shifted the class line even further to expand the ranks of management by effectively reading Section 2(12) out of the NLRA.

Both the NLRB and the Supreme Court's dissenting justices in those cases recognized that professional employees share common interests in maintaining the standards of their profession that they learn through advanced education and training. Such professional standards will normally include measures of competence in assigning work and directing other employees. Falling below such standards could result in discipline within the profession itself, including loss of licensing, but such discipline is outside the realm of the employer's purview.¹²³ In fact, maintaining professional standards may conflict with the employer's interest in profits and control, as in instances where a hospital employer seeks to reduce the number of nurses by reassigning some of their duties to non-nursing assistive staff. In these circumstances, nurses' common interest to act together as part of labor forms a strong basis for collective bargaining across the table from the employer. Further, the nurses' interest in unionizing and collective bargaining also promotes the public interest in maintaining health care standards against the employer's interest in cost cutting.¹²⁴ Only as part of labor can the nurses achieve such collective goals. Excluded from NLRA coverage as supervisors, the nurses will be subject to discharge for attempting to act col-

¹²¹ *Id.* at 12.

¹²² *Id.* at 19. For discussion of the NLRB's *Oakwood* decision, see Michael W. Hawkins & Shawn P. Burton, *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006); *How Textualism Saved The Supervisory Exemption*, 9 U. PA. J. LAB. & EMP. L. 1 (2006).

¹²³ See Crain, *Blueprint*, *supra* note 101, at 548-51 (discussing the role of the professions in setting standards, including licensure, for itself).

¹²⁴ See Rabban, *American Labor Law*, *supra* note 48, at 714-15 (discussing unions' collective bargaining proposals seeking employer agreements to adhere to professional standards, including the nursing profession).

lectively, including through campaigns to educate the public about their concerns.

Placing *Yeshiva* in the broader context of the Supreme Court's interpretation of the NLRA reveals how much faculty have in common with other employees in furthering the standards of their profession. Particularly in fields important to the public interest, like education and health care, the interests of professional employees are likely to clash with their employers' interests, as both fields increasingly incorporate the characteristics of big business. As the dissenting justices in *Yeshiva*, *Health Care & Retirement*, and *Kentucky River* observed, the interests of employers and those of faculty and health care professionals diverge in terms of their priorities and felt obligations in implementing their respective goals of quality education and quality health care. Professional standards call for maintaining policies and practices that further public interest goals, even when these standards may conflict with private employers' priorities such as higher profits or closer relations with industry.

Even in its early formation, the AAUP understood that the academic profession would achieve and retain power and autonomy through collective action, notwithstanding its attempt to distinguish faculty from other employees. Decades later, the Yeshiva University faculty concluded that they needed collective action, through unionization, to further their professional interests. The nurses in the health care facilities in *Health Care & Retirement* and *Kentucky River* also recognized their needs to unionize. The Supreme Court blunted these unionization attempts by refusing to rely on the employees' professional identity as a central factor that distinguishes the interests of the academic and nursing professions from the interests of their employers. Although *Yeshiva* was limited to the managerial employee holding, faculty might also be found to be supervisors, given the Court's comment that faculty autonomy over hiring and promotions of their peers has both supervisory and managerial qualities. Similarly, other professional employees, such as physicians and attorneys, will face restrictions in their rights to unionize due to the managerial employee and supervisory exclusions.

Another way of describing the Court's redrawing of the class line is that it converted intra-class issues into inter-class issues. Congress recognized that within the working class, employees may have different concerns and priorities in collective bargaining. Such differences among employees, all of whom are part of labor, are intra-class issues based on particular concerns linked to the nature of their work. In the NLRA, as enacted in 1935, Congress addressed these differences under Section 9, which creates procedures for a labor organization to become the exclusive bargaining representative of employees in "a unit appropriate for

such purposes.”¹²⁵ In cases where the union and employer cannot agree, the NLRB determines whether the union has petitioned for an appropriate unit according to its “community of interests” standard.¹²⁶ The Board evaluates objective working conditions, such as job location, work duties, benefits, and supervision on the job, to determine whether the employees have sufficient common interests to engage in effective collective bargaining or whether the differences in their job classifications will lead to intra-bargaining unit disputes.¹²⁷ The Board also considers the subjective factors of the union’s preferences, expressed in its petition for representation, and the employees’ desires to be part of the same bargaining unit, expressed in testimony at the NLRB hearing.¹²⁸ An NLRB determination that the employees do not share a community of interests is a description of intra-class differences, not a description of different class locations.

In the 1947 Taft-Hartley Act, Congress created an inter-class distinction by adding Section 2(11), defining statutory supervisors according to particular job duties carried out with independent judgment and in the interest of the employer. At the same time, by adding Section 2(12) and Section 9(b)(1),¹²⁹ Congress created intra-class issues concerning professional employees. Section 9(b)(1) provides that the NLRB shall not find a unit appropriate if it includes both professional and non-professional employees unless a majority of the professional employees vote for such inclusion.¹³⁰ Taken together, Sections 2(12) and 9(b)(1) confirm the class location of professional employees as part of labor, but also recognize that the privileged labor position of professional employees creates possibilities for intra-class differences in their bargaining interests. These intra-class differences will be resolved through an NLRB unit determination and a self-determination election, which provides pro-

¹²⁵ Section 9(a) of the NLRA states, in relevant part:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment[.]

Wagner Act, ch. 372, sec. 1, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 159(a) (2000)).

¹²⁶ See National Labor Relations Board, *An Outline of Law and Procedure in Representation Cases*, at § 12-210 (2005), available at http://www.nlr.gov/nlr/legal/manuals/outline_chap12.html.

¹²⁷ *Id.* at §§ 12-210 to 300.

¹²⁸ *Id.* at §§ 12-100, 12-239, 12-300.

¹²⁹ 29 U.S.C. § 159(b)(1) provides that “the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit.”

¹³⁰ This self-determination election by professional employees is known as a *Sonotone* election. See *Sonotone Corp.*, 90 N.L.R.B. 1236 (1950).

fessional employees with the right to express their subjective view on whether their interests will be served in a broader bargaining unit. In *Bell Aerospace*, *Yeshiva*, *Health Care & Retirement*, and *Kentucky River*, the Supreme Court failed to give meaningful effect to this statutory treatment of professionals as employees who, despite their privileged working conditions, are part of labor. Instead, the Court transformed an intra-class issue into an inter-class issue by defining professional employees' class interests to be the same as their employers.¹³¹

Redefining the intra-class bargaining unit issues of professional employees into inter-class exclusion issues has an impact beyond eliminating the employees' right to collectively bargain over wages and other bread and butter issues. Unionization is important to all employees as a means to redistribute both wealth and power through their participation in workplace decisions that affect their employment. For professional employees, the legally enforceable right to collectively bargain over such decisions is also a means to protect the standards of their profession. In health care, patient care quality will be affected through bargaining over issues such as adequate staffing of nurses and provision of high quality equipment. In universities, academic freedom and educational quality will be affected through bargaining over issues such as the administration's respect for faculty committee recommendations concerning academic programs or adequate consultation with faculty committees about selections of college deans. Where such issues extend beyond the statutory scope of mandatory subjects of bargaining, the parties can agree to bargain over them as permissive subjects.¹³² Even though the employer is not obligated to bargain over permissive subjects, effective negotiators may be able to incorporate such issues into the bargaining process.

Exclusion from the category of employee under the NLRA not only denies the right to unionize and collectively bargain, but also removes employees from any Section 7 protection. Managerial employees and supervisors are thus subject to retaliation by the employer for any concerted activity, whether such activity is part of formal unionization or other concerted activity.¹³³ This lack of protection may be very impor-

¹³¹ Section 9(b)(2) of the NLRA provides another example of Congress's recognition of intra-class differences, by providing craft employees with the right, in appropriate circumstances, to a "craft severance election." This is a self-determination election that enables skilled craft employees, such as electricians, to decide whether they wish to be carved out into a bargaining unit separate from a broader pre-existing mixed craft and non-craft unit. Similar to the self-determination election for professional employees, the craft severance election treats craft employees as part of labor, though in a privileged labor position. See *Mallinckrodt Chemical Works*, 162 N.L.R.B. 387 (1967); *Kaiser Foundation Hospitals*, 312 N.L.R.B. 933 (1993).

¹³² See Rabban, *American Labor Law*, *supra* note 48, at 702-09.

¹³³ See Crain, *Blueprint*, *supra* note 101, at 999-1000 (giving examples of managerial employees and supervisors discharged for engaging in concerted activity).

tant for faculty and other professionals, who may need collective activity to implement their professional standards. Without Section 7 rights, professionals are also unprotected if they refuse follow their employers' instructions to oppose unionization efforts by other employees.

III. FACULTY RESPONSES TO THE AGE OF UNIVERSITY CORPORATIZATION

A. UNIVERSITY CORPORATIZATION AND ACADEMIC FREEDOM: AN OVERVIEW

Faculty professional identity takes on particular significance in the current context of university corporatization trends, which have had an impact on a broad range of faculty activities, from teaching and research to faculty governance. Universities, like other social and economic institutions, have been affected by the expanding privatization of public services since the 1980s, including an increased focus on private markets as the means for delivering goods and services. Under the influence of these political and economic trends, universities have adopted policies and practices that expand their role as market actors in teaching and research. Some of these ventures have relied on new technology, such as university for-profit distance learning corporations and university commercialization of genetic research. Other developments have implemented traditional corporate employment models, including an increased use of contingent faculty and a corresponding decrease in tenure-track lines.

All of these corporatization developments have important implications for the institutional identity of the university and the professional identity of faculty. University expansion of private market activities in research creates tensions with its public mission, as expanded patenting and licensing activities restrict the public domain of academic research. These same tensions result in the teaching area, as for-profit distance learning corporations prioritize profit maximization over education. These market activities create closer university-industry relations through increased corporate financing of research and for-profit education ventures and through industry licensing of university patents.

These corporatization trends also create tensions between market activities and faculty professional norms. Commercialization of academic research may affect faculty independence in multiple ways. University technology transfer offices encourage faculty to apply for university-owned patents on publicly and privately funded academic research.¹³⁴ These patents are then licensed for use, including exclusive

¹³⁴ The federal Bayh-Dole Act of 1980 (codified as amended at 35 U.S.C. §§ 200-212 (2000)), authorizes and encourages universities, other nonprofit organizations, and businesses

and non-exclusive licenses to for-profit corporations.¹³⁵ Large-scale industry research funding agreements, including “strategic corporate alliances,” exchange corporate funds for exclusive licensing rights to university-owned patents.¹³⁶ These agreements often bring corporate funders into the research process through participation in choosing research proposals and in reviewing research results prior to public release.¹³⁷ Faculty are encouraged to engage in research with commercial potential, which may influence initial choices of research agendas and paths to follow during research projects. Private research funding and patenting and licensing activities integrate the university administration and industry more closely into academic research programs.

Such limits on faculty independence affect individual academic freedom, which is based on norms of academic work carried out as part of the university’s public mission, rather than for private interests.¹³⁸ In

that receive federal research funds to apply for patents on inventions resulting in whole or in part from use of such funds. Thus, universities are able to apply for patents on publicly or privately funded research. In 1979, before the Bayh-Dole Act, U.S. universities obtained 264 patents, whereas in 1997, U.S. universities obtained nearly ten times that number, at 2436 patents. Arti K. Rai & Rebecca S. Eisenberg, *Bayh-Dole Reform and the Progress of Biomedicine*, 91 AM. SCIENTIST 52, 53 (Jan.-Feb. 2003). In fiscal year 2000, U.S. universities filed for 8534 patents, an increase of 12 percent over the prior year. Goldie Blumenstyk, *Value of University Licenses on Patents Exceeded \$1-Billion in 2000, Survey Finds*, CHRON. HIGHER EDUC., Mar. 5, 2002. Between 1988 and 2003, U.S. patents awarded to academic institutions quadrupled, from about 800 to more than 3200 per year. Josephine Johnston, *Health Related Academic Technology Transfer: Rethinking Patenting and Licensing Practices*, 9 INT’L J. OF BIOTECHNOLOGY 156, 162 (2007) (citing National Science Board statistics). From 1980 to 1990, patent applications on NIH-funded inventions increased by almost 300 percent. Sheldon Krinsky, *The Profit of Scientific Discovery and Its Normative Implications*, 75 CHI.-KENT L. REV. 15, 22 (1999). Association of University Technology surveys of U.S. universities in 1991 and 2000 show that new patent applications during that period increased by 238%, licensing agreements increased by 161%, and royalties increased by more than 520%. Jerry G. Thursby & Marie C. Thursby, *University Licensing and the Bayh-Dole Act*, 301 SCIENCE 1052 (2003).

¹³⁵ The Association of University Technology Managers reports that half of the licenses are exclusive. Thursby & Thursby, *supra* note 134.

¹³⁶ Examples include the 1997 MIT-Merck agreement for \$15 million of corporate funding over five years in exchange for licensing rights to resulting patents, and the 1998 UC Berkeley-Novartis agreement for \$25 million of corporate funding over five years of Department of Plant and Microbial Biology in exchange for exclusive licensing rights to about a third of the department’s discoveries. William H. Honan, *Corporations Still Give, but Also Get*, N.Y. TIMES, July 15, 1998, at B9; Kenneth Sutherland Dueker, *Biobusiness on Campus: Commercialization of University-Developed Biomedical Technologies*, 52 FOOD DRUG L. J. 453, 481-507 (1997) (describing in detail patenting, licensing, start-up corporations, and corporate funding activities at Harvard, Stanford, and MIT).

¹³⁷ See *infra* notes 181-207 and accompanying text.

¹³⁸ See Risa L. Lieberwitz, *University Science Research Funding: Privatizing Policy and Practice*, in SCIENCE AND THE UNIVERSITY (Paula E. Stephan and Ronald G. Ehrenberg, eds.) (forthcoming) [hereinafter Lieberwitz, *University Science Research*]; Risa L. Lieberwitz, *The Marketing of Higher Education: The Price of the University’s Soul*, 89 CORNELL L. REV. 763, 782-89 (2004) [hereinafter Lieberwitz, *Marketing of Higher Education*]; Risa L. Lieberwitz, *Confronting the Privatization and Commercialization of Academic Research: An Analysis of*

commercializing academic research, private interests come to include faculty economic interests as well as university and corporate economic interests, where faculty will share in the profits of patents and licenses.¹³⁹

Privatizing academic research also affects collective aspects of academic freedom. Academic culture is based on communal values of sharing research methods and results with colleagues in informal settings and through publishing research results in the public domain.¹⁴⁰ Increased patenting and licensing and closer university-industry relations have led to increased secrecy in research and delays in publishing research results.¹⁴¹

Corporatization practices in university teaching also create contradictions with professional norms relating to faculty autonomy and academic freedom. Similar to the commercialization of research, private interests in profit-making through for-profit distance education limit the independence of participating faculty.¹⁴² Faculty autonomy has been affected in traditional academic programs, as well, with university cut-backs of tenure-track faculty positions and corresponding increases in employment of nontenure-track faculty and graduate student teachers.¹⁴³ The nontenure-track faculty consist of full-time or part-time lecturers on

Social Implications at the Local, National, and Global Levels, 12 IND. J. GLOBAL LEG. STUD. 109, 120-37 (2005) [hereinafter Lieberwitz, *Commercialization of Academic Research*].

¹³⁹ This problem is exacerbated by the lure of profits from patent licensing that the university will share with faculty inventors. The Bayh-Dole Act requires the university to share with a faculty member the profits from royalties related to a university-owned patent invention created by that faculty member. 35 U.S.C. § 202(c)(7)(C) (2000).

¹⁴⁰ See BERNARD BARBER, *SCIENCE AND THE SOCIAL ORDER* (1953); ROBERT K. MERTON, *THE SOCIOLOGY OF SCIENCE* (1973); Rebecca S. Eisenberg, *Proprietary Rights and the Norms of Science in Biotechnology Research*, 97 YALE L. J. 177, 181-84 (1987); Arti Kaur Rai, *supra* note 15, at 88-94; Lieberwitz, *University Science Research*, *supra* note 138; Lieberwitz, *Commercialization of Academic Research*, *supra* note 138, at 113.

¹⁴¹ See SHELDON KRIMSKY, *SCIENCE IN THE PRIVATE INTEREST: HAS THE LURE OF PROFITS CORRUPTED BIOMEDICAL RESEARCH?* (2003); Lieberwitz, *Commercialization of Academic Research*, *supra* note 138, at 129-30.

¹⁴² Lieberwitz, *Distance Learning*, *supra* note 5, at 113-22.

¹⁴³ Employment of part-time higher education faculty has grown dramatically, with an estimate of a 133% increase between 1971 and 1986, compared to an increase of only 22% of full-time faculty during that same period. See John C. Duncan, Jr., *The Indentured Servants of Academia: The Adjunct Faculty Dilemma and Their Limited Legal Remedies*, 74 IND. L.J. 513, 521 (1999). The percentage of part-time faculty has been estimated at 33% in 1987, 43% in 1998, and 46% in 2001. Jane Buck, *The President's Report: Successes, Setbacks, and Contingent Labor*, ACADEME, Vol. 87, No. 5, Sept.- Oct. 2001, at 18, 20. Estimates are given that more than half of the courses offered within some social science and humanities disciplines are taught by graduate students and contingent faculty and that full-time tenured, or tenure-track professors teach only 28% of foreign-language courses at doctoral institutions and only 26% of foreign-language courses at associate degree-granting institutions. *Id.* The 2006 AAUP report on contingent faculty positions concludes that full- and part-time nontenure-track faculty comprised 65 percent of all faculty in 2003. *Trends in Faculty Status, 1975-2003*, available at <http://www.aaup.org/AAUP/pubsres/research/trends1975-2003.htm>.

renewable contracts and adjunct faculty who work on a piece-work basis.¹⁴⁴

Some universities have also engaged in direct assaults on the tenure system, seeking to eliminate it or to assert greater administration or trustee monitoring of tenured faculty productivity or attitudes.¹⁴⁵ Measures that seek to weaken the tenure system will also weaken professional norms of academic freedom, which have been protected through job security created by tenure. Nontenure-track faculty with multi-year contracts are continually vulnerable to the administration's control over contract renewal. Adjunct faculty without contracts are even more vulnerable, similar to nonacademic employees subject to the employment-at-will doctrine.¹⁴⁶ This corporate business model of employment encourages self-censorship by faculty whose position is always contingent upon renewal by the administration. Limits on academic freedom will also affect collective faculty governance, which relies on the existence of independent faculty protected in their open, and even critical, views of the administration and trustees.

Faculty professional identity will influence their responses to these corporatization trends. As discussed in Parts I and II, the formation of faculty professional identity is closely related to faculty class location and class consciousness, which are complicated by faculty's privileged labor position. The combined effects of objective conditions of academic work, professional academic norms, and legally defined employment status create countervailing forces that support faculty independence from the administration while also promoting faculty alignment with the interests of the administration. The subjective consciousness of faculty as professional academic employees with interests distinct from the administration, thus, co-exists with faculty identifica-

¹⁴⁴ *Id.*; see also *Percentage Distribution of Faculty, by Employment Status and by Type and Control of Institution: Fall 1998*, at <http://nces.ed.gov/quicktables/Detail.asp?Key=673> (last visited Mar. 15, 2007); Duncan, *supra* note 143, at 524-28.

¹⁴⁵ For example, in 1995, the University of Minnesota Board of Regents attempted to restrict the tenure system, including proposals to make it easier to lay off tenured faculty and to discipline faculty for "not maintaining a 'proper attitude of industry and cooperation.'" In 1997, the faculty and the Board of Regents reached a compromise with a new tenure code providing for periodic post-tenure reviews leading to possible pay cuts for poor performance. The state's Board of Regents attempt to cut back rights under the tenure system was met by organized opposition, including a union organizing campaign among the faculty. In 1997, along with the compromise on the tenure system reform, the faculty voted against the union. Debbie Goldberg, *Keeping College Faculties Accountable*, WASH. POST, Jul. 27, 1997, at R04; Rene Sanchez, *Minnesota Faculty, Regents Put Tenure to the Test; Campus at Center of Growing Battle Over Job Guarantees and Power in Academia*, WASH. POST, Nov. 9, 1996, at A01. See also Renae Merle, *Academic Tenure is Under Fire: Profs Worry for Freedom of Thought*, TIMES-PICTAYUNE, Mar. 23, 1997, at A11 (discussing new tenure policies in universities in Florida, Colorado, Hawaii, Minnesota, and Texas).

¹⁴⁶ See Lieberwitz, *Distance Learning*, *supra* note 5, at 96-99.

tion with the interests of administration. As faculty are faced with multiple forms of university corporatization, the complexities of their professional identity will influence their reactions in support of and in resistance to particular policies and practices.

This section of the article analyzes faculty responses to three different aspects of university corporatization. While corporatization will take different forms in different universities, these examples represent the sorts of issues prevalent in many universities.¹⁴⁷ The situations presented are based on recent examples of corporatization trends at Cornell University in the teaching and research realms. The first example is Cornell University's creation of eCornell, a for-profit distance learning corporation. The second is the debate over the potential for Cornell to enter into "strategic corporate alliances" with large industry funders of academic research. The third example focuses on the unionization campaign by Cornell graduate teaching and research assistants.¹⁴⁸ Analysis of each of these situations reveals the importance of objective conditions of faculty employment and the subjective factor of faculty identity in shaping faculty responses. This evaluation also reveals the impact of university corporatization trends on multiple aspects of academic freedom, including individual faculty autonomy over research and teaching, communal norms among faculty, relations between tenure-track faculty, nontenure-track faculty, and graduate students, the scope of faculty governance, and the public mission of the university.

Analyzing these examples will help clarify the influence of faculty professional identity on faculty responses to university corporatization in the recent past. Moreover, greater clarity about the factors that influence faculty actions can contribute to greater consciousness about future choices. Given the co-existence of contradictory elements that make up faculty identity, faculty choices of action regarding university corporatization practices may reinforce certain aspects – such as faculty autonomy over distinct professional interests – while conversely lessening the

¹⁴⁷ For discussions of the widespread nature of these forms of corporatization in U.S. universities, see Lieberwitz, *Distance Learning*, *supra* note 5, at 96-99, 104-07 (describing university for-profit distance learning programs; and describing growth of contingent faculty); Lieberwitz, *Commercialization of Academic Research*, *supra* note 138, at 117-29 (describing university patenting and licensing of academic research and the large-scale university-industry funding agreements).

¹⁴⁸ The descriptions and analyzes of these three examples from Cornell University are informed, in part, by the author's direct experience in the events through faculty governance activities and other collective activities on campus. The author was involved in faculty governance activities in relation to eCornell, as a member of the Faculty Senate and University Faculty Committee (the executive committee of the Faculty Senate). As a Faculty Senate member and a member of the Faculty Senate *ad hoc* committee on Strategic Corporate Alliances (SCAs), the author participated in the creation of the *ad hoc* committee report on SCAs. The author was also involved in faculty activism and discussions in relation to the graduate student union organizing campaign at Cornell University.

influence of countervailing factors, such as the economic interests in common between faculty and the administration. Thus, faculty choices concerning university corporatization will be shaped by faculty professional identity and the results of those choices will, in turn, shape faculty identity.

B. eCORNELL: THE ROLE OF COLLECTIVE FACULTY GOVERNANCE AND ACADEMIC FREEDOM

In January 2000, the Cornell University administration announced its intention to create "eCornell," a for-profit corporation to develop and market distance learning courses.¹⁴⁹ This was the first notice any university faculty governance body had received of the Cornell administration's plan to seek approval from the board of trustees to create eCornell.¹⁵⁰ The Cornell University Faculty Senate immediately became involved in debating the administration's proposed for-profit distance learning corporation. In addition to discussion by the Faculty Senate, the Dean of Faculty sponsored a campus-wide forum on the issues.¹⁵¹ In March 2000, the Faculty Senate passed a resolution demanding active and continued faculty consultation and participation prior to the administration or trustees taking actions to create a distance learning entity, including any consideration of creating a for-profit corporation.¹⁵²

Shortly thereafter, Cornell board of trustees voted to create eCornell as a for-profit corporation.¹⁵³ The board of trustees' unilateral action, in the face of the Faculty Senate's assertion of rights to participate in any plans to create a distance learning entity, resulted in significant anger in the Faculty Senate.¹⁵⁴ Following a series of discussions with faculty governance representatives, the Cornell President agreed to appoint a joint administration-faculty committee to study all types of distance learning models.¹⁵⁵ The President and Provost also entered a written agreement, ratified by the Faculty Senate, to engage in early consultation with the Faculty Senate on issues of concern to the faculty.¹⁵⁶

In June 2000, the board of trustees reconfirmed its decision to create eCornell as a for-profit corporation, but decided to capitalize it solely from the University's unrestricted endowment, rather than seek third-party investors.¹⁵⁷ In September 2000, the Faculty Senate endorsed the

¹⁴⁹ Lieberwitz, *Distance Learning*, *supra* note 5, at 124.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 124-25.

¹⁵⁶ *Id.* at 125.

¹⁵⁷ *Id.*

joint administration-faculty committee's report produced over the summer, which supported the creation of eCornell to deliver distance education only for nondegree programs, on the condition that faculty retain autonomy over course content.¹⁵⁸ The committee did not take a position on whether eCornell should be a nonprofit or for-profit corporation, based on the committee's view that it lacked sufficient expertise on that issue.¹⁵⁹

eCornell was created as a for-profit corporation offering non-credit courses only.¹⁶⁰ Like for-profit distance learning ventures at other universities, eCornell was not a profitable business.¹⁶¹ Although most universities have discontinued their for-profit distance learning businesses, eCornell is still in existence with restricted course offerings and limited revenue.¹⁶² During the debates over eCornell, some faculty had predicted this financial outcome, which was sufficient reason for them to oppose its formation as a for-profit corporation.¹⁶³ Faculty also raised issues of principle underlying their critiques of eCornell, including values and norms of faculty governance, academic freedom, and the public mission of the university.¹⁶⁴ Faculty debates and actions concerning eCornell reveal the influence of these distinctive factors of faculty professional identity.

The Faculty Senate's actions were based on objective and subjective factors that distinguished faculty interests from the interests of the administration and board of trustees. To a great extent, the clarity of these contrasting interests was due to the actions of the administration and board of trustees in disregarding the role of collective faculty governance in creating new educational programs. Cornell University's bylaws recognize the role of the Faculty Senate to consider academic matters that affect more than one college within the university.¹⁶⁵ The administration's announcement of a unilateral plan to create a for-profit distance learning corporation, therefore, conflicted with the established objective condition of collective faculty governance over academic matters. The administration's failure to consult with the Faculty Senate ran afoul of the underlying principle of academic freedom in excluding faculty from

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 116-18 (citing financial difficulties or failures of university for-profit distance education programs, including eCornell).

¹⁶² *Id.* at 118; Dan Carnevale, *Cornell U. Revamps Its Distance-Education Unit*, CHRON. HIGHER EDUC., Mar. 19, 2004, at 29.

¹⁶³ Minutes of Mar. 8, 2000 Faculty Senate meeting, available at http://web.cornell.edu/UniversityFaculty/FacSen/approved_minutes/1999-2000/000308.html.

¹⁶⁴ *Id.*

¹⁶⁵ Cornell University By-Laws, Arts. XII, XIII, available at http://www.cornell.edu/trustees/cornell_bylaws.pdf.

participation in a decision that so clearly affected a basic educational function over which faculty claimed both expertise and autonomy.

Further, the unilateral action by the administration and trustees was more than a failure to respect an established process, as the issues of academic freedom also related to the content of the administration's plans for eCornell. By excluding the collective faculty voice of the Senate, the administration and trustees also ignored substantive positions against the formation of a for-profit distance learning corporation. In promoting eCornell as a for-profit business, the administration argued the need to act quickly to gain a competitive market edge.¹⁶⁶ The administration also promoted the benefits of a business model for creating eCornell as being more streamlined and efficient, providing the ability to use venture capital, and creating the potential for high profits.¹⁶⁷ The faculty debate, however, cautioned against actions that failed to fully consider the risks in choosing a for-profit corporate structure rather than engaging in distance education through the university's nonprofit institutional status.¹⁶⁸

It became clear in these debates that the subjective factor of the faculty's professional identity was linked to faculty concerns about the impact that eCornell could have on the objective conditions of the university's mission and the faculty's role as educators. The debate raised issues concerning the effects of eCornell on faculty governance processes, faculty autonomy over course content, and the public mission of the university.¹⁶⁹ Faculty were concerned that the goals of a for-profit business would conflict with the public mission of the university and that university partnerships with third party venture capitalists would sacrifice university and faculty independence over the curriculum and course content.¹⁷⁰

Faculty and administration interests conflicted dramatically over eCornell. Faculty's negative response emerged under a convergence of circumstances that brings into relief the different interests of the faculty and the administration. An important element was the degree of disrespect that the administration and trustees showed to the faculty governance process. By justifying its precipitous actions in creating eCornell as

¹⁶⁶ Lieberwitz, *Distance Learning*, *supra* note 5, at 114, nn.179 & 198.

¹⁶⁷ *Id.*

¹⁶⁸ Minutes of Mar. 8, 2000 Faculty Senate Meeting, *available at* http://web.cornell.edu/UniversityFaculty/FacSen/approved_minutes/1999-2000/000308.html (including a summary of the February 2000 Faculty Forum and the debate during the March 8, 2000 Faculty Senate meeting).

¹⁶⁹ Minutes of Mar. 8, 2000 Faculty Senate Meeting, *supra* note 168; *see also* Michale Arnone, *Cornell's Distance-Education Arm Readies New Program, and Hopes for Profits*, CHRON. HIGHER EDUC., Nov. 2, 2001, at 48.

¹⁷⁰ *Id.*; *see also* Sarah Carr, *Faculty Members Are Wary of Distance-Education Ventures*, CHRON. HIGHER EDUC., Jun. 9, 2000, at 41.

necessary to seize a competitive market position, the administration argued, in effect, that faculty governance of pedagogical matters could be overridden on the basis of private business principles. Faculty anger over this disrespect for collective faculty governance combined with concerns that a for-profit corporation could lead to the loss of individual faculty autonomy over course content in distance education. These concerns regarding changes in objective conditions of collective and individual faculty autonomy are closely linked to faculty subjective identity. A profit-maximizing goal in education clashes with faculty self-image as teachers exercising academic freedom to choose course coverage toward pedagogical goals that include encouraging debate about controversial subjects and ideas. Further, some faculty are skeptical about the pedagogical value of distance learning courses even within the nonprofit university structure, particularly when offered without any classroom instruction.¹⁷¹ Many faculty were concerned that eCornell would base its decisions about course content and on-line instructors on the basis of cost, without any quality control through traditional faculty governance processes.¹⁷²

Although faculty were unified over the process issues concerning respect for faculty governance, the faculty were divided over the substantive issue of whether a for-profit corporate structure of eCornell was appropriate. While the joint administration-faculty committee agreed that eCornell should offer only non-credit courses with full faculty autonomy over course content, the committee took no position on using a for-profit or nonprofit structure.¹⁷³ Further conflict over this issue was avoided by the trustees' decision to fully capitalize eCornell with Cornell funds and to comply with the recommendation to offer only non-credit courses. Thus, even though eCornell is a for-profit corporation, it maintains a significant degree of independence from interests outside the university, due to the lack of third party investors or shareholders. Additionally, restricting eCornell to non-credit courses avoids the intersection of eCornell with Cornell degree programs, thereby protecting faculty control over course content and quality.

Had any of these circumstances been different, faculty views about whether eCornell should be a for-profit corporation would have been more significant. Faculty could have become either more unified in opposing a for-profit structure or more divided over the issue. These potential schisms among faculty correspond with the co-existing tensions in

¹⁷¹ *Id.*; see also Andrea L. Foster, *A Congressman Questions the Quality and Rigor of Online Education*, CHRON. HIGHER EDUC., Mar. 31, 2006, at vol. 52:38; Michael Arnone, *Many Students' Favorite Professors Shun Distance Education*, CHRON. HIGHER EDUC., May 10, 2002, at 39.

¹⁷² *Id.*

¹⁷³ See Lieberwitz, *Distance Learning*, *supra* note 5, at 125.

the factors that make up faculty identity. For example, a board of trustees decision to fund eCornell with venture capital or to offer eCornell courses for Cornell credit would have increased faculty opposition to the for-profit structure. Stated in terms of faculty identity, such trustee actions would have further distinguished faculty professional academic interests in self-governance from their employer's business interests in profits. In contrast, if eCornell remained fully funded by Cornell and offered only non-credit courses, but also turned a profit, some faculty may have been willing to teach courses within a for-profit structure. Put in terms of faculty identity, the common objective interests of faculty and the administration in profits would lead some faculty to support a for-profit structure despite the tensions between a profit maximizing corporate goal and the university's public mission.

C. COMMERCIALIZING ACADEMIC RESEARCH: "STRATEGIC CORPORATE ALLIANCES"

Corporatization trends in academic research present similar tensions between faculty professional norms and the university's increased market activities. As in the case of for-profit distance learning, commercialization of academic research creates conflicts between the professional norms of academic freedom and the market values of profit maximization. Unlike the faculty debate over eCornell, faculty responses to commercializing academic research reflect greater internal divisions about the proper balance between these countervailing norms. The Cornell Faculty Senate's consideration of these issues reveals the influence of the co-existing complexities of faculty identity, which pull faculty simultaneously toward professional norms favoring academic research as part of the public domain and toward private economic interests in profiting from academic research.

In 2003, the Cornell administration began publicizing its plans to seek "Strategic Corporate Alliances" (SCAs) with industry.¹⁷⁴ Under a SCA, a for-profit corporation provides large-scale funding to a university research program or department in exchange for the corporation's right to exclusively license university-owned patents on research resulting

¹⁷⁴ See *Faculty Statement of Principles & Best Practices Concerning Strategic Corporate Alliances* (Fall 2005) [hereinafter referred to as *Strategic Corporate Alliances, Fall 2005*], at Appendix A (Cornell University Strategic Corporate Alliance Plan), Appendix B (Trustee Document: Considerations & Principles Regarding Strategic Corporate Alliances), and Appendix C (Current Cornell Principles to Guide Development of Strategic Corporate Alliances), available at <http://web.cornell.edu/UniversityFaculty/forums/SCA/SCAFinalReport-Fall2005.pdf>; see also Minutes of Faculty Senate Meeting of Nov. 9, 2005, available at <http://web.cornell.edu/UniversityFaculty/FacSen/051109SenateMtg/051109FSAgenda.html>.

from the funded academic program.¹⁷⁵ After sponsoring a university-wide faculty forum to discuss the issues,¹⁷⁶ the Faculty Senate created an *ad hoc* committee to produce a report with recommended principles and standards for Cornell to follow if it negotiated any SCAs.¹⁷⁷

The faculty *ad hoc* committee produced a final report in Spring 2005,¹⁷⁸ which was debated at two Faculty Senate meetings, in Spring and Fall 2005.¹⁷⁹ The lengthy period of time between the appointment of the *ad hoc* committee in 2003 and the submission of its final report to the Senate reflects the complexities of the issues and the disagreements over policies concerning university-industry relationships. The final committee report, endorsed by the Faculty Senate in Fall 2005, strongly reaffirms the distinctive public mission of the university and the importance of faculty academic freedom, including faculty independence from corporate funders.¹⁸⁰ The report also makes recommendations, however, that would strengthen university-industry ties. The most contentious issues concerned the extent of the corporate funder's role in the university's decisions relating to research funding, the scope of SCAs subject to the principles recommended in the report, and the corporate sponsor's access to research results through "first look" and exclusive licensing rights.

The primary disagreement focused on corporate funders' participation in decisions over funding awards. The Spring 2004 version of the report had restricted corporate funders to participation in the call for research funding proposals (RFPs). In helping to draft the RFPs, the corporate funders could express their research priorities. After this point, however, faculty would have complete control over the funding award

¹⁷⁵ The Cornell University administration's Strategic Corporate Alliance Plan defines a Strategic Corporate Alliance as "a comprehensive, formally managed company-university agreement centered around a major, multi-year financial commitment involving research, programmatic interactions, intellectually property licensing, and other services." *Strategic Corporate Alliances, Fall 2005, supra* note 174, at Appendix A (Cornell University Strategic Corporate Alliance Plan).

¹⁷⁶ *University Faculty Forum on Strategic Corporate Alliances* (Oct. 22, 2003), available at <http://web.cornell.edu/UniversityFaculty/forums/SCA/CorporateAlliances.html>.

¹⁷⁷ See Minutes of Faculty Senate Meeting of Nov. 12, 2003 (discussing the creation of the *ad hoc* faculty committee on Strategic Corporate Alliances), available at http://web.cornell.edu/UniversityFaculty/FacSen/approved_minutes/2003-2004/031112minutes.html.

¹⁷⁸ *Strategic Corporate Alliances, Fall 2005, supra* note 174.

¹⁷⁹ Minutes of Faculty Senate Meeting of Apr. 13, 2005 available at http://web.cornell.edu/UniversityFaculty/FacSen/approved_minutes/2004-2005/050413Minutes/050413minutes.htm; Minutes of Faculty Senate Meeting of Nov. 9, 2005, *supra* note 174.

¹⁸⁰ The report contrasts the goals of universities ("the creation of new knowledge and its broad dissemination") and for-profit corporations ("to generate a return on investment for its shareholder . . . utilizing the intellectual property its employees produce for commercial purposes"). *Strategic Corporate Alliances, Fall 2005, supra* note 174, at 10. The first principle of the report states, "The power to choose research topics freely and the ability to publish results promptly, without regard to outcome, are basic elements of academic freedom." *Id.* at 11.

decisions.¹⁸¹ The Cornell administration took the position that excluding the corporate funder from decisions about awarding research proposals and from exclusive licensing would be “deal killers” in negotiations to enter a SCA.¹⁸² The Spring 2005 version compromised by giving the corporate funders a role in awards decisions, but limited corporate representation to one-third of the members on the selection committee.¹⁸³ The Faculty Senate debate of this provision revealed the likelihood that a majority of the Senate would vote to remove this cap.¹⁸⁴ The final version of the report, therefore, eliminated the one-third corporate membership restriction. The final report, which was endorsed by the Faculty Senate in Fall 2005,¹⁸⁵ gives the corporate sponsor the general right to participate in awarding funds to faculty research proposals.¹⁸⁶ The report does emphasize, however, that “this process should be led by Cornell faculty.”¹⁸⁷

Each draft of the report recommended the use of a peer review process of research proposals submitted by faculty seeking SCA funds. The peer reviews by panels of “disinterested scholars” at Cornell would provide input to the selection committee on the merit of the research proposals.¹⁸⁸ The final report, however, limits peer review to “broad SCAs,” defined as corporate funding of “a potentially large group of faculty.”¹⁸⁹ “Narrow SCAs,” involving “a small number of specific faculty . . . identified in advance as the relevant researchers,” would not use either RFPs for funding distribution or peer review to evaluate the merit of proposals.¹⁹⁰

¹⁸¹ See *Draft of Faculty Statement of Principles & Best Practices Concerning Strategic Corporate Alliances* Sec. C.3 (Apr. 1, 2004), available at http://web.cornell.edu/UniversityFaculty/FacSen/approved_minutes/2003-2004/SCADraft4.htm.

¹⁸² This term was used by the Associate Dean of Faculty to describe the administration’s concerns. See Minutes of Cornell University Faculty Senate Meetings, Apr. 13, 2005, *supra* note 179 (Statements by Associate Dean of Faculty Cynthia Farina).

¹⁸³ *Draft of Faculty Statement of Principles & Best Practices Concerning Strategic Corporate Alliances* Sec. C.3 (Apr. 5, 2005), available at http://web.cornell.edu/UniversityFaculty/FacSen/approved_minutes/2004-2005/050413Minutes/SCARReport.pdf.

¹⁸⁴ See Minutes of Cornell University Faculty Senate Meeting, Nov. 9, 2005, *supra* note 174.

¹⁸⁵ *Id.*

¹⁸⁶ Section C.2 of the report states, “The corporate sponsor appropriately has a voice in management decisions, but may not have a representative with Co-Director status.” Section C.3 states, “[R]epresentatives of the corporate sponsor may participate in the selection of proposals to be funded, but this process should be led by Cornell faculty.” *Strategic Corporate Alliances*, Fall 2005, *supra* note 174, at 20.

¹⁸⁷ *Id.*

¹⁸⁸ Section D.2 states, “Peer review by disinterested scholars remains the premier method of assessing the merit of academic work.” *Id.* at 21.

¹⁸⁹ *Id.* at 20.

¹⁹⁰ *Id.*

A third area of controversy concerned the scope of corporate funders' "first-look" and exclusive licensing rights. Each version of the report incorporated the existing Cornell policy that restricted corporate funders to a maximum 90-day pre-publication period of first-look rights.¹⁹¹ This 90-day period would enable the corporate sponsor to review the research to determine if it contained confidential corporate information that would need to be eliminated.¹⁹² This time also provides a period for the university to file patent applications and for the corporate sponsor to negotiate exclusive licensing rights to future patents.¹⁹³ Although the report does not challenge these practices, it does urge the use of non-exclusive licenses, whenever possible.¹⁹⁴ It further recommends that SCA agreements provide for Cornell's right to freely distribute all research methods and results to researchers in any academic setting.¹⁹⁵

The faculty debate over SCAs reflects the contradictions in faculty professional identity, where faculty interests in academic freedom and self-governance co-exist with faculty alignment with interests of the university administration and trustees. Although the *ad hoc* faculty committee and Faculty Senate easily reaffirmed their support of the core values of faculty autonomy over academic research, there was no consensus over the acceptable limits on independence from private corporate funders.

In creating eCornell, the administration's and trustees' actions clashed with the objective and subjective interests of faculty in maintaining autonomy over teaching and the integrity of faculty governance. As a result, the Faculty Senate was unified in its opposition to the administration's proposals to establish a for-profit corporation that could be funded by venture capital and that might offer on-line courses for academic credit. In contrast, in the case of SCAs, many faculty members have interests in receiving private corporate research funding, which aligns them with the interests of administration and trustees in expanding university-industry research agreements. Such faculty interests create objective material conditions that can influence faculty views about the content of SCAs, including their support for private funders' involvement in university decisions about funding distribution and exclusive li-

¹⁹¹ *Strategic Corporate Alliances, Fall 2005*, supra note 174, at 14-15.

¹⁹² *Id.* at 14-15, Appendix C ("Current Cornell Principles to Guide Development of Strategic Corporate Alliances").

¹⁹³ *Id.* at 15-16, Appendix A (Cornell University Strategic Corporate Alliance Plan, section VII).

¹⁹⁴ *Id.* at 16.

¹⁹⁵ *Id.* This provision goes beyond the "Current Cornell Principles to Guide Development of Strategic Corporate Alliances," which states Cornell's rights to use any inventions for its own "research and education purposes" and "to distribute any biological materials created under a corporate research sponsorship to other academic researchers." *Id.* at Appendix C.

censing of university-owned patents. The Cornell administration emphasized the central importance of these issues to successful completion of an SCA, describing them as "deal killers." Faculty who stand to benefit from SCAs have an economic stake in their success, creating an alignment of interests with the administration and trustees over these issues.

The division in the faculty over the content of SCAs is indicative of fundamental disagreements concerning changes university-industry relations. SCAs comprise one aspect of an overall increase in commercialization of academic research over the last three decades. Since the mid-1970s, the convergence of several objective conditions has resulted in closer university-industry ties, including greater faculty involvement with industry. In the broader social and economic context of privatization, universities have expanded their role as market actors through patenting and licensing of academic research.¹⁹⁶ The expanding scope of these market activities has been made possible by changes in other objective conditions, including the enactment of the federal Bayh-Dole Act of 1980, which authorized and encouraged recipients of federal research funds to patent resulting research discoveries.¹⁹⁷ Prior to Bayh-Dole, academic research results went into the public domain unless the university applied to the federal funding agency for a transfer of title to the research.¹⁹⁸

During this same period, university interest in patenting academic research was heightened by the commercial potential of the new research discoveries in genetic engineering.¹⁹⁹ Universities' economic interests in patenting went hand in glove with industry economic interests in licensing these patents, including exclusive licensing by corporations in the pharmaceutical and agricultural industries.²⁰⁰ Faculty can profit from these activities, as the Bayh-Dole Act requires universities to provide researchers with a share of any patent royalties.²⁰¹ Faculty economic interests were further affected by increased corporate funding of academic research and corporate contracts with faculty as industry consultants.²⁰² Faculty entrepreneurial activity has also grown along with the

¹⁹⁶ See Lieberwitz, *University Science Research*, *supra* note 138; Lieberwitz, *Commercialization of Academic Research*, *supra* note 138, at 117-29.

¹⁹⁷ See *supra* note 134 and accompanying text.

¹⁹⁸ Lieberwitz, *Commercialization of Academic Research*, *supra* note 138, at 120.

¹⁹⁹ *Id.* at 120-21.

²⁰⁰ *Id.* at 123-24.

²⁰¹ 35 U.S.C. § 202(c)(7)(C) (2000).

²⁰² See Lieberwitz, *University Science Research*, *supra* note 138, citing Krinsky, *supra* note 134; David Blumenthal, *Biotech in Northeast Ohio Conference: Conflict of Interest in Biomedical Research*, 12 HEALTH MATRIX 377, 379 (2002); (about half of life sciences faculty act as consultants for industry); *id.* at 378-79 (Since the mid-1980s, twenty-one to twenty-eight percent of life sciences faculty have consistently received research support from industry, and

research advances in genetics and information technology, through faculty-created spin off corporations in the fields of genetics and information technology.²⁰³

The convergence of these objective conditions – life science academic research, legislative changes, university technology transfer through patents and licenses, industry support of academic research, faculty-created spin off corporations, and faculty consulting for industry – has encouraged integration of private corporations into the university and, in turn, faculty integration with private corporations. Closer university-industry relations have also resulted in changes in the objective conditions of academic culture and faculty relationships. The traditional practice of placing research in the public domain now competes with private control over and profits from patented research. For example, the potential for patenting academic research has increased secrecy among faculty, thereby altering the norm of broad sharing of research methods and results.²⁰⁴ Faculty independence has been reduced by the increasingly regular practice of pre-publication review by corporate funders of faculty research.²⁰⁵ Research quality is also affected through private control, as revealed by studies finding bias in the results of corporately-funded academic research.²⁰⁶

Changes in the objective conditions of faculty work and academic culture affect both objective and subjective aspects of faculty professional identity. Faculty have become entrepreneurs through their market activities, including patenting academic research, sharing in the profits of such technology transfer, increased reliance on corporate funding, consulting for industry, and establishing spin off corporations. As discussed in Section I, all tenure-track faculty have some objective material interests in common with university administrators, as a result of faculty's privileged labor position. Faculty engaged in these entrepreneurial activities go well beyond this point, as their objective material interests in research profitability coincide with those of university administrators, trustees, and corporate funders and licensees. What had been "third party" interests of individuals and groups outside the faculty now be-

about seven to eight percent of faculty reported that they hold equity in a company related to their research).

²⁰³ Blumenthal, *supra* note 202, at 385 (finding that during the 1980s and 1990s, faculty participated in founding twenty-four Fortune 500 companies and over 600 non-Fortune 500 companies in the life sciences).

²⁰⁴ See *supra* note 141 and accompanying text.

²⁰⁵ See Lieberwitz, *Commercialization of Academic Research*, *supra* note 138, at 129.

²⁰⁶ Eyal Press & Jennifer Washburn, *The Kept University*, ATL. MONTHLY, Mar. 2000, at 42; Mildred K. Cho & Lisa A. Bero, *The Quality of Drug Studies Published in Symposium Proceedings*, 124 ANNALS INTERNAL MED. 485 (1996); Mark Clayton, *Corporate Cash Campus Labs*, CHRISTIAN SCI. MONITOR, June 19, 2001, at 11; Krinsky, *supra* note 134, at 34; Krinsky, *supra* note 141, at 142-49.

come the faculty's interests. Objective practices in academic research are altered to further these common financial interests of faculty, administrators, and corporate funders, such as restricting the public domain, increasing secrecy among faculty colleagues, and inviting greater intervention by industry.

These objective changes, in turn, shape faculty subjective identity. Faculty professional self-image as market actors and industry partners alters their perceptions of the meaning of academic freedom and the public good. The traditional view of academic freedom comes from the AAUP 1915 and 1940 Statements, which emphasize faculty independence from university administrators and industry. These principles describe an academic culture in which the exercise of rights of individual faculty academic freedom furthers the collective interest of the profession and the public. Thus, academic freedom creates individual faculty autonomy over research, but also creates faculty obligations to remain independent from private interests. This requirement of faculty independence, expressed in the AAUP Statements as faculty "disinterestedness," is integral to avoiding institutional conflicts of interest.²⁰⁷ Regardless of individual faculty good faith, certain relationships create inherent conflicts of interest that should be avoided to protect research integrity and public trust in the academic profession.

Faculty self-governance, including peer review, is the institutional mechanism for protecting both the individual and collective interests of the academic profession. In the context of the Cornell faculty report on SCAs, this traditional perspective was expressed by faculty seeking to retain traditional independent peer review processes for awards of corporate funding. Although the SCA increases university dependence on corporate funds, excluding corporate representatives from the funding decisions would limit the degree of corporate intervention in the academic research process. Similarly, corporate monopoly access to academic research would be avoided by using only non-exclusive licenses of university patents.

In the current context of the commercialization of academic research, institutional interests in independence have often been trumped by faculty and university economic interests. As privatization trends increasingly equate the public interest with the corporate interest, faculty and administration become more likely to accept the integration of private corporate funders into academic research processes, as long as safeguards are followed to protect academic freedom. This faculty acceptance would restrict concerns about conflicts of interests to an individual, case-by-case level of analysis, rather than considering the institu-

²⁰⁷ See *supra* note 15 and accompanying text.

tional conflicts created by close university-industry ties.²⁰⁸ In terms of faculty identity, this approach emphasizes the alignment between the economic interests of university administration and individual faculty and minimizes the importance of safeguarding separate collective professional interests of the faculty. Academic freedom is thus defined as an individual right that includes profiting from patented research and industry consulting, but does not include collective professional norms requiring faculty independence from private interests. From this more individualistic perspective, conflicts of interests are adequately avoided by requiring faculty to disclose their financial relationships in academic publications and in university annual conflict of interest reporting forms.²⁰⁹ In the context of the Cornell faculty report on SCAs, this individualized approach protects academic freedom and independence by negotiating specific contract terms, including restrictions on the length of time for corporate funders' pre-publication reviews of academic research, limits on the degree of influence by corporate representatives on research funding committees, and SCA clauses that give academic researchers free access to patented or exclusively licensed research results.²¹⁰

The Cornell faculty report on SCAs, thus, reveals the division among faculty in defining their identity in the current context of university corporatization. To a great extent, this division corresponds to distinctions among disciplines, with faculty in the natural sciences and engineering more open to university-industry relations than faculty in the humanities and social sciences. These divisions also correspond to alignments of economic interests between the university administration and faculty who may benefit from commercialization of academic research, as opposed to faculty whose research holds little commercial potential. Faculty responses to issues like SCAs, however, cannot be reduced to a simple calculation of economic interests, given the presence of science

²⁰⁸ See Minutes of Cornell University Faculty Senate Meeting, Apr. 13, 2005, *supra* note 179 (Statement by a faculty member that "the primary requirement is not that one be disinterested in the research one is reviewing, but that any specific conflicts of interest are clearly expressed and avoided."); see also Lieberwitz, *Marketing of Higher Education*, *supra* note 138, at 772 (critiquing narrow focus on individual conflicts of interest).

²⁰⁹ Lieberwitz, *Marketing of Higher Education*, *supra* note 138, at 772.

²¹⁰ An external evaluation of the large-scale corporate funding agreement between University of California at Berkeley and Novartis (Syngenta) concluded that universities should avoid such agreements, due to the conflict of interests created within the university. See Lawrence Busch et al., *External Review of the Collaborative Research Agreement between Novartis Agricultural Discovery Institute, Inc. and the Regents of the University of California* (2004), available at http://www.berkeley.edu/news/media/releases/2004/07/external_novartis_review.pdf; Lieberwitz, *Commercialization of Academic Research*, *supra* note 138, at 124, 134.

and engineering faculty who have opposed such commercialization trends as inimical to the traditional communal values of science.²¹¹

The division among faculty on issues of commercializing academic research also has important implications for faculty governance as a collective expression of faculty identity. In the case of SCAs at Cornell, the faculty report asserted the unanimous faculty view of the importance of academic freedom and university independence, but also reflected the faculty majority view supporting the greater integration of corporate funders in academic research. Although the faculty governance process maintained a collective faculty presence in the university's deliberations about SCAs, the ultimate report expresses a faculty identity with interests that are in tension with the traditional professional norms of academic freedom. Given the dynamic relationship between objective and subjective conditions, the faculty committee report may both reflect and reinforce these changes in faculty identity.²¹²

D. ACADEMIC LABOR ALLIANCES OR DIVISIONS? GRADUATE ASSISTANT UNION ORGANIZING

Graduate assistant (GA) union organizing in private universities has been a recent phenomenon, emerging largely due to changing interpretations of GA employee status under the NLRA. GA unionization raises issues that overlap with the discussions of eCornell and SCAs, as GAs' work as teaching and research assistants fulfills the universities' core missions of education and research. Moreover, GA unionization is related to university corporatization trends, as union campaigns often involve concerns about increased employment of GAs and nontenure-track faculty as forms of cheap labor without the security of tenure. Similar to eCornell and SCAs, faculty responses to the GA union campaign at Cornell University reflect the influence of objective and subjective factors of faculty identity. The analysis of GA unionization efforts adds the complexities of graduate student identity, which is formed by objective and subjective factors both independent from and integrally related to faculty identity.

In the summer of 2002, a group of GAs, including teaching and research assistants, began a union organizing campaign seeking to unionize all Cornell GAs, to be represented by the United Auto Workers (UAW), which had recently unionized GAs at New York University

²¹¹ *Id.* at 146-47 (discussing examples of academic scientists seeking to broaden access to their research discoveries).

²¹² While the Cornell Vice Provost for Research expressed his appreciation to the faculty committee for its report, he also stated that the administration would treat the principles as "moral guidelines," rather than as "strictly binding legislation." Minutes of Cornell University Faculty Senate Meeting, Nov. 9, 2005, *supra* note 174 (Statement by Vice Provost Robert C. Richardson).

(NYU).²¹³ At an early stage in the union campaign, a faculty petition urged the Cornell administration to agree to hold a union election without contesting issues such as the appropriateness of the proposed bargaining unit, which would have required an evidentiary hearing and potential appeals before the NLRB.²¹⁴ In July 2002, the Cornell administration and the UAW agreed to hold an NLRB-conducted election in October 2002, without the need for a hearing.²¹⁵

The pre-election organizational campaign that followed was very contentious. A university-wide forum was held, which revealed deep divisions among faculty and students over the benefits and drawbacks of unionization.²¹⁶ In general, students and faculty in sciences and engineering were less favorable to GA unionizing than were students and faculty in the humanities and social sciences.²¹⁷ The UAW lost the election in a lopsided vote, with only one-third of GAs voting for the union.²¹⁸

Faculty and graduate student identities are important in understanding GA unionization, in general, and specifically in understanding the outcome of the GA union election at Cornell. Objective factors created at the local level of the university, including economic conditions and graduate students' relationships with their faculty graduate committees, influence how graduate students form their identity. Like faculty identity, graduate student identity has been influenced by the objective factor of labor law, through judicial and administrative interpretations of the NLRA. These objective factors create conditions influencing the subjective aspects of graduate students' identity. In the context of GA union campaigns, these objective and subjective factors help explain the responses of GAs to the idea of unionization. Faculty responses to the GA union campaign, which have an impact on graduate students, can also be evaluated in terms of faculty identity. Given the close relationship between faculty and GAs, as well as GAs' future identity as faculty, faculty identity and responses to GA union campaigns add to the objective conditions that influence GA identity and views about unionization.

²¹³ See *infra* note 236 and accompanying text.

²¹⁴ *University Agrees to Grad Students' Request to Unionize*, CORNELL DAILY SUN, Jul. 24, 2002, available at <http://www.cornellsun.com/node/6052>.

²¹⁵ *Id.*

²¹⁶ See *Hundreds Debate Over Grad Unions*, CORNELL DAILY SUN, Sept. 18, 2002, available at <http://www.cornellsun.com/node/6348>.

²¹⁷ *Id.*; *Graduate Students Prepare for Union Vote*, CORNELL DAILY SUN, Sept. 26, 2002, available at <http://www.cornellsun.com/node/6506>; *Union Vote Resounding No*, CORNELL DAILY SUN, Oct. 24, 2002, available at <http://www.cornell.sun/node/6889>.

²¹⁸ Of the 2318 eligible voters, 1351 voted against the union and 580 voted for it. *Union Vote Resounding No*, *supra* note 217.

1. *Graduate Assistants' Identity: Both Students and Employees?*

Judicial and administrative agency interpretations of faculty and GA coverage under the NLRA share a focus on the relationship between academic work and labor status. In *Yeshiva*, the Supreme Court interpreted this relationship as excluding most tenure-track private university faculty from employee status as part of labor, instead imposing a managerial status on faculty who have individual and collective autonomy over their academic work. The NLRB has also focused on the academic work/labor status distinction to remove GAs from the ranks of labor under the NLRA, but based on a different rationale from *Yeshiva*. Given the objective conditions of GA work, which does not include the sort of autonomy exercised by tenure-track faculty, GA status could not plausibly be described as managerial. Instead, the NLRB has simply removed GAs from the "labor" workforce altogether, interpreting student status as mutually exclusive with employee status.

Until its *New York University (NYU)*²¹⁹ decision in 2000, this NLRB doctrine appeared almost impervious to change, closing off the potential for GA unionization. *NYU* opened a brief period of GA union activity in private universities²²⁰ by redefining GAs as employees under the NLRA, only to be followed closely in 2004 by the NLRB's decision in *Brown University*,²²¹ returning to its doctrine excluding GAs from NLRA coverage. *NYU*, *Brown*, and earlier NLRB opinions provide important insight into the academic/labor distinction used to define GA status. Together with the Supreme Court's use of this academic/labor dichotomy in determining faculty managerial status in *Yeshiva*, the NLRB's decisions are, themselves, objective conditions influencing the formation of both faculty and graduate student identity.

The history of NLRB treatment of graduate students' labor status reveals the Board's continued reliance on an academic/labor distinction. Under NLRB doctrine prior to *NYU*, graduate students with university employment related to earning their academic degree were excluded from the legally defined status as employees under the NLRA. In *Cedars-Sinai Medical Center*²²² and *St. Clare's Hospital and Health Center*,²²³ the NLRB held that medical interns and residents were not Section 2(3) employees because their work as physicians in teaching hos-

²¹⁹ 332 N.L.R.B. 1205 (2000).

²²⁰ For an excellent description and analysis of the early years of the graduate assistant union movement in public universities, see Scott Edward Buchheit, *Unionizing Among Graduate Student Employees in American Universities, 1965-1975: Its Causes, Legal Status, and History* (Jan. 1977) (unpublished Master's Thesis, Cornell University) (on file with Cornell University Library).

²²¹ 342 N.L.R.B. 483 (2004).

²²² 223 N.L.R.B. 251 (1976).

²²³ 229 N.L.R.B. 1000 (1977).

pitals, which was a requirement for earning their medical degree, was performed “primarily as students and not primarily as employees.”²²⁴ The Board translated this student/employee distinction into an academic/labor dichotomy, concluding that “the mutual interests of the students and the educational institution in the services being rendered are predominantly academic rather than economic in nature.”²²⁵ As a result, the Board concluded that “such [academic] interests are completely foreign to the normal employment relationship and . . . not readily adaptable to the collective-bargaining process.”²²⁶

Throughout its opinion in *St. Clare’s Hospital*, the Board reiterated the academic/labor dichotomy, distinguishing the “student-teacher relationship,”²²⁷ which is “academic in nature,”²²⁸ from the “employee-employer relationship,”²²⁹ which is “economic in nature.”²³⁰ The Board further distinguished the academic and labor contexts by describing “the student-teacher relationship [as] inherently unequalitarian [sic]”²³¹ and therefore incompatible with the collective bargaining process, which is “designed to promote equality of bargaining power.”²³² In the Board’s view, collective bargaining by medical residents and interns over such academic matters as course content, graduation standards, and examinations “may unduly infringe upon traditional academic freedoms.”²³³

In its 1999 decision in *Boston Medical Center*,²³⁴ the NLRB reconsidered this doctrine, holding that medical interns and residents’ employment in teaching hospitals as part of their academic degree program was not mutually inconsistent with their interests in collective bargaining over working conditions.²³⁵ The following year, in *NYU*,²³⁶ the NLRB

²²⁴ 229 N.L.R.B. at 1002.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 1003.

²³⁴ 330 N.L.R.B. 152 (1999).

²³⁵ The Board explicitly “overrule[d] *Cedars-Sinai* and its progeny.” *Id.* at 163.

²³⁶ 332 N.L.R.B. 1205 (2000). On the *NYU* decision and GA organizing, see Comment, *Labor Law – NLRB Holds that Graduate Assistants Enrolled at Private Universities are “Employees” Under the National Labor Relations Act*, 114 HARV. L. REV. 2557 (2001); Grant M. Hayden, “*The University Works Because We Do*”: *Collective Bargaining Rights for Graduate Assistants*, 69 FORDHAM L. REV. 1233 (2001); Gordon Lafer, *Graduate Student Unions Fight the Corporate University*, DISSENT 63 (Fall 2001); Joshua Rowland, “*Forecasts of Doom*”: *The Dubious Threat of Graduate Teaching Assistant Collective Bargaining to Academic Freedom*, 42 B.C. L. REV. 941 (2001); Toby Miller, *Approach to the Cultural Study of Law: What It Is and What It Isn’t: Cultural Studies Meet Graduate-Student Labor*, 13 YALE J.L. & HUMAN. 69 (2001). The NYU graduate assistants, who were represented by the United Auto

extended *Boston Medical* to hold that university GAs are employees under Section 2(3) of the NLRA. In both decisions, however, the academic/labor and faculty/student dichotomies set forth in *St. Clare's Hospital* continued to influence the Board's vision of the meaning of employee status. The NLRB assured employers that the scope of collective bargaining would be restricted to protect the concerns for the universities' "academic freedom."²³⁷ In *Boston Medical*, while refusing to describe in any detail the line between mandatory and permissive subjects of bargaining, the Board referred to the experience of public sector universities, where the state law has been interpreted to restrict the scope of bargaining to protect universities' "autonomy" over academic matters, such as the content of assigned work.²³⁸ In *NYU*, the NLRB assured the university that the Board is "mindful and respectful of the academic prerogatives of our Nation's great colleges and universities,"²³⁹ while also expressing confidence that the scope of bargaining would be worked out through the "dynamic" process of collective bargaining.²⁴⁰

In *Brown University*,²⁴¹ only four years later, the NLRB overruled *NYU*, returning to its earlier doctrine that GAs' status as "primarily students" excluded them from the definition of employee under the NLRA. The NLRB re-emphasized the academic/labor dichotomy, quoting *St. Clare's Hospital* to hold, once again, that GAs act "primarily as students and not primarily as employees," which is a "fundamental distinction" that makes the academic interests in GAs' services wholly different from an economic relationship that would be subject to collective bargaining.²⁴²

While *Boston Medical* and *NYU* were victories and *Brown University* was a defeat for GAs interested in unionizing, all three decisions limit the potential collective power of GAs by dividing their academic and labor identities. In *Boston Medical* and *NYU*, the NLRB recognized medical students' and GAs' statutory rights to unionize as employees, but limited their collective labor power by excluding "academic" issues

Workers, entered into a collective bargaining agreement with NYU. *NYU, Grad Students Reach Contract Accord*, ASSOCIATED PRESS, Jan. 30, 2002. The university withdrew recognition of the UAW after the contract expired and after *NYU* was overruled. The NYU graduate assistant bargaining unit went out on an unsuccessful strike in November 2005, seeking to maintain recognition. The strike finally ended in September 2006. See Karen W. Arenson, *N.Y.U. Teaching Aides End Strike, With Union Unrecognized*, N.Y. TIMES, Sept. 7, 2006, at B2.

²³⁷ 330 N.L.R.B. at 164; 332 N.L.R.B. at 1208.

²³⁸ 330 N.L.R.B. at 164 (citing *Regents of the University of Michigan v. Michigan ERC*, 204 N.W.2d 218, 224 (Mich. 1973)).

²³⁹ 332 N.L.R.B. at 1208-09.

²⁴⁰ *Id.* at 1208.

²⁴¹ 342 N.L.R.B. 483 (2004).

²⁴² 342 N.L.R.B. at 487, 489 (quoting *St. Clare's Hospital*, 229 N.L.R.B. 1000, 1002 (1977)).

from the scope of mandatory subjects of bargaining. In other words, the NLRB included the medical students and GAs as part of labor, but at the cost of their academic identities. In overruling *NYU, Brown University* relied on GAs' academic identity as students as the basis for denying their labor identity as employees. Similar to faculty working conditions, though, creating a dichotomy between academic policy and employment is inconsistent with the realities of GA working conditions. For tenure-track faculty, the integration of academic and employment issues is central to their work. The academic issues of teaching and research *are* labor issues, ranging from issues of salaries to work load to academic freedom in the classroom, research, and public speech.²⁴³ Since it would be impossible to describe an academic/employment dichotomy for faculty, *Yeshiva* avoided the issue by removing most tenure-track faculty from the ranks of labor through imposition of a "managerial" identity onto such faculty.

In the case of GAs, the dichotomy between academic and labor issues is equally false and unworkable. Examples spring to mind that show the false dichotomy, such as the interrelation between workload and teaching quality or the relationship between evaluation of teaching assistant competence and academic freedom. In *St. Clare's Hospital* and *Brown University*, the NLRB recognized the intertwining of academic and labor issues, as well, though the Board relied on this point to reach the erroneous conclusion that collective bargaining was incompatible with the academic setting.²⁴⁴ Further, similar to faculty members, graduate students – be they medical residents or GAs – engage in a continual

²⁴³ The union in the *Boston Medical* case was willing to compromise on this point, to confine mandatory subjects to "employment-related issues," and assuring the NLRB that it "has never sought to bargain over academic prerogatives." 330 N.L.R.B. at 157. After the UAW won the election at NYU and was certified as the exclusive bargaining representative of the GA bargaining unit, NYU agreed to bargain with the UAW only when the UAW agreed not to bargain over academic issues, including:

[T]he merits, necessity, organization, or size of any academic activity, program, or course established by the university, the amount of any tuition, fees, fellowship awards, or student benefits (provided they are not terms and conditions of employment), admission conditions and requirements for students, decisions on student academic progress (including removal for academic reasons), requirements for degrees and certificates, the content, teaching methods, and supervision of courses, curricula, and research programs, and any issues related to faculty appointment, promotion, or tenure.

Michelle Amber, *NYU Agrees to Recognize, Bargain with UAW for Graduate Teaching Assistants*, 43 DAILY LAB. REP. AA-1 (2001) (quoting NYU-UAW post-certification agreement to bargain).

²⁴⁴ "If one were to conclude that the student-teacher and employee-employer relationships were in fact analogous, then it would follow that many academic freedoms would become bargainable as wages, hours, or terms and conditions of employment." 229 N.L.R.B. at 1003. The Board also gives examples of bargaining over hours of medical interns and residents and of assessments of educational progress. *Id.*

learning process related to their teaching and research, effectively removing any real distinction between their identities as students and academic employees.²⁴⁵ Thus, the NLRB's acceptance of a dichotomy between academic and labor issues resulted in incorrect holdings in *St. Clare's Hospital* and *Brown University*, which used the students' academic identity as the basis for excluding them from the ranks of labor.

2. *Academic vs. Labor Identities: The Impact on GAs and Faculty*

The Supreme Court's analysis in *Yeshiva* together with the NLRB's analysis in *St. Clare's* and its progeny, provide insight into the impact of law on the potential for collective action by faculty and graduate students. As discussed in Section II, in defining most private university tenure-track faculty as managerial, *Yeshiva* ignored faculty's distinct professional interests based in academic freedom, thereby encouraging faculty to adopt a subjective identity aligned with the university administration. This managerial identity has consequences for faculty collective action to assert independent interests from the administration. It also has consequences for faculty responses to collective action by other academic employees, including GAs.

Outside of the formal legal system, the historical development of professional norms of academic freedom creates a strong potential for faculty and GAs to find common interests in carrying out the core functions of the university. In this context, the rights of association in the NLRA should reinforce the common interests of faculty and GAs in creating working conditions that promote teaching and research consistent with academic freedom and the public good. Instead, judicial and administrative interpretations of the NLRA have defined faculty and GA identity in ways that remove both groups from the ranks of labor, while simultaneously dividing them from each other.

The Supreme Court in *Yeshiva*, and the NLRB in *St. Clare* and its progeny, used the academic/labor dichotomy to describe faculty and graduate student interests as being in conflict with each other. Rather than interpreting the NLRA in harmony with the historically developed rights of academic freedom, the Supreme Court and the NLRB have placed labor rights in conflict with academic rights. In *Yeshiva*, the Court excluded most tenure-track faculty from the ranks of labor by defining the faculty as managerial.²⁴⁶ In *Boston Medical* and *NYU*, the NLRB extended statutory rights to unionize to medical interns and to GAs, while simultaneously excluding academic issues from the scope of

²⁴⁵ See Klare, *supra* note 48, at 115-16; Miller, *supra* note 236, at 87-88, 94.

²⁴⁶ Klare, *supra* note 48, at 104-05, 119.

collective bargaining. In *Brown University*, the NLRB returned to its exclusion of GAs from the ranks of labor by using the academic/labor distinction to deny GA employee status.

In each of these cases, the Court and the NLRB reached conclusions in tension with the evidence of the objective conditions of faculty and GA work. In the case of tenure-track faculty, academic freedom and autonomy over teaching and research protect faculty independence from the university administration, in contrast to *Yeshiva's* assertion of faculty and administration alignment of managerial interests. In contrast to the NLRB's description of the dichotomy between academic and labor issues, GAs' dual identity as employees and students reflects the close relationship between academic and labor issues, just as the faculty's dual identity as employees and scholars intertwines academic and labor concerns.

Had the Supreme Court and the NLRB concluded that both tenure-track faculty and GAs were professional employees under Section 2(3) and 2(12) of the NLRA, faculty and GA common interests would be legally recognized. Instead, by legally defining tenure-track faculty as managerial, *Yeshiva* encourages – or even coerces – faculty and students to see their interests as being in conflict. In the short-lived period of the *NYU* decision, *Yeshiva's* managerial exclusion placed tenure-track faculty in direct conflict with the interests of GAs. In returning to its exclusion of GAs from labor in *Brown University*, the NLRB based its holding, in part, on the importance of maintaining an unequal relationship between faculty and students, viewing “equality of bargaining power” as “largely foreign to higher education.”²⁴⁷

Rather than building alliances toward a common academic and labor goals, these decisions place tenure-track faculty and students in opposition over both academic and labor issues. Under *Yeshiva*, faculty defined as managerial may see their interests as being in conflict with the graduate students, who may be viewed as a source of cheap labor. Placing tenure-track faculty on the employer's side of the class line deepens the inequality of the faculty/student relationship, which may already be subject to the inequalities of a paternalistic relationship.²⁴⁸ *Yeshiva* may have a similarly negative impact on the relationship between “managerial” tenure-track faculty and “non-managerial” nontenure-track faculty, as placing them on opposite sides of the class line creates the impression that they have opposing class interests.

²⁴⁷ 342 N.L.R.B. at 490 (quoting *St. Clare's Hospital*, 229 N.L.R.B. at 1000).

²⁴⁸ This vision of the faculty/student relationship is consistent with the NLRB's description of the “student-teacher relationship [as] an inherently inequalitarian [sic] one.” See *St. Clare's Hospital*, 229 N.L.R.B. at 1002. This description of the relationship reinforces the view that faculty and students belong on opposite sides of the class line.

These issues of identity can be applied to the context of the GA union campaigns and elections at Cornell University and other private universities. As in *Yeshiva*, which influenced faculty identity, legal definitions of graduate assistantship constituted an objective condition influencing graduate student identity formation. In the context of GA unionizing, the role of law in combination with other objective and subjective conditions reinforced both faculty and graduate student opposition to GA unionization. In particular, the academic/labor dichotomy relied upon in *Yeshiva* and the NLRB's GA cases cast the academic identity of faculty and graduate students as being inconsistent with their identity as part of labor. If tenure-track faculty accepted their legally-derived collective identity of being "managerial," their managerial frame of consciousness would likely increase their opposition to unionization by academic employees, including GAs. In the case of faculty in the sciences or engineering, other objective conditions such as involvement in technology transfer, may strengthen that faculty's already existing objective and subjective alignment with the administration's interests. Perhaps unsurprisingly, then, the strongest faculty opposition to GA unionization at Cornell came from the science and engineering departments.²⁴⁹

Where GAs decide to engage in collective action despite the *Brown University* holding—as in the recent GA strikes at NYU, Yale, and Columbia²⁵⁰—tenure-track faculty may place themselves in opposition to student assertions of power against the university administrations.²⁵¹ During such union campaigns, tenure-track faculty may feel compelled, as part of "management," to defend the university's treatment of GAs, including the financial need to conserve university resources by hiring contingent faculty and graduate students at low wages. Further, *Yeshiva*, *NYU* and *Brown University*'s definitions of class location of faculty and GAs rely heavily on managerial control over academic matters, including curriculum. During union campaigns, tenure-track faculty, as "managerial" employees, will be encouraged to defend their legally defined con-

²⁴⁹ Even for tenure-track faculty sympathetic to GA unions during the period that *NYU* defined GAs as employees, the law placed limits on their actions, as open support for GA unionization by managerial employees could be defined as coercing Section 2(3) employees into supporting the union. See *Harborside Healthcare, Inc. v. NLRB*, 230 F.3d 206, 210 (6th Cir. 2000) (pro-union statements or conduct by supervisors may be sufficiently coercive to invalidate a union election win).

²⁵⁰ See Marek Fuchs, *Yale and Columbia Graduate Students Push for Union*, N.Y. TIMES, Apr. 19, 2005, at B9; *Graduate Students at Yale and Columbia Plan One-Week Strike in Push for Union Recognition*, ASSOCIATED PRESS, Apr. 14, 2005.

²⁵¹ When the graduate assistants at NYU went on strike in November 2005, one newspaper account concluded that NYU President John Sexton was "counting on support from faculty members - who are sharply divided over whether graduate students should be allowed to form a union - and a low level of student participation in the strike." Jacob Gershman, *NYU President's Options Limited As Graduate Students Strike Today*, NEW YORK SUN, Nov. 9, 2005, at 2.

trol over such academic matters from bargaining by graduate student unions or by nontenure-track faculty unions.²⁵²

The combined effect of *Yeshiva* and the NLRB GA decisions may have an even stronger impact on graduate student responses to unionization. In *Boston Medical* and *NYU*, the NLRB limited graduate student employees' collective bargaining rights to "bread and butter" employment issues.²⁵³ Thus, even if graduate student employees are covered by the NLRA, the dichotomy between labor and academic issues will make it difficult for them to win union organizing campaigns and will undermine the collective power of students, generally.

Within the confines of this narrow scope of bargaining, it becomes very difficult for the union to campaign on a basis that appeals broadly to the concerns of all graduate students, not just the economic concerns of GAs. All graduate students, whether or not they are also university employees, have interests in issues that are essential to their ability to study and work in the university, including "economic" issues such as housing, health care, and stipends, as well as "academic" issues such as curriculum development and academic freedom. By artificially dividing labor and academic issues, and defining GAs' concerns in strictly self-interested economic terms separate from the interests of non-employee graduate students, the NLRB divides the graduate students from each other. This narrow appeal to economic self-interest will make unionization attractive only to GAs with the worst working conditions. GAs who are satisfied with the economic terms of their employment, but who have an interest in collective participation over the academic issues will see the union as powerless and irrelevant.

The dichotomy between labor and academic issues also defines graduate student employee identity in a way that emphasizes their differences from faculty. Since many of the graduate students envision themselves as future tenure-track faculty, the union's role in bargaining over narrowly defined GA employment issues carries only short-term gains. If the union could represent the collective interests of all graduate students in participating in academic policy and practice, the union's role would be more consistent with collective faculty representative bodies, such as faculty senates. Further, graduate students' reluctance to join a

²⁵² New York University adjunct faculty unionized in 2002, creating the largest bargaining unit of private sector adjunct faculty. They are represented by the United Auto Workers. Michelle Amber, *UAW Defeats AFT in Election Among Adjunct Faculty at NYU*, DAILY LAB. REP., July 10, 2002, at A4; Leslie Berger, *The Rise of the Perma-Temp*, N.Y. TIMES, Aug. 4, 2002, at A20.

²⁵³ See Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Law,"* 1990 WIS. L. REV. 1, 131-36 (discussing, outside the context of specific types of employees or unions, the effects on unions' power of the NLRA restriction of mandatory subjects of bargaining to "bread and butter" issues).

union is increased by the definition of tenure-track faculty as belonging to the employer's side of the class line. If faculty envision themselves as being in an antagonistic relationship to unionized graduate students, the students may be willing to forego the immediate benefits of a union, rather than subject themselves to the hostility of their graduate committee members or other powerful faculty.

These objective and subjective factors combined at Cornell to contribute to the overwhelming GA vote against the union. Unlike NYU, the economic conditions of employment at Cornell did not place the GAs in desperate financial straits, significantly lowering the benefit of unionizing to improve wages, hours, and working conditions defined in "non-academic" terms.²⁵⁴ Additionally, many members of the tenure-track faculty agreed with the administration's position that bargaining with a GA union would interfere with academic freedom.²⁵⁵ Given the objective implausibility of this position, considering the union was not able to campaign on academic issues, the faculty's opposition to the union is more likely explained in terms of faculty's subjective identity as being in a managerial role when dealing with GAs. This subjective faculty identity is reinforced by objective factors such as the benefits received from retaining control over GAs' wages in teaching and research assistance and the reduction of faculty work loads through graduate student teaching. Faced with the choice of alienating their graduate committee members and other faculty in their graduate fields, GAs could rationally decide to vote against the union. Handcuffed by the narrow scope of mandatory subjects of bargaining resulting from the NLRB's academic/labor dichotomy, the union was hard pressed to convince GAs that the current benefits of unionizing outweighed the future career benefits linked to identifying with the faculty's self-perception of being outside of the ranks of labor.

CONCLUSION

Understanding faculty professional identity is a complex task, but an essential one. This article has examined faculty identity created through two paths: first, through the early foundation of faculty professional academic freedom and independence from the university administration and trustees, and second, through the contradictory legal definition of tenure-track faculty as managerial employees aligned with the administration's interests.

²⁵⁴ See *Union Vote Resounding No*, *supra* note 217; *Unionization, Two Years On*, CORNELL DAILY SUN, Feb. 21, 2005, available at <http://www.cornellsun.com/node/13917>.

²⁵⁵ See *Hundreds Debate Over Grad Unions*, *supra* note 216 (describing concern by the Cornell administration and some faculty with possible interference with academic decisions).

The impact of faculty professional identity formation is of particular importance in the current corporatized university, where administrators and trustees have expanded university for-profit market activities. The pursuit of these private business goals is reflected in policies and practices that vitally affect faculty and students, including an emphasis on university patenting and licensing of faculty research, for-profit educational ventures, attacks on tenure and the accompanying increase of teaching by underpaid nontenure-track faculty and GAs.

The corporatization of the university presents crucial questions for the future of academic values and culture, and for the public mission of the university. Whether the faculty will respond to corporatization trends by asserting traditional academic values depends on a conscious reflection by faculty about their professional interests as academics. On one hand, faculty rights of academic freedom require respect for faculty independence and autonomy over their work, as well as other democratic values of freedom of speech and collective self-governance. These rights and values create a distinct professional identity for faculty as professional employees who are part of labor. On the other hand, faculty economic interests place them in a privileged position in relation to other academic employees, creating the basis for faculty alignment with interests of the administration.

Given the tensions between these co-existing conditions, other factors add gravitational forces by pulling faculty toward either a stronger identity with other professional employees or toward a greater alignment with management. The law is a powerful gravitational factor, as demonstrated by the impact of the *Yeshiva* decision defining most private university tenure-track faculty as managerial. Corporatization trends also create objective factors, supporting faculty's privileged status when they are given the opportunity to take part in university market activities. As these objective factors mount, they influence subjective aspects of faculty identity and present an environment increasingly more conducive to faculty perceptions of their interests as in alignment with the administration and industry funders.

Defining faculty professional identity and understanding the dynamic nature of its continued evolution is not just an "academic" matter. What is at stake here is the institutional identity of the university and the nature of faculty work and culture. Faculty professional identity based on core values of individual and collective rights of academic freedom and autonomy is integrally connected to maintaining the university's independence and public mission. Regardless of the *Yeshiva* decision's exclusion of most private university tenure-track faculty from the right to unionize under the NLRA, faculty can act collectively to retain a professional identity that distinguishes them from their university employers.

As universities embrace market policies and practices in tension with traditional academic values, faculty have the opportunity to reassert their distinct professional identity and, in turn, reinvigorate the university's public mission.