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ABSTRACT

This paper offers a legal examination of shared governance in higher education. It discusses what shared governance is; the legal character of faculty senates; faculty handbooks as enforceable contracts for governance provisions; faculty enforcement of statutory shared governance protections (the California experience); shared governance, "no confidence" votes, and the matters-of-public-concern test; and faculty unions and faculty senates. (EV)

Some Legal Aspects of Collegial Governance

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American Association of University Professors

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Courts have had occasion to examine the concept of shared governance in the academy most typically when:

- faculty or administration seek general judicial guidance on whether faculty handbooks are enforceable contracts under state law;
- faculty specifically seek to enforce their right to recommend or consult on certain academic issues, like curriculum, or academic program discontinuance;
- faculty or administration go to court to determine whether speech about shared governance is "protected" under the First Amendment; or
- faculty or administration sue to differentiate between faculty senates and faculty unions in cases involving faculty collective bargaining.

I. What is "Shared Governance"?

The *Statement on Government of Colleges and Universities* (hereinafter *Statement on Government*), which was jointly formulated by the American Association of University Professors (AAUP), the American Council on Education, and the Association of Governing Boards of Universities and Colleges, provides:

> Joint effort in an academic institution will take a variety of forms appropriate to the kinds of situations encountered. In some instances, an initial exploration or recommendation will be made by the president with consideration by the faculty at a later stage; in other instances, a first and essentially definitive recommendation will be made by the faculty, subject to the endorsement of the president and the governing board. In still others, a substantive contribution can be made when student leaders are responsibly involved in the process. Although the variety of such approaches may be wide, at least two general conclusions regarding joint effort seem clearly warranted: (1) important areas of action involve at one time or another the initiating capacity and decision-making participation of all the institutional components, and (2) differences in the weight of each voice, from one point to the next, should be determined by reference to the responsibility of each component for the particular matter at hand. . . .

The *Statement on Government* further provides that "[t]he faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process." It also provides "that [t]he governing board of an institution of higher education in the United States operates, with few exceptions, as the final institutional authority."

A recent national survey of four-year colleges and universities of faculty and administration found that,

while the concept of shared governance is deemed important by a strong percentage of respondents, disagreement exists about what the concept means:

- 47% defined shared governance as "fully collaborative decision-making," which "some might call a 'collegial model' of governance. Here, the faculty and administration make decisions jointly and consensus is the goal."
- 27% defined the concept as "consultative decision-making. . . . where the faculty's opinion and advice is sought but where authority remains with the senior administration and the board of trustees. . . . [T]he model revolves around information sharing and discussion rather than joint decision-making."
- 26% defined shared governance as "distributed decision-making," whereby "decisions are made by discrete groups responsible for specific issues. The understanding is that faculty have a right to make decisions in certain areas, and the administration and board in others."

Center for Higher Education Policy Analysis, *Challenges for Governance: A National Report* (CHEPA: 2003) <www.usc.edu/dept/chepa>.

Few courts have opined on the general concept of shared governance. One federal district court, in an early decision, explored the topic in lofty tones:

> Ideally, the governance of a university is based upon the concept of "shared authority." Central to the concept is the tenet that academics are given extensive authority to participate in university governance. The theory is that the university setting, unlike the industrial world, is a single community comprised of an amalgamation of components which, in a joint effort, create an atmosphere of mutuality and cooperation. . . . In order to effectuate the goals of shared authority, most higher education institutions have established university senates.

University of New Hampshire Chapter of the AAUP v. Haselton, 397 F. Supp. 107 (D.N.H. 1975). In a more jaded decision, the National Labor Relations Board (NLRB) opined that faculty participation in shared governance is simply a "sophisticated version of the familiar suggestion box." *Florida Memorial College*, 263 NLRB 1248 (1982), *enforced*, 820 F.2d 1182 (11th Cir. 1987).

Not all "shared governance" issues are limited to faculty and administration. Sometimes struggles emerge between boards and administrations.

> *Virginia Polytechnical Institute and State University*: A recent governance controversy at Virginia Tech arose between the administration and the board of trustees when the board took unilateral action on a number of matters, including ending affirmative action and excluding protections based on sexual orientation in its nondiscrimination policy. *See, e.g.*, Thomas Bartlett & Megan Rooney, "Runaway Board? Unilateral Actions at Virginia Tech Raise Questions about the Proper Role of Trustees," *The Chronicle of Higher Education* (Mar. 28, 2003) (noting that "Virginia Tech administrators say privately that the Board of Visitors . . . made these fundamental decisions on their own without communicating to them the university's top officials"). The board ultimately reversed its decisions after an outcry from the academic community. Thomas Bartlett, "Va. Tech Board Reverses Controversial Policies," *The Chronicle of Higher Education* (Apr. 18, 2003).

II. The Legal Character of Faculty Senates

What is a faculty senate? Is it a separate legal entity or an informal "committee" of the institution? Is it a creation of the state legislature? The board of trustees? The answer: it depends.

Some academic senates at public institutions are created by state statutes.

> *Gonzalez v. Irizarry* (The University of Puerto Rico), 387 F. Supp. 942 (D.P.R. 1974): The college president ruled that elected members of the academic senate could not serve for more than three consecutive terms. Members of the academic senate challenged that interpretation of the university bylaws and sought a temporary restraining order. The court rejected that effort, finding, in part, that such a term limit did not constitute "an undue restraint to their freedom of association and expression." In so ruling, the court noted that the university's academic senates are "legislative bodies constituted by law."

See § 610, Title 18, Laws of Puerto Rico ("Every university campus and college shall have an academic senate."). Other faculty senates are created through the formal (and legal) delegation of at least some authority by an institution's board of trustees. *See, e.g., Ahmadieh v. University of Southern Colorado*, 767 P.2d 746 (Co. App. 1988) (state legislature delegated legal authority to university board of trustees, and board delegated some, but not complete, authority to faculty senate on curriculum); *Searle v. Regents of the University of California*, 100 Cal. Rptr. 194 (Cal. App. 1972) (observing that board's delegation of authority over curricula to faculty senate is "neither exclusive nor irrevocable").

Other faculty senates serve solely at the discretion of the administration. *See, e.g.*, J.V. Baldridge & F. Kemerer, "Academic Senates and Faculty Collective Bargaining," 47 J. Higher Educ. 391, 393 (1976) (faculty senates are "dependent bodies" granted power through the "grace" of the administration).

Determining the legal status of faculty senates, including who may abolish them, is not always easy.

> *University of Notre Dame*: Members of the 2000-01 faculty senate voted to disband the senate, frustrated at its lack of power. Apparently the senate's jurisdiction was "limited to making recommendations on academic matters." Some agreed that the senate lacked the authority to dissolve itself, because "[e]liminating the body would require the approval of the university's Academic Council, president, and board of trustees." Members of the 2001-02 faculty senate later rescinded the earlier senate's vote to disband. Alex P. Kellogg, "Faculty Senate, Upset at Its Impotence, May Lack Power to Dissolve Itself," *The Chronicle of Higher Education* (May 7, 2001).

Courts sometimes address what type of legal entity faculty senates are when asked to determine whether senate meetings are covered by "open meeting" laws and, therefore, must be open to the public. (Open meeting laws vary from state to state.)

> *Tafoya v. Hastings College of Law*, 236 Cal. Rptr. 395 (Cal. App. 1987): Students sued the board of directors, deans, and faculty alleging violations of the state's open meeting law. The students alleged that "faculty meetings must be opened to the public." The college responded that only the board and certain of its committee meetings must be publicly held, not faculty meetings. The students reasoned that the board of regents is a state-created body and the board delegates some of its authority to faculty. Alternatively, the students claimed that the faculty served in an "advisory capacity" to the board. In concluding that faculty meetings were not subject to the open meeting law, the court noted that statements in the legislative committee report about open meetings included clear language that meetings of the academic senate were not subject to the law.

III. Faculty Handbooks as Enforceable Contracts for Governance Provisions

Courts are often asked to decide whether faculty handbooks, which include policies, rules, and procedures under which professors work, establish contractual relationships between a professor and an administration. While the issue usually arises in the context of individual breach-of-contract claims in the employment context, sometimes litigation arises between trustees and faculty senates about the legal status of faculty handbooks generally and whether governance provisions are enforceable specifically.

University of Dubuque v. University of Dubuque Faculty Assembly, No. EQCV90784 (Iowa Dist. 1999): The university's board of trustees, apparently in an effort to amend the university's faculty handbook without seeking faculty approval, sued 46 faculty members. The board sought a court order declaring that the faculty handbook used at the university was not a contract, but simply a "formal institutional policy statement." The faculty members argued that the handbook provided for faculty approval of handbook revisions. The trustees argued in state court, where they sought a declaratory judgment, that the faculty handbook was a "guidepost" because, if it were otherwise, the board would be "stymied by the faculty senate." The court noted that the faculty handbook was incorporated into each individual faculty member's letter of appointment. The court further observed that the preamble of the faculty handbook stated that the handbook was "legally binding." Accordingly, the court concluded that the university faculty handbook was "legally binding and enforceable upon both parties." At the same time, the court found that two provisions of the handbook conflicted, and resolved that potential conflict in favor of the trustees. Specifically, one clause provided for modifications of the handbook by the trustees only, and another provision established procedures for faculty approval of handbook revisions. The board claimed victory in the lawsuit, because the court "allow[ed] the Board of Trustees . . . . to adopt and incorporate into the Handbook any proposed modification submitted to the Amendment and Revision Committee, regardless of whether the same has been approved by the faculty at large."

Tabbox v. Indiana State University Board of Trustees, Cause No. 84D01-9203-CP-445 (Vigo Superior Court, Indiana, Apr. 1992): Seventy-eight members of the Indiana State University faculty sought a declaratory judgment and permanent injunction against their board for continuing a presidential search and appointing a new president in violation of their faculty handbook, which provided that faculty members serve on the search committee of the university. The court was asked to review not only the specific violation of the presidential search provision of the handbook, but also the larger issue about the legal status of the handbook as a "contract between the Faculty and the University." The parties settled. The settlement agreement did not directly address whether the faculty handbook was enforceable as a contract. Rather, it affirmed that the handbook "provide[s] for meaningful faculty participation in University governance. . . ."

Faculty for Responsible Change v. Visitors of James Madison University, 38 Va. Cir. 159 (Va. Cir. 1995): An association of faculty sued the university for breaching faculty employment contracts by closing some academic programs without having first obtained the recommendation from various faculty bodies, including the faculty senate. The faculty handbook, which was incorporated into individual letters of appointment, provided that JMU faculty had the "primary role" in the development, modification and review of the curriculum, while the president of JMU had the "final authority and responsibility" for curricular matters. The administration announced that it was merging one of its colleges with another, and that it was closing a number of academic programs. The administration announced these changes "without obtaining the recommendations of the University

Council, the Undergraduate Curriculum Council, the Graduate Council, or the Faculty Senate." The court noted that "FRC does not allege that its claim is formally supported by the JMU faculty as a political body." The court found no breach of contract. The court reviewed the faculty handbook language, and noted that the dictionary definition of "recommendation" does not require a recipient to be "bound to follow it." The court also noted that the president had "final authority" over all curricular matters. The court reasoned:

> These governance provisions expressed the parties' hopes and expectations with respect to faculty reorganizations and curriculum changes, but, as applied to the facts of this case, they are not an enforceable contract between the [administration] and the faculty as to the faculty's mandatory participation in the curriculum changes which the President made and which the Board of Visitors has not rescinded. FRC's remedy as a group in this case is political not legal.

Ahmadieh v. University of Southern Colorado, 767 P.2d 746 (Co. App. 1988): The appointments of a number of tenured faculty members were terminated as a result of a university reorganization of academic programs. The dismissed professors sued the university, arguing that the administration had violated their due process rights. The lower court reasoned that "the failure of the Board to refer its recommended program changes to the university curriculum committee and the faculty senate prior to their adoption violated a provision of the handbook which had been incorporated into plaintiffs' employment contracts." The appellate court reversed, framing the "primary" issue as whether the president was required to refer the reorganization plan to the curriculum committee or the faculty senate. The court found that the board

> did not intend to vest control over [the] curriculum . . . in the faculty. . . . Any construction of the handbook's language which inferred such vestment of control would constitute an improper delegation of authority vested by the General Assembly in the Board, and would render such handbook provisions unlawful and void.

IV. Faculty Enforcement of Statutory Shared Governance Protections: The California Experience

From time to time faculty senates go to court to enforce state statutory requirements that the administration consult with them or seek their recommendations. California is one state where faculty have sought to enforce their authority under state law in the courts—with mixed results.

Irvine Valley College Academic Senate v. Board of Trustees of the South Orange Community College District, Case No. 03CC05351 (June 20, 2003): The academic senates of Saddleback and Irvine Valley community colleges are suing their district chancellor and trustees in state court over a newly issued district-wide hiring policy that shifts decision making powers from the faculty to the administration. The case arises under California's education code, which provides that hiring policies "be developed and agreed upon jointly" by the district and the senate. The faculty senates sought to set aside the hiring policy because it was not approved in advance by each college's faculty senate. The trial court ruled that the faculty senates had "standing" to sue the district because they "are statutorily created bodies and have a clear beneficial interest" in the litigation.

The court next interpreted the statute as requiring that faculty senates "have a real and meaningful role—a joint role—in the creation and revision of hiring criteria, policies, and procedures":

> If [the faculty senates] decline to so participate, the District may nevertheless promulgate such revisions in accordance with due process standards. Alternatively, if [the faculty senates] are afforded a real and meaningful role, so that indeed they have had a true opportunity jointly to develop the criteria, policies, and procedures, formal and technical agreement may not be possible and, therefore, cannot be statutorily required. The relevant provisions of the Education Code, taken together, cannot be found to give the Senates a de facto veto or ability to frustrate reform.

The court found that in this case the faculty senates had not been "afforded an opportunity to jointly develop" the revised policy because, "[a]lthough the process began in February of 2002, [the faculty senates] were not informed until May." Furthermore, when the faculty senates were informed, the solicitation of their "input" was "insufficient" because, "[b]y that point in time, the real work had been done." Accordingly, the court stayed the implementation of the new hiring policies. The case remains in litigation. *See* "Faculty Senates Sue Districts Over Hiring Rules," *Black Issues in Higher Education* 17 (May 8, 2003).

Munsee v. Horn (California State University, Long Beach), 139 Cal. Rptr. 373 (Cal. App. 1977): The chair of the academic senate sued the college president seeking a judicial order that the senate's interpretation of campus procedures for appointment, promotion and tenure were binding on the president. Section 42701 of the California Administrative Code requires that "faculty be consulted on academic personnel matters" by the trustees. The court ruled that the senate's interpretation was "advisory only . . . unless and until approved by the college president." In so ruling, the court noted that the past practice of the previous college president was not binding on the current administration.

Searle v. Regents of the University of California, 100 Cal. Rptr. 194 (Cal. App. 1972): The court described this case as one of "essentially whether the regents or the faculty shall control university policy in determining whether credit is to be given for courses conducted by nonmembers of the faculty." The regents delegated to the academic senate the authority to "supervise all courses and curricula." At the same time, the regents retained the authority to make faculty appointments. The regents later adopted a resolution that limited the ability of non-faculty members to conduct course lectures for credit. When a lecture course, "Dehumanization and Regeneration in the American Social Order," was taught by Eldridge Cleaver, who was not a faculty member, the students were not granted academic credit. Students and faculty members sued the regents, seeking a ruling that the university grant the academic credit and rescind its resolution. The court acknowledged the board's delegation of authority over curricula to the academic senate, but found the authority to be "neither exclusive nor irrevocable." The court further opined that the "constitutional right of free expression . . . does not include the right to receive or bestow university credit for the listening to or for the choosing of the speaker."

V. Shared Governance, "No Confidence" Votes, and the Matters-of-Public-Concern Test

Faculty senates sometimes take "no confidence" votes on the performance of presidents or trustees. *See,*

e.g., "Faculty at Rockland Community College Votes No Confidence," *The Chronicle of Higher Education* (July 12, 2002). Whether faculty participation at public institutions in such "no confidence" votes specifically or speaking out on governance issues generally is "protected speech" under the First Amendment varies.

Courts have applied the "matters of public concern" balancing test to the expression of faculty members at public institutions. *See Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) (a court must "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees"). Under *Pickering* and its progeny, courts first determine whether a professor is speaking on a matter of public concern and, if so, whether the professor's speech outweighs the state's interest in an efficient academic workplace. The "content, form, and context of a given statement" is examined by courts in determining whether a particular topic addresses a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983).

The difference between a "matter of public concern" and a "matter of private interest" is difficult to delineate. *Compare Landrum v. Eastern Kentucky University*, 578 F. Supp. 241 (E.D. Ky. 1984) (ruling as unprotected speech professor's comments about school's real estate curriculum because the comments constituted a "personal grievance"), *with Johnson v. Lincoln University,* 776 F.2d 443 (3rd Cir. 1985) (holding as protected speech professor's comments on faculty reductions, student enrollment, and grade inflation, even though the topics were an outgrowth of personal disputes within the chemistry department, because "questions of educational standards and academic policy" are broad and implicate matters of public concern).

Is faculty advocacy around a "no confidence" vote protected speech? Different panels in the same court have looked at similar facts, and reached opposite conclusions.

> *Clinger v. New Mexico Highlands University*, 215 F.3d 1162 (10th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001): A faculty member who was denied tenure sued the university on a number of grounds, including the claim that she was retaliated against, in part, for her "advocacy before the Faculty Senate of a 'no confidence' vote with respect to four members of the Board of Regents in light of their purported failure to comply with an internal policy on the appointment of a new president." She argued that such speech was protected under the First Amendment. The court rejected that argument, finding the challenge essentially one about the "internal structure and governance" of the university, and concluding that such "matters of this nature 'rarely transcend the internal workings of the university to affect the political or social life of the community.'" And so, the court concluded that "[t]he First Amendment does not require public universities to subject internal structural arrangements and administrative procedures to public scrutiny and debate."
>
> *Gardetto v. Mason (Eastern Wyoming College)*, 100 F.3d 803 (10th Cir. 1996): A female professor's speech was found to be protected under the matters-of-public-concern test. She spoke out in favor of a no confidence vote against the college president and criticized in public the president's reduction-in-force (RIF) plan. The court found her call for the no-confidence-vote as "implicat[ing] broader concerns about [the president's] possible misrepresentation of his educational status, his lack of integrity and leadership, and the corresponding decline in student enrollment" at the college. The court further found her comments about the RIF plan a matter of public concern, because she had "a well informed perspective on expenditures of public funds" in the debate.

For commentary criticizing the application of the matter-of-public-concern test to professors, *see* Alisa

W. Chang, "Resuscitating the Constitutional 'Theory' of Academic Freedom: A Search for a Standard Beyond *Pickering and Connick*," 53 STAN. L. REV. 915, 938 (2001) ("The first and perhaps most fundamental problem with the automatic application of the *Pickering/Connick* rules to academic contexts is the fact that university professors are not employees in the traditional sense."); Matthew W. Finkin, "Intramural Speech, Academic Freedom, and the First Amendment," 66 Tex. L. Rev. 1323 (1988) (critiquing the application of *Connick* to intramural faculty speech).

QUERY: Faculty senates have recently spoken out against cooperating with the U.S. Departments of Justice and Homeland Security in Patriot Act investigations. One such case is the faculty senate at the University of Wisconsin at Oshkosh. *See, e.g.*, Michael Arnone, "Faculty Senate at Oshkosh Urges Professors Not to Cooperate With Patriot Act Investigations," *The Chronicle of Higher Education* (Mar. 11, 2003). Do you think such expression by faculty at public institutions would be protected speech under the matter-of-public-concern test?

VI. Faculty Unions and Faculty Senates

What is the role of faculty senates when the faculty chooses to unionize?

- In some court cases, faculty senates have disbanded after the election by faculty of collective bargaining. *See, e.g., In re: Keene State College Educ. Ass'n*, 120 N.H. 32 (1980) (eliminating faculty committees within managerial prerogative of university administration); *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984) (abolishing faculty senates and establishing "meet and confer" sessions for faculty union members). Such governance changes are sometimes initiated by the administration, and other times by faculty unions.

- In other situations, unions delegate some authority to the senate, whereby the union deals with economic concerns and the senate with academic ones.

- In still other cases, collective bargaining has not modified faculty senate jurisdiction.

In at least one early case the NLRB raised the question, but did not determine, whether the Northeastern University faculty senate itself constituted a faculty union. The board opined:

> Undoubtedly, this will affect the ability of faculty members to utilize existing governance structures in dealing with the administration over "rates of pay, wages, hours of employment, or other conditions of employment." The precise impact which selection of a bargaining representative will have upon such existing structures, however, is impossible to predict at this time. . . . [It is] unwise for this Board . . . to create the impression that selection of a bargaining representative need not necessarily have an impact on existing governance structures.

Northeastern University, 218 NLRB 247 (1978). *See generally* the November-December 1987 issue of *Academe: Bulletin of the American Association of University Professors*, which focuses on collective bargaining and faculty governance. The issue includes the following articles: Larry E. Glenn, "The Faculty Senate and the AAUP at Southern Connecticut State University" at 16; R. Thomas McDonald, "Governance on Trial" at 20; Susan Davidson Schaefer, "The Senate and the Union in the California State University System" at 12; Irwin Yellowitz, "Academic Governance and Collective Bargaining in the City University of New York" at 8. *See also* David M. Rabban, "Can American Labor Law Accommodate Collective Bargaining by Professional Employees?," 99 Yale L.J. 689 (1990).

A. State Laws

The legislature of California has recognized that shared governance and faculty unionization in colleges and universities can be compatible:

> [J]oint decisionmaking and consultation between administration and faculty or academic employees is the long-accepted manner of governing institutions of higher learning and is essential to the performance of the educational missions of these institutions. . . . Nothing contained in this chapter shall be construed to restrict, limit, or prohibit the full exercise of the functions of the faculty in any shared governance mechanisms or practices, including the Academic Senate of the University of California and the divisions thereof, the Academic Senates of the California State University, and other faculty councils, with respect to policies on academic and professional matters affecting the California State University, the University of California, or Hastings College of the Law. The principle of peer review of appointment, promotion, retention, and tenure for academic employees shall be preserved.

Cal. Gov't Code § 3561(b).

California law further provides that the scope of representation not include "[p]rocedures and policies to be used for the appointment, promotion, and tenure of members of the academic senate," unless "the academic senate" itself determines that these matters "should be within the scope of representation" or these matters are "withdrawn from the responsibility of the academic senate." *Id.* at § 3562(q)(1)(d).

The legislature of the State of Washington has taken a similar position. In enacting the recent law that extended collective bargaining rights to faculty at the University of Washington, the legislature noted its intent:

> The legislature recognizes the importance of the shared governance practices developed at the University of Washington. The legislature does not intend to restrict, limit, or prohibit the exercise of the functions of the faculty in any shared governance mechanisms or practices, including the faculty senate, faculty councils, and faculty codes of the University of Washington; nor does the legislature intend to restrict, limit, or prohibit the exercise of the functions of the graduate and professional student senate, the associated students of the University of Washington, or any other student organization in matters outside the scope of bargaining. . . .

§41.56.203, Title 41, Notes, 2002 C 34(2).

B. Case Law

The U.S. Supreme Court has ruled that the exclusion of non-union faculty members from shared governance where the faculty is unionized does not violate the non-union members' First Amendment rights of expression or association.

> *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984): In a case brought by 20 state community college faculty who were not

members of the union, the United States Supreme Court in a 5-4 decision upheld the constitutionality of the union's exclusive representation of all employees in the unit and, therefore, the state statutory provisions that restricted participation in "meet and confer" sessions to union members only. The Court found that the sessions did not violate the First and Fourteenth Amendment rights of the non-union faculty who disagreed with the union's view. The collective bargaining agreement replaced faculty senates with "meet and confer" sessions that were controlled by the faculty union and were the only fora for the formal expression of faculty views. The meet-and-confer language provided that professional employees, like faculty, may meet with their employers on matters that are outside the scope of mandatory bargaining topics. The statute recognized that "professional employees possess knowledge, expertise, and dedication which is helpful and necessary to the operation and quality of public services and which may assist public employers in developing their policies." The Court ruled that faculty "have no constitutional right to force the government to listen to their views . . . as members of the public, as government employees, or as instructors in an institution of higher education." In so ruling, the Court recognized that "there is a strong, if not universal or uniform, tradition of faculty participation in school governance, and there are numerous policy arguments to support such participation. But this Court has never recognized a constitutional right of faculty to participate in policymaking in academic institutions." Furthermore, the Court found no violation of the non-union members' rights of association and free speech because "[a] person's right to speak is not infringed when government simply ignores that person while listening to others" (in this case, faculty who were union members). The Court concluded: "Faculty involvement in academic governance has much to recommend it as a matter of academic policy, but it finds no basis in the Constitution."

The Supreme Court has also ruled that when faculty members have a meaningful role in academic decisionmaking, including faculty senates, they may be categorized as "managers" and, therefore, are not covered by the federal National Labor Relations Act, which protects the union activities of employees who work in the private sector.

NLRB v. Yeshiva University, 444 U.S. 672 (1980): The U.S. Supreme Court ruled in a 5-4 decision that faculty members at Yeshiva University were managerial employees and, therefore, excluded from coverage under the NLRA. The Court noted that "an employee may be excluded as managerial only if he represents management's interests by taking or recommending discretionary actions that effectively control or implement employer policy." The determination of managerial status is made on a case-by-case basis, and the "relevant consideration is effective recommendation or control rather than final authority." The Court reviewed the faculty functions in terms of both academic and nonacademic areas. It concluded:

> Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student

> body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.

> Nevertheless, the Court opined that "[w]e certainly are not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them." The Court also stated: Because "the Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry . . . principles developed for use in the industrial setting cannot be imposed blindly on the academic world."

Lower courts have also ruled that under specific state labor laws, which generally govern faculty in the public sector, faculty senates may not involve themselves in employment matters, which is the purview of the faculty union.

> *Central Michigan University Faculty Association v. Central Michigan University*, 273 N.W.2d 21 (Mich. 1978): The Michigan Supreme Court ruled that the college committed an unfair labor practice (ULP) when the university faculty senate passed a resolution establishing a teaching effectiveness program, which provided for the evaluation of professors by department faculty and students. The court found teacher evaluation to be a mandatory subject of bargaining between the faculty union and the administration and, therefore, the faculty senate resolution violated state labor law. At the same time, the court emphasized the college's "limited obligation to bargain before unilateral imposition of new criteria. This would not block the ultimate adoption of student evaluations as part of the criteria of teaching effectiveness; it would merely impose the reasonable burden upon the university to consult the [union] and discuss the program before its implementation."

The legal status of faculty senates and their legal authority, if any, is an evolving area of law and depends on a myriad of factors, including state law (state statutes and common law), your institution's bylaws, and the governing documents, if any, of the faculty senate. This brief overview seeks to provide you with some general legal information to take home to your campus. For specific legal guidance in this area, you should consider consulting with your institution's counsel, law professors who are familiar with higher education law in your state, and/or private lawyers who are familiar with your state law and have some kind of higher education legal experience.

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