

## Is *Yeshiva* Relevant?

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*Yeshiva* might easily never have happened. With the foolish vote of a single justice, swayed by the judicial activism of a former law-school administrator, an absurd law came into being.

Today he's known for a more recent liberal voting record, but it was his moderate conservatism that led Gerald Ford to appoint John Paul Stevens a Justice of the Supreme Court in 1975. It seems fitting that Stevens featured the theme of "learning on the job" in appearances leading up to his retirement in 2010. During the first few years of his appointment, Stevens voted to reinstate the death penalty, to restrict first amendment rights, and to oppose affirmative action in university admissions. In later decisions, however, he joined in decisions opposing or chipping away at all of these positions.

The same can be said for his service as the fifth vote in the *Yeshiva* decision, which packed a last-ditch legal fiction by an intransigent, lawbreaking employer into a poison pill still spreading through U. S. labor law. Since denying *Yeshiva*'s tenured faculty bargaining rights explicitly delineated for "professional employees" by the National Labor Relations Act (NLRA) with the fiction that participating in shared governance made them essentially "managerial" (thus excluded from NLRA protections), the majority opinion swiftly metastasized beyond the academy into hundreds of other workplaces, especially health care, with hundreds of thousands of nurses with modest "supervisory" duties losing long-established bargaining rights. (Not incidentally, the majority opinion also crushed several nascent efforts to organize physicians' unions in the managed-care industry.) By 2001, Justice Stevens had flip-flopped on the managerial exclusion and composed a dissent in the key health-care case aiming – and failing – to contain the spreading influence of his earlier assent in *Yeshiva*.

A one-time graduate student in English, Stevens's own vote, together with the views of his colleagues in the *Yeshiva* majority, may well have been informed by hazy, fatuous old-boys' club recollections of university life, as Justice Brennan's blistering dissent alleges: "The court's perception of the *Yeshiva* faculty's status is distorted by the rose-colored lens through which it views the governance structure of the modern-day university."<sup>1</sup> But the real judicial activist behind *Yeshiva* was operating on more than hazy liberal-arts experiences; he was projecting views developed as a long-serving member of campus administration. Thomas Hughes Mulligan graduated from Fordham, stayed there for his J. D., and then served in counter-intelligence, before returning to his alma mater as a law professor. From 1956 to 1971, Mulligan served as dean of Fordham Law School, until he was appointed to the Second Circuit Court of Appeals by Richard Nixon. As some of his speeches on the subject of his 1960s term as dean make clear, he

preferred power concentrated in the administration, and viewed with contempt most of the values expressed by the rising power of faculty and students.

As a long-serving administrator at an institution much like Yeshiva who had spoken out about the need to contain the rising influence of faculty, Mulligan might reasonably have recused himself from the *Yeshiva* case when it came before the Second Circuit. Instead, he took the lead among his colleagues and wrote the opinion, an astonishingly creative misconstruction of the faculty role in shared governance. Engaging in the most blatant form of judicial activism, the Second Circuit substituted its idiosyncratic judgment for the judgment of the agency assigned to interpret the National Labor Relations Act, and refused to order enforcement of the Board's decision.

Before Dean Mulligan got hold of the case, the law governing faculty bargaining rights approached crystal clarity, with the National Labor Relations Act clearly delineating those rights for "professional employees." Through the late 1960s and the '70s, faculty at institutions of all types bargained successfully, and, in public non-research institutions, unionization had swiftly become simply the norm (as was already the case for public schoolteachers, who had joined with other public-sector employees to win sweeping new legal protections for bargaining rights). When the faculty at Yeshiva organized, as at dozens of other private institutions, the National Labor Relations Board quickly certified the union and swept aside the administration's claim that faculty input over hiring and evaluation, and control over curricula and grading, turned them into "managerial employees" excluded from the Act's protections. When Yeshiva subsequently refused to bargain, the NLRB ordered them to the table.

Today, faculty at over 1,000 public college and university campuses bargain collectively. The only reason hundreds of private campuses aren't likewise organized is the specious reasoning embodied in the transparently union-hostile opinion of Dean Mulligan's Second Circuit, followed by the foggy vote of John Paul Stevens. As a matter of law, *Yeshiva* is a travesty and should be overturned.

As a matter of practice, however, *Yeshiva* is losing relevance. Since three-quarters of all faculty are now graduate students or lecturers on casual appointment, they can hardly be described as managerial, and can't be denied bargaining rights on that basis.

Instead, today, private institutions with a religious affiliation rely on defenses based in the claim that faculty employees at "religious institutions" are excluded from NLRA protections. While the NLRB has consistently distinguished between institutions with a substantial religious character and those with a religious affiliation, a 2002 D. C. Circuit Court opinion involving the University of Great Falls, a small Montana institution, radically undermined the Board's authority. Under *Great Falls*, courts may compel the NLRB to accept at face value the claims to a religious exemption of any institution that "presents itself to the public" as a religious institution. Denying NLRB the power to distinguish between real and false claims to the exemption is a transparent assault on long-established employee rights and protections – until this bad law is overturned, under the ruling, essentially, any employer that claims the exemption

may have it. Unlike *Yeshiva*, the ruling applies comprehensively – to part-time faculty, students, and non-teaching staff.<sup>2</sup>

Sadly, this sweeping, radical new barrier to organizing came into being in much the same way that *Yeshiva* did, with the determination of a conservative activist Circuit Court judge. Backed by Jesse Helms and appointed by Ronald Reagan to fill the seat vacated by Antonin Scalia's elevation to the Supreme Court, and at this writing the chief justice of the D. C. Circuit, David Sentelle has been described by *The New York Times* as "one of the federal judiciary's most extreme conservatives."<sup>3</sup> Sentelle's vote was instrumental in overturning the convictions of Oliver North and John Poindexter. He replaced the moderate Robert Fiske with the right-wing ideologue Kenneth Starr as independent counsel in the Whitewater investigation. A long-term Republican party operative, even four years after his appointment to the federal bench, Sentelle was still publishing right-wing screeds against "leftist heretics" who he claimed sought to establish "a collectivist, egalitarian, materialistic, race-conscious, hyper-secular, and socially permissive state."<sup>4</sup>

Sentelle's transparently activist opinion in the 2002 *Great Falls* decision gutted the NLRB's authority so far beyond reason that several attempts were mounted as a test of the ruling. The best of these came forward in March 2009, during the first year of the Obama administration. Fully supported by the NLRB's ruling that the school's ties to the Presbyterian Church were too insubstantial to justify a religious exemption, the UAW-affiliated faculty of Carroll College, like the faculty of Yeshiva, simply came to Federal court seeking enforcement of the Board's ruling in its case. But who did the NLRB and the faculty union find waiting for them? A fellow named Thomas Griffith, who arrived at the D. C. Circuit Court directly from a five-year stint as general counsel and assistant to the president of Brigham Young University.

Unsurprisingly for the recent former general counsel of a religiously-affiliated university, Griffith's 2009 opinion in the *Carroll* case bluntly applies the 2002 ruling advanced by his sitting chief: "Under *Great Falls*, Carroll is exempt from the NLRB's jurisdiction. We thus need not address Carroll's argument that its faculty members are managerial employees who fall outside the protection of the NLRA. We grant Carroll's petition for review, vacate the decision and order of the NLRB, and deny the Board's cross-petition for enforcement."<sup>5</sup>

So now what? When we face these shabby rulings, does it make sense for us to assume that the decision proceeded from ultimately reasonable arguments advanced by truth-seekers? Are they arguments put forward in an adversarial system but refereed with a reasonable degree of impartiality and with the prospect of eventual accountability in higher courts? Of course not. We need to see clearly that these are specious, intellectually dishonest arguments by activist reactionaries abusing the power of the bench to deny fundamental human rights. We need to see clearly that these rulings are the product of a flawed, inherently political process that is likely to disadvantage both truth and justice for decades to come. Few observers would say, for instance, that the current Supreme Court is the place to test David Sentelle's opinion in *Great Falls*.

But if the Supreme Court can't help us, what should we do? If the United Auto Workers and American Federation of Teachers aren't willing to spend any more of their resources fighting a corrupt judiciary, what should we do?

Ultimately what *Yeshiva* (1980), *Great Falls* (2002) and *Carroll* (2009) teach us is simple: what matters more than the law is the movement. The individuals who used (or abused) their power in these decisions were part of a social reaction to liberation movements of the 1960s and 1970s, including workplace democracy, feminism, and civil rights. They aren't lone wolves; they're conservative activists bound in a net of common culture, values, and mutual support. They didn't have law, precedent, or reason on their side; they simply imposed their will and made new law out of the power represented by their movement.

It would be tremendously foolish if we permitted any of these rulings to constrain us. We can build a movement with the students, nurses, young lawyers, schoolteachers, and countless others affected by exploitative and super-exploitative patterns of employment. We can overcome this dense lattice of hostile law. We can and must imitate the 1960s movement of public employees whose self-organization was illegal and yet also an unstoppable force for writing new law reflecting truth, justice, fairness, and democracy.

Is *Yeshiva* relevant? Are *Great Falls* and *Carroll*? Not to a movement, no – no more so than any of the thousands of municipal statutes once theoretically constraining the movement of schoolteachers and sanitation workers. The tightest straps on those schoolteachers and sanitation workers were never the law; they were emotional and intellectual and habitual – habits of deference to, and trust in, authority. They burst free. We can too.

## Notes

1. 444 U. S. 672, 702 (1980).
2. See *University of Great Falls v. NLRB*, 278 F.3d 1335 (D. C. Cir. 2002).
3. *New York Times*, August 17, 1994, quoted in Joe Conason and Gene Lyons, *The Hunting of the President* (New York: Macmillan, 2000), 131 (cited 387).
4. See Sentelle's review of Robert H. Bork's *The Tempting of America: The Political Seduction of the Law*, "The Clerisy of Power," *Harvard Journal of Law and Public Policy* 14/1 (1991): 228.
5. See *Carroll College, Inc., v. NLRB*, 558 F.3d 568, 575 (D. C. Cir. 2009).