ADOPTING OHIO SENATE BILL 5: THE ROLE OF THE PUBLIC UNIVERSITY PRESIDENTS

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> *The legislature is expected to address pension reform early. Language is being developed and not yet available; major changes . . . are being discussed [by Ohio's political leadership—changes that will require employees pay a portion of the employers' contributions]. This will likely be a major issue for faculty and staff. There may be opportunities for universities as employers to save money, but it will come out of the wallets of employees. . . . The Ohio and regional chambers of commerce has issued a report that recognizes the advantages of defined benefit [pension] plans and a retire/rehire policy [that allows senior university administrators to simultaneously receive a full pension and their full salary] . . . .*[1]

I. INTRODUCTION

In March 2011 the Ohio General Assembly passed Senate Bill Five ("S.B. 5"), a measure that would have banned collective bargaining by public university faculty members and severely limited bargaining rights for other public employees.[2] Ohio voters

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† The opinions contained in this article are those of the author and do not necessarily reflect those of Albany Law School or the *Albany Law Review*.

[1] Minutes of the Meeting of the Inter-University Council of Ohio 3 (Jan. 11, 2011) [hereinafter Jan. 11, 2011 Meeting Minutes] (on file with Albany Law Review).

[2] S.B. 5, 129th Gen. Assemb., Reg. Sess. (Ohio 2011). The bill was sent to Governor Kasich and signed on March 31, 2011. *Status Report of Legislation: 129th General Assembly-Senate Bills*, OHIO LEGISLATIVE SERV. COMM'N, http://www.lsc.state.oh.us/status129/senatebills.htm

decisively rejected S.B. 5 in a referendum election eight months later, preventing it from taking effect.[3] In response to public records requests I have received thousands of pages of documents that describe the role of public university presidents in connection with S.B. 5. Based on this newly available information, this article examines the actions, and analyzes the arguments, of senior university officials.

Together with similar collective bargaining legislation in Wisconsin, S.B. 5 triggered a national debate about labor policy and the role of the middle class in American life.[4] Besides those general concerns, however, the events hold special significance for our understanding of universities. S.B. 5 singled out university faculty for the most stringent treatment of any group and it did so via a provision—known as the "*Yeshiva* amendment"—that Ohio's public university presidents drafted and promoted in secret.[5]

The original version of S.B. 5 would have eliminated collective bargaining for public employees in Ohio, including employees of the state's public universities.[6] In late February 2011 legislative leaders substituted an amended bill, one that reinstated bargaining but limited its permissible subjects and effectively allowed public employing bodies to impose their own last offers at the end of process with no further recourse by employees.[7] The *Yeshiva* amendment further amended the bill by reclassifying university faculty as managers who were ineligible for bargaining, provided

(follow "0005" hyperlink).

[3] The referendum took place on November 8, 2011; as reported by the Ohio Secretary of State, 38.67% of voters approved S.B. 5, and 61.33% disapproved. *See Live Election Results: Election Night November8, 2011*, OHIO SEC'Y OF STATE, (Nov. 8, 2011), http://vote.sos.state.oh.us/pls/enrpublic/f?p=130:6:0. For discussion of the political implications see Henry J. Gomez, *Senate Bill 5 Repeal Sets Table for Democrats and President Barack Obama in 2012: Analysis*, CLEVELAND.COM (Nov. 8, 2011), http://www.cleveland.com/politics/index.ssf/2011/11/senate_bill_5_repeal_sets_tabl.html.

[4] *See* Reginald Fields, *8,500 Union Protesters Rally at Ohio Statehouse over Senate Bill* 5, CLEVELAND.COM (Mar. 1, 2011), http://www.cleveland.com/open/index.ssf/2011/03/ohio_senate_republicans_offer.html; Sabrina Tavernise & A.G. Sulzberger, *Thousands March on State Capitols as Union Fight Spreads*, N.Y. TIMES, Feb. 22, 2011, http://www.nytimes.com/2011/02/23/us/23ohio.html?pagewanted=all ("[T]he battle moved to Ohio . . . .").

[5] *See* Letter from Bruce Johnson, President & CEO, Inter-Univ. Council of Ohio, to Kevin Bacon, State Senator, Ohio Senate (Feb. 25, 2011) [hereinafter Letter from Johnson to Bacon] (on file with Albany Law Review).

[6] *See* Ohio Legislative Serv. Comm'n, Ohio Senate Bill Analysis as Introduced, S.B. 5, at 1 (2011), *available at* http://www.lsc.state.oh.us/analyses129/s0005-i-129.pdf.

[7] *See* Andrew Zucker, *Ohio Senate Republicans to Amend SB-5, Drop Complete Ban on Collective Bargaining*, THE NEW POLITICAL (Feb. 23, 2011), http://thenewpolitical.com/2011/02/23/ohio-senate-republicans-to-amend-sb-5-drop-ban-on-collective-bargaining.

only that the faculty participated in curricular, faculty hiring, or similar decisions.[8] Since every university faculty member does those things, the amendment effectively banned bargaining by faculty.[9] The amendment took its name from *NLRB v. Yeshiva University*, a United States Supreme Court decision holding that private university professors qualified as "[s]upervisors and managerial employees" under the National Labor Relations Act and were therefore excluded by the Act from collective bargaining.[10]

Ohio's university presidents effectively replaced traditional conceptions of the *university*, the *faculty*, and the *administration* with a standard labor law model, one restricted to the categories *management* and *employees*—both of which operate under presidential direction.[11] The presidents did so, I argue, in an effort to transform higher education institutions into what Benjamin Ginsberg calls "the all-administrative university."[12] Consistent with that view, the presidents identified their institutions with themselves, equating presidential authority with institutional freedom and creativity.[13]

This article has four parts. First, it chronicles the presidents' actions, which they took pains to conceal from public view. The presidents acted through the agency of the Inter-University Council ("IUC") of Ohio, a statewide association of public university administrations that represented the presidents in extended discussions with the Governor's office and legislators. Second, the article analyzes the presidents' claims that S.B. 5 would relax regulatory restraints and that faculty should not collectively bargain because they perform managerial functions, such as deciding on the curriculum and participating in the hiring and promotion of faculty members. These claims, I argue, are mistaken or, at least they are mistaken given the traditional conception of the

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[8] *See* Ohio Legislative Serv. Comm'n, Ohio Senate Bill Analysis as Reported by Subcomm. Ins., Commerce, & Labor, Sub. S.B. 5, at 2 (2011), *available at* http://www.lsc.state.oh.us/analyses129/s0005-rs-129.pdf [hereinafter Bill Analysis as Reported].

[9] Marc Kovac, *Senate Bill 5 Provisions*, RECORDPUB.COM (Oct. 23, 2011), http://recordpub.net/news/printer_friendly/5113549.

[10] NLRB v. Yeshiva Univ., 444 U.S. 672, 674, 679 (1980).

[11] *See Hearing on Am. Sub. S.B. 5 Before the H. Commerce & Labor Comm.*, 129th Gen. Assemb., Reg. Sess. 5 (Ohio 2011) [hereinafter Johnson Testimony: Mar. 16, 2011] (testimony of Bruce Johnson, President & CEO, Inter-Univ. Council of Ohio on Mar. 16, 2011) (on file with Albany Law Review).

[12] *See* BENJAMIN GINSBERG, THE FALL OF THE FACULTY: THE RISE OF THE ALL-ADMINISTRATIVE UNIVERSITY AND WHY IT MATTERS 38 (2011) ("On a firm foundation of bureaucratic bloat, the all-administrative university can be built.").

[13] *See* Johnson Testimony: Mar. 16, 2011, *supra* note 11, at 6.

university. Third, the article examines the presidents' own accounts of their actions, once their roles became known. Finally, I argue that the presidents' actions and words were inconsistent with the traditional idea of shared university governance, and comported instead with the model of an "all-administrative university."

Part II examines the presidents' efforts, commencing in fall 2010, to obtain far-reaching statutory changes that would *deregulate* and *reform* their institutions. These efforts were carefully concealed from faculty and the public. Part III turns to the IUC's support for S.B. 5 and the *Yeshiva* amendment. The IUC decided to largely avoid quantifying or even documenting any claims of financial savings; it emphasized instead the need to *deregulate* in order to make universities more *effective*.[14] Part IV examines the presidents' public statements in March 2011 after IUC's position on S.B. 5 and sponsorship of the *Yeshiva* amendment became known. The presidents went to great lengths trying to conceal their individual positions on S.B. 5; this part concludes that, as of mid-February 2011, virtually every president favored a ban on faculty bargaining, though only one admitted doing so. The conclusion argues that the actions and words of the presidents reflected their implicit adherence to the "all-administrative" model.

II. VERY AGGRESSIVE RECOMMENDATIONS: THE PRELUDE TO S.B. 5

In fall 2010, the presidents of Ohio's public universities decided to undertake a major political initiative. The state's gubernatorial election took place in November and John Kasich, the Republican candidate, was favored.[15] Bruce Johnson, the president of IUC, described the political plans at an October 12, 2010 meeting of university presidents:

> Either leadership scenario [the election of either candidate] will result in discussions about regulatory relief. IUC committees are working to develop a comprehensive package of options for the General Assembly to consider; these options will provide additional flexibility that institutions

[14] *See id.* at 3.

[15] Sean Trende, *Kasich Still Favored in Ohio Governor's Race*, REAL CLEAR POLITICS (Sept. 29, 2010), http://www.realclearpolitics.com/articles/2010/09/29/kasich_still_favored_in_ohio_gov_race_107363.html. Cindy McQuade, an IUC staffer, asked university officials to suggest items for an "IUC Deregulation 'Wish' List" in August 2010. E-mail from Cindy McQuade, Vice President for Operations, Inter-Univ. Council of Ohio, to iuc_hr@lists.acs.ohio-state.edu & iucprovosts@lists.acs.ohio-state.edu (Oct. 1, 2010) (on file with Albany Law Review).

will need if the state cannot maintain or increase support.[16]

At the same meeting the presidents learned that "all committees [were] working to develop the IUC regulatory reform list . . . ."[17] At that point the entries included items such as "multi-campus shared services and outsourcing" and intercampus group purchases of employee and student insurance.[18]

The next president's meeting, in November, followed John Kasich's election.[19] Mike Suver, a vice president of IUC, reported that IUC hoped "to get all reforms in one bill, and avoid piecemeal efforts."[20] He warned, however, that "[w]e can expect controversy from affected stakeholders."[21] Bruce Johnson also noted that a "Republican-controlled administration and legislature . . . tend to have a more cynical view of the public sector."[22]

Collective bargaining was a major concern in December 2010. Discussing a December 9, 2010 news item reporting that the Governor-elect supported changes in public collective bargaining, an e-mail identifying Mike Suver as the sender by name remarked that the news was "encouraging" and demonstrated that universities were "making progress on our regulatory mandate relief list already."[23] IUC did not know precisely how the Governor-elect planned to proceed, however.[24]

The initiative crystallized in mid-December, after Bruce Johnson and two members of the IUC Executive Committee met with Wayne Struble, an aide to Governor Kasich.[25] The agenda included six

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[16] Minutes of the Meeting of the Inter-University Council of Ohio 3 (Oct. 12, 2011) [hereinafter Oct. 12, 2011 Meeting Minutes] (on file with Albany Law Review).

[17] *Id.* at 2.

[18] *Id.*

[19] *See* Minutes of the Meeting of the Inter-University Council of Ohio 1 (Nov. 9, 2010) [hereinafter Nov. 9, 2010 Meeting Minutes] (on file with Albany Law Review).

[20] *Id.* at 2.

[21] *Id.*

[22] *Id.* at 3.

[23] E-mail from Cindy McQuade, Vice President of Operations, Inter-Univ. Council of Ohio, to iuc_bfo@lists.acs.ohio-state.edu & iuc_hr@lists.acs.ohio-state.edu (Dec. 10, 2010) (on file with Albany Law Review).

[24] *See generally* Letter from the Exec. Comm. of the Inter-Univ. Council of Ohio to John Kasich, Governor, State of Ohio (Jan. 19, 2011) [hereinafter Letter to Kasich] (on file with Albany Law Review) (including "Public Employee Collective Bargaining" on a list of topics for discussion with the Governor).

[25] *See* David Hodge & Roderick McDavis, Inter-Univ. Council of Ohio, Wayne Struble Meeting Agenda (Dec. 13, 2010) (on file with Albany Law Review). Johnson reported at a December 14, 2010 meeting of the IUC presidents that "Struble met yesterday with IUC President Johnson, IUC Chair David Hodge, and Past Chair Rod McDavis." Minutes of the Meeting of the Inter-University Council of Ohio 3 (Dec. 14, 2010) [hereinafter Dec. 14 2010 Meeting Minutes] (on file with Albany Law Review).

items; Two items—"The IUC and collaboration" and "Moving forward and working together"—highlighted the presidents' willingness to cooperate with the new administration. [26] "Restructuring and Regulatory Reform" was another item.[27] IUC had been discussing charter universities—an arrangement to free institutions from state regulations generally.[28] The Wayne Struble meeting agenda did not, however, mention collective bargaining.[29]

IUC's description of its political program visibly changed after that meeting. A few days later the presidents held their regular monthly meeting, [30] and David Hodge, President of Miami University, led a discussion of charters.[31] According to the minutes:

> Hodge stressed the importance of a unified message from IUC, and the need to develop a strategy on how to approach the issue. . . . Struble said that the proposal will be more powerful if IUC has a unified position.
>
> President Gordon Gee [of Ohio State University] provided a historical perspective on this issue, which arises from the dilemma that higher education's share of the state budget continues to shrink. . . . In the past, IUC institutions pursued this option individually, with no results. The proposal now is to try again in this environment, with the potential for more success within a deregulation approach, and in a common approach for which all institutions benefit. . . . Working together is the right thing to do for individual institutions and for the state.
>
> President Johnson said IUC has a choice on deregulation strategy, and we can pursue both strategies: (1) do as before, listing all the state's constraints; (2) work to develop the charter status, which will wholesale put aside these constraints. Wayne Struble indicated interested [sic] in the second approach. The new administration thinks this is the proper structure for us to operate, regardless of financial

[26] Hodge & McDavis, *supra* note 25; *see also* Dec. 14, 2010 Meeting Minutes, *supra* note 24, at 4 ("Working together is the right thing to do for individual institutions and for the state.").

[27] Hodge & McDavis, *supra* note 25. The remaining items on the agenda were "Introductions," "Higher Education as economic development," and "Concerns with the Chancellor's budget submission." *Id.*

[28] *See* Dec. 14, 2010 Meeting Minutes, *supra* note 25, at 3–4. "Restructuring" probably meant "charters." *See id.* at 3; Hodge & McDavis, *supra* note 25.

[29] *See* Hodge & McDavis, *supra* note 25.

[30] Dec. 14, 2010 Meeting Minutes, *supra* note 25.

[31] *See id.* at 3. Hodge chaired IUC's meeting. *Id.*

implications. We should not link this to funding.[32]

Thus, the regulatory reform agenda became more ambitious, and presidents were urged to "work[] together."[33] The discussion ended with a "consensus to go forward with the two-pronged deregulation strategy—charter university designation that is all encompassing . . . and a detailed list of specific deregulation recommendations from which the legislature could select."[34]

Charter status would presumably eliminate the obligation to bargain collectively. Johnson's report to IUC's Human Resources Committee on December 16, 2010, two days later, singled out collective bargaining.[35] Under the heading "Deregulation," Johnson listed "Charter University" and "Collective Bargaining."[36] According to Johnson, the former offered a comprehensive solution: "IUC is actively pursuing regulatory relief, possibly through a new 'charter university' provision. All institutions would be eligible as an option under IUC's proposal, based on not-yet-determined mission-based criteria [but] IUC will not present this proposal with any link to funding implications."[37]

With regard to collective bargaining, "Johnson asked committee members what the impact will be if collective bargaining is reformed or repealed."[38] He also revealed that IUC's collective bargaining initiative would remain secret from faculty members, university employees, and the public.[39] According to the minutes, "Johnson said there will be campus communication issues when the issue [of collective bargaining] is addressed in the legislature and covered by the media."[40] Clearly, he did not expect the presidents to discuss collective bargaining in public before that happened.

Johnson reported on "Restructuring and Regulatory Reform" at length when the presidents met in January 2011.[41] According to the minutes:

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[32] *Id.* at 3–4.

[33] *Id.* at 4.

[34] *Id.*

[35] Minutes of the Meeting of the Human Res. Comm. of the Inter-University Council of Ohio 2 (Dec. 16, 2010) [hereinafter Dec. 16, 2010 Human Res. Comm. Meeting Minutes] (on file with Albany Law Review).

[36] *Id.*

[37] *Id.* "Funding implications" were potentially divisive, since institutions in the position of Ohio State and Miami University might well accept less state funding in exchange for regulatory relief but institutions such as Cleveland State and Youngstown State might not.

[38] *Id.*

[39] *Id.* ("[T]here will be campus communication issues when the issue is addressed . . . .").

[40] *Id.*

[41] Jan. 11, 2011 Meeting Minutes, *supra* note 1, at 2.

> Johnson said he is optimistic that regulatory reform will be a significant piece of Governor Kasich's budget. Major items of the IUC reform package are being developed and discussed, though it is unknown whether they will be pursued in the budget or as separate legislation. IUC has submitted our very aggressive recommendations to the Governor's senior staff. It is still unknown whether we will get the "charter" university language (wholesale regulatory relief) or select areas of reform (e.g., construction reform, civil service reform, collective bargaining reform, etc.). The details are still unknown but we are making progress.
>
> Council members can use regulatory reform in discussion, as part of the IUC message. The business community is coming onboard with this approach; we continue to work to garner business leaders' support. . . .
>
> Council members discussed the importance of IUC speaking in one voice. Our message is compromised and weakened if not clear and singular. It can be confusing when legislators are getting many messages from numerous constituencies. IUC will work with its communications consultant to better define the message with details; presidents will need to articulate the impact as it relates specifically to their campuses. We will likely be asked but do not want to quantify savings on regulatory reform. We can provide examples but should resist quantification. It is not simply about money, but also about time savings and administrative costs. Campuses have had to hire attorneys and auditors to comply with additional regulations. For now, message should be focus [sic] on regulatory reform . . . .[42]

Thus, IUC was discussing its "*very aggressive*" proposals with political officials and with the business community, but not with university faculty.[43] If university shared governance meant anything at this point, it denoted shared governance with the business community and political leaders. Moreover, presidents "should resist quantification" and instead "articulate the impact [of regulatory reform] as it relates specifically to their campuses"—that is, supply anecdotes.[44]

The presidents wrote Governor Kasich on January 19, 2011

[42] *Id.* at 2–3.
[43] *See id.* at 2.
[44] *Id.*

explaining that they "want[ed] to make sure [he] underst[oo]d how fervently [they] support[ed] the concept of regulatory reform."[45] The letter listed "areas where universities could be relieved of or removed from compliance with current state laws" including "the Administrative Procedures Act," "Public Works Law," "Civil Service," "Purchasing," "OBM [(Office of Budget and Management)] Regulation," "Public Improvements," and "Public Employee Collective Bargaining."[46] The letter noted that charter universities represented "one way that regulatory reform could be accomplished."[47]

Carol Cartwright, President of Bowling Green State University ("BGSU"), wrote Governor Kasich on the same day, echoing IUC's letter.[48] In fact, she included the very same list of areas for reform.[49] However, where IUC urged that universities "be relieved of or removed from compliance with"[50] the statutes on the list, Cartwright "ask[ed] that state universities be specifically exempted from" those statutes.[51] Applied to collective bargaining, that would mean *eliminating* rather than *reforming* it—a distinction about to be become significant.

Two days later one president, Ronald Berkman of Cleveland State University, e-mailed Johnson.[52] Berkman expressed "surprise" because the letter to Governor Kasich

> endors[ed] a concept that had been the subject of very little discussion in the President's meeting. I don't recall any discussion about us formally taking a postion with the Governor. i [sic] have Board members who are upset by seeing this letter without having an opportunity to consider this proposal . . . . Maybe I missed something, but we seem to have eliminated the comprehensive discussions we have had [on] a number of issues, most of far less potential import

[45] Letter to Kasich, *supra* note 24, at 1.

[46] *Id.*

[47] *Id.*

[48] Letter from Carol A. Cartwright, President, Bowling Green State Univ., to John Kasich, Governor, State of Ohio (Jan. 19, 2011) [hereinafter Letter from Cartwright to Kasich] (on file with Albany Law Review).

[49] *Compare* Letter to Kasich, *supra* note 24, *with* Letter from Cartwright to Kasich, *supra* note 48.

[50] Letter to Kasich, *supra* note 24.

[51] Letter from Cartwright to Kasich, *supra* note 48.

[52] E-mail from Ronald M. Berkman, President, Cleveland State Univ., to Bruce Johnson, President & CEO, Inter-Univ. Counsel of Ohio (Jan. 21, 2011) (on file with Albany Law Review).

then this one, to rush to take a formal position.[53]

Berkman did not identify particular areas of concern, such as collective bargaining.[54] Nonetheless, his e-mail is the only record I have found in which an identifiable president expresses reservations about any part of IUC's agenda for "reform."

III. THE IUC AND S.B. 5

A. Collective Bargaining Reform and a "Minority" of Presidents

Johnson e-mailed the presidents on February 22, 2011, stating: "I am prepared to testify in support of SB 5 today and have attached my testimony. . . . After speaking with each of you, I included a paragraph indicating that some of our members would prefer reform of Ohio's public sector collective bargaining law rather than elimination."[55]

The version of S.B. 5 pending before the General Assembly on February 22, 2011 barred collective bargaining by public employees in general.[56] Johnson noted that the bill "expressly states that employees of a state institution of higher education do not have collective bargaining rights" and testified that "[t]he IUC supports the changes to law as recommended in Senate Bill 5 . . . ."[57] Regarding the division of opinion among the presidents, Johnson said, "[w]hile the IUC as a whole agrees that the current collective bargaining law equates to over-regulation . . . [a] . . . minority of IUC presidents believe that the state legislature should amend but not repeal the public sector collective bargaining laws that apply to public universities."[58]

Johnson did not identify the presidents in the minority or say how they would reform collective bargaining.[59] Interestingly, however, he cited federal labor law and the *Yeshiva* decision immediately

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[53] *Id.*

[54] *See id.*

[55] E-mail from Bruce Johnson, President & CEO, Inter-Univ. Council of Ohio, to iucpresidents-bounces@lists.service.ohio-state.edu (Feb. 22, 2011) [hereinafter E-mail from Johnson to iucpresidents] (on file with Albany Law Review).

[56] *See Hearing Before the S. Ins., Commerce & Labor Comm.*, 129th Gen. Assemb., Reg. Sess. 3 (Ohio 2011) [hereinafter Johnson Testimony: Feb. 22, 2011] (testimony of Bruce Johnson, President & CEO, Inter-Univ. Council of Ohio on Feb. 22, 2011) (on file with Albany Law Review). The state's political leadership clearly decided to take up a general collective bargaining measure before addressing charters or the presidents' deregulation agenda. The released records shed no light on when or why this happened. *Id.*

[57] *Id.*

[58] *Id.*

[59] *See id.* at 3–4.

after the reference to a "minority" of presidents.[60] "[The IUC] note[s] that the National Labor Relations Act governs private employers," Johnson said, and pointed out that *Yeshiva* had construed the Act to exclude most faculty members from bargaining.[61]

Since the pending version of S.B. 5 precluded all bargaining, it seemed unclear why Johnson had discussed *Yeshiva*. As originally written, however, Johnson's statement said that the "*minority*" of presidents—the "reformers," and not the IUC as a whole—favored a federal labor law model for Ohio and the *Yeshiva* decision.[62] According to that earlier draft of the testimony, the majority wanted to ban bargaining by all university employees, including faculty, while the minority favored a ban on faculty bargaining alone.

B. THE CASE FOR S.B. 5

1. Johnson's Testimony and Jacobs's Letter

With a single exception, Johnson's testimony comported with his admonition not to quantify. He testified that S.B. 5 "will help us build an environment that encourages and rewards creativity, that fosters efficiency, and that provides for pay increases based upon merit in order to promote even greater productivity."[63] He called for "free[ing] public higher education from the shackles of inefficiency and inflexibility" and freedom from "excessive regulation [that] severely hampers the public university's ability to fully and most efficiently utilize . . . scarce operating resources . . . ."[64] But Johnson did not explain how that would happen or get more specific.

The exception came early in Johnson's statement, when he cited figures that President Lloyd Jacobs of the University of Toledo had supplied in a letter to the Senate.[65] According to Jacobs's letter—as described by Johnson—abrogating union agreements at the University of Toledo would produce savings of "approximately $1 million in labor costs," plus "approximately $8 million more . . . in labor costs . . . to deal with ineffective employees," and a further

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[60] *Id.* at 4.

[61] *See id.* Johnson cited other features of federal labor as well, such as the ease with which unions could be decertified and a more limited scope of bargaining. *See id.*

[62] *See* discussion *infra* Part IV.E and accompanying footnotes.

[63] Johnson Testimony: Mar. 16, 2011, *supra* note 11, at 6.

[64] *Id.*

[65] *Id.* at 3.

"$2.6 million [in additional savings by] eliminat[ing] the unnecessary duplication of personnel."[66] According to Johnson, this represented a "potential . . . sav[ings of] as much as $10 million" at "just one institution."[67] Jacobs's letter itself, barely longer than a single page, provided no support for the figures it cited.[68]

After describing $11.6 million in savings—the total of the items cited by Johnson—Jacobs's letter said:

> Our ability to assign faculty to classroom work, research, or service might be improved under a scenario which includes the passing of Senate Bill 5 . . . . [O]ur unionized faculty are among our most important assets. We greatly value their intellect, however, we believe that as much as $10 million in potential savings could result from modification of statute law as reflected in Senate Bill 5.[69]

Jacobs apparently intended to say that ending *faculty* collective bargaining would save $10 million. He provided no clue, however, about how. Would the university end instruction in certain subjects and dismiss the teaching faculty? Which subjects? Would the university replace faculty with low-cost adjuncts? Would such measures diminish students' educational experience? Jacobs did not elaborate.

An indication of how little weight Johnson attached to Toledo's figures is that he misread them. Johnson cited $10 million as the sum total of all savings at the University of Toledo from S.B. 5—not as the savings associated with an end to *faculty* bargaining.[70] However, Jacobs had already described $11.6 million in savings—$1 million plus $8 million plus $2.6 million—before citing the $10 million figure.[71] In fact, the letter claims $21.6 million in savings and Johnson simply misread it.[72] Nor, so far as I know, has the error been noticed until now; it was not corrected in Johnsons' Senate testimony on March 16, 2011.[73] Apparently no one paid enough attention to notice the error—even though only Jacobs's figures were the only figures cited to support IUC's argument about

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66 *Id.*

67 *See id.*

68 Letter from Lloyd A. Jacobs, President, Univ. of Toledo, to Kevin Bacon, Chairman, Senate Ins., Commerce & Labor Comm., Ohio Senate (Feb. 16, 2011) [hereinafter Letter from Jacobs to Bacon] (on file with Albany Law Review).

69 *Id.*

70 *See* Johnson Testimony: Mar. 16, 2011, *supra* note 11, at 3.

71 *See* Letter from Jacobs to Bacon, *supra* note 68.

72 *See id.*

73 Johnson Testimony: Mar. 16, 2011, *supra* note 11, at 3.

savings.[74]

2. The "Data Request"

To prepare for Johnson's testimony, the IUC asked university human resources officials to forward information about unionization on their campuses.[75] Johnson ended up using little of the information, however; he testified that the number of unions and employees and the categories of employees who bargained varied from campus to campus, and argued that "[t]he point is, we have fourteen very different public universities . . . and they are all significantly impacted."[76] Thus, Johnson inferred "significant[] impact[]" from the mere fact that the number of unions and covered employees varied from campus to campus—a non sequitur.[77] If anything, the wide variation from campus to campus (at one university, fifteen percent of employees were unionized; at another, fifty-two percent)[78] suggested that the *significance* of collective bargaining varied widely too.

Though Johnson made little of the "data request," the responses warrant attention. For example, Robert J. Pietrykowski at Cleveland State portrayed collective bargaining as deeply flawed.[79] The problem, according to Pietrykowski, was that administrations did not always achieve a complete victory when bargaining and, even when they did, the process itself prevented administrations from immediately carrying out its plans.[80] Pietrykowski observed:

> [I]f the union can't succeed in direct negotiations with an employer, it can in effect appeal to a fact-finder to endorse their position or at the very least give them a part of an undeserved gain by compromising . . . its proposal to "split the baby" as it were. . . .
>
> This same scenario exists during an employer's administration of the negotiated agreement creating even more havoc in the form of an employer's requirement to

[74] *See id.*

[75] E-mail from Mike Suver, Vice President, Gov't Relations, Inter-Univ. Council of Ohio, to iuc_hr@lists.service.ohio-state.edu (Feb. 18, 2011) (on file with Albany Law Review).

[76] Johnson Testimony: Mar. 16, 2011, *supra* note 11, at 3.

[77] *Id.*

[78] *Id.*

[79] *See* Memorandum from Robert J. Pietrykowski, Assistant Vice President for Human Res., Cleveland State Univ., to Gov't Affairs, Inter-Univ. Council of Ohio 2–3 (Feb. 21, 2011) (on file with Albany Law Review).

[80] *See id.*

> engage in "interim bargaining". That is, anytime an employer chooses to engage in administrative action or exercise discretion in an area impacting "terms and conditions of employment", [sic] it must meet with and bargain to agreement or impasse with the impacted union. . . . [A] union can block interminably an employer's good-faith attempt to address pressing issues of budget or programs of instruction.[81]

Thus, whenever a fact-finder upheld part of the union's position, Pietrykowski deemed the union's gains "undeserved,"[82] his unstated assumption being that the administration is always right. And Pietrykowski offered no evidence, not even an anecdote, to show that collective bargaining processes created "havoc."[83]

Indeed, Pietrykowski described only one actual case of bargaining—a problematic case because the process worked so well that unions might cite it against S.B. 5. Cleveland State's

> administration negotiated a wage freeze for FY2010 covering all bargaining unit faculty and staff (which was extended to non-bargaining unit faculty and staff) and the option for up to five furlough days during calendar year 2011 for professional and classified staff (also extended to their non-bargaining unit counterparts) with the actual number and scheduling of furlough days to be implemented at administration's discretion.
>
> As such, CSU's unions would argue that collective bargaining reform will not result in any direct cost-savings—or—that any needed cost-savings can be negotiated at the bargaining table.[84]

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[81] *Id.*

[82] *Id.* at 2.

[83] *Id.* at 3.

[84] *Id.* at 2. Replies from other universities varied. Some, such as Kent State, were confined to figures about the number of unions, union members, and the like. *See* E-mail from Tiffany Murray, Dir., HRIS, Records, Compliance, Benefits & Affirmative Action Division of Hum. Res., Kent State Univ., to Inter-Univ. Council of Ohio Human Res. Comm. List (Feb. 19, 2011) (on file with Albany Law Review). Wright State University, on the other hand, described several arguments available to S.B. 5 opponents (for example, salaries will be "arbitrary" and based on favoritism without unions; supervisors' decisions will be "rubber stamp[ed]" using unfair processes; "[e]mployees will have no voice;" health care costs increasingly will be passed on to employees) and one argument for S.B. 5 (civil service protections will continue to apply). E-mail from Allan Boggs, Assistant Vice President for Human Res., Wright State Univ., to iuc_hr@lists.service.ohio-state.edu (Feb. 21, 2011) (on file with Albany Law Review). Ohio University's response noted that it had two unions—one for maintenance and service employees and one for police—and predicted "a great deal of civil unrest and turmoil" and "[i]n particular, slowdowns and work stoppages" if S.B. 5 passed. E-

Other administrators reasoned in the same way. Sean Patrick FitzGerald, Bowling Green State University's general counsel, drafted the *Yeshiva* amendment to S.B. 5.[85] FitzGerald considered bargaining meetings inherently objectionable.[86] Commenting on the views of David Jackson, the head of Bowling Green's newly formed union, he observed that "Jackson fails to recognize that his unionization effort itself will consume substantial administrative staff time."[87] As a "simple quantifiable example," FitzGerald reported that a Bowling Green union meeting "lasted . . . five hours" and "resulted in four BGSU administrators devoting about twenty staff hours to just that one bargaining session."[88] In FitzGerald's judgment, that fact "support[ed] the truth of Bruce[] [Johnson's] testimony."[89] In short, bargaining is objectionable because it requires meetings. Given such views, no further analysis is necessary and, as noted earlier, IUC provided none.[90]

The argument that "bargaining requires meetings" seems incongruous, however, coming from university administrators. Benjamin Ginsberg observes that university "administrators spend a good part of every day talking to one another . . . . [M]ost administrators and staffers attend several meetings every day, usually with other administrators and staffers. . . . Indeed, the major agenda item at many administrative meetings consists of reports from and plans for other meetings."[91]

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mail from Linda Lonsinger, Assoc. Vice President for Fin. & Admin. for Human Res., Ohio State Univ., to Inter-Univ. Council of Ohio Human Res. Comm. List (Feb. 21, 2011) (on file with Albany Law Review).

[85] *See* Tom Troy, *BGSU Officials Linked to Role in SB 5 Draft*, TOLEDOBLADE.COM (Sept. 22, 2011), http://www.toledoblade.com/Politics/2011/09/22/BGSU-officials-linked-to-role-in-S-B-5-draft.html.

[86] *See id.*

[87] E-mail from Sean Patrick FitzGerald, Office of the Gen. Counsel, Bowling Green State Univ., to Mike Suver, Vice President, Gov't Relations, Inter-Univ. Council of Ohio & Bruce Johnson, President & CEO, Inter-Univ. Council of Ohio (Mar. 1, 2011) (on file with Albany Law Review).

[88] *Id.* FitzGerald added that the twenty hour figure did "not include prep time or the cost of labor counsel" or "the like amount of time the representatives of the AAUP were not engaged in scholarship." *Id.*

[89] *Id.*

[90] Mike Suver, one recipient of FitzGerald's e-mail, wrote a brief reply: "Good points. And you're right about Bruce's testimony. Those numbers come directly from UT [University of Toledo]." E-mail from Mike Suver, Vice President, Gov't Relations, Inter-Univ. Council of Ohio, to Sean Patrick FitzGerald, Office of Gen. Counsel, Bowling Green State Univ. & Bruce Johnson, President & CEO, Inter-Univ. Council of Ohio (Mar. 1, 2011) (on file with Albany Law Review).

[91] GINSBERG, *supra* note 12, at 42.

C. The Yeshiva *Amendment*

S.B. 5 was amended a few days after Johnson testified.[92] The new version, as noted in the Introduction, did not entirely outlaw collective bargaining. Instead, it severely limited the subject matters of bargaining and, in case of an impasse, provided that employers would generally dictate contract terms.[93] The IUC at once offered a further amendment, one to ban faculty bargaining altogether.[94]

Two days after testifying Johnson e-mailed David Robinson, a lobbyist for Bowling Green State University.[95] "It looks like collective bargaining will remain," Johnson wrote, asking if Bowling Green would "support a specific amendment as it relates to [university] faculty."[96] The solution was IUC's *Yeshiva* amendment, which redefined university faculty members as "supervisors."[97]

Supervisors and managerial level employees were ineligible for bargaining under Ohio law.[98] However, a specific provision of existing law, Ohio Revised Code section 4117.01(F)(3), excluded university faculty from the supervisory and managerial categories.[99] It read:

> With respect to faculty members of a state institution of higher education, heads of departments or divisions are supervisors; however, no other faculty member or group of faculty members is a supervisor solely because the faculty member or group of faculty members participate in decisions with respect to courses, curriculum, personnel, or other matters of academic policy.[100]

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[92] *See* Ohio Legislative Serv. Comm'n, Ohio Senate Bill Analysis as Passed by the Senate, Am. Sub. SB 5, at 15–16 (2011), *available at* http://www.lsc.state.oh.us/analyses129/s0005-rs-129.pdf.

[93] *Id.* at 15–16; *see also* Bill Analysis as Reported, *supra* note 8, at 7–8 (describing dispute resolution procedures).

[94] *See* Letter from Johnson to Bacon, *supra* note 5 (proposing an amendment that would eliminate faculty bargaining by labeling faculty members as "management level employees").

[95] E-mail from Bruce Johnson, President & CEO, Inter-Univ. Council of Ohio, to David Robinson, The Montrose Group LLC & Mike Suver, Vice President, Gov't Relations, Inter-Univ. Council of Ohio (Feb. 24, 2011) (on file with Albany Law Review).

[96] *Id.*

[97] Letter from Johnson to Bacon, *supra* note 5.

[98] *See* OHIO REV. CODE ANN. § 4117.03(A)(2) (LexisNexis 2011) ("Public Employees have the right to [e]ngage in . . . activities for the purpose of collective bargaining . . . ."). "Supervisors" and "[m]anagement level employees" are not public employees. *Id.* § 4117.01(C)(7), (10).

[99] *Id.* § 4117.01(F)(3).

[100] *Id.* Section 4117.01(C)(10) of the Ohio Revised Code excludes "[s]upervisors" from the definition of "[p]ublic employee." It is public employees who enjoy the right to collectively

The *Yeshiva* amendment revised section 4117.01(F)(3) and reversed its meaning.[101] The version proposed by the IUC—and eventually enacted—read:

> With respect to faculty members of a state institution of higher education, heads of departments or divisions are supervisors; . . . in addition, any faculty member or group of faculty members that participate in decisions with respect to courses, curriculum, personnel, or matters of academic or institutional policy shall be deemed supervisors or management level employees.[102]

IUC's amendment also revised section 4117.01(L) to classify as "[m]anagement level employees"—and therefore ineligible to bargain—

> any faculty who, individually or through a faculty senate or like organization, participate in the governance of the institution, are involved in personnel decisions, selection or review of administrators, planning and use of physical resources, budget preparation, and determination of educational policies related to admissions, curriculum, subject matter and methods of instruction and research . . . .[103]

On February 25, 2011 Johnson wrote Kevin Bacon, the chair of the Senate committee holding hearings on S.B. 5, and proposed the amendment on behalf of the IUC.[104] Robinson, acting on behalf of Bowling Green, e-mailed a similar proposal to Bacon the same day, sending copies to Sean Patrick FitzGerald, Bowling Green's general counsel, and to Bruce Johnson.[105] Later the same day, Robinson forwarded another copy to Suver.[106] Suver, in turn, e-mailed Senator Bacon's office and explained that Robinson's amendment was "essentially the same as what the IUC is requesting," the principal difference being that Robinson had overlooked the need to

bargain. *Id.* § 4117.03(A)(2).

[101] Letter from Johnson to Bacon, *supra* note 5.

[102] *Id.*

[103] *Id.* at 2. Section 4117.01(C)(7) of the Ohio Revised Code excludes "[m]anagement level employees" from the definition of "[p]ublic employee." § 4117.01(C)(7).

[104] Letter from Johnson to Bacon, *supra* note 5 (proposing and arguing for the *Yeshiva* amendment).

[105] E-mail from David Robinson, The Montrose Group LLC. to Caryl Philips, Admin. Assistant, Ohio Senate & Laurel Ullman, Legislative Aide, Ohio Senate (Feb. 25, 2011) (on file with Albany Law Review) (including FitzGerald and Johnson as carbon copied recipients of the e-mail).

[106] E-mail from David Robinson, The Montrose Group LLC, to Mike Suver, Vice President, Gov't Relations, Inter-Univ. Council of Ohio (Feb. 25, 2011) (on file with Albany Law Review).

rewrite a second section of the statutes.[107] It remains unclear, however, why Robinson offered his own amendment, especially when Sean FitzGerald, Bowling Green's general counsel, apparently drafted IUC's version.[108] Perhaps Bowling Green officials wanted to demonstrate their support for S.B. 5 to university trustees?

IUC officials did not know whether the legislature would adopt the *Yeshiva* amendment. On February 27, 2011 Suver asked John Baron, Senate Counsel, whether "we have any hope of getting our amendment into the bill?"[109] Then, on March 1, 2011, good news: Johnson reported that a legislative "summary" seemingly included it.[110] Johnson cautioned the presidents that he had not "seen the actual language."[111] Suver was more optimistic. Conceding that he had seen only a summary of the bill, he nevertheless concluded: "Looks like we got it."[112] And they did.[113]

Thus, the *Yeshiva* amendment was conceived and drafted by university officials, not by the state's political leadership. Looking back, Johnson described it as a matter of "'common sense'" for public university administrations.[114] He was too modest, however. IUC had pioneered a new development in the law of public university faculty bargaining and its authors understood quite well what they had done.[115]

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[107] E-mail from Mike Suver, Vice President, Gov't Relations, Inter-Univ. Council of Ohio, to Caryl Philips, Admin. Assistant, Ohio Senate & Laurel Ullman, Legislative Aide, Ohio Senate (Feb. 25, 2011) (on file with Albany Law Review). IUC's proposal, but not Robinson's, included a revised definition of "management level employee" to OHIO REVISED CODE 4117.01(F)(3). Letter from Johnson to Bacon, *supra* note 5.

[108] At 12:16 p.m. on February 25, 2011 Suver e-mailed IUC's version to Robinson and said: "We used Sean's language." E-mail from Mike Suver, Vice President, Gov't Relations, Inter-Univ. Council of Ohio, to David Robinson, The Montrose Group LLC (Feb. 25, 2011) (on file with Albany Law Review). TOLEDOBLADE.COM later reported that FitzGerald "acknowledged that he suggested adopting the standard based on" the *Yeshiva* decision. Troy, *supra* note 85. FitzGerald did not expressly deny authoring the amendment, but described the *Yeshiva* decision as "widely known." *Id.* TOLEDOBLADE.COM also reported that Bruce Johnson had "disagreed that Mr. FitzGerald was the first or only one to think of applying the Yeshiva policy" and described *Yeshiva* as "'common sense' to university officials." *Id.*

[109] E-mail from Mike Suver, Vice President, Gov't Relations, Inter-Univ. Council of Ohio, to John Barron, Legal Counsel, Ohio Senate (Feb. 27, 2011) (on file with Albany Law Review).

[110] E-mail from Bruce Johnson, President & CEO, Inter-Univ. Council of Ohio, to iucpresidents@lists.service.ohio-state.edu (Mar. 1, 2011) [hereinafter March E-mail from Johnson to iucpresidents] (on file with Albany Law Review).

[111] *Id.*

[112] E-mail from Mike Suver, Vice President, Gov't Relations, Inter-Univ. Council of Ohio, to Inter-Univ. Counsel of Ohio Government Relations Representatives (Mar. 1, 2011) (on file with Albany Law Review).

[113] *See* Troy, *supra* note 85.

[114] *Id.* (quoting Bruce Johnson).

[115] On March 9, 2011, Inside Higher Ed published an article that credited Johnson with devising "the legal reasoning" behind the *Yeshiva* amendment, which the article described "as

D. Rudy Fichtenbaum's Testimony

Rudy Fichtenbaum, a Wright State University faculty member and union economist, testified against S.B. 5 on March 10, 2011.[116] Fichtenbaum did not assign precise economic values to the costs or benefits of bargaining. He argued, however, that unionized labor did not account for "inefficiencies and wasted resources" in the university system.[117] Fichtenbaum pointed out that faculty members at Ohio's "doctoral level public universities . . . earn an average of $4,800 a year less than faculty at other doctoral public universities in the U.S." and that compensating full-time faculty constituted "only 11.1% of [universities'] operating costs."[118] On the other hand, Fichtenbaum testified that "universities are suffering from 'administrative bloat,' expanding the resources devoted to administration significantly faster than spending on instruction, research and service."[119] He calculated that between 1987 and 2008 academic spending at Ohio public universities and community colleges increased 179%, but spending in administrative categories had increased 270%—a fifty percent higher rate.[120] Fichtenbaum

a new and unexpected tactic." Dan Berrett, *Tactic's Father Revealed*, INSIDE HIGHER ED (Mar. 9, 2011), http://www.insidehighered.com/news/2011/03/09/head_of_ohio_university_association_hatched_idea_to_kill_faculty_unions. Suver forwarded the article to Johnson saying he "[l]ove[ed] the headline." E-mail from Mike Suver, Vice President, Gov't Relations, Inter-Univ. Council of Ohio, to Bruce Johnson, President & CEO, Inter-Univ. Council of Ohio et al. (Mar. 31, 2011) (on file with Albany Law Review). Robinson also forwarded a news article about *Yeshiva* to Johnson and others. E-mail from David Robinson, The Montrose Group LLC, to Bruce Johnson, President & CEO, Inter-Univ. Council of Ohio et al. (Mar. 3, 2011) (on file with Albany Law Review) (forwarding an article from Inside Higher Ed entitled: "*New Tactic to Kill Faculty Unions*"). Later, FitzGerald proudly described to Johnson and Suver a Connecticut proposal modeled on the *Yeshiva* amendment. *See* E-mail from Sean Patrick FitzGerald, Vice President, Bowling Green State Univ., to Bruce Johnson, President & CEO, Inter-Univ. Coucil of Ohio, & Mike Suver, Vice President, Gov't Relations, Inter-Univ. Council of Ohio (Apr. 21, 2011) (on file with Albany Law Review). Suver then forwarded that e-mail to a legislative aide and added that "Ohio may have set a precedent with that *Faculty as managers'* [sic] amendment." E-mail from Mike Suver, Vice President, Gov't Relations, Inter-Univ. Council of Ohio, to Nathan Coe, Policy Advisor, Office of William G. Batchelder (Apr. 21, 2011) (on file with Albany Law Review) (emphasis added).

[116] *Hearing Before the H. Commerce & Labor Comm.*, 129th Gen. Assemb. (Ohio 2011) [hereinafter Fichtenbaum Testimony] (testimony of Rudy Fichtenbaum, Ohio Conference of the Am. Ass'n of Univ. Professors) (on file with Albany Law Review).

[117] *Id.* at 5.

[118] *Id.* (emphasis omitted). Fichtenbaum also testified that the proportion of salary "spent on benefits for full-time faculty" was lower than the proportion of salary spent on "the average private sector worker in the East North Central census." *Id.*

[119] *Id.* (quoting JAY P. GREENE ET AL., GOLDWATER INST., NO. 239, ADMINISTRATIVE BLOAT AT AMERICAN UNIVERSITIES: THE REAL REASON FOR HIGH COSTS IN HIGHER EDUCATION 1 (2010)).

[120] *See id.*

also cited high presidential salaries, the costs of athletics, and high expenditures on items such as cell phones for administrators.[121]

Finally, Fichtenbaum highlighted recent expenditures at the University of Toledo, where Lloyd Jacobs was president; from 2006 and 2009, he pointed out, "the salaries of 14 top administrators increased 22.5%, not including $1.5 million in bonuses, while the faculty received raises totaling about 10% over the same period."[122] Moreover, reports indicated that the university "spent millions of dollars maintaining an office in China and paying for travel (first class and business class) for administrators and members of the board of trustees along with their spouses."[123] "[I]t is administrative costs," Fichtenbaum concluded, "and other forms of wasteful spending—not associated with faculty, custodians or other workers who may be unionized—that explain shortfalls in efficiency and productivity."[124]

When a legislative aide forwarded Fichtenbaum's testimony to the IUC, Suver replied that Bruce Johnson would "address" Fitchenbaum's contentions in his testimony on March 16, 2011.[125] Suver added:

> They make a lot of accusations, as expected. Not all are accurate, as expected. What kills me is that they (the union) are just as responsible for the bloat as the [sic] say the administration is. And I'd argue that if the administration is, then it's because the unions have made it that way. His arguments are very disingenuous.[126]

Acknowledging administrative bloat, Suver somehow ended up blaming unions.[127] But Fichtenbaum's data covered unionized and nonunionized campuses alike,[128] and nothing suggested that unionized campuses were more *bloated*.[129] Nor did it seem plausible that the existence of unions necessitated large raises and bonuses for administrators or that positions related to collective bargaining

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[121] *Id.* at 5–6.

[122] *Id.* at 6. Fichtenbaum added that, according to a newspaper report, some of the university's "[t]rustees voiced support for the administration's need to pay high salaries and bonuses for the retention of administrators." *Id.*

[123] *Id.*

[124] *Id.* (internal quotation marks omitted).

[125] E-mail from Mike Suver, Vice President, Gov't Relations, Inter-Univ. Council of Ohio, to Nathan Coe, Policy Advisor, Office of William G. Batchelder (Mar. 14, 2011) (on file with Albany Law Review).

[126] *Id.*

[127] *Id.*

[128] Fichtenbaum Testimony, *supra* note 116, at 5–6.

[129] *See id.*

explained much of the increase in administrative costs.[130]

E. Bruce Johnson's House Testimony

Contrary to Suver's assurances, Johnson's testimony on March 16, 2011 did not seriously address Fichtenbaum's economic arguments. "Our institutions," Johnson testified, "have always sought to be as efficient and productive as possible, contrary to what you may have been told by those representing faculty unions."[131] Johnson then explained that the IUC operated approximately thirty group purchasing arrangements for universities, one of which saved an estimated $3.5 million per year statewide, while another saved over $1 million.[132] Those programs, however, said nothing about administrative bloat.[133] Fichtenbaum had described administrative bloat at universities;[134] Johnson replied that IUC produced savings. .[135]

Although Johnson alluded to efficiency and potential savings and even reprised his error about potential savings at the University of Toledo, [136] he emphasized the imperative of "effective management." [137] "[A]dditional flexibility and relief from burdensome . . . regulatory mandates" were necessary, Johnson said, "to fully unleash the creative potential on each of our campuses."[138] Far from emphasizing economics, Johnson said that IUC

> reject[s] the notion that our employees are overpaid or underworked. In fact, given their extraordinary educational level, it is far easier to make the case that most of our employees are underpaid. . . . [Instead, t]he problems that we are trying to resolve today are brought on by the nearly 30 years of history embodied in Ohio's collective bargaining law.[139]

Johnson's primary focus was the *Yeshiva* amendment. His letter to Senator Bacon on February 25, 2011 described Ohio law as "an

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[130] *See id.* It is worth noting that unions managed to bargain with universities without a large administrative cadre of their own.

[131] Johnson Testimony: Mar. 16, 2011, *supra* note 11, at 2.

[132] *Id.*

[133] *See id.*

[134] Fichtenbaum Testimony, *supra* note 116, at 5.

[135] Johnson Testimony: Mar. 16, 2011, *supra* note 11, at 2.

[136] *See id.* at 2–3. For a discussion of Johnson's error, see *supra* Part III.B.1.

[137] Johnson Testimony: Mar. 16, 2011, *supra* note 11, at 3.

[138] *Id.*

[139] *Id.*

anomaly" because public university faculty enjoyed "both 'shared governance' and faculty bargaining."[140] After summarizing the Supreme Court's *Yeshiva* decision, Johnson urged that "the same thinking should apply to public universities."[141]

The March testimony expanded on these arguments. Johnson acknowledged that university faculty had a "unique role," one reflected in the idea of "shared governance."[142] This distinguished them from "workers at other public agencies."[143] Precisely for that reason, however, "faculty should be treated as management, not as rank and file labor."[144] "[T]he underlying rationale of *Yeshiva*," Johnson said, is that faculty has a "choice."[145] "They can be the institution and work in its best interest or they can bargain with it, but they cannot reasonably be allowed to do both."[146] These remarks raised obvious questions, however. Why should faculty choose between "be[ing] the institution," as Johnson put it, and "bargain[ing] with it"?[147] If faculty *were* the institution, should they not have every opportunity to influence institutional decision-making, including via collective bargaining?

Justice Powell's opinion in the *Yeshiva* case declared that "the faculty's professional interests . . . cannot be separated from those of the institution,"[148] an idea similar to Johnson's claim that faculty *are* their institutions.[149] Powell was explaining, however, why even though federal labor law made special allowances for professionals to collectively bargain, and even though faculty qualify as professionals, faculty members should be considered managerial and not eligible to bargain.[150] The reason was that, unlike professionals in many other settings, the faculty's professional interests in teaching and research "cannot be separated" from the interests of the university.[151] Professionals become managers, according to Powell, when their professional objectives are the same

[140] Letter from Johnson to Bacon, *supra* note 5 (quoting OHIO REV. CODE ANN. § 4117.01(F)(3) (Lexis 2011)).

[141] *Id.*

[142] Johnson Testimony: Mar. 16, 2011, *supra* note 11, at 5.

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] NLRB v. Yeshiva Univ., 444 U.S. 672, 688 (1979).

[149] *See* Johnson Testimony: Mar. 16, 2011, *supra* note 11, at 5.

[150] *Yeshiva*, 444 U.S. at 681–82 (discussing the relationship between "managerial employees" and "professional employees" in federal labor law).

[151] *Id.* at 688.

as their institutions.[152]

Johnson ignored the *professional* issue. Instead, he argued that it was unfair for faculty to enjoy shared governance and collective bargaining simultaneously and it was also unfair that public universities—but not private ones—had to bargain with faculty.[153] Powell saw faculty at the core of universities, but Johnson was suggesting that faculty should not have too much institutional influence or power—a very different thing.[154]

True, Johnson had invoked shared governance and the concept of faculty defining their universities. But he did not directly acknowledge that faculty *should* have a primary role in hiring and curricular matters. "I would share with you," Johnson testified, "how the national AAUP itself views the ideal faculty role in institutional governance."[155] He further added, "I can think of no other area of public employment where bargaining unit members demand 'primacy' for themselves in deciding . . . who gets hired, dismissed, retained, promoted or given a for cause only employment contract . . . ."[156] Johnson did not seem to agree with the American Association of University Presidents ("AAUP"), and his phrasing suggested that faculty already had too much power. Where Justice Powell saw a central faculty role, Johnson seemed to see an excess of faculty influence.

IUC's reliance on the *Yeshiva* opinion was flawed in a more fundamental way. The Court did not resolve *Yeshiva*, and Justice Powell wrote, "by weighing the probable benefits and burdens of faculty collective bargaining. That, after all, is a matter for Congress, not this Court."[157] Thus, the Court did not decide that faculty collective bargaining actually harmed universities or the public; it was only interpreting a statute. Moreover—and unusually in a case of statutory interpretation—the Court disavowed any idea that its interpretation reflected a judgment by Congress about

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[152] Justice Powell added:

> [T]here can be no doubt that the quest for academic excellence and institutional distinction is a 'policy' to which the administration expects the faculty to adhere, whether it be defined as a professional or an institutional goal. It is fruitless to ask whether an employee is 'expected to conform' to one goal or another when the two are essentially the same.

Id. (citations omitted).

[153] *See* Johnson Testimony: Mar. 16, 2011, *supra* note 11, at 5.

[154] *See id.* at 6.

[155] *Id.* at 5.

[156] *Id.* at 6. For example, tenure protection.

[157] *Yeshiva*, 444 U.S. at 690 n.29 (citing C.W. Post Ctr. of Long Island Univ., 189 N.L.R.B. 904 (1971)).

whether faculty should bargain. When Congress enacted the National Labor Relations Act, Justice Powell observed, it never considered whether the law should cover university faculty: Congress had assumed that charitable institutions, such as universities, did not "affect commerce."[158] Further complicating matters, Powell noted:

> [T]he authority structure of a university does not fit neatly within the statutory scheme . . . . The [National Labor Relations] Board itself has noted that the concept of collegiality "does not square with the traditional authority structures with which the Act was designed to cope in the typical organizations of the commercial world."[159]

Making the same point, Justice Brennan's dissent emphasized that federal statutory categories were never designed to encompass academic institutions:

> Because . . . Congress did not contemplate its application to private universities, it is not surprising that the terms of the Act itself provide no answer to the question before us. Indeed, the statute evidences significant tension as to congressional intent in this respect by its explicit inclusion, on the one hand, of "professional employees" . . . and its exclusion, on the other, of "supervisors" . . . .Similarly, when transplanted to the academic arena, the Act's extension of coverage to professionals . . . cannot easily be squared with the Board-created exclusion of "managerial employees" in the industrial context.[160]

Thus, *Yeshiva* did not reflect a judgment by Congress or by the Supreme Court that faculty ought not to bargain. Johnson was wrong to treat the opinion as a repository of reasons against faculty bargaining. Relying on *Yeshiva,* he had no argument at all.

In any event, the issue facing Ohio's legislature was not how to interpret obscure statutory language. Before S.B. 5, Ohio law explicitly allowed bargaining by public university faculty and defined the exact level of university management—department chair—that precluded faculty members from joining a bargaining unit.[161] Johnson was not arguing about legislative intent; he was

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[158] *Id.* at 679–80 (citations omitted) (reviewing Congressional intent); *see also id.* at 692 (Brennan, J., dissenting) ("[A]t the time of the Act's passage Congress did not contemplate its application to private universities . . . .").

[159] *Id.* at 680 (quoting Adelphi Univ., 195 N.L.R.B. 639, 648 (1972)).

[160] *Id.* at 692 (Brennan, J., dissenting) (citations omitted).

[161] OHIO REV. CODE ANN. § 4117.01(F)(3) (LexisNexis 2011).

contending that a legislative judgment clearly embodied in Ohio law was wrong and that the law should be changed.[162] Doing so, he relied on the Supreme Court's *Yeshiva* opinion—which contained no reasons whatever to do so.[163] Johnson wanted the legislature to emulate a federal statutory scheme that was never designed for faculty and to discard a state statutory scheme that was.[164]

Johnson later explained the presidents' thinking to *The Chronicle of Higher Education*:

> "Our interest is to negotiate with labor and not to negotiate with management," Mr. Johnson said. As things currently stand, [Johnson] said, faculty members at most public colleges in the state have both unions and roles in managerial decisions, so that any time college officials are negotiating with faculty unions, "there is management, frankly, on the other side of the table from you."[165]

Johnson's claim seemed plausible, however, only when the general term "management" was substituted for the specific term "faculty."[166] But neither presidents nor legislators had any reason to think in terms of "management" rather than in terms of "faculty." And there is nothing implausible in the idea of faculty—as opposed to "management"—bargaining with university administrations.

Yeshiva was the vehicle by which the presidents replaced standard conceptions of "the university," "the faculty," and the "administration" with a model limited to the categories of "management" and "employee." Ironically, it matters little whether faculty count as "managerial" or "nonmanagerial employees" under this model. Both categories operate under presidential command, a conception at odds with the traditional ideas about shared governance and the faculty's role.

In any event, Johnson and the presidents did not accept the full force of their own argument. If a strict separation of faculty and administration is—for some unexplained reason—required in universities, then presidents and provosts should not hold faculty

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[162] Johnson Testimony: Mar. 16, 2011, *supra* note 11, at 6.

[163] *Id.* at 4–5.

[164] *Id.* at 4.

[165] Peter Schmidt, *Anti-Faculty-Union Proposal in Ohio Came From Public-University Association*, CHRON. HIGHER EDUC., Mar. 8, 2011, http://chronicle.com/article/Anti-Faculty-Union-Proposal-in/126648; *see also* Berrett, *supra* note 115 ("'[O]ne of the frustrations . . . is that when . . . [university administrations are] negotiating, they're, in fact, negotiating with management,' [Johnson] said.").

[166] *See* Berrett, *supra* note 115.

rank, which they invariably do,[167] and they should not receive tenure. To use Johnson's metaphor, when presidents and provosts are also tenured faculty members, faculty sit on the same side of the table as management—something Johnson considered an anathema.[168]

F. SOME REAL ISSUES

Consisting mostly of abstractions, Johnson's testimony never explored the actual terrain of faculty collective bargaining. Some subjects of bargaining—salary and benefits, for example—fall outside the faculty role in a shared governance model.[169] Regarding these subjects, faculty has no managerial responsibility whatsoever. From the point of view of *Yeshiva*, bargaining with faculty about salaries and benefits should be indistinguishable from similar bargaining with nonfaculty employees.

Other potential bargaining subjects do overlap with traditional faculty concerns. Curriculum, faculty hiring, tenure, and academic organization are examples. With or without collective bargaining, however, such issues are discussed by faculty and administration—at least they are under a shared governance model. If anything, collective bargaining may give administrations more say than before since, as Bruce Johnson pointed out, shared governance accords faculty "primacy" in those areas, not merely bargaining rights.[170]

Here, collective bargaining and shared governance coincide. Indeed, presidents may object to bargaining precisely because it makes shared governance a reality. It is easier to pretend to share governance than to pretend to bargain. This may explain why administrators object so strongly to collective bargaining meetings—when meetings are otherwise a constant in administrators' lives.[171] As Pietrykowski's objection implied, bargaining meetings—unlike shared governance sessions—may not

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[167] *See* Johnson Testimony: Mar. 16, 2011, *supra* note 11, at 5 (arguing for a sharp divide between management and faculty roles).

[168] *See* Schmidt, *supra* note 165.

[169] *See, e.g.*, AFT HIGHER EDUC., AM. FED'N OF TEACHERS, *Shared Governance in Colleges and Universities: A Statement by the Higher Education Program and Policy Council* 7–9, *available at* http://www.aft.org/pdfs/highered/sharedgovernance0806.pdf (discussing six principles of shared governance—salary and benefits not being one of them).

[170] Johnson Testimony: Mar. 16, 2011, *supra* note 11, at 6.

[171] *See supra* text accompanying notes 87–91; *see also* GINSBERG, *supra* note 12, at 42 (discussing the pervasiveness of meetings between administrators in academic settings).

leave the administration free to do whatever it wants.[172]

G. A Perfect Process

Aside from the misplaced analogy to the *Yeshiva* decision, Johnson offered only one concrete example in support of his argument. At an unnamed university, he said the collective bargaining agreement "requires a timeframe [for laying off faculty members] that is so long as to be utterly unresponsive to the need to make changes in a timely manner."[173] Tenured faculty, for example, received at least a year-and-a-half notice.[174] But Johnson did not explain why the university had agreed to the provision or what the faculty's motivation had been in seeking it.[175] Johnson did not compare the provision at issue to any other universities or to the norm in universities generally. Nor did he assert that the university in question had ever been harmed by it. Johnson did not even say that the university wanted to lay off a faculty member during the term of the agreement.

Yet, based on this single provision, Johnson urged the overthrow of Ohio's existing system of faculty collective bargaining.[176] In support of his "efficiency" argument, Johnson cited only unexamined figures from Toledo—figures that Johnson himself seemed not to take seriously.[177] In similar fashion, Johnson now cited a single contract clause to support "flexibility" and "*Yeshiva*."[178] In both cases, very general concepts supposedly resolved large issues without the need for further analysis or empirical support.

If the system of collective bargaining did not work perfectly, Johnson seemed to say—if it produced even one questionable clause—it had to be eliminated.[179] This was reminiscent of the claim that collective bargaining should be abolished because universities did not always prevail.[180] Underlying both ideas is an either/or proposition: either presidents are infallible and are never wrong, or mistakes are acceptable when presidents make them, but

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[172] *See supra* text accompanying notes 79–84.
[173] Johnson Testimony: Mar. 16, 2011, *supra* note 11, at 5.
[174] *Id.*
[175] *See id.*
[176] *See id.* at 6.
[177] *See* discussion *supra* Part III.B.1.
[178] Johnson Testimony: Mar. 16, 2011, *supra* note 11, at 3–4.
[179] *See id.* at 6.
[180] *See* discussion *supra* Part III.B.2.

not when they result from other sources, such as collective bargaining.

IV. THE ROLE OF THE PRESIDENTS

A. The Faculty Reaction

Since the presidents hid their actions, faculty knew nothing of the presidents' January letter to the Governor or their decision to support S.B. 5. For some reason, Johnson's testimony advocating an end to collective bargaining did not register on campuses either.[181] Thus, faculty were shocked on March 8, 2011 when the *Chronicle* reported that Johnson had proposed the *Yeshiva* amendment and even acknowledged doing so.[182]

Paraphrasing Johnson's account, the story reported that the presidents did not specifically approve the *Yeshiva* amendment.[183] But the presidents did favor more "flexibility," Johnson said, and they supported the general ban on bargaining in the original version of S.B. 5.[184] For that reason, Johnson believed the presidents had given him authority to propose the amendment.[185]

"Leaders of faculty unions [were] bristling at . . . [Johnson's] revelation," according to the *Chronicle*.[186] Rudy Fichtenbaum, who had testified about "administrative bloat,"[187] said that he was surprised and had believed the "presidents would not . . . take[e] such a stand."[188] Sherry Linkon and John Russo, faculty members and union officials at Youngstown State, said that IUC's "promotion of [the Yeshiva amendment] represents a betrayal of pledges by public-university presidents to remain neutral in the legislative

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[181] Sara J. Kaminski, the director of AAUP's statewide office in Columbus, told *The Chronicle of Higher Education* on March 8, 2011 that "she was 'not surprised'" at Johnson's proposing the *Yeshiva* amendment after his February testimony. Schmidt, *supra* note 165. However, Kaminski was the director of AAUP's statewide office and exceptionally close to legislative developments.

[182] *See id.* The story noted that a week earlier, the Senate approved a version of S.B. 5 that included the *Yeshiva* amendment. *Id.* On March 9, 2011, *Inside Higher Ed* ran a similar story, reporting that Bruce Johnson had proposed the *Yeshiva* amendment and "acknowledged" doing so. Berrett, *supra* note 115. The story noted that "until now, it remained unclear who had proposed" it. *Id.* The story concluded by stating that "[f]aculty union leaders have called the bill 'catastrophic.'" *Id.*

[183] *See* Schmidt, *supra* note 165.

[184] *See* Berrett, *supra* note 115.

[185] *See id.*

[186] *See* Schmidt, *supra* note 165.

[187] See *supra* Part III.D.

[188] Schmidt, *supra* note 165.

debate over collective bargaining."[189] Fichtenbaum, Linkon, and Russo were unusually engaged and informed and each had testified against S.B. 5.[190] Yet, even they had no idea of the presidents' actions.

Faculty Senates on a number of campuses quickly adopted resolutions against S.B. 5 and the *Yeshiva* amendment, beginning on February 28, 2011 with a unanimous resolution by the Shawnee State University senate declaring that collective bargaining

> helps ensure institutional stability and contributes to a productive work environment where mutual respect and genuine collaboration occurs. Collective bargaining facilitates effective planning and a predictable budgeting process; it helps protects [sic] worker's rights and health, and is a safeguard to academic freedom, which is essential to ensuring quality education for Ohioans.[191]

The Senate of Cleveland State acted on March 9, 2011.[192] Professor Mark Tebeau, who proposed the resolution, cited the *Chronicle* report and likened the IUC's actions to "being thrown under the bus by your colleagues."[193] The Ohio University Faculty Senate passed its resolution on March 14, 2011; among other things, it called on Johnson and the presidents to recant their support for the bill.[194] Professor Joseph McLaughlin, the Senate Chair, explained that he drafted the resolution because IUC had proposed the *Yeshiva* amendment.[195] Kent State's Senate also acted on March 14; Professor Pamela Grimm urged the presidents to vote publically so that faculty members would know where they stood.[196]

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[189] *Id.*

[190] Like Fichtenbaum, Linkon and Russo testified against Senate bill five. *Hearing on S.B. 5 Before the S. Ins., Commerce & Labor Comm.*, 129th Gen. Assemb., Reg. Sess. (Ohio 2011) (testimony of Sherry Linkon, Professor, Youngstown State Univ., & John Russo, Professor, Youngstown State Univ.) (on file with Albany Law Review).

[191] Minutes of the Meeting of the Faculty Senate of Shawnee State University (Feb. 28, 2011), *available at* http://www.shawnee.edu/gov/ufs/minutes2010.html.

[192] *See* Minutes of the Meeting of the Faculty Senate of Cleveland State University (Mar. 9, 2011), *available at* http://www.csuohio.edu/organizations/facultysenate/FSMIN-March-9-2011.pdf [hereinafter Cleveland State Meeting Minutes].

[193] *Id.* at 4. The author of this article is a faculty member at Cleveland State University and discussed the drafting of a resolution with Professor Tebeau.

[194] Minutes of the Meeting of the Faculty Senate of Ohio University 6 (Mar. 14, 2011), *available at* http://www.ohio.edu/facultysenate/.

[195] Kate Irby, *Faculty Senate Passes Resolution Against SB-5, McDavis' Position on Bill*, THE NEW POLITICAL (Mar. 15, 2011), http://thenewpolitical.com/2011/03/15/faculty-senate-sb5-resolution.

[196] Anna Staver, *Faculty Senate Shows Disapproval of SB 5*, KENTWIRED.COM (Mar. 14, 2011), http://kentwired.com/faculty-senate-shows-disapproval-of-sb-5.

The Youngstown State Senate adopted an anti-S.B. 5 resolution on March 3, 2011, after the Ohio Senate's adoption of the *Yeshiva* amendment, but before the IUC's role was publically known.[197] Even so, John Russo objected particularly to language in the *Yeshiva* amendment.[198]

Many faculty felt betrayed, and were appalled at the presidents' acting in secret. For example, Clifford Poirot, president of Shawnee State's Faculty Senate, posted a comment on the IUC's website:

> At best, the IUC can claim that it is speaking for the views of University Presidents . . . . What this clearly demonstrates is that the testimony and lobbying for inclusion of the notorious Yeshiva language in SB5 had absolutely nothing at all to do with shared governance. If shared governance existed, the IUC would not be making statements like this prior to (at a minimum) consulting broadly with the various stakeholders.[199]

Tracy Laux, a faculty member at Kent State, had posted a comment in the same vein:

> At our last Faculty Senate meeting, I asked President Lester Lefton of Kent State University whom did he mean when he stated "Kent State University" in his opening address. President Lefton answered by saying that Kent State had many stakeholders, such as faculty, students, alumni etc [sic] and when someone states Kent State University, it means all stakeholders. I accept that answer. . . . As all of the above are part of Kent State University . . . could you please stop stating that you do? I believe that you represent the 14 presidents of the 14 institutions to which you refer and maybe you represent their respective boards, but you

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[197] Andrea DeMart, *Academic Senate Passes Resolution Opposing SB 5*, THE JAMBAR.COM (Mar. 3, 2011), http://www.thejambar.com/news/academic-senate-passes-resolution-opposing-sb-5-1.2569128#.TpCQk7J2PbM.

[198] *Id.* The University of Akron Faculty Senate approved resolution in opposition to Senate Bill 5 at its March 2011 meeting. *See* THE UNIVERSITY OF AKRON CHRONICLE, A REPORT TO THE FACULTY OF THE UNIVERSITY OF AKRON 16 (Mar. 3, 2011), *available at* http://www.uakron.edu/facultysenate/docs/chronicle/2011/2011-Mar-3-Chronicle.pdf. The University of Cincinnati Faculty Senate website includes the text of an anti-S.B. 5 resolution that the Senate apparently adopted. *Resolution*, FACULTY SENATE, UNIV. OF CINCINNATI, http://www.uc.edu/content/dam/uc/facultysenate/senate/docs/resolutions/Resolution%20Ohio%20Senate%20Bill%20%20no_5.pdf. However, not every campus adopted such a resolution.

[199] Clifford Poirot, Comment to *Universities Welcome Budget's Proposed Regulatory Relief, Seek Refinements to Minimize Impact of Funding Cuts*, INTER-UNIV. COUNCIL OF OHIO (Apr. 3, 2011), http://www.iuc-ohio.org/for-immediate-release/comment-page-1. Professor Poirot became one of the four co-authors of the public records request to IUC, on which this article is based.

> most certainly do not represent the entirety of the fourteen institutions and it would be most reasonable of you to stop making such a claim.[200]

And Mark Tebeau, who authored Cleveland State's anti-S.B. 5 resolution, quoted another faculty member who had asked how university presidents would feel if the tables were turned:

> It's as if the faculty leaders of Ohio's public universities had drafted legislation that abolished university board of trustees, severely limited university presidents' compensation and created a system of governance based entirely on majority votes by faculty. And then, without saying anything to university officials, persuaded the governor to support the legislation and the legislature to enact it. While this was going on, the faculty would discuss routine matters with the administration but never mention their initiative.[201]

The *Yeshiva* amendment provoked outrage from faculty partly because it singled them out. Besides losing bargaining rights, faculty experienced the sting of discrimination. Even more importantly, the amendment demonstrated that the presidents had acted on their own initiative and not because of political pressure from above. Not knowing about the IUC's deregulation agenda, faculty might have imagined that fears of budget retaliation against their institutions had led presidents to support S.B. 5. The *Yeshiva* amendment demonstrated that a ban on faculty bargaining was precisely what the presidents wanted.

For presidents, too, the *Yeshiva* amendment may have come to be problematic. Here, the trouble was political. By late February 2011, national and statewide attention had focused on S.B. 5, and the intensity of opposition probably exceeded the presidents' expectations.[202] Some must have entertained second thoughts.

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[200] Tracy Laux, Comment to *Universities Welcome Budget's Proposed Regulatory Relief, Seek Refinements to Minimize Impact of Funding Cuts*, INTER-UNIV. COUNCIL OF OHIO (Mar. 22, 2011), http://www.iuc-ohio.org/for-immediate-release/comment-page-1. Bruce Johnson posted the following reply to Professor Laux: "On behalf of the 14 State University Presidents who represent the 14 State Universities, thanks for your input." Bruce Johnson, Comment to *Universities Welcome Budget's Proposed Regulatory Relief, Seek Refinements to Minimize Impact of Funding Cuts*, INTER-UNIV. COUNCIL OF OHIO (Mar. 23, 2011), http://www.iuc-ohio.org/for-immediate-release/comment-page-1 (directing his response to Laux, although posted on the main article).

[201] Cleveland State Meeting Minutes, *supra* note 192, at 4–5 (quoting the author of this article).

[202] *E.g.*, Irby, *supra* note 195; Alissa Widman, *Former BGSU Officials Linked to Ohio Senate Bill 5 Language*, THE BG NEWS (Sept. 23, 2011), http://www.bgnews.com/state/

Worse, the IUC's role had become public and campus "communication issues" had developed—as Bruce Johnson had predicted they would.[203]

B. The Presidents' Response

At Faculty Senate meetings and in comments in newspapers the presidents responded to the disclosures, but they generally refused to disclose their positions on S.B. 5.[204] Some presidents said that the presidents simply should take no position[205]—ignoring the inconvenient fact that they already had. Others emphasized that the presidents had disagreed among themselves—without saying what they had disagreed about.[206] Still, others praised unions in general.[207] The common threads in these presidential statements suggested that they had been coordinated and scripted. Coming from high public officials who also headed universities, the responses were extraordinary.

Alone among presidents, Lloyd Jacobs had publicly supported the original version of S.B. 5 during legislative hearings.[208] It does not appear, however, that Jacobs publically endorsed the *Yeshiva* amendment.[209] In March 2011, President McDavis of Ohio University indicated that he too had "supported the original version" of S.B. 5.[210] Regarding the *Yeshiva* amendment, however, his spokesperson would say only that he did "not oppose" it.[211]

A spokesperson for President Cynthia Anderson told the Faculty Senate of Youngstown State that the administration should "remain

article_f928380e-e59d-11e0-b650-001cc4c002e0.html.

[203] Dec. 16, 2010 Human Res. Comm. Meeting Minutes, *supra* note 35, at 2.

[204] *E.g.*, Berrett, *supra* note 115.

[205] *E.g.*, DeMart, *supra* note 197 (reporting that a Vice President at Youngstown State University—speaking on behalf of its president, Cynthia Anderson—advised that the administration ought to "remain neutral.").

[206] *E.g.*, Schmidt, *supra* note 165 ("Lester Lefton, president of Kent State University, said 'I am sure there is significant divergence of opinion among the presidents.'").

[207] Letter from Jacobs to Bacon, *supra* note 68 ("I believe that unions have done much good in the world and in the United States of America.").

[208] *Id.*

[209] *Cf.* Randiah Green, *President Jacobs Shows Support as Issue 5 Passes*, THE INDEPENDENT COLLEGIAN (Mar. 3, 2011), http://www.independentcollegian.com/president-jacobs-shows-support-as-issue-5-passes-1.2504109#.TpDS_bJ2PbM (suggesting—after the Ohio Senate approved S.B. 5 and the *Yeshiva* amendment—that President Jacobs supported the bill, but citing as evidence only his pre-*Yeshiva* letter to Senator Bacon).

[210] Andrew Zucker, *McDavis 'Not Opposed' to SB-5, Anti-Faculty-Union Provision*, THE NEW POLITICAL (Mar. 11, 2011), http://thenewpolitical.com/2011/03/11/mcdavis-not-opposed-to-sb5/.

[211] *Id.*

neutral."[212] The implication was that President Anderson had never taken a position and had nothing to disclose.[213] It remained unclear, however, why a university president would remain "neutral" on an issue of such critical importance. Taking a similar tack, University of Akron President Luis M. Proenza's position, as reported by the *Chronicle*, was that he "declined to take a stand."[214] "'What we have said on our campus,'" Proenza added, "'is quite simply that there are great universities with unions and great universities without them, and we intend to be a great university.'"[215]

"'I am sure there is significant divergence of opinion among the presidents,'" President Lefton of Kent State told a *Chronicle* reporter—speaking as if the presidents' deliberations were in the present, not the past, and as if he were an observer rather than a participant.[216] Lefton sounded similar themes at a Faculty Senate meeting, going so far as to imply that it might be illegal for him disclose his views.[217] According to the meeting minutes:

> [Faculty] Senator Feinberg . . . asked for President Lefton's position on Senate Bill 5 . . . . President Lefton said that Bruce Johnson gave testimony before an Ohio Senate committee on SB5, and as a member of the IUC . . . there is a divergence of opinion among the presidents regarding SB5. He further explained that he and the Kent State Board of Trustees have taken the position that they not comment on SB5. As a state university, Kent State is an "interested party" by state law staying silent on political issues such as candidates for governor, etc.[218]

Another president, Wright State's David R. Hopkins, sent out a campus-wide e-mail widely taken to be a statement of his opposition to S.B. 5 and the *Yeshiva* amendment.[219] After the amendment was

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[212] DeMart, *supra* note 197.

[213] Whether President Anderson was truly "neutral" is discussed *infra* text accompanying notes 246–48.

[214] Schmidt, *supra* note 165 (characterizing Proenza's position, but not quoting him).

[215] *Id.* (quoting Luis M. Proenza).

[216] *Id.* The idea of "neutrality" reflected the same unwillingness to acknowledge that the presidents already had acted.

[217] *See* Minutes of the Meeting of the Faculty Senate of Kent State University (Mar. 14, 2011), *available at* http://cphp.kent.edu/facultysenate/senateminutes/upload/fac-sen-03-14-11-minutes.pdf.

[218] *Id.*

[219] *See, e.g.*, *Roderick McDavis Supports S.B. 5, Opposes Collective Bargaining*, OU+AAUP (Mar. 9, 2011), http://ouaaup.wordpress.com/2011/03/09/roderick-mcdavis-stands-for-s-b-5-and-against-collective-bargaining (contrasting Hopkins' and McDavis' positions on S.B. 5).

adopted Hopkins wrote: "'I was raised in a union family and, as president and provost, have found our union leadership to be of the highest quality. I appreciate all they have brought to us, and I believe we are a stronger institution because of their dedicated commitment to their membership.'"[220]

Although strongly suggestive of opposition to S.B. 5, this e-mail nonetheless fell short of an unequivocal statement that Hopkins had opposed the bill. Even Hopkins seemed to be honoring some kind of agreement among the presidents not to disclose their own or other presidents' views.[221]

Remarks by President Ronald Berkman of Cleveland State incorporated all these themes: neutrality, divergent views, not taking a stand, and support for unions.[222] At a Faculty Senate meeting on March 9, 2011, Professor Beth Cagan asked President Berkman whether he "would share . . . his position" on S.B. 5.[223] The minutes read:

> President Berkman said that he would make a statement . . . . Evidently, and he was not privy to this, there was some implicit agreement that university presidents would not take a public position on SB 5. He thinks that for lots of reasons, it is a good practice right now to not take a public position on SB 5. President Berkman said that his personal feeling about it is that . . . [t]here are constructive changes in collective bargaining that can benefit our ability to meet our mission and those changes should be explored in a deliberate, constructive and non-partisan manner. However, he firmly believes that the right to collective bargaining should be preserved. He also agrees with President Lefton's statement, without naming names, that there are significant divergences of opinion among the presidents concerning SB 5 and the time will come probably when some of that divergence will become more public.[224]

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[220] *Id.* (quoting David R. Hopkins).

[221] In September 2011, Hopkins came closer to unequivocally opposing the *Yeshiva* amendment. According to a news account, "David Hopkins . . . said some of the flexibility Senate Bill 5 offers would allow his staff to better manage fiscal limitations, but he is not a supporter of eliminating union members from administrative decision making. 'We have always worked well with our union,' Hopkins said." Aaron Krause, *Boose to Speak in Norwalk About Senate Bill 5 Referendum, Issue 2*, NORWALK REFLECTOR (Sept. 22, 2011), http://www.norwalkreflector.com/content/boose-speak-norwalk-about-senate-bill-5-referendum-issue-2.

[222] Cleveland State Meeting Minutes, *supra* note 192, at 16.

[223] *Id.* at 15–16.

[224] *Id.* at 16.

Senator Brian Ray noted that the IUC had publically supported S.B. 5, making it too late for "neutrality."[225] President Berkman replied "that there will be a meeting next week with the IUC and there will be significant differences of opinion among the IUC about what has transpired."[226]

President Berkman also referred to the account of Bruce Johnson's remarks in the *Chronicle*.[227] According to Berkman, Johnson said that he had inferred the presidents' support for the *Yeshiva* amendment from their desire for additional flexibility.[228] But that was a "fairly long step" to take, Berkman observed.[229] He concluded that "either [Johnson] is off the reservation or he is on it and the question is which?"[230] However, Johnson had cited more than a bare desire of "flexibility;" in fact, he told the *Chronicle* that university presidents had endorsed the ban on all bargaining, including faculty bargaining, in the original version of S.B. 5.[231]

C. The March 15, 2011 IUC Meeting

President Berkman's prediction of "significant differences of opinion" at the March 15, 2011 IUC meeting proved mistaken. There was almost no dissent among the presidents, at least judging from the meeting minutes.[232]

Johnson opened the discussion noting that S.B. 5 had "stirred up controversy among university faculty."[233] The origin of the *Yeshiva* amendment, Johnson said, traced back to questions that legislators posed after he cited the *Yeshiva* ruling in his February testimony.[234] The IUC had responded by drafting the amendment "[w]ith the assistance of campus counsels . . . ."[235]

The meeting chair then:

> [A]sked for member discussion [by the presidents], and asked

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[225] *See id.*

[226] *Id.* at 17.

[227] *Id.*

[228] *Id.*

[229] *Id.*

[230] *Id.*

[231] Schmidt, *supra* note 165.

[232] *See* Minutes of the Meeting of the Inter-University Council of Ohio 3 (Mar. 15, 2011) [hereinafter Mar. 15, 2011 Meeting Minutes] (on file with Albany Law Review).

[233] *Id.* at 2.

[234] *Id.* Johnson was apparently referring to his House testimony on February 22, 2011. Johnson Testimony: Feb. 22, 2011, *supra* note 56 (testifying that the right of faculty to collectively bargain since the *Yeshiva* decision has turned on whether the role of the faculty member encompassed managerial authority).

[235] Mar. 15, 2011 Meeting Minutes, *supra* note 232, at 2.

> if there is any dissenting voice among the members. Several members expressed ongoing support for IUC's position and actions. One member suggested that one word could be added to clarify that faculty responsibilities are "primarily" in management areas. There was no consensus to this change. University leaders respect shared governance, which does not need to include collective bargaining.[236]

Clearly, IUC leaders were aware of the charge that Johnson lacked authority to propose the *Yeshiva* amendment: IUC minutes do not generally record calls for a "dissenting voice."[237] Nor do minutes explicitly say that no other president supported the "primarily management" proviso, which would have allowed almost all faculty to bargain.[238] But unless the minutes misrepresent what happened, the presidents overwhelmingly supported the *Yeshiva* amendment and Johnson.[239]

D. What Presidents Really Thought

Other records shed light on individual president's views. Lester Lefton's public comments emphasized the presidents' supposed "divergence of opinion."[240] But an e-mail exchange Lefton initiated with Bruce Johnson seemingly reflects his actual view.[241] Unsure whether the *Yeshiva* amendment had been adopted, Lefton asked on March 2, 2011 "Are we where we want to be on sb 5?"[242] Lefton

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[236] *Id.* at 3.

[237] *Compare id.* (calling for "dissenting voice[s]"), *with* Oct. 12, 2010 Meeting Minutes, *supra* note 16, at 2–4 (detailing the collective's priorities, but including no discussion, only a review of the priorities), *and* Nov. 9, 2010 Meeting Minutes, *supra* note 19, at 3 (following a report by Johnson of priorities, Presidents' council moved and all priorities were "unanimously approved" and in discussing USO, the members agreed to cooperate with each other in shared goals), *and* Dec. 16, 2010 Human Res. Comm. Meeting Minutes, *supra* note 35, at 2–3 (reflecting that Johnson asked members what the impact of collective bargaining would be, which resulted in the formation of a subcommittee; moreover, in a round-table discussion, members simply received updates), *and* Jan. 11, 2011 Meeting Minutes, *supra* note 1, at 1–3 (noting Johnson's report on various issues, such as the state of the budget, the Ohio Tuition Trust Authority, regulatory reform, and pension reform).

[238] *See* sources cited *supra* note 237 (making clear that the IUC meetings from October 12, 2010 to January 11, 2011 did not discuss the "primarily management" proviso or collective bargaining in depth).

[239] Presidents Hopkins and Berkman, who had separately indicated support for collective bargaining in their public comments, were both recorded as present. Mar. 15, 2011 Meeting Minutes, *supra* note 232, at 1.

[240] *See* Staver, *supra* note 196 (claiming a "divergence of opinion.").

[241] E-mail from Lester Lefton, President, Kent State Univ., to Bruce Johnson, President & CEO, Inter-Univ. Council of Ohio (Mar. 2, 2011) [hereinafter E-mail from Lester to Johnson] (on file with Albany Law Review).

[242] *Id.* The body of the e-mail was blank, but the question was posed in the subject line.

later e-mailed Johnson: "trying to figure out if i [sic] have got some of my mangement [sic] rights back—esp [sic] whether though [sic] the contract, faculty coninue [sic] to overcontrol [sic] the institution."[243] Believing that Lefton had been too forthright—and these are the most candid comments by a president in the thousands of pages of released records—Johnson urged him to "[r]emember these e-mails are subject to discovery in the legal processes."[244] Nothing suggests that Lefton saw the slightest divergence between Johnson's views about *Yeshiva* and his own, or for that matter, between his and Johnson's views and those of other presidents. Lefton's very question, "Are *we* where we want to be on sb 5," indicated agreement.[245]

Another IUC e-mail relates to the Youngstown State president's position of neutrality. In early March 2011, President Cynthia Anderson's spokesperson explained to the Faculty Senate that the administration should "remain neutral."[246] A few weeks later, Suver provided a gloss on her position. Commenting to Johnson and another IUC staffer about an editorial piece in the Youngstown State student newspaper about S.B. 5, Suver wrote: "Looks like her strategy to stay neutral is paying off. They aren't pointing the finger at her. Thanks to the IUC."[247] Suver seemed to consider "neutrality" a pose designed to hide President Anderson's support for S.B. 5.[248] This "strategy" succeeded, Suver suggested, because responsibility for supporting S.B. 5 had been deflected from

[243] E-mail from Lester Lefton, President, Kent State Univ., to Bruce Johnson, President & CEO, Inter-Univ. Council of Ohio (Mar. 2, 2011) (on file with Albany Law Review).

[244] E-mail from Bruce Johnson, President & CEO, Inter-Univ. Council of Ohio, to Lester Lefton, President, Kent State Univ. (Mar. 2, 2011) [hereinafter E-mail from Johnson to Lester] (on file with Albany Law Review).

[245] E-mail from Lefton to Johnson, *supra* note 241 (emphasis added).

[246] DeMart, *supra* note 197; *see also* discussion *supra* text accompanying notes 212–13 (discussing Cynthia Anderson's position).

[247] E-mail from Mike Suver, Vice President, Gov't Relations, Inter-Univ. Council of Ohio, to Cindy McQuade, Vice President of Operations, Inter-Univ. Council of Ohio & Bruce Johnson, President & CEO, Inter-Univ. Council of Ohio (Mar. 24, 2011) [hereinafter E-mail from Suver to McQuade & Johnson] (on file with Albany Law Review).

[248] Suver reiterated the same view in a March 1, 2011 e-mail to Johnson, commenting that Youngstown State's government relations representative "would freak if he knew" that Youngstown's Academic Senate was considering an anti-S.B. 5 resolution. *See* E-mail from Mike Suver, Vice President, Gov't Relations, Inter-Univ. Council of Ohio, to Colleen O'Brien, Assistant Vice President, Gov't Affairs, Ohio State Univ., & Bruce Johnson, President & CEO, Inter-Univ. Council of Ohio (Mar. 1, 2011) [hereinafter E-mail from Suver to O'Brien & Johnson] (on file with Albany Law Review). "They've [Youngstown State's administration] tried so hard and been so careful to walk that line of not *publicly* supporting the bill." *Id.* (emphasis added).

university presidents onto the IUC.[249] More generally, Suver implied that the IUC was willing to assume the blame for what the presidents themselves had done.

E. Reform, Don't Eliminate Bargaining: The Minority View

A broader clue to individual presidents' views appears in a February 21, 2011 draft of Johnson's testimony given on February 22, 2011.[250] In the statement as delivered, Johnson said that "the IUC as a whole"—presumably meaning all presidents—"agree[d] that the current collective bargaining law equates to over-regulation . . . ."[251] However, there was "discussion . . . about how best to address" the problem and "[a] minority of IUC presidents believe . . . the state legislature should amend but not repeal" laws that authorized collective bargaining at public universities.[252] Johnson then turned to federal labor law and the *Yeshiva* decision.

Johnson did not say *what* reforms the "minority" favored, however and it was unclear why references to federal labor law followed his remarks about the "minority" of presidents. His February 21, 2011 draft sheds light on both matters.[253]

Mike Suver e-mailed the draft to Johnson at 5:15 pm on February 21, 2011.[254] It included the following language:

> A small minority of IUC presidents believe that the state legislature should amend but not repeal the public sector collective bargaining laws that apply to public universities. *Those presidents note* that the National Labor Relations Act that governs private employers, and private universities, does not offer the overly broad bargaining rights that ORC 4117 gives to public employees in Ohio. They believe federal law is preferable to ORC 4117 in at least four important ways:
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> 1. The right of faculty at private universities to unionize and engage in collective bargaining is a matter of federal

[249] *See* E-mail from Suver to McQuade & Johnson, *supra* note 247.

[250] Hearing Before the S. Ins., Commerce & Labor Comm., 129th Gen. Assemb., Reg. Sess. 3 (Ohio 2011) [hereinafter Draft of Johnson's Testimony] (draft testimony of Bruce Johnson, President & CEO, Inter-Univ. Council of Ohio on Feb. 22, 1011) (on file with Albany Law Review).

[251] Johnson Testimony: Feb. 22, 2011, *supra* note 56.

[252] *Id.*

[253] Draft of Johnson's Testimony, *supra* note 250.

[254] E-mail from Mike Suver, Vice President, Gov't Relations, Inter-Univ. Council of Ohio, to Bruce Johnson, President & CEO, Inter-Univ. Council of Ohio (Feb. 21, 2011) (on file with Albany Law Review).

> labor law and governed by the NLRB. In *NLRB v. Yeshiva (1980)*, the U.S. Supreme Court held the faculty included "managerial" personnel and excluded them from the coverage under the National Labor Relations Act.[255]

Thus, after months of discussion with presidents, Johnson believed that a majority wanted to ban collective bargaining generally at universities and a minority wanted to ban bargaining by faculty only.[256] Johnson had cited *Yeshiva* immediately after mentioning the minority of presidents because that minority wanted to follow a federal model and ban only faculty bargaining.[257] But Johnson did not suggest that any other view commanded support among presidents. Thus, presidents in the "minority" would *favor* a *Yeshiva* amendment (as would presidents in the majority, once general collective bargaining was restored)—which may explain why Johnson believed he possessed authority to propose it.

Johnson spoke to each president by telephone before he testified on February 22, 2011.[258] No record describes those conversations and one can only speculate about why Johnson altered the February 21, 2011 draft. Perhaps a president had changed his or her mind because of the unexpectedly heated political climate. If that happened, Johnson could no longer say that every president in the minority favored the federal labor model. Moreover, where the draft refers to a "small minority" of presidents, the final version simply says "minority."[259] Perhaps the number of dissenting presidents had grown.

At least two other possibilities exist. Some presidents may well have wanted to lower their political profile because of the intense opposition to S.B. 5. They would not have changed their minds about collective bargaining, however. S.B. 5 seemed assured of passage, with or without public support from the presidents. Why not reap the benefits of an end to bargaining, then, without paying any political price? This option could hold special appeal for presidents in strongly pro-union areas of Ohio, such as the

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[255] Draft of Johnson Testimony, *supra* note 250, at 3–4 (emphasis added). The other differences were that strikers could be replaced, there were fewer proper subjects of bargaining, and it was easier to decertify a union. *Id.* at 4.

[256] *See id.* at 3.

[257] *See id.* at 3–4.

[258] E-mail from Johnson to iucpresidents, *supra* note 55.

[259] *Compare* Draft of Johnson's Testimony, *supra* note 250, at 3 ("A *small* minority of IUC presidents believe that . . . ." (emphasis added)), *with* Johnson Testimony: Feb. 22, 2011, *supra* note 56, at 3 ("A minority of IUC presidents believe that . . . .").

Northeast.[260] And, as the presidents' later public statements showed, some were perfectly capable of both desiring a political result and not wanting to pay any political price for doing so.

A second possibility centers on Bruce Johnson. Just before testifying, Johnson may have learned about the amendment to restore limited collective bargaining. Thus, he may have contemplated a *Yeshiva*-type measure before he testified. If he did, Johnson would not want to testify that only a *minority* of presidents supported *Yeshiva*. Instead, he would alter his statement to say that the entire IUC regarded the *Yeshiva* decision with favor; Johnson's final statement said exactly that.[261]

Whatever Johnson was thinking, the February 21, 2011 draft casts a harsh light on the presidents' public statements during March. Some presidents, as noted above, cited the "divergence of opinion" among them.[262] But should faculty feel mollified because some presidents wanted to ban only faculty bargaining, while the others wanted to ban all bargaining? Presidents talked about remaining "neutral" and "not taking a stand"—but they had not been neutral and had taken a very strong stand.[263] It was almost as if talking about "neutrality" in March could make them neutral retroactively. The presidents had created an *Alice in Wonderland* world for faculty—one in which "I strongly support collective bargaining" might very well mean "I adamantly oppose collective bargaining for you."

Shared governance presupposes respect by each element of a university for other elements. Mutual respect allows universities to operate using processes of discussion rather than command. Yet it is difficult to discern any respect for faculty in these events.

The presidents decided to restructure their institutions, so as to enhance their own authority and to conceal their design from faculty. When faculty finally got a glimmer of what presidents were doing, discussion ensued—discussions in which many presidential statements lacked any discernible relationship to reality. If faculty were playing Alice, the presidents had created Wonderland. In the presidents' version, Alice would never even notice that her world had been turned upside down.

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[260] Of course, a political price might be paid elsewhere—presumably, the state's political leadership would not be pleased.

[261] Johnson Testimony: Mar. 16, 2011, *supra* note 11, at 4.

[262] *See, e.g.*, *supra* note 206.

[263] *See* Schmidt, *supra* note 165; s*ee also* DeMart, *supra* note 197 (quoting administration officials at Youngstown State that administration ought to "remain neutral").

V. CONCLUSION: THE ALL-ADMINISTRATIVE UNIVERSITY

Benjamin Ginsburg has described the advent of an "all-administrative university." He writes:

> [M]ost professors view scholarship and teaching as ends and the university as an institutional means or instrument through which to achieve those ends.
>
> For administrators, on the other hand, it is the faculty's research and teaching enterprise that is the means and not the end. . . . Most administrators . . . view the university as the equivalent of a firm manufacturing goods and providing services whose main products happen to be various forms of knowledge . . . . To the managers of a firm in the knowledge industry . . . the manufacture of one or another product or service is not an end in and of itself but is, instead, evaluated on the basis of its contribution to the overall financial well-being of the enterprise.[264]

Followed to its logical conclusion, the enterprise concept of universities yields an institution organized like other enterprises, with a hierarchal system of command and control. And, like a corporation that comes to value its senior managers more than its investors, employees, or customers, an "enterprise" university can become "all-administrative" in nature by serving the interests of its administrators first of all. These institutions pay lip service to shared governance but they regard administration as the actual core of a university. The traditional notion of a defining or constitutive institutional element remains, but the defining element of a university becomes the president and his or her administration, not the faculty.[265]

A. The Presidents' Conception

The presidents' actions and words comport with the "all-administrative" model. In IUC discussions, the faculty was not treated as constitutive of the university, but was a "constituenc[y]"—like construction workers.[266] The word "faculty"

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[264] GINSBERG, *supra* note 12, at 167–68 (footnotes omitted).

[265] An entrepreneurial university need not value the interests of administrators above all else—an all-administrative university does. In drawing this distinction, I rely on Ginsberg's analysis. However, Ginsberg himself does not distinguish between the two in this way. *See id.* He may well assume—correctly, I believe—that an entrepreneurial university will inevitably become "all-administrative." *Id.*

[266] Jan. 11, 2011 Meeting Minutes, *supra* note 1, at 2.

itself rarely appears in IUC minutes. Instead, one finds general references to "affected stakeholders," "constituencies," "groups," or "employees."[267] To judge from the minutes, everyone, including faculty, was a *constituent* of the president.

Any measure that enhanced presidential authority counted as the removal of a restraint on the *university*—because the presidents, assuming the faculty's former role, *were* the university. *Deregulation* meant freeing *presidents* from constraints, including internal ones. Viewed objectively, S.B. 5 restrained universities by preventing them from bargaining, even if they wanted to do so. But the presidents thought the bill removed restraint on their institutions because it enhanced presidential authority. The same reasoning led Johnson to characterize faculty collective bargaining as unfair—private institutions, he noted, did not have to bargain with their faculties.[268] Because bargaining diminished the presidents' power, Johnson assumed that it disadvantaged universities.

As much as anything, how the presidents treated faculty revealed what they thought of universities. The prelude to S.B. 5 was a campaign by the presidents to deregulate universities—that is, enhance presidential authority—kept secret from faculty with the apparent agreement of all presidents.[269] And after IUC publicly endorsed S.B. 5, most presidents refused to inform faculty of their views and employed evasions instead. Presidents attempted to assuage faculty, whom they regarded as "constituents," but faculty were not to know what the presidents thought or did. All of this is inexplicable on a shared governance view, but predictable in an all-administrative university.

B. Yeshiva *Revisited*

Given their conception of a university, the presidents' reliance on the *Yeshiva* decision was ironic. If universities were hierarchical enterprises headed by a president—as the presidents supposed—faculty should enjoy bargaining rights, even with federal labor law as the model. The dissenting justices in *Yeshiva* explained:

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[267] *Id.* at 2–3; Nov. 9, 2010 Meeting Minutes, *supra* note 19, at 2; Dec. 16, 2010 Human Res. Comm. Meeting Minutes, *supra* note 35, at 2.

[268] *See* Johnson Testimony: Mar. 16, 2011, *supra* note 11, at 4–5.

[269] *See* E-mail from Suver to O'Brien & Johnson, *supra* note 248; *see also* March E-mail from Johnson to iucpresidents, *supra* note 110 ("We will continue to say 'the changes in SB5 give us additional flexibility to deal with significant changes facing higher education' or something to that effect.").

> [T]he 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. The Court's conclusion that the faculty's professional interests are indistinguishable from those of the administration is bottomed on an idealized model of collegial decisionmaking that is a vestige of the great medieval university. But the university of today bears little resemblance to the "community of scholars" of yesteryear. Education has become "big business," and the task of operating the university enterprise has been transferred from the faculty to an autonomous administration, which faces the same pressures to cut costs and increase efficiencies that confront any large industrial organization. The past decade of budgetary cutbacks, declining enrollments, reductions in faculty appointments, curtailment of academic programs, and increasing calls for accountability to alumni and other special interest groups has only added to the erosion of the faculty's role in the institution's decisonmaking process.[270]

Justice Powell ruled out faculty bargaining because Yeshiva University did not operate as an "enterprise."[271] Ohio's presidents then invoked his decision to enable their universities to operate as enterprises—indeed as all-administrative institutions.[272] If the presidents were right about the nature of universities, *Yeshiva* would have been decided the other way.

C. Managerial Right

Throughout the S.B. 5 controversy, a striking feature of IUC's and administrators' arguments was the lack of concrete detail. Perhaps the IUC's public relations consultant had advised Johnson to avoid details. Or perhaps supporting details did not exist, simply because the presidents were wrong. The possibility I want to suggest, however, is that the presidents believed they enjoyed something akin to a natural right, which required no defense. When labor

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[270] NLRB v. Yeshiva Univ., 444 U.S. 672, 702–03 (1980) (Brennan, J., dissenting) (internal citations omitted). Justice Powell replied to Justice Brennan's dissent in a footnote in the opinion of the Court, arguing that "[t]he shift [of power from faculty to administration], if it exists, is neither universal nor complete" and that the Court's decision had to be "based on the record," which indicated that the Yeshiva faculty's decisions were virtually never overturned. *Id.* at 689 n.29.

[271] *Id*.

[272] Johnson Testimony: Feb. 22, 2011, *supra* note 56, at 4.

urged adoption of the National Labor Relations Act during the 1930s, a deep belief in the principle of workplace democracy drove the effort.[273] As a natural extension of ideas about political and human liberty, industrial democracy seemingly required little argument. Ohio's public university presidents, I believe, operated with a comparably deep—but almost opposite—conviction. Their foundational principle was their right of management in an all-administrative university. This principle seemed similarly self-evident, requiring no evidence to support it.

Unlike labor in the 1930s, however, the presidents could not link their foundational idea to more generally accepted principles. Labor appealed to concepts of liberty and human flourishing. Presidents could hardly appeal to managerial authority in the same way. Moreover, the presidents were handicapped by a nominal adherence to a shared governance model, which remained a practical necessity for the time being. As a result, the presidents were left with nothing but uninspiring technocratic abstractions such as *efficiency* (without supporting evidence) or *deregulation*. These limits on what they could say may explain why presidents said what they did.

D. The Future

What will happen in the aftermath of the referendum remains unclear. Supporters of S.B. 5 may decide to introduce a "lite" version, containing only less controversial provisions, at some point in the future—perhaps after the presidential election in 2012.[274] Conceivably, a ban on faculty bargaining will be included in any new proposal. Meanwhile, the presidents' idea of "charter universities" has morphed into the Ohio Chancellor's "Enterprise University Plan."[275] In this form, however, it has attracted no support from the university presidents, at least as of this writing; according to President Berkman of Cleveland State, the presidents believe that the savings universities will realize from deregulation, as provided in the plan, would not make up for the plan's reductions

[273] *See* Melissa Scullen, Popular Constitutionalism and the 1937 Constitutional Revolution 21 (2011) (unpublished manuscript) (on file with Albany Law Review).

[274] See *Akron-Area Lawmakers Repond to SB 5 Repeal,* OHIO.COM (Nov. 10, 2011), http://www.ohio.com/news/politics/local/akron-area-lawmakers-respond-to-sb-5-repeal-1.244790 (reporting the statements of various legislators on the repeal of S.B. 5).

[275] UNIV. SYSTEM OF OHIO, BD. OF REGENTS, AN ENTERPRISE UNIVERSITY PLAN FOR OHIO (2011), *available at* http://www.ohiohighered.org/sites/default/files/uploads/enterprise-university-plan/Enterprise-Universities-Plan-WEB.pdf.

in state subsidy to universities.[276]

On the campuses, the presidents' once secret reform agenda may yet have lasting effects, instilling or deepening faculty distrust of university administrations. How deep or long lived that change might be is impossible to estimate. It also seems unclear how events will affect the presidents themselves. The fruits of their efforts—the referendum, the campus reaction to their supporting S.B. 5, the fate of "charter universities"—may well prompt presidents to think twice before launching another secret campaign for "very aggressive" reforms.

The day after the referendum, President Berkman of Cleveland State University addressed his Faculty Senate. As noted earlier, Berkman is the only president that IUC records identify as having expressed reservations about the presidents' actions: Berkman had objected to IUC's "rush[ing] to take a formal position" in the letter to Governor-elect Kasich.[277] Reporting to the Faculty Senate on November 9, 2011 Berkman said that during IUC discussions of S.B. 5 he had "made it clear" that he "was not in favor of IUC taking the position."[278] This statement did not identify the "position" in question, however. Like Berkman's earlier remarks,[279] the words were as consistent with support for a ban on faculty bargaining (while allowing other employees of universities to bargain)[280] as they were with opposition to IUC support for any part of S.B. 5.[281]

Nonetheless, this marked the first time a university president had stated, explicitly and publically, opposition to *any* IUC position on S.B. 5. Procedurally, Berkman was treating S.B. 5 as a proper subject of discussion with faculty—and also treating discussions with faculty as more important than IUC's imperative that

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[276] Minutes of the Meeting of the Faculty Senate of Cleveland State University -- (Nov. 9, 2011), (on file with author) [hereinafter Cleveland State Faculty Meeting Minutes]. The author was also present at this meeting.

[277] *See supra* text accompanying note 53.

[278] Cleveland State Faculty Meeting Minutes, *supra* note 276.

[279] *See supra* text accompanying notes 223–31.

[280] *See supra* text accompanying notes 252–58 (discussing the "minority" of presidents who favored a ban limited to bargaining by *faculty*).

[281] Lending weight to the latter interpretation is Berkman's objection to IUC's taking *any* "position" in the letter to Governor-elect Kasich. *See supra* text accompanying note 53. Lending support to the former interpretation is the lack of specificity in Berkman's statement and his alluding again on November 9, 2011 to a disagreement among the presidents—when the record suggests that the presidents did not disagree at all about a ban on faculty bargaining. *See* Cleveland State Faculty Meeting Minutes, *supra* note 276 (containing Berkman's statement that he had "asked" IUC to note whenever "took the position" that "there were presidents who disagreed"); *supra* Part IV.E (discussing evidence that even presidents in the "minority" on IUC favored a ban on faculty bargaining).

presidents "speak with one voice."[282] Indeed, at the same meeting, Berkman described his own and other presidents' views of the Enterprise University Plan. He went on to say that if IUC should discuss another proposal to ban faculty bargaining then he would report it to his university's faculty.[283]

The IUC presidents' aggressive reform agenda had proved self-defeating. They failed to achieve their objectives, of course. Worse, the "charter-enterprise" concept was now boomeranging. The presidents had envisioned themselves heads of autonomous "enterprises," with the power of a CEO, and free from "restraints," such as faculty collective bargaining. State political leaders proved more than willing to treat presidents as managers and universities as entrepreneurial; the *Yeshiva* amendment proved as much. But few managers direct free standing enterprises; in fact, most run departments in a larger "enterprise," subject to someone else's direction. And it was beginning to appear that state leaders viewed university presidents in that way.

The Chancellor's "Enterprise Plan," as previously noted, seemed likely to reduce state support for universities while providing comparatively little deregulation in return. Crucially, the plan did not grant presidents power to set tuition free from state imposed ceilings. Nor would the presidents gain enhanced authority over their faculties; by August, when the Enterprise Plan appeared, polls showed S.B. 5 heading toward a double-digit defeat.[284] Even IUC's injunction to "speak with one voice" made the presidents appear more like "company" men and women than the heads of autonomous enterprises.

In an enterprise university model, presidents replace the faculty as the defining element of a university. The presidents pay lip service to shared university governance while undermining the faculty's central role. But what the presidents were doing to their faculties, Ohio was now doing to presidents. State leaders seemed to pay lip service to an enterprise model while undermining both the role of presidents and the autonomy of the universities.

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[282] "Speaking with one voice" comported with public endorsements of IUC's positions, but not public disagreements. That is why Presidents McDavis and Jacobs could announce support for IUC's positions, but no president before Berkman said that he or she had been in opposition.

[283] Cleveland State Faculty Meeting Minutes, *supra* note 276 (responding to a question from Senator Brian Ray).

[284] *Kasich, SB5 Make Small Progress in Poll*, DAYTON BUS. J., Aug. 19, 2011, http://www.bizjournals.com/dayton/news/2011/08/19/kasich-sb5-make-small-progress-in-poll.html.

By "speaking with one voice" during the debates over S.B. 5—which meant not speaking to their faculties—the presidents diminished both themselves and their institutions. Almost a century earlier, university presidents had embraced tenure to protect the academic enterprise, and their own positions, from interference by boards of trustees and outsiders.[285] The lesson of S.B. 5 may be that the presidents should align themselves with their faculties again and embrace the traditional concept of a university. Public universities can maintain their traditional structure or they can become components in a larger, all-administrative enterprise—there may be no third way.

[285] GINSBURG, *supra* note 12, at 142–54 (outlining the origins of tenure and the development of principles of "job security" and "academic freedom").