NLRB Jurisdiction Over Colleges and Universities: A Plea for Rulemaking

Arthur P. Menard

Nicholas DiGiovanni Jr.
When the National Labor Relations Board (NLRB) first asserted jurisdiction in 1970 over institutions of higher learning, faculty unionism was yet a nascent concept. Since then, however, the movement has developed significantly, although the three major educational unions recently have suffered some critical defeats. While NLRB doors have been opened to faculty union organization, the limit of the Board's jurisdiction over colleges and universities remains unclear. Private colleges and universities with gross annual...
revenues in excess of one million dollars have been brought within the NLRB's discretionary jurisdiction by a rare exercise of rulemaking authority; public colleges and universities that are clearly "political subdivisions" of a state are excluded from NLRB jurisdiction by statute. The hazy distinction, however, between "public" and "private" has created serious jurisdictional uncertainty for institutions falling somewhere in the penumbras of these two definitional extremes.

Clarity in this area is unlikely as long as the Board exhibits its traditional reluctance to use its rulemaking authority. The complexity of the question, which involves numerous public policy factors as well as statutory interpretation, suggests that rulemaking is the appropriate vehicle for bringing some predictability to the issue of when the NLRB can and will assert jurisdiction over educational institutions. The frequently time-consuming adjudicative process, which has limited utility for gathering information and opinion and which must deal with issues in random order, cannot provide the certainty required to deal with the emerging faculty unionization movement.

**Cornell University and Rule 103.1: NLRB Jurisdiction over Private Colleges and Universities**

The jurisdictional provision of the National Labor Relations Act (NLRA) empowers the NLRB "to prevent any person from engaging in any unfair labor practice . . . affecting [interstate] commerce." In *Trustees of Columbia University*, legislative history of statutory limitations upon the Board's jurisdiction, found in the Act's definition of "employer," formed the basis for the univer-

7. Id. §§ 151-68.
sity’s claim that the Board should not assert its jurisdiction over institutions of higher education.11 Having found that “the activities of Columbia University affect[ed] commerce sufficiently to satisfy the requirements of the statute . . .,”12 the Board nevertheless concluded that nonprofit organizations, even if not exempted explicitly from statutory NLRB jurisdiction, were intended to be within the Board’s jurisdiction “only in exceptional circumstances and in connection with purely commercial activities of such organizations.”13 The Board therefore declined to assert jurisdiction over Columbia University,14 providing a longstanding precedent for questions of jurisdiction over educational institutions.15

Almost twenty years after Columbia, however, the Board took cognizance of a changed economic pattern of higher education in the United States when it reconsidered its position on jurisdiction over


11. 97 N.L.R.B. at 426-27, 29 L.R.R.M. at 1099. The petitioning union argued that the limited scope of the final exclusion in section 2(2) indicated a congressional intent to exempt only charitable hospitals and no other nonprofit organizations from the Board’s jurisdiction. Id. at 427, 29 L.R.R.M. at 1099.

12. Id. at 425, 29 L.R.R.M. at 1098. The Board determined that Columbia did affect commerce sufficiently to come within its jurisdictional standards:

During the academic year ended June 30, 1950, Columbia University had a direct inflow of $52,000 (10.5 percent of the standard established by Federal Dairy Co., Inc., 91 NLRB 638) and an indirect inflow of $584,000 (58.4 percent of the standard established by Dorn’s House of Miracles, Inc., 91 NLRB 632). During the same period, it also had a direct outflow of $4,890 from the sale of photostats, microfilms, and the Germanic and Romanic Reviews (19 percent of the standard established by Stanislaus Implement and Hardware Company, Limited, 91 NLRB 618) and an indirect outflow of $21,150 from the sale of radio and television rights to its football games (42.3 percent of the standard established by Hollow Tree Lumber Company, 91 N.L.R.B. 635). . . . In addition, Columbia University does a substantial amount of classified contract work for defense agencies . . .

Id. at 425 n.2, 29 L.R.R.M. at 1098 n.2.


14. The Board concluded: “Under all the circumstances, we do not believe that it would effectuate the policies of the Act for the Board to assert its jurisdiction over a nonprofit, educational institution where the activities involved are noncommercial in nature and intimately connected with the charitable purposes and educational activities of the institution.” 97 N.L.R.B. at 427, 29 L.R.R.M. at 1099.

15. Columbia was followed in Iowa State Memorial Union, 55 L.R.R.M. 1382 (1964) (NLRB administrative decision); Crotty Bros., Inc., 146 N.L.R.B. 755, 55 L.R.R.M. 1402 (1964); University of Miami, 146 N.L.R.B. 1448, 56 L.R.R.M. 1055 (1964).
colleges and universities in *Cornell University*,

dealing with the rights of bargaining units at Syracuse and Cornell Universities. By 1970, higher education had become big business: enrollment had increased dramatically with corresponding increases in the operating budgets of educational institutions, thereby enlarging greatly their impact on interstate commerce. Because Cornell and Syracuse, like Columbia, were private universities, the Board’s power to assert jurisdiction was not challenged. Nevertheless, when deciding whether, in its discretion, to assert that jurisdiction, the Board expressly overruled *Columbia*.

The Board examined the statutory foundation of *Columbia* and congressional action since that time, divining no legislative intent to put nonprofit employers beyond the Board’s reach. Coupled with the markedly increased economic impact of colleges and universities, the absence of a statutory mandate not to expand the Board’s discretionary jurisdiction impelled


17. In *Cornell*, the Board recognized the far-reaching effects of higher education on the economy:

[T]he approximately 1,450 private 4- and 2-year colleges and universities in the United States have on their payrolls some 247,000 full-time professionals and 263,000 full- and part-time nonprofessional employees. Operating budgets of private educational facilities were an estimated $6 billion in 1969, an increase of $300 million over the previous fiscal year. Income is derived not only from the traditional sources, such as tuition and gifts, but from the purely commercial avenues of securities investments and real estate holdings. Revenues of private institutions of higher education for fiscal year 1966-67 totaled over $6 billion. More than $1.5 billion of that sum came from Government appropriations. Private colleges and universities also realized a commercial profit of $70,678,000 from furnishing housing and food services.

183 N.L.R.B. at 332, 74 L.R.R.M. at 1273 (footnotes omitted). After analyzing other aspects of the changes in higher education since *Columbia*, the Board stated: “It is no longer sufficient to say that merely because employees are in a nonprofit sector of the economy, the operations of their employers do not substantially affect interstate commerce.” *Id.* at 333, 74 L.R.R.M. at 1273.

18. 183 N.L.R.B. at 334, 74 L.R.R.M. at 1275.

19. Not only did the Board find unpersuasive the legislative history relied upon in *Columbia*, but it refused to interpret congressional silence on the issue of nonprofit employers during later amendments to the Act as an indication that such employers were to be exempted from NLRB jurisdiction. *Id.* at 331, 74 L.R.R.M. at 1271-72. Moreover, the enactment in 1959 of section 14(c), 29 U.S.C. § 164(c) (1970), which specifically regulated the Board’s exercise of its discretionary jurisdiction while permitting the states to fill the voids left by the Board’s refusal to assert jurisdiction, “manifest[ed] a congressional policy favoring such assertion where the Board finds that the operations of a class of employers exercise a substantial effect on commerce.” *Id.* at 332, 74 L.R.R.M. at 1272.
the NLRB to retreat from its position in Columbia. Yet the Board declined in Cornell "to establish jurisdictional standards for nonprofit colleges and universities as a class . . . , leav[ing] the development of an appropriate jurisdictional standard for subsequent adjudication." The Board did not await "subsequent adjudication" to establish the standards, however; departing from a traditional reluctance to use its rulemaking powers, the Board promulgated rule 103.1:

The Board will assert its jurisdiction in any proceeding arising under sections 8, 9, and 10 of the Act involving any private nonprofit college or university which has a gross annual revenue from all sources (excluding only contributions which, because of limitation by the grantor, are not available for use for operating expenses) of not less than $1 million.

The Board observed that this rule would bring approximately 80 percent of all private colleges and universities and approximately 95 percent of all full- and part-time nonprofessional personnel under its umbrella. The rule clarified one of the questions left open by Cornell by establishing a definite dollar amount to determine the

20. The Board indicated that state labor relations laws did not provide adequate forums in most states to regulate the burgeoning campus unionization movement and concluded "that assertion of jurisdiction is required over those private colleges and universities whose operations have a substantial effect on commerce to insure the orderly, effective, and uniform application of the national labor policy." Id. at 334, 74 L.R.R.M. at 1274-75.
21. Id. at 334, 74 L.R.R.M. at 1275.
22. Section 6 of the NLRA, 29 U.S.C. § 156 (1970), provides: "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this [Act]." See Administrative Procedure Act § 10, 5 U.S.C. § 553 (1970). Although not questioning its power to make substantive rules, the Board, until 1970, had never issued such a rule. K. DAVIS, ADMINISTRATIVE LAW TEXT § 6.08, at 152 (3d ed. 1972).
24. One week after the rule took effect, Boston College became the first institution to be found to be within its scope. Boston College, 187 N.L.R.B. 133, 75 L.R.R.M. 1532 (1970).
25. The Board's jurisdictional rule announced in Cornell recently was challenged in the Court of Appeals for the First Circuit in NLRB v. Wentworth Institute & Wentworth College of Technology, Inc., No. 74-1219 (1st Cir., Mar. 31, 1975). The employer in Wentworth attacked the Board's assertion of jurisdiction over it by relying upon the same legislative history that had induced the Board in Columbia to withhold jurisdiction, id. at 6-9, while also contending that NLRB jurisdiction, when faculty unionization is involved, exceeded congressional intent, id. at 9-10. These contentions, however, along with a claim that the Board's only proper approach to assertion of jurisdiction over nonprofit educational institutions would be by rulemaking, were rejected by the court of appeals. Id. at 10. The court held that the Board did have jurisdiction over nonprofit educational institutions, id., and rejected
point at which the impact of private nonprofit colleges and universities upon interstate commerce would be deemed sufficient to warrant NLRB jurisdiction. But other questions remained, concerning, for example, the meaning of “private nonprofit college or university” and the jurisdictional status of other institutions not clearly within this definition. As an effort to delimit more clearly the Board’s power, the rule had the perhaps unintended effect of raising other difficult jurisdictional issues.

PRIVATE, PUBLIC, OR SOMETHING IN BETWEEN

Though American colleges and universities traditionally have been grouped into two apparently simple general categories, public and private, placement of a particular institution into one of these two groups may be difficult. As society has grown in size and complexity the line between public and private sectors of the economy has blurred almost beyond recognition. Government involvement in private industry and commerce has led to intricate organizations in which financing is a blend of the public tax dollar and the entrepreneur’s investment. Many educational institutions, originally created by private endowments and investments, now rely heavily upon public support such as government aid-to-education programs, public loans for students, and government contracts; many state colleges and universities no longer are controlled tightly by the state but operate essentially as private institutions. It has become more appropriate, therefore, to assign colleges and universities to

the school’s further arguments that college faculty should not be included as “employees” under the Act, id. at 10-14.

The Board’s decision to assert jurisdiction over private nonprofit colleges led to the often difficult problem of applying to educational institutions the law and precedents developed for the industrial sector. Problems that on their face seemed elementary, such as whether a faculty member is an “employee,” spawned philosophical discussions and difficult decisions. See Adelphi Univ., 195 N.L.R.B. 639, 79 L.R.R.M. 1545 (1972); Fordham Univ., 193 N.L.R.B. 134, 78 L.R.R.M. 1177 (1971); C.W. Post Center of Long Island Univ., 189 N.L.R.B. 904, 77 L.R.R.M. 1001 (1971). The Board has addressed the status of department chairmen as supervisors within the meaning of the Act, see, e.g., University of Miami, 213 N.L.R.B. No. 64, 87 L.R.R.M. 1634 (1974); Syracuse Univ., 204 N.L.R.B. No. 85, 83 L.R.R.M. 1373, 1375 (1973); considered the multicampus university and appropriate units therein, Fairleigh Dickinson Univ., 205 N.L.R.B. No. 101, 84 L.R.R.M. 1083 (1973); and departed from its usual practice of including regular part-time employees in the same unit with full-time employees, separating part-time faculty members from full-time members by relying upon such distinctly academic criteria as participation in institutional governance and eligibility for tenure, New York Univ., 205 N.L.R.B. No. 16, 83 L.R.R.M. 1549 (1973).
three, rather than two, general categories: those that are clearly private, those that are clearly public, and those that may be termed either quasi-private or quasi-public. Significantly, the category to which a particular institution is assigned may be determinative of NLRB jurisdiction.

A school financed exclusively by private funds and subject to no significant governmental control of internal management clearly should be classified "private." Jurisdictional determination for a clearly private school is made relatively easy by rule 103.1, which invokes NLRB jurisdiction for any "private nonprofit college or university which has a gross annual revenue from all sources . . . of not less than $1 million."26 In contrast, an educational institution that receives all or most of its funding from governmental sources and is managed internally by people responsible to the government clearly should be classified "public." Section 2(2) of the National Labor Relations Act (NLRA) excludes from the definition of an "employer," over whom the Board may assert jurisdiction, "any State or political subdivision thereof . . . ."27 The Board usually has ex-

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26. 29 C.F.R. § 103.1 (1974). Literal interpretation of the rule would require satisfaction of four tests: the institution must be "private," "nonprofit," a "college or university," and have annual revenue of at least one million dollars. Assuming a clearly private school, the "nonprofit" hurdle should not be substantial because it appears that the term serves a clarifying, rather than a restrictive, purpose. In Columbia, the Board reasoned that the drafters of the NLRA intended to exempt from NLRB jurisdiction nonprofit organizations engaged in activities not purely commercial in nature. 97 N.L.R.B. at 427, 29 L.R.R.M. at 1099. In Cornell, the Board expanded Columbia's rationale regarding nonprofit organizations to encompass even noncommercial institutions such as private colleges and universities; there is no indication, however, that a school otherwise within the scope of rule 103.1 would be excluded from NLRB jurisdiction because it is a profitmaking institution. But cf. Jurisdiction over Universities, supra note 16, at 422. Indeed, a profitmaking school would have no basis to seek exemption under any possible interpretation of the statutory limit upon the Board's regulatory powers over nonprofit institutions that was interpreted in Columbia and Cornell. Moreover, realization of a commercial profit in certain operations of an institution the primary purpose of which is education may not remove it from NLRB jurisdiction under Cornell and rule 103.1. See id. at 422, 428.

The question of whether a school is a "college or university" has not yet been at issue, and the dollar amount thus appears to be the most significant jurisdictional prerequisite for a clearly private school. If the dollar amount is not satisfied, the NLRB should refuse jurisdiction. Compare Judson School, 209 N.L.R.B. No. 110, 86 L.R.R.M. 1248 (1974) (jurisdiction asserted over corporation operating a private school where corporation had annual gross revenue exceeding one million dollars), with Children's Communities, Inc., 210 N.L.R.B. No. 5, 86 L.R.R.M. 1082 (1974) (jurisdiction denied where employer's gross income was $348,000), and Ming Quong Children's Center, 210 N.L.R.B. No. 125, 86 L.R.R.M. 1254 (1974) (jurisdiction declined where total anticipated annual income was $532,411).

amined two factors to determine whether an entity is a political subdivision of a state: the entity must "either be (1) created directly by the State, so as to constitute a department or administrative arm of government, or (2) administered by individuals who are responsible to public officials or to the general public."

Thus, any clearly public institution, created by the state or administered by individuals responsible to public officials or to the general public, should be exempt from NLRB jurisdiction under section 2(2) of the NLRA. The applicability of the Board's discretionary jurisdiction thus should not become an issue.

28. See also NLRB v. Natural Gas Util. Dist., 402 U.S. 600 (1971); Oxnard Harbor Dist., 34 N.L.R.B. 1285, 9 L.R.R.M. 73 (1941); Mobil S.S. Ass'n, 8 N.L.R.B. 1297, 3 L.R.R.M. 226 (1938). In NLRB v. Natural Gas Util. Dist., supra, the Supreme Court affirmed an appellate court finding that a nonprofit utility district in Tennessee was a political subdivision of the state and that it was, therefore, exempt from NLRB jurisdiction. The Court found several factors crucial. First, the district was created and organized under the Utility District Law of 1937, see Tenn. Code Ann. §§ 6-2601 to -2636 (Repl. Vol. 1971), and any district incorporated under this statute was declared to be a "'municipality' or public corporation . . . a body politic and corporate." Id. § 6-2607. Second, such districts had the power of eminent domain, which could be exercised against other governmental entities. Additionally, the records of all district proceedings were declared to be "public records," and the property and revenue of a district were exempt from all state, county, and municipal taxes, as was income from its bonds. 402 U.S. at 602, 606-07.

In Children's Village, Inc. 197 N.L.R.B. 1218, 80 L.R.R.M. 1747 (1972), the Board refused to assert jurisdiction over a New York school district, finding it to be a subdivision of the State of New York and noting that the district was created by the New York legislature. The state controlled the hiring, certification, and tenure of school district teachers, established all rules and regulations regarding discipline, and prescribed books and courses. The Board similarly refused to assert jurisdiction in Fayetteville-Lincoln County Elec. Sys., 183 N.L.R.B. 101, 74 L.R.R.M. 1278 (1970), finding that an electrical distribution system was a political subdivision and hence not a statutory "employer." The system had been created by state legislation, and members of the "board of utilities," the system's governing body ultimately responsible for day-to-day administration, were appointees of an elected official. See also NLRB v. Lewiston Orchards Irrigation Dist., 469 F.2d 698 (9th Cir. 1972); City of Austell Natural Gas Sys., 186 N.L.R.B. 280, 75 L.R.R.M. 1327 (1970); New Bedford S.S. Authority, 127 N.L.R.B. 1322, 46 L.R.R.M. 1173 (1960).

In Ohio Inns, 205 N.L.R.B. No. 102, 84 L.R.R.M. 1005 (1973), the Board found itself to be without jurisdiction over a lodge in a state-owned park because substantial state control of the lodge's operations and labor relations demonstrated that the state was at least a joint employer. The exemption was not based upon the "political subdivision" provision, however, but upon the exemption of the "State" as an employer. See note 27 supra & accompanying text.

When a quasi-public entity has been found to be an employer and not a political subdivision, the same criteria of state creation and control have been dispositive. See NLRB v. Randolph Elec. Membership Corp., 343 F.2d 60 (4th Cir. 1965); Minneapolis Soc'y of Fine Arts, supra. See also NLRB v. Natchez Trace Elec. Power Ass'n, 476 F.2d 1042 (5th Cir. 1973); Lewiston Orchards Irrigation Dist., 186 N.L.R.B. 827, 75 L.R.R.M. 1430 (1970); Hotel & Restaurant Employees Union, 153 N.L.R.B. 392, 59 L.R.R.M. 1488 (1965).
Many educational institutions, however, cannot be classified clearly as public or private, and such schools may find it difficult to determine whether the Board can or will assert jurisdiction over them. If not a political subdivision, a school seemingly would be within jurisdictional guidelines established by Cornell and rule 103.1; nevertheless, several NLRB decisions subsequent to Cornell indicate that the inquiry does not stop here, for even when the political subdivision exclusion has not barred jurisdiction, the Board has been reluctant to bring under its control labor disputes at institutions with substantial governmental connections. An examination of these decisions will illustrate the uncertainty generated, creating a need for definitive rulemaking.

Can the NLRB Assert Jurisdiction?

When considering a school that is neither clearly public nor clearly private, the initial determination should be whether the institution is a political subdivision. Two recent cases indicate that, despite the refined standards that have evolved regarding this issue, this question can be difficult.

In Temple University, a union had sought to organize a group of employees at Temple University in Philadelphia, but the school's unique nature presented jurisdictional difficulties for the NLRB. Originally chartered as a private, nonprofit college, Temple University had been absorbed into the Pennsylvania higher education system in 1965 by the Temple University-Commonwealth Act, which modified the university's original charter and vested in the Commonwealth of Pennsylvania, through the Governor and the legislature, substantial control over the university's affairs. Although Temple remained a private, nonprofit university, the Board found that the Act had made Temple a "State-related university." Several provisions of the Temple University-Commonwealth Act persuaded the Board not to assert jurisdiction, including the Act's stated purpose of extending higher education opportunities to Pennsylvania residents, regulation of the composition of the Board of

31. 194 N.L.R.B. at 1160, 79 L.R.R.M. at 1197. The Board stated: "Although the University is in form a private, nonprofit institution, it is apparent that the 1965 statute established the University as a quasi-public higher educational institution to provide low cost higher education for Commonwealth residents." Id. at 1161, 79 L.R.R.M. at 1198.
Trustees, a requirement that residents be charged less tuition and fees than nonresidents, inclusion of the university’s annual budget request in the Commonwealth’s overall budget, and requirements for reporting to the state auditor and the legislature on financial affairs and to the Governor and legislature on all university activities.\footnote{32} The Board also noted that in 1972 the state government contributed approximately two-thirds of the university’s unrestricted revenue, and that since 1965 Pennsylvania had spent $40 million on physical plant improvements and had appropriated an additional $79 million for future capital improvements.\footnote{33} Furthermore, the state government retained title to the land and buildings provided and did not charge rent to the university.\footnote{34} Declining to assert jurisdiction because of Temple’s close association with the state, the Board nevertheless did not hold that the university was within the per se “state or political subdivision” exception, but rested its decision upon its discretionary jurisdiction.\footnote{35} Temple, it was reasoned, had a “unique relationship” with the state that made inappropriate the assertion of jurisdiction,\footnote{36} effectively carving out an exception to the jurisdictional standards of rule 103.1 but neglecting to articulate the relationship, if any, between the exception and the statutory political subdivision exclusion. That this neglect bred confusion is evidenced by later activity concerning another hybrid private-public institution, the University of Vermont.\footnote{37}

The American Federation of Teachers (AFT) had been organizing actively in Vermont for some time, and in 1973 had defeated two other unions to acquire representation rights for faculty members and certain librarians in state colleges.\footnote{38} The principal target, the

\footnote{32} Id. at 1160-61, 79 L.R.R.M. at 1197.
\footnote{33} Id. at 1160, 79 L.R.R.M. at 1197. The state’s share of Temple’s operating income had risen from 37.3 percent in 1965. Id., 79 L.R.R.M. at 1197.
\footnote{34} Id., 79 L.R.R.M. at 1197.
\footnote{35} Id. at 1161, 79 L.R.R.M. at 1198. The university had conceded that it did not fit within the political subdivision exclusion. By accepting that admission, the Board indicated that an “instrumentality” over which the state exercises direct and extensive control is not merely by virtue of statutory language and state control a “political subdivision” outside the Board’s jurisdiction.
\footnote{36} Id., 79 L.R.R.M. at 1198.
\footnote{37} Morgan, Brown, Kearns & Joy currently serve as labor relations counsel to the University of Vermont.
\footnote{38} This unionization was accomplished under a provision of the Vermont State Employees Labor Relations Act, VT. STAT. ANN. tit. 3, § 941 (1972), as amended, VT. STAT. ANN. tit. 3, § 941 (1974).
University of Vermont (UVM) was chartered as a private, nonprofit university in 1791\textsuperscript{39} and retained that status, with minor modifications, until 1955\textsuperscript{40} when it was united with Vermont Agricultural College under the name “University of Vermont and State Agricultural College.”\textsuperscript{41} Despite statutory language directing that the resulting school “be recognized and utilized as an instrumentality of the state for providing public higher education . . . .”,\textsuperscript{42} the legislature did not provide for direct or extensive state control; consequently the state exercised only minimal control over the affairs of the university.

Although nine of the twenty-three members of the Board of Trustees are appointed by the legislature and three are appointed by the Governor, who also serves as an ex officio member, the Board is not answerable to the state for its actions nor can members be removed by the state. In the year ending June 30, 1973, state appropriations of $10.5 million accounted for only approximately 23 percent of total revenues of $45.4 million, and the state did not regulate fees, faculty salaries, standards for admission, or tuition, except to require that Vermont residents be charged a maximum of 40 percent of the non-resident tuition.\textsuperscript{43} The university was not required to submit a line budget to the legislature, and most new construction and renovation was financed by the university through bonds, long-term notes, and government loans and subsidies.

All land and buildings remained the property of the university, and rental properties, such as those for faculty and married student housing, were subject to local property taxes. Although the university’s educational buildings were exempt from state taxation, as were all such college facilities under Vermont law, the university was required to remit state income and sales taxes for some of its operations. Unlike other state agencies, the university was subject to municipal building permit requirements. Furthermore, the president and trustees retained complete authority to convey, mortgage, rent, or assign the school’s property, and to collect income therefrom.

\textsuperscript{39} Charter of University of Vermont, Nov. 3, 1791 (not included in revision and compilation of state statutes).
\textsuperscript{42} Id.
On May 24, 1974, the AFT filed charges against UVM with the NLRB, alleging violations of sections 8(a)(1) and 8(a)(2) of the NLRA. On June 12 the Regional Director dismissed the petition, stating in a letter to the parties: "It does not appear that further proceedings on the charge are warranted inasmuch as the University of Vermont, respondent herein, is an instrumentality of the State of Vermont, hence not an 'employer' under Sec. 2(2) of the Act. Cf. Temple University, 194 NLRB 1160. I am, therefore, refusing to issue a complaint in this matter." Both the union and the employer, however, deeming NLRB jurisdiction preferable to that of the state board, appealed this decision to the Board’s General Counsel. The parties questioned the strength of the nexus between the state and the university that had been relied upon to withhold jurisdiction. Moreover, the university noted that the regional director had used the term "instrumentality" of the state, while the Act, in section 2(2), excludes "any State or political subdivision thereof." On August 22, 1974, the General Counsel sustained the parties' appeal in a brief letter. The case was remanded to the Regional Director for investigation of the merits of the substantive charges, but the lack of any subsequent challenge to the Board’s jurisdiction has precluded further enlightenment on the jurisdictional issue.

The arguably errant interpretation of Temple by the Regional Director in his initial refusal to assert jurisdiction raises serious

44. 29 U.S.C. §§ 158(a)(1), (2) (1970). In general, the charges centered on alleged discrimination by the university against the AFT in favor of the American Association of University Professors in the use of college facilities.
45. Letter from Robert S. Fuchs, Regional Director, to John Dewey Federation of UVM, AFT, Local 3203, AFL-CIO, June 12, 1974.
46. See note 27 supra & accompanying text. An examination of legislative history reveals that the term "instrumentality" was not to be equated with "political subdivision," as the latter term was used in the Act. Following the congressional debate on the Taft-Hartley amendments in 1947, the final changes in the Act were discussed in the House Conference Report, which received the approval of both houses of Congress. The report, discussing section 2(2), focused on the exclusion of "wholly owned Government corporations" from the statutory definition of "employer": "In the case of instrumentalities of the United States, the conference agreement limits the exclusion to wholly owned Government corporations and to Federal Reserve Banks . . ." H.R. Rep. No. 510, 80th Cong., 1st Sess. 32 (1947), in 1 LEGISLATIVE HISTORY, supra note 10, at 536 (emphasis supplied). Relying upon this statement, the university asserted that "instrumentality" was used to designate wholly owned federal corporations and that, if an exemption did exist for "instrumentalities" of a state, it should be limited to wholly owned state corporations, which clearly would not encompass the University of Vermont.
47. Letter from Peter G. Nash, NLRB General Counsel, to David A. Jenkins, Aug. 22, 1974.
questions concerning the Board's treatment of quasi-public institutions of higher education. Although Temple was not based upon the statutory political subdivision exemption of section 2(2), but upon discretionary grounds, the Regional Director stated that the University of Vermont was not an employer within the meaning of that section. The original exclusion of all private colleges and universities from NLRB jurisdiction announced in Columbia also was based upon an interpretation of section 2(2), as was the Board's reversal in Cornell. Undoubtedly, therefore, reliance upon that section of the statute when dealing with schools such as Temple and UVM is not incorrect; failure to articulate whether reliance is placed upon the political subdivision exemption or upon more general discretionary concepts of jurisdiction over nonprofit organizations, as refined in Columbia, Cornell, and rule 103.1, however, might allow an unwarranted expansion of the political subdivision exception as it has developed in other contexts.

Application of the traditional political subdivision tests to the facts presented by the litigation concerning Temple University and the University of Vermont dispels any doubt about whether this statutory standard should apply. Neither Temple nor UVM could be said to have been created directly by the state; both schools, formerly private institutions, underwent charter modifications, with UVM even receiving a new name, but because both retained significant private aspects, this metamorphosis was incomplete. Legislation may have modified the operations of both schools, but it did not create them, although the formation of a new combined corporate entity from two formerly independent schools arguably was a "creation" of the new University of Vermont and State Agricultural College. The degree of state administrative control in each case, although significant in many respects, also does not appear to satisfy political subdivision standards. Only one-third of Temple's Board of Trustees were to be appointed by state officials, for example, and although a majority of UVM's trustees were state appointed, they were not subject to removal by the state nor were they responsible directly to the state for their actions.

Extended analysis of the political subdivision question, even if the results were more satisfying, would not be warranted. Notwithstanding any implication that the Regional Director may have relied upon this statutory exemption when refusing to consider the charges against UVM, Temple was not premised upon this provision. It is evident that the Board is developing a new exception to the broad
exercise of its discretionary powers in Cornell and rule 103.1. A further look at this exception therefore is necessary.

**Will the NLRB Assert Jurisdiction?**

A school not so clearly public that it is within the political subdivision exclusion and not so clearly private that it is "private" within the meaning of rule 103.1 faces uncertainty when determining whether its labor relations activities are regulated by federal standards. Rule 103.1 answered one difficult question by announcing a monetary jurisdictional limitation, thereby obviating a need to make a potentially troublesome determination about a school's impact on commerce. Undefined standards remain, foremost among them being the descriptive term "private." That the contradistinction between "private" and "political subdivision" does not end the inquiry can be seen in the Board's analysis in Temple: although the school was "a 'State-related university in the higher education system of the Commonwealth'" and an "'instrumentality' of the Commonwealth," it was not a political subdivision of Pennsylvania; nevertheless, the Board found such a "unique relationship" between the school and the state that it deemed the university to be a "quasi-public" institution, leading to the ruling that "it would not effectuate the policies of the Act to assert jurisdiction over the University."

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48. See note 23 supra & accompanying text.
49. 194 N.L.R.B. at 1161, 79 L.R.R.M. at 1198.
50. Id., 79 L.R.R.M. at 1198.
51. Id., 79 L.R.R.M. at 1198. Soon after Temple the Board, in Queens Borough Public Library, 195 N.L.R.B. 974, 79 L.R.R.M. 1561 (1972), applied the rationale of Temple in a different context by refusing to assert jurisdiction over a library because of its close relationship with the City of New York. Several important factors were noted: all trustees of the library were appointed by the mayor, and their removal from office was subject to mayoral approval; the trustees controlled the expenditure of all money appropriated by the city for the maintenance of the library, and the annual library budget had to be submitted for city approval; money required for salaries and operating expenses was provided by the city out of tax revenue; library employees were paid in accordance with the salary schedules for city employees; the library had to comply with the 1969-1970 job freeze imposed by the city; the city supplied more than 80 percent of the library's operating income with the balance supplied by the federal government and the State of New York; and title to all library buildings, books, and furniture remained in the city. The Board reasoned: "In Temple University we concluded that because of the 'unique relationship' between the University and the Commonwealth of Pennsylvania, we would decline to assert jurisdiction. In the instant proceeding, the nexus between the Library and the city of New York is as close, if not closer, for without city support the Library would cease to exist." Id. at 975, 79 L.R.R.M. at 1562.
In *Howard University*,

concerning a school with close ties to the federal, rather than a state, government, the Board declined to assert jurisdiction because of the university’s "unique relationship with the Federal Government . . . ." Chartered by Congress in 1867, Howard University had received federal funds since 1928 through annual congressional appropriations. The Department of Health, Education, and Welfare (HEW) inspected the school annually and controlled dispensation of federal funds. Howard was subjected to audits by several federal agencies, and, although it held title to its land and buildings, the federal government paid all construction costs, while regularly providing more than 50 percent of the total academic budget. Nonfaculty employees were classified on federal government wage scales. Analyzing these and other factors, the Board declined to assert its discretionary jurisdiction, stating:

The Federal Government’s interest in Howard’s financial affairs far exceeds, in degree, that normally associated with the Government’s customary funding of specific university projects, and is uniquely characterized by the involvement of several Federal Agencies at several levels. . . . [Congressional] statutory requirements for inspection and access to Howard’s financial records, budgets, accounts, and its physical facilities variously delegate lines of authority to a number of officials of [the Office of Budget and Management], HEW, and [the General Accounting Office] among others. . . .

. . . . We are persuaded, further, that, because of that unique relationship, effective use of the collective-bargaining process by the University and its employees in the manner and for purposes contemplated by the Act would entail the involvement of many Federal Agencies—entities over which we, of course, have no jurisdiction . . . .

*Temple* and *Howard* strongly suggest that governmental involvement with a private educational institution, although insufficient to make the institution a political subdivision, may create a "unique relationship" that leads the NLRB, in its discretion, to withhold jurisdiction. It remains unclear whether schools so excluded from

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53. Id. at ——, 86 L.R.R.M. at 1391.
54. Id. at ——, 86 L.R.R.M. at 1389-91.
55. Id. at ——, 86 L.R.R.M. at 1390-91.
federal coverage properly should be categorized as "private," "public," or something else. Regardless of nomenclature, however, the problem remains: what degree of governmental involvement is necessary to exclude a school from NLRB jurisdiction? In its first venture into the area of substantive rulemaking, the Board removed a significant barrier to effective application of its decision in *Cornell* by delineating clearly the requisite impact upon interstate commerce that justifies federal intervention into educational institutions' labor disputes; the need for further rulemaking to prescribe the limits of the term "private" in rule 103.1 is no less compelling.

**The Need for Rulemaking**

*General Benefits of NLRB Rulemaking*

Administrative agencies such as the NLRB can develop the law either by quasi-legislative rulemaking or by ad hoc adjudication. The NLRB, though expressly granted rulemaking authority in section 6 of the National Labor Relations Act, declined for many years to exercise this power. Instead, a yearly report summarizing the previous year's case-law developments was published. Thus the Board relied exclusively upon adjudication, indulging in adjudicative rulemaking while pretending not to be making rules at all. In *NLRB v. Wyman-Gordon Co.*, the Supreme Court upheld the Board's insistence upon satisfaction by an employer of a standard of disclosure in Board elections that had been announced in an earlier case. The Court indicated, however, that in some cases

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56. In *Temple*, the Board stated: "Although the University is in form a private, nonprofit institution, it is apparent . . . that the 1965 statute established the University as a quasi-public higher educational institution . . . ." 194 N.L.R.B. at 1161, 79 L.R.R.M. at 1198 (emphasis supplied).

57. As Members Fanning and Penello, dissenting in *Howard*, observed, "the exception for 'special circumstances' is about to outdistance the rule for general applicability." 211 N.L.R.B. at ----, 86 L.R.R.M. at 1391.

58. See note 22 supra. Moreover, Professor Davis submits that the authority to make rules is implied whenever any officer has discretionary power. K. Davis, supra note 22, § 6.04, at 143.


rulemaking rather than adjudication might be required.63 This admonishment apparently motivated the Board to reevaluate its former approach to rulemaking:64 one year after Wyman-Gordon, the Board used its rulemaking power for the first time in formulating rule 103.1,65 and it since has engaged in substantive rulemaking on two other occasions.66

Rulemaking, rather than adjudication, has been espoused for situations in which numerous parties potentially are affected by the administrative-lawmaking process for at least four basic reasons.67 First, in the NLRB adjudication procedure, although the Board often solicits amicus curiae briefs from a few eminent sources, relevant information may be excluded.68 Conversely, in the very open rulemaking procedure all interested parties are invited to participate by supplying information, and tentative rules are published for reaction by interested parties.69 Second, the adjudicative procedure

63. 394 U.S. at 764; see Silverman, supra note 61, at 609. Speaking for a plurality of four, Justice Fortas approved the substance of the Board's disclosure rule, while criticizing the procedure by which it had been promulgated: "The rule-making provisions of . . . [the Administrative Procedure] Act . . . were designed to assure fairness and mature consideration of rules of general application . . . . They may not be avoided by the process of making rules in the course of adjudicatory proceedings. There is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention." 394 U.S. at 764. Justice Douglas, dissenting, noted that "an agency is not adjudicating when it is making a rule to fit future cases." Id. at 777. Also dissenting, Justice Harlan contrasted the proper functions of adjudication and rulemaking, remarking: "[I]t is precisely in these situations, in which established patterns of conduct are revolutionized, that rule-making procedures perform [their] vital functions . . . ." Id. at 780-81. See also NLRB v. Bell Aerospace Co. Div. of Textron Inc., 94 S. Ct. 1757, 1771 ("[T]here may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act . . . .").

64. K. Davis, supra note 22, § 6.08, at 164.

65. 29 C.F.R. § 103.1 (1974); see note 23 supra & accompanying text.


67. K. Davis, supra note 22, § 6.03, at 142; Silverman, supra note 61, at 610.

68. Silverman, supra note 61, at 610. The Board, before deciding Cornell, received 28 amici curiae briefs, 16 favoring and 12 against assertion of jurisdiction. In addition, a resolution was passed in October 1969 by the National Association of State Labor Relations Agencies requesting the Board to maintain its private college exemption. Cornell Univ., 183 N.L.R.B. 329 n.1, 74 L.R.R.M. 1269, 1270 n.1 (1970). Yet such participation may not provide needed background data. See Silverman, supra note 61, at 610-11.

69. K. Davis, supra note 22, § 6.03, at 142; Silverman, supra note 61, at 610.
results in the haphazard development of a body of law because issues cannot be addressed in a logically constructed order; furthermore, parties to adjudication may be represented by counsel of unequal ability, may litigate without an awareness of larger questions involved, and may overemphasize past doctrine that possibly is inconsistent with present social needs and employer and employee concerns. Rulemaking, by contrast, permits flexible consideration of both broad and narrow issues in an appropriately defined context. Third, a standard created through rulemaking can be applied more fairly than can one created through adjudication because rules operate prospectively, while adjudication generally is retroactive. Finally, rulemaking enables an agency to initiate its own policies whenever it deems such action appropriate, rather than awaiting an appropriate case.

As considerations of public policy weigh more heavily in the development of administrative law standards, the advantages of rulemaking increase. Professor Davis has observed: "When more than a handful of parties are affected, creation of new law through . . . administrative rulemaking is much more desirable than . . . through . . . administrative adjudication." Public policy depends upon shifting conditions in society that cannot be understood properly without examining a wide range of information and viewpoints. Adjudication, in which the debate often is focused on a single, narrow issue, rarely provides the needed background. The applicability of these principles to the question of NLRB jurisdiction over labor disputes at institutions of higher education is clear; presumably, the Board recognized the importance of public policy considerations when it promulgated rule 103.1. Equally substantial policy factors engulf the question of whether, and to what extent,

70. Silverman, supra note 61, at 610. For example, when Cornell was decided, reliance upon the policy considerations underlying Columbia was inappropriate, as the impact of colleges upon interstate commerce had increased dramatically during the intervening years. See note 17 supra & accompanying text.

71. K. Davis, supra note 22, § 6.03, at 142. If Temple University, for example, had anticipated the Board's "unique relationship" rationale, much time and expense might have been saved.

72. K. Davis, supra note 22, § 6.03.

73. Silverman, supra note 61, at 610. If an exception for state-related private colleges inevitably was to be engrafted onto the Board's jurisdictional guidelines, encompassing it in the original rule would have eliminated the need for the perplexing litigation following Cornell.

74. K. Davis, supra note 22, § 6.03, at 142.
the Board should limit its regulation of quasi-public schools. Moreover, the jurisdictional question takes on greater significance when the unique characteristics of faculty unionism are considered.

**Jurisdiction over State-Related Colleges and Universities—A Question of Public Policy**

One factor that undoubtedly has made the NLRB reluctant to step into college labor disputes when the school has significant governmental ties is the potential for intergovernmental or intragovernmental conflict. This potential was recognized but not clearly relied upon in *Temple* when the Board noted the possible coverage of Temple's employees under Pennsylvania's public employee labor relations statute.\(^75\) More precisely stated was the Board's observation in *Howard* that to assert jurisdiction would involve "many Federal Agencies—entities over which we, of course, have no jurisdiction."\(^76\) That serious difficulties could result from inappropriate NLRB intervention into labor disputes involving state or federal agencies is evidenced by the explicit statutory exclusions provided for those agencies in section 2(2) of the NLRA. Inappropriate withholding of jurisdiction also has its costs, the foremost of which is the creation of a "no-man's land" in which neither federal nor state regulation of labor disputes is afforded.\(^77\) Adequate evaluation of the

\(^75\) 194 N.L.R.B. at 1161, 79 L.R.R.M. at 1197.

\(^76\) 211 N.L.R.B. at ___, 86 L.R.R.M. at 1391. The unique degree of federal involvement with Howard University was not overlooked by the Board, which stated that the school "enjoys a unique relationship with the Federal Government unmatched by any other university to which our discretionary jurisdictional yardsticks apply." *Id.* at ___, 86 L.R.R.M. at 1391.

\(^77\) In their dissent in *Howard*, Members Fanning and Penello noted that if the Board improperly declines to enter a dispute that also is not subject to regulation by a state agency, an area is created without effective governmental labor relations supervision. *Id.* at ___, 86 L.R.R.M. at 1392. Pointing out that such an approach is inconsistent with the Board's position in *Cornell* (see 183 N.L.R.B. at 331, 333-34, 74 L.R.R.M. at 1274-75), they concluded:

> What has been created here is a permanent no-man's land . . . .

In *Cornell* we changed our policy regarding the assertion of jurisdiction over private universities, realizing that increased Federal financial involvement was a significant factor favoring assertion. Now the majority declines jurisdiction because the Federal involvement is too substantial. We think the Cornell approach is the right one, and, except in situations where the Government is in effective control of the conduct of labor relations as spelled out in prior decisions, we would follow it.

211 N.L.R.B. at ___, 86 L.R.R.M. at 1392 (footnotes omitted).
multifarious types of governmental involvement in higher education and the possible effects of such involvement upon labor relations can be made only in a rulemaking proceeding not confined by the precise facts of a particular school.

Other policy considerations, primarily stemming from the narrower issue of faculty unionism, also point towards rulemaking as the proper means to establish jurisdictional guidelines. One argument against assertion of jurisdiction by the Board over public or quasi-public educational institutions is that faculty members, denied the right to strike under the labor relations laws of most states, would be granted that right under the NLRA, thereby interfering with the state's performance of its governmental function and indicating employee disloyalty to the sovereign. Although this argument may have merit when applied to police, firefighters, or even elementary and high school teachers, it is less persuasive when applied to college professors whose services may be less essential than those of more typical state employees. Furthermore, a very real issue of academic freedom is raised by denying teachers the ability to protect by economic sanction their right to freedom of expression.

81. One court has held, even in the face of strong antistrike legislation, that to enjoin a strike by professors aimed at protecting their freedom of expression the state must show violence, irreparable injury, or breach of peace. School Dist. v. Holland Educ. Ass'n, 38 Mich. 314, 326, 157 N.W.2d 206, 210 (1968).

There is also a pragmatic question regarding the effectiveness of antistrike legislation. The instances of teacher strikes undeterred by such legislation are legion. One example is the longest teacher strike in United States history in the Timberland, New Hampshire, School District, which began in the winter of 1973-74 and still continues.
Other policy considerations support assertion of jurisdiction. Many states have no legislation guaranteeing the organizational rights of faculty, and even when such legislation exists, it often provides no exclusion for "supervisors." Thus department chairmen, division directors, or deans, included in the bargaining unit under state law, may find that their own interests conflict with their duty to act on behalf of the administration. Moreover, the principal purposes of the NLRA apply to the issues presented by faculty unionism and institutions of higher education in general: states cannot, or at least have not, dealt adequately or uniformly with labor disputes, while large public and quasi-public educational institutions, engaged in and affecting interstate commerce, should operate under uniform and harmonious national labor policies.

CONCLUSION

Important public policy considerations pervade the issues raised by NLRB assertion of, or refusal to assert, jurisdiction over colleges and universities. Because of the large number of parties directly involved, including the general public, rulemaking, not adjudication, is the appropriate mechanism for decisionmaking. The necessary input for such a decision can come only from the broad variety of sources that can be activated by a rulemaking proceeding; cases since Cornell demonstrate the inherent deficiencies of adjudication when far-reaching policy factors are at play in the administrative lawmaking process. The ability of rulemaking to define the requisite impact upon commerce in rule 103.1 should signal the propriety of rulemaking for determining which schools, because of their governmental connections, will be excluded from NLRB jurisdiction.

82. For example, the Vermont State Employees Labor Relations Act, Vt. Stat. Ann. tit. 3, §§ 901-1007 (1972), which covers the faculties of the Vermont state colleges, has no such exclusion. This exclusion is provided by the NLRA. See 29 U.S.C. § 152(3) (1970).

83. See Cornell Univ., 183 N.L.R.B. 329, 333-34, 74 L.R.R.M. 1269, 1274-75 (1970). The increasingly complex problem of campus unionism possibly can be dealt with more adequately by a national labor forum that has, since Cornell, begun to resolve some of the thorny questions endemic to the college environment. See note 25 supra. More limited exposure to these questions on the state level might retard proper development of the law in this area.