

Everything Passes, Everything Changes

Unionization and Collective Bargaining in Higher Education

by William A. Herbert and Jacob Apkarian



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Herbert and Apkarian in their portrait of unionization in higher education follow the story from its earliest days to today

- Unionization in American universities stretches back to the 1930s. Attempts by university employees attempting to organize have a complex and tangled history.
- Since 2003, the percentage of the higher education workforce that is unionized has remained relatively constant at about 16 percent to 18 percent.
- In addition to faculty and graduate students' efforts to unionize, other groups—non-tenure track faculty, postdoctoral researchers, and service workers—have attempted to organize and been met with institutional resistance and mixed success.
- The results of the 2016 election will negatively affect current campus unions and impair future efforts at unionization.

Collective bargaining and unionization in higher education has a long history. In 1936, Teachers Union Local 5 President Charles J. Hendley criticized a speech by Teachers College Dean William F. Russell for his opposition to the unionization of college professors and primary and secondary teachers. The exchange occurred a few months following a campus strike by elevator operators and porters that was supported by faculty and students.

Hendley insisted that teachers had every right to form a union to improve their working conditions: "The Dean ridicules collective bargaining by teachers, but he and other educational administrators will have to learn to adjust themselves to it" (Hendley 1936).

Some of the earliest contracts on campuses date back to the 1940s. Howard University entered into an agreement with United Federal Workers of America, Congress of Industrial Organizations (CIO), in April 1946 for a bargaining unit of nonfaculty staff, and United Public Workers of America, Local 555, CIO, negotiated agreements for teachers at vocational schools. CIO unions negotiated faculty contracts at Howard University and Fisk University during the same period (Cain 2014).

Higher education collective bargaining in that era was the result of voluntary recognition by institutions, rather than by legal mandate. The National Labor Relations Board (NLRB) declined jurisdiction over private nonprofit educational institutions for many years.

In the public sector, a long and largely unstudied history of union organizing led to informal agreements and some written contracts without the existence of enabling legislation, primarily with local governments.

McCarthyism in all its manifestations in the 1940s to the early 1960s impaired associational activities on campuses, including efforts to enforce academic freedom and tenure (Schrecker 1986). Resistance to unionization in the academy over the years came from another source: faculty who viewed collective bargaining as inconsistent with professional status and autonomy.

For decades, private colleges and universities have had divergent views and approaches to unionization and collective bargaining. For example, Cornell University opposed a 1968 amendment to New York law that made that state's collective bargaining law applicable to nonprofit educational institutions, claiming collective bargaining would be disruptive and would increase costs. Other institutions, such as New York University and Union College, affirmatively supported the legislation. The bill was introduced a year after the end of a



faculty strike at St. John's University and at a time when the American Federation of Teachers (AFT) had established affiliates on certain New York campuses.

In 1970, Cornell successfully persuaded the NLRB to reverse itself and to begin to assert jurisdiction over representation issues at nonprofit educational institutions. Cornell's arguments were supported by some private institutions and opposed by others. The effect of Cornell's victory was to preempt the application of New York's statute, a law more protective of employee collective rights than the National Labor Relations Act, to nonprofit institutions. The NLRB's assertion of jurisdiction triggered many organizing efforts by faculty, administrative staff, and blue-collar workers at private institutions across the country.

A procedural framework for unionization and collective bargaining on public college campuses was not established until passage of state public sector collective bargaining laws in the 1960s and 1970s. The enactment of *de jure* mechanisms led to unionization and collective bargaining agreements on public sector campuses involving the trades and buildings and grounds workers, as well as clerical, food service, public safety, and academic labor. The workforce covered, the composition of the bargaining units, and the mandatory subjects of negotiations vary from state to state.

Current Collective Bargaining Figures in Higher Education

In 2016, 20.3 percent of postsecondary teachers were covered by a collective

bargaining agreement, according to Current Population Survey (CPS) data (Hirsch and MacPherson 2017). This figure does not include faculty in the thirty-five new collective bargaining units created in 2016 and other new faculty units without a first contract. Figure 1 displays a geographic breakdown of newly created faculty units in 2016, based on data from National Center for the Study of Collective Bargaining in Higher Education (Herbert 2016).

Last year, 15.7 percent of all workers at colleges and universities were covered by a collective bargaining agreement, according to CPS data (Hirsch and MacPherson, 2017). This compares to only 11.9 percent among all U.S. workers, according to Hirsch and MacPherson, or 12 percent, according to the U.S. Bureau of Labor Statistics (2017).

The overall rate of workers covered by collective bargaining agreements in higher education has remained relatively stable over the past decade, although there appears to be a slight decrease in coverage during the past few years. Figure 2 displays the percentage of all workers in higher education covered by collective bargaining agreements going back to 2003, using CPS data.

Graduate Assistants and Postdocs

Differences in the interpretation and scope of the NLRA and public sector laws have resulted in disparities with

respect to union density and collective bargaining on campus. One clear example of sector differences relates to the question of whether graduate students who receive compensation for teaching or research have a protected right to

unionize and be represented in collective bargaining.

For decades, private colleges and universities have had divergent views and approaches to unionization and collective bargaining.

Teaching assistants and research assistants at public institutions in states with public sector collective bargaining laws have engaged in negotiations for almost 50 years. There is a general recognition under those laws that students who receive payment for teaching or research are a part of academic labor and are entitled to bargain over their compensation and benefits.

A 2012 National Center analysis of survey data found more than 64,000 graduate student employees in bargaining units at public institutions (Berry and Savarese 2012). Since then, new units were established at Portland State University, the University of Connecticut, and Montana State University.

The size of the graduate student employee bargaining unit at Oregon State University doubled through the accretion of additional graduate employees. In Minnesota, where state law defines a separate graduate assistant unit at the University of Minnesota, 62 percent of the employees who participated in a 2012 election voted against union representation.

A related recent development in higher education is collective

bargaining for post-doctoral researchers. At least seven institutions have negotiated contracts applicable to post-doctoral scholars.

In the private sector, the employee status of teaching and research assistants under the NLRA has been subject to NLRB oscillations over the decades. Unionization efforts by these student employees have been strongly opposed by many private institutions.

After years of conflict, New York University in 2014 recognized a graduate assistant union following a non-NLRB election, which led to the successful negotiation of a contract. In August 2016, the NLRB reversed prior

precedent and concluded that Columbia University's graduate and undergraduate teaching and research assistants are statutory employees under the NLRA and therefore entitled to the full rights of association guaranteed by that law.

The NLRB's 2016 decision led to a new wave of unionization efforts at private colleges and universities. Graduate assistants at Yale successfully argued before an NLRB regional director that they should be permitted to unionize by department, an effort that resulted in eight newly certified collective bargaining "micro-units." Figure 3 compares the electoral outcomes at Yale by department.

Between September 1, 2016, and May 31, 2017, unions have been certified following NLRB elections to represent new student assistant bargaining units, with an aggregate of more than 5,600 employees, at American University, Brandeis University, Columbia University, Loyola University Chicago, Tufts University, and Yale University. Representation is also being pursued by student employees at the University of Chicago, the University of Pennsylvania, Boston College, Cornell University, Harvard University, and The New School.

Institutional opposition to student assistant unionization by some private colleges continues. At Duke University, the preliminary tally of ballots of participating graduate assistants showed that 63 percent voted against representation, an outcome that led to the withdrawal of the petition. Columbia University, Yale University, and Loyola University Chicago have filed challenges to the certifications at their institutions, while American University, Brandeis University, and Tufts University have not.

It is probable that one or more of the challenges will lead to a future swing of the NLRB pendulum concerning the statutory status of graduate assistants once the Senate confirms nominations to fill vacancies on the NLRB Board.

Faculty Unionization

The Y factor: Yeshiva

Another major difference in higher education labor relations between the public and private sectors concerns the right of tenure-track faculty to unionize. Four decades ago, the Supreme Court ruled that faculty at Yeshiva University were managerial personnel and not entitled to the rights under the NLRA because of their role in making mission-related decisions through shared governance (*NLRB v. Yeshiva University* 1980). In the wake of the *Yeshiva* decision, the unionization of tenure-track faculty at private institutions diminished considerably.

A 2012 National Center survey found a total of only 77 private sector

Figure 1. New faculty collective bargaining units in 2016.

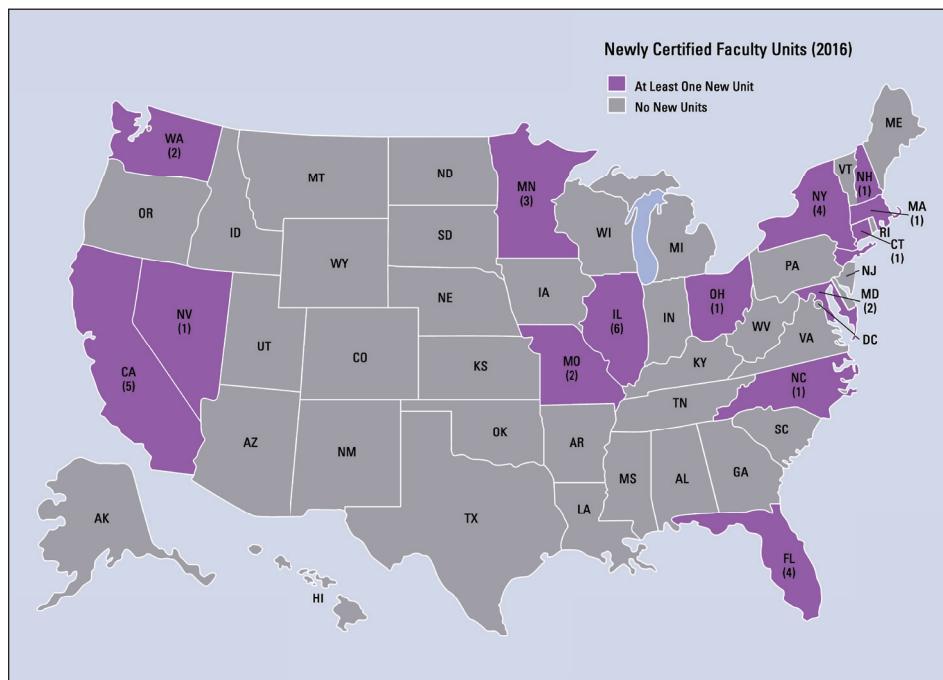
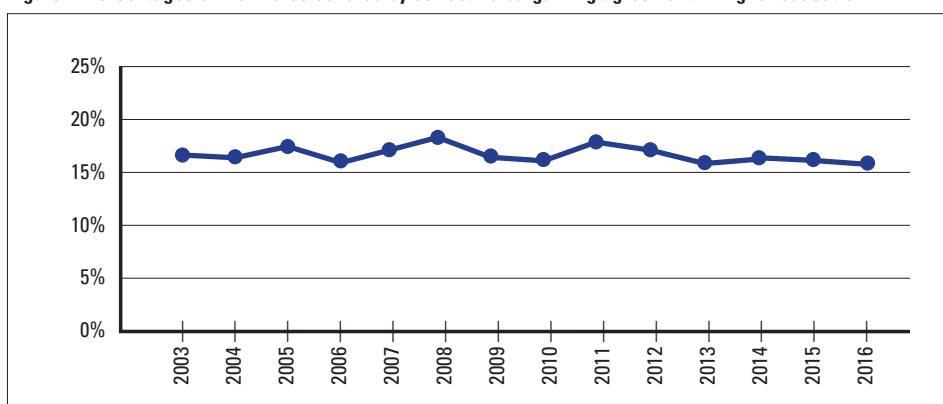


Figure 2. Percentages of workforce covered by collective bargaining agreement in higher education.



faculty bargaining units, and those with tenure-track faculty all predated the *Yeshiva* decision (Berry and Savarese 2012). Although the NLRB in 2014 increased the evidentiary burden for demonstrating managerial status of faculty, there has not been an upsurge in unionization efforts by tenure-track faculty at private institutions.

In 2016, only four petitions were pending at the NLRB seeking to represent tenure-track faculty. One resulted in the certification of a collective bargaining representative, and three were dismissed for different reasons (Herbert 2016).

In May 2017, a unanimous NLRB affirmed the dismissal of a petition involving Marywood University, finding the tenure-track faculty to be managerial personnel. Efforts by some institutions to expand the “Y Factor” to include adjunct faculty involved in committee work have been unsuccessful.

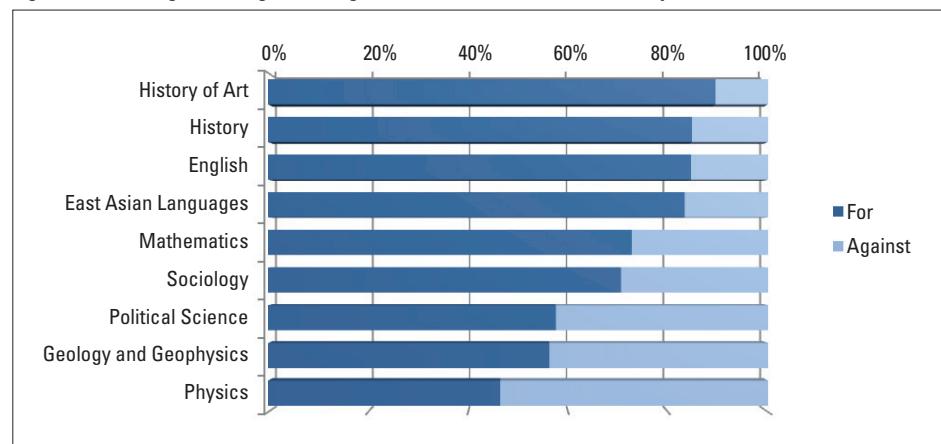
New public collective bargaining units with tenure-track faculty continue to grow. The past few years have seen newly certified or recognized public sector tenure-track faculty bargaining units in Florida, Illinois, Michigan, Missouri, Nevada, New Hampshire, Ohio, and Oregon.

The R factor: Religiously affiliated institutions

A 1979 Supreme Court decision has been the source of another legal obstacle that has impeded private sector faculty unionization (*NLRB v. Catholic Bishop of Chicago* 1979). In that case, the Supreme Court concluded that the NLRB should decline jurisdiction over questions of representation concerning parochial school faculty to avoid potential First Amendment issues. This precedent has been the basis for litigation by religiously affiliated institutions seeking to stop faculty unionization.

A National Center study identified nine cases pending last year where an institution argued that the NLRB should not assert jurisdiction over faculty unionization efforts because of the school’s religious affiliation (Herbert

Figure 3. Percentage of voting for and against unionization at Yale University based on NLRB data.



2016). One of the oldest of those cases, filed in October 2010, involves adjunct faculty at Manhattan College.

Substantial growth in adjunct unionization

The largest area of recent union density growth in higher education concerns non-tenure track faculty at private and public institutions (Herbert 2016). This growth is directly related to a systematic shift in higher education, which now relies heavily on lower paid and precariously employed adjunct faculty for classroom instruction. In many ways, the shift is analogous to the fissured workplaces in other industries (Weil 2014).

Last year, twenty-two new non-tenure track bargaining units were certified in the private sector, with an aggregate of 3,700 faculty members. Sixty-eight percent of the new units included both full-time and part-time non-tenure track faculty. Only five units were composed solely of part-time non-tenure track faculty, and two consisted of only full-time non-tenure track faculty. These newly created units represent a remarkable 28.5 percent increase over the number of private sector units found in the National Center’s 2012 survey (Berry and Savarese 2012). Future acceptance of faculty micro-units would naturally lead to a greater proliferation of new bargaining units.

In the public sector in 2016, three new non-tenure track units were created, composed of part-time faculty, with an

aggregate of 1,546 faculty members. This compares to nine new tenure-track public sector faculty units, with a combined total of 2,060 faculty members. The increase in public sector faculty bargaining units represented only a 2.1 percent increase over the number of such units in 2012.

Unit Composition: Combined or Separate?

A fundamental issue is whether non-tenure track faculty should be placed in a bargaining unit with tenure-track faculty or in a separate unit. A related issue is whether full-time and part-time non-tenure track faculty should be in a combined unit. Whether a combined or separate faculty unit is appropriate is a question of law to be determined by a labor relations agency unless the issue is resolved between the parties.

The unit composition issue is largely moot in the private sector because most tenure-track faculty are outside NLRA protections under *Yeshiva*. As early as 1973, the NLRB ruled that adjunct and part-time faculty should be excluded from a bargaining unit of tenure-track faculty because of conflicts caused by substantial differences between the two groups. The reasoning in those earlier decisions was applied last year by an NLRB regional director in ordering separate units for full-time and part-time faculty at the Minneapolis College of Art and Design.

The same issue in the public sector can lead to a different result depending on the state where the institution is located and the evidence presented at a hearing. In 2015, the Pennsylvania Labor Relations Board added adjunct faculty at Temple University to an existing unit of full-time faculty. New York's Public Employment Relations Board reached very different conclusions in 2016 and 2017 on the placement of adjunct faculty at two community colleges. In both cases, the adjunct faculty were placed in separate units rather than being added to existing full-time faculty units, as the colleges urged. The New York decisions were predicated on a precedent dating back to 1968, which found that differences between the faculty groups mandated separate units.

Reasonable people can differ over whether combined or separate faculty units enhance or impair collective negotiations. Tenure-track faculty can

help advocate for improving the working conditions of adjunct faculty, as was demonstrated a few years ago at the University of Illinois at Chicago. Tenure-track faculty at other institutions may choose not to emulate that approach, believing that their own working conditions should be prioritized at the expense of the adjunct faculty. Distinctions and disparities between groups of employees in a bargaining unit can lead to internal disputes during the bargaining process.

Strikes in Higher Education

In 1994, the National Center identified 163 faculty strikes that took place in higher education since 1966 (Annunziato 1994). The past four years have seen a much smaller number of higher education strikes. We have identified 20 strikes and one lockout in higher education since January 2013, based on information gathered from news reports

found on LexisNexis and Westlaw and government data.

Of the 20 strikes, 55 percent involved faculty or student employees. In September 2016, Long Island University imposed a very unusual and unsuccessful lockout of faculty that ended following protests. Faculty strike authorization votes at California State University, Barnard College, and Ithaca College led to agreements. In addition, Yale graduate assistants conducted a hunger strike in April and May 2017 seeking to compel the commencement of bargaining. Table 1 lists the strikes and the lock out on campuses since 2012.

Looking Ahead

The specific effect that labor law has on workplace collective action has been debated for decades. In higher education, however, little question exists that legal developments have directly affected the scope and size of unionization, particu-

Table 1. Strikes and a lockout in higher education, January 2013–May 31, 2017.

Institution	Unit Type	Union Affiliate	Date	Length
University of Illinois, Springfield	TT faculty	AFT	May 2017	6 days
University of California	Clerical workers	IBT	Jan 2017	1 day
University of California, Los Angeles	Skilled-trade workers	IBT	Jan 2017	5 days
University of California, Los Angeles	Skilled-trade workers	IBT	Nov 2016	1 day
Harvard University	Dining service workers	UNITE HERE	Oct 2016	20 days
Pennsylvania State System of Higher Education	TT and NTT faculty	APSCUF	Oct 2016	3 days
Long Island University	TT and NTT faculty	AFT	Sep 2016	12 days
Green River College	TT and NTT faculty	AFT	May 2016	3 days
University of Illinois, Urbana-Champaign	NTT faculty	AFT-AAUP	Apr 2016	3 days
City College of San Francisco	TT and NTT faculty	AFT	Apr 2016	1 day
Rock Valley College	FT NTT faculty	AFT	Sep 2015	4 days
University of California	Physicians, dentists, and podiatrists	AFSCME	Apr 2015	7 days
Rhode Island School of Design	Educational services	NEA	Apr 2015	5 days
University of California	Physicians, dentists, and podiatrists	AFSCME	Jan 2015	1 day
University of Oregon	Graduate teaching and research assistants	AFT	Dec 2014	8 days
University of California	Academic student employees	UAW	Apr 2014	2 days
University of Illinois, Chicago	TT and NTT faculty	AFT-AAUP	Feb 2014	2 days
Bellingham Technical College	NTT Faculty	NEA	Sep 2013	6 days
Nassau Community College	NTT Faculty	AFA	Sep 2013	5 days
University of Illinois, Urbana-Champaign	Educational services	SEIU	Mar 2013	3 days
University of Illinois, Urbana-Champaign	Accommodation and food services	SEIU	Mar 2013	3 days

larly with respect to academic labor.

The results of the 2016 election make changes to the NLRB inevitable. Decisions by a newly constituted NLRB, along with the expansion of state open-shop laws, will likely negatively affect unionization among faculty and other employees on campus. In the public sector, statutory changes in states such as Wisconsin and Iowa, and efforts to make the open shop a constitutional mandate, are aimed at undermining unionization and collective bargaining. In addition, continued cuts to the staff and budgets of labor relations agencies will make them less effective in resolving labor disputes.

The denuding of de jure workplace rights and protections will impair unionization on campus and elsewhere. Such changes will necessitate a shift in organizing strategies. It is likely that such shifts will result in a return to the more disharmonious labor tactics that formed the historical foundation for voluntary recognition and collective bargaining.

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