

# ACADEMIC CORPORATISM, NLRB V. YESHIVA, AND THE RISE OF THE UNIVERSITY PROFESSIONAL MANAGEMENT CLASS

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Derived from political corporatism, academic corporatism is an administrative strategy that is antithetical to the spirit that academics hold dear — including openness, transparency, collegiality, meritocracy, rule-governed procedures, balanced curriculum, a level playing field for probationary faculty and participation by faculty in governance.<sup>1</sup>

## INTRODUCTION

Within the United States, a cynical description of academic corporatism is that of universities “filled with armies of functionaries—the vice presidents, associate vice presidents, assistant vice presidents, provosts, associate provosts, vice provosts, assistant provosts, deans, deanlets, deanlings, each commanding staffers and assistants—who, more and more, direct the operations of every school.”<sup>2</sup> Generally, employees in the private sector have the right to form unions and engage in collective bargaining<sup>3</sup> under the National Labor Relations Act of 1935 (NLRA),<sup>4</sup> which established that workers’ rights to join unions and engage in collective bargaining was the “policy of the United States.”<sup>5</sup> Unlike their counterparts in public

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1. G.A. Clark, *How Academic Corporatism Can Lead to Dictatorship*, NATURE, Mar. 13, 2008, at 151.

2. BENJAMIN GINSBURG, THE FALL OF THE FACULTY: THE RISE OF THE ALL-ADMINISTRATIVE UNIVERSITY AND WHY IT MATTERS 2 (2011).

3. BUREAU OF LABOR STAT., DEP’T OF LAB., USDL-23-0071, UNION MEMBERS—2022 (2023), <https://www.bls.gov/news.release/pdf/union2.pdf>.

4. National Labor Relations Act of 1935, 29 U.S.C. §§ 151—169.

5. *The Law*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/rights-we-protect/the-law> (last visited Mar. 21, 2024).

university systems, however, tenure-track<sup>6</sup> faculty at private, non-religiously affiliated<sup>7</sup> colleges and universities have been prohibited from forming labor unions<sup>8</sup> or engaging in collective bargaining under the NLRA. That is because of the Supreme Court's 5-4 decision in *NLRB v. Yeshiva University* (1980).<sup>9</sup>

This article examines not just *Yeshiva*, but also the implications of both the reality of ever-expanding administrative staffs and the consequent perception of a decline in shared governance as a matter of policy as well as functionality. Part I briefly recounts the critical aspects of *Yeshiva*, and then places that decision in the context of the history and underpinnings of pre-*Yeshiva* faculty governance. What then follows is post-*Yeshiva*'s rapid growth of non-teaching administrators (the "professional-managerial class" or "PMC"),<sup>10</sup> and an examination of the consequences of academic corporatism. We conclude with recommendations for the way ahead, suggesting that shared governance measures and policies are even more important in the current academic environment than when *Yeshiva* was decided some forty-three years ago.

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6. Non-tenure-track instructional positions are growing at twice the rate of tenured-track teaching jobs. In some instances, non-tenure-track faculties are eclipsing tenured and tenure-track faculties. Non-tenure-track faculty typically have limited or no involvement in faculty governance. See AM. ASS'N OF UNIV. PROFESSORS, THE STATUS OF NON-TENURE-TRACK FACULTY (June 1993), <https://www.aaup.org/report/status-non-tenure-track-faculty>.

7. Unionization within religiously affiliated institutions falls outside the scope of this writing, although this issue was addressed in *NLRB v. Cath. Bishop of Chicago*, 440 U.S. 490 (1979). See also *Univ. of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002).

8. From 2012 to 2020, there was an 81.3% increase in union membership among non-tenured, contingent, or teaching assistant faculty at sixty-five private institutions. Over the same period, only three universities (Lesley University, Notre Dame de Namur, and Point Park University) voluntarily recognized tenure-track faculty bargaining units. See WILLIAM A. HERBERT ET AL., NAT'L CTR. FOR COLLECTIVE BARGAINING IN HIGHER EDUC. & THE PROFESSIONS, 2020 SUPPLEMENTARY DIRECTORY OF NEW BARGAINING AGENTS AND CONTRACTS IN INSTS. OF HIGHER EDUC. *passim* (Nov. 2020), <https://www.hunter.cuny.edu/ncsbhep/assets/files/SupplementalDirectory-2020-FINAL.pdf>.

9. *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980).

10. See, e.g., JOHN EHRENREICH & BARBARA EHRENREICH, *BETWEEN LAB. AND CAPITAL* (1979). As coined by the authors, the PMC is "defined by its role in the social reproduction of advanced capitalist countries [as a] proposition that there can be a third class, other than the capitalist and working classes." *Id.* at xv.

## I. YESHIVA'S INITIAL IMPLICATIONS FOR ACADEMIA AND SHARED GOVERNANCE

*Yeshiva* upheld a perception that college professors participating in institutional “shared governance”<sup>11</sup> were classified as “managers” within a collaborative, institutional shared governance model. As managers, college professors did not qualify for protection under the NLRA, and therefore may not join unions or form collective bargaining units.<sup>12</sup>

In 1974, *Yeshiva*'s faculty association petitioned the NLRB for certification as the bargaining unit representing all full-time faculty.<sup>13</sup> The *Yeshiva* administration opposed the faculty position, but, relying upon its prior holding in *C.W. Post Center of Long Island University*, the NLRB approved the petition and ordered an election.<sup>14</sup> *C.W. Post* held that faculty were neither supervisors nor managers because faculty authority was exercised collectively through committees and not as individuals.<sup>15</sup> Following the NLRB certification, *Yeshiva* administrators refused to bargain with the union and filed an unfair labor practice complaint with the Board. The University asserted that the NLRB had failed to recognize that *Yeshiva* faculty exercised significantly more authority than traditional faculty members.<sup>16</sup> Nevertheless, the NLRB rejected the position and found *Yeshiva* in violation of the NLRA.<sup>17</sup> The Second Circuit reversed the Board's decision and held that full-time *Yeshiva* faculty were managers because they “formulate, determine, and effectuate”<sup>18</sup> institutional policies and practices of the institution.

The Supreme Court affirmed the Second Circuit's determination.<sup>19</sup> The majority opinion, written by Justice Powell, rested upon a perception of private colleges as intimate enclaves of substantially autonomous scholars. Faculty were not considered to have “the type of management-employee relations that prevail in the pyramidal hierarchies of private industry.”<sup>20</sup> At

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11. See Carlene A. Clark, *The Yeshiva Case: An Analysis and an Assessment of Its Potential Impact on Public Universities*, 52 J. HIGHER EDUC. 449 (1981).

12. See *Yeshiva*, 444 U.S. at 681-82.

13. *Id.* at 674-75.

14. *C.W. Post Ctr. of Long Island Univ.*, 189 N.L.R.B. 904 (1971).

15. *Id.*

16. *Yeshiva Univ.*, 221 N.L.R.B. 1053 (1975).

17. *Id.*

18. *NLRB v. Yeshiva Univ.*, 582 F.2d 686, 695 (2d Cir. 1978). The appellate court attributed the managerial definition to *Retail Clerks International Ass'n v. NLRB*, 366 F.2d 642, 645 (D.C. Cir. 1966).

19. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 679 (1980).

20. *Id.* at 680.

the time, Yeshiva's faculty exercised significant control of curriculum, scheduling, student qualifications, teaching methods, grading, matriculation, admissions, and retention.<sup>21</sup> In overruling the NLRB<sup>22</sup> (and upholding the Second Circuit's denial of certification),<sup>23</sup> the *Yeshiva* Court determined the NLRB had failed to recognize the "'extensive control of Yeshiva's faculty' over academic and personnel decisions, as well as 'the crucial role . . . in determining other central policies of the institution.'"<sup>24</sup>

Justice Brennan, joined by Justices White, Marshall, and Blackmun, vigorously dissented. He criticized the majority's "perception of the Yeshiva faculty's status" as being "distorted by the rose-colored lens through which it views the governance structure of the modern-day university."<sup>25</sup> The majority also failed to recognize that, by 1980, faculty in at least eighty private universities (and in four times as many public programs) had already formed unions and engaged in collective bargaining.<sup>26</sup> Justice Brennan's dissent argued that the Court "purports to recognize that there are fundamental differences between the authority structures of the typical industrial and academic institutions which preclude the blind transplanting of principles developed in one arena onto the other," but that it "nevertheless ignores those very differences in concluding that Yeshiva's faculty is excluded from the Act's coverage."<sup>27</sup>

Relying upon the interests test of the Court's previous holding in *NLRB v. Bell Aerospace Co.* (1974),<sup>28</sup> Justice Brennan noted that the pivotal inquiry for determining managerial status is whether employees in performing their duties represent their own interests or those of the employer.<sup>29</sup> While faculty interests could not be fully "separated from those of the institution,"<sup>30</sup> private universities are hierarchical with formal chains of command running from governing boards through university officers to the faculty and students.<sup>31</sup> Justice Brennan asserted that faculty form a "parallel" network bringing a different type of management expertise in which authority "is attributable

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21. *Id.* at 676.

22. *See generally* 221 N.L.R.B. at 1054 (NLRB holding).

23. 582 F.2d at 698.

24. *Yeshiva*, 444 U.S. at 679.

25. *Id.* at 702 (Brennan, J., dissenting). *See* Arthur M. Sussman, *University Governance Through a Rose-Colored Lens: NLRB v. Yeshiva*, 1980 SUP. CT. REV. 27, 27.

26. Robert A. Gorman, *The Yeshiva Decision*, 66 ACADEME 188 (1980).

27. *Yeshiva*, 444 U.S. at 694 (Brennan, J., dissenting).

28. *See* *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974).

29. *Yeshiva*, 444 U.S. at 695-96 (Brennan, J., dissenting).

30. *Id.* at 696 (internal quotation marks and citation omitted).

31. *Id.* at 696-97.

solely to its collective expertise as professional educators, and not to any managerial or supervisory prerogatives.”<sup>32</sup> While leaving open the possibility that non-tenure-track faculty and teaching assistants could seek union representation, *Yeshiva* failed to grasp the reality that faculty act less as “managers” than as “professional employees”<sup>33</sup> which were and remain covered under the NLRA.

The overarching purpose of the NLRA is to counterbalance the vastly superior economic position of employers with the combined economic pressure of employees engaging collectively to improve working conditions or wages. While the Act confers upon employees the right to seek concessions without unions (so-called Section 7 “concerted activity” rights for “mutual aid or protection”<sup>34</sup>), these rights are of little to no significant benefit if employers retain “at will” employment rights under common law (subject to existing contracts or state laws). Likewise, what constitutes protected concerted action “must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.”<sup>35</sup>

Courts generally strictly scrutinize employee methods of protest under concerted activity.<sup>36</sup> Faculty members facing individualized action by administrators are generally far better protected by collectively negotiated procedures guaranteeing faculty representation and fair treatment. Even accepting Justice Powell’s over-simplified “shared governance” model, *Yeshiva* does not take account of the seismic changes that have taken place in higher education in the four decades since the case was decided. These changes include precipitous declines in tenure-track faculty positions, an extraordinary growth in non-teaching administrative positions, and rampant academic corporatism. Faculty influence outside classrooms has been subsumed by a profound unbundling of traditional faculty roles and

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32. *Id.* at 697.

33. National Labor Relations Act of 1935, 29 U.S.C. § 152(12)(a). (“The term ‘Professional employee’ means any employee engaged in work predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work; involving the consistent exercise of discretion and judgment in its performance; of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning.”).

34. National Labor Relations Act of 1935 § 157. See Gus Svolos, Note, *Concerted Activity Under Section 7 of the National Labor Relations Act*, 1955 U. ILL. L.F. 129 (1955).

35. *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

36. See Judith J. Johnson, *Protected Concerted Activity in the Non-Union Context: Limitations on the Employer’s Rights to Discipline or Discharge Employees*, 49 Miss. L.J. 839 (1978).

responsibilities. Private college administrators today exert near unfettered authority over career faculty. Further, faculty interests rarely are in alignment with the goals and plans of presidents and trustees. The traditional collegial consensus-building model of governance has been replaced by a command-hierarchical governance model.<sup>37</sup>

## II. THE WORLD OF AMERICAN ACADEMIA IN BRIEF IMPACTED BY *YESHIVA*

Tenure-track faculty are normally hired following global searches, multiple interviews, and both research and teaching demonstrations. They begin careers as assistant professors and move up the ladder to associate professor based upon reviews by faculty committees and administrators, ultimately to be granted tenure. Most faculty denied tenure are terminated or resign. Tenure-track faculty are evaluated, promoted, and granted tenure based upon three criteria: teaching, scholarship, and service. In most institutions, only tenured and tenure-track faculty can teach graduate courses, serve on faculty search committees, or participate in faculty governance.

Tenure density—the proportion of faculty in tenure-track positions—has been declining in the United States over the last several decades. This decline now constitutes the greatest threat to the traditional higher education governance model that the United States has ever experienced. The first college faculty union in America was AFT Local 33 at Howard University in 1918.<sup>38</sup> The motivations of Howard’s faculty remain obscure, although institutional governance, higher wages, academic job security, as well as supporting unionization in general have all been cited. Walter Dyson, secretary of Howard Local 33, recalled in 1944 that “teachers returned to their work, determined to make the schools safe for the teachers. They had worked to make the world safe for democracy; now they would work for democracy in education. They had fought autocracy abroad; they would now fight autocracy in the schools.”<sup>39</sup> Despite optimistic beginnings, Howard’s union disbanded in 1920. The University of Illinois faculty AFT local

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37. See PETER FLEMING, *DARK ACADEMIA: HOW UNIVERSITIES DIE* (2021), as reprinted in Peter Fleming, *The Authoritarian Turn in Universities*, *NONPROFIT Q.* (Mar. 28, 2022), <https://nonprofitquarterly.org/the-authoritarian-turn-in-universities/>.

38. See Timothy R. Cain, *The First Attempts to Unionize the Faculty*, 112 *TCHRS. COLL. REC.* 876 (2010). See also V.B. Turner, *Labor Organizations: Thirty-ninth Annual Convention of the American Federation of Labor*, 9 *MONTHLY LAB. R.* 241, 248 (1919).

39. WALTER DYSON, *HOWARD UNIVERSITY: THE CAPSTONE OF NEGRO EDUCATION: A HISTORY* 86-87 (1941).

founded in 1919<sup>40</sup> likewise folded within a year. Of the other twenty AFT union affiliates identified as representing college or normal faculty, all but one (Milwaukee State Teachers College—later the University of Wisconsin-Milwaukee) disbanded by 1923.<sup>41</sup>

A minor resurgence of private university unionizations occurred in the 1920s and early 1930s, including AFT Local 204 at Yale in 1928 and AFT Local 223 at the University of Wisconsin in 1930. Throughout the 1930s, approximately fifty more local faculty unions were established despite internal conflicts within the AFT<sup>42</sup> and the lack of de jure collective bargaining rights under state laws. Following the NLRB's recognition of the right of private college faculty to bargain in 1970,<sup>43</sup> most private college and university unions became affiliated with the American Association of University Professors (AAUP), which adopted a Statement of Collective Bargaining in 1973.<sup>44</sup> By 1979, 25–30% of all faculty in approximately 20% of private American colleges and universities were dues-paying members of collective bargaining units.<sup>45</sup> Thus, by the time *Yeshiva* was decided, over 55% of faculty at private four-year institutions and 65% of faculty at public colleges were tenured or tenure-tracked.<sup>46</sup>

It is important to note that in *NLRB v. Catholic Bishop of Chicago* (1979),<sup>47</sup> the Supreme Court determined that the NLRB lacked jurisdiction over faculty at church-operated schools based upon First Amendment concerns. Also, in 2002, the D.C. Circuit established a three-part, bright-line jurisdictional test to determine when the NLRB must decline to exercise jurisdiction.<sup>48</sup> Many private American colleges and universities integrate

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40. *Our History*, AM. FED'N OF TCHRS, <https://www.aft.org/highered/about-aft-higher-education/our-history> (last visited Mar. 22, 2024).

41. Cain, *supra* note 38.

42. See ELLEN W. SCHRECKER, *NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES* (1986).

43. Cornell Univ., 183 N.L.R.B. 329 (1970). See JUDITH WAGNER DECEW, *UNIONIZATION IN THE ACADEMY: VISIONS AND REALITIES* (2003).

44. *Statement on Collective Bargaining*, AM. ASS'N OF UNIV. PROFESSORS, <https://www.aaup.org/report/statement-collective-bargaining> (last visited Mar. 22, 2024).

45. Timothy R. Cain, *Organizing the Professoriate: Faculty Unions in Historical Perspective*, UNIV. OF GA. (Mar. 4, 2015, 2:27 PM), <https://ihe.uga.edu/news/stories/2015/organizing-professoriate-faculty-unions-historical-perspective>.

46. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STAT., *Digest of Education Statistics* tbl.232 (1995), <https://nces.ed.gov/programs/digest/d95/dtab232.asp>. See also JUDITH M. GAPP, *PART-TIME FACULTY: HIGHER EDUCATION AT A CROSSROADS* 27, in *ASHE-ERIC HIGHER EDUC. RSCH. REPS.* (Jonathan D. Fife, ed. 1984) reviewed by 56 *THE LIBR. Q.* 97 (Jan. 1986).

47. *NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 502-07 (1979).

48. *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1344-45 (D.C. Cir. 2002). The court held that the NLRB must decline jurisdiction if the institution (a) “holds itself out to students, faculty, and community

faith and religion into their student experience or curriculum.<sup>49</sup> The differences between more loosely affiliated religious universities, such as Villanova or Southern Methodist, and strictly fundamentalist programs, such as Oral Roberts or Bob Jones Universities, is important, but beyond the scope of this writing.

The NLRB's decision in *Pacific Lutheran University* (2014) provides a more recent paradigm applying *Yeshiva* by means of a "majority status" rule.<sup>50</sup> Under that rule, faculty exercise "effective" decision-making regarding "central" university policies if faculty constitute majority committee membership and if said committee's recommendations "routinely" become "operative without independent review."<sup>51</sup> In *Pacific Lutheran*, the Board delineated primary and secondary authority in evaluating whether faculty committee input and authority are considered "primary" or "secondary."<sup>52</sup> Primary authority arises from faculty authority over academic programs, enrollment management policies, and finances. Secondary authority was exercised over academic policies and personnel decisions.<sup>53</sup>

According to the AAUP's *Report on the Economic Status of the Profession, 2019–20*, "only 31 percent of faculty members in the United States are tenured or eligible for tenure."<sup>54</sup> According to McIver and Griffey, "[m]ore than 50 percent of all faculty members, and 75 percent of those ineligible for tenure, are classified as 'part time' even though they may teach full time or as 'adjuncts.'"<sup>55</sup> Visiting, part-time, and others comprise over

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as providing a religious educational environment"; (b) is "organized as a nonprofit"; and (c) is "affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion." *Id.* at 1343 (internal quotations omitted).

49. See, e.g., Anayat Durrani, *Learn About U.S. Colleges with Religious Affiliations*, U.S. NEWS & WORLD REP. (Sept. 26, 2018, 11:00 AM), <https://www.usnews.com/education/best-colleges/articles/2018-09-26/what-it-means-when-a-us-college-has-a-religious-affiliation>.

50. Pac. Lutheran Univ. & Service Employees International Union, Local 925, 361 N.L.R.B. 1404, 1404, 1408 (2014).

51. *Id.* at 1421.

52. *Id.* at 1427.

53. *Id.* See also *Univ. of S. Cal. v. NLRB*, 918 F.3d 126 (D.C. Cir. 2019) (upholding both *Yeshiva* and *Pacific Lutheran* in addressing whether non-tenure-track faculty at universities have the right to form a union under the NLRA).

54. Mia McIver & Trevor Griffey, *A New Deal for College Teachers and Teaching*, AM. ASS'N OF UNIV. PROFESSORS (2021), <https://www.aaup.org/article/new-deal-college-teachers-and-teaching#.Y4Z2iC2ZO1s> (last visited Mar. 23, 2024).

55. *Id.*



70% of instructional faculty.<sup>56</sup> Between 2013 and 2019, according to the National Center for the Study of Collective Bargaining in Higher Education, 118 new faculty bargaining units were recognized.<sup>57</sup> Of these, only three included tenure-track faculty, none of which were limited to tenure-track faculty.<sup>58</sup>

Seeking a brighter line test for determining whether faculty who exercise managerial roles are aligned with administrators, the NLRB in *Pacific Lutheran* examined what role faculty play in “academic programs, enrollment management policies, finances, academic policies, and personnel policies.”<sup>59</sup> Yet, even after modifying the definition of managerial faculty,<sup>60</sup> the NLRB subsequently dismissed three private university tenure-track faculty unionization cases, relying largely upon *Yeshiva*.<sup>61</sup> The result is an imbalance between a majority of public university tenure-track faculty protected by both tenure and collective bargaining rights and their private university colleagues deprived of academic freedom, equity, autonomy, and opportunities for professional growth. Without tenure, private university faculty are inhibited from expressing unpopular ideas,<sup>62</sup> challenging majority assumptions, or defending the rights of other colleagues for fear contracts will not be renewed or they will be denied tenure.

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56. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STAT., *Digest of Education Statistics*, NCES tbl.316.80 (2022), [https://nces.ed.gov/programs/digest/d20/tables/dt20\\_316.80.asp](https://nces.ed.gov/programs/digest/d20/tables/dt20_316.80.asp).

57. See Mary Ellen Flannery, *Behind the Explosive Growth of New Faculty Unions*, NEA NEWS (Nov. 29, 2020), <https://www.nea.org/advocating-for-change/new-from-nea/we-stepped-and-fought-back-behind-explosive-growth-new-faculty>.

58. The voluntarily recognized bargaining units with tenure-track faculty were at Lesley University, Notre Dame de Namur, and Point Park University. See HERBERT ET AL., *supra* note 8.

59. Pac. Lutheran Univ. & Service Employees Int'l Union, Local 925, 361 N.L.R.B. 1404, 1421 (2014).

60. *Id.* at 1423. Note, however, the NLRB subsequently modified *Pacific Lutheran University in Bethany College*, 369 N.L.R.B. 98 (June 10, 2020) (holding the NLRB has no jurisdiction over faculty at bona fide religious educational institutions). See also *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (instructive in determining whether an analysis of employees' roles is permitted in determining if a religious organization is exempt from Federal employment laws).

61. See *Carroll Coll.*, No. 19-RC-165133, N.L.R.B. (May 25, 2016); *Trs. of Tufts Coll.*, No. 01-RC-166588 N.L.R.B. (Apr. 5, 2016); *Marywood Univ.*, No. 04-RC-173160, N.L.R.B. (May 5, 2017).

62. See, e.g., Michael Levenson, *University Must Reinstate Professor Who Tweeted About 'Black Privilege'*, N.Y. TIMES (May 19, 2022), <https://www.nytimes.com/2022/05/19/us/twitter-florida-professor-reinstated.html?smid=url-share>; Kate McGee, *Third Fired Professor Claims in Federal Lawsuit that Collin College is Censoring Political Speech*, TEX. TRIB. (Mar. 8, 2022), <https://www.texastribune.org/2022/03/08/collin-college-free-speech-lawsuit/>.

### III. THE EXPONENTIAL EXPANSION OF NON-TEACHING ADMINISTRATORS

While academia still counts amongst its ranks many deans who were promoted from faculty positions (and continue to teach), the perception and reality of this paradigm is changing. Michael Bugeja points out the difficulty in firmly establishing what college deans currently do.<sup>63</sup> There is a risk that deans will identify less with faculty as they focus on operating budgets, enrollment, tuition allocations,<sup>64</sup> and fundraising. In some instances, to meet student retention, graduation, or diversity-hiring goals, deans will in turn hire cadres of non-teaching assistant and associate deans. Academic Vice-Presidents (also formerly promoted from faculty ranks) are being replaced by “Provosts” often with only modest teaching experience or scholarship. Provosts, in turn, hire and fire faculty while simultaneously insulating university presidents from playing any significant role in academic affairs. Challenges abound as “tuition keeps rising, debt keeps mounting, and provosts and deans are at the forefront of containing costs.”<sup>65</sup>

While tenured faculty positions have shrunk at both private and public universities, non-teaching administrative positions have expanded exponentially.<sup>66</sup> At Yale, for example, non-faculty administrative positions rose by almost 50% from 2004 to 2021.<sup>67</sup> At Stanford University (by 2018), 15,750 administrators and 2,288 faculty members served the needs of 16,937 students.<sup>68</sup> The student-to-administrator ratio at Stanford was even compared

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63. Michael Bugeja, *What Do Provosts and Deans Actually Do?*, INSIDE HIGHER EDUC. (Feb. 13, 2018), <https://www.insidehighered.com/views/2018/02/14/poorly-defined-roles-provosts-and-deans-can-lead-problems-major-universities>.

64. The simultaneous bureaucratization process and exponential increases in tuition is beyond the scope of this article. However, tuition increases have been rising at an average of twice the rate of inflation since at least the early 1990s. The average four-year college costs in America rose by almost 500% between 1985 and 2018. See Erik Sherman, *College Tuition Is Rising at Twice the Rate of Inflation—While Students Learn at Home*, FORBES (Aug. 31, 2020), <https://www.forbes.com/sites/zengernews/2020/08/31/college-tuition-is-rising-at-twice-the-inflation-rate-while-students-learn-at-home/>.

65. Bugeja, *supra* note 63.

66. See J. VICTOR BALDRIDGE, *MODELS OF UNIVERSITY GOVERNANCE: BUREAUCRATIC, COLLEGIAL, AND POLITICAL* (1971).

67. Philip Mousavizadeh, *A “Proliferation of Administrators”: Faculty Reflect on Two Decades of Rapid Expansion*, YALE DAILY NEWS (Nov. 10, 2021), <https://yaledailynews.com/blog/2021/11/10/reluctance-on-the-part-of-its-leadership-to-lead-yales-administration-increases-by-nearly-50-percent/>.

68. Andrew Friedman, *Stanford’s Administrative Bloat is Out of Control*, STAN. REV. (Nov. 7, 2018), <https://stanfordreview.org/stanfords-administrative-bloat-is-out-of-control/>. See also Richard Vedder, *More Employees Than Students at Stanford: Give Each Student a Concierge!*, MINDING THE

to being a guest at a nearby \$1,000-a-night hotel.<sup>69</sup> Benjamin Ginsburg notes that from 1985 to 2005 the number of university administrators nationwide rocketed by “85 percent, and the number of administrative staffers . . . by a whopping 240 percent.”<sup>70</sup> As of 2021, the largest single salary line item for private non-profit colleges and universities are salaries for academic support, student services, and institutional support (62%).<sup>71</sup> Public universities (typically with much higher faculty-to-student ratios) budget 36% of salaries for non-instructional administrators compared to 40% for faculty salaries.<sup>72</sup> The Bureau of Labor Statistics predicts a continuing 8% annual growth rate through 2030 for postsecondary administrators earning an average salary of \$96,910 per year.<sup>73</sup> Yale University employed 3,500 administrators for 5,300 undergraduate students in 2003. By 2021, well over 5,000 non-faculty administrators were meeting the needs of 5,900 Yale students—a 42% increase.<sup>74</sup>

Universities have essential functions that must be performed by administrators. This includes admissions, housing, health-clinics, food services, registrars, and business offices. Instructional and institutional support services likewise require infrastructure, as do human resources, janitorial, public relations, payroll, and information technology. Some of the most recent administrative growth has been in areas including, but not

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CAMPUS (Jan. 5, 2023), <https://www.mindingthecampus.org/2023/01/05/more-employees-than-students-at-stanford-give-each-student-a-concierge/>.

69. Friedman, *supra* note 68. The author also noted that if Stanford provided every undergraduate student “with a personal butler, then the University would still have 2,300 employees left to service the needs of its 9,400 graduate students.”

70. GINSBERG, *supra* note 2, at 28.

71. U.S. DEP’T OF EDUC., NAT’L CTR. FOR EDUC. STAT., *The Condition of Education 2021* ch. Postsecondary Institution Expenses (NCES 2021-144) (2021). Paul Jump, *Academics in the Minority at More Than Two-Thirds of UK Universities*, TIMES HIGHER EDUC. (Sept. 3, 2015), <https://www.timeshighereducation.com/news/academics-minority-more-two-thirds-uk-universities>.

72. U.S. DEP’T OF EDUC., *supra* note 71.

73. BUREAU OF LAB. STAT., *Occupational Outlook Handbook*, <https://www.bls.gov/ooh/management/postsecondary-education-administrators.html> (Sept. 6, 2023). When one of the authors was hired to teach in 2005 at a small private university, in addition to various program deans, university governance included the President, the Vice President for Academic Affairs, the Vice President for Finance, and one Assistant Vice President for Academic Affairs. By 2022, the “University Cabinet” included a provost, five new full Vice Presidents (Admissions, Marketing, Advancement, Student Life, and Student Success) and at least twenty additional Associate and Assistant Vice Presidents, Assistant (non-faculty) Deans, Assistant Provosts, and Directors. See, e.g., *University Cabinet*, SHENANDOAH UNIV., <https://www.su.edu/departments-offices/office-of-the-president/university-cabinet/> (last visited Jan. 5, 2023).

74. Mousavizadeh, *supra* note 67. The massive surge in non-teaching university employees is not unique to America. Academics are now also minorities in the UK and Australia. See Jump, *supra* note 71.

limited to, events-planners, fundraisers, and tutors in the guise of “Directors of Community Impact” and “Director of First Year Experience (FYE).”<sup>75</sup> Directors tend to fulfill more esoteric responsibilities such as building “institutional awareness.” “Directorates” require organic staffing to ensure universities are capable of “collaboration with internal and external partners.”<sup>76</sup> The beneficial “upskilling” of para-academics<sup>77</sup> and learning technologists results in the potential peril of “deskilling” of academic staff and faculty.<sup>78</sup> Para-academics must work as team-members with faculty and not prevent or pose barriers to direct engagement between faculty and students. Neil Mulholland notes a “vertical disintegration” of faculty roles until they consist “only of the few skills that cannot (yet) be efficiently insourced to homogenous university services.”<sup>79</sup> If discouraged from active engagement with students, and not trained to meet the learning and emotional needs of students, faculty could become mere “referral agents”<sup>80</sup> to “student success” specialists.

In 2015, Anthropologist David Graeber noted that

the last thirty years have seen a veritable explosion of the proportion of working hours spent on administrative paperwork, at the expense of pretty much everything else. In my own university [the London School of Economics], for instance, we have not only more administrative staff than faculty, but the faculty, too, are expected to spend at least as much time on administrative responsibilities as on teaching and research combined.<sup>81</sup>

In his 2019 essay, *Bureaucracy and Power in American Higher Education*,<sup>82</sup> Alexander Motyl notes how

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75. See, e.g., *Director of First Year Experience*, HIGHEREDJOBS, <https://www.higheredjobs.com/admin/details.cfm?JobCode=177937038&Title=Director%20of%20First%20Year%20Experience%20%28FYE%29> (last visited Jan. 5, 2023).

76. *Id.*

77. Para-academic is a term coined by Bruce Macfarlane in *The Morphing of Academic Practice: Unbundling and the Rise of the Para-academic*, 65 HIGHER EDUC. Q. 59 (2011), [https://brucemacfarlane.weebly.com/uploads/8/5/4/1/85415070/unbundling\\_paper\\_heq.pdf](https://brucemacfarlane.weebly.com/uploads/8/5/4/1/85415070/unbundling_paper_heq.pdf).

78. *Id.*

79. NEIL MULHOLLAND, RE-IMAGINING THE ART SCHOOL: PARAGOGY AND ARTISTIC LEARNING 66 (2019).

80. Macfarlane, *supra* note 77.

81. DAVID GRAEBER, THE UTOPIA OF RULES: ON TECHNOLOGY, STUPIDITY, AND THE SECRET JOYS OF BUREAUCRACY 133-34 (2015).

FN 83 – Alexander J. Motyl, *Bureaucracy and Power in American Higher Education*, FACTS & ART (Apr. 1, 2019), <https://www.factsandarts.com/essays/bureaucracy-and-power-american-higher-education>.

[p]residents, chancellors, provosts, deans, and their bureaucratic apparatuses preside over vast real-estate and financial holdings, engage in the economic equivalent of central planning, have inordinate influence over personnel, and are structured hierarchically, thereby forming an enormously powerful “new class” . . . circumscribed by the existence of the increasingly weaker cohort of tenured professors.

Motyl invokes Thorstein Veblen’s article from 1919 in *Higher Learning in America*,<sup>83</sup> in which university presidents draw about themselves “among the faculty a conveniently small number of advisers who are in sympathy with his own ambitions, and who will in this way form an unofficial council, or cabinet, or ‘junta.’” Veblen notes it is in furtherance of this scheme of academic control that “the captain of erudition should freely exercise the power of academic life and death over the members of his staff.”<sup>84</sup>

#### IV. ADMINISTRATIVE OUTREACH AND THE POTENTIAL FOR “BLOAT” IN DEI AND TITLE IX OFFICES

The 2020s have been an era of substantial social consciousness, including but not limited to the MeToo, Black Lives Matter, Gender Equality, and similar social justice movements. Concurrently, the fastest-growing directorates of noninstructional employees at American colleges and universities have been deans and vice presidents in support of Diversity, Equity, and Inclusion (DEI).<sup>85</sup> A 2021 Heritage Foundation study titled *Diversity University: DEI Bloat in the Academy* found an average of forty-five persons directly promoting DEI goals in each school.<sup>86</sup> Another 2021 study found DEI staffing levels at least 50% larger than the corresponding number of faculty in history departments.<sup>87</sup> Indeed Inc. reported that DEI-related employment in the industry rose 56.3% in 2020, and then 123% during the height of the COVID-19 epidemic between May and September of

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83. THORSTEIN VEBLÉN, THE HIGHER LEARNING IN AMERICA: A MEMORANDUM ON THE CONDUCT OF UNIVERSITIES BY BUSINESSMEN 99 (1918).

84. *Id.* at 100-01.

85. See B.E. Vaughn, *The History of Diversity Training & Its Pioneers*, STRATEGIC DIVERSITY & INCLUSION MGMT. MAG. 11 (Spring 2007) (illustrating the obscurity of the history of Diversity, Equity, and Inclusion departments in American universities).

86. Jay Greene & James Paul, *Diversity University: DEI Bloat in the Academy*, HERITAGE FOUND. (July 27, 2021) <https://www.heritage.org/education/report/diversity-university-dei-bloat-the-academy>.

87. *Id.*

2021.<sup>88</sup> Reports indicate that salaries and benefits alone for the Diversity Office at Florida International University exceed one million dollars per year.<sup>89</sup> A Fox News report found that public universities in Michigan, Maryland, and Virginia paid DEI vice-presidents salaries ranging from \$329,000 to \$430,000.<sup>90</sup> The University of Central Florida's vice president for Diversity, Equity, and Inclusion earns three times the average faculty salary at that institution.<sup>91</sup>

In academia, DEI efforts<sup>92</sup> focus upon “underrepresented minorities (URMs)”<sup>93</sup> and creating more “equitable academic environments.”<sup>94</sup> DEI policies, procedures, and training seek to make learning environments more diverse, equitable, and inclusive. Most universities frame diversity efforts as “social justice” imperatives or as a more mechanical “instrumental” approach<sup>95</sup> through which multiple perspectives improve learning for all (e.g., broadening horizons).<sup>96</sup> Both methodologies promote “structural change”<sup>97</sup> as essential in mitigating the harmful effects of past wrongs or in

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88. Jane Murray Kellogg, *Jobs in Diversity, Inclusion and Belonging Have Risen 123% Since May—Here's How to Get One*, INDEED (Apr. 23, 2023), <https://www.indeed.com/career-advice/finding-a-job/diversity-inclusion-and-belonging-jobs-rise>.

89. Ben Zeisloft, *Florida College Bureaucrats 'Significantly Misreported' Diversity Initiatives When Pressed by DeSantis*, DAILY WIRE (Feb. 2, 2023), <https://www.dailywire.com/news/florida-college-bureaucrats-significantly-misreported-diversity-initiatives-when-pressed-by-desantis-his-office-says>.

90. Joe Schoffstall, *College Diversity and Inclusion Officers Rake in Sky-High Salaries as Debt-Saddled Students Face Rising Costs*, FOX NEWS (Aug. 31, 2022), <https://www.foxnews.com/politics/college-diversity-inclusion-officers-rake-sky-high-salaries-debt-saddled-students-face-rising-costs>.

91. *Faculty & Staff Salaries*, UCF, <https://www.floridasalaries.org/ucf> (last visited Sept. 10, 2023).

92. Diversity is essential in breaking down racial stereotypes and preparing students “for an increasingly diverse workforce and society.” *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

93. No federal statute or regulation defines this term. Most university policies identify Blacks or African Americans, Hispanics or Latinos, American Indians or Alaska Natives, Native Hawaiians and other Pacific Islanders as underrepresented minorities. Most programs do not distinguish between native and foreign-born student achievement. *See, e.g.*, Jesse J. Tauriac & Joan H. Liem, *Exploring the Divergent Academic Outcomes of U.S.-Origin and Immigrant-Origin Black Undergraduates*, 5 J. DIVERSITY IN HIGHER EDUC. 244 (2012).

94. *See, e.g.*, TIA BROWN MCNAIR ET AL., FROM EQUITY TALK TO EQUITY WALK: EXPANDING PRACTITIONER KNOWLEDGE FOR RACIAL JUSTICE IN HIGHER EDUCATION (2020).

95. This article will not deeply delve into “viewpoint diversity” and the “instrumental approach” risks underrepresented minorities not as beneficiaries of diversity but as instruments yielding educational benefits for the campus and students at large. *See* James F. Blumstein, *Grutter and Fisher: A Reassessment and a Preview*, 5 VAND. L. REV. EN BANC 57 (2012); Anthony Lising Antonio et al., *Effects of Racial Diversity on Complex Thinking in College Students*, 15 PSYCH. SCI. 507 (2004).

96. *See* B. Rose Huber, *Common Approach to Diversity in Higher Education Reflects Preferences of White Americans*, PRINCETON NEWS (Apr. 12, 2021), <https://www.princeton.edu/news/2021/04/12/common-approach-diversity-higher-education-reflects-preferences-white-americans>.

97. In the fall of 2021, Boston University Chancellor Marcello Suárez-Orozco and Provost Joseph B. Berger sent a memo to faculty accusing the Faculty Council of acting in a “racially charged” manner

dissipating implicit (current) biases. Nevertheless, these programs consume enormous time and resources finding and recruiting low-income URM students.<sup>98</sup> The ongoing challenge is to ensure that DEI training is in-depth, effective,<sup>99</sup> and productive in implementation and practices.<sup>100</sup>

One such microcosm of challenge and opportunity is the Division of Equity and Inclusion at Portland State University, which has no less than twenty administrators serving under a University Vice President for Global Diversity & Inclusion.<sup>101</sup> The Division of Equity and Inclusion overlaps partially with a Portland State “Bias Review Team” charged with investigating claims of bias and discrimination on or off campus. The “team” consisted of fifteen various non-faculty administrators—i.e., Athletics Director, Dean of Students, Director of the Queer Resource Center, etc.—as well as one faculty member and one student representative.<sup>102</sup> Given this background, in 2022, Portland Professor Bruce Gilley was blocked from the University’s Twitter account by the Director of the University’s Division of Equity and Inclusion after Professor Gilley quote-tweeted a message from @UOEquity promoting a “Racism Interrupter.” Gilley also quoted the Declaration of Independence—specifically, “all men are created equal.” Unlike faculty employed by private universities, as a tenured state employee, Gilley enjoyed job security as a member of the

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and trafficking in “racial stereotypes and tropes” following complaints of a lack of transparency in recent dean searches. The faculty union responded that the provost’s comments were intended to “silence faculty while obscuring the administrators’ own failure to practice the shared governance they so often preach.” See Colleen Flaherty, *‘Beyond Rhetoric’ on Diversity*, INSIDE HIGHER ED (June 6, 2022), <https://www.insidehighered.com/news/2022/06/07/umass-boston-faces-questions-about-its-commitment-dei>.

98. Rodney J. Andrews et al., *Recruiting and Supporting Low Income, High-Achieving Students at Flagship Universities* (Nat’l Bureau of Econ. Rsch., Working Paper No. 22260, 2016), <https://www.nber.org/papers/w22260.pdf>; see also Jonathan Rothwell, *The Stubborn Race and Class Gaps in College Quality*, THE BROOKINGS INST.: SOC. MOBILITY PAPERS (Dec. 18, 2015), <https://www.brookings.edu/research/the-stubborn-race-and-class-gaps-in-college-quality/>.

99. See Edward Chang et al., *Does Diversity Training Work the Way It’s Supposed To?*, HARV. BUS. REV. (July 9, 2019), <https://hbr.org/2019/07/does-diversity-training-work-the-way-its-supposed-to>.

100. DEI and CRT initiatives have sparked substantial political controversy in Florida, Texas, and North Carolina university systems. Florida Governor Ron DeSantis signed HB 999/SB 266 on April 21, 2023, effectively defunding DEI bureaucracies across all twelve of Florida’s public universities. See also Eric Kelderman, *The Plan to Dismantle DEI*, CHRON. OF HIGHER EDUC. (Jan. 20, 2023), <https://www.chronicle.com/article/the-plan-to-dismantle-dei>.

101. See, e.g., *About GDI*, PORTLAND STATE UNIV., <https://www.pdx.edu/diversity/contact> (last visited Jan. 5, 2023).

102. See, e.g., *Bias Review Team*, PORTLAND STATE UNIV., <https://www.pdx.edu/diversity/bias-review-team> (last visited Jan. 5, 2023).

faculty union<sup>103</sup> and his superiors were acting under color of state action to limit his speech and academic freedom.<sup>104</sup>

For private university faculty, DEI offers opportunities to explore academic freedom but also potential challenges if faculty are required to document and promote specific DEI efforts to achieve promotion or tenure.<sup>105</sup> Faculty who fail to toe the DEI line may face a best-practices litmus test: incorporate critical race theory, intersectionality, and other orthodoxies into their classrooms, scholarship, and service, or face the insecurity of losing the opportunity for promotion and tenure.<sup>106</sup> Administrators of state colleges and universities selectively embrace academic freedom for speech they approve of while simultaneously censoring speech they find offensive. Healthy and viable tenure-granting processes should always take academic freedom into account. If administrators wield DEI policies and expectations to rid themselves of professors who challenge campus orthodoxies rather than legal obligations and societal norms, the system can fail to thrive. Any serious effort to uphold the academic freedom and pedagogical independence of private university faculty should include the opportunity to engage in free expression regarding conditions of employment, or opportunities, or lack thereof, for collective bargaining, especially absent the ability to bring actions under color of state action.<sup>107</sup>

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103. See, e.g., *Academic Unions*, PORTLAND STATE UNIV., <https://www.pdx.edu/academic-affairs/academic-unions> (last visited Jan. 5, 2023). Portland State University contingent and part-time faculty are represented by the Portland State University Faculty Association (PSUFA) Local 3571. Tenure track faculty are represented by the Portland State University Chapter, American Association of University Professors. *Id.*

104. 42 U.S.C. § 1983.

105. The 2022 AAUP Survey of Tenure Practices indicate that DEI criteria were found in tenure standards at 21.5 percent of all institutions and nearly half of large universities (45.6%). Hans-Joerg Tiede, *The 2022 AAUP Survey of Tenure Practices*, AM. ASS'N OF UNIV. PROFESSORS (2022), <https://www.aaup.org/report/2022-aaup-survey-tenure-practices>.

106. See, e.g., Colleen Flaherty, *Where DEI Work Is Faculty Work*, INSIDE HIGHER ED (Mar. 31, 2022), <https://www.insidehighered.com/news/2022/04/01/u-illinois-require-diversity-statements-tenure> (University of Illinois at Urbana-Champaign Provost advising faculty promotional candidates) (“[I]nclude a discussion of the context, importance, and impact of their (DEI) contributions along with their future plans for contributions. The candidate may choose to organize the statement by topic, activity, domain (e.g., research, teaching, and service), or in another manner.”).

107. See, e.g., *Free Expression*, UNIV. OF CHI., <https://freeexpression.uchicago.edu/> (last visited Jan. 4, 2023) (Chicago principles) (“An education that fosters free expression empowers students to engage with challenging ideas - in college and throughout their lives.”). See also Sigal Ben-Porath, *Against Endorsing the Chicago Principles*, INSIDE HIGHER ED (Dec. 10, 2018), <https://www.insidehighered.com/views/2018/12/11/what-chicago-principles-miss-when-it-comes-free-speech-and-academic-freedom-opinion> (addressing the “false assurance [the Chicago Principles] offer colleges and universities”).



Although universities and colleges must designate at least one Title IX compliance “coordinator,”<sup>108</sup> federal law does not mandate the position be full-time. Nor is there any specific mandate for a training regime, any expertise in law, investigations, or law enforcement. Paul Campos at the Colorado State School of Law states that so-called administrative burdens imposed by government regulations are “overblown” and do not correlate to the simultaneous growth in administrators.<sup>109</sup> Campos highlights that while 105 new full-time faculty positions were added at Colorado State between 1975 and 2008, the number of administrators grew by 221% (3,800 to 12,183).<sup>110</sup> Nevertheless, most colleges and universities are filling Title IX leadership positions with lawyers (JD) or licensed counselors, psychologists, or social workers.<sup>111</sup> Almost all colleges and universities today have a fully staffed Title IX office. George Washington University, for example, has a relatively modest staff of seven, including a JD “Director,” two subordinate attorneys, and four non-lawyer staff members.<sup>112</sup> The University of North Carolina has a Title IX office headed by a JD “Associate Vice Chancellor” and five subordinate attorneys.<sup>113</sup> Harvard University employs fifty-five Title IX coordinators<sup>114</sup> across two separate administrative divisions.<sup>115</sup> Title IX coordinators subsume management responsibilities across and over faculty, staff, and student life. Title IX offices typically report directly to vice presidents and provosts and normally act independent of even the most modest faculty oversight.<sup>116</sup>

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108. 34 C.F.R. § 106.8(a).

109. Paul F. Campos, *The Real Reason College Tuition Costs So Much*, N.Y. TIMES (Apr. 4, 2015), <https://www.nytimes.com/2015/04/05/opinion/sunday/the-real-reason-college-tuition-costs-so-much.html>.

110. *Id.*

111. See, e.g., *Job Descriptions: Director, Institutional Equity and Compliance and Title IX Coordinator*, MO. STATE UNIV. [hereinafter *Director*, MO. STATE], <https://www.missouristate.edu/Human/JobDescriptions/1691.htm> (last visited Mar. 23, 2024).

112. *About the Title IX Staff*, GEO. WASH. UNIV., <https://titleix.gwu.edu/about-title-ix-staff> (last visited Feb. 3, 2024).

113. *Equal Opportunity and Compliance: Our Team*, UNIV. N.C., <https://eoc.unc.edu/whowere/our-team/> (last visited Feb. 3, 2024).

114. See Claire E. Parker, *Sexual Assault Complaints Increased By 65 Percent Last Year*, HARV. CRIMSON (Dec. 13, 2017), <https://www.thecrimson.com/article/2017/12/13/title-ix-2017-report>. Harvard Law School employs only one independent compliance officer following separate procedures than Harvard University. See *Title IX Program Officers*, HARV. L. SCH., <https://hls.harvard.edu/staff-dashboard/human-resources/title-ix/title-ix-program-officers/> (last visited Feb. 3, 2024).

115. See Claire E. Parker, *Title IX Office to Restructure, Split into Two Offices*, HARV. CRIMSON (Apr. 5, 2017), <https://www.thecrimson.com/article/2017/4/5/title-ix-office-restructure/>.

116. A typical Title IX job description reads as follows: “The Director, Institutional Equity and Compliance and Title IX Coordinator reports to and receives administrative supervision from the General Counsel & Chief Compliance Officer. The Director, Institutional Equity and Compliance and Title IX

From 2010 forward, all reporting data submitted by postsecondary institutions receiving federal student aid funds are required to submit campus crime statistics in accordance with the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act.<sup>117</sup> Although the Clery Act requires investigating, adjudicating, and reporting of campus crime policies and statistics, the number of university employees, and in particular, lawyers (JDs) dedicated to these functions is surprising, if not astonishing. One would think our public and private universities are dealing with crime waves. Yet contemporary Department of Education reporting data belies this notion. For the 2020 academic year, total university disciplinary “actions” of all types totaled 126,316 over 10,882 campuses (5,930 institutions). This averages eleven actions per campus and twenty-one per institution at large.<sup>118</sup> Focusing on the University of North Carolina at Chapel Hill (enrollment 30,092), seventeen staff (working under no less than an “Associate Vice Chancellor”) and six attorneys resolved a total of twenty-four stalking cases, eight acts of “dating violence,” and seven domestic violence cases.<sup>119</sup> Following a public-records lawsuit by local media, UNC-CH released the names of only fifteen students found responsible for sexual misconduct over ten years between 2007 and 2017.<sup>120</sup> Notre Dame’s (12,800 students) “Institutional Equity” Office staff of six full-time employees, including an “Assistant Vice President for Institutional Equity” (and three JDs) reported only ten stalking incidents and two acts of dating violence.<sup>121</sup> Shenandoah University, a small to mid-size private university in Virginia, with one full-time Title IX official (also a JD) reported zero Title IX violations, zero arrests, and zero weapons violations for 2020.<sup>122</sup> Shenandoah did report sixteen drug and alcohol violations.

## V. A GROWING ETHOS OF ACADEMIC CORPORATISM

Competition for students, rising infrastructure costs, and (to a lesser extent) pressure to engage in outside grant-funded research, are all major

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Coordinator supervises professional staff, clerical staff, graduate assistants, and student workers.” *Director*, MO. STATE, *supra* note 112.

117. 20 U.S.C. § 1092(f) (with implementing regulations at 34 C.F.R. § 668.46 (2020)).

118. *Campus Safety and Security Data Analysis Cutting Tool*, U.S. DEP’T OF EDUC., <https://ope.ed.gov/campussafety/#/> (last visited Feb. 4, 2024).

119. *Id.*

120. *DTH Media v. Folt*, 822 S.E.2d 617 (N.C. 2019).

121. *UNC Releases Sexual Assault Records*, CAR. ALUMNI REV. (Aug. 8, 2020), <https://alumni.unc.edu/news/unc-releases-sexual-assault-records/>.

122. *Id.*

factors in the adoption of corporate management practices.<sup>123</sup> In the traditional university governance model, emphasis is placed upon cooperation and partnership between faculty and administration (of whom, most have risen from faculty ranks). Although faculty still retain primary responsibility over classroom curriculum, academic governance has evolved into a fully top-down exercise of power over vast bureaucracies of assistant vice presidents, associate provosts, assistant deans, and others. This shift in authority reveals a growing chasm between the interests of university administrators and those of the faculty. Academic corporatism is obvious when universities establish the need to hire “Chief Risk Officers” (CROs).<sup>124</sup> The Brown University CRO functions as “leader, partner and facilitator” regarding “institution level risk identification, analysis, evaluation, response and monitoring” within that institution’s “Enterprise Risk Management (ERM) process.”<sup>125</sup> The University of Toledo’s Associate Vice President for Risk Management and Chief Risk Officer reports to “Senior Leadership and ultimately the President,” as well as to the Finance and Audit Committee of the Board of Trustees.<sup>126</sup> Of the twelve listed “Key Responsibilities” of the Toledo CRO, none involve any direct or continuing engagement with faculty.<sup>127</sup>

The selection of business leaders and former military officers<sup>128</sup> as presidents and chancellors reflects new leadership styles to “create an environment more conducive to fostering entrepreneurship and

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123. See, e.g., ELLEN SCHRECKER, *THE LOST SOUL OF HIGHER EDUCATION: CORPORATIZATION, THE ASSAULT ON ACADEMIC FREEDOM, AND THE END OF THE AMERICAN UNIVERSITY* (2010); GAYE TUCHMAN, *WANNABE U: INSIDE THE CORPORATE UNIVERSITY* (2009).

124. See Adam Hayes, *Chief Risk Officer Definition, Common Threats Monitored*, INVESTOPEDIA, <https://www.investopedia.com/terms/c/chief-risk-officer-cro.asp> (May 28, 2023) (defining “chief risk officers” as the “corporate executive responsible for identifying, analyzing, and mitigating internal and external risks”).

125. See *Chief Risk Officer*, BROWN UNIV., <https://www.brown.edu/about/administration/evp-finance-and-administration/chief-risk-officer> (last visited Jan. 5, 2023).

126. See *Position Specification, Associate Vice President for Risk Management and Chief Risk Officer*, UNIV. OF TOL. (Dec. 2020), [https://www.utoledo.edu/depts/hr/employment/pdf/executive-search/AVP%20for%20Risk%20Management\\_CRO%20Specification.pdf](https://www.utoledo.edu/depts/hr/employment/pdf/executive-search/AVP%20for%20Risk%20Management_CRO%20Specification.pdf).

127. *Id.*

128. One example is Admiral William T. McRaven, who led U.S. Special Operations Command but had no professional academic experience, and was hired to lead a system of 14 campuses, 215,000 students and 90,000 employees as Chancellor of the University of Texas. McRaven’s contract was not renewed; ostensibly, McRaven resigned for health reasons, but the Board of Regents did not review his contract following a controversial land purchase and planned expansion. See Matthew Watkins, *UT System Chancellor Bill McRaven is Resigning in May*, TEX. TRIB. (Dec. 15, 2017), <https://www.texastribune.org/2017/12/15/ut-system-chancellor-bill-mcraven-will-resign-may/>.

innovation.”<sup>129</sup> Recent examples include Janet Napolitano (former Arizona governor and Secretary of Homeland Security) at the University of California, James Clark (former AT&T executive) at South Carolina, Timothy M. Wolfe (former president at Novell America) at the University of Missouri, and Clayton Rose (former vice chair at JP Morgan Chase) of Bowdoin College. Jonathan Lash at Hampshire College was a lawyer at an environmental think tank. Bruce Benson at the University of Colorado is from the oil industry. Neither hold PhDs. Recent research by Scott Beardsley at the Darden School of Business found that among 248 liberal arts presidents in 2014, 30% followed a non-traditional, non-academic path.<sup>130</sup> By 2017, almost half (46%) of university presidents came from corporations, the military,<sup>131</sup> or government.<sup>132</sup>

One particularly contentious non-traditional leadership hire was the selection of Bruce Harreld (formerly of IBM and president of Boston Market Co.) as President of the University of Iowa in September 2015. Harreld assumed the Presidency with no doctorate and with a search committee<sup>133</sup> composed primarily of business and political interests. Following a no confidence vote by faculty, the American Association of University

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129. Gamze Sart, *The New Leadership Model of University Management for Innovation and Entrepreneurship*, 57 EURASIAN J. OF EDUC. RSCH. 73 (2014), <https://dergipark.org.tr/tr/download/article-file/59888>.

130. SCOTT C. BEARDSLEY, HIGHER CALLING: THE RISE OF NONTRADITIONAL LEADERS IN ACADEMIA (2017). Beardsley has also noted most elite institutions are less likely to appoint nontraditional leaders than lower-ranking programs, but notes “there are still significant numbers of nontraditional presidents in the least likely segments: those that include the highest ranked, most selective, and richly endowed schools. Among them are stalwarts such as Bates, Bowdoin, Carleton, and Colby colleges.” See Scott C. Beardsley, *Shaking Up the Leaders*, MCKINSEY Q. (Feb. 9, 2018), <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/shaking-up-the-leadership-model-in-higher-education>.

131. E.g., Scott C. Beardsley, *Shaking up the Leadership Model in Higher Education*, MCKINSEY Q. (Feb. 9, 2018), <https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/shaking-up-the-leadership-model-in-higher-education>.

132. Purdue’s president, Mitch Daniels, is the former governor of Indiana. Florida State’s president, John Thrasher, was the Speaker of the Florida House of Representatives. See also Tressie McMillan Cottom et al., *The Ties that Corporatize: A Social Network Analysis of University Presidents as Vectors of Higher Education Corporatization*. SOCARXIV PAPERS (May 22, 2018), <https://doi.org/10.31235/osf.io/wpcfq>.

133. The Chair of the University of Iowa’s board of Regents released a statement that hiring Harreld would send a message that “the status quo is unacceptable.” See Jeff Charis-Carlson, *What’s Unacceptable About the Status Quo at UI?*, IOWA CITY PRESS CITIZEN (Sept. 8, 2015), <https://www.press-citizen.com/story/news/education/university-of-iowa/2015/09/18/whats-unacceptable-status-quo-ui/72050890/>.

Professors (AAUP) sanctioned the University of Iowa.<sup>134</sup> After continuing rancor, especially by disaffected faculty,<sup>135</sup> Harreld announced he was stepping down in October 2020. Laura McKenna in the *Atlantic* explains that a college campus “cannot be managed like a hierarchical corporation or a governmental bureaucracy,” and that “real value [] comes from having a deep understanding of the dynamics of a college campus and from having the loyalty of faculty.”<sup>136</sup> The “collegium” of engaged, intimate scholars seeking consensus decision-making retain little or no bargaining power where they are merely a minority voice in a complex web of competing power blocs.<sup>137</sup> In *The Ties that Corporatize: A Social Network Analysis of University Presidents as Vectors of Higher Education Corporatization*, the authors note that, “[w]ith financial pressures to generate revenue, universities respond by conceptualizing students as consumers and the university as a business” with a concomitant “cultural shift away from the traditional core mission of the university as an altruistic public good and towards a revenue-seeking [enterprise].”<sup>138</sup>

## VI. CORPORATISM DURING THE COVID PANDEMIC

During the COVID-19 pandemic of 2020 through the time of this writing, faculty have often faced a Hobson’s choice of either accepting ad hoc, “force majeure”<sup>139</sup> decision-making or losing their positions entirely. Keuka College in New York suspended the faculty handbook and terminated tenured faculty without simultaneously shutting down the underlying

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134. Jarrett Carter, *AAUP Sanctions U of Iowa for “Biased” Presidential Search*, HIGHER ED DIVE (June 21, 2016), <https://www.highereddive.com/news/aaup-sanctions-u-of-iowa-for-biased-presidential-search/421245/>.

135. See, e.g., Lucy Morris, *Harreld Hit with Series of Questions at UI Town Hall*, LITTLE VILLAGE MAG. (Feb. 24, 2016), <https://littlevillagemag.com/harreld-hit-with-series-of-question-of-town-hall/>.

136. Laura McKenna, *Why Are Fewer College Presidents Academics?*, THE ATLANTIC (Dec. 3, 2015), <https://www.theatlantic.com/education/archive/2015/12/college-president-mizzou-tim-wolfe/418599/>.

137. After being notified that outgoing Senator Ben Sasse had been selected as President of the University of Florida, the Faculty Senate overwhelmingly passed a no confidence resolution in that search and selection process. Of particular concern was the lack of transparency with the Florida Faculty regarding other viable candidates and qualifications. Univ. of Fla. Fac. Senate, *Resolution of No-Confidence* (Oct. 27, 2022), <https://fora.aa.ufl.edu/docs/78/2022-2023/Final.with.header.NoConfidencePresidentResolution.pdf>.

138. Cottom et al., *supra* note 132.

139. See Ross J. Bextermueller, *The Importance of Force Majeure Clauses During the COVID-19 Pandemic*, UC NEWS (Oct. 12, 2020), <https://www.uc.edu/news/articles/2020/10/the-importance-of-force-majeure-clauses-during-the-covid-19-pandemic.html>.

academic programs. Keuka's President in a written response to the AAUP noted that "I do not believe that when the AAUP's Statement on Government of Colleges and Universities was authored and adopted by that organization in 1966–67, its authors could have foreseen a financial environment like the one in which modern-day institutions currently operate."<sup>140</sup> As opposed to "financial exigency," mere "budgetary hardship" was proposed by John Carroll University in Ohio for incorporation into faculty handbooks which the AAUP acknowledges will "effectively render tenure meaningless at those institutions."<sup>141</sup> Marian University of Wisconsin declared an "enrollment emergency," and Medaille College implemented a revised faculty handbook which mandated "annual performance reviews" for recently tenured faculty and three-year contracts for tenured faculty with greater seniority.<sup>142</sup> Faculty who refused to sign new employment agreements were advised they would be considered "at-will employees."<sup>143</sup> Demographic enrollment challenges, aggravated by labor market volatility and financial strains during the pandemic, often resulted in unilateral decision-making by boards and administrators to discard institutional governance procedures. Restrictions on traditional university classrooms and campus education during the COVID-19 pandemic resulted in reductions in tuition income. In response, many colleges and universities imposed layoffs, reorganized programs, and announced significant changes in decision-making processes without faculty input.

A May 2021 special investigative report by the AAUP on the impact of the COVID-19 pandemic on faculty governance concluded the "COVID-19 pandemic has presented the most serious challenges to academic governance in the last fifty years."<sup>144</sup> A 2021 AAUP report found that more than 60% of four-year programs have zero faculty input upon budgetary matters as

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140. Lucas Day, *Keuka College Responds to American Association of University Professors Investigation*, FINGER LAKES DAILY NEWS (Sept. 23, 2020), <https://www.fingerlakesdailynews.com/2020/09/23/633774/>.

141. See Megan Zahneis, *Shared Governance Was Eroding Before Covid-19. Now It's a Landslide*, CHRON. OF HIGHER EDUC. (May 26, 2021), <https://www.chronicle.com/article/shared-governance-was-eroding-before-covid-19-now-its-a-landslide-aaup-report-says>.

142. *Id.*

143. *Id.*

144. *Special Report: COVID-19 and Academic Governance*, AM. ASS'N OF UNIV. PROFESSORS 34 (May 2021), <https://www.aaup.org/publications/aaup-policies-reports/governance-investigations/special-report-covid-19-and-academic>.

compared to a similar poll from 2001 at only 13%.<sup>145</sup> In May 2021, the AAUP sanctioned six campuses for violating “widely accepted standards of college and university governance” in shutting down programs and terminating tenured faculty.<sup>146</sup> The next month, the AAUP added Canisius College to its list of sanctioned programs after Canisius discontinued nine academic programs and terminated twenty-two tenured and tenure-track faculty without faculty consultation.<sup>147</sup> AAUP’s sanctioning report notes that the ad hoc nature of the process “disregarded normative standards of academic governance” and “degraded conditions for shared governance, weakened tenure, and damaged the climate for academic freedom.”<sup>148</sup> Although the pandemic often required swift administrative decision-making, matters relating to class sizes, teaching methods, and delivery formats were often enacted behind closed doors without faculty input. James White, interim dean of the College of Arts and Sciences at the University of Colorado at Boulder, stated: “Never waste a good pandemic” while announcing a long-term plan to replace tenured faculty members with non-tenure-track faculty members.<sup>149</sup>

Corporatism has the potential to replace shared governance in both public and private universities. Facing such changes, faculty in public universities and private colleges and universities, when authorized by state laws, are entitled under the NLRA to unionize and collectively bargain. The “community of scholars” are powerless within a “scheme of academic control” in which “the captain of erudition should freely exercise the power of academic life and death over the members of his staff.”<sup>150</sup> While there should always be healthy tension between an administration focused upon cost (or profit) and intellectual functions governed by academic core values,

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145. See 2021 AAUP Shared Governance Survey: Findings on Faculty Roles by Decision-Making Areas, AM. ASS’N OF UNIV. PROFESSORS (July 2021), <https://www.aaup.org/report/2021-aaup-shared-governance-survey-findings-faculty-roles-decision-making-areas>.

146. The sanctioning proclamation named the following programs: Canisius College (NY), Keuka College (NY), Marian University (WI), Medaille College (NY), Wittenberg University (OH), and Illinois Wesleyan University (IL), (November 2021). See Colleen Flaherty, *AAUP Sanctions 6 Colleges Over Shared Governance Concerns*, INSIDE HIGHER ED (June 10, 2021), <https://www.insidehighered.com/quicktakes/2021/06/10/aaup-sanctions-6-colleges-over-shared-governance-concerns>.

147. See Natalie Faas, *Canisius Among Six Other Colleges to Join the AAUP’s List of Sanctioned Institutions*, THE GRIFFIN (June 15, 2021), <https://www.griffinnewspaper.com/post/canisius-among-six-other-colleges-to-join-the-aaup-s-list-of-sanctioned-institutions>.

148. AM. ASS’N OF UNIV. PROFESSORS, *supra* note 145, at 6.

149. See Colleen Flaherty, *Never Waste a Good Pandemic*, INSIDE HIGHER ED (Dec. 4, 2020), <https://www.insidehighered.com/news/2020/12/04/boulder-arts-and-sciences-dean-wants-build-back-faculty-post-pandemic-one-non-tenure>.

150. VEBLEN, *supra* note 83, at 100-01.

as early as 1966, the American Council of Education, the Association of Governing Boards, and the AAUP underscored the critical role of the faculty governance in “such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process.”<sup>151</sup>

## CONCLUSION

Eliane Glaser laments “the replacement of the horizontal self-government of university departments with the vertical hierarchy of departmental heads and senior management.”<sup>152</sup> The traditional model of transparent and participatory faculty self-governance has been effectively disenfranchised within a rabbit warren of non-teaching underlings focused upon auditing and assessing “student experience” with only modest concerns for teaching, scholarship, or academic freedom. Ironically, while corporate sectors have embraced leaner and flatter organizational models, universities embraced hierarchical controls. Traditional faculty governance models preserved consultation and debate between faculty representatives and senior university officials. In defense of expanding administrations, David Attis aptly points out the following regarding new administrative staff hires taking over some of the more bureaucratic tasks from faculty: “If you think back 50 or 100 years ago, faculty members did all of these jobs . . . now . . . faculty members feel that their time is better spent educating students and doing scholarly research.”<sup>153</sup>

For some educators and staff at state institutions and the limited number of secular private institutions where faculty collective bargaining units have the right to bargain conditions and academic freedom, negotiated contractual commitments may offer greater security as well as retained stake in the operation of their institutions. Hierarchy has its place in academia, but a vast expansion of administrative officials without commensurate growth in faculty positions presages increased conflict between academics and administrative leadership. Administrators should always retain primary responsibility for finances and budgets, but private faculty encountering

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151. AM. ASS'N OF UNIV. PROFESSORS, STATEMENT ON GOVERNMENT OF COLLEGES AND UNIVERSITIES (1966), <https://www.aaup.org/report/statement-government-colleges-and-universities>.

152. Elaine Glaser, *Bureaucracy: Why Won't Scholars Break Their Paper Chains?*, TIMES HIGHER EDUC. (May 21, 2015), <https://www.timeshighereducation.com/features/bureaucracy-why-wont-scholars-break-their-paper-chains/2020256.article>.

153. Ivy Kaplan, *Breaking Down 'Administrative Bloat'*, THE COLLEGE POST (Apr. 24, 2019), <https://thecollegepost.com/breaking-down-administrative-bloat/> (quoting David Attis).



disparity in compensation and disenfranchisement in institutional governance may be inclined to pursue protections afforded under the NLRA, a sort of “New Deal for Higher Education [to support] labor rights and salary parity of all college [and university] teachers.”<sup>154</sup> Nevertheless, federal influence over higher education has generally been achieved by means of Congress’ *spending* power;<sup>155</sup> the NLRA, in contrast, was an assertion of Congress’ *commerce* power.<sup>156</sup> A challenge to *Yeshiva* in the realm of labor relations and education would therefore have to “substantially affect interstate commerce.”<sup>157</sup>

Adding to the difficulty of challenging *Yeshiva* is the doctrine of *stare decisis*. The central proposition of *Yeshiva* on “shared governance” was flawed, but any challenge to that proposition must demonstrate that *Yeshiva* was “not just wrong, but grievously or egregiously wrong.”<sup>158</sup> Moreover, the doctrine of *stare decisis* “carries enhanced force when a decision,” like *Yeshiva*, “interprets a statute.”<sup>159</sup> That is because, “unlike in a constitutional case, . . . Congress can correct any mistake it sees.”<sup>160</sup> Congress has had 40-plus years to respond to *Yeshiva*, yet has failed to do so. “As against this superpowered form of *stare decisis*,” the Court “would need a superspecial justification to warrant reversing”<sup>161</sup> *Yeshiva*.

Essential deliberative and consultive responsibilities of faculty can be consistent with the protection of collective bargaining agreements. Designating faculty as “managers” under the NLRA was an aberration, even in 1980, and is no more logical at the time of this writing. Appreciating that the Commerce Clause argument against *Yeshiva* is tenuous at best, are universities, in their present guise, really still “nonprofit institutions”<sup>162</sup> as conceptualized by the Court in *Yeshiva*? The Court has sagely opined that “beneficent aims . . . can never serve in lieu of constitutional power.”<sup>163</sup>

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154. McIver and Griffey, *supra* note 54.

155. *See, e.g.*, 20 U.S.C. § 1681(a) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving *Federal financial assistance*, . . .”) (emphasis added).

156. *See* 29 U.S.C. § 141(b) (identifying the purpose of the Act as being “to promote the full flow of commerce”).

157. *United States v. Morrison*, 529 U.S. 598, 609 (2000) (quoting *United States v. Lopez*, 514 U.S. 549, 559 (1995)).

158. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part).

159. *Kimble v. Marvel Ent.*, 576 U.S. 446, 456 (2015).

160. *Id.*

161. *Id.* at 458.

162. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 679 (1980).

163. *Carter v. Carter Coal Co.*, 298 U.S. 238, 291 (1936).

From a practical perspective, university administrations need not function as something between a sole proprietor and a multinational corporation; willing and able faculty and staff make a collaborative and consensus building business model both plausible and desirable for all parties involved. Faculty unions will not be ideal for ensuring that every faculty meaningfully share and participate in every or any university decision-making process. For universities to remain *sui generis* with distinguishing characteristics of academic freedom, shared governance, and due process, full-time tenured and tenure-track faculty must engage meaningfully and collectively with management, and vice-versa. While recognizing the intrinsic complexity of modern universities requires bureaucratic oversight, true shared governance, especially in matters unique to faculty, requires a balancing of interests through good-faith negotiations, whether collective bargaining, or otherwise. Faculty and staff must work together at achieving and retaining shared governance and act in the common good especially when exigencies like the COVID-19 pandemic of 2020 call for innovative and rapidly implemented solutions to shared challenges.