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## Resolving Regulatory Threats to Tenure

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## RESOLVING REGULATORY THREATS TO TENURE

*Joseph W. Yockey* \*

### ABSTRACT

*Many lawmakers and public university governing boards are looking to curb faculty tenure. Driven by both ideological and economic motives, recent efforts range from eliminating tenure systems altogether to interfering when schools seek to tenure individual, often controversial scholars. These actions raise serious questions about higher education law and policy and have important implications for the future of academic freedom. Indeed, if they gain further traction, current regulatory threats to tenure will jeopardize the ability of American universities to remain at the forefront of global research and intellectual progress.*

*This Article examines the growing anti-tenure sentiment among state officials and develops a framework for how members of academia should respond. In particular, this Article provides several novel legal strategies that public universities and their faculty can pursue to protect tenure from external interference. These strategies include replicating or defending tenure through alternative contractual means, as well as using privatization techniques to better preserve faculty autonomy. This Article also draws on collaborative governance theory to show how the quasi-legislative powers of private accreditors and similar groups can be applied to incentivize stakeholders on competing sides of the tenure debate to resolve their differences through cooperative decision-making.*

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*“It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university -- to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”*<sup>1</sup>

*“[S]ome university professors ... [believe] they’re Teflon-coated and indestructible and, therefore, maybe we need to look at getting rid of tenure.”*<sup>2</sup>

## INTRODUCTION

Public criticism of faculty tenure is nothing new. Ever since the development of modern tenure principles in 1915, critics have argued that granting near-permanent employment status to university faculty is too expensive and makes it too hard for schools to adapt to evolving trends in higher education.<sup>3</sup> Put more sharply, a common claim is that faculty, once tenured, often devolve into “deadwood.”<sup>4</sup> This trope is popular code for a tenured professor who stops writing and slides into teaching mediocrity—all while continuing to draw a comfortable salary for life and facing no real pressure to change.<sup>5</sup>

Yet even though tenure has long been an evergreen target of scrutiny, the level of anti-tenure sentiment in the United States is both intensifying and evolving. This is especially true around public universities.<sup>6</sup> For one, worries that it is imprudent to commit decades of financial resources to tenured faculty are gaining new traction as schools struggle to overcome rapidly declining state

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1. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

2. Vanessa Miller, *Iowa Universities Apologize for ‘Egregious’ Free Speech Errors*, CEDAR RAPIDS GAZETTE (Feb. 2, 2021, 6:26 PM), <https://www.thegazette.com/education/iowa-universities-apologize-for-egregious-free-speech-errors/> [<https://perma.cc/AG3F-R2YJ>] (quoting Rep. Steve Holt, Iowa Republican who sponsored a bill to eliminate tenure at the state’s public universities).

3. See Michael S. McPherson & Morton Owen Schapiro, *Tenure Issues in Higher Education*, 13 J. ECON. PERSPECTIVES 85, 85 (1999).

4. Nikolaos Nikoliodakis Athanassios C. Tsikliras, Stylianos Somarakis & Konstantinos I. Stergiou, *Tenure and Academic Deadwood*, 15 ETHICS IN SCI. AND ENV’T. POL. 87, 87 (2015) (describing results of empirical study which found that despite popular rhetoric, the productivity of tenured faculty increases over time regardless of academic discipline).

5. McPherson & Schapiro, *supra* note 3, at 85.

6. For the purposes of this Article, public universities are defined as four-year public institutions that offer at least some graduate or professional degree programs.

appropriations and the ongoing financial fallout of the COVID-19 pandemic.<sup>7</sup> At the same time, traditional economic arguments against tenure now often appear alongside others borne from the country's widening political divide. In the eyes of many conservative politicians and commentators, tenure is seen as little more than a self-governing loophole that empowers faculty to engage in political discrimination or otherwise perpetuate a campus ideological balance that tilts decidedly to the left.<sup>8</sup> These critics believe tenure is an obstacle preventing public universities from being more responsive to the values of all taxpayers—a concern that tracks broader empirical trends suggesting eighty-five percent of Republicans believe universities lean more liberal than conservative.<sup>9</sup> Framing matters in still starker terms, the son of former Republican President Donald Trump summarized the negative view of his father's administration toward university faculty as follows: “[They’ll] take \$200,000 of your money; in exchange [they’ll] train your children to hate our country.”<sup>10</sup> This attitude was echoed on the 2021 campaign trail by J.D. Vance, the best-selling author of *Hillbilly Elegy* and Republican candidate for U.S. Senate from Ohio, when he declared, simply, “[t]he professors are the enemy.”<sup>11</sup>

And rhetoric is giving way to action. Within the past year, legislators and lay governing boards in several states took concrete steps to either weaken entire tenure systems or interfere in specific tenure cases.<sup>12</sup> For example, in Iowa, anti-tenure views based on

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7. RONALD J. DANIELS, WHAT UNIVERSITIES OWE DEMOCRACY 72 (2021) (observing that since 2008, state funding per student at the median public research university decreased by over twenty-five percent with the percentage of revenue from state funds for some schools now below ten percent further noting the additional losses suffered by universities due to the COVID-19 pandemic); see also Robert C. Lowry, *The Political Economy of Public Universities in the United States*, 7 STATE POL. & POL'Y Q. 303, 315 (2007) (on declining appropriations); McPherson & Schapiro, *supra* note 3, at 85.

8. See, e.g., Miller, *supra* note 2; Scott Jaschick, *Professors and Politics: What the Research Says*, INSIDE HIGHER ED (Feb. 27, 2017), <https://www.insidehighered.com/news/2017/02/27/research-confirms-professors-lean-left-questions-assumptions-about-what-means> [https://perma.cc/ZQ3Q-GSP6]; Scott Jaschick, *DeVos v. the Faculty*, INSIDE HIGHER ED (Feb. 24, 2017) <https://www.insidehighered.com/news/2017/02/24/education-secretary-criticizes-professors-telling-students-what-think> [https://perma.cc/282B-MEDR].

9. Kim Parker, *The Growing Partisan Divide in Views of Higher Education*, PEW RESEARCH CTR. (Aug. 19, 2019), <https://www.pewresearch.org/social-trends/2019/08/19/the-growing-partisan-divide-in-views-of-higher-education-2/> [https://perma.cc/4SM2-K8W8].

10. See DANIELS, *supra* note 7, at 5.

11. Henry Reichman, *'The Professors are the Enemy'*, CHRONICLE OF HIGHER ED. (Dec. 14, 2021), <https://www.chronicle.com/article/the-professors-are-the-enemy> [https://perma.cc/6MJU-7K25].

12. Though taxpayers are the nominal overseers of public higher education, in effect that job is typically performed by elected officials. Usually, pursuant to statute, the governor

claims of anti-conservative-faculty bias saw a bill to abolish tenure advance out of legislative committee.<sup>13</sup> The bill ultimately failed to survive a fixed procedural cut-off date, but the Iowa House majority leader describes it as “a live round” that will remain on the Republican agenda going forward.<sup>14</sup> The Boards of Regents in Kansas and Georgia went even farther. The Kansas Regents suspended tenure protections at the state’s public universities for two years, effectively converting tenured faculty into at-will employees, and Georgia’s governing board removed long-standing procedural protections from tenured faculty to make it much easier to dismiss them.<sup>15</sup> A fourth, more surgical case of intervention occurred in North Carolina. There, in response to reported backlash from conservative politicians and donor pressure, the publicly appointed Board of Trustees of the University of North Carolina took the unprecedented step of declining to consider the university’s recommendation to grant tenure to Nikole Hannah-Jones, a Pulitzer-Prize winning journalist and the creator of the *New York Times*’ controversial *1619 Project*.<sup>16</sup> The Board’s decision not to act on what is traditionally a formality came after Hannah-Jones’

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appoints a specialized governing board either for each individual state university or for the state’s entire higher education system. The governing boards then make policy for the universities under their watch and monitor its implementation by the schools’ internal agents. See Eugenia Froedge Toma, *Boards of Trustees, Agency Problems, and University Output*, 67 PUB. CHOICE 1, 1–2 (1990).

13. O. Kay Henderson, *Iowa House Education Committee Votes to End Tenure at UI, ISU, UNI*, RADIO IOWA (Feb. 11, 2021), <https://www.radioiowa.com/2021/02/11/iowa-house-education-committee-votes-to-end-tenure-at-ui-isu-uni/> [<https://perma.cc/Y57K-BB37>].

14. Stephen Gruber-Miller, *Iowa Legislature Won’t Ban Tenure at Public Universities this Year after Bill Fails to Advance*, DES MOINES REG. (Apr. 1, 2021, 3:18 PM), <https://www.desmoinesregister.com/story/news/politics/2021/04/01/iowa-legislature-bill-ban-tenure-public-universities-professors-fails-advance/4836676001/> [<https://perma.cc/6HL5-LXMP>]; see also Katarina Sostaric, *Bill to Ban Tenure ‘A Live Round’ in Iowa House, Advances in Both Chambers*, IOWA PUB. RADIO (Feb. 12, 2021, 7:05 AM), <https://www.iowapublicradio.org/state-government/news/2021-02-12/bill-to-ban-tenure-a-live-round-in-iowa-house-advances-in-both-chambers> [<https://perma.cc/UMP2-XH25>].

15. Emma Pettit, *Kansas Regents Make It Easier to Dismiss Tenured Professors*, CHRON. OF HIGHER ED. (Jan. 21, 2021), <https://www.chronicle.com/article/kansas-regents-allow-spud-dismissals-of-tenured-faculty-members> [<https://perma.cc/YZ78-C5TH>]; AM. ASS’N OF UNIV. PROFESSORS, ACAD. FREEDOM AND TENURE: UNIV. SYS. OF GA. (Dec. 2021), <https://www.aaup.org/report/academic-freedom-and-tenure-university-system-georgia> [<https://perma.cc/WU3S-6D3E>].

16. Joe Killian & Kyle Ingram, *After Conservative Criticism, UNC Backs Down from Offering Acclaimed Journalist Tenured Position*, N.C. POLY WATCH (May 19, 2021), <https://ncpolicywatch.com/2021/05/19/pw-special-report-after-conservative-criticism-unc-backs-down-from-offering-acclaimed-journalist-a-tenured-position/> [<https://perma.cc/UCB5-P9KZ>]; Jack Stripling, *‘What the Hell Happened?’ Inside the Nikole Hannah-Jones Tenure Case*, CHRON. OF HIGHER ED. (June 11, 2021), <https://www.chronicle.com/article/what-the-hell-happened> [<https://perma.cc/4LTN-WLDN>].

appointment made it through every stage of the school's standard tenure approval process.<sup>17</sup>

For faculty at public research universities and many other academic stakeholders, the foregoing examples are alarming. Tenure is a bedrock principle in higher education. Though it undoubtedly represents a long-term investment and may deliver the occasional unproductive professor, those risks are generally understood as being well worth the potential costs given tenure's place at the core of the university's truth-seeking mission. In short, tenure is what drives a "climate of discovery" and the development of new knowledge on which "a free and dynamic society depends."<sup>18</sup> It protects faculty members' academic freedom to engage in independent scholarly inquiry without fear of political or ideological interference.<sup>19</sup> It affords faculty the necessary time and flexibility to pursue highly specialized, potentially revolutionary work. It reinforces the faculty's ability to monitor campus administrators for departures from academic norms. It creates the conditions necessary to incentivize the hiring of the most promising scholars. For these reasons, any attempt by public officials to meddle with tenure is seen by members of the academy as an assault on the very purpose of the modern university and the faculty's role within it.

That is where this Article comes in. Given the value that faculty believe tenure brings to the university's research mission and the common good, this Article will examine whether they and their institutions possess any meaningful legal options to defend tenure against interference from the bodies that oversee them. State legislatures and governing boards possess unilateral authority to reshape public university governance in significant ways, including to undermine or eliminate tenure. Does this power mean that faculty—individually or collectively—are helpless to push back? If another bill to abolish tenure advances in Iowa, or if trustees in North Carolina again fail to approve a properly vetted tenure appointment, can faculty in those states do anything under the law to protect tenure's primacy in the pursuit of truth?

To answer these questions, this Article will explore several strategies sounding in private law and governance that public universities and their faculty should consider when looking to enhance

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17. Killian & Ingram, *supra* note 16.

18. BENJAMIN GINSBERG, *THE FALL OF THE FACULTY* 132 (2011); McPherson & Schapiro, *supra* note 3, at 93.

19. McPherson & Schapiro, *supra* note 3, at 94.

autonomy over tenure. As the analysis will show, many of the strategies that might initially seem the most helpful—including the creative use of contracting and privatization—ultimately prove unsatisfying as long-term options. Instead, the most promising path toward safeguarding tenure from regulatory encroachment is one that fosters greater collaboration between the parties on competing sides of the tenure debate. The upshot of this approach, which draws on insights from collaborative governance theory, is to first establish strategic partnerships between faculty and other academic stakeholders, including private accreditors, that share similar interests and possess quasi-legislative power. From there, the resulting coalition should possess leverage capable of incentivizing anti-tenure state officials to cooperate toward resolving their concerns in ways that will no longer threaten scholarly independence and the academic integrity of public universities.

The remainder of the discussion proceeds as follows. Part I provides background on the origins, purpose, and mechanics of tenure. Next, Part II describes the major criticisms of tenure. These concerns are what prompt attempts by state actors to weaken, eliminate, or tamper with tenure policies or decisions. The prior examples from Iowa, Kansas, Georgia, and North Carolina will be explained in greater detail, along with similar illustrations from several other states. Part III then explains why tenure is worth protecting from regulatory attack and offers several strategies for doing so. After finding private law tactics based on innovative contracting and alternative organizational design promising as short-term options, Part III ultimately argues in favor of collaborative governance as the most sustainable approach to securing the value of tenure in the long run. Part IV concludes with a few thoughts on what the broader implications of this Article's findings mean for the health of American higher education going forward.

## I. TENURE'S EVOLUTION AND OPERATION

What is tenure? What does it accomplish? Do faculty with tenure really enjoy jobs for life, as is often alleged? To understand public resistance to tenure and the strategies faculty and schools can utilize in response, it is important to begin with some background on where tenure comes from and the function it serves.



## A. *Origins*

Tenure in higher education refers to a conditional guarantee of faculty employment without a mandatory termination date.<sup>20</sup> Obtaining this status represents a major professional achievement and provides a high degree of job security.<sup>21</sup> After successfully navigating a probationary period of peer scrutiny, today's tenured professor is free to continue in the paid employ of her university for as long as she likes, typically subject to termination only for adequate cause and in accord with strict due process requirements.<sup>22</sup>

Development toward modern faculty tenure began in the nineteenth century when instructors served at the pleasure of university administrators under informal one-year contracts.<sup>23</sup> Faculty at the time were considered at-will employees who could be let go for any reason and at any moment, just like a "factory hireling."<sup>24</sup> In this regime, the things faculty did or said could easily lead to their dismissal whenever they met with the disapproval of the presidents, provosts, or trustees who hired them. And this happened on numerous occasions between 1800 and the start of the twentieth century.<sup>25</sup> Faculty were fired for questioning tenets of their school's founding religious orthodoxy, for supporting the "wrong" political candidates, for teaching the theory of evolution, for supporting the

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20. William Van Alstyne, *Tenure: A Summary, Explanation, and "Defense"*, 57 AAUP BULL. 328, 328 (1971).

21. Albert H. Yoon, *Academic Tenure*, 13 J. EMPIRICAL LEGAL STUD. 428, 428 (2016) ("In academia, tenure is one of the most coveted milestones . . . Many tenure-track faculty do not receive tenure and leave academia altogether. Accordingly, those who receive tenure have succeeded where many more have fallen short.") (citations omitted); Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 CATH. U. L. REV. 67, 68 (2006) ("For a professor, tenure is often viewed as the 'Holy Grail' of academic employment . . .").

22. Adams, *supra* note 21, at 67. The policy language used by the University of North Carolina at Chapel Hill to define tenure is typical: "Academic tenure refers . . . to the protection of a faculty member against involuntary suspension, demotion, discharge, or termination from employment . . . except upon specified grounds and in accordance with specified procedures." *Trustee Policies and Regulations Governing Academic Tenure*, UNIV. OF N.C. AT CHAPEL HILL, 2, (2020), <https://academicpersonnel.unc.edu/wp-content/uploads/sites/1069/2020/02/UNC-Chapel-Hill-Tenure-Policies-and-Procedures.pdf> [<https://perma.cc/LS2P-HJKH>]. Note, too, that the federal Age Discrimination in Employment Act (ADEA) abolished mandatory retirement policies, thereby allowing tenured faculty to remain in paid status beyond the standard retirement age. See Yoon, *supra* note 21, at 429.

23. CHRISTOPHER J. LUCAS, *AMERICAN HIGHER EDUCATION: A HISTORY* 202 (2d ed. 2006).

24. John M. Breen & Lee J. Strang, *Academic Freedom and the Catholic University: An Historical Review, A Conceptual Analysis, and a Prescriptive Proposal*, 15 U. ST. THOMAS L.J. 253, 257 (2019).

25. See *id.* at 257; see also LUCAS, *supra* note 23, at 202.

abolition of slavery, and for taking positions interpreted as anti-business.<sup>26</sup>

The most significant early episode of faculty-administrative tension occurred at Stanford University. In 1900, Stanford's president fired the prominent professor of economics and sociology, Edward Ross, at the behest of the university's co-founder and sole trustee, Jane Lathrop Stanford.<sup>27</sup> Mrs. Stanford sought Ross's dismissal after taking offense to his public advocacy for populist economic policies, his criticism of corporate monopolies, and his stance against importing low-wage laborers from Asia.<sup>28</sup> She felt it inappropriate for a person working under the Stanford name to take partisan positions she disagreed with. Mrs. Stanford summed up her views with a stark warning: "All that I have to say regarding Professor Ross, however brilliant and talented he may be, is that a man cannot entertain such rabid ideas without inculcating them in the minds of the students under his charge . . . Professor Ross cannot be trusted and he should go."<sup>29</sup>

The Ross incident came to signify a turning point in the history of tenure for two reasons. First, Ross's dismissal coincided with a burgeoning shift among American universities away from being primarily sectarian institutions to ones modeled after their more science and research-focused counterparts in Germany.<sup>30</sup> The build-up to this transition began between 1870 and 1900 when approximately 8,000 U.S. college students studied in Germany.<sup>31</sup> Many of these students returned home with the view that American universities should be repurposed to align with the German emphasis on open inquiry and the sharing of new ideas through scholarship.<sup>32</sup> Of particular interest to American faculty was the novel German commitment to *Lehrfreiheit*, a theory that roughly translates to total freedom in the performance of university teaching and

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26. See GINSBERG, *supra* note 18, at 137–39.

27. See Breen & Strang, *supra* note 24, at 257; GINSBERG, *supra* note 18, at 140.

28. See Breen & Strang, *supra* note 24, at 257; GINSBERG, *supra* note 18, at 140.

29. GINSBERG, *supra* note 18, at 140.

30. See Breen & Strang, *supra* note 24; Edward Shils, *Do We Still Need Academic Freedom?*, 62 AM. SCHOLAR 187, 200–01 (describing German influence on the development and evolution of research universities in the United States).

31. Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1269 (1988).

32. *Id.*; see also Breen & Strang, *supra* note 24, at 256; Susanne Lohmann, *Darwinian Medicine for the University*, in GOVERNING ACADEMIA 71, 76–77 (Ronald Ehrenberg ed., 2004).

research.<sup>33</sup> Second, because Ross was a well-known scholar with a strong following, his firing garnered a high degree of media attention.<sup>34</sup> The event became a national scandal as several of his Stanford colleagues resigned in protest or were dismissed for supporting him.<sup>35</sup> From that point on, if any faculty in the United States had not fully appreciated the fragility of their positions, they did so now.

Together, the desire to raise America's research profile along with growing awareness that controversial scholarship could put their jobs at hazard eventually led faculty to take the first organized steps toward creating a formal system of tenure. The active scholars of the early 1900s saw at-will employment as making it impossible for them to operationalize *Lehrfreiheit* and produce research on par with what was happening in Europe since it meant creative, rigorous inquiry could be blocked any time a president, trustee, or donor found their efforts disagreeable.<sup>36</sup> A campaign to enhance faculty academic freedom and job security thus began to coalesce almost immediately after Ross's termination.<sup>37</sup> The philosopher Arthur Lovejoy led the charge.<sup>38</sup> Lovejoy, who left Stanford for Johns Hopkins University after the Ross case, founded the group that would become the American Association of University Professors ("AAUP") in January 1915.<sup>39</sup> His goal in establishing the AAUP was to unite and empower faculty across the country by articulating a collective vision of academic freedom rights, developing a means of intervening when universities infringed upon them, and designing a framework for meaningful job security built on rules and practices for tenure.<sup>40</sup> Nine hundred professors from

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33. Breen & Strang, *supra* note 24, at 256; Metzger, *supra* note 31, at 1269–70.

34. Warren J. Samuels, *The Firing of E.A. Ross from Stanford University: Injustice Compounded by Deception?*, 22 J. ECON. EDUC. 183, 183 (1991).

35. ELLEN W. SCHRECKER, NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES 17 (1986) ("The [Ross] controversy spread beyond Palo Alto. The American Economic Association set up a special investigating committee; there was even talk of a nationwide boycott of Stanford.").

36. JAMES AXTELL, WISDOM'S WORKSHOP: THE RISE OF THE MODERN UNIVERSITY 266 (2016); Lohmann, *supra* note 32, at 75; Breen & Strang, *supra* note 24, at 256–57; Shils, *supra* note 30, at 187; Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 L. & CONTEMP. PROBS. 325, 332 (1990); Metzger, *supra* note 31, at 1278–79.

37. JUDITH AREEN & PETER F. LAKE, HIGHER EDUCATION AND THE LAW 86–87 (2d ed. 2014).

38. *History of the AAUP*, AM. ASS'N OF UNIV. PROFESSORS, <https://www.aaup.org/about/history-aaup> [<https://perma.cc/9J3Y-Y9ZH>].

39. *Id.*

40. See Metzger, *supra* note 31, at 1267–68.

sixty-one other universities joined the AAUP at Lovejoy's invitation within the next four months, and the world-renowned philosopher John Dewey agreed to serve as the group's inaugural president.<sup>41</sup>

### B. *Initial Attempts*

The AAUP's opening act was to form a fifteen-member committee responsible for defining academic freedom and standardizing the circumstances under which universities could properly dismiss faculty.<sup>42</sup> The committee was chaired by Columbia University economist Edwin Seligman.<sup>43</sup> Seligman had previously led a joint effort by the American Economic Association, the American Sociological Society, and the American Political Science Association to document cases of academic freedom infringement throughout the country.<sup>44</sup> The members of Seligman's new AAUP committee—soon dubbed “Committee A”—fulfilled their charge by writing what is now known as the *1915 Declaration of Principles on Academic Freedom and Academic Tenure* (the “1915 Declaration”).<sup>45</sup> This document became the first of its kind in the United States to explicitly connect the *Lehrfreiheit* notion of academic freedom in teaching and research with the heightened job security of tenure as the optimal way to preserve it.<sup>46</sup> The authors' overarching position was that “once appointed, the scholar has professional functions to perform in which the appointing authorities have neither competency nor moral right to intervene.”<sup>47</sup>

In framing tenure along these lines, the *1915 Declaration* analogized the appropriate relationship between faculty and their university employers to the one “between judges of the federal courts

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41. *Timeline of the First 100 Years*, AM. ASS'N OF UNIV. PROFESSORS, <https://www.aaup.org/about/history/timeline-first-100-years> [<https://perma.cc/X6MW-AZLU>].

42. See Am. Ass'n of Univ. Professors, *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, 1 Bull. 17 (Dec. 1915), reprinted in AM. ASS'N OF UNIV. PROFESSORS, POLICY DOCUMENTS AND REPORTS, app. at 295 (10th ed. 2006) [hereinafter *1915 Declaration*].

43. *Id.*

44. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 41.

45. *Id.*

46. Metzger, *supra* note 31, at 1275–76.

47. *1915 Declaration*, *supra* note 42, at 295; Shils, *supra* note 30, at 189 (defining academic freedom as “immunity from decisions about academic matters taken on other than academic or intellectual grounds, by academic, governmental, ecclesiastical, or political authorities.”).

and the executive who appoints them.”<sup>48</sup> The drafters saw the separation of powers evident in the federal judicial system as a familiar and well-understood template for ensuring “independence of thought and utterance.”<sup>49</sup> A similar delineation of boundaries and authority between faculty and administrators would be necessary, they argued, for the university to fulfill its neutral social obligation of serving as an “intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally, perchance, it may become a part of the accepted intellectual food of the nation or of the world.”<sup>50</sup> Indeed, for the nascent AAUP, any administrator or trustee who put a finger on the scale in the “marketplace of ideas” could no longer be said to operate a true university.<sup>51</sup>

This view led the drafters to conclude the *1915 Declaration* with several procedural recommendations that center the evaluation of faculty performance and discipline in a system of peer review. The drafters accepted that lay administrators and governing boards could intervene to address non-academic failings by faculty, such as “habitual neglect of assigned duties,” but they were adamant that true freedom of inquiry meant only members of the academic profession be permitted to judge the merit and legitimacy of scholarly output.<sup>52</sup> Elevating peer review to the fore reflected the AAUP’s belief about the role of faculty in society. For Lovejoy, Dewey, Seligman, and their cohort, the job of faculty was to share the results of new research with their students and the public.<sup>53</sup> They further believed that for research to be seen as trustworthy by people outside the academy, it must be vetted by specialists in the field, conform to scholarly criteria, and remain free from any suspicion it was shaped by pressure from those “who endow or manage universities.”<sup>54</sup>

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48. *1915 Declaration*, *supra* note 42, at 295.

49. *Id.* at 295; see Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, 53 L. & CONTEMPORARY PROBLEMS 3, 12, 14 (1990).

50. *1915 Declaration*, *supra* note 42, at 297.

51. Metzger, *supra* note 31, at 1279; Breen & Strang, *supra* note 24, at 258–59.

52. Metzger, *supra* note 31, 1283–84.

53. *1915 Declaration*, *supra* note 42, at 294; see Metzger, *supra* note 31, at 1274.

54. *1915 Declaration*, *supra* note 42, at 25; David M. Rabban, *The Regrettable Underenforcement of Incompetence as Cause to Dismiss Tenured Faculty*, 91 IND. L.J. 39, 40 (2015).

These pillars of academic integrity led to the *1915 Declaration's* formulation of specific tenure standards.<sup>55</sup> According to the committee, faculty should receive permanent tenure after successfully completing up to ten years of probationary assessment by their peers.<sup>56</sup> The pre-tenure review period is what gives new and developing faculty “time to prove themselves, and their colleagues time to observe and evaluate them on the basis of their performance in the position.”<sup>57</sup> Afterwards, and assuming a successful peer review outcome, the drafters proposed a series of interrelated employment protections to reflect what the rigorous endorsement of tenure says about the strength of one’s academic standing: automatic and indefinite renewal of appointment; termination only for adequate cause; and the right to defend against termination at a hearing where the cause determination is made by one’s professional peers rather than administrators or trustees.<sup>58</sup>

The latter procedural feature was designed as the lynchpin for academic freedom. The drafters saw mandatory peer review at the dismissal stage as the means to ensure any president or trustee who sought to remove a tenured professor would first need to convince a faculty committee that the grounds for termination align with legitimate professional considerations rather than personal or political ones.<sup>59</sup> Put another way, the receipt of tenure creates a “rebuttable presumption of the [faculty member’s] professional excellence” that a school can only overcome by reference to the same professional standards that justified its conferral in the first place.<sup>60</sup>

To be sure, the rights and procedures set forth in the *1915 Declaration* were not new inventions. Similar features were known to exist at some medieval universities as early as the twelfth century.<sup>61</sup> But the Seligman committee’s work remains significant as the first organized attempt in the United States to advance formal

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55. *1915 Declaration*, *supra* note 42 at 300–01.

56. *Id.* at 300.

57. Am. Ass’n of Univ. Professors, *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments*, in AM. ASS’N OF UNIV. PROFESSORS, POLICY DOCUMENTS AND REPORTS 16, 16 (B. Robert Kreiser eds., 10th ed. 2006).

58. *1915 Declaration*, *supra* note 42, at 300–01.

59. *Id.* at 298.

60. William Van Alstyne, *The Meaning of Tenure*, in THE CASE FOR TENURE 3, 5 (Matthew W. Finkin ed., 1996).

61. GINSBERG, *supra* note 18, at 144; James J. Fishman, *Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others*, 21 PACE L. REV. 159, 163 (2000).

faculty tenure as the primary means of securing the freedom to teach, research, and write without fear of censorship or sanction.<sup>62</sup> And in staking its claim, the AAUP built the foundation for how tenure would come to be understood on virtually every American campus to this day.<sup>63</sup>

### C. *Institutionalization*

Like most bids for radical change in higher education, efforts to implement the *1915 Declaration's* vision for tenure got off to a slow start. University presidents and trustees fought the idea. They thought tenure would give intemperate faculty free reign to scandalize students under the guise of conducting research.<sup>64</sup> However, administrative attitudes began to shift as demand for higher education surged after World War I. By that point, a college degree had become a new mark of social prestige and the primary entry point to professions like law, medicine, and business.<sup>65</sup> The change in market dynamics led to an enrollment boom, with the total number of university students in the United States rising by over one thousand percent between 1870 and 1920.<sup>66</sup>

As schools struggled to find enough faculty to teach their now swollen student bodies, tenure emerged as a promising recruitment tool. The strongest scholars were attracted to tenure's role in protecting academic freedom, and university presidents found that offering secure lifetime appointments made it possible to hire and retain high-quality faculty without needing to offer higher salaries.<sup>67</sup> In addition, as universities grew and became harder to manage, faculty were increasingly asked to take more of a hand in directing the admissions and curricular aspects of campus operations.<sup>68</sup> Some faculty even transitioned into full-time administrative positions as the need for leadership ballooned.<sup>69</sup> With faculty influence reaching a new high by the mid-1920s, this

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62. Metzger, *supra* note 31, at 1284.

63. Matthew Jay Hertzog, *The Misapplication of Garcetti in Higher Education*, 2015 BYU EDUC. & L.J. 203, 204 (2015).

64. See GINSBERG, *supra* note 18, at 143–44.

65. *Id.* at 146.

66. *Id.*

67. See *id.* at 147–48.

68. See Shils, *supra* note 30, at 201.

69. GINSBERG, *supra* note 18, at 151–52.

transition, too, made it easier for academics to accelerate administrative buy-in to the AAUP's early tenure proposals.<sup>70</sup>

The eventual synergistic support for tenure among university constituents culminated in a series of co-sponsored conferences on the subject between the AAUP and the Association of American Colleges ("AAC") during a six-year span ending in 1940.<sup>71</sup> The AAC had been organized by university presidents shortly after the AAUP's formation to counter faculty support for tenure.<sup>72</sup> However, by 1940, the AAC and AAUP were no longer in direct opposition, and their discussions resulted in a multi-lateral agreement on tenure system purpose and design: the *1940 Statement of Principles on Academic Freedom and Tenure* ("1940 Statement").<sup>73</sup> The *1940 Statement* has since been incorporated into the policies of hundreds of American universities and remains the "focal point" for all current discussions of tenure.<sup>74</sup>

The *1940 Statement* begins by committing to three guiding philosophies: (1) universities exist to serve the common good and not to further the interests of individual teachers or institutions; (2) advancing the common good depends "upon the free search for truth and its free expression"; and (3) academic freedom in teaching and research is "fundamental to the advancement of truth."<sup>75</sup> From that premise, the authors pinpoint tenure as the "means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability."<sup>76</sup>

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70. *Id.* at 152.

71. See Breen & Strang, *supra* note 24, at 259.

72. *Id.*

73. Am. Ass'n of Univ. Professors, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, AM. ASS'N OF UNIV. PROFESSORS, *Policy Documents and Reports 13* (11th ed. 2014) [hereinafter *1940 Statement*].

74. Breen & Strang, *supra* note 24, at 259; AREEN & LAKE, *supra* note 37, at 359–60; Brown & Kurland, *supra* note 36, at 327 ("The 1940 Statement . . . incorporated, often verbatim, in the policies of hundreds of colleges and universities—is the yardstick for measuring adherence to proper standards of academic freedom and tenure.")

75. *1940 Statement*, *supra* note 73, at 14.

76. *Id.* The *1940 Statement's* addition of an economic security rationale for tenure was new. In part, this development reflected the recruiting challenge that many universities faced once demand for higher education increased dramatically after WWII. See Hertzog, *supra* note 63, at 206–07 ("Following the end of World War II, university enrollments began to swell with returning veterans entering higher education, spurred by financial assistance provided through the Montgomery GI Bill. Universities looked for incentives to retain existing faculty as well as inducements for new faculty. At this point, institutions of higher



These twin attributes—academic freedom and economic security—are what the AAUP and AAC felt would make tenure “indispensable to the success of an institution in fulfilling its obligations to its students and to society.”<sup>77</sup> Additionally, by adding a reference to freedom in the extramural context, the drafters sought to clarify that faculty speech in opposition to administrative policies or decisions also needs protection to advance the academic mission. No such reference appeared in the *1915 Declaration*, but, during the intervening twenty-five years, it became clear that professors were at the greatest risk of termination or discipline when criticizing the behavior of university officials rather than when making controversial research claims.<sup>78</sup>

With its normative framework in place, the *1940 Statement's* practical contributions focus on procedure: after completing a probationary period of no more than seven years (shortened from the *1915 Declaration's* proposal of ten), the faculty member should hold contractually enforceable “permanent or continuous tenure.”<sup>79</sup> The award of tenure signifies that the appointment is subject to termination “only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.”<sup>80</sup> The *1940 Statement* then outlines minimum due process standards to govern efforts to terminate tenured faculty for cause. The requirements include prior notice of the relevant charges, the right to third-party assistance or counsel, a stenographic record of proceedings, and adjudication by a faculty committee.<sup>81</sup>

Today, while the precise application of the *1940 Statement's* framework often varies from school to school, several key features remain consistent across institutions. One near constant is definitional. Eighty-seven percent of American universities define

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education began to view tenure as a benefit of employment and therefore implemented the AAUP's recommendation for acquiring tenure following a seven-year probationary period.”)

77. *1940 Statement*, *supra* note 73, at 14.

78. Metzger, *supra* note 49, at 3–4; Metzger, *supra* note 31, at 1275–76.

79. *1940 Statement*, *supra* note 73, at 15; *see also 1915 Declaration*, *supra* note 42, at 12.

80. *1940 Statement*, *supra* note 73, at 15.

81. *Id.* at 16. Other elements presented in the *1940 Statement* speak more to best practices than to specific processes. For example, the document suggests that academic freedom in the classroom should not be read to encompass the introduction of “controversial” matters unrelated to the course or subject. *Id.* at 14. Likewise, when faculty speak or write, they are urged to be accurate, to show appropriate restraint and respect for others' opinions, and to make clear that they are not speaking on behalf of their employer. *Id.*

tenure as a contractual promise of “‘permanent’ or ‘continuous’ employment until retirement, barring dismissal for cause.”<sup>82</sup> Most rules on the pre-tenure probationary period also incorporate the *1940 Statement’s* stated maximum of seven years, although a few doctoral institutions allow the period to run slightly longer.<sup>83</sup> The typical benchmarks for awarding tenure focus on faculty performance in teaching, research, and service.<sup>84</sup> Assessment of a pre-tenured faculty member’s progress in these three areas is usually done in stages by different faculty groups and administrators. The final tenure decision is made by the university president, which, in the case of public universities, is then subject to confirmation by a state governing board.<sup>85</sup> Throughout this process, rates of tenure success vary by discipline and by school. For example, recent survey data suggests that sixty-five percent of faculty in science and engineering succeed in receiving tenure, compared to ninety-five percent in law and only thirty percent in economics.<sup>86</sup> Professors who do not receive tenure normally leave academia for other career paths.<sup>87</sup>

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82. Cathy A. Trower, *What is Current Policy?*, in *THE QUESTIONS OF TENURE* 32, 43 (Richard P. Chait ed., 2002).

83. *Id.* at 36–37. Many schools allow for automatic or discretionary probationary time extensions under certain conditions (e.g., birth of a child, medical emergency, delay in the publication of scholarship for reasons outside of the faculty member’s control). *Id.* at 37–39.

84. Hertzog, *supra* note 62, at 206.

85. *See, e.g., Academic Affairs Manual* § 506-04: Tenure, ARIZ. STATE UNIV., <https://www.asu.edu/aad/manuals/acd/acd506-04.html> [<https://perma.cc/D2CC-T9JN>] (“[T]he final decision regarding the award of tenure is made through written notification to the candidate by the president.”); *Operations Manual* § III.10.1(a)(4)(i), UNIV. OF IOWA, <https://opsmanual.uiowa.edu/human-resources/faculty/tenure-and-non-tenure-appointments> [<https://perma.cc/6CKK-ZPHX>] (“Throughout the process of making a tenure decision, all concerned must recognize that an affirmative tenure decision is a prediction of future conduct, which prediction is based primarily on past performance. Unless those making the decision have a record of excellence before them—a record of excellence in both teaching and research—the prediction about the future is too uncertain to justify an affirmative decision. Any other premise is inconsistent with the ‘permanence’ associated with tenure. The tenure decision is the most important quality control available to the University. And unless the record presented is one of excellence in both teaching and research, an affirmative prediction about the future is too uncertain to be tolerated. In making a tenure recommendation to the Board of Regents, the University must be taken as saying that its prediction is based on a record of excellence.”).

86. *See* Adam Chilton, Jonathan S. Masur & Kyle Rozema, *Rethinking Law School Tenure Standards*, 50 J. LEGAL STUD. 1, 2 (2021); Yoon, *supra* note 21, at 428 n.2; Deborah Kaminski & Cheryl Geisler, *Survival Analysis of Faculty Retention in Science and Engineering by Gender*, 335 SCI. 864, 864 (2012). In 2007, Yale reported a tenure rate across the Faculty of Arts and Sciences of nineteen percent, ranging from fifty-seven percent for the biological sciences to fifteen percent for the social sciences. YALE UNIV., REPORT OF THE FACULTY OF ARTS AND SCIENCES TENURE AND APPOINTMENTS POLICY COMMITTEE 19 (2007).

87. Yoon, *supra* note 21, at 428.

#### D. Termination

Once granted, the heightened job security of tenure makes termination rare but not impossible. Several tenured professors are let go every year, and many more resign under pressure.<sup>88</sup> Still, while not a blanket guarantee of lifetime employment, the substantive and procedural rules surrounding the loss of tenure are stricter in academia than in most other professions.

Substantively, the permissible grounds to fire tenured faculty remain the two options set forth in the *1940 Statement*: adequate cause or financial exigency.<sup>89</sup> The traditional focus in cause-based cases is on a professor's fitness as a teacher and researcher.<sup>90</sup> Tenured faculty can generally be dismissed for incompetence, neglect of duty, moral turpitude, criminal behavior, poor performance, dishonesty, ethical violations, breach of institutional policy, or improper personal conduct (e.g., sexual harassment or drug abuse).<sup>91</sup>

The AAUP's threshold for terminating tenure on account of financial exigency requires a showing of imminent financial crisis that threatens the survival of the institution *as a whole* and which cannot be mitigated by means other than eliminating faculty.<sup>92</sup> Somewhat akin to financial exigency are terminations stemming from the discontinuance of an academic program or department. In this context, the AAUP states that any discontinuance must be based solely upon long-term "educational considerations" rather than "cyclical or temporary variations in enrollment."<sup>93</sup> Most schools include similar language in a standalone rule or else combine it with their financial exigency policies. In either case, almost

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88. GINSBERG, *supra* note 18, at 156 ("About 50 to 75 tenured faculty are fired every year [for cause]."); Brown & Kurland, *supra* note 36, at 344.

89. *1940 Statement*, *supra* note 73, at 15–16.

90. *Recommended Institutional Regulations on Academic Freedom and Tenure*, AM. ASS'N OF UNIV. PROFESSORS (2018), <https://www.aaup.org/report/recommended-institutional-regulations-academic-freedom-and-tenure> [<https://perma.cc/522V-A4KT>].

91. Trower, *supra* note 82, at 57.

92. *1940 Statement*, *supra* note 73 (emphasis added); *Recommended Institutional Regulations on Academic Freedom and Tenure*, AM. ASS'N OF UNIV. PROFESSORS (1995), <https://www.aaup.org/report/recommended-institutional-regulations-academic-freedom-and-tenure> [<https://perma.cc/522V-A4KT>].

93. AM. ASS'N OF UNIV. PROFESSORS, FINANCIAL EXIGENCY, ACADEMIC GOVERNANCE, AND RELATED MATTERS 7 (2004), <https://www.aaup.org/report/financial-exigency-academic-governance-and-related-matters> [<https://perma.cc/79HG-M4S6>]; Am. Ass'n of Univ. Professors, *The Role of the Faculty in Conditions of Financial Exigency*, in AM. ASS'N OF UNIV. PROFESSORS, POLICY DOCUMENTS AND REPORTS 292, 293 (11th ed. 2015); *1940 Statement*, *supra* note 73.

all universities commit to making a bona fide effort to reassign displaced faculty to alternative departments before severing their appointments altogether.<sup>94</sup>

Modern procedural requirements for terminating tenured faculty also originate in the *1940 Statement*. As before, peer review is front and center. A tenured professor facing termination is given “the right to a full hearing before a faculty committee.”<sup>95</sup> The format of the hearing generally resembles a civil trial. The faculty member is entitled to notice of the charges, assistance from an attorney or other advisor, and a written transcription of the proceedings. There will usually be examinations and cross-examinations of witnesses, the introduction of documentary evidence, and a presentation of competing arguments. The hearing committee will be instructed to apply a specific evidentiary standard (e.g., “clear and convincing”) to its review of the facts, with the burden of proof resting with the institution.<sup>96</sup> The process normally concludes with a committee recommendation on the merits that the university’s president can either accept or reject. If the president’s response is unfavorable to the charged faculty member—signifying a loss of tenure or the imposition of other sanctions—schools may allow for a final appeal to their institution’s highest governing board.<sup>97</sup>

## II. REGULATORY ATTACKS ON TENURE

Tenure’s hard-won ability to provide faculty with greater academic freedom and associated research benefits puts it at the heart of the modern university’s scholarly mission. Yet tenure also presents challenges and potential disadvantages that make it a longstanding target of criticism and reform. This Part describes the most significant critiques of tenure and, more importantly for present purposes, explains how alleged problems with the system

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94. See, e.g., UNIV. OF IOWA, *supra* note 85, § III.10.1(c)(2)(d) (“No faculty member may be terminated because of programmatic change or discontinuance unless, following the good faith efforts of the University and the faculty member, the faculty member cannot be transferred to another college or department where the professional services of the faculty member can be used effectively.”).

95. AM. ASS’N OF UNIV. PROFESSORS, FINANCIAL EXIGENCY, ACADEMIC GOVERNANCE, AND RELATED MATTERS, *supra* note 93, at 7; *1940 Statement*, *supra* note 73.

96. See UNIV. OF N.C. AT CHAPEL HILL, *supra* note 22, at 13.

97. See, e.g., UNIV. OF IOWA, *supra* note 85, § III.31 (describing “Appeals to Board of Regents”); *The Code and the UNC Policy Manual* § 101.3.1.1[R], UNIV. OF N.C. BD. OF GOVERNORS (July 1, 2019), <https://www.northcarolina.edu/apps/policy/doc.php?id=45> [per ma.cc/LKN4-WZCC].

connect to recent anti-tenure efforts undertaken by state legislatures and governing boards.

### A. *Expense and Entrenchment*

The classic objection to tenure is that it is too expensive. As one former university president observes, “[t]enure now means, for all intents and purposes, a thirty-year appointment. In the future, it could mean fifty years’... as people live and work longer.”<sup>98</sup> A current average salary of \$100,000 could therefore put the total institutional commitment to each tenured professor at \$3–5 million—and that is before factoring in periodic raises, inflation, and employer contributions to health and retirement plans.<sup>99</sup> To retain productive scholars and respected teachers, those outlays may equate to good value. However, unrelenting salary expenses could start to feel like poor long-term investments if tenured faculty diminish in scholarly production later in their careers.<sup>100</sup>

Another cost of tenure is its potential to reduce institutional flexibility. The fixed and lengthy obligation that tenure creates arguably makes it harder for schools to alter or upgrade their faculty composition in response to shifting academic needs.<sup>101</sup> For example, if a university president wants to establish a new research program or hire additional faculty to accommodate increasing class sizes, she must either find new funding or reallocate resources away from areas other than the tenured faculty payroll. The president could also seek to remove tenured faculty by discontinuing existing programs, but this option may not be in the school’s best academic interests, requires navigating tenure’s strict due process requirements, and, ultimately, may not result in meaningful savings if school policy requires reassigning displaced faculty to new departments.

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98. Roger G. Baldwin & Jay L. Chronister, *What Happened to the Tenure Track?*, in *THE QUESTIONS OF TENURE*, *supra* note 82, at 128.

99. *Id.*; *2020-21 Faculty Compensation Survey Results*, AM. ASS’N OF UNIV. PROFESSORS, <https://www.aaup.org/2020-21-faculty-compensation-survey-results> [<https://perma.cc/49EZ-75EU>] (scroll to bottom of webpage and follow “Download the survey tables” hyperlink).

100. See Brown & Kurland, *supra* note 36, at 331.

101. Baldwin & Chronister, *supra* note 98, at 128–29; Fritz Machlup, *In Defense of Academic Tenure*, in *THE CASE FOR TENURE*, *supra* note 60, at 12–13; John O. McGinnis & Max Schanzenbach, *College Tenure has Reached Its Sell-By Date*, *WALL ST. J.* (Aug. 11, 2015), <https://www.wsj.com/articles/college-tenure-has-reached-its-sell-by-date-1439335262> [<https://perma.cc/M8NV-LPRE>].

A further flexibility issue accompanies the unique shared-governance model of university decision-making. With faculty historically playing a formal role in reviewing institutional policy decisions through bodies like faculty senates and councils, critics contend that tenured faculty often use their security of position to resist change or slow down administrative actions for selfish reasons.<sup>102</sup> Even when tenured faculty do not attempt to block decisions, their ability to influence actions at the department, collegiate, or university level raises the overall costs of institutional decision-making.<sup>103</sup> As McPherson and Schapiro summarize, the independence that comes with tenure means administrators must “rely more on persuasion and less on negative sanctions in influencing the behavior of [tenured] faculty.”<sup>104</sup>

The perception that tenure is too expensive and restricts nimble management explains why many universities continue to shy away from hiring tenured and tenure-track faculty in favor of instructors who command lower salaries on shorter-term contracts.<sup>105</sup> Between 1975 and 2011, the percentage of tenured faculty at American universities fell from twenty-nine percent to seventeen percent.<sup>106</sup> The percentage of new faculty entering the tenure-track also decreased during that period from sixteen percent to seven percent.<sup>107</sup> On the flip side, the percentage of part-time and contingent faculty now providing university instruction is seventy-six percent.<sup>108</sup> It is simply cheaper and easier for schools to adapt to evolving operational and teaching needs if they can utilize agile personnel tactics.

With these considerations in mind, a review of several recent efforts to weaken or eliminate tenure highlights the specific ways in which financial and flexibility concerns often drive boards and legislators to act:

*South Carolina.* In November 2021, a bill sponsored by twenty-three Republican state representatives was introduced to prohibit public universities from offering tenure to any faculty hired in 2023

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102. Richard P. Chait, *Why Tenure? Why Now?*, in THE QUESTIONS OF TENURE, *supra* note 80, at 15; McPherson & Schapiro, *supra* note 3, at 92–93.

103. McPherson & Schapiro, *supra* note 3, at 92–93.

104. *Id.* at 93.

105. *Id.* at 89.

106. Steven Shulman et al., *Higher Education at a Crossroads: The Economic Value of Tenure and the Security of the Profession*, ACADEME, Mar.–Apr. 2016, at 9, 14.

107. *Id.*

108. *Id.* at 13–14.

or later.<sup>109</sup> The bill, titled the “Cancelling Professor Tenure Act,” would require public universities to offer employment contracts to faculty that are no longer than five years.<sup>110</sup> The bill also provides that the existing tenure system will terminate once “there are no faculty members covered by the system [i.e., those tenured prior to 2023] who remain employed by the institution.”<sup>111</sup> According to the bill’s lead sponsor, the goal of the proposed legislation is to make faculty job security consistent with workers in non-academic industries and enhance universities’ flexibility to respond to market changes in higher education.<sup>112</sup>

*Hawaii.* In October 2021, the University of Hawaii and the University of Hawaii Professional Assembly convened a task force—at the request of the Hawaii General Assembly—to consider tenure reform.<sup>113</sup> The proposals under review include restricting tenure to teaching faculty only—thereby eliminating tenure for faculty who solely perform research—and making student enrollment figures part of the criteria used to award tenure and authorize new tenure-track faculty hires.<sup>114</sup> According to board members and legislators supportive of tenure reform, the goal of the proposals is to generate institutional savings and align the conferral of tenure with broader state educational priorities.<sup>115</sup> However, many Hawaii faculty worry that implementation of the proposals would undercut their ability to engage in legitimate teaching and research activities whenever administrators, legislators, or other powerful non-academics see their work as unpopular with students or inconsistent with ever-shifting market trends.<sup>116</sup>

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109. Jeremy Bauer-Wolf, *National AAUP Condemns Bill to End Tenure at South Carolina Public Colleges*, HIGHER ED DIVE, <https://www.highereddive.com/news/south-carolina-lawmakers-propose-ending-tenure-at-states-public-colleges/610483/> [https://perma.cc/WAF3-WXQV] (Dec. 2, 2021).

110. *Id.*

111. H.R. 4522, 124th Gen. Assemb., Reg. Sess. (S.C. 2021–22).

112. *See* Bauer-Wolf, *supra* note 109.

113. Press Release, University of Hawai‘i, SCR 201 Tenure Task Force (Jan. 31, 2022), <https://www.hawaii.edu/offices/vp-academic-strategy/tenure-task-force/> [https://perma.cc/M42M-YPML]; S. Con. Res. 201, 2021 Leg., Reg. Sess. (Haw. 2021).

114. Colleen Flaherty, *Tenure for Teachers Only*, INSIDE HIGHER ED (Nov. 2, 2021), <https://www.insidehighered.com/news/2021/11/02/professors-hawaii-face-major-changes-tenure-system> [https://perma.cc/8FCC-WE8X].

115. *Id.*

116. *Id.*; *Here We Go Again on Tenure Battles*, UNIV. OF HAW. PRO. ASSEMBLY (Sept. 20, 2021), <https://www.uhpa.org/academic/here-we-go-again-on-tenure-battles/> [https://perma.cc/3R3K-VND6].

*Georgia.* In October 2021, the governing board for the public university system in Georgia approved changes in its post-tenure review policy that many Georgia faculty members describe as a significant step toward ending tenure.<sup>117</sup> Under the board's former post-tenure review policy, tenured faculty were reviewed every five years.<sup>118</sup> If any performance deficiencies were identified, the faculty member was given three years to improve.<sup>119</sup> After that period, failure to demonstrate improvement could trigger the start of dismissal proceedings subject to the traditional tenure requirements of due process, including a hearing before a panel of faculty peers.<sup>120</sup>

The new post-tenure review policy, purportedly meant to increase faculty accountability and promote student success, requires faculty to undergo a "corrective post-tenure review" after two consecutive negative annual reviews.<sup>121</sup> The policy further allows department chairs or deans to take remedial action, including termination, in the event a professor subject to a corrective review fails to make sufficient progress.<sup>122</sup> Though the policy states that chairs and deans should consider "feedback" from a committee of faculty colleagues, the new policy removes the system's prior requirement of a formal hearing before peers.<sup>123</sup> Consequently, critics of the board's action observe that the new post-tenure review policy allows university administrators to bypass existing faculty due process rights to fire faculty without a peer determination of whether their performance qualifies as unsatisfactory under appropriate professional standards.<sup>124</sup>

*Kansas.* In early 2021, the Kansas Board of Regents suspended the requirement that public universities declare financial exigency before terminating tenured faculty.<sup>125</sup> The policy suspension,

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117. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 15, at 2, 4–5.

118. *Id.* at 3.

119. *Id.* at 3, 7; see also *Post-Tenure Review Policy* 8.3.5.4, UNIV. SYS. OF GA., <https://www.usg.edu/post-tenure-review/policy> [<https://perma.cc/AJE5-4LDP>]; Colleen Flaherty, *Tenure Under Threat in Georgia*, INSIDE HIGHER ED (Oct. 4, 2021), <https://www.insidehighered.com/news/2021/10/04/tenure-under-threat-georgia> [<https://perma.cc/EUG4-K3FF>].

120. *Id.* at 4–5.

121. Michele Cohen Marill, *How the Board of Regents Pulls the Strings at Georgia's College and Universities*, ATLANTA (Dec. 9, 2021), <https://www.atlantamagazine.com/news-culture-articles/how-the-board-of-regents-pulls-the-strings-at-georgias-colleges-and-universities/> [<https://perma.cc/HQ7J-ZWR4>]; *Post-Tenure Review Policy* 8.3.5.4, *supra* note 120.

122. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 15, at 7, 12.

123. *Id.* at 12.

124. *Id.* at 4–5, 7.

125. Pettit, *supra* note 15.



which runs for at least two years, means that tenured faculty are effectively at-will employees subject to dismissal for any reason at any time.<sup>126</sup> In addition, although faculty who are fired under the new policy may file a grievance, unlike the standard process in tenure termination cases, the matter will now be heard by the state's Office of Administration Hearings rather than by a faculty peer review committee.<sup>127</sup> The policy also shifts the applicable burden of proof from university administrators to the terminated faculty member.<sup>128</sup> According to the Board, its decision to temporarily eliminate multiple procedural protections under existing tenure policies was taken to provide the state's schools with a more powerful "arrow in their quiver to deal with budget retrenchment."<sup>129</sup>

*Wisconsin.* In 2015, permanent reform to Wisconsin's tenure system came through a combination of legislative and board action. In an alleged attempt to "modernize" tenure due to mounting financial pressures, then-governor Scott Walker signed a bill into law that simultaneously cut \$250 million from the state's higher education budget and gave the Wisconsin Board of Regents greater flexibility to dismiss tenured faculty.<sup>130</sup> Before then, the state's faculty enjoyed some of the strongest tenure protections in the country. The Wisconsin code, rather than just university bylaws or

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126. The state's universities are not required to make use of the new policy. Four of the six state universities—Fort Hays State, Kansas State, Pittsburg State, and Wichita State—said they do not expect to use the policy. However, the state's flagship school, the University of Kansas, initially said it would consider using the policy and asked for an extension of time to determine whether it would submit a proposal on how to implement it. *Id.*; see also Lauren Fox, *Kansas Board of Regents Allows Extension for Controversial Policy on Tenure*, LAWRENCE JOURNAL-WORLD (Feb. 17, 2021, 2:34 PM), <https://www2.ljworld.com/news/ku/2021/feb/17/kansas-board-of-regents-allows-extension-for-controversial-policy-on-tenure/> [<https://perma.cc/5JYY-PLBU>].

127. Pettit, *supra* note 15.

128. *Id.*

129. *Id.* The Kansas Regents subsequently made two changes to the temporary tenure policy in the wake of criticism about their approach. First, the Regents specified that campus shared governance groups must be given an opportunity to provide feedback to a university president before the president terminates a faculty member's tenure. Second, the Regents instructed university presidents to disclose the justification for terminating any faculty member's tenure, as well as what alternative options were considered. See Rafael Garcia, *Kansas Regents Adopt Transparency Guidelines for Firing Tenured Faculty as an Olive Branch*, THE TOPEKA CAPITAL-JOURNAL, <https://www.cjonline.com/story/news/education/2021/04/14/kansas-board-of-regents-tweak-tenured-faculty-policy-greater-transparency-higher-education-covid-19/7184660002/#:~:text=While%20Kansas%27%20state%20universities%20will%20retain%20a%20new,administrations%20to%20be%20more%20transparent%20about%20those%20decisions> [<https://perma.cc/AF3Q-BG6P>] (Apr. 15, 2021, 12:51 PM).

130. Ben Trachtenberg, *The People v. Their Universities: How Popular Discontent is Reshaping Higher Education Law*, 108 KY. L.J. 47, 66–67 (2019).

board policy, had specified that tenured faculty members could be dismissed only for just cause or in cases of financial exigency that immediately threatened the institution's survival.<sup>131</sup>

By contrast, the 2015 tenure bill authorized the Regents to dismiss any faculty member, with or without tenure, "when such an action is deemed necessary due to a budget or program decision requiring program discontinuance, curtailment, modification, or redirection."<sup>132</sup> Though this language resembles typical terminology used in financial exigency policies, it expanded the grounds available for financially motivated dismissals by adding the broader criteria of program "modification" or "redirection."<sup>133</sup> The Regents eventually demurred on drafting a policy to implement dismissals in the latter two situations, but in 2016, they adopted policies that eliminated any right for faculty to review proposed program cuts and empowered administrators to base programmatic decisions solely on profitability concerns rather than on a combination of financial and educational factors.<sup>134</sup> Several commentators thus described the Regents' new rules as a "fake" tenure policy, and the change led to a series of faculty votes of "no confidence" in the President of the University of Wisconsin system.<sup>135</sup>

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131. See Colleen Flaherty, *'Fake' Tenure?*, INSIDE HIGHER ED (Mar. 11, 2016), <https://www.insidehighered.com/news/2016/03/11/u-wisconsin-board-regents-approves-new-tenure-policies-despite-faculty-concerns> [<https://perma.cc/D3L7-SZQ5>]; Colleen Flaherty, *Trying to Kill Tenure*, INSIDE HIGHER ED (June 1, 2015), <https://www.insidehighered.com/news/2015/06/01/wisconsin-faculty-incensed-motion-eliminate-tenure-state-statute> [<https://perma.cc/A5WS-T9DM>].

132. WIS. STAT. § 36.21 (2021); Trachtenberg, *supra* note 130, at 67.

133. Trachtenberg, *supra* note 130, at 67.

134. See Flaherty, *'Fake' Tenure?*, *supra* note 131.

135. *Id.* Similar to the development of tenure reform legislation in Wisconsin, in 2018, the Kentucky legislature added a provision in the state budget (enacted over the governor's veto) that gave public universities in the state the power to reduce tenured faculty when an academic program is discontinued or modified upon a determination by the governing board that the changes are in institutional best interests because of low enrollment, financial feasibility, budgetary constraints, or declaration of financial emergency. Trachtenberg, *supra* note 130, at 68 n.147. Thus, like the 2015 Wisconsin statute, the Kentucky bill's authorization to modify programs because of budgetary constraints provides a much lower bar for doing so than the traditional basis of "financial exigency" putting institutions at risk of surviving. *Id.* at 68–69; see also Scott Jaschik, *Tenure Under Threat in Kentucky*, INSIDE HIGHER ED (Mar. 29, 2018), <https://www.insidehighered.com/news/2018/03/29/kentucky-legislation-could-limit-tenure-protections> [<https://perma.cc/E6FA-LR99>] ("[P]ublic universities could dismiss tenured faculty members due to program changes or eliminations, not just the traditional reasons related to serious misconduct or failure to perform their jobs, or an institution on the verge of financial collapse.").

The first tenured faculty member to be let go under the policy's new provision for program elimination was fired in 2021.<sup>136</sup>

### B. *Ideology*

Along with financial and flexibility critiques of tenure, many lawmakers claim that the protection of tenure enables professors—the majority of whom identify as politically left-leaning—to stifle debate in the classroom, discriminate against students because of their political beliefs, or “indoctrinat[e]” students with leftist orthodoxy.<sup>137</sup> Critics allege, for example, that relative to at-will instructors, a tenured professor faces less risk for penalizing students who advance disfavored opinions since it is procedurally onerous for universities to pursue cause-based disciplinary measures in all but the most open and flagrant cases of misconduct.<sup>138</sup>

Concerns about faculty bias were central to recent efforts by Iowa legislators to abolish tenure. A bill introduced in both the Iowa House and Senate during the 2020–21 legislative session sought to prohibit state universities “from establishing or continuing ‘a tenure system for any employee . . . .’”<sup>139</sup> The draft specified that acceptable grounds for terminating any faculty member would include, *but not be limited to*, just cause, program discontinuance, or financial exigency, with university administrators also given sole authority to downsize faculty as necessary “to carry out the

136. Kelly Meyerhofer, *Tenured UW Prof Laid off After Program Cut, a 1st Under Controversial Policy*, WISC. ST. J. (Dec. 16, 2021), [https://madison.com/wsj/news/local/education/university/tenured-uw-prof-laid-off-after-program-cut-a-1st-under-controversial-policy/article\\_268b961c-9c9d-52d6-b1ab-99ade71e3425.html](https://madison.com/wsj/news/local/education/university/tenured-uw-prof-laid-off-after-program-cut-a-1st-under-controversial-policy/article_268b961c-9c9d-52d6-b1ab-99ade71e3425.html) [<https://perma.cc/7Z7P-H9FY>].

137. See, e.g., Miller, *supra* note 2; Scott Jaschik, *Professors and Politics: What the Research Says*, INSIDE HIGHER ED (Feb. 27, 2017), <https://www.insidehighered.com/news/2017/02/27/research-confirms-professors-lean-left-questions-assumptions-about-what-means> [<https://perma.cc/MS75-6RVZ>]; Scott Jaschik, *DeVos vs. the Faculty*, INSIDE HIGHER ED (Feb. 24, 2017), <https://www.insidehighered.com/news/2017/02/24/education-secretary-criticizes-professors-telling-students-what-think> [<https://perma.cc/3DZ6-ZT2C>].

138. See Miller, *supra* note 2.

139. Jeff Charis-Carlson & William Petroski, *Iowa Lawmaker Looking to End Tenure at Public Universities*, DES MOINES REG., <https://www.desmoinesregister.com/story/news/education/2017/01/12/iowa-lawmaker-looking-end-tenure-public-universities/96460626/> [<https://perma.cc/6DPJ-H5XL>] (Jan. 12, 2017, 8:35 PM); Sostaric, *supra* note 14. In addition to the anti-tenure bill in Iowa, similar bills were introduced in South Carolina and Massachusetts. See McPherson & Schapiro, *supra* note 3, at 88; Colleen Flaherty, *Killing Tenure*, INSIDE HIGHER ED (Jan. 13, 2017), <https://www.insidehighered.com/news/2017/01/13/legislation-tw-o-states-seeks-eliminate-tenure-public-higher-education> [<https://perma.cc/83SZ-TZ6C>].

academic duties and responsibilities of the college.”<sup>140</sup> The bill’s initial sponsor said his goal was to enhance institutional hiring flexibility and make it easier for schools to fire “bad” professors.<sup>141</sup> However, support for the proposal took on a political edge in the wake of several speech-related controversies at the state’s three public universities during the fall of 2020 that prompted allegations of systemic anti-conservative bias.<sup>142</sup> Even though none of the cited controversies involved actions taken by tenured faculty, the events triggered multiple investigative hearings and galvanized significant support for the anti-tenure bill among conservative members of the Iowa legislature.<sup>143</sup> As one state representative observed, “I wonder if the assault on [student] free speech by some university professors is not related to the belief that they’re Teflon-coated and indestructible and, therefore, maybe we need to look at getting rid of tenure . . . .”<sup>144</sup>

The Iowa anti-tenure bill subsequently advanced out of the House education committee by a vote of 12-9, making it eligible for a vote on the House floor.<sup>145</sup> This development prompted widespread local and national media coverage, including headlines in *The Chronicle of Higher Education*, *Inside Higher Ed*, and *Forbes*.<sup>146</sup> The national AAUP also spoke out against the legislation, as did the Iowa Board of Regents, the politically appointed

140. H.F. 49, 89th Gen. Assemb., Reg. Sess. (Iowa 2021), <https://www.legis.iowa.gov/legislation/BillBook?ga=89&ba=hf49> [<https://perma.cc/8S2P-F2YT>] (emphasis added). The bill also proposed that all institutions adopt written statements “enumerating” employee agreements and annual performance evaluations, along with minimum standards of good practice and review and disciplinary procedures. *Id.*

141. Charis-Carlson & Petroski, *supra* note 139.

142. See Miller, *supra* note 2.

143. *Id.*

144. Eric Kelderman, *In Iowa, Public Colleges Scramble to Ward Off Claims of Bias and Threat to Tenure*, THE CHRONICLE OF HIGHER EDUCATION (Feb. 3, 2021), <https://www.chronicle.com/article/in-iowa-public-colleges-scramble-to-ward-off-claims-of-bias-and-threat-to-tenure> [<https://perma.cc/UNN9-7AS7>]; see also Trachtenberg, *supra* note 130, at 68.

145. Shane Vander Hart, *Iowa House Committee Passes Bill Eliminating Tenure at Regent Universities*, IOWA TORCH (Feb. 10, 2021), <https://iowatorch.com/2021/02/10/iowa-house-committee-passes-bill-eliminating-tenure-at-regent-universities/> [<https://perma.cc/3EDY-QM3N>].

146. See, e.g., Kelderman, *supra* note 144; Michael T. Nietzel, *Want a State Legislature that Likes to Meddle with Higher Education? Move to Iowa*, FORBES (Feb. 11, 2021, 5:50 AM), <https://www.forbes.com/sites/michaelt Nietzel/2021/02/11/want-a-state-legislature-that-likes-to-meddle-with-higher-education-move-to-iowa/?sh=22fb00155afd> [<https://perma.cc/7XLK-RKKP>]; Colleen Flaherty, *Open Season on the Faculty*, INSIDE HIGHER ED (Feb. 11, 2021), <https://www.insidehighered.com/news/2021/02/11/open-legislative-season-faculty-io-wa-and-elsewhere> [<https://perma.cc/7XLK-RKKP>].

board that governs the state's public universities.<sup>147</sup> Later in the session, legislative priorities began to shift, and the anti-tenure bill failed to advance after a fixed voting deadline expired.<sup>148</sup> Nevertheless, the Speaker of the Iowa House described tenure reform as “a live round” on the Republican agenda.<sup>149</sup> Another representative characterized the party's ongoing focus on limiting tenure as necessary because “there is no longer diversity of thought” at the state's public universities.<sup>150</sup>

Three additional states where legislative interest in tenure reform has recently arisen are Florida, Texas, and Louisiana. In Florida, Republican Governor Ron DeSantis signed a bill on April 18, 2022, that requires tenured faculty at the state's universities to be reviewed every five years under conditions to be determined by the Florida Board of Governors.<sup>151</sup> What this new five-year review requirement will mean in practice remains uncertain—tenured faculty in the state are already required to undergo annual performance reviews by their institutions—but Governor DeSantis stated that his goal in signing the law was to limit the risk of political bias.<sup>152</sup> “I think what tenure does, if anything, it's created more of an intellectual orthodoxy,” DeSantis said.<sup>153</sup> Florida House Speaker, Chris Sprowls, added that the law is meant to prevent “indoctrination.”<sup>154</sup>

In Texas, Lieutenant Governor Dan Patrick announced in early 2022 that one of his top priorities for the 2023 session of the Republican-controlled state legislature is the abolition of tenure at all the state's public universities.<sup>155</sup> Patrick stated that the abolition

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147. Hank Reichman, *Statement on the Iowa Legislature's Threats to Academic Freedom and Tenure*, ACADEME (Mar. 4, 2021), <https://academeblog.org/2021/03/04/statement-on-the-iowa-legislatures-threats-to-academic-freedom-and-tenure/> [https://perma.cc/5MVH-XEBD].

148. Gruber-Miller, *supra* note 14.

149. Sostaric, *supra* note 14.

150. Vander Hart, *supra* note 145.

151. Divya Kumar, *DeSantis Signs Bill Limiting Tenure at Florida Public Universities*, TAMPA BAY TIMES (Apr. 19, 2022), [https://www.tampabay.com/news/education/2022/04/19/desantis-signs-bill-limiting-tenure-at-florida-public-universities/?utm\\_source=Iterable&utm\\_medium=email&utm\\_campaign=campaign\\_4109515\\_nl\\_Daily-Briefing\\_date\\_20220420&cid=db&source=ams&sourceid=](https://www.tampabay.com/news/education/2022/04/19/desantis-signs-bill-limiting-tenure-at-florida-public-universities/?utm_source=Iterable&utm_medium=email&utm_campaign=campaign_4109515_nl_Daily-Briefing_date_20220420&cid=db&source=ams&sourceid=) [https://perma.cc/UN83-N3ZL].

152. *Id.*

153. *Id.*

154. *Id.*

155. Andrew Schneider, *Dan Patrick's Plan to End Tenure at Texas Universities Could Have Dire Consequences, Experts Warn*, HOUS. PUB. MEDIA (Mar. 28, 2022, 4:07 PM), <https://www.houstonpublicmedia.org/articles/news/in-depth/2022/03/28/421924/patricks-plan-to-eliminate-tenure-at-texas-state-universities-could-have-dire-consequences-experts-w>

of tenure represents one way to limit the teaching of critical race theory and otherwise ensure the legislature has “a say in what the curriculum is.”<sup>156</sup> His proposal also adds that “the teaching of ‘critical race theory’” would become a new ground for cause-based tenure revocation for any professor already tenured.<sup>157</sup>

In Louisiana, the state legislature has not proposed the abolition of tenure but did order a study of tenure policies at the state’s public universities. On May 24, 2022, state lawmakers passed a bill creating the “Task Force on Tenure in Postsecondary Education.”<sup>158</sup> The task force is charged with issuing a report to the state legislature on proposed changes to the tenure policies of public universities.<sup>159</sup> Though the bill’s sponsor notes that the outcome of the task force’s report is uncertain, the text of the legislation indicates that it is intended to ensure that “faculty members are not using their courses for the purpose of political, ideological, religious or anti-religious indoctrination.”<sup>160</sup> The sponsor also stated on social media that he would “never advocate for tenure for anyone in any profession[.]”<sup>161</sup> These comments led faculty in Louisiana to express their concern that the bill is a first step in a legislative effort to abolish or substantially diminish tenure in the state.<sup>162</sup>

Finally, a more targeted example of alleged political interference with tenure occurred at the University of North Carolina-Chapel Hill (“UNC”) in May 2021. The situation arose after UNC’s Board of Trustees initially failed to act on the university’s recommendation to appoint Pulitzer-Prize-winning journalist Nikole

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arn/ [https://perma.cc/J3CA-2NW7]; see also Colleen Flaherty, *Texas Lieutenant Governor Orders Review of Tenure*, INSIDE HIGHER ED (April 6, 2022), [https://www.insidehighered.com/quicktakes/2022/04/06/texas-lieutenant-governor-orders-review-tenure?utm\\_source=Inside+Higher+Ed&utm\\_campaign=66d217f234-DNU\\_2021\\_COPY\\_02&utm\\_medium=email&utm\\_term=0\\_1fbc04421-66d217f234-236876314&mc\\_cid=66d217f234&mc\\_eid=5f64f8b4c5](https://www.insidehighered.com/quicktakes/2022/04/06/texas-lieutenant-governor-orders-review-tenure?utm_source=Inside+Higher+Ed&utm_campaign=66d217f234-DNU_2021_COPY_02&utm_medium=email&utm_term=0_1fbc04421-66d217f234-236876314&mc_cid=66d217f234&mc_eid=5f64f8b4c5) [https://perma.cc/G376-VNR9].

156. Schneider, *supra* note 155.

157. *Id.*

158. Act of May 24, 2022, SCR No. 6, 2022 La. Acts; Piper Hutchinson, *Louisiana Lawmakers Approve Study of University Tenure Policy*, LA. ILLUMINATOR (May 24, 2022, 7:41 AM), [https://lailluminator.com/2022/05/24/louisiana-lawmakers-approve-study-of-university-tenure-policy/?utm\\_source=Iterable&utm\\_medium=email&utm\\_campaign=campaign\\_4346137\\_nl\\_Daily-Briefing\\_date\\_20220526&cid=db&source=ams&sourceid=\[https://perma.cc/42JX-472Y\]](https://lailluminator.com/2022/05/24/louisiana-lawmakers-approve-study-of-university-tenure-policy/?utm_source=Iterable&utm_medium=email&utm_campaign=campaign_4346137_nl_Daily-Briefing_date_20220526&cid=db&source=ams&sourceid=[https://perma.cc/42JX-472Y]).

159. Hutchinson, *supra* note 158.

160. *Id.*

161. *Id.*

162. *Id.*

Hannah-Jones to a faculty position with tenure in its Hussman School of Journalism.<sup>163</sup>

Ordinarily, when a tenure application is presented to the Board following approval at the collegiate and university levels—as happened in the case of Hannah-Jones—the Trustees’ ratification is taken as a formality.<sup>164</sup> But Hannah-Jones is the founder of the controversial *1619 Project*, a work published by the *New York Times* that has drawn intense criticism from several conservative politicians for how it frames the role of slavery in U.S. history.<sup>165</sup> Former President Trump went so far as to call the *1619 Project* “ideological poison.”<sup>166</sup> Because the university’s Trustees are political appointees in a Republican-controlled state and did not explain why they took the unusual step of not voting on Hannah-Jones’ tenure file, members of the UNC campus and other stakeholders began to surmise that the inaction was politically motivated.<sup>167</sup> An anonymous trustee told the media that the Board’s inaction came in response to pressure from the state’s Board of Governors, the oversight body for the entire North Carolina education system.<sup>168</sup> Other reports suggested that one of the journalism school’s largest donors, its namesake Walter Hussman, Jr., contacted several

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163. Stripling, *supra* note 16; Killian & Ingram, *supra* note 16.

164. Keith E. Whittington & Sean Wilentz, *We Are Critics of Nikole Hannah-Jones—Her Tenure Denial Is a Travesty*, CHRON. HIGHER EDUC. (May 24, 2021), <https://www.chronicle.com/article/we-have-criticized-nikole-hannah-jones-her-tenure-denial-is-a-travesty> [<https://perma.cc/H7ZE-SSL5>].

165. *Id.*

166. *What Trump is Saying About 1619 Project, Teaching U.S. History*, PBS NEWS HOUR (Sep. 17, 2020, 6:20 PM), <https://www.pbs.org/newshour/show/what-trump-is-saying-about-1619-project-teaching-u-s-history> [<https://perma.cc/WYT8-M3RA>].

167. Whittington & Wilentz, *supra* note 164.

168. Killian & Ingram, *supra* note 16; The UNC Board of Governors is the policy-making body legally charged with the “general determination, control, supervision, management, and governance of all affairs of the constituent institutions.” It elects the president, who administers the University. The twenty-four voting members of the Board of Governors are elected by the Senate and House of Representatives for four-year terms. Each of the seventeen constituent institutions is headed by a chancellor who is chosen by the Board of Governors on the president’s nomination and is responsible to the president. Each institution has a board of trustees composed of thirteen members of eight appointed by the Board of Governors; four appointed by the General Assembly, two of whom shall be appointed upon the recommendation of the President Pro Tempore of the Senate, and two of whom shall be appointed upon the recommendation of the Speaker of the House of Representatives; and the president of the student government of the institution. Each board of trustees holds extensive powers over academic and other operations of its campus on delegation from the Board of Governors. See *Board of Governors*, UNIV. OF N.C. SYS., <https://www.northcarolina.edu/leadership-and-governance/board-of-governors/> [<https://perma.cc/8Z4Y-ST4P>]. The UNC Board of Governors oversees the UNC system; the UNC Board of Trustees is the governing body for UNC-Chapel Hill. *Id.*

senior university officials, other donors, and at least one governing board member to express reservations about Hannah-Jones' appointment.<sup>169</sup> These and similar stories led to growing suspicion that Hannah-Jones' tenure application was being handled differently on account of outside influence, particularly since she matched the profile of the two prior working journalists who had been appointed with tenure to the same position.<sup>170</sup> The Board's handling of the matter also made Hannah-Jones' appointment, as well as tenure in general, the subject of ongoing news coverage in the *New York Times*, the *Washington Post*, *National Public Radio*, the *Chronicle of Higher Education*, and many other national and international publications.<sup>171</sup>

Following several more weeks of public scrutiny, protests, and letters criticizing the Board of Trustees from UNC faculty groups, student leaders, and national academic organizations, the Board rescheduled a vote on Hannah-Jones' tenure application for a meeting on June 30, 2021.<sup>172</sup> At that meeting, they approved her appointment with tenure by a vote of nine to four.<sup>173</sup> However,

169. Stripling, *supra* note 16. Mr. Hussman stated that he did not pressure the journalism dean and denied threatening to withhold the balance of his financial commitment to the university if Hannah-Jones was hired. Lauren Lumpkin, *Nikole Hannah-Jones Will Not Join UNC*, WASH. POST (June 22, 2021, 9:49 PM), <https://www.washingtonpost.com/education/2021/06/22/hannah-jones-unc-tenure-faculty/> [<https://perma.cc/KB6A-Z8ZF>]. According to Hannah-Jones' legal team, "Since signing the fixed-term [five-year] contract, Ms. Hannah-Jones has come to learn that political interference and influence from a powerful donor contributed to the Board of Trustees' failure to consider her tenure application . . . . In light of this information, Ms. Hannah-Jones cannot trust that the University would consider her tenure application in good faith during the period of the fixed-term contract." *Id.*

170. Stripling, *supra* note 16; Killian & Ingram, *supra* note 16.

171. See, e.g., Katie Robertson, *Nikole Hannah-Jones Denied Tenure at University of North Carolina*, N.Y. TIMES, <https://www.nytimes.com/2021/05/19/business/media/nikole-hannah-jones-unc.html> [<https://perma.cc/W7V7-Y4AD>] (July 15, 2022); Lauren Lumpkin, *Nikole Hannah-Jones Will Not Join UNC Faculty Without Tenure, Legal Team Says*, WASH. POST (June 22, 2021, 9:59 PM), <https://www.washingtonpost.com/education/2021/06/22/hannah-jones-unc-tenure-faculty/> [<https://perma.cc/R5W4-SSB3>]; Stripling, *supra* note 16; David Folkenflik, *Nikole Hannah-Jones' Tenure Rejection Rocks UNC Campus*, NAT'L PUB. RADIO (June 18, 2021, 4:57 AM), <https://www.npr.org/2021/06/18/1008039050/nikole-hannah-jones-tenure-rejection-rocks-unc-campus> [<https://perma.cc/4RCK-AHX9>].

172. See Lindsay Ellis, *Nikole Hannah-Jones Declines U. of North Carolina's Tenure Offer, Plans to Join Howard U.*, CHRON. HIGHER EDUC. (July 6, 2021) <https://www.chronicle.com/article/nikole-hannah-jones-declines-u-of-north-carolinas-tenure-offer-plans-to-join-howard-u> [<https://perma.cc/5SM4-3PHJ>], (quoting UNC journalism faculty statement, "[w]e regret that the top echelons of leadership at UNC-Chapel Hill failed to follow established processes, did not conduct themselves professionally and transparently, and created a crisis that shamed our institution, all because of Ms. Hannah-Jones's honest accounting of America's racial history . . . ."); Jack Stripling, *Look Us in the Eye*, CHRON. HIGHER EDUC. (July 1, 2021) <https://www.chronicle.com/article/look-us-in-the-eye> [<https://perma.cc/YPY7-5UZ7>].

173. Stripling, *supra* note 172.



despite the positive vote, Hannah-Jones declined UNC's offer and instead accepted a similar position at Howard University.<sup>174</sup> When explaining her decision, Hannah-Jones cited her discomfort with the Trustee's handling of the process: "My peers in academia said that I was deserving of tenure. These board members are political appointees who decided that I wasn't."<sup>175</sup>

The incidents from Iowa, Texas, Louisiana, and North Carolina stand apart as examples of anti-tenure sentiment and action with straightforward political undertones. Yet even when cost rather than ideology is the cited justification for intervention, it is worth noting that almost every public step toward weakening tenure during the past decade has arisen in states under Republican control.<sup>176</sup> This trend is consistent with empirical evidence showing a strong partisan divide around attitudes toward higher education more generally. For example, a 2019 Pew Research Center survey found that the percentage of Republican respondents who believe universities have a negative effect on the United States rose from thirty-five percent to fifty-nine percent between 2012 and 2019 (compared to a decline of nineteen percent to eighteen percent during the same period among Democrats who share that view).<sup>177</sup> Additional survey data reveal that seventy-nine percent of Republicans believe higher education is heading in the wrong direction because professors bring their political and social views into class (seventeen percent of Democrats say the same), with nineteen percent of Republicans adding that they have "no confidence at all" in college professors to act in the public interest.<sup>178</sup> Accordingly, as the conversation around tenure reform evolves, it is reasonable to expect that universities in Republican-controlled states will continue to face a higher likelihood of legislative or board incursion into academic policy matters than others.<sup>179</sup>

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174. Ellis, *supra* note 172.

175. *Id.*

176. The one exception is Hawai'i, where Democrats currently hold a legislative majority. See generally Karin Fischer, *The Red-State Disadvantage*, CHRON. HIGHER EDUC. (Feb. 11, 2022), <https://www.chronicle.com/article/the-red-state-disadvantage> [<https://perma.cc/Z5CV-9VJE>].

177. Parker, *supra* note 9.

178. *Id.*

179. Of additional note are other recent legislative initiatives aimed at university operations. For example, in 2021, Republicans in Arkansas, Idaho, Iowa, Louisiana, New Hampshire, Oklahoma, Rhode Island, and West Virginia introduced legislation intended to limit the teaching of concepts associated with critical race theory as part of public university curricula. See Emma Pettit, *The Academic Concept Conservative Lawmakers Love to Hate*,

### III. REASONS AND METHODS TO UPHOLD TENURE

With tenure facing new and ongoing threats across several dimensions, how should faculty and public universities respond? This Part confronts that question first by describing the lasting importance of tenure and why it deserves protection. It then proceeds to assess the strategies available to academics seeking to defend tenure in the face of regulatory pressure.

#### A. *Why Tenure Is Still Worth Protecting*

Ever since the AAUP's initial efforts to define and advocate for tenure, the concept has remained a central feature of most major American research universities because of the value it brings to scholarly inquiry. The primary ways it does so are by (1) protecting academic freedom, (2) providing faculty with long-term financial security, and (3) bolstering research reliability and integrity. These elements have always been the theoretical driving forces behind tenure, but experience with their practical application over the past century now provides an even more complete picture of what faculty, students, and society stand to lose if public anti-tenure efforts gain further traction.

#### 1. Academic Freedom

The principal contribution of tenure remains the support it lends to faculty academic freedom in teaching and research. Modern tenure policies pursue that purpose through peer review and a set of procedural requirements meant to guarantee that attempts to dismiss tenured faculty are based on legitimate and factually proven grounds of professional misconduct rather than political, ideological, personal, or any other considerations that invade academic freedom.<sup>180</sup> This approach is necessary to ensure that scholars do not become unduly hesitant to engage in research of potential value due to a fear of summary termination for reasons

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CHRON. HIGHER EDUC. (May 12, 2021), <https://www.chronicle.com/article/the-academic-concept-conservative-lawmakers-love-to-hate> [<https://perma.cc/W9W8-YSU3>].

180. William Van Alstyn, *Tenure: A Summary, Explanation, and "Defense"*, in THE CASE FOR TENURE, *supra* note 60, at 4.

divorced from professional irresponsibility.<sup>181</sup> As noted earlier, the absence of tenure's procedural protections for academic freedom would put the university's broader educational mission at risk anytime a faculty member's work sparks strong public disagreement.<sup>182</sup>

This latter point—the relationship between tenure, academic freedom, and the purpose of the university—merits further elaboration. Tenure systems are not meant to benefit only the individual faculty member who attains tenured status. Tenure is not a job benefit like an attractive office location, a holiday salary bonus, or employer-sponsored health insurance. The security of position afforded by tenure is the means to an end of academic freedom sufficient to enable faculty to safely teach and produce scholarship that may benefit society despite challenging accepted wisdom or popular beliefs.

For example, when tenure protects a biologist who publishes research showing how agricultural runoff harms fish in a local river, the system does, indeed, advantage that professor when it enables her to keep her job over the objection of a pesticide company or politician who would prefer her findings stay hidden. But the ultimate beneficiary in this situation is not the professor or her university; rather, it is those members of the public interested in obtaining accurate information about water quality and habitat that is free from interference from actors with divergent, non-academic motives.<sup>183</sup> Tenure's intersection with academic freedom demonstrates that it is society that loses—not just faculty and students—when the only scholarship to emerge from universities is

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181. *Id.* at 7 (“An individual who is subject to termination without showing of professional irresponsibility...will to that extent hesitate publicly to expose his own perspectives and take from all of us that which we might more usefully confront and consider.”).

182. McPherson & Schapiro, *supra* note 3, at 93–94 (“[A]n important element in the work of faculty is to provide independent evaluations of performance, a task that includes evaluating student work and also judging the work of other academic professionals through refereeing processes and the like. The credibility of such evaluations obviously depends on the independence of the evaluators, which provides reason for institutions to take steps to insulate faculty from pressures.”).

183. See Machlup, *supra* note 101, at 26 (“It is not necessary to assume that there are several Galileos in every generation or several men who have similarly subversive ideas of similar importance to communicate. The case for tenure would be sufficiently supported by showing that a few men once in a while might feel insecure and suppress or postpone the communication of views which, true or false, wise or foolish, could inspire or provoke others to embark on or continue along lines of reasoning which may eventually lead to new insights, new judgments, or new appraisals regarding nature or society.”).

that which passes whatever litmus test happens to be set by those in political or economic power.<sup>184</sup>

## 2. Financial Security

The second advantage of tenure is its ability to provide faculty with financial security. There are several facets to this point. First, the prospect of near-permanent lifetime employment offsets the often-lower salaries that faculty at public universities receive in comparison to the private sector. This dynamic affects both faculty retention and recruitment. If tenure is weakened or unavailable at a public university, and if basic principles of the competitive market hold true, then the highest performing faculty will be incentivized to leave (or never join) that institution in exchange for the larger wages generally available at private firms or schools.<sup>185</sup> Should such a shift occur, it is reasonable to think there will be a corresponding decline in the overall academic quality of public universities, the educations their students receive, and the research they produce.<sup>186</sup>

A less intuitive economic benefit of tenure relates to the unique employment needs and trajectory of research faculty. Most scholars undergo lengthy and expensive training before joining a university's full-time faculty. Their path will often require four years of undergraduate education, one to two years for a master's degree, and then, on average, another eight or more years to earn a Ph.D. Assuming graduates ultimately secure a tenure-track position—

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184. Indeed, tenure, more than any other feature of academic life, has been the bulwark protecting the integrity of faculty research and teaching during some of the most politically polarized periods in modern U.S. history, including during the Red Scare, the Civil Rights Movement, and the Vietnam War. See Jeannie Suk Gersen, *Academic Freedom and Discrimination in a Polarizing Time*, 59 HOUS. L. REV. 781, 785–88 (2022).

185. Gabriel Kaplan, *Governing the Privatized Public Research University*, in *PRIVATIZING THE PUBLIC UNIVERSITY: PERSPECTIVES FROM ACROSS THE ACADEMY* 109, 120 (Christopher C. Morpew & Peter D. Eckel eds., 2009).

186. *Id.* In addition, schools could respond to the incentives that weaker tenure systems would create by paying faculty more in salary. Some faculty might see higher compensation as “worth” the loss of strong job security. But this approach relies on two assumptions: that schools can afford to pay more, and that the loss of academic freedom in absence of tenure is not socially harmful. As Trachtenberg observes, when the Wisconsin Board of Regents changed its tenure policy in 2015, the Wisconsin faculty “suffered a reduction in compensation—a loss of whatever their prior tenure protections were worth beyond the value of the new, lesser protections—with no corresponding pay increase. Some faculty left, and the flagship Madison campus estimated that it spent nearly \$9 million to retain faculty who received outside job offers between July and December 2015.” Trachtenberg, *supra* note 130, at 67.

already a rare feat in today's tight hiring market—they will next spend an additional six to seven years on academic probation before learning whether their tenure case is successful. What is more, the pre-tenure training and evaluation process usually occurs in the context of narrow, specialized research that involves skills and resources not easily adaptable to other uses. A mathematician cannot switch to teaching Shakespeare, nor can a cancer scientist repurpose her lab, her test subjects, and several years' worth of data to start work on a botany project—at least, not if schools and society want trustworthy research outputs. Thus, academics do not seek tenure simply for the sake of security in *a* job.<sup>187</sup> Rather, it is tenure's prospect of long-term job security in a specific *field of study* that makes the faculty's massive investments in training and specialization worth the risk.<sup>188</sup>

### 3. Scholarly Reliability

The third benefit of tenure is its role in quality control. At present, the main check on scholarly reliability occurs through the peer review component of the pre-tenure probationary period. That multi-year process enables faculty experts to assess whether candidates possess sufficient knowledge, capability, and promise to justify the length of commitment and considerable resource allocation that a tenure appointment represents.<sup>189</sup> Without an evaluation process of similar rigor, institutions may accumulate large groups of poor to middling teachers and researchers.<sup>190</sup> It is difficult to “fake” strong academic performance over the six or more years one spends under scrutiny on the tenure track. At the same time, tenure also bolsters the integrity of the probationary review stage due to how it protects the people doing the screening. Tenured faculty are free to vet every tenure case honestly and thoroughly without fear that they will place their own positions in jeopardy by supporting candidates who might prove better than

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187. Michael S. McPherson & Gordon C. Winston, *The Economics of Academic Tenure: A Relational Perspective*, in *THE CASE FOR TENURE*, *supra* note 60, at 104–11.

188. *Id.* at 106–07.

189. *Id.* at 110–17; *see also* Machlup, *supra* note 101, at 11 (noting that institutions must exercise care in making tenure decisions to avoid “an accumulation of substandard teachers on the permanent faculty”).

190. Brown & Kurland, *supra* note 36, at 334. Universities also have an interest in quality control due to reputational concerns, competition for the best students, and accreditation requirements.

them.<sup>191</sup> A comparable interest explains why professional sports teams hire general managers to fill out their rosters rather than turn that job over to current players vying for playing time.<sup>192</sup>

A further way in which tenure supports research quality and productivity is by affording scholars the time they need to be successful as both pre- and post-tenured faculty. Many research projects require multi-year time horizons before they begin to bear fruit.<sup>193</sup> A familiar example is the clinical trial. It often takes over six years of laboratory research before a new pharmaceutical is ready to be tested on patients, followed by several more years of observing and evaluating the effects of the treatment. In this research environment, tenure provides assurance that scholars will not be forced to stop their work prematurely or operate under a cloud of non-renewal.<sup>194</sup> Tenured researchers can undertake potentially groundbreaking efforts with the confidence that they will have sufficient time to collect data, test prototypes, and revise hypotheses as necessary to ensure reliable results. Likewise, universities, research teams, students, and grant-making agencies benefit when tenure prevents the loss of accumulated institutional knowledge, disruptions in workflow, or the need to allocate funds to cover replacement costs.<sup>195</sup>

### B. *Contractual Alternatives*

Turning next to specific legal strategies for protecting tenure from regulatory encroachment, the first and most straightforward option is alternative contracting. This approach involves trying to replicate the major substantive and procedural elements of institutional tenure policies through individually negotiated employment agreements between schools and “tenurable” faculty. For example, as others have noted, the long-term commitment and economic security of tenure could arguably be maintained via fixed or renewable faculty appointments of ten-, twenty-, or thirty-year

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191. McPherson & Schapiro, *supra* note 3, at 94–95; McPherson & Winston, *supra* note 187, at 113–15.

192. McPherson & Winston, *supra* note 187, at 113–15.

193. McPherson & Schapiro, *supra* note 3, at 94.

194. Brown & Kurland, *supra* note 36, at 333.

195. See Trachtenberg, *supra* note 130, at 67.

terms.<sup>196</sup> Versions of this idea are already often used to provide clinical and other non-tenure-track faculty with greater job security by placing them on rolling multi-year contracts that become presumptively renewable if certain performance criteria are met.<sup>197</sup> Similarly, from the perspective of tenure's peer-review hallmark, it is not difficult to imagine drafting agreements that grant long-term faculty a right to tenure-like due process in the event they are fired, disciplined, or denied a contract renewal.

An advantage of contractual alternatives in this context is jurisdictional. Public universities generally must only obtain the approval of their governing boards when hiring senior administrative officials like presidents, provosts, and deans, as well as when hiring or promoting faculty with tenure. For all other faculty and staff categories—including entry level tenure-track faculty, visiting faculty, adjunct faculty, and clinical faculty—the hiring function remains under the exclusive direction of university administrators.<sup>198</sup> One way to bypass board involvement in tenure appointments is thus not to structure them as such. Instead, faculty who meet certain criteria could be retained pursuant to long-term contracts developed to track the core rights of current tenured faculty but which fall within employment categories that do not require approval from bodies beyond campus. The immediate effect

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196. See Charles T. Clotfelter, *Can Faculty Be Induced to Relinquish Tenure?*, in THE QUESTIONS OF TENURE, *supra* note 82, at 225–28, 230–31, 235–38, 240–42; McPherson & Winston, *supra* note 187, at 117–18.

197. In a related university context, several schools recently extended “lifetime” contracts to certain coaches within their athletics programs. Under these contracts, the coaches’ appointments are presumptively renewable on a rolling basis and the grounds for dismissal are significantly narrowed. See, e.g., Jeff Borzello, *Kansas Jayhawks Sign Basketball Coach Bill Self to Lifetime Contract*, ESPN (Apr. 2, 2021), [https://www.espn.com/mens-college-basketball/story/\\_/id/31183214/kansas-jayhawks-sign-bill-self-life-contract](https://www.espn.com/mens-college-basketball/story/_/id/31183214/kansas-jayhawks-sign-bill-self-life-contract) [https://perma.cc/3MLJ-BJ4Q]; Adam Zagoria, *John Calipari Signs Lifetime Contract at Kentucky Worth \$86 Million*, FORBES (June 13, 2019, 6:54 PM), <https://www.forbes.com/sites/adamzagoria/2019/06/13/john-calipari-signs-lifetime-contract-at-kentucky-worth-86-million/?sh=2c3c10b3e384> [https://perma.cc/FF2S-GBWL].

198. The rationale for dividing hiring authority in this way reflects the practical realities and scope of modern university operations. Universities are complex organizations that employ thousands of people in countless different capacities. It would be difficult if not impossible for boards to meaningfully supervise the ongoing hiring activity that must occur at collegiate, departmental, and unit levels to keep institutions running smoothly. Yet, to uphold their broad oversight responsibilities, governing boards typically do retain an active role in vetting personnel who stand to impact university operations in the most significant financial and policy-oriented ways: senior administrators and tenured faculty. See, e.g., *Policy Manual* § 2.1: Human Resources, BD. OF REGENTS, STATE OF IOWA, <https://www.iowaregents.edu/plans-and-policies/board-policy-manual/21-human-resources> [https://perma.cc/KC42-M5A2]; *Operations Manual* § III.9.1: Appointments, General, UNIV. OF IOWA, <https://opsmanual.uiowa.edu/iii-91-appointments-general> [https://perma.cc/P5XY-9UJA].

of this approach would be to prevent governing boards from holding up or blocking campus-level appointments of high-quality instructors who would ordinarily qualify for tenure. UNC tried something similar once it became clear its Board of Trustees was not going to act on Hannah-Jones' tenure application. The university obviated board involvement by recategorizing its offer to Hannah-Jones as one for a five-year term contract.<sup>199</sup>

A model utilizing individual tenure-like contracts can also create room for additional regulatory deterrence. For instance, in tandem with contractual provisions that mimic tenure's traditional attributes, schools could further lessen faculty vulnerability by drawing upon common features found in executive change of control agreements. These agreements provide corporate executives with safeguards in the event their employment status becomes uncertain because of a merger or acquisition.<sup>200</sup> They accomplish this goal by triggering substantial severance payouts—known as “golden parachutes”—if an executive's employment is involuntarily terminated or her duties are substantially diminished following certain events.<sup>201</sup> The prospect of a payout in this situation reduces some of the personal risk that the executive faces if control of her company changes.<sup>202</sup> Faculty who would otherwise possess tenure but for changes in institutional policy share similar interests in security and stability. With that in mind, faculty contracts could be structured to oblige universities to make large severance payouts or provide continuous salary payments if dismissal occurs under circumstances that deviate from the substantive and procedural rules now associated with tenure. Inclusion of these terms would provide additional long-term economic protection to the faculty at issue, and the risk of steep financial penalties ought to discourage universities from pursuing summary terminations in all but the same extreme cases where tenure loss has always been acceptable.

Even with the possibility of creative contracting, however, there are several significant drawbacks to a “tenure” strategy premised on individual agreements that limit its appeal. The first problem is timing. Many of the contractual techniques described

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199. Robertson, *supra* note 171.

200. See EXEC. LEGAL SUMMARY 354: CHANGE OF CONTROL AGREEMENTS, Westlaw (June 2022).

201. See *id.*

202. See DEFENDING AGAINST HOSTILE TAKEOVERS, PRAC. L. CORP. & SECS., Westlaw Practical Law Practice Note 9-386-7206 (Oct. 2022).



above reflect regulatory gaps that enable universities to take advantage of current divides in board hiring authority to carve out greater independence. A legislature or governing board looking to further restrict university employment discretion could simply amend existing laws or policies to close those loopholes.<sup>203</sup> For example, a governing board might add to the list of matters requiring its formal approval any employment contract for more than a two-year term. South Carolina's proposed "Cancelling Professor Tenure Act" does something similar by limiting faculty to five-year employment contracts.<sup>204</sup> Or, as was briefly floated in Iowa, lawmakers could enact legislation placing university financial commitments above certain thresholds subject to authorization through the state's ordinary appropriations process.<sup>205</sup> In either case, a university's freedom to make creative use of existing employment powers would be short lived.

Additional obstacles include cost, marketability, and the competition for talent. The resources necessary to enter long-term contracts with faculty may be as substantial as with a tenure system, making this strategy incapable of fully resolving the financial concerns that often motivate tenure reform efforts. High-quality faculty with at least a modest degree of choice in appointment type and location will also reasonably demand higher compensation in exchange for accepting a renewable contract over lifetime tenure, thereby limiting the ability of this approach to fully address the cost concerns that often drive tenure reform. While the largest and most prestigious public universities might be able to afford to "buy" faculty with contractual tenure in this way, many others—especially those in less attractive geographic locales—will struggle to compete at a scale comparable to what they can accomplish by offering traditional tenure as the primary incentive to join or stay.<sup>206</sup>

By the same token, the status of tenure does more than just make dismissal harder. Tenure represents the pinnacle of peer recognition and achievement. It bolsters a faculty member's

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203. Even if a university's lay governing board is friendly to an arrangement negotiated by the school, the state legislature can always step in and regulate the board. See Michael R. Mills, *Stories of Politics and Policy: Florida's Higher Education Governance Reorganization*, 78 J. HIGHER EDUC. 162, 174–75 (2007).

204. H. 4522, 2022 Gen. Assemb., 124th Sess. (S.C. 2022); Jeremy Bauer-Wolf, *National AAUP Condemns Bill to End Tenure at South Carolina Public Colleges*, HIGHER ED DIVE, <https://www.highereddive.com/news/south-carolina-lawmakers-propose-ending-tenure-at-states-public-colleges/610483/> [<https://perma.cc/3TSU-HQHT>] (Dec. 2, 2021).

205. H.S.B. 66, 89th Gen. Assemb., Reg. Sess. (Iowa 2021).

206. See Clotfelter, *supra* note 196, at 223–24.

reputational capital by sending perhaps the strongest possible signal of scholarly excellence. As such, so long as traditional tenure remains the predominant method for establishing academic credibility, many faculty will shy away from schools experimenting with alternative contractual models in order to preserve their professional standing.<sup>207</sup> Only in the unlikely event that a substantial number of preeminent universities or faculty opt to deviate from the norm of offering traditional tenure will this prevailing market attitude be apt to change.<sup>208</sup> Indeed, absent a wholesale shift in perceptions of the value of tenure, any university that contemplates alternative governance or employment arrangements in response to regulatory interference will risk steep reputational damage.<sup>209</sup>

Finally, using contracts as a means of replicating tenure will make it difficult for universities to match the strong support for academic freedom and academic integrity that traditional tenure systems now provide. For one, shifting to a process of periodic contractual renewal as a substitute for “all-or-nothing” pre-tenure probation makes each performance review less significant. It will invite shirking on the part of review committees, and it may also cause faculty within the same renewable contract category to avoid evaluating their colleagues as strictly as might be appropriate out of fear of setting too high a bar for the assessment of their own performance.<sup>210</sup> Most critically, though, by definition any term

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207. In fact, the symbolic power of tenure is what usually leads schools without tenure systems to eventually add them. They find that tenure is a precondition to attracting faculty of the quality necessary to raise or maintain a reputation as a research institution. William T. Mallon, *Why is Tenure One College's Problem and Another's Solution?*, in *THE QUESTIONS OF TENURE*, *supra* note 82, at 249–55. For these and similar reasons, Chatham University reintroduced a faculty tenure system in 2022 after eliminating it in 2005. According to the school's press release announcing the change, “the new tenure contract system will expand the definition of scholarship, help reduce administrative resources, provide more clarity and job security for faculty, and attract, retain, and diversify top faculty talent.” *Chatham University Trustees Approve the Reintroduction of Faculty Tenure*, PULSE@CHATHAMU (Feb. 14, 2022), <https://www.pulse.chatham.edu/blog-announcements/2022/2/14/chatham-university-trustees-approve-the-reintroduction-of-faculty-tenure> [<https://perma.cc/HD34-EZA5>]. Joseph MacNeil, the interim dean of Chatham's School of Arts, Science and Business chaired the campus committee that recommended the restoration of tenure. He stated that the two most significant reasons his committee made its recommendation were to improve faculty recruitment and faculty morale. Colleen Flaherty, *A Return to Tenure*, *INSIDE HIGHER ED* (Feb. 16, 2022), <https://www.insidehighered.com/news/2022/02/16/chatham-u-expected-adopt-tenure-system-again> [<https://perma.cc/3DM7-5PKK>].

208. Clotfelter, *supra* note 196, at 239.

209. Judith Areen, *Governing Board Accountability: Competition, Regulation, and Accreditation*, 36 *J. COLL. & U.L.* 691, 708 (2010).

210. McPherson & Schapiro, *supra* note 3, at 95.

system provides faculty with less assurance of academic freedom than traditional tenure. If the lengths of contract terms are too short, then faculty with long-term research projects or ambitions will be reluctant to accept them since doing so would introduce conditions of uncertainty not found with tenure. Likewise, the prospect of needing to pass a series of continuous reviews will increase the likelihood that faculty become unwilling to pursue controversial or unconventional research out of fear of offending the persons charged with making their appointment or renewal decisions.

### C. *Privatization and Structural Innovation*

A strategy similar to replicating tenure through private employment contracts is the use of alternative organizational forms and relationships. In the conventional regulatory model, public universities, as state-owned enterprises, receive their authority from state lawmakers and the lay boards that oversee them.<sup>211</sup> These actors determine the level of independence that universities within their jurisdictions possess to make campus-level decisions. Thus, with respect to tenure, legislators can enact statutory measures to reshape a state's tenure system in ways that public universities must comply with despite disagreeing with them, and boards can impact tenure by using their authority to reform university policies or withhold approval for individual tenure applications. Less directly, boards retain strong influence over general campus operations through their ability to hire, monitor, and fire university presidents.

One option to shield tenure from legislative or board interference within this system is privatization. Privatization can take several forms, but in the broadest sense it reflects the regulatory philosophy "that 'government should steer, not row.'"<sup>212</sup> Proponents of privatization "argue that it is better for government to step back from day-to-day managerial matters and instead focus on goals and outcomes."<sup>213</sup> Applied to public universities, this approach would see public university governing boards act more akin

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211. Lowry, *supra* note 7, at 304; Michael K. McLendon & James C. Hearn, *Mandated Openness in Public Higher Education: A Field Study of State Sunshine Laws and Institutional Governance*, 77 J. HIGHER EDUC. 645, 647–48 (2006).

212. Kaplan, *supra* note 185, at 115–16 (quoting DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* 25 (1993) (quoting a regulatory philosophy of E.S. Savas)).

213. *Id.*

to corporate boards of directors by setting high-level policy goals but then affording near-exclusive managerial discretion to senior campus executives hired to execute them.

More direct applications of privatization include deregulation, outsourcing, and restructuring. Deregulation means granting institutions explicit autonomy to make certain operational decisions.<sup>214</sup> For example, deregulation might entail a state's governing board authorizing public universities to set their own tuition rates and admissions standards rather than reserve those powers for itself. Outsourcing goes a step farther. It involves forming contracts that authorize private organizations to provide goods or services that were previously under public control.<sup>215</sup> Common illustrations of outsourcing at universities include contracting with private companies to provide food services in dormitories or to operate the campus bookstore.<sup>216</sup> Finally, restructuring refers to the creation of private affiliate organizations or spin-offs designed to provide specific supporting functions to a public entity that creates them.<sup>217</sup> The most familiar restructuring scenarios in public higher education occur when universities organize their charitable foundations or athletics departments as independent 501(c)(3) non-profit corporations.<sup>218</sup>

Each privatization strategy, alone or in tandem, holds the potential to better protect university autonomy over academic matters like faculty hiring and tenure. The most promising options are general acquiescence and deregulation. If legislators and boards voluntarily agree to leave tenure rules and decisions up to the individual universities they govern, then concerns about public interference in tenure matters become largely moot. By contrast, outsourcing and restructuring are actions that universities can initiate on their own in situations where they enjoy less regulatory support.

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214. *See id.* at 109.

215. Robert C. Lowry, *Incomplete Contracts and the Political Economy of Privatization*, in *PRIVATIZING THE PUBLIC UNIVERSITY: PERSPECTIVES FROM ACROSS THE ACADEMY*, *supra* note 185, at 51.

216. Jon Marcus, *More Colleges and Universities Outsource Services to For-Profit Companies*, WASH. POST (Jan. 8, 2021, 12:00 PM), [https://www.washingtonpost.com/local/education/colleges-outsourcing-services/2021/01/07/c3f2ac6a-5135-11eb-bda4-615aaefd0555\\_story.html](https://www.washingtonpost.com/local/education/colleges-outsourcing-services/2021/01/07/c3f2ac6a-5135-11eb-bda4-615aaefd0555_story.html) [perma.cc/8ECD-NSUM].

217. Peter D. Eckel & Christopher C. Morpew, *The Organizational Dynamics of Privatization in Public Research Universities*, in *PRIVATIZING THE PUBLIC UNIVERSITY: PERSPECTIVES FROM ACROSS THE ACADEMY*, *supra* note 185, at 91.

218. *See* McLendon & Hearn, *supra* note 211, at 652.

Consider here the creation of independent 501(c)(3) nonprofits or limited liability companies (“LLCs”) as private university affiliates. The advantage of these private organizational forms is that they provide greater flexibility and control to the university that establishes them. For instance, with respect to university foundations, managing donations through a separate non-profit enables schools to receive and use funds directly without needing to navigate restrictions that otherwise apply to state budgeting and procurement processes.<sup>219</sup> Independent private affiliates can also receive grants from organizations that do not fund government agencies, and, in some jurisdictions, can rely on their private status to safeguard donor information from public records requests and government scrutiny.<sup>220</sup>

Extending this concept to tenurable faculty could entail a public university forming a nonprofit corporation or LLC—e.g., a Faculty College—for the purpose of contracting to provide teaching and research services to the parent institution. The Faculty College in this illustration, as an independent private firm, would remain the employer of record for all or a subset of faculty who, in turn, agree to teach and engage in scholarly activities pursuant to contracts negotiated between the university and its affiliate.<sup>221</sup> Faculty employed and organized in this way would then be free to adopt the policies they deem best for protecting academic freedom—including those around tenure—that mirror the ones enjoyed by their counterparts at private institutions.

Some states have already taken major steps toward a more privatized approach to public university governance. For example, in the early 2000s, the Virginia General Assembly designated several public universities as “quasi-public corporations” or “charter colleges” to loosen state regulation over campus operations in exchange for providing less in direct state appropriations.<sup>222</sup> The

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219. Martha T. McCluskey, *Following the Money in Public Higher Education Foundations*, AM. ASS'N UNIV. PROFESSORS: ACADEME (Jan.–Feb. 2017), <https://www.aaup.org/article/following-money-public-higher-education-foundations#.YSU-4N9OIPY> [<https://perma.cc/5W4E-NUZQ>].

220. See Will Jarvis, *Florida Universities Have Turned Athletics Departments Into Quasi-Private Arms. What Does That Mean for Public Accountability?*, CHRON. HIGHER EDUC. (June 17, 2019), <https://www.chronicle.com/article/florida-universities-have-turned-athletics-departments-into-quasi-private-arms-what-does-that-mean-for-public-accountability/> [<https://perma.cc/3YCG-2AFJ>].

221. See Kaplan, *supra* note 185, at 115–116.

222. Michael K. McLendon & Christine G. Mokher, *The Origins and Growth of State Policies that Privatize Public Higher Education*, in *PRIVATIZING THE PUBLIC UNIVERSITY*:

University of Virginia, Virginia Tech, and the College of William & Mary each accepted the legislature's proposal after determining that the tradeoff of less public financial support for near total academic autonomy was in their schools' best interests.<sup>223</sup> The General Assembly still sets high-level educational goals for its state universities under this new regulatory approach, but the operational choices about how to achieve them are now in the hands of campus managers.<sup>224</sup> Similar measures have been introduced in Maryland and New Jersey.<sup>225</sup>

Still, as with private employment contracts, privatization and the use of alternative entities is unlikely to be a long-term cure-all to public threats against tenure. One problem implicates political economy concerns. The few examples of privatization that have successfully led to greater public university autonomy occurred in states where there was strong legislative and gubernatorial support for that approach.<sup>226</sup> If lawmakers and governing boards elsewhere do not react as favorably toward ceding more local control to public universities, then they will be reluctant to authorize the actions necessary for it to happen, especially when it would mean the loss of powers they currently enjoy.<sup>227</sup>

A related concern is funding. To the extent that efforts to afford greater independence to universities receive the necessary political support, they will invariably be met with corresponding reductions in state appropriations—as in the case of the Virginia model.<sup>228</sup> Again, some institutions will be better positioned to accept that exchange than others.<sup>229</sup> International public research universities on the scale of University of Virginia or the University of California

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PERSPECTIVES FROM ACROSS THE ACADEMY, *supra* note 185, at 20; *see* Lowry, *supra* note 215, at 53–54; Kaplan, *supra* note 185, at 112–13.

223. *See* Lowry, *supra* note 215, at 52.

224. *See id.*

225. Robert O. Berdahl, *Balancing Self-Interest and Accountability: St. Mary's College of Maryland*, in SEEKING EXCELLENCE THROUGH INDEPENDENCE: LIBERATING COLLEGES AND UNIVERSITIES FROM EXCESSIVE REGULATION 59, 59–60 (Terrence J. MacTaggart & Associates eds., 1998); Darryl G. Greer, *Defining the Scope and Limits of Autonomy: New Jersey*, in SEEKING EXCELLENCE THROUGH INDEPENDENCE: LIBERATING COLLEGES AND UNIVERSITIES FROM EXCESSIVE REGULATION, *supra* note 225, at 84–85.

226. *See* Berdahl, *supra* note 225, at 63, 65, 69; Greer, *supra* note 225, at 84.

227. Lowry, *supra* note 215, at 54 (“[I]n practice, only those [measures] that leave state government officials at least as well off as they are now will receive consideration.”).

228. *See* McLendon & Mokher, *supra* note 222, at 20; Lowry, *supra* note 215, at 53–54; Kaplan, *supra* note 185, at 112–13.

229. *See* Terrence J. MacTaggart, *Preface* to SEEKING EXCELLENCE THROUGH INDEPENDENCE: LIBERATING COLLEGES AND UNIVERSITIES FROM EXCESSIVE REGULATION, *supra* note 225, at xii.

system may possess the reputations and resources necessary to successfully implement privatization strategies without state support, but many others will struggle to make up the difference if state funding decreases any further, particularly if the receipt of more autonomy does not include the ability to set tuition. This risk is most salient for regional and two-year public colleges that rely heavily on state appropriations to compensate for smaller endowments, less research funding, and fewer private donors. The prospective benefits of autonomy will mean little without ensuring that enough institutional funds remain available to keep operations afloat or pay for the services of a private faculty affiliate. In the same way, if the parent institution's finances suffer, a private affiliate may lack the means to generate sustaining income on its own. The affiliate might find that no market exists for the services of its faculty employees or members beyond the university that established it.

Funding concerns also raise corresponding questions about accountability. State actors may be reluctant to permit privatization in the public university context out of fear it will make schools less accountable to state objectives. This attitude recalls the classic problem of agency costs.<sup>230</sup> A danger of putting employees in charge of policy and management is that they will drift toward complacency or self-dealing.<sup>231</sup> In the university setting, this theory suggests faculty who gain greater authority over academic matters could take teaching and research in directions that do not align with the goals of state policymakers. Faculty traditionally require and enjoy considerable discretion to teach and engage in scholarship, but, as with all forms of discretion, this freedom creates room for self-serving behavior. Faculty tend to prioritize “academics (e.g., prestige, selective admissions, and fundamental research) . . .” whereas public officials typically focus on “cost control, broad-based access, and applied research.”<sup>232</sup> It is for this reason that states often utilize coordinating boards to oversee public university

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230. See Gregory H. Shill, *The Golden Leash and the Fiduciary Duty of Loyalty*, 64 UCLA L. REV. 1246, 1264–65 (2017) (citing Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 301 (1983)).

231. See Patrick M. Callan, Kathy Reeves Bracco & Richard C. Richardson, Jr., *State Policy for a Time of Adaptive Change*, in SEEKING EXCELLENCE THROUGH INDEPENDENCE: LIBERATING COLLEGES AND UNIVERSITIES FROM EXCESSIVE REGULATION, *supra* note 225, at 117.

232. Mark Stater, *Policy Lessons from the Privatization of Public Agencies*, in PRIVATIZING THE PUBLIC UNIVERSITY: PERSPECTIVES FROM ACROSS THE ACADEMY, *supra* note 185, at 137.

systems. Supporters of centralized coordination believe it enables boards to ensure universities comply with state priorities to the extent they deviate from the goals that local administrators or faculty would otherwise pursue.<sup>233</sup>

Two final limitations of privatization involve related practical and legal considerations. The novelty of reorganizing public university faculty within a private affiliate will no doubt prompt many of the same viability concerns identified above regarding private employment contracts. For example, faculty will reasonably be skeptical of joining a public university's private affiliate as their academic "home" if most schools continue to operate faculty appointments in the conventional fashion. They will require reassurance that an alternative employment relationship will neither negatively impact their professional reputations nor deny them access to the same institutional benefits associated with the prevailing university governance model.<sup>234</sup>

This latter concern underscores the high contracting and monitoring costs sure to accompany privatization. The more complex a task becomes, the harder it is to bargain over price and performance in advance.<sup>235</sup> This dynamic will make contracting in higher education especially hard. What faculty do in terms of teaching and research success is rarely easy to measure or evaluate using objective criteria. Should research performance be judged by citation counts, the placement of publications, positive societal impact, or amounts of grant funding?<sup>236</sup> Should teaching be assessed by student evaluations, graduate job placement, or class enrollment

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233. See Lowry, *supra* note 215, at 47.

234. For example, while external grant funding can generally follow any faculty members who transition their employment to a new entity, the researchers may still need to rely on the parent university's existing infrastructure for benefits like laboratory access, library services, information technology support, and the ability to hire graduate assistants and postdoctoral fellows. Ensuring that faculty maintain the ability to tap into these features upon moving to a separate affiliate, as well as deciding how the funding to support them will be apportioned, will require sophisticated contracting.

235. Laura A. Dickinson, *Public Values/Private Contract*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 335, 348 (Jody Freeman & Martha Minow eds., 2009) ("By their very nature, results-based contracts raise difficult questions about how best to measure output. Creating benchmarks may be relatively straightforward if the project at issue involves simply building a bridge or dam, but it is very difficult to measure intangibles, such as fostering human development or building civil society. Likewise, short-term results, such as whether food aid was delivered, are much easier to measure than longer-term systemic efforts to alleviate poverty, provide education, and so on.").

236. Benjamin E. Hermalin, *Higher Education Boards of Trustees*, in GOVERNING ACADEMIA 28, 30–31 (Ronald G. Ehrenberg ed., 2004).



size?<sup>237</sup> Unlike outsourcing to operate food services or operate a bookstore, these criteria introduce inherent ambiguities and elements of subjectivity that make it difficult to articulate performance expectations *ex ante* via contract.<sup>238</sup>

Similarly, several aspects of basic campus operations may prove too expensive to accommodate through contracting. Curricular needs change, room availability and enrollments fluctuate, student demand for courses often varies, and resources for student financial aid or new research opportunities shift over time. Yet if a university is obligated to obtain all or most of its teaching and research from a private affiliate pursuant to contract, it may be unable to gain the administrative flexibility necessary to adapt to evolving demands or goals without incurring significant additional costs.<sup>239</sup> The desire to avoid the high transaction costs inherent in securing complex faculty services through the open market is one reason why administering them within a single university enterprise is so attractive.<sup>240</sup> In the traditional university governance model, presidents, provosts, deans, and department chairs possess the discretion and flexibility to reallocate many routine teaching and research responsibilities without needing to renegotiate contracts with each instructor or otherwise radically adjust their strategic plans. It is also fair to presume that parent universities will be reluctant to contract away their ability to engage in direct oversight of faculty performance since they will likely share the blame for any problems created by a private affiliate. For instance, if students are unhappy with the quality of instruction they receive in an affiliate model, they are unlikely to parse their criticisms along legally precise lines of managerial authority—the target of their ire will simply be the “university,” which in their mind will include

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237. *See id.*

238. Kaplan, *supra* note 185, at 126; Stater, *supra* note 232, at 142. When there is a wide range of legitimate decisions a worker can make, it is most costly to monitor and evaluate the quality of those decisions. Dickinson, *supra* note 235, at 348.

239. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 667–68 (2000) (noting the “challenges governments face whenever they use contract, namely, the difficulty of drafting and monitoring the agreements. Tension inevitably develops between the desire to provide sufficient contractual specificity to enable meaningful monitoring and the temptation to leave terms flexible enough to allow adaptations in light of changing conditions. The administrative law demand for accountability presses for greater contractual specificity; however, no contract can be sufficiently specific to anticipate any and all situations that parties might encounter”).

240. Ronald H. Coase, *The Institutional Structure of Production*, 82 AM. ECON. REV. 713, 715–16 (1992).

all the major academic and organizational components contributing to their educational experience.<sup>241</sup>

Finally, whether courts will recognize the formal separateness of a private affiliate created to govern faculty is an open question. In analogous cases involving public university foundations organized as private 501(c)(3) nonprofits, several courts have deemed the foundations “state actors” for the purposes of public regulation because they perform a government function or share a “common interest” with the state.<sup>242</sup> For example, in *Gannon v. Board of Regents*, the Iowa Supreme Court held that Iowa’s open records laws applied to the private non-profit foundation of a public university because the foundation’s role in fundraising supported the university’s statutorily defined function of educating the state’s populace.<sup>243</sup> The service agreement between the university and the foundation specified that the foundation would provide services as an independent contractor rather than as an agent of the university, but the Court indicated that a state entity cannot outsource one of its “core functions” to a private entity and hope to shield that aspect of its operations from public oversight.<sup>244</sup>

Other courts to consider the separateness issue focus on the combination of funding sources and the identities of the parties who benefit from the public-private relationship. If a private affiliate receives at least some state funding and provides services that benefit a state entity, then it is more likely to be ruled a state actor.<sup>245</sup> Even without direct state funding support, some courts find that a private entity should be regulated as a public actor based solely on who benefits. Thus, in *Southern Illinois University*

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241. Faculty employed by a private affiliate may share a similar concern. At present, faculty can influence campus operations through traditional shared governance channels. However, those options may be foreclosed in a privatized model, making it harder for faculty to bargain to receive benefits not previously included in a contractual arrangement between the parent and the affiliate.

242. Salin G. Geevarghese, *Looking Behind the Foundation Veil: University Foundations and Open Records Laws*, 25 J. L. & EDUC. 219, 228, 230–32 (1996).

243. 692 N.W.2d 31, 33, 36, 41 (Iowa 2005).

244. *Id.* at 33, 35, 39.

245. See *Toledo Blade Co. v. Univ. of Toledo Found.*, 602 N.E.2d 1159, 1160 (Ohio 1992) (holding that private foundation was public agency because it received state funding by virtue of free office space on university property and played a policy-making role for university as its fundraiser); *Weston v. Carolina Rsch. & Dev. Found.*, 401 S.E.2d 161, 162–64 (S.C. 1991) (holding that private foundation of University of South Carolina was a public body because it operates for exclusive benefit of the university and obtained some funds that originated from the university, namely partial proceeds from the sale of a university building).

*Foundation v. Booker*, an Illinois appellate court ruled that land owned by a private foundation and then leased to a public university was “public” for the purposes of a property tax exemption since the university was the true party in interest and received all the practical benefits from using the land.<sup>246</sup>

These cases indicate that privatization efforts to evade state regulation of tenure could prove difficult to sustain. Like nonprofit foundations, the purpose of a private entity created to provide teaching and research services would be to support and advance the university’s public education mission. Besides, as *Gannon* suggests, courts are likely to approach privatization attempts that appear designed to sidestep specific laws—such as those eliminating tenure—with heightened skepticism.

#### D. Collaborative Governance

As the discussion reveals so far, legal strategies based on contracting, privatization, and alternative organizational structures all suffer from weaknesses that make them unlikely candidates on their own to secure tenure from regulatory attack. Most of these options also assume a defensive and, in some cases, almost adversarial posture. They emphasize the search for regulatory gaps and creative workarounds that might be tapped if tenure comes under direct threat, but they do little to proactively or systematically address the underlying concerns that often trigger efforts to impair tenure in the first place. Thus, even if private law tactics may, in theory, be capable of delaying or deflecting regulatory manifestations of anti-tenure sentiment, they appear ill-equipped to avert them over the long run.

A more promising way to sustain tenure is one that applies collaborative governance theory to the current framework of university governance and oversight. Applying a governance-based approach has the advantage of being forward-looking, durable, less reactionary, and better able to cut through political posturing to garner bipartisan and multi-stakeholder support.

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246. 425 N.E.2d 465, 468, 470–71 (Ill. App. Ct. 1981).

## 1. What is Collaborative Governance?

Governance refers to the systems, procedures, and activities that determine how power is exercised and decisions are made within a social group or organization.<sup>247</sup> Collaborative governance manifests within this general frame as an approach to governance reliant upon “processes and structures of public policy decision making and management that engage people constructively across the boundaries of public agencies, levels of government, and/or the public, private, and civic spheres in order to carry out a public purpose that could not otherwise be accomplished.”<sup>248</sup> Similar to new governance, which emphasizes the ability of private actors to advance public policy goals outside of a strict command-and-control regulatory regime, collaborative governance is described as a natural outgrowth of American federalism in that it envisions public and private stakeholders working together in a hybrid system of co-management to find win-win solutions to complex problems.<sup>249</sup> The practical steps that give effect to this approach can unfold in many ways, but they typically rely on a collective and consensus-based process of (a) identifying a specific public policy issue or question in need of attention, (b) developing and evaluating options to address it, (c) implementing solutions, (d) monitoring or enforcing the selected strategy, and (e) reviewing the efficacy and consequences of the chosen path.<sup>250</sup>

Importantly, collaborative governance shares several similarities with prevailing norms and best practices already associated with modern university governance. Returning to the early twentieth century, a supposed benefit of introducing the lay governing board structure to public universities was its potential to curtail political interference in campus matters.<sup>251</sup> If a governor or legislature wanted to meddle with faculty curricular or research decisions for political reasons, the hope was that the board would serve

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247. See Kirk Emerson et al., *Integrative Framework for Collaborative Governance*, 22 J. PUB. ADMIN. RSCH & THEORY 1, 2 (2012) (citations omitted); Lisa Blomgren Bingham, *Reflections on Designing Governance to Produce the Rule of Law*, 2011 J. DISP. RESOL. 67, 70 (2011).

248. Emerson, *supra* note 247, at 2.

249. *Id.* at 3.

250. Lisa Blomgren Amsler & Elise Boruvka, *Teaching Democracy Through Practice: Collaborative Governance on Campus*, 2019 J. DISP. RESOL. 73, 103–04 (2019).

251. Areen, *supra* note 209, at 699–700.

as an independent screen to protect academic autonomy.<sup>252</sup> However, as we have seen, a common consequence of the board's position as intermediary is simply a change in the source of campus interference from the government to the board level. To add a separate layer of faculty protection in the face of board overreach, the AAUP's *1915 Declaration* proposed a new form of university governance that contemplates a sharing of responsibilities among boards, central campus administrators, and faculty.<sup>253</sup> This concept is now known as "shared governance," and it enjoys as much prominence within universities as tenure.<sup>254</sup>

Shared governance posits that faculty should be given primary authority over all academic matters—including curriculum, instruction, research, and faculty status—with the board and central administrators separately charged with managing non-academic logistical and supporting functions like budgeting, human resources, campus building and capital projects, and maintenance of the university's endowment.<sup>255</sup> In addition, though shared governance draws a clear line between academic and administrative responsibility, it calls for "joint planning and effort" among all university constituents when major decisions affecting the institution need to be made.<sup>256</sup> As the AAUP puts it, shared governance's mandate of joint effort is essential because "[t]he variety and complexity of the tasks performed by institutions of higher education produce an inescapable interdependence among governing board, administration, faculty, students, and others."<sup>257</sup> The AAUP acknowledges that governing boards and university presidents remain the final two points of institutional power, but to remain in accord with shared governance principles, they urge non-faculty actors to "undertake appropriate self-limitation," especially when it comes to issues bearing on academic freedom.<sup>258</sup>

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252. *See id.* at 697–98.

253. *1915 Declaration*, *supra* note 47, at 4–5; Am. Ass'n. of Univ. Professors, *Statement on Government of Colleges and Universities* (1966), <https://www.aaup.org/report/statement-government-colleges-and-universities> [<https://perma.cc/74ER-MW6E>] [*hereinafter 1966 Statement*].

254. Gary A. Olson, *Exactly What is 'Shared Governance'?*, CHRON. HIGHER EDUC. (July 23, 2009), <https://www.chronicle.com/article/exactly-what-is-shared-governance/> [<https://perma.cc/4SLK-3QRQ>].

255. 1966 Statement, *supra* note 253.

256. *Id.*

257. *Id.*

258. Areen, *supra* note 209, at 701 (citing 1966 Statement, *supra* note 253).

Consistent with shared governance's emphasis on joint effort and planning, applying collaborative governance principles to the debate over tenure depends on involving multiple stakeholders in a synergistic decision-making process. The primary difference between shared and collaborative governance in this context, however, concerns the range of actors who should have seats at the table. Shared governance is localized to individual universities and involves only those stakeholders with established roles on each campus: faculty, staff, students, central administrators, and trustees. By contrast, collaborative governance encourages engagement across a more diverse population. Its scope is expansive enough to include collaboration among all public and private persons or groups who hold a strong interest in the policy matter at issue. Thus, in the case of higher education, a merger of shared and collaborative governance would lead to a collective decision-making process involving students, faculty, staff, and university administrators—the traditional pillars of shared governance—alongside other stakeholders affected by academic policy or who possess relevant expertise, including legislators, accreditors, academic consortia, alumni, and business and community leaders.

## 2. Bridging Collaborative and Shared Governance

How, then, can universities and faculty incorporate collaborative governance in their efforts to uphold tenure? For our purposes, we must first assume that legislators or boards desiring to interfere with or weaken tenure will initially be hesitant to engage with faculty and other academic stakeholders who oppose their objectives. Legislators and boards will likely see their current positions as strong enough not to require further engagement with parties that disagree with them, and, moreover, they may believe that collaborating with members of academia who are often seen as their political adversaries could damage their relationships with constituents and special interest groups. This mentality is consistent with the adversarialism that often accompanies the classic command-and-control approach to regulation, where lawmakers and governing authorities operate by establishing rules from a position of power and then encourage compliance through the threat of punishment.<sup>259</sup>

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259. See Chris Ansell & Allison Gash, *Collaborative Governance in Theory and Practice*, 18 J. PUB. ADMIN. RSCH. & THEORY 543, 544, 547 (2007).

Without the active involvement of relevant state actors, at least at the start, the process of building a foundation for collaborative governance will depend on establishing an initial point of leverage through joint action among a subset of public and private stakeholders willing to participate. The need here is to compensate for real or perceived imbalances in power. If some stakeholders lack the capacity or resources necessary for others to take them seriously, then stronger actors may manipulate the process for their benefit or simply decline to participate.<sup>260</sup> In our case, faculty and universities will not get far in their efforts to convince legislators or boards to collaborate on controversial issues like tenure unless they can show why they possess sufficient leverage to make the dialogic process appear mutually beneficial to all sides.

Forming a coalition capable of encouraging public officials to join the collaborative governance process will require two stages: coalition-building and empowerment. In the first stage, conditions must be present to convince a threshold group of stakeholders with an interest in the policy matter at issue to come together as a coalition to combine forces in the pursuit of further engagement. Scholars of collaborative governance observe that the ingredients necessary for this form of early collective action to emerge include the presence of one or more of the following: consequential incentives to act, a sense of interdependence, and feelings of uncertainty.<sup>261</sup> Consequential incentives are the internal or external problems or threats facing members of a stakeholder group that, if not adequately addressed, will lead to negative outcomes for each participant.<sup>262</sup> Interdependence refers to a recognition among stakeholders that they stand a better chance of accomplishing something together than if they act separately.<sup>263</sup> This driver is sometimes seen as another consequential incentive since the need for mutual reliance as a gateway to meaningful participation in the regulatory process often prompts parties to pursue collaborative governance in the first place.<sup>264</sup> Finally, uncertainty reflects the realization that the individual members of a stakeholder group often lack some of the informational pieces necessary to develop

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260. *Id.* at 551.

261. Emerson, *supra* note 247, at 9.

262. *Id.*

263. *Id.*

264. *See id.*

solutions to complex, multi-dimensional problems.<sup>265</sup> The prospect of having an opportunity to pool knowledge and resources to overcome information asymmetries can therefore become another powerful inducement to collaborate.<sup>266</sup>

Each of these drivers of collaboration appears present among the academic stakeholders most likely to be interested in or affected by regulatory activity targeting tenure. Consider, for example, a potential baseline coalition of public universities, their faculty, their alumni, accreditors, and consortia like university athletic conferences (e.g., the Big Ten) and formal university associations (e.g., the AAUP and/or AAU). The shared incentive for these actors to come together is the risk of harm to the entire academic enterprise that a loss or weakening of tenure will produce. As described earlier, tenure's primary function is to bolster academic freedom in teaching and research. Without it, universities will struggle to attract the highest quality scholars, their reputations will suffer, and the integrity of the research produced by their faculty will be jeopardized by the threat of political or other forms of interference from non-academics. Universities and their faculty obviously hope to avoid these consequences, but so will alumni, accreditors, and consortia. Alumni will not want the value of their degrees to diminish on account of a decline in the academic quality or reputation of their alma mater. Likewise, because accreditors and academic consortia see their missions in part or in full as improving the quality of higher education, promoting positive outcomes for students, and facilitating research that advances the public good, they too have an interest in ensuring that conditions on campuses throughout the United States remain capable of providing faculty the resources, security, and independence necessary to produce work with integrity and legitimacy.<sup>267</sup>

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265. *See id.* at 9–10.

266. *See id.* at 10.

267. *See, e.g., Who We Are*, AM. ASS'N OF UNIVS., <https://www.aau.edu/who-we-are> [<https://perma.cc/S8SY-28X5>] (“[T]he Association of American Universities is composed of America’s leading research universities. AAU’s 65 research universities transform lives through education, research, and innovation. Our member universities earn the majority of competitively awarded federal funding for research that improves public health, seeks to address national challenges, and contributes significantly to our economic strength, while educating and training tomorrow’s visionary leaders and innovators. AAU member universities collectively help shape policy for higher education, science, and innovation; promote best practices in undergraduate and graduate education, and strengthen the contributions of leading research universities to American society.”).



The same actors also depend on each other to accomplish their respective objectives, and they stand to benefit from sharing information and expertise. Because universities must be accredited to receive federal student financial aid, their reliance on accreditors is a critical component of their economic survival.<sup>268</sup> Furthermore, it is difficult to imagine a university overcoming the reputational damage that a loss of accreditation would have on its ability to attract students, faculty, and interest from donors and granting agencies. By the same token, accreditors cannot perform their work without assistance from the faculty at the institutions under review. Faculty prepare self-study reports and meet with external, uncompensated volunteer faculty peer reviewers as part of the fact-finding process accreditors use to evaluate an institution's compliance with applicable standards and identify areas of potential improvement.<sup>269</sup>

There is a similar symbiotic relationship between universities, alumni, and consortia. Cooperation and communication between faculty and alumni helps ensure that faculty stay aware of and responsive to the issues facing current and future graduates in industry. Relationships between universities and alumni can also create potential pipelines for greater fundraising support.<sup>270</sup> At a more systemic level, universities depend on formal conference and associational affiliations to facilitate intercollegiate athletic competition, research collaborations, revenue-sharing opportunities, and the development of best practices in a wide range of areas within higher education. For their part, consortia rely on the successes of their member institutions as they compete to garner prestige and remain influential. This concern is one reason why the Big Ten conference, for example, reportedly makes membership in the AAU a prerequisite to join.<sup>271</sup> The AAU is arguably the most elite academic association in the world, and membership in the invitation-only group represents one of the greatest scholarly achievements available to research-intensive institutions.

With conditions present to encourage an initial group of stakeholders invested in tenure to come together as a coalition, the

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268. Areen, *supra* note 209, at 726–27.

269. *Id.* at 719–21.

270. JOHN V. LOMBARDI, HOW UNIVERSITIES WORK 147–49 (2013).

271. Joseph Acosta, *What the Association of American Universities (AAU) has to do With Conference Expansion*, SPORTS ILLUSTRATED (Aug. 1, 2021 3:05 PM), <https://www.si.com/college/northwestern/football/what-the-association-of-american-universities-has-to-do-with-big-ten-expansion> [<https://perma.cc/XMV7-J695>].

second stage in convincing reluctant actors to join the collaborative governance process is empowerment. Empowerment is achieved when the now-engaged stakeholders successfully demonstrate they possess sufficient strength as a collective to merit the serious attention of the relevant public officials.<sup>272</sup> This is an area where the role of accreditors becomes especially critical. As already alluded to, accreditors provide assurance that universities meet established standards for quality and performance. Unlike most other countries that rely on government agencies to define standards for higher education, the United States' reliance on private accrediting agencies is meant to protect universities from undue government interference.<sup>273</sup> Yet there remains a strong financial link between accreditation and the federal government due to the large amount of funding the latter provides to higher education. Most significantly, federal law dictates that only universities accredited by an agency recognized by the U.S. Department of Education are eligible to receive federal student financial aid.<sup>274</sup> Given that approximately eighty-four percent of students attending public four-year universities receive some form of federal financial assistance, the economic incentives for schools to remain accredited are immense.<sup>275</sup>

From a governance perspective, the capacity of accreditors to greatly impact the operational health of public universities will bring to a coalition of academic stakeholders a powerful “stick” to incentivize public officials to join the collaborative process. Legislators and boards can easily dismiss advocacy efforts by faculty concerned about tenure since faculty occupy one of the lowest rungs on the state's regulating hierarchy. However, if a public university's accreditation is threatened on account of tenure reform, the same officials will now face pressure from the institution's students, alumni, external granting agencies, consortia, and any private businesses partnering with the school to prevent such a financially and reputationally disastrous outcome from occurring.

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272. See Emerson, *supra* note 247, at 14.

273. Areen, *supra* note 209, at 719.

274. In 1965, Congress passed the Higher Education Act (“HEA”), entrusting accrediting agencies with ensuring academic quality of the educational institutions at which federal student aid funds may be used, subject to oversight by the federal government through its recognition process. See 20 U.S.C. § 1001(a)(5); *Accreditation in the United States*, U.S. DEPT OF EDUC., [https://www2.ed.gov/admins/finaid/accred/accreditation\\_pg2.html](https://www2.ed.gov/admins/finaid/accred/accreditation_pg2.html) [<https://perma.cc/3QAD-VTGU>].

275. *Fast Facts: Financial Aid*, NAT. CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=31> [<https://perma.cc/PWC3-2MVU>].

Awareness of the broad collateral consequences that would accompany accreditation loss should thus shift the focus of the regulatory debate from a narrow position of state versus faculty to one where the state must engage with a much larger and more powerful group of interested participants to preserve its credibility and their support. It is in this respect that collaborative governance often comes to embody an iterative process. As the elements of consequential incentives, interdependence, and uncertainty evolve in the context of one stakeholder group, resulting repercussions can cause the universe of public and private actors invested in the collaborative process to expand.

### 3. Collaborative Blueprint for the Tenure Debate

Because collaborative governance reflects a process rather than a defined outcome, this Part will conclude by outlining how the suggestions above could be put into a usable framework to resolve the concerns motivating the tenure debate.

#### a. Organization

The intentional nature of collaborative governance means it does not emerge in a vacuum. One or more stakeholders must initiate the process and encourage others to participate. The parties must identify the issues to be addressed, meetings must be scheduled, and ground rules must be set to govern how decisions will be made. Typically, the presence of a facilitative leader is necessary for these organizational steps to come to fruition.<sup>276</sup> The single point of direction that a leader provides enables efficient communication among the participants and makes it easier to coordinate their activities.<sup>277</sup> Moreover, if disagreements arise, a leader seen as an “honest broker” will hopefully be able to mediate in such a way that keeps the process moving in a productive direction.<sup>278</sup> This function suggests that the leader should be someone who the parties regard as trustworthy, impartial, committed to due process, and willing to spend the time and energy necessary for collaboration to succeed.

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276. Emerson et al., *supra* note 247, at 9; Ansell & Gash, *supra* note 259, at 554–55.

277. Emerson et al., *supra* note 247, at 9; Ansell & Gash, *supra* note 259, at 554.

278. Ansell & Gash, *supra* note 259, at 555.

Candidates for the leadership role will vary depending on local circumstances and the current nature of the relationships between potential participants. However, since collaborative governance emerged as a way for individual public agencies or institutions to gain insights from a wider array of public and private actors, a promising option is someone with experience serving in a public leadership position that required fostering partnerships among internal and external stakeholders. In the case of collaboration on matters of academic policy like tenure, a current or former university president or dean might fit this description—ideally one who served during a time of relative peace between public officials and the state’s universities—as would a senior official from a major academic conference or private research organization.

If some stakeholders express disinterest in collaborative governance, then those who are willing to engage should seek to identify a leader who is respected and influential enough to stand a reasonable chance of convincing reluctant parties to join. In addition, in situations where a coalition must first be formed to generate leverage to get others on board, multiple leaders with different skill sets may be required: at least one to organize the initial coalition, and another to bring together the full complement of necessary participants.

Just as important as facilitative leadership is ensuring that the “right” people are at the table for the ensuing discussions.<sup>279</sup> Collaborative governance is most effective when the participants are thoughtful, fair-minded, knowledgeable about the issues under consideration, and willing to hear and consider competing viewpoints.<sup>280</sup> Of course, whether and to what extent each participant possesses these qualities may not become apparent until after the process begins—but without them, achieving consensus about facts or appropriate future actions may be impossible.<sup>281</sup>

With respect to tenure, the stakeholders most likely to be invested in this issue should already have leadership structures in place that make identifying potential representatives relatively straightforward. For example, a logical list of participants might include the chair and ranking minority member of state legislative committees on education, the presidents of university faculty senates or councils, one or two governing board members or university

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279. Emerson et al., *supra* note 247, at 11.

280. *See id.* at 11, 16.

281. *See id.* at 11–12.

trustees, university provosts or associate provosts, alumni association directors, and board members or senior administrative officials from accrediting agencies and academic consortia. These individuals should be well attuned to the issues under consideration and occupy positions of sufficient authority to be able to speak credibly on behalf of their respective groups, constituents, and organizations.

## b. Trust Building

As the collaborative process begins to take shape, an obvious challenge with pursuing this approach in the context of tenure is the antagonism that state and university stakeholders may feel toward each other. After all, the desire among legislators and boards to interfere with tenure is often borne from suspicion about faculty, a stated desire to limit their professional and financial security, and general skepticism about the value of public higher education.<sup>282</sup> Matters are further complicated when elected officials and political candidates make remarks that characterize faculty as biased, “sinister,” anti-American, or “the enemy.”<sup>283</sup> These conditions and comments reflect an “us versus them” mentality that often stymies productive dialogue over contentious issues.<sup>284</sup>

When conflict affects the collaborative process from the start, any future progress will first require a conscious effort to establish trust among the participants.<sup>285</sup> Building trust is what enables participants “to go beyond their own personal, institutional, and jurisdictional frames of reference and perspectives toward understanding other peoples’ interests, needs, values, and constraints.”<sup>286</sup> One initial strategy to deescalate tension among stakeholders that lack a history of cooperation is to insist upon face-to-face meetings. Face-to-face interactions are shown to lessen the risk of stereotyping, encourage professionalism, and enhance the clarity and accuracy of communication.<sup>287</sup> Early-stage meetings

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282. See *supra* Section II.B.

283. See, e.g., David Pitt, *Iowa Senate President Jake Chapman Says Press, Teachers have ‘Sinister Agenda’*, DES MOINES REG. (Jan. 11, 2022, 9:09 AM), <https://www.desmoinesregister.com/story/news/politics/2022/01/10/iowa-senate-gop-leader-press-teachers-have-sinister-agenda/9164884002/> [<https://perma.cc/7SRM-G4KJ>]; Reichman, *supra* note 11.

284. Ansell & Gash, *supra* note 259, at 553.

285. *Id.* at 558–59.

286. Emerson et al., *supra* note 247, at 13.

287. Ansell & Gash, *supra* note 259, at 558.

should also take place outside of public view to allow for the honest sharing of opinions and to discourage participants from using the opportunity for political posturing or grandstanding.

Once they begin, the focus during opening discussions should be on the search for shared interests and areas of common ground.<sup>288</sup> For instance, without referencing tenure, it is reasonable to presume that public and private stakeholders willing to engage in academic policy discussions will share at least some similar goals when it comes to subjects like keeping tuition affordable, supporting positive student outcomes, or advancing research and healthcare activities that benefit society at large. Though the parties may continue to disagree over the specifics for how to advance these goals, hopefully the realization that they seek certain comparable outcomes will begin to dampen any initial feelings of suspicion and antagonism. Indeed, the objective at the trust-building stage is not to develop shared beliefs on every point of contention but to generate mutual respect among participants *even when* they disagree.<sup>289</sup>

### c. Deliberation

If participants in the collaborative process overcome their distrust and demonstrate a capacity to engage in open, civil dialogue, then they can start deliberating over the specific policy matter at issue. Deliberation at this stage refers to a thorough examination of the participants' views, the joint development of relevant facts, and an attempt to reach consensus about how to move forward.<sup>290</sup> Crucially, deliberation in collaborative governance means more than just consultation.<sup>291</sup> The perceived legitimacy of the process and any eventual outcomes will depend on each participant feeling

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288. Emerson et al., *supra* note 247, at 11–12.

289. *Id.*

290. *Id.* at 12.

291. Ansell & Gash, *supra* note 259, at 546. (“Our definition of collaborative governance also sets standards for the type of participation of nonstate stakeholders. We believe that collaborative governance is never merely consultative. Collaboration implies two-way communication and influence between agencies and stakeholders and also opportunities for stakeholders to talk with each other . . . . Consultative techniques, such as stakeholder surveys or focus groups, although possibly very useful management tools, are not collaborative in the sense implied here because they do not permit two-way flows of communication or multilateral deliberation. Collaboration also implies that nonstate stakeholders will have real responsibility for policy outcomes. Therefore, we impose the condition that stakeholders must be directly engaged in decision making.”) (emphasis omitted).

she was directly involved and made meaningful contributions to the group's decisions.<sup>292</sup> This level of active joint participation is what distinguishes collaborative governance from more one-directional forms of regulatory engagement like lobbying or the issuance of public statements.<sup>293</sup>

One reason to be optimistic about deliberation in the context of the tenure debate goes back to the role of accreditation. As we observed, the threat of accreditation loss is likely the most powerful incentive available to encourage anti-tenure officials to join a collaborative effort. Yet a concern with using the accrediting process as the stick to bring recalcitrant public officials to the table is the possibility it may result in a series of specific demands—i.e., require tenure as a prerequisite to accreditation—that could be seen as an attempt to foreclose discussion of matters on which the parties disagree. Put another way, legislators or boards might interpret the threat of accreditation loss as an effort to blackmail them into removing tenure from the regulatory agenda before their underlying concerns about such issues as cost, flexibility, or bias can be addressed.

However, this worry reflects a fundamental misunderstanding about how accreditors operate, as well as why collaboration in the shadow of accreditation holds strong appeal. The focus of accreditation is on an institution's compliance with broad standards rather than narrow rules. The reason for this approach is that accreditors must craft criteria capable of being applied fairly to every college or university they evaluate. Since all schools vary in terms of size, level of resources, student and faculty composition, geographic footprint, and areas of academic priority, it is impossible to utilize a one-size-fits-all accrediting model. The specific factors and metrics that make the most sense when evaluating the academic quality of a 60,000-student public research university will vary greatly from those best suited to assessing a much smaller public liberal arts college. Accordingly, accreditors seek to develop standards and practices that go to the core of what it means to be

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292. *Id.*

293. *Id.* ("We impose the criteria of formal collaboration to distinguish collaborative governance from more casual and conventional forms of agency-interest group interaction. For example, the term collaborative governance might be thought to describe the informal relationships that agencies and interest groups have always cultivated. Surely, interest groups and public agencies have always engaged in two-way flows of influence. The difference between our definition of collaborative governance and conventional interest group influence is that the former implies an explicit and public strategy of organizing this influence.").

a legitimate institution of higher education while also remaining flexible enough to accommodate the unique characteristics of each school they review.

The approach taken by the Higher Learning Commission (“HLC”), one of the six regional accreditors of colleges and universities in the United States, offers a useful illustration of how the system works. The HLC evaluates five areas for accreditation: (1) mission; (2) integrity: ethical and responsible conduct; (3) teaching and learning: quality, resources, and support; (4) teaching and learning: evaluation and improvement; and (5) institutional effectiveness, resources, and planning.<sup>294</sup> Within each area, the HLC provides criteria used to determine compliance along dimensions every institution should be able to satisfy even if their specific methods and means of doing so differ.

For example, the HLC’s second criterion on Integrity: Ethical and Responsible Conduct asks whether the “institution is committed to academic freedom and freedom of expression in the pursuit of truth,” as well as whether its “governing board preserves its independence from undue influence on the part of donors, elected officials, ownership interests or other external parties.”<sup>295</sup> These standards do not dictate tenure as a required condition for accreditation. They instead leave room for institutions to exercise their own judgment when adopting context-specific policies so long as they are consistent with the HLC’s overarching requirements. Accordingly, a university’s governing board looking to abandon tenure may be able to accomplish that result without jeopardizing accreditation, but only if its decision is not based on political influence and alternative means are put into place to protect academic freedom. The standards also suggest that direct legislation to eliminate tenure might put accreditation at risk, not because it addresses tenure specifically, but rather because it could be characterized as external interference with governing board autonomy and a restriction that prevents institutions from adequately protecting academic freedom.<sup>296</sup>

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294. HIGHER LEARNING COMM’N, HLC POLICY BOOK 10–16 (2022), [https://download.hlc.commission.org/policy/HLCPolicyBook\\_POL.pdf](https://download.hlc.commission.org/policy/HLCPolicyBook_POL.pdf) [<https://perma.cc/ASF5-KPJD>].

295. *Id.* at 12.

296. For example, when the University of Florida attempted to prevent several of its faculty from testifying as expert witnesses based on fears of political reprisal, the school’s accreditor indicated that it planned to investigate whether the administration allowed external actors to impermissibly interfere with academic freedom. Lindsay Ellis, *U. of Florida’s Accreditor Will Investigate Denial of Professors’ Voting-Right Testimony*, CHRON. OF



The bounded discretion of standards like those used by the HLC should alleviate the fear that collaborative deliberations over tenure policy will inhibit a full consideration of stakeholders' competing concerns. While it is true that direct political interference with tenure occurring outside of an institution's own policies and practices will likely threaten accreditation, the flexibility inherent in a standards-based approach creates space for the parties to seek compromise over specific policy details. This dynamic may even promote more meaningful dialogue on the issues of greatest concern to tenure's critics. For instance, if accreditation serves to protect the core attributes of tenure from adverse regulatory action—thereby alleviating the primary concern of pro-tenure stakeholders—then universities and their faculty may grow more comfortable considering targeted reform proposals around issues like ideological balance, post-tenure performance review, and tenure's impact on institutional flexibility. This phenomenon recalls the concept of bracketing, where parties that begin as adversaries often find it easier to resolve their differences over certain related matters once an option that one side deems non-negotiable is removed from the range of possibility.<sup>297</sup> Knowing a deal-breaker is off the table helps quell the “winner-takes-all” mentality that can lock parties into intractable positions based on their perception of the extreme consequences at stake if they relent to suggestions made by others.

#### 4. Outcomes

The ability of deliberations to result in consensus that produces defined outcomes or plans for future action will depend on whether the participating stakeholders develop a shared understanding of what success means with respect to the issue under consideration.<sup>298</sup> In the context of tenure, one possibility is that collaboration among academic and public stakeholders will lead to a clear alignment on tenure's importance to the academic mission and the search for knowledge that serves the public good. But short of that sweeping outcome, an important advantage of collaborative

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HIGHER EDUC. (Nov. 1, 2021), <https://www.chronicle.com/article/u-of-floridas-accreditor-will-investigate-denial-of-professors-voting-rights-testimony> [<https://perma.cc/T3A9-YJ8E>].

297. William H. Simon, *Afterword—Part II: New Governance Anxieties: A Deweyan Response*, 2010 WIS. L. REV. 727, 733 (2010).

298. Ansell & Gash, *supra* note 259, at 561.

governance is its ability to yield intermediate outcomes or “small wins” that lay a foundation for establishing common ground on larger policy matters in the future.<sup>299</sup> For example, even if legislators and faculty end deliberations without agreeing on the fundamental importance of preserving tenure, the initial attempt at collaboration may still be described as a positive first step if the parties find newfound agreement over some of the relevant facts or resolve prior misconceptions about their respective views.<sup>300</sup> In this way, collaborative governance can be understood as an iterative process capable of increasingly positive evolution as participants build trust in each other in small increments over time.<sup>301</sup>

This feature of collaborative governance is captured in several respects through a recollection of tenure’s own history and development. As previously observed, widespread acceptance of tenure among non-faculty university administrators did not occur until the AAUP and AAC began collaborating in a series of meetings between 1937 and 1940 that led to the groups’ co-authorship of the *1940 Statement*.<sup>302</sup> The AAUP and AAC initially came into the process at loggerheads. The AAUP, representing faculty, and the AAC, representing university administrators, had never cooperated on matters of institutional policy at a national level, and the AAC was highly critical of the AAUP’s early advocacy for tenure in the *1915 Declaration*.<sup>303</sup> The AAC interpreted the AAUP’s objective as self-interested and aimed at preventing universities from dismissing even “manifestly unfit” faculty.<sup>304</sup> The AAC’s early antagonism toward the AAUP was so acute that, in 1917, the AAUP’s leaders gauged their odds of gaining support for tenure from university presidents “to be about as good as those of early Christians emerging triumphant from the lions’ pit.”<sup>305</sup>

Two developments eventually led to a positive shift in the parties’ relationship. The first was the arrival of new and more diverse voices within the AAC. Most of the initial opposition to tenure among AAC representatives came from those at smaller parochial

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299. *Id.*

300. By the same token, though, if the parties are unable to agree on even small matters of objective fact, then the impasse may be a sure sign that the chances of successful collaboration will remain remote.

301. Ansell & Gash, *supra* note 259, at 550.

302. See Metzger, *supra* note 49, at 12, 47.

303. *Id.* at 4, 12, 23.

304. *Id.* at 23.

305. *Id.*

colleges.<sup>306</sup> However, as AAC membership grew to include a greater number of presidents from larger, more research-focused universities, the group's collective willingness to discuss the possibility of tenure began to increase.<sup>307</sup> The transition from being completely anti-tenure to expressing an openness to discussing the concept at a high level illustrates the power of expanding the range of stakeholders participating in the collaborative effort to include as many relevant perspectives as possible. The greater the diversity of opinions represented, the lower the risk of capture by those with idiosyncratic agendas.

The second development to promote further cooperation was the decision by the individual leaders of the AAUP and AAC to meet in person to identify preliminary aspects of tenure that could serve as the basis for future discussion.<sup>308</sup> This basic turn to diplomacy established a precedent for direct engagement that, despite periodic tension and harsh rhetoric, lasted for the next fifteen years.<sup>309</sup> With the parties' willingness to hash out differences in the same room, they were able to educate each other about issues of greatest concern and the practical implications that various proposals would have on both faculty and administrators. Indeed, it was during a face-to-face conversation in 1940 between AAUP and AAC leadership when the latter's misunderstandings about the extent of tenure's protection for poorly performing faculty were finally resolved.<sup>310</sup> The resulting clarification was the last step necessary for the two groups to reach consensus on key aspects of operationalized tenure going forward.<sup>311</sup>

As promising an option as collaborative governance is for resolving adversarialism in policy making, the process is not immune to criticism. One concern is that cooperative decision-making among lawmakers and unelected stakeholders will limit democratic accountability. Voters might worry, for example, that collaborating with faculty and academic consortia in the shadow of accreditation will encourage legislators to be more responsive to preferences beyond those of the electorate. However, while it is true that collaborative governance frequently leads to compromise

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306. *Id.* at 22–23.

307. *Id.* at 23–24.

308. *Id.* at 25–26.

309. *Id.* at 27.

310. *Id.* at 61–62.

311. *Id.* at 62.

among public and private actors, worries that the approach is anti-democratic are overblown. First, there is no preset limit on the number or type of stakeholders who can participate. The goal of collaborative governance is to ensure that all parties with a demonstrated and vested interest in the matter under consideration can play a meaningful role in the deliberations. Thus, if a group of voters or other stakeholders can organize and demonstrate why its perspectives will better inform the dialogue, then its members should be permitted to designate a representative for inclusion at the table.

In addition, a key impetus for collaborative governance is the need to address imbalances in public accountability that often already exist. With campaign finance law limiting the amounts that political parties can spend on campaigns, most candidates for office now rely mainly on financial support from political action committees (“PACs”) that organize around individual issues, bills, or candidates. This dynamic has made PACs the primary patrons of many legislators, along with the party and caucus leaders who work with PAC managers to allocate spending.<sup>312</sup> The resulting financial arm’s race narrows the range of interests that legislators consider as they compete for funding and votes. Under these circumstances, the advantage of collaborative governance’s focus on diversity of views is its ability to counteract the danger that lawmakers and regulators will prioritize special interests over the interests of other parties materially affected by their policy choices.<sup>313</sup> That is, rather than limit the responsiveness of public officials, collaborative governance seeks to expand the spectrum of regulatory engagement to make it more comprehensive.

The need to make policy conversations around public higher education policy more representative is also justified by current trends in state appropriations. Throughout the country, state appropriations continue to represent an increasingly smaller proportion of public university revenues. Between 1980 and 2009, the percentage of state dollars that went toward public higher education fell from forty-four percent to thirty-two percent.<sup>314</sup> Yet despite shrinking state support, the level of state influence over public university operations has not declined at a comparable pace.

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312. Paula L. W. Sabloff, *Another Reason Why State Legislatures Will Continue to Restrict Public University Autonomy*, 20 REV. HIGHER EDUC. 141, 142–43 (1997).

313. Ansell & Gash, *supra* note 259, at 544.

314. Kaplan, *supra* note 185, at 111.

Therefore, by bringing more voices to the table through collaborative governance, the decision-making process around public university policy will hopefully re-calibrate in such a way that the influence of public officials begins to track the amount of state funding they provide in a fairer and more equitable way.

Another potential concern with a governance process that relies on one stakeholder group to establish leverage sufficient to incentivize reluctant participants to collaborate is that it will shift the risk of capture from one type of special interest to another. This risk shows up in the context of the model discussed earlier because of the role contemplated for accreditors in establishing the background conditions necessary to convince anti-tenure regulators to engage in dialogue. Will accreditors make compromise harder to achieve by simply supporting whatever academic stakeholders prefer given their need to rely on them in the accreditation review process?

The answer is most likely no. For one, outside of any attempt at incentivizing collaboration, accreditors do not appear captured by the interests of the institutions they review. If anything, a greater danger is that accreditors may use their power over universities' financial security to promote practices or objectives that are out of sync with what schools and faculty believe is in their best interests.<sup>315</sup> But even setting that possibility aside, accreditors must abide by professional norms of independence and objectivity to remain credible as sources of quality assurance.<sup>316</sup> Potential students and research granting agencies, for example, will dismiss accreditors' stamps of approval if they appear divorced from legitimate measures of accountability. Moreover, any evidence that an accreditor is biased will invite unwanted scrutiny from the Department of Education and jeopardize its status as a federally recognized monitor of institutions eligible to receive federal funds.<sup>317</sup> Should the latter occur, the accreditor will presumably become defunct.<sup>318</sup>

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315. See JOHN V. LOMBARDI, HOW UNIVERSITIES WORK 156 (2013).

316. Freeman, *supra* note 239, at 665–66.

317. Areen, *supra* note 209, at 726–27.

318. Notably, the Florida legislature passed a law in 2022 that requires state universities to change accreditors after each accreditation cycle. Kumar, *supra* note 149. Reports suggest that this law came about after the Southern Association of Colleges and Schools Commission on Colleges, the accrediting organization for universities in the Southeastern United States, expressed concern about political interference into decisions at Florida State University and the University of Florida. *Id.* The practical consequences of the law remain unclear, however, given the link between accrediting agencies and federal funding described

## CONCLUSION

As this Article shows, faculty and universities in states where tenure is under attack will need to pursue both defensive and proactive legal measures if they hope to secure tenure's primacy in the academic enterprise. The stakes are high. The scholarly output of American universities is the envy of the world in large part because of the proven independence from political and ideological interference that tenure provides.<sup>319</sup>

But whether through innovative contracting, alternative organizational design, or collaborative governance, protecting tenure is just one piece of what must be a comprehensive plan to uphold academic freedom across public universities. Lawmakers and regulators throughout the country continue to seek constraints on free inquiry in numerous ways beyond threatening tenure. For example, in nearly a dozen states, legislators introduced bills in the past year to regulate how subjects like race and sex are taught in university classrooms.<sup>320</sup> More directly, the University of Florida was recently enjoined from enforcing its faculty conflict-of-interest policy after a federal district court found that school administrators unlawfully suppressed several professors' expressive rights due to "perceived pressure from Florida's political leaders."<sup>321</sup> The court supported its ruling by observing that several Florida officials had praised reports that the university was censoring teaching about critical race theory, as well as by noting how the chair of the university's governing board publicly stated that proposed expert

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above. Moreover, most accrediting agencies focus their reviews across the same areas of inquiry regardless of their geographic emphasis, including on matters of academic freedom and political independence. Thus, even if Florida universities stop using the Southern Association of Colleges and Schools Commission on Colleges as their accreditor, any replacement will make similar inquiries. See Eric Kelderman & Emma Pettit, *Florida Lawmakers Put a Conservative Stamp on Higher Ed*, CHRON. OF HIGHER EDUC. (Mar. 9, 2022), <https://www.chronicle.com/article/florida-lawmakers-put-a-conservative-stamp-on-higher-ed> [<https://perma.cc/V8ZU-TTZF>].

319. JAMES AXTELL, WISDOM'S WORKSHOP 185, 343–44, 369, 373 (2016).

320. Joe Cohn, *New Wave of Bills on Race and Sex Stereotyping Violate Academic Freedom*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Jan. 26, 2022), <https://www.thefire.org/new-wave-of-bills-on-race-and-sex-stereotyping-violate-academic-freedom/> [<https://perma.cc/ZA-W2-C6U2>]; Emma Pettit, *The Academic Concept Conservative Lawmakers Love to Hate*, CHRON. OF HIGHER EDUC. (May 12, 2021), <https://www.chronicle.com/article/the-academic-concept-conservative-lawmakers-love-to-hate> [<https://perma.cc/W9W8-YSU3>].

321. Adam Steinbaugh & Jordan Howell, *Judge: University of Florida Can't Enforce Conflict-of-Interest Policy to Ban Faculty Testimony*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Jan. 21, 2022), <https://www.thefire.org/judge-university-of-florida-cant-enforce-conflict-of-interest-policy-to-ban-faculty-testimony/> [<https://perma.cc/D654-WQK5>].

testimony by the targeted professors would not be well received by Republican politicians.<sup>322</sup> The court ultimately likened the behavior of the university's administrators to that of their counterparts in foreign countries under authoritarian rule—countries where routinized faculty and student censorship is a way of life.<sup>323</sup>

It is for these reasons that, among the guidance offered by this Article, incentivizing positive steps toward collaborative governance is so vital. The power of collaborative governance is its ability to refocus parties on opposing sides of a complex policy debate away from adversarialism and toward mutual understanding and lasting trust.<sup>324</sup> My hope is that the model of collaboration provided here will facilitate greater cooperation between public officials and academic stakeholders in a way that creates a virtuous cycle of collaboration whenever any controversial or complex facet of academe comes under regulatory scrutiny. More than ever, how universities and faculty resolve the challenges to academic freedom they are currently facing will determine how society comes to see them: either as legitimate purveyors of knowledge or, instead, as mere instruments of state propaganda and orthodoxy.

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322. *Id.*

323. *Id.*

324. Emerson et al., *supra* note 247, at 18–19; Ansell & Gash, *supra* note 259, at 558.