

“SHARED” GOVERNANCE? NEW PRESSURE POINTS IN THE FACULTY/INSTITUTIONAL RELATIONSHIP

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“Recognizing our limitations as judges, we should hesitate before concluding that academic disagreements about what may appear to be esoteric topics are mere squabbles over jobs, turf, or ego.”¹

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1. Demers v. Austin, 746 F.3d 402, 413 (9th Cir. 2014).

I. INTRODUCTION

This article examines the impact of recent changes in colleges and universities on the relationship between faculty and institutions. Over the past several decades, many colleges and universities have been charting new paths—expanding educational opportunities to new formats, topics, and locales. At the same time, governments, accrediting bodies, and members of the public are taking a hard look at the effectiveness of America’s higher education system and asking profound questions: Is higher education fulfilling its purpose?² Is tuition too high?³ Why don’t more students complete college degrees?⁴ In the process, governments and accreditors have developed heightened expectations for—and imposed heightened legal and regulatory requirements upon— institutions of higher learning.⁵ It hardly needs be added that all such trends continue and the pace of change is accelerating.

These changes, both internal and external, bring new challenges for institutional governance. Administrators and faculty struggle to find the optimal allocation of their respective responsibilities. Which new areas lie primarily within the faculty’s expertise and responsibility, and which are primarily administrative in nature? What are the most useful models for consultation? This article examines three major areas that illustrate these challenges: (1) academic freedom and its relationship to assessment and accreditation; (2) faculty rights and responsibilities in distance education, establishment of campuses in other countries, and non-traditional offerings; and (3) the integration of compliance with traditional notions of faculty rights and responsibilities.

We assume that readers come with a working understanding of some major concepts. These include shared governance, faculty senates, and institutional decision-making. We will mention both regional and specialty accreditation. With respect to academic freedom, readers will find helpful an appreciation of the distinction between faculty academic freedom and institutional autonomy (sometimes called institutional academic freedom).⁶

2. See RICHARD ARUM & JOSIPA ROKSA, *ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES* (2010).

3. See Amy Phillips, *Is College Worth the Money?*, WASH. TIMES (Dec. 14, 2011), <http://communities.washingtontimes.com/neighborhood/60-second-attention-span/2011/dec/14/college-worth-money/>.

4. See Katherine Mangan, *2 Groups Describe Efforts to Push More Community-College Students toward Degree Completion*, CHRON. HIGHER EDUC. (Apr. 22, 2013), <http://chronicle.com/article/Groups-Describe-Efforts-to/138731/>.

5. See, e.g., Eric Kelderman, *Obama’s Accreditation Proposals Surprise Higher-Education Leaders*, CHRON. HIGHER EDUC. (Feb. 13, 2013), <http://chronicle.com/article/Obamas-Accreditation/137311/>.

6. For a discussion of individual and “institutional” academic freedom, see WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* § 7.1 (5th

Familiarity with the changing demographics of faculty, especially the increasing reliance on adjunct and other contingent faculty, will also serve the reader well.⁷

II. ACADEMIC FREEDOM IN THE CONTEXT OF ASSESSMENT AND ACCREDITATION

A. Background

Assessment is a relatively modern concept in American colleges and universities, while accreditation has deeper historical roots. Both have potentially significant impact upon academic freedom.

Starting in the 1970s, public concern developed over the value of higher education.⁸ By the mid-1980s, reformers called for learner-centered education and greater feedback to students, faculty, and institutions. The assessment movement took hold as states began to tie college and university funding to performance measures such as student retention, graduation rates, and even student learning. Accrediting organizations introduced standards for institutions to assess student outcomes.

Assessment shifts the discussion of college and university quality from a teaching to a learning focus. Outputs, rather than inputs, become the value proposition. Faculty play a traditional role in evaluating student work—from routine grading in introductory courses to review of a graduate student’s doctoral dissertation. Assessment, in this sense, is a central faculty responsibility. As external actors begin to mandate assessment, however, faculty concern may increase. Critics have argued that mandated assessment, which is directed primarily to undergraduate studies, smacks of standardization, the scourge of “teaching to the test,” and the risk of government intervention:

[I]ncreased public attention has been turned toward various plans for externally mandated assessments of learning outcomes in higher education. Some of the plans have been instituted on short

ed. 2013).

7. Further information is available from many sources, including Association of Governing Boards of Universities and Colleges, www.agb.org; American Association of University Professors, www.aaup.org; and the NACUA resources pages under the topics academic freedom and governance, <http://www.nacua.org/services/lrsindex.asp> (membership required). See also KAPLIN & LEE, *supra* note 6. For a very good 2014 publication on the subject of shared governance, see STEVEN C. BAHLS, *SHARED GOVERNANCE IN TIMES OF CHANGE: A PRACTICAL GUIDE FOR UNIVERSITIES AND COLLEGES* (2014).

8. See NORTHERN ILLINOIS UNIVERSITY OFFICE OF ASSESSMENT SERVICES, *HISTORY OF EDUCATIONAL ASSESSMENT* (2014), <http://www.niu.edu/assessment/manual/history.shtml#A>. The history, in turn, draws from MARY E. HUBA & JANN E. FREED, *LEARNER-CENTERED ASSESSMENT ON COLLEGE CAMPUSES: SHIFTING THE FOCUS FROM TEACHING TO LEARNING* (1999).

notice and with little or no participation by faculty members who, by virtue of their professional education and experience, are the most qualified to oversee both the details and the implications of a particular plan. Often these plans are the result of external political pressures, and may be accompanied by budgetary consequences, favorable or unfavorable, depending on the actual outcomes the mandated schemes purport to measure.⁹

The threat to academic freedom arises as external mandates begin to influence the faculty member's planning and delivery of course content. These are central faculty prerogatives (though, as noted in the following section, not unlimited ones). Recent reports suggest that standardized testing may be waning in popularity as a measure of institutional outputs. One expert has observed, "[t]he standardized tests of generic skills being touted today are simply not capable of fulfilling the dreams of policy makers who want to assess and compare the capacities of institutions (and nations) to improve college student learning."¹⁰

More fundamental though, than the precise tools for assessment would be the issue of the faculty's role in developing them.¹¹ Should legislators, accreditors, or administrators take the lead? What is, or should be, the faculty's contribution? A promising recent example of an internally-designed assessment tool comes from Sarah Lawrence College, where a faculty committee worked with the dean to develop a system of in-depth narrative evaluations of individual students' progress. The evaluation covers six areas of critical ability, such as the capacity to think analytically and independently. The areas evaluated transcend course content, and the narratives track each student's progress over time.¹² An internally-

9. AM. ASS'N OF UNIV. PROFESSORS, MANDATED ASSESSMENT OF EDUCATIONAL OUTCOMES (1991), available at <http://www.aaup.org/report/mandated-assessment-educational-outcomes>.

10. Dan Berrett, *Colleges Back Away from Using Tests to Assess Student Learning*, CHRON. HIGHER EDUC. (Apr. 21, 2014), <http://chronicle.com/article/Colleges-Back-Away-From-Using/146073>.

11. As one faculty advocate has observed:

If the professoriate is not successful in shaping this continuing discussion, and soon, by applying its arsenal of cross-curricular and networking skills to saying what will be measured and how those measures are to be used, there will be no end of "experts" who will gladly offer their services. Without the longstanding tradition of collegial peer review, the road to direct federal authority would be a fait accompli.

Greg Gilbert, *The Rise of the Professoriate*, AM. ASS'N UNIV. PROFESSORS (undated), www.aaup.org/issues/accreditation/resources-accreditation. Gilbert quotes Stephen Brint: "For the next generation of college teachers, the price could be steep if the current generation stares resolutely into the sand while the accountability movement gains force." *Id.*

12. See Dan Berrett, *Looking to a New Tool to Prove a College's Value*, CHRON. HIGHER EDUC. (May 7, 2014), <http://chronicle.com/article/A-College-Looks-to-a>

generated assessment method will not provide policy makers with a vehicle for global comparisons. It will, if developed in close collaboration with faculty, respect academic freedom and institutional autonomy.

Accreditation is another piece of the puzzle. Accrediting bodies are, to varying degrees, responsive to public calls for accountability and assessment.¹³ Accreditation may serve as a lever to drive institutional change in these areas.¹⁴ Yet, as a former provost has observed, ill-conceived accreditation requirements for assessment may threaten academic freedom, and faculty should resist these intrusions:

[I]t's time for college and university faculty to start paying attention to this seemingly dry issue [of accreditation]. Further, it's time they joined the effort by administrators and accreditors to resist the government's increasing intrusion into accreditation. That intrusion endangers both academic freedom and the unique American system of separation of the academy from the state.

Over the past 50 years, we have universalized American higher education so as to make it available to more people than ever before. But a major result of that has been expanding government control, which has only grown in intensity lately as state and federal governments have demanded that accreditors pay more attention to institutional accountability. Congress and the U.S. Department of Education are spelling out the meaning of all sorts of educational issues—even matters as basic as what constitutes a three-credit course.

Many faculty members have only a vague idea of the extent of government intrusion into academic life. Some refuse to believe that it will get worse, while others see the endless new rules as some campus administrative scheme to control their behavior.

...

New/146407/.

13. See, e.g., Eric Kelderman, *Teacher Accrediting Group Vows to Turn Teacher Education 'Upside Down'*, CHRON. HIGHER EDUC. (Feb. 28, 2012), <http://chronicle.com/article/Teacher-Accrediting-Group-Vows/130951/>.

14. As a general matter, the federal role in accreditation remains a topic of current political debate. Proposals range from fine-tuning the accreditation system to severing the link between federal financial aid eligibility and accreditation. E.g., U.S. DEP'T OF EDUC. NAT'L ADVISORY COMM. ON INSTITUTIONAL QUALITY AND INTEGRITY, ACCREDITATION POLICY RECOMMENDATIONS: HIGHER EDUCATION ACT REAUTHORIZATION (2012), available at www2.ed.gov/about/bdscomm/list/naciqi-dir/2012-spring/teleconference-2012/naciqi-final-report.pdf. Certain controversial position papers written under the prior administration have been archived on the U.S. Department of Education website. See also, Vickie Schray, *Assuring Quality in Higher Education: Recommendations for Improving Accreditation* (U.S. Dep't of Educ. Commission on the Future of Higher Education Issue Paper No. 14), available at www2.ed.gov/about/bdscomm/list/hiedfuture/reports/schray2.pdf.

. . . Academic leaders have failed to make clear to the faculty the role that accreditation plays, not just in quality assurance but in the preservation of a self-governed system of higher education—a unique American phenomenon. Most countries have a centralized education ministry. In the United States, a voluntary, responsible, and participatory accreditation system is the major tool we have to preserve, in the face of sweeping societal and political changes, such core values as academic freedom and institutional independence.¹⁵

Accreditation standards, while newly responsive to assessment, have long sought to protect academic freedom. Each regional accrediting body has adopted standards on academic freedom.¹⁶ But, just as faculty members sometimes overstate the reach of academic freedom, accrediting bodies (ironically) may do so as well. The Western Association of Colleges and Schools, for example, imposes a requirement that may surprise institutional administrators and lawyers: The institution publicly states its commitment to academic freedom for faculty, *staff*, and students, and acts accordingly. This commitment affirms that those in the academy are free to share their convictions and responsible conclusions with their colleagues and students in their teaching and writing.¹⁷

Apparently, in the eyes of WASC, all staff, including legal staff, should enjoy academic freedom, which is a peculiar expansion of the concept.

While issues of assessment and accreditation may only rarely arise in the day-to-day legal work of college and university lawyers, they can generate strife between faculty and administrators, as well as between institutions and the broader public. These issues also have the potential to reshape American colleges and universities.¹⁸

15. Milton Greenberg, *Accreditation and Faculty*, CHRON. HIGHER EDUC. (April 19, 2012), <http://chronicle.com/article/article-content/131577/>.

16. The American Association of University Professors (AAUP) has collected references to shared governance and to academic freedom in the standards and policy statements of the six regional accrediting agencies. See, e.g., AM. ASS'N OF UNIV. PROFESSORS, REGIONAL ACCREDITATION STANDARDS CONCERNING ACADEMIC FREEDOM AND THE FACULTY ROLE IN GOVERNANCE (Mar. 2008), available at <http://www.aaup.org/report/regional-accreditation-standards-concerning-academic-freedom-and-faculty-role-governance>.

17. W. ASS'N OF SCH. AND COLLS., DEFINING INSTITUTIONAL PURPOSES AND ENSURING EDUCATIONAL OBJECTIVES Standard 1.3 (2013) (emphasis added), available at <http://www.wascsenior.org/resources/handbook-accreditation-2013/part-ii-core-commitments-and-standards-accreditation/wasc-standards-accreditation-2013/standard-1-defining-institutional-purposes-and-ensuring-educational-objectives>.

18. For a different analysis of the relationship between academic freedom and assessment, see ASS'N AM. COLLS. & UNIV. BD. DIRS., STATEMENT ON ACADEMIC FREEDOM AND EDUCATIONAL RESPONSIBILITY, 1 (2006), available at www.aacu.org/about/statements/documents/academicfreedom.pdf:

There is, however, an additional dimension of academic freedom that was not

B. Existing Law and Standards

Whenever a governance dispute occurs between faculty and administrators, or between faculty and external regulators, faculty may assert an academic freedom right to be involved in decisions that affect their work and welfare. But the contours of academic freedom are widely misunderstood; faculty may believe that the doctrine gives them ultimate authority over curricular and workplace decisions, while administrators and others may believe that the doctrine only applies to classroom speech. Neither extreme is correct. Although academic freedom provides significant protections to faculty and has a rich history in judicial decisions, institutional policies, and “academic custom and usage,”¹⁹ it does have boundaries.

Many wrongly assume that academic freedom is a constitutional right that applies to all colleges and universities. Two fundamental flaws undermine this assumption. First, the United States Constitution applies only to *public* colleges and universities. It prohibits government, including public colleges and universities, from infringing free speech. A private institution is not an arm of the government. Second, the Constitution does not mention academic freedom.

All this being said, the relationship between First Amendment free speech and academic freedom is not always clear and is still evolving. The Supreme Court has construed the First Amendment’s protection of free speech as extending some protection for academic freedom.²⁰ Moreover, the Supreme Court and lower federal courts continue to interpret the interplay between freedom of speech and academic freedom, adjusting doctrines over time. Most recently, for example, the Supreme Court in *Garcetti v. Ceballos* stated that employees at publicly-funded organizations (including colleges and universities), do not have Constitutionally-protected free speech rights if the speech at issue is related to their job

well developed in the original principles, and that has to do with the responsibilities of faculty members for educational programs. Faculty are responsible for establishing goals for student learning, for designing and implementing programs of general education and specialized study that intentionally cultivate the intended learning, and for assessing students’ achievement. In these matters, faculty must work collaboratively with their colleagues in their departments, schools, and institutions as well as with relevant administrators. Academic freedom is necessary not just so faculty members can conduct their individual research and teach their own courses, but so they can enable students—through whole college programs of study—to acquire the learning they need to contribute to society.

19. “Academic custom and usage” is a term used to denote the unwritten but common understandings that members of academe share. For a discussion of this concept, see KAPLIN & LEE, *supra* note 6, at § 1.4.3.3.

20. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); see also *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

responsibilities.²¹ The Court left open the impact of the decision on faculty teaching and research, over which institutions exercise only limited supervision. Perhaps inadvertently, the Court excluded faculty governance from the topics for future consideration.

For faculty who work at public colleges and universities, *Garcetti* may well be a step backward. Prior to *Garcetti*, when a court was asked to decide whether a faculty member's speech was protected by the First Amendment, that court first would determine whether the speech was a matter of "public concern."²² If the speech was not a matter of public concern—but was instead a matter related to the private interest of the faculty member—it was not protected. If, on the other hand, the court determined that the speech was a matter of public concern, the court then balanced the faculty member's free speech interests against the college's interest in maintaining an efficient workplace or educational environment. *Garcetti* has added a threshold consideration: if the speech is related to the faculty member's work responsibilities, then it may be unprotected and the *Pickering* analysis not even conducted. Only if the faculty member's speech is not related to his or her job responsibilities does the *Pickering* analysis clearly come into play.

Although some lower federal courts have fashioned an "academic exception" to *Garcetti* when the speech at issue has involved classroom or pedagogical speech,²³ speech related to governance may not fit into this exception.²⁴ In a recent example, the head of a department within the University of Illinois College of Medicine claimed that he suffered retaliation for speech critical of various administrative policies; he further claimed that his speech should be exempt from the limitations of *Garcetti* because it was "related to academic scholarship or classroom instruction."²⁵ Ultimately, the United States Court of Appeals for the Seventh Circuit disagreed, concluding that the speech at issue was within the scope of the plaintiff's job responsibilities and was thus unprotected by the First Amendment.

But in another case, *Adams v. University of North Carolina at*

21. 547 U.S. 410 (2006). *But see* Lane v. Franks, 134 S. Ct. 2369 (2014), in which the Court ruled unanimously that a public employee who alleged that he was dismissed in retaliation for testifying truthfully in a criminal court proceeding was protected by the First Amendment because his job duties did not include testifying in court.

22. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

23. *See* Adams v. Univ. Of North Carolina-Wilmington, 640 F.3d 550 (4th Cir. 2011); *see also* Demers v. Austin, 746 F.3d 402 (9th Cir. 2014).

24. *See generally* Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L. J. 945 (2009). *But see* Demers, 746 F.3d 402.

25. *Abcarian v. McDonald*, 617 F.3d 931 (7th Cir. 2010) (quoting *Garcetti v. Ceballos*, 547 U.S. 410 (2006)).

Wilmington,²⁶ the United States Court of Appeals for the Fourth Circuit ruled that a professor’s publications were unrelated to his teaching or other university duties, and thus *Garcetti* did not apply. And in *Demers v. Austin*,²⁷ yet another Court of Appeals (in that instance, the Ninth Circuit) ruled that a professor’s proposal to restructure a school of communications, and a proposed book criticizing his university, were a form of scholarship and thus exempt from *Garcetti*. The professor alleged that he had received lower performance evaluations as retaliation for his writings, while the university asserted that his evaluations were lower because he had not published in refereed journals and had disregarded university rules about meeting his classes. The court found that, although the writings at issue were part of the professor’s official duties, they were “academic speech” and thus exempt from the *Garcetti* doctrine. The court said:

We conclude that *Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed “pursuant to the official duties” of a teacher and professor. We hold that academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering*.²⁸

Concluding that the writings at issue were matters of public concern, the court reversed the lower court’s award of summary judgment in favor of the university.

Given the sharp contrast among the outcomes in *Abcarian*, *Adams*, and *Demers*, how and when *Garcetti* will be applied to faculty speech remains uncertain. While the speech in *Demers* appears directly related to governance, the court characterized it as “teaching and academic writing.” In contrast, the speech in *Abcarian*, also involving governance matters, was characterized as work-related and thus exempt from First Amendment protection. In other post-*Garcetti* cases, speech about faculty hiring²⁹ and the use of funds from a research grant³⁰ were considered job-related and thus within the *Garcetti* precedent. And although some commentators believe that the outcomes in *Adams* and *Demers* may signal judicial willingness to apply an “academic exception” to *Garcetti*,³¹ it is by no means certain that courts will uniformly adopt this perspective in future litigation.

26. *Adams*, 640 F.3d at 550.

27. *Demers*, 746 F.3d at 402.

28. *Id.* at 412.

29. *Hong v. Grant*, 516 F. Supp. 2d 1158 (C.D. Cal. 2007).

30. *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008).

31. Thomas Sullivan & Lawrence White, *For Faculty Free Speech the Tide is Turning*, CHRON. HIGHER EDUC. (Sept. 30, 2013), <http://chronicle.com/article/For-Faculty-Free-Speech-the/141951>.

Although the faculty's role in institutional governance is typically a matter of policy and, perhaps, of contract (as set forth, for example, in a collective bargaining agreement or faculty handbook), faculty at "mature" colleges and universities expect to participate in faculty hiring and promotion, student admissions, curriculum content, evaluation of student academic performance, and graduation requirements.³² The level of participation may range from consultation to control, depending on the issue and the institution. As noted above, the regional accrediting associations expect the faculty to have a role in institutional governance; institutions found to provide inadequate opportunities for faculty to participate in governance may face criticism or probation from accrediting bodies.³³

Faculty who are dissatisfied with their governance role have used the accreditation process to attempt to increase their power. For example, when the Middle States Commission on Higher Education placed Kean University on probation in 2012, one of the Commission's concerns was that the university could not demonstrate "an institutional climate that fosters respect among students, faculty, staff, and administration."³⁴ The faculty had long been critical of the university's president and his alleged unwillingness to afford faculty a significant role in governance.

C. Looking Ahead

Although some faculty members may resist the forms of student assessment championed by accrediting agencies, the courts are unsympathetic to those faculty members whose "resistance" takes the form of insubordination.³⁵ While academic freedom may afford faculty the right to participate in governance, it is the institution's prerogative to decide whether to implement certain forms of student assessment and outcome measures. Given the power of accrediting associations, whose imprimatur is required for an institution to participate in the federal student financial aid programs, faculty participation would be appropriate in determining *how* student assessment may be accomplished, but not *whether* it will happen.

32. See, e.g., *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980). The amount and extent of the faculty's role in governance is presently the litmus test for their coverage by the National Labor Relations Act for the purpose of collective bargaining.

33. See, e.g., Nick DeSantis, *UVa.'s Accreditor Says Sullivan Ouster Has "Raised Questions" About Compliance*, CHRON. HIGHER EDUC. (June 25, 2012), <http://chronicle.com/blogs/ticker/uva-s-accreditor-says-sullivan-ouster-has-raised-questions-about-compliance/44813>.

34. Kelly Heyboer, *Kean University Officials Vow to Keep School's Accreditation*, NEWARK STAR LEDGER (July 10, 2012), http://www.nj.com/news/index.ssf/2012/07/kean_university_officials_vow.html.

35. See, e.g., *Wirsing v. Bd. of Regents*, 739 F. Supp. 551 (D. Colo. 1990).

III. THE FACULTY ROLE IN MANAGING THE ACADEMIC PROGRAM – DISTANCE LEARNING, ESTABLISHING OVERSEAS PROGRAMS AND CAMPUSES, AND NON-TRADITIONAL OFFERINGS

A. Background

Academic programs have been spreading—over the internet, to new overseas campuses, and to new subject-matter areas. To what extent do faculty members effectively manage these developments? To what extent *should* they?

The basic efficacy of the faculty voice in academic decision-making is a matter of ongoing debate. In many institutions, the numbers of part-time and adjunct faculty have grown, while tenure-track and tenured positions have declined.³⁶ In other words, fewer faculty members have full-time, economically stable relationships with their institutions. Moreover, at many institutions, resources are in decline, increasing the potential for internal conflict.³⁷ Such factors can have a real impact on shared governance.

One senior professor, discouraged by what he perceived as consistent administrative disregard of faculty opinion, concluded, “It takes years of rank and the bittersweet experience of extensive committee service to realize that faculty influence on the operation of the university is an illusion, and that shared governance is a myth.”³⁸ In a similar vein, the AAUP recently argued that the health of shared governance is precarious:

In today’s universities, while faculty may have effective control over their own courses and research, their sphere of influence on other academic matters has been eroded through the administration’s application of the goals and managerial practices of the corporate business model. Moreover, faculty loss of influence over programmatic and other academic matters reduces faculty influence even in their individual academic course content and research.³⁹

36. AFT HIGHER EDUC., AM. FED’N OF TEACHERS, AMERICAN ACADEMIC: A NATIONAL SURVEY OF PART-TIME/ADJUNCT FACULTY (Mar. 2010), *available at* http://www.aft.org/sites/default/files/aa_partimefaculty0310.pdf.

37. *See* JOHN QUINTERNO, THE GREAT COST SHIFT: HOW HIGHER EDUCATION CUTS UNDERMINE THE FUTURE MIDDLE CLASS 2 (2012), *available at* http://www.demos.org/sites/default/files/publications/TheGreatCostShift_Demos_0.pdf.

38. John Lachs, *Shared Governance Is a Myth*, CHRON. HIGHER EDUC. (February 6, 2011), <http://chronicle.com/article/Shared-Governance-Is-a-Myth/126245/>.

39. Brief for the American Association of University Professors as Amicus Curiae Supporting Petitioner Union at 9, Pac. Lutheran Univ. and Serv. Emps. Int’l Union, Local 925, N.L.R.B. No. 19-RC-102521, at *9 (2013), *available at* <http://mynlrb.nlr.gov/link/document.aspx/09031d45816702fd>.

This argument arose in a recent test of faculty rights under the National Labor Relations Act to form a union at a private university. The American Council on Education (ACE), participating as *amicus* in the same matter, painted a very different picture. ACE cited research showing that, in recent decades, faculty have maintained—or even gained—internal influence over their institutions:

[F]aculty participation in governance of academic matters increased over time. In 1970, faculties determined the content of curriculum at 45.6% of the institutions, and they shared authority with the administration at another 36.4%. By 2001, faculties determined curriculum content at 62.8% of the institutions, and they shared authority at 30.4%. In 1970, faculties determined the appointments of fulltime faculty in 4.5% of the institutions, and they shared authority at 26.4%. By 2001, faculties determined appointments of full-time faculty in 14.5% and shared authority in 58.2% of the institutions. (Quoting Judith Areen, “Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance,” 97 GEO. L.J. 945, 966 n.99 (2009).)⁴⁰

Others have suggested that the picture is more nuanced, with shared governance remaining most effective at the leading research universities. Moody’s Investors Service endorsed this view in a 2012 report issued after resolution of the University of Virginia’s leadership crisis. (The governing board had dismissed the president on scant notice. A huge outpouring of faculty support for the president led to her reinstatement two weeks later). Moody’s sees value in shared governance, while predicting more governance upheavals to come:

For the U.S. higher education sector overall, we expect governance and leadership clashes to increase in coming years as the sector’s ability to grow revenues dwindles, and its emphasis shifts to new operating efficiencies and cost containment

. . . .

Ironically, the clash between the president and some members of the University of Virginia board, highlights the stabilizing effects of the counter-intuitive “shared governance” model still in place at leading U.S. universities. Under this model, which is dramatically different from top-down corporate governance models, as well as electorally-driven government models, the tenured faculty, and to a lesser extent the alumni, students and

40. Brief of the American Council on Education et al. as Amici Curiae Supporting Respondent University at 18, Pac. Lutheran Univ. and Serv. Emps. Int’l Union, Local 925, N.L.R.B. No. 19-RC-102521, at *18 (2013), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458166ffa8>.

donors, have a powerful role to play in major university decision-making.

....

More university governance controversies are likely in coming years as the sector adapts to tougher economic realities. The faculty's implicit governing role remains especially strong at research universities, such as UVA, which are dependent on star "principal investigator" research faculty to attract grants and private gifts. However, the faculty's power is on the wane at the large majority of public and private US colleges and universities which operate with small endowments, weak selectivity, and high dependence on student tuition and/or state funding. Many universities are reducing the percentage of faculty that have tenure, a form of nearly guaranteed employment. This reduction erodes the implicit power of faculty and typically strengthens the hand of the board and president to deal with economic challenges quickly.....⁴¹

The report reiterated Moody's negative outlook for most colleges and universities, except for market-leading institutions, which have a stable outlook.⁴²

Specific issues and disputes illustrate the contrasting views of faculty and administrators toward their respective authority. The area of online learning offers salient examples. As recently as this year, it has been described as "the new frontier where the traditional rights of faculty members and the quality of instruction are up for grabs." The authors added:

In the rush to online education, faculty members have been signing contracts that abrogate the ownership of their classes, erode their collective interests, and threaten the quality of higher education. No standard (let alone best) practice has yet emerged, and faculty members are largely in the dark about what is at stake.⁴³

41. Virginia Dispute Highlights Governance Stress and Economic Threats Facing US Higher Education, MOODY'S INVESTORS SERV. 1-2(July 2, 2012), available at <http://chronicle.com/blogs/ticker/files/2012/07/UVA.pdf>.

42. Virginia Dispute Highlights Governance Stress and Economic Threats Facing US Higher Education, MOODY'S INVESTORS SERV., (July 2, 2012), available at <http://chronicle.com/blogs/ticker/files/2012/07/UVA.pdf>.

43. Colleen Lye & James Vernon, *The Erosion of Faculty Rights*, CHRON. HIGHER EDUC. (May 19, 2014), <http://chronicle.com/blogs/conversation/2014/05/19/the-erosion-of-faculty-rights/>. For an excellent legal analysis of intellectual property rights and online courses, see the 2013 NACUA conference outline, Megan W. Pierson, Robert R. Terrell, & Madelyn F. Wessel, "Massive Open Online Courses (MOOCs): Intellectual Property and Related Issues", which can be downloaded from the NACUA

Administrative decisions about online learning can evoke faculty concern. The media reported, for example, a 2013 controversy at San Jose State University.⁴⁴ The faculty took issue with the president's selection of online learning technology without, they felt, sufficient input from the faculty members who would need to teach using that technology and be significantly affected. Similar examples exist elsewhere.

Moreover, global academic ventures, particularly those involving buildings or entire campuses, have been another area of governance controversy. A notable example arose from the partnership between Yale University and the National University of Singapore (Yale-NUS) to develop the first liberal arts college in Singapore. According to press accounts, Yale's president took the position that faculty approval for the plan was unnecessary because Yale-NUS is a new institution not offering Yale courses, curricula, or degrees. Faculty concerns addressed not only their asserted right to be consulted but also Singapore's climate for civil rights, nondiscrimination, and political liberties.⁴⁵ Despite faculty protests, the Yale-NUS is open and accepting student applications.⁴⁶ Disputes about overseas programs may lead to unexpected outcomes. George Washington University, for example, recently shelved plans to open a campus in China, allegedly because the faculty senate did not approve of the plan.⁴⁷ And several faculty groups at New York University voted "no confidence" in President John Sexton, in part because of their belief that he disdains the faculty's governance role and has opened NYU campuses in Abu Dhabi and Shanghai without sufficient faculty consultation.⁴⁸ Similarly, Duke University's plans for a branch campus in China generated faculty concerns over the faculty role in designing and approving the project, the project's financing, and China's climate for academic freedom.⁴⁹

Closer to home, institutional plans for enrollment growth can raise similar questions about faculty input. Common examples include high

Legal Resources section at www.nacua.org.

44. Steve Kolowich, *Angered by MOOC Deals, San Jose State Faculty Senate Considers Rebuff*, CHRON. HIGHER EDUC. (Nov. 18, 2013), <http://chronicle.com/article/Angered-by-MOOC-Deals-San/143137/>.

45. Karin Fischer, *Yale Faculty Registers Concern about Campus in Singapore*, CHRON. HIGHER EDUC. (April 6, 2012), <http://chronicle.com/article/Yale-Faculty-Registers-Concern/131448/>.

46. Yale-NUS College, <http://www.yale-nus.edu.sg/> (last visited Nov 17, 2014).

47. *George Washington U. Won't Build China Campus*, INSIDE HIGHER ED (Feb. 4, 2014), <http://www.insidehighered.com/quicktakes/2014/02/04/george-washington-u-wont-build-china-campus>.

48. Jack Stripling, *Behind No-Confidence Vote at New York U., a Torn Faculty*, CHRON. HIGHER EDUC. (Mar. 12, 2013), <http://chronicle.com/article/Behind-No-Confidence-Vote-at/137873/>.

49. Ian Wilhelm, *Duke's China Plan Sparks Doubts on Campus*, CHRON. HIGHER EDUC. (May 25, 2011), <http://chronicle.com/article/Dukes-China-Plan-Sparks/127640/>.

school-to-college bridge programs, night classes for working adults, and satellite campuses convenient to underserved populations. An administration might proceed without soliciting faculty input, at the peril not only of incurring faculty opposition but also of missing advice from the campus constituency most knowledgeable about academic issues.

B. Existing Law and Standards

Accrediting associations require that an institution’s international programs or branch campuses meet all of the association’s accreditation standards, even if the program is operated jointly with another organization that is not accredited.⁵⁰ The institution’s self-study process, required by accrediting associations, must include attention to the overseas programs and/or campuses.⁵¹ Presumably, the same requirements that faculty participate in developing, evaluating, and delivering domestic programs would also apply to those programs delivered overseas. And, while the strength or weakness of the faculty’s governance role in the development of overseas campuses is seldom a legal issue, it is of great significance to the faculty, and they have not been silent in the face of institutions’ expansions overseas.

With respect to online learning and distance education, faculty participation has been more robust at many institutions because faculty create the course content, even if the institution chooses the web-based “platform” and the outside vendor that will supply the infrastructure for online learning. Accrediting associations require faculty involvement in curriculum development for distance or online learning, just as they do for traditional face-to-face learning.⁵² They also require the institution to provide technical support and training for faculty who teach using the online format.⁵³

Faculty ownership of curriculum content is a major flash point in the faculty governance/institutional autonomy arena. Faculty who have taught in traditional formats have typically assumed, whether the assumption was based upon tradition or an explicit policy, that they “owned” the content of the courses they developed—even though, technically, their course content is a “work made for hire” and would, in non-academic contexts, belong to

50. For example, the Middle States regional accrediting association requires that programs offered outside the United States meet the same standards that the institution itself must meet. MIDDLE STATES COMM’N ON HIGHER EDUC., INTERNATIONAL PROGRAMS OFFERED BY ACCREDITED INSTITUTIONS at 2, *available at* <https://www.msche.org/documents/P5.1-InternationalPrograms.doc>.

51. *Id.*

52. NATHAN LINDSAY, DECIPHERING DISTANCE LEARNING ACCREDITATION: A BALANCE OF OBSTACLES AND OPPORTUNITIES 7 (2006), ERIC Doc. No. 53909, *available at* <http://files.eric.ed.gov/fulltext/ED493909.pdf>.

53. *Id.*

their employer.⁵⁴ Institutions have typically not claimed ownership of course content, and there is little to no litigation on the subject. Ownership of the content of online courses, however, may be a different matter in that the institution may have invested resources—both human and financial—in the faculty member’s development of online course content through the hiring of technical support staff and investment in technology,⁵⁵ and thus may assert full or joint ownership of the content.

Some institutions address potential points of conflict with faculty by entering into a separate agreement with faculty who create online course content. The AAUP has released a “Statement on Distance Education,” which recommends that all faculty rights and prerogatives, such as academic freedom, faculty approval of courses and curricula, and the right of the instructor to select course materials, be the same in both traditional and online course formats. The Statement allocates to the faculty member or a faculty body the right to “exercise control over the future use and distribution of recorded instructional material and to determine whether the material should be revised or withdrawn from use.”⁵⁶ Given the potential for conflict, and the revenues that successful online education can attract, it is wise for institutions to adopt a written policy that specifies (i) the circumstances in which the institution will claim ownership or co-ownership, (ii) how royalties or licensing fees, if any, will be allocated, and (iii) whether the faculty member has a right of first refusal to update, revise, or assign a different instructor to the course.⁵⁷

C. Looking Ahead

With respect to distance learning, the institution, or one of its sub-units, holds the ultimate prerogative to decide whether and how to offer course content. Theoretically, at least, faculty can be required to teach online and to modify course content to fit the online format. However, some institutions have found that creating separate units, segregated from the core faculty disciplines, to focus on distance education has not produced the expected profits; several, including Temple University, New York

54. For a discussion of the “work made for hire” doctrine, see KAPLIN & LEE, *supra* note 6, at § 14.2.5.6.1.

55. Audrey Latourette, *Copyright Implications for Online Distance Education*, 32 J.C. & U.L. 613, 630 (2006).

56. AAUP, Statement on Distance Education (Mar. 1999), available at <http://www.aaup.org/report/statement-distance-education>. See also Donna Euben, “Faculty Rights and Responsibilities in Distance Learning” (2000), available at <http://www.aaup.org/faculty-rights-and-responsibilities-distance-learning-2000>.

57. For suggested approaches to such policies, see Michael Klein, “The Equitable Rule”: *Copyright Ownership of Distance-Education Courses*, 31 J.C. & U.L. 143 (2004).

University, and Columbia University, have closed these units.⁵⁸ Given the requirements of accrediting associations that faculty be centrally involved in creating, teaching, and evaluating online and distance learning, it would seem that the top-down approach is less successful than incentivizing faculty to adopt new technology and methods of delivering learning to their students.

IV. INSTITUTIONAL COMPLIANCE AND TRADITIONAL FACULTY RIGHTS AND RESPONSIBILITIES

A. Background

The compliance obligations of college and university institutions have increased substantially in recent decades.⁵⁹ Federal and state governments show little reluctance to adopt and impose additional requirements for record keeping, data reporting, and even institutional operations. A review of the Higher Education Compliance Alliance database illustrates the scope of federal regulation in areas as diverse as export controls, political campaigns, and campus safety.⁶⁰ Some compliance obligations encroach on faculty endeavors. Mandated training, for example, reduces the time available for core responsibilities.⁶¹ Other obligations, such as grant administration requirements, student disability accommodations, or occupational safety mandates, may directly affect how faculty perform their responsibilities.

As the messengers of compliance obligations, administrators may face faculty resistance. “This session is brought to you by the Supreme Court,” explained one campus counsel at the beginning of employment discrimination workshops she conducted after the United States Supreme

58. Risa L. Lieberwitz, *The Corporatization of the University: Distance Learning at the Cost of Academic Freedom?*, 12 B.U. PUB. INT. L.J. 73, 117 (2002).

59. For a discussion of the increase in federal compliance requirements in recent years, see Stephen S. Dunham, *Government Regulation of Higher Education: The Elephant in the Middle of the Room*, 36 J.C. & U.L. 749, 786–88 (2010).

60. HIGHER EDUC. COMPLIANCE ALLIANCE, <http://www.higheredcompliance.org> (last visited Nov. 25, 2014).

61. For example, employers in California must provide training on sexual harassment to certain employees. Under California law, “Employers with 50 or more employees must provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees who are employed as of July 1, 2005, and to all new supervisory employees within six months of assuming a supervisory position. Thereafter, covered employers must provide sexual harassment training and education to each supervisory employee once every two years.” *Sexual Harassment*, CAL. DEPT. OF FAIR EMP’T & Hous., http://www.dfeh.ca.gov/Publications_StatLaws_SexHarrass.htm (summarizing training requirements and liability of employers under 2014 Cal. Legis. Serv. Ch. 306 (A.B. 2053) (West)).

Court issued its related 1998 decisions in *Faragher* and *Ellerth*.⁶² In one instance, a prominent molecular biologist at the University of California, Irvine refused to take discrimination training required under state law. After an extended standoff in which the institution placed him on unpaid leave and he threatened to move to another university, the professor eventually relented.⁶³ In short, faculty may be individually or collectively resistant to fulfilling compliance obligations.

B. Existing Law and Standards

Several of the federal civil rights laws have a direct impact on faculty autonomy, particularly in the classroom. For example, students with disabilities are protected by both the Americans with Disabilities Act⁶⁴ and Section 504 of the Rehabilitation Act,⁶⁵ and they are entitled to reasonable accommodations to enable them to benefit from their educational experience. At many institutions, a central office, often unconnected to the “academic core,” reviews documentation of students’ disabilities and makes decisions concerning the types of accommodations needed in the classroom. Such accommodations may include alternate testing formats or additional time for tests, the use of technology (such as recording a professor’s lecture or asking the professor to wear a microphone), or copies of the professor’s notes for students with learning disorders.

Although a LexisNexis search did not uncover litigation by faculty asserting academic freedom justifications for failure to comply with an accommodation request by a student (or by the disability services office), the potential conflict between faculty hegemony in the classroom and the institution’s accommodation requirements has not gone unnoticed.⁶⁶ Faculty may assert intellectual property concerns and resist requests to tape their lectures, or they may refuse to provide lecture notes or to write important concepts on white or blackboards for students who have difficulty receiving information aurally. And because neither the ADA nor Section 504 considers accommodations that fundamentally alter the academic requirements of a course to be reasonable,⁶⁷ students must still be able to meet the academic and technical standards of the course or

62. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

63. The situation is described in greater detail in Ann Franke, “Getting on the Same Page: Educating Our Clients – How and Why to Educate Department Chairs, Deans, and Other Very Smart People,” NACUA Outline at 14 (Annual Conference, June 27-30, 2010).

64. 42 U.S.C. §§ 12101-12213 (2009).

65. 29 U.S.C. § 794 (2002).

66. *See, e.g.*, David Cope, *Disability Law and Your Classroom*, ACADEME (Nov.-Dec. 2005), at 37-39.

67. 28 C.F.R. § 36.302(a) (2011).

program⁶⁸ or meet the essential eligibility requirements of the academic program.⁶⁹ For that reason, faculty members may still consider whether the requested accommodation(s) interfere with their pedagogical goals or the content of their course.

Federal courts and the Office for Civil Rights (OCR), housed within the U.S. Department of Education, have weighed in on the issue of whether a university has a right to reject proposed accommodations that conflict with course requirements or learning objectives.⁷⁰ But OCR has found legal violations in cases where faculty failed to implement previously agreed-upon accommodations,⁷¹ or where the institution lacked a grievance procedure to address a faculty member’s refusal to allow an accommodation requested by the student.⁷²

One area of recent litigation pitting faculty pedagogical choices against the needs of students with disabilities arose in the context of access by visually-impaired students to course websites or e-readers. Faculty who have adopted technology for classroom use, for both standard courses and online learning, have found that some of the technology is not accessible to student with visual impairments. The National Federation of the Blind (NFB) filed several complaints against universities with the U.S. Department of Justice and the OCR. A complaint against Penn State University in 2010 filed with OCR claimed that the university’s course-management software, library catalog, and the websites of some academic departments were not accessible to blind students. That dispute was settled in 2011.⁷³

In 2011, the NFB filed complaints with the U.S. Department of Justice, alleging that the use of Google Apps by Northwestern and New York Universities disadvantaged visually impaired students because the software that students used to turn written words into spoken words was incompatible with the Google software.⁷⁴ Two other organizations

68. 34 C.F.R. §104.3(l)(1) (2011).

69. ADA Title II, 28 C.F.R. § 35.104 (2014).

70. *See Hoffman v. Contra Costa Coll.*, 21 Fed. Appx. 748 (9th Cir. 2001) (college had no obligation to require professor to allow student access to notes during examination); *see also Univ. of Akron*, OCR Case No. 15-02-2049, 103 L.R.P. 11607 (2003) (professor’s refusal to allow an open book take home examination was reasonable because memory and recall were essential course objectives).

71. *San Jose City College*, OCR Case No. 09-97-2093, 12 N.D.L.R. ¶ 193 (1997).

72. *California State University, Los Angeles*, OCR Case No. 09-03-2197, 28 N.D.L.R. ¶302 (2004).

73. Settlement between Penn State University and National Federation of the Blind (2011) (No. 03-11-2020), ACCESSIBILITY AND USABILITY AT PENN STATE UNIVERSITY, *available at* <http://accessibility.psu.edu/nfbpsusettlement>.

74. Press Release, Nat’l Fed’n of the Blind, Chris Danielson, National Federation of the Blind Asks Department of Justice to Investigate Schools Across the Country (Mar. 15, 2011), *available at* <https://nfb.org/node/1000>.

advocating for individuals with visual impairments sued Arizona State University, charging that visually impaired students could not use electronic textbooks that the school had distributed on Amazon Kindles. The lawsuit was settled, and the university agreed to “strive to use devices that are accessible to the blind.”⁷⁵ Similar complaints against other institutions (for example, Reed College, Pace University, and Case Western University) involving e-readers were settled by the Department of Justice;⁷⁶ the institutions now require only those e-readers that are accessible to visually impaired students.

The Departments of Justice and Education issued a joint “Dear Colleague” letter on June 29, 2010, which specifically addresses the limitations of the Kindle DX model that these institutions had adopted for classroom use. This letter states that the use of such technology is “unacceptable” when it is not accessible to all students.⁷⁷

Another federal civil rights law, Title IX of the Education Amendments of 1972,⁷⁸ imposes obligations on institutions that may impact faculty governance concerns. For example, the “Dear Colleague” Letter released by the Office for Civil Rights in April of 2011⁷⁹ advises that an investigation of a sexual assault claim should be completed within sixty days. If an institution uses a committee on which faculty sit to determine whether an incident of alleged assault or harassment has violated the institution’s discrimination policy, the work of that committee may not be completed within the required sixty day period, particularly if the investigation occurs during the summer or during semester breaks. This situation can pose problems if the faculty handbook, collective bargaining agreement, or other institutional policy reserves to the faculty the responsibility for fact-finding or for recommending sanctions, particularly if the accused is a faculty member. For example, the AAUP’s “Sexual Harassment: Suggested Policy and Procedures for Handling Complaints”⁸⁰

75. Charles Huckabee, *Arizona State U. and 2 Groups for the Blind Settle Lawsuit over Kindle*, CHRON. HIGHER EDUC. (Jan. 11, 2010), <http://chronicle.com/blogs/wiredcampus/arizona-state-u2-groups-for-the-blind-settle-lawsuit-over-kindle/20439>.

76. See Press Release, Dept. of Justice, Justice Department Reaches Three Settlements Under the Americans with Disabilities Act Regarding the Use of Electronic Book Readers (Jan. 13, 2010), available at <http://www.justice.gov/opa/pr/2010/January/10-crt-030.html>.

77. Joint “Dear Colleague” Letter: Electronic Book Readers, U.S. Dept. of Educ., Office of Civil Rights (Nov. 16, 2011), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100629.html>.

78. 20 U.S.C. §§ 1681 *et seq.* (2014).

79. “Dear Colleague” Letter: Campus Sexual Assault, Office of Civil Rights (Apr. 4, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

80. AM. ASS’N OF UNIV. PROFESSORS, POLICY DOCUMENTS & REPORTS 244-46

provides that, if a complaint is lodged against a faculty member, a faculty committee should determine "the merits of the allegation."⁸¹ This requirement may, in practical terms, require the institution to contemplate either a departure from the OCR's recommended Title IX compliance protocols or a departure from the expectations or even the contract rights of faculty.

C. Looking Ahead

Increasing federal and state government compliance requirements have the potential to shift the responsibility from faculty bodies to administrators for making recommendations or decisions concerning accommodations for students with disabilities or fact-finding concerning complaints against faculty. This has already happened in the realm of academic accommodations for students with disabilities, in that many institutions have decided that administrators trained to understand the medical or psychological accommodation needs of students should make at least the initial determination of what accommodations are necessary (and reasonable). Indeed, institutions that lacked expertise in this area found themselves liable for violations of the Americans with Disabilities Act or Section 504.⁸² Similarly, courts have ruled that a lengthy delay in addressing a student's sexual harassment claim against a faculty member could be evidence of "deliberate indifference," which would expose the institution to Title IX liability.⁸³

Commentators are bemoaning the reduction in the proportion of college and university employees who are full-time faculty members, noting the increase in the number of administrators as compliance responsibilities skyrocket.⁸⁴ This shift seems inevitable, given the present climate of increasing compliance responsibilities; it will continue to exacerbate the often-strained relationships between faculty and institutional leaders as faculty see their role in governance decline.

(10th ed., 2006).

81. *Id.* at 245.

82. *See, e.g.*, *Guckenberger v. Boston Univ.*, 957 F. Supp. 306 (D. Mass. 1997).

83. *See, e.g.*, *Hayut v. State Univ. of New York*, 352 F.3d 733 (2d Cir. 2003) (although lengthy delay in this case was attributable to the student's decision to wait to report the harassment until the end of the semester, the court stated that deliberate indifference could be found in a case where the delay was lengthy and unjustified.) *See also* *Oden v. Northern Marianas College*, 284 F.3d 1058 (9th Cir. 2002).

84. BENJAMIN GINSBERG, *THE FALL OF THE FACULTY: THE RISE OF THE ALL-ADMINISTRATIVE UNIVERSITY AND WHY IT MATTERS* (2011) (using data compiled by the U.S. Department of Education, Ginsberg states that between 1975 and 2005, the number of full time faculty in the U.S. increased by 51 percent, while the number of administrators increased by 85% and the number of professional staff increased by 240%).

V. RECOMMENDATIONS

Despite the recent high profile clashes between faculty bodies and administrators or trustees, and recognizing that compliance requirements are unlikely to diminish and will probably continue to increase, how can faculty and administrators (and boards) navigate these troubled waters? While acknowledging the structural and political difficulties that complicate collegial governance, we believe that there are strategies that can be used to help minimize the conflict and respond to the demands of external entities, whether governmental, political, or ideological. Below is a series of recommendations we offer for the reader's consideration.

1. Engage in a dialogue with faculty *before* a serious dispute arises about faculty roles in accreditation, assessment, non-traditional educational offerings, and the other "pressure points" identified above. Discussions held in times of (relative) calm may bear fruit in times of crisis.
2. Create standards, jointly agreed upon by the administration and the faculty, regarding the types of issues on which the administration will seek advice from representative faculty bodies.
3. Review the current structure of faculty governance committees or joint faculty/administration committees. Analyze which are working, which are useful, and which may be obsolete or not workable as currently configured. Also analyze whether other committees or structures may be needed. This review can and should be undertaken cooperatively with the faculty.
4. Avoid creating "busy work" for faculty committees; there is too much real work being left undone to waste human resources and faculty expertise.
5. For administrators, give serious consideration and deference to faculty recommendations, particularly those involving areas that are commonly termed the faculty's "primary responsibilities." Where the administration decides not to follow faculty recommendations, particularly in areas of primary faculty responsibility, consider discussing these differences or decisions with the appropriate faculty members or committees. This is consistent not only with the approach advocated in the AAUP's *Statement on Government* but it may also help the institution make sound decisions.
6. Share budget information with faculty as appropriate to the particular budgetary process at issue. Make the

faculty responsible for planning how new initiatives being proposed by the faculty will be funded through a joint effort between the faculty and the administration.

7. Encourage faculty participation not only in institutional governance but also in the accreditation process, including communication and negotiation with accrediting agencies as appropriate.
8. Talk with the faculty not only about the volume of compliance obligations that colleges and universities now face (which often does not resonate with faculty) but also more specifically about the faculty's role in ensuring compliance. Some of the faculty's resistance to "compliance" stems from lack of understanding of the faculty's role (and a fear stemming from that lack of understanding).
9. Share general information on the compliance obligations of colleges and universities. For example, introduce faculty leaders to the Higher Education Compliance Alliance website, created by NACUA in partnership with other groups.⁸⁵
10. Many faculty handbooks and related policies are seriously in need of updated definitions and procedures. While many institutions postpone faculty handbook revision initiatives, fearing the scheduling delays and potential disagreements that they may bring, a faculty handbook revision process (if properly managed) may offer invaluable opportunities for a dialogue with the faculty about new compliance requirements and challenges.

85. HIGHER EDUC. COMPLIANCE ALLIANCE, *supra* note 60.

