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# THE CORPORATIZATION OF THE UNIVERSITY: DISTANCE LEARNING AT THE COST OF ACADEMIC FREEDOM?

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## I. INTRODUCTION

The last decade of the twentieth century witnessed a romance with private economic markets and corporate profits. The stock market climbed in what appeared to be a perpetual spiral, based on public confidence in corporate expansion, particularly in the domain of new Internet and technology businesses.<sup>1</sup> In the world of higher education, universities<sup>2</sup> also entered the romance with private markets and corporate profits. Educational institutions built close relationships with large corporations and granted licenses to corporations to market products that resulted either from corporate research funding or from federal funding.<sup>3</sup> In fact, universities have never been so intertwined with the corporate business world. Not only are they more dependent on increased corporate funding,<sup>4</sup> but through technology-licensing offices to file and manage

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<sup>1</sup> See Jeff Madrick, *Enron, the Media and the New Economy*, THE NATION, Apr. 1, 2002, at 17 (commenting on the rhetoric of the “new economy” of the mid-1990’s which fueled the inflated speculative value of information technology stocks).

<sup>2</sup> Unless otherwise noted, this Article will use the term “university” to refer to both colleges and universities.

<sup>3</sup> Eyal Press & Jennifer Washburn, *The Kept University*, THE ATLANTIC MONTHLY, Mar. 2000, at 39.

<sup>4</sup> The growth of corporate funding for academic research is reported to have expanded at an annual rate of 8.1% between 1980 and 1998, to a level of \$1.9 billion in 1997, which is almost eight times the corporate funding level twenty years earlier. *Id.* at 41. Corporate-endowed professorships have also increased, including the Enron Professor of

university research patents, attacks on the tenure system, and the increased employment of low paid adjunct faculty and graduate student teaching assistants,<sup>5</sup> they have adopted corporate business practices and values. In the most recent "corporatization" trend, universities have joined the pursuit of profits through the corporate world of technology by creating for-profit subsidiaries to develop and market "distance learning" on the Internet.<sup>6</sup>

Against the background of the recent revelation of the depth and breadth of corporate corruption in scandals such as Enron, WorldCom, Global Crossing, and Adelphia Communications,<sup>7</sup> it is particularly troubling that universities have chosen to so closely align themselves with and model themselves after private industry. The negative consequences of the corporatization of higher education are serious and threaten the qualities of universities that distinguish academia from for-profit corporations.<sup>8</sup> As public or private nonprofit institutions, universities are intentionally different from commercial businesses in both their

Economics at the University of Nebraska, two Enron-endowed chairs in e-commerce and risk management at Rice University, Arthur Andersen-endowed professorships at the University of Southern California and Texas A&M, the Kenneth L. Lay Professorship in Political Science at the University of Houston, a Kmart-endowed chair at the West Virginia University Management School, and the BankAmerica Dean of Haas School of Business at the University of California, Berkeley. In light of the recent corporate collapses at Enron and Arthur Andersen, "the financing of some of them is now in doubt." Daniel Altman, *Enron Professor of Economics Has a New Ring Now*, N.Y. TIMES, Feb. 3, 2002, § 3, at 1; Press & Washburn, *supra* note 3, at 41.

<sup>5</sup> See *infra* text accompanying text notes 100-130.

<sup>6</sup> See *infra* text accompanying notes 131-177.

<sup>7</sup> See, e.g., Amy Borrus et al., *Corporate Probes: A Scorecard*, BUS. WK., June 10, 2002, at 42 (listing the corporate scandals, including the billions of dollars from corporate overstatement of revenues); Barnaby J. Feder, *And More Scandals*, N.Y. TIMES, Aug. 11, 2002, at 2 ("The accounting debacle at WorldCom took on new dimensions Thursday after the telecommunications giant raised its estimate of how much earnings had been improperly inflated in recent years by \$3.3 billion, to \$7.1 billion."); Richard A. Oppel, Jr., *Enron Official Expected to Say Many Knew of Irregularities*, N.Y. TIMES, Feb. 14, 2002, at C1 ("[Enron] restated its earnings on Nov. 8, when it announced that it had overstated income by nearly \$600 million during the prior five years, beginning a rapid series of events that led to Enron's declaration of bankruptcy a month later."); Simon Romero, *Echoes of Other Scandals Haunt a Chastened Qwest*, N.Y. TIMES, July 30, 2002, at C4 (stating that in late July 2002, Qwest admitted that "it had improperly accounted for at least 220 transactions valued at about \$1.16 billion from 1999 to 2001. That amount was less than the \$3.85 billion WorldCom improperly accounted for in a scandal that caused the largest bankruptcy filing in United States history earlier this month.").

<sup>8</sup> See Peter D. Blumberg, *From "Publish or Perish" to "Profit or Perish: Revenues From University Technology Transfer and the 501(c)(3) Tax Exemption*, 145 U. PA. L. REV. 89, 91 (1996) (quoting former Harvard University President Derek Bok, who cautioned the Harvard Board of Overseers that "flashing yellow lights should appear, however, whenever the institution seeks to make a profit on basic academic functions . . . such as . . . research . . . in order to finance its other activities").

goals and structure. Perhaps the corporate scandals will serve as reminders of these differences.

Universities have a public mission to engage in teaching and research for the social good, independent from any private interests, including those of corporate donors. To fulfill this public mission, one segment of the university workforce, the faculty, have been provided unique rights of academic freedom to engage in an open exchange of ideas in their teaching, research, and public speech, including the right to openly criticize the university administration.<sup>9</sup> Faculty academic freedom includes significant autonomy and self-governance over academic matters of research, teaching, and faculty hiring and promotion. The tenure system provides job security and due process rights to protect faculty from retaliation for exercising their academic freedom.

In contrast, commercial businesses exist for private profit-maximizing goals, and are supported by programs of privatization and deregulation.<sup>10</sup> For-profit corporations seek to maintain secrecy and nondisclosure of trade secrets and business information<sup>11</sup> and function within a nondemocratic hierarchical decision-making structure. In the wake of the recent corporate scandals, commentators have expressed surprise at the exceptional individuals who had the courage to raise dissenting views to corporate executives about fraudulent practices.<sup>12</sup> The aftermath of these scandals is a reminder of the corporate hierarchical power structure. Thousands of employees were laid off and left with worthless pension plans, while corporate executives profited enormously from having already

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<sup>9</sup> For discussion of the development and content of academic freedom, see *infra* text accompanying notes 14-65, 79-86.

<sup>10</sup> See *infra* text accompanying notes 157-170. For analysis of the systemic nature of the corporate scandals, see Thomas Frank, *Shocked, Shocked! Enronian Myths Exposed*, THE NATION, Apr. 8, 2002, at 17; Lester C. Thurow, *Government Can't Make the Market Fair*, N.Y. TIMES, July 23, 2002, at A19. Professor Thurow, an economist at the MIT Sloan School of Management, wrote:

Anyone who thinks the current round of corporate scandal could have been prevented with the rules and regulations simply does not understand American capitalism. The Enrons, WorldComs and Tycos are not abnormalities in a "basically sound system." Scandals are endemic to capitalism. The best any government can do is contain the damage, and the best any individual investor can do is get out of harm's way.

*Id.*

<sup>11</sup> See Blumberg, *supra* note 8, at 126-27 (discussing the inconsistency between granting trade secret protection to university research results and maintaining the integrity of the university's "public purpose," which provides the foundation for universities' federal 501(c)(3) tax exemption).

<sup>12</sup> See, e.g., Anita F. Hill, *Insider Women with Outsider Values*, N.Y. TIMES, June 6, 2002, at A31; Marci Alboher Nusbaum, *Blowing the Whistle: Not for the Fainthearted*, N.Y. TIMES, Feb. 10, 2002, § 3, at 10; John Schwartz, *Playing Know and Tell*, N.Y. TIMES, June 9, 2002, § 4, at 2; Jim Yardley, *With Warning on Enron, a Celebrity Is Born*, N.Y. TIMES, May 10, 2002, at A1.

cashied in their stock options.<sup>13</sup>

This Article will study the corporatization of the university, examining the resulting fundamental shift of values in higher education and the negative effects of those changes on academic freedom. The Article will address, as well, faculty responses to current threats to its autonomy and explore the potential for collective faculty action to reassert democratic values of academic freedom through faculty governance processes. The Article will focus closely on universities' most recent entry into the corporate world: for-profit "distance learning" corporations. Recent and continuing events related to Cornell University's creation of e-Cornell, a for-profit corporation to market educational materials on the Internet, will be studied as examples of the issues of academic freedom raised by university for-profit ventures. The debates at Cornell over the creation of e-Cornell raised issues of academic freedom in process and content. With regard to process, the issues of academic freedom entail collective faculty governance processes; with regard to content, the issues entail threats to academic freedom raised by the choice to create a for-profit corporation.

Part II of the Article sets forth a brief history of academic freedom in the United States, starting in 1915, with the creation of the American Association of University Professors to protect faculty rights to freely teach, research, and speak publicly. This history demonstrates the parallels between the struggles for academic freedom during the industrialization period of the 1900's and the current period of corporate globalization. Both eras have been marked by universities' increasing dependence on private corporate funding. Then, as now, the central role of private corporate financing was accompanied by corporate expectations of influence over and service by university teaching and research functions. This historical account also demonstrates that the values of academic freedom have been deeply internalized in university policies and practices, though the struggle for a broad scope of academic freedom has continued in the face of ongoing political and economic pressures.

Part III addresses the recent expansion of corporatization trends in the university that threaten to undermine the values of academic freedom through attacks on tenure, the growth of the nontenure-track contingent faculty workforce, and the adoption of for-profit models for research and teaching. The primary focus in this discussion is the recent pattern of public and private universities' creation of profit-driven Internet-based distance learning programs. The Article will examine the types of business organizations adopted by university distance

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<sup>13</sup> For a list of the millions of dollars of proceeds gained by stock sales by Qwest Communications International's current and former officers and board members from 1999 through mid-2001, see Romero, *supra* note 7. See also Rick Bragg, *Workers Feel Pain of Layoffs and Added Sting of Betrayal*, N.Y. TIMES, Jan. 20, 2002, § 1, at 1; Steven Greenhouse, *Labor to Press for Changes in Corporate Governance*, N.Y. TIMES, July 30, 2002, at C7; David Leonhardt, *Anger at Executives' Profits Fuels Support for Stock Curb*, N.Y. TIMES, July 9, 2002, at A1; Louis Uchitell, *Job Cuts Take Heavy Toll on Telecom Industry*, N.Y. TIMES, June 29, 2002, at C1.

learning for-profit programs, as well as university rationales for these new developments. The consequences for academic freedom of these for-profit businesses will be analyzed, as universities adopt goals and institutional structures that are in tension with the democratic values underlying academic freedom and the public mission of the university.

Part IV of the Article explores faculty responses to corporatization trends, with particular focus on Cornell University, presenting a case study of the administration's and trustees' creation of e-Cornell as a for-profit distance learning corporation. This case study also examines the faculty's collective response to the creation of e-Cornell and the potential power of faculty opposition to corporatization trends, where faculty collective action is motivated by a shared identity based on the values of academic freedom.

## II. THE BACKGROUND OF ACADEMIC FREEDOM IN THE UNITED STATES

Early faculty demands for academic freedom grew out of fundamental changes in the system of higher education during the post-Civil War era and the late nineteenth century. The collegiate evolution from a religious system to a secular system marked the beginning of the modern research university. The acceptance of the scientific method in faculty research and the development of the university to train future professors in a specialized field of science created conditions for successful demands for faculty autonomy. Initially, these demands were made to ecclesiastical boards of trustees and college officials, and then later to lay members of secular boards of trustees and college administrators.<sup>14</sup> Faculty called for autonomy to rely on peer-review judgments of faculty competence.<sup>15</sup> The ability of faculty to communicate with their colleagues across universities was enhanced by the formation of professional organizations of scholars in specialized fields, including the rapidly growing social sciences, during the late nineteenth and early twentieth centuries.<sup>16</sup>

During this period, the great expansion of industrialization also had major impacts on the nature of the university. In particular, the ability of social scientists to teach and do independent research was affected. Though they were also influenced by the scientific method and its reliance on stated values of "objectivity" and "neutrality" of the researcher, social scientists studied a society fraught with problems of increased divisions of wealth and power on the basis of class. This period included the birth and growth of the labor movement and the development of radical critiques of capitalism.<sup>17</sup> Professors studying this new

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<sup>14</sup> See RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 365 (1955).

<sup>15</sup> See *id.*; J. Peter Byrne, *Academic Freedom: A "Special Concern" of the First Amendment*, 99 YALE L.J. 251, 269-76 (1989).

<sup>16</sup> See Byrne, *supra* note 15, at 271 n.79.

<sup>17</sup> See PHILIP S. FONER, *HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES, VOL. I: FROM COLONIAL TIMES TO THE FOUNDING OF THE AMERICAN FEDERATION OF*

society included social reformers who, through their teaching, research, and public statements, called attention to problems such as private corporate control of railroads and utilities and exploitation of immigrant labor.<sup>18</sup> These academics also saw their research as contributing to remedies for such societal problems.<sup>19</sup>

As social reformers entered the growing academic fields of social science, the development of universities as important corporate structures was fueled by enormous financial contributions from major industrialists.<sup>20</sup> For example, toward the end of the nineteenth century, the founder of Standard Oil Company donated \$34 million to the University of Chicago, and the estate of West Coast railroad industrialist Leland Stanford donated \$24 million to Leland Stanford Junior University.<sup>21</sup> The magnitude of these donations is even more apparent when compared with donations immediately prior to the industrial era, which were typically in the thousands of dollars.<sup>22</sup> As universities became more financially dependent on funding from private corporations, the corporations gained leverage and the power to interfere with the academic freedom of professors.<sup>23</sup> Furthermore, the industrialists' class position increased their motivation to interfere with professors' autonomy. Social scientists criticizing capitalism and specific industry practices through their teaching, research, and public statements were acting directly against the interests of the universities' financial supporters.<sup>24</sup>

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LABOR 497-524 (1947).

<sup>18</sup> See ELLEN W. SCHRECKER, *NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES* 14-17 (1986).

<sup>19</sup> See *id.* at 14-15; HOFSTADTER & METZGER, *supra* note 14, at 417-18.

<sup>20</sup> See HOFSTADTER & METZGER, *supra* note 14, at 413.

<sup>21</sup> *Id.* During the early twentieth century, industrialists also donated millions of dollars through their newly established foundations, including the General Education Board, founded by John D. Rockefeller, and the Carnegie Corporation. *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> See *id.* at 413-19 (discussing the growth of corporate donations to universities and the increase in representation of industrialists and businessmen on boards of trustees).

<sup>24</sup> *Id.* at 413-19; SCHRECKER, *supra* note 18, at 14-17. See *AAUP 1915 Declaration of Principles*, in *ACADEMIC FREEDOM AND TENURE: A HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS* 155, 166-67 (Louis Joughin ed., 1967) [hereinafter *1915 Declaration of Principles*] (describing the "special dangers" to academic freedom in the social sciences, where "almost every question . . . is more or less affected with private or class interests; and, as the governing body of a university is naturally made up of men who through their standing and ability are personally interested in great private enterprises, the points of possible conflict are numberless"). Hofstadter and Metzger take the position that the confrontations between academics and industrial benefactors and trustees were not inevitable and can often be explained by specific nonideological factors. They do observe, though, that the closer an academic's work came to "threatening concrete interests" of business, as opposed to generally "doubting accepted ideologies," the greater the risk to the professor's employment. HOFSTADTER & METZGER, *supra* note 14, at 434.

Industrialists' expectations for university accomplishments were in marked contrast to the social scientists' social critiques and support for social reform of capitalism. Industry expectations were not even for a university "neutral" toward capitalism. Instead, industry viewed the university as the training ground for the technical experts and professionals who would be employed in industry in fields like engineering and management. Additionally, with the development of university departments in these technical and professional fields, industry anticipated that professors' research would be of utility in industry practice. In fields ranging from agriculture to business management to engineering, professors in traditional academic departments and extension divisions did produce such research, partly through individual contracts with specific industry clients.<sup>25</sup> The federal government, through the Morrill Act,<sup>26</sup> reinforced and aided this relationship between the universities and industry. Enacted in 1862, the Act created land grant colleges to provide education and training for students who would enter the growing industries, such as manufacturing and commercial agricultural ventures. The land grant colleges also provided applied research for industry and agriculture performed by faculty in new departments, such as agriculture, mechanical arts, commerce, and business administration.<sup>27</sup> Non-land grant colleges added such departments as well.<sup>28</sup>

Given the necessary connections between social scientists and the societal institutions they study, all social scientists, pure and applied alike, needed autonomy from the industrialists who were the benefactors and trustees of the universities. Like their natural science faculty counterparts, the social scientists demanded independence from governing university boards and officials. And, as in the natural sciences, the demand for academic freedom rested on the social scientists' expertise. Only professionals in the specialized fields, represented by newly formed professional organizations, such as the American Economic Association and the American Sociological Society, founded in the late nineteenth and early twentieth centuries, could properly judge their expertise.<sup>29</sup> This demand for freedom from interference by lay boards of trustees and university officials was harder to sustain for the social scientists than the natural scientists. Though the social scientists relied on the scientific method, the role of values, ethics, and

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<sup>25</sup> See HOFSTADTER & METZGER, *supra* note 14, at 379-83.

<sup>26</sup> Morrill Act, ch. 130, § 4, 12 Stat. 503, 504 (1862) (codified at 7 U.S.C. § 304 (2000)). The Act provides land grants to states for colleges

where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts . . . in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life.

Byrne, *supra* note 15, at 270 n.71.

<sup>27</sup> HOFSTADTER & METZGER, *supra* note 14, at 380; Byrne, *supra* note 15, at 270.

<sup>28</sup> HOFSTADTER & METZGER, *supra* note 14, at 380-81; Byrne, *supra* note 15, at 270.

<sup>29</sup> See Byrne, *supra* note 15, at 271 n.79, 273-76.

politics in analysis of social institutions was more obvious than in the natural sciences.<sup>30</sup>

Several well-known cases of dismissals of socially reform-minded professors during this period demonstrated the power of industry to intervene in university policy toward professorial academic freedom. These cases included the forced resignation of economist E.A. Ross from Stanford University and the dismissal of economist Edward W. Bemis from the University of Chicago because of their public political positions, such as advocacy of public ownership of utilities.<sup>31</sup>

An important collective assertion of academic freedom came in 1915 with the formation of the American Association of University Professors ("AAUP").<sup>32</sup> The academic freedom cases of the late nineteenth century formed a significant background for the creation of the AAUP, whose founders included faculty who had been involved in those conflicts.<sup>33</sup> The experience of these cases is reflected in the AAUP's 1915 Declaration of Principles ("Declaration"), which asserted that the greatest threat to academic freedom had shifted from the earlier ecclesiastical interference with the disciplines of philosophy and the natural sciences to the threat to the political and social sciences by powerful industrialists acting as benefactors and members of boards of trustees.<sup>34</sup>

The 1915 Declaration was important as a description of the scope of academic freedom claimed by the profession for itself. In an organized call for academic freedom, the AAUP brought together key players in faculty struggles for

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<sup>30</sup> See *id.* at 276.

<sup>31</sup> As university founder and sole trustee, Jane Stanford, widow of west coast railroad industrialist Leland Stanford, exercised enormous power to intervene in employment decisions, including making good on her statements to the Stanford president that Professor Ross, an outspoken critic of big business, "cannot entertain such rabid ideas without inculcating them in the minds of students . . . . There is a very deep and bitter feeling of indignation throughout the community . . . that Stanford University is lending itself to partisanism and even to dangerous socialism. Professor Ross cannot be trusted, and he should go." HOFSTADTER & METZGER, *supra* note 14, at 439. On similar political cases of this period, see *id.* at 419, 426-27; SCHRECKER, *supra* note 18, at 14-17.

<sup>32</sup> See HOFSTADTER & METZGER, *supra* note 14, at 468-70.

<sup>33</sup> See SCHRECKER, *supra* note 18, at 17-18. The formation of the AAUP is also consistent with the broader development of professionalization during this period. See Byrne, *supra* note 15, at 276-77; SCHRECKER, *supra* note 18, at 14 n.5; LAURENCE VEYSEY, *THE EMERGENCE OF THE AMERICAN UNIVERSITY* 416 (1965). The impetus for the AAUP formation has been linked, as well, to the political climate of the Progressive Era: a less political and socially traumatic time than the late nineteenth century, and an era promoting the link between expertise and public service. See SCHRECKER, *supra* note 18, at 17; David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 232 (1990).

<sup>34</sup> 1915 *Declaration of Principles*, *supra* note 24, at 165-66; HOFSTADTER & METZGER, *supra* note 14, at 412; SCHRECKER, *supra* note 18, at 18. The 1915 Declaration was drafted by the AAUP Committee on Academic Freedom and Tenure. *Id.*

autonomy from outside interference in their work. The impact of the faculty organizing into one cross-disciplinary organization is a testament to the potential of collective action to shape the norms of the workplace.<sup>35</sup> The Declaration led to a response in 1925 by the American Council on Education, which called a conference of higher education organizations for the purpose of issuing a joint statement of principles of academic freedom and tenure. The resulting 1925 Conference Statement on Academic Freedom and Tenure was followed by the AAUP 1940 Statement on Academic Freedom and Tenure, which was endorsed by the Association of American Colleges, and over subsequent decades, by over 150 academic professional organizations and universities.<sup>36</sup> Thus, the creation and development of "professional academic freedom" took place outside the judicial and legislative systems.<sup>37</sup>

A central motive of the 1915 Declaration, consistent with the earlier history of demands for academic freedom, was to justify professors' autonomy from intrusion by powerful parties outside the faculty, including boards of trustees and university officials, private donors, and legislators in the case of public sector universities.<sup>38</sup> The Declaration accomplished this goal; it made strong arguments for substantive and procedural protections from laypersons and institutions interfering on the basis of their vested interests in restricting freedom of inquiry and teaching. This essential barrier between the faculty and such powerful outsiders was created by building a wall between professional scholars and laypersons, who lacked the training and expertise needed to judge professional

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<sup>35</sup> The 1915 Declaration has been described as "the single most important document relating to American academic freedom." Byrne, *supra* note 15, at 276. It has also been noted as "the first comprehensive analysis of academic freedom in the United States, [which] remains the foundation for the non-legal understanding of academic freedom within the academic world." Rabban, *supra* note 33, at 232. For a discussion of the effectiveness of the AAUP's 1940 Statement of Principles on Academic Freedom and Tenure, which was based on the 1915 Declaration of Principles, in shaping the norms and practices of the academic profession, see Matthew W. Finkin, *Regulation by Agreement: The Case of Private Higher Education*, 65 IOWA L. REV. 1119, 1150-55 (1980).

<sup>36</sup> 1915 Declaration of Principles, *supra* note 24, at 157; AAUP POLICY DOCUMENTS & REPORTS 1 (1995). See generally Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, 53 LAW & CONTEMP. PROBS. 3 (1990). The AAUP has continued to issue policy statements, investigate alleged breaches of academic freedom in higher education, and more recently, represent university and college faculty in collective bargaining. AAUP POLICY DOCUMENTS & REPORTS, *supra* at 215.

<sup>37</sup> Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1265-68, 1285 (1988); William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79, 79-82 (1990). For discussion of the differences between professional and constitutional academic freedom, see *infra* text accompanying notes 75-86.

<sup>38</sup> Metzger, *supra* note 37, at 1276-81; Byrne, *supra* note 15, at 273-76.

competency of faculty.<sup>39</sup>

The 1915 Declaration describes faculty academic freedom as "compris[ing] three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extra-mural utterance and action."<sup>40</sup> In setting forth the scope and justification for these three freedoms, the Declaration discusses significant aspects of the university: the function of higher education; the nature of faculty work; the scope of individual faculty rights; the role of collective professional autonomy; and the relationship of faculty to the university.

The 1915 Declaration's argument for faculty autonomy interweaves the institutional identity of the university with the individual identity of the faculty member and the collective identity of the academic profession. The Declaration asserts that the institutional legitimacy of a university is dependent on its identity as a "public trust,"<sup>41</sup> given the role of "education [as] the cornerstone of the structure of society,"<sup>42</sup> "advanc[ing] knowledge by the unrestricted research and unfettered discussion of impartial investigators."<sup>43</sup> Unlike other employers, as trustees for the public, university trustees are "moral[ly] restricted" from using their power, including dismissals, to interfere with professors' "intellectual freedom" on the basis of the trustees' "private antipathies or resentments."<sup>44</sup> Regardless of its public or private status, a university claiming to be a "nonpartisan institution of learning" cannot legitimately act as a "private or proprietary trust" that dictates the views of its faculty.<sup>45</sup> The Declaration asserts a goal, as well, of protecting "college executives and governing boards" unjustly charged with violating academic freedom, which would be "highly detrimental to the good repute and the influence of universities."<sup>46</sup>

The 1915 Declaration links the university's institutional identity as a public trust for "advanc[ing] knowledge" with the right to academic freedom for individual faculty. Individual professors' primary responsibility is to the public, placing faculty more in the role of "appointees" of the trustees, rather than employees.<sup>47</sup> In carrying out their roles, faculty must be motivated solely by the search for truth in their area of expertise. Academic freedom is required to

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<sup>39</sup> Metzger, *supra* note 37, at 1276-81.

<sup>40</sup> *1915 Declaration of Principles*, *supra* note 24, at 158. The 1915 Declaration reflects the influence of the German university and the German concept of academic freedom, discussing *Lehrfreiheit* (freedom of teaching and freedom of inquiry) and *Lernfreiheit* (student freedom of learning). The 1915 Declaration explicitly omitted *Lernfreiheit*, focusing only on *Lehrfreiheit*. *Id.* at 157-58. On this omission, see Metzger, *supra* note 37, at 1271-72.

<sup>41</sup> *1915 Declaration of Principles*, *supra* note 24, at 160.

<sup>42</sup> *Id.* at 161.

<sup>43</sup> *Id.* at 159.

<sup>44</sup> *Id.* at 160.

<sup>45</sup> *Id.*

<sup>46</sup> *1915 Declaration of Principles*, *supra* note 24, at 174.

<sup>47</sup> *Id.* at 162-63. The Declaration draws an analogy to the appointment of federal judges by the President. See *id.* at 163.

ensure that professors, who are "trained for, and dedicated to, the quest for truth," state their own conclusions and "not the echoes of the opinions of the lay public, or of the individuals who endow or manage universities."<sup>48</sup> "Unadulterated" research and teaching is assured when "professional scholars" are motivated only by "their own scientific conscience and a desire for the respect of their fellow experts."<sup>49</sup> The Declaration places its faith in the scientific method, applied in both the natural sciences and the social sciences, as it requires "disinterestedness and impartiality"<sup>50</sup> free from the influence of either "vested [private] interests" or legislators.<sup>51</sup>

The 1915 Declaration explicitly identifies the particular need at that time to shelter academics from retaliation for their academic work, including their "extramural speech" on "controversial questions" and speech falling outside their expertise.<sup>52</sup> The Declaration's coverage of extramural speech was intended to cover speech outside a faculty member's professional duties or disciplinary expertise, whether made on or off campus, thus actually covering intramural and extramural speech.<sup>53</sup> The accuracy of the Declaration's concern with protecting extramural speech has been evidenced by the large number of AAUP investigations of allegations of university retaliation against faculty members for speech outside their teaching and research.<sup>54</sup> Academic freedom in extramural speech also includes a right of association, expressed by the Declaration as the freedom to "lend[] . . . active support to organized movements which [professors] believe to be in the public interest."<sup>55</sup>

The 1915 Declaration describes the autonomy of the academic profession as essential to guarding academic freedom from outside interference. This independence is achieved through a process of self-regulation, shifting the power to apply professional standards from nonfaculty trustees or legislators, to the faculty themselves, including the award of tenure through a system of peer-review.<sup>56</sup>

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<sup>48</sup> *Id.* at 162.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 166.

<sup>51</sup> 1915 Declaration of Principles, *supra* note 24, at 166-67.

<sup>52</sup> *Id.* at 172. At the same time, the obligations attached to academic freedom require professors to speak with care, "avoid[ing] hasty or unverified or exaggerated statements. . . ." The extension of academic freedom to extramural speech contrasted with German *Lehrfreiheit*, which limited academic freedom to speech within an academic's area of expertise. Metzger, *supra* note 37, at 1274-75.

<sup>53</sup> See Metzger, *supra* note 37, at 1275. See also Matthew W. Finkin, *A Higher Order of Liberty in the Workplace: Academic Freedom and Tenure in the Vortex of Employment Practices and Law*, 53 LAW & CONTEMP. PROBS. 357, 372 (1990).

<sup>54</sup> See Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1335-39, 1343-44 (1988); Metzger, *supra* note 37, at 1275-76, 1278.

<sup>55</sup> 1915 Declaration of Principles, *supra* note 24, at 172.

<sup>56</sup> See *id.* at 169.

The AAUP's next broad-based policy statement on faculty academic freedom was the 1940 Statement of Principles on Academic Freedom and Tenure ("Statement of Principles"), which was the culmination of a joint effort by the AAUP and the Association of American Colleges to create a restatement of principles of academic freedom.<sup>57</sup> The 1940 Statement of Principles, which has been widely accepted by academic organizations and institutions, reinforces fundamental aspects of the 1915 Declaration. It has been described as "adher[ing] to, adapt[ing], and strengthen[ing]" the principles of the 1915 Declaration.<sup>58</sup>

Consistent with the 1915 Declaration, the 1940 Statement of Principles justifies the right of academic freedom on the basis of the contribution of higher education to the "common good," rather than on the basis of individual or institutional interests.<sup>59</sup> To make this contribution, faculty need academic freedom which is essential to the "advancement of truth" in research and freedom in teaching and learning.<sup>60</sup> The 1940 Statement describes the triple identities of faculty, stating that "[c]ollege and university teachers are citizens, members of a learned profession, and officers of an educational institution."<sup>61</sup> The Statement of Principles emphasizes the centrality of tenure as supporting rights of academic freedom in teaching, research, and extramural activities.<sup>62</sup>

In carving out its areas of autonomy, the academic profession has created institutional norms in favor of faculty participation in university governance. In addition to peer-review, this participative role has also taken the form of faculty governance bodies, such as faculty senates and, in some cases, collective bargaining. The AAUP, beginning in the 1960's, adopted policy statements seeking to solidify and strengthen policies and practices favoring such faculty governance, calling for "joint effort" between faculty and university administration on university policy matters.<sup>63</sup> While the AAUP statements are

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<sup>57</sup> See *1940 Statement of Principles on Academic Freedom and Tenure*, in AAUP POLICY DOCUMENTS & REPORTS, *supra* note 36, at 3 [hereinafter *1940 Statement of Principles*]. The Association of American Colleges is now the Association of American Colleges and Universities. *Id.* at 1.

<sup>58</sup> The editor's note from a 1954 reproduction of the *Declaration of Principles*, 40 AAUP Bulletin, 89-112 (Spring 1954), states: "[In both] the 1925 Conference Statement and the subsequent adaptation of the principles set forth therein - the 1940 Statement of Principles, . . . the principles set forth in the Declaration of 1915 are adhered to, adapted, and strengthened . . . ."

<sup>59</sup> *1940 Statement of Principles*, *supra* note 57, at 3.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 4.

<sup>62</sup> See *id.* The 1940 Statement of Principles describes the collective role of faculty in providing due process rights to tenured faculty prior to dismissal or prior to the end of a contract term, which is expanded in the AAUP's 1958 Statement on Procedural Standards, supplementing the 1940 Statement. AAUP POLICY DOCUMENTS & REPORTS, *supra* note 36, at 11.

<sup>63</sup> See *Statement on Government of Colleges and Universities* (jointly formulated by the

primarily addressed to preserving faculty autonomy over its defined sphere of competence, such as faculty appointments and promotions, curricular matters, and judgments of student performance, they also restate the protection of faculty extramural speech.<sup>64</sup> The AAUP also adopted policy statements supporting the right of faculty to unionize and engage in collective bargaining.<sup>65</sup>

### III. THE CORPORATIZATION OF THE UNIVERSITY: CHALLENGES TO ACADEMIC FREEDOM

#### A. Corporatization vs. Faculty Rights: An Overview

Perhaps the most impressive aspect of the development of professional academic freedom is the AAUP's effective use of collective action to shape the norms and identities of the individuals, groups, and institutions in higher education. The AAUP academic freedom principles have been internalized by the academic profession and, in important ways, by academic institutions. Important principles for analyzing recent challenges to academic freedom include: the public mission of the university; faculty and institutional autonomy from corporate influence; and the role of faculty self-governance. These principles create a vision of the university, public or private, as an institution that exists to serve the public good, with faculty teaching and research contributing to expanding the public domain of inquiry and knowledge. The principles of academic freedom are also based on democratic rights of freedom of speech and association, due process, and self-governance, reflecting underlying values of autonomy, respect, dignity, and self-determination.

The principles of the public mission of higher education and the democratic rights of academic freedom have made a substantial difference in university policies and practices. Faculty exercise rights of academic freedom in their research, by teaching a wide range of courses across the curriculum and by speaking out individually and collectively on local, national, and international

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AAUP, the American Council on Education, and the Association of Governing Boards of Universities and Colleges and endorsed in 1967 by the AAUP) and *Statement on the Relationship of Faculty Governance to Academic Freedom* (approved in 1994 by the AAUP Committee T on College and University Governance and the AAUP Committee A on Academic Freedom and Tenure and, in 1994, adopted by the AAUP Council), in AAUP POLICY DOCUMENTS & REPORTS, *supra* note 36, at 179-89.

<sup>64</sup> The AAUP Committee A Statement on Extramural Utterances emphasizes the collective professional identity of academics in evaluating any charge by a university administration that a faculty member's extramural speech was so outside the individual right of academic freedom as to "clearly demonstrate the faculty member's unfitness to serve." AAUP POLICY DOCUMENTS & REPORTS, *supra* note 36, at 32.

<sup>65</sup> *Statement on Collective Bargaining* (adopted by the AAUP in 1973 and revised in 1984), in AAUP POLICY DOCUMENTS & REPORTS, *supra* note 36, at 217.

issues related to and independent of the university.<sup>66</sup> Faculty self-governance includes collective autonomy through the peer-review process for tenure, including internal tenure appeals processes in some universities, in which faculty committees have overturned negative tenure decisions on the basis of procedural and substantive flaws in department and college reviews. Faculties also engage in collective activities through faculty governance bodies, including faculty senates and in some universities, through faculty unions.

The corporatization of higher education presents a bold challenge to the vision of the university's public mission and independence and to the individual and collective rights of academic freedom described in the AAUP 1915 Declaration and the 1940 Statement of Principles. Furthermore, just as the 1915 Declaration and the 1940 Statement of Principles describe both public and private universities in their function as a public trust that contributes to the "public good," the current shift of university identity to private market actor affects both public and private sector universities.<sup>67</sup> Corporatization of the university is evidenced by universities adopting policies and practices modeled on private sector corporate businesses and developing close relations with private businesses in teaching and research activities.<sup>68</sup> The corporatization of the university has been manifested in multiple policies and practices, including: attacks on the tenure system; the growth of the contingent workforce of adjunct teaching faculty; the related exploitation of graduate students in fulfilling teaching needs; university patents of faculty research for commercial profit; the increased reliance on private research funding conditioned on private corporate control and licensing of research results; and university creation of for-profit corporations to market education through distance learning technology. These changes flow from pressures to privatize and to promote the values of the market and corporate control. These changes also reinforce each other, thereby furthering the goal of corporatization.

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<sup>66</sup> For commentary that is critical of the practice of academic freedom in its narrow scope and reinforcement of the status quo, but which also recognizes the importance of academic freedom for providing room for free speech and institutional change in teaching and research, see Craig Kaplan, *Introduction*, in *REGULATING THE INTELLECTUALS: PERSPECTIVES ON ACADEMIC FREEDOMS IN THE 1980S* 1 (Craig Kaplan & Ellen Schrecker eds., 1983); Bertell Ollman, *Academic Freedom in America Today: A Marxist View*, in *REGULATING THE INTELLECTUALS*, *id.* at 45; Frances Fox Piven, *Academic Freedom and Political Dissent*, in *REGULATING THE INTELLECTUALS*, *id.* at 17.

<sup>67</sup> See generally *CAPITALIZING KNOWLEDGE: NEW INTERSECTIONS OF INDUSTRY AND ACADEMIA* (Henry Etzkowitz et al. eds., 1998) [hereinafter *CAPITALIZING KNOWLEDGE*]; *CHALK LINES: THE POLITICS OF WORK IN THE MANAGED UNIVERSITY* (Randy Martin ed., 1998) [hereinafter *CHALK LINES*]; SHEILA SLAUGHTER & LARRY L. LESLIE, *ACADEMIC CAPITALISM: POLITICS, POLICIES, AND THE ENTREPRENEURIAL UNIVERSITY* (1997).

<sup>68</sup> On the corporatization of the university, see STANLEY ARONOWITZ, *THE KNOWLEDGE FACTORY: DISMANTLING THE CORPORATE UNIVERSITY AND CREATING TRUE HIGHER LEARNING* (2000); SLAUGHTER & LESLIE, *supra* note 67; *CAPITALIZING KNOWLEDGE*, *supra* note 67; *CHALK LINES*, *supra* note 67; Press & Washburn, *supra* note 3.

Universities justify their adoption of corporate business and employment practices as necessary to address the financial crises facing universities due to rising costs and declining public funding.<sup>69</sup> However, hidden in this stated justification is the fundamental change in the values and norms underlying the corporatization of the university. While universities do face serious financial constraints, it is doubtful that financial concerns are the primary motivation for the increased corporatization of the university. Rather, the ideological shift to a private corporate business model, with its accompanying norms of corporate authority and control, is as plausible a primary motivation as the financial motive. The thesis of an ideological motivation is evidenced by the explicit changes in stated values that accompany the adoption of corporate practices, the scope and speed of the changes, and the potential that these changes create for increased control by administrators, trustees, and private businesses over faculty and their work. In the case of for-profit educational corporate ventures, the highly speculative nature of the financial gains, together with the shifts to market values, support the thesis that ideology is a primary force for institutional change. The shift to private market values has deep and serious implications for both the public mission of the university and academic freedom.

Though the relationship between universities and private corporations has always been of deep concern, the recent trends toward corporatization are striking, considering the scope of the changes in university policies and practices and the nature of the historical moment in which such changes are taking place. As in the period of industrialization in the early 1900's, corporate power is at a zenith and the role of government in providing public goods and services is declining. In current times, corporate power is even stronger, being expressed on a global level through policies of capitalist triumphalism following the demise of socialist economies. Thus, capitalist countries, with the United States in the lead, have declared victory over all other economic models, resulting in an unimpeded drive toward privatization promoted by multinational corporations and institutions such as the International Monetary Fund, World Trade Organization, and the World Bank. Against this background, values promoting a public sharing of information, independence of universities from corporate influence, and democratic rights for faculty members can begin to look "out of step" with the rest of the world. While capitalist countries were in competition with alternative economic models, vesting universities with an independent public mission to provide academic freedom to faculty functioned as an assurance that education was a democratic institution. Without the pressures from communist economic models, though, the university's status as an independent institution is vulnerable to the declaration of the supremacy of private markets.

Opposing the trends toward corporatization of the university will be difficult and perhaps even more difficult due to limitations on the scope of professional

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<sup>69</sup> See DAVID F. NOBLE, *DIGITAL DIPLOMA MILLS: THE AUTOMATION OF HIGHER EDUCATION* 28 (2001).

academic freedom resulting from its historical development. The peer-review structure, while carving out an area of faculty self-governance, left the private corporate power of universities largely unchallenged.<sup>70</sup> Leaving the university trustees' and administration's powers largely intact has negatively affected faculty self-governance as a vehicle for broadening academic freedom. Peer-review structures have been criticized as "self-policing" rather than self-governance, as the continued potential for trustee and administration interference leads to peer-review within standards acceptable to the administration and trustees.<sup>71</sup> The subjectivity of professional standards leaves politically unpopular or controversial faculty vulnerable to judgments of "partisanship" and "incompetence,"<sup>72</sup> similar to the vulnerability of faculty during the period of industrialization. The history of peer-review systems in universities in the United States includes many instances of the realities of such vulnerability, including the dismissals of faculty during the McCarthy era, faculty targeted for their politics during the Civil Rights movement and the Vietnam War, and more recently, tenure denials of faculty viewed as overly partisan in their teaching and research aimed at social reform.<sup>73</sup>

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<sup>70</sup> In its early formative period, the AAUP faced the choice of whether to commit to a broad goal of fundamentally shifting governing power within the university. A syndicalist faction within the AAUP promoted such a challenge to the university's power structure, advocating the restructuring of higher education into a public system with faculty control over appointments of administrators and university officers. The AAUP, however, rejected this goal, opting not to challenge the private power structures of the system of higher education, thus maintaining a commitment to a system of higher education that depended heavily on privately funded colleges and universities with powerful university officials and administrators. Rather, the AAUP chose to make a more limited challenge to the power structure through the tactic of carving out a position of power for the academic profession within the existing institutional structure. See HOFSTADTER & METZGER, *supra* note 14, at 473; SCHRECKER, *supra* note 18, at 25-27; Byrne, *supra* note 15, at 278-79; Metzger, *supra* note 37, at 1276-78.

<sup>71</sup> The concept used here of "self-policing" to retain the autonomy of the academic profession from outside intervention relies heavily on the work of Ellen Schrecker. See Ellen Schrecker, *Academic Freedom: The Historical View*, in REGULATING THE INTELLECTUALS, *supra* note 66, at 25-27.

<sup>72</sup> The Declaration states that the profession must be willing "to purge its ranks of the incompetent and the unworthy, [and] to prevent the freedom which it claims in the name of science from being used as a shelter for inefficiency, for superficiality, or for uncritical and intemperate partisanship," to avoid the job being performed by laypersons. 1915 *Declaration of Principles*, *supra* note 24, at 170.

<sup>73</sup> See SCHRECKER, *supra* note 18, at 31-32; THE UNIVERSITY CRISIS READER 462-78 (Immanuel Wallerstein & Paul Starr eds., 1971); Milton Fisk, *Academic Freedom in Class Society*, in THE CONCEPT OF ACADEMIC FREEDOM 5, 11 (Edmund L. Pincoffs ed., 1972); Chester Hartman, *Uppity and Out: A Case Study in the Politics of Faculty Reappointments (and the Limitations of Grievance Procedures)*, in HOW HARVARD RULES 287 (John Trumbour ed., 1989); Lawrence S. Lifschultz, *Could Karl Marx Teach Economics in the United States*, in HOW HARVARD RULES, *id.* at 279; Jamin B. Raskin, *Laying Down the Law: The Empire Strikes Back*, in HOW HARVARD RULES, *id.* at 341; Howard Zinn, *The*

One result of this limited protection of academic freedom has been a distinction drawn between “scholars” and “activists,” creating a presumption that the partisanship of activists makes them unfit as scholars.<sup>74</sup> Though the illusion of such standards of neutrality and objectivity has been critiqued extensively, the vulnerability of activist faculty to tenure denials, particularly of leftist faculty, has been a reality. As a result, narrowed definitions of academic freedom have limited the presence of activist faculty who will individually and collectively oppose corporatization trends.

Even with these limitations, professional academic freedom remains the most important existing source of rights for faculty opposition to corporatization trends. The potential power of professional academic freedom, even as a body of “extra-legal” rights, can be contrasted with the limitations of constitutional academic freedom for opposing corporatization trends.<sup>75</sup> Professional academic freedom applies equally to both public and private universities. In contrast, the state action requirement makes constitutional academic freedom irrelevant to private sector faculty opposition to the actions of private university administrators and trustees.<sup>76</sup> Private sector employees, including university faculty, have no independent legal source of rights of free speech. Under the doctrine of employment-at-will, private employers are limited in their actions only by specific statutes that may include some speech protection, as for employees covered by the National Labor Relations Act (“NLRA”),<sup>77</sup> or by limitations created by individual employment contracts or collective bargaining agreements.<sup>78</sup>

Though public university faculty have First Amendment rights as public employees, constitutional academic freedom has limited value in opposing

*Politics of History in the Era of the Cold War: Repression and Resistance*, in *THE COLD WAR AND THE UNIVERSITY: TOWARD AN INTELLECTUAL HISTORY OF THE POSTWAR YEARS* 35, 52-71 (1997).

<sup>74</sup> See SCHRECKER, *supra* note 18, at 14-17, for a discussion of this division created during the earlier industrialization era.

<sup>75</sup> For a discussion of the importance of “non-legal factors in college governance . . . that give rise to legal or quasi-legal characteristics” in the areas of risk management, program accreditation, university consortia, and commercial activities on campus, see Michael A. Olivas, *THE RISE OF NON-LEGAL LEGAL INFLUENCES UPON HIGHER EDUCATION*, 4, 6-34, available at <http://www.ilr.cornell.edu/depts/cheri/> (last visited Jan. 24, 2003). As Professor Olivas notes, other examples, including “university/corporate research parks, the role of donors in determining policy, the marketing of intellectual property and patentable discoveries, and the commercialization of academic science” could be used to “illustrate [the author’s] thesis that campuses are affected in substantial and non-legal ways by large scale development, ones that are not strictly statutory/regulatory/litigative but which mimic legalization.” *Id.* at 5.

<sup>76</sup> Metzger, *supra* note 37, at 1291. Private university faculty could raise constitutional claims concerning actions taken against individual faculty or the university by legislatures or other government officials. See *id.* at 1291-92; Rabban, *supra* note 33, at 300.

<sup>77</sup> 29 U.S.C. §§ 151-169 (2000).

<sup>78</sup> See *infra* text accompanying notes 199-200.

corporatization trends. Constitutional academic freedom has been a basis for litigation of violations of individual rights of faculty, as in tenure cases or retaliation against individual faculty members because of their speech.<sup>79</sup> Opposition to university corporatization, by contrast, entails collective action by the faculty to affirmatively assert its collective professional academic freedom to participate in university governance. The problems of corporatization, therefore, cannot be raised as constitutional claims in a judicial forum. One can envision a case where litigation of individual rights would be relevant in relation to issues of corporatization. For example, a First Amendment academic freedom claim could be made where the public university denies tenure in retaliation for a faculty member's dissenting speech about corporatization or where the administration takes punitive actions against faculty who formed a faculty organization to protest corporatization. However, litigation of this sort is the consequence of the collective or individual protest, rather than the basis for opposing corporatization.

Constitutional academic freedom also has limitations in scope and content, even where it is properly the basis for a legal challenge. It was not until 1967, in *Keyishian v. Board of Regents*,<sup>80</sup> that the United States Supreme Court recognized a right of academic freedom under the First Amendment.<sup>81</sup> While the Court's early iterations of constitutional academic freedom echoed professional academic freedom values,<sup>82</sup> its effectiveness in the lower courts has been diminished by subsequent Supreme Court public sector employment cases that narrow the scope

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<sup>79</sup> See, e.g., *Trotman v. Bd. of Trs. of Lincoln*, 635 F.2d 216 (3d Cir. 1980); *Ollman v. Toll*, 518 F. Supp. 1196 (D. Md. 1981), *aff'd*, 704 F.2d 139 (4th Cir. 1983); *Cooper v. Ross*, 472 F. Supp. 802 (E.D. Ark. 1979).

<sup>80</sup> 385 U.S. 589 (1967) (striking down as vague and overbroad under the First Amendment New York's Feinberg Law, which conditioned employment in public education on taking loyalty oath and barred public employment of members of "subversive organizations").

<sup>81</sup> *Keyishian* was preceded by *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (containing an early development of a concept of academic freedom, without explicitly adopting academic freedom as a constitutional right). The Court held that the State violated due process by holding *Sweezy*, a Marxist economist, in contempt for refusing to answer, during a State investigation of public employment of "subversive persons," questions concerning his university lectures and other questions concerning political association. See *Byrne*, *supra* note 15, at 289-90; Richard H. Hiers, *Academic Freedom in Public Colleges and Universities: O Say, Does that Star-Spangled First Amendment Banner Yet Wave?*, 40 WAYNE L. REV. 1, 8-12 (1993); *Rabban*, *supra* note 33, at 235-41; *Van Alstyne*, *supra* note 37, at 105-18.

<sup>82</sup> In *Keyishian*, the Court stated:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

385 U.S. at 603.

of First Amendment protection for public employees vis-à-vis their government employers. In a series of cases, the Supreme Court consistently limited protection of public employee speech by applying a balancing test that affords great weight to government's interest as an employer with managerial prerogatives similar to private sector employers.<sup>83</sup> Though these cases arose outside of the university context,<sup>84</sup> lower courts apply this balancing test to faculty free speech cases in ways that either ignore or dilute the significance of constitutional academic freedom.<sup>85</sup> Additionally, in university cases, courts have

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<sup>83</sup> The Supreme Court developed its balancing test between 1968 and 1994 in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); and *Waters v. Churchill*, 511 U.S. 661 (1994). See also *Rankin v. McPherson*, 483 U.S. 378 (1987). The Court balances the "interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. The scope of speech coverage under this test is narrowed by the public concern element, which has been even more narrowly defined in terms of the workplace context. See *Connick*, 461 U.S. at 147. In applying the balancing test, the Court has emphasized its judicial deference to even speculative employer predictions of the potential for disruption at the workplace. See *Waters*, 511 U.S. at 673. There has also been a scholarly debate regarding the appropriate scope of constitutional academic freedom protection of intramural speech, divided along the lines of whether professors should enjoy broad constitutional protection for faculty speech unrelated to their academic discipline. Compare Finkin, *supra* note 53 (advocating broad constitutional protection of intramural speech), with William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in *THE CONCEPT OF ACADEMIC FREEDOM*, *supra* note 73, at 59; Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third "Essential Freedom,"* 45 STAN. L. REV. 1835, 1845-46 (1993), and Mark G. Yudof, *Intramural Musings on Academic Freedom: A Reply to Professor Finkin*, 66 TEX. L. REV. 1351 (1988) (all three authors advocating a narrower scope of protection).

<sup>84</sup> In *Pickering*, 391 U.S. 563, the Court held that the School Board abridged a high school teacher's freedom of speech by discharging him because he wrote and published a letter in the newspaper criticizing the School Board's and the school superintendent's handling of financial policy. In *Connick*, 461 U.S. 138, the Court held that a district attorney did not violate the First Amendment by discharging an assistant district attorney for distributing a questionnaire at the office to other attorneys concerning their views on office policy and pressure on employees to work in political campaigns. In *Waters*, 511 U.S. 661, the Court applied the balancing test in favor of a public sector hospital, which discharged nurse Churchill for her speech to another nurse that was critical about her supervisor and hospital training policy.

<sup>85</sup> Speech which clearly fits within the scope of professional academic freedom has been ousted from First Amendment protection by categorizing the speech as merely a personal grievance. See, e.g., *Landrum v. Eastern Ky. Univ.*, 578 F. Supp. 241 (E.D. Ky. 1984) (regarding academic curriculum); *Ballard v. Blount*, 581 F. Supp. 160 (N.D. Ga. 1983), *aff'd*, 734 F.2d 1480 (11th Cir.), *cert. denied*, 469 U.S. 1086 (1984) (regarding administrator's performance and denial of tenure), discussed in Finkin, *supra* note 54, at 1326. See also *Jeffries v. Harleston*, 52 F.3d 9 (2d Cir. 1995) ("*Jeffries II*") (applying *Waters* balancing test to support the City University of New York's ("CUNY") Board of

overridden the independent existence of individual faculty rights of academic freedom by affording broad judicial deference to university employers on the basis of institutional autonomy or institutional academic freedom from governmental (judicial) interference.<sup>86</sup>

Given the central role of collective faculty opposition to corporatization trends, statutory rights to unionize present a potentially significant source of strength. Here too, however, professional academic freedom retains its importance as a foundation for collective action. As with constitutional academic freedom, public and private university faculty have different protections with regard to statutory rights to engage in union activity. Public university faculty have the right to unionize under public sector collective bargaining statutes in more than half of the states.<sup>87</sup> As an independent organization representing faculty in an arms length

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Trustees' decision to remove a faculty member from his position as chair of the Black Studies department, based on the potential disruption from his public speech, which included negative comments about Jews). The court's decision followed an earlier decision finding CUNY's actions in violation of the First Amendment, based on a test requiring actual disruption. *Jeffries v. Harleston*, 21 F.3d 1238 (2d Cir. 1994) ("*Jeffries I*"). The Supreme Court vacated and remanded *Jeffries I* for reconsideration in light of *Waters*, 513 U.S. 996. See also *Scallet v. Rosenblum*, 911 F. Supp. 999 (W.D. Va. 1996) and *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) (in both cases, administration's interests outweighed the faculty member's free speech interests), discussed in Rachel E. Fugate, *Choppy Waters are Forecast for Academic Free Speech*, 26 FLA. ST. U. L. REV. 187, 205 (1998); Hiers, *supra* note 81, at 61. There have also been cases where the balancing test has resulted in a favorable outcome for the faculty, as in *Powell v. Gallentine*, 992 F.2d 1088 (10th Cir. 1993) (holding that the faculty member's First Amendment interests outweighed the administration's interests). See discussion in Hiers, *supra* note 81, at 90.

<sup>86</sup> See Matthew W. Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817 (1983); Hiers, *supra* note 81, at 17-19; Metzger, *supra* note 37, at 1310-19; Ailsa W. Chang, Note, *Resuscitating the Constitutional "Theory" of Academic Freedom: A Search for a Standard Beyond Pickering and Connick*, 53 STAN. L. REV. 915, 930-37 (2001). For discussions of the difficulties of litigating constitutional academic freedom as an individual right, given the Supreme Court's description of academic freedom in cases such as *Keyishian* as a protection of educational institutions from governmental interference, see Byrne, *supra* note 15, at 298; Chang, *supra*, at 922. See also Rabban, *supra* note 33, at 280-82 (describing constitutional academic freedom as an "individual" and an "institutional" right).

<sup>87</sup> RICHARD HURD & AMY FOERSTER, 23 DIRECTORY OF FACULTY CONTRACTS AND BARGAINING AGENTS IN INSTITUTIONS OF HIGHER EDUCATION 135 (1997) (listing thirty-four states with public sector collective bargaining legislation covering higher education faculty, including one state without legislation but with collective bargaining permitted by State Governing Board policy). The authors state that unionization in "faculty higher education remains geographically limited and almost exclusively a phenomenon of public sector institutions," with "seven states, four in the northeast and two on the west coast, account[ing] for 65.5 percent of the unionized professorate" and "[p]ublic colleges and universities employ[ing] 239,815 or 95.7 percent of the unionized professorate." *Id.* at ix-

relationship with the administration, the faculty union can provide a strong vehicle for collective opposition to university corporatization. The union's effectiveness will depend on the degree of faculty activism within the union and the scope of bargaining subjects addressed in collective bargaining. A faculty union can also gain strength by combining the values and practices of faculty governance under professional academic freedom with its statutory right to engage in collective bargaining.

In the private sector, the scope of faculty autonomy resulting from the successful demands for professional academic freedom has led the judiciary to severely limit the statutory rights of unionization for university faculty. In *National Labor Relations Board v. Yeshiva University*,<sup>88</sup> the Supreme Court held that Yeshiva University faculty were "managerial employees," and, therefore, not "employees" under the NLRA.<sup>89</sup> Without employee status, the faculty were excluded from protection of the rights created by the NLRA to form and join unions. The Court based its holding primarily on the evidence of faculty autonomy over academic matters, including curriculum, teaching methods, grading policies, and student admissions, which the Court found to be managerial duties carried out in the interest of the university.<sup>90</sup> The Court rejected the

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x. Unionized faculty at public colleges and universities are evenly divided between four-year and two-year institutions. *Id.* at x. See also Patrick Nagle, Note, *Yeshiva's Impact on Collective Bargaining in Public-Sector Higher Education*, 20 J.C. & U. L. 383, 393 (1994).

<sup>88</sup> 444 U.S. 672 (1980). The union petitioned to represent a bargaining unit consisting of the full-time faculty members at ten of the thirteen schools of Yeshiva University. The employer, Yeshiva University, opposed the petition on the ground that the faculty members were managerial or supervisory personnel. The NLRB found that the faculty were entitled to protection under the NLRA as professional employees. At an NLRB directed election, the faculty voted to unionize. *Id.*

<sup>89</sup> Section 2(3) of the NLRA defines "employee" as "any employee . . . but shall not include any individual employed as a supervisor . . . ." 29 U.S.C. § 152(3) (2000). Though "professional employees" are included as employees under Section 2(12) of the NLRA (29 U.S.C. § 152(12)) and there is no explicit statutory exclusion of "managerial employees," the Supreme Court judicially created the managerial employee exclusion, defined as those employees who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974). For discussions of *Yeshiva*, see Marina Angel, *Professionals and Unionization*, 66 MINN. L. REV. 383 (1982); George Feldman, *Workplace Power and Collective Activity: The Supervisory and Managerial Exclusions in Labor Law*, 37 ARIZ. L. REV. 525 (1995); Karl E. Klare, *The Bitter With the Sweet: Reflections on the Supreme Court's "Yeshiva" Decision*, 13 SOCIALIST REV. 99 (Sept.-Oct. 1983); David Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees*, 99 YALE L.J. 689 (1990); Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 132-39 (1988).

<sup>90</sup> See *Yeshiva*, 444 U.S. at 686-88. The Court noted that it did not rely "primarily" on the faculty role in "faculty hiring, tenure, sabbaticals, termination and promotion" to reach

National Labor Relations Board's ("NLRB") theory that such faculty autonomy was not managerial authority, since the faculty exercised their collective role in "collegial decision making" in their professional interest as opposed to in the interest of the university.<sup>91</sup> Instead the Court held that "[t]he controlling consideration . . . is that the faculty . . . exercise authority which in any other context unquestionably would be managerial."<sup>92</sup> Similar to supervisors, who are also excluded from protection of the NLRA, the Court found that the university administration had the right to demand the loyalty of its managerial employees, to whom it had delegated the power to make and carry out university policy.<sup>93</sup> The Court concluded that as managerial employees, faculty "must be aligned with management;"<sup>94</sup> unionization could create conflict of interests between the faculty and the university administration. The faculty have the right to unionize under the NLRA only in those private universities where faculty do not have the degree of work autonomy described in *Yeshiva*.<sup>95</sup>

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its decision on managerial status, as the Court did not reach the question of faculty supervisory status and "[t]hese decisions clearly have both managerial and supervisory characteristics." *Id.* at 686 n.23.

<sup>91</sup> *Id.* at 678, 685.

<sup>92</sup> *Id.* at 686.

<sup>93</sup> See *id.* at 682, 689. Supervisors, who are excluded from the category of employee under the NLRA, are defined in Section 2(11) as any individual with authority to carry out or "effectively recommend" any of twelve duties, including hiring, disciplining, or directing other employees "in the interest of the employer," using "independent judgment." 29 U.S.C. § 152(11).

<sup>94</sup> *Yeshiva*, 444 U.S. at 683.

<sup>95</sup> Under the case-by-case approach adopted in *Yeshiva*, the NLRB and the lower federal courts have occasionally found private sector university faculty to be non-managerial. Compare *Elmira Coll.*, 309 N.L.R.B. 842 (1992), *Lewis and Clark Coll.*, 300 N.L.R.B. 155 (1990), and *Boston Univ.*, 281 N.L.R.B. 798 (1986), *enf'd*, 835 F.2d 399 (1st Cir. 1987) (finding faculty managerial status), with *Univ. of Great Falls*, 325 N.L.R.B. 83 (1997), 331 N.L.R.B. No. 188 (2000), *enforcement denied on other grds*, 278 F.3d 1335 (D.C. Cir. 2002), *Cooper Union*, 274 N.L.R.B. 1768 (1985), *enf'd*, 783 F.2d 29 (2d Cir. 1986), and *Loretto Heights Coll.*, 264 N.L.R.B. 1107 (1982), *enf'd*, 742 F.2d 1245 (10th Cir. 1984) (finding faculty to be non-managerial). In a recent decision, the Regional Director of Region 2 of the NLRB found the faculty at Manhattan College to be non-managerial, concluding that "while the record clearly establishes that the Manhattan College faculty have a substantial role in the development of policy in academic and other spheres, . . . this role is fundamentally advisory in nature." *Manhattan Coll.*, 1999 N.L.R.B. LEXIS 903, 130-31 (Nov. 9, 1999). Though a three-member panel of the NLRB denied Manhattan College's appeal of the Regional Director's decision, the NLRB did not address the merits of the case, stating only that the appeal "raises no substantial issues warranting review." Courtney Leatherman, *NLRB Lets Stand a Decision Allowing Professors at a Private College to Unionize*, CHRON. HIGHER EDUC., July 7, 2000, at A14. The significance of the Regional Director's decision is uncertain, given the continued precedent of *Yeshiva* and its progeny and the outcome of the election at Manhattan College, where the union lost the election. See HURD & FOERSTER, *supra* note 87, at ix

The *Yeshiva* majority ignored the concept of academic freedom, failing to refer to it at all. The Supreme Court majority equated the university with any corporate employer and the faculty with managerial employees to whom the employer delegates significant autonomy over their work. The majority did not acknowledge unique university functions or academic freedom as relevant to defining power relations between faculty and university administrations, but instead viewed the university as a corporate institution entitled to undivided loyalty from its faculty.<sup>96</sup> In contrast, the four dissenting justices described faculty power of independent self-governance as synonymous with faculty academic freedom and essential to the functioning of the modern university.<sup>97</sup> Viewing faculty independence through the lens of academic freedom, the demand of loyalty to management creates a conflict of interest for faculty. Academic freedom should protect faculty from management demands of loyalty that could interfere with independent research and teaching or with independent faculty participation in shaping the universities' policies and practices.<sup>98</sup>

By treating the private university as a corporate employer, *Yeshiva* reflects and reinforces the ease with which universities can make choices to function increasingly like corporations. As the global economy shifts to the dominance of private market ideology, the university, as a private corporation, can shift with it. Furthermore, the *Yeshiva* holding limits collective faculty efforts to oppose

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(unionization in "faculty higher education remains . . . almost exclusively a phenomenon of public sector institutions); Courtney Leatherman, *NLRB Lets Stand a Decision Allowing Professors at a Private College to Unionize*, CHRON. HIGHER EDUC., July 7, 2000, at A14; Scott Smallwood, *NLRB Rules Against Faculty Union at Sage Colleges*, CHRON. HIGHER EDUC., Aug. 17, 2001, at 9. For the varying influence of *Yeshiva's* reasoning on public sector collective bargaining legislation and interpretation, see Nagle, *supra* note 87, at 393-403.

<sup>96</sup> See *Yeshiva*, 444 U.S. at 682. The Court refers early in its opinion to a "system of 'shared governance'" and "traditions of collegiality" in many universities, which distinguish them from "the type of management-employee relations . . . in the pyramidal hierarchies of private industry," which was the workplace model for the NLRA. *Id.* at 680. The Court's opinion, though, makes no further reference to the relevance of this contrast in interpreting the managerial employee exclusion. The Court draws upon industrial institutional structure, stating: "To the extent the industrial analogy applies, the faculty determine within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served." *Id.* at 686.

<sup>97</sup> See *id.* at 699-700 (Brennan, J., dissenting). Justice Brennan was joined in his dissent by Justices White, Marshall, and Blackmun.

<sup>98</sup> The dissenting opinion states:

Indeed, the notion that a faculty member's professional competence could depend on his undivided loyalty to management is antithetical to the whole concept of academic freedom. Faculty members are judged by their employer on the quality of their teaching and scholarship, not on the compatibility of their advice with administration policy.

*Id.* at 700.

university corporatization. While omitting any reference to academic freedom, the Supreme Court majority used the content of faculty autonomy to simultaneously undermine that autonomy and block faculty efforts to strengthen their independence. First, the Court undermined faculty autonomy by declaring that the university administration would never have delegated such power to faculty without demanding that faculty exercise their power consistent with administration policy. Second, delegation of this power transformed faculty into managers, excluded from rights under the NLRA, thus barring private university faculty from exercising statutory rights to engage in collective opposition to the administration.

The exclusion of private university faculty in so-called "mature universities" from coverage under the NLRA denies faculty the statutory rights to unionize and to engage in "other concerted activities for [their] mutual aid and protection."<sup>99</sup> Despite this statutory exclusion, the history of professional academic freedom continues to provide the basis for private and public sector university faculty to influence university policy. The strong tradition of professional academic freedom as a collective right of faculty autonomy and a broad individual right of free speech has laid the foundation for faculty dissent through formal institutions, such as faculty senates, or through organizations outside the formal university structure, such as anti-apartheid faculty groups. The broad scope of trustee and administrative control left intact through the development of professional academic freedom, however, limits faculty effectiveness in challenging decisions the administration views as being outside of the collective faculty purview. Despite academic freedom protection of extramural speech, administrations and trustees often respond that faculty have inappropriately reached outside the scope of faculty autonomy and into the domain of administrative and trustee authority when they attempt to influence university financial or other general policy decisions. Such administrative and trustee responses were made to faculty challenges to university investments and contract relationships during the Vietnam War and in relation to the apartheid regime in South Africa. These same administrative and trustee responses can be expected in the face of current faculty challenges to corporatization of the university. As discussed in Section IV of this Article, despite these historic and legal limitations, professional academic freedom can provide the basis for effective collective efforts by faculty.

#### *B. Corporatizing the Academic Workforce: Attacks on Tenure and the Increase in Contingent Faculty*

The attacks on the tenure process and the increased reliance on part-time and adjunct faculty are good examples of corporatization accompanied by shifts in values and norms.<sup>100</sup> The attacks on tenure have been supported with rhetoric

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<sup>99</sup> 29 U.S.C. § 157 (2000). See *Yeshiva*, 444 U.S. at 680 (majority's description of "shared authority in the "mature" university).

<sup>100</sup> The primary focus of this Article is on the for-profit distance learning corporation

decrying tenure as a costly, outmoded system of job security that eliminates work incentive and competition, supporting professors who are unaccountable for their alleged lack of productivity.<sup>101</sup> For example, in 1995, the University of Minnesota Board of Regents attempted to cut back rights under the tenure system, including proposals to make it easier to layoff tenured faculty and to discipline faculty for "not maintaining a 'proper attitude of industry and cooperation.'"<sup>102</sup> This confrontation ended in 1997 with a compromise between faculty and the trustees on reforms of the tenure system. The new tenure code did not include the layoff provision, but does include periodic post-tenure reviews leading to possible pay cuts for poor performance.<sup>103</sup> In 1994, Bennington College, which did not have a traditional tenure system, abolished even its "presumptive tenure" system under which faculty had been reviewed every five years, substituting one to five year individual contracts.<sup>104</sup> Bennington College followed this change with its dismissal of one-third of its faculty.<sup>105</sup>

Related to the attack on the tenure system is the enormous increase in hiring of adjunct faculty and the accompanying decline in the percentage of tenure-track faculty. Between 1971 and 1986, employment of part-time faculty has been estimated to have increased by 133%, compared to an increase of only 22% of full-time faculty during that same period.<sup>106</sup> Additional estimates include levels of

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and its consequences for academic freedom. Therefore, this Article is not intended to fully address the increased problems of the attacks on the tenure system, the growth of the contingent faculty workforce, and the influence of corporate funding on faculty research. These issues are set forth briefly here as part of the pattern of corporatization practices interacting with the development of for-profit distance learning corporations.

<sup>101</sup> See, e.g., Debbie Goldberg, *Keeping College Faculties Accountable*, WASH. POST, July 27, 1997, at R4; Renae Merle, *Academic Tenure is Under Fire: Profs Worry for Freedom of Thought*, TIMES-PICAYUNE, Mar. 23, 1997, at A11 (discussing new tenure policies in universities in Florida, Colorado, Hawaii, Minnesota, and Texas); Laurel Shaper Walters, *Tenure Comes Under Stricter Review*, CHRISTIAN SCI. MONITOR, Apr. 24, 1997, at 12.

<sup>102</sup> Debbie Goldberg, *supra* note 101, at R4; Rene Sanchez, *Minnesota Faculty, Regents Put Tenure to the Test; Campus at Center of Growing Battle Over Job Guarantees and Power in Academia*, WASH. POST, Nov. 9, 1996, at A1.

<sup>103</sup> The state's Board of Regents attempt to cut back rights under the tenure system was met by organized opposition, including a union organizing campaign among the faculty. In 1997, along with the compromise on the tenure system reform, the faculty voted against the union. See Goldberg, *supra* note 101, at R4; Sanchez, *supra* note 102, at A1.

<sup>104</sup> William Celis, *Radical Answer to a Small College's Woes*, N.Y. TIMES, June 23, 1994, at A12.

<sup>105</sup> See *id.*; Jane Buck, *The President's Report: Successes, Setbacks, and Contingent Labor*, 87 ACADEME, Sept.-Oct. 2001, at 18, 20.

<sup>106</sup> John C. Duncan, Jr., *The Indentured Servants of Academia: The Adjunct Faculty Dilemma and Their Limited Legal Remedies*, 74 IND. L.J. 513, 521 (1999). One estimate shows that part-time teaching accounts for more than fifty percent of all college classes. Tammie Bob, *Part-Time College Teachers Live the Tough Lessons of '90s-Style Economics*, CHI. TRIB. MAG., July 12, 1998, at 10.

part-time higher education faculty at 33% in 1987, 43% in 1998, and 46% in 2001.<sup>107</sup> Within some social science and humanities disciplines, estimates show that graduate students and contingent faculty teach more than half of the courses offered.<sup>108</sup> The United States Department of Education reports that in the fall of 1998, four of every ten instructional faculty in postsecondary institutions worked part-time.<sup>109</sup> Such adjunct, part-time, or contingent faculty are generally not tenure-track employees, lack contractual protections, and thus work on an at-will basis. They usually do not receive employment benefits and receive low pay for their teaching on a per-course piecework basis.<sup>110</sup>

These developments import private corporate values into the university in conflict with the values of academic freedom. Such academic freedom is based on faculty independence from the administration and trustees. The job security of tenure and faculty self-governance protects faculty autonomy. By contrast, the attacks on tenure and the growth in adjunct faculty hiring undermine academic freedom by increasing job insecurity, thereby enhancing university administrators' control over faculty, similar to the power of private business employers over their at-will employees. Such vulnerability affects the tenure-track, tenured faculty, and adjunct faculty, given the reduced chances of finding another tenure-track position and the potential for future attacks on tenure.

Given their precarious status in the university, part-time and adjunct faculty seeking to unionize in private sector universities do not face the obstacle of managerial status under *Yeshiva*. The increased employment of part-time and

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<sup>107</sup> Buck, *supra* note 105, at 20.

<sup>108</sup> See *id.* (citing a recent study by the Coalition on the Academic Workforce). Buck, President of the AAUP, also cites statistics provided by the Modern Language Association that full-time tenured or tenure-track professors teach only twenty-eight percent of foreign-language courses at doctoral institutions and only twenty-six percent of foreign-language courses at associate degree-granting institutions.

<sup>109</sup> *Part-Time Instructional Faculty and Staff*, available at <http://nces.ed.gov/programs/coe/2001/section5/indicator50.asp> (last visited Aug. 14, 2002); *Percentage Distribution of Faculty by Employment Status and by Type and Control of Institutions*, Fall 1998, available at <http://nces.ed.gov/quicktables/Detail.asp?Key=673> (last visited Aug. 14, 2002).

<sup>110</sup> Duncan, *supra* note 106, at 524-28. The AAUP has issued several reports and documents discussing the working conditions and status of part-time and adjunct faculty and making recommendations for "good practice." See *The Status of Non-Tenure-Track Faculty*, available at <http://www.aaup.org/statements/redbook/rbnonten.htm> (last visited Sept. 17, 2002) (report approved by AAUP Committee G on Part-Time and Non-Tenure-Track Appointments and adopted by the Council of the AAUP in June 1993); *Statement from the Conference on the Growing Use of Part-Time and Adjunct Faculty*, available at <http://www.aaup.org/issues/part-time/ptconf.htm> (last visited Sept. 17, 2002) (prepared by representatives from ten academic organizations attending the Conference on the Growing Use of Part-Time and Adjunct Faculty, Sept. 26-28, 1997); *Guidelines for Good Practice: Part-Time and Non-Tenure-Track Faculty*, available at <http://www.aaup.org/issues/part-time/ptguide.htm> (last visited Sept. 17, 2002).

adjunct faculty has been followed by their increased interest in unionizing.<sup>111</sup> Adjunct faculty at New York University (NYU) recently became the largest bargaining unit of private university adjunct faculty in the United States to vote for unionization.<sup>112</sup> Graduate teaching and research assistants at NYU also made an impact when they voted to unionize after the NLRB decided that graduate assistants are employees under the NLRA, despite their dual status as students.<sup>113</sup> Union organizing campaigns and elections at other private sector universities have expanded, joining NYU and public university graduate student unionizing efforts.<sup>114</sup>

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<sup>111</sup> See, e.g., Jeff Gottlieb, *She Makes Union Activism an Art; Labor: Fullerton College Art Instructor Persuades Colleagues to Organize and Finds a New Calling*, L.A. TIMES, Jan. 27, 2002, § 2, at 1; William Lucia, *Compete for NYU Adjuncts*, WASH. SQUARE NEWS VIA U-WIRE, Nov. 8, 2001; LeAnn Spencer, *College of DuPage Part-Time Faculty Vote to Unionize; Negotiations May Begin in Spring*, CHI. TRIB., Dec. 7, 2001, § 2, at 5.

<sup>112</sup> The NYU adjunct faculty members are represented by the United Auto Workers. Michelle Amber, *UAW Defeats AFT in Election Among Adjunct Faculty at NYU*, DAILY LAB. REP., July 10, 2002, at A4; Leslie Berger, *The Rise of the Perma-Temp*, N.Y. TIMES, Aug. 4, 2002, at A20.

<sup>113</sup> See *New York Univ.*, 332 N.L.R.B. 111 (2000) (relying on its decision in *Boston Med. Ctr.*, 330 N.L.R.B. 152 (1999), which overruled *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251 (1976)). *Cedars-Sinai* had excluded the medical interns, residents and fellows from coverage of the NLRA, finding that they were primarily students, not employees. See Comment, *Labor Law – NLRB Holds that Graduate Assistants Enrolled at Private Universities are “Employees” Under the National Labor Relations Act*, 114 HARV. L. REV. 2557 (2001); Grant M. Hayden, “*The University Works Because We Do: Collective Bargaining Rights for Graduate Assistants*,” 69 FORDHAM L. REV. 1233 (2001). The NYU graduate assistants, who are represented by the United Auto Workers, recently entered into its first collective bargaining agreement with NYU. See *NYU, Grad Students Reach Contract Accord*, ASSOCIATED PRESS, Jan. 30, 2002, at A6.

<sup>114</sup> See, e.g., Amba Datta, *Upcoming Vote Mobilizes Union Talks at Columbia U.*, COLUM. DAILY SPECTATOR VIA U-WIRE, Feb. 27, 2002; Jillian Duchnowski, *U. Illinois GEO Plans Second Work Stoppage*, DAILY ILL. VIA U-WIRE, Feb. 27, 2002; Graham Black, *Students May Get Bargaining Power: UW Walkout Last Spring Led to Legislation*, SEATTLE POST-INTELLIGENCER, Feb. 25, 2002, at B2; Maria Sprow, *GSIS Across Nation Try to Unionize*, MICH. DAILY VIA U-WIRE, Feb. 20, 2002. Following the conservative shift in appointments to the NLRB after the presidential election of George W. Bush, the NLRB, on March 21, 2002, granted Columbia University’s and Brown University’s requests for review of two Regional Directors’ decisions ordering an election in a bargaining unit of graduate teaching and research assistants and undergraduate teaching assistants at Columbia and a bargaining unit of graduate teaching and research assistants at Brown. The ballots in both elections have been impounded pending the outcome of the NLRB review. Despite the proximity in time of those appeals to NYU, 332 N.L.R.B. 111, the NLRB could overrule or modify the NYU decision. See *NLRB Grants Review of Decisions Involving Graduate TAs at Columbia, Brown Universities*, DAILY LAB. REP., Mar. 29, 2002, at A4; Ien Cheng, *Real-Life Lessons in Unionization: Education: Graduate Students Want More Money and the United Auto Workers Want More Members*; Ien Cheng

### *C. Corporatizing the University Mission: Pursuing Research and Teaching For Profit*

#### 1. Commercializing Academic Research

A fundamental change in values has been occurring in the university's research function with the focus on the commercial value of research findings. This shift to a profit-making goal for research has been manifested through increased private corporate funding for university research in exchange for significant corporate control over research findings, including exclusive licensing agreements for corporate donors, and confidentiality agreements. This control also includes prohibitions on publication of academic research methods and results for a period of months to protect corporate commercial interests from competitors during the time needed to apply for patents.<sup>115</sup> The federal Bayh-Dole Act of 1980, which permits universities to patent the results of federally funded faculty research and to earn royalties under licensing agreements that give rights to private for-profit corporations to market university-developed inventions, has also encouraged universities to pursue commercial research goals.<sup>116</sup> Under this legislation, universities or other nonprofit organizations can hold title to results of research supported in whole or in part by federal funding, rather than maintaining public ownership of federally funded research.<sup>117</sup> One survey reported a 198% increase

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*Looks at an Unusual Alliance*, FIN. TIMES, May 22, 2002, at 19.

<sup>115</sup> See Press & Washburn, *supra* note 3, at 41-42. The National Institutes of Health ("NIH") recommended that universities agree to a maximum of one or two months delay of publication, which would correspond to the period of time needed for a patent application. Longer periods, from four to more than six months, have also been required in the life sciences. *Id.* at 41. See also Rebecca Eisenberg, *Proprietary Rights and the Norms of Science in Biotechnology Research*, 97 YALE L.J. 177, 216-26 (1987); Sheldon Krimsky, *The Profit of Scientific Discovery and Its Normative Implications*, 75 CHI.-KENT L. REV. 15, 27-32 (1999); Joshua A. Newberg & Richard L. Dunn, *Keeping Secrets in the Campus Lab: Law, Values and Rules of Engagement for Industry-University R&D Partnerships*, 39 AM. BUS. L.J. 187, 201-12 (2002).

<sup>116</sup> See 35 U.S.C. § 200-12 (2000).

<sup>117</sup> See Blumberg, *supra* note 8, at 98; Rebecca S. Eisenberg, *A Technology Policy Perspective on the NIH Gene Patenting Controversy*, 55 U. PITT. L. REV. 633, 637 (1994). Two of the Bayh-Dole Act's policies and objectives are "to promote collaboration between commercial concerns and nonprofit organizations, including universities . . . [and] to promote the commercialization and public availability of inventions made in the United States by United States industry and labor . . . ." 35 U.S.C. § 200.

Press & Washburn note:

The goal of the legislation was to bring ideas out of the ivory tower and into the marketplace by offering universities the opportunity to license campus-based inventions to U.S. companies, earning royalties in return. Both the government and the business world saw universities not merely as centers of learning and basic research but as sources of commercially valuable ideas, which is why the Business-

in new U.S. patent applications by universities and a 133% increase in licenses of university-patented inventions between fiscal year 1991 and fiscal year 1999.<sup>118</sup> Under these potentially lucrative licensing arrangements, royalty payments for private corporate use of university-patented inventions are based either on a for-profit licensing company's sales or university equity in the licensing company, or both.<sup>119</sup> Universities may give licensing rights to university-patented inventions to for-profit companies unrelated to the university or to spin-off for-profit corporations created by the universities or the professors.<sup>120</sup>

These developments shift the goal of research from "advanc[ing] knowledge by the unrestricted research and unfettered discussion of impartial investigators"<sup>121</sup> to furthering the corporate goals of private donors and university patent and licensing divisions.<sup>122</sup> The focus on profitability of research results alters the purpose of research, including research carried out with public funding, from contributing to the public good to enhancing revenues in universities and for-profit corporations alike.<sup>123</sup> This focus on research as a commodity also shifts

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Higher Education Forum, a coalition of corporate and academic leaders, and similar groups lobbied to tear down the walls separating universities from the marketplace.

Press & Washburn, *supra* note 3, at 41. The Bayh-Dole Act also permitted small businesses to patent federally-funded research, which was extended in 1983 by Presidential Executive Order to all government contractors. See Eisenberg, *supra*, at 637.

<sup>118</sup> Association of University Technology Managers, *Surveys Bayh-Dole Act*, available at <http://www.autm.net/pubs/survey/facts.html> (last visited Sept. 18, 2002). University patents grew from fewer than 250 per year prior to the Bayh-Dole Act to "2,700 academic patents filed and 1,500 licenses granted to industry by universities" in 1992. Blumberg, *supra* note 8, at 98.

<sup>119</sup> A licensing survey by the Association of University Technology Managers reported that in fiscal year 2000, U.S. colleges, universities, and academic researchers received more than \$1 billion in royalties (forty percent more than in fiscal year 1999), created 368 spin-off companies (thirty-three more than in fiscal year 1999), and filed for 8,534 U.S. patents (twelve higher than in fiscal year 1999). Goldie Blumenstyk, *Value of University Licenses on Patents Exceeded \$1-Billion in 2000, Survey Finds*, CHRON. HIGHER EDUC., Mar. 5, 2002, available at <http://chronicle.com/daily/2002/03/2002030502n.htm>.

<sup>120</sup> See *id.*

<sup>121</sup> *1915 Declaration of Principles*, *supra* note 24, at 159.

<sup>122</sup> An NIH report, issued in 2001, recommended against allowing the federal government to share in the royalties from patents developed through NIH-funded research. Consumer rights groups support legislation including such a requirement as a way to provide taxpayers with a public share of royalties resulting from federally-funded research. These legislative proposals have been consistently defeated, with universities and corporations arguing that reducing their share of the profits would undermine corporate and university incentives to invest in research and licenses. See Dan Curry, *U.S. Should Not Seek a Share of Profits From Publicly Financed Drug Research, NIH Concludes*, CHRON. HIGHER EDUC., Aug. 23, 2001, available at <http://chronicle.com/daily/2001/08/2001082301n.htm>.

<sup>123</sup> See Krinsky, *supra* note 115, at 27-39.

attention from ethical and policy questions concerning the shaping of research agendas, the commercialization of research, patents of scientific discoveries that could benefit society, and private ownership of our most basic human material in genetic research.<sup>124</sup>

With the declining rate of public funding,<sup>125</sup> university dependence on corporate sponsors continues to grow, with universities seeking to attract corporate funds by creating close relationships with for-profit corporations. In addition to advancing corporate commercial goals, these relationships place corporate sponsors in a powerful position to affect research agendas and even influence research results that are against private corporate interests.<sup>126</sup> Such problems have become particularly salient in university research in the life sciences, where large pharmaceutical and biotechnology corporations stand to gain enormous market share and profits by providing tens of millions of dollars in funds to university science departments.<sup>127</sup> The relationship between the university and the corporate

<sup>124</sup> See *id.* Professor Krinsky states:

[M]edical knowledge must serve the common good. This fundamental value which survived through millennia of medical practice, is superseded by the normative changes taking place in biomedical sciences. Because every biomedical discovery has potential monetary value, the new culture of science will seek to protect that discovery from becoming part of the 'knowledge commons.'

*Id.* at 35.

<sup>125</sup> Press & Washburn note:

Although the federal government still supplies most of the funding for academic research (it provided \$14.3 billion, or sixty percent, in 1997 . . .), the rate of growth in federal support has fallen steadily over the past twelve years, as the cost of doing research, particularly in the cutting-edge fields of computer engineering and molecular biology, has risen sharply. State spending has also declined . . . . Meanwhile corporate giving is on the rise, growing from \$850 million in 1985 to \$4.25 billion less than a decade later . . . .

Press & Washburn, *supra* note 3, at 40-41. In addition, there have been overall declines in federal and state funding for higher education. See Blumberg, *supra* note 8, at 99.

<sup>126</sup> See Press & Washburn, *supra* note 3, at 42 (describing a case in 1996 where four university science researchers resigned after their corporate sponsor, Sandoz [now Novartis], altered a manuscript to remove findings of potential negative effects of the corporation's drugs: "The researchers aired their concerns in a letter to the *Journal of the American Medical Association*: 'We believe that the sponsor . . . was attempting to wield undue influence on the nature of the final paper. This effort was so oppressive that we felt it inhibited academic freedom.'").

<sup>127</sup> See Press & Washburn, *supra* note 3, at 39 (describing the 1998 agreement between "Novartis, a Swiss pharmaceutical giant and producer of genetically engineered crops and University of California at Berkeley. Under the terms of the agreement, Novartis will give Berkeley \$25 million to fund basic research in the Department of Plant and Microbial Biology, one of four departments within the [College of Natural Resources]."); Vicky Elliott, *Who Calls the Tune?*, UNESCO COURIER, Nov. 1, 2001, at 21 (describing the

sponsor is intertwined throughout the funding and research process. Universities provide corporate sponsors with positions on research grant committees.<sup>128</sup> In addition, sponsors get preferred access to researchers and research facilities, the ability to review corporately-funded research results,<sup>129</sup> and the lucrative exclusive licensing rights to university-patented research results. The loss of the university's independence due to corporate interests creates a conflict of interest for the university and academic researchers, which threatens to undermine their research credibility.<sup>130</sup>

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1998 agreement between UC Berkeley and Novartis : "For the first time, the work of an entire university department, not just that of its individual members contracting independently, was to be underwritten by a multinational company, with interests in health care, agribusiness and nutrition."). See also Krinsky, *supra* note 115, at 28-29 (describing university-industry partnerships between Monsanto and Harvard, and Monsanto and Washington University).

<sup>128</sup> See Press & Washburn, *supra* note 3, at 40 ("In exchange for . . . \$25 million, Berkeley grants Novartis first right to negotiate licenses on roughly a third of the department's discoveries . . . [and] grants the company unprecedented representation - two of five seats - on the department's research committee, which determines how the money is spent.").

<sup>129</sup> Press & Washburn, *supra* note 3, at 42. For descriptions of the various sorts of agreements that universities enter with corporations regarding delays of publication and treatment of research results as proprietary information, see Krinsky, *supra* note 115, at 30; Newberg & Dunn, *supra* note 115, at 209-12.

<sup>130</sup> See Press & Washburn, *supra* note 3, at 42; Mark Clayton, *Corporate Cash Campus Labs*, CHRISTIAN SCI. MONITOR, June 19, 2001, at 11 (describing published studies showing more favorable academic research findings concerning drugs manufactured by the corporations funding the research). Conflicts of interest are also created where universities and academic researchers hold equity in corporations providing funding or in university spin-off corporations that market research products. Press & Washburn, *supra* note 3, at 45-47; *Report Emphasizes Biotech's Need for Academic-Corporate Study*, SAN FRANCISCO CHRON., June 11, 2001, at D1 (describing a 117 page report, "Working Together, Creating Knowledge: The University-Industry Research Collaboration Initiative," "written by leading academic, corporate and governmental research officials," that supports the benefits of university-industry research relationships, but recommends changes in conflict of interest policies and in provisions for publication limits and delays).

For a discussion of "the relationship of funding sources to bias in research," including financial interests of authors of publications in scientific journals, see Krinsky, *supra* note 115, at 28-35. In an editorial entitled, *Is Academic Medicine for Sale?*, outgoing editor of the *New England Journal of Medicine*, Dr. Marcia Angell, called for reforms to address the medical schools' "Faustian bargain" to gain research funding from the biotechnology and drug industry. Dr. Angell stated: "When the boundaries between industry and academic medicine become as blurred as they are now, the business goals of industry influence the mission of medical schools in multiple ways." Jeff Donn, *Curbs on Researchers Urged: Conflicts of Interest Taint Science, Medical Journal Editor Says*, CHI. TRIB., May 18, 2000, at 12. On October 1, 2001, the journals *Nature*, *New England Journal of Medicine*, *Lancet*, and *Journal of the American Medical Association* addressed the problem of conflicts of interests of researchers with close ties to private donors by

## 2. Marketing the University "Brand Name:" For-Profit Distance Learning Corporations

The creation of profit-driven Internet-based distance learning programs in both public and private universities has further corporatized the university's teaching mission. While universities may raise revenue through distance learning courses within the existing nonprofit university structure,<sup>131</sup> some universities choose to develop distance learning programs in a for-profit structure. These programs take diverse forms, including: partnerships between public or private sector universities and for-profit corporations to market distance learning; for-profit subsidiaries, wholly-owned by a public or private nonprofit university; for-profit subsidiaries of a public or private nonprofit university, funded by venture capital; and for-profit distance learning institutions created and owned by a for-profit corporation.<sup>132</sup> Within each category, the distance learning programs exist as either degree-granting or noncredit courses in both public and private universities. Examples of these types of distance learning programs are: the California Educational Technology Initiative, a partnership between the California State University system and a business consortium consisting of Microsoft, GTE, Hughes, and Fujitsu;<sup>133</sup> UCLA Extension's partnership with the for-profit firm of Onlinelearning.net;<sup>134</sup> partnerships between the for-profit UNext.com and the business schools at University of Chicago, Columbia University, Stanford University, Carnegie Mellon University, and the London School of Economics, to offer distance learning courses through Cardean University, UNext.com's virtual university;<sup>135</sup> Western Governors' Virtual University, which is a partnership of

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requiring that authors of articles accepted for publication submit sources of funding, records of employment, and histories of financial investments. Readers will also be informed of an author's refusal to disclose this information. Kathleen Huvane, *Researchers Required to Show Money Trail*, WORLD WATCH, Jan.-Feb. 2002, at 7.

<sup>131</sup> For example, Duke University, Purdue University, University of Florida, and University of Baltimore offer MBA programs through their nonprofit university structure. See *The Dean's Corner*, available at <http://gsbwww.uchicago.edu/student/chibus/articles/990208/990208031.html> (last visited Sept. 11, 2000); <http://www.fuqua.duke.edu/admin/gemba/design/index.html>; <http://www.emba-agbus.purdue.edu> (last visited Oct. 3, 2002); [http://www.floridamba.ufl.edu/prosp\\_stu/imbaover.asp](http://www.floridamba.ufl.edu/prosp_stu/imbaover.asp) (last visited Oct. 3, 2002); [http://business.ubalt.edu/DegreePrograms/grad1/grad\\_index.html](http://business.ubalt.edu/DegreePrograms/grad1/grad_index.html) (last visited Oct. 3, 2002).

<sup>132</sup> See generally Nicholas Confessore, *The Virtual University*, NEW REPUBLIC, Oct. 4, 1999, at 26; Patrice M. Jones and Ron Grossman, *U. of C. Sets Controversial Course to Provide On-Line Business Classes*, CHI. TRIB., May 13, 1999, at 1; NOBLE, *supra* note 69, at 29-31; Eyal Press & Jennifer Washburn, *Digital Diplomas*, MOTHER JONES, Jan.-Feb. 2001, at 34; Press & Washburn, *supra* note 3, at 52-53.

<sup>133</sup> NOBLE, *supra* note 69, at 52-53.

<sup>134</sup> *Id.* at 51.

<sup>135</sup> Lisa Guernsey, *Click Here for the Ivory Tower*, N.Y. TIMES, Sept. 23, 1999, at G1; Lisa Wood, *Revolution in Online Education*, FIN. TIMES, Oct. 23, 2000; *Distance*

governors of seventeen western states and businesses such as IBM, Sun, AT&T, and Microsoft;<sup>136</sup> e-Cornell, a for-profit subsidiary of Cornell University, wholly owned by Cornell University;<sup>137</sup> NYUonline, New York University's wholly-owned for-profit subsidiary;<sup>138</sup> "Virtual Temple," Temple University's for-profit subsidiary, formed with plans to seek funding through venture capital or partnerships with other universities or Internet businesses;<sup>139</sup> University of Maryland's University College's wholly-owned for-profit subsidiary, UMUC OnLine.com Inc.;<sup>140</sup> a joint-venture distance learning company planned by TSL Education Ltd., a subsidiary of Rupert Murdoch's News Corporation, with Universitas 21, an 18-member incorporated network of universities, including McGill University, University of Birmingham, University of Toronto, University of Melbourne, University of Edinburgh, National University of Singapore, University of Virginia, and University of Michigan;<sup>141</sup> and for-profit accredited degree-granting universities, such as Jones International University,<sup>142</sup> University

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*Learning: The Future is Now*, available at

<http://gsbwww.uchicago.edu/news/gsbchicago/summer99/deanletter.html> (last visited Aug. 14, 2002).

<sup>136</sup> *The Dean's Corner*, *supra* note 131; NOBLE, *supra* note 69, at 57-58. Western Governors' University was founded in 1996 as a joint venture between the governors and for-profit businesses. The Western Governors' Virtual University began offering online courses in the fall of 1998. See NOBLE, *supra* note 69, at 57-58.

<sup>137</sup> See Sarah Carr, *Faculty Members are Wary of Distance-Education Ventures*, CHRON. HIGHER EDUC., June 9, 2000, at A41; Farhad Manjoo, *Virtual U*, CORNELL MAG., July-Aug. 2000, at 35.

<sup>138</sup> Carr, *supra* note 137, at A41; *NYU Becomes First Major University to Create For-Profit Educational "Spin-Off"*, NYU Press Release, available at [http://www.nyu.edu/publicaffairs/newsrelease/b\\_NYU\\_B.shtml](http://www.nyu.edu/publicaffairs/newsrelease/b_NYU_B.shtml) (last visited Jan. 24, 2003).

<sup>139</sup> Sarah Carr, *For-Profit Venture to Market Distance-Education Courses Stirs Concern at Temple*, CHRON. HIGHER EDUC., Dec. 17, 1999, at A46.

<sup>140</sup> Carr, *supra* note 137, at A41; Dan Carnevale, *U. of Maryland University College Creates For-Profit Arm to Market its On-Line Courses*, CHRON. HIGHER EDUC., Dec. 17, 1999, at A49.

<sup>141</sup> Michael Arnone, *International Consortium Readies Ambitious Distance-Education Effort*, CHRON. HIGHER. EDUC., June 28, 2002, at A28; Geoffrey Maslen, *Rupert Murdoch's Company Joins with 18 Universities in Distance-Education Venture*, CHRON. HIGHER EDUC., June 2, 2000, at A47. University of Michigan and University of Toronto have withdrawn from Universitas 21 "because they didn't feel confident associating their names with the project." Arnone, *supra*, at A28.

<sup>142</sup> Jones International University was the first completely online institution to gain accreditation. See Kelly McCollum, *Accreditation of On-Line University Draws Fire*, CHRON. HIGHER EDUC., Apr. 2, 1999, at A33. It is reported to be the largest private university in the United States. Stephen Brier & Roy Rosenzweig, *The Keyboard Campus; Digital Diploma Mills: The Automation of Higher Education*, THE NATION, Apr. 22, 2002, at 29.

of Phoenix, which is run by the for-profit Apollo Group,<sup>143</sup> Corinthian Colleges, Inc.,<sup>144</sup> and Concord Law School, "the nation's only entirely online law school," owned by the Stanley Kaplan corporation.<sup>145</sup>

Universities justify these relationships with for-profit corporations as the means to finance expensive distance learning technological ventures, either through partnerships with for-profit technology companies for technological development, marketing, and distribution, or through investment by third parties in the equity of a spin-off for-profit subsidiary of a university. For example, Dean Mark Zmijewski of the University of Chicago Graduate School of Business (GSB) described the need to "outsource" distance learning technology development to UNext.com. Zmijewski explained that "[t]he GSB is not in a financial position, nor does it have the in-house expertise, to make the investment to compete in the global long-distance learning market. The GSB should therefore work with a for-profit company to implement its business plan to enter this market."<sup>146</sup> Universities that have wholly-owned for-profit subsidiaries have either explicitly stated their future plans to seek investment capital by selling equity in the corporation or have left open that possibility. Michael Goldstein, an attorney hired by Cornell University when creating e-Cornell, described a major benefit of choosing the for-profit corporate structure as providing the opportunity to realize profits through the sale of equity in the corporation.<sup>147</sup> Dean Gerald A. Heeger, formerly of the New York University School of Continuing and Professional Studies, explained that NYU created NYUonline as a for-profit corporation because "[m]ounting distance-education courses is very expensive . . . . Being a for-profit [corporation] gives us some options in terms of gaining capital support

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<sup>143</sup> Guernsey, *supra* note 135, at G1; Manjoo, *supra* note 137, at 36. University of Phoenix offers bachelor's degrees in business and nursing, and master's degrees in business administration, nursing, and education. Michael Arnone, *America Online Seeks to Steer Subscribers to Distance-Education Providers*, CHRON. HIGHER EDUC., Jan. 25, 2002, at 31.

<sup>144</sup> Students at twenty-two of Corinthian Colleges' sixty campuses may enroll in online courses. Corinthian's nine Florida Metropolitan University campuses offer online accredited degrees in business, accounting, and criminal justice. See *15,000 Online Course Registrations for Corinthian Colleges During Fiscal 2002*, Corinthian College Inc., Press Release, June 21, 2002.

<sup>145</sup> Stanley Kaplan is "a subsidiary of the billion-dollar *Washington Post* media conglomerate and owns a chain of forty-one undergraduate colleges and enrolls more than 11,000 students in a variety of online programs, ranging from paralegal training to full legal degrees at its Concord Law School." Brier & Rosenzweig, *supra* note 142, at 30.

<sup>146</sup> *The Dean's Corner*, *supra* note 131.

<sup>147</sup> See Michael B. Goldstein, *To Be [For-Profit] Or Not To Be: What Is the Question?*, Change, Sept.-Oct. 2000, at 25. See also Michael Goldstein, Special Counsel to Cornell University, Minutes of the Cornell University Faculty Senate meeting, Remarks by Michael Goldstein, Sept. 13, 2000, available at <http://www.cornell.edu/UniversityFaculty/>.

that a non-profit simply doesn't have."<sup>148</sup> NYUonline left open the option of raising \$20 million to \$30 million from either the university funds or outside investors.<sup>149</sup> Heeger, who moved from NYU to become President of University of Maryland University College, stated that UMUC OnLine.com planned to offer public shares within a few years after creating the subsidiary.<sup>150</sup> Columbia University hired Ann G. Kirschner as the head of its for-profit subsidiary, Fathom, "to adopt the shape and tactics of a commercial venture and attract investment capital."<sup>151</sup> Columbia University's Vice President for Business Development stated that Fathom did not have plans for a public offering of stock, but also added, "we're looking at all the funding options."<sup>152</sup>

Universities also view their partnerships with for-profit corporations as potential revenue sources through university stock ownership in companies like UNext.com, describing "the huge upside" as "the value of the equity in the I.P.O."<sup>153</sup> Andrew M. Rosenfeld, a business consultant, graduate of the University of Chicago Law School, and a member of the Board of Trustees of the University of Chicago, heads UNext.<sup>154</sup> UNext's board of directors includes University of Chicago Professor of Economics Gary S. Becker, Nobel Prize winner for his theory of human capital, and its investors include former junk-bond trader Michael R. Milken, through his company, "Knowledge Universe."<sup>155</sup>

This rather dizzying array of distance learning institutional models has an important common dimension of directly involving public and private nonprofit universities in relationships with the private for-profit business sector for the delivery of education. By entering partnerships with for-profit businesses, contracting out distance learning functions to for-profit businesses, creating for-profit spin-offs, and selling equity in for-profit corporations, universities ignore the differences between a for-profit corporation and a public or private nonprofit university. These bold moves by universities mix the for-profit, public, and nonprofit sectors as if the choice of institutional structures were simply a matter of financial convenience with no consequences for the nature of the university or of education. One Cornell University Vice Provost described the for-profit subsidiary corporation e-Cornell by saying: "We are creating a hybrid organization – one that is nonprofit in its mission of education and for-profit in its

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<sup>148</sup> Lisa Guernsey, *NYU Starts For-Profit Unit to Sell On-Line Classes*, CHRON. HIGHER EDUC., Oct. 16, 1998, at A32.

<sup>149</sup> See *id.*

<sup>150</sup> See Carnevale, *supra* note 140, at A49.

<sup>151</sup> Scott Carlson, *Going For Profit and Scholarship on the Web*, CHRON. HIGHER EDUC., May 5, 2000, at A45.

<sup>152</sup> *Id.*

<sup>153</sup> Guernsey, *supra* note 135, at G1 (quoting Meyer Feldberg, Dean of Columbia University School of Business).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

structure."<sup>156</sup> Such actions, though, seek to deny the fact that the choice of delivering education through a public institution, a nonprofit corporation, or a for-profit corporate structure is a policy issue in which the choice of form reflects function. The nonprofit and the public universities are intended to pursue basic goals of providing education as a public good that benefits the students as well as society as a whole. Similar to public funding of governmental services, public subsidies for nonprofit corporations reflect a public policy of encouraging nonprofit corporations to provide certain types of goods and services for the public welfare, rather than for profit.<sup>157</sup> Education, the second largest nonprofit service employer in the United States,<sup>158</sup> is one of those services. As nonprofit corporations, universities receive public subsidies designed to support and maintain their efforts to provide education in the public interest. These subsidies are direct, through public funding, and indirect, through federal corporate income tax exemption, federal tax deductibility of donations,<sup>159</sup> and state sales and property tax exemptions.<sup>160</sup> Private for-profit businesses, including those in the education field, have complained that such subsidies give nonprofit universities an unfair market advantage.<sup>161</sup> These subsidies, however, are intended to provide a favored status to nonprofit corporations to encourage and enable them to serve the public interest rather than a private goal of profit-making.<sup>162</sup>

The non-distribution constraint on nonprofit corporations is as important as the public subsidies in directing the nonprofit corporation's functions toward its

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<sup>156</sup> Vice Provost Mary Sansalone, *Response to the Preliminary Report of the Provost's Advisory Committee on Distance Learning*, Aug. 3, 2000, available at <http://www.dayadmin.cornell.edu/Provost.DistanceLearning/resptofacrect4/resptofacrect4.html>.

<sup>157</sup> See Blumberg, *supra* note 8, at 101-5; LESTER M. SALAMON, *AMERICA'S NONPROFIT SECTOR: A PRIMER* (1992), discussed in Barbara K. Bucholtz, *Reflections on the Role of Nonprofit Associations in a Representative Democracy*, 7 CORNELL J. L. & PUB. POL'Y 555, 565-68 (1998); John D. Colombo, *Why is Harvard Tax-Exempt? (And Other Mysteries of Tax Exemption for Private Educational Institutions)*, 35 ARIZ. L. REV. 841, 857-77 (1993); Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1083-85 (2000).

<sup>158</sup> BURTON A. WEISBROD, *THE NONPROFIT ECONOMY* 72 (1988).

<sup>159</sup> Nonprofit private universities qualify for such exemptions as 501(c)(3) organizations, under 26 U.S.C. § 501(c)(3), serving educational purposes. Blumberg, *supra* note 8, at 101-05; Bucholtz, *supra* note 157, at 560-61; Colombo, *supra* note 157, at 857-77 (discussing the theories underlying tax exemptions).

<sup>160</sup> Blumberg, *supra* note 8, at 91-92; Bucholtz, *supra* note 157, at 561-62; Colombo, *supra* note 157, at 855-56.

<sup>161</sup> See Bucholtz, *supra* note 157, at 569.

<sup>162</sup> See WEISBROD, *supra* note 158, at 118. For an excellent discussion of a policy proposal to deny the 501(c)(3) tax exemption to university-industry licensing agreements that are inconsistent with the public purpose basis for the tax-exempt status, see Blumberg, *supra* note 8, at 134-46.

public mission. Though nonprofit corporations are not constrained in the amount of revenue they may generate, the non-distribution constraint prohibits the use of corporate funds for private inurement, which would include a prohibition of excessive salaries and rental prices, as well as sale of equity capital in the corporation.<sup>163</sup> Nonprofit corporations' surplus revenues – profits – must be returned to the corporation for use consistent with its public purpose.<sup>164</sup> The lack of profit-seeking for private gain contributes to providing the nonprofit with legitimacy and public trust that its work will be carried out in the public interest.<sup>165</sup>

There is evidence that the nonprofit corporate structure does result in real functional differences from for-profit corporations. Managers in nonprofit corporations may be more willing to forego the potential for higher salaries gained through profit distribution because they are attracted by the public goals of the nonprofit institution.<sup>166</sup> Nonprofit corporations compared with for-profit corporations in the long-term health care field provide more information to consumers and utilize costly resources for consumer welfare.<sup>167</sup> These differences have been attributed to the non-distribution requirement, which decreases management's incentives to maximize profits through practices, such as cutting labor costs, by "tak[ing] advantage of underinformed customers and sell[ing] outputs to the highest bidders."<sup>168</sup> An editorial in the *New England Journal of Medicine* described the problem of private investor-owned hospitals as "embod[ying] a new value system that severs the communal roots and Samaritan traditions of hospitals, makes doctors and nurses the instruments of investors and views patients as commodities."<sup>169</sup>

Higher education institutions can be viewed as part of a public-private

<sup>163</sup> See WEISBROD, *supra* note 158, at 118 (quoting the IRS' explanation that "prohibition of inurement, in its simplest terms, means that a private shareholder or individual cannot pocket the organization's funds except as reasonable payment for goods and services," from the IRS EXEMPT ORGANIZATIONS HANDBOOK § 342.1(1)). See also Blumberg, *supra* note 8, at 106-7; Colombo, *supra* note 157, at 850-51.

<sup>164</sup> See Goldstein, *supra* note 147, at 31.

<sup>165</sup> See Bucholtz, *supra* note 157, at 565.

<sup>166</sup> WEISBROD, *supra* note 158, at 32-33 (discussing studies of preferences and characteristics of managers and attorneys in the for-profit and nonprofit sectors).

<sup>167</sup> *Id.* at 147-59.

<sup>168</sup> *Id.* at 157-59. See also *To Profit or Not to Profit*, NEWSLETTER (People's Med. Soc'y), Apr. 1, 2000, at 3 [hereinafter *To Profit or Not to Profit*] (describing a Harvard University research study of for-profit dialysis centers, showing that "dialysis patients who receive care at for-profit dialysis centers are more likely to die and less likely to be put on a waiting list for a kidney transplant . . . . The researchers speculate that the differences stem in part from attempts made by for-profit facilities to cut costs.").

<sup>169</sup> *To Profit or Not to Profit*, *supra* note 168 (quoting Steffie Woolhandler, M.D., M.P.H., & David U. Himmelstein, M.D., *New England Journal of Medicine*, Aug. 5, 1999). See also Minow, *supra* note 157, at 1083-84 (discussing the problems of "conflicts of interests and conflicts of mission" in for-profit health care).

spectrum, with governmental institutions, such as the legislature, at the public pole and private for-profit businesses, such as Microsoft, at the private pole. The poles signify both the function and structure of institutions. Institutions at the public pole are democratic structures that provide goods and services in the public interest. At the private pole of the spectrum, for-profit institutions function through unilateral managerial decision-making to promote their profit-making goals. Universities, as either public or private nonprofit institutions should be located close to the public pole of the spectrum. The public mission of education reflects the democratic value of education and research to society as a whole, rather than as private commodities benefiting only the individual student or the individual researcher. Democratic rights of academic freedom and faculty self-governance also embody the public nature of the institutional structure. With the steady decrease in federal and state funding since the 1980's, public and private nonprofit universities have moved toward the private end of the spectrum, searching for private revenues to replace public funding.<sup>170</sup> Public and private university tuitions have increased, with private universities' skyrocketing tuition rates limiting students' access to education. Both public and private universities have become even more dependent on private wealth, through donations by private individuals and corporations, grants by private foundations, and boards of trustees dominated by corporate executives. University patenting and private corporate licensing of federally funded research results are part of this increased profit-seeking activity.

The development of for-profit distance learning programs is a new and significant shift of public and private universities toward the private pole of the public-private spectrum. Whether the change in corporate structure is done through "partnerships" between a university and a for-profit corporation or through university spin-off for-profit corporations for distance learning, the functional goal transforms from education in the public interest to education in the private interest of profit-maximization. By bringing for-profit businesses directly into the central educational mission of the university, the distance learning programs create a qualitative shift toward privatization and corporatization of the university. Certainly, the recent news of corporate corruption on a massive scale at companies such as Enron and WorldCom should be reminders of the systemic differences between the goals of for-profit and nonprofit corporations.

For-profit distance learning programs certainly did not initiate the battle over university corporatization. But by creating for-profit distance learning corporations or by entering partnerships with for-profit distance learning businesses, the university denies the unique character of the nonprofit institution in providing education and the unique goal of education as a public mission. The for-profit goal is also reflected in the institutional structure, given the altered relationship between the university and third-party financial supporters. Private

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<sup>170</sup> WEISBROD, *supra* note 158, at 103, 108. The nonprofit corporation continues to receive federal tax exemptions on these revenues as long as they do not fall into the category of unrelated business income. *Id.* at 109.

individual or for-profit corporate donors will no longer be outside parties, separated from educational policy and practice. If distance learning is carried out through contracts with for-profit corporations, the for-profit corporation becomes a "partner," not an outside donor. The success of the for-profit partner becomes intertwined with the success of the university distance learning program. In the university spin-off for-profit scenario, third-party financial supporters become venture capitalists, shareholders, and members of the board of directors. Even where the university fully funds the spin-off for-profit corporation, the new for-profit corporation exists for the private good of its shareholders and investors. The corporation's board of directors will have a fiduciary obligation to the shareholders and investors to make decisions to promote the goal of maximizing the profits of the investors and shareholders. Thus, the for-profit structure tears down the wall of separation between faculty and donors<sup>171</sup> and eliminates any pretense of educators' independence from the financiers. These changes within the context of distance learning programs will necessarily have effects on the broader character and function of the institution.

Adoption of the for-profit structure also undermines public and nonprofit universities' ability to distinguish themselves from private for-profit degree-granting universities such as University of Phoenix, Jones International University, and Corinthian Colleges, all of which are publicly traded on the stock market.<sup>172</sup> Such universities seek legitimacy as institutions of higher education providing an educational service to a wide range of students by claiming that they differ only in their funding sources.<sup>173</sup> By entering the for-profit education sector

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<sup>171</sup> See Goldstein, *supra* note 147, at 129. Goldstein describes the National Technology University's ("NTU") relationship with the third-party investor in its for-profit entity, "National Technology University Corporation:"

Of course, following the principle of there not being any free lunch, while control of NTUC continued to rest with NTU as the majority shareholder, the investor received a seat on the NTUC board and certain 'supermajority rights' as both a shareholder and director to enable it to protect its position should the need arise . . . Obviously such intrusion into the workings of the institution itself would be abhorrent, but these are common requirements in the context of commercial ventures.

*Id.*

<sup>172</sup> For reports of the growth and consolidation of for-profit higher education corporations, see Brier & Rosenzweig, *supra* note 142. The authors report that "[t]he fast-growing University of Phoenix is now the largest private university in the United States, with more than 100,000 students and almost one-third in online programs, which are growing more than twice as fast as its brick-and-mortar operation" and that "the price of the trading stock for the University of Phoenix's online operation has increased more than 80 percent in the past year." *Id.*

<sup>173</sup> See Ellen Liberman, *The New Competition for College: Traditional Academia's New Competitors are For-Profit, Virtual and Corporate Universities. Can State Schools Keep Up?*, STATE LEGISLATURES, May 1, 2002, at 12 (quoting University of Phoenix executive vice president, as stating: It's a difficult regulatory environment. But it's one we've

and de-emphasizing the link between their structure and legitimacy, public and nonprofit universities enhance this argument and obscure the importance of university independence in teaching and research from private corporate interests. Rather than viewing the quality and legitimacy of education as flowing from their public mission, this allows teaching to become simply a commodity that can be delivered equally well by private for-profit or nonprofit universities. The market will then become the central driving force for relevant choices, including faculty, curriculum, and degrees granted, with the link between education and corporate needs replacing the link between education and the public interest.<sup>174</sup> This shift parallels the growing use of universities to fulfill product development needs of for-profit corporations that fund academic research in exchange for lucrative licensing agreements.<sup>175</sup> While for-profit institutions remain a small percentage of higher education in the United States,<sup>176</sup> public and nonprofit universities' defense of for-profit education interferes with their motivation and ability to objectively evaluate the qualitative impact of the for-profit structure on the functions of higher education, including the impact on academic freedom of faculty and students.<sup>177</sup> Further, public and nonprofit universities' denial of the difference in

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worked our way through. And once we start operating, we become part of the academic and political landscape. We don't use tax dollars, we're for-profit, so we pay taxes, we hire people locally [to teach], and we train the workforce. There's no downside.) See also Brier & Rosenzweig, *supra* note 142, at 30 (describing University of Phoenix's founder John Sperling as stating jokingly that "Wall Street is our endowment."); Liberman, *supra* at 15 (stating that Rhode Island is the only state that limits degree-granting authority to nonprofit colleges and universities).

<sup>174</sup> See Liberman, *supra* note 173, at 15 (quoting Sharon Thomas Parrott, vice president for external relations at for-profit DeVry University, Inc., as stating: "One of the first things that the for-profits ask employers is: 'What do you need?' Until recently, higher education has seen itself as above that conversation.").

<sup>175</sup> See SLAUGHTER & LESLIE, *supra* note 67, at ch. 5-6. See also Liberman, *supra* note 173, at 17 (describing former University of Rhode Island president Frank Newman's view of "college athletics, which resemble a semi-pro farm system at some schools, and university contracts with private corporations, which have led to controversies over the independence and accuracy of the resulting research, [as] two examples of competition's downside in higher education").

<sup>176</sup> See Liberman, *supra* note 173, at 14 (citing US Department of Education statistics from 1995-1996 undergraduate enrollment distribution of six percent in private for-profit colleges and universities, sixteen percent in private nonprofit and seventy-eight percent in public colleges and universities, and statistics from the Education Commission of the States showing that "[f]or-profit, degree-granting institutions grew much faster than their nonprofit counterparts in total numbers, enrollment and market share from 1989 to 1999"); Brier & Rosenzweig, *supra* note 142, at 29-30 (estimating that online distance education courses are less than five percent of college courses taken in the United States but also identifying the importance of "the emergence of freestanding, for-profit educational institutions, which see online courses as a key part of their expansion strategy").

<sup>177</sup> As an example of the role of nonprofit institutions in identifying the differences between nonprofit and for-profit educational institutions, see Liberman, *supra* note 173, at

the nature and quality of education in the new for-profit structures undermines their ability to argue aggressively for their own public support through public funding and tax preferences.<sup>178</sup>

#### *D. For-Profit Education: Consequences for Academic Freedom*

For-profit education changes the institution's goals in ways that are fundamentally in tension with the values expressed in the AAUP 1915 Declaration. The mission of the university shifts from education in the "public interest" and education as a "public good," to the goal of education as a for-profit venture. Though university administrators promote the entry into the for-profit sector as a practical solution to the university's financial problems, several elements demonstrate that an ideological commitment to the private market also underlies the adoption of for-profit structures. This ideological commitment is expressed in the view that for-profit structures are superior to the public or nonprofit organizations because they provide the university with flexibility, control, and efficiency in private markets for distance learning. Examination of these asserted benefits shows that they are not supportable on the grounds presented and that they undermine basic principles of academic freedom and

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14-15 (discussing the AAUP's protest against the University of Phoenix's attempt to create a New Jersey campus, criticizing the proposed use of only an electronic archive, but no library, the "pre-packaged curricula," and "the rigid structure [that] hampered academic freedom and barred faculty from participating in the university's governance").

<sup>178</sup> The blurring of the difference between for-profit and nonprofit educational institutions is exemplified in the statement by Columbia University Executive Vice-Provost Michael M. Crow that "[w]e are expanding what it means to be a knowledge enterprise. We use knowledge as a form of venture capital," and by Utah's Governor Mike Leavitt that "[i]n the future, an institution of higher education will become a little like a local television station." Nick Bromell, *Summa cum avaritia: Plucking a Profit from the Groves of Academe*, HARPER'S MAG., Feb. 1, 2002, at 71. The US Department of Education has eliminated the rule, which had applied to some distance education programs, "requir[ing] higher education programs that did not operate in a standard semester, trimester or quarter system to offer a minimum of 12 hours of course work a week if their students were to be eligible for federal financial aid" under Title IV. Dan Carnevale, *12-Hour Rule, Viewed as Limiting Distance Education, Expires*, CHRON. HIGHER EDUC., Nov. 15, 2002, at A36; *Education: Proposal Could Result in Aid for E-Learning*, NAT'L J. TECH. DAILY, Aug. 8, 2002. The Education Department's final regulation extends to such non-standard programs the "one day" rule applied to higher education programs with a traditional academic calendar, which requires one day of instruction per week to be eligible for federal aid. See Carnevale, *supra*, at A36. The assistant secretary for the office of post-secondary education in the Education Department is Sally Stroup, who was confirmed by the Senate in March 2002. Stroup had been "chief Washington lobbyist for the Apollo Group, which owns the University of Phoenix, a fast-growing chain of for-profit institutions." Stephen Burd, *For-Profit Colleges Praise a Shift in Attitude at the Education Department*, CHRON. HIGHER EDUC., Nov. 9, 2001, at 24; Ana Marie Cox, *Phoenix Ascending*, IN THESE TIMES, May 13, 2002, at 10.

independence of faculty.

The ideological nature of universities' embrace of the for-profit corporate structure, whether through spin-off corporations or through university-corporate partnerships, is evidenced by the rhetoric and arguments used by its advocates. University administrators and trustees promote the use of for-profit corporations as an answer to the university's financial problems, describing the for-profit sector as the best way to take advantage of an untapped market for distance learning. Given the "rapidly changing nature" of Internet technology, administrators and trustees attempt to justify a rush to enter the distance learning market.<sup>179</sup> Administrators and trustees assert that the future of for-profit distance learning is inevitable, that "the train has left the station," and that greater deliberation over the policy of adopting a for-profit structure will simply harm the university's competitive advantage to seize market opportunities.<sup>180</sup> Supporters promote the superior nature of a for-profit corporation to reap the profits from distance learning ventures, because of the "business discipline" needed to run a profitable operation.<sup>181</sup> The use of corporate investors' capital is advocated as

<sup>179</sup> See, e.g., Cornell University President Hunter Rawlings' description of the need to "realize how rapidly our environment is changing" and to respond to the "strong pressures from several directions" to enter the for-profit distance learning market. Manjoo, *supra* note 137, at 36; University of Chicago Graduate School of Business (GSB) Dean Mark Zmijewski's statement that "the question is not whether the GSB should enter [the distance learning] market, but how the GSB should enter this market." *The Dean's Corner*, *supra* note 131.

<sup>180</sup> See, e.g., Goldie Blumenstyk, *Temple U. Shuts Down For-Profit Distance Education Company*, CHRON. HIGHER EDUC., July 20, 2001, at A29 (quoting Temple University's Associate Dean of Information Technology John P. DeAngelo, stating: "Two or three years ago, lots of colleges rushed into distance education fearing that 'someone would eat their lunch' if they didn't."); Carr, *supra* note 137; Goldstein, *supra* note 147, at 27 (discussing "a financial marketplace that describes e-learning as the 'next killer app on the Internet' . . . [and] '[t]he next Internet investment opportunity'"); *Distance Learning: The Future is Now*, available at <http://gsbwww.uchicago.edu/news/gsbchicago/summer99/deanletter.html> (last visited Aug. 14, 2002) (University of Chicago Graduate School of Business Dean Robert S. Hamada, promoting the entry into its distance learning partnership with UNext.com, stated, "I think of distance learning as a speeding train heading straight for us. We don't know precisely where it's going, but we can't wait and see - we must either leap aboard or be left behind.").

<sup>181</sup> See, e.g., Universitas 21 Chairman Alan Gilbert's statement touting the benefits of marketing online-education programs of a group of universities: "Properly branded, advertised, and promoted, [Universitas 21] will be hugely powerful, much more so than any individual university trying to franchise its brand around the world." Maslen, *supra* note 141. Even the failure of many "dot-com" companies has been described as a positive discipline of the market. One partner in an investment firm managing venture-capital deals described the many "train wrecks along the way" leaving "great room for entrepreneurship in the education and training industry." Sarah Carr & Goldie Blumenstyk, *The Bubble Bursts for Education Dot-Coms*, CHRON. HIGHER EDUC., June 30, 2000, at A39.

protecting the university's endowment from such a risky investment necessary in a start-up corporation. Doubters are assured that the "brand name" of the university will be protected by the careful choices of capital investors, who will not be given control over educational content.<sup>182</sup>

The rhetoric and arguments presented in favor of for-profit education both expose and hide the threat to the values and practices of academic freedom. The wholesale adoption of the market model explicitly limits education to a means of profit-making by using the university's "brand name" and abandoning the university's position as a "public trust" and education as a "public good." The rhetoric also describes the business world as offering qualities of "efficiency" and "discipline," in contrast to the academic world's slow processes of deliberation. Such rhetoric is overt in its embrace of market values over the values of academic freedom and the public mission of the university. Favoring "efficiency" and "discipline" uses profits as the measure of success of the university rather than evaluating the quality of education or the strength of a community valuing freedom of thought and experimentation. Implementing these market values will require hiring managers trained and socialized in the practices of the for-profit workplace; these practices include labor relations practices seeking to cut labor and production costs in order to maximize profits. Such anticipated changes in management values are supported by research showing that managers in nonprofit corporations are attracted to nonprofits because of the public goals more than the opportunity to share in corporate profits.<sup>183</sup>

Other arguments promoting the for-profit corporation require closer examination to reveal the dangers to academic freedom and the university's mission. The assurances that academic freedom will be protected are illusory. The explicit shift in the goal of the distance learning institution and the accompanying structural changes eliminate any separation between the university and the outside corporate financial interests. Faculty who participate in the for-profit corporation, by definition, engage in educational development or delivery to further the profit-making goal of the corporation and the private interests of financial investors. The for-profit structure completely contradicts the argument that education should not serve outside corporate interests. The for-profit corporation exists to serve the interests of third-party financial investors who have been made insiders in the university. The shift in university identity to a private

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<sup>182</sup> See Goldstein, *supra* note 147 ("The financial model implies a close relationship between the venture – and therefore the institution that created it – and the investor. This has resulted in a significant difference between the ordinary process of selecting a venture partner, and the process common to universities undertaking such an effort – the issue of 'compatibility' assuming great importance . . . . The result, particularly in a 'hot' market for e-learning ventures, is often a 'beauty contest' involving several potential investors. The characteristics that typically win the day are a good reputation, a sophisticated understanding of both the training and higher education fields, and a willingness to allow incumbent management to continue in place.").

<sup>183</sup> See *supra* text accompanying notes 166-168.

market institution also promotes a conservative bias in the content of the educational curriculum. The targeted market of for-profit distance learning will include a focus on "executive education." Though executive education is currently included in university extension programs, the shift to a for-profit corporation will limit the targeted audience to those who can pay and will exclude the less prosperous segments of the public currently served by extension programs.<sup>184</sup>

University administrators and trustees argue that the fast pace of technological change and the potential for profits require the university to act swiftly to enter the for-profit sector ahead of its academic competitors. These arguments have the effect of painting those who call for more deliberation as luddites attempting to obstruct good faith efforts to alleviate the university's financial woes.<sup>185</sup> But the realities create a different picture than the supporters of for-profit structures depict. First, the argument that new technology makes such distance learning for-profit ventures inevitable reverses means and ends by asserting that the use of technology determines the goal of profit-making.<sup>186</sup> Technological developments are the means which can be used to advance a variety of goals. Using the Internet to promote for-profit distance learning is no more inevitable than using the same technology to advance the goal of education in the public interest.<sup>187</sup>

Further, the financial reality is that distance learning as a for-profit venture is highly risky, as conceded by administrators and trustees who justify seeking venture capitalist partners as a means of protecting university endowments. The initial capital investments to start the corporation and to develop the educational products are at the level of tens of millions of dollars. This makes the possibility of recuperating the investment speculative, let alone making a profit. After only three to four years of launching distance learning for-profit companies, universities and for-profit corporations are disclosing that their initial projections of enrollments, third-party investment levels, and profit potential are not being met. This has led to a series of modifications of the programs, including cutting back on the scope of the programs, searching for alternate sources of investments, extending the timeline for implementing program plans, or even closing the

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<sup>184</sup> See, e.g., e-Cornell's course offerings from the Extension Division of the School of Industrial and Labor Relations (ILR) are part of its Human Resources Certificate, *available at* <http://www.e-Cornell.com/courses.jsp> (last visited Jan. 24, 2003); Goldie Blumenstyk, *supra* note 180 (stating that NYUonline courses primarily targeted a corporate market).

<sup>185</sup> See NOBLE, *supra* note 69, at 34.

<sup>186</sup> *Id.* at 26.

<sup>187</sup> *Id.* See Brier & Rosenzweig, *supra* note 142, at 30 (quoting San Diego State University philosophy professor and "distance-education pioneer" Andrew Feenberg "who has insisted that educational technology 'be shaped by educational dialogue rather than the production-oriented logic of automation,' and that such 'a dialogic approach to online education . . . could be a factor making for fundamental social change'"). See generally DAVID F. NOBLE, *FORCES OF PRODUCTION: A SOCIAL HISTORY OF INDUSTRIAL AUTOMATION* (1984).

distance learning for-profit programs entirely. These developments and the justification for them also demonstrate the contradictions between educational and for-profit goals. Based on Temple University's determination that it would not be profitable, Virtual Temple has closed completely only two years after its creation. Temple University plans to continue to develop distance learning courses, but they will only be based on academic criteria.<sup>188</sup> Having failed to attract venture capital, NYUonline, the for-profit wholly owned subsidiary of NYU, has closed after three years and an expenditure of \$25 million in NYU funds.<sup>189</sup> Pensare, a company that worked with Duke University Fuqua School of Business' for-profit subsidiary, has filed for bankruptcy under Chapter 11.<sup>190</sup> UNext has asked its "academic partners" to restructure their agreements with UNext, "to promote 'its continued ability to raise financing.'"<sup>191</sup> The news of restructuring comes in the context of speculation that one of UNext's biggest investors, Thomson Corporation, is asserting greater control over the company and may purchase UNext.<sup>192</sup> Thomson is a "publishing giant" that invested \$38 million as part of its announced "strategic alliance" with UNext.<sup>193</sup> Distance learning companies have also laid off employees, with UNext laying off 52 of 390 employees and e-College eliminating 35 of 330 employees. One equity industry analyst offered an explanation for these layoffs: "Often times, this is when you see companies getting rid of excessive baggage and making themselves lean and mean."<sup>194</sup> Within two months of its initial on-line course offerings, Fathom, Columbia University's for-profit subsidiary, decided to offer shorter, noncredit on-line courses for free, in an attempt to attract customers to buy the semester long on-line courses that cost \$500 and up.<sup>195</sup> After having invested more than \$18.7

<sup>188</sup> Blumenstyk, *supra* note 180.

<sup>189</sup> Scott Carlson & Dan Carnevale, *Debating the Demise of NYUonline*, CHRON. HIGHER EDUC., Dec. 14, 2001, at A31.

<sup>190</sup> Goldie Blumenstyk, *Company that Sells Duke's Online MBA Courses Files for Bankruptcy*, CHRON. HIGHER EDUC., June 1, 2001, available at <http://chronicle.com/free/2001/06/2001060101u.htm>. Duke's for-profit subsidiary, Duke Corporate Education, had been given equity in Pensare in exchange for Pensare's right to develop and use a software platform created at Duke's business school. Duke now hopes to buy the rights to the software platform. *Id.*

<sup>191</sup> This explanation has been attributed to Sam Steinhardt, the chief finance officer of learning technology at Stanford University, one of UNext's "academic partners." Goldie Blumenstyk, *UNext Seeks to Restructure its Relationships with Universities*, CHRON. HIGHER EDUC., Aug. 7, 2001, available at <http://chronicle.com/daily/2001/08/2001080701u.htm>.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> Sarah Carr, *A Second Distance-Learning Company Announces Layoffs as Technology Firms Tighten Belts*, CHRON. HIGHER EDUC., Mar. 22, 2001, available at <http://chronicle.com/free/2001/03/2001032201u.htm>.

<sup>195</sup> Scott Carlson, *Fathom, With Backing from Major Universities, Changes Strategy on Marketing and Content*, CHRON. HIGHER EDUC., Feb. 9, 2001, at A33. Fathom also

million into Fathom, Columbia has announced that it is closing Fathom due to its failure to make a profit.<sup>196</sup> E-Cornell has offered a ten percent discount on individual online human resource courses provided by Cornell's School of Industrial and Labor Relations Extension Division and a twenty percent discount for customers who register for the full noncredit certificate program in human resources.<sup>197</sup>

Even as it appears that the for-profit distance learning corporations will not turn out to be financially profitable, they will be costly to the traditional values and norms of the university. The danger to academic freedom presented by the university's adoption of a for-profit corporate structure for education lies in the alteration of the university's institutional identity in ways that also undermine faculty identity. The view that for-profit corporations have greater business discipline and efficiency is premised on the assertion that unilateral control by management over business and labor relations is more efficient than the more open and deliberative organizational structure associated with universities.<sup>198</sup> This approach is completely opposed to the values of academic freedom that underlie faculty autonomy and self-governance. Academic freedom, supported by the job security of the tenure system, enables faculty to create a unique workplace culture based on rights of expression and self-governance over hiring, promotion, and work process. In contrast, the doctrine of employment-at-will, which applies to virtually all other employees in the United States, gives employers the managerial prerogative to hire and fire employees at will and is limited only by specific statutory or contractual protections.<sup>199</sup> Since most employees are not unionized,

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postponed advertising in an attempt to save money, relying on word of mouth advertising by its member institutions, which include the American Film Institute, the London School of Economics and Political Science, and the University of Chicago. *Id.*

<sup>196</sup> Scott Carlson, *After Losing Millions, Columbia U. Will Close Its Online-Learning Venture*, CHRON. HIGHER EDUC., Jan. 7, 2003, available at <http://chronicle.com/free/2003/01/2003010701t.htm>. In addition to its \$18.7 million investment, Columbia had attempted to keep Fathom afloat with further investments, reported at \$10 million. Carlson, *supra* note 195, at A33.

<sup>197</sup> This offer was given for a limited month long period. E-mail message from e-Cornell (Sept. 28, 2001) (on file with author).

<sup>198</sup> Cornell University President Hunter Rawlings acknowledged the tension that exists between business and university cultures and structures when he explained in a letter to the faculty that the Board of Trustees had approved the creation of e-Cornell though it "shared all the faculty and administration's concerns about creating a for-profit entity," which included "the recognition that the deliberative culture of the university will at times be at odds with the realities of the rapidly changing Internet world." President Rawlings' Letter to the faculty, available at <http://asc-www.dayadmin.cornell.edu/Provost.DistanceLearning> (last visited Jan. 24, 2003).

<sup>199</sup> Civil service laws for public sector employees and contractual protection of collective bargaining agreements for unionized public or private sector employees provide employees with protection from discharge without just cause. See Charles Feigenbaum,

employers have almost total control over employees' conditions of employment, including control over employees' work product and time. This also enables employers to discharge employees without just cause, for arbitrary reasons, or for reasons such as employees' political views.<sup>200</sup> As a result, most employees will be left without any assurance of job security.

The shift of the university's institutional identity towards a self-image as a business corporation threatens to bring values of managerial control even more deeply into university labor relations policies by enhancing the administration's unilateral power. Thus, the creation of a for-profit corporation intersects with attacks on the tenure system and the growth of the vulnerable contingent faculty workforce. According to corporate measures of efficiency, management should implement employment-at-will policies to cut labor costs and to enhance profit potential and control over the workforce. Therefore, "good" business practice would dictate eliminating the tenure system from distance learning for-profit ventures and, instead, hiring faculty on fixed contracts to develop and implement distance learning courses. Such employment policies would increase management's "flexibility" in adjusting the size of the faculty to meet production requirements and other managerial needs. The context of for-profit distance learning programs provides university administrations with a stated logic for using the employment policies and practices of the for-profit corporation. But the effects are more far reaching. As the Florida public university system demonstrates, the business identity extends beyond distance learning for-profit into distance learning programs in the traditional university structure and from there may attempt to fit universities into a "business-based model." Florida Gulf Coast University ("FGCU") was founded in 1997 as part of the Florida state university system, and distance learning has been its central focus.<sup>201</sup> FGCU hires

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*Civil Service and Collective Bargaining: Conflict or Compatibility?*, in LABOR RELATIONS IN THE PUBLIC SECTOR: READINGS AND CASES 23 (Marvin J. Levine ed., 1979). There have been some state common law exceptions to the employment-at-will doctrine but these are limited in scope and effectiveness of protection. See Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65 (2000).

<sup>200</sup> Private sector employees' speech is generally unprotected unless related to protection under statutes such as the National Labor Relations Act or Title VII of the Civil Rights Act or unless employees are covered by a collective bargaining agreements' protection against discipline without just cause. Public sector employees' speech is covered by the First Amendment to the United States Constitution, though judicial interpretation has severely limited the scope of protection. See *supra* text accompanying notes 82-85; Risa L. Lieberwitz, *Freedom of Speech in Public Sector Employment: The Deconstitutionalization of the Public Sector Workplace*, 19 U.C. DAVIS L. REV. 597 (1986).

<sup>201</sup> FGCU's goal is to provide courses to "25 percent of all enrollments" through distance learning, including "remote access via Internet, videotaped class sessions, two-way interactive video, and printed materials." Richard Chait & C. Ann Trower, *Build It and Who Will Come?*, CHANGE, Sept.-Oct. 1998, at 20. See also Robin Wilson, *A New Campus Without Tenure Considers What It's Missing*, CHRON. HIGHER EDUC., May 12,

virtually all faculty on fixed renewable contracts, without any tenure system.<sup>202</sup> The faculty union agreed, in the collective bargaining contract, to the use of fixed term contracts at FGCU as a way to respond to pressure by the Florida Board of Regents and the Governor to use a "business-based model" for the entire state university system.<sup>203</sup> The union viewed the agreement on fixed term contracts at FGCU as a limited concession that would leave intact the tenure system in the rest of the state university system.<sup>204</sup> The FGCU administration promoted this new employment structure as part of an innovative program that sought faculty interested in experimenting with new forms of pedagogy. The faculty soon discovered, however, that, as contract workers, it was possible for the administration to unilaterally refuse to renew their contracts without stating any of the reasons for nonrenewal.<sup>205</sup> Some faculty claimed that their contracts were not renewed in retaliation for their open criticisms of administration policies and practices.<sup>206</sup> Following grievances filed with the faculty union based on the refusal to renew these contracts, the FGCU president agreed to create a faculty panel to study the system and make proposals for providing greater job security. The panel recommended the use of "rolling" three-year contracts that would automatically extend for an additional year following a positive annual evaluation.<sup>207</sup> The FGCU administration has endorsed the panel's recommendations and will submit this recommendation to the Florida state officials for approval.<sup>208</sup> One member of the Florida Board of Regents has

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2000, at A18.

<sup>202</sup> Only faculty who transferred to FGCU from a satellite campus of the University of South Florida retained their tenure or tenure-track status. Other newly hired faculty were given three- to five-year contracts. Wilson, *supra* note 201.

<sup>203</sup> Chait & Trower, *supra* note 201.

<sup>204</sup> The 1995-1998 collective bargaining agreement covering all Florida state universities provided that "it is the intent of the Board [of Regents] to authorize the use of such [multi-year] appointments at FGCU in a manner which supplements, rather than supplants, the use of tenure-earning appointments." *Id.*

<sup>205</sup> Some faculty are concerned that the administration will achieve cost savings by replacing them with lower paid new faculty. *Id.*

<sup>206</sup> Wilson, *supra* note 201.

<sup>207</sup> A professor receiving a negative evaluation would have a one-year contract extension; if a second negative evaluation is given after this extension, the professor would be given a final termination contract year. *Id.*

<sup>208</sup> In the summer of 2001, the Florida legislature voted to eliminate the Board of Regents, which had governed the state universities, replacing it with a system described as seeking a goal of "devolution," with a new Florida Board of Education that governs the K-20 educational system and a system of separate boards of trustees for each state university. Scott Powers, *Presidents Say Power Must Reside on Campus; Even Though the State Dissolved the Board of Regents, Universities Still Struggle for Autonomy*, ORLANDO SENTINEL, Dec. 10, 2001, at B1. Some faculty have criticized this new system as creating a potential for violating academic freedom. Barry Klein, *Faculty Leaders Disavow Overhaul*, ST. PETERSBURG TIMES, Mar. 3, 2001, at 1B.

criticized the recommendation as being inconsistent with the elimination of tenure, stating "[t]he whole idea is to give the university total flexibility."<sup>209</sup>

Copyrights to distance learning courses have also become a contentious issue. Whether developed by contract workers or tenure-track faculty, distance learning corporations have sought ownership rights of the course materials in order to enhance profits.<sup>210</sup> This shift in ownership of the work product also undermines faculty control over teaching and research, which is central to academic freedom. Similar to the role of "extra-legal" norms of professional academic freedom, creating powerful faculty rights in the university, extra-legal practices have established a tradition of faculty copyright with regard to teaching materials and scholarship.<sup>211</sup> Despite the federal Copyright Act<sup>212</sup> "work-for-hire" doctrine, which provides employers with ownership of intellectual property created by employees within the scope of employment,<sup>213</sup> the tradition in the university has been to recognize a "teachers' exception," thereby treating faculty as owners of their teaching materials and scholarship.<sup>214</sup> With the potential for increased revenue flowing from the use of the Internet in education, particularly in the for-profit structure, universities have begun to revise their policies relating to ownership of online teaching materials.<sup>215</sup> Just as the corporate employer removes control over the work product from wage laborers, the education corporation will seek to separate the faculty member from continued ownership of the educational product.<sup>216</sup> This competition for ownership over faculty work product is part of

<sup>209</sup> Wilson, *supra* note 201.

<sup>210</sup> See NOBLE, *supra* note 69, at 32-33, 37-39; Press & Washburn, *supra* note 3, at 52.

<sup>211</sup> For discussion of the role of academic norms and customs in creating this tradition, see Gregory Kent Laughlin, *Who Owns the Copyright to Faculty-Created Web Sites?: The Work-for-Hire Doctrine's Applicability to Internet Resources Created for Distance Learning and Traditional Classroom Courses*, 41 B.C. L. REV. 549, 560-61 (2000); Michele J. Le Moal-Gray, *Distance Education and Intellectual Property: The Realities of Copyright Law and the Culture of Higher Education*, 16 TOURO L. REV. 981, 998-1000, 1031-32 (2000); Ashley Packard, *Copyright or Copy Wrong: An Analysis of University Claims to Faculty Work*, 7 COMM. L. & POL'Y 275, 281-86, 293-94 (2002).

<sup>212</sup> The Copyright Act of 1976 provides that "[c]opyright in a work . . . vests initially in the author or authors of the work." 17 U.S.C. § 201(a) (2000).

<sup>213</sup> See 17 U.S.C. § 201(b); Le Moal-Gray, *supra* note 211, at 991 (explaining that "[c]opyright law generally places ownership, and therefore copyright, of intellectual property in the author or creator of the work . . . . The Copyright Act's 'work made for hire' doctrine, however, provides a major exception to the fundamental principle that copyright ownership vests initially in the individual who creates the work.").

<sup>214</sup> This "teachers' exception" has received some recognition in the courts, as well. See Laughlin, *supra* note 211, at 576-78; Le Moal-Gray, *supra* note 211, at 998-1000; Packard, *supra* note 211, at 281-86.

<sup>215</sup> Laughlin, *supra* note 211, at 556, 581-83; Le Moal-Gray, *supra* note 211, at 996-97; Packard, *supra* note 211, at 294-309.

<sup>216</sup> NOBLE, *supra* note 69, at 32-33, 37-39; Press & Washburn, *supra* note 3, at 52. The AAUP *Statement on Distance Education* calls for faculty to have "primary

the ideological shift from teaching and research being part of the public domain to teaching and research being commodities used to enrich universities and individual faculty members through private copyrights, patents, and licenses. Once the focus is changed to dividing up the spoils among corporations and individuals, the values of contributing to the public good and maintaining academic independence become secondary, at best.<sup>217</sup>

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responsibility for determining the policies and practices of the institution in regard to distance education. The rules governing distance education and its technologies should be approved by vote of the faculty concerned or of a representative faculty body . . . ." The *Statement* asserts faculty rights to academic freedom in distance education. Regarding "Ownership of Materials," the AAUP Special Committee on Distance Education and Intellectual Property Issues, in its "Suggestions and Guidelines: Sample Language for Institutional Policies and Contract Language for Distance Education Issues," states that "[t]he materials created by faculty members for distance education courses should be treated in exactly the same fashion as materials created by faculty members for traditional courses." *Available at*

<http://www.aaup.org/Issues/DistanceEd/Archives/specgmt/deguide.htm> (last visited Jan. 13, 2003). In its *Statement on Copyright*, the AAUP reasserts "[t]he prevailing academic practice to treat the faculty member as the copyright owner of works that are created independently and at the faculty member's own initiative for traditional academic purposes." *Available at* <http://www.aaup.org/statements/Redbook/Spccopyr.htm> (last visited Jan. 13, 2003).

<sup>217</sup> See David Noble, *The Future of the Faculty in the Digital Diploma Mill*, ACADEME, Sept.-Oct. 2001, at 27, 31; Gary Rhoades, *Whose Property Is It? Negotiating with the University*, ACADEME, Sept.-Oct. 2001, at 39, 42-43. The Massachusetts Institute of Technology (MIT) received \$11 million in grants for initial funding of its OpenCourseWare project, which includes developing Web sites for MIT courses if professors agree to include their courses. The course materials on the Web sites will be available for free to the public, while the interactive features of the courses will be available only to students enrolled in the MIT courses. The OpenCourseWare project also includes future plans to develop software for courses that would be available for free to other institutions. Even this project, though, includes contentious intellectual property issues, as MIT has acknowledged the need to address professors' concerns about their ownership and control of materials that they place on public Web sites. Additionally, MIT has left open the possibility of licensing the online course materials for use in courses offered by for-profit companies, though MIT asserts that it would not cease offering the material freely on the Web site as a condition of such a licensing agreement. See Arpon Basu, *Online Education Widely Denounced at International Conference*, CANADIAN BUS. & CURRENT AFF., Nov. 3, 2001; Jeffrey R. Young, *MIT Begins Effort to Create Public Web Pages for More Than 2,000 of Its Courses*, CHRON. HIGHER EDUC., Dec. 14, 2001, at 34; Jeffrey R. Young, *MIT Wins Grants to Make All Its Course Materials Free Online*, CHRON. HIGHER EDUC., June 18, 2001, *available at* <http://chronicle.com/free/2001/06/2001061801u.htm>.

#### IV. FACULTY RESPONSE TO CORPORATIZATION: BUILDING A COLLECTIVE FACULTY IDENTITY

Faculty responses to corporatization may range from enthusiasm about the closer relationship between universities and the private market to complete opposition to such developments. At the same time, most faculty have internalized an identity that relies on academic freedom as a central value and includes placing priority on individual autonomy in teaching and research. Most faculty see their choice of an academic career as a commitment to a unique endeavor, one with an independent role for faculty work and self-governance. Thus, even faculty who support private market activities by the university generally have a commitment to university policies and practices that respect the democratic rights of academic freedom. This internalized identity, based on a commitment to democratic principles of independence, autonomy, and self-governance, provides the greatest potential for opposing the corporatization of the university. Specifically, if faculty remember who they are and why they value academic work, they could create the foundation for a collective response to corporatization of the university.

##### *A. Collective Faculty Action at Cornell University*

Cornell University presents an interesting example of a recent faculty response to corporatization through the creation of a for-profit corporation, called "e-Cornell," to develop and market Internet-based distance learning courses. The following account is based on the author's involvement in the debates and faculty governance activities concerning e-Cornell. The narrative of the events surrounding e-Cornell reveals the potential for collective action by faculty to constrain university corporatization and, in so doing, to reinforce the values of academic freedom at the core of faculty identity.

Cornell's university faculty governance process is based on a Faculty Senate, with elected faculty representatives apportioned among the colleges and departments. The Faculty Senate deals with issues pertaining to matters of general educational policy, including academic matters affecting more than one college.<sup>218</sup> The University Faculty Committee ("UFC") acts as an executive committee for the Faculty Senate, meeting separately with the Dean of the Faculty to set the agendas for the monthly Senate meetings and to discuss issues to be brought to the Senate either by the UFC or by the various Senate committees. The UFC members and the Dean of the Faculty are elected by the university faculty. The UFC and the Dean of the Faculty meet regularly with the University Provost to learn of issues of interest to the faculty.

The Faculty Senate first addressed e-Cornell as a procedural issue. Specifically, the issue concerned respect for the role of the Faculty Senate as the

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<sup>218</sup> See *Organization and Procedures of the University Faculty*, Cornell University, available at <http://www.cornell.edu/UniversityFaculty> (last visited Jan. 24, 2003).

elected representative of the university faculty. In January 2000, the UFC learned for the first time that the Cornell central administration intended to seek approval from the Board of Trustees, at its March 2000 meeting, to create e-Cornell as a for-profit corporation to develop and market distance learning courses. The Cornell administration had developed this plan through discussions with some faculty and deans of the separate colleges, but it had not informed the UFC or the Faculty Senate of its plans. At the UFC's invitation, during the February Faculty Senate meeting, Vice Provost Mary Sansalone presented the administration's plan to seek trustee approval to create e-Cornell, which was still in a rudimentary development stage, but which was clearly based on a for-profit corporate model. The administration planned to seek capital from third-party investors, who would become shareholders and some of whom would sit on the e-Cornell Board of Directors.<sup>219</sup> Following the Vice Provost's presentation at the Senate meeting, the Senate discussed the plan, including concerns expressed by Senate members about the administration's failure to consult with the Faculty Senate before deciding to seek the Board of Trustees' approval to create a for-profit corporation to deliver education.

Wide-ranging discussions followed this February meeting, many concerning the procedural issues relating to the administration's failure to consult the Faculty Senate about e-Cornell and about the substantive issues concerning the pros and cons of distance learning, especially through a for-profit corporation. These issues were discussed at a Faculty Forum sponsored by the Dean of the Faculty in late February. In March 2000, the Faculty Senate resoundingly passed a resolution asserting its entitlement to fully participate in developing any principles and plans for distance learning, including any consideration of a for-profit corporation. Shortly thereafter, in March, the trustees voted to approve the creation of e-Cornell as a for-profit corporation, though the trustees neither made any material financial commitment to e-Cornell, nor approved the method for capitalizing e-Cornell.

The trustees' decision, in the face of the Faculty Senate resolution, to proceed unilaterally to create e-Cornell as a for-profit corporation was met with a great deal of anger by faculty in the UFC and in the Senate. After further discussions between the UFC and the central administration, Cornell's President agreed to appoint a joint administration-faculty committee with a broad charge to study all types of models for distance learning, including for-profit and nonprofit models. The President also agreed to meet with the UFC to draft a general written agreement of processes to ensure earlier consultation by the administration with

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<sup>219</sup> Vice Provost Mary Sansalone listed the reasons for creating a for-profit entity, including "opportunities" to "attract the capital needed to launch new programs," to "seek partnerships when name recognition in the marketplace and/capital are needed to launch new programs," and to "provide an opportunity for Cornell to benefit from the appreciated value of its equity interest in e-Cornell." *2000 e-Cornell report*, available at <http://asc-www.dayadmin.cornell.edu/provost.distancelearning> (last visited Oct. 15, 2002) (on file with author).

the Faculty Senate in the future on issues of concern to the faculty. At its April meeting, the Senate passed a resolution instructing the UFC to work on such an agreement with the President. At its May meeting, the Faculty Senate ratified the written agreement reached by the UFC, the President, and the Provost. The agreement included a provision stating that the President and the Provost explicitly "recognize the Faculty Senate as the bona fide representative of the University Faculty."<sup>220</sup> At the May meeting, the Senate also approved a process for the joint administration-faculty committee on distance learning to seek advice from the UFC during the joint committee's continued work in the summer.

The joint committee produced a report during the summer of 2000, that conditionally endorsed the creation of e-Cornell to deliver distance education in nondegree programs. Conditions included the assurance of faculty autonomy over course content. The report, though, stated that the committee would not take an explicit position recommending whether e-Cornell should be organized as a nonprofit or for-profit corporation, due to the committee's view that it lacked expertise on this issue.

The UFC responded positively, on the whole, to the joint committee's report. At its September 2000 meeting, the Faculty Senate passed a UFC resolution endorsing the joint committee's report, based in large part on the report's recommendations to restrict e-Cornell offerings to nondegree programs and to ensure faculty autonomy over course content. The UFC resolution also based its endorsement on the fact that in June 2000, the Board of Trustees decided to capitalize e-Cornell solely from the University's unrestricted endowment, rather than seek third-party investors. Thus, by the time the Faculty Senate met in September 2000, the Board of Trustees had reconfirmed its decision to create e-Cornell as a for-profit corporation, and had significantly limited the scope of e-Cornell by deciding not to sell equity in the corporation to third-party investors and by offering courses separately from any degree programs.

During the 2000-2001 school year, the joint administration-faculty committee continued to meet, discussing issues such as intellectual property rights and questions such as whether e-Cornell should offer credit courses. The Faculty Senate has not yet been asked to reconsider its position that e-Cornell should be restricted to nondegree programs and to noncredit courses. The Senate remains involved in the development of e-Cornell, including the UFC's review of and participation in amending the language of the Overarching Agreement between e-Cornell and Cornell University. The Faculty Senate has continued to assert its role in faculty governance in relation to e-Cornell; it passed a resolution, for example, calling for review by the Faculty Senate prior to changes in policy, such as the sale of equity to third-party investors or offering courses for credit. Though e-Cornell is a separate for-profit corporation, administrators have continued to consult the UFC concerning issues such as the appropriate titles for

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<sup>220</sup> *Principles of Cooperation and Consultation Between the President and Faculty Senate*, Cornell Faculty Senate Minutes, May 10, 2000 (Appendix C), available at <http://web.cornell.edu/UniversityFaculty/>.

individuals hired to implement distance learning courses developed by Cornell faculty for e-Cornell. The UFC and the Faculty Senate are also involved in crafting policy concerning intellectual property rights of materials developed by faculty for use on-line, either through e-Cornell or other university venues.

In analyzing the debate and actions concerning e-Cornell, one of the most interesting aspects is the overlap and inter-relation of the issues of process and content; the discussion of the process of faculty governance concerned issues similar to those raised in the discussion of the content of e-Cornell. Each discussion implicated issues of academic freedom. At the early stages of the administration's plans to create e-Cornell, the Faculty Senate was angered by the administration's disrespect for its role as the representative of the university faculty. This was a matter of academic freedom, an expression of the collective right of the faculty for self-governance. The widespread consensus on this issue was striking; it created a left-center-right coalition in the Faculty Senate. It was clear in the Senate discussions that faculty identity as autonomous, self-governing members of the university was at the core of the consensus. It was also clear that the broad and deep commitment to these values created the conditions for the significant concessions elicited by the Senate from the administration and the trustees: the creation of the joint administration-faculty committee with a broad charge to consider all aspects of distance learning and drafting of the agreement with the Faculty Senate on principles and practices to govern relations between the administration and Senate.<sup>221</sup> These concessions demonstrated faculty collective power to check the unfettered development of e-Cornell as a for-profit corporation and to demand respect for faculty governance processes. The role of the joint committee also demonstrated the importance of faculty governance in limiting the scope and reach of e-Cornell as a for-profit entity. In preserving faculty academic freedom to decide course content and in limiting courses to noncredit offerings, the joint committee achieved significant results.

The narrative of e-Cornell's development demonstrates the important role of faculty governance processes in maintaining faculty participation in university decision-making. The Faculty Senate successfully asserted its right to be consulted and to be taken seriously, with concrete results, including the written agreement between the administration and the Faculty Senate on faculty governance that recognized the Senate as the bona fide representative of the faculty, the joint administration-faculty committee's successful recommendations on e-Cornell's activities and functions, and the faculty role in drafting the e-Cornell Overarching Agreement. Despite the fact that the Faculty Senate was not adequately consulted on the issue of choosing a for-profit or nonprofit corporate structure for e-Cornell, the faculty governance process succeeded in forcing the administration to restrict its vision of e-Cornell. As opposed to the initial plans to create a for-profit corporation capitalized by third-party investors, including

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<sup>221</sup> The Faculty Senate's actions were also the culmination of a series of conflicts with the administration concerning the administration's lack of adequate consultation with the Senate about other academic matters, apart from distance learning.

venture capitalists, the trustees restricted e-Cornell to a self-funded for-profit corporation limited to noncredit courses and nondegree programs. Given the administration's enthusiasm for its initial plans, it is clear that faculty activism effectively pressured the administration and the trustees to severely limit their plans for the structure and scope of e-Cornell. The collective action of the faculty also established a pattern for continued consultation with the UFC and Faculty Senate by Cornell administrators concerning e-Cornell developments, including issues of intellectual property rights, which are of great interest to the faculty.

Though the Faculty Senate's protests contributed to the decision to restrict e-Cornell from seeking third-party investments, the existence of e-Cornell as a for-profit corporation is still a serious incursion into traditional nonprofit educational organization. Given the tax advantages of the nonprofit corporation that generates revenue, one must question why university administrators and trustees chose to create e-Cornell as a for-profit corporation. As a nonprofit corporation delivering distance learning courses, the university would retain its tax exemptions, as educational programs would not generate unrelated business income.<sup>222</sup> One explanation is the ideological attraction of the for-profit corporation, evidenced by the university administrators' rhetoric that a for-profit model would be tied to more efficient business methods. The closer the university's ties are to business and the more the university resembles a business corporation, the easier it will be for the administration and trustees to import business values and practices to the university. Policy and practice changes could include the removal of any constraints on salaries paid to managers and the use of "traditional" employment-at-will hiring practices for distance learning faculty. Despite assurances of faculty control in developing distance learning courses, the for-profit motive distorts academic freedom. As the fiduciary duty of the corporate managers will be to make a profit for the shareholders, decisions about product development and distribution will be driven by market demands. Further, e-Cornell will be positioned to shift to a sale of equity to third parties to realize any growth in value of the corporation, bringing third parties into a position to influence policy directly. Thus, continued Faculty Senate vigilance in monitoring any proposed policy and structural changes in e-Cornell is crucial to maintaining the current restrictions on its scope.

### *B. Creating a Faculty Consensus Against University Corporatization*

While the Cornell Faculty Senate consensus was strong concerning certain issues, such as the exclusion of third-party investors in e-Cornell, it is likely that it would have been more difficult to reach a broad consensus on the basic issue of

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<sup>222</sup> Internal Revenue Code 26 U.S.C. § 513(a) (2000) defines an "unrelated business" from which a 501(c)(3) organization generates taxable income as "any trade or business the conduct of which is not substantially related . . . to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501." See also Blumberg, *supra* note 8, at 110-11.

whether e-Cornell should be created as a for-profit corporation. Given the national and global shifts toward privatization and the realities of dependence on private corporate funding for facilities and research, many faculty may have concluded that the choice of a for-profit corporate structure does not pose dangers to academic freedom, that any danger is not significant, or, even if there is some danger to academic freedom, the financial problems of the university warrant projects such as e-Cornell as a for-profit corporation. As discussed in Part III of this Article, though, this issue of corporate structure raises important threats to academic freedom because of the potential negative effects of a for-profit education corporation on the public mission of the university.

In light of the current economic conditions of general market dominance and specific university financial difficulties, what is required to create a consensus that there are strong reasons to oppose the creation of for-profit education corporations? The answer lies in the individual and collective identities of faculty based on the values expressed in the AAUP 1915 Declaration<sup>223</sup> and the 1940 Statement of Principles.<sup>224</sup> As the consensus over the faculty governance issue at Cornell demonstrated, these values of academic freedom continue to resonate strongly with faculty.

Achieving faculty consensus to oppose for-profit education is tied to an understanding of such developments within the overall context of university corporatization. Privatization and commercialization of research, attacks on the tenure system, the increase of contingent faculty, growth in "partnerships" between industry and universities, and the creation of university for-profit corporations create a consistent pattern of corporatization. Individually, each development undermines academic freedom. Together, they demonstrate an ideological shift in the values and social role of the university. In each case, university administrators and trustees justify changes in policies and practices as nonideological practical responses to financial pressures on the university, particularly in light of decreased public funding. Thus, private funds are needed to support research; corporate licenses to market university-patented research results bring needed funds to support the university; nontenure-track faculty fulfill teaching needs without the costly commitment to tenured faculty lines; and technological developments open markets for distance learning, made financially viable through private industry investments. Further, administrators assure faculty that these developments, as specific measures to support university operations, will not modify the basic core of the university's mission. The Cornell administration's assertion that e-Cornell is "a hybrid organization—one that is nonprofit in its mission of education and for-profit in its structure"<sup>225</sup> is an

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<sup>223</sup> 1915 Declaration of Principles, *supra* note 24, at 157-76.

<sup>224</sup> 1940 Statement of Principles, *supra* note 57, at 33-39.

<sup>225</sup> Vice Provost Mary Sansalone, *Response to the Preliminary Report of the Provost's Advisory Committee on Distance Learning*, Aug. 3, 2000, available at <http://asc-www.dayadmin.cornell.edu/provost.distancelearning/> (last visited Aug. 3, 2000) (on file with author).

example of such an assurance.

Even accepting the reality of the financial difficulties faced by universities, corporatization trends are still ideological. They represent the universities' choice to respond to financial pressures by embracing private market ideology and result in a major shift in the university's identity. These developments establish a consistent pattern of increasing private business influence in the university and of importing private business philosophy into the university. These developments are interlocking; the specific changes reinforce each other. Increased dependence on private corporate funds for research, along with corporate demands for control over research findings, create an active presence and involvement of corporations in basic university research functions. In this context, venture capital investments in for-profit corporations and distance learning partnerships between universities and businesses simply extend the corporate presence into the university's teaching functions. With the growing ranks of contingent faculty, hiring nontenure-track faculty to work in university distance learning programs is a logical use of temporary or part-time faculty to carry the teaching workload. University patenting of faculty research creates a foundation for university copyright control of faculty distance learning courses. The acceptance of the profit-motive and business models in distance learning corporations reinforces the call for closer monitoring of tenured faculty productivity in order to create more efficient universities. This supports the critique of the tenure system as being an outmoded, expensive, and inefficient use of resources that promotes a noncompetitive environment and disincentives to high production.

These trends and patterns of corporatization are steadily shifting university identity toward a private corporate business model, portending serious threats to the university public mission and faculty academic freedom. Corporatization undermines basic principles of the social role of education and research in society, the meaning of academic freedom, and the central role of faculty governance in the university. The history of higher education in the United States has established the place of the university in the public domain. Despite the significance of private universities in higher education, their nonprofit structure reflects the importance of their contributions to the public interest through education and research. The combined effect of corporatization developments fundamentally challenges this model by privatizing and commodifying research and teaching. In resembling the private for-profit corporation, faculty identity becomes more tenuous as well. Where the university becomes simply part of the broader domain of corporations competing in the private market, it is more difficult to justify faculty rights to broad academic freedom, which are based on democratic principles of free speech, dissent, self-governance, and the sharing of knowledge in the public domain.

Some will argue that this appeal to academic freedom and faculty identity is based on an ideal and unrealistic image of the university, given the influence of corporations over university work, historically and presently. This rallying call is not, however, based on a purist or idealist image. It is precisely the reality of corporate power that makes the opposition to current corporate trends so

important. The dependence of the university on corporate funding has always limited the scope of academic freedom and has always created serious constraints on faculty and on the functioning of universities in the public interest. Additional shifts in higher education toward more direct relations with business corporations threaten to further limit academic freedom and the social role of universities. The most recent trend, the creation of for-profit educational corporations, including venture capital investments, public-private partnerships, and for-profit spin-offs, threatens to shift the playing field even further from the public to the private domain. Regardless of the current limitation of this structural shift to distance learning activities, the acceptance of the for-profit goal for both noncredit and degree granting distance learning programs is a qualitative change in the vision of higher education. Moreover, the embrace of the for-profit model for delivering education will make reversals of other corporatization trends more difficult. The problems of corporatization in teaching and research must be addressed in a context of public and private nonprofit universities functioning solely within an explicitly stated public mission.<sup>226</sup>

Given the threat to academic freedom, faculty have good reason to oppose the creation of for-profit educational entities and reason to believe that their opposition can make a difference. At Cornell, the Faculty Senate demonstrated that a united faculty governance body can effectively assert its collective power to oppose administrative actions. Faculties in other universities have also acted collectively to oppose university distance learning ventures for profit.<sup>227</sup> At York University, a 1997 settlement of a faculty strike included a collective bargaining agreement provision stating that faculty cannot be required to teach courses online or use technology in classroom teaching.<sup>228</sup> At Temple University, the trustees'

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<sup>226</sup> The example of Nike Founder and CEO Phil Knight's announcement that he would no longer make philanthropic donations to University of Oregon, based on Knight's displeasure with the university's decision to join the Workers' Rights Consortium (WRC), is a good example of corporations' attempts to influence university policy by placing conditions on even third-party funding. The WRC is an organization of universities to monitor employment conditions in factories manufacturing apparel to be sold by universities. Knight opposes the WRC because it does not include corporate businesses as members. Knight stated: "With this move the University inserted itself into the new global economy where I make my living. And inserted itself on the wrong side, fumbling a teachable moment." Joseph B. Frazier, *Nike CEO Phil Knight Halts All Donations to University of Oregon*, ASSOCIATED PRESS, Apr. 25, 2000. Seventeen months later, Knight, who was University of Oregon's largest donor, announced that he had decided to resume his donations for the university's expansion of its football stadium. Audrey Y. Williams, *U. of Oregon Ends Rift With Nike Executive, A Key Benefactor*, CHRON. HIGHER EDUC., Oct. 12, 2001, at 38. Knight's initial announcement withholding funding may have had the desired effect, as seven months prior to Knight's decision to resume donations, "the Oregon State Board of Higher Education banned the university from enforcing anti-sweatshop codes of conduct or joining groups that try to set workplace rules." *Id.*

<sup>227</sup> See NOBLE, *supra* note 69, at 50-56.

<sup>228</sup> Jeffrey R. Young, *David Noble's Battle to Defend the 'Sacred Space' of the*

decision to create Virtual Temple as a for-profit corporation was very controversial, with the Faculty Senate passing several resolutions calling for limits on the new corporation's scope and activities.<sup>229</sup> The California state university system's California Educational Technology Initiative ("CETI"), with its partnership with for-profit corporations such as Microsoft and GTE, led to active protests by faculty and students, through faculty senate resolutions, public demonstrations, and governmental hearings.<sup>230</sup> The proposed CETI agreement with private industry failed, though new plans continued.<sup>231</sup> Nine hundred faculty members at the University of Washington signed an AAUP open letter to the governor protesting his announcements of plans for statewide initiatives for online higher education. The faculty letter explicitly rejected the delivery of education as "a profit-making commodity to be offered on the cheapest terms to the highest bidder."<sup>232</sup> The United Faculty of Florida, the union representing Florida Gulf Coast University faculty, has been lobbying for a return to the tenure system and has protested the administration's policies asserting university ownership of copyrights of their intellectual property, including online course materials.<sup>233</sup> These examples demonstrate that faculty still claim democratic rights in the university, particularly over academic matters at the heart of faculty work.

Faculty opposition to corporatization is important, not only for its potential to achieve concrete constraints on university actions, but also as a means for strengthening faculty cohesiveness around a collective identity. Such opposition is an exercise of academic freedom, with faculty individually and collectively asserting their rights to criticize university policy and to engage in self-governance. It is academic freedom that provides faculty with the right to publicly criticize university corporatization. This is particularly true in private universities covered by *Yeshiva*. But even where faculty have the statutory right to form unions and bargain collectively, the history and tradition of academic freedom significantly strengthen faculty opposition to administrative policies. In exercising the right to academic freedom to oppose university corporatization, faculty continue to shape their identity by reinforcing the values that they hold in common regarding the public mission of education, the independence of teaching and research, and democratic rights of free speech and self-governance.

The 1997 faculty strike at York University, led by the York University Faculty Association (YUFA), provides an important example of the role of collective action in building and reinforcing faculty identity based on democratic values. As described by two feminists involved in the strike, the experience of participating

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*Classroom*, CHRON. HIGHER EDUC., Mar. 31, 2000, at A47.

<sup>229</sup> Sarah Carr, *For-Profit Venture to Market Distance-Education Courses Stirs Concern At Temple*, CHRON. HIGHER EDUC., Dec. 17, 1999, at A46.

<sup>230</sup> NOBLE, *supra* note 69, at 52-53.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 53. See also J.G., *Superstars Online*, AM. PROSPECT, Oct. 23, 2000, at 34-35.

<sup>233</sup> NOBLE, *supra* note 69, at 54-55; Stephen Kiehl, *Teachers Seek Job Security at Tenure-Free University*, PALM BEACH POST, June 10, 2000, at 1A.

in the strike developed a political consciousness among faculty members who were not yet strongly committed to the faculty union or to collective action.<sup>234</sup> One of the strengths of the faculty strike was its foundation on principles of equity, in which specific issues concerning salaries, benefits, workload and technology were part of broader demands for equity and democracy in university governance.<sup>235</sup> This principled base of the strike was central to creating deeper commitment to the faculty union's potential for promoting shared democratic values.<sup>236</sup> In exercising their right to engage in collective action, groups that had felt marginalized from the union – particularly women and people of color – participated in building alliances inside the union toward diverse goals linked by the principle of equity.<sup>237</sup> This experience was important, not only to build ties among faculty groups, but also to build alliances with graduate students and nontenure-track academics.<sup>238</sup> With sustained activity after the strike, such alliances can be strengthened to deepen and broaden the demands for equity and democratic governance. The experience of the strike also increased faculty members' understanding of the differences between the interests of faculty and the interests of the administration.<sup>239</sup> The reality of the conflict of negotiations and the strike made opposing positions clearer. The faculty found that the rhetoric of the administration in favor of equity was not necessarily matched by its actions and responses to faculty proposals.<sup>240</sup> Drawing lines between faculty and administration interests enhanced faculty commitment to collective action as a preferable means to ensure that their interests were addressed, as opposed to reliance solely on the good faith of administrators, who are subject to pressures that may be at odds with faculty concerns.<sup>241</sup>

Collective action based on principled positions can reinforce the values of academic freedom and faculty self-governance originally expressed in the AAUP 1915 Declaration of Principles.<sup>242</sup> The level of activity and participation will

<sup>234</sup> This description of the York University strike is based on the account and analysis in Linda Briskin & Janice Newson, *Making Equity a Priority: Anatomy of the York University Strike of 1997*, 25 FEMINIST STUD. 105, 106 (1999).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 107.

<sup>238</sup> Graduate students and nontenure-track academics did build alliances:

In addition to YUFA women, women members of the Canadian Union of Public Employees (CUPE) Local 3903—representing academics who contracted to teach on a course-by course basis and graduate students who conduct tutorials—actively supported the strike at risk to their own economic interests, as did a handful of impressive women student leaders.

*Id.* at 107.

<sup>239</sup> Briskin & Newson, *supra* note 234, at 109.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 107.

<sup>242</sup> *1915 Declaration of Principles*, *supra* note 24, at 157-76.

depend upon the issues and the degree of organization. Faculty participation in collective action may range across a broad spectrum – from voting in faculty senates, to signing petitions, to making speeches, to participating in strikes – but regardless of level of activity, the collective action holds the potential for promoting democratic values and opposing university corporatization. A cohesive faculty identity based on democratic principles will also create the potential for faculty alliances with graduate students and nontenure-track faculty in their increased efforts for equity through unionization.<sup>243</sup>

Recent events on university campuses following the September 11, 2001 attacks on the World Trade Center and the Pentagon are important reminders of the vulnerability of academic freedom in times of national tension. In multiple instances nationwide, faculty raising critiques of United States foreign policy and multinational corporate power have met with censorship in the form of university officials' public statements of criticism or threats of discipline.<sup>244</sup> Faculty rights to engage in such public expression flow from the broadly defined right to academic freedom as envisioned in the AAUP's 1915 Declaration<sup>245</sup> and 1940 Statement of Principles:<sup>246</sup> a right that encompasses the freedom of expression in teaching, research, and intramural and extramural speech on issues within and apart from a faculty member's academic discipline. The universities' embrace of corporate funds and corporate institutional models creates real obstacles to guarding this broad scope of academic freedom from pressures to restrict academic freedom to cover only faculty members' specific academic expertise in teaching and research. A collective faculty identity that is inextricably tied to values of a broad right of academic freedom will be essential to defending faculty rights to public expression.

<sup>243</sup> See *supra* text accompanying notes 111-114. On February 27, 2002, the NLRB issued a complaint alleging that NYU violated the NLRA by denying tenure to Professor Joel Westheimer in retaliation for his testimony in an NLRB proceeding in support of the NYU graduate student unionization efforts. The decision to deny tenure to Westheimer was met with widespread protest by the AAUP, the NYU graduate student union, and university professors across the country. *Labor Board Trial To Resolve NYU Tenure Turmoil*, WASH. SQUARE NEWS VIA U-WIRE, Feb. 28, 2002. The complaint was settled May 2002, with NYU's agreement to retract its denial of tenure and pay \$15,000 in backpay. Westheimer, who agreed to withdraw his tenure application retroactively, has moved to a position at the University of Ottawa. *NYU Settles Complaint by Professor Denied Tenure After Supporting Union*, DAILY LAB. REP., May 13, 2002, at A1.

<sup>244</sup> See, e.g., Anemona Hartcollis, *CUNY Chief Repudiates Forum Remarks*, N.Y. TIMES, Oct. 4, 2001, at D3; Sharon Jayson, *Faculty Group Stirs Debate of UT Free Speech Policy, Some Say President's Response to Professor's Article Was at Odds with University Philosophy*, AUSTIN AM. STATESMAN, Oct. 16, 2001, at B1; Danielle Szulczewski, *Profs Nationwide Challenge Speech Restraints After Attacks*, DAILY CARDINAL VIA U-WIRE, Oct. 12, 2001; Editorial, *Freedom of Speech Under Attack at UCLA Library*, DAILY BRUIN VIA U-WIRE, Oct. 5, 2001.

<sup>245</sup> 1915 Declaration of Principles, *supra* note 24, at 157-76.

<sup>246</sup> 1940 Statement of Principles, *supra* note 57, at 33-39.

## V. CONCLUSION

Corporatization of the university threatens the continued existence of democratic values at the heart of teaching and research in higher education, including the public interest mission of education and values of academic freedom. As the AAUP 1915 Declaration<sup>247</sup> and 1940 Statement of Principles<sup>248</sup> demonstrate, these values have been central to defining the institutional identity of the university and the individual and collective identities of faculty. The public mission of the university and academic freedom are essential to maintaining the legitimacy of the university as an independent institution committed to teaching, learning, and research free from the coercive influences of outside donors. Maintaining this institutional identity depends on a continued faculty identity as autonomous teachers, researchers, and participants in faculty governance.

Though the influence of corporate donors on university agendas has always been a dilemma, the recent ascendancy of the private market monopoly on economic models has expanded the influence of corporations on higher education to a broader scope. With increased privatization and corporatization shifting the values of the university, the identity of the institution is altered as well, internalizing corporate business values of profit maximization and managerial control. This new corporate university identity brings with it values and practices that place pressures on traditional individual and collective faculty identities. In service to private corporate interests, education and academic freedom will be only of instrumental value rather than goals in themselves. As an instrumental value, academic freedom can be manipulated and modified to support policies such as weakening the tenure system, hiring more adjunct faculty, commercializing the research funded by corporations, and making corporate investors inside partners in delivering education for profit.

These new policies favoring contingent employment and depending on private investment carry with them values inimical to principles of academic freedom. Academic freedom is essential to faculty identity, including the right to teach, research, and speak independently from the views of the administration, trustees, government, and private donors. Job security, through the tenure system, has been a key element in ensuring individual faculty rights of academic freedom by removing coercive power of such authority figures. Collective rights of academic freedom, through faculty self-governance in peer-review and through representative bodies such as faculty senates and unions, are also essential to faculty identity as fully participating members of the university community. The shift of university policy to increase the vulnerability of faculty through contingent employment, dependence on corporate research funding, spin-off for-profit corporations, and "partnerships" with corporate investors brings authoritarian private sector employment values into the university's relationship with its faculty. Traditional "at will" employment in the private sector provides

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<sup>247</sup> 1915 Declaration of Principles, *supra* note 24, at 157-76.

<sup>248</sup> 1940 Statement of Principles, *supra* note 57, at 33-39.

employers with enormous power to control employees' speech and activities at work and to arbitrarily hire and fire employees. The growth in contingent faculty employment, the attacks on tenure, the dependence on private corporate funding, and the adoption of a private corporate model enhance university administrations' and trustees' power over increasingly vulnerable faculty. This shift in faculty power threatens to weaken individual and collective identities, which rely on internalized values of academic freedom.

Though the march of universities toward privatization and corporatization may appear to be inexorable, faculty have a powerful weapon that can be raised in opposition. The history of academic freedom in the United States has created a strong faculty identity committed to values of autonomy and integrity in teaching and research, self-governance over academic matters, and the right to dissent. By remembering these core values that continue to shape their self-image, faculty can assert their individual and collective identities to reverse practices of corporatization and start to reclaim universities in the public interest.

