

ON SHARED GOVERNANCE, MISSED OPPORTUNITIES, AND STUDENT PROTESTS*

Nancy B. Rapoport[†]

I hear the frustration and the desire for change at Oberlin contained in the document which echoes national themes and concerns about racism and justice. Oberlin College and Conservatory are deeply committed to addressing these concerns, and to ensuring an inclusive and equitable educational experience for our students.

We have already taken important steps on many fronts. But we are not where we want to be. So we must commit ourselves to deep study of how systemic barriers persist at Oberlin despite all the substantial efforts being made by our faculty, staff, students, trustees, alumni, parents, and fellow citizens of our town, and to act based on what we learn. I invite everyone to join us in this work.

Some of the challenges outlined in the document resonate with me and many members of our community, including our trustees. However, some of the solutions it proposes are deeply troubling. I will not respond directly to any document that explicitly rejects the notion of collaborative engagement. Many of its demands contravene principles of shared governance. And it contains personal attacks on a number of faculty and staff members who are dedicated and valued members of this community.

Marvin Krislov, President, Oberlin College & Conservatory¹

* © Nancy B. Rapoport 2016. All rights reserved.

[†] Special Counsel to the President of the University of Nevada, Las Vegas. When I wrote this essay, I was the Acting Executive Vice President and Provost. The views in this essay are, of course, mine and not the views of anyone else at UNLV. Special thanks go to Brian Foster, Sandie Gajkowski, Kyle Kaalberg, Carol Needham, Nettie Mann, Carl Reiber, Bryan Spangelo, Rainier Spencer, and Alfred Chueh-Chin Yen for reviewing drafts of this essay; to Mike Van Luven for his superior research skills in gathering information about shared governance at other institutions; and to my two best editors, Jeff Van Niel and Morris Rapoport.

¹ Marvin Krislov, *Response to Student Demands*, OBERLIN ONCAMPUS (Jan. 20, 2016), <https://oncampus.oberlin.edu/source/articles/2016/01/20/response-student-demands> [<https://perma.cc/998N-MWQA>]; see also Scott Jaschik, *Oberlin's President Says No*, INSIDE HIGHER ED (Jan. 21, 2016), <https://www.insidehighered.com/news/2016/01/21/ober>

INTRODUCTION

Recent student protests calling for a more diverse and inclusive environment often target university administrations with a list of demands, most of which involve hiring more women and people of color and adding more gender/race studies to the curriculum.² Although I confess to reacting poorly to “demands” of any sort—preferring, instead, “requests” or “discussions”—my biggest frustration with these student demands are that they are targeting the wrong group. Yes, an administration can create an environment that might increase the likelihood of a diverse³ and inclusive campus.⁴ But administrators don’t just hire faculty⁵ members; the faculty has a significant role in making those decisions.⁶ The faculty of a unit makes the first cut about tenure and pro-

lins-president-refuses-negotiate-student-list-demands [<https://perma.cc/X4NJ-BS5P>]. Jaschik reported:

The 14-page list of demands at Oberlin was detailed and contained many controversial items. Among other things, it demanded the immediate firing of some Oberlin employees, the immediate tenuring of some faculty members, specific curricular changes, a review and possible revision of the grading system (to be overseen by students), the creation of “safe spaces” for black students in at least three buildings on campus, the creation of a program to enroll recently released prisoners from a nearby prison as undergraduates, divestment from Israel, and a requirement that black student leaders be paid \$8.20 an hour for their organizing efforts.

The students also demanded changes at Oberlin’s noted conservatory. For instance, the list of demands said that students should not be required to take “heavily based classical courses that have minimal relevance to their jazz interests.” Stating that classical music students are not required to study jazz, the list of demands says that students of jazz “should not be forced to take courses rooted in whiteness.”

Id. Several months after issuing this statement, President Krislov announced that he would be stepping down at the end of June 2017. *See President Krislov Announces Departure Plans*, OBERLIN NEWS CTR. (Sept. 6, 2016), <http://news.oberlin.edu/articles/president-krislov-announces-departure-plans> [<https://perma.cc/TJ4T-WDTK>].

² There’s a website that compiles the various lists of demands at different universities and colleges. THE DEMANDS, <http://www.thedemands.org> [<https://perma.cc/2N8R-BYYY>] (last visited Oct. 7, 2016). Hat tip to John Valery White for cluing me in about this website. Some of the demands involve university-level decisions from the get-go (e.g., divestiture and the diversity of the university-level administration), but most demands involve curricular and hiring/promotion issues.

³ Most calls for diversity are calls for increased hiring of women, people of color, people with disabilities, and gay, lesbian, bisexual, or transgendered people, but my own list of diversity concerns also includes diversity of experience and diversity of viewpoints. When a moderate like me is considered to be conservative, there’s a need for political diversity as well.

⁴ For example, the administration might create specific policies that require search committees to gather the best possible pool of candidates.

⁵ At UNLV, in addition to the traditional faculty categories of tenured, tenure-track, research faculty, teaching faculty, part-time instructors, and adjuncts, we call our professional staff members “administrative faculty” members to recognize the role that they have in our students’ education.

⁶ Bounded, of course, by considerations of procedural and substantive fairness and by budgetary and university mission considerations.

motion.⁷ The faculty of a unit also makes the first cut on decisions about what departments to establish, what curricula to offer, and what educational standards to enforce.⁸ Aside from the caveats that (1) the administration has to make sure that the faculty follows appropriate procedures and (2) budgetary or mission constraints affect the options available to the faculty, virtually all of the protestors' demands are more properly addressed to faculty members (and possibly also to the university's faculty senate), not to the administrators. In short, the student protestors lack an understanding of how shared governance works.⁹ But, sometimes, so do faculty members and administrators. In an attempt to go right to the "top," the protestors forget that there are different "tops"¹⁰ for different issues.

Part of the reason that academics themselves might misunderstand how shared governance is supposed to work lies in the binary nature of most conceptions of shared governance. "The faculty" is typically comprised of tenured and tenure-track professors, but "faculty" may also include non-tenure-track teachers and researchers; "the administration" consists of the president and his or her cabinet, the deans, and the department chairs (or department heads, or directors¹¹).¹² If we were talking about a boxing match, the announcer would say, in that singsong way that boxing announcers have, "in one corner, the faculty; in the other corner, the administration." The binary model of shared governance fails to consider that many administrators come from faculty, and some still teach and do research. The binary model also fails to consider that the fulcrum is at the departmental chair level: full-time faculty members with additional administrative responsibilities. In this essay, I'll suggest a different model of shared governance, but one point will stay the same: students who want universities to change should understand how shared governance works.

⁷ See *supra* note 6. The usual process means that the unit makes a P&T recommendation, then the college, then the dean, then the university P&T committee, then the president and provost, and (finally) the decision goes to the governing board.

⁸ See *supra* note 6.

⁹ They also seem to lack an understanding that every major decision has tradeoffs. Want a new multicultural office? Then there are space and budgetary decisions that will cost someone (students?) money. Want a new major? What courses won't someone teach so that he or she can teach courses in that new major?

¹⁰ Yes, the president has the final say, so there's only one real "top." My point is that presidents don't do the first cut when hiring or promoting professors; they review the process and deal with institutional priorities, but only after the unit, college, dean, and provost consider the hiring and promotion recommendations.

¹¹ Sometimes the people who run units are called "directors" instead of "chairs" or "heads."

¹² I'm still learning the difference between a department chair and a department head. UNLV has chairs, not heads. What I've heard is that chairs have set terms, sometimes renewable, but they return to the faculty after their terms are over. Department heads seem to have longer terms, serving at the pleasure of the dean. I'm not the only one who's unclear about the difference. See *Heads or Chairs?*, FEMALESCIENCEPROFESSOR (Nov. 1, 2013, 12:03 AM), <http://science-professor.blogspot.com/2013/11/heads-or-chairs.html> [<https://perma.cc/4ZUQ-2QNM>].

I. SHARED GOVERNANCE AS AN OPERATING PRINCIPLE OF RESEARCH UNIVERSITIES¹³

Research universities, like many other complex organizations, are hierarchical, but with a twist: shared governance¹⁴ vests the faculty with significant input into the academic side of the house.¹⁵ The idea is simple: those people with the most knowledge of an area should have the most input, subject to reasonable checks and balances. Even though many university administrators are also professors,¹⁶ presidents, provosts, and deans generally lack uninterrupted blocks of time to devote to their own academic fields.¹⁷ On the other hand, presidents, provosts, and deans spend their days on issues of budget, facilities, due process, and regulations; most professors don't. The theory of shared governance begins with the concept that universities can make better decisions when people with the most knowledge in an area have a greater say in their own realms—and when they consult with others who may have different information and perspectives.

¹³ Shared governance isn't just a key component of research universities, but that's the group of higher education institutions on which I'm focusing in this essay.

¹⁴ The proper term is "shared governance," not "faculty governance." The faculty doesn't run the university. Shared governance gives the faculty significant input into decisions, but the heads that will roll when those decisions go bad aren't the professors' heads. I've made this point before:

Moreover, once professors venture beyond their legitimate areas of responsibility—beyond furthering their discipline's research, teaching their students, admitting new students, and hiring new faculty members—the real problem of shared governance is the lack of shared consequences for actions. If a faculty sets a budget and then overspends it, the faculty members don't get fired; but the administrators might. If a faculty allocates portions of a building to particular activities and the allocation doesn't "work" for all of the department's constituencies, the faculty doesn't get called on the carpet; the department chair or dean does. If a faculty votes to cut the size of the entering class or eliminate a program beloved by the alumni, the faculty suffers no consequences (at least not directly), but the department chair or dean certainly does.

Nancy B. Rapoport, *Academic Freedom and Academic Responsibility*, 13 GREEN BAG 189, 200 (2010) (footnotes omitted) (reviewing MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* (2009)).

¹⁵ Shared governance involves *only* the academic side of the house. As Judith Areen explains:

Shared governance applies only to academic matters, moreover. As a result most colleges and universities have a dual-management structure. There is a fairly horizontal relationship among governing board, administration, and faculty when academic matters are at issue. The traditional "pyramidal hierarchy" characteristic of for-profit corporations, by contrast, applies to board oversight of administrators and staff. It also applies to oversight of faculty when nonacademic matters are at issue. A faculty member, for example, cannot invoke academic freedom as a justification for not teaching his or her classes, or for demanding better health benefits.

Judith Areen, *Governing Board Accountability: Competition, Regulation, and Accreditation*, 36 J.C. & U.L. 691, 703–04 (2010) (footnote omitted).

¹⁶ I get irritated when people forget that most university administrators are often also professors.

¹⁷ Not that professors have that many uninterrupted blocks of time, either, but they can have their holidays and summers (more) unstructured.

A. *The Basic Idea:*¹⁸ *Joint Decision-Making with Spheres of Influence*

The AAUP's (American Association of University Professors) *Statement on Government of Colleges and Universities* begins¹⁹ with the concept of joint effort:

Joint effort in an academic institution will take a variety of forms appropriate to the kinds of situations encountered. In some instances, an initial exploration or recommendation will be made by the president with consideration by the faculty at a later stage; in other instances, a first and essentially definitive recommendation will be made by the faculty, subject to the endorsement of the president and the governing board. In still others, a substantive contribution can be made when student leaders are responsibly involved in the process. Although the variety of such approaches may be wide, at least two general conclusions regarding joint effort seem clearly warranted: (1) important areas of action involve at one time or another the initiating capacity and decision-making participation of all the institutional components, and (2) differences in the weight of each voice, from one point to the next, should be determined by reference to the responsibility of each component for the particular matter at hand, as developed hereinafter.²⁰

These joint decisions include "[t]he framing and execution of long-range plans," "decisions regarding existing or prospective physical resources," "budgeting," and the choice of a new president, deans, and other chief academic officers.²¹ The *Statement* also delineates a president's responsibilities²² as well as what areas fall within the faculty's purview (curriculum, research, faculty status and salary increases, input into the selection of a department head or

¹⁸ For a wonderful discussion of shared governance, see Areen, *supra* note 15, at 698–704.

¹⁹ After a preface, of course. *Statement on Government of Colleges and Universities*, AM. ASS'N UNIV. PROFESSORS, <http://www.aaup.org/report/statement-government-colleges-and-universities> [https://perma.cc/78W3-JJ2A] (last visited Oct. 7, 2016).

²⁰ *Id.*

²¹ *Id.* Typically, the faculty doesn't have a vote on choosing presidents, deans, and CAOs, but the faculty provides input to the hiring committees.

²² The *Statement* specifies the role of the president:

It is the duty of the president to see to it that the standards and procedures in operational use within the college or university conform to the policy established by the governing board and to the standards of sound academic practice. It is also incumbent on the president to ensure that faculty views, including dissenting views, are presented to the board in those areas and on those issues where responsibilities are shared. Similarly, the faculty should be informed of the views of the board and the administration on like issues.

The president is largely responsible for the maintenance of existing institutional resources and the creation of new resources; has ultimate managerial responsibility for a large area of non-academic activities; is responsible for public understanding; and by the nature of the office is the chief person who speaks for the institution. In these and other areas the president's work is to plan, to organize, to direct, and to represent. The presidential function should receive the general support of board and faculty.

Id.

chair, and admissions).²³ The joint nature of the decision-making process means that:

Agencies for faculty participation in the government of the college or university should be established at each level where faculty responsibility is present. An agency should exist for the presentation of the views of the whole faculty. The structure and procedures for faculty participation should be designed, approved, and established by joint action of the components of the institution. Faculty representatives should be selected by the faculty according to procedures determined by the faculty.²⁴

Shared governance places specific areas—admissions, curriculum, faculty status—primarily within the faculty’s purview precisely because the faculty is likely to have the best (most complete and most up-to-date) understanding of the body of knowledge that comprises a specific academic discipline. As the former dean of Harvard’s Faculty of Arts and Sciences Henry Rosovsky explains, “Final judgments on educational questions are best left in the hands of those with professional qualifications: academics who have experienced a lengthy period of apprenticeship and have given evidence of performing high-quality work, in teaching and research, as judged by their peers on the basis of broad evidence.”²⁵ Other areas are more properly put primarily within the administration’s purview, given its own knowledge base. Shared governance, like leadership generally, should be a relationship based on knowledge and mutual respect.²⁶ That joint decision-making, represented in a Venn diagram, would look like this:

²³ Specifically, the *Statement* provides: “The faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process.” *Id.* The *Statement* suggests great deference to the faculty in this regard, but also recognizes that, sometimes, presidents have to shake things up: “The president must at times, with or without support, infuse new life into a department; relatedly, the president may at times be required, working within the concept of tenure, to solve problems of obsolescence.” *Id.* Moreover, the *Statement* recognizes some of the constraints inherent in the administration’s responsibilities: “Budgets, personnel limitations, the time element, and the policies of other groups, bodies, and agencies having jurisdiction over the institution may set limits to realization of faculty advice.” *Id.*

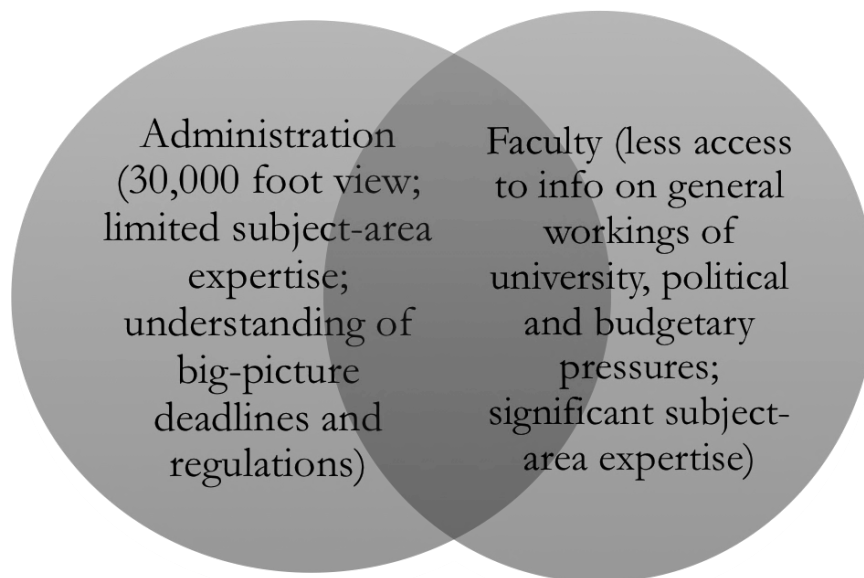
²⁴ *Id.* (footnote omitted).

²⁵ HENRY ROSOVSKY, *THE UNIVERSITY: AN OWNER’S MANUAL* 270 (1990); *cf. id.* at 266 (“Some areas of governance and policy are properly deemed beyond faculty jurisdiction, usually for reasons of lack of specialized competence or conflict of interest.”).

²⁶ Larry Catá Backer has described shared governance as a relationship among the faculty, the administration, the board of trustees/regents, the state, and students:

I have begun to understand this more formally as a set of tensions inherent in the position of a university faculty senate within a governance structure that places it between the *hierarchical structures* of university administration, the *political structures* of state and federal governments, the *fiduciary structures* of the Board of Trustees, and contests among them all, the *academic structures* of knowledge production and sharing from which administrators, politicians, regulators, board members and consumers (employers and alumni) derive benefits and from which the profitability of the enterprise is (un)conventionally but increasingly measured.

FIGURE 1



[REST OF PAGE INTENTIONALLY LEFT BLANK]

Larry Catá Backer, *Between Faculty, Administration, Board, State, and Students: On the Relevance of a Faculty Senate in the Modern U.S. University* 5 (Feb. 10, 2013) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2032779 [<https://perma.cc/Z2QL-LPJG>]. I have to confess, though, to a visceral reaction to those parts of his speech that seemed, to me, to be deeply skeptical of an administration's motives and behavior. He speaks of administrative bullies and he gives a nod to faculty bullies. *Id.* at 17–18. But I was left with the impression that there are more of the former than of the latter. My own take is that bullying is equally distributed across groups.

Here's another way to think about the different realms of expertise:²⁷

TABLE 1

Administrators	Professors
More likely to understand the [university]'s multiple short- and long-term needs.	More likely to understand the needs of individual faculty members.
More likely to have data about the university's . . . budget and about the university's short-term and long-term plans.	More likely to have information about various individuals' behavior over time, and in a variety of situations (e.g., who takes committee work seriously, who can be trusted to work independently).
More likely to have information about how various sub-units interact (e.g., the needs of various departments within a [college], the budgetary limitations of each).	For professors who have been at the institution for a while, more likely to have information about why certain proposals haven't worked well in the past and about how best to move a proposal forward (how best to respect the community's process of decision-making).
More information about the regulations and costs associated with various proposals.	More information about what would make their jobs easier (but less information, probably, about the costs associated with improving the conditions).
More likely to have short deadlines for making decisions.	More likely to have some uninterrupted time to think about an issue from a variety of perspectives.
More likely to have information from alumni and other members of the . . . community, due to regular interaction with those communities.	More likely to know how the institution has changed internally over time.

Each group brings something important to the table, and the fact that each group has different expertise increases the odds that important decisions will factor in most, if not all,²⁸ necessary considerations. Complementary knowledge is a good thing, generally speaking, though it's only effective if knowledge is shared in a timely and forthright manner.

A particular institution's shared governance can be healthy or unhealthy, depending on both the structure of the governance model and the personalities and skills of those involved. Neil Hamilton has provided this test for healthy shared governance:

²⁷ Nancy B. Rapoport, *Not Quite "Them," Not Quite "Us": Why It's Difficult for Former Deans to Go Home Again*, 38 U. TOL. L. REV. 581, 584 (2007).

²⁸ Shared governance, unfortunately, almost always ignores the group of people who have immediate responsibility for getting certain very important things done on time: the administrative assistants, the building maintenance workers, the groundskeepers—in essence, the people who keep the university running at the most fundamental of levels.

Healthy shared governance is a structure, a process, and most importantly a culture of trust in decision making that fundamentally depends on the reflective engagement of each member of the major stakeholder groups at a university—the board, the administration, and the faculty—with the mission and the tradition of the university and the academic profession in the context of the present challenges and opportunities of their institution.²⁹

Let's talk about structure first. Dean Rosovsky, in his marvelous book, *The University: "An Owner's Manual"*, sets out seven principles of shared governance:

- “Not everything is improved by making it more democratic.”³⁰
- “There are basic differences between the rights of citizenship in a nation and the rights that are attained by joining a voluntary organization.”³¹
- “Rights and responsibilities in universities should reflect the length of commitment to the institution.”³²
- “In a university, those with knowledge are entitled to a greater say.”³³
- “In universities, the quality of decisions is improved by consciously preventing conflicts of interest.”³⁴
- “University governance should improve the capacity for teaching and research.”³⁵
- “To function well, a hierarchical system of governance requires [an] explicit mechanism of consultation and accountability.”³⁶

I'll just say that Dean Rosovsky is a very wise person. These principles capture the philosophy of shared governance perfectly. Were a university to abide by these principles, the shared governance of that university would get a head start on being healthy. But structure alone is not enough. The people who are part of shared governance have to be able to trust each other. They need to be able to talk freely (and sometimes confidentially) and to know that what they say will not be distorted or used against them later. They also need to know that the other person's word, once given, is reliable.

That culture of trust, though, is a tricky thing. Trust comes not just from which person is in which role at an institution at a given time, but also how pri-

²⁹ Neil W. Hamilton, *The Future of Shared Governance*, 2 (Univ. of St. Thomas Sch. of Law Legal Studies Research Paper Series, Research Paper No. 06-03, 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=875473 [<https://perma.cc/T5NY-3PBN>].

³⁰ ROSOVSKY, *supra* note 25, at 262.

³¹ *Id.* at 265.

³² *Id.* at 267.

³³ *Id.* at 269.

³⁴ *Id.* at 273.

³⁵ *Id.* at 276.

³⁶ *Id.* at 277.

or people in that role have behaved and how those now filling those roles speak to, and refer to, each other.³⁷ The best president and provost in the world, and the best faculty senate chair, will still wear the mantle of their predecessors on their shoulders, at least until they have established their own credibility and trustworthiness.³⁸ Increase trust, and the likelihood of a healthy model of shared governance increases. Decrease trust, and shared governance will decay.

B. When Shared Governance Goes Awry

Let's start with an example from the University of Missouri ("Mizzou"). It's possible that the recent student protest caused the resignation of Mizzou's president and chancellor,³⁹ but it's also possible that the protest—or the protest *alone*—didn't trigger those resignations. According to one source,⁴⁰ Professor Arthur Jago, three separate failures of shared governance contributed to the resignations.⁴¹ Maybe so; maybe not. But Professor Jago's essay makes an important point, no matter what triggered the resignations: "When a leader assumes that certain people will be difficult, but fails to test that assumption and pushes forward autocratically, that leader creates people who are difficult. The prophesy is self-fulfilling."⁴² That point is true whether we're talking about administrators or faculty members: assuming that the other side is going to be intransigent will create (or perpetuate) intransigency.⁴³

³⁷ In terms of how referring to a group matters in terms of trustworthiness, see *supra* notes 29–36 and accompanying text. See also *infra* note 38 and accompanying text.

³⁸ In my role as Acting Executive Vice President and Provost, I have had the opportunity to work with two chairs of the faculty senate. The first one quit shortly after I began my term. The second one has been a wonderful colleague and confidante, and he began his term by reaching out to me with the concept of "no daylight and no surprises." We each pledged that we would share information and upcoming decisions and that we would be direct and honest with each other. We've had frank conversations, and we've sometimes disagreed with each other, but his leadership in extending me that olive branch has taken our shared governance from one that was not so healthy to one that is among the best I've seen anywhere. In other words, I owe Bryan Spangelo a great deal.

³⁹ For a timeline of the student protests at Mizzou, see, for example, Michael Pearson, *A Timeline of the University of Missouri Protests*, CNN, (Nov. 10, 2015, 8:21 AM), <http://www.cnn.com/2015/11/09/us/missouri-protest-timeline> [<https://perma.cc/6EN9-6BVM>].

⁴⁰ That source, though, appears to be heavily involved in Mizzou's own shared governance structure, so his take on the causes of the resignations could be shaped by his own governance perspective.

⁴¹ Arthur G. Jago, *How Three Bad Decisions Signaled Doom at Mizzou*, CHRON. HIGHER EDUC. (Nov. 19, 2015), <http://www.chronicle.com/article/How-Three-Bad-Decisions/234278> [<https://perma.cc/TV4X-ZMVL>] ("With the advantage of perfect hindsight, three autocratic decisions foreshadowed the more serious disruptions that led to the unprecedented resignations of the institution's top two administrators . . . [closing the University of Missouri Press; eliminating certain graduate student tuition waivers; and eliminating a graduate student health insurance subsidy].").

⁴² *Id.*

⁴³ Of course, the same can be said of Congress these days.

So why might one side assume intransigency? It's possible that the assumption comes from specific experiences in dealing with particular people. But it's also possible that "them-ification"⁴⁴ is at fault. I've written about the "us" vs. "them" distinction in shared governance before,⁴⁵ and this paragraph best sums up my frustration when professors forget that most administrators actually come from (and still are members of) the professoriate:

For all of the language that universities use about shared governance, though, I've seen dramatic examples of a fundamental lack of respect on both groups' parts: a cynicism about faculty members and about administrators. Even before I became one of "them," I didn't understand the deep-seated distrust of administrators that some faculty members displayed, although I've seen this behavior at several law schools. For some professors, administrators are venal, craven creatures who run academic units solely to gratify their own egos. These professors don't see administrators simply as having a different perspective, with access to different information.⁴⁶

That name-calling is far from one-sided, unfortunately. Administrators can "them-ify" faculty members just as easily as faculty members can "them-ify" administrators.⁴⁷ My point is that shared governance is not achievable as long as there is pervasive "them-ification." Name-calling and objectification will undercut the necessary ability to hear each other's point of view.

That "hearing out" is crucial. Decisions made in a vacuum—especially decisions made in haste, in reaction to real or perceived bad behavior—can end up creating more problems than they solve. Sometimes, though, people confuse not getting their own way with not having been heard out. Let's distinguish those two concepts (not "winning" and not having been "heard"): good decisions come from good information,⁴⁸ and input from affected constituencies can

⁴⁴ Carol Needham gets a special shout-out for coining this term, but Alfred Yen should get a hat-tip as well. See Nancy B. Rapoport, *Going from "Us" to "Them" in Sixty Seconds*, 31 U. TOL. L. REV. 703 (2000); see also William G. Bowen & Eugene M. Tobin, *Toward a Shared Vision of Shared Governance*, CHRON. HIGHER EDUC. (Jan. 5, 2015), <http://chronicle.com/article/Toward-a-Shared-Vision-of/151041> [<https://perma.cc/8XFR-D4ER>] ("What is most needed on the part of all parties, including both faculty members and administrators, is not just a willingness to reject 'we' versus 'they' thinking, but an eagerness to embrace good ideas generated by others."). I've experienced some "them-ifying" myself.

⁴⁵ See, e.g., Rapoport, *supra* note 14; Nancy B. Rapoport, *Decanal Haiku*, 37 U. TOL. L. REV. 131 (2005); Nancy B. Rapoport, *Eating Our Cake and Having It, Too: Why Real Change Is So Difficult in Law Schools*, 81 IND. L.J. 359 (2006); Rapoport, *supra* note 44; Rapoport, *supra* note 27; Nancy B. Rapoport, *Of Cat-Herders, Conductors, Tour Guides, and Fearless Leaders*, 33 U. TOL. L. REV. 161 (2001); Nancy B. Rapoport, "Venn" and the Art of Shared Governance, 35 U. TOL. L. REV. 169 (2003).

⁴⁶ See Rapoport, *supra* note 27, at 584 (footnotes omitted).

⁴⁷ See Jago, *supra* note 41.

⁴⁸ E.g., *Miscellaneous*, THE OFFICIAL WEBSITE OF WILL ROGERS, <http://www.cmgww.com/historic/rogers/about/miscellaneous.html> [<https://perma.cc/CR3Y-LAQB>] (last visited Oct. 7, 2016) ("Good judgment comes from experience, and a lot of that comes from bad judgment.").

provide useful information that, in turn, can lead to better decisions. But a president can listen to input and still disagree with it.⁴⁹ So can a faculty senate chair. The point is to listen and to be open to persuasive arguments.

II. THE MISSING ELEMENTS IN MOST SHARED GOVERNANCE MODELS

A significant problem with the binary model of shared governance is that other voices, with persuasive arguments and important experience to offer, aren't present. At the risk of being thought sacrilegious, I'll say that binary-shared governance excludes an important group: representatives from the ranks of department chairs (or department heads) and directors.

A. *Why Chairs⁵⁰ Should Be Part of University Shared Governance*

When I was an associate dean at The⁵¹ Ohio State University, I sometimes subbed in for the dean at University Senate meetings. The Ohio State University Senate combines faculty, administrators, and students,⁵² and so I just assumed that other universities' governance structures were the same. They're not. But the beauty of Ohio State's University Senate was that different groups came together to discuss policies, bylaws, and changes to academic units or academic programs. The people who wanted a change were there to discuss why they wanted the change; the people who would be most affected by the proposed change were there to discuss the change's implications; and the people charged with administering the change were there to talk about potential pitfalls and possible amendments. In a faculty senate—as opposed to a university senate—people who might want a change are there, and people who may be affected by a change are there, but the people responsible for administering the change are, at best, in the audience. They're not part of the deliberative body itself. Their absence from deliberations creates a risk that a proposed change will be difficult to implement or that it will create unintended consequences. If the point of shared governance is to make better decisions and to give people with the most knowledge the biggest “say,” then we miss out by omitting the department chairs, who are at the front line of most departmental issues.

B. *What About Some of the People in Support Roles?*

Support personnel are called different things at different universities. At UNLV, our administrative faculty members are the equivalent of professional

⁴⁹ Remember my point about whose head rolls when things go wrong? See Rapoport, *supra* note 14. That's why the ultimate responsibility for major decisions is vested in the president.

⁵⁰ Or department heads, or directors, as the case may be.

⁵¹ Yes, the “The” is capitalized. Cf. *Aside, The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474, 1474 nn. 1 & 4 (1975).

⁵² See OHIO ST. U. SENATE, <http://senate.osu.edu> [<https://perma.cc/T2TF-FNMU>] (last visited Oct. 7, 2016).

staff elsewhere: the assistant deans, business managers, advisors, career development officers, heads of non-academic divisions like mail and parking, the professional staff,⁵³ and myriad other people who are not professors but who can make sure that a university runs like clockwork. Our classified⁵⁴ staff members (non-exempt employees), who are State of Nevada employees and are governed by State of Nevada rules, range from administrative assistants to the people who make sure that our grounds are well-kept and that everything is in working order. Many faculty members think of a university as having three basic castes:⁵⁵ administrators, full-time faculty members, and support personnel. Each of these three groups is vital to a university's well-being, though most people would notice the absence of support personnel first.⁵⁶

For most matters⁵⁷ that are within a faculty's purview (admissions, curriculum, and faculty hiring and promotion), the professional staff and administrative assistants will likely know more about timelines and the mechanics of a policy than will tenured or tenure-track professors; hence, finding a way of getting their input as drafts of policies or bylaws are developed will likely make those drafts better.⁵⁸ Many faculty senates already have provisions that permit professional staff members to serve, and I applaud those senates that do.⁵⁹ But even without including that cohort in a senate, some regular mechanism for input and feedback would help in the decision-making process.

C. *New Blood vs. Knowledge Base*

If I had to name the single most overused⁶⁰ statement in a university, that statement would be "we've always done it this way."⁶¹ (That statement out-

⁵³ Called "administrative faculty" at UNLV. See UNLV FACULTY SENATE, COMMITTEE HANDBOOK: ADMINISTRATIVE FACULTY COMMITTEE 1, 4 (2016), http://www.unlv.edu/sites/default/files/page_files/27/AFC-Handbook-May2016.pdf [<https://perma.cc/959P-7LYL>].

⁵⁴ Some institutions refer to this group as civil service workers.

⁵⁵ Though the rank ordering of the caste can depend on whether the person doing the ranking is a full-time professor or not.

⁵⁶ With the right support personnel in place, a university could probably run just fine without most other administrators, and universities function during winter and summer breaks without the full complement of full-time professors. Universities would grind to a halt, though, without hard-working, intelligent, creative, and emotionally aware support personnel.

⁵⁷ For some matters, such as the academic calendar, everyone on campus is affected. Consider the timing of spring break: everyone will have an opinion about the optimal time, from the president to the people doing deferred maintenance on buildings. How difficult would it be for a faculty senate to get input from the non-exempt staff side of the house? Well, OK: it's actually not that easy, given how many people serve in non-exempt roles throughout campus, but a non-exempt staff member who serves in the senate could still find ways to canvass his constituency to vet some of the policies under consideration.

⁵⁸ Department chairs, of course, will also know a great deal about timelines and mechanics.

⁵⁹ Including UNLV's own Faculty Senate.

⁶⁰ And unhelpful.

ranks only one other, in my opinion: the tried-and-true rejoinder to innovations that says, “we tried it that way once, and it didn’t work.”) Resistance to changes in shared governance models will probably use one or the other of these two statements. Adding categories of personnel, and especially changing a faculty senate to a university senate, will, at the very least, make faculty senators fearful about their ability to maintain control over academic matters that are within their purview.

There are some options for reducing that fear. One possibility is to start by creating *ex officio* members of a faculty senate. A faculty-only senate could experiment⁶² with adding department chairs and representatives from the professional staff (if the professional staff is not already considered part of the faculty writ large).⁶³ My scientist friends will tell me that this experiment lacks a control group (a “control senate”), and so the experiment idea isn’t perfect. But here’s a test to see if adding *ex officio* members to a faculty-only senate, and to its committees,⁶⁴ is better for a university than is excluding them: are the policies and bylaws enacted more closely followed than policies and bylaws enacted without *ex officio* members? In other words, if we have the right policies and bylaws, it should be easier for people to follow them, without the need for numerous work-arounds or flat-out violations.

In my recent experience, I’ve concluded that faculty senates add or amend bylaws in response to frustrations with a failure to follow prior bylaws or a broader failure to follow the principles of shared governance. In essence, the amended bylaws are a faculty senate’s version of “hey, we really mean it this time—do it our way.” Instead of facing the issue of an intransigent chair or dean head on,⁶⁵ ever-stronger bylaws become the faculty’s work-around. But

⁶¹ UNLV was founded in the 1950s. See *Celebrating 50 Years, Timeline*, UNIV. NEV. LAS VEGAS, <http://celebrating50.unlv.edu/timeline.html> [https://perma.cc/CLX5-MPDB] (last visited Oct. 7, 2016). Depending on how one counts its founding, it began either in 1951, as an extension program, 1954 as the “Southern Regional Division of University of Nevada,” or 1957 as a separate college of the University of Nevada. *Id.* (There are other potential starting dates that one could use.) Most people choose 1957 as the founding year. Why does that date matter? Because any university that is only three years older than I am has no right to respond to questions by saying, “we’ve always done it this way.” The Ohio State University, founded in 1870, is barely old enough to say that; Oxbridge, however, can use that phrase with impunity. *Oxbridge*, FREE DICTIONARY, <http://www.thefreedictionary.com/Oxbridge> [https://perma.cc/Q57A-BMYQ] (last visited Oct. 7, 2016).

⁶² For a good discussion of the value of testing assumptions in an organization, see Robert Kegan & Lisa Laskow Lahey, *IMMUNITY TO CHANGE: HOW TO OVERCOME IT AND UNLOCK THE POTENTIAL IN YOURSELF AND YOUR ORGANIZATION* (2009).

⁶³ If the faculty senate were feeling particularly optimistic, it might consider some *ex officio* deans as well.

⁶⁴ UNLV’s Faculty Senate has *ex officio* members on committees but not (yet) on Senate itself.

⁶⁵ Part of not facing intransigent administrators head on might be due to unclear or nonexistent policies that can deal with administrative overreaching. Another part is that administrators report to other administrators, not to the faculty or staff, so the options for feedback

perhaps some of the failure to follow bylaws could be due to the way that a particular bylaw is drafted. If a bylaw doesn't fit the practice of a unit, that bylaw will be overlooked and ultimately forgotten. Better-drafted bylaws, with significant input from chairs and others who are charged with implementing those bylaws, are likely to result in more consistent compliance.

Other problems with compliance may involve the sticky issue of how long an incumbent senator has served. Senate work is complex, and senators spend a lot of time working on the shared governance of a university. Having a knowledge base of several years' worth of experience can save time as new issues develop. But if there is little new blood in the senate, then there is less opportunity to consider new approaches to old issues, let alone emerging issues. As faculty senates consider succession planning, they, like other organizations, should consider mechanisms to bring new players into the fold, as well as mechanisms to mentor those new players into leadership roles within the senate.

D. Checks on Bullying Behavior

Part of the reason, I think, that department chairs aren't traditionally part of shared governance has to do with fear of retaliation. (I'm excluding the "them-ification" of chairs for the moment.) Stories abound about abusive chairs and, for that matter, abusive deans, provosts, and presidents. I'm positive that there *are* abusive administrators, though I doubt that most administrators are abusive.⁶⁶ But the remedy for abusiveness isn't exclusion from participation in shared governance. The remedy is to remove abusive administrators. If deans aren't removing bad chairs, then the deans need to suffer repercussions. If the provost doesn't remove abusive deans, then the provost needs to suffer repercussions. If a president's annual evaluation process includes the ability of a cabinet-level administrator to fix problems within his or her unit, then cabinet-level administrators will get the hint pretty quickly: fix problems or leave.

about behavior are limited to mechanisms such as 360-degree reviews, votes of no confidence, or grievances. It would be nice if there were less formal ways to resolve problems—at least the less serious ones.

⁶⁶ My working thesis is that abusive behavior is normally distributed in all university groups: faculty, staff, administration, and even students.

E. Putting It Together:⁶⁷ The Need for More Voices in the Room

Let's go back to that chart I referenced earlier in this essay.⁶⁸ When we add in the other set of voices,⁶⁹ we get a much more balanced, and informative, conversation that should help us make better decisions:

TABLE 2

Central Administration and Deans	Chairs/Directors	Professors
More likely to understand the [university]'s multiple short- and long-term needs.	More likely to understand the strengths and needs of the collective group of people in the chair's/director's unit.	More likely to understand the needs of individual faculty members.
More likely to have data about the university's . . . budget and about the university's short-term and long-term plans.	Also likely to know about individual's behavior and how that behavior factors into the goals and needs of the unit.	More likely to have information about various individuals' behavior over time, and in a variety of situations (e.g., who takes committee work seriously, who can be trusted to work independently).
More likely to have information about how various sub-units interact (e.g., the needs of various departments within a [college], the budgetary limitations of each).	Likely to know what's working and not working in terms of bylaws and policies.	For professors who have been at the institution for a while, more likely to have information about why certain proposals haven't worked well in the past and about how best to move a proposal forward (how best to respect the community's process of decision-making).
More information about the regulations and costs associated with various pro-	Good information about the unit-level tradeoffs in terms of budget and personnel allo-	More information about what would make their jobs easier (but less infor-

⁶⁷ Cf. STEPHEN SONDHEIM, *PUTTING IT TOGETHER* (RCA 1992). I know, that's an inside joke, but this Sondheim reference reminds me of a line that applies equally to artists and other creative types (including—yes—administrators): "Look, I made a hat / Where there never was a hat." STEPHEN SONDHEIM, *SUNDAY IN THE PARK WITH GEORGE* (1984). We create (or invent, or build, or work in administration) in order to help bring something to life that owes its existence, at least partially, to our efforts. I tell people all the time that the only reason to be an administrator is to fulfill that part of yourself that likes helping others achieve something important to them. If you don't like helping people in invisible ways, don't be an administrator.

⁶⁸ See *supra* note 27 and accompanying text.

⁶⁹ The "Central Administration and Deans" column and the "Professors" column are still taken verbatim from my earlier chart. Rapoport, *supra* note 27, at 584.

posals.	cation; possibly also good information about the college/school-level budget and personnel needs and demands.	mation, probably, about the costs associated with improving the conditions).
More likely to have short deadlines for making decisions.	The worst of all worlds: pressing deadlines and only a few levers to encourage timely and responsive behavior.	More likely to have some uninterrupted time to think about an issue from a variety of perspectives.
More likely to have information from alumni and other members of the . . . community, due to regular interaction with those communities.	Also likely to understand long-term internal changes in an institution.	More likely to know how the institution has changed internally over time.
Thanks to more frequent exposure to different groups on a regular basis, more likely to spot trends in higher education, the political realm, and, perhaps, in the workforce. ⁷⁰	Also likely to spot trends in the evolution of their own subject area and in higher education generally.	More likely to spot trends in the evolution of their own subject area (in their own departments). ⁷¹

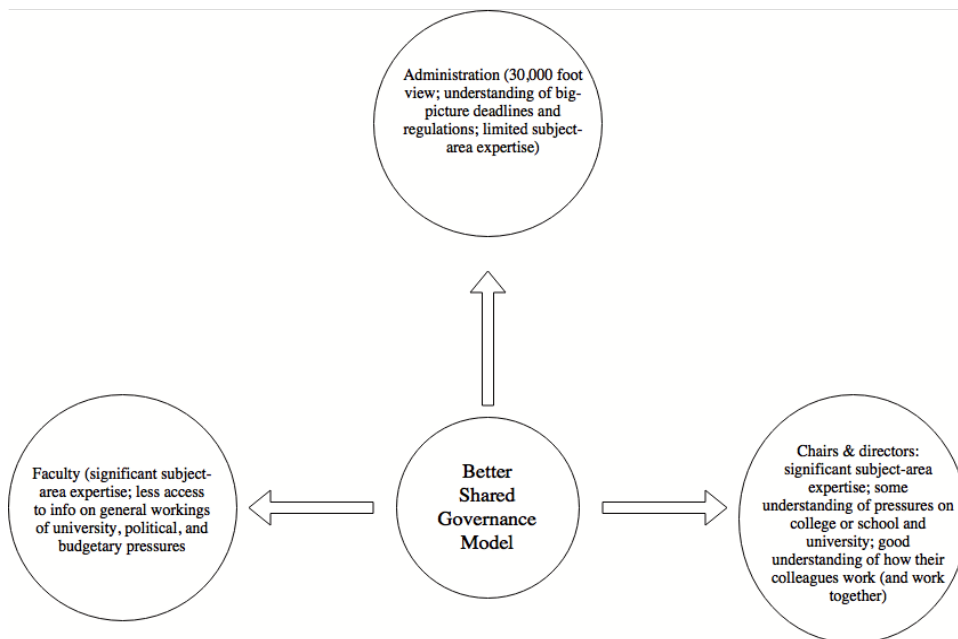
[REST OF PAGE INTENTIONALLY LEFT BLANK]

⁷⁰ Added to column—not from the prior chart referenced in n.27.

⁷¹ Added to column—not from the prior chart referenced in n.27.

Represented in a diagram (with apologies to the law review editors who have to figure out how to make this diagram look good in print), the better version of shared governance would look more like this:

FIGURE 2



Notice whose voices I didn't add: regents/trustees, alumni, and students. Regents and trustees already have a seat at the governance table: decisions flow up from the president to them. Their voices will automatically be heard later in the process. Moreover, in my experience, regents and trustees are active fiduciaries all year long, not just when it's time to make key decisions. They ask us questions about how specific areas work (or are working), they call problems to our attention, and they provide feedback from their conversations inside and outside the university. Alumni can also provide good input, but having them participate directly in shared governance doesn't make sense. They're neither charged with the academic responsibilities that the faculty has nor are they charged with the non-academic responsibilities that the administration has, such as budget, compliance, or facilities. An active alumni organization and other ways of getting alumni input will help the key governance players with their decision-making, but alumni input, not alumni participation in shared governance, is all that's needed.⁷²

⁷² I've had the privilege of serving on the board of the Association of Rice Alumni, and its mission reflects exactly what I think alumni should be doing:

What of student participation in shared governance? Some boards of regents include student members, and university senates like Ohio State's also include students. I agree wholeheartedly that the governance of universities should consider student needs in decision-making, and including students as non-voting⁷³ members at the board level or the senate level is one way to get that input. But input is different from governance, and—as with my point about alumni and shared governance—students (by definition) don't have the scholarly perspective of faculty members, nor do they have the 30,000-foot perspective on all of a university's moving parts that administrators have. We need to hear their points of view, and we need to take those points of view into account in our own decision-making, but a student-run university is not consistent with shared governance principles.

III. STUDENT PROTESTS AND SHARED GOVERNANCE

Let's return to the issue of with whom student protesters should be discussing their concerns. Before drafting this section of my essay, I attempted to categorize the more than seventy different lists of demands described in the demands.org.⁷⁴ After reading the first six lists of demands, I had to stop. Too many of these demands involved things that neither a faculty nor an administration could affect, and others were too diffusely described to fit into clear categories. It's fair to say, though, that many of the demands involved changes in hiring and evaluation practices, changes in curriculum, more mental health support, and more diversity training.⁷⁵ With these very broad categories in mind, the student protestors were aiming at the wrong group of people.

[REST OF PAGE INTENTIONALLY LEFT BLANK]

The association strives to stimulate intellectual and social participation of all members of the ARA and to enable them to contribute to and share in the enhancement of the university. In addition, the association endeavors to foster deeper concern among its members for the welfare of the university, to strengthen the bond of understanding between the university and the community, to encourage gifts, to attract outstanding students and faculty, and to contribute toward maintaining Rice as a university in keeping with the ideals and aims of its founder.

About the Association of Rice Alumni (ARA), RICE ALUMNI, <http://alumni.rice.edu/about> [<https://perma.cc/VPA3-A4YG>] (last visited Oct. 7, 2016).

⁷³ Even the student members of Ohio State's University Senate don't have voting rights. *See Chapter 3335-5 Faculty, Governance, and Committees*, BOARD TRUSTEES, <http://trustees.osu.edu/rules/university-rules/chapter-3335-5-faculty-governance-and-committees.html> [<https://perma.cc/UE8S-FWEP>] (last visited Oct. 7, 2016).

⁷⁴ *See* THE DEMANDS, *supra* note 2.

⁷⁵ *Id.*

TABLE 3

Type of Demand	Mostly the faculty side of shared governance or the administrative side?	Would having chairs/directors at the table help?
Faculty hiring/promotion	Faculty side	Yes; both in terms of allocating resources and in making sure that new hires are treated fairly
Staff hiring/promotion	Administrative side	Only for the hiring/promotion of staff members within that department; possibly useful in terms of hiring/promoting staff members within the college or school
Curricular changes	Faculty side	Yes; a new curriculum has to be managed by the department chair
New departments/majors	Faculty side in terms of proposing new departments/majors; administrative side in determining whether those departments/majors meet the university's standards and fit the university's mission (also in determining whether the university can afford those new departments/majors in terms of additional expenses)	Yes; new departments will need new chairs, and chairs will have to manage any new majors within their departmental units.
New offices to support mental health needs	Administrative side (including determining how to pay for any new offices); if the only two ways to pay for new offices are to increase tuition or to cut other offices or programs, then the faculty side should be consulted ⁷⁶	No
New offices to support diversity needs	Same as above	No
Diversity training of students in orientation	Administrative side	Only to the extent that department chairs are in-

⁷⁶ As I was reading the various demands, I was wondering how universities were expected to pay for so many new departments, offices, and personnel without drastically increasing tuition.

		volved in orientation activities
Diversity training of students in courses	Faculty side (though academic freedom figures prominently in what any faculty member is being asked to do in his or her courses); administration can encourage such training	Maybe; the chair can encourage such training but likely can't require it
Diversity training of faculty members	Collaboration between administration and faculty	Yes; department chairs can coordinate the training and verify if the faculty member has taken the training
Diversity training of staff members	Administrative side	Yes; department chairs can coordinate the training and verify if the faculty member has taken the training

The rub, of course, is that we shouldn't expect students to understand the basics (let alone the nuances) of shared governance.⁷⁷ Shared governance is the "inside baseball" of academia.⁷⁸ In a protest situation, the idea that students should start with "the following is our list of demands for the administration, and afterwards, we'll set out our list of demands for the faculty" is ludicrous. But those inside academia who are counseling students to engage in protests should understand at least the broad strokes of shared governance. Their failure to explain to students which things an administration can change and which things only a faculty can do is a real disservice to the students. Demanding something that is not within a person's control is not effective advocacy. Those same mentors who suggest that students should demand more infrastructure and more personnel owe those students the duty of explaining the likely sources of funds for those additional expenses. If part of a faculty's duty is to set educa-

⁷⁷ My friend Rainier Spencer pointed out, in his comments on an earlier draft, that we shouldn't expect students to know whether they should target some of their demands to faculty and some of their demands to administration, and he suggests that students could bring all of their demands to the faculty senate, which could then forward the various demands to the particular groups with the primary ability to address them. He also pointed out that "if dep[artmen]t chairs were members of the senate, they (chairs) could be positioned most effectively to entertain those complaints and address them constructively."

⁷⁸ I still don't have a complete handle on the meaning of "inside baseball," but I like this working definition that William Safire gave back in 1988: "From its sports context comes its political or professional denotation: minutiae savored by the cognoscenti, delicious details, nuances discussed and dissected by aficionados." William Safire, *On Language; Inside Baseball*, N.Y. TIMES (June 19, 1988), <http://www.nytimes.com/1988/06/19/magazine/on-language-inside-baseball.html> [<https://perma.cc/9WCX-PXGL>].

tional standards, then the faculty could be doing a better job of explaining shared governance to students.

CONCLUSION

The recent student protests highlight the need for an understanding of shared governance, and a focus on shared governance provides an opportunity for universities to consider moving from a binary model (faculty and administration) to a tertiary model (faculty, chairs, and administration). Chairs are in a good position to evaluate many student demands, and they are the natural fulcrum of governance. They are still full-time faculty members who write and teach, and they are the part of administration where key day-to-day decisions affecting faculty life are made. Good chairs can navigate being first among equals, and they understand the pressures on active faculty members while understanding the various pressures and regulations that universities, colleges, schools, and departments face. Experimenting with adding chairs to the shared governance mix might help universities make better decisions—some, but not all of which, might relate to the issues raised by the protests themselves.