

THE ETHICS OF THE ORGANIZATION

Towards a Theory of Faculty Governance: Or How I Learned to Stop Worrying and Love the Union

VÍCTOR M. MUÑIZ-FRATICELLI*

“A university, like everything else, has a place in the society to which it belongs, but that place is not the function of contributing to some other kind of activity in the society but of being itself and not another thing.”¹

TABLE OF CONTENTS

I. INTRODUCTION.	1001
II. THE IDEA OF THE UNIVERSITY	1003
III. THE IDEA OF A MULTI-VERSITY	1008
IV. THE PROBLEMS OF THE MULTI-VERSITY	1010
V. TOWARDS A RE-CONSTITUTION OF THE <i>CIVITAS PHILOSOPHORUM</i> . . .	1014

I. INTRODUCTION

Around four years ago, a colleague at McGill University approached me with the idea that the professors in the Faculty of Law should seek to form a faculty union. This was not the first time that such an idea had been proposed at McGill, but every previous attempt at unionization had failed. The reasons for failure were complicated and had as much to do with the politics of the province as with any principled opposition to organized labor. In the 1970s, professors in nearly all the universities in Québec had unionized, followed by most universities in Canada.² But McGill—the most prestigious English language institution in the province—had remained aloof from its provincial brethren and retained a more traditional model of faculty representation in which a voluntary faculty association

* Víctor M. Muñoz-Fraticelli is Associate Professor of Law and Political Science at McGill University. Many thanks to Michelle Atkin and Elyssa Khoury for research assistance, and to the Social Sciences and Humanities Research Council of Canada for material support. © 2024, Víctor M. Muñoz-Fraticelli.

1. Michael Oakeshott, *The Idea of a University*, 17 ACAD. QUESTIONS 23, 30 (2003).
2. DAVID ROBINSON, THE STATUS OF HIGHER EDUCATION TEACHING PERSONNEL IN AUSTRALIA, CANADA, NEW ZEALAND, THE UNITED KINGDOM, AND THE UNITED STATES 30 (2006), [https://www.caut.ca/docs/reports/the-status-of-higher-education-teaching-personnel-in-australia-canada-new-zealand-the-united-kingdom-and-the-united-states-report-prepared-for-education-international-\(mar-2006\).pdf](https://www.caut.ca/docs/reports/the-status-of-higher-education-teaching-personnel-in-australia-canada-new-zealand-the-united-kingdom-and-the-united-states-report-prepared-for-education-international-(mar-2006).pdf) [<https://perma.cc/L5D6-GBYX>].

(to which even the higher administrators belonged) discussed salaries and working conditions with the Deans and the Provost, ideally (or perhaps mythically) over a glass of sherry at the Faculty Club. Many McGill professors prided themselves on a model of governance that they characterized as more collegial than the adversarial model that prevailed in unionized faculties.

I shared this perception, not on historical or cultural grounds—I was an immigrant to Canada and Québec and did not carry the weight of past grievances—but on what I understood to be a distinction of principle, rooted in historical practice, between university professors and employees. I celebrated the legendary incident at Columbia University when a senior professor, responding to President Dwight Eisenhower’s remark in a faculty meeting that he was glad to have met the employees of Columbia University, retorted that the professors are not the employees of the university, they *are* the university.³ I was frustrated, of course, with the increasing managerial turn of university administrators or the centralization of university bureaucracy, but I perceived these to be reformable incidents that did not affect the core of academic status. To accept a condition of mere employment seemed to be an abdication of the medieval idea of a self-governing society of scholars.

I am not sure exactly what jolted me out of this complacency. Surely the administration’s obsequiousness towards the provincial government during the COVID pandemic, and its disregard for the expertise and prerogatives of the professoriate had something to do with it, but this merely made it impossible to ignore the erosion of those collegial practices that had not only characterized but *constituted* the university since its twelfth-century origins. The idea of collegiality was now invoked only as pantomime, as a glib glass of sherry at the Faculty Club, while the original sense of collegiality—rule by the *collegium*—gave way to rule by administrators selected from the professorial corps but neither formally nor practically answerable to it. It occurred to me that, if I was to be treated as an employee by my employer, I should respond as one and seek to organize collectively to improve my work conditions.

But—and here is the problem—I still believe in the medieval idea of rule by *collegium* and refuse to give it up, to cleanly break with the historical practices that are not accidental but essential to the university as a form of life, a mode of experiencing the world. How, then, to reconcile the form of faculty organization that I now consider inevitable under present institutional and historical conditions with the idea of the university that still motivates me and so many others to remain in this particular community?

This essay arose, then, as an attempt to understand my own trajectory over the past years from a staunch opponent—on traditionalist grounds—to faculty unionization, to an advocate and organizer. While my immediate motivation is autobiographical, as a legal and political theorist I cannot help but to approach the

3. JULIUS GETMAN, *IN THE COMPANY OF SCHOLARS* 90 (1st ed. 1992).

problem in the spirit of what John Rawls, in describing political philosophy, calls “reconciliation,” an attempt “to calm our frustration and rage against our society and its history by showing us the way in which its institutions, when properly understood, from a philosophical point of view, are rational, and developed over time as they did to attain their present, rational form.”⁴ It will take more time and space to work out a full argument that reconciles the *collegium* with the faculty union, but I want to lay the general outline here, to at least indicate which questions should be answered for this attempt to be successful, or at least plausible or reasonable.

Because my conversion to the cause of faculty unionization is not a conversion to the cause of syndicalism *tout court*, there are intellectual traditions and resources from which I cannot, in good conscience, draw. Others may find it easier to accept that “[t]he bourgeoisie has stripped of its halo every occupation hitherto honoured and looked up to with reverent awe. It has converted the physician, the lawyer, the priest, the poet, the man of science, into its paid wage labourers” and direct their political energies accordingly.⁵ I prefer to remain agnostic about the broader ideological question and present the issue within the narrower frame of the continuity of faculty unions with the historical practice of the university and the society of scholars. I would even venture to describe my position as a reactionary argument for unionization which may nonetheless overlap with more radical positions.

II. THE IDEA OF THE UNIVERSITY

I take as a point of departure the description of the university articulated by Michael Oakeshott: “a corporate body of scholars. . . [living] in permanent proximity to one another. . . [and] a place where a tradition of learning is preserved and extended, and where the necessary apparatus for the pursuit of learning has been gathered together.”⁶ This idea is not an analytic construction, but a historical achievement. While there have always been itinerant or settled scholars who dedicated their lives to the pursuit and transmission of knowledge, it is only in twelfth-century Italy and France that these scholars formally organized themselves into permanent, independent, self-governing, and self-reproducing corporate bodies. Those first universities—the University of Bologna and the University of Paris—still exist today and, while they have changed much in size and form, they retain at their core a commitment to scholarly autonomy which, I will argue, differentiates the university from other institutions.

I take the idea of the university to be a set of institutionalized practices which developed historically to constitute and preserve the conditions necessary for the

4. JOHN RAWLS, LECTURES ON THE HISTORY OF POLITICAL PHILOSOPHY 10 (Samuel Freeman ed., 2007).

5. KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO 76 (Jeffrey C. Isaac ed., Yale Univ. Press 2012) (1848).

6. Oakeshott, *supra* note 1, at 24.

flourishing of a society of scholars.⁷ This definition may seem innocuous, even banal, but I think it has some interesting implications for the relationship between the professoriate—and the society of scholars more broadly—and the institution. The idea of a university has two aspects or modes that are rooted in its medieval origins: first, the university, in its original and literal sense, is a corporation (*universitas*) organized for the carrying out of a trade, namely the trade of teaching and learning; and second, the university in its more general sense, which emerged with the growth of a university *system* across Europe, is a discrete portion of the broader society of scholars. Neither of these modes is necessarily prior to the other—the local and the universal are historically and conceptually linked. Thus, the first *universitas* was founded by foreign students in the city of Bologna, while the local *collegia* of masters and doctors recognized the status of the others as participants in a shared community.⁸

I find it useful, nonetheless, to distinguish these two aspects of the university by reference to the two modes of association described by Michael Oakeshott: the enterprise association, or *universitas*, which is an association of people brought together in pursuit of an extrinsic common purpose; and the civil association, or *societas*, which is an association of people “related solely in terms of their common recognition of the rules which constitute the practice of civility.”⁹ I recognize that the use of Oakeshott’s terms may give rise to some confusion, as I will later defend the idea of the university not as an *universitas* but as a *societas*. I will try to reduce the ambiguity by reference to the *collegium* or the society of scholars, and I think the distinction will remain relatively clear.

Oakeshott distinguishes between these two modes of association to better draw the difference between a purposive conception of the state—as a guarantor of welfare or a vehicle for the triumph of class or the achievement of the nation—, and an “adverbial” conception of the state—the state as a practice-based or moral association,

held together by the acceptance not of a common purpose but the authority of common practices. Its members share nothing in common save the recognition of the authority of these practices, and remain free to pursue their self-chosen

7. Another word for a set of institutionalized practices which developed historically is *tradition*, with the understanding that these practices are not only bare procedure but are also bearers of meaning, and are thus hermeneutic and not only instrumental.

8. Unsurprisingly, perhaps, the analogy between university and church is inescapable. Modern canon law defines the church itself as a *societas*, 1983 CODE c.204, § 2, and the various associations within it as *universitates*, 1983 CODE c.114, but this distinction has not always held. In past centuries, as Oakeshott notes, the church has been characterized as a *universitas*. There is also an important debate between Cardinal Walter Kasper and (then) Cardinal Joseph Ratzinger about which has primacy: the universal or the particular church. Compare Walter Cardinal Kasper, *On the Church*, AMERICA, Apr. 23, 2001, at 8, with Joseph Cardinal Ratzinger, *The Local Church and the Universal Church: A Response to Walter Kasper*, AMERICA, Nov. 19, 2001, at 7.

9. MICHAEL OAKESHOTT, ON HUMAN CONDUCT 128 (1st ed., 1975); see also Bhikhu Parekh, *Oakeshott's Theory of Civil Association*, 106 ETHICS 158 (1995).

substantive purposes provided that they subscribe adequately to the considerations and “compunctions” of the practices concerned.¹⁰

An adverbial conception of the state is one that does not dictate an ultimate end or *summum bonum* for its citizens but rather sets the rules through which citizens should relate to each other, whatever their particular aims shall be. The European state, Oakeshott argued, understood as *civitas*, should be conceived as a civil association in order to promote individual freedom within the structure of the rule of law, in a way that allowed each individual to still pursue their own ends without being compelled to ascribe to the ends of another. This conception of the state as *civitas* or civic association confronts the conception of the state as *universitas* or enterprise association, which conceives of the state as a mere instrument for the achievement of an external goal, whether the fulfillment of the ethnic nation, the triumph of a social class, or the mere procurement of maximal material welfare. Oakeshott knows, and acknowledges, that the modern European state draws on both conceptions of association and oscillates between the two, though he prefers that it oscillate towards the civil rather than the enterprise.¹¹ But these are ideal types, and an association that begins resembling one may well find itself moving towards the other and back again.

Some scholars have noted the ambivalent status of universities as between the civil and the enterprise conception of association.¹² “A university” writes Jacob Levy, “offers adverbial rules for how departments, faculties, centers, and schools govern their curricula and research agendas, not substantive rules on their content or conclusions.”¹³ But Levy ultimately decides against including universities in the category of the civil association. The central practices of universities, academic freedom most notably, are not purely adverbial but constrain the researcher and the teacher to the judgment of peers in accordance with substantive standards of a discipline. The researcher is not only compelled to *teach thusly* but to *teach this*.¹⁴ Levy’s intention, in specifying the substantive content of academic freedom, is to distinguish it from freedom of speech in a liberal state. And for that purpose, the distinction is correct and it succeeds: academic freedom is both more extensive and more constrained than the freedom of speech of the citizen; more extensive in that it insulates the scholar from certain consequences that freedom of speech would not insure against (such as the application of a “duty of loyalty” towards one’s employer), and more constrained in that not just any expression is permitted, but only expression that conforms to the methodological standards of a discipline and the general indication of a curriculum.

Nonetheless, I think that the substantive constraints of scholarly practice are overwrought and prove too much. Regarding teaching, yes, an instructor is

10. Parekh, *supra* note 9, at 175.

11. See OAKESHOTT, *supra* note 9, at 266.

12. See JACOB LEVY, RATIONALISM, PLURALISM, AND FREEDOM 271–78 (2015).

13. *Id.* at 272

14. *Id.* at 273

bound to keep the class on the subject being taught and there is a “purpose” to the course insofar as the objective is to teach the students what they signed up to learn. The constraints on research, however, are not so clearly directed. There are methodological standards and (sometimes vague) disciplinary boundaries, but scholars are not instructed on what to research, much less on the impact such research should have. Attempts to constrain or direct research are rightly resisted and condemned.

The autonomy of scholarship in the university is, moreover, an exercise of academic autonomy more generally, which is to say, self-governance of the academic community. The practice of self-governance is constituted by equal status among scholars (though modulated by academic rank) which identifies the class of peers who define a discipline and govern academic institutions. Indeed, the idea of a peer in scholarly production is distinguished by discipline but not institutional affiliation, while the idea of a peer in faculty governance it is distinguished by institutional affiliation but not by discipline. This conforms with historical practice and has normative implications to the idea of academic citizenship. In essence, “[w]hat distinguishes a university is a special manner of engaging in the pursuit of learning. It is a corporate body of scholars, each devoted to a particular branch of learning: what is characteristic is the pursuit of learning as a co-operative enterprise.”¹⁵ And this cooperative enterprise does not dictate purposes to scholars but only mutual terms of recognition.

This is most evident in the terms in which faculty governance is (or aspires to be) conducted. Firstly, the principles of faculty governance apply across a wide range of disciplines, so disciplinary standards must be articulated so generally as to be almost, if not actually, adverbial. Second, faculty governance is premised not on expertise but on status, namely the status as a credentialed and appointed scholar. While the conditions of appointment are disciplinary—a professor is appointed to teach in a department or faculty according to disciplinary rules—the status of a professor in a university transcends departmental restrictions. The ambiguous boundaries between different disciplines, combined with the tendencies towards interdisciplinary research and cross-departmental appointments, mean that a professor may conduct their scholarship autonomously on the basis of their status as an academic even if they must fulfill certain criteria when teaching a particular course.

For historical reasons originating in the cathedral schools of Paris and imperial and papal proclamations, faculty members have long understood themselves as something akin to citizens of an academic polity. Rashdall notes that “[t]he Guild, whether of scholars or of the members of a political party or a particular trade, was a civic state in miniature, a *civitas in civitate*.”¹⁶ And Saint Albert the Great, the most celebrated professor in the history of the University of Paris

15. Oakeshott, *supra* note 1, at 24.

16. 1 HASTINGS RASHDALL, *THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES* 165 (Cambridge Univ. Press 2010) (1895).

(without doubt because of his most celebrated student, Saint Thomas Aquinas), called Paris “*civitas philosophorum*.”¹⁷ Perhaps the most telling analogy is the one Oakeshott borrows from Augustine in defining the European state as a “*civitas peregrina*,”¹⁸ an image more appropriate to the society of scholars than to the territorially bounded citizens of a modern state.

Of course, the specific institutions of a particular university may be instrumental and purposive, in the sense that they are created and maintained so that the conditions conducive to research and learning may be carried out by the society of scholars. But this is like saying that the tax authority of an Oakeshottian civil association is purposive because it collects resources in order to maintain the minimal institutions necessary for the rule of law to be upheld. The *core purpose* of the university as a discrete, corporate body is to maintain the conditions necessary for the mode of learning practiced by the society of scholars, that is, to maintain the conditions conducive to teaching and research, to “the pursuit of learning as a co-operative enterprise.”¹⁹

All this to say that there are discrete purposes in the various functions and roles exercised in any association, but this does not make the association as a whole purposive. In the case of the university, the overarching purpose of the association is simply to constitute a portion of the self-governing society of scholars. While the practice of the society of scholars is not the same as the practice of the *civitas* which centrally concerned Oakeshott—the practice of scholars is better described as a practice of collegiality, not of civility, which evokes the *collegium* which governed the medieval institutions—it is of the same manner or *mode*. The university is a hybrid creature: *qua* corporation, it is an association of people (many but not all of them scholars) whose shared purpose is the constitution and preservation of the university *qua* portion of the society of scholars.

This, I think, has significant implications for university governance. One such implication is that the idea of the *collegium*, as developed historically and as experienced practically, is that of a political association with an intrinsic conception of citizenship, of governance, and of autonomy from other groups in society. The institutional form which the university took was contingent on the juridical institutions available in twelfth century Bologna, Paris, and Oxford, but these institutions merely reflected the underlying political principle of the *collegium*. The university still lived in the world and had to contend with political grievances (both petty and legitimate) against its influence, and threats to its independence and status, so it was often compelled to seek protection from kings and popes and

17. Thomas O'Meara, *Paris as a Cultural Milieu of Thomas Aquinas's Thought*, 38 THOMIST: SPECULATIVE Q. REV. 689, 690 (1974); see also Charles Gross, *The Political Influence of the University of Paris in the Middle Ages*, 6 AM. HIST. REV. 440, 440 (1901).

18. OAKESHOTT, *supra* note 9, at 266.

19. Oakeshott, *supra* note 1, at 24.

emperors, gaining privileges but also risking (and suffering) the indignities of meddlesome incursions into its governance structures.²⁰

III. THE IDEA OF A MULTI-VERSITY

This idea of the university as institutionalized collegium contrasts with a different and competing idea which Clark Kerr famously called the “multi-versity.”²¹ The defining feature of the multi-versity is its schizophrenic form of governance. Modern North American universities operate on the principle of “shared governance” in which a Board of Governors or Regents administers all the pecuniary aspects of the institution while the professoriate manages “purely” academic affairs, such as the criteria for the conferral of degrees and the content of the curriculum. The professorial presence in the Board is, in most cases, nominal, and far outnumbered by representatives of various “stakeholders” most of whom are not members of the academic community, much less of the *collegium*.

There is some justification for structuring universities as systems of shared governance. Institutionally, shared governance models aim to represent various stakeholder interests—faculty, students, non-academic staff, and external community interests—at the highest governing bodies of the university, and thus have their interests considered by the Board. All these stakeholders have an *interest* in the core purpose of the university, but their interest does not *change* the core purpose of the university, which pertains to the preservation of the conditions necessary for scholars to conduct research and teaching. Immediately below the Boards of Governors, university administrators exercise authority in the purest illustration of the “service conception”, as their function is defined by the core purpose of the university.

If we understand the core purpose of the university in terms of an enterprise association, the direction of policy and the exercise of administrative authority are directed by fiduciary principles of loyalty and care. If, however, we also understand the core purpose of the university in terms of a civic association, the

20. See generally Osmo Kivinen & Petri Poikus, *Privileges of Universitas Magistrorum et Sclorum and Their Justification in Charters of Foundation from the 13th to the 21st Centuries*, 52 HIGHER EDUC. 185 (2006). The most famous grant of privileges to European scholars is the *Authentica Habita* of Frederick Barbarossa, given at the Diet of Roncaglia in 1158 at the behest of legal scholars from the University of Bologna, who had advised the emperor in his disputes with the Pope. The *Habita* guarded students from reprisals, exempted scholars from the jurisdiction of town and local laws, and gave legal protection to the university system by facilitating the recognition of academic degrees granted by any university in every other university. King Philip Augustus would grant similar privileges to the scholars at the University of Paris in 1200 (which is taken as the founding date of the University), and these would be extended by King Louis IX. See Pearl Kibre, *Scholarly Privileges: Their Roman Origins and Medieval Expression*, 59 AM. HIST. REV. 543 (1954). After the University of Paris strike of 1229, Pope Gregory IX, a graduate of the institution, expanded on those privileges in the bull *Parens Scientiarum* of 1231. But with papal protection also came papal meddling in the curriculum, though the scholars of Paris managed to rebuff these in time. See Peter R. McKeon, *The Status of the University of Paris as Parens Scientiarum: An Episode in the Development of Its Autonomy*, 39 SPECULUM 651 (1964).

21. CLARK KERR, *THE USES OF THE UNIVERSITY* 5 (5th ed. 2001).

fiduciary principle is not sufficient, as the structure of governance must respond to the conception of academic citizenship which, while differentiated among various ranks, presumes a fundamental baseline of equal scholarly dignity.

Ostensibly, at least in more prestigious universities, all the top executive positions in the institution are occupied by professors, but these are appointed by the Board and serve at its pleasure. Their duty of loyalty and care is to the institution as such, not to the society of scholars or, for that matter, to any particular stakeholder. Because of this, the top university administrators necessarily view every institute, faculty, department, and even individual professors as contributory factors to the institutional purposes of the university and are compelled to manage those factors through increasingly centralized control. The Academic Senate is also generally managed by the administration and serves, for the most part, only a bookkeeping function. There is, in effect, no structural constraint to managerialism, as there is generally no alternance in governance in top administration; top administrators, especially at the most prestigious colleges, do not normally return to the professoriate and, when they do, they can honestly claim that they were bound by their duty to the institution, not by their shared commitment to the practice of collegial governance.

Now, there is nothing inherently wrong or immoral with this governance structure. It is suited to the kind of institution that is the multi-versity. There are understandable reasons for this development. The multi-versity serves the public good which presently provides a significant (though increasingly small) portion of the finances of the institution. And the shared governance model gives institutional voice and vote to different stakeholders who might otherwise go unrepresented. But this merely illustrates the difference between the idea of the multi-versity and the idea of the university.

The *collegium* is a community defined by common recognition by its members of the practice of collegiality, and the institutional form it takes in the university serves to constitute this community juridically and preserve the conditions for collegial association. The public good, in this conception, is a positive externality but not the main purpose or principle of association. By contrast, the multi-versity is defined by its extrinsic purpose, by its social utility, and more often by the diverging social utilities of various stakeholders. At its most lofty these may be scientific research, economic development, and cultural literacy; at its most vulgar, to quote Clark Kerr again (perhaps apocryphally) “the three major administrative problems on a campus are sex for the students, athletics for the alumni and parking for the faculty.”²²

22. *Education: A View from the Bridge*, TIME, Nov. 17, 1958, at 96. Reportedly, Kerr, then chancellor of the University of California, made the remark at the inaugural ceremony of the new president of the University of Washington. *Id.*

IV. THE PROBLEMS OF THE MULTI-VERSITY

Why, then, should one committed to the idea of the university conclude, not only on strategic but on principled grounds, that it can only be preserved in the present through the unionization of the professoriate? I can think of a progression of arguments which suggest that conclusion. These deserve a more extensive treatment than the one I can provide here, so what follows will be more of a sketch of the relevant questions to address rather than a fully-fledged argument. But the objective is to explain which aspects of the multi-versity are discontinuous, or even hostile to, the idea of the university, and to suggest reasons why the reconstitution of the *collegium* passes through and is continuous with the faculty union.

First, the university is a political institution, not in the sense of being guided by an ideology or striving to control the levers of coercive power. Rather, the university is a *civitas*, a society of members united by a common rule. The nature of this rule is complex because scholars who are part of a university come together both for a core purpose—to preserve the conditions conducive to research and teaching—but also through a common status—that of members of a self-governing society of scholars. The university is usually understood in terms of its purpose and thus as an association of more limited scope, but I would argue that what makes the university distinctive—and what makes it political—is the mutually recognized status of its members. The university is a specific instance of a broader society of scholars and thus conforms to what Michael Oakeshott called a *civil* as opposed to an *enterprise* association.

The purpose of any given university is instrumental to the more important association of scholars in terms of common status. There is historical precedent for this which is preserved in current practice. The most important implication of this argument is that the university should not be defined in terms of an external purpose (to pursue truth, to train future citizens, to develop useful research) but should instead be defined in terms of the internal relationship between scholars (most importantly, though not exclusively, its faculty). The modern university inverts this logic by justifying the university in terms of the external purposes it serves, rather than the internal relationship between scholars, and preserving this internal relationship only insofar as it is useful or conducive to those external purposes.²³

Second, the administrators in a modern university, a multi-versity (I will generally use Kerr's term from now on), are taken from the ranks of the faculty but are neither politically nor legally accountable to it. This is a radical discontinuity with the original idea of the university as a self-governing society of scholars.²⁴ But the problem of discontinuity is not only descriptive, it is normative. The

23. See KERR, *supra* note 21, at 14–15.

24. The discontinuity is traceable, in part, to the growth of an administrative segment of university governance which has been eloquently criticized most prominently by Benjamin Ginsberg. See BENJAMIN GINSBERG, *THE FALL OF THE FACULTY* (1st ed. 2011).

highest university administrators, generally those at and above the level of Dean, have distinct and exclusive fiduciary duties towards the institution, that is, towards the legal corporation, and not, as in the original medieval idea of the *collegium*, towards the professoriate.²⁵ The university as a corporate institution has internal and external stakeholders beyond the faculty whose interests and needs must be accounted for. These are represented in the Board, but the Board (and the university officers it appoints) do not have duties to these stakeholders severally. Rather, its duty is to the corporate institution and, in turn, to the multitude of social purposes that the multi-versity is intended to pursue.

This multiplicity of purposes and stakeholders makes the Board effectively unaccountable in directing the goals of the institution and undermines the core purpose of maintaining the conditions necessary for the practice of scholarship. The idea that the purpose of the university is to promote the public good, rather than to maintain the conditions necessary for the practice of scholarship, is an instance of the problem of public fiduciaries. The Board and administrators of the multi-versity are closer to “[p]oliticians and bureaucrats [who] are not like private fiduciaries. They do not serve discrete classes of beneficiaries, and they are subject to demands that cannot be distilled into a discrete maximand.”²⁶ While some scholars have argued that this sort of fiduciary problem is resolved by appeal to different orders of loyalty, balanced through a duty of fair and equitable treatment of stakeholders,²⁷ the problem remains that the multitude of interests of various constituencies who are not participants in the practice of scholarship will tend to instrumentalize scholarly relations.²⁸

In practice, the multiplicity of internal and external “stakeholders” in the multi-versity means that the senior administration has to balance different competing external purposes dictated by the various constituencies when managing the university. But inversely, this directs the administration not only to ignore but to actively disregard the idea of self-governance of a society of scholars, as this

25. See CANADIAN ASS’N OF UNIV. TCHRS., *FIDUCIARY DUTIES OF UNIVERSITY BOARD MEMBERS* (2020), <https://perma.cc/A6RS-4CZU>, at 5. The CAUT argues that “the representational nature of the governing body of a university” allows representatives of academic staff to “participat[e] in board processes on the basis that they represent an internal community with separate interests from the ‘whole’ university community” which implicitly recognizes a potential incompatibility of interests and assumes that non-representative (“independent”) board members may not enjoy the prerogative of advocating for a separate community of interest.

26. Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1206 (2014).

27. See EVAN FOX-DECENT, *SOVEREIGNTY’S PROMISE* 35 (2011); Evan J. Criddle & Evan Fox-Decent, *Guardians of Legal Order: The Dual Commissions of Public Fiduciaries*, in *FIDUCIARY GOVERNMENT* (Evan J. Criddle et al. eds., 2018).

28. By contrast, one of the most sophisticated university constitutions of early modernity, Cardinal Cisneros’ statutes of the University of Alcalá de Henares, preserved faculty governance in the first and second senses (appointment from the ranks of scholars by election voted among scholars). It also ensured stakeholder and institutional interests through the annual appointment of a visitor with broad accounting authority. See Cardinal Cisneros, *Constituciones Latinas del Cardenal Cisneros al Colegio Mayor de San Ildefonso y Universidad de Alcalá de 1510*, PORTAL DE ARCHIVOS ESPAÑOLES, <https://pares.mcu.es:443/ParesBusquedas20/catalogo/description/4630531> [<https://perma.cc/ZN54-KA2S>].

would undermine the administration's exercise of its fiduciary duty towards the institution. Not only is the professoriate orphaned by an administration whose duties point elsewhere, but the normative interest of the professoriate—to *not be governed* by any but themselves—is actively opposed by the normative interest of the administration—to *govern* the professors (as well as the students, the administrative and service personnel, and so on).²⁹

Third, returning to the idea of a self-governing society of scholars, we need to contemplate what *political rule* should look like in academic life. The idea of political rule evokes the conception of the society of scholars as *cives* or citizens of a *civitas philosophorum*. Faculty governance, that is, faculty authority over “across the entire range of decision making that bears, whether directly or indirectly, on its responsibilities”³⁰ is normatively and functionally prior to institutional governance. The latter exists to ensure the conditions of the former. Faculty governance has been understood in several ways, (1) as governance by administrators who are members of the faculty; (2) as governance by administrators who are elected by and may be dismissed by the faculty; and (3) as governance by administrators who alternate between administrative and faculty roles. The first of these is a necessary but not a sufficient conception of faculty governance. As a conception of faculty governance, it is superficial at best. A member of the faculty appointed by, and serving at the pleasure of, a non-faculty Board only has a tenuous connection to the professoriate, mainly in terms of past experience. There are many instances of high-level administrators continuing to have an active scholarly life, but this is due to temperament, not due to the structures of appointment and accountability.

The second conception, governance by administrators elected and dismissed by the faculty, is historically important and normatively attractive. It is the model followed by medieval and early modern universities that emancipated themselves from cathedral schools, and thus from the church hierarchy, and organized themselves on the basis of equal status among masters and doctors. Normatively, it seems to best embody the common sense understanding of self-government. But by that same token, it fails to take account of later historical developments. The most obvious is that, under present conditions, the reestablishment of electing university administrators by the faculty has little possibility of success. University administrators may emerge from the ranks of the faculty but, especially at the higher levels, they respond to those who appoint them not to those they govern. A dean is appointed and dismissed at the pleasure of the rector or provost, a rector or provost

29. Of course, the interests of other constituencies that participate in or are affected by scholarly institutions need and deserve protection. But this protection has, in the past, been afforded in ways that did not undermine faculty governance. The figure of the Visitor, still in effect in many chartered universities, was a common safeguard. See 1 HASTINGS RASHDALL, *THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES* (Cambridge Univ. Press 2010) (1895) at 490, 493.

30. AM. ASS'N OF UNIV. PROFESSORS, *ON THE RELATIONSHIP OF FACULTY GOVERNANCE TO ACADEMIC FREEDOM* (1994), <https://www.aaup.org/report/relationship-faculty-governance-academic-freedom> [<https://perma.cc/U5EX-7FWL>].

at the pleasure of the president or principal, and a president or principal at the pleasure of the Board. This is unlikely to change.

This leaves the third conception, governance by administrators who alternate between administrative and faculty roles. Put another way, faculty governance is ensured by administrators who govern and are governed in turn. This is, of course, Aristotle's definition of *political* rule, "a kind of rule exercised over those who are similar in birth and free."³¹ It is the barest basis of republican conceptions of governance as non-domination and forms the distinction between rule between citizens and rule of a master over servants. This conception of faculty governance incorporates the qualification requirement of the first conception and preserves the centrality of the faculty in a system of shared governance of the second conception. Administrators should emerge from the ranks of faculty (otherwise they could not return to it) but they should hold limited term appointments with the expectation (subject, of course, to exceptions) that they will return to those ranks rather than seek ever higher appointment. This means that they must consider the impact of the rules and policy decisions on fellow faculty because they will themselves be subject to those decisions in due (and brief) course.

But in the modern multi-versity, the political rule of the society of scholars is disrupted by the lack of alternance between faculty and senior members of the administration, who increasingly do not return to the ranks of the professoriate at the end of their term. Conventional wisdom in universities shows that becoming a dean represents a jump to a different career track. It is increasingly common for deans to continue to ascend the academic administrative hierarchy—or to jump to other prominent positions in public or private service, especially in the professional faculties—and thus to become ever more estranged from structures of proximate accountability to the faculty. The reputational gains they obtain while in office propel them towards higher positions in other universities, in public service, or in private enterprise. And increasingly, their growing salaries, disproportionately higher than those of regular faculty, effectively preclude them from descending again to the ranks of the professoriate.

Fourth, the break in political governance of the society of scholars that is characteristic of the multi-versity goes hand in hand with increasing managerial centralization. Centralization occurs in spite of, or rather because of, the plurality of purposes that defines the multi-versity. By contrast, the lowest, most local, and decentralized level of university governance exhibits the greatest alternance of power and the simplest ordering of interests. This is, of course, the department organized by academic discipline in direct line with (though much richer variety than) the four faculties of the original European universities—liberal arts, theology, law, and medicine.

The present state of university administration shows that this third conception of faculty governance is very much the norm at some levels and very much not

31. ARISTOTLE, *POLITICS* 72 (C.D.C. Reeve trans., Hackett Publ'g Co. 1998) (c.350 BCE).

the norm at others. The most obvious example of effective alternation in governance happens at the department level. The expectation of a department chair is that they will serve a limited term and return to regular teaching, research, and collegial membership in the academic unit. Associate deans and other intermediate administrators of various sorts are usually closer to the department chair in terms of alternation in governance than to full deans who have effectively jumped onto a new career track, though that is changing in universities where professional administrators have been brought in to perform functions previously done by faculty. But in one way they are also less proximate. Their decisions bear on faculty-wide (and sometimes university-wide) interests which need to balance the needs and preferences of different units. Upon return to the ranks of the professoriate, however, they do not return to the faculty (or university) as such but rather to their department. If they have performed their role correctly, they did not favor their department over others. Yet it is only in their department that they face the republican accountability of being governed by those they once governed. This is something analogous to a market failure—or accountability failure—which happily does not occur at the department level.

This argument suggests that there is a connection between the civil conception of faculty governance and the idea of subsidiarity interpreted as a “preference for proximity.”³² Subsidiarity is not premised on a putatively objective assessment of which level of governance is best placed to accomplish a specified task (a conception of subsidiarity that presumes an agreed-upon objective or task and a settled authority to determine appropriate competencies, as I have argued elsewhere.³³ Rather subsidiarity should encourage decisions to be taken but at a level where authorities are likely to also be affected by those decisions directly.

Centralizing administrators have used a teleological—that is, an enterprise association—reading of subsidiarity to concentrate university functions in the name of efficiency, uniformity, and accountability to (mostly external) stakeholders. This responds to the enterprise model of the university which prioritizes the goal or object of the institution over the terms of relation among its members. But prioritizing those terms of relation, the model of university as a civil association, presents a much stronger argument for decentralization and faculty control, as subsidiarity is then grounded on the conditions of self-governance rather than on an external goal.

V. TOWARDS A RE-CONSTITUTION OF THE *CIVITAS PHILOSOPHORUM*

So this is where we stand: The original idea of the university is of a primarily civil association constituted by a society of scholars who relate to each other as equals in status and who share in the self-governance of the *collegium*. This relationship of self-governance distinguishes the university from other institutions engaged in research and teaching. Any discrete university exists only to give

32. Maria Cahill, *Subsidiarity as the Preference for Proximity*, 66 AM. J. JURIS. 129 (2021).

33. VICTOR M. MUÑIZ-FRATICELLI, *THE STRUCTURE OF PLURALISM* 56–80 (2014).

institutional form to the self-governing society of scholars and to preserve the conditions of research and teaching. All other purposes it may pursue are incidental and secondary. The society of scholars is the sole beneficiary of any fiduciary duty that its administrators may assume. The proper exercise of these duties is ensured by a regular alternance of power in which academic administrators return to the ranks of the faculty at regular intervals. It is also ensured by a clear preference for local governance centered at the department level or its equivalent.

Contrast that with the idea of the multi-versity. The multi-versity is explicitly instrumental. It exists because it is able to realize a multiplicity of purposes defined by its various constituencies and stakeholders. If faculty are allowed some self-governance over research and teaching, it is by function of their expertise, not because of any inherent principle of self-governance. Multi-versity governance, rather, is vested on a board of trustees composed mostly of non-academics. This board appoints senior administrators from the ranks of the faculty, but neither the board nor these administrators owe a duty of loyalty to the professoriate (or, for that matter, to any other constituency) but to multi-versity as a separate entity. The career trajectory of senior administrators ensures that the republican convention of alternance in power is irreparably broken. The increasing centralization of academic management removes many institutional decisions from the local level where interest and expertise are most aligned. The multi-versity, to be sure, is not an inherently immoral institution, but it is a perversion of the original idea of the university and is, in any case, a different sort of thing altogether.

Given the problems of the multi-versity, any attempt to re-constitute the idea of the *collegium* must be centered on the professoriate, answerable only to its members, ensure alternance of power, and respect local variability and governance. If it is to be the faculty union, it may follow the form but not the practice of an ordinary trade union, whose main purpose is to negotiate for salaries and working conditions within the confines of the company structure. The faculty union must instead seek to model the *collegium* and effectively become the organ of self-governance of the professoriate.

The trade union form may seem to be at odds with the vision of *collegium*, but I would argue that it mimics the process by which the first universities were formed. At neither Bologna nor Paris did there exist a template for the institution of a permanent scholarly institution. What existed, after the rediscovery of the *Corpus Iuris Civilis* in the eleventh and twelfth centuries, were the little-understood institutional forms of imperial Roman law that had developed in a different social and economic context and did not, at the time, form the basis of any actually existing legal system in the West. The students at Bologna took what they found, the Roman corporate form of *universitas* and turned it to their purposes. The masters and doctors in Paris (and later the masters and doctors at Bologna, in reaction to ever more assertive student power) did the same with the concepts of *universitas* and *collegium*. They found oppressive the constraints of the cathedral school and stultifying the control of city authorities

over the scholarly community, so they turned to the Roman corporation and the guild—devised and developed not for academic purposes but to facilitate commercial transactions—to assert the independence of those communities from ecclesiastical and temporal authority.³⁴

The origins of the European university are also not far removed, in practice, from the history of organized labor. Bologna, the first university in Europe was, in essence, a student union. And Paris, which serves as a precursor and model of most English and North American universities, gained most of its privileges and protections through a strike in 1229. It is perhaps time to reconsider the idea of the university as emerging not from the coincidence of individual scholars engaged in contemplation, but rather as a collective enterprise secured through organized conflict with external authority. It is in that organization that genuine collegiality, as rule of the *collegium* over the *civitas philosophorum*, emerged and can perhaps be restored.

34. HAROLD J. BERMAN, LAW AND REVOLUTION 123–127, 215–221 (1983).