Saving Rutgers Camden

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SAVING RUTGERS–CAMDEN*

Perry Dane, **Allan R. Stein, *** and Robert F. Williams****

This, sir, is my case. It is the case not merely of that humble institution, it is the case of every college in our land . . . . Sir, you may destroy this little institution; it is weak, it is in your hands! I know it is one of the lesser lights in the literary horizon of our country. You may put it out! But if you do so, you must carry through your work! You must

* We dedicate this Article to former Rutgers–Camden Chancellor Wendell Pritchett, whose courage, skill, and dedication made possible the favorable outcome to the “merger crisis.” We also dedicate the Article to the members of the 1956 Rutgers Board of Trustees, whose foresight and attention to their fiduciary duty to Rutgers University resulted in the “legislative contract” quality of the 1956 Rutgers, The State University Act that protected the University from legislative changes without Rutgers’ consent in 2012, and should continue to so protect it in the future.

We emphasize at the outset that this Article is an academic paper by three individuals, not any sort of official document or report. None of the views we take here should be ascribed to Rutgers, The State University, or to any other entity, and any remaining errors are entirely our own.

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extinguish, one after another, all those great lights of science which for more than a century have thrown their radiance over our land! It is, Sir, as I have said, a small college. And yet there are those who love it!

Daniel Webster

The bad guys got outmaneuvered by a bunch of nerds.

Kate Epstein
Assistant Professor of History
Rutgers University–Camden

I. INTRODUCTION

On January 25, 2012, Governor Chris Christie announced to the world that the Camden campus of Rutgers University was to be severed from Rutgers and taken over by Rowan University, and he wanted it done by July 1, 2012. The merger proposal was included as part of a plan for Rutgers to absorb most of the University of Medicine and Dentistry of New Jersey (UMDNJ), including the medical school in New Brunswick that an earlier governor had taken away from Rutgers decades earlier.

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Every major political force in the state was lined up in support of the plan. Democratic Senate President, Steven Sweeney, whose district included Glassboro, Rowan's home, asserted that the Rowan takeover was essential to keep dollars from flowing up the turnpike; he asserted that "only roughly 55 cents for every tuition dollar of a Rutgers–Camden student stays on the Camden campus." The merger would create a South Jersey research university that would rival Rutgers for state support. George Norcross, Chairman of the Board of Cooper Hospital in Camden, and one of the most powerful political forces in the state, took to the airwaves and newspapers to praise the takeover. Former Governors Thomas Kean, Brendan Byrne, and James Florio, a graduate of Rutgers Law School–Camden, enthusiastically endorsed the proposal. The former Camden law dean and provost seemed to support the plan, at least in concept. Even Richard McCormick, the President of Rutgers, although expressing regret, seemed resigned to the loss of the Camden campus if that were the only way for Rutgers to acquire UMDNJ. For months, almost no political leader spoke out in opposition.

8. Id.
14. President McCormick, testifying before the Senate Higher Education Committee on February 6, 2012, made the following remarks:
Given our choice, if we could pick and choose among the recommendations of the UMDNJ Advisory Committee, we would not want to turn over the Rutgers–Camden Campus to Rowan University, in Glassboro. I can't imagine that either the Rutgers
Board of Governors or the Board of Trustees would willingly relinquish the campus, nor would I recommend that course, if there were the possibility of choosing among the recommendations.

At this point, however, we don’t know if we will have a choice because the exact contents of a plan are understandably unclear. We do not yet know whether the global restructuring as recommended by the committee will move as a single package, with linkage between all of the parts, or if the parts will move independently of one another. We also do not yet know the vehicle for the restructuring—whether this will be done by an executive reorganization plan or by legislation.


15. Surprisingly, one of the earliest voices against an outright takeover of the Camden campus was that of state Senator Donald Norcross, the eventual co-sponsor of the legislation to implement the Camden plan and the brother of George Norcross. Norcross, whose daughter was a student at Rutgers Law School—Camden, announced on February 15, 2012, that it was essential that Rutgers remain in Camden. Senator Donald Norcross, Senator Norcross Addresses the Rutgers University Board of Governors at Rutgers—Camden, YOUTUBE (Feb. 15, 2012), http://www.youtube.com/watch?v=bxTWJo06o28&feature=share.; Donald Norcross, Region Must Get Fair Share of Education Funds, COURIER-POST (Feb. 28, 2012), http://www.courierpostonline.com/article/20120229/OPINION02/302290003/Region-must-get-fair-share-education-funds. The Governor, in response, suggested that nothing George Norcross said reflected that view. James Osborne, Norcross Brothers Diverge on Fate of Rutgers—Camden, PHILLY.COM (Mar. 4, 2012), http://articles.philly.com/2012-03-04/news/31121698_1_rutgers-board-campus-cooper-university-hospital/2.

Another early opponent was United States Senator Frank Lautenberg, who in February, wrote to Governor Christie expressing concern about the merger. Lautenberg Raises Questions Over Proposed Merger, COURIER-POST (Feb. 22, 2012), http://www.courierpostonline.com/article/20120222/NEWS01/1202222002/Lautenberg-raises-questions-over-proposed-merger.

In March, Lautenberg called for an investigation of the merger plan by the U.S. Department of Education. Lautenberg asserted “[s]uspicious have been raised that this decision has been crafted to benefit powerful political interests without regard for the impact on students, the academic institutions themselves and the community . . . .” Colleen O’Dea, Lautenberg Calls for Investigation into Rutgers-Rowan Merger, NJ SPOTLIGHT (Mar. 27, 2012), http://www.njspotlight.com/stories/12/0327/0110/.


A group called “The Leaders Fund” published the letter on PolitikerNJ.com. The group was reported to have received contributions from several Rowan University Trustees. The AUDITOR/THE STAR-LEDGER, Interesting Donations by Rowan University Trustees, NJ.COM (Apr. 1, 2012), http://blog.nj.com/njv_auditor/2012/04/interesting_donations_by_rowan.html. It also has ties to George Norcross. Gregory J. Volpe & James W. Prado Roberts, Money
We were totally outgunned and completely blindsided, and yet, in the end, we prevailed. This Article is an attempt to process how that happened and to reflect on some of the lessons that can be gleaned from this controversy.

This is not, nor could it be, the definitive history of this episode. Each of the authors of this Article was involved in different aspects of the opposition to the merger, and much of the understanding comes from first-hand experience. Many of the critical events occurred behind closed doors, and we do not have reliable information about many key conversations. We do know what was reported in the press and some of the central actors have spoken with us both on and off the record. Where available, we have provided citations to the public record, but much of this is based on our own experience, perceptions, and information.

The Article proceeds in four parts. Part II recalls the history of Rutgers from its founding, emphasizing the issues and themes that exploded so dramatically in 2012. Part III tells the story of the fight over the proposed merger, culminating in the final bill in June 2012 that preserved Camden as an integral part of Rutgers. Part IV analyzes the legal constraints on the proposed merger. Part V concludes with some broader perspectives on legal pluralism, the public/private divide, the relationship between state universities and state governments, and competing visions for the role of the faculty. The Article speaks with a single collective voice, but we should be up front about our respective roles: Allan Stein is primarily responsible for this Introduction and Part III, Perry Dane for Parts II and V, and Robert Williams for Part IV.

II. A BRIEF HISTORY OF RUTGERS’ TRANSFORMATION INTO THE STATE UNIVERSITY OF NEW JERSEY

This Article tells an important story—the campaign to save Rutgers–Camden. That story has a deep background; some of it going back to early American constitutional history and even further back to medieval ideas about the distinct privileges of academic communities. It also has broad implications for the theory and practice of university governance and the role of faculty in the organic life of the university. We will take up those themes at the end of the Article.

But the story of the campaign to save Rutgers–Camden makes sense only in the light of the history of Rutgers, the State University of New Jersey, and in fact reflects only the latest dramatic moment in a series of struggles and challenges that have marked Rutgers since before it was the State University, and for that matter, before it was called Rutgers.

The history of Rutgers has been told definitely elsewhere, and we rely here on that earlier work. But we want to highlight three themes that have haunted the university from its colonial beginnings, and which reappeared critically in the crisis over the future of Rutgers–Camden. Those themes are identity, control, and money. Ambiguity about identity. Struggles over control. And concerns about money.

The institution that became Rutgers was founded as Queen’s College in 1766. It was named in honor of Charlotte, wife of George III. Colonial Governor William Franklin signed its charter by authority of the King. But the three most important facts about its founding are as follows.

First, the College was “private,” at least in the same complicated and ambiguous sense in which the other Northeastern colonial colleges such as Harvard, Yale, and Princeton might anachronistically be described as having been private in the 18th century. Indeed, it would remain private—and eventually so in the familiar modern sense—for a long time.

Second, Queen’s College, now Rutgers, was a Dutch Reformed institution. Harvard and Yale were Congregationalist; the College of New Jersey, now Princeton, was Presbyterian; King’s College, now Columbia, was Anglican; and the College of Rhode Island, now Brown, was Baptist.

16. The most authoritative history of the University remains Richard P. McCormick, Rutgers: A Bicentennial History (1966). Much of the Rutgers story that we review in this Part, whether or not cited specifically, is drawn from this book. McCormick, a University Professor of History at Rutgers and a former Dean of Rutgers College, was the father of Richard L. McCormick, the nineteenth President of the University, who was in his last year in office during the crisis over the fate of Rutgers–Camden. The elder McCormick died in 2006. See Greg Trevor, Richard P. McCormick, Beloved Rutgers Professor and University Historian, Dies, Perspectives on History (Jan. 2013), http://www.historians.org/publications-and-directories/perspectives-on-history/0601bri2.

18. Id.
19. Id.
20. We return to these ambiguities in infra Part V.
The Dutch Reformed community in colonial America traced back to the original Dutch colony whose capital was New Amsterdam. The Dutch surrendered to the British in 1664 and New Amsterdam became New York. But Dutch culture and the Reformed faith continued to be influential in much of the area, including New Jersey and the Hudson River valley, and the pull of the Netherlands—its language, ethnicity, and religious hierarchy—continued to be a part of the American dynamic for many years. Reformed theology is still important today, in intellectual heft if not sheer numbers, representing a particularly sophisticated and philosophically thoughtful dimension of “conservative” Christian thinking. It has also inspired important philosophical trends including “Reformed epistemology” and its

the University of Pennsylvania, was the first, at least nominally, non-sectarian of the Northeastern colonial colleges, Edward Potts Cheney, History of the University of Pennsylvania 1740–1940, at 32–33 (1940); Cohen & Kisker, supra, at 25; though it was dominated in its early years by Anglicans. Cheney, supra, at 32, 120–25.


The Dutch Reformed religious tradition in the United States is now divided among several denominations. The leading two are the Reformed Church in America (RCA), which emerged directly out of the colonial Dutch church, and the Christian Reformed Church in North America (CRC), which was established in 1857, led by factions of later Dutch immigrants upset by what they considered religious laxity and cultural assimilation in the older denomination. See Robert P. Swierenga & Elton J. Bruins, Family Quarrels in the Dutch Reformed Churches in the 19th Century (2000); M. Eugene Osterhaven, Saints and Sinners: Secession and the Christian Reformed Church, in WORD and WORLD: Reformed Theology in America 45 (James W. Van Hoeven ed., 1986) [hereinafter Van Hoeven, Word and World]. Many nineteenth-century Dutch immigrants settled in Western Michigan, and though a good many of their children continued to attend Rutgers back in New Jersey, they also created new institutions including Hope College, affiliated with the RCA, and Calvin College, affiliated with the CRC. See Wynand Wickers, A Century of Hope, 1866–1966 (1968); Harry Boonstra, Our School: Calvin College and the Christian Reformed Church (2001). Both Hope and Calvin are fascinating and distinguished schools that might be imagined, if in a very ahistorical sense, as reflecting what Rutgers might have become had it remained small and religiously affiliated.

offshoots. Particularly interesting and evocative (though, strictly speaking, only coincidental) in the light of this Article’s emphasis on questions of governance and pluralism, has been the powerful interest in Reformed political theology in examining the autonomous if connected roles and competencies of the distinct spheres of government, church, education, and other dimensions of the social order.

The third crucial fact about the founding of Queens College is that it was, in the words of the University’s leading historian, a “Child of Controversy.” The very need to establish a Dutch Reformed college was bitterly debated. At first, religious authorities in Amsterdam refused to give up ecclesiastical jurisdiction over the American church and insisted that ministers travel back to Europe to be trained. And in America, many Dutch Reformed folks wanted to send their sons to Kings College (Columbia).

The upshot is that Queen’s College, born in division, continued to struggle in its early years, straining to attract students and raise money and often uneasily negotiating over authority, control, and even ownership of the college’s building with the General Synod of the Dutch Church in America. The college closed and reopened and closed and reopened again. It coexisted with the theological seminary that still sits in the middle of our New Brunswick campus. In 1793, the trustees rejected, by one vote, a proposal to merge with Princeton. The institution named itself after Colonel Henry


Among the most explicit points of connection between the Kuyperian interest in “sphere sovereignty” and constructive thinking about the necessary, if relative, autonomy of secular universities in a larger polity of polities has been the work of the University of Alabama legal scholar Paul Horwitz, proceeding on a trajectory from his article to his recent book. Paul Horwitz, Churches as First Amendment Institutions: Of Spheres and Sovereignty, 44 Harv. C.R.-C.L. L. Rev. 79, 87 (2009); Paul Horwitz, First Amendment Institutions (2013).


31. Id. at 32–39.

32. Id. at 21.
Rutgers in 1825, in honor of his gift and coinciding with a newly negotiated covenant with the General Synod.  

In 1862, Congress passed the Morrill Act to finance state land-grant colleges. Each state was allotted scrip to federal lands that it could sell to finance higher education, particularly "related to agriculture and the mechanic arts." Most states sold their scrip to private owners to finance new state-controlled schools, but not all. New York allowed Ezra Cornell to buy and hold on to the land allotted to the state long enough for it to appreciate substantially in value, thus establishing part of the seed for Cornell University’s endowment as a private university that still includes some state land-grant schools.

In New Jersey, Rutgers and Princeton both lobbied to become the state’s land-grant school. Rutgers had better lobbyists. In being designated New Jersey’s land-grant institution, however, Rutgers—like Cornell and MIT—remained independent.

Rutgers’ relationship with the state began tentatively. The college put off reforming its classical curriculum, but it established separate schools for science and agriculture to fulfill its land-grant mission. For a while, beginning in 1917, the State University of New Jersey was a division of Rutgers College, odd as that might sound. Meanwhile, the State Legislature bungled the initial finances of the land-grant system and was stingy with

33. Id. at 40–41.
36. Nevins, supra note 34, at 29, 30 ("It is a matter of rather gruesome interest to ascertain which states did worst in betraying their children. This bleak distinction seems to lie among Rhode Island, Connecticut, Pennsylvania, and New Jersey. . . . When New Jersey was given scrip for 210,000 acres, Princeton and Rutgers squabbled lustily for the prize until in 1864 Rutgers bore it away. And what a prize! State commissioners sold the scrip on a saturated market for a little more than fifty cents an acre, or $116,000, a sum upon which New Jersey obligated herself to pay only 5 per cent a year, or $5,800."). McCormick puts the figure at $112,160. McCormick, supra note 16, at 89 ("The average return received by all the states," by contrast, was $1.65 an acre."). In New York, Cornell ultimately realized an endowment of about $5,000,000 because Ezra Cornell held on to the land on behalf of the University long enough for its value to appreciate dramatically. See Becker, supra note 35, at 116.
additional funds.\textsuperscript{37} In fact, the classical college often subsidized the landgrant institutions.\textsuperscript{38}

For close to a century, struggles, and confusion over identity, control, and money recurred. Even though Rutgers was now New Jersey’s land-grant university and its faculty and students eventually reflected that, it only slowly untangled its formal affiliation and cultural ties to the Dutch Reformed Church. Thus, the charter requirement that three-quarters of trustees must be members of the Church was reduced, with the approval of the General Synod, to two-thirds in 1891 and then eliminated in 1909.\textsuperscript{39} It took until 1920, however, for the charter to be stripped of “every denominational reference.”\textsuperscript{40} As late as 1916, the college’s 150\textsuperscript{th} anniversary celebration included a formal address by Rev. Ame Vennema on behalf of the Reformed Church in America that thanked Rutgers for “the magnificent service” it had rendered to the denomination with which it had “been so closely affiliated for a century and a half” and described it as still a “safe college” that “never failed to place proper emphasis upon character building and wholesome religious influence.”\textsuperscript{41} In a rhetorical flourish that glossed

\begin{footnotes}
\item[38] \textit{Id.} at 92–93, 117–19.
\item[39] \textit{Id.} at 154–55.
\item[40] \textit{Id.} at 181.
\item[41] Ame Vennema, \textit{Address, in Rutgers College: The Celebration of the One Hundred and Fiftieth Anniversary of its Founding as Queen’s College} 45, 46 (J. Volney Lewis et al. eds., 1917). Vennema was the former President of the General Synod. He was also, at the time of his address, the President of Hope College. \textit{Id.} at 45; see also \textit{supra} note 24 (discussing Hope College). He devoted part of his talk to greetings from Hope, bringing:

\begin{quote}
[T]o our older sister our most respectful salutations and felicitations upon her one hundred and fiftieth birthday anniversary . . . Born of the same mother, moved by the same spirit, fostered by the same care, confronted by the same problems, struggling with and surmounting similar difficulties, it is easy for one who knows us both to note the family resemblance.
\end{quote}

A fine spirit of helpful reciprocity has always characterized the relations between the two sisters. Before we had risen to the dignity of a college we sent to you the graduates of our Academy [Hope had begun as a secondary school] that you with your better facilities might carry forward in them the work we had begun . . . . On the other hand, men whom you had so well prepared have rendered valuable service in laying the foundation and rearing the superstructure of our educational system . . . . I cannot imagine a situation that would interfere with the cordiality of the relations between Rutgers and Hope through the coming years.

\textit{Id.} at 47–48.
\end{footnotes}
over Rutgers' new and complicated identity, Vennema characterized the loosening of ties with the church as merely a sign of the church's recognition that Rutgers had "attained sufficient stability and maturity to stand upon its feet and shoulder responsibility for its own conduct."\textsuperscript{42}

Meanwhile, Rutgers and the State repeatedly adjusted their relationship, trying out various solutions, pushed along by political forces as well as a series of commissions over the years that studied and restudied the matter. The tide went back and forth. State money was rarely adequate, but Rutgers never quite managed to raise enough private money either. A State Board of Regents tried to exert control, but met resistance. President John Martin Thomas in the late 1920s pushed to transform Rutgers into a true state university, but the Board of Trustees removed him. More generally, they successfully resisted efforts to turn Rutgers over to the State.

One particular source of tension between Rutgers and the State in the 1920s and 1930s was the University's anti-Semitism.\textsuperscript{43} As one alumnus put it then, "Rutgers represented itself as a 'State College' when seeking money from the state, but acted on admissions as 'a private institution free to do as its authorities may see fit.'"\textsuperscript{44} In fact, as one pair of historians put it, the trustees "were willing to jeopardize the university's funding from public sources rather than abandon their own prejudice."\textsuperscript{45}

With all that, when the University commemorated its 175\textsuperscript{th} anniversary in 1941, Princeton president Harold Dodds could still celebrate how at Rutgers "the lion of public support has been able to lie down in peace with the lamb of private management."\textsuperscript{46} He said, "Rutgers is unique,"\textsuperscript{47} but he also stressed how this arrangement affirmed the ideals of higher education in a democracy. At the same convocation, former Rutgers president William Demarest offered the invocation, thanking God for the school's "ever enlarging work, for the long line of faithful trustees and teachers, for the great succession of those sent forth to serve God and their fellow men."

\textsuperscript{42} Vennema, supra note 41, at 46.
\textsuperscript{43} Michael Greenberg & Seymour Zenchelsky, Private Bias and Public Responsibility: Anti-Semitism at Rutgers in the 1920s and 1930s, 33 Hist. of Educ. Q. 295 (1993).
\textsuperscript{44} Id. at 312.
\textsuperscript{45} Id. at 318–19.
\textsuperscript{46} Harold Willis Dodds, Response for Delegates, in One Hundred Seventy-Fifth Anniversary Convocation: Exercises Commemorating the Founding of Rutgers as Queen's College 1766–1941, 13, 14 (1942) [hereinafter Anniversary Convocation].
\textsuperscript{47} Id. at 15.
“Continue Thou Thy favor,” he continued, “that through the years to come we may not fail to serve well each day and generation.”

Time moves on. Some change came in 1945. The University continued to struggle with its complicated history and mixed identity. Then the University and the State negotiated a new dispensation enshrined in the Rutgers Law of 1956.

The Rutgers Law established a new Board of Governors to manage the University, with the State appointing six of its eleven members. But the Law also left the Board of Trustees with several crucial powers. It advises the Board of Governors. Its consent is necessary to the appointment of the University President. It appoints, from its members, the five remaining members of the Board of Governors. It retains responsibility over the University’s pre-1956 and some of its post-1956 private assets. Finally, the Trustees can pull those assets out if they conclude that the State has crossed certain red lines, including interfering with aspects of Rutgers’ essential self-governance.

The Rutgers Law was not just a statute, but also a legislative contract. As will be explained in Part IV of this Article, any substantial legislative amendment to that contract requires the approval of both the Board of Governors and the Board of Trustees.

One last piece of the story; in 1947, New Jersey adopted a new constitution, creating an unusually strong executive and an invigorated and streamlined judiciary, partly to overcome the sectional conflicts that have

49. 1945 N.J. Laws, ch. 9 (codified as amended at N.J. Stat. Ann. § 18A:65-26 (West 2013)) (designating Rutgers as the State University of New Jersey, impressing its property “with a public trust for higher education for the people of the State,” and declaring that the State and the Trustees of Rutgers College “covenant and agree” that the Rutgers educational facilities would be utilized by the State as an “instrumentality of public higher education,” and that the State would appropriate “just and reasonable sums” to utilize the facilities and “purchase” educational services from Rutgers). The Act specified that it would only go into effect if the trustees accepted its provisions and amended the Rutgers charter accordingly.
53. Infra text accompanying notes 239–250.
traditionally frustrated progress in the State.\textsuperscript{54} In the late 1940s and early 1950s, in the service of that same political vision, Rutgers absorbed existing schools in Newark and Camden, thus becoming—crucially—a statewide, as well as, the State University.\textsuperscript{55} The campus in Camden now includes a law school founded in 1926,\textsuperscript{56} a college, graduate departments, business and nursing schools, and a wealth of scholarly centers and enterprises.

In 2012, though, struggles over identity, authority, and money exploded again.

III. THE SIX-MONTH BATTLE TO SAVE RUTGERS–CAMDEN

The plan to merge Camden into Rowan emerged from a commission appointed by the Governor in 2011 to study the state of medical education in New Jersey.\textsuperscript{57} The Commission’s work did not seem relevant to us; other than a School of Nursing, there is no medical education on the Camden

\textsuperscript{54} We take this argument from John Farmer, Jr., Rowan-Rutgers Merger Puts Local Political Interests Ahead of the State, NJ.COM (June 6, 2012), http://blog.nj.com/njv_guest_blog/2012/06/rowan-rutgers_merger_puts_loc.html. Farmer was the Dean of the Rutgers School of Law–Newark and the New Jersey Attorney General. He now serves as Rutgers University General Counsel. See also BARBARA G. SALMORO & STEPHEN A. SALMORO, NEW JERSEY POLITICS AND GOVERNMENT: THE SUBURBS COME OF AGE (3d ed., 2008). See generally ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION (2d ed. 2012).

\textsuperscript{55} No less than the creation of a strong governor and attorney general and a centralized and independent judiciary, the designation of Rutgers as the state university of New Jersey was intended to create an institution powerful enough to counter the centrifugal forces of local and regional interests that, for most of New Jersey’s history, had frustrated every effort to achieve greatness as a state.

Farmer, supra note 54. Dean Farmer’s column, written in the midst of the struggle over the fate of Rutgers–Camden, forcefully argued that the merger plan, even in its later watered-down incarnation, would have “balkanize[d] Rutgers in the service of local and regional interests” contrary to the aspiration and political vision embodied in the 1947 Constitution. \textit{Id.} That argument is compelling. At least in retrospect, though, it also illustrates a certain ironic tension in the political vision of the 1947 Constitution, after all. \textit{See infra} text accompanying notes 106–108. Governor Christie’s original intention to affect the amputation of Rutgers–Camden from Rutgers and its absorption into Rowan by an executive reorganization plan subject only to a legislative veto was justified by the argument that New Jersey’s unified-executive form of government left no room for independent state bodies (or state universities) outside the purview of the statute authorizing the governor to shuffle around the departments of state government. We deal with that argument \textit{infra} Part IV. and in the text accompanying notes 170–172 and 187–190.


\textsuperscript{57} Barer Report, supra note 5.
campus. However, several months before its report was due, the Commission’s charter was apparently expanded to consider whether the educational resources in Southern Jersey could be more effectively utilized.\textsuperscript{58} An interim report from the Commission issued on September 20, 2011, made no recommendations regarding Camden, but noted that “the Committee plans in the next phase of its work to consider whether a new combination of public higher education assets in Southern New Jersey is potentially the best way for New Jersey to support and improve public medical education in Southern New Jersey and the vitality of the region.”\textsuperscript{59}

Perhaps that should have raised red flags. The idea of splitting up Rutgers into three distinct, though still federated regional units, each of which would in turn absorb some units of the UMDNJ, had been floated ten years earlier as part of another study of medical education in the state.\textsuperscript{60} That plan also had its critics, but the University embraced it.\textsuperscript{61} Negotiations over its implementation collapsed at the last moment, however, when it became clear that the cost of doing it correctly would be prohibitive.\textsuperscript{62} Nevertheless,

\begin{itemize}
\item \textsuperscript{58} See id. at 2 ("The Committee notes that the scope of its task at the time of the Interim Report’s release was expanded by Governor Christie to allow it to consider an integration of higher education assets in southern New Jersey, beyond, but in service to, medical education."). Id.
\item \textsuperscript{59} Id. at 46.
\item \textsuperscript{61} See Proposal to Restructure New Jersey’s Public Research Universities, RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, http://web.archive.org/web/20041205215109/http://ruweb.rutgers.edu/restructure/home.shtml (last visited Mar. 9, 2014); Committees Weigh in on Restructuring, RUTGERS THE STATE UNIVERSITY OF NEW JERSEY, http://urwebsrv.rutgers.edu/focus/article/Committees%20weigh%20on%20restructuring/1198/ (last visited Mar. 9, 2014) (university web sites dealing with anticipated reorganization). Although some on the Rutgers–Camden campus were skeptical of the Vagelos plan, it never provoked the same sort of immediate organized and sustained opposition as the 2012 proposal. For one thing, while the plan divided the Camden and Newark campuses from New Brunswick, it contemplated that the three new universities would remain in a sort of federal relationship with some central administration and centralized functions, and it appeared as negotiations proceeded that all three institutions would retain a common “University of New Jersey” name. Vagelos Report, supra note 60, at ii. In addition, none of the campuses, including Rutgers–Camden, would be taken over by an alien institution; to the contrary, each unit would absorb part of UMDNJ. Id. Most affirmatively, from the point of view of many on campus, the plan promised to give Rutgers–Camden the sort of autonomy and enhanced financial resources that it had long sought. Id. at 65.
\item \textsuperscript{62} See Marcia A. Karrow, Task Force Meeting of Legislative Task Force on Higher Education and the Economy 23 (Dec. 19, 2006) (noting that implementation of reorganization plan would cost “anywhere from a $1.3 billion to a $2 billion”); Testimony of Richard J.
in light of poor economic conditions in the state,\textsuperscript{63} coupled with a Governor sworn to eliminate wasteful spending,\textsuperscript{64} we assumed that any similar proposal would be doomed from the start.\textsuperscript{65}

Although virtually no one on the Camden campus was aware that a takeover by Rowan was even under serious consideration,\textsuperscript{66} two months before the Commission publically announced its recommendations, Rowan

\begin{quote}
Goldstein, Chief Executive Officer, New Jersey Council of Teaching Hospitals, at 110 (reorganization “plan was studied extensively and was ultimately dismissed, because it was judged to be too expensive, costing, then, in excess of a billion dollars, and too difficult to accomplish.”) (copy on file with Rutgers Law Journal).


\textsuperscript{64} In October 2010, Governor Christie famously cancelled plans for a new Hudson rail tunnel on the grounds that the state could not afford it. The decision forfeited billions in federal and Port Authority subsidies for the project. Patrick McGeehan, \textit{Christie Halts Train Tunnel, Citing its Cost}, N.Y. TIMES (Oct. 7, 2010), http://www.nytimes.com/2010/10/08/nyregion/08tunnel.html?_r=0.

\textsuperscript{65} The origins of the Barer Report provision for the takeover of Camden by Rowan go back to 2010. \textit{See Barer Report, supra note 5}. In December 2010, a Commission on Higher Education headed by former Governor Thomas Kean issued a study of merging UMDNJ into Rutgers. There was no mention of Camden in the body of the report, but an attached Appendix Q stated the following:

The concept below reflects many ideas we received regarding the future of Cooper Medical School of Rowan University and its relationship with other institutions of higher education in southern New Jersey. We present it here to contribute to the discussion we encourage to continue on this important matter.

\textit{N.J. Higher Educ. Task Force, The Report of the Governor’s Task Force on Higher Education} (2010), available at http://higheredtaskforce.rutgers.edu/pdf/20101201_high_edu.pdf. The Appendix goes on to sketch out the concept of merging Rowan and Rutgers, concluding that “[c]ombining Rowan University and Rutgers Camden to create a significant new Research University in South Jersey would be the most important step the State could take toward providing adequate higher education for this region.” \textit{Id.} at 128.


\textsuperscript{66} The Barer Commission spoke with only one official on the Camden campus—Chancellor Wendell Pritchett—and that consultation occurred on December 1, 2011, late in the process. \textit{Barer Report, supra note 5}, at 9; \textit{see Minutes of Rutgers Board of Governors Meeting, Dec. 14, 2011}, at 13 (copy on file with Rutgers Law Journal). To the best of our information, no other dean, faculty member, or student on the Camden campus was interviewed by the Barer Commission.
went so far as to hire consultants to study how to implement the takeover. The plan called for the complete absorption of Camden into Rowan University. It was, from their perspective, a done deal.

What we did not know—and they apparently did know—was that Camden was the price the political leaders had assessed for giving Rutgers something it desperately wanted: a new medical school in New Brunswick picked up through the dissolution of UMDNJ.

Enmity between Rutgers and South Jersey politicians had been growing for several years. Two events in particular seem to have hardened that hostility, culminating in the merger demand. First, in 2009, the Rutgers administration failed to act on a proposal for Rutgers–Camden to acquire a proposed medical school at Cooper Hospital in Camden. As a result, the Cooper medical school became part of Rowan University. That acquisition

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70. One of the explicit goals of McCormick’s presidency was the reacquisition of the medical school attached to UMDNJ, which Rutgers relinquished control over in 1971 (UMDNJ subsequently grew into a full-scale medical university with additional, distinct units). McCormick’s contract with Rutgers provided a bonus to him should he meet three goals: acquisition of a medical school, getting an educational bond initiative on the ballot, and raising $140 million in donations to the university. As a result of meeting the first two goals, the Board of Governors awarded McCormick a $66,667 bonus upon his resignation in December 2012. Kelly Heyboer, Rutgers Board OKs $66k Bonus for Former President, N.J.COM (Dec. 15, 2012), http://www.nj.com/news/index.ssf/2012/12/rutgers_board_oks_66k_bonus_fo.html.

71. The administration’s claim that they were studying the proposal was, after some point, apparently perceived by Cooper officials as a rejection of it.

72. See Executive Reorganization Plan 02–2009 (2009), available at http://uco.rutgers.edu/umdnj-fin-stmt-fy-2013 (transferring School of Osteopathic Medicine to Rowan University); Ted Sherman, How Camden Got a New Medical School, N.J.COM (Feb. 1, 2012), http://www.nj.com/inside-jersey/index.ssf/2012/01/building_strong_medicine.html ("The state had already authorized money for a new building in 2002 under the Camden Revitalization Act. But UMDNJ passed once again. And Rutgers, also approached a second time, said no, according to Sheridan."); See generally, Bob Braun, Rutgers–Camden medical school situation is personal, as well as political, N.J.COM (June 18, 2012),
severely taxed the resources of Rowan.\textsuperscript{73} Rutgers’ resistance must have appeared even more galling in light of its subsequent attempt to obtain a medical school in New Brunswick. Camden is not where the University wanted to invest and expand.

Then, later in 2009, the New Brunswick administration again undermined a local initiative in regard to a new $55 million dormitory building. Local Rutgers administrators, working with South Jersey politicians, had developed a plan for the county to finance and own the structure, which Rutgers would then lease for student housing.\textsuperscript{74} The plan was vetoed late in the process by New Brunswick. Although the dorm was ultimately constructed, it was built on New Brunswick’s terms, without regard for the complex plans put in place locally.

These two events significantly bolstered the argument that Camden needed more autonomy from New Brunswick, and without that autonomy, Camden would never receive its fair share of state resources. This became the central narrative of merger proponents.

Merger proponents, then, must have been a least somewhat perplexed by the unanimous and passionate opposition that the proposal generated on the Camden campus. From the politicians’ perspective, they were redressing a...
long-standing slight to both the campus and the people of South Jersey. 75 By building a rival university to Rutgers in the south, they were crafting a win-win solution. 76

What merger proponents failed to understand, of course, was that a university is not simply the sum of resources, jobs, and contracts. Even though Rowan and Rutgers—Camden are roughly the same size, 77 they have distinct educational identities. Rutgers is a major research institution, on every one of its campuses. Faculty are appointed and promoted based largely on their potential to engage in significant scholarship, and they are attracted to the university because of the resources committed to supporting that research. Similarly, the students who come to Rutgers enjoy the prestige and recognition of the Rutgers brand. The prospect of losing that Rutgers identity for both students and faculty was a devastating blow.

Rowan, in contrast, is not primarily a research institution, 78 and it does not enjoy the same level of national brand recognition. Perhaps the best proof

75. Rowan Merger Questions in Need of Answers, THE WHIT (Nov. 2, 2011), http://www.thewhitonline.com/rowan-merger-questions-in-need-of-answers/ (“On Oct. 25, Interim President Dr. Ali Houshmand confirmed to a room full of people that the merger will be occurring at Rowan University.”).

76. See Jessica Bautista & Jessica Driscoll, Sweeney: Details Still Scarce on Rowan, Rutgers—Camden Merger, NJ.COM (Feb. 5, 2012), http://www.nj.com/gloucester-county/index.ssf/2012/02/sweeney_details_still_scarce_o.html (“I don’t think there has to be any losers here at all,’ Sweeney emphasized. ‘Everything is in the details—how you handle the contracts, how you treat people fairly.’”); George Norcross Interview with the Star-Ledger, STAR-LEDGER (May 14, 2012), available at http://video-embed.nj.com/services/player/bcpid1949044328001?bctid=1638821893001&bckey=AQ---AAAAPLMIP6E-,BRrRHTAlHjRdo2SPuH4yjTxdlZDIA (“I’m not certain why a good plan and a good idea or a good concept, let me put it that way, a great concept, didn’t gain tremendous support.”); Kelly Heyboer, Officials Discuss Compromise in Rutgers-Rowan Merger: A Combined Institution With an Independent Board, NJ.COM (May 14, 2012), http://www.nj.com/news/index.ssf/2012/05/officials_reach_compromise_in.html.

In contrast to the politicians, the academic consultants retained by Rowan to provide a merger roadmap clearly foresaw the passionate opposition by Camden faculty: [W]e believe a significant portion of the faculty and staff at Rutgers—Camden will express their unhappiness with what the Advisory Committee has recommended. We suspect the rhetoric used by those opposed to the integration of Rutgers—Camden into the New Rowan University will be strong and perhaps even personal.


77. Barer Report, supra note 5.

78. A provision of the legislation that ultimately became part of the law was the designation of Rowan as “a public research university.” N.J. STAT. ANN. § 18A:64M-3 (West 2013). This was presumably included to give Rowan increased prestige and access to a greater level of state funding.
of that was the effect of the merger announcement on Rutgers–Camden Law School admissions. From the day after the Governor’s announcement to the passage of the final bill, Rutgers Law School in Camden received only twenty-five percent of the applications for admission it received at that time the previous year. It enrolled an entering class of less than half its normal size.

In the days following the Governor’s announcement, sentiment on the campus shifted from shock to highly energized and effective mobilization. On February 2, 2012, Chancellor Wendell Pritchett broke ranks with university administration and condemned the plan as a bad deal.79 Pritchett had initially issued a non-committal response,80 urging everyone to study the Commission recommendations.81 His courageous departure from that stance had a galvanizing effect on the nascent political organizing. All of the professional and intellectual resources of the campus were deployed to create a remarkable grass-roots opposition to the merger. Rutgers AAUP-AFT provided funding, logistical support, and the unequivocal solidarity of the membership. The union was matched by the faculty-governing bodies on the other Rutgers campuses, who quickly opposed the proposal.82


80. Pritchett’s letter to the campus community on January 25, 2012, stated, “This proposal rightfully addresses the critical need for increased support of higher education in our region. At the same time, decisions such as these require, by law, the approval of Rutgers’ two governing boards. I expect and welcome a full and robust discussion about this proposal.” E-mail from Wendell E. Pritchett, Chancellor, Rutgers University–Camden, to the Campus Community, Rutgers–Camden and the University of Medicine and Dentistry Advisory Committee (Jan. 26, 2012, 4:24 PM EST), available at http://news.rutgers.edu/medrel/camden/chancellor-pritchett-20120126/.

81. See Shelly, supra note 79.

82. See, e.g., Rutgers University Senate Statement on Proposed Merger of Rutgers–Camden with Rowan University (Jan 27, 2012), http://senate.rutgers.edu/RutgersCamdenSeparationLinks.html; Letter from Anastasia Mann and Janice Fine, Professors, Eagleton Institute, to Rutgers Board of Governors (Feb. 16, 2012) (copy on file with Rutgers Law Journal); Letter from Carol Allemand, Chair, Rutgers New Brunswick Dep’t of French, to Ralph Izzo and Richard McCormick (undated) (copy on file with Rutgers Law Journal); Letter from Joan W. Bennet, Vice President, Promotion of Women in Science, Engineering, and Mathematics, to Ralph Izzo (Mar. 21, 2012) (copy on file with Rutgers Law Journal); Statement of Dorothy L. Hodgson, Professor and Chair, Rutgers Dep’t of Anthropology (Feb. 21, 2012) (copy on file with Rutgers Law Journal); Resolution of Rutgers–New Brunswick Graduate School of Education Faculty (Feb. 10, 2012) (copy on file with Rutgers Law Journal) (passed unanimously); Resolution of General Council of the
Camden faculty formed two local groups: the Campaign to Save Rutgers Camden, a not-for-profit corporation which raised over $70,000 to buy advertising, and the Committee to Save Rutgers Camden, which led the political and press efforts as well as research and rapid response initiatives.

Working groups at the Law and Business Schools developed sophisticated analyses of the legal and financial aspects of the merger.\textsuperscript{83} While the law professors delved into intricacies of the University’s relationship to the state (much of which is included here), corporate and finance experts combed through bond indentures and financial reports to calculate the enormous cost of the proposed merger.\textsuperscript{84} Others focused on the different educational profiles of Rowan and Rutgers,\textsuperscript{85} consortium-model alternatives to the merger, and the adverse impact of a merger on the City of Camden.\textsuperscript{86}

Two leaders of the Committee to Save Rutgers Camden, law professor Adam Scales and historian Andy Shankman, developed an impressive expertise in reaching out to reporters to educate them about the harmful effects of the merger. Op-ed pieces written by Camden faculty, coordinated by Scales and Shankman, appeared almost daily.\textsuperscript{87} Shankman and Scales

\begin{footnotesize}
\textsuperscript{83} As one reporter put it, “the pushback from, among others, the high-octane attorneys in that Rutgers–Camden building called the School of Law was apparently as unanticipated as the deep public anger displayed in all those ‘Keep Rutgers in South Jersey’ yard signs and bumper stickers.” Kevin Riodan, Rutgers Boards Demand Role in Any Merger, PHILLY.COM (June 8, 2012), http://articles.philly.com/2012-06-08/news/32102117_1_rutgers-camden-higher-education-boards.

\textsuperscript{84} See, e.g., Transcript of Testimony of Arthur Laby & Gene Eugene Pilotte, New Jersey Senate Higher Education Committee Hearings (June 14, 2012) (copy on file with Rutgers Law Journal); Eugene Pilotte, Financial Implications of the Proposal to Merge Rowan University and Rutgers–Camden (copy on file with Rutgers Law Journal).


\textsuperscript{86} See, e.g., Statement of Daniel Cook to New Jersey Senate Higher Education Committee and the Assembly, Joint Hearing at Rowan University (Mar. 19, 2012).

\end{footnotesize}
testified in numerous public hearings and led delegations to visit almost
every editorial board in the region. This, in turn, generated overwhelming
editorial and op-ed opposition to the merger. The New Jersey State Bar

4, 2012), http://www.courierpostonline.com/article/20120605/OPINION02/306270002/State-
can-t-just-change-Rutgers-Camden-s-governance; Allan R. Stein & Robert F. Williams,
Rutgers Reorganization Proposal is Hasty and Will be Costly, NJ.COM (June 14, 2012),
http://blog.nj.com/njv_guest_blog/2012/06/rutgers_reorganization_proposa.html [hereinafter
Stein & Williams, Rutgers Reorganization Hasty]; Dan Cook, Rowan Plan is Wrongheaded,
PHILLY.COM (Jan. 31, 2012), http://articles.philly.com/2012-01-31/news/31008629_1_rowan-
camden-campus-institution; John Wall, The Political Pillaging of Rutgers–Camden,
PHILLY.COM (June 15, 2012), http://articles.philly.com/2012-06-15/news/32255561_1_rowan-
camden-higher-education-rutgers-university; Julie A. Ruth & Maureen Mornin, Rowan
Rutgers Realignment: Rutgers Brand Would Be Harmed, NJ.COM (Feb. 12, 2012),
http://www.nj.com/gloucester/voices/index.ssf/2012/02/rowan_rutgers_realignment_
rut.html.

Rutgers–Camden Professor of History Emeritus Howard Gillette was a particularly
prolific contributor to the public discourse. See, e.g., Howard Gillette, Remember the Kean
Task Force Report!, RUTGERS UNIV.–CAMDEN (Mar. 27, 2012),
http://gillette.rutgers.edu/2012/03/27/remember-the-kean-task-force-report/; Howard Gillette,
What’s Behind the Takeover Proposal? We’re Getting Closer to the Truth, RUTGERS UNIV.–
CAMDEN (Apr. 3, 2012), http://gillette.rutgers.edu/2012/04/03/whats-behind-the-takeover-
proposal-were-getting-closer-to-the-truth/; Howard Gillette, The View from Glassboro: What
the Takeover Could Mean, RUTGERS UNIV.–CAMDEN (Feb. 21, 2012),
http://gillette.rutgers.edu/2012/02/21/the-view-from-glassboro-what-the-takeover-could-
mean/; Howard Gillette, Rowan’s Battle Plan to Take Over Rutgers–Camden, RUTGERS UNIV.
–CAMDEN (Apr. 2, 2012), http://gillette.rutgers.edu/2012/04/02/rowans-battle-plan-to-
takeover-rutgers-camden/; Howard Gillette, How Rowan Would Effect the Takeover of
Rutgers–Camden, RUTGERS UNIV.–CAMDEN (Mar. 22, 2012), http://gillette.rutgers.edu/
2012/03/22/how-rowan-would-effect-the-takeover-of-rutgers-camden/; Howard Gillette, In
Sweeney Bill, It’s Takeover by Another Name, RUTGERS UNIV.–CAMDEN (June 5, 2012),
http://gillette.rutgers.edu/2012/06/05/in-sweeney-bill-its-takeover-by-another-name/.
88. Before passage of the final bill, virtually every press outlet in the region came out
against merger. See, e.g., The Record: No Rutgers Merger, NORTHJERSEY.COM (June 28,
Milou, Rory O’Brien McElwee, Adam Scales, Andrew Shankman, & Sanford Tweedie, Joint
Board Wrong for Rowan and Rutgers–Camden, COURIER-POST,
http://www.courierpostonline.com/article/20120627/OPINION02/306270002/Joint-board-
wrong-Rowan-Rutgers-Camden; STAR-LEDGER Editorial Board, Try Again on Flawed Rutgers
Plan, NJ.COM (June 24, 2012), http://blog.nj.com/njv_editorial_page/2012/06/try_again_on_
flawed_rutgers_pl.html; Herald News: State University Plan Is Being Rushed,
159831775_State_university_plan_is_being_rushed.html; Bob Braun, Rutgers to be
Dismembered in Political Power Play, NJ.COM (June 21, 2012),
http://blog.nj.com/njv_bob_braun/2012/06/braun_rutgers_to_be_dismembered.html [hereinafter
Braun Dismembered]; Not Quite There on Rowan-Rutgers Merger Plan, NJ.COM (June 6, 2012),
http://www.nj.com/gloucester/voices/index.ssf/2012/06/editorial_not_quite_
there_on_r.html; Editorial, Don’t Erase Rutgers from South Jersey, COURIER-POST (May 26,
Association went on record in opposition,\textsuperscript{89} and the influential New Jersey Law Journal editorialized against the "hostile takeover."\textsuperscript{90}

In an attempt to diffuse rising student anger over the proposal, merger proponents quickly supported and touted a resolution by the Rutgers Board of Governors guaranteeing current Rutgers students a Rutgers diploma upon graduation.\textsuperscript{91} Merger proponents appeared baffled that the guarantee did little to soften opposition.\textsuperscript{92}

The Board of Governors meeting at which that resolution was passed is also notable as one of several remarkable and deeply revealing events of political theatre that occurred throughout the course of the controversy. The regular meeting took place on February 15, 2012, by a coincidence of the schedule, on the Rutgers–Camden campus. An "overflow crowd of 600"\textsuperscript{93} showed up, revved up by an outdoor rally beforehand. When, after an hour of routine business, the Board finally turned to receiving comments on the merger plan, Senator Sweeney was the first to speak. He tried to defend the


proposal, with few specific arguments, and was met with loud retorts from the crowd. He seemed genuinely surprised that his assurance that current Rutgers–Camden students would graduate with a Rutgers degree did not go over well. He also suggested, vaguely, that he was not particularly concerned whether the relationship between Rutgers–Camden and Rowan ended up being a full-scale merger or something less, as long as his goals were met. State Senator Donald Norcross, George Norcross’s brother, also spoke. He was on record supporting the merger proposal, and would continue to be a major player, but on this occasion took a more neutral position, floating the idea—which would become an important theme in subsequent revisions of the plan—that, even with a merger of some sort, the “Rutgers brand” would remain in Camden.94

All the remaining statements at the meeting were from vehement opponents of the proposal: administrators, faculty, undergraduate and graduate students, including foreign students, alumni, and Camden residents. Some of the statements were deeply analytic, while others were more emotional. They spoke from different perspectives and made different, if overlapping, arguments, but their combined effect was powerful. The imbalance between supporters and opponents was stunning.

At this event, and throughout the controversy, the students were invaluable. They understood social media and the art of early twenty-first century mobilizing. One student designed a webpage that included a petition, which grew to 14,000 names.95 They organized highly visible rallies that drew excellent press coverage. Over spring break, the union organized massive student lobbying in Trenton.96

Camden alumni were also deeply committed to the survival of the campus and were fully engaged in the opposition. They rented a billboard on a trailer, took out ads, and distributed lawn signs, which were displayed throughout the region.97

For several months, opponents of the merger continued to dominate the public discourse, focusing on the haphazard and thinly justified basis for the

94. Id.
Barer Commission recommendations, the unexamined, and potentially astronomic cost of the merger, the devastating impact the merger would have on Rutgers as a whole, the Rutgers–Camden campus and the City of Camden, and the importance of preserving educational choice in South Jersey. These arguments stood unanswered.

The few public legislative hearings that were held were dominated by merger opponents. One good early example—another dramatic instance of the sort of political theatre that punctuated the controversy—was a joint hearing of the State Senate and Assembly’s Higher Education Committee held at the Rowan University campus on March 19, 2012. The hundreds of Rutgers folk who drove the some twenty-mile route to Rowan expected that this hearing, held on what they assumed would be the opposition’s home turf, would have a very different dynamic than the previous month’s Board of Governors meeting on the Rutgers–Camden campus. But the two events ended up feeling very similar. Again, several titled eminences—Senate President Sweeney, Rowan President Ali Houshmand, the mayor of Glassboro, and the like—spoke in favor of the plan. But the vast majority of the fifty or so witnesses argued against it, including Rutgers–Camden Chancellor Pritchett, faculty, students, alumni, and others. Though the session took place on the Rowan campus, only a few speakers appeared from the rank-and-file Rowan community, and those few were split; some were either strongly opposed for their own reasons, neutral, or skeptical. The Rowan faculty senate ultimately concluded, in a formal resolution, that joint

100. As noted earlier, the Law School applications dried up overnight.
101. One particularly cogent argument asserted that if the same Rowan degree would be available in both Glassboro and Camden, there would be little incentive for students to opt for Camden. Howard Gillette, Merger Proposal Will Harm Camden’s Effort to Recover, RUTGERS UNIV.–CAMDEN (Feb. 5, 2012), http://gillette.rutgers.edu/2012/02/05/merger-proposal-will-harm-camdens-effort-to-recover/.
governance was not in their best interest.\textsuperscript{104} The legislators spoke of their own frustration at the plan's lack of details, including the absence of cost estimates.\textsuperscript{105}

The imbalance at this hearing, and the merger supporters' failure even to attempt a ground game, enhanced the opposition's credibility and boosted our morale. But it was also baffling and even disturbing. Were the political forces pushing the plan unprepared just for the reaction? Or were they so confident they could get their way that they saw no need to appeal to public opinion? The latter possibility loomed, because as encouraging and effective as the grass roots efforts were in moving public sentiment, we faced two seemingly insurmountable obstacles. First, the Governor and others, including Rutgers officials, had intimated that the Governor could implement the Barer Commission proposals by an Executive Reorganization Plan—and a memorandum from the New Jersey Office of Legislative Services confirmed that view.\textsuperscript{106} (Thus, it is likely that part of the reason merger proponents were caught flat-footed in the battle for public opinion was their expectation of implementation by an Executive Reorganization Plan). By statute, the Governor arguably had the power to reconfigure any units in the Executive Department without prior legislative approval.\textsuperscript{107} The plan would go into effect unless the Legislature passed a veto resolution within sixty days.\textsuperscript{108} Given the alignment of political forces, there was no possibility of such a legislative veto. Thus, our political organizing was, to a large degree, falling on deaf ears. The Governor did not need popular support to issue a plan, and the Legislature would not have to justify passing any legislation; mere inaction would do the trick.

A second and far more troubling obstacle was that even if the Governor did not have the power to reconfigure Rutgers pursuant to an Executive Reorganization Plan, the takeover appeared to enjoy strong bipartisan support, and the politicians seemed determined, if necessary, to pass legislation before the July 1, 2012 deadline announced by Governor Christie.

\begin{footnotes}
\footnotetext[105]{See Leslie Brody & Patricia Alex, \textit{Concerns About Merger's Cost Dominate at Hearings}, HERALD-NEWS, Mar. 20, 2012. Legislators and witnesses raised broader questions about the cost of the entire reorganization plan at a separate Assembly Budget Committee hearing held the same day in Newark. \textit{Id.}}
\footnotetext[106]{See infra note 164 and accompanying text.}
\footnotetext[107]{As it turned out, the Governor’s power does not extend to agencies that are “in,” but not “of” Executive departments. See infra notes 182–194 and accompanying text.}
\footnotetext[108]{N.J. STAT. ANN. § 52:14C-1 \textit{et seq.} (West 2009); See infra notes 163–69 and accompanying text.}
\end{footnotes}
Even though public opinion was running strongly against the takeover, political leaders did not have to fear that support for the takeover would have political costs because of the buy-in from the other party.

What we needed was a legal challenge, and preferably one that could be asserted in federal court, insulated from the perceived political influence of merger proponents. We explored the possibility that transferring the faculty to a different university was in violation of tenure and collective bargaining agreements, but there was little precedent for such a challenge. Two developments, however, radically changed the legal and political landscape.

On February 23, 2012, the Trustees of Rutgers University met for the first time to consider the implications of the Barer Commission Report, and they were not happy. In advance of the Trustee’s meeting, campus organizing focused on persuading the Trustees that the divestiture of Camden was ill-conceived and would have enormous costs to the campus, the University, the city and the state. Letters and petitions were sent, and a highly capable delegation from the campus travelled to New Brunswick to make the case in person.

Perhaps the most fortuitous circumstance was that the Chair of the Governor’s Commission, Saul Barer, was a member of the Board of Trustees, and he was present at the meeting. Dr. Barer was repeatedly pressed for an account of why Camden needed to be given away, and what the costs of that divestiture would be. He had no answers.

109. See Eagleton Inst. of Politics, Rutgers-Eagleton Poll: New Jersey Voters Remain Opposed to Rutgers-Camden/Rowan Merger (Apr. 3, 2012), available at http://eagletonpoll.rutgers.edu/polls/release_04-03-12.pdf (finding opposition to merger was at 59% while support was at 19%).

110. Sweeney reportedly remarked to several merger opponents that he was confident that the governor’s influence over the courts would prevent any successful challenge to the legislation.


113. The board heard testimony from twenty individuals, including faculty, students, alumni, and administrators. See generally Rutgers-Camden Merger Information: Two-Minute Statements of Faculty, Staff, and Students at the Rutgers Board of Trustees Meeting on the Merger in New Brunswick (Feb. 23, 2012) (copy on file with Rutgers Law Journal).

114. Minutes of the Trustees Meeting for Feb. 23, 2012 (statement of Dr. Saul Barer, Chair of the Governor’s Commission).
Dr. Barer's testimony included the following summary. Dr. Barer stated that the objective for Rutgers was clear: to take Rutgers to the next level to become a great university through incorporating a medical school. Dr. Barer explained that in the south it was decided that, for economic reasons, a critical mass needed to be developed to serve the underserved portion of the state. At the conclusion of Dr. Barer's remarks, Mr. Schmidt asked the trustees for questions or comments for Dr. Barer.

To answer a trustee's question regarding the change in scope of the Advisory Committee, Dr. Barer stated that the Committee began focusing beyond medical education after the release of the Advisory Committee's interim report. He further stated that he received a written request from Governor Christie regarding the new directive.

In response to a trustee's question concerning the research performed in connection with the recommendations for Rowan University and Rutgers–Camden, Dr. Barer stated that there were no written summaries of the findings. He stated that the committee spoke with many faculty members from both schools and reviewed statistics and reports from Rowan University and Rutgers–Camden. He added that the Advisory Committee did not review the financial aspects since it was not a part of Governor Christie's charge to the Advisory Committee. Dr. Barer stated that the Advisory Committee intended that the financial aspects would be addressed in the next phase of the planning.

A trustee requested a reading of the communication between the Advisory Committee and Governor Christie in order to have a clearer understanding of how the events transpired before the release of the Advisory Committee's final report.

In response to a question concerning other alternatives to merging Rowan University and Rutgers–Camden, Dr. Barer stated that the Advisory Committee considered various options for Rutgers–Camden. Dr. Barer stated that it is difficult for a major university to nourish three branches and this was the main reason to suggest creating a major university in South Jersey. He stated that Rutgers could then focus on New Brunswick and Newark while incorporating UMDNJ.

To answer a trustee's question, Dr. Barer stated that the Advisory Committee considered the current diminished funding to state higher education and that, if the Advisory Committee's recommendations succeeded, there would be two state research institutions competing for funding.

Dr. Barer added that from a financial perspective, the Advisory Committee qualitatively considered the financial benefit to Rutgers through potential federal grants, the investment of health care companies, and the significant potential to attract clinical research dollars to Rutgers.
A stunned President McCormick, appearing before a meeting of the Camden faculty the following day, conceded that the unanticipated opposition of the Trustees completely altered the landscape. According to McCormick, the Trustees were prepared to pass a resolution on the spot rejecting the Camden plan, but because they were meeting in a closed session, no votes were permitted. Although President McCormick had apparently gotten a buy-in for the plan from the Board of Governors, or at least its leadership, the Trustees had by all accounts been left out of the loop.

In response to a trustee’s question, Dr. Barer explained that the Advisory Committee’s recommendations were offered as a package. He reported that in the recommendation, the Advisory Committee did not allow for the parties involved to select from the package piecemeal.

To answer a trustee’s question regarding Dr. Barer’s dual position as a Trustee and a member of the Advisory Committee, Dr. Barer stated that he unequivocally believes that the recommendations are the best for the citizens of New Jersey and for Rutgers. He added that the Advisory Committee’s recommendations would take Rutgers to new heights—nationally and internationally.

A trustee asked Dr. Barer to detail the implications to taxpayers in New Jersey and what the taxpayers will be facing if the Advisory Committee’s recommendations did not succeed. In response, Dr. Barer reiterated that the Advisory Committee did not address the quantitative aspects of the recommendations. The Advisory Committee believed this would be handled with each entity individually. Dr. Barer again reiterated that the Advisory Committee was charged with providing a vision and a structure for higher medical education and higher education that would serve the people of New Jersey most effectively.

In response to a trustee’s question, Dr. Barer stated that the people who are best qualified to delineate the expenses involved in the recommendations are the individual institutions involved. He added that the Advisory Committee’s role is done, and stated that the implementation of the recommendations are the responsibility of the individual institutions.

Id.

115. The meeting with the Camden faculty was not recorded.
116. Id.
President McCormick’s inattention to the Trustees was, perhaps, understandable. As we have discussed and will explain in more detail below, since the passage of the Rutgers Act of 1956, the role of the Trustees had become largely ceremonial. Governance of the University in the 1956 Rutgers Act was vested almost entirely in the Board of Governors, a majority of whom are appointed by the Governor.\textsuperscript{118} Although the Trustees were the legal owners of some of the University’s property,\textsuperscript{119} their only role in the operation of the University was consultative.\textsuperscript{120} They did, however, possess one critical power which proponents of the takeover failed to notice: the Trustees were the successors in interest of the private Rutgers College Board of Trustees.\textsuperscript{121} Under the 1956 Act, any transfer of University property obtained before 1956, and any substantial changes to the governance of the University, required Trustee approval.\textsuperscript{122} Moreover, under the United States and New Jersey Constitutions, the Legislature was prohibited from unilaterally impairing this “contract.” This statutory/constitutional guarantee, discussed in detail below, became the lynchpin of the opposition to the takeover.

Proponents of the takeover plan quickly scrambled to circumvent Trustee opposition. Cooper Hospital retained a lawyer, William Harla, to prepare an exhaustive, twenty-seven page analysis of title to the land that the Camden campus is situated on.\textsuperscript{123} He concluded that since most of the property had been acquired after 1956, the Trustees had no power to block the transfer of that property to Rowan.\textsuperscript{124} The memorandum, however, ignored the broader power of the Trustees to approve any significant change to University governance.\textsuperscript{125}

On March 8, 2012, a second highly fortuitous development further complicated the takeover. The Appellate Division of the New Jersey

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\textsuperscript{119} Id. § 18A:65-13.
\textsuperscript{120} Id. § 18A:65-26(1), 24.
\textsuperscript{121} Id. § 18A:65-13.
\textsuperscript{122} Id. § 18A:65-27(ii)(b)(4).
\textsuperscript{123} Memorandum from William Harla & Megan E. Sassaman (May 9, 2012) (copy on file with Rutgers Law Journal).
\textsuperscript{125} See Statement of Allan Stein, Professor, Rutgers University School of Law–Camden, to Joint Meeting of Rutgers Bd. of Governors and Bd. of Trustees (June 6, 2012) (copy on file with Rutgers Law Journal).
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Superior Court held that the Governor’s power to reorganize the executive department under an Executive Reorganization Plan did not extend to agencies, like the Council on Affordable Housing (COAH), that were “in but not of” the executive department of state government. As we will develop below, the Governor’s authority over Rutgers is, if anything, weaker than his authority over the agency affected in the COAH case. Thus, COAH seemed to shut the door on implementing the Barer Report through executive reorganization.

COAH seemed to catch the takeover proponents off guard. Faced with the necessity of passing legislation in the face of enormous political pushback, proponents of the takeover began intensive negotiations with affected stakeholders. George Norcross disclosed a compromise plan on May 14, 2012, and Senator Sweeney introduced a bill reflecting those terms on June 1, 2012. Under the proposed legislation, Camden would have continued to operate as part of Rutgers, but governance would have been vested in a “joint Rowan-Rutgers Board,” which would have the final say as to the operation of both the Rowan and Camden campuses. Rutgers was further directed to enter into a ninety-nine year lease of its campus to the Joint Board for one dollar per year. Mr. Norcross candidly admitted that he still wanted to achieve, indirectly, the integration of the two schools that did not seem politically viable to achieve directly.

127. Infra notes 173–176 and accompanying text; see generally Kevin Shelly, Rule Seen to Discourage Rowan-Rutgers Merger, COURIER-POST, Feb. 21, 2012, at 11A.
129. See Heyboer, supra note 128.
131. Id. § 19; see also infra, notes 245–49 and accompanying text.
133. George Norcross made the following remarks in a meeting with the Editorial Board of the Star-Ledger on May 14, 2012, the details of the compromise plan were reported in the media:
I believe there needs to be a single entity. But I also believe there are other forms of mergers that can take place that preserve the identity of the institutions, each in their
The compromise thus secured for the campus its ability to continue operating as part of Rutgers, albeit under a governance scheme that could well erode its autonomy. Ironically, the terms of the proposed legislation seemed only to harden Trustee opposition, and, indeed, contributed to loss of support in the Rutgers Board of Governors as well.¹³⁴ Unlike the outright divestiture of Rutgers–Camden proposed by the Barer Report, the proposed legislation called for Rutgers–Camden to operate as a unit of Rutgers University while depriving the University of the power to govern the operation of the campus. To the Boards, this “franchise” arrangement was the worst of all possible worlds.

At a June 6, 2012, joint meeting of the Board of Trustees and Board of Governors, both Boards endorsed a set of “principles” that committed the University to maintaining complete control over the Camden campus, thus placing the University as a whole in direct opposition to the Camden plan.¹³⁵ The Boards then appointed a joint committee to represent the University in negotiations with the Legislature.

The sponsors of the legislation, however, appeared undeterred. First, they inserted into the bill a “non-severability clause”: if any part of the legislation was deemed invalid, then no other part of the legislation would

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own, and can create, a self-governing entity that doesn’t exist today including in Newark, because I don’t think you take the Rutgers name and discard it.

I support the merger because you have to have a singular entity with self-governance in each of these regions. You must have it. You can’t have things governed from New Brunswick. Newark has to be governed by Newark and its community. South Jersey’s got to be governed by its community . . .

I think there is a way, a specific way, in order to make this work, and to address many of the issues that have been brought up. The way this has been perceived, presented, or otherwise, um, created a very bad circumstance. And yes, I am trying to put Humpty Dumpty back together again because the city of Camden’s future is at stake.

Heyboer, supra note 128.


take effect. In other words, Rutgers was not going to get their medical school unless they were willing to let go of Camden. The Governor reiterated this message in public comments.

The sponsors then fast-tracked committee consideration of the bill. One day of hearings was scheduled in both the House and Senate Committees on Higher Education. These events echoed earlier hearings in their dramatic imbalance between a few official witnesses supporting the plan and a cascade of vehement witnesses in opposition. This time, though, representatives of both Rutgers’ Boards told the Legislature, in no uncertain terms, that any changes to Rutgers’ governance required their assent, and they were deeply troubled by the plans for Camden. Other witnesses, including representatives of the Rutgers Board of Governors, testified that changes in the governance of Camden would violate the terms of university bonds, the refinancing of which would cost hundreds of millions of dollars. Bill sponsor Donald Norcross was pressed repeatedly to provide cost estimates for the legislation. He had none, but promised the


139. Matt Katz, One Legislative Panel Backs Rutgers Overhaul, PHILLY.COM (June 16, 2012), http://articles.philly.com/2012-06-16/news/32255500_1_rutgers-camden-rutgers-university-higher-education-committee (discussing testimony of Board of Trustees Member Lora Fong).


committee that he would provide numbers before the bill was brought to the floor. The legislation nonetheless cleared both committees with no dissenting votes. As an editorial in the Star-Ledger put it:

Even by Trenton standards, Monday’s hearing on the promising plan to reshape higher education was an embarrassment.

No one was able to answer the most basic question: How much would it cost? And yet, the plan is up for a vote in the full Senate tomorrow. This is not how government should work. A plan hatched behind closed doors is rushing to the finish line.

With only days before the scheduled floor vote, two additional events seemed to turn the tide. First on June 17, 2012, the Board of Trustees


On June 25, 2012, three days before the bill’s passage, the Assembly Budget Committee made the following statement:

Given the complexities of the bill and the entities to which it applies, and the absence of significant information to assess the bill’s fiscal impact, the OLS notes the possibility that the bill could cause significant unanticipated costs to Rutgers University, Rowan University, University Hospital, and the State, as well as potential savings and benefits.


143. Nurin, supra note 136.

144. Higher Ed Merger Plan is Promising, but It’s Not Ready Yet, NJ.COM (June 20, 2012), http://blog.nj.com/njv_editorial_page/2012/06/higher_ed_merger_plan_is_promi.html; see also Braun Dismembered, supra note 88.
announced that it had retained the services of attorney Neil Katyal. Katyal is a nationally-known partner at Hogan Lovells, a former acting Solicitor General of the United States, and law professor at Georgetown University. He had succeeded in persuading the United States Supreme Court that several aspects of the detention of terrorist suspects at Guantanamo base were illegal. This seemed to send a signal: we intend on asserting our legal rights.

Then, on June 27, 2012, the Office of Legislative Services ("OLS"), a non-partisan office designed to provide legal advice to the Legislature confirmed the University's assertion that under the 1956 Act, University consent was required for several features of the proposed legislation, and that the failure to obtain that consent would be in violation of the Contracts Clause of the Federal Constitution. Senator Sweeney's office scrambled to secure a second memo from attorney Harla, which again asserted that no University consent was required to implement the legislation, and again, ignored the fact that the bill called for significant changes in university governance, which would require Board consent under the 1956 Act.

We may never know whether the OLS memo and appointment of Katyal were the cause, or whether the bill proponents simply became worn down by the constant stream of critical op-ed pieces, editorials, and overwhelming popular opposition, but the dynamics of the negotiations seemed to change fundamentally at that point.


147. Letter from Anita M. Saynisch, Principal Counsel, New Jersey State Legislature, Office of Legislative Services (June 27, 2012) (redacted copy on file with Rutgers Law Journal) [hereinafter Saynisch Letter]. The addressee of the letter, presumably a member of the Assembly, has been redacted.

148. See infra note 151 and accompanying text.


150. See supra note 122.

151. Negotiations reportedly almost fell apart days before the final vote. Several accounts suggested that the impasse was resolved by a legal memo from Mr. Harla, which concluded that amendments to the bill removing the obligation of Rutgers to lease land to Rowan obviated the requirement that Trustee approval be obtained. Darryl Isherwood, Rutgers
Details of the final negotiations remain sketchy. The University at this point was suffering from something of a power vacuum in its leadership. President McCormick had announced his resignation, and President Barchi had not yet come on board. University General Counsel John AlGer had left to assume a college presidency. Steven Weissman, an attorney for the faculty union, reportedly took the laboring oar in crafting the final legislation.

The final bill, radically altered from the prior version, was released on the day of the legislative approval. It gave Rutgers–Camden a near-total victory. The authority of the "joint board" was limited to overseeing health science education. Both Rutgers and Rowan were required to fund, 

Trustees’ Approval No Longer Required for Reorganization, According to Legal Analysis, POLITICER NJ (June 28, 2012), http://www.politickernj.com/58185/rutgers-trustees-approval-no-longer-required-reorganization-according-legal-analysis. The article stated that, "[t]he opinion takes on greater significance today after the Trustees all but scuttled negotiations with the Legislature by dropping a last-minute set of amendments. Talks broke down, sources said, when the trustees introduced amendments that would have changed labor protections already negotiated into the bill." Id.

A later story further credits the second Harla memorandum with breaking the logjam: All it apparently took to get the Rutgers Board of Trustees to back off its threat of taking the whole thing to court and sweeping away an OLS report that said the Trustees must sign off on any merger was a legal opinion by Bill Harla of the DeCotiis firm, which represents Cooper Health System, that it was irrelevant to the final version of the bill. William Harla Legal Opinion Lauded in Politifax, DECOTISS NEWS, http://www.decotiislaw.com/news/2012/07/10/william-harla-legal-opinion-la (last visited Mar. 10, 2014).

Other sources suggest that it was the intervention of the Governor’s office that brought the parties back to the bargaining table. Given the fact that the final bill conformed to the principles endorsed by both Boards, the claim that the Harla memo brought the parties back to the table is not plausible.


153. President Barchi’s appointment was announced on April 11, 2011, but his term did not begin until September 1, 2011. Richard Edwards was named acting President on June 20, 2011. Minutes of Rutgers Board of Governors Meeting 2 (June 20, 2012). Richard Edwards was named acting President on June 20, 2011. Id.

154. Alger officially resigned his office on June 30, 2012, to assume the Presidency of James Madison University. Id.


indefinitely, joint medical-science education. The Governor signed the legislation on August 21, 2012, and the Rutgers Boards passed resolutions of approval on November 19, 2012. On May 6, 2013, pursuant to the practice that was followed in connection with the implementation of the Rutgers Act of 1956, both Rutgers Boards received a declaratory judgment confirming that its agreement to the 2012 legislation was consistent with their fiduciary obligations. The nerds had won.

Camden had survived as an integral part of Rutgers University.

IV. THE LEGAL ARGUMENTS

A. Governor’s Executive Branch Reorganization Authority

As we have emphasized, the fight for Rutgers-Camden involved a combination of inspired activism, important alliances, luck, and law. In this Part of the Article, we burrow into the legal dimensions of the struggle, both to document the past and to nail down some of the principles that Rutgers and other institutions might need to deploy again in the future.

Initially, the Governor and others intimated that the Governor would be able to effect his planned changes in New Jersey higher education himself through his authority under the 1969 Executive Reorganization Act, and

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157. *Id.* § 64M-38e. This statutory requirement, of course, could be changed by a future Legislature.

158. *Id.* § 65-14.7.


160. The resolutions included the requirement that the Boards seek a declaratory judgment that their approval of the legislation was consonant with their fiduciary obligations. *Minutes of Joint Rutgers Board of Governors and Trustees Meeting* (Nov. 19, 2012) (copy on file with Rutgers Law Journal).

161. Trs. of Rutgers Coll. in N.J. v. Richman, 125 A.2d 10, 26–27 (N.J. Ch. Div. 1956); *see also* note 219 *infra* and accompanying text.


an opinion from the OLS supported that claim of authority. This raised, rather immediately, the question of whether gubernatorial authority under that act would, in fact, permit such a higher-education reorganization. Later on, the question evolved into whether the Legislature could accomplish the merger by statute. We felt that if gubernatorial action, which would stimulate immediate litigation, could be avoided and the battleground shifted to the Legislature, we would at least have the opportunity to participate in committee hearings, compromise negotiations, and lobbying. This would shift the burden from those opposing the transfer under the Governor’s executive reorganization authority to those supporting the transfer in the Legislature.

In 1969, the Legislature delegated to the Governor authority to reconfigure the structure of state executive agencies in the 1969 Executive Reorganization Act. This legislation gave the Governor the power to reorganize “[a]ny division, bureau, board, commission, agency, office, authority or institution of the executive branch. . . . ‘Reorganization’ means a transfer, consolidation, merger, co-ordination, authorization, or abolition. . . .” The Act includes specific requirements for the content of a reorganization plan, so any proposal by the Governor would have had to be carefully scrutinized in light of these requirements. Once the plan is submitted to the Legislature, if sixty days pass without the adoption of a joint resolution rejecting the plan (presumably in its entirety) it has the force of law. The sixty days runs even if the Governor submits the plan on the last


165. N.J. STAT. ANN. § 52:14C-2 (West 1970). This legislative delegation of authority was upheld against a state constitutional separation-of-powers challenge in Brown v. Heymann, 297 A.2d 572 (N.J. 1972). The New Jersey Supreme Court was careful to note that “the Governor is limited to rearranging what already exists.” Id. at 10. This may at least partially explain why the Barer Commission recommended that Rowan take over Rutgers rather than vice versa. To the extent that the politicians wanted to be able to direct resources to South Jersey programs outside of the control of the Rutgers administration in New Brunswick, the transfer of Rutgers resources to Rowan at least arguably “rearranged what already exists.” Creation of a new South Jersey institution anchored by the former Rutgers–Camden campus would have been much more difficult to implement under the executive reorganization authority.

166. N.J. STAT. ANN. § 52:14C-3 (emphasis added).

167. Id. § 14C-7.
day of the legislative session. As noted above, this process places the burden on those who oppose a reorganization plan to obtain a joint resolution rejecting it. This is a very different process from the one leading to the positive enactment of a law.

The key question for our purposes was whether Rutgers is “of the executive branch.” Although it might appear that the operation of a university has little to do with the governance function of the executive branch, the issue was complicated by article V, section IV, paragraph 1 of the New Jersey Constitution, which requires all “executive and administrative offices, departments, and instrumentalities of state government to be allocated to twenty principal departments. Each principal department shall be under the supervision of the Governor.”

Rutgers was designated as an instrumentality of the state in the 1956 Rutgers Act. This raises two questions: (1) Are “state instrumentalities” necessarily instrumentalities of “state government” for purposes of the New Jersey Constitution? and (2) even if an entity is in the executive branch for purposes of the New Jersey Constitution, does that mean that it is of the executive branch for purposes of the Executive Reorganization Act?

It was our contention that Rutgers is not part of state government, and thus, is outside of the executive department altogether. The purpose of article V, section IV, paragraph 1 of the New Jersey Constitution, was to consolidate the Governor’s authority over disparate parts of state government. This is part of New Jersey’s “strong governor” model. The executive branch implements the laws, under the direction and supervision of the Governor. Although Rutgers University performs or delivers governmental services it does not govern. Rutgers University simply has no role in implementing the laws enacted by the New Jersey Legislature, nor does it have any role in governing the state. Thus, the appellate division has held that, despite its status as an “instrumentality of the state,” “Rutgers was


established as the State University of New Jersey, and was not administratively located within an Executive Branch department.”

The whole point of the 1956 Rutgers Act was to place the University outside the control of the political branches. The state pledged in that Act to insulate the university from “partisanship,” and “the powers granted to the corporation or the boards . . . may be exercised without recourse or reference to any department or agency of the state.” Any change in the governance structure must be approved by the Rutgers Board of Trustees, only a minority of whose members are appointed by the Governor. Although the Governor appoints a majority of the Board of Governors, they serve for fixed terms and are removable only for cause. The Governor has no direct operational control over the University whatsoever. The president of the University reports to, and serves at the pleasure of the Rutgers Board of Governors, not the Governor.

Moreover, if the University were considered within the executive branch, the Rutgers Act would have unconstitutionally placed University governance beyond the authority of the Governor, who, as a constitutional matter, must exercise control over all executive agencies. Thus, in order for a court to consider Rutgers an instrumentality of state government for purposes of the New Jersey Constitution it would have to deem the entire Rutgers Act unconstitutional.

However, that question was effectively mooted by the appellate division’s fortuitously timed decision in the COAH case, invalidating the Governor’s attempt to abolish the Council on Affordable Housing pursuant to an Executive Reorganization Plan. On March 8, 2012, the appellate division held that there are independent agencies “in” the executive branch for purposes of the New Jersey Constitution, which are not “of” the

174. Id. § 65-28 (emphasis added).
175. Id. § 65-27(I)(b)(4).
176. Id. § 65-15.
177. Id. § 65-14.
178. Id. § 65-14(b)(ii).
179. Id. § 65-19.
180. Id. § 65-31.
181. N.J. CONST., art. V, § 4, para. 2; see Shelly, supra note 127.
executive branch for purposes of the Executive Reorganization Act; if the Legislature has not given the Governor operational control over an agency, the agency is considered outside the scope of the Governor’s reorganization power.

COAH dealt with the highly controversial topic of affordable housing. On the heels of the famous Mt. Laurel decisions, the Legislature created the Council on Affordable Housing, to implement the Mt. Laurel mandate of affordable housing. The legislation designated the Council as “in, but not of” the Department of Community Affairs. The Governor, under the statute, had little control over the agency’s operation. The COAH board is appointed by the Governor, but serves for fixed terms. Under the statute, the governing board of COAH is made up of representatives of each stakeholder group, and the political and regional affiliations of board members must be balanced. Based on these, and several other relevant considerations, the court concluded that the Governor’s statutory authority under the 1969 Act simply did not reach an agency such as COAH.

The COAH court held that the legislative designation of an agency as “in but not of” complies with the constitutional requirement that the executive branch be organized into no more than twenty departments under the Governor’s control. But that designation also insulates, at least partially, the Agency from direct gubernatorial control. The COAH decision noted that the Legislature uses this “in but not of” designation as “the most common means of identifying those agencies that the Legislature intended to be independent and outside the scope of Executive control—including the Executive’s reorganization power . . .”

The court went on to note that the constitutional convention had recognized “quasi-independent” agencies such as the Public Utilities Commission, and that soon after the adoption of the 1947 Constitution the New Jersey Supreme Court had held that agencies could be “in but not of” a department and still maintain their independence. The court observed that New Jersey’s Executive Reorganization Act was modeled on a similar

184. In re Plan, 38 A.3d at 621.
185. Id.
186. Id. at 622.
187. Id. at 629.
188. Id. at 628 (citing New Jersey Tpk. Auth. v. Parsons, 69 A.2d 875 (N.J. 1949)).
federal statute that had not been applied to independent federal agencies.\footnote{Id. at 634–38.} Finally, the court cautioned that an interpretation of the Executive Reorganization Act permitting the Governor to reorganize or abolish independent “in but not of” agencies would raise significant constitutional separation-of-powers concerns.\footnote{Id. at 630.}

Rutgers University is, if anything, far more independent than the Council on Affordable Housing. Rutgers was restructured in 1956 to, among other things, continue its autonomy and avoid political and gubernatorial control.\footnote{See supra notes 170–80 and accompanying text. In late 2013, the New Jersey Supreme Court affirmed the appellate division’s decision. In re Plan for Abolition of Council on Affordable Hous., 70 A.3d 559 (N.J. 2013); see also Brittney A. Cafero, Separation “of” Powers: N.J. High Court Strikes Down Governor’s Reorganization Plan Abolishing COAH, RUTGERS J.L. & PUB. POL’Y REGION IN REVIEW BLOG (Nov. 8, 2013), http://rutgerspolicyjournal.org/separation-%E2%80%9Co%E2%80%9D-powers-nj-high-court-strikes-down-governor%E2%80%99s-reorganization-plan-abolishing-coah.} The appellate division in Keddie v. Rutgers\footnote{669 A.2d 247, 251 (N.J. Super. Ct. App. Div. 1996).} summarized the numerous instances in which Rutgers was found to be independent of the State:

The University is capable of being sued and has the power to sue, and thus, is not considered part of the State in regard to the New Jersey Contract Liability Law . . . . Rutgers is not considered an arm of the State within the meaning of the Eleventh Amendment’s suit immunity . . . . Nor is it considered an alter-ego of the State for purposes of civil rights legislation, but rather is a “person” subject to action under 42 U.S.C.A. § 1983. Further, its faculty are not considered employees of the State for purposes of conflict of interest laws. (citations omitted).\footnote{Id. In regard to the applicability of the conflicts-of-interest statute to Rutgers faculty, the appellate division in Keddie cited In re Determination of the Exec. Comm’n on Ethical Standards, 561 A.2d 542, 548 (N.J. 1989), which held that a Rutgers University professor in a legal teaching clinic is not to be regarded as a State employee for purposes of the conflicts-of-interest law. Keddie, 669 A.2d at 251.}

The court also stated that “whether or not a particular law is applicable to Rutgers depends upon consideration of both the law’s general purpose, as well as the purposes of the Rutgers law.”\footnote{Keddie, 669 A.2d at 251.} Neither the 1956 Rutgers, The State University Act, nor the 1969 Executive Reorganization Act indicates in any way that Rutgers University is part of the executive branch and even
could be, constitutionally, subject to the Governor’s limited, delegated reorganization authority.

Rutgers’s independence from executive control is reinforced by the Legislature’s clear statements in the 1994 Higher Education Restructuring Act. In that Act, the legislature enacted a massive reorganization of higher education in New Jersey. This 175-page law included, among others, three extremely important sections:

Allocation of institutions to Department of State:

For the purposes of complying with the provisions of Article V, Section IV, Paragraph 1 of the New Jersey Constitution, any State institution of higher education . . . or other department of State government shall be allocated to the Department of State upon the effective date of this act. Notwithstanding this allocation, any such institution shall be independent of any supervision or control of the Department of State or any board, commission or officer thereof and the allocation shall not in any way affect the principles of institutional autonomy established in this act.

Section 26 of the Act carried over N.J. STAT. ANN. § 18A:3B-26, which provides that:

This act shall not be construed to impair any vested rights, grants, charter rights, privileges, exemptions, immunities, powers, prerogatives, franchises or advantages continued, granted or obtained by Rutgers, The State University under the “Rutgers, The State University Law,” N.J.S. 18A:65-1 et seq., nor shall this act be construed to impose additional powers, duties or responsibilities upon Rutgers, The State University not contained within N.J.S. 18A:65-1 et seq.

The very last section in this long, complex Act consisted of the following important Section 306:

Specific enabling legislation required for reorganization transfer:

197. Id. § 18A:3B-26.
For the purposes of any reorganization or transfer after the effective date of this act, any commission, council, board or other body created pursuant to this act, and any public entity transferred or otherwise reorganized herein shall not be subject to the provisions of the “Executive Reorganization Act of 1969,” P.L. 1969, c.203 (C.52:14C-1 et seq.), but shall require specific enabling legislation.198

Merger proponents made much out of the fact that this last limitation on the Governor’s reorganization authority was focused primarily on administrators—commissions, councils, and boards199—not educational

198. Id. § 18A:3B-36. The last section of the 1994 Act, section 306 quoted above, was not in the original legislation, but was added as an amendment after a hearing before a joint meeting of the Senate and Assembly Education Committees on May 26, 1994. Apparently the impetus for the inclusion of this section, recommended by the two committees, was the following testimony by Edward Goldberg, the Chancellor of Higher Education, whose department was being abolished by the 1994 enactment:

One way of analyzing this bill to focus on the position to which the greatest power will flow under the bill as drafted, and that is the position of Governor: this Governor, the next Governor, and the next Governor.

....

I urge you to keep Higher Education and as one of the 20 principal departments of State government. If you think Higher Education is not worthy of that placement within New Jersey’s State government, I urge you to exempt the diffused, fragmented structure that will come out of S-1118 from the Executive Reorganization Act so that future reorganizations of Higher Education can’t be rushed through even faster than this one can.


199. See, e.g., William Harla, State Law Doesn’t Block University Merger Plan, COURIER-POST (Mar. 13, 2012), http://www.courierpostonline.com/article/20120314/OPINION02/303140007/State-law-doesn-t-block-university-merger-plan [hereinafter Harla, State Law Doesn’t Block Plan]. Interestingly, Governor Christie utilized the 1969 Executive Reorganization Act in 2011 to abolish the New Jersey Commission on Higher Education, created by the 1994 Act, and transfer its powers and duties to the Secretary of Higher Education, who reports to the Governor. This action seems clearly to have contravened section 306 of the 1994 Act, as quoted above. See Executive Reorganization Plan #005-2011 (June 29, 2011); see Saynisch Letter, supra note 147, at 5–6 (noting that this Reorganization plan “transpired notwithstanding” supra note 147).
institutions, with the exception of institutions “transferred or otherwise reorganized herein.” Because Rutgers was not transferred or reorganized under that statute, they argued, it was subject to the Governor’s authority.200

This argument bordered on the frivolous. Not only was Rutgers’s autonomy specifically preserved in section 26, but the argument is based on an absurd premise that the Legislature must have been more concerned with the autonomy of educational bureaucrats and administrators of the state colleges reorganized under the Act than it was about Rutgers. The far more persuasive account of that section is that no one ever thought Rutgers was subject to executive reorganization authority to begin with; the Act protects those institutions that it was, at the same time, allocating to the Department of State.201 Since Rutgers was not significantly affected202 there was no reason to be concerned that the Governor would assert Reorganization authority over it. The Act simply offered the state colleges some of the protections that Rutgers already had under the 1956 Rutgers Act.

The COAH decision seemed to stop in their tracks most of those who believed the Governor could reorganize Rutgers University on his own. The

200. A 2011 legal opinion rendered by the nonpartisan Office of Legislative Services in Trenton also concluded that a reorganization of Rutgers University to merge UMDNJ could be accomplished under the 1969 Executive Reorganization Act. Letter from Kelly to Senator Rice, supra note 164; see also Harla, State Law Doesn’t Block Plan, supra note 199. These views seemed to be given credit in state government circles in Trenton and Rutgers University officials in New Brunswick, while our views were ignored.

201. Rowan, however, was reorganized under the Act. Accordingly, even if Rutgers were not protected from the Executive Reorganization Act, use of that authority to reconfigure Rowan to include Rutgers–Camden would have been expressly prohibited under section 26 of the 1994 Higher Education Restructuring Act. See N.J. STAT. ANN. § 18A:3B-26.

202. There was also an argument that even if Rutgers was not “transferred” it was at least partially “otherwise reorganized” in the 1994 Act. Section 2 of the Act included a list of legislative findings, including a number of expressed concerns about the value and function of institutions of higher education, of course including Rutgers. Id. § 18A:3B-2. The main focus of these legislative findings is to indicate that institutions of higher education are valuable but underutilized, and that unnecessary state oversight and bureaucracy should be eliminated to permit such institutions to be responsible on their own for achieving the goals of higher education. See id. Section 3 of the Act, a definition section, includes Rutgers within the definition of “public research university.” Id. § 18A:3B-3. Section 6 provides a long list of powers and duties of the governing boards of institutions of higher education, of course including Rutgers. Id. § 18A:3B-6. The Department of Higher Education, to which Rutgers had been assigned, was abolished. See id. Section 7 of the Act established a new body corporate and politic, the New Jersey Presidents’ Council. Id. § 18A:3B-7. Each president of a public institution of higher education was made a member of this new council. Id. This would have been a new role for the Rutgers University President, whose duties were therefore “reorganized.”
Office of Legislative Services issued a new opinion, concluding now that reorganizing Rutgers was not within the Governor’s statutory authority. In the wake of the COAH decision, the Governor sought a stay of the decision in the New Jersey Supreme Court while review of the decision was sought under the Supreme Court’s discretionary jurisdiction. In June 2012, the New Jersey Supreme Court denied the motion for stay, further supporting (at least in the public’s mind) the argument that reorganizing Rutgers was not within the Governor’s statutory authority. Ultimately, more than a year after our own dispute was put to bed, the New Jersey Supreme Court, in a 5–2 decision, affirmed and amplified the appellate division's analysis. The court noted that even though there had been some unchallenged Executive Reorganization Act plans affecting independent agencies in the past, these could not serve as precedents for the proper interpretation of the Act. The court concluded that to abolish or reorganize an independent agency would require a bicameral lawmaking process equal to that used to create the independent agency in the first place. These conclusions, of course, apply with even greater force to Rutgers University, which is not only protected by its statutory independence but also its unique legislative contract status.

In retrospect, the appellate division’s fortuitous COAH decision added the element of luck to the already powerful rule of law arguments about the Governor’s lack of statutory authority to reorganize Rutgers University. The argument described in the next section—that the 1956 Rutgers, The State University of New Jersey Act created a “legislative contract” that could not be unilaterally modified by statute without the approval of both Rutgers’ Boards of Trustees and Governors—would have added, as noted earlier, substantially to the argument against the Governor’s statutory reorganization authority.


206. Id. at 578, 580.

207. Id. at 578–79.
B. The New Jersey/Rutgers University “Legislative Contract”

1. The Transition of Rutgers from Private to Quasi-Public

As discussed above, Rutgers, originally called Queen’s College, was founded by royal charter in 1766 as a Dutch Reformed institution. It was later designated as New Jersey’s land grant college in 1864, thus beginning a slow process of transition in its relationship with the State. Nevertheless, it operated largely as a private institution until the formal designation of the entire university as the State University of New Jersey in 1945.

In 1945, the Legislature enacted chapter 49, Laws of New Jersey 1945, declaring that the school be “designated as the State University of New Jersey to be utilized as an instrumentality of the State for providing public higher education and thereby to increase the efficiency of the public school system of the State.”

The 1945 Act declared that the Trustees of Rutgers College accept the Act and that “its property and educational facilities are impressed with a public trust for higher education for the people of the State.” This enactment did not convert Rutgers’ property into state property.

Section 6 of the 1945 Act declared that the State and Trustees “covenant and agree” that the Rutgers educational facilities would be utilized by the State as an “instrumentality of public higher education,” and that the State would appropriate “just and reasonable sums” to utilize the facilities and “purchase” educational services from Rutgers. The Act provided that it would not go into effect until the Trustees amended the Rutgers charter to conform to the Act and accepted its provisions. This 1945 law can be seen as beginning to forge a deal or bargain, literally a legislative contract, between the State of New Jersey and Rutgers University. This form of legal protection could be seen as analogous to the state constitutional provisions on higher education governance found in a few other states.

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208. See supra notes 17–20 and accompanying text.
210. Id. § 2.
211. Id. § 13.
Historian Richard P. McCormick (the father of President McCormick) described the impact of the 1945 Act:

Rutgers had now achieved legal recognition as the State University of New Jersey, seemingly bringing to a culmination an evolutionary process that had begun in 1864 with its designation as the land-grant college of New Jersey. It had also succeeded very largely in preserving its autonomy. To President Clothier the new relationship to the state was best described as a “partnership of two self-respecting and mutually respecting entities.” “The State has not taken over Rutgers,” he explained to the Trustees, “but it has now given Rutgers full recognition.” He envisioned increases in state appropriations both for operating expenses and for urgently needed buildings to enable Rutgers to meet its obligations as the State University in the critical years that lay ahead. But the question that remained to be answered was whether an autonomous university controlled by a Board of Trustees only a minority of whom were public appointees could, in fact, win support as a state university.213

After extensive further negotiations, the Legislature enacted the 1956 “Rutgers, The State University Law.”214 This 1956 Act, although slightly modified in later years, forms the current legal structure for Rutgers. The 1956 Act created a new Board of Governors that would have some overlapping membership with the Trustees, and share the “government, control, conduct, management and administration” of the University with the Board of Trustees.215 The Board of Trustees itself was continued and “reorganized and reconstituted” under the 1956 Act.216 It is the successor in interest to the original Trustees of Queens College.217 The Act’s effectiveness was made contingent upon its acceptance by the Board of Trustees.218 Prior

215. Id. §§ 5, 18, 21.
216. Id. §§ 2, 6.
217. Id.
218. Id. § 37.

This Act shall take effect, except in so far as hereinafter otherwise provided, upon the adoption by the Board of Trustees of the Corporation of a resolution accepting the provisions, benefits and obligations hereof, including the provisions changing its name and effectually amending its Charter, and the filing of a certificate of the adoption thereof in the office of the Secretary of State, provided, that if such
to such acceptance, the Board sought and received a favorable opinion from
a chancery judge, who wrote an exhaustive opinion reviewing Rutgers’
unique status and approving the Board’s proposed action in accepting the Act
as consistent with its fiduciary duties.219

Then, with respect to the 1956 Act, Dr. McCormick stated:

Ever since the early years of President Thomas’ administration the question
of the degree to which the state should participate in, or control, the
management of Rutgers had been a lively one, requiring frequent
consideration by the Board of Trustees and occasioning intermittent public
controversy. Now, persuaded that such a move was in the best interests of
public higher education in New Jersey and on the basis of certain
guarantees, the Trustees took the momentous step of governors on which
their representatives were in the minority. Not quite an agency of the state
and with its autonomy seemingly insured, Rutgers was to become something
more than an “instrumentality of the State” in its new role as Rutgers, The
State University.220

The current version of the Rutgers Act provides the following powers
and duties for the Board of Trustees: act in an overall advisory capacity;
control Rutgers properties, funds, and trusts vested as of 1956; control
certain properties, funds, and trusts received both before and after 1956
(continuing the recognition that Rutgers property, educational facilities, and
rights and privileges are impressed with a public trust for higher education
for the people of New Jersey); make available to the Board of Governors the
income from such properties and funds; have sole authority over the
investment of funds under its control; maintain an administrative staff and
pay expenses of its operation; be represented on various committees; 221 and
consent to any indebtedness incurred by the University.222

The 1956 Rutgers Act continued by declaring as a matter of public
policy that: “The corporation and the university shall be and continue to be

resolution shall not be adopted and such certificate be not filed before September 1,
1956, this Act shall thereupon become void and of no effect.

Id. This clause, making clear the contractual nature of the 1956 Act, was not
codified, so many were unaware of it.


222. Id. § 18A:65-25(e).
given a high degree of self-government and that the government and the
conduct of the corporation and the university shall be free of partisanship."223

This autonomy is further protected by section 28, which guarantees that
"the powers granted to the corporation or the boards . . . may be exercised
without recourse or reference to any department or agency of the state . . ."224

N.J. STAT. ANN. § 18A:65-27, part II provides a clear recognition that
the 1956 Act constitutes a legislative contract by specifying the
"consideration" provided for the State's use of Rutgers' property.225
Importantly, § 18A:65-4 states that nothing in the Act would interfere with
Rutgers' preexisting rights or privileges.226 Most significantly, the Trustees
are vested with the authority to hold the State to its promises: the law
provides that the Board of Trustees retains the right to "withdraw the use of
the properties and funds above described" if any one of several conditions
occurs without the consent of the Board of Trustees.227 These conditions
include renaming the University, not continuing Rutgers as the State
University, filling the office of president without the advice and consent of
the board, and a variety of specific statutory "self-government" provisions,
including those outlining the duties of the Boards of Trustees and
Governors.228

The New Jersey Supreme Court has thus clearly recognized that the
Rutgers Act is not simply a legislative plan, but rather a "contract between
the Trustees and the state" which resulted in the creation of "an autonomous
public university."229 Rutgers has accordingly been held not subject to public
bidding statutes applicable to state departments generally.230 Moreover, in a
recent decision, the New Jersey Supreme Court reiterated its view of the
independence of Rutgers University.231

223. Id. § 18A:65-27.
227. Id. § 18A:65-27(c).
228. Id. § 18A:65-27(b).
aff'd, 275 A.2d 441 (N.J. 1971); Richardson Eng’g Co. v. Rutgers, State Univ., 238 A.2d 673
(N.J. 1968).
careful analysis of this and several other cases concerning Rutgers University, see Jon C.
Dubin, The Rutgers Cases and the State of the Law of State Law School Clinical Programs, 65
We continued through press statements and op-ed pieces to state that because the 1956 Act was not an ordinary statute, but rather constituted a "legislative contract," it could not be amended by the Legislature unilaterally without the consent of the Rutgers boards. Again we were ignored in Trenton until the very last days of the legislative session.


Article I, Section 10 of the United States Constitution prohibits the states from passing any "law impairing the obligation of Contracts." A similar constraint is included in the New Jersey Constitution in Article I, Paragraph 7.

In Trustees of Dartmouth College v. Woodward, the United States Supreme Court held unconstitutional the legislation taking control of Dartmouth College away from the Dartmouth Board of Trustees. The Court held that the corporate charter granted by the King of England, which vested in the college "the right to govern the institution and to appoint their own successors," was a contract that was impaired by the passage of a state law creating a board of overseers appointed by the Governor. Not only is the Dartmouth College case directly on point for either the Governor's or the Legislature's forced severance of the Rutgers-Camden campus, but the nonconsensual merger legislation presented an even clearer case of an unconstitutional impairment of the obligation of contract. This is because the United States Supreme Court, as well as many other federal courts, has indicated that they should look with special scrutiny when a state attempts by law to impair its own contract. The legislation purporting to force the merger would have impaired the State of New Jersey's own contract, entered

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232.  Stein & Williams, Rutgers Reorganization Hasty, supra note 87.
235.  N.J. CONST. art I, § 7 ("The Legislature shall not pass any . . . law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made.")
236.  17 U.S. 518 (1819). See infra notes 262–75 and accompanying text.
237.  Id. at 643-44. See also U.S. Trust Co. v. New Jersey, 431 U.S. 1 (1977) (holding unconstitutional a New Jersey legislative repeal of a statutory covenant that prohibited Port Authority revenues from being used for mass transit).
into with Rutgers University in 1956. This is the worst kind of contract
impairment. Imagine if a state could form a contract and then simply breach
it by passing a law.

The Rutgers Act of 1956 similarly constitutes a contract with the State of
New Jersey, as previously recognized by the New Jersey Supreme Court. The
Trustees of Rutgers turned over operational control of the University to
the Board of Governors under the very specific conditions specified in the
1956 statute. These conditions protected the autonomy of Rutgers and
insulated it from excessive political interference, as outlined above.

Against this legal background, the merger legislation as originally
proposed would have substantially altered the governance of Rutgers
without consent of the University. It would have displaced the authority
exercised by the Board of Trustees and Board of Governors over the Camden
campus and replaced it with decision-making wholly outside of university
control. Specifically, it would have breached the promise of self-governance
guaranteed in the 1956 Act and placed control over the use of university
assets and programs in the hands of political appointees. It therefore would
have constituted an unconstitutional impairment of the contractual rights of
the Board of Trustees. The State cannot (nor can Rutgers) unilaterally alter
the conditions upon which Rutgers became the State University.

The so-called compromise bill introduced on June 1, 2012, called for a
change in the governance structure of both Rutgers–Camden and Rowan
rather than the complete transfer of Rutgers–Camden into Rowan as the
Barer Commission had originally proposed. The legislation called for the
creation of two new governing boards: a campus board to supervise the
operation of Rutgers–Camden campus, and a joint Rutgers/Rowan Board
with the ultimate decision-making authority over both Rutgers–Camden and
Rowan. The bill also mandated a 99-year lease of the Camden campus to
the new governing entity for $1 per year.

239. See supra text accompanying note 229.
240. See supra text accompanying notes 128–34.
j/bills/215/S2063/documents/NJD00034229/. Section 18(b) of the bill called for the creation
of a new Board of Trustees for the Rutgers University Camden campus. Id. § 18(b). The eight-
member board would be composed of a non-voting Chancellor sitting ex officio; two members
of the Rutgers Board of Governors; one member of the Rutgers Board of Trustees; and four
South Jersey residents appointed by the Governor. Id.

This campus board would have “general supervision over and shall be vested with the
conduct of Rutgers University–Camden.” Id. § 19. This included the power to “determine
policies for the organization, administration, and development of Rutgers University–
Camden”; “set tuition and fees”; direct, control and “disburse all moneys appropriated to
The new campus Board would have assumed virtually all of the governance currently exercised by the Rutgers Board of Governors. Indeed, the new board would have had the unprecedented power to incur debt, something the Board of Governors can do only upon the advice and consent of the Board of Trustees. 243 The Bill did not contemplate the Board of Governors having any role in the actual award of tenure and promotion, or the actual creation of academic programs; or the actual award of degrees. Its role was limited to promulgating standards. 244

Even more significant than the creation of a local campus board was the creation of a joint “Rowan University-Rutgers-Camden Board of Governors.”245 This joint board would have had “full authority over all matters concerning the supervision and operations of Rowan University and Rutgers University-Camden . . . .”246 It would have had plenary authority over all decisions made by both the Rutgers campus and Rowan boards. 247 It would also have had authority to “determine policies for the organization, administration, and development of curriculum and programs of Rowan University and Rutgers University-Camden.”248

The joint board would have been composed of two members elected from the Rutgers-Camden campus board, two members elected from the Rowan Board of Trustees, and three members appointed by the Governor. 249 Thus, a body completely independent from Rutgers University would exercise the ultimate governing authority over the Camden campus.

Rutgers University-Camden by the Legislature, including appropriations for fringe benefit costs, and all moneys received from tuition, fees, auxiliary services, and other sources”; direct and control the use of charitable gifts to the campus; “borrow money for the needs of Rutgers University-Camden”; “purchase all lands, buildings, equipment, materials, and supplies”; “appoint and fix the compensation of the chancellor of Rutgers University-Camden”; as well as “elect, appoint, remove, promote, or transfer all corporate, official, educational, and civil administrative personnel, and fix and determine their salaries.” Id.

242. Id. § 21. The bill also called for the transfer of all UMDNJ assets and liabilities to Rutgers, and created a new governing board for the Rutgers–Newark campus. Id. § 16. We will focus our attention primarily on the Camden provisions here, but there is no doubt that the other components of the Bill were equally incompatible with the governance structure established in the 1956 Act.

244. S. 2063 §22.
245. Id. § 25.
246. Id.
247. Id.
248. Id. § 26(b).
249. Id. § 25(a).
The initial bill thus constituted a wholesale displacement of Rutgers governance over the Camden campus. The campus would have operated as Rutgers in name only, with all decision-making exercised by non-Rutgers officials. Taken together, these three provisions alone constituted a wholesale repudiation of the University’s rights under the 1956 Act.

It thus should have come as no surprise when, on June 27, 2012, OLS issued an opinion confirming what we had been contending for months: the 1956 Rutgers Act constituted a “legislative contract” that could not be abrogated without the consent of both the Rutgers Trustees and Board of Governors:

It may be argued that there are provisions in the bill ... that would effectuate a substantial alteration of the Rutgers’ structure and would substantially alter “provisions for the essential self-government of the university.” This would be sufficient to trigger the Board of Trustees’ ability to withhold or withdraw use of the university’s properties and funds. In addition, certain provisions of the bill may infringe on the Board of Governors’ responsibility to govern, conduct, and manage the university. The responsibilities of the two boards were recognized as part of the “legislative contract” between the university and the State effectuated by the 1956 legislation. Accordingly, implementation of Assembly Bill No. 3102 (IR) would require the consent of both boards.  

As we discussed in more detail in Part III, the Rutgers Boards, which several weeks earlier had committed to maintaining existing governance over all campuses, now held all the cards. The final legislation, announced the same day as the final Senate and Assembly approval, gave the University everything it wanted: a new medical school and continued ownership of, and governing authority over, the Camden campus.

V. PERSPECTIVES ON THE STRUGGLE

So that is our story. The charge of this Part of the Article is to broaden our perspective on the drama. We will begin by zooming out conceptually and then zoom back in to think once more about law, politics, and their relation to each other. We will then conclude with some more specific questions about the place of faculty in the university community and in university self-governance.

250. Saynisch Letter, supra note 147.
In October 2011, well before the release of the report proposing Rowan University’s absorption of Rutgers–Camden, Ali Houshmand, Rowan’s President and a major booster of the plan, said of Rutgers and Rowan that “We [both] belong to the taxpayers.” That claim turned out to be radically incomplete. Rutgers, a “public” university, had some decidedly “private” rights.

Strictly speaking, this was the consequence of a special history whose full import neither Houshmand nor the plan’s political patrons could reasonably have appreciated. As Princeton President Harold Dodds had put it romantically but powerfully in 1941, “Rutgers is unique,” a distinct case of the “lion of public support” lying down “in peace with the lamb of private management.” The lion and the lamb had renegotiated their relationship in 1956. They then stared each other down in 2012. The lion roared, but eventually retreated. The lamb, after all, still had a charter granted by King George III.

Yet the Rutgers story is not merely a fluke. Other universities, including public universities, have seen struggles over governance and autonomy. At around the same time as the tail end of the battle at Rutgers, a more widely-publicized crisis flared at the University of Virginia when that University’s Board of Visitors dismissed the relatively new and popular University President with little explanation, then soon relented in the face of unified and sustained protests by faculty, students, and many alumni. The law, history, and politics were different, but the sense of an academic community rising up to define its own fate was strikingly similar. And in this age of austerity, growing political polarization, and declining respect for academic expertise, more and more state colleges and universities will surely see their

252. See ANNIVERSARY CONVOCATION, supra note 46 and accompanying text.
254. One of us, Perry Dane, happened to be attending a small academic conference at Harvard just as the Rutgers and Virginia stories were both at dramatic stages. He and a couple of colleagues from the University of Virginia were the only ones in the room constantly checking their smart phones or tablets for news from their home campuses, and they commiserated with the distinct sense that they understood each other the way nobody else in the room possibly could. Interestingly, the conference was on religion and law, and a major topic was the question of “freedom of the church,” which we will briefly take up infra at notes 292–297 and accompanying text.
autonomy and identity, not to mention their claims to money, continue to come under political assault.255

More abstractly, though, the story of the struggle to save Rutgers–Camden fits into two important theoretical conversations about legal nature and authority.

The first of these conversations concerns the pervasive fluidity of those nagging categories of “public” and “private.” The line between “public” and “private” arises in many contexts and is contested in most of them.256 Even the sheer multiplicity of uses is interesting.257 It is surely notable, for example, that the same term “public” gets used to describe “the public fisc,” “public company,”258 “public charities,”259 “public utilities,” “[English] public schools,”260 and “public displays of affection”; its significance in each of these uses is different, but also related.261 The notions of public and


257. See Martha Minow, Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-profit and Profit, and Secular and Religious, 80 B.U. L. REV. 1061, 1080 (2000) (“We use ‘public/private’ ambiguously, and refer simultaneously to the distinction between government and everything else on the one hand, and family and everything else on the other. At times, we put employment and market exchanges on the side of the private and, at other times, on the side of the public.”).

258. The term “public company” generally refers to firms whose shares are offered to the general public and traded in a stock market rather than remaining closely-held.

259. For a meditation on the complex and difficult implications of treating churches and other religious groups as “public” charities under federal and state law in the United States, see Perry Dane, The Public, the Private, and the Sacred: Variations on a Theme of Nomos and Narrative, 8 CARDOZO STUD. L. & LITERATURE 15 (1996) [hereinafter Dane, Variations].

260. The term “public schools” in England refers to a select number of prestigious independent, non-state-affiliated, grammar schools. See generally JONATHAN GATHORNE-HARDY, THE OLD SCHOOL TIE: THE PHENOMENON OF THE ENGLISH PUBLIC SCHOOL (1978) (surveying the history and culture of English public schools). The paradigmatic public schools are ancient, wealthy institutions, such as Eton and Harrow, though the category is now understood to sweep more broadly. See Blake v. Mayor and Citizens of the City of London, [1887] L.R. 19 Q.B.D. 79. In the United States and elsewhere, they would all be called “private schools.”

261. We will return to the connection among these meanings and usages infra notes 311–318 and accompanying text.
private, even at their most general, are not meaningless. But they are best understood as accent marks rather than sealed-off categories.

Even if we limit ourselves, however, to the line between state-controlled institutions and private actors—or more narrowly yet to the line between state-controlled and independent colleges and universities—the story is much more hazy than we often assume, not only because there are borderline cases, but because the categories themselves are complex and negotiable.

Recall the Dartmouth College case, discussed in Part IV. Though the case is most famous for defending private contracts against state impairment, the Supreme Court’s opinion actually took that principle for granted and devoted most of its attention to the claim that Dartmouth College’s charter was not a contract but a public act subject to revision in the public interest. That argument was not trivial, although the Court tried to minimize it. Indeed, the private or public character of our great early colleges were often

262. Supra notes 236–38 and accompanying text.

263. See Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 625 (1819) (“On the judges of this Court, then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the Constitution of our country has placed beyond legislative control; and however irksome the task may be, this is a duty from which we dare not shrink.”); id. at 627 (“It can require no argument to prove that the circumstances of this case constitute a contract.”); id. at 650 54 (finding that the contract with Dartmouth had been impaired).

264. See id. at 627–50. As the Court emphasized, the “parties in this case differ less on general principles, less on the true construction of the Constitution in the abstract, than on the application of those principles to this case and on the true construction of the charter of 1769.” Id. at 629. Specifically, the Court framed the question before it as follows:

If the act of incorporation be a grant of political power, if it create a civil institution, to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States.

But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves, there may be more difficulty in the case, . . . [and] it becomes a subject of serious and anxious inquiry whether those whom they have legally empowered to represent them forever may not assert all the rights which they possessed while in being . . . as respects the maintenance of the College charter.

Id. at 629–30; see also Rodney A. Smolla, The Constitution Goes to College: Five Constitutional Ideas That Have Shaped the American University 38–53 (2011).
not well-defined, to say the least, by modern standards. We noted in Part II that Queen’s College, which became Rutgers, was “private” at its founding in 1766. That is to say, it was not the State (or Colonial) University of New Jersey. But we also emphasized that it was only “private” “in the same complicated and anachronistic sense as the other Northeastern colonial colleges such as Harvard, Yale, and Princeton.” As historians of the period consistently emphasize, none of the early colonial colleges were purely “private”: their charters were granted by favor of the sovereign, they often received generous subsidies from the public treasury or from special state lotteries, and their governance structures often included colonial and, later, state officials. Moreover, the precise relationship between state and school often changed, or was fought over. In Connecticut, for example, Yale College was, at its founding, more self-sufficient than most of the other colonial colleges. But in the late eighteenth century, financial need as well as political and religious tensions with the state, led it to agree that the Governor, Lieutenant Governor, and six members of the Council of State—later six Senators—would sit on the Yale Corporation, its governing board. That arrangement ended in 1871, though the Governor and Lieutenant-

265. Supra notes 20–25 and accompanying text.

266. Supra note 20 and accompanying text. Ironically, at least one historian has argued the creation of Queen’s College as the second chartered college in New Jersey, in addition to Princeton, was a decisive step toward “what eventually became the nineteenth-century private or denominational college.” Jurgen Herbst, From Crisis to Crisis: American College Government, 1636–1819, 113 (1982) [hereinafter Herbst, From Crisis to Crisis].


268. See Brooks Mathew Kelly, Yale: A History 69, 273 (1999); Whitehead, supra note 267, at 36–43.
Governor are still ex officio members of the Corporation.\textsuperscript{269} Meanwhile, in New Hampshire, the State tried, in effect, to take over Dartmouth College without its consent, a move it would probably not have even contemplated had it thought that Dartmouth’s private and autonomous status was self-evident.\textsuperscript{270} These stories, read from our contemporary perspective, necessarily raise some tantalizing questions: For the years that Yale’s governance included representatives of the State, was it a “public” institution? And did Chief Justice Marshall, in vindicating Dartmouth’s rights under the Contracts Clause, actually help create, and not merely

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269. As a matter of convention, they have not, for many years, actually involved themselves in the business of the Corporation. See Azeezat Adeleke & Aaron Mak, The Most Secret Society: A Behind-the-Scenes Exploration of the Yale Corporation, \textit{The Politic} (Feb. 28, 2014), http://thepolitic.org/the-most-secret-society/ (“The final two members [of the Yale Corporation] are the Governor and Lieutenant Governor of Connecticut, who serve ex-officio and, by all accounts, have never attended a Corporation meeting.”).

270. See Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819). The message from Governor William Plumer to the legislature at the opening of its 1816 session is particularly rich in stated and unstated assumptions:

- Permit me to invite your consideration to the state and condition of Dartmouth College, the head of our learned institutions. As the State has contributed liberally to the establishment of its funds, and as our constituents have a deep interest in its prosperity, it has a strong claim to our attention. The charter of that college was granted December 13th, 1769, by John Wentworth, who was then Governor of New Hampshire, under the authority of the British king. As it emanated from royalty, it contained, as was natural it should, principles congenial to monarchy; among others, it established Trustees, made seven a quorum, and authorized a majority of those present to remove any of its members which they might consider unfit or incapable, and the survivors to perpetuate the Board by themselves, electing others to supply vacancies. This last principle is hostile to the spirit and genius of a free government. Sound policy therefore requires that the mode of election should be changed, and that Trustees, in future, should be elected by some other body of men.

- The college was founded for the public good, not for the benefit or emolument of its Trustees; and the right to amend and improve acts of incorporation of this nature has been exercised by all governments, both monarchical and republican. In the Charter of Dartmouth College it is expressly provided that the president, trustees, professors, tutors and other officers, shall take the oath of allegiance to the British king; but if the laws of the United States, as well as those of New Hampshire, abolished by implication that part of the Charter, much more might they have done it directly and by express words. These facts show the authority of the Legislature to interfere upon this subject.

\textbf{Baxter Perry Smith, The History of Dartmouth College} 100–01 (1878) (internal quotations omitted).
\end{quote}
enforce, the powerful American idea—unknown or marginal in much of the rest of the world—of the “private” college.\(^{271}\)

In fact, even this modest deconstructive gesture might just represent a sort of simple-minded legal academic hubris. Serious historians of American education look at a broader range of evidence. Some argue that the Dartmouth College case was actually a bit of a sideshow,\(^ {272}\) and that the full-fledged distinction between private and public colleges and universities did not appear until the Civil War.\(^ {273}\) Others locate the separation a century earlier.\(^ {274}\) This disagreement, which by the admission of all concerned intertwines questions of substance and terminology,\(^ {275}\) is not one on which we can take any position. But it does confirm, if nothing else could, the fluidity, contingency, and interpenetration of the categories of public and private in American education.

In any event, the creation of the land grant system and the birth of the great state university systems later in the nineteenth century might then be understood as one more piece of the continuing narrative: the Morrill Act did not literally create the idea of the public “state” university,\(^ {276}\) but it did animate the category and redefine its significance.\(^ {277}\) In a deep sense as well, 

\(^{271}\) Morton Horwitz goes much further than this, referring to the Dartmouth College case’s “separation between public and private corporations” as “entirely novel.” Morton J. Horwitz, The History of the Public/Private Distinction, 130 U. PA. L. REV. 1423, 1425 (1982). For Horwitz, the real import of the case, though, was not to entrench the “private” status of American nonprofit colleges and universities, but more broadly, “to free the newly emerging business corporation from the regulatory public law premises that had dominated the prior law of corporations, whether municipal or trading corporations, both of which were regarded as arms of the state.” Id. This possibly inflated view of the case is, in an odd sort of irony, actually consistent with the argument that the case was less important in the history of American education more specifically. See infra note 272 and accompanying text.

\(^{272}\) See Whitehead, supra note 267, at 83–84 (arguing that the Dartmouth College case, at the time it was decided, actually changed little in the relationship between the college and the state or in broader views of the nature of American colleges and universities).

\(^{273}\) See, e.g., id.

\(^{274}\) See, e.g., Herbst, From Crisis to Crisis, supra note 266, at 113, 143–46, 293 n. 1.

\(^{275}\) For Whitehead’s effort to refine his own views in the light of Herbst’s critique, see John S. Whitehead, How to Think About the Dartmouth College Case, 26 HIST. EDUC. Q. 333 (1986). Herbst’s companion essay is located in 26 HIST. EDUC. Q. 342 (1986).

\(^{276}\) “Eight so-called state universities were established between 1785 and 1820,” beginning with the University of Georgia. Whitehead, supra note 267, at 47. “Five of these were founded in states that had no other college or university.” Id.

\(^{277}\) Significantly, the democratizing spirit at the heart of the Morrill Act had as much or more to do with ideas of curricular reform—a conscious revolt against the narrow classical curriculum in most existing colleges and universities—as it did with a new mode for financing
the creation of state universities across the nation cemented the process that Dartmouth College had (at least in the legal imagination) more tentatively begun—the separation of the older (and newly created) "private" colleges and universities from the state.\(^{278}\) But, as already discussed, that story is complicated too. Rutgers was not the only existing private institution to obtain land-grant status.\(^ {279}\) Yale in Connecticut\(^ {280}\) and MIT in Massachusetts\(^ {281}\) were other examples, though those designations, unlike that of Rutgers, were eventually overshadowed or rescinded in favor of new state institutions.\(^ {282}\) And some states, most famously Michigan\(^ {283}\) and

and governing American higher education. See Nevins, supra note 34, at 1–6, 16, 85–91. At Rutgers, the original classical college and the new "State University" coexisted uncomfortably for some years. See supra Part II, notes 36–50 and accompanying text.

278. See generally Nevins, supra note 34; Whitehead, supra note 267.


280. Kelly, supra note 268, at 189, 248, 261, 289–91. As with Rutgers, the land-grant designation was attached, not to the original college, but to a new "scientific school" under its general auspices.


282. The Massachusetts legislature designated both MIT and the Massachusetts Agricultural College, now the University of Massachusetts, as its land-grant schools in 1863. MIT retains its land-grant designation, at least in principle. The scientific school at Yale was originally Connecticut's only land-grant institution, but the Legislature eventually voted to withdraw Yale's designation and shift it to the Storrs Agricultural School, now the University of Connecticut. Yale sued and was ultimately awarded substantial damages to make up for its loss of state funds. Kelly, supra note 268, at 290.

283. The current language usually interpreted to confer constitutional autonomy, ultimately derived from the state constitution of 1850, reads in part:

The regents of the University of Michigan and their successors in office [and the boards of certain other state universities] shall constitute [bodies corporate] . . . Each board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds. Each board shall, as often as necessary, elect a president of the institution under its supervision . . . . The board of each institution shall consist of eight members who shall hold office for terms of eight years and who shall be elected as provided by law . . . .

Mich. Const. art. VIII, §§ 5–6. According to the Michigan courts' classic formulation: By the provisions of the Constitution . . . the board of regents is made the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the legislature . . . . [It] is given . . . . "general supervision of the University, and the direction and control of all expenditures from the University funds." . . . . [The] board of regents has independent control of the affairs of the University . . . .

Regents v. Auditor Gen., 132 N.W. 1037, 1040 (Mich. 1911). To be sure, the autonomy of the university boards is subject to most laws of general applicability.
California, as they developed their state university systems, enshrined for them in the state constitutions a degree of protected autonomy that gave them at least some of the attributes of their older private counterparts.

In recent years, the categories of public and private have evolved further. On the one hand, the large private universities now depend on federal research grants and various forms of student aid for much of their funding, tying them intimately to a national intellectual, regulatory, and financial infrastructure that might, except in form, be considered profoundly "public." At the same time, though, many state universities, partly due to their own quest for accomplishment and prestige, but mostly due to radical reductions in state support, are behaving more and more like traditional private universities. In particular, some specific units of state universities,

The University of Michigan is an independent branch of the government of the State of Michigan, but it is not an island. Within the confines of the operation and the allocation of funds of the University, it is supreme. Without those confines, however, there is no reason to allow the regents to use their independence to thwart the clearly established public policy of the people of Michigan.


The University of California shall constitute a public trust, to be administered by the existing corporation known as "The Regents of the University of California," with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university and [statutory competitive bidding requirements]

. . . . The university shall be entirely independent of all political or sectarian influence and kept free there from in the appointment of its regents and in the administration of its affairs, and no person shall be debarred admission to any department of the university on account of race, religion, ethnic heritage, or sex.

CAL. CONST. art. IX, § 9. The University’s Board of Regents consists of seven ex officio members and eighteen members appointed by the Governor with advice from a committee that includes both public members and representatives of the University community and alumni. Id. art. IX, §§ 9(a), 9(e).

including some law schools, have functionally operated much like their private counterparts for many years. More recently, and interestingly, some states have established statutory mechanisms for state universities to negotiate enhanced autonomy from the state, often as part of a complex set of financial and regulatory quid pro quos. The movement even has a name—charter universities—a term that, even if it does not bring our story full circle, does at least evoke the acts of the legal imagination that established and defined the first colonial colleges out of which American higher education grew in the first place.

These complexities need to be kept in mind in any conversation about issues of educational governance and control, not to mention identity and money. The balance between state authority and university self-governance, as well as, among different elements within the university, is not simply given. It is open to interpretation, legal argument, and political struggle. More than that, even as the concepts of “public” and “private” are deeply, and rightly, consequential, the meaning of those concepts, and not only their specific applications, turn out to be contingent, contested, and richly complex. President Houshmand’s casual claim that Rutgers and Rowan both “belong to the taxpayers” was an important intervention in that ongoing conversation. But, so was the mobilization on the Rutgers–Camden campus against the plan to merge it with Rowan. And so, conclusively, was the decision of the Rutgers Board of Trustees to fully inhabit its role as the incarnation and guarantor of the old “private” Rutgers whose consent would

For an argument that situates this phenomenon in the context of larger trends in American public higher education, see Christopher Newfield, Unmaking the Public University: The Forty-Year Assault on the Middle Class 173–94, 270–75 (2008).

286. See Denis Binder, The Changing Paradigm in Public Legal Education, 8 Loy. J. Pub. Int. L. 1 (2007); Rachel Moran, Clark Kerr and Me: The Future of the Public Law School, 88 Ind. L.J. 1021, 1031 (2013) (lamenting that “as state revenues for public law schools decline, there is a growing rhetoric of privatization and self-sufficiency. The law schools at the University of Michigan and the University of Virginia already have moved decisively in this direction, while those at Arizona State University and the University of Minnesota have announced plans to become self-sufficient.”).


289. See supra note 251 and accompanying text.
be necessary to any significant change in the University’s governance or organization.

More broadly yet, the struggle to save Rutgers-Camden resonates with another crucial insight—legal pluralism. Legal pluralism, as both a normative or descriptive idea, comes in many flavors. Its basic claim, though, is that law and juridical dignity are not the sole province of the state. Other legal orders of all sorts exhibit many of the attributes of what we loosely call “sovereignty” or, in Robert Cover’s wonderful coinage, juris genesis. Legal pluralism is not just a reified construct. It reflects the lived life of normative communities, their internal dynamics, and their external relations. It is fully immersed in the grit of life, including its power plays, pretensions, violence, and material facts.

Some of the work of Perry Dane (the lead drafter of this Part of the Article), has focused particularly on the relationship between the state and religious legal orders, each trying to make sense of the nature of the other, and respect its claims, or not as the case may be, in what is at heart an essentially existential encounter of two different realms of authority. This


291. Cover, supra note 290, at 11.

sort of vision of multiple legal orders goes back a very long time, at least to the Middle Ages and arguably even earlier.293

But, the insights of legal pluralism do not just apply to churches. For almost as long, universities have also been recognized as exhibiting important attributes of autonomy, self-governance, and self-definition.294 This autonomy has not always been respected, and its scope and limits have been fought over with consequences that still resonate today.295 But the same can be said about the church. Indeed, for much of the last thousand years, state, church, and university have often been engaged in a complex and tense three-way encounter.296 One reason we dwelled on the Dutch Reformed legacy of Rutgers in Part II was to emphasize that three-way interaction and to show how Rutgers lived in the circle of both state and church, sometimes simultaneously.297

The contemporary American imagination continues to recognize the self-governing, autonomous, character of colleges and universities, if fitfully and

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293. See Tamanaha, supra note 290.
295. Medieval universities:
[S]ought to safeguard their autonomy and independent status . . . in a long series of battles that, in the beginning at least, nearly put a stop to the whole enterprise. The result was that the universities survived, but in a new ideological context, with a concept of the university that was no longer neutral. This phase in the university’s life had consequences for centuries to come, and it is no exaggeration to say that many of the topical problems in the universities in the twentieth century go straight back to events in the thirteenth . . . .

296. For an account of one of the formative episodes in that history, see Alan E. Bernstein, Magisterium and License: Corporate Autonomy against Papal Authority in the Medieval University of Paris, 9 Viator 291 (1978).
297. See supra notes 21–28 and accompanying text.
inconsistently. At least one court has specifically connected this principle to the through-line of tradition beginning with the ancient medieval universities and carried forward by the American colonial colleges and the Dartmouth College case:

The intellectual history of Western Europe and the United States is marked by the establishment and gradual growth of universities that are self-governing, in the selection of their faculties, in prescribing their curriculum, and in administering discipline of their student bodies. This history demonstrates that centers of higher learning can best develop and flourish in an atmosphere of liberty and independence, where they are free from governmental influence in any respect as to any aspect of their activities. A glance at this history is convincing. Universities in Italy, such as Bologna; universities in France, such as Paris; and Universities of Oxford and Cambridge in England, all of which originated in the Middle Ages, were from their very inception and always have remained independent bodies, unfettered by any intrusion on the part of any governmental agency, or of the courts. In this country with the early establishment of Harvard, William and Mary, Yale, Princeton and King’s College (later Columbia), this tradition was continued and has prevailed. Such institutions have been free of governmental control. One attempt to the contrary was defeated by the decision of the Supreme Court in the Dartmouth College case, in which the college was eloquently and forcefully [sic] represented by Daniel Webster as counsel. Fortunately, even State universities in this country, which came later, particularly the larger institutions, have been left singularly free of governmental control or interference.


See, e.g., Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985) ("When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty’s professional judgment."); Lieberman v. Gant, 630 F.2d 60, 67 (2d Cir. 1980) ("A university’s prerogative to determine for itself on academic grounds who may teach is an important part of our long tradition of academic freedom . . . . The Congress that brought educational institutions within the purview of Title VII could not have contemplated that the courts would sit as Super-Tenure Review Committee(s)."") (citations, footnotes, and internal quotation marks omitted)); Stern v. Univ. of Okla. Bd. of Regents, 841 P.2d 1168, 1172 (Okla. Civ. App. 1992) ("Courts must take special care to preserve a university’s autonomy in making lawful tenure decisions when reviewing tenure cases.").

To be sure, judicial deference to autonomous university decision-making is not absolute, and the various relevant doctrines are complex and inconsistent. Many of these cases pose the question, also present in internal church disputes, what it actually means to defer to a self-governing institution when the institution itself is internally divided. Our broad-brush point here, though, is simply to point out that the law recognizes a degree of autonomy consistent with the legal pluralist conversation.
"academic freedom," though the precise institutional implications of that idea have never been completely pinned down. It also remains unclear to what extent the federal constitutional protection of institutional academic freedom (as distinct from the protection of individual academics and also as distinct from the various state constitutional protections discussed earlier) applies to universities that are, by at least some measure, fully "public." In


A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest . . . . It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail the four essential freedoms of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

Id. at 262–63 (internal quotation marks and citations omitted).

301. See Emergency Coal. to Defend Educ. Travel v. U.S. Dep’t of the Treasury, 545 F.3d 4, 15 (D.C. Cir. 2008) (Edwards, J., concurring) ("Academic freedom is not an easy concept to grasp, and its breadth is far from clear."). For a clear and nuanced discussion of both the context of Frankfurter’s invocation of the “four essential freedoms of a university” and the mixed reception of the idea in First Amendment doctrine, see SMOLLA, supra note 264, at 17-37.

Struggles over university self-governance have also played out in recent years in the context of continuing constitutional debates about affirmative action and diversity. On the one hand, the Supreme Court invoked a commitment to educational autonomy in upholding some forms of race-conscious admissions policies in public universities. See Grutter v. Bollinger, 539 U.S. 306, 329 (2003) ("We have long recognized that . . . universities occupy a special niche in our constitutional tradition. In announcing the principle of student body diversity as a compelling state interest [in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978)], Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy." (internal citations omitted)). See also Neal K. Katyal, The Promise and Precondition of Educational Autonomy, 31 Hastings Const. L.Q. 557 (2003). On the other hand, in its more recent case, Schuette v. Bann, 188 L.Ed. 2d 613 (2014), which upheld Michigan voters’ effort to ban race-conscious admissions in public universities, both the plurality and concurring opinions essentially ignored the question of educational autonomy, even as a factor in considering the scope of the so-called political process doctrine that was the battleground on which the case was fought. But cf. id, slip op., at 17 (Sotomayor, J., dissenting) (emphasizing the independent constitutional authority of Michigan’s public universities’ Boards of Regents).

302. Compare J. Peter Byrne, Academic Freedom: A “Special Concern of the First Amendment,” 99 Yale L.J. 251, 300 (1989) (arguing that a public university is a “unique state entity” that can assert “federal constitutional rights against the state itself”), and HORWITZ, supra note 27, at 101–02, 102 n.82 (citing cases), with SMOLLA, supra note 264, at 44 (finding that as a doctrinal matter, it would be “incoherent to claim that . . . [public] universities could sue the state that created them for violation of their First Amendment rights. The creature
any event, there is enough substance to the idea to justify Paul Horwitz describing universities as one of the paradigmatic examples, along with churches, the press, and so on, of what he calls “First Amendment institutions.”303 Horwitz’s argument draws in part on the deep insights of legal pluralism.304 For our specific purposes here, however, the increment of meaning, added by attention to legal pluralism, is particularly helpful and important.

To begin with, thinking about universities in the context of legal pluralism sheds light on the meaning and resonance of the legal arguments that opponents of the merger plan discovered and developed to help stave it off. As Robert Cover long ago emphasized, distinct normative communities do not only read and write their own law,305 they also interpret the state’s law in the light of their own commitments. Those interpretations are not only acts of advocacy; they create law and belong to the mosaic of legal meanings out of which inter-communal encounter is constituted.306 And at least sometimes, the power of those interpretations—not merely their doctrinal soundness, but the force of their vision—can in turn help shape the state’s reading of its own law. Conversely, Perry Dane has argued in some of his work on law and religion that civil statutes dealing with church governance need to be understood not merely as authorizing or regulating such governance, but also as efforts to translate the church’s own law into secular terms.307 That translation is rarely perfect; it is sometimes insistently ungenerous, and it rarely even tries to be entirely faithful. But it is, in any event, crucial to the ongoing process of mutual, existential, encounter.

cannot sue the creator.”). But see infra note 310 and accompanying text (further discussing Smolla’s views).

303. HORWITZ, supra note 27, at 107–43.
304. Id. at 287.
305. See Cover, supra note 290, at 25–35.
306. As Cover put it in his discussion of one of his many examples:
   Mennonite understanding of the first amendment . . . is not to be taken as simply the “position” of an advocate—though it is that. I am asserting that within the domain of constitutional meaning, the understanding of the Mennonites assumes a status equal (or superior) to that accorded to the understanding of the Justices of the Supreme Court. In this realm of meaning—if not in the domain of social control—the Mennonite community creates law as fully as does the judge.

Id. at 28.
307. See, e.g., Dane, A Holy Secular Institution, supra note 292; Dane, “Omalous” Autonomy, supra note 292; Dane, Varieties, supra note 292.
In this Article, which deals with a state university rather than a religious community, we have several times emphasized that the Rutgers Law of 1956 is both a statute and a binding legislative contract. Seen more broadly, though, the Rutgers Law was also an effort to give legislative shape to negotiations that took place both between Rutgers and the state and within Rutgers itself as it grappled, not only in 1956 but earlier as well, with both the past and the future of the organism born in 1766. Moreover, the efforts in 2012 to fashion legal arguments out of the Rutgers Law of 1956, and the ways in which those arguments were taken up by the Rutgers Board of Trustees, the Office of Legislative Services, and others, and resisted by the proponents of the merger with Rowan to varying degrees, were, as Robert Cover might emphasize, not merely instances of after-the-fact legal advocacy; they were themselves part of the ongoing process of negotiating within and among distinct normative worlds.

The statutes and legal arguments we have been recounting in this Article are specific to Rutgers. But they are also an example of a more general pattern. In a sense, all the disparate instruments of university self-determination that we have been discussing here—the Rutgers Act in New Jersey; constitutional guarantees in Michigan, California, and elsewhere; the colonial charters; the First Amendment’s guarantee of academic freedom; and even just traditions of deference and restraint—arise out of their own complex histories of mutual encounter. But they are at the same time functionally overlapping and, in any event, deeply connected. And

308. For the complete narrative, see supra Part III.
309. For a fascinating and indirect, but dramatic, contribution to that conversation, see Sussex Commons Assocs. v. Rutgers, 46 A.3d 536 (N.J. 2012) (holding that the Rutgers Law School–Newark legal clinic was, with some exceptions, not subject to the disclosure requirements of New Jersey’s Open Public Records Act). Doctrinally, the dispute in the case was only incidentally about Rutgers as such. The court’s analysis ultimately turned on a very general question: “whether records related to clinical cases at public law school clinics are subject to OPRA.” Id. at 544. If New Jersey were ever to have a public law school clinic not connected to Rutgers, the holding in the case would protect it too. See id. Nevertheless, the court went out of its way to say that “Rutgers’ status and history help inform this matter,” to mention Rutgers’ history as a “private” college founded in 1766, and to emphasize the University’s “distinct status,” as a “hybrid institution—at one and the same time private and public,” retaining substantial “private autonomy,” and for many purposes not “an arm of the state.” Id. at 542, 543 (internal quotations omitted). The decision in Sussex Commons was handed down at the beginning of July 2012 right after the merger controversy had been settled but was surely drafted before that outcome was anywhere near assured. See id. It is hard to imagine that the court was not trying to send a signal.
310. Rodney Smolla is thinking along similar lines in his discussion of the principle of academic freedom. He argues, for example, that although public universities cannot, strictly
wherever and whenever those instruments are interpreted or rethought, that conversation can and should involve a strong dose of organic self-definition. This perspective also adds a new powerful twist to the complexities of the public/private divide. We argued above that the categories of public and private "are best understood as accent marks rather than sealed-off categories."

Even conceding the "public" character of "public universities," a fully fleshed-out legal pluralism would still suggest that multivocality and separate spheres of authority can exist even in the "public" sphere. In one sense, it is precisely the high "public" character of Rutgers that contributes as much as its "private rights" to its aspiration to be a self-governing nomos complicatedly interacting with other sources and agents of legal authority. More generally, it might even be possible to see a certain unity here, otherwise obscure in the flux of history and variant usages, in the very idea of "public" institutions. Consider again the apparent hodge-podge of, say, "the public fisc," "public companies," "public charities," and the like. This variety of uses should perhaps recall to us the very old, but easily-forgotten, wisdom that saw King and Commons, Church and State, Universities, and even Corporations as all occupants of the public realm, separate and connected to varying and changing degrees, but all possessing normative dignity and a share of autonomy. The irony here, of course, is that normative autonomy is often associated with "private ordering"—even "private rights"—rather than the "public realm." One response is that

speaking, assert their own constitutional right to academic freedom against the state, the indirect influence of constitutional principles on other bodies of law and on legislative decisions by way of what he calls the "Shadow Constitution" and the "Constitutional Unconscious" can make up for some of the logical gap. See supra note 269; SMOLLA, supra note 264, at 46–53. At least one of us, though, in an important difference from Smolla, would prefer to think of the Constitution, not as the foundational text shedding its light on other parts of the law, but as one of many sources of law that can act together to reflect what is in a deep sense a more existential encounter between the state and the self-governing nomos of the university. Dane, VARIATIONS, supra note 259, at 21 (discussing "constitutional glare"—"the tendency of constitutional talk to obstruct the normative work done by the rest of law, and to obscure the degree to which constitutional law itself is embedded in larger narratives and traditions").

311. Supra text accompanying notes 229–30.
312. See supra note 251, which comes closest to being explicit on exactly this point.
313. Cf. HORWITZ, supra note 27, at 120–21 (discussing boundary questions in protection of university autonomy).
314. See supra notes 258–61 and accompanying text.
315. The obvious irony here is that normative autonomy is often associated not with the "public" realm but with "private ordering."
316. Supra text accompanying notes 121, 219–20, 251–52.
“private ordering,” however robust, is never quite the same thing as genuine legal pluralism.\(^{317}\) In a deeper sense, though, we should perhaps understand “private ordering” and “legal pluralism in the public realm” as complementary formulations, derived from and appropriate to different discourses drawing on different rhetorical resources and subject to different conceptual constraints, but also at least sometimes standing together as loose translations each of the other.

But we should get off that train before it becomes so reified as to lose touch with the hard facts of legal pluralism. The most obvious hard fact in the campaign to save Rutgers–Camden is that it was a fight, hard-won and against the odds. In Part III of this Article, we left unresolved whether the defenders of Rutgers ultimately succeeded because they were able to organize a united campus and an increasingly sympathetic public and press, or just because their legal arguments happened to work.\(^{318}\) As a matter of straightforward historical causation, we do not even know how to begin untangling those threads. The counterfactual pathways involved in imagining either legal arguments without political mobilization or political mobilization without legal arguments are just too speculative to be helpful.

But that difficulty is itself significant. As Robert Cover repeatedly emphasized, normative orders are maintained by commitment, a willingness to resist and even to lay down one’s life.\(^{319}\) Our struggle to save Rutgers–Camden required commitment. We did not risk our lives, or our blood, but we did invest our time and our both real and symbolic sweat and tears. At some other institutions facing similar challenges, the predominant attitude has been passivity, accepting that decisions will be made at a higher pay

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318. Our discussion in Part III and Part IV also emphasize a third leg of the stool—not only law and politics, but also luck. See supra text accompanying notes 110–115, 126, 182, 188–89. The strongest dose of “luck” came in the coincidental release in March 2012 of In re Plan for Abolition of Council on Affordable Hous., 38 A.3d 620 (N.J. Super. Ct. App. Div. 2012), which struck down Governor Christie’s effort to unilaterally abolish the Council on Affordable Housing. See supra Part III and text accompanying notes 182–93. We are not sure what to do with the “luck” piece here except to thank Providence and move on.


The community that disobeys the criminal law upon the authority of its own constitutional interpretation, however, forces the judge to choose between affirming his interpretation of the official law through violence against the protesters and permitting the polynoma of legal meaning to extend to the domain of social practice and control.

*Id.* at 47–48.
grade. The faculty, students, administrators, alumni, and friends of Rutgers–Camden, and eventually the Boards of Trustees and Governors, refused to be passive. And, vitally, that vision of Rutgers and our campus was grounded in the felt reality of organic self-governance.

To put it another way: it is a commonplace that law and politics are connected. But that does not only mean that politics shapes law. Visions of law—understood pluralistically to include the unofficial law of communities—can also motivate and give content to political intensity. We were not only defending our own interests, we were defending our nomos. In other words, the legal and political pieces of the struggle were not separate; they both reflected and reinforced each other. More precisely, the story at Rutgers–Camden reflected an iterative, mutually-reinforcing, construction, of communal self-understanding, political mobilization, and “law on the books.” The ultimate, clinching, constitutional and statutory arguments came relatively late in the story, as various events intervened and as Rutgers’s defenders came to a more complete understanding of the University’s distinctive history. But those arguments would probably not have been perceived as intellectually credible without the politics that fit those arguments into a coherent vision that was more than a mere technical ploy (after all, as President Houshmand had insisted, Rutgers and Rowan both “belong to the taxpayers,” and various political figures assumed until almost the bitter end that resistance would be futile).\(^\text{320}\) Yet, at the same time, the legal arguments were not just epiphenomenal; they helped motivate and make sense of the continuing effort. At the end of the day, as argued in Part III, the crucial audience was the Board of Trustees, a governing body once thought vestigial, but which asserted itself precisely because, in the congruence of vision, politics, and law, it came to understand its unique role as both the guarantor of a community and the fiduciary of an inheritance.

We promised to end these reflections by zooming back in to a specific aspect of governance inspired, but left unresolved by the struggle to save Rutgers–Camden. If the University is genuinely a polity, then that has implications not only for its “external relations,” but for its internal governance as well. Checks and balances, and often disagreements, among various divisions and constituencies, mark true polities. At Rutgers, some important forces seemed willing to cede Rutgers–Camden for what they perceived to be the long-term welfare of the University. Nevertheless, in a successful polity, the various estates and factions must—whatever their

\(^{320}\) See supra notes 251 and 289 and accompanying text.
different roles or even different views—remain more than mere contractual partners; each must, if only imperfectly, keep the larger good in mind.

One reason that the proponents of the merger plan, and even many disinterested observers, never quite grasped the seriousness of the opposition is that they failed to understand this point. They often assumed that the various constituencies at Rutgers who opposed their plans could be placated by appealing to their mere self-interest. Thus, for example, very early in the story, the political backers of the plan tried to mute student opposition by assuring current Rutgers–Camden students that, come what may, they would graduate with Rutgers diplomas.321 Similarly, near the end of the story, when a state-wide coalition of unions seemed to endorse a scaled-down but still deeply malformed version of the reorganization bill after negotiating the inclusion of significant job security, representation, and other protections, some politicians, journalists, and members of the public wrongly assumed that the faculty, having had its labor demands met, was or should be satisfied. One of us, Perry Dane, made one of his few personal appearances in the story at that point, speaking with a reporter who was genuinely surprised that he and his colleagues were not happy with the latest turn of events. Dane said: “The tenure and promotion issues are important, but nobody I have talked to thinks now we have achieved our personal goals the rest doesn’t matter. The issues we care about are not just our own careers.


[T]he manner in which the [takeover] idea was revealed could’ve been handled better . . . . But Sweeney said the proposal isn’t going away. Therefore, he offered, the next step is to address concerns and educate people as quickly as possible about the merger details, which haven’t yet been specified . . . Sweeney affirmed . . . that “anyone who went to Rutgers, who is enrolled in Rutgers, should graduate with Rutgers degrees.” At a presentation during the Rowan University Senate meeting in Glassboro on Friday, Rowan’s Interim President Ali Houshmand echoed that guarantee. “This is very important,” said Houshmand. “Every current student of Rutgers University is entitled to, and will receive, a Rutgers degree.”

It's the ability of this campus to be excellent. His sentiments on that score were almost universally shared.

The wrinkle here is that the Rutgers faculty was, in fact, represented by a trade union—a joint chapter of the American Association of University Professors (AAUP) and the American Federation of Teachers (AFT)—which was a member of that just-discussed statewide coalition. Faculty at private colleges and universities are not typically represented by unions; in *NLRB v. Yeshiva University*, decided in 1980, the United States Supreme Court held that faculty, by virtue of their central role in academic governance, are usually “managerial” employees exempt from the reach of the National Labor Relations Act. The NLRA, however, does not cover state employees, leaving the field to state law. Thus, for example, the Rutgers faculty union is authorized under the provisions of the state’s Employer-Employee Relations Act.

As an abstract matter, there is a deep structural tension between the thousand-year vision of universities as organic, self-governing communities in which faculty play a central role and the trade union idea of faculty as workers negotiating with management over the terms of their employment. The *Yeshiva University* decision nods to that tension.

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324. 444 U.S. 672 (1980).


326. Id. § 152.


328. Cf. Frank H.T. Rhodes, *The Creation of the Future: The Role of the American University* 66–67 (2001) (“Whatever the alleged benefits to their members, I regard [faculty] unions as a divisive and destructive influence on the university community . . . [They] promote a narrow view of the teacher’s role.”); ASS’N OF DEP’TS OF ENGLISH, *Report of the ADE Ad Hoc Committee on Governance* 10–11 (2001), available at http://www ade.org/reports/governance_report.pdf (“While union contracts can include in their legal protections faculty involvement in governance and can prevent the alteration of institutional bylaws without faculty concurrence, the structure of collective bargaining is ultimately binary—a rule-based and often adversarial negotiation between two groups, one of which is considered labor, the other management. Placing key dimensions of faculty-administration relations in a legal framework, collective bargaining may work against the
In practice, though, the relationship between faculty unionization and the nature and quality of university governance is much more variable and complicated, and deeply contextual. Our Rutgers story confirms that more textured picture. On the one hand, there were moments when the union did seem to take an unduly narrow view of the controversy, frustrating and even collegial ethos that encourages faculty members and administrators to address each other as peers and fellow stakeholders and that promotes a sense of governance as responsibility for the institution that is shared, cooperative, and deliberative.”). See generally MARY BURGAN, WHATSOEVER HAPPENED TO THE FACULTY? DRIFT AND DECISION IN HIGHER EDUCATION 101–23 (2006) (discussing the role of faculty in university governance and the controversy regarding the place and role of faculty unions).

329. The structure and history of the AAUP also reflects at least the duality of these two visions. For many years, the national AAUP was simultaneously a professional organization, pursuing an agenda focused on shared governance and academic freedom, and a labor organization, the parent body of local AAUP union chapters. See Robin Wilson, *The AAUP, 92 and Ailing*, CHRON. OF HIGHER EDUC. (June 8, 2007), http://chronicle.com/article/The-AAUP-92Ailing/3053. In 2013, the AAUP divided itself, for tax and regulatory reasons, into three entities: the AAUP (a professional membership association), the AAUP-CBS (a formal labor union), and the AAUP Foundation (a public charity). See AM. ASS’N OF UNIV. PROFESSORS, http://www(aaup.org/about/organization (last visited Apr. 16, 2014). The three new entities, however, plan to continue to operate “cohesively and collaboratively.” Id.


Scholars have also studied the precise effect of unionization on faculty salaries and other conditions of employment. See, e.g., Arthur J. Hosios & Aloisius Siow, *Unions Without Rents: The Curious Economics of Faculty Unions*, 37 CANADIAN J. ECONS. 28 (2004) (concluding that Canadian faculty unions do successfully negotiate for higher relative salaries, but at the expense of more onerous teaching conditions and reduced research output); Ehrenberg, et al., *supra*, at 213 (“Numerous studies . . . suggest that at best, faculty unions increase their members’ average salaries by a very small percentage, and some found that faculty unions have had no effect.”); David W. Hedrick, Steven E. Henson, John M. Krieg & Charles S. Wassell, Jr., *Is There Really a Faculty Union Salary Premium*, 64 INDUS. & LAB. REL. REV. 558 (2011) (finding in a careful statistical study that, controlling for other variables, the union wage premium is positive but statistically insignificant). For theoretical explanations for such results, see Hosios & Siow, *supra*; Gordon Tullock, *The Effect of Unionization on Faculty Salaries and Compensation*, 15 J. LAB. RES. 199 (1994).
angering some of us.\textsuperscript{331} The union also found itself not always comfortably straddling two roles—as a partner in the university-based movement to save Rutgers–Camden and as a union standing in solidarity with other workers at both Rutgers and elsewhere.\textsuperscript{332}

Nevertheless, on balance, the efforts of the faculty union were indispensable to the battle to save Rutgers–Camden. The union lent its expertise and financial, organizational, and legal resources to the larger campaign. It also helped the effort by playing an often unpublicized “inside game” with the political actors pushing the Rowan merger, acting in some instances as a “good cop” in contrast to the “bad cop” of the public struggle. Then in the final days of the drama, union officials worked closely with the Board of Trustees to fashion the Board’s strategy and proposals, playing a role completely at odds with the usual adversarial assumptions of labor-management relations.

In short, the faculty union in this instance managed to overcome the tension between the communal and adversarial visions of the role of the faculty in the life of the university by transcending its circumscribed role and reimagining its mission. The tension itself did not disappear; it is large and structural, and does not depend on individual actions and motivations. But it was managed and on the whole rendered constructive, at least in the unusual context of a community’s common defense against a dramatic, extreme, external attack.

The National Labor Relations Board has for some years been considering whether the finding in \textit{Yeshiva University}—that faculty are managerial employees—should be reconsidered in the light of increasing centralization and corporatization in many colleges and universities.\textsuperscript{333} This is not the place to wade into the legal and policy thickets of that question. But there might be something to be said here in the light of our earlier discussion of legal pluralism and the life of the university.

\textsuperscript{331} For example, near the beginning of the process, when some of us suggested possible forms of constructive links between Rutgers and Rowan, we heard that they were out of the question because they might threaten other bargaining units.

\textsuperscript{332} Another small emblem of the dilemma: the Fall 2012 issue of the AFT’s higher education magazine ran a short piece on the Rutgers-Rowan struggle in which it gave the impression that the main objection to the original merger proposal was that it “potentially would have broken asunder the bargaining unit relationships at Rutgers–Camden and Rowan.” \textit{Partnership, Not Merger, for Rowan and Rutgers}, 32 \textsc{AFT on Campus}, Sept.–Oct. 2012, at 14. Somebody was looking at the problem through the wrong end of the telescope.

\textsuperscript{333} See Point Park Univ., Notice and Invitation to File Briefs, 6-RC-12276 (NLRB May 22, 2012), 2012 WL 1865034; Point Park Univ. v. NLRB, 457 F.2d 42 (D.C. Cir. 2006).
Retreating from the account of the university in the Yeshiva University case is viscerally troubling. The AAUP and others might be right that “Universities’ increasing use of a corporate business model and the significant expansion of university administration have eroded faculty effective control and effective recommendations over academic affairs.”

But, if so, that should be a reason to mourn. Better perhaps to fight those trends rather than concede them as the basis for a labor organizing “victory.” Indeed, a victory built on that basis risks amplifying to the breaking point the tension between the ancient idea of the university as a self-governing community and the new conception of professors as contract labor.

Nevertheless, if we were right earlier in this Part in suggesting that the various legal instruments of university self-determination—charters, statutes, constitutions, and traditions—are also efforts at negotiating and translating the internal life of the academic community, then it should be possible to see the legal recognition of a collective bargaining union in the same way, as a multivocal legal act, assimilating its legal and ideological underpinnings but also capable in certain settings of weaving its way into the fabric of genuine, communal, organic, self-definition.335

334. See Brief for Am. Ass’n of Univ. Professors as Amici Curiae Supporting Petitioner, at 12, Point Park Univ., 06-RC-012276 (NLRB June 29, 2012).

335. Cf. Gary Rhoades, Medieval or Modern Status in the Postindustrial University: Beyond Binaries for Graduate Students, 4 J. ACAD. LAB. 16 (2009). To be sure, even the standard trade union model might require rethinking in our globalized and post-industrial age. But that topic is entirely beyond the scope of this discussion.