

Axing Autonomy: How the Deal Between the University of Wisconsin System and State Legislature Represents the Degeneration of Autonomy in Higher Education Governance

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Higher Education is under attack. From the recent actions of the federal government, designed to strip funding from institutions and dictate admission and administrative action, to state governments promulgating bills and state executive orders targeting the operations of public higher education institutions. Some of these issues spark debate on a national stage, but the sheer volume and range of actions taken against both private and public universities have left many issues without a spotlight. In December 2023, the University of Wisconsin (UW) System Board of Regents approved a plan that shifted diversity, equity, and inclusion (DEI) initiatives after a series of public threats and closed-door negotiations with the Speaker of the House of the Wisconsin State Legislature. This paper will explore the growing erosion of higher education governing board autonomy through actions of state government and ultimately recommend a path forward for the UW System that strengthens the power of its governing board. First, the paper will define the relationship of higher education governing boards and state government, paying particular attention to the formation of the UW System. Next, it will outline the agreement formed in December 2023, before finally analyzing how this agreement represents a larger, systemic problem facing higher education institutions across the country. Finally, the paper recommends the Wisconsin State Legislature grant the UW System constitutional autonomy.

Introduction

In July 2023, Florida made national headlines when Governor Ron DeSantis signed Senate Bill 266 (“SB 266”), which prohibited public colleges and universities from allocating funds towards diversity, equity, and inclusion (DEI) initiatives. This legislation drew public outrage — it signified an outlandish legislative encroachment on the state of higher education in Florida. The unabating actions by the Florida state government to enact legislation impacting the governance of Florida's public higher education institutions and the

education of students represent a national trend toward the politicization of higher education. While Florida has recently taken the national spotlight, the actions of the Florida legislature are not unique, nor are the increased rates by which legislators involve themselves in the minutiae of higher education institutional operations.

Even more startling than the enactment of encroaching statutory provisions is the newfound phenomenon whereby state legislators' threats are enough to coerce university systems into action. At a time when legislators are using the

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spending power of the government, both state and federal, to pressure educational institutions into comporting with their ideologies and demands, university leaders should engage in crucial conversations geared towards understanding the foundations of university autonomy and identifying ways to protect this autonomy. Public higher education universities are fundamentally linked to their state's government. Relying on the state for appropriations, administrative agency support, and even their very existence, these institutions are forever in an imbalance of power with the legislature. While certain states have attempted to remedy this imbalance by granting institutions constitutional autonomy, others, such as Florida, have leaned into the power dynamic by enacting legislation that impacts the core of university governance. Although Florida has been at the forefront of national headlines, it is just one of the many states whose public higher education universities face increased pressure and coercion from state legislators.

In December 2023, a divided University of Wisconsin (UW) System Board of Regents approved a plan to freeze diversity, equity, and inclusion staffing through 2026 and reorganize roughly forty positions from DEI-focused to oriented towards the general student body.¹ This plan did not emerge in a silo. Months before, Republican legislators – spearheaded by the Speaker of the House – threatened to cut all state funding to the UW System unless every DEI position was removed or reimaged. In a series of deliberations between those in the state capital and the UW

System President, a plan emerged that approved state-allocated funding towards employee pay plan increases and building renovations, so long as university support for DEI was severely diminished.

This paper analyzes the relationship between higher education governing boards and state government, drawing on historical relationships and statutory commandments. Arguing that the Wisconsin State Legislature's threats eroded the foundation of higher education governance in the State of Wisconsin, this paper illuminates the growing national trend whereby an external governing body uses fiscal threats to exert pressure and control over higher education institutions. Part II provides general background on higher education institutions. Part III describes the UW System deal that passed in December 2023. Part IV analyzes this deal considering the legislative history of the UW System and the Board's governing documents. Part V recommends that to solidify the separation between higher education governance and state legislative involvement, the State of Wisconsin should grant the UW System constitutional autonomy. Part VI concludes by emphasizing that the bedrock elements of the deal within the UW System were a prelude to a national erosion of higher education governing bodies' autonomy.

¹ In October 2023, the University of Wisconsin System rebranded to become "Universities of Wisconsin," however their name under the Wisconsin State Statutes remains the University of Wisconsin System. See Kimberly Wethal, *'UW System' is Rebranding and Will Get a New Name*, Wis. State J. (Oct. 11, 2023), https://madison.com/news/local/education/university/uw-system-universities-new-name/article_0c003876-679d-11ee-a1ef-1b1238783aa0.html. For ease, this paper will reference them as "University of Wisconsin System," "UW System," or "System."

The Build-Up: The Foundation of Institutional Relationships with State Governments & the History of Higher Education in Wisconsin

Internal and External Governance within Higher Education

Decision-makers at public higher education institutions must be mindful of both internal and external governance in all that they do.² The highest internal level of governance is a board of trustees or board of regents, which has fiduciary responsibility for the institution or university system.³ Public universities often consult state legislatures when making policies or other internal decisions because the state government controls various funding channels and can enact legislation binding those institutions.⁴ Because of this influence, state legislators can wield significant power over a university system, despite holding no internal position.⁵

Board governance models can vary widely from state to state, or even institution to institution.⁶ However, scholars have noted that three primary

models represent the majority of governance structures: (1) the “planning agency” model; (2) the “statewide coordinating board” model; and (3) the “consolidated governing board” model.⁷ Each model describes the power dynamics between university systems (or individual institutions) and their governing board. The first model, the planning agency, gives very little authority to the board and allows individual campuses to control their budget, administration, and other prominent university aspects.⁸ The second model, the coordinating board, grants the board a more involved role in decision-making; however, it is generally limited to persuasion or mere budget oversight.⁹ While coordinating boards may review decisions made at the institutional level, chancellors and presidents retain the majority of autonomy over their campuses.¹⁰ The final model, the consolidated governing board, provides the board control over almost every aspect of the institution or university system, including campus governance and operational decisions.¹¹

Reports and studies dating back to 1952 emphasize the importance of maintaining institutional

² See William A. Kaplin et. al, *The Law of Higher Education, Student Version* (2020) at page xlvi (dividing external governance into private external governance and public external governance).

³ *Id.* at pages xlvi-xlix.

⁴ See Derek Bok, *Higher Education in America* (2015) at page 17 (noting that all universities are subject to general legislation, regulation, and oversight by state and federal governments).

⁵ Paul Krugman, *The Biggest Threat to America’s Universities*, N.Y. Times (Dec. 14, 2023), <https://www.ny-times.com/2023/12/14/opinion/harvard-desantis-florida-college.html>. But see Bok, *supra* note 4, at page 16 (“American colleges and universities have been subject to less government supervision and control than their counterparts in most other nations.”).

⁶ Michael K. McLendon & Erik C. Ness, *The Politics of State Higher Education Governance Reform*, Peabody J. Educ. vol. 78 (2003) at pages 66, 67 (“No two states share precisely the same governance design.”).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Tracey Bark, *Information Provision as Agenda Setting: A Study of Bureaucracy’s Role in Higher Education Policy, Regul. & Governance* vol. 15 (2021) at pages 408, 411.

¹¹ *Id.*; McLendon & Ness, *supra* note 6, at page 67.

independence and autonomy.¹² Institutional autonomy can be at odds with an involved state assembly. While institutions cannot exist without state participation, state government leaders often make changes based on political pressure, not higher education best practices or institutional needs.¹³ Because higher education impacts a number of fields, many politicians develop strong opinions about campus life, academic freedom, and policies.¹⁴ Although both are hallmarks of American higher education, institutional autonomy is not the same as academic freedom.¹⁵ While First Amendment rights on university campuses are important, as are the rights of faculty, university autonomy plays only a small part in academic freedom discourse.¹⁶ University autonomy is what “allows for the exercise of academic freedom”; the Supreme Court has noted that “academic freedom thrives . . . on autonomous decision-making by the academy itself.”¹⁷

Scholars divide institutional autonomy into substantive and procedural autonomy. Substantive autonomy describes the rights university leaders must establish goals, priorities, and other university guideposts and metrics.¹⁸ Procedural autonomy is the right of the university to determine the methods by which they will achieve defined goals or objectives.¹⁹

Some states have attempted to counteract this control over higher education institutions by implementing a constitutional provision that vests oversight power to the governing board.²⁰ However, merely granting a board constitutional status does not provide that board with true governing authority; it must be granted “constitutional autonomy” from the state governing entities to be considered a “separate department of

¹² See Joseph Beckham, *Reasonable Independence for Public Higher Education: Legal Implications of Constitutionally Autonomous Status*, J.L. & Educ. vol. 7 (1978) at pages 177, 177–78 [hereinafter Beckham, *Reasonable Independence*] (noting how the 1952 Commission on Financing Higher Education and a 1959 report from the Eisenhower committee emphasized that state government intrusion into higher education decision-making is likely and should be restrained).

¹³ See *id.* at page 178 (“State participation in the evolution of higher education policy is a reality which necessarily attaches to state financial support . . .”); see also Neal H. Hutchens, *Preserving the Independence of Public Higher Education: An Examination of State Constitutional Autonomy Provisions for Public Colleges and Universities*, J.C. & U.L. vol. 35 (2009) at page 271 (“In American higher education, the need to make public colleges and universities responsive to the public interest is often in tension with the necessity of providing institutions with the requisite authority to manage their internal affairs.”).

¹⁴ See Rebecca S. Natow, *Higher Education Rulemaking: The Politics of Creating Regulatory Policy* (2017) at page 81 (describing how state government often participates in the note and comment process of federal education policymaking).

¹⁵ See Karen Petroski, *Lessons for Academic Freedom Law: The California Approach to University Autonomy and Accountability*, J.C. & U.L. vol. 32 (2005) at pages 149, 206 (stating that parallels exist between university autonomy and academic freedom but that the purposes behind the two differ).

¹⁶ See R. George Wright, *University Missions and Legal Limitations on Campus Speech*, J.L. & Educ. vol. 52 (2023) at pages 222, 241 note 109 (articulating how university autonomy assists in ensuring fifty different state legislatures are not crafting fifty different speech policies on local universities).

¹⁷ Association of American Universities, *Academic Principles: A Brief Introduction* (2013) (quoting Regents of Univ. of Mich. V. Ewing, 474 U.S. 214, 226 n.12 (1985)).

¹⁸ Hutchens, *supra* note 13, at page 273.

¹⁹ Beckham, *Reasonable Independence*, *supra* note 12, at pages 178–79.

²⁰ *Id.* at page 179.

government, not merely an agency”²¹

Because autonomy is derived from a state legislative grant, each state has different bounds by which they are confined. For example, “Michigan, California, and Minnesota continue as the states with the strongest judicial recognition of constitutional autonomy, not only in the number of cases, but also in the language used by state courts to describe the legal protections that result from constitutional autonomy.”²² Conversely, Arizona, Colorado, Missouri, and Utah have extensive legislative oversight, with little to no recognition of constitutional autonomy.²³

Most states without recognized constitutional autonomy define or subject the powers and duties of public college and university governing boards through statutory authority.²⁴ In these states, public higher education is “continuously subject to legislative and executive prerogative.”²⁵ Although these statutes often confer the responsibility of operating the institution, or university system, with the board of trustees (or regents), universities are not explicitly granted autonomy, and state governments can implement statutory

amendments at their discretion.²⁶ Legislative encroachment on higher education policy is, in part, a direct result of the system it created; institutions depend on state governments for budgetary needs, civil services, and centralized purchasing.²⁷

In recent years, legislative encroachment in higher education decision-making has risen at an alarming rate.²⁸ In January 2024, the American Association of University Professors published a *Statement on Political Interference in Higher Education* (“Statement”) that detailed the uptick in state legislation dealing with politicized higher education issues.²⁹ Specifically, the Statement noted that since September 2020, “at least ninety-nine bills representing direct political interference in higher education have been introduced in more than thirty state legislatures.”³⁰ One of the most notable examples is Florida’s SB 266 bill, which prohibits institutional funding for DEI initiatives. The Statement highlighted that at least eighteen other state governments are attempting to enact similar legislation.³¹ Elected leaders are not experts in higher education governance, nor

²¹ Hutchens, *supra* note 13, at page 274.

²² *Id.* at page 282.

²³ *Id.* at pages 309–10.

²⁴ *Id.* at page 271.

²⁵ Joseph Beckham, *Constitutionality Autonomous Higher Education Governance: A Proposed Amendment to the Florida Constitution*, U. Fla. L. Rev. vol. 30 (1978) at page 543 [*hereinafter* Beckham, *Constitutionally Autonomous*] (describing the operating structure of the State University System of Florida).

²⁶ *See id.* at pages 555–57 (proposing a constitutional amendment that would give the Florida Board of Regents constitutional autonomy).

²⁷ Beckham, *Reasonable Independence*, *supra* note 12, at pages 178–79.

²⁸ *See generally Confronting Legislative Attacks on Higher Education*, Academe (Fall 2023).

²⁹ American Association of University Professors, *Statement on Political Interference in Higher Education* (Jan. 2024), <https://www.aaup.org/report/statement-political-interference-higher-education>.

³⁰ *Id.*

³¹ *Id.*

should every politician become one.³² Higher education is a unique and dynamic enterprise, unlike a business, K-12 school, or any other entity.³³

The political interference in decisions such as DEI or free speech on campus is not where politicians draw the line. Legislators from Utah, Iowa, and Texas, along with numerous others, have publicly criticized the spending structures, low-profit programs, and shared governance models of higher education institutions.³⁴ Mindsets such as these, which focus on turning higher education institutions into purely for-profit entities, harm institutional foundations; often liberal arts curriculum, mental health and non-academic support services, and support staff are at the top of the chopping block when institutions look to cut back on unprofitable university operations.³⁵ By minimizing institutional autonomy and the decision-making power governing boards have to make informed decisions about the unique crises they may face, legislators create global confusion and

insert politicization into the academic environment.³⁶

Once something is enacted into state law, it is difficult to reverse; this situation is vastly different from board resolutions and internal policies, which are designed to survive the test of time but can be modified as needed based on higher education best practices. An example of this occurred during the COVID-19 pandemic. If each institutional policy was enacted into state law, then universities would have had to petition state government officials to change the statutes or code to allow for remote learning and other modifications to an in-person university experience. If the institutional policies existed at the governing board or institutional level, as many did, then the universities could quickly call a board or leadership meeting to modify the policy to meet the needs of students, faculty, and staff.³⁷

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³² See Jessica Blake, *Wisconsin Experts Convene to Address System Enrollment Woes*, Inside Higher Ed (July 19, 2024), <https://www.insidehighered.com/news/government/state-policy/2024/07/19/wisconsin-experts-convene-fix-system-enrollment-woes> (describing how the legislature created a committee of “four lawmakers and 14 public stakeholders” that would analyze an issue over a year-long period).

³³ See David Rosowsky, *If Colleges Are Businesses, Why Not Run Them That Way?*, Forbes (May 10, 2020), <https://www.forbes.com/sites/davidrosowsky/2020/05/10/if-colleges-are-businesses-why-not-run-them-that-way/>.

³⁴ See Michael T. Nietzel, *State Legislatures Ready to Put Higher Education on the Hot Seat Again*, Forbes (Jan. 8, 2025), <https://www.forbes.com/sites/michaelt Nietzel/2025/01/08/state-legislatures-ready-to-put-higher-education-on-the-hot-seat-again/>.

³⁵ See Michael Hiltzik, *Column: When Universities Try to Behave like Businesses, Education Suffers*, L.A. Times (June 3, 2016), <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-university-business-20160602-snap-story.html> (“Running a college like a business (full stop) risks sacrificing some the most foundational elements of a broad-based education — intellectual pursuit, inquiry, discourse, transmission and discovery of knowledge — focusing only on those fields that generate revenue, maximize product (i.e., graduates’) value, and create wealth.”).

³⁶ See American Association of University Professors, *supra* note 29 (discussing the increased politicization of higher education because of an onslaught of new pieces of state legislation).

³⁷ *Compare UW System Guidance for COVID-19 Testing and Reopening Campuses to Minors*, UW System Admin. (May 4, 2021), <https://www.wisconsin.edu/uw-policies/uw-system-administrative-policies/uw-system-guidance-for-covid-19-testing-and-reopening-campuses-to-minors/> (outlining interim guidance for testing protocols), with Rich Kremer, *Republican Lawmaker Officially Seeking Lawsuit Against UW System Over COVID-19 Mandates*, Wis. Public Radio (Sept. 3, 2021), <https://www.wpr.org/education/republican-lawmaker-officially-seeking-lawsuit-against-uw-system-over-covid-19-mandates> (detailing how a state senator planned to sue the UW System for “refusing to seek Republican approval of COVID-19 campus safety measures”).

& Wisconsin State Legislature

The University of Wisconsin System has a unique complex history with the Wisconsin State Legislature (“State Legislature”). On October 12, 1971, the State Legislature established the University of Wisconsin System by combining Wisconsin State Universities (“WSU”) and the University of Wisconsin.³⁸ The Wisconsin State Universities originated as normal schools and the University of Wisconsin, created by the state constitution, contained four four-year universities.³⁹ The initial idea of a merger between WSU and the University of Wisconsin came as a campaign promise from 1970 gubernatorial candidate Patrick Lucey — not the university system or Wisconsin citizens.⁴⁰ After a bombing on one campus took place, followed by public outcry, Lucey chose to put “campus unrest” at the forefront of his campaign and used this as a platform to change the operational structure of a higher education consortium he referred to as “the worst-run program in the state.”⁴¹ This merger made the UW System the fourth-largest public university system in the United States.⁴² This merger used the Wisconsin Idea, first articulated by former University of

Wisconsin President Charles Van Hise, as a guiding principle.⁴³ The Wisconsin Idea stands for the philosophy that education influences lives beyond the classroom and public higher education institutions can impact the economic growth of the state.⁴⁴

The creation of the UW System led to the consolidation of Chapters 36 and 37 of the Wisconsin State Statutes into the renowned Chapter 36, which governs the UW System to this day.⁴⁵ The first challenge individuals spearheading the merger faced was crafting the governing documents for the Board of Regents, which comprised members from the WSU Board and the University of Wisconsin Board.⁴⁶ While WSU and University of Wisconsin leaders disagreed on numerous decisions within the merger, one point brought uniformity: increased state government involvement.⁴⁷ Representatives from the Department of Administration advocated for increased legislative and gubernatorial involvement including proscribing statutes directing “administrative roles for the governor and legislature in university management and operations.”⁴⁸ Neither the University of Wisconsin, nor WSU, supported these

³⁸ Patricia A. Brady, *A History of the University of Wisconsin System* (2020) at page 14; see also Joseph Clarence-Rost, *The Merger of the University of Wisconsin and the Wisconsin State University Systems: A Case Study in the Politics of Education* (Jan. 19, 1973) at page 645 (on file with the University of Wisconsin library) (“The merger bill went through six different phases and through all four modes of the decision-making process.”).

³⁹ Brady, *supra* note 38, at page 14.

⁴⁰ Brady, *supra* note 38, at pages 13, 19; Clarence-Rost, *supra* note 33, at page 650.

⁴¹ Brady, *supra* note 38, at page 13.

⁴² Brady, *supra* note 38, at page 39.

⁴³ *Id.* at pages 50-51.

⁴⁴ *Id.* at page 51.

⁴⁵ *Id.* at pages 49-50; WIS. STAT. ch. 36 (2023).

⁴⁶ Brady, *supra* note 38, at page 47.

⁴⁷ *Id.* at pages 57-58.

⁴⁸ *Id.* at page 58 (noting that other proposals included legislative approval of mission statements and the Department of Administration retaining control of university academic staff employment).

proposals, but the underlying tension of state government in university governance would pervade in years to come.⁴⁹

Today, the UW System is comprised of thirteen universities and twenty-six campuses.⁵⁰ UW Madison, as the flagship campus, has a world-renowned reputation that globalizes the Wisconsin Idea and UW System.⁵¹ The Board of Regents (“Board”) consists of eighteen members, fourteen of whom are appointed by the Governor and serve staggered seven-year terms, two are students (one traditional, one nontraditional), and two are ex-officio (the State Superintendent of Public Instruction and the President of the Wisconsin Technical College System Board, or their designee).⁵² The Board began enacting diversity-aimed initiatives in 1987, and in 2009 it adopted an “Inclusive Excellence” framework, which had no specific goals or set end date.⁵³ The System has continually emphasized its commitment to embracing and promoting DEI, despite a tumultuous

history with marginalized identities and historically low enrollments of students of color.⁵⁴

The Deal: The Formation of the Agreement Between the Board of Regents and Wisconsin State Legislature

The Wisconsin State Assembly was at a crossroads in June 2023 over a heated debate surrounding university funding and DEI initiatives.⁵⁵ On one side stood the Speaker of the State Assembly, Republican Representative Robin Vos, who proposed removing all of the System’s funding toward DEI initiatives and efforts, which he estimated to be \$32 million, from the annual state budget.⁵⁶ On the other side stood Democratic Governor Tony Evers, who declared that he would veto the entire state budget should the finance committee approve the proposed cut.⁵⁷ After a seven-hour closed debate, the finance committee

⁴⁹ *Id.*

⁵⁰ See *id.* at pages 175-77, 307-12 (describing the comprehensive UW institutions and UW Madison as the flagship institution).

⁵¹ *Id.* at pages 178-79.

⁵² *Informational Paper 36: University of Wisconsin System Overview*, Wis. Legis. Fiscal Bureau (Jan. 2003) at page 2 [hereinafter *Informational Paper 36*].

⁵³ *Id.* at pages 11-12.

⁵⁴ See *id.* at page 13 (highlighting that from 2011 to 2021 enrollment of African American students decreased by 14.9% and Native American students decreased by 41.4%); Isaac Trussoni, “*Sifting and Reckoning*” *Exhibit Grapples with Racist History of UW*, Madison 365 (Sept. 12, 2022), <https://madison365.com/sifting-and-reckoning-exhibit-grapples-with-racist-history-of-uw/> (promoting a public history project and exhibit, commissioned by UW System Administration, that displays and discusses the UW System’s history); *2023-2028 Strategic Plan*, University of Wisconsin System (Dec. 8, 2022), <https://www.wisconsin.edu/president/download/StrategicPlan2023-28.pdf> [hereinafter *2023-2028 Strategic Plan*] (establishing the promotion of DEI as a core value of the UW System).

⁵⁵ See Liam Knox, *DEI Standoff Derails a State Budget*, Insider Higher Ed (June 16, 2023), <https://www.insidehighered.com/news/government/state-policy/2023/06/16/dei-funding-battle-paralyzes-wis-budget-negotiations> [hereinafter Knox, *DEI Standoff*] (detailing the debate over university funding).

⁵⁶ *Id.* but see Rich Kremer, *UW System Hires New Chief Diversity Officer Amid GOP Pushback Against Campus DEI Offices*, Wis. Public Radio (June 12, 2023), <https://www.wpr.org/diversity-and-inclusion/uw-system-new-chief-diversity-officer-gop-pushback-against-campus-dei> (noting that at one point Vos claimed the UW System spent around \$16 million per year on DEI positions).

⁵⁷ Knox, *DEI Standoff*, *supra* note 55.

remained at a standstill.⁵⁸ The threat of budget cuts was not novel to the UW System, which faced a \$250 million cut in 2015.⁵⁹ However, the threat of DEI funding cuts seemed more to do with a political agenda and grandstanding, than with concern over specific statistics demonstrating excess spending.⁶⁰ In calling for the removal of DEI positions on UW System campuses Speaker Vos stated that DEI employees are “burrowed in like a tick on every single college campus” and that funding towards DEI efforts “implements much of their left-wing agenda.”⁶¹

Six months later, UW System President Jay Rothman and UW Madison Chancellor Jennifer Mnookin announced they had reached a deal with Speaker Vos (the “Deal”).⁶² Specifically, the Deal called for the UW System to: (1) freeze hiring for DEI positions for three years; (2) “restructure” one-third of the existing 130 DEI positions to

roles that can serve all students; (3) guarantee admission to UW Madison for all Wisconsin high school students in the top 5% of their class and guarantee admission to the remaining UW campuses for all Wisconsin high school students in the top 10% of their class; and (4) create an endowed chair position at UW Madison that focuses on “conservative political thought.”⁶³ In exchange for these concessions, the System would receive \$800 million to cover: (1) pay raises for their employees; (2) several building projects, including an engineering building at UW Madison; (3) renovations at various institutions; and (4) funding to allow for the demolition of several unused and uninhabitable buildings.⁶⁴ This deal did not originate from weeks of public negotiation, or even internal negotiations within the UW System and

⁵⁸ *Id.* (highlighting that the chair of the State Assembly's Black caucus saw the DEI budget dispute as “kind of a last Hail Mary,” and foresaw both side's willingness to “put[] the whole budget on hold” before reaching any bipartisan agreement).

⁵⁹ Luke Schaetzel, *Just How Much has the UW System Lost Since 2011?*, The Observatory (Apr. 16, 2024), <https://observatory.journalism.wisc.edu/2016/11/09/just-how-much-has-the-uw-system-lost-since-2011/>; see also Rich Kremer, *Most UW System Campuses have Budget Deficits in the Millions*, Wis. Public Radio (May 25, 2023), <https://www.wpr.org/economy/most-university-wisconsin-system-campuses-have-budget-deficit-millions> (stating that “state funding levels for public universities in Wisconsin ranked 42nd in the nation”); Knox, *DEI Standoff*, *supra* note 55 (“At some point you’re starting to cut into muscle and bone, not just getting rid of excess . . .”).

⁶⁰ Compare Rich Kremer, *Vos Says UW Deal ‘First Step’ Toward Eliminating ‘Cancerous’ DEI Practices*, Wis. Public Radio (Dec. 14, 2023), <https://www.wpr.org/education/vos-uw-deal-first-step-toward-eliminating-cancerous-dei-practices> (citing a statement from Vos where he noted that “Republicans know this is just the first step in what will be our continuing efforts to eliminate these cancerous DEI practices on UW campuses”), with Kelly Meyerhofer, *What to Know about UW’s 10-Year Tuition Freeze and What’s Ahead for Wisconsin College Students*, Milwaukee J. Sentinel (Aug. 11, 2022), <https://www.jsonline.com/story/news/education/2022/08/11/what-know-university-wisconsin-tuition-freeze/10179505002/> (noting that in 2013 Republican’s froze tuition for the UW System because an audit revealed hundreds of millions in reserves).

⁶¹ Alexander Shur, *Robin Vos Calls for Cutting Diversity, Inclusion Positions Across UW System*, Wis. State J. (May 5, 2023), https://madison.com/news/state-regional/government-politics/robin-vos-calls-for-cutting-diversity-inclusion-positions-across-uw-system/article_8b5e2a14-d6e2-5041-8fa5-f30c9fa34008.html.

⁶² Liam Knox, *No End to Wisconsin’s Higher Ed Budget Standoff*, Inside Higher Ed (Dec. 8, 2023), <https://www.insidehighered.com/news/government/state-policy/2023/12/08/wisconsin-board-rejects-funding-and-dei-deal-legislature>.

⁶³ Ava Menkes, *What to Know About the UW System Funding Deal*, The Daily Cardinal (Dec. 27, 2023), <https://www.dailycardinal.com/article/2023/12/what-to-know-about-the-uw-system-funding-deal>.

⁶⁴ *Id.*

state government officials.⁶⁵ In fact, lawmakers, faculty, students, and staff vocalized their shock over hearing about the Deal at the same time as the public, with no opportunity for input from anyone other than those in the room.⁶⁶

Within twenty-four hours of its announcement, the proposal was brought before the Board for a vote.⁶⁷ Immediately after the resolution was brought to the floor, Regents moved to table it, signaling their discomfort with the expedited timeline.⁶⁸ However, this motion failed, and discussion commenced.⁶⁹ The discussion surrounded an understanding of the tumultuous time, Regents' desires to fund the pay plan and much-needed building renovations, but an apprehension to approve the plan due to the dismantling of DEI support – both an actual dismantling and one from the public's perspective – and “concerns about the compromises the UWs may be expected to make in the future with the legislature if

the present resolution were to be adopted.”⁷⁰ After a roll call vote, the resolution failed with eight Regents voting in favor and nine opposed.⁷¹ In response to this vote, Speaker Vos announced publicly that he would not change “one thing” in the deal, and other Republican lawmakers strongly hinted that the Regents who voted against the deal could have their positions revoked at their upcoming Senate confirmation meeting.⁷²

Four days later, the Board reconvened to consider the proposal, unchanged, once again.⁷³ In her opening statement, Regent President Karen Walsh noted that the conversations at their last meeting illustrated that Regents had not had sufficient time to review the materials prior to the vote.⁷⁴ Walsh also noted that by approving the proposal, the core values of the UW System would not be jeopardized but current efforts would be “reimagined” – a word also within the proposed

⁶⁵ *Id.*

⁶⁶ *See id.* (highlighting a comment from a state senator who remarked that, “The initial proposal seemed like it was part of a hostage negotiation”).

⁶⁷ *See Special Meeting of the Board of Regents of the University of Wisconsin System*, Universities of Wisconsin (Dec. 9, 2023), [https://www.wisconsin.edu/regents/download/Meeting-Notice---Special-Meeting-of-the-UW-System-Board-of-Regents-\(December-9,-2023\).pdf](https://www.wisconsin.edu/regents/download/Meeting-Notice---Special-Meeting-of-the-UW-System-Board-of-Regents-(December-9,-2023).pdf).

⁶⁸ *See Record of the Special Meeting of the University of Wisconsin System Board of Regents*, Universities of Wisconsin (Dec. 9, 2023) at pages 5-6, https://www.wisconsin.edu/regents/download/meeting_materials/2023_meeting_materials/December-9-2023-Special-Board-of-Regents-Meeting-Record.pdf [*hereinafter* December 9 Record].

⁶⁹ *Id.* at page 6.

⁷⁰ *Id.* at page 7.

⁷¹ *Id.* at page 8.

⁷² Mitchell Schmidt, *UW Regents to Meet Again on Funding Dispute; Robin Vos Says It's His Final Offer*, Wis. State J. (Dec. 12, 2023), https://madison.com/news/state-regional/government-politics/robin-vos-uw-system-pay-dei-deal-final-offer-regents/article_480bd51e-983a-11ee-9b7e-4f6ff1868814.html (citing a post on X, formerly Twitter, that read “It’s good to know before their upcoming Senate confirmation votes that several Regents chose their sacred ideology over getting our students ready for their careers”).

⁷³ *Special Meeting of the Board of Regents of the University of Wisconsin System*, Universities of Wis. (Dec. 13, 2023), [https://www.wisconsin.edu/regents/download/meeting_materials/2023_meeting_materials/Meeting-Notice---Special-Meeting-of-the-UW-System-Board-of-Regents-\(December-13,-2023\).pdf](https://www.wisconsin.edu/regents/download/meeting_materials/2023_meeting_materials/Meeting-Notice---Special-Meeting-of-the-UW-System-Board-of-Regents-(December-13,-2023).pdf).

⁷⁴ *Record of the Special Meeting of the University of Wisconsin Board of Regents*, Universities of Wis. (Dec. 13, 2023) at page 2, https://www.wisconsin.edu/regents/download/meeting_materials/2023_meeting_materials/December-13-2023-Special-Board-of-Regents-Meeting-Record.pdf [*hereinafter* December 13 Record].

resolution.⁷⁵ Regent Ashok Rai said he would support the resolution and informed his colleagues that “to successfully move forward the Board must directly engage with the decision-makers who have authority over the resources the [University] of Wisconsin [System needs.]”⁷⁶ During the meeting, several Regents and Chancellors spoke about the need for the pay plan increase, building renovations, and the positive impact automatic enrollment could have on university attendance.⁷⁷ Regents against the proposal noted that it is wholly within the legislature’s power to approve the pay plan and capital projects and that the Board should not lean into the politicization of the fundamental role the State Legislature must play in supporting public higher education within the state.⁷⁸ Ultimately, the proposal passed with a vote of eleven Regents in support and six in opposition.⁷⁹ The Deal’s approval led many to speculate about the power the legislature now holds over the Board and the entire System.⁸⁰

The UW System is not the only university system whose DEI programs and efforts are under attack.⁸¹ Nor is it the only Wisconsin entity under attack. Months after the deal passed, Vos brought a constitutional amendment to prohibit state and local governments, including the UW System, from giving preferential treatment to individuals “on the basis of race, sex, color, ethnicity or national origin,” and while the amendment must still pass through the Senate, it received House approval.⁸²

The Break Down: How the Deal Departs from the Legislative Intent in the Creation of the UW System and Sets a Dangerous Precedent

“It will be a dangerous, a most dangerous experiment, to hold these institutions subject to the rise and fall of popular parties, and the fluctuations of political opinions Benefactors will have no certainty of effecting the object of their bounty;

⁷⁵ December 13 Record, *supra* note 74, at page 2; December 9 Record, *supra* note 68, at page 3.

⁷⁶ December 13 Record, *supra* note 74, at page 2.

⁷⁷ *Id.* at pages 2–4.

⁷⁸ *Id.* at page 4.

⁷⁹ *Id.*; see also Raja Razek & Andy Rose, *University of Wisconsin System Board Approves Deal for \$800 Million in State Funding that Cuts Back Diversity Initiatives*, CNN (Dec. 14, 2023), <https://www.cnn.com/2023/12/13/us/university-of-wisconsin-diversity-initiatives-funding/index.html>.

⁸⁰ See, e.g., Michael T. Nietzel, *University of Wisconsin Regents Flip-Flop; Approve Deal with Legislature to Limit Diversity Effort*, Forbes (Dec. 14, 2023), <https://www.forbes.com/sites/michaelnietzel/2023/12/14/university-of-wisconsin-regents-flip-flop-approve-deal-with-legislature-to-limit-diversity-efforts/?sh=650c3124dfbb> (commenting on how the approval of the plan “sets a very bad precedent for undermining the ability of university boards to operate with reasonable independence and autonomy”); Kelly Meyerhofer, *UW Regents Approve Deal on Diversity, Pay Raises After Six-Month Budget Standoff*, Milwaukee J. Sentinel (Dec. 13, 2023), <https://www.jsonline.com/story/news/education/2023/12/13/university-of-wisconsin-regents-approve-deal-on-diversity-pay-raises/71909112007/> (“Bowing to pressure, both political and financial, the regents reversed course . . .”).

⁸¹ See Erin Gretzinger & Maggie Hicks, *Tracking Higher Ed’s Dismantling of DEI*, The Chronicle of Higher Ed. (Apr. 19, 2024), https://www.chronicle.com/article/tracking-higher-eds-dismantling-of-dei?bc_nonce=k3zp04kf3zskc9z84h3d&cid=reg_wall_signup#wisconsin (tracking changes at 146 college campuses related to DEI efforts).

⁸² Scott Bauer, *Wisconsin Assembly Passes Constitutional Amendment to Limit Diversity Efforts*, AP News (Feb. 15, 2024), <https://apnews.com/article/wisconsin-dei-legislature-diversity-bc58c08c0fd4564c083685021eba-baa9>.

and learned men will be deterred from devoting themselves to the service of such institutions, from the precarious title of their officers.”⁸³

These words, although written in 1819, still ring true today. Legislative encroachment in higher education governance has serious implications no matter how it is done. But, if the legislature begins to work outside of the bounds of their prescribed rights, or those intended to be their rights, then the very foundation of higher education governance and autonomy is at risk. The difficulty surrounding legislative encroachment is, in part, because the authority a state has over a statutory university system is theoretically limitless. But, looking deeper, limits do exist. The legislature must grant funding and approve capital projects.⁸⁴ The Board, whose authority has been delegated by the legislature, must be able to effectively work within their prescribed rights and the rights the statutory creators intended them to have. Governing documents and legislative intent are two key sources of information to review when determining whether a legislature has overstepped its bounds.

The Inherent Autonomy of the UW System Board of Regents

Since the UW System originates in statute, the Board does not have constitutional autonomy

over all university governance matters.⁸⁵ Chapter 36 promulgates that the Board of Regents has the primary responsibility for governance; however, it must also “promote the widest degree of institutional autonomy within the controlling limits of system-wide policies and priorities established by the board.”⁸⁶ The Board can establish mission statements, determine the educational program offerings, and create policies to guide programs at each institution.⁸⁷ Board bylaws vest the executive responsibility for the operation and management of the System with the President of the UW System.⁸⁸ The bylaws also have seven standing committees that approve educational programs, capital building projects, the operating budget, and other matters necessary for the oversight of the system.⁸⁹ Chapter 36 also grants power to the chancellors of each institution.⁹⁰ It prescribes them to be the executive heads of their institution and vests them “with the responsibility of administering board policies under the coordinating direction of the president” to whom they are accountable to, in addition to the Board.⁹¹

Although each state’s higher education governing board has unique characteristics, each can be classified in one of the three governance structure models: planning agency, statewide coordinating

⁸³ Beckham, *Reasonable Independence*, *supra* note 12, at page 177.

⁸⁴ See December 13 Record, *supra* note 74, at page 4 (statement of Regent Miller).

⁸⁵ See Hutchens, *supra* note 13, at page 271; WIS. STATS. ch. 36.

⁸⁶ WIS. STAT. § 36.09.

⁸⁷ *Id.*

⁸⁸ *Bylaws of the Board of Regents of the University of Wisconsin System*, Universities of Wisconsin (Dec. 9, 2022), <https://www.wisconsin.edu/regents/download/BOR-BYLAWS.pdf>.

⁸⁹ *Id.*

⁹⁰ WIS. STAT. § 36.09(3).

⁹¹ *Id.*

board, or consolidated governing board.⁹² The UW System Board of Regents should be classified as a consolidated governing board based on its role and rights over the universities. The classification of the Board incorporates its governing responsibilities as stewards of the UW System but also as fiduciary for every UW System university. Each of the thirteen universities within the UW System are governed, to some degree, by the Board, System President, and a University Chancellor. University chancellors have the discretion to determine how they will implement governing policies and operate the day-to-day functions of their campus(es). Similarly, the System President can plan system-wide initiatives and direct chancellors to take action on various items without Board approval.⁹³ Even with these rights, the Board is not a planning agency, because individual campuses cannot control their budgets or most of their administrative structures and responsibilities.⁹⁴ A strong argument can be made that the Board is a coordinating board because the rights of chancellors are not completely curtailed by the decision-making ability of the Board.⁹⁵ However, the chancellors do not retain full autonomy over large institutional decisions,

and the Board is granted full decision-making authority, not review.⁹⁶ While the Board may have nuanced ways of delegating authority to the System President and a University Chancellor, it should ultimately be classified as a consolidated governing board.⁹⁷ As a consolidated governing board, Regents should be given autonomy over decisions that fall within their statutory authority.

Since the UW System is a product of legislative action, there will always be a need for legislative involvement in certain decisions. Legislative action can have a positive impact on the university system; the idea of the UW System came not from a university-driven initiative, but from a gubernatorial candidate.⁹⁸ The legislative intent of the UW System emerged through discourse and committees outside of the Senate floor. The bill enacting the merger did not address the numerous governmental and administrative issues that were likely to arise and served as more of a symbolic gesture.⁹⁹ Because of riots that had plagued the University of Wisconsin-Madison, the legislature used the merger, in part, to show the people of Wisconsin that they had some control over the

⁹² See McLendon & Ness, *supra* note 6, at page 67 (describing the various models for governance structures).

⁹³ See, e.g., Maria Blough, *UW System: Got Vaccinated? Enter Raffle for \$7,000 Scholarships*, WEAU 13 News (July 25, 2021), <https://www.weau.com/2021/07/25/uw-system-got-vaccinated-enter-affle-7000-scholarships/> (announcing President Tommy Thompson's vaccination initiative for all UW System campuses).

⁹⁴ See McLendon & Ness, *supra* note 6, at page 67 (describing a planning agency).

⁹⁵ See *id.* (noting that a coordinating board gives autonomy to chancellors and presidents).

⁹⁶ See *id.*

⁹⁷ See *id.*; see also Aims McGuinness, *Classification of State Higher Education Structures*, Nat'l Center for Higher Educ. Management Systems (Apr. 23, 2014), <https://www.leg.state.nv.us/interim/77th2013/committee/studies/commcollegesgovfund/other/23-april-2014/> (classifying Wisconsin as a state with two coordinated governing boards).

⁹⁸ See Brady, *supra* note 38, at pages 13, 19; Clarence-Rost, *supra* note 38, at page 650.

⁹⁹ Clarence-Rost, *supra* note 38, at page 651; see also Brady, *supra* note 38, at page 24 (noting that Lucey believed "that university leaders and the academic community would simply work out the specifics once the merger was accomplished").

universities.¹⁰⁰ Behind the scenes of the merger, discussions arose over “the effect that the merger struggle would have on the independence of higher education from political control.”¹⁰¹

Once approved, representatives of WSU, the University of Wisconsin, the state government, and the public were selected to serve on the Merger Implementation Study Committee (“MISC”).¹⁰² While political leaders were consulted during this process, the primary obligation to restructure this higher education behemoth fell to university leadership.¹⁰³ The creation of the statutory scheme now referred to as Chapter 36 of the Wisconsin State Statutes was spearheaded by university leaders, who worked to achieve a collective voice among the MISC on university missions, faculty involvement in governance, and faculty tenure.¹⁰⁴ Despite divided opinions on individual campus autonomy from the UW System Administration, all MISC members agreed that the state government should not have a codified role in the new governance model.¹⁰⁵

Similar structures for decision-making can exist today. There is a role for the legislature in influencing the strategic vision of the university. However, this cannot be done without the consultation of university leaders and those holding fiduciary responsibilities over the UW System. Just as MISC was comprised of multiple university

stakeholders, initiatives and committees with legislative and university stakeholders can be created, so long as the implementation of the unified vision is left to university leadership. This is not what occurred with the Deal between the UW System and the Wisconsin State Legislature.

The Deal’s Implications for the UW System’s Relationship with the State Legislature

Through a technical analysis of the Deal, no issues of legislative encroachment or overstepping of authority occurred; the Board’s resolution contained provisions clearly within their prescribed rights. It is what underlies this Deal that creates reason for pause. A system that respects and retains the power vested in a consolidated governing board is one that allows them to create change through their own processes and means, with legislative input when necessary.¹⁰⁶

Understanding the history of the UW System better informs the relationship between state government and the Board. The university system could not exist without state government, nor could it function without a governing board, but the roles of each are not explicitly outlined in statute and at times seem to be crafted more from the personalities of who is in charge, rather than what is best for the UW System, as the steward of the

¹⁰⁰ Clarence-Rost, *supra* note 38, at page 651.

¹⁰¹ *Id.*

¹⁰² Brady, *supra* note 38, at page 38.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at pages 50–54.

¹⁰⁵ *Id.* at pages 57–58.

¹⁰⁶ Cf. Lyman A. Glenny & Frank A. Schmidlein, *The Role of the State in the Governance of Higher Education*, Inst. for Rsch. on Educ. Fin. and Governance (1980) at page 7 (describing the relationship between state government and higher education as a “persistent human paradox” because there is a “simultaneous need for structure and for antistructure, for dependence and for autonomy, for involvement and for privacy”).

Wisconsin Idea.¹⁰⁷ But, from its very inception, state leaders recognized that while they have oversight authority and the ability to enact change in the UW System, doing so without relying on guidance from higher education experts can create a mirage of problems. Although not explicitly enacted in the statutory scheme, legislative history indicates that politicians should recognize the Board's, and UW System Administration's rights of organization and operation.¹⁰⁸ The Board should be allowed to govern based on their statutory right of governance.

This right of governance is not all-encompassing, nor should it be. There are means for legislative involvement within the current structure that exists in Wisconsin. Since the majority of the Board is appointed by the Governor, all appointments are inherently political.¹⁰⁹ This is a tool Florida Governor Ron Desantis recently used when he appointed six new members to the Board of Trustees at the New College of Florida, in an effort to enact

a "top-down restructuring."¹¹⁰ While this is extremely troubling and will have detrimental impacts on the operation and student experience at New College, the power of Board appointment rests with the Governor. It is imperative university leaders foster partnerships with state officials because university faculty, students, and staff are a large part of their constituency.¹¹¹ However, if the relationship is inherently built on a power imbalance and erosion of statutory rights, then it is unlikely meaningful change can happen.

The Deal encapsulates the division of rights between the Board and state leaders. Some, including Democratic state representatives, argue that the Deal, at its core, breaks the law.¹¹² Before a discussion of the implications of the Deal can occur, whether the Deal stripped away the clearly defined rights of the UW System or State Legislature must be determined.

The Board's signed resolution installs a hiring freeze for all DEI positions through December 31,

¹⁰⁷ See Valerie Strauss, *How Gov. Walker Tried to Quietly Change the Mission of the University of Wisconsin*, Wash. Post (Feb. 5, 2015), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/02/05/how-gov-walker-tried-to-quietly-change-the-mission-of-the-university-of-wisconsin/> (describing how Governor Walker's budget proposal put in word changes to the Mission of the UW System without even announcing the change publicly, let alone based on a proposal or conversation with UW System leadership).

¹⁰⁸ See Brady, *supra* note 38, at page 38 (describing the roles legislators and higher education leaders naturally took in the merger of the UW System, despite no articulated agreement).

¹⁰⁹ See Valerie Strauss, *A University of Wisconsin Campus Pushes Plan to Drop 13 Majors – Including English, History, and Philosophy*, Wash. Post (Mar. 21, 2018), <https://www.washingtonpost.com/news/answer-sheet/wp/2018/03/21/university-of-wisconsin-campus-pushes-plan-to-drop-13-majors-including-english-history-and-philosophy/> (noting how the 2015 legislature weakened tenure and Regents in turn set policies making it easier to lay off tenured faculty).

¹¹⁰ *Anatomy of a Political Takeover at Florida Public College*, AP News (Mar. 30, 2023), <https://apnews.com/article/desantis-new-college-florida-woke-timeline-5a5bcd78230ddd2a1adb8021fea8a755> (noting how the board immediately fired the New College President and eliminated the "Office of Outreach and Inclusive Excellence").

¹¹¹ See Robert D'Andrea, *Wisconsin Republicans Deny UW System Staff Pay Raises Over Diversity Funding*, Wis. Public Radio (Oct. 17, 2023), <https://www.wpr.org/economy/wisconsin-republicans-deny-uw-system-staff-pay-raises-over-diversity-funding> (noting that over half of Wisconsin's state workforce, roughly 34,000 people, are employed by the UW System).

¹¹² Anna Kleiber et. al, *UW System Passes Deal Freezing DEI Positions in Exchange for Buildings, Pay Raise Approval*, The Daily Cardinal (Dec. 13, 2023), <https://www.dailycardinal.com/article/2023/12/uw-system-passes-deal-freezing-dei-positions-in-exchange-for-buildings-pay-raise-approval> (highlighting a tweet from a democratic representative that read "Threats, intimidation, special favors, and yes, breaking the law – folks, this is your WI Republican Party").

2026, and further requires “realignment” of at least one-third of all existing DEI positions.¹¹³ Under Wisconsin Statutes 36.115 and 36.21, the Board is charged with creating a personnel system, separate from that of the Wisconsin state government, and granted the rights to terminate faculty or academic staff “when such an action is deemed necessary due to a budget or program decision” that can be made in consultation with faculty and the chancellor of an institution.¹¹⁴ Thus, determining what positions should be created, contained, or removed is a decision vested in the Board.

Additionally, the Deal calls for guaranteed admission for students in the top percentiles of their Wisconsin high school classes, and similarly, the State Statutes vest the creation of policies for admission within the System to the Board.¹¹⁵ Finally, the Deal approved the creation of a specific position at UW Madison: a chair that serves “conservative political thought.”¹¹⁶ This position is clearly within the Board’s authority to create, however specific positions beyond those that are primarily administrative are often left up to the

discretion of the university chancellor to create.¹¹⁷ Ultimately, the entire deal stands within the purview of the Board, based on powers granted to them by the Wisconsin State Legislature. Further, the agreements of the State Legislature are within their authority, not the Board’s. Pay plan increases, and capital project approval, renovation, and demolition, are encompassed in the state allocations the UW System receives through the approval of the annual and biennial budget.¹¹⁸ Each change also represents a request proposed in the UW System’s last annual budget, which was approved by the Board and then sent to the State Legislature.¹¹⁹

The history of the University of Wisconsin System demonstrates that respect between the Wisconsin State Legislature and public higher education in Wisconsin existed at one point.¹²⁰ However, this Deal indicates that any semblance of that respect is now gone. This Deal featured not just one threat from a state legislator but multiple iterations of threats, given over a prolonged period and

¹¹³ December 13 Record, *supra* note 74.

¹¹⁴ WIS. STAT. §§ 36.21, 36.115.

¹¹⁵ December 13 Record, *supra* note 74; WIS. STAT. § 36.11(3) (granting rights to chancellors to establish specific requirements for admission).

¹¹⁶ December 13 Record, *supra* note 74.

¹¹⁷ See *Regent Policy 20-21: University Personnel Systems*, Universities of Wis. Bd. of Regents (Nov. 10, 2022), <https://www.wisconsin.edu/regents/policies/university-personnel-systems/> (maintaining board control of personnel appointment but delegating authority of implementing the personnel system of UW Madison to their Chancellor).

¹¹⁸ See *Regent Policy 19-1: University Facilities, Space, and Physical Development Capital Funding and Costs*, Universities of Wis. Bd. of Regents (Oct. 8, 2021), <https://www.wisconsin.edu/regents/policies/university-facilities-space-and-physical-development-capital-funding-and-costs/> (outlining that General Purpose Revenue and General Fund Supported Borrowing are the primary funding sources for most physical development on campuses).

¹¹⁹ *Approval of the 2023-25 University of Wisconsin Biennial Operating Budget and Financial Aid Request*, Univ. of Wis. System Bd. of Regents (Aug. 18, 2022), <https://budget.wisc.edu/content/uploads/2023-25-uw-system-budget-request.pdf>.

¹²⁰ See Brady, *supra* note 38, at page 38 (outlining the history of the UW System and legislative deference to university decision-making).

occasionally directed at specific Regents.¹²¹ Board discussions surrounding the Deal are indicative of just how much pressure they felt.¹²² The final resolution the Board approved had been denied just three days earlier and received no changes in the interim.¹²³ Those who supported the plan discussed “direct engage[ment] with the decision-makers who have authority over [] resources,” but did not describe any involvement in crafting the Deal or discuss how the changes the UW System would agree to benefitted universities.¹²⁴ In fact, no individual who spoke in favor of the Deal’s approval indicated support for the major cuts to DEI staffing and student resources, or the creation of the UW Madison chair position; while these elements were the cornerstone of the arguments of Regents who opposed the plan.¹²⁵ Board discussion made one aspect of the Deal extremely clear: this plan did not originate from the Board, UW System Administration, or even shared governance.¹²⁶ Further, the Board passed this Deal almost exactly one year after approving a strategic plan spanning from 2023-2028; one of the “core values” of this plan is diversity.¹²⁷ The plan states, “We are committed to diversity, equity, inclusion, and belonging. These principles are key to our long-term success.”¹²⁸ Before the Deal, the Board engaged in no action or public discussion

surrounding the proposed elimination of DEI positions, nor was there any indication that chancellors and university leaders demanded these actions be taken.

Because of the inherent power dynamic between the Board and State Legislature, and because of the higher education expertise that rests with the System, higher education proposals or ideas should originate from Board resolutions, System proposals, or a joint committee or task force structure to ensure that wide-scale actions do not have negative, unintended ramifications. It is the duty of the State Legislature to approve pay plan increases and the capital budget, should they choose. It is not their right to use their fundamental role as a means to politicize and dictate specific personnel decisions.¹²⁹ The Board, although composed of gubernatorial appointees, is meant to be insulated from political influence to uphold their duties as fiduciaries of the UW System.¹³⁰

The state legislature has means of enacting change that is driven by political thought, should they choose. They control the budget, statutes, and capital projects, and can audit the UW System. Although not prescribed anywhere, this is where the authority of the state government lies. Decisions that go deeper than this, such as

¹²¹ Schmidt, *supra* note 72.

¹²² See generally December 13 Record, *supra* note 74; December 9 Record, *supra* note 68.

¹²³ December 13 Record, *supra* note 74, at page 2.

¹²⁴ *Id.*

¹²⁵ See *id.* at pages 2-4.

¹²⁶ See WIS. STAT. § 36.09(4), (4m), (5) (creating shared governance structures, which allow students, faculty, and staff to participate in some governance processes).

¹²⁷ 2023-2028 Strategic Plan, *supra* note 54.

¹²⁸ *Id.*

¹²⁹ See December 13 Record, *supra* note 74, at page 4.

¹³⁰ See Informational Paper 36, *supra* note 52, at page 2.

programmatic change, prioritization of goals, and individual faculty and staff positions, should be left up to the discretion of the Board, President, and institutional Chancellors. A university system is not a business; it is a complex and dynamic enterprise that must be recognized for its unique position.¹³¹ The leaders required to run it must be well versed in its nuance and always look towards the future.¹³² Politicians are not charged with thinking about the longevity and strategic visions of our institutions, nor should they be, but with that understanding comes the requisite that politicians defer to Board decisions and prioritization.¹³³ The Board cannot be insulated, nor can it act in the best interest of the UW System, if it does not have protections in place to combat threats made by state legislators.

The Restoration: How University Autonomy can be Strengthened Through Constitutional Change

It is imperative for limits to be placed on the legislature's oversight and control over a university system, for without those, the Board merely becomes a magic wand that does the bidding of

strong political influencers. For this reason, the Wisconsin State Legislature should grant constitutional autonomy to the Board of Regents. The state constitution already requires the establishment of a state university and outlines the need for higher education opportunities for citizens.¹³⁴ In the modern age, where the rights of university leaders are being stripped away almost daily, provisions must be put in place to protect higher education institutions before they merely become political conduits that fail to make meaningful changes towards their missions.¹³⁵

The UW System should be granted constitutional autonomy because it is their duty to provide proper and effective governance as stewards of the Wisconsin Idea.¹³⁶ Granting the UW System constitutional autonomy would not provide it with unbridled control. Judicial interpretations of the authority conferred on the governing board would provide oversight into their actions.¹³⁷ Autonomy is vital to the success of the UW System because it is one system comprised of thirteen individual and unique universities. The current statutory regime requires regulations that follow a "one-size-fits-all" model, which dampens

¹³¹ But see Erik Gross, *Should Universities be More Like Corporations?*, Am. Council of Trustees and Alumni (Feb. 25, 2020), <https://www.goacta.org/2020/02/should-universities-be-more-like-corporations/> (arguing that there is no market competition within universities and their longevity is a sign of market failure).

¹³² Cf. Kathy Johnson Bowles, *Higher Ed's Relationship with the Government: It's Complicated*, Inside Higher Ed (May 2, 2022), <https://www.insidehighered.com/blogs/just-explain-it-me/higher-ed's-relationship-government-it's-complicated> ("Lawmakers often see solutions to problems in higher education as one-size-fits-all.").

¹³³ See James L. Bess & Jay R. Dee, *Understanding College and University Organization: Theories for Effective Policy and Practice* (2007) at page 540 ("Excessive uses of power . . . sometimes arise illegitimately – this is, without community acceptance – and are deleterious to the accomplishment of the missions of institutions.").

¹³⁴ See Brady, *supra* note 38, at page 4.

¹³⁵ See Beckham, *Reasonable Independence*, *supra* note 12, at page 188 ("Limits must be placed on the legislature's power to condition appropriations to the university system, otherwise the power of the conditioned appropriation could be used to strip the governing board of constitutional authority.").

¹³⁶ See Beckham, *Constitutionally Autonomous*, *supra* note 25, at pages 544–45 ("The purpose of the provision granting autonomy is to confer on the Regents full power in the conduct of exclusively university system affairs.").

¹³⁷ *Id.* at page 543 (arguing that judicial interpretation would serve as a check on Florida's board, should they be granted constitutional autonomy).

university identity or requires the legislature to enact rules that target one university, which leaves the administrative code disorganized and unclear.¹³⁸ “The principal threat to the autonomy of the state higher education system is bureaucratic intrusion that receives stimulus from delegations of power by the legislature or the executive.”¹³⁹ Legislative leaders are not going to review legislative intent or the Board’s bylaws to determine where their powers lie. They are going to act, then dare anyone at the UW System to challenge them.

Conclusion

The impact of higher education expands far beyond the boundaries of the university – that is the Wisconsin Idea. While the name may be unique to Wisconsin, the principle that education influences lives beyond the classroom is not. Public universities exist to serve the citizens of their states through research, education, and program implementation. University leaders undertake this large responsibility and craft missions, strategic plans, and programs to meet the identified needs. Universities do not exist in a silo; they must seek input and collaboration from state government leaders to enact meaningful change. But, if this relationship is not structured toward providing a sustainable and purposeful

environment for faculty, staff, students, and the larger community, then the very foundation of higher education is at stake.

The Deal struck between the UW System Board of Regents and the State Legislature is just one example of the erosion of the very foundation of higher education governance. By allowing a single, albeit powerful, legislator to create deliberate and widespread change impacting tens of thousands of students, the Board created an opportunity for legislatures to get around the state governmental processes and simply dictate higher education policy with a single threat. There is no going back from the power imbalance set in motion by the Deal; the UW System should be granted constitutional autonomy because that is the only way to ensure the rights of the Board and university leaders, granted to them by statute, will be respected moving forward. The Deal has startling implications for the future of the UW System and the adoption of the idea that the weaponization of spending power will allow universities to do the legislature's bidding has the ability to destroy any rights of university leaders to make meaningful decisions for students, staff, faculty, and citizens of the state. With great power comes great responsibility — with relinquished power comes relinquished possibility.¹⁴⁰

¹³⁸ See, e.g., WIS. STAT. § 36.11(58) (denying transfers of funds to the University of Wisconsin-Oshkosh Foundation); see Bark, *supra* note 10, at page 409 (describing how the degree of centralization within an agency impacts the diversity within an institution and the increased focus on the global agenda)

¹³⁹ Beckham, *Constitutionally Autonomous*, *supra* note 25, at pages 544–45.

¹⁴⁰ See *Spider-Man*, Sony Pictures (2002).