

# DUTIES

## What if Universities Had Actual Trustees?

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### ABSTRACT

*This article examines the governance challenges faced by universities, drawing a parallel between these institutions and business entities. It argues that universities, much like corporations, are structured with boards and CEO-equivalents, but differ in their lack of a profit motive and clear measures of success. This absence of explicit objectives often leads to ineffective governance. It proposes a solution: university board members should be selected for their expertise in overseeing complex organizations and engage actively in governance. The article suggests that the ethical duties and fiduciary obligations of university board members should be analogous to those of trustees in a non-charitable purpose trust. This approach would require them to act independently and in alignment with the university's mission, potentially leading to more effective governance and accountability. The article concludes by advocating for clearer university missions and a more focused, trustee-like role for university boards, to ensure better governance and address the myriad challenges universities face.*

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Universities are organizations in the same sense that business entities such as corporations are organizations. Indeed, some universities are corporations – Harvard University is a corporate entity and proudly announces it is the “oldest corporation in the Western Hemisphere.”<sup>1</sup> Regardless of their precise legal organizational form, universities are structured in many of the same ways as most business entities: they are governed by boards, which delegate day-to-day decision-making to a CEO-equivalent. The major formal distinction between universities-as-organizations and most business entities is that universities do not have an explicit profit motive; the major functional distinction is that they lack an objective measure of success equivalent to profits; the major structural distinction is their boards have far less responsibility than a corporate board, in part because there is no objective measure by which their performance can be judged.<sup>2</sup> What if that was not true? What if we instead evaluated their governance in the same way we evaluated other organizations, by looking at the performance of the people responsible for governing them? In short, what if members of university boards had ethical obligations (which might even be enforceable through the courts) to give their universities a clear mission and evaluate the decisions they made against those obligations in the same way that corporate boards and other governing bodies are responsible to define the mission of their organizations and make decisions in light of that mission?

My argument in this paper is that universities suffer from the same governance problems as many large business entities and that many of these governance problems are due (at least in substantial part) to their boards’ failure to perform effective governance, a problem that afflicts many for-profit entities as well. As Kenneth Ashworth, a pivotal figure in the development of the University of

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1. *Harvard Corporation*, HARVARD.EDU, <https://www.harvard.edu/about/leadership-and-governance/harvard-corporation/> [https://perma.cc/E362-LJ3Y]

2. RYAN C. AMACHER & ROGER E. MEINERS, *FAULTY TOWERS: TENURE AND THE STRUCTURE OF HIGHER EDUCATION* 29 (2004) (“Most trustees have no particular expertise in higher education and are passive, allowing administrators to run the show unless things seem to be getting grossly out of hand. Trustees rarely focus on the kind of objective measures available to guide corporate board members.”); see Henry G. Manne, *The Political Economy of Modern Universities*, in *EDUCATION IN A FREE SOCIETY* 165 (Anne Husted Burleigh ed., 1973) (providing an in-depth law-and-economics analysis of the evolution of, and incentive problems in American universities).

Texas at Austin, put it in his memoir: “Most regents sought to be on university boards because they wanted the prestige and to bask in the glory of being associated with the achievements and reputation of an institution of higher learning or to serve on the board of their alma mater to flaunt their success and become the envy of all their former classmates.”<sup>3</sup> Similarly, Henry Manne, both a founding father of the Law and Economics movement and an experienced consumer of university governance at the multiple institutions where the Law and Economics Center resided during his career, contended that “[t]he most significant characteristic of the modern university trustee is his almost total lack of real interest in exercising any authority.”<sup>4</sup> Given these motives, it should not be surprising that university boards are often seen more as a reward for their members than effective governance institutions. Nor should it be a surprise that university boards often do not engage in real governance. For example, former University of Pennsylvania trustee and CEO of Apollo Global Management, Marc Rowan, commented on the difference between the environment of open debate over strategy at his firm and what he experienced during his time on Penn’s board of trustees by saying: “In all the years I was a trustee, we never had a debate, we never had a discussion, we never made a hard decision.”<sup>5</sup>

There is no simple remedy for this institutional failure other than the obvious: university board members should be selected for their expertise in overseeing large complex organizations and boards made up of such members should engage in active governance of the institutions they oversee. This is easier said than done, however. Even corporate boards of for-profit entities often seem asleep at the wheel and oblivious to what often appear to outsiders *ex post* to be obvious dangers, despite at least formal legal duties that require them to pay attention to important issues.<sup>6</sup> For example, Delaware’s *Caremark* doctrine imposes a duty on boards “to exercise oversight” and to monitor a business’ “operational viability, legal compliance, and financial performance.”<sup>7</sup> Why are university boards not

3. KENNETH ASHWORTH, HORNS OF A DILEMMA: COPING WITH POLITICS AT THE UNIVERSITY OF TEXAS 38 (2011) (Ashworth also recounted how the Chair of the state Coordinating Board commented “Boards of Regents can be bought for nothing” in blaming them for continually increasing enrollment caps to help local real estate developers); *Id.* at 94.

4. Manne, *supra* note 2, at 181.

5. Rachel Louise Ensign, *The Billionaire Donor Taking on his Alma Mater over Antisemitism*, WALL ST. J., Nov. 3, 2023, [https://www.wsj.com/us-news/education/the-billionaire-donor-taking-on-his-alma-mater-over-antisemitism-2d1637cd?st=esy1bshtg86bsz&reflink=integratedwebview\\_share](https://www.wsj.com/us-news/education/the-billionaire-donor-taking-on-his-alma-mater-over-antisemitism-2d1637cd?st=esy1bshtg86bsz&reflink=integratedwebview_share) [https://perma.cc/WX3A-MGRZ].

6. The Theranos board is a classic example. Aside from a single board member who raised questions of Elizabeth Holmes and who was then forced off the board through threats of litigation, no “other board member . . . was even interested in asking questions or challenging Holmes” despite being “highly accomplished . . . famous diplomats, statesmen, and political and military leaders”; in part this was because none had “any substantial scientific or health care industry experience”, which led one compliance expert to term the board “window dressing.” Brent T. Wilson, *Theranos and the Tale of the Disappearing Board of Directors*, IDAHO STATE BAR (Mar. 11, 2020), <https://isb.idaho.gov/blog/theranos-and-the-tale-of-the-disappearing-board-of-directors/> [https://perma.cc/G3N5-9AWG].

7. In *Re Caremark Int’l Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996) (Although the Delaware Supreme Court recently reaffirmed it in *Marchand v. Barnhill*, where it held that “[a] board’s

held to a similar standard? One reason is that arguing that the solution is getting board members to be more active leaves unanswered the question as to what they are going to be active in doing because a university board does not have an equivalent to a corporation's stock price against which to measure a university board's success or failure.<sup>8</sup>

There is an alternative analogy for the role of university board members that is even better suited to improving university governance than the corporate board and thus provides a better model for university board member's ethical duties: the role of trustee of a trust.<sup>9</sup> The fiduciary obligations of trusteeship are well established in Britain, the United States, and other common-law-derived jurisdictions. Trusts are flexible, time-tested forms of organizing collective endeavors.<sup>10</sup> Indeed, in the late nineteenth century, trusts were a significant rival to corporations as the preferred means of organizing businesses.<sup>11</sup> Both the relatively common charitable purpose trust and the more recent acceptance in many jurisdiction of non-charitable purpose trusts provide analogues in which a trust serves a purpose without requiring the identification of specific beneficiaries, making them a good fit for universities whose educational missions are not aimed at specific beneficiaries.<sup>12</sup> Conceiving of university board members as having roles closely analogous to the trustees of purpose trusts would represent a significant departure from how the role of board members in virtually all U.S. universities is currently conceived.

'utter failure to attempt to assure a reasonable information and reporting system exists' is an act of bad faith in the breach of the duty of loyalty," see *Marchand v. Barnhill*, 212 A.3d 805, 809 (Del. S.Ct. 2019), the state supreme court's shift of the legal basis of *Caremark* from the duty of care to the duty of loyalty raised the bar for such claims, leading many to conclude that even a legal duty whose violation could produce personal liability provides little check on board inattention; Stephen M. Bainbridge et al., *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 597-604 (2008).

8. See L. Burke Files et al., *Corruption in University Admissions and the Administrative Allocation of Scarce Goods*, 47 BYU L. REV. 1 (2021) (Together with L. Burke Files and Roger E. Meiners, I have previously argued that university boards should have been held accountable for their failure to adequately supervise the universities involved in the Varsity Blues admissions scandal).

9. Indeed, many university boards are called "boards of trustees" in recognition of their status as, more or less, charitable purpose trusts.

10. See D. J. HAYTON, *THE LAW OF TRUSTS* v (4<sup>th</sup> ed., 2003) (describing the trust as "a flexible living organism responsive to changing circumstances").

11. Eric C. Chaffee, *A Theory of the Business Trust*, 88 U. CIN. L. REV. 797, 810 (2020) ("Trusts remained as cornerstone of American business for much of the nineteenth century."); see also John Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, in *MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW* 170 (David Hayton ed., 1999) ("most of the wealth that is held in trust in the US is placed there incident to business deals, and not in connection with gratuitous transfers. It will be seen that well over 90 per cent of the money held in trust in the US is in commercial trusts as opposed to personal trusts.").

12. There are serious arguments about the recognition of non-charitable purpose trusts in English law. See, e.g., Paul Baxendale-Walker, *PURPOSE TRUSTS* 318-20 (1999). I am going to ignore those in this article since it is sufficient for my purposes that some jurisdictions recognize such trusts. Further, I'm going to ignore the distraction of the body of English law determining whether a purpose trust is for a sufficiently charitable purpose to be considered valid by the English courts, since the statutory non-charitable purpose trusts authorized by multiple other jurisdictions eliminates the need to do so.

In terms of the ethics of university governance, my argument has an important implication: if university board members actually acted as trustees do, they would have a duty to exercise independent judgment on the matters that come before them and to evaluate their decisions by considering the facts relevant to the decision and not considering things not relevant to the decision (such as their own preferences).<sup>13</sup>

#### I. DEFINING THE PROBLEMS WITH UNIVERSITIES WE ARE TRYING TO SOLVE

Universities face many challenges. Among those commonly recognized recently include the extent of their commitment to free speech, defining the boundaries of academic freedom, balancing the research and teaching roles of the faculty, being financially viable, and coping with an increasing regulatory burden from the federal and state governments. Critics on both the left and the right have even longer lists of problems with universities. These include the failure to adequately diversify their faculties in particular dimensions (race/ethnicity/gender on the left, ideology on the right) and teaching/emphasizing the “wrong” subjects, readings, and pedagogical approaches. Of course, critics on the left and the right often see mirror images of those problems. For example, the left thinks university curricula are still too “colonial” and wants efforts to “decolonize” them;<sup>14</sup> the right thinks university curricula have gone “woke” and wants to bring back the central role of what it sees as canonical works.<sup>15</sup> There are a host of more prosaic challenges that lack ideological content as well: the “enrollment cliff” due to the demographic collapse of the population of the age to attend universities,

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13. See, e.g., Sieff v. Fox [2005] EWHC 1312 (Ch) (describing the “Rule in *Hastings-Bass*”, later curtailed in Britain but enshrined in a statute in multiple offshore jurisdictions. In addition, this duty could be made legally enforceable, as is the case for both charitable and non-charitable purpose trusts, through the creation of a role equivalent to that of the trust protector or the purpose trust enforcer. Charitable purpose trusts are generally enforceable by the relevant state’s attorney general; non-charitable purpose trusts often require appointment of one or more protectors, whose role typically includes holding trustees accountable to the purpose of the trust); see Richard C. Ausness, *The Role of Trust Protectors in American Trust Law*, 45 REAL PROP. TR. & EST. L. J. 319 (2010) (U.S. states and many offshore jurisdictions have been willing to innovate in trust law to attract business); see, e.g., DOMESTIC ASSET PROTECTION TRUSTS A PRACTICE AND RESOURCE MANUAL (Alexander A. Bove, Jr. ed., 2021) (describing at length the efforts of multiple U.S. states to attract asset protection business by adopting statutes with attractive features). If a reader is worried that this is all empty theorizing, the reader can be assured that multiple states would likely adopt legislation making the use of trusts described here possible, if they thought there was business to be lured to their state. Creating such a role would provide a means to keep university boards’ attention focused on their mission while avoiding the problem of endless nuisance suits by disgruntled stakeholders that would be the most likely result of attempting to stakehold more generally.

14. See, e.g., Elizabeth Charles, *Decolonizing the curriculum*, 32(1) INSIGHTS 24, 29 (2019) (“The time is right for decolonizing the curriculum to reinvigorate what is being taught in HEIs. In critically re-examining what is included in the curriculum – the voices, narratives and different sources of knowledge – education could be transformative of both the individual (staff and/or student) and the impact this might have on the subject discipline and society.”); Riyad A. Shahjahan, et al., “*Decolonizing” Curriculum and Pedagogy: A Comparative Review Across Disciplines and Global Higher Education Contexts*, 92(1) REV. ED. RES. 73 (2022) (reviewing efforts worldwide).

15. See, e.g., HAROLD BLOOM, *THE WESTERN CANON: THE BOOKS AND SCHOOL OF THE AGES* (1994).

growing skepticism about the value of university education, and increasing public awareness of the skyrocketing cost of attending universities. I contend that these specific problems are less important than the more general one of lacking a clear purpose because without a clear purpose, universities are unable to have effective governance in all but the rarest cases.

### A. *Why Missions Matter*

Without effective governance, universities cannot address the other, subsidiary issues. My argument is that the lack of a clear purpose is the defining governance problem of the modern university because its absence precludes holding boards accountable. Further, without a board that shares a vision of the university's purpose, and then engages in active governance of the institution in pursuit of that purpose, universities will fail in finding satisfactory answers to the subsidiary questions that we often think of as the main problems for universities.<sup>16</sup>

To see the importance of the mission to universities consider the parallel critiques of modern American universities by the left and right. Neither is happy with the current curricula offered, although they differ dramatically in how they want to change them. Let us take mathematics as an example. From the left, there are proposals to decolonize the math curriculum, which in practice often appears to mean highlighting the contributions of non-Europeans to the development of mathematics and using examples derived from non-European cultures.<sup>17</sup> Opponents from the right argue math should be based on "the use of the scientific method, meritocracy, best practice, a colorblind approach to knowledge claims that judge those knowledge claims only on their inherent value, not on who was making them."<sup>18</sup> A university could plausibly decide to pursue either course, emphasizing a decolonizing approach to teaching mathematics or a focus on teaching math without regard to such considerations.<sup>19</sup> Which to choose?

16. FRANKLIN PATTERSON & CHARLES R. LONGWORTH, *THE MAKING OF A COLLEGE: PLANS FOR A NEW DEPARTURE IN HIGHER EDUCATION* 68 (1966) (When Hampshire College was being planned in the mid-1960s, there was a suggestion that the college have a "vice-president in charge of revolution." This was as terrible an idea as many of the rest of the ideas of that era: fostering instability would be precisely the opposite of the appropriate steps to take).

17. See, e.g., Rachel Crowell, *Maths Plot a Course to Cultural Equality*, 614 NATURE 183 (2023); see also *Why we have nothing to fear from the decolonization of mathematics*, 614 NATURE 8 (2023).

18. Bruce Gilley, *What does 'Decolonize Math' Mean?*, BEYOND WOKE WITH PETER BOGHOSSIAN (Dec. 29, 2021), <https://boghoasian.substack.com/p/what-does-decolonize-math-mean> [<https://perma.cc/WTF6-TJNG>].

19. The Second Circuit recently affirmed universities' right to – consistent with *their* academic freedom – to exclude a candidate for a tenure track job based on the candidate's choice of professional methodology. In *Heim v. Daniel*, 81 F.4th 212, 234 (2<sup>nd</sup> Cir. 2023), the court held that the State University of New York at Albany could reject a candidate for a macroeconomics decision on the basis of his Keynesian views, since it preferred candidates who took a microfoundations approach. The court concluded that

Defendants have decided to prioritize, for purposes of scarce tenure-track positions, a particular methodology. Heim does not dispute that their decision was the product of a learned and strategic choice, made by experts in their good faith professional judgment, free from any influence from political entities in the state or other governmental or university officials outside the relevant



In most universities, the choice of approach is going to be left in the first instance to the mathematics department.<sup>20</sup> If the department includes people with both views, leaving the decision to the department makes the hiring of faculty members for the math department a battlefield on which issues of which approach to take will be fought. The decision could be bumped to the college level, although doing so risks simply transforming the contested terrain to all hiring and brings in decisionmakers likely less aware of the specific tradeoffs entailed by choosing between various approaches. Current practice at most universities is to leave such decisions to individual departments or colleges.

In the rare cases where boards do intervene to set the university's direction – as happened recently at the public New College in Florida, where a board majority consisting primarily of newly appointed board members recently fired the college president and replaced the board chair at their first meeting and then adopted a new approach to the institution's mission that differed substantially from its previous approach<sup>21</sup> – this can be seen as political interference (in the case of New

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discipline. . . . That is, and must be, permissible. If the Supreme Court's (and this Court's) enthusiastic endorsement of the First Amendment principles supporting a university's academic freedom is to be given any practical bite, decision-makers within a university must be permitted to consider the content of an aspiring faculty member's academic speech, and to make judgments informed by their own scholarly views, when making academic appointments.

20. In 1966, Yale President Kingman Brewster, Jr. noted that departments and disciplines were problematic themselves:

Not only do professors get tenure, but courses, fields, disciplines, and, above all, departments get tenure. At least a professor is mortal: departments go on forever. Perpetuity, as someone observed, is a long time. The discipline as the primary organizing principle of academic life is of course essential to the maintenance of standards of both faculty appointments and educational rigor. But to permit it to be the be-all and end-all of academic strategy is inevitably to risk the exclusion of generalizing, synthesizing college education on one hand and the pursuit of transdepartmental intellectual excitement on the other. . . . There is no gimmick solution.

See FRANKLIN PATTERSON & CHARLES R. LONGWORTH, *THE MAKING OF A COLLEGE: PLANS FOR A NEW DEPARTURE IN HIGHER EDUCATION* 63 (1966). If, as at my university, many students in mathematics courses are majors in other disciplines (e.g., engineering), those departments are likely to also have strong views on what needs to be covered in introductory math classes. While the math department could ignore those views, it would bear the risk that, say, the engineering school might decide to develop its own introductory courses in “math for engineers”, which could have negative consequences for the math department's revenue if “tuition follows the student” and funding is linked to enrollment. At Texas A&M, roughly a third of our total undergraduate enrollment are engineering students. If that stream of students were diverted from math department (a College of Arts and Sciences department) to engineering departments' own math offerings (in the College of Engineering), that would significantly disrupt existing revenue models. So, people outside the math department are likely to have input into how math is taught at most universities. Moreover, wherever general education requirements are instituted they soon become, as the founders of Hampshire College observed in the mid-1960s and as remains true today, objects of “further faculty study and scrutiny; in some cases, they became the object of academically cosmic conflict.” See *id.* at 82.

21. Ian Hodgson, Divya Kumar, & Lane DeGregory, *Change comes swiftly to New College as DeSantis appointees replace president*, TAMPA BAY TIMES (Jan. 31, 2023). Coverage of New College prior to the new board appointees' arrival was sufficiently sparse that it is hard to tell to what extent the prior mission came from the board rather than from the faculty. There is little doubt, however, that the new mission comes from the new board members. Whatever one's views of the merits of that mission, its articulation and implementation thus far are an example of how a board with a clear mission can

College because the trustees are appointed by the state's governor).<sup>22</sup> The criticism of the trustees' decision seems to be based on a belief that state governments are obliged to fund public education but not to say much about the mission of the institutions they fund. Getting a blank check from your funder is a very nice thing for the recipient of the funds, but other than the assertion that universities must be left alone to do whatever they want, free of "interference" by funders (a thesis that is sometimes applied to private funders as well), this assertion is not supported by anything other than the claim that universities in which funders do not meddle are better than those in which there is active governance from outside the university.<sup>23</sup> It is relatively easy to be concerned (especially if one is a professor) at many of the examples Prof. Gene Nichol elaborates in his essay on political interference cited above. A state government singling out a private university with threats over its tax-exempt status because the university's law clinic has sued to stop polluting industries' expansion is a clearcut case of unconstitutional behavior as is a public university denying a researcher reappointment over concern that his research put federal grants at risk by criticizing the federal government's work on New Orleans' levees. But it is less clear to me why the Arizona legislature is not entitled to instruct its state universities to offer "freedom schools," which Nichols complains have been "lavishly funded" in contrast to the "very modest" funding increases given the universities' general budgets. After all, a student enrolled in one of them defended them as encouraging "the free pursuit of civic and liberal education through a curriculum that emphasizes the reading and analysis of political philosophy and economic theories."<sup>24</sup> Why — uniquely among the many functions of state government — is higher education to be simply given money without strings? One reason legislatures might be skeptical about the

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engage in governance that has an impact. The New College case also raises important issues about the extent to which state universities should be constrained in their missions by their public character, issues that are beyond the scope of this article.

22. See, e.g., Andrew Atterbury, *Conservative trustees oust president at Florida's New College amid leadership overhaul*, POLITICO (Jan. 31, 2023) <https://www.politico.com/news/2023/01/31/florida-new-college-conservative-trustees-00080541> [<https://perma.cc/HE33-XY2G>]; Michelle Goldberg, *This is What the Right-Wing Takeover of a Progressive College Looks Like*, N.Y. TIMES (Apr. 29, 2023) <https://www.nytimes.com/2023/04/29/opinion/new-college-florida-republican-desantis.html#:~:text=Ron%20DeSantis%20of%20Florida%20appointed,to%20turn%20the%20quirky%2C%20L.G.B.T.Q> [<https://perma.cc/XU43-C4PT>]; but see Christopher F. Rufo, *D.E.I. Programs are Getting in the Way of Liberal Education*, N.Y. TIMES, July 27, 2023, (arguing that the approach he and his fellow new trustees support will "encourage a culture of open debate and cultivate a "community of scholars" with a wide diversity of opinions and a shared commitment to truth — something that both liberals and conservatives can and should support.").

23. See, e.g., Gene Nichol, *Political Interference with Academic Freedom and Free Speech at Public Universities*, AAUP (Nov. 2018) <https://www.aaup.org/article/political-interference-academic-freedom-and-free-speech-public-universities> [<https://perma.cc/XC7K-HWLL>] ("Public universities cannot thrive without a vibrant, secure, and zealously guarded sanctuary of academic freedom. And democracies cannot meaningfully function without the kind of rigorous, skeptical, probing, unfettered, and unfearing research that takes place at our great public universities.").

24. Brock Blaisdell, *Arizona's 'freedom schools' teach students to think critically. What's wrong with that?*, AZCENTRAL (Apr. 6, 2023) <https://www.azcentral.com/story/opinion/op-ed/2023/04/06/freedom-schools-are-the-opposite-partisan-as-critics-claim/70085813007/> [<https://perma.cc/3KDF-QMEG>].



universities they fund is that those universities often cannot define their purpose and spend considerable effort offering legislators “advice” (sometimes couched as demands) on how *they* should behave.<sup>25</sup>

Having a clear university mission and a board whose members – as described below – act as “real” trustees would act can help settle such issues like the type of math instruction or whether there should be a “freedom school” or not, and do so consistently across the university. A mission that emphasizes serving “persons of all racial, ethnic and geographic groups” (as my university does) might put more emphasis on ensuring math classes are culturally accessible while one that focuses on maximizing departments’ rankings in surveys that emphasize faculty publications in leading journals might be more focused on how to encourage its faculty to do more of that (although that is also one of our goals). What is probably not an achievable strategy is trying to do both at the same time unless the leading journals started publishing articles on decolonization of math. This sort of decision seems to me to properly belong with the body governing the institution, not with individuals in any particular department or college. The decision’s location need not be an entirely binary choice – if boards are going to make such decisions, they would do well to solicit input both from existing faculty and from experts in fields outside the current faculty on issues such as what to emphasize in the curriculum. Nonetheless, seeking input is not the same as making the ultimate decision and it is here that focusing on the board’s role is most important.

Another example of where a clear mission would make a difference comes from Elizabeth Popp Berman’s critique of the transformation of many research universities into what she calls “market universities.”<sup>26</sup> She attributes this both to government encouragement (particularly through funding) of the treatment of “academic science as an economically valuable product” and “the spread of a new idea, that scientific and technological innovation serve as engines of economic growth.”<sup>27</sup> As she describes it,

This shift from a ‘science-as-resource’ to ‘science-as-engine’ model had a major impact on the university. It changed the calculus through which universities made decisions about what kinds of activities were appropriate to pursue. It gave universities a new mission: to facilitate economic growth by making sure their research reached the marketplace. It encouraged universities to

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25. Richard Rahn, a former professor turned policy entrepreneur, business person, and newspaper columnist, points to the development of faculty resolutions insisting governments adopt the faculty’s priorities in the late 1960s as a marker of the decline of U.S. universities. Richard W. Rahn, *Universities Become Increasingly Irrelevant*, WASH. TIMES, Dec. 18, 2023, (pointing out that it was unlikely “anyone in Washington cared about what a group of professors thought. It was just one little sign of the increasing irrelevance of academia.”).

26. ELIZABETH POPP BERMAN, *CREATING THE MARKET UNIVERSITY: HOW ACADEMIC SCIENCE BECAME AN ECONOMIC ENGINE* (2012); *see also* DEAN O. SMITH, *MANAGING THE RESEARCH UNIVERSITY* 275-76 (2011) (discussing conflicts over including commercialization measures in promotion and tenure decisions).

27. Berman, *supra* note 26, at 2.

move away from a passive role in which they simply created the knowledge that industry would draw on—or not—as needed. Instead, they would start working actively to turn scientific innovation into economic activity through technology transfer, faculty entrepreneurship, spinoff firms, and research partnerships with industry. The assimilation of new ideas about the impact of innovation on the economy led logically enough to other new ideas about what the relationship between academic science and the commercial world should be, and the changed environment policymakers had created made such ideas easier to put into practice.<sup>28</sup>

Berman argues that this shift fundamentally changed how universities operate, in everything from how they allocate resources to what faculty are incentivized to do to what graduate students did after getting their degrees. She suggests university administrators were willing participants in this transformation because the view of academic science as an economic engine proved more useful in persuading legislators to support increased funding for universities than the inherent value of science itself.<sup>29</sup> While I am skeptical of how successful university administrations have been in bringing a “market orientation” to university research based on my research into the topic, on my own experience as a university administrator involved in commercialization, and on the incentive structure of universities, Berman’s thesis about the shift in attitudes toward commercialization documents an important shift in central administration attitudes that has led to significant resource allocation changes (e.g. the funding of technology transfer offices at hundreds of universities).<sup>30</sup> Such decisions should be based on a university’s mission, not on the pursuit of (often chimerical) royalties from commercialization. However, because university board members are often most comfortable with financial issues, and so focus almost exclusively on operational financial decisions, decisions with far-reaching consequences are a result not tested against their impact on the core mission.<sup>31</sup>

### *B. Being Clear About the Mission*

There are relatively few universities with specific missions. A rare example of one that has a clear mission is Brigham Young University (BYU), whose affiliation with the Church of Jesus Christ of Latter-Day Saints gives it a purpose beyond the generic “prepare leaders for the [twenty-first] century” theme that dominates much of higher education. Long ago, I heard a former BYU provost (whose name I have unfortunately forgotten) speak at a higher education leadership conference about how valuable having a clear mission was for decision making at BYU, and the more time I have spent in universities, the more I appreciate

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28. Berman, *supra* note 26, at 3-4.

29. Berman, *supra* note 26, at 147.

30. See Andrew P. Morriss & Roger E. Meiners, *Unpacking Coasian ‘Red Boxes’: Universities and Commercialization*, 12 NYU J. INT. PROP. & ENT. L. 52 (2022).

31. Amacher & Meiners, *supra* note 2, at 29.

his insight. BYU's clear mission provides a yardstick against which proposed actions can be evaluated that is more rigorous than whether it "prepares leaders for the twenty-first century," a phrase so meaningless that it is almost impossible to imagine a plausible proposed action by any university that could not pass muster.

We can see this clearly if we compare BYU's Mission Statement and its stated "aims of a BYU education" with my own university's far lengthier Mission Statement:

**BYU Mission Statement:** "The mission of Brigham Young University—founded, supported, and guided by The Church of Jesus Christ of Latter-day Saints—is to assist individuals in their quest for perfection and eternal life."<sup>32</sup>

**The Aims of a BYU education:** "A BYU education should be spiritually strengthening, intellectually enlarging, and character building, leading to life-long learning and service."<sup>33</sup>

**Texas A&M University Mission Statement:** "Texas A&M University is dedicated to the discovery, development, communication, and application of knowledge in a wide range of academic and professional fields. Its mission of providing the highest quality undergraduate and graduate programs is inseparable from its mission of developing new understandings through research and creativity. It prepares students to assume roles in leadership, responsibility and service to society. Texas A&M assumes as its historic trust the maintenance of freedom of inquiry and an intellectual environment nurturing the human mind and spirit. It welcomes and seeks to serve persons of all racial, ethnic and geographic groups as it addresses the needs of an increasingly diverse population and a global economy. In the [twenty-first] century, Texas A&M University seeks to assume a place of preeminence among public universities while respecting its history and traditions."<sup>34</sup>

Of course, a public land-grant university's mission should be quite different from that of a private religiously affiliated university. But I think that the important difference between the two is not the public-versus-private distinction or the religious-versus-secular distinction but one we might term a clarity-vs-'all things to everyone' distinction.

Not only is Texas A&M's mission statement four times the length of the BYU mission statement (and more than twice the length of the combined mission statement and aims statement), but A&M's has at least six distinct goals, including some that are quite difficult to measure, while BYU's has fewer, more straightforward goals, for at least one of which success can be measured in a concrete way:

32. *About*, BYU.EDU, <https://www.byu.edu/about> [<https://perma.cc/Y6AD-XNPW>].

33. *Id.*

34. *Our Mission*, TAMU.EDU, <https://www.tamu.edu/statements/mission.html#:~:text=Texas%20A%26M%20University%20is%20dedicated,of%20academic%20and%20professional%20fields> [<https://perma.cc/XN8S-3C74>] (stating Texas A&M's mission statement is representative of the mission statements of many universities).

whether its graduates go on to “lifelong learning and service.” In general, the BYU system has worked hard to avoid “mission creep” at any of its higher education institutions.<sup>35</sup> By contrast, Texas A&M’s mission statement contains almost nothing with which any reasonable person could disagree and, while including many admirable sentiments, is hard to see as providing much of a guide to decision-making by the board, the university leadership, department chairs, or individual faculty members. Is there anything a university might reasonably do that does not fit within the broad umbrella of goals it sets out? I cannot think of any.

Arguments over issues like the appropriate works to include in general education requirements cannot be settled by reference to broad, generic “preparing leaders” missions. Nor does a board delegating such decisions to the faculty provide a solution; that merely kicks the can down the road. Without a clear mission for the university, any faculty dispute over whether to teach more Shakespeare or more Maya Angelou usually merely comes down to whether the English department is dominated by fans of the former or the latter. That may settle the immediate question of what will be on next semester’s Literature 101 syllabus, but it does not necessarily make what happens in Literature 101 consistent with how other courses in the university are taught, or even whether the various sections of Literature 101 experience a consistent curriculum, learn similar skills, are evaluated in similar ways, and so on. And, unless we think that it is unnecessary for the experience students have in studying literature to be a coherent part of their experience in studying biology, economics, and philosophy, devolving matters to the departmental or individual faculty member level seems inappropriate since those other departments (which may or may not be in the same college within any particular university) would lack voice; yet opening the structure of the literature curriculum to the entire faculty threatens to drown any discussion in such an array of such varied disciplinary perspectives as to make it almost impossible to make decisions reasonably quickly. A solution to that is to have a clear mission and a body devoted to ensuring that the mission is pursued by decision makers throughout the organization.

### *C. How Having a Mission Matters*

Once a clear mission has been defined, trustees can evaluate decisions within a common framework. This precisely the point the former BYU provost made in the remarks mentioned above, telling his audience that it was not difficult at BYU to evaluate proposals for new initiatives against the university’s mission. More generally, even outside the religious affiliation of BYU, it seems that adopting a curricular or organizational change based on whether it increases the chance students will be lifelong learners is a far easier question to debate and decide than whether a change falls within a more sweeping mission like A&M’s, since almost nothing fails the test of being within such a large collection of goals.

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35. CLAYTON M. CHRISTENSEN & HENRY J. EYRING, *THE INNOVATIVE UNIVERSITY: CHANGING THE DNA OF HIGHER EDUCATION FROM THE INSIDE OUT* vii (2011).

Consider the structure of universities set out by Wilhelm von Humboldt in the fragment of an 1809 (or thereabout) work, *On the Internal Structure of the University in Berlin and its Relationship to Other Organizations*, which is notable both for its influence on the development of higher education in the United States and its early attention to the type of organizational questions I have argued are critical.<sup>36</sup> Von Humboldt's vision was of a university where "one central principle—the pursuit of knowledge for its own sake" was the university mission.<sup>37</sup> Its first imperative was to be "unity of teaching and research."<sup>38</sup> If this mission had "the upper hand" in a university, he contended, "there will be no need to worry about particular details."<sup>39</sup> In addition, he argued that "everything clearly depends on upholding the principle that knowledge has never been, nor ever will be, fully discovered in final form."<sup>40</sup> Ensuring that "we do not go down the wrong path" requires three "intellectual pursuits": "derive everything from first principles," "everything must be developed toward an ideal," and "the principle and the ideal should always be connected in a single ideal."<sup>41</sup> Von Humboldt was given the opportunity to create a university along the lines he described in 1809-10, resulting in the University of Berlin and the subsequent remodeling along similar lines of many other universities in many of the German states.<sup>42</sup> Johns Hopkins University was founded in the United States in 1876 explicitly based on von Humboldt's vision and some other prominent U.S. universities embraced that mission as well.<sup>43</sup>

Unfortunately, von Humboldt's original vision later suffered from some of the mission creep we observe in many U.S. universities today, in part because so many universities in Germany adopted it as a mission, often attempting to institute it on a scale where the integration of research and teaching became problematic.<sup>44</sup> Building a "'community of scholars and students' engaged on a common task," where students participated in research as part of the search for truth is, at best, challenging to implement at the scale of most large state universities in the United States, for example.<sup>45</sup> Keeping to the mission requires discipline by the governing body, resisting the temptation to expand or to focus resources outside those areas where a joint faculty-student research orientation is achievable.

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36. THE RISE OF THE RESEARCH UNIVERSITY: A SOURCEBOOK 108-113 (Louis Menand et al., eds., 2017) (providing an English translation with introductory material) [hereinafter von Humboldt].

37. von Humboldt, *supra* note 36, at 111.

38. von Humboldt, *supra* note 36, at 107.

39. von Humboldt, *supra* note 36, at 111.

40. von Humboldt, *supra* note 36, at 110.

41. von Humboldt, *supra* note 36, at 110.

42. Steven Muller, *Wilhelm von Humboldt and the University in the United States*, 6 JOHNS HOPKINS APL TECHNICAL DIGEST 253, 253 (1985).

43. *Id.* at 254.

44. *Id.* at 255.

45. Robert Anderson, *The 'Idea of a University' today*, HISTORY & POLICY (Mar. 1, 2010) <https://www.historyandpolicy.org/policy-papers/papers/the-idea-of-a-university-today> [<https://perma.cc/ECW7-65B5>].

A recent concrete example from my university demonstrates this problem.<sup>46</sup> After the appointment of a new president, who commissioned a management consulting firm to review the university's organization, Texas A&M underwent a massive reorganization during the 2022-2023 academic year. Departments and programs moved between colleges, new colleges were created, and some colleges combined. A parallel administrative reorganization centralized a number of functions, fundamentally changed the role of the provost, and made extensive changes to the central administration. Among all these changes, let us consider one particularly dramatic one, based on recommendations from the management consultant: combining the College of Liberal Arts, the College of Sciences, and most of the College of Geosciences into a new College of Arts and Sciences, while shifting the biomedical sciences program from the College of Veterinary Medicine and Biomedical Sciences into the new College of Arts and Sciences, and shifting the Department of Political Science and part of the Department of International Studies from Liberal Arts into the Bush School of Government and Public Service. The stated purpose of the creation of the College of Arts and Sciences was "to create a critical mass by which all programs will benefit" and to "strengthen this core of our institution" while the shift of the biomedical sciences program to Arts and Sciences would "eliminate redundancy between programs and create synergy between units with similar interests and focus."<sup>47</sup>

These all seem like sensible goals – no one would be *for* redundancies or *against* creating synergies, after all, although one observer's synergy could well be another's redundancy – but, after the president who initiated the changes abruptly retired in summer 2023 following a controversy over allegations of political interference in hiring at the university and the suspension of a faculty member after complaints from state officials about comments she made during a lecture at another university,<sup>48</sup> a reassessment of the entire plan was initiated by the interim president who replaced her.<sup>49</sup> That reassessment included an examination of the decision to create the College of Arts and Sciences from the combination of three existing colleges which concluded that "the rationale for this merger

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46. I should note that I think Texas A&M University is reasonably well governed in the current paradigm of university governance. The Board plays a key role in hiring the system chancellor and university presidents throughout the many universities in the system, in reviewing major changes such as the creation of new degree programs and so on, and in setting overall policies such as the decision to centralize servers in secure data facilities. My argument here is that universities would be better served with a different type of board than U.S. universities have had, not that my university's existing board or any other universities' existing boards are failing at what university boards have historically done.

47. M. KATHERINE BANKS, *THE PATH FORWARD* 5 (2021) [https://cache.cloud.tamu.edu/path-forward/The-Path-Forward.pdf?\\_gl=1\\*1ul1pn5\\*\\_ga\\*MjYzMjk5NDQyLjE2OTkxMDkyNjU.\\*\\_ga\\_SJ5GMN0ZQL\\*MTY5OTIzNjYyNy4yLjAuMTY5OTIzNjYyNy42MC4wLjA](https://cache.cloud.tamu.edu/path-forward/The-Path-Forward.pdf?_gl=1*1ul1pn5*_ga*MjYzMjk5NDQyLjE2OTkxMDkyNjU.*_ga_SJ5GMN0ZQL*MTY5OTIzNjYyNy4yLjAuMTY5OTIzNjYyNy42MC4wLjA).

48. OFFICE OF GENERAL COUNSEL, TEXAS A&M UNIVERSITY SYSTEM, *REPORT ON THE FAILED HIRING PROCESS AT TEXAS A&M UNIVERSITY RELATING TO DR. KATHLEEN McELROY* (2023), <https://www.tamus.edu/wp-content/uploads/2023/08/OGC-Report-on-McElroy-Matter-8-3-23.pdf>.

49. OFFICE OF GENERAL COUNSEL, TEXAS A&M UNIVERSITY SYSTEM, *REVIEW OF ACTIONS TAKEN BY TEXAS A&M UNIVERSITY RELATING TO DR. JOY ALONZO* (2023), <https://www.tamus.edu/wp-content/uploads/2023/08/5-OGC-Report-on-Alonzo-Matter-8-3-2023.pdf>.



was not and still has not been clearly articulated, leaving leadership of the new college to develop the rationale from any benefits realized.”<sup>50</sup> Unsurprisingly, however, given the amount of effort that went into the combination of the three colleges, the new structure is largely being retained.<sup>51</sup>

A significant reorganization of an organization seems like an area where a governing board would be expected to provide oversight. And indeed, our board appears to have behaved the way university boards ordinarily do, with little mention of the reorganization in any of the board minutes.<sup>52</sup> The level of input it provided into the various decisions appears to have been no less, and no more, than any other university board would likely to have contributed. Like Professor Hasnas in his article in this collection, my choice of an example is based on my knowledge of my own institution, not on a desire to single it out, as it behaves as most universities do.

In the case of the reorganization of the university, the board’s role was less like the role the trustees of a trust would have provided and more like a corporate board approving a plan put forward by management. Trustees’ duties under trust law are significantly greater than those we impose on university board members or even corporate board members, who do owe duties of loyalty and care to the shareholders that are likely more substantial than those university board members owe. For example, real trustees owe significant fiduciary duties with respect to the trusts they administer, including duties of care, loyalty, and impartiality.

50. TEXAS A&M UNIVERSITY, QUICK-LOOK ASSESSMENT OF THE PATH FORWARD IMPLEMENTATION 10 (2023), <https://cache.cloud.tamu.edu/path-forward/quick-look-assessment/Final-Quick-Look-Assessment-100423.pdf>.

51. *Id.* at 12 (except for the transfer of some administrative functions to the central administration and the return of the biomedical sciences program to Veterinary Medicine).

52. Very little discussion seems to have been had in 2000 when the College of Arts and Sciences was split into a College of Liberal and Fine Arts and a College of Science and Technology. The Board minutes from that meeting state only “On motion of Ms. Armstrong, seconded by Mr. Stevens and by a unanimous vote, the following minute order was adopted:

The Board of Regents of The Texas A&M University System approves the administrative change to reorganize the College of Arts and Sciences into the College of Liberal and Fine Arts and the College of Science and Technology and to re-align academic departments more similar in philosophy and content, to be effective June 1, 2000.

*See* TEXAS A&M UNIVERSITY SYSTEM, MINUTES OF THE MEETING OF THE BOARD OF REGENTS OF THE TEXAS A&M UNIVERSITY SYSTEM 11 (1999), <https://assets.system.tamus.edu/files/bor/pdf/Minutes/Regular/1990/1999-12-2.pdf>. I could not locate a record of a similar formal decision on combining the various colleges into a College of Arts and Sciences at any meeting between the decision of the university president to proceed with the consultant’s recommendation of the combination and the launch of the new college on September 1, 2023. News reports based on the release of communications among regents show there was discussion among university leadership and the board, although they present that discussion in a less than flattering light, with one regent writing to another that the president “told us multiple times the reason we were going to combine [the colleges of] arts and sciences together was to control the liberal nature that those professors brought to campus.” Kate McGee, *Texas A&M leaders’ text messages show desire to counteract perceived liberal agenda in higher education*, TEXAS TRIBUNE (August 4, 2023) <https://www.texastribune.org/2023/08/04/texas-am-mcelroy-texts/> [<https://perma.cc/ME5V-JP2N>].

One university with which I am familiar implements something like this model: a well-established private university in Guatemala, Universidad Francisco Marroquín (UFM). This university was founded by a group of business people after years of discussions about an appropriate mission and the university has since flourished.<sup>53</sup> I've been fortunate enough to teach there in several summer sessions, and to get to know many of the founders, current and past leadership, and many students and alumni.

Once the decision to create a university was made, the group organizing UFM invested considerable effort in writing and discussing what became the *Philosophy Statement of Universidad Francisco Marroquín*.<sup>54</sup> This is not a brief mission statement but a lengthy, fourteen-page document describing in detail the university's role in politics and society. The document also described the university's position on academic freedom and its intellectual approach, focusing on theory rather than practice.<sup>55</sup> The founders also invested considerable energy in organizing the Board of Trustees. As founder and first UFM president, Manuel Ayau, describes it:

Our decision on how to organize the Board of Trustees came from reflecting on what had happened to various institutions over time, and observing how their very purposes had been changed, in some cases ending up contrary to those of the founders. Obviously there is no eternal guarantee; however, due to its organization, it is unlikely that it will be possible to deviate from the objectives of UFM's founders for a long time. It is not that we presuppose bad intentions on the part of others, rather differences in criteria with regard to goals or university policy.<sup>56</sup>

A fifty-member Board of Trustees was established, which is responsible for electing six of the nine members of the board of directors, including the treasurer. The directors then elect the president, vice-president, and general secretary, who also serve as directors. This structure was designed to "avoid what had happened in nearly all universities in the world: that they have come to be governed by members of the teaching staff and/or students."<sup>57</sup>

The job of the trustees, as set out in the bylaws, are:

- a. To ensure that the objectives of the university are met

53. See MANUEL F. AYAU, MEMOIRS AND COMMENTS ON THE FOUNDING OF UNIVERSIDAD FRANCISCO MARROQUÍN AND ITS ANTECEDENTS 18 (1992).

54. Ayau, *supra* note 53, at 20. In many respects – keeping in mind the differences between Guatemala's civil law legal system and the Anglo-American trust – UFM's organization looks a great deal like a purpose trust. For example, the university "belongs to no one in the sense that no one can exercise over it the rights generally associated with holding something in property." *Id.* at 24.

55. Universidad Francisco Marroquín, *Philosophy Statement* (2020).

56. Ayau, *supra* note 53, at 24.

57. *Id.* at 26.

- b. To ensure the financial solvency of the university and the proper administration of its assets
- c. To appoint its representatives to, and/or remove them from, the Board of Directors and to appoint the university's treasurer
- d. To fill the vacancies among its ranks
- e. To assume all duties and powers assigned to it by the bylaws and that have not been listed in this article, as well as those that by their nature are within its competence
- f. To decide in common accord with the Board of Directors on the reform of these bylaws.<sup>58</sup>

Ayau goes on to summarize these duties as to stand “as a guardian of the success of the project,” noting that the meaning of the Spanish word used in the documents to describe this, “velar,” is “to solicitously care for something,” which he notes is “different from managing it or carrying it out.”<sup>59</sup> The directors are more directly engaged with the administration. The trustees, should they become dissatisfied with the university's course, are to first attempt “to persuade the Board of Directors to correct its course; its last resort is to remove its representatives.”<sup>60</sup> The founders believed that this arrangement would “avoid the concentration of power in any of [the] governing bodies, without taking away ultimate authority from the Trustee Committee. This implies that decisions need to be made, as they always have been, through persuasion and not authoritatively.”<sup>61</sup>

The founders also had a clear vision for what the university would look like—it would be small, “to focus its efforts toward an academic elite at the highest level possible so that the influence of its graduates in the dissemination of ideas flows from the top down.”<sup>62</sup> Its leadership has continued to make an effort to be true to that intent. For example, UFM's third president, Giancarlo Ibargüen, said in his inaugural address that “It is our duty and responsibility, and also that of future generations, to appraise the work done at our university considering founders' intent” and demonstrate the commitment to that intent by discussing the founders' vision at length.<sup>63</sup> His successor, Gabriel Calzada, did the same, while also highlighting the “process of reinvention” the university had underway, prompting a reexamination of teaching methods among other things.<sup>64</sup> This example demonstrates that it is possible to organize a university around a mission or philosophy and to have a governance structure that can be successful in keeping that mission at the center of university governance.

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58. Letter from Manuel Ayau on the role of trustees (April 14, 2020), 1.

59. *Id.* at 2.

60. *Id.*

61. Manuel Ayau, *Addendum to his letter on the role of the trustee* (July 25, 2000).

62. Ayau, *supra* note 53, at 30.

63. Giancarlo Ibargüen, *Inaugural Address* (July 8, 2003).

64. Gabriel Calzada, *Inaugural Address* (August 4, 2013).

## II. TRUSTEE OBLIGATIONS UNDER TRUST LAW

There is vast literature on trusts, which have been described as “the guardian angel of the Anglo-Saxon, accompanying him everywhere, impassively, from the cradle to the grave.”<sup>65</sup> Trusts are said to have “almost infinite adaptability,”<sup>66</sup> to be “as flexible as the human mind can devise for providing a solution to otherwise intractable problems,”<sup>67</sup> and to be “the greatest achievement of Anglo-American law.”<sup>68</sup> Although trust law has developed many complex rules, as a creature of equity, trust law also puts “less emphasis on detailed rules that have emerged from the cases and more weight on the underlying principles that engendered those rules, treating the rules less as rules requiring complete compliance and more as guidelines to assist the court in applying those principles.”<sup>69</sup> This makes it particularly useful for exploring the ethical duties university trustees might be asked to assume.

The trust that seems to me to be the closest fit to a university is the non-charitable purpose trust. While it has been argued that English trust law recognized such trusts in the past, modern English trust law does not do so.<sup>70</sup> However, many jurisdictions other than England and Wales have now recognized non-charitable purpose trusts, typically by statute. The jurisdictions recognizing such trusts include both “offshore” jurisdictions (including Bermuda, Belize, the British Virgin Islands, the Cayman Islands, the Cook Islands, the Isle of Man, Jersey, and Nevis) and a majority of U.S. states (often via adoption of the Uniform Trust Code).<sup>71</sup> Because these trusts are creatures of statute, the details of the rules governing them differ from jurisdiction to jurisdiction. The details of these

65. HAYTON, *THE LAW OF TRUSTS*, *supra* note 12, at 2 (quoting French lawyer Pierre Lepaulle).

66. Edward Halbach, *The Uses and Purposes of Trusts in the United States* in *MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW* 143 (David Hayton ed., 1999).

67. David Hayton, *The Uses of Trusts in the Commercial Context* in *MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW* 168 (David Hayton ed., 1999).

68. Robert C. Lawrence III, *An Historic Overview of the Evolution of Trusts* in *THE INTERNATIONAL ACADEMY OF ESTATE AND TRUST LAW: SELECTED PAPERS, 1997-1999*, 5 (Rosalind F. Atherton ed., 2001).

69. *Re Montagu's Settlement Trusts* [1987] 1 Ch 264 HC.

70. *Re Recher's Will* [1972] 1 Ch 526 HC (“A trust for non-charitable purposes, as distinct from a trust for individuals, is clearly void because there is no beneficiary.”). *But see* Paul Matthews, *From Obligation to Property, and Back Again? The Future of the Non-Charitable Purpose Trust*, in *EXTENDING THE BOUNDARIES OF TRUSTS AND SIMILAR RING-FENCED FUNDS 203-04* (David Hayton ed., 2002) (“Some scholars and authors assert that, conceptually at least, beneficiaries are optional, and at least one even that there is copious House of Lords authority – binding on the lower courts – that NCP trusts are perfectly valid in English law, and that all the textbooks are simply wrong.”); *see generally* Paul Baxendale-Walker, *PURPOSE TRUSTS* (1999).

71. *See* Ayana Hull-Brathwaite & Christopher McKenzie, *British Virgin Islands*, in *TRUSTS IN PRIME JURISDICTIONS* 88 (Alon Kaplan ed., 2nd ed, 2006) (“Most leading offshore jurisdictions have introduced legislation enabling the creation of non-charitable purpose trusts (purpose trusts) and a great deal of new use is made of this legislation, particularly in the commercial context (in order to take advantage of one of the features of such a trust which is that there is no beneficial owner of the trust’s assets).”); Unif. Trust Code §409(1). Note that the Uniform Trust Code requires purpose trusts to end after 21 years but that some states do not require this.

differences are less important, however, since what we are concerned with are the duties that trustees of non-charitable purpose trusts have toward the purpose itself. If university trustees behaved as trustees of non-charitable purpose trusts are required by both law and ethics to behave, universities would be better governed. To enable this to happen, universities would have to have a purpose akin to that of a non-charitable purpose trust. My contention is that such a purpose would look more like BYU's than it would like Texas A&M's.

#### *A. Why Non-Charitable Purpose Trusts?*

As a preliminary matter, I need to justify my choice of non-charitable purpose trusts as the model. I chose them for three reasons. First, the key distinction between purpose trusts and beneficiary trusts (those where the trustee holds property on behalf of the owner of equitable interests) is the absence of an individual or individuals to whom the trustee owes fiduciary duties. A cleverer lawyer than I could likely craft a beneficiary class that might benefit from a university (perhaps future students) to permit a standard beneficiary trust. However, this seems to me to add an unnecessary layer of complexity to the analogy without gaining much beyond the ability to establish such a trust under English law, the law of a state that has not adopted a variant of the Uniform Trust Law, or other statute authorizing non-charitable purpose trusts.

Second, the main issue raised by purpose trusts relative to beneficiary trusts is the question of who can seek to enforce a purpose trust's duties against its trustees if the trustees fail to fulfill their obligations. Some jurisdictions have solved this problem by requiring the appointment of an "enforcer" for non-charitable purpose trusts.<sup>72</sup> Since we are considering the ethical duties of the trustees, rather than their legal duties, whether there is someone with standing to enforce the trust in court is less relevant here than it would be if we were drafting a trust document for someone seeking to establish a university owned by a non-charitable purpose trust. To the extent enforcement is something we need to worry about, the solution of requiring an enforcer addresses many, if not all, of the issues with which we'd be concerned.<sup>73</sup>

Third, the non-charitable purpose trust eliminates the argument over whether something meets the definition of a charitable purpose, which would be raised by relying on charitable purpose trusts (permissible in all trust jurisdictions). Particularly since we are looking to trust law for ethical guidance and not

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72. See, e.g., Trusts (Jersey) Law (2023 consolidation) §12 ("A trust shall not be invalid to any extent by reason of Article 11(2)(a)(iv) if the terms of the trust provide for the appointment of an enforcer in relation to its non-charitable purposes, and for the appointment of a new enforcer at any time when there is none.").

73. There is a "Quis custodiet ipsos custodes?" aspect to punting issues of enforcement to the enforcer – how do we know that the enforcer will undertake his or her duties to enforce the trust's terms if the trustees fail to live up to their duties. A theoretically unsatisfying response is that being careful about picking the enforcer – who is, in some jurisdictions, under fiduciary duties as well – is a solution.

worrying about the practical issues of drafting a trust we expect to be used in the real world, this also simplifies our task.

There is an alternative structure that we could also use as a model: the private foundation. This is a civil law entity which a number of common law jurisdictions have adopted via statute, including New Hampshire and Wyoming.<sup>74</sup> Frequently described as the civilian equivalent to a trust, private foundations can be traced to Liechtenstein's 1926 Persons and Companies Act (the *Personen und Gesellschaftsrecht* statute, or "PGR").<sup>75</sup> Foundations have a longer civil law history, but Liechtenstein was the first to make them broadly available outside estate planning and charitable endeavors.<sup>76</sup> Unlike trusts, private foundations are entities with a governing body (councils)<sup>77</sup> and founders retain considerable powers that settlors rarely can have over trust property.<sup>78</sup> As fascinating as they are as an example of legal borrowing, bringing foundations into the mix would likely be confusing terminologically, add little to our consideration of ethical duties, and provide few benefits to the conceptual discussion. If, however, we were discussing how to practically implement a university governance system, considering using a private foundation would be an important option because a private foundation is an entity with legal personality,<sup>79</sup> which need not have beneficiaries with enforceable rights,<sup>80</sup> and whose "council" is responsible to remain faithful to the foundation's purpose.<sup>81</sup>

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74. Andrew P. Morriss, *Importing Private Foundations Into the Common Law*, IFC REV. (Sept. 29, 2021), <https://www.ifcreview.com/articles/2021/september/importing-private-foundations-into-the-common-law/> [https://perma.cc/2AEE-MEYS]; Andrew P. Morriss, *Private Foundations in the Common Law Caribbean: Variations on a Theme*, IFC REV. (Sept. 8, 2021), <https://www.ifcreview.com/articles/2021/september/private-foundations-in-the-common-law-caribbean-variations-on-a-theme/> [https://perma.cc/77YA-2WA6].

75. Paolo Panico, PRIVATE FOUNDATIONS: LAW AND PRACTICE 5 (2014). In addition, Liechtenstein provides for statutory trusts in the PGR. David Hayton, *English Trusts and their Commercial Counterparts in Continental Europe*, in EXTENDING THE BOUNDARIES OF TRUSTS AND SIMILAR RING-FENCED FUNDS 39-40 (David Hayton ed., 2002).

76. Paolo Panico, *New Foundation Legislation in Common Law Jurisdictions: A 'Second Generation'?*, 26 TRUSTS & TRUSTEES 511 (2018).

77. Justin P. Thorens, *The Trustee in a Civil Law Country: The Case in Switzerland* in THE INTERNATIONAL ACADEMY OF ESTATE AND TRUST LAW: SELECTED PAPERS, 1997-1999, 25-26 (Rosalind F. Atherton ed., 2001).

78. See Robert Feenstra, *Foundations in Continental Law since the 12<sup>th</sup> Century: The Legal Person Concept and Trust-like Devices* in ITINERA FIDUCIAE: TRUST AND TREUHAND IN HISTORICAL PERSPECTIVE 306 (Richard Helmholz & Reinhard Zimmerman eds., 1998).

79. Panico, PRIVATE FOUNDATIONS, *supra* note 75, at 4.

80. Johanna Niegel, *Purposeful trusts and foundations?*, 18 TRUSTS & TRUSTEES 451, 456-57 (2012); Panico, PRIVATE FOUNDATIONS, *supra* note 75, at 91.

81. Panico, PRIVATE FOUNDATIONS, *supra* note 75, at 91.



*B. What Duties Does a Trustee of a Non-Charitable Purpose Trust Owe to the Trust's Purpose?*

A key function of organizational law generally, including trust law, is to provide a set of rules for the internal governance and administration of an organization; modern trust law gives trustees broad powers subject to fiduciary obligations.<sup>82</sup>

The settlor need not spell out with specificity what the trustee should do in all possible future circumstances, an impossible task given transaction costs and the settlor's lack of clairvoyance. Instead, trust law provides the trustee with expansive default powers of administration, the trustee's exercise of which is subject to review *ex post* for compliance with the open-ended fiduciary duties of loyalty and prudence.<sup>83</sup>

The trust model thus does not limit the scope of the mission universities could adopt. Once adopted, however, the trustees would both have extensive administrative powers in pursuit of the purpose and a concomitant responsibility to exercise those powers to promote the purpose. These powers can be broadly defined as trusts are both creatures of trust law (whose source is in equity) and the trust documents that create them.<sup>84</sup> Indeed, trust documents can expand or restrict the default trustee powers to a considerable extent.<sup>85</sup>

In general, the "core" of trusts is the accountability of trustees.<sup>86</sup> This "separate unique obligation"<sup>87</sup> of the trustee is the source of the duties that I argue would improve university governance. If we compare the corporate director's duty of loyalty to the trustee's duty of loyalty, we find that in the former case,

82. Robert H. Sitkoff, *Trust law as Fiduciary Governance Plus Asset Partitioning*, in THE WORLDS OF THE TRUST 430 (Lionel Smith ed., 2013). As trusts are not companies or corporate persons; instead a trust is a segregated fund owned by the trustees. As a result, there are different rules for trusts than there are for companies. See David Hayton, *Principles of European Trust Law* in MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW 24 (David Hayton ed., 1999).

83. Sitkoff, *supra* note 82, at 430-31.

84. David Hayton, *The Uses of Trusts*, *supra* note 67, at 151 ("In practice, however, to provide required flexibility and protection from over-rigorous rules of trust law, trusts are normally created by lengthy formal documents drawn up by skilled lawyers, while trustees keep detailed records to protect themselves against the risk of actions against them").

85. Hayton, THE LAW OF TRUSTS, *supra* note 12, at 140 ("Trustees automatically have many powers which may be exceeded or qualified by the trust instrument, so long as the relevant trust clause is not uncertain, illegal or contrary to public policy (for example a power to accumulate income for 80 years contravenes English but not Jersey or Isle of Man rules). Many extra powers are usually conferred by well-drafted trust instruments . . .").

86. David Hayton, *Principles of European Trust Law* in MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW 28 (David Hayton ed., 1999). See also Sarah Worthington, *The Commercial Utility of the Trust Vehicle*, in EXTENDING THE BOUNDARIES OF TRUSTS AND SIMILAR RING-FENCED FUNDS 135 (David Hayton ed., 2002) (listing the imposition of "onerous duties" on trustees as a key commercial advantage of trusts). The attribution of the core of the trust being the trustee's "fundamental duty . . . to adhere to the terms of the trust, to take reasonable care of the trust assets and to act in the best interests of the beneficiaries or, in the case of a trust for purposes, the furtherance of those purposes" is generally to Millett LJ in *Armitage v Nurse* [1998] Ch 241.

87. Hayton, *Principles of European Trust Law*, *supra* note 86, at 33.

[f]iduciary duty law has proven far better at specifying process-based solutions to breaches of what we have elsewhere called traditional loyalty, where, typically, the director and officer may be putting the corporation's money in his own pocket, whether by making a deal with the corporation, taking an opportunity that should be the corporation's, or competing with the corporation. The duty of good faith, true to its characterization as a branch of the duty of loyalty, will only be breached by behavior that is in affirmatively bad faith. Uncritically saying yes to a decision favored by the CEO to keep one's job as a director does not count.<sup>88</sup>

In contrast, trustees of a non-charitable purpose trust have fiduciary duties to administer the trust strictly in accordance with its stated purpose, to avoid conflicts of interest, and to act with care and skill in making decisions.

In the case of purpose trusts, we look to the purpose to understand the trustee's obligations. As Baxendale-Walker summarizes, "The trust instrument is the 'guidance chip' for the Purpose Trust. It controls the trust."<sup>89</sup> Since there are no beneficiaries to enforce a noncharitable purpose trust, many of the jurisdictions permitting them require there to be an "enforcer," who has the same rights of enforcement as a beneficiary would have in a classical trust.<sup>90</sup>

The first problem is that, as noted earlier, many, if not most, universities have uncertain purposes. As Anton Duckworth, author of Cayman's noncharitable purpose trust law (the Special Trust Alternative Regime or STAR Trust) explained, "One way of putting it is that the trust instrument must answer the question: 'for what purpose is the trust property to be held?'"<sup>91</sup> If we were designing a university-as-purpose-trust from the ground up, this would be remediable by insisting that its creation would require that "the purpose must not only be expressed, but expressed with certainty."<sup>92</sup> Unfortunately, the thousands of existing U.S. universities lacking clear missions means the trustees will have to distill that purpose for themselves. Asking trustees to turn a vague mission into a clearer one is thus the first step.

One example of how this might apply in a university context is that the trustees would have a "duty to advance the purpose of the trust," which would require them to make a conscientious effort to align the university's resources, policies, and strategic direction with its mission statement. Here's how such a duty might be interpreted against common issues university trustees face:

- Trustees typically engage in strategic planning and resource allocation. In doing so, they would need to ensure that any strategic plan adopted is

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88. Claire A. Hill & Bett H. McDonnell, *Structural Bias, R.I.P.?* in RESEARCH HANDBOOK ON FIDUCIARY LAW 258 (D. Gordon Smith & Andrew S. Gold eds., 2018).

89. Baxendale-Walker, *supra* note 69, at 326.

90. See, e.g., Cayman Islands Trust Law §100. If the position of enforcer falls vacant, the courts are empowered to appoint one. Cayman Islands Trust Law §100(4).

91. Baxendale-Walker, *supra* note 69, at 326 (quoting Duckworth).

92. *Id.*

designed to further the university's mission. For example, if the mission emphasizes research excellence, trustees might prioritize investments in research facilities and faculty recruitment in those fields.

- A trustee would need to scrutinize the university's budget and financial management to ensure fiscal practices support the mission. This might involve careful analysis of how funds are allocated across various departments and ensuring that expenditures drive the mission forward, such as funding scholarships if access to education is a key component of the mission.
- When developing or approving policies, the trustee would consider whether each policy helps to realize the university's mission. This could relate to admissions policies, faculty hiring practices, student life, and more, ensuring that all policies contribute to the creation of an environment that supports the mission.
- Decisions about academic programs and research priorities would be assessed based on their contribution to the mission. A trustee would push for the development or enhancement of academic and research areas that are directly related to the mission's core objectives.
- The trustees would look to foster a campus culture and set of institutional values that reflect and promote the mission. This could influence positions on student and faculty diversity, campus free speech, and other cultural issues.

In applying the "duty to advance the purpose" to these issues, a university trustee would continuously reference the mission statement as a guiding star for decision-making. The mission statement effectively becomes the yardstick against which all strategic considerations are measured. This approach ensures that the university does not drift from its foundational objectives and that it maintains a clear course toward fulfilling its purpose, as defined in the mission statement.

### *C. Rigidity*

One problem that application of a trust model to university boards might raise is the possibility that a university conceived as a non-charitable purpose trust might at some point find itself committed to a purpose that was too rigidly defined. Princeton, after all, was founded in 1746 to train ministers dedicated to the views of New Light Presbyterians.<sup>93</sup> By 1768, Princeton's sixth president, John Witherspoon, managed to shift the focus away from training future ministers to a focus on the values of the Scottish Enlightenment and by 1812 theological training was moved to a new institution, the Princeton Theological Seminary. By 1977-1981 when I attended it, there was no mention of anything to do with

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93. Princetoniana Museum, *The Founding*, <https://www.princetonianamuseum.org/artifact/bd7f0c28-a3dd-4637-a553-5d4789c561ce> [<https://perma.cc/VKC6-GE5Z>].

Presbyterians or preparation for the ministry in any religion. Indeed, there was little indication (aside from a lovely chapel building and rather bland services at the start of the academic year and at graduation) of any connection to Christianity. Thus, in less than 100 years, the founders' intent had been radically transformed and the original purpose abandoned. This is either fabulous flexibility (Princeton's version of the story) or a foreshadowing of the university's sequential abandonment of Presbyterianism and then the Enlightenment values and donor intent for purposes ever more remote from the original purpose.<sup>94</sup>

In general, trustees have broad discretion. In beneficiary trusts, this includes the ability to decide critical questions such as which beneficiaries receive capital or income, subject to trustees' duty to exercise independent judgment while considering only the reasons for which they have been given discretion and not ulterior purposes or reasons irrelevant to any sensible expectation of the settlor.<sup>95</sup> Even where trusts explicitly state that a trustee has no duty to act in a particular instance, trustees retain the power to act and courts may treat this as a fiduciary power that brings with it the expectation that the trustee will act where a reasonable person would do so.<sup>96</sup> In general, there is little reason to fear that trustees viewing themselves as bound to a purpose would behave too rigidly. Non-charitable purpose trusts can adapt to changed circumstances, either through the judicial application of the doctrine of equitable deviation or through mechanisms built into the trust instrument, such as giving the power to a protector.<sup>97</sup>

#### D. Outside Monitors

Another difference is that courts oversee trusts and trustees to a far greater extent than they do either corporate or university boards, providing opportunities to both seek a court's advance blessing for a potentially controversial decision and a forum where those affected by trustee decisions can seek redress. Courts have extensive inherent powers over trusts.<sup>98</sup> These developed, at least in part, because trusts are potentially extremely long-lived and so trust language that

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94. See Doug White, *ABUSING DONOR INTENT: THE ROBERTSON FAMILY'S EPIC LAWSUIT AGAINST PRINCETON UNIVERSITY* (2014).

95. David J. Hayton, *English Trust Law Problems and Pitfalls for Trustees and Fiduciaries* in *THE INTERNATIONAL ACADEMY OF ESTATE AND TRUST LAW: SELECTED PAPERS, 1997-1999*, 85 (Rosalind F. Atherton ed., 2001).

96. *Id.* at 92.

97. Ausness, *supra* note 13, at 369-70; Richard C. Ausness, *Sherlock Holmes and the Problem of the Dead Hand: The Modification and Termination of 'Irrevocable' Trusts*, 28 QUINNIPAC PROB. L. J. 237, 257-62, 280-94 (2015).

98. Richard Nolan, *Invoking the Administrative Jurisdiction: The Enforcement of Modern Trust Structures*, in *EQUITY TRUSTS AND COMMERCE* 156 (Paul S. Davies & James Penner eds., 2017) ("The inherent jurisdiction of the Court of Chancery, and all its successor courts in common law jurisdictions across the world, to supervise, and if necessary intervene in, the administration of trusts is an ancient and well-established jurisdiction of such courts. It is a jurisdiction that marks a radical distinction between the law of trusts and the wider law of obligations.").

seemed appropriate when drafted could become out-of-date with the passage of time.<sup>99</sup>

Hayton summarized the multiple roles of courts in supervising trusts this way:

At one end of the broad spectrum of the Chancery jurisdiction the judge has to be a stern disciplinarian castigating trustees in hostile proceedings in open court for their breaches of trust. At the other end of the spectrum he is a guide, mentor and friend: privately, in a friendly chambers summons, he may be very liberal and helpful . . .<sup>100</sup>

Having an outside body capable of playing the role of “guide, mentor and friend” as well as “disciplinarian” is something missing from university trustees. Unless, at public universities, that role is taken on by the politicians appointing the trustees—and even where it is, it is difficult to picture the relationship as being “guide, mentor and friend” rather than political patron.

In addition to courts’ supervisory roles, trusts can (and in some instances, must) have other actors whose role includes ensuring trustees’ fidelity to the trust, including protectors and enforcers. For example, “[t]he international trust model sees the protector as a participant in the fulfillment of the trustee’s duties who also has his own duties and responsibilities as a fiduciary for the protection of the beneficiaries or the trust purpose. This is why he has regularly been held to have the right to act or to intervene in proceedings relating to the administration of the trust.”<sup>101</sup> One way to provide university trustees with guidance in sticking to their missions is for similar bodies to be created for universities.

Trust protectors can play an important role in keeping a purpose trust on track. Among the powers they can be given in many jurisdictions are: the ability to amend trust terms, the power to oversee the trust’s activities to ensure its purpose is being addressed, appointment and removal of trustees, resolving conflicts among trustees, providing an additional check on trustees by being required signatories for certain actions, and ensuring compliance with legal requirements.<sup>102</sup> Having an outside individual or body with an analogous role would serve as an important check on university boards—one that is generally absent from either private or public university boards.

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99. David Hayton, *The Uses of Trusts*, *supra* note 67, at 160-61 (“This inherent jurisdiction initially developed in respect of trusts to advance the interests of a particular family for four generations or so. Thus, trustees could be advised on the extent to which powers drafted in old-fashioned form could be exercised in light of changed economic circumstances not foreseen when the old trust instrument was executed. Indeed, the trustees could be authorized to go beyond the terms of the trust and perform managerial or administrative acts not authorized in the old trust instrument but necessary to further the settlor’s intention to benefit the beneficiaries and to prevent detrimental consequences affecting the beneficiaries if the court did not intervene.”).

100. HAYTON, *THE LAW OF TRUSTS*, *supra* note 12, at 181.

101. Maurizio Lupoi, *TRUSTS: A COMPARATIVE STUDY* 261-62 (2000).

102. Baxendale-Walker, *supra* note 69, at 13, 240, 249.

### III. CONCLUSION

There is a wide range of possible missions for universities. Religiously-sponsored institutions will have different missions from secular ones; land-grant institutions ought to have quite different missions from non-land-grant ones; public universities should differ from private ones. Community colleges' missions should be different from research universities, and both should differ from those of liberal arts colleges. Once an institution has settled on a mission, however, it needs a board to keep it focused on that mission. In this article, I've suggested that the law of noncharitable purpose trusts offers a way to maintain that focus by having university governing boards act as if they were (or perhaps actually be) trustees of such a trust. If a university has such a mission and such a board, then I think its governance will be better than that of institutions which lack a clear mission and such a board.

There are downsides to empowering trustees, particularly from the point of view of the faculty. For example, Ashworth describes the legendary conflict between longtime University of Texas Board of Regents Chair, Frank Erwin, and then liberal arts dean, John Silber:

John Silber understood that a major role of a great university is to be a critic of society at large. Erwin begrudgingly tolerated the freedom of tenured faculty to speak out on political, economic, social, and legal issues. He did not like it. In his view, this hurt UT. He felt certain that the school would be better off with the public and its elective officials if faculty members would just keep their mouths shut and not feel compelled to speak out on controversial issues. Erwin felt the faculty often bit the hand that fed them; Silber, I think, felt that was a duty of a top-flight faculty.<sup>103</sup>

Ashworth's conclusion from his experience at Texas was "that the regents and administrators be seen to understand their appropriate roles of funding, facilitating, and protecting the university in its quest for excellence—and *that they stay within those appropriate roles.*"<sup>104</sup> My thesis has been that he got this wrong. University trustees have an overriding responsibility to keep universities focused on their missions. No other group in a university—not the faculty, not the administration, not the students, and not the alumni—have the ability to play that role.

This matters because trustees should be answering the "big questions" about universities, decisions that shape the details of what is taught and how and to whom.<sup>105</sup> These include such matters we think of as explicitly involving governance as the selection of the board, the president, and various other high-level decision makers; personnel issues, such as what kind of faculty are going to be hired and on what terms; how the budgets of units are determined, whether cross-

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103. Ashworth, *supra* note 3, at 207.

104. *Id.* at 232.

105. I owe a particular debt to Gabriel Calzada for my list of issues here.



subsidies across units are permitted, and how the university is financed. Even decisions that can appear relatively small—should the university participate in the various external rankings of universities, programs, and departments such as those done by *U.S. News*—can have major impacts. In the case of rankings, for example, there is considerable evidence that rankings-pressure drives decision making.<sup>106</sup> Jack Snyder and Alexander Cooley's critique of rankings in public policy decision making is equally applicable to academic rankings (an analogy on which they rely in part):

Raters commonly identify a mixed bag of attributes and processes that encompass a syndrome of desired (or undesired) elements that seem to go together in emblematic cases of success (or failure). Rather than using theory to sort out which things in the grab bag are causes, which are consequences, and which relationships are variable or conditional, raters assign arbitrary weights to elements that are assumed to be additive, when in fact they are interactive in complex ways. . . . [T]he result may be an index that obscures the very distinctions that are most important for policy evaluation.

It is hard to imagine a stronger case for deep involvement of a governing body than the decision about whether (and how) to participate in ranking schemes, given the widespread impact such decisions have on virtually every aspect of institutions. Yet there is little evidence that such decisions are considered by governing bodies.<sup>107</sup>

In the end, someone must be responsible for decisions at universities—the buck has to stop somewhere. Current university governance all too often diffuses this responsibility. It is unclear whether a decision is driven by the shadowy “administration”, a faculty committee, a dean, or the board. Giving decision making power to a group that takes on the kind of fiduciary obligations that trustees of non-charitable purpose trusts do is one way to have those with whom the buck stops think about their responsibilities to the institution as a whole. If we are to be serious about the ethics of university governance, we must be serious about first defining who holds those ethical responsibilities and then determining how they will be held accountable.

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106. See Wendy Nelson Espeland & Michael Sauder, *ENGINES OF ANXIETY: ACADEMIC RANKINGS, REPUTATION, AND ACCOUNTABILITY* 7 (2016) (law school rankings “transform the power relations within schools, day-to-day organizational practices, and the ways professional opportunities are distributed.”).

107. The recent flurry of decisions by law schools to not participate (although, to still attempt to influence, in at least some cases) *U.S. News* rankings were largely presented as administrative decisions by deans, not even as the result of faculty governance, let alone board governance. See, e.g., Paul Caron, *With Connecticut and Pittsburgh, 42 Law Schools Are Boycotting the U.S. News Rankings*, TaxProf. (Feb. 11, 2023) [https://taxprof.typepad.com/taxprof\\_blog/2023/02/with-connecticut-and-pittsburgh-42-law-schools-are-boycotting-the-us-news-rankings.html](https://taxprof.typepad.com/taxprof_blog/2023/02/with-connecticut-and-pittsburgh-42-law-schools-are-boycotting-the-us-news-rankings.html) [<https://perma.cc/9YBT-CXNY>].