

Recalibrating Public University Governing Boards

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Education is primarily a public business. . .

John Dewey¹

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For most public universities in America, a single governing board of trustees (or regents) serves as the primary legal authority over the institutions within each state’s system of higher education. The board hires and monitors university presidents, sets tuition rates and admissions criteria, directs long-term strategic and financial planning, and acts as a liaison between campus administrators, public officials, and ordinary citizens. University governing boards also have the final say on several core academic matters, including questions of faculty tenure, the closing or opening of individual colleges, and the creation of new degree programs. Given the myriad ways governing boards can critically impact the schools under their watch, one would hope they are composed of qualified, objective

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1. JOHN DEWEY, MORAL PRINCIPLES IN EDUCATION vi (1909).

members committed to sound governance practices and a faithful allegiance to the university's mission of teaching, research, and service.

This Essay argues that, sadly, this expectation rarely reflects reality. Public university boards are broken. Trustees are often ill-equipped to fulfill their fiduciary responsibilities or politicized in ways that encourage autocracy, bias, and a harmful disdain for academic freedom. The countless students, faculty, and other stakeholders who depend on and support public higher education should not accept the status quo. Significant governing board reform is necessary for public universities to both keep pace with their private counterparts and sustain a meaningful pursuit of truth and discovery.

This Essay is organized as follows. Part I provides an overview of the origins and purpose of public university governing boards. In theory, the archetype public university governing board would understand, enrich, and protect university life. It would consist of members with deep knowledge of the purposes of higher education and academic freedom, the markets for students and research grants, the competitive challenges facing schools, enrollment trends, accreditation rules, relevant state and federal regulations, student retention rates, financial aid policies, and the quality, goals, and demographics of students, faculty, and staff. The board should be able to determine whether campus administrators are working together effectively for the good of the institution. It should preserve institutional autonomy and prevent external interference in faculty scholarship. Its members should appreciate the organizational complexity of universities. They should collectively possess expertise in higher education policy, finance, risk management, real estate, government relations, crisis planning, fundraising, athletics, and the arts. They should be transparent, sophisticated, ethical, and committed to advancing the best interests of the state and the institutions they hold in trust. They should appreciate and abide by their fiduciary obligations. These characteristics would combine to form an ideal governing board capable of successfully overseeing the modern university both today and into the future.

Part II explains the weaknesses and limitations of the prevailing system of university governance. For many reasons, the ideal governing board seldom exists in practice. Most trustees are political appointees. They are not selected through a competitive search, nor are they chosen for specific skills germane to academic management. Trustees typically do not have *any* professional experience in higher education. They are often part-time, unpaid volunteers who are appointed because of their political or social connections. Unlike corporate boards, where best practices and occasionally state and federal regulations dictate that directors be recruited for their industry expertise and qualifications, no similar expectations surround the selection of university trustees. Indeed, few governing boards feature any "inside" members from university leadership. Most trustees thus rely only on filtered or partial information provided by others when making decisions.

At the same time, the political nature of trustee appointments often leads to accusations of cronyism or capture. Sometimes these claims are legitimate; other times they are not. But, in any case, the default perspective of many university

stakeholders is to view trustees with suspicion and distrust, particularly when they appear overtly partisan, overstep their authority, or behave in ways that depart from academic norms and principles. As these critiques gain greater traction, America's place at the forefront of intellectual progress—at least as far as public universities are concerned—will suffer a harsh, possibly fatal blow.

Part III proposes and assesses an alternative model: a co-governing board structure. The framework I advance draws on several existing university governance attributes but reformulates them into a dual, co-governing board system built around fenced and specialized oversight responsibilities. The first of the two co-governing boards would consist of what I call the “Board of State Trustees.” In one major respect, this Board would resemble current governing board design by consisting of politically appointed members. Maintaining democratic control over governance at the board level reflects how public universities remain creatures of the state that were organized to advance state interests. Yet, to mitigate the threats to institutional autonomy, research integrity, and academic freedom posed by trustees' lack of knowledge and political capture, I argue that this Board should have exclusive voting control over only a limited range of high-level university matters. Matters placed under this Board's authority should be ones where democratic accountability can be preserved without directly jeopardizing academic independence and reliability, namely, selecting and monitoring the university president, providing advice to campus managers, assisting with public and governmental relations, and ensuring that systems are in place to adequately monitor institutional compliance with regulatory and legal requirements.

All other major matters of governance—i.e., matters principally of an academic nature—would be overseen by a second co-governing body: the “Board of Shared Governance.” This board's voting members would be drawn from the university's primary stakeholder groups—faculty, students, and staff—as well as senior administrative leadership (e.g., president and provost). The goal is to place responsibility for the university's core academic mission in the hands of those who possess the relevant expertise, knowledge, and values to appropriately manage it. Though this board would maintain final authority over academic matters, the Board of State Trustees could still exert a strong level of policy influence through its exclusive supervision of the university president.

Part IV concludes with an acknowledgment that each public university system must craft the governance solution that is most appropriate for its unique needs and goals. Naturally, this will require that policymakers on both ends of the political spectrum work together to find more effective ways to balance state priorities while preserving academic freedom and a genuine commitment to the pursuit of scholarly discovery.

I. ORIGIN AND PURPOSE OF PUBLIC UNIVERSITY GOVERNING BOARDS

The origin story of the public university governing board begins with the origins of the public university itself. Universities were created to facilitate and

coordinate the search for truth.² Initially, in the United States, this search for truth occurred mainly within small, religiously affiliated colleges founded by seventeenth-century colonists.³ By the early 19th century, however, the larger, government sponsored schools that would become today's state universities began to emerge. These institutions—with the University of Virginia, the University of North Carolina, and the University of Georgia being among the first—were established to educate and train the state's citizenry as a means of strengthening the broader economy and promoting the public welfare.⁴ A state with citizens trained in the most advanced agricultural, medical, and mechanical skills would presumably enjoy more collective prosperity than one without.

From a governance perspective, the earliest American universities ran much the same way as England's Oxford and Cambridge—but with one major difference. Rather than relying exclusively on faculty to manage the institution's affairs, as was the case in England, the first universities in the U.S. were governed by citizen boards consisting of community, political, or religious leaders.⁵ This approach was borne more from practical necessity than conscious choice: there simply were not enough faculty in the U.S. at the time to handle both the teaching and oversight responsibilities necessary to run a school.⁶

Though the size of their faculties eventually grew to match those in England and Europe, reliance on non-faculty governing boards persists to this day at most American universities, both public and private. Particularly for state institutions, this state of affairs relates to the very reason for their existence. Because state universities seek to enrich the lives of the taxpayers in their communities, a governing board made up of lay representatives offers a mechanism for ensuring that public goals for higher education remain aligned with the priorities of the citizenry. Moreover, with the state being the primary source of public university funding, at least historically speaking, a board drawn from politically selected representatives allows taxpayers to maintain a modicum of control over an institution they help support financially.

Structurally and operationally, a near-universal feature of modern public university boards is the governor's power and responsibility to appoint trustees. Following their gubernatorial appointment, trustees typically must then be confirmed by the legislature. State laws also delineate a range of board powers and responsibilities, and many require periodic public reports on board and university activities.⁷

2. See Keith E. Whittington, *Academic Freedom and the Mission of the University*, 59 HOUS. L. REV. 821 (2022).

3. JUDITH AREEN & PETER F. LAKE, *HIGHER EDUCATION AND THE LAW* 27 (2d ed. 2014).

4. *Id.*

5. *Id.* Note that the structure of public university governing boards can vary from state to state in discrete ways. For example, in some states, each individual public university has its own designated governing board that is in turn overseen by a single state-wide board of trustees or regents. These differences aside, however, the points and recommendations made in this Essay should apply to all state governing boards regardless of their specific structure.

6. *Id.*

7. See, e.g., IOWA CODE § 262.26 (2024).

One board responsibility of significant interest to many state residents is the setting of admissions criteria and tuition rates for each university within the state's system of higher education. Another is the allocation and apportionment of total state appropriations to each institution under the board's control. The board must consider these matters, which involve both academic and economic judgments, within a broader framework of priorities influenced by political considerations and the demands of students, faculty, alumni, and private industry.⁸ For example, depending on the workforce needs of a particular state, a board might face pressure to add or close individual colleges or departments in response to perceived market interest and competitive concerns.

When governing boards decide to act, their choices must reflect their status as fiduciaries of the institution they hold in trust.⁹ Individually, this means each trustee owes to her university the classic fiduciary duties of care and loyalty. The duty of care "relates to the level of confidence expected of the board in carrying out governance responsibilities by using the degree of diligence and skill one would expect of a prudent person" performing the same role.¹⁰ As with corporate directors, compliance with the duty of care typically boils down to making decisions on a fully informed basis. The duty of loyalty "requires that board members act in good faith and in the best interests of the institution, not out of self-interest."¹¹ This duty is the classic "no-conflict" duty: each trustee must put the "well-being of the institution" above any competing organizational, political, or personal allegiances.¹²

Some scholars maintain that public board trustees also owe a third duty to their university known as the duty of obedience.¹³ This fiduciary obligation is said to be unique to nonprofit board members. It requires trustees to remain faithful to the mission of the nonprofit organization they serve, which for a public university means obedience to the school's purpose and state charter.¹⁴

What, then, is the mission and purpose of a university? A useful description of the university's mission comes from Robert A. Scott, the former president of Adelphi University. Scott describes the university's role as being one of creator, curator, and critic.¹⁵ He writes:

8. ROBERT A. SCOTT, *HOW UNIVERSITY BOARDS WORK* 26 (2018).

9. *Id.* at 37 ("University trustees hold an institution's state-granted charter in trust.").

10. *Id.*

11. *Id.*; see also KENNETH P. MORTIMER & COLLEEN O'BRIEN SATHRE, *THE ART AND POLITICS OF ACADEMIC GOVERNANCE* 23 (2013).

12. Ellis et al., *The New Order*, *CHRON. OF HIGHER EDUC.* (Sept. 25, 2020), <https://www.chronicle.com/article/the-new-order> [https://perma.cc/LN2L-FR67].

13. See Thomas Lee Hazen & Lisa Love Hazen, *Punctilios and Nonprofit Corporate Governance—A Comprehensive Look at Nonprofit Directors' Fiduciary Duties*, 14 U. PA. J. BUS. L. 347, 386-92 (2012).

14. See *id.*; see also KENNETH P. MORTIMER & COLLEEN O'BRIEN SATHRE, *THE ART AND POLITICS OF ACADEMIC GOVERNANCE* 23 (2013); Brian Pusser & Sarah E. Turner, *Nonprofit and For-Profit Governance in Higher Education*, in *GOVERNING ACADEMIA* 248 (Ronald G. Ehrenberg ed. 2004).

15. ROBERT A. SCOTT, *HOW UNIVERSITY BOARDS WORK* 36-37 (2018) (emphasis added).

In fulfillment of its mission of teaching, research, and service, the university serves as a *creator* of new knowledge and understanding. It is a *curator* of what is known, serving as a repository of the past. Finally, it is a *critic* of the status quo, emphasizing and supporting independent thought.¹⁶

As explained more fully in the following sections, this three-fold function means that the university trustee's duty of obedience makes her accountable for preserving the school's institutional autonomy and academic freedom.¹⁷

II. WEAKNESSES OF MODERN GOVERNING BOARDS

A. *Lack of Experience and Expertise*

When considering how modern public university boards have evolved from inception to today, the initial hopes one might have for their quality often bump into a disappointing reality. Though most trustees are independent from the schools they monitor in the sense of not being employed by them, and thus presumptively unbiased by the interests of campus managers and other constituents, their professional backgrounds and the circumstances surrounding their appointments rarely lend objective confidence in their ability to act as faithful and wise academic stewards.

The main contributor to this concern is the fact that board members are typically political appointees chosen not for their expertise or experience but because of either their ideological commitments or in appreciation for their political support and campaign donations.¹⁸ As one commentator notes, the appointment of a trustee is, "short of a judgeship, the most prestigious that a governor could confer."¹⁹ Indeed, besides prestige, being a trustee also comes with many other perks, including tickets to football games and invitations to other major campus events like museum openings and concerts. All told, seventy percent of public-university trustees were appointed through a nomination and confirmation process controlled

16. *Id.* at 36-37 (emphasis added).

17. *Id.* at 36 ("[Trustees] are responsible for institutions that are charged not only with preparing graduates for productive roles in society but also with questioning that same society."). Former University of Chicago President Hanna Gray offers perhaps the best description of the divide between faculty and trustee responsibility: "Faculty are individual talents and intellectual entrepreneurs, demanding developers of their disciplines. . . who have in fact certain constitutional rights in the process of governance and hold the most important authority that exists in the university, that of making ultimate academic judgments. And boards exist to ensure this freedom and creativity and to protect the processes and health of the environment that make them possible." Brian Pusser & Sarah E. Turner, *Nonprofit and For-Profit Governance in Higher Education*, in *GOVERNING ACADEMIA* 297 n. 8 (Ronald G. Ehrenberg ed. 2004).

18. See W.H. COWLEY, PRESIDENTS, PROFESSORS, AND TRUSTEES 203-05 (1980); Benjamin E. Hermalin, *Higher Education Boards of Trustees*, in *GOVERNING ACADEMIA* 33, 42-47 (Ronald G. Ehrenberg ed. 2004); Donald E. Heller, *State Oversight of Academia*, in *GOVERNING ACADEMIA* 53 (Ronald G. Ehrenberg ed. 2004); Brian Pusser & Sarah E. Turner, *Nonprofit and For-Profit Governance in Higher Education*, in *GOVERNING ACADEMIA* 255 (Ronald G. Ehrenberg ed. 2004).

19. James O. Freedman, *Presidents and Trustees*, in *GOVERNING ACADEMIA* 13 (Ronald G. Ehrenberg ed. 2004).

by members of a single political party.²⁰ Collectively, this group donated approximately \$20 million to politicians within their home institutions' state during the most recent election cycle.²¹ Few if any of these appointees, however, came from backgrounds that would suggest specialized knowledge in higher education policy or management.

By way of illustration, consider the current composition of the Board of Regents for the State of Iowa, the governing board of the author's home institution. The Iowa Board of Regents consists of (1) a physician; (2) a social worker; (3) a real estate developer; (4) the president of a construction company; (5) a current University of Iowa undergraduate student; (6) a retired banker; (7) the former president of a community college; (8) the CEO of a fuel systems company; and (9) the former deputy communications director for a state governor.²² While several of these individuals come from backgrounds that presumably involve some skills and experiences of at least modest relevance to higher education management and oversight—including finance and executive leadership—only one has worked in any form of higher education administration, and that was for a community college with an academic mission far removed from the traditional public research university.

Iowa's governing board is not unique. Unlike corporate boards constituted in the presence of strong market forces and shareholder pressures, the typical public university board lacks any professional expertise in the field of higher education.²³ In fact, "[o]ne of the ironies of university governance in the United States, especially when compared to corporate boards in business, is the trustee's lack of knowledge about higher education."²⁴ While it is difficult to "imagine a successful business including as directors people with little or no experience in the purpose, technology, market, and competition of the enterprise," this reality dominates across the public university governing boards in this country.²⁵

The foregoing circumstances make it unrealistic to expect current governing boards to function as optimal guardians of the university's full panoply of programs, resources, and values. Trustees lack the time and knowledge to be adequate monitors and stewards of what happens on campus. Most are ill-suited to scrutinize judgments about where to direct teaching and research funds, whether to adjust the size of the student body, or whether it makes sense to add or eliminate majors or degrees. By the same token, if campus administrators begin to take the university in problematic financial, strategic, or academic directions,

20. Ellis et al., *supra* note 12.

21. *Id.*

22. *Member Bios*, IA. BOARD OF REGENTS, <https://www.iowaregents.edu/the-board/member-bios> [<https://perma.cc/X8RC-PTW3>].

23. ROBERT A. SCOTT, *HOW UNIVERSITY BOARDS WORK* 71 (2018).

24. Robert A. Scott, *Changing Governance Models in North American Higher Education*, in *GOVERNING HIGHER EDUCATION TODAY* 63–64 (Strike et al., eds. 2019).

25. *Id.*

the average public governing board is rarely qualified to decide whether or how to second-guess them for the good of the institution and its mission.

Once we acknowledge that the typical public university governing board is characterized by a lack of relevant expertise and widespread inexperience among its membership, several discrete issues come into focus. The first relates to the sheer scope and complexity of the modern governing board's list of responsibilities. Boards must do many, if not all, of the following tasks:

- (1) Select the university president;
- (2) Monitor the university president's performance;
- (3) Respond to and manage major campus crises, especially when a crisis implicates the university president's fitness to serve;
- (4) Set tuition rates and admission criteria;
- (5) Monitor the university's performance in comparison to its competitive peers;
- (6) Implement standards and systems for compliance with legal and regulatory requirements;
- (7) Oversee and assist with government and community relations;
- (8) Interface with university and public stakeholders to gain information about issues or concerns;
- (9) Approve faculty candidates applying for tenure;
- (10) Monitor the need for and performance of individual colleges, degrees, and programs;
- (11) Review and vote on the university's strategic plan;
- (12) Review and vote on proposals for campus capital projects, including new construction; and
- (13) Lobby for additional funds within the state's budget and legislative appropriations process.

It is unreasonable to expect trustees to intelligently exercise independent judgment over these critical and context-specific matters when they lack the objective qualifications and knowledge necessary to adequately evaluate them. Absent at least a modest grounding in higher education policy or experience in higher education management, they will be ill-suited to ask the kinds of tough questions or engage in the type of diligence necessary to credibly assess how well a university is performing, or to offer smart guidance on what should change to improve results. This limitation becomes even more pronounced when we consider that trustees are part-time, unpaid volunteers who often have no formal relationship with the institutions under their watch.

Indeed, it is the typical trustee's lack of any professional connection to the university she is meant to oversee that also highlights a second significant problem with the traditional governing board model. Because trustees tend to be independent political appointees, at least in the sense of not being university employees, they must rely on others within the university to provide information about the matters the board must address. For example, if a university wants to build a new student recreational facility, adjust admissions or scholarship criteria, or launch a new degree program, these proposals will be presented to the board by the campus managers responsible for them. This creates the possibility that university employees will present information in a manner that maximizes the chances for board approval, even if that means filtering or characterizing it in ways that might not be fully accurate or complete. And yet, since trustees are non-experts who generally lack any direct working knowledge of what is happening on campus, their ability to judge what they are being told—and thereby serve as adequate monitors of campus decision-making—is significantly constrained. Put another way, even if trustees were to possess sufficient expertise or experience, their part-time and outsider status would still prevent them from taking a meaningful and reliable role in providing strategic advice and oversight.

B. Politicization and Overreach

In addition to questions about their qualifications, a parallel concern is the specter of political string-pulling that surrounds the public board at every turn. For too many trustees, the political nature of their appointment causes them to forget that they serve both state *and* university interests.²⁶ This is not terribly surprising. It is only natural for trustees to want to uphold the ideological preferences of the political parties and elected officials responsible for their selection, even if those preferences conflict with the university's own mission and goals. After all, rather than being selected for their expertise or experience, it is usually one's status as the political ally of a governor or key legislator that puts a person on the path toward trusteeship in the first place.²⁷

Nevertheless, while it may be common and understandable, this dynamic presents its own, more direct set of dangers. The problem with trustees driven by

26. ADRIANA KEZAR & WILLIAM G. TIERNEY, CTR. FOR HIGHER EDUC. POL'Y ANALYSIS, ASSESSING PUB. BD. PERFORMANCE 4 (2002). <https://files.eric.ed.gov/fulltext/ED486175.pdf> [<https://perma.cc/TW3G-LFXT>].

27. Brian Pusser & Sarah E. Turner, *Nonprofit and For-Profit Governance in Higher Education*, in GOVERNING ACADEMIA 255 (Ronald G. Ehrenberg ed. 2004); KEZAR & TIERNEY, *supra* note 26, at 5. ("The political culture of public boards should be addressed and the mission of public service advanced irrespective of ideological perspectives. A troubling aspect of most public boards is that people come to the work of the board bearing their own particular ideology based on party affiliations. However, it is important that the work of the board be carried out in a non-partisan way."). Moreover, in the context of public university governance, there is nothing akin to the mandatory disclosure requirements that apply to public corporate boards. For instance, public university trustees are not required to reveal potential conflicts of interest with university employees, the status of any pending litigation against them, or the nature of their financial expertise—all of which are matters that corporate directors must frequently disclose. *See, e.g.*, Management and Certain Security Holders, 17 C.F.R. 229.400.

partisan loyalties is the greater risk they will engage in biased overreach into the independent academic pursuits of the institutions they direct. As the final voice on major academic and non-academic questions affecting university life, a partisan or ideologically captured board can run roughshod over settled scholarly ideals like the importance of peer review, evidence-based research, free inquiry, free expression, and the curricular rights of faculty. Recent examples from Florida and North Carolina illustrate this concern.

In Florida, Governor Ron DeSantis began to reshape the state's New College of Florida (NCF) along political and ideological lines in January 2023 by appointing six new trustees to NCF's board who were aligned with his conservative ideals, including four who lived outside of the state.²⁸ These trustees' self-proclaimed mandate was to transform NCF into a replica of the private and Christian Hillsdale College in Michigan.²⁹ One trustee acknowledged the board's intention to "demonstrate that the public universities. . . can be recaptured, restructured, and reformed," especially around prevailing academic theories "on race and gender."³⁰ Then, at its first meeting, the new NCF board fired the university's sitting president.³¹ A few months later, the board denied tenure to five NCF professors who had already received approvals at every other point in the college's tenure review and decision process.³² The denials came pursuant to instructions by the recently appointed NCF president, a former state Republican legislator who had never worked in higher education, who said they were necessary given the school's "renewed focus on ensuring the college is moving towards a traditional liberal arts institution."³³ Shortly thereafter, the board eliminated NCF's entire gender studies department.³⁴ One NCF trustee summed up the board's approach by saying it was time to "get out of this idea that somehow a public university system is a totally independent entity that practices academic freedom."³⁵

A board following the Republican party's current playbook in Florida could elect to terminate disfavored degree programs, deny tenure to "problematic" faculty, vest the board with exclusive powers to select new faculty, restrict what

28. Josh Moody, *The Administrative Overhaul of New College of Florida*, INSIDE HIGHER ED (Sept. 19, 2023), <https://www.insidehighered.com/news/governance/executive-leadership/2023/09/19/new-college-florida-looks-outside-academe-fill-jobs> [https://perma.cc/KQ4Z-DBPW].

29. Josh Moody, *DeSantis Aims to Turn Public College into 'Hillsdale of the South'*, INSIDE HIGHER ED (Jan. 10, 2023), <https://www.insidehighered.com/news/2023/01/11/desantis-seeks-overhaul-small-liberal-arts-college> [https://perma.cc/5WSC-QW7V].

30. *Id.*

31. *Id.*

32. Tom Bartlett, 'Shame on You': Over Fiery Protests, Florida's New College Trustees Deny 5 Tenure Bids, CHRON. OF HIGHER EDUC. (Apr. 26, 2023), <https://www.chronicle.com/article/shame-on-you-over-fiery-protests-floridas-new-college-trustees-deny-5-tenure-bids> [https://perma.cc/M76Q-VWWS].

33. Josh Moody, *New College Board Denies Tenure for 5 Professors*, INSIDE HIGHER ED (April 27, 2023), <https://www.insidehighered.com/news/governance/trustees-regents/2023/04/27/new-college-board-denies-tenure-5-professors#:~:text=The%20five%20professors%20who%20were,than%20the%20customary%20sixth%20year> [https://perma.cc/3835-2AN7].

34. Moody, *supra* note 28.

35. Moody, *supra* note 29.

materials can be used in individual classes, or require students to take courses that teach only board-approved dogma. These moves might score points among certain political supporters or patrons, but they risk destroying the public's interest in preserving academic independence—a principle meant to ensure that research and scholarly outcomes are based on professional standards and evidence rather than corrupt meddling.

Two additional cases of apparent board politicization hail from North Carolina. First, after reportedly facing pressure from Republican politicians and donors in the state, the Board of Trustees of the University of North Carolina took the unprecedented step of declining to consider the University of North Carolina at Chapel Hill (UNC)'s recommendation to grant tenure to Nikole Hannah-Jones, the Pulitzer-Prize winning journalist responsible for creating the *New York Times*' controversial *1619 Project* publicly opposed by many leading Republican officials.³⁶ The board's intentional inaction in response to what is traditionally a formality came after Hannah-Jones' faculty tenure file successfully made its way through every other stage of the school's standard approval process.³⁷

Two years later, North Carolina's board passed a resolution directing UNC to develop a School of Civic Life and Leadership.³⁸ This school was described by trustees as a politically conservative center intended to remedy a lack of "right-of-center views" on campus.³⁹ Though there is nothing unusual about a governing board weighing in on proposed colleges, schools, or departments, the board's designated role in these situations is traditionally one of evaluation after a campus's own faculty proposes and approves the plan. Accordingly, by creating a school with a pre-determined ideological agenda directly and without faculty input, the North Carolina board departed from settled academic policies, norms, and processes to accomplish a politically motivated result.⁴⁰

C. Harms to Universities and the Public

The lack of relevant expertise, knowledge, and experience that permeates public university boards, coupled with the politicization that these boards often exhibit, produces serious social harms.

From the standpoint of promoting and maintaining university quality, the current board governance system generally places oversight responsibility in the hands of non-expert trustees who work part time—meeting perhaps four or five

36. See Joseph W. Yockey, *Resolving Regulatory Threats to Tenure*, 57 U. RICH. L. REV. 579, 607-10 (2022).

37. *Id.*

38. Adrienne Lu, *UNC's Board Comes Under Scrutiny After Surprise Plan for 'Civic Life' School*, CHRON. OF HIGHER EDUC. (Feb. 16, 2023), <https://www.chronicle.com/article/uncs-board-comes-under-scrutiny-after-surprise-plan-for-civic-life-school> [https://perma.cc/S3UD-UNPL].

39. *Id.*

40. See Abby Pender, *'I'm flabbergasted': UNC Leaders Blindsided by Trustees' Decision on School of Civic Life and Leadership*, THE DAILY TAR HEEL (Jan. 30, 2023), <https://www.dailytarheel.com/article/2023/01/university-unc-leaders-blindsided-trustees-decision-professional-school> [https://perma.cc/CQ62-PRNJ].

times per year—and who receive most of their information from self-interested sources on campus. Under these circumstances, it is difficult to imagine governing boards adding value to the complex academic and operational decisions that affect a wide range of scholars, students, and alumni on a daily basis. The typical governing board is unqualified to make reliable judgments on the finer points of higher education policies, practices, and trends. The public should also not expect trustees to be effective in observing or responding to problems on campus given how far removed they are from the faculty, students, and staff working on the ground.

These conditions leave university stakeholders vulnerable to dangers created by both board action and inaction. When boards act, there is a heightened risk that their choices will be uninformed, misinformed, or premised on beliefs and experiences that are not germane to higher education. Conversely, because of practical limitations on the board's ability to monitor, instances of malfeasance and other problems on individual campuses may easily evade detection and mitigation. In either case, the public and the university's stakeholders are not receiving the benefit of qualified, fully engaged experts when it comes to university decision-making and oversight.

The harms to universities and the public caused by board politicization are arguably even more worrisome. This becomes clear when we remember that the overarching purpose of public university governing boards is to “maximize the legitimate functions of the [university].”⁴¹ A university can only be legitimate—and thus deserve the classification as a university—if it upholds principles of academic integrity. Academic integrity, in turn, depends on the preservation of academic freedom. Faculty and students must be free to follow the evidence and the findings of their research wherever they lead without regard to political pressures, interests, or favoritism. If boards can dictate what ideas or results are “acceptable” or “appropriate” without regard to professional standards and merit, then the development of new knowledge on which “a free and dynamic society depends” will not reliably manifest.⁴² Dogma and political orthodoxy will instead prevail, in which case the university's academic outputs will fail to hold up against independent scrutiny by other scholars, institutions, businesses, and governments.

Of course, as creatures of the state, public universities are never fully immune from the influence of lawmakers and other politicians. Besides selecting trustees, elected officials control university appropriations and often influence how universities respond to issues of importance to local citizens and private industry. Still, throughout modern American history, “universities have long enjoyed a significant degree of freedom from political meddling in academic affairs,” with this approach being proven and accepted as the necessary means of ensuring

41. Brian Pusser & Sarah E. Turner, *Nonprofit and For-Profit Governance in Higher Education*, in *GOVERNING ACADEMIA* 255 (Ronald G. Ehrenberg ed. 2004).

42. BENJAMIN GINSBERG, *THE FALL OF THE FACULTY* 132 (2011).

trustworthy scholarship and research.⁴³ In this way, universities have functioned independently amidst political division much like the federal judiciary. The separation of power and authority between federal judges and the executive who appoints them provides a degree of “independence of thought and utterance” akin to what is demanded and required of university faculty.⁴⁴ The need for a clear delineation of boundaries between trustees and universities is what allows the latter to be an “intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally, perchance, it may become part of the accepted intellectual food of the nation or of the world.”⁴⁵

The social value that accrues when universities are insulated from politically motivated boards goes beyond just abstract ideals. The absence of academic freedom would jeopardize the university’s academic mission any time the work of faculty or students offends or challenges people or groups from different ideological, political, social, or religious backgrounds. For example, if a board’s political biases or loyalties result in the denial of tenure for a chemistry professor producing sound research on the safety of certain household cleaning products, not only will that professor suffer, but so too will members of society who stand to benefit from new discoveries about matters of public health.

Other, more discrete consequences of board politicization include the risk of a “brain drain” from the state as faculty elect to move to areas or schools with greater protection of academic freedom, as well as the risk of accreditation loss.⁴⁶ Florida and Wisconsin, for instance, both saw significant numbers of their most prominent and successful public university faculty exit after the Republican-controlled governing boards of each state began to intrude into campus academic autonomy.⁴⁷ Likewise, accrediting bodies warn that a board’s failure to protect the

43. Keith E. Whittington, *DeSantis’s Terrifying Plot Against Higher Ed*, CHRON. OF HIGHER EDUC. (Feb. 27, 2023), <https://www.chronicle.com/article/desantiss-terrifying-plot-against-higher-ed> [<https://perma.cc/5VC6-6425>].

44. Am. Ass’n of Univ. Professors, *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, 1 BULL. 17 (Dec. 1915).

45. See Joseph W. Yockey, *Resolving Regulatory Threats to Tenure*, 57 U. RICH. L. REV. 579, 590 (2023) (quoting Am. Ass’n of Univ. Professors, *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, 1 BULL. 17 (Dec. 1915)).

46. Of course, over time, it is possible that the adverse consequences of board politicization will eventually trigger a process of self-correction. That is, as stronger faculty and students go elsewhere in pursuit of better academic options, the institutions they leave behind will decline, and the political benefits of seeking to improve or restore them ought to become apparent to future public officials. My thanks to Andrew Morriss for sharing this observation.

47. See Susan H. Greenberg, *Faculty Flee New College of Florida*, INSIDE HIGHER ED (July 19, 2023); Pat Schneider, *Leaving UW: Reduced Funding, Politics Force Fond Faculty to Say Farewell*, CAP. TIMES (May 14, 2016), https://captimes.com/news/local/education/university/leaving-uw-reduced-funding-politics-force-fond-faculty-to-say-farewell/article_11da9d3f-69ff-5ce1-94ee-72338e586e18.html [<https://perma.cc/J6Y7-ZBAZJ>].

academic freedom of faculty can spell the end of a university's accreditation.⁴⁸ Should that happen, both the university and its students would be unable to obtain much-needed federal funding, including federal research grants and financial aid.⁴⁹

III. MOVING TO A CO-GOVERNING AND FENCED BOARD MODEL

The discussion so far suggests the prototypical public university governing board is unfit to perform the responsibilities assigned to it and should be restructured. This restructuring should aim to produce a system of university governance better able to balance the important values of democratic accountability, expert oversight, and academic integrity.

As an initial step toward conceptualizing a more capable, independent, and public-focused university board structure, I propose adopting a co-governing and fenced approach consisting of dual boards with separate and distinct responsibilities. The first of the two co-governing boards in my model would be a "Board of State Trustees." As is the historic norm for public governing boards, this body would be populated with politically appointed trustees to address the need for democratic accountability. However, unlike boards today, the authority vested in these trustees would be cabined to high-level policy matters of a chiefly non-academic nature.

The second co-governing board in my proposed system—a "Board of Shared Governance"—would be comprised of representatives from core university stakeholder groups, including faculty, students, staff, and senior administration. Depending on the needs and goals of particular state universities, this board might also include representatives from government, alumni, or private industry. The mandate of this second board would be to oversee the university's primary academic function. The key advantage of placing responsibility for top-level academic matters in the hands of trustees from traditional shared governance groups is the ability of this board to harness relevant and diverse expertise from knowledgeable constituencies while still maintaining a healthy separation from external political pressure. I expand on both components of my proposed co-governing model below.

A. *Design of a Board of State Trustees*

The first board in the dual, co-governing university board system I envision would be a board of trustees made up of political appointees selected by the state

48. See Lindsay Ellis, *U. of Florida's Accreditor Will Investigate Denial of Professors' Voting-Rights Testimony*, CHRON. OF HIGHER EDUC. (Nov. 1, 2021), <https://www.chronicle.com/article/u-of-floridas-accreditor-will-investigate-denial-of-professors-voting-rights-testimony> [https://perma.cc/NNB7-ZBK6].

49. See Joseph W. Yockey, *Resolving Regulatory Threats to Tenure*, 57 U. RICH. L. REV. 579, 635-36 (2023); COUNCIL FOR HIGHER EDUC. ACCREDITATION, *About Accreditation*, <https://www.chea.org/about-accreditation> [https://perma.cc/B35B-GCX2] (last visited Feb. 27, 2024) ("The federal government requires that a college, university, or program be accredited in order to be eligible for federal grants and loans or other federal funds.").

governor and confirmed by the legislature. This process of trustee selection is consistent with prevailing governing board design, and I preserve it here as a means of ensuring that parties responsible for public university governance stay responsive to state and taxpayer interests.

Importantly, however, this so-called Board of State Trustees would differ from contemporary practice in one key respect. Rather than serve as the final authority on *all* academic and non-academic matters affecting public universities, this board would be responsible for the following tasks only: (1) selecting and monitoring the university president; (2) providing advice to campus managers; (3) assisting with public and governmental relations; and (4) ensuring that systems are in place to adequately monitor institutional compliance with regulatory and legal requirements. The common thread uniting these tasks is a desire to maintain fidelity to several key board responsibilities while also checking the board's ability to encroach on academic integrity and cause problems due to lack of expertise.

By structurally separating oversight responsibilities that do not depend on specific knowledge or expertise in higher education and erecting a barrier between this board and academic matters, the Board of State Trustees can focus its efforts on aspects of oversight where its status as an independent political body adds value (or at least does not risk significant harm). For instance, the need to ensure that reasonable monitoring and compliance programs are in place at the campus level is an area where the board's lack of direct ties to the university can be an asset. The independence of the board helps to remove fears that insiders might neglect compliance to extract self-interested benefits for themselves—a classic “fox guarding the hen house” concern. At the same time, because of its power to select and monitor the university president, this board will still be able to exert strong influence over high-level university policy choices to the extent they bear on larger state interests and priorities.

In both scenarios, the main advantage of a fenced approach to governance is that the board will be limited to weighing in on only those matters which it has the time and competence to assess without jeopardizing the university's need for academic independence. That is, to perform tasks like monitoring presidential performance, providing advice to campus managers, assisting in government relations, and ensuring basic compliance systems are in place, the board needs only members who have good basic judgment and an understanding of their narrow mandate rather than intimate knowledge of the university or higher education in general.

Admittedly, given the Board of State Trustees' relationship to the university president, my proposal cannot remove all risk of political intrusion into academic affairs. As is true in the corporate board context, “there is a ‘fuzzy’ line between monitoring executive performance and managing the [organization] itself.”⁵⁰ If a

50. Usha Rodrigues, *A Conflict Primacy Model of the Public Board*, 2013 U. ILL. L. REV. 1051, 1075.

politically conservative board selects a politically conservative president, for instance, presumably that president will be more likely to push a conservative agenda across campus. Nevertheless, by confining the board's authority to presidential oversight, the danger of the board micromanaging or surgically influencing university academic and operational decisions should be moderated. Moreover, the significant transaction costs associated with searching for and replacing a president, coupled with the risk of destabilizing university and local constituencies that might be affected by a presidential change, should deter the removal of a sitting president absent clear and compelling performance concerns.

B. Design of a Board of Shared Governance

The second co-governing board in my proposed model, the Board of Shared Governance, would differ from the Board of State Trustees by consisting of non-politically appointed trustees selected from among a public university's principal shared governance groups: faculty, students, and staff (including staff in senior administrative leadership roles, like president and provost).

Though the notion of including some representatives from shared governance on public governing boards is not entirely novel, to my knowledge, no state system features a governing board made up exclusively of university employees and students. Yet, the benefit of this approach is that state universities and the public would be able to rely on trustees who possess relevant expertise and experience to oversee the range of academic matters for which those traits would prove most useful.⁵¹ Whether reviewing tenure applications, setting tuition rates, or evaluating admissions criteria, trustees who have closer and more specialized knowledge of those issues should be better positioned to assess and act on them. The trustees in this model—whether faculty, students, or staff—will be able to exercise their voices, balanced against the voices of their peers, on the basis of information, training, and experience of most direct relevance to the issues at hand. Indeed, the members of this board will better understand what is being asked of them, as well as what effects their decisions will have on the university, to a much more nuanced and intimate degree than one could hope for in the case of non-expert, independent trustees who meet only a few times each year. An analogy can be drawn to the significant reliance on specialized subcommittees in the corporate board context. The same objective defines both board structures: tying authority and responsibility to directors or trustees who are the most qualified to render sound and efficient judgments on the matters within their assigned purview.

A further advantage of designing a co-governing board around traditional shared governance categories is this approach's ability to parallel how university

51. Another reason to elevate campus stakeholder control over public university academic operations relates to the recent trend of declining state appropriations for higher education. As public universities rely less on state appropriations and more on their own entrepreneurial pursuits and donations to drive revenues, there becomes less justification for giving the state an oversized role in the governance and control of individual schools. See Joseph W. Yockey, *Resolving Regulatory Threats to Tenure*, 57 U. RICH. L. REV. 579, 645-46 (2023).

decision-making already happens on a day-to-day basis. Shared governance is a term of art in the field of higher education. It describes the predominant way universities make decisions within a governance landscape characterized by the unique roles and responsibilities of its constituents. Broadly speaking, shared governance posits that faculty should be given primary authority over all academic matters, including the curriculum and faculty hiring and promotion, with governing boards, staff, and senior administrators separately responsible for all other university operations as befits their unique qualifications and assigned duties.⁵² Students are another pillar of the traditional shared governance model, but their influence is typically advisory rather than authoritative. Still, despite the drawing of clear academic and non-academic boundaries across each category, the hallmark of modern shared governance is “joint planning and effort” among all major campus constituencies.⁵³ According to the American Association of University Professors (AAUP), this collaborative ideal persists because “[t]he variety and complexity of the tasks performed by institutions of higher education produce an inescapable interdependence among governing board, administration, faculty, students, and others.”⁵⁴

In keeping with this conventional understanding of shared governance, a board composed of representatives from each shared governance constituency will unite responsible parties in a formal fiduciary structure that makes them accountable for the choices they make at the campus level. That is, members of the shared governance board will be required to take ownership of their decisions in light of the demands and interests of the groups they represent. For their part, university stakeholders in this system would also now be able to influence the complex array of academic and non-academic matters facing universities more directly through qualified and well-informed representatives rather than being left to rely chiefly on outsiders who possess little (or biased) expertise.

C. Remaining Questions and Challenges

There are multiple advantages to redrawing and then fencing governing board authority along the dual lines I envision. By removing political appointees from direct control over academic affairs, the public university can operate with the independence and freedom necessary to preserve its scholarly integrity. Democratic accountability will endure through the state’s direct oversight of the university president, but now those members of the campus community with the appropriate expertise will be charged with monitoring major strategic and operational matters affecting the academic mission.

Though one might worry that members of the Shared Governance Board will advance their own biases when left in charge of academic functions free of direct

52. *Id.* at 629-30.

53. Am. Ass’n of Univ. Professors, *Statement on Government Colleges and Universities*, 52 Bull. 375, 376 (Dec. 1966).

54. *Id.*

state control, that fear should be tempered. For one, the university president will maintain a vested interest, driven by a desire for self-preservation, in collaborating with both boards to reach mutually acceptable decisions wherever possible. This dynamic resembles the classic philosophy behind privatization efforts in public higher education more generally, where the guiding philosophy is a government that “steers not rows.”⁵⁵ Publicly elected and appointed officials will still set broad state educational objectives via their relationship with the president, but my proposal then leaves implementation to specialized actors who can collaborate and exercise day-to-day discretion on the ground.⁵⁶

At the same time, in a manner akin to the federal executive branch’s need to work through policy proposals and compromise with competing members of a bicameral legislature, the university president will be unable to stray too far from the support of the politically appointed or campus boards without jeopardizing her perceived legitimacy in the eyes of either group. Board members drawn from the major shared governance bodies will also find their own interests moderated by competition and the need to maintain the support (and secure the votes) of their colleagues representing other campus constituencies—a refinement aligned with the philosophy of interdependency and “joint planning and effort” that has defined university shared governance since the early 20th Century.⁵⁷

In arguing the merits of my proposed co-governing board model, I acknowledge that several questions and challenges remain. Most obvious among them is the steep political hurdle my proposal would face. For the fenced governance approach I advance to become reality, state lawmakers and public officials would first need to voluntarily relinquish the power they hold over the single, unified governing board system currently in place in most states. It is hard to imagine governors and legislators willingly ceding oversight responsibility for academic matters to a board of non-appointed shared governance representatives selected by university constituents, especially in today’s highly polarized political environment. For this reason, my more immediate goal is to start a conversation about the limitations of the current system—limitations that risk negatively impacting the public as well as state universities and their stakeholders—in the hope that doing so will prompt ongoing discussion among independently minded policy advocates about reform options consistent with the ideas and themes expressed here.

55. Gabriel Kaplan, *Governing the Privatized Public Research University*, in *PRIVATIZING THE PUBLIC UNIVERSITY* 115-16 (Christopher C. Morpew & Peter D. Eckel eds., 2009).

56. As an alternative approach, and in an effort to further enhance democratic accountability, a university might consider allowing the Board of State Trustees to elect the members of the Board of Shared Governance from among a list of candidates nominated by the various university stakeholder groups. This approach would resemble the common “merit selection” process used in many states to appoint judges. See John F. Kowal, *Judicial Selection for the 21st Century*, BRENNAN CTR. FOR JUST. (June 6, 2016), <https://www.brennancenter.org/our-work/research-reports/judicial-selection-21st-century> [https://perma.cc/H5BG-5FGS]. My thanks to Andrew Morriss for suggesting this idea.

57. Am. Ass’n of Univ. Professors, *supra* note 44; Am. Ass’n of Univ. Professors, *supra* note 53, at 376.

Beyond the obvious political and practical challenges, a separate question is whether the members of my proposed Board of Shared Governance could be counted on to fulfill their responsibilities without succumbing to their own biases and conflicted interests. For example, would a trustee representing tenured faculty be capable of abiding by her duties of care and loyalty when passing judgment on matters directly affecting her faculty constituents? Or would the faculty trustee always be beholden to whatever policy choices her faculty prefers, even if in her independent judgment those preferences would be detrimental to the university's broader institutional interests? If we are concerned that politically appointed trustees will be biased toward their political benefactors, then the same risk would seemingly arise in the context of trustees selected by shared governance groups.

Though the possibility of capture exists within a proposed Board of Shared Governance, there are reasons to suggest this fear is overblown. For one, part of the attraction of a governing body drawn from shared governance is that the different interests and perspectives certain to emerge from among faculty, staff, and student representatives will naturally deter overreach. With no single constituency standing in a dominant position relative to the others, each representative will be required to justify her positions and negotiate to obtain the votes necessary to accomplish desired outcomes.

In addition, the position of the university president as potential mediator in this framework cannot be ignored. Since the president is subject to oversight by the Board of State Trustees and would sit on the Board of Shared Governance, the president will need to mediate disputes among both boards and across trustee coalitions in ways that attempt to preserve her credibility in the eyes of all concerned. Again, the president's role in this scenario would, in some respects, be akin to the philosophy that animates efforts to privatize public higher education. With privatization, the government's role is to "step back from day-to-day managerial matters and instead focus on goals and outcomes."⁵⁸ Applied here, the president, as agent of the Board of State Trustees, can focus the Board of Shared Governance on fulfilling broad state objectives while simultaneously helping to direct their execution within a system that allows for the shared governance trustees closer to campus to exercise discretion and judgment consistent with their areas of specialization.

IV. CONCLUSION

By taking a more nuanced and curated approach to the structure of public university governing boards, the model of co-governance described in this Essay offers a better path to protecting the public's interest in achieving meaningful oversight of university operations while preserving a level of campus autonomy necessary to protect teaching and research integrity. Admittedly, much work still

58. Gabriel Kaplan, *Governing the Privatized Public Research University*, in *PRIVATIZING THE PUBLIC UNIVERSITY* 115-16 (Christopher C. Morpheus & Peter D. Eckel eds., 2009).

needs to be done before the ideas presented here can manifest in meaningful ways. My arguments for structural board reform are therefore intentionally focused on broad, generalized concepts to provide room for each public university system to craft the governance solution that is most appropriate for its unique needs and goals. In the final analysis, little change—and little assurance of sustainable quality across the landscape of public higher education—will come until policymakers on both ends of the political spectrum acknowledge that the prototypical university governing board is broken. It is time to find more effective ways to balance state priorities while preserving academic freedom and a genuine commitment to the pursuit of scholarly discovery.