

PUBLIC UNIVERSITY AND AFFILIATED FOUNDATION RELATIONSHIPS:  
BALANCING CONTROL AND AUTONOMY

Rebecca Cady<sup>1</sup>

INTRODUCTION

This paper explores the legal relationship between public colleges and universities and their affiliated foundations. The focus is on public schools, rather than private, because under state law they are usually considered to be state agencies and are thereby subject to state regulations and reporting requirements.<sup>2</sup> Depending on the balance of control and autonomy between a university and its foundation, establishing an affiliated foundation can provide some relief from these restrictions. In this way, public universities stand to gain, or lose, more by the creation of separate foundations than do private educational institutions.

Against the backdrop of the reasons why a university may choose to form an affiliated foundation, the paper offers an overview of the necessary structural considerations for organizing such a foundation. The manner in which university and foundation relationships are defined and the measure of control that is attributed to each entity are crucial to the viability of both organizations. Ambiguity in the authority and obligations between a university and a foundation can lead to internal legal disputes that are damaging to both. Clark College and the University of Georgia experienced conflicts with their affiliated foundations and their circumstances emphasize the importance of clearly defining each institution's role. External legal claims can also be raised against foundations and institutional relations inform legal conclusions in a variety of issues. A

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<sup>2</sup> 15 A AM. JUR. 2D Colleges and Universities § 2 (2004). "In many jurisdictions [public] universities are considered state agencies, instrumentalities of the state, or a unit of state government."

growing body of case law addresses the applicability of state open-record laws to university affiliated foundations, with outcomes frequently hinging on the degree of institutional control or autonomy. Other areas where institutional boundaries inform the legality of certain actions include state property tax exemptions, minority scholarships, lobbying, and scientific research. A survey of these topics demonstrates that, when it comes to establishing an affiliated foundation, one size does not fit all. Institutional policies on affiliated foundations from the University of Virginia, the University System of Maryland, and the Montana University System illustrate a variety of ways to manage legal risks resulting from the formation of these organizations.

## ORGANIZATIONAL PURPOSE AND STRUCTURE

Public universities may establish affiliated foundations for diverse reasons including alumni relations, fundraising, property acquisition, research support, and political advocacy. Regardless of the type of objective, the primary mission of all affiliated foundations is to financially support their educational institution.<sup>3</sup> The ability of a foundation to fulfill this central purpose and to carry out specific aims depends on its organizational structure and its relationship to the university. An institution must consider what it hopes to accomplish when creating an affiliated foundation because the organization's purpose helps to determine its proper configuration, and this can subsequently affect the foundation's ability to effectively support the university. For example, public institutions may be hampered by state requirements for bids or the timing of appropriations when seeking to purchase property or build structures.<sup>4</sup> Establishing a foundation to serve these functions may be an effective solution. A foundation with such aims would benefit

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<sup>3</sup> See, e.g., Thomas Arden Roha, *State University-Related Foundations and the Issue of Independence*, Occasional Paper No. 39 ASS'N OF GOVERNING BOARDS OF UNIV. & COLL., at 1 (Jan. 2000); KAPLIN, WILLIAM A. & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* § 2.2.5 (3rd Ed. 1995).

<sup>4</sup> HEDGEPEETH, ROYSTER C., *BOARD BASICS FOUNDATION RELATIONS: CREATING A SUCCESSFUL AFFILIATED FOUNDATION*, 5 (Association of Governing Boards of Universities and Colleges 1999). See also, Carol L. Zeiner, *Monetary and Regulatory Hobbling: The Acquisition of Real Property by Public Institutions of Higher Education in Florida*, 12 U. MIAMI BUS. L. REV. 103 (2004).

from a close organizational relationship to the university because of the property tax exemptions that generally attach to educational institutions.<sup>5</sup> Another need might be funding for targeted student scholarships that enhance the diversity of the student body. To fulfill this purpose, even though funds raised are private monies, the foundation would benefit from an attenuated relationship to the public institution.

Affiliated foundations may be established in myriad ways, so it is advisable for the university to examine various aspects of the foundation in order to determine the most appropriate arrangement.<sup>6</sup> The most basic element is corporate tax status and the source of the foundation's budget and the management of its funding must be addressed. In addition, the institution's history and legislative definitions, particularly as they relate to "public agency" status, its governing board and oversight policies, and the necessary degree of autonomy are essential considerations.<sup>7</sup> As public institutions rely more heavily on private sources of funding and charitable organizations come under increasing public scrutiny, it is essential to the fiscal health of the institution and its foundations that their relationships are carefully construed.<sup>8</sup> The characteristics identified here are pertinent because courts often look to them when defining a foundation's legal status and deciding whether and how to apply state regulations.<sup>9</sup>

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<sup>5</sup> *Id.*; see, e.g., *Northern Illinois Univ. Found. v. Sweet*, 603 N.E.2d 84 (Ill. App. Ct. 1992) (property held by foundation did not qualify for tax exemption); *Southern Illinois Univ. Found. v. Booker*, 425 N.E.2d 465 (Ill.App. 1981) (property held by foundation was exempt because the university exerted substantial control over the foundation and the property).

<sup>6</sup> Hedgepeth, *supra* note 4.

<sup>7</sup> *Id.* at 3.

<sup>8</sup> See, e.g., *First in a Series of Essays: The Changing Relationship Between States and Their Institutions, Shifting Ground: Autonomy, Accountability, and Privatization in Public Higher Education*, American Council on Education, <http://www.acenet.edu/programs/changing-relationship/roundtables.cfm> (May 2004). Albert B. Crenshaw and Marc Kaufman, *Senate Panel Examines Ways to Curb Abuses in Giving, Receiving*, WASH. POST, Apr. 6, 2005, at E1. "Simply stated, there are increasing indications that the twin cancers of technical manipulation and outright abuse that we saw develop in the profit-making segments of the economy are now spreading to pockets of the nonprofit sector." Internal Revenue Commissioner Mark W. Everson told the [Senate] panel yesterday."

<sup>9</sup> *Id.* at 4. See also, Roha, *supra* note 3.

University-affiliated foundations may be formed by university charter or through the creation of an independent entity that later becomes linked to the university.<sup>10</sup> They are generally established as tax-exempt, charitable organizations under the Internal Revenue Code section 501(c)(3). To be recognized as such, an organization must “be organized and operated exclusively [meaning primarily] for an exempt purpose.”<sup>11</sup> Foundations supporting colleges and universities qualify under section 501(c)(3) because they usually meet the definition of “charitable” by advancing educational or scientific endeavors.<sup>12</sup> While 501(c)(3) charitable organizations are the most common structures, a university may want to align itself with a political organization, such as a Political Action Committee (PAC) formed under Internal Revenue Code section 527(f). PACs are to some extent tax-exempt organizations, but contributions given to PACs are not tax deductible for the donors.<sup>13</sup>

Questions of organizational purpose also lead to consideration of operating fund sources and fiscal management.<sup>14</sup> When a university provides its foundation with office space, pays public retirement benefits for its employees, and the foundation accepts gifts given to the university, a close relationship exists. Alternatively, when a foundation occupies and pays for office space apart from the institution, covers its own employee salaries and benefits, and has a separate financial system, a more attenuated relationship is created. Depending on the particular function of the foundation, a closer or more distant relationship may be desirable.

Board composition is another important determinant of a foundation’s legal status. If university board members and the university president are voting members of the foundation board, this suggests a close relationship between the two institutions and indicates a lack of

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<sup>10</sup> Kaplin, *supra* note 3, 93.

<sup>11</sup> HOPKINS, BRUCE R., *THE LAW OF TAX-EXEMPT ORGANIZATIONS* §§12.1, 17.1 (8th Ed. 2003).

<sup>12</sup> *Id.* at § 6.6, 167.

<sup>13</sup> See, Bruce Hopkins, *supra* note 11, §4.4 at 76; Theodore J. Hopkins, Jr., *Foundations Supporting Colleges and Universities: Unrelated Business Income Taxation*, 40 S.C. L. REV. 597, 599-600 (1989).

<sup>14</sup> See Hedgepeth, *supra* note 4, 3-4; Salin G. Geevarghese, *Looking Behind the Foundation Veil: University Foundations and Open Records Laws*, Vol. 25 No. 2 J.L. & EDUC. 219, 232 (1996); see also, BAHLMANN, DAVID W., *BOARD BASICS FOUNDATION RELATIONS: ASSET MANAGEMENT FOR PUBLIC INSTITUTIONS* (Association of Governing Boards of Universities and Colleges 1999).

foundation independence.<sup>15</sup> Foundation interference in university operations can also indicate an overlap of control. If the foundation plays a policymaking role in the operations of the university or pays a significant portion of the salary for university executives, it may be viewed as a public agency.<sup>16</sup> In an article outlining appropriate relations between governing boards and foundation boards, Richard Legon notes that “successful fund-raising requires an appropriate balance of foundation autonomy and accountability to the institution” and recommends that college board members be appointed to foundation boards, particularly when the member’s term on the college’s governing board has ended.<sup>17</sup> Legon asserts that “Such appointments may be the most effective means of facilitating communications between the boards,” while cautioning that this is so “only when [the appointments] are intended to strengthen the relationship between the boards, not reduce foundation autonomy.”<sup>18</sup> Regardless of foundation board membership, it is the university’s obligation to clearly articulate board responsibilities through its own policies or bylaws, or its formal agreement with the foundation.<sup>19</sup> Having guidelines for cooperation firmly in place will contribute to a mutually respectful relationship and better enables the university and foundation to manage potential disputes.<sup>20</sup>

#### WHO IS IN CHARGE?

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<sup>15</sup> See, e.g., *Jackson v. Eastern Michigan Univ. Found.*, 544 N.W.2d 737, 739 (Mich. App. 1996) (In determining whether the foundation was a public body, the court reviewed its articles of incorporation and bylaws and determined that it was a public body, in part because five of the foundation trustees were permanently required to be filled by university officials). *But see, Courier-Journal & Louisville Times Co. v. Univ. of Louisville Bd. of Trustees*, 596 S.W.2d 374, 376, 379 (Ky. Ct. App. 1980) (Although all members of the University Board of Trustees served as directors of the Foundation, the Court held that this did not make the Foundation a public body but did require that Foundation board meetings be open to the public.)

<sup>16</sup> See *Toledo Blade Company v. Univ. of Toledo Found.*, 602 N.E.2d 1159, 1162 (Ohio 1992); see also Geevarghese *supra* note 14, 224-25.

<sup>17</sup> LEGON, RICHARD D., BOARD BASICS FOUNDATION RELATIONS: GOVERNING AND FOUNDATION BOARD RELATIONSHIPS 2, 11 (Association of Governing Boards of Universities and Colleges 1999).

<sup>18</sup> *Id.*

<sup>19</sup> Legon, *supra* note 17, 6.

<sup>20</sup> *Id.*

Public university foundations are private entities with public responsibilities and questions about how autonomous these entities should be can create a great deal of controversy.<sup>21</sup> At base, these issues demonstrate the necessity of effective communication and fostering positive relationships between the two entities. They also illustrate the necessity for careful consideration about the legal structure of affiliated foundations. Sometimes the issue simply is a disagreement between institutional leaders, but more commonly the controversies arise because of unclear legal rights and responsibilities between the organizations. When uniting with these types of organizations, in addition to the concern about external legal assaults on the functions of affiliated foundations, universities must consider the possibility of internal legal struggles. Disputes of this sort can damage a public institution's reputation within the community it serves.<sup>22</sup>

In March, a lawsuit between a New Mexico community college and its foundation settled, clearing the way for the college to dissolve the foundation.<sup>23</sup> When the college governing board encountered resistance from the foundation over an attempt to redefine the scope of the foundation's fundraising activities, the board decided to disband the existing foundation and create a new one.<sup>24</sup> Tales of similar controversy from two schools, Clark College and the University of Georgia, serve as examples of internal legal disputes resulting from confusion over the proper balance of control and autonomy between the institution and the foundation.

#### Clark College

Clark College (Clark) is a state community college located in Vancouver, Washington, that was founded in 1933. Washington state law provides the authority for public colleges and universities to contract with private entities for the purpose of fundraising in support of the

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<sup>21</sup> Legon, *supra* note 17, 15.

<sup>22</sup> See, e.g., *Editorial, In Our View: Time for Change*, THE COLUMBIAN, Apr. 9, 2002, at C6. "As long as [the College and the Foundation] . . . leaders are at odds, the college and this community will suffer. . . "The college is a far more public institution [than the foundation]. The college trustees are appointed by the governor, and they must be answerable to the public, including patrons of the college."

<sup>23</sup> Erin Strout, *Community College in New Mexico Settles Lawsuit with its Foundation*, CHRONICLE OF HIGHER EDUC., Mar. 2, 2005, 29.

<sup>24</sup> *Id.*

institution.<sup>25</sup> The Clark College Foundation (CCF), established as a 501(c)(3) charitable organization, now holds assets valued at about \$59 million and it has the most assets of any two-year college foundation in the nation.<sup>26</sup> In the summer of 2002, a legal dispute over Clark's authority to review CCF's financial records that arose from a disagreement over contract language became public.<sup>27</sup> The contract was eventually restructured, but the relationship between Clark's president and CCF's president was deemed "unsalvageable" as a result of the conflict and it ultimately contributed to the college president's forced resignation.<sup>28</sup>

News articles covering the controversy repeatedly described it as a quarrel about control.<sup>29</sup> Admitting as much in remarks made at a meeting of state community college presidents, the president of Clark said, "The foundation 'has been operating very autonomously for quite some time . . . Quite frankly, this is an argument over control.'"<sup>30</sup> It also appeared to be about money. Observers speculated that Clark was envious of CCF's wealth and CCF may have been too assertive in trying to direct strategic planning at Clark.<sup>31</sup> The lawyers were apparently not helping the situation. One article queried, "And was that tough Seattle lawyer the [college] trustees hired only making things worse?"<sup>32</sup> Another commented that while this disagreement might appear to simply be a personality conflict, the primary issue was control and that, according

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<sup>25</sup> Relationship Between University and Nonprofit Organizations that Engage in Fund-Raising Activities for Them, 1993 WL 541316, 3-4 (Wash.A.G.) (affirming the authority of state higher education institutions to solicit donations benefiting institutional programs and to contract with a private nonprofit organization to facilitate fundraising efforts).

<sup>26</sup> Clark College Foundation, *Statement of Financial Position (Audited)*, (June 30, 2004); Clark College, *2002 Clark College Report to the Community*, [http://www.clark.edu/gen\\_info/anrp\\_02.php](http://www.clark.edu/gen_info/anrp_02.php) (last visited Apr. 1, 2005); Brian Willoughby, *College and the Foundation: Organization's Bankroll a Likely Source of Tension*, THE COLUMBIAN, Apr. 10, 2002, at A4.

<sup>27</sup> Gregg Herrington, *Hasart Resigns from Clark Foundation*, THE COLUMBIAN, March 29, 2002, at A1.

<sup>28</sup> *Id.*, Gregg Herrington, *Clark College and the Foundation: Hasart Under Attack on Two Fronts*, THE COLUMBIAN, Apr. 10, 2002, at A1 (quoting Foundation president Elson Strahan).

<sup>29</sup> See, e.g., Gregg Herrington, *Political Notebook: Control Over Foundation Fueled Controversy at Clark College*, THE COLUMBIAN, Apr. 21, 2002, at C1; Herrington, *supra* note 28.

<sup>30</sup> Gregg Herrington, *Political Notebook: Dispute Between Clark College, Foundation is Ugly, Baffling*, THE COLUMBIAN, March 31, 2002, at C1.

<sup>31</sup> Herrington, *supra* note 30 (citing as an example the Foundation's efforts to raise funds for a new athletic complex without approval from the College); Herrington, *supra* note 27.

<sup>32</sup> Gregg Herrington, *Political Notebook: Feud Between College Leaders, Foundation Boss Defies Solution*, THE COLUMBIAN, Apr. 21, 2002, at C1.

to some at CCF, the “college’s attorney on this matter was combative from the outset.”<sup>33</sup> An editorial concluded that one lesson to be learned from the controversy is “to not take lightly the need to forge strong working relationships.”<sup>34</sup>

The dispute arose during negotiations for the renewal of CCF’s contract with Clark. On January 25, 2000 the state auditor’s office notified the Clark president that, “the existing agreement between college and foundation ‘limits the college’s ability to inspect or copy foundation records.’”<sup>35</sup> Clark, supported by this statement from the state auditor, wanted full access to CCF’s financial records.<sup>36</sup> CCF responded that the State Attorney’s General Office prescribed the existing contract language, which restricts Clark’s access of CCF records to “reasonable cause” requests, in 1998.<sup>37</sup> The amount of assets held by CCF, acquired in a relatively short period of time under the direction of the CCF president, and the fact that the foundation president earned more than the college president were cited as reasons for Clark’s heightened interest in CCF’s financial records.<sup>38</sup> In rejecting new language that would grant total access, CCF asserted that it was concerned with retaining the “authority to make key financial decisions” and its ability to protect the privacy of donors.<sup>39</sup>

As part of its refusal to modify the contract language, and in an effort to assert its independence from the state auditor, CCF vacated its offices on the Clark campus, which were located in the same area as the college president’s office, and moved to a separate facility in county property on a lease-to-own basis.<sup>40</sup> The space on campus was valued at approximately \$70,000 yearly and had been provided to CCF at no cost. CCF officials reportedly feared that

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<sup>33</sup> Herrington, *supra* note 29.

<sup>34</sup> Editorial, *In Our View: A Time for Healing*, THE COLUMBIAN, Apr. 19, 2002, at C6.

<sup>35</sup> Tom Vogt, *Clark College Board Ousts President*, THE COLUMBIAN, Apr. 19, 2002, at A1.

<sup>36</sup> Mhari Doyle, *Clark College, Foundation Contract Decision Delayed*, THE COLUMBIAN, Aug. 1, 2001, at C1.

<sup>37</sup> Vogt, *supra* note 35; Doyle, *supra* note 36; Herrington, *supra* note 32.

<sup>38</sup> See, e.g., Willoughby, *supra* note 28.

<sup>39</sup> Tom Vogt, *Control of Money Divides College, Foundation*, THE COLUMBIAN, July 25, 2001, at A1.

<sup>40</sup> Vogt, *supra* note 39.

accepting that type of state funds would provide the state auditor a basis for reviewing CCF's financial records.<sup>41</sup>

This view is consistent with principles for maintaining a foundation's status as a private entity because courts often look to whether an affiliated organization is the recipient of direct public funds, or is the beneficiary of public resources by occupying office space provided by the institution it supports.<sup>42</sup> Guidance on foundation relations and the role of the foundation board counsels, "If an institution is considering establishing a foundation to take advantage of increased flexibility to pursue opportunities, the governing board must examine state statutes closely [because] if a state auditor regards foundations as extensions of state agencies . . . the foundations are subject to the same requirements that regulate the institution. Consequently, the sought after flexibility can be lost."<sup>43</sup> The goal is to cooperatively link the mission of the college to the activities of the foundation. But, in order for the foundation to fulfill its established purpose, the two structures must be fiscally and organizationally distinct.

Much of CCF's resistance to new contract language about records access occurred when the Clark president suggested that CCF was withholding information and some perceived her to imply that there was a mismanagement of funds by CCF.<sup>44</sup> The CCF president stated, "The allegations have very specific legal implications," asserting that it was "important for the college to clarify that the records are in order."<sup>45</sup> New language for the contract was eventually agreed upon, allowing the college to audit the foundation's records only as a way to confirm that CCF

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<sup>41</sup> Doyle, *supra* note 36.

<sup>42</sup> *Weston v. Carolina Research & Dev. Found.*, 401 S.E.2d 161, 163-64 (S.C. 1991) (treating the foundation as a "public body" because of its reliance on public funds); *Toledo Blade Company*, 602 N.E.2d 1159 (stating that the foundation's past no-cost use of university facilities contributed to a finding that it was a public office and subject to state open-record law). For a discussion of these cases, see, Roha, *supra* note 3 and Geevarghese, *supra* note 14, 233.

<sup>43</sup> SIMIC, CURTIS R., BOARD BASICS FOUNDATION RELATIONS: THE ROLE OF THE FOUNDATION BOARD 11 (Association of Governing Boards of Universities and Colleges 1998).

<sup>44</sup> Gregg Herrington, *Rebuilding Trust a Common Goal*, THE COLUMBIAN, Apr. 19, 2002, at A5.

<sup>45</sup> *Id.*

was meeting its contract obligations to Clark.<sup>46</sup> The contract also retained the reasonableness clause for all requests.<sup>47</sup>

The situation at Clark could be understood as merely a story about personality conflict, isolated and irrelevant. What is relevant is that the conflict played itself out over the legal relationship between Clark and CCF.<sup>48</sup> In defense of Clark, it appears that CCF may have been overstepping its bounds on some attempts to influence Clark policymaking decisions. In defense of CCF, case law supports its assertion that the financial records and audits of CCF ought to remain separate from Clark to preserve CCF's status as private entity.<sup>49</sup> Subjecting CCF to state audits and commingling the records of the two organizations would likely present problems for the legal status of CCF, to the detriment of Clark. Perhaps an understanding of the legal benefits to foundation independence would have moderated Clark's demands for full access to CCF records and led them to pursue other means of ensuring that CCF did not make isolated decisions about the future of Clark. Responding to the state of affairs at Clark and CCF, David Bass of the Council for Advancement and Support of Education commented, "As their assets grow and (foundations) assume increasing responsibility, they become increasingly autonomous. . . . I don't mean that they set policy for the institution or operate at odds with the institution, but they do operate with an increasing level of legal independence."<sup>50</sup> Therefore, the lesson to be learned from this situation – apart from "play well with others" – may be that clear organizational definitions can protect the institutions from harming each other. It is also important that colleges and foundations understand that the role and status of affiliated foundations may need to change over time.

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<sup>46</sup> Mhari Doyle, *Foundation, College Reach Agreement*, THE COLUMBIAN, Aug. 8, 2001, at A1.

<sup>47</sup> *Id.*

<sup>48</sup> Herrington, *supra* note 29 (describing the legal and organizational structure issues underlying the perceived personality differences between the college and foundation boards and presidents).

<sup>49</sup> See, e.g., *State Board of Accounts v. Indiana Univ. Found.*, 647 N.E.2d 342 (Ind. Ct. App. 1995) (holding that because the foundation could not be a "public entity" subject to audit by the state board of accounts as all public funds it received were in the form of fee for service, and that, consequently, it was not a "public agency" subject to the state Public Records Act).

<sup>50</sup> Willoughby, *supra* note 26.

The Clark story demonstrates this principle: “[I]t is clear that an institution must carefully structure and document its relationship with each organization it creates or with which it affiliates. In so doing, it should focus on the purposes it seeks to fulfill, the degree of control it needs to attain or retain, and the consequences of particular structural relationships on the respective rights of the parties to act autonomously of one another.”<sup>51</sup> What happened at Clark College can be viewed as the result of a college compensating for a loss of control over the activities of its affiliated foundation. Unfortunately, it did so by attempting to implement financial controls that interfered with the very functions the college wanted the foundation to fulfill.

#### University of Georgia

The controversy at the University of Georgia (UGA) began in the summer of 2003 when the University of Georgia Foundation (UGA Foundation or Foundation) board held a special session and determined that the University’s president, Michael Adams, should be fired.<sup>52</sup> The UGA Foundation was chartered in 1937 by a group of alumni and is the University of Georgia’s primary fundraising organization with assets of over \$400 million.<sup>53</sup> Specialty foundations do exist, such as an athletic alumni foundation, a real estate foundation, and a research foundation, but at the time they were all organized as affiliates of the main foundation, rather than the University.<sup>54</sup> Even though the UGA Foundation paid 57% of Adams’ salary in 2003, it had no authority over his employment contract.<sup>55</sup> The University System of Georgia Board of Regents (Board of Regents) is responsible for the hiring and firing of all state system college and

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<sup>51</sup> KAPLIN, *supra* note 3, 98.

<sup>52</sup> Maria Saporta and Kelly Simmons, *Key UGA Board Meets About Adams*, THE ATLANTA JOURNAL-CONSTITUTION, July 1, 2003, at 1A.

<sup>53</sup> *Id.* The University of Georgia Foundation, *About the Foundation*, <http://www.alumni.uga.edu/ugafoundation/about.html> (last visited July 16, 2007).

<sup>54</sup> The University of Georgia Foundation, *About the Foundation*, [http://www.jafos.alumni.uga.edu/ugafoundation\\_about.htm](http://www.jafos.alumni.uga.edu/ugafoundation_about.htm) (last visited Apr. 5, 2005).

<sup>55</sup> Saporta, *supra* note 52; see also Julianne Basinger, *Georgia Battle Pits Board Against Board*, CHRONICLE OF HIGHER EDUC., Nov. 28, 2003, at 1.

university presidents.<sup>56</sup> This meant that any call by the Foundation board for the dismissal of President Adams had no force.

The dispute between the UGA and its Foundation arose from a lack of agreement about the scope of each organization's control over the other. Because the UGA Foundation paid such a substantial share of the UGA president's salary, it claimed authority to establish performance expectations. Because UGA established the UGA Foundation and had a significant hand in managing its funds, it perceived the UGA Foundation as existing at the discretion of the University. UGA Foundation board members claimed that their displeasure with Adams resulted from his mismanagement of Foundation funds and they called for an independent audit of UGA in this area.<sup>57</sup> Interestingly, this action was initiated only after Adams' fired the popular athletic director and former football coach Vince Dooley.<sup>58</sup> Foundation board members did admit that this was at least a catalyst for the audit (about 18 of the 56 board members supported Adams throughout and stated that the dispute was all about alumni outrage over the athletic director's firing).<sup>59</sup>

The audit, issued in October 2003 and costing the Foundation more than \$135,000, appeared to identify some instances of bad judgment by Adams, though no overt mismanagement of funds was found.<sup>60</sup> However, the validity of the audit results, which the UGA Foundation provided to the Board of Regents, was hotly contested.<sup>61</sup> The confrontation was described as involving "powerful forces . . . fully engaged in a war for control . . ." and as pitting "those charged with running the state's system of higher education against university supporters

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<sup>56</sup> *Id.*

<sup>57</sup> Basinger, *supra* note 56

<sup>58</sup> *Id.*

<sup>59</sup> The Associated Press, *Jimmy Carter Looks for UGA Peace Plan*, Nov. 8, 2003, <http://www.cnn.com/2003/EDUCATION/11/08/carter.uga.ap> (last visited July, 2007).

<sup>60</sup> Dana Tofig, *Adams Report Spurs Showdown at UGA: Regents Back President, Detractors Call for Ouster*, THE ATLANTA JOURNAL-CONSTITUTION, Oct. 30, 2003, at 1A.

<sup>61</sup> Margaret Newkirk and Robert Luke, *Unfair or Balanced: UGA Audit Pored Over*, THE ATLANTA JOURNAL-CONSTITUTION, Nov. 4, 2003, at 1A.

who help fill UGA's coffers."<sup>62</sup> Some commentators viewed the audit as full of innuendo and others considered it improper that the Foundation's regular auditing firm was hired to conduct this "forensic" audit.<sup>63</sup> The Foundation also had this type of audit conducted on its own fiscal management, but refused to make that audit public until a ruling by the state attorney general demanded it.<sup>64</sup>

In November of 2003 Adams refuted most of the audit's claims of impropriety and the Board of Regents issued statement in support of Adams, declaring the matter to be over.<sup>65</sup> The dispute was nowhere near finished. The UGA Foundation board continued to push for Adams to be fired and refused to transfer additional dollars to UGA. Many board members, most of whom were UGA alumni, retracted pending gifts, as did a number of other alumni.<sup>66</sup> Despite the negative publicity, over the year total fundraising still increased by 8%, but donations from the Athletic Alumni group did drop 25%.<sup>67</sup>

In May the Board of Regents passed a resolution to dissolve the UGA Foundation and directed President Adams to terminate the relationship.<sup>68</sup> At the same time, it also made significant policy changes.<sup>69</sup> It amended the presidential compensation policy, dictating that none

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<sup>62</sup> *Id.*

<sup>63</sup> Alan Judd, *Audit's Details Forcefully Disputed*, THE ATLANTA JOURNAL-CONSTITUTION, Oct. 30, 2003, at 1A.

<sup>64</sup> Tom Bennett, *University of Georgia Foundation's Meetings Are Latest to be Opened by Thurbert Baker*, Georgia First Amendment Foundation Spring 2004 Newsletter, <http://www.gfaf.org/newsletters/spring2004Thurbert.pdf> (last visited July 16, 2007). The overlap in fiscal management between UGA and the Foundation and the Foundation's reliance on UGA employees led to the determination that the Foundation was a public agency and subject to state open-record law.

<sup>65</sup> Tofig, *Adams Report*, supra note 60. See also, Kelly Simmons, *UGA Foundation Fights for Life*, THE ATLANTA JOURNAL-CONSTITUTION, May 27, 2004, at 1A.

<sup>66</sup> Maria Saporta, *UGA's Fund-Raising Falters*, THE ATLANTA JOURNAL-CONSTITUTION, Nov. 9, 2003, at 1G.

<sup>67</sup> Joshua Karlin-Resnick, *Georgia Regents Mend Fences with University's Fund-Raising Foundation*, CHRONICLE OF HIGHER EDUC., Aug. 13, 2004, at 25.

<sup>68</sup> Simmons, supra note 65.

<sup>69</sup> Board of Regents of the University System of Georgia, *Meeting Minutes*, June 2004. The Committee on Finance and Business Operation reported the approval of an addition to The Policy Manual, Section 208 Compensation of Presidents (Item 5) and the Committee on Organization and Law reported the approval of revision to The Policy Manual, Section 1905 Cooperative Organizations (Item 2). See also, Karlin-Resnick, supra note 67.

of a Georgia University System president's salary could be paid by an affiliated foundation.<sup>70</sup> In addition, it implemented a new policy regarding "cooperative organizations" that addressed the role of affiliated foundations within the state university system and promulgated "guiding principles" designed to facilitate these organizations' efforts in support of their respective universities.<sup>71</sup>

Ultimately, through these policy changes, the Board of Regents and the Foundation altered significant aspects of their relationship and reconciled.<sup>72</sup> The Foundation Board reduced its membership to 36 (it had been an unwieldy 56) and opened its membership to other members of the community.<sup>73</sup> It had previously been restricted almost exclusively to UGA alumni.<sup>74</sup> The UGA Foundation continued to rely on a large number of UGA employees, including its Chief Financial Officer.<sup>75</sup> It also continued to share a donor information database and the administration of a \$30-million scholarship program with UGA.<sup>76</sup> However, the universe in which these shared aspects were determined is now structured according to the guidelines in the Board of Regents' new policy on "Cooperative Organizations."<sup>77</sup> Even with these significant changes, there is still work to be done. While the Board of Regents reviewed its policies relating to affiliated foundation, the UGA Foundation has yet to approve new guidelines for its Board of Trustees.<sup>78</sup> Unsurprisingly, the main sticking point centers on an issue of control. A Memorandum of Understanding issued by the Board of Regents to the Foundation requires that the president of UGA be a voting member of the UGA Foundation board and its executive

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<sup>70</sup> *Id.*

<sup>71</sup> University System of Georgia Board of Regents Policy Manual, § 1905 Cooperative Organizations (Revised June 9, 2004).

<sup>72</sup> Kelly Simmons, *UGA Foundation Extends Olive Branch*, THE ATLANTA JOURNAL-CONSTITUTION, July 1, 2004, at 1A. See also, Karlin-Resnick, *supra* note 67.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Simmons, *Foundation Fights for Life*, *supra* note 65.

<sup>76</sup> *Id.*

<sup>77</sup> Karlin-Resnick, *supra* note 67; Board of Regents Policy Manual, § 1905, *supra* note 69.

<sup>78</sup> Kelly Simmons, *University Foundation Falls Behind Missing Deadline: Group Can't Agree on Guidelines for Their UGA Relationship*, THE ATLANTA JOURNAL-CONSTITUTION, March 12, 2005, at 1B.

committee and the Foundation opposes this directive.<sup>79</sup> The UGA Foundation will revisit this issue at their next board meeting on May 25 – 27, 2005.<sup>80</sup>

The break-up and make-up at UGA also raises a philosophical question about the specific relationship between foundations and university presidents. The UGA Foundation asserts that its mission is to support academics and the president, but its main job is to fundraise rather than to dictate academic policy.<sup>81</sup> In sad contrast, a university president's job presumably is to oversee the academic priorities of the institution. Yet one article reports that while the battle was raging among the UGA Foundation, the Board of Regents, and the UGA President, "The only apparent consensus is that Adams' job security ultimately depends on the success of annual fund-raising and the current campaign."<sup>82</sup>

An editorial about the dispute, written in May of 2004 after the Board of Regents decided to dissolve the UGA Foundation, but prior to their reconciliation, observed the confusion and conflict that can arise when the relationship between a university and its foundation is not well-defined:

In the public battle for control of the University of Georgia, the state Board of Regents not only defeated its challengers this week, but also banished them from the field. . . . The problem is that some of these wealthy benefactors [Foundation board members] still believe that their foundation posts and their generous donations to UGA entitle them to a voice in who runs the university and how it's run. It doesn't. The Georgia Constitution awards sole authority for setting university policies and budgets and hiring college presidents to the Board of Regents. By definition, the foundation is supp to work on behalf of the university and the president, not against them. But the regents set the stage for the interference by letting the foundation underwrite nearly half of Adams' compensation package. Because they were handing \$229,000 to Adams,

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.* The University of Georgia Foundation is now independent of UGA and, according to the Foundation's website, "operating in a cooperative spirit with the University of Georgia under terms of a shared services agreement." UGA Foundation, *About the Foundation*, <http://www.alumni.uga.edu/ugafoundation/about.html> (last visited July 17, 2007).

<sup>81</sup> UGA Foundation, *Mission Statement*, <http://www.jafos.alumni.uga.edu/ugafoundation> (last visited Apr. 5, 2005).

<sup>82</sup> Saporta, *UGA Fund-Raising Falters*, *supra* note 66.

foundation members logically assumed that they had a vote in whether he stayed or went.<sup>83</sup>

Ambiguity in the relationship, whether with a closely aligned foundation such as the one here, or in a more attenuated organizational affiliation, creates cracks in the internal structure that can lead to very public debacles; very expensive ones as well. One estimate of the Foundation's legal and auditing expenditures during the first year of the dispute topped \$600,000.<sup>84</sup>

UGA offers a story about a foundation wanting to assert more control over the university it supports than is prudent. It is also an example of the dangers that can arise when public institutions rely too heavily, or inappropriately, on private funds for basic operating expenses. The situation at UGA demonstrates this principle: "A foundation can contribute most effectively to its host institution when the relationship between the two organizations is mutually supportive, responsibilities of the two entities are defined clearly, operational structures are conducive to success, and [board] members are selected with care and given significant responsibilities."<sup>85</sup> Traditionally, affiliated foundations were established to enhance student scholarships or improve facilities on campus. But, in an age of rising costs and diminishing public resources, foundation dollars often go to things as basic as the university president's salary. In light of disagreements like the one in Georgia, this may be changing.

#### WHERE THE BALANCE OF INDEPENDENCE AND CONTROL MATTERS

Recent case law dealing with state "sunshine" or open-record laws demonstrate that courts closely evaluate factors signifying how dependent an affiliated foundation is on its host

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<sup>83</sup> Editorial, *Our Opinions: UGA Rift Appears on the Mend*, THE ATLANTA JOURNAL-CONSTITUTION, July 2, 2004, at 14A.

<sup>84</sup> Dana Tofig, Patti Ghezzi, Kelly Simmons, *UGA Told to Dump Donors: Regents Declare War on Powerful Foundation That Tried to Oust President*, THE ATLANTA JOURNAL-CONSTITUTION, July 2, 2004, at 1A.

<sup>85</sup> Simic, *supra* note 43.

institution to determine whether the foundation is a public agency.<sup>86</sup> The effect of state open-record laws on affiliated foundations will be discussed in greater detail below, but the manner in which courts evaluate the relationship between universities and foundations in this context is illustrative of how their legal status is determined generally. Thomas Arden Roha identifies seven measures of control that can shape a foundation's legal status.<sup>87</sup> Among these are whether the foundation has an independent board, the foundation's source of operating funds, the presence or absence of independent legal counsel for the foundation, and the text of the agreement between the foundation and the university.<sup>88</sup>

In a similar analysis of the case law regarding university foundations and open-record laws, Salin Geevarghese identifies several inquiries that probe whether a foundation is a public body.<sup>89</sup> These questions include whether the foundation relies on public funding from the state, whether it has a policymaking role within the university, the extent to which university and foundation funds are commingled, and the degree to which the foundation relies on the university for office space and employees.<sup>90</sup>

The difficulty with these factors and any determination of a foundation's legal status is that, depending on what function it is carrying out, the benefits of being closely connected to or more attenuated from the university vary. When a foundation is seeking to excuse itself from public open-record laws in order to protect donor privacy, it needs to be structured as quite independent and distinct from the university. However, the foundation needs to be closely aligned with the functions of the university when it is seeking to qualify for education property tax exemptions. One way to manage these competing needs is to set up multiple affiliated foundations. The University of Virginia approaches its affiliated foundations in this manner and its

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<sup>86</sup> See, e.g., Thomas Arden Roha, *supra* note 3 at 4-5; Geevarghese, *supra* note 14, 232-33.

<sup>87</sup> Roha, *supra* note 3.

<sup>88</sup> *Id.*

<sup>89</sup> Geevarghese, *supra* note 14, 232-33.

<sup>90</sup> *Id.*

policy relating to these entities is discussed below.<sup>91</sup> Another tactic is to make public as much information as possible and then work with the state legislature to establish laws that exempt, to a certain degree, donor records from disclosure.<sup>92</sup> This section offers summaries of several legal issues that can be affected by the structure of a university's affiliated foundation.

### Open-Record Laws

Privacy of foundation records is important because confidentiality protects the donor list, considered the primary asset for many foundations, and providing donor anonymity is also perceived to encourage future contributions.<sup>93</sup> The public often wants access to these records because of suspected mismanagement of funds or fear of undue influence on university policy by major donors.<sup>94</sup> Though state statutes do vary, they are remarkably similar and generally follow the format of the Federal Freedom of Information Act (FOIA).<sup>95</sup> These state statutes subject institutional records of public agencies to public disclosure.<sup>96</sup> When affiliated foundations are deemed to be private entities they are shielded from open-record laws.<sup>97</sup> To determine whether a foundation is a public agency, courts review a range of factors pertaining to the degree of control that a university has over foundation operations and, to a lesser extent, the degree of control that

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<sup>91</sup> University of Virginia, *Policy on University-Related Foundations*, <http://www.virginia.edu/foundations/policy.html> (last modified Feb. 15, 2005) (last visited July 16, 2007).

<sup>92</sup> See, e.g., Phyllis Lepke, *Privacy vs. Accountability: What Does "Open Records" Mean to You?*, COUNCIL FOR ADVANCEMENT AND SUPPORT OF EDUC. ACCOUNTABILITY, (Jan. 2004) at <http://www.case.org/Content/Miscellaneous/Display.cfm?contentItemID=3805> (last visited July 16, 2007).

Erin Strout, *Georgia, Iowa Decide on Donor Privacy*, CHRONICLE OF HIGHER EDUC., Apr. 8, 2005, at 26.

<sup>93</sup> David Bass, *Protecting Donors' Privacy is a Matter of Good Ethics and Good Business*, CHRONICLE OF HIGHER EDUC., Apr. 23, 2004, at 15; Rick Cohen, *Donations to Public-University Foundations Ought to Be Matters of Public Record*, CHRONICLE OF HIGHER EDUC., Apr. 23, 2004, at 14.

<sup>94</sup> *Id.*; Anne H. Moore, *Public-Policy Influences on Public Colleges and University Foundations*, Occasional Paper No. 40 ASS'N OF GOVERNING BOARDS OF UNIV. & COLL., at 1-2 (Jan. 2000).

<sup>95</sup> See, e.g., Kaplin, *supra* note 3, §6.5.2.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

the foundation had over university policy as described above.<sup>98</sup> The closer the relationship, the more likely the foundation is to be found a public body.

Case law in this area is evolving and recent decisions suggests that affiliated foundations are not nearly as protected from these laws as they once were, regardless of how they are organized.<sup>99</sup> Up until about 2000, the outcome was relatively evenly divided.<sup>100</sup> This recent trend could be linked to rising public distrust of charitable organizations.<sup>101</sup> Even when courts find that open-record laws apply to foundations, they do not necessarily require them to open all of their records.<sup>102</sup> In fact, donor records and some aspects of financial records may be protected.<sup>103</sup> But this again depends on how the relationship between the foundation and the university is structured and on how much perceived control the university has over these elements.<sup>104</sup>

Nonetheless, even when foundations are found to be public bodies, the structure of the relationship between the university and the foundation can continue to affect the extent to which the law applies.<sup>105</sup> Separation between finances, donor records, employees, computer systems, and policies that strictly define the relationship and the degree of control between the two bodies

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<sup>98</sup> Roha, *supra* note 3; see also, Brent R. Appel, *Records in University Fundraising: Public or Private?*, 28 ABA State & Local Law News 3, 18 (2005) (reviewing the recent decision in *Gannon v. Board of Regents*, 692 N.W.2d 31 (Iowa 2005)).

<sup>99</sup> See, e.g., *Gannon v. Board of Regents of the State of Iowa*, 692 N.W.2d 31 (Iowa 2005) (holding that, based on its agreement with the university, the foundation performed a government function and was a public agency subject to public records law); *Cape Publications, Inc. v. The Univ. of Louisville Found., Inc.*, No. 01CI03349, slip op. (Ky. Jefferson Cir. Ct. Nov. 24, 2004) (determining that the foundation is a public agency and holding that no donor records met the "personal privacy exemption" provided in the law).

<sup>100</sup> See Roha, *supra* note 3, 9.

<sup>101</sup> See Moore, *supra* note 94.

<sup>102</sup> See, e.g., *Guste v. Nicholls College Foundation*, 564 So.2d 682 (La. 1990) (restricting public access to records of public funds and exempting records of private donations).

<sup>103</sup> *Id.*

<sup>104</sup> See, e.g., *4-H Road Community Ass'n. v. West Virginia Univ. Found.*, 388 S.E.2d 308 (W. Va. 1989) (holding that foundation was private entity and not subject to public records laws because it received only private funds and did not rely on any public funds or benefit from any public property or public employees).

<sup>105</sup> *State Board of Accounts v. Indiana Univ. Found.*, 647 N.E.2d 342 (Ind. Ct. App. 1995) (finding that the foundation was created under a broad statutory grant of authority, that the foundation was responsible for the administration of all funds, and that the funds managed were private, therefore the foundation was not subject to the state public record law).

will greatly influence the determination of courts in this area.<sup>106</sup> *Toledo Blade Company v. University of Toledo Foundation* is perhaps the seminal case for identifying the elements of a foundation's relationship with a university that courts assess when determining whether the foundation is a public office.<sup>107</sup> Here the court determined that donor data did constitute public records and the primary basis for its holding was the close relationship between the foundation and the university.<sup>108</sup> Specifically, the court noted that the foundation received state funds through public employee retirement benefits and facilities, the foundation played a "policymaking role" in university decisions, and that the foundation supplemented the president's salary.<sup>109</sup> This case continues to provide a model for the degree to which courts look to relational dynamics in determining the legal consequences of public records laws for affiliated foundations.

There are now a small number of state statutes enacted to explicitly *exempt* the donor records of university affiliated foundations from open-record laws.<sup>110</sup> Georgia is the latest to consider such language and Nevada has already enacted such a statute.<sup>111</sup> The language of the Nevada statute provides that, "A university foundation is not required to disclose the name of any contributor or potential contributor to the university foundation, the amount of his contribution or any information which may reveal or lead to the discovery of his identity."<sup>112</sup> Absent specific legislation providing such an exception, certain university arrangements with affiliated foundations will virtually ensure that open-record laws apply to all foundation records.

## Property Tax Exemptions

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<sup>106</sup> See, e.g., *Toledo Blade Company v. Univ. of Toledo Found.*, 602 N.E.2d 1159 (Ohio 1992).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 1162-1164.

<sup>110</sup> Lepke, *supra* note 92.

<sup>111</sup> The Georgia State Legislature is also considering such a provision. Alan Judd, Bill Hides, *Corporate Donors: Mask for University Giving Could Cloak Conflicts*, THE ATLANTA JOURNAL-CONSTITUTION, March 7, 2005, at 1A; Nev. Rev. Stat. 396.405 § 2 (2000).

<sup>112</sup> Nev. Rev. Stat. 396.405 § 2 (2000).

Education exemptions from property tax obligations are common at the federal, state, and local levels.<sup>113</sup> In determining whether an organization qualifies for this type of exemption, courts generally rely on a purpose and activities test and evaluate the organization's mission and the property's functions to determine whether they are educational.<sup>114</sup> The stated purpose may be demonstrated through Articles of Incorporation or other agreements that specify the organizational mission.<sup>115</sup> Actual activities must be "educational," a term generally defined to include direct support functions.<sup>116</sup>

Property tax exemptions do require a close connection to the educational institution if they are to extend to affiliated foundations. In *Southern Illinois University Foundation v. Booker*, the court held that property owned by a foundation but used by the university for married student housing did qualify for a property tax exemption.<sup>117</sup> Beyond making a determination that providing married student housing was an educational purpose, the court also had to determine the property holder's legal status.<sup>118</sup> The court operated with some sleight of hand because it concluded that, for all practical purposes, the property was really owned by the university.<sup>119</sup> In doing so, it took into account the fact that the university retained the power to select the foundation's trustees, had the power to dispose of the property, and could alter the charter of the foundation.<sup>120</sup> The court also noted that the property was operated and maintained by the university and that university funds paid the mortgage.<sup>121</sup> The court concluded that the foundation, which held legal title to the property, qualified for the tax exemption because it was so closely aligned with the university.<sup>122</sup>

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<sup>113</sup> William B. Johnson, *Annotation: What are Educational Institutions or Schools Within State Property Tax Exemption Provisions*, 34 A.L.R. 4th 698, §1 (2004).

<sup>114</sup> *Id.*, §2.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*, §3.

<sup>117</sup> *Southern Illinois Univ. Found. v. Booker*, 425 N.E.2d 465 (Ill.App. 1981).

<sup>118</sup> *Id.* at 467.

<sup>119</sup> *Id.* at 471.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

In contrast, property leased to a state university by its foundation was deemed ineligible for an exemption because it was not considered property of the state or in educational use.<sup>123</sup> Here the university and foundation were also closely associated.<sup>124</sup> Apart from the non-educational use of the property (it was used for outside conferences), the key factual difference was the presence of a third party in the arrangement.<sup>125</sup> The grantor of the property had placed numerous restrictions on the property that the Foundation had to respect.<sup>126</sup> Furthermore, the grantor retained the possibility of reverter over the property.<sup>127</sup> Therefore, it was the lack of the foundation's control of the property that most influenced the determination that state law ownership requirements were not met.<sup>128</sup>

The functional prong of the property tax exemption test depends to some extent on a close alignment between the university and the foundation. In *Northern Illinois University Foundation v. Sweet*, even if a third-party had not been involved with the property ownership, the foundation still would not have qualified for the exemption.<sup>129</sup> This is because the property was not being used in the service of education.<sup>130</sup> Instead, it was rented to outside associations and businesses for conferences on all manner of things.<sup>131</sup> Its activities did not support (other than by generating revenue) the university's institutional mission of educating students.<sup>132</sup>

As these cases demonstrate, when a foundation seeks to qualify for educational property tax exemptions, the university must have a significant voice in its operations in order to prove educational purpose.<sup>133</sup> The activities conducted on the property must also be closely aligned to those of the university for the functional prong to be fulfilled. Yet, if the foundation also seeks to

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<sup>123</sup> *Northern Illinois Univ. Found. v. Sweet*, 603 N.E.2d 84 (Ill. App. Ct. 1992).

<sup>124</sup> *Id.* at 89.

<sup>125</sup> *Id.* at 88.

<sup>126</sup> *Id.* at 87-88.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 89.

<sup>129</sup> *Northern Illinois Univ. Found.*, 603 N.E.2d at 36.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 37.

<sup>132</sup> *Id.* at 38.

<sup>133</sup> See also, Kaplin, *supra* note 3, §5.3.2.

acquire property on behalf of the university, it is important to preserve some operational independence. If a foundation is so much a part of the institution as to be indistinguishable, it could be subject to the same burdens of state authorization and acquisition procedures that the university was attempting to alleviate.<sup>134</sup>

#### Independent Alumni Associations

In the aftermath of the 1996 *Hopwood v. Texas* decision, public universities in Texas saw declining enrollments of minority students.<sup>135</sup> University officials attributed this decline to the institutions' "inability to practice affirmative action in admission and scholarship decisions."<sup>136</sup> However, the University of Texas (UT) fared better in terms of minority enrollment than the state's other large public institutions.<sup>137</sup> The Texas Exes' Texas Leaders Scholarship was credited as being part of this difference.<sup>138</sup>

The Texas Exes is an alumni association that was created by graduates of UT in 1885.<sup>139</sup> It was originally an extension of the university, benefiting from state appropriations, but it became a separate entity in 1919.<sup>140</sup> The Texas Exes was not established as a means of coping with restrictions on minority recruitment. But, when *Hopwood* effectively ended affirmative action in state-supported educational institutions, the Texas Exes responded. Its organizational structure enabled it to assist UT in combating the decline in minority enrollment that resulted from *Hopwood* and help UT support a diverse student body. In 1997 the Texas Exes created a new scholarship program called the Texas Leaders Scholarship to support minority students with

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<sup>134</sup> Zeiner, *supra* note 4, 104-07.

<sup>135</sup> *Hopwood v. Texas*, 78 F.3d 932, 945-46 (5th Cir. 1996). "Accordingly, we see the caselaw as sufficiently established that the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional." Suzannah Creech, *U. Texas, A&M Minority Enrollment Low*, DAILY TEXAN, Sept. 18, 1998, at U-Wire.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Texas Exes University of Texas Alumni Association, *History*, <http://www.texasexes.org/about/history.asp>, (last visited July 16, 2007).

<sup>140</sup> *Id.*

funding that UT could no longer legally supply.<sup>141</sup> Because the organization is “separate from and independent of UT,” it is not controlled by the Hopwood decision, which applies to state entities.<sup>142</sup> This status is the result of the organization’s governing structure, its lack of the use of any state supported funds, and its office location, which is on campus, but within a privately funded alumni center.

The Texas Exes was able to assist in fulfilling UT’s institutional mission because UT exercises no organizational or fiscal control over it. The lack of oversight of an alumni association’s activities is not always favorable for an institution. At Villanova University, a private institution, a legal dispute over trademark infringement and unfair competition arose between the university and an alumni association unconnected to Villanova.<sup>143</sup> An alumni club that had been closely associated with Villanova, but later disaffiliated, continued to use university logos to raise scholarship support.<sup>144</sup> Villanova sued for trademark infringement because of the resulting confusion with fundraising efforts conducted by the institutional alumni office.<sup>145</sup> In contrast, the independence of the Texas Exes enables the organization to achieve what UT alone cannot.

#### Political Advocacy, Lobbying and PACs

Educational institutions incorporated under section 501(c)(3) face many potential dangers and complexities when engaging in legislative advocacy.<sup>146</sup> The ability of public institutions to lobby on behalf of their own interests is restricted by their tax structure and, in many cases, state law.<sup>147</sup> A memo issued by the American Council on Education illustrates a range of permissible

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<sup>141</sup> Texas Exes, *supra* note 139; Editorial, *Influence and Hope*, THE AUSTIN AMERICAN-STATESMAN, Oct. 19, 1998, at A10.

<sup>142</sup> Jayne Noble Suhler, *Private Money Finding Its Way to Minority Students*, DALLAS MORNING NEWS, June 24, 1998, at 1A.

<sup>143</sup> *Villanova Univ. v. Villanova Alumni Educ. Found. Inc.*, 123 F.Supp.2d 293 (E.D.Pa. 2000).

<sup>144</sup> *Id.* at 300.

<sup>145</sup> *Id.*

<sup>146</sup> Martin Michaelson, Robert Kapp, & Adam Feuerstein, *Memorandum: Political Campaign-Related Activities of and at Colleges and Universities*, AMERICAN COUNCIL ON EDUCATION (Nov. 11, 2003).

<sup>147</sup> Public institutions are not prohibited entirely from lobbying. In most cases the scope of their activities are limited. State law restrictions vary. For example, the State of Maryland offers a

and prohibited political behavior, but avoids offering direct legal advice and cautions that institutions that engage in political activities may be jeopardizing their tax-exempt status.<sup>148</sup> The greatest risk to institutions that partake in improper political conduct is the loss of their tax-exempt status, a status that makes contributions to the institutions tax-deductible.<sup>149</sup> Nonetheless, public university dependence on state budgetary allocations and the potential imposition of state and federal regulations often require universities to engage the attention of their state legislatures and Congress.<sup>150</sup>

Public university officials differ as to what political actions are in the best interests of their institutions. A reporter for the Chronicle of Higher Education observes, “Public colleges and college systems remain shy about acknowledging that they engage in lobbying, mainly because most states have laws prohibiting them from using public funds for overtly political purposes. But most public colleges see lobbying their state governments as essential.”<sup>151</sup> Some simply utilize the limited range of permissible conduct left to the university.<sup>152</sup> Others elect to rely on outside assistance. A relatively small, but growing, number of universities chose to align with Political Action Committees (PACs).<sup>153</sup> PACs are somewhat of an anomaly for this discussion because universities do not formally establish them at all.<sup>154</sup> PACs must operate as completely separate entities from the colleges and universities they intend to support. A “university’s name is not used

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“Lobbying Exemption” for private independent nonprofit colleges and universities under state ethics law. *Special Ethics Law Memo*, Lobbying Registration Exemptions: General Information, <http://www.ethics.gov.state.md.us/college.htm> (Oct. 9, 2002).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> See, e.g., Matt Williams, *Lawmaker Questions Universities’ Lobbying Expenses*, MISSOURI DIGITAL NEWS, March 7, 2002 at <http://www.mdn.org/2002/STORIES/UMLOBBY.HTM> (last visited July 16, 2007). “Public colleges and universities are spending more than \$800,000 every year lobbying Missouri lawmakers for more funding, according to state records.”

<sup>151</sup> Peter Schmidt, *In State Capitals, Public Colleges Adapt to a Tough Game*, CHRONICLE OF HIGHER EDUC., Oct. 22, 2004, at 34.

<sup>152</sup> COOK, CONSTANCE E., *LOBBYING FOR HIGHER EDUCATION: HOW COLLEGES AND UNIVERSITIES INFLUENCE FEDERAL POLICY*, 171 (Vanderbilt Univ. Press 1998).

<sup>153</sup> *Id.* at 129-31, 166-70.

<sup>154</sup> Theodore J. Hopkins, *supra* note 13 at 600 n7 (noting that while §501(c)(3) organizations can establish a separate entity under §527(f) but it is still restricted from engaging in political campaign activities otherwise prohibited by §501(c)(3) and observing that states may have additional restrictions).

or otherwise acknowledged in connection with any contributions made by the PAC to any candidates for public office.”<sup>155</sup>

Citizens for Higher Education (CHE) is an independently organized PAC lobbying in support of the University of North Carolina at Chapel Hill (UNC).<sup>156</sup> In 2002 CHE donated \$154,000 to various state election campaigns within North Carolina.<sup>157</sup> The PAC was created in April of that same year by six UNC alumni.<sup>158</sup> Their intent was to “increase the University’s presence in the political process.”<sup>159</sup> University PACs are relatively rare nationwide, but CHE is the second group of this type in North Carolina.<sup>160</sup> The Economic Development Coalition was started in 2000 to support North Carolina State University.<sup>161</sup> Duke University also now has a PAC.<sup>162</sup>

Some advocates for public colleges oppose the use of PACs. The perception is that public institutions should not be “associated with partisan politics.”<sup>163</sup> They assert that educational institutions operate in the “public interest,” not “special interest.”<sup>164</sup> Others fear that the tax-exempt nature of their institutions makes support from a PAC illegal.<sup>165</sup> Concerns of this type may be due to a misapprehension of that status. Being a nonprofit, tax-exempt organization does not prevent colleges and universities from being supported by lobbying arms.<sup>166</sup>

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<sup>155</sup> Michaelson, *supra* note 146, 4.

<sup>156</sup> Schmidt, *supra* note 151.

<sup>157</sup> Gillian Bolsover, *UNC PAC Distributes \$154K to Candidates*, DAILY TAR HEEL, Nov. 1, 2002, at <http://www.dailytarheel.com>.

<sup>158</sup> Matt Hanson, *UNC-CH PAC Yet to Donate Any Funds*, DAILY TAR HEEL, Oct. 15, 2002, at <http://www.dailytarheel.com>.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> Cleve R. Wootson, Jr., *Group Swaps Funds, Votes*, DAILY TAR HEEL, Nov. 2, 2004, at <http://www.dailytarheel.com>.

<sup>163</sup> Schmidt, *supra* note 151; *see also*, Cook, *supra* note 152, 130 (discussing the limited use of PACs by colleges or universities and stating that “presidents of all types of institutions . . . expressed their disapproval of PACs,” viewing it unfavorably as special interest lobbying).

<sup>164</sup> Cook, *supra* note 152, 168.

<sup>165</sup> *Id.* at 169.

<sup>166</sup> *Id.*

Yet others worry about “potential conflicts of interest with campus constituents and other institutional priorities.”<sup>167</sup> Inherent in the safeguard against corruption that the required complete separation between universities and PACs provides is a lack of university control over the PAC’s activities. Therefore, public universities seeking more sway in the political realm must be willing to cede some control to associations organized under tax structures permitting greater political activism.

#### Technology Transfer and Research Foundations

Income generated through research grants and technology transfer agreements are a growing force in many institutional budgets, but reliance on this type of funding can raise concerns about commercial influence on academic endeavors.<sup>168</sup> In discussing the ethics of collaborations between academe and industry, Kenneth Dueker notes that institutional entities responsible for commercializing technology transfer also have an obligation to “protect their university from potential legal claims or other sources of exposure resulting from transfer activities.”<sup>169</sup> As a precursor, it is the university’s responsibility to organize technology transfer management in a manner that enhances this protection.

The Wisconsin Alumni Research Foundation (WARF) is a private, nonprofit organization designed to support scientific research at the University of Wisconsin-Madison (UW-M).<sup>170</sup> It was founded in 1925 and is considered the “progenitor of university technology transfer.”<sup>171</sup> WARF’s role is to patent the discoveries of UW-M researchers and license the technologies to

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<sup>167</sup> *Id.*

<sup>168</sup> Kenneth Sutherlin Dueker, *Biobusiness on Campus: Commercialization of University-Developed Biomedical Technologies*, 52 FOOD & DRUG L.J. 453, 470 (1997).

<sup>169</sup> *Id.*

<sup>170</sup> Wisconsin Alumni Research Foundation, *About Us: Our History*, <http://www.warf.org/about/index.jsp?cid=26> (last visited July 16, 2007).

<sup>171</sup> Dueker, *supra* note 168, 456. i Wisconsin Alumni Research Foundation, *About Us: Our History - WARF and Bayh-Dole*, <http://www.warf.org/about/index.jsp?cid=26&scid=35> (last visited July 16, 2007) (WARF was instrumental in the passage of the 1980 Bayh-Dole Act, giving universities ownership and licensing rights over federally funded intellectual property).

companies.<sup>172</sup> WARF distributes revenues from these licenses to the UW-M, which in turn uses the income to help fund additional research.<sup>173</sup> WARF also manages the commercial business ventures of the UW-M by licensing technology to new business startups.<sup>174</sup> The actual decision of how the income from technology transfers is spent is made entirely by university officials, without input from WARF.<sup>175</sup> The reason for this policy is to “allow the commercial use of UW-M discoveries while avoiding a situation where commercial interests directly influence the research being conducted on campus.”<sup>176</sup>

WARF is also the designated patenting and licensing office for UW-M and all inventions arising from federally funded research conducted through the university must be disclosed to WARF.<sup>177</sup> The WARF royalty revenue sharing program illustrates how income generated by an inventor's licensed technology is managed.<sup>178</sup> Inventors are paid a gross percentage share of royalties and WARF then deducts its operating expenses from royalty income and the WARF endowment. The remaining net income funds the WARF annual unrestricted grant to UW-M.<sup>179</sup>

Concerns about undue commercial influence on academic research and educational priorities continue to be raised as public institutions become more reliant on all types of private funding.<sup>180</sup> The fiscal arrangement between UW-M and WARF is responsive to these concerns. WARF capitalizes on the research activities of UW-M through commercial licensing arrangements. UW-M is obviously the direct beneficiary of this commercialization, but it is

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<sup>172</sup> WARF, *supra* note 170.

<sup>173</sup> *Id.*

<sup>174</sup> THE UNIVERSITY OF WISCONSIN-MADISON, A GUIDE FOR NEW BUSINESS VENTURES AT THE UNIVERSITY OF WISCONSIN-MADISON: FOR FACULTY AND STAFF INTERESTED IN LICENSING A TECHNOLOGY AND STARTING A NEW BUSINESS 3 (UW-Madison Office of Corporate Relations and WARF 2003).

<sup>175</sup> WARF, *supra* note 170.

<sup>176</sup> *Id.*

<sup>177</sup> Wisconsin Alumni Research Foundation, *For Researchers: Why Patent?*, <http://www.warf.org/inventors/index.jsp?cid=7> (last visited July 16, 2007).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> See, e.g., Second in a Series of Essays: The Changing Relationship Between States and Their Institutions, *Rewriting the Rules of the Game: State Funding, Accountability, and Autonomy in Public Higher Education*, American Council on Education, <http://www.acenet.edu/programs/changing-relationship/roundtables.cfm> (Oct. 2004).

protected to some degree because the revenue sources are pooled. Also, the entity that enters into the licensing agreements (WARF), does not dictate how revenue is spent. In this way, the autonomy of the foundation enhances the perceived integrity of the university.

Then again, WARF's technology transfer revenue only comprises about five percent of UW-M's research budget.<sup>181</sup> This means that large research universities may benefit from such arrangements, but are still heavily reliant on other external sources of funds to support programs of this sort. Even so, this type of revenue does ameliorate that reliance and is celebrated. Dueker notes that the "cherished position" of licensing income "stems from the fact that income from licensing university inventions is generally free from the burdens and constraints of other funding sources . . . the funds that a university earns from technology licensing provide the means to exercise academic freedom."<sup>182</sup> The creation of an affiliated foundation to manage these licensing arrangements can, as WARF demonstrates, ensure that freedom.

While the university should be independent of the foundation when dealing with university-generated research income, the reverse is not necessarily true with regard to intellectual property ownership; it is important for the university to retain an ownership interest in the intellectual property. In *Speck v. North Carolina Dairy Foundation*, a case about disputed research royalties, the close relationship between the university and its research foundation was instrumental in the court's holding in favor of the institution.<sup>183</sup> University professors conducted institutionally funded research on acidophilus milk and the university patent committee applied for a patent of the product through its Dairy Foundation.<sup>184</sup> The researchers argued the university and the foundation breached their fiduciary duty to the professors by "using the secret process to their own advantage."<sup>185</sup>

The court denied the professors any claim to royalties and found that "at all pertinent times," the "secret process . . . belonged to the University and that the University was merely

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<sup>181</sup> Dueker, *supra* note 168, 457.

<sup>182</sup> *Id.*

<sup>183</sup> *Speck v. North Carolina Dairy Foundation*, 319 S.E.2d 139 (N.C. 1984).

<sup>184</sup> *Id.* at 141.

<sup>185</sup> *Id.* at 143.

waiving its rights in favor of the Foundation or using the Foundation as its agent for marketing.”<sup>186</sup> The court pointed to the “close relationship” maintained between the foundation and the university and the fact that the Vice Chancellor of Development for the university served as Secretary of the foundation.<sup>187</sup> Furthermore, the court pointed to the fact that the “University and the Foundation are not dedicated to making and retaining profits, but instead use their income for the good of the public by promoting and financially assisting scientific research for the common good.”<sup>188</sup> The foundation managing the commercial enterprises still should not dictate how that income is expended, but an organizational affiliation with the university does offer some protection from this type of intellectual property dispute.

#### DEFINING AFFILIATED FOUNDATIONS THROUGH UNIVERSITY POLICY

This brief overview of three policies regarding the institutional approach to affiliated foundations demonstrates that there are means by which universities can minimize the inherent legal risks of these organizations and maximize their benefits. Model practices advise that university policies “incorporate foundation functions, . . . provide oversight for organizational policy and operation, . . . [and] discourage micromanagement of foundation operations [while] limit[ing] intervention.”<sup>189</sup> When public universities have policies like those described here, which define the role of university leaders in relation to affiliated foundations and the scope of these organizations, they are fulfilling their institutional obligations.

#### University of Virginia

When an institution or higher education system establishes multiple foundations, explicit policies that convey a global approach to the creation of affiliated foundation are essential. The

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<sup>186</sup> *Id.* at 144.

<sup>187</sup> *Id.* at 141.

<sup>188</sup> *Id.* at 145.

<sup>189</sup> Hedgepeth, *supra* note 4, 6.

Policy on University-Related Foundations for the University of Virginia (UVA) is a good example of this approach.<sup>190</sup> UVA's policy governing affiliated foundations offers guidance for the creation of multiple foundations addressing diverse needs and communities within the institution. The policy describes the process by which foundations may be created. It also prescribes a plan for university and foundation working relationships that expressly provides for board composition and cooperation. Among other issues, the UVA policy addresses the availability and use of UVA resources and services, the relationship of foundations with UVA, the strategy for foundation management and operation, and systems for fiscal accounting and reporting.

Notably, the policy opens with a purpose statement: "Affiliated foundations exist because of, and for, the public institutions they support and whose names they share. Looking beyond their separate corporate identities, the foundations can be depositories of substantial funds charitably donated for the benefit of public higher education institutions and their related activities."<sup>191</sup> UVA currently identifies 24 affiliated foundations. Some are specific to a particular educational school, some focus on a special activity, and others are designed to provide general support. Among them are an alumni foundation, an athletic foundation, a tax foundation, and a patent foundation. While this sizable array of organizations may be too much for some institutions, UVA's approach allows it to create individual entities designed to meet different institutional needs.

#### University System of Maryland

The University System of Maryland (USM) also has an overarching policy on affiliated foundations.<sup>192</sup> Instead of governing one university with multiple foundations, the primary aim of USM's policy is to administer foundation relations for multiple schools. The policy is designed to

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<sup>190</sup> University of Virginia, *Policy on University-Related Foundations*, <http://www.virginia.edu/foundations/policy.html> (last modified Feb. 15, 2005). (last visited July 16, 2007)

<sup>191</sup> *Id.*

<sup>192</sup> University System of Maryland, *Policy on Affiliated Foundations*, § IX 2.00 (as amended Oct. 1, 1999), at <http://www.usmd.edu/Leadership/BoardOfRegents/Bylaws/SectionIX/IX200.html> (last visited July 16, 2007).

accommodate a variety of affiliated foundations, including multiple foundations at a particular school. An organization may be affiliated with the state system or with any of the individual institutions in the system and approval by the state system Board of Regents is not required, suggesting a degree of autonomy for these organizations.<sup>193</sup>

The policy also dictates that all affiliated foundations will be formed under section 501(c)(3) as charitable tax-exempt organizations. It goes on to articulate activities in which it is permissible for the foundation to engage. Recalling the Clark College story, it is significant that the policy explicitly provides for all foundations to be audited by an independent auditor not associated with either the foundation or the state, in addition to internal foundation audits.<sup>194</sup>

#### Montana University System

Similar to the University System of Maryland, the Montana University System sets forth a broad policy for all its institutions and their foundations.<sup>195</sup> Like UVA, it begins with a purpose statement regarding the creation of affiliated foundations.<sup>196</sup> It states, “Foundations are established to enable institutions to accomplish more than public funding allows. The private, independent nature of foundations also provides the added advantage of flexibility in fiscal management and responsiveness in donor services.”<sup>197</sup>

Another statement of the policy addresses public confidence in charitable organizations. In this section, the policy directly acknowledges the independent identity of affiliated foundations. “The Board of Regents recognizes it cannot and should not have direct control over campus-affiliated foundations. These foundations must be governed separately to protect their private, independent status.”<sup>198</sup> The policy also outlines the Board of Regent’s authority in the university

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Montana Board of Regents of Higher Education, *Policy and Procedures Manual: Campus-Affiliated Foundations*, Montana University System, Policy 901.9 (July 14, 2004) at <http://www.montana.edu/wochelp/borpol/bor900/901-9.htm> (last visited Apr. 6, 2005).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

system and defines the necessary components of operating agreements between state universities and affiliated foundations. In sum, the policy aims to define the scope of foundations within the university system, preserve organizational flexibility, and bolster public confidence in these private entities that support the state public university system.

By now it should be apparent that there is no prescription for how to organize an affiliated foundation to avoid negative legal consequences. And yet, it should also be apparent that there are numerous things that a university can do to boost the vitality and effectiveness of these organizations. The quality of institutional decisions about foundation structure is measurably improved when the legal consequences of that structure are considered. Furthermore, the abilities of universities and affiliated foundations to adapt to future challenges are enhanced when the boundaries between the entities are clearly articulated and when the foundation has well-defined mission. Policies such as those mentioned above show that a university, or university system, can narrowly define the character of affiliated foundations, even when it intends for those foundations to operate with a high degree of independence.

## CONCLUSION

Affiliated foundations can be very beneficial organizations for public universities and may be something of a necessity if the educational missions of these universities are to be optimally fulfilled. As long ago as 1939, the University of Georgia Chancellor remarked, "No state university or university system can exist on state support alone. Even the most forward state universities find it necessary to ask for outside contributions to carry on their work. Certain projects must rest with loyal friends for support. . . ."<sup>199</sup> Despite benefits provided by affiliated foundations, they still pose certain risks for universities. As this paper illustrates, many internal

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<sup>199</sup> Dr. S.V. Sanford, quoted at <http://www.jafos.alumni.uga.edu/ugafoundation> (last visited Apr. 5, 2005).

and external legal conflicts relating to affiliated foundations rest on the balance of control and autonomy between these organizations and the universities that create them.

Success in facing legal dilemmas arising from university affiliated foundations depends to a great extent on the amount of consideration given to the proposed organization's structure and to the existing evidence of where conflict is likely to occur. If multiple goals are being served, it may be advantageous to establish more than one foundation. Once the initial purpose and structure of any foundation is formed and articulated, continued attention and management of the university's relationship with the foundation is required. The role of foundations often evolves as they acquire assets and as university needs change, but these adjustments can be successfully managed when they are purposefully undertaken and openly acknowledged by those responsible for the administration of these organizations.