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A History of Nonprofit Boards in the United States

By Peter Dobkin Hall

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Although few practices are more ancient than communities delegating authority to small groups of elders, deacons, proprietors, selectmen, counselors, directors, or trustees, the formal responsibilities and informal expectations defining who they are, what they do, and how they do it have varied from time to time and from place to place. The tasks of tribal elders in traditional societies obviously differ from the responsibilities, authority, and methods of selecting members of the College of Cardinals in the Roman Catholic Church, the board of directors of General Motors, and the fellows and overseers of the Harvard Corporation.

Addressing the question of why boards exist calls to mind the old legal formula of property as a "bundle of sticks." This refers to the historical fact that property ownership traditionally involved various rights of use — the right to farm, to take wood, to pass over, to occupy, and so on. Only in the recent past and only in our culture did absolute ownership — the unified "bundle" of all the assorted rights of use — become generally accepted as the definition of property ownership.

Like property rights, the roles and responsibilities of boards of directors and the organizations with which they are associated — as well as the broader legal, governmental, and economic settings in which they operate — have evolved and changed over time. To fully grasp the dimensions of contemporary board governance requires that we carefully dismantle the "bundle" in order to examine the various rights, laws, expectations, and embedded assumptions that comprise it.

Boards and individual trustees are often unpleasantly reminded of aspects of their responsibilities that had never been sufficiently spelled out. The recent case of Adelphi University, a private college on Long Island whose board was ousted for allegedly mismanaging its assets, is a case in point. The board was evidently unaware that a series of legislative enactments dating back to the 1780s had created a regulatory body — the Regents of the University of the State of New York — that measured the board's behavior by a different and more demanding standard than would have been used by the state's attorney general. Similarly, a decade ago, the board members of Pennsylvania nonprofits were shocked to discover that the tax exemptions their organizations enjoyed were not absolute — but were subject to review by local tax authorities. Incidents like these suggest that understanding why boards exist requires a more than passing examination of the past.

THE FIRST AMERICAN BOARD

The antecedents of modern nonprofit governance practices in America date back to the earliest settlers. Many of the early colonies were settled by private companies whose proprietors were a particular group of individuals. In the case of the Massachusetts Bay Company, the charter provided that the members of the company were granted perpetual succession — which gave them the right to appoint their successors and to elect officers.

The corporation appointed 13 men, chosen for their honesty, wisdom, and expertise, to manage the colonial government. The charter also specified the times at which the government of the corporation should assemble (at least quarterly) and the number necessary for a quorum and empowered them to make laws and ordinances.

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The Massachusetts Bay Company's charter — which created the first American board — illustrates the lack of distinction between public and private domains. It was more than a grant of property — it also delegated the right to govern. By extending the franchise from the relatively small group of incorporators to the far larger group of men eligible to elect and serve as members of the general court, the company made the rights and privileges of the private grant equivalent to those of the state. At the same time, they wrought a fundamental transformation in the nature of authority, by making positions in the corporation *offices* that individuals held subject to the rules of the corporate body rather than personal possessions: Perpetual succession, in other words, became an attribute of the corporation rather than of the individuals who comprised it.

THE RISE OF GOVERNING BOARDS

The tripartite structure of the Massachusetts Bay Company — with an executive component (the governor and deputy governor) and two legislative components (the assistants and the general court) — came to be a paradigm for other bodies politic in the colony: The churches adopted a congregational polity, with the roles of the minister, elders (deacons), and the congregation as a whole mirroring the relationships between government bodies; the townships similarly divided authority between the selectmen (the executive) and the town meeting (legislative). Decision-making groups like the assistants, town selectmen, and church elders were all representatives of the public: They served at the pleasure of those who elected them.

These democratic features, however, were hindered by powerful informal norms of deference. Custom entitled colonial families noted for wealth, learning, and genteel birth to particular consideration: They received larger shares in the division of common lands, were given preferential seating in churches, and were likely to be elected and reelected to town and colony offices.

A shift from broad-based congregational decision making to governance by church elders also began in the 1630s. Although they shared certain fundamental beliefs, the religious dissenters who migrated to New England, having rejected the episcopal authority of the Anglican church, had little practical experience in church governance. The question of governance hinged on profoundly important matters of theological interpretation and public order: If churches were to be voluntary, what authority could the clergy properly exercise? If churches were voluntary bodies, what was their proper relationship to civil government?

At the outset, these matters were left to congregations to decide, but in 1636, influential members of Boston's First Church challenged the authority of its senior minister, John Wilson. The turbulence caused by this controversy produced a set of legislative enactments and an ecclesiastical constitution that shifted the power to convene congregational meetings, to administer discipline, and to examine and ordain ministers to church elders. In effect, the elders of congregations became the governing boards of the colony's religious organizations.

Harvard and the Origins of Lay Governance

Recognizing the need to train future leaders, the Massachusetts colonists established a college in 1636. The legislature placed the school under the authority of a governing board consisting of 12 overseers, including six magistrates and six ministers.

In 1643, Henry Dunster, Harvard's president, wrote an appeal for funds directed at wealthy and benevolent Puritans who had remained in England. The text refers to the regular presence of the overseers at the students' monthly recitations and disputations, suggesting that the governing board took its oversight responsibilities very seriously indeed. They saw themselves as representing the public interest by ensuring accountability.

In 1650, Dunster obtained for Harvard a formal charter of incorporation. The charter was an attempt to frame Harvard as a corporate entity distinct from the state: This would not only secure its control of properties that had been entrusted to it, but would also provide it with greater autonomy in managing its own affairs. The drafters specified the nature and extent of corporate powers, making a distinction between the persons who might serve as officials of the corporation and their role as *officers.* Thus, pains were even taken to specify that officers would, after death or removal, be chosen by the corporation — since traditional usage would have permitted these positions to be passed on by will. The charter divided governance between two bodies: the president and fellows, who would actually be the corporation, and the overseers, whose power was restricted to vetoing decisions of the fellows and to intervening in cases where the fellows were deadlocked.

With its foundations thus solidly laid, Harvard grew steadily until 1686, when, as part of England's efforts to reorganize colonial administration, the colony's charter was suspended. The restoration of colonial government in 1692 opened a decade of struggle over control of the college and the definition of its corporate powers. The clergy, led by Harvard's president, Reverend Increase Mather, strove to keep the college under church control and free of political influence. However, the Royal Governor and his political allies, most of them merchants from the coastal towns, strove to shift control to the laity.

After multiple charters were enacted and then annulled and other attempts to satisfy the contenders were made, the general court threw up its hands and allowed the college to operate as a *de facto* corporation, over which the mercantile element gradually gained control. Led by

John Leverett, who served as Harvard's president from 1708 to 1724, the college resumed operating under the 1650 charter, which provided for a seven-member corporation (the president and fellows) and a board of overseers composed equally of ministers and magistrates. The charter explicitly entrusted management to the president and fellows and granted "visitation" — through which the public exercised oversight — to the overseers.

THE STRUGGLE FOR CONTROL OF HARVARD

In the closing years of President Leverett's tenure, the struggle over control of Harvard and its mode of governance broke out once again when the corporation elected three ministers, none of them resident in the college, as fellows, straying from the precedent of electing tutors. The conflict was fueled by a series of problems involving political patronage, the discipline of students, and a battle over the control of a major donation to the college.

Leverett and the merchants were attempting to alter the structure of accountability set forth in the charter by naming as fellows officers who were not intimately involved with the work of the college. The overseers appealed to the legislature to resolve the conflict. The legislature sided with the overseers when it reported that tutors had the right to be fellows.

During the controversy, President Leverett considered going over the heads of the legislators by obtaining a royal charter from King George I. While this would have ensured the college's independence from colonial politics, it would have placed Harvard under Anglican supervision and would, in consequence, have ensured that Yale (established in 1701) rather than Harvard would have become New England's chief institution of higher education. Instead, Leverett chose to maintain the college's autonomy as best he could, by insisting that only a nonresident governing board could best ensure Harvard's welfare.

Leverett's argument stands as the starting point of a distinctly American method of institutional governance.

John Leverett's response to the legislature's efforts to alter Harvard's charter were a classic statement of the role of governing boards both in securing the independence of corporations from politics and in ensuring the accountability of their officials to the public. Leverett's argument stands as the starting point of a distinctly American method of institutional governance. To argue for governing boards that were neither governmentally controlled nor wholly self-serving (as governance by resident fellows would have been), but that promoted the good of the institution and the public, was an extraordinary assertion. Moreover, it opened the way for Harvard to break away from the influence of the church.

ALTERNATIVE MODELS OF GOVERNANCE

One result of the laity's victory at Harvard was that religious conservatives, increasingly unhappy with the college's liberalism, resolved to establish another school. In the fall of 1701, according to legend, a group of leading Connecticut ministers met to establish a new institution and began by donating a collection of books for its library.

The Connecticut group, unlike those who founded Harvard, proceeded without legal authority to create a corporation. Nonetheless, the Connecticut general assembly, carefully skirting the question of whether its act constituted the granting of a charter, enacted a statute giving the ten ministers who petitioned on behalf of the Collegiate School the right to erect the college. At their first meeting in 1701, trustees drew up bylaws and appointed a rector for the new institution.

The governance model for the "Collegiate School" (which would later become Yale) differed significantly from Harvard's. Rather than having dual boards — one self-perpetuating body to order the affairs of the institution, the other an *ex officio* group to provide accountability to church and state — Yale had a single self-perpetuating board composed of nonresident members of the clergy.

The lack of a formal charter of incorporation, combined with the colonists' legal naivete, almost immediately created problems. Since the board was not incorporated as a "body politic" (which would have required all the trustees to abide by majority decisions), when disagreement arose over where to locate the college, the board broke apart, and each trustee faction led sympathetic groups of students off to study in a different place. In 1718, London merchant Elihu Yale made a major donation to the struggling Connecticut school — one that carried the condition that the college be located in New Haven. That settled the matter.

Although Yale's location ceased to be contentious, the college inevitably found itself entangled in the religious and political strife of the period. In the 1720s, a major controversy broke out when the president, several tutors, and a number of students disavowed congregational ordination and defected to the Anglicans. In response to the disorders in the college, the general assembly in 1723 passed an act that moved the loosely organized school toward corporate status by setting out major clarifications of the powers of its trustees. The act provided for the replacement of incapacitated trustees, established that trustees could resign, provided for the number of trustees needed for a quorum, lowered the age of eligibility for trustees (from 40 to 30), and made the president an ex officio member of the board. By granting Yale the power to make its own bylaws, the charter dramatically increased Yale's independence from the legislature and, by requiring the trustees to act as a collective body, from the sectarian conflict that was so dividing public opinion.

When the government suspended its annual grants, Yale was forced to turn to sympathetic individuals for financial support, which only served to stir up more enmity among those who viewed the college as a public institution.

The Trustees' Right to Independent Judgment

Yale's new charter strengthened the college's capacity to govern itself by clarifying trustees' roles as members of a corporation. But while clarifying its character to act collectively, the charter left the capacities of individual trustees to act independently undefined.

In the 1750s, as part of a broad effort to promote order in Connecticut's turbulent religious life, Yale president, Thomas Clap, persuaded a majority of the board to subject its members to examinations to ensure their orthodoxy and to expel those who failed to meet the test. Reverend Joseph Noyes, a particular target of these efforts, stoutly defended his right to dissent from decisions of the majority. He argued that the board's powers were limited to the powers enumerated in the college's charter and by Common Law requirements for due process. Only evidence of failure to fulfill his duties as a trustee could serve as grounds for removal; his refusal to vote with the majority could not.

In response to Clap's argument that colleges as religious societies should be permitted separate standards of governance, Noyes replied that he did not believe Yale to be so unique as to justify exempting it from the rules governing other corporate bodies.

Noyes's powerful argument in favor of trustees' right to follow their own consciences and, when necessary, to dissent from decisions of the majority added an important dimension to the concept of trusteeship. His argument established that corporations, though granted certain powers of self-government, remained subject to the state, and it affirmed that trustees were ultimately accountable not to the corporation, but to their consciences and to God.

THE ORIGINS OF STAKEHOLDER REPRESENTATION

The Revolution brought with it challenges to government support for religion, placing sectarian colleges like Yale and Harvard in straitened financial circumstances. Harvard, which first invited laymen onto its governing board in 1780, developed especially close ties to Boston's mercantile community — ties that rendered large-scale fund-raising unnecessary until the end of the nineteenth century.

Yale took another path. As it was located in a small town that lacked the concentrated wealth of Philadelphia, Boston, or New York, its first inclination was to make peace with the state legislature in the hope of reviving public support. To this end, for example, when Reverend Ezra Stiles was being courted for Yale's presidency in the 1770s, he drafted a plan intended to make the college appear less sectarian and more public-serving by adding professorships in law, medicine, history, and belles lettres.

Intrigued by the possibility of the legislature's resuming grants to the college in exchange for representation on the board, Stiles pursued private conversations with key legislators. One legislator suggested putting council members on the Yale Corporation. But Stiles pointed out potential problems: Because the council (the upper house of the legislature) also functioned as the state's supreme court, putting council members on the Yale Corporation *ex officio* would mean that the council would have to disqualify itself in cases involving the college.

The laity wanted more than a token voice in college affairs. Much as Stiles wanted Yale to enjoy the kind of financial support that institutions with mixed polities in other states were enjoying, he also worried that tinkering with the intentions of the college's founders carried very real risks. Stiles worried that any kind of mixed polity would erode Yale's religious ties.

Two conservative political leaders presented Stiles with a grant that carried the condition that the Corporation include as *ex officio* members the governor, the lieutenant governor, and six senior members of the council. Yale's 1745 charter remained otherwise intact, with the ten "successor trustees" continuing to hold a majority and to make decisions free of legislative interference.

Although this agreement temporarily bound together the interests of political and religious conservatives, in the end conservatives could not hold the line against social and cultural forces that were breaking people out of old habits of deference and subservience. The election of Thomas Jefferson to the Presidency in 1800 not only rallied dissenters everywhere; the new President's willingness to appoint his allies to public offices gave them a strong power base for pursuing their efforts to separate church and state. In 1815, the Congregational Church was disestablished, and the legislature chartered Episcopal and Methodist colleges (Trinity and Wesleyan), breaking Yale's monopoly on higher education.

Rather than abandoning its religious ties, however, Yale looked on them as a source of potential strength. An early effort to raise funds for a professorship of divinity proved so successful that by the 1820s, friends of the college were proposing a more ambitious, nationally based fund drive. Although the effort to raise $100,000 took four years to complete, its success demonstrated that Yale no longer had to depend on government and could look to a new constituency — its nationally dispersed alumni — for financial support.

The *ex officio* representatives of government — 8 of the 19 members of the Yale Corporation — remained on the board, but, permanently in the minority, they seldom attended meetings. This lack of attendance became a major irritant to generous alumni, who were denied a voice in governance in spite of Yale's increasing dependence on their largesse.

PUBLIC AND PRIVATE POWER IN THE EARLY REPUBLIC

The development of philanthropic and voluntary associations depended on the emergence of a legal infrastructure that defined the rights of individuals with regard to the property they might devote to charitable and educational purposes and clarified the nature and powers of institutions that receive charitable gifts.

When the colonies declared their independence from Great Britain, legislators were immediately faced with a pressing question: What laws were appropriate to governments founded on popular consent? Believing that continued reliance on English law could only perpetuate undemocratic institutions, Jefferson urged Virginians to rewrite the law from the ground up. More cautious leaders like John Adams argued for the fundamental soundness of the Common Law and thought it sufficient to repeal or amend only those parts of it that were repugnant to common sense and republican liberties.

Although most of the former colonies ultimately decided to accept the greater part of English law, these choices were generally uninformed by any clear idea of what the Common Law was. Few Americans had formal legal training, so while nominally operating in a Common Law system, as actually practiced the law was a combination of statutes, highly localized customary law, and common sense. Only with the adoption of the Constitution in 1789 and with the increasing availability of English legal texts did American lawyers and jurists begin to fully understand the Common Law and its applicability to American conditions.

Unfolding in the setting of intense political conflict of the 1790s, these developments were inevitably politicized. Jefferson and his Democratic Republicans viewed the increasing acceptance of the Common Law as another Federalist attempt to subvert the popular will by subjecting it to legal doctrines that were contrary to American ideals. Accordingly, the Jeffersonians not only fought the Common Law in principle; they also challenged its application.

Inevitably, legal outcomes depended on the political coloration of the states where the questions were debated. In Virginia, where Jeffersonians held sway, English legal traditions asserting private rights were rejected in favor of the legislatures. In Federalist New England, the courts more often succeeded in asserting their authority.

The generally unsettled condition of American law inevitably shaped the treatment of corporations, with which few Americans had any practical experience. No one knew this better than James Sullivan, the attorney general of the Commonwealth of Massachusetts who devoted considerable thought to the question of corporations. The legislature, he noted, had granted corporations a variety of powers. Some were perpetual, others were limited. But no Massachusetts charter contained language that explicitly made a corporation's existence subject to the pleasure of the legislature. Whether the legislature possessed ultimate control over corporations was unclear. English precedents provided no guidance. Although Massachusetts had adopted the Common Law, because few corporations existed in the state before that time, there were no applicable precedents. While the legislature could assume the ultimate power to dissolve or alter corporations at its pleasure, taking such a course would not, in Sullivan's view, be without political peril. Unfortunately, neither the law nor experience provided any guide as to how to proceed.

Did legislatures succeed to the powers of king and parliament when independence was declared? If so, to what extent were these powers altered by the state and federal constitutions? The outcome of this debate would have tremendous consequences for governing boards. If the Jeffersonian viewpoint prevailed, government would have such sweeping powers over charitable and other corporations that boards would be little more than agents of government. The Common Law framework, on the other hand, empowered boards in unique ways. English eleemosynary institutions (those established for charitable purposes or related to or supported by charities) were subject to various kinds of formal accountability. Thus, if the right to create associations could be regarded as an aspect of the right to assemble, it took no great leap of imagination to argue that nonprofits and their boards were guardians of citizens' private rights, requiring that they be regarded as exercising powers delegated from the people rather than from government. Such a doctrine would curtail the capacity of government to oversee or constrain their activities.

All Americans of the time viewed charitable, religious, and educational institutions as public enterprises. The question demanding resolution was: Who is the public? During the first two decades of the nineteenth century, the federal courts — especially the United States Supreme Court under John Marshall's leadership — would reconcile the Constitution and Common Law and in so doing clarify the relationships between public and private power in the republic.

CORPORATIONS, TRUSTEES, AND STATE POWER

Politicians rushed in where lawyers and judges feared to tread — with the result that, during the first two decades of the nineteenth century, Jeffersonians mounted a series of attacks on established incorporated associations throughout the country.

The turning point in this debate focused on New Hampshire's efforts to take over Dartmouth College. In 1816, the Jeffersonians took control of the New Hampshire government and elected as governor William Plumer, who intended to establish the legislature's authority over Dartmouth.

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Within weeks, the legislature passed a bill that, in effect, constituted a state takeover of the institution, changing its name from Dartmouth College to Dartmouth University. Its 12-member self-perpetuating board was replaced by 21 trustees appointed by the governor and a board of 25 overseers appointed by the legislature.

The new trustees and officers of Dartmouth University took control of the college buildings. But the old board of trustees refused to acknowledge their authority and sued to recover their property. The outcome of the case was almost a foregone conclusion, since the judges had all been appointed by Governor Plumer. The decision of the state court provides an excellent summary of the Jeffersonian position on the place of charitable and educational institutions in the polity. Although conceding the possibility that the integrity of Dartmouth's charter could be argued as a matter of protecting private rights, the Chief Justice was not inclined to do so. He argued that if Dartmouth College was a public corporation and a public trust, the powers of the legislature over its affairs was unquestionable.

THE PUBLIC INSTITUTION AS PRIVATE ENTERPRISE

The issue might have ended, as it started, in New Hampshire had the case not attracted such broad interest. If the precedent were allowed to stand, some thought, every charitable and educational corporation in the country was in danger. Daniel Webster, a Dartmouth alumnus and at that time a member of Congress, had joined the trustees' legal team. Webster suggested the possibility that the federal courts might consider the case on appeal if the justices could be persuaded that the legislature's action had violated Article I, Section 10 of the Constitution, which prohibits states from interfering with the obligation of contracts. Webster went on to draw careful distinctions between charitable entities like Dartmouth College and other kinds of corporations, pointing out that such organizations are private and function according to the will of the donors. The government does not delegate public power to a private group, but rather it helps to forward the donor's charitable intent by the granting of nonprofit status.

In Webster's view, state aid did not affect the private nature of the corporation: The legislature could place conditions on its grants, but it had no authority to redirect the contributions of other donors or the framework of governance by which they were administered. This did not mean, in Webster's view, that trustees were exempt from public accountability.

Webster's argument hinged on the assertion that the New Hampshire legislature's actions impaired the obligation of contracts and were therefore unconstitutional. In this closing remarks, Webster queried:

If the right to create associations could be regarded as an aspect of the right to assemble, it took no great leap of imagination to argue that nonprofits and their boards were guardians of citizens' private rights.

> *Shall our state legislature be allowed to take that which is not their own, to turn it from its original use, and apply it to such ends or purposes as they, in their discretion, shall see fit? Sir, you may destroy this little institution; it is weak; it is in your hands!*
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> *. . . But if you do. . .You must extinguish one after another, all those great lights of science, which, for more than a century, have thrown their radiance over the land! It is, sir, as I have said, a small college, — and yet there are those who love it . . . .*

As Yale law professor Elizur Goodrich commented, "Chief Justice Marshall was visibly stirred, and many persons in the room were weeping, quite unashamed."

Webster's most powerful argument centered on his conception that Dartmouth's contract involved multiple stakeholders. Webster claimed that civil institutions belong to the people and should therefore be subject to their authority.

In the decision, Chief Justice Marshall reframed the central question of the case boldly: Do the objects of the corporation give certain corporations distinctly public characters? Are trustees performing a duty derived from government? Marshall argued that the character of civil institutions is determined by how and why they are formed, not by their incorporation. He concluded that if charitable gifts and charitable institutions were subject to the perpetual threat of legislative interference, no sensible person would be willing to make donations for charitable, educational, or religious purposes.

Marshall's decision did more than protect corporations from legislative interference: It advanced the notion that the will of the public could be expressed by other than electoral and governmental means.

The decision in the Dartmouth College case was perhaps the single most important judgment handed down by an American court. Marshall's decision did more than protect corporations from legislative interference: It advanced the notion that the will of the public could be expressed by other than electoral and governmental means. In doing this, it legitimated the idea of private associational initiative in the public interest. To this conception, perhaps more than any other, the nonprofit sector owes its existence.

The Court's solution to the problem of corporations was a distinctively American one, envisioned by neither the Common Law (as construed in England) nor the Constitution — but resulting from the reconciliation of the two. The Common Law, while protecting private rights, placed no limit on the powers of parliament. Thus, in theory, parliament could act to alter or abolish corporate charters at its discretion. The Constitution, on the other hand, contained no explicit provisions regarding corporations, although it did prohibit states from passing laws that impaired contracts. Marshall's reasoning added to — and thus Americanized — the Common Law by limiting the powers of legislatures. It carried into American legal doctrine the legitimacy of Common Law views of property rights. All in all, it was an extraordinary act of creative legal thinking.

Although the Jeffersonian view of voluntary associations received a blow from which it never fully recovered, the ideas of those who opposed the privatization of important arenas of public action such as charity and education did not wither away. Quite the contrary. In states like Virginia, where hostility to corporations ran deepest, the legislature, in approving corporate charters, took greater care to explicitly provide for state oversight and control.

Because they were embraced by most states beyond New England, the views of the losers in the Dartmouth College case are of more than antiquarian significance. Not only did they frame public policy on the state level through the nineteenth century, they have to a considerable extent been carried into our own time by legislators, regulators, and jurists. The criticisms of foundations and other charitable, tax-exempt entities that began to be expressed in the 1950s are grounded in the ideas of Jefferson and Plumer. In the 1980s, states like Pennsylvania, which had annulled the Common Law and erected its charities under its own statutes, rediscovered Jeffersonian doctrines in setting the "charitableness test" that enabled local authorities to weigh the value of nonprofits' tax exemptions against the public benefit their activities provided. And in the 1990s, New York, acting through the Regents of the University of the State of New York — a body established in 1785 to oversee eleemosynary institutions — replaced 18 of the 19 trustees of Adelphi University.

Though the accountability of trustees to government varies considerably from state to state, the overall trend — even in states that kept the English Common Law in place — increasingly favors Jefferson's views. Even the United States Supreme Court tilted significantly in this direction when it permitted the federal government to make the receipt of federal support and the privileges of tax exemption contingent on the willingness of nonprofits to embrace federal antidiscrimination statutes.

Both perspectives place uniquely heavy responsibilities on boards. In a Common Law state like Connecticut, for example, the only way of enforcing performance is likely to be through the attorney general. In non-Common Law states like New York or Pennsylvania, performance can be enforced through the courts or through regulatory bodies like the Regents, which can hold trustees accountable to specific statutory standards. Although these states still limit standing to government officials, the range of officials and agencies with such standing is greater.

The difference between the two frameworks is evident in the outcomes of recent litigations involving boards. In Connecticut, when faculty, alumni, and dissident trustees charged that the Unification Church takeover of the University of Bridgeport violated the institution's charter, the courts ruled that none of these stakeholders had legal standing. In New York, when faculty and alumni challenged Adelphi University's board with self-dealing and misuse of the institution's funds, they were able to cite specific state regulations and, in doing so, could move the Regents to investigate and take appropriate action without the attorney general's ever entering the case. Similarly in Pennsylvania, once the courts had established that local tax authorities had the power to assess the charitableness of exempt organizations, the attorney general ceased to be the only official with standing to hold such entities accountable.

TRUSTEES AS FIDUCIARIES

Massachusetts led the nation in both the chartering of corporations and the establishment of charitable trusts. By the second decade of the nineteenth century, wealthy Bostonians were leaving increasing proportions of their estates in trust, and charities like the Massachusetts General Hospital and Harvard were accumulating formidable endowments. The boundaries between private and eleemosynary interests were not always clear: Many trust estates contained provisions on behalf of charitable institutions; certain charitable institutions managed private trusts on behalf of individuals; and, more frequently than not, the same group of businessmen and lawyers both sat on the tightly interlocked boards of for-profit and nonprofit corporations and served as trustees for families and individuals.

Because the value of these assets was subject to fluctuation in the rapidly growing economy, trustees became increasingly worried about liability issues: Could beneficiaries hold them accountable for the performance of investments? Were some investments more risky than others?

Much depended on the resolution of these questions. Economic growth created an insatiable demand for capital. But legal uncertainties constrained the willingness of trustees to invest imaginatively. In the 1820s, a group of Boston trustees, hoping to discover the legal limits of fiduciary prudence, brought a test case before the state's Supreme Judicial Court. The suit involved a $50,000 trust established by John McLean to support his widow, which on her death was to be divided between Harvard College and Massachusetts General Hospital. Trustees of the McLean estate invested extensively in manufacturing stocks — which yielded generous dividends, despite their fluctuating value. When Mrs. McLean died, the trustees turned over the stocks, whose book value had sunk to $30,000. The college and the hospital brought suit, charging that the McLean bequest had been squandered by risky investments and demanding that the deficiency be made good by the trustees.

In setting forth his opinion, Justice Samuel Putnam carefully reviewed both the legal and practical issues defining trustees' fiduciary duties. Depending almost entirely on English precedents, Putnam stated that to hold trustees accountable for diminutions of principal (in the absence of obvious mismanagement) would impose such a burden on trustees that no sensible person would agree to serve as trustee. Putnam resolved, "All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion, and intelligence manage their affairs." This formulation, known as the Prudent Man Rule, has been the fiduciary standard to which trustees have been held ever since. Trustees are not held accountable for financial losses incident to the normal fluctuation of markets.

The interpretation of fiduciary prudence has changed in recent years. Many influential legal scholars have asserted that fiduciary prudence requires "maximum return" on investments through diversified portfolios. Other recent refinements in the rule concern the power of trustees to delegate asset management to investment professionals. Though traditionally prohibited, such delegation became licit in states that adopted the American Bar Association's Model Nonstock Corporation Statute, which shifted fiduciary accountability from the stricter trust to the more flexible corporate director standard, thus expanding the mechanisms available to boards.

ACCOUNTABILITY AND VOLUNTARY ASSOCIATIONS

Although both the common law and statutory perspectives treated eleemosynary corporations as public bodies, the question of who the public was and how it could express its will within such entities remained unclear. The problem of accountability in membership organizations troubled many early-nineteenth-century commentators.

Reverend Francis Wayland, president of Brown University and America's leading political economist, was concerned not only with the tendency of associations to concentrate power in the hands of a few, but with the specific mechanisms through which they represented or failed to represent the views of their members and, hence, the public.

Wayland's ideas about how to remedy the lack of mechanisms of accountability within membership organizations were Jeffersonian in character. His first concern had to do with organizations engaged in political advocacy — which he felt peculiarly prone to abuse. All too frequently, associations seeking to promote their ideas forged coalitions with political groups and, in doing so, became corrupted.

But even these external constraints were insufficient to prevent the tendency of powerful factions from taking control of associations and putting them to evil purposes. In addition, internal rules were needed to regulate members of voluntary associations.

Wayland's anti-institutional conception of voluntary associations minimized the role of the board and placed primary responsibility for governance in the hands of the membership. This put him in conflict with colleagues like Yale professor and abolitionist Leonard Bacon, whose response to Wayland's views constitute the first fully articulated rationale for board governance.

At the time their debate began, the possibilities of voluntary associations were still largely unknown. As these organizations matured, their governance structures had become more elaborate and their power accordingly altered. Because they were national organizations and their trustees were in no position to oversee day-to-day operations, larger boards increased the power of salaried executives and board insiders.

In 1847, Bacon elaborated his concerns about governance in an article published in the *New Englander*, entitled "Responsibility in the Management of Societies." He reflected in very concrete organizational terms on the process of governance, the mechanics of associational accountability, and the broader issues of moral agency.

He expressed particular concern that the power gained by paid executives and board factions had made these societies dangerously self-serving. He went on to point out that what made them true to their trust and effective as managers was not their clerical status, but their personal qualities. Shall the officers in the executive department govern the whole movement, responsible only to God? Or shall they be under the government of some constituency?

First, he argued, "a true responsibility of the executive to some superior or constituent power, is a security against mismanagement and the gradual perversion of the trust." Perversions of trusts (what we today would call mission displacement), Bacon noted, tended to occur inadvertently, as a by-product of routine, taking place "for the most part unconsciously, gradually, and with the best intentions." Bacon did not think that the solution to this problem was to eliminate managers and board committees, but to require them to report fully and regularly on their activities.

Bacon's third argument in favor of increasing the accountability of executives was that failure to do so might invite public hostility towards the societies. Having dismissed political or market accountability as unworkable, Bacon considered the alternative of accountability to churches and denominations. This he found equally unsatisfactory, because this merely shifted the problem of unaccountable bureaucracy onto the churches themselves.

The one form of accountability that Bacon believed could ensure the accountability of administrators was a true working board of trustees, in which each member retained a sense of individual responsibility for the activities of the organization. Bacon's conception of what made a good board was amazingly foresighted, showing a remarkable sensitivity to both group dynamics and issues of organizational boundaries. Even more important, it addressed issues of organizational legitimacy and authority in a democracy by suggesting that these, rather than proceeding from electoral or political accountability, proceeded from the fiduciary responsibilities imposed on trustees as managers of the property of others.

Bacon's essay is the first serious study of nonprofit management and governance. His analysis of the dimensions and dilemmas of governance is remarkably penetrating and as relevant to the problems of organizational accountability and board-staff conflict as they existed in the 1840s as it is to those problems as we perceive them today.

STAKEHOLDERS DEMAND A VOICE

There had been stirrings of change in America's colleges since the 1820s. But the real transformation of higher education only began in the 1860s, when alumni at both Harvard and Yale moved to demand a voice in university governance.

The national attention given the issues of governance at Yale between 1868 and 1871 suggests that the public perceived that the struggle was far more than a parochial matter of institutional control. On one level, it was acknowledged to be a showdown between the clergy and the laity for control of the central institutions of American culture. On another, it took the measure of the emergent business class as a national leadership group. At the same time, both the contenders and journalistic bystanders seemed to be aware of the extent to which the struggle involved an attempt to articulate a new rationale for the privatization of important domains of American life.

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The uprising of Yale's lay alumni was sparked by a review in the *New Englander* written by Yale's president, Theodore Dwight Woolsey, of an address on the reform of Harvard's charter delivered by Harvard professor Frederic Hedge. In the review of Hedge's address, Woolsey commented favorably on substituting alumni representatives for state officials and suggested that Yale would benefit from such a change. Woolsey's comments galvanized Yale alumni, who, as they anticipated the president's retirement, began pushing actively both for a change in the college's charter and for curricular reforms akin to those proposed at Harvard. Alarmed, Yale conservatives, led by Reverend Noah Porter, began to mobilize against the laity and their supporters within the faculty.

Porter suggested that alumni lacked the necessary knowledge to govern a college; he even denied that trustees should be elected from outside the state of Connecticut — since the college was, preeminently, a Connecticut institution. And he denied that the ministers' lack of competence as financial managers had anything to do with the reluctance of alumni to contribute money to the school.

Porter's defense of the old order engages the most fundamental issues surrounding trustee governance: Who owns an eleemosynary institution? Who has standing to demand a voice in its affairs? As a member of the faculty, Porter also seemed to be advancing — through his repeated use of the term "we" — special claims for the professoriate as a constituency with superior standing to the alumni. In a remarkably resonant way, Porter's sentiments reveal the defensive state of mind of the clerically dominated colleges as they faced the challenge of an educated national business elite, determined to remake the world in its own image.

The alumni's outrage at Porter's stance boiled over at the annual alumni dinner in 1870. William Walter Phelps spoke on behalf of the younger Yale alumni when he criticized the current management of the college as too conservative and narrow. Very much in the brash competitive spirit of Gilded Age entrepreneurialism, Phelps suggested that the clergy's otherworldly resistance to change placed the college at a decided competitive disadvantage, pointing to the decisions by the sons of Lincoln and Grant to attend Harvard rather than Yale.

The debate over Yale's governance became a national issue — the subject of newspaper editorials and letters in national periodicals. The attention devoted to the issue is not surprising, as the stakes involved nothing less than the question of who should control American culture — the ministers who had reigned basically unchallenged since the establishment of the first colleges, or the emergent class of businessmen and professionals who felt closely tied to the colleges and felt that they were owed a voice in them. The outcome of the struggle at Yale would serve as a paradigm both for the control of higher education in America and, more broadly, for a redefinition of the boundaries between the public and private domains.

The struggle for control of Yale provided alumnus William Graham Sumner with an opportunity to critique traditional models of educational finance and governance in the pages of the *Nation*. Sumner suggested that the alumni had a very tangible interest in the future of the college and that the gratitude and responsibility alumni exhibited constituted an untapped, potentially rich resource. While never adopted as a model for university finance, Sumner's article helped to provide a rationale for the establishment of the Yale Alumni Fund, an annual drive directed at all Yale alumni that became a powerful instrument for driving the college toward the modernity it so resisted.

The resolution of the struggle for control of Yale was a less-than-satisfactory compromise. The Corporation agreed to seek a charter revision from the legislature that, while retaining the governor and lieutenant-governor as *ex officio* members, would replace the senators with six trustees elected by the alumni and serving six-year terms. The ten "successor trustees" — the self-perpetuating part of the board —was opened in theory to the laity, but laymen would not achieve a majority on the board until 1910.

By the turn of the century, all the other major universities and most of the national associational enterprises had come under lay control. The final blow was Andrew Carnegie's offer to fund pensions for college and university faculty — on condition that their institutions sever their religious ties. Laicization was more than anticlerical, however. It was, more centrally, an effort to replace guild-like forms of professional self-government with decision making by "disinterested" businessmen and their allies. As such, it can be seen as an effort to create a new kind of public accountability — accountability not to the public as represented by government or by professional authority, but to the public as represented by the most economically successful.

BEYOND LAY GOVERNANCE

By the turn of the century, businessmen dominated the boards of most colleges and universities and, through the establishment of grantmaking foundations, had created powerful instruments for shaping the priorities and policies of a wide range of cultural institutions. Political economist Thorstein Veblen, one of the most perceptive and bitter critics of lay governance, believed that expertise, not money or other forms of ascriptive authority, legitimated power.

Lay control of university budgets, in Veblen's view, created a situation in which "men of affairs" were able to decide "what the body of academic men that constitutes the university may or may not do with the means in hand; the merits of which these men of affairs on the governing board are in no special degree qualified to judge." "These governing boards of businessmen commonly are quite useless to the university for any businesslike purpose. . . . Their sole effectual function," Veblen declared, was "to interfere with the academic management in matters that are not of the nature of business, and that lie outside their competence and outside the range of their habitual interest."

Veblen believed that corrupt and exploitative capitalists grew wealthy on the ideas and energy of the genuinely talented and learned. He believed that the market ethos eroded universities' commitment to intellectual excellence and shifted the primary goals of higher education from the pursuit and diffusion of knowledge to the acquisition of wealth. Business values, he believed, led boards to prefer short-term, tangible returns over "those intangible, immaterial uses for which the university is established."

By the turn of the century, scholars had been pushed aside: Between 1860 and 1900, the percentage of businessmen on university boards increased from 23 to 26 percent, of bankers, from 5 to 13 percent; and of lawyers, from 21 to 26 percent — while the percentage of educators increased from only 5 to 8 percent. A measure of faculties' loss of voice was their diminishing contribution to university fund drives. In the larger universities, faculty had become employees and increasingly regarded their boards as hostile to the academic enterprise. However exaggerated the criticisms, they were a portent of the adversarial spirit that would increasingly characterize board-staff relationships in the twentieth century.

TRUSTEESHIP IN THE LIBERAL STATE

Secularization of educational and charitable institutions did not diminish tensions over governance. The emergent cadre of corporate managers espoused a general theme of cooperation, social harmony, and economic and political order. They worked to regulate the corporate economy through the agencies of government, private associations, and trade organizations. Mobilization for the first World War was an experiment in public-private partnership, as industrial production, transportation, food, finance, and other crucial domains were coordinated by quasi-public boards staffed by volunteers from big business. On the civilian front, corporate managers took charge of new charitable vehicles like the Community Chest and the Red Cross and displaced the clergy and other traditional community leaders from positions in older social welfare institutions like the charity organization societies.

The most articulate spokesman for this new style of leadership was President Herbert Hoover, a millionaire mining engineer turned public servant. Acknowledging the "great inequalities and injustices" caused by modern industry, Hoover sought to frame a new conception of "progressive individualism" that would reconcile traditional democratic and Christian values with the realities of capitalism. Hoover recognized that inequality was an inevitable consequence of industrialism but believed that equal opportunity, combined with a culture of service and cooperation that acknowledged the interdependence of all Americans, could lead to a new social and economic order.

Central to the success of this "associative state" was a conception of public life based on new kinds of organizations to advance community cooperation and economic objectives. These organizations were to advance greater mutuality of interest, service, and public responsibility. In this system, organizations promoting economic cooperation worked closely with other kinds of voluntary organizations to combine self-interested pursuits with the higher values of cooperation and public service.

Hoover's efforts not only helped to familiarize the mass of Americans with board governance, but democratized and disseminated its use as a mechanism for public and private decision making. Citizens, through chambers of commerce, trade associations, service clubs, charities, and a host of public boards, worked to solve problems in such fundamental areas of public life as city planning, education, public health, and recreation.

THE NEW ERA, THE NEW DEAL, AND THE MODERNIZATION OF GOVERNANCE

Perhaps the most compelling evidence for the impact of New Era social philosophy on governance is the emergence, beginning in the mid-1920s, of focused efforts to educate trustees and to improve board performance. These efforts raised a host of concerns about directors' responsibilities to the public and to stockholders, focusing on such issues as accountability, conflict of interest, fiduciary prudence, and the duty of loyalty.

After the war, the focus of writing about board governance shifted toward concerns about the governance of private social service agencies and libraries — hybrid organizations that, like many of the components of Hoover's "associative state," straddled the public-private boundary.

During the 1930s, dozens of articles appeared, one announcing the formation of an annual conference of college and university trustees. But this increased attention from general interest periodicals barely suggested the virtual explosion of interest in governance in specialized journals, at professional conferences, and within community agencies. In 1936, the New Haven Council of Social Agencies published *The Board Member: A Guide to the Discharging of Administrative Responsibilities for Social Work*. This volume was clearly intended to help train not only local trustees but a national constituency, since the Council worked closely with leading academics in Yale's School of Nursing and the Medical School's Department of Public Health. (The chair of the Council committee that produced the volume was Annie Winslow, the wife of Charles-Edward Amory Winslow, the university's senior professor of public health.) *The Board Member* contained an extensive bibliography, listing more than 70 publications on various aspects of organizational governance, all of them published in the previous six years. A 1938 volume, *Social Agency Boards and How to Make Them Effective*, listed nearly 200 books and articles on board governance — all but a handful published after 1924.

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The major themes of these publications would sound familiar to a board member of the 1990s. In an article in the Survey in May of 1927, Annie Winslow listed "the three outstanding problems which confront the members of a board of management in any field of social activity": "How shall the necessary funds be raised?" (fund-raising); "What kind of a nurse shall the board employ?" (hiring an executive director); "Having raised the funds and chosen the technical expert, what else has the board to do?" (dividing organizational responsibilities between board and staff). Cross-cutting the answers to these questions were themes of effectiveness, efficient use of resources, and accountability.

The board training activities described in the article had a similarly contemporary character. The first institute, which met in New Haven in 1927, attracted 200 participants from 12 states addressed topics such as board-staff relations, board members' responsibilities and function, relationships between social agencies, and board members' education. *The Board Member*, which Annie Winslow took the lead in producing nine years later, further broadened the range of concerns, with chapters on the conduct of meetings, committee structure, the management of professional staff and volunteers, financial management and responsibility, planning, public relations, and collaborative activities.

After 1940, concerns about governance and formal efforts to educate boards broadened to include public and private colleges and universities, boards of education, independent schools, hospitals, and grantmaking foundations. The debate over the role and responsibilities of the boards of business corporations was also rekindled. But despite the increasing inclusiveness of coverage of governance issues, educational efforts also displayed a curious narrowing of focus. Through the 1920s, the primary concern of those writing about — and educating — trustees and directors had been community welfare and the interrelationship of public and private power; after 1930, board literature and education focused increasingly on issues of technique and were framed by concerns about vitality, efficiency, and harmony within particular firms. In the years after World War II, the stewardship dimension of governance was gradually displaced by the perspectives and methods of managerial professionalism.

GOVERNANCE IN THE ERA OF BIG GOVERNMENT

The years following John F. Kennedy's election witnessed an explosion in the number of secular, charitable, tax-exempt organizations. Estimated by the IRS commissioner to number some 50,000 in 1950, by the mid-1960s more than a quarter million were registered with the IRS. By the mid-1980s, the United States was home to more than a million nonprofits.

This extraordinary growth contradicted conventional wisdom about charitable organizations, which had assumed that the growth of government would lead to a diminution of private initiative. Conventional wisdom, as it turned out, had failed to grasp the unique nature of the American welfare state, which, rather than being based on the elaboration of vast central government bureaucracies, operated instead as an allocative mechanism, delegating the implementation of federal programs to states and localities and, through tax incentives that encouraged charitable giving, to private nonprofit organizations. Growing direct subsidies (grants and contracts) and indirect subsidies (tax-exemption and deductibility) of nonprofits increased the need for trained managers, skilled in meeting the complex demands of external funders.

As their numbers increased, so too did regulatory scrutiny. In the early 1950s, Congress began to tighten federal surveillance of foundations. In the 1960s, these concerns broadened to include the rapidly growing universe of charitable, tax-exempt donee organizations. After a series of hearings in 1969, Congress passed a tax reform bill that enacted rigorous registration, reporting, and accountability requirements. With the increasing sophistication and intensity of marketing and soliciting by professionally managed nonprofits, many states increased their regulatory attention to these enterprises. These policies fundamentally altered the character of nonprofits. By the 1980s, traditional nonproprietary organizations supported by donations and governed by volunteers were rapidly being supplanted by professionally staffed "commercial nonprofits," supported by grants, contracts, and earned income and governed by insider boards.

Among the most powerful forces transforming board governance were changes in the fundamental laws that had given American nonprofits their uniqueness as private corporations serving the public interest. The most important of these legal changes was the Model Nonstock Corporation Statute, drafted by the American Bar Association in 1964 (and revised in 1987), an effort to bring the statutory treatment of nonprofits into line with the main body of corporate law. It permitted the establishment of nonprofits for *any* legal purpose — rather than restricting them to the charitable, educational, and religious uses mentioned in the Elizabethan Statute of Charitable Uses and its Americanized equivalents. This statute freed nonprofits to engage in business activities as long as these ultimately served charitable objectives. The 1987 revised statute further defined the nature of nonprofit corporations by setting forth three classifications for nonprofits: public benefit corporations, mutual benefit corporations, and religious corporations. Further, the model statute shifted criteria of prudence from a strict trust standard to a more flexible corporate director standard. Under trust standards, self-dealing and other forms of conflict of interest had been strictly prohibited; under the corporate director standard, such transactions were permissible as long as the board was fully informed and they were not demonstrably contrary to the nonprofit's best interest.

The adoption of the model statute by many states went far toward eliminating the distinctions between for-profit and nonprofit enterprise. Nonprofits could do anything for-profits could do — except distribute their surpluses in the form of dividends. Although private inurement was prohibited, in practice it became virtually impossible — except in instances of outright theft — to prevent it. While boards remained invested with an aura of public-mindedness, the standards by which these could be measured and defined became harder to enforce. The transformation of nonprofit law created an ironic situation in which for-profit corporations — with accountability to stockholders and to customers — were more amenable to standards of ethical conduct than nonprofit corporations.

These trends had profound impacts on governance. As nonprofit organizations proliferated and their purposes expanded beyond traditional charitable, educational, and religious activities, the pool of trustees began to include men and women with no previous board experience and, more often than not, ideas about organizational and community leadership that differed significantly from those of the Protestant elites that had historically dominated nonprofit governance. Increasing dependence on government funding in certain nonprofit industries — and by 1980, more than half the revenues of nonprofits in the human services were directly derived from government — created a demand for board members who could span the boundaries between entrepreneurial organizations and influential constituencies that had come to include government agencies, foundations, corporations, and client groups.

At the same time, increasingly professionalized management downplayed the importance of trusteeship: Schooled in business models of management in which insider boards rubber-stamped the decisions of executives, career-minded administrators were likely to regard independent-minded trustees as obstacles to organizational effectiveness.

The convergence of these forces stimulated a widening perception of a crisis in nonprofit governance, which was greeted first by a trickle and then by a deluge of books and articles on boards and their responsibilities. Not surprisingly, the first scattered efforts centered on governance in higher education and grantmaking institutions. Much of this work was sponsored by trade groups like the Council on Foundations, the Foundation Center (and its predecessor, the Russell Sage Foundation), and the Association of Governing Boards of Universities and Colleges.

The real tidal wave of interest emerged in the early 1980s, when the number of publications about governance surged from two or three a year to dozens. These books and articles appeared in a host of new newsletters that focused on defining the responsibilities of board members, particularly as fund-raisers and representatives of stakeholder groups. The chronology of interest, with 1982 marking the steepest rise in the number of publications, suggested that they represented the response of nonprofits to the major cuts in government spending proposed by Ronald Reagan the previous year. Interestingly, little if any of this work was produced by scholars or by national industry groups, suggesting that the pinch of government austerity was being felt primarily on the local level. Local nonprofit executives were desperately trying to activate their boards but, at the same time, wanted to be sure that boards did not become inappropriately empowered.

By the mid-1980s, concern about board governance had spread to academia and the national trade groups, and the range of issues dealt with began to include such issues as effectiveness, director liability, committee structure, the interpretation of mission, and the division of responsibilities between board and staff. The last of these signaled the eruption of highly publicized conflicts between boards and executive directors in organizations throughout the country and these were followed by a series of notable scandals (Covenant House, the "televangelists," United Way) that called attention to the increasingly problematic nature of nonprofit governance and increasing confusion about the role of nonprofit boards of directors. By the late 1980s, the National Center for Nonprofit Boards was formed in response to the increasing call for governance information.

NONPROFIT GOVERNANCE IN THE POSTLIBERAL ERA

Despite their aggressive rhetoric, Ronald Reagan and George Bush were less responsible for fundamentally altering the relationship of nonprofits and government than generally supposed. More powerful forces were at work, however, which would transform the role of nonprofits and the responsibilities of nonprofit boards almost beyond recognition.

The most important of these involved deinstitutionalization and privatization — the dismantling of state institutions providing care for the disabled. This process had begun in the late 1960s as an effort by liberal social service providers and civil libertarians to guarantee the disabled treatment, minimize restraints on their personal freedoms, and provide for their reintegration into community life. To implement these policies, most states privatized major areas of human services provision, providing community-based treatment and care through contracts with nonprofit service providers. Organizations governed by insider boards built national empires of group homes that wielded enormous political power and accumulated impressive wealth. Under these regimes, advocacy organizations, which once represented clients' and their families' interests, became lobbyists for service providers. By the late 1980s, a number of commentators argued that boards had become largely irrelevant. "Boards are not part of an organization's technical core," wrote scholars Robert Herman and Peter Tulipana. "Rather, the board is a device used by the organization to 'manage' the organization's environment."

Hospital boards suffered a similar marginalization with the transformation of health policy and financing. Alarmed by the skyrocketing costs of providing care for the aged, dependent, and disabled, the federal government, in the early 1980s, began encouraging experiments with alternative forms of health care provision, including managed care under for-profit auspices. Fueled by government funding and contracts with business and insurance companies, health care became an immensely profitable enterprise. Although largely nonprofit at the outset, changes in law and policy that eliminated many of the differences between proprietary and nonproprietary service providers encouraged mergers, takeovers, and conversions of form that, in the past, would have been difficult or impossible.

Encouraged by the prevailing political winds — which stressed the importance of profitability over public service — boards more often than not went along with merger, takeover, and conversion proposals.

Though differing in their origins and motives, both of these revolutions — in human services and in health care — had similar impacts on nonprofit boards. Freed by legal changes of the need to consider community benefit in any broad sense and with minimal formal accountability to beneficiaries, trustees had only to consider the financial prospects of organizations on whose boards they sat. Encouraged by the prevailing political winds — which stressed the importance of profitability over public service — boards more often than not went along with merger, takeover, and conversion proposals. Even when these proposals went against their inclinations, trustees often had little choice about approving them.

Efforts to invoke earlier standards of stewardship fared poorly during the 1980s. Early in the decade, proponents of higher standards of philanthropic intent had challenged the will of oil heiress Beryl Buck, who had left her estate as a charitable trust to the people of Marin County, one of California's wealthiest enclaves. Because of an enormous increase in the value of the estate, the trustee of the fund appealed to the probate court for a *cy pres* ruling to alter Mrs. Buck's instructions, arguing that the public interest required sharing with more needy populations. The effort was unsuccessful. The people of Marin County were determined to keep the fund whether they needed it or not.

In the early 1990s, alumni, faculty, and a number of trustees of Connecticut's University of Bridgeport challenged the takeover of the school by the Professors World Peace Academy, a front for Korean cultist Sun Young Moon. Claiming that it violated the university's charter (which required that it remain a secular institution), devalued their degrees, and ignored the intent of donors, the plaintiffs asked the Connecticut courts to annul the merger. The Connecticut Supreme Court eventually ruled that without opposition from the attorney general on behalf of the public, the plaintiffs lacked standing to question the actions of the university's board.

In the late 1990s, signs of a shift toward the empowerment of stakeholders began to emerge. In 1990, responding to public complaints, Connecticut's attorney general demanded that the state's 42 hospitals account for the estimated $50 million in "free bed trust funds" donated over the previous century and a half. The investigation showed that most institutions, confident of their immunity from suit, had seldom devoted these funds to the purposes intended by donors. Early in 1997, the Regents of the University of the State of New York, a body with uniquely broad supervisory powers over the Empire State's nonprofit institutions, after a sweeping investigation, ousted the board and executives of Adelphi University in response to complaints that they had violated their responsibilities as trustees. In May 1997, responding to charges that funds given for maintenance of Yale's Divinity School had been misapplied, Connecticut's attorney general, ignoring the argument that as a public corporation Yale was immune to suits by beneficiary groups, granted students, alumni, and donor representatives legal standing to pursue a class action suit. As the second known instance of stakeholders receiving such standing — and the first to involve an institution of national eminence — the outcome of this suit may revolutionize American charities law by making trustees directly accountable to the public.

TRUSTEESHIP IN THE NEW POLITY

The growth of the nonprofit sector since the mid-nineteenth century has been based to a large degree on an implicit division of responsibility between government and private providers in which the state took care of the incorrigible, incurable, and ineducable and private organizations saw to the needs of the less disabled and dependent. By the 1960s, the expansion of government responsibility had reached the point that many influential public figures wondered whether the privileges accorded charitable donors and the exempt organizations they supported could be justified to an increasingly tax-sensitive public. Under the circumstances, it is not surprising that much of the attention to governance was framed by efforts to make nonprofits more democratic by stressing concerns about responsiveness, diversity, access, and public reporting. To be sure, there were major differences of opinion about how these ends should be accomplished, with foundations and other donors favoring self-regulation and donees recommending legal and regulatory changes to ensure that democratization went beyond rhetoric.

The great irony of these efforts was their failure to grasp the full range of forces that were transforming the nonprofit universe. Even when researchers like Henry Hansmann, Burton Weisbrod, and Ralph Kramer sounded alarms about the emergence of fundamental changes in the sector due to reforms in corporation law and the privatization of human services provision, they were attacked or ignored. Their work was often used to characterize nonprofits as voluntary and donative and hence capable of effective self-regulation.

Under the circumstances, it was hardly surprising that virtually all of the literature on boards produced after 1970 treated governance generically, was prescriptive, and was directed at an audience of executives and board members who were eager to make their boards more efficient and effective.

By the late 1980s, the transformation of the voluntary sector into a kind of "shadow state" — either heavily funded by government, devoted to advocacy efforts directed at government, or both — had become impossible to ignore. And, as the provision of essential services became more privatized and more Americans depended on nonprofits, the problematic accountability of nonprofits and the gap between the rhetoric and reality of governance has become more glaringly evident.

If philanthropic leaders and industry associations have been slow to face these problems, the electorate and its representatives have not. Some states, notably Pennsylvania, have taken cognizance of the extent to which entrepreneurial nonprofits enjoying exemption from local property taxes were not providing community benefits commensurate with the subsidies they enjoyed and have empowered counties and municipalities to impose "charitableness tests." While not directly involving boards, these efforts may reawaken nonprofit directors to their roles as trustees for the public. Other states, like New York, by rediscovering long-ignored regulatory powers and by taking action against the boards of organizations like the New-York Historical Society and Adelphi University, may similarly dispel the contemporary illusion that the responsibilities of nonprofit directors are limited to promoting the corporate interest, narrowly construed. Also, Congress has seriously debated further limitations on the advocacy and lobbying activities of exempt organizations (notably the Istook Amendment).

Can the "privateness" of nonprofits be credibly sustained in the face of their growing dependence on direct and indirect subsidies by government — and in the absence of effective and enforceable mechanisms of accountability? For all the ink expended on the issue of organizational mission as a form of public trust, the reality is that the legal "reforms" of the 1970s made nonprofit assets as fungible as those of for-profit corporations — and rendered the efforts to constrain the activities of trustees in terms of mission largely an enterprise in empty moralizing. Despite the decision in the Buck Trust case, the salience of donor intent — a matter largely of concern only to endowed organizations — is elusive, at best. Since historically neither donors, their descendants, nor potential beneficiaries have legal standing to challenge the use of charitable funds — and attorneys general have been less than willing to take positions on these questions — "mission" has become a less-than- meaningful constraint on the actions of trustees. The efforts of localities to ensure that tax-exempt organizations produce social benefits, though a potentially important way of imposing accountability of a sort, may require nonprofits and their boards to act in ways that run quite contrary to the intentions of donors.

Of all those writing on nonprofits over the past half-century, only one commentator — Alan Pifer —has been willing to argue boldly and unashamedly that nonprofits are, more than anything else, *private* institutions, for which boards of trustees are alone legally responsible. Pifer declared, "Nonprofits offer a special opportunity . . . for concerned citizens . . . to accept a significant measure of personal responsibility for the provision to the public of many kinds of essential services. Acceptance of this kind of responsibility enables lay men and women to become informed about pressing national problems."

Pifer acknowledged the role of nonprofits in safeguarding academic, professional, and artistic freedom and asserted that "if they ceased to function as a private responsibility there is no guarantee that the same kinds and quality of service they now provide could or would be provided at public expense." Finally, Pifer argued that these entities brought "to our national life vital elements of diversity, free choice, and heterodoxy."

It has become increasingly obvious that vision, mission, and moral commitment are not in any sense the exclusive preserve of private nonprofit enterprise.

Keeping in mind that Pifer's primary interest was preserving not the institutional *status quo* but a free society, this vantage points toward some potentially radical solutions to the dilemmas facing boards.

First, it may be that the "special opportunity" of board service should be seen *not* as a chance to serve the public good or provide for the needy as others (government, beneficiaries, clients) might define those goods or those needs, but the chance to devote time and resources to the service of an individual or shared vision of what those goods or needs might be. Such opportunities to engage the broadest questions of the commonwealth and to participate in the process of defining such questions and their possible solutions are not amenable to regulatory and legal "reforms," managerial modeling, or interventions in group process. They invite — but do not require — citizens to conceive of organizational leadership as part of a larger process of community leadership.

Second, because Pifer was writing in 1970, well before anyone was aware of the extent to which nonprofits had become dependent on government largesse, he was able to argue that private institutions, because they "are not directly dependent on public appropriations," are "less immediately vulnerable to restrictions on their capacity to function effectively" in defense of these freedoms. Implicit in his argument is the notion — to quote Thomas Jefferson — that "dependency begets subservience and venality, suffocates the germ of virtue, and prepares fit tools for the design of ambition" — and that organizations dependent on government are less than likely to function effectively as vehicles for the expression of fundamental rights.

For Pifer, as for most of us at the time, the commitment to the "vital elements of diversity, free choice, and heterodoxy" in society meant something very different than it does now. In 1970, "diversity" for most Americans certainly did *not* mean broad inclusion of racial, ethnic, and gender minorities; "free choice" did *not* include the freedom to behave irrationally; and "heterodoxy" meant a relatively narrow range of beliefs. Viewed as an historical product, Pifer's version of the liberal state was notable — and praiseworthy — for its capacity to dominate public and private enterprise in ways that segmented markets and established domains of public life framed by the authority of educated expertise. Educated elites created a variety of informal mechanisms for giving a public character to the activities of private nonprofit institutions. And when those elites collapsed, the capacity of nonprofit organizations to sustain the crucial linkage between private initiatives and the public good also vanished.

None of this should be taken to suggest that the goals of a free society are unattainable or that trusteeship is a not centrally important instrument for realizing its highest purposes. It does suggest, however, the need to draw clear distinctions between the range of possible ways of maintaining capacities for diversity, free choice, and heterodoxy and the notion of nonprofit organizations as they have come to exist as the best or only way of doing so.

As we have come to comprehend corporate organizations and public agencies over the past quarter-century, it has become increasingly obvious that vision, mission, and moral commitment are not in any sense the exclusive preserve of private nonprofit enterprise. Values and convictions — a sense of stewardship — can be central to any and all organizations. The discovery of this important truth —perhaps articulated most clearly in the work of Robert Greenleaf — has incalculably important implications for governing boards.

After a successful business career (as a top executive at AT&T) and active citizenship (as a trustee of a variety of nonprofits), Greenleaf came to understand that the crucial difference between good and bad leadership lay not in the setting in which it was exercised, but in the moral imagination, individual and collective, of those occupying leadership positions. His conceptions of "servant leadership" resonate most powerfully for those entrusted with governance responsibilities — for governing boards, perhaps more than any other component of organizational life, bear particular responsibilities for mediating between the internal culture of collective actors and their external environments. As such, they have the capacity not merely to respond and react to trends and forces in public life, but to shape and enact those forces. As Greenleaf suggests, doing this effectively requires unusual abilities to listen, learn, reflect, and converse, and to create new ways of feeling, valuing, and acting.

There is nothing soft or weak about this process, as the experiences of Greenleaf and his colleagues at AT&T well knew. AT&T's extraordinary financial success was due to its understanding that it provides far more than telephone service: It was "a public trust" whose obligation not only involved providing adequate service, but also agent of a more fundamental process of transforming society through providing access to a technologies that, in effect, abolished time and distance.

It is no coincidence that the executives who promoted these reflective and expressive dimensions of corporate culture were part of a cutting-edge generation of professional managers who had been extensively involved in progressive social reform before entering business careers. Louis Brandeis suggested that the successful conduct of business would require not only technological prowess, but knowledge of management that focused on the relations of labor and capital, the intertwining of social and industrial problems, and a grasp of state and federal regulation of business.

Under the circumstances, it is not surprising that the leaders of firms like AT&T not only led their companies to extraordinary and enduring preeminence, but nurtured successors like Chester Barnard (who is credited as the father of modern management theory) and Robert Greenleaf.

CONCLUSION: WHY *DO* BOARDS EXIST?

If once we lived in a society of communities, today we live in a society of formal organizations, public and private, almost all of which are governed by citizen boards — from the Security Council of the United Nations and the Cabinet of the President of the United States through the vestries of churches, historic district commissions, and boards of neighborhood associations.

Ethicist David H. Smith, writing on trusteeship, describes such "entrusted" organizations as being "nested in the larger moral matrix of their society" and devotes particular attention to the role of boards as articulators of institutional values. Greenleaf would suggest that this statement expresses more than a reactive posture. Boards are far more than the sum of the individual values and viewpoints of their members; they are arenas in which individual members work actively toward mutually acceptable decisions and outcomes. But board decision making involves more than the affairs of the particular organizations the boards govern: both draw on and contribute to the sum of public values and actions. Trustees are "boundary-spanners" for whom board service joins private and public values — as the work of the best organizational scholars suggests, they exercise unique dual roles as managers of the internal cultures and the external environments of the entities they serve and, as such, are strategically situated to have a broadly powerful transformative influence on the world of which they are a part.

In a very real sense, then, boards exist — at least for now — to serve as the binding which holds together the "sticks" — political, economic, cultural, public, and private — that comprise public life.

Suggested Resources

Ben-Ner, A. "Who Benefits from the Nonprofit Sector? Reforming Law and Policy Toward Nonprofit Organizations." *Yale Law Journal* 104, 1994, pp. 731-62.

Ben-Ner, A. Law and Public Policy." *Nonprofit Management & Leadership Vol. 4, No. 4, 1994, pp. 393-414.*

Bograd, H. "The Role of State Attorneys General in Relation to Troubled Nonprofits." *PONPO Working Paper #206.* New Haven: Program on Non-Profit Organizations, Yale University, 1994.

Bowen, W.G. *Inside the Boardroom: Governance by Directors and Trustees.* New York: John Wiley & Sons, 1994.

Brody, E. "Agents without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms." *New York Law School Law Review 40*, 1996a, pp. 457-536.

Brody, E. "Institutional Dissonance in the Nonprofit Sector." *Villanova Law Review 41*, 1996b, pp. 433-504.

Carver, J. *Boards That Make a Difference: A New Design for Leadership in Nonprofit Organizations.* San Francisco: Jossey-Bass Publishers, 1990.

Chait, R.P., Holland, T.P., and Taylor, B.E. *The Effective Board of Trustees.* New York: MacMillan Publishing Company, 1991.

Chisolm, L. "Accountability of Nonprofit Organizations and Those Who Control Them: The Legal Framework." *Nonprofit Management & Leadership* Vol. 6, No. 2, 1995, pp. 141-56.

Fraker, A.T., and Spears, L.C. (eds.). *Seeker and Servant: Reflections on Religious Leadership.* San Francisco: Jossey-Bass Publishers, 1996.

Frick, D.M., and Spears, L.C. (eds.). *On Becoming a Servant-Leader.* San Francisco: Jossey-Bass Publishers, 1996.

Greenleaf, R. *Servant Leadership: A Journey into the Nature of Legitimate Power and Greatness.* New York: Paulist Press, 1977.

Hansmann, H. "Economic Theories of Nonprofit Organization." In W.W. Powell (ed.), *The Nonprofit Sector: A Research Handbook*. New Haven: Yale University Press, 1987, pp. 27-42.

Middleton, M. "The Place and Power of Non-Profit Boards of Trustees." *PONPO Working Paper #78.* New Haven: Program on Non-Profit Organizations, Yale University, 1983.

Middleton, M. "Nonprofit Boards of Directors: Beyond the Governance Function." In W.W. Powell (ed.), *The Nonprofit Sector: A Research Handbook.* New Haven: Yale University Press, 1987, pp. 141-153.

Nason, J.W. *The Nature of Trusteeship: The Role and Responsibilities of College and University Boards.* Washington, DC: Association of Governing Boards of Colleges and Universities, 1982.

O'Connell, Brian. *The Board Member's Book*. New York: Council on Foundations, 1985.

Oleck, H. *Nonprofit Corporations, Organizations, and Associations*. Sixth Edition. Englewood Cliffs: Prentice Hall, 1988.

Oleck, H. and *Stewart, M. Nonprofit Corporations, Organizations, and Associations.* Sixth Edition. Englewood Cliffs: Prentice Hall, 1994.

Salamon, L.M., and Abramson, A. *The Federal Budget and the Nonprofit Sector*. Washington, DC: Urban Institute Press, 1982.

Salamon, L.M. "Partners in Public Service." In W.W. Powell (ed.), *The Nonprofit Sector: A Research Handbook.* New Haven: Yale University Press, 1987, pp. 99-117.

Salamon, L.M. *Partners in Public Service: Government-Nonprofit Relations in the Modern Welfare State.* Baltimore: The Johns Hopkins University Press, 1996.

Smith, D.H. *Entrusted: The Moral Responsibilities of Trusteeship*. Bloomington: Indiana University Press, 1995.

Stone, M.M. "Competing Contexts: The Evolution of an Organizational Governance Structure in Competing Environments." *PONPO Working Paper #185*. New Haven: Program on Non-Profit Organizations, Yale University, 1993.

Wood, M.M. "The Governing Board's Existential Quandary." *PONPO Working Paper #143.* New Haven: Program on Non-Profit Organizations, Yale University, 1989.

Wood, M.M. (ed.). *Nonprofit Boards and Leadership: Cases on Governance, Change, and Board-Staff Dynamics.* San Francisco: Jossey-Bass Publishers, 1995.

Young, D.R., Hollister, R.M., Hodgkinson, V.A., and Associates. *Governing, Leading, and Managing Nonprofit Organizations.* San Francisco: Jossey-Bass Publishers, 1993.

Young, D.R. (ed.). "Dilemmas of Nonprofit Accountability: Special Issue." *Nonprofit Management & Leadership* Vol. 6, No. 2, 1995.