

Dartmouth College, the Battle Over Parity & the Legal Notion of Fiduciary Duty

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Dartmouth College, one of the nation’s oldest institutions of higher learning and the preserve of one of our premiere undergraduate programs, has in the past five years seen something quite like a revolution.

At Dartmouth, the Board of Trustees’ September 2007 decision to dilute significantly the representation of alumni-elected trustees—eliminating distributed democratic governance structures that were carefully maintained for over a century—has sparked a nationally-covered imbroglio. The issue of whether to hear litigation on these changes is now before the Grafton Country Superior Court.

But to understand what’s at stake in the current case, one must consider the context. These events, at first glance, may appear to be one elite college’s internal governance dispute. But what happens in Hanover both indicates and influences current trends in academic board oversight—a realm undergoing significant rethinking in light of the ongoing economic downturn. And with the ongoing governance revolution, the eyes of higher education are looking on. Dartmouth, to be sure, is far from the only place where fealty to organizational leaders—and the notion of “going along in order to get along”—has been placed before true fiduciary duty.

First, some necessary background on Dartmouth’s governance. The Board is composed of “Alumni Trustees” and “Charter Trustees.” While these two classes of Trustees are equal in power, they attain their positions by different methods. Alumni Trustees are nominated through annual elections in which all of Dartmouth’s 69,000 living alumni have the opportunity to vote. Charter Trustees, on the other hand, are appointed by the Board. Additionally, the College president and the governor of New Hampshire serve *ex officio* on the Board.

Board “parity”—that is, a Board composed of an equal number of Alumni Trustees and Charter Trustees—was the result of a landmark compromise in 1891 between the Association of Alumni, acting on behalf of all Dartmouth degree-holders, and the College administration. Boiled down to its essentials, the administration needed resources to expand Dartmouth’s ambitions, and it asked alumni to provide financial support. Alumni, in turn, requested a meaningful voice in the College’s direction. Both sides compromised in what has become known as the 1891 Agreement: Dartmouth would be led by a Board with half elected and half appointed trustees, not including *ex officio* members. Since then, the College has prospered. (Background on the 1891 Agreement—important to the current alumni litigation, but not the focus of this paper—can be found [here](#).)

This agreement, explicitly honored through two previous Board expansions,¹ effectively ended in 2007, when the Board voted to increase its size from 16 to 24 members. Eight additional seats, it was decided, would be filled entirely by board-selected, self-perpetuating Charter Trustees; no new Alumni Trustee seats would be added. Thus, Charter Trustees, close to the administration by virtue of their appointment, had been granted a two-thirds majority of decision-making power at the College.

A close examination of the chronology shows the unmistakable aim of these reforms: the entrenched authority at Dartmouth has been trying to rid the Board of those who ask probing questions and who do not reflexively accept the administration's word as final. In short, the current contretemps boil down to how one defines a trustee's fiduciary duty.

The Petition Trustee Moment in Hanover

In annual trustee elections, the Dartmouth [Alumni Council](#)² has traditionally nominated two to three Alumni Trustee candidates for whom alumni can vote. Those not nominated by the Council have the option of obtaining 500 signatures to appear on the ballot; these Trustee hopefuls are known as "petition candidates." Dartmouth is one of the few colleges in the nation that provide this petition route.³

This strong democratic tradition has been reinvigorated in recent years. In 2004, T.J. Rodgers, CEO of a Silicon Valley semiconductor company, became the [first successful petition candidate](#) to win a seat on Dartmouth's Board since 1980. In 2005, two more Petition Trustees—Peter Robinson, a Hoover Institution Research Fellow at Stanford University, and Todd Zywicki, Professor at the George Mason School of Law—were [victorious](#). In 2007, Stephen Smith, Professor at the University of Virginia School of Law, and now the Notre Dame University School of Law, became the [fourth Petition Trustee](#) elected in as many years. Echoing the sentiments of his Petition Trustee colleagues, Zywicki [described](#) his victory as "an alumni response to an administration that has been increasingly making questionable decisions."

Expressing perceived shortcomings of the Dartmouth administration—unquestionably a reason why these petition candidates were elected—created some tension when the Petition Trustees assumed seats on the Board. Those loyal to then-President James Wright saw the willingness to speak out as a violation of a Dartmouth Trustee's duty; the Petition Trustees viewed—and continue to view—this critical analysis as fulfilling, rather than betraying, their fiduciary responsibilities to the College.

Traditionally, fiduciary duty has been understood as having two components: the duty of loyalty and the duty of care. The [duty of loyalty](#) requires a fiduciary to act in a manner he or she reasonably believes to be in the best interests of the organization. The [duty of care](#) obliges directors to inform themselves of reasonably available information prior to making a business decision.⁴ More recently, courts have considered the [duty to act in good faith](#) as a fiduciary requirement. This component, similar to the duty of care, is satisfied when a director makes informed decisions without conflicts of interest.⁵

The question central to the dispute regarding Dartmouth governance is to *what* or to *whom* do fiduciaries owe their duty. Corporate directors have a relatively straightforward task of serving the corporation and its shareholders. In the case of a charitable trust, however, which generally does not have “ascertainable beneficiaries who can enforce their rights,” the duty of fiduciaries is instead directed toward fulfilling or furthering the organization’s mission.⁶

As recent events at Dartmouth have shown, there is a considerable degree of subjective interpretation of how one can best serve an institution. And, to be sure, a “one size fits all” model does not apply to academic governance. Yet Dartmouth alumni provided an unmistakable electoral mandate—four consecutive alumni elections resulted in four “outsider” petition candidate victories. To the College’s benefit, democratic means allowed alumni to express their desire for change.

Reinvigorating Dartmouth’s undergraduate academic focus, leaning an administrative bureaucracy, and recognizing of the importance of a “free marketplace of ideas,” have been central to Petition Trustees’ Board tenure.

When Rodgers was elected to the Board in 2004, removing the College’s [speech code](#) became a major priority. In May 2005, with Zywicki and Robinson advocating against the speech code on their petition candidate platforms, the College formally rescinded its controversial policies. (Or, as Dartmouth General Counsel Robert Donin wrote in a [letter](#) to the Foundation for Individual Rights in Education (“FIRE”), the College “end[ed] confusion;” first by simply causing the speech code’s supporting document to vanish from the College’s website, and only after a subsequent outcry by making affirmative declarations in favor of freedom of speech.)

Shortly thereafter, FIRE moved Dartmouth from its lowest rating to its highest rating on its free speech/academic freedom ranking scale. FIRE president David French [wrote](#) that the “speech code fell not as a result of a court order but because individuals inside and outside the college (including trustee candidates Peter Robinson and Todd Zywicki) understood that the speech code was fundamentally incompatible with the marketplace of ideas and with any reasonable conception of an effective liberal arts education.”

Petition Trustees, three of whom came from academic backgrounds, also made clear their priority to improve undergraduate education. Specifically, they pushed to increase economics and government faculty to be proportionate with the growing number of students in the programs. The problem, Petition Trustees said, was not just as one of student-faculty ratio; it was fundamental to the school’s *raison d’être*.

At the time, there had been much discussion about Dartmouth moving in the direction of a university, dedicating resources to areas such as research. But Petition Trustees’ reinvigorated academic focus reminded fellow trustees that, as Dartmouth *College*, they had an obligation to serve the [school’s mission](#) of “providing the best undergraduate liberal arts experience.”

Improving undergraduate education became part of the platforms of [subsequent petition candidates](#)—much to the chagrin of the administration, who preferred to keep the problem quiet and narrowly in-house. In the first Board meeting following Zywicki’s election, as he had promised alumni, he advocated for the creation of a Standing Committee on Academic Excellence and Mission. The oral essay was rebuffed. A January 6, 2007 written memorandum to the Board stressed, again, that trustees must “develop the expertise to effectively exercise the board’s oversight responsibilities on Dartmouth’s ‘core’ business”⁷ of undergraduate education, and that the proposed Committee was the way to do it.

The persistent academic focus paid off. Student complaints of “[chronically overenrolled](#)” departments, given support from College directors, were addressed by [administrative action](#). Furthermore, in September 2007, the Board [created](#) a standing committee on academic affairs. Oversubscribed departments were bolstered and communication between college leaders and faculty improved to the College’s indisputable benefit. The 2010 *U.S. News and World Report* ranked Dartmouth [number one](#) in Undergraduate Teaching, above competitors Princeton, Yale, and Stanford.

Other efforts by Petition Trustees were more controversial in the boardroom. Attempts to reign in what some directors viewed as overspending were greeted with reservation and, at times, outright hostility. (Board confidentiality provisions restrict what can be disclosed with regard to financial discussions.) But Petition Trustees, despite the apparent unpopularity of their message, continued to exercise their fiduciary duty to oversee the College’s ledger.

Perhaps it is understandable that personal relationships could strain in the crucible of Board debate. But to view these scrutinizing efforts as anything but beneficial to the College is simply wrong. Indeed, the *Guidebook for New Hampshire Nonprofit Organizations* (PDF) explicitly states that “[i]t is the job of the governing board to oversee the work of the executive director...and to see that the charity is faithfully carrying out its charitable purpose without extravagance or waste.”⁸

The lure of social cohesion—even at the expense of critical oversight—is widely known. “Once inducted into the most prestigious ‘club,’ it inhibits asking the nasty questions” because ‘you want to stay a member,’” Michael Blumenthal, former United States Secretary of the Treasury, said of his time spent on overseeing boards.⁹

This is not to say that making friends on the board does not contribute to effective board governance. Personal relationships can often influence directors to devote more time and attention to the organization. It is important, however, for board members to acknowledge the “inescapable tension” in “maintaining an appropriate distance between board members and the CEO and maintaining trust and collegiality,” so that they may identify a balance, wrote [William G. Bowen](#), a preeminent scholar on university governance who has served on the boards of six nonprofit institutions.¹⁰

José A. Cabranes, a sitting federal judge, former Yale University General Counsel, and three-decade university trustee (Fordham University (1974-77), Colgate University (1987-90), Yale University (1987-99), and Columbia University (2000-present)), also has considerable first-hand knowledge of

governance in higher education. In a 2007 *Fordham Law Review* article (PDF), Judge Cabranes noted that trustees, especially business executives, tend to act toward university presidents as they wish *their* boards would act toward them—deferentially. And the phenomenon of board members believing they serve at the pleasure of the executive is what one nonprofit attorney and blogger, has termed “[upside down board](#).” The ascendance of the [hedge-fund community](#), a peculiar province of graduates of elite institutions, has contributed to the prevalence of the upside down board; Board members frequently are not only major donors, but count their *alma maters* as major clients.

Evelyn Brody, a nonprofit specialist and professor at the Chicago-Kent College of Law, examined the fiduciary duty of loyalty as having two distinct aspects: independence and financial disinterest. Brody described “internal independence” as a “separation between oversight and management,” in a 2005 *Chicago-Kent Law Review* article (PDF). For colleges and universities, trustees with close ties—whether personal or financial—to those tasked with administrative functions represent a potential impairment of the proper exercise of fiduciary duty.

The Perfidious Trustee Charge

As the above examples illustrate, Petition Trustees’ interpretation of their fiduciary obligations were often at odds with those of other Dartmouth Board members. As such, the motivation of the Board majority to alter the governing structure needs to be reconsidered. Take, for example, the attempt to enact a *Statement on Governance and Trustee Responsibilities*, an emendation to what is commonly referred to as the “Trustee Charge.” Following the successful petition candidacies of Rodgers, Zywicki, and Robinson (and with the eventually successful Smith petition candidacy underway), the Board circulated a revised draft of the 50-year-old Trustee Charge in February 2007.

Stressing that “knowledgeable advisers on best practices for nonprofit organizations on governance” had been consulted in the formulation of this revised Trustee Charge, the Board laid out new obligations in this draft version. Among the fiduciary responsibilities was a requirement to “[e]xercise *substantial self-restraint* from taking a *public* position on issues prior to Board opportunity for deliberation or action.” [Emphasis added]

Petition Trustees recognized that these revisions had the potential to render the Board a rubber-stamp for administrative decisions, and they noted that, following three successful petition candidacies, the timing of these revisions was dubious.

The resistance and words of caution from Petition Trustees had some effect. In the final version, adopted in June 2007, two passages to which Petition Trustees objected were removed (the requirements to “[e]xercise substantial self-restraint from taking a public position on issues prior to Board opportunity for deliberation or action” and to “[p]ublicly support Board decisions”). Yet, for Petition Trustees, some troubling language remained, such as the provision to “[r]epresent Dartmouth positively in words and deeds”—surely a worthy end but a command ripe for censorial abuse. A single

Trustee vigilantly performing his oversight duty could find himself in violation of his Board’s bylaws for doing so.

The Constitutional Putsch

In May 2006, the Alumni Governance Task Force (“AGTF”), commissioned by the Alumni Council to examine the College’s governance structure, proposed sweeping changes. In its proposition, the AGTF aimed to consolidate the Alumni Council and the Association of Alumni under a single constitution, require petition candidates to [disclose their candidacies](#) *before* the Nominating Committee announced its selections, and dispose of the approval voting mechanism that had been in place since 1990. (Approval voting, ironically, was instituted as a reaction to the previous successful petition trustee candidacy—that of Dr. John Steel, who left the Board in 1990.¹¹)

These significant changes required a referendum vote for alumni to enact what was in essence a new constitution for the Association of Alumni. Pursuant to the 1891 Agreement, the Association is charged with administering the balloting—even though the vote itself is an individual right. Yet the AGTF’s proposed alterations represented major alterations to this long-standing agreement between the administration and alumni.

Roland Adams, College spokesperson, told *The Dartmouth* that the administration was committed to remain “uninvolved” in the discussion of the new constitution.

In an [August 23, 2006 letter](#), the American Council of Trustees and Alumni (ACTA) discussed two mass e-mails encouraging a “yes” vote on the constitutional referendum that were sent to alumni using official Dartmouth e-mail servers. And, as noted in ACTA’s September 25, 2006 [statement](#), then-Dartmouth President Wright violated the neutrality pledge when he voted—in his capacity as a Dartmouth trustee—to recommend that alumni vote “yes” on the proposed constitution.

Despite this lobbying campaign, alumni voted in record numbers, breaking all previous turnout rates, to oppose the proposed constitutional adjustments. To pass, the referendum needed to be approved by two-thirds of voting alumni.¹² As it turned out, 51.4% voted “no.” The proposed constitution was soundly rejected. In his [address to the Alumni Council](#) on December 1, 2006, Wright stated:

Following a vigorous campaign on all sides and a historic level of participation, alumni did not give it [the proposed changes] a majority, much less the two-thirds support it required. Basically, we split down the middle. It is my view that this signals that it is time to give efforts at alumni governance reorganization a rest. Let us work with the existing structure.

As even Wright recognized, the alumni clearly voiced—through a free and open democratic process—the importance of having input on Dartmouth’s governance. Wright also promised at least one major giving family—which in spite of its considerable capacity to give fully endorsed the equitably granted right to vote for half of the Board—that efforts to rig the system would be put to rest.¹³

Nonetheless, the goose that laid the golden egg—the long-standing practice of Board parity that accounted for such intense alumni loyalty—was targeted for extinction. The demise of parity was to be accomplished, it turned out, by democratic means if the alumni could be persuaded to vote against their and the College’s best interests, but by undemocratic processes if necessary. Or, as Zywicki stated in his October 27, 2007 address to the John William Pope Center for Higher Education Policy in Raleigh, N.C.: “[B]asically they couldn’t win at the ballot box...so they got rid of the ballot box.”

Discomfiting Democratic Governance by Other Means

Four days after Petition Trustee Smith was elected to the Board—the fourth victory of a petition candidate in as many years—the Governance Committee undertook a “review” of the Board’s structure, methods, and procedures. The review had never been authorized by the full Board, and the study was conducted in secret by the Governance Committee, on which President Wright served, and on which no petition candidate has ever been a member.

News of the “review” emerged only when then-chairman of the Board and then-chairman of the Governance Committee William Neukom mentioned the study during a meeting with the Alumni Council, an organization created under the broader Association of Alumni. Several alumni present at that meeting later emailed the four Petition Trustees and other key alumni, bringing the Petition Trustees the first news they’d heard of the Governance Committee’s reactionary move.

As news of the Governance Committee’s review spread, the Association of Alumni informed the Board of its objection to any change in the 1891 Agreement. After consulting Board Chair Ed Haldeman and President Wright, the administration promptly [defunded the Association of Alumni](#). In addition, the administration prohibited the Association of Alumni from using the College’s alumni mailing list to inform fellow alumni.

Perturbed by the administration’s forceful maneuvering, all four Petition Trustees addressed the alumni in an [August 6, 2007 letter](#). “What the administration has not been able to win by election, it appears now willing to take by fiat, declaring that the 1891 Agreement between the College and its alumni *never really existed*.” [Emphasis in original]

According to both the Governance Committee and the Association of Alumni, the overwhelming majority of the hundreds of alumni letters to the administration favored the preservation of the 1891 Agreement. Ignoring an Association of Alumni poll that found 92% of alumni for, and only 8% against parity, the administration continued its push. In September 2007, the Governance Committee presented its study titled, oddly, *Governance Recommendations to Maintain The College’s Preeminent Role in Higher Education*, proposing to expand the Board from 18 to 26 members, exclusively through appointed trustees, and to overhaul the process by which alumni trustees—now contemplated to be a permanent minority—were elected.

On September 8, 2007, a Board majority voted to accept the Governance Committee’s advice and destroy the parity that had balanced Alumni Trustees with Charter Trustees for 116 years. Chairman Haldeman issued a public statement on Dartmouth’s website, stating that the adjustments would “preserve alumni democracy at Dartmouth by keeping eight alumni trustees,” and simply “adding alumni [as Charter Trustees only] to meet the needs of the College.”¹⁴

The outside world took note: On September 11, 2007, *The Wall Street Journal* editorialized, in “[Dartmouth Diminished](#), that “the independent trustees were willing to dissent from the insular uniformity of modern higher education, so they had to be neutered before they might actually make a difference.”

Additionally, the Board rescinded the constitutional right of the Association of Alumni to conduct trustee elections if the Association failed to comply with forthcoming Board directives on how balloting ought to run. Failure to obey would cause the balloting to be transferred to the Dartmouth Office of Alumni Relations, an administrative body which had long served as the principal political operator injecting administrative druthers into the democratic alumni trustee process.

The Association of Alumni executive committee responded with a legal complaint in October 2007 that sought to block the Board’s action. The Trustees countered with a Motion to Dismiss the lawsuit, arguing that the 1891 Agreement did not constitute a legally binding contract. On February 1, 2008, Justice Timothy J. Vaughan of the Grafton County Superior Court [denied the Trustees’ Motion to Dismiss](#) (PDF). In his written opinion, Vaughan wrote that the Association had provided “sufficient evidence” to show that a contract existed, in which the Association members (alumni) agreed to contribute funds to the College and in return received Board representation.

In this case, the clearest objective evidence of the parties’ intent is their course of conduct for the 116 years since the Agreement: the Board has continued to consist of one half Alumni Trustees, and one half Charter Trustees. On both occasions of expansion, the number of Alumni Trustees increased accordingly in order to maintain the same ratio.

The parties thus [prepared for trial](#). Before the trial began, however, there was an annual election for the Association of Alumni Executive Committee. The stakes of the election, in light of the pending litigation, [were elevated](#). It was clear that the winner of the election would determine the fate of the lawsuit by becoming the plaintiff therein. The College administration began pouring resources into the election. If it could become the plaintiff against itself, it could attempt to vitiate any legal opposition to its own oversight, destroying the 1891 Agreement with its alumni—its students, its fundraisers, its core constituency—from the inside.

On March 17, 2008 the Office of Alumni Relations announced two slates of eleven candidates—the “unity slate” selected by the Nominating Committee and the “parity slate” formed by petition. The so-called “unity slate” ran on a platform that countered the “[destructive forces](#)” that threatened the College—namely, the Alumni Association’s then-pending suit to preserve the long-standing balance

between alumni and charter trustees. Meanwhile, the “parity slate” defended the 1891 Agreement and aimed to preserve parity through the pending lawsuit. Parity slate leaders acknowledged that the lawsuit was a last resort, but felt that Dartmouth’s best interests were served by preserving the distinctive element of alumni input. The “unity slate,” led by John Mathias, a Chicago lawyer, took no public position either for or against parity, and took steps to cause pro-parity alumni, which constitute the wide majority, to believe that his slate would negotiate to achieve parity.

Similar language marked an April 28, 2008 mailing to all Dartmouth alumni, signed by a majority of the Board¹⁵, that characterized the Petition Trustees’ “political agenda” as the “heart of their opposition to the expansion of the College’s Board of Trustees.” Nowhere in the mailing did it mention parity, only briefly touching upon “additional skills and talent” that eight new Charter Trustees would bring. It ruthlessly—and personally—targeted the opposition: “They have lost sight of Dartmouth’s purpose. The College exists to provide a superb education to its students, not to advance the personal politics of its alumni,” the Board majority wrote. Nowhere did the Board majority’s letter actually point to what agenda the petitioners or the parity slate could possibly possess other than the restoration of a democratic governance mechanism.

Alumni, apparently persuaded by the fiery rhetoric and mass campaigning on behalf of the “unity slate”—communications sent via the College’s official global mailing list and denied to alumni holding opposing passions—elected the “unity slate” candidates to the Association of Alumni Executive Committee in June 2008. And, in a June 10, 2008 conference call, the newly appointed committee voted to grant Mathias the authority to “to take any and all actions necessary to obtain the prompt dismissal of the lawsuit.”

The lawsuit was then voluntarily dismissed by the Association “with prejudice.” This docket marking meant that the Association essentially waived—or sought to waive, now and into the future—the right to re-open the legal issue of whether the 1891 Agreement was a contract. This meant that, even though no trial had been held on the central question of whether the Board-packing plan to destroy parity was or was not lawful, the Association was seeking to deprive Dartmouth’s alumni from ever raising the issue again. Despite the momentous importance of the “with prejudice” marking, there was no reference in this important meeting to that docket marking, according to the [meeting minutes](#). Dartmouth College and its students and alumni were thus deprived of a contractual right, now and forever, by means of a stealth maneuver.

Due to the overwhelming controversy, the Board [postponed](#) its mission to select eight additional Charter Trustees. Instead, five new trustees were appointed in September 2008, officially ending 116 years of parity. The Board’s size was augmented to 21 members, not including *ex officio* members.

In May 2008, the Board voted to freeze trustee elections until the *Association of Alumni of Dartmouth College v. Trustees of Dartmouth College* lawsuit had been resolved. As a result, trustee elections, which were scheduled to take place in the spring of 2009, were postponed. As of September 2009, two elections have been scheduled for spring 2010.

The Improper Ejection of Trustee Zywicki

In April 2009, the Board deliberated the reelection of a number of Trustees, including Petition Trustees Rodgers, Robinson, and Zywicki. These reelections had, theretofore, been routine. But based on the tone of debates from the past five years, there was considerable reason for the Petition Trustees to fear retaliation. Fortunately for Rodgers and Robinson (and primarily, for Dartmouth), their second terms were approved.

The reelection procedure for Petition Trustee Zywicki was, however, far more contentious than that of any other Trustee. The chief concern raised by members of the Board was Zywicki's Pope Center speech in October 2007 for which the Board had already [censured](#) Zywicki¹⁶ for casting a former Dartmouth president in a negative light. (The full text of this speech can be accessed [here](#).)

During their final deliberations, from which Zywicki was excluded, members of the Board again scrutinized Zywicki's performance based on his 2007 lecture. Other issues surfaced as well. "I can say from personal knowledge that many of the statements made in that meeting about Todd Zywicki were factually incorrect, but Todd was not there to respond," [Rodgers wrote](#) in *The Dartmouth*.

On April 5th 2009, the Board denied Zywicki reelection. It marked the first time in recent history that the Board [denied a trustee a second term](#).¹⁷ While Haldeman, the current Board Chairman, asserted in an [April 17, 2009 statement](#) that the "evaluation process [for reelecting Trustees] itself is thorough and consultative,"¹⁸ [Zywicki](#) and the [Dartmouth community](#) were left to speculate on the reasons for Zywicki's dismissal, as the Board invoked its "confidentiality" as a reason not to discuss deliberations. Crucially, the vote, for the first time in at least five years, was held in secret.

It should be noted that Zywicki was offered the opportunity to resign prior to his notification of termination. As [Rodgers wrote](#) in *The Dartmouth*: "Todd was offered the option to save himself – to resign before the vote and slink out of town. Todd Zywicki's greatest achievement as a Dartmouth trustee may well be having the personal courage to force the Board Majority to take responsibility for a political lynching."

It's important to note the history of how the Board assumed this *reelection* authority. From 1891 to 1990, alumni had the right to reelect the Alumni Trustees. It is fair and sensible, after all, to allow those who elect a trustee to also vote on their performance after one term. However, the Board stripped alumni of this authority, and transferred it to *itself* in 1990.

Zywicki [noted the significance](#) of when the change occurred in an open letter he posted to his George Mason website days after his removal.

The date is not a coincidence: the tenure of Dr. John Steel '54, the first petition trustee elected to the Board, expired that year. The new regime—that the Board sits in judgment of itself—was adopted precisely so that any future petition Trustees could be removed after one term.

Since then, the prospect of removal at the end of their elected term is held over Trustees' heads from their first day on the Board. Even those elected by the alumni specifically to provide an independent voice are aware that they must toe the party line or risk expulsion at the end of their first term.

Proper Notions of Fiduciary Duty, Historically and Legally Considered

Viewed in the larger context of American nonprofit organizations, recent actions at Dartmouth—namely, treating any expression of skepticism toward the decision-making of the incumbent administration as fiduciary treason—show a perilously narrow interpretation of trusteeship. This outlook places fidelity to established power over the serious oversight inherent in fiduciary duty properly understood.

The precise role of nonprofit trustees has been explored in American nonprofit organizations, particularly universities, since the 17th century. Indeed, private nonprofits are the culmination of individual initiative and the driving force of civil society. As such, they have often been battle grounds for competing interests and values.

Among the first to publish criticism of nonprofit governance was 19th century Yale professor and trustee Leonard Bacon. In his 1847 article “Responsibility in the Management of Societies,” Bacon warned that the “great perversions of trusts” tended to occur “for the most part unconsciously, gradually, and with the best intentions.”¹⁹ Bacon did not see the elimination of managers and board committees as a solution; rather, he proposed that such officials be required to report fully and regularly on their activities. Bacon elaborated that the board’s “function should not begin and end with electing an executive committee,” and that its business should be “supervision, not administration.”²⁰

Although he was referring to the potential for corruption among fiduciaries of any organization—specifically, the American Tract Society and the American Board of Foreign Missions—Bacon’s insightful observation doubtlessly resonates among modern nonprofits that find themselves caught in the tension between the requirements of fiduciary duty properly understood and the lure of an artificial and comforting unanimity of opinion.

In 1723, Yale revised its charter to strengthen the institution’s capacity to govern itself independently of the state legislature. Although the charter clarified the roles of its trustees as members of a corporation acting collectively, it failed to delineate the capacities of trustees to exercise independent judgment.²¹ In an attempt to establish order within the turbulent atmosphere of contesting religious factions during the 1750s, then-president of Yale Thomas Clap, persuaded the majority of the board to incorporate routine examinations for its members. These examinations were intended to ensure orthodoxy and to expel individuals who failed to share the majority’s opinion. In response, Reverend Joseph Noyes assertively defended his right to dissent from decisions of the majority. While Clap argued that colleges, as religious societies, should uphold separate standards of governance, Noyes insisted that it was both the right and duty of trustees “to follow their consciences and, when necessary,

to dissent from decisions of the majority.”²² Despite Noyes’ refusal to participate in Clap’s proposed examination, Noyes remained on the board until 1761. It was an early affirmation of nonprofit trustees’ right—indeed, obligation—to question the decision making of the majority in serving the institutional mission.

As institutions moved toward a more secular model of education, the composition of their governing boards changed. The original Dartmouth Charter required a certain percentage of trustees to be residents of New Hampshire; this was abandoned in favor of a more flexible policy. Boards formerly composed of only local clergymen, state officials, and/or faculty members began to include alumni. The initial catalyst for alumni participation was monetary need at institutions such as Yale and Columbia University and Dartmouth College.²³ In order to finance burgeoning ambitions, colleges and universities gave alumni a voice in their institutional direction. And alumni did not fail their *alma maters*; the principal academic issue at Dartmouth when the 1891 Agreement was executed was President Bartlett’s insistence that *only* a classical curriculum could be offered. The alumni wanted Dartmouth to offer modern science classes as well, and, with the franchise, they succeeded.

Far more than simply fund-raisers, however, trustees played an active role in campus affairs at many colleges and universities. Many considered themselves “stewards of institutional mission” and were highly influential in shaping institutional direction. This state of affairs, in which trustees were decidedly more interventionist in day-to-day campus life than they are today, lasted well into the 20th century.²⁴

Soon after World War II, a wealth of publications discussing board governance appeared in specialized journals, at professional conferences, and within community agencies.²⁵ The resounding themes of these publications included fundraising, the hiring of executive directors, and the division of organizational responsibilities between board and staff.

Beginning in 1940, concerns about board governance and formal efforts to educate board members had expanded to include public and private colleges and universities, educative boards, independent schools, hospitals, and grant-making foundations. It became apparent, however, that the progression of articles and journals on boards had a more narrowed focus. While scholarship of the 1920s focused on the relationship between public and private power and aimed to educate board members in promoting community welfare, scholarship of the 1930s was characterized by concerns about vitality, efficiency, and harmony within organizations.²⁶ In the decades after World War II, the emphasis on individual stewardship and self-policing elements of governance had eroded and had been replaced by conflicting ways of thinking—one featuring regulatory frameworks imposed by the state and the other emphasizing methods of managerial professionalism.²⁷

Some of the most influential forces in the transformation of board governance were the alterations in the laws granting American nonprofits their unique status as private corporations serving a public interest. Among the most profound changes came in 1964 when the American Bar Association drafted the Model Nonstock Corporation Statute.²⁸ In an effort to align the statutory treatment of nonprofits

with that of corporate bodies, several states implemented the model statute, which had the effect of allowing nonprofits to engage in business activities as long as they ultimately furthered charitable goals.

The role of university trustees, in particular, also significantly changed in the 1960s, as faculty involvement in university governance increased, and the notion of shared governance gained prominence. This trend was urged by the American Association of University Professors' (AAUP) 1966 *Statement on Governance in Colleges and Universities*, which, with approval of both the American Council on Education (ACE) and the Association of Governing Boards (AGB), advocated for co-management of colleges and universities by faculty members.²⁹ This faculty role was recognized in 1980 in the *NLRB v. Yeshiva University* case, in which the [Supreme Court](#) declared that professors were effectively “managerial employees” in the university context.³⁰

During the 1980s, traditional nonprofit organizations supported by donations and governed by donors and volunteers became increasingly displaced by professionally staffed commercial nonprofits, supported by grants, contracts, and earned income, and governed by insider boards.³¹ The shift in governance was armored by progressively professionalized and entrepreneurial management, which was perceived to be more adept at control of the ebb and flow of funds in the American market.

By the 1990s, with faculty power firmly institutionalized at colleges and universities, a notion that university presidents were bereft of power took hold.³² The AGB, in 1996, argued that university presidents needed to regain power with a pivotal document of its own: *Renewing the Academic Presidency: Stronger Leadership for Tougher Times*. Though this outlook was applied to varying degrees at colleges and universities, an imperative toward greater executive power in universities was thus established.

The wrangling was now between faculties and presidents—permanent constituencies, to be sure, suckling at the university itself, but decidedly not its purpose for being. Neither the glories of the professoriate nor the legacies of the president are a college's *raison d'être*: its students, and the persisting value of the degrees held by alumni, is.

Presidential and professorial decision-making power, combined with the rise of the administrative bureaucracy in academia, have generally relegated trustees to a secondary role in campus affairs. Today, trustees are mainly tasked with major administrative appointments, raising funds, and managing endowments (with, of course, variations among institutions).

Judge Cabranes, in his aforementioned *Fordham Law Review* article, cited as “myth” the notion that modern university trustees have significant decision-making power. Instead, he said, the current power struggles center between faculty and the executive, and trustees serve as a “rubber-stamp” for most decisions. Even in the spheres where trustees have clearly delineated authority—oversight of the university finances, for example—they have largely abdicated this responsibility. He calls on trustees to demand more financial information, implying that not doing so—even with a limited scope of a trustees fiduciary duty—is to fail on the job.

[E]ven university trustees who are discharging only the limited duty to either ‘back’ or ‘sack’ a president can perform this function effectively only if they have a full picture of how efficiently the university’s finances are being managed, and how well it is performing. Management is disciplined by requirements to provide more information, and more information makes possible meaningful board oversight.³³

Judge Cabranes was well aware of the hostility with which his message would be met by entrenched university authority. “[T]hese modest suggestions will, I suspect, be greeted with reservations, resistance, and perhaps alarm by university power holders who are not accustomed to even minimal oversight.”³⁴

The Reformatory Moment

In the early 2000s, a series of corporate accounting scandals dominated the headlines and sparked public outrage. After the much-publicized Enron and WorldCom scandals, Congress passed the Sarbanes-Oxley Act (formally known as the Public Company Accounting Reform and Investor Protection Act). The legislation set standards for all U.S. public company boards and public accounting firms, covering issues such as auditor independence, corporate governance, internal control assessment, and enhanced financial disclosure.

Beset by their own series of public relations disasters, nonprofit organizations (including universities³⁵) have **voluntarily adopted** some of the same regulations that apply to for-profit corporations in order to ameliorate intense public scrutiny. Improper accounting and outright self-dealing at some of the nation’s most prominent nonprofits have cast a long shadow.³⁶ Scandals at the **United Way**³⁷ and the **Red Cross**³⁸ garnered page-one headlines and caused well-deserved donor outrage. Similar instances of financial impropriety have marked colleges and universities in recent years. For example, Vanderbilt University Chancellor E. Gordon Gee spent more than \$6 million of school funds on his university-owned mansion. One university trustee admitted to the *Wall Street Journal* (PDF) in September 2006 that the financial oversight was “probably a little loosey-goosey.”³⁹ And American University President Benjamin Ladner **resigned** in 2005 after reports that he appropriated more than \$500,000 of university funds for personal use. The common thread among these cases, in both charitable nonprofits and universities, was a failure of oversight by trustees of institutional funds.⁴⁰

These cases (as well as numerous others) spurred calls for legal reforms on nonprofit boards, which were only further emphasized by **declining public confidence**.⁴¹ Some states have adopted more rigorous requirements for financial accountability, most notably California’s 2004 **Nonprofit Accountability Act** (PDF), which imposed similar requirements on nonprofits as Sarbanes-Oxley imposed on for-profit corporations.⁴² In 2007, Arkansas and Virginia followed suit and passed laws requiring governance standards for nonprofits.⁴³

It is not, however, only self-dealing or accounting errors that have affected colleges and universities. On August 6, 2009, a state-appointed panel issued a scathing [report](#) (PDF) on the “shadow admissions process,” in which applicants with ties to trustees, politicians, and large donors received preferential consideration at the University of Illinois—Urbana-Champaign.⁴⁴ The report cited the political influence that the Illinois Governor exerted on University Trustees, and their subsequent compliance in rigging the admissions system. The report further recommended the resignation of all University Trustees for their egregious failure in fulfilling their fiduciary duties.

While corruption has an obvious negative impact, lax oversight is harmful as well. Greensboro College in North Carolina, which had amassed a \$19 million debt since 2001, recently had to pledge its entire campus, endowment, and real estate holdings as loan collateral to Bank of America. The 40-member board of trustees claimed they did not know how bad the situation had gotten. “If you’re told, ‘Everything is OK,’ and you’re not told about problems, you don’t go looking for them. You’re there to help,” one former Trustee told the *Greensboro News-Record*. Lack of economic oversight has unquestionably affected even the [wealthiest of institutions](#),⁴⁵ Dartmouth [included](#).⁴⁶

Most states continue to have relatively lenient legal standards for nonprofits (relative to for-profit companies), recognizing that self-regulation can often be the key to survival. As such, many have voluntarily adopted certain requirements of the Sarbanes-Oxley Act to [increase donor confidence](#) in the organization’s fidelity to its mission.

Aligning academic boards with the cultural trends of increased critical oversight has obvious benefits, but some boards have moved to adopt the norms of for-profit corporate governance that are simply not applicable to the university context. Admittedly, this is a thin distinction when considered on a theoretical level. But in practical terms, misguided nonprofit reforms—some of which, upon close examination, actually violate an institution’s mission—are readily evident.

For example, some nonprofit boards have emphasized the adoption of formal nondisclosure pledges or confidentiality agreements that step well beyond nondisclosure of proprietary information.⁴⁷ This is hardly uncommon in the business sector, where bottom-line strictures demand a certain degree of internal accord and non-transparency. And though there is evidence that nonprofit board directors have, from time to time, attempted to hush public dissent, only recently have dominant majorities of some nonprofit boards proposed and ratified binding pledges not to publicly air differences. According to a 2006 *BoardSource* publication, “If a board member does not support a decision for whatever reason, [he or] she has a responsibility to remain silent or step down from the board.”⁴⁸ (Recall the resignation offer made to Zywicki before his second term was denied.)

These directives, written in highly influential publications in the realm of university governance, disregard the important role that public discussion has on decision-making at universities and nonprofits in general. “In the nonprofit context, nondisclosure agreements or the use of ‘executive session’ rules to curtail debates about policy and procedure depart from established norms. They shut down opportunities for public dialogue and for communication with other concerned and influential

parties, including reporters,” nonprofit specialist Norman I. Silber wrote in the *Oregon Law Review* (PDF).⁴⁹

These developments have affected even the most unlikely of nonprofits. In 2006, the *New York Times* reported that the American Civil Liberties Union (ACLU) board had discussed adopting policies to discourage members of the board from publicly criticizing the organization. Such an incident occurring in an organization that champions free speech indicates the pervasive—and corrosive—nature of this new wave of thinking. Only after intense public pressure were these blatantly hypocritical and highly destructive proposals abandoned.⁵⁰

Far from anecdotal anomalies, these provisions have been codified in influential nonprofit sources. The American Law Institute’s proposed *Principles of the Law of Nonprofit Organizations*—which many view as a “best practices” guideline—recommends a basic obligation on the part of governing board members to maintain secrecy, but adds that “[o]nce a final decision has been reached, *public criticism might be permissible consistent with fiduciary duties.*”⁵¹ [Emphasis added]

Fidelity to institutional leaders, rather than institutional mission, is now paramount in higher education, as deviation from accepted decisions is perceived as potentially shrinking the donor base. Administrators cringe at public disagreement; rather than focusing on the long-term likelihood that competing ideas will result in implementation of the fittest, they tend to focus on the short-term possibility that a particular alumni subset may be offended.⁵² This shortsighted outlook is not only an insult to the intelligence of alumni and other constituencies, but it is ultimately detrimental to the institution, as established ideas are enthroned and unchallenged. It is also based on false premises: as in the case of Dartmouth, there is no established correlation between public criticism and donor decline. There is, in point of fact, every evidence that the warm relationship between College and alumni contemplated by the framers of the 1891 Agreement has caused alumni to participate and to give more broadly—focusing not on any particular issue, and serving not their personal politics, but in simple reaction to the proffering of a genuine voice.

The failure by trustees to examine critically important segments of college and university governance, and the establishment of unchallenged assumptions and policies, should be anathema to institutions of higher learning in particular, where critical thought and a search for truth are in theory (but too often not in practice) central. At Dartmouth, a disingenuous call to “de-politicize” elections and keep criticism in-house has led to a deviation from the true purpose of a university trustee.

Vox Clamantis in Deserto

Dartmouth’s motto—*Vox Clamantis in Deserto* (“the voice crying in the wilderness”)—was originally an allusion, when proposed in 1770, to Dartmouth’s rural location in what was then the English settlers’ frontier.⁵³ The phrase is found in Biblical passages and is often attributed to John the Baptist, the loyal follower ultimately beheaded for his radical convictions. It is unbecoming of an institution

that proclaims this ideal to remove a dissenting voice—one that may have questioned the establishment but did so with Dartmouth’s best interests in mind—from its governing ranks.⁵⁴

Perhaps it is a signal that Dartmouth is heading in a new direction. As Board Chairman Haldeman said in a July 9, 2007 *Q&A Regarding the Governance Review* (PDF), “Today’s Board must do what it believes is best for Dartmouth in the 21st century—*whatever it determines that is.*” [Emphasis added] Trustees do owe their duty to Dartmouth. But the Board majority’s actions, collusive with the administration, have made clear that, in practice, loyalty must be toward the executive before the institution.

And from the various Board actions over the past five years, it has become clear that mitigating, if not entirely suppressing, alumni input—specifically through controlling and sharply limiting the representation of Petition Alumni Trustees—is what the Board believes is necessary for the new Dartmouth. The Board majority’s arguments rest on an assumption that recent contentious elections have hurt the College’s reputation by hurting the administration’s reputation.

This is far from the truth. Though it is impossible to determine the precise causal relationships in the swings in alumni giving, it is clear that, through the contentious petition election campaigns and the public criticism aired by some Trustees, [overall alumni giving rates](#) actually *increased*, and the [ambitious capital campaign](#) was on schedule as of July 2008.⁵⁵ Furthermore, trends in alumni election participation have increased significantly since petition candidates were included on the ballots.

For more than a century, there has been a pact that the alumni voice would be included in governance decisions, and, in return, that alumni would underwrite the College’s plans. Today, half of Dartmouth’s operating budget comes from the alumni.⁵⁶ The rate of alumni giving at Dartmouth consistently ranks among the nation’s highest.⁵⁷ Like a government of laws and not of men, Dartmouth has thrived when it has been a college of students and not of deans. The quashing of alumni input places a college in distinct peril. Where a selfish sally against reasoned alumni input is prosecuted—occasionally for reasons no more profound than the vanity of a board majority—the institution will suffer. Dartmouth students and alumni consistently have been, and remain, insistent upon the preservation of parity, and the reinstatement thereof is an ongoing matter. Whatever the success of that effort, Dartmouth’s is now, emphatically, a cautionary tale.

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¹ In 1961, the Board voted to add four “elected” Trustees—two Alumni Trustees and two Charter Trustees—for a total of 14. In 2003, the Board voted to augment the board to 20 Trustees. Two of those seats were filled in 2005—one Alumni Trustee and one Charter Trustee—for a total of 16 elected Trustees. This parity between Alumni Trustees and Charter Trustees continued until September 2008, when five Charter Trustees were appointed to the Board.

² The Association of Alumni is elected by and represents the entire alumni body. Its Executive Committee consists of the elected leaders. The Alumni Council, on the other hand, is a self-perpetuating body comprised of class officers and regional officers. Its stated mission is “To sustain a fully informed, representative, and engaged exchange of information and sentiment between alumni and their College, and to enhance and inspire alumni involvement that furthers the mission of the College.”

³ Harvard University and Hamilton College afford similar “petition” candidacies for alumni elections on their respective governing boards.

⁴ *Smith v. Van Gorkom*, 488 A.2d 858, 872-73 (Del. 1985).

⁵ Evelyn Brody, “Charity Governance: What’s Trust Law Got to do With it,” *Chicago-Kent Law Review*, May 2005 (Vol. 80) p. 668.

⁶ *Id.*, p. 644.

⁷ Letter from Todd Zywicki to the Board Governance Committee, January 6, 2007.

⁸ Michael S. DeLucia, *Guidebook for New Hampshire Nonprofit Organizations*, Second Edition. Office of the NH Attorney General, Charitable Trust Unit.

⁹ Michael Blumenthal, as quoted in William G. Bowen, *The Board Book: An Insider's Guide for Directors and Trustees* (New York: W.W. Norton & Company, 2008) p. 146.

¹⁰ *Id.*, p. 147.

¹¹ See Todd Zywicki “History of Trustee Election Rules at Dartmouth,” <http://volokh.com/posts/1157212982.shtml>

¹² The longstanding original standard for constitutional amendments was three-fourths. Just prior to the balloting for the proposed constitutional revision, the standard was dropped, at a rushed vote, to two-thirds; at the same vote, alumni favoring the constitution granted themselves the power to make voting recommendations on the ballot itself. The ballot materials did indeed contain an insistence that alumni approve the constitution. The constitution failed to reach either the original or the new, lower standard of approval. It is further worth noting that the Association of Alumni executives who promulgated these wheel-greasing measures did so only by extending their own terms, unilaterally, by nine months. See http://www.goactablog.org/blog/archives/2006/06/dartmouth_alumn.html

¹³ “Mark and Patrick Byrne Support Parity,” Email from Mark Byrne and Patrick Byrne to 1985 classmates, May 21, 2008. These brothers urged their fellow 1985 graduates to support the “Parity Slate” in the 2008 Association of Alumni Executive Committee election. They wrote:

- 1) Because a few trustees got elected by petition, who had differing views to those of the leadership, the college tried to change governance by referendum, to make it harder for petition trustees to get elected. They lost that referendum.
- 2) President Wright wrote to us shortly thereafter, promising an end to the matter.
- 3) The matter was not, in fact, dropped, and a five man governance committee managed to plan and narrowly pass a resolution to turn Dartmouth’s Trustee’s Board into a self-electing elite, permanently.

¹⁴ As noted in the 2007 Governance Committee’s *Recommendations*, however, charter trustees are not required to be Dartmouth graduates (p. 10).

¹⁵ Although the communication had the aesthetic indicia of a formal Board communication, it appears that no vote was held to authorize its publication.

¹⁶ According to Dartmouth spokesperson Roland Adams, “there was no knowledge of a trustee ever receiving a formal censure” before Zywicki.

¹⁷ “No one in the administration is currently aware of a previous Dartmouth parallel to this instance, certainly not in the modern history of the institution,” Dartmouth spokesperson Roland Adams said after the Board’s decision had been made public.

¹⁸ In his April 17th, 2009 response to Zywicki’s open letter to the Dartmouth community, Haldeman described the process by which the Board evaluates and reelects its members:

Each trustee being reviewed receives from a fellow Board member a personal assessment of the feedback provided by other Board members. Members being considered for re-election also are allowed to address the Board. And then, after thorough review and discussion of the results, the full Board votes on re-election. Each of these steps was followed in Mr. Zywicki’s case — and in the case of all the trustees reappointed.

¹⁹ Leonard Bacon, “Responsibility in the Management of Societies,” *New Englander and Yale Review*, January 1847 (Vol. 5) p. 32-33.

²⁰ *Id.*, p. 36-37.

²¹ Peter Dobkin Hall, *A History of Nonprofit Boards in the United States* (Washington, DC: BoardSource, 2003) p. 7

²² *Id.*, p. 8.

²³ José A. Cabranes, “Myth and Reality of University Trusteeship in the Post-Enron Era,” *Fordham Law Review*, November 2007 (Vol. 76) p. 960.

The growth and evolution of these institutions into the centers of secular learning of the current era—universities committed to education designed to meet the needs of an evolving social order—required expansion of the base of financial support and stimulated the movement toward greater participation of alumni and other independent trustees in the governance of these universities.

²⁴ Stephen H. Balch, “Academic Governance: The Trustee’s Warrant,” *Academic Questions*, Fall 2008 (Vol. 21, No. 4) pg 446.

Until the twentieth century’s dawn—and well beyond at some colleges and universities—trustees saw themselves as the stewards of institutional mission, which generally included a broad range of creedal and cultural commitments. In so serving, they had little compunction about minding the opinions, faith, and morals of both faculty and students, with miscreants occasionally sent packing. As the self-defined representatives of legitimate and/or communal interests in shaping the intellect and character of the young, trustees felt entitled, when the stakes were sufficiently high, to override the views of academic professionals.

²⁵ Hall, *supra* note 21, p. 29.

²⁶ Peter Dobkin Hall, “Resolving the Dilemmas of Democratic Governance: The Historical Development of Trusteeship in America, 1636-1996,” *Philanthropic Foundations: New Scholarship New Opportunities*, ed. Ellen Condliffe (Lagemann Bloomington: Indiana University Press, 1999) p. 32.

²⁷ *Id.*, p. 31.

²⁸ *Id.*, p. 32.

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- ²⁹ George Keller, "A Growing Quaintness: Traditional Governance in the Markedly New Realm of U.S. Higher Education," *Competing Notions of Academic Governance*, ed. William G. Tierney (Johns Hopkins University Press: 2004).
- ³⁰ *NLRB v. Yeshiva University*, 444 U. S. 672 (1980).
- ³¹ Henry Hansmann, "Economic Theories of Nonprofit Organizations" *The Nonprofit Sector: A Research Handbook*, eds. Walter W. Powell and Richard Steinberg (New Haven, CT: Yale University Press, 2006) p. 27-42.
- ³² Mary Burgan, "Why Governance? Why Now?" *Competing Notions of Academic Governance*, ed. William G. Tierney (Johns Hopkins University Press, 2004).
- ³³ Cabranes, *supra* note 24, p. 973.
- ³⁴ *Id.*, p. 976.
- ³⁵ Drexel University, for example, became the first private university to voluntarily implement some reforms of the Sarbanes-Oxley act in August 2003. See, Mike Mathias, "Drexel Models Rules After Sarbanes-Oxley," *Philadelphia Business Journal*, August 11, 2003.
- ³⁶ Jeremy Benjamin, "Reinvigorating Nonprofit Directors' Duty of Obedience," *Cardozo Law Review*, March 2009 (Vol. 30, No. 4.). Available online: <http://www.cardozolawreview.com/content/30-4/BENJAMIN.30-4.pdf>
- ³⁷ *The New York Times* reported that William Amaroy and aides directed funds meant for the United Way to other organizations under their control, and they also diverted funds for personal expenses.
- ³⁸ Incorrect counts of Hurricane Katrina victims staying in Red Cross-funded hotel rooms caused public outrage, *The New York Times* reported on October 15, 2005.
- ³⁹ "Vanderbilt Reins in Lavish Spending By Star Chancellor," Joann S. Lublin and Daniel Golden, *The Wall Street Journal*, September 26, 2006, A1. Available online: http://www.vandycommunity.org/files/WSJ_VanderbiltReinsInChancellor_LubinGolden_092606.pdf
- ⁴⁰ Some prominent nonprofit governance scholars have attributed the lack of willingness of state attorneys general to enforce mission accountability, for example, because of their sole focus on financial improprieties. This has led to an unchecked and widespread "mission creep" development in the nonprofit sector, in which nonprofits have strayed from their foundation in order to service other constituencies. See, generally, Dana Brakman Reiser "Enron.org: Why Sarbanes-Oxley Will Not Ensure Comprehensive Nonprofit Accountability," *U.C. Davis Law Review*, 2005 (Vol. 38).
- ⁴¹ Paul C. Light, "To Give or Not to Give: The Crisis of Confidence in Charities," The Brookings Institute, Policy Brief, December 2003. Available online: <http://www.brookings.edu/papers/2003/12charities.aspx>. This study showed that after September 11, 2001, public confidence in nonprofit organizations steadily declined, even as confidence in virtually every other institution went up.
- ⁴² Stephanie Tsacoumis, "No Profit Doesn't Mean No Problem." *Legal Times*, November 20, 2006 (Vol. XXIX, No. 47). Available online: <http://media.gibsondunn.com/fstore/pubs/Tsacoumis%2011-20-06.pdf>
- ⁴³ "Nonprofits scramble under new scrutiny," Sheri Qualters, *The National Law Journal*, September 3, 2007. Available online: <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1188205347990> (subscription required).
- ⁴⁴ Mikva, Abner, "STATE OF ILLINOIS ADMISSIONS REVIEW COMMISSION: Report and Recommendation," August 6, 2009. Available online: <http://admissionsreview.illinois.gov/documents/FinalReport.pdf>
- ⁴⁵ Nina Munk, "Rich Harvard, Poor Harvard," *Vanity Fair*, August 2009. Available online: <http://www.vanityfair.com/politics/features/2009/08/harvard200908> (On the lack of oversight and accountability at Harvard University that contributed, at least in part, to the unprecedented decline in the largest university endowment in the country.) See, also, Robin Goldwyn Blumenthal, "The IRS's New Target: College Endowments," *Barron's*, August 3, 2009.
- ⁴⁶ Due to "operating deficits, a decline in the college's endowment, and its debt load," Dartmouth's bond rating was downgraded in May 2009. "Dartmouth College, Its Bond Rating Downgraded, Takes On More Debt," *The Chronicle of Higher Education*. May 26, 2009.
- ⁴⁷ Norman I. Silber, "Anticonsultative Trends in Nonprofit Governance," *Oregon Law Review*, 2007 (Vol. 86, No. 1) p. 75. Available online: <http://www.law.uoregon.edu/org/olr/archives/86/silber.pdf>
- ⁴⁸ Katha Kissman, *Taming the Troublesome Board Member* (Washington, DC: BoardSource, 2006) p. 41.
- ⁴⁹ Silber, *supra* note 48, p. 76.

⁵⁰ See, generally, Wendy Kaminer, *Worst Instincts: Cowardice, Conformity, and the ACLU* (Boston: Beacon Press, 2009).

⁵¹ *Principles of the Law of Nonprofit Organizations*, Tentative Draft No. 1 (The American Law Institute, February 2007).

⁵² See, for example, “The Gremlins of Governance: A Trusteeship Q&A with Richard Chait, Research Professor at the Harvard Graduate School of Education,” *Trusteeship*, July/August 2009, p. 13. “Inside the boardroom, the wingspan of wealth spans the entire portfolio of governance, especially to the extent that fellow trustees and senior administrators believe that disagreement might jeopardize a future gift or suggest ingratitude for a previous gift,” Chait said.

⁵³ Letter from Dartmouth President Eleazar Wheelock to Robert Keen, March 13, 1770. Dartmouth College Library, Special Collections, Ms. 770213.2.

⁵⁴ It may be inappropriate in the university context, but it is hardly unprecedented. In Kissman, *supra* note 49, p. 42, a section titled “Food for Thought” offers the following quotation; “There is no room for sustained loyal dissent on a nonprofit board.”

⁵⁵ By June 2009, it was clear that fund-raising efforts were below expected average, though it would be impossible to deny the effects of the overall economic downturn on the ability for Dartmouth’s alumni to donate. However, any prospect that the petition candidate elections *specifically* caused decline in giving is demonstrably false, as Smith’s 2007 campaign had been long-completed when the above article was published in July 2008.

⁵⁶ The Dartmouth College Fund (annual alumni giving) provides about \$45 million each year toward the overall budget of around \$460 million. But the endowment, which is composed virtually 100% of alumni-contributed funds, provides around \$180 million. Thus, in total, funds that derive from alumni either directly (annual giving) or indirectly (earnings from endowment) provide around \$225 million per year of a \$460 million budget, or around 50%.

⁵⁷ Dartmouth ranked 15th in *total* alumni fund-raising for the 2006-2007 fiscal year, despite competing with much larger public universities. Among institutions ranked in the top 20 for 2006-2007, Dartmouth had the smallest enrollment. *The Chronicle of Higher Education 2008-09 Almanac*, ed. Jeffrey Brainard. (Volume 55, No. 1) p. 32. (Original data source: Council for Aid to Education)