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Governing Board Accountability: Competition, Regulation and Accreditation


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36 J.C. & U.L. 691-729 (2010)

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GOVERNING BOARD ACCOUNTABILITY: COMPETITION, REGULATION, AND ACCREDITATION

JUDITH AREEN*

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INTRODUCTION

On September 17, 2009, the attorney general of New Jersey filed a sixteen-count civil complaint against the president and board of trustees of Stevens Institute of Technology.¹ The complaint set forth a lengthy list of alleged misdeeds including providing excessive compensation and low-interest loans to the president without proper authorization, and concealing

* Interim Dean and Paul R. Dean Professor of Law, Georgetown University Law Center. I am grateful to Matthew Berns, William Bratton, Jonathan Cooper, Richard Cooper, Donald Langevoort, Rick Legon, John Olson, Ronald Pearlman, Milton Regan, and Robert O’Neil for their very helpful comments on earlier drafts of this Article, and to Michael Crapanzano for his research assistance.

1. Complaint, *Milgram v. Trs. of the Stevens Inst. of Tech.*, No. HUD-C-115-09 (N.J. Super. Ct. Law Div. Sept. 17, 2009), *available at* <http://www.nj.gov/oag/newsreleases09/pr20090917a-complaint.pdf> (last visited May 11, 2010).

negative financial reports from the full board.² The national press did not report the filing for more than three months but, recognizing that the case was both important and rare, the *New York Times* eventually put the story on page one³ and followed it with an editorial urging the legislature “to strengthen New Jersey’s weak laws governing the financial behavior of colleges and other nonprofit institutions.”⁴

The filing raised a number of questions about the responsibilities of college and university governing boards: By what authority does a state attorney general bring a complaint against a private university? What are the legal obligations of trustees of private colleges and universities?⁵ Are they different from the obligations of trustees of public institutions of higher education? How are boards of trustees held to account? Are existing accountability mechanisms effective?

To answer these questions and to understand more generally the responsibilities of trustees, Part I of this article traces the evolution of the role of governing boards in the United States, from guiding the first colonial colleges to overseeing more than 4,300 institutions of higher education, which range in size and mission from small, sectarian, private colleges and two-year community colleges to multi-campus public universities with tens of thousands of students and multiple doctoral and professional programs.⁶ This history reveals how their distinctive governance structure helped to promote academic excellence by providing American colleges and universities with significant autonomy from government control. In the twentieth century, governing boards further refined their role by embracing shared governance, a system in which governing boards delegate primary responsibility for academic matters to faculties.⁷ The combination of autonomy from state control on the one

2. Complaint, *supra* note 1, at ¶¶ 38, 40, 41, 332.

3. See Sam Dillon, *College Is Beset by Accusations in New Jersey*, N.Y. TIMES, Dec. 22, 2009, at A1.

4. Editorial, *The Stevens Scandal*, N.Y. TIMES, Dec. 28, 2009, at A24. The parties reached a settlement on January 15, 2010. See *infra* text accompanying notes 127–128.

5. Colleges and universities use a variety of names for the members of their respective governing boards, including “curator,” “director,” “manager” and “regent.” The term “trustee” is used here to encompass all of the many names employed. Although the for-profit sector in higher education has grown significantly in size and importance in the last few decades, this article will focus on nonprofit and public institutions.

6. See 2005 *Carnegie Classification of Institutions of Higher Education Efforts to Combat Illegal File Sharing and Plagiarism*, CHRON. HIGHER EDUC., Aug. 28, 2009, at 36. Although only 1,700 of the 4,300 institutions are public, the majority of post-secondary degrees awarded are from public institutions. *Growth in Bachelor’s Degrees Awarded by Field of Study*, CHRON. HIGHER EDUC., Aug. 28, 2009, at 16.

7. See *infra* Part I.B.

hand and shared governance on the other has produced what is widely considered the leading system of higher education in the world.⁸

Part II of the article analyzes the three primary ways in which governing boards are held to account: (1) competition, (2) regulation, and (3) accreditation. Together, they have created a market in higher education that is both lightly regulated, and quite competitive. Part III sets forth recommendations on how governing boards best can meet key legal and structural responsibilities.

I. EVOLUTION OF THE AMERICAN SYSTEM OF GOVERNANCE.

A. Lay Governing Boards

In order to understand the responsibilities of governing boards, it helps to have some knowledge of how the American system of governance evolved and how it compares to the systems common in other countries. There are three primary models of academic governance in use: (1) control by the faculty; (2) control by the state; and (3) control by governing boards. Although the faculty-control model arose in the Middle Ages, a few institutions, including Oxford and Cambridge, are still run by their faculties. At Oxford, a twenty-six member Council sets policy for the university on most matters, but final responsibility rests with Congregation, a body that includes some 4,000 members of the academic, senior research, library, museum, and administrative staffs.⁹ At Cambridge, although a twenty-one member Council is the principal policy-making organ of the university, the ultimate governing body is Regent House, which consists of some 3,800 officers, fellows, faculty, and others.¹⁰ Efforts to streamline the governance structure of each university were defeated in recent years. In 2006, the then-Vice-Chancellor of Oxford proposed the adoption of an American-style governing board. After heated debate, Congregation, by a vote of 720 to 456, turned down the proposed change.¹¹ In 2009, the

8. See JONATHAN R. COLE, *THE GREAT AMERICAN UNIVERSITY* 1–5 (2009) (America has “the greatest system of higher learning that the world has ever known” whether measured by the quality of faculty and students, rankings of universities, or number of Nobel Prizes received). The most recent Annual Ranking of the World Universities by Jiao Tong University of Shanghai placed 55 American universities in the top 100 positions. The only non-American institutions in the top twenty were the Universities of Cambridge (4), Oxford (10), and Tokyo (20). ARWU–2009, *Academic Ranking of World Universities 2009*, available at <http://www.arwu.org/ARWU2009.jsp> (last visited May 11, 2010).

9. News: Next Steps for Oxford Governance, Oxford University, <http://www.admin.ox.ac.uk/po/051212.shtml> (last visited Oct. 4, 2009).

10. How the University Works, University of Cambridge, <http://www.cam.ac.uk/univ/works/regenthouse.html> (last visited May 11, 2010).

11. *Report of the Proceedings in Congregation, 28 Nov. 2006*, OXFORD UNIV.

Higher Education Funding Council for England, which provides public funds to Oxford, Cambridge, and other institutions of higher education, proposed that the governing council of Cambridge University should have a majority of outside trustees, but then agreed to defer the proposal for three years.¹²

The second governance model—control of colleges and universities by the government—is most prevalent in continental Europe, Asia, and Latin America. Although there are signs that European countries are moving towards greater university independence,¹³ it remains the case that many countries limit the autonomy of their institutions of higher education and thereby hinder their ability to function well.¹⁴ In six European countries, for example, appointments of some staff (usually faculty) must be approved by a national Ministry of Education or the President of the country.¹⁵ In most of Europe, the government sets individual faculty salaries,¹⁶ and in nine countries, it determines tuition or fees.¹⁷

The third model of governance, which is widely followed by both private and public institutions of higher education in the United States, puts control in the hands of a lay governing board (“lay” meaning nonfaculty).¹⁸

GAZETTE, Dec. 7, 2006, available at www.ox.ac.uk/gazette/2006-7/supps/1_4791.htm. The Vice-Chancellor elected to take the matter in December to all of Congregation by postal ballot. This time, more than 2,500 members of Congregation voted, and again the proposal was rejected when more than sixty percent of those who voted opposed the change. *Rejection on a Division of Amended Legislative Proposal Confirmed by Postal Vote*, OXFORD U. GAZETTE, Jan. 11, 2007, available at www.ox.ac.uk/gazette/2006-7/weekly/110107/acts.htm.

12. Donald MacLeod, Cambridge Dons Retain Control of University, *Guardian*, March 20, 2009, available at <http://www.guardian.co.uk/education/2009/mar/20/cambridge-dons-control>.

13. THOMAS ESTERMANN & TERHI NOKKALA, UNIVERSITY AUTONOMY IN EUROPE I: EXPLORATORY STUDY 42 (European University Association (EUA) 2009), available at http://www.upr.si/fileadmin/user_upload/RK_RS/EUA_Autonomy_Report_Final.pdf.

14. *Id.* See also Simon Marginson, *Going Global: Governance Implications of Cross-Border Traffic in Higher Education*, in *COMPETING CONCEPTIONS OF ACADEMIC GOVERNANCE* 1, 7 (William G. Tierney ed., 2004) (In Western European countries “the nation remains a central actor in governance.”); COLE, *supra* note 8, at 459 (French system of higher education “is very closely linked to state control . . . with national policies controlling the operation of individual units in the system to an excessive degree.”); *Id.* at 461 (In Germany “[t]here is a high level of bureaucratic state control of the system. . . . [T]he absence of competition within Germany itself creates stagnation in the system and hurts the quality of higher education within the country.”).

15. The six are Bulgaria, France, Poland, Romania, the Slovak Republic, and some German states. *Id.* at 28.

16. *Id.* at 41.

17. *Id.* at 22. The nine include France, Spain, and Turkey.

18. See Ass’n of Governing Bds. of Univs. & Colls. (AGB), *AGB Statement on Institutional Governance*, in *AGB STATEMENT ON INSTITUTIONAL GOVERNANCE AND*

Louis Menand recently described the modern American university as a product of the nineteenth century.¹⁹ In fact, its governance structure is older. The use of lay boards dates back to the seventeenth century, although shared governance did not develop until the early twentieth.

Harvard, the oldest American college, was modeled on Emmanuel College of Cambridge University, at least with respect to curriculum and facilities.²⁰ When Harvard was founded in 1636, however, there were not enough scholars in Massachusetts Bay Colony to copy the English system of faculty governance. The colonists instead put a lay governing board in charge of the college.²¹ This improvised governance structure was adopted in turn by the other colonial colleges, and remains the most common form of governance in American higher education.²²

At first, the use of lay governing boards did not influence American higher education. As in Europe, faculty were hired only to teach, and the curriculum contained the same mix of scripture and classics that had been used in European higher education institutions for centuries.²³ By the end of the Civil War, however, the mission of American colleges and universities began to change. Leading college and university presidents

GOVERNING IN THE PUBLIC TRUST: EXTERNAL INFLUENCES ON COLLEGES AND UNIVERSITIES 1, 2 (2003) (“[T]he presence of lay governing boards is what distinguishes American higher education from most of the rest of the world . . .”).

19. LOUIS MENAND, *THE MARKETPLACE OF IDEAS: REFORM AND RESISTANCE IN THE AMERICAN UNIVERSITY* 17 (2010).

20. Of the 100 graduates of Cambridge University who crossed the North Atlantic before 1646, thirty five were connected to Emmanuel College, including John Harvard. NORMAN SCARFE, *CAMBRIDGESHIRE* 94–95 (1983).

21. Harvard’s oldest governing board, the Board of Overseers, which was established in 1642, was initially made up of public officials and ministers from neighboring towns. CONSTITUTIONAL ARTICLES AND LEGISLATIVE ENACTMENTS RELATIVE TO THE BOARD OF OVERSEERS AND THE CORPORATION OF HARVARD UNIVERSITY 3–4 (1835), <http://pds.lib.harvard.edu/pds/view/2582402?op=n&n=1&treeaction=expand> (last visited May 11, 2010). In 1650, the colonists established the Harvard Corporation to oversee the college because the Board of Overseers was both too large and too difficult to assemble to govern effectively the ordinary business of the college. SAMUEL ELIOT MORISON, *HARVARD COLLEGE IN THE SEVENTEENTH CENTURY* 3–4 (1936). The Corporation consisted of five fellows, the president, and the treasurer of Harvard—as it does today. Harvard University, *Governance of the University*, <http://www.news.harvard.edu/guide/underst/index.html> (last visited Mar. 4, 2010). Harvard is unusual in having two governing boards: the Corporation, which oversees most matters; and the Board of Overseers, which is consulted on major issues. *Id.*

22. Improvisation was not the only driving force. The lay governing-board structure adopted at William and Mary was modeled in part on Scottish institutions, particularly the College of Edinburgh. JURGEN HERBST, *FROM CRISIS TO CRISIS: AMERICAN COLLEGE GOVERNMENT, 1636–1819*, at 32.

23. CAROLINE WINTERER, *THE CULTURE OF CLASSICISM: ANCIENT GREECE AND ROME IN AMERICAN INTELLECTUAL LIFE, 1780–1910*, at 11–29 (2002).

and faculty increasingly sought to emulate German universities, particularly in their embrace of research as well as teaching.²⁴ At the same time, the first Morrill Act, signed into law by President Lincoln in 1862, authorized the establishment of land-grant colleges and universities, which also were committed to scientific research—at least if the science was relevant to agriculture or to the mechanical arts.²⁵ Clark Kerr best captured the nature of these two influences:

The one was Prussian, the other American; one elitist, the other democratic; one academically pure, the other sullied by contact with the soil and the machine. The one looked to Kant and Hegel, the other to Franklin, Jefferson, and Lincoln. But they both served an industrializing nation.²⁶

Together, the confluence of these two developments also produced the modern American university. The change in mission was accompanied by change in the membership of governing boards. Historians still debate whether the earliest American colleges were public, private, or something else entirely.²⁷ The thirty members of the Board of Overseers at Harvard, for example, were appointed by the state until 1865 when Massachusetts conferred the power to elect the overseers on the university's alumni.²⁸ The change of control at Harvard took place without much controversy. At Yale, by contrast, the debate over whether alumni should control the governing board became a national issue that was discussed in many newspaper editorials and letters in national periodicals.²⁹ Ultimately, the

24. The University of Berlin, founded in 1810 by Wilhelm von Humboldt, was the first university dedicated to research as well as teaching. WILLIAM CLARK, *ACADEMIC CHARISMA AND THE ORIGINS OF THE RESEARCH UNIVERSITY* 442–46 (2006); 3 *A HISTORY OF THE UNIVERSITY IN EUROPE* 4–5 (Walter Ruggie ed., 2004).

25. GEORGE RAINSFORD, *CONGRESS AND HIGHER EDUCATION IN THE NINETEENTH CENTURY* 91–91, 101 (1972).

26. CLARK KERR, *THE USES OF THE UNIVERSITY* 11–12 (1963).

27. Compare JOHN S. WHITEHEAD, *THE SEPARATION OF COLLEGE AND STATE: COLUMBIA, DARTMOUTH, HARVARD AND YALE, 1776-1876*, at 45 (1973) (“a distinction between private and public or state institutions was not commonly recognized before the Civil War”) with HERBST, *supra* note 22, at xi (the modern American configuration in which public and private institutions exist side by side “emerged in the four decades before 1820”).

28. An Act in Relation to the Board of Overseers of Harvard College, 1865 Mass. Acts 565–67. That same year, Cornell established a place for an alumnus on its governing board, although the first alumni trustee was not seated until 1874. MORRIS BISHOP, *A HISTORY OF CORNELL* 77, 195 (1962).

29. Peter Dobkin Hall, *Noah Porter Writ Large?: Reflections on the Modernization of American Education and Its Critics, 1866-1916*, in *THE AMERICAN COLLEGE IN THE NINETEENTH CENTURY* 196, 211 (Roger L. Geiger, ed., 2000). Hall concluded that the fight was a much about religion as it was about the role of the state:

The stakes involved nothing less than the question of who should control American culture—the ministers who had reigned basically unchallenged

six state senators on the Yale governing board were replaced by trustees elected by the alumni. The ten positions for “successor trustees,” the self-perpetuating part of the board, were opened to lay members at least in principle, although alumni did not become a majority of the board until 1910.³⁰ By early in the twentieth century, all major private colleges and universities were under lay control.³¹

By constitutional authority in some states,³² and by statute in others,³³ most public institutions of higher education in the United States also are governed by lay boards.³⁴ In *Regents of the University of Michigan v. State of Michigan*,³⁵ for example, the state supreme court rejected as a violation of the state constitution the attempt of the state legislature to require the university’s governing board to divest from companies doing business in South Africa. The court also recounted the experience of the state when the legislature had entire control and management of the university, and noted that the result had been a university that “was not a success.”³⁶ When the Michigan Constitution of 1850 gave control of the university to a lay governing board, by contrast, the university grew “to be one of the most successful, the most complete, and the best-known institutions of learning in the world.”³⁷ Governing boards thus have served as a buffer for public as well as private institutions of higher education in the United

ever since the establishment of the first colleges, or the emergent class of businessmen and professionals who, as alumni, felt closely tied to the colleges and, as the people being asked to support them, felt that they were owed a voice in them.

Id.

30. *Id.* at 212. The alumni took their revenge. When Yale attempted to raise funds from the alumni in 1871, the effort was an abysmal failure. *Id.* at 213.

31. *Id.* at 213.

32. *See, e.g.*, CAL. CONST. art. IX, § 9; GA. CONST. art. 8, § 4; MICH. CONST 1963 art. 8 §§ 5 and 6. *See generally* WILLIAM A. KAPLIN & BARBARA A. LEE, 2 THE LAW OF HIGHER EDUCATION 1255-58 (4th ed. 2006).

33. *See, e.g.*, 110 ILCS 205/10; K.S.A. CONST. art. 6, § 2 (“The legislature shall provide for a state board of regents and for its control and supervision of public institutions of higher education”); WYO. CONST. art. 7, § 17 (“The legislature shall provide by law for the management of the university, its lands and other property by a board of trustees.”).

34. Board members are selected in a variety of ways. In Michigan the regents are elected state-wide. MICH. CONST. art. 8, § 15. In California, they are appointed by the governor and confirmed by the Senate. CAL. CONST. art. 9, § 9.

35. 419 N.W. 2d 773 (Mich. Ct. App. 1988).

36. *Id.* at 776.

37. *Id.* State constitutions do not always protect state colleges and universities from state legislation. *See, e.g.*, *Univ. of Utah v. Shurtleff*, 144 P.3d 1109 (Utah 2006) (upholding right of state to prohibit university from barring possession of firearms on campus, and distinguishing the decision in *University of Michigan v. State of Michigan* on the ground that wording of Utah constitution differed from that of the Michigan constitution).

States from excessive government control.

Of course, governing boards were not the only factor that led to a considerable degree of autonomy for American institutions of higher education. As Alan Macfarlane has observed:

A society or civilization to a certain extent gets the university it deserves. If a society is open, balanced, and liberal, it will be reflected in that kind of university. If it is closed, inquisitorial, centralized, it will get another kind.³⁸

The United States was founded on the principle of limited government. That belief is not only embedded in the Constitution, it is reflected in the major, federal programs that provide financial support to higher education. Thus the G.I. Bill, which provided funding for more than three million veterans to attend institutions of higher education, empowered individual students to decide which institution to attend. This meant that federal funds went to the institutions chosen by students rather than by the government. The same approach was used in the National Defense Education Act of 1958, the first of the post-war acts that provided significant financial aid to students at institutions of higher education.³⁹

B. Shared Governance

The United States not only developed a new form of governance for colleges and universities, both public and private, when it embraced lay governing boards—it also devised a new relationship between governing boards and their faculties. The changing relationship with faculty began in the late nineteenth century. As faculty members conducted more original research and developed expertise in a variety of disciplines, a number of clashes erupted between faculty members and trustees. Those clashes, in turn, led to a new form of internal governance.

One of the most publicized disputes involved Edward A. Ross, a prominent economist on the Stanford faculty. His advocacy of free silver and opposition to the exploitation of foreign labor offended Mrs. Leland

38. ALAN MACFARLANE, REFLECTIONS ON CAMBRIDGE 12–13 (2009).

39. The Serviceman's Readjustment Act, 58 Stat. 284, codified as amended at 10 U.S.C. § 16131, better known as the GI Bill, was signed into law on June 22, 1944, by President Roosevelt. By 1947, there were 1,164,000 veterans registered for college using the G.I. Bill, nearly half of all enrolled students. MILTON GREENBERG, THE GI BILL: THE LAW THAT CHANGED AMERICA 36 (1997). In 1972, Congress amended the 1964 Higher Education Act to provide Basic Educational Opportunities Grants, soon renamed Pell Grants in honor of their Senate sponsor, to low-income students. By 1990, the program was providing 3 million students nearly \$4 billion in aid. JOHN R. THELIN, A HISTORY OF AMERICAN HIGHER EDUCATION 325 (2004). *See generally* ALICE M. RIVLIN, THE ROLE OF THE FEDERAL GOVERNMENT IN FINANCING HIGHER EDUCATION 61 (1961).

Stanford, the sole trustee of the university that she and her late husband had founded in memory of their son. In 1897, she demanded that David Starr Jordan, then president of Stanford, fire Professor Ross. President Jordan delayed as long as he could, but, in 1900, he capitulated.⁴⁰

In response to the Ross affair and a growing number of disputes between faculty members and governing boards at other institutions, both public and private, a group of leading scholars in 1915 organized the American Association of University Professors (AAUP).⁴¹ That same year, the AAUP issued a *Declaration of Principles on Academic Freedom and Academic Tenure*,⁴² which has come to be recognized as the seminal statement of academic freedom in the United States.⁴³

What is not as widely recognized is that the *Declaration* also endorsed a new approach to governance. The *Declaration* credited the German concept of academic freedom as its inspiration, but in Germany no lay boards were interposed between the government and the faculty. The state posed the most immediate threat to academic freedom. In the United States, by contrast, the lay governing board at once offered faculty some insulation from governmental meddling and created a new source of interference with faculty control of academic matters. To protect American faculties from overreaching by governing boards, the *Declaration* adopted a broader form of academic freedom, one that rested on a new allocation of governance responsibilities within colleges and universities. This allocation has come to be known as “shared governance”:

A university is a great and indispensable organ of the higher life of a civilized community, in the work of which the trustees hold an essential and highly honorable place, but in which the faculties hold an independent place, with quite equal responsibilities—and in relation to purely scientific and educational questions, the primary responsibility.⁴⁴

40. ORRIN LESLIE ELLIOTT, *STANFORD UNIVERSITY: THE FIRST TWENTY-FIVE YEARS* 11 (1937); MARY O. FURNER, *ADVOCACY & OBJECTIVITY: A CRISIS IN THE PROFESSIONALIZATION OF AMERICAN SOCIAL SCIENCE, 1865-1905*, at 233–39 (1975).

41. CHRISTOPHER JENCKS & DAVID RIESMAN, *THE ACADEMIC REVOLUTION* 15–20 (1968); LAWRENCE R. VESEY, *THE EMERGENCE OF THE AMERICAN UNIVERSITY* 384–418 (1965).

42. AM. ASS’N OF UNIV. PROFESSORS, *GENERAL DECLARATION OF PRINCIPLES*, reprinted in 2 *AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY* 860, 860 (Richard Hofstadter & Wilson Smith eds., 1961) [hereinafter 1915 DECLARATION].

43. See, e.g., Robert Post, *The Structure of Academic Freedom*, in *ACADEMIC FREEDOM AFTER SEPTEMBER 11*, at 61, 64 (Beshara Doumani ed., 2006) (the Declaration is “arguably the greatest articulation of the logic and structure of academic freedom in America.”).

44. 1915 DECLARATION, *supra* note 42 at 866.

The *Declaration* justified this new approach to governance on the pragmatic ground that shared governance is the best way for an institution to promote “[g]enuine boldness and thoroughness of inquiry.”⁴⁵ It warned of the danger of “a tyranny of public opinion” in any democracy, and explained that a college or university must be a refuge from such tyranny, “an intellectual experiment station, where new ideas can germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen.”⁴⁶ If trustees were to hold the power to decide what is taught and written, the *Declaration* warned, the institution would be more an instrument of propaganda than a true university.⁴⁷

The contours of shared governance were further refined by leading higher-education associations. In 1966, the AAUP issued a *Statement on Government of Colleges and Universities*, which had been formulated jointly with the American Council of Education, the professional association of college and university presidents.⁴⁸ The *Statement* explored

45. *Id.* at 862. Some colleges and universities involved faculty in governance of academic matters decades earlier. Jeremiah Day, for example, who was president of Yale from 1817 to 1846, discussed and decided all questions connected with college policy in meetings of the faculty. RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 235 (1955).

46. 1915 DECLARATION, *supra* note 43, at 870. A recent example of the pressure public opinion can bring to bear on an institution’s governing board took place at the University of Nebraska. On November 20, 2009, the Board of Regents by a 4-to-4 vote defeated an effort to limit human embryonic stem cell research at the university. Monica Davey, *U. of Nebraska Defeats Tighter Limits on Stem Cell Research*, N.Y. TIMES, Nov. 21, 2009, at A12. The measure was defeated only because of a change-of-heart by a regent who had been backed by anti-abortion groups in his campaign to be elected to the board. Nebraska is one of the few states where regents are elected in state-wide elections. Scott Jaschik, *Narrow Win for Stem Cell Research*, INSIDE HIGHER EDUC., Nov. 23, 2009, <http://www.insidehighered.com/layout/set/print/news/2009/11/23/nebraska> (last visited Mar. 1, 2010).

47. 1915 DECLARATION, *supra* note 43, at 870.

48. AM. ASS’N OF UNIV. PROFESSORS, 1966 STATEMENT OF GOVERNMENT OF COLLEGES AND UNIVERSITIES, *reprinted in* AAUP POLICY DOCUMENTS & REPORTS 135–40 (10th ed. 2006) [hereinafter 1966 STATEMENT]. In addition, the board of directors of the Association of Governing Boards (AGB) encouraged institutions and their boards to consider the *1966 Statement*. ASS’N OF GOVERNING BODS. OF UNIVS. & COLLS., STATEMENT ON BOARD ACCOUNTABILITY 2 (2007), *available at* <http://agb.org/sites/agb.org/files/u16/AGB%20Statement%20on%20Board%20Accountability.pdf> (last visited May 11, 2010) (Noting that “[a]mong th[e] abiding values [of higher education] are self-regulation and autonomy, academic freedom and due process, shared governance, educational quality, transparency and fiscal integrity.”). The 2007 Statement added that “[t]he faculty and academic administrators—not the board—shape the manner in which subjects are taught and learning experiences framed, identify who shall teach these programs, and develop approaches to assess the outcomes of student learning.” *Id.* at 7. *See also* ASS’N OF GOVERNING BODS. OF UNIVS. & COLLS., EFFECTIVE GOVERNING BOARDS: A GUIDE FOR MEMBERS OF GOVERNING BOARDS OF INDEPENDENT COLLEGES AND UNIVERSITIES 4 (2009) (“[T]he tradition of shared governance [is] integral to the academic

the benefits of shared governance and explained the need for joint efforts by the key constituencies:

The variety and complexity of the tasks performed by institutions of higher education produce an inescapable interdependence among governing board, administration, faculty, students, and others. The relationship calls for adequate communication among these components, and full opportunity for appropriate joint planning and effort.⁴⁹

The *Statement* identified major activities that would benefit from joint effort, including framing and executing long-range plans, decisions regarding existing or prospective physical resources, budgeting, and selection of a new president.⁵⁰ It also outlined the distinctive roles of governing boards, faculties, and administrators. Governing boards, in addition to being responsible for the matters that need joint work, should husband the endowment, obtain needed capital and operating funds, and pay attention to personnel policy.⁵¹ Faculty should have primary responsibility for academic matters, including “curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life that relate to the educational process.”⁵² Giving the faculty primary responsibility for academic matters, the *Statement* explained, means that presidents and boards should overrule faculty decisions about academic matters “only in exceptional circumstances, and for reasons communicated to the faculty.”⁵³

Although governing boards were acknowledged to be the “final institutional authority,” the *Statement* urged them to undertake appropriate self-limitation. An effective board, “while maintaining a general overview, entrusts the conduct of administration to the administrative officers—the president and deans—and the conduct of teaching and research to the faculty.”⁵⁴

In 1980, the Supreme Court acknowledged the value of shared governance in *NLRB v. Yeshiva University*.⁵⁵ In the course of deciding that the faculty at Yeshiva could not organize as a union because their managerial responsibilities meant that they were not ordinary employees, the Court explained:

The “business” of a university is education, and its vitality

community”).

49. 1966 STATEMENT, *supra* note 48, at 136.

50. *Id.* at 136–37.

51. *Id.* at 138.

52. *Id.* at 139.

53. *Id.*

54. *Id.* at 138.

55. 444 U.S. 672 (1980).

ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions. . . . The university requires faculty participation in governance because professional expertise is indispensable to the formulation and implementation of academic policy.⁵⁶

Academic leaders also have addressed the strengths and weaknesses of shared governance. In 1934, A. Lawrence Lowell, then president of Harvard University, explained that because colleges and universities are established not to earn profits, but to preserve, transmit and increase knowledge, the relationship of board to faculty should not be one of employer to employee, but one of mutual cooperation for “the promotion of the scholar’s work.”⁵⁷ Although some presidents have advocated a more corporate style of management,⁵⁸ most have concluded that assigning faculty primary responsibility for academic matters is the best way to strengthen their commitment to the production and dissemination of knowledge. In the words of Derek Bok:

No one ever raised the level of scholarship by ordering professors to write better books, nor has the quality of teaching ever improved by telling instructors to give more interesting classes. In these domains, good work depends on the talent and enthusiasm of professors.⁵⁹

Shared governance is not without its faults. Faculty senates can be slow to respond even to time-sensitive matters or dominated by petty debate. But its merits have led to its adoption by a majority of American institutions of higher education. A 2001 survey found that faculty participation in the governance of academic matters has increased significantly in recent decades. In 1970, faculties determined the content of the curriculum at 45.6% of the 1,321 surveyed institutions, and they shared authority over the curriculum with the administration at another 36.4%. By

56. *Id.* at 688–89 (footnote omitted).

57. A. Lawrence Lowell, *The Relation Between Faculties and Governing Boards*, in AT WAR WITH ACADEMIC TRADITIONS IN AMERICA 288–90 (photo. reprint 1970) (1934).

58. See, e.g., James J. Duderstadt, *Fire, Ready, Aim! University Decision-Making During an Era of Rapid Change*, in GOVERNANCE IN HIGHER EDUCATION: THE UNIVERSITY IN A STATE OF FLUX 26 (Werner Z. Hirsch & Luc E. Weber eds., 2001).

59. DEREK BOK, 2006-07 ANNUAL REPORT TO THE HARVARD CORPORATION, available at <http://harvardmagazine.com/breaking-news/president-boks-annual-report> (last visited Oct. 4, 2009). Bok added:

It is certainly true that professors can resist change and that, like most human beings, they are often loath to give up their prerogatives. For all that, however, American universities have fared quite well over the past 50 years, the very period when faculty power reached its zenith.

Id.

2001, faculties determined curriculum content at 62.8% of the institutions, and shared authority at an additional 30.4%.⁶⁰ Similarly, by 2001, faculties determined the appointment of full-time faculty in 14.5% and shared authority in 58.2% of the surveyed institutions.⁶¹ Shared governance, as a refinement of the governing board structure used by both public and private institutions of higher education, has become the norm at the very time that American higher education has been recognized as including the lion's share of the best colleges and universities in the world.⁶²

Shared governance should not be confused with *divided* governance. It gives faculties *primary*—not *exclusive*—responsibility for academic matters. As the 1966 *Statement on Government* recognized, there are times when a governing board should override a faculty decision.⁶³ Similarly, although governing boards have primary responsibility for financial matters, it is normally best to consult with the faculty about, or include representatives of the faculty in, the decision-making process for financial and other matters that will directly affect the ability of faculty to research or to teach, such as the budget, strategic planning, and the construction of new academic facilities.⁶⁴

Shared governance applies only to academic matters, moreover. As a result most colleges and universities have a dual-management structure. There is a fairly horizontal relationship among governing board, administration, and faculty when academic matters are at issue. The traditional “pyramidal hierarchy” characteristic of for-profit corporations, by contrast, applies to board oversight of administrators and staff.⁶⁵ It also applies to oversight of faculty when nonacademic matters are at issue. A

60. Gabriel E. Kaplan, *How Academic Ships Actually Navigate*, in GOVERNING ACADEMIA 165, 172, 202 (Ronald G. Ehrenberg ed., 2004). Faculty participation varies significantly by type of institution. “In for-profits the faculty are quite clearly employees, few faculty are involved in creating curriculum, and decision making of all sorts is firmly in the hands of managers.” Brian Pusser & Sarah E. Turner, *Nonprofit and For-Profit Governance in Higher Education*, in GOVERNING ACADEMIA 235, 251.

61. Kaplan, *supra* note 60 at 202.

62. *See supra*, note 8 and accompanying text.

63. 1966 STATEMENT, *supra* note 48, at 139.

64. *Id.* at 137. Specifically, the statement reasoned that:

The allocation of resources among competing demands is central in the formal responsibility of the governing board, in the administrative authority of the president, and in the educational function of the faculty. Each component should therefore have a voice in the determination of short- and long-range priorities, and each should receive appropriate analyses of past budget experience, reports on current budgets and expenditures, and short- and long-range budgetary projections.

Id.

65. *Cf. NLRB. v. Yeshiva Univ.*, 444 U.S. 672, 680 (1980) (“The [National Labor Relations] Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry.”).

faculty member, for example, cannot invoke academic freedom as a justification for not teaching his or her classes, or for demanding better health benefits.⁶⁶

The American use of lay governing boards protects the independence of the nation's colleges and universities from state control and, refined by the adoption of shared governance, has been a major force in producing the best higher education sector in the world. It takes more than a particular governance structure, however, to produce academic excellence. The next section will analyze how American governing boards are held to account

III. FORMS OF ACCOUNTABILITY: COMPETITION, REGULATION, AND ACCREDITATION

There are three forms of accountability that have shaped American higher education: competition, licensing, and accreditation.

A. Competition

Market competition has held American colleges and universities to account from the earliest decades of the nation,⁶⁷ and it remains the most important form of accountability. The institutional diversity that came to characterize American higher education led to robust competition for students, faculty, and funds by the twentieth century. As explained by Ruth Simmons, president of Brown University:

Another factor in the strength of U.S. higher education is the competition that its institutions enjoy with each other, and I don't mean on the athletic field. We all compete for students, faculty, government grants, awards and prizes, philanthropic support, and rankings. Those institutions that compete most successfully attract better students and more resources and, in so doing, they continue to improve, extending their success in more and more powerful ways. Those institutions that are weaker may fall back and even go out of business. Economists tell us that competition is good and that, under most circumstances, it leads to improvement. Our competition relies on our differences, the advantages that we can establish, the niches that are uniquely ours.⁶⁸

66. See, e.g., *Smith v. Kent State Univ.*, 696 F.2d 476 (6th Cir. 1983) (upholding termination of a tenured professor who repeatedly refused to teach assigned classes).

67. During the colonial period, there was little competition because each college was established in a separate colony until Queens College (Rutgers) was founded in 1766. Religious differences still limited most competition between Queens and Princeton. HERBST, *supra* note 22, at 112.

68. Ruth J. Simmons, President, Brown University, Address at the Economics

Institutional diversity has further contributed to the quality of American higher education by providing multiple settings in which to determine how best to educate different students and to stimulate research and innovation. A major source of the institutional diversity that characterizes American higher education is the existence of a strong private as well as a strong public sector.⁶⁹ In the early years of the nation, however, it was not at all clear that the private sector would survive.

In 1779, the Pennsylvania legislature suspended the powers of the trustees of the (private) College of Philadelphia, changed its name to the University of the State of Pennsylvania, and appointed twenty-four new trustees, including six state officials.⁷⁰ The legislature was responding in part to action taken by trustees of the college during the revolution. Some trustees withdrew to the British lines, or to Great Britain itself.⁷¹ Of the three trustees who were members of the Continental Congress, one voted for the Declaration of Independence, one against, and one refrained from voting.⁷² Other trustees and their families remained on pleasant terms with the British army of occupation in Philadelphia in 1777 and 1778, and the Provost chose not to participate in any way in the movement for independence.⁷³

For nearly a decade, the original trustees of the college resisted the actions of the state until, in 1789, the legislature, whose membership had changed in intervening elections, acknowledged that its earlier actions violated state-law protections of private property, and restored the property of the college.⁷⁴ For a brief time, the college and the university attempted to operate separately, but they merged in 1791 to form the (private) University of Pennsylvania.⁷⁵

Club of Washington, D.C., April 2, 2008, *transcript available at* <http://brown.edu/Administration/President/letters/2007-2008/economic-club.pdf>.

⁶⁹ Although only 1700 of the 4300 institutions of higher education in the United States are public, the majority of post-secondary degrees are awarded by public institutions. CHRON. HIGHER EDUC., Aug. 28, 2009, at 16. Most students outside the United States attend public universities. In Europe, only Portugal and Turkey have large private sectors in higher education. Estermann & Nokkala, *supra* note 13, at 9.

⁷⁰ EDWARD POTTS CHEYNEY, HISTORY OF THE UNIVERSITY OF PENNSYLVANIA, 1740-1940, at 123-24 (1940).

⁷¹ *Id.* at 119.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 146-50. A more dramatic confrontation involving higher education occurred in New York City in 1775 when hundreds of protestors armed with clubs threatened Myles Cooper, the president of Kings College (the precursor of Columbia University) for being a Tory. Alexander Hamilton, a student at the college, detained the mob long enough for the president to escape. RON CHERNOW, ALEXANDER HAMILTON 63-64 (2004).

⁷⁵ *Id.* CHENEY, *supra* note 70, at 162-69.

A better-known challenge to private higher education took place in New Hampshire, although it grew out of an internal governance dispute rather than a state-initiated effort to seize control. Clergyman Eleazor Wheelock established Dartmouth College at his own expense for the purpose of Christianizing Native Americans.⁷⁶ Rev. Wheelock obtained a charter from the King of England in 1769 and raised money for the college from the English aristocracy. The royal charter gave him the right to select his successor, and he named his son, John.⁷⁷ By the early nineteenth century, the original trustees had been replaced with new ones who were both less deferential to and more conservative religiously than the president.⁷⁸ In 1814, this board refused to permit President John Wheelock to teach his traditional course to seniors in the college.⁷⁹ This was the last straw for the embattled college president. When President Wheelock complained to the legislature about his treatment, the trustees fired him.⁸⁰

Wheelock then reached out for support to the Jeffersonian Republicans, who for the first time in 1816 had captured New Hampshire's governorship and a majority in the state legislature. The reconstituted legislature passed a statute to turn (private) Dartmouth College into (public) Dartmouth University.⁸¹ A companion statute authorized a fine of \$500 if any trustee interfered with the new university's operations.⁸² The trustees concluded that they had no choice but to sue. They lost in the state courts and appealed to the Supreme Court of the United States.

With Chief Justice John Marshall writing, the Court in *Trustees of Dartmouth College v. Woodward*⁸³ held that the college's charter was a contract protected under the Constitution's Contracts Clause from breach by the state.⁸⁴ The trustees' victory kept Dartmouth private. More importantly, *The Dartmouth College Case* has stood since as a bulwark protecting private colleges and universities from state expropriation and thus helped to preserve a private sector in American higher education.

The intense competition in higher education today for students, faculty, and funds means that governing boards need to be particularly careful of the reputation of their institution. If a board fails to oversee the president adequately, an institution's reputation may be as damaged by

76. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 631 (1819).

77. *Id.* at 632.

78. HERBST, *supra* note 22, at 235.

79. WHITEHEAD, *supra* note 27, at 54.

80. *Id.* at 58–59.

81. *Id.* at 63. The statute is set forth in the official report of the case, 17 U.S. (4 Wheat.) 518, 539–44 (1819).

82. WHITEHEAD, *supra* note 27, at 65.

83. 17 U.S. (4 Wheat.) 518 (1819).

84. *Id.* at 654.

adverse publicity as by a civil complaint brought by the state attorney general. Similarly, a board's failure to uphold academic standards in admissions or in the granting of degrees may lead to as much reputational harm as overpaying the president.⁸⁵ A look at several of the most publicized recent controversies reveals the kinds of misjudgments that may lead to reputational harm.

1. Board Failure to Oversee the President

One of most-publicized recent failures of a governing board to oversee a president took place at American University. The matter came to the attention of the media in July 2005, when *The Washington Post* received an anonymous letter. It was a copy of a letter that had been sent a few months earlier to the board of trustees of American alleging "severe expense account violations" by the university president and his wife.⁸⁶ The letter claimed that they had charged the university for presents for their family, a personal French chef, long weekends in Europe that were not for university business, and daily wine for lunch and dinner at \$50 to \$100 per bottle. When outside auditors investigated the allegations, the chair of the board's audit committee learned that they were "all basically true."⁸⁷ After continuing, negative publicity, the Board voted to dismiss the president.⁸⁸

2. Board Failure to Resist Improper Intervention by State Officials or Major Donors

Colleges and universities understandably seek to be responsive to requests from major donors or state officials who have power over their funding. Being responsive, however, does not justify granting academic favors to public officials, their relatives, or their friends. Two recent and

85. The costs of scandal to a nonprofit college or university can be seen in the experience of several respected charities. In the 1990s, the president of the United Way was convicted of embezzling \$600,000. See Karen W. Arenson, *April 2-8: He Took at the Office*, N.Y. TIMES, Apr. 9, 1995, Sec. 4, at 2. A few years later the head of the United Way of the National Capital Area pleaded guilty to criminal fraud. See generally Nicole Gilkeson, Note, *For-profit Scandal in the Nonprofit World: Should States Force Sarbanes-Oxley Provisions onto Nonprofit Corporations?*, 95 GEO. L.J. 831 (2007). After the fraud, private contributions to the United Way of the National Capital Area dropped by more than \$30 million, resulting in a thirty percent reduction in total revenue. The charity was forced to lay off forty percent of its workforce. Jacqueline L. Salmon, *United Way's Donations Plummet; Charity Will Cut 40% of Workforce*, WASH. POST, Jan. 31, 2003, at A1.

86. Harry Jaffe, *Let Them Eat Truffles*, WASHINGTONIAN, April 2006, at 76.

87. *Id.* at 120.

88. Michael Janofsky, *College Chief at American Agrees to Quit for Millions*, N.Y. TIMES, Oct. 26, 2005, at A20. The president was later permitted to resign and provided with a generous settlement. *Id.*

widely-publicized incidents demonstrate the high reputational price that institutions and their governing boards may pay if they fail to resist inappropriate requests from public officials or donors.

*a. The University of West Virginia and the Governor's
Daughter*

The controversy began on October 11, 2007, when a reporter from the Pittsburgh Post-Gazette contacted West Virginia University (WVU) to confirm the credentials of the daughter of the governor of West Virginia, who had just been appointed chief operating officer of one of the world's largest generic drug companies.⁸⁹ The company's chairman was a major contributor to the governor's campaign, as well as the University's largest donor, having given \$20 million to the University in 2003.⁹⁰ The University told the newspaper that the governor's daughter had earned an undergraduate degree at West Virginia University, but had not finished her executive MBA degree as she claimed on the company's website. Days later, a University spokeswoman reported that the daughter had completed all of the requirements for the MBA degree, but simply had failed to pay a \$50 graduation fee. When pressed to explain its conflicting statements, the University said that the business school had failed to transfer some of her credits and grades to the records office.

After a three-month investigation, a five-member Special Investigative Panel appointed by the University's provost and the Faculty Senate found that there had been no academic justification for granting the MBA degree to the daughter.⁹¹ They also found that University administrators had added courses and unearned grades to her record.⁹² When the report was released, the provost of the university and the dean of the business school resigned,⁹³ and the chairman of the University's Board of Governors gave up his chairmanship.⁹⁴ One month later the president of the University announced that he, too, would resign.⁹⁵

89. Ian Urbina, *University Investigates Whether Governor's Daughter Earned Degree*, N.Y. TIMES, Jan. 22, 2008, at A15.

90. *Id.*

91. JOHN M. BURKOFF ET. AL, REPORT OF THE SPECIAL INVESTIGATIVE PANEL FOR REVIEW OF EXECUTIVE MBA PROGRAM RECORDS, Apr. 21, 2008, at 3, available at <http://facultysenate.wvu.edu/r/download/15764> (last visited Nov. 27, 2009).

92. *Id.* at 6–8.

93. Patricia Sabatini and Len Boselovic, *The Story of a Cover-up*, PITTS. POST-GAZETTE, May 4, 2008 at A1.

94. Paul Fain, *Chairman of West Virginia U. Board Quits Post but Will Not Leave the Board*, CHRON. HIGHER EDUC., May 9, 2008, <http://chronicle.com/article/Chairman-of-West-Virginia-U/40949/> (last visited Nov. 23, 2009).

95. Paul Fain, *Questions Follow a Political President's Fall*, CHRON. HIGHER

b. Shadow Admissions at the University of Illinois

On May 29, 2009, the *Chicago Tribune* reported that a “shadow” admissions system existed at the University of Illinois, under which some well-connected applicants were admitted over the protests of admissions officers because the applicants were sponsored by state lawmakers or University trustees.⁹⁶ The following month, the governor of Illinois, appointed an investigative commission chaired by Abner Mikva, a respected former federal judge and congressman, to investigate the matter.⁹⁷ The *Tribune* later reported there were nearly one hundred instances where trustees had backed applicants in the past three years, “including their relatives and the children of colleagues and ‘key employees.’”⁹⁸ According to the *Tribune*, every member of the board took part except for the newest trustee, who had been on the board for only one month.⁹⁹ The chairman of the board resigned on August 3, 2009, and the investigative commission called on all politically-appointed trustees to do the same.¹⁰⁰

The Mikva Commission Report, released on August 6, 2009, concluded:

For years, a shadow admissions process existed at the University of Illinois. Unknown to the public and even to most University employees, this shadow process—referred to as “Category I”—catered to applicants who were supported by public officials, University Trustees, donors, and other prominent individuals. While applicants who lacked such clout sought admission through the University’s official admissions process, Category I applicants were given separate and often preferential treatment by University leadership. . . . In scores of instances, the influence of prominent individuals—and the University’s refusal or inability to resist that influence—operated to override the decisions of admission professionals and resulted in the enrollment of students who did not meet the University’s

EDUC., June 20, 2008, at A11.

96. Jodi S. Cohen, Stacy St. Clair, & Tara Malone, *Clout Goes to College: Rezko Relative is Among Those Admitted to U. of I. in Shadow System Influenced by Trustees and Other Insiders*, CHI. TRIB., May 29, 2009, at 1.

97. Karen Ann Cullotta, *Panel to Investigate Admissions at U. of Illinois*, N.Y. TIMES, June 11, 2009, at A18.

98. Robert Becker, Tara Malone, & Jodi S. Cohen, *Trustees No Strangers to Clout*, CHI. TRIB., June 21, 2009, at 1.

99. *Id.*

100. Ashley C. Killough, *Report Calls on All U. of Illinois Trustees to Resign*, CHRON. HIGHER EDUC., Aug. 6, 2009, <http://chronicle.com/article/Report-Calls-on-All-U-of-I/47969> (last visited Nov. 23, 2009).

admissions standards—some by a considerable margin. . . .¹⁰¹

The report found that, due to the advocacy of influential “sponsors,” the University admitted in 2009 at least thirty-three Category I undergraduate applicants who had been designated for denial by the admissions officers.¹⁰² In addition, the College of Law admitted twenty-four substandard applicants between 2003 and 2007.¹⁰³

The report recommended that all members of the Board of Trustees submit their resignations in order to permit the governor to decide who should be reappointed.¹⁰⁴ It also recommended establishing a firewall around the admissions process, which would prohibit consideration of sponsorship by prominent individuals or other undue influence in the admissions process.¹⁰⁵ In September, the University president announced his resignation.¹⁰⁶

Competition has served as a powerful source of accountability for colleges and universities and for their governing boards even in the best of times. As recent controversies demonstrate, trustees must be careful to act in ways that will not harm the reputation of their institution because applicants, faculty, and grantors may avoid an institution that develops a reputation for either academic or financial irregularities.

B. Regulation

1. Of Nonprofit Organizations Generally

From the earliest days of the nation, regulation of American higher education has been viewed as a state rather than a federal responsibility.¹⁰⁷ The first regulations of the structure or governance of private institutions of higher education and of other nonprofit organizations were not promulgated, however, until after World War II. Like most nonprofit organizations, if colleges or universities chose to incorporate in earlier years, they used the “nonstock” provisions found in the general corporation

101. STATE OF ILLINOIS ADMISSIONS REVIEW COMMISSION, REPORT & RECOMMENDATIONS, Aug. 6, 2009, at 3, available at <http://admissionsreview.illinois.gov/documents/FinalReport.pdf>.

102. *Id.* at 4.

103. *Id.*

104. *Id.* at 6.

105. *Id.* at 7.

106. Jodi S. Cohen, Stacy St. Clair, & Tara Malone, *University of Illinois President B. Joseph White Resigns*, CHI. TRIB., Sept. 24, 2009, available at <http://www.chicagotribune.com/news/chi-u-of-i-white-resign-24-sep24,0,161068.story> (last visited Nov. 27, 2009).

107. LAWRENCE A. CREMIN, AMERICAN EDUCATION: THE NATIONAL EXPERIENCE 1783-1876, at 400-09 (1980).

law of many states.¹⁰⁸ In 1952, a Model Non-Profit Corporation Act was developed by a committee of the American Bar Association.¹⁰⁹ By 2003, the Model Act had prompted the adoption of nonprofit corporation acts in all but two states.¹¹⁰

The nonprofit corporation acts divide the fiduciary obligations of nonprofit trustees into a duty of care and a duty of loyalty.¹¹¹ The duty of care is essentially the same as the duty owed by directors of business corporations to their shareholders: a director must exercise “that degree of skill or diligence, and care that a reasonably prudent person would exercise in similar circumstances.”¹¹² There are, however, significant differences between the duty of loyalty owed by for-profit directors and that owed by nonprofit trustees. These differences reflect the different organizational purposes of for-profit and nonprofit corporations:

The officers and directors of a for profit corporation are to be guided by their duty to maximize long term profit for the benefit of the corporation and the shareholders. A nonprofit public benefit corporation’s reason for existence, however, is not to generate a profit. Thus a director’s duty of loyalty lies in pursuing or ensuring pursuit of the charitable purpose or public benefit which is the mission of the corporation.¹¹³

Nonprofit corporations by definition are precluded from distributing their surplus profits to those in charge of the organization, a prohibition that Henry Hansmann termed “the nondistribution constraint.”¹¹⁴ This

108. Elizabeth A. Moody, Foreword, MODEL NONPROFIT CORPORATION ACT xix (3d ed. 2009).

109. *Id.*

110. MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS 152 (2004). In Delaware and Kansas, charitable corporations are governed by the business corporation act, but their articles of organization must both provide that the corporation is not created for profit and prohibit the distribution of dividends to shareholders. *Id.*

111. *Id.* at 199–226.

112. ROBERT CLARK, CORPORATE LAW § 3.4 (1986). Liability for violating the duty of care is limited by the business judgment rule: a director’s business judgment cannot be attacked unless it “was arrived at in a negligent manner, or was tainted by fraud, conflict of interest, or illegality.” *Id.*

113. *Summers v. Cherokee Children & Family Servs.*, 112 S.W.3d 486, 504 (Tenn. Ct. App. 2002).

114. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980):

A nonprofit organization is, in essence, an organization that is barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees. By “net earnings” I mean here pure profits—that is, earnings in excess of the amount needed to pay for services rendered to the organization; in general, a nonprofit is free to pay reasonable compensation to any

definition of what it means to be a nonprofit has the virtue of being used in the nonprofit corporation statutes of all fifty states.¹¹⁵ State laws embody the constraint by providing that “insiders,” including trustees, officers and donors, may not take advantage of their positions either by engaging in self-dealing transactions that benefit themselves at the expense of the mission of the nonprofit organization, or by approving or accepting excessive compensation.¹¹⁶ Most states also restrict their officeholders from receiving distributions of budgetary surpluses, which means that *public* colleges and universities also are subject to the nondistribution constraint.¹¹⁷

Significantly, the means of enforcing the duties of for-profit boards and nonprofit trustees are quite different. In the for-profit sector, the possibility of a stockholder derivative action helps to ensure the board’s accountability. In the nonprofit sector, however, charitable corporations have no stockholders to bring such an action. Most states, therefore, have enacted statutes authorizing the state attorney general to intervene when the board of a charitable organization fails to fulfill its duty of care or loyalty.¹¹⁸ It was this type of statute that authorized the action filed in New

person for labor or capital he provides, whether or not that person exercises some control over the organization. . . . I shall call [this prohibition on the distribution of profits] the “nondistribution constraint.”

115. Richard Steinberg & Walter W. Powell, *Introduction* to THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 1 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006).

116. American Law Institute, Principles of the Law of Nonprofit Organizations § 310 Duty of Loyalty (Tentative Draft No. 1, March 19, 2007, tentatively approved at 2007 and 2008 Annual Meetings):

The duty of loyalty requires each board member, the governing board, and each committee of the board and committee member--

(a) to act in a manner that such person or body reasonably believes to be in the best interests of the charity, in light of its stated purposes. . . .

The Official Comment answers the question to whom fiduciary duties are owed:

In a private (noncharitable) trust, trustees owe fiduciary duties to the beneficiaries; in a business corporation, the directors owe their duties to the corporation. In the case of a charitable trust, which lacks ascertainable beneficiaries who can enforce their rights, the fiduciary duties are instead said to run to the charitable purpose. . . .

. . . By using the phrase “best interests of the charity, in light of its stated purposes,” this Section combines the trust and corporate language to declare an affirmative obligation of the fiduciaries to govern for charitable purposes, and not for the benefit of board members, executives, donors, or other private parties. Of course, private individuals—such as students . . . will incidentally benefit from the charities activities.

117. THE NONPROFIT SECTOR, *supra* note 115, at 2.

118. The tradition of relying on government action to stop fraud in charitable

Jersey against Stevens Institute of Technology.¹¹⁹

The action was filed on September 17, 2009.¹²⁰ Several counts of the complaint focused on actions that had been approved by only a minority of the board. Specifically, the complaint alleged that the president and chairman of the board joined with the two vice-chairs of the board to “dictate the composition of most committees of the Board,” and otherwise to control the full board.¹²¹ Among the kinds of information that allegedly were not disclosed to the full board were the reasons PriceWaterhouseCoopers withdrew as outside auditor in 2005, the internal-control letters of the independent auditors, the compensation of the president, and unauthorized loans to the president.¹²²

To support the claim of excessive presidential compensation, the complaint alleged that, in fiscal year 2007, the president was paid \$770,000 to oversee operating expenses of \$158 million.¹²³ That same fiscal year, the president of MIT was paid \$635,000 to oversee operating expenses of more than \$2.3 billion.¹²⁴ The complaint also alleged that when a

organizations originated in seventeenth-century England. See Kevin C. Robbins, *The Nonprofit Sector in Historical Perspective: Traditions of Philanthropy in the West*, in THE NONPROFIT SECTOR, *supra* note 115, at 13 (discussing Statute of Charitable Uses of 1601 and the inquisitorial powers and procedures conveyed to local commissioners to combat fraud in charitable organizations).

119. See *supra* text accompanying notes 1–2. A decade ago, a similar action was brought against the trustees and officers of private Adelphi University. It was brought by the New York Board of Regents rather than the Attorney General, however, because New York grants the Regents broad powers to oversee all academic institutions. In 1997, the trustees and officers of Adelphi filed a civil suit to prohibit the New York Board of Regents from conducting a hearing into the fitness of the board. *In re Adelphi University v. Board of Regents of the State of New York*, 229 A.D.2d 36, 652 N.Y.S. 2d 837 (1997). The court held that the Regents had the necessary statutory authority to proceed. After a full inquiry, the Regents removed eighteen of the nineteen Adelphi trustees. The reconstituted Board of Trustees fired the president, whose compensation had triggered the Regents’ initial inquiry. His compensation had reached \$837,113 in 1995 and included an option to purchase his \$1.3 million apartment in Manhattan and an \$82,000 Mercedes. Courtney Leatherman, *Adelphi’s Former Trustees Reach Multimillion-Dollar Settlement with University*, CHRON. HIGHER EDUC., Nov. 27, 1998, at A34. A 1998 settlement brought Adelphi University \$1.23 million from the former trustees, and another \$1.45 million from the insurance company that had indemnified them. David M. Halbfinger, *Lawsuits Over Ouster of Adelphi Chief Are Settled*, N.Y. TIMES, Nov. 18, 1998, at B14; William H. Honan, *Campus in Turmoil: A Special Report; Adelphi, A Little University with Big Ideas*, N.Y. TIMES, Feb. 5, 1997, at B1.

120. Complaint, *supra* note 1; John Hechinger, *New Jersey Sues Stevens Institute of Technology*, WALL ST. J., Sept. 17, 2009, <http://online.wsj.com/article/SB125322955414021243.html> (last visited May 11, 2010).

121. Complaint, *supra* note 1, ¶¶ 9, 32, 35.

122. *Id.* at ¶¶ 38, 40, 41, 332.

123. *Id.* at ¶ 54.

124. *Id.* at ¶ 53.

compensation comparability analysis was first procured from an executive-compensation firm in 2005, the president and other officers attempted to influence the consultant by arguing that universities with larger budgets and student bodies should be included in the list of peer schools used. The compensation committee never provided the report of this consultant to the full board.¹²⁵ A second consultant looked only at salary and bonus, and ignored the loans, loan forgiveness, housing, and tuition benefits that also were provided to the president. When the president told the second consultant to alter the peer group used for comparison, moreover, the firm complied, and only the revised report of the second firm was given to the full board.¹²⁶ Referencing the Chronicle of Higher Education, the complaint noted that the president's cash compensation alone made him the tenth highest paid university president in the United States, and that eight of the nine presidents with higher cash compensation were at schools with operating budgets that exceeded \$1 billion.¹²⁷

On January 15, 2010, a settlement was reached between Stevens Institute of Technology and the New Jersey Attorney General.¹²⁸ In it, the Board agreed to a number of governance changes including a requirement that the entire board approve key compensation and investment decisions, improvements in the operations of Board committees, particularly Audit, Compensation, and Investment, and the appointment of a non-trustee financial expert to the Audit Committee.¹²⁹ The president earlier had announced that he would leave his position on June 30, 2010.¹³⁰

In the last decades of the twentieth century, after Congress approved large increases in the amount of federal loans and grants available for post-secondary students,¹³¹ the federal government began to regulate some operations of colleges and universities. It did so by placing conditions on their students' eligibility for federal financial aid.¹³² Another significant

125. *Id.* at ¶¶ 375, 384.

126. *Id.* at ¶¶ 390, 397, 408.

127. *Id.* at ¶¶ 435, 438.

128. Settlement in *Milgram v. Trustees of the Stevens Institute of Technology*, available at <http://stevens.edu/sit/board-of-trustees-statement.cfm> (last visited May 11, 2010).

129. *Id.*

130. Letter from Lawrence T Babbio, Chairman of the Board of Trustees and Harold J Raveche, President, Stevens Institute of Technology, Jan. 15, 2010, available at http://www.stevens.edu/pdf/LB_HR_Statement.pdf (last visited May 11, 2010); *Stevens Institute's President Will Resign as Part of Settlement with New Jersey*, CHRON. HIGHER EDUC., Jan. 15, 2010, <http://chronicle.com/blogPost/Stevens-Institutes-Preside/20548/> (last visited May 11, 2010).

131. See *supra* note 39.

132. See, e.g., Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (prohibiting federal funding of students in educational institutions that discriminate on the basis of sex in education programs or activities); the Family

source of federal regulation of colleges and universities is the tax code. Colleges and universities are not commonly thought of as charities, but the federal tax code includes them in its definition of “charitable organizations” eligible for tax relief.¹³³

There are two primary forms of federal tax relief provided to qualified charities. Since the enactment of the federal income tax in 1913, the United States has exempted the income of all qualified charitable organizations from federal taxation.¹³⁴ In addition, since 1917, the United States has provided an income tax deduction to individual and corporate donors to qualified charities.¹³⁵ Together, these two provisions provided more than \$40 billion in tax relief to the nonprofit sector in 2001.¹³⁶ Approximately 10% of this amount, or \$4 billion, went to higher education.¹³⁷

Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g (prohibiting federal funding of students in educational institutions that have a policy or practice of releasing education records to unauthorized persons); and the Clery Act, 20 U.S.C. § 1092(f) (prohibiting federal funding of students in education institutions that do not notify their constituent communities of certain crimes).

133. The confusion produced by the difference between the legal and the common meaning of the word “charitable” was first noted by Lord MacNaghten in *Commissioners v. Pemsel*, A.C. 531, 583 (1891). The legal meaning of “charitable organizations” is rooted in the Statute of Charitable Uses of 1601, Stat. 43 Eliz., c.4, which included in its definition of charitable purposes, relief for the aged and poor, schools of learning, free schools, scholars in universities, and churches. Thus, educational organizations are not required to aid the poor in order to qualify as charitable organizations under the tax code. In 1983, the Supreme Court held that the exemption may be denied, however, if a charitable organization is violating public policy. *Bob Jones Univ. v. United States*, 461 U.S. 574 (upholding denial of tax-exempt status to university because of its racially discriminatory policy).

134. I.R.C. § 501 (c) (3); *see generally* DARRYLL JONES ET AL., *THE TAX LAW OF CHARITIES AND OTHER TAX EXEMPT ORGANIZATIONS* (2003). States provide comparable tax benefits to qualified organizations and donors. *See, e.g.*, *Yale Univ. v. Town of New Haven*, 42 A. 87 (Conn. 1899) (holding section 3820 of the Connecticut General Statutes makes colleges, academies, churches, and public school houses or infirmaries tax exempt). *See generally* John D. Colombo, *Why is Harvard Tax-Exempt? (And Other Mysteries of Tax Exemption for Private Educational Institutions.)*, 35 ARIZ. L. REV. 841, 855–56 (1993) (“state tax exemption tends to follow the federal pattern”). In addition, states exempt educational institutions from property taxes. *See City of Washington v. Board of Assessment Appeals*, 704 A.2d 120 (Penn. 1997) (upholding property tax exemption of Washington & Jefferson College). *See generally* William R. Ginsberg, *The Real Property Tax Exemption of Nonprofit Organizations: A Perspective*, 53 TEMP. L.Q. 291 (1980).

135. I.R.C. § 170 (a). Some nonprofit corporations, such as private clubs and unions, are exempt from taxes on the income that they generate, but are not eligible to receive tax-deductible charitable contributions. I.R.C. §§ 501(c)(7) and (c)(5).

136. John Simon, Harvey Dale & Laura Chisolm, *The Federal Tax Treatment of Charitable Organizations*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK*, *supra* note 115, at 267, 271.

137. From July 2007 through June 2008, \$31.6 billion was given to higher

The federal tax code also reinforces the nondistribution constraint by (1) a proscription against “inurement,”¹³⁸ (2) a proscription against more than incidental private benefit, and (3) rules imposing taxes on excess-benefit transactions.¹³⁹ The proscription against inurement applies to benefits received by “insiders.”¹⁴⁰ The private-benefit proscription, by contrast, applies to benefits received by anyone unless the benefits are incidental.¹⁴¹ Finally, since 1996, the tax code has provided for penalty excise taxes to be imposed on any insider who receives an “excess benefit” from a qualified charity, and on any “organization manager” who knowingly participates in the transaction.¹⁴²

2. Higher Education Licensing Laws

In addition to the state corporate law requirements and federal tax benefits available to nonprofit corporations generally, most states also have laws that apply specifically to higher education. Because most applicants and their families are not in a good position to evaluate the academic quality of colleges and universities, many states decided that some form of consumer protection was needed. Most turned to licensing, the same approach used to protect the public from unqualified doctors, lawyers, and other professionals.

The move toward licensing began toward the end of the nineteenth century when concern escalated about diploma mills that were preying on the unwary.¹⁴³ In 1897, the National Education Association asked states to exercise some supervision over degree-conferring institutions in order to bar diploma mills.¹⁴⁴ One of the first fruits of this call for regulation was a licensing law adopted in New Jersey in 1912 and signed into law by

education in the United States. GIVING USA FOUNDATION, GIVING USA 2009: THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 2008, at 97 (2009). This was slightly more than 10% of the total charitable giving that year. *Id.* at 4.

138. The term was first used in 1909 to preclude exempting from an excise tax any “part of the net income [of charitable organizations,] which inures to the benefit of any private stockholder or individual.” THE NONPROFIT SECTOR, *supra* note 115, at 282.

139. *Id.* at 281 (“The proscriptions against private inurement and more-than-incidental private benefits and the . . . rules imposing sanctions on “excess benefit” transactions parallel the state-based *duty of loyalty* rules that regulate and punish fiduciaries’ self-dealing and diversion of a charity’s financial assets to themselves.”).

140. See I.R.C. §501(c)(3). “Insider” was defined in 1996 to mean “any person who was . . . in a position to exercise substantial influence over the affairs of the organization.” Treas. Reg. § 53.4958-6(a).). Authorities agree that the inurement proscription does not prevent the payment of reasonable compensation for goods or services. Simon et al., *supra* note 136, at 282.

141. IRS Gen. Couns. Mem. 39862 (Nov. 21, 1991).

142. I.R.C. § 4958; see also Simon et al., *supra* note 136, at 283.

143. ROBERT H. REID, AMERICAN DEGREE MILLS 12 (1959).

144. *Id.* at 13.

Woodrow Wilson during his brief tenure as governor between his years as president of Princeton and as president of the United States. In *Shelton College v. State Board of Education*,¹⁴⁵ the New Jersey Supreme Court upheld the New Jersey licensing law, and explained that, as useful as private accreditation is, “it cannot deal directly with the nonaccredited school. It cannot stop the substandard school or close the out-and-out degree mill.”¹⁴⁶ For those problems, licensing is needed. Shelton College asserted that the licensing statute violated its First Amendment rights. The court disagreed; it described the privilege of granting a degree as “intimately related” to the public welfare and thus unquestionably subject to state regulation.¹⁴⁷ The law did not violate the First Amendment, the court explained, because licensing did not turn on the content of what the college taught but on the granting of degrees. The college’s assertion that the Constitution guaranteed an absolute right to bestow the degree of Bachelor of Arts was dismissed as simply “untenable.”¹⁴⁸

A similar conclusion was reached in *Nova University v. Educational Institution Licensure*.¹⁴⁹ The court there explained that, by 1929, the District of Columbia had become the “capital” for practically all diploma mills in the United States and the world.¹⁵⁰ “Hundreds of fraudulent institutions of ‘learning’ incorporated in the District and sold degrees from baccalaureate to doctoral in every conceivable field of study with little or no academic work.”¹⁵¹ They also sold their charters to individuals who ran diploma mills in other states and other countries.¹⁵² In response, Congress enacted a statute requiring degree-granting institutions incorporated or operating in the District to be licensed.¹⁵³ Like Shelton College, Nova University claimed applying that the licensing statute to its program violated its First Amendment right to free speech. Citing *Shelton*, the D.C. Court of Appeals rejected Nova’s challenge.¹⁵⁴

Despite the licensing requirements imposed by most states, diploma mills remain a serious problem. In 2008, for example, a couple pleaded guilty to mail and wire fraud after a federal investigation into their diploma mill, most often called St. Regis University, which had churned out more

145. 226 A.2d 612 (N.J. 1967).

146. *Id.* at 619.

147. *Id.* at 618 (quoting ELLIOTT, *THE COLLEGES AND THE COURTS* 200 (1930)).

148. 226 A.2d at 620.

149. 483 A.2d 1172 (D.C. Ct. App. 1984).

150. *Id.* at 1176.

151. *Id.*

152. *Id.*

153. Pub. L. No. 70-949, § 586a, 45 Stat. 1504 (1929).

154. 483 A.2d at 1181.

than 10,000 diplomas for customers in 131 countries.¹⁵⁵ Among their customers were more than 350 federal employees, including the deputy undersecretary for personnel and readiness at the Defense Department, who was charged with overseeing two million Pentagon employees.¹⁵⁶

It is evident that more needs to be done to stop diploma mills.¹⁵⁷ As a step in the right direction, the Higher Education Opportunity Act (HEOA) of 2008, in order to “prevent, identify, and prosecute diploma mills,” mandated better collaboration among the Secretary of Education and the United States Postal Service, the Federal Trade Commission, the Department of Justice (including the Federal Bureau of Investigation), the Internal Revenue Service, and the Office of Personnel Management.¹⁵⁸ It will take more than collaboration, however, to police diploma mills effectively. Both states and the federal government need to devote resources to the problem.¹⁵⁹

Regulating the minimum quality of higher education, moreover, as licensing does, does nothing to improve academic quality at institutions that meet state minimum standards. Fortunately, a new mechanism was developed in the United States to raise academic quality without increasing the role of government: accreditation.

155. Diana Jean Schemo, *Diploma Mill Concerns Extend Beyond Fraud*, N.Y. TIMES, June 29, 2008, Sec. 1 at 4.

156. *Id.* In 2004, the Government Accountability Office (GAO), at the request of Congress, investigated whether federal funds had been used to pay for degrees from diploma mills, and whether federal employees holding senior-level positions had obtained degrees from them. *Diploma Mills: Federal Employees Have Obtained Degrees from Diploma Mills and Other Unaccredited Schools, Some at Government Expense: Hearing Before the S. Comm. on Governmental Affairs, 108th Cong. (2004)* (statement of Robert J. Cramer, Managing Director, Office of Special Investigations, GAO), available at <http://www.gao.gov/new.items/d04771t.pdf> (last visited May 11, 2010). The GAO searched the Internet for unaccredited schools that offered degrees for a relatively-low fee, awarded credits on the basis of life experience, and did not require any classroom instruction. *Id.* at 1. Three of the four unaccredited schools they investigated provided records that identified 463 purchasers of their degrees who were employed by the federal government. *Id.* at 2. One was employed in a senior position at the Department of Homeland Security. *Id.*

157. See generally ALLEN EZELL & JOHN BEAR, *DEGREE MILLS: THE BILLION-DOLLAR INDUSTRY THAT HAS SOLD OVER A MILLION FAKE DIPLOMAS* (2005).

158. Pub. L. No. 110-315, 122 Stat. 3098 (2008).

159. On January 28, 2010, Representative Timothy Bishop, a Democrat from New York, introduced the Diploma and Accreditation Integrity Protection Act, HR 4535. It is co-sponsored by Michael N. Castle, a Republican from Delaware. The bill would direct the Federal Trade Commission to take action against diploma mills and accreditation mills, and report its findings to the Department of Education. Thomas Bartlett, *New Bill in Congress Would Make Diploma Mills a Federal Concern*, CHRON. HIGHER EDUC., Jan. 29, 2010, <http://chronicle.com/article/New-Bill-in-Congress-Would-/63776/> (last visited Feb. 7, 2010).

C. Accreditation

Most nations have a ministry of education that sets national standards for their institutions of higher education. The United States, by contrast, developed its own system for ensuring and improving academic quality, one that was designed to protect the autonomy of colleges and universities from government control. Accreditation, the American approach, relies on private, voluntary associations that use peer review to accredit institutions of higher education.¹⁶⁰ At the heart of the system are six regional associations that accredit institutions in their geographic areas.¹⁶¹ There are also a number of specialized accreditors, such as the Section of Legal Education and Admission to the Bar of the American Bar Association, which accredits law schools.

The New England Association, established in 1885, is the oldest of the regional accreditors, although it did not begin formally accrediting institutions until 1952.¹⁶² By contrast, the North Central Association, which was established in 1895, issued its first list of accredited institutions in 1913.¹⁶³

The need for a comprehensive approach to accreditation became apparent in 1912, when the University of Berlin announced that, for purposes of admission to its graduate programs, it would recognize American undergraduate degrees only if they were from members of the Association of American Universities (AAU). Other universities in Germany and Holland soon adopted the same policy.¹⁶⁴ Charles Eliot, then president of Harvard, a member of the AAU, took the position that the Association should either justify the confidence being placed in it by foreign universities, or notify them that there were American institutions outside the Association whose work and standing were not inferior to those who were members.¹⁶⁵ As in a game of hot potato, responsibility for accreditation was passed around for a number of years. The AAU

160. The New York Board of Regents, which is a public body, is an exception to this pattern. It was established in 1787. Its members at first were required to visit every college in the state and to report on them annually to the legislature. WILLIAM K. SELDEN, *ACCREDITATION: A STRUGGLE OVER STANDARDS IN HIGHER EDUCATION* 30 (1960).

161. The six are the New England Association of Schools and Colleges, the Middle States Association of Colleges and Schools, the Southern Association of Colleges and Schools Commission on Colleges, the Higher Learning Commission of the North Central Association of Colleges and Schools, the Northwest Commission on Colleges and Universities, and the Western Association of Colleges and Schools.

162. SELDEN, *supra* note 160, at 30, 37.

163. *Id.* at 31, 37.

164. GEORGE F. ZOOK & M. E. HAGGERTY, *THE EVALUATION OF HIGHER INSTITUTIONS* 34 (1936).

165. *Id.*

concluded that it did not want the responsibility of accrediting colleges and universities. An earlier effort by the United States Bureau of Education (a precursor of the present Department of Education) to take on the task was stopped by President Taft after widespread public criticism of the Bureau's proposal.¹⁶⁶ The American Council on Education (ACE) took up the responsibility for accreditation in 1921, but abandoned it in 1935.¹⁶⁷ Ultimately, accreditation was left to the regional accreditors. Since 1996, the private Council for Higher Education Accreditation (CHEA) has coordinated the work of the six regional accreditors as well as many of the specialized accreditation bodies.¹⁶⁸ CHEA today is the largest institutional membership organization of higher education in the United States, with some 3,000 degree-granting colleges and universities as members.¹⁶⁹

Accreditation, in contrast to licensing, was designed to provide quality improvement as well as quality assurance.¹⁷⁰ To achieve both goals,

166. *Id.* at 21.

167. *Id.* at 41, 43.

168. Harland Bloland has chronicled the rather tumultuous history that led to the establishment of CHEA. HARLAND G. BLOLAND, CREATING THE COUNCIL FOR HIGHER EDUCATION ACCREDITATION (2001). The higher-education community was extremely hesitant at first to organize a national body to coordinate the work of the various accreditors, but came to realize that the alternative was likely to be more regulation by either the states or the federal government.

169. Letter from Judith S. Eaton, President, Council For Higher Education Accreditation, to Colleagues (October 2006), available at http://www.chea.org/pdf/PrezLtr_DegMills_1006.pdf (last visited Nov. 23, 2009).

170. JUDITH S. EATON, AN OVERVIEW OF U.S. ACCREDITATION (2009), available at http://www.chea.org/pdf/2009.06_Overview_of_US_Accreditation.pdf. See, e.g., Middle State Commission on Higher Education: Mission, Vision, & Core Values, <http://www.msche.org/?Nav1=ABOUT&Nav2=MISSION> (last visited May 11, 2010) ("The Middle States Commission on Higher Education is a voluntary, non-governmental, membership association that is dedicated to quality assurance and improvement through accreditation via peer evaluation."). See also Western Association of Schools and Colleges: Purposes of WASC Accreditation, <http://www.wascenior.org/node/247> (last visited May 11, 2010):

The accreditation process is aimed at: Assuring the educational community, the general public, and other organizations and agencies that an accredited institution has demonstrated it meets the Commission's Core Commitments to Institutional Capacity and Educational Effectiveness, and has been successfully reviewed under Commission Standards; Promoting deep institutional engagement with issues of educational effectiveness and student learning, and developing and sharing good practices in assessing and improving the teaching and learning process; Developing and applying Standards to review and improve educational quality and institutional performance, and validating these Standards and revising them through ongoing research and feedback; Promoting within institutions a culture of evidence where indicators of performance are regularly developed and data collected to inform institutional decision making, planning, and improvement; Developing systems of institutional review and evaluation that are adaptive to institutional context and purposes, that build on institutional evidence and

accreditors rely on self-studies and peer evaluation. The accrediting organization recruits a team of faculty and administrative peers to visit an institution being accredited (or reaccredited). Team members are all volunteers and, typically, uncompensated. The institution being visited prepares a self-study that summarizes how well it thinks it is meeting the standards of the accrediting organization. The self-study is followed by a multi-day visit by the accreditation team to the college or university, which includes meetings with faculty, administrators, and students, attending classes, and inspection of facilities. After the visit, the team prepares a detailed report on the institution based on what was learned during the visit and other information provided by the school. The site team report is then used by the accrediting body to decide whether to accredit (or reaccredit) the school.¹⁷¹ In contrast to licensing under which an institution is simply either granted or denied a license, accreditation provides more guidance to institutions. Even institutions that are accredited (or reaccredited) receive a confidential report from the accrediting agency, which identifies ways to improve the institution.

There have been a number of challenges to, and court rulings about, the authority of regional accreditors. One of the most important was the decision by the Seventh Circuit in *North Dakota v. North Central Association of Colleges*,¹⁷² which established the authority of regional accreditors to act even when the conditions that led them to withdraw accreditation from a college were the result of actions by a state government. The court held that, as private associations, accreditors are free to establish their own standards.¹⁷³

II. IMPROVING BOARD OVERSIGHT

As the previous section has shown, trustees of colleges and universities, in addition to meeting the legal standards imposed on the boards of all nonprofit corporations, must ensure that their institutions also meet the demands of a highly competitive marketplace in higher education, comply with state licensing requirements, and satisfy accreditation standards. Recent controversies highlight three areas that need particular board attention: (1) avoiding the reputational harm that can result from excessive

support rigorous reviews, and reduce the burden and cost of accreditation; and Promoting the active interchange of ideas among public and independent institutions that furthers the principles of improved institutional performance, educational effectiveness, and the process of peer review.

Id.

171. Eaton, *supra* note 170, at 6–7. The time periods for reaccreditation vary. For example, it is seven years for law schools, and ten for the regional accreditors.

172. 99 F.2d 697 (7th Cir. 1938).

173. 99 F.2d at 700.

compensation or conflicts of interest; (2) understanding that in the eyes of the public, the nondistribution constraint applies to academic goods as well as to financial assets; and (3) strengthening the quality and autonomy of accrediting bodies.

A. Reputational Harm Caused by Excessive Compensation or Conflicts of Interest

The *Stevens* complaint suggests that in addition to their oversight of the endowment and other assets, governing boards should compare the compensation of presidents of similar colleges and universities when setting the compensation for the president of their institution.¹⁷⁴

The events at American University underscore that a governing board should have procedures in place not only for reviewing the president's compensation, but for overseeing the president's institutional expenditures as well.¹⁷⁵ No board member should look over a president's shoulder, but a wise president will welcome a well-crafted review procedure. For example, the compensation committee of the board might establish appropriate policies on such matters as presidential travel, meals, and gifts. The president's expenses then can be reviewed annually by the outside auditors to see that they conform to the established policies.

To ensure that trustees themselves are complying with state law, a growing number of college and university boards have adopted conflict-of-interest policies that require annual disclosures by all board members and senior officers of actual conflicts of interest, and of affiliations that might create the appearance of such a conflict.¹⁷⁶

Given the importance of faculty to the reputation and revenue of institutions of higher education, governing boards also should adopt procedures for identifying, and eliminating financial conflicts of interest that might compromise the scholarly objectivity of faculty members.¹⁷⁷

174. A 2007 survey of trustees found that a stunning 23% of trustees *did not know* whether their boards used comparative data to determine the president's compensation, and 5% reported that the board had no role in determining the president's compensation. Paul Fain, *For Trustees, Faith in College Presidents Lies at the Heart of Good Relationships*, CHRON. HIGHER EDUC., May 11, 2007, at A14.

175. See *supra* text accompanying notes 86–88.

176. A 2009 survey found that 89% of boards have a conflict-of-interest policy, compared with only 46.5% in 1986. *Survey of Higher Education Governance*, ASS'N OF GOVERNING BODS. 3 (2009). More boards of private colleges and universities had such policies than boards of public institutions because of the use of statewide conflict policies for state agencies. *Id.*

177. In FY 2008, 80% of the budget of the National Institutes of Health (NIH)—\$29.5 billion—was distributed through almost 50,000 competitive grants to researchers at over 3,000 universities, medical schools, and other research institutions. DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE OF THE INSPECTOR GENERAL,

Public Health Service regulations require all institutions that receive funds from the National Institutes of Health to have policies that require researchers to disclose “significant financial interests” in entities whose financial interests may be affected by their research.¹⁷⁸ Governing boards should consider extending those disclosure standards to all researchers, whether or not they are funded by NIH.

B. The Nondistribution Constraint and Academic Goods

In addition to their duty to oversee the financial assets of their college or university, governing boards have a fiduciary duty to protect and enhance the academic mission of their institution. As Peter Ewell has explained:

It is up to the faculty and administration to uphold and improve academic quality. But it is up to the board to understand it and to see that it gets done. Ensuring academic quality is a fiduciary responsibility; it is as much part of our role as board members as is ensuring that the institution has sufficient resources and is spending them wisely.¹⁷⁹

Because faculty are central to the academic success of a college or university, conscientious trustees should be as knowledgeable about their quality as about the health of the financial assets.¹⁸⁰ A good place to begin is with faculty hiring and retention patterns. Unfortunately, it typically is easier for a board member to know the win-loss records of an institution’s athletic teams than it is to know how many of the recent offers to hire faculty were accepted or rejected, or how many experienced faculty were persuaded to leave other institutions to join the school, or how many

HOW GRANTEEES MANAGE FINANCIAL CONFLICTS OF INTEREST IN RESEARCH FUNDED BY THE NATIONAL INSTITUTES OF HEALTH 1 (Nov. 2009), *available at* <http://oig.hhs.gov/oei/reports/oei-03-07-00700.pdf> (last visited May 11, 2010).

178. 42 C.F.R. § 50.604(a) (2009). The term “significant financial interest” is defined as income to an investigator, or the investigator’s spouse or dependent child that exceeds \$10,000 in a year, or an equity interest whose value exceeds that amount or 5% ownership in a company. In 2008, the National Institutes of Health took the unprecedented step of suspending a five-year, \$9.3 million grant to Emory University because the principal investigator on the grant, a tenured faculty member, had failed to disclose some \$800,000 in payments from pharmaceutical companies. Joe Pereira, *Emory Professor Steps Down*, WALL ST. J., Dec. 28, 2008, *available at* <http://online.wsj.com/article/SB123000405102929417.html>. A report by the Inspector General of the Department of Health and Human Services found that 50% of universities do not ask their faculty members to disclose financial conflicts of interest. DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE OF THE INSPECTOR GENERAL, *supra* note 177, at 13. In addition, university administrators rarely require researchers to eliminate or reduce such conflicts. *Id.* at ii.

179. PETER T. EWELL, MAKING THE GRADE: HOW BOARDS CAN ENSURE ACADEMIC QUALITY vii (2006), quoted in EFFECTIVE GOVERNING BOARDS, *supra* note 48, at 16.

180. EWELL, *supra* note 179, at xiii.

departed for other institutions. Hiring patterns should not be assessed for only one year, of course, but over a period of years. Moreover, hiring trends may vary considerably from department to department or school to school. It is important, therefore, for a governing board to work closely with academic leaders when reviewing faculty data.

A major challenge for any governing board is how to promote academic quality without undermining the faculty's responsibility for academic matters. The importance of respecting the role of the faculty is demonstrated by the controversies discussed above. Several would not have occurred if the governing board and administrators had upheld the academic standards established by faculty for admitting applicants¹⁸¹ or granting degrees to students.¹⁸² A conscientious governing board therefore, will ensure that faculty members in the institution understand their role in overseeing such academic matters as the curriculum, faculty hiring, and student academic standards.¹⁸³ The board also should encourage the faculty to establish standards for monitoring the quality of teaching and research.¹⁸⁴

Admissions are a particularly challenging area for many colleges and universities. Because of the additional life-time compensation and social prestige that a post-secondary degree brings, the public understandably expects that the entrance requirements and graduation standards of an institution of higher education will be applied fairly. If a college or university grants public officials or their relatives an advantage in the awarding of admission spots or degrees, the public is likely to feel that its trust has been betrayed as much as it does when a charitable assets are mismanaged.

Although faculty have primary responsibility for establishing the standards for admission,¹⁸⁵ in most colleges and universities individual admission decisions are made by administrators with little or no faculty

181. See *supra* text accompanying notes 96–106.

182. See *supra* text accompanying notes 89–95.

183. New faculty members might benefit as much as new trustees from some orientation about their governance responsibilities.

184. See EFFECTIVE GOVERNING BOARDS, *supra* note 48, at 15.

The faculty and academic administrators—not the board—determine the manner in which subjects are selected and taught, faculty members are recruited . . . curricula are reviewed and revised, student progress and performance are assessed, and degrees are awarded. Yet it is appropriate for the board to convey its expectations that faculty will establish and monitor standards for teaching and learning, as well as for curricular review and revision.

Id.

185. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 363 (2003) (holding that the First Amendment protects four academic freedoms first identified by Justice Frankfurter: to determine “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”).

participation. Because they do not have tenure, administrators are likely to be particularly vulnerable to pressure from senior administrators or trustees to admit applicants who would not be admitted on their merits. As the Mikva report found, it is important to have an admissions process that treats all applicants fairly.¹⁸⁶ Striking the right balance between resisting improper pressure to admit a particular applicant, and being fair to all applicants is not easy. The report, for example, did not recommend prohibiting all letters of support from prominent officials or donors. It did recommend limiting them to standard letters of recommendation. A complete ban on such letters presumably would not be fair to an applicant who had worked for a public figure, and who would thereby be unable to submit a letter of recommendation from his or her employer. To ensure that even letters of recommendation from prominent individuals are not given undue weight, the report recommended that the university adopt a written admissions policy that clearly sets forth the factors that may be considered in admissions decisions.¹⁸⁷ It also recommended that admissions decisions be made by a committee, rather than by a single person, on the ground that a committee is less likely to cave to improper pressure to admit a particular applicant.¹⁸⁸ Finally, the report recommended that no answer should be given to inquiries about the status of an applicant from prominent individuals who are not members of an applicant's family (or the equivalent). Any admissions-related inquiries from unrelated, prominent individuals should be documented, the report advised, and the inquirers notified that such documentation is subject to disclosure under the Illinois Freedom of Information Act.¹⁸⁹ In short, as Justice Brandeis recommended, sunshine should be used as a disinfectant.¹⁹⁰

C. Strengthening Accreditation

One of the most effective ways of measuring academic quality is the accreditation process. In some respects, accreditation is to academic programs what audits are to financial affairs. A careful board will take advantage of the opportunity accreditation presents, therefore, by reviewing with the institution's academic leadership the reports of the various accreditation visiting teams.¹⁹¹

186. *See supra* text accompanying note 105.

187. STATE OF ILLINOIS ADMISSIONS REVIEW COMMISSION, *supra* note 101, at 43.

188. *Id.* at 36.

189. *Id.* at 43–44.

190. LOUIS BRANDEIS, OTHER PEOPLE'S MONEY—AND HOW BANKERS USE IT 67 (1914), *available at* <http://www.law.louisville.edu/library/collections/brandeis/node/191> (last visited May 11, 2010).

191. The Association for Governing Boards concurs:

Unfortunately, in recent years the federal government has increasingly threatened the independence of the American system of accreditation. Although President Taft blocked the earliest effort to have the federal government assume responsibility for accreditation, once substantial federal funds began to flow to higher education, predictably more federal oversight followed. When the GI Bill was reauthorized in 1952 and extended to cover Korean War veterans, Congress also authorized the Commissioner of Education to publish “a list of nationally recognized accrediting agencies and associations which he determines to be reliable authority as to the quality of training offered by an educational institution.”¹⁹²

A more serious challenge arose in 1992 when Congress required every state to establish a State Postsecondary Review Entity (SPRE) that would review institutions identified by the Secretary of Education as having specified problems, such as a high default rate on student loans.¹⁹³ Most accreditors saw this as a direct attempt either to eliminate accreditation or to federalize accrediting organizations.¹⁹⁴ In 1995, however, the challenge was defanged when President Clinton signed into law a bill that rescinded funding for the SPREs.¹⁹⁵ In 1998, the Reauthorization of the Higher Education Act entirely eliminated the SPRE requirement, along with a companion requirement that accrediting agencies carry out unannounced visits to campuses.¹⁹⁶

The most recent federal challenge to the independence of accreditation bodies came from the Executive Branch rather than Congress. Federal law provides that colleges and universities must be accredited by an accrediting agency recognized by the Secretary of Education if they want to be eligible to receive federal student financial assistance.¹⁹⁷ Under the leadership of

An especially valuable source of [information about academic quality] is board participation in the external review of academic units and the institution as a whole by regional and specialized accrediting associations. The board should commit substantial time to read and discuss the reports of accreditation visiting teams, under the guidance of the president and academic administrators who bear direct responsibility for the units under review.

EFFECTIVE GOVERNING BOARDS, *supra* note 48, at 16.

192. Pub. L. No. 78-346, 58 Stat. 284.

193. 1992 Amendments to the Higher Education Act of 1965, Pub. L. 102-325, 106 Stat. 448, discussed in BLOLAND, *supra* note 168, at 39–40.

194. BLOLAND, *supra* note 168, at 40.

195. *Id.* at 117.

196. *Id.* at 189.

197. Higher Education Act of 1965, Pub. L. 89-329, 79 Stat. 1219 (November 8, 1965), codified as amended in 20 U.S.C. §1001 et seq. Colleges and universities must meet three requirements to be eligible for Title IV student financial-assistance-program funds: they must be (1) certified by the Department of Education as eligible; (2) accredited by an accrediting agency recognized by the Secretary of Education and (3)

Secretary Margaret Spellings, the Department of Education in 2006 began to press accrediting associations to require the institutions they accredit to assess student achievement or risk being denied official recognition by the Department.¹⁹⁸ In response, Congress in the Higher Education Opportunity Act of 2008 (HEOC) prohibited the Department of Education from regulating the manner in which accrediting agencies assess student achievement.¹⁹⁹

Although Congress rebuffed the most recent federal challenge to the autonomy and flexibility of private accreditors, the pressure on the federal government to increase its regulation of accreditors may prove irresistible in the future, given the large amount of federal funding that goes to higher education.²⁰⁰ Certainly the requirement that colleges and universities must be accredited by an agency recognized by the Secretary of Education for their students to receive federal financial assistance gives the federal government enormous potential leverage over accreditors. If accreditation is to endure, institutions of higher education and their governing boards need to understand and to support the capacity of the American system of accreditation to provide accountability without losing its independence from government control.

licensed or authorized by the state education agency in which they operate. The review process is set forth in 20 U.S.C. § 1099b; 34 C.F.R. Part 602.

198. See A. Lee Fritschler, *Government Should Stay Out of Accreditation*, CHRON. HIGHER EDUC., May 18, 2007, at B20:

. . . Last September a report by the Spellings Commission on the Future of Higher Education expressed grave concern about the quality and purpose of colleges and universities. . . . One remedy that the Education Department has proposed would give accrediting agencies responsibility not only to evaluate institutions for access to federal student-aid money but also to set and enforce minimum standards for “student achievement.” Under draft rules, if the department decides that the learning standards that an accretor applies to institutions are not sufficiently high, it can withdraw the accrediting agency’s power to accredit. . . .

199. Pub. L. 110-315, 122 Stat. 3078. HEOC also reconfigured the National Advisory Committee on Institutional Quality and Integrity, which recommends whether particular accreditors should be approved by the Secretary. Formerly, all members of the Committee were appointed by the Secretary of Education. In the future, one-third of the eighteen members will be appointed by the Secretary, one third by the Senate, and one-third by the House of Representatives. Pub. L. 110-315, 122 Stat. 3091.

²⁰⁰ By 2005, the federal government for the first time provided more financial support for higher education than the states. Federal funding included \$61 billion in loans, \$18 billion in direct student-aid grants, and an estimated \$8 billion in tax support for a total of more than \$90 billion. All the states combined provided about \$74 billion that year of which \$7 billion was for financial aid. F. King Alexander, *The States’ Failure to Support Higher Education*, CHRON. HIGHER EDUC., June 30, 2006, at B16.

III. CONCLUSION

College and universities in the United States differ from most institutions of higher education in their use of lay governing boards, which shield them from excessive government control, and in their adoption of shared governance, which gives faculties rather than boards primary responsibility for academic matters. Shared governance also protects from public and trustee pressure the free inquiry that is central to the effectiveness and productivity of modern academic institutions. The combination of lay governing boards and shared governance has been a major force in developing the best higher education sector in the world.

Private colleges and universities and their governing boards are subject to the same laws that apply to all nonprofit corporations. State nonprofit corporation laws impose on governing boards duties of care and of loyalty to the mission of preserving, transmitting, and increasing knowledge. They also prohibit the distribution of surplus resources to those in charge of the institution—apart from the payment of reasonable compensation for goods and services. Federal tax laws reinforce this nondistribution constraint and are the source of more than \$4 billion annually in tax exemptions and deductions for higher education.

State nonprofit corporation laws, however, have been enforced against colleges and universities only in the most extreme circumstances. Competition, therefore, remains the most important form of board accountability. State licensing laws establish minimum standards that academic institutions must meet in order to offer degrees, but they generally do not focus on increasing academic quality above the minimum. Accreditation, by contrast, is as concerned with quality improvement as with quality assurance. This distinctly American form of accountability is carried out by private, voluntary associations that use self-studies and peer assessment to evaluate colleges and universities and to advise them on how to improve their programs and functions. Accreditation also has helped to protect the autonomy of the higher education sector from government control, although the federal government in recent years has taken an increasingly active role in regulating the accreditors. In fulfilling their fiduciary duty to preserve the fiscal integrity of their institutions, governing boards should pay particular attention to the compensation and expenditures of their presidents. They also should adopt conflict-of-interest policies that apply to governing board members as well as policies that ensure that the scholarly objectivity of faculty is not compromised by financial conflicts of interest.

Governing boards also have a fiduciary duty to protect and enhance the academic quality of the college or university they oversee. Because the public expects the nondistribution constraint to apply to academic goods as well as to financial resources, governing boards should be particularly

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careful to uphold the standards established by faculties for such academic matters as admitting applicants and granting degrees. Finally, governing boards need to understand and to support the system of accreditation that has developed in the United States to improve academic quality without increasing the role of the government in higher education.