THE

ACADEMIC CORPORATION

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EDWIN D. DURYEA

EDITED BY

DON WILLIAMS

# THE ACADEMIC CORPORATION A HISTORY OF COLLEGE AND UNIVERSITY GOVERNING BOARDS

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FALMER PRESS
A MEMBER OF THE TAYLOR & FRANCIS GROUP
NEW YORK & LONDON
2000

Published in 2000 by Falmer Press A member of the Taylor & Francis Group 29 West 35th Street New York, NY 10001

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10 9 8 7 6 5 4 3 2 1

### Library of Congress Cataloging-in-Publication Data

Duryea, E. D. (Edwin D.)

The academic corporation : a history of college and university governing boards / Edwin D. Duryea ; edited by Don Williams.

p. cm. — (Garland reference library of social science; 1416. Garland studies in higher education; 23)

Includes bibliographical references and index.

ISBN 0-8153-3376-5 (alk. paper)

- 1. Universities and colleges—United States—Administration—History.
- 2. Universities and colleges—Europe—Administration—History.
- I. Williams, Donald T. II. Title. III. Series: Garland reference library of social science; v. 1416. IV. Series: Garland reference library of social science. Garland studies in higher education; vol. 23.

LB2341.D79 2000

378.73—dc21

99-38674

CIP

Printed on acid-free, 250-year-life paper.

Manufactured in the United States of America

# Series Editor's Preface

Higher education is a multifaceted phenomenon in modern society, combining a variety of institutions and an increasing diversity of students, a range of purposes and functions, and different orientations. The series combines research-based monographs, analyses, and discussions of broader issues and reference books related to all aspects of higher education. It is concerned with policy as well practice from a global perspective. The series is dedicated to illuminating the reality of higher and post-secondary education in contemporary society.

Philip G. Altbach Boston College

## Foreword

Professor Duryea has rendered a great service to those who think and care deeply about how the nation's colleges and universities will be governed in the new century. This work is the result of monumental effort, his labor of love for many years. It wrestles with a single vexing question: Will higher education's basic form of governance, the "autonomous corporation" whose roots can be traced to the Roman Empire, function as effectively in the new century as it has for the past twenty centuries? Professor Duryea shows that the legal concept of the autonomous corporation (the citizen governing board) was challenged and drastically changed during the second half of the twentieth century. Should that concern the political leaders of the twenty-first century? How can they be made aware of the question?

State universities and private universities will no doubt continue to endure great pain caused them by a society that, ironically, although it recognizes their enormous success in adjusting and accomplishing their mission to serve society well, nevertheless insists on serious tinkering with their governance and management. Plenty of room remains for concern: These tinkerings by federal, state, and local political leaders, the courts, federal regulatory agencies, faculty and staff unions, special-interest groups of all persuasions, and even some brands of activist trustees could conceivably turn the waning legal doctrine of corporate autonomy completely on its head. Is it possible that the for-profit corporation, also with its roots in the Roman Empire, will survive relatively unscathed whereas the charitable, tax-exempt corporation is caught in a mindless spiral of dismantlement?

x Foreword

Will colleges and universities be able to do their jobs if they are not governed ultimately by groups of corporate citizens, substituting for legislative bodies and direct government control? That their authority has eroded far beyond what is expected of them is without question. Especially in recent decades, the distinctions between government agencies and private corporations have virtually disappeared.

This book paints a fascinating picture of how the legal doctrine of corporate autonomy and the long, winding, and dusty road traveled by the academic governing board brought us to where we are today. It should be read by every college and university president, faculty union leader, academic senate president, attorney, and rank-and-file trustee. But it urgently needs to be read also by elected political leaders, activist trustees, state attorneys general, jurists, and government agency executives.

Wisdom that stems from historical perspective and experience is captured between these covers. The reader does not have to love history to benefit from Edwin Duryea's fascinating collection of anecdotes about how Popes, kings, colonial governors, trustees, college and university presidents, state legislators and governors, religious leaders, and the more recent pluralism in our society have influenced the academic corporation's development. Vignettes from the histories of the universities in Bologna, Paris, Geneva, Oxford, and Cambridge, among others in Europe, are mixed with many more from colonial Harvard, Yale, William and Mary, College of New Jersey (Princeton), and many others. And there is, of course, Dartmouth College and Chief Justice John Marshall's decision on behalf of the U.S. Supreme Court in 1819, a benchmark case in American jurisprudence that affected the expansion and treatment of both for-profit and charitable and educational organizations for more than a century.

Professor Duryea's superb history lesson makes the case that this important and complex, albeit imperfect, legal concept and manner of governing the academy has proved to be remarkably resilient in its evolution over eons. Its viability has been tested at every turn, its definition refined and redefined, its applicability to different situations interpreted and reinterpreted to fit the tenor of the times. Presuming that no acceptable alternative to the corporate form of governance in the academy will be found, Professor Duryea, without saying so directly, seems to place his money on its continued and hopefully successful evolution—not on its demise. In his words: "When academic institutions integrate positively with their society and offer it intellectual leadership, both prosper."

Foreword xi

This book will serve as an authoritative reference on the cultural and legal development of the citizen governing board and academic governance in the United States for many decades to come. It will be a long time before anyone else will need to undertake the enormity of what Ed Duryea has done here. Virtually all of the most significant scholarly work done to date is cited here, including applicable case law and scores of helpful illustrations from university founding documents. All serious students of academic governance owe Professor Edwin Duryea and his colleague, Professor Donald T. Williams, our thanks. They build on the superb scholarship of W. H. Cowley, with whom they both studied at Stanford University.

Richard T. Ingram
President
Association of Governing Boards
of Universities and Colleges
Washington, D.C.

### Preface

Historian Walter Metzger, in an essay on academic governance, made the point that "history is at its heuristic best... when it contemplates gestalts—patterns of academic power relationships that have internal and external manifestations—and when it undertakes to show over suitable sweeps of time how these relationships came to pass" (1989, p 3). His observation points to the sense of history that guided the investigation for this essay. The discussion to follow has sought to convey meaningful insights into the origins and progression of corporate organization associated with Western universities. To this end, it focuses on interpretive analysis intended for persons interested in the organization and governance of our colleges and universities: how it evolved and—one has to presume—whether and to what extent changing conditions raise the question of its obsolescence.

I should note also at the outset that, in line with Professor Metzger's observation, that which follows also has a narrow focus, recognizing that it will address one aspect of a complex social history and draws upon a multiplicity of sources directed to the history of higher education—namely, the corporate form of organization and how it shaped the government of higher education. Thus, I have sought not a detailed history but, rather, a somewhat factual essay that will convey an understanding of the origins and evolution of the corporate basis for college and university government. The book seeks to convey an interpretive narrative of the academic corporation from its formation in the University of Paris, through its applications in medieval and Renaissance England to colonial America. It does not include in scope the parallel systems of

xiv Preface

organization associated with universities in Italy, southern France, and Spain, or in what are now Germany, Poland, and Czechoslovakia. All have contributed significantly to the history of higher learning, of course, but led to different forms of government in northern Europe and Latin America.

In the United States, governing boards have contributed in a very fundamental manner to the transition from a few small colleges in a rural, colonial society to the complex system of colleges and universities we know today. Within this context, the following discussion assumes that the corporate form of university and college government in the United States today derived its organizational flexibility from precedents in Roman law, precedents still familiar to us today.

Historically, particularly in western Europe, the University has projected the aura of a place apart, an intellectual sanctuary in which scholars could ply their trade of teaching and learning free from direct intrusions from an external society. This constituted, if not the essence, the model for their formation, first, as a guild and, then, on the basis of a charter conveying the characteristics of what we know now as a corporation with its responsibility and autonomy spelled out in a founding document. The story of the formation and rise to eminence of the medieval University of Paris illustrates its application. In reality, of course, a corporate charter in that time carried no more authority than that granted to it by a sovereign, in medieval society the pope or, later, the Crown, as a privilege that rested upon the continuing approval and survival of that authority. Within this condition the corporate structure has provided since that time a traditional and legal foundation for a reasonable degree of autonomy over internal affairs.

In the United States, the chartered corporation has enjoyed freedom from extensive governmental supervision beyond that of its European predecessors. A constitution and an established legal system enforced by courts has made this possible. For colleges and universities, the Dartmouth College case of 1819 laid down a constitutional premise for the separation of private colleges from the structure of government, an autonomy that carried over to public institutions. However, just as an obeisance to papal authority overlay the autonomy of medieval predecessors, academic autonomy in this country does not belie the sovereignty of federal and state governments. As we enter a new century, it becomes increasingly apparent that this relationship between the campus and the eapitol is experiencing an era of reappraisal, a situation addressed in Chapter 9.

In conclusion, I wish to add a final note regarding sources and perspective. While original documents have been canvassed—especially pertinent court cases and founding documents—in the main I have relied upon selected secondary sources. Throughout, I have sought to place the history in a social context, recognizing that American colleges and universities have both influenced and been influenced by their society. In particular, one cannot ignore the fact that these institutions have performed tasks that transcend their commitments to the advancement of knowledge and learning.

Also, I should explain the plethora of footnotes. I trust that the reader will not find them a distraction, but it did seem appropriate to convey this information in some detail. I have inserted them on the basis of three criteria: that they amplify the text for a better grasp of the topic under discussion, that they suggest references helpful for further exploration of a particular subject, and that they contribute additional detail when considered pertinent.

I cannot conclude this preface without recognizing the very major contribution of Professor Emeritus of Education at the University of Washington, Donald T. Williams. Without his encouragement and contribution in both form and, especially, substance, the manuscript would not have progressed beyond an initial draft. Also, I must express my appreciation to my wife, Libera, for her support and assistance during the final review of the manuscript. She bolstered my spirits and contributed a highly valued editorial assistance at a critical time.

# Contents

	Series Editor's Preface	vii
	Foreword	ix
	Preface	xiii
Chapter 1	Prologue	1
Chapter 2	Medieval Origins	7
	Precedents from Roman Law	9
	The University at Paris	12
	The Medieval Corporation	16
	Formation of the Universities in England	20
Chapter 3	English Antecedents	31
	Primacy of the State	34
	Royal Jurisdiction	38
	The Colleges	43
	English Law of Corporations	50
	Transition to American Colonies	54
Chapter 4	American Adaptations	61
	Influence of the English Corporations	62
	Reformation Influences	67
	European Precedents	69
	Conclusion	76

vi	Contents

CHAPTER 5	Governance of the Colonial Colleges	81
	Harvard	85
	William and Mary	87
	Yale	90
	Other Colonial Colleges	92
Chapter 6	Corporate Autonomy: The Dartmouth College Case	105
	Antecedents to the Case	108
	The Corporate Context for the Decision	116
	Legal Decisions Prior to the Dartmouth Case	121
	The Case	126
	Implications of the Decision	136
CHAPTER 7	Foundation of an American System	145
	Modification of the Dartmouth Decision	149
	Expansion of Public Higher Education	153
	State Foundations as Public Corporations	158
CHAPTER 8	Governing Board Authority in Practice	167
	The Control of Educational Programs	170
	Faculty Relations	173
	The Oversight of Students	186
	Requirements for Educational Achievement	196
	Financial Management	199
Chapter 9	Conclusion: From Past to Future	215
CHAITER	The Past	216
	Developments Since the 1950s	219
	A Look to the Future	226
	Bibliography	231
	Appendix 1: Cases for Chapters Seven and Eight	253
	Appendix 2: Founding Documents	263
	Index	265

### CHAPTER 1

# Prologue

A casual examination of American higher education discloses an impressive diversity among the post-baccalaureate institutions that literally dot the maps of fifty states: an aggregate of more than 3,600 research universities, four-year liberal arts colleges, public comprehensive colleges and universities, and community colleges combining basic arts and sciences with vocational programs. They range from those with a primarily local or state constituency to major universities with a national perspective. They spread across the nation in a pattern reflective of population density, yet include rural, isolated locations and the traditional tree-studded campuses as well as high-rise buildings. Taken as a whole, higher education in the United States must convey to the foreign observer a bewildering complexity of establishments, purposes, students, courses, and functions.

Nevertheless, those of us who have taken a professional interest in systematically observing this social enterprise recognize an integrated pattern in the curriculum, in students and their campus life, in campus design, and in the array of extracurricular activities ranging from social affairs to intercollegiate athletics. Commonality rather than diversity characterizes the enterprise when one focuses on how it functions. The immediate question that comes to mind, therefore, is how this diversity has been organized to produce this universality in structure and function. The discussion to follow responds by examining the history of university organization from its origin in medieval Europe.

From those early beginnings there have emerged within American higher education certain common structures for control and organization. This commonality enables everyone from elected officials to hopeful college applicants to understand and cope with the American system. When government councils and private donors seek to found a new institution, for instance, they have an established pattern at hand for its structure, one that originates with the formation of a board of governors, usually designated as "trustees" or "regents." The board, in turn, locates a president who assumes the immediate task of organization, including the appointment of appropriate central administrators, deans, and faculty members. These institutions employ faculty members who, because of their service at other institutions and their own experience as students, have a sense of how the organization will function. Out of what at first appears a complex and diverse educational system there emerges a general consensus as to how it is organized and what it does.

The central feature of governance comes into focus when one considers a board's relationship with the general society.<sup>2</sup> First and fundamentally, it holds its office and assumes its responsibilities on the basis of an act of public government: a charter or a statute or constitutional provision. Whatever operating autonomy it may enjoy in managing internal affairs, its members remain obligated to the founding agency: a private donor as conveyed in its charter or local, state, and in a few instances federal governments as conveyed in legislative statute or constitutional provision. Internally, governing authority in the United States flows directly through the governing boards rather than, as in the instance of many universities abroad, to an internal academic constituency and/or governmental agency. With a few exceptions, boards draw upon private citizens who contribute their time, effort, and financial support as a public service.3 In accepting their office, board members assume an important public responsibility for the welfare of their campuses. A partial parallel exists in those philanthropic associations or public agencies that are separated from administrative departments and whose members serve on a voluntary basis. Examples include freeway authorities and utility commissions.

As a consequence of this governing structure, and indeed as its original intention, colleges and universities have performed a public function that remains essentially separate from the state in the private sector and from other agencies of government in the public. Members of their boards hold a Janus-like position. They look internally to represent the public interest, as assigned by founding documents and conveyed or affirmed by an informal consensus on the part of political, economic, and social forces that impinge on their institutions. Outwardly, they represent

Prologue 3

the interests of faculties, students, and administrators to the government and general public. This important dualism becomes most obvious in matters of funding. What is required for internal purposes must come from external sources.

On the basis of their charter of incorporation, private boards have an existence in law separate from their sources of support. Nevertheless, they must respond to the interests and desires of those who do contribute to their financial well-being. Moreover, they perform a recognized educational service for the public at large, a function implicit in their tax-exempt status. Public boards have a direct responsibility to authorities of the state government that supports them and are subject to its executive and legislative branches—although governors and legislators traditionally have acceded to them substantial independence and, as a rule, have not meddled directly into internal affairs.<sup>4</sup> Not surprisingly, in neither sector have governing boards performed perfectly; but, since their colonial origins, they have demonstrated a reasonable balance, albeit at times an uneasy one, between public responsibility and institutional autonomy.

The history that follows reviews the origins and development of the corporate form of organization as it affected the universities and colleges of Europe, England, and the United States. In the United States, it has provided an effective mechanism whereby state governments were able to maintain their sovereignty, yet delegate in an orderly way authority for activities they deem important for their own and public interest. It has also contributed to the decentralization of authority in a manner which enables private forces to counter the supremacy of the state. Previously, it enabled the medieval and the English universities and the colleges that grew up around them to carry out their mission as centers of learning outside the bureaucracy of the state.

This discussion also has the purpose of conveying an understanding of the role of governing boards by examining the origins and evolution of the corporate form as the legal foundation for the governance of colleges and universities. In brief, one can note a pervasive trait of American higher education has been the influence of governing boards of lay trustees; groups of predominantly nonacademic members exercising legal authority for their institutions in the form of private and public corporations. Two historical legal forms, intersecting in the American colonies, are responsible for this form of government: the lay board of trustees and the academic corporation. Under titles such as *curatores*, *reformatores*, and *trattatores*, the concept of nonacademic trustees had precedents in the northern Italian medieval *studia* at Bologna, Padua,

Florence, and Pisa (to cite a few examples); the Geneva Academy of Calvin; and the Dutch and Scottish universities established during the Reformation (Cowley, 1980, Chap. 2).

As an organizational form for exercising at least some of the functions of governance, however, the educational corporation is a legacy of medieval universities. It can be observed as early as the beginning of the thirteenth century, when scholars offering lectures in Paris joined together as an academic guild and developed the constructs of corporateness in order to strengthen their position in relationships with the local municipal and church authorities, a common practice in medieval Europe. This nascent form of government by masters appeared in similar form in other universities in northern Europe and at the universities and constituent colleges of Oxford and Cambridge.<sup>5</sup>

During that period, however, officials of the dominant Roman Catholic Church carried the organization of Paris and other universities a step further by issuing papal charters which confirmed their organization as official or legal components of the church. Jurists in the papacy who designed this doctrine drew upon the practice of emperors of the Roman Empire, who desired to create a legal basis for their control of indigenous associations not a part of the state administration. Alan Karp called it "one of the greatest contributions of the Roman jurist... to legal thought." Its essential character emerges in the notion that "rights and duties can be ascribed to an organization apart and distinct from its members" (Karp, 1971, 61).

The Roman emperors recognized the necessity of accommodating private groups apart from the state administration. To this end, they allotted a delegation of limited authority which allowed private groups to conduct a specified activity outside the state's administration but under its sovereignty—which, of course, is an essential characteristic of corporations as we know them today. This corporate line of descent then moved in the eleventh and the twelfth centuries to the papacy in Rome, crossed the channel to England, and there matured in the sixteenth century as a conduit for philanthropic and commercial undertakings. When, in the sixteenth century, the practice of incorporation migrated with settlers to colonial North America, it continued the traditions and practices of England, including especially its use of joint stock and similar economic enterprises as well as philanthropic associations. After the Revolutionary War, the corporate form in this country increasingly served business interests as well as those of a nonprofit nature. By the mid-eighteenth century the corporation had become a staple in the American economy.

As one looks back over the application of the corporate form in higher education, two linked questions emanate from the genealogy. How and why has the corporate form persisted as the basis for the government of Western universities for eight centuries? Do governing boards now confront social conditions which may erode the traditional pattern and function of the corporate form? A search for answers to these questions has guided the historical investigation chronicled here.

### NOTES

<sup>1</sup>The Higher Education Directory for 1997 lists 1,594 public and 2,087 private two-year and four-year colleges and universities.

<sup>2</sup>As used in this discussion, the word *government* refers to organizational structure and that of *governance* to the activity associated with government.

<sup>3</sup>As a rule, in the private sector, the founder selects members of the initial board, which holds the right of cooptation, that of appointing the successors of members who resign or become incapacitated. In the public realm civic government or the voting public makes the selection. For some public institutions, major public officers serve on boards as a consequence of their position, frequently in a nonvoting capacity.

<sup>4</sup>The corporate autonomy of boards in both private and public sectors has received serious government attention in recent decades. The autonomy of a century ago has dissipated considerably. Chapter 9 will return to this matter.

<sup>5</sup>Paraphrased from Karp and Duryea, 1979, 1-2.