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Revisiting the *Dartmouth* Court Decision: Why the US has Private Nonprofit Agencies Instead of Public Non-Governmental Organizations (NGOs)

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Abstract

In 1819, the US Supreme Court ruled in *Dartmouth v. Woodward* that Dartmouth College, even though originally chartered by government, was legally akin to a private corporation. This landmark decision was the founding legal document of what has become the American private nonprofit sector. While the decision has attained hagiographic status, this paper explores what the US nonprofit sector would look like if the Supreme Court had ruled the other way. Using alternate history and scenario writing as research methodologies, it highlights the invisible losses due to the decision and depicts what a public nonprofit sector would have looked like, one with more public accountability and required to demonstrate a tangible public benefit.

Introduction

The nonprofit sector is in some respects a natural phenomenon of human society, of the basic human impulse as societies evolve beyond subsidence living to the creation of a civil society. Unrelated individuals who have common interests gravitate together to create groups and associations. Before the US Supreme Court's 1819 decision in the landmark *Dartmouth* case there was what would now be called a nonprofit sector or civil society. It flourished in pre-independence colonial North America and for the four decades of the existence of the United States until the court's decision.[1] These nonprofit organizations were often based on the shared

beliefs of a common religion or the practice of a common profession. For example, in colonial Boston, Paul Revere has been described as "an associating sort of man" and "a great joiner" because of the large number of groups he belonged to.[2] In fact, he was precisely the right person for his famous ride because he circulated in so many different networks.[3] As such, the pre-*Dartmouth* American nonprofit sector was a spontaneous outcropping of natural trends when societies reached post-subsidence stages. But in other respects, especially in the US, the nonprofit sector is – from the legal perspective – a wholly artificial sector, totally defined by rules determined by a different sector, government. Congress and state legislatures have largely enacted the 'rules of the game' and can change them at will.

But the legal core that defines and limits the power of government to intervene in the nonprofit sector is the 1819 decision of the US Supreme Court in the case of *The Trustees of Dartmouth College v. William H. Woodward*. Everything else that Congress or state legislatures enacted subsequently is mere commentary. The decision established that Dartmouth College, while founded as a publicly chartered institution, had – due to a contractual relationship arising from a bequest to the College – become a 'private' corporation. Government would be impairing a contract if it tried to intervene in Dartmouth's affairs and the US Constitution prohibited the state and federal governments from disregarding or superseding legal contracts between two parties. The *Dartmouth* decision established that legislative power over charities "is not absolute."[4] Even if a legislative body were to reserve, in the law it passed incorporating a nonprofit, the right to change the terms of the charter in the future, it still could take no action that would have the effect of impairing a contract signed by the charitable corporation.[5] This is the reason that the decision has been hailed as a breakthrough moment for the US nonprofit sector. By assigning nonprofit organizations the legal status comparable to a private business corporation (and the right of both to sign inviolable contracts), the Court was largely prohibiting the government's power to regulate nonprofit organizations. From that kernel, the entire legal structure for the sector gradually emerged.[6]

The decision has been elevated to hagiographic status. A long-running and multi-edition text in American history described the decision as "of far-reaching importance," with its good implications being that "it protected privately endowed colleges, schools, and the like from political interference, and encouraged endowments for education and charity."[7] According to Neen, "Following the Dartmouth decision, civic activity was no longer limited to public trustees who held political office."[8] Hammack called it an "important" case in the history of the American nonprofit sector for several reasons, including the legal rights of nonprofit corporations and the conceptualization of private organizations providing services to the public.[9] Campbell called it "the Supreme Court's first great civil liberties case."[10] McGarvie declared that "The real importance of the *Dartmouth College* case is not simply the delineation of private and public, but the perpetuation of the alternative visions of American society by the legal recognition of public and private spheres."[11] The editor of Daniel Webster's papers wrote in 1989 that the decision "remains one of the celebrated decisions of the Marshall Court." It was one of the "major judicial statements of public policy…[that] rippled through nineteenth century jurisprudence."[12] Finally, in 2005, Brands characterized the decision as "a blow against state power."[13] Hence, the general historical consensus has been to applaud the decision and view it as the event that paved the way for the birth of an independent nonprofit sector in the US.

The problem with the conventional wisdom of the case having been decided correctly – even courageously – is that this presumption suffocates a critical review of the implications of the ruling. In his history of the evolution of the media industry in the US, Starr noted the general tendency to accept historical developments as right: "Things that work satisfactorily come to be thought of as right: Laws, methods, and systems that appear to be successful become the basis of standards, often gradually appearing to be natural and inevitable, as if there could be no other way."[14] An economic history of Nazi Germany pointed out how difficult it is "to unpick the effect of hindsight."[15] These insights indeed capture exactly how the *Dartmouth* case has been treated in histories of the American nonprofit sector; namely that the decision was a good thing, clearing the way for the emergence of an independent civic sector, free of the evils of interference and meddling by governments and, worse, politicians. The encomiums and glorification of the decision present a nonprofit version of Voltaire's *Candide*. The *Dartmouth* decision has not only been accepted, but also sanctified as 'all is for the best in this, the best of all possible worlds.'

It is precisely this contention of the unmitigated positives of the court's decision that this paper seeks to contest by using the alternate history technique as a means for reexamining the case. What if the Court had decided the case the other way? While the benefits of the decision have been universally celebrated, what have been the losses? In what ways would the nonprofit sector have evolved differently from what it did become? This article examines the nonprofit road not taken.

Studying history through alternate scenarios

The paradigm of social science research generally discourages speculation, whether about the future or revisiting history through alternate scenarios. For understandable reasons, many in the professoriate consider this to be beyond the ken of serious academic work. Despite its obvious flaws, speculation and, especially, counterfactual history have a modest toehold in academe. It is variously called alternative history, alternate history, fictional history, counterfactual history and parahistory. In 1996 and 2001, two university presses published volumes about the genre, analyzing existing literature and presenting perspectives on this approach.[16] For the discipline of political science, literature on fictional scenarios of the future, including explorations of different forms of governance, have become mainstream enough that another academic press published a book on 'poli sci fi'[17] and courses on it have become increasingly common offerings by political science departments in US colleges and universities. The American Political Science Association has a formal Section on Politics, Literature, and Film.[18] For professional historians, speculation through the counterfactual technique has gained some degree of respectability, although is hardly a mainstream activity.[19] In 2006, a fourth academic press published a volume by well-established historians on counterfactual scenarios regarding the rise of the Western World. Why not China, they asked?[20]

Some academic writers and professional historians have engaged in historical speculation as part of their factual historical inquiries. After all, historical writing is by definition revisionist. It is

the historian who is deciding what is important and what isn't, and such judgments can change over time. The counter-factual approach is an almost inevitable aspect of the historiographic approach called 'histoire événementielle,' i.e. a focus on pivotal historical events as major turning points in history.[21] Some published histories announce in their titles their pivotal events and concepts approach. A two volume college level reader on *Pivotal Interpretations of American History*[22] included, quite naturally, such selections as "Did the Civil War Retard Industrialization?"[23] and "Could a Protestant Have Beaten Hoover in 1928?"[24] Other volumes have included the *Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas*[25] and *Pivotal Decades: The United States, 1900-1920*.[26] Focusing on pivotal events highlights "the causal power of particular actions and contingent events."[27] For example, writing about the California Gold Rush in the mid-19th century, Brands reminds the readers that "history never tells us what would have happened, only what did happen."[28] Similarly, a history of the Progressive Era examined the acceptance of racial segregation by reformers and then notes: "It might have been different. However convenient, segregation and disfranchisement were not foreordained."[29] Another history of the same era asked, "suppose Congress had never passed the [Lever] act? What would have happened in its absence?" It then provided "a counterfactual…thought experiment" to examine such a scenario.[30] A recent economic history of Nazi Germany posed several counterfactual scenarios that could have happened.[31]

Other academic and professional historians have made examinations of alternate history the central theme of their research projects. For a detailed study of how Hitler came to power legally, Turner reminded readers that history can "give the impression that what happened was the inexorable product of great impersonal forces, that it was bound to happen, that there were no alternatives."[32] In fact, but for a handful of decisions by a few individuals, Hitler would not have become Chancellor in 1932. Tuchman analyzed four major 'follies' of history, including the British actions which led to the American Declaration of Independence and the Vietnam War. In each case, leaders persisted in the pursuit of a policy contrary to their self-interest, when the counter-productiveness of their actions was identified at the time and when "a feasible alternative course of action" was available.[33] If such a reasonable substitute option was available and discussed, but not taken, then this was a pivotal historical moment when events *could* have gone another way rather than what actually happened.

Counterfactual history often focuses on presidents. If Washington had emancipated his slaves during his presidency rather than after his and his widow's deaths, what impact would that have had? More generally about Washington's and others' decisions during the war of independence, "The failure of emancipation to take root during the war is one of the great *What ifs* of the Revolution."[34] The political decisions during Jefferson's presidency to extend slavery to the southern part of the Louisiana Purchase were "by no means inevitable."[35] If Lincoln had had more close friends whom he trusted, what decisions might he have made differently? A prominent academic specialist on Lincoln speculated about three significant counterfactual scenarios based on that premise.[36] A different history focusing on Lincoln's cabinet raised a similar question. "Was this outcome [the civil war] inevitable? It is not a question that can be answered in the abstract. We must begin with the historical realities and ask if the same actors with the same convictions, emotions, and passions could have behaved differently. Possibly…"[37]

Finally, after publishing a biography of President Kennedy, Dallek speculated whether in his second term Kennedy would have made different decisions about Viet Nam than Johnson had.[38]

In public administration, a pivotal event in the development of municipal public reporting in the US occurred when the normative theory then in vogue could have been replaced with an empirically-based one.[39] While it did not happen, such (non)events practically beg for some discussion about the path that the city management profession opted not to take. Such discussions are not flights of fantasy, but rather necessary questions as part of the historical method. A journal in that discipline recently published a symposium on historical fiction, including speculation on US history if Alexander Hamilton had not died in his duel with Aaron Burr and how presidents after Herbert Hoover might have treated the US Bureau of Efficiency if it had not been abolished in 1933.[40]

In the field of US nonprofit studies, inquiries into nonprofit history and examinations of published fiction relating to nonprofits are conventional and widely accepted subfields.[41] This project experiments with a meshing of the two approaches by conducting an experiment with nonprofit alternate history. Such a research approach has not been explored on any extensive basis for the nonprofit sector. At times, leading authors have published predictions about the future of the US nonprofit sector, based on key trends pending at the time of writing. For example, in 2002 O'Neill dedicated the last chapter of his overview volume to the prospects for the sector in the near future.[42] Similarly, Salamon's 'state of the sector' reader that same year included his predictions about the implications of key trends on the health and status of the sector in the near term and foreseeable future.[43] In a non-refereed journal, a short speculative piece predicted a crash in the US nonprofit sector within the decade as a reasonably possible future scenario.[44] O'Neill has observed informally that he has been surprised at how little speculative writing there has been about the future of the American nonprofit sector.[45] He provided one of the infrequent examples of such an effort in his keynote address to the "Benchmark 3" conference at Arizona State University in 2006.[46]

Certainly, there is much that could be said to dismiss historical fiction. Besides issues of methodology and rigor, what intrinsic or useful contribution to serious scholarship can it make? The key is whether to view the chronology of history as inevitable and linear. As part of his introduction to a history of Reconstruction, Foner pointed out that "The historian, however, must avoid telescoping the actual course of events into a predetermined, linear progress."[47] But history is not inevitable. Rather, it reflects in part the contingency of events and therefore cannot always be predicted.[48] If, indeed, an event could have turned out differently, then surely a modest effort to examine an alternate scenario enriches and informs our understanding of history, its implications and its significance.

Therefore, there may be a limited benefit to identifying nexus events[49] in US nonprofit history and then developing alternate scenarios that could just as easily have occurred. Scenario writing is, in fact, an accepted technique in policy analysis. It is a method of exploring the developments that may occur subsequently as a result of the various options presented to the policy maker for a decision.[50] In 2005, Lee identified three modest benefits to historical speculation. First, it helps focus on the importance of <u>past</u> pivotal events by identifying what could have happened. Second,

it describes what the present would be like if historical events had taken a different path. Finally, this approach can help in assessing the importance of how, for a pending decision, selecting one of several alternatives can affect future outcomes.[51] This inquiry focuses on examining an alternate profile of the US nonprofit sector had the US Supreme Court ruled the other way in the *Dartmouth* decision.

The nonprofit sector in pre-*Dartmouth* America

The neologistic nature of 21st century study of America's nonprofit sector is most starkly apparent when trying to apply such terminology to the colonies and the post-independence United States during the pre-*Dartmouth* era.[52] Hall introduced his historical overview of the sector by reminding readers that the 18th century counterparts to contemporary nonprofits "little resembled the forms they take in modern America."[53] Neem suggested that the post-Independence resistance to the formalization of the nonprofit sector "might seem odd" to contemporary observers.[54] The most accurate historical generalization would probably be that there was *no* nonprofit sector at the time. In that era, there was little categorization of entities within the political economy. Practically all forms of endeavor emanated from governmental grants of power. For example, many religious organizations had official status as the 'established' church for that state and received funding from government for activities that would now be considered welfare and social services.[55] This did not change greatly even during the shift from pre- to post-independence eras. The First Amendment's ban on establishment of religion was not ratified until 1791, a decade and a half after independence (and still continued in some states for several years after that).

Almost all entities that were not integrally within government had the status of corporations that were chartered by state government or their colonial antecedents. This law-making process was identical whether the entity was to be part of (what would now be called) the business sector, local government or the nonprofit sector.[56] (Similarly, divorces could only be obtained by an act of a state legislature.)[57] Therefore, all such chartered corporations were viewed in some respects as extensions of government or at least creatures of government.[58] For example, legislatures often inserted in the corporate charters they approved (regardless of the entity's sector) a general 'reservation' clause that explicitly permitted it to impose subsequent changes on the corporation.

The concept of government chartering corporations predated colonial America and was prevalent in England beginning in medieval times. Sometimes charters were unilaterally issued by kings and later, as Parliament gradually assumed more power vis-à-vis the monarchy, by the legislative branch. The British government would authorize a (business) corporation to incorporate by issuing a charter, sometimes called a patent. Some of these historically prominent for-profit corporations included the East India Company (1600), the Jamestown colony in Virginia (1606) and the Hudson Bay Company (1670).[59] Similarly, and without much distinction, dating as early as the 12th century, the Crown also issued charters to (what came to be called) municipal corporations.[60] The activities of these municipal entities were originally commercial in nature and therefore the incorporation approach was understandable. Gradually, however, municipal corporations took on civic and public sector roles, essentially inventing what evolved to be

modern municipal government. Yet their legal status as a corporation remained central to their existence.

In fact, significant to this discussion of the *Dartmouth* ruling, English municipal corporations gradually asserted that they were independent of Crown or Parliamentary control after their charters were issued. A major effort by 17th century kings to reassert their ongoing authority to modify already-issued municipal charters caused an uproar and was a failure, further solidifying the municipal claims of post-chartering independence.[61] After that, "the municipal corporation had achieved a protected status… Privileges which the crown had bestowed could not be retrieved."[62] The doctrine of charter inviolability and sanctity became a fixed and central tenet of British municipal government after 1688, though not necessarily in the American colonies and after, with the creation of the United States.

The legal basis for city government in early America was a direct inheritance of British law requiring incorporation. One of the earliest municipal corporations in colonial North America was Philadelphia (1691), with 14 in existence by 1750.[63] After independence, state legislatures assumed the role of issuing charters. Some of the first were Charleston (1783) and Baltimore (1796).[64] Hence, leading up to *Dartmouth*, municipal corporations chartered by government were as common as charters issued to business corporations or (what would now be called) nonprofit corporations. For the latter, for example, educational and cultural institutions were often chartered with such provisions as public officials directly appointed to boards of directors, trustees or visitors to oversee the activities of the corporations. The question of the inviolability of a corporate charter, therefore, was equally applicable to municipal, business and nonprofit corporations.

Dartmouth v. Woodward

Given its importance, the specifics of the events that led to the *Dartmouth* case and the subsequent litigation have already been examined in detail elsewhere and do not need to be recounted at length here.[65] Briefly, the issue in New Hampshire politics (driven by partisan politics of the fading Federalist Party and the rising Jeffersonian Republican [now Democratic] Party) was over the control of Dartmouth College. The state legislature passed, and the governor signed, a state law expanding the size of its board of trustees and clarifying that the naming of these trustees would be by state government. The college resisted, largely on the grounds that as a corporation it was beyond the reach of the legislature. The central issue that emerged during the litigation – and which is the key focus of this reexamination – is the precise nature of the college's corporate status. This question then led to the related issue of whether a bequest from a donor to the college created a contractual relationship between two private parties and, if so, was the state legislature's action unconstitutional because it violated the clause in the federal constitution prohibiting the government from impairing a contract?

Since the original institution had been chartered by the government (pre-independence), did that mean the college corporation was an extension of government? Or, once an educational institution had been incorporated, did it become free of any future governmental control? This

specific question then led to a more general review of the legal status of corporate entities, hence the eventual significance of the case beyond the nonprofit sector. And, since several different kinds of corporations were chartered by state legislatures, were they all alike in the key principle of continuing governmental control? Or, were different kinds of corporations subject to different rules regarding subsequent governmental oversight?

The decision of the high court of New Hampshire in November 1817 was based on the premise that there were only two kinds of corporations that the state legislature could charter.[66] First, there were private corporations, which were established "for the immediate benefit and advantage of individuals."[67] Examples of private corporations then in existence in New Hampshire, which would be familiar to a 21st century observer, included banks, insurers and manufacturers. Other charters were issued by the legislature to companies to finance, build and then profit from usage of highways ("turnpike roads"), bridges and canals. The latter category reflected the-then method of building a public infrastructure and financing it through user fees that went to the investors who paid to build it. The second category of corporation recognized in the court decision was the public corporation, which was established to accomplish "public purposes" and the members of the corporation did not hold any "beneficial interest," i.e. they did not own it and could not receive a benefit from it – exactly the opposite of the stock holders or owners of a private corporation. The common manifestations of a public corporation in New Hampshire at the time were local governments, namely "Counties, towns, [and] parishes."[68] These sub-state entities were public corporations created by charters issued by the state legislature. This approach is still nearly universal in 21st century America, where counties, municipalities and townships are 'creatures of the state,' i.e. they do not have any inherent powers and are totally subject to legislative acts that assign, limit, expand or reduce their scope of legal operations.[69]

The state court opinion did not recognize any other co-equal categories of corporations beyond private and public ones, such as charitable corporations, eleemosynary corporations or private non-stock corporations. Given the choice between private and public corporations, the state court did not hesitate to classify Dartmouth as a public corporation. The core reasoning was simple: no individuals 'owned' it in the sense of the holder of stock in a private corporation and no individuals could benefit financially from the profits of the corporation. Therefore, Dartmouth was a public corporation that was chartered to provide a 'public' benefit, i.e. the training of citizens, professionals and future leaders. Given that Dartmouth was a public corporation and that the legislature routinely revised the powers and structures of public corporations, then the special legislation changing the governance of the school was a routine exercise of governmental power. Judgment for the defendant.[70]

The College then appealed the state court ruling to the US Supreme Court.[71] In a very passionate oral argument when the court heard the case in March 1918, Daniel Webster insisted that British law recognized more than two categories of corporations. He said that Dartmouth qualified as an eleemosynary[72] corporation or as a charitable corporation.[73] Webster then argued that the nature of such entities was that they were more like private corporations than public ones. He claimed that a close review of the activities of charities and private corporations showed a high similarity in the nature of their operations, powers, rights, parties to contracts and control of private

property. That meant, he argued, Dartmouth was a corporation that was a "*private* Charity."[74] As such, the New Hampshire state legislature could not modify Dartmouth's charter once issued, comparable to the way it was restrained from unilaterally changing the charters of private corporations. On the other hand, the legislature had an understandable right to modify the charters of public corporations, such as municipalities. Webster's emotional peroration[75] was supposedly so powerful that he brought most of the justices and the audience to tears.[76] Morrison and Commager dryly commented that Webster's argument reflected his "characteristic eloquence and illogic."[77]

Webster's central thesis was, in retrospect, geocentric. In New England, the legal status of municipal corporations was more subject to state court and state government intervention than the legal practice in New York State. In New York, assertions of the autonomy of municipal corporations after a charter had been issued were more strongly asserted and more often upheld.[78] Yet, had Webster acknowledged that, it would have contradicted the essence of his argument. He merely asserted to the US Supreme Court a supposed truism, namely that the government's power to modify the charter of a municipal corporation was unrelated to the autonomy of counterpart private and, impliedly, nonprofit corporations that were similarly government chartered. (In large part due to the *Dartmouth* decision, it became settled law that municipal corporations were "wholly subject to the legislative power of the state" even after a charter had been issued.)[79]

After a year-long delay due to the difficulty of forming a majority consensus,[80] the court eventually agreed. On February 2, 1819, the Supreme Court ruled 5-1 that Dartmouth's existence as a charitable and eleemosynary corporation was merely as a subcategory of private corporations.[81] That there was a generalized public benefit to Dartmouth's activities or even that the state had donated land for its campus were immaterial to the principle that the state legislature could not change a corporate charter for a private corporation once issued (and that the donor's bequest had the status of a contract – which the legislature similarly could not impair).

According to Hall, the court decision "had limited impact."[82] However, a book review essay in 1820 in *North American Review* – at that time "the most important intellectual quarterly in America"[83] – stated that "Perhaps no judicial proceedings in this country, ever involved more important consequences, or excited a deeper interest in the public mind, than the case of Dartmouth College, recently determined in the Supreme Court of the United States."[84] This suggests the recognition of the import of the decision was quite immediate.

While the decision also had a major impact on the development of the business sector in the US political economy, the focus here is on what came to be called the nonprofit sector. As a result of the *Dartmouth* decision, it became a matter of settled law that corporations that were organized for charitable purposes were wholly within the larger rubric of private corporations. Even though they might have public benefits and even though individuals could not obtain a private interest for personal benefit in such corporations, they were nonetheless a sub-genre of business corporations. That meant the scope of any possible governmental intervention, regulation or control of nonprofits was sharply circumscribed. Thus was born the 'private nonprofit' sector.

The gradual emergence of the nonprofit sector in the American political economy, especially since the mid-20th century, can be seen as a direct outgrowth of the *Dartmouth* decision. McCarthy stated that the decision "considerably revised" the legal status and underlying premises of nonprofit organizations.[85] Young characterized the court's ruling as "A crucial turning point."[86] It was henceforth and permanently to be defined as a private activity, wholly independent of any significant governmental involvement. For example, in his 1999 overview of the American nonprofit sector, Salamon identified its private nature as one of the six defining characteristics of the sector: "Nonprofit organizations are neither part of the governmental apparatus nor governed by boards dominated by government officials. …[They] are fundamentally private institutions in basic structure."[87] The terminology even is reflected in federal law. For example, the one of the legal definitions of a community action agency is as a "private nonprofit agency."[88]

As an understandable outgrowth of *Dartmouth*, there was a close and confusing similarity between for-profit corporations and nonprofit ones. This was demonstrated in a famous incident in 1905. A New York State legislative committee was appointed to investigate alleged corruption in the life insurance business. Some of the accusations included inflated salaries, nepotism and insider dealing. At the time, some life insurance companies were for-profit stock corporations while others were nonprofit mutual corporations. When being cross-examined by Committee Counsel Charles Evans Hughes, the president of a mutual corporation described his organization as "a great beneficent missionary institution" that operated "from a pure spirit of philanthropy and benevolence." Hughes dryly followed up, asking about "the salaries of the missionaries."[89] When one of the defenders of the companies referred to them as eleemosynary institutions, it caused great hilarity and snickering. That incident probably helped contribute to the sharp diminution of the usage of the term.

Contemporary exemplars of the post-*Dartmouth* private nonprofit sector

What hast *Dartmouth* wrought? Two types of nonprofit organizations in contemporary America help demonstrate the peculiarities of this private nonprofit sector. Community action agencies (CAAs) and economic development corporations (EDCs) provide tangible examples of the oddity of trying to conform their public-benefiting yet legally private nonprofit status with the public sector links they have.

The concept of a community action agency emerged from the initiatives that led to President Johnson's War on Poverty in the 1960s. Partly encouraged by social scientists, the idea was for a local organization that would be largely directed by grass-roots citizens. This would be a step toward the institutionalization of locally-controlled anti-poverty programs as well as "the professionalization of reform."[90] The central tenet of the concept that gradually evolved in practice was that, in some respects, CAAs would reflect traditional governmental social service bureaucracies, in that they would be the front-line deliverers of government-funded social assistance and programs. However, the decision-making would be at the local, even neighborhood level, not in Washington, DC, the state capital, the courthouse or even city hall.

This would truly be controlled by real people, local activists reflecting the authentic priorities of the 'community' (whatever that means). Most importantly, CAAs would be more than neutral providers of public services, as government bureaucracies are expected to be. Rather, simultaneous with delivering social services, CAAs would also be advocates for the needs of local neighborhoods and, especially, disempowered minorities. CAAs would be agitating governments for change, the same governments that funded the services they provided.

However, what these agencies actually were "was not clearly specified by the legislation."[91] In formal legal terms, it is relatively simple to identify the sectoral status of CAAs. In the original 1964 War on Poverty law, they were defined as "a public or private nonprofit agency…, or a combination thereof."[92] Due to the conjunctive "or," a CAA could theoretically be both a public and a private entity simultaneously – an impossibility based on a strict interpretation of *Dartmouth*. Three tumultuous years later, Congress tried to get a better handle on the unruly organizations it had authorized. Now,

> A community action agency shall be a State or political subdivision of a State (having elected or duly appointed governing officials), or a combination of such political subdivisions, or a public or private nonprofit agency or organization which as been designated by a State or such a political subdivision or combination of subdivisions.[93]

The de facto reality of CAAs organized as nonprofits is that they are governmental in nature, given the services they deliver and the representativeness of their boards, yet they are "private nonprofit" in their independence from government and their mission to advocate for the poor and voiceless in society. The frequency of CAAs being organized as nonprofits nationally is indicated by formal titles that include either "Corporation" or ", Inc."[94]

The peculiar nature of CAAs is reflected in some state laws as well. For example, for Wisconsin, the legislature has made contradictory enactments about CAAs as it struggled to create a statutory status for them. A CAA located in 71 of Wisconsin's 72 counties (all except Milwaukee) must be a "private, nonprofit" corporation. Yet, simultaneously, each – like a state agency – is subject to the legal principle of open records and some aspects of the open meetings law. Also, at least a third of its board of directors must be elected public officials or their representatives.[95] The law applying to the CAA in the state's most populous county is even more complicated. It reverses the legal presumptions of the law for outstate CAAs, but ends up legally in the same place. While the law defines the Milwaukee CAA as an "intergovernmental commission," thus placing it squarely in the public sector, the agency "may be established in cooperation with a nonprofit corporation," ambiguously making it somewhat of a private nonprofit as well.[96] Similarly, while the Milwaukee CAA is required to conduct all of its meetings under the state open meetings law (like a typical public entity), it operates like a nonprofit. For example, it is governed by By Laws that are adopted and amended by its board and it has the traditional structure of a nonprofit: a board, officers elected by a board, committees of the board, annual meetings and an executive director accountable to the board.[97]

Hence, CAAs are conceptually pretzel-like and multi-faced organizations. Many are incorporated as private nonprofits, yet they perform some governmental functions and are under certain expectations to operate like government agencies. The oxymoronic status of CAAs, especially

during the tumultuous 1960s and early 70s, helps demonstrate the difficulty of harmonizing a post-*Dartmouth* legal system with the natural functioning of a broadly defined public sector.

A second exemplar of the *Dartmouth*-dictated American nonprofit sector is the economic development corporation (EDC). This is an entity that both de facto and de jure straddles all three sectors, often confusingly and arbitrarily. Economic development corporations became popular beginning in the 1950s as a means of promoting local economic development, whether in a region, state or locality. The peculiarity of the concept is demonstrated by the efforts of several circa 1958 federal reports to describe them:

- "operating under enabling acts of the State legislatures and in general [they] are profitmaking private corporations (although profit is strictly a secondary consideration)."[98]
- "The purposes of both profit and nonprofit development corporations are stated in similar terms."[99]
- "While State development credit corporations have the organizational structure of profitmaking corporations, they are more accurately described as nonprofit institutions."[100]

Given these options, EDCs have usually been chartered by state legislatures (either by general or specific legislation) and hold tax exempt status due to their public benefiting orientation. They can alternatively be organized as a stock (i.e. for profit) or nonstock (i.e. nonprofit) corporation. The latter can be membership or non-membership based, i.e. with members electing a board of directors (but having no ownership stake like a stockholder) or a board that is self-perpetuating. Even if they are for-profit, they are intended to accomplish a public purpose, with profit not the primary motivation for the existence of the corporation or the rationale for the investment by stockholders. This makes EDCs "unique" entities, because they are private – whether for-profit or nonprofit – but always have a "public interest purpose."[101] In 1970, an updated summary published by the federal government of the legal and financial aspects of EDCs similarly minimized the distinction between for-profit and nonprofit forms of incorporation, largely reducing the difference to "certain restrictions on distribution of earnings and assets."[102]

It is the hair-splitting nature of *Dartmouth* that permits the existence of an entity organized for a public purpose, sometimes even founded at the initiative of a local government, yet defines it as a private corporation that cannot be controlled by government once it is chartered. This is compounded by the even odder situation that an EDC can be either for-profit or nonprofit and its sectoral affiliation is practically irrelevant. It is seemingly oxymoronic for government to authorize the establishment of a private corporation, which is then beyond its reach, yet whose raison d'être is to accomplish a public purpose of that same government. These legal truths are so artificial that they defy a sense of logic and practically empty terms such as 'public,' 'government' and 'nonprofit' of real-world meaning.

The oddity of the EDC concept surfaces with regularity. Several contemporary examples from Wisconsin reflect that. The Waukesha County Economic Development Corporation describes itself as "a 501(c)3 not-for-profit corporation" that "receives combined private-public sector

support."[103] Tangible support from government agencies included funding from Waukesha County government that "supports WCEDC's basic operational needs" and federal money for a revolving loan fund channeled through the Waukesha County government's Community Development Block Grant office.[104] When tax dollars cross the threshold from government to this EDC, they are no longer in the public sector and are now exclusively under the control of a private nonprofit corporation. They are beyond the reach of normal compulsory governmental accountability and stewardship processes. They have irretrievably become private funds.

One county over, this issue was subject to recent litigation regarding the powers of the City of Beaver Dam's EDC. In 2004, the Beaver Dam Area Development Corporation had negotiated an agreement with Wal-Mart to build a distribution center in the city. Citizens who disagreed with the deal quickly complained that they could not get the usual public access to documents and meetings of the Corporation because the EDC insisted it was a private entity. How could that be, asked the citizens? After all, the EDC "receives most of its funding from the city; the mayor and other officials serve on its board of directors; the city provides office space and other clerical support; [and] it has no clients other than the city."[105] While the corporation eventually voluntarily agreed to release some documents to the group, the state's attorney general decided to take the EDC to court to codify her contention that EDCs were quasi-government entities and therefore subject to the state's good government laws, such as open records and open meetings. She contended that:

> "A public agency -- the City of Beaver Dam -- cannot 'spin off' a private entity, as allegedly happened in Beaver Dam, and then consider itself above the state laws that ensure that the public has open access to the public's business."[106]

Two years later, the trial-level judge ruled against her. In essence, the court's ruling was upholding the *Dartmouth* principle that a nonprofit corporation was a private sector entity. The attorney general vowed to appeal the decision.[107] At the time of writing, the case was still pending in the appellate process.[108] In the meantime, in an effort to quell the controversy, a legislative committee appointed to develop a solution deadlocked over a 'compromise' bill to make the state's open records and open meetings laws applicable to EDCs with more than half of their assets coming from governmental sources.[109] EDCs opposed the idea as 'too much' publicness and the media opposed it as 'too little.'

The EDC of the state's largest city, the Milwaukee Economic Development Corporation, presents the same now-you-see-it-now-you-don't pattern. It describes itself as "a <u>private</u> non-profit corporation,"[110] yet the mayor is a member of the Board of Directors. As part of its 2005 annual report, the mayor oddly described it as "a nonprofit corporation and lending arm <u>within</u> the City of Milwaukee Department of City Development."[111] The municipality's Department of City Development provides all staffing for the corporation, yet in 1985 the department head objected vociferously to an audit report from Arthur Andersen that suggested the corporation and a sister organization "should be considered component units of the City reporting entity."[112] The founding agreement between the city and the EDC, when the city transferred to it some federal funds from the Model Cities program, exposes the artificiality of the private sector affiliation of the corporation. The agreement states that should the corporation ever disband or terminate its

working agreement with the municipality, then its assets would revert back to the city.[113] This means the municipal government was temporarily privatizing some of its money as long as this was politically convenient. These were public sector funds which were, through a legal maneuver, placed out of reach of governmental and democratic institutions for as long as this government agency wanted. Trying to walk the minefield, in 2006 a reporter described the corporation as "affiliated" with the city.[114] Significant sums are at stake. Since being founded in 1971, the corporation received most of its additional capitalization from the city, especially from federal grants. By 2004, it reported $49.5 million in net assets.[115]

CAAs and EDCs have been presented here as the natural, but illogical, outgrowth of *Dartmouth*. These are entities that engage in public purposes and are largely financed by government funds. Yet they are not within the public sector. Instead, legally, they are private corporations. This may be a mind-bending distinction, but it is a crucial aftermath of *Dartmouth*. While the public can make government accountable, it cannot do so in the same way for these supposed private nonprofit corporations. CAAs and EDCs demonstrate the significance of the US Supreme Court's decision. They are, of course, not the only examples. For instance, nowadays many government agencies have wholly-owned nonprofit affiliates. One of the first to start the trend was the National Park Service's National Park Foundation, which was incorporated by Congress in 1967.[116] When he signed this bill into law, President Johnson stated the purpose of the Foundation was to rely "Upon private capital" to "augment" the work of a government agency.[117] These entities, which work hand-in-glove with a public-sector agency, are legally private and can shield funds and information in ways that a government agency cannot. Due to *Dartmouth*, the uses and spending of the funds raised are beyond the decision-making and policymaking reach of the legislative, executive and – of course – judicial branch. Again, the claim of being private is a fiction. In the case of the National Park Foundation, the Secretary of the Interior is by federal law the chair of its board of directors,[118] an indication of the artificial privateness of the nonprofit. Another example relates to most public television stations, which have a 'friends' group that conducts on-air fundraising aimed at helping the station. This is no ordinary nonprofit. None of the hundreds, even thousands, of other nonprofit agencies in that media market are accorded the same free and virtually unlimited access to the station's airwaves. The friends group has a monopoly that derives from the public status of the station. Yet, again, key decisions about assets and their distribution are wholly beyond the reach of government and the public. The demarcation line is practically invisible. When viewers decide to donate, in their minds they are helping an under-funded government entity, not a private corporation.

If *Dartmouth* had gone the other way: Dartmouth College and other private nonprofit universities

It is at this point in the narrative that the focus shifts from what *actually* happened to what *could* have happened. If the Marshall court had ruled the other way in the case, how might the US nonprofit sector look today, compared to the status quo? The effort to explore this unchosen path of history is not intended to be a frivolous inquiry, but rather with the goal of identifying the costs of the court's decision in juxtaposition to the given narrative and conventional wisdom of the purported benefits of the *Dartmouth* decision.

Regarding Dartmouth College itself, it is relatively easy to depict an alternate history of what likely would have been the real-world outcome if the US Supreme Court had upheld the New Hampshire Superior Court ruling. In that case, the school would have been deemed an extension of state government and therefore subject to some degree of post-charter political control and charter revisions, such as appointments to its Board of Trustees. In tangible terms Dartmouth would have became the de facto University of New Hampshire, the state's institution of higher education.[119] What would the implications of this scenario be?

Glorifiers of the *Dartmouth* decision suggest that a court ruling in the other way would have meant the politicization of the college and the meddling in its academic quality by base politicians. Whitehead suggests this is a misinterpretation that 20th century historians have imposed on the court case. He suggested that state governments, such as – but not limited to – New Hampshire, had little interest in micromanaging institutions of higher education. Rather, they sought to reduce the sectarian religious affiliations of colleges (Dartmouth was viewed as Congregational) so that the schools would be more "representative of the state at large" and therefore offer a more secular education that would be appropriate for any of the state's citizens.[120] In fact, as soon as it won its case, Dartmouth quickly turned to the state legislature for financial assistance, indicating that the received wisdom of the case may not have been accurate.[121]

Generally, a quick review of the status of public higher education in the United States contradicts the argument that state governments sought to meddle in pedagogy. State universities have emerged as institutions that have a large degree of independence from state legislatures in such areas as academic freedom, freedom of inquiry and freedom of expression. Certainly, there are occasional headline stories in the 21st century of state politicians seeking to fire a certain controversial professor or to mandate how a specific academic subject is treated. But, in general, the very broad – nearly universal – consensus of American political culture has created a deeply rooted modus vivendi that permits the co-existence of academically independent public universities within the confines of state government. Some of the most prestigious American universities are part of state government, such as the University of Michigan, UCLA and UC-Berkeley. Even garden-variety land grant state universities are generally recognized for the basic academic freedoms that the faculty possesses. Of course, some are of lower quality than others, but there are no apparent major text-book cases of the dour and seemingly inevitable consequences that the *Dartmouth* decision supposedly freed Dartmouth and American higher education from facing.[122]

In fact, one can argue that as a generalization, public universities in the United States have more academic freedom than nonprofit institutions of higher education. This is especially so regarding nonprofit schools that are affiliated with religious or other similar movements. At some of those colleges, the faculty's freedom to teach is proscribed by religious dogmas, doctrines, principles, catechisms and cannon law. Nothing can be taught that violates the precepts of the religion. For example, consider how evolution is treated in biology courses of nonprofit universities affiliated with religious denominations that reject evolution. While such limitations on academic freedom are fully legal and within the rights of a nonprofit corporation, this example indicates that the

premise of one of the central justifications of the *Dartmouth* decision is false in practice. Private universities are not inherently and always freer academically than public institutions of higher education in 21st century America – *Dartmouth* notwithstanding.

Similarly, when the issue of hate speech codes to regulate student conduct was being debated in academe in the 1990s, the difference between public institutions of higher education and nonprofit universities was readily apparent.[123] As components of government, public entities were automatically subject to the First Amendment prohibitions on constraining free speech, while private nonprofit ones could theoretically trespass on constitutional rights. Hence, as a general rule, freedom of speech at public universities was greater than at private ones. Similarly, at public universities students and faculty cannot be disciplined or even expelled for nonconforming behavior without due process leading up to a decision. Also, such administrative decisions can be appealed to the courts when violations of constitutional protections are alleged. These due process rights do not automatically apply at nonprofit institutions of higher education. The operational application of various constitutional privileges in the Bill of Rights again demonstrates that the reality of higher education in the US is actually the opposite of a putative signal benefit of the *Dartmouth* decision. As a general rule, due to the Constitution, public sector universities provide more freedom than private ones.

What could have been: America's <u>public</u> nonprofit sector

Moving beyond an alternate history of Dartmouth College itself, if the court's decision had gone the other way, then nonprofit organizations in the US would legally be in the public sector. Perhaps they would be exactly like the pre-*Dartmouth* situation, extensions of the federal or state government, such as receiving charters from Congress or state legislatures and with government controlling some appointments to boards of directors. Perhaps they would be self-creating, but subject to a higher threshold to qualify for nonprofit status. There would be no private nonprofit sector. Certainly, given the constitutional ban on establishment of religion, one would hypothesize that religious bodies and their affiliated institutions would bear a legal status akin to their peers in pre-*Dartmouth* (but disestablished) America. However, secular organizations would largely be within the public sector, as extensions of government, with quasi-governmental status or meeting the legal requirements for establishing a public nonprofit entity. They would be <u>in</u> the public sector, but not government, precisely the mirror image of post-*Dartmouth* reality, namely that nonprofits are in the private sector but are not for-profit businesses. The general premise of this kind of nonprofit sector would be that it exists to accomplish public purposes and to promote the public interest.

For example, all nonprofits would have to have a public purpose, of engaging in activities that benefit the commonweal. This, it could be argued, would be a positive effect, since it would weed out of existence the proliferation of US nonprofits that have such narrow goals and missions that they, de facto, are serving a private rather than public purpose. For instance, various tax benefits and subsidies benefit elderly housing complexes that cater to the wealthy. The economic elite could no longer masquerade its institutions as private nonprofits ones, supposedly deserving of the benefits that other nonprofits may qualify for. Certainly, such

private-purpose associations could exist, probably as pure business corporations, albeit not as for-profit entrepreneurial entities. But, their private-serving and private-benefiting raison d'être would preclude them from a public nonprofit sector.

These public nonprofit corporations would presumably be subject to the culture reflected by the 'rules of the game' that Americans impose on government. For example, the accountability and transparency that is expected of government would be extended to nonprofits, though probably not with the same degree of rigor. But certainly the current opaqueness of nonprofits would presumably shift to some form of mandatory translucency. No longer would uninformative and even misleading annual 990 statements be enough to justify the tax expenditures that a nonprofit benefits from.[124] In general, the underlying premises of public administration and public law in a democracy would apply to these nonprofit agencies to some degree. Moe has catalogued about one hundred general management laws that Congress has enacted to direct the management of the executive branch.[125] Presumably many of the rationales embedded of these general management laws would also apply to public nonprofit agencies. Certainly, nonprofits would be distinct from government itself and, therefore, subject to a lesser standard regarding accountability and rules of conduct.

As a reflection of the contemporary push for government to operate in a more business-like fashion, Cohen and Eimicke tried to delineate the principles that are inherent in the public sector. They argued that no matter how much government sought to act as though it were in the private sector, it was compelled to honor some principles that are deeply embedded in the American public sector. As such, their argument can be used conversely. If we seek to identify the differences between a private nonprofit sector and a public nonprofit sector, then the difference would be the same principles Cohen and Eimicke presented. These would be the inherent characteristics of any public sector entity, whether by governments or by nonprofits. These principles include serving the public interest, ensuring through analysis, acting with compassion and empathy, and taking personal responsibility for decisions.[126] While it could be argued that these guidelines already vaguely apply in principle to the American private nonprofit sector, but there would be at least two important differences for public-sector nonprofit agencies. First, the rigor of upholding these rules would be greater with public nonprofits than their fuzzier and less compulsory applicability in America's private nonprofit sector. Second, the consequences of violating these principles would be greater, given the public sector context of nonprofit agencies.

Besides these process oriented and governance issues, public nonprofit agencies would be expected to demonstrate a tangible and identifiable public benefit, justifying their existence. For example, it would not be enough for a nonprofit hospital vaguely to assert that it served a public purpose. What were the public benefits it provided to justify its nonprofit status (and accompanying tax benefits) and were those benefits sufficient to maintain its legal status? What public benefits did a country club provide to justify exemption from paying federal and state income taxes?

In general, the nonprofit sector's placement within the larger genus of the public sector would inherently guarantee the public purpose of all nonprofits. Further, the oversight powers of government would permit greater regulation to ensure the public-benefiting orientation of

nonprofit agencies – certainly to a greater degree than can occur in the post-*Dartmouth* legal context.

Depicting an American public nonprofit sector

It is not necessary to engage in far-ranging alternate history to depict manifestations of the contemporary nonprofit sector if the court's decision had gone the other way. Rather, in the US today there is a relatively minor, but extant, public nonprofit sector. These nonprofit agencies are a clear representation of what the entire (non-religious) American nonprofit sector would have looked like in a different post-*Dartmouth* America. They are a "commingling of the legal characteristics of the governmental and private sectors."[127] However, because these entities are so overshadowed by the traditional private nonprofit sector, they are often overlooked or ignored in surveys of nonprofits in the US.

The components of this 'shadow' public nonprofit sector comprise five categories: traditional (private) nonprofit corporations chartered by Congress after the *Dartmouth* decision, publicly-oriented nonprofit corporations and three types of public purpose corporations. The heterogeneity of this public nonprofit corporate sector is reflected by the terminology that tries to encompass them. The *US Government Manual* includes them in categories entitled Government Corporations and Quasi Official Agencies.[128] Other terms to describe these entities have included quasi-government and quasi-private.[129] An acronym in international usage that has turned into a word in lower case is quango, for quasi-autonomous non-governmental organizations.[130] According to Moe, the commonality that these diverse entities have is that they "have some legal relation or association, however tenuous, to the federal government. One common aspect of this mélange of entities is that they are generally *not* agencies of the United States, as that term is used in Title 5 of the U.S. Code."[131] That these entities are not 'pure' government is reflected by the existence of an academic literature in public administration that critiques such organizations as not being governmental enough.[132] This confirms the theoretical possibility as well as reality of having a public nonprofit sector, i.e. organizations that are public, but are not government.

1. 'Private' nonprofit corporations chartered by Congress: Most post-*Dartmouth* depictions of the impact of the decision present it as a kind of nonprofit declaration of independence, when legislative approval was no longer necessary for the creation of a nonprofit organization. The central tenet of *Dartmouth* was that nonprofits were no longer to be seen as extensions of government and were no long in the public realm. In particular that meant a nonprofit could incorporate without permission by government, especially reflected in the process of the issuance of charters enacted by legislative bodies.

Yet, oddly, since the decision, Congress has continued routinely passing laws (signed by presidents, of course) that incorporated a particular nonprofit organization, corporations that in the post-*Dartmouth* context would be legally defined as *private* corporations.[133] Since legislative approval of the incorporation of a nonprofit was not required anymore, this is something of a peculiar pattern, the continuation of the pre-*Dartmouth* legal situation. These legislative

enactments creating private nonprofit corporations have persisted through to modern times. Some examples include the Institution for the Education of Colored Youth (1863),[134] the American Historical Association (1889),[135] Boys Scouts of America (1916),[136] AMVETS (1947),[137] Big Brothers of America (1958)[138] and American Gold Star Mothers (1984).[139] Significantly, given *Dartmouth*, in some cases Congress explicitly reserved the right to revise or even repeal the charter granted those nonprofits. For example, it included such provisos in 1958 in the bills incorporating the Veterans of World War I of the United States of America[140] and the Jewish War Veterans U. S. A. National Memorial.[141]

Even if Congress was creating such nonprofit organizations in its more circumscribed capacity as the-then legislative branch of the municipal government of the District of Columbia, these nonetheless were statutory enactments, as was common pre-*Dartmouth*. Also, in 1901 Congress enacted a code of laws for the District that included the right of nonprofit organizations located in the District of Columbia to incorporate without individual legislative permission.[142] Therefore, all post-1901 Congressional charters for nonprofit corporations based in Washington, DC were doubly unnecessary from a legal perspective.[143] Yet, for whatever reason, these private nonprofit organizations have sought to be chartered by act of the legislative body.

Such post-*Dartmouth* Congressionally-issued charters somehow imply a degree of respectability, even accountability, although that is legally and factually incorrect based on that court decision. For example, in 2006 a reporter for Associated Press pointedly referred to the Red Cross as "The 125-year-old charity, chartered by Congress."[144] Similarly, in his book on the 1918 influenza pandemic, Barry described the Red Cross as "quasi-public institution" that was "*Officially* chartered by Congress."[145] A directory published in 1949 described the Red Cross as a "Quasi-Official Agency."[146] Such descriptions intimated some aspect of organizational responsibility to the federal government, greater than a 'pure' private nonprofit agency. Various efforts within Congress have been made to permanently terminate the granting of these charters.[147] However, political realities will probably never permit that to occur in a definitive and iron-clad manner. Politicians invariably believe they will look good (even if only in the eyes of a few), if they accede to a request from a group for its own federal incorporation law.

In 1965 President Johnson vetoed such an incorporation bill, complaining of the lack of "clearly established standards and criteria as to eligibility." He suggested that if the federal government were to continue issuing such charters, then "federally chartered corporation be more carefully supervised by an agency of the Federal Government" than other nonprofits.[148] However, his veto did not trigger any significant reforms.[149]

To the contrary, his veto did not prevent a rash of incorporation charters in 1984 for veterans' organizations, including (besides the already mentioned Gold Star Mothers) the Polish Legion of American Veterans,[150] Catholic War Veterans,[151] Navy Wives Clubs of America,[152] Daughters of the American Colonists,[153] 369th Veterans' Association[154] and Women's Army Corps Veterans' Association.[155] Other more recent incorporations have included Daughters of Union Veterans of the Civil War 1861-1865 (1985),[156] National Mining Hall of Fame and Museum (1988),[157] Fleet Reserve Association (1996),[158] Air Force Sergeants Association (1997)[159] and the American GI Forum (1998).[160] In 2006, the Korean War Veterans Association was seeking a federal charter,

claiming that Korean War veterans were being dishonored because so many other veteran organizations had received federal charters, yet they had not. Legislation passed the Senate, but was blocked in the House Judiciary Committee by then-Chairman F. James Sensenbrenner, Jr. (R-WI) who sought to uphold the sometimes respected moratorium on issuing any more federal charters.[161] He feared that any new charter would "give the false impression that Congress is supervising" the nonprofit.[162] However, given political realities, it is likely that the organization would eventually win, perhaps through an amendment to a different bill that would not need to go to the House Judiciary Committee.[163]

Still, it is inaccurate to depict these organizations as wholly unaccountable to the federal government and merely gaining the veneer of prestige and respectability from such statutes. Moe suggested that there could be situations where "the government's interests may be at odds with the interests of" a Congressionally-chartered nonprofit.[164] For example, some of the incorporating charters required an annual report to Congress including a financial audit. This requirement became a standard feature in the second half of the 20th century. More significantly, whenever a Congressionally-chartered nonprofit would want to change the basic elements of the corporation, such as membership eligibility or name, such revisions would require the passage of an amendatory law through Congress, not necessarily an easy task. For example, in 1984, AMVETS needed legislative approval to extend the eligibility for membership[165] and Congress clarified the property tax exempt status of a building owned by the previously-chartered Jewish War Veterans.[166] On other occasions, in 1986 it added two new sections to the 1901 charter it had granted to the General Federation of Women's Clubs[167] and two years later it changed the size of the board of trustees of the Frederick Douglass Memorial and Historical Association.[168] Some examples from the 21st century include changes in the charters of Southeastern University of Washington, DC (2001),[169] AMVETs again (2002)[170] and Veterans of Foreign Wars (2002).[171] The risk of requesting such legislation, of course, is that it opens up the entire charter to amendment, such as by a legislator who thinks poorly of the organization or who wants to give meaning to federal charters in general. A reluctance to go to Congress to modify an organization's charter would presumably have a healthy impact on promoting actions and behaviors that would prevent the nonprofit from being seen by Congress in a bad light.

More substantively, in 1967 Congress passed a law requiring that Disabled American Veterans (DAV) submit an annual financial audit of its books to the General Accounting Office[172] (GAO, a legislative branch agency), that GAO was required to review the annual audit for any possible irregularities and that the costs to GAO's work be borne by DAV.[173] This law was prompted by some financial scandals during the 1960s at DAV, including tampering with bingo results in New York,[174] and being bilked by a fundraising consultant it had hired for about $2 million,[175] the operations of its thrift stores in Chicago[176] and the contributions from unsolicited mailings of mini-license tags to car owners.[177] Things got so bad for DAV, that a federal judge said at a sentencing hearing, "This is as phony a charity as I've ever seen…No one should give a penny to the D.A.V. until it straightens out its housekeeping."[178] The law requiring a GAO audit of DAV's annual financial report was intended to restore the credibility and integrity of this congressionally-chartered nonprofit. As it had been incorporated by Congress, the legislative branch perhaps felt a more direct sense of obligation to clear up any wrongdoing. In justifying passage of the law, the Senate Judiciary Committee said the bill would "greatly aid" the

organization, but carefully omitted the underlying reason prompting the DAV's request for the law.[179] The House Committee report and floor debates were even vaguer about the impetus for the bill.[180] Yet, clearly, the Congressional seal of approval carried a price when an agency was involved in misbehavior. In this case, the organization itself petitioned for such a law, knowing that despite the costs it was a necessary step for restoring public confidence.

Similarly, in late 2006, the Red Cross announced that it wanted to change its governance structure, but would need Congressional action to modify its statutory charter.[181] In this context, facing Congress (and the president in his role of signing or vetoing legislation) meant the supposed private corporation was compelled to obtain public-sector approval for any major changes it desired. These two examples, of DAV and the Red Cross, are two rare, but concrete, instances that demonstrate how nonprofit accountability would be operationalized if the US had a public nonprofit sector, instead of a private *Dartmouth* one.

2. Publicly-oriented nonprofit corporations: In some cases, Congress has enacted traditional legislation incorporating nonprofit organizations, but such organizations have been expected to be publicly-oriented in their work, even if legally they are deemed as private non-stock corporations sharing the same legal status as those in the previous category. Some examples include the National Academy of Sciences (1863),[182] the re-incorporation of the American National Red Cross (1900)[183] and the National Academy of Public Administration (1984).[184]

For the latter two organizations, Congress again explicitly reserved the right to amend or repeal the charter at any time. While infrequent, Congress has sometimes exercised the right to amend these incorporation acts. In 1997, Congress revised the charters of the National Academy and Sciences and the National Academy of Public Administration to impose certain restrictions that routinely apply to federal agencies to these two nonprofit corporations. The restrictions related to appointments, permissible activities and reporting.[185]

3. Public purpose corporations (I): Congress has chartered so-called private corporations that explicitly have public purposes and sometimes even routinely receive federal funds. They are deemed by Congress as independent of the government, but having a public purpose nonetheless. Conventional examples of such entities include the establishment by statute of the Corporation for Public Broadcasting (1967),[186] the Legal Services Corporation (1974),[187] the State Justice Institute (1984)[188] and the Corporation for National and Community Service (1993).[189] Such entities are real-life and de facto examples of a public nonprofit sector that would have predominated in the American political economy, instead of the existing private nonprofit sector, if the court had ruled the other way in the *Dartmouth* case.

For example, when Congress created the Corporation for Public Broadcasting (CPB) it stated with precision that the entity was a nonprofit corporation and that it was not an agency of the federal government, but that it had the purpose of receiving federal appropriations and expending them to promote "noncommercial" broadcasting and prevent governmental "interference with or control of program content or other activities."[190] This law was cited in 2006 in a report by

CPB's Inspector General which criticized the former Board Chair for seeking to promote an ideological orientation to programming that reflected the White House's viewpoint.[191] Similarly, the statutory charter of the Legal Services Corporation specifically categorized it as "a private nonmembership nonprofit corporation" even though it was assigned a thoroughly public purpose as its raison d'être, that of providing certain legal services to indigent US citizens.[192]

Going farther back, the creation of the Smithsonian Institution by statute in 1846 was also an example of Congressional chartering of a public, but independent, corporation. The law carefully avoided stating the precise nature of the entity, referring to it simply as "an 'establishment'."[193] However, in the enactment, the Smithsonian was given the right of "perpetual succession"[194] and Congress reserved for itself the right to alter the Smithsonian law.[195] Both of those were routine features of federal legislative charters that incorporated nonprofit corporations. The final signal that the Smithsonian was a corporation was the last section of the 1846 statute. Reflecting the post-*Dartmouth* legal situation, it stated that even though Congress reserved for itself the right to change the Smithsonian law, it simultaneously recognized that Congress could not order that a contract signed by the Smithsonian could be "divested or impaired."[196]

4. Public purpose corporations (II): Besides the previous category, Congress has occasionally chartered "wholly owned government corporations." Legally, these are corporations, but their equity is owned exclusively by the federal government and they are created to accomplish a public purpose, but through entities that are not traditional instrumentalities of the government, such as cabinet departments, agencies and regulatory commissions. For example, the Pension Benefit Guarantee Corporation is wholly owned by the government.[197] In these cases, the corporate structure helps achieve public goals when those missions are sometimes financed by user fees rather than government appropriations. Other examples of wholly owned government corporations include the Overseas Private Investment Corporation and the Export-Import Bank.[198]

5. Public purpose corporations (III): Congress has also chartered corporations that are defined as government corporations but it either has a mixed ownership or there is the legal possibility of such nonexclusive ownership by the federal government. This distinguishes them from corporations in the previous category that must be wholly owned by the federal government. Some examples of mixed ownership federal corporations include the Federal Deposit Insurance Corporation[199] and the National Railroad Passenger Corporation, also known as AMTRAK.[200] Like wholly owned government corporations, these federal corporations generally are expected to be financed by user fees such as insurance premiums, program revenue and customer payments.

Significantly, the US Supreme Court ruled in 1995 that while Congress explicitly deemed AMTRAK as a private corporation (notwithstanding who owned it), the agency was fundamentally a federal agency created for a public purpose.[201] This helps clarify the existence of such corporations in the public sector rather than in the private sector, reflecting their public purpose. Even though they may reflect the structure of a for-profit private sector stock

corporation, they are not created to make a profit. Rather, they are created to accomplish a public purpose and, hopefully, to cover their own expenses rather than requiring permanent Congressional bailouts. Hence, these are nonprofit government corporations, belonging within the public nonprofit sector rather than the private nonprofit sector.[202]

Conclusions

The preceding sections depicted what the American nonprofit sector would have looked like had the US Supreme Court upheld the ruling of the New Hampshire court in the *Dartmouth* case. The discussion focused on the already existing public nonprofit sector that currently exists, but in the shadow of the immense private nonprofit sector. In this alternate history, nonprofits – except religiously oriented ones – would have required some form of governmental approval. Is this such a bad thing? One can argue that a more rigorous public oversight of nonprofits than currently exists could, of course, stifle political dissent or advocacy of unpopular ideas. Yet, that would be counterbalanced by a nonprofit sector that would, daily, need to demonstrate that it was working in the public interest, rather than advancing narrow, selfish and self-serving causes. Having a public nonprofit sector would return the mission of nonprofits to the original 17th century British meaning of eleemosynary institutions, since the term eleemosynary is derived from the word alms. An American public nonprofit sector would be, at heart, charity oriented rather than the omnibus and largely intellectually empty one of the post-*Dartmouth* US nonprofit sector. For example, one of the reasons that so few nonprofits are ever stripped of their status, their property tax exemption or their IRS standing is because the meaning of the term nonprofit has been emptied of much meaningful substantive content or purpose. As long as the entity is a nonstock corporation (and does not engage in overt political activities), it can justifiably claim that its raison d'être is nonprofit.

The peculiarities of the private sector status of America's nonprofits have been highlighted by two high profile national controversies during the first decade of the 21st century. First, in 2000, the US Supreme Court was asked to rule if the Boy Scouts could ban the participation of homosexuals as scout masters. The Court declared in *Boy Scouts of America and Monmouth Council v. James Dale* that such discrimination did not violate the law. One of the elements that led to the upholding of the policy was the "private not-for-profit" status of the organization. Even though some of the dissents filed in the case referred to the Scouts as a corporation that had been chartered by the federal government, they did not even argue that a Congressional charter inherently affected the private status of the organization.[203]

Then, in 2006, the Red Cross's relief services after Hurricane Katrina were called into question. Here was the anomaly of an organization that was described as "The nation's largest charity"[204] – not in any way a government agency – yet its honorary chair was the President of the United States. The organization promised publicly that it would voluntarily engage in organizational reforms, but emphasized the focus of the revamping would be based on "'best practices' in non-profit and corporate governance."[205] In a June 2006 report, it referred to improving its "business accountability practices."[206] If it ever came to it, the Red Cross could always reject federal 'interference' in its legal status as a private corporation. A few months later, the Red Cross

recommended passage of legislation to eliminating presidential appointees on its board of directors and repealing the president's power to designate the principal officer of the corporation.[207]

The de jure assertions about the privateness of the Red Cross are belied by heretofore confidential documents of the Nixon White House. They show intense White House involvement, including by his two most senior assistants, H. R. Haldeman and John Ehrlichman, in the composition of Board of Directors. They were especially interested in, and actively participated in, the behind-the-scenes maneuvering by various directors to be designated by Nixon as the Board's principal officer (as specified in the law).[208] Haldeman also had the final say on selecting the members of the Board for the slots reserved for federal officials (comprising a minority of the entire Board).[209] All this for an ostensibly <u>private</u> organization.

Other, lesser, events in the first decade of the 21st century could be seen as contributing to a perception that American nonprofit agencies were so independent that they were sometimes operating in ways that were self-dealing, self-serving and not in the public interest. The seeming absence of significant public purpose to some specific activities of several high profile nonprofits, an inevitable outgrowth of *Dartmouth*, triggered a series of minor investigations and criticisms by Senator Charles E. Grassley (R-IA), chair of the Senate's Finance Committee. He criticized the payments to the former president of American University in Washington, DC,[210] the salary and housing allowance for the head of the Getty Museum in Los Angeles[211] and the seeming minor degree of free health care that nonprofit hospitals provided in return for tax exemptions.[212] Yet, as much as Grassley could try to tinker around the edges of the US tax code dealing with nonprofits, *Dartmouth* would be an insurmountable barrier to any major qualitative reforms.

Recent events in one specific state, Wisconsin for purposes of discussion, also displayed the oddities caused by the *Dartmouth* decision to assign nonprofit organizations to the private sector. In 2002, the housing and economic development authority of the state government, which routinely issued moral obligation bonds to fund projects, created a nonprofit arm and shifted to it $94 million in assets, including $24 million in cash.[213] This legally shielded the control of the assets and funds to a new private nonprofit corporation[214] that was beyond the policy reach of a just-elected governor of the other party. While the political context made for a swell controversy (eventually a legal settlement was reached),[215] the underlying principle of being able to convert a significant sum of public sector funds to a seemingly private status seemed to be largely taken for granted.

Four years later, the state's public university, the University of Wisconsin, announced that its Madison flagship campus had received the largest individual contribution ever, $50 million. The money would be spent to establish a "private institute" to promote research operating along side a conventional institute of this governmental university. Why a private arm of a public agency? That private status would "enable the institute to respond more quickly to capitalize on scientific opportunities as they arise."[216] At a later meeting of a governmental body to approve the construction of the building, a project leader said, "It is hoped that most research in the twin institutes will be highly collaborative," thus further indicating how interlocking the public and

private entities would be in their operations.[217] So, here was a public sector agency shifting a contribution to the private sector to make it beyond the reach of the 'rules of the game' that control government decision-making. It had a flavor of a now-you-see-it, now-you-don't shell game, all aimed at creating an artificial legal construct that placed the funds in the private sector, yet within a government entity.

These high profile controversies all were related to the legal status of nonprofits as within the private sector. They also indirectly juxtaposed the public's lay sense of what nonprofits should be with the post-*Dartmouth* limitations on public oversight of nonprofit operations. Notwithstanding the significance or even scandalous status of some of these incidents, government (on behalf of the public interest) could not intervene in nonprofit agencies any more than it could with for-profit corporations. In American culture, the right of the private sector to be free of government meddling is not only a strong principle, but is also – for nonprofits – fully buttressed by the *Dartmouth* decision.

The common parlance in the US for the third or independent sector is to refer to it as the nonprofit sector. On the other hand, in most other countries, the term is nongovernmental organization (NGO). Based on this analysis of the *Dartmouth* decision, the different usage appears to be much more than mere chance. This nomenclature conveys a significant message. In the *Dartmouth* case, the US Supreme Court ruled that a chartered entity such as a college was more like a business than it was an extension of government. Institutions of higher education (and all other such associations) were corporations in the same sense that businesses were corporations. Even though both were initially chartered by a governmental body, they become independent from government right after that. Both were private corporations, with the only key difference between them being that business corporations were organized to make a profit while eleemosynary corporations were not profit oriented. So, gradually emerged the contemporary term for such an organization, it was a corporation, just merely a nonprofit one. Another common contemporary term is private nonprofit organization, which further expresses the close link between businesses and the third sector.

Had the New Hampshire court's decision been upheld instead, the impact of the *Dartmouth* decision would have been to reaffirm the status quo that charitable and educational corporations were more like municipal corporations than business ones. In other words, these entities would be defined by their relationship to the public sector rather than to the private sector. Hence, they would have been called nongovernmental organizations, i.e. in the public sphere although not 'pure' government.

This is more than quibbling about terminology. It is about the ultimate and core orientation of the third sector. Does it have a public purpose or a private purpose? *Dartmouth* settled it. America's nonprofit sector was to be in the private realm. While the direction that history took has had some benefits, this alternate history has also identified some of its major costs. By clearly shifting the nonprofit sector into the private realm, the inherent dynamic of the relationship between nonprofits and government became that nonprofits could use their private status as a shield to block constructive criticism or efforts to pull them back to more explicit and tangible public-benefiting purposes. 'You can't touch me' is the unstated message, 'because we are

private and we insist on our privacy. And, thanks to *Dartmouth*, you can't do anything about it.' Don't tread on me is an unfortunate and perhaps even crippling maxim for America's nonprofit sector. It didn't have to be that way.

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Also, my thanks to Professor David Hammack who, at the beginning of this inquiry, suggested I start with *The Papers of Daniel Webster*. That recommendation saved me scores of hours of searching for primary sources relating to the *Dartmouth* case.

Endnotes

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[2] David Hackett Fischer, *Paul Revere's Ride* (New York: Oxford University Press, 1994), p. 19.
[3] Ibid., p. 27 and Appendix D.
[4] Marion R. Fremont-Smith, *Governing Nonprofit Organizations: Federal and State Law and Regulation* (Cambridge, MA: Belknap Press of Harvard University Press, 2004), p. 153.
[5] Ibid., p. 154.
[6] On a separate track, the court's decision was also the kernel for the emergence of the US business sector. For example, Roger Kennedy likened the decision to the boundary separating two of the three key epochs in American business history: pre-*Dartmouth*, *Dartmouth* to the New Deal, and post-New Deal (Roger G. Kennedy, *Mr. Jefferson's Lost Cause: Land, Farmers, Slavery and the Louisiana Purchase* [New York: Oxford University Press, 2003], p. 63-64).
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[21] Like everything else, historical writing goes through fads. At present, it is more fashionable to write history from the perspective of rank-and-file citizens and to focus on societal conditions. This historical approach is sometimes called 'history from below.'
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[67] 1 NH 115.
[68] 1 NH 117.
[69] The sharp expansion of the scope municipal corporations to include special purpose districts began about 1911 and was briefly of strong interest to political science, prompting creation of a repeating feature in the *American Political Science Review*. See, for example, Charles Kettleborough, "Special Municipal Corporations," *APSR* 8:4

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[71] For the text of the oral arguments before the US Supreme Court, see Philip B. Kurland and Gerhard Casper (eds.), *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* (Washington, DC: University Publications of America, 1978), Vol. 1, pp. 600-24.
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[92] 78 Stat. 516, emphasis added.

[93] 81 Stat. 691. While the definition was repealed in 1981, it continues to be valid by indirect reference in subsequent laws. See, for example, the section on references in the Community Opportunities, Accountability, and Training and Educational Services Act of 1998 (Section 683, 112 Stat. 2755).
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[118] 81 Stat. 656. That the National Park Foundation was chartered and incorporated by act of Congress is another indication that is not a 'real' nonprofit in the common sense meaning of the term.
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[126] Steven Cohen and William Eimicke, "Is Public Entrepreneurship Ethical? A Second Look at Theory and Practice," *Public Integrity* 1:1 (Winter 1999) 54-74.
[127] Ronald C. Moe, "Governance Principles: The Neglected Basis of Federal Management," in Thomas H. Stanton and Benjamin Ginsberg (eds.), *Making Government Manageable: Executive Organization and Management in the Twenty-First Century* (Baltimore: Johns Hopkins University Press, 2004), p. 32.
[128] *The United States Government Manual, 2005/2006* (Washington, DC: Office of the Federal Register, National Archives and Records Administration, 2005), pp. viii-ix.
[129] Harold Seidman, "United States experience: the need to reassert the Government Corporation Control Act 1945," *Public Administration and Development* 18:3 (August 1998), p. 298.
[130] Anthony M. Bertelli, "Governing the Quango: An Auditing and Cheating Model of Quasi-Governmental Authorities," *Journal of Public Administration Research and Theory* 16:2 (April 2006), p. 240.
[131] Ronald C. Moe, "The Emerging Federal Quasi Government: Issues of Management and Accountability," *Public Administration Review* 61:3 (May/June 2001), p. 291, italics in original.
[132] Besides the already cited literature, see especially Harold Seidman, "The Theory of the Autonomous Government Corporation: A Critical Appraisal," *Public Administration Review* 12:2 (Spring 1952) 89-96. This article contains a comprehensive literature review demonstrating that this topic was subject to a lively debate within public administration at the time.
[133] For a list of congressionally chartered 'private' nonprofit corporations, see Title 36 of the US Code, entitled "Patriotic Societies and Observances."
[134] 12 Stat. 796.
[135] 25 Stat. 640.
[136] 39 Stat. 227.
[137] 61 Stat. 403.
[138] 72 Stat. 1691.
[139] 98 Stat. 237.
[140] 72 Stat. 375.
[141] 72 Stat. 1741.
[142] 31 Stat. 1280-1316.
[143] Congress revised and codified the laws affecting the incorporation of nonprofits in Washington, DC in 1962 when it adopted the District of Columbia Nonprofit Corporation Act (76 Stat. 265). Probably still being careful about the *Dartmouth* ruling regarding irrevocable incorporations, Congress explicitly retained the right to revise that law, too (76 Stat. 306).
[144] David Crary, Associated Press, "Red Cross moves to clean up its act," *St. Louis [MO] Post-Dispatch*, April 9, 2006, p. A4.
[145] John M. Barry, *The Great Influenza: The Epic Story of the Deadliest Plague in History* (New York: Viking, 2004), p. 128, emphasis added.
[146] Huberta A. Prince (ed.), *The Washington Book Mart* (New York: Oceana, 1949), p. 7.

[147] Moe, "The Emerging Federal Quasi Government," pp. 303-04.
[148] Lyndon B. Johnson, *Public Papers of the Presidents of the United States: Lyndon B. Johnson: 1965*, Book II (Washington, DC: Government Printing Office, 1966), p. 990.
[149] In his veto message, President Johnson stated, "I am asking the Department of Justice and the Bureau of the Budget to explore these questions also and to make appropriate recommendations to me" (ibid., p. 991). However, there is no record in his presidential papers that the two agencies did that (email from Allen Fisher, Archivist, Johnson Presidential Library, April 19, 2006, author's files).
[150] 98 Stat. 1239.
[151] 98 Stat. 1343.
[152] 98 Stat. 2428.
[153] 98 Stat. 2910.
[154] 98 Stat. 2920.
[155] 98 Stat. 3097.
[156] 99 Stat. 1020.
[157] 102 Stat. 3849.
[158] 110 Stat. 2760.
[159] 111 Stat. 1963.
[160] 112 Stat. 1530.
[161] Letter from Congressman F. James Sensenbrenner, Jr., Chair, House Judiciary Committee, to the author, June 22, 2006, author's files. Sensenbrenner lost his chairmanship when the Democrats became the majority party in the 110th Congress (2007-08).
[162] Cary Spivak and Dan Bice, "Sensenbrenner stymies veterans of Korea," *Milwaukee [WI] Journal Sentinel*, May 28, 2006, p. 2A.
[163] For a comprehensive discussion and listing, see Ronald C. Moe and Kevin R. Kosar, *Congressionally Chartered Nonprofit Organizations ("Title 36 Corporations"): What They Are and How Congress Treats Them* (Updated January 13, 2006), Report of the Congressional Research Service of the Library of Congress.
[164] Moe, "Governance Principles," p. 33.
[165] 98 Stat. 220.
[166] 98 Stat. 2263.
[167] 100 Stat. 804.
[168] 102 Stat. 3337.
[169] 115 Stat. 899.
[170] 116 Stat. 1496.
[171] 116 Stat. 1497.
[172] Renamed Government Accountability Office in 2004.
[173] 81 Stat. 655.
[174] Emanuel Perlmutter, "D.A.V. Suspends Posts in Bingo Case," *New York Times*, April 28, 1961, pp. 1, 19.
[175] United Press International, "Fund Raiser Accused of Bilking Disabled Veterans of $2 Million," *New York Times*, August 11, 1964, p. 17; and Associated Press, "4 Indicted on Fraud on Gifts to D.A.V.," *New York Times*, December 23, 1964, p. 18.
[176] Louis Dombrowski, "Disabled Vets Heads Ask State Inquiry: Tell of Suspicious Operations of Stores," *Chicago Tribune*, June 10, 1965, p. C11.
[177] "State Charges D.A.V. Fraud on Auto Tags: Seeks Injunction on Operations," *Chicago Tribune*, March 18, 1967, p. B7.
[178] "Two Get Probation in D.A.V. Swindle," *Chicago Tribune*, December 17, 1967, p. E11.
[179] US Congress, Senate, Committee on the Judiciary, "Audit of Disabled American Veterans Accounts," 90th Congress, 1st session, 1967, Senate Report 889, p. 2.
[180] US Congress, House, Committee on Veterans' Affairs, "Audit of Disabled American Veterans Accounts," 89th Congress, 2nd session, 1966, House Report 2009; Ibid., 90th Congress, 1st session, 1967, House Report 6; *Congressional Record* 113:3 (February 20, 1967), p. 3820. GAO opposed the legislation, arguing that it should not be required to audit, even if reimbursed, a "private organization operated with private funds" (letter from Acting Comptroller General R. F. Keller to Committee Chairman Olin E. Teague, September 6, 1966, reprinted on p. 3 of both House reports referenced earlier in this endnote).

[181] American Red Cross, *American Red Cross Governance for the 21st Century: A report of the Board of Governors*, November 1, 2006. Retrieved February 19, 2007: http://www.redcross.org/static/file_cont5765_lang0_2176.pdf.
[182] 12 Stat. 806.
[183] 31 Stat. 277. Before 1900, the Red Cross existed as a 'regular' nonprofit association that was incorporated under the laws of the District of Columbia. It was first incorporated in 1881 and then re-incorporated in 1893.
[184] 98 Stat. 127.
[185] Moe, "Emerging Federal Quasi Government," p. 303.
[186] 81 Stat. 369.
[187] 42 USC 2996.
[188] 98 Stat. 3336.
[189] *US Government Manual 2005/2006*, pp. 373-76.
[190] 81 Stat. 370.
[191] Office of the Inspector General, Corporation for Public Broadcasting, *Review of Alleged Actions Violating The Public Broadcasting Act of 1967, as Amended*, Report No. EPB503-602. Retrieved February 20, 2007: http://www.cpb.org/oig/reports/602_cpb_ig_reportofreview.pdf.
[192] 42 USCA 2996b(a).
[193] 9 Stat. 102. It is possible that the word establishment was put in quotation marks in the statute to reflect that it was a quote from James Smithson's will regarding the bequest to the United States. Regardless, the term was not commonly used in the statutes and in the federal government up to then, so clearly an entity that was out of the ordinary was being created.
[194] Ibid.
[195] 9 Stat. 106.
[196] Ibid.
[197] *US Government Manual 2005/2006*, p. 504.
[198] 31 USC 9101(3)(C) and (H).
[199] 31 USC 9101(2)(B).
[200] *US Government Manual 2005/2006*, p. 475.
[201] Seidman, "United States experience," p. 298; and David H. Rosenbloom and Suzanne J. Piotrowski, "Outsourcing the Constitution and Administrative Law Norms," *American Review of Public Administration* 35:2 (June 2005), p. 112.
[202] For a comprehensive and up-to-date summary, see Ronald C. Moe and Kevin R. Kosar, *The Quasi Government: Hybrid Organizations with Both Government and Private Sector Characteristics* (Updated May 18, 2005), Report of the Congressional Research Service of the Library of Congress.
[203] 2000 US LEXIS 4487.
[204] Hope Yen, Associated Press, "Red Cross to share money in wake of Katrina criticism," *Chicago Sun-Times*, April 4, 2006, p. 20.
[205] American Red Cross, "American Red Cross Board of Governors Announces Independent Governance Advisory Panel" (press release), April 4, 2006, p. 1, emphasis added. Retrieved February 20, 2007: http://www.redcross.org/pressrelease/0,1077,0_314_5254,00.html.
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[207] American Red Cross, *American Red Cross Governance for the 21st Century: A report of the Board of Governors*, November 1, 2006. Retrieved February 19, 2007: http://www.redcross.org/static/file_cont5765_lang0_2176.pdf.
[208] National Archives II (College Park MD), Nixon Presidential Materials Project, White House Special Files, Staff Member and Office Files: Memo from John Ehrlichman to H. R. Haldeman, 23 January 1973 (2 January 1973 – 31 January 1973 [4 of 5] Folder, Box 63, Chronological File 1969-1973, John D. Ehrlichman Papers); Memo from Larry Higby to H. R. Haldeman, Subject: Red Cross Situation, 10 February 1973 and Memo from T. O'Donnell to Lewis Dale, 15 February 1973 (both in Reorganization Departments and Agencies Part I Folder, Box 173, Alpha Subject Files, H. R. Haldeman Papers).
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