

2016

# Nonprofit Oversight under Siege: Introduction

Dana Brakman Reiser

*Brooklyn Law School*, [dana.brakman@brooklaw.edu](mailto:dana.brakman@brooklaw.edu)

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>



Part of the [Nonprofit Organizations Law Commons](#)

---

## Recommended Citation

91 Chi.-Kent L. Rev. 843 (2016)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

# NONPROFIT OVERSIGHT UNDER SIEGE

## INTRODUCTION

DANA BRAKMAN REISER\*

Across the globe today, nonprofit regulators are under siege. In a variety of ways and for myriad reasons, those entrusted with oversight of charity and civil society are increasingly scrutinized, criticized, marginalized and attacked. The articles that follow this introduction tell compelling stories of the increasingly grave challenges nonprofit regulators face around the world. Taken together, they offer both lessons and warnings for those who study and advocate for the nonprofit sector, which cannot thrive without legitimate and effective oversight.

Notably, the roots of this symposium issue lie in another Chicago-Kent Law Review symposium on nonprofit law, held in 2004 and published the following year.<sup>1</sup> That earlier symposium, entitled *Who Guards the Guardians?: Monitoring and Enforcement of Charity Governance*, focused its attention on the accountability of charity fiduciaries. It was held at what in hindsight looks like a high point in government interest in and critique of nonprofit governance in general and the performance of charity fiduciaries in particular. Bringing together scholars from around the globe in the shadow of recently released Senate Finance Committee staff proposals, the conversation focused on the meaning of accountability for nonprofit leaders, and how various legal systems pursued it.

The symposium from which the articles here are drawn was held at Chicago-Kent College of Law on November 19, 2015, and again brought together leading domestic and international scholars of nonprofit law. The dialogue in 2015 again included discussion and comparison of the experiences in many diverse countries, but the focus had shifted dramatically. A decade ago, nonprofit fiduciaries and other leaders were experiencing the harshest criticisms; today it is nonprofit

\* Professor of Law, Brooklyn Law School.

1. See Symposium, *Who Guards the Guardians?: Monitoring and Enforcement of Charity Governance*, 80 CHI.-KENT L. REV. 543 (2005).

regulators who appear in the cross-hairs. Further, the attacks have become more pointed. Rather than looking for solutions to ensure organizational guardians will be accountable, today's critiques question the legitimacy of regulators themselves and challenge the very idea of nonprofit regulation.

Our speakers' presentations elicited many thoughtful questions and comments, both from their fellow panelists and the lively audience the symposium attracted. Attendees included additional scholars, many of whom were attending the simultaneous annual meeting in Chicago of the Association for Research on Nonprofit Organizations and Voluntary Action. We also benefitted from the insights of nonprofit regulators, attorneys practicing in the area, and leaders of local nonprofit organizations. The articles included in this issue profited greatly from this discussion, and will allow regulators, advocates and scholars to see the broader trends into which these often disheartening national stories fit.

The symposium articles fall broadly into two groups. The initial three articles address the domestic context, reporting and analyzing challenges to nonprofit regulators in the U.S. The remaining five articles—including one to be published in a future volume, but described here—look abroad. They share the experiences of nonprofit regulators under scrutiny in a wide range of countries. The first two Parts of this introduction summarize these contributions. The final Part draws out the common threads and guidance to be found among these diverse stories, followed by a brief conclusion.

## I. CHALLENGES TO NONPROFIT REGULATION IN THE U.S.

The scandal that emerged in 2013 out of IRS review of applications for tax exemption is the starting point for our U.S.-focused articles. Evelyn Brody and Marcus Owens explain the developments leading up to it and the IRS' dramatic actions since, warning that the response may be laying the groundwork for new troubles down the road.<sup>2</sup> Recognizing how the scandal hobbled the potential for IRS regulation in the area and the FEC's political stalemate, Linda Sugin considers whether and how state attorneys general might step in to regulate nonprofits' political activities.<sup>3</sup> Finally, Lloyd Mayer's contribution

2. See Evelyn Brody & Marcus Owens, *Exile to Main Street: The I.R.S.'s Diminished Role in Overseeing Tax-Exempt Organizations*, 91 CHI.-KENT L. REV. 859 (2016).

3. See Linda Sugin, *Politics, Disclosure, and State Law Solutions for 501(c)(4) Organizations*, 91 CHI.-KENT L. REV. 895 (2016).S

takes a step back from this particular turn of events to evaluate the fragmented American system of nonprofit regulation more generally.<sup>4</sup>

Before recounting the “sorry saga of the recent unpleasantness”<sup>5</sup> at the IRS, Brody and Owens begin by unpacking the arcane and complex framework regulating the advocacy and political activity of tax-exempt nonprofits.<sup>6</sup> Nonprofits that are tax-exempt under Internal Revenue Code § 501(c)(3) are barred from all participation in political campaigns and may engage only in insubstantial lobbying efforts.<sup>7</sup> Social welfare organizations exempt under Code § 501(c)(4), by contrast, may engage in unlimited lobbying activity and may participate in political campaigns so long as such efforts are not their primary activity.<sup>8</sup> For organizations that will primarily engage in political campaigns, exemption is available under Code § 527 as a political action committee.<sup>9</sup> Neither contributions to social welfare organizations nor those to political action committees will generate tax deductions for donors, however, in distinction to the tax treatment of gifts to § 501(c)(3) charities. Crucially, § 527 organizations must disclose their donors publicly, while donors to 501(c)(4) groups may remain anonymous.<sup>10</sup> When *Citizens United v. FEC* cleared a path for corporations, including nonprofit corporations, to make unlimited independent expenditures, applications for 501(c)(4) status increased dramatically.<sup>11</sup>

The IRS made a critical mistake in dealing with this upsurge in applications by screening applications for more fulsome review by searching for those organizations with political terms in their names.<sup>12</sup> When news of this practice entered the tense and partisan political climate, strong reactions followed: a Department of Justice investigation, congressional hearings, a media blitz and endless grandstanding.<sup>13</sup> The Treasury Department did issue proposed new regulations to clarify 501(c)(4) status in late 2013.<sup>14</sup> But these were met with such overwhelming dissatisfaction that the government withdrew them,

4. See Lloyd Hitoshi Mayer, *Fragmented Oversight of Nonprofits in the United States: Does it Work? Can it Work?*, 91 CHI.-KENT L. REV. 937 (2016).

5. Brody & Owens, *supra* note 2, at 860.

6. See *id.* at 861–62.

7. See *id.* at 862.

8. See *id.* at 863.

9. See *id.* at 863–64.

10. See *id.* at 864.

11. See *id.* at 865.

12. See *id.* at 865–66.

13. See *id.* at 866–68.

14. See *id.* at 868–69.

and the latest budget deal prohibits any spending on revising them through September 2016.<sup>15</sup>

In the meantime, the IRS was purged of its top management, including the entire experienced leadership in the exempt organizations area.<sup>16</sup> After reassigning the technical legal staff to the Office of Chief Counsel, the agency relocated the new leadership of the exempt organizations unit from Washington D.C. to Cincinnati, and put in place a highly streamlined process for applications for 501(c)(3) status for small organizations.<sup>17</sup> The intense scrutiny and criticism the IRS experienced in response to the scandal also caused it to struggle to maintain adequate funding from Congress.<sup>18</sup> Brody and Owens recognize that today's determination process is faster than in years past. They warn, however, that the response of curtailing the IRS role in nonprofit regulation creates new opportunities to game the system and skirt the limitations on exempt activities.<sup>19</sup> They advocate incremental reforms to mitigate these harms, including a more robust evaluation of new small organizations' applications for exempt status.<sup>20</sup>

Linda Sugin's article picks up the story here. The aftermath of the IRS scandal and the perpetual deadlock of the Federal Election Commission leave her with little hope for federal regulation of electoral dark money funneled through nonprofit organizations.<sup>21</sup> Her article queries whether the states might play a useful gap-filling role.

Sugin begins with the forays by two states into this area: California and New York. California's regulations, promulgated in 2014, require 501(c)(4) organizations spending money on state elections and ballot measures to report their donors to regulators, and to disclose their top donors publicly.<sup>22</sup> The regulation also takes pains to pierce through the layers of organizations sometimes employed to obscure donor identities.<sup>23</sup> New York acted twice on these issues. In 2013, new regulations applying to non-charitable nonprofit organizations required reporting of expenditures on state election activity as well as

15. *See id.* at 869.

16. *See id.* at 867–68.

17. *See id.* at 874–78.

18. *See id.* at 872, 881–82.

19. *See id.* at 883–89.

20. *See id.* at 889–91.

21. *See Sugin, supra* note 3, at 896–903.

22. *See id.* at 904–05.

23. *See id.* at 905–06.

disclosure of donor names, which would be posted publicly.<sup>24</sup> These regulations were withdrawn in June 2014, when the state amended its election legislation.<sup>25</sup> The new election law focuses broadly on reporting of election expenditures by a range of organizations, not merely nonprofits.<sup>26</sup> Notably, it requires only that these expenditures and contributor names be reported to state officials; the public disclosure element was lost.<sup>27</sup>

Sugin then identifies the relevant policy goals in combatting dark money, and considers how they map onto the regulatory prerogatives of the states. The many and varied policy goals include equalizing political power; to “creat[ing] frictions”<sup>28</sup> that make it difficult for out-of-state groups to influence state elections; fighting voter and donor fraud; and protecting the reputation of the charitable sector.<sup>29</sup> She argues that to craft apt solutions, states will need to tailor their regulatory interventions to their desired set of goals, and warns they must act carefully to avoid constitutional violations.<sup>30</sup>

These early case studies illuminate what state involvement has to offer the regulation of dark money in the U.S. While not a replacement for nationwide efforts to reduce the role of unaccountable funds in elections, they may help protect charities from disparagement, and donors from being led astray.<sup>31</sup> In addition, states may operate as laboratories to generate experience with a variety of approaches from which national regulation may take useful lessons if the gridlock in Washington ever clears.<sup>32</sup>

Lloyd Mayer reminds us that the combination of state and federal jurisdiction is not unique to regulation of nonprofits’ political activities. Shared power pervades nonprofit law. In the U.S., state law governs the formation of nonprofit organizations, and states are responsible for enforcing the obligations of their fiduciaries, ensuring preservation and appropriate use of charitable assets, and regulating charitable solicitation activity; states also have the power to grant and condition

24. *See id.* at 907–08.

25. *See id.* at 909.

26. *See id.* at 909–10.

27. *See id.* at 910.

28. *Id.* at 912.

29. *See id.* at 911–17.

30. *See id.* at 918–28.

31. *See id.* at 928–35.

32. *See id.* at 931–32.

state tax benefits.<sup>33</sup> Federal tax authorities bestow and police federal tax benefits, including exemption and eligibility to receive deductible contributions.<sup>34</sup> And over the years, Congress and federal tax regulators have made increasing incursions into regulating nonprofit governance, especially self-dealing by organizational leaders.<sup>35</sup>

This fragmentation across state and federal authorities also occurs in many other regulatory contexts, and recent literature suggests that such multiple regimes offer both advantages and disadvantages.<sup>36</sup> Fragmentation creates the risk of duplicative regulation, increased compliance burdens, races to the bottom and obscuring accountability.<sup>37</sup> But, as Sugin's piece argues as well, fragmentation also allows for beneficial experimentation.<sup>38</sup> At the same time, fragmentation can reduce the risk of under-regulation, allow different regulators to develop complementary expertises, and decrease the likelihood of agency capture, among other benefits.<sup>39</sup> Mayer carefully assesses how these benefits and drawbacks balance out in the nonprofit context.<sup>40</sup>

He concludes that the consequences of fragmented regulation in the nonprofit space have been primarily on the positive side, particularly as a means to counteract the resource constraints that hamper all nonprofit regulators.<sup>41</sup> Improvements remain possible, though. Mayer echoes the oft-heard call for improved coordination of state and federal information-gathering.<sup>42</sup> He also advocates a provocative proposal for consolidating financing for nonprofit regulation across all levels of government.<sup>43</sup>

## II. NONPROFIT OVERSIGHT UNDER SIEGE ABROAD

The next group of papers turns our attention to developments abroad. Each of these five articles tells the story of a different regulator or group of regulators operating in a different political environment. Our contributors explore developments in Europe, Asia, Australia and

33. See Mayer, *supra* note 4, at 939-41.

34. See *id.* at 941.

35. See *id.* at 941-42.

36. See *id.* at 944-46.

37. See *id.* at 947-48.

38. See *id.* at 946-47.

39. See *id.*

40. See *id.* at 948-59.

41. See *id.* at 959.

42. See *id.* at 960-62.

43. See *id.* at 962-63.

Canada. Yet, a number of strikingly similar themes run between them, and also relate back to the U.S.-focused articles.

We begin in England and Wales, with Debra Morris' article on the Charity Commission for England and Wales.<sup>44</sup> Long an example to the world of well-resourced, careful, and effective regulation, the Charity Commission has recently come under intense scrutiny and pressure, financial as well as substantive. The focus on the Commission began as part of required reviews of its performance under the Charities Act of 2006, a major piece of charitable legislation.<sup>45</sup> It intensified soon after, due to a series of perceived Commission missteps. Critics challenged the Commission's effectiveness on grounds that it did too little to combat the major tax evasion scheme perpetrated through the charitable Cup Trust and the abuse of charities by terrorist organizations.<sup>46</sup> The Commission's independence and legitimacy was also undermined by claims it challenged actions by charities with political leanings opposed to policies of the conservative government.<sup>47</sup> This long and widely admired nonprofit regulator found itself in unfamiliar territory.

Morris reports a curious mix of responses to the critiques levied at the Commission. On the one hand, the Commission experienced a devastating loss of funding reminiscent of the IRS' post-scandal experience; its budget, along with other government functions, has been slashed by nearly half in less than a decade.<sup>48</sup> On the other hand, Parliament has passed new legislation that grants the Commission increased powers and new remedies; it only awaits Royal assent.<sup>49</sup> While the Commission no doubt welcomes greater enhanced enforcement authority, Morris makes clear it will be difficult for it to make progress without greater resources.<sup>50</sup>

One controversial way to bridge this funding gap is self-funding by the nonprofit sector. The Commission has said it will need to explore imposing fees on regulated charities, and a survey suggested the general public supports such a move.<sup>51</sup> Charities themselves, however, are understandably anxious about how such a step will impact both their

44. See Debra Morris, *The Charity Commission for England and Wales: A Fine Example or Another Fine Mess?*, 91 CHI.-KENT L. REV. 965 (2016).

45. See *id.* at 966.

46. See *id.* at 968-71.

47. See *id.* at 971-77.

48. See *id.* at 966.

49. See *id.* at 979-80.

50. See *id.* at 982-83.

51. See *id.* at 982-84.



own financial bottom lines and the independence of the Commission.<sup>52</sup> Although she believes it will be some time before the funding question is resolved, Morris sees signs of progress. She ends her article on the hopeful note that the Commission is “proving its resilience and soldiering on.”<sup>53</sup>

Oonagh Breen turns our attention to attempts at regional nonprofit regulation by the European Union.<sup>54</sup> She offers two very different stories. The first details the struggle, and ultimate failure, to adopt European-level foundation legislation. The second describes the complex relationship between the EU, the nonprofit community, and international efforts to prevent the use of nonprofit organizations in financing terrorism. Neither is an unqualified success story, but both experiences teach valuable lessons in regulatory strategy and design.

The effort to develop a European foundation statute began in response to concerns that the lack of uniformity in foundation law introduced unnecessary financial burdens on European nonprofits and frustrated cross-border philanthropy.<sup>55</sup> The lack of a treaty basis for the EU to regulate nonprofit organizations directly, however, meant that any such regulation would have to achieve unanimous consent from all 28 member nations.<sup>56</sup> A raft of controversies quickly emerged.<sup>57</sup> The challenge of finding a single statute that would appeal to and function within the wide variety of legal systems and charitable cultures in each member state ultimately proved too much.<sup>58</sup> The European Foundation Statute was dropped from the legislative agenda, and the problems it was meant to fix remain unremedied.<sup>59</sup>

Breen’s second case study, of the European Union’s engagement with the Financial Action Task Force (FATF) on revising its provisions on nonprofits, moves from hard to soft law. The FATF is an intergovernmental body dedicated to combatting the funding of terrorist groups.<sup>60</sup> As part of its efforts to prevent terrorist entities from abus-

52. *See id.* at 984–87.

53. *Id.* at 988.

54. *See* Oonagh B. Breen, *European Non-profit Oversight: The Case for Regulating from the Outside In*, 91 CHI.-KENT L. REV. 991 (2016).

55. *See id.* at 996–97.

56. *See id.* at 993–95.

57. *See id.* at 998–1002 (describing debates over the definition of “public benefit purpose,” the tax implications of European foundation status, and even the use of the “foundation” concept itself).

58. *See id.*

59. *See id.* at 1002–03.

60. *See id.* at 1004.

ing or inventing nonprofit organizations as conduits for terrorist financing, the FATF issued a series of recommendations and best practices for member governments, including the EU, to follow.<sup>61</sup> The nonprofit sector respects the importance of the FATF's mandate, but found its early efforts in the nonprofit sphere overly restrictive and, at times, counterproductive.<sup>62</sup>

As a regional member of the FATF, the EU is responsible for complying with its recommendations, including those relevant to nonprofits.<sup>63</sup> But its early efforts to develop a code of conduct and other guidance failed—in no small part due to the EU's lack of engagement with the sector.<sup>64</sup> In contrast, the FATF itself began to engage the nonprofit sector with a consultation in 2013.<sup>65</sup> This road was not altogether smooth, and in a recent misstep the FATF failed to seek wide-ranging comments on its March 2015 report.<sup>66</sup> In a striking turnaround, however, the EU appears to have learned the engagement lesson. The EU Commission leaked the report to nonprofits for their review.<sup>67</sup>

Breen is cautiously optimistic that challenges to regulators from the nonprofit sector itself can result in positive change.<sup>68</sup> EU-level direct nonprofit legislation is unlikely to get past the structural impediments that stand in its way. But, collaboratively-developed soft law may represent an alternative paradigm for better regulation of European nonprofits.<sup>69</sup>

In his presentation at the live symposium, Mark Sidel explored a very different set of examples of how governments may regulate the nonprofit space—frustrating the growth of civil society in disturbing ways.<sup>70</sup> After noting the phenomenon of the narrowing space for civil society in China and elsewhere, his review tracked developments in nonprofit regulation across five diverse Asian countries. Many of these nations are increasing the engagement of national security regulators

61. *See id.* at 1004–05.

62. *See id.* at 1005–08.

63. *See id.* at 1010.

64. *See id.* at 1010–12.

65. *See id.* at 1012.

66. *See id.* at 1012–15.

67. *See id.* at 1015–16.

68. *See id.* at 1016–19.

69. *See id.* at 1019–20.

70. *See* Mark Sidel, *The Reorientation and Securitization of Nonprofit Oversight in Asia* (Univ. of Wis. Law Sch., Working Paper, 2016).

in charity oversight, with the goals of tamping down dissent and limiting the role of domestic and foreign organizations and foreign funding. A few, however, offer bright spots in an otherwise sobering report, and suggest models for reform.

Sidel first, and most extensively, discussed the situation in China. Under its system of “differentiated management,” China has for decades more intensely regulated domestic advocacy and foreign nonprofits of all stripes than it has domestic social service organizations.<sup>71</sup> Authorities perceive the latter posing little threat, while they suspect the former may be seeding political transformation.<sup>72</sup> Official attention to these particular charities grew following the “color revolutions” of the early 2000s, and further increased after the Xi Jinping government took office in 2012. It culminated in 2014 when authority over foreign NGOs and foundations was proposed to be moved from the Ministry of Civil Affairs to the more powerful Ministry of Public Security. The Ministry of Public Security quickly drafted a new and highly restrictive law to regulate foreign nonprofits, usurping the Ministry of Civil Affairs’ authority over one of the most controversial slices of the Chinese nonprofit pie. This swift and clear move to securitize nonprofit regulation in China generated fierce opposition from the sector at home and abroad. The ultimate fate of this legislation was unknown until it passed just before this issue went to print, and delayed publication of Professor Sidel’s article will allow him to explore this new development in greater detail.<sup>73</sup>

Sidel’s presentation also compared and contrasted Chinese developments with those in a variety of other Asian nations. Vietnam, also a one-party state with concerns about outside groups agitating for political change, has taken a more balanced approach. The security service plays an important role in nonprofit regulation, but does so in collaboration with an intermediary group, the Vietnam Union of Friendship Organizations, which manages most contact with foreign NGOs.<sup>74</sup> Sidel expressed regret that China declined to follow this example.

71. See, e.g., Mark Sidel, *The Shifting Balance of Philanthropic Regulation in China*, in *PHILANTHROPY FOR HEALTH IN CHINA* (Jennifer Ryan et al. eds., 2014) for more information on the Chinese system of nonprofit regulation.

72. See *id.*

73. See Edward Wong, *Clampdown in China Restricts 7,000 Foreign Organizations*, *N.Y. TIMES*, Apr. 28, 2016, at A1.

74. For information on the Vietnam Union of Friendship Organizations, see *COMINGO, VUFO and PACCOM, VUFO-NGO RESOURCE CTR.*, <http://www.ngocentre.org.vn/content/comingo-vufo-and-pacom> (last visited May 25, 2016).

India provides very different points of comparison. The longstanding and vibrant nonprofit community there has come under increasing scrutiny, often in the name of counter-terrorist initiatives similar to those addressed by Professor Breen. Since 2014, this “hardening” of nonprofit oversight has intensified, with the removal of thousands of groups from the register of NGOs permitted to receive foreign funds, challenges to Greenpeace in India, and the freezing of Ford Foundation funds.<sup>75</sup> Greenpeace won relief in court and Ford negotiated for access to its funds and the capacity to continue making grants, and the trend in India is not toward full securitization.<sup>76</sup> Yet, Sidel reported that formerly passive regulators are being pushed to stronger efforts, particularly since the start of the Modi administration.

Recent changes in Pakistan and Cambodia more closely mirror those in China. Pakistan shifted nonprofit oversight to more security-minded regulators<sup>77</sup> and Cambodia adopted new and highly restrictive nonprofit legislation.<sup>78</sup> The many stories Sidel offered combine to powerfully argue there is a trend toward securitization of nonprofit regulation in Asia. This trend challenges traditional nonprofit regulation, and undermines the sector’s ability to enhance civil society. But it is not unopposed, and it is the subject of fierce debate in a number of Asian countries.

Myles McGregor-Lowndes’ article recounts the travails of the Australian Charities and Not-for-Profits Commission (ACNC).<sup>79</sup> In a shock-

75. See, e.g., Vaishnavi Chandrashekar, *India Crackdown? Ford Foundation Latest Foreign NGO Slapped by Delhi*, CHRISTIAN SCI. MONITOR (May 4, 2015), <http://www.csmonitor.com/World/Asia-South-Central/2015/0504/India-crackdown-Ford-Foundation-latest-foreign-NGO-slapped-by-Delhi>; *Foreign Funding: Modi Government Cancels Licences of over 10,000 NGOs*, ECON. TIMES (July 22, 2015, 2:21 PM), [http://articles.economictimes.indiatimes.com/2015-07-22/news/64725606\\_1\\_foreign-contribution-fcra-home-ministry](http://articles.economictimes.indiatimes.com/2015-07-22/news/64725606_1_foreign-contribution-fcra-home-ministry).

76. See Press Release, Greenpeace, *Delhi High Court Orders MHA to Allow Access to Greenpeace India’s Domestic Accounts* (May 26, 2015), <http://www.greenpeace.org/india/en/Press/Delhi-High-court-orders-MHA-to-allow-access-to-Greenpeace-Indias-domestic-accounts/>; Bharti Jain, *Ford Foundation-govt Stand-off Ends as NGO Agrees to Come Under Fema*, TIMES OF INDIA (July 16, 2015, 3:23 AM), <http://timesofindia.indiatimes.com/india/Ford-Foundation-govt-stand-off-ends-as-NGO-agrees-to-come-under-Fema/articleshow/48092013.cms>.

77. See *Pakistan: Withdraw Repressive New NGO Rules*, HUMAN RIGHTS WATCH (Oct. 6, 2015), <https://www.hrw.org/news/2015/10/06/pakistan-withdraw-repressive-new-ngo-rules> (reporting the shift of authority to the more security minded Ministry of Interior).

78. See MARK SIDEL & DAVID MOORE, INT’L CTR. FOR NOT-FOR-PROFIT LAW, *THE LAW AFFECTING CIVIL SOCIETY IN ASIA: DEVELOPMENTS & CHALLENGES FOR NONPROFIT & CIVIL SOCIETY ORGANIZATIONS* (2015).

79. See Myles McGregor-Lowndes, *Australia – Two Political Narratives and One Charity Regulator Caught in the Middle*, 91 CHI.-KENT L. REV. 1021 (2016).

ing turnabout fueled by a change of government, the agency was slated for abolition just two years after its creation.<sup>80</sup> Even more confounding, as McGregor-Lowndes explains, both sides of the debate defended their actions as necessary to reduce “red tape” burdens on charities.<sup>81</sup> This argument was attractive to conservative voices seeking to diminish government involvement, and also to those seeking reform and streamlining of charity regulation by moving its nexus from the various states to the federal level. It was on this basis that in 2010 the Labor government proposed a scoping study for a one-stop national charity agency and later introduced the 2012 bill creating the ACNC.<sup>82</sup> The then-opposition argued that the measure would be self-defeating, by adding to charities’ regulatory burdens more generally, and thereby improvidently expanding government.<sup>83</sup> The bill passed over these objections and the ACNC began operations.

Then, in September 2013, a new coalition government came to power. Calls were raised to shutter the infant agency in line with coalition’s general goal of reducing national-level legislation and government involvement in the economy and the lives of private citizens.<sup>84</sup> By March 2014, a bill had been introduced to repeal the legislation establishing the ACNC.<sup>85</sup> The ACNC staff admirably continued work despite the axe quite precipitously hanging over them, and the agency generated surprising improvements in the short and troubled period after its inception.<sup>86</sup> The Senate passed a motion calling for withdrawal of the ACNC repeal bill in 2015 and relief finally came early this year, when the Minister for Social Services announced the Australian Government would no longer proceed with it.<sup>87</sup>

McGregor-Lowndes relates this strange tale, but also exposes the flaw that lies at its heart. Empirical research across many contexts strongly and uniformly demonstrates that perceptions of red tape burdens are much stronger than their reality.<sup>88</sup> In the Australian nonprofit experience in particular, McGregor-Lowndes and Christine Ryan have shown that the red tape burdening charities there arises from detailed

80. *See id.* at 1021.

81. *See id.* at 1021–22.

82. *See id.* at 1028–30.

83. *See id.* at 1030–31.

84. *See id.* at 1037–39.

85. *See id.* at 1038.

86. *See id.* at 1034–37.

87. *See id.* at 1043.

88. *See id.* at 1031–34.

and repetitive applications for state-level grants.<sup>89</sup> The ACNC plays no part in these state grant application processes, so neither creating it as a national regulator nor removing it from this role would ease the real red tape burden borne by Australian charities. Perhaps the current reprieve will allow ACNC to convene the various state authorities needed to address these and other more trenchant concerns. As McGregor-Lowndes insightfully concludes, “it is yet to be confirmed whether this period will be seen by history as [the ACNC’s] prolonged death throes or a baptism by fire from which it emerges with toughened character and resolve.”<sup>90</sup>

In the symposium’s final article, Adam Parachin recounts the story of a damaging scandal just barely avoided.<sup>91</sup> In 2012, the Canada Revenue Agency received earmarked funds in the federal budget to conduct audits of charities’ political advocacy activities.<sup>92</sup> This move generated significant controversy, including claims that the agency was acting for political purposes and targeting environmental charities.<sup>93</sup> When the October 2015 election replaced the conservative government, priorities in the charity regulation area shifted as well. Justin Trudeau’s Liberal administration will not pursue further audits and instead has pledged to clarify and reform the law relating to charities’ political activity.<sup>94</sup> Parachin declines to comment on the merit of the audits or the allegations of bias they spurred, as details of the audits and their results have not yet been made public.<sup>95</sup> Instead, he asks more abstract jurisprudential and policy questions. Does the “political purposes” doctrine, which remains a matter of public debate despite the change of administration, inject corrupting ideals into Canadian charity law? And, if so, what can be done to limit this effect?

Parachin begins his analysis with the case of *McGovern v. Attorney General*, which held that a trust is not charitable if it includes a direct and principal purpose “to further the interests of a particular political party” or “to procure changes in the laws” or policies domestically or abroad.<sup>96</sup> He argues that this doctrine has become intertwined with

89. See *id.* at 1032.

90. *Id.* at 1044–45.

91. See Adam Parachin, *Reforming the Regulation of Political Advocacy by Charities: From Charity Under Siege to Charity Under Rescue?*, 91 CHI.-KENT L. REV. 1047 (2016).

92. See *id.* at 1049.

93. See *id.* at 1048–49.

94. See *id.* at 1055.

95. See *id.* at 1048.

96. *Id.* at 1057–58.

three problematic misconceptions about charity law, which reform efforts should avoid perpetuating. Parachin asserts that charities' political activities should not be policed as a means to rationing tax expenditures.<sup>97</sup> Nor does he believe the standard economic account of charities as a response to market and government failures sheds much light on the proper application of the charity/politics distinction.<sup>98</sup> Finally, he forcefully argues against grounding the distinction on a need for neutrality.<sup>99</sup>

In place of these current (but, in his view, misguided) touchstones, Parachin proposes three alternatives. As the doctrine is modernized, courts and regulators would do well to remember the "innovative capacity of charities as thought leaders."<sup>100</sup> Charities can make unique and important contributions to political discourse that should not be silenced. Further, Parachin argues that the attempt to separate charity and politics is, on some level, doomed to failure. As his arguments regarding neutrality suggest, charity is always about pursuing some conception of the good—over other, conflicting conceptions. Charitable appeals will always contain messages that are caught up in this idea of what is good and valuable.<sup>101</sup> Ultimately, Parachin argues that the key to the charity/politics distinction lies in retaining the space and difference not between charity and politics, but between charity and *government*.<sup>102</sup> It is charity not being government, doing government and becoming too involved with government, that should be guarded against. This focus will allow much political advocacy by charities to survive, as Parachin asserts it should.

### III. PARALLELS, LESSONS AND WARNINGS

Despite the diverse national and regional stories these articles tell, major cross-cutting themes emerge from the symposium as a whole. These themes generate lessons for those observing the increasing challenges faced by nonprofit regulators around the globe, and for regulators themselves.

The first is institutional competence. In every context studied, the expertise and resources of nonprofit regulators matters greatly. Mayer

97. *See id.* at 1059–60.

98. *See id.* at 1061–62.

99. *See id.* at 1062–70.

100. *Id.* at 1070.

101. *See id.* at 1071–74.

102. *See id.* at 1074–77.

takes on these issues at the conceptual level, considering the capacity of state and federal regulators to achieve the objectives set for them by state and federal law. Sugin, too, steps back—considering the purposes of state nonprofit regulation and whether they suit the role of cleaning up campaign finance.

For many of our other authors, the question is more pragmatic. Brody and Owens expose the massive change in the work that federal tax regulators can produce when stripped of financial and human resources in response to a scandal. McGregor-Lowndes recounts the effects of even more dramatic swings in staffing and funding at the ACNC. Morris warns of a similar dynamic taking hold at the storied Charity Commission, and Parachin describes its sobering near miss in Canada. These articles also remind us that even if budgets and headcounts are not ultimately slashed, the sense of insecurity created by attacks on regulators saps their capacity to guide and police the sector.

The contributions to this symposium further demonstrate that assets and experience alone will not ensure regulators' effectiveness and ability to withstand attacks. The larger government context into which they fit is just as important. Sugin's consideration of a role for states in regulating dark money responds to the hard truth that federal regulation has become incapacitated. Breen's cautious optimism for soft law to make gains in regulating the EU nonprofit sector similarly takes on board the reality that forging unanimity across 28 member states to enact hard law is nearly impossible. Perhaps most dramatically, Sidel's review of developments in Asia shows how autocratic regimes can absorb nonprofit regulation into a security apparatus, massively changing its orientation and effects on the sector. Where and how nonprofit regulators fit within the larger governmental and political structure of which they are a part will often be determinative.

Relatedly, the second theme running through this set of articles is the impossibility of placing charity and the politics in neat and mutually exclusive silos. Connections between nonprofits and politics create serious risks and sometimes inflict grave damage. The IRS scandal that Brody and Owens and Sugin describe has seriously wounded its nonprofit regulatory arm, causing harm the extent of which may not be known for years to come. Perceived political bias likewise threatens the legitimacy of UK regulators. In Australia, McGregor-Lowndes depicts a nonprofit regulator in its infancy caught in a hail of crossfire over the size of the national government.



Yet, the articles in this symposium also reveal the enduring connection between charity and politics. Attempts to wall them off from each other seem inevitably to break down. As Parachin reminds us, charity is the pursuit of some version of the good. It can never be fully disconnected from political causes and crises. Nowhere is this deep connection between the goals of government and the nonprofit sector more frighteningly obvious than in attempts to quash nonprofit organizations that might shelter dissent in the contemporary China that Sidel explores. We can try to draw the strands of charity and politics apart, but they keep coming back together, perhaps unavoidably so. This symposium helps us to begin considering the tools required to manage the influence that politics will perennially have on charities and on charity regulation—to avoid its corruption, capture or incapacitation.

As co-organizers and co-editors of the symposium, Professor Brody and I invite readers to grapple with these themes along with us. We are certain you will find many other valuable insights in these pages as well. We thank you for your attention, the authors for their incredible contributions, and the *Chicago-Kent Law Review* editors for their dedication and hard work.