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Political Activity / Advocacy by The Sector And The States' Role

Politics and The Public Benefit Corporation

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INTRODUCTION

Politics has given "social welfare" a bad name. In a year featuring important election-year debates over a great recession, health care coverage, fiscal austerity, and, well, "social welfare," six of the top ten New York Times stories of 2012 containing that term concerned campaign spending from undisclosed funding sources[1]*. The juxtaposition of social welfare and dark money is unfortunate beyond semantics. It reflects a broader confusion between tax law and election law, as well as between federal and state regulation. For decades, Congress has tried and failed to legislate a coherent regime for the tax exemption and disclosure of political contributions and expenditures. From 501(c)(4) organizations to 527 organizations and back again, and from soft money to PACs to independent expenditures, federal law continually channels and rechannels essentially fluid political activity through a series of leaky regulations administered by ineffective enforcement agencies. Meanwhile, at a time when the vast majority of Americans find it increasingly difficult to make their voices heard and dollars count in politics, the regulatory complexity of organized political participation is that of the tax code squared by campaign finance law.*

More productively, the juxtaposition of the nonprofit and the political also serves as a reminder of an important issue generally overlooked in national campaign finance debates. Political organizations are, and should be, nonprofit organizations. As such, they are governed by a body of law more fundamental than either the tax code or campaign finance regulation: the traditional duty of the states, typically state attorneys general, to supervise nonprofit organizations. In the realm of charity regulation, state attorneys general have the power to hold organizations accountable to the public to which they owe their

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[1] NYTimes.com, archives search of 2012 stories for "social welfare" ranked by relevance (Jan. 12, 2013), available at http://query.nytimes.com/search/sitesearch/#/%22social+welfare%22/from20120101to20121231/.

privileged tax and organizational status, and to their members and donors to whom they owe their funding. Similar state interests in accountability apply to noncharitable political nonprofit organizations. Indeed, those basic state legal interests fairly can be said to lay the foundation for the federal tax and campaign finance regulatory superstructure that is the locus of most policymaking in the law of politics. State attorneys general therefore have a fundamental role to play in improving the accountability of political organizations, and have the power to do so. That role is increasingly important as federal regulatory failures in tax and campaign finance law blur the distinctions between political organizations and other nonprofit social welfare and even charitable organizations. Not only do contributors and the public rely on effective policing of nonprofit political activity, but nonprofits themselves should want a legal regime under which they can credibly disclaim to their donors certain political activities, while safely advocating their organizational mission through less direct means of political influence.

This paper explores the relationship between federal tax and campaign finance regulation, and state nonprofit supervision, of political organizations. "Political organizations," for these purposes, means an organization regardless of its tax or campaign finance status that solicits and spends money to influence elections, directly or indirectly.[2] *Part I considers the similarities between the accountability means and ends of nonprofit supervision for political organizations, and campaign finance regulation of those same organizations. Part II compares the institutional structures of federal tax and campaign finance regulation with that of state nonprofit supervision. It argues that state institutions, particularly state attorneys general, can be more effective at achieving the shared accountability ends of nonprofit and campaign finance regulation than federal institutions, particularly the Internal Revenue Service and the Federal Election Commission. The conclusion examines a recent example of state nonprofit supervision in the service of political organization accountability, and suggests how it and other innovations at the state level might best contribute to a distinct form of political organization accountability.*

I. THE ACCOUNTABILITY OF POLITICAL ORGANIZATIONS AS NONPROFITS

Political organizations are, and should be, nonprofit organizations. Political organizations receive most of their income through member dues or private donations. They work to influence elections on behalf of, rather than distribute profits to, their members. Their output is therefore influence, which can be particularly difficult to measure, at least until after the election. Influence also is a public good because the producer cannot easily exclude anyone from its impact. Finally, and not insignificantly, political organizations' ultimate purpose is, at least in the eyes of their members, the promotion of

[2] This definition is fraught with vagueness, and might extend to lobbying and issue advocacy in some circumstances. But one premise of the paper is that a legal definition, no matter how clear in theory, does little work without an effective institutional structure of enforcement. Such a structure may include state enforcers that come to various, but similarly effective in each state's circumstances, definitions of political organizations for the purpose of nonprofit (as well as campaign finance) regulation.

social welfare. All of these features shared by political organizations also distinguish nonprofits from business organizations. The key structural feature of nonprofits that serves this distinction is the duty of general or "public," rather than private, benefit enforced through a prohibition on payment of dividends, the nondistribution constraint.[3]

State law imposes the nondistribution constraint on nonprofit organizations, most commonly through the corporate charter. Political organizations are nonprofit organizations under state law first, and tax- exempt entities under federal law second. Political parties and candidate campaigns often incorporate as nonprofit corporations, as do independent advocacy groups. The corporate form confers general organizational advantages like perpetual life and, to a lesser extent, limited liability, that facilitate amassing and deploying resources for political activities. More broadly, the corporate form establishes an agency relationship between an organization's management and its funders that aligns their interests. Fiduciary duties of care and loyalty do some of this accountability work. Beyond those duties, in political organizations where contributors are members or donors who do not necessarily have voting rights or other direct control of management, a legal constraint against the distribution of dividends further assures funders that their money will support shared political goals rather than personal inurement. So political organizations that incorporate opt for the nonprofit form.

State and federal governments confer a variety of special privileges on nonprofit corporations to encourage their development in the absence of a profit motive. Most importantly, federal tax law subsidizes the nonprofit corporate form through an income tax exemption, providing an additional incentive for political organizations to incorporate. So that this fiscal incentive is not wasted or misdirected, Congress has drawn boundaries around tax-exempt nonprofit political activity.[4] A traditional charity under section 501(c)(3), eligible for tax-deductible contributions along with the income tax exemption, may not have as a "substantial part" of its activities "carrying on propaganda, or otherwise attempting, to influence legislation," with some exceptions, and may not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[5] Social welfare organizations under section 501(c)(4) must be "primarily engaged in promoting in some way the common good and general welfare of the people of the community,"[6] a purpose that regulations construe to exclude any primary purpose that includes "direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office."[7] The IRS General Counsel later extended the primary purpose test to labor organizations under section 501(c)(5), and trade organizations under section 501(c)(6).[8] Finally, federal tax law

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3 *See generally*, Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 Yale L.J. 835 (1980).
4 See 26 U.S.C. § 162(e) (Denial of deduction for certain lobbying and political expenditures). As Lloyd Mayer puts it, "The heart of the tax law provisions addressing political activity is the longstanding rule that no deduction is allowed for expenditures for political activity." Lloyd H. Mayer, The Much Maligned 527 and Institutional Choice, 87 Boston L. Rev. 625, 637 (2007).
5 26 U.S.C. § 501(c)(3).
6 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i).
7 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii).
8 Gen. Couns. Mem. 34233 (Dec. 30, 1969). See generally Ellen P. Aprill, Regulating the Political Speech of Noncharitable Exempt Organizations after Citizens United, 10 Election L. J. 363, 381-87 (2011).

provides directly for a tax-exempt "political organization" under section 527, "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures" to influence candidate campaigns.[9] State tax law looks to federal tax status for the purpose of determining state tax privileges.

In exchange for the associated privileges of corporate status and tax exemption, the state and federal legal regimes governing the nonprofit organization demand two kinds of accountability. First, the organization must be accountable to the public, who confer tax and other privileges through their government only to the extent the organization returns the broader public benefits subsidized through the nonprofit form. The primary means of public accountability for nonprofit organizations under nonprofit and tax law, disclosure, is similar to the primary means of campaign finance regulation (at least after Citizens United and associated deregulation of campaign expenditures). Second, the organization must be accountable to its members and donors, who contribute only to the extent the organization's goals are credibly aligned with their own. Donor accountability through fiduciary and solicitation law, a primary concern of nonprofit law, is less developed as a concern of campaign finance regulation.

A. Accountability to the Public

Long after states limited the purposes for which organizations can incorporate, nearly all states retain a special nonprofit corporate form provided by statute.[10] That form enables a political organization to signal its adherence to the nondistribution constraint and thereby encourage contributions. Federal and state tax laws provide tax exemptions for nonprofit organizations. In return for these privileges as nonprofits, political organizations must limit their activities and, in so many words, act like nonprofits. State corporate law mainly imposes formal limits such as the prohibition on paying dividends and, relatedly, heightened fiduciary duties and conflict of interest standards relative to business corporations. Under the policy against the deductibility of political (as opposed to business or charitable) expenditures, federal tax law keeps political organizations from acting too much like businesses through the anti-inurement provisions on the one hand, and keeps charities from acting too much like political organizations through the political activity limits on the other hand.

The primary form of political organizations' accountability to the public under nonprofit law is financial disclosure through means such as the federal Form 990 and state registration laws. Disclosure also is a central tool in campaign finance regulation, but the primary concern of disclosure under nonprofit law is disclosure of expenditures made while the primary concern of disclosure under campaign finance law is disclosure of contributions received. The public accountability of a nonprofit corporation requires that it disclose to the public its expenditures to allow the public to verify how they are consistent with its nonprofit status (e.g., appropriate programs, no inurement, limited or no political activity), whereas campaign finance requires that a political organization disclose to the

[9] 26 U.S.C. § 527(e). The tax exemption only extends to income derived from political fundraising, see 26 U.S.C. § 527(c), and only to the extent contributions and expenditures are timely disclosed under either section 527 or federal or state campaign finance laws. See 26 U.S.C. § 527(j).

[10] See Marion Fremont-Smith, GOVERNING NONPROFIT ORGANIZATIONS at 152 (Belknap Press 2004) ("As of January 1, 2003, forty-eight states and the District of Columbia had enacted nonprofit corporation acts").

public its contributions to allow the public to verify who is funding its political expenditures (also disclosed). Although the experience of section 527 in operation has been disappointing, the logic of that law in enforcing the distinction between nonprofit and political activities for disclosure purposes is sound. Basically, section 527 holds that political organizations' political activities are tax exempt if, and only if, they are disclosed. In doing so, the law attempts to distinguish political organizations, which are subject to this general public policy of donor disclosure, from tax-exempt charities and non-exempt businesses, which are not.

Charity donors and members, as well as donors to and members of traditional social welfare organizations that do not participate in political activities, are generally exempt from a policy of disclosure as a matter of associational freedom recognized in statute and constitutional doctrine. Tax law distinguishes charities from political organizations with the political activity prohibitions, one of the few bright lines drawn in this area of tax policy that has remained effective in the test of time. Business shareholders and patrons, while they may be disclosed through other corporate and securities law, are not typical subjects of a policy of political disclosure because even when a business corporation makes political expenditures its funding is not necessarily informative of its funders' political interests.[11] Tax law distinguishes businesses from political organizations with the anti- inurement provisions.

Campaign finance law, properly conceived, draws the same lines between charity and political nonprofit organizations, and those organizations and businesses, for disclosure purposes. Yet, as the experience of 501(c)(4) organizations and section 527 itself demonstrates, bright lines are elusive. In particular, federal regulators' failure to find a workable threshold for when political activity becomes a nonprofit's primary purpose under tax law, or major purpose under campaign finance law, opened a gaping loophole in the disclosure regime for noncharitable exempt organizations under tax law and for non-PAC political organizations under campaign finance law. Going forward, one question is whether state nonprofit supervision can help clarify or reinforce that distinction for disclosure and related purposes of public accountability.

B. Accountability to Donors

The most familiar role of states in nonprofit regulation is in ensuring accountability to donors. The state attorney general's powers to supervise nonprofit organizations is rooted in ancient charitable trust doctrine, and confirmed by modern statutes or judicial decisions in every state.[12] These powers include the traditional enforcement of fiduciary duties to ensure the careful and loyal execution of donor intent, and more recent registration and disclosure laws that take a consumer protection approach to facilitate informed giving by individuals at the solicitation stage. Donor accountability is not a primary concern of campaign finance regulation, but political organizations as nonprofits similarly depend on donor trust that contributions will be used to further the organization's political purposes. Conversely, donors to charities and

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[11] See, e.g. Citizens United v. Federal Election Comm'n, 130 S.Ct. 876, 905 (2010) ("All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas.").

[12] See Fremont-Smith, supra n. 10 at 305-306.

nonprofit organizations that cannot engage in political activity, or represent to their donors they will not engage in political activity, need to trust that such organization will abstain from politics.

At their core, fiduciary duty and solicitation laws address charities already prohibited from political activity as a matter of their federal 501(c)(3) status. Compliance with the narrow boilerplate requirements of the federal organizational test can, in the case of 501(c)(3) organizations, provide states grounds to enforce broader fiduciary duties invoked by that boilerplate, for example.[13] But the basic nonprofit governance principles extend beyond sections 501(c)(3) to 501(c)(4), both of which share anti- inurement provisions that allows tax-exempt status on the condition that "no part of the net earnings of such entity inures to the benefit of any private shareholder or individual."[14] Although section 527 does not discuss inurement as such, it does presume that amounts "diverted for the personal use of the candidate or any other person" will be treated as taxable income.[15] While these provisions reinforce a nonprofit corporation's duty to serve public (or at least political) rather than private benefit as a matter of accountability to the public,[16] they also parallel a fiduciary duty of loyalty to the corporation as a matter of accountability to donors.

State nonprofit law typically casts a wider net than federal tax law, and that net also includes at least some categories of political activity even within the common law definition of charity.[17] The Revised Model Nonprofit Corporation Act, for example, provides for the incorporation of a "public benefit corporation" for "the purpose of engaging in any lawful activity."[18] Any organization incorporated under that status is subject to the nondistribution constraint and attorney general supervision powers, regardless of its political activities.[19] Charitable solicitation laws also sweep political activities within the state definitions of charity that are typically broader than 501(c)(3). In an implicit recognition of this, many states partially or fully exempt political fundraising from their charitable registration statutes,[20] based on an expectation that political organizations will file properly under campaign finance laws.[21] To the extent they apply, both the fiduciary duty enforcement and solicitation regulation powers of the state may have particularly useful, but relatively unexplored, functions for political organizations.

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[13] See Fremont-Smith, supra n. 10 at 246, citing T.R. 1.501(c)(3)-1(b)(1)(i)(a)-(b).

[14] 14 See, e.g., 26 U.S.C. § 501(c)(4)(B); see also 26 U.S.C. § 501(c)(3); 26 C.F.R. § 1.501(c)(5)-1(a)(1); 26 U.S.C. § 501(c)(6).

[15] 26 U.S.C. § 527(d).

[16] See, e.g.,American Campaign Academy v. Comm'r, 92 T.C. 1053 (1989).

[17] 17 See Laura Chisolm, Politics & Charity: A Proposal for Peaceful Coexistence< 58 Geo. Wash. L. Rev. 308, 346 (1990) ("What can be derived from the cases is the principle that at common law, political purposes are not charitable purposes; what the cases do not necessarily establish is that the use of political means (even arguably partisan political means) to achieve a charitable end nullifies the charitable character of that end at common law.").

[18] RMNCA § 3.01(a).

[19] See, e.g., RMNCA § 13.01 (prohibited distributions); RMNCA § 1.70 (attorney general power to commence enforcement proceeding).

[20] See, Multi-State Filer Project, Appendix of Cooperating States, available at http://www.multistatefiling.org/n_appendix.htm (visited Jan. 17, 2013) (11 of 40 states exempt political organizations from charitable solicitation registration).

[21] See, e.g., Rev. Code. Wash. § 19.09.020(2) ("political organizations are not charitable organizations" but are subject to some solicitation regulations).

The role of fiduciary duties in corporate political activity was suggested by *Citizens United*'s reliance on "the procedures of corporate democracy" to correct political distortions of the corporate form.[22] This renewed corporate law commentators' focus on the relationship between campaign spending and corporate governance. In an earlier response to *Austin v. Michigan Chamber of Commerce*[23] (the case *Citizens United* overruled), Jill Fisch explained how fiduciary duty law can regulate corporate political speech.[24] First, rules against self-dealing and waste prohibit management from spending corporate funds "on political issues that further its political objectives rather than those of the corporation."[25] Second, the rule against waste also prohibits management from spending corporate funds that do not actually further the corporation's interests, broadly construed.[26] Third, management "must pursue, as its primary objective, the achievement of corporate profits,"[27] or in the nonprofit realm, the achievement of the corporation's public mission. Whether political expenditures by business corporations benefits or costs shareholders in general is debated,[28] but the related question as to the fidelity of nonprofit corporate management to the corporation's political ends merits further exploration.

Nonprofit corporations are far less constrained by market forces than business corporations. The attributes that determine a nonprofit corporation, like the nondistribution constraint and a requirement of general rather than specific benefit also suggest, as Larry Ribstein has explained, "agency costs arguably are even higher in non-profits than in for-profits."[29] State supervision is necessary because "contributors to charitable-type non-profits usually are not merely passive, like public corporations shareholders, but have no governance rights at all."[30] Although nonprofit contributors theoretically face lower exist costs simply by ending their contributions, "non-profits can exploit their members' moral commitment to the cause, geographical proximity, or social incentives to join, and can offer politicians not only money but member votes,"[31] even when the political outcomes management may achieve do not closely align with the contributors' purposes. Moreover, the close relationships among the fundraisers, political consultants, and media firms that surround many major political organizations threaten serious conflicts of interest. There is also a version of a potential agency cost that pervades the nonprofit sector: management of any organization built around defeating an adversary, whether medical, social, or political, may have more of an interest in sustaining the fight rather

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[22] Citizens United v. Federal Election Comm'n, 130 S.Ct. 876, 911 (2010), quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 794 (1978).
[23] 494 U.S. 652 (1990).
[24] See Jill E. Fisch, Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures, 32 Wm. & Mary L. Rev. 587 (1990).
[25] Fisch, supra n. 24 at 636.
[26] Fisch, supra n. 24 at 636.
[27] Fisch, supra n. 24 at 636.
[28] Compare John C. Coates, Corporate Politics, Governance, and Value Before and After Citizens United, Harvard Law School, Working Paper Series, 2012 (finding a correlation between political committee activity and poor corporate governance) with Robert J. Shapiro & Douglas Dowson, Corporate Political Spending: Why the New Critics are Wrong (Manhattan Institute 2012) (finding corporate political activity appears to have a
[29] Larry Ribstein, The First Amendment and Corporate Governance, 27 Ga. St. L. Rev. 1019, 1045 (2011).
[30] Ribstein, supra n. 29 at 1046.
[31] Ribstein, supra n. 29 at 1046.

than in winning it.[32] Such problems may argue for stricter enforcement of nonprofit corporate fiduciary duties by state officials than business corporate fiduciary duties by shareholders.

These potential conflicts of interest, as well as outright deception by some political organizations, also suggest a role for state officials to police political solicitations as they police charitable solicitations. Beyond assumed fiduciary duties, contributors to political organizations seek the same assurances as donors to other nonprofits that their money will be put to use according to the organization's representations. Where fiduciary duty regulates the expenditure of political contributions after the fact, solicitation law regulates the solicitation of political contributions before the contributor's check is written (or, increasingly, before the contributor's text message is sent). Although deception of a political contributor seeking to generally positive effect on firm value). fund attack ads to defeat an elected official through independent expenditures may make for a less sympathetic case than, say, deception of a charitable donor seeking to help victims of a natural disaster, it has a similarly corrosive effect on donor confidence. When political contributors, especially small donors, cannot trust that their contributions will actually go to support their causes, they will be less likely to participate in campaign finance and leave the field to large and perhaps less accountable, or more corrupting, financiers.

II. STATE ENFORCEMENT OF POLITICAL ORGANIZATION ACCOUNTABILITY

Despite the legal norms separating charitable andpolitical organizations, they are all fundamentally nonprofit organizations. As Part I argued, their similar attributes give rise to similar demands for accountability to the public and to donors. As in charity regulation, overlapping federal and state enforcement institutions attempt to meet those demands for accountability from political organizations. The failings of some of those institutions to provide basic accountability has prompted calls for reform. Most of the proposed reforms aim at the federal level and the jurisdictions of the FEC, the IRS, and the FEC. A few proposed reforms aim at state campaign finance enforcement. This paper argues that reforms should also aim at the relatively underdeveloped jurisdiction of state nonprofit supervision over political organizations.

State nonprofit supervision has similar advantages over federal enforcement in regulating political organizations as it has in regulating charities.[33] First, institutionally, nonprofit law enforcers like state attorneys general face more direct incentives toward energetic resolution of organizational accountability problems typical of modern campaign finance practice, particularly when aggregated across politically diverse states with concurrent jurisdiction over nationally active political organizations. This energy and

[32] See Lindsay Young, Outside Spenders' Return on Investment, Sunlight Foundation (Dec. 12, 2012), available at http://reporting.sunlightfoundation.com/2012/ return_on_investment/ (finding several of the highest-spending political organizations in the 2012 campaign had dismal "returns on investment" in terms of election results).
[33] See Lloyd Hitoshi Mayer & Brendan M. Wilson, Regulator Charities in the Twenty- First Century: An Institutional Choice Analysis, 85 Chi. Kent L. Rev. 479 (2010) (arguing that states have institutional advantages in enforcing nonprofit corporate governance law).

flexibility contrasts with the sclerotic Federal Election Commission and the tightly leashed Internal Revenue Service. Lloyd Mayer explains how IRS enforcement of political activity "tend to become bogged down," and the "most politically sensitive cases tend to be the ones for which IRS action is most delayed."[34] He compares the nine years it took for the IRS to rule on the Christian Coalition's application for tax-exempt status under section 501(c)(3), and the additional five years it took for the IRS to litigate the denial of that status to a conditional approval, to the seven years it took for the FEC to litigate its case to a finding of "only minor violations."[35] The comparison is intended to favor federal campaign finance enforcement relative to federal tax enforcement, but both fall far short of satisfactory when in the meantime political organizations decide to spend in several election cycles without basic accountability under the law. Between the IRS, designed to be shackled away from political influence, and the FEC, designed to be paralyzed by it, neither should be expected to hold political organizations accountable within the relevant electoral timeframes. In contrast, when authorized, state attorneys general can bring enforcement actions relatively quickly when the facts warrant it, under their own or a client agency's enforcement powers.[36]

Second, constitutionally, nonprofit law is a content-neutral means to ensure organizational accountability on generally applicable grounds of fiduciary duty and public benefit. This neutrality contrasts with the sometimes self-entrenching or partisan tendencies of more targeted legislative campaign finance reforms. As Jill Fisch argues, "traditional corporation law offers a multitude of less intrusive methods for dealing with the corrosive effect of corporate speech."[37] The Supreme Court leaves open the avenue of traditional corporation law in *Citizens United* by finding that corporate political speech provided "little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.'"[38] Although the Court also holds that a ban on corporate expenditures was overinclusive to the extent "it covers all corporations, including nonprofit corporations,"[39] it does not suggest that corporate democracy has no role to play in nonprofit political activities. Another virtue of fiduciary law's general applicability is how that makes it an unsuitable vehicle for political entrenchment. Complex campaign finance reform proposals, even at (or especially at) the federal level, can conceal loopholes or lines drawn at the wrong place to satisfy politically powerfulinterests.[40] Broad common-law principles embodied in the law governing all

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[34] Mayer, supra n. 4 at 677.
[35] Mayer, supra n. 4 at 677-78.
[36] See, e.g., Fair Political Practices Commission v. Americans for Responsible Leadership, No. S206407 (Cal. Nov. 4, 2012) (ordering compliance with preliminary injunction requiring disclosure of ballot issue committee contributions on eve of election); Ysursa v. Education Voters of Idaho, No. CV.OC-2012-19280 (4th Dist. Idaho, Oct. 29, 2012) (granting preliminary injunction requiring disclosure of ballot issue committee contributions on eve of election, noting "[t]he fact that the federal disclosure laws, apparently by omission, create a 'loophole' as to reporting requirements for 501(c)(4) entities through which it appears truckloads of millions of dollars drive through, does not bind either the voters of Idaho or their legislature."). Although filed before the election, both of these decisions were appealed before full pre-election disclosure.
[37] Fisch, *supra* n. 24 at 643.
[38] *Citizens United*, 130 S.Ct. at 911, *quoting Bellotti*, 435 U.S. at 794.
[39] *Citizens United*, 130 S.Ct. at 911.
[40] See, e.g., Gail Russell Chaddock, Who's exempted from 'fix' for Supreme Court campaign finance ruling?, Christian Science Monitor (June 25, 2010) (describing version of federal DISCLOSE Act "that exempted the

nonprofit corporations are less likely to facilitate special treatment to certain political organizations.

Third, politically, governing political organizations as nonprofit corporations subject to public benefit and fiduciary duties reinforces important political values of civic association. The deeply rooted civic republican emphasis of nonprofit law contrasts with the bureaucratic means and ends of modern campaign finance and tax-exempt organization laws. To be sure, this advantage is subtler than the practical or doctrinal advantages of state nonprofit enforcement. Yet it is worth remembering "the earliest forerunners of the modern business corporation were the ecclesiastic and charitable organizations … of early England."[41] In the early United States, as Justice Scalia explained in *Citizens United*, "[b]oth corporations and voluntary associations actively petitioned the Government and expressed their views in newspapers and pamphlets,"[42] in what might be the progenitors of modern social welfare organizations that engage in politics. If political corruption is understood as the undue influence of factions at the expense of the people, the conception of candidate-associated political organizations may benefit from a closer association of the fiduciary duties they owe their constituents as individual donors with the fiduciary duties candidates owe their constituents as citizens.[43] Focusing on the question of whether a political organization meets the broad test of "public benefit," or whether its management's decisions serve its fiduciary duty of loyalty towards its members or donors, may be more productive (if more difficult) questions to pose about nonprofit involvement in politics than more technical questions under federal tax or campaign finance laws. Putting a political organization's associational structure directly at issue, rather than simply focusing on collateral issues of tax exemption or campaign communications, better respects the principles that lead individuals to associate for public purposes in the first place.

CONCLUSION

The New York Attorney General recently proposed new rules requiring nonprofit organizations to report electioneering expenditures.[44] The effort marks an early example of how states might address political organizations through general nonprofit supervision authority. According to the Attorney General, The rule aims to, among other things: enhance detection and deterrence of illegal conduct by covered organizations and related individuals; inform and protect prospective donors to such organizations; protect the integrity and reputation of nonprofit organizations that do not intervene in political campaigns; maintain the anonymity of donors to covered organizations if their donations are restricted to purposes unrelated to influencing elections; protect the public interest in

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NRA, as well as other nonprofit giants such as AARP and the Sierra Club, from new disclosure requirements.").

41 Fremont-Smith, supra n. 10 at 40.

42 Citizens United, 130 S.Ct. at 927 (Scalia, J., dissenting).

43 See, e.g., D. Theodore Rave, Politicians as Fiduciaries, 126 Harv. L. Rev. 671, 706- 23 (2013) (analogizing elected officials to corporate fiduciaries).

44 See N.Y. Atty. Gen., Charity Disclosure Regulations (Dec. 12, 2012), available at http://www.ag.ny.gov/charity-disclosure-regulations (visited Jan. 18, 2013).

transparent financing of state and local elections; shield donors to covered organizations that intervene in political campaigns from public disclosure if it will cause undue harm, threats, harassment or reprisal; and ensure that there is clear guidance to covered organizations and related individuals concerning compliance.[45]

The expressed rationale of the rule amounts to a strong statement of the alignment between nonprofit supervision and campaign finance regulation. It combines public and donor accountability, and protection of apolitical nonprofits' integrity, in a way instantly recognizable to those in the nonprofit sector, and consistent with this paper's discussion. This accountability serves the same ends of encouraging confidence and broad participation in the political process as it does in the charitable sector. The means, however, may not fully realize the potential of state nonprofit enforcement concerning political organizations. The proposed rule mimics electioneering communication disclosure requirements at the federal level, though it is limited to organizations already registered under state law and the annual filing those organizations must make.[46] Time will tell whether the disclosures will prompt complaints by donors and members, or investigations by the Attorney General, about expenditures that breach the organization's duties to its donors or the public. The various institutional, constitutional, and political advantages of state enforcement may themselves make this disclosure more effective than the broken federal campaign finance system. That is a worthy goal in itself. Yet to the extent the disclosure leads to new kinds of enforcement actions arising under the states' traditional powers of nonprofit supervision, it will represent what may be the state attorney general's most distinct and undervalued contribution to a solution of the special problems that arise when politics meets the public benefit corporation.

[45] N.Y. Atty. Gen., Charity Disclosure Regulations: Regulatory Impact Statement (Dec. 12, 2012), availableathttp://www.ag.ny.gov/sites/default/files/press-releases/2012/c4%203%20%20Regulatory%20Impact%20Statement.pdf (visited Jan. 18, 2013).
[46] Proposed 13 N.Y.C.R.R. 91.6 (Annual Disclosure of Electioneering Activities by Non-501(c)(3) Registrants).