HARVARD
BUSINESS LAW
REVIEW

BEYOND THE BOARD: ALTERNATIVES IN NONPROFIT CORPORATE GOVERNANCE

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I. Introduction

The diversity of the nonprofit sector is manifold. There is great variety in organizational form; nonprofit organizations have long been structured as corporations, charitable trusts, and unincorporated associations. Now the Internal Revenue Service (IRS) has recognized the exempt status of standalone limited liability companies.[1] Likewise, the range of activities across the sector is stunning: healthcare, education, welfare, religion, the arts, and the environment. And even within those fields the diversity astounds: from a tiny free clinic to the Adventist Health System; from a new public charter school to Harvard University; from a Primitive Baptist chapel to the thousands of Roman Catholic congregations, orders, and organizations; from a community theater to the Metropolitan Opera. That immense diversity has affected even the relatively uniform world of nonprofit corporate governance.[2]

The basic principle of board governance remains the standard for nonprofit corporations: "[e]ach nonprofit corporation must have a board of directors."[3] But attempting to legislate for such a diverse sector has led lawmakers to realize that one size does not fit all and not every non-profitmaking corporation is best served by traditional board governance. Consequently, the various state nonprofit corporation statutes include a really amazing variety of mechanisms to deviate from, supplement, or even override that basic principle.

The following discussion reviews many of these mechanisms. Reference will be made repeatedly to the Revised Model Nonprofit Corporation Act, promulgated by the Business Law Section of the American Bar Association (ABA) in 1987 and subsequently adopted by at least

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[1] *See* Instructions for Part II, line 2 of IRS Form 1023.

[2] *See* William M. Klimon, *Recent Developments in Nonprofit Corporate Governance*, in NATIONAL BUSINESS INSTITUTE,TAX EXEMPT ORGANIZATIONS BOOT CAMP 283, 303-04 (2016).

[3] REVISED MODEL NONPROFIT CORP. ACT § 8.01(a) (AM. BAR ASS'N 1987).

half of the states. The widespread adoption of that model law makes it a useful touchstone for exploring alternatives to board governance. But the great variety of nonprofit governance innovations is not ignored and several nonuniform state-specific provisions are also discussed.

II. Board-side Alternatives

A. Committees

The principal substitute for board governance is familiar to most people involved in the work of nonprofit boards: the committee of the board. The nonprofit corporation laws permit a nonprofit corporation, either in its governing documents or by action of its board, to delegate some, indeed almost all, of the board's authority to a smaller group.[4] Some restrictions apply. These committees of the board must generally be formed by a supermajority vote of the board.[5] But a committee's authority is not unlimited. Typical authority that cannot be delegated include: authorizing distributions; approving or recommending to members extraordinary transactions like merger, sale of all assets, or dissolution; making appointments to the board or a committee; and amending the governing documents.[6]

There are two additional restrictions on board committees that are germane to this discussion. First, delegation to a committee does not automatically constitute compliance with the directors' fiduciary duties.[7] The directors still retain general oversight responsibility over the corporation, although they are entitled to rely on a board committee if they reasonably believe that the committee merits confidence.[8] But the delegation to a committee remains a delegation and is not a fundamental restructuring of corporate governance.

Second, a committee of the board must comprise only directors.[9] While that requirement is often ignored in practice, it remains aligned with the policy underlying the idea of board committees also reflected in the supermajority authorization requirement mentioned above, namely that committees of the board must be a true subset of the board. They gain their authority to exercise powers of the board only because they are a microcosm of the board itself that has been empowered not just by a simple majority of a quorum but rather by an unimpeachable majority of the directors. Therefore, they are less an alternative to board governance than a refined instance of it.

All of that said, board committees remain creatures of statute and many states' statutes include exceptions to the general rule explained above. I have compiled the following examples of state statutes that permit nonprofit corporations to appoint nondirectors to committees that exercise the powers of the board. In some cases, these committees are limited to specific functions or otherwise limited by certain conditions; in other cases, the committees may have general authority and operate under no special conditions. There is a variety of statutory

[4] *See* REVISED MODEL NONPROFIT CORP. ACT § 8.25 (AM. BAR ASS'N 1987).
[5] *See* REVISED MODEL NONPROFIT CORP. ACT § 8.25(b) (AM. BAR ASS'N 1987).
[6] *See* REVISED MODEL NONPROFIT CORP. ACT § 8.25(e) (AM. BAR ASS'N 1987).
[7] *See* REVISED MODEL NONPROFIT CORP. ACT § 8.25(f) (AM. BAR ASS'N 1987).
[8] *See* REVISED MODEL NONPROFIT CORP. ACT § 8.30(b)(3) (AM. BAR ASS'N 1987).
[9] *See* REVISED MODEL NONPROFIT CORP. ACT § 8.25(a) (AM. BAR ASS'N 1987).

authority in this regard:

- California's Nonprofit Integrity Act permits a charitable corporation that is required (by the Act) to have an independent audit committee to appoint nondirector members to that committee.[10]
- Delaware's General Corporation Law permits nonstock corporate boards great freedom in arranging their governance, including the ability to appoint nondirector committee members if that permission is set out in the corporation's charter.[11]
- Georgia's Nonprofit Corporation Code permits the members or directors of a nonprofit corporation to appoint former board members as voting members of a board committee if the corporation's articles or bylaws permit that option.[12]
- Illinois's General Not For Profit Corporation Act of 1986 permits a board committee to comprise all nondirectors if the committee's functions relate to the "election, nomination, qualification, or credentials" of directors or if the committee is otherwise involved in the process of electing directors.[13]
- Maryland's General Corporation Law (which also applies to nonstock corporations) permits the board (or a board committee) to select "special legal counsel" to determine whether indemnification of a director, officer, employee, or agent is appropriate; that determination is usually made by the independent directors, a committee, or by the shareholders.[14] The statute also permits the same procedure to be used for the review and approval of interested-director transactions.[15]
- Minnesota's Nonprofit Corporation Act affirmatively permits board committee members to be nondirectors unless the corporation's articles or bylaws prohibit it.[16]
- Texas's Business Organizations Code permits a "management committee," i.e., any committee that has the authority of the board to manage the corporation, of a religious institution to comprise in part or in whole nondirectors.[17]

I have seen these statutes used by a Texas church to establish an independent compensation committee when the directors of the family-run church are all employees of the church and thus interested parties. Likewise, a Maryland charity used an independent legal counsel to approve an interested-director transaction involving the provision of investment

[10] *See* CAL. GOV'T CODE § 12586(e)(2) (Deering 2019). It should be noted that guidance from the California Attorney General undercuts the value of this statutory exception, suggesting that the addition of a nondirector to an audit committee transforms what would otherwise be a board committee into an advisory committee, as would ordinarily be the case in the absence of the Nonprofit Integrity Act. *See Nonprofit Integrity Act of 2004 FAQ*, CAL. DEP'T *OF* JUSTICE, no. 11, https://oag.ca.gov/charities/laws#integrityact (last visited Mar. 11, 2019).

[11] *See* DEL. CODE ANN. tit. 8, § 141(a), 141(j) (2019).

[12] *See* GA. CODE ANN. § 14-3-825(b) (2018).

[13] 805 ILL. COMP. STAT. ANN. 105 / 108.40(a) (2019).

[14] MD. CODE ANN., CORPS. & ASS'NS § 2-418(e)(2)(ii) (LexisNexis 2018).

[15] *See* MD. CODE ANN., CORPS. & ASS'NS § 2-419(e) (LexisNexis 2018).

[16] *See* MINN. STAT. § 317A.241, subdiv. 2 (2018).

[17] TEX. BUS. ORGS. CODE ANN. § 22.218(b-1) (West 2017).

services by an affiliate of a director.

While a committee can provide some flexibility in structuring nonprofit governance, most states' nonprofit corporations laws include much stronger tools to structure an alternative to the board of directors.

B. Board Alternatives

In 1987, the Section of Business Law of the ABA promulgated a major revision to its Model Nonprofit Corporation Act (1952; revised 1957 and 1964). The Revised Model Nonprofit Corporation Act, recognizing the enormous diversity of the nonprofit sector, explicitly permitted the derogation from board governance; "[t]he articles may authorize a person or persons to exercise some or all of the powers which would otherwise be exercised by a board. To the extent so authorized any such person or persons shall have the duties and responsibilities of the directors, and the directors shall be relieved to that extent from such duties and responsibilities."[18] Among the key factors to note are that the alternative governors must be announced in the publicly filed charter document, thus giving notice to third parties. Additionally, this is not a mere delegation of board authority but rather a permanent reassignment of fiduciary responsibility, emphasized by the fact that the directors are relieved of their duties. That is a key piece of the structure, but it is also an important selling point in convincing fiduciaries to adopt this kind of alternative governance structure. Finally, the statute refers to transfer of governance authority to "a person or persons," which opens up the possibility of having a management entity assume some or all of the board's role.[19]

The most important point to note is the great flexibility this provision provides. The Revised Model Act has been adopted in about twenty-five states and board alternatives are thus widely available.[20] Some states that retained the first Model Act adopted some nonuniform provisions permitting alternatives to board governance.[21] Even some states that have not adopted any Model Act have similar provisions. For example, Delaware's General Corporation Law, which applies also to nonprofit corporations, includes a similar provision.[22] The same is true for

[18] REVISED MODEL NONPROFIT CORP. ACT § 8.01(c) (AM. BAR ASS'N 1987).

[19] REVISED MODEL NONPROFIT CORP. ACT § 1.40(47) (AM. BAR ASS'N 1987) ("'Person' includes any individual or entity"). For a recent discussion of replacing the board with a management entity, see STEPHEN M. BAINBRIDGE & M. TODD HENDERSON, OUTSOURCING THE BOARD: HOW BOARD SERVICE PROVIDERS CAN IMPROVE CORPORATE GOVERNANCE (2018).

[20] *See* Michael E. Malamut, *Summary of Sources of State Nonprofit Corporation Laws*, Nat'l Parliamentarian 8, 10–11 (2008).

[21] *See*, *e.g.*, N.J. REV. STAT. § 15A:6-1 (1983) ("The activities of a corporation shall be managed by its board, except as in this act or in its certificate of incorporation otherwise provided."); WIS. STAT. § 181.0801(3)(a) (1997) ("The articles of incorporation or bylaws approved by the members, if any, may authorize a person to exercise some or all of the powers which would otherwise be exercised by a board. To the extent so authorized such a person shall have the duties and responsibilities of the board, and the directors shall be relieved to that extent from such duties and responsibilities.").

[22] DEL. CODE ANN. tit. 8, § 141(a) (2019) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation.").

Kansas and Oklahoma, the two states that closely follow Delaware's corporation law.[23] In fact, Delaware and its followers go much further in permitting just about any conceivable variance away from board governance: "[t]he certificate of incorporation of any nonstock corporation . . . may otherwise provide that the business and affairs of the corporation shall be managed in a manner different from that provided in this section [on board governance]."[24]

What can board alternatives be used for? Imagine a private foundation whose founder sits on the board but whose control of the foundation's investment holdings (which include company shares also present in his personal portfolio) triggers additional SEC filings.[25] Transferring the board's control of its holdings to an investment committee (which does not include the founder) that is empowered in the foundation's charter with the board's authority may solve that problem. Or imagine a community foundation with a very specific mission to serve the social-welfare needs of its community being offered a large endowment for arts grantmaking. The arts grantmaking could be entrusted to a board alternative, perhaps structured like a committee, with full governance authority for that endowment, allowing the community foundation's board to continue its focus on its social welfare mission.

C. Designated Bodies

A further refinement of the board alternative arrived in 2008 with the ABA's updating of its model nonprofit corporation, called the Model Nonprofit Corporation Act, Third Edition (MNCA 3d ed.). The MNCA 3d ed. introduced the term "designated body" for a person or group of persons who exercise some but not all of the authority of a nonprofit corporation's governing body.[26] A designated body can also take on some powers of the membership, which is outside the boundaries of this discussion.[27] The designated body was introduced to give some more certainty in the structuring of board alternatives.[28] So, in addition to the transfer of liability from the board to the designated body found in earlier statutes, the MNCA 3d ed. provides that the rules governing the rights and duties of directors apply also to the members of designated bodies.[29] Likewise, charter provisions providing indemnification to or limitation of liability of directors also apply to designated body members.[30]

The MNCA 3d ed. also introduced some flexibility into the board alternatives, permitting the structure to be set out in either the articles of incorporation or the bylaws.[31] Otherwise it functions much like the general board alternative, but with these two important restrictions: that it does not take on all the powers of the board and that its membership does not comprise only directors. The logic behind these factors is nicely captured in the Official Comment to the

[23] KAN. STAT. ANN. § 17-6301(a) (2005); OKLA. STAT. tit. 18, §18-1027.A (2013).

[24] DEL. CODE ANN. tit. 8, § 141(j) (2019); *see also* KAN. STAT. ANN. § 17-6301(j) (2016); OKLA. STAT. tit. 18, §18-1027.G.1 (2013).

[25] *See* William M. Klimon, *Re-Membering the Nonprofit—Uses of Members in Corporate Governance*, TAX'N OF EXEMPTS, Nov./Dec. 2012, at 22, 27.

[26] MODEL NONPROFIT CORP. ACT, 3D ED. § 8.12(a) (AM. BAR ASS'N 2008).

[27] *See* MODEL NONPROFIT CORP. ACT, 3D ED. § 8.12(b) (AM. BAR ASS'N 2008).

[28] *See* MODEL NONPROFIT CORP. ACT, 3D ED. § 8.12 cmt. (AM. BAR ASS'N 2008).

[29] *See* MODEL NONPROFIT CORP. ACT, 3D ED. § 8.12(a)(1) (AM. BAR ASS'N 2008).

[30] *See* MODEL NONPROFIT CORP. ACT, 3D ED. § 8.12(a)(3) (AM. BAR ASS'N 2008).

[31] *See* MODEL NONPROFIT CORP. ACT 3D ED. § 8.12(a) (AM. BAR ASS'N 2008).

MNCA 3d ed.: "[i]f all the powers, authority, and functions of the board of directors are vested in a body, it is not a designated body but has instead the status of the board of directors . . . . If all the members of a group of individuals that have some of the powers, authority, and functions of the board of directors are directors . . . the group will be a committee of the board rather than a designated body."[32]

So far, the District of Columbia is the only jurisdiction that has adopted the MNCA 3d ed.,[33] but D.C.'s designated-body provisions have already proven useful. For example, in the case of trade association reincorporated in Washington, D.C., to take advantage of other provisions of the MNCA 3d ed., the association also wanted to empower its finance and audit committee with final authority over the selection of the external auditor and review of the audit report, while at the same time including nondirector financial experts on the committee. The finance and audit committee was constituted in the association's bylaws as a designated body and so is permitted to take on that board authority without a membership exclusively made up of directors.

The designated body has also been proposed as the solution to a common problem of disagreement in family foundations. Particularly in multi-generational family foundations, disputes between the generations, or between different branches of the family about the mission of the organization, and especially about its grantmaking programs, often lead to the breakup of these foundations. But instead of establishing multiple foundations at the cost of the loss of economies of scale with regard to administration and investment management—not to mention family harmony—each family branch can be given its own designated body to pursue its own grantmaking agenda, free from responsibility for the others. Even in cases where the family remains united, interests and expertise may diverge and a series of designated bodies structured to pursue specific subject-matter grantmaking can make room for philanthropically minded family members who will have full authority for grantmaking in their area of interest but who would not otherwise be interested in board service.

D. Member or Director Agreements

Yet another mechanism to designate some substitutes for the board is the member or director agreement. Following the lead of the Model Business Corporation Act's provision on shareholder agreements,[34] Virginia's nonprofit corporation law lacks the board-alternative provision but permits the members or, in the case of a nonmembership corporation, directors to adopt an agreement varying the governance of the corporation.[35] That provision is frequently employed to permit the use of directors' proxies. Director proxies are specifically listed in the statute as an appropriate subject for derogation from the general rule prohibiting proxies by authorizing them in a member or director agreement.[36] But more relevant for this discussion are

[32] MODEL NONPROFIT CORP. ACT 3D ED. § 8.12 cmt. (AM. BAR ASS'N 2008); *see also* MODEL NONPROFIT CORP. ACT 3D ED. § 1.40(11) (AM. BAR ASS'N 2008).

[33] *See* D.C. CODE §§ 29-401.01–29-414.04 (2011).

[34] *See* MODEL BUS. CORP. ACT § 7.32 (AM. BAR ASS'N 2008).

[35] *See* VA. CODE ANN. § 13.1-852.1 (2018).

[36] *See* VA. CODE ANN. § 13.1-852.1.A.3 (2018); *see also* THE AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS TENTATIVE DRAFT NO. 1 § 320 cmt. a(2) (2007) ("[I]t is impermissible for a

the provisions authorizing eliminating the board of directors and transferring the board's powers to any member, director, or other person.[37] The statute is consistent with the typical board-alternate statutes in relieving the disempowered board of liability and transferring those obligations to whomever is vested with governing authority.[38] Although the statute imposes some restrictions on the use of member or director agreements, it leaves Virginia nonprofit corporations a wide latitude to structure their own governance.[39]

So, for example, a small incorporated Baptist church could do away with a board of directors and split governing authority between the pastor and the bench of deacons. Neither the law concerning member and director agreements—no reported cases have been identified—nor their use seems particularly well developed in the nonprofit context. But the statutory permission provides another potentially useful tool in structuring nonprofit governance for a corporation formed in a state authorizing them.

III. Members

The role of members in most membership organizations is clear. In labor unions, trade associations, social clubs, and churches and other religious organizations with congregational polity, the organization exists for the sake of the members and generally the members vote for the leadership of the organization. Indeed, under the Revised Model Act, a member is defined simply as a person who has a right under the governing documents to vote for one or more directors.[40] But what about members in charities that are not member focused? What role do they have?

For the majority of charities, they have no role. BoardSource's 2015 survey of nonprofit governance practices found that seventy percent of charities surveyed had self-perpetuating boards, which is a good indication that those organizations lacked an active corporate membership.[41] Some scholars have argued that this "dismembering" of charitable nonprofits is a

board member of a corporate charity to delegate the responsibilities to be informed and to participate in deliberation. In the absence of statutory authorization, a board member may not send a substitute to the board meeting or grant another board member the power to vote in his or her place, with or without instruction. The substitute or proxy cannot count towards either the quorum or the vote, and the other board members breach their fiduciary duties if they give effect to the proxy.").

[37] *See* VA. CODE ANN. § 13.1-852.1.A.1, -852.1.A.5 (2018).

[38] *See* VA. CODE ANN. § 13.1-852.1.E (2018).

[39] For example: approval and amendment may be made only unanimously; an agreement is perpetual only if included in the corporation's governing documents or otherwise so stated; an agreement does not apply to or ceases to be effective for corporations with more than 300 members; and the existence of any of these agreements must be noted on membership certificates. *See generally* VA. CODE ANN. § 13.1-852.1 (2018).

[40] *See* REVISED MODEL NONPROFIT CORP. ACT § 1.40(21) (AM. BAR ASS'N 2008); *see also* DEL. CODE ANN. tit. 8, § 102(a)(4) (2019) ("If neither the certificate of incorporation nor the bylaws of a nonstock corporation state the conditions of membership, or other criteria for identifying members, the members of the corporation shall be deemed to be those entitled to vote for the election of the members of the governing body pursuant to the certificate of incorporation or bylaws of such corporation or otherwise until thereafter otherwise provided by the certificate of incorporation or the bylaws.").

[41] *See* BOARDSOURCE, LEADING WITH INTENT: A NATIONAL INDEX OF NONPROFIT BOARD PRACTICES 13 (2015), https://leadingwithintent.org/wp-content/uploads/2017/09/LWI2015-Report.pdf.

sign of weakening of democratic practice.[42] Setting aside those larger policy questions, I have previously argued that the disuse of nonprofit corporate membership ignores a useful mechanism by which to vary from board governance.[43]

Even in an organization that does not exist to serve its members, membership in the corporate-law sense can provide important powers to founders, supporters, and other constituencies and thus sometimes necessary balance to the governance of a nonprofit. Alternatively, some membership organizations are best served if the membership supplants the board and governs in its place.

A. Member Authority

As noted above, membership is essentially the right to vote for the governing body of a nonprofit corporation. That right grants a basic, if indirect authority over the governance of a nonprofit corporation but does not vary from board governance. But that basic authority can be expanded upon in two ways: by the members' statutory approval rights or by powers reserved to the members in the governing documents.[44]

Statutory approval rights. Many nonprofit corporation statutes require or permit the members' approval of fundamental transactions like amendment of the governing documents, merger or consolidation, sale of corporate assets other than in the regular course of business, and dissolution and winding up of the corporation.[45] While not substituting for board action, these powers permit the members to veto, or approve, the board's action in key matters and thus provide some variance from strict board governance. Generally, the members' exercise of their voting rights in these instances is not thought to impose any fiduciary duties, but in the case of a sole member exercising its voting rights there is authority, analogizing to the case of a controlling shareholder, for the imposition of a duty of loyalty to test whether the member's actions harm the corporation's charitable mission or assets or provide an improper personal benefit to the member.[46]

Reserved powers. In addition to the powers granted by statute to members, other powers can be reserved to the members as well. These often include the right to approve changes to the corporation's mission or purposes, nomination or appointment power with regard to the officers, and approval power over budgets, borrowing, and other significant financial matters. In other cases, it might involve exclusive rights over matters where authority is usually split between the board and the members, like changes to the governing documents or approval of other fundamental transactions.

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[42] *See* Dana Brakman Reiser, *Dismembering Civil Society: The Social Cost of Internally Undemocratic Nonprofits*, 82 OR. L. REV. 829, 831 (2003).

[43] *See* William M. Klimon, *Re-Membering the Nonprofit—Uses of Members in Corporate Governance*, TAX'N OF EXEMPTS, Nov./Dec. 2012, at 22.

[44] *See* Dana Brakman Reiser, *Decision-Makers Without Duties: Defining the Duties of Parent Corporations Acting as Sole Corporate Members in Nonprofit Health Care Systems*, 53 RUTGERS L. REV. 979, 991 (2001) [hereinafter *Decision-Makers*].

[45] *See* REVISED MODEL NONPROFIT CORP. ACT §§ 10.03(a)(2), 10.21(a)(2), 11.03(a)(2), 12.02(b)(2), 14.02(a)(2) (AM. BAR ASS'N 2008).

[46] *See* Oberly v. Kirby, 592 A.2d 445, 461–63 (Del. 1991).

How are powers reserved to the members? Some jurisdictions, like California, explicitly permit the governing documents to reserve some governance matters to the members.[47] Otherwise, the board-alternative statutes discussed above can provide similar flexibility. An equally important question is how are the members' rights structured? Is it a right to vote for or against an action proposed by the board or is it an independent right to take action in place of the board? It is critical that the drafting of the relevant governing document be precise on this question both so that the members or directors do not approve actions that are ultra vires, and so that liability for those actions is appropriately allocated. Members' voting on matters within their usual competence, like appointing or removing directors, or on matters recommended to them for approval by the board like a merger or sale of all the corporation's assets, ordinarily would not impose a duty on members or consequently give rise to liability for breach.[48] On the other hand, the members' assuming typical board powers brings with it the concomitant duties and liabilities.[49] The American Law Institute has recently addressed this question and has followed this basic principle in addressing the obligations of nonprofit corporate members:

A legal member of a charity . . . may be a fiduciary of that charity. For example, when a charity's membership acts as a board, as permitted in some states and in some circumstances, a member is a fiduciary to the same extent as a member of a board. In cases in which a member has the right to participate in the governance of a charity to the same degree as a member of a board, such member is a fiduciary. In other cases, a member may have extensive rights to control the affairs of the charity, although that member's rights are more limited than those of a member of the board; such member will have fiduciary duties commensurate with that member's powers.[50]

In practice, to what purpose can the reservation of corporate power to the members be put? The variations are almost endless. Imagine, for example, the founder of a large private foundation who wants to attract top talent to his board and so disclaims his right to elect directors and permits the board to be self-perpetuating, but, desiring to guarantee the integrity of his vision, he reserves the power during his life to remove any and all directors.

Or, in another case, the founders of an educational institution bring public notoriety and intellectual property to a new charity but seek funding from private foundations. The foundations will contribute but only with board representation and a governance structure that vests most powers in the board. In that case, the founders can take on the role of members and retain rights to nominate both directors and officers who are in turn appointed by the board, as well as over changes to the governing documents and other fundamental transactions.[51]

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[47] *See* CAL. CORP. CODE § 5210 (West 2019) ("Subject to the provisions of this part and any limitations in the articles or bylaws relating to action required to be approved by the members . . . , or by a majority of all members . . . , the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board.").

[48] *See* Reiser, *Decision-Makers*, 53 RUTGERS L. REV. at 983. *Cf.* Oberly v. Kirby, 592 A.2d at 462–63.

[49] *See* Lifespan Corp. v. New England Med. Ctr. Inc., 731 F. Supp. 2d 232 (D.R.I. 2010) (under Massachusetts law) (citing Health Alliance of Greater Cincinnati v. Christ Hosp., 2008 WL 4394738 (Ohio Ct. App. Sept. 30, 2008) and Reiser, *Decision-Makers*, 53 RUTGERS L. REV. 979); *see also* J. PATRICK WHALEY, ET AL., ADVISING CALIFORNIA NONPROFIT CORPORATIONS § 10-34 (3d ed. 2015).

[50] RESTATEMENT OF THE LAW, CHARITABLE NONPROFIT ORGANIZATIONS § 2.01 cmt. c (AM. LAW. INST., Tentative Draft No. 1, 2016).

[51] *See* William M. Klimon, *Re-Membering the Nonprofit—Uses of Members in Corporate Governance*, TAX'N

IV. Member Governance

Yet another means to restructure a nonprofit's governance authority by means of its membership is to be found in at least two states' statutes. The nonprofit corporation laws of the District of Columbia and Texas each lack the standard board-alternative provisions.[52] But they do permit member governance or member management of corporations formed under those laws.[53]

In essence, these two provisions are quite similar: they authorize member governance, if permitted in the governing documents (only the certificate in Texas's case), and they permit, but do not require, a board of very limited powers. There the statutes diverge. Texas's law says little else. D.C.'s statute prescribes a set of default governance rules that make it clear that the body of members should act like a board of directors—the prohibition of proxies, supermajority vote required to approve fundamental transactions, and the disallowance of a voting agreement—and a series of optional provisions to further specifically empower the members.[54]

While both statutes favor an affirmative election of member governance, they each recognize that member-governing status may be implicitly selected: in D.C., by having the members regularly meet and govern the organization and by having no board or one of only limited powers delegated either in the governing documents or by the members;[55] in Texas, by a church with congregational polity and member management, incorporated before 1994.[56]

The particularities of the two statutes also seem to indicate for whom these provisions might be most useful. Member governance seems ideal for a congregational church in Texas. While in D.C., the Coalition for Democratic Process, a group made up of associations of parliamentarians and fraternal associations, lobbied successfully for a more democratically based governance alternative to be included in the District's new nonprofit statute.[57] Member governance thus seems to be a relevant option for organizations whose members eschew a fiduciary board in favor of direct democracy or at least a more parliamentary system of governance—whether inspired by religious belief or democratic conviction.

V. Other Alternative Governance Mechanisms

A. Delegates

The close cousin of the corporate member is the delegate. "'Delegate' means a person

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OF EXEMPTS, Nov./Dec. 2012, at 27–28.

[52] *See* D.C. CODE § 29-406.01 (2019) (requiring board governance except for designated bodies); TEX. BUS. ORGS. CODE § 22.201 (West 2017).

[53] *See* D.C. CODE § 29-401.50(a) (2019); TEX. BUS. ORGS. CODE § 22.202 (West 2017).

[54] *See* D.C. CODE § 29-401.50(c)–(d) (2019).

[55] *See* D.C. CODE § 29-401.50(a)(2) (2019).

[56] *See* TEX. BUS. ORGS. CODE § 22.202(b) (West 2017).

[57] *See* Michael E. Malamut, *District of Columbia Enacts Member-Friendly Nonprofit Corporation Law, Part I*, NAT'L PARLIAMENTARIAN 11, 11–15 (2011).

elected or appointed to vote in a representative assembly for the election of directors or on other matters."[58] Delegates are a distinctly traditional governance mechanism, existing in some older organizations but most prominent only in political parties. Their use has waned with the decline of membership-based charities. But delegates remain a useful governance alternative because of one provision in the Revised Model Act (also found in the statutes of some other states, like New York): namely, under the governing documents delegates may have and may exercise some or all of the powers of the members.[59] So imagine coupling the delegates' usual role in appointing directors with some statutory-authorized or reserved member powers.

In a recent instance, a trade association was governed by a very large board of nearly fifty trustees, elected by the regional chapters of a national membership. The association also had a ten-member executive committee. This structure was problematic for several reasons. A governing board of that size was highly inefficient. It was also apt to overdelegate to the executive committee and thus come near to abdicating its responsibilities. In turn, the executive committee was improperly constituted by the trustees. Instead of the committee's comprising all trustees, trustees were a small minority of its members. Thus, governance instability was compounded by illegality. Everyone agreed the structure was broken. The initial solution was to convert the executive committee into the governing body. But the trustees were, for both good reasons and bad, reluctant to give up their authority. It was here that instituting the use of delegates proved very useful. So, in addition to converting the executive committee into the governing body, the board of trustees was converted into a body of delegates. That designation fit their role as having been selected by the chapters to appoint the executive committee, now reconstituted as the board. Still jealous of their authority, the trustees-now-delegates were able to exercise all the authority of the members, which included some newly reserved powers over some important governance matters. The authorization and empowering of delegates provided a neat solution to the governance dilemma, accomplished by repurposing a classical nonprofit governance structure.

B. Designators

As an alternative to the membership model, California nonprofit public benefit corporation law permits the appointment, removal, and replacement of directors by designators specified in the governing documents.[60] While the rights around appointing directors are key rights and, as noted above, are under some statutes the definition of nonprofit corporate membership, the California law makes it clear that designators are not members.[61] What value

[58] REVISED MODEL NONPROFIT CORP. ACT § 1.40(7) (AM. BAR ASS'N 2008).

[59] *See* REVISED MODEL NONPROFIT CORP. ACT § 6.40(a) (AM. BAR ASS'N 2008); N.Y. NOT-FOR-PROFIT CORP. LAW § 6.03(d) (McKinney 2019).

[60] *See* CAL. CORP. CODE §§ 5220(d) ("[A]ll or any portion of the directors authorized in the articles or bylaws of a corporation may hold office by virtue of designation or selection by a specified designator as provided by the articles or bylaws rather than by election."); 5222(f) ("If by the provisions of the articles or bylaws a designator is entitled to designate one or more directors, then . . . [u]nless otherwise provided in the articles or bylaws at the time of designation, any director so designated may be removed without cause by the designator of that director."); 5222(e)(1) (West 2019).

[61] *See* CAL. CORP. CODE § 5056(d)(2) (West 2019) ("A person is not a member by virtue of any of the following: … Any rights such person has to designate or select a director or directors.").

then does a designatorship have then that membership does not? The principal value is in reapportioning indirect governance authority without all of the formalities and rights of membership. By one count, members of California nonprofit corporations have the right to vote on nearly two dozen different matters, including amending the governing documents and approving fundamental transactions,[62] as well as other nonvoting rights, like the right to inspect corporate records and the membership.[63] None of those rights are automatically granted to designators. Thus, a corporation adopting a designatorship model retains a simpler governance structure.

On the other hand, the California statute permits other governance decisions to be subject to the approval of third parties, including approval of amendments to the articles of incorporation and bylaws and approval of mergers and sales of all or substantially all of the corporation's assets.[64] Indeed, any right of members can be conferred on nonmembers by specific provision in the governing documents.[65] While none of those provisions specifically refer to designators, certainly those powers could be joined with the rights of designators in any number of combinations.

But it was the simplicity of the designatorship model that made it appealing in a recent case. During the mid-2010s, the Internet Corporation for Assigned Names and Numbers (ICANN), a California nonprofit corporation that sets the technical standards for the worldwide internet, underwent a governance-reform process in order to identify a governance structure that would assure both ICANN's independence and accountability in preparation for the transfer of control over the Internet Assigned Numbers Authority, the technical heart of the internet, from the U.S. Commerce Department to ICANN itself.[66] In its role as the Address Supporting Organization and a constituent body of ICANN, as well as its position as an international association representing the five global regional internet registries, the Numbers Resource Organization (NRO) proposed during that debate that ICANN adopt a designatorship model that

[62] Under the California nonprofit public benefit corporation law, members have the right to vote for or in certain circumstances: CAL. CORP. CODE § 5220 (if the articles or bylaws provide that one or more directors be elected by the members of any class voting as a class), § 5222 (removing directors without cause), §§ 5224(a)–(b) (filling director vacancies caused by the removal of a director in certain cases), §§ 5150(a), 5813 (amending articles or bylaws that materially and adversely affect rights on voting or transfer), § 5151(b) (amending bylaws to change the number of directors), § 5220(a) (amending articles or bylaws extending director terms beyond that for which the director was elected or amending any bylaw increasing director terms), § 5220(d) (amending articles or bylaws that adopt, amend, or repeal provisions for designating directors), § 5512 (amending bylaws that increase the quorum for conducting membership meetings), § 5613(e) (amending articles or bylaws affecting proxy rights), § 5616(a) (amending articles or bylaws that change or eliminate cumulative voting provisions), § 5342 (amending articles or bylaws terminating membership rights), § 5813.5 (amending articles to change the corporation's status to that of a different type of nonprofit corporation, social purpose corporation, business corporation, or cooperative corporation), § 5911(a)(2) (selling, leasing, exchanging, transferring, or making other disposals of all or substantially all assets not in the usual and regular course of the corporation's activities), §§ 6012, 6015(a) (entering into and amending agreements of merger), §§ 6610, 6612(a) (making and revoking most kinds of voluntary elections to wind up and dissolve).

[63] *See* J. PATRICK WHALEY, ET AL., ADVISING CALIFORNIA NONPROFIT CORPORATIONS § 10-36 (3d ed. 2015).

[64] *See* CAL. CORP. CODE §§ 5132(c)(4), 5150(d), 6012, 5911(a)(2) (West 2019).

[65] *See* CAL. CORP. CODE § 5056(b) (West 2019) ("The articles or bylaws may confer some or all of the rights of a member, set forth in this part and in Parts 2 through 5 of this division, upon any person or persons who do not have any of the voting rights referred to in subdivision (a).")

[66] *See* Gillian Tett, *Why Icann and internet governance are no longer America's domain*, FINANCIAL TIMES, Jan. 28, 2016, https://www.ft.com/content/c9ec6e58-c41d-11e5-b3b1-7b2481276e45.

largely conformed to its previous, perhaps inadvertently chosen, model.[67] While that model was not ultimately adopted by ICANN, the NRO's advocacy of that model points to its potential appeal.

C. Specified Persons

Similar to the designator- and approval-rights provisions in the California nonprofit laws, the Revised Model Nonprofit Corporation Act includes terms that permit the articles of incorporation to require the approval of a specified person for amendments to the governing documents, mergers, and dissolution.[68] Again, like the designators, the specified-person provisions provide member-like powers to persons to whom, for whatever reason, the corporation is disinclined to grant full membership rights. As the statutes make clear, the approval rights of designated persons may function in tandem with membership voting—and approval—rights as well, so that the designated-person provisions can empower different stakeholders in the corporation without all the paraphernalia of membership.

For example, the mother superior of a Catholic religious order may be the designated person of a nonprofit corporation housing the operations of a hospital founded by the order, the control of which has been transferred to a lay board. The lay board may approve all day-to-day policies and supervise operations, but changes to the governing documents or changes of control over or dissolution of the hospital can be reserved to the head of the founding order.

The authority of specified persons has been eliminated from the MNCA 3d ed., presumably in favor of designated bodies and the divisibility of membership rights as tools for governance flexibility under that law.

D. Religious Authority

Speaking of the exercise of authority by religious superiors, both the Revised Model Act and the MNCA 3d ed. include provisions that privilege governance practices required by religious doctrine or canon law over the provisions of the nonprofit corporation law to the extent constitutionally required.[69] Presumably, these provisions would permit a church with a

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[67] *See* NRO, NRO STATEMENT ON IANA STEWARDSHIP TRANSITION AND ICANN ACCOUNTABILITY (Oct. 14, 2015), https://www.nro.net/nro-statement-on-iana-stewardship-transition-and-icann-accountability.

[68] *See* REVISED MODEL NONPROFIT CORP. ACT § 10.30 ("The articles may require an amendment to the articles or bylaws to be approved in writing by a specified person or persons other than the board."), § 11.03(a)(3) ("[A] plan of merger to be adopted must be approved . . . in writing by any person or persons whose approval is required by a provision of the articles authorized by section 10.30 for an amendment to the articles or bylaws."), § 14.02(a)(3) ("[D]issolution is authorized if it is approved . . . in writing by any person or persons whose approval is required by a provision of the articles authorized by section 10.30 for an amendment to the articles or bylaws.") (AM. BAR ASS'N 1987).

[69] *See* REVISED MODEL NONPROFIT CORP. ACT § 1.80 (AM. BAR ASS'N 1987) ("If religious doctrine governing the affairs of a religious corporation is inconsistent with the provisions of this Act on the same subject, the religious doctrine shall control to the extent required by the Constitution of the United States or the constitution of this state or both."); MODEL NONPROFIT CORP. ACT, 3D ED. § 1.60 (AM. BAR ASS'N 2008) ("If religious doctrine or canon law governing the affairs of a nonprofit corporation is inconsistent with the provisions of this [act] on the same subject,

congregational polity to empower its members even without membership-governance provisions in the relevant statute or allow a Baptist congregation to grant governance powers to its pastor or deacons in the face of, or perhaps even in place of, a board of trustees. Otherwise religious corporations may certainly make use of the alternative-governance schemes discussed above.

Finally, it should be noted that under the Model Acts the directors of religious corporations may rely on religious ministers in meeting their fiduciary duties in the same way that they may rely on their officers and professional advisors.[70]

VI. Conclusion

Advising nonprofit corporations on governance matters presents many challenges. The needs they seek to meet are often complex, their resources often limited, and their principals often volunteers. With the harsh realities of fundraising and staffing shortfalls, many view board governance as at best nuisance and at worst a hindrance to accomplishing their missions. Unfortunately, developments both old and new in the nonprofit corporation laws provide mechanisms to make governance more responsive to the circumstances of each nonprofit corporation. Though unknown to many, the tools of governance alternatives are there. It is up to the legal advisors and counsellors to make them known and to help put them to use.

the religious doctrine or canon law shall control to the extent required by the Constitution of the United States or the Constitution of [*name of state*] or both.").

[70] *See* REVISED MODEL NONPROFIT CORP. ACT § 8.30(b)(4) (AM. BAR ASS'N 1987) ("[A] director is entitled to rely on information, opinions, reports, or statements . . . if prepared or presented by . . . in the case of religious corporations, religious authorities and ministers, priests, rabbis or other persons whose position or duties in the religious organization the director believes justify reliance and confidence and whom the director believes to be reliable and competent in the matters presented."); MODEL NONPROFIT CORP. ACT, 3D ED. § 8.30(f)(4) (AM. BAR ASS'N 2008) ("A director may . . . on in the case of a corporation engaged in religious activities, religious authorities and ministers, priests, rabbis, imams, or other persons whose positions or duties the director reasonably believes justify reliance and confidence and whom the director believes to be reliable and competent in the matters presented.").