



## **Issues of Concern to the Nonprofit Sector**

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## **Tim Delaney**

Since 2008 Tim Delaney has channeled his diverse leadership experiences in law, government, and nonprofits to serve nonprofits and communities across America as President & CEO of the National Council of Nonprofits, a trusted resource and advocate for America's charitable nonprofits. Tim has served as a partner at a large law firm (where he helped impeach a Governor and led the firm's government relations practice), as his state's Solicitor General and then Chief Deputy Attorney General (where he led his state to win four out of four cases in the U.S. Supreme Court), and founder of the Center for Leadership, Ethics & Public Service (where he championed positive ethics and promoted civic engagement, working with – among thousands of others – several Attorney General Offices across the nation). Now as head of the Council of Nonprofits, connecting the nation's largest network of nonprofits with more than 25,000 nonprofit members, Tim helps nonprofits engage in critical policy issues, collaborate and exchange solutions, and achieve greater impact in their communities. Numerous organizations have formally recognized Tim's community and professional contributions, including the National Association of Attorneys General (Marvin Award for leadership and service, and co-recipient of the Best Brief Award for legal writing in the U.S. Supreme Court), LBJ School of Public Affairs (alumnus of the year), and the *NonProfit Times* (Power & Influence Top 50 nonprofit leaders).

## **National Council of Nonprofits**

The National Council of Nonprofits (Council of Nonprofits) is a trusted resource and advocate for America's charitable nonprofits. Through our powerful network of State Associations and 25,000-plus members – the nation's largest network of nonprofits – we serve as a central coordinator and mobilizer to help nonprofits achieve greater collective impact in local communities across the country. We identify emerging trends, share proven practices, and promote solutions that benefit charitable nonprofits and the communities they serve. Learn more at [CouncilofNonprofits.org](http://CouncilofNonprofits.org).

### **Our Nation's Greatest Challenge**

“The biggest problem facing America is not those issues that bombard us daily, from homelessness and failing schools to environmental devastation and the federal deficit. Underlying each is a deeper crisis. ...

*The crisis is that we as a people don't know how to come together to solve these problems.”*

–Francis Moore Lappé and Paul Martin DuBois,  
in *The Quickening of America*

## **Overarching Concern: Lack of Knowledge About Charitable Nonprofits**

### **A. Roles**

1. **Natural Partners.** Governments and charitable nonprofits serve the same constituents and same communities, so they are natural partners.
2. **Independent, Private Entities.** While governments and charitable nonprofits are natural partners, the Constitution protects charitable nonprofits as private, independent entities. See, e.g., *Dartmouth College v. Woodward* (1819) (rejecting a state government's attempt at legalistic alchemy to turn a private charitable entity into a public body under its control).
3. **Governments Rely on Nonprofits.** Governments – recognizing that nonprofits are more efficient and effective – rely heavily upon charitable nonprofits to deliver needed public services. Indeed, almost a third (32%) of the nonprofit sector's revenues comes from providing contracted services for governments. SOURCE: *The Nonprofit Sector in Brief: 2011*, at page 3 (National Center for Charitable Statistics).
4. **Public Advocates.** In addition to providing public services for the government, charitable nonprofits serve the public by providing a protected platform through which to deal with government. When creating our form of government, “*We the people of the United States*” – recognizing “*that ... governments are instituted among men, deriving their powers from the consent of the government*” – declared and protected in the First Amendment the rights of association and to petition the government. So we the people designed a mechanism – the fundamental right to associate together (through nonprofits) – to allow us to band together to lift our voices collectively so we can be heard to influence our government that we created.
5. **Nonpartisan.** Notwithstanding loose language in *Citizens United* and inaccurate headlines in newspapers, charitable nonprofits cannot contribute to, support, or oppose partisan political campaigns for or against individual candidates. See Section 501(c)(3). However, they may engage in nonpartisan efforts to engage citizens in exercising the right to vote.

### **B. Numbers**

1. **Size and Scope.** The **VAST MAJORITY** of charitable nonprofits are **small to midsized groups in local communities**:
  - a. 96.1% of charitable nonprofits have income of less than \$5 million. SOURCE: *The Nonprofit Sector in Brief: 2011*, Figure 1 at page 3 (National Center for Charitable Statistics).
  - b. 93.6% of charitable nonprofits have income of less than \$1 million. *Id.*
2. **Jobs.** Almost 10 percent of American workers are employed by the nonprofit sector. SOURCE: *The Nonprofit Almanac 2012 (forthcoming)* (The Urban Institute).

### **C. Trends**

1. **Fragility of the Nonprofit Sector:** 57% of nonprofits report having 3 months or less cash-on-hand. SOURCE: [2012 State of the Sector Survey](#), Nonprofit Finance Fund. This fragile condition presents a danger for Americans, because the nonprofit sector serves as America's social safety net to provide for people needing basic human services like food, shelter, and health care. Yet that community safety net is unraveling rapidly, straining to endure the additional weight dropping on it from the economy.
2. **Demand for Services Skyrocket.** In 2011 85% of nonprofits saw an increase in the demand for services. SOURCE: [2012 State of the Sector Survey](#), Nonprofit Finance Fund. This latest surge of increased demand is piled on top of three straight years of increased demand: 77% of nonprofits experienced an increase in demand in 2010; 71% experienced an increase in 2009; and 73% experienced an increase in 2008. *Id.*

## Government-Nonprofit Contracting<sup>1</sup>

**Government, at every level, provides few human service programs directly. Instead, government funds an array of services and programs, such as employment and training, health care, child care, foster care, food and nutrition programs, senior citizen centers, social services, and many others. ... In the social service field, policymakers routinely use the front-line service delivery capabilities of nonprofit organizations instead of developing new public bureaucracies.<sup>2</sup>**

The so-called “system” through which governments contract for the services on which they rely has evolved over decades through happenstance, improvisation, and frustration. Therefore, it is inappropriate to blame current government officials who inherited this broken system. The National Council of Nonprofits published two Special Reports noting the nonprofit sector’s growing challenges in meeting increasing demands with decreasing revenue, and in both we have reached out to our colleagues in government in respectful ways to highlight the issues rather than point a blaming finger. We will not attack government officials, but neither will we simply look away pretending that this growing crisis does not exist. To advance the will of the people by providing services to those in need when they need it, while ensuring value to taxpayers, it is time to heal the broken “system.”

### An Urgent Problem

For a variety of reasons, including to maximize efficiency and effectiveness, governments often contract with nonprofits to deliver particular services (such as food, shelter, and social services) to certain categories of people in need (such as children, the disabled, the sick, the elderly, or others). Yet recent government reports admit that governments have failed to honor their written agreements to pay nonprofits to deliver those government services:

- Illinois’ Comptroller released a 50-page list of more than 2,000 nonprofits that the state has failed to pay almost half a billion dollars – *and that’s for just the first half of this year*;
- New York’s Comptroller found that 92.5 percent of the state’s contracts with nonprofits were late and the state had delayed paying numerous nonprofits for multiple years;
- The U.S. Government Accountability Office found that – for a single federal program – some states pass all dollars to the nonprofits to pay for the services while other states take funds for themselves;
- The Congressional Research Service warned, “It appears that governments, especially state governments, may be contributing to the financial difficulties of nonprofit organizations, even to the point of not paying for contracted services.”

No one should accuse governments of acting with malice, intentionally trying to abuse the nonprofits delivering services and the individuals who are to receive services. Rather, over time this service-delivery “system” has evolved through happenstance, not design, and left nonprofit human service providers at the mercy of uncoordinated and often contradictory policies and practices of different

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<sup>1</sup> Excerpts from “[Costs, Complexification, and Crisis: Government’s Human Services Contracting “System” Hurts Everyone](#)” (Special Report, National Council of Nonprofits; October 7, 2010) (all internal citations removed here for space, but may be found in the original at [www.govtcontracting.org](http://www.govtcontracting.org)). See also [Human Service Nonprofits and Government Collaboration: Findings from the 2010 National Survey of Nonprofit Government Contracting and Grants](#) (Urban Institute; October 7, 2010) (results of the first national survey documenting the serious and widespread problems experienced by nonprofit human service providers under contract with governments at the local, state, and federal levels)(the Urban Institute data is broken out by state).

<sup>2</sup> Carol J. De Vita and Eric C. Twombly, “Nonprofits and Federalism,” chapter 7 in *Nonprofits & Government: Collaboration & Conflict*, edited by Elizabeth T. Boris and C. Eugene Steurle (2nd ed. 2003; Urban Institute) at 259 (emphasis added).

federal, state, and local government departments, agencies, and offices. The consequences of neglecting this broken contracting system are staggering in scope, undermining the reliability of a “system” that is supposed to deliver vital human services.

### **The Broken “System” Hurts Everyone in America**

The Urban Institute’s hard data now prove what has been known intuitively: that government contracting practices too often undercut delivery of the very services that governments are trying to provide through their contracts with nonprofits. The pain caused by the broken contracting “system” hurts more than the children, the elderly, the sick, the hungry, the homeless, and other individuals in need who cannot count on the programs to be there when the services are not funded, underfunded, or paid late. The new data show that governments using flawed contracting practices do so at the direct expense of nonprofit employees. Moreover, the misaligned policies and practice also harm taxpayers paying for the services, intrude on private philanthropy, divert funding away from nonprofits that do not have government contracts, and create a serious drag on the entire economy. Any policymakers expecting private philanthropy to fill the void are mistaken, because foundations and federated charities do not have enough assets to bridge the gap when governments do not honor their commitments. Statistically significant data show that reliable government contracting practices allow more services to be delivered to people in need – whereas negative contracting practices actually prevent needed services from being delivered.

### **Government’s Human Services Contracting “System” Is Woefully Broken**

This research project began following an increased number of reports about governments failing to pay nonprofits on a timely basis as required by the terms of validly binding contracts. It turns out, however, that the late payment problem is just one of five major problems that human service nonprofits are experiencing:

#### **1. Governments Failing to Pay the Full Costs**

When governments do not pay the full costs of the services, nonprofits must divert time and resources trying to make up the difference, thus limiting attention on delivery of services to those in need. Governments pay less than it actually costs to deliver the services by, among other ways, denying or severely restricting indirect/overhead/administrative costs that are real, using outdated or artificially low reimbursement rates, requiring matching costs, and imposing unfunded mandates.

#### **2. Governments Changing the Terms of Contracts Mid-Stream**

When governments change the terms of their written agreement mid-way through performance, it hurts the people the programs are designed to help, weakens our communities by undercutting trust in government, and destabilizes the organizations that governments and taxpayers rely on to fulfill their obligations. Even when governments reduce payments, they often still demand full performance by the nonprofit, which is expected to produce the same outcomes with less funding.

#### **3. Governments Paying Late**

Failure by governments to pay their bills when they are due amounts to an unreasonable taking – essentially forcing nonprofits to involuntarily bankroll the government services they provide. This practice increases the cost of providing services, shortchanges the people who are most in need, and forces nonprofits to borrow or raise funds to fulfill the governments’ legal obligations.

#### **4. Complexification of Contracting Processes**

Bidding burdens, needless red tape, and other government contracting policies and bidding practices routinely impose avoidable inefficiencies on nonprofits, thereby creating waste, eroding productivity by diverting staff time from serving individuals, and reducing the amount of services

actually delivered to individuals and communities in need. Many of these complexities also add costs to taxpayers.

### **5. Complexification of Reporting Requirements**

Reporting and oversight processes that once made sense can run amuck when needlessly duplicated, resulting in higher costs to taxpayers without adding value and diverting resources from delivery of needed services. Everyone needs to recognize that spending certain dollars chasing possible pennies is not cost effective for taxpayers.

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### **Negative Trends Continue in 2012.**

- Federal government fails to provide full cost of services 79% of the time. SOURCE: 2012 State of the Sector Survey, [Government Funding Charts](#), Nonprofit Finance Fund.
- State/local governments fail to provide full cost of services 75% of the time. *Id.*
- When governments fail to honor their written obligations to pay on time, nonprofits have to compensate in a variety of ways, including
  - Reducing services to the public
  - Downsizing staff
  - Delaying payments to their vendors
  - Incurring higher costs through a line of credit (when they can get one). *Id.*

**Top Ten Nonprofit Policy Issues:  
2011 State and Local Policy Review**  
*(originally published early 2012)*

To anticipate the public policy issues that nonprofits will face at the state and local levels in 2012, it is useful to review the significant policy challenges and opportunities that nonprofits faced in 2011. The following brief analysis shares a sampling of insights that the National Council of Nonprofits gained through its work with the collective network of [State Associations](#) of nonprofits and other nonprofit organizations active at state and local levels.

**1. Shifting Fiscal Obligations:** State and local policymakers continued in 2011 to [offload their public responsibilities](#) by slashing funding for and sometimes even eliminating essential programs, expecting that others – nonprofits and foundations – would fill the voids and pick up the slack. [Apparently without knowledge](#) of the severe strains already burdening charitable nonprofits, governors from [Washington State](#) to [Michigan](#) and [South Carolina](#) – across the country and across the political spectrum – openly turned to nonprofits to assume responsibility for programs that their governments were unwilling to provide. In [Arizona](#), [California](#), and [New Jersey](#), to name only a few, public officials abandoned operations for parks, public museums, and community development as a way to save money, at least for the state. And states actually sought to divert philanthropic dollars from existing nonprofit activities to government programs by creating their own nonprofits, such as the [Kansas](#) Arts Foundation that replaced the state-run Kansas Arts Commission.

**2. Boston PILOT Scheme:** Boston's elected officials tried to evade 200 years of Massachusetts law that prohibits cities from imposing property taxes on tax-exempt charities by asserting that they were merely seeking "voluntary" [payments in lieu of taxes \(PILOTs\)](#). But instead of sending letters requesting donations of a truly voluntary nature, the city – with all the subtlety of a scarlet letter – sent simulated property tax bills to the 45 largest nonprofit landowners demanding "voluntary" payments of up to 25 percent of an imaginary tax liability. While many targeted institutions yielded, several others refused to concede to the [coercive extra-legal demands](#), noting they give benefits to the community every day.

**3. A Tale of Three Cities:** Nothing reveals the challenges tax-exempt nonprofits face at the local level better than their experiences dealing with policymakers who were so desperate for money that they seized at any justification for grabbing charities' funds without resort to consistent principles. As noted, Boston, without authority of law, demanded payments in lieu of taxes from larger nonprofits. In [Chicago](#), the Mayor declared that while he regarded taxing nonprofits a non-starter, he nonetheless intended to require nonprofits to start paying certain fees to the city. [New Orleans'](#) Mayor rejected PILOTs and fees as unworkable and inappropriate, but called on the Louisiana Legislature to allow the city to directly tax the property of charitable nonprofits. These three Mayors proffered three contradictory rationalizations for filling their budget holes. Their shared similarity was the practical effect each scheme would have on local communities: diverting already committed and vitally needed resources away from nonprofit missions – money contributed to deliver programs and services for individuals and local communities.

**4. Respecting Tax Exemption:** However, in the overwhelming number of cases in 2011, the majority of policymakers successfully fought back short-sighted efforts to take resources away from nonprofit missions through sales taxes, property taxes, and other new taxing mechanisms. For instance, new taxes were proposed yet rejected in [Georgia](#), [Rhode Island](#), and [Washington, DC](#); the general excise tax exemption was threatened but preserved in [Hawaii](#); and the [New Orleans](#) property tax campaign

was ultimately withdrawn. In all these situations, nonprofit organizations stepped forward with extensive advocacy efforts that demonstrated the positive impact of their work and the negative consequences of the legislative proposals to divert funds that had been donated to charities. Indeed, the [North Dakota](#) Legislature actually extended tax exemptions to enable more nonprofits in the state to focus on their mission-related work.

**5. Collaborating for the Public Good:** When government officials sat down as partners with nonprofit leaders – as occurred in 2011 in [Connecticut](#), [Illinois](#), [Maryland](#), [North Carolina](#), and [Texas](#) – they developed lasting solutions that will improve services for the people who need them most, ensure that taxpayers receive full value for the programs they are funding, and strengthen communities. Likewise, a [New York](#) working group and a [New Jersey](#) Red-Tape Review Commission began looking into needed reforms to streamline the interactions between government, nonprofits, and others. In each of these states, representatives of government agencies that contract with nonprofit human service providers collaborated with nonprofit contractors to identify problems and solutions to broken contracting policies, procedures, and practices. Much of 2012 will be devoted to implementing the recommendations of the state task forces and providing examples to the rest of the country of collaborations that can solve problems in ways that serve everyone’s best interests.

**6. Meaningful Seats at the Table:** [Connecticut](#)’s Governor became the first in the nation to establish a cabinet-level official to serve as liaison with nonprofits providing services to its citizens on behalf of the government. The Governor also created a permanent [Cabinet on Nonprofit Health and Human Service](#) to examine and enhance the effectiveness, transparency, and efficiency of partnerships between the state and nonprofit health and human service providers. Most recently, [Iowa](#) created the Governor’s Nonprofit Project to “encourage changes in policy and procedure that create efficiencies in the interactions between state governments and the nonprofits that provide invaluable services to their citizens.” In these states and elsewhere, solution-oriented nonprofits are being invited to the policymaking table to resolve the most pressing social problems of the day.

**7. Reasonable Regulation:** Michigan updated its *Charitable Organizations and Solicitations Act* to streamline regulations and clarify when and how an organization must file with the Attorney General’s Office. [New Jersey](#) raised the threshold for mandatory audits under the fundraising statute from \$250,000 to \$500,000, saving each smaller organization an average of \$7,000 annually, and collectively saving the state’s nonprofits more than \$10 million that can now be devoted to program work rather than more paperwork.

**8. Losing Their Incentives:** After years of progress, taxpayers in some states saw a loss of government incentive for their donations to the work of charitable nonprofits. In [Hawai’i](#), the Legislature imposed caps on the amount that upper-income taxpayers can claim in itemized deductions. [Michigan](#) repealed long-standing tax credits to encourage donations to food banks, education, and community foundations in order to pay for tax cuts for businesses. In [Montana](#), however, a similar effort to end the state’s Charitable Endowment Tax Credit failed in mid-March after lawmakers learned that the tax credit was in fact a powerful tool for fostering both economic and community development.

**9. Mandatory Volunteerism:** Legislators in multiple states proposed bills promoting a policy that can only be called “mandatory volunteerism”: requiring individuals to volunteer with a nonprofit for a certain number of hours per week to be eligible for certain public programs. Bills were introduced to impose “volunteerism” mandates before individuals could receive unemployment benefits in [Florida](#),

[Georgia](#), and [North Carolina](#), and Medicaid services in [Utah](#). None of the bill sponsors has asked whether nonprofits want or can even handle an onslaught of tens of thousands of individuals who would be forced to show up *to do time* rather than *to do good*.

**10. Nonprofits Are Not “Quasi-“ Anything:** Under well-established American law, charitable nonprofits are private corporations. Yet in 2011, too many policymakers had difficulty understanding that, *as in the case of for-profit businesses*, receipt of public funding through arms-length transactions involving contracts or grants does not convert private independent organizations into governmental instrumentalities. Lawmakers in [Florida](#), [Massachusetts](#), [Nevada](#), and [New Hampshire](#) sought to impose ineffective and burdensome mandates, restrictions, and other reporting burdens on nonprofit contractors on the gross misunderstanding that private nonprofit organizations are somehow “quasi-governmental,” “government-sponsored,” or “publicly supported” entities.

### **Food for Thought**

*“Help me never to judge a man until  
I have walked a mile in his moccasins.”*  
--Native American proverb

Consider this true story. As a former Chief Deputy AG, I was visiting with a colleague Chief Deputy in another state who with prideful glee handed me a set of extremely rigorous draft regulations of nonprofits they had developed. Seeing how overbearing the proposals were, I asked how his wife was doing. He looked at me with puzzlement, then he shared that she was having challenges at work because of lack of funding. Knowing she worked for a nonprofit, I then asked if she had a budget large enough to hire the lawyers and accountants needed to comply with the draft regulations. This seasoned veteran then blanched, because he suddenly realized that the draft regulations would hurt not only “bad actors” but also his spouse.