

Hobbes and Corporate Ontology: The Essence of the Nonprofit

I. Introduction

There is a rich history of debate surrounding the essence of the corporation. The traditional object of this debate has been the business corporation. By contrast, little has been written about the essence of the nonprofit corporation. We are shockingly ignorant of it. We know that, in the United States at least, nonprofits receive preferential tax treatment from state and municipal governments as well as the federal government. We know that nonprofits are forbidden from distributing profits to shareholders. We know that they must pursue a certain set of enumerated purposes. But these facts represent knowledge merely about the nonprofit's behavior and its treatment, not its essence.

We are ignorant of the nonprofit's essence despite its enormous importance in our society. At the risk of regurgitating the tired list of nonprofit statistics, let me briefly emphasize the importance of the nonprofit sector to the United States. 1.5 million nonprofits are registered with the Internal Revenue Service (Urban Institute 2020). The nonprofit sector contributes over one trillion dollars annually to the U.S. economy. Nonprofits employ approximately ten percent of the U.S. workforce (Salamon and Newhouse 2019). Last year, charitable contributions in the United States reached nearly 500 billion dollars (Indiana University Lilly Family School of Philanthropy 2022). Nonprofits are entrusted with the custody of our most important values, pursuing humanitarian, artistic, religious, and educational goals. The nonprofit sector, especially in the United States, constitutes a substantial share of our economic, political, and social lives. Yet if someone were to ask what a nonprofit *is*, you might find yourself at a loss for words, as the existing discourse on nonprofits fails to answer that question.

My aim in this paper is to establish an ontological account of the nonprofit corporation. Such an account should explain how nonprofits are “created” or “incorporated.” It should explain the relationship between the nonprofit and the classes of people typically associated with it — donors, volunteers, employees, and the like. Finally, an ontological account of the nonprofit should be able to explain how the corporation, an incorporeal concept, materially interacts with the world. I use the term, “corporate ontology,” to refer to what many today call “corporate personhood.” Whereas personhood evokes moral and juridical concepts of rights and obligations, I use ontology to denote a descriptive inquiry into the corporation's essence. For simplicity, this paper examines only the ontological essence of charitable nonprofits in the United States (i.e.,

nonprofits that pursue charitable purposes as defined in 26 U.S.C. § 501(c)(3)). Because Hobbes' theory of representation applies universally to corporations, however, charitable nonprofits in the United States are indicative of non-charitable nonprofits as well as nonprofits globally.

This paper proposes that a Hobbesian theory of representation helpfully illuminates the nonprofit's essence. Using Thomas Hobbes' contractual approach to representation, I argue that donors, volunteers, employees, board members, and the state collectively contract to authorize the nonprofit, which is in turn represented by its employees and board members. In Section II.A, I explain why prevailing theories on the corporation — advanced with for-profit corporations in mind — do not map well onto today's nonprofits. Section II.B overviews and defends Hobbes' contractual, interpretive theory of representation, proposing it as a framework through which we might understand the nonprofit. Importantly, I am not proposing an interpretation of Hobbes' actual beliefs about the nonprofit but am using his theory of representation, which continues to influence contemporary ideas about representation, to construct an ontological theory of the nonprofit. Section III applies the Hobbesian theory of representation to the nonprofit. It is divided into three subsections, each of which discusses a different aspect of the representational process. Section III.A identifies the authorship of the nonprofit, III.B describes the substance of that authorization, and III.C explains how the nonprofit ultimately transforms that authorization into action through representation. Finally, Section IV discusses implications of this ontological theory for future scholarship.

II. Background

A. Prevailing Theories of Corporate Ontology

Existing theories of the corporation cannot adequately explain the nonprofit's essence. Three views of the corporation have historically dominated the debate regarding corporate ontology: concession theory, real entity theory, and aggregate theory (Claassen 2021). Each of these has focused on the business corporation as the object of its study. Concession theorists argue that the corporate form is a fiction created by law (Millon 1990). Under this theory, the corporation is a product of the state. Real entity and aggregate theorists, by contrast, argue that the existence of a corporation predates its legal recognition and is primarily the product of private initiative. The fundamental rift between real entity and aggregate theory turns on whether the corporation is an entity separate from its members. Real entity theory states that the corporation is distinct from its

members whereas aggregate theory states that the corporate form is merely a convenient representation for the legal rights of its shareholders.

Concession theory was the predominant view of corporate ontology in the early United States. During this period, corporate charters were only granted through discrete acts of state legislatures (Millon 1990). The corporate charter sharply limited the activities that a business corporation could pursue, and charters were typically issued to corporations pursuing a public function (Barkan 2012). The degree of control states wielded in establishing and regulating corporations during this time substantiated the idea that corporations were a governmental construction. The widespread adoption of general incorporation statutes in the late nineteenth century, allowing firms to incorporate for any lawful purpose, eventually eroded support for concession theory. These statutes made legal incorporation “a mere administrative formality” and coincided with a nationwide trend towards commercial deregulation, weakening the relationship between the state and the corporations within it (Claassen 2021, 105n10).

These changes brought about, and were partially the product of, a growing preference for real entity theory, which saw corporations as the result of private initiative and market forces (Millon 1990). Because of its position that corporations were entities separate from their shareholders, real entity theory justified a view of corporate ontology in which the corporation had duties and obligations to persons other than its shareholders. Emerging in the early twentieth century, aggregate theory sought to establish the primacy of the shareholder by rebutting real entity theory. Aggregate theorists argued that the corporate form was just a vessel through which a corporation’s employees realized the property interests of its shareholders. Today, a version of this theory — stating that the corporation is a “nexus of contracts” — has taken hold of the legal academy, particularly within its law and economics corners (Millon 1990, 229). On this view, the corporation is an exact sum of the contractual relationships that occur within it. Notably, these contracts are no different than those that occur within the broader marketplace and are not limited to just those negotiated by its shareholders.

Which of these theories, if any, best explains the ontological essence of the nonprofit? At first glance, concession theory seems to most closely align with our legal treatment of nonprofits. Modern nonprofit charters resemble the limited for-profit charters of the early United States. Like for-profits during that period, nonprofit corporations can only incorporate to pursue a limited set of public purposes, including, *inter alia*, the relief of poverty, advancement of

education, pursuit of religion, and promotion of health (American Law Institute 2021; hereinafter ALI). Just as state legislatures had to specially authorize for-profit charters in the early years of the United States, the Internal Revenue Service specially approves 501(c)(3) applications today. Nonprofits are not only closely regulated at the state and federal levels, but they are also affirmatively supported by these governments. Nonprofits receive exemption from state and federal taxes, and the federal government provides tax deductions to charitable donors. Some theorists have argued persuasively that we should view these tax benefits as public subsidies (*see, e.g.*, Reich 2018). Under this view, the state is deeply entangled with nonprofits, as it subsidizes their existence. Taken at face value, this evidence suggests that nonprofits are artificial creations of the state.

A closer look, however, problematizes the fit between concession theory and our contemporary treatment of nonprofit organizations. Applications for federal tax-exemption are rarely denied; a study of 501(c)(3) applications showed that the IRS only rejects 1–2% of applications annually (Reich, Dorn, and Sutton 2009). While nonprofits are limited in the purposes they can pursue, their purposes are often at odds with the state's interests. Religious organizations, for instance, are generally considered to be charitable. If these organizations were the product of state authorization, that would create a substantial conflict with the First Amendment's Establishment Clause, which prohibits the state from sponsoring institutions of worship. Likewise, the nonprofit sector is filled with organizations expressly designed to dissent against governmental practice. Mississippi, a state that has banned abortions, is hardly incentivized to establish The Pink House Fund, a Mississippi nonprofit that assists persons seeking out-of-state abortions. Nor does the mere concession of tax benefits show public authorship. The federal government provides taxpayers a tax credit for children they claim as dependents. This benefit, however, does not transform nuclear families into artificial creations of the state. Tax benefits like these show state approval of private activity but are not indicia that the state has single handedly authorized the activity. The nonprofit, therefore, is at least partially the product of private initiative, ruling out concession theory as the best explanation of its essence.

While acknowledging that the nonprofit is the product of private initiative, real entity theory does not tell us more about what the nonprofit *is* or why it acts. At its core, all that real entity theory tells us is that the corporation is an entity separate from its members and that its

membership group includes private actors. It does not explain how the corporation becomes an entity, its relationship to its members, or how it interacts with the world. Aggregate theory, in its traditional form, does not adequately explain the nonprofit's essence because of its fixation on shareholders, which nonprofits definitionally lack (*see* Hansmann 1980). The “nexus of contracts” variation on aggregate theory also seems inapposite to nonprofits, as nonprofits are not, at least facially, inundated with the number of contracts that surround a for-profit corporation. Nonprofits, unlike businesses, engage in many relationships that are considered non-contractual for legal purposes — for example, those with its donors, volunteers, board members, and beneficiaries.

Very little scholarship has been produced that attempts to modify prevailing theories on the business corporation to fit the nonprofit. Recognizing the limited application of these business theories to the nonprofit, Eric Chaffee (2015) advances a new theory specifically tailored to the nonprofit, which he refers to as “collaboration theory.” Collaboration theory asserts that the nonprofit is fundamentally a shared project between the federal government, state government, and the public, as the existence of the nonprofit is only made possible through the collective efforts of these groups. This theory, while possibly amenable to a Hobbesian view on the nonprofit, fails to give a full account of its essence. First, it concludes that the state and public are responsible for the nonprofit's existence but is silent on exactly how they create and sustain it. Second, it does not define what it means by “the public.” Indeed, the federal government and state government are arguably embodiments of the public, in which case collaboration theory merely asserts that the public creates the nonprofit. Surely, the public cannot refer to every U.S. constituent, as most people would disavow and advocate for the abolition of certain nonprofits that depart from their belief system. Furthermore, the mere assertion that the nonprofit is authorized by everyone tells us nothing in particular about any given nonprofit. Finally, collaboration theory tells us nothing about how the nonprofit comes to act on the world.

Hobbes' theory of representation fills in the gaps left by concession theory, real entity theory, aggregate theory, and collaboration theory. It is a universal theory of representation, so it applies equally to the incorporation of a state, the incorporation of a business, and the incorporation of a nonprofit. Further, it provides details on who creates a corporation, how it is created, its purpose and limitations, and how the corporation, as an incorporeal entity, interacts with the material world.

B. Hobbes' Theory of Corporate Ontology

Hobbes' representational account offers two insights that prevailing theories of corporate ontology lack. Unlike the business theories outlined above, Hobbes' theory of representation applies universally to all corporations. It therefore allows us to apply Hobbes' insights on the commonwealth to the nonprofit. Second, Hobbes details how a corporation's constituents authorize the *corpus* and explains the subsequent representation of their will.

In *Leviathan*, Hobbes (2017, chap. 16) provides a systematic account of how people can come to be "personate[d]," or represented. According to Hobbes, there are two basic classes of persons in political society — natural persons and artificial persons. Natural persons are authors of their own words and actions. The words and actions of artificial persons, by contrast, are owned by another. The artificial person represents an author, a natural person. An artificial person comes to represent the words and actions of a natural person by covenanting (i.e., forming a contract) with them. This covenant limits the scope of the artificial person's representation. A representative can only legitimately speak on behalf of a natural person where the natural person has authorized them to do so. A representative, for example, cannot lawfully enter into a binding covenant with another person where the author has not given them the authority to do so. Such a covenant would be illegitimate because it was the result of a breach in contract between the author and their representative.

This representational theory serves as the foundation for Hobbes' account of the social contract between constituents of a state. Constituents contract with one another to authorize a commonwealth and a sovereign representative, whose primary purpose is to keep the peace (Hobbes 2017, chap. 18). Constituents concede some of their natural rights as a term of the social contract, but they receive security in exchange for this concession. In a state of nature, individuals can never be secure in their persons or property because they are constantly at-risk of being dominated by another (Chap. 13). Likewise, private cooperation is impossible because there is no external force securing covenants. The sovereign remedies these problems by establishing juridical rights and obligations, including the right to contract, which are backed by state violence.

The commonwealth is not a party to the social contract but rather a product of it (*see* Hobbes 2017, chap. 18). The commonwealth is a public corporation and, like other kinds of corporations (e.g., hospitals and churches), it is a "Thing[] Inanimate" (113). Inanimate things

cannot be authors because, much like “Children, Fooles, and Mad-men,” they lack the capacity for reason. As such, the commonwealth is incapable of participating in the contract that establishes it. Instead, the commonwealth mediates the representational relationship between author and representative. It is authorized by natural persons and represented by an artificial person or set of artificial persons. The commonwealth unifies the will of its constituents while the sovereign — in the form of a monarch, assembly, or other political body — represents it (Chap. 16; Barkan 2013, 21). Just as the commonwealth is incapable of authorship, it is also incapable of acting on its own. The social contract that establishes the commonwealth, therefore, includes a term that provides for its representation. Notably, the sovereign represents the commonwealth, not its individual constituents (Runciman 2009). Like the sovereign, a nonprofit’s representatives interpret and implement the unified will of its constituents rather than the individualized will of any given constituent. This is not to say that all of a nonprofit’s constituents enjoy equal representation. Unequal representation, however, stems from the content of the collective contract rather than the existence of multiple, differential contracts.

Hobbes viewed the commonwealth as the ultimate, public corporation. He analogizes the commonwealth to for-profit corporations, famously describing the latter as “lesser Commonwealths in the bowels of a greater . . . ” (2017, 230). Hobbes likewise compares the governance process of a state or municipality to that of private corporations, namely universities and churches (160). Indeed, the similarity of private corporations to public commonwealths concerned Hobbes because they, as mini-states within the state, presented a threat to the sovereign’s supremacy (Barkan 2013).

Hobbes is often characterized as a concession theorist by his contemporary interpreters (*see, e.g.*, Turner 2016), and this interpretation certainly fits Hobbes’ general wariness towards private corporations (Boyd 2001). Noting that private “bodies politique” (i.e., corporations) cannot enjoy the absolute power that the sovereign possesses, Hobbes (2017, 156) writes, “[t]he bounds of that Power, which is given to the Representative of a Bodie Politique, are to be taken notice of, from two things. One is their Writ, or Letters from the Sovereign: the other is the Law of the Common-wealth.” On its face, this suggests that private corporations are created by the state, either through an affirmative grant from the sovereign or the general incorporation process of the commonwealth. As Rutger Claassen (2021) — who has interpreted Hobbes as a “neo-concession” theorist — notes, however, this passage merely recommends limitations for the

sovereign to place on private corporations. Importantly, it does not tell us how private corporations come to exist in the first place. Hobbes, therefore, may have believed at an ontological level that the corporation is a product of private initiative while simultaneously advocating for strict commercial regulation. If Hobbes did commit himself to concession theory, he would be contradicting his central insight that commonwealths mirror private corporations “on a large scale” (Turner 2016, 16). Such an inconsistency can be explained by Hobbes’ political opposition to powerful, private corporations, which may have impaired his assessment of them. Ultimately, my argument does not turn on Hobbes’ alignment, or lack thereof, with concession theory because his theory of representation can be applied to private corporations without reference to his other views on their role in a political society.

The question remains why we should accept Hobbes’ account of representation rather than an alternative account. To borrow Philip Pettit’s (2009) terminology, why should we accept Hobbes’ “interpretive” account of representation? Pettit offers a helpful taxonomy of the three traditional views on political representation: representatives either “stand for” their representees (the indicative account), “act for” them (directed account), or “speak for” them (interpretive account) (65). All three accounts assume that representees authorize their representatives, so what separates them is the substance of that authorization. Under the indicative account, representatives function as proxies for those they represent. Each representative embodies the beliefs, interests, and circumstances of the subgroup that authorizes them. Once authorized, the representative is not required to respond to the interests of their representees, as it is presumed that the beliefs of the representative are naturally aligned with those of their representees. By contrast, Pettit categorizes the directed and interpretive accounts as “responsive” views of political representation. On the directed account, representatives are “voiceboxes” for their representees (72). They merely mimic the interests of their representatives, which they continually monitor. On the interpretive account, representatives function as trustees for their representees, acting for the benefit of the *corpus* rather than merely parroting their representees’ individual interests.

Hobbes’ representational theory is widely, and correctly, viewed as an interpretive account (*see, e.g.*, Verstein 2012). The indicative account clearly does not fit Hobbes’ views on representation. Hobbes never says that the artificial person must embody the traits of their author, and his monarchical sympathies are in tension with the indicative account, as a single

representative is ill-suited to embody all the traits of its representees. Hobbes' account, by contrast, is generally compatible with a responsive view on representation, as he states that the artificial person's actions must *correspond* with the terms of their authorizing covenant (2017, chap. 16). At first glance, his representational theory seems to comport with the directed account of representation, as some artificial persons "have their words and actions *Owned* by those whom they represent" (112), suggesting that the artificial person is merely a voicebox for their representee. But having your words and actions owned by another does not mean that your words and actions are identical to those of your representees. If a representative merely parroted their representees, they would be unable to unify their divergent interests in one person, which is what is required of Hobbes' sovereign. The covenant between author and representative does not commandeer the representative but merely sets out the limits of their representation within which the representative is entrusted to interpret their representee's interests (Pitkin 1967, 20). Hobbes describes his sovereign as a trustee for the public, "*trusted with . . . the procuration of the safety of the people*" (231; emphasis modified). The interpretive account, therefore, most closely parallels Hobbes' views on representation.

Relative to the indicative and directed accounts of representation, Hobbes' representational theory best explains the corporation's ontological essence. While all the accounts discussed in the preceding paragraph acknowledge the authorization aspect of representation, Hobbes' account provides a simple, persuasive, and comprehensive explanation of how persons come to be represented: they sign a contract. In this explicit or implicit contract, authors designate a purpose, or mandate, for their representation and delineate its scope. The sovereign's mandate is to establish a stable political environment by enforcing covenants between private persons, and, at least according to Hobbes, it enjoys unlimited means towards achieving this end (Pitkin 1967, 30). The real estate agent's mandate is to find a suitable property for the aspiring homeowner but is limited by a certain price range, geography, size, and other details set by their client. The contractual approach appeals to our intuition because it rests on the commonplace assumption that people act for their own benefit. Corporations do not appear arbitrarily but are the product of human will and bargaining. As Hobbes' historicization of the commonwealth shows, corporations form when individuals seek to secure goods that they cannot easily attain through individual means. Not only is this account simple and persuasive, but it also

enables us to analyze the behavior of corporations; when seeking to understand why corporations behave in the way they do, we need look no further than the ends of their representees.

Additionally, the interpretive account of representation is generally superior to the indicative and directed accounts because the latter do not adequately explain the real-world behavior of corporations. While nonprofits and governmental bodies often seek to employ individuals who embody the traits of the communities they serve, this kind of indicative representation is largely aspirational. In the for-profit context, employees of large corporations certainly do not embody their representees insofar as we assume that shareholders constitute a for-profit corporation's constituency, or at least a large portion of it. A Walmart cashier generally does not embody the circumstances of the Walton Family. Likewise, the directed account of representation suffers from internal inconsistency. It is assumed that, under the directed account, a representative would adhere to the majority preference of the group it represents (Pettit, 2009). Relying on his theory of the "discursive dilemma" as well as Kornhauser and Sager's doctrinal paradox, Pettit (75) explains that this assumption creates a paradox within the directed account:

Suppose that A, B, and C want to establish a majority collective view on three issues: whether p; whether q; and whether p&q. They might be judges in a court who have to decide on whether a plaintiff in tort did harm (p), had a duty of care (q) and so was liable for damages (p&q) (Kornhauser and Sager 1993). It is perfectly possible for A, B, and C each to have a consistent set of views on these issues and yet for the group to be forced by majority voting into endorsing an inconsistent set.

That will happen, for example, if the votes that the individuals submit are as follows. A and B vote that p, C votes against; B and C vote that q, A votes against; and so only B votes that p&q. A and C vote that not-p&q, thereby giving a majority verdict that p, that q, and that not-p&q.

As this paradox shows, a functioning representative must be afforded latitude to interpret the interests of its representees as opposed to parroting their preferences on an issue-by-issue basis.

III. Applying a Hobbesian Theory of Representation to the Nonprofit

Hobbes' theory of representation illuminates the nonprofit's essence and behavior. It explains who authorizes the nonprofit, how they authorize it, the limits of that authorization, and the transformation of that authorization into action via representation. Below, Section III.A uses the principle of consideration to identify the nonprofit's authorship and Section III.B discusses the substance of that authorization. Finally, Section III.C explains how a nonprofit's representatives realize the will of its constituents.

A. The Nonprofit's Authorship

The question at the core of a corporation's essence is its authorship. On the Hobbesian view, collective authorship is established in the form of a contract. A nonprofit's authors, therefore, will be engaged in a contract related to the organization. The concept of a nonprofit generally evokes notions of gift-giving rather than contract-bargaining, but a closer examination reveals the deeply contractual nature of nonprofits.

At its core, a contract requires mutual assent and consideration. (ALI 1981). The Hobbesian social contract is implicit, as most political societies lack explicit documentation of the contract to which their constituents have assented. While the U.S. Constitution mirrors a contract in its enumeration of terms (*see* Michelman 2003), it lacks evidence of mutual assent from all the relevant constituents that most explicit contracts would contain. The contracts underlying private corporations — both for-profit and nonprofit — are similarly implicit. While nonprofits have explicit articles of incorporation and governance documents, these fail to capture the entire universe of contracts that make up a corporation, as they merely represent agreements between the nonprofit's board and the state. The implicit nature of the social contract underlying the nonprofit makes it difficult to find material evidence of mutual assent. Evidence of mutual consideration, by contrast, provides a useful heuristic for determining corporate authorship.

The basic assumption behind the concept of consideration is that people enter into contracts to obtain something of value from another. The element of consideration distinguishes a contract from a gift, another kind of binding legal agreement. In a gift agreement, a giver offers something of value to the receiver with no expectation of something in return (ALI 2003, § 6.1). A contractual agreement, by contrast, only becomes binding where both parties offer something of value to one another. Not only must the consideration be of value, but it also must be the thing that motivated the other party to enter into the agreement (ALI 1981). A promise or performance

qualifies as consideration when the party has limited their freedom of action in some way (*Hamer v. Sidway* 1891). For example, I have established consideration in my contract with you where I promise to forgo smoking cigarettes in exchange for \$100. For consideration purposes, it is irrelevant that I would benefit from forgoing smoking cigarettes even without your offer of \$100 because my promise to you still limits the range of possible actions that I can take. To identify a nonprofit's authorship, one must search for similar indications of consideration.

A nonprofit's founder is a natural candidate for authorship. They are colloquially and legally credited with "creating" and "incorporating" the nonprofit. Founders certainly offer things of value to the nonprofit, as they commit their labor, their wealth, and their network to it. While founders constitute a portion of a nonprofit's authorship group, however, they are rarely its sole authors. A corporation is potentially immortal, outliving any given generation (Claassen 2021). Founders, by contrast, are mortal, and many are serial entrepreneurs who move to a new project after stabilizing the previous one. If founders are the sole authors of a nonprofit, how do we explain a nonprofit's continued activity after the founder has passed away or moved to a new organization? We are left with, in Claassen's words, a "zombie collective" (114). A corporation's authorization is not a discrete, instantaneous moment but a continuous act that is constantly shifting hands. Who, then, helps sustain the nonprofit after its founder's death or departure?

A nonprofit's donors supply value in the form of monetary or in-kind contributions. Likewise, its volunteers supply value in the form of uncompensated labor. One's donation of time or labor to a nonprofit is commonly viewed as gratuitous. Indeed, the U.S. tax code treats charitable contributions as a kind of gift (i.e., as performed without any expectation of return) (26 U.S.C. § 170). Donors and volunteers, however, do receive consideration in exchange for their contributions. In addition to the "warm glow" they experience as a result of their contribution (Andreoni 1990), donors and volunteers receive an assurance that the nonprofit will use their contribution to further its charitable purpose — what I refer to hereinafter as a "charitable assurance."

When a charitable nonprofit seeks to incorporate, it must file its articles of incorporation with the state. These articles include a statement of the organization's purpose that aligns with the state's definition of charity. To retain state charitable status, the nonprofit's activities must align with its stated purpose. To attain federal 501(c)(3) status, the nonprofit must be "organized

and operated *exclusively*” for its stated charitable purpose, restricting the allocation of its resources (26 U.S. Code § 501(c)(3)). The contributions that a nonprofit collects are held in trust for its charitable purpose (ALI 2021, § 4.01). When a charity dissolves, its remaining assets are not distributed to its members but conveyed to a different organization that shares its purpose (§ 3.03). When a donor or volunteer gives their money or time to a nonprofit, therefore, they receive an assurance that their contribution will be directed towards the organization’s charitable aim. The state attorney general secures this assurance by investigating and prosecuting nonprofits that divert resources from their stated purpose (§ 4.01). In this way, the nonprofit provides consideration when it accepts a charitable contribution because it commits itself to using that contribution towards its charitable end, thereby limiting its freedom of action. Much like the party who promises to forgo cigarettes, the nonprofit promises to forgo activities other than those that advance its purpose. As such, a contract is formed between the nonprofit and its volunteers and donors.

Nonprofits obviously contract with their employees. A nonprofit employee provides their labor in exchange for wages. The nonprofit provides wages in exchange for its representation. Is it possible, however, that a nonprofit’s employees also make up a portion of its authorship group? The mere fact that an employee represents the nonprofit does not automatically disqualify the nonprofit from representing them. The commonwealth, for instance, draws from the multitude for its representation. A political official is simultaneously party to the social contract that creates the commonwealth and representative of the commonwealth. In fact, viewing employees as partial authors to the nonprofit helps explain the pay gap that they commonly accept as a condition of their career. Those who work in management and professional roles for nonprofit organizations, which constitutes over half of nonprofit employees, are undercompensated relative to their for-profit counterparts (Bishow and Monaco 2016). Perhaps, however, nonprofit employees are compensated in a different fashion than their for-profit counterparts. In addition to receiving wages in consideration for their labor, employees also receive the same assurance that donors and volunteers receive — that their contribution of labor will go towards the nonprofit’s stated purpose. Some nonprofit professionals refer to this type of consideration as “psychic income” (*see, e.g.,* Peter Manzo 2004). Nonprofit employees who are underpaid, then, possibly make up the difference through the receipt of authorial shares.

If a nonprofit's employees are often authors of its actions, then its board members are almost certainly as well. Like employees, board members enact the will of the nonprofit by making important governance decisions — for example, employment decisions and long-term planning — and overseeing the operations of the nonprofit. Unlike employees, nonprofits rarely compensate board members for their labor. Moreover, board members are generally expected to donate or fundraise some annual amount as a condition of their service. For this reason, a board member's role resembles that of an employee, a volunteer, and a donor. In exchange for their voluntary contributions of money and labor, the board member receives a charitable assurance.

Another possible author of a nonprofit's activity is the state. While the state is not best understood as a nonprofit's sole author for reasons given above, it is likely a partial author and even a majority author in some cases. At both the state and federal level, governmental agencies will fund the work of nonprofits through contracts and grants. Agencies will often outsource the provision of social services to nonprofits that bid for it. Agencies will also fund nonprofits through grants that do not include an explicit *quid pro quo*. The implicit *quid pro quo* in such an agreement, however, is the same that a private donor receives in exchange for their contribution, a charitable assurance. In the case of contracting and grantmaking, the nonprofit functions as an agent of the state, providing goods and services that are publicly desired. Governmental funding serves as the primary source of monetary support for many nonprofits, especially social service organizations. For example, Compass Family Services (2019, Part VIII), a nonprofit supporting unhoused families in San Francisco, received the majority of its 2018 financial support from governmental contributions. As the commonwealth is not capable of forming authorial intent, state authorization of nonprofits actually stems from its constituents and is enacted by its representative(s).

Beneficiaries are not authors of the nonprofit because they typically do not contract with it for their representation. This is notable given the popular discourse among nonprofit thought leaders who argue that nonprofits “speak for” the communities they serve (Borysiewicz 2021). Beneficiaries are often the recipients of gratuitous services rather than participants in a mutual contract. Food banks, for instance, do not ordinarily charge their beneficiaries for the food that they provide. Many charitable services, unlike charitable contributions, are gratuitous. Indeed, in some cases, it would be impossible for the nonprofit to contract with its beneficiaries. An animal shelter, for example, cannot contract with the animals it rescues presumably because animals are

incapable of consenting to a contract. The same holds true for a nonprofit that works with infants (*see* ALI 1981, § 12). At least in some cases, therefore, a nonprofit's authorship group entirely excludes the population it serves.

Certain types of nonprofit organizations contract with their beneficiaries as a feature of their charitable model. Nonprofit hospitals and educational institutions exemplify this model. Hospitals contract with their patients by providing medical services in exchange for payment. Likewise, universities contract with their students by providing educational services in exchange for tuition. One might quibble with the idea that patients or students — at least those who pay full tuition — are best understood as beneficiaries; you could alternatively classify them as customers. In any case, the contract between the patient and the hospital or the student and the university is not a representative one, or at least is not of the same kind as that between a donor and nonprofit. A patient is not contracting with the hospital in exchange for a charitable assurance, nor is a student. Even though a contract has been struck between the nonprofit and the beneficiary, it does not include representation as one of its terms.

Admittedly, beneficiaries often provide things of value to the nonprofit that serves them. A beneficiary might share their lived experience to help the organization improve its programs, might volunteer, donate, and even work for the nonprofit. When a beneficiary volunteers with or donates to a nonprofit, they contract with it for their representation just as any other volunteer or donor does. Depending on the nature of their employment situation, the beneficiary may also be considered an author of the nonprofit. When this occurs, however, the beneficiary has ceased to be just a beneficiary and becomes a beneficiary and a donor or a beneficiary and a volunteer. Beneficiaries *qua* beneficiaries, on the other hand, are not represented by the organization. It is only when they take some additional step — e.g., donating — that they become represented.

Many organizations try to counteract a nonprofit's non-representation of its beneficiaries by including members of their community on their staff or board. In other words, they seek to substitute their beneficiaries' lack of interpretive representation with indicative representation, as the employees or board members with lived experience partially mirror the interests and beliefs of their beneficiaries. Even if you are compelled by the indicative account of representation, you should be wary of equating these inclusionary practices with genuine representation. Like Hobbes' interpretative account, the indicative account presumes that representatives are authorized by their representees. In the generic case, however, employees and board members

with lived experience have not been authorized by a nonprofit's beneficiaries because beneficiaries have no authorial stake in the corporation. This is not to say that the inclusion of lived experience within a nonprofit's staff or board is meaningless. Of course, nonprofits who have a sense for the interests of their beneficiaries will serve that community better than those that do not. But better service is not the same as genuine representation.

The fact that a Hobbesian theory of representation excludes beneficiaries from a nonprofit's authorship group might demonstrate the weakness of Hobbes' theory. Why require a contract to be formed between representers and represented? Why is consent, on its own, insufficient? Furthermore, why require consent at all? Perhaps it is sufficient that a representative acts on behalf of their representee, even if they are technically unauthorized to do so. A simple requirement of consent, however, does not suddenly transform beneficiaries into authors, as nonprofits are not required to and often do not secure the consent of their beneficiaries before acting on their behalf (Borysiewicz 2021). In cases where nonprofits do obtain consent from their beneficiaries, their representation would be offered as a gift. Meanwhile, nonprofits would continue to form representational contracts with donors, volunteers, board members, employees, and the state. As I outline below, those who contribute substantial value to the nonprofit enjoy a larger share of the authorial pie. Therefore, the representation of major stakeholders would still dwarf the gratuitous representation of beneficiaries, rendering the latter *de minimis*. Finally, we should prefer a theory of representation that requires authorization over one that omits it because the process of authorization allows representees to set limits on their representation, thereby ensuring a more accurate interpretation of their interests.

Importantly, not all constituents hold equal shares in the nonprofit's authorization. In his telling of the social contract, Hobbes makes no reference to shares because — at least in the perfectly egalitarian commonwealth — everyone enjoys the same percentage of authorial control. For the authorization of the commonwealth, every person offers the same consideration, conceding some of their natural rights to the commonwealth. The authors of a private corporation, by contrast, offer different amounts of value. A for-profit firm, for example, distributes shares based on the size of a shareholder's investment. A shareholder who invests a million dollars will enjoy a larger number of shares than one who invests a thousand. While nonprofits are definitionally prohibited from distributing financial shares, they often distribute shares of a different kind — shares of influence. Like the business shareholder who invests a

million dollars, the major donor who contributes a million dollars annually enjoys greater influence over the nonprofit's operations than the modest donor who contributes ten dollars annually. Nonprofits take more care to steward their largest donors because they want to encourage their continued support, and this stewardship often includes asking the donor for their input on the nonprofit's operations. Likewise, major donors sometimes leverage the size of their gifts to place conditions on its implementation. For example, John Olin famously — or infamously depending on your political priors — induced elite law schools across the country to establish law and economics programs by distributing hundreds of millions of dollars in charitable contributions (Miller and Zinsmeister). Rest assured that my ten dollar donation would not persuade any law school to establish a similar program in law and political theory. The disproportionate number of shares held by major donors helps explain the commonplace phenomenon of mission creep, where nonprofits will alter their activities and even their missions to reflect the whims of their donors (Jonker and Meehan 2008).

The concept of authorial shares is not limited to donors but extends to all individuals who contract with the nonprofit for their representation. While precise calculation may be impossible, the number of shares that each person holds is roughly proportional to the value they provide to the nonprofit. A donor who contributes one million dollars annually holds many more shares than the volunteer who contributes ten hours of their labor annually. An employee who contributes fifty thousand dollars worth of labor annually does not enjoy authorial shares proportional to fifty thousand dollars; rather their authorial share is proportional to the difference between the fair market value of their labor and their wages. Therefore, an employee who contributes fifty thousand dollars worth of labor but receives forty thousand dollars in wages might enjoy a lower number of shares than a board member who contributes twenty thousand dollars in labor and monetary contributions but receives no compensation for doing so. Ostensibly, those who enjoy a larger number of shares have greater control in setting the parameters of the nonprofit's representation.

To clarify, I am not making any normative claims about the uneven distribution of authorial shares. I am merely identifying and explaining their empirical existence. Many donors contribute large sums to nonprofits without conditions while others leverage the influence conferred on them by their magnanimity. Certainly, the United States has a troubled history of wealthy individuals who leverage their philanthropy to advance unscrupulous ends (*see, e.g.,*

Keefe 2021). Importantly, the possession of authorial shares is not equivalent to their use. A donor may possess a large number of shares without ever leveraging them to influence the nonprofit. Those who enjoy a large number of authorial shares, however, always retain the capacity for influencing the nonprofit even where they refrain from doing so.

B. The Substance of the Authorization

Thus far, all that has been established is that various classes of individuals — donors, volunteers, employees, board members, and the public — contract with one another to establish and maintain a nonprofit. Besides identifying the unequal distribution of authorial shares, not much has been said about the substance of this collective authorization. Indeed, one might question whether these contractual relationships even qualify as representational. What if these contracts are transactional in a more mundane sense? For example, a charitable contribution to Compass Family Services might be no more representational than the purchasing of coffee for a friend. Both involve transactions that are intended to benefit another. Why does one of these contracts result in representation where the other does not?

Obviously, not all transactions are of a representational kind. When I buy a hot dog from a hawker at a baseball game, I am not authorizing them to represent me in any way. I am merely bargaining for a hot dog, nothing more. Likewise, when I purchase coffee from my local café, I am not bargaining for my representation. Even if I purchased coffee from that café daily and become known as a regular there, I would not view the café's activity as an extension of myself. If the café became embroiled in some public controversy — for example, it became known that the store was using beans harvested through forced labor — I might feel some amount of shame and would likely stop patronizing the store. The shame that I experience, however, would stem from my association with the store and perhaps the fact that I have enabled it through my patronage. Nevertheless, I have not authorized the café's unscrupulous behavior.

A representational contract, at least under the interpretive account, is distinct from other kinds of transactions because the representative is entrusted with substantial decision-making authority. The purchase of a drip coffee does not authorize the barista to make substantial decisions on one's behalf. They have some minor discretion regarding how long to brew the coffee, how high to fill a cup, and other choices of that kind, but this hardly compares with the level of decision-making one entrusts to a real estate agent or attorney. As the public's representative, Hobbes' sovereign is entrusted to *interpret* their rights and interests, which

includes making life-and-death decisions on their behalf (Pitkin 1967, 31). Likewise, a nonprofit is entrusted to interpret the charitable interests of its authors, therein acting as their representative.

Of course, the interpretive responsibility of a representative has limitations. Representees assign a purpose to the representation, which functions as a general limit, and often specify particular limitations within that purpose. The purpose behind the political representation of the multitude, according to Hobbes, is to secure private covenants, persons, and property. Hobbes' sovereign, unlike private corporations, enjoys unlimited means to attain this end (Pitkin, 1967, 30). The purpose underlying the representative relationship between the nonprofit and its members is the organization's charitable mission, as stated in its organizing documents or expressed by its activities. The nonprofit is limited in how it pursues this end. As a general matter, the nonprofit cannot engage in more than an insubstantial amount of commercial activity (26 C.F.R. § 1.501(c)(3)–1(b)), nor can the nonprofit behave in ways that are illegal or contrary-to-fundamental-public-policy (ALI 2021, § 1.01). Likewise, a charitable contribution always comes with the unspoken specification that it must be directed towards the nonprofit's charitable ends. At an individual level, donors will often place conditions on their contributions that further limit their application towards the nonprofit's charitable ends (§ 4.02).

Nonetheless, a nonprofit's members entrust the organization with significant interpretive responsibility. Although charitable contributions — especially those directed at particular programs — are always conditional, nonprofits usually have significant latitude in their implementation. A donor may leverage their authorial shares to significantly narrow the range of options a nonprofit can choose from, but this does not render the relationship non-representational. The real estate agent does not cease to become a representative merely because their client provides them with a limited price range.

Having established that the *sine qua non* of a representative relationship is interpretive responsibility, it is important to identify the interpretation's source. In other words, what exactly is being interpreted? In a commonwealth, the sovereign interprets the juridical rights of its subjects, namely the right to be secure in their contracts, property, and persons. A real estate agent interprets the commercial and personal interests of their client, striving to minimize cost while maximizing comfort and overall utility. A nonprofit interprets the charitable interests of its constituents. The nonprofit may have a very specific sense of your charitable interests depending

on your involvement with the organization. Even if the only interaction between you and a nonprofit is a one-time, small donation, however, the organization still has a general sense of your charitable interests as expressed through your donation. If you donate to Compass Family Services, for example, the nonprofit knows, at a bare minimum, that you care about improving the circumstances of unhoused populations.

In addition to the general limitations imposed on nonprofits, the sum of its constituents' charitable interests serves as a specific limit on the range of interpretative possibilities that a nonprofit enjoys. A nonprofit acts illegitimately, therefore, when it diverts its resources to a purpose other than that which its constituents entertained, even where that new purpose remains charitable. Its behavior in this case is *ultra vires* (Pitkin 1967, 20), breaching the limitations bargained for by its constituents. A nonprofit supporting unhoused families would be met with public outrage as well as legal action if it suddenly began using the resources entrusted to it to collect high art. A nonprofit's lawful behavior is guided by the general and specific limitations set on it by its constituents. These limits are stipulated in the contract that a constituent assents to when they offer a nonprofit their labor or wealth. Within the bounds of these limitations, the nonprofit enjoys interpretive responsibilities — namely to implement the resources entrusted to it in a way that will advance its constituents' charitable interests.

C. Representation: Transforming Authorization into Action

Throughout this paper, I have described the nonprofit as acting in a variety of ways, forming contracts with its constituents, interpreting their charitable interests, and implementing their contributions. The notion of an active nonprofit seems to conflict with my earlier statement that the nonprofit, as a type of corporation, is an inanimate thing. Indeed, without some form of assistance, inanimate things are incapable of acting (Runciman 2009, 23). Hence, the corporation relies on representatives to enact the will of its constituents. Just as the sovereign enacts the will of the commonwealth, a nonprofit's board and staff enact the will of the nonprofit (or, more precisely, the will of its constituents).

A corporation is a product of the contracts formed between its authors. Notably, it is not party to the contract itself. When a prospective constituent of the nonprofit gives their money or labor to it, therefore, they do not sign a contract with the nonprofit but with the collective it already represents. This collective contract includes a stipulation for the nonprofit's representation. Presumably, this stipulation includes general terms about the nonprofit's

governance structure, but it might also include specific terms about employee characteristics. For example, the contract authorizing an institution of religious worship might specify that its ministers belong to the faith that the institution proselytizes. Once contracted to represent the nonprofit, employees and board members enact the will of its constituents, interpreting their charitable interests in the process. Their contract binds them to the representational limitations defined by the nonprofit's constituents. When a nonprofit's representatives exceed these limitations, they act illegitimately, as they have breached their contract with the nonprofit. As noted earlier, a board member or employee may, and often does, represent the nonprofit while simultaneously belonging to its authorship group. Ultimately, a nonprofit's board and employees are the vessel through which the unified will of its constituents is expressed.

IV. Conclusion

A Hobbesian theory of representation allows us to accurately and comprehensively describe a nonprofit's essence and behavior. This theory supplants prevailing views of the corporation, which do not fit the empirical realities of the nonprofit. On the Hobbesian account, a corporation is authorized by a collective of private persons to actualize goals that are less attainable through individual endeavor. The corporation serves to unify the will of its diverse group of authors, and this unified will is actualized through the efforts of the corporation's representatives. The principle of consideration, which is necessary to any contract, enables us to identify a corporation's authorship group, which in the nonprofit context notably excludes beneficiaries. Donors, volunteers, employees, board members, and the state contract with one another to establish a nonprofit that interprets their charitable interests, and this interpretive responsibility is limited by terms stipulated in the authorizing contract. A nonprofit's employees and board members perform the interpretation of their constituents' interests as well as the implementation of their charitable programs since the nonprofit itself is incapable of acting.

While this paper focuses strictly on the ontological essence of the nonprofit, it establishes a foundation for further scholarship. Empirical scholarship on the roles of various stakeholders (e.g., donors) in the creation and operation of the nonprofit can test this theory's fit with nonprofits' actual behavior. For normative scholarship, on the other hand, it is helpful to know exactly what nonprofits are and why they behave as they do. For example, insofar as it is a political good for vulnerable communities to have a voice in defining the social services they receive, perhaps the state is a better provider than the nonprofit. Beneficiaries are often excluded

from the group that authorizes the nonprofit, whereas they are generally included in the group that authorizes the commonwealth (at least in the ideal). Likewise, this paper sheds new light on the federal charitable contribution deduction. While we conventionally view it as rewarding altruistic gifts, the deduction actually incentivizes a particular kind of contractual behavior. Because charitable contributions signify mutually beneficial relationships between donors and nonprofits, mere reference to the contribution's unselfish quality is insufficient to justify the deduction (*see, e.g.*, Commission on Private Philanthropy and Public Needs 1975, 128). Finally, this paper should alarm advocates of the view that nonprofits are "schools of democracy" (*e.g.*, Dodge and Ospina 2015). By virtue of their unequal distribution of authorial shares, nonprofits more closely resemble plutocracies than democracies. Wealthy donors can and do purchase an inordinate level of influence within the organizations to which they contribute. Given this, one has good reason to doubt whether nonprofits are truly up to the task of maintaining and advancing democratic principles (*see generally* Giridharadas 2018).

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