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The Distinction between Public, Nonprofit, and For-Profit: Revisiting the "Core Legal" Approach

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ABSTRACT

In studying the characteristics that determine the public, nonprofit, and/or for-profit nature of organizations, public administration scholarship has elaborated upon the "dimensional" approach (e.g., Bozeman, Barry. 2007. *Public values and public interest: Counterbalancing economic individualism.* Washington, DC: Georgetown Univ. Press), to the point where it is now furnishing a rich body of theoretical and empirical material on organizational identity. Yet as Bozeman says, there was always another "complementary" approach to the same set of issues, namely the "core legal" approach which, as Bozeman, Barry, and Stuart Bretschneider (1994. The 'publicness puzzle' in organization theory: A test of alternative explanations of differences between public and private organizations. *Journal of Public Administration Research and Theory* 4:197–223) say, is "equally important." This article revisits the legal approach, showing that it is as complex and theoretically motivated in its own way as the dimensional approach, and setting out its basic structure. Only once the core legal approach is seen as a more equal partner will it be possible to pursue Bozeman and Bretschneider's call for "studies employing both core and dimensional models," in which the two are fully complementary, and the capacities of each are available for conceptualizing the identity of organizations—both when such identity is settled and when it is contested—and for predicting the consequences for organizational behavior that follow.

INTRODUCTION

Over the past 20 years, public administration scholars have produced a large body of fruitful research on the distinction between public and private—both for-profit and nonprofit (Bovaird 2004, 222)—enterprises. Although individual studies each contribute their own insights, and differences of perspective and emphasis have emerged, by and large that scholarship (which, following common usage (Bozeman 2007), will here be called the "dimensional school") displays four characteristics.

To begin with, the organizational and economic criteria that have emerged to evaluate the relative publicness/privateness of an organization are both (1) multiple and (2) clear. They are multiple because any given study, let alone the body of dimensional scholarship

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that has emerged as a whole, offers an array of such criteria: for example, political and economic authority measured in various ways (e.g., due process, accountability, welfare provision), ownership, funding, or social control (Antonsen and Jørgensen 1997; Benn and Gaus 1983; Bozeman 1987; Ghobadian et al. 2004; Kettl 1993; Lan and Rainey 1992; Nutt and Backoff 1993; Perry and Rainey 1988; Rainey 1996; see also Milward and Provan 2000 and Koppell 2003). And these criteria are clear because they are relatively easily operationalized. Each lends itself to some form of measurement, hence to an empirical way of classifying an organization along the public-private dimension.

On the basis of these criteria, dimensional-school scholars are then able to classify any given organization on an (3) individual basis by virtue of the (4) "hybridity" or "blurriness" of its public and private characteristics (Antonsen and Jørgensen 1997, 337; Skelcher 2005, 348). To say that dimensional-school scholars classify organizations individually means that in their findings, any given organization can, by itself, be deemed to display a particular overall degree of "publicness," without reference to any other particular organization with which it may be linked. This is not to say that an organization's environment is irrelevant—many dimensional-school criteria involve a weighing of the kinds of external authorities or stakeholders that impinge on the organization (Emmert and Crow 1987)—only that ultimately, organizations are classified singly, and not in virtue of any particular dyadic relationship, in their degree of publicness. Finally, organizations, unless they are extreme cases, emerge as "blurred"—as "hybrids" (Ghobadian et al. 2004, 277)—exhibiting more or less publicness because, taken as a whole, any given organization will display characteristics that fall at different points on each criterion's public-private spectrum. "The dimensional approach assumes the difference between public and private is a matter of degree," Antonsen and Jørgensen (1997, 228) say, "and multidimensional."

In sum, the criteria that have emerged from the last two or more decades of dimensional-school scholarship, diverse though they are, can as a general statement be described as clear (i.e., operational) and multiple, with the organizations concerned being classified individually and usually emerging as nuanced hybrids along the public-private spectrum. As comprehensive as this scholarship has been, though, there remains an important direction that has not been pursued.

While noting that "the dimensional approach focuses on sources and extent of political and economic authority," Bozeman (2007, 8) distinguishes it from a "'core' approach to comparing public and private organizations [that] focuses on sector and legal status of organizations," noting that "[b]oth are important in explaining behaviors and outcomes . . .." Yet although both are important, as Bozeman says, public administration scholars have concentrated their research on the dimensional approach. By examining legal discourse over organizational identity—as manifested in court decisions and legal commentary over whether any given organization is public, nonprofit, or for-profit—this article offers a framework for applying the core legal approach that suggests how it might be fleshed out in a fashion that more fully complements the dimensional approach.

Such cases and commentary embrace the following kinds of questions, all of which require participants to find criteria on which to characterize an organization as public, nonprofit, or for-profit in contested situations: Is a proposed retail shopping space in a public municipal convention center an integral part of that larger public project, such that the state can legitimately expropriate property for it, or is it better understood as a private for-profit venture? Is a university bookstore a nonprofit enterprise, eligible for an income-tax exemption, or is it

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better understood as a taxable for-profit business just like any other book shop? Is a nonprofit such as the Red Cross just a nonprofit, or does the state's support of it through tax expenditures convert it into a public entity, a state actor, such that it must abide by constitutional constraints?

Given the depth and breadth of the legal discourse surrounding such issues, the heavy focus in public administration scholarship on the dimensional approach, and the observation (Bozeman and Bretschneider 1994, 218) that "neither a dimensional nor a core explanation alone is likely to prove as powerful as both together," this is an appropriate juncture at which to examine these bodies of legal discourse. In the remainder of this Introduction, I set out in general terms the ways in which—for each of the four characteristics identified above with the dimensional school—legal discourse over the public/nonprofit/for-profit borders differs almost symmetrically, displaying a complementary degree of complexity and theoretical structure. I then substantiate and flesh this out, in the body of the article, by taking a deeper look at legal discourse and conclude by suggesting hypotheses for further research as to how the legal approach might complement the dimensional approach as a predictor of organizational behavior.

Organizations in Legal Discourse: Relational, Not Individual; Distinct, Not Blurry

First, in legal discourse, the organizations involved are conceived more relationally than individually. Much legal discourse concerns itself with the controversial status of one organization in light of its relationship not with "many external stakeholders" (Antonsen and Jørgensen 1997, 339, 353), as does the dimensional approach, but with a single other, whose status is not at issue. So, for example, the question is whether the shopping center is a public or a for-profit enterprise *in light of its relationship* with a clearly public municipal convention center or whether the bookstore is a nonprofit or for-profit entity *in light of its relationship* with the clearly nonprofit university.

Second, the adversarial requirements of legal cases demand that each party, on either side of a given case, argue that the organization falls wholly on one side or the other of whatever border is being contested: public/for-profit, for-profit/nonprofit, or public/nonprofit. Those who, for example, believe that the state should be able to expropriate property for a shopping center want to identify that center as an unambiguously public enterprise. Those who, by contrast, want to bar the taking will claim that it is an undilutedly for-profit enterprise. Judges, for their part, are likewise compelled to find that the entity is definitively for-profit or nonprofit or public, as the case may be. Thus, whereas the dimensional approach ultimately focuses on organizations conceived individually, while classifying many such organizations as ultimately blurred hybrids of public, for-profit and/or nonprofit features, legal discourse classifies organizations relationally, while ultimately forcing parties and judges to do so in a black-or-white way: as public, for-profit, or nonprofit.

Criteria in Legal Discourse: One, Not Many; Contested, Not Clear

Third, whereas in dimensional scholarship, several organizational and economic criteria have been shown to be relevant in assessing the publicness of an organization, legal discourse pervasively hinges on only one organizational and one economic criterion. And of the two, this article will argue, ultimately only one—the economic-based framing—is explanatory: that is, the criterion to which all sides appeal in making their cases in legal controversies over an entity's public, nonprofit, or for-profit identity.

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The organizational logic has to do with the presence or absence of links between the organization whose status is in question and the one whose status is not. Such organizational links, as we shall see, can be financial (does the state's tax exemption for the Red Cross represent a flow of public funds to the nonprofit?), purposive (can the university and the bookstore be said to share pedagogical purposes?), or contractual (does the convention center lease space to the shopping center, or are they mutually free-standing?). These organizational issues—whether organizational links are tight or loose—pervade legal discourse over organizational identity and do so in common ways.

The second logic, an economic one, has to do with how the key transaction at play, between or surrounding the two organizations, should be framed. In any given case, the contesting parties can ultimately be seen to differ over whether the key transaction is better understood as a market exchange, a gift/transfer, or as something else. And, it will be argued in the body of this article, it is this economic and not the organizational logic that, in the final analysis, accounts for why different parties locate the contested organization on one or the other side of the border in question.

And yet—fourth and finally—although legal discussion over organizational identity ultimately hinges on only one criterion, that criterion is not, as are many of the criteria proposed by dimensional-approach scholars, a clear one: operational, lending itself to a fairly uncontroversial, measurable sense of where a given organization falls. And that is because transactions, at least as they emerge in legal discourse, are contested concepts: matters of competing construal or framing, not dispositive measurement. That is why cases arise: why it is that the same entity can be seen, by the litigating parties, in two diametrically contrary ways: as for-profit and public, or nonprofit and for-profit, or public and nonprofit, depending on the border battle at issue.

Such contestability, however, does not mean that no consequences follow for managerial or organizational behavior. It is just that whereas for the dimensional approach, it is necessary to gauge the degree of organizational publicness in order to see whether managerial behavior correspondingly varies, for the legal approach, the very contestability of the organization's publicness suggests, by way of behavioral consequences, that managers will take action that lends support to their own preferred view of the organization's identity in any given case. For example, the shopping center's management will want to credibly cast their enterprise as public in order to justify a taking on its behalf and will do so by pursuing strategies that will lend plausibility to the view of the key transaction that—as the paper will detail—most sustains a claim to public enterprise status. After all, although any given case is controversial, only one side will win, and it will do so on the basis of the plausibility surrounding its view of the key transaction.

Methodologically, this article explicates American legal discourse over organizational identity in the only way that it can be explicated, that is, interpretively. As Smith (1985, 104–6) has observed, if one is offering a "qualitative interpretive narrative that shows [certain] structures of thought and argument to be visible in [legal] texts," one can do so only by discussing "a few major cases that seem representative . . . instead of documenting how these structures are visible in all or even most of the relevant cases." The object here is not to explain the state of the law, which is always changing, but to look at the permanent structure of argumentation: the criteria on which participants in legal discourse make their cases about organizational identity. Consequently, this article considers both majority and dissenting opinions, as well as the views of commentators and advocates who side with

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each. Cases are selected on the basis of how well the arguments they contain exemplify a particular ongoing stance to be found in discourse, not on whether they were precedent setting.

In the next section, the article sets out the four-fold typology of "transactions" that will be used to explain all three border debates. It then examines, in turn, debates over the public/nonprofit border, the for-profit/nonprofit border, and the public/for-profit border as they play out in various bodies of American legal discourse. And it concludes by advancing some hypotheses as to what follows, for organizational behavior and future research, from the fact that transaction-based framings lie at the heart of legal discourse over the public/for-profit/nonprofit identity of organizations.

FOUR KINDS OF TRANSACTIONS

Transactions, as understood here, are assumed to be complete and specified, meaning that the focus will be on the nature of the transaction itself, not on the costs of repairing its lack of completion or specification, as in transaction-cost analysis (Williamson 2000); the approach here also differs from, though is not inconsistent with, the "transactional" category advanced by Nutt and Backoff (1993).

More specifically, transactions, in what follows, will be viewed as either exchanges or transfers. An "exchange with equivalence" will be taken to mean an ordinary quid pro quo: an exchange of market equivalents between two parties. A consumer gets a good or service and a producer or provider receives an amount of money that the marketplace—as represented by the marginal buyer and seller—deems that good or service to be worth. A "transfer with gain," by contrast, will be taken to mean an ordinary gift transaction, in which value is transferred such that one party gives it up and the other gains it.

Both exchanges and transfers, however, can be redescribed so that each takes on some of the qualities of the other. An exchange, for example, can sometimes be viewed through inframarginal lenses. Any given market exchange can involve a producer surplus—for purposes here, a "producer surplus" is interchangeable with "profit"—which arises because, at any given market price, all producers except the marginal one would have been willing and able to accept a lower price to supply the product, usually but not always because of their greater efficiency (Wessel 1969). Thus, they reap the surplus involved in the difference between the actual price and the one that would have brought them into the market. When discourse participants, in what follows, "open up" what could otherwise be described as an exchange of market equivalents to focus on the existence of a producer surplus, they are, in effect, redescribing the exchange so that it takes on some of the qualities of a transfer. They are redescribing it as a situation in which one side, the producer, gains more than it gives up. We can call this an "exchange with gain," in the sense that the focus is on the producer surplus—the profit—gained by one side, the producer or provider, in what is an ordinary market exchange (the other side might gain a "consumer surplus" as well, but in what follows that is not the focus).

Likewise, just as an exchange can be viewed through inframarginal lenses, a transfer—a gift—can be viewed through externality lenses. Though a transferring side may be giving something of value to a recipient side, the transferring side can still reap a kind of return in the form of a warm glow, a "consumption externality" (Malani and Posner 2007). Think of a benefactor contributing to a food bank. When a recipient consumes the gift of food, the giver, on some constructions, is said to vicariously derive utility from the knowledge that

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others less well off are being properly nourished. When participants in legal discourse focus on the consumption externality enjoyed by the transferring side, they are, in effect, redescribing the transfer so that it takes on the qualities of an exchange, in which the transferring side actually does get back, in vicarious utility, as much as it gives up (otherwise, on this view, it would not have been motivated to make the transfer). We can call this a "transfer with equivalence," in the sense that the focus is on the consumption externality enjoyed in return by the party that makes the transfer, and which is equivalent, for that transferring party, to the value of what it gives up.

On the framework to be used in what follows, then, there exist four different ways of viewing transactions: as exchanges with equivalence (an exchange in which each party gives up and receives equal market value), transfers with gain (a transfer in which one party gives up value and the other gains it), exchanges with gain (a market exchange in which the focus is on the inframarginal surplus enjoyed by the provider/producer side), and transfers with equivalence (a transfer or gift in which the focus is on the consumption externality enjoyed by the transferring side). As we shall see, legal debates over organizational identity can be redescribed, at their most fundamental level, as a conflict between these four ways of conceiving transactions.

The Public/Nonprofit Border

Tough calls as to whether an enterprise should be deemed public or nonprofit arise most prominently in bodies of legal discourse concerned with the juncture of tax and constitutional issues. Many participants in such discourse argue that the tax exemption for nonprofits represents a flow of public money—tax revenue that the state could rightfully collect from nonprofits—back to nonprofits. In organizational terms, these discourse participants argue, such flows represent a link between government and nonprofit that connects the two entities, converting the nonprofit into a public entity, a state actor properly subject to constitutional strictures. Other discourse participants, by contrast, deny that the tax exemption constitutes public money. For them, it is really the nonprofit's own money all along because, properly understood, nonprofits earn no income and hence owe no tax to begin with. Government and nonprofit are thus entirely separate organizations, and nonprofits are on no possible construal public enterprises.

And yet, as we shall see, a belief that the exemption does represent a flow of public funds to nonprofits—an organizational link between state and nonprofits—is, for some discourse participants, entirely consistent with the conclusion that nonprofits are in fact not, properly understood, public entities. Likewise, the belief that the exemption represents no such linkage can actually support the view that nonprofits are essentially public entities. To appreciate what lies at root of legal discourse over which side of the public/nonprofit border a contested organization occupies, it is necessary to look to the way in which discourse participants conceive the key transaction at play.[1]

1 Beyond the tax exemption, of course, the state engages in other kinds of linkages with nonprofits involving flows of public money, for example, via contracts or vouchers. Insofar as such linkages raise public/nonprofit identity questions (as opposed to, say, religious freedom or establishment questions), those questions are identical to the issues raised by the tax exemption, but they have not provoked the same kinds of legal cases that the tax exemption has. Since the focus here is on what legal discourse contributes to the organizational identity question, the discussion will center on tax exemption cases and commentary, although their logic extends to other kinds of financial linkages between state and nonprofits.

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In Organizational Terms, the Tax Exemption Represents a Flow of Funds from the Public Treasury to Nonprofits, and the Nonprofit Becomes a Public Entity

In legal discourse, the tax law scholars Surrey and McDaniel have pioneered the view that, in organizational terms, the tax exemption constitutes a flow of public money to nonprofits, and therefore, nonprofits can be understood as state actors. How does the reasoning here go?

The Surrey/McDaniel view begins with a focus on the transaction between nonprofits and their donors, likening it (to use an example advanced by Hansmann 1980) to the transaction between Tiffany's and a person who buys a diamond, asking the store to send it to a friend. Although such a transaction appears to be a transfer in which the giver loses something of value and the recipient gains it, the pleasure that the giver receives actually converts the transaction into what is here being called a "transfer with equivalence," in which the giver derives an amount of utility, in the form of a consumption externality, equivalent to the money he or she gives up: otherwise the giver would not have made the gift. That is why the income that Tiffany's earns, even from such transactions, is considered commercial income and is hence taxable.

The crucial step taken by the Surrey/McDaniel view is to claim that there is no difference between (on the one hand) Tiffany's and its gift-giving consumer and (on the other hand) any nonprofit and its donor. The donor, say to the Red Cross, derives a consumption externality—a warm glow, a feeling of having done good, a satisfaction of his concern for others, a vicarious enjoyment of beneficiaries' consumption of Red Cross services—that, to the donor, is worth (i.e., equivalent to) the amount of the transfer (McDaniel 1972, 370). As Hunter (1968, 36) puts this view, "giving is . . . a form of consumption for the giver. The giver buys the satisfaction of making a gift—as an alternative to other satisfactions he could buy with the same sum."

By constructing the transaction as a transfer with equivalence in this way, in which the donor gets equivalent satisfaction in return for his or her donation, the Surrey-McDaniel view is able to stamp the donation as income earned by the nonprofit. And such ordinary income, of course, is taxable. That such income is in fact exempted from tax means, then, that what are rightfully public funds have constructively flowed back to the nonprofit. It is thus a conception on which the key transaction is a transfer with equivalence between donor and nonprofit that, on the Surrey-McDaniel interpretation, converts nonprofits into public entities—"government[s] of [their] own" (McDaniel 1972, 377)—acting as they always do with public funds flowing through their veins. The "tax exemption becomes a form of government subsidy constituting state action," Upton (2001, 816) writes (see also Freeman 2003). The point here is simply that this view—that nonprofits are fundamentally public entities—ultimately rests on a particular framing of the transaction between donor and nonprofit as a transfer with equivalence.

In Organizational Terms, the Tax Exemption Represents a Flow of Funds from the Public Treasury to Nonprofits, and Yet the Nonprofit Remains a Nonprofit

Another set of discourse participants, though, while accepting that the tax exemption does represent a flow of public money from state treasury to nonprofit, and hence an organizational connection between the two, nevertheless refuses to conclude that nonprofits thereby become state actors. That is because these discourse participants shift their focus from the transaction between the nonprofit and its donors to the one between the nonprofit and the government. And, as a 1996 Pennsylvania case put this view, nonprofits "relieve . . .

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government of some of its burdens" and thereby confer "a pecuniary benefit for which [nonprofits] receive . . . a quid pro quo in the form of exemption from taxation" (*Community Service Foundation v. Bucks* 1996, 377; see also *Credit Counseling Centers Inc. v. City of South Portland* 2003, 458). Such a transaction—a straightforward quid pro quo—is, in terms being used here, an "exchange with equivalence" between government and nonprofits, in which government pays via the tax exemption for the services that nonprofits render.

What implication does this view of the transaction carry for the matter of whether nonprofits cross the border into the public sphere, becoming state actors? Even though the tax exemption comprises the public's money, nevertheless, because it is requited in this way—because real consideration is provided in return by nonprofits—that money ceases to be the public's and becomes the nonprofit's, just as the money one spends for any commodity ceases to be one's own and becomes the vendor's. According to Brody and Cordes (1999, 151, 153), when "subsidies granted by the government to nonprofit organizations" are seen "as a quid pro quo"—when governments are seen to get back an equivalent value from nonprofits in the form of services performed—the "tax exemption . . . carries with it a sense of leaving the nonprofit sector inviolate:" in other words, a sense of leaving nonprofits in the nonprofit sphere, not pulling them over into the public realm.

To sum up thus far: Both the Surrey-McDaniel view and the quid pro quo view deem the tax exemption to be a flow of public money to nonprofits: an organizational link between state and nonprofit. But they utterly disagree on whether nonprofits should therefore be understood as public entities, and they do so because they take very different views of the fundamental transaction at play. For the Surrey-McDaniel view, which holds that the nonprofit becomes a state actor, the pivotal transaction is a transfer with equivalence between donors and nonprofits. For the "quid pro quo" view, on which the nonprofit remains a nonprofit, the key transaction is an exchange with equivalence between government and nonprofit.

In Organizational Terms, the Tax Exemption Does not Represent a Flow of Funds from the Public Treasury to Nonprofits, and the Nonprofit Remains a Nonprofit

Now consider the argumentation mounted by those who hold that the tax exemption—far from representing a flow of tax monies back to the nonprofit—simply recognizes the fact that none of the nonprofit's revenues are taxable: that they are never rightfully the public's in the first place. Thus, no public funds flow through the nonprofit's veins, the tax exemption constitutes no organizational linkage between government and nonprofit, and the nonprofit remains on the nonprofit side of the border.

What is the reasoning here? For the legal scholar Bittker, when a donor gives to a nonprofit, the transaction is best understood as a transfer with gain—a transfer in which the donor gives up value and donees gain it. It is a mistake, for Bittker, to view the transaction as a transfer with equivalence, in which the donor gets back, via a consumption externality, an amount of utility equivalent to the transfer. Instead, what Bittker focuses on is the mere fact that the donor gives up something of market value, and the ultimate donees—those whom the nonprofit helps—gain it. The donor's contribution to the nonprofit is thus not income that the nonprofit earns by providing satisfaction to the donor; rather it is simply value that is transferred from the donor, via the nonprofit, to donees. As Bittker and Rahdert (1976, 309) put it, the nonprofit should be viewed as a mere "conduit through which the

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funds move from the donor to the ultimate recipients, without creating any tax consequences for the intermediary."

The tax exemption, consequently, is not a rebate of income tax rightfully owing—public funds—back to the nonprofit. Rather, the exemption represents a recognition that the nonprofit owes no tax in the first place because it earns no income. Free as it is from receiving any funds that belong to the public, the nonprofit thus remains in the nonprofit sphere. And ultimately, on Bittker's view, this is because the key transaction is a transfer with gain—an actual transfer of value—between donor and donees. (Here, as in what follows, when the terms "transfer with gain" or "exchange with gain" are used, the gaining party will always be the second one mentioned; so here, the transaction is a transfer with gain between donors and donees).

In Organizational Terms, the Tax Exemption Does Not Represent a Flow of Funds from the Public Treasury to Nonprofits, and Yet the Nonprofit Becomes a Public Entity

A final view holds that the tax exemption does not represent an organizational link, that is, a flow of public funds—tax revenue—back to nonprofits, but that this is precisely because nonprofits are really public entities to begin with, and the tax exemption simply recognizes that public enterprises are not taxable in the first place.

Again, a particular view of the key transaction can be seen to underpin this position. Let us say that the amount of public (cultural, health-care, social, educational) services that taxpayers would be prepared to pay for is \$X. The government collects \$X in taxes, but although it is mandated to provide \$X worth of public services, it actually is able to vacate part of that responsibility—supplying only \$X − \$Y worth of public services—because it knows that nonprofits will pick up the slack, providing \$Y worth of "public functions" and paying for it out of their own fundraising (Barak-Erez 1995). The government is thus able to charge taxpayers \$X for services, whereas supplying those services at a cost to it of only \$X − \$Y. In this way, nonprofits enable the government to retain a surplus—earn a profit of \$Y—in its exchange with taxpayers, converting that exchange (in terms being used here) into an exchange with gain between taxpayers and government. Government officials, as public choice scholars have argued, can then use that surplus in any number of (self-serving) ways, from pursuing pet projects to returning it to taxpayers via tax cuts in return for their votes—just as a merchant might use his or her profits on anything from purchasing desired items to giving customers rebates in order to undercut competitors.

Unlike the quid pro quo view, on which nonprofits execute responsibilities which the government pays for through the exemption, on this "public function" view, nonprofits are executing *and* paying for public responsibilities that government otherwise would have had to execute and pay for. In thus providing real "public service[s]" (Yarmolinsky 2000, 178), nonprofits cross the border into the public sphere, becoming for this reason "state actors" themselves (Barak-Erez 1995; Brody 1998). And that is ultimately because, on this "public function" view, the key transaction is an exchange with gain between taxpayers and the government: a market exchange in which taxpayers pay the government for a global set of services, and the government in return ensures their supply, but does so—with the help of nonprofits—at profit to itself.

In sum, the very same entity—whether Red Cross or local soup kitchen—can lend itself to four different perspectives, two arguing that such nonprofits in fact cross the border into the public realm, becoming state actors or "governments of their own," and two arguing that they remain wholly outside the public sphere, in their own nonprofit realm. But

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differing views of the organizational links between state and nonprofit, via the tax exemption, do not map onto these differences over which side of the public/nonprofit border the entity occupies.

Instead, at the most fundamental level, it is differing views of the underlying transaction that explain these divergent perspectives. A framing on which the key transaction is a transfer with equivalence between donors and nonprofits, as with Surrey-McDaniel, or an exchange with gain between taxpayers and the government, as with the "public function" view just discussed, are what lie at the bottom of any legal claim that a nonprofit has crossed the border into the public realm. But absent these two framings—if in other words the transaction is viewed as an exchange with equivalence between government and nonprofit, as with the "quid pro quo" school, or as a transfer with gain from donor to donees, as with Bittker—then the nonprofit remains a nonprofit. It is the view of the transaction that is determinant (see table 1).

The For-Profit/Nonprofit Border

The legal question of whether and when a for-profit enterprise can legitimately be classified as a nonprofit, and hence tax exempt, arises most richly in situations in which the notionally for-profit enterprise—such as a pasta company or a gift shop—is owned by a nonprofit, such as a university or a museum. One strand of legal argument holds that when the two entities, the for-profit subsidiary and the nonprofit owner, share common purposes, then the for-profit will be deemed to have crossed the line into the nonprofit realm too, and its income will not be taxable. For example, the Internal Revenue Service (IRS) has held that a museum gift shop, which sells art books, replicas of the pictures the museum displays, and the like sufficiently shares the latter's "purposes [of] stimulating public . . . appreciation of art" that it can be deemed a nonprofit enterprise too, hence nontaxable (IRS 1973). If, however, the two entities do not share a common purpose—if their purposes are not "substantially related" (IRS 1976)—then, on this view, the for-profit will be deemed not to have crossed into the nonprofit sphere. A pasta company owned by a university remains a for-profit enterprise, hence taxable, since its purpose is to manufacture food products, whereas the purpose of a university is to educate students.

It would thus at first seem as if a broadly organizational criterion—a teleological one having to do with whether the two organizations share the same purposes—explains on which side of the for-profit/nonprofit line a contested entity will be located. But when a

Table 1
Is the Entity Public or Nonprofit?

	Organizational Links	
Location of Entity	Financial Link Exists: Exemption Is Public Money	Financial Link Does Not Exist: Exemption Is Not Public Money
Nonprofit becomes a public actor	Surrey-McDaniel view: Key transaction is a transfer with equivalence between donors and nonprofit	Public-Function view: Key transaction is an exchange with gain between taxpayers and government
Nonprofit remains a nonprofit	Quid Pro Quo view: Key transaction is an exchange with equivalence between government and nonprofit	Bittker view: Key transaction is a transfer with gain between donors and donees

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broader view is taken of the bodies of law involved, this organizational consideration—the presence or absence of shared purposes with its nonprofit owner—ceases to adequately explain whether a for-profit will be seen to have crossed the line into the nonprofit realm. The so-called "commerciality doctrine," for example, argues that as the purposes of a for-profit subsidiary and its nonprofit owner become more and more identical—as their organizational goals meld—far from the nonprofit elevating the for-profit to its status, the for-profit, if anything, pollutes the nonprofit (American Institute for Economic Research 1962, 938). Conversely, many have argued that precisely when the nonprofit owner and for-profit subsidiary do *not* share common purposes, the subsidiary can itself then actually cross the line and become a nonprofit too. In effect, by staying out of its nonprofit owner's sphere, the for-profit avoids polluting the nonprofit, thus keeping the latter pure enough to elevate the former by virtue of their owner/subsidiary connection.

Relative organizational closeness or distance, this time having to do with organizational purposes not financial flows (since all owner-subsidiary relations involve financial ties), ultimately fail to explain differing views as to which side of the nonprofit/for-profit border a contested subsidiary enterprise occupies. Instead, we can gain clarity as to what determines whether a for-profit subsidiary of a nonprofit will be deemed to have crossed the line into the nonprofit sphere—becoming exempt from tax—if we take a more fine-grained look at perceptions of the underlying transaction.

In Organizational Terms, There Are No Shared Purposes between a For-Profit and Its Nonprofit Owner, and the For-Profit Remains a For-Profit

Begin with legal discourse over the "unrelated business income tax" (UBIT). Suppose a for-profit and its nonprofit owner do not share common purposes; suppose that the for-profit's activities are "unrelated" to the nonprofit's, as with a pasta company and its university owner. Or consider a nonprofit medical journal that, for profit, sells advertising space to pharmaceutical companies. Even though the ad department's profits may go to support the journal's nonprofit enterprise of spreading scientific knowledge, the purposes of the ad enterprise, to sell promotional space to drug manufacturers, differs from the purposes of the journal, which are to spread impartial scientific information (Haimes 1992, 1100; Mancino 1981, 1101).[2]

On the UBIT view, any for-profit enterprise whose activities remain unrelated to its nonprofit owner's remains in the for-profit sphere, hence taxable. But why? Time and again, those taking the UBIT view adopt a particular perspective on the key transaction at play: It is seen simply as an exchange with equivalence—a regular market exchange—between the for-profit enterprise and its own consumers. A medical journal's advertising business "sell[s] its services to outside consumers" (Mancino 1981, 1101), namely the pharmaceutical enterprises that, in a straightforward exchange of market equivalents, pay for and then receive the advertising space it sells. Each side gets something that the market has determined to be of equivalent value—advertising space for the drug company, money which that space is worth for the ad business—and there is nothing in a transaction so conceived that justifies a tax exemption. As the IRS (1967) puts it, what matters is "the fair market value of the consideration received by the purchaser for his payment." It is irrelevant that the "total

2 It does not matter if the for-profit "subsidiary" enterprise remains a formally distinct entity or is absorbed into the nonprofit owner. A for-profit enterprise can be unrelated in its purposes or activities, even if it is part of the "integrated assets" of the nonprofit (Bittker and Rahdert 1976, 317)—as, for example, with a medical journal and its ad department.

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proceeds of the sale" may go "exclusively for charitable purposes." The purchaser is a consumer, not a donor.

In Organizational Terms, There Are No Shared Purposes between a For-Profit and Its Nonprofit Owner, and Yet the For-Profit Nevertheless Becomes a Nonprofit

Another perspective, though, accepts exactly the same organizational perspective but draws the opposite conclusion concerning the status of the subsidiary. Specifically, it declares that, precisely when the nonprofit owner and its for-profit subsidiary do not share common purposes, the for-profit *should* be deemed to have crossed into the nonprofit sphere as well, becoming exempt from tax. When we examine the reasoning here, we will see a different conception of the underlying transaction at work.

Consider a for-profit cafeteria owned by a nonprofit hospital. The cafeteria provides food, and the hospital, medical services; hence, the two do not harbor shared purposes. But in this respect, so the argument here goes, the relationship between the cafeteria and the hospital is no different than that between a charity gala and the old-age home it supports. The purpose of the old-age home is to aid the elderly, but this is not the purpose of the gala, which is to provide entertainment; the old-age home and the gala—just like the hospital and the cafeteria, or the medical journal and the ad business—do not possess the organizational link of shared purposes as the IRS understands them. Yet notwithstanding the absence of shared purposes, the IRS regards such galas as nonprofit enterprises, simply because they channel their profits to the charity that stages them. So why then should we not regard the cafeteria, which channels its profits to the hospital—or the ad business, which channels its profits to the journal—as nonprofit enterprises (*Friendsview Manor v. State Tax Commission 1966*)?

UBIT doctrine advancers, who view the for-profit in such cases of divergent organizational purposes—whether the ad business/journal case or the cafeteria/hospital case—*as* a for-profit, will, as we have seen, home in on the transaction between the for-profit and its customers, which is nothing but an exchange with equivalence. They "look . . . rather narrowly at the transactions between providers of goods or services and the recipient," as one court explicitly noted (Yorgason 1986, 662–3).

By contrast, charity-gala analogists, who view the for-profit—again, whether ad business or cafeteria—as in fact crossing the line into nonprofit status, home in on the "warm glow" (Colombo 2001, 657) or "pleasure of giving" (Buckles 2002, 1334) that cafeteria patrons or drug advertisers are said to get, in exchange for engaging in a transaction whose profits become donations to the hospital or medical journal. It is the same warm glow that purchasers of charity-gala tickets get when they engage in a transaction whose profits—surplus—become donations to a charity (see, e.g., *Friendsview Manor v. State Tax Commission 1966*, 108; IRS 1967). As Malani and Posner (2007, 2049, 2043) put it, in these cases, where there is a "transfer [of] surplus," the purchaser enjoys an equivalent "warm glow consumption." Such a transaction, in terms being used here, is a "transfer with equivalence" between the consumer and the for-profit, in which the consumer becomes a donor, and the for-profit consequently crosses the line to nonprofit status. "It might be argued," as Hansmann (1989, 629) puts this view, that cafeteria "profits . . . should be exempted on the grounds that these profits are essentially donations" (see also Ellman [1982, 1023]: "surely some transactions that appear to be purchases are in fact donations"). On the charity gala analogy, then, the key transaction is a transfer with equivalence.

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The question thus far has been: How is it that different discourse participants can agree that a for-profit subsidiary and its nonprofit owner share no organizational purposes, yet disagree diametrically over whether the for-profit remains a for-profit or else becomes a nonprofit itself? The answer is: It depends on whether the transaction between its consumers and the for-profit is framed as an exchange with equivalence (in which case the for-profit remains a for-profit) or a transfer with equivalence (in which case the consumer becomes a donor, and the for-profit becomes a nonprofit). The same question, however, can be asked about situations in which the for-profit does share the nonprofit's purposes.

In Organizational Terms, There Are Shared Purposes between a For-Profit and Its Nonprofit Owner, and Yet the For-Profit Remains a For-Profit

Consider the museum gift shop, and let us accept, with the IRS, that it shares with its nonprofit museum-owner the "purposes [of] stimulating public appreciation of art": that the purposes of the two organizations are identical. On one line of argument, the "notion that [a] nonprofit [harbors] commercial activities which are substantially related to [its] tax-exempt purposes is a contradiction in terms" (Kosaras 2000, 123). This is because of the "commerciality doctrine," on which a nonprofit, by allowing part of its (art-stimulating) activities to become profit oriented, not only fails to lift those activities into the nonprofit sphere but might itself tumble over onto the for-profit side of the line. Such activities create a situation in which, for example, "every [museum] visitor is thought of as a customer"—an opportunity to earn a profit—and no longer as a donee, someone who should benefit for free (or at least at reduced price) from the nonprofit's charitable fundraising, in true nonprofit fashion. Indeed, the "nonprofit sector abandons its spirit when it [thus] assimilate[s] the values of the business sector as part of its mission" (Kosaras 2000, 175; see also Dees [1998] and Foster and Bradach 2005, 99).

What view of the key transaction is at play here? If the gift shop and the museum share the nonprofit purposes of stimulating appreciation for art, then those who enjoy the goods or services of both are properly thought of as donees, the beneficiaries of those nonprofit purposes. For a nonprofit to then charge its donees to defray part of its nonprofit purposes (i.e., stimulating interest in art) a price that includes a surplus—to engage them in "exchanges with gain"—is, in this way, to treat those donees as consumers. But that is precisely what the museum allows its gift shop to do. In terms being used here, the transaction of purchasing an art poster at the gift shop is an exchange with gain between those who should be properly understood as donees—and who are thereby recast as consumers—and the nonprofit. For as commerciality doctrine advancers make clear, their focus is on the profit—the producer surplus—that the (in this case) museum retains from its gift shop: the fact that part of its nonprofit purposes of stimulating artistic appreciation involves a "pricing structure designed to produce a profit"; that it enjoys a "markup" over cost: a "surplus" (Colombo 2002, 501, 502; *Living Faith, Inc. v. Commissioner* 1991).

This "profit-oriented mood" (Kosaras 2000, 170) disqualifies the museum itself as a nonprofit, on the commerciality doctrine, and therefore destroys the museum's capacity to elevate the gift shop by virtue of their shared purposes. The shop remains on the for-profit side of the border. And that is because the key transaction is seen as an exchange with gain between donees, who become consumers, and the nonprofit.

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In Organizational Terms, There Are Shared Purposes between a For-Profit and Its Nonprofit Owner, and The For-Profit Becomes a Nonprofit

But recall that for the IRS, the museum gift shop—precisely *because* it shares its organizational purposes with the museum—migrates across the line into the nonprofit realm. Or, to take another example, a university bookstore—though it may earn a profit—shares its organizational purposes, educating students, with those of the nonprofit university and so, discourse participants have argued, should move into the nonprofit realm (*Stanford University v. Bookstore Helvering 1936*, see dissent). On this view (Note 1968, 1284), "[an] exemption granted to encourage a particular [nonprofit] activity is not perverted by other, [for-profit] activities which in themselves . . . bear a close"—or even "identical"—"relation to the exempt purpose": a perspective diametrically opposed to the commerciality doctrine (*Mississippi Chemical Corporation v. IRS 1986*, 635). Instead, the nonprofit's capacity to elevate the for-profit's activities by virtue of their close organizational linkages, precisely by virtue of the fact that the for-profit activities are "an integral and inseparable part of an exempt entity," remains intact (*EST v. IRS 1979*).

How can profit-earning museum gift shops and university bookstores be seen as nonprofit enterprises when the commerciality doctrine would deny such a claim? Again, the answer has to do with how the key transaction gets framed. The best way to see this is to draw an analogy between nonprofits with for-profit subsidiaries that share the same purposes, on the one hand, and mutual benefit organizations—co-ops or social clubs—on the other. In mutual benefits, there is such a tight nexus between for-profit and nonprofit purposes that the two merge completely (Ware 1989, 71). A mutual benefit provides commercial services to its members—it sells their wheat, as with a co-op, or provides a communal facility in return for membership dues, as with a social club—and yet mutual benefits are deemed nonprofit entities. In such organizations, as Houck (1984, 1137) says, there is clearly a "nexus"—indeed, an identity—"between [these notionally] nonexempt activities and the organization's exempt purposes," which are also to sell wheat or provide a common facility. And yet, as Houck says, "the closer the nexus, the more likely the exemption:" not, as with the commerciality doctrine, the less likely. Why is this? As the court explained in *McGlotten v. Connally (1972*, 458):

> in a situation where individuals have banded together to provide [say] recreational facilities on a mutual basis, it would be conceptually erroneous to impose a tax on the organization as a separate entity. The funds exempted are received only from the members and any profit which results from overcharging for the use of facilities still belongs to the same members. No income of the sort usually taxed has been generated; the money has simply been shifted from one pocket to another, both within the same pair of pants.

As the *McGlotten* Court describes the key transaction, the mutual benefit transfers any profits it earns—any producer surplus, that is, whatever differences remain between price and cost—right back to the consumer. A social club's consumers, in other words, enjoy not only their own consumer surplus but the producer surplus as well. A transfer with gain thus takes place between the producer—the club—and the consumer—the member, of a sort that amounts to a real gift: the gift of the club's profit, its producer "surplus" (Note 1968, 1284; *Stanford University v. Bookstore Helvering* 1936, dissent; James and Rose-Ackerman 1986, 23). Hence the mutual benefit is properly described as a nonprofit, not having earned any income.

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What is true for the mutual benefit, in which nonprofit and for-profit elements share identical purposes, is true as well—so mutual benefit analogists argue—for universities and their bookstores or museums and their gift shops. On this mutual-benefit analogy, what matters is that the profits that the museum gift shop retains are returned to the patrons in the form of lower admission prices to, or better exhibits at, the museum, allowing those patrons to return to their roles as donees. Likewise, what matters is that university bookstore profits are returned to students in the form of lower tuition or better educational offerings, converting them back from consumers to donees. Applying this view, courts have held that "surplus revenue is not synonymous with private profit," (Kosaras 2000, 148; see also Rose-Ackerman 1996, 715–6; *St. Joseph Hospital v. Berks County Board of Assessment Appeals* 1998, 937). The transaction being isolated here, in terms of the framework being advanced in this article, is a transfer with gain between nonprofits and donees. The producer surplus earned from the giftshop or bookstore is best understood not as profit but as a transfer with gain, a transfer made by the nonprofit museum or university, and gained by their donees: museum visitors and university students.

So to sum up debate over the nonprofit/for-profit border: Here, one and the same view of organizational linkage—whether close, as when nonprofit and for-profit share organizational purposes, or attenuated, as when they do not—each gives rise to diametrically opposed conclusions as to whether the for-profit crosses the line into the nonprofit sphere. And the reason is that ultimately, all such conclusions actually rest on their own competing and mutually symmetrical views of the key transaction in question (see table 2).

The Public/For-Profit Border

The question as to whether a particular enterprise is more appropriately classified as a for-profit or a public one gets debated in a host of legal and administrative contexts, but principally in takings law, property-tax law, and law governing tax-deductible municipal bond financing. When, for example, is an enterprise—say a for-profit golf course in a public park or a for-profit shopping concourse in a public plaza—itself sufficiently imbued with the public purposes of its surroundings that it becomes a public project itself: hence eligible for the state taking property on its behalf, exempting it from property tax, or according to it tax-deductible municipal bond financing? And when, conversely, is that golf course or

Table 2
Is the Entity Nonprofit or For-Profit?

	Organizational Links	
Location of Entity	Teleological Link Does Not Exist: No Shared Purposes	Teleological Link Exists: Shared Purposes
For-profit becomes a nonprofit entity	Charity-gala analogy: Key transaction is a transfer with equivalence between consumers/donors and for-profit	Mutual-benefit analogy: Key transaction is a transfer with gain between the nonprofit and donees
For-profit remains a for-profit	UBIT view: Key transaction is an exchange with equivalence between consumers and for-profit	Commerciality doctrine view: Key transaction is an exchange with gain between donees/consumers and nonprofit

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shopping concourse better understood as merely an ordinary for-profit enterprise, for which a taking or tax exemption or tax-deductible financing would be illegitimate?

In some cases, a direct contractual relationship will link the two organizations, the public entity and the for-profit enterprise in question: usually a leasing relationship, in which, for example, a public park leases space to a for-profit golf course or a public plaza leases space to retail outlets. But once again, the presence or absence of an organizational link between the public entity and the for-profit, in and of itself, does not tell us whether the for-profit enterprise will therefore be reconceived as a public one. Instead, it is views of the key transaction at play that determine whether the for-profit will be deemed to have crossed the border into the public realm.

In Organizational Terms, Contractual Links Exist between the For-Profit and Public Entities, and Yet the For-Profit Remains a For-Profit

Begin with cases in which there exists an organizational financial/leasing link between a public and a for-profit enterprise. In 1993, the Florida municipality of Capital City leased part of a public park to a for-profit golf course. Deeming itself to now be a public project—organizationally linked as it was to the public park—the course sought a property tax exemption (*Capital City v. Tucker* 1993, 848). Likewise, in 1981, the city of Seattle wanted to lease part of a public plaza to for-profit retail outlets and sought to expropriate the property necessary for the stores to be built (In re City of Seattle 1981, 552).[3]

Opponents of such projects worry that the for-profit element, contractually linked as it is to the public, "corrupts," "poisons," or "destroys the public nature of the entire project" (Benedict 2000, 223; In re City of Seattle 1981, 556, Panama City 1957, 613) and thus remains itself a mere "private enterprise operating under the guise of a public facility" (Ide and Ubel 1985, 727). In deeming such projects to remain for-profit ones, hence ineligible for the taking or tax advantage in question, opponents—in transactional terms—focus on the ordinary market-style exchange with equivalence represented by the contractual tie, the leasing contract, between the government and the for-profit. For example, in the 1981 Seattle case—in which the court denied the city's request to take land for the plaza's retail project—the court ruled that the city was simply planning to "lease [space] for private use as retail establishments," establishments which in turn would hold the role of "customers" or "purchase[rs]," with the city as "provider," in a straightforward quid pro quo (In re City of Seattle 1981, 559, 560, 556, 561; *Capital City v. Tucker 1993*, 451). Nothing about such a transaction distinguishes it in any way from other kinds of ordinary market transactions in which each party gains equivalently and which we therefore deem ineligible for tax exemptions or takings. There is nothing public about it; hence, nothing public about the for-profit enterprise, when the transaction is framed in this way: as an exchange with equivalence between a governmental entity and the for-profit.

3 As courts have observed for quite some time (*Panama City* 1957, 613), attempts to stamp a project as public or for-profit by weighing the relative financial gains accruing to the for-profit as compared with the public can yield only differences of "degree, not kind." And this can do no more than leave the case in a gray area when what is required of courts is that they deem the project to fall on one side of the line or the other.

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In Organizational Terms, Contractual Links Exist between the For-Profit and Public Entities, and the For-Profit Becomes a Public Entity

Defenders, by contrast, claim that "[w]hat in its immediate aspect [may seem to be] only a private" endeavor, whether a golf course or a retail outlet, may "be raised . . . to a public affair" via the organizational, that is, leasing linkage with the public entity, whether public park or public plaza (*Hawaii Housing Authority v. Midkiff 1984, 244*; see also Kruckeberg 2002, 561). But that is because they construe the key transaction differently. On this construction, the key transaction is not one in which the for-profit golf course or retail stores "consume" a lease which a government entity provides. Rather, the transaction is one in which the public consumes recreation or communal opportunities that the government provides through the park or plaza, of which the golfing or retail services that the for-profit enterprises furnish are but a part. The golf course or the stores are not to be viewed in their "immediate aspect" as engaging in "only a private transaction"—a leasing transaction—with the government, as one court (*Hawaii Housing Authority v. Midkiff 1984, 244*) put it. Rather, they are to be construed in their intermediate aspect, embedded as entities intermediary to the government's provision, via parks or plazas, of leisure and communal space for the public. The "ultimate distribution," as a Montana takings case framed it, is "to the consuming public" (Harmon 1982, 451).

What justifies this view, on which what is happening transactionally in the golf course and retail-space cases, is that the government is providing services for the public? It is the idea that the government knows what the public wants: that the public wants the kind of recreational services that include a golf course or communal spaces that contain stores. "The great respect we owe to state legislatures . . . in discerning local public needs" is what "justif[ies] the use of the takings power" in such cases, as one court put it (*Kelo v. New London 2005*, 2663–4). Or, in the words of another court (*Berman v. Parker* 1954, 31; see also Kulick 2000, 648), "when the legislature has spoken, the public interest has been declared." The language of discourse participants is quite explicit here. To ward off those who argue that rent-seeking golf courses and retail outlets can, through various kinds of political pressure, skew state preferences, those who believe that they are legitimate public projects must insist that the government's preferences in fact faithfully replicate the public's (*Pittsburgh Public Parking Authority v. Board of Property Assessment* 1954, 667; *Southwestern Illinois Development Authority v. National City Environmental* 2002, 18).

In terms of the framework being advanced here, such a transaction—in which the government, mirroring exactly the public's preferences, furnishes services for the public—is a "transfer with equivalence" between government and public. It is a transfer because the government, on this conception, is purchasing services not for itself but the public. Yet in order to classify the golf course or the retail space as public entities, we have to believe that the government knows what the public wants: that government's preferences derive from and reflect faithfully the public's. The government itself is not consuming the recreational or communal services in question, but its own preferences are, in a democratic society, contingent on—derived from—the public's, and so are satisfied when theirs are (see Durham 1985, 1282–3; *Kelo v. New London* 2005, 2667).

This is simply a way of saying that government enjoys a consumption externality from the public's consumption of those recreational or communal services. This makes the basic transaction a "transfer with equivalence" between the government and the public, in which the transferring government enjoys an equivalent consumption externality.

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So given the presence of organizational/leasing links connecting the two organizations, government entity and for-profit, the question of whether the for-profit will be deemed to have entered the public realm depends on how the key transaction is framed. If the transaction is framed as an exchange with equivalence between government and for-profit, in which the for-profit consumes a lease and the state supplies it, then it remains a for-profit. If the transaction is instead seen as a transfer with equivalence between government and public, in which the public consumes recreational or communal or other such services transferred by the government but in which the government itself then derives an equivalent consumption externality from the transfer, then the for-profit becomes a public entity.

In Organizational Terms, No Contractual Links Exist between the For-Profit and Public Entities, and Yet the For-Profit Becomes a Public Entity

Now, turn to cases in which there are no analogous contractual ties linking the two organizations, government and for-profit. Here too, sometimes the for-profit is seen to have migrated into the public sphere, whereas at other times it is not. And here, too, what is key to explaining this difference is how the key transaction gets framed.

In *State ex rel Washington State Convention Trade Center v. Evans* (1998), a takings case, the Washington state Supreme Court considered a proposal to expropriate property for the construction of a four-story building, the bottom three floors of which were to contain for-profit retail/parking space and the top floor a public, that is, municipal convention center. There was, however, to be no leasing or other ongoing contractual linkage between the convention center and the retail space. As the court said, the project presented "two entirely separate facilities, one wholly public and the other wholly private" (*State ex rel Washington State Convention Trade Center v. Evans 1998*, 1257). The private, that is, for-profit element could be separated out in this way, the court reasoned, because the for-profit and public elements accompanied each other only "for the purposes of [the] construction economy yielded to both parties" (*State ex rel Washington State Convention Trade Center v. Evans 1998*, 1260) and not through any substantive contractual or other linkage. They were merely "geographically proximate."

Having made this observation, the court then ruled that the presence of the for-profit retail floors "would not invalidate an exercise of eminent domain on behalf of the project" (Benedict 2000, 239; *State ex rel Washington State Convention Trade Center v. Evans 1998*, 1258). The public convention-center element, "not 'corrupted'" by any contractual links with the for-profit retail element, would remain able to endow that for-profit element—and hence the entire combined project—with an undiluted public quality, justifying the state's expropriation of the land (Benedict 2000, 237; *State ex rel Washington State Convention Trade Center v. Evans 1998*, 1255; for similar arguments in tax-deductible bond cases, see IRS 1992).

In transactional terms, it is clear from its reasoning that the court deemed the for-profit element—the retail space—to be transferring value from itself to the public element, the convention center. In terms of the framework being advanced here, the transaction, for the court, was a transfer with gain from the stores to the public enterprise. By drawing shoppers and providing parking, the stores were giving a benefit to the convention center, which would thereby become a more attractive venue: a benefit for which the convention center was not required to pay. As the Coase theorem suggests, the stores in principle could have charged the civic center for such a benefit, and the fact that they did not means that they were giving up the opportunity to enjoy a producer surplus—a profit earned from providing

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a crowd—and were thus making a transfer of that magnitude to the convention center. As one commentator on the Washington case put it, the stores made a "contribution toward the [convention center] project," namely "revenue generation," and this constitutes a "public purpose" (Benedict 2000, 247) or "government profit" (*State ex rel Washington State Convention Trade Center v. Evans 1998*, 1260; see also *Florida v. Orange County Industrial Development Authority* 1982, 960, 961). Viewing the key transaction in this light—as a transfer with gain between the stores and the convention center—the court deemed the stores public enterprises, eligible for a taking.

In Organizational Terms, No Contractual Links Exist between the For-Profit and Public Entities, and the For-Profit Remains a For-Profit

The dissent, by contrast, held the exact same view of the case in organizational terms—the convention center and retail spaces were bereft of any organizational link—and yet it drew the opposite conclusion. For the dissent, the very fact that "the public and private [were] separable" meant that "the project [should] fail" (Benedict 2000, 240). The for-profit retail space's lack of organizational connection with the public element deprived the retail space of any edification, any "raising" up out of the for-profit realm and into the public sphere (for similar arguments in tax-deductible bond cases, see *Florida v. Orange County Industrial Development Authority* 1982; *Florida v. Osceola County Industrial Development Authority* 1982).

That is because the dissent took a different view of the key transaction at play, focusing on the transaction between the stores and their customers, not the stores and the convention center. Far from donating some of their erstwhile profit to the public convention center by not charging for the production of the crowds they helped draw, the stores, the dissent believed, should be seen as nothing more than profitable enterprises, selling goods to consumers, and getting a producer surplus from them. Far from being a transfer with gain between the stores and the convention center, then, the key transaction is an exchange with gain between consumers and the stores, in which what mattered, for the dissent, was that the stores would earn a profit, a "surplus" (Benedict 2000, 264) of revenue in excess of what it cost them to provide their wares. The state's treating such stores as public entities by taking property on their behalf, or allowing them tax-deductible financing, would thus simply increase the economic rent, the producer surplus, they get from their commercial transactions with consumers. So conceived, a "taking [would be] nothing more than the city using its eminent domain power to allow a private corporation to generate more profit" (Cramer 2004, 413). Such a view of the transaction fails to qualify those enterprises as public but rather confirms their for-profit status.

So once again, the exact same organizational situation—this time, one in which the for-profit and the public have no contractual links—can be seen in two diametrically opposed ways. If the key transaction is framed as a transfer with gain between the for-profit and the governmental entity—a transfer of customer traffic from the for-profit (stores) in which the public (convention center) gains—then the for-profit stores will be seen to have crossed the line and become public entities themselves, eligible for a taking or a tax advantage. If, however, the key transaction is viewed as an exchange with gain between consumers and the stores—an exchange of money for goods in which the stores gain a producer surplus, a profit—then these for-profit entities will be deemed to remain in the for-profit realm (see table 3).

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Table 3
Is the Entity Public or For-Profit?

Location of Entity	Organizational Links: Contractual Link Exists: Leasing Arrangement	Organizational Links: No Contractual Link Exists: No Leasing Arrangement
For-profit becomes a public enterprise	Legislative echo view: Key transaction is a transfer with equivalence between government and taxpayers	Convention-center majority: Key transaction is a transfer with gain between the for-profit and government
For-profit remains a for-profit	Seattle case: Key transaction is an exchange with equivalence between government and for-profit	Convention-center dissent: Key transaction is an exchange with gain between consumers and for-profit

CONCLUSION

Given that the core legal approach to organizational identity differs from the dimensional approach in the ways set out in the Introduction, it is to be expected that its implications for organizational behavior and outcomes will differ as well. To see this, consider two points. First, any given controversy over organizational identity that rises—or risks rising—to the level of a legal case rests on competing ways of framing the key transaction. Second, though, this does not mean that the entire question is ultimately arbitrary. In any given conflict, cases must be argued, and although over the universe of all cases, the same competing views of the transaction will be at play, any given case is ultimately decided one way or the other, meaning that in any given case, one or the other view of the transaction will prevail. Hence, as a general behavioral proposition, managers, whenever their organization's identity as public, for-profit, or nonprofit becomes legally contestable, will face a strong incentive to make their view of the transaction as compelling as possible. And this suggests a number of behavioral hypotheses for future research.

For example, the analysis in Part I leads to the hypothesis that when managers of nonprofit organizations seek to avoid being deemed to be state actors or exercising public functions, they will take action that casts the key transaction as either an exchange with equivalence between government and nonprofit (the "quid pro quo" view) or as a transfer with gain between donors and donees (the Bittker view). In behavioral terms, they might do this by (for example) showing—through detailed and transparent reporting requirements—that the nonprofit provides public value commensurate with the tax deduction it receives, along the lines of the "quid pro quo" argument. Or they might eliminate all vestiges of the kinds of perks that nonprofits sometimes offer their donors, so as to reinforce, along Bittker's lines, the donative nature of the transaction and, hence, the nonincome earning character of the organization. Empirical studies could explore these kinds of behavioral hypotheses.

When it comes to the analysis in Part II, the behavioral hypotheses would be that, when for-profits seek nonprofit status, managers will be motivated to take action that helps cast the key transaction as a transfer with equivalence between consumers/donors and the for-profit ("charity gala" analogy) or a transfer with gain between the nonprofit and

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consumers/donees ("mutual benefit" analogy). They might do this by taking marketing and organizational measures to make the consumer aware of the extent to which his or her purchases actually involve a contribution to nonprofit purposes, for example, stressing to hospital cafeteria customers that the proceeds of their purchases support the operating budget of the hospital, along the lines of the charity gala analogy. Or they might create accounting and financial channels that directly flow profits back to the consumer—museum attendees, for example—in visible ways, as the mutual-benefit analogy might indicate.

Finally, the findings in Part III suggest, as behavioral hypotheses, that managers in cases of public/for-profit border contestation can be expected to take action to define their organization as public—so as to receive tax-favored financing, for example—and that they will ultimately do so by casting the key transaction as either a transfer with equivalence between government and taxpayers ("legislative echo" view) or a transfer with gain between the for-profit and the government ("convention center majority" view). In behavioral terms, they might do the former by (for example) using polling to show that the government's preferences are in line with the public's on the matter at hand and the latter by taking action to maximize the positive externalities their project creates for nearby public entities.

These hypotheses are simply meant to be suggestive, not exhaustive, of the kinds of behavioral consequences—in terms for example of accounting structures, reporting strategies, transparency measures, public surveys, or externality generation—that the legal approach suggests might flow from situations of contested organizational identity. At this stage, they must remain hypotheses for future research.

As Bozeman and Bretschneider (1994, 218) say, "the core [legal] and dimensional approaches are not mutually exclusive alternatives but are instead useful and even complementary alternatives." The point here, then, is emphatically not that the core legal approach is superior to or should supplant the dimensional approach, any more than the reverse. Each makes the other more complete, possibly because (these too would be questions for future research) they each apply to different constellations of organizations or possibly because they each apply to the same organizations in different sets of circumstances (e.g., the legal approach would have more to say about circumstances in which the identity of the organization itself grows sufficiently controversial to become a legal issue or when managers are motivated to take action to forestall any such legal controversies).

Beyond this, future research might explore whether certain kinds of organizations find themselves most prone to legal conflicts over organizational identity. Is it possible that certain organizations with particular degrees and types of publicness as measured by the dimensional approach, for example, are those that find themselves most likely to provoke legal controversies over their public/nonprofit/for-profit identity? Or is it the case that those organizations most likely to court identity controversies are those with a particular relationship—whether financial, purposive, or contractual—to a particular entity whose public/nonprofit/for-profit identity is not in contest, as is the case with those studied in the article?

Yet another behavioral question might begin with the following question: The kinds of organizational behavior that the preceding analysis posits as the consequences of legal controversies include the development of accounting structures, reporting strategies, transparency measures, public surveys, or externality generation that shore up a particular view of the key transaction. They differ from the kinds of organizational behavior that, on the dimensional approach, have been shown to vary according to degrees and types of publicness, such as those having to do with managerial autonomy, customer focus, innovation rates, and

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incentive structures. As Bozeman and Bretschneider (1994, 218) say, ‘‘Formal legal status’’ can be expected to have ‘‘important independent effects’’ on managerial behavior.

By the same token, where certain kinds of managerial behavior do not seem to vary by publicness, it may well be because that publicness—that organizational identity—has become legally contestable. After all, in such cases of contested identity, the exact same organization, with the exact same approaches to managerial autonomy, customer focus and the like, can at any given time be seen as both public and private depending on who is doing the classifying and which conceptions of the transaction they marshal. In other words, in these circumstances perceptions of the publicness of the organization can vary without there being any changes in the organization's behavior on the measures on which dimensional-approach scholars focus. This might help explain why we do not always see expected behavioral differences between public, nonprofit, and for-profit organizations.

The basic behavioral implications of the preceding analysis, then, are that in cases where the identity of an organization becomes, or risks becoming, legally contestable, managerial behavior will be determined in part by the desire to validate and vindicate management's desired perception, whether public, for-profit, or nonprofit as the case may be. Managers, in other words, will want to create a record of behavior that lends credence to their preferred view of the key transaction. For precisely because perceptions of organizational identity can differ in a sufficiently contested way that they become legal issues, much managerial behavior, it can be hypothesized, will be devoted to the endeavor to buttress the perception of the organization's identity that its management wants to take at any given time. And that, in turn, implies that managers will take action to ensure that the view of the key transaction that sustains their preferred view of organizational identity will prevail in any controversy.

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