Charitable (Anti)Trust: The Role of Antitrust Regulation in the Nonprofit Sector

Elizabeth A.M. Searing

Andrew Young School of Policy Studies, Georgia State University

Atlanta, GA, 30043

1. Introduction

The last decade has brought the skills and methods of operating nonprofit and for-profit organizations much closer together (Dart 2004). The popularity of social enterprise has shown that “doing good” is possible without a tax break, and payments in lieu of taxes (PILOTS) have shown that nonprofits can often afford to shoulder more of the tax burden. Nonprofits continue to adopt commercial revenue streams and operate within increasingly mixed markets to provide goods and services to the public. Given the gradual agglomeration of these business concepts in the nonprofit sector and the cost-saving mergers that an economic downturn brings, it was not surprising that concerns regarding industrial organization, and specifically monopoly power, have appeared on the policy agenda now. The recent decisions of the Court, which are often in regard to mixed markets between nonprofit and for-profit enterprises (Lynk 1995), have been relatively straightforward in their refusal to grant nonprofits an exemption from antitrust regulation (Hospital Corp. of America v. FTC 1986; National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla 1984).
This view, however, is misleading. In 1952, the Court issued an opinion in *U.S. v. Oregon Medical Society* that professional organizations could clearly violate antitrust considerations since application of such rules would imply that such professionals were part of a the regular commercial market, which might offend the ethical sensibilities of doctors (United States v. Oregon State Medical Soc). This logic held until 1975, when the nonprofit Virginia State Bar Association was considered guilty of anticompetitive practices despite dealing exclusively with the professions; however, the decision was augmented to allow for the possibility of a “public service” exemption in later cases (Goldfarb v. Virginia State Bar 1975). Over the next four decades, the markets for many kinds of public services have evolved. Case law, especially in the medical field, has been addressed, though little other than the potential for antitrust applicability has been established. Recently, however, the record has become more pronounced and consistent in the area of mergers, which have become more popular with the economic downturn. In 2012, a U.S. district court blocked the acquisition of a nonprofit hospital by another nonprofit (Federal Trade Commission v. Promedica Health System, Inc. 2012); in an important twist on this case, the Supreme Court ruled just last week on *FTC v. Phoebe Putney*, where a nonprofit acquisition of a for-profit hospital was blocked on anti-competitive grounds (Federal Trade Commission v. Phoebe Putney Health System, Inc 2013; FTC v. Phoebe Putney Health System, Inc 2011). Questions such as natural monopoly or anti-competitive practices in an exclusively nonprofit market or a charity framework have had significantly less, if any, discussion.

The purpose of this study is to address these ambiguities in the application of anti-trust regulations to nonprofit sector enterprises. Though legal opinion on the status of nonprofits in mixed markets such as hospitals is becoming more established, the rules become more vague as
nonprofits which are involved in less commercialized activities or in markets with fewer for-profit competitors. Though the common tests of the Sherman Act regarding the level of prices and quantities produced are simple to apply in strongly mixed markets, the question of consumer impact becomes more hazy as the consumer is responsible for less of the cost for the good or service. In such cases, can anti-competitive practices be justified in the name of other stakeholders, or in the potential harms of competitors rather than direct consumers? Such questions are normally subservient to questions regarding consumers, but may play a larger role in nonprofit regulation; such exploration is necessary, and the findings from these commercially gray markets can be applied to the more straightforward mixed market cases to help clarify the continuing debate over how comparable nonprofit and for-profit enterprises are before anti-trust law. Further, it will help explore whether the existence of market domination by a nonprofit entity has net benefits to society: if consumers bear limited direct costs, is the existence of a natural monopoly attributable to economies of scale a burden or a boon?

Case law is organic and provides a limited number of instances for traditional statistical approaches. Accordingly, answers to these questions will be found through a comprehensive literature review and the development of a typology of anti-competitive nonprofit markets. These markets will then be modeled and the applicability of the identified reasoning of anti-competitive behavior regulation will be tested for different scenarios. By testing the reasons offered by different court decisions in markets where the foundations for such concerns are unclear (such as where there are no price signals), we will gain a clarity that will be beneficial not only to those organizations hoping to steer clear of legal challenges, but also provide a guide to legal scholars interested in the consistency of the court’s application of antitrust regulatory powers.
2. Literature Review

As mentioned, the case law and resulting responses in applying anti-competitive regulations to non-commercial entities is rich and extends for several decades; over this time, though the founding statutes have remained unchanged, both the case law and the markets in which such enterprises operate have evolved. The primary research question for this study addresses this development:

*RQ: How can existing antitrust regulations address noncompetitive practices in the nonprofit sector?*

This is broken down into four subsidiary questions, each of which plays a particular role in the analysis: what is an anti-competitive practice, does it exist in the nonprofit sector, what are the available tools, and how can existing regulatory responses be harmonized and applied to nonprofit enterprises? The first three are addressed in turn to form a foundation of existing law and practice; we then use this foundation to develop a typology which harmonizes the different strands of antitrust theory that have been applied in disparate fashion to the nonprofit sector in hopes of providing a cohesive guide for scholars and practitioners.

2.1 The Definition of Anti-Competitive Practice

There are several ways to define an anti-competitive practice: by firm behavior *prima facie* and by the resulting evidence in the consumer market of such practices. Since the justification of regulating each differs, this study asks:
**Q1: What are monopolistic and anticompetitive practices and why are they regulated?**

Anticompetitive practices are actions that an organization takes in order to decrease the amount of competition in their marketplace. This is not the traditional tug of war that takes place while companies try to differentiate their products, but rather a targeting of the competitive mechanism itself. By restricting competition, the few (or, in the case of monopoly, the one) firms are able to charge higher prices and reduce quantity more than they would if they did not have market power. The courts define market power as the ability “to control prices or exclude competition” (United States v. EI du Pont de Nemours & Co 1957); this is in contrast to a perfectly competitive market, where the price is set by the collective group of consumers.

Anticompetitive practices in the for-profit sector distort equilibrium so that a company can both provide less of the good and charge a higher price. This means that “surplus” which used to belong to consumers is being removed and transferred to the producer (whether for-profit or nonprofit). This practice also produces a significant deadweight loss to society. In order for this “surplus” to be returned to consumers, government intervenes in order to address the problem. This can include defensive moves such as blocking prospective mergers that are deemed against the interest of consumers; this can also involve active moves such as breaking apart a large monopoly into components.

It is important to note that profits to the companies are not necessary to prove monopolistic power, only price and entry controls (Nalebuff 2009); for example, the airline industry has been wracked by bankruptcies, but continues to exercise power through the hub-and-spoke structure and, occasionally, predatory pricing (Spirit Airlines, Inc. v. Northwest Airlines, Inc 2005). Further, the conditions which give rise to market power do not need to be
the direct cause of collusive action on behalf of the dominant firms; monopolies, oligopolies, and dominant monopolistically competitive firms can also utilize “naturally” occurring phenomena such as high barriers to entry and high sunk costs, which prevent new competitors from competing effectively. The harms which come from concentrated market power can be divided into four broad types of adverse impact: those on price, quantity, distributive justice, and market heterogeneity.

Figure 1: A Profitable, Monopolistically Competitive Firm. Adapted from Krugman & Wells (2008).
2.1.1. Impacts on Price

The most well-known consequence of anti-competitive practice is the increase in the price of a good. For the sake of illustration, our hypothetical good is a day of inpatient stay at a hospital. According to economic theory, a monopolist (or any other firm with market power) knows that they will maximize their profits by producing at a different price than the one found in a perfectly competitive market. If our hypothetical hospital knew they were the only place in the county capable of performing an inpatient procedure, then they could charge more for a day than they could if they were competing for patients with another hospital, or with another three hospitals. Especially in the cases involving emergency procedures where travel time is unavailable and the demand for service highly inelastic, the potential for large monopoly profits is quite large. Even in the case of total monopoly, however, the price which can be charged is still limited by market demand.

2.1.2. Impacts on Quantity

Often in tandem with a price increase in monopolistic markets is a decrease in the quantity available. Since even monopolists face a downward-sloping demand curve\(^1\), their ability to charge a higher price means that they do not need to produce as many goods as they would under perfect competition, with the exact quantity and price depending on their cost structure. In Figure 1, the quantity produced in a perfectly competitive market would be at the intersection of the marginal cost curve and the demand curve, since, in perfect competition, the demand curve is the marginal revenue curve (which are all horizontal lines at the equilibrium

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\(^1\) This is because, for any given price, there will be less potential buyers at the next highest price, a relationship which normally holds regardless of how many sellers there are in the market.
price level). The monopolistic quantity is clearly to the left of the quantity which would be produced in a perfectly competitive market.

To continue on with our example, this would mean that, depending on the cost structure of the hospital, it might maximize profits to offer twenty beds for inpatients per day at a higher price than it would to offer forty for a lower price. This would deprive the community of twenty hospital beds that could have been utilized without monopolistic power.

2.1.3. Impacts on Distributive Justice

There are concerns of distribution and fairness beyond those directly associated with the prices or quantities faced by consumers; in our analysis, we will call these concerns those of distributive justice. What does economic theory have to say about the community that lost the potential use of twenty beds? This loss of the opportunity for people to make themselves better off using the market is shown by the pink triangle in Figure 1, which signifies the lost welfare to society due to the allocative inefficiency of the exercise of market power. In other words, since more hospital beds would have been available if the powerful firm(s) did not have the ability to set prices, those people who would have paid more than the equilibrium price but less than the monopolistic price are now going without medical services. Even though the monopolistic firms are better off with higher profits at the cost of consumer welfare, this does not outweigh the deadweight loss that is not recouped due to the trades of money and beds that potentially could have happened, but did not.

Bork (1966) contends that this loss is the primary focus behind the drafting of the antitrust regulations, though specifically the loss to consumers. If consumers are being forced to
pay higher prices than are necessary, then government should step in to curtail the power of the firms.\(^2\) However, this logic is also used to justify the existence of monopolies when there are cost efficiencies to be had, which continues to provoke legal debate. In economics, the balancing of total welfare is became known as the Williamson tradeoff: how much cost efficiency needs to be gained in order to compensate for the inefficiencies of market power (Williamson 1968)? The courts, however, have generally not held the cost savings to the producer or elements of welfare to the consumer are grounds to permit high market concentrations, though this is not without exception (Bork 1966; FTC v. Indiana Federation of Dentists 1986; Federal Trade Commission v. HJ Heinz Co 2001; Fisher, Lande, and Vandaele 1983; FTC v. Brown Shoe Co 1966).

Also within this category of harms are those concerns that nonprofits, specifically, should not be receiving any profits from market transactions due to either their tax status or their mission. This can be seen as a more complicated Williamson tradeoff: market power will be more likely to be tolerated for cost efficiencies, but any gain in producer surplus will be frowned upon. Though this attitude toward the retention of earnings by nonprofits is hopefully changing in the interest of financial soundness (Calabrese 2011; Bowman 2011), it is currently a valid concern for both donor and policy audiences.

\(2.1.4. \textit{Impacts on Competition and Heterogeneity}\)

In contrast to the previous consumer-centered impacts of monopolistic and anti-competitive behavior, there are strong considerations which stem from the legal record regarding

\(^2\) There are, of course, arguments from stalwart Neoclassical economics that all monopolists will fall in the long run due to consumer behavior and the workings of the market, but these are uncommon in applied economics and are not considered here.
the worthiness of preserving competition and diversity in providers simply prima facie. The producer-centered arguments are present in the Alcoa case, where the court determined that there was inherent value in the preservation of a large number of competitors, regardless of what the cost implications were to consumers (United States v. Aluminum Co. of America 1945). This line of reasoning, also called “no abuse” logic, treats the condition of competition as having inherent worth regardless of whether any consumers are injured. Grandy maintains that an analysis of the Congressional debates leading up to the Sherman Act clearly indicate a focus on preserving “full and free competition” as the predominant concern, with the consumer effects listed afterwards as undesirable effects, but not the primary focus of the Act (1993). Therefore, it can be the existence of a competitive market that is the goal rather than allocative or distributional efficiencies, per se; this would just allow a diverse mix of different products which could compete to fit the different needs of a market. This approach particularly lends itself to nonprofit analysis since the concept of demand heterogeneity is already an established theory of nonprofit density (Matsunaga and Yamauchi 2004; Corbin 1999).

2.2 Regulatory Tools which Address Anti-Competitive Practice

Now that we have established the definitions and motivations for controlling anti-competitive behavior in firms, we need to discuss the tools available for that task. To do so, we ask:

Q2: What regulatory tools are used to address anticompetitive practices?

There are interrelated layers of tools which are used by antitrust authorities to evaluate and regulate anticompetitive behaviors by firms in the United States. Undergirding the case law of
the last century, some of which has already been mentioned, there are three foundational statutes that guide the scope of antitrust enforcement. Since this study builds on case law in multiple sectors in order to apply the logic to a less-known area, the definitions and intents contained in the original statutes are worth examining.

Most anti-competitive actions taken by the government stem from three statutes: the Sherman Antitrust Act and the Clayton Antitrust Act, both of which are enforced by the Antitrust Division of the Department of Justice (Department of Justice 2012), and the Federal Trade Commission (FTC) Act, which established the FTC and gave them power to redress actions under the Clayton Act and their own Act (Federal Trade Commission 2008). The Sherman Antitrust Act was passed in 1890 and was a response to the economic conditions at the time, which were dominated by price-fixing cartels such as those forming the railroads (Binder 1988). The Sherman Act forbade such outright collusion by forbidding "every contract, combination, or conspiracy in restraint of trade," and any "monopolization, attempted monopolization, or conspiracy or combination to monopolize" (Federal Trade Commission 2008). Unfortunately, this caused a wave of mergers as firms who had been colluding chose to unify, instead, giving rise to such corporate giants as Shell Oil and U.S. Steel (Bittlingmayer 1985). This behavior inspired the drafting and passage of the Clayton Act in 1914, which was an expansion and clarification of the powers declared in the Sherman Act. The original version only addressed horizontal mergers, however, incentivizing other types of merging and mutual asset acquisition amongst firms until the loopholes were closed with an amendment to the Clayton Act in 1950 (Turner 1964).

The Federal Trade Commission (FTC) Act was drafted and passed in 1914, also as a method of controlling the powerful trusts dominating the economy. The FTC Act contains more
sweeping powers of regulation and can be utilized by both the FTC and private consumers in litigation (Sovern 1991), but it also provides a more narrow definition of its scope, limiting it to companies who “operate for [their] own profit or that of its members” (*Federal Trade Commission Act* 1914). Though there are currently arguments being made about whether the retained earnings of nonprofit organizations constitute profit (Calabrese 2012), the retention within the organization of revenues in excess of costs passes the literal common definition profit, regardless of intent or distribution. However, because the Sherman and Clayton Acts are missing such verbiage altogether, they are used more often in the scope of the literature used in this study.

2.3 *The Existence and Forms of Anti-Competitive Practices in the Nonprofit Sector*

We now have several definitions of anti-competitive practice, some of which are more applicable to different parts of the nonprofit sector than others. Accordingly, our second research question is:

*Q3: Do monopolistic and anticompetitive practices occur in the nonprofit sector?*

Based on the legal record, the answer is a definitive yes, with cases dating back over fifty years. In addition to the qualitative answer, however, further explanation regarding the type of anticompetitive practice is necessary. As hinted in the previous section, different market compositions and logics lend themselves to different definitions of anti-competitive practice; which types are found where is an especially salient component to the normative debate of whether such regulations should exist in the nonprofit sphere. Further, the largest conundrum of
antitrust regulations isn’t in developing a way to apply the regulations, but deciding between the many justifications that have been offered thus far at different times, in different sectors.

As mentioned in the introduction, examples of the court offering opinion on nonprofit competitive practices explicitly reaches back to the middle of the twentieth century. Since then, the courts (and the regulations which have been brought to suit) have had a tendency to address different types of nonprofit industry in waves, depending on the political and social climate at the time. Initial cases were brought concerning regulatory bodies; this was followed by a strong amount of literature on the hospital mergers of the 1980’s. This was followed by several cases brought against elements of the education industry, and then health care reforms and a worsening macroeconomic climate have again brought hospitals and other medical concerns to the fore. During each of periods, case law on previous decisions and other nonprofit topics expanded, often as the logic of the previous period was revisited in light of new court rulings.

2.3.1 Regulatory Agencies

The first forays into nonprofit anti-competitive regulations first began in response to the powers of regulatory agencies and professional societies; Philipson and Posner (2006) contend that such agencies are often seen as extensions of private concerns, so it is logical that the bridge in antitrust applications began here. The first was *American Medical Association v. United States*, where the nonprofit AMA was convicted of conspiracy for threatening doctors with loss of licensure for working with a contract provider similar to today’s HMO (American Medical Assn. v. United States 1943). This was partially contraindicated almost a decade later, when the Court decided that the contract provider set up by the Oregon Medical Association with
significant market power and tactics of coercion was permissible (Goldberg and Greenberg 1977); there, the Court recognized “that forms of competition usual in the business world may be demoralizing to the ethical standards of a profession“ (United States v. Oregon State Medical Soc 1952). This logic would extend for another twenty-five years until two seminal cases were brought in 1975. The first, Goldfarb v. Virginia State Bar, expressly stated that the “learned professions” were not exempt and constituted competition subject to rule of law (Goldfarb v. Virginia State Bar 1975). The second case was brought by the FTC against the AMA, who then lost in the Supreme Court regarding whether they were permitted to control how doctors recruited patients. In the following decade, a series of cases regarding the role and powers of professional associations were brought and found against the interests of the associations (Hydrolevel Corp. v. Am. Soc. of Mech. Engineers 1980; Howe and Badger 1982; FTC v. Indiana Federation of Dentists 1986).

Recently, the tighter fiscal climate has again brought the attention of the public onto regulatory bodies whose “natural monopolies” have been unchecked to this point; this does not necessarily focus on cost savings (and actually can inhibit such a feature), but, in the nonprofit sector, stems from the appropriateness of favorable tax treatment in an entity that may be seeing monopoly rents. For example, the tax-exempt status of the National Football League (NFL) has recently drawn increased media scrutiny. Though a 501(c)6 organization which does not qualify for donations which are tax deductible, the NFL has a tax exemption on the revenues it makes, which in 2008 was almost 7 billion dollars (Cohen 2008). Further, it has lobbied to recuse itself from the regulatory requirement of disclosing the salaries of top executives (Cohen 2012). The suggested punishment for this monopoly, however, is normally just the loss of tax exempt status,
with no one ever mentioning touching the monopoly status itself (Cohen 2012, 2008). Why are the critics addressing the tax status and not the market status?

It is interesting to note, however, that the first forays into controlling anti-competitive behavior in the nonprofit sector were not based on monetary reasoning, but rather the element of market control. The court does not base the case verdicts on the presence of increased service pricing or decreased output, but instead that the concentration of the power to regulate a profession, despite honorable intentions, does not suffice as justification for monopoly.

2.3.2 Hospitals

Hospitals provide the most fertile ground for anti-trust regulation since the market for their services is heavily integrated with for-profit enterprises; this lends itself to the traditional definitions of anti-trust such as consumer-based logics of price and quantity levels. The topic of mergers and anticompetitive behavior in the hospital industry has become quite active recently. The recent blocking of a nonprofit hospital acquiring a for-profit hospital in Albany-Dougherty County, Georgia, on antitrust grounds is the first time such regulations have been employed successfully in almost a decade (Bell 2012); between 1994 and 2006, the government lost all seven antitrust suits brought against hospital mergers (Richman 2007). The appeal of this case, Federal Trade Commission (FTC) vs. Phoebe Putney Health Systems Inc. et al., was decided in favor of the government in spring of 2013 (Federal Trade Commission v. Phoebe Putney Health System, Inc 2013). Further, as the topic of healthcare reform continues to appear on the national political agenda, so do the shifts in market conditions and renewed regulatory interests.
The 1980’s was an interesting time in antitrust policy: 216 hospitals merged each year between 1980 and 1983 (Finkler and Horowitz 1985), which helped prompt the release of the 1984 Merger Guidelines and a further wave of consolidation in the hospital market (Kopit and McCann 1988). The 1984 merger guidelines also detail the new reliance on the Herfindahl-Hirschman Index (HHI) to evaluate whether an unfavorable competitive environment existed which warranted further review, which can be problematic based on prior and contextual conditions (Jennings 1992); as mentioned by Kopit and McCann (1988), the potential for any market to contain the number of hospitals that the statute would consider unremarkable is extremely low. The question, then, becomes one of context – if all mergers will come under scrutiny due to HHI, then the market power and ability to set price become the concern, regardless of the threshold level of concentration.

This turns the conversation to the question of price-setting and the gathering of monopoly (or oligopoly) rents. Kopit and Vanderbilt (1995) maintain that, regardless of the profit or nonprofit orientation of the hospitals, both are price takers because of the power of the government to set prices through Medicare and Medicaid; further, they maintain that the cost efficiencies gained would outweigh any trace adverse impacts; this reinforces the opinion Kopit and McCann (1988) expressed prior that antitrust actions can only be justified on the grounds of consumer harm. Metzenbaum (1993) and Simpson and Shin (1998) also contend that efficiencies could outweigh consumer harms when evaluating the permissibility of a nonprofit merger, though they are more certain than Kopit and McCann (1988) that harms would prevail.

A great deal of the existing argument concerning antitrust regulation in the hospital sector, therefore, relies on the empirical evidence of consumer harm and rent-seeking by the incumbent hospital(s). Lynk’s (1995) study finds significantly lower price increases in
nonprofit markets than in for-profit ones using California data from 1989; however, several other studies have disputed Lynk’s methods and results, arriving at the opposite conclusion (Young, Desai, and Hellinger 2000; Simpson and Shin 1998; Melnick, Keeler, and Zwanziger 1999). Capps et al. (2002) produce merger simulation outcomes on data from Chicago and San Diego in a strong critique of the use of the SSNIP criterion in determining market share, finding that there are price effects.3 Finally, Balto and Geertsma (2001) examine the market impacted by the pro-merger FTC v. Butterworth case and conclude that competition would have been preferable to the conditions afforded by the merger.

As mentioned at the beginning of this section, the principles which motivate the legal corpus in the mixed hospital market are the monetary, consumer-based harms. Of crucial consequence to this is whether the incentive to seek monopoly rents exists in a nonprofit; do incentives exist for the nonprofit to be self-seeking (Prüfer 2011). This potential self-promotion can be seen from two levels: that of the individual decision-maker (presumed executive director or board member) of the nonprofit, and that of the nonprofit itself.

As Posner noted in 1986, "The adoption of the nonprofit form does not change human nature, as the courts have recognized in rejecting an implicit antitrust exemption for nonprofit enterprises” (Hospital Corp. of America v. FTC 1986). Though this may be an excessively pessimistic view of the human condition, it need not be so; human nature’s drive to succeed also fuels collaboration, perseverance, and the innovations necessary to tackle the social ills that both nonprofit and for-profit social enterprise do. The wisdom in Posner’s words does not arise from

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3 Capps et al. (2002) maintain that the continued use of the SSNIP criterion in determining market size for the purposes of merger evaluation will result in the approval of practically all mergers. Despite the fact that market boundaries traditionally play a significant role in discussions of antitrust behavior, their role in the nonprofit debate is surprisingly limited.
its potential description of everyone, but from the potential for it to describe anyone. Enough
cases of nonprofit fraud exist to realize that fallible humans with selfish goals can lurk in a
nonprofit. Regulations exist in the for-profit and mixed sectors not because the corporations are
self-interested enough to injure other corporations or consumers, but because the individuals
leading them are. There is no convincing evidence that different individuals lead nonprofits; in
fact, there is a great deal of evidence that they are the same.

Lynk (1995), however, maintains that the ownership difference between for-profits and
nonprofits is key: even if the managers are entirely self-interested, there is no incentive to profit-
maximize through the organization because they will not see distributions. He concedes that
there may be a sense of community ownership, in that a government hospital may be a
mechanism of monetary transfer between private citizens and government programs such as
Health Corp 1996) goes one step further, contending that the presence of community leaders on
the board will remove anti-competitive effects and restrain any increase in pricing. This logic,
however, ignores a crucial factor: profit-maximization can be incentivized through both
individual and organizational desires to self-promote, with the latter potentially coexisting with
philanthropic aims.

So if we relax the assumption dictating any level of self-promotion on behalf of the
managers, will a philanthropically-minded organization still prefer to make profits? The answer
is affirmative, and for several reasons. The first is the empirical observation that nonprofits do,
in fact, accumulate retained earnings, and that those who do not are often unable to, not
unwilling to (Calabrese 2012, 2011; Carroll and Stater 2009). The second is that profit
maximization of a nonprofit entity can be entirely justified if the managers consider the
contributions of their own organization to be of more social benefit than the money’s potential alternative. All that is necessary for a justification of profit-maximization in a nonprofit is the assumption that the managers believe in the nonprofit’s mission and their ability to achieve it.4

The mechanics of antitrust in the mixed-form hospital market continue to unfold, with the most recent ruling on Phoebe reversing the trend of a more lenient treatment of nonprofits (Richman 2007). Though the question of whether there are cost efficiencies gained in the consolidation of hospitals has generally been accepted as true, there continues to be debate on what level of standing such a fact has in the decision of antitrust matters. Further, the evidence on whether consumers see harm through increased prices continues to be mixed, while the nonprofit literature has generally come to accept that nonprofit organizations will accrue some level of profit in order to assure their own longevity and that of their mission. Finally, non-consumer reasons for the preservation of competition have begun to emerge, similar to other fields which have addressed nonprofit competitive behavior.

2.3.3. Education

Between the two large waves of interest in the hospital mergers was a period of time that saw a great deal of activity in the education sector. Here we see a combination of factors which could and have been used to justify anticompetitive practice: price and quantity effects, social welfare, entry barriers, and inherent desirability of competition. More so than the other two

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4 This is also notwithstanding the theoretical argument that, given optimal values of external variables, the cost-minimizing and profit-maximizing outcomes are the same (Whitin 1955); there is much less discussion on whether nonprofits minimize costs.
sectors, the educational cases were relatively unique and contextual, but provide an underlying theme.

First, the precedent set in the cases regarding professional regulatory agencies was translated to filings against those nonprofits responsible for accreditations in schools. The Massachusetts Law School at Andover filed suit against the American Bar Association (ABA) for denying it accreditation based on characteristics that had no bearing on the quality of their legal education, such as a reliance on part-time faculty (Mass. School of Law at Andover v. American Bar Ass'n 1998); the Department of Justice filed a similar complaint against the ABA which ended in arbitration and the promise of reforms (Kolovos 1996). The main thrust of these arguments were not whether the price for a law student was increasing (though such allegations remain, see (Elson 2012)) , but whether the ABA was exercising enough market power to restrict entry and stifle competition, an accusation which was echoed by a team of deans from the country’s top law schools in 1994 (Dykstra 1995). Therefore, the argumentation more closely resembles the producer-side theories regarding healthy competition and entry barriers than it does price fixing (Lao 2001).

Second came the challenges over the fixing of financial aid. The primary case, *US v. Brown University*, described the behavior of nine different schools who had been meeting for decades to negotiate what financial aid packages would be offered to top students that had been accepted at multiple schools (Srinivasan 1994). The universities contended that this system minimizes the money and time that they spend trying to attract the top applicants; rather than duplicating one another’s efforts, and that the savings allowed them to admit more students with higher need; the government alleged that the behavior was price fixing which allowed them to charge higher prices (US v. Brown University 1993). MIT was the only school to take the
government to trial, and the case would eventually be settled out of court (Bamberger and Carlton 2004).

The questions then become about whether there were harms for the students or society at large, in addition to whether the system was suppressing competition. The empirical evidence of whether students are subjected to rent-gathering is mixed: Carlton et al. (1995) find no evidence that students faced higher prices due to collusion, whereas Epple et al (2006) do find evidence of rent-seeking among the more prestigious educational institutions. Further, there was little way to verify the overall social welfare gains or losses as the demographic composition of colleges is subject to a host of complex and intervening variables. As the question of educational pricing continues to the current day to take a prominent place in political debate, the question of application of the law turns to nonprofit form and intent.

The nonprofit nature of the institutions also took a prominent place in the argument, with the District court finding no difference in Sherman Act application and the Court of Appeals finding it central to the argument (US v. Brown University 1993; US v. Brown University 1992). Carlton et al. (1995) claim that the existence of trade barriers and absence of auctions for attendance necessitate a beneficent nonprofit objective function, which this paper considers specious logic that detracts from the reasonable claim that the nonprofit objective function is simply complex; Srinivasan (1994), however, contends that the nature of nonprofit collaboration is the distinctive element under consideration. This claim has foundations elsewhere in the literature, relying not on the motives of the individual nonprofits and managers, but rather the nature of collaborations themselves (Young 2007); however, the existence of net social welfare gains, like those of harmful pricing, are difficult to prove, especially if the needed analysis is concurrent to the legal proceedings. Thus, Brown leaves a mixed legacy: the ruling of the
District Court (affirmed by the Court of Appeals) that higher education is a commercial activity declares nonprofits within regulatory scope, but the Court of Appeals declaration that nonprofits should not face a *prima facie* declaration of collusion (but not an exemption) keeps ambiguity at the core of nonprofit antitrust regulation (US v. Brown University 1993; US v. Brown University 1992).

3 Typology of Anticompetitive Nonprofit Markets

First, does the federal government have any jurisdiction over nonprofits using the Sherman or Clayton Acts? In 1969, the courts found that the FTC did not have the authority to regulate a nonprofit or anything founded for "charitable, educational, civic, patriotic, social welfare, health, scientific and research" purposes because of the stipulation that the corporations being regulated must be seeking profit for the benefit of their owners, per the Wheeler-Lea test (Community Blood Bank of Kansas City Area, Inc. v. FTC 1969). This wording refers specifically to that found in the FTC Act. Since this time, however, the FTC has had numerous instances where the involvement of a nonprofit in a mixed market has justified their jurisdictional oversight. The scope is more straightforward, however, with the more powerful Sherman and Clayton Acts. Neither the Sherman Act nor the Clayton Act specifies a corporation of any kind, leaving the definition merely at those who participate in trade or commerce. Accordingly, the Department of Justice has a much larger range of undisputed jurisdiction, thought the FTC’s involvement in the enforcement of the Clayton Act gives precedent for their involvement in even pure nonprofit cases. Since the foundation statutes can

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5 The FTC filed suit under the FTC Act rather than the Sherman or Clayton Acts.
be extended to include pure philanthropy, the next step in evaluating the degree of applicability
to the nonprofit sector is to distill the current case law covered in previous sections into
attributes. To do this, we have constructed a typology of eight characteristics with which we can
classify and extend potentially anti-competitive scenarios (see Table 1).

3.1. Potential Harms

The existing case law, as discussed above, focuses on four potential areas of harm caused
by anti-competitive practices: increased price, decreased quantity output, distributive injustice,
and decreased market heterogeneity. These were described in Section 2.1, and we categorize the
existing case law based on the logic offered in the opinions. Though often many reasons are
offered for the ruling, we distill the result down to the top two for purposes of the typology.

The primary objections to the professional association monopolies were regarding
distributive justice and heterogeneity. Whether the price of becoming a doctor or recruiting
patients was increasing was beside the point; rather, whether there was an inherent problem in
the concentration of market power, regardless of action, seemed to take the fore. This was
followed by concerns, especially modern ones, that these strong entry barriers were being set up
around institutions that were seeking monopoly rents. Though not clamoring against the demand
side of higher prices, simply the notion that a tax-exempt organization of any kind (even if not
tax deductible) would achieve a certain level of profit triggers concerns that exempt
organizations should not do so *prima facie*.

The strong and established presence of both for-profit and nonprofit corporate forms in
the hospital sector introduces a much more traditional analysis for anticompetitive impacts. The
potential that prices for services may increase and the quantity available decrease in any given
area are often the center of debate; unlike arguments such as those in professional associations
that do not rely on pricing, there is a heavy amount of data and econometric modeling in hospital
antitrust analysis. The concerns on pricing and quantity are especially applicable to the
provision of emergency services, which are generally considered to be unprofitable (Capps et al.
2002); even though such services are highly inelastic, the expenses incurred encounter normative
and market forces that would prevent overt price-gouging. However, the consumer impacts
drive the regulations.

For the antitrust regulations in the area of education, there is a blend of both concern for
preserving heterogeneity and preventing higher consumer pricing. Especially in the case of the
law school accreditation, the mere presence of market power and the ability to enact barriers to
entry was considered grounds for court intervention. Further, this concern about prima facie
market power was enough to override potential evidence of cost savings through the collusion
between the Ivy schools. These cost savings, however, were a far from universally accepted
outcome, and concern that at least some of the schools were using their market power to increase
prices helped mire the definition of collusion amongst nonprofits as something that cannot be
assumed as either harmful or benign (US v. Brown University 1993).

3.2 Entry Barriers

In traditional for-profit anticompetitive analysis, one of the signs of potential market
power is the existence of barriers which stall or prevent market entry to competitors. As
mentioned previously, if potential competitors are freely able to enter the market where a
monopolist or oligopolists are extracting profits, then they will do so in hopes of capturing some
of the profits for themselves. Theoretically, firms will continue to enter until all profits are gone and the market power of the original players is gone. At this point, there are no profits that can be extracted from the market, and consumers are better off. The originally powerful producers, however, have lost their profits, which provide incentives for them to prevent additional firms from entering. Also, as is mentioned in Salamon’s (2002) description of policy tools, neither price nor quantity deviations from the equilibrium are capable of being supported without some kind of market entrance control, otherwise competitors would flood in to take advantage of the profit opportunities. Therefore, how easily potential new competitors can pose a challenge (also known as “contestability”) is a key determinant of market structure (Carlton and Perloff 2005, 76).

There are several different types of entry barrier: natural, market, and governmental. Natural entry barriers exist in markets where there is increasing returns to scale, allowing incumbent firms to constantly gain in cost savings and preventing other firms from joining at prices they can afford to sell at; a similar natural entry barrier exists in industries such as mining or airlines due to a very large initial need for capital to cover fixed or sunk costs. A market barrier is another name for what Carlton and Perloff call “product differentiation” – demand-related elements such as strong brand preference that keep similar products from being viewed as substitutes for each other (2005). These are created by the market participants, often oligopolists, and can be enforced through predatory pricing (Spirit Airlines, Inc. v. Northwest Airlines, Inc 2005) or brand prestige (Federal Trade Commission v. HJ Heinz Co 2001). Since one of the reasons often discussed for the success of nonprofits in mixed markets is that nonprofits gain an advantage in markets for trust goods, this type of barrier is extremely relevant. Finally, there is a government barrier, such as patents or slot controls at airports (Friedman
These barriers are official obstacles such as professional licensing requirements or patents that are artificial barriers placed around an industry in order to protect a particular audience. It is also useful to remember that where large barriers to entry exist on goods and services that are highly inelastic and deemed “necessities,” the government will often regulate them as utilities.

3.3 Market Scope

Market scope is a very general way to describe the extremely important variable of how to define the market currently being investigated for anticompetitive behavior. Many cases, especially prior to the advent of the internet, were based on geographically-defined lines: how many competitors existed within what could be considered the feasible driving distance for a consumer. Also considered were how much organizations in the market had to have in common; in FTC v. Staples (FTC v. Staples, Inc 1997; Dalkir and Warren-Boulton 1999), one of the deciding issues was whether large discount retail chains such Wal-Mart should be included in antitrust analysis with the three large office-supply retail chains. There are, however, larger networks where monopolistic market power can be a concern. For example, the scope of a professional organization is analogous to the scope of the profession itself; as mentioned previously, the scope of the profession is not the primary concern, but rather the existence of a single regulator of entry. The analysis of education markets varies depending on the level of institution; in Brown (US v. Brown University 1993), the students being negotiated over were from a diverse geographical area, though discussions regarding community colleges may be more focused on local markets.
Market scope has already played a large part in the antitrust analysis of hospitals, including nonprofit ones (Jacobs 1996; Wade 1997; US v. Mercy Health Services 1995). The drawing of geographical boundaries where services are considered to have competitors was the deciding factor in *US v. Mercy*, where the inclusion of regional hospitals at some distance from the originally-drawn market was ruled to be valid in the analysis. The designation of catchment areas is also familiar to other nonprofit social service providers, who use it as a way of both attracting the attention of political backing and of gauging community need (Lipsky and Smith 1989); this practice has, in for-profit debates, been linked to uncompetitive practice and collusion (State of Ohio Ex Rel. v. Louis Trauth Dairy 1994).

3.4 Number of Competitors

The number of competitors in the market where the nonprofit operates is, by definition, an important characteristic of a competitive market. According to Neoclassical economic theory, the number of firms in a market should be determined by profit-making opportunities – if there are economic profits being made (lost), then firms will enter (leave) the market until the market clears and no firm acquires profits. This frictionless model is still used as a theoretical guide, but questions regarding the proper concentration of firms in a market are more complex and depend on several factors, many of which are discussed below. Additionally, it promotes the overly simplistic view that, since nonprofits are not organized for the pursuit of profit, that there should never be antitrust considerations brought to bear. This is flawed on two levels. First, a nonprofit should (and often does) seek to gather a slight surplus in net assets in order to ensure financial health (Calabrese 2012; Bowman 2011). Second, even if the nonprofit was unwilling or unable to retain earnings, the general relationship that larger numbers of firms in a sector causes more competition for resources is relatively universal. Unlike the for-profit sector, where the service
recipient and the revenue provider are normally the same people, these roles are often cleaved in the nonprofit sector. Therefore, we must keep competition on both levels in mind when we evaluate the extension of anticompetitive concerns.

The density of the marketplace is therefore of potentially double interest when discussing antitrust measures for nonprofits, only the theoretical apparatus of market-clearing is an even poorer fit than it is with for-profit markets. In our typology we therefore include the average number of competitors in a particular market space in order to lay a foundation for the traditional density arguments found in the literature of both sectors, though the literature in nonprofit studies is primarily on the financial resource side. Additionally, even in the for-profit sector, the marginal impact of another firm in a market can vary widely; including information on simple numbers of participants will help determine not only whether there are harms, but how the relationship changes as the market size and resources fluctuates.

3.5 Types of Competitors

What different corporate forms are active in the market under consideration? As noted above, those markets with a heavy for-profit presence are more easily modeled with the traditional price and quantity concerns for monopoly; the existence of a mixed market implies that there is some degree of profit-seeking to have enticed the for-profits to compete there. The strong presence of both for-profits and nonprofits in the hospital and education industries indicates that there will be some ability to use traditional antitrust logic such as price and quantity effects, in addition to potentially detecting phenomena like excessive rent-seeking.

The existence of primarily nonprofit competitors will imply potentially divergent recipient and financial provider audiences as the norm in the industry; there would still be heavy
resource competition, but it could be along multiple revenue channels and there could be similar internal tensions across organizations. Additionally, such as the cases involving professional associations, the existence of purely earned income revenue streams in a single-seller market begs the question regarding the need not only for industrial reorganization, but also revisiting of the tax exemption in such a case. Finally, in cases of *monopraebi* (which would be a single service “provider” rather than simply “seller”) that are absent any earned revenues, could anti-trust analysis apply?

3.6 Pricing Ability

Returning to Neoclassical economic theory, a firm in a perfectly competitive market would be a price-taker with no power to influence the price of the good or service they were producing; on the opposite side of the spectrum, a monopolist would only be constrained by the demand for the product, and the firm could extract rent from the consumer. Therefore, though there are similar threads between physical characteristics of the market such as scope and number of participants, we also need to keep in mind the elasticity of demand for the services which are on offer when evaluating potential harms. These three elements then combine to form a gauge of the level of pricing ability in a market.

Professional associations, since they guard the universe of their profession through controlling entry, have strong pricing abilities due to the relatively inelastic demand for their certification. If someone is not allowed to call themselves an engineer or doctor without the credentialing of an organization, then the need for that certification is acute and the potential for rent extortion is high. The discussion regarding educational institutions is more nuanced, similar to the market scope debate: someone whose heart is set to attend a particular school will pay
more to do so, but there is a tuition level where a student will choose to attend a comparable or less prestigious college (Shin and Milton 2006). When comparing price elasticity for community colleges, however, the cost of education is being weighed against both other educational institutions and the gains of entering immediate employment (Heller 1997).

3.7 Product Attributes

The characteristics of the product or service are likewise important not only to the discussion of whether and how antitrust regulation should come into play, but also in explaining the presence of nonprofits in the field. Higher education and professional membership are highly excludable, lending themselves to market mechanisms; higher education and hospitals are highly rivalrous, meaning that the scarcity of a particular consumable service can drive up the price. Elasticity was considered earlier as a component of pricing ability and separately here: is the product necessary (professional credential), highly desirable (higher education), or variable (depending on type of hospital service)? Finally, the question of how well firms can differentiate their products from each other impacts whether substitute products are perceived and helps in defining market scope. If multiple organizations existed in the same geographical location for hospitals, would there be reputation effects that would allow some hospitals to charge more than others, all else being constant?

3.8 Revenue Mix

Unique to analyses of the nonprofit sector are discussions on the impacts of revenue mix. For-profit organizations subsist almost entirely on fees for services and goods – this can come through market exchanges, memberships or, in the case of hospitals and other social service firms, government transfers or contracts. The nonprofit form, however, is designed to
accommodate a much wider diversity of revenue sources. For example, philanthropy from individuals is often critical to nonprofit subsectors such as arts and cultural organizations (Rooney 2007). This adaptability, however, comes with additional complications that having a purely commercial revenue model does not.

For example, the interests and expectations of multiple types of financial stakeholders may not align: some donors may suspect the intentions of a nonprofit which gained substantial revenue from commercial activities (Miller 2005). There is also a rich literature on the effects of government giving “crowding out” other types of financial support (Andreoni and Payne 2003; Brooks 2003). We would therefore expect to see markets that have strong representation from both for-profits and nonprofits to involve substantial amounts of earned revenue that the two types of organization would both compete for. The professional organizations contained here were solely supported by earned income such as dues and fines. Nonprofit hospitals and educational institutions, both products of mixed markets, have more diverse blends of financial support which focus on earned income, but are complemented by government grants and contracts for the former and philanthropy and endowment income for the latter (as generalizations). It would therefore appear that earned income would be indicative of a mixed market, but that a diversified revenue portfolio would help differentiate the organizations from each other and allow less resource competition on a resource level.
<table>
<thead>
<tr>
<th>Professional Associations</th>
<th>Potential Harms</th>
<th>Entry Barriers</th>
<th>Market Scope</th>
<th># Competitors</th>
<th>Types of Competitors</th>
<th>Pricing Ability</th>
<th>Product Attributes</th>
<th>Revenue Mix for the NFP</th>
</tr>
</thead>
<tbody>
<tr>
<td>Distributive Justice; Competition and Heterogeneity</td>
<td>Strong (government; market)</td>
<td>Professional practice</td>
<td>None</td>
<td>Nonprofit, though mixed possible</td>
<td>Strong control</td>
<td>Excludable, potentially rival, potentially differentiable, inelastic</td>
<td>Earned income (dues; fines)</td>
<td></td>
</tr>
<tr>
<td>Hospitals</td>
<td>Price; Quantity</td>
<td>Strong (natural; market)</td>
<td>Geographical</td>
<td>Small</td>
<td>Mixed</td>
<td>Depends on service (and landscape is changing)</td>
<td>Potentially excludable, rival, potentially differentiable, elastic to inelastic depending on service</td>
<td>Earned income; government grants; contracts</td>
</tr>
<tr>
<td>Education</td>
<td>Competition and Heterogeneity; Price</td>
<td>Strong (government; market)</td>
<td>Varies</td>
<td>Varies</td>
<td>Mixed</td>
<td>Above average control</td>
<td>Excludable, rival, differentiable, somewhat elastic</td>
<td>Earned income (tuition, fees, activities); donations; investments; grants</td>
</tr>
<tr>
<td>Animal Shelters</td>
<td>Quantity; Distributive Justice</td>
<td>Strong (natural; government)</td>
<td>Geographical</td>
<td>None to Small</td>
<td>Mixed</td>
<td>Small to average control</td>
<td>Excludable, rival, somewhat differentiable, inelastic</td>
<td>Govt contracts; earned income; donations</td>
</tr>
<tr>
<td>Thrift Stores</td>
<td>Competition and Heterogeneity; Quantity</td>
<td>Strong (market; natural)</td>
<td>Geographical</td>
<td>Small</td>
<td>Mixed</td>
<td>Small</td>
<td>Excludable, rival, differentiable, elastic</td>
<td>Earned income</td>
</tr>
<tr>
<td>Soup Kitchens</td>
<td>Quantity</td>
<td>Small</td>
<td>Geographical</td>
<td>Small</td>
<td>Nonprofit</td>
<td>None</td>
<td>Excludable, rival, somewhat differentiable, inelastic</td>
<td>Donations</td>
</tr>
</tbody>
</table>

Table 1: A Typology of Anticompetitive Markets Involving Not-for-profits
4 Applications of the Typology: Three Cases

We now extend the typology we have developed using the case law into three nonprofit-dominated markets that currently do not have anti-competitive regulations. These have been deliberately chosen to illustrate different significant combinations of attributes and how those could lend themselves to antitrust analysis. The description will begin with market level characteristics followed by firm-specific traits; the potential harms will be discussed once the market and firm characteristics are understood. It is important to remember that many of these nonprofit-dominated markets may find themselves in positions of market power simply because there are no other players due to a lack of profits; this situation is lamentable, but can also be found in the for-profit arena and is not the concern of this paper. Instead, we focus on the situations that could arise with potentially harmful anticompetitive outcomes, understanding that these may fall on the side of possible rather than common. This too, however, resembles the regulation of private markets that seek to guard against the exception.

4.1 Animal Shelters

Animal shelter facilities care for stray and abandoned animals (normally cats and dogs) and are found in several different varieties and corporate forms. Though many animal shelters begin as start-up nonprofits in a community location, there can be significant barriers to entry. First, there are capital costs to be paid up front for facilities and supplies with which to house the animals; their constant care and feeding requires a healthy influx of revenues to match the outflow. Additionally, shelters (as opposed to breed rescues and other organizations which may also work in advocacy or as foster coordinators) often require government licensing, which creates an entry barrier (Michigan Department of Agriculture & Rural Development 2013). The
market scope of these shelters are local in terms of the animals and the financial resources, though some shelters which specialize in particular breeds can differentiate themselves enough to compete in a larger area using the internet and social media. There are generally very few organizations competing for resources in the same area, though the scope of the market for financial resources may be more competitive than the scope for the service; those individuals who would donate money to a local shelter may also be predisposed to donate to other animal welfare organizations on both local and national levels. Animal shelters can be nonprofit, for-profit, or governmental organizations; though the presence of government in the market is a good indication that this service is inelastic, the provision of animal shelter facilities is both excludable and rival, with some ability to differentiate based on breed, organization type, and euthanasia practices. Depending on the state and municipality, these organizations (if they are not governmental) would find funding from potentially government contracts, in addition to a large portion of adoption and other fees.

There are two primary avenues for anticompetitive harm here, each pertaining to a different market condition. The first would be a fear of quantity restriction due to an inadequate number of participants in the market. It is a fair generalization to state that such services are undersupplied as a matter of resource restrictions, but the concern here would be that mergers would be attempted in the name of cost savings that may serve the public interest better as separate entities. This is similar to the situations we have seen in the hospital markets – in order to realize cost savings, institutions will merge; however, as also evidenced in the hospital case law, cost savings may not be sufficient to justify the loss of facilities associated with a merger. There is an interesting complexity with animal shelters in that they are more likely than hospitals to be looking at financial disaster and/or closure, which would merit consideration in the
evaluation of the situation. However, the impact on the community of having fewer beds, even canine ones, must be given consideration.

From another angle, in any situation involving government contracting lays the potential for bid manipulation and collusion. There is nothing unique to the *Trauth* case that would make it inapplicable to even a purely nonprofit market; the inability to distribute profits does not preclude an attempt to circumvent the law. For example, one of the dominant theories of nonprofit formation is that of government failure: the state was unable to provide suitable services, thus the services were subcontracted out via private or third sector organizations. If someone were running an animal shelter in a particular area with a couple of other shelters and they were all bidding on county contracts, they could easily make the case that a few more dollars in the pocket of their organizations would save the lives of more animals than if it stayed with the county. In this case, the rents those organizations would collect would not be distributed to shareholders, but they would be removed from the state and, hence, increase the societal welfare loss by the amount of other programs that would have seen the money.

4.2 *Thrift Stores*

A thrift store is a revenue generating vehicle that can be either for-profit or nonprofit at the store level. Sometimes these are simply branches of a nonprofit which are reselling donated items, while other times the stores are for-profit and either owned by the nonprofit or have received goods from a nonprofit which sold them donated items wholesale. These stores provide gently used items at steep discounts compared to their cost new, which makes them attractive to both shoppers looking for bargains and for those who are interested in supporting a particular nonprofit or cause.
Entry barriers can be substantial, but not necessarily so. Any thrift store will require a brick-and-mortar location, which could be extremely costly if facilities are needed separate from where the nonprofit is currently located. In addition to a storefront, costs such as parking, means of sorting and displaying goods, and other costs of conducting a retail business can be substantial. Beyond these natural barriers, however, are also market barriers: if there is a pre-existing thrift store in the area, customers could have loyalties to particular stores or organizations based on elements other than price or quality of goods. This differentiation between stores creates a market inertia that is difficult to penetrate for a nonprofit looking to enter the market. Markets are typically geographically based, with few, but normally some, competitors. Though the corporate form of the storefront may vary, most thrift stores are associated in some way with a nonprofit; the primary means of funding for the storefront organization is definitely earned income, though some organizations that are part of larger nonprofits may also have their budgets supplemented by other means. The product attributes lend themselves to a strong mixed market scenario: excludable, rival, differentiable, and highly elastic. There is a small degree of autonomy to set prices, though the margins on second-hand retail are traditionally quite small.

The largest concern for thrift stores is one that was highlighted in a recent article in the Nonprofit Quarterly (Jaworski 2013): the presence of a large and well-known thrift store may force smaller entities out of business due to its ability to flex its own market power. The case in question involves the arrival of a Goodwill store in the town of Louisburg, North Carolina, where other small-scale thrift stores were thriving. For the purposes of antitrust analysis, however, let us assume that the opposite was true: Goodwill exists in the town and there are a few smaller nonprofits that would like to start up thrift stores. Goodwill has name recognition
for both donative and retail purposes, an established supply chain, and a larger corporate infrastructure, including an executive director who shares an executive package worth $795,000 with his wife. Does this situation describe a market that has all of the thrift stores it needed, otherwise economic incentives would drive the nonprofits to open a thrift store due to potential gains in the long run? Or does it indicate a prohibitive and potentially unlawful abuse of power?

From a policy perspective, this becomes difficult. There are clear harms to the competitive and heterogeneous composition of the market by allowing one company to dominate, even if what brought it to domination was brand differentiation. As Posner suggested, this type of loyalty can be seen as an entry barrier. But it is difficult to envision a policy that would address this outright through an active policy – size concerns such as those of The Bell Telephone Company were able to be addressed through the breaking up into divisions. If Goodwill dominates the thrift market, there isn’t much to be done for breaking it up into smaller, yet still operable pieces, especially since the thrift revenue is used to fund work programs elsewhere in the organization. Even in cases of generally accepted monopoly, such as the Windows operating system where there were few (and arguably any) true rivals, it was anticompetitive practice such as bundling their browsers with their operating system which brought the attention of the regulators. Those monitoring the thrift market would definitely have precedence for blocking any proposed mergers with the Goodwill giant on the basis of both continued market heterogeneity and of fears for decreased quantities; mergers between competitors would need to be weighed on their own merits and market shares in order to determine if the loss in social welfare when they combine is tenable. But the best potential for maintaining competitive practice might be the option where Goodwill can be given the benefit of the doubt and its behavior monitored for signs of anticompetitive practice such as loss-leading
with certain goods or deliberately targeting the donor rosters of smaller organizations. This will not help the budding thrift stores overcome the entry barriers which would help bar their way into competing with Goodwill, but those can be targeted with local legislative initiatives such as zoning flexibility for operating thrift store. Importantly, however, we should recognize that in terms of social welfare, the distribution of our earned or donative dollars in a market with a monopolist or monopraebist dominant enough to deny market entrance is not necessarily equivalent to the social welfare gained from a varied and heterogeneous market.

4.3 Soup Kitchens

Soup kitchens are the proverbial charity; here, those with no or negligible means to pay are able to get a hot meal. As such, these enterprises are often solely funded through donative means, either from individual supporters or from a supporting religious institution. Entry barriers are extremely small – some communities are beginning to require permits, but these are not universally mandatory. Further, such services are often run out of the religious house of worship or prepared there and brought elsewhere to serve. The market scope is geographical and often small enough to travel on foot due to the needs of the service recipients, which would allow several to operate in a particular area; there are seldom more than a few to be found, however, and they are always nonprofit if they have taken a formal corporate form. Even though the food is excludable, rival, differentiable, and highly inelastic, there is traditionally no charge for the meal and, therefore, no pricing ability for the organization.

From a competitive viewpoint, we would not expect competition over service recipients. Unlike job training or case work, there is no incentive to cream off the less hungry; unlike paying
diners, there is no reason to target particular types of eaters. The only competition that needs to be considered is that of resources: if there are two soup kitchens within a four block area and one more wants to open, are there barriers to prevent it from doing so or adverse effects on those currently in the market? Though an argument could be made that there is a finite amount of donation available for a particular cause and further groups would simply be dividing the pie into smaller slices, we do not consider this likely given the differentiability of the religious sponsors and their congregations and, therefore, do not consider market entry or increasing density to be problematic. The only concerns which would arise would stem from consolidation: if the three existing soup kitchens wanted to consolidate into one, should there be consideration from an anti-trust angle? Though we believe there would be serious concern over quantity restrictions, the inability to erect entry barriers or collect revenue makes the potential for any kind of anti-competitive behavior on a market level very unlikely. This is not a function of the soup kitchens being nonprofit – instead, it is a function of their reliance on philanthropy, absence of entry barriers, and inability to price their outputs.

5 Conclusion

This study provides a broad outline for the potential applications of existing antitrust regulations to the nonprofit sector, using a comprehensive typology to gauge how and under what circumstances regulation may apply. Rather than concentrating on corporate form or tax status, we have used market and firm traits to extend existing case law on mixed markets and nonprofits further into markets that have not yet been subject to anticompetitive regulations.
This study does have limitations. This paper does not directly address many of the questions which will require attention before policy interventions, such as appropriate levels of profit in the nonprofit sector and the role of taxation exemptions in competitive mixed markets (such as in Colombo (2006)). Further, several simplifying assumptions were made for the sake of exposition that the typology needs empirical verification that the specific combinations of traits described above are found in the market. As this paper has illustrated, the nonprofit form per se does not indicate an absence of anticompetitive practices or antitrust concerns; however, certain combinations of attributes – such as purely donative revenues and an absence of pricing ability – make the threat of *monopraebi* less oppressive.

As the nonprofit world struggles to make itself leaner and more professionalized, many of us are watching elements such as the tax exemption and merger implications of becoming a sector which, in many ways, begins to look a little more like business. Nonprofits can effectively compete in mixed markets with for-profits, and social enterprises are theoretically doing an admirable job in “doing good while doing well.” What this study hopes to emphasize is that, in addition to taxation and profit retention, there are several other elements of for-profit business activity that are not being given due consideration in nonprofit or social enterprise literature because unique terms have developed to describe them in more flattering terms. There are parallels between nonprofit collaboration and for-profit collusion, and between nonprofit exemplars and for-profit monopolies; regardless of motive, the incentive to circumvent the law is present in all sectors, and the nonprofit sector should be cognizant of these parallels before the Department of Justice and FTC are.
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