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Symposium Article

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

Abstract: The purpose of this study is to address the ambiguities in the application of anti-trust regulations to the nonprofit sector. We first survey policy tools and their diverse historical usage in nonprofit and mixed markets, specifically in professional associations, hospitals, and education. This analysis informs the development of a typology of anti-competitive nonprofit markets which is used to classify the three historical examples into eight traits. Finally, this typology is applied to three new markets – animal shelters, thrift stores, and soup kitchens – which have less in common with purely for-profit markets and have little or no discussion in antitrust literature. We find that 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 anticompetitive practice less oppressive.

Keywords: antitrust, competition, regulation, mixed market, monopoly, *monopraebi*

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1 Introduction

The last few decades have brought the skills and methods of operating nonprofit and for-profit organizations much closer together (Dart 2004). The growing 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 potentially afford to shoulder more of the tax burden. Nonprofits continue to

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adopt commercial revenue streams and operate within increasingly mixed markets to provide goods and services to the public. The historical decisions of the Court, which often address 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 (1984; 1986). Basing antitrust regulation on shared characteristics with the for-profit sector, therefore, should be relatively straightforward.

This supposed clarity, 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 (1952). This logic held until 1975, when the nonprofit Virginia State Bar Association was found to have engaged in anticompetitive practices; however, the decision was augmented to allow for the possibility of a "public service" exemption (1975). Recently, mergers have increasingly blurred nonprofit and for-profit markets. In 2013, the Supreme Court ruled on *Federal Trade Commission (FTC) vs. Phoebe Putney Health Systems Inc. et al. (FTC v. Phoebe Putney)*, where a nonprofit acquisition of a for-profit hospital was blocked on anticompetitive grounds (2011; 2013). However, questions such as natural monopoly or anticompetitive practices in an exclusively nonprofit or charity framework have had significantly less, if any, discussion. Is there a regulatory basis for antitrust regulation in a predominantly or wholly nonprofit market?

The federal government has antitrust jurisdiction over nonprofits in the legal record with cases dating back over 50 years. 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 (1969).[1] 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 wider scope of the regulation 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 and granting the Department of Justice a much larger range of undisputed jurisdiction. But under what

1 The FTC filed suit under the FTC Act rather than the Sherman or Clayton Acts.

circumstances and using what precedent could a mixed or fully nonprofit market warrant antitrust intervention?

The purpose of this study is to address the ambiguities in the application of antitrust regulations to the nonprofit sector. We first survey policy tools and their diverse historical usage in nonprofit and mixed markets, specifically in professional associations, hospitals, and education. This analysis informs the development of a typology of anticompetitive nonprofit markets which is used to classify the three historical examples into eight traits. Finally, this typology is applied to three new markets – animal shelters, thrift stores, and soup kitchens – which have less in common with purely for-profit markets and have little or no discussion in antitrust literature. 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 clarity that will be beneficial to both policy professionals and leaders in those organizations hoping to steer clear of legal challenges.

2 Survey of existing antitrust regulations in nonprofit markets

2.1 Defining anticompetitive practice

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. The Court defined market power as the ability "to control prices or exclude competition" (1957); this condition 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. The "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 welfare loss to society. In order for the "surplus" to be returned to consumers, government often intervenes. This involvement 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, however, 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 (2005). Further, market power can occur without direct or collusive action between firms; dominant firms can also utilize "naturally" occurring phenomena such as high barriers to entry that prevent new firms from competing effectively. Recent analyses even suggest that such behavior may not necessarily have adverse impact, such as vertical contracting in software (Prieger and Hu 2012) or the protection of patents (Cotter 2012).

2.2 Professional and trade associations

The first forays into nonprofit anticompetitive regulations first began in response to the powers of industry self-regulatory agencies and professional societies; Philipson and Posner (2009) contend that such agencies (often 501(c)6 nonprofits) 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 hospital privileges and professional ostracization for working with a contract provider similar to today's HMO (1943). This ruling 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" (1952). This logic would extend for another 25 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 (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 (1980; Howe and Badger 1982; 1986).

Recently, the financial success of some professional societies whose "natural monopolies" have been unchecked to this point has made the political agenda; 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 seven 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 2008, 2012). It is interesting to note, however, that the first forays into controlling anticompetitive behavior in the nonprofit sector were not based on monetary reasoning, but rather the element of market control.

2.3 Hospitals

Hospitals provide the most fertile ground for antitrust regulation since the market for their services is heavily integrated with for-profit enterprises. This environment lends itself to the traditional definitions of antitrust 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 *FTC v. Phoebe Putney* was the first time such regulations have been employed successfully in almost a decade (Bell 2012; 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 1980s 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 numerical measure of concentration becomes less of a concern than the actual market power and ability to set price.

The potential absence of a quick rule of thumb regarding density 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 though 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 (Simpson and Shin 1998; Melnick et al. 1999; Young et al. 2000). 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 (Small but Significant and Non-transitory Increase in Price) criterion in determining market share, finding that there are price effects.[2] 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.

Of crucial consequence to whether consumers face harms is whether the incentive to seek monopoly rents exists in a nonprofit (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 Judge 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" (1986). The wisdom in Posner's

2 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.

words does not arise from 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.

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 roads. The court's opinion in *FTC v. Butterworth* (1996) goes one step further, contending that the presence of community leaders on the board will remove anticompetitive 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 (Carroll and Stater 2009; Calabrese 2011, 2012). 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.[3]

2.4 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 have been used to justify anticompetitive practice:

3 This argument 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.

price and quantity effects, social welfare, entry barriers, and inherent desirability of competition. More so than the other two sectors, the educational cases were relatively unique and contextual, but provide an underlying theme.

First, the precedent set in the cases regarding professional societies 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 (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 was not whether law student costs were 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 has little to do with the traditional charges of price fixing, but instead suggests an inherent value in the worth of healthy competition (Lao 2001).

Second came challenges involving collusion and 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; the government alleged that the behavior was price fixing which allowed them to charge higher prices (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.

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 (1992; 1993).

Carlton et al. (1995) claim that the existence of trade barriers and absence of auctions for attendance necessitate a beneficent nonprofit objective function; 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). 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; however, the court of appeals' declaration that nonprofits should not automatically face charges of collusion (but not necessarily an exemption) keeps ambiguity at the core of nonprofit antitrust regulation (1992; 1993).

3 A typology of anticompetitive nonprofit markets

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 existing anticompetitive scenarios (see Table 1). We then extend the typology to nonprofit markets that have not yet been subject to antitrust scrutiny (see Table 2).

3.1 Potential harms

The existing case law, as mentioned previously discussed above, focuses on four potential areas of harm caused by anticompetitive practices: increased price, decreased quantity output, social welfare loss, and decreased market heterogeneity. The primary objections to the professional association monopolies were regarding heterogeneity and social welfare loss. On the former, 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. 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 afterward as undesirable effects, but not the primary focus of the Act (1993). Therefore, it can be the

Table 1: Typology of nonprofit markets with existing antitrust regulation

	Potential harms	Entry barriers	Market scope	# Competitors	Types of competitors	Pricing ability	Product attributes	Revenue mix for the nonprofit
Professional associations	Distributive justice; Competition and heterogeneity	Strong (government; market)	Professional practice	None	Nonprofit, though mixed possible	Strong control	Excludable, potentially rival, potentially differentiable, inelastic	Earned income (dues; fines)
Hospitals	Price; quantity	Strong (natural; market)	Geographical	Small	Mixed	Depends on service (and landscape is changing)	Potentially excludable, rival, potentially differentiable, elastic to inelastic depending on service	Earned income; government grants; contracts
Education	Competition and heterogeneity; price	Strong (government; market)	Varies	Varies	Mixed	Above average control	Excludable, rival, differentiable, somewhat elastic	Earned income (tuition, fees, activities); donations; investments; grants
	Attribute level	Market	→				←	Firm

Table 2: Typology of nonprofit markets with hypothesized antitrust regulation

	Potential harms	**Entry barriers**	**Market scope**	**# Competitors**	**Types of competitors**	**Pricing ability**	**Product attributes**	**Revenue mix for the nonprofit**
Animal shelters	Quantity; distributive justice	Strong (natural; government)	Geographical	None to Small	Mixed	Small to average control	Excludable, rival, somewhat differentiable, inelastic	Govt contracts; earned income; donations
Thrift stores	Competition and heterogeneity; quantity	Strong (market; natural)	Geographical	Small	Mixed	Small	Excludable, rival, differentiable, elastic	Earned income
Soup kitchens	Quantity	Small	Geographical	Small	Nonprofit	None	Excludable, rival, somewhat differentiable, inelastic	Donations; government grants
	Attribute level	Market	→				←	Firm

existence of a competitive market that is the goal rather than allocative or distributional efficiencies, per se; this market 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 (Corbin 1999; Matsunaga and Yamauchi 2004).

For the latter social welfare concerns, Bork (1966) contends that its loss is the primary focus behind the drafting of the antitrust regulations, not price or quantity effects specifically. 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 (1966; Bork 1966; Fisher et al. 1983; 1986; 2001).

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 concern 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 (Bowman 2011; Calabrese 2011), it is currently a valid concern for both donor and policy audiences. Here, there are concerns 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 at all.

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: prices may increase and the quantity available may decrease. 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. On the quantity side, this would mean that, depending on the cost structure of the hospital, it might maximize profits to offer 20 beds for inpatients per day at a higher price than it would to offer 40 for a lower price. This course of action would deprive the community of 20 hospital beds that could have been utilized without monopolistic power.

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 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 continued. This ambiguity helped extend the possibility of collusion among nonprofits and emphasized that possibility that nonprofit behavior cannot be assumed as entirely benign (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. 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).

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 (2005) or brand prestige (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 2000). 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. With little competition in the area, a potential monopolist could increase the price or restrict the quantity of a product, and the consumers would have little choice but to accept the price increase, provided there was a certain degree of price inelasticity (Gaynor et al. 2013). Testing for this condition is how the SSNIP test for determining a market was developed: if the price of a good could not be raised by 5% for a year and gain profits for the firm, then the firm did not have market power and the market definition was expanded until this condition was met (Massey 2000). Also considered were how much organizations in the market had to have in common; in *FTC v. Staples* (1997; Dalkir and Warren-Boulton 2009), 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. The FTC argued that, regardless of where shoppers eventually bought their office supplies, the fact that the three leading office-supply store chains all took pricing cues from each other was enough to restrict the definition of market to that particular type of establishment (Salinger 2011).

There are, however, larger networks where monopolistic market power can be a concern without geography as a role. The analysis of education markets varies depending on the level of institution, since the factors by which geographically disperse Ivy League schools compete will be different than the factors which decide attendance at community colleges, which are often located based in areas of potential students. For example, in Brown (1993), the students being negotiated over were from diverse geographical areas and may not have been facing price harms, but what was assumed to be relatively inelastic demand for an Ivy League education and a willingness to substitute between such institutions gave the schools the ability to divide up which students would be offered particular aid packages.

Market scope has also played a large part in the antitrust analysis of hospitals, including nonprofit ones (1995; Jacobs 1996; Wade 1997). 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 market as originally drawn was ruled to be valid in the analysis. The large amount of merger activity and analysis of the hospital market have also provided examples of SSNIP's shortcomings: exhaustive information requirements, portfolios of mixed services, cost structures, and endogenous changes can all bias the outcomes (Dobbs 2003; Neumann and Veigland 2004; Gaynor et al. 2013).

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); however, in for-profit debates, this type of behavior has been linked to uncompetitive practice and collusion (1994). The role of market scope therefore is extremely salient here not only in determining who the competitors in a market are but also in revealing pieces of the objective for the firm by watching their financial behavior (Holtmann 1983; Steinberg 1986; Ballou and Weisbrod 2003).

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 (Bowman 2011; Calabrese 2012). Second, even if the nonprofit was unwilling or unable to retain earnings, the general relationship that larger numbers of firms in a sector cause 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. 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. Therefore, we must keep competition on both levels in mind when we evaluate the extension of anticompetitive concerns.

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. As mentioned previously, there is evidence suggesting that different types of firms operate with different objective functions, though how much different is a matter of dispute (Steinberg 1986; Erus and Weisbrod 2003). However, even within the hospital industry, there is evidence of differences between organizational types: pricing has been studied exhaustively with mixed results, while purchases of actual hospitals have shown that nonprofits will pay less for other nonprofits with similar mission than they will for for-profits (Gertler and Kuan 2009).

The existence of primarily nonprofit competitors in a market 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 multi- or single-seller nonprofit 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 antitrust 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 it was 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.

In nonprofit and mixed markets, pricing decisions can be even more complex. Evidence suggests that nonprofits would price lower and treat costs differently than for-profit firms would (Ansari et al. 1996); further, behavior such as bundling in for-profit firms strongly resembles the desirable practice of cross-subsidization in nonprofits first outlined by James (1983). 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. Beyond the large amount of literature devoted to describing nonprofit compensation for governmental or market failures, scholars such as Ben-Ner and Van Hoomissen (1991) break down mixed market goods along similar lines as common for-profit markets: what are the levels of rivalry and excludability. Higher education and professional memberships are highly excludable, lending themselves to market mechanisms as efficient distributional channels; however, both can be heavily skewed due to asymmetric information or entry barriers signaling potential market failures. Similarly, higher education and hospitals are highly rivalrous, meaning that the scarcity of a particular consumable service can drive up the price; however, it also means that such markets could be ripe for the introduction of substitutes barring anticompetitive behavior. 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.

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 active applications of anticompetitive 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. Despite these low numbers of competitors, there is a wide assortment of potential types. 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 location, these organizations (if non-governmental) could find funding from potentially government contracts, in addition to a large portion of adoption and other fees; this gives them some degree of freedom in setting their pricing. However, though they have a large degree of fiat control over their pricing on such services as adoption since their services have few substitutes, their prices are held in check by their desire to place as many pets as possible.

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; therefore, 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 bargain shoppers and 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. 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, especially if a large brand such as Goodwill is already operating in or moves into the area (Jaworski 2013). Further, 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. What level of thrift store should be considered market saturation, and what if that is only one store?

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 reactive approach 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 antitrust 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 anticompetitive behavior on a market level very unlikely. This inability to exercise market power to their benefit 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 Conclusions

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 professionals are concerned with 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 personal or benevolent 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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