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How Charitable Is the Sherman Act

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Note

How Charitable Is the Sherman Act?

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Charity is a valued component of American life.[1] In recognition of that value, the government encourages charitable activity by extending special privileges under the law to charitable organizations[2] and allowing taxpayers to deduct charitable gifts from their taxes each year.[3] These policies have contributed to growth in the charitable sector. For example, in 1997 more than $143.5 billion was donated to a wide range of charitable organizations, a 7.5% increase over the previous year.[4]

Despite the legal privileges the charitable sector enjoys, it is constrained by finite dollars to meet a seemingly infinite

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1. Charitable organizations provide the majority of society's arts, more than half of hospital care, one-fifth of colleges and universities, one-seventh of secondary education, two-thirds of day care and a large part of vocational training and family counseling. *See* David C. Hammack & Dennis R. Young, *Perspectives on Nonprofits in the Marketplace*, *in* NONPROFIT ORGANIZATIONS IN A MARKET ECONOMY 4-5 (David C. Hammack & Dennis R. Young eds., 1993). In addition to their social value, charitable organizations are a vital element of the modern economy. *See* Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 835 (1980). The government is particularly indebted to charities because they perform functions that the government would otherwise have to provide. *See* BRUCE R. HOPKINS, THE LAW OF FUND-RAISING § 1.1, at 2 (2d ed. 1996).

2. *See* Hansmann, *supra* note 1, at 836-37 (summarizing federal laws affording special treatment to nonprofit organizations).

3. *See* 26 U.S.C. § 170(a)(1) (1994) (allowing tax deduction for charitable contributions).

4. *See Giving USA 1998 Announces Charitable Giving Increased 7.5% in 1997* (visited Oct. 31, 1998) <http://aafrc.org/NEWS.HTM> (totaling donations to religious, educational, health, human services, arts/humanities, public/social benefit and environmental organizations). *Giving USA* concludes that recent growth in the charitable sector has been driven primarily by households that file itemized tax returns, although giving from each of the four major categories of donors—individuals, bequests, foundations, and corporations—increased in 1997. *See id.*

charitable need.[5] As a result, charities employ sophisticated business techniques to compete effectively for the dollars that are available in the charitable marketplace.[6] When charities behave like businesses they must operate according to the same laws that constrain traditional businesses.[7] For instance, when charities act in their business capacities they are subject to the Sherman Act, which prohibits unreasonable restraints of trade and monopolistic conduct.[8] However, it is not always apparent when a charity is acting like a business such that it is subject to the antitrust laws. In particular, it is not clear whether charitable fundraising constitutes "trade or commerce" under the Sherman Act.

In *Dedication and Everlasting Love to Animals v. Humane Society of the United States*,[9] the Ninth Circuit reasoned that

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5. *See infra* note 57 (discussing the finite common giving pool in the charitable market).

6. *See infra* notes 59-61 (discussing the modern technology and business techniques employed in charitable fundraising).

7. *See, e.g.*, NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 120 (1984) (finding nonprofit defendant subject to Sherman Act). There is also a body of state and federal law that pertains directly to the charitable sector. At the state level, charitable solicitation statutes are the primary legal means for regulating charities. *See generally* HOPKINS, *supra* note 1, § 3 (providing a comprehensive overview of state laws regulating charities). By virtue of their police power, states enjoy wide latitude to regulate the charitable sector and state attorneys general perform the primary watchdog function. *See* National Center for Nonprofit Boards, *What You Should Know About Nonprofits*, (visited Oct. 29, 1998) <http://www.ncnb.org/what_you_should/know_. . .fits/html/body_monitoring_nonprofits.html> (discussing how nonprofits are governed and monitored). However, the Supreme Court has said that a state cannot limit the amount a charity can spend on fundraising. *See* Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 636-39 (1980) (finding that state statutes that limit fundraising expenditures violate the First Amendment).

At the federal level, the Internal Revenue Code, which provides tax exemptions to charities and the entities that contribute to them, also exerts significant control on the charitable sector. *See* National Center for Nonprofit Boards, *supra* (discussing how the Internal Revenue Service monitors tax-exempt organizations). Other bodies that regulate charities include boards of directors and private watchdog groups. *See id.*

8. Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade." 15 U.S.C. § 1 (1994). Section 2 condemns "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce." *Id.* § 2. The Sherman Act is based on the theory that ultimately competition will produce lower prices and better goods and services. *See* National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978).

9. 50 F.3d 710 (9th Cir. 1995).

"[i]f statutory language is to be given even a modicum of meaning the solicitation of contributions by a nonprofit organization is not trade or commerce, and the Sherman Act has no application to such activity."[10] The *DELTA* court's holding has been called "cutting-edge jurisprudence [that] raises some interesting arguments for those counseling nonprofit organizations concerning avoidance of antitrust liability."[11] Presumably, a fundraising exemption creates a loophole through which adroit nonprofits may escape liability under the antitrust laws.[12] Notably, since the Ninth Circuit proclaimed this immunity no other federal court has explicitly endorsed the view that soliciting charitable gifts is automatically exempt from Sherman Act jurisdiction.[13]

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10. *Id.* at 712.

11. William E. Walters, *Antitrust and the Nonprofit Environment: Doing Good Without Doing Time*, 25 COLO. LAW. 51, 52 (1996).

12. Some charitable organizations currently escape taxation of unrelated activities by portraying those activities as "fundraising." *See* HOPKINS, *supra* note 1, § 6.6(b), at 462-78 (discussing unrelated income rules under the Internal Revenue Code). It is not unreasonable to assume that unscrupulous organizations would attempt to exploit a fundraising exemption to the antitrust laws. Parties have tried to exploit similar loopholes in the past. For instance, it was historically believed, although never authoritatively held, that the professions did not engage in "trade or commerce" under the Sherman Act. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 786 (1975) (discussing the "classic" argument traditionally advanced to distinguish professions from trades, businesses and other occupations and ultimately rejecting that argument); WILLIAM C. ANDERSON, A DICTIONARY OF LAW 1043 (1889) (defining "trade" as an activity carried on for profit, "distinguished from the liberal arts and learned professions, and from agriculture") (citing Whitcomb v. Reid, 31 Miss. 569 (1856)). The Supreme Court has since closed that potential loophole. *See Goldfarb*, 421 U.S. at 787 (finding that Congress did not intend a sweeping exclusion of the professions from the Sherman Act).

In addition to creating an opportunity for organizations to elude antitrust scrutiny, the holding in *DELTA* may chill legitimate antitrust litigation. Parties in federal court must abide by the Federal Rules of Civil Procedure, which mandate that claims must be warranted by existing law, or at least a good faith argument for the extension or reversal thereof. *See* FED. R. CIV. P. 11(b)(2). If the settled law of the circuit is that charitable fundraising is not commercial behavior, parties that bring claims alleging anticompetitive behavior in that context may be subject to sanction. *See* FED. R. CIV. P. 11(c) (providing for sanctions where Rule 11 has been violated).

13. Nevertheless, charities are not subject to the Sherman Act in every instance. For example, Federal Trade Commission jurisdiction is limited to entities "organized to carry on business for [their] own profit or that of [their] members." Federal Trade Commission (FTC) Act § 4, 15 U.S.C. § 44 (1994). What constitutes "profit" under the FTC Act is currently under review by the Supreme Court. *See FTC's Invalidation of Dental Association's Advertising Rules Is Focus of Oral Argument*, Antitrust & Trade Reg. Rep. (BNA) No.

Only one circuit court has cited *DELTA* for its holding that fundraising is not trade or commerce. In *Virginia Vermiculite v. W.R. Grace & Co.*, the Fourth Circuit acknowledged that the *DELTA* court interpreted "trade or commerce" to the exclusion of charitable fundraising, but declined to make a similar blanket exemption for charitable donations.[14] Unlike the *DELTA* court, the court in *Virginia Vermiculite* refused to interpret the statute apart from the behavior at issue in the case.[15] Rather, the Fourth Circuit first examined evidence of the alleged anticompetitive charitable donation to determine whether it constituted trade or commerce.[16] The facts of the case led the court to conclude that the transaction *was* commercial and, upon further analysis, was an anticompetitive act in violation of the Sherman Act.[17]

The Fourth Circuit's refusal to exempt a charitable gift from the purview of the Sherman Act is consistent with antitrust jurisprudence that recognizes commercial conduct in the charitable sector and calls for careful scrutiny of an organization's behavior to determine whether antitrust review is appropriate.[18] Blanket immunity is a rare exception, not the rule.[19] To be exempt from the antitrust laws an activity must

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1892, at 5 (Jan. 14, 1999) (reporting that the definition of profit under the FTC Act was a focal point of oral arguments before the Supreme Court in *California Dental Association v. Federal Trade Commission*, U.S. Sup. Ct., No. 97-1625, *argued*, Jan. 13, 1999). At least one court has determined that charitable fundraising may affect commerce such that the FTC has jurisdiction under 15 U.S.C. § 45(a)(2). *See* Federal Trade Comm'n v. Saja, No. Civ-97-0666-PHX-SMM, 1997 WL 703399, at *2-3 (D. Ariz. Oct. 7, 1997) (finding that the defendant's fraudulent fundraising scheme affected commerce such that FTC jurisdiction under the FTC Act was appropriate). Outside the realm of antitrust, however, the result may be different. For instance, the Supreme Court has found that charitable fundraising is fully protected speech, rather than commercial speech, which is subject to a more deferential standard of review. *See* Riley v. National Fed'n of the Blind, 487 U.S. 781, 787-95 (1988).

14. 156 F.3d 535, 540 (4th Cir. 1998), *petition for cert. filed*, No. 98-1289 (Feb. 10, 1999).

15. *See infra* Part III.B (discussing the Fourth Circuit opinion in *Virginia Vermiculite*).

16. *See id.*

17. *See id.*

18. *See infra* notes 32-36 and accompanying text (discussing the analysis courts undertake to determine whether the Sherman Act applies).

19. *See infra* note 34 and accompanying text (discussing courts' general reluctance to grant exemptions from the Sherman Act); *infra* note 37 and accompanying text (discussing the Supreme Court's explicit refusal to automatically exempt nonprofits from antitrust review); *infra* Part IV.C (discussing limited areas where judicially created exemptions have been recognized).

meet stringent standards.[20] By creating an immunity instead of examining the specific conduct before it, the *DELTA* court set a dangerous precedent, ripe for disingenuous organizations to manipulate to their advantage.

This Note explores whether and how the federal antitrust laws[21] apply to charitable organizations' fundraising activities.[22] Part I provides an overview of the Sherman Act. Part II discusses "trade or commerce" as defined by the Sherman Act and how commercial dynamics play out in the charitable sector. Part III discusses the Ninth Circuit's decision in *DELTA* and the Fourth Circuit's decision in *Virginia Vermiculite*. Finally, Part IV argues that the Ninth Circuit was shortsighted in exempting charitable activity from the Sherman Act and

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20. *See infra* Part IV.C (discussing judicially created exemptions from the Sherman Act).

21. For purposes of this Note, "antitrust laws" are sections one and two of the Sherman Antitrust Act. *See* 15 U.S.C. §§ 1, 2 (1994).

22. For purposes of this Note, "charitable organizations" are those that are tax-exempt under the Internal Revenue Code. *See* 26 U.S.C. § 501(c)(3) (1994) (listing organizations operated "exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals"). To qualify for federal income tax exemption the organization must have a specified public, rather than private, purpose. However, no law mandates that charitable nonprofits serve the indigent, prohibits them from engaging in business activities, or limits the salaries they pay to staff and directors. *See* Evelyn Brody, *Institutional Dissonance in the Nonprofit Sector*, 41 VILL. L. REV. 433, 478 (1996). This Note will use the terms "charitable" and "nonprofit" interchangeably to refer to these organizations, although charities are generally considered a subset of the larger group of nonprofit institutions. *See* Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L. J. 299, 330-57 (1976) (distinguishing among different types of nonprofits, particularly as treated by the federal tax code); *see also* HOPKINS, *supra* note 1, § 2.1, at 21-24 (discussing the scope of the term "charitable organization"). Charities share the same general characteristics of nonprofits. For instance, both charities and nonprofits can and do earn profits but neither can distribute profits to their members, officers, shareholders or owners. *See* ELAINE M. HADDEN & BLAIRE A. FRENCH, NONPROFIT ORGANIZATIONS 9 (1987) (explaining that the difference between nonprofit and for-profit organizations is not whether they may earn profits, but rather who may receive those profits). Accordingly, a religious organization that generates income from a bake sale maintains its tax-exempt charitable status as long as the income is exclusively devoted to the purpose of the organization and is not disbursed to the organization's members or shareholders. *See* Community Blood Bank v. Federal Trade Comm'n, 405 F.2d 1011, 1019-20 (8th Cir. 1969) (using this example to describe the distinction between for-profit and nonprofit firms).

that the Fourth Circuit took the more prudent analytical path in examining the intersection between the specific charitable activity before it and the principles embodied in the Act.

Charitable fundraising is inherently commercial.[23] Accordingly, the antitrust laws should apply to fundraising activities.[24] Application of the Sherman Act to charitable fundraising is not only mandated by law, it is good policy. Antitrust principles of efficiency, minimum production cost, innovation, equal market access and fair distribution are as desirable in the charitable marketplace as they are in a traditional business setting.[25]

I. THE SHERMAN ANTITRUST ACT

The Sherman Act promotes competition among businesses.[26] Rather than restrict the Act's jurisdiction to an exclusive list of

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23. *See infra* Part II.C (discussing the commercial nature of charitable fundraising).

24. *See infra* note 37 and accompanying text (discussing courts' application of antitrust laws to commercial activities undertaken by nonprofit organizations).

25. *See* Dedication & Everlasting Love to Animals v. Humane Soc'y of the United States, 50 F.3d 710, 713 (9th Cir. 1995) (acknowledging the importance of these principles in the nonprofit sector).

26. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 n.15 (1940) (examining extensive legislative history of the Sherman Act and concluding that competition was its aim and that the Act was designed to prevent restraints on such competition); THE POLITICAL ECONOMY OF THE SHERMAN ACT: THE FIRST ONE HUNDRED YEARS, at vii (E. Thomas Sullivan ed., 1991) ("The first principle of antitrust is that our economic system should operate through market forces and that American markets should be competitive."); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 1 (1984) ("The goal of antitrust is to perfect the operation of competitive markets."). Antitrust law is based on the premise that through competition, producers will strive to satisfy the consumer's wants at the lowest price with the sacrifice of the fewest resources. *See* Theodore J. Stachtiaris, Note, *Antitrust in Need: Undergraduate Financial Aid and* United States v. Brown University, 62 FORDHAM L. REV. 1745, 1766 (1994).

There is a question among courts and scholars whether competitive ends are appropriate in a nonprofit context. *See, e.g.*, NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 122 (1984) (White, J., dissenting) ("By mitigating what appears to be a clear failure of the free market to serve the ends and goals of higher education, the NCAA ensures the continued availability of a unique and valuable product" that otherwise might not be available); Nolan Koon, United States v. Brown University *and a New Proposal to Discern Whether Certain Financial Aid Constitutes "Trade or Commerce"*, 22 J.C. & U.L. 191, 200 (1995) (arguing that while antitrust analysis is a "science premised upon economic models and theory," economic predictions are not appropriate for every situation); Richard Bartlett, Note, *United Charities and*

activities, Congress wrote the law in broad strokes, without defining the specific parameters of the competitive principles it espouses.[27] As a result, courts are to interpret the Act "in the light of its legislative history and of the particular evils at which the legislation was aimed."[28] By affording such latitude, Congress also created a debate as to how the courts should apply the Act to achieve its competitive end. The predominant view is that the purpose of the antitrust laws is to maximize consumer welfare and increase economic efficiency without consideration of other social goals.[29] A minority view is that competition under the antitrust laws should promote various social welfare goals in addition to economic ideals.[30] Either

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the Sherman Act, 91 YALE L.J. 1593, 1597 (1982) (arguing that rules of structure and conduct developed in a for-profit setting may not be appropriate in the charitable sector due to institutional differences between the two); Srikanth Srinivasan, Note, *College Financial Aid and Antitrust: Applying the Sherman Act to Collaborative Nonprofit Activity*, 46 STAN. L. REV. 919, 928-29 (1994) (noting that while antitrust laws are based on models of perfectly-functioning markets, nonprofits appear where market *failures* occur). *But see* National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 689-90 (1978) (rejecting the argument that the particular characteristics of an industry might make competition undesirable and therefore outside the purview of the antitrust laws).

27. *See National Soc'y of Prof'l Eng'rs*, 435 U.S. at 678 (finding that Congress "did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations"); Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975) (finding that "Congress intended to strike as broadly as it could in § 1 of the Sherman Act," and that reading broad exemptions into the Act would be contrary to its purpose); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944) (stating that "[l]anguage more comprehensive is difficult to conceive," and concluding that Congress intended to bring every anticompetitive business activity within the scope of the Act).

28. Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940).

29. This view is most famously attributed to Judge Bork. *See* ROBERT H. BORK, THE ANTITRUST PARADOX ch. 2 (1978); *see also* RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 20 (1976) (concluding that although noneconomic goals are mentioned in the legislative history of the antitrust laws, Congress's dominant intent was to promote economic principles of competition and maximum efficiency); Frank H. Easterbrook, *Is There a Ratchet in Antitrust Law?*, 60 TEX. L. REV. 705, 714-17 (1982) (arguing that the Supreme Court is wrong where it sacrifices economic efficiency to other goals). According to those who subscribe to this school of thought, social, political or other nonefficiency criteria are not applicable to the antitrust analysis. *See generally* Robert H. Lande, *Wealth Transfers As the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 69 (1982). Rather, the only legitimate analysis evaluates the activity's effect on competition. *See id.* The Supreme Court has explicitly endorsed this view. *See National Soc'y of Prof'l Eng'rs*, 435 U.S. at 691.

30. *See, e.g.*, LAWRENCE ANTHONY SULLIVAN, HANDBOOK OF THE LAW OF

way, the Act assumes that judicial review is necessary whenever parties have a financial interest in restraining competition.[31]

In order for a Sherman Act claim to stand, the activity in question must constitute "trade or commerce" as defined by the Act[32] and must not be otherwise immune from the purview of the federal antitrust laws.[33] Although judicially created ex-

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ANTITRUST § 2, at 10-13 (1977) (arguing that antitrust is a system of law, not a system of economics, which rightfully has noneconomic objectives); Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1194-1203 (1977) (arguing that goals of antitrust include redistribution of income, promotion of small enterprises, freedom for entrepreneurs and neutral treatment of minorities); Lande, *supra* note 29, at 96-105 (describing the 51st Congress's desire to curb the social and political power of trusts and monopolies and protect business opportunities for small firms).

31. *See* Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 697 (1991) (concluding that the legislative history of the Sherman Act supports the requirement of judicial review for financially interested parties). This bolsters the position that careful antitrust review of a nonprofit's activities is appropriate, since nonprofits can and do earn profits. *See supra* note 22 (discussing how a nonprofit may earn profits but is precluded from distributing those profits to its members, officers, shareholders or owners). Moreover, even though a charity cannot distribute profits to certain parties, that restriction is no guarantee that the organization will act in the best interests of those for whom it is organized. *See* PHILIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 232.2, at 275 (Supp. 1991); *see also* Bartlett, *supra* note 26, at 1601 n.37 (arguing that just as a for-profit monopolist can raise its prices to increase profits, a monopolist charity can vary the nature of the goods and services it provides to the advantage of those who control the organization).

32. *See, e.g.*, Dedication & Everlasting Love to Animals v. Humane Soc'y of the United States, 50 F.3d 710, 712 (9th Cir. 1995) (finding that solicitation of contributions by a nonprofit organization is not "trade or commerce" and is therefore not subject to the Sherman Act); Marjorie Webster Junior College v. Middle States Ass'n of Colleges and Secondary Schs., 432 F.2d 650, 655 (D.C. Cir. 1970) (concluding that educational regulation is noncommercial activity beyond the scope of the Sherman Act). *But see* Goldfarb v. Virginia State Bar, 421 U.S. 773, 786-88 (1975) (finding the sale of professional services to be "trade or commerce" and subject to the antitrust laws).

33. Although the text of the Sherman Act does not provide for any explicit exemptions, the courts have immunized certain conduct that otherwise might be challenged under the antitrust laws. For instance, states are immune from antitrust liability. *See* Parker v. Brown, 317 U.S. 341, 350-52 (1943) (establishing "state action" immunity). The state action immunity doctrine that originated in *Parker* is based on principles of federalism. *See* DANIEL R. MANDELKER ET AL., FEDERAL LAND USE LAW § 11.02, at 11-3 (1998). The immunity reflects a "compromise between the judiciary's obligation to respect the results of the democratic process at the state level and its obligation to respect that same process at the national level." Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE

emptions are recognized, there is a strong presumption against implied immunity from Sherman Act scrutiny.[34] Moreover, even where an activity is otherwise noncommercial, it can be subject to antitrust review if it is undertaken with a commercial purpose[35] or with the knowledge that it would have anti-

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L.J. 486, 501 (1986). Municipalities that act on a clearly and affirmatively expressed mandate from the state are also immune. *See* Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38-39 (1985) (finding that municipal conduct undertaken pursuant to a clearly expressed state policy with the foreseeable result of displacing competition is immune from federal antitrust liability). Municipalities do not enjoy the same automatic exemption as states because "[c]ities are not themselves sovereign; they do not receive all the federal deference of the States that create them." City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 412 (1978).

Another source of immunity is the *Noerr-Pennington* doctrine, which provides that pursuing litigation or seeking other governmental action against a competitor is normally a protected activity. *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, *reh'g denied*, 365 U.S. 875 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965). The *Noerr-Pennington* exemption is premised on the constitutional theory that the First Amendment protects the right to assemble and petition the government. *See* MANDELKER ET AL., *supra*, § 13.06[1], at 13-39. This exemption is not absolute, however, and may be invalid if the petitioning involves fraudulent actions, "sham" litigation, commercial dealing, private standard-setting or situations in which the government being petitioned is acting in a commercial capacity. *See id.* § 13.06[1][b]-[e].

Another exemption is found where the antitrust laws intersect with the National Labor Relations Act. *See* 29 U.S.C. §§ 151-59 (1994). Under this statute, anticompetitive labor-management activities are subject to review by the National Labor Relations Board rather than the federal judiciary. *See* Brown v. Pro Football, Inc., 50 F.3d 1041, 1045 (D.C. Cir. 1995), *aff'd*, 518 U.S. 231 (1996) (finding agreement among owners of professional football teams to cap players' salaries exempt from antitrust laws). The exemption reconciles federal antitrust and labor policies based on the principle that lawful restraints of competition imposed through the bargaining process are exempt from the antitrust laws as long as the restraints are limited to the labor market organized around the collective bargaining relationship. *See id.*

34. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975) ("[O]ur cases have repeatedly established that there is a heavy presumption against implicit exemptions.") (citations omitted).

35. *See* Marjorie Webster Junior College v. Middle States Ass'n of Colleges and Secondary Schs., 432 F.2d 650, 654-55 (D.C. Cir. 1970) (stating that antitrust laws would apply to the act of accreditation if there were a commercial motive for the action). But the opposite is not true. A noncommercial motive will not spare an otherwise commercial activity from antitrust review. *See Goldfarb*, 421 U.S. at 787-88 (finding that while nonprofits engaged in noncommercial activity may escape liability under the antitrust laws, the immunity is narrowly circumscribed and does not extend to commercial transactions with a "public-service aspect"); United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993) (acknowledging the defendant's promotion of congressionally recognized social goals, but finding that social welfare justifications did not remove its conduct from the realm of trade or commerce).

competitive effects.[36] Notably, the Supreme Court explicitly has refused to provide blanket immunity to charitable organizations by virtue of their nonprofit status.[37] The legislative history of the Sherman Act reveals that Congress did consider granting an exemption for nonprofit actors, but such an exemption was never enacted into law. [38] Nevertheless, the courts

36. *See* Virginia Vermiculite v. W.R. Grace & Co., 156 F.3d 535, 541 (4th Cir. 1998), *petition for cert. filed*, No. 98-1289 (Feb. 10, 1999) (finding that an organization that would otherwise be exempt from the antitrust law loses its exemption by acquiescing to a conspiring party's conduct with the knowledge that it would have anticompetitive effects).

37. *See, e.g.*, National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 100 n.22 (1984) ("There is no doubt that the sweeping language of § 1 applies to nonprofit entities . . . and in the past we have imposed antitrust liability on nonprofit entities which have engaged in anticompetitive conduct.") (citations omitted); American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 576 (1982) ("[I]t is beyond debate that nonprofit organizations can be held liable under the antitrust laws."). In denying such an exemption the Court has recognized that an activity may be characterized as both socially useful and as business at the same time. *See Goldfarb*, 421 U.S. at 787-89 (finding that "*whatever else it may be*," the exchange of professional services for money is commercial activity) (emphasis added and citations omitted).

A textual analysis of the Sherman Act provides three reasons supporting the conclusion that nonprofits are not exempt. First, there is no mention of such an exemption anywhere in the Act. *See* 15 U.S.C. §§ 1, 2 (1994). Second, the language of the act is comprehensive, as opposed to restrictive. *See infra* Part II.A (discussing Congress's drafting of the Sherman Act in broad terms, so as to encompass the widest range of anticompetitive activities). Third, while the Sherman Act makes certain conduct illegal, it does not address the lawfulness of certain entities or structures apart from their conduct. *See* Koon, *supra* note 26, at 199 (highlighting the distinction between entities and their conduct under the Sherman Act).

Extra-textual support for the non-exemption of nonprofits exists as well. For instance, it is generally recognized that charities can and do operate in a commercial capacity. *See infra* notes 65-66. Charities are also a major component of the American economy. *See supra* note 1. If this large portion of commerce is to be extracted from the purview of the antitrust laws, it should be done by Congress, not by judicial fiat. *See e.g.*, National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978) (stating that the courts' role is limited to determining the competitive impact of an activity and suggesting that Congress must make larger policy decisions about whether antitrust principles are properly applied in a particular industry). Indeed, Congress has made such policy decisions in the past. *See, e.g.*, Charitable Donation Antitrust Immunity Act of 1997, Pub. L. No. 105-26, 111 Stat. 241 (1997) (immunizing "donations made in the form of charitable gift annuities and charitable remainder trusts from the antitrust laws").

38. *See* 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 251-52 (Earl W. Kintner ed., 1978). When asked whether the Sherman Act would apply to temperance societies, Senator Sherman responded, "I do not see any reason for putting in temperance socie-

have been reluctant to condemn a nonprofit under the Act for conduct that promotes the public interest.[39]

Since charitable organizations are not automatically exempt from the Sherman Act, the threshold question is whether the activity in question constitutes "trade or commerce."[40] If the court determines that no trade or commerce is at issue, the analysis ends. If, however, a charitable activity implicates trade or commerce, the court must further examine whether that behavior violates the antitrust laws.[41]

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ties any more than churches or school-houses or any other kind of moral or educational associations that may be organized. Such an association is not in any sense a combination or arrangement made to interfere with interstate commerce . . . ." *Id.* at 252. The Supreme Court has expressly sanctioned the authoritative value of the legislative history of the Sherman Act. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940). Despite its endorsement of the legislative history, the Supreme Court has indicated that a determination of what constitutes trade or commerce must also be informed by the current social context. *See Goldfarb*, 421 U.S. at 788 (finding that *"[i]n the modern world,* it cannot be denied that the activities of lawyers play an important part in commercial intercourse," and that lawyers' anticompetitive conduct might restrain commerce) (emphasis added). It is not uncommon for federal statutes to evolve by taking the current context into consideration. For example, the federal tax code has been amended over the years to extend the tax exemption to new areas where nonprofits have developed. *See* Hansmann, *supra* note 1, at 882.

39. Some courts have avoided imposing the Sherman Act on nonprofits by factoring social welfare goals into the antitrust analysis. *See, e.g.*, United States v. Brown Univ., 5 F.3d 658, 679 (3d Cir. 1993) (remanding for further consideration of nonprofit defendant's noneconomic and procompetitive justifications for alleged anticompetitive activity). Other courts have found that application of the antitrust laws to nonprofits is not appropriate where the conduct at issue is noncommercial. *See, e.g.*, Marjorie Webster Junior College v. Middle States Ass'n of Colleges and Secondary Schs., 432 F.2d 650, 654 (D.C. Cir. 1969) (finding that accreditation activities of nonprofit organization are not commercial activity).

40. *See* Peter James Kolovos, Note, *Antitrust Law and Nonprofit Organizations: The Law School Accreditation Case*, 71 N.Y.U. L. REV. 689, 711 (1996) ("A threshold question in any antitrust case is whether the challenged activity amounts to 'trade or commerce' and thus falls within the jurisdictional reach of the Sherman Act.").

41. Once it is determined that antitrust laws apply, the court proceeds with one of three levels of analysis for a claim brought under § 1 of the Sherman Act. First, the court will condemn an activity as per se illegal when the activity appears to always or almost always restrict competition and decrease output. *See* Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-20 (1979). If an activity is not illegal per se, the court will apply a "quick look" rule of reason analysis. This is an intermediate standard that applies where competitive harm is presumed, but allows the defendant to rebut the presumption with competitive justifications for the restraint. *See* Lee Goldman, *The Politically Correct Corporation and the Antitrust Laws: The Proper Treatment of Noneconomic or Social Welfare Justifications Under Sec-*

II. "TRADE OR COMMERCE" IN ANTITRUST THEORY AND CHARITABLE PRACTICE

A. "TRADE OR COMMERCE" UNDER THE SHERMAN ACT

Section 1 of the Sherman Act condemns every "contract, combination . . . or conspiracy, in restraint of trade."[42] Section 2 prohibits monopolizing, attempting to monopolize or conspiring to monopolize "any part of the trade or commerce among the several States."[43] According to the legislative history of the Act, the 51st Congress considered it impracticable to enumerate every activity within the meaning and purpose of the words "trade" and "commerce" and thought that the inter-

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tion 1 of the Sherman Act, 13 YALE L. & POL'Y REV. 137, 141 (1995). If the restraint is clearly harmful with little benefit, a "quick look" allows the court to condemn the act without protracted litigation. *See id.* It also gives the courts flexibility to consider the defendant's justifications for the restraint and uphold conduct that is harmless to competition. *See id.* If the defendant provides a viable justification, the court will then apply the full-scale "rule of reason" analysis and consider the "history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, [and] the purpose or end sought to be attained." Board of Trade v. United States, 246 U.S. 231, 238 (1918). While the rule of reason considers the surrounding circumstances of and rationales for a particular activity, it is unclear whether noneconomic justifications are properly factored into the equation. *Compare* National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 689-90 (1978) (rejecting defendants' public safety justification on grounds that the Rule of Reason is limited to an activity's impact on competition, and finding that any argument based on noneconomic justifications should be addressed to Congress), *with Goldfarb*, 421 U.S. at 788 n.17 (1975) ("The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently."). The question whether noneconomic justifications are acceptable is particularly relevant in the charitable setting where antitrust conduct is alleged, as such justifications may allow a charity to escape antitrust liability. *See supra* note 39.

42. 15 U.S.C. § 1 (1994). Restraints of trade that are either "in" interstate commerce or have a substantial "effect" on interstate commerce are included under the Sherman Act. *See* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948). The effect is that federal antitrust laws can reach activities at the local level as long as there is a substantial effect on interstate commerce. *See* MANDELKER ET AL., *supra* note 33, § 13.04[3], at 13-25.

43. 15 U.S.C. § 2. Unlawful monopoly is "distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinell Corp., 384 U.S. 563, 571 (1966). In other words, the mere possession of monopoly power is not illegal. *See* Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CAL. L. REV. 263, 288 (1986).

pretation of these terms was better left to the judiciary.[44] Accordingly, whether a transaction is classified as commercial or noncommercial depends on the nature of the act and the totality of the surrounding circumstances.[45]

With no definitive authority controlling the parameters of what constitutes trade or commercial conduct under the Sherman Act, a variety of interpretive theories have emerged. At one end of the spectrum is the argument that by using the terms "trade or commerce" Congress intended the Act to cover only traditional business firms, not charitable entities.[46] A more moderate approach places "pure charity" outside the scope of the antitrust laws, which does not exempt nonprofit institutions altogether, but does limit their liability.[47] At the

44. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 n.10 (1940) (citing Senator Edmunds, *The Interstate Trust and Commerce Act of 1890*, 194 N. AM. REV. 801, 813 (1911)). Many argue that the courts are restricted in this interpretative endeavor to the common law. *See* Arthur, *supra* note 43, at 279 n.64 (listing scholars who agree that the Sherman Act was intended to codify common law). Dictionaries published around the time of the Sherman Act provide insight into the common law definition of these terms. "Trade" was not thought to encompass the liberal arts or the learned professions. *See* ANDERSON, *supra* note 12 (discussing the common law definition of "trade"). The common law definition of "trade" also excluded the activities of local government entities. *See* MANDELKER ET AL., *supra* note 33, § 13.07[1], at 13-57. "Commerce" was defined by common law as "an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care and various mediums of exchange, become commodities and enter into commerce." ANDERSON, *supra* note 12, at 198 (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 229 (1824)).

45. *See, e.g.*, United States v. Brown Univ., 5 F.3d 658, 666 (3d Cir. 1993) (noting that courts classify a transaction as commercial or noncommercial in light of these factors).

46. *See* Arthur, *supra* note 43, at 278. Arthur concludes that charities are not covered by the antitrust laws because there is no mention of charitable activities in the Act's legislative history or at common law. *See id.* at 278 n.62. Rather than treat the Sherman Act as "enabling" legislation that invites the federal courts to learn how businesses and markets work and prescribe rules that make them work in socially efficient ways, Arthur contends that the scope of the Sherman Act should be limited "to the business restraints of trade against which the Act was originally directed," and should not extend to local governments or charitable institutions. *Id.* at 266, 271-72; *see also* Stachtiaris, *supra* note 26, at 1760 ("The debates prior to the passing of the Sherman Act confirm that the Act was not intended to reach the activities of organizations embracing social causes.").

47. *See, e.g.*, *Brown*, 5 F.3d at 665-66 (opining that "pure charity" is not commerce). *But see* United States v. Rockford Mem'l Corp., 717 F. Supp. 1251, 1284 (N.D. Ill. 1989), *aff'd*, 898 F.2d 1278 (7th Cir. 1990); E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE: CASES, MATERIALS, PROBLEMS 233 (4th ed. forthcoming 1999)

other end of the spectrum is the proposition that some traditional charitable activities are "trade or commerce" and are therefore subject to Sherman Act jurisdiction.[48]

B. "TRADE OR COMMERCE" IN THE CHARITABLE SECTOR

While there is little debate that trade and commercial activity takes place in traditional business settings, the issue is less settled when it comes to the charitable sector. In the nonprofit context, the definition of "trade or commerce" is decided on a case-by-case basis, which has produced varied results. For instance, the Supreme Court has held that a nonprofit organized to regulate amateur athletics engages in commercial activity where its television broadcasting plan constitutes horizontal price fixing and imposes limitations on output.[49] Similarly, the Third Circuit has found that an agreement among nonprofit universities to share scholarship information is within the jurisdictional reach of the Sherman Act because providing scholarships is commercial in nature and reflects the business aspects of a university.[50] On the other hand, the D.C. Circuit has found that a voluntary nonprofit educational corporation that accredits nonprofit colleges does not violate the Sherman Act where there is only an incidental restraint of trade and no commercial intent motivating the behavior.[51]

C. "TRADE OR COMMERCE" AND CHARITABLE FUNDRAISING

Commercial dynamics permeate the charitable sector.[52] Charities produce goods and services.[53] Individuals and other

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(manuscript on file with the author) ("[N]onprofits may seek monopoly profits and cause competitive injury even when acting for purely charitable purposes.").

48. *See e.g.*, Virginia Vermiculite v. W.R. Grace & Co., 156 F.3d 535, 541 (4th Cir. 1998), *petition for cert. filed*, No. 98-1289, WL 554196, at *4-5 (Feb. 10, 1999) (finding that a donation to a charitable organization was "fundamentally commercial," evidenced by the transaction's effect on the market and the direct commercial benefits for the charity, its management and its members).

49. *See* NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 99-100 (1984).

50. *See Brown*, 5 F.3d at 666-68.

51. *See* Marjorie Webster Junior College v. Middle States Ass'n of Colleges and Secondary Schs., 432 F.2d 650, 654-55 (D.C. Cir. 1970) (reasoning that "an incidental restraint of trade, absent an intent or purpose to affect . . . [commerce], is not sufficient to warrant application of the antitrust laws" and acknowledging that if a commercial motive were present, "antitrust policy would presumably be applicable").

52. *See* Brody, *supra* note 22, at 466 (noting that it is often difficult to ex-

entities purchase charitable goods and services for their own benefit and for the benefit of others.[54] The "price" of a charitable product is the amount of donative capital required to produce an additional unit of service.[55]

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plain how a nonprofit organization behaves differently from a proprietary enterprise); Hammack & Young, *supra* note 1, at xix (noting that nonprofit management programs adopt methods from the business sector, including marketing, entrepreneurship and financial management techniques, in order to compete in the new nonprofit market environment); Lester M. Salamon, *The Marketization of Welfare: Changing Nonprofit and For-Profit Roles in the American Welfare State*, 67 SOC. SERV. REV. 16, 16-17 (1993) (noting the "striking" expansion of commercial activity by nonprofit organizations); Bartlett, *supra* note 26, at 1596 n.22 (discussing commercial features of charitable solicitation).

53. The goods and services produced by charities range from food and clothes for the poor, to education for various sectors of society, to counseling for the mentally ill, to performing arts productions, museums and animal shelters. Unlike for-profit firms, which produce goods and services at marginal cost, a charitable organization may produce at any level of output for which its donations and investment income cover the average cost of production. *See* Bartlett, *supra* note 26, app. at 1612.

54. The goods and services that are purchased from a charitable organization may be for the benefit of the public, rather than the individual who pays for the charitable production. *See* Hammack & Young, *supra* note 1, at 2 (describing how a donor may intend his or her contribution to provide services for the benefit of others under arrangements that can be conceived of as "markets"); Bartlett, *supra* note 26, at 1598 n.28 (describing how donations may purchase a public good, such that the benefits are not limited to those who pay for their production). On the other hand, charitable contributions also benefit the donor. For instance, individuals who donate to charities are eligible for income tax deductions. *See* 26 U.S.C. § 170(a)(1) (1994) (allowing tax deduction for charitable contributions). The Internal Revenue Service has even ruled that credit card holders may claim deductions for a credit card company's payments to charitable organizations on their behalf. *See* Peter M. Berkery, Jr., *Card Holders May Deduct Charitable Contributions Made from Rebates*, ACCOUNTING TODAY, July 8, 1996, at 10. Corporations and other entities also benefit from charitable giving because such gifts tend to engender goodwill in the communities where they do business. For instance, Philip Morris has a long history of generously funding the arts in New York City, where it is headquartered. *See* Brody, *supra* note 22, at 468. Corporate donations may also be linked directly to a company's business goals. *See* Margaret M. Blair, *A Contractarian Defense of Corporate Philanthropy*, 28 STETSON L. REV. 27, 48-49 (1998) (identifying patterns of corporate giving that show that companies have a vested interest in contributing to a healthy workforce and therefore donate accordingly); Marianne Jennings & Craig Cantoni, *An Uncharitable Look at Corporate Philanthropy*, WALL ST. J., Dec. 22, 1998, at A18 (citing Ben & Jerry's as an example of a company that has made philanthropy a central part of its marketing strategy); *see also infra* note 76 and accompanying text (explaining the altruistic and self-benefiting elements of charitable giving).

55. *See* Bartlett, *supra* note 26, app. at 1613 n.3. A charity that produces additional goods and services with the same amount of donative capital does

To be viable in the charitable marketplace, an organization must garner support from donors who fund the production of charitable goods and services.[56] Since charities cannot function without contributions, competition for donations is a matter of institutional survival.[57] The battle to raise charitable dollars intensifies as the public grows increasingly reluctant to spend tax dollars on social problems.[58] To compete effectively for donations, organizations employ sophisticated business methods and fundraising techniques, including professional fundraisers and modern technology.[59] Today charitable fundraising is

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so at a lower price. *See id.*

56. *See* Brody, *supra* note 22, at 467 (arguing that nonprofits must and do compete for funds, labor, legitimacy and survival); Hammack & Young, *supra* note 1, at 4 (explaining how a nonprofit needs support from customers, sponsors or donors who fund the production of charitable goods and services); HOPKINS, *supra* note 1, at 24 ("Fund-raising is, in itself, a unique form of communication that 'promotes' and 'sells' the product (cause) and 'asks for the order' at the same time.").

57. *See* David D. Blaine et al., *Survey of 1995 Nonprofit Case Law*, 31 U.S.F. L. REV. 125, 209 (1996) (noting that the life span and success of a nonprofit is determined by the amount of charitable gifts it collects). While charities espouse different causes and new sources of donations can be found, charities are dependent on a common giving pool and must compete for contributions from within that pool. *See* Leslie G. Espinoza, *Straining the Quality of Mercy: Abandoning the Quest for Informed Charitable Giving*, 64 S. CAL. L. REV. 605, 654 (1991).

58. This trend was particularly acute during the Reagan and Bush eras, although the effect still lingers where the rallying cry is for smarter and smaller government, less welfare and more self-sufficiency. *See* Howard P. Tuckman, *How and Why Nonprofit Organizations in a Private Economy Obtain Capital*, *in* NONPROFIT ORGANIZATIONS IN A MARKET ECONOMY, *supra* note 1; Dana Milbank, *U.S. Charities Fear They Will Be Overwhelmed, Not Empowered, by Republican Welfare Cutbacks*, WALL ST. J., Nov. 7, 1995, at A24 (reporting that in response to Republican welfare cutbacks, charities estimated they would need giving to increase 247% by the year 2002).

59. Espinoza calls this dynamic the charitable "fund-raising mill," characterized by hard-sell marketing, telephone and mail appeals. Espinoza, *supra* note 57, at 609. As a result of this unbridled competitive fundraising, charities must spend more and more of the money they collect to raise additional funds. *See id.* In the past, there have been well-publicized instances in which charities have raised millions of dollars but allocated only a small portion to their charitable purpose. *See, e.g.*, *'Helping Children'*, WASH. POST, Feb. 7, 1980, at A1 (reporting on a Virginia charity that raised nearly $1 million for its cause but allocated 93% of that total to management fees, administrative costs, and fundraising); Liz Spayd, *Marines' Toys for Tots Spent Millions on Itself: Donations Used to Run Charity, Not Buy Gifts*, WASH. POST, Oct. 2, 1995, at A1 (reporting that that organization spent 10% of the money it raised on toys for children with the balance going to management, fundraising and promotional material); Carol Gentry, *AIDS Charities Let Pros Run Major Events*, WALL. ST. J., Oct. 1, 1997, at NE 1 (noting that the AIDS Ride has

geared to consumers, making it easier than ever for individuals to donate. For instance, many charities solicit gifts paid by credit card.[60] A number of charities have also taken advantage of electronic commerce by accepting donations over the Internet.[61] As charities develop new methods to attract gifts, "consumerism" has emerged in the charitable marketplace.[62] Besieged by solicitations for contributions, individual and corporate patrons have become critical consumers, taking a businesslike approach to spending their gift dollars.[63]

The donations a charity collects not only fund its charitable purpose, but also enable it to maintain its organizational infrastructure.[64] Like any business, a charity must participate

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been criticized for hiring highly-paid fundraisers and delivering only fifty cents on the dollar to actual services). Those who criticize the "big business" of competing for the charitable dollar advocate regulation to minimize abuse, protect donors from fraud, and reduce the waste of charitable donations. *See* HOPKINS, *supra* note 1, § 1, at 1. Others question whether such regulation merely stifles the charitable marketplace. *See id.*

60. For instance, Teaching Tolerance, an organization that seeks to reduce prejudice in America, accepts gifts paid via VISA, MasterCard and American Express. *See* letter from Teaching Tolerance, a nonprofit organization, to potential donor (Oct. 15, 1998) (on file with author).

61. The Shelter, a charity that works on behalf of the homeless, is one of many organizations that accept credit card donations over the Internet. *See* <http://secure.mailmktg.com/echarity/shelter/donate.htm> (visited Jan. 5, 1999).

62. *See* HOPKINS, *supra* note 1, § 1.4, at 16-17 (describing the "consumerism" movement in nonprofit charitable organizations).

63. *See id.* at 17 (noting that donors are demonstrating a greater proclivity to inquire about fundraising and fund-expenditure practices of charitable organizations); Bartlett, *supra* note 26, at 1601 n.39 (noting that most charities cooperate with one of three national "watchdog" agencies that provide information to donors, including the percentage of funds a charity commits to fundraising, spends on programs and unexpended income). While modern technology and business necessity has increased the flow of information about the charitable sector, some argue that an information void about charities persists. *See, e.g.*, Hansmann, *supra* note 1, at 843-44 (identifying information deficiency in the nonprofit sector). Without sufficient or reliable sources of information, donors must either invest time researching charities or simply remain uninformed. *See* Susan Rose-Ackerman, *United Charities: An Economic Analysis*, 28 PUB. POL'Y 323, 325 (1980). Despite a lack of information, donors may contribute to an organization that fits their ideological beliefs, with little thought about the efficiency of the organization's operation. *See id.* at 338. Another factor contributing to the information void is that many nonprofits produce services whose ultimate worth is unknown. *See id.* at 324. For example, Rose-Ackerman argues that cost-benefit analysis is difficult to apply to social services such as counseling. *See id.*

64. *See* Tuckman, *supra* note 58, at 206-07 (discussing the role of capital in nonprofit firms).

in the relevant markets for labor, capital and other resources necessary for operation.[65] As it develops strategies for success in the charitable marketplace, the organization must also decide how to maximize its resources and whether to compete or cooperate with other organizations in light of market dynamics as well as the laws and customs of society.[66]

The charitable marketplace of today, characterized by modern technology and business plans, is distinctly different than the one in place when the antitrust laws were enacted.[67] Consequently, if we are to give deference to the mindset of the 51st Congress that drafted the Sherman Act, it is important to note that charity in the 1890s was predominantly local and grounded in religious and social communities.[68] The days of "corporate" charities and mass fundraising did not come until later.[69] Ironically, the great charitable trusts that emerged

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65. *See id.* A charitable organization engages in capital investment when it purchases tools or skills of the labor force. *See id.* at 206. A charity consumes when it uses funds to pay for salaries or fringe benefits, purchases advertising or maintains its facilities. *See id.* In this way, charities engage in cross-subsidization, such that income derived for one purpose is diverted to another. *See* Hansmann, *supra* note 1, at 877-78.

66. *See* Hammack & Young, *supra* note 1, at 4.

67. In recent years the nonprofit sector has taken on new dimensions. "Nearly three quarters of all charitable 501(c)(3) organizations, excluding most religious organizations and private foundations, have been founded since 1970." *Overview and Executive Summary: The State of the Independent Sector* (visited Oct. 31, 1998) <http://www.indepsec.org/programs/research/almanac_overview.html>. The federal tax exemption has also been extended beyond its original scope to include newer areas of charity, such as the performing arts. *See* Hansmann, *supra* note 1, at 882. While the charitable sector has evolved in new directions over time, charitable organizations have historically enjoyed a privileged legal status. The Statute of Charitable Uses is generally regarded as the first time charities were recognized under the law. *See* 43 ELIZ. (1601) c.4. That statute divided charity into three general classes: relief and assistance of the poor and needy, promotion of education, and maintenance of public buildings and works. *See* ANDERSON, *supra* note 12, at 169-70. The legal inquiry was whether the purpose of the gift was within the principle and reason of the statute, although not expressly named in it. *See id.* Similarly, nineteenth-century nonprofits were largely protected from lawsuits, enjoyed the power to acquire, retain and increase endowments, and were exempt from local, state and federal taxes. *See* Hammack & Young, *supra* note 1, at 10.

68. *See* Espinoza, *supra* note 57, at 638. Historically, public charities were governed as trusts. *See id.* at 636. Trustees were accountable to the courts and were personally liable for losses the charity suffered as a result of negligence or mismanagement. *See id.*

69. The corporatization of charities began around World War II, when both charitable foundations and small operating charities began forming as corporations. *See* Espinoza, *supra* note 57, at 641-42. By the 1950s, three fourths of existing foundations were incorporated. *See id.* Just as the notion

from the Industrial Revolution were made possible by the same concentration of economic power the 51st Congress sought to dismantle.[70]

D. "TRADE OR COMMERCE" AND CHARITABLE GIVING

The solicitation of charitable contributions is an activity pursued by a charitable organization, but it cannot successfully occur without a return from a donor. Thus, the goal of solicitation is a transaction that occurs between the charity and a patron who contributes to it. Both the charity and the donor benefit from the exchange. The charity is able to fund its charitable operation as a result of the gift.[71] Although a donor's contribution may be considered an altruistic act with little or no return,[72] it may also be characterized as a "consumption purchase," where the donor gains something of value in exchange for his or her gift.[73]

A donor's return on his or her charitable investment can take many forms. The most obvious example is the tax advantage afforded by the Internal Revenue Code.[74] The return may also take the form of a privilege. For instance, a sizeable gift to Carnegie Hall might earn the donor a coveted seat on the

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of corporate charities was an undiscovered phenomenon in the late nineteenth century, so too was fundraising as we know it today. A review of legal dictionaries published in the 1890s reveals that "fundraising" was not a recognized common law term.

70. *See* Catherine C. Eckel & Richard Steinberg, *Competition, Performance, and Public Policy Toward Nonprofits, in* NONPROFIT ORGANIZATIONS IN A MARKET ECONOMY, *supra* note 1, at 57, 77 (noting that many prominent charitable nonprofits bear the names of powerful monopolists such as Rockefeller, Mellon, Carnegie and Ford). One study found that wealthy individuals in the nineteenth century feared the political power of the general population, which in turn led them to find new ways to bring society under their control. *See* Brody, *supra* note 22, at 438. The study concluded that industrial magnets used charitable contributions to fund foundations as a means of influencing research, education and the media, with the ultimate goal of reforming social, economic and political life. *See id.*

71. *See supra* notes 64-66 and accompanying text (discussing charities' expenditures of donations).

72. *See* Bartlett, *supra* note 26, at 1599 (describing the common conception of charitable giving as a unilateral act).

73. *See id.* (explaining how charitable donations are "consumption purchases" in terms of marginal satisfaction and utility to the donor); *see also* Hansmann, *supra* note 1, at 855-59 (characterizing contributions as a form of voluntary price discrimination for public goods in which those who value the good most pay the highest price and those who value it least pay less).

74. *See* 26 U.S.C. § 170(c)(2) (1994) (allowing taxpayers who contribute to § 501(c)(3) organizations to deduct their contributions).

Hall's board of directors.[75] A smaller donation will at least contribute to the donor's and others' enjoyment of the performing arts. On a more esoteric level, the donor may gain satisfaction from contributing to others' welfare, feel that the donation increases his or her social status, consider the gift part of a social contract, or simply find that giving assuages religious or moral guilt.[76]

III. THE NINTH AND FOURTH CIRCUITS PART WAYS

A. THE NINTH CIRCUIT: *DEDICATION AND EVERLASTING LOVE TO ANIMALS V. HUMANE SOCIETY OF THE UNITED STATES*

The issue of charitable fundraising was central in *Dedication and Everlasting Love to Animals v. Humane Society of the United States*.[77] Both DELTA and the Humane Society are organized to support the welfare of animals and both are funded

75. *See* Monica Langley, *Concerted Efforts: Even CEOs Sweat out Carnegie Hall Tryouts; For the Board, That Is"* WALL ST. J., July 30, 1998, at A1. A fringe benefit of a seat on Carnegie Hall's board is the business contacts it affords its members. For example, a chairman of a financial conglomerate acknowledged that a merger with another financial conglomerate was "born" in the Hall's private Club Room. *See id.* Smaller and more common benefits may include the charity's publication of an individual or corporate donor's name in the charity's newsletter or posting a "thank you" banner or sign in the donor's honor at a charity event. Depending on the circulation of the publication or exposure of the public display of gratitude, a charity's "thank you" may be a powerful advertising medium. The IRS has not let such benefits go unchecked. In one case, the IRS recognized the commercial potential of a for-profit corporation that sponsored a college football bowl game under the guise of a "gift." *See* HOPKINS, *supra* note 1, § 6.17(b), at 539 (citing IRS Tech. Adv. Mem. 9147007 (TAM)). The TAM characterized the fruits of that gift as unrelated business income because the payment was for a package of valuable services. *See id.*

76. *See* Kenneth J. Arrow, *Gifts and Exchanges*, *in* ALTRUISM, MORALITY, AND ECONOMIC THEORY 13, 17 (Edmund S. Phelps ed., 1975) (providing three utilitarian theories for charitable giving); Hammack & Young, *supra* note 1, at 3 (noting that in exchange for contributing, a donor at minimum receives the assurance that his or her beliefs and values will be served, while other donors may receive recognition or other nonmaterial benefits); Russell Hardin, *Altruism and Mutual Advantage*, 67 SOC. SERV. REV. 358, 362 (1993) (arguing that benevolence tends to contribute to the egoism of the benefactor); Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567, 567 (considering non-altruistic motives for giving); Bartlett, *supra* note 26, at 1599 (listing potential benefits a donor receives from his or her gift as possible explanations for why people donate to charitable causes).

77. 50 F.3d 710 (9th Cir. 1995).

by public donations.[78] In its claim, DELTA alleged that the Humane Society violated sections one and two of the Sherman Act by restraining competition in the market for charitable donations and attempting to monopolize that market.[79] The district court granted summary judgment in favor of the Humane Society on grounds that the organization did not have a majority share of the relevant market and that DELTA neither alleged nor offered the requisite evidence of antitrust injury.[80]

The Ninth Circuit affirmed on separate grounds, finding that the solicitation of charitable donations is not "trade or commerce" and therefore that DELTA failed to state a viable claim.[81] Circuit Judge Noonan relied on the Supreme Court's definitions of "commerce" and "restraint of trade" to support the conclusion that text and precedent "forbid[ ] extension of the Sherman Act to charitable fundraising never envisaged as trade by the common law."[82] The court reasoned that despite

78. *See id.* at 711. The charitable nature of supporting animal welfare has been statutorily and judicially recognized. *See, e.g.*, 26 U.S.C. § 501(c)(3) (1994) (exempting organizations that prevent cruelty to animals from federal income tax); *In re* Estate of Coleman, 138 P. 992, 993 (Cal. 1914) (finding testator's $30,000 gift to build a fountain for the benefit of thirsty animals and birds a "charitable purpose" such that the Rule of Perpetuities did not apply).

79. *See DELTA*, 50 F.3d at 711. DELTA also alleged that in furtherance of these antitrust violations the Humane Society attempted to cause the Attorney General of California to take disciplinary action against DELTA and to cause "providers of valuable services" to discriminate against DELTA. *Id.* In its motion for summary judgment the Humane Society argued that the antitrust laws did not apply to the parties, that the parties did not operate in the same market, and that in any event, it did not have monopoly power in the relevant market. *See id.* In support of its motion the Humane Society submitted evidence that its expenses exceeded its annual receipt of donations. *See id.* For its part, DELTA submitted evidence of its animal rescue work, which included publishing books and magazine articles promoting animal welfare. *See id.* at 712. DELTA also submitted evidence that it had been successful in collecting out-of-state donations in the past. *See id.*

80. *See id.* at 712.

81. *See id.* at 714.

82. *Id.* at 712-13. The Ninth Circuit reasoned that the 51st Congress intended "trade or commerce" to be defined in a restrictive sense, and cited Chief Justice John Marshall's definition of "commerce" in the context of the commerce clause. *See id.* at 712-13 (defining "commerce" as "the commercial intercourse between nations, and parts of nations, in all its branches") (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824)). The court's reliance on Chief Justice Marshall as authority for a restrictive meaning of "commerce" seems misplaced, considering Marshall's broad interpretation of the commerce clause. *See Gibbons*, 22 U.S. at 196 (defining the commerce power as "complete in itself, [which] may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution"). The

the reputation, prestige and money the Humane Society and its officers derived from donations, the act of collecting those donations is not trade or commerce under the meaning of the antitrust laws.[83] Accordingly, the opinion dismissed the district court's inquiry into the Humane Society's share of the relevant charitable market as "distinctly odd . . . because there isn't any market."[84] The opinion did acknowledge that in some contexts, a nonprofit organization does engage in trade or commerce[85] and that the Sherman Act's objectives of efficiency, minimum production cost, innovation, equal market access and fair distribution are important in a nonprofit environment.[86] Ultimately, though, the court failed to see the nexus between the antitrust laws and charitable fundraising.[87]

The Ninth Circuit's opinion implies that it generally disapproves of the antitrust laws invading the charitable domain. For example, the court highlighted *United States v. Brown University*, a case in which the Third Circuit found that a nonprofit university engages in commerce where it awards scholarships, but remanded the case for further evaluation of the challenged conduct under the Rule of Reason.[88] In doing so,

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DELTA court also noted that a restraint of trade was well understood at common law and that the Sherman Act simply codified the common law tradition. *See DELTA*, 50 F.3d at 712. Moreover, the court surmised that the Supreme Court has embraced the common law traditions of trade or commerce and rejected the expansion of those concepts to embrace other activities. *See id.* at 712-13 (discussing the Supreme Court's refusal to apply the Sherman Act to a union's sitdown strike) (citing Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 (1940)).

83. *See id.* at 714; *cf.* United States v. Brown Univ., 5 F.3d 658, 666 (3d Cir. 1993) (stating that regardless of whether MIT's motive was "altruism, self-enhancement or a combination of the two," MIT received "increased prestige and influence" in exchange for providing financial aid).

84. *Id.* at 714.

85. *See id.* at 713 (acknowledging that a nonprofit does not enjoy blanket immunity from antitrust liability, but stating that "it is a leap . . . to the conclusion that charitable activities are subject to the Sherman Act when they do not constitute trade in the sense of the common law").

86. *See id.*; *cf.* United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945) ("Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant . . . necessary to counteract an inevitable disposition to let well enough alone.").

87. *See DELTA*, 50 F.3d at 714.

88. *See id.* at 714 (citing *Brown Univ.*, 5 F.3d at 658). The court in *Brown University* strongly suggested that an evaluation of the defendant's procompetitive social welfare justifications under the Rule of Reason would lead to the conclusion that the defendant's conduct did not violate the Sherman Act.

the *DELTA* court suggested that even if the antitrust laws did apply to charitable fundraising, the Humane Society should not be held liable for its conduct.[89] The opinion concluded with the court expressing in dicta its concern that if the Sherman Act were extended to charitable fundraising, the law would inevitably become a "hunting license" to attack everything from church fairs to the solicitation of voluntary blood donors to engagement or marriage.[90]

B. THE FOURTH CIRCUIT: *VIRGINIA VERMICULITE V. W.R. GRACE CO.*

The Ninth Circuit appears to be alone in providing a blanket exemption to charitable transactions under the Sherman Act. In *Virginia Vermiculite v. W.R. Grace Co.*,[91] the Fourth Circuit considered whether a donation of land to a nonprofit organization was commercial in nature. The plaintiff alleged that the defendant mineral producer's donation of mining rights to the defendant nonprofit organization was an exclusionary act designed to keep the plaintiff out of the mineral market in violation of sections one and two of the Sherman Act.[92] After a review of the relevant case law, the district court suggested that the defendant's nonprofit status outweighed the anticompetitive effects of its actions.[93] Accordingly, the district court concluded that the nature of the donative transaction,

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See Brown Univ., 5 F.3d at 678; *see also supra* note 41 (discussing the Rule of Reason and its application to nonprofits).

89. Perhaps more telling than the court's discussion of *Brown University* is what followed it. A citation referenced a commentary on the case arguing that the Sherman Act was not intended to reach the activities of organizations embracing social causes and that even Rule of Reason analysis is inappropriate. *See id.* at 714 (citing Stachtiaris, *supra* note 26). Another article cited by the court noted that after remand, the *Brown* case ended with an out of court settlement where the defendants admitted no guilt and were allowed to continue sharing scholarship information. *See id.* (citing William H. Honan, *M.I.T. Wins Right to Share Financial Aid Data in Antitrust Accord*, N.Y. TIMES, Dec. 23, 1993, at A13).

90. *See DELTA*, 50 F.3d at 714. The court cited no authority to support its prediction that such an atrocity would befall society if the Sherman Act were applied to fundraising.

91. 156 F.3d 535 (4th Cir. 1998), *petition for cert. filed*, 1998 WL 554196.

92. *See id.* at 538.

93. *See* 965 F. Supp. 802, 815 (W.D. Va. 1997) ("The purpose of the Act is to ensure that competition reigns supreme in the business world. But the Sherman Antitrust Act makes no value judgment that competition in the business world should be elevated over pursuit of noncommercial social or political objectives by noncommercial social or political organizations.").

elucidated by an examination of the nonprofit's noncommercial motives to protect a natural resource, precluded antitrust liability.[94]

The Fourth Circuit reversed on grounds that the "donative" transaction between the defendant mineral producer and the nonprofit was "fundamentally commercial." To support its holding, the court cited the donation's effect on the commercial market for the mineral, as well as the direct commercial benefits the transaction produced for the nonprofit and its management and members.[95] The court rejected the notion that a nonprofit's noncommercial, sociopolitical objectives wholly exempt it from the antitrust laws.[96] Rather, a review of the Sherman Act's text and precedent led the court to conclude that the law is triggered by an organization's commercial conduct, irrespective of its social welfare goals.[97] Upon an examination of the evidence, the court found that the behavior at issue was essentially commercial, and remanded the case for further proceedings.[98]

IV. ANALYSIS: CHARITABLE FUNDRAISING IS "TRADE OR COMMERCE" UNDER THE SHERMAN ACT

A. WHERE THE *DELTA* COURT WENT WRONG

The Ninth Circuit in *DELTA* concluded that charitable fundraising is not "trade or commerce" without examining the nature of the behavior at issue. Rather, its conclusion was based solely on a restrictive interpretation of the text. A practical reading of the opinion suggests that the Ninth Circuit did not want to smear a charitable transaction with an anticompetitive label or burden a charity with an undue legal responsibility. This reading is reasonable considering that the court failed to acknowledge the commercial dynamics of charitable fundraising or to heed precedent and determine whether the Humane Society's alleged monopolization of donations to sup-

94. *See id.* at 818.

95. *See* 156 F.3d at 541. The court went on to explain that an organization that may otherwise be exempt from the antitrust laws loses its exemption by conspiring with a nonexempt party. *See id.* Regardless of motive, it is sufficient that the organization acquiesced in a restraint of trade with the knowledge that it would have anticompetitive effects. *See id.*

96. *See id.* at 540.

97. *See id.* at 541.

98. *See id.* at 542.

port the welfare of animals was motivated by commercial or anticompetitive intent. Thus, the *DELTA* court's holding that fundraising is outside the meaning of "trade or commerce" created a blanket exemption of that activity from the antitrust laws. However, an exemption in this case is misplaced, as it was created without support of the Sherman Act's text or precedent and without distinguishing the commercial aspects of charitable fundraising from trade or commerce in the normal course of business. In short, by failing to consider the nature of fundraising and how it implicates the antitrust laws, the Ninth Circuit in *DELTA* strayed from the carefully pruned path of Sherman Act jurisprudence where the breadth of the text is honored,[99] alleged antitrust violations are carefully examined,[100] and exemptions are not lightly granted.[101]

The *DELTA* court conducted its textual analysis of the antitrust laws in a restrictive mode that caused it to lose sight of its duty to scrutinize carefully alleged anticompetitive behavior.[102] While judicial restraint is a virtue in statutory interpretation, Congress wrote the Sherman Act in broad textual strokes,[103] knowing that a combination of words could not possibly capture every activity that the Act was intended to condemn.[104] In light of Congress's design and intent, the courts have brought the text to bear on a wide range of anticompetitive trade and commercial activity, wherever it might occur.[105] Where the courts have determined that the antitrust laws do not apply to a particular activity, the result has not been reached in haste. Only after the alleged anticompetitive behavior has been closely examined for commercial and anticompetitive motives will it pass unscathed from antitrust review.[106]

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99. *See supra* note 27 and accompanying text (discussing the broad stokes with which the Sherman Act is written).

100. *See supra* notes 35-36 and accompanying text (discussing how even otherwise noncommercial transactions may be subject to antitrust review if undertaken with a commercial purpose or knowledge of anticompetitive effects).

101. *See supra* notes 34-37 and accompanying text (describing courts' reluctance to grant immunity under the antitrust laws).

102. *See supra* Part III.A. (discussing the court's opinion in *DELTA*).

103. *See supra* note 27 and accompanying text.

104. *See supra* note 27 and accompanying text.

105. *See supra* notes 34-38 and accompanying text (discussing presumptions against exemptions and how an otherwise noncommercial activity might be subject to antitrust review).

106. *See supra* notes 34-38 and accompanying text.

The *DELTA* court reasoned that Congress chose the words "trade" and "commerce" for their *restrictive* meaning. Its first step in doing so was to quote Chief Justice John Marshall's definition of "commerce" in the context of the Commerce Clause.[107] It is ironic at best, and contrary to legal and historical logic at worst, to use Justice Marshall's interpretation of the Commerce Clause in support of a restrictive textual reading. Justice Marshall was anything but confined in his interpretation of that constitutional text, and in fact read the language of the Commerce Clause broadly.[108]

The Ninth Circuit also professed its allegiance to the common law in justifying its restrictive reading of the Sherman Act.[109] Although the Supreme Court uses common law to inform its interpretation of the Sherman Act, it has not limited itself to common law notions. For instance, when the Sherman Act was enacted the common law did not consider trade or commerce to take place in the liberal arts or the learned professions.[110] Since then the Court has recognized that commercial activity does take place in those contexts and has held that neither is immune from antitrust liability under the Sherman Act.[111] The activities of local governments were also exempt from antitrust review at common law.[112] The Court has not confined itself to this limitation, either. Rather, local governments are only exempt where they act with an affirmatively expressed mandate from the state.[113]

By reading the Sherman Act in a restrictive vein and concluding that charitable fundraising is immune from the anti-

107. *See supra* note 82 (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)).

108. *See supra* note 82 (discussing Marshall's broad interpretation of the Commerce Clause).

109. *See supra* note 82 (citing Apex Hosiery Co. v. Leader, 310 U.S. 469, 497-98 (1940), where the Court found that the Sherman Act is aimed at "only those [acts] which are comparable to restraints deemed illegal at common law" and is limited to "restriction or suppression of commercial competition").

110. *See supra* notes 12, 44 and accompanying text (discussing common law definition of "trade").

111. *See supra* notes 12, 35 and accompanying text (discussing *Goldfarb*'s finding that Congress did not intend a sweeping exclusion of the professions and the Court's refusal in *United States v. Brown University* to grant blanket immunity to nonprofit educational institutions from the antitrust laws).

112. *See supra* note 44 (discussing common law exclusion of local governments from antitrust liability).

113. *See supra* note 33 (discussing when extension of state action immunity to municipal conduct is appropriate).

trust laws, the *DELTA* court foreclosed a considered analysis of the specific behavior at issue. Had it scrutinized the activity more closely, the court would have recognized that fundraising is a business activity that charities undertake in support of their missions.[114]

In its most basic form, fundraising is the exchange of money for a charitable product.[115] Donors contribute, or purchase, charitable goods and services they deem valuable. Often, donors do not directly see, touch or benefit from their charitable dollars in action. For instance, when a donor contributes to a charity whose mission is to increase educational opportunities for students in a particular community, that donor's only connection to the program might be the check he or she wrote. If the program is successful, the students are the direct beneficiaries. The donor may also benefit in a number of ways. If the donor employs members of the community, he or she will benefit from a heightened quality of the labor pool in that market. More educational opportunities may also contribute to making the community in which the donor lives safer and more productive. At the very least, the donor is likely to have gained some measure of satisfaction from his or her gift.[116]

While the production of charitable goods and services may be the ultimate goal of an organization that raises funds, the reality of doing business dictates that some of the money it collects will be allocated to the organization's infrastructure.[117] Even a soup kitchen must pay utility bills. More sophisticated organizations operate with the benefit of modern technology, professional management and other accommodations that come with a price tag. Beyond these operational expenditures, many charitable dollars are re-circulated into the "fundraising mill," the organizational apparatus that is dedicated to producing more donations.[118] While it may be axiomatic that "it takes money to make money," in some cases more money is

114. *See supra* Part II.B (discussing commercial elements of fundraising).

115. *See supra* Part II.B.

116. *See supra* notes 72-76 and accompanying text (discussing potential benefits donors may receive in exchange for their gifts).

117. *See supra* notes 64-65 and accompanying text (discussing expenditures of charitable dollars to this end).

118. *See supra* note 59 and accompanying text (discussing Espinoza's characterization of the "fundraising mill" and the fundraising programs employed by charities).

taken into the fundraising mill than is given to the intended beneficiaries of the charitable product.[119] There is no common denominator for overhead and fundraising expenditures, but an analysis of the fundraising transaction is incomplete without acknowledging where the dollars are disbursed after they are raised. In short, fundraising fuels the multifaceted commercial enterprise of the charitable sector.

B. WHERE THE *VIRGINIA VERMICULITE* COURT WAS RIGHT

In contrast to *DELTA*, the Fourth Circuit's opinion in *Virginia Vermiculite* represents a considered analysis of the alleged anticompetitive behavior at issue and a careful review of whether and how that behavior is subject to antitrust review. The Fourth Circuit rejected the lower court's suggestion that the defendant's nonprofit status outweighed the anticompetitive effects of its actions.[120] Rather than accept the charity defense as a bulletproof shield against antitrust liability, the Fourth Circuit examined the evidence and determined that the nonprofit's conduct affected the commercial market and produced direct commercial benefits for the nonprofit itself, as well as its management and members.[121] The court went on to emphasize that even if the defendant were otherwise exempt by virtue of being a nonprofit organization, it would forfeit its immunity merely by acquiescing in its co-defendant's restraint of trade, knowing the restraint would have anticompetitive effects.[122] Finally, contrary to the district court, the Fourth Circuit stressed that the nature of the nonprofit's intent is irrelevant in the analysis.[123] With this line of reasoning the court implied that a mere cursory or overly forgiving review of a

119. *See supra* note 59.

120. *See supra* notes 93-94 and accompanying text (discussing the district court's opinion in *Virginia Vermiculite*).

121. *See supra* note 95 and accompanying test (discussing this part of the Fourth Circuit's opinion). Notably, the *DELTA* court dismissed the notion that the reputation, prestige and money that fundraising garnered for the Humane Society and its officers implicated its fundraising activities under the antitrust laws. *See supra* note 83 and accompanying text.

122. *See supra* note 95. This is in line with other courts' holdings that where exemptions exist, they are fragile and may easily be lost. *See supra* note 33 (discussing how *Noerr-Pennington* immunity may be lost if the petitioning involves fraudulent actions, "sham" litigation, private standard-setting or situations where the government being petitioned is acting in a commercial capacity).

123. *See supra* note 96 and accompanying text.

nonprofit's behavior is not an appropriate substitute for thorough antitrust analysis.

A comparison of the Ninth Circuit's reasoning in *DELTA* and the Fourth Circuit's reasoning in *Virginia Vermiculite* shows that the *DELTA* court failed to properly assess the claims before it. Although the court in *Virginia Vermiculite* ultimately found the nonprofit liable under the Sherman Act, had the *DELTA* court engaged in a similar analysis of the Humane Society's alleged anticompetitive behavior, it might nevertheless have concluded that the Humane Society did not violate the law. If the Ninth Circuit had acknowledged the commercial nature of charitable fundraising, it would have considered the circumstances surrounding and rationales for the Humane Society's activity.[124] The evidence may have shown that the Humane Society's conduct was not sufficient to be condemned under the antitrust laws.[125] Alternatively, the Humane Society may have convinced the court that noneconomic justifications for its behavior excused its anticompetitive effects.[126] It is also possible that a thorough review of the Humane Society's actions would have rendered it liable under the antitrust laws. While these possibilities are pure conjecture in a retrospective analysis, they offer reasoning that would have brought a more legally sound conclusion to the case.

C. AN EXEMPTION FOR CHARITABLE FUNDRAISING IS INAPPROPRIATE

Once it is established that fundraising constitutes "trade or commerce," it is apparent that the *DELTA* court created an exemption for this activity under the Sherman Act. The import of this finding cannot be underestimated, because the Sherman Act does not exempt any trade or commercial activities on its face and judicial exemptions from the Act are generally not fa-

124. *See supra* note 41 and accompanying text (discussing Rule of Reason analysis); *see also supra* note 39 and accompanying text (noting that federal courts are often reluctant to condemn a nonprofit under the Sherman Act for activities that promote the public interest).

125. *See supra* note 43 and accompanying text (noting that mere possession of monopoly power is not in itself an antitrust violation).

126. *See supra* note 41 (discussing the possibility that noneconomic justifications should be factored into the Rule of Reason equation). Although it is debatable whether the social benefit argument is legally sound, there is at least support for this proposition in the case law.

vored.[127] True, the courts have made exceptions and granted certain immunities under the Act.[128] A charitable cause would provide a tempting opportunity to find an exemption in the spirit of the Sherman Act even though the letter of the law does not provide for it. Nevertheless, a closer look at antitrust jurisprudence reveals that more than a charitable spirit is required to justify an exemption to the Sherman Act. Rather, a judicial exemption should reflect a compromise between the Sherman Act and constitutional principles or Congress's explicit intent that a different federal statute occupy the field.

State action immunity from the antitrust laws is grounded in principles of federalism.[129] The Supreme Court recognized that applying the Sherman Act to the actions of a state impinged upon the states' police power and their ability to act as sovereigns.[130] By recognizing an exemption for states, the Court did not validate anticompetitive state action. Rather, it struck a balance between judicial review and respect for the democratic process.[131] Principles of federalism also explain the limited exemption that is afforded to local governments and other state actors. Since those entities do not enjoy the same sovereign status as the states, their conduct must be expressly directed by the state in order for immunity to attach.[132]

State sovereignty is not threatened by applying the Sherman Act to charitable fundraising. While charities may receive grants from the government and perform functions that government might otherwise perform, charitable organizations are not sovereign government actors. Contrary to state actors, whose immunity is conditioned upon a clearly articulated mandate from the legislature, charities tend to fill a void where the government has decided not to act, or at least to act in a lesser capacity.[133] Moreover, since the absence of a profit motive is no guarantee that an organization will act in the best in-

127. *See supra* notes 34-37 (discussing courts' reluctance to grant immunity from antitrust laws).

128. *See supra* note 33 and accompanying text (discussing exemptions from antitrust laws).

129. *See supra* note 33 (discussing state action immunity).

130. *See supra* note 33.

131. *See supra* note 33.

132. *See supra* note 33 (discussing the applicability of state action immunity to local governments).

133. *See supra* note 1 and accompanying text (discussing charities' role in providing services that the government cannot or does not provide).

terests of its consumers,[134] some measure of judicial oversight is required to enforce compliance with the law.[135] The justification for such oversight is especially strong in the charitable sector because donors may not have enough information to monitor the activities of the organizations to which they contribute[136] and charities are ultimately not accountable to their direct beneficiaries.[137] Therefore, without judicial oversight, anticompetitive behavior in the commercial sector would likely go unchecked.

Immunity under the *Noerr-Pennington* doctrine is another example of a balance between the Constitution and federal antitrust policies.[138] The *Noerr-Pennington* exemption is grounded in the First Amendment and protects a private actor's right to petition the government, regardless of anticompetitive intent or effect.[139] Nevertheless, the *Noerr-Pennington* doctrine is not an impermeable exemption; it does not apply if legitimate petitioning activities are accompanied by illegal or fraudulent actions, are based on "sham" litigation, or involve a government entity that is acting in its commercial capacity.[140]

Applying the Sherman Act to charitable fundraising does not violate free speech in the charitable marketplace. By promoting the policies of competition and consumer welfare, the antitrust laws actually protect a charity's free speech from being suppressed through unlawful restraints.[141] Rather than allowing monopolistic organizations to unlawfully manipulate the charitable market to the exclusion of smaller and less powerful charities, the antitrust laws are a means to prohibit such anticompetitive tactics and ensure that freedom of expression prevails. Accordingly, the balance between the antitrust laws

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134. *See supra* note 31 and accompanying text.

135. *See supra* note 31 and accompanying text.

136. *See supra* note 63 (discussing the information void in the charitable sector).

137. While it may be argued that a charity's anticompetitive conduct may be policed by the power of the donor's pocketbook, the void of reliable and consistent information in the charitable sector makes that prospect less likely. *See supra* note 63.

138. *See supra* note 33 and accompanying text (discussing *Noerr-Pennington* doctrine).

139. *See supra* note 33 and accompanying text.

140. *See supra* note 33 and accompanying text.

141. In this way, antitrust laws and the First Amendment promote the same interest: a diverse and growing nonprofit sector where small or less powerful charities are not boxed out of the market. *See* Espinoza, *supra* note 57, at 667 (explaining that these were the goals of the Court in *Schaumburg*).

and the First Amendment is achieved without exempting charitable fundraising from Sherman Act jurisdiction.

Finally, the non-statutory labor exemption reflects a compromise between antitrust policies and federal labor law.[142] Although anticompetitive activity can occur in the labor sector, the courts have found that the National Labor Relations Act affords parties adequate tools to protect against and remedy such conduct.[143] Deferring to Congress's intent that federal labor law exclusively govern this area, the courts have restricted the Sherman Act's jurisdiction over labor issues to the narrowest of circumstances.[144]

Unlike the confluence of the Sherman Act and federal labor law that produced the non-statutory labor exemption, there is not a merger between antitrust law and the law governing charities to justify similar immunity for charitable fundraising. The National Labor Relations Act is a comprehensive and unified federal code representing Congress's intent that the statute occupy the field of labor law. By contrast, charitable fundraising is regulated by a panoply of state laws that are notoriously inconsistent from state to state.[145] Where comprehensive state charitable solicitation statutes are in place, they are generally concerned with registration and reporting requirements for charitable organizations and professional fundraisers.[146] These laws have more to do with preventing consumer fraud than they do with maintaining competition among charities.[147]

While state laws governing charities are fragmented and inconsistent, the Internal Revenue Code is a uniform and deeply entrenched force in the charitable sector.[148] Federal tax laws focus on which activities of an organization are exempt for tax purposes and which are accountable to the Internal Revenue Service. The Internal Revenue Code does not, however,

142. *See supra* note 33 and accompanying text.

143. *See supra* note 33 and accompanying text.

144. *See supra* note 33 and accompanying text.

145. *See supra* note 7 and accompanying text (citing Hopkins' overview of state laws regulating charities). Hopkins notes that there is no federal law dedicated to governing charitable fundraising, "nor is there any immediate prospect of one." HOPKINS, *supra* note 1, § 6, at 427.

146. *See supra* note 7 and accompanying text (citing Hopkins' review of state laws regulating charities).

147. *See supra* note 7 and accompanying text.

148. *See supra* notes 3, 22 (discussing Internal Revenue Code sections that apply to charities).

provide parties the tools with which to defend against anticompetitive conduct. Moreover, these laws do not represent Congress's intent to restructure the area of charitable fundraising under a comprehensive federal statute, as was the case with the National Labor Relations Act. Absent some overriding reason why these state or federal laws should exclusively occupy the charitable sector, an exemption for fundraising analogous to the statutory labor exemption is inappropriate.

In addition to these well-established exemptions, the courts also have recognized certain situations in which alleged anticompetitive conduct is not properly classified as trade or commerce.[149] Such determinations are carefully circumscribed and are made only after close scrutiny of the behavior at issue. For instance, an entity's intent can be the determining factor in deciding whether an activity constitutes commerce.[150] Thus, while accrediting secondary schools may be the antithesis of commercial behavior if there is no commercial motivation behind the act, if the same activity were motivated by commercial intent it would be subject to the antitrust laws.[151] In a similar manner, the Ninth Circuit could have endeavored to classify the particular fundraising activity in *DELTA* as noncommercial by examining the intent behind[152] and effect of the Humane Society's conduct.[153] By concluding its review with an assumption that fundraising is not trade or commerce, the *DELTA* court did not avail itself of the opportunity to justify why that behavior is not commercial activity.

This is the point at which the Ninth and Fourth Circuits split.[154] Because the issue of charitable fundraising was not before it, the Fourth Circuit did not have the need or occasion to take issue with the *DELTA* court's holding. Yet by refusing to accept *DELTA*'s premise that a charitable transaction enjoys antitrust immunity, the Fourth Circuit implicitly rejected the *DELTA* court's conclusion that a blanket exemption is appro-

149. *See supra* note 51 and accompanying text (discussing the Supreme Court's finding in *Marjorie Webster* that petitioner's accreditation activities were not trade or commerce under the Sherman Act).

150. *See supra* note 35.

151. *See supra* note 35.

152. *See supra* note 35.

153. *See supra* note 95 and accompanying text (discussing the *Virginia Vermiculite* court's reasoning that a transaction's effect on the market is evidence of its commercial nature).

154. *See generally supra* Part III (discussing the opinions in *DELTA* and *Virginia Vermiculite*).

priate for charitable transactions. In proceeding as it did, the Fourth Circuit in *Virginia Vermiculite* properly considered the totality of the circumstances surrounding the alleged anticompetitive behavior to determine whether it was commercial in nature.

D. APPROPRIATE REVIEW IS BASED ON THE NATURE OF THE CONDUCT AND THE TOTALITY OF THE SURROUNDING CIRCUMSTANCES

In *United States v. Brown University*, the Third Circuit aptly summarized that "[c]ourts classify a transaction as commercial or noncommercial based on the nature of the conduct in light of the totality of the surrounding circumstances."[155] According to antitrust jurisprudence, the "totality of the surrounding circumstances" includes the legislative history of the Sherman Act, the antitrust common law, the text of the Act, and the facts of the particular case before the court. A proper analysis of the claims in *DELTA* would have included a review of each of these factors and related the broad context of the Sherman Act to the particular conduct at issue in the case.

While the legislative history of the Sherman Act provides evidence that Congress considered the application of the law in non-traditional business contexts, it does not resolve the issue.[156] In the debate that occurred before the bill was enacted, the Senate discussed whether the antitrust law would apply to the temperance movement.[157] Four points about this piece of legislative history render it neutral in the analysis of trade or commerce as it pertains to fundraising. First, Congress ultimately chose *not* to create an exemption for the temperance movement, nor did it exclude any other kind of moral or educational organization that might be organized.[158] Second, the Senate debated the option of exempting *organizations* from the Act's reach, not the specific *activity* of any organization.[159] The Supreme Court has flatly rejected the notion that moral or

155. 5 F.3d 658, 666 (3d Cir. 1993).

156. *See supra* note 38 and accompanying text.

157. *See supra* notes 42-43 (discussing sections one and two of the Sherman Act).

158. *See supra* note 38 (discussing Senate debate about the issue).

159. *See supra* note 38 and accompanying text. Koon argues that the distinction between entities and their conduct provides one explanation for why nonprofit organizations cannot automatically escape liability. *See supra* note 37.

educational organizations are exempt from the Sherman Act simply by virtue of their social welfare goals.[160] Next, charities in the nineteenth century did not bear the same resemblance to businesses as they do today.[161] Since the common law was fickle in its application of antitrust principles in non-traditional business sectors[162] and antitrust laws would not be applied in those sectors until later,[163] it logically follows that Congress would not have considered the antitrust laws to apply in that context. Finally, modern fundraising was a yet-undiscovered phenomenon in the charitable sector and accordingly, the activity was not subject to common law antitrust review.[164] It would have been impossible for Congress or the early courts to consider the commercial dynamics of a concept that was not familiar to them.

Although the Supreme Court has sanctioned the inquiry into the legislative history of the Sherman Act,[165] such evidence, by itself, should not be the turning point of any judicial analysis. Where it does not directly address the issue at hand, legislative history should be even less controlling. In the end, the legislative history of the Sherman Act is inconclusive about whether trade or commerce would have encompassed fundraising in the minds of the 51st Congress.

The next step in evaluating the totality of the surrounding circumstances is to evaluate the pertinent common law. Like the legislative history, common law informs the application of the Sherman Act, but it does not erect barriers beyond which the law cannot reach. Common law did not subject trade or professional organizations or local government entities to antitrust scrutiny.[166] Nevertheless, modern courts have applied

160. *See supra* note 37 and accompanying text.

161. *See supra* notes 68-69 and accompanying text (discussing how charitable organizations in the 19th century were closely related to the local and religious communities and that business dynamics did not play a significant role in their operation until after World War II).

162. *See supra* note 44 and accompanying text (discussing the common law view that antitrust law did not apply to the liberal arts, learned professions or local government entities).

163. *See supra* notes 37-39 and accompanying text (discussing courts' application of antitrust law in non-traditional business sector).

164. *See supra* note 69 and accompanying text (noting that "fundraising" was not a common law term recognized in the legal dictionaries circa 1890).

165. *See supra* note 38 and accompanying text (citing Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940)).

166. *See supra* note 44 and accompanying text.

the Sherman Act in each of these contexts.[167] The courts' decisions to do so are not irreconcilable with common law. Rather, trade and professional organizations and local government entities did not generally perform the same commercial functions at common law that they came to perform in later years.[168] The charitable sector has undergone a similar transformation since common law prevailed in the area of antitrust.[169] Perhaps the most telling evidence of the evolution is that the word "fundraising" was not in the legal vernacular at the time the Sherman Act was passed.[170] Today the concept is as familiar to legislators as it is to the general public.

When Congress enacted the Sherman Act, it did so against the backdrop of common law. Neither common law nor Congress envisioned a charitable sector that looks and acts like the traditional business sector. Thus, it is reasonable to conclude that the common law provides a solid starting point for the fundamental antitrust principles that the Sherman Act was intended to promulgate. It is unreasonable, however, to use the common law as a conclusive thesaurus for modern antitrust law.

The text of the Sherman Act is the next step in evaluating the totality of the surrounding circumstances. The pivotal text for the Ninth Circuit in *DELTA* was that which pertains to "trade or commerce."[171] Yet, to read those terms to the exclusion of the rest of the Act is illogical. Whether an activity is commercial in nature is merely the threshold question in antitrust review.[172] More must be shown for the court to find a violation. Section one of the Act says that a "*restraint* of trade" is unlawful, not mere participation in trade.[173] Monopolizing, attempting to monopolize, or conspiring to monopolize commerce is unlawful under section two.[174] Conduct short of those anticompetitive standards does not violate the law.

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167. *See supra* notes 33, 37.

168. *See supra* notes 33, 37.

169. *See supra* Part II.B (discussing commercialization in the charitable sector).

170. *See supra* note 69.

171. *See supra* notes 81-87 and accompanying text (discussing the *DELTA* court's analysis of "trade or commerce").

172. *See supra* note 40 and accompanying text.

173. *See supra* note 8 and accompanying text (discussing section one of the Sherman Act).

174. *See supra* note 8 and accompanying text (discussing section two of the Sherman Act).

The courts have developed a careful analytical structure under which alleged anticompetitive trade and commercial activity are weighed against the legal mandate of the Sherman Act.[175] In applying that structure to nonprofits, the courts have suggested that leniency should be factored into the equation.[176] Had the Ninth Circuit in *DELTA* looked beyond the threshold of "trade or commerce," it would have recognized that blanket immunity is not required to find that an activity does not violate the antitrust laws. Rather, a charitable organization that raises funds without restraining trade or monopolizing, attempting to monopolize, or conspiring to monopolize commerce can do so lawfully under the Sherman Act.

Finally, the Ninth Circuit did not pause to consider a crucial component of the surrounding circumstances: the nature of fundraising in general and the nature of the allegedly anticompetitive fundraising in the particular case before it. When charities raise funds they do so in exchange for the production of charitable goods and services. *"Whatever else it may be,"*[177] this is commerce in the most common usage of that word. *"In the modern world,"*[178] it cannot be denied that fundraising plays an important part in commercial intercourse. Acknowledging the commercial nature of charitable fundraising simply opens the door for further analysis.[179] It is the particular manner in which the Humane Society conducted its fundraising activities that renders it lawful or unlawful under the Sherman Act.

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175. *See supra* note 41 (discussing analytical framework for evaluating anticompetitive conduct under the Sherman Act).

176. *See supra* note 39 and accompanying text (noting that some courts have been reluctant to condemn activities of nonprofits under the Sherman Act).

177. *See supra* note 37 (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975)).

178. *See supra* note 38 (quoting *Goldfarb*, 421 U.S. at 788).

179. Such review is controlled by precedent and is unlikely to deluge the charitable sector with the atrocities predicted by the *DELTA* court. *See supra* note 90 and accompanying text (noting the Ninth Circuit's fear that application of the antitrust laws to fundraising would transform the law into an unmitigated "hunting license"); *see also supra* note 41 (discussing the various levels of antitrust review).

E. IMPLICATIONS OF FUNDRAISING AS COMMERCIAL ACTIVITY: ABIDING BY THE LAW AND PROMOTING GOOD POLICY

At first glance, the argument that fundraising is trade or commerce under the Sherman Act seems to be an uncharitable reading of the law, subjecting goodwill organizations to unnecessary legal scrutiny. But there is another side to the issue. Charities ultimately exist for those who directly consume, or benefit from, charitable goods. Antitrust principles of efficiency, minimum production cost, innovation, equal market access and fair distribution[180] serve to promote the welfare of those for whom the charitable marketplace exists. If the ultimate beneficiaries of the charitable sector are our concern, it is only just to enforce the laws so that charities respond to market demands in the most cost-effective and efficient manner possible. By prohibiting monopolies and other unlawful restraints in fundraising activities, the antitrust laws are an effective means to a charitable end.

Some courts and scholars believe that competition is misplaced in the charitable sector.[181] Although the courts have rejected that premise and applied the Sherman Act to commercial conduct wherever it occurs, they have shown an inclination to apply the antitrust laws more leniently when traditional business entities are not involved.[182] As such, the courts can harmonize the language of the Sherman Act with charitable activity rather than set the dangerous precedent of creating a blanket exemption in an area where the Constitution or a pervasive federal statute is not threatened. Immunizing charitable fundraising from antitrust liability invites disingenuous organizations to take advantage of the law, consumers, and beneficiaries in the charitable marketplace. Fidelity to the intent of the 51st Congress, the text of the Sherman Act, and the current state of the antitrust laws requires courts to recognize commercial behavior, wherever it may occur, and to ensure that it does not take place in an unlawful manner.

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180. *See supra* note 86 and accompanying text.
181. *See supra* note 26.
182. *See supra* note 39 and accompanying text.

CONCLUSION

This Note argues that charitable fundraising is "trade or commerce" under the Sherman Act and, accordingly, that charities must conform to the antitrust laws when they solicit donations. Neither the Sherman Act nor judicial precedent exempts charitable institutions from the purview of the federal antitrust laws. A court is not free, therefore, to elevate a charity above the law and turn a blind eye to its anticompetitive fundraising activity. As the market for charitable donations becomes more competitive, the charitable sector increasingly mirrors and interacts with traditional business markets. This means the courts must look beyond a charity's espoused noneconomic goals to properly scrutinize alleged anticompetitive activities. Whereas a nonprofit's conduct may ultimately be excused, it should not be by virtue of an exemption, but rather because the law applied to the facts of the case does not warrant antitrust liability.

The *DELTA* court's across-the-board exemption of charitable fundraising from antitrust accountability represents unwarranted judicial activism and sets a dangerous precedent whereby anticompetitive behavior may go unchecked in a charitable guise, depriving consumers in the charitable marketplace of the benefits of competition and detracting from the legitimacy of the charitable sector. Until and unless Congress creates an explicit exemption under the Sherman Act for fundraising undertaken by charitable organizations, the antitrust laws require that competition, consumer welfare, and efficiency prevail in the charitable sector.