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BUILDING A MOAT AROUND THE IVORY TOWER: PRICING POLICY IN THE BUSINESS OF HIGHER EDUCATION

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Harvard College, as far as it educated at all, was a mild and liberal school, which sent young men into the world with all they needed to make respectable citizens, and something of what they wanted to make useful ones. Leaders of men it never tried to make. Its ideals were altogether different. The Unitarian clergy had given to the College a character of moderation, balance, judgment, restraint, what the French call *mesure*; excellent traits, which the College attained with singular success, so that its graduates could commonly be recognized by the stamp, but such a type of character rarely lent itself to autobiography.¹

I. INTRODUCTION

The colleges and universities² that Americans attend are, like the automobiles we purchase and drive, icons that create, reflect, and reinforce the sense of who we are. While our automobiles impart merely an aura of style or stylelessness, opulence or austerity, our colleges shape our development both superficially and deeply, affecting what we know, what we believe, and the values which help to define the self and give meaning to our lives. Henry Adams' description of Harvard in 1854 evokes the venerable impression that a college education is above all else a process of quality. Each good college and the education it provides has a unique character,

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1. HENRY ADAMS, *THE EDUCATION OF HENRY ADAMS* 54-55 (1918) (italics in original).

2. For the purposes of this article, the term "colleges" will be used as an inclusive and broad reference to all institutions of higher education which provide four-year, undergraduate degrees. This includes virtually all universities as well.

which is the fiber of fierce loyalties, death-grip rivalry both academic and athletic, and the donations and bequests which help to ensure the hegemony of American higher education.

Colleges and universities establish policies that are meant to enhance the better parts of their distinctive characters. St. John's College, distinguished for its great books curriculum, offers one prescribed undergraduate course of study, and allows no transfer credit, thereby maintaining uniformity and cohesiveness of experience.³ Students at Brown University⁴ or Hampshire College⁵ begin the process of higher education knowing that they have chosen schools that provide much more flexibility, autonomy, and freedom in their philosophical approaches to curriculum. Jesuit institutions like Marquette⁶ and Georgetown⁷ still require the undergraduate study of religion, ethics, or theology, reflecting the values they consider fundamental. Schools also offer differing extracurricular environments, which tend to reflect the values and philosophies of the professors, administrators, and trustees who shape their individual characters.⁸

As each college's individual choice of policies creates plurality and diversity among the many institutions from which students may choose, the concerted policy of the industry of higher education⁹ has been to emphasize differences in character while mitigating the effects of price in the marketplace. The ostensible ideals of wealthy institutions that have the resources to indulge their highest principles are lofty ones, including choice of college based on the best fit, and egalitarian access to their programs regardless of financial status. Financial aid policies of colleges that have been relatively unfettered by budgetary constraints tend to be fashioned to these ends.

As trends in higher education are often set by a small cadre of elite institutions, recent questions regarding the soundness of financial aid policy have focused on the practices of twenty-three colleges that are members of

3. See *THE INSIDER'S GUIDE TO THE COLLEGES* 352-53 (The Yale Daily News ed., 1990).

4. *Id.* at 697-99.

5. *Id.* at 373-77.

6. *Id.* at 812-14.

7. *Id.* at 229-32.

8. A freshman attending Skidmore College will find neither a football team nor a system of sororities and fraternities, experiencing an expressly or tacitly distinctive set of institutional values and priorities. That student would face substantially different influences had he or she chosen to attend Cornell University, for example.

9. The term "industry" is chosen advisedly here to refer to a cluster of institutions which often choose to view themselves as charged with a public duty and, therefore, above or apart from the directly profit-seeking business groups which are normally held to comprise an industry. The decision to view higher education as a business is supported in section V of this article.

the "Overlap Group."¹⁰ Until recently, the Group collaborated on financial aid offers made to prospective freshmen. The Justice Department targeted the colleges and other private, highly selective institutions¹¹ for an antitrust investigation. Members of the Overlap Group have consistently maintained that collaboration regarding aid packages aptly focuses student decision-making on the qualitative distinctions between and among institutions.¹² Uniformity of expected student contribution removes issues of cost and allows the prospective freshman to assess and choose based solely on character and attributes.

The removal or diminution of cost as a factor in student decision-making is part of a larger philosophical shift in thinking about higher education. Whereas, before the 1950s, scholarships were offered primarily to reward a history of merit, financial aid is offered more frequently today on the basis of need.¹³ Inherent in this shift has been an effort to make higher education accessible across socio-economic, racial, and ethnic lines, and to provide more egalitarian access to our finest institutions.

The Justice Department has contended that the Overlap Group's practices, regardless of motive, amount to unlawful price fixing.¹⁴ Some critics of the member colleges suggest that the purported maintenance of purity in the college decision process masks a truer intention to exploit students and limit intergroup competition for the most able.¹⁵ Whether they impute

10. Members of the Overlap Group are: Amherst, Barnard, Bowdoin, Brown, Bryn Mawr, Colby, Columbia, Cornell, Dartmouth, Harvard, Massachusetts Institute of Technology, Middlebury, Mount Holyoke, Princeton, Pennsylvania, Smith, Trinity (Connecticut), Tufts, Vassar, Wellesley, Wesleyan, Williams, and Yale.

11. The Justice Department has sought information from the following schools which are not members of the Overlap Group: Agnes Scott, Albion, Antioch, Bates, Bennington, Chatham, Wooster, Connecticut College, Converse, Denison, DePaul, Earlham, Goucher, Hamilton, Hollins, Hope, Johns Hopkins, Kalamazoo, Kenyon, Mary Baldwin, Northwestern, Oberlin, Ohio Wesleyan, Randolph-Macon Women's College, Sarah Lawrence, Skidmore, Stanford, Sweet Briar, Chicago, Rochester, Southern California, Wabash, Wells, and Wheaton (Massachusetts).

12. See Scott Jaschik, *Justice Department's Antitrust Investigation Focuses on Elite Colleges*, CHRON. HIGHER EDUC., Jan. 30, 1991, at A1. Jaschik states: "Colleges in the Overlap Group have defended their activities. They say the comparisons insure that students receive comparable aid packages from all the institutions that admit them, permitting the students to base their final decisions on academic rather than financial reasons." *Id.* at A22.

13. In 1954, the College Board established the College Scholarship Service to help determine in a centralized way the contributions which students could be expected to make toward their educations, calculated on the basis of financial need. In tandem with the subsequent establishment of the Overlap Group, the College Scholarship Service ushered in a new approach to pricing philosophy in American higher education.

14. See *Department of Justice Briefing re Ivy League Members and Massachusetts Institute of Technology Collusion Activities Investigation*, FED. NEWS SERV., May 22, 1991.

15. See, e.g., Philip Benoit, *Overlap Group Regrouping?*, WASH. TIMES, Sept. 3, 1991, at D4. Benoit states: "[T]he institutions are not as concerned with the students as they would have us

conspiratorial intent or merely document an epiphenomenal by-product, those who disfavor collaboration insist that it creates more problems than it solves.

II. TUITION AND FINANCIAL AID POLICY IN THE OVERLAP GROUP

The Overlap Group, which was created in 1956, held annual meetings through 1990 for the purpose of comparing and adjusting financial aid offers made to Overlap acceptees.¹⁶ The express, overt function of these meetings was to standardize the financial aid offers made to each acceptee so that the financial investment he or she would be required to make across member institutions would be virtually identical.

In August of 1989, approximately twenty colleges were contacted by the Justice Department, which sought information about the way they set tuition rates and calculated financial aid offers. During late 1989 and throughout 1990, additional colleges were approached and similarly questioned, bringing the total number of institutions under investigation to fifty-seven by January of 1991.¹⁷ The Overlap Group met as usual during the spring of 1990,¹⁸ but disbanded its annual conference in 1991 under the mounting pressure of the investigation.¹⁹ By May of 1991, charges were brought by the Justice Department against the eight Ivy League colleges²⁰ and the Massachusetts Institute of Technology.²¹ The complaint alleged that the nine defendant schools had violated section 1 of the Sherman Act²² by

believe. What they are interested in is maintaining a high degree of control over the choices of the top college applicants in the country and reducing financial aid expenses." *Id.*

16. An Overlap acceptee is any applicant who was accepted at two or more of the member institutions of the Overlap Group.

17. For a complete list of the fifty-seven schools investigated, see *supra* notes 10 and 11.

18. See Anthony Flint, *Colleges Huddle Despite Price-Fixing Probe*, BOSTON GLOBE, Mar. 28, 1990, at 55.

19. See Gary Putka, *Colleges Cancel Aid Meeting Under Scrutiny*, WALL ST. J., Mar. 12, 1991, at B1.

20. The members of the Ivy League, all members of the Overlap Group as well, are Brown, Columbia, Cornell, Dartmouth, Harvard, Pennsylvania, Princeton, and Yale.

21. While other members of the Overlap Group, as well as nonmembers, were scrutinized for alleged price-fixing activities, the Ivy League schools and M.I.T. were targeted in particular, possibly because of their high profile and the specific programs they used in their approach to financial aid. The schools allegedly agreed to provide aid on the basis of need but not on the basis of merit, and shared a common financial aid formula called the "Ivy Needs Analysis" to calculate the family's contribution. Like the other members of the Overlap Group, they compared the offers made to Overlap acceptees and altered them in order to achieve a standard family contribution expectation.

22. 15 U.S.C. §§ 1-7 (1988). Section 1 of the Sherman Act states:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be

agreeing and collaborating: (1) to fix the "family contribution" calculation across member schools, and (2) to ban the granting of financial aid based on merit.²³ On May 22, 1991, the Ivy League schools entered a consent decree in which they denied the allegations of price fixing but agreed to end future cooperation in determining financial aid offers.²⁴ The case is still pending against the Massachusetts Institute of Technology, which declined to join the Ivy League colleges in the consent decree. Although the Justice Department has taken no action against the remaining fourteen members of the Overlap Group, the de facto disbanding in 1991 suggests the tacit consent of these remaining institutions to the terms of the Ivy League compromise.

In the sixty-day period during which the Justice Department heard comments regarding the tentative consent decree, a former Princeton University student contended that the decree was inadequate to compensate former students and remedy past practices, rendering it more difficult for those harmed by the conspiracy to prove that the Overlap process violated the law.²⁵ The Justice Department responded that the decree was intended to ameliorate future activity rather than compensate for past grievances. The Department focused on developing sound public policy rather than compensating or punishing existing infractions, and entered final judgment approving the tentative consent decree on August 26, 1991.²⁶

Potential private claimants were not alone in their criticism of the Justice Department's participation in the consent decree. Thomas Sowell, economist and senior fellow at the Hoover Institution at Stanford, stated:

illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1988).

23. These charges are detailed in a Department of Justice Briefing by Richard Thornburgh, U.S. Attorney General; James F. Rill, Assistant Attorney General for the Antitrust Division; and Robert E. Bloch, Professions and Intellectual Property Section, Antitrust Division. See *supra* note 14.

24. See Anthony DePalma, *Ivy Universities Deny Price-Fixing But Agree to Avoid It in the Future*, N.Y. TIMES, May 23, 1991, at A1.

25. See *DOJ Responds to Comments on Student Aid Decree*, 61 Antitrust & Trade Reg. Rep. (BNA) No. 1531, at 276 (Aug. 29, 1991).

26. 56 Fed. Reg. 42,068 (1991); see also *United States v. Brown University*, 772 F. Supp. 241 (E.D. Pa. 1991). The Justice Department's letter, written by Robert E. Bloch, Chief of the Professions and Intellectual Property Section, states in part that the complaint's temporal language "is related to the scope of our investigation and is legally sufficient for obtaining the broad injunctive relief that was requested." *DOJ Responds to Comments on Student Aid Decrees*, *supra* note 25, at 276. The relief focuses on the future, "not the past." *Id.*

Any businessmen known to have engaged in such collusion could expect widespread media denunciation as a certainty and antitrust prosecutions as a high probability, with jail sentences being by no means out of the question. Instead, the academic officials and institutions involved have been allowed to sign a consent decree, agreeing not to collude in the future. Attorney General Richard Thornburgh's statement on the issue was the mildest kind of reproof, and the media have almost unanimously bought the colleges' claim that their financial aid policies were designed to "benefit needy students."²⁷

There is substantial consensus among the Overlap school officials who have spoken regarding past practices that the consent judgment was a pragmatic strategic maneuver calculated to eliminate future costs of compliance with the investigation.²⁸ On May 23, 1991, the day on which the consent judgment was entered, high-level representatives of Ivy League universities continued to support publicly the practices in question.²⁹ Parties to the consent decree have suggested that they intend to seek congressional authorization to resume Overlap Group activities,³⁰ and the issue of both past

27. Thomas Sowell, *Price Gouging*, FORBES, June 24, 1991, at 109, 109.

28. At least temporarily, a consortium of 32 colleges, calling itself the Consortium on Financing Higher Education, is trying to avoid further entanglement with the Justice Department. The Consortium colleges, among the nation's most expensive, have issued guidelines to help define appropriate behavior within the spirit of the May 23 consent decree. In particular, the guidelines allow only historical discussion of tuition, faculty salaries, and financial aid awards and policies. Consortium meetings will be subject to prior legal review to determine whether potentially anti-competitive behavior exists and, if so, to remove it from the agenda. See Robin Wilson, *Consortium of 32 Colleges Issues Guidelines on Limits to Discussion of Student Aid and Related Issues*, CHRON. HIGHER EDUC., Oct. 30, 1991, at A35.

29. See Scott Jaschik, *Ivy League Agrees to End Collaboration on Financial Aid*, CHRON. HIGHER EDUC., May 29, 1991, at A18 ("[m]ost officials of Overlap institutions said that the organization had been helpful to them and to students and that the Ivy League universities had signed the agreement mainly to avoid an expensive legal battle."). Daniel Steiner, vice president and general counsel at Harvard, stated that "[o]ur practices served the good social purposes of making sure that a limited amount of financial funds went to the neediest students." DePalma, *supra* note 24, at B13. The denial of price-fixing activity which accompanied the Ivy Schools' reluctant participation in the consent judgment was the force behind the refusal of the Massachusetts Institute of Technology to join the settlement. Mark Wrighton, provost at M.I.T., stated: "We do not believe that our processes, including the overlap meetings, violated antitrust laws." *Id.* Benno Schmidt, Jr., president of Yale, characterized Attorney General Thornburgh's allegations as "grossly unfair," and Princeton president Harold Shapiro argued that "[a]wards in excess of need either divert resources from needy students or require an increase in revenues or reductions in other programs to support aid above the level of need." *Id.*

30. See *Ways & Means Private-College Lobbyists are Trying to Win Congressional Support for Legislation that Would Allow them to Establish a Uniform Financial-aid Policy*, CHRON. HIGHER EDUC., Oct. 16, 1991, at A41. The article states that "[t]he proposal is being pushed by Princeton University and other private institutions to restore their right to meet and set policies jointly." *Id.*; see also Jaschik, *supra* note 29, at A19 (stating that Columbia University issued a statement at the

and future practices is still open with regard to M.I.T. and the fourteen other Overlap institutions.

The May 23 consent of the Ivy League institutions was a reluctant but strategically calculated maneuver. Their consideration of efforts to lobby Congress for special dispensation to reconvene their meetings indicates that the merits of the Overlap issue remain unsettled in the eyes of some of the most prestigious participants. M.I.T.'s refusal to participate in the consent judgment, and the omission from litigation of other Overlap and non-Overlap subjects of the investigation, confirm that the question of collaboration is still alive. Moreover, private actions for damages based on past practices will require some final determination of the legitimacy of prior Overlap Group behavior under the antitrust laws.³¹

III. REGULATION OF PRICE FIXING IN SPECIAL INDUSTRIES

The Justice Department's suit against the Ivy League schools and M.I.T. alleged that the schools violated section 1 of the Sherman Act, which prohibits every "contract, combination . . . or conspiracy, in restraint of trade or commerce. . . ."³² Allegations of horizontal price fixing traditionally fall within this section, and a finding of price-fixing activity is considered to be a *per se* violation for which no rationale or explanation will serve as a defense.³³ While it has been suggested that the *per se* standard has recently been eroded and, on occasion, supplanted by a "qualified *per se*" analysis, clear instances of price fixing are still adjudicated under ordinary circumstances without reference to the "Rule of Reason" or consideration of ameliorating circumstances.³⁴ Several recent cases suggest, however, that Rule of Reason analysis may apply to special classes of defendants. Under Rule of Reason analysis, the court weighs the costs and

time of entering the consent decree, "that it would ask Congress to amend antitrust laws to allow colleges to return to the [pre-consent decree] financial-aid policies").

31. The first private suit for damages was filed in 1989, during the earliest phase of the Justice Department investigation. The merits of the case have not yet been decided, as the district court recently denied defendants' motions to dismiss for lack of personal jurisdiction and improper venue. *Kingsepp v. Wesleyan Univ.*, 763 F. Supp. 22 (S.D.N.Y. 1991).

32. 15 U.S.C. § 1 (1988).

33. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (in which Justice Douglas stated that "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal *per se*"); cf. *Board of Trade v. United States*, 246 U.S. 231 (1918).

34. See David P. Kreisler, Note, *The Antitrust Laws and the Overlap Group: Were Colleges and Universities the Robber Barons of the 1980s?* 42 SYRACUSE L. REV. 217, 227 (1991) (citing *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984)). While the Court applied the Rule of Reason in *NCAA*, the behavior at issue was not direct price fixing, but rather an agreement to restrict the televising of member teams' games.

benefits of the contested behavior to determine whether the economic consequences thereof are ultimately harmful or beneficial.³⁵

In *Goldfarb v. Virginia State Bar*,³⁶ the Supreme Court rejected the argument that the Sherman Act does not apply to learned professions. The Court noted that the per se scrutiny ordinarily applied in cases of horizontal price fixing may be relaxed with regard to this group, observing that business and the professions are not automatically interchangeable, and that 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."³⁷ Because the Court did not explicitly state the nature of such differentiated analysis, and because the Court ultimately found the minimum fee agreements of the lawyer defendants unlawful, the degree to which application of the per se rule may be tempered as applied to nonbusiness entities remains speculative. Cases following *Goldfarb* have not adequately clarified confusion regarding the standard applied to professions.

The Supreme Court applied the Rule of Reason to alleged price fixing activity in *National Society of Professional Engineers v. United States*.³⁸ The Court noted, however, that *Goldfarb* did not "fashion[] a broad exemption under the Rule of Reason for learned professions."³⁹ While the Court admitted that "professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary,"⁴⁰ it refused to expand the Rule of Reason to "support a defense based on the assumption that competition itself is unreasonable."⁴¹ Thus, while the Rule of Reason may be applied to learned professions, it cannot be stretched to support an anticompetitive policy. "Reasonable" price fixing is entirely a function of net procompetitive effect. Noneconomic ends, however rational, cannot render a price fixing scheme acceptable under the Rule of Reason.⁴² Given the difficulty of establishing competitive

35. The Rule of Reason, as noted herein, is not traditionally applied to price-fixing activity, but was developed in the realm of trust-busting litigation, essentially differentiating between good trusts and bad trusts. See *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). Because the rule was developed in response to monopolization rather than price fixing, and because price fixing is commonly held to be strictly illegal under the per se rule, it remains unclear how price fixing is evaluated under Rule of Reason analysis.

36. 421 U.S. 773 (1975).

37. *Id.* at 788 n.17.

38. 435 U.S. 679 (1978).

39. *Id.* at 696.

40. *Id.*

41. *Id.*

42. See *id.*

advantages conferred upon the market by price fixing, application of the Rule of Reason is deceptive in these cases. Since the ability to prove procompetitive net effect is extremely rare, Rule of Reason scrutiny is close to per se analysis in degree of stringency.⁴³

Because of factual similarities, these limitations are germane to the case against the Overlap Group. In *Society of Engineers*, the practice in question was an agreement among engineers to foreclose competitive bidding for their services by refusing to discuss prices with potential clients until after negotiations.⁴⁴ For ostensibly ethical reasons, including maintenance of quality and safety, the engineers, like the college administrators in the Overlap Group, created a policy which eliminated a customer's ability to consider variations in price among bids received.⁴⁵

The Court noted that the Rule of Reason does not permit an argument that "because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition."⁴⁶ The decision in *Society of Engineers* also implies that it is unreasonable per se to suggest that anticompetitive behavior will enhance quality or safety.⁴⁷ These restrictions hint that the application of the Rule of Reason will result in a finding that price-fixing behavior is unreasonable under all but the most extraordinary circumstances,⁴⁸ again suggesting that the distinction between the per se and Rule of Reason approaches is more a technicality than a meaningful difference.

43. This phenomenon is not as peculiar as it may sound, given the original determination in *Socony-Vacuum* that price-fixing activity is per se anticompetitive. The largely illusory distinction between per se and Rule of Reason approaches to price fixing reflects a spurious departure from *Socony-Vacuum's* accurate assessment that price fixing is uniformly bad for markets.

44. See *Society of Engineers*, 435 U.S. at 692.

45. *Id.* at 693-94.

46. *Id.* at 689 (citations omitted).

47. The court stated:

Petitioner's ban on competitive bidding prevents all customers from making price comparisons in the initial selection of an engineer, and imposes the Society's views of the costs and benefits of competition on the entire marketplace. It is this restraint that must be justified under the Rule of Reason, and petitioner's attempt to do so on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act.

The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.

Id. at 695.

48. One scholar has suggested that the test in *Society of Engineers* requires a showing that the alleged behavior has procompetitive justifications, as well as proof that the actions comprise the least restrictive alternative. See Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 225 (1990).

Regarding colleges specifically, the court in *Marjorie Webster Junior College Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc.*⁴⁹ stated that the Sherman Act was "tailored . . . for the business world,' not for the noncommercial aspects of the liberal arts and the learned professions."⁵⁰ The degree to which per se scrutiny is relaxed, and the extent to which extenuating factors are examined, should therefore depend on the relatively commercial or noncommercial nature of the Overlap Group policy at issue. The arguments in Section V support a conclusion that the fixing of aid offers is in essence a commercial aspect of higher education, subject to the full scrutiny of the Sherman Act.

What comprises the distinction between full scrutiny and levels of relaxed scrutiny under the Sherman Act remains uncertain. It is difficult to discern a consistent analytical framework for evaluating price fixing among professional and public service entities. The confusion relates more to nomenclature than substance, however, as judges and scholars apply the labels of per se, qualified per se, and Rule of Reason arbitrarily in a manner that disguises a surprising degree of consistency in approach. As the Supreme Court noted in *Arizona v. Maricopa County Medical Society*,⁵¹ "the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike."⁵² In a similar vein, the Court has stated that the Rule of Reason places a "heavy burden" on defendants to justify anti-competitive behavior under circumstances held to justify the relinquishment of per se scrutiny.⁵³

Notwithstanding the muddled state of the law regarding both the degree of scrutiny properly applied and the precise meaning of each level of scrutiny, it appears that the Overlap Group faces significant hurdles in defending its behavior. In particular, relaxation of per se analysis in instances of horizontal market restrictions is granted only if such restrictions are "essential if the product is to be available at all."⁵⁴ Given the thousands of colleges that operate successfully without resorting to the behavior of the Overlap Group, it is highly unlikely that this hurdle can be met. Moreover, under the remote chance that the relaxed scrutiny of the Rule of Reason were granted, the heightened defensive burden established by the Supreme Court renders such application very similar to per se analysis.

49. 432 F.2d 650 (D.C. Cir. 1970) (omission in original) (footnotes omitted), *cert. denied*, 400 U.S. 965 (1970).

50. *Id.* at 654.

51. 457 U.S. 332 (1982).

52. *Id.* at 346 (quoting *United States v. Socony-Vacuum*, 310 U.S. 150, 221-22 (1940)).

53. *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 113 (1984).

54. *Id.* at 100.

In particular, the schools would be required to show that their policies have not resulted in a net reduction of competition among institutions of higher education. To do so, they must demonstrate either that they do not wield significant market power as a group, or alternately that although they do wield such power, their activities are in fact procompetitive.⁵⁵ While the Overlap schools are only twenty-three out of thousands of two-and-four year institutions of higher education, they tend to compete for students predominantly against each other and a handful of schools outside the group.⁵⁶ This phenomenon has been explained by Richmond, who contends that “[n]ame’ private institutions . . . constitute a separate market. They are uniquely attractive to prospective students and their parents; competing universities, including public institutions and lesser-known private colleges, are unable to attract this student population.”⁵⁷ That the cadre of schools in the Overlap Group forms a market distinct from the masses of other colleges is not surprising given the opportunities associated with the elite credentials they confer. Chief executive officers of the “*Business Week* 1000” are most likely to have received their undergraduate training from (in descending order) Princeton, Yale, and Harvard, all members of both the Ivy League and the Overlap Group.⁵⁸ Because salaries appurtenant to these positions are stunningly high,⁵⁹ and because the advantages prestige degrees obtain within many career paths, efforts of the Overlap Group to close ranks and inflate tuition are unlikely to be countered by the smaller fees charged by state schools or less prestigious private schools.

The determination of the relevant market in which to assess market power is a function of cross-elasticity of demand.⁶⁰ The *Fiske Guide to Colleges*, consistently evincing substantial and relatively exclusive overlap of application among the collaborating Overlap Group schools,⁶¹ suggests that the borders of demand are virtually restricted to these elite institutions.

55. For analysis of this line of reasoning, see Douglas R. Richmond, *Private Colleges and Tuition Price-Fixing: An Antitrust Primer*, 17 J.C. & U.L. 271, 299-301 (1991).

56. The 1989 *Fiske Guide to Colleges*, among a small collection of college guides used by prospective students, lists what it calls “Overlaps,” those schools to which applicants for each listed school are most likely to apply. See EDWARD B. FISKE, *THE FISKE GUIDE TO COLLEGES* (1989). Amherst’s overlaps, for example, are listed as Harvard, Yale, Princeton, Stanford, and Brown. *Id.* at 28. The University of Pennsylvania’s lists its overlaps as Cornell, Brown, Duke, Princeton, and Stanford. *Id.* at 558. Overlaps for Middlebury College are Dartmouth, Williams, Brown, Bowdoin, and Amherst. *Id.* at 471.

57. Richmond, *supra* note 55, at 299.

58. See Monica Roman et al., *A Portrait of the Boss*, *BUS. WK.*, Nov. 25, 1991, at 180, 180.

59. See *id.* The average *Business Week* 1000 chief executive officer’s base salary and bonus in 1990 was \$868,000.

60. See generally *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

61. See generally FISKE, *supra* note 56.

This evidence suggests that the Group itself is the relevant market, and that the Group's market power is formidable.⁶²

Under per se analysis, the collaborative behavior of the Overlap Group is price fixing behavior in violation of section 1 of the Sherman Act. Even rigorous Rule of Reason analysis,⁶³ assuming for the moment that the Overlap events should be governed by that standard, requires that the collaborators justify their behavior by demonstrating its essentially procompetitive effects on the market.⁶⁴ The discussion in Section IV, addressing the benefits and disadvantages of collaboration, reveals that the advantages sought by the Overlap Group are consistently either noncompetitive⁶⁵ or ideologically anti-competitive.⁶⁶ Even under the theoretically more forgiving Rule of Reason analysis, noncompetitive goals should be achieved under less restrictive alternatives, i.e., using policies that achieve legitimate and lawful goals without unnecessarily burdening market competition. Anti-competitive objectives, yielding anti-competitive results, fail by definition the test requiring net procompetitive effect on the marketplace. Because the dynamics discussed in Section IV reflect anti-competitive and unduly burdensome noncompetitive market influence, the behavior of the Overlap Group is illegal under either per se or Rule of Reason analysis.

In Section IV, the effects of Overlap activity, both beneficial and disadvantageous, are discussed in detail. Under the preceding analysis of current

62. Non-Overlap schools under Justice Department investigation, such as Stanford, generally charge tuition rates very similar to those charged by Overlap schools, suggesting the possibility of informal price fixing, or formal price fixing through a mechanism other than the Group itself.

There are one or two institutions not under investigation whose relatively low tuition rates and independent aid assessments form the exception that proves the rule. Rice University, for example, is a very heavily endowed university whose tuition is relatively low, and whose overlap schools are listed in the *Fiske Guide* as Stanford, Princeton, University of Texas at Austin, Texas A & M, and Harvard. FISKE, *supra* note 56, at 597. Likewise, Deep Springs College attracts a freshman class whose overlaps in application include Harvard, Yale, and Cornell. *Id.* at 241 (Deep Springs is a two-year, tuition-free college whose graduates are primarily fed back to Overlap Group schools for their junior and senior years of college). These exceptional institutions, each of which is small and extremely competitive in admissions policy, do little to mitigate the stronghold of the Overlap Schools on the pools of highly competitive college applicants.

63. By "rigorous" Rule of Reason analysis, I suggest a standard which gives the Overlap Group the greatest benefit of the doubt possible in evaluating alleged price-fixing behavior. Normally the standard is labelled "qualified per se," nomenclature that indicates a standard closer to the per se standard than to the more lenient Rule of Reason.

64. See *Board of Trade v. United States*, 246 U.S. 231, 238 (1918). The Court stated: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Id.*

65. "Noncompetitive" advantages are those that are unrelated to market competition.

66. "Anti-competitive" advantages are those that represent a policy decision to reduce competition.

antitrust law and underlying policy, this balance of interest weighs against the Overlap Group practices, suggesting illegal price fixing has occurred even under Rule of Reason scrutiny. Moreover, the factors in Section IV suggest that congressional responsiveness to lobbying efforts aimed at creating an exception for institutions of higher education would result in poor public policy which ignores the economic functions of colleges in modern American society.

IV. THE BENEFITS AND DISADVANTAGES OF COLLABORATION

The Overlap Group contends that its meetings, held in order to fix and unify the expected financial contributions of each prospective student and family, served positive functions for the individuals who fell within the system and for society at large. The Justice Department insisted that the practices of the Overlap Group constituted illegal price fixing under the Sherman Act, and were therefore unlawful and contrary to public policy. The specific merits on each side are represented below in a discussion that addresses the major policy issues concerning the Overlap Group in the form of points made by, or available to, the Overlap Group (represented by letter) and counterpoints made by, or available to, the Justice Department and other critics (represented by letter prime).⁶⁷

A. Collaboration Allows Students to Choose a College on the Basis of Its Distinctive Qualitative Merits Rather Than on the Basis of Cost.

The argument most frequently raised to defend collaboration is one that seeks purity of education, untainted by worldly but inevitable concerns. Uniform awards⁶⁸ remove the element of price as a factor in selecting a school, leaving students free to choose based on the important qualitative

67. I discuss points made by "or available to" each group because not all of the arguments made herein have been posited by the groups that might benefit from their use. Some of the reasoning contained in this section cannot be attributed to either Overlap schools or the Justice Department. Reasoning that may be attributable to members of either group is annotated to reflect such attribution; nonannotated reasoning represents my efforts to discuss the merits of the controversy as thoroughly as possible, and cannot be attributed to the parties involved.

68. In writings concerning the Overlap Group and its activities, phrases such as "uniform awards" are often used because such terms are concise. This term and similar terms can lead to confusion, however, because they are technically an inaccurate description of the goals of the Overlap Group. The aim of collaboration is not to create identical awards, but rather to create awards that will result in identical expected family contributions. For example, if College A charges \$14,000 annual tuition, and College B charges \$13,000 annual tuition, and the colleges agree that the family contribution should be \$9,000, College A would award \$5,000 and College B would award \$4,000, rendering the financial choices of the applicant identical. This phenomenon will be referred to herein as the creation of "uniform awards," even though the aid figures awarded by different colleges in the Group are usually somewhat different.

differences of size, environment, curriculum, orientation toward teaching or research, departmental strengths, and overall compatibility with student goals and expectations.

Because cost is a less compelling factor for wealthy students than for poor students, administrators contend that the elimination of Overlap activity will disproportionately hurt needy students.⁶⁹ Under the new competitive scheme, students in wealthy public school districts and at expensive private institutions will be the ones most likely to negotiate financial aid offers under the tutelage of the best guidance counselors money can buy. Advantaged students who may not need financial aid to make a choice on the basis of nonfinancial characteristics will receive a greater proportion of existing funds, thereby reducing aid to disadvantaged students who will be forced to make that college decision which mitigates the augmented financial stress. Since the price elasticity of demand will be greatest for these needier students, they are the most vulnerable to monetary bargaining pressures. After the consent decree, wealthy students will decide which college to attend as they always have—on the basis of the relative merits of the schools under consideration. As they do so with the added benefit of merit scholarships and heightened negotiating power, shrinking pools of aid available to the middle and lower classes will force an increased number of less fortunate students to choose the only college they can afford.⁷⁰

A. 1. Collaboration Forces Students to Choose a College Based on Characteristics other Than Cost.

Assuming only the most benevolent intentions on the part of college administrators,⁷¹ removal of cost issues from the college decision is harmful. Neoclassical economic theory and classically liberal notions of political

69. See Jaschik, *supra* note 29. Michael S. McPherson, co-director of the Williams College Project on the Economics of Higher Education, states that while the disbanding of the Overlap Group "will help some students and hurt others. On the whole, the students who will do worst will be the neediest. The extremely bright kids who already have very promising futures will have even better futures." *Id.* at A19.

70. The problem of access to top private colleges is exacerbated as state institutions are forced to meet budget constraints in the 1990s by reducing enrollment, a phenomenon believed by many administrators to have a disproportionately harmful effect on minority and low-income students. See Goldie Blumenstyk, *Public Colleges, Battered by Recession, Turn Away Thousands of Students*, CHRON. HIGHER EDUC., Nov. 13, 1991, at A1.

71. This assumption is made to give the entire benefit of the doubt to the college administrators' perspective on the Overlap Group issue. It would be naive to believe that college administrators are any more immune to opportunistic behavior than other groups of professionals. Undoubtedly some administrators, notwithstanding public relations proclamations to the contrary, embrace the practices of the Overlap Group as a means of augmenting market power and gaining control over the pricing mechanism.

freedom support the greatest possible degree of consumer choice in making purchases in capital markets.⁷² With tuition and fees alone approaching \$20,000 a year at the most expensive private institutions,⁷³ arguments suggesting that college education is not a market transaction appear specious at best and absurdly self-serving at worst. Applied to the question of which college to attend, the basic principles of political economy which support our system of capitalism mandate that comparative pricing be included within the consumer's purchasing decision.⁷⁴ To remove pricing from the student's purview, even in the name of academic purity, the Overlap Group paternalistically channels all consumers into a philosophy of education that they may not independently support if given a choice. Many students, for many reasons, would prefer to choose from top schools based on price. Student A may believe that quality distinctions among the schools are largely illusory, in which instance the determining factor should ideally be price. Student B may believe that the Overlap schools do differ in distinctive, qualitative ways, but she would still prefer to make her decision based on price. Student C might believe that price should not be a factor in determining among schools. She will retain the option to choose based on noneconomic factors, to the extent that she is fiscally able. For each of these students, Overlap Group practices remove the option of considering price, whereas prohibition of collaboration restores it. If one premise behind free markets is the maintenance and optimization of individual freedoms, then the fixing of financial aid offers is harmful as a derogation of those freedoms.

Collaboration has effects on individual students beyond the theoretical impingement upon political and economic freedoms. Students may find that they are unable to attend any of the prestigious schools within the Overlap Group because aid offers are less generous than the best aid offer

72. See CAPITALISM AND FREEDOM: PROBLEMS AND PROSPECTS PROCEEDINGS OF A CONFERENCE IN HONOR OF MILTON FRIEDMAN 7-36 (Richard T. Selden ed., 1975). Milton Friedman's classical defense of neoclassical economics contends that unfettered markets in which consumers maintain the highest possible degree of choice are inextricably joined to the broader maintenance of individual freedom within our socio-economic system.

73. In the academic year 1990-91, 73 private four-year colleges charged tuition and fees in excess of \$15,000 per annum. The average tuition and fees charges at these schools was \$16,161. The schools represent 12.9 percent of total enrollment at private colleges. Tuition and fees for 1990-91 at Bennington College, traditionally the most expensive in the nation, was \$17,790. See *Fact File: 1991-92 Tuition and Fees at More Than 2,900 Colleges and Universities*, CHRON. HIGHER EDUC., Oct. 23, 1991, at A31-36.

74. Thornburgh stated the rationale behind this assertion succinctly: "The defendants conspired to eliminate cost competition as a factor in choosing a college. The choice of whether to consider price when picking a school belongs to parents and students, not the college or university." See *supra* note 14.

would have been in the absence of collaboration.⁷⁵ Thornburgh has stated that "[a] major potential negative effect of the collusion . . . is that students may have been deprived of the opportunity to attend the defendants' school of their choice, because they were not offered as much aid as they would have been in the absence of the conspiracy."⁷⁶ Students A, B, and C alike are apt to become victims of this scenario, as idiosyncratically generous offers are brought in line with more conservative offers.⁷⁷

B. Collaboration is not Harmful within the Public Service Context of Higher Education, which is Outside the Scope of Profit-Seeking Behavior.

Members of the Overlap Group insist that there is a poor fit in the application of antitrust laws to institutions of higher education. Their assertions tend to be represented in quotations within the popular press, and are therefore of necessity generalized and not highly developed. These statements tend to focus on the profit motive of business, maintaining that colleges do not seek profits and are therefore beyond the regulatory scope of the Sherman Act.⁷⁸

Several arguments are implicit in these generic press-release statements. Colleges have no motives to fix prices at artificially high levels. Colleges have no shareholders, distribute no dividends, and neither appreciate nor depreciate in value within any marketplace of public purchases and sales. While colleges operate with budgets and endowments, their financial aid programs are the antithesis of profit—they amount to the public disbursement of significant levels of institutional resources.⁷⁹ Therefore, there is no benefit to be gained by prohibiting the collaboration of colleges with regard to financial aid. The Sherman Act was passed during the Progressive era of reform in order to stem pernicious and predatory practices of emerging

75. While the Overlap Group may argue that collaboration is intended to avoid just such an eventuality by meeting the financial need of all applicants, many aspiring students find themselves unable to attend prestigious private schools because of the practical discrepancy between the uniform, official assessment of need and actual need.

76. See *supra* note 14.

77. Given the absence of competition among the elite schools comprising the Overlap Group, there are economic incentives to collaborate downward rather than upward in determining financial aid. While Student C might benefit from the realignment of low aid offers to meet the higher aid offers of other schools, budget-conscious administrators have little motivation to err in favor of generosity.

78. Francis Oakley, president of Williams College, has been quoted as saying: "The Sherman Act speaks to the danger of restraint of trade . . . But we do not exist for trade. We have no desire to turn profits; we exist, indeed, to give profits away." Nicolaus Mills, *Are Colleges Fixing Prices?*, NATION, Mar. 19, 1990, at 379, 379 (omission in original).

79. *Id.*

trusts and combinations.⁸⁰ Given the disparity between institutions of higher education and the kinds of organizations that were meant to be covered by the law, application of the Sherman Act to colleges will bear no social or economic benefits. There are costs in terms of both the strategic planning of individual institutions and the industrial policy making of all colleges collectively as they attempt to meet the public's needs using scarce resources. It is argued that collaboration which benefits the cooperating organization should be preserved since collaboration costs society nothing. Colleges face logistical and financial difficulties in pursuing their legitimate strategic goals and providing their services to the public. Cooperative behavior can reduce costs by eliminating redundancies of procedure and establishing a reliable source of information which otherwise can be expensive and difficult to obtain.⁸¹ Apart from its strategic role in hampering institutional efforts to implement individual missions, application of antitrust laws to colleges retards the development of sound and cohesive educational industrial policy, which can help American institutions retain an advantageous position relative to foreign institutions.⁸² The maintenance of the highest quality American education in turn supports the infrastructure necessary to preserve and enhance our social and economic roles within the global community.

80. For a discussion of the evils at which the developing antitrust laws were aimed during the early part of the Twentieth Century, see RICHARD HOFSTADTER, *THE PROGRESSIVE MOVEMENT, 1900-1915*, at 141-44 (1986) (quoting Theodore Roosevelt on trusts and big business).

81. See Steven R. Salbu, *Joint Venture Contracts as Strategic Tools*, 25 *IND. L. REV.* 397, 423 (1991). In this Article, I contend that enhanced learning and assimilation of new information are strategic variables which can be affected by the nature of collaborative arrangements.

82. Proposals favoring industrial policy have applied mostly to profit-oriented businesses, particularly as American companies attempt to compete with Japanese companies. Proponents of industrial policy suggest that centralized planning and support for target industries creates significant strategic advantages for those industries as they compete in the global market against more traditionally constrained players within strict laissez-faire political economies. By analogy, it can be argued that these advantages should apply as well to institutions of higher education seeking to maintain the highest level of quality in a global context. For a discussion of the concept of industrial policy, see Robert B. Reich, *Why the U.S. Needs an Industrial Policy*, 60 *HARV. BUS. REV.* 74 (1982).

B. 1. Within Any Competitive Industry or Market Segment, Collaboration on Price Will Tend to Reduce Competition Among Sellers, Discouraging Price Containment and Quality Enhancement.

Questions of price fixing, like all antitrust issues, are best evaluated in terms of consumer welfare.⁸³ In competitive markets, consumer interests are advanced by policies that maintain price competition and help reduce the power disparity between individual buyers and corporate giants.⁸⁴ Accordingly, the United States Supreme Court has noted that "the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of . . . price control by the maintenance of competition."⁸⁵

Without the benefit of collaboration, colleges from the late 1970s through the early 1990s would have faced more intense competition for declining numbers of high school graduates.⁸⁶ Such competition should be expected to result in favorable trends for student consumers, manifested in intensified price and quality competition.⁸⁷ Collusion among the colleges has allowed them to counter these otherwise naturally occurring market

83. For a detailed discussion of this assertion, see Charles F. Rule & David L. Meyer, *An Antitrust Enforcement Policy to Maximize the Economic Wealth of All Consumers*, 33 ANTITRUST BULL. 677, 693-700 (1988).

84. Business historian Alfred Chandler has documented the tremendous growth in size and power of corporations in modern America. He contends that the planning mechanisms of these large businesses have replaced Adam Smith's invisible hand with the "visible hand," capable of unilaterally affecting those market factors which Smith contended would modulate themselves without recourse to government regulation. See generally ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977). As university endowments continue to grow, the disparity of power observed by Chandler increasingly characterizes higher education as well as profit-seeking industrial organizations. See generally CARL KAYSER & DONALD F. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* (1959) (suggesting that market power is harmful to competition, therefore public policies should act to reduce such power).

85. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1926).

86. Absolute numbers of high school graduates have been declining since 1978. See Michele N-K Collison, *Acceptance Rate Up for This Semester at Many Colleges*, CHRON. HIGHER EDUC., Nov. 27, 1991, at A1. Projected private, four-year college enrollment for the early 1990s is as follows: 2,773,000 (1991); 2,766,000 (1992); 2,757,000 (1993); 2,747,000 (1994). *Projections of College Enrollment, 1991-2001*, CHRON. HIGHER EDUC. ALMANAC, Aug. 28, 1991, at 14.

87. Chicago School economist Richard Posner notes that:

[B]y 1898 the Supreme Court had firmly established the principle, immensely important to the development of a sound antitrust policy, that cartels and other price-fixing agreements were illegal regardless of the "reasonableness" of the price fixed. Consistent with the economic analysis of the monopoly problem, the Court decided that collusive pricing was inefficient and should be forbidden; the reasonable price was the competitive price.

RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 24 (1976) (footnote omitted).

forces, conferring upon them a degree of immunity from pressures to reduce either absolute tuition charges or, at the very least, the rapid rate of their annual increase. The counter-intuitive continuity of inflation in higher education under conditions of potentially reduced demand is theoretically a function of the institutional market power generated through price fixing. While disincentives to innovate and improve quality are less quantifiable than statistics indicating rising tuition rates, the logic of competitive markets suggests that those institutions which insulate themselves from the need to compete on price will also find less necessity to compete on other grounds, including the quality factors which they claim to be protecting through their policies.

Thomas Sowell contends that the financial aid policies of the Overlap Group are duplicitous in their claim of trying to help needy students. According to this argument, the colleges maintain highly over-inflated list prices and offer standardized discounts to each student in order to charge the highest that the market will bear, bleeding both families and sources of government support.⁸⁸ Likewise, Ian Ayres has maintained that this practice is "no different from a horizontal agreement among manufacturers to fix uniform discounts for their products."⁸⁹ Given the market power to inflate prices artificially and the market pressures to do so under increasing or even normal budget pressures, college administrators are likely to raise prices, either consciously or unintentionally, beyond what would be the equilibrium price under more normal competitive conditions.

C. Collaboration Helps Colleges to Assess Financial Need More Accurately, Improving the Rational Allocation of Scarce Resources.

In a complex society with increasingly sophisticated financial and economic arrangements, the task of assessing student need has become more difficult. College officials have evoked the complexity of making rational financial aid decisions to defend the joint efforts of the Overlap Group,⁹⁰ implicitly grounding their arguments in basic decision theory which sug-

88. See Sowell, *supra* note 27.

89. Ian Ayres, *Colleges in Collusion*, NEW REPUBLIC, Oct. 16, 1989, at 19, 19.

90. See Robin Wilson, *Collapse of Student-Aid Talks Among Top Colleges Leaves Big Gaps in Offers; an Advisor Sees 'Chaos,'* CHRON. HIGHER EDUC., Sept. 11, 1991, at A1. Wilson states: "Aid officers at the Overlap institutions do not comment on individual students' packages. But they say that assessing a student's financial need frequently involves a complicated series of calculations, so it is possible to come up with several determinations of how much a family can afford to pay." *Id.* at A39. The article quotes Walter H. Moulton, director of student aid at Bowdoin College, as stating: "Economic life in the U.S. has become very complicated. Consequently, measuring ability to pay in middle-and upper-income families has become an art form of vast dimensions." *Id.*

gests that quality of information, interpretation, and resolution can improve with group efforts and a larger population of decision makers. Classical decision theory contends that human beings are utility optimizers who seek to make the best choice under the circumstances.⁹¹ They define the problem at hand, seek alternative responses, rank the responses on the basis of cost-benefit analysis, and choose the optimal course of action. Behavioral decision theory has noted that the intended rationality of decision makers is often thwarted by cognitive and practical bounds, rendering the process more an exercise in finding an acceptable or "satisfying" alternative. Given this tendency of humans to fall short of ideal rationality, an increase in the size of the group of evaluators can potentially enhance the quality of the perception of the problem, the number and effectiveness of alternatives found, the accuracy of rankings, and the ultimate decision itself.⁹² Obtaining the most accurate assessment of need is vital in a system that attempts to make quality education affordable to everyone, since offers that are inflated beyond actual need deplete an already inadequate pool of resources, lowering the awards made to persons who are marginally unable to attend expensive institutions.⁹³

Implicit in this defense is the institutions' assertion of autonomy in developing objectives and goals. Members of the Overlap Group share a philosophy that financial aid policies should attempt to make higher education accessible to all, regardless of need. To do this under conditions of scarcity, it is imperative that assessments of need be accurate, thereby avoiding awards inadvertently in excess of true need.

The colleges also contend that prohibiting merit awards across institutions is necessary to implement goals of universal access. They reason that to maintain sufficient funds to meet the financial needs of all potential students, bidding on the basis of characteristics other than need must be curtailed.⁹⁴ If the Ivy League's consensus not to offer merit awards is banned

91. For a discussion of classical decision theory, see generally JOHN DEWEY, *HOW WE THINK* (1910).

92. This potential improvement in decision making by larger groups may be curtailed by the phenomenon of "groupthink," a tendency within groups toward cohesive and conforming behavior. See JAMES L. BOWDITCH & ANTHONY F. BUONO, *A PRIMER ON ORGANIZATIONAL BEHAVIOR* 99-100, 133-35 (2d ed. 1990).

93. See Susan Dodge, *Overlap Group Makes Aid Process Fairer, Targets of Inquiry Argue*, CHRON. HIGHER EDUC., Oct. 11, 1989, at A32. According to Dodge, "officials say the group's work has helped them avoid bidding wars over students. Such wars would result in less aid for some students . . . because colleges would be forced to offer more money to some students than others to lure them into attending." *Id.*

94. See *Antitrust Agreement Will Not Bring Lower Tuition Rates, Experts in College Financing Say*, CHRON. HIGHER EDUC., May 29, 1991, at A18. William R. Cotter, president of Colby College, states that "if colleges spent more money on merit-based scholarships—as many expect

by law, the individual institutions may be forced by competitive pressures to vie for top students as they grudgingly admit the newly created competitive necessity of granting scholarships on the basis of merit.⁹⁵

Accordingly, agreements to award aid solely on the basis of need, combined with the well-formulated and accurate assessments of need which can be achieved collectively, are a method of implementing strategies which the colleges contend falls legitimately within their dominion.⁹⁶ The colleges defend the social virtues of their egalitarian goals, maintaining that the past practices of both Ivy and Overlap agreements have been necessary to the achievement of these lofty ends.

C. 1. Improvements in Resource Allocation Decisions can be Made Without Incurring Costs Related to Collaboration.

While joint efforts to accurately determine the financial need of individual students are undoubtedly rational in the economic sense, they are not the only means of improving the quality of aid offers. When financial aid officers from different colleges meet and share information, each is likely to gain a better data base from which to make informed decisions, as well as previously unconsidered perspectives offered by others. In the same vein, managers of the big three American automobile manufacturers would realize increments in efficiency by collaborating and agreeing on the optimal pricing policies for their marketing strategies, given their own complex array of statistical information. As our antitrust laws force private business to find alternate means of rationalizing the pricing mechanism, so they are

they now will do—students who do not receive financial aid would probably face tuition increases. When you raise tuition for merit awards, then all the other students and their families pay, and that's not fair." *Id.*

95. This assertion is supported by the economic literature suggesting that cartelization short of binding legal contract invariably leads to unilateral cheating, followed by widespread industry participation in the ostensibly undesirable pricing behavior. It is in this manner that OPEC resolutions to cap oil production among its members so often fail. After the first member cheats, others follow like dominos. See EDWIN MANSFIELD & NARIMAN BEHRAVESH, *ECONOMICS U.S.A.* 410 (1986). The authors state that "one firm may be driven to cheating because it hears that another firm is doing so, with the eventual result that the collusive agreement is torn apart." While the Ivy League schools operating under express agreements to offer no merit aid were unlikely to risk their credibility, reputations, and integrity by cheating, they will be more likely to stray from the "no merit aid" norm if it is merely a tacit value system, rather than a legally and ethically binding and legitimate agreement.

96. The Overlap Institutions achieved real benefits from collaboration in accurately assessing need. Institutions can collectively improve their evaluation of commonly held financial information, and they can share unilaterally held information which may be gleaned from different application forms, telephone interviews, etc., thereby filling gaps of information for some or all participating institutions. See Dodge, *supra* note 93, at A33.

justified in forcing colleges to do so in a competitive environment.⁹⁷ Because the anti-competitive market effects of price fixing are considered to outweigh gains in efficiency and quality of information,⁹⁸ these institutions must find other means of improving the quality of their decisions—means that are less intrusive upon the delicately balanced competitive nature of an otherwise relatively unregulated capitalist economy. Such means might include enlarged and improved data bases, more elaborately structured financial aid forms, use of telephone interviews to obtain explanatory information, continuing education programs for and improved training of financial aid personnel, and more clearly defined, well-informed policies for the interpretation of information best aimed at successfully implementing the strategies of the individual institutions.⁹⁹

Among these alternatives, all of which are means of rationalizing the aid-awarding process in a manner less restrictive to competition among Overlap members, is the potential for members to share data without resorting to actual price fixing. If the aim of collaboration is to improve the information base upon which decisions are made, the creation of a mutual financial data base achieves the goal without fettering the marketplace with unnecessary collaboration on the actual aid offers themselves.¹⁰⁰

Opponents of collaboration also reject the premise that potentially inflated aid offers based on unilateral miscalculation of need will necessarily reduce the offers made to candidates whose offers leave them at a financial

97. Notwithstanding reduced scrutiny of antitrust violations during the Reagan era, President Bush appears to support a meaningful antitrust policy both at home and abroad. See Ernest Gellhorn & Kathryn M. Fenton, *Vertical Restraints During the Reagan Administration: A Program in Search of a Policy*, 1988 ANTITRUST BULL. 543 (1988). While critics view some antitrust laws as potential impediments to industrial collaboration, innovation and efficiency, most agree that price fixing behavior bears little or no benefit to outweigh its anti-competitive effects. See David B. Audretsch, *Divergent Views in Antitrust Economics*, 1988 ANTITRUST BULL. 135, 146 (1988) (stating that section 1 of the Sherman Act is probably the least controversial of the antitrust laws). Under this line of reasoning, colleges and businesses alike should be required to rationalize their operations without resort to price fixing behavior.

98. See *supra* note 33.

99. Theoreticians such as Michael Porter support the role of antitrust laws in the maintenance of healthy competitive environments. See generally MICHAEL E. PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* (1990). Applying Porter's theories to the administration of colleges, subjecting financial aid officers to the rigors of antitrust regulations will act as an impetus to innovation and the development of creative solutions which strengthen, rather than weaken, the industry.

100. This less restrictive means of rationalizing financial need analysis is more likely to be considered reasonable than past price fixing behavior, and would avoid the potential per se scrutiny of price fixing behavior. The degree of express and implied collaboration would need to be monitored to ensure that the shared data base does not become a shrouded or implicit price fixing mechanism through the use of disguised collaborative approaches to analyzing identical data, aimed at indirectly fixing awards.

margin. According to Robert Bloch, the harm-at-the-margins argument "wrongly assumes that a school's financial aid budget is fixed. Though aid budgets may be limited at some point, they are not fixed at current levels."¹⁰¹ Bloch's assertion, technically value-free, is factually correct. Colleges regularly make strategic budgeting decisions in which resources are shifted from ends such as libraries, facilities, and faculty salaries, as well as student financial aid. If, upon cessation of collaboration, a college finds itself unable or unwilling to mitigate losses in accuracy of needs calculation, it retains the option to shift more funds to student aid in order to maintain sufficient resources to meet the needs of marginal applicants.¹⁰² This option also exists to counter the reduction of need-based funds which might occur if Overlap institutions were to bid on the basis of merit. Institutions contending that the prospect of such bidding would impair their strategic goal of universal access fail to recognize that their options are not closed simply because collusion is prohibited. Rather, the options must be exercised within a competitive marketplace, in which implementation of strategy is not free.

A college can unilaterally decide to offer aid solely on the basis of need, in essence refusing to participate in competitive bidding based on merit.¹⁰³ This decision of course bears a cost as the institution loses potentially talented students lured by the competitive bidding of other schools. Likewise, a college can decide that it will commit itself unilaterally to compete by granting merit scholarships and to award all students aid which fully meets need. This decision bears the cost of shifting resources from another part of the budget to increase the overall pool of aid money.

Given these real but costly options, the position of the Overlap Group is based on the implicit assumption that colleges should not have to bear any costs of competition in pursuing their strategic goals. This argument might be more palatable if there were no benefit to be gained from price competi-

101. See *supra* note 26.

102. While businesses regularly face the painful necessity of cutting budgets and shifting resources as a fact of life, there is implicit in the arguments of Overlap supporters a denial that there should be opportunity costs in academic strategic decision-making.

103. The Justice Department's position regarding needs-based financial aid has been consistent throughout its investigation and initiation of prosecution. According to James Rill, Assistant Attorney General for the Antitrust Division, the Justice Department and the complaint do not preclude a college defendant from unilaterally establishing aid based on need. What the complaint and the relief prohibits [sic] among other things is a collusive establishment of a policy that aid will be based only on need, and in addition, prohibits [sic] the establishment of a uniform formula and prohibits [sic] the meetings in which individual students were discussed.

See *supra* note 14.

tion among colleges. Yet such competition would benefit students with need by increasing individual aid offers as well as total aid pools. Moreover, by freeing individual schools to court students with scholarships based on merit, the ban against exclusively need-formulated, collusive aid allows students to sell their talents to the Overlap institutions. Finally, just as price competition forces private businesses to operate lean and reduce waste, the end of price collusion is likely to render colleges more efficient in their operations.

V. HIGHER EDUCATION AS BIG BUSINESS

As noted earlier, there remains some ambiguity in the law regarding the appropriate treatment of learned professions under the Sherman Act's provisions.¹⁰⁴ Uncertainty surrounds two vital questions pertinent to the Overlap Group case: whether to apply the per se rule, the Rule of Reason, or some hybrid thereof, and whether these approaches are actually as distinctive in practice as they are in theory.

The arguments that follow suggest that higher education bears significant characteristics of profit-oriented businesses. These similarities between colleges and corporations support the application of per se analysis, or alternatively, a qualified per se analysis which requires use of the least restrictive alternative to address legitimate goals.¹⁰⁵ While a reduced or relaxed scrutiny of anti-competitive behavior among educational institutions may be appropriate regarding purely academic questions, heightened scrutiny should apply to policies which directly affect pricing through the establishment of uniform aid offers.¹⁰⁶

A professor of economics recently stated that "universities . . . are not profit-maximizing institutions and hence are not subject to market pressures."¹⁰⁷ This is implicitly or explicitly the line of reasoning behind the notion that colleges are not bound by the Sherman Act and the movement encouraging Congress to exempt them if they are so bound.¹⁰⁸ The statement's validity rests on the proposition that only profit-seeking organizations are affected by supply and demand. If this underlying presumption were true, application of antitrust laws to the Overlap Group would be economically irrational, serving to fetter the members' ability to gain benefits

104. See *supra* note 43 and accompanying text.

105. See *supra* note 48 and accompanying text.

106. See *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schls., Inc.*, 432 F.2d 650 (D.C. Cir. 1976), *cert. denied*, 400 U.S. 965 (1970).

107. David Colander, *Economists Don't Teach Students What They Need to Know*, CHRON. HIGHER EDUC., Nov. 13, 1991, at A52.

108. See *supra* note 30 and accompanying text.

from collaboration while accomplishing no valid competitive function. If, however, colleges are affected by market forces despite their not-for-profit status, regulation prohibiting anti-competitive behavior serves a rational purpose. To the extent that these institutions compete and are forced to jockey for position aggressively, the temptation they face to tamper with market forces increases, and the need for substantial enforcement of anti-trust laws grows.¹⁰⁹

The dynamics of higher education in the 1980s and 1990s reflect a climate of intense competition that rivals private industry, notwithstanding the technically not-for-profit status of the institutions themselves. This phenomenon is a function of two interacting forces that are discussed in the remainder of this section.

A. Competition for Institutional Resources Reflects the Extent to Which These Resources Enhance the Lives of the Faculty and Administrators Who Seek Them.

Healthy budgets confer innumerable benefits directly upon administrators and faculty who control tuition and financial aid decision-making processes. Wealthy colleges can pay higher salaries, grant generous and frequent sabbatical leaves, provide a high level of research support, and maintain liberal pools of travel funds, all of which help promote the prestige, honor, and external consulting opportunities that are important to many academics.¹¹⁰

Critics have recently condemned professors for engaging in opportunistic, self-aggrandizing behavior which ostensibly exploits lavish resources at the expense of teaching and other forms of service to students.¹¹¹ The accusations of these critics are as often justified as they are grossly unfair, as the

109. For a discussion of the nature of intra-industry competition and jockeying for position, see generally MICHAEL E. PORTER, *COMPETITIVE STRATEGY* (1980).

110. Even among the very wealthiest institutions, disparities of endowment are dramatic. For example, in 1990, the five best endowed universities spanned the following range of endowments: Harvard, \$4,653,229,000; University of Texas System, \$3,256,192,000; Yale, \$2,570,892,000; Princeton, \$2,527,140,000; and Stanford, \$2,053,128,000. The twentieth wealthiest university, Johns Hopkins, had an endowment in 1990 of \$560,478,000. See *College & University Enrollments over \$60-million*, CHRON. HIGHER EDUC. ALMANAC, Aug. 28, 1991, at 36. Although absolute endowment figures must be tempered by enrollment figures reflecting the extent to which the dollars must be stretched, colleges operate under conditions of enormous fiscal inequality. The pressures they face to compete under these circumstances are reflected in both the rapid increase of tuition and the resources dedicated to ambitious fund-raising drives.

111. See CHARLES J. SYKES, *PROFSCAM: PROFESSORS AND THE DEMISE OF HIGHER EDUCATION* 33-77 (1988) (discussing the "flight from teaching," by which Sykes refers to the reduction in teaching responsibilities in favor of research and increased activity external to the university, often for additional emolument); see also ROGER KIMBALL, *TENURED RADICALS*:

faculty at a college, like the personnel at any profit-oriented corporation, includes selfish, selfless, and hybrid personalities. While generalizations in regard to faculty behavior may condemn the good with the bad, they have served to highlight two points crucial to the applicability of antitrust laws to higher education: there are enormously compelling stakes within reach of academic decision makers, stakes which should be expected to tempt at least some to indulge in anti-competitive behavior; and professors, who are as fallible as managers, officers, and directors of businesses, will at times succumb to the temptation. For these reasons, it is unrealistic to suggest that colleges should be immune from antitrust regulation because they technically seek no profits.

B. Tuition Dollars Contribute Significantly to the Institutional Resources at Private Colleges.

Compared to state colleges which receive much of their funding from state sources, private colleges make up a greater proportion of their budgets from the tuition they charge to students. For this reason, tuition has a greater impact on professorial and administrative resources at private colleges than at public colleges. While qualitative, noneconomic motives for removing price from student consideration should be identical for all colleges, private or public, the economic motives for eliminating price consideration apply disproportionately to private colleges.

If the purpose of the Overlap Group's activities were legitimately qualitative, we would expect to see an analogous movement in the public college sector. Yet prestigious state institutions have not attempted to collaborate in the manner of the Overlap group. Schools like the "Public Ivys,"¹¹² while natural leaders in seeking access to higher education by their very missions and temperaments, have not sought to coordinate financial aid offers among themselves in order to remove the consideration of cost from the college selection question. Innumerable explanations may account for this fact, including the notion that public institutions are not presented with an

HOW POLITICS HAS CORRUPTED OUR HIGHER EDUCATION (1990) (addressing the effect of tenured professorial power on the curriculum and the operation of the university).

112. See RICHARD MOLL, *THE PUBLIC IVYS: A GUIDE TO AMERICA'S BEST PUBLIC UNDERGRADUATE COLLEGES AND UNIVERSITIES* (1985). According to Moll, the Public Ivys consist of the University of California, Miami University of Ohio, the University of Michigan, the University of North Carolina, the University of Texas, the University of Vermont, the University of Virginia, and the William and Mary College. "The best of the rest" includes the University of Colorado, Georgia Institute of Technology, the University of Illinois, New College of the University of South Florida, Pennsylvania State University, the University of Pittsburgh, the State University of New York at Binghamton, the University of Washington, and the University of Wisconsin.

adequate self-serving incentive to engage in price fixing, given the costs and risks involved and the relatively minor role of tuition in terms of total budget dollars. Conversely, policy makers at private colleges, who are theoretically no more concerned with access to education than their public-college counterparts, have greater incentive to hinder price competition, thereby increasing the total tuition revenues that play so vital a role in maintaining a high quality of support for their work.

Proposition A suggests that colleges, while technically not-for-profit, deal in high stakes that are considered very valuable to members of their decision-making communities. Proposition B suggests that private colleges receive potentially greater economic gains from price fixing than public colleges, while both groups benefit equally when students and institutions are matched on the basis of noneconomic factors. The fact that private colleges have engaged in collaborative activity for which there is no public college analogue suggests that either (i) they are engaging in anti-competitive rather than strategic, qualitative behavior that relates to their missions and objectives, or (ii) they have and will continue to have much motivation and temptation to do so. Under either scenario, arguments to the effect that private colleges are not in business and therefore should be treated with special consideration appear feeble.

These dynamics explain why the technicality of not-for-profit status is largely irrelevant to the existence of institutional temptation to behave opportunistically, including the temptation to interfere with healthy free-market functioning, in an effort to control the pricing mechanism. Just as managers of corporations have been observed to act for their own individual interests at the expense of the welfare of shareholders,¹¹³ the administrative and academic decision makers at colleges also have plenty of competitive (or, unfortunately, anti-competitive) incentives. As the existence of profit-seeking shareholders has become largely irrelevant in motivating managerial behavior,¹¹⁴ the economic distinction between corporations and colleges has blurred—both are run by human beings who are naturally self-interested. Because the stakes in both arenas are high enough to encourage anti-

113. Myles Mace has documented the opportunistic behavior of directors of corporations. See generally MYLES L. MACE, *DIRECTORS: MYTH AND REALITY* (1986).

114. The irrelevance of shareholders, and hence the mitigation of the profit motive as a driving force in managerial decision making, has been documented since the early twentieth century. See generally THORSTEIN VEBLEN, *THE THEORY OF BUSINESS ENTERPRISE* (1904) (documenting the separation of ownership and control in business organizations); see also ADOLPH A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1934) (observing the potential for conflicts of interest between owners and managers, and analyzing the nature of the relationship between shareholders and directors).

competitive activity, both are legitimately subjected to antitrust scrutiny. For these reasons, colleges should be treated like the profit-oriented businesses they have come to resemble in terms of the economic factors which motivate their leaders.¹¹⁵

VI. CONCLUSION

The past practices of the Overlap Group violate section 1 of the Sherman Act under either per se or Rule of Reason analysis. Under the decision in *Board of Trade*, price fixing is per se a violation of the Act.¹¹⁶ Behavior which sets uniform prices among twenty-three institutions clearly falls within this rule. Arguments to the effect that institutions of higher education should be evaluated using a more lenient standard, such as a qualified per se or a Rule of Reason approach, all depend upon a finding that the practices in question comprise professional behavior¹¹⁷ of a noncommercial nature.¹¹⁸ Because tuition revenues are in fact a compelling commercial element of higher education that students face, as documented in Sections IV and V, a reduced level of scrutiny cannot be justified.

Were a court, notwithstanding these arguments, to apply a Rule of Reason analysis, the behavior of the Overlap Group would still comprise a violation of the Sherman Act. Under the Rule of Reason, behavior that would otherwise violate the antitrust laws may be allowed if it can be shown to have an essentially procompetitive effect.¹¹⁹ While the colleges can and do make claims which suggest rational bases for collaborating on financial aid offers, these goals consistently fall outside the realm of competition inducement. Although objectives such as equal access and choice based on qualities may be laudable, they confer no positive effect on competition sufficient to counter the anti-competitive nature of the price-fixing behavior. As a result, the benefits obtained from Overlap Group collaboration cannot be characterized as procompetitive, and fail to meet even the reduced threshold of the Rule of Reason.

115. Apart from the incentives for decision makers to act opportunistically, budgets and resources of universities are enormous, reflecting a parity between the power of these institutions and the power of corporations. For example, in 1989, the range of total research and development spending at the sixty top institutions based on expenditure extended from \$648,395,000 at Johns Hopkins University to \$82,914,000 at Princeton University. CHRON. HIGHER EDUC. ALMANAC, Aug. 28, 1991, at 37.

116. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

117. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975).

118. See *Marjorie Webster Junior College v. Middle States Ass'n*, 432 F.2d 650, 654 (D.C. Cir. 1976), cert. denied, 400 U.S. 965 (1970).

119. See *Richmonds supra* note 55.

Should college administrators petition Congress for a revision of the laws allowing resumption of Overlap Group collaboration, the policy considerations discussed herein suggest that the petition should be denied. Higher education has grown in size, resources, and power to such an extent that little justification remains for carving an exception which would distinguish it from corporate America in general. Because administrators and professors face significant incentives to engage in anti-competitive behavior, the law should continue to prohibit price-fixing activity as it does in other sectors.

