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NOTES

ANTITRUST IN NEED: UNDERGRADUATE FINANCIAL AID AND *UNITED STATES v. BROWN UNIVERSITY*

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INTRODUCTION

On December 22, 1993, following the Third Circuit's decision to remand the case to the district court,[1] the Justice Department and the Massachusetts Institute of Technology ("MIT") agreed to settle a bitter thirty-month antitrust suit.[2] Many academic observers applauded the settlement as a significant victory for MIT.[3] As MIT President Charles M. Vest said, the settlement represents "a way to allow principle to outweigh narrow, overly technical readings of the law."[4] Unfortunately, however, a technical reading of the law by the Third Circuit will stand as precedent, potentially affecting future antitrust litigation.[5]

The litigation began on May 22, 1991, when the Justice Department

1. *See* United States v. Brown Univ., 5 F.3d 658, 661 (3d Cir. 1993).

2. *See* Matthew Brelis, *MIT, US Resolve Suit on Aid Data*, Boston Globe, Dec. 23, 1993, at 21. Under the settlement, in exchange for dismissal of the suit, MIT agreed to 1) award financial aid solely on the basis of financial need; 2) meet to discuss common methods to determine need; 3) exchange, through a third party, financial data on individual families to insure its consistency; and 4) admit students on the basis of merit without consideration of ability to pay tuition. *See id.* MIT further agreed not to discuss individual student awards, prospective tuition, or faculty salaries. *See id.* The Ivy League schools, *see infra* note 6, originally defendants with MIT in this action, settled the case previously. *See infra* notes 9-10 and accompanying text. The Justice Department, however, agreed to include the schools in the later settlement reached with MIT. *See* Brelis, *supra*, at 21.

3. *See* William H. Honan, *M.I.T. Wins Right to Share Financial Aid Data in Antitrust Accord*, N.Y. Times, Dec. 23, 1993, at A13.

4. *M.I.T. Reaches Settlement in Lawsuit on Financial Aid*, Harv. U. Gazette, Jan. 7, 1994, at 1.

5. *See* United States v. Brown Univ., 5 F.3d 658 (3d Cir. 1993). The law under which this case was brought, Section 1 of the Sherman Act, 15 U.S.C. § 1 (1988), includes a private right of action. *See* 15 U.S.C. § 15 (1988). A settlement, usually called a "consent decree," does not affect individuals not party to the decree. *See, e.g.*, Broadcast Music, Inc. v. CBS, 441 U.S. 1, 13 (1979) ("Of course, a consent judgment, even one entered at the behest of the Antitrust Division, does not immunize the defendant from liability for actions, including those contemplated by the decree, that violate the rights of nonparties."). Thus, private individuals may still bring suit against MIT and the other parties to the consent decree. One action has been brought by a recent graduate of Wesleyan University. *See* Kingsepp v. Wesleyan Univ., 142 F.R.D. 597, 603, (S.D.N.Y. 1992). MIT, however, was not named as a defendant in the suit. *See id.* at 597. The plaintiff's motion for class certification has been denied for failure to satisfy the adequacy of counsel requirement of Fed. R. Civ. P. 23(a)(4). *See id.* at 603. Furthermore, the decision in United States v. Brown University, 5 F.3d 658 (3d Cir. 1993), may well affect the treatment of educational institutions and other nonprofit organizations in future antitrust litigation.

charged the eight Ivy League schools[6] and MIT with agreeing to form a "collegiate cartel" to fix financial aid packages in violation of Section 1 of the Sherman Antitrust Act.[7] The Justice Department argued that the purpose of the agreement was to eliminate competition for students and effectively raise the cost of a degree to those students.[8] The Ivy League schools immediately settled the case through a consent decree,[9] agreeing to cease sharing financial aid information.[10] MIT, however, decided to defend its financial aid practices.[11]

The Justice Department challenged the colleges' well-established financial aid policies.[12] Since the 1950's, financial aid officials from twenty-three prestigious northeastern colleges[13] have gathered to share financial information about jointly admitted students who applied for financial aid.[14] The self-named "overlap group"[15] sought to eliminate

6. The eight Ivy League schools are Brown University, Columbia University, Cornell University, Dartmouth College, Harvard University, Princeton University, University of Pennsylvania, and Yale University.

7. *See* Edwin M. Yoder, Jr., *No 'Collegiate Cartel'*, Wash. Post, May 27, 1991, at A23 (describing the action as "perhaps the most overbearing move against private higher education in the nation's history"). Section 1 of the Sherman Act provides in pertinent part: "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 illegal." 15 U.S.C. § 1 (1988).

8. *See* Anthony DePalma, *Price-Fixing or Charity? Trial of M.I.T. Begins*, N.Y. Times, June 26, 1992, at A17. The Antitrust Division of the Justice Department alleged that the Ivy League and MIT unlawfully conspired to restrain trade by (1) agreeing to award financial aid exclusively on the basis of need; (2) agreeing to implement a common formula to calculate need; and (3) collectively setting each commonly admitted students' family contribution toward the price of tuition. *See* United States v. Brown Univ., 5 F.3d 658, 663-64 (3d Cir. 1993).

9. Consent decrees are a major part of the Justice Department Antitrust Division's enforcement program. A consent decree is a settlement whereby the defendant agrees to refrain from certain practices deemed illegal by the government and the government entity agrees to drop its suit. *See* Black's Law Dictionary 410-11 (6th ed. 1990).

10. *See* Anthony DePalma, *Ivy Universities Deny Price-Fixing But Agree to Avoid It in the Future*, N.Y. Times, May 23, 1991, at A1; Yoder, *supra* note 7, at A23. The Ivy League universities agreed to end their policy of basing all aid decisions solely on need and to cease agreeing on uniform aid awards for students admitted to more than one Ivy League school. *See* DePalma, *supra*, at A1.

11. *See* Yoder, *supra* note 7, at A23.

12. *See* Anthony DePalma, *In Trial, M.I.T. to Defend Trading Student-Aid Data*, N.Y. Times, June 24, 1992, at A17.

13. The participants include the Ivy League colleges, *see supra* note 6, MIT, Amherst College, Barnard College, Bowdoin College, Bryn Mawr College, Colby College, Middlebury College, Mount Holyoke College, Smith College, Trinity College, Tufts University, Vassar College, Wellesley College, Wesleyan University, and Williams College. *See* Susan Chira, *23 Colleges Won't Pool Fiscal Data*, N.Y. Times, Mar. 13, 1991, at B7. The Justice Department charged only the Ivy League schools and MIT. *See* Roger Parloff, *Conceptual Combat*, Am. Law., Nov. 1992, at 78, 79-80.

14. *See* DePalma, *supra* note 12, at A17.

15. The name of the association originated from the idea that when an applicant has been accepted at more than one of the member schools, part of the applicant pool has overlapped. *See* Mary C. Cage, *Justice Department Widens Probe of Tuition and Student Aid to 40 Colleges*, Chron. Higher Educ., Sept. 20, 1989, at A19.

competition for students based on financial aid awards by offering packages founded solely on financial need.[16] In furtherance of this goal, they set up a formula for determining need and established uniform aid awards for students admitted to two or more member schools.[17]

MIT argued that the purpose of the overlap agreement is to insure fairness in distributing financial aid.[18] By awarding aid only to students who need it, the overlap colleges can "spread their money further" than if they awarded aid based on academic or other merit.[19] In an analysis submitted to the district court, University of Chicago economist Dennis W. Carlton supported the overlap agreement: "The effect of the overlap meetings was not to raise price as is typically associated with price fixing, but rather to transfer dollars primarily from students with higher-income parents who would otherwise receive non-need-based aid to other students."[20]

Chief Judge Louis Bechtle of the Eastern District of Pennsylvania disagreed. The Chief Judge accepted the Justice Department's argument that the overlap agreement's purpose was to raise the cost of education at the overlap colleges.[21] The Judge, therefore, invalidated the overlap group's practice of sharing information as a violation of the Sherman Act.[22] One year later, however, Judge Cowen of the Third Circuit reversed Chief Judge Bechtle's decision, remanding the case for reconsideration.[23] The Third Circuit directed the district court to consider the procompetitive and non-economic justifications of the overlap agreement, in order to determine if the Sherman Act was violated.[24]

Section 1 of the Sherman Act prohibits agreements "in restraint of trade or commerce."[25] The statute was written in very broad terms, leaving the judiciary to shape its limits.[26] The courts have developed three levels of scrutiny for analyzing an alleged Sherman Act violation.[27] First, some agreements are considered illegal per se, for history and experience have shown them to be "plainly anticompetitive."[28] Such violations are subject to a conclusive presumption of illegality.[29] Second, the

16. *See* DePalma, *supra* note 12, at A17. For a review of the terms of the overlap agreement, see United States v. Brown Univ., 5 F.3d 658, 662 n.2 (3d Cir. 1993).

17. *See id.*

18. *See id.*

19. *See id.*

20. *Id.* (emphasis omitted).

21. *See* United States v. Brown Univ., 805 F. Supp. 288, 307 (E.D. Pa. 1992), *rev'd*, 5 F.3d 658 (3d Cir. 1993).

22. *See id.*

23. *See* United States v. Brown Univ., 5 F.3d 658, 679 (3d Cir. 1993).

24. *See id.* at 678.

25. *See* 15 U.S.C. § 1 (1988).

26. *See infra* part I.A.

27. For a more detailed discussion of the three standards, see *infra* part I.B.

28. *See, e.g.*, National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978) (discussing the nature of per se illegality).

29. *See, e.g.*, Standard Oil Co. v. United States, 221 U.S. 1, 65 (1911) (asserting that

"quick look" mode of analysis, an intermediate standard, presumes competitive harm, and thus forces the defendant to assert some competitive justifications for the restraint.[30] Finally, the "rule of reason" standard places the initial burden on the plaintiff to establish that the agreement unduly restrains trade or commerce.[31] The burden then shifts to the defense to proffer a sufficient pro-competitive objective.[32]

The district court decided the case based on the quick look standard.[33] The Third Circuit, however, noted the "nature" of higher education and the asserted pro-competitive and pro-consumer features of the overlap agreement. It, therefore, ordered the district court to investigate "more fully . . . the procompetitive and noneconomic justifications proffered by MIT," and thus apply the traditional rule of reason standard.[34]

MIT's victory, however, was only partial. Though the college was given a better opportunity to argue its justifications, the Third Circuit agreed with the district court in holding that the gratuitous offering of financial assistance to incoming students was a "commercial transaction," not a charitable act, and thus within the purview of the Sherman Act.[35] The Third Circuit, however, in equating the setting of tuition rates to the setting of financial aid packages,[36] took an unnecessarily wooden view of the financial aid practices of the overlap colleges and failed to consider thoroughly the legislative and judicial history of the Sherman Act.

This Note argues that financial aid distribution is a charitable act not governed by the Sherman Act. Part I of this Note discusses the history of and legal standards promulgated under Section 1 of the Sherman Act. Part II examines the historical treatment of nonprofit organizations under the Sherman Act, setting forth a two-part scheme for analyzing potential antitrust violations. Part III evaluates the relationship between the overlap agreement and commerce under the Sherman Act. Part III concludes that financial aid is not commerce, and thus the overlap agreement does not violate the Sherman Act. Part IV examines the per se, quick look, and rule of reason standards, in the event that courts consider financial aid to be commerce, and determines that courts should

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the fixing of rates among competitors is subject to a "conclusive presumption of invalidity").

30. *See, e.g.*, NCAA v. Board of Regents, 468 U.S. 85, 107-10 (1984) (discussing the quick look standard).

31. *See, e.g.*, Board of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918) (setting forth a "classic" statement on the rule of reason). For the statement in full, see *infra* note 60.

32. *See id.*

33. *See* United States v. Brown Univ., 805 F. Supp. 288, 304 (E.D. Pa. 1992) (placing the burden on MIT to justify its actions), *rev'd*, 5 F.3d 658 (3d Cir. 1993).

34. United States v. Brown Univ., 5 F.3d 658, 678 (3d Cir. 1993).

35. *See id.* at 668.

36. The court said, "The amount of financial aid not only impacts, but directly determines the amount that a needy student must pay to receive an education at MIT. The financial aid therefore is part of the commercial process of setting tuition." *Id.* at 666.

apply the rule of reason standard. Finally, this Note concludes that the overlap agreement is not a Sherman Act violation: first, it is not commerce under the Sherman Act, and second, regardless of the analysis of commerce under the Act, the overlap agreement passes the rule of reason standard.

I. SECTION 1 OF THE SHERMAN ACT

A. *Background*

The Sherman Act of 1890[37] was originally enacted to protect consumers from manipulation and control by large trusts and combinations during the late nineteenth century.[38] Section 1 of the Act provides in pertinent part: "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 illegal."[39] Congress wrote the statute in very broad terms, leaving a great deal for judicial interpretation.[40] Chief Justice Charles Evans Hughes described the Act as a "charter of freedom" which possesses "generality and adaptability comparable to that found to be desirable in constitutional provisions."[41]

The very breadth of the condemnation, however, has given rise to great ambiguity in application.[42] Consequently, Chief Justice Edward D. White endeavored to limit its scope. In *Standard Oil v. United States*,[43] the Chief Justice effectively amended the statute. No longer were all restraints of trade illegal. Rather, only those agreements which "unduly"

37. 15 U.S.C. §§ 1-7 (1988).

38. *See, e.g.*, Apex Hosiery Co. v. Leader, 310 U.S. 469, 492-93 (1940) ("[The Sherman Act] was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern."); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959) (concurring in the *Apex* court's recognition that the Sherman Act is aimed primarily at combinations having "commercial objectives"); Standard Oil Co. v. United States, 221 U.S. 1, 50 (1911) (pointing out that the Act was passed out of a fear of vast accumulations of wealth and the oppressive power which often accompanies it).

39. 15 U.S.C. § 1 (1988).

40. *See* Lawrence A. Sullivan, Handbook of the Law of Antitrust § 63 (1977). One commentator points out that "legislative history demonstrates that Congress intended courts to shape the Act's broad mandate." *See* Douglas R. Richmond, *Private Colleges and Tuition Price-Fixing: An Antitrust Primer*, 17 J.C. & U.L. 271, 275 (1991) (citing National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978)). In one of the Supreme Court's early Sherman Act decisions, the Court wrestled with the construction and scope of the statute. *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 326-27 (1897) (applying the Sherman Act to an agreement among railway companies).

41. Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933).

42. *See* Sullivan, *supra* note 40, at § 63 (discussing the development of the rule of reason and per se doctrine).

43. 221 U.S. 1 (1911).

restrain trade or commerce were prohibited.[44] Pointing to the common law background on which the statute was based, the Chief Justice said, "The statute . . . evidenced the intent not to restrain the right to make and enforce contracts . . . which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods . . . which would constitute an interference that is an undue restraint."[45]

In order to prove an offense under Section 1, the plaintiff/prosecutor,[46] therefore, must establish three elements: 1) that a contract, combination or conspiracy between at least two entities existed; 2) that the conspiracy created a restraint on interstate trade or commerce; and 3) that the restraint was unreasonable.[47] The existence of a conspiracy is a factual question. The statute, however, does not define a "restraint of interstate trade or commerce," nor does it suggest what makes a restraint unreasonable. As a result, the judiciary is left to define the boundaries of a restraint of trade or commerce under the Sherman Act.[48]

B. *The Standards*

The determination of the reasonableness of a restraint of interstate trade or commerce often engenders great debate.[49] In order to aid in this determination, the courts have fashioned three standards.

1. The Per Se Approach

The per se doctrine states that arrangements which have a "direct and immediate effect . . . upon interstate commerce" are presumptively invalid.[50] The per se rule condemns practices which have been shown

44. *See id.* at 60. The Chief Justice's opinion developed into what is now called the rule of reason. For a discussion of the rule of reason standard, see *infra* part I.B.3.

45. *Standard Oil*, 221 U.S. at 60.

46. Actions under the Sherman Act may be brought by the United States government or by private individuals. *See* 15 U.S.C. § 15 (1988). Often private action follows a successful government proceeding. *See, e.g.*, Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 483 (1968) (shoe manufacturer sues lessor of shoe manufacturing machinery following successful government prosecution of lessor).

47. *See, e.g.*, United States v. Yellow Cab Co., 332 U.S. 218, 233 (1947) (holding that the transportation of interstate travelers by taxi cab from their homes to the railroad station is not interstate commerce under the Sherman Act); Board of Trade of Chicago v. United States, 246 U.S. 231, 241 (1918) (holding that an agreement prohibiting members of a trade board from purchasing or offering to purchase grain between sessions of the board at a price other than the closing bid did not unduly restrain trade).

48. *See* Roger D. Blair & Carolyn D. Schafer, *Antitrust Law and Evolutionary Models of Legal Change*, 40 U. Fla. L. Rev. 379, 386 (1988).

49. The reasonableness requirement, in fact, cannot be found within the letter of the statute. The statute, by its terms, prohibits all restraints of trade. Virtually every contract, however, restrains trade to some extent. Thus, over the years, courts have decided that only activities which unduly restrain trade are prohibited by the Sherman Act. *See supra* notes 42-45 and accompanying text.

50. United States v. Joint Traffic Ass'n, 171 U.S. 505, 568 (1898). The Supreme Court later defined the per se rule as focusing on "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease

through experience to be so highly suspect that a violation is presumed.[51] For example, horizontal price-fixing, an agreement to fix prices between or among independent entities which compete on the same level in the distribution of products or services, generally is a per se violation.[52] The courts have held that it is in "nature," "character," and "necessary effect" adverse to competition and, therefore, generally subject to a conclusive presumption of invalidity.[53] Essentially, the per se rule condemns agreements which "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable."[54]

2. The "Quick Look" Approach

The "quick look" is an intermediate standard employed in cases where the per se standard does not apply, but where the "anticompetitive consequences" of the activity are apparent.[55] Under the quick look approach, competitive harm is presumed. Unlike the per se standard, however, the quick look gives the defendant the opportunity to present competitive justifications for the restraint.[56] If no legitimate justifications are offered, the court condemns the practice "without ado."[57] If the defendant offers sound justifications, then the court applies the full-scale "rule of reason" analysis.[58]

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output." Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 19-20 (1979).

51. *See* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978) ("[A]greements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality . . . are 'illegal *per se*.' "); United States v. Topco Assoc., 405 U.S. 596, 607-08 (1972) ("It is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act.").

52. A horizontal agreement to fix prices is considered the "archetypal example" of a per se violation. *See* Catalano, Inc. v. Target Sales, 446 U.S. 643, 647 (1980); *accord* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 344-45 (1982); United States v. Trenton Potteries Co., 273 U.S. 392, 397-98 (1927).

53. Standard Oil Co. v. United States, 221 U.S. 1, 65 (1911). In fact, horizontal price-fixing was the first category of business conduct to which courts officially applied the per se rule. *See Trenton Potteries*, 273 U.S. at 396-98 (expressing the per se rule); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 216 (1940) (employing the term "per se" for the first time).

54. Northern Pacific Ry. v. United States, 356 U.S. 1, 5 (1958); *accord* NCAA v. Board of Regents, 468 U.S. 85, 103-04 (1984) ("Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct."); *Maricopa County*, 457 U.S. at 344 ("Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable.").

55. *See NCAA*, 468 U.S. at 106.

56. *See id.* at 110.

57. *See* Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n, 961 F.2d 667, 674 (7th Cir.), *cert. denied*, 113 S. Ct. 409 (1992).

58. *See* United States v. Brown Univ., 5 F.3d 658, 678 (3d Cir. 1993).

3. The Rule of Reason Approach

In contrast to the inflexible per se approach, the "rule of reason" permits the courts to determine whether conduct is "significantly and unreasonably" anticompetitive in character or effect.[59] Early on, courts realized that "[e]very agreement concerning trade, every regulation of trade, restrains."[60] Thus, the rule logically condemns only those activities which *unduly* restrain trade.[61] In situations where per se and quick look condemnation is inappropriate, courts fully examine the activity at issue to determine whether the agreement promoted or restricted competition.[62]

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59. *See* Report of the Attorney General's National Committee to Study the Antitrust Laws 11 (1955) [hereinafter, Attorney General's Report]. The Supreme Court stated in Appalachian Coals v. United States, 288 U.S. 344 (1933):

> The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce, but they do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis.

Id. at 360.

60. Board of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918). *Chicago Board of Trade* recites the classic statement of the rule of reason which is routinely quoted in jury instructions:

> [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. 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. To determine that question the court must ordinarily consider the facts peculiar to the business . . . ; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Id.

In National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978), Justice Stevens discussed Justice Brandeis' opinion in *Chicago Board of Trade*. *See id.* at 687-88. Justice Stevens wrote, "[o]ne problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says. The statute says that 'every' contract that restrains trade is unlawful. But, as Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law." *Id.* *See also* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 342-43 (1982) (discussing the evolution of the rule of reason).

61. *See* Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911); *see also* Attorney General's Report, *supra* note 59, at 11 ("While Standard Oil gave the courts discretion in interpreting the word 'every' in Section 1, such discretion is confined to consideration of whether in each case the conduct being reviewed under the Act constitutes an undue restraint of competitive conditions . . . .").

62. NCAA v. Board of Regents, 468 U.S. 85 (1984), clarified a point of ambiguity on the rule of reason: noncommercial goals of an agreement should not be considered. *See*

The plaintiff bears the initial burden of showing that the activity at issue may "suppress or even destroy competition."[63] If the plaintiff meets this standard, the burden shifts to the defendant to prove that the activity promotes a sufficiently "pro-competitive" objective.[64] To mount a successful rebuttal, the plaintiff must "demonstrate that the restraint is not reasonably necessary to achieve the stated objective."[65]

II. NONPROFIT ORGANIZATIONS AND COMMERCE UNDER THE SHERMAN ACT

Since nonprofit organizations, by definition, do not aim to increase the wealth of their members, it would appear that they would not engage in price-fixing or other Section 1 restraints of trade.[66] Though they do not seek personal profits, however, nonprofit organizations may nonetheless intentionally restrain commerce. For example, the Supreme Court found that a nonprofit foundation that established maximum fees for doctors participating in a health insurance plan constituted an illegal price-fixing arrangement.[67] The analysis should focus not on the nonprofit character of the organization, but rather, on the nature of the activity at issue.

A. *Case History*

The Supreme Court has suggested that antitrust laws should not apply to noncommercial entities.[68] In *Apex Hosiery Co. v. Leader*,[69] members of a labor union,[70] in an attempt to unionize a hosiery factory, forcibly took possession of a plant.[71] During this "sit-down" strike, union members damaged or destroyed machines, resulting in the complete suspen-

id. at 104. The court must focus solely on the issue of whether the agreement promotes or restricts competition. *See id.*

63. *Chicago Board of Trade*, 246 U.S. at 238; *accord Professional Eng'rs*, 435 U.S. at 691.

64. *See* United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993).

65. *Id.* (citations omitted).

66. Senator Sherman did not envision the application of the Sherman Act to nonprofit organizations. In response to a proposed addition to the Sherman Act to include an exception for "temperance societies," Senator Sherman remarked, "I do not see any reason for putting in temperance societies 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." 21 Cong. Rec. 2658 (1890).

67. *See* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 349 (1982).

68. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940).

69. 310 U.S. 469 (1940).

70. The treatment of labor unions in antitrust law has a confused history. Section 6 of the Clayton Act, 15 U.S.C. § 17 (1988), for example, states that labor is not an article of commerce and that antitrust laws should not forbid labor organizations. Nonetheless, as the *Apex* court noted, labor unions are not wholly exempt from antitrust law. *See Apex*, 310 U.S. at 487-88. For an interesting discussion of labor and antitrust law in a modern context, see Jonathan S. Shapiro, Note, *Warming the Bench: The Nonstatutory Labor Exemption in the National Football League*, 61 Fordham L. Rev. 1203 (1993) (discussing the history of the nonstatutory labor exemption).

71. *See Apex*, 310 U.S. at 482.

sion of business.[72] The union did not seek to increase profits by affecting market price, but rather attempted to compel the company to accede to its demands.[73] The Court extensively examined the legislative history of the Sherman Act[74] to determine whether the Act prohibited the union's activity.[75] The Supreme Court held that the union's activities did not violate the Sherman Act because the union did not intend to affect the prices of hosiery.[76]

More recent decisions of the Supreme Court, however, clearly hold that nonprofit organizations are not categorically exempt from the Sherman Act.[77] For example, in *Goldfarb v. Virginia State Bar*[78] the Fairfax County Bar Association, a nonprofit organization, prescribed a minimum-fee schedule for legal services relating to residential real estate transactions.[79] The Virginia State Bar, exercising its administrative agency powers, enforced the schedule.[80] The Court rejected the County Bar's argument that "learned professions" are not regulated by the Sherman Act, noting that the public service aspect of a professional service is not controlling.[81] The Court held that the fee schedule promoted by the bar association set prices for the purpose of eliminating competition among lawyers.[82] Thus, disregarding the nonprofit character of the association, the Court found that the activities of the bar association violated Section 1 of the Sherman Act.[83]

Despite *Goldfarb's* denunciation of a Sherman Act exemption for professional associations, the Court did not totally discount the nature of an organization from the analysis:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to

72. *See id.*

73. *See id.* at 502.

74. *See id.* at 489-501. The Court stated: "In consequence of the vagueness of [the Sherman Act's] language, perhaps not uncalculated, the courts have been left to give content to the statute, and in the performance of that function it is appropriate that courts should interpret its word in the light of its legislative history and of the particular evils at which the legislation was aimed." *Id.* at 489 (citations omitted).

75. *See id.* at 490.

76. *See id.* at 501-02.

77. *See, e.g.*, NCAA v. Board of Regents, 468 U.S. 85, 100 n.22 (1984) ("There is no doubt that the sweeping language of § 1 applies to nonprofit entities.").

78. 421 U.S. 773 (1975).

79. *See id.* at 776-78.

80. *See id.*

81. *See id.* at 787 (citing United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 489 (1950)); *see also* FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 465-66 (1986) (holding that a dental association rule forbidding members to submit x-rays to dental insurers in connection with claim forms constituted an unreasonable restraint of trade under the Sherman Act); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 681 (1978) (holding that an association of professional engineers' canon of ethics prohibiting competitive bidding by its members violated the Sherman Act).

82. *See Goldfarb*, 421 U.S. at 782-83.

83. *See id.* at 788.

> view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could be properly viewed as a violation of the Sherman Act in another context, be treated differently.[84]

Thus, though the nonprofit nature of an organization does not warrant a categorical exemption, it does play a major role in the analysis.

Consequently, charitable and social welfare organizations generally are not considered commerce under the Sherman Act unless the challenged conduct is plainly engaged in for the purpose of revenue enhancement.[85] This caveat is evident in the apparent distinction between business leagues, whose object quite often is increasing revenues, and charitable or social welfare organizations, which generally do not promote the private gain of their members.[86] The significance of this dichotomy should not be overstated, however. While it is clear why business leagues often implicate the Sherman Act, it does not necessarily follow that charity or social welfare organizations do not. The type of organization alone offers little to the analysis.[87] Rather, the question must focus on the *nature of the activity* at issue.

B. *Examining the Nature of the Activity: Effect Versus Intent*

In examining the nature of the activity at issue, some courts focus on the effect of the activity,[88] while others emphasize the intent of the actor's conduct as well.[89] The distinction is obviously vital: many activi-

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84. *Id.* at 788 n.17. The Court went on to stress, "We intimate no view on any other situation than the one with which we are confronted today." *Id.*

85. *See* Mark D. Selwyn, Note, *Higher Education Under Fire: The New Target of Antitrust*, 26 Colum. J.L. & Soc. Probs. 117, 142 (1992).

86. *See id.* at 142-44 (comparing FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) (refusing an exemption for a group of lawyers who boycotted indigent defense work as a way of increasing compensation) with NAACP v. Claiborne Hardware, 458 U.S. 886 (1982) (permitting a civil rights boycott of white-owned businesses as a way of highlighting racial discrimination of local merchants)).

87. The nature of an association, standing alone, does not provide sanctuary from the Sherman Act. *See* Associated Press v. United States, 326 U.S. 1, 7 (1945).

88. *See, e.g.*, Goldfarb v. Virginia State Bar, 421 U.S. 773, 786-87 (1975) (discounting legal association's stated goal of providing services necessary to the community); United States v. Topco Assocs., 405 U.S. 596, 610-11 (1972) (discrediting defendant's intent to foster competition with larger supermarket chains); United States v. Masonite Corp., 316 U.S. 265, 276 (1942) (rejecting defendant's contention that they had an "honest and sincere" intent to recognize and exercise the rights belonging to the defendant under its patents).

89. *See, e.g.*, Apex Hosiery Co. v. Leader, 310 U.S. 469, 512-13 (1940) (holding that a labor union strike did not implicate commerce under the Sherman Act since the suspension of business was not intended to affect commerce); NOW v. Scheidler, 968 F.2d 612, 622-23 (7th Cir. 1992) (holding that pro-life protests directed against abortion clinics do not implicate commerce under the Sherman Act because they are not intended to create a monopoly for any one provider); Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Sch., 432 F.2d 650, 654 (D.C. Cir. 1970) (requiring "com-

ties affect commerce though the actors did not intend to do so. An additional requirement of intent significantly burdens prosecutors/plaintiffs.

For example, in *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools*,[90] the D.C. Circuit Court's intent requirement thwarted the plaintiff's cause of action.[91] In *Marjorie Webster*, a nonprofit organization, the "MSA," accredited qualified colleges in an effort to improve higher education.[92] The MSA refused to accredit Marjorie Webster Junior College because it was not "a nonprofit organization with a governing board representing the public interest."[93] Marjorie Webster brought suit to compel consideration for accreditation without regard to the school's proprietary nature.[94] The D.C. Circuit Court, however, held that the refusal to accredit was not a commercial activity under the Sherman Act.[95]

In examining the accreditation system, the *Marjorie Webster* court stated that the Sherman Act did not extend to "noncommercial aspects of the liberal arts."[96] The court focused on the intent of the MSA, explaining, "an incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of the profession, is not sufficient to warrant application of the antitrust laws."[97] The court's decision, therefore, rested on the fact that the MSA did not intend to affect commerce.

The *Marjorie Webster* approach, however, does not require that courts focus on intent in all situations. As the Third Circuit noted in *United States v. Brown University*,[98] "[t]he *Marjorie Webster* court focused primarily on intent because the nature of the conduct in that case was distinctly noncommercial. The MSA received no payment or other benefit for evaluating institutions and deciding whether to accredit them."[99] No money was exchanged for services, and no price setting occurred.

Therefore, a two-step analysis is required to determine whether the Sherman Act applies: (1) is the activity plainly commercial? and (2) if it is not plainly commercial, was there an intent or purpose to affect commerce? If the activity is plainly commercial, then the Sherman Act controls, and the court must examine the reasonableness of the restraint. If the activity is not plainly commercial, then the court must ask whether there was any intent or purpose to affect commerce. If such an intent

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mercial motive" in order for a college accreditation process to implicate the Sherman Act).

90. 432 F.2d 650 (D.C. Cir. 1970). MIT relied "heavily" on *Marjorie Webster* in its defense. *See* United States v. Brown Univ., 5 F.3d 658, 667 (3d Cir. 1993).

91. *See Marjorie Webster*, 432 F.2d at 654.

92. *See id.* at 652.

93. *Id.* at 652-53.

94. *See id.* at 653.

95. *See id.* at 654-55.

96. *See id.* at 654.

97. *See id.*

98. 5 F.3d 658 (3d Cir. 1993).

99. *Id.* at 667.

existed, then the Sherman Act governs, and the court must examine the reasonableness of the restraint. If there was no intent or purpose to affect commerce, the activity is not regulated by the Sherman Act, and therefore, there is no violation.

III. THE OVERLAP GROUP, COMMERCE, AND *UNITED STATES V. BROWN UNIVERSITY*

Consistent with this two-step analysis, courts must first examine whether the overlap group's financial aid activities are plainly commercial. Then, if the activities are not plainly commercial, courts must consider the intent or purpose of the overlap agreement.

A. *Is the Nature of the Overlap Group's Conduct Plainly Commercial?*

The Third Circuit in *United States v. Brown University*[100] equated financial aid policies to the calculation of tuition.[101] Determining base tuition and offering financial aid, however, are distinct practices. While tuition is calculated according to the cost to educate the student,[102] financial aid is determined by an individual's financial need.[103]

1. The Relationship Between Tuition and Financial Aid

Overlap group colleges set their tuition according to the college's cost to educate the student.[104] The base tuition of colleges in the overlap group, in fact, is lower than the actual cost to educate the student.[105] In addition to the lower price which all students receive, the colleges offer gifts to incoming students, generally in the form of grants or low-cost loans.[106]

The overlap group decided to allocate its limited resources solely on the basis of a student's financial need.[107] To determine this need, they agreed on a formula and met annually to insure that jointly admitted students received similar financial aid awards.[108] As a corollary to this agreement, the colleges agreed not to consider a student's financial ability to pay in admission decisions.[109] Therefore, they would not deny admis-

100. 5 F.3d 658 (3rd Cir. 1993).
101. *See id.* at 666.
102. *See id.* at 682 (Weis, J., dissenting).
103. *See id.* at 662.
104. *See id.* at 682 (Weis, J., dissenting).
105. *See id.* at 666; Carol Jouzaitis, *MIT Insists Student Aid Plan Not Fee Fix*, Hous. Chron., July 12, 1992, at A2.
106. *See Brown*, 5 F.3d at 681 (Weis, J., dissenting).
107. *See Brown*, 5 F.3d at 662; DePalma, *supra* note 8, at A17; Yoder, *supra* note 7, at A23.
108. *See Brown*, 5 F.3d at 662-63; DePalma, *supra* note 8, at A17.
109. *See Brown*, 5 F.3d at 682 (Weis, J., dissenting) ("As a part of their perceived responsibility to society, MIT and the other Ivy League schools adopted a policy of admitting students based on academic, and not financial, ability."). Furthermore, it is cer-

sion to a borderline student who could make only a small monetary contribution to her tuition.[110]

The Third Circuit examined whether the overlap group's actions should be considered plainly commercial under the Sherman Act.[111] Judge Robert E. Cowen, writing for the majority, focused on the relationship between financial aid and tuition.[112] Financial aid exists only in relation to tuition. As the court pointed out, a student is not free to take a financial aid award and apply it to another college.[113] Thus, Judge Cowen reasoned, financial aid is a "discount" on the cost of tuition, and therefore is plainly commercial: "The amount of financial aid not only impacts, but directly determines the amount that a needy student must pay to receive an education at MIT. The financial aid therefore is part of the commercial process of setting tuition."[114]

When viewed in this fashion, financial aid does appear to be used as a tool in commerce; however, this naked picture of financial aid belies the nature of the financial aid system and ignores the purposes of the Sherman Act. Calculating tuition and determining financial aid are distinct functions. Tuition is set according to the expense of operating the institution—the cost to educate the student.[115] Financial aid, on the other hand, is determined according to a student's financial need.[116] It is not calculated as a discount to the normal cost, the way a loaf of bread, for example, might be discounted. A company discounts bread for a variety of reasons, but ultimately its objective is to increase profits, not to fulfill a perceived responsibility to society.[117]

Imagine, if possible, that bread-makers decide that they have an obligation to feed the hungry. In furtherance of that goal, they institute a price structure to allow the destitute to pay for the bread according to their financial assets. Assuming no one pays more than cost, would such an agreement be considered a violation of the Sherman Act? Attacking such an arrangement would certainly be an unnecessarily wooden application of the law.[118]

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tainly unusual and unbusiness-like for an entity to sell its services to people who do not have the money to pay, when others who can pay are in great supply.

110. As the dissent in *Brown* pointed out: "The record demonstrates that MIT receives over three times as many applications as it can accept and that it could fill its classrooms with students who are able to pay the full base tuition." *Id.* (Weis, J., dissenting).

111. *See id.* at 665-68.

112. *See id.*

113. *See id.* at 666.

114. *Id.*

115. *See id.* at 682 (Weis, J., dissenting).

116. *See id.* at 662.

117. *See id.* at 682 (Weis, J., dissenting).

118. As the Supreme Court stated in Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940), "we are not relegated to so mechanical an application of these cryptic phrases in the application of the Sherman Anti-Trust Act, for the Court has since so interpreted them as to give to the phrase 'restraint of trade or commerce' a meaning and content consonant with the legislative and judicial history of the Act . . . ." *Id.* at 509-510.

Similarly, the overlap group, as noted by Judge Joseph F. Weis, Jr., in his dissenting opinion, is not "compelled nor advised by business considerations, but only serves commendable social objectives."[119] The overlap group has instituted a system which makes it possible for all qualified students, regardless of financial position, to attend the member colleges.[120] At the same time, no student pays more than cost. Such a system simply does not restrain commerce. Rather, it aids those students who cannot afford the tuition.

2. The Benefit to the Overlap Group

Judge Cowen's opinion in *Brown* emphasized that MIT benefits from providing financial aid.[121] Judge Cowen noted that by distributing aid, MIT enables exceptional students who otherwise could not afford the tuition to attend.[122] He then stated that "[t]he resulting expansion in MIT's pool of exceptional applicants increases the quality of MIT's student body. MIT then enjoys enhanced prestige by virtue of its ability to attract a greater portion of the 'cream of the crop.' "[123] This conclusion, however, is unsupported.

First, the record does not support the assumption that the financial aid program enhances MIT's institutional prestige. MIT has long been a college of rich tradition and prestige.[124] Need-based financial aid is not likely to attract students sufficiently to enhance the college's reputation.[125] Rather, MIT could better attract the most qualified students by giving them full scholarships, regardless of need, and then filling the rest of the class with the many capable applicants who can afford to pay full tuition. MIT would thus get the "best and the brightest" by diverting all financial aid to the best qualified applicants, depriving only low-income students.

Second, though the school benefits by enabling exceptional students to attend, the financial aid program benefits society more than it promotes

119. United States v. Brown Univ., 5 F.3d 658, 683 (3d Cir. 1993) (Weis, J., dissenting).

120. The overlap system, known as the "Ivy Methodology," in fact, is quite similar to the federal system of disbursing financial aid, known as the "Congressional Methodology." *See* 20 U.S.C. §§ 1070-99 (1988 & Supp. III 1991). Though the Ivy Methodology generally results in less generous aid packages than under the Congressional Methodology, *see Brown*, 5 F.3d at 663, both methods focus solely on financial need, not on academic or other merit. *See id.* at 662 (discussing the Congressional and Ivy methods as determining aid based on "family assets" and "demonstrated need," respectively).

121. *See Brown*, 5 F.3d at 666-67.

122. *See id.* at 667.

123. *Id.*

124. MIT was founded in 1861 and currently has an operating budget of $1.1 billion and an endowment of $1.5 billion. *See id.* at 661. Its governing body is comprised of "distinguished leaders in science, engineering, industry, education and public service." *Id.*

125. Judge Weis notes in his dissent: "The students are the recipients of largesse, and any contribution they make in return has not been substantiated. No quid pro quo of substance exists." *Id.* at 684 (Weis, J., dissenting).

the college itself. The low-income applicants and society benefit from allowing a greater number of low-income applicants to participate in higher education. Economic diversity is increased and students from low-income backgrounds are educated. This benefit outweighs the advantage to MIT of admitting an only slightly more qualified student with significantly less financial resources.

Further, as the *Brown* dissent points out, "[t]he funds that are earmarked for student aid could instead be used to increase salaries as a means of attracting the very finest faculty."[126] Faculty reputation vitally contributes to a college's prestige and attractiveness.[127] Likewise, computers, housing, libraries, and other aspects of the college that require funding affect the college's reputation.

Moreover, alumni and philanthropists donate money to colleges, among other reasons, to allow students who cannot otherwise afford the tuition to matriculate.[128] If the money were funneled through a church organization, for example, instead of through a college, it would certainly be considered charity.[129] In both situations, granting money to aid in tuition payment is a donation, not a commercial discount in price.

Furthermore, the legislative history of the Sherman Act suggests that Congress did not intend for the Act to reach social causes.[130] The Supreme Court in *Apex Hosiery Co. v. Leader*[131] pointed out that the history of the Sherman Act emphatically supports the conclusion that " 'business competition' was the problem considered and that the act was designed to prevent restraints of trade which had a significant effect on such competition."[132] 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.[133]

Although setting tuition is regulated by the Sherman Act, financial aid is not. Offering financial aid and calculating tuition are distinct prac-

126. *Id.* (Weis, J., dissenting).

127. *See id.* (Weis, J., dissenting).

128. *See* Anthony DePalma, *Maxwell to Donate $10 Million to Polytechnic U.*, N.Y. Times, Sept. 18, 1991, at D17; George Judson, *Yale Sets Goal of $1.5 Billion in 5-Year Fund-raising Drive*, N.Y. Times, Mar. 3, 1992, § 1, at 46.

129. Judge Weis, in his dissenting opinion in *Brown*, pointed out that under the federal tax code, university-funded aid is "undoubtedly charitable." *See Brown*, 5 F.3d at 683 (Weis, J., dissenting).

130. *See* 21 Cong. Rec. 2658-59 (1890) (statement of Senator Sherman). Senator Sherman stated:

> I do not see any reason for putting in temperance societies [as a special exception] 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 . . . . You might as well include churches and Sunday schools.

Id.

131. 310 U.S. 469 (1940).

132. *Id.* at 493 n.15.

133. *See* NOW v. Scheidler, 968 F.2d 612, 618 (7th Cir. 1992) (citing 20 Cong. Rec. 1458-59 (1889)).

tices. Determining tuition is a business decision akin to setting the price for bread. Each is a market determination of how much the commodity is worth. In contrast, the amount of aid to be given away is a social decision in the same way that the amount of discounted bread to be given away to the destitute is a social decision that bread-makers are free to determine. Calculating financial aid is not a business decision, but rather a social determination that aid should be based solely on need. Therefore, need-based financial aid is not a plainly commercial activity under the Sherman Act.

B. *Was There Any Intent or Purpose to Affect Commerce?*

Since awarding financial aid is not a plainly commercial activity, the overlap group violated the Sherman Act only if it intended to affect commerce.[134] The overlap agreement established a financial aid formula to determine economic assistance solely on a prospective student's financial need.[135] This practice would allow all qualified students to attend regardless of their ability to pay.[136] This reflects a social policy decision—equity requires that financial aid decisions be based on financial need. Admittedly, this policy affects an applicant's decision by eliminating one factor, the amount of financial aid, from the process. However, this effect is incidental to the overlap group's equitable allocation of its gifts.[137]

When the effect on commerce is only an incidental result of a valid social objective, the Sherman Act is not implicated.[138] For example, the Eighth Circuit, in *Missouri v. NOW*[139] recognized that organizations may unintentionally affect commerce.[140] In *Missouri v. NOW*, the State of Missouri brought an action against NOW alleging that NOW's campaign for a convention boycott[141] of states which had not ratified the Equal Rights Amendment constituted a conspiracy in restraint of trade under

134. *See supra* part II.B.

135. *See* United States v. Brown Univ., 5 F.3d 658, 682 (3d Cir. 1993) (Weis, J., dissenting); DePalma, *supra* note 8, at A17; Yoder, *supra* note 7, at A23.

136. *See Brown*, 5 F.3d at 682 (Weis, J., dissenting). Judge Weis further points out

> [a]s a result of these policies, the record demonstrates that the number of students from minority groups and non-affluent families who attend MIT has increased dramatically in recent years. The government does not challenge the societal good that flows from these need-blind admission and need-based aid policies. Indeed, financial aid made available by the government is aimed at the very same objective.

Id. at 682-83 (citing Higher Education Act of 1965, 20 U.S.C. §§ 1001-1146a).

137. If agreeing to base aid solely on need is a violation, then should we force the colleges to give athletic scholarships? Band Scholarships? Drama scholarships?

138. *See, e.g.*, NOW v. Scheidler, 968 F.2d 612, 620-23 (7th Cir. 1992) (illegal conduct which had an economic impact on abortion clinics is not prohibited by the Sherman Act); Missouri v. NOW, 620 F.2d 1301, 1315-16 (8th Cir. 1980) (boycott of Missouri conventions by the National Organization for Women is not a Sherman Act violation despite its adverse economic impact).

139. 620 F.2d 1301 (8th Cir. 1980).

140. *See id.* at 1315.

141. NOW engaged in an "economic boycott campaign," refusing to hold their con-

the Sherman Act.[142] The Eighth Circuit, recognizing that Missouri was injured by NOW's campaign, nonetheless held that NOW did not violate the Sherman Act: "the finding by the district court . . . that NOW's campaign was intended to and did in fact injure Missouri in its relationship with its convention customers can mean no more than that Missouri sustained a *direct injury* as an *incidental* effect of NOW's campaign to influence governmental action."[143] Therefore, NOW did not violate the Sherman Act.[144]

Similarly, the purpose of the overlap agreement is not to injure the student or to affect interstate commerce, but rather to allocate the colleges' charitable resources in the fairest way possible. The overlap group is comprised of nonprofit organizations which, like the nonprofit accrediting institutions in *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools*,[145] sought neither to affect commerce nor to injure any student, but rather to develop the quality of the institutions in the fairest way possible.[146] Any injury to a prospective student by the overlap agreement is unintentional and incidental to the socially commendable goal of providing aid to all students who need it. The overlap group's financial aid policy is not plainly commercial,[147] and the overlap group did not evidence any intent to affect commerce.[148] Therefore, the overlap agreement does not violate the Sherman Act.

IV. JUDICIAL STANDARDS FOR DETERMINING AN "UNREASONABLE RESTRAINT OF TRADE:" WHICH STANDARD APPLIES?

Even if the financial aid policy of the overlap group is considered commercial, the policy is justified under the rule of reason standard.[149] Application of the per se and quick look standards is inappropriate because of the overlap agreement's unique characteristics. Furthermore, the procompetitive features of the agreement make the restraint reasonable.

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ventions in states which had not ratified the Equal Rights Amendment. *See id.* at 1302-03.

142. *See id.* at 1302.

143. *Id.* at 1315 (second emphasis added).

144. *See id.* at 1315-16.

145. 432 F.2d 650 (D.C. Cir. 1970). For a detailed discussion of the *Marjorie Webster* decision, see *supra* part II.B.

146. *See id.* at 652; United States v. Brown Univ., 5 F.3d 658, 661-62 (3d Cir. 1993). The *Brown* court stated:

> Although MIT could fill its entire entering class with students able to pay the full tuition, it utilizes a need-blind admissions system under which all admission decisions are based entirely on merit without consideration of an applicant's ability to pay tuition. . . . To provide admitted needy students with a realistic opportunity to enroll, MIT also is committed to satisfying the full financial aid needs of its student body.

Id.

147. *See supra* part III.A.

148. *See supra* part III.B.

149. For a discussion of the rule of reason standard generally, see *supra* part I.B.3.

A. *Applying the Per Se Approach*

The overlap agreement's distinctive characteristics make the application of the per se standard inappropriate.[150] First, the overlap agreement's object is not to maximize profits, but rather to benefit society. The Supreme Court in *Goldfarb v. Virginia State Bar*[151] cautioned against applying traditional antitrust concepts outside of conventional business activities. The court noted 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."[152]

In *Arizona v. Maricopa County Medical Society*,[153] for example, the Supreme Court applied the per se standard to two county medical societies that set maximum fee-schedules for medical services.[154] The Court emphasized, however, that "[t]he price-fixing agreements in this case . . . are not premised on public service or ethical norms."[155] This distinction plays an important role in the analysis. Price-fixing arrangements premised on profit-maximization clearly violate the Sherman Act.[156] Agreements based on ethical norms, however, require closer scrutiny to determine if the Act is violated.[157] Thus, the public service nature of the overlap agreement makes the application of the per se standard inappropriate.

In addition, the overlap group modeled its financial aid system after the federal government's system of financial aid.[158] Both systems base aid solely on need, rather than on academic or other merit.[159] Both systems also set up a formula for determining a student's need to ensure that similarly situated students are treated equally regardless of the individual college.[160] This suggests that the overlap group's policy, which in theory mimics the federal system, deserves more than cursory scrutiny.[161]

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150. For a discussion of the unique characteristics of the overlap group which make application of the per se standard inappropriate, see Donald R. Carlson & George B. Shepherd, *Cartel On Campus: The Economics and Law of Academic Institutions' Financial Aid Price-Fixing*, 71 Or. L. Rev. 563, 614-17 (1992). For a discussion of the per se standard generally, see *supra* part I.B.1.

151. 421 U.S. 773 (1975).

152. *Id.* at 788-89 n.17. *See also* FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 458-59 (1986) (noting that the Supreme Court has been "slow" to condemn rules adopted by professional associations as per se unlawful).

153. 457 U.S. 332 (1982).

154. *See id.* at 348-49.

155. *Id.* at 349.

156. *See id.* at 348-49.

157. *See id.*

158. *See* 20 U.S.C. §§ 1070-1099 (1988 & Supp. III 1991). Congress further approved the concept of need-blind admissions and agreement among schools on general principles for determining student aid in the Higher Education Amendments of 1992, Pub. L. No. 102-325, § 1544, 106 Stat. 448, 837 (codified at 20 U.S.C. § 1088 (Supp. IV 1992)).

159. *See* 20 U.S.C. § 1070a-1(a)(2).

160. *See* United States v. Brown Univ., 805 F. Supp. 288, 291-93 (E.D. Pa. 1992).

161. *See* Carlson & Shepherd, *supra* note 150, at 616.

Furthermore, the economic impact of the overlap agreement is unclear. As the Supreme Court stated in *FTC v. Indiana Federation of Dentists*,[162] "we have been slow . . . to extend *per se* analysis to . . . business relationships where the economic impact of certain practices is not immediately obvious."[163] No definitive evidence exists that the overlap agreement had any effect on the price of education at overlap colleges.[164] The per se standard, therefore, should not be applied to the overlap agreement.

B. *Applying the Quick Look Approach*

The quick look approach should only be applied in situations where anticompetitive behavior, such as higher price and output reduction, is readily apparent.[165] The district court in *United States v. Brown University*[166] applied the quick look standard.[167] The Third Circuit reversed, holding that the quick look standard should not be applied to the overlap agreement because of the "nature of higher education" and pro-competitive and pro-consumer features of the overlap agreement.[168]

The Supreme Court has previously applied the quick look standard to an agreement among colleges. In *NCAA v. Board of Regents*,[169] the Court applied the quick look standard to a television broadcast agreement among colleges.[170] The NCAA, in an attempt to limit adverse effects on attendance and to spread the participation in televised football games among as many universities as possible, limited the number of football games any one school could televise.[171] The Supreme Court declined to mandate the rule of reason analysis because the district court found that the agreement actually increased prices and restricted output.[172]

According to the Court, "[T]hese *hallmarks* of anticompetitive behavior place upon [the NCAA] a heavy burden of establishing an affirmative

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162. 476 U.S. 447 (1986).

163. *Id.* at 458-59 (citing Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979)).

164. In a laborious study of the overlap agreement, Professors Donald R. Carlson and George B. Shepherd concluded that the economic impacts were "not obvious," calling the effect of the agreement "intricate and sometimes counterintuitive." *See* Carlson & Shepherd, *supra* note 150, at 616.

165. *See* NCAA v. Board of Regents, 468 U.S. 85, 113 (1984) (applying a truncated rule of reason standard, though not labeling it the "quick look").

166. 805 F. Supp. 288 (E.D. Pa. 1992), *rev'd*, 5 F.3d 658 (3d Cir. 1993).

167. United States v. Brown Univ., 5 F.3d 658, 664 (3d Cir. 1993) (analyzing the proceedings below).

168. *See id.* at 678. For a discussion of the quick look standard generally, see *supra* part I.B.2.

169. 468 U.S. 85 (1984).

170. *See id.* at 91-92 (applying a truncated rule of reason analysis though not employing the term "quick look").

171. *See id.*

172. *See id.* at 107 ("Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference.").

defense . . . ."[173] Such "hallmarks" of anticompetitive behavior do not exist in the overlap case. No evidence suggests that the overlap agreement has caused or is likely to cause output reduction—enrollment has not declined.[174] Nor has it been determined whether the overlap agreement affects the price of education at member colleges.[175]

Furthermore, the distinctive characteristics that make per se analysis inapplicable[176] also make application of the quick look approach inappropriate. The overlap group has offered sound justifications for its practices.[177] The overlap agreement allows the schools to fulfill the socially desirable goal of providing all needy students with financial aid.[178] Therefore, the quick look presumption of competitive harm does not apply.

C. *Applying the Rule of Reason Approach*

Since both the per se and quick look standards do not apply, the overlap agreement must be analyzed under the rule of reason standard.[179] The rule of reason analysis is limited to examining the agreement's effect on competition.[180] Thus, social justifications, such as aiding minorities, are not considered when determining the reasonableness of the restraint.[181] The overlap agreement's pro-competitive characteristics, however, make the agreement lawful.

The overlap agreement does not diminish the colleges' incentive to keep costs down and preserve its resources. Antitrust law is based on the belief that, through competition, producers will strive to satisfy the consumer's wants at the lowest price with the sacrifice of the fewest resources.[182] Eliminating competition based on financial aid, however, does not eliminate the overlap colleges' desire to save resources. The disbursement of financial aid is markedly different from the setting of price in a market economy. For example, when bread-makers fix the price of bread, little incentive exists to conserve resources or keep costs down, since they are happily making a profit with no worry of competition. In contrast, when a college offers aid, it is actually taking money out of a fund and using it to pay that student's tuition. Even though competition among schools based on aid is eliminated, the college still

173. *Id.* at 113 (emphasis added).
174. *See* United States v. Brown Univ., 5 F.3d 658, 674 (3d Cir. 1993).
175. *See id.*
176. *See supra* part IV.A.
177. *See id.*
178. *See* Parloff, *supra* note 13, at 78.
179. *See supra* part IV.A-B.
180. *See* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978) ("Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions."). For a discussion of the rule of reason generally, see *supra* part I.B.3.
181. *See id.*
182. *See* Sullivan, *supra* note 40, at 2-3.

takes money out of its assets that it could use elsewhere. Since the college diminishes its resources by giving need-based financial aid, it still has an incentive to keep its costs down, thereby preserving its resources.

In addition, although the overlap agreement eliminates competition for students based on price, the agreement has other pro-competitive effects. Antitrust purists argue that competition is the best method for allocating resources and will ultimately produce "not only lower prices, but also better goods and services."[183] The Supreme Court, however, has recognized that the Sherman Act does not sanction a blind adherence to competition. Rather, the Sherman Act accepts certain arrangements which are "designed to increase economic efficiency and render markets more, rather than less, competitive."[184] The Third Circuit recognized this and thus remanded the case to the district court for consideration of the overlap agreement's pro-competitive effects.[185]

The overlap agreement has two important pro-competitive effects that the district court failed to fully consider. First, it improves the quality of education at schools.[186] The Supreme Court has recognized improvement in the quality of a service that enhances the public's desire for that service as one possible pro-competitive virtue.[187] The district court in *Brown* noted that it cannot be denied that "cultural and economic diversity contributes to the quality of education and enhances the vitality of campus life."[188] Cultural and economic diversity has increased considerably as a result of the overlap agreement, therefore increasing the quality of the service.[189]

Second, the overlap agreement increases consumer choice by making education more accessible to a greater number of students. Enhancement of consumer choice is a traditional objective of antitrust law and has also been acknowledged as a pro-competitive benefit.[190] As a result of the overlap agreement, available resources are spread among more needy students than would be the case if some students received aid in

183. *Professional Eng'rs*, 435 U.S. at 695; *accord* Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951) ("The heart of our national economic policy long has been faith in the value of competition.").

184. Northwest Wholesale Stationers v. Pacific Stationery & Printing Co., 472 U.S. 284, 295 (1985) (quoting Broadcast Music, Inc. v. CBS, 441 U.S. 1, 20 (1979)); United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978) (substantially the same quote); *accord* Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360 (1933) ("The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it."). For a discussion of the overlap agreement and its relationship to competition written prior to the Third Circuit decision in United States v. Brown Univ., 5 F.3d 658 (1993), see Selwyn, *supra* note 85, at 156-62.

185. *See Brown*, 5 F.3d at 674, 678.

186. *See id.* at 674.

187. *See* NCAA v. Board of Regents, 468 U.S. 85, 114-15 (1984).

188. United States v. Brown Univ., 805 F. Supp. 288, 306 (E.D. Pa. 1992), *rev'd*, 5 F.3d 658 (3d Cir. 1993).

189. *See* United States v. Brown Univ., 5 F.3d 658, 682 (3d Cir. 1993) (Weis, J., dissenting).

190. *See NCAA*, 468 U.S. at 102; *Brown*, 5 F.3d at 675.

excess of need.[191] The overlap system maximizes the number of students able to afford an education at an overlap member college.[192] Removing financial obstacles for the greatest number of talented but needy students increases students' access to the colleges, thereby widening consumer choice.

In addition to its pro-competitive effects, the overlap agreement avoids the great enemy of antitrust analysis—output reduction. In Senator Sherman's speeches during debate on the Sherman Act,[193] in treatises,[194] in articles,[195] and in most relevant Supreme Court opinions,[196] output reduction is considered the "paradigm inefficiency."[197] With the overlap agreement in place, however, there has been no such negative effect. As tuition increased over the last thirty-four years, enrollment has not declined.[198] Therefore, the overlap agreement does not restrict output.

Given the overlap agreement's pro-competitive features and its failure to cause output reduction, the primary evil attacked by the Sherman Act, the overlap agreement passes the rule of reason test and thus does not violate the Sherman Act.

CONCLUSION

After a two-year investigation and two-and-one-half years of litigation, MIT and the overlap agreement are back where they started. The settlement between the Justice Department and MIT validates the majority of the overlap group's policies, only prohibiting the discussion of individual aid awards.[199] Antitrust law, however, is not back where it started. Instead, the Third Circuit has expanded the scope of Section 1 of the Sherman Act beyond the intent of the framers and the opinions of the Supreme Court.

The overlap agreement is an attempt by the member colleges to distribute their limited funds in the fairest way possible. The overlap colleges are private institutions which have no legal obligation to provide

191. *See Brown*, 5 F.3d at 675.

192. *See id.*

193. *See* 21 Cong. Rec. 2460 (1890).

194. *See* Phillip E. Areeda, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1511 (1986).

195. *See* Robert H. Lande, *Wealth Transfers at the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L.J. 65, 88, 92-93 (1982); Thomas A. Piraino, Jr., *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. Cal. L. Rev. 685, 719 (1991).

196. *See, e.g.*, NCAA v. Board of Regents, 468 U.S. 85, 109-15 (1984) (analyzing the effect on output of an agreement among colleges to limit the number of games each college would televise).

197. *See* Carlson & Shepherd, *supra* note 150, at 622.

198. *See id.* For example, in 1989 enrollment was 993, in 1985 enrollment was 1061, in 1983 enrollment was 1075, and in 1981 enrollment was 1031. *See* Barron's Profiles of American Colleges 482 (17th ed. 1990); *id.* at 417 (15th ed. 1986); *id.* at 415 (14th ed. 1984); *id.* at 367 (13th ed. 1982).

199. For a review of the settlement, see *supra* note 2.

financial assistance. Nonetheless, the colleges offer grants and low-cost loans so that all admitted students, regardless of their financial circumstances, can attend. This beneficence does not resemble the manipulative "trusts and combinations" which Senator Sherman attacked.[200] Nor do these social policies resemble the endeavor of a business league which sets a minimum price for services in order to inflate profits.[201] Like the bread-makers that help feed the hungry, the overlap group gives aid to the people who need it. The Sherman Act does not prohibit that.

200. *See* Earl W. Kintner, The Legislative History of the Federal Antitrust Laws and Related Statutes 112-14 (1978); *see also, e.g.*, Apex Hosiery Co. v. Leader, 310 U.S. 469, 492-93 (1940) ("[The Sherman Act] was enacted in the era of 'trusts' and 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern.").

201. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 776-78 (1975).