Journal of College and University Law
Winter, 1999

*451 THE SHERMAN ACT ANTITRUST PROVISIONS AND COLLEGIATE ACTION: SHOULD THERE BE A CONTINUED EXCEPTION FOR THE BUSINESS OF THE UNIVERSITY?

Jeffrey C. Sun [FNa1]
Philip T.K. Daniel [FNaa1]

Attorneys; Jeffrey C. Sun, Philip T.K. Daniel

INTRODUCTION

The federal antitrust laws are known for their particularly complex and inconsistent language. [FN1] Accordingly, courts have specifically recognized the Sherman Act as antitrust legislation containing broad and ambiguous language. [FN2] Senator Sherman intended this broad, inclusive language and stated that the Sherman Act was meant to "g[o] as far as the Constitution permits Congress to go ...." [FN3] All commercial activities come within the purview of the act and violations are found when commercial activities have more than an incidental effect on competition. [FN4]

In contrast, noncommercial activities do not fall within the statutory language of the Sherman Act. When Senator Sherman presented this bill, he never anticipated that any conduct by an educational institution would constitute commercial conduct. [FN5] Consequently, the suggestion to add an explicit exception for educational institutions and churches was absurd. However, within the last twenty years, an upsurge of antitrust actions has been brought against colleges and universities as well as associated organizations. [FN6] Additionally, in the past twenty years, colleges and universities have interacted in more commercial conduct with the intent of maximizing institutional wealth ***452** and control. Sections 1 and 2 of the Sherman Act have been of particular interest to administrators in higher education.

Section 1 of the Sherman Act states, 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 hereby declared to be illegal. [FN7]

Judicial interpretations have held that only unreasonable restraints of trade violate § 1 of the Act, as opposed to every contract affecting commerce. [FN8]

Section 2 of the Sherman Act states, in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. [FN9]

Thus, unfair market controls violate the language within § 2 of the Act. [FN10]

This article discusses the notion that colleges and universities, as well as their regulatory bodies, are expected to act in a manner that preserves and promotes scholarship, service, and student development, otherwise known as the Collegiate Action Test. [FN11] When the educational institution or the regulatory association

fails to meet the Collegiate Action Test, a challenged restraint could potentially be classified as an act having more than an incidental effect. In other words, the restraint qualifies as a Sherman Act violation.

The Collegiate Action Test evaluates the nature and manner of the purported act. In a higher education context, when the nature and manner of the conduct deviates from the preservation and promotion of scholarship, service, and student development, the restraint of trade behavior will invariably be viewed by a court as an antitrust violation.

To explore the development of the Collegiate Action Test, Section I of the article addresses the creation and purposes of the Sherman Act. Section II illustrates effective claims against colleges and universities, including immunity defenses. Section III examines the judicial scrutiny in Sherman Act cases and specifically in cases involving colleges and universities. Section IV encompasses key Sherman Act cases for colleges and universities and the court's analysis of each case. Parts A and B focus on the governing bodies that dictate rules and regulations to the educational institutions. Parts C and ***453** D address restraints schools allegedly place on third parties and students. Part E concludes with the fertile area of proprietary establishments. Throughout Section IV, the application of the Collegiate Action Test determines the foreseeability of a Sherman Act violation.

I. BACKGROUND: THE SHERMAN ACT (1890)

A. Promulgation of the Sherman Act

In 1889, Ohio Senator John Sherman introduced the first antitrust bill to the Senate floor. [FN12] Congress enacted this antitrust legislation, attributed to Senator Sherman and named the Sherman Act of 1890, [FN13] to end the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organizations, and the effects these organizations brought in their ability to oppress and injure individuals. [FN14]

Senator Sherman proposed the bill with the mindset that improperly formed concentrations of economic power would be illegal. [FN15] At the time, business people were attempting to form trusts by pooling their resources in an attempt to gain complete control over an industry or a major section of an ***454** industry. [FN16] Indeed, John D. Rockefeller's Standard Oil originated this idea of collaborating resources; however, a court in Ohio prevented such a movement and held the trust unlawful. [FN17] Soon after, the Whiskey Trust, the Sugar Trust, the Lead Trust, and the Cotton-Oil Trust arose. [FN18] To alleviate the threat of potential conglomerations, Congress whole-heartedly supported the antitrust legislation and passed it in 1890. [FN19]

B. Purpose of the Sherman Act

The Sherman Act was aimed at preserving free unfettered competition as the rule of trade. [FN20] By carrying out such legislation, Congress determined that the market would yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political, and social institutions. [FN21] Simply stated, in the absence of trust formations, a free market economy is expected to flourish and provide maximum efficiency of services and goods. [FN22] The central evil that the Act sought to overcome was the combination of corporate giants or trusts, conspiring to hinder competition in order to raise prices and reap supracompetitive profits to the detriment of consumers (and competition). [FN23]

Prior to the enactment of the Sherman Act, common law doctrines dictated the laws of unreasonable restraints of trade. [FN24] Under the common law, courts typically found antitrust violations with contracts for the restriction or suppression of competition in the market, agreements to fix prices, acts to divide marketing

territories, apportionment of customers, production restrictions, and other similar practices which tended to raise prices or otherwise take from buyers or consumers the advantages accrued from free competition in the market. [FN25] The very nature of these agreements allowed the common ***455** law to blanketly label the trusts illegal; thus, the trusts were unenforceable at common law. [FN26]

The first Sherman Act challenge requiring legislative interpretation dealt with § 1 of the Act. Under a strict reading of the Sherman Act, § 1 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." [FN27] Fortunately, the courts, with careful and deliberate decisions, confined the scope of the Act to conduct that results in an unreasonable restriction of trade, not just "any" trade restraint. [FN28] In United States v. Joint Traffic Association, [FN29] the Supreme Court recognized that Congress could not have intended a literal interpretation of the word "every." In further support of this non- literal reading, in Chicago Board of Trade v. United States, [FN30] the Supreme Court once again disavowed any legislative intent to bar the making of "every" interstate contract. [FN31] If the courts had interpreted the language of the Sherman Act as more inclusive and broader, antitrust would have been even more difficult to understand and perhaps even inconceivable. [FN32]

II. THE DEVELOPMENT OF CASE LAW

A. Establishing a Claim: Effect on Commerce

Generally, antitrust actions under the Sherman Act have been narrowed to violations of either § 1 or § 2, or both. [FN33] The essential elements of a § 1 Sherman Act claim are: (1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market that affects interstate commerce; and (3) an accompanying injury. [FN34] A § 2 violation requires: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." [FN35] Violations under either section focus on the issue of trade or commerce between or among the states. [FN36]

***456** (1) Application of the Sherman Act to Nonprofit Entities

A restraint of trade occurs when the combining of economic powers or possession of singular control results in a substantial and adverse impact on interstate commerce. [FN37] In Goldfarb v. Virginia State Bar, [FN38] the petitioners/plaintiffs sought title examination services from attorneys for less than the rigidly established minimum fees that were set by the local bar association. As the state bar explicitly required adherence to bar association fee schedules, a Virginia attorney could not deviate from the floor pricing schedule without suffering disciplinary measures initiated by the bar association disciplinary committees. [FN39] Alleging that the set fee schedule was price-fixing, real estate purchasers brought a class action suit against the Virginia State Bar and the local bar association.

The district court struck down the minimum fee schedule as a violation of the Sherman Act. [FN40] The court was not convinced by the local bar's argument that personal services from a "learned profession" were not "trade or commerce" and therefore were exempt from the Sherman Act. [FN41] In making its determination, the trial court recognized a Supreme Court case that declared the services of real estate brokers to be commercial activities. [FN42] Furthermore, the court said, personal services and commodities alike constitute trade when carried on for profit; therefore, it said, the Sherman Act applies to services. [FN43]

The Court of Appeals for the Fourth Circuit reversed the trial court's decision. [FN44] The appellate court held that the state bar was exempt from Sherman Act liability and that the local bar association fee schedules were within the "learned profession" exemption as a defense to a Sherman Act violation. [FN45] The court also declared the local bar's actions insufficient to constitute a restraint of

interstate trade or commerce. [FN46] Since the court of appeals found the lawyering practice to be exempt from the Sherman Act, the lower court's acknowledgement that the fee schedule served as a substantial restraint of trade became irrelevant. [FN47]

***457** The Supreme Court reversed and found no exception for a "learned profession" under the Sherman Act. [FN48] The Court would not adopt such a broad exception because the "nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act." [FN49] Furthermore, the Court did not believe that a "public-service aspect of [a] professional practice" was a controlling factor in determining a § 1 Sherman Act exception. [FN50] In fact, the court ruled that the Sherman Act applied to price-fixing resulting from the quasi-judicial actions of the Virginia Bar Association, assumed to be a nonprofit association. [FN51] The Goldfarb decision, hence, serves as controlling authority in cases applying the Sherman Act to institutions of higher education. [FN52]

Prior to Goldfarb, the Sherman Act had not been applied to cases involving nonprofit organizations because the cases involved noncommercial activities. [FN53] In Apex Hosiery Co. v. Leader, [FN54] the Court acknowledged the purpose of the Sherman Act as a means of addressing commercial objectives. [FN55] Apex Hosiery also recognized the limitations of the Act with regard to certain organizations that normally have other noncommercial objectives, such as labor unions. [FN56] Nonetheless, the Court saw nonprofit organizations as entities that were capable of conducting commercial activities. In such an instance, nonprofit organizations would fall under the language of the Sherman Act. [FN57] Accordingly, Goldfarb held that an organization itself does not receive a blanket exception; however, if the activity in question is noncommercial in nature, the activity is not covered under the Sherman Act. [FN58]

***458** B. Immunity

(1) The Parker & Noerr-Pennington Doctrine

The Sherman Act pertains to a "person" or "persons," including "corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." [FN59] Nothing in the language of the Sherman Act or its legislative history mentions the Act's purpose to include restraint of trade by a state. [FN60] Consequently, the Supreme Court has recognized state immunity for qualifying federal antitrust challenges. [FN61] The test used to determine state immunity for federal antitrust actions is derived from the Supreme Court's decision in Parker v. Brown. [FN62]

Under the first prong of the Parker test, [FN63] the challenged restraint must involve a state policy mandating the anticompetitive restraint and this state restraint must be "clearly articulated and affirmatively expressed as state policy." [FN64] In Bates v. State Bar of Arizona, [FN65] the Arizona Code of Professional Responsibility, along with the Arizona Supreme Court Rules, prohibited attorney advertising. The policy was "clearly articulated" for the purpose of maintaining professional behavior. [FN66] Thus, the state policy, which mandated restraint, satisfied the first prong of the Parker doctrine.

The second prong of Parker requires that the policymaker actively supervise the state policy. [FN67] In the Bates case, the Arizona Supreme Court supervised attorney adherence to its rules and the Arizona State Bar monitored an attorney's professional behavior. [FN68] As both entities served as supervisors, particularly the Arizona Supreme Court as policymaker, the second prong was fulfilled. Thus, attorney rules were held immune from Sherman Act challenges. [FN69]

***459** Similarly, in Cowboy Book, Ltd. v. Board of Regents for Agricultural and Mechanical Colleges, [FN70] the court reiterated the rule that the Sherman Act was not intended to restrain state action or official action directed by the state. In

this case, the plaintiff, a bookseller, sought an antitrust action against Oklahoma State University. [FN71] The university's bookstore extended credit to students for textbook purchases. The credits were issued as a form of financial assistance. The court recognized these credits as an effective means and called the method "both necessary and convenient in aiding the students." [FN72] In analyzing whether there was a Sherman Act violation, the court factored in the following: "The Board of Regents' status, state supervision of the Board's financial affairs, and state policies regarding financial assistance to the students." [FN73]

The Board of Regents was created under the state constitution and essentially served as a department or function of state government. [FN74] "Thus, considering the weight which may be given" to the Board under state constitutional power, "the act of extending credit to students in this case could be construed as an act of sovereignty as long as the Board is within its express general powers." [FN75] Furthermore, the court found that the Board's accountability for the university's financial affairs and the state policy of providing financial assistance was sufficient to "displace competition in student affairs." [FN76] Indeed, the Board was charged with maintaining and operating the school's facilities, including the university bookstore, "for the comfort, convenience and welfare of their students [[.]" [FN77] In continuing to enumerate the Board's responsibilities, the court recognized that the Board's position embodied active and extensive state supervision. In short, Oklahoma State University met the Parker two-prong test and was immune from federal antitrust actions arising from credits extended to students for textbook purchases. [FN78]

***460** There is some contention that Parker's second prong is not always required. Justice Powell stated in dicta that "[i]n cases in which the actor is a state agency, it is likely that active supervision would also not be required, although we do not here decide that issue." [FN79] Adopting Powell's position in Porter Testing Laboratory v. Board of Regents for Oklahoma Agriculture and Mechanical Colleges, [FN80] the Court of Appeals for the Tenth Circuit held that the second prong should "not be applied to the activities of a state agency when there is no private entity involvement." [FN81] The plaintiff in Porter was a soil-testing lab service. The lab alleged that Oklahoma State University, in actions through its agricultural extension service, violated federal antitrust laws by monopolizing the market for certain agricultural testing. [FN82]

When an arm of the state carries out anticompetitive activity ostensibly pursuant to state authorization, the Parker doctrine which governs state immunity is "appropriate only if the replacing of free competition with some form of restraint or regulation is indeed authorized or approved by the state." [FN83] As a function of its duties, the Board of Regents for Oklahoma Agricultural and Mechanical Colleges was responsible for overseeing the agricultural extension work under the direction of Oklahoma State University. The University was specifically appointed as the vehicle for executing extension services, particularly to conduct a nonprofit venue for soil testing. [FN84] As the Parker doctrine does not require explicit mandates of specific and detailed legislation to indicate the state's authorization, the Oklahoma statute that granted the Board's powers to create extension services satisfied the "clearly articulated policy" requisite to immunity. [FN85]

Generally, after concluding that the governing authority has articulated a clear policy to displace competition for a desired purpose, the second prong of requiring active supervision of the policymakers follows. However, in Town of Hallie v. City of Eau Claire, [FN86] the Supreme Court held that the active supervision requirement did not apply to municipalities. Pursuantto Town of Hallie, the Porter court adopted the same analysis and struck the second prong requirement for defendant, a non-private entity. [FN87] It is undisputed that the Board's actions, along with the other named defendants, constituted conduct executed under the auspices of official departments of the ***461** State. [FN88] Therefore, the second prong was not necessary. Alternatively, the court examined the fulfillment of the second prong and found sufficient statutes mandating strict supervision of the extension services. [FN89] Thus, the Court of Appeals for the Tenth Circuit did not firmly apply a single prong test to state authorized restraints, but it saw no reason to require the second prong in the absence of a private entity-defendant.

Another means of seeking protection from the Sherman Act originated from Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc. [FN90] and United Mine Workers of America v. Pennington. [FN91] The Noerr-Pennington doctrine permits private, competitive actors, such as companies and unions, to attempt to influence governmental action without concern of a Sherman Act violation. [FN92] The rationale behind this acceptable behavior is that, in its absence, the branches of government would not be acting on behalf of the people. "[T]o a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." [FN93] Accordingly, organizations such as the American Bar Association may be found immune under the Noerr- Pennington doctrine for attempting to influence public policy relative to law school accreditation. [FN94] Likewise, educational institutions that collaborate to influence Congress will be found free of Sherman Act violations, with respect to acts performed for political influence. Therefore, a group of colleges and universities can collaborate for the purpose of persuading Congress to enact legislation exempting them from certain antitrust provisions. [FN95]

(2) The Eleventh Amendment and Immunity

One recent trend is to argue that states are immune from all federal antitrust legislation under the Eleventh Amendment, which would obviate the need for a Congressional exemption for state colleges and universities. The landmark case regarding Eleventh Amendment immunity is the Supreme Court's decision in Seminole Tribe of Florida v. Florida. [FN96] In Seminole Tribe, ***462** the Court, on federalism grounds, invalidated the provision of the Indian Gaming Regulatory Act which purported to make states amendable to suit. [FN97]

In Seminole Tribe, the Court stated that Congress lacked authority under the Commerce Clause to abrogate the states' Eleventh Amendment immunity, notwithstanding a clear statement of intent. [FN98] Justice Stevens, in dissent, argued in a footnote that the majority's decision would prohibit the enforcement of federal antitrust legislation against the states because federal courts have exclusive jurisdiction. [FN99] Justice Rehnquist, writing for the majority, countered in a footnote that "contrary to the implication of Justice Stevens' conclusion, it has not been widely thought that the federal antitrust ... statutes abrogated the States' sovereign immunity." [FN100] Some courts have noted the confusing message of the battling footnotes and avoid the constitutional question altogether in antitrust cases. [FN101]

One court cited Seminole Tribe for the proposition that a university enjoys Eleventh Amendment immunity in an antitrust case. [FN102] In fact, the "overwhelming majority" of courts hold that state colleges and universities enjoy Eleventh Amendment immunity in a variety of arenas. [FN103] Most courts do not ***463** hold state colleges and universities automatically immune, but instead investigate a variety of factors. [FN104] "[T]here are many factors which must be considered ..., the most significant is whether any liability against the agency must be paid from public funds in the state treasury." [FN105] However, a state college or university cannot "create its own immunity" by structuring finances in such a way that any judgment would necessarily be paid partially from state funds. [FN106] Finally, although courts are reluctant to find waiver, [FN107] state colleges and universities will want to prevent the inadvertent waiver of any possible Eleventh Amendment immunity in antitrust cases.

III. JUDICIAL SCRUTINY UNDER THE SHERMAN ACT

During the last hundred years of the Sherman Act's existence, federal courts have applied several tests for antitrust analysis. The two commonly utilized forms of judicial scrutiny have been the per se rule and rule of reason. [FN108] Most recently, an intermediate test has been applied in the higher education context. [FN109]

***464** A. Per Se Rule

The first declared form of antitrust judicial scrutiny recognized by the courts is the per se rule. The creation of the per se rule has been attributed to Addyston Pipe & Steel Co. v. United States. [FN110] "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." [FN111] The rule simply places a presumption of unreasonableness on contracts restraining trade based on "business certainty and litigation efficiency." The per se rule is appealing because of its simple application and arguably much more efficient means of analyzing antitrust cases. In Northern Pacific Railway Company v. United States, Justice Black rationalized the use of the per se rule:

> This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable-- an inquiry so often wholly fruitless when undertaken. [FN112]

Although the courts are generally reluctant to find all inquiry into reasonableness "wholly fruitless" and declare a restraint illegal per se, clear violations have occurred in the following areas: boycotting, [FN113] indirect price fixing, [FN114] direct price fixing and bid rigging, [FN115] horizontal conspiracy to injure a direct competitor, [FN116] and vertical conspiracies. [FN117]

***465** There are also instances where the courts have been wary to assert the presumption of unreasonableness, such as vertical maximum price fixing, [FN118] rules adopted by professional associations, [FN119] and mergers with competitors. [FN120] The broad language of the Sherman Act's reference to the "restraint of trade" has been recognized as broad and adaptable to a court's desired interpretation as with constitutional provisions. [FN121] Early in the Sherman Act history, Judge Taft wrote:

> It is true that there are some cases in which the courts, mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not. [FN122]

Accordingly, for some courts, the strict liability characteristic of the per se rule has not been appealing. [FN123] Consequently, decisions that are strictly based on the nature of the restriction challenged under the Sherman act have been undesirable. [FN124]

***466** During the infancy stage of the Sherman Act, the case of Jellico Mountain Coal served as a test. [FN125] The case arose when the government charged the Nashville Coal Exchange ("NCE") with controlling Nashville's coal market. The NCE held 80% of the market and excluded non-member access to the coal industry. In making its decision, the Jellico court refrained from applying a strict per se rule, and instead applied a similar version to today's standard for conspiracies in restraint of trade. [FN126] Jellico has also been characterized as an illustration of a "modern cartel theory to a price- fixing episode" that occurred over 100 years ago. [FN127]

Since the case did not proceed on appeal, it serves very little value as precedent for courts today. [FN128] On the other hand, the historical significance of the case may be factored in the following manner: (1) "tacit collusion is difficult to organize when the number of sellers is large [[;]" [FN129] (2) any restraint of trade may be a violation of the Sherman Act if its purpose is to monopolize; [FN130] and (3) the per se rule as the courts see it today was not the first test to be applied.

B. Rule of Reason

The rule of reason allows for more analysis and deviates from the strict application of the per se rule. As its name suggests, the rule of reason requires the fact finder to decide whether the restrictive practice imposes an unreasonable restraint of competition under all the circumstances of the case. [FN131] For example, in Jefferson Parish Hospital District No. 2 v. Hyde, [FN132] the hospital created an exclusive contract for anesthesiological services. After reviewing the record, the Court determined that no unreasonable restraint on trade existed. Specifically, the Court stated: "The record sheds little light on how this arrangement affected consumer demand for separate arrangements with a specific anesthesiologist." [FN133] When the per se rule is an improper application, the plaintiff bears the burden of proof that the restrictive conduct unreasonably restrained competition and violated the Sherman Act. [FN134]

The very nature of the industry serves as a justification for applying the rule of reason. In Jefferson Parish, the market itself was not defined. Furthermore, "[t]he market is not necessarily the same as the market in which hospitals compete in offering services to patients; it may encompass competition ***467** among anesthesiologists for exclusive contracts such as the ... contract [at issue here] and might be statewide or merely local." [FN135] The Court noted that "the range of alternatives open to the patient would be severely limited by the nature of the transaction and the hospital's unquestioned right to exercise some control over the identity and the number of doctors to whom it accords staff privileges." [FN136] For that reason, the court considered that the very nature of the anesthesiological services industry necessities a reasonable limitation, as implemented in this case. Similarly, the courts have followed the industry rationale to justify applying the rule of reason to higher education cases. [FN137]

As a general rule, if a court has some doubt as to the applicable antitrust rule, the judge will scrutinize the case under the rule of reason. [FN138] Doubts tend to exist in the application of the per se rule, and according to the Supreme Court, determination of the proper rule includes factoring the extent to which the practice or restraint threatens the "central nervous system of the economy." [FN139] In Chicago Board of Trade v. United States, [FN140] Justice Brandeis explained the rule of reason:

> 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 to which the restraint is applied; 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. [FN141]

The application of the rule of reason has been applied in nearly all theories asserted under federal antitrust litigation, including vertical maximum price-fixing, [FN142] non price-fixing vertical restraints, [FN143] limiting cooperative ventures, ***468**[FN144] state statutes violating antitrust laws, [FN145] foreign states' exclusive rights contracts, [FN146] and professional services' boycott. [FN147]

C. "Quick Look" or "Abbreviated" Rule

The "quick look" or "abbreviated" rule of reason is the latest approach formulated for antitrust judicial scrutiny. The rule has also been coined as the "NCAA Approach" [FN148] because the rule originated from National Collegiate Athletic Association v. Board of Regents of University of Oklahoma. [FN149] The case of

Board of Regents of University of Oklahoma dealt with antitrust violations of horizontal price fixing and output limitations. [FN150]

In Board of Regents of University of Oklahoma, the Court recognized this particular restraint as traditionally illegal per se. [FN151] Nevertheless, the Court opted not to analyze the case under the per se rule. Although the Court would have easily applied the per se rule to a similar situation involving commercial entities, the NCAA was recognized as an "industry in which horizontal restraints on competition are essential if the product is to be available at all." [FN152] Consequently, the Court employed what has been referred to as the "quick look" or "abbreviated" rule of reason analysis because elaborate data was not necessary and the conduct involved would normally fall under the per se rule. [FN153] In short, "[a] number of factors, including most prominently the structure of the industry involved and the nature" of the activity, are generally considered before determining the judicial scrutiny, particularly in the context of education. [FN154]

The "quick look" rule of reason analysis has not been widely used. In fact, the use of this judicial scrutiny is arguably limited and has only been applied to the case in which the rule originated. At the same time, it appears highly unlikely that the per se rule would be applied to challenges made within the education context. For the most part, a presumption against illegality still exists in antitrust suits within an educational setting where the educational institution asserts a defense related to scholarship, service, or student development. [FN155] Thus, in lieu of a per se analysis, courts are more inclined to apply the presumption and scrutinize a case within the educational context under a "quick look" rule of reason.

***469** IV. SHERMAN ACT APPLICATION TO SPECIFIC HIGHER EDUCATION ENVIRONMENTS

A. School Accreditation and Student Admissions

"The 'business' of a university is education, and its vitality ultimately must depend on academic policies...." [FN156] These policies generally establish the curriculum, student admissions, and faculty practices. Upon meeting specifically stated guidelines, a school may be granted an accredited certification establishing its adherence to the accrediting committee's standards. "Program accreditation is a mechanism for quality assurance that has become almost universal." [FN157] In a decision to grant or renew a school's accredited standing, the courts have traditionally given deference to the academic accreditation association. [FN158] Likewise, decisions involving Sherman Act challenges against accrediting associations have been consistent with this deferential view of favoring the accrediting associations. [FN159] Thus, courts generally respond to antitrust challenges that have been filed against accrediting associations by following the Collegiate Action Test.

The Sherman Act prohibits unreasonable restraints of trade within the commercial setting, "not ... the noncommercial aspects of the liberal arts and the learned profession." [FN160] In Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools, Inc., the school brought an action against the Middle States Association of Colleges and Secondary Schools ("Middle States"), the regional accreditation association. Marjorie Webster Junior College ("Marjorie Webster") was a proprietary college for women. In 1966, the school applied for accreditation to Middle States. Middle States declined consideration of Marjorie Webster on the grounds that the school was "not 'a nonprofit organization with a governing board representing the public interest."' [FN161] Soon after, Marjorie Webster filed suit against Middle States under § 3 of the Sherman Act. [FN162]

The district court favored Marjorie Webster's contention that Middle States violated § 3 of the Sherman Act, as the organization inhibited the college's ***470** ability to compete in the field. [FN163] The court also found Middle States in violation of the Fifth Amendment based on its policy to deny accreditation to all proprietary schools, a policy that was described as arbitrary, discriminatory, and unreasonable. [FN164] With the finding that the injury caused was irreparable, the

district court ordered that Marjorie Webster be accredited. Middle States appealed and the appellate court stayed the lower court's order during the appeal period.

The noteworthy appellate decision held the Sherman Act inapplicable to accreditation policies. [FN165] Specifically, the court stated "that the circumstances are not such as to warrant judicial interference with the accreditation and membership policies of Middle States." [FN166] As the objectives set forth by Middle States were not commercial, the accreditation policies could not create a Sherman Act violation. As the court stated, "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." [FN167] Indeed, the noncommercial aspect of accreditation was not even in dispute. [FN168]

In dicta, the chief judge of the Court of Appeals for the District of Columbia Circuit acknowledged the possibility of commercial motives within the accreditation setting, which could potentially violate the Sherman Act. [FN169] In a footnote, the judge cited an example of such a case: "[I]f accreditation were denied any institution purchasing textbooks from a supplier who did not provide special discounts for association members, it would be hard to imagine other than a commercial motive for the action." [FN170] However, the facts in the case did not model a commercial violation and the motive for the policy was noncommercial with a focus on the public's interest.

Additionally, Middle States' policy at most imposed only a minimal burden on commercial activity. To illustrate, the court noted the following: (a) the school maintained its accreditation status with the District of Columbia Board of Education; (b) Marjorie Webster was not precluded from listing itself in any of the major publications with college lists; (c) the status did not ***471** affect the students' financial aid funding; and (d) the nonaccreditation did not prevent students from receiving credit after transferring to an accredited institution. [FN171] In sum, Marjorie Webster could not demonstrate a deprivation of a substantial professional advantage nor did the school provide any evidence that Middle States intended to maintain a monopoly or unreasonably restrain trade. Middle States' denial of Marjorie Webster's accreditation status amounted to only an incidental effect and thereby was permissible and sufficient to withstand a federal antitrust action.

In another accreditation antitrust suit, the Court of Appeals for the Third Circuit held that the American Bar Association ("ABA") accreditation guidelines did not invoke a Sherman Act violation. [FN172] Moreover, the court sustained the lower court's decision entitling the ABA immunity under the Noerr Doctrine. [FN173]

In 1921, the ABA established its standards of accreditation for institutions of legal education. [FN174] For many years after, the ABA petitioned state supreme courts to recognize ABA accredited schools. [FN175] Although legal education from an ABA accredited school satisfies the legal education requirement for all states and the District of Columbia, many states provide other alternatives that satisfy the legal education requirement. [FN176] Moreover, special petition procedures exist in all states that allow graduates from non-ABA accredited schools to be admitted to practice in the respective state.

Massachusetts School of Law ("MSL") opened its doors in 1988. Two years later, the Board of Regents of Massachusetts authorized the school to grant J.D. degrees. MSL's educative goal was to attract mid-life, working class, and minority students and to provide low cost, high quality legal education. [FN177] MSL was granted recognition by several surrounding states allowing MSL graduates to seek admission into the state's bar even though the institution did not comply with ABA accreditation standards. [FN178] MSL's noncompliance resulted in the denial of its application for provisional accreditation by the ABA. The ABA evaluation committee that denied MSL its provisional accreditation cited eleven areas where MSL failed to comply, including: "high student/faculty ratio, over-reliance on part-time faculty, heavy teaching load of full-time faculty, lack of adequate sabbaticals for faculty, use of a for-credit bar review class, failure to limit hours students may be employed, and ***472** failure to use the LSAT or give evidence validating its own admission exam."

[FN179]

Shortly after the notice of denial by the ABA, MSL filed an action against the ABA, the Association of American Law Schools, and the Law School Admissions Council. [FN180] The complaint essentially asserted the belief that these organizations conspired to enforce the ABA's anticompetitive accreditation standards through the following mandates:

> (1) fixing the price of faculty salaries; (2) requiring reduced teaching hours and non-teaching duties; (3) requiring paid sabbaticals; (4) forcing the hiring of more professors in order to lower student/faculty ratios; (5) limiting the use of adjunct professors; (6) prohibiting the use of required or for-credit bar review courses; (7) forcing schools to limit the number of hours students could work; (8) prohibiting ABA-accredited schools from accepting credit transfers from unaccredited schools and from enrolling graduates of unaccredited schools in graduate programs; (9) requiring more expensive and elaborate physical and library facilities; and (10) requiring schools to use the LSAT.

The complaint later sparked a Department of Justice investigation of the ABA. [FN181]

At trial, the district court granted summary judgment to the ABA and the other defendants indicating that the Noerr-Pennington doctrine precluded antitrust liability inasmuch as issues involving bar admission are made by states and "the Sherman Act does not prohibit ... anticompetitive restraint imposed by a state as an act of government." [FN182] Moreover, "even if the anticompetitive restraint results directly from private action, it is still immune if it is an "incidental effect" of a legitimate attempt to influence governmental action." [FN183] The judicial scrutiny adopted in this case was the rule of reason. [FN184]

MSL appealed and the appellate court affirmed the lower court's rule of reason analysis based on the context of the case. Professional organizations such as the ABA have traditionally been afforded deferential treatment in the courts. [FN185] Furthermore, the Supreme Court has said that it "has 'been slow to condemn rules adopted by professional societies as unreasonable per ***473** se,' even when the behavior resembles conduct usually subject to a per se approach." [FN186] In essence, the courts have asserted a rebuttable presumption of a noncommercial, justifiable restraint, amounting to nothing more than an incidental effect when a nonprofit, professional organization has been charged with a Sherman Act claim. [FN187]

MSL believed that the ABA was responsible for the school's deficiencies, but the appeals court found none of these to rise to the level of a Sherman Act violation. First, MSL disputed the ABA's "'carte-blanche delegated authority to decide who can take bar exams."' [FN188] MSL believed such authority represented an anticompetitive restraint. The court found that the ABA has never had unfettered hegemony over state bar concerns. Every state's bar admissions rules have been governed by the state's highest court. [FN189] According to the court, the ABA has never served as the ultimate admission decision-maker to any state. The ABA's role has been merely to determine the accreditation standards of the schools.

Second, MSL alleged injury from the denial of accreditation through the stigmatic effect in the market place. [FN190] The lower court found any injury incidental to the ABA's primary purpose and thus immune under the Noerr doctrine. [FN191] In arguing against the applicability of the Noerr doctrine, MSL relied heavily on Allied Tube & Conduit Corp. v. Indian Head, Inc. [FN192] which dealt with a code created by the defendants. [FN193] The defendants in Allied Tube had a "force in the marketplace independent of any government adoption (or petitioning for such adoption) in that there was a conspiracy among manufacturers, distributors, and consumers not to trade in products not approved by the code." [FN194] Thus, Allied Tube held that Noerr would be appropriate in traditionally noncommercial activity, but the application of the immunity doctrine would be determined through the actual context and nature of the activity, if the noncommercial activity was based on a restraint of trade. [FN195] In contrast, the court in MSL found the ABA's activities neither ***474** noncommercial nor a restraint of trade. [FN196] Furthermore, the court

held that Noerr immunity applied because the ABA undertook the required petitioning process and the harm suffered by MSL amounted to nothing more than an incidental effect. [FN197] The result of this case would have been substantially different if the ABA had attempted to convince anyone, particularly potential applicants or faculty, that MSL was not a suitable legal education institution. If such attempted influence had occurred, the court would undoubtedly have seen the effect as more than incidental and a violation of the Sherman Act for which the Noerr doctrine would not have applied. [FN198]

Third, MSL contended that the ABA's policies, if adopted by MSL, would have contributed to the anticompetitive polices of the ABA. Specifically, the school alleged that the ABA participated in price-fixing and boycotted non-ABA accredited schools. [FN199] The court recognized that the ABA was immune from "liability attributable to the state action in requiring applicants for the bar examination to have graduated from an ABA-accredited law school" and also acknowledged the application of the Noerr doctrine with respect to the stigma drawn from the school's non-ABA accredited status. [FN200] On the other hand, the ABA was not immune as to the actual enforcement of its standards. "The state action relates to the use of the results of the accreditation process, not the process itself. The process is entirely private conduct which has not been approved or supervised explicitly by any state." [FN201]

As this private action was not protected by immunity, MSL needed to only bring forth enough evidence to demonstrate price-fixing and boycotting; however, MSL failed to do so. [FN202] MSL contended that the ABA raised faculty salaries for the purpose of achieving accredited status, yet the record conflicted with such an assertion. MSL also asserted that the ABA's salary requirements created an inflated market cost for law professors. Again, the court found no justification for such an allegation because the school relied on adjunct faculty and all the full-time professors, other than the dean, had never been employed at another law school. [FN203] Therefore, the ABA's influence did not effect MSL's market for faculty as MSL involved a different faculty market. [FN204] In short, this court found MSL had failed to show an ABA anticompetitive policy of price-fixing with respect to faculty salaries.

MSL also argued that the ABA effectuated a boycott by precluding ABA accredited schools from accepting transfer credits from non-ABA accredited schools. [FN205] The court was not persuaded and stated that the disputed rule ***475** was a standard promulgated by the ABA. MSL did not demonstrate how the standard injured the school. Equally important, MSL admitted that the school discouraged its students from transferring and that the school would have denied admissions to a student believed to have intentions of transferring soon after admission. [FN206] As a result, the court found no boycott activity existed. [FN207]

The courts' treatment of Sherman Act accreditation cases mirrors antitrust challenges under the college admissions context. In Selman v. Harvard Medical School, [FN208] the plaintiff, a medical student enrolled at Universidad Autonama of Guadalajara, Mexico, applied to several medical schools in the United States. He sought admission under the "Federal Transfer Program" but was rejected by all the schools. [FN209] He filed suit on behalf of himself and similarly situated foreign students against the universities and the Association of American Medical Colleges. He asserted several claims, among them a § 1 Sherman Act violation. [FN210]

Selman properly recognized the non-existence of automatic exclusions under the Sherman Act, particularly the misconceived "learned professions" exemption. [FN211] Thus, under Goldfarb, the profession or organization itself cannot be exempted merely because of the type of profession or organization it purports to be, but rather, the court must examine and evaluate the organizational, commercial, and noncommercial motives. [FN212] Similarly, the Collegiate Action Test may be used to evaluate the likelihood of a Sherman Act claim: [FN213] whether the manner and nature of the conduct preserved and promoted scholarship, service, or student development.

In Selman, the plaintiff challenged an educational function that has traditionally

been viewed as noncommercial. The plaintiff could hardly say that a college's admissions criteria based on academic foundations are a commercial activity. [FN214] At best, academic admissions standards have an incidental effect on commercial aspects of medical education. [FN215] Selman believed that his rejection based on the admissions restrictions would adversely affect "the quality of care given to the public." [FN216] As Selman introduced no facts supporting ***476** adverse effects and as the university's decision centered around noncommercial aspects, the court dismissed the antitrust claim. [FN217]

To summarize, the courts in antitrust actions have afforded accrediting organizations deferential treatment analogous to traditional academic deference. In fact, cases demonstrate the existence of a general presumption that "the public interest is served by the promotion of enhanced education and training requirements." [FN218] Likewise, the courts respect the assiduousness involved in academic selection and defer to the exercise of professional, academic judgment. [FN219] In short, "[c]ourts are properly reluctant to intrude into the academic decision-making process except where invidious abuses are indicated." [FN220]

B. Athletics

College athletics has transformed into big business. [FN221] For 1997, the National Collegiate Athletic Association ("NCAA") reported an estimated $641 million in full and partial athletic scholarships awarded to student athletes by colleges and universities. [FN222] On the other hand, the NCAA prohibits a student-athlete from accepting most forms of income beyond the estimated cost of schooling. In fact, if any student-athlete is "caught taking gifts or money in violation of NCAA rules, the student-athlete risks being declared ineligible for competition." [FN223] The irony, however, is the wealth stored within the NCAA itself. A recent investigative report disclosed that "in the ***477** past 23 years the NCAA's total revenue has increased almost 8,000 percent, and the NCAA's $1.7 billion contract with CBS-TV for rights to the Division I basketball tournament is bigger than any single pro sports league deal with any network." [FN224] As a result, the NCAA has been challenged with several suits surrounding the Sherman Act.

In NCAA v. Board of Regents of University of Oklahoma, the Supreme Court held that the restraints placed on the broadcast of college football by the NCAA violated the Sherman Act. [FN225] During the age of television infancy, the University of Pennsylvania ("Penn") televised one of its 1938 season home games. Then from 1940 through the 1950 season, Penn televised all its home games. In 1950, a NCAA Television Committee was appointed to conduct preliminary surveys of the impact of televised games on college football attendance. According to the report, "the television problem is truly a national one and requires collective action by the colleges." [FN226] To advance the study, the NCAA employed the National Opinion Research Center ("NORC"). NORC was responsible for setting a systematic study to examine the attendance at the games after the program implementation. Thereafter, a television committee was appointed to create a NCAA television plan in an attempt to protect live attendance and maintain a competitive balance among amateur athletic teams.

The plan for 1951 consisted of the following: "only one game a week could be telecast in each area, with a total blackout on 3 of the 10 Saturdays during the season[; a] team could appear on television only twice during a season." [FN227] With the exception of Penn, the universities fully supported the plan. Penn dissented and announced that it would continue to televise its home games. The NCAA responded by placing the institution as a "member in bad standing." [FN228] Simultaneously, the four schools scheduled to play at Penn in the 1951 season refused to play. Penn then reconsidered its announcement and decided to follow the NCAA television plan.

For the next 25 years, 1952-77, the NCAA executed a similar system: the television committee circulated a questionnaire to the members and then used the responses to determine the following season's plan. In 1977, the NCAA abolished the regular membership approval and established "principles of negotiation" for future telecast

contracts. Soon after, the NCAA entered into its first 4-year contract granting exclusive rights to the American ***478** Broadcasting Companies ("ABC") for the 1978-81 seasons. [FN229] Thus, individual contracting was limited to ABC.

In 1981, the NCAA announced limitations on negotiating television contracts. Schools were restricted to negotiating with two designated "carrying networks." [FN230] The NCAA also created a separate agreement with each of the carrying networks to televise the restricted fourteen live games per season. In addition, "[e]ach of the networks agreed to pay a specified 'minimum aggregate compensation to the participating NCAA member institutions"' during the 1982-85 seasons. During this four year time period, compensation totaled $131,750,000. The plan also contained "appearance requirements" and "appearance limitations." [FN231] Finally, the rule that sums up the antitrust violation states that "[n]o member is permitted to make any sale of television rights except in accordance with the basic plan." [FN232]

In Board of Regents of University of Oklahoma, the Court found that the NCAA had imposed a horizontal restraint, "an agreement among competitors on the way in which they will compete with one another." [FN233] The Court acknowledged that this particular type of restraint has been treated as illegal per se. [FN234] However, the Court decided not to take such a route. In determining its judicial scrutiny, the Court expressly stated that such a deviation was not attributable to the Court's lack of experience, the nonprofit nature of the NCAA, or the preservation and encouragement of intercollegiate amateur athletics. [FN235] Instead, the Court departed from the traditional per se rule because the NCAA is an "industry in which horizontal restraints on competition are essential if the product is to be available at all." [FN236] Consequently, the ***479** Court employed what has been referred to as the "quick look" or "abbreviated" rule of reason. [FN237]

The court recognized the NCAA as the governing body in the best position to "preserve the character" of competition within college athletics. [FN238] "In order to preserve the character and quality of the 'product,"' limitations that qualify as horizontal restraints must be placed, particularly when an academic, noncommercial institution is involved. [FN239] Consequently, the Court believed that the NCAA was justified in limiting college football broadcasts and agreed with the following arguments:

(1) The NCAA television plan had no significant anticompetitive effect since it maintained no market power; [FN240]

(2) The television plan constituted a cooperative "joint venture" to assist in the marketing of broadcast rights; [FN241] and,

(3) The plan maintained a competitive balance among amateur athletic teams which has been characterized as a legitimate and important interest. [FN242]

Thus, it was proper for the NCAA to regulate such matters as the number of games the teams can play each season, the number of coaches and players a college football team can have, all of the rules of play for college football, the recruitment of high school athletes by the colleges, minimum standards of academic achievement for athletes, and the number of athletic scholarships a school can award. [FN243]

In determining the possible anticompetitive implications of limiting college football broadcasts, however, the original trial court in the case framed the issue as "whether there are other products that are reasonably substitutable for televised NCAA football games." [FN244] According to the findings of the District Court for the Western District of Oklahoma, intercollegiate football telecasts appealed to an audience "uniquely attractive" to advertisers. [FN245] Likewise, the trial court believed that competitors were "unable to offer programming that can attract a similar audience." [FN246] In other words, there were no reasonably substitutable products. Therefore, the NCAA possessed the market power or the ability to alter the interaction of supply and demand in ***480** the market. [FN247] The NCAA unsuccessfully attempted to justify this market control.

One of the NCAA's justifications for the television plan was the need for a cooperative joint venture. To support its argument, the NCAA reasoned that such an arrangement would enhance the product "by reaping otherwise unattainable efficiencies." [FN248] Although the Court did not view the telecast as a justifiable

scheme for attaining efficiencies, it accepted the possibility that "improvement[s] in quality of a product or service" may enhance the "public's desire for that product or service as one possible procompetitive virtue." [FN249] In Board of Regents of University of Oklahoma, the telecast plan restricted the university's ability to contract with the networks. Specifically, it dictated the number of televised games, established the telecast price, and prearranged the basic terms of each contract between the network and home team. [FN250] Furthermore, as the Court aptly stated, "[h]ere the production has been limited, not enhanced." [FN251] Thus, the NCAA provided a noncompetitive market only in an environment where there existed no unattainable efficiencies. [FN252]

As a second justification, the NCAA expressed an interest in protecting live attendance at the games. As the Court pointed out, this issue revolved around "the concern ... that fan interest in a televised game may adversely affect ticket sales for games that will not appear on television." [FN253] The rule impeded on fair competition and demonstrated the fears that the product would fail sufficiently to attract attendees to live home games when a televised game was simultaneously shown. [FN254] Indeed, the telecast regulations failed to meet the goal of "maintain[ing] the integrity of college football as a distinct and attractive product." [FN255] Consequently, the NCAA's control over output to increase revenues violated the Sherman Act.

Finally, the NCAA asserted the need for a competitive balance among amateur athletic teams. The Court focused on this issue in deciding to deviate from the application of the per se rule. [FN256] As the facts did not entail sophisticated statistical data or industry-wide analysis, the Court's use of the "quick look" rule of reason was sufficient to evaluate the effects on the defined market.

Under the "quick look" analysis, the Court held the telecast restrictions improper because the NCAA controls hindered competition and the NCAA ***481** had other provisions in place to better serve its goal of preserving amateurism within intercollegiate competitions. [FN257] Moreover, according to the findings of the trial court, consumption would materially increase if the controls were removed. [FN258] As equal competition maximizes consumer demand, the controls placed by the NCAA could not adequately serve the legitimate purposes prescribed under the Sherman Act. [FN259] Therefore, according to the court, the amateurism argument failed to support the notion of maintaining a competitive balance. Instead, the court indicated that the telecast policies merely controlled the output and price levels between all the member schools and were not intended to preserve and promote the goals of scholarship, service, or student development.

It has been noted that the NCAA typically engages in two distinguishable types of rulemaking policies. "One type is rooted in the NCAA's concern for the protection of amateurism; the other type is increasingly accompanied by a discernible economic purpose." [FN260] As courts have noted before, the Sherman Act is invoked in situations where the NCAA eligibility guidelines have "any nexus to commercial or business activities." [FN261] Thus, an unreasonable restraint of trade coupled with elements of an economic purpose may result in a federal antitrust violation. On the other hand, reasonable restraints that pass the Collegiate Action Test, those truly rooted in the preservation and promotion of amateurism and other non-economic purposes, survive antitrust challenges.

Courts have effectively utilized a "quick look" analysis to invalidate other NCAA regulations. In January 1991, the Division I members of the NCAA voted in the Restricted Earnings Coach Rule ("Rule"). The Rule's stated goal was to establish a restricted earnings category that would "encourage the development of new coaches while more effectively limiting compensation" ***482** to coaches within the restricted earnings category. [FN262] Likewise, the NCAA's objectives were "to level the playing field to obtain competitive equity, to provide for an entry-level coaching position and to cut costs." [FN263] In Law v. National Collegiate Athletic Association, the court declared the Rule a restraint of trade, and thus, that the NCAA regulation restricting coaches salaries was a violation of § 1 of the Sherman Act. [FN264]

Although the Law court called its analysis the rule of reason and only briefly mentioned the existence of the "quick look" doctrine, the scrutiny which followed seemed to apply the intermediate test developed by the Board of Regents of University of Oklahoma decision. [FN265] The Rule was inherently an anti-competitive restraint of trade. To justify the restraint, the NCAA was required to demonstrate that the Rule promoted a legitimate, pro- competitive goal. [FN266] Normally, the court would follow a per se scrutiny to analyze the Rule. [FN267] However, the court used what resembled a "quick look" rule of reason and found that the NCAA failed to provide evidence that the Rule furthers any of its objectives - cost cutting measures, promotion of amateurism, and establishment of competitive equities. [FN268] Under this abbreviated scrutiny, the NCAA was unable to show the nexus between the objectives and the Rule.

In contrast to the court's finding in Law, the NCAA was promoting a non-commercial, regulatory activity in Hairston v. Pacific-10 Conference ("Pac- 10"). [FN269] In Hairston, the court did not find a Sherman Act violation when the NCAA and Pac-10 imposed a two-year bowl ban against the University of Washington. The decision to sanction the University of Washington occurred after the University violated several NCAA rules and regulations. Several players on the University of Washington's football team filed the claim contending that the Pac-10 and the NCAA conspired to restrain trade when they imposed the penalty against the University. The school admitted the violations, yet the players asserted that the penalty was unduly harsh and excessive and thereby in violation of the Sherman Act. [FN270] The court disagreed and granted summary judgment for the defendants. In arriving at its decision, the court recognized the NCAA's and Pac-10's legitimate basis for imposing such a penalty. [FN271] Similar to student disciplinary dismissals, [FN272] the court acknowledged ***483** the link between the charge and the penalty and deferred its opinion to the policymaking authority. [FN273] In essence, the court acknowledged the fulfillment of the Collegiate Action Test.

Similarly, thecourts in Gaines v. National Collegiate Athletic Association [FN274] and Banks v. National Collegiate Athletic Association [FN275] declined to apply the Sherman Act after the students had violated the NCAA eligibility rules. The "no draft" rule precludes intercollegiate eligibility when an athlete requests to be named on a draft list or even a supplemental draft list. [FN276] The "no agent" rule precludes eligibility once the player agrees to be represented by an agent. [FN277] This rule may be violated by a written or oral agreement. Furthermore, the "no agent" rule does not require the agent to receive any financial benefit and applies to all agents, including family members. [FN278]

In Gaines, the plaintiff-athlete renounced his college eligibility and declared himself eligible for the National Football League ("NFL") draft. Gaines was not drafted by any of the teams. Afterward, Gaines was contacted by his older brother's agent, Mr. Greer, about the possibility of signing a free agency contract with an NFL team. Thus, Gaines accepted the consequences when he failed to decline Greer's possible offer. Unfortunately, Greer contacted Gaines the next day to inform him that the NFL team was no longer interested. As a result of these two actions, Gaines was found in violation of the "no draft" and "no agent" rules. [FN279]

The court disagreed with Gaines' framing of the NCAA eligibility rules as "unreasonably exclusionary" and "anticompetitive." [FN280] The court held that the antitrust laws do not apply to NCAA eligibility requirements because the requirements are noncommercial regulations that preserve amateurism. [FN281] Alternatively, the United States District Court for the Middle District of Tennessee believed that the NCAA requirements were established to benefit both the players and the public. In particular, the rules preserved amateurism in athletics. [FN282] More importantly, the rules offered a better product "by maintaining the educational underpinnings of college football and preserving the stability and integrity of college football programs." [FN283] Accordingly, the legitimate justifications for the rules refute the allegations that the rules were "unreasonably exclusionary" or "anticompetitive." [FN284]

As in Gaines, the plaintiff in Banks [FN285] violated the "no draft" and "no agent" rules established by the NCAA. Banks is slightly distinguishable from ***484**

Gaines because in Banks the plaintiff violated the regulations by publicly entering the football draft. However, despite the blatant violation, and in contrast to Gaines, the Banks court hesitated in exempting the "no draft" and "no agent" rule from antitrust scrutiny. The court evaluated the case and found that no competitive measures existed in this particular set of facts. [FN286] Furthermore, the court reiterated the Supreme Court's discussion in Board of Regents of University of Oklahoma which recognized most regulatory controls by the NCAA as justifiable means of fostering competition for amateur intercollegiate athletics. [FN287]

In sum, as a governing body for intercollegiate athletics, the NCAA has been granted wide discretion analogous to the academic judgment rule. Indeed, many times courts have deferred to the governing body and placed a presumption that the conduct or rule is noncommercial. Academic deference and a favorable presumption are most likely found when the conduct primarily focuses on the areas of scholarship, service, or student development and any anticompetitive features are, at most, incidental. Thus, the cases involving student-athletics line up in accordance with the Collegiate Action Test.

C. Tuition and Financial Aid

The costs of a college education have skyrocketed in the last twenty years and are expected to increase by approximately 5% every year for the next several years. [FN288] In fact, current college costs, including books, fees, and housing, are estimated at amounts of approximately $10,000 a year for a state university and $21,000 for a private college. [FN289] Of course, these amounts only represent estimations of the national average. Therefore, schools on the high-end represent startling figures for educating an individual.

To illustrate the national impact of funding and expenditures, statistics gathered by The Chronicle of Higher Education are reprinted below:

Average tuition and fees:

At public 4-year institutions $3,243

At public 2-year institutions $1,633

At private 4-year institutions $14,508

At private 2-year institutions $7,333

Total Estimated Student Aid Sources (1998-99): .. $60.5 billion [FN290]

***485** The statistics show that the distribution of financial resources is complex, [FN291] and with much at stake, commercial aspects have been recognized in the areas of financial aid and tuition. [FN292]

In United States v. Brown University, [FN293] the Court of Appeals for the Third Circuit held that a financial aid scheme at issue was an inherently suspect restraint of trade and thus remanded the case under a "quick look" rule of reason analysis. [FN294] This case, which could be more aptly named the MIT Financial Aid Challenge, arose as a result of the Ivy Overlap Group ("Overlap") collectively calculating the financial aid packages of its applicants. [FN295] Overlap consisted of Brown University, Columbia University, Cornell University, Dartmouth College, Harvard University, MIT, Princeton University, the University of Pennsylvania, and Yale University. The Overlap members agreed that no participating member would issue scholarships and that financial aid packages would be calculated in a uniform format utilizing the Ivy Methodology. [FN296] The Ivy Methodology differed from the traditional Congressional Methodology. [FN297] The net effect of the different calculation method altered the financial aid package downward. [FN298]

The Overlap financial aid investigation began in August 1989 when United States

Attorney General Richard Thornburgh ordered the Department of Justice to scrutinize the financial aid practices of all schools who had engaged in this cartel-like system. [FN299] Acknowledging the abuses within college finances, ***486**[FN300] a total of fifty-seven schools were targeted and investigated. [FN301] These schools included members of the Great Lakes College Association, [FN302] University of Southern California, and Stanford, [FN303] as well as a number of east coast schools. [FN304]

After reviewing its findings, the Department of Justice's Antitrust Division brought a civil action against Overlap for Sherman Act violations. [FN305] To remedy the improper activity, the Department of Justice sought injunctive relief. After having evaluated the situation, all the Overlap schools except MIT signed a consent decree with the Department of Justice. [FN306] MIT continued ***487** to contest the charge because it believed that no valid Sherman Act claim existed. [FN307]

At the time the case was filed, the law on antitrust as it applied to nonprofit organizations was firmly established. Courts had previously determined that acts performed with a noncommercial motive were immune from antitrust regulation. [FN308] "This immunity, however, is narrowly circumscribed. It does not extend to commercial transactions with a 'pure- service aspect."' [FN309] To classify an activity as commercial or noncommercial, the court first examined the "nature of the conduct in light of all the circumstances." [FN310] The nature of paying tuition, whether to a profit-making venture or a nonprofit organization, constituted a commercial transaction. In fact, MIT conceded the point that paying full tuition is a commercial activity. [FN311]

The court next analyzed the question of whether "providing financial assistance solely to needy students [is] a selective reduction or 'discount' from the full tuition amount, or a charitable gift?" [FN312] If the financial aid program amounted to a charitable gift, the court noted that the activity would exist beyond a commercial setting. Conversely, if the court recognized the financial award as a selective reduction or "discount" from the full tuition, the activity would fall within the category of a commercial transaction. [FN313] As the financial aid package directly defrayed the cost of the total school tuition and only applied at the issuing school, the court recognized the receipt of a financial award as restrictive. Thus, the court found the restrictive applications were limited and "only available in conjunction with a complementary payment," namely the amount of the student and family contribution. Therefore, the school's financial assistance did not constitute a charitable gift. [FN314]

MIT disputed the court's conclusion. It argued that granting financial assistance exclusively to needy students and calculating the amount of the contribution and aid did not qualify as a commercial activity. [FN315] MIT rationalized the charitable gift argument as noncommercial and argued that "the price needy students are charged is substantially below the marginal cost of ***488** supplying a year of education to an undergraduate student." [FN316] However, MIT's argument was displaced when MIT conceded that setting the full tuition amount was a commercial decision. [FN317]

Accordingly, the financial aid awards did not qualify as charitable contributions. [FN318] The court added that financial aid, which is a form of tuition discounting, cannot be classified as charity because the schoolreceives a tangible benefit. [FN319] MIT attempted to counter the court's response by illustrating the program's intangible benefits. Specifically, MIT emphasized the program's potential to increase its applicant pool, thus improving the quality of students admitted. In the past, the Supreme Court acknowledged that nonprofit organizations derived "significant benefit from increased prestige and influence," [FN320] which naturally flows from and increased quality of students. Conversely, MIT was able to achieve such prestige through locking its market forces and participating in a price-fixing collegiate cartel. [FN321] Under the challenged program, MIT had maintained an "overrepresentation of high caliber students." [FN322] In short, MIT managed to maximize its student selectivity and price while maintaining certain "benefits at a bargain." [FN323] Therefore, the challenged program arguably involved a commercial activity within a nonprofit setting.

After deciding that the program was a commercial activity and not a gift or charitable contribution, the court's next objective was the choice of judicial scrutiny. The trial court noted that MIT, along with the Ivy League Schools, adjusted financial aid packages in a uniform manner and prohibited ***489** deviations exceeding an immaterial amount of $500. Thus, Overlap participated in a horizontal price-fixing structure, defined as artificial price setting among industry competitors. [FN324] "Price fixing is the prime example and the best-known per se violation of the Sherman Act." [FN325] Accordingly, "the Supreme Court has consistently held [price fixing] to be illegal per se." [FN326] Despite this generally accepted rule, the trial court utilized the intermediate test, the "abbreviated" rule of reason analysis. [FN327] The choice of tests was predicated upon the viewpoint that "special scrutiny of restraints involving professional association[s]" should be made for Supreme Court consistency. [FN328]

Upon appeal, the Court of Appeals for the Third Circuit offered three possible rules: the rule of reason, the per se rule, and the intermediate rule, also known as the "abbreviated" or "quick look" rule of reason analysis. The appellate court was persuaded to utilize a different level of scrutiny and come to a different conclusion from the trial court, but the Third Circuit did not revert to the per se rule. In addition to MIT's resemblance to a professional association, the school represented a nonprofit educational institution that deviated from the typical economic models of competition. [FN329] "While it is well settled that good motives themselves 'will not validate an otherwise anticompetitive practice,"' [FN330] courts usually examine the party's intent in evaluating the effects of the alleged restraint. [FN331] The Third Circuit, therefore, applied the full rule of reason, but limited its application to antitrust claims within the higher education context. [FN332]

To convince the appellate court that a full rule of reason analysis was necessary, MIT successfully argued the following:

(1) by promoting socio-economic diversity at member institutions, Overlap improved the quality of the education offered; [FN333]

***490** (2) by increasing the financial aid available to needy students, Overlap provided some students who otherwise could not have been able to afford an Overlap education the opportunity to have one; [FN334]

(3) by eliminating price competition among participating schools, Overlap channeled competition into areas such as curriculum, campus activities, and student-faculty interaction; [FN335] and

(4) by enabling member schools to maintain a steadfast policy of need-blind admissions and full need-based aid, Overlap promoted the social ideal of equality of educational access and opportunity. [FN336]

The court was satisfied with the rationale and scrutinized the case under the full rule of reason. In declaring its decision, the court stated: "It may be that institutions of higher education 'require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently."' [FN337] Once again, a court deviated from the per se application in the educational context and closely evaluated the particular circumstances.

The arguments asserted by MIT were well-taken. The Third Circuit acknowledged MIT's points as possible valid defenses. The court stated that "[i]t is most desirable that schools achieve equality of educational access and opportunity in order that more people enjoy benefits of a worthy higher education." [FN338] Contrary to the lower court's opinion, the Third Circuit also wrote: "[I]t is a common good that should be extended to as wide a range of individuals from a broad range of socio-economic backgrounds as possible." [FN339] In other words, the appellate court supported the notion that social welfare justifications may at least change the rule of antitrust judicial scrutiny. [FN340]

To withstand scrutiny under the rule of reason, restraints must survive a two-prong test. First, the contested restraint must achieve its purported ***491** goals. [FN341] Furthermore, the restraint utilized must represent a substantially less restrictive alternative. [FN342] Arguably, in the Overlap situation the first prong

was fulfilled by the social welfare justification. [FN343] Specifically, MIT could have articulated the purported goals through simple economic analysis and student diversification statistics. Nevertheless, MIT would still be required to demonstrate the Overlap method as the substantially less restrictive alternative. MIT would more than likely fail the second prong with the current trend of federal antitrust case analysis. [FN344]

When the Overlap investigation arose, many members of Congress were surprised at the sudden resurgence of antitrust actions. In particular, Congress was caught off guard by the Department of Justice's choice in targeting institutions of higher education. When the Sherman Act was originally enacted, Congress did not intend the legislation to cover "temperance societies" much less schools. [FN345] With respect to antitrust statutory language, courts have questioned the judicial exemption because it was probably unforeseeable at the time of enactment that churches and schools could engage in commercial activity. Furthermore, the plain language of the Act does not exempt schools, churches, or other similar groups. In reaction to the flurry of antitrust activity, members of the House of Representatives drew their attention to antitrust reform within the higher education setting in 1991. [FN346]

Congress discussed the desired changes for several years. Bills were introduced as The College Financial Aid Protection Act of 1992 and The College Financial Aid Protection Act of 1993. [FN347] Finally, on October 20, 1994, § 568 ***492** of the Improving America's Schools Act of 1994 was passed as a statutory note to § 1 of the Sherman Act. [FN348]

The statutory note placed within § 1 of the Sherman Act explicitly permits the financial aid arrangement cast out in the Overlap situation. The statutory exemption allows universities and colleges to collaborate, provided that students are admitted under a need-blind basis. [FN349] The caveat to the 1994 bill was its time limitation. When originally passed, the note was to expire on September 30, 1997. Consequently, the amendment was reviewed in mid- 1997 and extended to September 30, 2001. Moreover, the heading originally labeled "temporary exemption" no longer contains the word "temporary." [FN350] Although there is no assurance of permanency of the amendment, Congress has certainly made strides towards effectuating a need-based system of evaluation. [FN351] In the meantime, the note in § 1 of the Sherman Act further supports the Collegiate Action Test in that schools may collaborate as long as such collaborations are in furtherance of the goals of scholarship, service, or student development.

By eliminating the competition for students without financial need, colleges and universities may reallocate their funding. Accordingly, the goals of social welfare may be satisfied with only an incidental effect on anticompetitive measures. The statutory note amended within § 1 of the Sherman Act revives the meaning of educational opportunity and diverts judicial analysis from the commercial aspects of tuition and financial aid. That is, the statutory note offers protection so that schools can again focus on the collegiate goals of scholarship, service, and student development. In the absence of such legislation, many colleges and universities would be unable to provide adequate financial aid packages for some of the brightest young men and women. [FN352] Without the provision of adequate financing, the basic goals of education, the passing of traditions and values from one generation to the next, would not be met.

***493** D. Student Housing and Food Services

Colleges and universities around the country are continually improving their housing and food service facilities because these areas are generally profit- making enterprises for educational institutions. [FN353] Indeed, many colleges and universities require their students to live on campus. In fact, a state institution's room and board is often higher than the cost of its tuition. [FN354] Consequently, certain restrictions on housing and food services create the potential for antitrust violations, particularly when the restrictions fail to adequately meet any of the objectives of scholarship, service, or student development.

In Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton College ("Hamilton"), [FN355] the court found that Hamilton's residential and food service mandate met the "effect on commerce" test, thereby violating the Sherman Act. Hamilton had changed its policy and required all students to live in college-owned housing and to purchase the college-sponsored meal plans ("residential policy"). [FN356] The plaintiffs asserted that Hamilton's housing scheme had a commercial purpose, specifically, to eliminate "residential services" competition. [FN357] Prior to the policy change, Hamilton received more than $7 million from housing services while other landlords received approximately $1 million in revenues. [FN358] Under the new rule, Hamilton monopolized the housing services market and absorbed all housing-related revenues. [FN359] Likewise, the mandate adversely affected the food service market. [FN360]

***494** In addressing the "commerce" issue, the court was first required to examine the nature of the activity, not the form or objectives of the organization. [FN361] Here, the housing and food mandates were arguably an attempt to meet the educational goals of the college. In fact, Hamilton alleged that residential policy was made in order to create an academic environment more appealing to female applicants. [FN362] However, when examining the nature of the activity, the court addressed the issue as "whether the aspects of the defendant's business that are infected by the allegedly unlawful conduct can reasonably be expected, as a matter of practical economics, to have a not insubstantial effect on interstate commerce." [FN363] In support of this case, the plaintiffs advanced statistical data demonstrating the significant dollar amounts provided by out-of-state students. In addition, they argued that Hamilton had control of the output and prices without losing any students. "That is precisely the vice of a monopoly." [FN364] Therefore, it was clear to the court that Hamilton's policy created a control mechanism. Furthermore, the actual nature of the activity did not revolve around scholarship, service, or student development, but rather, the residential policy was a means of increasing the institution's revenues. [FN365] Thus, the application of the Sherman Act was appropriate and consistent with prior case rulings. [FN366]

***495** E. Proprietary Establishments

Colleges and universities maintain and operate many facilities that are nonacademic in nature. These proprietary establishments are essentially profit centers contributing to the school's annual revenue. In many instances, activities conducted by these establishments deviate from the educational policies of scholarship, service, and student development. Instead, the conduct generally entails commercial aspects. As a result, a successful Sherman Act charge against the school is more likely to occur.

In Sunshine Books, Ltd. v. Temple University, [FN367] the Court of Appeals for the Third Circuit vacated the district court's decision to dismiss the antitrust action brought against Temple University. According to the complaint, Temple attempted to eliminate a bookseller-competitor through a predatory pricing scheme. [FN368] To gain market share control, Temple slashed prices through its "manager's special." For the most part, these discounts only applied to titles that were also sold by the defendant- bookseller, Sunshine Books. In order to compete, Sunshine was forced into selling some of its titles below cost. [FN369] Soon after, Sunshine filed suit.

Sunshine argued that under the Sherman Act, "prices that are calculated todestroy, rather than reflect, competition do not comport with the Act's purposes." [FN370] The appellate court agreed and evaluated Temple's pricing scheme by determining if Temple priced certain texts below its average variable cost. [FN371] According to the figures brought to the court's attention, the calculations attributable to payroll expenses and inventory shrinkage as it ***496** applied to average variable cost were in dispute. [FN372] Consequently, the court remanded the case for factual determination with respect to payroll allocation to the average variable cost.

The detailed judicial analysis from Sunshine arose from the complex nature of accounting definitions and procedures. In other words, the court was faced with questions of what qualifies as variable costs, how the allocation of costs are

derived, and how these determinations are reconciled under different accounting approaches. [FN373] Although no subsequent opinion was announced, [FN374] the court was unlikely to offer the academic institution deferential treatment as the price-discounting conduct failed to embody the notions of scholarship, service, and student development. Likewise, the ostensible reason for Temple's action was merely to eliminate its competition and perhaps eventually increase prices, thereby, qualifying as a Sherman Act violation.

University proprietary establishments themselves do not constitute a Sherman Act violation. Thus, in Campus Center Discount Den v. Miami University, [FN375] the court properly dismissed an action brought by a local convenience store that charged Miami University ("Miami") with anticompetitive conduct when it opened a similar operation on its campus. Miami opened its convenience store in order to accommodate its students who live on-campus, not to eliminate all competition.

Prior to the store's opening, Miami offered meal cards that operated on a "use it or lose it" credit system. [FN376] To offer more flexibility and convenience, Miami offered an alternative to the cafeteria meal plan by allowing purchases at the convenience store for equivalent meal amounts. As a result, a local convenience store brought an action against Miami alleging that the university's store "provided stiff competition." [FN377] The plaintiff asserted only that its business was reduced. Since the plaintiff failed to demonstrate the effects from the operations of Miami's convenience store on the entire convenience store market, Miami's motion for summary judgment was affirmed.

In Campus Center Discount Den, Miami had no intentions of eliminating the convenience store market. Since most Miami freshmen and transfer students live on campus, the flexibility of the meal cards created a better opportunity for students. Equally important, the system did not generate more revenues for the university. Thus, in pursuit of easy access and community life, Miami was allowed to operate an additional facility for its students with no expectations of significant increase in revenues free from antitrust challenges.

***497** To summarize, a school's proprietary establishment is one of the few areas within the educational context where one could find successful Sherman Act challenges. A school's proprietary establishment inevitably involves commercial transactions. Furthermore, the very nature of a proprietary establishment within a college or university lends itself to offering special incentives or restricting usage. On the other hand, if an educational institution behaves in a manner consistent with the Collegiate Action Test by preserving and promoting scholarship, service, and student development, and not focusing on profit, the antitrust challenge is likely to fail.

V. CONCLUSION

Colleges and universities were never expressly insulated from the Sherman Act. Instead, noncommercial activity was excluded, and at the time of the Act's passage, the legislators did not expect institutions of higher education to partake in commercial behavior. As colleges and universities have examined their financial status, they have also deviated from the traditional collegiate conduct of preserving and promoting the goals of scholarship, service, and student development. [FN378] In the past twenty years, the primary purpose for institutions of higher education became muddled with the notions of anticompetitive restraints and revenue generating projects. In essence, colleges and universities have become a form of "big business."

Despite this collegiate trend, courts have been unwilling to exercise an antitrust judicial scrutiny that resembles strict liability, generally referred to as the per se rule. Alternatively, most courts have examined cases under the rule of reason analysis when a school or educational governing body has been charged with a Sherman Act violation. For the most part, these cases did not require extensive inquiry as commonly seen in a rule of reason scrutiny.

The courts seem to place a presumption that an educational institution's conduct is noncommercial unless otherwise shown. Likewise, the decision to follow such a lenient analysis is consistent with the courts' traditional deference to educational institutions. In the past, the academic judgment rule has been applied to cases where the school was in the best position to decide the issue, not the court. Thus, the case would have been dismissed and left for the administrators to decide.

Similar to the academic judgment rule is the test developed from this comment: the Collegiate Action Test. The Collegiate Action Test is the evaluative process for Sherman Act challenges against an institution of higher education or an educational governing board. The test simply evaluates the nature and manner of the alleged anticompetitive conduct. If the challenged activity serves the primary purpose of preserving and promoting scholarship, service, or student development, the alleged anticompetitive claim will fail. At best, the activity has an incidental restraint of trade, and therefore, it does not qualify as a Sherman Act violation.

***498** The Collegiate Action Test successfully states the outcome of all the Sherman Act cases where claims have been brought against a higher educational institution or its governing body, except for United States v. Brown University. As discussed above, [FN379] the outcome of Brown University disturbed many. As a result, conservative legislative dissenters supported and passed the statutory note contained within § 1 of the Sherman Act. The note specifically exempts the conduct found to violate antitrust in Brown University. The statutory language, hence, further supports the Collegiate Action Test.

Finally, as the structure and focus of colleges and universities enter into a more commercial scheme, administrators should avoid maintaining merely a benign intent of social welfare. Instead, the institutions should place their primary focus on preserving and promoting scholarship, service, or student development. Such a focus is sure to meet the Collegiate Action Test and survive an antitrust challenge.

***499** VI. APPENDIX

B. The Sherman Act

§ 1. TRUSTS, ETC., IN RESTRAINT OF TRADE ILLEGAL: PENALTY

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 hereby declared to be 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 $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. MONOPOLIZING TRADE A FELONY: PENALTY

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 3. TRUSTS IN TERRITORIES OR DISTRICT OF COLUMBIA ILLEGAL: COMBINATION A FELONY

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the

District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 4. JURISDICTION OF COURTS; DUTY OF UNITED STATES ATTORNEYS: PROCEDURE

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined ***500** or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

§ 5. BRINGING IN ADDITIONAL PARTIES

Whenever it shall appear to the court before which any proceeding under section 4 of this title may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

§ 6. FORFEITURE OF PROPERTY IN TRANSIT

Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section 1 of this title, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

§ 7. "PERSON" OR "PERSONS" DEFINED

The word "person", or "persons", wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

[FNa1]. Teachers College, Columbia University.

[FNaa1]. University of Minnesota.

[FN1]. HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW § 2.4 (1st ed. 1985).

[FN2]. See, e.g., United States v. United States Gypsum Co., 438 U.S. 422, 439

(1978); St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 556 (1978).

[FN3]. 20 CONG. REC. 1167 (1889); see also Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 329 n.7 (1991).

[FN4]. Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1050 (9th Cir. 1982).

> Generally speaking, the Sherman Act bans all arrangements that are adopted to reduce competition, or which, regardless of purposes, have a significant tendency to reduce competition. Thus arrangements that are adopted for and tend to achieve other purposes are not condemned by the Act merely because they carry come incidental and inconsequential restraining effect on competition.

Id. (citing L. SULLIVAN, ANTITRUST, § 63 at 166 (1977)).

[FN5]. See 21 CONG. REC. 2658-59 (1890).

[FN6]. The cases ensued shortly after the decision of Goldfarb v. Virginia State Bar, 421 U.S. 771 (1975), which opened the door for antitrust actions against nonprofit entities. See discussion infra Part II.A.i and Part IV.A.

[FN7]. 15 U.S.C. § 1 (1994 & Supp. 1996).

[FN8]. See, e.g., Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

[FN9]. 15 U.S.C. § 2 (1994).

[FN10]. See, e.g., United States v. Grinnell Corp., 384 U.S. 563 (1966).

[FN11]. The authors believe that collegiate goals should focus on three primary areas: scholarship, service, and student development. Accordingly, the authors contend that these three primary areas must be developed within each student in a higher education institution. These elements meet the Collegiate Action Test discussed throughout the comment. Cf. WILLIAM A. BARRY, S.J., ALLOWING THE CREATOR TO DEAL WITH THE CREATURE: AN APPROACH TO THE SPIRITUAL EXERCISES OF IGNATIUS OF LOYOLA (1994); CLARK KERR, THE USES OF THE UNIVERSITY (1993).

[FN12]. 21 CONG. REC. 2589 (1889).

[FN13]. Theodore Kovaleff, Historical Perspective: An Introduction, in THE ANTITRUST IMPULSE: AN ECONOMIC, HISTORICAL, AND LEGAL ANALYSIS 3, 8 n.9 (Theodore P. Kovaleff ed., 1994). Kovaleff noted:

> It is interesting to note that very little of Senator Sherman's original work was included in the Act. According to Thorelli, Republican Senator George F. Edmunds of Vermont drafted sections 1, 2, 3, 5, and 6; Senator James Z. George (Democrat, Mississippi) was responsible for section 4; Senator George F. Hoar (Republican, Massachusetts) contributed Section 7; and Senator John J. Ingalls (Republican, Kansas) wrote Section 8. Id. at 212. This situation prompted a rather embittered Senator Hoar to write ironically, "In 1890 a bill was passed which was called the Sherman Act, for no other reason that I can think of except that Mr. Sherman had nothing to do with framing it whatsoever."

Id. at 210 (quoting 2 G.F. HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS 363 (1903)). It is, however, understandable why the bill was not named for the Massachusetts Senator!

[FN14]. EARL W. KINTNER, AN ANTITRUST PRIMER: A GUIDE TO ANTITRUST AND TRADE REGULATION LAWS FOR BUSINESSMEN 16 (1964).

[FN15]. Eleanor M. Fox & Lawrence A. Sullivan, The Good and Bad Trust Dichotomy: A Short History of the Legal Idea, in THE ANTITRUST IMPULSE: AN ECONOMIC, HISTORICAL, AND LEGAL ANALYSIS 87 (Theodore P. Kovaleff ed., 1994). The work also adds Senator Sherman's discussion with respect to the purpose of the bill:

> The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition. These combinations already defy or control powerful transportation corporations and reach State authorities. They reach out their Briarean arms to every part of our country. They are imported from abroad. Congress alone can deal with them, and if we are unwilling or unable there will soon be a trust for every production and a master to fix the price for every necessity of life.

Id. (citing Robert A. Bork, The Role of the Courts in Applying Economics, 54 ANTITRUST L.J. 21, 24 (1985)).

[FN16]. KINTNER, supra note 14, at 9; see, e.g., City Ry. Co. v. Citizens' St. Ry. Co., 166 U.S. 557 (1897); United States v. Joint-Traffic Ass'n., 171 U.S. 505 (1898).

[FN17]. KINTNER, supra note 14, at 9-10. The court found that the purposes of the trust were "to establish a virtual monopoly of the business of producing petroleum ... and to control ... the price ...." Id. at 10.

[FN18]. Id. at 12.

[FN19]. Id; see also Kovaleff, supra note 13, at 8 n.10. Kovaleff notes that no explanation was provided as to the single dissenter's vote. See 21 CONG. REC. 3153 (1889). By 1890, when the Sherman Act was passed, at least twenty-six states already had some form of antitrust prohibition. See ANTITRUST L. DEV. (4th ed.) Ch. IX.C.

[FN20]. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

[FN21]. Id.

[FN22]. See generally HOVENKAMP, supra note 1, at § 2.4.

[FN23]. EARL W. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES (1978) (quoting legislative debates). Included among the practices viewed by the Supreme Court as most dangerous are the following: horizontal and vertical price-fixing, certain tying arrangements, group boycotts or concerted refusals to deal, and horizontal market divisions. See 2 JULIAN VON KALINOWSKI, ANTITRUST LAWS & TRADE REGULATION § 6.02[1] (1984); see also Apex Hosiery Co. v. Leader, 310 U.S. 469, 497 (1940).

[FN24]. Apex Hosiery Co., 310 U.S. at 497.

[FN25]. Id.

[FN26]. Id.

[FN27]. 15 U.S.C. § 1 (1994, Supp. II 1996 & Supp. III 1997).

[FN28]. See Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 58 (1911).

[FN29]. 171 U.S. 505 (1898).

[FN30]. 246 U.S. 231 (1918).

[FN31]. Id. at 238.

[FN32]. See United States v. South-Eastern Underwriters Ass'n., 322 U.S. 533, 553 (1944).

[FN33]. See generally United States v. Grinnell Corp., 384 U.S. 563 (1966); American Tobacco Co. v. United States, 328 U.S. 781 (1946).

[FN34]. See Denny's Marina, Inc. v. Renfro Prods., Inc., 8 F.3d 1217, 1220 (7th Cir. 1993) (citing Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 961 F.2d 1148, 1158 (5th Cir. 1992)); Wilder Enterprises, Inc. v. Allied Artists Pictures Corp., 632 F.2d 1135, 1139 n.1 (4th Cir. 1980); Ernest W. Hahn, Inc. v. Codding, 615 F.2d 830, 844 (9th Cir. 1980); cf. Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

[FN35]. Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481 (1992) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

[FN36]. See 15 U.S.C. § § 1 & 2 (1994, Supp. II 1996 & Supp. III 1997); see also Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 n.7 (1959).

[FN37]. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195 (1974).

[FN38]. 421 U.S. 773 (1975).

[FN39]. Id.

[FN40]. Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 497 (E.D. Va. 1973).

[FN41]. See id. at 494.

[FN42]. See id. at 494-95 (citing United States v. National Ass'n. of Real Estate Bds., 339 U.S. 485, 490, 492 (1950)).

[FN43]. Id.

[FN44]. Goldfarb v. Virginia State Bar, 497 F.2d 1 (4th Cir. 1974).

[FN45]. See id. at 12-14.

[FN46]. See id. at 13-14.

[FN47]. See id. at 13 ("It is abundantly clear from the record before us that the fee schedule and the enforcement mechanism supporting it act as a substantial restraint upon competition among attorneys practicing in Fairfax County. The question before us, however, is whether this is a "restraint of trade or commerce among the several States" and therefore a violation of the Sherman Act.").

[FN48]. Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975).

[FN49]. Id. (citing Associated Press v. United States, 326 U.S. 1, 7 (1945)).

[FN50]. Id. (citing United States v. National Ass'n. of Real Estate Bds., 339 U.S. 485, 489 (1950)).

[FN51]. For other cases where courts have ruled that Sherman Antitrust provisions relate to the activities of non-profit organizations, see Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine, 520 U.S. 564 (1997); American Soc'y of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 576 (1982); Richard Bartlett, Note, United Charities and the Sherman Act, 91 YALE L.J. 1593, 1596 (1982).

[FN52]. See, e.g., NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 100 n.22 (1984) ("There is no doubt that the sweeping language of § 1 applies to nonprofit entities."); United States v. Brown Univ., 5 F.3d 658, 665 (3d Cir. 1993) ("Congress, however, intended this statute to embrace the widest array of conduct possible.").

[FN53]. See Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 214 n.7 (1959).

[FN54]. 310 U.S. 469 (1940).

[FN55]. See id.

[FN56]. See id.; see also Virginia Vermiculite, Ltd. v. W.R. Grace & Co., 965 F. Supp. 802, 813 (W.D. Va. 1997) ("Despite their apparent distance from 'Big Business,' nonprofit organizations have been brought within the scope of the Act."), rev'd, Virginia Vermiculite, Ltd. v. W.R. Grace & Co., 156 F.3d 535, 540 (4th Cir. 1998) (questioning whether an "exemption" for nonprofit organizations exists and emphasizing "that the dispositive inquiry is whether the transaction is commercial, not whether the entity engaging in the transaction is commercial").

[FN57]. See, e.g., Radiant Burners, Inc. v. Peoples Gas Light. & Coke Co., 364 U.S. 656 (1961) (involving a gas burner manufacturer who brought action against nonprofit association and its members).

[FN58]. See Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975).

[FN59]. 15 U.S.C. § 7 (1994).

[FN60]. See generally 21 CONG. REC. 2589 (1889); see also Parker v. Brown, 317 U.S. 341, 350-51 (1943).

[FN61]. See Parker, 317 U.S. at 350-53; California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 103-06 (1980).

[FN62]. 317 U.S. 341 (1943). See Saenz v. University Interscholastic League, 487 F.2d 1026 (5th Cir. 1973) In this case, the plaintiff sued an integral part of the University of Texas at Austin, known as the University Interscholastic League ("League"), for a slide rule contest. The court declared that the League constituted a governmental entity outside the ambit of the Sherman Act. Therefore, the League as an integral part of the University of Texas at Austin was immune from the Sherman Act claim. See id. at 1028.; see also City of College Station, Texas v. City of Bryan, Texas, 932 F. Supp. 877, 885-87 (S.D. Tex. 1996).

[FN63]. The first prong originated, in part, from Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (Stevens, J., plurality opinion).

[FN64]. City of Lafayette, La. v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978) (Brennan, J., alternative plurality opinion).

[FN65]. 433 U.S. 350 (1977).

[FN66]. Id. at 362.

[FN67]. Lafayette, 435 U.S. at 410. But see Cowboy Book, Ltd. v. Board of Regents for Agric. and Mechanical Colleges, 728 F. Supp. 1518, 1521 n.4 (W.D. Okla. 1989) ("It is not required, however, that the entity be actively supervised if a clear state policy exists.").

[FN68]. Bates, 433 U.S. at 362.

[FN69]. Id.; cf. Goldfarb v. Virginia State Bar, 497 F.2d 1 (4th Cir. 1974).

[FN70]. 728 F. Supp. 1518 (W.D. Okla. 1989).

[FN71]. Id.

[FN72]. Id. at 1523.

[FN73]. Id. at 1522.

[FN74]. Id.

[FN75]. Id.

[FN76]. Id. at 1523.

[FN77]. Id.

[FN78]. Id. at 1523-24. In addition, the court added that immunity may also exist in other circumstances similarly related to the purpose found here. Specifically, the court stated:

> Extension of credit to students for rental of dormitory rooms could well be attacked by rental businesses in the university town. Along the same lines, extensions of credit for room and board costs may include payments for food prepared in the school cafeteria. These extensions of credit could be subject to attack by local restaurants and fast food businesses. It is this Court's belief that the self-contained and self-reliant environment of a state university as created by the Oklahoma Constitution and Oklahoma statutes precludes attack by local commerce. It was an act of government to constitutionally create the Board of Regents, and further grant express powers to the Board to do everything necessary and convenient to make the state universities effective.

Id. at 1523.

[FN79]. See Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46 n.10 (1985); see also FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992) (characterizing the second prong of Midcal/Parker as requiring that "the State provide[[[ ] active supervision of anticompetitive conduct undertaken by private actors"); Cowboy Book, 728 F. Supp. at 1521 n.4 (W.D. Okla. 1989) ("It is not required, however, that the entity be actively supervised if a clear state policy exists.").

[FN80]. 993 F.2d 768 (10th Cir. 1993).

[FN81]. Id. at 771.

[FN82]. Id. at 770.

[FN83]. Id. (citing Hoover v. Ronwin, 466 U.S. 558, 568 (1984)).

[FN84]. Porter Testing, 993 F.2d at 770.

[FN85]. Id. at 771.

[FN86]. 471 U.S. 34 (1985).

[FN87]. Porter Testing, 993 F.2d at 772.

[FN88]. Id.

[FN89]. Id. at 772-73.

[FN90]. 365 U.S. 127 (1961).

[FN91]. 381 U.S. 657 (1965).

[FN92]. See Noerr, 365 U.S. at 136-37; Pennington, 381 U.S. at 670.

[FN93]. Noerr, 365 U.S. at 137. "The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political area .... All of this caution (respecting legislation relating to political activities) would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact ...." Hennessey v. National Collegiate Athletic Ass'n, 564 F.2d 1136 (5th Cir. 1977) (quoting Noerr, 365 U.S. at 141).

[FN94]. See, e.g., Brandt v. American Bar Ass'n, No. CIV.A. 3:96-cv- 2606D, 1997 WL 279762, at *1 (N.D. Tex. May 15, 1997).

[FN95]. Cf. 143 CONG. REC. E1331-01 (1997) (Honorable Michael Oxley of Ohio speaking on behalf of The Charitable Donation Antitrust Immunity Act of 1977); 137 CONG. REC. E2147-02 (1991) (Honorable Barney Frank of Massachusetts speaking against "Financial Aid for the 'Haves"').

[FN96]. 517 U.S. 44 (1996).

[FN97]. Id. at 47.

[FN98]. Id. See Blatchford v. Native Village of Noatak, 501 U.S. 775, 786 (1991) (requiring a clear Congressional statement to abrogate the states' Eleventh Amendment immunity). See also Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238-39 (1985).

[FN99]. Id. at 77 n.1 (Steven, J., dissenting).

[FN100]. Id. at 72 n.16. The majority argues that the effects of Seminole Tribe are not so draconian as the decision leaves standing the doctrine of Ex Parte Young. See Ex Parte Young, 209 U.S. 123 (1908) (allowing suit against a state official for injunctive relief to end a continuing federal law violation). Additionally:

> [I]t has not been widely thought that the federal antitrust ... statutes abrogated the States' sovereign immunity. This Court never has awarded relief against a State under any of those statutory schemes; in the decision of this Court that Justice Stevens cites (and somehow labels "incompatible" with our decision

here), we specifically reserved the question whether the Eleventh Amendment would allow a suit to enforce the antitrust laws against a State.
Id. (citing Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 n.22 (1975)).

[FN101]. Bowers v. National Collegiate Athletic Ass'n, 9 F. Supp. 2d 460, 498 n.15 (D.N.J. 1998) (failing to reach the Eleventh Amendment question in an antitrust case and noting that Eleventh Amendment immunity "appears to be an issue over which there may be some disagreement"). See also Cowboy Book, Ltd. v. Board of Regents for Agric. and Mechanical Colleges, 728 F. Supp. 1518, 1519 n.2 (W.D. Okla. 1989) ("Because the state action immunity doctrine is dispositive, the Court does not address the Eleventh Amendment issues.").

[FN102]. University of Tex. at Austin v. Vratil, 96 F.3d 1337, 1340 (10th Cir. 1996) (citing Seminole Tribe for the proposition that state colleges and universities are entitled to Eleventh Amendment immunity from being treated as parties for discovery purposes in an action alleging federal antitrust violations by the athletic association for the colleges and universities).

[FN103]. Watson v. University of Utah Med. Cen., 75 F.3d 569 (10th Cir. 1996). See, e.g., Brine v. University of Iowa, 90 F.3d 271 (8th Cir. 1996) (finding university and board of regents immune from due process and First Amendment claims under § 1983); Cantu v. Rocha, 77 F.3d 795 (5th Cir. 1996) (finding university police and professor immune from § 1983 claims); Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1349-50 (9th Cir. 1981) (finding board of regents, but not coaches and athletic director, immune from § 1983 claims); Long v. Richardson, 525 F.2d 74, 79 (6th Cir. 1975) (finding Memphis State University president immune from suit to recover out of state tuition fees under equal protection and due process).

[FN104]. Van Pilsum v. Iowa State Univ. of Science and Tech., 863 F. Supp. 935, 936 (S.D. Iowa 1994) (citing the nine factors utilized in Kovats v. Rutgers, 822 F.2d 1303, 1309 (3d Cir. 1987)). The factors the Van Pilsum court considered included:
> (1) [L]ocal law and decisions defining the status and nature of the agency involved in its relation to the sovereign; (2) most importantly, whether the payment of the judgment will have to be made out of the state treasury; (3) whether the agency has the funds or the power to satisfy the judgment; (4) whether the agency is performing a governmental or proprietary function; (5) whether it has been separately incorporated; (6) the degree of autonomy over its operations; (7) whether it has the power to sue and be sued and to enter into contracts; (8) whether its property is immune from state taxation; and (9) whether the sovereign has immunized itself from responsibility for the agency's operations.

Id. at 936.

[FN105]. Trotman v. Palisades Interstate Park Comm., 557 F.2d 35, 38 (2d Cir. 1977). See also Edelman v. Jordan, 415 U.S. 651, 663 (1974) (citing Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944) ("Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.")).

[FN106]. Sherman v. Board of Curators of the Univ. of Mo., 16 F.3d 860, 874 (8th Cir. 1994).

[FN107]. "While a state may waive [Eleventh Amendment] immunity, such waiver will be found only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."' Board of Governors of the Univ. of N.C. v. Helpingstine, 714 F. Supp. 167 (M.D.N.C. 1989) (finding no waiver to suit for alleged Sherman Act

violation in trademark licensing).

[FN108]. See National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978); Mark D. Selwyn, Higher Education Under Fire: The New Target of Antitrust, 26 COLUM. J.L. & SOC. PROBS. 117, 143 (1992).

[FN109]. See National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla., 468 U.S. 85 (1984); see also Douglas R. Richmond, Antitrust in Higher Education: An Overview, 61 U. MO. K.C. L. REV. 417, 423 (1993).

[FN110]. 85 F. 271, 283-84 (6th Cir. 1898); see, e.g., Edward P. Hodges, The Antitrust Act and the Supreme Court: An Analysis of the Supreme Court Decisions Construing Section 1 of the Sherman Antitrust Act, 17 (1941); but cf., Thomas E. Kauper, The Justice Department and the Antitrust Laws: Law Enforcer or Regulator?, in The Antitrust Impulse: An Economic, Historical, and Legal Analysis 440 (Theodore P. Kovaleff ed., 1994) ("The use of per se rules, and of what might be called antitrust analysis by characterization, began with United States v. Standard Oil Co.").

[FN111]. Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 344 (1982).

[FN112]. 356 U.S. 1, 5 (1958). Justice Black's explanation for using the per se rule was prefaced with the comments: "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Id.

[FN113]. See, e.g., Fashion Originators' Guild of Am., Inc. v. F.T.C., 312 U.S. 457, 468 (1941).

[FN114]. See, e.g., United States v. Masonite Corp., 316 U.S. 265 (1942).

[FN115]. See, e.g., United States v. Pennsylvania Refuse Removal Ass'n, 242 F. Supp. 794 (E.D. Pa. 1965); see also James A. Rahl, Price Competition and the Price Fixing Rule--Preface and Perspective, 57 Nw. U. L. REV. 137, 142 (1962) (The per se rule is "grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition.").

[FN116]. See, e.g., Anderson Engines, Inc. v. Briggs & Stratton Corp., 531 F. Supp. 1155 (S.D. Fla. 1982).

[FN117]. Id.

[FN118]. See, e.g., Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 731 (1988).

[FN119]. See, e.g., FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 457- 58 (1986) (noting the Court was slow to condemn rules adopted by professional associations as unreasonable per se).

[FN120]. See, e.g., Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23 (1979) (noting that mergers among competitors eliminate competition, including price competition, but they are not per se illegal, and many of them withstand attack under any existing antitrust standard); cf. United States Dept. of Justice 1968 Merger Guidelines, 2 Trade Reg. Rep. (CCH) & 4510 (May 30, 1968).

[FN121]. See A. D. NEALE & D. G. GOYDER, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA: A STUDY OF COMPETITION FORCED BY LAW 23 (1980). Indeed, Neale and Goyder also note Judge Learned Hand's perspective in constitutional interpretations. Specifically, they quote him stating: "The words he must construe are empty vessels into which he can put nearly anything he will." Cf. DUDLEY H. CHAPMAN, MOLTING TIME FOR ANTITRUST: MARKET REALITIES, ECONOMIC FALLACIES, AND EUROPEAN INNOVATIONS 56-61 (1991) (discussing the U.S. Supreme Court's deviation from general canons of statutory interpretation such as legislative history).

[FN122]. United States v. Addyston Pipe & Steel Co., 85 F. 271, 283-84 (6th Cir. 1898). But see Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 354 (1990) (casting question as to then Judge Taft's '?ea of doubt").

[FN123]. The Supreme Court has repeatedly explained that the per se approach is not to be readily expanded to new arrangements or to business relationships with which the courts are inexperienced. See, e.g., FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 458-59 (1986); American Ad Management, Inc. v. GTE Corp., 92 F.3d 781, 784 (9th Cir. 1996). See also United States v. Parke, Davis & Co., 362 U.S. 29 (1960):

> Until today I had not supposed that any informed antitrust practitioner or judge would have had to await Beech-Nut to know that the concerted action proscribed by the Sherman Act need not amount to a contractual agreement. But neither do I think it would have been supposed that the Sherman Act does not require concerted action in some form.

Id. at 52 (Harlan, J., dissenting).

[FN124]. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58-59 (1977).

[FN125]. John J. Siegfried & Michelle Mahony, The First Sherman Act Case: Jellico Mountain Coal, 1891, in THE ANTITRUST IMPULSE: AN ECONOMIC, HISTORICAL, AND LEGAL ANALYSIS 45 (Theodore P. Kovaleff ed., 1994).

[FN126]. Id. at 75-76.

[FN127]. Id. at 48.

[FN128]. Id. at 74.

[FN129]. Id. at 76.

[FN130]. Id.

[FN131]. See Arizona v. Maricopa County Med. Soc'y, 457 U.S. 382 (1982).

[FN132]. 466 U.S. 2 (1984).

[FN133]. Id. at 30.

[FN134]. Id. at 29.

[FN135]. Id.

[FN136]. Id. at 30.

[FN137]. See infra text p. 476 & n.218, p. 478 & n.236.

[FN138]. Continental T.V., Inc.v. GTE Sylvania Inc., 433 U.S. 36, 58-59 (1977).

[FN139]. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.59 (1940).

[FN140]. 246 U.S. 231 (1918).

[FN141]. Id. at 238.

[FN142]. See, e.g., State Oil Co. v. Khan, 522 U.S. 3 (1997), overruling Albrecht v. Herald Co., 390 U.S. 145 (1968).

[FN143]. See, e.g., Matrix Essentials, Inc. v. Emporium Drug Mart, Inc., 988 F.2d 587 (5th Cir. 1993).

[FN144]. See, e.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284 (1985).

[FN145]. See, e.g., Rice v. Norman Williams Co., 458 U.S. 654 (1982).

[FN146]. See, e.g., Metro Indus., Inc. v. Sammi Corp., 82 F.3d 839 (9th Cir. 1996).

[FN147]. See, e.g., Betkerur v. Aultman Hosp. Ass'n, 78 F.3d 1079 (6th Cir. 1996).

[FN148]. See Stephen D. Browning, Note, The Misguided Application of the Sherman Act to Colleges and Universities in the Context of Sharing, 33 B.C. L. REV. 763, 770 (1992).

[FN149]. 468 U.S. 85 (1984).

[FN150]. See infra Part IV.B.

[FN151]. Board of Regents of Univ. of Okla, 468 U.S. at 100.

[FN152]. Id. at 101.

[FN153]. See, e.g., United States v. Brown Univ., 5 F.3d 658 (3d Cir. 1993).

[FN154]. United States v. U. S. Gypsum Co., 438 U.S.422, 443 (1978).

[FN155]. In other words, if the case meets the Collegiate Action Test, the case is generally found with at most an incidental restraint of trade.

[FN156]. National Labor Relations Bd. v. Yeshiva Univ., 444 U.S. 672, 688 (1980) (citing K. MORTIMER & T. MCCONNELL, SHARING AUTHORITY EFFECTIVELY 23-24 (1978)).

[FN157]. David Kember & Jan McKay, Action Research into the Quality of Student Learning: A Paradigm for Faculty Development, J. HIGHER EDUC., Sept. 19, 1996, at 528.

[FN158]. See, e.g., Wilfred Academy of Hair and Beauty Culture v. Southern Ass'n of Colleges and Schs., 957 F.2d 210, 214 (5th Cir. 1992) ("Federal courts have consistently limited their review of decisions of accrediting associations to whether the decisions were 'arbitrary and unreasonable' and whether they were supported by 'substantial evidence."'); Parsons College v. North Central Ass'n of Colleges and Secondary Schs., 271 F. Supp. 65, 72 (N.D. Ill. 1967).

[FN159]. See, e.g., Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schs., Inc., 432 F.2d 650 (D.C. Cir. 1969); Brandt v. American Bar Ass'n, No. CIV.A. 3:96-cv-2606D, 1997 WL 279762, at *1 (N.D. Tex. 1997); Massachusetts Sch. of Law v. American Bar Ass'n, 107 F.3d 1026 (3d Cir.), cert. denied, 118 S. Ct. 264 (1997).

[FN160]. Marjorie Webster Junior College, 432 F.2d at 654.

[FN161]. Id. at 652-53.

[FN162]. Id. at 653.

[FN163]. Id.

[FN164]. See Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schs., Inc., 302 F. Supp. 459 (D.D.C. 1969).

[FN165]. Marjorie Webster Junior College, 432 F.2d at 653. As one would expect, the following accreditation associations submitted amici curiae briefs urging reversal of the lower court: American Bar Association along with the Association of American Law Schools, American Association of University Professors, The Association of Independent Colleges and Universities in New Jersey, New England Association of

Colleges and Secondary Schools, Inc., North Central Association of Colleges and Secondary Schools, Inc., Northwest Association of Secondary and Higher Schools, Inc., Pennsylvania Association of Colleges and Schools, Inc., Southern Association of Colleges and Schools, Inc., and Western Association of Schools and Colleges.

[FN166]. Id.

[FN167]. Id. at 654.

[FN168]. Id.

[FN169]. Id. at 654-55.

[FN170]. Id. at 655 n.21.

[FN171]. Id. at 656.

[FN172]. Massachusetts Sch. of Law at Andover v. American Bar Ass'n, 107 F.3d 1026 (3d Cir. 1997), cert. denied, 118 S. Ct. 264 (1997).

[FN173]. Id. at 1036-37. For more regarding the Noerr doctrine, see infra Part I.B.

[FN174]. Id. at 1029.

[FN175]. Id. at 1029, 1038.

[FN176]. Id. at 1030. Other avenues besides graduating for an ABA accredited law school may include "legal apprenticeship, practice in another state, and graduation from a school approved by the Association of American Law Schools or a state agency." Id.

[FN177]. Id. at 1029.

[FN178]. Id. at 1030.

[FN179]. Id.

[FN180]. This comment will focus on the action brought against the ABA.

[FN181]. In the interest of the public, a consent decree was ordered pursuant to the Antitrust Procedures and Penalties Act. See 60 Fed. Reg. 39421-39427 (Aug. 2, 1995); 60 Fed. Reg. 63766-63862 (Dec. 12, 1995). For more information on this issue, see Thomas Sowell, Question Power of Busybodies, TIMES UNION, ALBANY, N.Y., Sept. 26, 1998, at A7; Mark Clayton, Bucking the Bar's Benchmarks: Law School's Challenge the Standards for Getting a Seal of Approval, CHRISTIAN SCI. MONITOR, Aug. 18, 1998, at B1; Davis Bushnell, School Tries New Tactic Against ABA, BOS. GLOBE, July 26, 1998,

at 4.

[FN182]. Massachusetts Sch. of Law v. American Bar Ass'n, 937 F. Supp. 435,441 (E.D. Pa. 1996) (quoting Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961)).

[FN183]. Id.

[FN184]. Massachusetts Sch. of Law, 107 F.3d at 1033.

[FN185]. See, e.g., Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982).

[FN186]. Massachusetts Sch. of Law, 107 F.3d at 1033 (citing FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 458 (1986) (adopting a Rule of Reason approach even though behavior resembled group boycott); see also National Soc'y of Prof. Eng. v. United States, 435 U.S. 679, 692- 94 (1978) (using Rule of Reason analysis even though agreement affected prices); Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 n.17 (1975) (distinguishing between practice of professions and other business activities); United States v. Brown Univ., 5 F.3d 658, 672 (3d Cir. 1993) (using Rule of Reason approach used even though behavior resembled price fixing).

[FN187]. This assertion is consistent with the Collegiate Action Test.

[FN188]. Massachusetts Sch. of Law, 107 F.3d at 1035 (citing MSL Reply Brief at 19).

[FN189]. Cf. Hoover v. Ronwin, 466 U.S. 558 (1984) (noting where the Arizona Supreme Court was determined to be the policymaker and monitor of lawyer's professional conduct).

[FN190]. Massachusetts Sch. of Law, 107 F.3d at 1037.

[FN191]. Massachusetts Sch. of Law v. American Bar Ass'n, 937 F. Supp. 435, 442 (E.D. Pa. 1996).

[FN192]. 486 U.S. 492 (1988).

[FN193]. Massachusetts Sch. of Law, 107 F.3d at 1037.

[FN194]. Id. (citing Allied Tube, 486 U.S. at 503, 507 (emphasis added)).

[FN195]. Allied Tube, 486 U.S. at 504-05.

[FN196]. Massachusetts Sch. of Law, 107 F.3d at 1037-38.

[FN197]. Id. at 1038.

[FN198]. Id. (citing Noerr, 365 U.S. at 142).

[FN199]. Id.

[FN200]. Id. at 1039.

[FN201]. Id. at 1035 (citing California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97 (1980)).

[FN202]. Id.

[FN203]. Id. at 1039-40.

[FN204]. Id. at 1040.

[FN205]. Id.

[FN206]. Id. at 1040 n.18.

[FN207]. Id. at 1040-41.

[FN208]. 494 F. Supp. 603 (S.D.N.Y. 1980).

[FN209]. Id. at 608.

[FN210]. Id. at 620.

[FN211]. Id.; seealso Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

[FN212]. Id. (citing Goldfarb, 421 U.S. at 788-89 & n.17).

[FN213]. For an explanation of issues surrounding the issues of scholarship and service within the university, see BARRY, supra note 11; KERR, supra note 11.

[FN214]. Cf. Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978) (refraining from intervening in a case establishing sufficient procedural due process and where the decision to dismiss was based on academic judgment); Haberle v. University of Ala. at Birmingham, 803 F.2d 1536 (11th Cir. 1986) (addressing where student enrolled in a Ph.D. program fulfilled all requirements except that he did not pass the qualifying exam; deference was given to exercise of academic judgment).

[FN215]. Selman, 494 F. Supp. at 621.

[FN216]. Id. (citing Complaint at 69).

[FN217]. Id.

[FN218]. Sherman College of Straight Chiropractic v. American Chiropractic Ass'n, Inc., 654 F. Supp. 716, 722 (N.D. Ga. 1986); see also Poindexter v. American Bd. of Surgery, Inc., 911 F. Supp. 1510, 1519 (N.D. Ga. 1994); DeGregorio v. American Bd. of Internal Medicine, No. 92-4924, 1993 WL 719564, at *11 n.14 (D.N.J. Oct. 1, 1993); Zavaletta v. American Bar Ass'n, 721 F. Supp. 96, 98 (E.D. Va. 1989).

[FN219]. See, e.g., Staudinger v. Educational Comm'n for Foreign Med. Graduates, No. 92 Civ. 8071 (JFK), 1994 WL 410875 (S.D.N.Y. Aug. 3, 1994) ("[F] ailure to meet the academic standards set by leading medical schools is not an antitrust injury.").

[FN220]. Selman, 494 F. Supp. at 621.

[FN221]. Cf. Marjorie Cortez, U. to Score Baskets of Publicity, Little Cash, DESERET NEWS, Mar. 24, 1998, at A1 ("University [of Utah] officials insist money isn't the focus of college athletics, but [President] Machen, for one, isn't bowled over by the WAC [Western Athletic Conference] business arrangement."); Mukul Verma and Michael Antrobus, Selling Football, GREATER BATON ROUGE BUS. REP., Sept. 1, 1998, at 28 ("[A] sports business expert once described college athletics programs as an escalating war fought with money."); Money at the Root of this Evil; Garnett, Bryant Worlds Apart; Rookie Is Doomed to Fail; Bryant Should Go to School, SAN DIEGO UNION-TRIB., May 12, 1996, at C4, available in 1996 WL 2159082 ("College administrators and coaches should come clean with the truth. College sports are just as much a business as professional sports.").

[FN222]. National Collegiate Athletic Association, NCAA Fact Sheet < www.ncaa.org/about/factsheet.html> (last visited Feb. 12, 1999).

[FN223]. NCAA's Money Motives Questioned: Newspaper Cites Soaring Revenue, Officials' Perks, STAR-TRIB. NEWSPAPER OF THE TWIN CITIES, Oct. 5, 1997, at 02C, available in 1997 WL 7584794; see also McCormack v. National Collegiate Athletic Ass'n, 845 F.2d 1338 (5th Cir. 1988). When the Southern Methodist University football program exceeded restrictions on compensation for student- athletes, the NCAA suspended the football program for one season along with other penalties. The court held that the NCAA's eligibility requirements did not violate the Sherman Act because the rules were reasonable and noncommercial in nature. Id. at 1343-44.
George Hostetter, Future Pros Have Much (Money) to Consider: From Starving Student to Wealthy Individual; How Are Athletes Preparing Themselves?, FRESNO BEE, Nov. 17, 1997, available in 1997 WL 14836347. Recently, Bob Oliver, director of membership services for the National Collegiate Athletic Association, said schools break no NCAA rules by teaching the value of money to athletes.

[FN224]. Id.

[FN225]. National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla., 468 U.S. 85 (1984).

[FN226]. Id. at 89.

[FN227]. Id. at 90.

[FN228]. Id.

[FN229]. Id.

[FN230]. Id. at 92.

[FN231]. Id. at 94. "Under the appearance limitations no member institution is eligible to appear on television more than a total of six times and more than four times nationally, with the appearances to be divided equally between the two carrying networks [and the limitations apply only to two-year periods, 1982 and 1983 then 1984 and 1985]." Id.

[FN232]. Id.

[FN233]. Id. at 99.

[FN234]. Id. at 100.

[FN235]. Id. at 100-01.

[FN236]. Id. at 101. Some courts have understood the NCAA unavailability argument as:

> [Intercollegiate sports competition] would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules ... must be agreed upon, and all restrain the manner in which institutions compete.... Thus, the NCAA plays a vital role in enabling [intercollegiate sports] to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice ... and hence can be viewed as procompetitive.

Smith v. National Collegiate Athletic Ass'n, 139 F.3d 180, 186 (3d Cir. 1998) (citing Board of Regents of Univ. of Okla., 468 U.S. at 101-02, 104). More recently, the argument has been characterized as "absent fan attendance there would be no games thereby mooting television revenues." United States v. Andreas, 23 F. Supp. 2d 863, 866 (N.D. Ill. 1998). Either way, Board of Regents of University of Olkahoma has been cited for the proposition that "[a] part from these limited instances where price-fixing is a crucial means of ensuring the continued existence of the means of production or the market itself, courts have found no reason to not apply the per se rule to horizontal price-fixing schemes...." Id.

[FN237]. See, e.g., United States v. Brown Univ., 5 F.3d 658 (3d Cir. 1993).

[FN238]. Board of Regents of Univ. of Okla., 468 U.S. at 102.

[FN239]. Id. at 101-02.

[FN240]. Id. at 109.

[FN241]. Id. at 113.

[FN242]. Id. at 117.

[FN243]. Board of Regents of Univ. of Okla. v. National Collegiate Athletic Ass'n, 546 F. Supp. 1276, 1309 (W.D. Okla. 1982).

[FN244]. Board of Regents of Univ. of Okla., 468 U.S at 111.

[FN245]. Id.

[FN246]. Id.

[FN247]. Id. at 109, 111-12.

[FN248]. Id. at 113 (quoting Maricopa County Med. Soc'y, 457 U.S. at 365 (Powell, J., dissenting)).

[FN249]. United States v. Brown Univ., 5 F.3d 658, 674 (3d Cir. 1993) (citing Board of Regents of Univ. of Okla., 468 U.S. at 114-15).

[FN250]. Board of Regents of Univ. of Okla., 468 U.S. at 113.

[FN251]. Id. at 114.

[FN252]. Id. at 113-14.

[FN253]. Id. at 115.

[FN254]. Id.

[FN255]. Id. at 116.

[FN256]. Id. at 117.

[FN257]. See supra note 223.

[FN258]. Board of Regents of Univ. of Okla. v. National Collegiate Athletic Ass'n, 546 F. Supp. 1276, 1310 (W.D. Okla. 1982).

[FN259]. Board of Regents of Univ. of Okla., 468 U.S. at 119-20. Furthermore, the "quick look" analysis led to the conclusion stated below:

> This is true not only for television viewers, but also for athletes. The District Court's finding that the television exposure of all schools would increase in the absence of the NCAA's television plan means that smaller institutions appealing to essentially local or regional markets would get more exposure if the plan is enjoined, enhancing their ability to compete for student athletes.

Id. at 120.

[FN260]. Justice v. National Collegiate Athletic Ass'n, 577 F. Supp. 356, 383 (D. Ariz. 1983).

[FN261]. Smith v. National Collegiate Athletic Ass'n, 979 F. Supp. 213, 217 (W.D. Pa. 1997), aff'd in part and vacated in part, Smith v. National Collegiate Athletic Ass'n, 139 F.3d 180 (3d Cir. 1998), cert. granted, National Collegiate Athletic Assoc. v. Smith, 119 S. Ct. 31 (1998). The issue here, however, is only whether the NCAA is subject to Title IX. It should be noted that NCAA undergraduate eligibility rule prohibiting eligibility to students in postbacclaureate program is not a Sherman Act violation because of the distinction between commercial and noncommerical activities. See Smith, 139 F 3d. at 185.

[FN262]. Law v. National Collegiate Athletic Ass'n, 902 F. Supp. 1394, 1401 (D. Kan. 1995), aff'd, 134 F.3d 1010 (10th Cir. 1998).

[FN263]. Id. at 1410.

[FN264]. Id.

[FN265]. See, e.g., id. at 1403, 1405, 1407-10. Furthermore, the court places language that the NCAA is subject to an analysis "under the rubric of the rule of reason." Id. at 1404. The language may indicate that the court was referring to the "quick look" rule of reason.

[FN266]. Id.

[FN267]. Id. at 1402-05.

[FN268]. See id. at 1409-10.

[FN269]. 893 F. Supp. 1495 (W.D. Wash. 1995), aff'd, 101 F.3d 1315 (9th Cir. 1996).

[FN270]. Id. at 1496.

[FN271]. Id.

[FN272]. See, e.g., Goss v. Lopez, 419 U.S. 565 (1975); Psi Upsilon of Phila. v. University of Pa., 591 A.2d 755 (Pa. Super. Ct. 1991).

[FN273]. Hairston, 893 F. Supp. at 1495.

[FN274]. 746 F. Supp. 738 (M.D. Tenn. 1990).

[FN275]. 977 F.2d 1081 (7th Cir. 1992).

[FN276]. See Gaines, 746 F. Supp. at 740.

[FN277]. See id. at 741.

[FN278]. See id.

[FN279]. Id.

[FN280]. Id. at 745.

[FN281]. Id. at 743.

[FN282]. Id. at 746.

[FN283]. Id.

[FN284]. Id.

[FN285]. Banks v. National Collegiate Athletic Ass'n, 977 F.2d 1081, 1083 (7th Cir. 1992).

[FN286]. Id. at 1087.

[FN287]. Id. at 1089 (citing Board of Regents of Univ. of Oklahoma, 468 U.S. at 104).

[FN288]. Jeffrey Levine, Planning Can Keep College Costs Under Control, CAPITAL DIST. BUS. REV., Albany, Nov. 10, 1997, at 41, available in 1997 WL 15022826.

[FN289]. Id.

[FN290]. Ben Gose, Average Tuition Rises 4% in a Year, More Than Twice the Rate of Inflation, CHRON. HIGHER EDUC., Oct. 16, 1998, at A56; THE COLLEGE BOARD, TRENDS IN STUDENT AID 1998 (1998).

[FN291]. Pat Ordovensky, Aid Options Broader Than Most Callers Seem to Think, USA TODAY, Nov. 14, 1997, at 05D, available in 1997 WL 7019870 (acknowledging the reality that many parents are unaware of the financial aid process).

[FN292]. See, e.g., United States v. Brown Univ., 5 F.3d 658 (3d Cir. 1993); cf. 137 CONG. REC. S6927-03, *S6932 (1991) (discussing of the Equity Investment in America goals to fight college cost inflation by refusing to permit students to use EIA funds at schools that persist in raising tuition and fees to unacceptable levels).

[FN293]. 5 F.3d 658 (3d Cir. 1993).

[FN294]. Id. at 669.

[FN295]. Id. at 662 & n.1.

[FN296]. Id. at 662-63. If a member school deviated from this rule, a retaliatory sanction would be issued.

[FN297]. Id. at 663.

For example, when a family has two or more children simultaneously attending college, the Congressional Methodology evenly apportions the parental contribution while the Ivy Methodology apportions the contribution based on the relative cost of the colleges. When a student's parents are divorced, the Congressional Methodology expects a parental contribution only from the custodial parent while the Ivy Methodology expects a contribution from both the custodial and noncustodial parents.

Id.

[FN298]. Id.

[FN299]. Mark D. Selwyn, Higher Education Under Fire: The New Target of Antitrust, 26 COLUM. J.L. & SOC. PROBS. 117, 119 (1992).

[FN300]. Abuse of financial discretion has plagued the academic world. See Martin Anderson, Universities Failing The Grade: Institutional Corruption, THE DALLAS MORNING NEWS, Sept. 20, 1992, at 1J, available in 1992 WL 10759729:

The California Institute of Technology, for example, retracted a $20,000 charge for "a three-day meeting by the board of trustees at the Smoke Tree Ranch in Palm Springs." Nearly $8,500 was for a dinner party for the trustees during that trip, including "10 $4 cigars, $120 for parking, $375 for musicians and $167 for the dance floor." The University of Texas charged off "a dozen engraved crystal decanters from Neiman-Marcus" as a research expense. The president of the University of Pittsburgh charged off his golf club membership, opera tickets, a trip his wife took to Grand Cayman, and travel expenses to "football matches in Dublin."

Dartmouth College, while not making the list of the top 100 colleges and universities in the amount of federal funds received, agreed to retract a whopping $746,031 of research charges. The pulled expenses included $20,490 for a chauffeur used by Dartmouth president James Freedman and his wife, $46,500 for parties at the president's house, $12,134 for the study of "the college's investments in South Africa," $60,343 for expenses "connected to laying off employees," and $55,470 in legal fees to defend the college against a civil rights lawsuit brought by a student newspaper, The Dartmouth Review.

The third great financial corruption scandal that afflicts American colleges and universities in the 1990s is big-time college athletics. Under- the-table deals in the recruitment of student athletes is nothing new. Everyone knows how admission, eligibility and graduation rules have been bent and twisted to accommodate student athletes. But for a long time it was pretty much nickel-and-dime corruption, done as

much to boost the spirits of the school's alumni and students as it was to raise money. Like prostitution and gambling, it was always present, but in the past it was controlled, mostly out of sight.
Id.

[FN301]. Alice Dembner, U.S. Closes Antitrust Cases on Colleges, B. GLOBE, Sept. 23, 1993, at 29, available in 1993 WL 6610090.

[FN302]. U.S. Clears 3 Colleges of Alleged Price-Fixing, INDIANAPOLIS NEWS, Feb. 13, 1992, at C01, available in 1992 WL 3806912 ("Earlham and Wabash colleges, DePauw University and nine other Great Lakes College Association members in Michigan and Ohio received notices saying they have been cleared.").

[FN303]. Ronald J. Ostrow and Larry Gordon, 8 Ivy League Schools Sign Collusion Ban, L.A. TIMES, at Pt. A-1, available in 1991 WL 2279011.

[FN304]. Under Antitrust Scrutiny, Top Schools Will Stop Swapping Financial Aid Data, ATLANTA J., Mar. 22, 1991, at E07, available in 1991 WL 7779683. The other east coast schools included: Amherst, Williams, Tufts, Middlebury, Colby, Bowdoin, Trinity, Wesleyan, Barnard, Wellesley, Vassar, Smith, Mount Holyoke, and Bryn Mawr.

[FN305]. United States v. Brown Univ., 805 F. Supp. 288 (E.D. Pa. 1992).

[FN306]. United States v. Brown Univ., 5 F.3d 658, 664 (3d Cir. 1993).

[FN307]. See Gary Putka, Class Actions: Ivy League Discussions On Finances Extended To Tuition and Salaries, THE WALL STREET JOURNAL, May 8, 1992, at A1, available in 1992 WL-WSJ 648930.
MIT's court filings argue that there was nothing wrong with overlap and that it wasn't saving any money by participating. The overall financial-aid budget was constant, MIT says, so that any money saved on one student would go to another. MIT adds that its $20 million aid budget is far more generous than that of most schools.

[FN308]. See Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).

[FN309]. Brown Univ., 5 F.3d at 666 (citing Goldfarb, 421 U.S. at 787- 88).

[FN310]. Id.; cf. NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 97-98 (1984).

[FN311]. Brown Univ., 5 F.3d at 666.

[FN312]. Id.

[FN313]. Id.

[FN314]. Id.

[FN315]. Id.

[FN316]. Id.

[FN317]. Id. But cf. Sunshine Books, Ltd. v. Temple Univ., 697 F.2d 90 (3d Cir. 1982) (finding predatory pricing is said to exist if the product pricing is below the marginal cost of the product).

[FN318]. Id. But see Dedication and Everlasting Love to Animals v. Humane Soc'y, Inc., 50 F.3d 710, 712 (9th Cir. 1995) (holding where two nonprofit organizations are in direct competition in a geographic market or nationwide market solicitation of contributions by nonprofit organization is not "trade or commerce"); cf. Federal Trade Comm'n v. Saja, No. Civ-97-0666-PHX-SMM, 1997 WL 703399, at *2 (D. Ariz. Oct. 7, 1997) (dealing with a non-Sherman Act claim where charitable fundraising is not commercial in nature).

[FN319]. Id. See also Donald Robert Carlson & George Bobrinskoy Shepard, Cartel On Campus: The Economics and Law of Academic Institutions' Financial Aid Price-Fixing, 71 OR. L. REV. 563, 571-72 (1992) (considering of net revenue benefits that students provide in a true economic context).

[FN320]. Id. at 667.

[FN321]. Id.; Martin Anderson, Universities Failing the Grade, DALLAS MORNING NEWS, Sept. 20, 1992, at 1J, available in 1992 WL 10759729.
U.S. Attorney General Richard Thornburgh, a 1954 Yale graduate himself, declared that 'this collegiate cartel denied students and their families the right to compare prices and discounts among schools, just as they would in shopping for any other service.... The revered stature of these institutions of higher learning in our society does not insulate them from the requirements of the antitrust laws.'
Id.

[FN322]. Id.

[FN323]. Id.; Carlson & Shepard, supra note 319, at 605-08. Price competition has potential of luring students away from the highest ranked schools. Here, the anticompetitive price-fixing mechanism could have adversely affected some of the Overlap members.

[FN324]. Id. at 670.

[FN325]. KINTNER, supra note 14, at 31; see also Steve Stecklow & William M. Bulkeley, Antitrust Case Against MIT Is Dropped, Allowing Limited Exchange of Aid Data, WALL ST. J., Dec. 23, 1993, at A12, available in 1993 WL-WSJ 670524. "'That activity we've always held was flat-out illegal,' said Robert E. Litan, deputy assistant attorney general for the antitrust division. 'This settlement affirms that position."'

[FN326]. Brown Univ., 5 F.3d at 670 (citing Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 435-36 (1990)); Maricopa, 457 U.S. at 344-47;

Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 646- 47 (1980); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392, 397-98 (1927).

[FN327]. United States v. Brown Univ., 805 F. Supp. 288, 301 (E.D. Pa. 1992).

[FN328]. Id. at 304; see also Brown Univ., 5 F.3d at 669.

[FN329]. Brown Univ., 5 F.3d at 671; cf. ROBERT BORK, THE ANTITRUST PARADOX 116 (1978).

[FN330]. Id. at 672.

[FN331]. Id.

[FN332]. Id. at 678.

[FN333]. Id. at 674.

[FN334]. Id. at 674-75.

[FN335]. Id. at 675.

[FN336]. Id.

[FN337]. Id.

[FN338]. Id. at 678.

[FN339]. Id.

[FN340]. See Debbie Goldberg, MIT Aid Process Violates Antitrust Law, Judge Finds; Price Fixing Seen in Discussion of Student Financial Assistance With Ivy League Schools, WASH. POST, Sept. 3, 1992, at A20, available in 1992 WL 2169126. An excerpt of the article has been reprinted below:

"The court is not to decide whether social policy aims can ever justify an otherwise competitively unreasonable restraint," Bechtle wrote. Besides, the judge added, MIT is welcome to "maintain the policies of need-blind admissions and need-based aid." But under the ruling, it would not be able to set these policies in collusion with other institutions.

Cowen wrote the 2-1 decision, in which the appeals court found that student financial aid is a "commercial transaction," subject to the Sherman Antitrust Act. But the judges also found that U.S. District Judge Louis Bechtle "erred in finding that MIT violated the act's price-fixing provisions because he failed to fully investigate MIT's 'social welfare justifications' for participating in the so-called Overlap Agreements" with the eight other schools.

[FN341]. Id. at 678-79.

[FN342]. Id. at 679.

[FN343]. See discussion infra notes 338-39 and accompanying text.

[FN344]. See, e.g., Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537 (2d Cir. 1993); Wilk v. American Med. Ass'n, 719 F.2d 207 (7th Cir. 1983). But see North American Soccer League v. National Football League, 670 F.2d 1249 (2d Cir. 1982), cert. denied, 459 U.S. 1074 (1982) (Rehnquist, J., dissenting). Although certiorari was denied, Justice Rehnquist wrote the following dissent:

> The Court of Appeals has taken this statement too far by adopting the least restrictive alternative analysis that is sometimes used in constitutional law. The antitrust laws impose a standard of reasonableness, not a standard of absolute necessity. The Court of Appeals ignored its own holding that the proper standard is that the constraint be "reasonably necessary." The Court of Appeals also ignored its own holding that the possibility of less restrictive alternatives is only one among many proper considerations for the factfinder.

Id. (citations omitted).

[FN345]. 21 CONG. REC. 2658-59 (1890). When discussing the language of the Act, Senator Sherman aptly stated:

> 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 .... You might as well include churches and Sunday schools.

[FN346]. See, e.g., 137 CONG. REC. E2147-02; 137 CONG. REC. E2648-01; see also 138 CONG. REC. E1245-03; 138 CONG. REC. E1810-02.

[FN347]. See 138 CONG. REC. E1810-02; 139 CONG. REC. E2449-02.

[FN348]. See 15 U.S.C. § 1 note (1994, Supp. II 1996 & Supp. III 1997), Application of Antitrust Laws to Award of Need-Based Educational Aid, Pub. L. No. 103-382, Title V, § 568(a) to (d), October 20, 1994, 108 Stat. 4060 (1994); The language has been reprinted in the Appendix. See infra Part VIII.

[FN349]. 15 U.S.C. § 1 (1994, Supp. II 1996 & Supp. III 1997), Pub. L. No. 103-382, Title V, § 568(a), 108 Stat. 4060.

[FN350]. See 143 CONG. REC. S8373-01.

[FN351]. The goal of the Overlap Group was "to direct a limited pool of financial aid dollars toward those students with the most need - and with the finding that the practice restricts competition." Debbie Goldberg, MIT Aid Process Violates Antitrust Law, Judge Finds; Price Fixing Seen in Discussion of Student Financial Assistance With Ivy League Schools, WASH. POST, Sept. 3, 1992, at A20, available in 1992 WL 2169126. Supporters of the amendment believe that proper allocation should allow for the "continuation of favorable treatment for need-based education[]." Thus, the antitrust laws should not interfere with such a purpose. See 143 CONG. REC. H6969-02; 143 CONG. REC. S8373-01.

[FN352]. Cf. STEPHEN GOLDSTEIN, E. GORDON GEE, & PHILIP T.K. DANIEL, LAW AND PUBLIC EDUCATION: CASES AND MATERIALS, at 6-7 (3rd ed. 1995) (citing Jefferson, Notes on Virginia, in FOUR WORKS OF THOMAS JEFFERSON, (Federal Edition 1904) at 60-65 (discussing of public financial support for superior students)).

[FN353]. See Jon Marcus, School Projects, Colleges Across the Country Experience New Waves of Building, CHI. TRIB., Sept. 7, 1997, at 5D, available in 1997 WL 3586102. The news clip highlighted studies conducted by two industry associations estimating needed maintenance to existing buildings within American colleges and universities. Estimates are currently at $26 billion attributable to long-delayed maintenance. Despite this statistic, "'Revenue- producing buildings are easy to justify, but many of us are not solving our deferred maintenance problem because it's hard to raise money for maintenance,' said William Brown, president of Bryan College in Tennessee." Id.

[FN354]. College Savings Plans Offer Cost, Tax Benefits to Parents, TAMPA TRIB., Aug. 15, 1997, at 7, available in 1997 WL 10802066 (according to Barbara Jennings, chair of the College Savings Plan Network and executive director of Ohio's Tuition Trust Authority).

[FN355]. 128 F.3d 59 (2d Cir. 1997).

[FN356]. Id. Previously, Hamilton College applied the residential policy only to first year students. Starting September 1995, the residential policy applied to all students. Id.

[FN357]. Id.

[FN358]. Id. at 59, 61.

[FN359]. The plaintiffs alleged that Hamilton College implemented the new housing policy for the commercial purpose of raising revenues by:
    (1) forcing all Hamilton students to purchase residential services from Hamilton;
    (2) allowing Hamilton to raise its prices for such services; and
    (3) attempting to purchase the fraternity houses at below-market prices.
Id. at 66.

[FN360]. With respect to the food service market, the plaintiffs asserted that:
    (1) they [the fraternities] have been effectively eliminated from the food service market, which will permit Hamilton to charge higher rates for its food services; and
    (2) the quality of service offered at Hamilton College will be lower.
Id. at 67.

[FN361]. Id. at 64.

[FN362]. Id. at 59.
    According to the Chairman of the Board of Trustees, fewer than 20% of the current students, self-selected [fraternity] males who have inherited these [[[[fraternity houses,] virtually control social life on [Hamilton's campus]. Women

students tell us time and again that, while they are fond of Hamilton, they do not feel they have the same social and residential opportunities as their male classmates. They do not enjoy--and cannot afford to replicate--the privileges of fraternity life. More disturbing is evidence that this disparity is leading many of the most talented prospective female applicants to seek education elsewhere.... The most disturbing result, however, has been increasing evidence that Hamilton is in danger of being perceived more for its social life than for its academic rigor....

[FN363]. Id. at 67 (citations omitted).

[FN364]. Id.

[FN365]. When a university'sinterest revolves around scholarship, service, or student development, instead of an increase in revenue, the outcome is different. Cf. Lee v. Life Ins., Co. of North Am., 23 F.3d 14 (10th Cir. 1996). A university requiring students to pay health services fees and purchase health insurance as a pre-condition to undergraduate attendance does not qualify as a section 1 violation for "tying" because the university had no appreciable economic power (AEP) in either the university education market or the health care market. Id. at 15-17.

[FN366]. Cf. American Nat'l Bank and Trust Co. of Chi. v. Board of Regents for Regency Univs., 607 F. Supp. 845 (N.D. Ill. 1984). The court allowed owners of private dormitories adjacent to the university campus to file a Sherman Act claim against the school. In this case, Northern Illinois University (NIU) required single, freshmen students under the age of 21 and not living with their parents to reside in the college-owned housing facilities. If a room assignment was not available, the student would be offered temporary housing that was not a dormitory facility. The landlords in the area alleged that NIU intentionally delayed and/or misrepresented their availability for the purpose of inducing freshmen to pay the fees for the university residence hall rooms and board costs. Consequently, the court denied the defendant's motion to dismiss. Soon after, the case was settled.

[FN367]. 697 F.2d 90 (3d Cir. 1982).

[FN368]. Id. at 91. Under antitrust laws, predatory pricing is setting prices below appropriate measure of cost in order to eliminate the entity's competitors and eventually the entity will maintain more market share control.

[FN369]. In reaction to the "manager's special," Sunshine Books discounted its books and undercut Temple by an additional twenty-five cents per text. Id. at 92.

[FN370]. See id.

[FN371]. This evaluation for predatory pricing originated from Professors Areeda and Turner. The court explained the purpose of adopting the Areeda- Turner Theory:

> A firm's economic costs may be divided into two categories: "fixed" and "variable." "Fixed" costs do not vary with output; they are costs that would continue even if the firm produced nothing at all. "Variable" costs, on the other hand, do vary with changes in output. "Average variable cost" is the sum of all variable costs divided by output, and "marginal cost" represents the increment to total cost resulting from the production of an additional increment of output. Professors Areeda and Turner conclude that "marginal- cost pricing is the economically sound division between acceptable, competitive behavior and 'below-cost' predation." However, they recognize that a marginal-cost standard inevitably

clashes with "the difficulty of ascertaining a firm's marginal cost. The incremental cost of making and selling the last unit cannot readily be inferred from conventional business accounts, which typically go no further than showing observed average variable cost. Consequently, Areeda and Turner acknowledge the need to use average variable cost as a surrogate for, or "indicator" of marginal cost. Id. at 94.

[FN372]. Id. at 94-95.

[FN373]. Id. at 94-96.

[FN374]. The District Court's decision was vacated and the case was remanded for factual determination. Assuming that there was no settlement, the subsequent District Court case was not published; therefore, the actual outcome is not available.

[FN375]. No. 96-4002, 1997 WL 271742, at *1 (6th Cir. May 21, 1997).

[FN376]. Id.

[FN377]. Id.

[FN378]. Justice Felix Frankfurter wrote: "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation." Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J. concurring).

[FN379]. See discussion supra Part IV.C.

END OF DOCUMENT