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Arthur Austin

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ARTICLES

IVY LEAGUE PRICE-FIXING: CONFLICT FROM THE INTERSECTION OF EDUCATION AND COMMERCE

ARTHUR AUSTIN*

INTRODUCTION

“No one attending the [price-fixing] gatherings was so stupid that he didn’t know the meetings were in violation of the law. But it is the only way a business can be run. It is free enterprise.”¹

Price-fixing is universally acknowledged as the most pernicious antitrust offense.² To Adam Smith price-fixing was evidence of a

* Edgar A. Hahn Professor of Jurisprudence, Case Western Reserve University School of Law, Cleveland, Ohio.

¹ JOHN G. FULLER, *THE GENTLEMEN CONSPIRATORS* 191 (1962).

² See A.D. NEALE, *THE ANTITRUST LAWS OF THE U.S.A* 444 (3d ed., Cambridge University Press 1980) (1960) (stating “Price-fixing agreements come first in importance among these offenses and nobody in the United States now expects to get away with overt price agreements or any of the obvious variants such as agreements for level tendering, formula pricing, and so on”).

character flaw in tradesmen.³ Attorney General Robert Kennedy called it a “major threat to democracy.”⁴ Consistent with these views the Supreme Court decrees some forms of price-fixing *per se* illegal, beyond the redemption of any defenses.⁵

The *per se* rule applies to “classic” price-fixing, i.e. cases in which the conspirators are caught with their hands dangling in the cookie jar.⁶ It is the tawdriness of the offense that accounts for its public stigma. While the fix may be hatched on the tailored greens of a posh golf course, Mafia-like tactics implement the scheme. Communications via code or fraudulent travel vouchers in which a trip to White Sulfur Springs ends in a clandestine midnight meeting in Dirty Helens in Milwaukee: “they were gentlemen, and they paid for their drinks,”⁷ while erstwhile business colleagues devise ways to cheat on each other.

The sleaze factor tends to overshadow the economic subtleties that motivate risking jail time. Fixing typically occurs in concentrated markets where producers sell homogenous products, e.g. oil, sugar, building supplies, confronted by inelastic demand.⁸ Homogeneity makes it easier to organize and conduct the collusion.⁹ Moreover, the likelihood of tampering increases in declining industries in which the profit level is being squeezed.¹⁰ It follows that in periods of shrinking demand managers are

³ See ADAM SMITH, *WEALTH OF NATIONS* 137 (Prometheus Books 1991) (positing meetings of members of same trade generally lead to conspiracies).

⁴ Fuller, *supra* note 1, at 176.

⁵ See, e.g., *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218-24 (1940) (emphasizing that so-called competitive abuses or evils which price-fixing agreements were designed to eliminate or alleviate do not justify a defense).

⁶ See *id.* at 223 (noting that classic price-fixing occurs under Sherman Act when a combination is formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce).

⁷ Fuller, *supra* note 1, at 174.

⁸ See David A. Butz, *Vertical Price Controls With Uncertain Demand*, 40 *J. LAW & ECON.* 433, 455 (outlining the conventional ingredients for a successful cartel as “homogeneous products, stable demand, concentrated retailing, entry barriers, long-run profits.”).

⁹ See Kenneth M. Davidson, Symposium, *1982 Merger Guidelines: The Competitive Significance of Segmented Markets*, 71 *CALIF. L. REV.* 445 (positing “homogeneity is a condition that facilitates reaching consensus and detecting deviation” which makes price fixing even more likely).

¹⁰ See Michael K. Vaska, Comment, *Conscious Parallelism and Price Fixing: Defining the Boundary*, 52 *U. CHI. L. REV.* 508, 510 (1985) (discussing attraction of cartel formation because cartels maximize profits of their members by reducing total output and setting prices well above marginal cost, thus achieving a market price that is higher than the price that would prevail if the market were competitive).

pressured to improve performance and thus more likely to succumb to price-fixing.¹¹ However, there are anomalies.

a. The Ivy League Price-Fixers

But to many observers, there is one reason the case against the *Overlap* agreement went forward. “Because,” says a leading antitrust attorney, “they’re a violation of the antitrust laws.”¹²

Ivy League price-fixing originated in a series of 1950 meetings in which member schools reached a consensus not to bid for “star” athletes and then turned to a discussion of whether a similar consensus was appropriate for “star” students.¹³ M.I.T. joined the Ivy Group¹⁴ as the meetings evolved into *Overlap*, a yearly process for implementing a need-based admissions policy by sharing student financial information.¹⁵ When tuition grants among schools differed by more than \$500, *Overlap* members pledged to charge “approximately the same amount”, regardless of the school the student ultimately selected.¹⁶ Any doubt about *Overlap*’s price-fixing intentions were resolved by the process adopted at the annual meetings:

¹¹ See *id.* at 511 (furthering that pressure to succeed can even drive members of cartel to cheat on one another by pricing below the monopoly price).

¹² Liza Mundy, *Who Targeted the Ivies?* LINGUA FRANCA, Nov/Dec., 1992, at 30.

¹³ See Michael C. Petronio, Comment, *Eliminating the Social Cost of Higher Education: The Third Circuit Allows Social Welfare Benefits to Justify Horizontal Restraints of Trade in United States v. Brown University*, 83 GEO. L.J. 189, 200-01 (1994) (explaining that Ivy *Overlap* Group developed whereby its member institutions met annually to share financial information in order to adjust their figures for each admitted candidate so that each family was asked to pay approximately the same amount regardless of which Ivy *Overlap* institution the candidate chose, thus neutralizing the effect of financial aid).

¹⁴ See *id.* at 189 n.2 (recanting details of Ivy *Overlap* Agreement, in which the manual states that MIT is considered a member of Ivy Group for purposes of Ivy *Overlap* rules).

¹⁵ See *id.* (outlining provisions of Ivy *Overlap* Agreement whereby all Ivy Group institutions will share financial information concerning admitted candidates at annual Ivy *Overlap* meeting prior to mid-April common notification date in order to enable student to choose among the Ivy Group institutions for non-financial reasons).

¹⁶ U.S. v. Brown Univ., 805 F. Supp. 288, 293 (E.D. Pa. 1992) rev’d, remanded by U.S. v. Brown Univ., 5 F.3d 658 (3d Cir. Pa. 1993) (positing as a general rule that families will be asked to pay approximately the same amount regardless of the Ivy Group institution they choose to attend); see Douglas R. Richmond, *Antitrust and Higher Education: An Overview*, 61 UMKC L. REV. 417, 451 (1993) (stating that family contribution-differences of less than \$500 were understood to be close enough to warrant no discussion aimed at determination of a common figure).

During those few minutes allocated to individual aid applicants, the schools could not and did not make a genuine and concerted effort to assess accurately the aid applicants actual financial circumstances . . . [the meetings] were more a result of compromise and expediency than a genuine effort, as M.I.T. contends, to "get it right." As a result . . . aid applicants and their families would pay the same amount regardless of which Ivy League Overlap Group Institution the student decided to attend.¹⁷

Overlap ignored ominous signals. Even a casual following of the highly-charged news accounts of the Electrical Conspiracy of the early 50's should have tripped in trepidation among *Overlap* participants. One would expect those in authority to have sought legal review after the publicity about executive jail sentences and the Kefauver hearings that forced the public admission by the General Electric CEO that his company's price fixing was "foolish, immoral, and illegal."¹⁸

But this was not, at least initially, the stereotypical price-fixing conspiracy. No slinking to Dirty Helens, no exotic codes, no enforcers.¹⁹ "Nobody," said an Ivy spokesman, "is bound by anything."²⁰ It started with two groups – *Overlap* and *Pentagonal/Sisters*²¹ – all elite private schools linked by a common student audience, a shared educational ideology, as well as an admissions perspective. Specifically, sharing student information in order to implement a fair and efficient admissions process.²² As every antitrust lawyer knows, it is dangerous to

¹⁷ *Brown Univ.*, 805 F. Supp. at 295.

¹⁸ Fuller, *supra* note 1, at 202.

¹⁹ *Brown Univ.*, 805 F. Supp. at 294 (explaining, however, that they did appoint a "driver" who was responsible for calling out applicant's name and schools which had admitted applicant for *Overlap* comparisons).

²⁰ Connie Leslie & Sue Hutchinson, *An Ivy League Cartel*, NEWSWEEK, Aug. 21, 1989, at 65 (quoting Nancy Agnew, spokeswoman for Wellesley College).

²¹ Composed of: Amherst, Williams, Wesleyan, Bowdoin, Dartmouth, Barnard, Bryn Mawr, Mount Holyoke, Radcliffe, Smith, Vassar, and Wellesley. The *Pentagonal* group was comprised of formerly all-male schools. The *Seven Sisters* group consists of schools which were historically all-female, though some schools in the group now admit male students. *Brown Univ.*, 805 F. Supp. at 290.

²² See *id.* at 293 (outlining an agreement between the *Overlap* members to "a common system for measuring parental ability to pay and also seek to reduce differences in the other elements of needs analysis").

exchange information that touches prices or costs.²³ Hence the irony of a comment by the president of an *Overlap* member who, in extolling the socio-economic goals of *Overlap*, bragged: “Against such a plethora of information, college and university officials seldom meet without there being some discussion about tuition and salary.”²⁴

In a display of insouciance the president, “who once worked as an antitrust lawyer,”²⁵ overlooked the dangerous implications of this comment and its historical origins with Adam Smith’s admonition:

People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary.²⁶

For over thirty years *Overlap* conducted a textbook price cartel.²⁷ The coupling of the nation’s most prestigious institutions, all located within shouting – collusion – distance, produced a synergized form of market power.²⁸ The longevity of the arrangement certifies its success in maintaining cartel discipline. It was an achievement in the face of emerging – then obvious – negative legal precedent shadowed by what eventually became the reality of costly litigation.

²³ See, e.g., *U.S. v. Container Corp. of Am.*, 393 U.S. 333, 336-38 (1969) (emphasizing that where the exchange of price information has an anticompetitive effect in an industry, the Court will not allow price to be used even in an informal way to restrain competition).

²⁴ William R. Cotter, *Colleges’ Efforts to Rationalize the Financial-Aid System Should Not be Treated as Violations of Antitrust Laws*, CHRON. HIGHER EDUC., Sept. 6, 1989, at B1-3.

²⁵ *Id.*

²⁶ Smith, *supra* note 3, at 137.

²⁷ Elbert L. Robertson, *Antitrust as Anti-Civil Rights? Reflections on Judge Higginbotham’s Perspective on the “Strange” Case of United States v. Brown University*, 20 YALE L. & POLY REV. 399, 401 (2002) (noting that *Overlap* began in the late 1950s).

²⁸ Richard Morrison, Comment, *Price Fixing Among Elite Colleges and Universities*, 59 U. CHI. L. REV. 807, 811 (1992) (arguing that “participants in the Overlap Group probably possess a high degree of market power because the reputation commanded by these schools carves out a distinct market for their educational services.”).

With *Bleakhouse* tenacity the *Overlap* issue has persevered from the initial meetings in the 1950's on to the Congressional exemption of today. In the interim, the Government investigation and complaint came in the late 1980's followed by the Ivy League members agreeing to a consent decree in 1991, as M.I.T. opted to litigate to the Third Circuit, getting an adverse decision in the District Court remanded in 1993.²⁹ That same year M.I.T. joined the consent decree. The *Bleakhouse* effect continues with the extension of the exemption to 2008.³⁰

This Essay examines the evolution of *Overlap*, including the range of possible influences – history and context – capped by a deconstruction of the Court of Appeal's effort to square the academic mission with Antitrust principles. It is a narrative of people with lofty ideals ultimately challenged by the conflicting dynamics of an Intersection of Education and Commerce. The discussion includes an explanation for *Overlap's* decision to consent out despite a firm commitment to the credibility of their legal position followed by an analysis of post decree expiration consequences. The narrative ends with an effort to parse the tensions between Antitrust and higher education. The essay begins with a hypothetical Opinion Letter profiling the Antitrust landscape during the early stages of *Overlap*.

b. The 1958 Opinion Letter

Consistent with Adam Smith's warning and the presence of an ample number of supporting decisions, business associations do not breathe without review by antitrust counsel.³¹ As a preface it should be noted that an Opinion Letter would offend the bulk of the academic clients who would resent the suggestion of *any* connection with the profit maximizing motivations of Trade.

²⁹ Theodore J. Stachtaris, Note, *Antitrust In Need: Undergraduate Financial Aid and United States v. Brown University*, 62 FORDHAM L. REV. 1745 (1994) (discussing "Third Circuit's decision to remand the case to the district court" and the ultimate settlement).

³⁰ For a brief history of *Overlap*, see H.R. Rep. No. 107-32, at 2 (2001). The exemption allows private universities to create agreements "to provide aid on the basis of need only, to use common principles of need analysis, to use a common financial aid application form, and to allow the exchange of the students' financial information through a third party" until 2008. Michael F. Urbanski et al., *Antitrust and Trade Regulation Law*, 38 U. RICH. L. REV. 59, 83 (2003).

³¹ See PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES § 242 (5th ed. 1997) (furthering that the decision to hold the meeting in itself could be considered a violation of the Sherman Antitrust Act).

Even by 1989 – when there was no doubt about an antitrust implication – the *Overlap* constituency was “stunned”³² by the Antitrust Division’s investigation, criticizing the Government for conducting a “witch-hunt.”³³ Frustrated with the antitrust entanglement, a Dartmouth official summed up the consensus: “[s]chools like ours should not be seen as competitors in the same way that toaster manufacturers are.”³⁴

Opinion letters would have covered common ground,³⁵ opening with a blunt acknowledgement that but for the noncommercial context the *Overlap* arrangement was classic price-fixing under *Socony* Footnote 59;³⁶ “surely one of the most important footnotes in Supreme Court annals. . . .”³⁷ The conspiracy was transparently advertised in the *Manual of the Council of Ivy League Presidents*,³⁸ an explicit codification of information exchange procedures and pricing objectives: “The purpose of the compare agreement is to neutralize the effect of financial aid so that a student may choose among Ivy Group institutions for non-financial reasons.”³⁹ Even the term *Overlap* was an open

³² See Gary Putka, *Educated Moves: Elite Private Colleges Routinely Raising Tuition*, WALL ST. J., Sept. 5, 1989, at 1 (noting many educators, especially at private schools, were stunned by the investigation).

³³ Scott Jaschik, *Investigation Into Tuition Fixing Spreads; 55 Institutions Now Say They Are Targets*, CHRON. HIGHER EDUC., October 4, 1989, at A1 (quoting Vanderbilt University professor who stated that colleges have tried to “pretend this is not a real issue by getting it depicted as a witch-hunt.”).

³⁴ Sharon LaFraniere, *Ivy League Schools Agree To Halt Collaboration on Financial Aid*, WASH. POST., May 23, 1991, at A3 (quoting Dartmouth’s argument that “colleges should not be treated like ordinary businesses.”).

³⁵ An opinion letter would have included references to the danger of circulating any information touching on price and cost.

When courts interpret an antitrust law to forbid horizontal agreements to set prices, firms seeking to coordinate their behavior may experiment with “second best” devices that fall short of reaching a consensus on output and prices but help approximate the result of an express price-fixing arrangement. A number of Sherman Act decisions in the 1920’s dealt with agreements by competitors to engage in what commentators later would call “facilitating practices.” The era’s most prevalent practice consisted of agreements, often reached in the context of a trade association, to share information on matters such as pricing, costs, inventories, and the terms of specific sales transactions.

ANDREW I. GAVIL ET AL., *ANTITRUST LAW IN PERSPECTIVE: CASES CONCEPTS, AND PROBLEMS IN COMPETITION POLICY*, 267 (2002).

³⁶ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940) (discussing price-fixing standard under the Sherman Act).

³⁷ James Rahl, *Price Competition and the Price Fixing Rule – Preface and Perspective*, 57 NW. U. L. REV. 137, 141 (1962) (noting importance of Justice Douglas’s footnote in *Socony*).

³⁸ See *United States v. Brown Univ.*, 805 F. Supp. 288, 292-93 (1992) (noting various policy and procedure provisions in the *Manual*).

³⁹ *Id.* at 293.

declaration of purpose – it specifically referred to the price adjustments – fixing – of Overlapping student applications.⁴⁰

Economic power, the second prong of Footnote 59, was patent in a conspiracy of the most elite and wealthy academic institutions in the country – a virtual Prestige Cartel.⁴¹ According to economic theory, satisfaction of the third prong – negative market effects – was inevitable. Competition for students on the basis of merit was eliminated, sharing application information produced cost savings unavailable to nonmembers, and, most importantly, the application price adjustments enabled *Overlap* members to maximize net revenue from undergraduate education, which could be dispersed among other institutional enterprises – including faculty and staff.⁴²

Antitrust opinion letters adhere to a protocol of doom, resurrection, and calculated hedging. *Overlap* would get a heavy dose of doom under Footnote 59, which ironically came from William O. Douglas, a former law professor at Yale.⁴³ The Sherman Act's restriction of jurisdiction to "restraints of trade or commerce among the several states"⁴⁴ is resurrection of Justice

⁴⁰ A disputed assumption, Hoxby attributes the term to the overlapping of the athletic conferences – Ivy, Pentagonal, and Seven Sisters. Caroline M. Hoxby, *Benevolent Colluders? The Effects of Antitrust Action on College Financial Aid and Tuition*, NAT'L BUREAU ECON.RES. WORKING PAPERS 7754 (June 2000). The Manual states that "[f]amily contributions shall be compared and adjusted if necessary so that, as a general rule, families will be asked to pay approximately the same amount regardless of the Ivy Group institution they choose to attend." *Brown*, 805 F. Supp. at 293.

⁴¹ See GEORGE DENNIS O'BRIEN, *ALL THE ESSENTIAL HALF-TRUTHS ABOUT HIGHER EDUCATION*, 144 (The University of Chicago Press 1998) (characterizing *Overlap*'s price-fixing scheme as a "[p]restige [c]artel"); David A. Garvin, *THE ECONOMICS OF UNIVERSITY BEHAVIOR*, 10 (1980); see also Scott Maston, *Old School Ties: Financial Aid Coordination and the Governance of Higher Education*, 28 J. ECO. BEHAVIOR AND ORGANIZATION 23, 26-9 (1995) (theorizing that non-price competition dissipates prestige power).

⁴² Donald Robert Carlson & George Bobrinsky Shepherd, *Cartel on Campus: The Economics and Law of Academic Institutions' Financial Aid Price-Fixing*, 71 OR. L. REV. 563, 579 (1992) (noting that "[i]n order to achieve the primary objective of prestige maximization, institutions seek to maximize net revenues from undergraduate education.").

⁴³ Footnote 59's sweeping extension of Sherman Act coverage arguably confirms his reputation for sloppiness. See Felicia R Lee, *How Nobility of Purpose Can Square With Meanness and Lies*, N.Y. TIMES, May 24, 2003, at B11. "In 'Wild Bill: The Legend and Life of William O. Douglas' (Random House), Bruce Allen Murphy, a professor of civil rights at Lafayette College in Easton, Pa., argues that Douglas's sloppiness in framing and writing Supreme Court decisions and his penchant for falsehood stemmed from boredom with the high court and a deep need to invent the person he wanted to be: a politician." *Id.*

⁴⁴ Monopolies and Combinations in Restraint of Trade, 15 U.S.C.S. § 1 (2005) (limiting the act's applicability to "restraint of trade, commerce among the several states, or with foreign nations").

Story's view of trade: "Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade."⁴⁵ Hence, when the Supreme Court endorsed Story's definition of "trade" in 1950,⁴⁶ the Opinion Letter could persuasively counsel *Overlap* that a Sherman Act threat was virtually non-existent. By plain meaning the Act's express reference to "trade or commerce" excludes coverage of *Overlap*'s central mission of providing a liberal arts' education.⁴⁷

After noting the transparency of a conspiracy that provided the member schools' with a predictable source of revenue, an Opinion Letter would be obliged to approve *Overlap*. Prescient counsel would add a modest hedge, calling attention to cases nibbling away at the implicit learned profession exemption,⁴⁸ the growing relevance to antitrust of economic theory, and the emergence of a close affinity between higher education and commerce, concluding with a cautionary suggestion to get continued yearly reviews.⁴⁹

c. The Intersection of Education and Commerce

World War II evoked the debut of a conflict between the Emersonian view of "knowledge for the sake of knowledge"⁵⁰ and the commercial objectification of knowledge into a consumable product. The G.I. Bill "sent a seismic shock through academic life"⁵¹ by unleashing a large population of subsidized students

⁴⁵ The Nymph, 18 Fed. Cas. 506, 507 (1834).

⁴⁶ See *United States v. Nat'l Ass'n of Real Estate Bds.*, 339 U.S. 485, 490-91 (1950) (quoting Justice Story's definition of "trade" in *Nymph* and stating that "[i]t is in that broad sense that 'trade' is used in the Sherman Act").

⁴⁷ Comment, *The Applicability of the Sherman Act to Legal and Other "Noncommercial" Activities*, 82 YALE L. J. 313, 316 (1972) (arguing that "[s]ince the Act expressly applies to 'trade or commerce,' any activity not 'trade or commerce,' so the inference goes, falls outside the Act").

⁴⁸ See James E. Coleman, Jr., *Learned Professions, Antitrust Exemptions*, 33 ANTITRUST L.J. 48 (1967) (stating "there is no express statutory exemption for the professions". It exists because of "a negative inference drawn from the affirmative language of the Sherman Act, which extends federal antitrust jurisdiction only to 'trade or commerce'").

⁴⁹ See Malcolm B. Coate & Jeffrey H. Fischer, *Can Post-Chicago Economics Survive Daubert?*, 34 AKRON L. REV. 795, 807 (2001) (noting that "[t]he Chicago school of antitrust economics is based on the insight that neoclassical economic theory is required to understand market competition and, therefore, controls optimal antitrust enforcement").

⁵⁰ RALPH WALDO EMERSON, *THE AMERICAN SCHOLAR* 15, 23 (Cornell Press 1955).

⁵¹ CLARK KERR, *THE USES OF THE UNIVERSITY* 52 (Harvard University Press 1963) (noting G.I. Bill's effect on academic life); see Milton Greenbert, *How the G.I. Bill Changed*

that converted the Academy into a group of university nations, each with increasing student and faculty populations. The Federal government, at the urging of the influential Academy lobby, opted to divest its wartime technological resources by delegating future research to the university system, thereby deploying a Marshall Plan for U.S. colleges.⁵² Under the aegis of the National Science Foundation, the federal government used the grant system to transfer wealth to the Academy for problem-solving projects thereby converting research into a form of entrepreneurial capitalism while institutionalizing an intersection of Education and Commerce.⁵³

In a 1963 Harvard lecture, Clark Kerr acknowledged that the Intersection was causing a “vast transformation of university life”⁵⁴ creating “The Federal Grant University”. Three years later Life Magazine provided a glimpse into the transformation by publishing *The Wizard of Flunk-Out U*.⁵⁵ Willard G. Roberts, Ph.D. and President of Parsons College, defied the Emersonian ideal by anticipating the Wal-Mart tactics of contemporary academe: he openly used money to attract faculty, aggressively bragged about making a profit, while recruiting flunk-outs and students with poor credentials.⁵⁶ Roberts’ flamboyant style, defiance of conventional academic protocol, seeming success (Parsons went from 300 to over 5,000 students during his tenure

Higher Education, CHRON. HIGHER EDUC., June 18, 2004, at B9 (discussing the impact that G.I. Bill had on universities).

⁵² See M. Gregg Bloche, Review Essay, *Rogue Science: Science in the Service of Human Rights*. By Richard Pierre Claude, 91 GEO. L.J. 1257, 1259 (2003) (noting that in Cold War America, “leading universities affirmed their commitment to conducting science in service of the nation’s security, though they insisted on maintaining Chinese walls between classified military research and academic programs”).

⁵³ Haran Craig Rashes, *The Impact of Telecommunication Competition and the Telecommunications Act of 1996 on Internet Service Providers*, 16 TEMP. ENVTL. L. & TECH. J. 49, 52-3 (1997) (detailing National Science Foundation’s involvement in development of the internet, its initial purpose for “non-commercial use by research and educational organizations” and subsequent privatization).

⁵⁴ Kerr, *supra* note 51.

⁵⁵ James D. Koerner, *THE PARSONS COLLEGE BUBBLE* 166 (Basic Books, Inc. 1970). (“It was the work of members of Life’s Chicago staff and had been done with the encouragement of a Milwaukee public relations firm that Roberts was then retaining. Both Roberts and his publicists expected treatment that would be favorable in the customary way. The article, enriched with large photographs and plentiful quotes from Parson’s students, turned out to be a racy, satirical, and blistering account of Robert’s ‘rip-roaring, bell-ringing, every-time-a bulls-eye salesmanship and rigid cost accounting.’ The main focus of the piece was on the country-club aspect of the college, the draft-dodging ‘dumb rich kids,’ the sports cars, the hard-drinking party-goers, and the fat profit that Parsons said it was making out of it all.”)

⁵⁶ *Id.* at 58-62.

1955-67), and bad publicity, led to the decertification and eventual demise of Parsons College.⁵⁷

University accrediting agencies are voluntary associations constituting a “somewhat formal structure to effectuate common purposes and goals.”⁵⁸ They function as a barrier to entry: without accreditation a school’s students cannot transfer, its graduates are hindered in graduate school admission, and, most importantly, both student and institution are denied various forms of governmental assistance.⁵⁹ For Parsons College the real barrier was the prevailing Emersonian vision that did not countenance interference in the accepted methods of transferring knowledge. They were accused of abdicating acceptable admission standards in exchange for tuition, mocking Emersonian ideals with Wal-Mart promotions, and the “persistent failure on the part of the College to correct certain serious weaknesses in its operation.”⁶⁰ Judge Julius Hoffman implicitly endorsed the Emersonian culture by rejecting Parsons due process claim with pointed advice: “In this case, the issue was not innocence but excellence.”⁶¹

In the prevailing idiom of mass marketing Roberts commercialized the college degree by treating students as consumers, convincing them that a degree is an entitlement.⁶² It

⁵⁷ See Betsie Freeman, *Cultivating Harmony Transcendental Meditators and Other Residents Learn to Live Together in an Iowa Town*, OMAHA WORLD-HERALD, October 10, 2004, at 1E (reporting that Parsons College property was bought for 3 million dollars in 1974 by Maharishi University of Management, founded by Maharishi Mahesh Yogi, who was also the founder of the Transcendental Movement).

⁵⁸ Comment, *The Legal Status of the Educational Accrediting Agency: Problems in Judicial Supervision and Governmental Regulation*, 52 CORNELL L. Q. 104, 108 (1966).

⁵⁹ See Hazel G. Beh, *Downsizing Higher Education and Derailing Student Educational Objectives: When Should Student Claims for Program Closures Succeed?*, 33 GA. L. REV. 155, 172-173 (1998) for examples of how certain accrediting agencies aid students in the event an academic program is terminated. “When a program is forced to close, many accrediting agencies have promulgated standards that require the closing program to develop a closure plan that facilitates orderly closure and minimizes disruption of student education.” *Id.* at 172. Such care is necessary, as almost all professions require graduation from an accredited program as prerequisite to practice. *See id.* at 172, n.70. “In those cases, loss of accreditation is devastating to the school and the student.” *Id.*

⁶⁰ *Parsons College v. North Central Assoc. of Colleges and Secondary Schools*, 271 F. Supp. 65, 68 (1967).

⁶¹ *Id.* at 72.

⁶² See Vance Packard, *THE HIDDEN PERSUADERS* 123 (David McKay Company, Inc. 1957) (quoting Lloyd Warner, an influential American sociologist and anthropologist who was noted for his studies on class structure for the proposition that “Within the status systems something else operates that is at the very center of American life and is the most motivating force in the lives of many of us – namely what we call social mobility, the

was a campaign that “needed to be done with some deftness as no one cares to admit he is a social striver.”⁶³ Roberts succeeded with the students but failed to impress his peers – and the press.⁶⁴ His timing was bad; the academy still esteemed “excellence,” meritocracy, and the Emersonian paradigm. Had Roberts packaged his open admissions program as a class distinction metaphor, or “a second opportunity for underachievers”, it would have helped, but not changed, the outcome.

Although the Emersonian model still dominated, *Overlap* would have been less confident of their invulnerability to antitrust scrutiny if they had only parsed the implications of Clark Kerr’s Harvard lecture. Speaking of the transformation of the university to a captive of the federal grant apparatus, he noted the shift from the traditional knowledge for its own sake ideals to a corporate model:

The university and segments of industry are becoming more alike. As the university becomes tied into the world of work, the professor – at least in the natural and some of the social sciences – takes on the characteristics of an entrepreneur. Industry, with its scientists and technicians, learns an uncomfortable bit about academic freedom and the handling of intellectual personnel. The two worlds are merging physically and psychologically.⁶⁵

Cautioning his audience on the need to adjust to the transformation, Kerr warned of the habit of faculty to be “liberal about the affairs of others” but “radically conservative” within the context of their own backyard.⁶⁶

aspiration drive, the achievement drive, the movement of an individual and his family from one level to another, the translation of economic goods into socially approved symbols, so that people achieve higher status.”).

⁶³ *Id.*

⁶⁴ See *Parsons College*, 271 F. Supp. at 68 (discussing how the Commission on Colleges and Universities unanimously voted to drop Parsons College from its membership primarily due to “lack of confidence in the administrative leadership of the College.”).

⁶⁵ Kerr, *supra* note 51, at 90-91.

⁶⁶ *Id.* at 99.

d. Overlap Gets Some Space

In a terse series of paragraphs – less than a page of text (excluding footnotes)⁶⁷ – the D.C. Circuit Court cited lack of Sherman Act jurisdiction in reversing the District Court’s holding that an accreditation association’s refusal to evaluate Marjorie Webster Junior College’s application for membership was an unreasonable restraint of trade.⁶⁸ Although the specific explanation was the plaintiff’s failure to implicate “trade or commerce,” the broader context was the Intersection of Education and Commerce.⁶⁹ As a proprietary school Webster could not satisfy the rule that a member “should be a non-profit organization with a governing board representing the public interest.”⁷⁰ Profit and its baggage was the flash point of the trial, buzzing with clashing testimony over the compatibility between profit and the Emersonian ideal.⁷¹

Witnesses for Middle States argued that education is an “eleemosynary activity” and “not under any circumstances. . . to

⁶⁷ *Marjorie Webster Junior College, Inc. v. Middle States Assoc. of Colleges and Secondary Schools, Inc.*, 432 F.2d 650, 653-55 (D.C. Cir. 1970) (holding that (1) Sherman Act was not applicable to Middle States’ conduct, (2) circumstances did not warrant judicial interference with accreditation and membership policies of Middle States, and (3) assuming applicability of Due Process Clause, Marjorie Webster did not sustain burden of showing irrationality of policy in question as applied to bar consideration of Marjorie Webster for accreditation).

⁶⁸ *Marjorie Webster Junior College, Inc. v. Middle States Assoc. of Colleges and Secondary Schools, Inc.*, 302 F. Supp. 459 (D.D.C. 1969). Marjorie Webster Junior College, Inc. had sought regional accreditation for its District of Columbia institution, and the District Court had invoked jurisdiction under both 28 U.S.C. §1337, which vests original jurisdiction of actions involving the antitrust laws in the district courts of the United States, and D.C. Code § 11-521 (1967 ed.). *Id.* at 460.

⁶⁹ For an interesting discussion on this point, see Clark C. Havighurst & Nancy M.P. King, *Private Credentialing of Health Care Personnel: An Antitrust Perspective*, 9 AM. J.L. & MED. 131 (1983). The authors note that Justice Bazelon’s opinion in *Marjorie Webster* was “particularly insightful in suggesting the possibility that proprietary schools might organize a competing accrediting body, thus facilitating competition between differing philosophies of education.” *Id.* at 164-65. Yet, in the end, they opine that “issues of this kind should be resolved in the marketplace and not in the courts. . .” *Id.* at 165.

⁷⁰ *Marjorie Webster*, 302 F. Supp. at 462.

⁷¹ For further discussion of Emersonian philosophy and its compatibility with current social theory, see Cornel West, Symposium, *Roberto Unger’s Politics: A Work in Constructive Social Theory: Between Dewey and Gramsci: Unger’s Emancipatory Experimentalism*, 81 NW. U. L. REV. 941 (1987). The symposium presents an in-depth examination of Emersonian themes, such as “the centrality of a self’s morally laden transformative vocation; the experimentation of the self to achieve self-mastery and kinship with nature; and. . .the idea of self-creation and self-authorization.” *Id.* at 943.

be confused or equated with a profit-making institution.”⁷² The responsibility of higher education is to “overcome the ignorance of students,” a goal incompatible with the profit motive.⁷³ Moreover, in a proprietary school there would be a “divided allegiance by those responsible for the basic decisions between making a profit and the quality of the program.”⁷⁴

Marjorie Webster witnesses extolled the benefits of the profit motivated efficient use of resources,⁷⁵ amplified by testimony arguing that the “profit motive might be one mechanism by which new private institutions . . . could . . . offer competition to the state systems. . . .”⁷⁶ Nobel Laureate Milton Friedman, the plaintiff’s star witness, testified:

One of the desirable features about a profit institution is that it makes the interests of the man who runs it tend to coincide with the interests of his customers and whether these customers be students who come to college to learn or whether they be other customers One of the sources of the current unrest on the campuses is undoubtedly the fact that as more and more of the financing is available from research funds, from governmental funds, there has been less and less need for these institutions to serve their customers properly, namely, the students⁷⁷

The District Court decision “sent shock waves through the world of professional higher education.”⁷⁸ Milton Friedman’s apparent influence exacerbated the Academy’s disappointment and bafflement. He had become a symbol of the free market

⁷² James Thomas Bannon, Jr., *The Regional Accrediting Associations and the Courts: A Study of the Marjorie Webster Case* (1973) (unpublished Ph.D. dissertation, Syracuse University) (on file with University Microfilms, Ann Arbor, Michigan) at 100.

⁷³ *Id.* at 101 (quoting testimony of John Everett, President of the New School for Social Research).

⁷⁴ *Id.* (quoting testimony of Glenn J. Christensen, President of Middle States).

⁷⁵ *Id.* at 103 (discussing statement of Lloyd Elliott, President of George Washington University).

⁷⁶ *Id.* at 105.

⁷⁷ *Id.* at 103–4. Bannon sums up: “What all of the expert testimony on the profit motive in higher education seemed to come down to was: (1) that expert witnesses for the Association shunned the idea of proprietary education without knowing anything about it and (2) that expert witnesses for the College, while not on completely firm ground, at least presented some plausible arguments which tended to refute the assertions of the Association’s witnesses. When opinion freely abounds, there is much to be said for the plausible argument.” *Id.* at 105–6.

⁷⁸ *Id.* at 8.

movement that exulted supply and demand driven by profit – a concept anathema to the contemporary academic establishment.⁷⁹

The president of Middle States described the seriousness of the threat:

Now, in 1969, a United States District Court has ruled that education is a form of commerce. This, in effect, moves education from the enclave of tradition, wherein it has grown and flourished for twenty-four centuries, and forces it into the world of commerce, subject to all the restrictions and restraints indigenous to the market place. In effect, it dictates that education is a product, not a process; that a college is a property, not a community; and that a teacher is an employee, not an agent of his civilization.⁸⁰

Judge Bazelon of the D.C. Circuit Court of Appeals rejected the premise that education is a “form of commerce” and his opinion should have inspired a favorable Opinion Letter to *Overlap* clients subject, however, to some caveats. It was a dismissive – even curt – opinion. Confronted with an issue of considerable importance, Bazelon uncharacteristically passed without a thorough analysis. Several years later, a Yale Law Journal *Comment* offered a plausible explanation for the Judge’s strategy.⁸¹

Judge Bazelon recognized two limitations on Sherman Act jurisdiction – first, activity not Trade or Commerce and secondly, “traditionally noncommercial” activities.⁸² The *Comment* challenged the applicability of the first as a jurisdictional

⁷⁹ For further discussion of how economic, consumer-driven theory can be applied to academic institutions, see Marina Lao, *Discrediting Accreditation?: Antitrust and Legal Education*, 79 WASH. U. L.Q. 1035, 1078-87 (2001). The article, in general, accords with Milton Friedman’s position that “fears about consumers’ inability to make choices for themselves are paternalistic and unsound, and that excluding competitors only serves to enhance a profession’s income and status.” *Id.* at 1081 n.266.

⁸⁰ James D. Koerner, *The Case of Marjorie Webster*, 20 THE PUB. INTEREST 40, 54-55 (Summer, 1970).

⁸¹ Comment, *supra* note 47 (analyzing the recent Supreme Court decisions regarding the Sherman Act from a more practical perspective).

⁸² *Id.* at 317-18; see *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools, Inc.*, 432 F. 2d 650, 653 (D.C. Circuit 1970) (“Despite the broad wording of the Sherman Act, it has long been settled that not every form of combination or conspiracy that restrains trade falls within its ambit.”).

requirement due to its origin as “a convenient drafting device” to assure that the common law restraint of trade characterization would not exceed the constitutional limits of the Commerce Clause.⁸³ The second limitation had been “created”⁸⁴ specifically by Judge Bazelon to get around the fact that Marjorie Webster was a proprietary institution and hence was, in fact, trade or commerce.⁸⁵ Relying on generalizations,⁸⁶ Bazelon concluded that the process of college accreditation was not a “traditional” commercial activity. Dismissing the two limitations as *ad hoc* bootstraps the *Comment* concludes that the Supreme Court “has consistently considered the evil [of restraints of trade] in general economic terms.”⁸⁷

Marjorie Webster gave *Overlap* at least five years of space before the 1975 *Goldfarb* decision extended antitrust jurisdiction dangerously close to, if not within, the non-profit sector.⁸⁸ Someone associated with *Overlap* surely read the *Goldfarb* decision in which a unanimous court held that “the public service aspect” of the practice of law “does not provide sanctuary from

⁸³ Comment, *supra* note 47, at 321 (theorizing the legislature meant to exempt “learned professions” such as law and medicine).

⁸⁴ *Id.* at 317 (furthering that this limitation also rests on the “assumption that Congress did not intend the Act to apply universally”).

⁸⁵ Marjorie Webster forced the issue by refusing to switch to non-profit status. “It might have yielded to Middle States’ suggestions and converted to nonprofit status. It would then have been accredited by Middle States in all probability and would have solved its most pressing problems. But conversion would have brought heavy taxes to the stockholders. It would also have represented to the Webster family a surrender to discriminatory practice and monopolistic power in education. To one member of the family, Sherwood Webster, such a surrender was particularly galling. He is one of two vice-presidents of the college and he more than any other person wanted to fight Middle States rather than capitulate to it in the way that other proprietary institutions had done in the past.” Koerner, *supra* note 80, at 44.

⁸⁶ See, e.g. *Klor’s Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 214 n.7 (1959) (“The Court in *Apex* recognized that the Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives”); *Marjorie Webster Junior College, Inc.*; 432 F.2d at 654 (“But the proscriptions of the Sherman Act were ‘tailored . . . for the business world,’ not for the noncommercial aspects of the liberal arts and the learned profession.”).

⁸⁷ Comment, *supra* note 47, at 326. “The Act maintains a free market by barring interference from accreditation and exercise of market power on the theory that an open market system will elicit products and services at the lowest prices. At the same time, it assures those who produce goods or provide services of an open market in which to freely compete.” *Id.*

⁸⁸ See generally Douglas R. Richmond, *Private Colleges and Tuition Price-Fixing: An Antitrust Primer*, 17 J.C. & U.L. 271, 276 (1991) (noting that “[i]t is now beyond question . . . that nonprofit status, standing alone, is insufficient to shield organizations from antitrust scrutiny.”).

the Sherman Act.”⁸⁹ The litmus test is whether there is an exchange of money for services,⁹⁰ a proposition that was subsequently endorsed by both courts in the *Overlap* litigation.

I. CONTEXT

Yet setting things in context is always worth doing, always illuminating. It helps us enlarge the picture. It peers behind the masks that writers and theorists take up to convince us that they have given birth to themselves. There are always risks involved in searching out the figure in a carpet or shaping the multitude of possibilities into a single coherent narrative.⁹¹

a. Vietnam and Social Consciousness

The timeline for *Overlap*'s context is symbolized by a 1966 conversation between the Yale Corporation and the newly appointed admission director who, with the endorsement of President Kingman Brewster, announced that henceforth students would be admitted on the basis of talent, merit, and diversity.⁹² The Corporation was told that the traditional automatic pipeline from the favored prep schools was history. While never referencing *Overlap* in his certification of THE GUARDIANS, Geoffrey Kabaservice nevertheless describes its echo:

The policy received relatively little attention at the time and its financial implications were seriously underestimated, but need-blind admissions became one of the most important ways in which Yale

⁸⁹ *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975).

⁹⁰ *Id.* (explaining that this is the requirement for activity to be considered commerce).

⁹¹ Morris Dickstein, *Literary Theory and Historical Understanding*, CHRON. HIGHER EDUC. (Wash., D.C.), May 23, 2003, at B7, B10.

⁹² GEOFFREY KABASERVICE, *THE GUARDIANS: KINGMAN BREWSTER, HIS CIRCLE, AND THE RISE OF THE LIBERAL ESTABLISHMENT*, Chp. 7 (2004). “When told that the new students would come from nontraditional sources – public high school graduates, Jews, minorities, and even women, his interlocutor shot back; ‘You’re talking about Jews and public school graduates as leaders. Look around you at this table’ – he waved a hand at Brewster, Lindsay, Moore, Bill Bundy, and the other distinguished men assembled there. ‘These are America’s leaders. There are no Jews here. There are no public school graduates here.’” *Id.* at 259.

attracted students from less affluent backgrounds. Brewster observed that the policy helped attract wealthy students as well, particularly during the 1960s. Now that “the pocketbook was no longer relevant to admission,” he said, “the privileged took pride in the feeling that [they] had made it on the merits rather than on the basis of something ambiguously called ‘background.’”⁹³

Yale’s need-based admissions policy was a high risk departure from tradition, inviting – and getting – vigorous criticism from alumni and often vicious hostility from feeder prep schools.⁹⁴ As an “evolutionary path between revolution and decay”⁹⁵ it was rationalized by its advocates as a metaphor for social consciousness, an objective that was soon appropriated and dominated by the Vietnam War.

The Vietnam Context was a student rebellion against the draft that escalated into violent confrontation with what was viewed as an authoritarian, white male, hierarchical academy covering for an unjust war.⁹⁶ Violence was *de rigueur* at places like Harvard, Berkeley, Columbia, Cornell, Brown, Chicago, Wisconsin, Duke, and Stanford, which became battlegrounds for strikes and occupation, and ultimately death at Jackson State and Kent State.⁹⁷ As the university system bartered with concessions the movement enlarged its agenda to include student participation in decision-making, revised curriculum, and a more diverse student body.

⁹³ *Id.* at 264.

⁹⁴ See e.g. Nicholas Thompson, *The Best, The Top, The Most*, N.Y. TIMES, August 3, 2003, at 4A, Column 3, Education Life Supplement, Pg. 24 (reporting generally that schools feel pressure to stay on top of U.S. News and World report and thus have a tendency to grant merit scholarships rather than need-based ones).

⁹⁵ See Kabaservice, *supra* note 92, at 289.

⁹⁶ See generally Todd Edward Pettys, *Punishing Offensive Conduct on University Campuses: Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*, 72 N.C.L.REV. 789, 795 n.50 (mentioning numerous Vietnam rebellions on college campuses).

⁹⁷ In a vignette of the times Kathy Boudin, a student in my first-year Contracts course in 1968 withdrew to join the Weatherman. Kathy served twenty-two years for participating in a robbery of a Brink’s truck and the killing of two police officers. For a description of the incident, Boudin’s subsequent sentencing and incarceration, see Susan Braudy, FAMILY CIRCLE: THE BOUDINS AND THE ARISTOCRACY OF THE LEFT (2003); Elizabeth Kolbert, *The Prisoner: Kathy Boudin’s Dreams of Revolution Got Her Twenty Years Behind Bars, Should She Now Go Free?* NEW YORKER, July 16, 2001, p.44. In 1970, twenty miles south of my school, the National Guard killed four Kent State students. See Gerald W. Heaney, *Judge Martin Donald Van Oosterhout: The Big Judge from Orange City, Iowa*, 79 IOWA L. REV. 1, 32 (1993).

Social consciousness was the unifying mantra of the student antiwar movement. Draft deferment, which discriminated against the poor and minorities, was a high-impact and clearly legitimate target.⁹⁸ For the Ivy schools, it was a particularly sensitive issue; they were, by their own acknowledgement, the traditional sanctuary of the Nation's best and brightest – which, under the glare of protesters, came to mean white male elitist Wasp preppies. It became a symbiotic conflict in which *Overlap's* social consciousness theme was validated by the antiwar movement, compelling its continued existence.

In the chaos of the Vietnam crisis serious consideration of the antitrust risks of a politically significant practice was highly unlikely. *Overlap's* first – and only – priority was to manage and monitor a paradigm change from the old authoritarian, white male, hierarchical, research intense system to a more inclusive egalitarian model.⁹⁹ Charles Reich, a young Yale Law professor, captured the evolving *motif* in the discovery of the Lost Self's redemption in skepticism “of both linear and analytic thought.”¹⁰⁰ Reich's vision was “suspicious of logic, rationality, analysis, and of principles.”¹⁰¹ Adjusting to grading egalitarianism to keep students out of military service,¹⁰² forced to share decision-making with students, and being held accountable in student evaluations, rendered the risk of an antitrust attack on a project in sync with the prevailing context an acceptable trade-off.

⁹⁸ See Jules Witcover, *Still Looking for Successor to RFK*, PLAIN DEALER (Cleveland, Ohio), at 2C (reporting on Kennedy's chiding of students who would accept draft deferments while protesting in favor of the poor and minorities who generally ended up going to war for them).

⁹⁹ See *United States v. Brown Univ.*, 5 F.3d 658, 664 (3d Cir. 1993) (rationalizing the existence of the *Overlap Group*, MIT argued that it “increased consumer choice and enhanced the quality of the education provided to all students by opening the doors of the most elite colleges in the nation to diversely gifted students of varied socio-economic backgrounds”).

¹⁰⁰ Charles A. Reich, *THE GREENING OF AMERICA* 241 (1970).

¹⁰¹ *Id.* at 278.

¹⁰² The appropriateness of grading curves continues to divide the academy. See John Marrow, *Easy Grading Makes Deep Learning More Important*, USA TODAY, Feb. 5, 2003, at 13A; Stuart Rojstaczer, *Everyone is Above Average*, WASH. POST, Feb. 2, 2003, at A21; Valen E. Johnson, *An A is an A is an A*, N.Y. TIMES, EDUCATION LIFE, §4(A), April 14, 2002, at 14. A Harvard law professor resolved the controversy by giving 149 A's and one B+ in his evidence course. Katrina Campbell, *With Nesson, An A for Evidence*, HARVARD RECORD, Mar. 18, 1994, at 1.

b. The Postmodern Backlash

Louis Menand introduces his account of the backlash against the 1945-75 Golden Age of Education with the emergence of a new faculty-student profile: less white males, more minorities and females – accompanied by a drop in enrollment.¹⁰³ The response came in a competitive recruitment environment in which schools targeted a new relevant market of non-whites and women.¹⁰⁴ According to Menand, “it was economic necessity that made them do it.”¹⁰⁵

In the emerging “backlash” anti-disciplinary scholarship – work that “amounted to criticism of the practices and assumptions of its own discipline”¹⁰⁶ – transformed the Academy’s agenda.¹⁰⁷ Menand exults the destruction of the walls separating disciplines, a recognition that “cultural differences seem a lot more interesting than similarities.”¹⁰⁸ The transformation from the Golden Age template of objectivity, reason, and knowledge was certified by *Bakke*, which forced the Academy to “begin talking about diversity . . .”¹⁰⁹ “‘Diversity’ is the very word Powell used in the *Bakke* opinion, and there are probably very few college catalogs in the country in which the word ‘diversity,’ or one of its cognates, does not appear.”¹¹⁰

Menand’s “backlash” interpretation is confirmed by the ideological influence from the influx of ‘60’s legacies into the

¹⁰³ Louis Menand, *College: The End of the Golden Age*, THE N.Y. REVIEW OF BOOKS, October 18, 2001, at 47.

¹⁰⁴ *Id.* at 45. “[T]he system had over expanded during the Golden Age. Too many state-subsidized slots had been created, and one result was a much higher level of competition among colleges to recruit students.” *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ “There is no doubt that this work, by feminists, students of colonialism and post-colonialism, non-whites, gays, and so on, tended to call into question the very idea of academic disciplines as discrete and effectively autonomous fields of inquiry. But the questioning of the traditional assumptions of academic work, particularly in the social sciences and humanities, that took place after 1975 was only adding fuel to a fire started from other causes.” *Id.*

¹⁰⁸ *Id.* at 46.

¹⁰⁹ *Id.*

¹¹⁰ The dialogue concentrated on “. . . talk about ‘interpretations’ (rather than ‘facts’), ‘perspective’ (rather than ‘objectivity’), and ‘understanding’ (rather than ‘reason’ or ‘analysis’). An emphasis on universalism and ‘greatness’ has been replaced by an emphasis on diversity and difference; the scientific norms which once prevailed in many of the ‘soft’ disciplines are viewed with skepticism; ‘context’ and ‘contingency’ are continually emphasized; attention to ‘objects’ has given away to attention to ‘representations.’” *Id.* at 46-7.

Academy who rode Vietnam deferment into graduate school and on to tenure making yesterday's student radical today's tenured professor or academic dean.¹¹¹ Radical Harvard Law professor Duncan Kennedy, who advocated a lottery admissions policy for elite law schools,¹¹² explained the 60's legacy: "The slogan should not be '68, the failed revolutionary movement . . . but the 60's, a diffuse cultural rebellion with a thousand specific implications for daily life in the 90's."¹¹³ A coalition of tenured radical faculty supported by energized students carried the 60's diversity culture into a 90's validation of *Overlap*.

II. AN ANTITRUST DECONSTRUCTION LOOKING FOR SOCIAL WELFARE

A renovated faculty/student population combined to produce new intellectual currents derived from the dissolution of disciplinary parameters and motivated by a dedication to theoretical proof of the arbitrariness of meaning. The controlling theory is deconstruction, which offers a process for the deferral of meaning through tracing¹¹⁴ – each word or phrase has a legacy

¹¹¹ ROGER KIMBALL, *TENURED RADICALS: HOW POLITICS HAS CORRUPTED OUR HIGHER EDUCATION* xiv (Elephant Paperback 1998) (1990) (noting that the new academic elite are the tenured or soon-to-be-tenured radicals now controlling nearly all of the most prestigious humanities departments in the country); see DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* 1-23 (1991); CHARLES SYKES, *THE HOLLOW MEN: POLITICS AND CORRUPTION IN HIGHER EDUCATION* (Regnery Gateway 1990) (discussing the crisis in higher education and focusing on its impact upon Dartmouth College); see also Michael W. Hirschorn, *A New-Left Challenger Comes to an Uneasy Peace with Academe*, *CHRON. HIGHER EDUC.*, June 29, 1988, at A3 (describing the movement of 60s student-activists into teaching positions).

¹¹² DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY* 121-22 (1983). Of Kennedy, Calvin Trillin said: "Kennedy – who can turn out slightly antic left-wing slogans practically as a parlor trick, the way some people can recite the verses to old songs – has said, 'Resist at the bourgeois dinner party as well as on the assembly line.'" Calvin Trillin, *A Reporter at Large: Harvard Law*, *NEW YORKER*, Mar. 26, 1984, at 53, 59.

¹¹³ Ken Emerson, *When Legal Titans Clash*, *N.Y. TIMES MAG.*, April 22, 1990, at 26, 66.

¹¹⁴ Trace refers to the suspension of meaning: every word has trace of meaning from previous words while simultaneously hold itself open to the traces of subsequent words. See TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 114, 119 (University of Minnesota Press 1996) (1983). Trace joins the "inside" of the text to the outside. According to EVE TAVOR BANNET, *STRUCTURALISM AND THE LOGIC OF DISSENT* 212 (University of Illinois Press 1989): "It joins the word or meaning which is 'present' in the text to words, meanings and associations which are 'absent' in the text but implied by the word's chain of associations or differential relations. Of course, the precondition for this operation is to erase such concepts as authorial intention, linguistic intentionality and the difference between conscious and unconscious intentions. Cleverly used, a word in one literary or philosophical text can lead not only to any number of other literary or other

from its previous use, while simultaneously remaining open for a new-deferred-meaning.¹¹⁵

Despite intended obfuscatory syntax,¹¹⁶ deconstruction is a relatively simple process. Start the performance by identifying a “privileged” interpretation of the text as decreed by the “dominant” majority view. An authoritative, privileged interpretation rationalizes the process of deconstruction.¹¹⁷ The next step: identify a counter – repressed¹¹⁸ – interpretation and nominate it as the new privileged meaning.¹¹⁹ The performance never stops; the new privileged meaning is now subjected to the same “undermining, subverting, exposing, undoing, transgressing, and demystifying”¹²⁰ treatment. What remains is discord: “the text resolutely refusing to offer any privileged reading . . .”¹²¹

From the 1970’s deconstruction was the fashion for the humanities and social sciences, engaging students and faculty in sophisticated theoretical exercises in interpretation.¹²² The fashion was funneled into legal education through the efforts of three anti-establishment movements – Critical Legal Studies, Feminists, and Critical Race – who esteemed deconstruction for

philosophical texts, but almost anywhere, in a system of ‘infinite reference of one to another.’”

¹¹⁵ For discussions of deconstruction, see JOHN ELLIS, *AGAINST DECONSTRUCTION* (1989); DAVID LEHMAN, *SIGNS OF THE TIMES* (1991); FRANK LENTRICCHIA, *AFTER THE NEW CRITICISM* (1980); Raymond Tallis, *A Cure for Theorrhea*, 3 *CRITICAL REV.* 7 (1989).

¹¹⁶ A duty to “avoid transparent language.” Tallis, *supra* note 115, at 29.

¹¹⁷ “To say that a text has one meaning sounds inherently restrictive; that makes the leap to ‘no limit on meanings’ – the typical leap to an opposite extreme – more plausible.” Ellis, *supra* note 115, at 125.

¹¹⁸ “A repressed writing . . . is the ‘tension between gesture and statement’ in such critical texts which ‘liberates the fixture of a general grammatology.’” CHRISTOPHER NORRIS, *DECONSTRUCTION: THEORY AND PRACTICE* 31 (Methuen & Co. 1982).

¹¹⁹ While always retaining the “privileged” view-in view “Deconstruction does and must then require that the traditional idea be held still and allow itself to be deconstructed *and* retained; and the whole resulting *complex* is the result of the deconstructive method. Since deconstruction wants to show that the text says the opposite (or also says the opposite) of what it seems to say or is traditionally thought to say, the traditional version is the reference point that deconstruction needs both during and *after* it has done its work in order to exist.” Ellis, *supra* note 116, at 71.

¹²⁰ *Id.* at 69 (listing the words used to describe the operation that deconstruction performs).

¹²¹ *Id.* at 71 (explaining what deconstruction shows and that deconstructive criticism clearly transgresses the limits established by traditional criticism).

¹²² “[T]he product of a restless play within language that cannot be fixed or pinned down for the purposes of conceptual definition.” See CHRISTOPHER NORRIS, *DERRIDA* 15 (Harvard University Press 1987) (citing the example of how Derrida coined the neologism *différance* in order to suggest how meaning is at once ‘differential’ and ‘deferred’).

its practical use as a vehicle to subvert what was viewed as a dominant law culture of politicized objectivity and patriarchy.¹²³ “Law is conceived to be the instrument of ideology, the ideology of ruling class, and it is the legal scholars’ duty to demystify it, exposing rhetoric as sham and putative truths as spurious.”¹²⁴ Hence upon matriculation students were embraced by a result-oriented group of faculty bent on using deconstruction to impose social consciousness on the law.¹²⁵

Everything in the curriculum – beginning with the core of contracts, torts, and constitutional law – received a deconstruction screening,¹²⁶ except antitrust. To the antitrust *cognoscente* the reason is obvious: the Sherman Act’s puzzling language along with its historical underpinnings propagate and perpetuate a persistent stream of privilege – marginalized confrontations.¹²⁷ Speaking in a Derridaian stutter, antitrust judges have devised an esoteric vocabulary to issue irreconcilable opinions constituting an open invitation to criticism and deconstruction.¹²⁸ Everyone reforms antitrust; muckrakers from Ida Tarbell to Ralph Nader come and go, Robber Barons, from J. P. Morgan (“I like a little competition, but I like combination

¹²³ See Gerald P. Moran, *A Radical Theory of Jurisprudence: The “Decisionmaker” as the Source of Law*, 30 AKRON L. REV. 393, 414-21 (1997) (explaining the currently developing trends in law schools and their being confronted with the underlying themes of postmodernism in an effort to explain the acts of the “Decisionmaker.”); see also Barbara Johnson, *Response: The Postmodern in Feminism*, 105 HARV. L. REV. 1076 (1992) (discussing the use of postmodern theory with feminist theory).

¹²⁴ DAVID LEHMAN, *SIGNS OF THE TIMES: DECONSTRUCTION AND THE FALL OF PAUL DE MAN* 38 (1991).

¹²⁵ See ROGER KIMBALL, *TENURED RADICALS: HOW POLITICS HAS CORRUPTED OUR HIGHER EDUCATION* xiv (Elephant Paperback 1998) (1990) (noting that the new academic elite are the tenured or soon-to-be-tenured radicals now controlling nearly all of the most prestigious humanities departments in the country); DINESH D’SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* 1-23 (1991); CHARLES SYKES, *THE HOLLOW MEN: POLITICS AND CORRUPTION IN HIGHER EDUCATION* (Regnery Gateway 1990) (discussing the crisis in higher education and focusing on its impact upon Dartmouth College); see also Michael W. Hirschorn, *A New-Left Challenger Comes to an Uneasy Peace with Academe*, CHRON. HIGHER EDUC., June 29, 1988, at A3 (describing the movement of 60s student-activists into teaching positions).

¹²⁶ See ARTHUR AUSTIN, *THE EMPIRE STRIKES BACK: OUTSIDERS AND THE STRUGGLE OVER LEGAL EDUCATION* 95, 99 (1998) (noting that Duncan Kennedy first described deconstruction through the lens of contracts, and that deconstructionist readings are still popular in undergraduate settings, where such readings originated).

¹²⁷ *Id.*

¹²⁸ See generally Arthur Austin, *Antitrust Deconstructed*, 22 STETSON L. REV. 1101 (1993) (demonstrating a form of deconstruction that uses antitrust text confrontation – sentences from the privileged canon facing marginal views – to demonstrate text encounters).

better. . .")¹²⁹ to Bill Gates, rationalize their success while economists asserting the "God's truth" is in their "Black Boxes,"¹³⁰ duke it out over a self-serving privileged view. Distilled of iconoclastic reform chatter, one issue perseveres – the effort to moderate the tension between the benefits of the "invisible hand" of the free market and the values of social welfare.

A historically correct antitrust deconstruction trace would start almost three hundred years ago with *Mitchel v. Reynolds*,¹³¹ when the court invited a conflict between privileged and marginal voices by making a distinction between reasonable and unreasonable restraints of trade.¹³² This distinction served as an even balance between competing interpretations until the populists achieved privilege status in the Sherman Act of 1890, which gave the government a prosecutorial blunderbuss by forbidding "every" contract in restraint of trade.¹³³ In 1911 the Supreme Court elevated the populist privileged view by dissolving the Rockefeller empire while marginalizing their authority with Chief Justice White's deconstruction of the Sherman Act:¹³⁴ "every" does not mean "every,"¹³⁵ thereby signaling that courts would entertain competing voices from the margins. From the margins the voice of capitalism got privileged status in 1920; the Government argued that U.S. Steel's "power for evil,"¹³⁶ derived from size alone, constituted monopolization

¹²⁹ CLARENCE H. CRAMER, *AMERICAN ENTERPRISE: FREE AND NOT SO FREE* 423 (Little, Brown & Co. 1972) (quoting J.P. Morgan and noting how he was known for combining businesses).

¹³⁰ See *But Ceteris Are Never Paribus*, *FORBES*, Dec. 15, 1974, at 22, 23 (citing the remark attributed to Frank Modigliani, M.I.T. economist, "You can't argue about what's inside my black box [i.e., economic model] because I made it. The God's truth isn't in the black box, I am the God's truth!").

¹³¹ 1 P. Wms. 181, 24 Eng. Rep. 347 (1711).

¹³² See *id.* (stating that "[g]eneral restraints are all void . . . Particular restraints are either, without consideration, all of which are void . . . or upon a good and adequate consideration, so as to make it a proper and useful contract.").

¹³³ See 15 U.S.C.1 (2005) (declaring "[e]very 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").

¹³⁴ See *Standard Oil Co. v. U.S.*, 221 U.S. 1, 45 (1911) (holding the defendant was in fact a monopoly pursuant to the plain, unambiguous meaning of the statute).

¹³⁵ See *id.* at 62 (concluding that "it behooves us to consider the contentions urged on one side or the other concerning the meaning of the statute, which, if maintained, would give to it, in some aspects a much wider and in every view at least a somewhat different significance.").

¹³⁶ *U.S. v. U.S. Steel Corp.*, 251 U.S. 417, 447–48 (1920) (juxtaposing the power for evil with the actual exercise of evil).

under the Sherman Act. Acknowledging U.S. Steel's "impressive size," the Court nevertheless privileged its presence: "[W]e must adhere to the law, and the law does not make mere size an offence, or the existence of unexercised power an offence."¹³⁷

In *United States v. Aluminum Co. of America*,¹³⁸ the antitrust trace was jolted into textural nihilism confirming the Pareto metaphor: antitrust is like a bat, from one angle it resembles a bird, from another view you see a mouse.¹³⁹ With Derridaian zest Judge Hand taunted competing Interpretive Communities with a demonstration of self-deconstruction. He started with the premise that monopoly-in-fact is a protected status. The privileged reading of the Sherman Act from *U.S. Steel* still prevails. "The successful competitor, having been urged to compete, must not be turned upon when he wins."¹⁴⁰ He added another gospel of the privileged: "size does not determine guilt."¹⁴¹ Hand went on to buttress the privileged reading by charting out safe harbors for the monopolist: achieving size by virtue of natural monopoly, change in consumer tastes, and as a "survivor . . . by virtue of his superior skill, foresight and industry."¹⁴²

Having given the "combination"¹⁴³ crowd the endorsement of a privileged interpretation Hand opted to self-deconstruct. He throws the winners into an abyss of a Mensongian cul-de-sac.¹⁴⁴ The winner loses by winning as a result of anticipating the efforts of rivals, by embracing every new opportunity and by exploiting "a great organization, having the advantage of experience, trade connections and the elite of personnel."¹⁴⁵ Like

¹³⁷ *Id.* at 451.

¹³⁸ *U.S. v. Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945).

¹³⁹ See EDWARD S. MASON, *ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM* 391 (Harvard University Press) (1957) (recalling "Pareto once remarked that the statements of Karl Marx are like bats; from one angle they resemble birds while from another view they look like mice. This observation is equally apropos with respect to antitrust decisions. It is possible for the skillful reader to buttress almost any preconceived notion of what the antitrust laws are about by judicious citation of chapter and verse.").

¹⁴⁰ *Aluminum Co. of America*, 148 F. 2d at 430.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Menand, *supra* note 103, at 47.

¹⁴⁴ See MALCOLM BRADBURY, *MY STRANGE QUEST FOR MENSONGE* 78 (Penguin 1987).

¹⁴⁵ *Aluminum Co. of America*, 148 F. 2d at 431.

Professor Morris Zapp, Hand cuts off the limb he's sitting on¹⁴⁶ to extract a privileged reading empty of privilege thereby leaving the monopolist to live in an antitrust abyss, paralyzed by Hand's admonition that "no monopolists monopolizes unconscious of what he is doing."¹⁴⁷ Whatever he does, he risks litigation.¹⁴⁸ Classic Postmodern irony; in the words of the elusive "Laureate of Absence," Henri Mensonge: "[T]here is no about about for anything to be about."¹⁴⁹

Hand cunningly deposited *Alcoa's* deconstruction legacy in the margins. Obscured by his deft expositions on the effects of the defendant's exclusionary conduct was the seed for a social benefit privileged interpretation of the Sherman Act:

It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. These considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes.¹⁵⁰

Whether, as Professor Dewey suspected, Hand wrote a "tongue-in-cheek" opinion,¹⁵¹ is open to debate. There is no doubt, however, that his comments anticipated, if not stimulated, the public interest movement in antitrust.¹⁵² What may have been Hand's tongue-in-cheek views were elevated to privileged status by Chief Justice Warren in 1962 when he identified market deconcentration as the central goal of anti-merger policy,

¹⁴⁶ See generally DAVID LODGE, *SMALL WORLD: AN ACADEMIC ROMANCE* 134 (MacMillan Books 1984) (attempting to become leading academic by "cutting off the limb he is sitting on").

¹⁴⁷ *Aluminum Co. of America*, 148 F. 2d at 432.

¹⁴⁸ See DONALD DEWEY, *MONOPOLY IN ECONOMICS AND LAW* 239 (1966) (suggesting that "If the monopolist responds to the threat of potential competition by keeping prices low in order to ensure that it does not materialize as actual competition, he violates the law. If . . . he charges what the traffic will bear, his monopoly power is presumably 'unreasonably' exercised.").

¹⁴⁹ BRADBURY, *supra* note 144, at 63.

¹⁵⁰ *Aluminum Co. of America*, 148 F. 2d at 427.

¹⁵¹ Dewey, *supra* note 148, at 86.

¹⁵² See GREEN, MOORE, WASSERSTEIN, *THE CLOSED ENTERPRISE SYSTEM: THE NADER STUDY GROUP REPORT ON ANTITRUST ENFORCEMENT* 297 (Mark Green ed. 1971) (determining that "[e]vil conduct and evil intent are not required; monopoly power, whether or not exercised, is the offense.").

specifically mentioning its “threat to other values.”¹⁵³ The notion that “other [non-economic] values” constituted the privileged vision of anti-merger enforcement confirmed the presence of social welfare in the antitrust dictionary.¹⁵⁴

Antitrust is a boneyard of irreconcilable decisions. Supreme Court opinions have split personalities ranging through precedent, formalism, economic theory, and “policymaking.”¹⁵⁵ Out-right reversal is disdained; in a field as impenetrable and subjective as restraint of trade the Court prefers to maintain access to an array of options.¹⁵⁶ Over the years the decisions have developed a vocabulary of terms – rule of reason, *per se*, quick look, conscious parallelism “plus,” “literal” price fixing – that entice deconstruction. A case like *Alcoa* leaves an analytical process enabling successors to justify whatever fits an agenda. Thus while conventional wisdom may favor the Chicago free market theme as privileged, it is ultimately at the mercy of the antitrust split personality. The presence of decisions rejecting a social welfare rationalization is not conclusive.

III. JUDICIAL DECONSTRUCTION AND SOCIETAL ANTITRUST

“For the Ivy Schools are part of a price-fixing system that OPEC might envy”¹⁵⁷

“The goal, according to university officials, is to make sure that scholarships are based only on need and to prevent schools from bidding against each other for talented applicants.”¹⁵⁸

¹⁵³ *Brown Shoe Co., v. U.S.*, 370 U.S. 294, 316 (1962). For a critique of *Brown Shoe* see Robert Bork, Ward Bowman, *The Crisis in Antitrust*, 65 COLUM. L. REV. 363 (1965).

¹⁵⁴ See *Brown Shoe*, 370 U.S. at 316 (confirming “[t]hroughout the recorded discussion may be found examples of Congress’ fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values . . .”).

¹⁵⁵ See Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 266, 309-17 (1986) (discussing that “[i]n approaching these cases, the Court has also worn three faces; that is, it has assumed three different and conflicting roles”, following precedent, regulating economics and policymaking).

¹⁵⁶ See *id.* at 267 (announcing that “[a]ll the contending antitrust schools agree on one critical point: that the Sherman Act cannot, and should not, be given a settled meaning derived from traditional statutory sources.”) (footnote omitted).

¹⁵⁷ Gary Putka, *Do Colleges Collude on Financial Aid?*, WALL ST. J., May 2, 1989, at B1.

¹⁵⁸ Paul M. Barrett, Christopher J. Chipello, *U.S. Investigates Prestigious Universities, Colleges for Possible Antitrust Violations*, WALL ST. J., Aug. 10, 1989, at B2.

“Whereas businesses hold down prices to compete, Northwestern’s Mr. Weber adds, many schools ‘raise prices to meet the competition.’”¹⁵⁹

The Context of the mid-fifties suggests that Antitrust was a benign shadow. There was no need for lawyers – this was education, not selling toasters. Over time an informal socio-ideological commitment became a bureaucracy with detailed memorials of price-fixing. The ultimate implication of the memorials came from the evolution of the Academy vision from a singular focus on the transfer of knowledge to an Intersection of learning *and* commerce.¹⁶⁰ *Overlap* was put on notice of the new Context by Clark Kerr’s Harvard Lecture on the implications of Federal Grant University (1963) and the fall-out from Milton Friedman’s testimony and the issues raised in *Marjorie Webster* (1970).¹⁶¹ With *Goldfarb* (1975) on the books, the Intersection of Education and Commerce was evenly balanced and by the late 80’s *Overlap* was in need of a candid Opinion Letter.

Instead they got a civil complaint alleging a conspiracy to fix prices.¹⁶² Harvard’s general counsel immediately framed the defense: “Our practices served the good social purposes of making sure that a limited amount of financial funds went to the neediest students.”¹⁶³ The next day every school excepting M.I.T. consented out,¹⁶⁴ prompting a New York Times headline: *Ivy Universities Deny Price-Fixing But Agree to Avoid It in the Future*.¹⁶⁵

¹⁵⁹ Gary Putka, *supra* note 32, at A1, A6.

¹⁶⁰ See Herschel I. Grossman, *The Economics and Politics of Scholarships*, ACADEMIC QUESTIONS, Summer 1995, at 59 (discussing how colleges want to use exceptional students to attract more prospective students and hence are like any business).

¹⁶¹ See Francis H. Horn, *New Knowledge is Power*, N.Y. TIMES, Jan. 5, 1964, at BR12 (book review) (noting that Kerr emphasized the changes to all members of the university as a result of the increase in federal research programs, which have created the federal grant university).

¹⁶² See *U.S. v. Brown Univ.*, 805 F. Supp. 288, 289 (E.D. Pa. 1991) (stating the United States brought the action after a two year investigation), *rev’d and remanded*, 5 F.3d 658 (3rd Cir. 1993).

¹⁶³ Anthony DePalma, *Ivy Universities Deny Price-Fixing But Agree to Avoid It in the Future*, N.Y. Times, May 23, 1991, A-1.

¹⁶⁴ Because MIT was not a named party in a class action suit by a student they were not confronted with a treble damage judgment – as were the other schools. If they won, the other schools could move to have the decree removed. Officials denied “that they are cooperating on some sort of grand strategy.” Scott Jaschik, *Overlap Group Could Survive Ivy League’s Agreement to End Collaboration on Financial Aid, Lawyer’s Say*, CHRON. HIGHER EDUC., June 5, 1991, A15-16.

¹⁶⁵ DePalma, *supra* note 163.

a. United States v. M.I.T. I: The Competing Context of Economic Models

The trial opened with M.I.T. counsel informing the Court “that before there was a Sherman Act, there was M.I.T.”¹⁶⁶ He scolded the Antitrust Division for contaminating *Overlap* culture with the taint of commerce: “M.I.T. is unlike any institution that the antitrust division has ever encountered. M.I.T.’s function is to teach, to discover, and to build . . . yet in the eyes of the antitrust division, such an institution is indistinguishable from a manufacturer of toaster ovens or porcelain fixtures.”¹⁶⁷ The lecture emphasized that higher education does not square with the smoke stack corporate profit-maximization shareholder dividend model.¹⁶⁸ Under a “multiattribute objective function”¹⁶⁹ system in which students are both consumers and producers of a college education, predictions and judgments on economic effects are problematical. “Therefore, there is no way to predict, as a matter of theory, whether schools would find it in their interest to raise prices to students if it would be profitable to do so.”¹⁷⁰

The Government economist countered by addressing the nuts and bolts of education: M.I.T. and other schools compete for students, faculty, and financial support and in the process seek to maximize revenues over costs. The revenue excess – the academic dividend – goes to the institution’s shareholders – administrators and faculty – in “greater travel funds, higher faculty salaries, improved facilities, etc.”¹⁷¹ Hence, the only difference between the two models “is the way in which they consume profits – for-profit entities distribute profits among the

¹⁶⁶ Roger Parloff, *Conceptual Combat*, AM. LAWYER, Nov. 1992, at 82.

¹⁶⁷ *Id.*

¹⁶⁸ “M.I.T. contends that while economic theory can predict the behavior of a for-profit firm, since by definition its primary motivation is profit-maximization, economic theory cannot predict the consequences of cooperative behavior among non-profit institutions such as colleges, since non-profit educational institutions have diverse interests, some of which may conflict with the goal of profit-maximization. M.I.T. contends that basic economic theory rejects a presumption that bona fide non-profit organizations that act cooperatively will do so in a way that harms the consumer.” U.S. v. Brown Univ., 805 F. Supp. 288, 302 n.9 (E.D. Pa. 1992)

¹⁶⁹ Dennis W. Carlton, Gustavo E. Bamberger, Roy J. Epstein, *Antitrust and Higher Education: Was there a Conspiracy to Restrict Financial Aid*, NBER Working Paper No: 4998, Jan. 1995, at 10 (stating “it is simply not possible to predict inevitable consequences from cooperative price setting.”).

¹⁷⁰ *Id.*

¹⁷¹ *Brown*, 805 F. Supp. at 302 n.9.

owners, while non-profits entities distribute profits within the organization.”¹⁷² A distinction with no economic distinction. And so long as they spend it on something, it constitutes an accounting “cost.”¹⁷³ Economists call it amenities that can have x-inefficiency effects.¹⁷⁴ In academe, it’s known as the perk system.¹⁷⁵

M.I.T. *I* is a textbook confrontation between privileged and marginal views. From the privileged vantage, the defendant argued that the Emersonian vision of higher education is committed to providing an intellectual experience: “The pursuit of truth for its own sake”¹⁷⁶ and therefore beyond Sherman Act jurisdiction. They ignored Clark Kerr’s voice from the margin announcing the “transformation” of the university into a

¹⁷² *Id.*

¹⁷³ Thomas Sowell, *The Scandal of College Tuition*, COMMENTARY, Aug., 1992, at 23 (explaining “whatever colleges and universities choose to spend their money on is called a cost”); see Grossman, *supra* note 160, at 59 (noting that tax laws allow private colleges to designate themselves not-for-profit enterprises, which in turn allows them to include in their costs some amounts that are really profits).

¹⁷⁴ See Carlson, Shepherd, *supra* note 42, at 580-81.

Second, institutions sometimes provide benefits to their faculty, students, and staff, even if the benefits do not increase prestige, or even if the funds that are spent on the benefits would increase prestige more if they were spent in other ways. For example, certain faculty and staff receive salaries and amenities, such as expensive office furnishings or the use of a faculty club, even if the expenses are unnecessary to retain the faculty and staff. We call expenditures that do not maximize prestige ‘X-inefficiency.’ The degree to which institutions engage in X-inefficiency is uncertain. On one hand, *Overlap* eliminates price competition in the market for undergraduate education and provides increased market power to elite institutions. Standard X-inefficiency theory predicts that the absence of robust market discipline breeds X-inefficiency. Staff and faculty have an incentive to create comfort for themselves. Like managers of a firm that is insulated from competitive pressure, the staff and faculty that decide to engage in X-inefficiency spending benefit directly from it.

Id.

¹⁷⁵ *Id.* “In addition, amenity competition consumed a substantial portion of funds that *Overlap* institutions could otherwise have devoted to other uses, such as to endowment growth and to aid for needy students. Competitive pressure to attract students created an incentive to devote to amenity competition a significant part of the net revenues that *Overlap* created that is of the transfers from star students. Consequently, less revenue remained for other uses.” *Id.* The Government argued “that *Overlap* schools admitted using their aid formula to save money – at the expense of students’ families. It quotes a Harvard official as saying that formula helped the school save \$250,000 for one freshman class, and an M.I.T. official as saying under oath that his school saved \$2,000 per needy applicant in 1985 by using its ‘more sophisticated approach’ to determine need.” Huntley Collins, *Inside Look at Colleges’ Data Pool Facing Antitrust Action*; PHILADELPHIA INQUIRER, April 13, 1992, at A01.

¹⁷⁶ ROBERT MAYNARD HUTCHINS, *THE HIGHER LEARNING IN AMERICA* 33 (Transaction Publishing 1995) (1936).

commercially driven community.¹⁷⁷ They likewise disregarded *Goldfarb* which introduced the new reality from the margin by rejecting *Marjorie Webster's* exclusion from coverage of traditionally noncommercial restraints of trade unless they were commercially motivated.¹⁷⁸ The Trial Court's conclusion: "[E]xemptions should be granted warily" and given the magnitude of "M.I.T.'s economic activity" the privileged view of education as noncommercial was "pure sophistry."¹⁷⁹ The exchange of money between student and school "is 'commerce' in the most common usage of that word."¹⁸⁰

On the substantive issue the Government backed its argument for a profit-maximizing context with evidence demonstrating a connection between *Overlap* and price. MIT argued that the multi-purpose objectives of a non-profit model defied the simplistic assumption of a for-profit system. The battle of the experts was a wash – persuasive but inconclusive. The Court buried the impasse by adopting a "facial" reading of the facts.

The Court's use of an "abbreviated" rule of reason-deemed appropriate for "inherently suspect"¹⁸¹ conduct-restricted inquiry to the facial implications of the evidence. The Court discerned the manifest anticompetitive intent of *Overlap* in the *Ivy Overlap Agreement* whereby "member institutions purposefully removed. . .price considerations and price competition. . ." ¹⁸² In addition to rendering conflicting expert testimony irrelevant, a "quick look" evaluation shifted a "heavy burden" on MIT to rebut with a procompetitive explanation.¹⁸³ It was a burden that under precedent could not be satisfied with a proffer of social welfare arguments. The Judge, perhaps mindful of the defense's opening remarks, concluded: "The court, is obligated . . . to judge *Overlap* against a different framework: that of the Sherman Act, which,

¹⁷⁷ See *The Knowledge Industry*, N.Y. TIMES, May 5, 1963, at 200 (acknowledging Clark Kerr's lectures are important for trying to assess the vast changes under way in higher learning).

¹⁷⁸ See Julie L. Seitz, Comment, *Consideration of Noneconomic Procompetitive Justifications in the MIT Antitrust Case*, 44 EMORY L. J. 395, 406 (stating that in *Goldfarb v. Virginia State Bar*, the Supreme Court rejected a total exclusion of professional organizations from the antitrust laws and also appeared to reject the motivation requirement from *Marjorie Webster*).

¹⁷⁹ U.S. v. Brown Univ., 805 F. Supp. 288, 298 (E.D. Pa. 1992)

¹⁸⁰ *Id.* (citing *Goldfarb v. VA State Bar*, 421 U.S. 773, 787-88 (1975)).

¹⁸¹ *Id.* at 303.

¹⁸² *Id.*

¹⁸³ *Id.* at 304.

not as old as MIT, has nevertheless for more than a century guided our Nation's economic policies."¹⁸⁴

b. United States v. M.I.T. II: Price Fixing as a Social Benefit

A conventional linear doctrinal analysis would criticize the Third Circuit for its questionable reading of relevant precedent,¹⁸⁵ specifically Supreme Court decisions dealing with the intersection of the Sherman Act and social benefit justification. *Professional Engineers*¹⁸⁶ and *Indiana Federation of Dentists*¹⁸⁷ are cited for the proposition that it is impermissible to justify restraints of trade imposed for social welfare if they inhibit free market forces.¹⁸⁸ Judge Cowen evaded this embargo with a razor thin distinction: *Overlap* did not subvert market forces; instead it enhanced consumer choices. "[I]t purports only to seek to extend a service to qualified students who are financially 'needy' and would not otherwise be able to afford the high cost of education at M.I.T."¹⁸⁹ In fact, *Overlap* bureaucratically sought to displace, via forced mediation, all market choices.¹⁹⁰ In 1990, the Supreme Court reaffirmed *Professional Engineers* by holding that the Sherman Act does not tolerate "inquiry into the question whether competition is good or bad."¹⁹¹

¹⁸⁴ *Id.* at 307 (reviewing financial aid programs of colleges across United States).

¹⁸⁵ See Michael C. Petronio, Comment, *Eliminating the Social Cost of Higher Education: The Third Circuit Allows Social Welfare Benefits to Justify Horizontal Restraints of Trade in United States v. Brown University*, 83 GEO. L.J. 189 (1994) (critiquing holding of *United States v. Brown University*); Julie Seitz, *Consideration of Noneconomic Procompetitive Justifications in the M.I.T. Antitrust Case*, 44 EMORY L.J. 395 (1995) (reasoning that appellate court mistakenly remanded case to district court); Srikanth Srinivasan, Comment, *College Financial Aid and Antitrust: Applying the Sherman Act to Collaborative Non-Profit Activity*, 46 STAN. L. REV. 919 (1994) (proposing an alternative standard); see also Richard Morrison, Comment, *Price Fixing Among Elite Colleges and Universities*, 59 CHI. L. REV. 807 (1992) (stating that fixing financial aid awards is illegal and policies should be changed).

¹⁸⁶ 435 U.S. 679 (1978).

¹⁸⁷ 476 U.S. 447 (1986).

¹⁸⁸ Petronio, *supra* note 185, at 212 ("The Supreme Court's analysis in these two cases demonstrates that it has unambiguously removed social welfare justifications from the antitrust equation").

¹⁸⁹ *U.S. v. Brown Univ.*, 5 F.3d. 658, 677 (3rd Cir. 1993) (noting that *Overlap* did not seek to withhold benefits).

¹⁹⁰ See generally *Id.* at 665 (discussing district court holding prohibiting M.I.T. from entering into combinations or conspiracies which may have effect of determining financial awards).

¹⁹¹ *FTC v. Superior Court Trial Lawyers Ass'n.*, 493 U.S. 411, 424 (1970).

The Court of Appeals tracked the District Court on “trade or commerce” virtually lockstep.¹⁹² The perfunctory acceptance of the government’s argument on jurisdiction was a nod to get an opportunity to register a deconstruction of academic socio-ideological price-fixing.¹⁹³ Judge Cowen scowled into the furnace of price-fixing to “face the trouble already there”¹⁹⁴ by announcing that “*per se* rules of illegality are judicial constructs”¹⁹⁵ derived from economic predictions. By invoking social constructionism, a technique for criticism and power shifting, he prefaced a deconstructive interpretation. As a liberating and all-purpose wrecking ball for breaking down conventional wisdom and authoritarian dialogue, social construction is anathema to the dominant voice of the privileged text. “The claim of social construction, then, is supposed to jolt our pre-theoretical commitments by taking something that we previously thought to be natural/universal/inflexible and instead showing it to be constructed – local – deconstructable.”¹⁹⁶

As a deconstructionist Judge Cowen starts with the accepted Antitrust assumption that any direct interference with pricing among rivals is *per se* illegal: standard ukase from the Footnote 59 text. To the social constructionalist this is not an inevitable construction: “Far from being inevitable, [it] is the contingent upshot of historical events.”¹⁹⁷ To establish the lack of inevitability, Judge Cowen surmises that since *Overlap* conduct has satisfied the threshold of price interference only in a “literal sense . . . [it]

¹⁹² This was criticized for assuming Trade or Commerce without a threshold finding on “competence – the power of the executive, an administrative agency, the courts, or other statutory implementors to act under the mandate of a particular, proper delegation of jurisdictional power – in this instance, the Sherman Act.” Nelson O. Fitts, *A Critique of Noncommercial Justifications for Sherman Act Violations*, 99 COLUM. L. REV. 478, 482 n. 18 (1999). (discussing separate categories of jurisdiction and competence). A positive finding on Trade or Commerce would have compelled the Court to “move on to its substantive economic analysis free of justificatory excuses.” *Id.* at 496.

¹⁹³ The Court expressly reserved the right to consider the influences of “congressionally-recognized and important social welfare goals . . . [which] will influence whether this conduct violates the Sherman Act.” *Brown*, 5 F. 3d. at 668.

¹⁹⁴ Denis Donoghue, *FEROCIOUS ALPHABETS* 185 (1984). Reference to Paul deMan’s deconstruction technique.

¹⁹⁵ *Brown*, 5 F. 3d. at 677 (3rd Cir. 1993) (stating that *per se* rules can also be based on economic predictions).

¹⁹⁶ Douglas Litowitz, *The Social Construction of Law: Explanations and Implications*, STUDIES IN LAW, POLITICS, AND SOCIETY 215, 217 (ed. Austin Sarat & Patricia Ewick 2000).

¹⁹⁷ Ian Hacking, ARE YOU A SOCIAL CONSTRUCTIONIST? *Lingua Franca*, May/June 1999, at 65, 66. See Ian Hacking, *THE SOCIAL CONSTRUCTION OF WHAT?* (2002).

does not mean that it automatically qualifies as *per se* illegal price-fixing.”¹⁹⁸ He referenced the Supreme Court’s acknowledgement that “literalness is overly simplistic and often overbroad.”¹⁹⁹ Literalness, as Robert Bork suggested in 1965 while a Yale antitrust law professor “demonstrates that those rules . . . are inadequate”,²⁰⁰ they lack context. To Cowen, *Goldfarb* was merely a caution, a warning signal to courts to avoid blindly succumbing to adherence to literal non-contextual simplicity.²⁰¹

A deconstructionist subverts the ostensible certainty of words by demonstrating that “the different intentions, therefore the different meanings, are fixed by the differences in contexts.”²⁰² For *Overlap* the context is higher education, a field implicating sociopolitical objectives “that conflict with the goal of pure profit maximization.”²⁰³ Hence a new “relevant context”²⁰⁴ of “pure altruistic motive”²⁰⁵ prompts the Court to reject *per se*. “We thus agree with the district court that *Overlap* must be judged under the rule of reason.”²⁰⁶ That was, however, the only point of agreement – merely the first prong of Judge Cowan’s deconstruction.

c. *Sociology Under the Rule of Reason*

For the ironic reader belief is always accompanied by
the belief that what one believes cannot be the full

¹⁹⁸ *Brown*, 5 F.3d at 670 (quoting *Broadcast Music Inc. v. C.B.S.*, 441 U.S. 1, 8 (1979)).

¹⁹⁹ *Broadcast Music v. Columbia Broadcasting System*, 441 U.S. 1, 9 (1979) (holding that nonexclusive blanket licenses should undergo an examination under rule of reason and remanding to district court for determination).

²⁰⁰ Robert Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 777 (1965).

²⁰¹ Justice Cowen read *Goldfarb* as counseling “against applying traditional antitrust rules outside of conventional business contexts.” See *Brown*, 5 F.3d at 670.

²⁰² Gerald Graff, *Determinacy/Indeterminacy* in CRITICAL TERMS FOR LITERARY STUDY 166 (ed. Frank Lentricchia, Thomas McLaughlin 1990).

²⁰³ *Brown*, 5 F.3d at 677 (noting that courts will consider party’s intent in its judgment).

²⁰⁴ “In other words, determining the relevant context of an utterance is a process just as dependent on inference as any other part of the interpretive process, and therefore just as open to dispute.” Graff, *supra* note 202, at 167.

²⁰⁵ *Brown*, 5 F.3d at 672 (reasoning that *Overlap* should not be declared *per se* unreasonable).

²⁰⁶ *Id.*

story: there is always something further, something more, to be understood in understanding.²⁰⁷

Chicago School economists prefer Rule of Reason;²⁰⁸ it denies populist inclined judges the opportunity to contour facts to fit anti-defendant *per se* categories.²⁰⁹ Rule of reason compels analysis and has been used by Chicago as a Trojan Horse to engage in a dialogue over competing paradigms²¹⁰ – with the edge inevitably going to efficiency economics.²¹¹ Relying on a heavy dose of deconstruction irony the Third Circuit turned Chicago ideology on its head.

Judge Cowen refused to accept the autonomy of Chicago economics as the controlling privileged guide for antitrust policy and analysis. He initiated his campaign by valorizing M.I.T.'s argument that *Overlap* promoted "socio-economic diversity" which enhanced competition by improving the "quality" and "vitality" of education at *Overlap* schools.²¹² He then notes that the Supreme Court "has recognized improvement in the quality of a product or service that enhances the public desire for that product or service as one possible pro-competitive virtue."²¹³ In resorting to non-quantifiable criteria on an arcane and open-ended subject such as diversity,²¹⁴ the Court injects sociology, politics and psychology into a subject that the Chicago economist

²⁰⁷ William Ray, LITERARY MEANING: FROM PHENOMENOLOGY TO DECONSTRUCTION 188 (1984).

²⁰⁸ See *Chicago Board of Trade v. U.S.*, 246 U.S. 231 (1918) (stating an accepted definition of rule of reason).

²⁰⁹ Petronio, *supra* note 185, at 196-98 (comparing rule of reason with *per se* illegality).

²¹⁰ "Business practices tested under a full Rule of Reason, with no presumptions based on any set of facts and with the burden of showing anticompetitive effect on the plaintiff, will usually turn out to be legal." Robert Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1, 2 (1978).

²¹¹ Arthur Austin, *Antitrust Reaction to the Merger Wave: The Revolution vs. the Counterrevolution*, 66 N.C. L. REV. 931, 948-49 (1988) (stating that the *per se* rule of reason is "anathema to the aspirations of Chicago economists").

²¹² *United States v. Brown Univ.*, 5 F.3d 658, 674 (3d Cir. 1993) (noting MIT's contention that by promoting socio-economic diversity, *Overlap* contributed to quality of education offered by schools).

²¹³ *Id.*

²¹⁴ "Diversity is a large idea in the way that Wyoming is a large state: it is a big part of everyone's map of America, but there is not much there." PETER W. WOOD, DIVERSITY: THE INVENTION OF A CONCEPT 1 (2003). For a quick, but intelligent, read on the complexities of diversity, see Alan Wolfe, *The One and the Many*, NEW REPUBLIC, June 9, 2003, at 26. (Review of Peter H. Shuck, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A DISTANCE (2003)).

would apply rational empirically based analysis.²¹⁵ Blending sociology and economics also enables Judge Cowen to objectify value judgments on *Overlap* as a vehicle for improving consumer choice: "Enhancement of consumer choice is a traditional objective of the antitrust laws and has been acknowledged as a pro-competitive benefit."²¹⁶ In fact, inspiring desire for a product is often a function of product differentiation, disdained as wasteful by many economists.²¹⁷

Deconstruction irony continues to churn when Cowen revises the model of competition to include "the social ideal of equality of educational access and opportunity."²¹⁸ He achieves this by first tolerating the District Court's reliance on precedent rejecting illegality for trade restraints that deny consumers the opportunity to make imprudent decisions in an otherwise competitive market.²¹⁹ He then finesses *Overlap*'s price-fixing by referencing its enhancement of competition "by broadening the socio-economic sphere of its potential student body."²²⁰ Instead of suppressing competition, as had occurred in *Professional Engineers*, *Overlap* merely *regulated* competition in order "to enhance it, while also deriving certain social benefits."²²¹ To further irritate the Chicago School, Judge Cowen said: "If the

²¹⁵ Cowen gets support from an emerging paradigm in economics that disputes "rational economics": "Present-day economists may know more than medieval astronomers, but they too are captives of a single overarching idea: that most people in everyday life are rational calculators of their own self-interest – that they are, in economic jargon, maximizers of utility. Given a sufficient amount of information, they will come to the logically correct decision every time. Modern conventional economics is not just a series of calculations about trade or jobs or money. It is a theory about human behavior. And it is a theory that, to say the least, deserves more scrutiny than it normally gets." Alan Ehrenhalt, *Keepers of the Dismal Faith*, N.Y. TIMES, Feb. 23, 1997, at E13. See also Mark Bauerlein, *The Two Cultures Again: Tilting Against Objectivity*, CHRON. HIGHER EDUC., Nov. 16, 2001, at B14; Peter Monaghan, *Taking On 'Rational Man': Dissident Economists Fight for a Niche in the Discipline*, CHRON. HIGHER EDUC., Jan. 24, 2003, at A12; Louis Uchitelle, *A Challenge to Scientific Economics*, N.Y. TIMES, Jan. 23, 1999, at B7; Robert Kuttner, *The Poverty of Economics*, ATLANTIC MONTHLY, Feb., 1985, at 74.

²¹⁶ See *Brown Univ.*, 5 F.3d at 675.

²¹⁷ See Arthur Austin, *Antitrust Proscription and the Mass Media*, DUKE L.J. 1021, 1036-38, 1057-64 (1968) (explaining how economists see advertising as a waste of resources).

²¹⁸ *Brown Univ.*, 5 F.3d at 675.

²¹⁹ See *id.* at 673-74. "We therefore agree that *Overlap* 'requires some competitive justification even in the absence of a detailed market analysis.'" *Id.* at 673.

²²⁰ *Id.* at 677.

²²¹ *Id.* In *Professional Engineers* the Court struck down a ban on competitive bidding intended to shield the public from a safety threat from low bids by engineers culling costs to get business. "[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *National Soc. of Professional Engineers v. U.S.*, 435 U.S. 679, 696 (1978).

rule of reason analysis leads to this conclusion, then indeed *Overlap* will be beyond the scope of the prohibition of the Sherman Act.”²²² Then, with a deconstruction flourish, the Judge converts “equality of educational access and opportunity” into a commodity, a “common good that should be extended to as wide a range of individuals from as broad a range of socio-economic backgrounds as possible.”²²³ Irony trumps Chicago to open the door for a re-emergence of societal antitrust with all of its trade offs – including officious governmental interference.²²⁴ Under Judge Cowen’s skillful deconstruction M.I.T. – and by implication the Ivies – would have been evaluated under a Rule of Reason analysis with instructions to consider social welfare activities.

IV. BETWEEN THE ROCK OF EDUCATION AND THE HARD PLACE OF ANTITRUST

“Even as public attention has been riveted on matters of principle such as affirmative action. . . the American university has been reinventing itself in response to intensified competitive pressures. Entrepreneurial ambition, which used to be regarded in academia as a necessary evil, has become a virtue.”²²⁵

The Emersonian side of the Academy’s Intersection with Commerce produces a steady stream of lament over the “corporatizing” of higher education.²²⁶ To critics the problem starts with the enormous endowments that the elite schools can exploit to influence and make money.²²⁷ Yet, as Derek Bok,

²²² *Brown Univ.* 5 F.3d at 677.

²²³ *Id.* at 678.

²²⁴ See Arthur Austin, Book Review, *Antitrust Law and Economics* (3rd ed.) by Ernest Gellhorn, 56 U. CIN. L. REV. 193, 197 n.25 (explaining that the “vigorous campaigns” of societal antitrust “argue that the antitrust laws should be used to proscribe “persuasive” advertising, to declare annual automobile style changes an unfair method of competition, and attack market concentration to reduce poverty and crime.”). *But see* Carlton, Bamberger & Epstein, *supra* note 169, at 144–46.

²²⁵ DAVID L. KIRP, SHAKESPEARE, EINSTEIN, AND THE BOTTOM LINE: THE MARKETING OF HIGHER EDUCATION 3-4 (2003).

²²⁶ See Henry A. Giroux, *Neoliberalism, Corporate Culture, and the Promise of Higher Education*, 72 HARV. EDUC. REV. 425 (2002) (criticizing the growing influence corporate culture has on university life).

²²⁷ John Hechinger, *When \$26 Billion Isn’t Enough*, WALL ST. J., (*Pursuits*), Dec. 17, 2005, p.1 (noting that while higher education gets \$24 billion in donations annually, many wealthy colleges are withdrawing less than 5% from their endowments); Johanna Berkman, *Harvard’s Hoard*, N.Y. TIMES MAGAZINE, June 24, 2001, at 38 (discussing

former president of Harvard says: "There is never enough money to satisfy their desires."²²⁸ Schools have become capitalist entrepreneurs, investing in faculty run companies, collaborating with outsiders on profitable patent research, sponsoring internet education, cajoling federal grant freebies,²²⁹ and a classic Flem Snopes scam – franchising school logos for personalized alumni caskets.²³⁰

"Everything nowadays," opines Richard Posner, "is businesslike, rule bound, disenchanting."²³¹ Academic aspirations are conducted within the imperatives of profit center departments in which administrative decisions are consistent with commercial rationalization.²³² The consequence is the comingling of the Emersonian and commercial components, exposing the educational functions to risks of trade. In this context a consent settlement was a rational response to the enigmatic consequences of an adverse judgment on the merits. Subsequent events demonstrated the prudence of a settlement that got rid of the inhibiting effects of litigation²³³, avoided a serious drain on endowment and human resources while playing

Harvard's \$19 billion endowment and its fundraising efforts); David L. Marcus, *The New College All-Stars*, U.S. NEWS & WORLD REP., Nov. 13, 2000, at 49 (discussing the money managers hired to oversee universities' large endowments).

²²⁸ Derek Bok, *THE COMMERCIALIZATION OF HIGHER EDUCATION* 9 (2003).

²²⁹ See Richard Posner, *The University as Business*, ATLANTIC MONTHLY, Jun. 2002, at 21 (noting that major universities have become multi-hundred-million enterprises, "and they behave accordingly and are managed accordingly"); Goldie Blumenstyk, *Income from University Licenses on Patents Exceeded \$12-Billion*, CHRON. HIGHER EDUC., Mar. 22, 2002, at A31 (discussing how several universities are cashing in on royalties for the right to use inventions); Karen W. Arenson, *Columbia Sets Pace in Profiting Off Research*, N.Y. TIMES, Aug. 2, 2000, at B-1 (discussing Columbia's creation of Columbia Media Enterprises, designed to "nurture digital projects"); Eval Press & Jennifer Washburn, *The Kept University*, ATLANTIC MONTHLY, Mar. 2000, at 39 (discussing how Novartis, a Swiss pharmaceutical company, gave Berkeley \$25 million to fund research).

²³⁰ Anne Marie Chaker, *The New School Spirit: Burial Plots for Alums*, WALL ST. J., July 20, 2003, at D1. Students are familiar with another manifestation of academic capitalism – "luxury learning" – resort style extras, overseas jaunts, free phones, or any other marketing ploy to get at nonacademic discretionary items. See Jonathan B. Weinbach, *Luxury Learning*, WALL ST. J., Nov. 10, 2000, at W-1; Elizabeth Bernstein, *College With All the Perks*, WALL ST. J., Apr. 11, 2003, at W-1; Elizabeth Bernstein, *The Deluxe Semester Abroad*, WALL ST. J., Feb. 7, 2003, at W-1; Sara Rimer, *For a Price, Colleges Offer Students Privacy*, N.Y. TIMES, Jan. 27, 2003, at A-1; Jonathan Kaufman, *At Elite Universities, A Culture of Money Highlights Class Divide*, WALL ST. J., June 8, 2001, at A-1.

²³¹ Posner, *supra* note 229.

²³² *Id.* (discussing how universities have become very similar to businesses while their faculty ironically criticizes capitalism).

²³³ Allowing MIT and other schools to engage in *Overlap*-type behavior. Carlton, Bamberger & Epstein, *supra* note 169, at 146.

the victim role to the government's "grossly unfair" charges.²³⁴ The decree also deflected attention from a potentially more serious problem.

a. The Risk of a Type I Price Fixing Conspiracy

Government documents used as the basis for a May 8, 1992, Wall Street Journal article, revealed that the Ivies were vulnerable to charges that they colluded to fix faculty salaries and agreed on tuition increases.²³⁵ The argument that tuition discounting was charity and therefore beyond Sherman Act jurisdiction is irrelevant to charges of interfering in the pricing of more obvious manifestations of trade – costs and wages. Tuition and wages could not be rationalized as charity.²³⁶ Exposed as Type 1 (*per se*) price-fixers, *Overlap* would forfeit the "high moral" ground position.²³⁷

From academic years 1979-80 to 1986-87 the Council of Ivy League Presidents met annually to exchange information.²³⁸ According to the Wall Street Journal a typical meeting – such as the one conducted December 3, 1986, at the Harvard Club in New York City – begin with a brief discussion of "local" concerns such as sexual harassment, freshman football, animal-rights activists, then proceed on to the "traditional budget colloquy."²³⁹

²³⁴ DePalma, *supra* note 163 at A-1. A comment attributed to Benno Schmidt Jr., president of Yale, who later resigned to lead a company involved in for-profit secondary education.

²³⁵ "Some of the documents revealing the private Ivy meetings were obtained through a Freedom of Information Act request. Others are part of the government's filings in a case that may go on trial next month in federal district court in Philadelphia." Gary Putka, *Class Actions: Ivy League Discussions on Finances Extended to Tuition and Salaries*, WALL ST. J., May 8, 1992, at A1, A5.

²³⁶ *Id.*, at A1, A5 (discussing the so-called "illegal price-fixing arrangement" wherein certain Ivy League schools planned both tuition and salary increases).

²³⁷ "Like price-fixing, wage-fixing is forbidden under Section 1 of the 1890 Sherman Antitrust Act, which has been interpreted to hold that any agreement between competitors that aims to affect price – or effectively does so – is illegal. True, government lawyers would have had a tougher time proving collusion on salaries and tuition than on financial aid: While the schools had an explicit policy of discussing aid awards, they were more discreet about trading salary and tuition figures. If the Justice Department had been able to make such a case, however, the universities would have had no high moral ground to stand on," Liza Mundy, *The Fixers: How They May Have Tampered With Your Pay*, LINGUA FRANCA, Nov/Dec., 1992, at 28.

²³⁸ Putka, *supra* note 235, at A5 ("[i]nternal Ivy documents obtained by the government show the schools' presidents met...and discussed the following academic year's tuitions, and sometimes salaries.").

²³⁹ Mundy, *supra* note 237, at 29 (detailing the topics that were discussed at the Harvard Club meeting of December 1986).

Derek Bok of Harvard announced a 5.8 percent to 5.9 percent tuition increase, Princeton settled on 6.25 percent, the others, excepting Cornell²⁴⁰ and Dartmouth, came in within a 5.8 percent – 7.5 percent increase range. Salary increases were 5 percent to 6.25 percent. Dartmouth prompted an “audible gasp . . . followed by vigorous drubbing”²⁴¹ with salary and tuition projections of 8 percent to 8.5 percent. In a subsequent memo the Dartmouth President wrote: “[W]e will need to rethink our proposed salary and tuition scheduled increases and do so rather promptly.”²⁴² After Dartmouth folded, *Overlap*’s range of tuitions went from \$16, 841 to \$17,000, a spread of \$359 (excepting Cornell).

As a conscious parallelism scenario in which price and cost decisions occur in tandem among a small group of rivals, the primary legal issue is proof of an agreement.²⁴³ This requires evidence of conduct beyond uniformity of pricing – “plus” factors.²⁴⁴ Assuming the credibility of the Wall Street Journal articles it is possible to posit a sufficient level of “pluses” to get a case to the jury. Efforts to police the parallelism indicates that school officials assumed they had an agreement. They “squabbled bitterly” over alleged cheating. Accusing Harvard of unilaterally reducing net tuition to a student accepted by both schools, a Dartmouth official wrote: “Either we have an agreement we all stick to or we do not have an agreement.”²⁴⁵ Efforts to get Stanford – who “enraged the Ivies by wooing top students with more generous offers”²⁴⁶ – on board likewise

²⁴⁰ Cornell was subsidized by New York State. Putka, *supra* note 235, at A1, A5.

²⁴¹ Mundy, *supra* note 237, at 29.

²⁴² *Id.*

²⁴³ “[C]onscious parallelism is devoid of anything that might reasonably be called agreement when it involves simply the independent responses of a group of competitors to the same set of economic facts – independent in the sense that each would have made the same decision for himself even though his competitors decided otherwise. But the consciously parallel decisions of oligopolists in setting their basic prices, which are interdependent in that they depend on competitors setting the same price, are not nearly so easily disposed of on the ground that no agreement is involved.” Donald F. Turner, *The Definition of Agreement Under The Sherman Act*, 75 *HARD. L. REV.* 655, 663-66 (1962).

²⁴⁴ “However, parallel pricing, without more, does not itself establish a violation of the Sherman Act. Courts require additional evidence which they have described as ‘plus factors.’ Examples of these ‘plus factors’ include actions contrary to a defendant’s self-interest, product uniformity, exchange of price information and opportunity to meet, and a common motive to conspire in a large number of communications” (citations omitted). *Wallace v. Bank of Bartlett*, 55 F.3d 1166, 1168 (6th Cir. 1995).

²⁴⁵ Putka, *supra* note 235, at A1, A5.

²⁴⁶ *Id.*

constitutes “plus” evidence of efforts to protect the parallelism strategy. “We want them to get enough on our wavelength in need analysis to look like one of the Ivies, meaning not off the reservation too often.”²⁴⁷ Moreover, Stanford’s rejection of an offer to join because of reservations over antitrust is a persuasive “plus,” as is their request to delete all references to a “common” agreement in communications. On Stanford’s intransigence, a Yale official said: “I guess they are just too paranoid on the subject of collusion.”²⁴⁸ One official saw a need for legal counsel: “I believe it will be necessary to get some first class talent involved in this one.”²⁴⁹

Lawyers charged with the responsibility to draft opinion letters would know that the pluses would likely get jury evaluation. After acknowledging that a “jury and a judge could have gone either way,” an Emory University law professor added that if his president asked him on the propriety of meeting with Duke and Vanderbilt to discuss tuition and salaries he would “tell him he was crazy – don’t do it.”²⁵⁰ A Columbia law professor was equally blunt: “if this were Ford and General Motors getting together to set prices or executive compensations . . . the only questions would be which prison the executives would go to.”²⁵¹

All of the *Overlap* Presidents were experienced in negotiating the Byzantine dark alleys of the elite wing of the academy. Three were former law school deans – Bok walked from Harvard Law School to the President’s office while Presidents Schmidt of Yale and Sovern of Columbia had deaned at Columbia Law School. McLaughlin of Dartmouth was an M.B.A., Bowen of Princeton an economist,²⁵² Swearer of Brown a political scientist while as a historian, Hackney of Penn, was the only one with a humanities background.²⁵³ And any problems with

²⁴⁷ *Id.* “A secret 1986 attempt to bring Stanford into the fold, dubbed ‘Operation Highstick,’ failed because Stanford, according to electronic mail messages among the Ivy schools, worried that the Ivies were colluding illegally.” *Id.*

²⁴⁸ *Id.*

²⁴⁹ Scott Jaschik, *Colleges Question Effectiveness of Overlap Group*, CHRON. HIGHER EDUC., May 20, 1992, at 6.

²⁵⁰ Putka, *supra* note 235, at A2.

²⁵¹ Mundy, *supra* note 237, at 1.

²⁵² Bowen and Bok subsequently co-authored THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (2003).

²⁵³ Paul Gray, President of M.I.T., an engineer, attended the meetings in 1979, 1981, and 1983, exchanging tuition and salary data. In a memo he mentioned “Some concerns

comprehending the complexities of the Sherman Act could have been explained by Bok – a former antitrust professor.²⁵⁴ Considering all that was on the table one can surmise that as risk averse managers the group fully appreciated the benefits of burying the record of their meetings in a consent decree.²⁵⁵

b. Resurrection Through Settlement and Exemption

Accepting the gloss of agreeing not to agree at meetings and not to fix faculty salaries in exchange for a ten year expiration date gave *Overlap* a window to exercise their considerable lobbying leverage.²⁵⁶ They were favored by *Zeitgeist*. The trifecta of education as a national priority, affirmative action as an entitlement, anchored by diversity as the reigning social imperative, have been Beltway icons for decades. A low cost college education is boilerplate rhetoric in every political campaign. They also could count on a favorable media who viewed the case as counter productive,²⁵⁷ summarized in the voice of public intellectuals like David Riesman: “They’re defending an idea where these institutions truly were doing something wonderful.”²⁵⁸

Overlap used the decree window as a platform for rehabilitation, negotiating a statutory exemption that tripped in

expressed: 1) Are we pricing ourselves out of the market? 2) Increases at 7-8% level will bring public criticism.” Putka, *supra* note 235, at A5.

²⁵⁴ If his article on mergers (*Section 7 of the Clayton Act: The Merging of Law and Economics*, 74 HARV. L. REV. 226 (1960)) is any indication; it would have been long, thorough, and inconclusive. See Austin, *supra* note 126, at 48-50.

²⁵⁵ That prohibited: “(I) Entering into, directly or indirectly, any contract, agreement, understanding, arrangement, plan, program, combination, or conspiracy with any other college or university or its officers, directors, agents, employees, trustees, or governing board members to fix, establish, raise, stabilize, or maintain student fees or faculty salaries.” U.S. v. Brown University et al, Proposed Consent Judgment, 56 FR 26156 (June 6, 1991).

²⁵⁶ “Already, the Ivy League members are lobbying Congress to include a provision in the reauthorization of the Higher Education Act that would allow institutions to agree, as a group, to award aid based solely on need, provided that they do not coordinate aid determinations.” Scott Jaschik, *supra* note 249, at 3.

²⁵⁷ “The case received widespread news coverage and editorials supporting the school’s policy and MIT’s decision to fight the government appeared in several major newspapers, including the N.Y. Times, L.A. Times, Washington Post, Boston Globe, and the Philadelphia Inquirer.” Carlton, Bamberger, Epstein, *supra* note 168, at 1.

²⁵⁸ Anthony DePalma, *In Trial, M.I.T. to Defend Trading Student Aid Data*, N.Y. TIMES, June 24, 1992, at A17.

when the decree expired in 2001.²⁵⁹ The exemptions Purpose statement explains the justification for the *Overlap* resurrection:

“The need-based financial aid system serves social goals that the antitrust laws do not adequately address—namely, making financial aid available to the broadest number of students solely on the basis of demonstrated need. Without it, the schools would be required to compete, through financial aid awards, for the very top students. Those very top students would get all of the aid available which would be more than their demonstrated need. The rest would get less than their demonstrated need or none at all. Ultimately, such a system would serve to undermine the principles of need-based aid and need-blind admissions. No student who is otherwise qualified ought to be denied the opportunity to go to one of the nation’s most prestigious schools because of the financial situation of his or her family.”²⁶⁰

To the deconstructionist, silence speaks. Hence the lack of committee hearings on the Exemption is testimony to the energetic influence of the *Overlap* lobby. The Judiciary Committee’s Report pays homage to the Prestige Cartel, noting the commitment to the social cause of need-blind aid by “a number of prestigious colleges and universities.”²⁶¹ The Report emphasized the importance of eliminating socioeconomic barriers to attending “the nations most prestigious schools.”²⁶²

The disconnect of the Academy from antitrust was empowered by the 568 President’s Working Group, a bureaucracy named after the Exemption section number that permits schools who agree to an exclusive commitment to need-based aid and to collaborate on needs criteria, exchange applicant data, and use an independent third party to exchange information on cross-school applicants. The goal: families “with similar financial profiles should contribute similar amounts.”²⁶³

²⁵⁹ *Application of Antitrust Laws to Award of Need-Based Educational Aid*, 115 Stat. 648, 2001.

²⁶⁰ Report to Accompany H.R. 768, House of the Judiciary, *Need-Based Educational Aid Act of 2001*, April 3, 2001.

²⁶¹ *Need Based Educational Aid Act of 2001: Hearing on H.R. 768 before the Comm. on the Judiciary*, 107th Cong. (2001).

²⁶² *Id.*

²⁶³ The 568 Presidents’ Working Group, <http://www.news.cornell.edu/releases>

As a congressionally sanctioned trade association of elite schools who cater to the same student market, the President's Group walks a delicate line. While exchange of wage information is expressly forbidden, the collaborative bureaucracy implicates the threat of an Adam Smith scenario of invitation to collusion.²⁶⁴ It is customary for trade associations to emphasize preventative antitrust.²⁶⁵ Meetings are scripted while taping is imposed for discussion of sensitive topics. The Smith problem occurs when the script ends and the cocktails flow. For the President's Group there is an added risk of scrutiny emanating from the political context surrounding the *Overlap* investigation. In the rumor cacophony following the media exposure of the government's interest in Ivy League tuition the consensus settled on political motivation. It was either John Sununu, Bush I aid, who, with college age children, was incensed at rising tuition,²⁶⁶ or Attorney General Thornburg's attempt at "cultural bashing" to seek blue collar support for a Senate run (which he lost).²⁶⁷ The most rational explanation commingles a Wall Street Journal article²⁶⁸ describing the *Overlap* process with the resounding spike in tuition during the 1980's.²⁶⁹ The article projected the impression of the classic "smoke-filled room"²⁷⁰ akin to Dirty Helen's²⁷¹ and a motive to "end a bidding war."²⁷²

/July01/568.presidents.report.html (adding that institutions should evaluate both income and assets).

²⁶⁴ See Peter Carstensen, *Colleges and Student Aid: Collusion or Competition?*, CHRON. HIGHER EDUC., Aug. 10, 2001, at 24. "On the face of it, their efforts appear to be well-meaning, but how their recommendations play out will certainly bear watching. The 568 group's 'consensus' strategy invites high-price, brand name private institutions to eliminate price competition by private, collective action. And who would benefit then? The students? Or the colleges themselves, operating much like a cartel?" *Id.*

²⁶⁵ See *id.* "... present activity may be a continuation of past misconduct..." *Id.*

²⁶⁶ See generally Jaschik, *supra* note 33 (noting the investigation was motivated by the Bush-Regan administrations).

²⁶⁷ See generally *Id.* (stating that some do not understand the Justice Department's motivation).

²⁶⁸ See Putka,, *supra* note 159 (noting that overlap also raises issues of "Good Practice").

²⁶⁹ See *id.* "Overlap is at least in violation of the letter of the principal, but perhaps the colleges would argue not in violation of the spirit." *Id.* "Critics say the Ivy League and other top colleges have laid the political groundwork for the federal investigators by projecting an image of wealth and indifference to parental fears about affordability as they raised tuitions in the 1980s at a pace well above historical rates." Putka,, *supra* note 159.

²⁷⁰ See Hoxby, *supra* note 40, at 24. Hoxby identifies another influence:

Nevertheless, we might worry about other events influencing colleges that coincide with the timing of the antitrust action. The obvious candidate is the performance of financial markets over the period under consideration.

Intentional or by chance, accusing the Reagan-Bush administrations of overzealous prosecutorial discretion was an effective tactic. It shifted attention from the tedious and complicated issue of student aid as price-fixing to the hot topic of governmental interference.²⁷³ The image of elite Ivy League schools subjected to antitrust investigation smacked of a “witch hunt” – which had the effect of deflecting attention from the real issue²⁷⁴ while encouraging rumors of a chilling effect on inter-institutional relations.²⁷⁵

CONCLUSION: A KERR-EMERSONIAN CONSTRUCT

The acceptance of the non-profit model as the definitive criteria for public policy by the Third Circuit and Congress is the safe haven for the 568 President’s Group. The core assumption is that profit maximization does not exist in the world of education where a scattergraph of objectives is allocated among the

Fluctuations in financial markets produce corresponding fluctuations in endowments, which are a major source of income for most private, highly selective colleges. Following positive shocks to their endowments, colleges might increase their total expenditure on financial aid and decrease the rate of increase in tuition. It is possible that the *continued pursuit* (rather than the initiation) of the antitrust action was endogenous to the performance of financial markets. The fact colleges appeared to be rich in 1990 may have increased DOJ’s appetite for the investigation. Would DOJ have pursued the investigation just as strongly in the early 1980s, when tuition was rising faster than it was in 1990 but the financial markets made the colleges appear comparatively poor?

Id. at 25.

Some writers have suggested that there was a link between the antitrust investigation and the federal investigation of Stanford University for misuse of federal research grants. There was no logical or practical link between the cases, however. There were not, for instance, data that were relevant to both investigations. If there was any link at all, it was probably just that both investigations were partially spurred by the colleges’ apparent wealth. *Id.* at 25.

²⁷¹ Fuller, *supra* note 1, at 34 (noting name of bar where the group would meet).

²⁷² Putka, *supra* note 159. Putka quotes Joe Case who said, “Overlap was started . . . to end a bidding war for good students among selective Eastern Colleges . . .” *Id.*

²⁷³ See Jaschik, *supra* note 33 (noting there has not been any public outcry about the investigation).

²⁷⁴ See *id.* “I’ve heard of three examples of college people trying to pretend this is not a real issue by getting it depicted as a witch-hunt. That is deeply self-centered on their part; and so blend to the real issues.” *Id.*

²⁷⁵ See *id.* “It has a chilling effect on very legitimate collegial relationships between institutions, . . . Ms. Hanson said that, as colleges have tried to improve their budget forecasts in recent years, they have consulted with other institutions to check their projections of such factors as inflation, government support, and enrollment trends. These sorts of things might not continue, she said, even though they help colleges make more accurate budget projections so that they can limit tuition increases. College decisions will also be affected, Ms. Hanson said, by the lawyers most institutions are hiring, who have the interests of their clients in mind and not the larger interests of higher education.” *Id.*

preferences of students, faculty, donors, and parents.²⁷⁶ Since priorities constantly shift among preferences, there can never be an objective and static statement on economic results. There is, however, a competing “construct”²⁷⁷ which acknowledges a softening between the assumed solid barriers between profit and non-profit.

As Clark Kerr predicted, the Academy nurtured its own constituency of stockholders in the production of the most popular product in the civilized world – a college degree. Like the profit sector, they sell a mixed package of economic and social components – all designed to cultivate and propagate a trademarked degree whose value is determined by a stock market system known as “rankings”.²⁷⁸ Institutional addiction to brand competition and product differentiation functions as both cause and effect: “The undue influence of outside consultants in marketing colleges and students.”²⁷⁹

Like a profit conglomerate firm schools allocate resources to the subsidiary-affiliates on the basis of the best result – sometimes social objectives, other times economic, with a revenue motivation. Schools, like corporations, know that if they lose some “stars” from, for example, the economics department, the value of their product – the degree – will go down and the rational reaction is a shift of resources in response.²⁸⁰ In the conglomerate world, it is called cross-subsidization.²⁸¹ In higher education, it could be creating a new revenue source by imposing a high tax on a cash rich law school.²⁸²

²⁷⁶ See *U.S. v. Brown Univ.*, 805 F. Supp. 288, 303 n.9 (E.D. Pa. 1992) (noting that non-profit educational institutions have diverse interests).

²⁷⁷ See note 205 and accompanying text. The court in *Brown* explains that colleges have both non-profit and profit goals. See *Brown*, 5 F.3d. at 672.

²⁷⁸ See Jeff Lustig, *The Mixed Legacy of Clark Kerr: A Personal View*, ACADEME, Jul./Aug. 2004, at 51 (proposing college is for knowledge production and consumption).

²⁷⁹ Lloyd Thacker, *Confronting the Commercialization of Admissions*, CHRON. HIGHER EDUC., Feb. 25, 2005, at B26. Thacker also condemns the “marketing of prestige, popularity, comfort, status, and brand as important educational criteria. That has contributed to the transformation of education into product and student consumer.” *Id.*

²⁸⁰ See Timothy Aepfel, *Economists Gain Star Power: Hot Demand Lifts Salaries, As Elite Universities Seek Big Names*, WALL ST. J., Feb. 22, 2005, at A2 (positing top named professors will help recruit the brightest students).

²⁸¹ World Trade Organization, http://www.wto.int/english/tratop_e/serv_e/telecom_e/tel12_e.htm (defining cross-subsidization as “The practice of using profits generated from one product or service to support another provided by the same operating identity”).

²⁸² See Arthur S. Hayes, *Law Schools Prove Milkable Cash Cows For Many Struggling Parent Universities*, WALL ST. J., June 19, 1992, at B1 (commenting that law

A Kerr-Emersonian construct is a metaphor for higher education as revenue diversification, dedicated to success in allocating resources among competing subsidiaries to maximize market performance as measured by prestige. Students, faculty, research, and donors, are the dominant subsidiaries, each proffering a balance sheet of costs, preferences, and production statements to justify their role in achieving and executing the school's objectives.

Students, as producers, are valued according to merit and/or a socioeconomic index. Faculty salaries, carried on the books as a cost, quantify the individual's contribution to market performance; *supracompetitive* remuneration constitutes a dividend, calculated on the basis of the professor's status on a spectrum of average to star.²⁸³ Research is defined by recognition within the Academy and success is motivated by higher wage dividends, grants and awards. The donation stream is the result of an effective symbiosis of the subsidiary units elevating the prestige factor into endowment. On Harvard's \$19 billion endowment (which increased to \$25.9 billion by 2005)²⁸⁴ the president of Bard College said: "We've reduced our definition of worth into fame and wealth, and it carries over into the way institutions think about themselves. An overwhelmingly huge part of what Harvard is about is about managing its money."²⁸⁵

Whatever the context, the academic institution's revenue stream incorporates the participation of stakeholders – higher education's version of shareholder – whose performance can earn a dividend. Like any shareholder they are motivated by a vested interest in maximizing corporate success. Endowment portfolios managers get hefty bonuses,²⁸⁶ president's get compensation

school was a barely break even operation); Ken Myers, *Professors at GWU Law Charges That University Takes Too Much*, NAT. L.J., May 2, 1994, at A14 (stating law school was keeping school revenue).

²⁸³ See Kirp, *supra* note 225, at Chap. 4. Often identified as the subject of a lateral acquisition. See *id.*

²⁸⁴ See Ben Gose, *Prudent Management or Outright Greed? Critics Ask How Big Endowments Should Be*, THE CHRON. OF PHILANTHROPY, MAY 27, 2004, at 9 (reporting that Harvard is seeking even more money than their nearly \$20 billion in cash).

²⁸⁵ Johanna Berkman, *Harvard's Hoard*, N.Y. TIMES MAGAZINE, June 24, 2001, at 38, 40 (noting Harvard is safe if there is an atomic bomb).

²⁸⁶ See David L. Marcus, *The New College All-Stars*, US NEWS AND WORLD REPORT, Nov. 13, 2000, at 49 (noting college billionaires' club is crowded); John L. Pulley, *Embracing Performance Pay*, CHRON. OF HIGHER EDUC., May 16, 2003, at A28 (noting Klapp is a fund-raising success).

packages commensurate with colleagues in commerce, while everyone on campus has a shot at the ubiquitous amenity dividend.²⁸⁷ As consumers students are the recipients of upscale lodging, food, and recreational facilities. It's "luxury learning" with a capitalist twist.²⁸⁸ And then there is a dividend that has become a virtual entitlement – the x-inefficiencies that every professor learns to inveigle – free meals and trips, faculty discounts, summer grants, subsidized moonlighting as consultants, public intellectuals on the Call Girl circuit²⁸⁹ or media "quote-suppliers"²⁹⁰ – the list is endless.

In what he termed the Second Transformation, Clark Kerr predicted an Intersection of university and industry in which faculty, especially in the natural and social sciences, would assume the "characteristics of an entrepreneur".²⁹¹ He also surmised that the key to growth and success was money.²⁹² Kerr's perspicacity has been confirmed with recognition of a bundling at elite academic institutions of education, industry, and money.²⁹³ In a Kuhnian paradigm shift the university as

²⁸⁷ See generally Julie L. Nicklin, *74 Private –College Presidents Earned More Than 3000,000 in 1998-9*, THE CHRON. HIGHER EDUC., November 24, 2000, at A26 (explaining *The Chronicle* began tracking executive compensation).

²⁸⁸ See Weinbach, *supra* note 232. "The universities blame the amenities arms race on cutthroat competition for top applicants. But critics are asking the obvious question: Shouldn't that money go towards labs and libraries instead of fitness centers and smoothie bars? Even more important, some campus perks, especially the luxurious dorms, cost significantly more money – potentially 'ghettoizing' college life for kids who can't afford them. Indeed, some contend much of the upgrading is simply a business proposition, an effort by academic institutions to boost their own fortunes by attracting rich kids. 'We're allowing people's wallets, from the get-go, to determine what kind of life they can enjoy on campus,' says Larry Rosenthal, an urban-housing specialist at the University of California, Berkeley. It goes against 'principles of higher education.'" "[C]olleges from Northwestern to Duke are pushing free cell phones, free cable television, and even specially baked birthday cakes." See also Bernstein, *supra* note 232; Rimes, *supra* note 232.

²⁸⁹ See ARTHUR KOESTLER, *THE CALL-GIRLS: A TRAGI-COMEDY* 7 (1973). "It becomes a habit, maybe an addiction. You get a long-distance telephone call from some professional busybody at some foundation or university – "sincerely hope you can fit it into your schedule – it will be privilege to have you with us – return fare economy-class and a modest honorarium of . . ." *Id.*

²⁹⁰ See Herbert Gans, *The Future of the Public Intellectual*, THE NATION, Feb. 12, 2001, at 25. "Most public intellectuals function as quote-suppliers to legitimize the media . . . You know, if no journalist calls for a quote, then I'm not a public intellectual; I just sit there writing my books and teaching classes." *Id.*

²⁹¹ See Kerr, *supra* note 51, at 90.

²⁹² See *id.* at 117.

²⁹³ See Arenson, *supra* note 231. "There's been a paradigm shift [said a University of Southern California vice-provost]. There was a time that this kind of work – and the idea of making money from your research – was not acceptable at universities, including ours." *Id.*

entrepreneur relies on MBA management techniques to nurture the money stream derived from sources such as outsourcing,²⁹⁴ research and patent marketing,²⁹⁵ and joint venturing with for-profit enterprises.²⁹⁶ The new Intersection willingly accommodates an “education is a business”²⁹⁷ ethos.

It is too soon to accept the new paradigm as sufficiently formulated and tested to provide a basis for public policy. Nevertheless, the widespread presence of a vigorous dialogue suggests the first stage in Kuhn’s description of paradigm change – a “crisis” in which the assumptions of the dominant paradigm cannot adequately respond to new “puzzles”.²⁹⁸ The crisis is here: the commingling of profit and capitalism with education threatening “anomalies whose characteristic feature is their stubborn refusal to be assimilated to existing paradigms.”²⁹⁹ The anomaly’s capstone is a conflict between the corrupting effects of “corporatization” on the education mission and the benefits of the money stream supporting the socioideological vision of the institution.³⁰⁰ According to Kuhn, a crisis is resolved by

²⁹⁴ See *id.* “Our motivation is to be entrepreneurial. . . We’ve been giving it away for generations. Now we want to get a fair return, always so we can reinvest it. That is changing the relationship of universities to the outside world.” *Id.*

²⁹⁵ See Goldie Blumenstyk, *Colleges Seek a Record Number of Patents*, CHRON. HIGHER EDUC., Dec. 3, 2004, at A27 (commenting that some of America’s elite educational institutions have been successful in patenting and licensing ventures); Goldie Blumenstyk, *Income From University Licenses on Patents Exceeded \$1 Billion*, CHRON. HIGHER EDUC., Mar. 22, 2002, at A22 (observing universities are filing patents on inventions more aggressively).

²⁹⁶ See Audrey Williams June, *Checking In on Campus: Colleges Become Hoteliers to Pamper Visitors and Get More of Their Money*, CHRON. HIGHER EDUC., Aug. 16, 2002, at A29 (reporting Saint Louis University has entered into ventures with hotels and hospitals in order to bolster university-related business).

²⁹⁷ See Bernard Wysocki, *How Dr. Papadakis Runs a University Like a Company*, Wall St. J., Feb. 23, 2005, at 1-A, 13A (noting many universities are grappling with how “business-minded” they should be. There is also debate as to what the compensation packages of their money managers should be comprised of).

²⁹⁸ See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 92 (1970) (“In both political and scientific development the sense of malfunction that can lead to crisis is prerequisite to revolution”).

²⁹⁹ See *id.* at 97 (“Paradigms provide all phenomena except anomalies with a theory-determined place in the scientist’s field of vision”).

³⁰⁰ Commentary on the crisis on higher education flourishes. See generally, *supra* note 41, Kerr, *supra* note 51, Kabaservice, *supra* note 92, Menand, *supra* note 103, Kirp, *supra* note 225, Giroux, *supra* note 226, Bok, *supra* note 228, see Eric Gould, *The University in a Corporate Culture* (2003); Christopher Newfield, *Ivy and Industry: Business and the Making of the American University, 1880-1980* (2003); Richard Ohmann, *Politics and Knowledge: The Commercialization of the University, the Professions, and Print Culture* (Press, 2003); Jennifer Washburn, *University Inc.: The Corporate Corruption of Higher Education* (2005); James O. Freedman, *Liberal Education and the Public Interest* (2005).

“revolution”, a face-off between models in which “[c]onversion will occur a few at a time until, after the last handouts have died, the whole profession will again be practicing under a single, but now different, paradigm”.³⁰¹

This will not be a quick or cordial paradigm shift. Too many people with strong commitments – the education lobby, social scientists already attached to existing models, corporatizers³⁰² – and perhaps trust-busters still holding a grudge against the Prestige Cartel. Any consensus from the inevitable contention will have to accommodate the static from the growing separation between the “elite” institutions and the “other” schools. The Prestige Cartel is composed of mostly private schools, heavily endowed, research intense, star faculty and merit students, blending into a source of market power. They shrewdly play the ranking game to cultivate media interest.³⁰³ Elite institutions favor a trust or holding company organizational scheme composed of virtually autonomous fiefdoms in a mixture of non-profit and profit activities.³⁰⁴ Collectively the Prestige Cartel shares a form of monopoly power, confronting putative rivals with what Judge Hand called “the advantage of experience, trade connection, the elite of personal.”³⁰⁵ Hence “one might fancy that the *Overlaps* had cornered the Prestige market. . . .”³⁰⁶

The Others are mostly public institutions whose traditional source of positive cross-elasticity of demand with the Prestige Cartel came from taxpayer subsidy. While generous funding, strong alumni support, and effective management enabled a small group of universities to compete with the elites, an epidemic of budget anemia – “unfunding” – has driven schools to

³⁰¹ See Kuhn, *supra* note 298, at 152.

³⁰² See Basinger, *supra* note 251. “College presidents should support and encourage collaborations between university researchers and private corporations, according to a report issued last week by the American Council on Education and the National Alliance of Business. . . . The report urges universities to adopt hiring, tenure, and promotion policies that reward researchers for collaborating with industries. Universities also should coordinate the various offices that support such collaborations, and consider creating central offices to oversee the partnerships, the report says.” *Id.*

³⁰³ See Thacker, *supra* note 279 (“Excessive media interest in a group of elite institutions that both responds to increased consumer interest in “the best colleges” and encourages the frenzy”).

³⁰⁴ See *id.* (advancing that colleges, often held in public trust, have the “obligation and the power” to shape the educational system in America).

³⁰⁵ *U.S. v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945).

³⁰⁶ See O'Brien, *supra* note 41, at 146.

embrace privatization.³⁰⁷ A president of the University of Michigan described his school as a “privately funded public university.”³⁰⁸ This is an issue that fuels more static for the paradigm crisis by forcing the “self-sufficiency” option into the mix.³⁰⁹ The University of Virginia countered defunding by negotiating a franchise relationship for law and graduate business schools with the central administration enabling them to operate under a private budget subsidized by corporate revenues, executive educational programs, and even profits from a school owned hotel. “In its eagerness to enter the elite national ranks, Darden (U.Va’s Business School) has made the pursuit of money its main objective.”³¹⁰ Anticipating the future the Virginia Legislature is considering “state-assisted charter” university status for U.Va., William and Mary, and Virginia Tech, providing budgeting flexibility.³¹¹

The antitrust Exemption expires in 2008.³¹² So long as the Elites continue to integrate the non-profit mission with the lessons of capitalism renewal is a long shot. The Exemption’s sunset will invite Antitrust scrutiny and a hard look at an industry that exhibits the mutual interdependence characteristics of an oligopoly – including the persistent increase in prices. It is the profile of an industry ripe for a wave of Civil Investigative inquiries.

Trustbusters will return to the education industry with the knowledge that the credibility of the Third Circuit’s approval of a social consciousness defense is now of problematical credibility.

³⁰⁷ See Sam Dillon, *At Private Universities, Warnings of Privatization*, N.Y. TIMES, Oct. 16, 2005, at 112 (warning while privatization is going on at many flagship universities, it is clear that most academic institutions of higher learning cannot survive without the aid of public funding).

³⁰⁸ See *id.* (noting Michigan finances approximately 18 percent of the University of Michigan at Ann Arbor’s revenue).

³⁰⁹ See *id.* (concluding as a result of the paradigm crisis, most public universities are looking more and more like private institutions).

³¹⁰ Kirp, *supra* note 225, at 144 (advancing the theory that, by focusing on making money, Virginia has decreased its emphasis on faculty research).

³¹¹ See Sara Hebel, *A Businessman Bridges the Political Aisle*, CHRON. HIGHER EDUC., Feb. 25, 2005, at A1, A21 (reporting Governor Warner was dubious about how much money the schools would actually save by winning the aid of government assistance).

³¹² See Stephen Burd, *Congress May Permit Aid Talks to Continue*, CHRON. HIGHER EDUC., Nov. 2, 2001, at A31 (reporting the group has met every year to determine how much financial aid would be given to students who were admitted to multiple “elite” institutions).

Even assuming a “pure” Emersonian model, a social welfare justification is not a process efficient option for the judicial process – judgments on topics like educational policy are too ambiguous and contentious. The effort to accommodate diversity as a function of competition for example.³¹³ More importantly, events have rendered social welfare a moot issue. So long as revenue is the reigning factor in the Elite’s management ethos, courts will be obliged to respond to antitrust claims in a complementary fashion by exclusive reliance on economic criteria.³¹⁴

³¹³ See Andrew Delbanco, *The Endangered University*, N.Y. REV. OF BOOKS, Mar. 24, 2005, at 19 (“Yet it is risky to raise any question – even a friendly one about the educational consequences of diversity”).

³¹⁴ See Andrew Hacker, *The Truth About the Colleges*, N.Y. REV. OF BOOKS, Nov. 3, 2005, at 51, 52 (“The colleges’ costs are also relevant here. The twelve have similar price tags despite differences in endowments and local labor costs. Even if there isn’t overt consultation, there seems to be a kind of consensus not to engage in price competition”).