

2004

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Recommended Citation

Mark D. Bauer, *Small Liberal Arts Colleges, Fraternities, and Antitrust: Rethinking Hamilton College*, 53 Cath. U. L. Rev. 347 (2004).

Available at: <https://scholarship.law.edu/lawreview/vol53/iss2/3>

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SMALL LIBERAL ARTS COLLEGES, FRATERNITIES, AND ANTITRUST: RETHINKING HAMILTON COLLEGE

Mark D. Bauer⁺

INTRODUCTION

Few would deny that colleges compete with one another.¹ Harvard and Yale have maintained a spirited academic rivalry for over 300 years.² News stories often advertise the success of one college in pinching a star professor from another.³ Whether in the rankings published annually in *U.S. News & World Report*⁴ or on the football field, colleges can be rapacious competitors. This competition continues despite the fact that substantially all four-year private colleges are non-profit organizations, and are generally recognized by the Internal Revenue Service as tax-exempt public charities for the purpose of charitable donations.⁵

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1. See *College Scramble: High Schoolers Aren't the Only Ones Anxious, as Colleges Compete for the Brightest Prospects*, ABCNEWS.COM at http://www.abcnews.go.com/sections/nightline/DailyNews/college_admissions030119.html (last visited Oct. 6, 2003). The words "college" and "university" are used as the institution uses them. For example, although Colgate University (which has a small master's degree program) and Denison University (which has no graduate students at all) are liberal arts colleges, they term themselves universities and will be referred to as such. This article, however, focuses on the uniquely American small liberal arts college. The term "fraternity" is used in this article to describe both women's fraternities (often colloquially called sororities) and men's fraternities. The term "fraternity" is also used to describe coeducational fraternities—usually traditionally-male fraternities that have accepted women as members in some or all chapters.

2. See generally *Harvard-Yale: Friends and Foes*, 2003 HARVARD-YALE REGATTA PROGRAM, available at <http://www.gocrimson.ocsn.com/genrel/053003aaa.html> (last visited Oct. 6, 2003).

3. See, e.g., Sarah Betts, *Ivies Compete for Big-Name Profs*, THE DARTMOUTH, Apr. 18, 2002, at <http://www.thedartmouth.com/article.php?aid=2002041801050>.

4. See *America's Best Colleges 2004*, U.S. NEWS & WORLD REPORT, at http://www.usnews.com/usnews/edu/college/rankings/ranklibartco_brief.php (last visited Mar. 2, 2004).

5. 26 U.S.C. § 501(c)(3) (2000).

Colleges not only compete against each other, they compete with local businesses and services.⁶ Most private colleges maintain ancillary services that are, at best, tangentially related to their educational mission.⁷ For instance, colleges often directly compete against fraternities and sororities, local landlords, restaurants, and bookstores.⁸ Cases over the years have noted that in competition against smaller entities, colleges can often be more than just fierce competitors; colleges can be illegal monopolists.⁹

Small liberal arts colleges are a unique breed. Instead of chasing federal grants for research, the glories of semi-professional sports, or the headlines emanating from prestigious graduate schools, liberal arts colleges primarily focus on undergraduate education.¹⁰ These schools are usually small, intimate, and possessed with—at least in the eyes of their administrations, faculties, and trustees—a clear sense of mission and community.¹¹ These schools can easily articulate the unique benefits of their style of residential education and detail precisely what makes them different from any other college.¹²

Although several small colleges have always prohibited fraternities,¹³ abolishing long-established fraternity systems is a relatively recent phenomenon. Williams College requested that all fraternities surrender their national charters and voluntarily cede their houses to the college by

6. See, e.g., *Sunshine Books, Ltd. v. Temple Univ.*, 697 F.2d 90, 91 (3d Cir. 1982).

7. See, e.g., Williams College Housing Office website, at <http://www.williams.edu/admin-depts/bg/housing/main.html> (last visited Oct. 6, 2003).

8. See, e.g., Shinika A. Sykes, *Store, College in Battle Over Books*, SALT LAKE TRIB., July 30, 2003, at B2; Maria Siakavellas, *Question of Boston Housing Crisis Musters Mixed Response from Industry*, MULTI-HOUSING NEWS, Mar. 3, 2003; Hupp Staci, *ISU Shops Snag Students' Money*, DES MOINES REG., Feb. 22, 2004, at 1B.

9. See, e.g., *Sunshine Books*, 697 F.2d at 91. See generally Douglas R. Richmond, *Antitrust and Higher Education: An Overview*, 61 UMKC L. REV. 417, 417, 446-61 (1993); Jeffrey C. Sun & Philip T.K. Daniel, *The Sherman Act Antitrust Provisions and Collegiate Action: Should There Be A Continued Exception for the Business of the University?*, 25 J.C. & U.L. 451, 452, 469-97(1999).

10. *America's Best Colleges 2004*, *supra* note 4 (stating that “liberal arts colleges emphasize undergraduate education and award at least half of their degrees in the liberal arts disciplines”); The Carnegie Foundation for the Advancement of Teaching, *The Carnegie Classification of Institutions of Higher Education*, Category Definitions, at <http://www.carnegiefoundation.org/Classification/CIHE2000/defNotes/Definitions/htm> (last visited Oct. 6, 2003).

11. See generally ARTHUR M. COHEN, *THE SHAPING OF AMERICAN HIGHER EDUCATION* 304 (Jossey-Bass Publishers 1998).

12. *Id.*

13. Aaron Gifford, *Higher-Ranked Colleges Lack Frats: After Hamilton Eliminated Houses, Applicant Pool Quality and Quantity Improved*, POST-STANDARD, May 4, 2001, at A14.

1966.¹⁴ In the early 1980s, Colby College and Amherst College abolished their approximately 150 year-old fraternity systems.¹⁵ Since then, at least seven other colleges, mostly in the Northeast, have either abolished fraternities or required fraternities to abandon their houses.¹⁶

The decision to end or drastically reform fraternities is almost always couched in terms of behavioral problems, sexism, privilege, or liability.¹⁷ These issues have presented problems at some schools and may comprise one of the factors in the decision to end fraternities.¹⁸ This article makes no attempt to justify inappropriate conduct.¹⁹ A key factor that has received little attention, however, is that fraternities often own and

14. Editorial, *Fraternity Restraint*, CHRISTIAN SCIENCE MONITOR, Mar. 2, 1984, at 15; Philip F. Smith, *The Demise of Fraternities at Williams*, CHRON. OF HIGHER EDUC., Apr. 2, 1999, at B6.

15. See ERNEST CUMMINGS MARINER, *THE HISTORY OF COLBY COLLEGE* 104 (Colby College Press 1963); Milan Simonich, *Waynesburg College Makes its Greek Life History: Trustees say Social Clubs at Odds with School's Goals*, POST GAZETTE, Sept. 7, 1999; *About Amherst: A History of Amherst College*, at http://www.amherst.edu/about_amh/history (last visited Oct. 10, 2003).

16. The colleges discussed in this article are Williams College in Williamstown, Massachusetts (abolishing fraternities 1962-70); Colby College in Waterville, Maine (abolishing fraternities in 1984); Bowdoin College in Brunswick, Maine (abolishing fraternities in 1997); Amherst College in Amherst, Massachusetts (abolishing fraternities in 1984); Hamilton College in Clinton, New York (required abandonment of fraternity houses in 1995); Denison University in Granville, Ohio (requiring abandonment of fraternity houses in 1995); Lawrence University in Appleton, Wisconsin (denied fraternity special housing privileges in 2000); Alfred University in Alfred, New York (abolishing fraternities in 2002); Bucknell University in Lewisburg, Pennsylvania (encourages fraternities to sell houses to University), and Colgate University in Hamilton, New York (requiring the sale of fraternity houses to the University by 2005). Milan Simonich, *supra* note 15; *About Amherst: A History of Amherst College*, *supra* note 15; Ben Gose, *Do Bans on Fraternities Violate the First Amendment? Right of Free Association is Cited in Attempts to Restore Greek Groups, and to Bar Them*, CHRONICLE, Nov. 27, 1998, available at <http://www.dke.org/chronicle1127.html> (last visited Sept. 30, 2003); Lawrence University, *Trustees Act To Improve Residential Life*, at <http://www.lawrence.edu/taskforce/reslife/> (last visited Apr. 8, 2004); Alfred University, *Report of the Trustee Task Force on Greek Life*, May 17, 2002, available at <http://www.alfred.edu/greektaskforce/index.html> (last visited Sept. 30, 2003); Bucknell University, *The Plan for Prominence in Fraternity and Sorority Affairs*, Feb. 2002, at <http://www.bucknell.edu/greeklife/prominence.htm> (last visited Apr. 8, 2004); *Colgate University to Make Changes in Residential Education*, July 9, 2003, available at <http://www.collegenews.org/x2714.xml> (last visited Sept. 30, 2003).

17. See, e.g., Leana Donofrio, *Private Colleges Ban Fraternities, Sororities*, DAILY ILLINI ONLINE, Oct. 15, 2002, at <http://www.dailyillini.com/oct02/oct15/news/printer/campus01-printer.shtml> (last visited Oct. 6, 2003).

18. See generally Nancy S. Horton, *Traditional Single-Sex Fraternities on College Campuses: Will They Survive in the 1990's?*, 18 J.C. & U.L. 419 (1992).

19. L. Mercedes Wesel, *Vocal Fraternity Members Oppose Selling to Bowdoin*, PORTLAND PRESS HERALD, Mar. 6, 1997, at 1A; Jeffery Reeves, *Ordinance Concerns Penn State U. Fraternity Proprietors*, DAILY COLLEGIAN, Nov. 7, 2000.

control valuable real estate on increasingly land-starved campuses.²⁰ Such fraternities also may offer housing and dining services, often superior in quality and lower in price than competing college room and board services.²¹ In these situations, the decision by a college to abolish fraternities may simply represent the choice of an entity with market power to eliminate viable competitors.²²

This article explores the antitrust ramifications of a small college's decision to end traditionally-housed fraternities. As background, Part I explores the history and development of small liberal arts colleges and fraternities. The American liberal arts college is unique to the world and the similarly unique development of fraternities is traceable to certain notable events in the history of higher education in the United States. Part II provides the analytical framework for antitrust analysis, along with an explanation of its impact on college operations. In fact, the question of whether the antitrust laws apply to colleges at all has undergone extensive litigation and now appears resolved. Part III discusses an antitrust lawsuit brought by a group of fraternities against Hamilton College. This is the only case ever to consider the issues discussed in this article, but a panoply of errors prevents the case from yielding dispositive conclusions regarding how antitrust laws govern college actions toward fraternities. Part IV reviews actions by nine colleges that have radically altered their fraternity systems. Although a few other colleges have made some changes to fraternities over time, these nine schools have imposed the most draconian changes to existing fraternity systems, chilling property rights and perhaps running afoul of antitrust law.²³ Part V suggests possible action by affected parties to pursue litigation or reduce antitrust liability.

20. See Colin Kearns, *IU Hopes to Acquire Old Pike House*, IDSNEWS.COM, Feb. 24, 2003, at <http://idsnews.com/story.php?id=15013> (last visited Oct. 6, 2003).

21. Melody Wang, *Fraternity Members Meet to Discuss Housing Issues*, DAILY BRUIN ONLINE, Feb. 11, 2000, at <http://www.dailybruin.ucla.edu/db/issues/00/m02.11/news.housing.html> (last visited Oct. 6, 2003).

22. See, e.g., *Sunshine Books, Ltd. v. Temple Univ.*, 697 F.2d 90, 91 (3d Cir. 1982).

23. Middlebury College, for example, imposed a variety of constraints on fraternities, including forbidding them from using the word "fraternity;" Union College is dispossessing fraternities of long-occupied homes built by the fraternities, but where the land is college-owned-but is also moving the fraternities into other housing on campus; and Franklin & Marshall College "derecognized" fraternities, but students are permitted to join the off-campus organizations. Andrea Gissing, *Social House Roots Found in Fraternal History*, MIDDLEBURY CAMPUS, Mar. 11, 2004, available at <http://www.middleburycampus.com/news/2004/03/11/>

News/Social.House.Roots.Found.In.Fraternal.History-630763.shtml (last visited Apr. 8, 2004); Alan Wechsler, *A \$20M Gift For Union College*, TIMES UNION, Nov. 22, 2002, at A1; Paula Holzman, *After 15 Years, F&M Mulls Rerecognizing Frats*, INTELLIGENCER J., Sept. 17, 2003, at A1. These actions are likely not impacted by the antitrust laws.

I. THE SYMBIOTIC RELATIONSHIP BETWEEN COLLEGES AND FRATERNITIES

A. *Origins of Fraternities and American Liberal Arts Colleges*

Most discussions of the development of the North American college fraternity begin with reference to the founding of Phi Beta Kappa at the College of William and Mary in 1776.²⁴ By 1990, the traditionally all-male fraternities had 5,238 chapters on 800 college campuses, with 4.5 million members, including 400,000 undergraduates.²⁵ However, the exact dates and numbers may not be as important as the reasons why college fraternities came into existence.

At the time of the founding of Phi Beta Kappa, college students were enrolled on a few campuses along the eastern seaboard of what would become the United States.²⁶ These colleges closely modeled English colleges.²⁷ These schools imposed tight restrictions on students' educational choices and "social life was extremely limited, if it existed at all."²⁸ The "[f]aculty had absolute power within the institutions and students were regulated closely from morning vespers through the evening meal."²⁹

24. BAIRD'S MANUAL OF AMERICAN COLLEGE FRATERNITIES § I-10 (Jack L. Anson & Robert F. Marchesani, Jr. eds., Baird's Manual Foundation, Inc. 20th ed. 1991) [hereinafter BAIRD'S]. From its inception, Phi Beta Kappa possessed many characteristics of modern fraternities, including "secrecy, a ritual, oaths of fidelity, a grip, a motto, a badge for external display, a background of high idealism, a strong tie of friendship and comradeship, an urge for sharing its values through nationwide expansion." *Id.* In 1831, a man named William Morgan claimed to be a royal arch Mason and threatened to betray the secrets of his organization and publish its ritual. *Id.* Soon afterwards he was murdered and anti-Masonic fervor spread throughout the United States, resulting in the formation of a major political party. *Id.* With all the anti-Masonic sentiment in the country, Phi Beta Kappa elected to transform itself into a purely honorary fraternity, and to publish its ritual. *Id.*

25. *Id.* § I-27. The term "traditionally all-male" fraternities is used because several, including Psi Upsilon and Theta Delta Chi, permit each chapter to elect whether to initiate women.

26. See BAIRD'S, *supra* note 24, § I-10; DONALD G. TEWKSBURY, THE FOUNDING OF AMERICAN COLLEGES AND UNIVERSITIES BEFORE THE CIVIL WAR 32-33 (Teachers' College, Columbia University 1932).

27. See CHRISTOPHER J. LUCAS, AMERICAN HIGHER EDUCATION: A HISTORY 109 (St. Martin's Griffin 1994).

28. WILLIAM A. BRYAN, THE EIGHTIES: CHALLENGES FOR FRATERNITIES AND SORORITIES 1 (Robert A. Schwartz ed., American College Personnel Association Media 1983).

29. *Id.* The earliest published rules at Harvard stated 'Every one shall consider the main end of his life and studies to know God and Jesus Christ, which is eternal life . . . and therefore to lay Christ in the bottom, as the only foundation of all sound knowledge and learning'; each scholar was to read the scriptures twice daily so that he 'shall be ready to give such an account

The earliest colleges offered courses of study that reflected the settlers' desire to transfer higher learning from Oxford and Cambridge to the American wilderness.³⁰ The curriculum was "a combination of medieval learning, [and] devotional studies judged conducive to the preservation of confessional religious piety."³¹ As a result of this restrictive atmosphere, students developed secret literary societies, with related mottos, passwords, and symbols, resembling those of Phi Beta Kappa and the Masons.³² These societies gave students a forum to "express themselves freely on the foremost topics of the day as well as the more enduring questions prompted by their studies."³³

By choosing Greek letters and mottos to represent the new groups, students could more closely identify with the glories of ancient civilization, including athletics, art, literature, philosophy, and democratic values.³⁴ At the time, Classical Greek was a prerequisite for admission to college; in fact, the study of Greek and Latin remained a central curricular goal at many colleges into the twentieth century.³⁵

The early colleges tolerated Phi Beta Kappa and its progeny.³⁶ The founders of these societies persuaded faculties that the organizations possessed the same worthy intellectual and moral ambitions as the colleges.³⁷ The colleges probably recognized that squelching the fledgling organizations would have failed because, as Alexis de Tocqueville observed, "Americans of all ages, all stations in life, and all types of dispositions are forever forming associations."³⁸ Having discovered a way to ease the tedium of classical studies with debate, discussion, and fellowship, fraternities spread to almost every college.³⁹ But the

of his proficiency therein, both in theoretical observations of the language, and logic, and in practical and spiritual truths, as his tutor shall require, according to his ability.'

LUCAS, *supra* note 27, at 104. The royal attorney general for the Province of Virginia gave an opposing view when the Crown gave acreage to found the College of William and Mary. *Id.* at 105. He said "Souls! Damn your souls! Raise tobacco!" *Id.*

30. LUCAS, *supra* note 27, at 109.

31. *Id.*

32. BRYAN, *supra* note 28, at 1.

33. BAIRD'S, *supra* note 24, § 1-1.

34. MARIANNE R. SANUA, "HERE'S TO OUR FRATERNITY": ONE HUNDRED YEARS OF ZETA BETA TAU 1898-1998 3 (Brandeis University Press 1998).

35. *Id.*

36. HANK NUWER, WRONGS OF PASSAGE; FRATERNITIES, SORORITIES, HAZING, AND BINGE DRINKING 102 (Indiana Univ. Press 1999).

37. *Id.*

38. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 513 (J.P. Mayer ed., Anchor Books 1969).

39. Maureen Sirhal, *Fraternities on the Rocks*, Policy Review, Feb. 2000, available at <http://www.policyreview.org/feb00/sirhal.html> (last visited Mar. 15, 2004).

movement would not have become significant had it not been for a unique twist in American higher education.

B. Religion, Rivalries, and Dartmouth College

Each of the nine colleges founded before the American Revolution shared a broad sense of mission—to educate civic leaders and the clergy.⁴⁰ But from the start, each college was founded with a unique mission, in the belief that the colleges founded previously had failed. In response to a perceived decline in piety at Harvard, a group of alumni founded Yale.⁴¹ Also troubled with declining piety, Presbyterians founded a college of their own at Princeton.⁴² Equally discouraged by perceived religious decline at Yale and Harvard, New England Congregationalists threw their support behind Dartmouth.⁴³ The Baptists founded Brown, and then the Dutch Reformed Church, not to be outdone, founded Rutgers.⁴⁴

Until the end of the nineteenth century, England had only four universities.⁴⁵ By 1802, the United States had twenty-eight colleges, nineteen established between 1782 and 1802.⁴⁶ A number of factors contributed to the creation of new colleges during this period, including religion, state pride, increasing affluence, and the westward advance of the frontier.⁴⁷ One factor that restrained the founding of even more colleges was the unresolved issue of state control.⁴⁸

Unlike the English colleges where the faculty had complete control, states chartered each college and asserted at least some control.⁴⁹ In the summer of 1819, the Governor of New Hampshire sought to take control of Dartmouth by replacing its college and church-elected trustees with new state-appointed trustees.⁵⁰ Daniel Webster successfully argued for

40. LUCAS, *supra* note 27, at 105. The nine colleges were Harvard (1636), William and Mary (1693), Yale (1701), College of New Jersey (later named Princeton) (1746), Kings College (later named Columbia) (1754), College of Philadelphia (later named the University of Pennsylvania) (1740), College of Rhode Island (later named Brown) (1764), Queens College (later named Rutgers) (1766), and Dartmouth (1769). *Id.*; *Harvard University at a Glance*, at <http://www.news.harvard.edu/glance/> (last visited Apr. 8, 2004).

41. LUCAS, *supra* note 27, at 105.

42. *Id.* at 106.

43. *Id.*

44. *Id.* Much of this religious zeal was termed the “Great Awakening,” which imbued most of the American Protestant denominations with missionary fervor. *Id.*

45. *Id.* at 117.

46. *Id.*; TEWKSBURY, *supra* note 26, at 32-36.

47. LUCAS, *supra* note 27, at 117.

48. *Dartmouth Coll. v. Woodward*, 17 U.S. 518, 665-66 (1819).

49. *Id.*

50. *Id.* at 551-54.

Dartmouth in the United States Supreme Court.⁵¹ In that case, the Court held that Dartmouth was a private rather than public entity, and therefore the state of New Hampshire did not have regulatory power over it.⁵²

C. *Fledgling Colleges and the Rise of the German Universities*

With the question of state control finally resolved, a remarkable number of colleges were founded in the early nineteenth century. By 1861, America had 250 colleges.⁵³ New Englanders moving West founded Carleton and Oberlin, seeking to make the western frontier more like the settled East.⁵⁴ States, too, founded publicly controlled colleges to prevent tuition dollars from flowing to neighboring states.⁵⁵ Every denomination wanted "to train its own ministers, hold the loyalty of its own young people, and convert outsiders."⁵⁶ Communities recognized that colleges brought faculty, students, and, most importantly, money.⁵⁷

These new colleges were generally underfunded, lacking resources to build even the most rudimentary classroom facilities; some colleges opened with no money, and sometimes very few students.⁵⁸ While the English model of residential colleges remained a popular ideal, few American colleges had money to build dormitories.⁵⁹

By 1816, the influence of the new German universities began to grow.⁶⁰ German universities focused on scholarly research and inquiry, and were directly related to the "gradual emergence of a more secular society," as opposed to the English model that focused on preparing a learned clergy.⁶¹ As the German influence grew, students became less interested

51. *Id.* at 551.

52. *Id.* Webster's famous closing argument included the statement: "It is, sir, as I have said, a small college. And, yet *there are those who love it.*" DANIEL WEBSTER, *Peroration to the Dartmouth College Case*, in 15 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 11 (J. McIntyre ed., 1903).

53. LUCAS, *supra* note 27, at 117.

54. *Id.* at 118.

55. *See id.* at 117-18.

56. OSCAR HANDLIN & MARY F. HENDLIN, *THE AMERICAN COLLEGE AND AMERICAN CULTURE: SOCIALIZATION AS A FUNCTION OF HIGHER EDUCATION* 25 (McGraw-Hill Book Co. 1970).

57. *Id.* at 25-26.

58. LUCAS, *supra* note 27, at 117.

59. *Id.* at 117, 126-28. In its first eighty years of existence, the University of Pennsylvania added not one dollar to its endowment, and this situation was far from unique. HANDLIN & HENDLIN, *supra* note 56, at 27.

60. GREGORY A. BARNES, *THE AMERICAN UNIVERSITY: A WORLD GUIDE* 28 (ISI Press 1984).

61. LUCAS, *supra* note 27, at 142.

in a college education centered around “harsh discipline, religious services, and relentless study.”⁶² The influential trend of German universities, who did not concern themselves with students’ out-of-class activities, encouraged other colleges to abandon the task of building dormitories and supervising student activities.⁶³ For example, following the example of German universities, the chancellors at the universities of Michigan and Wisconsin demanded the closing of existing dormitories.⁶⁴

D. The Era of Fraternity House Construction

Boarding houses and local landlords often treated students badly, unfairly charging and cheating them.⁶⁵ The Civil War also pushed schools towards bankruptcy; many universities could not afford to pay faculty, let alone construct student housing.⁶⁶ Fraternities, which were purely literary societies until this point, began to house and feed their members.⁶⁷

Until this time, fraternities had been very small; chapters seldom exceeded thirty members and were usually half that size.⁶⁸ The original debating and literary societies evolved into a broader fellowship, but remained focused on intellectual pursuits.⁶⁹ In some respects, the dawn of the era of fraternity houses ended the “golden age” of fraternity intellectualism.⁷⁰ Once a fraternity’s members settled under one roof, the main emphasis became practical: filling the house, paying the bills, maintaining the premises, and attending to legal matters.⁷¹

College officials, who had originally opposed fraternities because of their secrecy, now welcomed and encouraged fraternities to house and feed students.⁷² Furthermore, college officials recognized that building a fraternity chapter house “arouse[d] the interest and involvement of their wealthy alumni;”⁷³ in fact “[f]ew presidents failed to perceive the advantages of the fraternities, which took the college out of the lodging

62. BARNES, *supra* note 60, at 33.

63. BAIRD’S, *supra* note 24, § I-14.

64. *Id.*

65. *Id.*

66. *Id.* Rutgers lowered its price from \$500 to \$100 to attract more students. HANDLIN & HENDLIN, *supra* note 56, at 28.

67. BAIRD’S, *supra* note 24, § I-14.

68. *Id.* § I-2.

69. *Id.*

70. *Id.*

71. *Id.*

72. SANUA, *supra* note 34, at 3.

73. *Id.*

business, freed capital for other uses, and spared the faculty the tasks of supervision.⁷⁴

Chapter houses became the prominent architectural features on many campuses and fraternity traditions became campus traditions.⁷⁵ Fraternity alumni felt intense loyalty to their chapter and *alma mater* and they generously donated to both, believing support for one helped the other.⁷⁶ Colleges and fraternities grew symbiotically intertwined to the point of mutual dependency.⁷⁷

After World War II, colleges were flooded with money from the GI Bill and government grants.⁷⁸ For generations before this influx of capital, extracurricular activities, housing, and fraternities all had evolved without supervision and coordination by the colleges.⁷⁹ In the post-war years, many colleges became interested in building dormitories and improving campus conditions.⁸⁰ In many instances, this put the colleges into direct competition with the privately owned and operated fraternities for the first time in history.

E. The Modern Era

Although many variations exist, the traditional fraternity that exists today on the vast majority of four-year college campuses is housed in a building owned in fee simple by an incorporated alumni association.⁸¹ Fraternities offer residential services, including housing and meal programs, as well as organized social activities and leadership training, often through their national or international organizations.⁸² The central

74. HANDLIN & HENDLIN, *supra* note 56, at 40.

75. BAIRD'S, *supra* note 24, § 1-3.

76. *Id.*

77. *Id.*

78. LUCAS, *supra* note 27, at 203-04.

79. *Id.*

80. *Id.*

81. See, e.g., Minutes of the Trustees of Indiana University, Indiana University Bloomington, Sept. 20, 2002, available at <http://www.indiana.edu/~trustees/m092002.html> (last visited Jan. 29, 2004); Minutes of the University Arkansas Board of Trustees, University of Arkansas for Medical Sciences Board Room, May 20, 1994, available at <http://www.vack.edu/admin/vcfainfo/minutes/52094.pdf> (last visited Jan. 29, 2004); Bylaws of the Sigma Cui Building Association, proposed Nov. 7, 1998, available at <http://www.sigmachiclarkson.com/bylaws/BYLAWS95.doc> (last visited Jan. 29, 2004).

82. See, e.g., Greek Affairs: The Organizations: Housing & Property Management, UNC Chapel Hill, available at <http://greeks.unc.edu/orgs/housing> (last visited Jan. 29, 2004); see University of California Santa Barbara Community Housing available at http://www.housing.ucsb.edu/cho_community.html (last visited Jan. 29, 2004); K-State Housing, available at <http://consider.k-state.edu/housing> (last visited Jan. 19, 2004); Internal Revenue Service, Fraternity Foundations, available at <http://irs.gov/pub/iwrs-tege/topicg.pdf> (last visited Jan. 29, 2004).

organizations are usually 501(c)(7) not-for-profit organizations under the tax code, and are affiliated with a 501(c)(3) non-profit educational foundation that awards scholarships to members and pays for leadership training and other educational programming.⁸³ The central organizations grant charters to local chapters and require them to meet certain standards, supervised by national officials and local alumni.⁸⁴ Because of their central location on many campuses, fraternities today undergo microscopic scrutiny—an unenviable position at best.⁸⁵ Large and magnificent chapter houses and the private nature of some fraternity activities attract attention from students and administrators.⁸⁶

Many colleges, both large and small, have embarked on unprecedented expansion of physical facilities.⁸⁷ Prospective students today often demand lavish dormitories, attractive social spaces, pleasant eating facilities, and compelling opportunities for organized living (including theme and special interest housing, cooperatives and residential colleges).⁸⁸ In response to these demands, many colleges have set goals to build major new facilities, overhaul dormitories, and create new residential living and learning options.⁸⁹

At least part of the boom in new construction relates to the popular rankings published each year by *U.S. News & World Report*, *The Princeton Review*, *The Insider's Guide to Colleges*, the *Fiske Guide to*

83. See, e.g., Ted Lieber and Jay Rotz, *Fraternity Foundations*, available at <http://irs.gov/pub/iwrs-tege/topicg.pdf> (last visited Jan. 30, 2004); see also Rev. Rul. 64-118, 1964-1C.B.182 (holding that in order to qualify under section 501(c)(3) of the Code, a fraternity must have an educational purpose and “must be without any substantial noneducational purpose or activity”).

84. See, e.g., Sigma Phi Epsilon Fraternity Trust Agreement, available at <http://www.sigep.org/nhc/Trust-Agreement.doc> (last visited Jan. 30, 2004); Social Fraternities and Sororities At UW-Madison, available at <http://soo.studentorg.wisc.edu/PDF/Chapter11.pdf> (last visited Jan. 30, 2004).

85. See generally BAIRD'S, *supra* note 24, § I-5; A. Tacuma Roebuck, *Campus Buzz*, THE TENNESSEAN, Aug. 30, 2003, at 1D; Alan Wechsler, *Campus Alcohol Incidents Drop*, TIMES UNION (Albany, N.Y.), Dec. 5, 2002, at A1; Alan Wechsler, *A \$20M Gift For Union College*, TIMES UNION (Albany, N.Y.), Nov. 22, 2002, at A1; Aaron Gifford, *Higher-Ranked Colleges Lack Frats After Hamilton Eliminated Houses*, Applicant Pool Quality and Quantity Improved, POST-STANDARD (Syracuse, N.Y.), May 4, 2001, at A14; Diane Loupe, *The UGA President Search*, ATLANTA J.-CONST., June 3, 1997, at 3C; Smith, *supra* note 14.

86. Bridget Behling, *Fraternities Confused About Administration's Concerns*, THE TUFTS DAILY, at http://www.tuftsdaily.com/articleDisplay.jsp?a_id=1062 (last visited Jan. 30, 2004).

87. Greg Winter, *Jacuzzi U? A Battle of Perks to Lure Students*, N.Y. TIMES, Oct. 5, 2003, at A1.

88. *Id.*

89. *Id.*

Colleges, and others.⁹⁰ These publications value—to a greater or lesser degree—diverse options in social and residential programs, as well as new facilities.⁹¹ These offerings are often easier to quantify in rankings than the quality of instruction, the strength of the curriculum, or the prestige of the school's degree.⁹² At many small colleges, a shortage of land or money for new construction contributes to lower rankings.⁹³ Some colleges enroll too few students to populate the plethora of residential and social options the rankings value.⁹⁴ And at many of these schools, some believe fraternities—because of their land, domination of campus life, or behavioral problems—stand in the way of higher national rankings.⁹⁵

II. ANTITRUST BACKGROUND

The enigmatic term “antitrust” was coined in the late nineteenth century.⁹⁶ The term derives from the ascendancy of a political movement driven to prohibit powerful business entities that combined as trusts to control pricing and output for entire industries.⁹⁷ In the United States,

90. *America's Best Colleges 2004*, *supra* note 4; ROBERT FRANEK ET AL., *THE BEST 351 COLLEGES* (The Princeton Review, 1st ed. 2004); YALE DAILY NEWS STAFF, *THE INSIDER'S GUIDE TO THE COLLEGES 2004* (13th ed. 2003); EDWARD B. FISKE, *THE FISKE GUIDE TO COLLEGES 2004* (2003).

91. See generally Quinn Bernier, *New College Ranking System Rekindles Criticism*, CHICAGO MAROON, Oct. 17, 2003, available at http://maroon.uchicago.edu/news/articles/2003/10/17/new_college_ranking_php (last visited Mar. 15, 2004); Letter from Gerhard Casper, President, Stanford University, to James Fallows, Editor, *U.S. News & World Report* dated Sept. 23, 1996 available at <http://www.stanford.edu/dept/pres-provost/president/speeches/961206gcfallow.html> (last visited Mar. 15, 2004); NATIONAL OPINION RESEARCH CENTER, *A Review of the Methodology for the U.S. News & World Report's Rankings of Undergraduates Colleges and Universities* available at <http://www.washingtonmonthly.com/features/2000/norc.html> (last visited Mar. 15, 2004); Michael Crissey, *Changes in Annual College Guides Fail to Quell Criticisms on Their Quality*, CHRON. OF HIGHER EDUCATION, Sept. 5, 1997, available at <http://chronicle.com/free/v44/i02/02a06701.htm> (last visited Mar. 15, 2004); Nicholas Thompson, *Playing With Numbers*, WASHINGTON MONTHLY, Sept. 2000, available at <http://www.washingtonmonthly.com/features/2000/0009.thompson.html> (last visited Mar. 15, 2004).

92. See sources cited *supra* note 90.

93. See sources cited *supra* note 90.

94. See sources cited *supra* note 90.

95. See, e.g., HAMILTON COLLEGE, *THE REPORT ON THE COMMITTEE ON RESIDENTIAL LIFE* 4.

96. ANDREW I. GAVIL ET AL., *ANTITRUST LAW IN PERSPECTIVE CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 2 (Thompson West 2002).

97. *Id.* at 2; see also HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 53 (The Johns Hopkins Press 1954).

the use of the term antitrust continues to refer to the competition laws passed by Congress since 1890.⁹⁸

One of the main goals of antitrust law “is to ensure that markets are competitive.”⁹⁹ Yet competition has been defined and redefined, often in conflicting ways, by generations of judges, scholars and trial attorneys. Robert Bork examined the legislative history of the Sherman Act and concluded that the Act was designed to promote efficiency.¹⁰⁰ Other scholars have suggested that efficiency in business was not a widely held social objective in 1890, and the purpose of the Sherman Act may have been to protect small businesses or consumers.¹⁰¹ Still others have suggested that the Sherman Act was intended to promote justice and fairness in business behavior.¹⁰²

Prior to the Sherman Act, contracts in restraint of trade were, at least in theory, unenforceable under common law.¹⁰³ In Great Britain in 1624, the Statute of Monopolies limited the King’s power to grant monopolies.¹⁰⁴ Although common law remedies were stronger in the United States than in England, they could not adequately restrain the John D. Rockefellers, James B. Dukes and other monopolists of the late nineteenth century, which led to the public’s disdain for trusts.¹⁰⁵

98. More than ninety countries have competition laws, but only the United States terms such laws “antitrust.” ROBERT PITOFSKY ET AL., *TRADE REGULATION* 15 (Foundation Press, 5th ed. 2003).

99. HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 3 (2d ed. 1999). See *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997) (articulating the purpose of antitrust laws).

100. See Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7 (1966); see also ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 66 (Basic Books, Inc. 1978) (stressing the importance of consumer welfare and implying efficiency).

101. Daniel J. Gifford, *Antitrust’s Troubled Relations with Intellectual Property*, 87 MINN. L. REV. 1695, 1698 (2003); see Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 83 (1982).

102. HOVENKAMP, *supra* note 99, at 48.

103. See *Bd. of Trade v. United States*, 246 U.S. 231 (1918); *United States v. Joint Traffic Ass’n*, 171 U.S. 505 (1898); *United States v. Trans-Missouri Freight Ass’n.*, 166 U.S. 290, 328 (1897). See also HOVENKAMP, *supra* note 99, at 51.

104. WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* 31 (University of Chicago Press 1965).

105. See *id.* at 51-52, 55. Standard Oil owner John D. Rockefeller’s net worth was equal to almost 2.5% of the United States’ economy, or at least twice as much as Microsoft founder Bill Gates is worth today. Steve Schifferes, *Trustbusters: A History Lesson*, BBC NEWS (Feb. 15, 2000) at http://news.bbc.co.uk/2/hi/in_depth/business/2000/microsoft/635257.stm. When Rockefeller retired in the 1890s, his average income exceeded \$10 million each year, when the average American was earning under \$10 a week—and this was before personal income tax. RON CHERNOW, *TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR.* 397 (Random House 1998).

The Sherman Act of 1890 is considered the keystone of American competition law.¹⁰⁶ "Most substantive antitrust law derives from the analysis and application of . . . Sections [one] and [two] of that Act," which regulate restraints of trade, monopolization, and attempts to monopolize.¹⁰⁷ The Clayton Act and the Federal Trade Commission Act, both passed in 1914, elaborate on, and extend the Sherman Act.¹⁰⁸

A. *The Sherman Act*

In 1888, Ohio Senator John Sherman introduced the first antitrust bill on the Senate floor.¹⁰⁹ Congress passed the Sherman Act in 1890, intending it to "curb the power and monopolistic abuses of the trusts that had come to dominate the American econom[y]."¹¹⁰ Section one of the Act declared illegal "[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."¹¹¹ Section two of the Act prohibited the possession of monopoly power in interstate commerce and "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."¹¹² To prevail on a section two claim a plaintiff must establish that the alleged monopolist had a "dangerous probability of success," not just the intent to monopolize.¹¹³

The Supreme Court observed that:

The Sherman Act was designed to be a comprehensive charter of economic liberty . . . [resting] on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality . . . [and] provid[e] an environment conducive to the preservation of our democratic political and social institutions.¹¹⁴

106. LAWRENCE ANTHONY SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 13 (West Publishing Co. 1977). The Sherman Act is codified at 15 U.S.C. §§ 1-7 (2000).

107. SULLIVAN, *supra* note 106; 15 U.S.C. §§ 1, 2 (2000).

108. SULLIVAN, *supra* note 106. The Clayton Act is codified at 15 U.S.C. §§ 12-27 (2000). 15 U.S.C. §§ 12-27 (2000). The Federal Trade Commission Act is codified at 15 U.S.C. §§ 41-44 (2000). 15 U.S.C. §§ 41-44.

109. THORELLI, *supra* note 97, at 166.

110. 3 EARL W. KINTNER & JOSEPH P. BAUER, *FEDERAL ANTITRUST LAW* 4 (1983).

111. 15 U.S.C. § 1.

112. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

113. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 454-56 (1993) (discussing *Swift & Co. v. United States*, 196 U.S. 375 (1905)).

114. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

The plain meaning of the Sherman Act prohibits *every* agreement in restraint of trade.¹¹⁵ An early departure by the Supreme Court from such a strict interpretation of the Sherman Act evolved into the two paradigms of antitrust analysis: the *per se* rule and the rule of reason.¹¹⁶

B. *The Per Se Rule and the Rule of Reason*

When the Supreme Court first considered a case brought under the Sherman Act, it considered itself constrained by the Act's stricture, in section one, against "every" restraint of trade.¹¹⁷ Although a contract in restraint of trade might still be valid under common law, the Court interpreted the Sherman Act to eliminate that possibility.¹¹⁸ This interpretation was elegant in its simplicity, but was also untenable, because it would have prohibited a vast array of necessary and harmless business arrangements.¹¹⁹

Just over ten years later, the Supreme Court reinterpreted the Sherman Act to prohibit only "unreasonable" restraints of trade.¹²⁰ Under the *per se* rule, inherently anticompetitive restraints on competition, such as price fixing, are conclusively deemed illegal without further inquiry into their alleged reasonableness.¹²¹ Such a naked restraint is unreasonable because of its pernicious effect on competition.¹²² For restraints on trade that are not inherently anticompetitive, the Court adopted the "rule of reason" analysis.

Under the rule of reason, a court weighs competitive factors and determines whether there has been a significant interference with, or impact on, competition.¹²³ The Supreme Court has been reluctant to condemn rules adopted by professional associations as illegal *per se*.¹²⁴

115. 15 U.S.C. § 1 (2003); *United States v. Trans-Missouri Freight Ass'n.*, 166 U.S. 290, 328 (1897).

116. *Trans-Missouri*, 166 U.S. at 388.

117. *See Trans-Missouri*, 166 U.S. at 328; LETWIN, *supra* note 103, at 167-68.

118. LETWIN, *supra* note 104, at 168.

119. *See Trans-Missouri*, 166 U.S. at 344 (White, J., dissenting). In his dissent, Justice White refers to what will become the "rule of reason." *Id.* at 355 (White, J., dissenting).

120. *Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

121. *State Oil Co. v. Khan*, 522 U.S. 3, 14-15 (1997); *see also United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927). "Practices considered *per se* illegal include: (1) [h]orizontal agreements to fix prices . . . (2) [v]ertical agreements to fix minimum resale prices . . . (3) [h]orizontal territorial, customer and other market restraints between competitors . . . (4) [c]ertain competitively motivated group boycotts." WILLIAM C. HOLMES, *ANTITRUST LAW HANDBOOK* 250 (1998).

122. *See Trenton Potteries*, 273 U.S. at 397-98.

123. *See Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360-61 (1933); *Bd. of Trade*, 246 U.S. at 238 (discussing the "true test of legality").

124. *F.T.C. v. Ind. Fed. of Dentists*, 476 U.S. 447, 457 (1986).

Therefore, antitrust scrutiny of non-profit organizations, including colleges, is analyzed under the rule of reason.¹²⁵

C. Interstate Commerce

Violations under sections one and two of the Sherman Act must occur in trade or commerce among the states.¹²⁶ The two approaches used to determine whether a challenged practice has the requisite effect on interstate commerce are the "flow of commerce" test and the "effecting commerce" test.¹²⁷ Both are applied liberally.¹²⁸

In the "flow of commerce" test, even an extremely minimal amount of affected interstate commerce meets the Sherman Act interstate commerce requirement.¹²⁹ Even if largely intrastate in nature, the conduct may still meet the requirements of the Sherman Act under the "effecting commerce" test.¹³⁰ To effect commerce as such, a plaintiff must show that the defendant's general business activity has an effect on interstate commerce, and not that the restraint itself affects interstate commerce.¹³¹ "The Supreme Court has held that . . . Congress intended in the Sherman Act to exercise its powers under the Commerce Clause to the fullest constitutional extent."¹³²

Not only is the antitrust interstate commerce requirement easy to meet under any circumstance, but colleges can and do engage in interstate commerce. Most colleges recruit students and faculty on a nationwide—indeed worldwide—basis.¹³³ These same institutions often solicit

125. *United States v. Brown Univ.*, 5 F.3d 658, 671-72 (3d Cir. 1993); *see Ind. Fed'n of Dentists*, 476 U.S. at 458; *see also Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756 (1999) (applying the rule of reason standard to nonprofit organizations); *accord Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982); *Nat'l Soc'y for Prof'l Eng'rs v. United States*, 435 U.S. 679, 698 (1978) (setting a reasonable standard against which to judge the professional organization).

126. 15 U.S.C. §§ 1-2. The antitrust laws derive from the Commerce Clause of the U.S. Constitution. *See LETWIN, supra* note 104, at 89.

127. *See McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242 (1980) (calling the tests the "in commerce" and "effect on commerce" theories). *See also HOVENKAMP, supra* note 99, at 746.

128. HOVENKAMP, *supra* note 99, at 747.

129. *See Apex Hosiery Co. v. Leader*, 310 U.S. 469, 485 (1940) (noting that "it is the nature of the restraint and its effect on interstate commerce and not the amount of the commerce which are the tests of violation"); HOLMES, *supra* note 121, § 8.01[2], at 705.

130. HOVENKAMP, *supra* note 99, at 747.

131. *See Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 329 (1991).

132. *Hamilton Ch. of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59, 66 (2d Cir. 1997) (citing *Summit Health, Ltd.*, 500 U.S. at 329 n.10); *Hosp. Bldg. Co. v. Trusts. of Rex Hosp.*, 425 U.S. 738, 743 (1976) (concluding that trade or commerce under the antitrust laws "encompass[] far more than restraints on trade that are motivated by a desire to limit interstate commerce or that have their sole impact on interstate commerce").

133. *See Tarleton v. Meharry Med. Coll.*, 717 F.2d 1523, 1531-32 (6th Cir. 1983).

financial support from alumni and foundations across the world.¹³⁴ Colleges use U.S. mail to contact residents of other states.¹³⁵ Finally, colleges are supported by deliveries of materials, supplies, and food from the various states and foreign countries.¹³⁶

I. Non-Profit Organizations

The Sherman Act always has been applied to profit-making entities, as they increase market power and stifle competition.¹³⁷ Although the Supreme Court has charted a circuitous course, it has become clear that the Sherman Act applies to non-profit entities as well.¹³⁸ To set this stage, in 1940 the Supreme Court considered whether a labor union's strike was a conspiracy in violation of the Sherman Act and suggested that the reach of the Act did not extend to non-commercial activities.¹³⁹

In *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges & Secondary Schools, Inc.*, the U.S. Court of Appeals for the District of Columbia implied an exemption for educational institutions from the Sherman Act.¹⁴⁰ In that case, a for-profit college challenged an educational accreditation agency that only recognized non-profit institutions.¹⁴¹ Reversing the judgment of the trial court, the Court of Appeals held that the Sherman Act was "tailored . . . for the business world,' [and] not for the non-commercial aspects of the liberal arts and the learned professions."¹⁴²

Although *Marjorie Webster* was never formally reversed, the soundness of the judgment was substantially called into question by the

134. See Julianne Basinger, *More U.S. Colleges Court Their Foreign Alumni*, CHRON. OF HIGHER EDUC., Apr. 23, 1999, at A49.

135. *Hodgson v. Waynesburg Coll.*, No. 71-686, 1971 WL 170, at *1 (W.D. Pa. July 22, 1971).

136. See *United States v. Sherlin*, 67 F.3d 1208, 1213 (6th Cir. 1995) (concluding that because a college had out-of-state students, advertised out of state, and purchased food and supplies from outside the state, it was engaged in interstate commerce for purposes of a federal arson charge); *United States v. Barton*, 647 F.2d 224, 232 (2d Cir. 1981); *Hou v. Commonwealth of Pa., Dep't. of Educ., Slippery Rock State Coll.*, 573 F. Supp. 1539, 1541 (W.D. Pa. 1983) (holding that the industry of higher education affected interstate commerce); *Cornell Univ.*, 183 N.L.R.B. 329-30, 332-24 (1970) (noting that two universities were engaged in interstate commerce for purposes of the National Labor Relations Act).

137. See *Marjorie Webster Jr. Coll. v. Middle States Assoc. of Colls. & Secondary Sch.*, 432 F.2d 650, 654 (D.C. Cir. 1970).

138. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 787 (1975) (concluding that "[t]he nature of an occupation . . . does not provide sanctuary from the Sherman Act").

139. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495-97 (1940).

140. 432 F.2d 650, 654-55 (D.C. Cir. 1970).

141. *Id.* at 652-53.

142. *Id.* at 654.

Supreme Court's later ruling in *Goldfarb v. Virginia State Bar*.¹⁴³ In *Goldfarb*, a home buyer sued the Virginia State Bar, which set minimum attorneys' fees for examining titles.¹⁴⁴ In rejecting the Virginia Bar's argument that the learned professions did not involve trade or commerce, the Court held that "Congress intended to strike as broadly as it could in § 1 of the Sherman Act, and to read into it so wide an exemption as that urged on us would be at odds with that purpose."¹⁴⁵ Since *Goldfarb*, courts consistently have applied the Sherman Act to anticompetitive conduct by non-profit organizations.¹⁴⁶

Certain college undertakings, such as curricular decisions, likely fall outside the scope of the Sherman Act.¹⁴⁷ But students' payment of money for various services constitutes a commercial transaction and undergo Sherman Act scrutiny.¹⁴⁸ In *United States v. Brown University*, the government successfully challenged an agreement between the Ivy League universities, as well as MIT, limiting competition in the distribution of financial aid by agreeing to award aid solely on the basis of need through a common formula.¹⁴⁹ The relevant market was

143. *Goldfarb*, 421 U.S. at 786-87. See Foundation for Interior Design Educ. Research v. Savannah Coll. of Art & Design, 244 F.3d 521, 530 (6th Cir. 2001) (confirming that the status of *Marjorie Webster's* exemption of colleges from the Sherman Act is questionable after *Goldfarb*).

144. *Goldfarb*, 421 U.S. at 775-76.

145. *Id.* at 786-87.

146. See, e.g., *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993) (concluding the act of setting tuition and fees is trade or commerce under the Sherman Act) (citing *Goldfarb*, 421 U.S. at 788 n.17); see, e.g., *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 100 n.22 (1984) (noting that the Sherman Act applies to non-profit entities); *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 576 (1982) (asserting that "nonprofit organizations can be held liable under the antitrust laws"); *Ariz. v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356-57 (1982) (holding that a nonprofit organization of doctors violated the antitrust laws); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 681 (1978) (determining that a nonprofit association's rule against competitive bidding violated antitrust laws); *Ass'n for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577, 582-84 (D.C. Cir. 1984) (concluding that the argument that "nonprofit status and affiliation with higher education warrant special treatment under the antitrust laws"). See also *Hamilton Ch. of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59, 66 (2d Cir. 1997) (noting that whether conduct is trade or commerce is a determination on the merits of the claim and not jurisdictional). See generally PHILLIP E. AREEDS & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 261 (2000), LEXIS, Antitrust Law (Areeda), Database. Since *Goldfarb*, several courts have narrowly confined *Marjorie Webster* to its particular facts. See, e.g., *Brown Univ.*, 5 F.3d at 665-66 (3d Cir. 1993) (detailing that "[n]onprofit organizations are not beyond the purview of the Sherman Act, because the absence of profit is no guarantee that an entity will act in the best interest of consumers"); *Hennessey v. NCAA*, 564 F.2d 1136, 1149 (5th Cir. 1977).

147. See *Marjorie Webster*, 432 F.2d at 654-55.

148. See *Brown Univ.*, 5 F.3d at 667-68.

149. *Id.* at 663.

described as “educational services.”¹⁵⁰ The defendant, MIT,¹⁵¹ argued that its conduct in “disbursing charitable funds to achieve the twin objectives of advancing equality of access to higher education and promoting socio-economic and racial diversity” was not trade or commerce.¹⁵²

Notwithstanding MIT’s educational and social mission, the U.S. Court of Appeals for the Third Circuit was not persuaded that the exchange of money for educational services was not “trade or commerce.”¹⁵³

Regardless of whether MIT’s motive is altruism, self-enhancement or a combination of the two, MIT benefits from providing financial aid The resulting expansion in MIT’s pool of exceptional applicants increases the quality of MIT’s student body. MIT then enjoys enhanced prestige by virtue of its ability to attract a greater portion of the “cream of the crop.” The Supreme Court has recognized that nonprofit organizations derive significant benefit from increased prestige and influence.¹⁵⁴

The court held that “[t]he exchange of money for services, even by a nonprofit organization, is a quintessential commercial transaction,” and thus determined that MIT was engaged in “trade or commerce” when making financial aid decisions and awards.¹⁵⁵ Other courts have held that the Sherman Act may regulate a wide array of college activities, such as intercollegiate sports.¹⁵⁶

D. Product and Geographic Markets

“Market power is the ability . . . to increase[] profits by reducing output and charging more than a competitive price for a product.”¹⁵⁷ A

150. *Id.* at 666.

151. *Id.*; Theodore J. Stachtariis, Note, *Antitrust in Need: Undergraduate Financial Aid and United States v. Brown Univ.*, 62 FORDHAM L. REV. 1745, 1745-46 (1994). All the Ivy League schools settled with the U.S. Department of Justice before trial. *Id.* MIT chose instead to litigate the matter as the sole defendant, leaving Brown University ignominiously in the case caption. *Id.*

152. *Brown Univ.*, 5 F.3d at 665.

153. *Id.* at 665-66.

154. *Id.* at 666-67 (citing *Am. Soc’y of Mech. Eng’rs v. Hydrolevel Corp.*, 456 U.S. 556, 576 (1982)).

155. *Id.*

156. *See, e.g., NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984); *see Sunshine Books, Ltd. v. Temple Univ.*, 697 F.2d 90, 96 (3d Cir. 1982) (concluding that a bookseller competing against college in sale of textbooks to students stated a claim for monopolization under the Sherman Act against the college).

157. HOVENKAMP, *supra* note 99, at 78. In economic terms, “[m]arket power is a firm’s ability to deviate profitably from marginal cost pricing.” *Id.* at 79. Market power

large market share alone is not the evil that the Sherman Act condemns.¹⁵⁸ Instead, the Sherman Act condemns the ability to charge more than a competitive price for a product, when facilitated by a large market share.¹⁵⁹ Market power is not created by excluding competitors *per se*.¹⁶⁰ Such exclusion, however, becomes significant in obtaining or maintaining market power.¹⁶¹

Raising prices will almost always lead to lost sales.¹⁶² But an entity with market power has the ability to maintain profitability and avoid losing sales, while increasing prices above the competitive level.¹⁶³ Proof of market power requires a properly defined "relevant market."¹⁶⁴ Markets, however, prove difficult to define.¹⁶⁵ A product market includes the cluster of products or services with which the alleged monopolist's products or services compete.¹⁶⁶ The geographic market constitutes the area within which the alleged monopolist competes in selling its products or services.¹⁶⁷

For example, the General Electric Company manufactures ovens for home kitchens. The relevant product market could be "General Electric ovens for home kitchens," "ovens," "appliances," "major appliances," or "kitchen appliances." These categories could be further defined by restricting the market to "non-commercial," or "general, non-luxury use." General Electric's market share of "General Electric ovens for home kitchens" is 100%. General Electric's share of the other potential markets is substantially less. "The outer boundaries of a product market are determined by the reasonable interchangeability of use" of a product.¹⁶⁸ If a consumer needs an oven, a refrigerator is not an acceptable substitute. Furthermore, the majority of consumers would probably accept only a standard home oven, whereas few would consider an eight-burner commercial oven as a reasonable substitute.

has also been defined as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

157. HOVENKAMP, *supra* note 99, at 78.

158. *See id.* at 80-82.

159. *See United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945).

160. HOVENKAMP, *supra* note 99, at 78.

161. *Id.*

162. *Id.*

163. *Id.* *See Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). *See also* William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 937 (1981).

164. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 455-56 (1993).

165. HOVENKAMP, *supra* note 99, at 89.

166. *See id.* at 90.

167. *Id.* at 113.

168. *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 325 (1962).

The most important consideration is the interchangeability of use with another product and the cross-elasticity of demand—or willingness of consumers to accept substitutes.¹⁶⁹ In this hypothetical situation concerning the sale of ovens, a reasonable interchangeability of use between a General Electric oven and a Whirlpool oven likely exists. But the same would not hold true between an oven and a dishwasher. Determining cross-elasticity of demand is a more abstract process.¹⁷⁰ The relevant test is whether a change in the price of one product will alter the demand for another product:¹⁷¹ “[i]f there is a substantial interaction between the two, so that a slight change in the price of one will significantly affect demand for the other, then both products will be included in the same product market.”¹⁷²

The relevant geographic market in the General Electric hypothetical might be a town, region, the United States, the United States plus other industrialized nations, or even the entire world. Analyzing “the market area in which the seller operates, and to which the purchaser can practicably turn for supplies,” determines a geographic market.¹⁷³ For the most part, an analysis of the geographic market considers the same factors as the product market: whether buyers will increase purchases from more distant sellers as price increases, or if distant sellers can service a market.¹⁷⁴

With regard to colleges, fraternities, and residential services, the correct definition of a product market is subject to debate and has never been fully resolved in any court.¹⁷⁵ It is likely, however, that there is a discrete product market for residential services for college students at individual colleges, which include housing, meals, and social facilities.¹⁷⁶

169. See HOVENKAMP, *supra* note 99, at 89.

170. See *id.* at 103.

171. See, e.g., *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 392 (1956).

172. HOLMES, *supra* note 121, § 2.03[1], at 408.

173. *Tampa Elec. Co., v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961).

174. See *United States v. Grinnell Corp.*, 384 U.S. 563, 575-76 (1966); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963) (“[T]he ‘area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.’”). See also *Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1421 (6th Cir. 1990) (noting that the market selected must “correspond to *commercial realities* of the industry”) (internal quotations omitted).

175. See generally *Hamilton Ch. of Alpha Delta Phi, Inc. v. Hamilton Coll.*, No. 95-CIV-0926, 1996 WL 172652 (N.D.N.Y. Apr. 12, 1996); *Hamilton Ch. of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59 (2d Cir. 1997); *Hamilton Ch. of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 106 F. Supp. 2d 406 (N.D.N.Y. 2000).

¹⁷⁶ See *infra* Part III for discussion of the product market for residential services at colleges.

E. Monopsony

“The mirror image of [a] monopoly is [a] ‘monopsony.’”¹⁷⁷ A monopsonist is a monopoly buyer rather than a seller;¹⁷⁸ in other words there may be a variety of sellers but only one buyer for the product or service. The harm from a monopsonist is that it reduces the number of available sellers by making below-market purchases.¹⁷⁹ Thus, a monopsonist forces output and price to fall below the competitive level.¹⁸⁰

III. HAMILTON COLLEGE

A. Background

The only fraternity antitrust suit brought to any court is fraught with procedural and substantive errors, the insolvency of the fraternities bringing the case, settlement by the majority of plaintiffs before final disposition of the case, and various issues becoming moot during the long course of the litigation. Although the *Hamilton College* case provides a helpful discussion of these complex issues, unfortunately it does not represent settled or well-reasoned law.¹⁸¹

In 1831, Hamilton College had a student body under one hundred, a president, four professors, four buildings, a few woodsheds, and its first fraternity, Sigma Phi.¹⁸² By 1837, Hamilton had three fraternities, including the first chapter of a new national fraternity, Alpha Delta Phi.¹⁸³ By 1960, 87% of Hamilton students belonged to fraternities.¹⁸⁴

177. HOVENKAMP, *supra* note 99, at 13.

178. *Id.* at 13-14.

179. *Id.* at 14.

180. *Id.*

181. In *Hack v. President and Fellows of Yale College*, several Orthodox Jews contested Yale's requirement that all freshmen live in coeducational dormitories, claiming, among other things, that the requirement was an attempted monopoly in violation of the Sherman Act. 237 F.3d 81, 82-83 (2d Cir. 2000). Because the plaintiffs did not allege that Yale had any market power in the local housing market, the Second Circuit found no violation of the Sherman Act. *Id.* at 85. In *American National Bank and Trust Company of Chicago v. Board of Regents for Regency Universities*, owners of a private dormitory alleged that Northern Illinois University's housing policies violated the antitrust laws, but the school was exempted under the state action immunity doctrine. 607 F. Supp. 845, 846-51 (N.D. Ill. 1984).

182. THE ANNALS OF PSI UPSILON 147, 149 (Peter A. GaBauer ed., 1941) [hereinafter ANNALS]. Sigma Phi was the first fraternity to branch out from its founding campus and Hamilton was its second chapter. *See id.* at 149.

183. *See id.*

184. *Hamilton Ch. of Alpha Delta Phi, Inc. v. Hamilton Coll.*, No. 95-010 0926, 1996 WL 172652, at *1 (N.D.N.Y. Apr. 12, 1996). *See also The Report of the Committee on Residential Life*, *infra* note 185.

The number of students involved in fraternities declined after Hamilton became coeducational, and was approximately twenty percent in 1995.¹⁸⁵

Starting in the 1880s, the fraternities began building structures to house and feed students.¹⁸⁶ These houses were paid for by alumni and students then attending Hamilton.¹⁸⁷ By the 1920s, the fraternities had built large elegant homes that could house hundreds of students and had the capability to feed even more.¹⁸⁸ The fraternities offered better, less expensive meal plans than the college, as well as superior study facilities.¹⁸⁹ The Psi Upsilon house, for example, cost \$100,000 for the land, buildings, and furnishings in 1921, over \$1 million in today's dollars, not reflecting over eighty years of appreciation.¹⁹⁰ It was the largest fraternity house east of the Mississippi River.¹⁹¹ The *New York Times* described all the fraternity houses as "sprawling mansions."¹⁹²

B. *The New Residential Plan*

In the 1993-94 school year, Hamilton received \$7 million from housing and meal services, while the fraternities at Hamilton received approximately \$1 million.¹⁹³ In terms of sleeping and dining capacity,

185. Hamilton College, *The Report of the Committee on Residential Life*, 1995, at 4. By some definitions, Hamilton became coeducational in 1968 when it established the all-female coordinate Kirkland College on land adjacent to the Hamilton campus. *Id.* Hamilton merged with the all-female Kirkland College in 1978. *Id.* Seven fraternities and four sororities were affiliated with Hamilton, as well as one non-Greek letter social club, the Emerson Literary Society. *Id.* The fraternities and the Emerson Literary Society owned houses and land. *Hamilton Ch. of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59 (2d Cir. 1997).

186. ANNALS, *supra* note 182, at 152-53.

187. *Id.* During much of the fraternities' growth period, Hamilton offered no dining facilities. WALTER PILKINGTON, HAMILTON COLLEGE 133 (Hamilton College 1962).

188. *Hamilton Coll.*, 1996 WL 172652, at *1-*2.

189. *See* Aff. of Francis A. O'Brien, Former Trustee of Hamilton College at ¶21, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599); Dep. of Jane Fraser, Trustee of Hamilton College, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599).

190. ANNALS, *supra* note 182, at 155; Federal Reserve Bank of Minneapolis, *Federal Reserve Bank of Minneapolis Consumer Price Index Calculator*, at <http://minneapolisfed.org/research/data/us/calc> (last visited Apr. 5, 2004).

191. G. Rollo Begley & Ryan Gorshe, *Slow Night at Frat-less Hamilton College*, DARTMOUTH REVIEW, Feb. 4, 2002; Celine Geiger, *Hamilton's Greek Life Examined: Facts, Fiction, and the Future of Societies on the Hill*, HAMILTON COLLEGE SPECTATOR, May 3, 2003.

192. Karen W. Arenson, *Trust Suit Reinstated Against College's Curbs on Fraternities*, N.Y. TIMES, Oct. 29, 1997, at B11.

193. *Hamilton Coll.*, 128 F.3d at 61. Psi Upsilon first provided residential services in 1921. *Hamilton Coll.*, 1996 WL 172652 at *1. Today, it houses forty students, can provide meals for sixty, and operates on a fixed annual budget of \$60,000. *Id.* Psi Upsilon had revenues of \$154,393 in the academic year ending June 30, 1994. Pl.'s Compl. at ¶6, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599). Alpha Delta Phi began offering room and

Hamilton controlled eighty percent of the residential services market for Hamilton students.¹⁹⁴ Around 1992, Hamilton was faced with an excess number of dormitory beds because of poor management, including the decision to allow too many students to live off-campus.¹⁹⁵ Hamilton then made a business decision to forbid sophomores from living in fraternity houses, for at least the 1993-94 school year.¹⁹⁶ This had a devastating impact on the fraternities' finances.¹⁹⁷ One year later, Hamilton decreed that all students were required to live in college-owned housing and participate in a college meal plan.¹⁹⁸

Because the school did not have dormitory space for all of its students, it was the school's hope that the fraternity houses, "which for many years have been an integral part of the Hamilton campus, [could] be used for College-related purposes."¹⁹⁹ To that end, the school sought to purchase all of the fraternity houses for their continued use as student housing.²⁰⁰ A. Barret Seaman, a Hamilton College trustee, told the alumni of Delta Kappa Epsilon Fraternity:

board in 1929. *Hamilton Coll.*, 1996 WL 172652 at *1. The fraternity can house thirty students and provide meals for sixty. *Id.* Fixed expenses were \$45,000 per annum. *Id.* Sigma Phi began offering residential services in the 1920s. *Id.* at *2. The fraternity had fixed annual expenses of \$40,000. *Id.* Delta Kappa Epsilon provided room and board beginning in 1921. *Id.* It can house twenty-five students and provide meals for fifty. *Id.* Its fixed expenses were approximately \$40,000 annually. *Id.*

194. Oral Argument Tr., Motion for Preliminary Injunction, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599).

195. Aff. of Francis A. O'Brien, Former Trustee of Hamilton College at ¶¶29-36, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599).

196. *Id.*

197. *Id.* at ¶¶31-36. In the 1993-94 school year, only 13% of Hamilton's students were permitted to live off-campus; 140 in fraternity houses and eighty in apartments adjacent to campus. Pl.'s Compl. at ¶32, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599).

198. *The Report of the Committee on Residential Life*, *supra* note 185, at 7. The plan was made effective in September 1995. *Hamilton Coll.*, 1996 WL 172652 at *3. Over the previous ten years, there were between 200 and 250 more Hamilton students than the college could house in its own dormitories. *Id.* at *2.

199. *The Report of the Committee on Residential Life*, *supra* note 185, at 9. Following the school's ban on fraternity living, but before the fraternity houses were acquired by the college, Hamilton was forced to permit 80 students to live off-campus during the 1995-96 academic year due to lack of accommodations. *Hamilton Coll.*, 1996 WL 172652 at *3. Currently, because of the continuing shortage of dormitory space, approximately 4% of Hamilton students live off campus. Hamilton College, *Residential Life at Hamilton College*, at <http://onthehill.hamilton.edu/VirtualTour/life1.html>; Hamilton College, *Transferring to Hamilton College*, at <http://www.hamilton.edu/admission/ApplicationProcess/transferfaqs.html>. Essentially, students living off campus are permitted to live anywhere except in a fraternity house.

200. *The Report of the Committee on Residential Life*, *supra* note 185, at 9. The fraternities estimated that forcing the sale of the houses would save the college the cost of building dormitory space for 200 students, or \$30-40 million. Plaintiff's Complaint at ¶55, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599).

Gentlemen this is a done deal. You may collectively decide to fight it; you may even raise enough money to keep the building intact for a few years. But I am here to tell you that, like [Delta Kappa Epsilon] at Middlebury, you would be throwing good money after bad. The College simply isn't going to allow the place to be used by the fraternity, unless it's under Hamilton's control.²⁰¹

Hamilton's large market share gave it a dangerous probability of achieving a monopoly for residential services for Hamilton students. But, in the tiny hamlet of Clinton, New York, in addition to the potential monopoly, Hamilton also had monopsony power as the sole potential buyer of the fraternity houses.²⁰² One representative of Hamilton told the fraternities "I guess you guys will have to board up the houses if you don't sell them to us."²⁰³ Hamilton trustee Stuart Scott told the fraternities "we have all the [cards]."²⁰⁴ Trustee Thomas Schwartz remarked that he favored paying the fraternities a fair price for the houses, but only "if they sell immediately."²⁰⁵

In a document used by Hamilton to coach its employees about how to answer telephone inquiries from alumni and parents about its new residential policy, Hamilton boasted that forcing an additional 200 students into college-owned facilities would generate "increased board revenues" which would enable Hamilton "to pay for part of [its] debt" incurred while renovating its existing buildings.²⁰⁶

C. *The Fraternities Sue Hamilton*

Four fraternities sued Hamilton College.²⁰⁷ The fraternities alleged that Hamilton's residential plan was a commercial strategy to eliminate

201. Aff. of Donald E. Burns, Alumni President, Hamilton Chapter of Delta Kappa Epsilon, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599).

202. Aff. of William O. Kerr at ¶15, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599). Clinton's population is under 2,000. U.S. Census Bureau, *Population Estimates of Incorporated Places by State*, at <http://eire.census.gov/popest/data/cities/subtab07.php>. Because of the enormous size of each fraternity house, their proximity to the college campus, their configuration to feed and sleep scores, their ability to entertain hundreds, combined with the tiny size of Clinton, Hamilton College was the only likely purchaser of the houses. See *infra* notes 305-09 and accompanying text.

203. Pl.'s Compl. at ¶42, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599).

204. Aff. of William O. Kerr at ¶15, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599) (internal citations omitted).

205. *Id.* (internal citations omitted).

206. Briefing Materials for Callers [Regarding the] Trustee Residential Life Decision, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599).

207. *Hamilton Coll.*, 128 F.3d at 59. The four fraternities were Alpha Delta Phi, Delta Kappa Epsilon, Psi Upsilon, and Sigma Phi. *Id.*

competition in housing and food services for Hamilton students.²⁰⁸ The fraternities further alleged that Hamilton's efforts to buy the fraternity houses were unlawful exercises of monopoly power; having positioned itself as the only available buyer in the market, Hamilton would be able to buy the houses at below-market prices.²⁰⁹

*D. Dismissal by the District Court for the Northern
District of New York*

Hamilton moved to dismiss the complaint, arguing that its residential policy was not "trade or commerce" or "interstate commerce" under the

208. Twenty percent of Hamilton's total revenue came from the sale of food and rental housing to students. Def.'s Answer to Pl.'s Interrogs., *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599).

209. *Hamilton Coll.*, 128 F.3d at 61. See Trish Willingham, *Fraternities' Housing Lawsuit Rejected*, POST-STANDARD, Apr. 15, 1996. Hamilton eventually purchased all of the fraternity houses for prices close to the college's original offers. See *Hamilton Fraternities End Lawsuit Vs. College*, POST-STANDARD, May 9, 1999, at B1; *Hamilton Considers Uses For Sigma Phi Frat House*, POST-STANDARD, Feb. 16, 2003, at B1; *Hamilton and Sigma Phi Agree to Terms*, HAMILTON ENEWS, at http://www.hamilton.edu/news/more_news/display.cfm?ID=5733§ion=News%2C%20Sports%2C%20Events&subsection=Hamilton%20eNews (last visited Apr. 19, 2004). Many of the fraternities donated the money back to Hamilton to endow scholarships. See Meghan Hern, *Fraternities Settle Lawsuit With Hamilton College*, THE SPECTATOR, Feb. 19, 1999. While Hamilton argued that it had an independent appraiser assess the fair market value of each house, the fraternities argued that the appraisals were inherently flawed. See generally Pl.'s Compl. at ¶42, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599); Aff. of John E. Becker, President and Chairman of the Board of the Alumni Association of the Psi Chapter of Psi Upsilon, Inc. at Hamilton College at ¶15, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599); Aff. of Mark C. Richardson, President of the Board of Trustees of the Hamilton Chapter of Alpha Delta Phi, Inc. at ¶15, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599); Aff. Donald E. Burns, President of the Delta Kappa Epsilon Society of Hamilton College at ¶18, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599); Aff. of Christopher Freeman, President of the Board of Beta of Sigma Phi Society, Inc. at ¶15, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599). The fraternities claimed that it would be impossible to assess the value of a 20,000 square foot (or more) building adjacent to a college campus with a commercial kitchen and ballroom sized common areas. See generally Pl.'s Compl. at ¶54, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599); Aff. of William O. Kerr at ¶17. The fraternities argued that the correct valuation would be based on replacement costs—estimated to be in the millions—rather than the fair market value, which was \$200,000 to \$300,000. Aff. of John E. Becker, President and Chairman of the Board of the Alumni Association of the Psi Chapter of Psi Upsilon, Inc. at Hamilton College at ¶15, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599); Aff. of Mark C. Richardson, President of the Board of Trustees of the Hamilton Chapter of Alpha Delta Phi, Inc. at ¶15, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599); Aff. Donald E. Burns, President of the Delta Kappa Epsilon Society of Hamilton College at ¶18, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599); Aff. of Christopher Freeman, President of the Board of Beta of Sigma Phi Society, Inc. at ¶15, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599). Arguably, Hamilton, a private college, was engaging in a process closer to eminent domain than a purchase on the open market.

Sherman Act.²¹⁰ The college further maintained that its decision was intended to increase its competitiveness with peer institutions that had less dominant fraternity systems, or no fraternities at all.²¹¹ The fraternities responded that Hamilton's stated purpose was merely a pretext designed to obscure the college's purely commercial motive.²¹² The fraternities argued that Hamilton's new residential policy was nothing like admission or accreditation decisions, noting that the college collected fees for room and board separately from tuition.²¹³

The district court granted Hamilton's motion to dismiss.²¹⁴ It held that the fraternities' complaint was insufficient to establish that the college's new residential policy was "trade or commerce" under the Sherman Act.²¹⁵ The court additionally held that the fraternities failed to establish the requisite nexus between Hamilton's conduct and interstate commerce.²¹⁶ The judge suggested that "[s]tudents who dislike the new housing policy have the power to leave Hamilton."²¹⁷

210. *Hamilton Coll.*, 128 F.3d at 62. Hamilton maintained that its decision to "decouple fraternities from houses" would increase its competitiveness with peer institutions that had less dominant fraternity systems. See *Hamilton Ch. of Alpha Delta Phi, Inc. v. Hamilton Coll.*, No. 95-CIV-0926, 1996 WL 172652, at *3 (N.D.N.Y. Apr. 12, 1996). Hamilton consistently identified students as "customers" during the deliberations of the Committee on Residential Life. Mins. of the Comm. on Residential Life, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599). Hamilton also argued that a college's self-regulation was immune from antitrust scrutiny. *Id.* at 61. The antitrust laws, however, place a legislative limit on self-regulation which restrains trade. See, e.g., *Silver v. N. Y. Stock Exchange*, 373 U.S. 341, 360 (1963). Accordingly, Hamilton's status as a self-regulating organization was insufficient to defeat the fraternities' complaint. *Hamilton Coll.*, 128 F.3d at 64.

211. *Hamilton Coll.*, 1996 WL 172652 at *2. Hamilton claimed that the fraternities' dominance of the school's social life was leading its most talented prospective female students to enroll elsewhere. *Id.*

212. *Hamilton Coll.*, 128 F.3d at 66.

213. *Hamilton Coll.*, 1996 WL 172652, at *5.

214. *Hamilton Coll.* 128 F.3d at 62. Hamilton's initial motion was under 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. *Id.* The court then stated that it would consider converting the motion to dismiss into a motion for summary judgment. *Id.* Although both parties submitted affidavits in response to the court's suggestion, the judge finally ordered the matter dismissed under 12(b)(6), based on the lack of subject matter jurisdiction. *Id.*

215. *Hamilton Coll.*, 1996 WL 172652, at *7.

216. *Id.* Among other reasons, the court pointed out that although 59% of Hamilton's students came from out of state, "fraternities have no influence on the admissions process." *Id.* at *1, *8. Earlier in the decision, the court cited with approval Hamilton's argument that the fraternities had a negative impact on the admissions process. *Id.* at *2-*3.

217. *Id.* at *6. The court noted that in the three previous school years, thirty-seven students, twenty-seven students, and twenty-three students, respectively, had transferred to other institutions. *Id.*

E. Appeal to the Court of Appeals for the Second Circuit

The Second Circuit reversed.²¹⁸ The Court of Appeals pointed out that its ruling was primarily procedural; the question was whether the fraternities adequately alleged that the challenged conduct affected interstate commerce.²¹⁹ The court noted that “[a]lthough the Sherman Act applied ‘only to a very limited extent to [noncommercial] organizations,’” the Supreme Court has held that “in determining whether particular conduct is ‘commerce,’ a court’s principal focus must be on the nature of the activity, rather than the form or objectives of the organization.”²²⁰

The court pointed out that certain activities of higher education institutions, such as curriculum and accreditation, are central to the educational mission and are far removed from business competition regulated by the Sherman Act, placing them outside the realm of “trade or commerce.”²²¹ However, the court also noted that “certain activities in higher education are so proprietary in nature that the applicability of the Sherman Act is not even questioned.”²²² Such activities, the court pointed out, include athletics, bookstore operations, tuition setting, and financial aid awards.²²³ Recognizing the difficulty in drawing distinctions in this area, the court held that, as a threshold matter, the question of whether Hamilton’s residential policy implicated trade or commerce was not a jurisdictional question, but a determination of the merits of the fraternities’ claim, an issue not suitable for summary judgment.²²⁴

The court further held, using the “effect on commerce” test, that the fraternities had adequately claimed that Hamilton’s allegedly unlawful conduct had a “not insubstantial effect on interstate commerce.”²²⁵ The fraternities provided evidence that Hamilton solicits applicants from across the country and around the world.²²⁶ Fifty-nine percent of the college’s students came from other states and foreign countries and

218. *Hamilton Coll.*, 128 F.3d at 68.

219. *Id.* at 63. The court also noted that “where the proof of the alleged antitrust violation is largely in the hands of the defendants, dismissals prior to giving the plaintiff an opportunity for discovery should be granted sparingly.” *Id.*

220. *Id.* at 64 (citing *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959)).

221. *Id.* at 64 (citing *Marjorie Webster Junior Coll., Inc. v. Middle States Ass’n of Colls. and Secondary Schs., Inc.*, 432 F.2d 650 (D.C. Cir. 1970)).

222. *Id.* at 64.

223. *Id.* at 64-65 (citing *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984); *Sunshine Books, Ltd. v. Temple Univ.*, 697 F.2d 90 (3d Cir. 1982)); *United States v. Brown Univ.*, 5 F.3d 658 (3d Cir. 1993).

224. *Hamilton Coll.*, 128 F.3d at 66.

225. *Id.* at 67.

226. *Id.*

Hamilton generated four million dollars in room and board fees from these out-of-state students (representing forty-five states and twenty-nine foreign countries).²²⁷ Although the district court concluded that there was no evidence that Hamilton's residential plan would affect the number of out-of-state students matriculating at the college, the Second Circuit pointed out that Hamilton's ability to "restrict output and raise prices without losing any students . . . [was] precisely the vice of a monopoly."²²⁸ The court concluded that Hamilton's purportedly illegal activities could reasonably be expected to affect interstate commerce.²²⁹ The Second Circuit reversed the district court and remanded the case for further proceedings.²³⁰

F. *Aftermath and Remand*

Despite prevailing on appeal, three of the four fraternities were forced to settle with Hamilton.²³¹ While Hamilton's ban on living in fraternities was in effect and without room and board fees to cover maintenance, taxes, and loan service, as well as the cost of the lawsuit itself, the three fraternities were forced to abandon further litigation.²³² Each of the three fraternities eventually agreed to sell their houses to the college, and most agreed to contribute the proceeds of the sales (after paying off debt) to endow Hamilton scholarships.²³³

Sigma Phi, however, pursued the case back to the U.S. District Court for the Northern District of New York.²³⁴ On remand, Hamilton moved for summary judgment.²³⁵ Magistrate Judge Norman A. Mordue granted

227. *Id.*; see also Hamilton College, *Hamilton at a Glance: The Student Body*, at http://www.hamilton.edu/hamilton_at_a_glance (last visited July 14, 2003).

228. *Hamilton Coll.*, 128 F.3d at 67.

229. *Id.*

230. *Id.* at 68.

231. *Hamilton Fraternities End Lawsuit*, *supra* note 209. The three fraternities were Alpha Delta Phi, Delta Kappa Epsilon, and Psi Upsilon. *Id.*

232. *Id.* Alpha Delta Phi spent more than \$70,000 in legal fees. Trish Willingham, *Fraternities' Housing Lawsuit Rejected*, POST-STANDARD, Apr. 15, 1996, at A5.

233. Michael Debraggio, *Hamilton and Sigma Phi Agree to Terms*, Feb. 14, 2003, at http://www.hamilton.edu/news/more_news/display.cfm?ID=5733. See Hern, *supra* note 209; Aaron Gifford, *Higher-Ranked Colleges Lack Frats After Hamilton Eliminated Houses*, POST-STANDARD, May 4, 2001, at A14. See Hamilton College, Press Release, *Hamilton College Trustees Act to Build New Social Space, Reach Agreement to Purchase DKE Fraternity*, Dec. 10, 1998, at http://www.hamilton.edu/news/more_news/display.cfm?ID=1696; Geiger, *supra* note 190.

234. *Hamilton Ch. of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 106 F. Supp. 2d 406 (N.D.N.Y. 2000).

235. *Id.* at 407.

summary judgment in favor of Hamilton College, holding that Hamilton lacked market power in the relevant market.²³⁶

After the Second Circuit remanded the matter to the district court, the parties were instructed to plead and prove the “[d]efinition of the relevant product and geographic markets.”²³⁷ The judge stated that “[a]lthough market definition is generally a question of fact, the issue can be decided as a matter of law.”²³⁸ To support this essential point, the magistrate cited *Purgess v. Sharrock*.²³⁹ In *Purgess*, the United States District Court for the Southern District of New York wrote that “[a]s a general rule, market definition is a question of fact, to be decided by the jury. In this case, however, [the plaintiff] has offered so little evidence regarding the proper market, no reasonable jury could make a finding on that issue.”²⁴⁰

The *Purgess* court’s dissatisfaction with the plaintiff’s testimony stems from the fact that no reasonable jury could determine what the proper product or geographic market was, based solely on *Purgess*’ testimony.²⁴¹ The plaintiff, a medical doctor, offered no expert testimony, and as a result, was less convincing to the court.²⁴² He produced no other evidence for the court.²⁴³

Unlike in *Purgess*, the *Hamilton College* plaintiffs hired an expert witness to present economic evidence of the product market.²⁴⁴ To demonstrate the product market, the plaintiffs retained William O. Kerr, Ph.D, an economic consultant and executive vice president of PENTA Advisory Services, LLC.²⁴⁵ The District Court for the Northern District

236. *Id.* at 406.

237. *Id.* at 408.

238. *Id.*

239. No. 91 CIV 621, 1992 WL 349683 (S.D.N.Y. Nov. 9, 1992). The court also cited another case, *Ally Gargano/MCA Advertising Ltd. v. Cooke Properties., Inc.*, No. 87 CIV. 7311, 1989 WL 126066, at *16 (S.D.N.Y. Oct. 13, 1989). *Ally Gargano* appears to offer no support for the court’s suggestion that product market definition could be decided as a matter of law, as well as involving a section one violation of the Sherman Act, not section two of the Sherman Act. *Id.*

240. *Purgess*, 1992 WL 349683, at *5.

241. *Id.*

242. *Id.*

243. *See id.*

244. *Hamilton Ch. of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 106 F. Supp. 2d 406, 409 (N.D.N.Y. 2000).

245. *Id.* Dr. Kerr was co-founder of PENTA and continued with the firm when Navigant Consulting acquired it. He now serves as a managing director for Navigant and is director of the firm’s economics practice. Dr. Kerr’s practice covers a range of economic consulting, including market and price studies, economic policy analysis, and antitrust. He has testified in twenty-three legal matters and published or presented seventeen papers. Navigant Consulting, at <http://www.navigantconsulting.com>. In a

of New York very likely made reversible error with its contention that product market definition could be decided as a *matter of law*.²⁴⁶

G. The Alleged Product and Geographic Markets

Like Hamilton, many colleges often take in millions of dollars each year in exchange for food and lodging, and are in direct competition with fraternities providing the same services. Although a college may have an educational purpose in banning students from living or eating in privately-owned fraternity houses, the Sherman Act requires valid business justifications for actions adversely affecting a competitor, and that any action not advancing competition must be achieved in the least restrictive way.²⁴⁷

summary judgment proceeding in an antitrust matter, the nonmoving party need only demonstrate a reasonable economic theory in order to reach a jury. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 595-95 (1986).

246. See, e.g., *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 468-69 (1992) (stating that if plaintiff's product market was "economically senseless," summary judgment should be granted to defendant); *Smalley & Co. v. Emerson & Cuming, Inc.*, 13 F.3d 366, 368 (10th Cir. 1993) (asserting that the court could determine product market as a matter of law because a flawed product market definition was the sale of a single product to a single customer); *Midwest Radio Co., Inc. v. Forum Publ. Co.*, 942 F.2d 1294, 1297 (8th Cir. 1991) (deciding the product market issue as a matter of law because plaintiff produced no evidence); *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1374 (9th Cir. 1989) (declaring that the process of defining a product market "is a factual inquiry for the jury; the court may not weigh evidence or judge witness credibility"); *Continental Orthopedic Appliances, Inc. v. Health Ins. Plan of Greater N. Y., Inc.*, 40 F. Supp. 2d 109, 120 (E.D.N.Y. 1999) (noting that, despite skepticism regarding the plaintiff's definition of the product market, since it was properly plead, resolution must wait for full discovery and trial); *Huhta v. The Children's Hosp. of Philadelphia*, No. Civ.A. 93-2765, 1994 WL 245454, at *3 (E.D. Pa. May 31, 1994) (observing that on summary judgment a jury would not be able to evaluate the plaintiff's proposed product market because it was too vague and contained undefined terms); *Adcom, Inc. v. Nokia*, No. 90-4088, 1993 WL 165734, at *3-*5 (E.D. La. May 10, 1993) (determining that a product market could be assessed as a matter of law because the plaintiff introduced no evidence to support its definition); *Contico Int'l. v. Rubbermaid, Inc.*, 801 F. Supp. 280, 282 (E.D. Mo. 1992) (holding that the definition of product market is a question of fact and summary judgment is only appropriate if the plaintiff fails to present an issue of fact).

247. See, e.g., *Aspen Skiing Co. v. Aspen Highlands Skiing*, 472 U.S. 585, 605, 605 n.32, 608-11 (1985); *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993); *United States Football League v. Nat'l Football League*, 842 F.2d 1335, 1359 (2d Cir. 1988). The Supreme Court has stated that a university has "four essential freedoms . . . to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (citation omitted). As one court noted, "[w]hile we recognize the 'accidental' educational benefits that might accrue from communal living, there is serious doubt that such might justify requiring students to live in dormitories, especially when they are otherwise of full legal capacity by age." *Cooper v. Nix*, 343 F. Supp. 1101, 1111 & n.3 (W.D. La. 1972) (partially reversed on other grounds).

Dr. Kerr, the fraternities' expert economist, defined the relevant product market as residential services in and around the small town of Clinton, New York, where Hamilton College is located.²⁴⁸ He explained that "[t]he demand side is composed of Hamilton students, whose specialized needs for particular types of housing, food and meeting space are distinct from those of other consumers in the geographic area."²⁴⁹ "Until 1995, private landlords and fraternities were among the suppliers of residential services to the students [at Hamilton]."²⁵⁰ There is likely no cross-elasticity of supply or demand between residential services for matriculating college students and residential services for the general population.²⁵¹ Students need to live close to class and college-related activities; persons unrelated to a college are unlikely to live in a dormitory (even if they were permitted to do so) or in a fraternity house. In small college towns, there are sometimes very few places for students to live aside from college dormitories and fraternities.²⁵²

Hamilton College's expert, Jerry Hausman, suggested that the relevant product market was "over one hundred highly select [private] colleges with which Hamilton competes."²⁵³ According to Professor Hausman, because highly select colleges charge similar fees, Hamilton would be unable to raise its charges for room and board above competitive levels without the possibility of losing students to other colleges.²⁵⁴

Dr. Kerr disputed Hausman's conclusions, stating that "prior to enrolling at Hamilton, applicants possess incomplete information regarding 'the effective quality-adjusted price of room, board, and residential services at Hamilton,' [since students are unaware] of factors such as overcrowding which reduce the quality of the facilities provided by the college."²⁵⁵ Furthermore, after completing one year at Hamilton

248. *Hamilton Coll.*, 106 F. Supp. 2d at 410.

249. *Id.*

250. *Id.*

251. Aff. of Jerry A. Hausman at ¶¶15-17, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599).

252. Clinton, New York, where Hamilton is located, has a population of fewer than 2,000. U.S. Census Bureau, *Population Estimates of Incorporated Places by State*, at <http://eire.census.gov/popest/data/cities/subtab07.php>.

253. *Hamilton Coll.*, 106 F. Supp. 2d at 409.

254. *Id.* Hamilton exercised its market power over board charges for many years. For approximately thirty years, Hamilton assessed a "food service charge" on students living in private apartments or fraternities, attempting to distribute the costs of Hamilton's dining facilities to all students, regardless of whether they used Hamilton's dining facilities. By 1994 the "food service charge" for students not eating in Hamilton's dining facilities was \$300 per year, —effectively serving as a penalty surcharge on the privately owned and operated fraternities. Pl.'s Compl. at ¶43, *Hamilton Coll.*, 128 F.3d 59; Aff. of Francis A. O'Brien, Former Trustee of Hamilton College at ¶37, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599).

255. *Hamilton Coll.*, 106 F. Supp. 2d at 410.

(and presumably learning more about the true cost of a college education), “students have a substantial investment in continuing to attend Hamilton and typically would not transfer to other colleges as a result of an increase in housing cost or a decrease in housing quality.”²⁵⁶ Dr. Kerr also stated that Hamilton could raise the price for room and board by as much as five percent without losing any students to other schools.²⁵⁷

The court suggested that a student’s inability or reluctance to transfer in response to Hamilton’s housing policy was a moot point because the housing policy already had been in effect for five years and all current students were aware of it before they matriculated.²⁵⁸ Faced with a Hobbesian Dilemma, the fraternities originally had asked for a preliminary injunction when Hamilton announced its new residential policy, in order to prevent this type of injury and the potential for mootness.²⁵⁹ The District Court, however, denied injunctive relief to the fraternities, though the Second Circuit ruled that the decision was based on a mistaken understanding of the relevant law.²⁶⁰

Dr. Kerr also pointed out, and the court agreed, that Hamilton had not provided accurate information about the impact of financial aid awards, which he contended is the real determining factor in college costs.²⁶¹ Because of the importance of financial aid, “the actual cost of attending the comparable colleges cannot be ascertained” without data on financial aid awards.²⁶² The court, without citing economic support, suggested that financial aid awards may not be so influential as to negate increased room and board costs.²⁶³ Hamilton’s own website reported:

Through a comprehensive program of scholarships, loans and campus jobs, Hamilton awards need-based financial aid to help families afford the difference between the cost of a Hamilton education and the amount they are able to pay. Every year Hamilton provides financial assistance to approximately half of

256. *Id.* Additionally, students at Hamilton have traditionally been required to live in college housing during their freshman year. Thus, competition for alternative residential services does not begin until a student’s second year. Oral Argument Tr., Motion for Preliminary Injunction, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599).

257. Aff. of William O. Kerr at ¶6, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599).

258. *Hamilton Coll.*, 106 F. Supp. 2d at 413.

259. *Hamilton Ch. of Alpha Delta Phi, Inc. v. Hamilton Coll.*, No. 95-CIV-0926, 1996 WL 172652, at *1 (N.D.N.Y. Apr. 12, 1996);

260. *Id.*; *Hamilton Coll.*, 128 F.3d at 61, 66-68.

261. *Hamilton Coll.*, 106 F. Supp. 2d at 410.

262. *Id.* at 412.

263. *Id.* at 412-13.

its students and offers payment plans and loan options to help families spread costs over more than four years.²⁶⁴

In 2002-03, the average Hamilton financial aid award was \$24,030 towards an annual cost of \$39,050.²⁶⁵ Although the fraternities submitted evidence demonstrating the substantial financial incentives students had to remain at Hamilton after their first year, the court refused to consider that factor in determining the relevant market.²⁶⁶ At the same time, the magistrate noted that highly selective colleges charge similar fees for tuition, room, and board.²⁶⁷

Dr. Kerr averred “that Hamilton has effectively raised the cost of residential housing by reducing the quality of the housing provided.”²⁶⁸ The court focused on the fact that no evidence was introduced to suggest that the quality of student housing at Hamilton was less than that offered by other highly select colleges.²⁶⁹ Instead, arguing that the product market concerned residential choices for Hamilton students, the fraternities submitted evidence that fraternity houses at Hamilton offered superior lodging, meals, and social space, as compared to facilities owned by the college.²⁷⁰

After the decision to ban students from living in fraternities, Hamilton crowded two and three students into dormitory rooms designed for one or two students.²⁷¹ Despite the court’s assertion to the contrary, Hamilton’s Report of the Committee on Residential Life, which was the impetus for this suit, extensively discussed the lack of social and study space on campus and the need for immediate and long-term renovations.²⁷²

The immediate impact of the College’s plan was a classic monopoly outcome: students received less for more. There was a reduction in available living facilities, and students were crowded into dormitory spaces that were designed for fewer

264. Hamilton College, *Tuition, Financial Aid and Scholarships*, at <http://www.hamilton.edu/admission/tuition/>.

265. *Id.*

266. *Hamilton Coll.*, 106 F. Supp. 2d at 412 n.6.

267. *Id.* at 412.

268. *Id.* at 413 n.7.

269. *Id.*

270. Aff. of Francis A. O’Brien, Former Trustee of Hamilton College at ¶21, *Hamilton Ch. of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59 (2d Cir. 1997) (No. 96-7599); Dep. of Jane Fraser, Trustee of Hamilton College, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599).

271. Brief of Plaintiff-Appellants at 12, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599) (internal citations omitted).

272. See The Report of the Committee on Residential Life, *supra* note 183, at 12-15.

people. The quality of the services provided by the College declined.²⁷³

Professor Hausman insisted that Hamilton was incapable of raising prices for residential services to supra-competitive because of competition with other colleges.²⁷⁴ He noted that Hamilton's room and board charges in 1993-94 were \$4850, while its chief rival, Colgate, charged \$550 more than Hamilton.²⁷⁵ Today, after eliminating competition from the fraternities and private landlords, Hamilton charges \$7360 for room and board, \$205 more than Colgate.²⁷⁶ Since announcing the closing of the fraternity houses in 1995, Hamilton's charges for room and board have increased \$2,310.²⁷⁷ The magistrate held that the relevant product market was "all colleges which are 'reasonably interchangeable' with Hamilton," and therefore the fraternities proposed product market was "incorrect as a matter of law."²⁷⁸

In rejecting the fraternities' claim that the relevant product market was residential services to Hamilton students, the magistrate ignored several arguments made by Dr. Kerr, as well as other additional arguments that might be obvious to many antitrust practitioners.²⁷⁹ Students invest "non-salvageable" time and money when they enter college.²⁸⁰ Course credits earned at one school may not be transferable at par—or at all.²⁸¹ For example, Hamilton requires students to complete at least two years of coursework on campus.²⁸² Many schools offer little financial aid to transfer students, and some offer none at all.²⁸³ Students have other

273. Br. of Pl.-Appellants at 6, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599) (internal citations omitted).

274. Aff. of Jerry A. Hausman at ¶15, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599).

275. *Id.*

276. *Tuition, Financial Aid and Scholarships*, *supra* note 264; Colgate University, *Financial Aid*, at <http://offices.colgate.edu/financialaid/cost/default.asp>. See also Aff. of Francis A. O'Brien at ¶3, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599). Hamilton College and Colgate University are not only rivals, they are similarly sized with similar histories, in neighboring villages less than twenty miles apart. *Id.*

277. See Br. of Pl.-Appellants at 2, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599).

278. *Hamilton Ch. of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 106 F. Supp. 2d 406, 413 (N.D.N.Y. 2000).

279. *Id.* at 410.

280. Aff. of William O. Kerr at ¶6, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599).

281. *Id.*

282. *Hamilton College, Transferring to Hamilton*, at <http://www.hamilton.edu/admission/ApplicationProcess/transferfaqs.html>.

283. See Lois M. Baron, *Transferring Translates Deadlines, Other Hurdles*, WASH. TIMES, Apr. 7, 2003, at E2. "Colleges use scholarships to attract students of high caliber that will raise their profile. A university's rating is determined by its freshman rankings Therefore, it doesn't make as abundant use of scholarships on transfer students." *Id.* See also Joshua S. Wyner, *Transfer Students Lack Scholarship Support*, STAR-GAZETTE, Oct. 27, 2002, at 8A.

sunk-costs in choosing a college, including making friends, learning their way around, and establishing a rapport with teachers and administrators.²⁸⁴ The term “*alma mater*” itself suggests a life-long relationship, and these institutions of higher learning frequently advertise their uniqueness and distinctiveness.²⁸⁵ The existence of these sunk-costs means that Hamilton could “opportunistically raise the cost or lower the quality of the student’s remaining education at Hamilton without causing the student to transfer.”²⁸⁶

Dr. Kerr stated that Hamilton required all students to live on-campus in part to convert fraternity property to its own at below-market prices, and in part to “remove competition in the rental housing market.”²⁸⁷ Hamilton’s new housing policy forced students to buy residential services from the college, despite students’ clear preference to purchase these services from fraternities “based upon an evaluation of the price, value and product characteristics.”²⁸⁸ Without “power to dictate price to the student[s] . . . , [Hamilton] would not have been able to sell its services to [fraternity members] . . . [thus] [t]he college did not compete on the merits.”²⁸⁹ Although colleges may face competition from other colleges with regard to tuition, the fraternities likely restrained Hamilton from raising the cost and reducing the quality of residential services.

284. Aff. of William O. Kerr at ¶6, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599). Students may be limited in their choice of college by proximity to family, legacy connections, and the availability of a particular course of study. *Id.*

285. See, e.g., Hamilton College, *An Invitation to Apply for the Position of President of Hamilton College*, at <http://mercury.hamilton.edu/college/PresidentialSearch/challengestatement.html> (last visited Apr. 8, 2004). Professor Hausman’s suggestion that students unhappy with prices at Hamilton can choose to transfer to another school raises an old antitrust concept, the “cellophane fallacy.” *Hamilton Coll.*, 106 F. Supp. 3d at 409. Judges have often misused the concept of cross-elasticity of demand because they fail to understand that markets can be defined too broadly. HOVENKAMP, *supra* note 99, at 103. Originally coined from the Supreme Court’s decision in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956), the “cellophane fallacy” suggests that anything can be a substitute if the desired product’s price grows high enough, but that fails to negate the existence of market power. *Id.*

286. Aff. of William O. Kerr at ¶6, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599). Although Hamilton probably had no market power in competition among highly selective liberal arts colleges for incoming freshmen, the college likely had market power in the sale of educational and residential services to rising sophomores, juniors, and seniors already matriculated at Hamilton. *Id.* at ¶14. High school seniors have imperfect information about potential room and board savings and may not be aware that fraternities provide a less expensive alternative to on-campus housing. *Id.*; see *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 474-75, 481 (1992) (discussing a seller’s opportunity to take advantage of unsophisticated consumers through price discrimination).

287. Aff. of William O. Kerr at ¶20, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599).

288. *Id.* at ¶10.

289. *Id.*

Time has proven Dr. Kerr's theory; since Hamilton imposed its new residential policy, the college has increased room and board over that of its chief competitor, now charging \$205 more than Colgate.²⁹⁰ Furthermore, Hamilton began crowding two students into rooms, and actually converted some corridors into bedrooms.²⁹¹ The 1992 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines test whether a hypothetical monopolist could impose a "small but significant and non-transitory" increase in price.²⁹² The benchmark used is a 5% price increase.²⁹³ Since 1995, Hamilton has raised room and board rates by 34%, while the inflation over the same time period has only increased prices by 21.7%.²⁹⁴ In 1995, Hamilton charged 10% less for room and board than Colgate University; in 2003 Hamilton charged 6.3% more than Colgate for the same services, or a relative increase of 16.3%.²⁹⁵ By any standard, Hamilton has increased prices more than 5%. Without the restraint of competitive services offered by fraternities, Hamilton is free to raise room and board prices at least as high as the most expensive of the highly selective liberal arts colleges.²⁹⁶

In addition to the issue of monopolization, the fraternity houses could not be used in a different manner without a substantial revenue loss—which raises the question of monopsony.²⁹⁷ Because Clinton, New York, is a small college town with a population of approximately 2,000, large fraternity houses with ballroom-sized social spaces and commercial kitchens have few alternative uses.²⁹⁸ Hamilton's decision to restrict its

290. Aff. of Jerry A. Hausman at ¶15, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599); *Compare Tuition, Financial Aid and Scholarships*, *supra* note 263 (stating that Hamilton charges \$7360 for room and board), *with Financial Aid*, *supra* note 275 (stating that Colgate charges \$7155 for room and board).

291. Aff. of Christine Gammill at ¶4, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599).

292. United States Department of Justice and United States Federal Trade Commission, 1992 Horizontal Merger Guidelines § 1.0 (1992), *available* at <http://www.ftc.gov/bc/docs/horizmer.htm> (last visited Sept. 29, 2003).

293. *Id.* § 1.11.

294. *See Tuition, Financial Aid and Scholarships*, *supra* note 264; Federal Reserve Bank of Minneapolis, *Consumer Price Index and Inflation Rates*, at <http://minneapolisfed.org/research/data/us/cal/hist1913.cfm> (last visited Apr. 5, 2004).

295. Aff. of Jerry A. Hausman at ¶15, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599); *Tuition, Financial Aid and Scholarships*, *supra* note 264; *Financial Aid*, *supra* note 276.

296. *See* Mark Clayton, *Backlash Brews Over Rising Cost of College*, CHRISTIAN SCIENCE MONITOR, June 17, 2003. In the 1990s, tuition and fees at four-year colleges increased an average of 35% to 51%. *Id.* Because perhaps all private colleges are unaffordable for most middle class families at the list price, it is possible that tuition and fees are given a strong consideration in selecting a college, and certainly not where there is a mere five percent difference in the price of room and board.

297. Aff. of William O. Kerr at ¶13, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599).

298. Population Estimates of Incorporated Places by State, *supra* note 252.

students' residential choices blocked the fraternities (and private apartment owners) from earning any revenue from their properties; by controlling the level of demand, Hamilton has directly and substantially reduced the value of the properties.²⁹⁹

Although Hamilton arguably competes with—and has no market power over—other highly selective liberal arts colleges, this group provides a relevant description of Hamilton's "output" market.³⁰⁰ In a classic monopsony, there is one dominant buyer in the input market, the sellers cannot move to other input markets, and the sellers have no impact on, or relationship to, the output market.³⁰¹ Regardless of Hamilton's lack of market power in the output market of highly selective liberal arts colleges, Hamilton did have monopsony power in the input market—the local rental property market.³⁰²

G. Monopolization

The primary issue in *Hamilton College* was the definition of the product market.³⁰³ Had the court accepted the relevant product and geographic markets as residential services for students in Clinton, New York, the fraternities would have been able to make a strong case that Hamilton monopolized or attempted to monopolize that market.³⁰⁴ After identifying the relevant product and geographic markets, single firm monopolization requires proof that the alleged monopolist possesses "[m]onopoly power," or "the power to control prices or exclude competition" within the relevant market.³⁰⁵ The court explained in *Grinnel* that "[t]he offense of monopoly under section two of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that

299. Aff. of William O. Kerr at ¶14, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599). This is further evidenced by statements made by Hamilton, including "I guess you guys will have to board up the houses if you don't sell them to us." See *supra* notes 292-296 and accompanying text.

300. Thomas McCarthy, presentation to the Federal Trade Commission, *Health Insurance Monopsony Issues: Product Market Definition*, Apr. 24, 2003, available at <http://www.ftc.gov/ogc/healthcarehearings/docs/030424mccarthy.pdf> (last visited Sept. 29, 2003).

301. *Id.*

302. Aff. of William O. Kerr at ¶19, *Hamilton Coll.*, 128 F.3d 59 (No. 96-7599).

303. *Hamilton Coll.*, 123 F.3d at 64-66.

304. See *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). Had the fraternities won a preliminary injunction when the suit was originally filed, they likely would have alleged that Hamilton was engaged in attempted monopolization of the market for residential services. *Id.* To attempt to monopolize, an entity must have the intent to monopolize and a dangerous probability of success. *Id.*

305. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956); see also *Am. Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946).

power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”³⁰⁶

A high market share offers particularly compelling evidence of market power and monopoly.³⁰⁷ Dr. Kerr testified that Hamilton controlled at least 80% of the market for residential services for students in Clinton, New York before the residential policy was imposed, and virtually 100% of that market afterwards.³⁰⁸ Since closing the fraternities, Hamilton has raised prices for room and board well beyond the rate of inflation.³⁰⁹ Because Hamilton imposed rules to put the privately owned and operated fraternities out of business—and did not gain market share because of “a superior product, business acumen, or historic accident”—Hamilton College was a monopolist.³¹⁰

IV. OTHER SMALL LIBERAL ARTS COLLEGES’ ACTIONS AGAINST FRATERNITIES

Although many schools have never permitted the establishment of fraternities, radical transformation of existing fraternity systems was unknown until Williams College began the process of abolishing its fraternities in 1962.³¹¹ Since Williams took this unprecedented action,

306. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

307. *See, e.g.*, *Eastman Kodak Co. v. Image Technical Servs., Inc.* 504 U.S. 451, 457 (1992) (possessing 80% to 95% market share); *Grinnell*, 384 U.S. at 563 (controlling 87% market share); *Cost Mgmt. Servs., Inc. v. Wash. Natural Gas Co.*, 99 F.3d 937, 950 (9th Cir. 1996) (exercising a 90% market share); *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 201 (3d Cir. 1992) (owning 55% market share coupled with conduct and other factors); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 271 (2d Cir. 1979) (possessing over 60% market share).

308. *Aff. Of William O. Kerr at ¶ 19, Hamilton Coll.*, 128 F.3d 59 (No. 96-7599). It is unclear whether Hamilton controls 100% of the market because the college allows a few students to live off-campus, but they do so only at Hamilton’s sufferance.

309. *See supra* notes 216-220 and accompanying text.

310. *Grinnell*, 384 U.S. at 570-71. *See also* *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585, 604 (1985); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 75 (1911); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 431 (2d Cir. 1945). Hamilton’s imposition of rules to deny the fraternities any source of revenue, combined with some of the comments of various trustees, would likely have met the requirement for bad conduct.

311. Williams College, *History of the College*, at http://www.williams.edu/home/about_history.php (last visited Apr. 8, 2004). Schools banning fraternities from the onset include those closely affiliated with religious orders (e.g., University of Notre Dame, Georgetown, Earlham, and Brandeis) and schools with edicts from founders or other early benefactors (e.g., Rice, Reed, Bates, Oberlin, and Carleton). *See generally* University of Notre Dame, *Of Interest to Students* at <http://www.nd.edu/~alcooll/students.html> (last visited Apr. 19, 2004); Arthur J. Hope, *The Story of Notre Dame*, at <http://www.archives.nd.edu/hope/hope14.htm> (last visited Apr. 19, 2004); Georgetown University, *Student Programs*, at <http://www.georgetown.edu/student-affairs/handbook/living/programs.html> (last visited Apr. 19, 2004); Earlham College, *Living in Community*, at <http://www.earlham.edu/>

nine other colleges (including Hamilton) have taken action to dispossess fraternities of privately owned houses or long-term leases.³¹² Each of these colleges is small, prestigious, and highly selective in their admissions. These colleges are all located in rural areas or small towns with few or no residential and dining options other than the college and the fraternities.

The transformation of fraternities at these colleges can be divided into two categories: 1) campuses where fraternities owned their house and/or land and were either banned, required to become non-residential, or ordered to sell their houses to the college; and 2) campuses where fraternities shared ownership of the houses with the college and were either banned or required to become non-residential.³¹³ In both instances, college actions have overlapping and distinct antitrust

curriculumguide.livingincommunity/introduction.html; Brandeis University, Rights and Responsibilities, at http://www.brandeis.edu/studentlife/sdje/rr/html/rr_appendix.html (last visited Apr. 19, 2004); Rice University, The History of Campus Theater, at <http://dacnet.rice.edu/~FoRTh/Calendar/history.html> (last visited Apr. 19, 2004); Reed College, Presidential Search Case Statement, at http://web.reed.edu/president/president_search/case_statement.html (last visited Apr. 19, 2004); Bates College, Student Life, at <http://www.bates.edu/x22220.xml> (last visited Apr. 19, 2004); Oberlin College, Campus Life, at http://www.oberlin.edu/coladm/campus/h_d.html (last visited Apr. 19, 2004); Oberlin College, Oberlin College Rules and Regulations, at http://www.oberlin.edu/wwwcomm/r_r/nonacademic.html (last visited Apr. 19, 2004). Several other schools, including Princeton, acted to restrict or forbid fraternities in the 1800s, but this was before the first fraternity house was ever constructed. See Princeton University, Greek-Letter Fraternities, at http://etc.princeton.edu/CampusWWW/Companion/greek_letter_fraternities.html (last visited Apr. 19, 2004).

312. A tenth school, Union College, is not discussed in this article because the process and scope of proposed change to the fraternity system is still undergoing debate. In the early 1990s, Middlebury College essentially forced each of its fraternities to sever ties with its national organization, but did not specifically abolish the fraternities or alter the fraternities' property rights. In 1988, Franklin & Marshall College "derecognized" its fraternities, but did not forbid students from joining the organizations or alter the fraternities' property rights. Franklin & Marshall, *Virtual Tour: Greek Life and F&M*, at <http://www.fandm.edu/departments/admission/see/tour/greek.html> (last visited Oct. 1, 2003).

313. See *infra* Parts IV.A.-B. Though useful and appropriate for antitrust analysis, these categories do not fully capture the myriad of complicated relationships between fraternities and their host institutions. On many campuses, some houses (or land the fraternities sit on) are either partially or completely owned by the college, while others are owned by the fraternities in fee simple. On other campuses, fraternities are housed in college dormitories, but those dormitories were paid for by the fraternities or fraternity alumni, sometimes controlled by a contract, and sometimes not. On still other campuses, the fraternities formerly owned their houses and land in fee simple, but conveyed the buildings to the college for some token sum, often to reduce property taxes. The gift to the college may have been memorialized with an agreement giving the fraternity the right to use the house in perpetuity, for ninety-nine years, or may have been sealed with a simple handshake.

ramifications. This section will review the specific events at each college and then provide a combined legal analysis.

A. *Campuses Where Fraternities Owned Houses and Land*

1. *Williams College - 1962*

Williams College was founded in 1791 as a free school for children; one year later its trustees converted the primary school into a college.³¹⁴ Suggesting that Harvard could not do the job by itself, Williams proposed (and received) state assistance for the tiny college in the Berkshire Mountains so that Massachusetts would become “the Athens of the New World.”³¹⁵ Fraternities came to Williams in 1833, soon after the first fraternity was founded at Union College.³¹⁶ By the early 1900s there were fifteen fraternities at Williams, each with a large privately owned home which supplied housing and dining facilities to students.³¹⁷

The continued existence of fraternities at Williams was debated for decades.³¹⁸ As early as 1925, Williams considered abolishing fraternities but determined that it would be “financially impractical” to replace or purchase necessary housing, dining, and social space.³¹⁹ After World War II, the Committee on Post-War Extracurricular Activities at Williams recommended allowing the fraternities to reopen because “the College lack[s] dormitory and eating space for all.”³²⁰ Further, in 1946, it would have “cost the College perhaps a million dollars to replace the facilities now offered by the fraternities and several hundred thousand dollars

314. Williams College, *History of Williams*, at http://www.williams.edu/home/about_history.php (last visited Apr. 8, 2004). England’s third university was founded in the nineteenth century; Williams was the twenty-first college established in the United States. *Id.*

315. JOHN R. THELIN, *THE AMERICAN COLLEGE AND UNIVERSITY* 49-50 (Univ. of Georgia Press 1990).

316. Williams College, Report of the Committee on Review of Fraternity Questions, June 30, 1962, at 6. *See also* ANNALS, *supra* note 182, at 300. In 1834, the “Equitable Fraternity” was founded at Williams as an anti-secret fraternity. The organization eventually evolved into Delta Upsilon, an international “non-secret” fraternity. *Id.*

317. *See* ANNALS, *supra* note 182, at 300-03; Report of the Committee on Review of Fraternity Questions, *supra* note 316, at 6.

318. *See, e.g.*, Report of the Committee on Review of Fraternity Questions, *supra* note 316; Williams College, Report of the President’s Committee of Ten on the Fraternity-Neutral Situation at Williams College, Apr. 1925, at 11.

319. Report of the President’s Committee of Ten on the Fraternity-Neutral Situation at Williams College, *supra* note 318.

320. Williams College, Report to the Board of Trustees of Williams College from the Committee on Post-War Extra-Curricular Activities, Jan. 1946, at 8.

annually to maintain such facilities."³²¹ The existing college dormitory facilities "paled in comparison" to the fraternity houses.³²²

The Committee on Post-War Extracurricular Activities did recommend, however, postponing recruitment of new fraternity members until the sophomore year, to allow for construction of a dining room for freshmen, and so that fraternities could agree to non-discrimination in recruitment.³²³ In 1960, Williams imposed a program called "Total Opportunity," in which all men desiring membership in a fraternity were guaranteed to receive at least one invitation, although not necessarily from the fraternity the student desired.³²⁴

In 1962, Williams announced that the college would assume "at the earliest feasible date, complete responsibility for providing housing, eating, and social accommodations for the entire student body in units owned and operated by the College."³²⁵ The Trustees noted that a "sizeable portion of the responsibility of the College" was delegated to the fraternities by allowing them to offer housing, dining facilities, and social space.³²⁶ The Trustees termed this an "abdication" by the college of its "responsibilities."³²⁷ In fact, fraternities fed 94% of the three upper classes, housed 44% of them, and "provid[ed] most of the social life for all of them."³²⁸ The Trustees agreed that as soon as was practicable, Williams needed "to provide College owned and operated housing, feeding, and social facilities for the entire student body."³²⁹ Because "the fraternities must of course give way to the College in any conflict of interest between them," the Trustees hoped that the fraternities would donate their houses to the college, or at least agree to sell the buildings and land.³³⁰

During the next six years, under substantial pressure from Williams, fourteen of the fraternities donated their houses to the college.³³¹ Today the college uses almost all of these houses as dormitories.³³² Most of the

321. *Id.*

322. Smith, *supra* note 14.

323. Report to the Board of Trustees of Williams College from the Committee on Post-War Extra-Curricular Activities, *supra* note 320, at 9-11.

324. Report of the Committee on Review of Fraternity Questions, *supra* note 316, at 7.

325. Williams College, Statement of the Board of Trustees and Report of the Committee on Review of Fraternity Questions, June 30, 1962, at 4.

326. Report of the Committee on Review of Fraternity Questions, *supra* note 316, at 6.

327. *Id.*

328. *Id.* at 9.

329. *Id.*

330. *Id.* at 10, 12-13.

331. Smith, *supra* note 14. The one holdout fraternity sold its house to the town of Williamstown. *Id.* Its former bar is now the town jail. *Id.*

332. *Id.*

fraternities ceased operations with the transfer of their chapter houses to the college, but a few existed as student organizations without houses until 1970 when they were banned completely.³³³

2. Bowdoin College - 1997

Bowdoin was founded in 1794 in what is now Brunswick, Maine.³³⁴ Even today, Bowdoin is a beautiful and isolated campus. When Bowdoin was first established, the founders offered an entire township in Maine to any contractor willing to travel to Brunswick to build them a four-story building; they found no takers.³³⁵ Despite these inauspicious beginnings, today Bowdoin is ranked as one of the top ten liberal arts colleges in the United States and maintains eighty buildings on its 110-acre campus.³³⁶

Fraternities came to Bowdoin in 1841 with the establishment of a chapter of Alpha Delta Phi.³³⁷ Then, “[f]or well over a century, the College delegated much of its responsibility for residential and social life to fraternities.”³³⁸ The college built no dormitory space between 1964 and 1996, despite almost doubling the number of undergraduates and becoming coeducational.³³⁹ In 1997, Bowdoin could house only 59% of its students in centrally located dormitories.³⁴⁰ Bowdoin believed that to compete with other liberal arts colleges, it needed to house at least 95% of its students.³⁴¹ Similarly, Bowdoin could only feed 71% of its students at maximum capacity, including using “rooms ordinarily used for meetings.”³⁴² As early as 1927, Bowdoin acknowledged that it “allowed the fraternities to accumulate property and have made use of them in many ways to provide facilities which the College would otherwise have been obliged to furnish.”³⁴³ In 1997, the Commission on Residential Life

333. *Id.*

334. ABOUT BOWDOIN, at <http://www.Bowdoin.edu/about> (last visited Sept. 29, 2003). Until 1820, Maine was part of Massachusetts. History and Background, at http://www.maineucc.org/historyandbackgroundcarved_fr.htm (last visited Sept. 30, 2003).

335. THELIN, *supra* note 315, at 44.

336. *Liberal Arts Colleges-Bachelor's (Nationally) Top Schools*, U.S. NEWS & WORLD REPORT, at http://www.usnews.com/usnews/edu/college/rankings/brief/libartco/tier1/t1libartco_brief.php; Bowdoin College, *Visiting Bowdoin*, at <http://www.bowdoin.edu/visiting/> (last visited Sept. 30, 2003).

337. ANNALS, *supra* note 182, at 138.

338. BOWDOIN COLLEGE, *The Commission on Residential Life to the Board of Trustees of Bowdoin College, Interim Report*, Feb. 22, 1997, at pt. I. [hereinafter *Interim Report*] at <http://www.bowdoin.edu/reslife/crl/> (last visited Sept. 30, 2003).

339. *Id.* at pt. II.

340. *Id.*

341. *See id.*

342. *Id.*

343. *Id.*

concluded that Bowdoin “repeatedly made conscious decisions not to develop adequate College facilities for residential life.”³⁴⁴

Bowdoin’s dormitories had inadequate social and study space.³⁴⁵ The facilities included few common spaces and almost no kitchen facilities, amenities which were common and popular at peer institutions.³⁴⁶ Study spaces and computer labs were almost non-existent in Bowdoin dormitories.³⁴⁷ Bowdoin’s “long-standing inattention and failure to provide suitable facilities and resources” limited student opportunities.³⁴⁸ Whether developed in competitive response or simply acting to fill a glaring need, “[t]he fraternities own and therefore control most of the best informal social spaces on campus.”³⁴⁹ Because the fraternities own the most important social spaces on campus they “bear the major burden of providing a student-organized social life not only for their members but for the rest of Bowdoin students.”³⁵⁰

In 1997, the Commission on Residential Life recommended abolishing fraternities, a recommendation endorsed unanimously by the Bowdoin Board of Trustees.³⁵¹ The Commission recommended the adoption of a residential college system and stated that the new residential colleges’ success depended on entirely eliminating competition from the fraternities: “two competing House systems could not easily coexist at this small college and would duplicate resources.”³⁵² Accordingly, after the current students graduated, fraternities were barred from operating at Bowdoin, and “[t]he College [would] endeavor to work cooperatively with the fraternity corporations to find mutually acceptable terms and conditions that will allow Bowdoin to acquire [the] fraternity houses.”³⁵³

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*; BOWDOIN COLLEGE, *Final Report of The Commission on Residential Life to the Board of Trustees of Bowdoin College* at http://www.studorgs.bowdoin.edu/howell/systemdocs/crl_final.htm/ (last visited Sept. 30, 2003).

352. *Interim Report, supra* note 338, at pt. III. “The availability of these houses will play a crucial role in the success of the College House system.” *Id.*

353. *Id.* The Delta Sigma house was acquired in late 1997. See L. Mercedes Wesel, *Bowdoin to Buy, Destroy Frat House*, CENT. ME. MORNING SENTINEL, May 20, 1997, at 12. Bowdoin agreed to pay \$250,000 for the buildings and land. *Id.* After paying off a \$75,000 mortgage, the alumni agreed to donate the rest back to the college as an endowment to support artistic and cultural events. *Id.* The Psi Upsilon house was purchased by the college in late 1998. Laura Hilburn, BOWDOIN ORIENT, Dec. 4, 1998. The college paid \$280,000 for the house; after paying off various debts of \$43,000, the Psi Upsilon alumni agreed to donate the rest of the money to the college to support the

3. Alfred University - 2002

Alfred University, located in rural western New York State, traces its roots to 1836.³⁵⁴ Fraternities and sororities were established at Alfred approximately eighty-five years ago, during World War I.³⁵⁵ In February 2002, the Board of Trustees established a Task Force on Greek Life to determine whether fraternities and sororities should continue to exist at Alfred.³⁵⁶ The Report of the Task Force recognized a pattern at Alfred and elsewhere, in which colleges delegated responsibility for residential and social life to fraternities.³⁵⁷ One option Alfred considered was to “leave the Greek system alone.”³⁵⁸ That choice was considered unacceptable because “physical assets like [the privately owned and maintained] houses” could not be left “to the vagaries of chance.”³⁵⁹ The Task Force recommended that Alfred abolish its fraternities and purchase the houses from the alumni corporations.³⁶⁰ The Report noted that “[w]hether they eliminated or dramatically reformed their Greek systems, nearly all the colleges [Alfred] studied purchased the fraternity and sorority houses on or near their campuses . . . [and] required Greeks to live in college dorms or allowed them to stay in Greek houses under much tighter controls.”³⁶¹

4. Bucknell University - Present

Bucknell has considered itself a fraternity-oriented school since 1887, when the first fraternity expanded to the university.³⁶² Approximately 60% of Bucknell’s undergraduate students belong to fraternities or sororities.³⁶³ Bucknell has a long history of working with its fraternities and sororities to create a better Greek system, in part because of the

environmental studies program. *Id.* Bowdoin acquired the Kappa Delta Theta house in the summer of 2000. *Id.* It planned to move the admissions office to the house and to use a barn adjacent to the house as a crafts center. *Id.* The house was given to Bowdoin as a gift; the college in return agreed to establish a \$350,000 endowment to provide scholarships to legacies of fraternity alumni. *Id.*

354. Alfred University, *History of AU*, at http://www.herr.alfred.edu/special/archives/histories/history_of_au.shtml (last visited Sept. 30, 2003).

355. *Report of the Trustee Task Force on Greek Life*, *supra* note 16, at 4. Alfred’s fraternity system began much later than other east coast institutions. *Id.*

356. *Id.* at 1-2.

357. *Id.* at 7.

358. *Id.* at 11.

359. *Id.*

360. *Id.* at 21-22.

361. *Id.* at 22. The Task Force also recommended raising the residency requirement to three or four years. *Id.*

362. The Plan for Prominence, *supra* note 16, at app. II.

363. *Id.* Bucknell’s calculation is based only on students eligible for membership (sophomores, juniors, and seniors). *Id.*

university's long dependence on fraternities.³⁶⁴ For example, in the early twentieth century, Bucknell was forced to pay for rooms in private houses because of a shortage of dormitory space.³⁶⁵ The university encouraged the fraternities to build houses at their own expense to board students.³⁶⁶

The university's latest plan for fraternity and sorority improvement is called "The Plan for Prominence,"³⁶⁷ which calls for Bucknell to acquire every fraternity and sorority house.³⁶⁸ As early as 1989, Bucknell considered the independently owned houses an obstacle for the university, and called for the purchase of every house by the university by 1999.³⁶⁹ The 2002 Plan for Prominence reaffirmed that goal.³⁷⁰ Once every fraternity house was owned by the university, "students would be paying the same rental rates to live in [all] fraternity chapter houses," thus eliminating any price competition.³⁷¹ The remaining privately owned fraternity houses have been given two years to bring fraternity houses up to the "Bucknell standard."³⁷² If the standard is not met, Bucknell "will not permit students to reside in the facility."³⁷³

5. Colgate University - Present

Colgate originated in 1817 when a Baptist seminary was founded in rural Hamilton, New York.³⁷⁴ Seventy years of support from the soap-making Colgate family resulted in the name change to Colgate University in 1890.³⁷⁵ Fraternities and sororities have long dominated the social life at the 2,700 student school.³⁷⁶ James C. Colgate pointed out that all alumni who contributed to the building of fraternity houses helped the university in providing student housing.³⁷⁷ In 1894, half the

364. See Alan Janesch, *New Greek Plan*, BUCKNELL WORLD, Sept. 2001.

365. J. ORIN OLIPHANT, *THE RISE OF BUCKNELL UNIVERSITY* 249 (Appleton-Century-Crofts 1965).

366. *Id.*

367. The Plan for Prominence, *supra* note 16.

368. *Id.* at Initiative 26.

369. *Id.* at Initiative 27.

370. *Id.*

371. *Id.*

372. *Id.* This standard is comparable to other Bucknell-owned residential facilities. *Id.*

373. *Id.*

374. Colgate University, *Origin and History of Colgate University*, at <http://www.colgate.edu/about/history.asp> (last visited Oct. 2, 2003).

375. *Id.*

376. Aaron Gifford, *Colgate Greek Life on the Line*, POST-STANDARD, May 4, 2001.

377. HOWARD D. WILLIAMS, *A HISTORY OF COLGATE UNIVERSITY* 237 (Van Nostrand Reinhold Co. 1969).

students lived in fraternity houses.³⁷⁸ In the early 1900s, Colgate invited six more fraternities to campus in order to meet the school's needs for dormitory accommodations and eating facilities.³⁷⁹ In 2003, the chairman of the board of trustees acknowledged that "fraternities and sororities are an important part of Colgate's history and traditions."³⁸⁰

Undoubtedly emboldened by the outcome of the *Hamilton* case, in July 2003, Colgate's board of trustees approved the recommendations of the Task Force on Campus Culture.³⁸¹ Effective immediately, Colgate will begin purchasing each of the privately owned fraternity and sorority houses:³⁸² "[a]fter two years, all fraternity and sorority members will be required to live in housing owned by the university."³⁸³ Once Colgate purchases a house, the university will provide all food services in lieu of the fraternity, therefore eliminating price competition with the university.³⁸⁴

Although Colgate decided not to eliminate fraternities and sororities, members will not be permitted to live in privately owned chapter houses when the two years has elapsed—the fraternity must sell the house to Colgate in order to continue as a student organization.³⁸⁵ If a fraternity fails to recruit enough members to meet the college-established occupancy level, Colgate reserves the right to select students to move into the house or to deny the fraternity's use of that house.³⁸⁶

B. *Campuses Where Fraternities Shared Ownership Rights*

1. *Colby College - 1983*

Originally chartered in 1813, Colby was crowded into ten buildings in downtown Waterville, Maine, sandwiched between the Kennebec River and a railroad repair yard.³⁸⁷ In 1952, Colby moved to a new 714-acre

378. *Id.*

379. *Id.*

380. Glenn Coin, *Colgate to Buy Frat, Sorority Houses*, POST-STANDARD, July 11, 2003.

381. Colgate University, *Residential Education: Question and Answer*, at <http://www.colgate.edu/residentiallife/questions.asp> (last visited Sept. 30, 2003).

382. *Id.*

383. Colgate University, *Colgate Embarks on Residential Education Program*, at <http://www.colgate.edu/residentiallife/release.asp> (last visited Oct. 8, 2003).

384. Colgate University, Letter from John Golden, Chair, Board of Trustees, July 8, 2003.

385. *Residential Education: Question and Answer*, *supra* note 381.

386. *Id.*

387. Colby College, *A Brief History of Colby*, at <http://www.colby.edu/tour/history.shtml> (last visited Sept. 30, 2003).

campus two miles from downtown Waterville on Mayflower Hill.³⁸⁸ Colby's fraternities were invited to move with the college, and the fraternity houses were included in the college's master design plan.³⁸⁹ The reasoning for this inclusion was "[b]ecause of the role fraternities were playing in housing Colby students, this move was viewed possible only if fraternity houses were constructed in this new location. The reconstruction of the fraternity buildings was an integral component of the relocation of the Colby campus."³⁹⁰ The new chapter houses were constructed on college land, with a combination of funds from fraternity alumni and college-backed forty-year loans to the fraternities that the fraternities were obligated to pay off.³⁹¹ Colby owned the land under the fraternity houses.³⁹²

For a service fee, the college billed fraternity members for room fees and dues.³⁹³ After collecting rent, Colby then transferred all the money to accounts made available to the fraternity alumni corporations, who could spend the funds with college approval.³⁹⁴ If any fraternity ceased operations, the long-term land lease allowed Colby to exercise one of three options: 1) pay a sum equal to the fair market value of the building to the fraternity corporation, 2) allow for transferring the building to a separate campus organization, on the college's terms, or 3) pay a rental fee tied to the expected return realized from using the building as a dormitory.³⁹⁵ According to the Maine Supreme Court, neither the

388. Colby College, *Facilities*, at <http://www.colby.edu/admissions/facilities/> (last visited Sept. 30, 2003); Colby College, *Colby at a Glance*, at <http://www.colby.edu/about/index.html> (last visited Sept. 30, 2003).

389. Colby College, *Report of the Trustee Commission on Campus Life*, 6 (Dec. 1983). See also *Biographical Dictionary, Jens Larson*, at <http://www.maineolmsted.org/ad/arson.html> (last visited Sept. 30, 2003). Larson was an architect at Colby College. *Id.*

390. *Alpha Rho Zeta of Lambda Chi Alpha, Inc. v. City of Waterville*, 477 A.2d 1131, 1135 (Me. 1984).

391. ERNEST CUMMINGS MARINER, *THE HISTORY OF COLBY COLLEGE*, 470-71 (Colby College Press 1963). Three fraternities had set aside substantial funds to move to Mayflower Hill and a fourth owned valuable property adjacent to the old campus. *Id.* at 470. The "Committee of Twenty-One" recommended to the board of trustees "that fraternities able and willing to build houses should be required to locate them on college property." *Id.* The college extended one-half the cost of the houses at 4.5% interest for thirty years. *Id.* Inflation led to the college increasing the amount of the loans and imposing a new term of forty years. *Id.* at 471. The college agreed "that, as long as the fraternity desired to do so and continued to maintain standards required by its national office and by the College, and met its financial obligations, it should be permitted the right of sole occupancy of the house." *Id.* at 470.

392. *City of Waterville*, 477 A.2d at 1133.

393. *Id.* at 1135.

394. *Id.*

395. *Id.*

fraternities nor the college entirely owned the building.³⁹⁶ Even Colby recognized the fraternities as “purely private groups” operating as entities separate from the college.³⁹⁷

After considerable study, Colby withdrew “its recognition and support of its several fraternities and sororities” at the end of the 1984 school year.³⁹⁸ The college discussed several alternatives to abolishing fraternities.³⁹⁹ One option was acquiring each of the fraternity houses and allowing fraternities, sororities, and “special interest” groups to compete for periodic occupancy of the fraternity houses.⁴⁰⁰ The college determined, however, that its new plan for a residential college system would fail “if placed in constant competition [with the fraternities, sororities and] special interest groups.”⁴⁰¹

Colby then entered into negotiations with each fraternity to acquire each house.⁴⁰² The college agreed to allow the fraternity to recommend new names for the buildings.⁴⁰³ Colby also agreed to install a permanent plaque on each building in honor of the fraternity that built it, and to establish a scholarship fund for fraternity members’ children and grandchildren equal to the market value of the fraternity house.⁴⁰⁴

396. *Id.* at 1136. The college did have the power to expel individual fraternities from the houses (subject to reimbursement for construction costs), restrict alienation of the property, control who resided in the buildings, and require the fraternities to charge no less for boarding than the dormitories. *Id.* at 1137.

397. Report of the Trustee Commission on Campus Life, *supra* note 389, at 12.

398. *Id.* at 15.

399. *Id.*

400. *Id.* at 13.

401. *Id.* Colby’s residential college system, or “Commons,” called for students to join one of four distinct communities during their undergraduate years. *Id.* Each Commons would link several dormitories with social space, faculty members, funding and a separate dining hall. *Id.* The fraternities, with considerable social space, would become vital components of the Commons. *Id.* at 4, 16.

402. *Id.* at 15.

403. Report of the Trustee Commission on Campus Life, *supra* note 389, at 15.

404. *Id.*; Jeffrey J. Simek, *Untitled*, UPI, May 22, 1984. Chi Realty Corp. sued Colby College on behalf of Zeta Psi fraternity for allegedly breaching the 1951 agreement that permitted Zeta Psi occupancy of a fraternity house. *Chi Realty Corp. v. Colby Coll.*, 513 A.2d 866, 867 (Me. 1986). Zeta Psi asserted that the abolition of the entire fraternity system failed to meet the condition that the fraternity be “suspended or expelled,” which historically had been restricted to the failure to maintain “academic and social standards.” *Id.* The Maine Supreme Court affirmed the summary judgment of the trial court entered in favor of the college. *Id.* at 868. In 1990, nineteen members of Lambda Chi Alpha fraternity were either suspended or placed on probation for their membership in a fraternity. *Phelps v. Pres. and Trus. of Colby Coll.*, 595 A.2d 403, 403-04 (Me. 1991). The students sued Colby College alleging a violation of their rights under the Maine Civil Rights Act. *Id.* at 404. The trial court denied relief to the students and the Maine Supreme Court affirmed, holding that the Maine Civil Rights Act did not authorize “Maine courts to mediate disputes between private parties exercising their respective

2. Amherst College - 1984

Of all the colleges to take action against fraternities, few produced more rancor than Amherst College.⁴⁰⁵ An otherwise outstanding liberal arts college, Amherst provided its students with just four months warning that it planned to abolish fraternities, and it provided no plan to replace them.⁴⁰⁶ Amherst College was founded in 1821.⁴⁰⁷ Fraternities were established at Amherst College in 1836.⁴⁰⁸ In 1887, President Julius Seelye remarked in a report to Amherst's trustees that "[b]esides other help toward the good work of the college, important service is rendered by the societies and the society houses."⁴⁰⁹ President Seelye was, in part, referring to the fraternities' construction of living and eating space for Amherst students.⁴¹⁰ The fraternities revolted against the asceticism of life at Amherst.⁴¹¹ The construction of fraternity houses allowed escape from "primitive college dormitories" and the "squalor of private lodgings."⁴¹²

Amherst only began to offer food services to its students in 1940.⁴¹³ The college failed to build a dormitory with living and social amenities as

rights of free expression and association." *Id.* at 407. The college noticed a drop in alumni contributions, presumably because many alumni were so embittered by the fraternity situation. See Anthony Flint, *Liberty, Equality—But No Fraternities*, BOSTON GLOBE, Dec. 18, 1989, at 66.

405. See, e.g., Flint, *supra* note 404; *Amherst Students Hold Sit-In*, N.Y. TIMES, Feb. 21, 1984, at A12. Of the approximately 1500 students at Amherst in 1984, 1200 participated in a poll regarding fraternities. *Id.* 85% voted in favor of keeping fraternities. *Id.* Despite the ban on on-campus fraternities, approximately 8-12% of current students are members of the so-called underground fraternities, according to dean of students Ben Lieber. Rachel Zinn, *Lieber Talks to Faculty About Fraternities*, AMHERST STUDENT, Jul. 22, 2003.

406. Amherst College, Resolution, Board of Trustees of Amherst College (Feb. 24, 1984). Amherst is currently ranked number two in the 2004 U.S. News & World Report rankings. *Liberal Arts Colleges-Bachelor's (Nationally) Top Schools*, *supra* note 337.

407. ANNALS, *supra* note 182, at 106.

408. *Id.*

409. WILLIAM S. TYLER, A HISTORY OF AMHERST COLLEGE Ch. 12, at <http://www.amherst.edu/~rjyanco/amherst/history/1894tyler-ws/chapter12/menu.html> (last visited Sept. 30, 2003).

410. See *id.*

411. THOMAS LE DUC, PIETY AND INTELLECT AT AMHERST COLLEGE 124 (Columbia University Press 1946).

412. *Id.* at 124-25. In the 1870s, lodging became scarce, therefore it is not surprising that membership in fraternities doubled during that time. *Id.* at 125.

413. CLAUDE MOORE FUESS, STANLEY KING OF AMHERST 270 (Columbia Univ. Press 1955); Amherst College, *Final Report of the Ad Hoc Trustee Committee on Campus Life*, 2 (Feb. 21, 1984).

comparable to the magnificent, sprawling fraternity houses until 1963.⁴¹⁴ “Many students fe[lt] coerced into fraternity rush because of the lack of alternative housing possibilities on campus which would allow them a social life and the ability to live with friends,”⁴¹⁵ because Amherst’s original dormitories were designed solely for sleep.⁴¹⁶

Between 1961 and 1963, each fraternity was asked by the college to donate its house to Amherst.⁴¹⁷ Amherst suggested that it was in the best interests of the college, and all alumni, for the school to own all buildings related to the college and all land on its periphery.⁴¹⁸ Each fraternity agreed and donated its house to the college; then, the college leased the houses back to the individual fraternities’ alumni corporation.⁴¹⁹ It is probably no accident that the fraternities agreed to donate their valuable houses to Amherst at the same time that Williams College was abolishing fraternities completely.⁴²⁰ The alumni corporation owners may have viewed the donation of the houses as a way to appease Amherst and prevent it from following the example set by close rival Williams.⁴²¹ This lease arrangement continued for two decades, despite rising unrest among the faculty regarding the continued existence of fraternities at Amherst.⁴²² Finally, on February 24, 1984, the Amherst Board of Trustees terminated the leases, effective June 30, 1984, and “discontinued” the fraternity system.⁴²³

414. *Final Report of the Ad Hoc Trustee Committee on Campus Life*, *supra* note 413, at 3. Many students were forced to live in rooms in town because of the lack of college dormitory space. FUESS, *supra* note 413, at 314.

415. NEW ENGLAND ASSOCIATION OF SCHOOLS AND COLLEGES, EVALUATION OF AMHERST COLLEGE (1978), *quoted in* Mark D. Bauer, *Isolated Phenomenon or Impending Pandemic?*, DIAMOND OF PSI UPSILON, Spring 1984, at 5.

416. Amherst College, *Interim Report of the Ad Hoc Trustee Committee on Campus Life* (Jan. 9, 1984).

417. *Id.*

418. *Id.*

419. Julian H. Gibbs, *The Place of Fraternities at Amherst College*, Feb. 16, 1983 at 2. President Gibbs suggested that some fraternities entered into this arrangement to avoid rising taxes and insurance. *Id.* President Gibbs further noted that “in their original acceptance of the properties, the Trustees made no commitment to operate the residences as fraternities; one would scan the relevant documents in vain for any hint of such a commitment.” *Id.* at 10. See *Letter from Thomas Hanford*, HISTORY OF FRATERNITIES AT AMHERST COLLEGE, (Jul. 31, 2003), Gamma Collection, Psi Upsilon Fraternity Archives, 3003 E. 96th Street, Indianapolis, IN, 46240. *Id.*

420. See *Letter from Thomas Hanford*, *supra* note 419.

421. *Id.*

422. *Id.*

423. *Final Report of the Ad Hoc Trustee Committee on Campus Life*, *supra* note 413. Many of the fraternities have continued to operate, albeit without college recognition. Because the trustees’ resolution spoke only of houses, some believed it within the spirit of the trustees’ resolution to continue operating as fraternities without a residential

3. *Denison University - 1995*

Denison was founded in 1831 by an Ohio Baptist society.⁴²⁴ Although always an undergraduate college, the trustees of Denison called it a university because it offered several courses of study.⁴²⁵ At the time the action was taken against fraternities, the school had 1,800 students, ten fraternities, and eight sororities.⁴²⁶ Each fraternity house was located on a plot of ground owned in fee simple by the university.⁴²⁷ The buildings were erected and maintained by the individual fraternities subject to ninety-nine year lease agreements that were indefinitely renewable.⁴²⁸ The language of the leases allowed Denison to take over the houses provided it compensated the fraternities.⁴²⁹

Denison came to depend on the privately-owned fraternity houses to feed the overwhelming majority of its students.⁴³⁰ “[I]f the facilities for feeding and housing students provided by these fraternities were not available, the university would be obligated to expend a large sum of money to provide the equivalent in dormitory and dining-room service.”⁴³¹ On April 22, 1995, after five months of debate, Denison’s

component. Amherst termed these “underground fraternities” and considered taking action against the organizations. See, e.g., Editorial, *Maintain Off-Campus Frats for Benefit of Social Life*, AMHERST STUDENT, Oct. 30, 2002. Lately the rhetoric appears to have cooled; Amherst now often refers to the fraternities as “off-campus.” Zinn, *supra* note 405.

424. *Denison Yesterday and Today*, at <http://www.denison.edu/areainfo/duhist.html> (last visited Mar. 2, 2003).

425. *Id.* Some graduate courses were offered briefly approximately eighty years ago. *Id.*

426. Alan D. Miller, *Denison Braces for Possible Trouble Over Fraternity Vote*, COLUMBUS DISPATCH, Apr. 19, 1995. The sororities were never residential, although some had nonresidential meeting houses. *Id.*

427. *Denison Univ. v. Bd. of Tax App.*, 183 N.E.2d 773, 775 (Oh. 1962).

428. *Id.* One fraternity, Delta Upsilon, was subject to a one-year renewable lease.

429. Alan D. Miller, *Denison Trustees Close Fraternity Houses*, COLUMBUS DISPATCH, Apr. 23, 1995.

430. In 1968, 76% of male students chose to affiliate with a fraternity; in 1995, 48% of the men were fraternity members. *Letter from Charles A. Brickman, Chair, Denison University Board of Trustees to Denison Community*, May 19, 1995, reprinted in DENISON MAGAZINE, Spring 1995.

431. *Id.* The dean of Denison wrote in 1948:

“The criticisms which have been leveled against fraternities and sororities in some other institutions miss their mark at Denison. Here they hold a valued and permanent place. The college recognizes that a group of a thousand or more students will inevitably divide itself into smaller social units. If these units comprise students who are essentially similar to the students in other groups and if membership is available to the large majority of students, the college can enjoy the benefits of well-established national organizations while escaping most of the problems which arise on campuses where membership is a special privilege for a selected minority. Denison therefore encourages social affiliation.”

trustees voted to require all students to live and eat in university-owned buildings.⁴³² The trustees' decision called for the university to negotiate with each fraternity to "determine fair compensation" for the houses, so students could continue living in them, albeit without any connection to the fraternities that built and owned them.⁴³³

4. *Lawrence University - Present*

In 1847, a Boston philanthropist, Amos A. Lawrence, commissioned a frontier school in what would become Appleton, Wisconsin, to afford "gratuitous advantage to Germans and Indians of both sexes."⁴³⁴ Lawrence University was one of the first coeducational colleges in the country and today enrolls over 1,300 undergraduates.⁴³⁵ It is ranked in the top tier of liberal arts colleges.⁴³⁶

Before 1941, Lawrence's fraternities maintained off-campus housing.⁴³⁷ President Henry Wriston did not consider the existing fraternity houses satisfactory for permanent housing.⁴³⁸ To accomplish Lawrence's mission of being a residential college, the off-campus fraternity houses were sold in exchange for five new dormitory buildings that were, built by Lawrence for fraternity use.⁴³⁹ The total cost of each building was \$285,000—the fraternities paid a significant amount through the sale of their old fraternity houses, alumni donations, with the remainder financed through the university.⁴⁴⁰ President Thomas Barrows attributed a 10% increase in Lawrence's enrollment to the fraternity quadrangle and the university's growing reputation.⁴⁴¹

In 2000, after considerable study, the board of trustees of Lawrence University adopted a plan to end the permanent use of the buildings

CYRIL F. RICHARDS, DENISON 84-8 (Denison University Press 1948).

432. Miller, *supra* note 429; *Trustee Resolution Concerning Fraternities*, Apr. 23, 1995, reprinted in DENISON MAGAZINE, Spring 1995.

433. Alan D. Miller, *Denison Braces for Possible Trouble Over Fraternity Vote*, COLUMBUS DISPATCH, Apr. 19, 1995, at 1A; *Trustee Resolution Concerning Fraternities*, Apr. 23, 1994, reprinted in DENISON MAGAZINE, Spring 1995.

434. Lawrence University, *A Brief History of Lawrence University*, at <http://www.lawrence.edu/library/archives/history.shtml> (last visited Sept. 30, 2003).

435. Lawrence University, *Fast Facts About Lawrence University*, at <http://www.lawrence.edu/about/fastfacts.shtml> (last visited Mar. 15, 2004).

436. *Liberal Arts Colleges-Bachelor's (Nationally) Top Schools*, *supra* note 336.

437. CHARLES BREUNING, *A GREAT GOOD WORK: A HISTORY OF LAWRENCE UNIVERSITY 1847-1964* 112 (Lawrence Univ. Press 1994).

438. *Id.* at 178.

439. Lawrence University, *Report of the Task Force on Residential Life*, Sept. 2000, at pt. V.

440. *Id.*

441. BREUNING, *supra* note 437, at 195.

constructed and partially paid for, by the fraternities.⁴⁴² Effective in the 2003-04 school year, fraternities, sororities, co-ops, and other special interest groups will compete for three-year leases for the former fraternity buildings.⁴⁴³ Lawrence maintains that the fraternity houses are “wholly owned” by the university, although it acknowledges that the fraternities helped pay to build the buildings, furnish the living rooms and lounges, and provide almost all kitchen equipment, appliances, and supplies.⁴⁴⁴ In response to claims made by the fraternities that Lawrence is breaching its contractual obligations, the university offered to “provide the fraternities with the continued opportunity to occupy formal group houses, with assured meeting space, and with the financial enhancements of endowed scholarship funds for their members.”⁴⁴⁵ Lawrence refused to guarantee “exclusive occupancy of particular units of college-owned housing in perpetuity.”⁴⁴⁶ The fraternities responded by informing the university that there would be no further negotiations and that they were considering litigation.⁴⁴⁷

C. Antitrust Ramifications

1. Campuses Where Fraternities Owned House and Land

Each of these situations is very similar to *Hamilton College*: 1) the fraternities owned their houses and land; 2) the fraternities provided residential services to students at the college at competitive rates for decades; 3) each of the fraternities was or has been in competition with the college to provide residential services to students; 4) each college controlled the vast majority of the residential services for students; and 5) each of these colleges is located in a tiny hamlet, or is far enough outside of town, to make it a distinct geographic market.⁴⁴⁸

442. Letter from Harold E. Jordan, Chair of the Board of Trustees, to the Lawrence Community, Oct. 20, 2000 (on file with author).

443. *Id.*

444. Lawrence University, *Frequently Asked Questions Task Force on Residential Life*, at <http://www.lawrence.edu/taskforce/reslife/questions.shtml> (last visited Apr. 8, 2004).

445. Letter from Harold E. Jordan, Chair of the Board of Trustees, to All Lawrence Alumni, Sep. 4, 2001 (on file with author).

446. *Id.*

447. *Id.*

448. 2000 U.S. Census, at <http://www.epodunk.com> (last visited Sept. 30, 2003). Williams College is located in Williamstown, Massachusetts, population 8,424. *Id.* Bowdoin College is located in Brunswick, Maine; population 21,172. *Id.* Alfred University is located in Alfred, New York; population 3,954. *Id.* Bucknell University is located in Lewisburg, Pennsylvania; population 5,620. *Id.* Colgate University is located in Hamilton, New York; population 3,509. *Id.* Colby College is located several miles outside Waterville, Maine; population 15,605. *Id.* Amherst College is located in Amherst, Massachusetts; population 34,874. *Id.* Although other residential options may exist in the

A violation of section two of the Sherman Act requires that only two elements be shown.⁴⁴⁹ Actual monopolization requires a firm to acquire or retain monopoly power through competitively unreasonable practices.⁴⁵⁰ Attempted monopolization requires a firm to engage in competitively unreasonable practices that create a “dangerous probability” of monopoly power being achieved, as well as the intent to possess a monopoly.⁴⁵¹ A high market share in the relevant markets, combined with anticompetitive conduct, generally establishes a *prima facie* case for monopolization or attempted monopolization.⁴⁵²

By deeming “residential services for students” to be the product and geographic market definition, and in consideration of each college’s already high market share and overt statements to drive the fraternities out of the business of providing residential services to students, a *prima facie* case under section two of the Sherman Act for monopolization or attempted monopolization is established.⁴⁵³ Although section two of the Sherman Act can be reached through intent, a high market share, and anticompetitive conduct,⁴⁵⁴ the actual relationship and interaction between colleges and fraternities is quite complicated. Simply calling the two competitors, and relying on the high market share and anticompetitive conduct of the college, may not persuade every court that the Sherman Act has been violated. In addition to high market

town of Amherst, the college generally requires all students to live on campus and prohibits many students from maintaining cars. Amherst College, *New Students*, at <http://www.amherst.edu/~dos/newstudents.html>; Amherst College, *Residential Life* at <http://www.amherst.edu/~dos/reslife>. Part of Amherst’s population may be attributed to the other two schools it hosts, the University of Massachusetts (with 23,000 students) and Hampshire College (with 1,175 students). See 2000 U.S. Census, at www.epodunk.com. Denison University is located in Granville, Ohio; population 3,167. *Id.* Lawrence University is located in Appleton, Wisconsin; population 70,087. *Id.*

449. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

450. *Id.*

451. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993). See also Times-Picayune Publ’g Co. v. United States, 345 U.S. 594, 626 (1953).

452. See, e.g., Great W. Directories, Inc. v. Southwestern Bell Tel. Co., 63 F.3d 1378, 1384 (5th Cir. 1995); United States Anchor Mfg. Co. v. Rule Indus. Inc., 7 F.3d 986, 999-1001 (11th Cir. 1993); Advanced Health Care Servs. v. Radford Comm. Hosp., 910 F.2d 139, 147 (4th Cir. 1990). See also Eastman Kodak Co. v. Image Technical Servs., Inc. 504 U.S. 451, 452 (1992) (80% to 95% market share); United States v. Grinnell Corp., 384 U.S. 563, 563 (1966) (87% market share); Cost Mgmt. Servs., Inc. v. Wash. Natural Gas Co., 99 F.3d 937, 940 (9th Cir. 1996) (90% market share); Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 201-02 (3d Cir. 1992) (55% coupled with conduct and other factors); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 269 (2d Cir. 1979) (over 60% market share).

453. See, e.g., Grinnell Corp., 384 U.S. at 570-71; Image Technical Servs., 504 U.S. 451, 452; Berkey Photo, 603 F.2d 263, 274; Fineman, 980 F.2d 171, 201.

454. Grinnell Corp., 384 U.S. at 570-71; Berkey Photo, 603 F.2d at 274.

share and anticompetitive conduct on the part of the alleged monopolist, other theories allow an aggrieved competitor to reach section two. These may be particularly relevant for fraternities contemplating action against a college.

a. *Secondary Market Lock-In*

Even if a college faces competition from other colleges in its primary market selling educational services, forcing students to purchase residential services from the school may violate section two of the Sherman Act. In *Eastman Kodak Co. v. Image Technical Services, Inc.*, the Supreme Court found that when Kodak competed to sell photocopiers in its primary market, it created a monopoly in the sale and service of replacement parts for its copiers.⁴⁵⁵

The most important factor in a *Kodak* analysis is the element of surprise; imperfect information exists as to the real costs of the product, and a consumer can only determine the true costs of the product after they are locked in to its use. Kodak sold large, high-volume photocopiers.⁴⁵⁶ Kodak also provided service and parts for its machines; it produced some of the parts itself and the rest were produced by "independent original-equipment manufacturers (OEMs)."⁴⁵⁷ For a period of time, independent service organizations (ISOs) repaired and serviced Kodak equipment at prices substantially lower than Kodak itself charged, using parts purchased from Kodak or the OEMs.⁴⁵⁸ Some years later, Kodak prevented the ISOs from purchasing replacement parts, forcing customers to turn to Kodak for service.⁴⁵⁹ Many of the ISOs were forced out of business, and others lost substantial revenue.⁴⁶⁰ Customers were forced to purchase parts and services from Kodak, even if they preferred the ISOs.⁴⁶¹

The Court noted that just as separate markets existed "for cameras and film, computers and software, [and] automobiles and tires," there was a separate market for copier parts and service.⁴⁶² Simply because one product would be worthless without the other did not preclude the two

455. See generally *Image Technical Servs.*, 504 U.S. 451. Despite the similarity, *Kodak* is not an antitrust tying case, which requires a monopoly in the primary market to force consumers to purchase a separate and unrelated product.

456. *Id.* at 456-57.

457. *Id.* at 457.

458. *Id.* at 457-58.

459. *Id.* at 458.

460. *Id.*

461. *Id.*

462. *Id.* at 463.

related products from comprising separate antitrust markets.⁴⁶³ Kodak argued that even if it had a monopoly in parts and service for Kodak copiers, it faced significant competition in the sale of photocopiers.⁴⁶⁴ Thus, if Kodak charged a supra-competitive price for parts and service, it would lose copier sales to companies charging less for service.⁴⁶⁵

The Supreme Court disagreed.⁴⁶⁶ In complex markets where initial competition is imperfect, consumers may be locked into a product with the first purchase, but may not be aware of subsequent required costs.⁴⁶⁷ Photocopiers are expensive and customers are unlikely to simply go out and purchase a new one because of sunk costs.⁴⁶⁸ Additionally, it remains difficult or impossible to determine the full lifecycle costs at the time of purchase.⁴⁶⁹ Even if customers could determine average costs, lifecycle costs will vary from customer to customer based on the degree of use.⁴⁷⁰ Through negotiations over price, Kodak charged customers that had extensively studied lifecycle costs less than customers who were less sophisticated.⁴⁷¹

Although a controversial decision, two pieces of evidence in *Kodak* tended to prove Kodak's market power: 1) Kodak charged higher prices than the ISOs for the same service; and 2) Kodak was able to engage in price discrimination in providing service to different customers.⁴⁷² There are striking similarities between *Kodak* and the colleges that have taken draconian actions against privately owned and operated fraternity houses. First, like *Kodak*, educational services and residential services can easily be seen as distinct antitrust product markets, despite the fact that they are often sold together. Second, the fraternities sold residential services at all these colleges for many decades and had done so with superior quality and a lower price than the college.⁴⁷³ Just as many Kodak customers preferred ISOs,⁴⁷⁴ many customers of college

463. *Id.* (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 19 n.30 (1984)).

464. *Id.* at 465.

465. *Id.* at 466.

466. *Id.* at 472.

467. *See id.* at 474-75.

468. *See id.*

469. *Id.* at 473.

470. *Id.* at 473-74.

471. *Id.* at 476.

472. *Id.* at 457-58.

473. *See, e.g.,* *Aff. of Francis A. O'Brien, Former Trustee of Hamilton College at ¶21, Hamilton Ch. of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59 (2d Cir. 1997) (No. 96-7599); *Dep. of Jane Fraser, Trustee of Hamilton College, Hamilton Coll.*, 128 F.3d 59 (No. 96-7599).

474. *Image Technical Servs.*, 504 U.S. at 458.

educational services probably preferred to purchase their residential services from fraternities.⁴⁷⁵

Third is the element of surprise. The cost of a college education is a great unknown.⁴⁷⁶ Even at the list price for tuition and room and board, students are generally unable to calculate the cost of travel, entertainment, books, and other incidentals until they have completed at least one year at school, if then.⁴⁷⁷ Finding that tuition, room, board, books, and incidental costs were more expensive than anticipated, students may seek out cheaper residential services, which are foreclosed if the college ends private ownership of fraternity houses. Even students who knew nothing about fraternities in high school, or never thought of joining such an organization when choosing a college, may change their mind upon arriving at a college because of costs as well as social contacts. Furthermore, students are unlikely to transfer to less expensive schools because of sunk costs, lack of financial aid for transfer students, and the affinity they develop for the institution.⁴⁷⁸

At best, a high school senior cannot determine the full lifecycle costs of a college education choosing among many colleges offering competing educational services.⁴⁷⁹ But the existence of financial aid makes the actual cost of college impossible to predict, and comparison between schools difficult.⁴⁸⁰ Financial aid awards determine the real cost of college.⁴⁸¹ Even if students do exhaustive research into the lifecycle costs of college, they cannot anticipate tuition increases or the tendency of many schools to lower financial aid awards after the first year.⁴⁸² Finally, though charitable in purpose, financial aid is inherently a form of price discrimination because it charges consumers different rates for the same

475. See *Hamilton Ch. of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 106 F. Supp. 2d 406, 410 (N.D.N.Y. 2000).

476. See *id.*

477. See Nishad Majmudar, *College Expenses Add Up*, DEMOCRAT & CHRON. (Rochester, N.Y.), July 27, 2003, at 3E; Juliana Gittler, *Make Your College Choice A Wise Investment: Experts Advise That Cost Is A Major Consideration, But One Of Many*, POST-STANDARD (Syracuse, N.Y.), Apr. 3, 2002, at 3; John Estrella, *Beware of the Phone Bill*, PATRIOT LEDGER (Quincy, MA), Aug. 9, 2001 at 22; Helen Huntley, *The College Burden*, ST. PETERSBURG TIMES, Sept. 3, 2000, at 1H; Jeremy Redmon, *College Bookstore Enjoys High Margins*, WASH. TIMES, May 23, 1999, at C15; Jon Estrella, *It Doesn't Add Up*, PATRIOT LEDGER (Quincy, MA), Aug. 11, 2001, at 29; Andrew Garber, *The (Real) Costs of College*, SEATTLE TIMES, Nov. 30, 2003, at A1.

478. See *supra* note 283.

479. See generally *Hamilton Coll.*, 106 F. Supp. 2d at 406.

480. See *id.* at 410.

481. *Id.*

482. See Kerr, *supra* note 204 at ¶ 6.

services.⁴⁸³ Although laudable in purpose, the ability to discriminate in price between students provides ample proof that colleges have market power.⁴⁸⁴

b. Exclusion of Competitors

In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, the Supreme Court held that a dominant firm violated section 2 of the Sherman Act by refusing to continue to cooperate with its smaller competitor.⁴⁸⁵ From 1958 to 1978, the owners of downhill ski resorts in Aspen, Colorado cooperated in offering a combined lift ticket that entitled a purchaser to ski at any one of the local mountains.⁴⁸⁶ Originally, three separate companies owned three ski resorts in Aspen.⁴⁸⁷ By 1967, the Aspen Ski Company purchased a second ski resort, and built an entirely new ski resort, giving it control of three of the four mountains.⁴⁸⁸ However, the four-area all-Aspen lift tickets, allowing skiers to utilize the facilities at separately owned Aspen Highlands, was still offered for sale.⁴⁸⁹ In 1978, despite the success of the four-area pass, Aspen Ski Co. terminated the joint-marketing agreement and began promoting its own three-area ticket.⁴⁹⁰ Because few customers were interested in buying a single-area pass, Aspen Highlands' market share, revenues, and profits fell sharply.⁴⁹¹

483. See Ted Bergstrom, *College Tuition and Price Discrimination*, at <http://www.econ.ucsb.edu/~tedb/eep/news/tuition.html> (last visited Mar. 15, 2004); Peter Passell, *The New Economics Of Higher Education*, N.Y. TIMES, Apr. 22, 1997, at D1; AMERICAN COUNCIL ON EDUCATION, STRAIGHT TALK ABOUT COLLEGE COSTS AND PRICES, REPORT OF THE NATIONAL COMMITTEE ON THE COST OF HIGHER EDUCATION (1998).

484. HOVENKAMP, *supra* note 99, at 567 (citing RICHARD POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 62-65 (1976)). According to Judge Posner, price discrimination in a market with multiple sellers also suggests a cartel. *Id.*

485. 472 U.S. 585, 600-05, 611 (1985).

486. *Id.* at 589-92. For reasons not explained, the all-Aspen ticket was not offered in the winter of 1972-73. *Id.* at 590.

487. *Id.* at 589.

488. *Id.*

489. *Id.*

490. *Id.* at 592-93. Aspen Ski Co. did not actually eliminate the pass. Instead, the company offered a new revenue sharing plan that was intended to be unprofitable for Aspen Highlands—"an offer that [Aspen Highlands] could not accept." *Id.* at 592.

491. *Id.* at 594. It is also worth noting that even before Aspen Ski Co. discontinued the four-mountain pass, it tinkered repeatedly with the methodology used to calculate attendance and reimbursement for each mountain. *Id.* at 591-92. At one point Aspen Highlands was forced to accept a fixed percentage of revenue that was lower than its historical patronage. *Id.* This is not dissimilar to colleges forbidding sophomores from living in fraternity houses, placing finite limits on the number of beds that fraternities are allowed to fill, or mandating that room and board fees be equalized with similar services offered by the college.

The Supreme Court affirmed the judgment of the Court of Appeals for the Tenth Circuit, holding that Aspen Ski Co. violated section two of the Sherman Act.⁴⁹² The Court pointed out that there was no general duty for a monopolist to cooperate with a rival, but “[t]he absence of an unqualified duty to cooperate does not mean that every time a firm declines to participate in a particular cooperative venture, that decision . . . may not give rise to liability in certain circumstances.”⁴⁹³ The all-Aspen lift ticket originated in a competitive market and continued for many years.⁴⁹⁴ It was desired by consumers and similar arrangements were popular at other multi-mountain ski areas.⁴⁹⁵ Aspen Ski Co.’s “decision to terminate the all-Aspen ticket was thus a decision by a monopolist to make an important change in the character of the market.”⁴⁹⁶ The exclusion of Aspen Highlands was illegal “predatory” conduct because it was based on factors “other than efficiency.”⁴⁹⁷

Similarly, fraternities at Williams, Bowdoin, Alfred, Bucknell, and Colgate were friendly competitors with their host institutions.⁴⁹⁸ They offered desirable residential services for decades when the colleges chose not to do so.⁴⁹⁹ When the colleges entered into direct competition for those residential services, the fraternities cooperated with the colleges to continue offering services to students.⁵⁰⁰ The friendly competition between the colleges and fraternities is one of the factors that finally inspired the colleges to build adequate dining and residential facilities for students.⁵⁰¹ The decision by these colleges to forbid students from being members of fraternities (Williams, Bowdoin, and Alfred) or to force

492. *Id.* at 611.

493. *Id.* at 600-01.

494. *Id.* at 603.

495. *Id.*

496. *Id.* at 604.

497. *Id.* at 605. The Court, quoting Judge Bork, suggested that predation can occur when the predator has overwhelming market size (80% or even 90%) and the intent to drive others from the market. *Id.* at 608 n.39.

498. *See supra* Part III.G.

499. OSCAR HANDLIN & MARY F. HANDLIN, *THE AMERICAN COLLEGE AND AMERICAN CULTURE* 39-40 (1970).

500. *Id.* at 40, 81-82. Colleges often impose regulations on fraternities, including when students may join, when students may live in a fraternity house, and other rules regarding conduct, policies and programs. *See Report to the Board of Trustees of Williams College from the Committee on Post-War Extra Curricular Activities, supra* note 320, at 9; (deferring fraternity recruitment until the sophomore year); *Report of the Committee on Review of Fraternity Questions, supra* note 316 (requiring the fraternities to offer membership to all who sought to join); Aaron Gifford, *Colgate's Greek Life on the Line in New Times, Few Liberal Arts Schools Allow Fraternities*, POST-STANDARD, May 4, 2001, at A1 (noting that Bowdoin required all fraternities to admit women).

501. *See supra* Parts I.D.-E.

privately owned corporations to sell their assets (Bucknell and Colgate) is no different than Aspen Ski Co.'s decision to end its cooperation with Aspen Highlands.⁵⁰²

Like Aspen Ski Co., the colleges would undoubtedly offer many justifications for abolishing the privately owned and operated fraternities.⁵⁰³ Fraternities have been accused of a great many sins over the years, from being accomplices to the feared Masonic movement in the early nineteenth century, to being elitist nuisances today.⁵⁰⁴ Although colleges may be largely free to establish unique and distinctive communities, the antitrust laws still require deference to competitors that

502. Smith, *supra* note 14; Report of the Trustee Task Force on Greek Life, *supra* note 16, at 3, 22; *Final Report of the Commission on Residential Life to the Board of Trustees of Bowdoin College*, *supra* note 351; Residential Education: Question and Answer, *supra* note 383; The Plan for Prominence, *supra* note 16, at Initiative 26, 27.

503. See Randy Kennedy, *A Frat Party Is: a) Milk and Cookies b) Beer Pong*, N.Y. TIMES, Nov. 7, 1999, at 4A, 28 (noting that the image of fraternities is that of "drunken abandon").

504. Some of the colleges' complaints regarding fraternities are of questionable logic. For example, with regard to elitism, highly selective liberal arts colleges that often reject 70% or more of the students who apply, can call any organization elitist while fraternities often initiate any prospective members interested in joining. See *Best Liberal Arts Colleges*, U.S. NEWS & WORLD REPORT, Sept. 2, 2003, at 98-99 (reporting that Amherst College has a 18% acceptance rate, Williams has a 23% acceptance rate, and Bowdoin has a 25% acceptance rate). As to the broad claim of nuisance, it is difficult to understand how the fraternities are at fault for the caliber of students these colleges choose to admit. Indeed, since fraternities are often subjected to group punishment by colleges, it would seem that students' valued ties to the organizations might make them less likely to violate college rules than if they were acting alone. Since eliminating fraternities, Colby, Hamilton, and Bowdoin have experienced an increase in alcohol problems and drunk driving. Jen Taylor, *Five Schools Show Options for Dartmouth's Transition from Single-Sex Greek System*, THE DARTMOUTH, Feb. 22, 1999; Heather Kofke-Egger, *Effects of Removing Frats Unclear*, THE DARTMOUTH, Nov. 22, 1999. Forcing the closure of fraternities may result in students drinking in less supervised and less accountable venues. Indeed, even some of the data linking fraternities to alcohol merits closer examination. For example, the well-publicized Harvard School of Public Health College Alcohol Study by Henry Wechsler claimed that up to 80% of fraternity members are binge drinkers. Henry Wechsler Et Al., *College Binge Drinking in the 1990s: A Continuing Problem*, 48 JOURNAL OF AMERICAN COLLEGE HEALTH 199-210 (Mar. 2000). However, the Journal of American College Health also reported that 78% of college athletes are binge drinkers—virtually the same number attributed to fraternity drinking. See Maureen Sirhal, *Fraternities on the Rocks*, HERITAGE FOUNDATION POLICY REVIEW 55, 60-61 (Feb. 2000) (suggesting that fraternities are not the cause of the problem, and referring to Wechsler's report, which noted that collegiate alcohol abuse was strongly related to high school alcohol abuse). Interestingly, most of the colleges that have completely abolished fraternities (e.g. Williams, Colby, and Bowdoin), have replaced them with residentially-oriented clubhouses that are indistinguishable from fraternities except for the fact that they are directly run by the college. See generally Andrew Brownstein, *Union Eyes Fraternity Changes*, TIMES UNION, June 2, 2000, at B1; Kennedy, *supra* note 503 at 4A. At these schools, it may be possible today for a hate-group to register with the college as a student organization, but joining a fraternity may lead to expulsion. *Id.* at 30.

have cooperated to provide services for decades.⁵⁰⁵ For students, the end result of the college's actions is that prices go up and quality goes down, and fraternity corporations are denied the use of privately-owned business facilities for any reasonable purpose.⁵⁰⁶

In *Aspen Ski Co.*, the Supreme Court noted that interchangeable lift tickets between separately owned ski resorts were popular in several markets.⁵⁰⁷ Perhaps as a result of *Aspen Ski Co.*, interchangeable lift tickets are common at ski areas across the United States today.⁵⁰⁸ It is no surprise that after the decision in *Hamilton College*, Bowdoin acted with impunity not only to abolish fraternities but to strongly recommend each fraternity donate their house to the college.⁵⁰⁹ Now, in an even more aggressive stance, Colgate and Bucknell have demanded that each privately-owned fraternity sell their only important physical asset to the school—immediately.⁵¹⁰ The most significant result of *Hamilton College* may be that colleges have been emboldened to eliminate one of the few restraints on their relentless price increases.⁵¹¹

2. Campuses Where Ownership Rights Are Shared

Antitrust analysis of the disparate situations at Colby, Amherst, Denison, Lawrence, and other similar schools is likely to be far more fact-specific than the situations where fraternities owned their houses and land. The mere fact that a fraternity operates under a lease or

505. See *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585, 610-11 (1985).

506. See *id.* at 608.

507. *Id.* at 603.

508. See generally *Aspen Skiing Co.*, 472 U.S. at 603. See, e.g., *My Tahoe Vacation*, at http://www.mytahoevacation.com/travel_planner.phtml?tabID=7§ionID=34&catID=127 (last visited Mar. 15, 2004); *Five Resort Interchangeable Lift Ticket* at http://swa.swavacations.com/ski/utah/lift_tickets.asp#five (last visited Mar. 15, 2004); *Steven's Pass*, at http://www.stevenspass.com/html/lodging/lodging_index.shtml (last visited Mar. 15, 2004).

509. See *Interim Report*, *supra* note 338, at pt. IV.

510. Residential Education Question & Answer, *supra* note 383; Plan for Prominence, *supra* note 16, at *Initiative* 26, 27.

511. See Aaron Gifford, *Colgate's Greek Life on the Line in New Times*, *supra* note 500, at A1 (noting that only five of the top twenty-five liberal arts colleges in the U.S. News & World Report 2003 rankings continue to have fraternities); Aaron Gifford, *Higher-Ranked Colleges Lack Frats*, POST-STANDARD, May 4, 2001, at A14 (confirming the same); Edgar Allen Beem, *Fraternity Row*, BOSTON GLOBE, Nov. 30, 1997, Magazine, at 20 (colleges across New England are banning fraternities). One may ponder whether these actions by colleges have been taken independently, or in some form of conscious parallelism. See University Wire (May 9, 2000). Dean of Williams College, Peter Murphy, said "[s]peaking as a seasoned administrator, fraternities are an evil and all institutions would be better off without them." *Id.* See generally *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993).

license does not preclude antitrust liability on the part of the college—a business that rents property to house operations can still be a viable competitor. Detailed analysis, however, requires a close examination of relevant leases, conveyances, contractual rights, historic practices, and state property laws.

It is possible that on some of these campuses, fraternities were merely student organizations, and not businesses, operating at the sufferance of the host institution. The more independent each organization is, and the more appurtenances of revenue-generating business, the more likely the Sherman Act will apply.⁵¹² Indeed, if the fraternities are functioning independent businesses, college action to dispossess them of long-term leases on houses or land may make a *prima facie* case for monopolization under section 2 of the Sherman Act.⁵¹³

Another theory applicable to campuses where ownership rights are shared is the “essential facilities” doctrine.⁵¹⁴ First described in a 1912 Supreme Court case, the doctrine arises when a monopolist controls a resource that is essential for meaningful competition.⁵¹⁵ Under the doctrine, the denial to a competitor of sufficient access to a facility amounts to monopolization “where granting access is reasonably feasible and denying access is without countervailing competitive justification.”⁵¹⁶

Although the Supreme Court largely has ignored the essential facilities doctrine for the past eighty years, it remains good law. In *MCI Communications Corp. v. AT&T Co.*, the United States Court of Appeals for the Seventh Circuit held that the essential facilities doctrine requires proof of four elements: 1) control by monopolist of an essential facility or resource serving the monopolist’s market; 2) a competitor’s inability to copy the essential facility; 3) the denial to a competitor of the

512. See *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 348-49 (1982) (proposing that organizations, not traditionally thought of as businesses, can be considered such for the purposes of the Sherman Act).

513. See generally *Eastman Kodak Co. v. Image Technical Servs., Inc.* 504 U.S. 451 (1992); *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *Cost Mgmt. Servs., Inc. v. Wash. Natural Gas Co.*, 99 F.3d 937 (9th Cir. 1996); *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171 (3d Cir. 1992); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979).

514. The essential facilities doctrine bears certain similarities to the exclusion of a competitor in the Court of Appeals decision in *Aspen Skiing*, 738 F.2d at 1519-22. In fact, the U.S. Court of Appeals for the Tenth Circuit decided in favor of *Aspen Highlands*, in part based on essential facilities. *Id.* The Supreme Court stated that it did not need to reach the issue of essential facilities in order to affirm the Tenth Circuit on other grounds. 472 U.S. at 611 n.44.

515. *United States v. Terminal R.R.*, 224 U.S. 383, 409-11 (1912) (involving a group of railroad companies that were required to allow competitors—for a fee—to use their bridge over the Mississippi River and their downtown terminal).

516. HOLMES, *supra* note 121, § 2.06[2], at 472.

use of the facility; and 4) the feasibility of providing access to the facility.⁵¹⁷ In *MCI*, the Seventh Circuit found AT&T monopolized the long distance telephone market because it refused to grant MCI, a competing long distance seller, access to local telephone facilities controlled by AT&T.⁵¹⁸ Like AT&T controlling access to local telephone markets, colleges owning fraternity houses or land exert control over a facility essential for competition.

As the colleges themselves have found, it is impractical or unreasonable to duplicate the fraternity houses. Many colleges surely would have chosen to do so and avoid the wrath of angered fraternity alumni if this were at all a reasonable course. Not only is it exceedingly expensive to build dormitories, many colleges have simply run out of land.⁵¹⁹ Certainly this explains why Hamilton College would offer \$250,000 to \$350,000 for a fraternity house with elegant social space that sleeps thirty students.⁵²⁰ Even if a college determines that it can no longer host residential fraternities, it is unclear why fraternities are refused the same accommodations as other student groups. Providing access to meeting and social space for fraternities was certainly feasible at Colby and Amherst, where fraternities held leases giving them property rights to use buildings at least partially owned by the colleges for decades.⁵²¹

V. CONCLUSIONS

[I]t is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any

517. 708 F.2d 1081, 1132-33 (7th Cir. 1983).

518. *Id.* See also *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377-78 (1973) (holding that an electric power utility involved in both generation and distribution violated antitrust laws by refusing to sell power to a municipality desiring to engage in retail distribution). Another theory upon which to premise litigation is that a college monopolizing the market for residential services is illegally facilitating vertical integration by refusing to sell to independently owned retail competitors. See, e.g., *id.* at 371; *Eastman Kodak Co. of N.Y. v. So. Photo Materials Co.*, 273 U.S. 359, 368, 375 (1927); *Paschall v. Kan. City Star Co.*, 727 F.2d 692, 696-98 (8th Cir. 1984) (*en banc*).

519. See, e.g., Editorial, *Musical Chairs*, TUFTS DAILY, Oct. 3, 2002; Modisane Kwanza, *Building Boom at St. Michael's*, BURLINGTON FREE PRESS, Mar. 8, 2002, at 1A; Phil Sutin, *Clayton Will Hear Plans for Two More Dormitories*, ST. LOUIS POST-DISPATCH, Jan. 7, 2002, at 1. See generally Scott Carlson, *Colleges Struggle with 60's Legacy*, CHRONICLE OF HIGHER EDUCATION, Aug. 17, 2001, at 23. In 1999, the average cost of dormitory construction per bed was \$32,705. Paul Abramson, *1999 Construction Report*, COLLEGE PLANNING AND MANAGEMENT, at <http://63.151.44.192/cpm/special/constrpt/1999/1999rpt.htm> (last visited Sept. 28, 2003).

520. *The Report of the Committee on Residential Life*, *supra* note 185; Aff. Of William O. Kerr at ¶ 15; *Hamilton Coll.*, 128 F.3d 59 (No. 96-759a).

521. See *supra* Parts III.G.2.a.-b.

tolerable degree for ages the common purposes of society, or of building it up again, without having models and patterns of approved utility before his eyes.⁵²²

The residential liberal arts college is a uniquely American tradition. “These are institutions that have eschewed most of the enormous variety of activities that define the modern university—from graduate and professional schools to large research establishments to semiprofessional sports.”⁵²³ Liberal arts colleges focus on the education of young minds, concentrating not only on the classroom environment but also on residential living and learning.⁵²⁴

According to Dr. David M. Stameshkin of Franklin & Marshall College, at various times for various reasons, fraternities have stood directly in the way of college efforts to define and refine residential living.⁵²⁵ For that reason, small colleges have often taken action to weaken the influence of fraternities.⁵²⁶ The colleges that have actually eliminated fraternities are those that believe that they can fully control their environment.⁵²⁷

In that respect, colleges are no different than any other monopolist; they are simply trying to control their environment and anyone or anything that gets in their way. Colleges have cited many reasons for the abolition of fraternities over the years, and some may even require fraternity reform or disciplinary action.⁵²⁸ It seems reasonable, however, that if one or more fraternities act improperly, then those fraternities should be disciplined, or perhaps even removed from campus. But there can be no legitimate business reason to ban fraternities that have been good campus citizens, throwing the good out with the bad. Indeed, when fraternities are banned, the students involved in them remain, which raises serious questions as to whether conduct was ever really the motivating factor for abolition.

Colleges can and should create distinctive living and learning environments both to distinguish themselves and to offer students

522. EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (1790).

523. Michael S. McPherson et al, *Economic Challenges for Liberal Arts Colleges*, DAEDALUS, Winter 1999, at 73.

524. *Id.*

525. David M. Stameshkin, *Remarks at the History of Education Society Annual Meeting*, Oct. 18, 2001 (copy on file with author). Franklin & Marshall “derecognized” its fraternities in 1988. *Id.*

526. *Id.*

527. *Id.*

528. Aaron Gifford, *Colgate’s Greek Life on the Line in New Times*, POST-STANDARD, May 4, 2001, at A1; Aaron Gifford, *Higher-Ranked Colleges Lack Frats*, POST-STANDARD, May 4, 2001, at A14.

exciting and different choices. But even this laudable goal does not exempt colleges from the strictures of the Sherman Act.⁵²⁹ Bowdoin's Board of Trustees likely summarized the philosophy and strategy of many college trustees and administrators when it endorsed the statement that "two competing House systems could not easily coexist at this small college and would duplicate resources."⁵³⁰ Americans—particularly students and parents paying for a college education—must decide whether this choice should rest with the college alone. It is quite likely that if such a statement were made by any enterprise other than a college, that organization could be subject to investigation by either the Federal Trade Commission or the Department of Justice.

Colleges can deemphasize and even eliminate fraternities without running afoul of the Sherman Act by out-competing them. If new social structures designed by colleges are well-designed and provide students with necessary outlets for expression, let them compete against the fraternities and let the marketplace determine which students prefer. The dynamics of competition may result in better college living and dining options or better managed fraternities making positive contributions to campus life. Perhaps competition will result in both a strong college-run residential system and strong fraternities. Regardless of precisely which arrangement prevails, a more stimulated and satisfied student body is likely to result in higher rankings in the various national surveys.

Hamilton's decision to abolish residential fraternities not only led to higher prices for residential services at Hamilton, it may have provided cover for small liberal arts colleges across the United States to raise prices, draining personal and public coffers and impeding many young Americans' educational goals. And the poorly adjudicated *Hamilton College* has encouraged an unprecedented number of colleges to usurp the property rights of fraternities and sororities. It is time to question whether this is really permitted under the antitrust laws.

529. See *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1996).

530. *Interim Report*, *supra* note 338, at pt. III.