Antitrust as Anti-Civil Rights? Reflections on Judge Higginbotham's Perspective on the "Strange" Case of United States v. Brown University

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A. Leon Higginbotham, Jr.’s profound legacy as a jurist, advocate, scholar, and public servant will endure as long we collectively pursue freedom and equality under law. The late Judge’s lasting effect on the law is as much a product of his personal influence on the generation of young lawyers, law clerks, and undergraduate students he taught, mentored, and inspired, as it is of the marvelously crafted body of judicial opinions he left behind. To the very end, Judge Higginbotham utilized his brilliant legal mind, rhetorical gifts, and indefatigable spirit in total commitment to forging a socially just society, offering a better future for those generations who would follow him.

In the last years of his life, one area of public policy debate that increasingly engaged the Judge’s attention and energy was the effective promotion of racial and socioeconomic diversity in the academy. The Judge’s personal story

† Associate Professor of Law, Suffolk University Law School; B.A. Brown University, 1980; J.D. Columbia Law School, 1989; M.A. Wharton/Doctoral University of Pennsylvania, 1992. This Article stems from several stimulating conversations I shared with the late Honorable A. Leon Higginbotham, Jr. in the mid-1990s when the Judge was a professor at the Kennedy School of Government at Harvard University. The Judge’s generosity and encouragement was a primary source of motivation for this piece and it is dedicated to his memory. I would like to thank Yale Law BLSA, the Yale Law & Policy Review, Dean Mike Thompson, and everyone attending the Race, Values, and American Legal Process conference held at Yale Law School on February 22-24, 2002. For their comments and support, I would like to thank my colleagues F. Michael Higginbotham, Jeffrey Atik, Peter Carstensen, Marcella David, Victoria Dodd, Joseph Franco, Duncan Kennedy, Bob Lande, Hans-Henrik Lidgard, and Anthony Polito. Thanks to Thane Scott, Esq., Andre Dennis, Esq., Sally Akai, Esq., and Beverly Ledbetter. Special thanks to my superb student editor Rajesh Nayak at the Review. Thanks to Diane D’Angelo and all research and reference support from Archer Library staff at Suffolk Law School. Finally, thanks to my wife Dawn and daughter Erica, who could not attend my remarks at the Conference, but who were with me in spirit.

1. Several legal journals have published symposia or memorial articles honoring A. Leon Higginbotham, Jr.’s memory, in tribute to his lasting legacy for both academic scholarship and the legal profession as a whole. See, e.g., Charles Ogletree, Jr., Judge A. Leon Higginbotham, Jr.’s Civil Rights Legacy, 34 HARV. C.R.-C.L. L. REV. 1 (1999); Symposium, In Memoriam: A Leon Higginbotham, Jr., 16 HARV. BLACKLETTER L.J. 1 (2000); Symposium, In Memoriam: A. Leon Higginbotham, Jr., 112 HARV. L. REV. 1801 (1999); Symposium, A Tribute to Judge A. Leon Higginbotham, Jr., 33 LOY. L.A. L. REV. 973 (2000).

2. The author respectfully and fondly refers to A. Leon Higginbotham, Jr. as “the Judge,” as do many of his other former students and clerks.

of rising from "blue collar" urban poverty and segregated schools to attend the Yale Law School and later to garner acclaim as one of the greatest federal judges of the twentieth century is a powerful narrative that testifies to the promise and potentialities of access to educational opportunities and of pluralism in the academy.\textsuperscript{4} Despite witnessing decades of retreat by the Supreme Court from many core principles of \textit{Brown v. Board of Education},\textsuperscript{5} Judge Higginbotham remained an ardent and outspoken defender of desegregation and affirmative action in higher education.\textsuperscript{6} He was committed to preserving affirmative action plans that he believed were both constitutionally sound and socially necessary to help eliminate the lingering vestiges of historical racial subordination most apparent in slavery and societal segregation. In Judge Higginbotham's view, affirmative action promoted valuable academic diversity by ensuring that Americans of all races would have access to educational opportunities, allowing them the opportunity to fulfill their intellectual potential.\textsuperscript{7}

In fact, while participating in his last meeting as Commissioner on the United States Commission on Civil Rights, just three days before his death, Judge Higginbotham characterized diversity in higher education as "among the most significant issues of the next century . . . and of the deepest consequence."\textsuperscript{8}

This Article stems from several conversations the author had with Judge Higginbotham in the mid-1990s about an unusual antitrust case that will be analyzed in this Article in some detail, \textit{United States v. Brown University},\textsuperscript{9} the famous (or infamous) "Ivy League price-fixing" conspiracy case. This case was brought by the United States Department of Justice ("the Government") against the Ivy League Schools ("the Ivies") and the Massachusetts Institute of Technology (MIT) in 1991.\textsuperscript{10} From its inception, the case was controversial because it involved a novel application of antitrust doctrine normally reserved for commercial price-fixing ventures to cooperative, non-profit decisionmaking. National editorial pages characterized the government's case as "strange."\textsuperscript{11} or

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\item \textsuperscript{4} Judge Higginbotham presented a vivid personal account of the forces that played roles in transforming his life: beloved family members, supportive and encouraging teachers and mentors, and education from an institution like Yale, due in large part to its pluralistic mission. \textit{See generally} A. Leon Higginbotham, Jr., \textit{The Dream with Its Back Against the Wall}, \textit{YALE L. REP.}, Spring 1990, available at http://www.law.yale.edu/yls/etc-article.jsp?c_id=163.
\item \textsuperscript{5} 347 U.S. 483 (1954).
\item \textsuperscript{6} \textit{See generally} A. Leon Higginbotham, Jr., \textit{Breaking Thurgood Marshall's Promise}, \textit{N.Y. TIMES}, Jan. 18, 1999 (Magazine), at 28.
\item \textsuperscript{7} \textit{See generally} Charles Ogletree, Jr., \textit{Higginbotham's Reciprocal Legacy}, 53 \textit{RUTGERS L. REV.} 665, 673 (2001).
\item \textsuperscript{9} 5 F.3d 658 (3d. Cir. 1993).
\item \textsuperscript{10} \textit{See id.}
\item \textsuperscript{11} \textit{United States v. MIT: An Unfair Attack on the Way Top Colleges Parcel Out Their Scholarship Money}, \textit{PHILA. INQUIRER}, May 9, 1992, at A5 (remarking that the idea of an antitrust suit against the colleges was "strange"). \textit{See also} \textit{Antitrust Goes to College}, \textit{WASH. POST}, May 6, 1992, at A28
\end{itemize}
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even "destructive."12 Since the late 1950s, a group of schools, including the Ivies and MIT, had met to determine the amount of scholarship awards their commonly admitted students would receive, basing their decisions solely on the relative economic need of each individual student. The Justice Department attacked this process, called "Overlap," as a violation of antitrust prohibitions.13

The Ivies and MIT argued that Overlap avoided the deleterious effects of "bidding" for particularly attractive applicants, thereby driving up the award package of some students, and given limited scholarship budgets, effectively reducing the amount available for others.14 The Ivies claimed Overlap supported the universities' practice of offering admissions decisions on a "need blind" basis.15 They argued that Overlap promoted socioeconomic and racial diversity by making their institutions accessible to a greater number of students from racial minority groups and economically disadvantaged backgrounds.16 The Government countered with the charge that Overlap participation was garden variety price fixing, furthering a conspiracy designed to raise tuition revenues in violation of Section 1 of the Sherman Act,17 a restraint of competitive bidding that impermissibly hindered commerce.18

This Article argues that Judge Higginbotham's insightful characterization of the case's policy implications raises profound issues of doctrinal intersection, radically altering the case's overall significance.19 On June 22, 1993, A.

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15. Id.
19. With fond appreciation, I offer this anecdote to further demonstrate the many ways in which Judge Higginbotham's generosity, personal dedication to excellence, and inspirational mentorship set the stage for this Article. Since the late 1970s, I periodically occupied the same academic space as the great Judge A. Leon Higginbotham, Jr. I was introduced to the Judge by a female, African-American Columbia Law School classmate who clerked for him and who often spoke of his kindness, brilliance, and prodigious work ethic. At Yale, the University of Pennsylvania, and later at Harvard, I had many friends who enrolled in the Judge's Race and the American Legal Process courses and seminars. Judge Higginbotham was a marvelous teacher who conducted his classes in a humane Socratic style, rich in wit, anecdote, and pinpoint analysis. While the Judge's courses were often oversubscribed, he welcomed auditors and vagabonds alike (I never enrolled in the Judge's courses but visited several class sessions). In fact, at the University of Pennsylvania, the Judge's Thursday evening Race and Law seminars sometimes drew larger turnouts from students of color than did BLSA meetings.

One afternoon, after visiting the Judge's Race and the Law seminar at Harvard, I took advantage of the Judge's famous "open door" policy and dropped in to discuss some issues of interest raised during the stimulating class discussion. The Judge remembered me from past conversations and warmly welcomed me into his cramped Kennedy School office. I mentioned to the Judge that my legal scholarship focused largely on antitrust, but that I was also interested in civil rights issues, especially the constitu-
Leon Higginbotham, Jr. stood before his former colleagues on the Third Circuit and argued an amicus brief supporting appellant MIT on a pro bono basis. He represented a coalition of civil rights and educational policy organizations seeking reversal of the judgment by the Federal District Court for the Eastern District of Pennsylvania, which held that MIT and the Ivy League schools had in fact engaged in illegal price fixing. Ultimately, the case was successfully defended by the Massachusetts Institute of Technology on appeal when the Third Circuit reversed and remanded the District Court’s finding of a section 1 Sherman Act violation.

While the author was surprised to learn that Judge Higginbotham had actually argued in the case, given the Judge’s commitment to diversity in the academy, it came as no surprise that he would eagerly represent parties seeking to ensure that these elite corridors of power remained open to intellectually talented students of all races, regardless of their socioeconomic backgrounds. From Judge Higginbotham’s perspective, this case was never really an antitrust case; it was undoubtedly a civil rights case in the constitutional tradition of Brown v. Board of Education and Regents of University of California v. Bakke, cloaked in a formalistic antitrust subterfuge, which was politically designed to limit diversity at the nation’s premiere universities. In fact, the Judge characterized the case as part and parcel of a conservative Republican administration’s “anti-civil rights” agenda. The author completely agreed with the Judge regarding the Bush Justice Department’s motivation in bringing this
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action. After all, then-Attorney General Richard Thornburgh had filed the civil antitrust suit against MIT and the Ivy League Schools with much publicity just prior to resigning to run for a Pennsylvania Senate seat.\(^{28}\) It was an administration that offered numerous challenges to affirmative action programs and race-based scholarships.\(^{29}\) It was also the administration that gave us Justice Clarence Thomas.\(^{30}\) However, the author found immediate but fascinating disagreement with the Judge’s firm conclusion that this case lacked doctrinal significance simply because it was subterfuge for an anti-civil rights agenda.

This Article argues that *United States v. Brown University* is in fact a doctrinally significant antitrust case for precisely the reasons Judge Higginbotham discounted its substantive validity. This case’s doctrinal significance goes beyond the formalist parameters of ordinary Sherman Act litigation to the substantive values of diversity and pluralism essential to its holding.\(^{31}\) Modern antitrust law, with its distinct neoclassical economic paradigms, labyrinthine formalist structures, and peculiar populist history, necessarily involves essentially contested social values.\(^{32}\) Therefore, a correct formalist perception of what antitrust “really” is must take into account the almost categorically universal range of value conflicts that can be the source of legitimate antitrust dispute. This Article will argue that Judge Higginbotham’s formalistic characterization of the appropriate limits of antitrust doctrine was inaccurate.\(^{33}\) However, since he resisted the trial court’s narrow devaluation of educational diversity and pluralism in its misapplication of free-market metaphors, the Judge’s argument was correct at its core and, in fact, insightful to the point of being visionary. While the Judge erred in his conclusion that the Sherman Act did not properly extend to cooperative university decisionmaking regarding scholarship fund allocation, not to mention his assertion that *United States v. Brown University* was an antitrust nonstarter, the Judge correctly noted the essential values of racial and socioeconomic diversity to any great modern university.\(^{34}\) The Third Circuit ordered the trial court to evaluate the economic significance of racial and socioeconomic diversity.\(^{35}\) Therefore, from within antitrust doctrine,


\(^{29}\) Memorandum to the Attorney General, *supra* note 23, at 1-2.


\(^{31}\) My argument goes to the effects of Judge Higginbotham’s insights into the broader purposes of antitrust law.


\(^{34}\) See Higginbotham, *supra* note 4.

\(^{35}\) *Brown Univ.*, 5 F.3d at 678-79. The court reversed and remanded with instructions that MIT’s procompetitive reasons be evaluated under a full “rule of reason” analysis rather than under a “quick
an efficient, procompetitive, and welfare-maximizing result was proposed, consistent with Judge Higginbotham’s pluralistic vision.

BACKGROUND AND HISTORY OF UNITED STATES V. BROWN UNIVERSITY

In 1991, the Government sued MIT and the eight colleges and universities in the Ivy League: Brown University, Columbia University, Cornell University, Dartmouth College, Harvard University, the University of Pennsylvania, Princeton University, and Yale University. According to the Government, the nine schools violated Section 1 of the Sherman Act by engaging in a conspiracy to restrain price competition for students receiving financial aid. The Government claimed that the schools conspired on financial aid policies, in an effort that could be construed to reduce aid and thereby raise their revenues.

The schools responded that the Sherman Act did not apply to them, citing their status as not-for-profit institutions. Furthermore, they justified their cooperative behavior by explaining that it enabled them to concentrate aid on only those in need, and thereby helped the schools to achieve their socially desirable goals of “need-blind” admission coupled with providing financial aid to all needy admitted students. Without collective action, the school argued, there would be less financial aid available to needy students, with a resulting decrease in the number of lower-income students attending those schools.

All of the Ivy League schools signed a consent decree agreeing to stop the challenged cooperative activity; but MIT refused to sign, opting to go to trial instead. After a ten-day bench trial, the District Court for the Eastern District of Pennsylvania found that MIT had violated Section 1 of the Sherman Act. The court rejected MIT’s contention that the challenged conduct did not constitute commercial activity: “The court can conceive of few aspects of higher education that are more commercial than the price charged to students.”

Although the court accepted the Government’s position that the Overlap conduct affected commerce and thus was susceptible to attack under the

look" analysis. Id. To explain, the Third Circuit detailed distinction between “per se,” “quick look,” and the full “rule of reason.” Id. at 668-69. The “per se” approach applies where a Sherman Act violation is conclusively unreasonable or anticompetitive because of its formal structure; such violations are condemned automatically. Id. at 669. The “quick look” or truncated approach applies when suspected violations are not “per se” but likely violations, providing a moderate approach that places the burden on the defendant to give procompetitive reasons for the suspect conduct. Id. The full “rule of reason” approach requires an elaborate inquiry into all the economic implications of the suspect behavior to determine whether it unduly restrains competition under the Sherman Act. Id. at 668-69.

37. Id. See also Brown Univ., 5 F.3d at 663-64.
38. MIT Brief, supra note 14, at 13.
39. Id. at 5.
40. Id. at 5-6.
41. Id. at 2 n.2.
43. Id. at 298.
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Sherman Act, the court refused to find the Overlap process per se illegal. The court observed that "[m]erely because a certain practice bears a label which falls within the categories of restraints declared to be per se unreasonable does not mean a court must reflexively condemn that practice to per se treatment."[44] The court did not, however, undertake an in-depth rule-of-reason analysis of the Overlap conduct. Instead, the court ruled that the challenged conduct should be examined using an abbreviated rule-of-reason analysis.[45] The court deemed that a full-scale rule-of-reason analysis was not needed because the Overlap conduct was "so inherently suspect" that "'no elaborate industry analysis'" was required to demonstrate its anticompetitive character.[46]

The court had ruled that "[s]ince the Ivy Overlap Agreements are plainly anticompetitive, the Rule of Reason places upon MIT 'a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market.'"[47] The court held that evidence that the challenged conduct did not affect the prices charged by the Overlap schools did not provide an affirmative defense for the conduct: "Even accepting MIT's premise that Overlap was revenue neutral [i.e., did not affect average net tuition per student], to say that a restraint is revenue neutral, by itself, says nothing of its pro-competitive virtue."[48]

The court rejected MIT's justifications for Overlap and concluded:

The court is not to decide whether social policy aims can ever justify an otherwise competitively unreasonable restraint. The issue before the court is narrow, straightforward and unvarnished. It is whether, under the Rule of Reason, the elimination of competition itself can be justified by non-economic designs. The Supreme Court has unambiguously and conclusively held that it may not.

Both the Government and MIT appealed certain portions of the district court's ruling. In September 1993, the Court of Appeals for the Third Circuit ruled (by a 2-to-1 majority) that the district court had erred in several respects, and remanded the case to the district court for retrial.[50]

The court of appeals first examined whether the challenged conduct constituted trade or commerce. The court upheld the district court's finding and ruled that providing educational services in return for payment (whether discounted or not) is a commercial activity that subjects MIT to the antitrust

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44. Id. at 299.
45. Id. at 301.
46. Id. at 303 (quoting FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459 (1986)).
47. Id. at 304 (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 113 (1984)).
48. Id. at 304.
49. Id. at 305.
50. United States v. Brown Univ., 5 F.3d 658 (3d Cir. 1993). Dissenting, Judge Weis argued that the Sherman Act should not apply to the challenged conduct, which he did not feel constituted commerce. Id. at 683 (Weis, J., dissenting).
laws.\footnote{Id. at 668.} However, the court noted that “[a]lthough MIT’s status as a nonprofit educational organization and its advancement of congressionally-recognized and important social welfare goals does not remove its conduct from the realm of trade or commerce, these factors will influence whether this conduct violates the Sherman Act.”\footnote{Id.} Thus, the court ruled that the social goals of MIT’s policy were relevant in an antitrust analysis.

The court of appeals also addressed whether the district court erred by using a Rule of Reason, instead of a per se, approach in evaluating Overlap.\footnote{Id. at 669-70.} The court of appeals upheld the district court’s ruling that Overlap was not per se illegal and held that Overlap’s “alleged pure altruistic motive and alleged absence of a revenue maximizing purpose contribute to our uncertainty with regard to Overlap’s anti-competitiveness, and thus prompts us to give careful scrutiny to the nature of Overlap, and to refrain from declaring Overlap per se unreasonable.”\footnote{Id. at 672.}

The court of appeals disagreed with the district court’s ruling that the effect of Overlap on average net tuition per student was irrelevant, though. The court of appeals ruled that “the absence of any finding [by the district court] of adverse effects such as higher price or lower output is relevant, albeit not dispositive, when the district court considers whether MIT has met [its burden of establishing an affirmative justification for Overlap].”\footnote{Id. at 674.}

The court of appeals also ruled that the district court erred by not investigating more fully MIT’s procompetitive and non-economic justifications for the Overlap conduct. The court of appeals noted that MIT had proffered procompetitive economic justifications for Overlap.\footnote{Id. at 677.} Indeed, the court of appeals agreed that if a rule-of-reason analysis determined that Overlap increased consumer choice, as MIT alleged (by allowing needy but able students who otherwise would not have attended MIT to attend after all), then Overlap would be permissible under the Sherman Act.\footnote{Id.} The court of appeals ruled that “[t]he nature of higher education, and the asserted pro-competitive and pro-consumer features of the Overlap, convince us that a full rule of reason is in order here.”\footnote{Id. at 678.}

Finally, the court of appeals held that “[e]ven if anticompetitive restraint is intended to achieve a legitimate objective, the restraint only survives a rule of reason analysis if it is reasonably necessary to achieve the legitimate objectives

\begin{footnotes}
\footnote{Id. at 668.}
\footnote{Id.}
\footnote{Id. at 669-70.}
\footnote{Id. at 672.}
\footnote{Id. at 674.}
\footnote{Id. at 677.}
\footnote{Id.}
\footnote{Id. at 678.}
\end{footnotes}
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proffered by the defendant."\(^5\) If, on remand, the district court found that MIT could persuasively justify Overlap, then the Government would have an opportunity to prove that a reasonable but less restrictive alternative existed that could meet Overlap’s objectives: “To the extent that increasing consumer choice and promoting socioeconomic diversity in the context of higher education reflect social as well as procompetitive values, the district court should have considered the degree to which Overlap furthered these social objectives.”\(^6\) The court stated further:

It is most desirable that schools achieve equality of education access and opportunity in order that more people enjoy the benefits of a worthy higher education. There is no doubt, too, that enhancing the quality of our educational system re-dounds to the general good . . . . [I]t is a common good that should be extended to as wide a range of individuals from as broad a range of socio-economic backgrounds as possible. It is with this in mind that the Overlap Agreement should be submitted to the rule of reason scrutiny under the Sherman Act.\(^6\)

The parties eventually settled.\(^6\) Under the terms of the settlement, MIT and other schools were allowed to engage in Overlap-type behavior, including pooling of student information.\(^6\) Specifically, they were allowed to agree to deny merit aid and to agree to use common principles to determine the amount of aid, but discussions about individual students’ financial aid were not allowed.\(^6\) Audits to detect schools that deviate significantly from agreed-upon common principles for awarding aid are allowed.\(^6\) Since the demise of Overlap, there have been several statutes proposed in Congress to exempt from Sherman Act scrutiny discussions between universities regarding the process and substance of financial aid.\(^6\)

ECONOMIC IMPLICATIONS OF UNITED STATES V. BROWN UNIVERSITY

The primary focus of economic inquiry in modern antitrust law is to deter-

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59. Id. at 678-79.
60. Id. at 675 n.10.
61. Id. at 678.
63. Id.
64. Id.
65. Id.
66. In light of the disbanding of Overlap and the adverse social consequences thereof, Congress amended the Sherman Act with the Improving America’s Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified as amended at 15 U.S.C. § 1 (1994)). This amendment granted a limited antitrust exemption that allows institutions of higher education at which students are admitted on a need-blind basis to agree: (1) to provide aid on the basis of need only; (2) to use common principles of need analysis; (3) to use a common aid application; and (4) to exchange students’ financial information through a third party form. 15 U.S.C. § 568. But the institutions are not permitted to agree on the amount of any prospective financial aid award to any specific individual; this amendment did not alter the Overlap settlement agreement. Since then, this exemption was recently renewed as the Need Based Education Act of 2001, Pub. L. No. 107-72, 115 Stat. 648 (codified as amended at 15 U.S.C. § 1 (2001)).
mine whether suspect behavior injures competition. To some economists, competition is defined very narrowly and its sole purpose is to enhance efficiency. If the Overlap process left both the schools' revenues and class sizes unchanged, and if it also prohibited merit aid at those schools, then Overlap likely transferred to needy students some income that otherwise would have gone to meritorious non-needy students. Such Overlap conduct also likely resulted in different allocation of students to schools than otherwise would have occurred; that is, a larger number of needy students attended the Overlap schools than had Overlap not been in place.

From this perspective, there is no necessary inefficiency generated by Overlap; instead, its major effect is better characterized as a mechanism of income redistribution. The Government argued that there was a class of consumers harmed by the Overlap conduct, namely, meritorious high-income students. But if Overlap primarily redistributed income, then for every winner, there was an equal loser. In such a case, there is no necessary efficiency loss from income transfers.

The general hostility most economists have toward cooperative price-setting in the profit-maximizing sector should not lead to automatic condemnation of a practice focused primarily on equity concerns, with few (if any) efficiency consequences, not to mention that such a policy would be all but un

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68. See generally Carlton et al., supra note 67.

69. See Carlton et al., supra note 67, at 144. The schools claimed that Overlap allowed them to obtain a diverse group of students. As a general matter, it is unclear how to determine whether one mix of students is more efficient than an alternative mix because there is no unambiguous agreement on what "output" a school should be trying to achieve. As a theoretical matter, it is possible to justify the Overlap conduct on the basis of efficiency in matching. Suppose that students care about the quality of their classmates. Then, given the quality attributes of each person, one can ask whether competition can achieve the optimal allocation of students to schools. This problem is similar to one posed by Tjalling C. Koopmans & Martin Beckmann, Assignment Problems and Location of Economic Activities, 25 ECONOMETRICA 53 (1957), and studied by ALVIN E. ROTH AND MARILDA A. OLIVEIRA SOTOMAYER, TWO-SIDED MATCHING: A STUDY IN GAME THEORETIC MODELING AND ANALYSIS (1990). See also LESTER G. TELSER, ECONOMIC THEORY OF THE CORE (1978). Each of these studies shows that unconstrained competition cannot always achieve an optimal allocation.

70. If the Government were correct and the Overlap conduct had raised the schools' revenues, then the cooperative action would seem similar to a cartel. Even here, though, the not-for-profit schools could argue that they differ from a profit-maximizing cartel because any increased revenues that they receive are more likely to be spent on desirable causes. Except perhaps in unusual cases, the enforcement problem associated with determining whether the increased revenues were spent productively are so great that it would not be desirable to allow such a defense, even for not-for-profit institutions. Moreover, the danger of the cooperative agreement causing inefficiency increases as the average net tuition per student rises.

71. See Carlton et al., supra note 67, at 135.
thinkable (at least, for the motives claimed by MIT) in the profit-maximizing sector.\textsuperscript{72} No cartel of profit-maximizing firms would cooperate \textit{solely} to redistribute income among its customers.\textsuperscript{73}

Further, if one articulates goals for the antitrust laws beyond economic efficiency, many other practices could be condemned. For example, if one assumes that the antitrust laws guarantee unrestricted competition under all circumstances, then by assumption the Overlap conduct violates this goal. But that standard would condemn many practices generally viewed as procompetitive. For example, policies that reduce information costs or that allow a manufacturer to use vertical restrictions on distributors to encourage the provision of services often are considered procompetitive. Yet in each case some individuals may be harmed. Consumers with low search costs or consumers with no need for the particular service would benefit if the antitrust laws forbade such policies, even if, overall, consumers gain from these policies. Thus, any sensible antitrust policy must involve some balancing of harms and benefits to consumers.\textsuperscript{74}

Was the Overlap conduct necessary to meet MIT’s and the other schools’ social goals? In particular, does assisting needy students require collective action, or would it be possible for each school to meet the same goal by unilaterally implementing its own financial aid policy?

MIT presented expert testimony that, without Overlap, competition for star students would break out in the future and financial aid to needy students would be reduced.\textsuperscript{75} The adverse consequences of such an effect on the needy could be especially pronounced in light of recent trends in financing higher education.\textsuperscript{76} Federal support for higher education declined substantially since its high point in the 1970s. For example, real federal aid (grants plus loans) per enrolled undergraduate student dropped by about fifteen percent between 1975 and 1988.\textsuperscript{77} Real federal grants per enrolled undergraduate student fell over the same time period.\textsuperscript{78} Compounding the problem, the real cost of a college education increased by almost fifty percent during the same period.\textsuperscript{79} The com-
bined effect of reductions in total aid and increases in tuition cause the real price paid per student to rise by at least fifty percent between 1975 and 1988.80

To offset the decline in federal grants and aid, states and schools have expanded their grant and aid awards, but not all of the increase goes to needy students. Data provided in a study published by Dennis Carlton, Gustavo Bamberger, and Roy Epstein show that merit aid has generally become increasingly important as a fraction of institutional aid.81 In other words, as schools grant more aid, they grant it increasingly to meritorious non-needy students. In recent years, several schools (including Brown University and Smith College, former participants in Overlap) have admitted that they can no longer afford to maintain purely “need-blind” admissions policies.82

The procompetitive effects of Overlap are difficult to directly assess. Whether or not, and to what extent, Overlap succeeded in increasing access to needy students depends on variables that are potentially difficult to quantify. Carlton, Bamberger, and Epstein concede that the data necessary to definitely assess Overlap’s effectiveness was not available based on evidence admitted at trial.83 To compensate, they propose that the average entering percentage of students of color (African-American and Hispanic students) is a proxy variable that is likely related to income, which should provide some indication of Overlap’s effectiveness.84

Studies on this data have found evidence that Overlap increased black enrollment by a statistically significant amount.85 The magnitude indicates that for the typical school during the period from 1984 to 1990, Overlap increased black enrollment to about five percent of the student body from the about three percent that would otherwise be predicted.86 These results provide indirect evidence to support MIT’s claim that Overlap did achieve its social goal.

APPRAISING APPELLANT MIT’S ARGUMENT

Unlike most defendants in a price-fixing case, MIT did not dispute that it engaged in the challenged conduct; at trial, MIT readily admitted that it met with the other Overlap schools and discussed financial aid packages for individual students.87 However, MIT vigorously disputed the Government’s characterization of its conduct as an attempt to raise net tuition revenues.

80. Id.
81. Id.
83. See Carlton et al., supra note 67, at 143.
84. Id.
85. See id. at 144.
86. Id.
87. MIT Brief, supra note 14, at 9.
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MIT had several responses to the Government. First, MIT argued that, as a threshold matter, the challenged conduct did not constitute “trade or commerce” and thus was not proscribed by the Sherman Act. MIT argued that it and the other Overlap schools “engaged in Overlap to advance educational access and socioeconomic diversity and to maximize the effective use of private charitable funds. In so doing, they neither sought nor obtained any financial or commercial benefit,” and therefore that MIT’s conduct should not be subject to the antitrust laws. 88 Furthermore, MIT argued that because the actual cost of an MIT undergraduate education exceeded the total revenue received from every student (even those receiving no financial aid), all grants of financial aid constituted a form of charity, not a reduction from “list price.” Thus, according to MIT, the conduct at issue “involved the coordinated distribution of private, charitable funds to qualified but needy students to help them defray the expenses of an education at MIT.” 89

MIT argued that the legislative history of the Sherman Act showed that it was not intended to apply to the charitable activities of not-for-profit educational institutions. For example, they argued, Senator Sherman contended that there was no need to amend his proposed act to exempt temperance unions when proposing the statute that bears his name in 1890. 90

Second, MIT argued that if the court decided that the Sherman Act did apply to the challenged conduct, that conduct should not be condemned as a per se violation, but instead should be analyzed under the Rule of Reason. MIT argued that the per se rule should be applied only to types of conduct where “a court can look back upon unambiguous judicial experience demonstrating that the challenged practice is a ‘naked restraint of trade with no purpose except stifling of competition.’” 91

MIT argued that the court did not have analogous judicial experience with the type of challenged conduct because the firms acting collectively in this case were not-for-profit institutions, whereas most antitrust cases involve for-profit firms. 92 According to MIT, the court should not condemn conduct practiced by not-for-profits simply because that same conduct when practiced by for-profit firms would harm competition. 93 That is, even though the court’s experience shows that when profit-maximizing firms meet to set prices, they almost always intend to increase prices and profits (and thereby harm consumers). But the same is not necessarily true when not-for-profit schools meet to set financial aid policy collectively.

88. Id. at 2.
89. Id.
90. Id. at 43.
91. Id. at 16 (quoting Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289 (1985)).
93. Id.
In particular, MIT argued that the Government’s claim—that net tuition revenues inevitably would increase as a consequence of the collective action—was wrong as a matter of economic theory. Even if the Government’s argument generally were true for profit-maximizing firms, it was not true for not-for-profit firms. Because not-for-profit firms maximize a multi-attribute objective function, it simply is not possible to predict inevitable consequences from cooperative price setting. In fact, the university as a non-profit entity seeks and employs many objectives that are contrary to revenue-maximizing goals or behavior. For example, as a matter of economic theory, the cooperative efforts of the Overlap schools could indeed be designed to conserve their financial aid with the ultimate goal of enabling greater numbers of needy students to attend their schools.

Third, MIT argued that the challenged conduct was justified on “social welfare” grounds that the Government officially endorses, as its need-based allocations were consistent with federal guidelines. In particular, MIT argued that the challenged conduct was needed to conserve aid for the truly needy, and claimed that the Overlap conduct helped the Overlap schools achieve their goals of need-blind admissions with a guarantee of full aid if admitted. Moreover, the schools believed that their policies were entirely consistent with the federal government’s financial aid policy. With minor exceptions, federal money can be given only to needy students. A meritorious high-income (but non-needy) student generally cannot receive any federal aid. Moreover, students receiving any federal aid at all generally cannot receive supplemental awards from a school beyond demonstrated financial need.

Finally, MIT argued that if the challenged conduct were evaluated under the Rule of Reason, the empirical evidence showed that the Overlap agreements produced no antitrust harm. MIT argued that the economic rationale for a per se rule against collective price setting is that price typically rises as a result of collective action. Because this underlying rationale does not generally apply to not-for-profit schools, MIT claimed that the only way to determine whether the collective agreements on aid raised prices was to study the actual results of the agreements. MIT’s expert economist performed such a study and found no statistically significant basis for the claim that the collective action raised average net tuition per student at the Overlap schools. Thus, MIT argued that the statistical evidence did not support the Government’s hypothe-
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sis that the collective action inevitably must have increased the Overlap schools' net tuition revenues.101

FROM ANTITRUST ERROR TO PATH-BREAKING INSIGHT

Representing the Philadelphia School District in support of appellant MIT, Judge Higginbotham argued before the Third Circuit from an amicus brief that made three basic points in its argument section: (1) that the district court had erred in limiting its rule-of-reason analysis to commercial standards of competition; (2) that Overlap had promoted competition among MIT and Ivy League Schools; and (3) that the district court’s conclusion that Overlap had suppressed competition based on price was unsupported by the evidence.102

The Third Circuit ultimately agreed with Judge Higginbotham's second and third points. However the court found his first point, the argument that university allocation of scholarship money is substantially "noncommercial"—enough so to categorically remove it from review of the Sherman Act—to be erroneous.103 This same argument, an essential part of MIT’s defense, was ultimately rejected by the Third Circuit.104 In later conversations with Judge Higginbotham, this author pressed the former Commissioner of the Federal Trade Commission105 on why such a seemingly untenable argument from the perspective of modern antitrust doctrine would serve as a major premise in the strategy of the case.106 Always the litigator, the Judge was quick to cite Judge Weis' dissenting opinion, which supported his and MIT’s contention that philanthropic activity by non-profit institutions was never intended to be subject to Sherman Act scrutiny.107 Furthermore, he reminded the author that the Supreme Court might have sided with his position had the case ever gone up on appeal. He assured me that MIT’s determined commitment to socioeconomic diversity

101. Id. In the typical alleged price-fixing conspiracy, the conspiring firms are accused of raised price and restricting output. See, e.g., Standard Oil Co. v. United States, 221 U.S. 1, 52 (1911) (citing three evils leading to public outcry against monopolies, including the power to fix the price, the power to place limitations on production, and the danger of quality deterioration); United States v. Addyston Pipe & Steel Co., 175 U.S. 211 (6th Cir. 1899) (involving a typical price-fixing conspiracy as described).

102. Amicus Brief, supra note 20, at 22-34.

103. United States v. Brown Univ., 5 F.3d 658, 667-668 (3d Cir. 1993). Judge Higginbotham had argued that "[c]ontrary to the District Court 's decision and Order, the student selection and admissions process is not a matter of dollars and cents [i.e. noncommercial]." Amicus Brief, supra note 20, at 25 (emphasis in original). This argument suggests that money is irrelevant to the student's matriculation decision, which is highly counterintuitive. The correct issue should have been whether or not Overlap produced commercial or competitive benefits that outweighed its restraints on competition.

104. Brown Univ., 5 F.3d at 668.


107. See infra text accompanying note 137.
as an essential component of its educational quality and mission would have lead it to appeal an adverse decision “all the way” to the Supreme Court had no satisfactory settlement occurred.108

A cursory reading of non-profit antitrust cases supports the Third Circuit’s refusal to accept the Judge’s conclusion that universities’ financial aid grants should be categorically immune from Sherman Act scrutiny. In Marjorie Webster Junior College v. Middle States Association,109 the D.C. Circuit ruled that a higher education accrediting organization was not violating the Sherman Act by refusing to grant an applicant school accreditation because of the applicant’s proprietary status. Here the fact that the non-profit accrediting agency followed a longstanding policy designed for the non-commercial purpose of promoting the “liberal arts” led the court to conclude that the Sherman Act did not apply.110

In Marjorie Webster, there was no commercial purpose.111 The court held that the refusal to accredit “absent an intent or purpose to affect the commercial aspects of the profession” did not constitute commerce.112 Constructing a formalist notion of what constitutes “commerce” is invited as a litigation strategy to avoid Sherman Act scrutiny. However, non-profit organizations are not entitled to class exemptions from the Sherman Act, and it would be bad public policy to categorically grant them such immense protected economic power based primarily on their organizational structure. The correct test is whether the effect of the restraint under the Rule of Reason inhibits competition more than advancing it.113 Instead, Judge Higginbotham and MIT were seduced into a Marjorie Webster College defense based on the semantics of “commerciality.”

The Third Circuit was non-receptive, finding that MIT and the Ivies were paid by students (constituting commercial gain) through tuition, while Middle States Accrediting, their analogue in Marjorie Webster, received no remuneration.114 The Third Circuit opinion found MIT’s financial aid process to be the essence of commercial activity, finding that charging tuition is the very “opposite side of the coin” of non-commercial activity.115 The Judge’s tremendous insights into both the institutional value of diversity for universities and its pro-competitive market benefits was a sufficient basis to sustain MIT’s defense un-

108. In conversations with MIT’s lead counsel, Thane Scott, the author was assured that MIT President Charles M. Vest was committed to winning the case both to vindicate MIT and to publicly reaffirm its commitment to socioeconomic diversity. Conversations with Thane Scott, Partner, Palmer & Dodge, LLP, Boston, Mass. (Autumn, 1998).
110. Id.
111. Id.
112. Id. at 655.
115. Id. at 667 (stating “[w]e can conceive of fewer aspects of higher education that are more commercial than the price charged to students.”).
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der the Rule of Reason. Cases like *NCAA v. Board of Regents of the University of Oklahoma* \(^{116}\) and *Federal Trade Commission v. Indiana Federation of Dentists*, \(^{117}\) along with *Goldfarb v. Virginia State Bar*, \(^{118}\) all suggested that categorical per se exemptions for universities and professions acting for a purported public purpose were precluded under the Sherman Act. Therefore, as in *United States v. Brown University*, the court would have to decide liability under the Rule of Reason. A modern efficiency-based rationale involving market exchange metaphors of financial aid grants in exchange for tuition revenues emphasizes the commercial nature of the interaction most relevant to the Third Circuit.

Therefore, the Judge's argument regarding the original intent of the Sherman Act, as echoed in Judge Weis's dissent in *United States v. Brown University*, was both overly formalist and oddly naïve in light of the grip economic theory has on antitrust doctrine. The "commodification" of education and educational processes gave immediate currency to those "discounting" scenarios alleging that Ivy League scholarship allocation was strategic marketing rather than pure philanthropy. In the absence of a congressional exemption, all interstate commerce affecting economic competition is subject to Sherman Act scrutiny. \(^{119}\)

In sum, the two successful prongs of Judge Higginbotham's amicus argument correspond to the Third Circuit's affirming that Overlap had not produced any hallmark effects generally attributable to anticompetitive behavior. \(^{120}\) In fact, as MIT and Judge Higginbotham argued, Overlap increased economic competition by increasing consumer choice and promoted educational opportunity by providing greater access to critical resources for the economically disadvantaged. \(^{121}\) The resulting increase in racial and socioeconomic diversity improved the educational experience at MIT, better preparing the nation's future leaders for the challenges of an increasingly diverse and complex world. \(^{122}\)

Therefore, consistent with the intent of the Sherman Act, Overlap in fact helped promote socioeconomic diversity and thus the "product quality" of MIT and the Ivy League. Its demise threatened the quality of those institutions. Indeed, Judge Higginbotham argued that the importance of racial diversity in student bodies has been recognized in analogous contexts by the Supreme

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\(^{116}\) 468 U.S. 85, 113 (1984) (finding no per se liability for educational non-profit collegiate athletic association that violated Sherman Act because of special role of universities in providing product).

\(^{117}\) 476 U.S. 447 (1986) (finding no per se violation with regard to the professional restraint, but requiring no Rule of Reason inquiry).

\(^{118}\) 421 U.S. 773 (1975) (finding no per se violation for professional licensing associations' restraints, and counseling against applying traditional commercial antitrust standards outside of business context, noting public service features of professions).


\(^{120}\) Amicus Brief, *supra* note 20, at 29, 31.

\(^{121}\) See *supra* notes 83-84 and accompanying text.

MIT also stressed that both Justices White and Rehnquist recognized the propriety of considering non-economic values in evaluating the conduct of non-profit educational institutions under the Sherman Act, echoing a longstanding principle under which courts have given wide latitude to educational institutions in light of their important and unique position in our society. Further, in his concurring opinion in *Sweezy v. New Hampshire*, Justice Frankfurter summarized the “four essential freedoms” of colleges and universities:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail the four essential freedoms of a university—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.126

The freedom to determine on academic grounds who may be admitted to study is illusory if schools are denied the practical ability to develop a system to eliminate ability to pay as a factor the admissions office must consider.

Recognizing the importance of academic freedom, the Supreme Court has also acknowledged that academic decisions clearly connected to the educational mission of an institution embody constitutional values protected under the First Amendment:

> [The goal of] attaining ... a diverse student body ... clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.127

In addition to academic freedom, the right of free association is encompassed within First Amendment freedoms as well.128

By promoting socioeconomic diversity through merit-based admissions and need-based aid, the Judge argued that Overlap directly affected who may be allowed to study at MIT.129 The principles of academic freedom endorsed in *Bakke* extend also to universities, which make their own judgments as to economic mechanisms that enable them to better achieve their educational objectives in selecting a student body. It is no accident that *Bakke* also enshrines the constitutionalizing of racial and socioeconomic diversity as compelling state interests in the education context. The fundamental values underlying the challenged agreement are values of equality of educational access and opportunity,
values which have been developed, advanced, and embraced by the courts and gain their legitimacy as essential features of university education promoting the public good.

In his amicus brief, Judge Higginbotham argued that the lower court erred in its ruling that these considerations were entitled to no weight whatsoever in assessing the reasonableness of Overlap. The Third Circuit ultimately vindicated the Judge on this point. However, the Third Circuit correctly rejected the Judge’s contention (like MIT’s) that the process of granting financial aid coordinated by Overlap members was a “charity” and thereby should be categorically exempt from Sherman Act scrutiny. While it is true that from a historical perspective, Senator Sherman (the primary architect of the Sherman Act) never intended his legislation to apply to “moral or educational associations,” the Judge knew of and even argued in his amicus brief the history of important antitrust cases involving non-profits under the Sherman Act. Given the trend of modern cases involving the coordinated horizontal restraints of non-profit institutions, the Judge’s insistence on a formal, categorical exemption from Sherman Act liability led to predictable error.

In our conversations, Judge Higginbotham defended his formalistic perspective by citing his colleague Judge Weis’s dissenting opinion in the case:

Practices that might be illegal in the commercial area do not transform a charity activity into a business one . . . .

The issue is not whether MIT is a non-profit entity, but rather whether the challenged activity is commercial or not . . . .

It does seem ironic, however, that the Sherman Act, intended to prevent plundering by the “robber barons,” is being advanced as a means to punish, not predations, but philanthropy . . . . This is hardly the public good that Congress intended.

Indeed, the negative effects of the demise of Overlap in economic terms are reflected (if indirectly) in stories in the popular press, such as the following:

Under the current free market, schools now use more and more aid to attract top-notch, wealthier students with merit awards or tuition discounts, leaving less aid available for needier students. And colleges are paying for the discounts they offer

130. Id. (arguing that “the full range of factors” should be taken into account).
131. The Third Circuit concluded that the district court erred by not fully investigating the pro-competitive reasons given by MIT for its participation in Overlap; as a result, the court reversed and remanded the case with instructions to conduct a full Rule of Reason analysis. United States v. Brown Univ., 5 F.3d 658, 678 (3d Cir. 1993).
132. Id. at 668.
133. Amicus Brief, supra note 20, at 22-26.
134. See, e.g., Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 113 (1984) (applying an abbreviated Rule of Reason analysis to strike down collegiate conference rules restricting competition between colleges for television broadcasts, where the effect of the purportedly non-commercial restrictions was to reduce output and set minimum prices).
136. Id.
137. Id. at 685.
the more attractive students by targeting other groups of applicants to pay full fare, which now reaches beyond $30,000 a year at many schools...

Those who get hurt, administrators say, are the poorer or middle-income students who do not have some special talent to set them apart.

"Everyone agrees that there's got to be a better way; this unbridled, winner-take-all effort is extremely expensive, not only for the institutions, but for the consumer, whose interest the federal government was supposedly aiming at," said Joseph Russo, director of financial aid at the University of Notre Dame. "Where do these price discounts get funded? They get funded by tuition. Who pays tuition? People pay tuition, and they're borrowing like never before."

But not all commentators agree that MIT's procompetitive arguments justify its participation in a collusive agreement that restrains universities from converting need-based awards into merit-based awards. These types of restrictions (including the Ivy Overlap agreement) at least theoretically constitute a "restraint on trade" by disabling students from successfully seeking bids within the group for higher awards.

The traditional view of antitrust law is to discourage the collective use of private power to effect commerce. And to some commentators the provision of financial aid is commerce because it affects the "price" of tuition a recipient has to pay. In fact, this is exactly what the Third Circuit found in United States v. Brown University. The Judge's formalistic insistence on the characterization of Overlap awards as pure philanthropy in order to exempt the process from Sherman Act consideration was erroneous because it failed to recognize the extent to which contemporary economic paradigms set the scope of the Sherman Act. However, this error was not fatal to the Judge or MIT's position; although Overlap implicated commerce and the Sherman Act applied, the Third Circuit ruled the fatal per se standard was not applicable. Given the unique

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139. See, e.g., Standard Oil Co. v. United States, 221 U.S. 1 (1911).
140. Despite MIT's Third Circuit victory, the majority of academic commentary suggests the Overlap agreement was in fact a price-fixing cartel, characterized by universities that both had market power and effectively price discriminated. Two esteemed antitrust scholars who hold this view are Robert Lande and Peter Carstensen. See Robert H. Lande & Howard P. Marvel, Three Types of Collusion: Fixing Prices, Rivals, and Rules, 2000 WISC. L. REV. 941, 983 (discussing MIT and the Ivies as collusive price discriminators); P. Carstensen, Private Colleges Have No Special Right to Fix Prices or to Restrict Competition, CHRON. OF HIGHER EDUC., Dec. 6, 1998, at B1-B3. The most extensive economic analysis of the case disagrees, though. See Carlton et al., supra note 67.
141. 5 F.3d at 666.
142. In Brown University, the court explains that the per se rule is designed to condemn plainly "anti-competitive" agreements or practices. Id. at 670. Per se rules apply to price fixing, joint refusals to deal, territorial and output restrictions, etc. Classic cases were commercial and industrial conspiracies like United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897) (examining an agreement fixing prices in the railroad industry), Adyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899) (finding price-fixing non-ancillary to a reasonable restraint acceptable at common law and with an improper commercial purpose), United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (rejecting a reasonable price defense in a price-fixing case dealing with vitreous potteries), and United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (finding an indirect price-fixing scheme when action in concert raised prices without direct agreement on price). The modern per se case that the Government claimed was controlling in the MIT case
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nature of the market for non-profit enterprise in the context of higher education, MIT’s procompetitive justifications for participating in Overlap could immunize the practice under the Rule of Reason.\textsuperscript{143} It was the district court’s failure to adequately consider MIT’s procompetitive justifications that was the basis for reversal on appeal before the Third Circuit.\textsuperscript{144}

Professor Peter Carstensen has been particularly skeptical of treating private colleges differently from other market producers:

The plain truth is that private colleges compete for students in the same ways and for the same reasons that producers of other goods and services compete for customers. Selling a college education is a business, and competition for the most coveted students grow keener everyday.

Consumer perceptions of the quality and value of an institution are important, but so is price. Any applicant or parent makes a trade-off between the perceived advantages of a high-prestige, brand-name college and the institution’s price. Low-interest loans, scholarships, and grants are basically discounts off that price. Thus, the strategy behind colleges’ financial aid is no different from the rebates and low-cost financing that automobile manufacturers offer to make their products more attractive.\textsuperscript{145}

The market metaphor certainly has some relevance for the provision of college education. However, Carstensen has mistakenly overextended the market metaphor to conditions for which it is inapplicable. Here in the context of need-based grants regulated by Overlap, unlike a normal buyer-seller market situation, “discounting” is irrelevant because the allocation of financial aid is based solely on the ability of the student to pay and had no proven effect on the overall level of tuition charged.\textsuperscript{146} The rule that emerges from antitrust cases like Catalano, Inc. v. Target Sales, Inc.\textsuperscript{147} suggests that the collusive use of market power to restrain the competitive determination of price by charging different amounts to purchasers, or “price discrimination,” is a per se violation of the Sherman Act.\textsuperscript{148} However, such a rule is not relevant to the decision to

\textsuperscript{143} See Carlton et al., supra note 67, at 145 (explaining how the economic effects of Overlap distinguish the MIT case from the chain of per se and Rule of Reason cases that preceded it).
\textsuperscript{144} United States v. Brown Univ., 5 F.3d 658, 660 (3d Cir. 1993).
\textsuperscript{145} Peter Carstensen, Colleges and Student Aid: Collusion or Competition? CHORN. REV., Aug. 10, 2001, at 24.
\textsuperscript{146} Brown Univ., 5 F.3d at 674 (noting that “the district court expressed doubt as to whether price effects could be determined to a reasonable degree of economic certainty”).
\textsuperscript{147} 446 U.S. 643 (1980).
\textsuperscript{148} Catalano held that where sellers with market power collusively eliminated discounts off the market price, they committed a per se violation of the Sherman Act. Id. at 648.
jointly agree to allocate financial aid based on objective proof of "inability to pay," which is exactly how need-based scholarships are determined. That is, facts adduced in the *Brown University* litigation suggest that Ivy Overlap was revenue-neutral, and had no discernable effect on tuition (price) charged to the entering class.\(^{149}\)

Finally, this purported analogy to commercial discounts ignores the most fundamental principles of the commercial activities to which anyone would analogize financial aid. Almost any basic microeconomics or business textbook will instruct the reader that discounts should never be made available unless they increase volume and enhance total revenue.\(^{150}\) A firm "discriminates" in price because it earns higher profits by doing so.\(^ {151}\) Business texts teach managers that it makes no commercial sense to give a customer a discount if the same product or service can be sold at full price to another customer.\(^ {152}\) Standard economic analysis also dictates that a profit-maximizing firm must never sell a product or service below the cost of producing it (the "long-run marginal cost"); instead, each buyer must pay enough to contribute to overhead.\(^ {153}\) Many of these essential market requirements, however, are not met by the non-profit universities’ collection of tuition revenues and fees. Certainly, costs are not covered by distributing financial aid. Indeed, in this context, Overlap-limited financial aid failed to resemble an impermissible commercial discount, since MIT and the Ivies: did not hold significant market power (as evidenced by the expanding, not contracting, supply over the lifespan of Overlap, in terms of the number of students attending); did not lack viable substitutes (Stanford, Rice, Caltech, Berkeley, Virginia, Chicago, Michigan, Duke?); did not have increased revenues (the court found revenue neutrality); and failed to effectively price-discriminate against classes of buyers (since the increases in need-based scholarships awarded offset increased revenues from higher tuition charged).\(^ {154}\)

Discounting is thus irrelevant to need-based allocative decisionmaking. In fact, in the context of non-profit institutions of higher education, we should be cautious about analogies made to profit-maximizing models. Because the market for higher education is replete with market failure (e.g. asymmetric information and externalities), it is potentially harmful to fashion policy based on such inappropriate analogies. The modern university as a non-profit institution strives to maximize several variables, including: the provision of quality graduate and undergraduate education; the general welfare of students; the general welfare of faculty and administrators; prestige; racial and socioeconomic diver-


\(^{150}\) Id.

\(^{151}\) ROGER BLAIR & DAVID KASERMAN, ANTITRUST ECONOMICS 261 (1985).

\(^{152}\) Id.

\(^{153}\) Id.

\(^{154}\) See Carlton et al., supra note 67, at 136.
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Universities establish rules and practices promoting institutional values and integrity that are highly inefficient from a purely profit-maximizing perspective. For example, despite the high market demand for admission by an objectively wealthy and qualified group of applicants, MIT will not charge applicants higher tuition based on that excess demand, nor will it sell seats in the entering class or raise its tuition to meet its marginal costs. All Overlap participants operate at a substantial financial loss, which is further evidence of the market failure phenomena that pervades the process of education as non-profit enterprise. MIT and most other Ivies grant admissions decisions on a need-blind basis, refusing to consider the applicant’s ability to pay. Therefore, the evidence does not support the contention that Overlap behavior by non-profit institutions approximated the economic harms and inefficiencies of a well-functioning profit-maximizing cartel.

The rule-of-reason process would require the economic and institutional value of socioeconomic diversity in the context of the modern university to be balanced against perceived adverse effects of market restraints on competitive moves by scholarship recipients in appraising MIT’s procompetitive rationale for Overlap. The controlling test of legality under the Rule of Reason is whether a challenged practice is unreasonably restrictive of competitive conditions. I argue that the most significant part of Judge Higginbotham’s perspective on this case is his recognition that the alleged restraint on competition—the jointly imposed limitation on students’ ability to enter bidding processes within the Overlap group—was merely an ancillary regulatory restraint. By preventing the perverse effects of a “bidding war” benefiting wealthier students who were “objectively” more meritorious than economically disadvantaged students or students from racial minority groups, Overlap prevented the exhaustion of limited financial-aid budgets, allowing need-based

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155. See MIT Brief, supra note 14, at 4. The economic theory of market failure recognizes that education is a public good incapable of being commodified in terms of quality or return on investment; therefore, non-profits step in to provide what the for-profit sector would undervalue and under-supply. See, e.g., HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 190 (1996) (discussing private colleges).

156. See MIT Brief, supra note 14, at 5.

157. Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).

158. The rule of Addyston Pipe & Steel v. United States, 175 U.S. 211 (1899), was that restraints of trade that were merely ancillary to a legitimate purpose were reasonable and would be allowed. Certainly, the admissions process involved in Ivy Overlap implicated commerce, but it was in fact ancillary to a broader, competition-enhancing purpose, which provided a potential justification favoring Judge Higginbotham’s pro-MIT argument. Ultimately, the decision by the Third Circuit requiring a full-blown Rule of Reason analysis was consistent with this view.

159. While popular, traditional measures of “merit” are often flawed in that they correlate disturbingly both with race and income. Several authors have found evidence of the structural economic and cultural inequalities associated with the Scholastic Aptitude Test, for example. See NICHOLAS LEMANN, THE BIG TEST 648 (1999). See also Explaining Black-White Gap in SAT Scores, J. OF BLACKS IN HIGHER EDUC., Autumn, 2000, at 87.
scholarship awards to be targeted to promote the university's goals of racial and socioeconomic diversity. In short, while Overlap decisionmaking was commercial in effect,\textsuperscript{160} it was procompetitive in purpose because of three effects: (1) Overlap improved the educational quality of each institution by assuring valuable socioeconomic diversity that elevated the quality of the learning experience; (2) Overlap promoted consumer choice by expanding the range of individuals who could take advantage of an Overlap institution's education; and (3) Overlap enhanced each institution's competitive position by allowing them to compete with each other on the bases of other educational objectives. Thus, even though Judge Higginbotham was wrong to argue that Overlap should be exempted per se from the Sherman Act, his intuitions were correct since a full rule-of-reason analysis confirms that diversity is a procompetitive value.

**JUDGE HIGGINBOTHAM’S PLURALISTIC VISION: DIVERSITY VALUE AND CONTEMPORARY CHALLENGES TO EDUCATIONAL EQUALITY**

To the very end of his life, Judge Higginbotham was a tireless warrior for the cause of racial and socioeconomic diversity in higher education.\textsuperscript{161} He remained a staunch defender of race-conscious affirmative action programs consistent with the diversity rationale of *Bakke*\textsuperscript{162} and the principle of desegregation expressed in *Brown*.\textsuperscript{163} In his amicus argument on behalf of the parties supporting MIT in *United States v. Brown University*, the Judge detailed how Ivy Overlap promoted socioeconomic diversity, fostered competition, and helped prevent the economic re-segregation of our nation's most prestigious universities.\textsuperscript{164}

The Judge utilized exhaustive statistical research and data to demonstrate the positive effects of Overlap and the predictable socially destructive effects of its demise due to misguided antitrust prosecution.\textsuperscript{165} The Judge argued that without the protections of the Overlap program, bidding on the most meritorious applicants, regardless of need, would result in additional awards, above need, being given in order to entice applicants form one school to another.\textsuperscript{166}

\textsuperscript{160} MIT Brief, *supra* note 14, at 47.
\textsuperscript{161} See *supra* text accompanying note 8.
\textsuperscript{164} Brief of the Philadelphia School District, *supra* note 20, at 6: "[If the Overlap injunction remains,] MIT and the Ivy Schools will revert to economically segregated havens, demarcated by income and race—hardly a competitive advance from the point of view of student 'consumers'” (citation omitted).
\textsuperscript{165} The Judge's data on the effectiveness of Overlap in promoting racial diversity is detailed in his memo to Attorney General Janet Reno, which requested that the Justice Department drop the case after MIT's victory before the Third Circuit. Memorandum to the Attorney General, *supra* note 23, at 7.
\textsuperscript{166} As the *New York Times* reported: "Student shopping for the best aid packages has been common for years among major public universities and the so-called public Ivies, like the University of Michigan, the University of California at Berkeley and the University of Texas at Austin." William Celia, *Ivy League Finds Itself Locked in Bidding War for Prospective Students*, N.Y. TIMES, Sept. 22, 1993, at B11.

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Awards above need to individual students would in turn result in the depletion of the limited financial aid resources\textsuperscript{167} available to the schools for the benefit of a smaller number of needy applicants.\textsuperscript{168} The Judge anticipated, and his data suggested, that members of racial minority groups and the economically disadvantaged would primarily be harmed by the demise of Overlap; they would be the primary victims of "bidding wars" triggered by the reintroduction of merit-based scholarships.\textsuperscript{169} An economic re-segregation of the Ivy League campuses was a likely result. While the effect would not immediately return the campuses to the token racial representation figures of pre-\textit{Brown} years, its impact on desegregation progress would be devastating nonetheless.\textsuperscript{170}

With the advanced perspective of hindsight, it appears that many of the Judge's concerns about the future of racial and socioeconomic diversity in the absence of Overlap have been borne out. Since the demise of Ivy Overlap in the early 1990s, there has been a significant drop in the average number of students of color (especially African-Americans) who have enrolled at the previously participating institutions.\textsuperscript{171} There have been movements by several of the wealthiest institutions to increase their overall financial aid pool in response to Overlap's demise. However, it is not clear whether these moves will only serve to exacerbate the overall negative effects of the current bidding wars on socioeconomic diversity.\textsuperscript{172} Furthermore, a recent study by Harvard educational policy and economics specialist Caroline Hoxby examines the effect of the repeal of Overlap, coming to conclusions that strongly suggest that Judge Higginbotham's arguments about the merits of Overlap were profoundly correct.\textsuperscript{173} This study finds

\textsuperscript{167}. In \textit{United States v. Brown Univ.}, the court acknowledged that MIT operated at a loss. 5 F.3d 658, 660 (3d Cir. 1993).

\textsuperscript{168}. "[I]f one student gets more aid, then that money has to come from someplace else. And frequently it comes from awards that you can make to other students." Celis, supra note 152 (quoting Robert Durkee, Vice President for Public Affairs at Princeton University).


\textsuperscript{170}. Higginbotham, Memorandum to the Attorney General, supra note 23, at 9-10 ("The places intended for [talented African-American, Hispanic, and Native American students] will instead be filled by more economically qualified, but not necessarily better academically qualified, applicants, almost necessarily resulting in a less diverse student body. While MIT and the Ivy League colleges will not completely revert to the white affluent havens they were prior to the implementation of the Overlap Program, much of the progress realized will be lost.").

\textsuperscript{171}. \textit{See, e.g., Colleges and Universities Showing a Decline in Enrollments of African Americans}, J. OF BLACKS IN HIGHER EDUC., Spring 1997, at 8-11 (concluding that despite strong affirmative action pressures during the 1980s and early 1990s, the enrollment of African-Americans has dropped significantly at many of the nation's most prestigious colleges and universities). In a chart showing enrollment patterns between 1980 and 1994 (the fourth year after the disbanding of Ivy Overlap), the study shows declines of 33.8\% at Dartmouth, 28\% at Princeton, 26\% at Cornell, and 9.7\% at Brown. Id. at 8.


\textsuperscript{173}. Studies have shown that "[t]he elimination of the Overlap meeting apparently did affect financial aid at colleges that had participated . . . . Probably as a consequence, trends in Overlap colleges towards less well off, more black, more Hispanic student bodies were partially reversed. Though small, the changes will, if they continue, have a substantial effect on the colleges' student composition."
that merit considerations have implicitly begun to overshadow diversity concerns due to "bidding," and if this trend continues, the number of poor students who will be able to attend these elite schools will decrease significantly.\footnote{174}

In the last year of his distinguished life, Judge Higginbotham spoke about what he believed should be a national priority for the new millennium regarding race relations:

Although America has made substantial progress in the area of race relations, there is considerable work yet to be done. Today, the legacy of slavery still exists in the form of substantial gaps in the quality of life enjoyed by black and white citizens. . . . These gaps must be closed in order to ensure that all Americans are free to realize their potential. This will not be an easy task. Today in America, there are many people who believe that we must put individual merit ahead of efforts to promote increased access to opportunity for Americans of all races. . . . Advocates of "meritocracy" too easily dismiss the lingering legacy of disadvantage from centuries of racism and disparate treatment. For meritocratic standards to operate fairly on an individualistic basis, all individuals must have truly equal opportunities to compete. . . . The Underground Railroad of today must utilize affirmative action and other programs to create a society where all Americans are free to realize their full potential.\footnote{175}

The Judge's call for the continued utilization of affirmative action policy came at a time when its legal and political viability was threatened on several fronts. Affirmative action in education is currently under greater threat than at any time in its over thirty-year history. Judge Higginbotham, who witnessed the onset of the rollback, remained determined to fight until the very end for preserving the legacy of Brown and the constitutionalized diversity rationale justifying the use of race-based affirmative action in Bakke.\footnote{176} This determination explains why MIT's Third Circuit victory in United States v. Brown University was so important as a matter of civil rights law as well as from the perspective of antitrust policy. It explains why Judge Higginbotham would stand before the Third Circuit to argue most effectively the amicus brief on behalf of the Philadelphia School District, contributing to MIT's success.

Racial and socioeconomic diversity are at the forefront of an intense battle over affirmative action now before the Sixth Circuit regarding affirmative action at the University of Michigan Law School. In the combined cases of Gratz v. Bollinger and Grutter v. Bollinger, the diversity rationale given by Justice


\newblock {\textit{Id.}} at 16.


\newblock {\textit{See}} Higginbotham, \textit{Breaking Thurgood Marshall's Promise}, supra \textit{note 6}, at 28 (providing a detailed response to the devastating effects of both Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), which struck down the use of affirmative action at the University of Texas Law School, and California's Proposition 209, which indirectly constrained racial diversity at the University of California's flagship Boalt Hall School of Law). \textit{See also} A. Leon Higginbotham, Jr., \textit{Open Letter to Arthur Liman}, 17 \textit{YALE L. & POL'Y REV.} 593, 599 (1998) (lamenting these civil rights reversals).
Antitrust as Anti-Civil Rights?

Powell in *Bakke* is being directly challenged.\(^{177}\) This case questions whether a public institution has a compelling state interest in obtaining the educational benefits of diversity that justifies the competitive consideration of an applicant’s race in admissions.\(^{178}\) Applying strict scrutiny in *Bakke*, Justice Powell wrote, “the attainment of a diverse student body... clearly is a constitutionally permissible goal for an institution of higher education.”\(^{179}\) Given the divergent trend of recent anti-affirmative action decisions in the federal courts, the enduring constitutional validity of *Bakke* and its diversity value rationale is being directly challenged. One criticism of the use of diversity and diversity value is that such considerations are too abstract or general to constitute a constitutionally cognizable basis for social policy.\(^{180}\)

Despite Judge Higginbotham's erroneous amicus argument in *United States v. Brown University* that scholarship funding in support of academic diversity was “charity” categorically beyond the statutory competence of the Sherman Act, his tremendous insight into the economic and procompetitive virtues of Ivy Overlap salvaged the case under the Rule of Reason.

At least, a full consideration of the competitive benefits of Overlap given the inherent value of diversity to higher education was required as a matter of law. It seems that the case for establishing how racial and socioeconomic diversity is essential to the enterprise of the modern university based on economic and competitive considerations was successfully made by Judge Higginbotham and MIT’s lawyers in *United States v. Brown University*. It follows, therefore, that the defense team for the University of Michigan in *Grutter* would be well-advised to utilize the insights about the procompetitive necessity of a financial aid policy that promotes socioeconomic diversity. This argument can help concretize their constitutional claim for socioeconomic diversity on the admissions front. In all likelihood, the Judge would draw a clear parallel between the legacy of *Brown* and its desegregation mandate in the admissions context of *Grutter* to his successful strategy in the MIT case.\(^{181}\) To this extent, antitrust doctrine and civil rights doctrine converge in a way that has profound social policy significance.\(^{182}\)

In essence, the University of Michigan is claiming that its future as a great

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180. See, e.g., Metro Broad., Inc. v. FCC, 497 U.S. 547, 614 (1990) (O’Connor, J., dissenting) (“The interest asserted in these cases... [i]s certainly amorphous...”).
181. The Judge linked the history of *Brown v. Board* and its goal of desegregating American schools with the necessity to prevent the economic resegregation of the Ivy League colleges by not ending Overlap. Higginbotham, Memorandum to the Attorney General, supra note 23, at 15-21.
182. Other famous cases have tested the tension between antitrust law and civil rights concerns. NAACP v. Claiborne Hardware, 458 U.S. 886 (1982). See also Missouri v. NOW, 620 F.2d 1301 (8th Cir. 1980) (discussing the First Amendment right of petition with regard to political boycotts), cert. denied, 449 U.S. 842 (1980).
institution is at stake if its ability to pick a racially diverse class is invalidated and *Bakke* is overruled. When commenting on what made his law alma mater Yale University "great," the Judge made the following remarks:

The greatness of Yale is not its age but its mission. And what makes Yale even greater today is its pluralism. Yale's greatest days are not in its past, when women and blacks were unheard of on the faculty and were barely visible in the student body. Today more than ever our students come from all states, they practice different religions, they represent all races. In this milieu of erudition and diversity the best in all of us is brought out.183

Very important antitrust doctrine was established in the Third Circuit's ruling in *United States v. Brown University*. Now, in rule-of-reason cases, the competitive significance of socioeconomic diversity as one goal of a university must be considered in determining whether its coordinated allocation of student financial aid violates the Sherman Act.

In his capacity as amicus advocate for the interests of the Philadelphia School District in preserving socioeconomic diversity at MIT and in the Ivy League, the Judge was a part of a talented and successful team of appellate lawyers. His advocacy skills and amazing insights as demonstrated in this antitrust case were utilized to help keep America's premiere academic institutions "great" by maintaining racial and socioeconomic diversity by preserving financial accessibility for the greatest number of qualified applicants. His vision and skills are truly needed to sustain the values of diversity and pluralism that are currently being challenged on many legal fronts. The Judge's last contributions to the law promise to sustain those values for which he devoted so much of his life's struggles.

**CONCLUSION**

Judge Higginbotham's advocacy helped make law in the "strange" case of *United States v. Brown University*. His intuition about the importance of diversity value and pluralism for higher education was more important than arcane features of antitrust doctrine or disputes about the limits of statutory competence. His approach to the case gives concrete significance to diversity as both a social ideal and as an economic variable in the modern university's production or status function. Hopefully, the Judge's affirmation of the power of diversity and pluralism in education in the antitrust context can be applied by courts involved in current constitutional litigation calling racial diversity's importance into question. The Judge's groundwork can help us continue our collective struggle to transform America into a just society, abundant with equal opportunity, and supported by the realized potential of every citizen, regardless of race or class.