

# Agreements to Improve Student Aid: An Antitrust Perspective

Deborah Jones Merritt and Andrew Lloyd Merritt

The cost of law school continues to climb: annual tuition and fees exceed \$60,000 at several schools.<sup>1</sup> Tuition discounts, meanwhile, are widespread. Just one-third of law students pay sticker price for their education; the other two-thirds secure a discount.<sup>2</sup> Those discounts range from a few hundred dollars to more than \$65,000.<sup>3</sup> What accounts for such great variation in the price that students pay for a legal education—even among students who sit in the same classroom?

Some discounts address financial need; others encourage students from underrepresented minority groups to enter the legal profession. Still others attract students with leadership abilities, multicultural awareness, military experience, or other valued qualities. As Professor Whitford explains in a companion article, however, a substantial number of discounts stem from the “intense competition” fostered by the *U.S. News* ranking method.<sup>4</sup> That

**Deborah Jones Merritt** is the John Deaver Drinko/Baker & Hostetler Chair in Law at Moritz College of Law, The Ohio State University. J.D. 1980 Columbia Law School. **Andrew Lloyd Merritt** earned his J.D. in 1980 from Columbia Law School. They dedicate this article to the memory of William Kenneth Jones, the late Charles Evans Hughes Professor of Law at Columbia University. Dad taught them antitrust law at the dinner table as well as in the classroom. They thank Daniel Merritt, Scott Norberg, Kate O’Neill, Jerome Organ, and Stephen Ross for their suggestions and insights.

1. According to data collected by the American Bar Association Section of Legal Education and Admissions to the Bar, seven law schools set tuition and fees that exceeded \$60,000 for 2016–2017. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS’N, ABA REQUIRED DISCLOSURES, <http://abarequireddisclosures.org/> (last visited June 16, 2017) (choose “Compilation—All Schools Data” for 2016, then open spreadsheet for “Tuition and Fees and Living Expenses”) [hereinafter ABA REQUIRED DISCLOSURES].
2. *See id.* (choose “Compilation—All Schools Data” for 2016, then open spreadsheet for “Grants and Scholarships (prior academic year)”) (113,907 students were enrolled in J.D. programs during 2015–2016, and 75,753 of them (66.5%) held a scholarship of some amount). Throughout this article, we use the words “discount,” “grant,” and “scholarship” interchangeably.
3. *Id.* Southern Illinois University School of Law reported that twenty-five percent of its scholarships awarded no more than \$500. At the top end of the scale, Columbia Law School reported forty-two scholarships covering its full tuition of \$65,260.
4. William C. Whitford, *Law School-Administered Financial Aid: The Good News and the Bad News*, 67 J. LEGAL EDUC. 4, 4 (2017).

method incorporates the median LSAT and UGPA of each school's entering class,<sup>5</sup> giving schools a strong incentive to discount tuition in order to attract students who will maintain or enhance those medians.<sup>6</sup>

In recent years, another incentive for discounting has emerged. Declining student demand has forced schools to manage their budgets carefully. By setting a high list price for tuition, and then offering customized discounts, law schools benefit from price discrimination.<sup>7</sup> This type of pricing is legal,<sup>8</sup> but it imposes several costs on students and the educational program. Price discrimination shifts wealth from buyers to sellers; average tuition prices probably are higher than they would be in a more uniform pricing scheme.<sup>9</sup> Price discrimination that focuses on merit rather than need also discourages low-income students from fully developing their human capital.<sup>10</sup> The opacity of the system, finally, may deter talented students from applying to law school; that deterrent effect can be particularly severe for low-income, minority, and female applicants.<sup>11</sup>

5. See Robert Morse & Kenneth Hines, *Methodology: 2018 Best Law Schools Rankings*, U.S. NEWS: EDUC. (Mar. 13, 2017, 9:30 PM), <https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology?int=9d0608> [<https://perma.cc/5MWV-XB2C>]. Together, LSAT and UGPA medians account for 22.5% of a school's score. *Id.*
6. Note that when schools use discounts to advance their position in the *U.S. News* rankings, they do not always reward applicants with the highest LSAT scores and UGPAs. An applicant with a score that matches (and thus maintains) the school's median is just as valuable as one with a much higher score. Rankings-driven discounts thus vary from pure "merit" decisions.
7. Economists recognize tuition discounts as a form of price discrimination. See, e.g., Matt Gianneschi & Sarah Pingel, *A Hidden Cause of Rising Tuition: Tuition Discounting in Public Colleges and Universities*, PROGRESS EDUC. REFORM (Educ. Comm'n of the States, Denver, Colo.), Aug. 2014, at 1, 4, <https://www.ecs.org/clearinghouse/01/14/07/11407.pdf> [<https://perma.cc/UB6Z-PGJV>] ("Tuition discounting is a form of price discrimination."); Alexandre Belloni et al., *Optimal Admission and Scholarship Decisions: Choosing Customized Marketing Offers to Attract a Desirable Mix of Customers*, 31 MARKETING SCI. 621, 622 (2012) ("[T]he postsecondary education industry . . . relies heavily on price discrimination and targeted marketing under the guise of scholarships and selective admission."); James L. Doti, *Is Higher Education Becoming a Commodity?*, 26 J. HIGHER EDUC. POL'Y & MGMT. 363, 363 (2004) ("Private colleges and universities are price discriminators."); Frederick G. Tiffany & Jeff A. Ankrom, *The Competitive Use of Price Discrimination by Colleges*, 24 E. ECON. J. 99 (1998); Joel Waldfogel, *First Degree Price Discrimination Goes to School*, 63 J. INDUS. ECON. 569 (2015).
8. The Robinson-Patman Act, 15 U.S.C. § 13 (2012), outlaws some price discrimination in selling goods, but the statute does not apply to the sale of services (including educational programs). Nor do the statute's tentacles reach the one-on-one haggling found on car lots and in bazaars.
9. See *infra* Part II.A (discussing both empirical and theoretical evidence of this effect).
10. See *infra* Part II.C. "Human capital" represents the skills, learning, and other assets that an individual brings to the workplace. Humans invest in their capital primarily through education. See Claudia Goldin, *Human Capital*, in HANDBOOK OF CLIMETRICS 55, 56 (Claude Diebolt & Michael Hauptert eds., 2016).
11. See *infra* Part II.A.

When tuition discounts focus on need, they increase access to legal education.<sup>12</sup> Discounts designed to improve rankings or raise revenue, in contrast, cause significant harm. Like Professor Whitford, we believe that the costs imposed by the latter discounts outweigh any benefits they confer. We encourage law schools to reduce their reliance on “merit-based” scholarships (which encompass all discounts based on factors other than financial need) and devote more of their resources to need-based grants.<sup>13</sup>

Unlike Professor Whitford and other critics, however, we believe that law schools can pursue that goal collectively—*without* antitrust liability. Schools, in fact, have three avenues to seek that end. First, a little-known exemption to the Sherman Act allows “institutions of higher education . . . to agree . . . to award . . . financial aid only on the basis of demonstrated financial need” as long as the institutions admit all students “on a need-blind basis.”<sup>14</sup> The same exemption allows schools “to use common principles of analysis for determining the need of such students for financial aid.”<sup>15</sup> A group of law schools could agree tomorrow to limit all of their scholarships to need-based

12. “Need” is an amorphous concept for graduate and professional students. Many of these students are independent of their parents; if they did not attend graduate school, they would support themselves in the job market. At the same time, relatively few applicants have amassed significant savings of their own. Almost all applicants, therefore, might be able to demonstrate some degree of need.

Law schools nonetheless recognize that financial resources vary among their students—and award need-based scholarships on that basis. A student from a low-income family, for example, lacks the kind of financial cushion available to a student from a more affluent background, even if neither set of parents pays for the student’s legal education. For examples of how law schools currently measure need, see *Determination of Financial Need*, HARV. L. SCH., <http://hls.harvard.edu/dept/sfs/financial-aid-policy-overview/determination-of-financial-need/> (last visited July 10, 2017) [<https://perma.cc/D7L3-B5ER>]; *How Need-Based Aid Works*, YALE L. SCH., <https://law.yale.edu/admissions/cost-financial-aid/how-need-based-aid-works> (last visited July 10, 2017) [<https://perma.cc/UU5X-44SJ>]; *Financial Aid*, STAN. L. SCH., <https://law.stanford.edu/apply/tuition-financial-aid/jd-financial-support/> (last visited July 10, 2017) [<https://perma.cc/SC5P-H7L8>].

13. As Professor Whitford reports, grants that incorporate “merit” far outnumber those based purely on need. Whitford, *supra* note 4, at 7–8. In 2009–2010, public schools allocated twenty-one percent of their scholarship dollars to purely need-based aid; private schools invested fifteen percent that way. TASK FORCE ON FINANCING LEGAL EDUC., AM. BAR ASS’N, FINAL REPORT 29 (2015) [hereinafter ABA TASK FORCE 2 REPORT]. More recently, a national sample of aid recipients reported that seventy-nine percent of their awards were merit-driven. LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, LAW SCHOOL SCHOLARSHIP POLICIES: ENGINES OF INEQUITY 8 (2016), <http://lssse.indiana.edu/wp-content/uploads/2015/12/LSSSE-2016-Annual-Report-1.pdf> [<https://perma.cc/HZ8R-93P4>] [hereinafter LSSSE REPORT].

14. 15 U.S.C. § 1 note (2012) (codifying Improving America’s Schools Act of 1984, Pub. L. No. 103-382, title V, § 568(a), 108 Stat. 4060, as amended). This provision is scheduled to expire on Sept. 30, 2022. The heading on the note is “Application of Antitrust Laws to Award of Need-Based Educational Aid.” A 2015 act, called the Need-Based Educational Aid Act of 2015, Pub. L. No. 114-44, 129 Stat. 472, amends 15 U.S.C. § 1 note (2012).

15. *Id.*

aid—and could devise guidelines for measuring that need—without violating the federal antitrust laws.<sup>16</sup>

Second, if law schools want to venture beyond this safe harbor, they could lobby Congress to modify the current exemption. Law schools, for example, might seek an exemption that shielded agreements to *limit* merit aid—without requiring those agreements to bar merit scholarships entirely. The current exemption already recognizes the policies supporting scholarship-related agreements; Congress might be amenable to a slight change in the language.

Finally, if these legislative options are not sufficient, law schools could ask the Department of Justice for a business review letter assessing the legality of a proposed agreement to limit merit-based aid. The Department's Antitrust Division regularly issues those letters,<sup>17</sup> and the arguments outlined in this article would support a favorable letter. A positive letter from the department would not immunize schools from antitrust liability, but it would significantly reduce any risk.

Legal education's accrediting body, the Council of the ABA Section of Legal Education and Admissions to the Bar, could also take steps to de-escalate the use of merit-based aid. The council, for example, could adopt an accreditation standard requiring each law school to divide scholarship dollars between need- and merit-based awards.<sup>18</sup> An alternative standard might require schools to limit merit aid to funds drawn from endowments or donors specifying that purpose. If those avenues appear too risky—despite the routes we outline here—the council could adopt an accreditation standard requiring law schools to publicize more clearly the nature and amount of tuition discounts they offer to students; that type of informational standard would incur no antitrust risk.

In Part I of this article we briefly trace the history of attempts to restrict merit-based scholarships in higher education, including the antitrust case law and congressional exemption that now govern those attempts. In Part II we explore social and economic research that demonstrates the procompetitive

16. We do not address state antitrust laws in this Article. To the best of our knowledge, states have not attempted to use those laws to prosecute agreements related to scholarships in higher education. *Cf.* Memorandum from Wayne D. Collins & Vittorio E. Cottafavi to Robert Shireman & Matthew Reed (May 5, 2008) [hereinafter Collins & Cottafavi Memo], in INST. FOR COLL. ACCESS & SUCCESS, TIME TO REEXAMINE INSTITUTIONAL COOPERATION ON FINANCIAL AID 12 (2008) (memo from two antitrust experts noting that states are unlikely to challenge these restrictions because “a challenge . . . would likely be politically unpopular”). *Id.* at 29.

17. *See infra* Part III.C.

18. *See* Letter from Deborah Jones Merritt, John Deaver Drinko/Baker & Hostetler Chair in Law, Moritz Coll. of Law, Ohio State Univ., to the Am. Bar Ass'n Task Force on the Future of Legal Educ. (May 11, 2013) (proposing such a standard), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/taskforcecomments/201305\\_deborah\\_merritt\\_comment.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/taskforcecomments/201305_deborah_merritt_comment.authcheckdam.pdf) [https://perma.cc/KR6P-QU9Z]. *See also* Randall T. Shepard, *The Problem of Law School Discounting—How Do We Sustain Equal Opportunity in the Profession?*, 50 IND. L. REV. 1, 10-11 (2016) (discussing this proposal); Whitford, *supra* note 4, at 13-14 (same).

effects of agreements limiting merit-based scholarships. In Part III, finally, we explain how law schools could rely upon this history and research to navigate the three avenues noted above. We also examine ways for the council to modify its accreditation standards. As we show, there are several promising routes for reforming harmful scholarship practices.

### I. History: Scholarships and Antitrust Law

The tension between need-based and merit-based scholarships dates back centuries. In 1643, Ann Radcliffe endowed a scholarship at the fledgling Harvard College; it was the first scholarship in the American colonies.<sup>19</sup> She intended the scholarship to benefit a “poor scholar,” but also expressed her preference for a “kinsman if he be ‘pious’ and ‘well deserving.’”<sup>20</sup> Our nation’s first scholarship, therefore, combined notions of need (“poor”) with seventeenth-century concepts of merit (family relationship, piety, and moral desert). For centuries, American colleges continued to mingle these concepts.<sup>21</sup>

After World War II, colleges felt increased pressure to provide purely need-based aid. The GI Bill had demonstrated the transformative power of higher education, and the public wanted to maintain access to those opportunities.<sup>22</sup> The appeal of merit-based scholarships, however, did not disappear. Top students had begun applying to multiple schools, which stimulated bidding wars for their enrollment.<sup>23</sup> To end these wars and preserve resources for needy students, some of the most selective schools agreed to award aid solely on the basis of demonstrated financial need. As we explain below, those agreements provoked antitrust scrutiny and—ultimately—partial vindication.

More recently, antitrust litigation has focused on a special type of merit-based aid: athletic scholarships. The National Collegiate Athletic Association (NCAA) has long limited the size of those scholarships, and several athletes have challenged those restrictions. We discuss those developments, along with their relevance for law schools, in the final section below.

#### A. The Overlap Groups

Starting in the 1950s, more than 100 colleges clustered into two dozen leagues known as “overlap groups.”<sup>24</sup> The colleges within each group tended

19. RUPERT WILKINSON, *AIDING STUDENTS, BUYING STUDENTS: FINANCIAL AID IN AMERICA* 2 (2005).

20. *Id.*

21. *Id.* at 9-45.

22. *Id.* at 115.

23. *Id.* at 115-16. Even before the advent of modern ranking systems, colleges competed to attract students with the most prestigious academic credentials. Professors like to work with highly credentialed students; those students can also enhance the educational environment for their classmates. Students with top credentials, finally, signal a college’s desirability to other applicants. This phenomenon existed long before *U.S. News* capitalized on it.

24. *TIME TO REEXAMINE*, *supra* note 16, at 6.

to receive applications from common students; the word “overlap” referred to their overlapping applicant pools. Within several of these groups, the members agreed to ban merit-based scholarships and award only need-based aid. The groups also developed common guidelines for assessing need; this prevented participating colleges from awarding merit-based scholarships in the guise of extra need. Within at least some groups, finally, admissions officers met annually to discuss the financial need of each student admitted to more than one of the group’s colleges. For each of those “overlapping” admittees, the schools agreed on the student’s level of need.<sup>25</sup>

The most prominent overlap group was the “Ivy Overlap” one, composed of the eight Ivy League colleges and the Massachusetts Institute of Technology (MIT).<sup>26</sup> Those schools, like members of some other groups, agreed to award scholarships solely on the basis of financial need assessed by common guidelines. Starting in 1958, representatives of the Ivy Group met regularly to compare need assessments for students admitted to two or more of their schools. When schools differed by more than \$500 in that assessment for a student, they adjusted their calculations so that students would pay comparable amounts to attend any school within the group.<sup>27</sup>

These meetings continued for more than thirty years. In 1989, *The Washington Post* revealed the practice and denounced the schools for maintaining a “price-fixing system that OPEC might envy.”<sup>28</sup> The article prompted the Department of Justice to investigate all of the overlap groups for possible antitrust violations.<sup>29</sup> In 1991, it decided to pursue the Ivy Overlap Group in court. The department filed a civil action against all nine members of that group, alleging that they were violating Section 1 of the Sherman Act.<sup>30</sup> The eight Ivy League schools signed a consent decree in which they denied liability but agreed to end the challenged agreements.<sup>31</sup> MIT, however, decided to defend the group’s practices in court.

### B. *The Lawsuit*

The trial contest between MIT and the Department of Justice unfolded in the District Court for the Eastern District of Pennsylvania. After a ten-day trial, Chief Judge Louis C. Bechtle ruled for the Department of Justice (*Brown I*).<sup>32</sup> The Ivy Overlap agreement, Judge Bechtle found, “struck at the

25. *Id.* at 6–7; WILKINSON, *supra* note 19, at 131–32.

26. WILKINSON, *supra* note 19, at 132; TIME TO REEXAMINE, *supra* note 16, at 7.

27. See *United States v. Brown Univ.*, 805 F. Supp. 288, 292–96 (E.D. Pa. 1992) [hereinafter *Brown I*], *rev’d*, 5 F.3d 658 (3d Cir. 1993).

28. WILKINSON, *supra* note 19, at 196.

29. *Brown I*, 805 F. Supp. at 289.

30. 15 U.S.C. § 1 (2012).

31. Collins & Cottafavi Memo, *supra* note 16, at 24–25.

32. *Brown I*, 805 F. Supp. 288.



heart of the commercial relationship” between colleges and their students.<sup>33</sup> By setting aid amounts and banning merit scholarships, he decided, the colleges engaged in horizontal price fixing.<sup>34</sup> He refrained from declaring that conduct per se illegal “in light of the Supreme Court’s repeated counsel against presumptive invalidation of restraints involving professional associations,” but found the conduct unlawful after applying an abbreviated rule of reason analysis.<sup>35</sup> The Ivy Group failed that “quick look” test because its justifications rested on “social policy aims” rather than the procompetitive goals required by the antitrust laws.<sup>36</sup>

MIT appealed the decision and, in September 1993, the Court of Appeals for the Third Circuit decisively reversed the district court (*Brown II*).<sup>37</sup> One member of the panel concluded that the award of university scholarships was “charity” rather than commercial activity; he would have granted judgment immediately for MIT.<sup>38</sup> Indeed, he “question[ed] why the heavy artillery of antitrust has been wheeled into position to shoot down practices that so obviously advance the public interest.”<sup>39</sup> The other two judges, who conveyed the majority view, also displayed considerable sympathy for MIT’s position. They decided that MIT had articulated at least two procompetitive justifications for the Overlap agreement, which required the district court to apply a “full scale rule of reason analysis.”<sup>40</sup>

The first of these justifications stemmed from MIT’s claim that the agreement “enhanced the consumer appeal of an Overlap education” by “promoting socio-economic diversity at member institutions.”<sup>41</sup> The Third Circuit agreed

33. *Id.* at 298.

34. *Id.* at 301.

35. *Id.* at 301. The courts have developed three types of review for practices challenged as unlawful restraints of trade. Some agreements are per se illegal, others are evaluated under a rule of reason, and an intermediate group receives an abbreviated or “quick look” rule-of-reason analysis. See LAWRENCE A. SULLIVAN ET AL., THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK § 5.1a (3d ed. 2016); Collins & Cottafavi Memo, *supra* note 16, at 15-16 (discussing the three standards of review in the context of the *Brown* litigation).

36. *Brown I*, 805 F. Supp. at 305. The Supreme Court has made clear that antitrust law “focuses directly on [a] challenged restraint’s impact on competitive conditions.” Nat’l Soc. of Prof’l Eng’rs v. United States, 435 U.S. 679, 688 (1978). Litigants cannot invoke social welfare concerns to justify a restraint on trade; the courts accept only procompetitive justifications. See generally SULLIVAN ET AL., *supra* note 35, § 5.3f.

37. United States v. Brown Univ., 5 F.3d 658 (3d Cir. 1993) [hereinafter *Brown II*].

38. *Id.* at 683 (Weis, J., dissenting).

39. *Id.* at 680. Judge Weis’s position almost certainly conflicts with established antitrust principles, which direct courts to focus exclusively on a restraint’s competitive impact. Broader appeals to the “public interest” cannot justify a trade restraint. See *supra* note 36. Weis’s opinion, however, reflects the sympathetic eye that judges can bring to agreements designed to further educational aims.

40. *Id.* at 679.

41. *Id.*

that “improvement in the quality of a product or service that enhances the public’s desire for that product or service” may count as a “procompetitive virtue.”<sup>42</sup> The second procompetitive effect rested on the fact that “the number of students able to afford an Overlap education [was] maximized.”<sup>43</sup> By “removing financial obstacles for the greatest number of talented but needy students” and “widening student choice,” the Ivy Overlap agreement increased the number of students eligible for an elite college education.<sup>44</sup> Once again, the court acknowledged “consumer choice [as] a traditional objective of the antitrust laws” that confers a “procompetitive benefit.”<sup>45</sup>

The appellate court noted several other points that favored MIT. The Ivy Overlap agreement, the court observed, did not “cause any reduction of output.”<sup>46</sup> The participating colleges, in other words, educated as many students under the agreement as they would have done in its absence. Nor did the agreement appear to have “an aggregate effect on the price of an MIT education.”<sup>47</sup> The agreement shifted costs among students, but did not allow MIT to reap higher revenue overall. This “absence of any finding of adverse effects such as higher price or lower output [was] relevant” to the agreement’s status under the rule of reason.<sup>48</sup> The court remanded the case for the trial judge to more fully assess the agreement under that rule.

That assessment, the court noted, would include consideration of any “substantially less restrictive alternative” to the Ivy Overlap agreement.<sup>49</sup> The rule of reason, it reminded the district court, requires a multistep inquiry. First the plaintiff must show that an “agreement produced adverse, anti-competitive effects within the relevant product and geographic markets.”<sup>50</sup> Next, the defendant may “show that the challenged conduct promotes a sufficiently pro-competitive objective.”<sup>51</sup> If the defendant carries that burden, then “the plaintiff must demonstrate that the restraint is not reasonably necessary to achieve the stated objective.”<sup>52</sup> On remand, therefore, the court would consider both the procompetitive objectives urged by MIT and the availability of any less restrictive means identified by the Department of Justice.

42. *Id.* (citing *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 114-15 (1984)).

43. *Id.* at 675.

44. *Id.*

45. *Id.* (citing *NCAA*, 468 U.S. at 102).

46. *Id.* at 674.

47. *Id.*

48. *Id.*

49. *Id.* at 679.

50. *Id.* at 668.

51. *Id.* at 669.

52. *Id.*



The department, however, opted to end the case. Rather than petition the Supreme Court for certiorari or return to the district court, the government dismissed the lawsuit in return for a letter in which MIT agreed to abide by designated “Standards of Conduct.”<sup>53</sup> Those standards allowed MIT and other schools to “agree to provide only need-based financial aid and to prohibit merit scholarships” as long as the participating schools “practice[d] need-blind admissions” and “provide[d] financial aid sufficient to meet the full need of all [admitted] students.”<sup>54</sup> The department, therefore, acquiesced in group agreements to limit merit aid; its only victory lay in preventing colleges from jointly setting financial need for specific students.

The department’s willingness to dismiss the suit in return for a letter, rather than require a consent decree or settlement contract, was unusual.<sup>55</sup> The department’s leniency may have reflected the force of the Third Circuit’s support for agreements banning merit-based scholarships. Equally important, congressional developments had reduced the lawsuit’s importance.

### C. Congressional Action

While MIT fought for the Overlap principles in court, its Ivy League peers successfully lobbied Congress.<sup>56</sup> The 1992 amendments to the Higher Education Act allowed institutions of higher education to “voluntarily agree . . . to award financial aid . . . only on the basis of demonstrated financial need” and to “discuss and voluntarily adopt defined principles of professional judgment for determining student financial need.”<sup>57</sup> To eliminate any prospect of antitrust liability, the section explicitly declared: “No inference of unlawful contract, combination, or conspiracy shall be drawn from the fact that institutions of higher education engage in conduct authorized by this section.”<sup>58</sup>

Congress, notably, set this exemption to expire after just two years.<sup>59</sup> It also provided that the temporary exemption would not “affect any antitrust litigation pending on the date of enactment.”<sup>60</sup> The legislators, in other words, gave the Department of Justice an opportunity to seek judicial validation of its underlying antitrust claims. In particular, the department could have petitioned the Supreme Court to review the Third Circuit’s decision. Instead,

53. Letter from MIT Lawyer Thane D. Scott to Deputy Assistant Attorney Gen. Robert Litan (Dec. 22, 1993), <http://tech.mit.edu/Bulletins/ovrlp-ts.html> [<https://perma.cc/PJG3-7BBT>].

54. *Id.*

55. See Collins & Cottafavi Memo, *supra* note 16, at 26.

56. See generally WILKINSON, *supra* note 19, at 199–200.

57. Pub. L. No. 102-325, 106 Stat. 456, section 1544(b). This provision did not limit the exemption to schools practicing need-blind admissions. Congress added that caveat in 1994. See *infra* note 61.

58. *Id.* section 1544(d).

59. *Id.* section 1544(e).

60. *Id.* section 1544(a).

the department allowed MIT to sign a letter similar to the statutory exemption. The department thus joined the Third Circuit and Congress in allowing agreements that barred merit-based scholarships.

Congress did not allow the statutory exemption to lapse. It renewed the provision in 1994,<sup>61</sup> and has continued to renew it since then.<sup>62</sup> The most recent extension, passed in 2015, prolongs the antitrust exemption to September 30, 2022.<sup>63</sup> Institutions of higher education, therefore, may agree to award scholarships “only on the basis of demonstrated financial need” and “to use common principles of analysis for determining the need” as long as they engage in “need-blind” admissions.<sup>64</sup>

#### *D. Use of the Congressional Exemption*

Surprisingly few colleges or universities have taken advantage of Congress’s “overlap” exemption.<sup>65</sup> On the contrary, a majority of undergraduate institutions embraced merit-based aid during the 1990s and 2000s.<sup>66</sup> Some schools used that aid to balance budgets and fill empty seats.<sup>67</sup> Others succumbed to pressures generated by newly popular ranking systems. Merit-based aid, these schools discovered, would attract students with higher test scores and high school grades; those credentials, in turn, would enhance the school’s rank.<sup>68</sup>

Just as the Ivy Overlap group prevailed, therefore, commitment to need-based aid waned among colleges.<sup>69</sup> Even elite schools backed away from agreements to bar all merit-based scholarships. A few dozen formed an association known as the “568 Presidents’ Group,” named after the statutory

61. Improving America’s Schools Act of 1994, Pub. L. No. 103-382, § 568, 108 Stat. 3518, 4060. This version was the first to limit the exemption’s reach to schools practicing need-blind admissions. *Id.* § 568(a). The statute, however, did not require schools to meet the financial need of all admitted students, as MIT’s letter agreement with the Department of Justice provided. *See supra* notes 53-54 and accompanying text.
62. For a brief discussion of this history, see Collins & Cottafavi Memo, *supra* note 16, at 27.
63. Need-Based Educational Aid Act of 2015, Pub. L. No. 114-44, 129 Stat. 472 (2015).
64. 15 U.S.C. § 1 note (2012).
65. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-963, HIGHER EDUCATION: SCHOOLS’ USE OF THE ANTITRUST EXEMPTION HAS NOT SIGNIFICANTLY AFFECTED COLLEGE AFFORDABILITY OR LIKELIHOOD OF STUDENT ENROLLMENT TO DATE 9-10 (2006), <http://www.gao.gov/assets/260/251608.pdf> [<https://perma.cc/J84W-TWS8>] [hereinafter GAO REPORT].
66. WILKINSON, *supra* note 19, at 152-53; Amanda L. Griffith, *Keeping Up with the Joneses: Institutional Changes Following the Adoption of a Merit Aid Policy*, 30 ECON. EDUC. REV. 1022, 1022-23, 1025 (2011).
67. WILKINSON, *supra* note 19, at 164-74.
68. Griffith, *supra* note 66, at 1023-24.
69. We have not found any evidence that law schools (or other graduate programs) ever considered using the overlap exemption. Graduate and professional programs did not participate in the original overlap groups or the antitrust litigation. The exemption appears to have gone unnoticed among post-baccalaureate programs.

section creating the antitrust exemption.<sup>70</sup> The group, however, has limited its work to maintaining common guidelines for its members to use when assessing financial need.<sup>71</sup> It does not require its members to eschew all merit-based aid; nor has it pursued other options allowed by the statutory exemption.<sup>72</sup>

Some educators and policymakers have urged colleges to make more use of the exemption. In 2008, for example, The Institute for College Access & Success called for colleges to increase enrollment of low-income students by shifting aid from merit-based scholarships to need-based ones.<sup>73</sup> Colleges, the institute noted, could avoid the problems of unilateral action by joining agreements shielded by the exemption.<sup>74</sup> Similarly, a group of college presidents discussed both the exemption and their desire to constrain merit aid at a 2013 meeting sponsored by the Council of Independent Colleges (CIC).<sup>75</sup> Educators have also mooted the idea of expanding the current exemption to allow agreements to limit aid, rather than ban that aid entirely.<sup>76</sup>

The Antitrust Division has given mixed signals about its attitude toward overlap-like agreements. In 2013, the president of one higher education association reported that he had held “a series of preliminary conversations in which officials of the U.S. Justice Department had expressed a willingness to review (and potentially bless) accords in which colleges would agree to take common steps to reduce non-need-based aid.”<sup>77</sup> Later the same year, however, the department opened an informal investigation into the CIC meeting at which college presidents had discussed their desire to limit merit-

70. GAO REPORT, *supra* note 65, at 9-10.

71. *Id.* at 11.

72. *Id.* The group maintains a website, <http://www.568group.org/index.html>, although the site has not been updated since 2016. A few of the wealthiest colleges, including Harvard and Yale, now award more need-based aid than the 568 guidelines allow. These colleges, accordingly, no longer participate in the group. See Caitlin Roman, *Yale Leaves Financial Aid Group*, YALE DAILY NEWS, Sept. 26, 2008, <http://yaledailynews.com/blog/2008/09/26/university-leaves-financial-aid-group/> [<https://perma.cc/L9VL-G639>].

73. TIME TO REEXAMINE, *supra* note 16, at 6.

74. *Id.* at 7-11.

75. Doug Lederman, *Baby Steps for Need-Based Aid*, INSIDE HIGHER ED (Jan. 7, 2013), <https://www.insidehighered.com/news/2013/01/07/private-college-presidents-push-campaign-limit-use-non-need-based-aid> [<https://perma.cc/2263-8GV5>]. See also WILKINSON, *supra* note 19, at 142-74 (reporting administrators’ desire to shift resources from merit scholarships to need-based aid); Scott Jaschik, *Angst and Hope for Liberal Arts Colleges*, INSIDE HIGHER ED (July 13, 2016), <https://www.insidehighered.com/news/2016/07/13/meeting-discusses-challenges-facing-liberal-arts-colleges> [<https://perma.cc/TN4T-HFLV>] (reporting academic conference discussing these issues).

76. TIME TO REEXAMINE, *supra* note 16, at 10-11; WILKINSON, *supra* note 19, at 191-92; Lederman, *supra* note 75.

77. Lederman, *supra* note 75.

based scholarships.<sup>78</sup> The department quickly backed off the investigation,<sup>79</sup> especially after the presidents noted their First Amendment right to discuss proposed legislation,<sup>80</sup> but the incident made some academic officials uneasy about discussing problems in the financial aid system.

#### *E. Student-Athletes and the NCAA*

At the college level, athletic scholarships constitute an important set of merit awards. The NCAA allows schools to award scholarships based on athletic ability but, in order to preserve the amateur nature of college athletics, limits those scholarships to the “cost of attendance” at college.<sup>81</sup> Schools, in other words, may not offer athletes financial payments that exceed their educational costs. Until 2014, the scholarship cap was somewhat lower, embracing only “tuition and fees, room and board, and required course-related books.”<sup>82</sup> That lower cap precluded schools from paying for transportation, supplies, and some other incidental expenses of college attendance.<sup>83</sup>

Several athletes have challenged the scholarship caps under the antitrust laws. A recent decision by the Ninth Circuit, *O’Bannon v. NCAA*, gave both sides a partial victory. Reviewing the NCAA’s pre-2014 rule, the court agreed with the athletes that the scholarship cap had a “significant anticompetitive effect on the college education market.”<sup>84</sup> The court then sided with the NCAA on the existence of a procompetitive justification: the scholarship limit furthered the NCAA’s commitment to amateurism, which enhanced the leagues’ “appeal to consumers.”<sup>85</sup> In the final step of its analysis, however, the court concluded that the NCAA had not used the least restrictive means to protect amateurism; on the contrary, there were “reasonable alternatives” that would be “virtually as effective” as the NCAA’s challenged rule “without [imposing] significantly increased cost.”<sup>86</sup> The best alternative was the one that the NCAA had already adopted: raising the scholarship cap to cover the full cost of college attendance.

78. Kevin Kiley, *A Deficit of Trust*, INSIDE HIGHER ED (June 18, 2013), <https://www.insidehighered.com/news/2013/06/18/justice-department-launches-investigation-merit-aid-talks> [<https://perma.cc/M9HL-SZ5G>].

79. David McCabe, *Nugent Avoids DOJ Investigation into Aid*, KENYON COLLEGIAN (Gambier, Ohio), Sept. 5, 2013, at 4, [https://issuu.com/kenyoncollegian/docs/kenyon\\_collegian\\_09.05.13/4](https://issuu.com/kenyoncollegian/docs/kenyon_collegian_09.05.13/4) [<https://perma.cc/26LA-GYPX>].

80. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

81. *O’Bannon v. NCAA*, 802 F.3d 1049, 1054–55 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016).

82. *Id.* at 1054.

83. The monetary difference amounted to “a few thousand dollars at most schools.” *Id.* at 1054 n.3.

84. *Id.* at 1072.

85. *Id.* at 1073.

86. *Id.* at 1074.

Although the NCAA lost the *O'Bannon* contest, the Ninth Circuit's decision established a key principle favoring the organization. The court enthusiastically endorsed the "NCAA's commitment to amateurism" and the weight of that commitment in a rule-of-reason scale.<sup>87</sup> The NCAA lost because it had already created a less restrictive rule that promoted the same ends; the court simply required it to apply that rule retroactively. The court's overall approach bodes well for schools defending other types of agreements to limit scholarships. If schools articulate a persuasive procompetitive purpose, and there are no less restrictive means to attain that purpose, courts may uphold the agreements.<sup>88</sup>

Litigation over the NCAA's scholarship rules continues. The organization is settling one class action on grounds that track *O'Bannon*; it has agreed to compensate class members for the money they lost under the NCAA's pre-2014 scholarship rules.<sup>89</sup> A more ambitious class action remains on the docket: That one challenges all restrictions on athletic scholarships, claiming that schools should be able to bid openly for the market value of players.<sup>90</sup> Resolution of that lawsuit could affect the legality of other agreements to limit merit-based scholarships. The sports context, however, is so distinctive that it offers only limited guidance to law schools contemplating restrictions on other types of merit aid.

87. *Id.* at 1073. Michael Carrier argues that the *O'Bannon* court "short-circuited" its rule-of-reason analysis by failing to conduct a full balancing test. Michael A. Carrier, *How Not to Apply the Rule of Reason: The O'Bannon Case*, 114 MICH. L. REV. FIRST IMPRESSIONS 73, 73 (2015), [http://michiganlawreview.org/wp-content/uploads/2015/12/114MichLRevFl73\\_Carrier.pdf](http://michiganlawreview.org/wp-content/uploads/2015/12/114MichLRevFl73_Carrier.pdf) [<https://perma.cc/TJW8-3CBY>]. We read the *O'Bannon* opinion, however, as implicitly finding that the procompetitive effects of amateurism outweigh the anticompetitive effects on athletes, rather than as resting solely on analysis of least restrictive means.
88. *See also* Agnew v. NCAA, 683 F.3d 328 (7th Cir. 2012) (dismissing challenge to NCAA scholarship caps on the ground that the plaintiffs failed to properly identify a relevant market); McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988) (NCAA rules limiting benefits awarded student-athletes are valid under the rule of reason).  
Antitrust defendants, of course, should do more than simply articulate a procompetitive effect; they should offer some credible evidence that the effect exists. Stephen F. Ross and Wayne DeSarbo persuasively critique *O'Bannon* on the ground that the defendants failed to show that payments to student-athletes actually would diminish the consumer appeal of college sports. Stephen F. Ross & Wayne S. DeSarbo, *A Rapid Reaction to O'Bannon: The Need for Analytics in Applying the Sherman Act to Overly Restrictive Joint Venture Schemes*, 119 PENN ST. L. REV. STATIM 43 (2015), [https://pennstatelaw.psu.edu/sites/default/files/OBannon%20Final\\_o.pdf](https://pennstatelaw.psu.edu/sites/default/files/OBannon%20Final_o.pdf) [<https://perma.cc/H6JY-EXUG>]. They also offer an innovative marketing technique to measure any such effect.
89. Ralph D. Russo, *Preliminary Approval Given to \$208.7 Million NCAA Settlement*, U.S. NEWS (Mar. 22, 2017, 1:53 PM), <https://www.usnews.com/news/best-states/california/articles/2017-03-22/preliminary-approval-given-to-2087-million-ncaa-settlement> [<https://perma.cc/TYW5-KCM5>]. The district judge gave preliminary approval to the settlement in March, and the plaintiffs' firm has started notifying class members about the settlement. *See NCAA Grant-In-Aid Settlement*, <http://www.grantinaidsettlement.com/> (last visited Sept. 30, 2017).
90. Michael McCann, *How Tentative Grant-in-Aid Class Action Settlement Affects NCAA, Student-Athletes*, SPORTS ILLUSTRATED (Feb. 5, 2017), <https://www.si.com/college-football/2017/02/04/shawne-alston-grant-aid-class-action-lawsuit-ncaa-settlement> (discussing *Jenkins v. NCAA*, filed in the United States District Court for the District of New Jersey).

## II. Promoting Competition

The precedents discussed above show significant sympathy for agreements restricting scholarships in higher education. The case law is limited, but courts have judged those agreements under the rule of reason rather than declare them invalid *per se*. The cases also make clear that an anti-competitive agreement will survive scrutiny if the defendant articulates procompetitive rationales for the compact, the plaintiff cannot point to a less restrictive alternative, and the procompetitive benefits outweigh any anti-competitive burden.<sup>91</sup> The procompetitive rationales voiced by the defendant play a key role in that analysis: They determine whether less restrictive alternatives are feasible, as well as whether the rule-of-reason balance tilts in the agreement's favor.

With that template in mind, we explore the procompetitive rationales that might justify an agreement to limit merit scholarships in legal education. As we show, those scholarships harm the market in at least three ways: They raise overall prices; reduce access and diversity; and diminish investment in human capital. Agreements restricting those scholarships, conversely, would moderate prices, enhance access and diversity, and encourage students to invest more fully in their human capital. Each of these justifications is a procompetitive one that would justify an agreement to limit merit scholarships.

We cast our arguments in procompetitive terms, rather than social welfare ones, because the antitrust laws recognize only the former justifications.<sup>92</sup> Through the Sherman Act, Congress established a “national policy favoring competition.”<sup>93</sup> Courts cannot deviate from that policy by deciding that, in certain markets, another public value trumps competition. Instead, in antitrust litigation, “the inquiry is confined to a consideration of impact on competitive conditions.”<sup>94</sup> We focus our inquiry on the same issue.

### A. Increased Costs

The report of a recent ABA task force suggests that widespread tuition discounting “contributes to the steadily increasing price of legal education.”<sup>95</sup>

91. See generally Michael A. Carrier, *The Rule of Reason: Bridging the Disconnect*, 1999 B.Y.U. L. REV. 1265 (explaining how courts apply these considerations).

92. See *supra* note 36.

93. *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 234 (2013).

94. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 690 (1978). Some agreements promote procompetitive ends along with social welfare goals. Indeed, parties often can articulate the same purpose in multiple ways. SULLIVAN ET AL., *supra* note 35, § 5.3f. Courts do not penalize parties for pursuing social policies other than competition (unless those policies mask an attempt to restrict competition), but they accept only procompetitive purposes to defend an agreement.

95. TASK FORCE ON THE FUTURE OF LEGAL EDUC., AM. BAR ASS'N, REPORT AND RECOMMENDATIONS 2 (2014), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/report\\_and\\_recommendations\\_of\\_aba\\_task\\_force.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf) [<https://perma.cc/HQ9J-DUFW>]. See also Frank H. Wu, *Foreword*, LSSSE REPORT, *supra*



The task force, in other words, proposed that discounting allows law schools to collect more revenue from students overall than they would obtain through uniform pricing. Economic theory and empirical research support that suggestion.

By setting a steep nominal tuition and then offering individual discounts, law schools are able to benefit from price discrimination.<sup>96</sup> Each school estimates the maximum price that an applicant will pay to attend that school—and then tries to match that price with an appropriate discount.<sup>97</sup> When calculating those offers, schools have a significant degree of consumer information. They know each applicant’s credentials, which allows them to predict the other schools that might have admitted the applicant and how much aid those schools might offer.<sup>98</sup> Indeed, some information about competing offers and scholarship awards is publicly available on the website [lawschoolnumbers.com](http://lawschoolnumbers.com).<sup>99</sup> Some schools also request detailed financial data from applicants, including information about parental income.<sup>100</sup> This information allows

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note 13, at 5 (“Law schools could reduce the price of attendance across-the-board for the benefit of students” by abandoning merit-based scholarships.).

96. See *supra* note 7 (citing economic literature that recognizes higher education scholarships as a form of price discrimination).
97. Schools, of course, also follow their own preferences in making scholarship offers. A candidate with an LSAT at the school’s median might be willing to attend that school for free, but the school is unlikely to lower its price that far for a median student.
98. Some of those predictions rest on experience; others depend on sophisticated algorithms. See Belloni et al., *supra* note 7, at 623–31 (describing an algorithm for graduate MBA programs); Matthew Quirk, *The Best Class Money Can Buy*, ATLANTIC, Nov. 2005 (describing both experiential and mathematical models) <https://www.theatlantic.com/magazine/archive/2005/11/the-best-class-money-can-buy/304307/> [<https://perma.cc/P8DN-ZRL6>]; Jeffrey A. Summers, *Net Tuition Revenue Generation at Private Liberal Arts Colleges*, 12 EDUC. ECON. 219, 227–28 (2014).
99. Prospective law students founded this site as a way of sharing information about the application process. *About Us*, LAW SCHOOL NUMBERS, <http://lawschoolnumbers.com/about> (last visited July 9, 2017). Applicants post their academic credentials, schools to which they have applied, admission status at those schools, and the size of any scholarship awards. Participation may skew toward applicants with large scholarship offers, and there is no guarantee that applicants report their status accurately, but the data provide admissions officers (and any other interested person) an overview of admission standards and pending scholarship offers at competing schools.
100. Duke Law School, for example, counsels applicants: “Except for those students who have significant personal and/or family resources, all candidates are urged to complete [a financial disclosure profile] so that they can be considered for the full range of available need- and merit-based scholarships.” *Applying for Scholarships*, DUKE LAW, <https://law.duke.edu/admis/financial/handbook/sec2/#a> [<https://perma.cc/E56K-ZXNB>]. “Parental information is required” for that profile “regardless of age or marital status.” *Applying for Financial Aid*, DUKE LAW, <https://law.duke.edu/admis/financial/handbook/sec1/> [<https://perma.cc/4YCT-LC5T>]. See also Gregory Randolph, *Price Discrimination and Rising Costs: Is There Any Relationship?*, in *DOING MORE WITH LESS: MAKING COLLEGES WORK BETTER* 53, 60–62 (Joshua C. Hall ed., 2010) (reviewing financial information available to colleges when admitting students and calculating scholarships).

schools to tailor individualized discount offers for each student. If the initial discount misses the mark, the school may be able to negotiate directly with an applicant.<sup>101</sup>

In addition to possessing this information, each law school holds significant market power over some of its applicants. Students do not have the option of purchasing a legal education from any law school; they are limited to the schools that offer them admission. As students choose among that subset of schools, they usually prefer one school over others.<sup>102</sup> For each student, the preferred school holds considerable market power: Other schools are weak substitutes, and the student will pay more to attend the preferred school. In economic terms, each student's demand for his/her preferred school is relatively inelastic; that inelasticity confers market power.<sup>103</sup>

Law schools, of course, vary in the extent of market power they exercise. Some schools have rivals that match them closely in student appeal; those schools may compete aggressively to attract students out of a common applicant pool. Other schools hold a more commanding position based on their geographic location, reputation, employment outcomes, or other factors. Every law school, however, holds market power over at least some applicants—and the aggregate power is substantial.<sup>104</sup>

This combination of market power and consumer information gives law schools the ability to customize prices for admitted students. That price discrimination is lawful; indeed, it is an increasingly common practice in the

101. Scholarship negotiations have become common in recent years. Although applicants, rather than schools, typically initiate these negotiations, schools often have the opportunity to increase offers for desirable students.

Prospective students possess some of the same information available to law schools; those insights can strengthen their hand in negotiations. Applicants, however, vary widely in their knowledge of the scholarship market. Even well-informed negotiators, moreover, cannot forestall price discrimination. The essence of price discrimination is that sellers customize prices to extract the maximum price that each applicant is willing to pay. Negotiation is simply one means of achieving that end.

102. That preference often rests on the school's prestige or employment outcomes, which affect the market value of the degree. Geography also plays an important role for some applicants. Cf. Jerome M. Organ, *Net Tuition Trends by LSAT Category from 2010-2014 with Thoughts on Variable Return on Investment*, 67 J. LEGAL EDUC. 51, 52-54 (2017) (describing geographic differences in cost of law school). A range of other preferences can also sway an applicant's decision.

103. A group of economists recently demonstrated a similar pattern of market power among colleges. See Dennis Epple et al., *Market Power and Price Discrimination in the U.S. Market for Higher Education* 27 (Nat'l Bureau of Econ. Res, Working Paper, No. 23360, 2017) (all colleges are able to obtain tuition revenue that exceeds marginal effective cost and "the most selective colleges have significant market power and charge significant mark-ups to students"), <http://www.nber.org/papers/w23360.pdf> [<https://perma.cc/Q6WD-ASUV>].

104. Remember that market power does not guarantee a sale; consumer demand rarely is perfectly inelastic. By offering a substantial scholarship, a second-choice school may lure an applicant away from his/her first choice. The very size of the scholarships needed to achieve that goal, however, confirms the market power that the first-choice school wields.

marketplace.<sup>105</sup> Economists agree, however, that price discrimination almost always “transfer[s] wealth away from consumers and toward sellers.”<sup>106</sup> This happens because the seller can extract each buyer’s “reserve price,” the highest price at which the buyer is willing to purchase the service. The buyers who pay top dollar more than compensate for the ones who pay lower prices; on average, consumers pay more than they would in a uniform pricing scheme.

Price discrimination has two different effects, which are important to separate. First, some consumers subsidize others. In legal education, as many educators have recognized, the students who pay list-price tuition subsidize those who receive scholarships. But second, and equally important, the *average* price rises for consumers. This second effect is not merely theoretical; several researchers have demonstrated its presence empirically in higher education.<sup>107</sup> One study calculated that a graduate program could raise net revenue by at least four percent to five percent through price discrimination; larger gains of eight percent to nine percent would have been possible absent a statutory cap on tuition.<sup>108</sup>

This effect on overall price provides a procompetitive justification for agreements to limit merit scholarships: By restricting price discrimination, those agreements would reduce tuition prices overall. Law school tuition is sufficiently high that even a marginal decrease would benefit students.<sup>109</sup> A

105. See *supra* note 8 (noting the legality of price discrimination in service industries). For a discussion of increasing price discrimination in the marketplace, see Lina M. Khan, Note, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 763 (2017) (discussing how retailers are anxious to use detailed consumer information to differentiate prices).

106. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 14.5a, at 772 (5th ed. 2016). See also Nicholas W. Hillman, *Tuition Discounting for Revenue Management*, 53 RES. IN HIGHER EDUC. 263, 268 (2012) (“colleges can intentionally exploit students’ willingness to pay in order to extract their consumer surplus”); Waldfoegel, *supra* note 7, at 570 (“[P]rice discrimination can allow sellers to generate more revenue.”).

107. See, e.g., Doti, *supra* note 7, at 365–66 (study of 107 colleges and universities suggested positive revenue effects of price discrimination, although gains appeared to diminish for less selective schools); Hillman, *supra* note 106 (study of public colleges demonstrated revenue-enhancing effect of price discrimination); Summers, *supra* note 98 (study of more than 100 private liberal arts colleges found that price discrimination increased revenue); Tiffany & Ankrom, *supra* note 7 (data from a sample of 233 colleges suggested that schools had increased net revenue through price discrimination). See generally Jerry Sheehan Davis, *Unintended Consequences of Tuition Discounting*, LUMINA FOUND. FOR EDUC. NEW AGENDA SERIES (Indianapolis, IN), May 2003, at 4, <https://www.luminafoundation.org/files/publications/TuitionDiscounting.pdf> [<https://perma.cc/MA2R-X9JB>] (Tuition discounting “is the art and science of establishing the net price of attendance for students at amounts that will maximize tuition revenue while achieving certain enrollment goals.”); Dennis Epple et al., *Admission, Tuition, and Financial Aid Policies in the Market for Higher Education*, 74 ECONOMETRICA 885, 887 (2006) (by “link[ing] tuition to student (household) income,” colleges “extract additional revenues from students who are inframarginal consumers of [that] college”).

108. Waldfoegel, *supra* note 7, at 595.

109. Suppose, for example, that a school’s average net tuition (with a high sticker price and discounting) is \$25,000. If price discrimination generates a four percent premium, then eliminating discounts would lower tuition by an average of \$1,000 per student for

price decline might also attract additional students to law school; most schools currently operate at significantly less than full capacity.<sup>110</sup>

Schools, of course, might choose to maintain at least some price discrimination. A school, for example, might conclude that students with high LSAT scores add enough dynamism to the classroom that students with lower scores should subsidize the former students. Schools might also differentiate tuition so that students with corporate aspirations subsidize those committed to public service. No law prevents schools from making those choices. But if schools want to restrict merit-based scholarships, as many writers (including us) propose, the price-enhancing effects of those scholarships would help justify an agreement to limit them.

Need-based scholarships deserve special mention. Like merit-based scholarships, those discounts reflect price discrimination. Students from wealthy backgrounds subsidize the tuition of classmates from low-income families; average prices may also rise. Three factors, however, make need-based scholarships more procompetitive than merit-based ones. First, law schools are unlikely to grant as many need-based awards as merit-driven ones.<sup>111</sup> Any effect on overall prices, therefore, will be smaller than in the current system. Second, need-based scholarships will increase access to law school, which promotes consumer welfare.<sup>112</sup> Need-based scholarships, finally, serve the procompetitive

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each year of enrollment. That \$3,000 is equivalent to 2.5 weeks of pay at an entry-level law job. See *Salaries for New Graduates Rise While Employment Rate Remains Unchanged, Number of Private Practice Jobs Tumbles*, NALP (Aug. 17, 2016), [http://www.nalp.org/uploads/SelectedFindingsPressRelease\\_Classof2015.pdf](http://www.nalp.org/uploads/SelectedFindingsPressRelease_Classof2015.pdf) [<https://perma.cc/YN3M-G7CC>] (median starting salary for 2015 graduates was \$64,800).

110. Enrollment of first-year J.D. students has fallen 29.3% over the past six years. *Compare Enrollment and Degrees Awarded 1963-2012 Academic Years*, AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/enrollment\\_degrees\\_awarded.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf) [<https://perma.cc/N95G-2DHT>] (52,488 first-year J.D. students in 2010-2011), with *2016 Standard 509 Information Report Data Overview*, AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/2016\\_standard\\_509\\_data\\_overview.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2016_standard_509_data_overview.authcheckdam.pdf) [<https://perma.cc/9S2T-XET2>] (37,107 first-year J.D. students in 2016-2017).
111. In our current merit-focused system, two-thirds of all law students hold scholarships. See *supra* note 2. In contrast, about five percent of students come from families in the bottom quartile of the income distribution; another eleven percent hail from families in the next quartile. Richard H. Sander, *Class in American Legal Education*, 88 DENVER U.L. REV. 631, 639 (2011). Even if need-based scholarships greatly increased attendance by those students, as we hope, the percentage attending will fall far short of two-thirds.
112. See *infra* Part II.B. Our current system of merit-based scholarships may attract some students who would otherwise have attended other graduate programs. There is little evidence, however, that this has occurred to any significant extent. Applications to law school remain low, and schools are turning to other initiatives to attract those students. Allowing law school applicants to use scores from the general Graduate Record Exam (GRE), for example, may have a greater effect in attracting students from other degree programs.

goal of encouraging low-income students to expand their human capital.<sup>113</sup> For all of these reasons, need-based scholarships have procompetitive effects that merit-based awards lack.

### B. Reduced Access and Diversity

In addition to raising overall costs, merit-based scholarships can significantly reduce both access to higher education and diversity on campus. Those negative effects arise in at least four ways. First, if schools draw all scholarships from the same financial bucket, increases in merit aid reduce the resources available for low-income students.<sup>114</sup> This trade-off is not inevitable; schools could fund need-based scholarships by taking money from other parts of the budget. As a practical matter, however, dollars for merit-based aid tend to diminish dollars for need-based scholarships.<sup>115</sup>

Second, merit-based scholarships have driven up the list price of tuition. Those posted rates deter some applicants more than others: They cause more “sticker shock” among low-income or minority applicants than among their peers.<sup>116</sup> Our high-list/high-discount system thus may discourage low-income and minority students from even considering law school.<sup>117</sup>

Third, the discounting system imposes particularly high psychic costs on low-income and minority applicants. Many of these applicants distrust bureaucratic decision-making.<sup>118</sup> They may also fear that their race or low

113. See *infra* Part II.C.

114. See SARA GOLDRICK-RAB, *PAYING THE PRICE: COLLEGE COSTS, FINANCIAL AID, AND THE BETRAYAL OF THE AMERICAN DREAM* 252 (2016).

115. See Davis, *supra* note 107, at 6-15; Griffith, *supra* note 66, at 1023.

116. See JENNIFER GIANCOLA & RICHARD D. KAHLENBERG, *TRUE MERIT: ENSURING OUR BRIGHTEST STUDENTS HAVE ACCESS TO OUR BEST COLLEGES AND UNIVERSITIES* 14-25 (2016), <https://www.luminafoundation.org/files/resources/jkcf-true-merit-report.pdf> [https://perma.cc/48KX-DAQA]; WILKINSON, *supra* note 19, at 13; Donald E. Heller, *Student Price Response in Higher Education*, 68 J. HIGHER EDUC. 624, 632, 647 (1997); Lesley J. Turner, *Rethinking Institutional Aid: Implications for Affordability, Access, and the Effectiveness of Federal Student Aid*, in *REINVENTING FINANCIAL AID: CHARTING A NEW COURSE TO COLLEGE AFFORDABILITY* 149, 150 (Andrew P. Kelly & Sara Goldrick-Rab eds., 2014).

117. See U.S. GOV'T ACCOUNTABILITY OFFICE GAO-10-20, *HIGHER EDUCATION: ISSUES RELATED TO LAW SCHOOL COST AND ACCESS* 37 (2009), <http://www.gao.gov/assets/300/297206.pdf> (noting that some law school officials believed that “rising law school tuition may have disproportionately affected minority students”). Some law schools attempt to enhance diversity by offering special scholarships to minority students; others try to increase access by considering need as part of their scholarship process. Unless schools advertise these practices widely, however, they will not overcome the disparate impact of sticker shock. See also *infra* notes 189-90 and accompanying text (describing the opacity of scholarship information currently provided by most law schools).

118. Sara Goldrick-Rab & Tammy Kolbe, *A Matter of Trust: Applying Insights from Social Psychology to Make College Affordable*, 3 POL'Y INSIGHTS FROM BEHAV. & BRAIN SCI. 237, 241 (2016).

economic status will disadvantage them when negotiating for scholarships.<sup>119</sup> Law schools ask these students to commit to legal education, invest significant time and money in studying for the LSAT, risk rejection from multiple schools, and then undertake an uncertain negotiation process—all before they will know the cost of their legal education. This is a heavy burden to place on any young adult, but it is particularly weighty for students with limited experience in higher education.<sup>120</sup>

Some of the same concerns may limit applications from another group that remains underrepresented in the legal profession: women.<sup>121</sup> A large body of research demonstrates that women are less comfortable than men when negotiating for their own financial advantage.<sup>122</sup> By requiring prospective students to engage in high-stakes financial negotiations before they attend their first class, law schools may deter women from applying to their programs. Only 2.6% of female college graduates apply to law school, while 3.4% of male graduates do so.<sup>123</sup>

119. For studies demonstrating racial differences in negotiation outcomes, see Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109 (1995); Paul J. Ferraro & Ronald G. Cummings, *Cultural Diversity, Discrimination, and Economic Outcomes: An Experimental Analysis*, 45 ECON. INQUIRY 217 (2007); Jennifer T. Kubota et al., *The Price of Racial Bias: Intergroup Negotiations in the Ultimatum Game*, 24 PSYCHOL. SCI. 2498 (2013). For the impact of socioeconomic class, see Michael W. Kraus & Wendy Berry Mendes, *Sartorial Symbols of Social Class Elicit Class-Consistent Behavioral and Physiological Responses: A Dyadic Approach*, 143 J. EXPERIMENTAL PSYCHOL.: GEN. 2330 (2014).
120. See Randolph, *supra* note 100, at 67 (describing the burdens on students who “do not know the price that they will pay to attend a given college before they apply to schools”); Goldrick-Rab & Kolbe, *supra* note 118 (describing the many psychic burdens that low-income and minority students bear as they pursue higher education).

Applicants have tried to mitigate the uncertainty of law school pricing by developing websites like [lawschoolnumbers.com](http://lawschoolnumbers.com) and [top-law-schools.com](http://top-law-schools.com). Both sites encourage applicants to post information about their academic credentials, admission status at specific schools, and scholarship awards from those schools. Other applicants can draw upon this information when evaluating scholarship offers and negotiating for a higher offer. The sites may assist some applicants, but they are probably unknown to others. For some, the information on these sites may actually increase the stress of the application and negotiation process. See *also supra* note 99 (describing how law schools may tap information contained in these sites).

121. AM. BAR ASS’N COMM’N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW (2017), [https://www.americanbar.org/content/dam/aba/marketing/women/current\\_glance\\_statistics\\_january2017.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_january2017.authcheckdam.pdf) [<https://perma.cc/QLG5-TBW8>] (detailing persistent underrepresentation of women at different levels of the profession).
122. See, e.g., LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON’T ASK: THE HIGH COST OF AVOIDING NEGOTIATION—AND POSITIVE STRATEGIES FOR CHANGE* (2007); Emma Holliday et al., *Gender Differences in Resources and Negotiation Among Highly Motivated Physician-Scientists*, 30 J. GEN. INTERNAL MED. 401 (2015).
123. Deborah Jones Merritt & Kyle McEntee, *The Leaky Pipeline for Women Entering the Legal Profession* 1 (Nov. 2016), [https://www.lstradio.com/women/documents/MerrittAndMcEnteeResearchSummary\\_Nov-2016.pdf](https://www.lstradio.com/women/documents/MerrittAndMcEnteeResearchSummary_Nov-2016.pdf) [<https://perma.cc/84B5-UNAF>]. This statistic surprises many legal educators; they forget that women make up 57.1% of



The primary factor that law schools use to award “merit” scholarships, finally, correlates highly with race, gender, and socioeconomic background. Black and Latino/a law students have lower LSAT scores than their white and Asian classmates.<sup>124</sup> Women suffer the same disadvantage compared with men.<sup>125</sup> Students whose parents never attended college, similarly, average lower LSAT scores than students with more educated parents.<sup>126</sup> Scholarships that stress LSAT scores, therefore, reduce access for all these historically disadvantaged groups.

Whatever the mechanism, merit-based scholarships do seem to depress access and diversity within legal education. One study shows that the percentage of black and Mexican-American law students declined between 1993 and 2008, a period in which schools increasingly embraced merit aid.<sup>127</sup> Another confirms that that black, Latino/a, and moderate-income law students are less likely than their white, Asian, and affluent classmates to receive merit scholarships.<sup>128</sup> And, although no study directly ties gender to scholarships, recent work shows that women law students cluster in significantly lower-ranked schools than men.<sup>129</sup> That enrollment pattern may stem from schools offering fewer merit scholarships to women.<sup>130</sup>

On the college level, a well-designed study offers further evidence that merit-based aid diminishes access for minorities and low-income students. Economist Amanda Griffith compared colleges that shifted to merit aid with those that did not, while controlling for numerous differences between those

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college graduates. *Id.* If law school were as attractive to women as to men, applications would rise sixteen percent overall. *Id.* Note that women outnumber men in many other graduate programs; their reluctance to apply to law school does not reflect a lack of interest in graduate education. *Id.*

124. See LSSSE REPORT, *supra* note 13, at 9.

125. LAW SCH. ADMISSION COUNCIL, TECHNICAL REPORT 14-02, SUSAN P. DALESSANDRO ET AL., LSAT PERFORMANCE WITH REGIONAL, GENDER, AND RACIAL/ETHNIC BREAKDOWNS: 2007-2008 THROUGH 2013-2014 TESTING YEARS 19-20 (2014), [https://www.lsac.org/docs/default-source/research-\(lsac-resources\)/tr-14-02.pdf](https://www.lsac.org/docs/default-source/research-(lsac-resources)/tr-14-02.pdf) [<https://perma.cc/2AA6-RS8R>].

126. LSSSE REPORT, *supra* note 13, at 10. Researchers frequently use parental education as a measure of family income. *Id.*

127. Conrad Johnson, *Disturbing Trend in Law School Diversity*, COLUM. L. SCH, <http://blogs.law.columbia.edu/salt/#content> (last visited June 22, 2017). In more recent years, as overall class sizes have fallen, the percentage of black and Latino/a law students has risen again. See Aaron N. Taylor, *Diversity as a Law School Survival Strategy*, 59 ST. LOUIS U. L.J. 321, 340, 342 (2015). The absolute number of those minority students, however, has declined and their enrollment has shifted to less prestigious schools. *Id.* at 340-43.

128. LSSSE REPORT, *supra* note 13, at 9-10. In this study, two-thirds of white (sixty-seven percent) and affluent (sixty-five percent) students reported receiving merit scholarships; just half of black (forty-nine percent) and economically disadvantaged (fifty-two percent) students did so.

129. Merritt & McEntee, *supra* note 123, at 2.

130. *Id.* at 3.

groups.<sup>131</sup> Her regression analysis persuasively shows that adoption of merit aid was “associated with a decrease in the percentage of low-income and Black students, particularly at the more selective institutions.”<sup>132</sup>

Conversely, another recent study shows that mandating need-based aid increases enrollment by low-income and minority students.<sup>133</sup> The colleges in the latter study differentiated tuition by degree program but also devoted legislatively required amounts of revenue to need-based aid. The combined effect shifted low-income and minority students into degree programs with more promising career outcomes.

Law schools, in sum, have a strong argument that restrictions on merit-based aid would increase both the number of students applying to law school and the diversity of those applicants. As the Third Circuit recognized in *Brown II*, those are important procompetitive effects. Enhancing consumer choice is a traditional procompetitive effect recognized by the antitrust laws.<sup>134</sup> By restricting merit-based scholarships, law schools would attract more low-income, minority, and female applicants—and would increase the number of students benefiting from legal education.<sup>135</sup> More diverse classes, meanwhile, would improve the quality of the educational product.<sup>136</sup> Courts have also recognized that effect as procompetitive under rule-of-reason analysis.<sup>137</sup>

These procompetitive effects carry special weight in legal education because law schools serve as gatekeepers to the legal profession. If law schools increase the number and diversity of their students, as well as the quality of their educational program, the profession will benefit. Those competitive benefits, in turn, will flow to consumers of legal services.

131. Griffith, *supra* note 66. Griffith’s study included 133 private colleges that did not offer merit aid in 1987. Over the next nineteen years, ninety-three of those schools started awarding merit aid; Griffith compared outcomes at those schools with those at the other forty.
132. Griffith, *supra* note 66, at 1033. See also Eric A. Hanushek et al., *Borrowing Constraints, College Aid, and Intergenerational Mobility*, 8 J. HUM. CAP. 1, 1 (2014) (in a theoretical model, need-based aid was more effective than merit-based aid in “promoting aggregate efficiency and income equality”); Sigal Alon, *Who Benefits Most from Financial Aid? The Heterogeneous Effect of Need-Based Grants on Students’ College Persistence*, 92 SOC. SCI. Q. 807 (2011) (demonstrating the importance of need-based aid in helping low-income students persist in college).
133. Rodney Andrews & Kevin Stange, *Price Regulation, Price Discrimination, and Equality of Opportunity in Higher Education: Evidence from Texas* (Univ of Mich., Working Paper, Feb. 2017), <http://www-personal.umich.edu/~kstange/papers/AndrewsStange2016.pdf> [https://perma.cc/PPC9-D3NG].
134. Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102 (1984); *Brown II*, 5 F.3d at 658, 675.
135. Most schools currently operate under capacity, see *supra* note 110, so they could admit qualified low-income, minority, and female applicants without displacing other students.
136. See *Grutter v. Bollinger*, 539 U.S. 306, 319–20, 330–32 (2003) (citing numerous sources).
137. *Nat’l Collegiate Athletic Ass’n*, 468 U.S. at 114–15; *Brown II*, 5 F.3d at 674.

### C. Impaired Development of Human Capital

Law schools, like other educational programs, enhance human capital: A law degree increases both job opportunities and income for degree holders.<sup>138</sup> That capital development, however, is not uniform across law schools. Some schools are better investments than others.<sup>139</sup>

When prospective students choose among schools, therefore, they make an important choice about developing their human capital. Scholars have shown that wealthy students tend to choose institutions that will maximize their human capital, even if they pay more to attend those schools.<sup>140</sup> Low- and middle-income students are more price-sensitive; they are more likely to compromise their capital development for lower tuition—even when long-term returns would justify a greater investment.<sup>141</sup>

Merit-based scholarships exacerbate this trend. Wealthy students enroll at the school that offers them the highest promise of capital development, even if they pay full tuition for that opportunity.<sup>142</sup> These students can afford to reject scholarship offers from schools with lower prospects of capital development. Low- and moderate-income students, on the other hand, must balance capital development against cost. These students may decline full-price seats at schools that will maximize their capital development while accepting scholarships at schools that offer somewhat less promise. The latter students

138. Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. LEGAL STUDIES 249 (2014).
139. JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 49–50, 57–60 (2005); Luis Garicano & Thomas N. Hubbard, *Hierarchical Sorting and Learning Costs: Theory and Evidence from the Law*, 58 J. ECON. BEHAVIOR & ORG. 349 (2005); Organ, *supra* note 102; Richard Sander & Jane Bambauer, *The Secret of My Success: How Status, Eliteness, and School Performance Shape Legal Careers*, 9 J. EMPIRICAL LEGAL STUD. 893, 917 (2012) (status of law school correlates significantly with income even after controlling for LSAT scores and law school grades); Scott F. Norberg, *The Case for an ABA Accreditation Standard on Employment Outcomes* 10 (FIU Legal Studs. Res. Paper Series, Paper No. 17-20, 2017), <https://ssrn.com/abstract=2998306> (showing wide range of initial employment outcomes among law schools).
140. Christopher Avery & Caroline M. Hoxby, *Do and Should Financial Aid Packages Affect Students' College Choices?* in COLLEGE CHOICES: THE ECONOMICS OF WHERE TO GO, WHEN TO GO, AND HOW TO PAY FOR IT 239, 265–68 (Caroline M. Hoxby ed., 2004).
141. See ANTHONY P. CARNEVALE & MARTIN VAN DER WERF, THE 20% SOLUTION: SELECTIVE COLLEGES CAN AFFORD TO ADMIT MORE PELL GRANT RECIPIENTS 6–7 (low-income students are underrepresented at selective colleges that “produce graduates that earn more in the workplace on average”), <https://cew-7632.kxcdn.com/wp-content/uploads/The-20-Percent-Solution-web.pdf> [<https://perma.cc/3WT4-PTMX>]; ANTHONY P. CARNEVALE & JEFF STROHL, SEPARATE & UNEQUAL: HOW HIGHER EDUCATION REINFORCES THE INTERGENERATIONAL REPRODUCTION OF WHITE RACIAL PRIVILEGE (2013) (documenting increased segregation of black, Latino/a, and low-income students in less selective, low-tuition colleges), [https://cew-7632.kxcdn.com/wp-content/uploads/SeparateUnequal.FR\\_.pdf](https://cew-7632.kxcdn.com/wp-content/uploads/SeparateUnequal.FR_.pdf) [<https://perma.cc/PPX8-9CY5>]; Turner, *supra* note 116, at 161–62.
142. See Epple et al., *supra* note 103, at 1–2 (under merit-based schemes, students who pay maximum tuition at each school “are of relatively low ability in the school” and “have income sufficiently high so that they are willing to pay the price maximum”).

benefit from a low-cost legal education, but they constrain the long-term value of their degree.<sup>143</sup>

Merit-based aid thus fosters a system that sorts students by wealth, rather than by the merit it purports to reward.<sup>144</sup> High-income students tend to “matriculate up,” paying full price to attend the school that is most attractive to them. Moderate-income students are more likely to “matriculate down,” accepting scholarships to attend less-preferred schools—even when they have better credentials than their wealthy peers.<sup>145</sup>

143. Choosing a lower-ranked school does not inevitably depress a student’s long-term prospects. A student who attends a lower-ranked school, for example, may compensate for that constraint by performing exceptionally well. *See* Sander & Bambauer, *supra* note 139, at 901 (finding that student grades play a greater role than prestige in predicting the financial returns to legal education). The strategy, however, is risky; some career opportunities decline precipitously outside the most elite law schools. The academic consensus, along with the behavior of wealthy students, counsels that “where you go to school matters.” GIANCOLA & KAHLBERG, *supra* note 116, at 8.

144. *See* GIANCOLA & KAHLBERG *supra* note 116, at 1 (“American postsecondary education is highly stratified by socioeconomic class, with 72 percent of students in the nation’s most competitive institutions coming from families in the wealthiest quartile.”); Richard Sander, *The Use of Socioeconomic Affirmative Action at the University of California*, in *THE FUTURE OF AFFIRMATIVE ACTION: NEW PATHS TO HIGHER EDUCATION DIVERSITY AFTER FISHER V. UNIVERSITY OF TEXAS* 99, 105 (Richard D. Kahlenberg ed., 2014) (“Nationally, elite law schools . . . draw only about one-tenth of their students from the bottom half of the national SES distribution”); Aaron N. Taylor, *Director’s Message*, LSSSE REPORT, *supra* note 13, at 6 (“These trends [in law school merit aid] exacerbate preexisting privilege and disadvantage, setting the stage for long-term disparities in experiences and outcomes.”).

145. To understand this dynamic, consider two hypothetical students: Veronica is wealthy, while Betty is poor. Betty’s college grades and LSAT scores win her admission to Pembroke School of Law, a fictitious school ranked about tenth in *U.S. News*. Betty’s credentials put her slightly above the median for Pembroke, and that school offers her a scholarship covering one-quarter of her tuition. Riverdale Law, another fictitious school ranked about thirtieth, also admits Betty. Her LSAT score and UGPA put her more significantly above the median at Riverdale, so the school offers her a half-tuition scholarship.

Betty would like to attend Pembroke because it has a higher ranking, it offers a clinical program that appeals to her, and she particularly likes the professors she met during a campus visit. She concludes, however, that the price differential is too high; without a safety net of family support she is reluctant to borrow too heavily. She accepts the half-tuition scholarship from Riverdale.

Veronica’s grades and scores are lower than Betty’s. When Betty gives up her seat at Pembroke, Veronica is admitted off the waitlist with no scholarship money. Several other schools, including Riverdale, offer Veronica small scholarships but she chooses to attend Pembroke at full price; her parents’ wealth supports that option.

How would a shift to need-based scholarships change this scenario? If Pembroke devoted more of its resources to need-based scholarships, it might offer Betty a more substantial scholarship—allowing her to attend her preferred school. Veronica, then, would not gain admission to Pembroke; she would attend Riverdale or another school that admitted her.

The example demonstrates the paradox of “merit-based” aid. Under a merit-based system, the student with lower credentials (Veronica) attends the higher-ranked school. A shift to need-based aid allows the more qualified student (Betty) to attend that higher-ranked school if she wants to do so.

Shifting aid to need-based scholarships alters this dynamic. Dennis Epple and his colleagues found that awarding college aid purely on the basis of need “causes some of the [financially] poorer students to attend higher quality colleges” while “the reverse is true for some of the richer students.”<sup>146</sup> A policy limiting merit-based aid thus “increases the access to high quality education of lower income households.”<sup>147</sup> It can also *raise* the quality of students at each school because low-income students can afford to attend the most selective school that admits them.<sup>148</sup>

Enhancing the development of human capital improves consumer welfare in several ways. Well-educated individuals produce high-quality goods and services; they also innovate to challenge existing sellers. These highly educated individuals, finally, have the resources to consume a wide variety of goods and services. Our competitive economy prospers when individuals maximize development of their human capital.<sup>149</sup> If law schools encourage low-income students to make the same educational investments that wealthier students are able to make, consumers and the economy will benefit. Transferring resources from merit-based scholarships to need-based ones would help achieve that end. Wealthy students would still maximize their human capital investment by attending the institutions that best match their credentials and career goals. Financially disadvantaged students, meanwhile, would acquire the resources to make the same choices.<sup>150</sup>

### III. Practical Options for Law Schools and the Council

As explained above, our current system of merit-based aid undermines competition in at least three ways: It raises overall costs to law students, reduces access and diversity, and impairs capital development by low-income students. Those losses provide procompetitive justifications for agreements limiting merit-based scholarships. The justifications are especially compelling in the market for legal education because that market directly affects the one for legal services. If law schools can moderate costs, enhance access and diversity, and promote capital development, they will also improve competition in the legal profession.

146. Epple et al., *supra* note 107, at 916.

147. *Id.* at 888.

148. For an example of this effect, see the story of Betty and Veronica *supra* note 145.

149. See Goldin, *supra* note 10 (describing the importance of human capital development in the United States). Developing human capital is especially important in a global economy. Today’s law school graduates compete, not only with other graduates of U.S. schools, but with lawyers from around the world.

150. Some defenders of merit-based aid argue that these scholarships enable lower-ranked schools to enhance their educational quality by enrolling a few “superstars” who would otherwise attend a higher-ranked school. Low- and moderate-income superstars, however, are most likely to take advantage of those scholarships; wealthier superstars will choose to attend the higher-ranked school. Given the disadvantages that low-income students suffer throughout their lives, it seems unfair to rely upon them to enhance the education of wealthier (but less accomplished) classmates.

These procompetitive effects offer strong policy reasons for law schools to limit merit-based aid; they would also provide a defense against any antitrust challenge. Under *Brown II*,<sup>151</sup> *O'Bannon*,<sup>152</sup> and other precedents, courts almost certainly would judge agreements to restrict merit aid under the rule of reason. A court might find an agreement anti-competitive under the first step of that analysis, but law schools could advance procompetitive justifications at least as strong as those presented in *Brown II* and *O'Bannon*.<sup>153</sup> More narrowly tailored alternatives would be difficult to identify; indeed, an agreement that merely limited merit aid (rather than banning it entirely) would be more narrowly tailored than the current congressional exemption.<sup>154</sup> Rule-of-reason analysis thus would favor law schools.<sup>155</sup>

We recognize, however, that lawsuits are expensive and time-consuming to defend. Law schools might not want to risk those costs—although MIT won widespread admiration for doing so in the 1990s.<sup>156</sup> We present here, therefore, three practical options for law schools. Each of these avenues would permit

151. See *supra* notes 37–55 and accompanying text (discussing *Brown II*).

152. See *supra* notes 81–88 and accompanying text.

153. The procompetitive rationales advanced in *Brown* were very similar to those offered here. Law schools, however, are in a stronger position than the *Brown* defendants for two reasons: (1) A much broader theoretical and empirical literature supports their procompetitive claims; and (2) any agreement among law schools would not include the very dubious Ivy Overlap practice of agreeing on aid amounts for individual applicants.

In *O'Bannon*, similarly, the defendant offered weak empirical evidence of a procompetitive effect. See Ross & DeSarbo, *supra* note 88. Law schools can rely upon a well-developed literature to defend the procompetitive effects discussed here.

154. See *supra* Part II.C.

155. Judicial opinions suggest that “plaintiffs almost never win under the rule of reason.” Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 830 (2009). The most recent study of published opinions, in fact, found that plaintiffs won only one of 222 cases assessed under the rule of reason. *Id.* Disputes generating a published opinion may not represent the full universe of antitrust claims; defendants with weak cases may be more likely to settle before the dispute generates a judicial opinion. Still, the published case law suggests that current antitrust law favors defendants in many circumstances.

Law schools faced with an antitrust claim might obtain summary dismissal of any private lawsuits, without reaching the rule-of-reason analysis, on the ground that no private plaintiff can establish a sufficient antitrust injury. A law student with a high LSAT score and little financial need might claim that an agreement restricting merit aid reduced the value of scholarships offered to him. It would be difficult, however, for that student to establish the value of any scholarship he would have received absent the agreement; current practices are highly discretionary and subject to individual negotiation. In addition, the challenger and other students would have benefited from an offsetting moderation of list prices.

Questions of antitrust standing and injury, however, are complex; a disgruntled student or other private party might suggest sufficient antitrust injury to proceed with a lawsuit. For that reason, we focus our discussion on outcomes under a full rule-of-reason analysis.

156. See WILKINSON, *supra* note 19, at 197 (“MIT’s stance was much admired by elite-college administrators, including many at Ivy colleges, and other people concerned about student aid. One of the smaller overlap colleges sent ten thousand dollars to MIT as a gesture of appreciation.”).



schools to limit merit-based aid with little or no antitrust risk. In the final subsection, we explain that most of the same options would support adoption of an accreditation standard limiting merit-based aid.

#### A. Use the Statutory Safe Harbor

Congress already allows institutions of higher education to make agreements awarding scholarships only to financially needy students; those covenants are exempt from the antitrust laws.<sup>157</sup> Schools qualify for this exemption as long as they admit all students on a “need-blind basis.”<sup>158</sup> Admissions, in other words, must occur “without regard to the financial circumstances of the student involved or the student’s family.”<sup>159</sup>

We suspect that most, if not all, law schools admit students on a need-blind basis.<sup>160</sup> The exemption, therefore, is available for any schools choosing to use it. The only drawback to this safe harbor is that it requires schools to award *all* their financial aid on the basis of need.<sup>161</sup> Many law schools might prefer to limit merit aid rather than ban it entirely. In particular, schools might want to retain scholarships focused on attracting minority students, those committed to public service, or those who have demonstrated exceptional leadership. Some endowed scholarships might also specify merit- rather than need-based criteria.

It is, however, at least worth considering this option. Preservation of merit-based scholarships may not be as important as legal educators first imagine. Schools could reward students committed to public service through back-end loan repayment assistance programs rather than upfront scholarships.<sup>162</sup> Minority students often qualify for need-based aid, especially when schools consider family wealth rather than income.<sup>163</sup> Schools, finally, may have adopted scholarships focused on leadership and other qualities partly to

157. 15 U.S.C. § 1 note (2012). *See generally supra* Part II.C.

158. 15 U.S.C. § 1 note (2012).

159. *Id.*

160. For graduate programs, generous federal loans relieve much of the incentive to consider an applicant’s ability to pay. Law schools know that if an applicant cannot finance her education directly, she has the option of covering costs through federal loans.

161. *See Collins & Cottafavi Memo, supra* note 16, at 30.

162. *Cf. Whitford, supra* note 4, at 11 (favoring the use of more “back-ended needs-based financial aid”).

163. *See LSSSE REPORT, supra* note 13, at 10 (“Black [law students] were the most likely recipients of need-based scholarship aid; white [students] were least likely.”). Harvard Law School, which awards all of its scholarships based on need, makes clear that it assesses several measures of a family’s wealth: “A resource assessment is a relative measure of a given family’s financial strength compared to all other families applying for financial aid in an academic year, and is best thought of as a measurement of each family’s ability to finance the cost of education over time. It is an evaluation of not just a family’s current resources from present income earned, but also of the overall savings and investment level, as well as the family’s ability to borrow against these resources.” *Determination of Financial Need, supra* note 12.

balance awards tied to test scores and grades. If schools eliminate the latter scholarships, are other types of merit-based aid necessary?

Need-based aid is so effective at lowering costs, increasing access, enhancing diversity, and developing human capital that law schools should at least explore agreements to abandon all merit-based aid. Those agreements would risk no antitrust liability. Note that the statutory exemption does not require *all* schools to participate in an agreement. A subset of schools could lead the way by agreeing to award financial aid solely on the basis of need.<sup>164</sup> Shifting scholarship practices as part of a group carries less rankings risk than acting unilaterally. Indeed, if schools publicize their shared commitment to lowering costs and addressing need, they might increase the quantity and quality of their applicants.<sup>165</sup>

### *B. Lobby for Modification of the Statutory Exemption*

If the current statutory exemption does not accommodate enough law schools, schools could ask Congress to modify the exemption. A slight change—to allow agreements limiting merit-based aid—would serve the procompetitive interests outlined above. None of those interests requires complete abolition of merit aid; even limiting that aid could reduce costs, increase access, improve diversity, and enhance the development of human capital. Law schools, therefore, could make a persuasive policy case to modify the exemption.

In addition to those arguments, three factors might persuade Congress to grant this relief. First, the current statute simply reflects the practices of the colleges that originally lobbied for the exemption. Those colleges wanted to ban all merit-based aid, and the statute adopted their goal. There is no evidence that Congress would have rejected a different exemption that allowed agreements to limit merit aid.

Second, a modified exemption would be less restrictive than the current one. The current provision offers just two choices: Agree to ban all merit-based aid or make no agreements. Agreements to moderate merit aid offer more market flexibility, better furthering both educational and competitive goals.

Finally, if law schools favor modifying the exemption, they are unlikely to meet opposition from other quarters.<sup>166</sup> The change would impose no costs

164. Shared characteristics might prompt schools to form this type of group. Schools with a commitment to Christian education, for example, might decide that need-based aid furthers that commitment. A group of flagship public law schools, similarly, might further their identity by declaring their commitment to achieving lower costs, greater access, and increased diversity through need-based scholarships.

165. The current exemption expires on Sept. 30, 2022, but Congress has continually renewed a form of the exemption since first adopting it in 1992. Even if the exemption ends in 2022, it gives law schools five years to reform harmful scholarship practices.

166. Like Professor Whitford, we believe that “many law schools” would like to shift resources from merit-based aid to need-based aid, but that they don’t see a way to accomplish that goal without collective action. Whitford, *supra* note 4, at 12. Our article builds on that premise.

on the federal budget, and it would not compel any action by colleges or universities. Modifying the exemption would simply allow institutions to agree to limit merit-based aid if they believed those agreements would promote access and other higher education goals.

Several college presidents and policymakers have already expressed interest in lobbying Congress to modify the exemption.<sup>167</sup> By working with those advocates, law schools would strengthen their position while minimizing their own investment in lobbying. Given the current statutory exemption, the strong policy reasons to modify that exemption, and the national interest in expanding financial resources for needy students, this advocacy effort holds promise of success.

### C. Request a Letter from the Department of Justice

If law schools cannot fit within the current antitrust exemption, and if Congress fails to respond to requests for a statutory modification, schools have one other way to minimize antitrust risk while pursuing agreements to limit merit-based aid. A group of schools could design a suitable agreement and, before implementing the agreement, request a business review letter from the Department of Justice.

The department has a well-established procedure for advising businesses on the potential antitrust consequences of proposed conduct.<sup>168</sup> Any business may submit a written request to the Assistant Attorney General of the Antitrust Division, providing detailed information about the proposed practice. The division will review the proposed practice, requesting additional data and conducting an independent investigation if necessary. After completing the review, the department issues a letter offering one of three possible responses:

1. The Department of Justice does not presently intend to bring an enforcement action against the proposed conduct.
2. The Department of Justice declines to state its enforcement intentions. The Division may or may not file suit if the proposed conduct happens.
3. The Department of Justice will sue if the proposed conduct happens.<sup>169</sup>

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If schools prefer the current merit-based system, then Congress is unlikely to modify the exemption. But if educators genuinely want to elevate need-based aid over merit awards, it should be relatively easy to lobby Congress for a modification of the current exemption.

167. See, e.g., WILKINSON, *supra* note 19, at 191-92; TIME TO REEXAMINE, *supra* note 16, at 10-11; Collins & Cottafavi Memo, *supra* note 16, at 30, 32.

168. U.S. DEP'T OF JUSTICE, INTRODUCTION TO ANTITRUST DIVISION BUSINESS REVIEWS (2011), <https://www.justice.gov/sites/default/files/atr/legacy/2011/11/03/276833.pdf> [https://perma.cc/6382-34WW]; Antitrust Division Business Review Procedure, 28 C.F.R. § 50.6 (2016). The Federal Trade Commission has a similar process, see *Advisory Opinions*, FED. TRADE COMM'N, <https://www.ftc.gov/policy/advisory-opinions> (last visited June 29, 2017) [https://perma.cc/8PSY-FRCZ]. We focus on the Department of Justice process because that agency prosecuted the Ivy Overlap case.

169. U.S. DEP'T. OF JUSTICE, *supra* note 168, at 2.

A positive response from the department (i.e., a “no present intention” letter) does not insulate the business from all antitrust liability. The Antitrust Division “remains free to bring whatever action it subsequently comes to believe is required by the public interest.”<sup>170</sup> After issuing a “no present intention” letter, however, the division “has never subsequently brought a criminal action” as long as the parties made “full disclosure at the time the business review request was presented to the Division.”<sup>171</sup>

The division also publicizes its business review letters;<sup>172</sup> the content of those letters may discourage private plaintiffs from challenging the reviewed action. If litigation occurs, “courts frequently cite [the division’s] review as a factor in judicial approval of [the] arrangements.”<sup>173</sup> Indeed, “there is no reported case in which an approved agreement was subsequently held to be unlawful.”<sup>174</sup> A positive business review letter, therefore, would give law schools substantial protection against antitrust liability.<sup>175</sup>

Antitrust experts warn of some drawbacks to seeking a business review letter. Division staff may be conservative in issuing positive letters; if an arrangement is novel, the division may conduct a “prolonged” review culminating in a noncommittal letter.<sup>176</sup> More worrisome, seeking a review letter may alert the division and private plaintiffs to activity that would have otherwise gone unnoticed.<sup>177</sup>

These reservations, however, are unlikely to apply to law schools proposing to regulate merit-based scholarships. Law schools are nationally prominent; they would not be able to hide an agreement from the Antitrust Division or other potential plaintiffs. The issues surrounding limitation of merit-based aid, furthermore, were extensively explored in the *Brown* litigation and enactment of the congressional exemption. Assessing the procompetitive (or anti-

170. *Id.*

171. *Id.*

172. See *Business Reviews*, U.S. DEP’T OF JUSTICE (last updated Mar. 25, 2016), <https://www.justice.gov/atr/business-reviews>

173. Peter C. Carstensen, *Replacing Antitrust Exemptions for Transportation Industries: The Potential for a “Robust Business Review Clearance,”* 89 OR. L. REV. 1059, 1069 (2011).

174. *Id.* See also Ky P. Ewing, Jr., *Thoughts on Seeking Business Reviews of Competitor Collaborations*, ANTITRUST, Summer 2005, at 40, 42 (“to the best of my knowledge, no successful antitrust challenge has ever been mounted in court by a private plaintiff against activities ‘cleared’ by [the Antitrust Division]”).

175. A positive letter, unfortunately, cannot insulate schools from the risk that a lawsuit would be filed. Plaintiffs file many unsuccessful antitrust challenges, see *supra* note 155, and those lawsuits must be defended. Some plaintiffs, however, would have trouble establishing standing to challenge an agreement to restrict merit scholarships; others would struggle to prove their damages. See *supra* note 155. Those factors, when combined with a positive business review letter, might dissuade plaintiffs and attorneys from filing suit.

176. Ewing, *supra* note 174, at 42.

177. *Id.* at 41.

competitive) effects of such an agreement should not be unduly challenging for Antitrust Division attorneys. Law schools could hope for a definitive letter rather than a noncommittal one.<sup>178</sup>

Most important, the procompetitive arguments outlined above make a persuasive case in favor of agreements limiting merit-based scholarships. Even with limited empirical evidence, the Third Circuit signaled in *Brown II* that similar rationales could justify these agreements under the rule of reason. Over the past twenty-five years, economists and other social scientists have built a substantial body of research supporting that conclusion. That research could help convince the Antitrust Division that voluntary agreements limiting merit aid are procompetitive.

#### *D. Adopt an Accreditation Standard*

For simplicity, our discussion has focused on the antitrust status of agreements among individual law schools. The Council of the ABA Section of Legal Education and Admissions to the Bar, however, could also limit merit-based scholarships by adopting an accreditation standard. Such a standard could bar merit-based aid entirely, limit the extent of that aid, restrict the sources of that aid, or take other forms.

An accreditation standard could establish a uniform guidepost for all law schools while leaving significant flexibility to each school. A standard requiring that need-based aid at least equal merit-based aid, for example, would not require law schools to award particular levels of aid—or any aid at all. Nor would that type of standard dictate the type of “merit” recognized by law schools, the particular students receiving aid, or the amounts of those awards. Law schools would make all of the latter decisions unilaterally.

From an antitrust perspective, an accreditation standard would not benefit from the current statutory exemption; that exemption protects agreements among schools, not accreditation standards. The council, however, could lobby Congress to modify the exemption to allow accreditation standards limiting merit-based scholarships. That advocacy could incorporate the same arguments outlined above.<sup>179</sup> Similarly, the council could seek a business review letter focused on the legality of an accreditation standard. Once again, the policy arguments developed in this article would support a positive letter.

178. A consortium of colleges and universities used the business-review process in 2011 to seek the Department’s perspective on a “Designated Suppliers Program” governing school-licensed apparel. Letter from Donald I. Baker, Baker & Miller, PLLC, to Acting Assistant Attorney Gen. Sharis A. Pozen (Dec. 15, 2011), <https://www.justice.gov/sites/default/files/atr/legacy/2014/01/15/302113.pdf> [<https://perma.cc/G9UK-BVPM>]. The proposed program included regulation of minimum wages and other working conditions for companies participating in the program, but the Department found countervailing procompetitive benefits and issued a “no present intention” letter. Letter from Acting Assistant Attorney Gen. Sharis A. Pozen to Donald I. Baker, Baker & Miller PLLC (Dec. 16, 2011), <https://www.justice.gov/sites/default/files/atr/legacy/2011/12/19/278342.pdf> [<https://perma.cc/PY7C-GT8X>].

179. See *supra* Part II.

It is possible that Congress and the Department of Justice would view an accreditation standard even more favorably than an agreement among law schools. When applying antitrust law, courts have been quite deferential to accreditation standards.<sup>180</sup> That acquiescence is especially appropriate when (a) the accrediting body includes decision-makers drawn from outside the regulated group, and (b) any proposed standards are subject to public notice and comment. These conditions limit the power of competitors to manipulate accreditation standards in anti-competitive ways.<sup>181</sup>

The council's composition and procedures satisfy both of those requirements,<sup>182</sup> which would carry weight in any antitrust challenge. If the council concluded after both internal deliberation and public notice and comment that educational and procompetitive goals require channeling more financial resources to need-based scholarships, and that modest limits on merit aid would further that end, it is difficult to imagine the Department of Justice or courts second-guessing that decision.<sup>183</sup>

180. See, e.g., *Found. for Interior Design Educ. Research v. Savannah Coll. of Art & Design*, 244 F.3d 521 (6th Cir. 2001); *Mass. Sch. of Law at Andover, Inc. v. ABA*, 107 F.3d 1026, 1038 (3d Cir.1997); see generally AM. BAR ASS'N SECTION OF ANTITRUST LAW, HANDBOOK ON THE ANTITRUST ASPECTS OF STANDARDS SETTING (2d ed. 2011) [hereinafter STANDARDS SETTING]; Clark C. Havighurst & Peter M. Brody, *Accrediting and the Sherman Act*, LAW & CONTEMP. PROBS., Autumn 1994, at 199 (1995) (reviewing history and theory of accreditation cases); Matthew Struhar, *How to Dismantle a Virtual Cartel: The Promises and Pitfalls of Higher Education Reform in California*, 14 U.C. DAVIS BUS. L.J. 127, 138 (2013) ("courts have not found that the Sherman Act requires aggressive policing of accreditation").

181. Cf. STANDARDS SETTING, *supra* note 180, at 55 ("the DOJ has indicated that it is less inclined to challenge a proposed standard where a wide array of constituencies was involved in setting the standard").

182. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, THE LAW SCHOOL ACCREDITATION PROCESS 3 (2016) ("The Council is comprised of 21 voting members, no more than 10 of whom may be law school deans or faculty members. Other members of the Council include judges, practicing attorneys, one law student, and at least three public members."), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2016\\_accreditation\\_brochure\\_final.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2016_accreditation_brochure_final.authcheckdam.pdf) [https://perma.cc/M2PC-RZVB]; SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 2016-2017, at 125-26 (2016) (outlining internal operating practices for review and revision of standards).

183. The council, however, would not be able to invoke state-action immunity to shield the type of standards discussed here. Although several states require bar applicants to graduate from ABA-accredited law schools, and thus delegate some authority over professional preparation to the ABA Council, the council is not itself sovereign. To invoke state-action immunity, therefore, the council would have to satisfy the two-part test recently confirmed in *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015). Both prongs of that test would be difficult for the council to satisfy. State supreme courts have not "articulated a clear policy" favoring agreements to limit merit-based aid; nor do they offer "active supervision" when the council develops accreditation standards. *Id.* at 1112.

State-action immunity plays a more central role when unaccredited law schools (or their students) challenge an accreditation standard. Courts have concluded that those plaintiffs cannot blame accreditation standards for the fact that graduates of unaccredited schools are not allowed to practice law in some states. Those "complaints are more properly directed to



It is true that the department sued the ABA in 1995, challenging several accreditation standards as unlawful restraints of trade.<sup>184</sup> That action, however, concentrated on practices that tended to enhance faculty salaries, as well as on procedural defects in the council's membership and standard-setting procedures. "The focus of th[e] case," the department explained, "was the capture of the ABA's law school accreditation process by those who used it to advance their self-interest . . . ."<sup>185</sup> The department acknowledged that it was "not particularly qualified" to determine the content of most accreditation rules.<sup>186</sup> Instead, it sought "to reform the process, removing the opportunity for taint, and then to have the cleansed process establish new rules."<sup>187</sup>

The accreditation standards proposed in this article would not financially benefit law schools at students' expense. On the contrary, one purpose—and likely effect—of any limit on merit-based aid would be to *lower* average tuition paid by students.<sup>188</sup> Given that goal, the companion aims of increasing access and diversity, and the council's current processes, it is unlikely that the department would challenge an accreditation standard focused on increasing resources for need-based aid.

At the very least, the ABA Council could adopt an accreditation standard requiring law schools to publicize scholarship practices on their websites and in other admissions materials. The ABA gathers annual information about the percentage of students receiving scholarships at each school, the percentage receiving different levels of aid, and the quartile value of those scholarships. Those data appear in the "ABA Standard 509 Information Report," which most law schools post on their websites.<sup>189</sup> The law school web pages we have visited, however, give students no clue that information about tuition discounts is buried in those linked reports. Instead, schools use extraordinarily vague language to describe their scholarship practices.<sup>190</sup>

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the state supreme courts that have chosen to recognize only ABA-accredited schools" and those "state regulatory policies are outside the ambit of the Sherman Act." *Zavaletta v. ABA*, 721 F. Supp. 96, 98 (E.D. Va. 1989).

184. Complaint, *United States v. ABA*, No. 1:95CV01211 (June 27, 1995), <https://www.justice.gov/atr/case-document/file/485696/download> [<https://perma.cc/8V7Y-SRZL>].

185. *United States' Response to Public Comments at 4, United States v. ABA*, No. 1:95CV01211 (Oct. 27, 1995) <https://www.justice.gov/atr/case-document/file/485676/download> [<https://perma.cc/PF9P-SLHQ>].

186. *Id.*

187. *Id.* See also Order and Final Judgment, *United States v. ABA*, No. 1:95CV01211 (June 25, 1996) (focusing on salary concerns and procedural remedies), <https://www.justice.gov/atr/case-document/file/485671/download> [<https://perma.cc/7LC7-BSEW>].

188. See *supra* Part II.A.

189. These reports also appear on the ABA's website, ABA REQUIRED DISCLOSURES, *supra* note 1.

190. Our alma mater, for example, includes this language in the financial aid portion of its website: "Columbia Law School awards grant assistance primarily on the basis of demonstrated financial need. However, there are a number of fellowships that are not based on financial need, which are awarded by the Admissions Office at the time an applicant is admitted

A “scholarship transparency” standard would require schools to disclose prominently, in language that applicants will understand: (a) the criteria they use to award scholarships; (b) the approximate number and size of awards conferred in different categories; and (c) whether the school will negotiate offers. Students considering law school should be able to estimate the tuition they will pay *before* they invest significant time and money in the application process. Potential applicants should also have the information they need to negotiate effectively. The opacity of our current system hurts too many applicants—especially those from historically disadvantaged groups.

Law schools might object that they need flexibility in crafting each year’s scholarship offers, so they could not reliably publicize the number and amount of grants in advance. This, however, would simply indicate that schools use discounts to maximize their own revenue and prestige rather than to recognize genuine merit or address financial need. Students—especially low-income, minority, and female students—would benefit from open information about the discounts each school might be willing to offer them.

### Conclusion

Many legal educators are pessimistic about the chances of reforming financial aid practices. We are somewhat more optimistic: We see several options for law schools or the council to limit merit-based aid and devote more resources to need-based scholarships. That shift could moderate the costs of legal education; increase access for low-income, minority, and female students; enhance diversity; and encourage sounder investment in human capital. These benefits would accrue to individual applicants, law schools, the legal profession, and the economy as a whole. The potential benefits are great, while the risks are low.

The antitrust laws, as we have shown, do not forbid all agreements or accreditation standards designed to limit merit-based aid. On the contrary, law schools and the council have several promising avenues to pursue. The avenues require some effort, and one of them is not entirely risk-free. The question is: Will law schools put in the effort? How strong is their commitment to increasing access and diversity in our profession? If the will exists, the ways are there.

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to the Law School. There is no separate application for these fellowships.” *Financial Aid: An Introduction*, COLUM. L. SCH., <http://www.law.columbia.edu/financial-aid/introduction> (last visited June 30, 2017) [<https://perma.cc/AQP6-SNX4>]. We could not find any further description of the number, amount, or criteria for the non-need-based fellowships, although we perused all of the financial aid pages and searched the site for “fellowships.”

A few law schools do give students a candid view of their scholarship practices. *See, e.g.*, *JD Scholarships*, T. JEFFERSON SCH. L., <https://www.tjisl.edu/admissions/scholarships> (last visited July 9, 2017) [<https://perma.cc/7W5M-NCVX>] (LSAT and UGPA matrix used to calculate scholarships); *Scholarships and Financial Aid*, W. MICH. U. COOLEY SCH. L., <http://cooley.edu/prospective/scholarships.html> (last visited July 9, 2017) [<https://perma.cc/4V54-APAS>] (slightly less detailed matrix).