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Civil Rights, Antitrust, and Early Decision Programs

ABSTRACT. Early decision admission programs—which allow a student to receive early notification of admission in return for a commitment to attend a particular institution—enjoyed explosive popularity at America’s institutions of higher education in the 1990s. Schools use the programs to stabilize class size and identify enthusiastic applicants. The programs, however, favor students who are wealthier and whiter than their regular decision classmates. This Note applies civil rights and antitrust principles to discuss serious legal concerns raised by early decision programs.

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INTRODUCTION

A 2003 study of students at Harvard, Princeton, MIT, and Yale found that, “among those students for whom financial aid was not a concern,” seventy-eight percent used early admission programs to apply to college; among students for whom “financial aid was important to their choice of college, only 48.0 percent applied early.”¹ That finding, and others like it, has sharpened a debate over college early admission programs in general, and early decision programs—which require applicants to a given university to enroll there if admitted early—in particular. On one side of the debate are those who argue that early admission programs offer significant benefits to both institutions and students, stabilizing enrollment levels while providing students a way of indicating their first-choice school.² On the other side are those who feel, in the words of one counselor, that early admission programs “serve the institutional needs of colleges a great deal more than [they] serve students.”³ While the schools benefit from the programs, the programs push the college search process earlier and earlier into students’ high school careers. Students now begin the college admissions process—historically largely confined to a student’s senior year—as early as freshman or sophomore year.

Beyond sharpening this debate over students’ general well-being,⁴ the release of the Avery study in 2003 expanded the incipient debate⁵ over the impact of early admission programs on the rate at which poor and minority students are admitted to universities. As Bruce Poch, Dean of Admissions at

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1. CHRISTOPHER AVERY ET AL., *THE EARLY ADMISSIONS GAME* 59 (2003).
 2. See, e.g., William T. Conley, *Early Decision Is Good Option*, USA TODAY, Aug. 6, 2003, at A10; Mary Haile, *Early Decision Numbers Plunge at Dartmouth*, DARTMOUTH, Jan. 6, 2005, LEXIS, News & Bus., Univ. Wire File (quoting Dartmouth Dean of Admissions Karl Furstenberg that early decision works well because “[t]here are many students who know that Dartmouth is their first choice, and we also have a value of making and sticking to commitments”).
 3. Eric Hoover, *New Attacks on Early Decision*, CHRON. HIGHER EDUC., Jan. 11, 2002, at A45 (quoting H. Boggs Wright, Director of Guidance, McLean High School, McLean, Virginia).
 4. *Id.* (quoting Wright as stating that “[w]hen you’re deciding where to go to college, it’s important to have a period of reflection. An extra six months may not seem like a long time to an adult, but for a high-school kid, it’s an eternity.”); see also AVERY ET AL., *supra* note 1, at 3 (quoting Larry Momo, the former admissions director at Columbia University, arguing that “[t]his getting-to-colleges early disease of the 90’s is producing a high school culture that is destroying the simplicity and repose of adolescence with its carefree spirit, idyllic visions, its ease and frivolity; replacing them with mindless overwork, cynical maneuvering, constant anxiety, and the sleep that does not refresh”).
 5. See, e.g., Nicholas Thompson, *Early Admissions Seen as Tilted to the Affluent*, BOSTON GLOBE, Dec. 24, 2001, at A1.

Pomona College, put it: “Whiter but richer kids [come] in early; middle-income kids and people of color apply later. It’s a separate but maybe unequal system.”⁶

The impact of early admission programs on access to higher education took on yet greater importance in the wake of the Supreme Court’s 2003 decisions in *Gratz v. Bollinger*⁷ and *Grutter v. Bollinger*.⁸ The cases brought to a close years of litigation challenging the University of Michigan’s undergraduate- and law-school-admissions processes. In clear, cogent language, the Court announced that educational diversity is a compelling interest that justifies the consideration of race in higher education admissions practices. Dozens of institutions of higher education filed or joined amicus briefs in support of the University of Michigan,⁹ arguing that a diverse student body is essential to fulfill their educational missions.¹⁰ Yet many of those same institutions continue to employ early admission programs after *Grutter* and *Gratz*, even as growing evidence suggests that the programs limit student-body diversity. One of the questions this Note seeks to answer is why, if schools place such a high premium on diversity, early admission programs have become so prevalent over the past decade.

Early admission programs exploded in popularity during the 1990s, and the National Association of College Admissions Counseling (NACAC) estimates that roughly one-third of the nation’s 1400-plus four-year colleges and universities now offer an early admission option.¹¹ Between 1990 and 1996, seventy colleges and universities started early decision programs. A study by the NACAC found “significant evidence of a trickle down effect: the most selective colleges had long used early admissions, while many of the less

6. *Id.* After expanding its early decision program, Pomona saw significantly fewer students applying for financial aid. *Id.*

7. 539 U.S. 244 (2003).

8. 539 U.S. 306 (2003).

9. For the complete list of amici in *Grutter* and *Gratz*, see Information on U-M Admissions Lawsuits, <http://www.umich.edu/~urel/admissions/legal/amicus.html> (last visited July 11, 2005).

10. See, e.g., Brief of Amherst College et al. as Amici Curiae Supporting Respondents at 4, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516), reprinted in 319 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 1210, 1219 (Gerhard Casper & Kathleen M. Sullivan eds., 2004) [hereinafter LANDMARK BRIEFS].

11. See Mary C. Bridgman, *Early Admissions: Application Process Helps Some Get Leg up on Others*, COLUMBUS DISPATCH (Ohio), Jan. 17, 2005, at C1.

selective colleges ha[ve] implemented them since 1990.”¹² The programs are heavily concentrated among the nation’s elite schools,¹³ but the programs have moved to less selective schools over the last decade. Some schools now accept half of their incoming classes through the programs.¹⁴

Early admission programs come in two basic forms—early decision (ED) and early action (EA)—both of which allow high school seniors to apply to a college or university in November. The schools then provide students with a decision in early December, in advance of other colleges’ regular-decision application deadlines.¹⁵ Under ED, applicants promise that they will enroll if admitted to the college or university. Under EA, students do not promise to enroll if admitted, but still benefit from a school’s early reply. Under both ED and EA, a college can admit or reject an applicant, or defer consideration of the application to its regular-decision admissions cycle.¹⁶ ED “predominates at the most selective colleges,” while EA is more common at less selective colleges.¹⁷

This Note will focus on ED because, although ED and EA share certain features, ED has greater inequitable effects on the college admissions process.¹⁸ This Note argues that ED diminishes campus diversity. The Avery study provides data analysis about early admission programs’ wealth effects, but does not thoroughly discuss its findings’ implications for campus diversity. Extrapolating from the study, it seems likely that, as colleges accept larger percentages of their classes through ED, colleges’ socioeconomic and racial diversity are affected. A program that affects one may well impact the other; while the Avery study notes this, it does not attempt a more detailed analysis of the relation between race and ED. This Note moves beyond the Avery study to further delineate ED’s possible relation to a school’s racial composition.

This Note is not only descriptive, but also prescriptive. It uses legal analysis to shine light on possible solutions to these problems. There has been little discussion of the legal implications of ED, and no other commentator has used

12. AVERY ET AL., *supra* note 1, at 36.

13. *Id.* at 1-2 (noting that nearly seventy percent of the private institutions on *U.S. News & World Report*’s lists of “Best National Universities” and “Best Liberal Arts Colleges” use an early admission program).

14. See, e.g., Chanakya Sethi, *Princeton Admits Half of Next Year’s Class Early*, DAILY PRINCETONIAN, Jan. 8, 2004, LEXIS, News & Bus., Univ. Wire File.

15. Regular-decision application deadlines typically fall between December and early January. Michelle Woo, *Early Action Plans Help College-Bound Beat Stampede*, ARIZ. REPUBLIC, Jan. 23, 2005, at B3.

16. AVERY ET AL., *supra* note 1, at 2.

17. *Id.* at 44-45.

18. See *infra* Part I.

a legal framework, derived from either civil rights or antitrust law, to address the ED debate.¹⁹ The debate, until now, has centered on whether it is appropriate for colleges and universities to employ ED programs in light of their commitments to educational diversity and student well-being.²⁰ The discussions have largely focused on the institutions' preferences rather than their legal obligations. Moving the debate away from educational choice and toward the available legal frameworks emphasizes different facets of early admission programs than the educational ethics debate does: It emphasizes race and class impact in place of student well-being as a measure of the programs' gains and losses. Legal analysis also provides a structure to the debate that, through litigation, can mandate change. This may be especially important because extralegal reform efforts, to date, have met with only limited success.²¹

This Note begins in Part I by briefly examining the rise of early decision. In Part II, it then considers why, if schools are concerned about diversity, they have done nothing about ED, when it has clear impacts on less privileged students. Part III then analyzes the relevance of civil rights law. It demonstrates how ED functions, and how schools might react to minority application shortfalls resulting from ED. It argues that because of its disparate impact on minority applicants, ED might violate Title VI of the Civil Rights Act of 1964.²² This Part of the Note focuses on civil rights analysis and separates out ED's racial impact from more general discussions about ED's effects on student well-being. It shows that ED programs, rather than raising diffuse, debatable concerns, may in fact create specific legal harms that demand redress. A significant practical problem exists, however, with civil rights analysis: There is almost no readily available data about racial breakdowns for ED or regular-decision applicants. This makes a civil rights violation harder to prove once analysis moves outside the realm of theory. It is not an incurable problem, however. As the Avery study shows, colleges and universities do have the

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19. The Avery study mentions legal issues in passing—often relegating them to footnotes—but never provides any substantial legal analysis. For the one discussion in the report that briefly discusses antitrust concerns about ED, see AVERY ET AL., *supra* note 1, at 335 n.27.
 20. See, e.g., Nancy Donehower, *The Personal Touch Is Gone from College Admissions*, CHRON. HIGHER EDUC., Jan. 10, 2003, at B16 (discussing the shift in admissions outlook as moving from concern about students' well-being to focusing on "business" outcomes); Scott Jaschik, *Another Way in: Ex-Counselor Working Toward Less-Stressful College Admissions*, BOSTON GLOBE, Jan. 30, 2005, at B9 (discussing Lloyd Thacker's Education Conservancy and its work to re-humanize college admissions).
 21. See *infra* notes 98-103 and accompanying text.
 22. The Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VI, 78 Stat. 241, 252-53 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-7 (2000)).

information that would allow a robust civil rights analysis. Nevertheless, the problem is a serious one, because they are extremely reluctant to release the data.²³

Part IV considers an alternate legal framework for evaluating ED: antitrust. Moving to antitrust law shifts the focus from ED's racial impact to its socioeconomic impact and cures the informational problems that would plague any civil rights action. Given the practical limitations of civil rights analysis, antitrust law offers an alternative legal ground on which litigants challenging ED programs might prevail. While access to higher education has traditionally been litigated under civil rights laws, antitrust precedent exists that could be brought to bear in this context. Certain reciprocal actions by ED schools, used to enforce students' promises to attend, might trigger an analysis similar to that in *United States v. Brown University*.²⁴ And while introducing antitrust law does move the debate from race to class, antitrust analysis, like civil rights analysis, focuses the ED debate on a specific legal harm. Significantly, the practical problems interfering with civil rights analysis do not exist in the antitrust realm, permitting the application of a more robust legal critique to ED programs.

While there has been some legislative gesturing toward ED reform, neither the legal nor the educational community seems to have considered the possibility that ED's fate lies not with the institutions that employ ED but with the courts. Because both race and class have played such instrumental roles in the diversity debates, this Note focuses its discussion of diversity on those factors. For civil rights law, ED's racial effects come to the fore; in antitrust analysis, ED's effects on different socioeconomic groups predominate. Both civil rights law and antitrust law suggest that, beyond being unfair, ED programs may actually be illegal. The Note then concludes by discussing several options for reform. It argues that one option—a central first-choice clearinghouse—better serves both students and colleges than does the current model, while avoiding the more serious concerns raised by ED.

23. See *infra* Section III.A.

24. 5 F.3d 658 (3d Cir. 1993).

I. THE RISE OF EARLY DECISION

Harvard, Yale, and Princeton first inaugurated ancestors of today's ED programs in the mid-1950s.²⁵ For decades, the programs remained limited in scope,²⁶ reserved only for top applicants.²⁷ In the 1980s, however, the market for higher education shifted, as demand dropped off precipitously. Because ED (but not EA) programs provide an almost one-to-one admit-to-enroll ratio,²⁸ many schools turned to ED programs, which "predictably fill[ed] their classes."²⁹

In 1983, schools were given a second reason to create ED programs to control their enrollment figures: *U.S. News & World Report* had begun publishing an annual guide, *America's Best Colleges and Universities*, which parents, students, and high schools quickly began to rely on in assessing the relative merits of universities and colleges.³⁰ One recent study shows that changes in *U.S. News* rank significantly affect a school's ability to attract students.³¹ According to the study, a slip of five ranks requires a school to increase the number of applicants admitted by two percent; when a school dropped in rank, the average SAT scores of its incoming class dropped as well.

25. James Fallows, *The Early-Decision Racket*, ATLANTIC MONTHLY, Sept. 2001, at 37, 44. For a more extended overview of the precursors to the present early admission system, see AVERY ET AL., *supra* note 1, at 25-30.

26. Amy Argetsinger, *Where Early Decision Is Won and Lost*, WASH. POST, Dec. 16, 2002, at A1.

27. AVERY ET AL., *supra* note 1, at 34; *see also* Fallows, *supra* note 25, at 44.

28. AVERY ET AL., *supra* note 1, at 174.

29. Justin Ewers, *Decisions, Decisions*, U.S. NEWS & WORLD REP., Oct. 27, 2003, at 61 (confirming that ED programs help universities fill their classes). This continues to be the case today. According to the Avery study:

[M]ost of the admissions offices that responded to our survey stated that Early Decision helps them to manage enrollment figures for the entering class. A common metaphor used in several surveys was that Early Decision helps to build the base of the class. Locking in students through Early Decision acceptances also shields a college from the consequence of some unexpected springtime disaster that would discourage admitted candidates from attending the college.

AVERY ET AL., *supra* note 1, at 176 (internal quotation marks omitted).

30. AVERY ET AL., *supra* note 1, at 32.

31. The study analyzed the effect of the *U.S. News & World Report* rankings from 1987 to 1997 on both large universities and small liberal arts colleges. James Monks & Ronald G. Ehrenberg, *The Impact of U.S. News & World Report College Rankings on Admissions Outcomes and Pricing Policies at Selective Private Institutions* 6, 9-10 (Nat'l Bureau of Econ. Research, Working Paper No. 7227, 1999), available at <http://www.nber.org/papers/w7227>; *see also* Kate Zernike, *Fortunes of Colleges Are Shown To Rise, Fall with Rankings*, BOSTON GLOBE, Feb. 7, 2000, at A1.

Schools that dropped in rank also had to offer admitted students more financial aid to entice students to attend.³²

In response, although schools publicly downplayed the rankings' importance,³³ they tried to influence the rankings by manipulating any factors that they could control.³⁴ In one survey of 241 colleges, more than half admitted that they had instituted specific measures to improve their ranking.³⁵ ED programs were especially attractive because they allowed schools to control two *U.S. News* factors: "selectivity" (the percentage of students a college accepts from its applicant pool) and "yield" (the percentage of accepted students who matriculate).³⁶ By guaranteeing that an admitted student would enroll, ED programs raised yield rates,³⁷ and, in turn, reduced the number of applicants a school needed to admit to fill its class—thus increasing the school's selectivity.³⁸ As some schools added new ED programs, schools with existing

32. Monks & Ehrenberg, *supra* note 31, at 6.

33. Zernike, *supra* note 31.

34. See, e.g., Amy Argetsinger, *Colleges Lobby To Move Up in the Polls: Schools Politicking Each Other To Advance in Annual Rankings*, WASH. POST, Sept. 14, 2002, at A1; see also Zernicke, *supra* note 31 (noting that Cornell, which used to count anyone who ever attended the school as an alumnus, recently began excluding anyone who did not graduate because doing so increased the percentage of alumni who donate to the school—one of the *U.S. News & World Report* ranking factors).

35. Daniel J. Levin, *Want a Better Guide to Colleges? So Do Colleges*, WASH. POST, Sept. 22, 2002, at B2.

36. Eliot Applestein, *Applications, Admissions & College Rankings*, WASH. POST, Aug. 24, 2000, at C4.

37. The Avery study found that almost ninety-six percent of students admitted under ED policies matriculate. AVERY ET AL., *supra* note 1, at 174. The yield is not one hundred percent because schools lose some students to whom they have offered insufficient financial aid, and most colleges will release these students from their promises to attend. See *infra* notes 183-184 and accompanying text.

38. *Note Book*, CHRON. HIGHER EDUC., Oct. 10, 1997, at A45 (“[A] counselor . . . said colleges were using early-decision programs to polish admissions statistics that are used by . . . *U.S. News & World Report* ‘There is no better way to shore up yield and drive down the admit rate than through the use of early-decision programs.’”). According to *U.S. News & World Report*, “selectivity” and “yield” account for only about four percent of a school’s overall score. However, because most of the variables that make up a school’s score are difficult to change rapidly, Fallows, *supra* note 25, at 40, schools focus on admissions statistics because those are the only numbers they can guarantee will change from year to year. *Number of Early-Decision Applicants Continues To Rise*, CHRON. HIGHER EDUC., Jan. 9, 1998, at A55 (noting that Harvard may choose to admit a greater proportion of its class early if the number of applicants continues to rise); see also Karen W. Arenson, *Top Colleges Filling More Slots with Students Who Apply Early*, N.Y. TIMES, Feb. 14, 1996, at A1. Before dropping “yield” as a statistic, *U.S. News & World Report* broke down the student selectivity score as follows:

programs admitted higher percentages of their class early, in part to affect *U.S. News* rankings. Schools recognized that the rankings affected “the number of students who apply to a school, donations from alumni, pride and satisfaction among students and faculty members, and even the terms on which colleges can borrow money.”³⁹

During the early 1990s, institutions found that ED had a third beneficial effect: It limited financial aid expenditures. Traditionally, colleges had been able to control their financial aid outlays only by limiting the amount of their financial aid awards to admitted students. A case during the 1990s, *United States v. Brown University*,⁴⁰ however, resulted in financial aid wars.⁴¹ The decision forbids private schools from discussing financial aid awards with each other,⁴² leading many schools to lose even what little control they had over their financial aid outlays. Private schools had to compete with one another,⁴³ and with public colleges and universities flush with budget surpluses because of a booming economy in the mid- and late-1990s. Because of the strong economy, many states started merit-based scholarship programs to encourage

Student selectivity. A school’s academic atmosphere is determined in part by the abilities and ambitions of the student body. We therefore factor in test scores of enrollees on the SAT or ACT tests (40 percent of this ranking factor); the proportion of enrolled freshmen who graduated in the top 10 percent of their high school classes for the national institutions and the top 25 percent for the regional schools (35 percent of the score); the acceptance rate, or the ratio of students admitted to applicants (15 percent); and the yield, or the ratio of students who enroll to those admitted (10 percent).

U.S. NEWS & WORLD REPORT, AMERICA’S BEST COLLEGES 30 (2001).

39. Fallows, *supra* note 25, at 40. Fallows reports a story from Bruce Poch, Director of Admissions at Pomona College in California:

These bond raters were obsessing about our yield! They were chastising me because Pomona’s yield was not as high as Williams’s or Amherst’s, because they took more of their class early. We explained that our regular-decision yield was quite high, and finally got a triple-A bond rating. Obviously, there were other considerations, but this saved the college millions in interest.

Id. at 42.

40. 805 F. Supp. 288, 296 (E.D. Pa. 1992), *rev’d* 5 F.3d 658 (3d Cir. 1993).
41. Stephen Burd, *Private Colleges Seek To Extend Antitrust Exemption for Aid Talks*, CHRON. HIGHER EDUC., Mar. 16, 2001, at A25; Ben Gose, *Changes at Elite Colleges Fuel Intense Competition in Student Aid*, CHRON. HIGHER EDUC., Feb. 5, 1999, at A42 (discussing the Department of Justice investigation that spawned the suit).
42. *United States v. Brown Univ. (Brown Univ. II)*, 5 F.3d 658 (3d Cir. 1993).
43. Gose, *supra* note 41. Most elite private schools had to compete against each other through financial aid awards for the first time in the wake of the Justice Department’s disbanding of the Overlap Group. *See infra* Part IV.

their top high school students to attend college in-state.⁴⁴ Some students were able to pit public or private institutions against one another and raise their financial aid offers by several thousand dollars.⁴⁵ Most private colleges did not have unlimited financial aid budgets, and these new developments strained their limited resources.⁴⁶

Then, during the late 1990s, public colleges and universities began experiencing financial strains. A slowing economy led to widespread state budget cuts for higher education. By the late 1990s, therefore, both public and private institutions were looking for ways to make up the funding shortfall without tuition increases that would draw the ire of students, parents, and state and federal lawmakers.⁴⁷

Schools turned to ED programs because such programs allowed them to limit, to a certain extent, financial aid outlays. ED permitted schools to minimize financial aid expenditures⁴⁸ because ED applicants were generally wealthier and less likely to apply for financial aid than members of the general applicant pool. If colleges did accept needy ED applicants, the students were bound to the school and did not have the option of comparing financial aid packages or negotiating a better award.⁴⁹

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44. See, e.g., Elizabeth F. Farrell, *Public-College Tuition Rise Is Largest in Three Decades*, CHRON. HIGHER EDUC., Oct. 31, 2003, at A33 (“In an effort to elevate their academic prestige, many state universities have devoted more financial resources to providing merit-based aid in the form of scholarship programs for students with high standardized-test scores and top grades.”); Patrick Healy, *More State Legislatures Consider Merit Scholarships for College Students*, CHRON. HIGHER EDUC., May 15, 1998, at A42; Peter Schmidt, *As Economy Chugs Along, States Pour Money into Higher Education*, CHRON. HIGHER EDUC., Dec. 17, 1999, at A28.
45. Jenna Russell, *Top Applicants Bargaining for More Aid from Colleges*, BOSTON GLOBE, June 12, 2002, at A1.
46. Gose, *supra* note 41.
47. Farrell, *supra* note 44 (discussing a College Board study showing a connection between state budget cuts and increases in tuition); see also Michael Arnone, *State Budget Writers Are Urged To Protect College Access and Affordability*, CHRON. HIGHER EDUC., Jan. 21, 2004, <http://chronicle.com/daily/2004/01/2004012102n.htm> (discussing a report by the National Center for Public Policy in Higher Education urging “governors and state lawmakers [to] enact ‘emergency measures’ to” maintain higher education affordability).
48. AVERY ET AL., *supra* note 1, at 176-79.
49. Ben Gose, *A Competitive Edge: Students Hope Early Decision Applications Will Help Them Get into Good Colleges*, CHRON. HIGHER EDUC., Mar. 15, 1996, at A39 (“A disproportionate number of [wealthy] students apply early. . . . Students who need financial aid traditionally have applied to several colleges and waited to see which gave them the best offer. That . . . precludes them from applying early.”).

Thus, by the late 1990s, schools had discovered three distinct institutional benefits of early admission programs—particularly ED programs. The programs stabilized enrollment, protected *U.S. News and World Report* rankings, and limited financial aid outlays. Colleges and universities also argued that the programs benefited those students who had a strong preference for one institution and were willing to commit to a single school early in the admissions process. Those students could clearly communicate their desire to attend to their top school choice, and would, hopefully, be finished with the stress of the admissions process before Christmas of their senior year.

The release of the Avery study and the Supreme Court's opinion in *Grutter* upset this delicate balance. The Avery study—the most thorough analysis available of the effects of early admission programs on the admissions process⁵⁰—presented a competing set of concerns about early admission programs. It found that, for both EA and ED programs, early applicants received a significant boost to their admissions chances, equivalent to a one-hundred-point jump in their SAT I score.⁵¹ The study also showed that the lion's share of the ED benefit went to wealthy students with sophisticated knowledge of the college admissions process, who applied earlier at higher rates than their less privileged peers.⁵²

Early admission programs work to the benefit of the wealthy partly because the wealthy, to a greater extent than the poor, have access to information about the benefits of applying early. Indeed, public information on early admission programs varies in accuracy and clarity, while the well-connected have access to more accurate information from friends, family, and college counselors.⁵³ The information gap exists equally for both EA and ED programs.

Moreover, even if they knew about it, poor students could not take advantage of ED because these students must first be certain that they wish to attend a particular college. Attaining that level of certainty generally requires funds for at least one trip, if not several, to various campuses. Further, when students apply ED, they “forfeit the option of negotiating financial aid. This barrier often leads financial aid candidates to apply . . . regular decision,

50. The Avery study analyzed five years of admissions data from fourteen highly selective colleges and universities. AVERY ET AL., *supra* note 1, at 9.

51. *Id.* at 137. In other words, if all other academic factors were held constant, a student's odds of being admitted under ED were the same as if he had been a regular-decision applicant with an SAT score 100 points higher than the student's actual score. Thus an ED applicant with a 1200 SAT score was as likely to be admitted as a regular-decision applicant who, with otherwise identical credentials, had achieved a 1300 SAT score.

52. *Id.* at 13.

53. *Id.* at 85-88.

putting them at a disadvantage relative to wealthier students who may gain a boost in admission chances by applying early.”⁵⁴

II. DIVERSITY AS A COMPELLING INTEREST IN HIGHER EDUCATION

While ED programs were growing rapidly, institutions of higher education fought a fierce battle to diversify their student bodies. It would seem illogical for colleges to maintain an unnecessary barrier to improving diversity. Changes both inside and outside of individual institutions, however, have pushed schools into precisely that scenario.

Diversity, as a topic in educational thought, dates back more than 150 years.⁵⁵ Educators originally deemed interaction among “dissimilar individuals” to be “essential to learning.”⁵⁶ The concept of diversity expanded over time to encompass not just differences in students’ ideas, but also differences of “geography, religion, nation of birth, upbringing, wealth, gender, and race.”⁵⁷ In the last thirty years, the pursuit of diversity in higher education has migrated into Supreme Court doctrine as a compelling justification for state action. This Part discusses, in brief, how diversity became such an important focus for both the legal and higher education communities. It then attempts to explain why, if schools are so committed to diversity, they have not reformed their early admission programs.

A. Diversity: Educational Benefit, Societal Imperative

1. Bakke: Diversity as Educational Benefit

In *Regents of the University of California v. Bakke*,⁵⁸ the Supreme Court struck down the quota-based admissions system at the medical school of the University of California. Justice Powell’s controlling opinion held that, while the school’s racial quota system was unconstitutional, the medical school did have a legitimate interest in the consideration of race, namely, “obtaining the educational benefits that flow from an ethnically diverse student body.”⁵⁹

54. *Id.* at 13.

55. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* 218 (1998).

56. *Id.*

57. *Id.* at 218–19.

58. 438 U.S. 265 (1978).

59. *Id.* at 306.

Justice Powell located the right to select a diverse student body in the educational institution's right to academic freedom under the First Amendment, concluding that "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body."⁶⁰

Powell argued that a diverse student population altered the very nature of the education students at the institution received:

Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.⁶¹

Powell concluded that students from different backgrounds created a richer learning environment for their peers by providing information and viewpoints beyond those offered by any single professor, or even any homogenous group. Beyond the realm of medicine, Powell believed that the "nation's future depend[ed] upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples."⁶² In training future leaders, the university had a vested interest in selecting a student body that "contribute[d]" to a "robust exchange of ideas."⁶³ Powell maintained that "[t]he atmosphere of speculation, experiment and creation—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body."⁶⁴ In keeping with his interest in many kinds of diversity, Justice Powell emphasized that race could only be considered along with other factors, like socioeconomic disadvantage, in creating a diverse student body.⁶⁵

60. *Id.* at 312.

61. *Id.* at 314.

62. *Id.* at 313 (internal quotation marks omitted).

63. *Id.* (internal quotation marks omitted).

64. *Id.* at 312 (internal quotation marks omitted).

65. *Id.* at 315 ("It is not an interest in simple ethnic diversity [that justifies the use of race] The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.").

2. *Grutter and Gratz: Diversity as Societal Imperative*

Twenty-five years later, the Supreme Court again took up the issue of diversity and affirmative action in higher education. A developed body of affirmative action law framed the debate in the University of Michigan cases. In the years after *Bakke*, the Court had limited the number of acceptable affirmative action rationales and program types under the Fourteenth Amendment's Equal Protection Clause. Against this backdrop, affirmative action in higher education appeared at risk.⁶⁶

In *Grutter v. Bollinger* and *Gratz v. Bollinger*, however, the Court reaffirmed its commitment to diversity in higher education. Justice O'Connor, writing for the *Grutter* majority, affirmed that diversity is a compelling state interest⁶⁷ and rejected the notion that the post-*Bakke* decisions foreclosed the diversity rationale.⁶⁸ The Court deferred to the law school's educational judgment that diversity was essential to its educational mission, reflecting universities' "special niche in our constitutional tradition."⁶⁹

The Court also emphasized the educational benefits that flow from a diverse student body, stating that colleges and universities could select students who would "contribute the most to the 'robust exchange of ideas.'"⁷⁰ This reasoning closely followed that of Justice Powell in *Bakke*. The *Grutter* opinion also emphasized the importance of having a diverse national leadership. The Court recognized that only if members of all racial and ethnic groups could access higher education would they be able to participate fully in the nation's civic life.⁷¹ For the *Grutter* Court, the societal need for a diverse leadership provided a second compelling reason to allow colleges and

66. In *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274-76 (1986), the Supreme Court rejected the need for role models as a compelling government interest for the purposes of strict scrutiny analysis. The Court struck down a program in which minority teachers were hired first and fired last in order to ensure that there were role models for minority students. In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Court, again applying strict scrutiny, struck down a race-based set-aside for minority contractors that was designed to address broad societal discrimination. The Court ruled that because the city failed to show specific racial discrimination in the Richmond construction industry, the city could not use race-based affirmative action. Finally, in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), the Court held that strict scrutiny applied equally to federal and state affirmative action programs and to both beneficial and burdensome racial classifications.

67. 539 U.S. 306, 325 (2003).

68. *Id.* at 328.

69. *Id.* at 329.

70. *Id.* (quoting *Bakke*, 438 U.S. at 313).

71. *Id.* at 332.

universities to consider race in admissions.⁷² *Grutter* underscored the value of diversity in higher education, and Michigan and its amici embraced that view.⁷³

B. Studies Relevant to the Diversity Debate

Different empirical and sociological studies – including several proffered by the University of Michigan – have borne out the Supreme Court’s concern for diversity in higher education.⁷⁴ Michigan’s central study, conducted by Patricia Gurin, found that students who experienced classrooms and social settings with the greatest racial and ethnic diversity “showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills.”⁷⁵ Another study, this one of the black-white composition of small groups of students on three campuses, found that groups with racial- and opinion-minority members, or

72. *Id.*

73. See, e.g., Brief of Amherst College et al. as Amici Curiae Supporting Respondents, *supra* note 10, at 5 (“The point is so basic, and the agreement of educators is so broad, that amici need not argue it at length. Diversity in all its aspects is one of the factors that make American colleges and universities unique, educationally superior, and the envy of the world.” (citation omitted)).

74. Michigan has made the complete set of studies, as well as responses to critiques of the studies, available on its lawsuit-related website. Information on U-M Admissions Lawsuits, <http://www.umich.edu/~urel/admissions/research/index.html> (last visited July 11, 2005).

75. Expert Report of Patricia Gurin, *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000) (No. 97-CV-75321), *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-CV-75928), reprinted in *Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 363, 365 (1999). Gurin studied multi-institutional national data, the results of an extensive survey of students at the University of Michigan, and data drawn from a specific classroom program at the University of Michigan. See Information on U-M Admissions Lawsuits: Gurin – The Studies: Methods and Measures, <http://www.umich.edu/~urel/admissions/research/expert/studies.html> (last visited Nov. 16, 2005); see also Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330 (2002). But see Brief for National Association of Scholars as Amicus Curiae Supporting Petitioners at 5, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516), reprinted in 321 LANDMARK BRIEFS, *supra* note 10, at 402 (critiquing the Gurin study’s findings). For a response to this critique, see Patricia Gurin, Response to the Critique by the National Association of Scholars of the Expert Witness Report of Patricia Gurin in *Gratz, et al. v. Bollinger, et al.* and *Grutter v. Bollinger, et al.*, <http://www.umich.edu/~urel/admissions/research/gurin.html> (last visited June 25, 2005).

those who reported having racially diverse friends and classmates, experienced increased discursive complexity.⁷⁶

Similarly, Derek Bok and William Bowen's iconic study, *The Shape of the River*, provides solid evidence that affirmative action meets the societal needs described by Justice O'Connor.⁷⁷ Bok and Bowen found that having a diverse community during college affected the post-college attitudes and actions of matriculants—both black and white. Matriculants reported extremely high levels of interracial interaction at the selective institutions.⁷⁸ The more selective the schools, the higher the level of black-white interactions.⁷⁹ Bok and Bowen found that white students who interacted extensively with black students in college continued to have extensive interracial interactions after college.⁸⁰

C. *Race and Class in the Avery Study*

Given the widespread recognition that diversity is an important educational good, one might think that if so many schools have chosen ED, it must foster—

76. Anthony Lising Antonio et al., *The Effects of Racial Diversity on Complex Thinking in College Students*, 15 PSYCHOL. SCI. 507 (2004).

77. BOWEN & BOK, *supra* note 55.

78. *Id.* at 231.

79. *Id.* at 237.

80. *Id.* at 238-39. In the years since *The Shape of the River's* release several studies have reached starkly different conclusions. See, e.g., Stanley Rothman et al., *Does Enrollment Diversity Improve University Education?*, 15 INT'L J. FOR PUB. OPINION RES. 8 (2003) (finding that when students', faculties', and administrators' evaluations of the educational and racial atmosphere were correlated with the percentage of minority students enrolled at a college or university, the predicted positive associations of educational benefits and interracial understanding failed to appear). Justice Thomas noted two studies in his *Grutter* dissent that found that black cognitive development and academic achievement were higher at historically black colleges. *Grutter v. Bollinger*, 539 U.S. 306, 364 (2003) (Thomas, J., dissenting) (citing W.R. Allen, *The Color of Success: African-American College Student Outcomes at Predominantly White and Historically Black Public Colleges and Universities*, 62 HARV. EDUC. REV. 26, 35 (1992); Lamont Flowers & Ernest T. Pascarella, *Cognitive Effects of College Racial Composition on African American Students After 3 Years of College*, 40 J.C. STUDENT DEV. 669, 674 (1999)). Justice Thomas also noted another study that found that racially diverse student bodies that were created through affirmative action actually undermined students' perception of academic quality. Stanley Rothman et al., *Racial Diversity Reconsidered*, 151 PUB. INT. 25 (2003). Justice Thomas explained that the study found "that the racial mix of a student body produced by racial discrimination of the type practiced by the Law School in fact hinders students' perception of academic quality." *Grutter*, 539 U.S. at 364 (Thomas, J., dissenting). Thus, though there is strong evidence in support of the Court's interest in racial diversity in higher education, the position is not without its critics.

or at least not reduce—diversity. Yet, as discussed above, the Avery study shows that students who apply ED “are disproportionately non minorities from advantaged backgrounds.”⁸¹ Further, at ED schools “African Americans and Hispanics applied early at lower rates than the overall early application rate. Across the schools, African Americans applied early about half as often as others; Hispanics about two-thirds as often as others Similarly, financial aid applicants were less likely than others to apply early.”⁸²

Among the study’s interviewees, over eighty percent of the students from prominent private high schools applied early, as did more than three-quarters of the students for whom “financial aid was not a concern.”⁸³ Students from less competitive public high schools applied early at just half the rate of their private school classmates, and less than half of those students who considered financial aid important in their college choice applied early.⁸⁴

The study explains that the results were driven in part by the challenge involved in finding the right school.⁸⁵ “Students who expect[ed] to rely on financial aid faced an especially difficult decision about whether to apply” ED, in part due to ED’s increased odds of admission.⁸⁶ On the one hand, if a student applied ED and was admitted, he might receive a smaller financial aid package than he would have had he been admitted as a regular applicant and been able to “compare and negotiate financial aid packages.”⁸⁷ On the other hand, if he did not apply ED, his chances of being rejected altogether increased significantly.⁸⁸ The Avery study finds that nearly half of the students who

81. AVERY ET AL., *supra* note 1, at 59.

82. *Id.* (stating that “3.6 percent of African Americans and 4.8 percent of Hispanics applied early at ED schools, while 7.4 percent of all applicants to those schools applied early”).

83. *Id.*; see also Mark Helm, *Finding Financial Aid for College Can Be Confusing and Frustrating*, SAN DIEGO UNION-TRIB., Feb. 2, 2003, at H5 (citing Harris Poll results finding that “two-thirds of African-American and Hispanic parents said that they don’t have enough information about how to pay for college”); Kari Neering, *College Aid Hunt Daunting for Some*, J. NEWS (Westchester County, N.Y.), Jan. 27, 2003, at 1A.

84. AVERY ET AL., *supra* note 1, at 59 (“Among those who went to a prominent private high school, 83.5 percent applied early; among those students for whom financial aid was not a concern, 78.0 percent applied early to some college. In contrast, of the students who went to less competitive public high schools (where it is common for graduates not to go on to college), only 42.6 percent applied early. Similarly, among the colleges students who reported that financial aid was important to their choice of college, only 48.0 percent applied early to some college.”).

85. *Id.* at 59-60.

86. *Id.* at 116.

87. *Id.* at 116; see also *infra* notes 180-182.

88. AVERY ET AL., *supra* note 1, at 116.

applied ED did so for strategic reasons—regardless of whether they actually had a first-choice college or not—and students who did not need financial aid made the decision to apply ED more easily than those who did.⁸⁹

The study also shows that students' degree of access to information about the benefits of applying early varies widely.⁹⁰ The study considers all of the resources that high school students use to gather college information—guidance counselors, college websites, family and friends, admissions officers, and commercial guidebooks—and finds the generally available sources rife with misleading and contradictory information. For example, while the Avery study shows that all students benefit from applying ED wherever possible, between 1997 and 2002 the guides gave students varying information, some of which directly contradicted the Study's findings. One guide said students benefit from applying ED at all schools, while another stated that students benefit from applying ED only to lower-ranked schools. One guide announced that an advantage exists for applying ED; another said that it does not. One guide said that students should apply strategically to gain the benefit of ED; another said that they should only apply ED if the school was their first choice.⁹¹

In contrast to generally available information sources, those that vary in relation to an applicant's social background—guidance counselors, family, and friends—provide information that increases in accuracy as student privilege increases.⁹² Guidance counselors offer one clear example: All of the guidance counselors interviewed at nationally prominent high schools knew that applying ED would increase a student's chances of being admitted.⁹³ In interviews with college students, however, it became clear that only about one-third of guidance counselors overall “indicated that applying early would help [students'] chances of admission” or generally encouraged students to apply early—as opposed to one hundred percent of the elite counselors. Indeed, more than sixteen percent of students believed that their counselor “hindered” their application process.⁹⁴

89. *Id.* at 206-07; see also Claire Luna, *Latino Parents Often Lack College-Entry Savvy*, L.A. TIMES, July 12, 2002, at B4 (recounting the results of a study of more than one thousand Latino parents showing little or no knowledge of college preparation).

90. AVERY ET AL., *supra* note 1, at 10.

91. *Id.* at 74-78.

92. See, e.g., *id.* at 12-13, 87.

93. *Id.* at 85.

94. *Id.* at 86.

The differing quality of advice translates into real differences in students' understanding of early admission. Interviews with 350 students from Harvard, Yale, MIT, and Princeton revealed that students' levels of understanding varied widely.⁹⁵ To determine whether "students from more prominent high schools were better informed [about early admission programs] than those from less competitive schools," the study divides the students' high schools into five categories, and finds that students' levels of understanding rose or fell with high school status, dropping as students moved from more elite to less elite high schools. Ninety percent of the students from the most prominent private high schools, and eighty-four percent from the best public high schools, "had a full understanding of early applications when they applied to college."⁹⁶ At the other end of the spectrum, among Harvard, Princeton, MIT, and Yale students who attended high schools in the lowest category, almost half did not fully understand the early application process when they applied to college.⁹⁷ In sum, the Avery study reveals not only the advantages reaped by ED applicants, but also that socioeconomically privileged students were most likely to participate in the programs, both because they could afford to forgo comparing financial aid packages from different colleges, and because they better understood the benefits of applying through ED.

D. Barriers to Reform

Concerns about ED's effects on student-body diversity have drawn attention from major university leaders, including Yale's President, Richard Levin,⁹⁸ and even the United States Senate.⁹⁹ *U.S. News & World Report*

95. *Id.* at 72-74.

96. *Id.* at 73.

97. *Id.*

98. See Karen W. Arenson, *Yale Changes Its Approach to Admissions*, N.Y. TIMES, Nov. 7, 2002, at A27 (quoting President Levin of Yale as saying "[t]he only people served by early decision is the colleges"); Patrick Healy, *Stanford Joins Yale in Dropping Early Admissions Policy*, BOSTON GLOBE, Nov. 7, 2002, at A20.

99. Senator Edward Kennedy, the ranking Democrat on the Senate Health, Education, Labor, and Pensions Committee, proposed reforming ED as part of the reauthorization of the Higher Education Act. See S. 1793, 108th Cong. §§ 3(2)(I), 302(a), 302(b)(2) (2003). The proposal would have required colleges with ED programs to inform the federal government of the percentage of each enrolled class admitted under ED, broken down by race and Pell Grant status. Schools that did not comply could have lost eligibility for federal financial aid. The proposal also responded to concerns that schools had expressed that any collective ED reform effort would be an antitrust violation; the bill would have waived federal antitrust regulations and allowed college representatives to develop common guidelines to end

changed its rankings formula, dropping the yield category, in an effort to decrease schools' incentives to employ ED to manipulate their rankings.¹⁰⁰ The push toward reform, however, has had a limited impact. Although Stanford and Yale have dropped their ED programs in favor of an EA program known as Single Choice Early Action (SCEA),¹⁰¹ few major schools have followed their lead.¹⁰² In fact, some top schools have continued to actively defend their ED programs as beneficial not just for the schools, but for students as well.¹⁰³

If schools know that ED reduces diversity, and those same schools desire diversity, why has there not been significant change in the use of the programs? Commentators have suggested that it is no coincidence that the three schools that have taken a strong position on early admission programs—Harvard, Stanford, and Yale—have phenomenally high yields.¹⁰⁴ The schools were able to adopt EA because its nonbinding nature was unlikely to affect their yield: Most accepted students would attend, whether they were required to or not.¹⁰⁵ Colleges with less appeal—the majority of schools with ED plans—have more to lose by adopting EA and will be more likely to retain ED. These

binding ED admissions policies. See Stephen Burd, *Key Issues Before Congress*, CHRON. HIGHER EDUC., Apr. 30, 2004, at B21; Tiffany Hoffman, *Bill May Alter Admission Policies*, COLLEGIATE TIMES, Nov. 7, 2003, at 1; Kat Schmidt, *Bill Threatens Early Decision*, TUFTS DAILY, Nov. 7, 2003, LEXIS, News & Bus., Univ. Wire File.

100. Jacques Steinberg, *College Rating by U.S. News Drops Factor in Admissions*, N.Y. TIMES, July 10, 2003, at A14; Jeffrey R. Young, *'U.S. News' Drops a Controversial Part of Its Formula for Ranking Colleges*, CHRON. HIGHER EDUC., July 11, 2003, <http://chronicle.com/daily/2003/07/2003071103n.htm>. Dropping the "yield" statistic will not completely remove schools' incentives to employ ED. ED's one-to-one yield also affects a school's selectivity, because schools that adopt ED do not need to accept as many students as those schools that do not. Unless *U.S. News & World Report* also drops the selectivity statistic, which seems unlikely, schools can still manipulate the rankings.
101. Jeffrey R. Young, *Yale and Stanford End Early-Decision Options and Defy National Group*, CHRON. HIGHER EDUC., Nov. 22, 2002, at A58. SCEA requires that the student apply only to one school early, but it still allows the student to apply to as many schools at the regular application deadlines as he chooses.
102. Yassmin Sadeghi, *Early Admissions Still Ignite Debate*, YALE DAILY NEWS, Feb. 18, 2005, at 1 (noting that only "Harvard, Stanford and the Massachusetts Institute of Technology have switched to single-choice early action"). Harvard has consistently maintained EA, refusing to switch to ED even as its competitors did so.
103. See, e.g., Mary Haile, *Early Decision Numbers Plunge at Dartmouth*, DARTMOUTH, Jan. 6, 2005, LEXIS, News & Bus., Univ. Wire File (reporting comments from Dartmouth Dean of Admissions, Karl Furstenberg, supporting ED); see also AVERY ET AL., *supra* note 1, at 17 ("[O]ther prominent institutions such as Columbia and Penn have made it quite clear that they like Early Decision.").
104. See, e.g., AVERY ET AL., *supra* note 1, at 273; Ewers, *supra* note 29, at 61.
105. AVERY ET AL., *supra* note 1, at 272-73.

schools, once they and their competitors adopt ED, cannot afford to back down.

As in a classic prisoner's dilemma,¹⁰⁶ if all of the schools that adopted ED for competitive reasons could be convinced to drop ED, all of the schools would be better off. However, schools that adopted ED for competitive reasons would hesitate to drop the program unilaterally; if they did so, their *U.S. News & World Report* rankings would change accordingly.¹⁰⁷ As a result, even though many college administrators would welcome reform,¹⁰⁸ they will only change their practices if "all colleges, or at least . . . all with whom they regularly compete" do so simultaneously.¹⁰⁹ If the change is not simultaneous and universal, it will not succeed.

Schools have created a situation for themselves "in which any single institution or small group of institutions may think that to give up [ED] would be tantamount to unilateral disarmament in the admissions wars."¹¹⁰ Reform must be coordinated. The schools, however, cannot bring about change because antitrust concerns prevent concerted action by any group of schools.¹¹¹ Yet schools also remain unwilling to accept outside intervention: Proposed legislation that would allow ED reform encountered vehement opposition from both the NACAC¹¹² and individual institutions.¹¹³ Many schools, even if they disliked ED, felt that it was inappropriate for the federal government to intervene in institutional decisions.

106. *Id.* at 261-63 (noting that the ED reform process can be understood as a prisoner's dilemma).

107. The Avery study quotes Harvard's William Fitzsimmons's succinct description of the key difficulty of abandoning early admissions: "If we gave it up, other institutions inside and outside the Ivy League would carve up our class and our faculty would carve us up." *Id.* at 272. The same holds true for abandoning ED in favor of EA, if competitor schools still offered ED.

108. Karen W. Arenson, *Change on Early Admission Produces Application Shifts*, N.Y. TIMES, Nov. 13, 2003, at A27.

109. AVERY ET AL., *supra* note 1, at 259.

110. Richard W. Lyman, *Who Should Reform Early-Decision Programs?*, CHRON. HIGHER EDUC., Nov. 21, 2003, at B5.

111. Yale's President, Richard Levin, sought an antitrust exemption from the Department of Justice that would have allowed the Ivy League presidents to meet and discuss a collective change. Ultimately, "the Justice Department signaled that it might view [the meeting] as anti-competitive," but that a formal review of the issue would probably take months. Arenson, *supra* note 98; Healy, *supra* note 98.

112. Jeffrey R. Young, *Counselors Group Fears Congress Will Limit Early-Decision Admissions Programs*, CHRON. HIGHER EDUC., Oct. 17, 2003, at A42.

113. Schmidt, *supra* note 99.

III. EARLY DECISION AND CIVIL RIGHTS

Courts have a long history of remedying civil rights inequities in education.¹¹⁴ Information about ED's impact on students of different races is limited, but based on the information available, this Part explains why ED programs might violate Title VI of the Civil Rights Act of 1964.

A. *Early Decision's Impact on Minority Enrollment*

Sources discussing ED's implications for racial minorities are rare. Colleges and universities fiercely guard their admissions data,¹¹⁵ with the result that little is reported about how ED and race interact. The Avery study, the major work on ED, assumes that racial minorities are unaffected by ED. In contrast, the Bok and Bowen study on affirmative action assumes that, unless institutions correct for ED's racial effects, ED reduces the number of minority students at an institution. The two positions are not mutually exclusive and help illuminate the problems driving the civil rights analysis of ED. The all-things-being-equal presupposition of the Avery study becomes the root of the ED civil rights problem.

Although the Avery study is exhaustive in many respects, it provides only limited information about race. The study's authors felt that institutional priorities gave three groups—athletic recruits, alumni children, and underrepresented minorities—a substantial edge in the admissions process, regardless of when those students applied. The study made the assumption that applicants from those groups neither gained nor lost from early admission programs, and thus omitted the groups from much of its analysis.

The study does, however, break down racial group trends in the early and regular admissions stages. The study finds that EA and ED applicants are disproportionately white and Asian students from advantaged backgrounds. At each of the fourteen colleges in the study, African-Americans and Hispanics applied early at lower rates than other applicants. Across the schools using ED programs, African-Americans applied early about half as often as others; Hispanics about two-thirds as often as others.¹¹⁶

In contrast, *The Shape of the River* posits that the low number of minority applicants under early admission programs would, all other things being equal,

114. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

115. AVERY ET AL., *supra* note 1, at 306.

116. See *supra* note 82.

ultimately lower the number of minority students at a college or university.¹¹⁷ The difference between the two positions comes from the assumption about “all other things being equal.” The Avery study assumes that schools will intervene, through affirmative action, to prevent the low number of minority ED applicants from affecting the number of underrepresented minorities on campus. However, that assumption is legally problematic in the wake of *Grutter* and *Gratz*: If schools adjust for losses from ED, they risk running afoul of the Supreme Court’s Equal Protection jurisprudence; if the schools do not adjust, they may violate Title VI of the Civil Rights Act of 1964.

The positions taken by the Avery and Bok-Bowen studies suggest that if a school accepts a relatively low number of underrepresented minorities through its ED program, it can respond in two possible ways during its regular-admissions process. First, the school can make up for any shortfall in minority ED applicants during its regular decision period. In order to do so, it would likely have to apply heightened affirmative action at this point. Second, the school can choose not to respond at all, regardless of the shortfall in minority applications during the ED cycle. This would result in an overall class with lower minority enrollment. Thus, if a school implements an ED program (as many did during the 1990s), yet otherwise remains constant in its admissions process, it will likely reduce the number of minority students in its incoming classes.¹¹⁸

B. Title VI and Fourteenth Amendment Analysis

Title VI of the Civil Rights Act of 1964 applies to both public and private institutions that receive federal funds.¹¹⁹ Section 601 provides that no person shall, “on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity” covered by Title VI.¹²⁰ Section 602 authorizes federal agencies to implement the provisions of section 601 “by issuing rules, regulations, or orders of general applicability.”¹²¹ Exercising this authority, the

117. BOWEN & BOK, *supra* note 55, at 38 n.24.

118. The more selective the college, the more likely it is (with the exception of Stanford, Yale, and Harvard) to have an ED program. So if schools are not compensating for their ED programs, minority students are not only losing ground—they are losing it at the most selective and prestigious schools.

119. 42 U.S.C. §§ 2000d to 2000d-7 (2000).

120. Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 241, 252 (codified as amended at 42 U.S.C. § 2000d (2000)).

121. Civil Rights Act of 1964, § 602 (codified as amended at 42 U.S.C. § 2000d-1 (2000)).

Department of Education promulgated a regulation to create a right of action against institutions that sponsor programs that have a disparate impact on underrepresented minorities.¹²² As the discussion above demonstrates, the disparate impact from ED could trigger this Title VI protection.

To defend their ED programs against a Title VI challenge, schools might point out that the analysis above is inaccurate. Rather than letting the minority population drop after the adoption of ED, schools could simply adjust for the ED shortfall by accepting more minority students at the regular-decision stage. That argument, however, faces a legal challenge from Supreme Court precedent in *Connecticut v. Teal*.¹²³

The *Teal* plaintiffs filed suit to protest a written examination that Connecticut required from employees who applied to be promoted to positions as Welfare Eligibility Supervisors. The plaintiffs argued that this screening test had a disparate impact on black applicants, who passed the test at only sixty-eight percent of the rate of their white competition. In response to the suit, Connecticut raised a “bottom line” defense. The state showed that, under its affirmative action program, the state hired a higher percentage of blacks who passed the test than whites who passed. The result, the state claimed, washed out any disparate impact initially caused by the test, because the bottom line was that the same number of blacks were hired with or without the test. The Supreme Court rejected Connecticut’s argument by focusing on the individual employee, rather than on the minority group as whole¹²⁴: The fact that the

122. 34 C.F.R. § 100.3 (2004). Recent cases from the Supreme Court, however, indicate that it may be difficult to find a plaintiff to bring suit. *Alexander v. Sandoval*, 532 U.S. 275 (2001), denies a private right of action under Title VI. If any party has the ability to enforce the disparate impact regulations under Title VI, it may be the Office of Civil Rights at the Department of Education. The Office of Civil Rights has the right to promulgate and enforce regulations for Title VI. 42 U.S.C. §§ 2000d-1, 2000d-5 (2000); 34 C.F.R. § 100.8 (2004). However, given the Office’s current tenor and its focus on opening up programs that are explicitly limited to minority students, the Office is unlikely to pursue a case against schools with early admission policies that may have a disparate impact on the basis of race. See, e.g., Peter Schmidt, *Iowa State Changes Minority Program*, CHRON. HIGHER EDUC., Mar. 28, 2003, at A24 (reporting that Iowa State University has agreed to open a previously race-exclusive summer program to nonminority applicants after receiving letters from the Center for Equal Opportunity and the American Civil Rights Institute warning that they would file a complaint with the Office for Civil Rights unless the college changed the criteria for program participation); Peter Schmidt & Jeffrey R. Young, *MIT and Princeton Open 2 Summer Programs to Students of All Races*, CHRON. HIGHER EDUC., Feb. 21, 2003, at A31. In his dissent in *Sandoval*, Justice Stevens suggested that private plaintiffs might still be able to pursue a Title VI disparate impact claim under 42 U.S.C. § 1983. *Sandoval*, 532 U.S. at 299-300 (Stevens, J., dissenting).

123. 457 U.S. 440 (1982).

124. *Id.* at 453-54, 455-56.

state had acted in the minority group's interest by enacting an affirmative action program did not repair the harm done to the individual employee who, because of the discriminatory screening process, did not make it to the second step of the hiring process. The Court allowed that a bottom line defense might eliminate the possibility of a discriminatory intent, but pointed out that courts do not consider intent in disparate impact cases.¹²⁵

The *Teal* precedent may or may not apply to ED. While courts have often applied standards from Title VII in the Title VI context,¹²⁶ there does not appear to be Title VI case law applying *Teal*'s "bottom line" analysis in the college admissions context. However, courts have applied *Teal* in other Title VI contexts.¹²⁷ There may be a significant distinction between a test that disadvantages minority job applicants and a program that prevents more minorities from even applying. If a court did adopt *Teal*, a college's affirmative action regular-decision correction for the minority drop-off caused by ED would not provide a defense to an ED disparate impact claim. Like the applicant test in *Teal*, ED is an identifiable, discrete part of the admissions process that can be distinguished from the admissions process as a whole. The court could thus separate ED for the purposes of disparate impact analysis. If a court were to isolate the ED program, it would not matter whether a school admitted the same final number of minority students with or without an ED program because individual students would still be harmed when the school decided to institute ED. They would be the students, analogous to the harmed

125. *Id.* at 454-55.

126. *See, e.g.*, *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) (noting that courts in Title VI disparate impact cases have looked to Title VII cases for guidance); *Smith v. Barton*, 914 F.2d 1330, 1336 (9th Cir. 1990) (noting that courts frequently look to Title VII to determine rights and procedures available under Title VI); *Ga. State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985) (applying the test from Title VII to a disparate impact claim under Title VI); *Larry P. v. Riles*, 793 F.2d 969, 982 n.9 (9th Cir. 1984) (noting that Title VII's "manifest relation" standard applies to disparate impact cases brought under Title VI); *NAACP v. Med. Ctr., Inc.*, 657 F.2d 1322, 1331 (3d Cir. 1981) (en banc) (noting that Title VII standards are instructive in a Title VI case).

127. *See, e.g.*, *Chicago v. Lindley*, 66 F.3d 819, 829 (7th Cir. 1995) (assuming that although *Teal* is a Title VII case, "the principle for which it stands is applicable in a Title VI case as well"); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1420 (11th Cir. 1993) (citing *Teal*'s disparate impact analysis in a Title VI case); *Riles*, 793 F.2d 969 (holding that IQ placement tests for special education classes created an unacceptable disparate impact on African-American children and were not required by educational necessity); *Cureton v. NCAA*, 37 F. Supp. 2d 687 (E.D. Pa. 1999) (holding that NCAA freshman-year-eligibility rules had an unjustified disparate impact on African-American students), *rev'd on other grounds*, 198 F.3d 107 (3d Cir. 1999).

job applicants in *Teal*, who were able neither to apply under ED nor to meet the higher academic standards applied to regular decision candidates. The harm to those students, under *Teal*, would be enough to trigger disparate impact analysis.

This argument assumes that admissions standards rise between early and regular decision for minority and nonminority students alike. The Avery study, however, only provides direct evidence of the rise in standards for nonminority students. If the standards do not change, then the somewhat academically weaker students who do not have the wherewithal to apply early can still compete effectively in regular decision, vis-à-vis other minority students. Thus the disparate impact claim, though still possible, is not as clear.

If disparate impact does occur and a school is not legally allowed to correct for ED impact on minority enrollment levels—or if the school decides that the change is part of the regular fluctuation of admit and yield rates¹²⁸—the ED program will run afoul of Title VI.¹²⁹ Federal regulations allow the government to withdraw funding from institutions that have policies that disproportionately affect racial or ethnic groups.¹³⁰ Thus, if schools maintain their ED programs, they may risk losing federal funding.¹³¹

Even if there were a bottom line defense for regular-decision corrections, an attempt to compensate for the shift in class composition in order to comply with Title VI risks running afoul of *Grutter* and *Gratz*. The Supreme Court has consistently held that an educational institution may not set admissions quotas for students of color. If ED caused a drop-off, the only way to “make up” for a decreased number of minority applicants in the ED pool would be to set a quota or a “plus” factor target, which would violate *Gratz*. In sum, although

128. Michigan reported that minority students made up anywhere from 13.5% to 20.1% of its student body between 1993 and 1998. *Grutter v. Bollinger*, 539 U.S. 306, 336 (2003).

129. 42 U.S.C. § 2000d (2000).

130. Jennifer C. Bracer, *Killing the Messenger: The Misuse of Disparate Impact Theory To Challenge High-Stakes Educational Tests*, 55 VAND. L. REV. 1111, 1119 (2002).

131. Even when a plaintiff can make a showing of disparate impact, a school may still justify the impact as an “educational necessity.” See *Bd. of Educ. v. Harris*, 444 U.S. 130, 151 (1979). The school must show that any given requirement has a manifest relationship to the education in question. *Id.* at 151. If a school justifies a practice as an educational necessity, the plaintiff may still prevail by showing that an alternative practice would serve the same purpose without the discriminatory effect. Cf. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (discussing how a plaintiff overcomes an analogous “business necessity” defense). Schools seem unlikely to muster effective educational necessity defenses. Indeed, ED does not appear to be a necessity at all. Most schools functioned for a significant period of time without ED programs, before adopting them in the 1990s.

the limited data available impedes concrete conclusions, ED programs may well violate civil rights laws.

IV. EARLY DECISION AND ANTITRUST

Although civil rights is the dominant legal paradigm in educational reform, antitrust analysis offers a cogent alternative legal critique of ED programs—one that shifts the focus from race to class and obviates the information problem. This Part argues that ED violates basic antitrust principles. Section A—through an analysis of the *United States v. Brown University*¹³² price-fixing case—argues that antitrust principles apply in the higher education context. The following Sections then evaluate two possible ways that ED violates the Sherman Act: through market division and information sharing. Finally, Section D considers possible procompetitive justifications for ED.

A. Antitrust and Higher Education

1. Basic Principles of Antitrust

The Sherman Act governs “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States.”¹³³ Thus, the “existence of interstate commerce is both a jurisdictional requirement and an element of the substantive offense.”¹³⁴ Supreme Court precedent suggests that nonprofit status and educational mission do not place an institution outside the realm of commerce.¹³⁵ The Supreme Court has noted that “[t]he nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act . . . nor is the public-service aspect of professional practice controlling in determining whether § 1 includes professions.”¹³⁶ Instead, courts must determine if the restraint in question (whether or not by a nonprofit organization) “is one that promotes competition or one that suppresses competition.”¹³⁷ Under Supreme Court precedent, “the most

132. *United States v. Brown Univ. (Brown Univ. II)*, 5 F.3d 658 (3d Cir. 1993).

133. 15 U.S.C. § 1 (2000).

134. *United States v. Brown Univ. (Brown Univ. I)*, 805 F. Supp. 288, 296 n.2 (E.D. Pa. 1992), *rev’d* 5 F.3d 658 (3d Cir. 1993).

135. *Id.* at 297 n.3 (“It is beyond debate that nonprofit organizations can be held liable under the antitrust laws.” (internal quotation marks omitted)).

136. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 787 (1975) (citation omitted).

137. *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 691 (1978).

fundamental principle of antitrust law” is that a market must be responsive to consumer preference.¹³⁸

The Supreme Court has applied three different forms of analysis to evaluate whether business arrangements violate the Sherman Act. The first is the per se rule: Per se violations are those that clearly interfere with market functions¹³⁹ and often directly affect price. The classic example is horizontal price-fixing between competitors: corporations acting together to raise prices for products they manufacture, where they control a substantial part of the interstate trade and commerce in that commodity.¹⁴⁰ Under the per se rule, “[t]he Act places all such schemes beyond the pale.”¹⁴¹ Per se violations rarely require extensive factual analysis by the court. Arrangements that do not match the classic contours of a per se violation may be evaluated under a second standard, known as “quick look” analysis.¹⁴² When applied, a court takes a “quick look” at the agreement or arrangement at issue. The court determines whether a more detailed analysis is necessary, or whether the case may be shunted into the per se category. The third standard of review is under the rule of reason.¹⁴³ The rule of reason evaluates the “reasonableness” of an arrangement and is highly fact intensive.

2. *The Brown University Cases*

In 1991, after a two-year investigation of the financial aid programs of various colleges and universities across the country, the Department of Justice filed a civil suit against MIT and the eight Ivy League schools.¹⁴⁴ Each school was a member of the “Overlap Group”—twenty-five private colleges and universities¹⁴⁵ that had been meeting each spring since 1958 to coordinate

138. *Brown Univ. I*, 805 F. Supp. at 304.

139. See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

140. See, e.g., THOMAS D. MORGAN, *MODERN ANTITRUST LAW AND ITS ORIGINS* 192-219 (2d ed. 2001).

141. *Id.* at 221.

142. *NCAA v. Bd. of Regents*, 468 U.S. 85, 110 (1984) (noting that “the rule of reason can sometimes be applied in the twinkling of the eye” (internal quotation marks omitted)).

143. See *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911) (establishing the rule of reason test).

144. The suit was filed on May 22, 1991. Michael C. Petronio, Comment, *Eliminating the Social Cost of Higher Education*, 83 *GEO. L.J.* 189, 190 (1994).

145. See *United States v. Brown Univ. (Brown Univ. I)*, 805 F. Supp. 288, 289-90 (E.D. Pa. 1992) (listing member institutions), *rev'd* 5 F.3d 658 (3d Cir. 1993).

financial aid awards.¹⁴⁶ The Overlap Group allowed the schools to implement their belief that “any admitted student should have the opportunity to attend the college of her choice, regardless of her ability to pay.”¹⁴⁷ Under the Overlap Agreement, the member schools agreed to three conditions: (1) they would award aid “solely on the basis of applicants’ demonstrated financial need,” (2) they would all use a single method for calculating that need, and (3) they would equalize financial aid awards to any student admitted to more than one institution (“overlaps”).¹⁴⁸

The government charged the schools with “unlawfully conspir[ing] to restrain trade,”¹⁴⁹ a violation of § 1 of the Sherman Act.¹⁵⁰ Specifically, the government charged that the schools had committed illegal horizontal price-fixing by collectively determining student aid. All of the defendant schools, except MIT, entered into a consent decree on the day the government filed suit; MIT alone went to trial.¹⁵¹

The district court held that the Overlap Group’s actions violated the Sherman Act. Although MIT argued that the Sherman Act did not apply to the Overlap Group because the Group’s “activities did not constitute trade or commerce,”¹⁵² the district court disagreed and held that educational institutions were subject to the Act. Turning to the specifics of the Group’s behavior, the court concluded that the members were committing horizontal price-fixing.¹⁵³ Price-fixing entities need not raise prices for all consumers to a uniform level; they merely have to tamper with market functions—for instance by colluding to set different rates for different customers—in order to violate the Sherman Act.¹⁵⁴ Although horizontal price-fixing is typically a per se violation of the Sherman Act, the Supreme Court has suggested that the per se rule should not

146. Petronio, *supra* note 144, at 190.

147. Srikanth Srinivasan, Note, *College Financial Aid and Antitrust: Applying the Sherman Act to Collaborative Nonprofit Activity*, 46 STAN. L. REV. 919, 921 (1994).

148. *Brown Univ. I.*, 805 F. Supp. at 293.

149. *Id.* at 289.

150. 15 U.S.C. § 1 (2000).

151. *Brown Univ. I.*, 805 F. Supp. at 289.

152. *Id.* at 296.

153. The classic case establishing the illegality of horizontal price-fixing is *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), which held that an organized effort to raise prices among major oil companies selling gasoline in the Midwestern United States was illegal horizontal price-fixing.

154. See *Socony-Vacuum Oil*, 310 U.S. at 223 (stating that price-fixing occurs when competitors act in concert with the intent of “raising, depressing, fixing, pegging, or stabilizing the price of a commodity”).

apply to certain kinds of horizontal agreements.¹⁵⁵ Notably for the educational context, in *Goldfarb v. Virginia State Bar* the Court cautioned that “[i]t would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas.”¹⁵⁶

In *Brown University*, the district court heeded the Supreme Court’s admonition to use caution when applying the per se rule outside a purely business context, but determined that “[n]o reasonable person could conclude that the Ivy Overlap Agreements did not suppress competition.”¹⁵⁷ Though the economic effects of suppressing competition were not clear, the court ultimately decided that they were irrelevant because “the member institutions purposefully removed, by agreement, price considerations and price competition for an Overlap school education.”¹⁵⁸ The court felt that the Overlap Group so effectively “denied students the ability to compare prices” when choosing between the member institutions that it “infringe[d] upon the most fundamental principle of antitrust law”: that all markets should be responsive to consumer preference.¹⁵⁹ The court rejected all of MIT’s proffered defenses and granted a permanent injunction precluding MIT from participating in any agreement that affected the price paid by an admitted student.¹⁶⁰ Both sides appealed.

On appeal, the Third Circuit gave more attention to MIT’s alleged procompetitive justifications for the Overlap Group. MIT argued that, although the Overlap Group might appear to violate the Sherman Act by interfering with market function, certain features of the arrangement actually enhanced competition. MIT proffered several justifications: that the Group enhanced competition by providing aid and options to needy students who would not otherwise have been able to attend Overlap schools without limiting the options of their wealthier peers; that controlling price enhanced competition between the institutions along other axes, such as curriculum and campus life options; and finally, that only by coordinating several aspects of their financial aid programs were the Overlap Group schools able to assure that

155. In *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979), the Court reasoned that not every agreement that appeared to be horizontal price-fixing was motivated by the desire to affect the market. Without that motive, the Court held that the arrangement would not trigger the per se rule. *Id.* at 10.

156. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 788 n.17 (1975).

157. *Brown Univ. I*, 805 F. Supp. at 300-02.

158. *Id.* at 303.

159. *Id.* at 304.

160. *Id.* at 307.

students were admitted only on the basis of merit and that the full financial needs of admitted students were met. MIT argued that because financial aid budgets are finite, without Overlap, schools would compete aggressively for top students through financial aid, to the detriment of their less flashy, but just as needy, classmates, thereby significantly decreasing the availability of need-based aid.¹⁶¹

The Third Circuit, heeding *Goldfarb*, keyed on the schools' intent in forming the Overlap Group. The court noted that the district court failed to make any findings about the signature economic consequences of illegal horizontal price-fixing: reduced output or increased price.¹⁶² The court gave the agreement's justifications some consideration, because of MIT's alleged altruism and claimed "absence of a revenue maximizing purpose."¹⁶³ The burden, however, remained on MIT "to justify price fixing with some procompetitive virtue, or with a showing of Overlap's reasonable necessity to its institutional purpose."¹⁶⁴ Though the court of appeals, like the district court, rejected MIT's argument that the agreement enhanced competition in areas other than price,¹⁶⁵ it was more receptive to MIT's other justifications.

The Third Circuit held that in this specific context, "rather than suppress competition, Overlap may in fact merely regulate competition in order to enhance it, while also deriving certain social benefits,"¹⁶⁶ and thus the asserted

161. *Id.* at 304-05.

162. *United States v. Brown Univ. (Brown Univ. II)*, 5 F.3d 658, 674 (3d Cir. 1993).

163. *Id.* at 672.

164. *Id.* at 674.

165. *Id.* at 675.

166. *Id.* at 677. Critics have attacked the Third Circuit's *Brown University* decisions for straying from Supreme Court antitrust doctrine. See, e.g., Petronio, *supra* note 144, at 208-15; Srinivasan, *supra* note 147, at 939 (arguing that antitrust law was incorrectly, and too harshly, applied in *Brown University* because the court did not understand the economic model for nonprofit activity). As noted above, the Supreme Court has traditionally held that horizontal price-fixing is a per se antitrust violation, and nonprofit activity is not exempt from that restriction. Indeed, the Court has not been receptive to social-welfare justifications for different forms of price interference. See *Goldfarb v. Va. State Bar*, 421 U.S. 773, 786-88 (1975) (rejecting the bar association's argument that maintaining a price schedule supports fundamental standards of professional ethics in a "learned profession"). Since *Goldfarb*, the Supreme Court has refused to exempt nonprofit associations from Sherman Act regulation. See, e.g., *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982) (striking down maximum fees set by a nonprofit association for medical services). In *National Society of Professional Engineers v. United States*, the Supreme Court struck down a professional association's requirement that engineers and customers not discuss price until the customer had selected an engineer to work on their project. The Court held that antitrust analysis under the Sherman Act, which strongly favored competition, did not allow "a defense based

procompetitive and social-welfare features of the Overlap Agreement required further analysis. The court emphasized the special nature of education as a social good that should be widely available. It remanded the case to the district court so that the court could “more fully investigate the procompetitive and noneconomic justifications proffered by MIT.”¹⁶⁷ On December 22, 1993, MIT and the Antitrust Division settled the lawsuit on terms similar to the consent decrees for the other Overlap institutions.¹⁶⁸

While the suits were pending in *Brown University*, Congress granted the Overlap Group schools a two-year grace period. As an interim measure, Congress approved arrangements among schools in which they agreed upon general principles for determining student aid in need-blind admissions, while prohibiting discussion of individual students.¹⁶⁹ Congress has renewed the same or similar versions of the provision several times—most recently in 2001—but the provision will expire in 2008.¹⁷⁰ The message is clear: Schools may cooperate in setting general financial aid methodologies, but the Overlap Group cannot be revived, and agreements resembling the Overlap Group violate the Sherman Act.

The following Sections argue that ED, by replicating many of the features of the Overlap Group, runs afoul of the Sherman Act.

B. Market Division in Higher Education

1. Addyston Pipe: Customer Allocation Defined

Schools' interactions under ED look remarkably like those at issue in *Brown University*. Under the Overlap Agreement, school officials met and decided on financial aid. They then returned to their schools and refused to negotiate further with admitted students—or, if they did make changes to the student's

on the assumption that competition itself is unreasonable.” 435 U.S. 679, 696 (1978); see also Nelson O. Fitts, Note, *A Critique of Noncommercial Justifications for Sherman Act Violations*, 99 COLUM. L. REV. 478 (1999); Petronio, *supra* note 144; Julie L. Seitz, Comment, *Consideration of Noneconomic Procompetitive Justifications in the MIT Antitrust Case*, 44 EMORY L.J. 395, 396 (1995) (concluding that “the appellate court inappropriately remanded the case to the district court for further consideration of social procompetitive justifications”).

167. *Brown Univ. II*, 5 F.3d at 678.

168. See Theodore Stachtiaris, Note, *Antitrust in Need: Undergraduate Financial Aid and United States v. Brown University*, 62 FORDHAM L. REV. 1745, 1745 n.2 (1994).

169. Higher Education Amendments of 1992, Pub. L. No. 102-325, § 1544, 106 Stat. 448, 837 (expired Sept. 30, 1994).

170. Need-Based Educational Aid Act of 2001, Pub. L. No. 107-72, 115 Stat. 648 (codified as amended at 15 U.S.C.A. § 1 note (West 2005)).

aid packet, they did so only in concert with other Overlap schools. It was direct horizontal price-fixing. ED takes the form of a different antitrust violation: customer allocation.¹⁷¹

Future Chief Justice William Howard Taft wrote the classic opinion on customer allocation while he sat on the Sixth Circuit. In *United States v. Addyston Pipe & Steel Co.*,¹⁷² six manufacturers of cast-iron pipe agreed among themselves to divide southern and western markets into regional monopolies with fixed price systems in each territory.¹⁷³ Taft, writing for the Sixth Circuit, held that the association was an illegal “combination or conspiracy” in restraint of trade.¹⁷⁴ On appeal, the Supreme Court largely upheld the ruling,¹⁷⁵ and *Addyston Pipe* remains an important precedent that is routinely cited in customer-allocation cases.¹⁷⁶

2. Application of Customer Allocation to Early Decision

Under ED, a student only applies to one school and promises to attend if admitted. In part, the system functions by relying on students to honor their promises. Colleges and universities, however, have developed an alternate system of ED enforcement that involves exchanging information in a fashion similar to the Overlap Agreement, creating a customer-allocation problem.

Schools typically require an ED applicant to sign a statement in which the student promises not only to attend if admitted, but also to withdraw all applications pending at other institutions.¹⁷⁷ Although the applicant’s promise

171. Customer allocation and horizontal price-fixing are equally violative of the Sherman Act. The same legal repercussions exist for both types of violations.

172. 85 F. 271 (6th Cir. 1898), *aff’d*, 175 U.S. 211 (1899).

173. *Id.* at 278-79, 291-93.

174. *Id.* at 291.

175. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

176. *See, e.g., United States v. Topco Assocs.*, 405 U.S. 596 (1972) (holding that a cooperative supermarket association that restricted members’ sales of privately labeled grocery products was a horizontal restraint on trade and a per se antitrust violation); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967) (holding that respondent company’s efforts to allocate mutually exclusive territories among manufacturer-licensees was a per se antitrust violation). The Supreme Court has since reaffirmed that customer allocation is a per se violation of the Sherman Act. *See Topco*, 405 U.S. at 608 (holding that “[o]ne of the classic examples of a per se violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition”).

177. Howard Greene & Matthew Greene, *Early-Application Papers Require Careful Scrutiny*, COLUMBUS DISPATCH (Ohio), Oct. 8, 2003, at F3.

is not legally enforceable,¹⁷⁸ ED schools have another way to force students to adhere to their choices. Once a school admits a student under ED, it notifies the student, and also sends a list of the students it has admitted ED to all of its competitor schools. Those schools then check the list and take two steps. First, they may terminate any EA or regular decision application that an ED-admitted student has submitted. Second, if they discover that the student has applied ED to more than one school, they notify the first school—and all involved typically revoke the student's admission. In short, "colleges practice this form of reciprocity for self-protection."¹⁷⁹

In essence, the competitor schools, who—under EA or regular decision—might have lured the student away with a better financial aid package, promise not to compete with the school to which the student has been admitted. The colleges have, through their agreement, created monopolies on certain customers' business for themselves—an illegal customer allocation and horizontal restraint of trade. Just as it is illegal to act in combination with competitors to set different prices for different customers, it is also illegal for competitors to grant each other exclusive access to certain customers. Each school, by sending out a list that its competitors will enforce, is guaranteed a listed student's attendance, and a student can only negotiate financial aid with the school that admitted him. In the remaining negotiations, the student has given up his leverage: He cannot make a credible threat to go elsewhere, because his name has already been removed from other schools' applicant pools.

Anecdotal evidence suggests that schools use this strong financial aid position to provide less financial aid than they otherwise would have.¹⁸⁰ Some colleges reduce aid more subtly, by shifting financial aid from grants to loans.¹⁸¹ Other anecdotal evidence shows that students who can negotiate may raise their financial aid offers by thousands of dollars.¹⁸² When schools swap

178. AVERY ET AL., *supra* note 1, at 55.

179. *Id.*

180. See *id.* at 178-79; Alvin P. Sanoff & Jo Ann Tooley, *Locking Up Students*, U.S. NEWS & WORLD REP., Dec. 23, 1996, at 66, 67. For articles discussing a broader trend toward price discrimination in determining financial aid, see Peter Passell, *The New Economics of Higher Education: Private Colleges Juggle Aid Formulas To Fill Seats with the Top Freshmen*, N.Y. TIMES, Apr. 22, 1997, at D1; and Steve Stecklow, *Expensive Lessons: Colleges Manipulate Financial-Aid Offers, Shortchanging Many*, WALL ST. J., Apr. 1, 1996, at A1.

181. AVERY ET AL., *supra* note 1, at 179.

182. See *id.* at 178 (discussing Carnegie Mellon's negotiations with admitted students); Jenna Russell, *Top Applicants Bargaining for More Aid from Colleges*, BOSTON GLOBE, June 12, 2002, at A1.

ED lists and enforce them, the ultimate effect on individual ED students looks much like the results achieved directly through Overlap. For at least a subset of their admitted students, schools do not have to compete over financial aid.

One important caveat is that schools will generally release an ED student from her commitment to attend if the student receives “inadequate” financial aid. Students do not take full advantage of this for two reasons. First, some students simply are not aware that the option exists,¹⁸³ and second, others are not willing to run the risk of losing a sure thing. As the Avery study points out:

Admission offices . . . raise the stakes for early admits who seek release from their commitment for financial reasons. Many schools rescind the offer of admission when they release an Early Decision admit from the commitment to enroll. In that case, the student is considered separately for admission in the regular decision pool. Families that question the financial aid offer or suspect that they could secure a better deal from other schools may be hesitant to ask for the commitment to be released when the price is to reopen the admissions decision.¹⁸⁴

By imposing an additional, heavy cost on a student’s option to exit, schools can maintain control of the outcome. Students may decide that the cost of a less attractive financial aid package does not outweigh the uncertainty of going through another round of the admissions process. In sum, this ED technique recreates a fact pattern that concerned the courts in *Brown University*—using collusion as a way to limit financial aid outlays. ED should thus trigger Sherman Act scrutiny.

C. *The Information-Sharing Antitrust Model*

In addition to the customer-allocation concern discussed in the previous Section, there is a second reason that ED programs may be illegal under antitrust law. The Supreme Court has held that information exchange between competitors may violate the Sherman Act when the effect of the exchange is to alter or control prices in the vendors’ favor. In *United States v. Container Corp. of America*,¹⁸⁵ each defendant asked its competitors for information on their most recent price charged or quoted, whenever it needed the information and could not find it elsewhere. Each defendant that received such a request usually

¹⁸³. AVERY ET AL., *supra* note 1, at 116-17.

¹⁸⁴. *Id.* at 57.

¹⁸⁵. 393 U.S. 333 (1969).

furnished the data, with the understanding that it too would receive such information when it sent requests. The information requested, however, was often available from other sources, such as customers, and the exchanges of information were infrequent and irregular.¹⁸⁶ The Court found, however, that the “exchange of price information seemed to have the effect of keeping prices within a fairly narrow ambit,” though “at a downward level.”¹⁸⁷ The Court concluded “that the exchange of price information has had an anticompetitive effect in the industry, chilling the vigor of price competition.”¹⁸⁸ Such interference with free-market price levels, the Court held, was a per se violation of the Sherman Act.¹⁸⁹

Because ED involves such extensive information sharing about “customers,” which in turn encourages schools not to compete for one another’s ED applicants, the schools’ ED enforcement mechanisms could drive down the level of financial aid received by a student. In that case, ED would run afoul of *Container Corp.*

The Supreme Court’s information-sharing cases, however, are not wholly coherent, and it is unclear which factors the Supreme Court looks to in determining whether the information sharing is benign, or whether it is cover for illegal horizontal price-fixing. For example, in *Maple Flooring Manufacturers’ Association v. United States*,¹⁹⁰ the Court held that trade associations that openly and fairly gathered and disseminated information about past prices, costs of the product, stocks of merchandise on hand, and the approximate cost of shipping did not engage in unlawful restraint of commerce. However, in a similar case, *American Column and Lumber Co. v. United States*, the Court held that vendors’ participation in a group plan to disseminate accurate knowledge of production and market conditions through reports of past transactions, additional questionnaires inviting estimates, and discussions of future market conditions violated the Sherman Act.¹⁹¹ In the case of ED, because there is only one important fact being shared (that a student has been admitted ED) and its effect on price is fairly clear, the court may see a reason to be concerned about information sharing, causing ED further antitrust problems.

186. *Id.* at 335.

187. *Id.* at 336.

188. *Id.* at 337.

189. *Id.*

190. 268 U.S. 563 (1925).

191. 257 U.S. 377 (1921).

D. Possible Defenses: Procompetitive Justifications for Early Decision

Notably, the schools that employ ED cannot proffer the same kinds of procompetitive justifications that the Overlap Group provided in *Brown University*. Unlike the Overlap program, ED does not enhance diversity at universities or the product offered to students. One author has offered an alternative procompetitive justification of ED. Professor George Priest looked at a variety of markets that Professor Alvin Roth had described as “unraveling”¹⁹² and argued that, in fact, the various markets exhibited a fact pattern in which time had become a form of currency.¹⁹³

Roth has studied the phenomenon of “time creep” in several markets, such as the market for medical interns, rush week for fraternities, and invitations to play in college bowl games.¹⁹⁴ In all of the “unraveling” markets, transactions occur at earlier and earlier time periods; the time creep from the initial date of transactions to the earlier ones is a form of market failure, in which market participants make decisions before the time at which the participants could maximize their available information. In all the markets Roth has studied, recruiters are competing for high-quality applicants. “Once one recruiter moves early, the others will have to follow suit, and many may well try to jump still further ahead. With such a process, the timing of each market moves inexorably forward.”¹⁹⁵ Candidates also pressure one another to decide at earlier times: Waiting a day may mean that all desirable positions are gone if everyone else acted the day before.

For Roth, optimal matches occur when there is an ordinal preference match between buyers and sellers—in the case of college admissions, when a first-choice student matches with his or her first-choice school. According to Roth, market failure occurs in unraveling markets because parties cannot fully

192. Alvin E. Roth & Xiaolin Xing, *Jumping the Gun: Imperfections and Institutions Related to the Timing of Market Transactions*, 84 AM. ECON. REV. 992, 994 (1994).

193. George L. Priest, *Reexamining the Market for Judicial Clerks and Other Assortative Matching Markets*, 22 YALE J. ON REG. 123 (2005) (analyzing the clerkship market from an information-acquisition standpoint). Applying this logic to ED, applicants—who cannot negotiate the terms of their education or of their attendance—can use time as a way of registering the intensity of their preferences for a school. They cannot offer to pay more to attend, but they can apply at a time that limits their ability to further negotiate financial aid.

194. See, e.g., Alvin E. Roth, *The Evolution of the Labor Market for Medical Interns and Residents: A Case Study in Game Theory*, 92 J. POL. ECON. 991 (1984); Roth & Xing, *supra* note 192.

195. AVERY ET AL., *supra* note 1, at 265.

express their optimal ordinal preferences—they are working under conditions of uncertainty, where time constraints may prevent full information.¹⁹⁶

Priest, however, has suggested that many of the markets studied by Roth are ones in which the forms of negotiable currency are limited: For example, the markets for medical residencies or judicial clerkships are ones in which the nature of the job, and often the salary, are nonnegotiable. Priest has argued that in markets like these, where most conditions are nonnegotiable, time itself becomes a form of currency.¹⁹⁷ Thus, ED converts time into currency, and allows students to express more fully their preferences in a way that would not be possible if ED did not exist. Priest's argument does provide a possible procompetitive justification for ED. While EA might serve a similar purpose, by allowing students to apply at an earlier time and thus express a strong preference, ED's binding nature makes it a more accurate indicator of student preference.

The Avery study's findings do not support this supposition. It shows that half of the students who applied ED applied strategically—not because they had a strong preference for the school.¹⁹⁸ In contrast, only one-seventh of the students who applied to schools with EA programs did so for strategic reasons.¹⁹⁹ The benefits to students under both programs are similar—in both cases, students receive a significant boost in their application strength by applying early—so the incentives to apply strategically are roughly the same. At an EA school, the strategic incentives might even be stronger, because a student could receive the benefit of applying early without being bound to attend. The Avery findings suggest that ED is not as accurate a predictor of student preference as schools might hope.

Beyond the empirical uncertainty of Priest's claim for ED, however, it is not clear that the suggested market efficiency gains from ED for students outweigh the losses ED causes to individual students. Students who apply ED benefit in two ways: first, by being able to express their preferences, and second, if they are accepted, by finishing the stressful college application process ahead of their peers. However, ED also disadvantages students by limiting their ability to negotiate financial aid, and thus denying needier students the ability to take advantage of an ED option. To the extent that the costs of ED outweigh the market benefits for students, student consumers suffer. If this happens, ED violates the Sherman Act.

196. See Roth & Xing, *supra* note 192.

197. See Priest, *supra* note 193.

198. AVERY ET AL., *supra* note 1, at 207.

199. *Id.* at 206.

CONCLUSION

Leaders in higher education continue to discuss ways to improve diversity in their student bodies.²⁰⁰ One answer is to eliminate ED because it creates unnecessary roadblocks to both racial and socioeconomic diversity. Colleges and universities could achieve the legitimate goals that ED serves—identifying student enthusiasm and stabilizing yield—through at least two other options. The first would be to adopt Single Choice Early Action (SCEA). SCEA allows a student to apply early to only one school, though she can later apply to other schools under regular decision. SCEA allows schools to identify enthusiastic students but does not limit a student’s financial aid negotiations. Schools could thus legally enforce the single-choice element of SCEA in the same way that they enforce ED, without running afoul of antitrust law.

SCEA, however, comes with its own possible legal problems. The Avery study found that minority students apply at similar rates, relative to their white peers, under EA as they do under ED.²⁰¹ Two factors may reduce the number of minorities in the ED applicant pool. First, minority families may be more concerned about how they will pay for college than nonminority families, and may thus be more unwilling to commit to a school without comparing financial aid packages. Second, minority families may know less about the advantages of the early application process than nonminority families; indeed, the Avery study repeatedly stresses this point. If the financial aid concern predominates, minority students would be more willing to apply EA than ED. The limited information available to the contrary suggests that, instead, the information problem predominates; minority families may not know enough about the intricacies of early admission programs to differentiate between ED and EA. If that is so, implementing SCEA—while it addresses ED’s antitrust problems—will not resolve the disparate impact issue.

The Avery study suggests another, more promising, option: eliminating early admission programs altogether, while allowing students to indicate a single first-choice school through a neutral nationwide clearinghouse.²⁰² Under

200. Peter Schmidt, *College Presidents Urge Changes in Undergraduate Education for Sake of Student Diversity*, CHRON. HIGHER EDUC., Apr. 20, 2005, <http://chronicle.com/daily/2005/04/2005042001n.htm>.

201. AVERY ET AL., *supra* note 1, at 59 (“Specifically, 11.9 percent of African Americans and 13.5 percent of Hispanics applied early at Early Action schools, while 20.5 percent of all applicants to those schools applied early. The pattern is the same at Early Decision schools: 3.6 percent of African Americans and 4.8 percent of Hispanics applied early at ED schools, while 7.4 percent of all applicants to those schools applied early.”).

202. *Id.* at 289.

this system, less privileged students would not have to contend with early admissions' varying deadlines, requirements, and rules. Instead, all students would apply regular decision and submit the name of their top-choice college to the clearinghouse. The clearinghouse would, in turn, share the information with colleges and universities. The model is similar to the College Board's system for the SATs: Students' scores are on file with the College Board, and students formally request that the Board release that information to the colleges and universities to which they are applying. An independent third party verifying students' choices would prevent students from gaming the system: Unlike the current system, students could not represent to several schools that each of the schools is the student's first choice. The Avery study points out that an "indicated interest" system already exists for well-connected students. College counselors from top high schools often place calls to admissions officers to let a school know when a student has a regular-decision "first choice." The Avery proposal would formalize such a system and make it available to all students.²⁰³ It is an attractive, and legally promising, proposal because it reduces both the financial concerns raised by antitrust analysis and the informational ones raised by civil rights law.

Although the educational community has argued intensely about ED's ethical implications, almost nobody has considered ED's legal implications. This Note injects legal analysis and structure into the debate. Both civil rights and antitrust analysis raise significant legal concerns that cannot be ignored. While ethical arguments for and against ED can only persuade, ED's legal problems may result in mandated change and thus demand the attention of the higher education community. The legal concerns also command reform. Schools have resisted change and dragged their feet, denying that ED causes any real problems. Basic analysis in two different legal fields advises otherwise. Though the available information is sometimes vague, even the limited information available suggests that ED is a problem worthy of more serious discussion and analysis from both the higher education and legal communities.

203. *Id.* at 289-91.