THE UNBUNDLING OF HIGHER EDUCATION

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OUTLINE

I. INTRODUCTION

"So far as the mere imparting of information is concerned, no university has had any justification for existence since the popularization of printing in the fifteenth century."

Alfred North Whitehead[1]

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THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

CARNEGIE COMM'N ON HIGHER EDUCATION, THE FOURTH REVOLUTION—INSTRUCTIONAL TECHNOLOGY IN HIGHER EDUCATION (1972) [hereinafter cited as THE FOURTH REVOLUTION];

C. HOULE, THE EXTERNAL DEGREE (1973) [hereinafter cited as C. HOULE];

J. VON KALINOWSKI, BUSINESS ORGANIZATIONS, ANTITRUST LAWS AND TRADE REGULATION (1972) [hereinafter cited as J. VON KALINOWSKI].

1. A.N. WHITEHEAD, THE AIMS OF EDUCATION 42 (1963).

For many years universities organized along traditional lines have almost totally dominated higher education. Until recently the universities' power could be justified because no other means of purveying higher education was technically feasible. Improvements in communications technology, however, have made possible the development of degree-granting programs,[2] often called "open universities," that are no longer tied to the inflexible curriculum or expensive facilities and programs of conventional universities. It is the thesis of this Article that the current structure of the university system has retarded this development and that an antitrust attack on the monopolistic practices of private universities[3] is feasible and should be successful.[4]

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2. For a general discussion of external degree programs, see COMMISSION ON NON-TRADITIONAL STUDY, DIVERSITY BY DESIGN (1973); R. FLAUGHER, M. MAHONEY & R. MESSING, CREDIT BY EXAMINATION FOR COLLEGE-LEVEL STUDIES: AN ANNOTATED BIBLIOGRAPHY (1967); C. HOULE 87-119; O. MILTON, ALTERNATIVES TO THE TRADITIONAL 77-89; Openness—The New Kick in Education, 1972 (Ford Foundation Reprint); Boyer & Keller, *The Big Move to Non-Campus Colleges*, 54 SATURDAY REV., July 17, 1971, at 46.

The State University of Nebraska has established a resource library in which most innovative and non-traditional educational programs are recorded.

3. State universities would probably be immune to antitrust attack under the Parker v. Brown, 317 U.S. 341 (1942), state-action exemption to the Sherman Act. In *Parker*, the Court stated: "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-51. Commenting on *Parker*, one writer has concluded that "state agencies have enjoyed almost absolute immunity from the antitrust laws, and attempts to distinguish the activities as proprietary rather than governmental in nature have met with little success." Note, *Emerging Limitations on the Immunities of State Action and the Efforts to Influence Governmental Action Under the Sherman Act*, 1 MEMPHIS ST. U.L. REV. 323, 325 (1971). *See also* Comment, *Antitrust Immunity: State Action Protection Under* Parker v. Brown, 7 U.S.F.L. REV. 453, 465-67 (1973). Citing *Parker*, the Fifth Circuit in Saenz v. University Interscholastic League, 487 F.2d 1026 (5th Cir. 1973), held that the University Interscholastic League, a bureau of the Extension Division of the University of Texas, was "a governmental entity exempt from the Sherman Act." *Id.* at 1027.

4. One compelling reason that innovation is needed is that the costs of a traditional university education are rapidly escalating. The College Entrance Board's College Scholarship Service makes the following projections of yearly college costs in 1974-75:

	commuting students	
two-year public college:	$1,922 (up 15.4%)	[from the previous year]
four-year public college:	$2,085 (up 17.5%)	
four-year private college:	$3,683 (up 16.5%)	
	residential students	
two-year private college:	$3,617 (up 13.2%)	
four-year public college:	$2,400 (up 7%)	
four-year private college:	$4,039 (up 9.4%)	

College Bills to Pay? Brace Yourself, CHANGING TIMES, July 1974, at 4. *See The Squeeze on Education*, FORBES, Sept. 15, 1974, at 37; *College: Still Higher Tabs for Higher Education*, BUSINESS WEEK, July 13, 1974, at 13.

Because of direct and indirect government subsidies, endowment income, and pri-

This Article analyzes the four distinct services performed by universities and describes recent experiments in offering the services separately. A system which offers these four functions in a package on a take-it-or-leave-it basis is referred to as a "bundled system," whereas an "unbundled" system offers the functions separately. The Article will discuss the application of the antitrust laws to the private nonprofit college generally[5] and to the specific university practice of tying its various services together. The rigidities of the existing bundled educational system then will be contrasted with the benefits of unbundling education.

A. The Four Functions of Traditional University Systems

Because of a degree's usefulness in our credential-oriented society, most students attend a university principally to earn a degree; but universities are not just degree-granting, accrediting institutions. They in fact perform four different and quite distinct functions: impartation of information, accreditation, coercion, and club membership.

Impartation of Information. A major function performed by universities is the impartation of information. In American undergraduate education, the live lecture is the most commonly used method of transmitting information from the instructor to the students, as it has been since the inception of the university in medieval Europe.[6] Today, seminars are infrequent, and tutorials rarer still. At live lectures the majority of the students behave more like the passive audience at a play than active participants in an academic pursuit, although occasion-

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vate gifts, the cost to society of educating a student considerably exceeds tuition costs. A dramatic example is Yale University, where the estimated cost of instruction per student for 1974-75 is $7,460, and the tuition and fees for that period are $3,650. *The Squeeze on Education, supra* at 38; *cf. Where Does the Money Go?*, FORBES, Sept. 15, 1974, at 120. *See generally* CARNEGIE COMM'N ON HIGHER EDUCATION, HIGHER EDUCATION: WHO PAYS? WHO BENEFITS? WHO SHOULD PAY? (1973); E. CHEIT, THE NEW DEPRESSION IN HIGHER EDUCATION—TWO YEARS LATER (1973); COMMITTEE FOR ECONOMIC DEVELOPMENT, THE MANAGEMENT AND FINANCING OF COLLEGES (1973).

5. For a discussion of the Sherman Act's application to nonprofit corporations generally, see H. TOULMIN, 6 ANTITRUST LAWS OF THE UNITED STATES § 12.43C (Supp. 1973); Nawalanic, *Motives of Non-Profit Organizations and the Antitrust Laws*, 21 CLEV. ST. L. REV. 97 (1972).

6. *See generally* C. HASKINS, THE RISE OF UNIVERSITIES 61 (1923). Several of the original functions of the lecture system, including reading texts so that students could correct handcopied manuscripts, are now obsolete. *Id.* at 58. The scarcity of books in the Middle Ages also created an early need for anti-monopolistic ordinances in university cities: "[T]he sale of books was hedged in by close restrictions designed to curb monopoly prices and to prevent their removal from town." *Id.* at 52.

ally genuine dialogue develops between the professor and the boldest students in a class. These lectures usually develop around a basic textbook purchased by the students. Generally, the text is neither written by the lecturer nor published by a company associated with the university. Students are sometimes assigned course papers which require the use of the university library, the cost of which is included in the students' tuition. Nevertheless, non-textbook source material plays a relatively unimportant information-transfer role in undergraduate education.

Accreditation. Accreditation services consist of grading the work of students and awarding degrees. To test the proficiency of students, the professor may give periodic written examinations or assign course papers or other projects. Students ordinarily receive final grades upon the completion of each semester or quarter of study. Most universities require a minimal level of cumulative performance for continued enrollment. Students desire this accreditation function because it provides periodic feedback on performance and an achievement record that enhances employment opportunities. The accreditation process is completed for a student when the university measures his record against the requirements prescribed by the university for the awarding of a particular degree. Aside from its historical basis, the degree-awarding function is somewhat puzzling. The general public attaches great importance to the awarding of a diploma, but usually the only real services rendered by the university in this process are counting the number of passed courses, checking to see whether certain distributional requirements have been met, and calculating the student's grade point average. As long as degrees are granted on the basis of such automatic formulae, the diploma itself adds no significant information about the student which the transcript could not already provide.

Coercion. Universities form a crucible in which the professors, the school administration, and peer-group influence all place pressure on the student to perform his or her work.[7] Some professors use the threat of an unannounced quiz to encourage preparation for each class, while others call on students and publicly berate those who are unprepared. By imposing inflexible deadlines, the university increases the pressures which influence student behavior. Each semester, a student must ordinarily enroll in courses which are worth a minimum

7. Many professors and university administrators might view coercion as the least important function of the university, but for many students it may be even more important than impartation of knowledge.

number of "credits." If he fails to master the material of a course by the date of examination, the student receives a failing grade, a blemish on his record. Similarly, if he fails to finish a paper by an assigned deadline, undergraduate professors usually lower the student's grade for the course. In most colleges, after a certain grace period has elapsed, a student may not drop a course without receiving a failing grade. In addition, there are other penalties for dropping a course after the grace period. Tuition is not refunded, and the substitution of another course is not permitted. Most students are also concerned about being branded a failure in the eyes of their fellow students. This influence inspires at least minimal performance. While these pressures often have undesirable side effects such as neuroses and mental breakdowns, many students value the coercive features of the university and would probably be less comfortable with a system that demanded a heavier reliance on their own initiative and motivation. Without this coercion, most students might lack the will power to study intensively, even though, theoretically, they could master college-level work simply by systematic reading.

Club Membership. This concept is especially prevalent in the British university system, where the phrase "the old school tie" is used to connote the social and business affinity of those who have attended the same college or public school. In its more attenuated form in the United States, the club membership[8] function has two aspects: (1) exclusiveness and (2) interaction (social as well as intellectual).

Since leading universities accept only a relatively small percentage of those who apply, being accepted is similar to being asked to join a rather exclusive club. Acceptance itself is a confirmation of one's intelligence.[9] If the student actually attends one of these leading universities, he will have the opportunity to associate with those of similar intellectual abilities and eventually with those graduates of the school who have distinguished themselves. This arrangement may easily redound to the student's advantage as these relationships mature into significant opportunities in the job market.

Club membership has a second aspect that does not depend on the exclusiveness of the school's admission policy. It is the opportunity for residential university students to interact with other students. In-

8. This concept should be distinguished from membership in a social fraternity or sorority. The club described here is composed of the entire student body of a university.

9. However, in some circles, it is considered in bad taste to boast about being accepted at schools which a student does not actually attend. Almost no one puts such information on his resume.

formally, this might take the form of intellectual bull sessions. On a more formal level, students may join special interest clubs that sponsor activities directed at particular academic areas.

B. *Attempts at Unbundling*

Although the current structure of the university system is encrusted with tradition, other means do exist now for instructing college students.[10] In Britain, new methods of information impartation have been incorporated into a program called the Open University, which offers students an opportunity to earn a college degree while continuing to work. The Open University employs a variety of techniques and technologies, including television, radio, brief summer school sessions, and centers replete with tutors and counselors.[11] The number of American counterparts to Britain's Open University has been growing. Chicago's innovative TV College[12] has been joined by Empire State

10. For example, video cassettes are now commercially available. The cassette can be used to record a televised lecture series. The student can "play" the cassette on a television set that has been modified. Various organizations now offer instruction by this means; for example, advertisements for *Time-Life* video cassette series have appeared in *Time*. One such advertisement was captioned "Learn speed reading from Dick Cavett on your own prime time." *Time-Life* also offers Kenneth Clark's "Civilization" series on video cassettes. In late 1973, Seton Hall Law School was awarded a grant by the Exxon Foundation and the Department of Health, Education and Welfare to produce and distribute a complete video cassette law course on "Women and the Law." 27 Law School News, December 1973, at 2.

San Francisco's public library is establishing a video resource center with video tapes and closed circuit television sets. Maloney, *TV Freaks to Invade Reader's Last Bastion*, San Francisco Progress, Aug. 17, 1974, at 16, col. 1.

11. CARNEGIE COMM'N ON HIGHER EDUCATION, NEW STUDENTS AND NEW PLACES—POLICIES FOR THE FUTURE GROWTH AND DEVELOPMENT OF AMERICAN HIGHER EDUCATION 112-13 (1971); C. HOULE 34-38; W. Perry, *Britain's Open University*, in UNIVERSAL HIGHER EDUCATION COSTS, BENEFITS, OPTIONS 287-92 (L. Wilson & O. Mills, eds. 1972); *Symposium: The Open University—A Case Study in Education Technology*, in 5 ASPECTS OF EDUCATIONAL TECHNOLOGY 38-75 (D. Packham, A. Cleary & T. Mayes eds. 1971); Walsh, *The Open University: Breakthrough for Britain?*, 174 SCIENCE 675 (1971); Weintraub, *British Open a College for Dropouts*, N.Y. Times, Jan. 12, 1971, at 37, col. 1. For a description of similar developments in Sweden, Japan, and West Germany, see THE FOURTH REVOLUTION 25-27.

The University of London has long had a program offering degrees to any student who passed the required examinations even if he has not received any formal instruction. C. HOULE 20-27. For a discussion of foreign external degree programs generally, see *id.* at 18-44.

For an excellent bibliography of the literature on external degrees, see *id.* at 187-208.

12. The TV College, now in its thirteenth year, offers an associate in arts to those who complete its program of broadcast television instruction. For a general discussion of credit for television courses, see Sharon, College Credit for Off-Campus Study 8-10, 1971 (Bethesda, Maryland, ERIC Document Reproduction Service ED 048 520).

College, a New York university which has no campus, classrooms, laboratories, or libraries.[13] Similar independent courses of study are now offered by the University Without Walls, a degree-granting consortium of twenty-nine colleges.[14]

Other state universities, including those of Oklahoma, Massachusetts, Minnesota, Florida, Vermont, California, and Hawaii, are experimenting with various types of less extreme external degree programs.[15] With support from the federal government's National Institute of Education, the State of Nebraska has created the State University of Nebraska, an open university or "university without walls" which will offer college courses through educational television, textbooks, newspapers, correspondence, video cassettes, sound-tape cassettes, and regional resource centers.[16] The National Institute of Education also hopes to establish an open university for the entire Middle West, called the "University of Mid-America," which would provide instruction to students who cannot afford to attend college on campus.[17]

Other programs offer courses related to a particular subject. In cooperation with the University of California Extension, *Psychology Today* offers two separate introductory psychology courses in the format of either an independent study plan[18] or independent study supplemented by television programs shown by local educational television stations.[19] Another new program is Courses by Newspaper, which is

13. C. HOULE 97-100. Students are guided by "mentors" who help them to work out a flexible educational program leading to a degree. *Id.*

14. CARNEGIE COMM'N ON HIGHER EDUCATION, THE CAMPUS AND THE CITY—MAXIMIZING ASSETS AND REDUCING LIABILITIES 57-58 (1972); C. HOULE 111-16; TIME, Aug. 28, 1972, at 40-42; Ehrich, *Off-Campus U*, Wall Street J., Feb. 2, 1972, at 1, col. 1.

15. CARNEGIE COMM'N, *supra* note 14, at 55-57; CARNEGIE COMM'N, *supra* note 11, at 114-15; C. HOULE 100-11, 176-77.

16. The State University of Nebraska has published a series of nine undated mimeographed essays with the following titles: The S-U-N Concept—Bringing Education to People; Nebraska—An Ideal Location for an Open Learning System; Review of Literature on Nontraditional Higher Education; The S-U-N Target Population; S-U-N—The Instructional Design Dimension; The S-U-N Delivery System in the State of Nebraska; The S-U-N Resource Center; S-U-N Research and Evaluation; The History of S-U-N and Its Organizational Structure.

17. Spivak, *Lack of Political Clout in Congress Threatens Once-Glamorous National Institute of Education*, Wall Street J., June 28, 1974, at 30, col. 1.

18. The independent study course includes programmed study manuals, a textbook, long-playing records, self-check quizzes, and computer-scored examinations. Those who successfully complete the course receive five credits from the University of California Extension.

19. The television course consists of eighteen half-hour television programs, a textbook, a study guide, a film guide, records, self-tests, and a series of computer-scored examinations. The University of California, San Diego, will grant eight extension credits to those who complete the course. PSYCHOLOGY TODAY, Oct. 1973, at 75.

funded by the National Endowment for the Humanities and administered by the University of California, San Diego, Extension. The first course, "America and the Future of Man," started in newspapers all over the country in October, 1973.[20]

Tutoring services are also developing. In Chicago, there is a "Learning Exchange" which matches tutors and pupils. When a person telephones the Exchange and expresses interest in learning a certain subject, he is given the names, backgrounds, and telephone numbers of those who have registered to teach that subject. If no teacher is available, the student's name is kept on file until a tutor registers.[21] New York State has a similar program run by the Central New York Regional Learning Service, established by a grant from the United States Office of Education. One of the Regional Learning Service's programs is a Regional Instructional Reserve which maintains a computerized list of all local people qualified (in the judgment of academic panels) to serve as tutors in different subjects.[22]

These developments have received the encouragement of several groups that have studied contemporary higher education. The Carnegie Commission on Higher Education has recommended "that state and federal government agencies, as well as private foundations, expand programs of support for the development of external degree systems and open universities . . ."[23] and has urged "the development and utilization of outstanding instructional programs and materials for use with new educational hardware."[24] The Commission hopes that by the year 2000 there will be widespread "availability of education through independent study both within and without traditional institutions . . . through applications of the expanding technology."[25] The Commission on Non-traditional Study has made similar recommendations:

20. C. HOULE 183; TIME, Jan. 21, 1974, at 53; *see* Evening Tribune (San Diego), Oct. 4, 1973, § A, at 6, col. 1. To receive UCSD Extension Credit for the course, students must pay $45, which entitles them to a package containing supplementary lectures, a study guide, tests, a record, and a learning game, all published by CRM, the owner of *Psychology Today*. PSYCHOLOGY TODAY, Oct. 1973, at 75; Evening Tribune (San Diego), Oct. 4, 1973, § A, at 6, col. 1.

21. Brown, *In Chicago, It's Easy to Find Someone to Teach Lion Taming or Anything Else*, Wall Street J., April 10, 1973, at 14, col. 2.

22. C. HOULE 117.

23. CARNEGIE COMM'N, *supra* note 11, at 117. Similar recommendations are made in the following studies: CARNEGIE COMM'N ON HIGHER EDUCATION, LESS TIME, MORE OPTIONS—EDUCATION BEYOND THE HIGH SCHOOL 20 (1971); THE FOURTH REVOLUTION 51-53, 92-94.

24. THE FOURTH REVOLUTION 48.

25. *Id.* at 93.

> Degrees should sometimes be awarded wholly by examination if two conditions are met: the institution concerned is an established and reputable educational authority; and valid and reliable examinations are available to test the attainment of the degree's objectives.[26]
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> . . . [I]n exceptional cases, under conditions which are carefully controlled by quality standards, degrees should be awarded by non-teaching institutions . . . .[27]

There are also some indications that accreditation is being offered as a separate function. Students who participate in the College Level Examination Program (CLEP) of the College Entrance Examination Board are able to demonstrate their college-level proficiency by examination on various subjects no matter when, where, or how this knowledge was acquired.[28] The Board of Regents of the University of the State of New York[29] and the Board of Higher Education of the State of New Jersey[30] have both established external degree-granting programs[31] based on CLEP tests, United States Armed Forces Institute examinations, and the New York-New Jersey program's own college proficiency examinations.[32] One group, the 1971 Assembly of the American Academy of Arts and Sciences on University Goals and Governance, has advocated the establishment of national and institutional examinations to enable students to receive credit for knowledge acquired through experience and independent study.[33]

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26. COMMISSION ON NON-TRADITIONAL STUDY, *supra* note 2, at 131. The Commission on Non-Traditional Study was created in 1971 by the Carnegie Corporation, the College Entrance Examination Board, and the Educational Testing Service.

27. *Id.* at 133.

28. C. HOULE 75-76, 117-18; Sharon, *supra* note 12, at 13-14.

29. University of the State of N.Y., The Regents External Degree—Handbook of Information for Candidates, 1972. *See also* C. HOULE 94-97.

30. Thomas A. Edison College, 1973-74 Bulletin: The External Degree Program of the State of New Jersey.

31. The term "external degree" has a vague definition. Houle defines an external degree as "one awarded to an individual on the basis of some program of preparation (devised either by himself or by an educational institution) which is not centered on traditional patterns of residential collegiate or university study." C. HOULE 14-15. The New York and New Jersey programs are examples of the most extreme form of the external degree program, which allows the student to prepare for examinations in any manner that he sees fit. See authorities cited in notes 29 & 30 *supra.*

32. In 1973 these three-hour proficiency tests were administered in May and October at a cost of $15 and $25 per examination. There were no prerequisites set for any of the examinations which covered material comparable to that in college courses. Examinations vary in format and may include multiple choice, short answer, essay, and problem questions. Thomas A. Edison College, *supra* note 30, at 14-44; University of the State of N.Y., *supra* note 29, at 7; New York State Education Department, College Proficiency Examinations, 1973.

33. *See* State Univ. of Neb., Review of Literature on Nontraditional Higher Educa-

The general concept that universities offer their functions as separate services also has been endorsed by the federal government. A task force concerned with higher education and commissioned by the Department of Health, Education, and Welfare recommended in 1971:

> We believe it is time for a different approach to making higher education more available and more stimulating to those people unable to attend a college full-time . . . . We propose that the resources for education provided as a package by the college (formal instruction, reading, libraries, examinations, degrees, etc.) be provided to the community as separate services in order that individuals and groups can find their own way to an education.
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> We believe that there are literally millions who can benefit from new approaches to an education . . . .
>
> If separate organizations are established that provide the traditional functions of the college directly to the community, individuals can fashion and legitimize their own programs . . . .
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> While at first glance the functions of a college seem inseparable, closer examination would indicate that their separation is not only possible, but would have advantages.[34]

In a more general way, Congress has approved these approaches. One goal for the federal Fund for the Improvement of Postsecondary Education[35] is "the establishment of institutions and programs based on the technology of communications."[36] The Fund also is to be used to work towards "the creation of new institutions and programs for *examining and awarding credentials to individuals* . . . ."[37]

Changes are needed in the existing university system in order to make higher education available to students of modest economic means. The foregoing material indicates that some progress in this direction has already taken place. At this stage, however, the market for individual educational services can hardly be considered competitive. The market incentive to provide independent courses of study could be greatly improved if prestigious universities were required to sell accreditation as a separate product. This change would remove some of the stigma that has grown up around education provided by "correspondence" type schools. One possible means of bringing about this change is federal antitrust law.

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tion (undated mimeographed pamphlet), *citing* AMERICAN ACADEMY OF ARTS AND SCIENCES, REPORT OF THE ASSEMBLY ON UNIVERSITY GOALS AND GOVERNANCE (1971).

34. F. NEWMAN, REPORT ON HIGHER EDUCATION 68-69 (1971).

35. *See* 20 U.S.C. § 1221d (Supp. II, 1972).

36. *Id.* § 1221d(a)(3).

37. *Id.* § 1221d(a)(8) (emphasis added).

II. APPLICABILITY OF FEDERAL ANTITRUST LAW[38]

The federal antitrust law which would most likely apply is section 1 of the Sherman Act.[39] It outlaws every combination in restraint of trade or commerce among the states.[40] However, antitrust law does not reach restraints of trade which either qualify for an exemption or fail to satisfy jurisdictional requirements.

A. "Learned Profession" Exemption

To block the application of federal antitrust laws, universities might interpose the "learned profession" exemption. The rationale for this exemption is that members of a profession are not engaged in trade or commerce[41] and that therefore the jurisdictional language of the Sherman Act does not reach their activities. The problems of successfully asserting this defense are legion. First, the exemption itself is a rather flimsy construct built by lower courts upon Supreme Court dicta.[42] It has never been specifically endorsed by the Supreme

38. Of course, restraints of trade by universities also may violate *state* antitrust laws. There appears to be extremely little statutory or judicial discussion of the applicability of state antitrust laws to educational institutions. In 1971, one commentator examined the various state antitrust statutes and concluded "there currently does [*sic*] not appear to be any state antitrust statutes mentioning or disclosing any application of antitrust violations to non-profit corporations." Nawalanic, *supra* note 5, at 111. There have been a few cases in which schools and colleges have been sued by small businessmen contesting regulations which were alleged to interfere arbitrarily with their businesses. These suits have been largely unsuccessful. *See* Ken Stanton Music, Inc. v. Board of Educ., 227 Ga. 393, 181 S.E.2d 67 (1971); Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913); Casey County Bd. of Educ. v. Luster, 282 S.W.2d 333 (Ky. App. 1955); Jones v. Cody, 132 Mich. 13, 92 N.W. 495 (1902). *Contra*, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915). For a discussion of several of these cases, see Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U.L. REV. 705, 709-21 (1962).

39. Tying arrangements have been held illegal under both section 1 of the Sherman Act, 15 U.S.C. § 1 (1970), and section 3 of the Clayton Act, *id.* § 14. Although the literal terms of the Clayton Act refer to exclusive dealing contracts, the section has been held to apply to tying contracts. *See* International Business Machs. Corp. v. United States, 298 U.S. 131, 135 (1936). The Clayton Act is not of direct concern to the universities because it restricts only sales of "goods, wares, merchandise, machinery, supplies, or other commodities." 15 U.S.C. § 14 (1970).

40. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of *trade or commerce* among the several States, or with foreign nations, is hereby declared to be illegal . . . ." 15 U.S.C. § 1 (1970) (emphasis added).

41. *See* Comment, *Bar Association Minimum Fee Schedules and the Antitrust Laws*, 1974 DUKE L.J. 1164, 1195.

42. Two Supreme Court decisions contain the dicta that are the basis of this exemption. In Federal Baseball Club v. National League of Baseball Clubs, 259 U.S. 200 (1922), the Court said that "the [baseball] exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words." *Id.*

Court[43] and has been soundly criticized.[44] Although the Fourth Circuit in *Goldfarb v. Virginia State Bar*[45] recently accepted the "learned profession" exemption,[46] two later district court decisions cast doubt on its vitality.[47] Moreover, the term "learned profession" has never been comprehensively defined in the context of the federal antitrust law.

The traditional definition of the learned professions—theology, law, and medicine[48]—would exclude the work of most university professors. Furthermore, the cases discussing this exemption frequently suggest that a basis for different treatment is the effort of professionals to raise their own ethical standards.[49] University professors, however, do not have a professional association with the power to prevent one who has violated the association's ethical standards from continuing to teach. Thus, the "learned profession" exemption might not apply to university professors. Even if professors qualify for the exemption,

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at 209. The second case is FTC v. Raladam Co., 283 U.S. 643 (1931). In this case, which arose under the Federal Trade Commission Act, 15 U.S.C. § 45 (1970), the Court in dictum explained: "Of course, medical practitioners . . . are not in competition with respondent. They follow a profession and not a trade, and are not engaged in the business of making or vending remedies, but in prescribing them." *Id.* at 653.

The most recent lower court decision to uphold the "learned profession" exemption, Goldfarb v. Virginia State Bar, 497 F.2d 1 (4th Cir.), *cert. granted*, 95 S. Ct. 223 (1974), placed heavy reliance on the *Raladam* dicta. *Id.* at 13.

43. In two later decisions, the Supreme Court carefully avoided deciding whether the antitrust laws contain an exemption for the professions. *See* United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 491-92 (1950); American Medical Ass'n v. United States, 317 U.S. 519, 528 (1943). However, the Supreme Court may have to make a definitive ruling on the issue when it decides Goldfarb v. Virginia State Bar, 497 F.2d 1 (4th Cir.), *cert. granted*, 95 S. Ct. 223 (1974).

44. *See, e.g.*, Comment, *supra* note 41, at 1195-1200; Note, *Antitrust Law: An Application of the Sherman Act to the Professions*, 25 U. FLA. L. REV. 740, 761-62 (1973); Note, *The Applicability of the Sherman Act to Legal Practice and Other "Non-Commercial" Activities*, 82 YALE L.J. 313, 324-31, 336-37 (1972).

45. 497 F.2d 1 (4th Cir.), *cert. granted*, 95 S. Ct. 223 (1974).

46. *Id.* at 13-14.

47. United States v. National Soc'y of Professional Eng'rs, 43 U.S.L.W. 2269 (D.D.C. Dec. 19, 1974) ("The concept of a learned profession exception to the antitrust laws is of dubious validity in view of the repeated reluctance of federal courts to recognize it as a legitimate exception to the Sherman Act."); United States v. Oregon State Bar, 385 F. Supp. 507 (D. Ore. 1974) ("[T]he 'learned profession' dicta in these two cases [*Raladam Co.* and *Federal Baseball Club*] have no current vitality . . . ." *Id.* at 515).

48. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1286 (unabridged 1961).

49. *See* Levin v. Doctors Hosp., 233 F. Supp. 953, 954 (D.D.C. 1964), *rev'd on other grounds*, 354 F.2d 515 (D.C. Cir. 1965). *See generally* 16F J. VON KALINOWSKI § 49.02[1], at 49-8 to 49-9; Comment, *supra* note 41, at 1200-07.

universities have a further problem. As even the *Goldfarb* court recognized, "[t]he 'learned profession' exemption is a defense to a Sherman Act violation only where the restraint is upon the learned profession itself."[50] When universities restrain commerce or competition in educational markets, the restraint affects independent organizations offering educational services but not the professional activities of professors. Thus, any attempt by universities to assert a defense based on the "learned profession" exemption would fail.

B. Noncommercial Intent Exemption

Universities might argue that they qualify for the noncommercial intent exemption recently endorsed in *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges & Secondary Schools, Inc.*[51] Marjorie Webster Junior College is a profit-making proprietary college, and the Middle States Association is a nonprofit educational corporation which accredits institutions of higher and secondary education.[52] Marjorie Webster contended that Middle States and its members had restrained the junior college's trade in violation of section 3 of the Sherman Act[53] by acquiring monopoly power over regional accreditation in the mid-atlantic region and by using this power to inhibit competition from proprietary (privately-owned, profit-oriented) educational institutions. Middle States flatly refused to accredit any college that was not a "nonprofit organization with a governing board representing the public interest."[54] Because of Marjorie Webster's non-accredited status, several accredited senior colleges and universities rejected transfer applications and credits from its graduates,[55] thereby handicapping the junior college's recruitment of high school graduates.

The District of Columbia Circuit Court of Appeals held that this restraint did not violate the Sherman Act. The court held that "an incidental restraint of trade, absent an intent or purpose to affect the com-

50. 497 F.2d at 15.

51. 432 F.2d 650 (D.C. Cir. 1969), *cert. denied*, 400 U.S. 965 (1970). This decision is noted in 20 AM. U.L. REV. 200 (1970); 84 HARV. L. REV. 1912 (1971); 56 VA. L. REV. 1492 (1970). *See also* J. BRUBACHER, THE COURTS AND HIGHER EDUCATION 110-13 (1971).

52. 432 F.2d at 652. Middle States accredits *schools*. Of course, this function is totally different from the accreditation of *students* discussed earlier.

53. 15 U.S.C. § 3 (1970). This section uses the same language as section one of the Sherman Act, but it applies only to the District of Columbia and to Territories.

54. 432 F.2d at 652-53.

55. Marjorie Webster could only show that eleven educational institutions rejected the transfer of its credits because of a lack of accreditation. *Id.* at 656 n.33.

mercial aspects of the profession, is not sufficient to warrant application of the antitrust laws."[56] The rationale of *Marjorie Webster* has been severely criticized by several commentators,[57] and the exemption that it creates may be on the same shaky legal basis as the "learned profession" exemption. Nevertheless, even if *Marjorie Webster* is good law, its protection of incidental restraints is too small a shield for the giant universities. Universities might plausibly argue that the tying of lectures to examinations is not commercially motivated; however, they will not be able to show that the restraint is only incidental. The *Marjorie Webster* court believed that the junior college could operate successfully without accreditation and that therefore the effect of the denial of accreditation was incidental.[58] The impact of the universities' restraint on independent study organizations is far more severe. As a consequence of the current university structure, few students, after paying tuition, have additional funds to purchase study aids. Obviously, independent study firms could do much more business and take advantage of economies of scale if all students had the option of shifting a substantial part of the funds that they spend for university instruction to the purchase of independently offered study aids.

C. *Effect on Interstate Commerce*

Section 1 of the Sherman Act prohibits only those restraints of trade which pertain to "trade or commerce among the several states or with foreign nations."[59] This phrase has been construed to be as broad as the constitutional limits of congressional power to regulate commerce.[60] Therefore, the Supreme Court's substantial expansion of the commerce clause[61] has also widened the application of the Sherman Act.

In the words of the Court, "[i]t is well established that an activity which does not occur *in* interstate commerce comes within the scope

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56. *Id.* at 654-55.

57. *See, e.g.*, Comment, *supra* note 41, at 1209; 84 HARV. L. REV. 1912, 1918-20 (1971).

58. 432 F.2d at 658.

59. 15 U.S.C. § 1 (1970).

60. *See* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 558 (1944); C. HILLS, ANTITRUST ADVISER 17-19 (1971); 16 J. VON KALINOWSKI § 5.01[1], at 5-8, 5-17.

61. *See* Perez v. United States, 402 U.S. 146 (1971); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964). *See also* Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271 (1973).

of the Sherman Act if it substantially *affects* interstate commerce."[62] The extent to which the activities of an educational institution affect interstate commerce,[63] of course, depends upon the character of the institution in question. In most cases, however, this requirement should not prove to be a formidable obstacle to the application of antitrust law to universities. So long as the contested activity is one ultimately affecting competition in interstate markets, the Sherman Act's interstate commerce requirement will be satisfied.[64] "If it is interstate commerce which feels the pinch, it does not matter how local the operation which applies the squeeze."[65] In the case of higher education, the separate sale of educational functions would unquestionably cause many students to substitute books and other materials for lectures. Since the market for textbooks and educational materials is undeniably interstate in character,[66] the tying arrangements of even the most local college would meet the Sherman Act requirement of affecting interstate commerce. Furthermore, the general education programs of universities affect several other national markets, since most universities and colleges nationally attract students, obtain supplies, hire faculty, solicit alumni for contributions, sponsor paid-admission athletic competitions, and belong to interstate collegiate associations.

D. Special Antitrust Exemption for Higher Education

The Supreme Court possibly could create an antitrust exemption for higher education on the ground that the Sherman Act was not in-

62. Burke v. Ford, 389 U.S. 320, 321 (1967), *citing* United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954), *and* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948); *see* P. AREEDA, ANTITRUST ANALYSIS 120-22 (2d ed. 1974); Eiger, *The Commerce Element in Federal Antitrust Litigation*, 25 FED. B.J. 283 (1965); Kallis, *Local Conduct and the Sherman Act*, 1959 DUKE L.J. 236; Krotinger, *The "Essentially Local" Doctrine and Section 1 of the Sherman Act*, 15 W. RES. L. REV. 66 (1963); *cf.* Comment, *Private Physician Unions: Federal Antitrust and Labor Law Implications*, 20 U.C.L.A.L. REV. 983, 995-99 (1973).

63. *See* Wickard v. Filburn, 317 U.S. 111 (1942). One leading commentator has summarized:

> The phrase "restraints affecting commerce" can become meaningful only where there is a clear understanding of the types of restraints which are encompassed in the phrase, of the necessary nexus between the restraint and interstate commerce, of the point in time when the restraint may be imposed, of the extent to which the restraint must interfere with interstate commerce, and the like. 16 J. VON KALINOWSKI § 5.01[3], at 5-69 to -70.

64. Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948).

65. United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 464 (1949).

66. The Supreme Court has held that the transportation of books, papers, and illustrative apparatus by a correspondence school to its students and agents located in other states is interstate commerce within the meaning of the Constitution of the United States. *See* International Textbook Co. v. Pigg, 217 U.S. 91 (1910).

tended to regulate the internal affairs of private universities. However, one leading commentator has observed that "the Supreme Court and Congress have, in the main, been reluctant—at least since the 1930's—to create or expand antitrust exemptions and have instead placed their principal faith in the efficacy of free competition, or, as a substitute, detailed economic regulation."[67] In 1944, the Court refused to even consider an argument that an implied exemption of insurance companies from the antitrust laws would benefit the public:

> Opinions [have been] expressed by various persons that unrestricted competition in insurance results in financial chaos and public injury. Whether competition is a good thing for the insurance business is not for us to consider. Having power to enact the Sherman Act, Congress did so; if exceptions are to be written into the Act, they must come from the Congress not this Court.[68]

Nevertheless, Congress has been willing to listen to special interest groups seeking an exemption from antitrust laws. For example, in response to the Court's decision quoted in the preceding paragraph, Congress passed the McCarran-Ferguson Insurance Regulation Act[69] exempting insurance companies subject to state regulation from federal antitrust regulation. Congress also could grant an exemption for higher education. It already has done so with respect to the Robinson-Patman Act: "[N]othing in [the Act] . . . shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."[70]

Similar antitrust legislation exempting colleges and universities could be passed. While such legislation would protect universities from the short-term dislocations that might result from the application of federal antitrust law, over the long-term this legislation probably would stifle significant innovations in the field of higher education. Until Congress takes such action, the Sherman Act should be held applicable to the universities.

III. Tying Arrangements in Restraint of Trade

The Sherman Act condemns tying arrangements, agreements by

67. Pogue, *The Rationale of Exemptions from Antitrust*, 19 A.B.A. Antitrust Section 313, 329 (1961). *See* Comment, *Bar Association Fee Schedules and Suggested Alternatives: Reflections on a Sherman Exemption That Doesn't Exist*, 3 U.C.L.A.-Alaska L. Rev. 207, 234-36 (1974).

68. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 561 (1944).

69. 15 U.S.C. §§ 1011 *et seq.* (1970).

70. 15 U.S.C. § 13(c) (1970).

a party to sell one product or service on the condition that the buyer also purchase a second product or service.[71] A tie-in is per se illegal under the Sherman Act if three elements are present. First, there must be two distinct products involved: the tying product, which is generally the more desirable of the two, and the tied product, which the seller links to the former as a condition of its sale. Naturally, if there are not two or more separate products, there can be no tying arrangement. Second, it must be shown that the seller has sufficient power in the market of the tying product to adversely affect competition in the tied product's market through the tying arrangement. Third, "not an insubstantial amount"[72] of commerce must be foreclosed in the market of the tied product or service.[73] Even if only the first of these conditions is present, a tie-in may be declared illegal if it is an unreasonable restraint of trade violating the "general standards of the Sherman Act."[74] The elements of an illegal tying arrangement are present in the bundled system of higher education.

A. Separate Products

By definition, a tying arrangement must involve two or more products or services. These two products must be sufficiently distinct and separate to convince a reasonable person that they are not in fact basically one product.[75]

The problem of the defining criteria of separate products has proved especially challenging when two items, which may theoretically

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71. *See* Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). The condition of the tying arrangement must be imposed in such a way that one must be "compelled to operate [in one product] in order to obtain the [other]." Capital Temporaries, Inc. v. Olsten Corp., 365 F. Supp. 888, 896 (D. Conn. 1973); *see* Edwin K. Williams & Co. v. Edwin K. Williams & Co.-E., 377 F. Supp. 418, 424-27 (C.D. Cal. 1974); Refrigeration Eng'r Corp. v. Frick Co., 370 F. Supp. 702, 710 (W.D. Tex. 1974).

72. Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958); *see* Abrams, *Tying Arrangements and Exclusive Dealing Contracts,* 53 CHICAGO B. RECORD 75, 76-77 (1971); *The Supreme Court, 1968 Term,* 83 HARV. L. REV. 7, 237 (1969); Note, *Product Separability: A Workable Standard to Identify Tie-In Arrangements Under the Antitrust Laws,* 46 S. CAL. L. REV. 160, 161 (1972). *See also* Nelson, *Tying Arrangements Reconsidered: A Review of* Fortner Enterprises, Inc. v. U.S. Steel Corp., 15 ANTITRUST BULL. 7 (1970); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws,* 72 HARV. L. REV. 50 (1958); Note, *The Logic of Foreclosure: Tie-In Doctrine after* Fortner v. U.S. Steel, 79 YALE L.J. 86, 91-93 (1969).

73. *See* Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). *See generally* Comment, *Franchise Tie-Ins and Antitrust: A Critical Analysis,* 1973 WIS. L. REV. 847, 856; Note, *The Logic of Foreclosure, supra* note 72, at 91-93.

74. *See* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 500 (1969). *See also* 16 J. VON KALINOWSKI § 6.02[1][b]; Abrams, *supra* note 72, at 78.

75. *See* Note, *Product Separability, supra* note 72, at 161, 163-65.

be marketed independently, are nonetheless so functionally interrelated that they may be considered a single product.[76] Although some commentators have purported to formulate workable standards for determining whether or not a particular sale involves "different" products,[77] one antitrust attorney has warned that "it is impossible to predict how a court will decide the question of singleness."[78] Another commentator has remarked: "The factual complexities that face a court in making this determination are exacerbated by the lack of any manageable standards."[79]

There is precedent, however, to support a finding of separateness in two types of cases: (1) when the products fall into different categories, *i.e.*, when the products tied are recognizable as arising from two truly different lines of business, and (2) when the difference is qualitative, as when one product of distinctly inferior quality is tied to a better product, albeit of the same industry. In *Fortner Enterprises, Inc. v. United States Steel Corp.*,[80] the Supreme Court found "categorical" separateness where financial credit was being tied to the sale of prefabricated buildings. On several occasions, the courts have held trademark/patent licensing and business management services or business supplies to be two separate items.[81] More recently, product separability based on qualitative differentials has formed the basis of several

76. The tests for determining whether a particular sale involves "different" products have never been conclusively established by the Supreme Court. *See id.* at 163. *See also The Supreme Court, 1968 Term, supra* note 72, at 244-47.

77. *See* Note, *Product Separability, supra* note 72, at 165-69; *cf.* Turner, *supra* note 72, at 67-72; Wheeler, *Some Observations on Tie-Ins, the Single Product Defense, Exclusive Dealing and Regulated Industries*, 60 CALIF. L. REV. 1557 (1972); 4 SETON HALL L. REV. 610, 613-18 (1973).

78. Abrams, *supra* note 72, at 79 (footnote omitted).

79. 4 SETON HALL L. REV. 610, 613 (1973) (footnote omitted). *See also* Ross, *The Single Product Issue in Antitrust Tying: A Functional Approach*, 23 EMORY L. REV. 963, 1013 (1974).

80. 394 U.S. 495 (1969). *Fortner* is the primary subject of discussion in Baker, *Another Look at Franchise Tie-Ins after* Texaco *and* Fortner, 14 ANTITRUST BULL. 767 (1969); Nelson, *supra* note 72; Tingle, *Financial Assistance as a Tying Product—Fortner Enterprises v. U.S. Steel*, 25 BUSINESS LAW. 121 (1969); *The Supreme Court, 1968 Term, supra* note 72, at 235-47; Note, *The Logic of Foreclosure, supra* note 72; 48 N.C.L. REV. 309 (1969); 31 OHIO ST. L.J. 861 (1970); 23 SW. L.J. 907 (1969); 21 SYRACUSE L. REV. 245 (1969); 47 TEX. L. REV. 1449 (1969); 38 U. MO. K.C.L. REV. 483 (1970); 9 WASHBURN L.J. 282 (1970).

81. Tying arrangements involving patented or copyrighted tying products are especially suspect under the antitrust laws. *See* United States v. Loew's, Inc., 371 U.S. 38, 45-47 (1962); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948). *See generally* Timberg, *Antitrust and Industrial Property: Tie-Ins and Grant Backs*, 42 ANTITRUST L.J. 651, 653-54, 663 (1973). Although not copyrighted, college courses are copyrightable and have the unique features of copyrighted material.

tying cases.[82] After finding exhibition football games sufficiently inferior in quality to regular season games to be less desirable to paying spectators, the Second Circuit held that "the distinction between exhibition and regular season contests is sufficiently sharp, at the very least, to render the factual determination of product separability more appropriate for a trial than for summary judgment."[83]

There appear to be only two constraints to the finding of separateness: first, a seller is not required to separate his product into the smallest components that could conceivably be sold; and second, a seller will not be compelled to unbundle its product if this would result in awkward or inconveniently diverse business relationships. An example of the first principle was demonstrated in *Times-Picayune Publishing Co. v. United States*,[84] where the Supreme Court held that the publisher of a morning and afternoon newspaper did not violate the antitrust laws by requiring advertisers to buy space in both newspapers, thereby depriving advertisers of the option of advertising in just one. The Court ruled that advertising access to the readership of both morning and afternoon newspapers was, in fact, a single product.[85] The publishing company was free to sell its total circulation as a unit. As a lower court stated, "It is apparent that, as a general rule, a manufacturer cannot be forced to deal in the minimum product that could be sold or is usually sold."[86] Lower court opinions have applied the second principle to condone a credit institution's practice of requiring its borrowers to buy a "package" which included a certificate of title prepared by attorneys designated by the institution[87] and to sanction a fruit wholesaler's condition that forwarding and loading services attach to its sales.[88] In these cases, if the antitrust laws prevented the seller from marketing as single products either *delivered* fruit or credit *with* title certification, the seller would have to deal continuously with the many different agents of his purchasers—lawyers, loaders, and drivers.

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82. *See* Coniglio v. Highwood Servs., Inc., 495 F.2d 1286 (2d Cir. 1974); American Mfrs. Mut. Ins. Co. v. American Broadcasting—Paramount Theatres, Inc., 388 F.2d 272 (2d Cir. 1967); Associated Press v. Taft-Ingalls Corp., 340 F.2d 753 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965).

83. Coniglio v. Highwood Servs., Inc., 495 F.2d 1286, 1291 (2d Cir. 1974).

84. 345 U.S. 594 (1953).

85. *Id.* at 613-15.

86. United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 559 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

87. Forrest v. Capital Bldgs. & Loan Ass'n, 504 F.2d 891 (5th Cir. 1974).

88. I. Haas Trucking Corp. v. New York Fruit Auction Corp., 364 F. Supp. 868 (S.D.N.Y. 1973).

B. *The Tying of Information Impartation to Accreditation*

To establish a tying arrangement in higher education, it is first necessary to identify the desired tying service and the tied, or less desirable, service and then to show that the two are either categorically or qualitatively distinct. Although individual preferences undoubtedly vary, the students most harmed by university tying arrangements are probably those who wish to purchase accreditation only and not live lectures by professors. Therefore, accreditation is the tying service and impartation the tied service.

As discussed in the introduction, accreditation and information impartation are clearly separate functions of the university system. Those who desire a record of achievement from a given university may not desire information impartation from the accrediting institution. Furthermore, different skills are involved in performing the two functions. A good lecturer is not necessarily a good examination drafter or grader. In addition, the two services are rendered at different times and under different circumstances. The distinction between accreditation and impartation is recognized at Oxford and Cambridge where it has long been the responsibility of the colleges solely to teach and of the university solely to test and to award degrees.[89] The two functions, therefore, fall into two different categories of products offered for sale.

If examination results were kept secret and disseminated only to the students as feedback, it could be argued that tests are an integral part of the information impartation process. A student who had done poorly would continue to study a certain area, while a student who had demonstrated mastery could move on to other subjects. In present-day universities, however, there is tremendous emphasis on the final examination at the end of a course. Even when a student barely passes, he moves on to a different course. There is no further study of the subject, no opportunity to retake the final examination, and the grade is permanently recorded for various uses.

It is sometimes argued that a college degree represents not only examination results but also class attendance at the accrediting institution; therefore, accreditation encompasses class attendance. In fact, however, almost all universities and colleges have voluntary class attendance. A degree from these schools guarantees only that the student paid for classes and not that he actually attended them. Employers appear unconcerned by this lack of guarantee of class attendance.

89. E. ASHBY, UNIVERSITIES: BRITISH, INDIAN, AFRICAN 25 (1966); C. HOULE 20.

No special value is placed on the degrees of the rare colleges with compulsory attendance. Furthermore, since college credits frequently are transferred between institutions, a degree from a college does not even guarantee that the student paid for four years of classes at that institution.

C. *Market Power*

For a tie-in to be illegal, the seller must possess "sufficient economic power [in the market for the tying product] to produce an appreciable restraint on free competition in the tied product."[90] Tying arrangements "deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in [the tying] market."[91]

The degree of market power which is required for per se illegality in tying arrangements does not rise to the level of monopolistic or dominant market power.[92] In *Fortner*, the Supreme Court stated:

> The standard of "sufficient economic power" does not . . . require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient *even though power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market* . . . . Accordingly, the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market.[93]

Under the standards set forth in *Fortner*, sufficient economic power is attributable to a variety of market conditions, including good

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90. Northern Pac. Ry. v. United States, 356 U.S. 1, 11 (1958); *see* Anderson v. Home Style Stores, Inc., 58 F.R.D. 125 (E.D. Pa. 1972).

91. Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958).

92. In *Times-Picayune*, the Supreme Court originally ruled that the Clayton Act is violated when the seller enjoys either a *monopolistic* position in the market for the tying product or if a substantial volume of commerce in the tied product is restrained, and it further held that the Sherman Act is violated whenever *both* conditions are met. 345 U.S. at 608-09. Subsequently, however, in Northern Pac. Ry. v. United States, 356 U.S. 1 (1958), the Sherman Act requirement of monopoly power or dominance in the tying product was redefined. The Court held that the relevant market power test is satisfied whenever the tying party has "sufficient economic power to produce an appreciable restraint on free competition in the tied product." *Id.* at 11.

93. 394 U.S. at 502-04 (emphasis added; footnotes omitted).

will or public acceptance,[94] the uniqueness of the tying product,[95] or the size of the seller's business and the portion of the market controlled by it.[96] Power may also be inferred "from the tying product's desirability to consumers" in conjunction with "the acceptance of a burdensome tie-in by an appreciable number of buyers in the market of the tying product . . . ."[97] Under any of these tests, virtually all universities will have the requisite market power. The college degree is so desirable that droves of students are prepared to acquiesce to the tying together of information impartation and accreditation by every university. The universities manifestly impose burdensome terms such as the accreditation-impartation tie-in on their students. Therefore, a court applying the *Fortner* test should have little difficulty finding that the "economic power" of any given college is sufficient to produce an appreciable restraint of free competition.

It is evident that the *Fortner* test for market power demands no more than a showing of widespread tying practices.[98] Only the Fourth Circuit has suggested that if the seller proves that its tying arrangement serves legitimate business purposes[99] would a plaintiff have to establish by further evidence that the seller has power over buyers in the market.[100] Rarely will business purposes protect tie-ins.[101] Because of the incontestable strength of university power in the accreditation market and

94. *See* Anderson v. Home Style Stores, Inc., 58 F.R.D. 125, 128 (E.D. Pa. 1972).

95. United States v. Loew's, Inc., 371 U.S. 38, 45 (1962).

96. Credit Bureau Reports, Inc. v. Retail Credit Co., 358 F. Supp. 780, 790 (S.D. Tex. 1971), *aff'd*, 476 F.2d 989 (5th Cir. 1973); *see* I. Haas Trucking Corp. v. New York Fruit Auction Corp., 364 F. Supp. 868, 876 (S.D.N.Y. 1973).

97. McMackin v. Schwinn Bicycle Co., 354 F. Supp. 1154, 1156 (N.D. Ill. 1973); *see* Advance Business Syss. & Supply Co. v. SCM Corp., 415 F.2d 55, 67-68 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970); *cf.* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 504 (1969).

98. *See* 394 U.S. at 502-04. Applying the *Fortner* test in Advance Business Syss. & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970), the Fourth Circuit stated that "a seller's successful imposition of a tying arrangement on a substantial amount of commerce may be taken as proof of his economic power over the tying product." *Id.* at 62.

99. The Fourth Circuit has interpreted the language of *Fortner*, 394 U.S. at 506, as holding that a per se violation will be found "unless the defendant can show legitimate business reasons for a tie-in . . . ." 415 F.2d at 68. However, other courts have treated the questions of market power and justification of the tying practice as distinct. *See, e.g.*, Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

100. *See* 415 F.2d at 67-68.

101. *See, e.g.*, Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 506-09 (1969); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 50-52 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

the fact that this power way itself have no rational basis, it is unlikely that, even in the Fourth Circuit, the universities could escape antitrust liability. The attractiveness of an accreditor should depend primarily on its accuracy and consistency, not on selectivity and strictness of standards. An accrediting organization which reliably awards grades from zero to one thousand should be more attractive to students and employers than an accreditor which refuses to grade most students, and then even flunks out many of those bright students it deigns to grade.[102] Ironically, if the accrediting and information-imparting functions of higher education were unbundled, the irrational preference for selective accreditators would probably dissipate, and eventually colleges would lack the tying market power to tie impartation to accreditation even if such a tie-in were legal.

D. Not Insubstantial Anticompetitive Effects

The final requirement for finding a tie-in illegal per se is that "a not insubstantial" amount of business be actually foreclosed in the tied market.[103] In *International Salt Co. v. United States*,[104] the Supreme Court found that $500,000 worth of annual business "cannot be said to be insignificant or insubstantial."[105] Similarly, in *Fortner* the Court said:

> [N]ormally the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimis*, is foreclosed to competitors by the tie

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102. For a discussion of how accreditation organizations might function under an unbundled system, see paragraph accompanying note 122 *infra*.

103. *See* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 499 (1968); Northern Pac. Ry. v. United States, 356 U.S. 1, 11 (1958). *See also* ABA, ANTITRUST DEVELOPMENTS 1968-1971 34-37 (Supp. 1971); ABA, ANTITRUST DEVELOPMENTS 1955-1968 105-08 (1968); E. SINGER, ANTITRUST ECONOMICS 196 (1968); 16H J. VON KALINOWSKI § 64.05[2]; Abrams, *supra* note 72, at 76-77; Nelson, *supra* note 72; Comment, *Private Enforcement of Antitrust Laws: Damages Recoverable for an Illegal Tying Arrangement*, 78 DICK. L. REV. 305, 308-10 (1973); *The Supreme Court, 1968 Term*, *supra* note 72, at 237; Note, *Tie-out—A Case for the Extension of Tying Theory*, 35 OHIO ST. L.J. 140 (1974); Note, *Product Separability*, *supra* note 72; Comment, *supra* note 73, at 853-55; 4 SETON HALL L. REV. 610 (1973).

The Second Circuit Court of Appeals has construed this language to create two separate tests: one of "not insubstantial" commerce involved, and another of "anticompetitive effects." *See* Coniglio v. Highwood Servs., Inc., 495 F.2d 1286, 1289 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3295 (U.S. Nov. 19, 1974). Upon reflection, however, it would appear that the Supreme Court intended to erect only one integrated requirement that a not insubstantial amount of competition be foreclosed in the tied market.

104. 332 U.S. 392 (1947).

105. *Id.* at 396.

. . . .

[W]e cannot agree . . . that a sum of almost $200,000 is paltry or "insubstantial."[106]

The Court went on to make it clear that

[f]or purposes of determining whether the amount of commerce foreclosed is too insubstantial to warrant prohibition of the practice, . . . *the relevant figure is the total volume of sales tied by the sales policy under challenge*, not the portion of this total accounted for by the particular plaintiff who brings suit.[107]

The rationale supporting the "not insubstantial" test also has been stated explicitly: "[B]ecause tying arrangements generally serve no legitimate business purpose that cannot be achieved in some less restrictive way, the presence of *any* appreciable restraint on competition provides a sufficient reason for invalidating the tie."[108]

Under this test, the tying arrangements of even the smallest colleges would foreclose "not insubstantial" competition. If live lectures were not tied to examinations, students would probably purchase more sound tapes, video cassettes, books, and other educational material. Since the market in videotaped, sound-taped, or mimeographed college lectures virtually has been foreclosed, the total volume of sales tied under the typical university's economic policies is substantial.

Each requirement for a per se violation therefore has been met, completing one count in the indictment against the tying of information impartation to academic accreditation.[109]

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106. 394 U.S. at 501-02.

107. *Id.* at 502 (emphasis added).

108. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 503 (1969).

109. Some lower court decisions have thought that certain unusual circumstances can justify a tying arrangement that would otherwise be per se illegal. In Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961), a seller was permitted to tie silos to unloaders after demonstrating that half the customers who previously bought unloaders separately had demanded refunds because the product did not work efficiently when installed in silos other than those manufactured by the seller. In another case, a tie-in of unpatented components into a patented heating system was permitted because the tying product was guaranteed. Electric Pipe Line, Inc. v. Fluid Sys., Inc., 231 F.2d 370 (2d Cir. 1956). *See generally* 104 U. PA. L. REV. 1123 (1956). Dictum in another opinion indicates that during the *initial stages* of a new industry a tie-in may be justified if necessary to insure satisfactory performance of complex equipment. United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 556-57 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961). It also has been suggested that in order to protect its good will, a franchisor can engage in tying arrangements when it is impractical or impossible to specify a substitute for the tied products. Susser v. Carvel Corp., 332 F.2d 505, 519 (2d Cir.) (Friendly & Medina, JJ., concurring), *cert. granted*, 379 U.S. 885 (1964), *writ of cert. dismissed as improvidently granted*, 381 U.S.

E. Rule of Reason Violations

In addition to demonstrating that a tie-in is per se illegal, the plaintiff has the further option of proving "on the basis of a more thorough examination of the purposes and effects of the practices involved, that the general standards of the Sherman Act have been violated."[110] The rule of reason approach presupposes only that the plaintiff can establish the existence of a business arrangement proscribed by section 1 of the Sherman Act and that he can produce some argument that the practice in question is unreasonable. Fundamentally, the antitrust laws operate within good judgment to protect the nation against all unreasonable restraints of trade.[111] The general standards of the Sherman Act have been articulated in a number of classic antitrust decisions,[112] including Chief Justice White's opinion in *Standard Oil Co. v. United States*:

> [T]he criteria to be resorted to in any given case for the purpose of ascertaining whether violations . . . have been committed, is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act, and thus the public policy which its restrictions were obviously enacted to subserve.[113]

In 1918, Justice Brandeis discussed the scope of this "rule of reason":

> To detemine [whether a restraint is unreasonable] the court must ordinarily consider the facts peculiar to the business to which the re-

125 (1965). *See also* 16H J. VON KALINOWSKI § 64.05[1]; Abrams, *supra* note 72, at 78-79; Comment, *supra* note 73, at 866-68.

However, the holding of *Fortner* would appear inconsistent with the notion that an otherwise per se violation may be completely immunized from antitrust attack by special circumstances. 394 U.S. at 498.

Even if certain factors, such as the introduction of a new product or the protection of good will, could remove a tie-in from the per se rule, such justifying conditions are not found in American higher education. Most institutions of higher learning have been in business for many years, and the prestigious universities can protect their reputations in less restrictive ways. For example, an accreditor which insisted on testing only a small number of individuals would not be precluded from reducing demand by raising prices, using screening examinations, or employing any other technique which did not involve restraints of trade. Universities could also award different classes of degrees, as is commonly done in England.

110. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 500 (1969); *see* Comment, *Private Enforcement of the Antitrust Laws, supra* note 103, at 310.

111. *See generally* E. SINGER, *supra* note 103, at 198. *See also* Wheeler, *supra* note 77; Comment, *Private Enforcement of the Antitrust Laws, supra* note 103, at 307-08.

112. *See, e.g.*, United States v. Trenton Potteries Co., 273 U.S. 392 (1927); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918); United States v. American Tobacco Co., 221 U.S. 106 (1911); Standard Oil Co. v. United States, 221 U.S. 1 (1911); A. STICKELLS, FEDERAL CONTROL OF BUSINESS: ANTITRUST LAWS 111-14 (1972); 16 J. VON KALINOWSKI § 6.02 (Supp. 1973).

113. Standard Oil Co. v. United States, 221 U.S. 1, 62 (1911).

straint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.[114]

Under these admittedly imprecise standards, there exists a sufficient degree of judicial discretion to justify holding the tying of impartation to accreditation to be illegal as an unreasonable restraint of trade.

F. The Ultimate Test: Reasonableness

From a legal realist's point of view, it will always be the reasonableness of a particular restraint which ultimately determines whether a court decides that the restraint violates the antitrust laws. Purported per se antitrust analysis often reflects certain vestiges of a rule of reason inquiry.[115] As Professor Malcolm Wheeler perceptively observed: "[P]er se rules . . . usually shift the focus from the basic issue of whether trade has been or is likely to be restrained to the definitional question of whether the challenged practice is . . . a tie-in."[116]

The single-product or single-service defense is the most difficult obstacle faced by a plaintiff attacking the accreditation-impartation tie-in. A court's decision on the single-service issue will depend largely on its attitude toward the reasonableness of tying together the two educational functions. The rest of this Article will discuss the reasonableness of the two-function (accreditation-impartation) tying arrangement and the four-function (accreditation-impartation-coercion-club) tie-in. Both the rigidities of the present system and the advantages of the unbundling will be described.

IV. Is the Four-Function Tie-In Reasonable?

A. Some Rigidities of the Bundled System

Although universities presently tie together the four educational functions, these functions vary in importance and value to different students. A student who wants just one service, say accreditation, cannot purchase just that. The rigidity and inflexibility of American university education resulting from this packaging are illustrated by the following examples.

A student who desires a college diploma generally must attend a single college for four years. Because of residency requirements, it is almost impossible to spend one year at each of four institutions and

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

115. E. Singer, *supra* note 103, at 198.

116. Wheeler, *supra* note 77, at 1557. *See* Comment, *Private Enforcement of Antitrust Laws, supra* note 103, at 307-08. *See also* E. Singer, *supra* note 103, at 198.

earn a bachelor's degree. Furthermore, the student is forced to take a specific number of courses per semester. Because of time conflicts, he may be unable to take a desired course. Examinations are given only at certain times. The student may not create his own tri-mester or penta-mester system. He is not able to take one course compressed into a short time period or ten courses simultaneously over a long period. In addition, the student is deterred from varying the information impartation techniques used to prepare for the final examination in a course. Under no circumstances is he allowed to pay a lower tuition and just take the test. Conceivably, students could independently hire tutors, purchase transcripts of lectures at other schools, or buy specially prepared video cassettes on the subjects they were studying; but any expenditures on these items would be in addition to regular tuition. Since the student must pay an extremely high fee for classes even if he does not go to them, he is most likely to simply attend classes and not bother with other possible means of information impartation.[117]

Still another example of the rigidity of the system is the inalterability of final examination dates even if the student is not fully prepared. Finally, there is also no choice as to the type of examination. If a student decided he really knew the material, he might desire a six-hour test or an intensive oral examination rather than a simple two-hour test; but even if he is willing to pay a higher fee, he is rarely offered the option of a different kind of examination.

B. Higher Education Unbundled

Perhaps the best way to convey the disadvantages of tying together education services would be to describe a hypothetical system in which higher education was restructured along functional lines. An unbundled education industry would contain both profit-oriented and nonprofit firms and institutions. Education would be divided into four subindustries: information impartation, accreditation, coercion, and clubs.

Information Impartation Firms. The information impartation subindustry would be profit-oriented, consisting of tutoring firms, book publishers, video-cassette producers, and sellers and renters of books

117. If a student goes to fifteen hours of classes per week during a seventeen-week semester, he will attend 255 hours of class. If his tuition for the term were $1,500 and this sum were allocated entirely to the cost of classes, the average cost per hour of class would be $5.88. If three quarters of the tuition were allocated to the price of classes, the average cost per class hour would be $4.41. Despite the fact that most students are avid film-goers, few students would be willing to pay $8.82 for even the most highly rated two-hour movie.

and cassettes. Book publishing would operate much as it does today, although there might be more programmed texts and increased use of mimeographing, photostating, and photo-offsetting to publish materials for narrow markets. For example, good lectures offered at one school would be mimeographed and sold to students at more than one college.

Educational video tape production would combine aspects of book publishing and television program production. The video cassette would be produced competitively by teams of authorities writing scripts for simulated classroom situations, educational tours or demonstrations, with actors and actresses playing the parts of professor and students. The tapes would be pre-tested on students, and every variable from the color of the instructor's tie to the number of jokes per lecture could be considered.[118] The video tape performance could be dubbed into foreign languages for promotion overseas where most countries provide higher education to only a small fraction of their populations. Cassette publishers would furnish free programmed guides to their tapes referring viewers to other tapes for further explanation of troublesome points. Cassettes would be marketed world-wide in suggested course collections to students, profit-oriented and nonprofit libraries, conventional colleges, television broadcasters, cable television companies, and any other firm or organization which cared to purchase them.

Cable television may eventually become an important disseminator of college video courses. The Sloan Commission estimates that by 1980

> [t]he majority of cable franchises will have a capacity of at least twenty channels, that forty-channel systems will be commonplace or at least well within the state of the art, and that even greater capacity may be found in great metropolitan areas. . . . This is a conservative prediction; . . . it is at least conceivable that ordinary channel capacity will rise to eighty or above by the use of paired cables or more capacious cables.[119]

The Commission also believes that by 1980 between forty and sixty percent of the nation's homes will have cable television.[120]

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118. The University of Southern California has a voluntary workshop designed to make its teachers more interesting. The workshop is run by an actor, director, and a comedy writer-performer, who adds jokes to lectures. Lancaster, *Ever Hear the One About the Professor and the Gag Writer?*, Wall Street J., April 17, 1974, at 1, col. 4; *Heeere's the Prof . . .*, TIME, Dec. 2, 1974, at 92.

119. SLOAN COMM'N ON CABLE COMMUNICATIONS, ON THE CABLE: THE TELEVISION OF ABUNDANCE 37 (1971).

120. *Id.* at 38-39. *See also* COMMISSION ON NON-TRADITIONAL STUDY, *supra* note 2, at 102-06; THE FOURTH REVOLUTION 20-21; Lapierre, *Cable Television and the Promise of Programming Diversity*, 42 FORDHAM L. REV. 25 (1973); Molenda, *CATV and Access to Knowledge*, 2 YALE REV. OF L. & SOCIAL ACTION 243, 249 (1972).

Independent organizations would also publish advice on how best to intermix the tapes and books of different firms, and tutors would give advice on what books to read and which tapes to view. In addition to recommending educational material, tutors would also answer individual questions and provide counselling, which would be necessary since even the most sophisticated system of programmed video tapes could not completely anticipate the needs of each individual student. The tutoring industry would be extremely diverse and decentralized. Some companies would have a large number of tutors and attempt to build up a reputation for consistent excellence. Other tutors would operate in smaller partnerships or as solo practitioners. No particular degree would be a prerequisite to entering the profession. Those tutors who were most talented would presumably command the highest hourly fee. Sophisticated systems of programmed computerized instruction[121] and other unusual methods of information transfer would eventually become a part of the dynamic, competitive, and profitable impartation industry.

Accreditation Agencies. The accreditation agencies would have the functions of test-drafting, test-marking, degree-awarding, paper-grading, and possibly paper-assigning. Each agency would offer objective and essay examinations in various subjects. Readers of essay-type examinations would be carefully trained by the agency to grade tests consistently and would be provided with manuals to guide them in the grading of each particular question. To encourage consistency, graders would be divided into different levels. Some of the tests graded by the first or lowest level readers would be randomly selected for re-grading by second level graders, who in turn would have some of their tests selected randomly for a third reading by third-level graders—and so on. Each student would be allowed to select one of several grading systems—from a pass-fail grade to a numerical grade of zero to one thousand. A student who felt that his test had been marked unfairly could pay an extra fee and have his examination regraded. The size of the extra fee would vary with the level of grader requested.[122]

Accreditation agencies would grade papers and dissertations on much the same basis as essay examinations. Although some firms might grade only essays on certain topics, most firms would probably be willing to grade any paper for a fee.

121. *See generally* R. LEVIEN, THE EMERGING TECHNOLOGY—INSTRUCTIONAL USES OF THE COMPUTER IN HIGHER EDUCATION (1972).

122. Although wealthier individuals could afford to "appeal" their grades more often, they would have no guarantee that the second grade would be higher.

An accreditation agency would award diplomas on the basis of its own grades and those of other firms. The management of the organization would select the other agencies whose grades it would accept; but once this decision were made, the actual degree-awarding process itself would be quite mechanical, and only a small fee would be charged for this service. Some accreditation agencies would be state-supported or private nonprofit organizations. Others might be private profit-oriented corporations. The profit-oriented accreditation agencies naturally would do their best to attract customers. Nevertheless, it is likely that the most profitable firms would be the ones with the highest reputation for reliability, integrity, and consistency. As long as an agency had a broad enough range of grades (zero to one thousand, for instance), a prospective employer would not care whether the agency was exclusive as long as its grades were consistent.

Coercion Firms. Accreditation agencies with a sufficiently large scale of operations might offer tests in certain subjects as frequently as once a month or even once a week. With freedom to take tests whenever they wished, students would have a tremendous choice of work-pace.

For some students this flexibility in examination scheduling might prove to be a curse rather than a blessing; but private enterprise should be capable of devising ingenious ways of enabling students to force themselves to work. For instance, a student might deposit a sum of cash or a promissory note with a company on the condition that the firm return portions of the funds on a weekly basis if the student did his work and performed saisfactorily on a short quiz. If he failed to do his work, he would forfeit his money. In effect, the young person would be paid a weekly salary to do school work. Less wealthy individuals would put smaller amounts of money into escrow, while richer students would deposit larger sums; but the money in jeopardy would be equally valuable to both groups.

Students might also contract in advance for harassment if they slacked off in their studies during certain periods. The techniques used by these work-coercers would be quite similar to those employed by bill collectors. Coercive services such as these would only be purchased by those students for whom general social and economic pressures were insufficient motivators.

Clubs and Youth Centers. Since the accreditation agencies and book and video cassette publishers would sell their products and services to anyone, there would be no prestige attached to patronizing any particular tester or publisher. (There would, however, be value in ob-

taining high grades, and there might conceivably be some prestige in patronizing certain tutoring firms.)

It is quite possible that exclusive clubs of students would appear. Individuals would join clubs for both the prestige of being a member and the possibility of social and intellectual interaction with other persons whose interests and intelligence were similar. Although some entrepreneur might conceivably organize such clubs for profit, it seems more probable that such organizations would not be profit-oriented.

Students who felt that exclusive clubs were excessively snobbish would not be forced to join such clubs in order to meet other young people. Centers probably would be founded in widespread parts of the world. More affluent students might in a single year visit youth centers in Rio, Berkeley, and Paris. Poorer students would roam about less but might still dwell abroad during some period of their studies.

C. *Advantages of the Unbundled Educational System*

Restructuring education along functional lines would have many advantages. The most obvious benefit would be the increased freedom offered the student to choose what courses to take and where and when to take them. The unbundled system would enable each student to have his own individualized curriculum tailored to his special needs. Some young people might specialize early; others might sample many different disciplines even at an advanced level before making any decision to specialize. For example, with video cassettes a student interested in law or medicine could take several courses in these subjects without first being forced to make an irreversible decision.

The unbundled system would free young people from the needlessly rigid curriculum requirements sometimes imposed by colleges. Employers and society at large probably have relatively flexible concepts of a liberal arts education. Most non-academics are indifferent as to whether someone they meet has had two semesters of laboratory science or one year of physical education while at college. Two highly esteemed institutions, Harvard College and Yale Law School, have very few required courses. In theory, a student is free to choose a college whose curriculum requirements match his own desires. In practice, however, high school seniors are relatively uninformed about the educational policy of the college they choose. The decision to attend a particular school is influenced by a great many factors, including cost, location, social life, parental pressure, and prestige. Once a student attends a school, it is difficult to transfer. For students enrolled in a college with inflexible curriculum requirements, moving from the tra-

ditional system to the unbundled system would be like moving from the local tyranny of a small company town to the cosmopolitan tolerance of a large city.

The flexibility of the new system would be a boon to many individuals who presently are unable to obtain higher education. It would be much easier for poor youths to gradually earn a college degree while simultaneously holding a job. Many older men and women who have been frustrated by their lack of college or post-graduate education also would have the opportunity to study conveniently for a degree.

An important benefit to everyone of the restructured system would be the opportunity for continuing education throughout life. There would no longer be a dichotomy between school and the rest of one's adulthood. Indeed, industry and government might require their employees to maintain their expertise by taking courses. If a more flexible workweek or work-year became commonplace, adults would have ample opportunity to take additional courses and get accreditation for each of them. Career changes therefore would become easier. The frustrated businessman who became interested in history could take courses to become either an amateur or professional historian. In the words of one educator:

> However sophisticated or naive the discussion of . . . [unbundling] may appear, at the heart of its advocacy lies the deep and perennial egalitarianism of the American ethos, rooted in the belief that the individual should have as much education as he needs or wishes to develop his potentialities. And in that ethos, the college or university degree is the tangible manifestation that learning has taken place.[123]

The restructured system would have still other benefits, one of which would be a decrease in neurotic competition. Without rigid deadlines, education would be more relaxed than at present. Students would no longer be forced to undergo the traumatic experience of taking all their examinations in just one or two weeks. A person could take a test whenever he felt he had mastered the material, or he could decide to skip the examination if he had lost interest in a course. If he did poorly on an examination, he could study some more and take the test again a month or so later. The "open admissions" policy of accreditation agencies also would eliminate the oppressive rat race to get into colleges and graduate and professional schools. Finally, the increased emphasis on continuing education throughout life would make it less important how one performed in any particular year.

123. C. HOULE 64.

Specialization by function would improve the quality of education provided. Video cassettes produced by teams of internationally distinguished personnel would be superior to most lectures presently available on any college campus. The well-developed tutorial system would furnish the individualized instruction presently not offered by universities in the United States but which operates very successfully in England.

Similarly, the tutorial and accreditation agencies would attempt to find and train the best suited individuals with particular talents for assisting or evaluating an individual student's educational progress. Even coercion firms could do a more effective job of forcing individual students to work than the present educational system, which often allows students to procrastinate and to do most of their work at the end of the semester. A further advantage would be the variety of clubs formed, since each student could join those which suited his particular interests.

Not only would the restructured system offer more individualized and better educational services, but it would probably do so at a much lower cost per student. Almost all of the high cost of the present college system buys information impartation. It is an incredibly expensive and wasteful duplication of effort to have similar lectures delivered by professors all over the world. There are fantastic economies of scale in higher education which presently are not being realized. Once the cost of a course were spread over a sizeable portion of the student population of the world, the cost per student would be nominal. Higher education could then be made available to all those who desired it, whether they lived in a ghetto in the United States or in the rural areas of a developing Asian nation. Unbundling of higher education in the United States would aid economic development throughout the world, in poor and rich nations alike.[124]

D. Possible Objections to the Unbundled System

There are many possible objections to the unbundled system just described, and this Article will attempt to anticipate the legal implications of a few of them.

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124. For a different vision of an unbundled world of higher education, see Mood, *Another Approach to Higher Education*, in UNIVERSAL HIGHER EDUCATION—COSTS, BENEFITS, OPTIONS 293-310 (L. Wilson & O. Mills eds. 1972). Also of interest are the comments on Professor Mood's paper. *Id.* at 310-18. For other futuristic views of university education, see CAMPUS 1980—THE SHAPE OF THE FUTURE IN AMERICAN HIGHER EDUCATION 149-75, 220-35, 279-98 (A. Eurich ed. 1968).

Some individuals may fear that a few accreditation agencies would become too powerful and effectively dictate educational policy throughout the United States or even throughout the free world. For several reasons, this is highly improbable. There are only limited benefits to size in the business of grading essay examinations. An agency which graded essay tests would have to double its staff to double its business. Moreover, it does not seem beyond the capacity of an employer to become familiar with a wide variety of accreditation agencies—all of which would be honest, reliable, and consistent but each with a different educational viewpoint—just as our society is now able to receive graduates of hundreds, if not thousands, of colleges. It would not even be surprising if firms appeared which specialized in evaluating and comparing accreditation agencies, thereby enabling relatively small accreditation agencies to prosper. Because students could take tests in different nations with relative ease and because multi-national accreditation agencies might open branches in many countries, higher education in many nations might actually become less oligopolistic and elitist.

Centralization of power in the video cassette publishing industry also seems improbable. Since any entrepreneur could produce and distribute a taped lecture or lecture series without a prohibitive capital outlay, one would expect that this subindustry would be almost as decentralized and diverse as the present-day international book publishing, record, or film industries (underground and aboveground). The brisk competition between video tape publishers of different nations would result in such an active international cultural cross-fertilization that it would be impossible for any one publisher to dominate the world of thoughts and ideas.

Earlier in this Article, escape from rigid curriculum requirements was mentioned as an advantage of the new system. Some academics may feel that this increased freedom is not beneficial but harmful. Although this Article has a libertarian bias, this is not the place for an extended discussion of paternalism versus libertarianism. Even in an unbundled educational world, individuals dissatisfied with the way the system operates could attempt to change its course by vigorously entering the marketplace of ideas with their own books, articles, cassettes, and reviews of books and cassettes. Some accreditation agencies also could grant special certificates for completion of certain rigidly defined curricula. Employers and others would undoubtedly come to their own conclusions about the worth of certain courses, so that there always would be social and economic pressure toward conformity, as well as students who resist this pressure.

Indeed, other critics may object that the restructured educational system places too much emphasis on accreditation and the invidious discrimination of grades. Students might feel less, rather than more, freedom under the new system.

Some persons might criticize the unbundled educational system because it apparently does not encourage research, especially in the laboratory sciences. But the search for knowledge would not be stifled. Tutors and scriptwriters would be forced to do research to maintain or improve their teaching or writing skills. Conventional research journals would most likely still provide specialized media for disseminating current research and giving researchers the pleasure of seeing their work published. The federal government, private foundations, and corporations could increase their subsidy of pure research, and many private universities with substantial endowments could convert themselves into predominantly research institutes.

To facilitate the teaching and testing of research techniques, especially in the laboratory, the unbundled system undoubtedly would make certain adaptations. Accreditation agencies would administer practical examinations; home experimental kits would be manufactured;[125] and tutoring firms would give laboratory instruction, possibly in connection with audio-tape instruction.[126] In the end, if it proves impossible to unbundle certain forms of highly specialized instruction, this instruction could be rendered by approved tutors who would certify student achievement; but this should be exceptional.

There are, of course, other problems with unbundling which might be more intractable. Copyright violations might become difficult to police or prevent, and the impersonal nature of the accreditation system might conceivably encourage cheating. Careful proctoring and vigilance could be used to deter dishonesty.

Ultimately, the most important concern is the quality of education produced by the unbundled system. Defenders of present university tying arrangements will undoubtedly assert that video cassettes are not as effective as live professors. Empircal research demonstrates, however, that personal instruction at the college level is *not* necessarily

125. Britain's Open University uses an ingenious home experimental kit in its science courses. Walsh, *supra* note 11, at 676.

126. There have been experiments with audio taped individual laboratory instruction at Purdue University and at Golden West Community College in California. S. BASKIN, HIGHER EDUCATION: SOME NEWER DEVELOPMENTS 63 (1965); THE FOURTH REVOLUTION 17-18; Kiester, *Electronic U.*, SATURDAY REV. OF EDUCATION, May 1973, at 56; *see* 1973-74 Catalog of Golden West College, Huntington Beach, California.

superior to instructional television. In 1966, a review of 207 published studies comparing instructional television and conventional teaching indicated that there was probably no significant difference; sixty-three found television instruction to be superior; and fifty showed conventional instruction to be better.[127] After analyzing the actual data contained in forty-two comparative studies in which a total of 348 comparisons of final examination results had been made, two experts commented: "The conclusions of our comparative analysis are unequivocal . . . . In the most intensive analysis across many studies yet made, we can find no evidence to dispute the conclusion that one-way television is as good as other college instructional media."[128]

Empirical research questions the superiority of lecture and/or discussion over independent study. A major investigation in 1968 pooled the data from a large number of studies conducted between 1924 and 1965 on the relationship between achievement and instructional arrangements. The study showed that there was no discernible difference between lecture and discussion, between lecture and lecture-discussion, between supervised independent study and face-to-face instruction, between supervised independent study and lecture, between supervised independent study and discussion, between supervised independent study and lecture-discussion, between supervised independent study and unsupervised independent study, and between *even unsupervised independent study and face-to-face instruction.* Under the subtitle "In a Word—Nothing," the authors conclude: "These data demonstrate clearly and unequivocally that there is no measurable difference among truly distinctive methods of college instruction when evaluated by student performance on final examinations."[129]

Several large-scale studies not included in the above pooling analysis have generated similar conclusions. Experiments at Antioch College[130] and the University of Colorado showed that drastic reductions in class time had no adverse effect on content understanding.[131] A study at Miami University in Ohio, using classes of different sizes, com-

127. C. CHU & W. SCHRAMM, LEARNING FROM TELEVISION: WHAT THE RESEARCH SAYS 100 (1967).

128. R. DUBIN & R. HEDLEY, THE MEDIUM MAY BE RELATED TO THE MESSAGE—COLLEGE INSTRUCTION BY TV 1-2 (1969).

129. R. DUBIN & T. TAVEGGIA, THE TEACHING-LEARNING PARADOX—A COMPARATIVE ANALYSIS OF COLLEGE TEACHING METHODS 35 (1968).

130. Antioch College, 1957-58 Experiment on Independent Study, 1958.

131. H. GRUBER & M. WEITMAN, SELF-DIRECTED STUDY: EXPERIMENTS IN HIGHER EDUCATION *passim* (1962).

pared three educational formats with many variations—television, lecture, and discussion—and found no significant differences among any of the groups taught by different methods.[132]

In the words of one leading commentator, Ohmer Milton:

> Consistently, . . . such variables as class size, frequency of class meetings, and manner of presentation [including independent study], when considered in isolation, have been demonstrated to wield no major impact upon learning as measured by the usual tests. Even when some of these variables have been combined, their influence appears to be quite minimal. . . .
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> . . . Because of the consistency of the results in different institutions of higher learning—for example, selective and non-selective ones—and the disciplines in and among them, a far-reaching conclusion, and one which undoubtedly is disturbing to many faculty members and students, can be drawn about the teaching of subject matter content: *If the content of a discipline can be defined as a body of information and concepts, the way or ways in which ideas or concepts are organized, and the methods by which knowledge is sought, and if it is acceded that class examinations measure content primarily—there being no research evidence to the contrary—then the explanations of such content by the instructor in the classroom, by whatever method, contribute little to the learning of content.*[133]

In summary, the possible objections to the unbundled system are not persuasive. In light of the research on learning, the case for unbundling is overpowering. Students should at least be given the option of purchasing less expensive media of instruction free from the restraints of anti-competitive educational tying arrangements.

V. Concluding Comments

The Supreme Court once remarked that "[t]ying arrangements serve hardly any purpose beyond the suppression of competition."[134] The tying arrangements in higher education are no exception. The tying of impartation to accreditation cannot be justified and greatly harms society. Under abstract antitrust principles, this unreasonable tie-in violates the Sherman Act. Nevertheless, the judiciary might be reluctant to mandate such a radical transformation of American higher education. Even so, changes will come; but they will be evolutionary rather than revolutionary.

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132. Experimental Study in Instructional Procedures (F. Macomber ed. 1957).
133. O. Milton, *supra* note 2, at 23-24 (emphasis added).
134. Standard Oil Co. v. United States, 337 U.S. 293, 305-06 (1949).

The slow evolution toward unbundling has already begun. As mentioned in the introduction, there are already several external degree programs which offer accreditation with little or no tied impartation. The nation is becoming increasingly receptive to public service television and national testing services. Already, many individuals give such tests as the Graduate Record Examination, the Scholastic Aptitude Test, and the Law School Aptitude Test more weight than grade point averages or transcripts.

While the evolutionary process toward unbundled education has begun, colleges which have tied their services for centuries will undoubtedly be resistant to change.[135] However, pressure from several sources will overcome this resistance. There is increasing pressure on American society to provide a college education to all those who want it, while at the same time the financial cost to society of providing a university education is rising to almost prohibitive levels.[136] In 1972 institutions of higher education spent approximately thirty billion dollars.[137] College students also are beginning to demand reforms in what they consider to be a largely anachronistic and arbitrary educational system.

Unbundling of higher education along functional lines offers the hope of increasing the quality of lectures, making more individualized instruction available, changing education into an ongoing process continuing throughout life, and offering students remarkable freedom of choice as to courses, schedules, work-pace, and place of residence. Most importantly, this improved education could be provided to many more individuals throughout the world at much lower cost. The antitrust laws can unleash these benefits for our society, and the courts should declare illegal the tying arrangements in higher education.

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135. *See generally* R. EVANS, RESISTANCE TO INNOVATION IN HIGHER EDUCATION—A SOCIAL PSYCHOLOGICAL EXPLORATION FOCUSED ON TELEVISION AND THE ESTABLISHMENT (1968).

136. See note 4 *supra.*

137. COMMITTEE FOR ECONOMIC DEVELOPMENT, *supra* note 4, at 13.