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NOTE

NOBODY LIKES A CHEATER: COLLEGE ADMISSIONS, ANTITRUST, AND BIPARTISANSHIP

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I. Introduction

Section 568 of the Improving America's Schools Act of 1994 expired in September 2022,[1] marking a bipartisan acknowledgment that the field of antitrust law had been swinging from dormant to ineffective for too long. The exemption ("§ 568") was utilized by prestigious universities known as the "Ivy Plus" schools, including familiar names such as Harvard, Yale, Brown, Rice, Chicago, and Stanford. Under § 568, the Ivy

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1. Emma Whitford, *Financial Aid Blues: Elite Colleges See Federal Antitrust Exemption Expire as Price-Fixing Lawsuit Advances*, FORBES (Oct. 5, 2022, 11:56 AM), https://www.forbes.com/sites/emmawhitford/2022/10/05/financial-aid-blues-elite-colleges-see-federal-antitrust-exemption-expire-as-price-fixing-lawsuit-advances/?sh=34116ed3176e.

Plus schools were granted an exemption to section 1 of the Sherman Act which allowed them to collude in evaluating and determining the financial need of applicants so long as the universities took a need-blind approach to the admissions process.[2] Several pending lawsuits allege that these universities were colluding, but not satisfying the necessary condition of need-blind evaluation.[3] Politicians on Capitol Hill rendered their final judgment as to not only the guilt of the universities protected by the exemption, but also as to the efficacy of the exemption to begin with.[4] With the opportunity to extend § 568, politicians on both sides of the aisle chose to allow the exemption to reach its natural end—a seeming rebuke of the now-controversial college admissions process.

The voluntary sunsetting of § 568 presents an opportunity to examine the evolution of bipartisanship in the field of antitrust law, to reflect upon the effects that § 568 had on the college admissions process while active, to scrutinize the limited use of massive endowments in lending financial aid, and to predict how the college admissions process will be affected by antitrust laws moving forward. This Note will touch on each of these issues in detail, with a focus on the interplay between politics, college admissions, and antitrust law. By the end, the reader will have an appreciation for the role of antitrust law and enforcement in an area that many people (whether students, parents, or academics) have a particularized expectation. This Note will also impart observations of antitrust bipartisanship in a time where bipartisanship seems to be more of an exception than the norm.

II. Section 1 of the Sherman Act: An Overview

Congress passed the Sherman Act in 1890[5] which marks the first—and to this day most—significant step in antitrust law in America's history.[6] The bill came in response to the accumulation of wealth and the utilization of this stockpile to create monopolies over critical industries such as oil and railroads. The law marked a transition into what would later become known as the "Progressive Era," embodied most by President

2. *See* H.R. Rep. No. 114-224 at 1 (2015).
3. *See* Carbone v. Brown Univ., 621 F.Supp.3d 878, 883 (N.D. Ill. 2022).
4. *See* Whitford, *supra* note 1.
5. 15 U.S.C. § 1 (1890).
6. *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Oct. 2, 2023).

Theodore Roosevelt (also known as the "Bull Moose").[7]

Section 1 of the Sherman Act provides, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[8] At its conception, the term "every" was construed literally.[9] This presented a great obstacle to not only industry, but also charitable works (which will become relevant later) because contracts and conspiracies can be formed that create a larger benefit to trade and commerce without the conspiracy.[10] Recognizing the unworkable nature of this interpretation in a rapidly growing economy, the Supreme Court adopted a holistic method of evaluating an alleged restraint of trade, now famously known as the rule of reason.[11] Today, "most antitrust claims are analyzed under [the] rule of reason."[12] Under this analysis,

> the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect. Should the plaintiff carry that burden, the burden then shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant can make that showing, the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.[13]

In the mid-twentieth century, at the height of antitrust enforcement, the Supreme Court adopted what is known as the *per se* illegal rule.[14] Under this analysis, activities are *per se* illegal if they present such a high probability of being anticompetitive that they warrant an irrebuttable

7. Sid Milkis & Carah Ong, *Transforming American Democracy: TR and the Bull Moose Campaign of 1912*, U. VA. MILLER CTR., https://millercenter.org/transforming-american-democracy-tr-and-bull-moose-campaign-1912 (last visited Oct. 2, 2023).

8. 15 U.S.C. § 1 (1890).

9. Standard Oil Co. v. United States, 221 U.S. 1, 59 (1911).

10. *Id.*

11. Bd. of Trade of City of Chicago v. United States, 246 U.S. 231, 244 (1918).

12. State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (internal quotations omitted).

13. National Collegiate Athletic Ass'n v. Alston, 141 S.Ct. 2141, 2160 (2021) (quoting Ohio v. American Express Company, 138 S.Ct. 2274, 2284) (internal quotations omitted).

14. National Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 125 (1984).

presumption of illegality.[15] The defendant is almost certain to be found in violation of section 1 of the Sherman Act because the anticompetitive practice is illegal "as a matter of law."[16]

The latter part of the twentieth century brought with it what came to be known as the "Chicago Revolution" because of an emergent shift in antitrust enforcement philosophy that originated in the University of Chicago School of Law.[17] This approach fostered a less prohibitive approach to antitrust enforcement, where the focus was consumer welfare rather than protection of companies affected by trade restraints.[18] With this philosophy taking root in the Supreme Court through the nominations of President Ronald Reagan,[19] the *per se* illegal approach was neutered in its use.[20] However, the Court sought the virtues of judicial expediency and resolved to find a mechanism that was less factually burdensome than the full rule of reason analysis, yet more nuanced than the *per se* analysis. Such an approach was instituted in what would become known as the "quick look" rule of reason analysis.[21] Under the quick look analysis, an antitrust plaintiff

> has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect. Should the plaintiff carry that burden, the burden then shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant can make that showing, the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.[22]

This three-step, burden-shifting framework certainly puts the plaintiff in an advantageous position at the onset of litigation; but the presumption

15. *See generally id.* at 85.

16. *Id.* at 100 (citing Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20 (1979)).

17. ANDREW I. GAVIL, ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, COMMENTS, AND PROBLEMS IN COMPETITION POLICY 85 (American Casebook Series 4th ed. 2022).

18. *Id.*

19. *Id.* at 86.

20. *Id.* at 85 ("As a consequence, they tended to conclude that most markets were competitive[.]").

21. *See generally Bd. of Regents of the Univ. of Okla*., 468 U.S. 85.

22. *Alston*, 141 S.Ct. at 2160 (quoting Ohio v. American Express Company, 138 S.Ct. 2274, 2284 (internal quotations omitted)).

is rebuttable, which levels the playing field in a way that the *per se* rule does not.[23] Significantly, the Court recently utilized the quick look approach in a case involving the limit on financial aid available to collegiate athletes established by the National Collegiate Athletic Association.[24]

As clear from the paragraphs above, determining which rule will be used is critical to an antitrust defendant's likelihood of success. In most cases, the defendant will seek the traditional rule of reason analysis because it calls for the most detailed look into the relevant industry, market, and circumstances of the alleged restraint of trade. If a defendant cannot receive a traditional rule of reason review, the defendant will seek a quick look analysis due to the possibility of meeting a rebuttable burden. The plaintiff will seek a *per se* analysis in any case because of the irrebuttable presumption of guilt, but the defendant will vehemently fight it.[25]

While the plain language of section 1 of the Sherman Act is short and broad, the evolutions of the Court's analyses of alleged violations take multiple forms. The strategy of litigation will often be to fight fiercely to state the grounds upon which the standard of review is appropriate given the alleged restraint of trade. As we move into the evaluation of litigation involving § 568, it will be important to note the standard of review used by the Court when evaluating the alleged restraints of trade regarding financial aid and college admissions.

III. Section 568: How It All Started

Although the modern iteration of § 568 originated as a temporary exemption in the 1992 Higher Education Act, the roots of the Ivy Plus Cartel were planted in the mid-twentieth century.[26] This so-called cartel began in the 1950s when a group of Ivy League schools banded together to agree to only grant need-based financial aid rather than merit-based financial aid, and to further share a common formula to determine the financial need of admitted students.[27] This arrangement went largely undisturbed until the late 1980s when the Antitrust Division of the

23. *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 100.
24. *Id.*
25. *Id.* at 100.
26. H.R. Rep. No. 114-224 at 2 (2015).
27. *Id.*

Department of Justice caught wind of the collusion between the universities and brought suit under section 1 of the Sherman Act in 1991.[28] Of all the universities facing suit, only one opted to take the case to trial—the Massachusetts Institute of Technology ("MIT").[29]

The trial was first heard as a bench trial in the Federal Eastern District of Pennsylvania where the court, in applying a rule of reason analysis, found MIT's arrangement to be an unlawful restraint of trade under section 1 of the Sherman Act.[30] In its decision, the court stated that the conduct of MIT and the "Ivy Overlap Group" as a whole "amount[ed] to more than price fixing in the literal sense."[31] The court hinted that the existence of the agreement among "horizontal competitors" would traditionally qualify for a *per se* analysis, but "in the exercise of caution" the court opted to apply the rule of reason analysis.[32] In applying the rule of reason, the court quickly determined that the horizontal agreement was patently anticompetitive, stating that "[n]o reasonable person could conclude that the Ivy Overlap Agreements did not suppress competition."[33] The court further noted that the agreement "interfered with the natural functioning of the marketplace by eliminating students' ability to consider price differences when choosing a school and by depriving students of the ability to receive financial incentives which competition between those schools may have generated."[34]

The decision could not have been clearer in the court's view, as the language of the agreement "directly proclaimed the intent to neutralize the effect of financial aid so that a student may choose among Ivy Group institutions for reasons other than cost."[35] It was obvious that its member institutions aimed to minimize the level of competition between members, leaving students with zero bargaining power and less consumer preference—a violation of the "most fundamental principle of antitrust law."[36] MIT offered procompetitive justifications such as a lack of intent to profit from the agreement, increased competition among the member

28. *Id.*
29. *Id.*
30. United States v. Brown Univ., 805 F.Supp. 288, 307 (E.D. Pa. 1992), *rev'd* 5 F.3d 658 (3d. Cir. 1993).
31. *Id.* at 301.
32. *Id.*
33. *Id.* at 302.
34. *Id.*
35. *Id.*
36. *Id.* at 304.

institutions in non-financial areas such as campus life and reputation, diversity, and a lack of financial resources to enter into bid wars for talented students.[37]

The court summarily dismissed these defenses, observing that "if these policies are as meaningful as MIT avows, and these institutions refuse in any way to forsake admitting the 'best of the best,' then they should be willing to dedicate the necessary resources to ensure the continuation of these policies."[38] The court quickly and easily recognized what Congress would later fail to see: these schools are wealthy, holding massive unrestricted endowments, and the effect of having to offer competitive financial aid packages will not be economically ruinous. Unfortunately, the clear eyes of the Eastern District of Pennsylvania were swiftly turned away.

The Third Circuit Court of Appeals reversed and remanded because the lower court applied a quick look analysis when it should have applied the rule of reason analysis due to the alleged procompetitive effects raised by MIT.[39] The Third Circuit first determined that the arrangement was facially a horizontal agreement among competitors that traditionally receives *per se* treatment; but the court refused to apply the most stringent antitrust analysis because of the members' non-profit status and public interest motive.[40] In moving to a full rule of reason analysis, the court noted that MIT explicitly did "not dispute that the stated purpose of [the Ivy] Overlap [Program] is to eliminate price competition for talented students among member institutions."[41]

The court found, like the district court, that the agreement is facially anticompetitive.[42] However, the Third Circuit differed from the district court in its genuine consideration of MIT's competitive justifications.[43] While still hesitant to fully endorse MIT's social welfare justifications due to the possibility of implicit "economic self-interest or revenue maximization," the court found these justifications strong enough to warrant of full rule of reason analysis on remand.[44] Instead of appealing the Third Circuit decision, MIT entered a consent decree with the

37. *Id.* at 304-06.
38. *Id.* at 307.
39. United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993).
40. *Id.* at 671-72.
41. *Id.* at 673.
42. *Id.*
43. *Id.*
44. *Id.* at 677.

Department of Justice.[45]

In 1992, Congress passed a temporary antitrust exemption that effectively authorized the arrangement amongst the Ivy Plus Cartel on the grounds that the financial aid calculation for a specific student could not be agreed upon by the universities.[46] This exemption was formalized into what we know as § 568 as a part of the Improving America's Schools Act of 1994.[47] The new exemption was more lax than its 1992 predecessor in that it allowed a common aid application form and the exchange of individual student financial information, resembling the consent decree entered following the litigation mentioned above.[48] Like its predecessor, § 568 was a temporary exemption that had to be renewed annually.[49] Until September 30, 2022, the exemption was renewed at each opportunity.[50] Under the most recent iteration of § 568, universities were permitted to engage in the following collusive behavior: awarding financial aid solely on the grounds of financial need, using common metrics to determine financial need, using a common aid application, and exchanging financial information of students and families.[51]

IV. The Effectiveness of Section 568

In determining the effectiveness of the § 568 exemption prior to its retirement, the initial goals of the exemption must be fully understood. The methodology used to establish a student's financial need is the Federal Need Analysis Methodology, which calculates need by considering the "expected family contribution" via the family's income and assets.[52] Prior to the § 568 exemption and *United States v. Brown University*, the Ivy Plus schools used a collective methodology to determine a student's need.[53] The § 568 exemption allowed the schools to continue to share data and methodology, but only if *all* students were admitted on a need-blind

45. H.R. Rep. No. 105-144 at 2 (1997).
46. *Id.*
47. *Id.* at 2-3.
48. *Id.* at 3.
49. *Id.* at 2.
50. *Id.* at 2, 4.
51. *Id.* at 2-3.
52. Statement of Interest of the United States at 2, Carbone v. Brown Univ., 621 F.Supp.3d 878 (N.D. Ill. 2022) (No. 1:22-cv-00125).
53. *Id.* at 3.

basis.[54] However, the initial theory and law was that while the schools would use a common methodology, they would still be free to offer different aid packages to incentivize students to attend their university.[55] This would enhance competition and lessen the financial burden of students in attending high-profile universities.[56]

As alleged in *Carbone v. Brown University* however, this goal was not recognized.[57] Rather, the universities shared methodology and data to determine a given student's financial need, but then they colluded to ensure each student was offered the same package as the other universities.[58] This eliminated competition, rather than fostering it, because instead of determining need on a collective basis while still placing competitive offers, the universities essentially capped the amount of aid a student could receive at *any* of the participating schools. This approach maximized the amount of money that a student's family would have to pay for the student to attend the university.[59]

As contended in the *DOJ Statement of Interest*, if the universities can first cap the student's need and then collude to not offer a more generous aid package, then the universities are not competing against each other in a way that maximizes that incentive of a student to choose the university.[60] Rather, the student could be forced to take out a $20,000 loan at Harvard, Yale, Brown, or Dartmouth and the only real choice the student would have would be based on their preferred university, not because one is offering a package that would result in a lower loan amount.[61]

Notice that this was the same goal and outcome of the Ivy Overlap Group that predated the § 568 exemption.[62] Now consider what impact this would have on lower-income students seeking to attend an Ivy Plus university. If a student's need determined through the collective formula arrives at $30,000 per year and then they are admitted to nine of the participating universities, their maximum offer from each university will be $30,000. This caps their incentives and opportunities due to the collusion amongst these universities to eliminate competition within their

54. *Id.*
55. *Id.*
56. *Id.* at 3-4.
57. *Carbone*, 621 F.Supp.3d at 883.
58. Statement of Interest, *supra* note 52, at 11.
59. *Id.* at 13.
60. *Id.*
61. *Id.*
62. *Id.* at 2.

elite ranks. This also leads the low-income student to decide among the most prestigious universities in the world with the only differentiating factor being their general preference.

In a world envisioned by the drafters of the § 568 exemption, the need would collectively be calculated as $30,000, but then each university would craft their own aid package to entice the attendance of the lower-income student.[63] This would foster competition among the prestigious universities to make their university more enticing to a lower-income student because instead of deciding to attend Harvard for the sake of attending Harvard, or Yale for the sake of attending Yale, the student could choose Dartmouth because Dartmouth's aid package allows them to take out $20,000 less in student loans each year.[64] As a result of this competition, the cost of attending college would be lowered and the opportunities of lower-income students would be maximized.[65]

As shown, this utopian dream was that—just a dream.[66] The universities rightfully used the collective formula to determine need, but then they unlawfully colluded to offer identical aid packages to individual applicants across the board.[67] This limited the amount of aid a student could receive at a given university and eliminated any meaningful choice by the admitted student.[68] Therefore, while the goal of § 568 was pure and procompetitive, the abuse of the exemption by the universities actually eliminated competition and hurt the consumer (in this case, the student) in a substantial manner.[69]

The statistics glean the utter failure of the § 568 exemption. In 1990, Ivy League and Ivy Plus schools all increased their yearly tuition by a significant margin.[70] Harvard, Penn, Brown, Dartmouth, Columbia, Stanford, Princeton, and MIT all increased tuition by approximately five to seven percent.[71] These hikes occurred while the DOJ investigated the collusion at the heart of *United States v. Brown University* that eventually

63. *See generally* H.R. Rep. No. 105-144 at 2-3 (1997).
64. H.R. Rep. No. 114-224 at 3 (2015).
65. *See generally id.* at 6.
66. *See generally* H.R. Rep. No. 114-224 (2015).
67. *Id.*
68. *Id.*
69. *Id.*
70. Alexandra E. Tibbetts, *Tuition, Fees Will Jump Past $20,000*, THE HARV. CRIMSON (Mar. 8, 1990), https://www.thecrimson.com/article/1990/3/8/tuition-fees-will-jump-past-20000/.
71. *Id.*

led to the inception of the § 568 exemption.[72] From 1999 to 2019, the average cost of attendance at nonprofit private universities like the Ivy Plus schools increased from approximately $20,000 to approximately $48,000.[73] Accordingly, the average student loan debt for graduates from private universities averages about $32,000.[74] From 1998 to 2008, the cost of attendance at Princeton (including tuition, room, and board) drastically increased from approximately $29,000 per year to approximately $40,000 per year, while the average bill for a student on financial aid only mildly decreased from about $14,000 per year to about $12,000 per year.[75]

Clearly the framers of the § 568 exemption would not have foreseen that leniency in allowing private universities to use collective metrics to determine need would lead to a massive spike in the cost of attendance, coupled with a massive student-debt crisis. Surely, they anticipated that the universities would save time and energy in calculating need, but they also must have anticipated that this collective information would lead to higher competition to woo promising admittees. They would probably also be shocked to know that as tuition and debts have spiked, so too have the endowments of the same universities that have increased their rates and colluded to minimize financial independence of choice.

V. Just a Drop in the Bucket: Are the Endowments Worth It?

A central concern of Congress when it enacted the § 568 exemption was that if the elite institutions had to compete for students using financial aid, there would not be enough aid for everyone else.[76] Prior to evaluating the efficacy of this concern, a perusal of the size of the university endowments in question is necessary. Of note, elite private university endowments are modestly taxed on investment returns.[77] As a general

72. *Id.*

73. Melanie Hanson, *Average Cost of College by Year*, EDUC. DATA INITIATIVE, https://educationdata.org/average-cost-of-college-by-year (last updated Jan. 9, 2022).

74. Emmie Martin, *Here's How Much More Expensive it is For You To Go To College Than it Was For Your Parents*, CNBC (Nov. 29, 2017, 9:55 AM), https://www.cnbc.com/2017/11/29/how-much-college-tuition-has-increased-from-1988-to-2018.html.

75. Katherine Hobson, *Financial aid: Who wins?*, PRINCETON ALUMNI WKLY. (May 14, 2008), https://paw.princeton.edu/article/financial-aid-who-wins.

76. H.R. Rep. No. 105-144 at 3 (1997).

77. Isabella B. Cho & Eric Yan, *Harvard Says the Endowment Tax is a Blow to Higher Education*, THE HARV. CRIMSON (Sept. 23, 2022), https://www.thecrimson.com/article/2022/9/23/endowment-tax-feature/.

disclaimer, endowments do possess specifically earmarked funds that can only be spent on specific uses. However, the figures cited below refer to the *unrestricted* endowment in 2021.[78]

In 2021, Brown University—the headline defendant in the *Carbone* litigation—had an unrestricted endowment of over $960,000,000.[79] Thirteen elite private universities from Columbia to Yale had endowments over $1,000,000,000.[80] Meanwhile, the University of Pennsylvania's unrestricted endowment surpassed $10,000,000,000.[81] Needless to say, these private universities hold an exceptional amount of money in their endowments. Of note, only one of the universities with an endowment over $1,000,000,000 had more than 5,000 undergraduate students in the 2020 to 2021 academic year.[82]

Given the size of the endowments relative to the number of aided students, the next inquiry is the average grant given to each student. Facially, the amount of aid given appears to be extremely generous. For example, at Penn, the average need-based grant is $54,253 per student.[83] At Brown, the average is $53,276 per student.[84] The amount of aid is similar at the other relevant universities.[85] Once you peel back the layers, however, this grant of aid is not as significant as it first appears. At Penn, the average net price for aided students still surpasses $25,000.[86] At Brown, the price exceeds $27,000.[87] Once again, the net price is similar among the relevant universities.[88]

Given Congress' concern over the competition among these elite schools leading to a lack of aid for other qualified lower-income students, one may wonder whether this concern was well-founded given the relative size of the endowments of the universities that it sought to protect. Of note, if a university like Penn were to allocate an additional two percent of their unrestricted endowment to financial aid, the additional money per aided

78. Declaration of Robert E. Litan regarding Memorandum in Opposition to Motion, Exhibit F Corrected at 2, Carbone v. Brown Univ., 621 F.Supp.3d 878 (2022) (cv-00125), https://568cartel.com/wp-content/uploads/2022/06/Exhibit-F.pdf.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*

student would be over $47,000 per year.[89] Compared to the net price, this would put all aided students at Penn on a full scholarship.[90] At Brown on the other hand, the additional spending would only provide an additional $6,531 per aided student, marking that Brown spends a significant portion of its unrestricted endowment on financial aid.[91] This metric fluctuates significantly among the relevant universities, but it is noteworthy that at ten of those universities, an additional two percent of unrestricted endowment spending on financial aid would result in full scholarships for aided students.[92] As a disclaimer, universities like Harvard and Princeton have used their substantial endowments to pay the full tuition for students below a certain level of income; but with a cost of attendance surpassing $75,000 per year in the 2023 to 2024 academic year, a middle-class family would likely struggle to meet this price without substantial debt or financial aid.[93]

The conservative use of endowments for financial aid amongst the most elite private institutions has drawn the ire of prominent politicians in recent years.[94] While on the campaign trail in 2016, then-Republican nominee for President Donald Trump openly criticized universities for failing to use their tax-free endowments to further assist students in paying tuition.[95] Once he became President, he made his criticism a policy point; and as a part of his signature 2017 tax bill, universities with endowments surpassing $500,000 per student were required to pay a "1.4 percent excise tax on investment returns."[96] However, this was described by *The Harvard Crimson* as a "drop in the bucket" when compared to Harvard's $53,000,000,000.[97] No matter how small the effect may be, the tax bill's passing by a Republican Congress and signing by a Republican President marked a notable foreshadowing of what was to come regarding higher education. Less than five years later, the § 568 exemption was allowed to

89. *Id.*
90. *Id.*
91. *Id.*
92. *See id.*
93. *See* Steven Sorace, *Cost of Ivy League Colleges Climb Over $80k in 2023*, FOXBUSINESS (Mar. 29, 2023, 2:31 PM), https://www.foxbusiness.com/economy/cost-of-ivy-league-colleges-climb-over-80k-2023.
94. *See infra* notes 95-96, 126.
95. Evan Mandery, *What Trump Gets Right About Harvard*, POLITICO (Sep. 27, 2022, 4:30 AM), https://www.politico.com/news/magazine/2022/09/27/trump-elite-colleges-taxes-00058697.
96. Cho & Yan, *supra* note 77.
97. *Id.*

expire, this time by a Democratic Congress, showing that the practices of elite private institutions such as those mentioned above had drawn the disdain of both parties in United States politics.[98]

VI. *Carbone v. Brown University*: The Ivy Towers Are Shaken

On January 9, 2022, a class-action lawsuit was filed in the United States District Court for the Northern District of Illinois against universities that were members of the "568 Group" including Brown University, Dartmouth College, the University of Chicago, Georgetown University, Yale University, and Cornell University.[99] The premise of the litigation was that the universities "participated . . . in a price-fixing cartel that is designed to reduce or eliminate financial aid as a locus of competition, and that in fact has artificially inflated the net price of attendance for students receiving financial aid."[100] The plaintiffs further alleged that "by developing and adopting the [Consensus Methodology], 'the 568 [Group] has intended to reduce or eliminate, and in fact succeeded in reducing or eliminating, price competition among its members.'"[101] The universities jointly and separately filed motions to dismiss, which the court rejected.[102]

In the motions to dismiss, the universities premised the impossibility of liability upon the § 568 exemption, which was still in effect at the onset of the litigation.[103] Much ink was spilled over the proper interpretation of the term need-blind as it pertains to the exemption, with the plaintiffs arguing that the term applies to "any aspect of an applicant's financial circumstances," and the universities arguing that it applies "only to financial information in a student's financial aid application or other proxies for a student's need for financial aid."[104] The court found that the plaintiffs had sufficiently alleged facts to support the allegation that the universities did not "admit *all* students on a need-blind basis."[105] The plaintiffs satisfied their burden by alleging that the universities consider the financial status of an applicant's family in a manner that favors the

98. *See infra* note 126.
99. *See Carbone*, 621 F.Supp.3d 878.
100. *Id.* at 882-83 (quoting Am. Compl. ¶ 1).
101. *Id.* at 883.
102. *Id.*
103. *Id.* at 883.
104. *Id.* at 884.
105. *Id.* at 885.

wealthy in hopes of securing future donations or rewarding past donations.[106] The universities argued that "preferential treatment of children of wealthy donors does not amount to consideration of an applicant's need for financial aid," which the court summarily rejected.[107] Finally, in evaluating the proper review framework to apply, the plaintiffs defined the relevant market as the "Market for Elite, Private Universities" further defined as "the market for undergraduate education at private national universities with an average ranking of 25 or higher in the *U.S. News & World Report* rankings from 2003 through 2021," which the court deemed as adequate.[108]

In analyzing the magnitude of the *Carbone* litigation, even in light of the § 568 exemption's expiration, the significance is found between the lines. To properly evaluate the shortcomings of the exemption and the future of college admissions after its expiration, understanding the mindset of these universities is essential. It is noteworthy that nearly thirty years after the enactment of § 568, the universities were arguing that preferential treatment to wealthy donors in hopes of obtaining a donation did not eliminate protection under § 568.[109] This sheds light on the negative consequences of the exemption that Congress either did not predict or did not care to consider.[110]

At this stage, it is important to recall that the initial justifications for the exemption were premised upon expanding financial access to lower-income students to elite universities.[111] The theory was that "[t]hose very top students would get all of the aid available which would be more than they need. The rest would get less or none at all."[112] Forget the facial absurdity of this justification considering the size of the endowments at the universities in question—the radical disconnect between the intent of the exemption and its abuse in practice is evidenced by these Ivy and Ivy Plus universities' beliefs that the exemption could protect them in considering the financial status of wealthy student, all in hopes of merely securing donations.[113]

This disparity between purpose and practice illuminates the fact that

106. *Id.*
107. *Id.* at 886.
108. *Id.* at 889 (quoting Am. Compl. ¶ 241).
109. *Id.* at 886.
110. *See* H.R. Rep. No. 105-144 (1997).
111. *Id.* at 2-3.
112. *Id.* at 3.
113. *See* H.R. Rep. No. 105-144 at 2-3 (1997).

the exemption likely never worked the way it was supposed to, and that the universities never intended for the exemption to actually expand access to their institutions for lower-income students. Rather, when peering between the ink on the page, the narrative behind § 568 as illuminated in the *Carbone* litigation paints a picture much more bleak than initially presents. If you shape the narrative as follows, the story of § 568 and the admissions process at elite institutions of higher education becomes one of decades of deception at the expense of the talented but less fortunate in our society.

For over thirty years—tracing back to the 1950s—the elite universities in the United States colluded to use common principles to determine financial need and to offer uniform financial aid packages.[114] Then they got busted.[115] Upon discovery of these practices, the only university that did not settle its lawsuit with the DOJ was MIT; MIT instead entered into the consent decree that the § 568 exemption was premised upon.[116] In enacting § 568, Congress allowed the portion of the agreement that permitted the use of common principles but barred the granting of uniform aid packages.[117]

In theory, this sounds like an equitable remedy. However, what Congress and every sector of the antitrust enforcement apparatus failed to recognize was that these universities had been cheating for over three decades. Instead of eliminating any possibility of future cheating, Congress gave the universities an avenue to agree to common principles and failed to ensure that the universities were not still offering uniform packages. But it is clear from the legislative history that it was never the intent of Congress in enacting the exemption to produce a procompetitive environment for the most gifted lower-income students this country has to offer.[118]

Instead, the Congress was more concerned with the elite institutions having to compete with one another using financial aid.[119] The result of this anticompetitive concern was that the universities in fact did not compete because they violated § 568 by continuing to award identical aid packages; but they did so in a manner that actually comported with the

114. *Id.* at 2.
115. *Id.*
116. *Id.*
117. *Id.* at 3.
118. *See id.* at 2-3.
119. *Id.*

justification of § 568 of reducing financial aid competition.[120] By enacting § 568, Congress essentially chose the economic concerns of Ivy League schools ahead of extremely successful lower-income students and the result is evident in the *Carbone* litigation.[121]

A class of plaintiffs filed suit for financial damages and the "568 Group" argued that they should be able to prefer wealthy students under § 568.[122] An exemption premised on eliminating financial aid competition did just that at the expense of the same people that the drafters of § 568 sought to protect.[123] In many ways, it can be reasonably argued that Chief Judge Louis Bechtle of the United States District Court for the Eastern District of Pennsylvania saw through the Ivy Group's justifications with clearer eyes than the Third Circuit, Congress, and the DOJ. If this is so, the result of the Third Circuit's rejection of his reasoning can be directly traced to the expiration of the same exemption to which the rejection gave life.

VII. The Evolving Political Landscape: Bipartisanship in the Era of Populism

There has been much discourse regarding the polarization of the current political scene in the United States. A study by Pew Research Center found that the parties are further "apart ideologically today than at any time in the past 50 years."[124] A trend in antitrust law is emerging that suggests polarization has not yet reached this important economic field, but instead is reversing historic differences between the parties on the subject.[125]

Beginning in the 1970s, antitrust policy was a partisan effort, with the Democratic Party leaning towards aggressive enforcement of antitrust laws and the Republican Party taking a "laissez faire" approach to antitrust enforcement.[126] However, the laissez faire approach is losing its luster to

120. *See generally id.*; *Carbone*, 621 F.Supp.3d 878.
121. *See generally id.*; *Carbone*, 621 F.Supp.3d 878.
122. *See generally Carbone*, 621 F.Supp.3d 878.
123. H.R. Rep. No. 105-144 at 3 (1997).
124. Drew Desilver, *The polarization in today's Congress has roots that go back decades*, PEW RSCH. CTR. (Mar. 10, 2022), https://www.pewresearch.org/fact-tank/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/.
125. *See generally infra* notes 126, 133.
126. Daniel A. Crane, *Antitrust's Unconventional Politics*, CATO INST. (Summer 2018), https://www.cato.org/regulation/summer-2018/antitrusts-unconventional-politics#.

Republicans in the twenty-first century.[127] Former President Donald Trump returned a populist sentiment to the Republican Party, at least rhetorically, that harkened back to a time in which the party was led by trustbusters such as President Theodore Roosevelt.[128] This sentiment permeated throughout the Republican Party, primarily on the topic of "Big Media" and social media.[129] This is a significant break from the commonplace approach to antitrust enforcement in the Republican Party, which had been prevalent since the inception of the "Chicago School" theory of antitrust enforcement that was largely attributed to Robert Bork in the 1970s.[130]

Under the Chicago School theory of antitrust enforcement, the focus was placed completely upon "economic efficiency and consumer welfare."[131] The current shift in antitrust policy to the right symbolizes a return to the pre-Chicago world in which antitrust enforcement focused also upon "economic, social, and political" goals.[132] Rather than being lenient towards emerging monopolies across the board for the sake of cheap consumer goods at the cost of small businesses, the emerging renaissance of antitrust enforcement on the right side of the political spectrum appears to focus on issues touching upon social and political goods.[133] For example, a key issue for those on the right is political censorship on social media.[134] In a review of Senator Josh Hawley's book *The Tyranny of Big Tech*, which is premised upon the intersection of media and antitrust law, the Cato Institute states that "it reads much like books on the political left."[135] This fact would certainly mark a significant shift in policy that has otherwise remained largely stagnant for nearly fifty years.

The question must be asked whether one then-junior senator's book is enough to mark an actual ideological shift in the Republican Party's policy on antitrust enforcement. To answer that question, the expiration of the § 568 exemption provides a gleaning insight. Beginning in 2016 with the

127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id*.
133. *See* Matthew Feeney, *The Tyranny of Big Tech*, CATO J. (Fall 2021), https://www.cato.org/cato-journal/fall-2021/tyranny-big-tech.
134. *Id.*
135. *Id.*

campaign and eventual election of Donald Trump, elite universities fell under the scrutiny of those on the right.[136] In a speech towards the end of the 2016 campaign, Trump's rebuttal to the Democratic Party's policy plank of providing free tuition to public universities was premised upon the greed and mismanagement of tax-free university endowments.[137] He noted that "too many of these universities don't use the money to help with tuition and student debt."[138] Like most prongs of Trump's platform, this too gained popularity and adherence within the Republican Party.[139] This adoption came to a head towards the end of 2022 when Congress allowed the § 568 exemption to expire after almost thirty years of unbroken continuity.[140]

One month prior to the exemption's eventual expiration, two Republican senators—Marco Rubio and Mike Lee—came out in favor of its sunsetting.[141] The two wrote a letter in support of the plaintiffs in the *Carbone* litigation with a particular focus on increasing competition in higher education through increased enforcement of antitrust laws, including a recommendation that the Department of Justice investigate the affected universities for antitrust violations.[142] Roughly two months later, Congress allowed the exemption to expire.[143] While it is important to note that Congress was controlled by the Democratic Party at the time, the fact that the expiration garnered support from high-profile Republicans marks a notable shift in antitrust enforcement policy, especially in the field of higher education.[144]

VIII. Exemption from Nothing: Where Do We Go from Here?

As we move into the world after § 568, predicting what comes next cannot be done without much reference to the pre-568 admissions landscape. As discussed above, § 568 was a result of the consent decree between MIT and the DOJ and stems from accusations of collusion in college admissions. It is critical to note at this juncture that prior to the

136. Mandery, *supra* note 95.
137. *Id.*
138. *Id.*
139. *Id.*
140. Whitford, *supra* note 1.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*

enactment of the § 568 exemption, these arrangements between universities were potentially violations of section 1 of the Sherman Act.[145] The only avenue that the universities had to continue their collusion was the § 568 exemption that expressly permitted the conduct. Thus, in the aftermath of the sunset of § 568, the collusion present at the onset of the exemption will no longer be permissible. Therefore, the analysis is two-fold in forecasting the effects of the exemption's expiration.

The first aspect is a positive formulation of a world in which the universities adhere to the Sherman Act and students are evaluated and offered financial aid on an individual, school-by-school basis with no collusion. Under this formulation, the expiration of § 568 will have remarkably favorable outcomes for students in the admissions process because the students will be evaluated on a need-blind basis by all universities *and* the aid packages offered will be independently determined by the universities. This affords the student a range of options rather than identical aid packages among a group of elite universities. The increased range of options will heighten competition as the considerations for the student will increase, making the size of the aid package imminently important in the student's eventual enrollment decision.

The second aspect is a far more pessimistic formulation. It is premised on the theory that if the universities cheated prior to receiving the exemption, they will continue to cheat despite the exemption's sunsetting. This formulation requires a further estimation at the level of antitrust enforcement moving forward, which may offset the effect of future violations by regularly monitoring the universities' processes and enforcing antitrust violations as they come. If enforcement is in fact heightened to a level that was not present prior to the § 568 exemption, then the outcomes for students will be very positive. However, if the antitrust enforcement apparatus fails to properly monitor and regulate the universities following the expiration of the § 568 exemption, then it is possible, if not likely, that the collusion will continue and students will still face the anticompetitive repercussions of the collusion amongst elite private institutions. Therefore, much of the impact of the expiration of § 568 will be determined by the zeal of the antitrust enforcement apparatus in continuing to monitor the universities and hold them accountable when violations are committed.

The text of § 568 itself did not give rise to the anticompetitive effects

145. *See Brown Univ.*, 805 F.Supp. at 298-99; *see also Brown Univ.*, 5 F.3d at 673.

that ultimately led to its voluntary expiration. Rather, the willful violation of the exemption was the cause of its death. Under § 568, as long as students were admitted on a "need-blind basis," universities could use "common principles of analysis" to calculate the need of students.[146] However, this exemption came with the caveat that the use of "such principles does not restrict financial aid officers at such institutions in their exercising *independent professional judgment* with respect to individual applicants for such financial aid."[147] The text of the exemption is clear in that universities like Harvard and Yale could use "common principles" to determine a student's financial need without committing an antitrust violation.[148]

It is unquestioned that universities in the "§ 568 Group" used these "common principles" in accordance with the exemption. The disputed matter in the *Carbone* litigation is instead that the universities then further colluded—without the protection of the exemption—to offer universal aid packages premised upon the "common principles."[149] Thus, in evaluating the future of college admissions in a world after § 568, one should recall that the exemption itself was not the source of evil remedied by its expiration. Rather, the anticompetitive roots are the same as those present in 1993 when the exemption was created. The focus of the positive world after § 568 then must be grounded in a theory of heightened monitoring and enforcement by the antitrust enforcement apparatus.

As discussed above, there is increasing indication that there is a rise in vigorous bipartisan antitrust enforcement.[150] This shift in policy on both sides of the aisle paints a rosy picture for the future of college admissions following the expiration of § 568. While detractors and skeptics will argue that the increased bipartisan rhetoric on the topic of antitrust enforcement is just that, the root causes of the shift make the possibility of enforcement appear much more like a reality than a rhetorical fugazi. Both parties find their roots in modern, heightened antitrust enforcement to be grounded in sentiments of populism—whether on the censorship of Big Tech advanced by Senator Hawley, or the several loopholes detailed by Senator Klobuchar that allow corporations to be impervious to antitrust enforcement.

146. Improving America's Schools Act of 1994, Pub. L. 103-382, § 568(a)(1)-(2).
147. *Id.* at §568(a)(2) (emphasis added).
148. *Id.*
149. *Carbone*, 621 F.Supp.3d at 883.
150. Cho & Yan, *supra* note 77.

From a rhetorical standpoint, the criticism of higher education is present on both sides of the aisle. This is true of Senator Bernie Sanders' criticisms of the cost of higher education, but also Governor Ron DeSantis' criticism of the ideological disparities present in university faculties.[151] Criticism of higher education has also reached the judiciary, where at least two federal judges have boycotted hiring clerks from Ivy or Ivy-adjacent law schools due to free speech concerns.[152] Therefore, the world after § 568's sunsetting is a much different place than when it existed because both parties at the very least appear open to more stringent regulation and enforcement of antitrust laws. Both parties and the bench criticize the current environment of higher education. This is supported by the fact that high-profile politicians on both sides of the aisle give their support to the sunsetting of the exemption, as well as the recent tax on the wealthiest of endowments by a Republican Congress.[153] The current ecosystem is ripe for the proper enforcement of antitrust laws as it pertains to college admissions in a way that has possibly never been present. Higher education is very much on the radar of both parties and in an era of heightened polarization. It appears that both Democrats and Republicans are unified in their dissatisfaction with the current state of higher education and a joint desire to at least explore more stringent antitrust enforcement.

In determining the future of college admissions after the expiration of § 568, it is necessary to examine the political climate to predict whether the universities will be forced to change course. Fortunately for students, the expiration of § 568 comes at a time of heightened scrutiny of higher education and a bipartisan sentiment in favor of antitrust enforcement. With universities under the microscope like never before, it is unlikely that they will be able to fly under the radar in the same way they were in the twentieth century. Even as the universities in the twenty-first century colluded together under the guise of § 568, a critical firewall has been eliminated.

151. Greg Allen, *Gov. DeSantis Targets 'trendy ideologies' at Florida universities*, NPR (Jan. 13, 2023, 4:04 PM), https://www.npr.org/2023/01/13/1149135780/gov-desantis-targets-trendy-ideology-at-florida-universities; Shawn M. Carter, *Bernie Sanders: One thing needs to change in order to make America 'great'*, CNBC MAKE IT (Oct. 10, 2017, 9:39 AM), https://www.cnbc.com/2017/10/10/bernie-sanders-we-need-to-make-college-free-to-make-america-great.html.

152. Madison Alder, *Stanford Law Added to Clerk Hire Boycott by US Judges Ho, Branch*, BLOOMBERG L. (Apr. 2, 2023, 6:19 PM), https://news.bloomberglaw.com/us-law-week/stanford-law-added-to-clerk-hire-boycott-by-us-judges-ho-branch.

153. Cho & Yan, *supra* note 77.

The mere possibility of collusion in the financial aid package process appears to be a legal impossibility now that it is once again an antitrust violation for two or more universities to use common principles to determine need. For example, if Dartmouth and Rice are not permitted to share a common process to determine a student's need, then it is likely that the two universities would come to a different calculation independently. When the universities decide to accept a student, the student's need will be calculated using different methods and principles, and the final financial-aid package offer should not be uniform among the universities. The § 568 exemption created sufficient opportunity and coverage for the universities to both use common principles to determine need *and* to collude in the final aid package.[154] Without the ability for universities to coordinate with each other on common principles, the coverage and opportunity to collude in a final package offer is eliminated.

Further, with the heightened scrutiny on higher education and bipartisan sentiment in favor of more stringent antitrust enforcement, it is increasingly likely that any possible attempt to agree to common principles will be investigated and face swift enforcement. As a result, an applicant's determined need may vary due to institutions using different criteria. The final aid packages offered will provide the student with more options and will allow the student to further negotiate with universities by using another institution's offer as leverage.

The major shift will come as a result of students being able to weigh financial considerations, not just consideration of campus life and prestige as has been the case for over seventy years.[155] This change is clearly procompetitive and beneficial to the consumer, as the purchaser of higher education will be left with more options. The absence of collusion among universities will lead to more competitive tuition and offers of aid that will lead to a more affordable college education. The advocacy of Republican senators Mike Lee and Marco Rubio for the DOJ to increase oversight on this issue signals that procompetitive promises of the exemption's expiration will not be empty.[156]

The more pessimistic point of view is premised on the fact that these elite universities have effectively been violating the Sherman Act since the 1950s and have only been caught a handful of times. And there is no reason to believe that it will be any different this time. This view has the most

154. *See Carbone*, 621 F.Supp.3d at 893-94.
155. *See Brown Univ.*, 805 F.Supp. 288; *see also Brown Univ.*, 5 F.3d 658.
156. Whitford, *supra* note 1.

compelling form of merit—history. Detractors from the optimistic view of the expiration of § 568 will point to polarization in our political system that will not allow a consensus of politicians to support stronger enforcement of antitrust laws against elite universities. This criticism finds support in the different topics the political parties' respective antitrust "champions" focus upon. For the Democrats, Senator Amy Klobuchar appears to be focused on "mega-mergers," while Republican Senator Josh Hawley appears to be focused on the "censorship" of conservative voices in Big Tech.[157] And while universities are certainly angering America's most prominent voices, the connection between that anger and antitrust regulation to resolve it is notably lacking—even with the expiration of § 568 aside.

It is entirely plausible that leaders in both major parties are frustrated with higher education and that that those leaders want to strengthen antitrust enforcement, but the chain between those two desires is wholly unconnected. Antitrust enforcement in sectors such as major mergers or Big Tech would require so much human power that the elite private institutions could once again fly under the radar. If they were able to do so, they could violate the Sherman Act for another thirty years until the next lawsuit forces an apology. The last time that the universities were caught with their hands in the cookie jar, Congress said that competition amongst the schools was *bad* and granted them an exemption of the Sherman Act that they willfully violated for thirty years.[158] Since the *Carbone* litigation is still pending at the time of this Note, it is possible that it will spur yet another exemption to replace the expired § 568.

While the pessimistic analysis of the expiration of § 568 certainly has the benefit of history, it is forced to reconcile with the evolved times that we live in, both in in politics and in antitrust policy. Since the inception of § 568, the evolution of the United States' antitrust law has faced markedly less polarization; however, it can hardly be said that populism played as prominent of a role as it does today.

The nation's immigration policy when § 568 was enacted, as highlighted by the 1990 Immigration Act, favored immigration by welcoming 700,000 immigrants to the country—a far cry from

157. *Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement*, U.S. SEN. KLOBUCHAR (Feb. 4, 2021), https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement.

158. H.R. Rep. No. 105-144 at 2-3 (1997).

campaigning on building a border wall and disparaging immigrants.[159] The North American Free Trade Agreement of 1994 eliminated tariffs and opened trade with Mexico and Canada.[160] President Bill Clinton took a cue from his predecessor Ronald Reagan in his 1996 State of the Union Address, stating that "[t]he era of big government is over."[161] The Chicago School of antitrust enforcement began to take shape on the federal bench with Justice Antonin Scalia's splintering dissents, and Judge Richard Posner lecturing on law and economics.[162] It wasn't until the 1980s that the Ivy League schools began aggressively investing their endowments, leading to the gargantuan figures that we see today.[163] Needless to say, the world has changed significantly since § 568's enactment thirty years ago.

While the political climate and antitrust theory has shifted, so too has the plethora of information available to prospective students and applicants. In the 1990s, it was possible that a student would not know the financial aid offer received by their roommate until the two were already on campus. With the expansion of the internet and methods of communication, the access to information by prospective students creates a dynamic that did not exist at the time of the § 568 exemption's enactment.

For example, students applying to Yale, Harvard, Brown, Cornell, and Rice in 1993 were limited to phone calls, in-person meetings during a campus visit, or letter correspondence to discuss aid packages that they had been offered. In 2023, through social media platforms such as X (formerly known as Twitter) and Reddit, prospective students can join message boards that are solely dedicated to discussing the acceptance or rejection to a university and financial aid awards.[164] On these message boards, prospective students can place information such as their race, ethnicity, test scores, high school GPAs, and extra-curricular activities and

159. *Historical Overview of Immigration Policy*, CTR. FOR IMMIGR. STUD. https://cis.org/Historical-Overview-Immigration-Policy (last visited Oct. 6, 2023).

160. *North American Free Trade Agreement (NAFTA)*, U.S. TRADE REP., https://ustr.gov/about-us/policy-offices/press-office/ustr-archives/north-american-free-trade-agreement-nafta (last visited Oct. 6, 2023).

161. President William Jefferson Clinton, State of the Union Address (Jan. 23, 1996), https://clintonwhitehouse4.archives.gov/WH/New/other/sotu.html.

162. *Richard Posner, Distinguished Fellow 2018*, AM. ECOM. ASS'N, https://www.aeaweb.org/about-aea/honors-awards/distinguished-fellows/richard-posner (last visited Oct. 6, 2023).

163. *Carbone*, 621 F.Supp.3d 878.

164. *E.g.*, r/CollegeAdmissions, REDDIT, www.reddit.com/r/CollegeAdmissions (last visited Oct. 6, 2023).

whether they were accepted, denied, or waitlisted.[165] They can then disclose the financial aid package offered by each university.[166] These spaces allow for communication among prospective students at a level that was not present at the time of the exemption's enactment, nor during the collusive period prior to the enactment.

The development of communication technology supports a positive view of the § 568 exemption's expiration in both a direct consumer empowerment context and in a regulatory context. First, if an applicant for financial aid can compare their credentials and financial aid offers with other applicants, they can then use these comparative figures as leverage in negotiating for higher financial aid awards. A counter to the efficacy of this argument will be that some applicants will lie, resulting in these figures not being reliable for negotiating purposes. However, these platforms allow for direct messaging so that if an applicant sees that another student with similar or lesser credentials has purported to receive a more generous aid package from a shared school, then the applicant can message the posting person to receive more information and confirm the validity of the post. From a regulatory perspective, the ability for students who have applied for financial aid to post their financial aid award offers on a common platform will centralize knowledge of uniform offers from similar schools in a way that was not present thirty years ago.

For example, if a student obtained acceptance to Yale, Penn, Dartmouth, and Chicago, and all four schools offered identical financial aid award packages, the student could then post these awards on a content-specific message board. The student could then end their post with a statement asking other members of the message board about their own financial aid packages and other similarly situated students will likely reply stating their shared experience. This will allow students to share information with one another and possibly bring their uniform packages to the attention of the regulatory authorities. Thus, the universities will be unable to fly under the radar like they were thirty years ago because of the increased capacity of prospective students to share information with one another. Further, the consumer will benefit from a negotiation standpoint in a way that was unavailable at the time that the § 568 exemption was enacted.

The world has evolved dramatically since the 1950s when the Ivy Overlap Group began their collusion, and as it pertains to higher education,

165. *Id.*
166. *Id.*

much has changed since 1993 when the § 568 exemption was enacted. Tuition is higher, student loan debt is more prevalent, large endowments are taxed, and the most powerful exemption in the financial aid process has expired. Politically, the era of big government has returned because of the terrorist attacks of September 11, the Great Recession in 2009, and the Coronavirus Pandemic in 2020. Antitrust policy has progressed with the arrival of Big Tech and emerging monopolies in both technology and shipping services.

Communication has evolved with the expansion of the internet and the establishment of social media. To believe that the Ivy Plus schools' blatant disregard of the Sherman Act will continue to be tolerated would require one to ignore the last thirty years of evolution that our society has undergone. Further, it is incongruent with what history has actually taught us. The average person in 1849 would have thought the concept of the lightbulb to be crazy. The average person in 1878 would not have dreamed of the complexity of Ford's Model T. Similarly, the average person in 1987 would have disregarded the innovation of the iPhone as one of mere science fiction. History has taught us that as technology evolves, so too does our society and politics. The field of antitrust law embodies this evolution more than any other field of law we know. The field has been responsive throughout history, creating standards of review from text that would lend no indication of such interpretations. The world has changed, including its view of higher education and the admissions process. Since its inception in the United States, the field of antitrust law will continue to evolve with it.

IX. Conclusion

In 1993, college admissions among elite private institutions changed, endorsing much of an anticompetitive program that had been in place since the mid-twentieth century. In September of 2022, Congress decided that its endorsement was wrongly founded and allowed the § 568 exemption to reach its natural end. The sunset of the exemption was a response to a society that had evolved dramatically since the exemption's inception. Higher education, politics, antitrust policy, and communication are drastically different than they were thirty years ago. These shifts allowed for the exemption's death, and they will give birth to a new era of competition in the field of college admissions that will benefit students, parents, and consumers. These changes will help to rectify an issue that is

at the forefront of our current societal conscious.