Inquiring Minds
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"The Best Ways to Fix College Admissions Are Probably Illegal" *The Atlantic,* Apr 27, 2018

Cooperation among selective schools would make students' lives easier. It would also likely run afoul of federal antitrust law.
Year after year, the admissions process at selective colleges seems to make high-schoolers and their parents only more anxious. The numbers are wild: Harvard admitted just 4.6 percent of its nearly 43,000 applicants for the class that begins this fall. Stanford accepted only 4.29 percent, and Princeton 5.5 percent. Although selective schools—those that accept fewer than half of applicants—enroll only about one-fifth of U.S. undergraduates, they account for more than one-third of applications each year.

Plenty of ideas to fix the system—to make it more bearable for students, parents, and even colleges themselves—have been floated in recent years, including restructuring the whole process to be a somewhat randomized lottery, or implementing a matching system akin to how medical-school graduates are placed in residencies. They are promising, but they have something problematic in common: In all likelihood, they'd be illegal.

That's because, like nearly every other American company and organization, colleges and universities are subject to antitrust law, meaning they are bound to compete with one another in a way the government deems fair. Such antitrust provisions are vital—they are what stop, say, automakers from raising the price of cars in unison—but in the case of higher education, it might turn out that antitrust law stands in the way of making college admissions, as well as the linked and similarly fraught process for divvying out financial aid, fairer and less harrowing for all involved.

Take, for example, the idea of a national clearinghouse or a matching system, similar to the one for medical-residency programs. With a national clearinghouse, students could upload their academic records and accomplishments during their high-school career and then in their senior year simply press a button to apply to colleges. The database would be open to admissions officers at all colleges, so they could see where else students are applying, bringing a level of openness to the process. Under a matching system, students and colleges would each submit rank-order lists of each other and be paired as closely as possible.

Those who follow admissions closely tend to think that such a system would ease the pressures on students, parents, and schools. But, alas, antitrust law prohibits it—it would produce a level of cooperation that the federal government would likely find unacceptable. (The medical-residency match program is legal because Congress granted it an antitrust exemption about 15 years ago.)

Other promising college-admissions fixes that have been proposed run up against some of the same problems. One feature of the shared application designed by an advocacy group called the Coalition for Access, Affordability, and Success is a virtual "locker," which is already being tested by more than 130 prestigious schools. It allows students as early as ninth grade to upload their written work, videos, photos, and other materials that show off their potential beyond a transcript. At first, only students can access the locker, but over time they can open it to their parents, counselors, and to colleges through the admissions process. While the virtual locker doesn't have the transparency of a clearinghouse, it too might raise antitrust concerns one day, depending on how colleges want to share access with each other.

Another idea that has been floated is to have admissions to selective colleges determined by a lottery. The names of qualified students would be picked at random until a class is filled. "A strict lottery system for academically qualified applicants would be the most equitable, least costly, and most publicly explainable method of dealing with the ever-growing demand for scarce seats at our most selective institutions," said Barmak Nassirian, the director of federal relations for the American Association of State Colleges and Universities. A lottery system would also, in all likelihood, not pass muster with the Department of Justice, which enforces antitrust law, because depending on how it was administered, it likely would require colleges to share information about applicants with each other.

Another option: Put a limit on the number of colleges to which students can apply. The proportion of college freshmen who applied to seven or more colleges reached 35 percent in 2016, up from 18 percent a decade ago, and from just 9 percent in 1990. Some eight in 10 freshmen in 2016 applied to at least three colleges. "If you limited it to, say, five, everyone would get fewer applicants," said Catharine Bond Hill, the former president of Vassar College who now heads the nonprofit research group Ithaka S+R. This is a solution that might not be banned by antitrust provisions, as it might be able to be implemented through, say, the Common Application, rather than through the direct cooperation of colleges.

Even changes that work within the current admissions and financial-aid systems—rather than remaking them entirely—would likely run afoul of federal laws. College leaders, for instance, find themselves in a tricky position when it comes to "merit aid" scholarships that some schools give out. For instance, Grinnell College, a selective liberal-arts school in Iowa, uses merit aid as a tool for recruiting students who might otherwise turn them down—in practice, the scholarships are small discounts for wealthier students who end up paying less than full tuition.

But these scholarships serve another purpose, too: Grinnell, like other selective colleges, is trying to increase the number of low-income students on campus. This year, the college estimates 26 percent of its incoming class will be eligible for Pell Grants, which mostly go to students from families making less than $40,000 annually. But Pell Grants don't come close to covering the cost of tuition, so to make up some of the difference, Grinnell sets aside 10 percent of its financial-aid budget for merit aid to lure students who can afford to pay a lot more.

Many of Grinnell's higher-ranked competitors have sworn off such merit aid—on the grounds that it helps families who can already afford college—but schools right below Grinnell in the rankings offer such discounts. So Grinnell officials maintain that if they abandoned merit aid, they would also likely give up the tuition dollars of those students who would follow the money and attend lower-ranked colleges that offer discounts.

"The way to end this arms race is for institutions to spend less on merit-based aid and amenities and use that money on need-based aid," said Hill, the former Vassar president. If such an approach were widely embraced, Hill believes it could result in greater economic diversity on campuses: There'd be more money to devote to low-income students. And affluent students wouldn't be as tempted by money in making their college choice.

But Grinnell and other institutions that use merit aid as bait for affluent students would only stop if they knew their competitors would too. And that would require them to cooperate in ways prohibited by antitrust laws. "One effect of antitrust laws is that colleges in a weaker market position pursue strategies to generate revenue but that ultimately drive up prices across the board," said Joseph Bagnoli Jr., the vice president for enrollment and dean of admission and financial aid at Grinnell College in Iowa. Those "strategies" he's referring to are things like merit aid, or spending on amenities that competitors have on their campus, such as new dormitories and recreation centers. These amenities tend to siphon away money that could theoretically be put toward financial aid instead.
There is, as well, a subtler, more philosophical argument for exempting colleges from antitrust law. "If universities are getting federal funds, they shouldn't be allowed to shroud in secrecy the process for determining who gets admitted," said Jon Boeckenstedt, the associate vice president for enrollment management and marketing at DePaul University, in Chicago.

Antitrust law exists to protect consumers—in the case of higher education, it's what prevents colleges from colluding on setting tuition costs. But, beyond Major League Baseball, few entities in the United States operate with the kind of freedoms from antitrust laws that higher education would need to truly reform the admissions and financial-aid process.

Recently, the association in Washington, D.C., that represents private colleges requested a five-year exemption from antitrust laws for its member schools. Its reasoning goes that if schools were allowed to cooperate, they could build new tuition pricing models together. They could also share information on applicants they have in common and the financial-aid packages they're offering them, which might end, or at least slow, the arms race of trying to provide more money than a competitor to every student regardless of need. A sense of reasonableness might return to the admissions process and at the same time slow the rapid rise of college tuition.

The Justice Department does not appear interested in granting this request. Instead, the department has for years been bringing more scrutiny to colleges' practices,

rather than becoming more permissive. *Inside Higher Ed* reported earlier this month on a federal investigation of colleges—this one related to the practices of early-decision admissions—and it was the latest of several. The Justice Department in 2017 launched an inquiry into alleged discrimination against high-achieving Asian American college applicants, as well as an antitrust probe of the ethics code of the trade association that represents high-school counselors and college-admissions deans.

An earlier incident, in 2013, presaged this. In January of that year, presidents of several hundred small, private colleges gathered for the Council of Independent Colleges annual winter meeting in Palm Harbor, Florida. Among the sessions was one on how schools should end bidding wars for students and curtail the use of generous merit-aid packages.

The discussion caught the attention of the U.S. Justice Department. Five months later, lawyers for the department wrote a letter to a handful of college presidents who were at the meeting, warning them that agreements to "restrict tuition discounting" might violate antitrust laws and instructed them to preserve information related to the session. (That investigation is now closed.)

The inquiry that was first reported on this month pertains to early decision, an arrangement under which applicants commit to attending a school if accepted and agree not to apply via regular decision elsewhere. The percentage of the incoming class accepted through early decision at selective colleges has risen rapidly in the last decade now accounts for about half the class on some campuses.

Colleges are leaning more on early decision for two reasons. One, as more students apply, colleges have a difficult time predicting how many of them will actually show up. Early decision reduces that uncertainty. Second, students who apply early decision clearly want to enroll, and they often come from higher-income families. As a result, they demand less financial assistance, and that gives colleges the financial security to spend a bit more freely on the much larger pool of applicants in the regular-admissions round.

Some schools share information like this because they want to make certain their early admits are not in admissions pools elsewhere. The Justice Department, as part of its latest inquiry, wants to know if schools make admissions decisions based on what other schools have done with an applicant.

Colleges and universities have been at this crisis point before. Until the 1990s, the Ivy League colleges and the Massachusetts Institute of Technology set financial-aid awards jointly, so students could choose colleges based on factors other than cost. The practice, however, ended after the Justice Department accused the participating schools of price-fixing. College admissions have changed drastically in the intervening years, but the department's thinking on the subject has—probably for the worse—remained the same.

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