Pace Law Review

Volume 29
Issue 3 *Spring 2009*
Recent Developments in New York Law

Article 9

April 2009

Monopoly Pricing on Campus: New York's Textbook Access Act

Gary Minda

Recommended Citation
Gary Minda, *Monopoly Pricing on Campus: New York's Textbook Access Act*, 29 Pace L. Rev. 523 (2009)
DOI: https://doi.org/10.58948/2331-3528.1061
Available at: https://digitalcommons.pace.edu/plr/vol29/iss3/9

Monopoly Pricing on Campus: New York's Textbook Access Act

Gary Minda*

One of my fondest memories from my days as a student at Michigan State University was the "sit in" at the university bookstore led by my economics professor, the late Walter Adams.[1] Professor Adams was without a doubt one of the most popular teachers in the university's economics department, and he was well known outside the university for speaking out against the dangers of monopolies in the American economy as an expert witness in Congress.[2] He was gritty and not afraid to express his views. As president of the university, he was supportive of the right of students to protest injustices on campus. Professor Adams taught Economics 444, a senior-level class on

---

* Professor of Law, Brooklyn Law School. This essay was supported by a summer research stipend from Brooklyn Law School.

1. Walter Adams was the Distinguished University Professor of Economics and past president of Michigan State University from 1947 until his retirement in 1992. He then joined Trinity University's Department of Economics and taught economics as the Vernon F. Taylor Distinguished Professor of Economics until his death on September 8, 1998. He was born in Vienna, Austria in 1922 and moved with his family to Brooklyn, New York in 1935. He earned his B.A. in economics from Brooklyn College in 1942 and then joined the United States Army in 1943, where he served with distinction in the 83rd Infantry and 11th Armored divisions—landing in Normandy on D-Day, fighting in the Battle of Bulge, and helping to liberate three concentration camps. He earned a battlefield commission as a second lieutenant and was awarded the Bronze Star for heroic conduct. After WWII, he completed his graduate studies in economics and earned his M.A. and Ph.D. degrees at Yale University in 1946 and 1947, respectively. For many years at Michigan State, Professor Adams taught a senior-level class (known in the course catalog as Economics 444) on American enterprise and public policy. It was widely reputed to be one of the most difficult but rewarding courses available at Michigan State. Robert Bao, *Walter Adams, 1922-98*, MSU ALUMNI MAGAZINE, Nov. 25 2006, *available at* www.msu.edu/unit/msuaa/magazine/w99/adams.htm. It was Professor Adams and Economics 444 that inspired my desire to be a teacher.

2. One former Economics 444 student wrote that "[s]tudents who signed up for Econ 444 knew that they were going for the educational adventure of their lives." Jim Brock, *An Insider's View of Economics 444*, MSU ALUMNI MAGAZINE, Nov. 25 2006, *available at* https://www.msu.edu/unit/msuaa/magazine/w99/adams.htm. Professor Adams frequently traveled to Washington, D.C., where he served as an expert witness at Congressional budget hearings. Bao, *supra* note 1.

American enterprise and public policy. I was fortunate enough to take this class, and it turned out to be one of the most memorable educational experiences of my life. It was during class that Professor Adams encouraged us to protest the monopoly prices we had to pay for our textbooks by joining him in a sit-in at the university bookstore.

Textbooks were then, as they are today, a significant barrier to accessing upper level education.[3] The average college student now pays nearly one thousand dollars per year on course materials and books, a sum that is eclipsed by law students who pay, on average, two hundred dollars for a single casebook for their law classes.[4] Textbook publishers can raise their book prices without fear of losing sales to competition because they have monopoly power.[5] As economists explain, text-

---

3. Margaret Webb Pressler, *Textbook Prices on the Rise*, WASH. POST, Sept. 18, 2004, at E01, *available at* http://www.washingtonpost.com/wp-dyn/articles/A30151-2004Sep17.html ("The National Association of College Bookstores says wholesale prices of college textbooks have risen nearly 40 percent in the past five years.").

4. Press Release, N.Y. State Consumer Prot. Bd., New York State Consumer Protection Board Partners with Barnes and Noble College Booksellers to Raise Awareness about Lower Textbook Cost Options for Students (Nov. 12, 2008), *available at* http://www.consumer.state.ny.us/pressreleases/2008/nov122008.htm ("In 2007-08, students paid an average of $988 for books and supplies, an amount equivalent to 23% of senior college tuition at SUNY, 25% at CUNY or 28% of average community college tuition and fees in New York State, according to an April 2008 report entitled Sticker Shock 101, issued by the New York Public Interest Research Group (NYPIRG). Over the past two decades, college textbook prices have increased at twice the rate of inflation, according to a U.S. Government Accountability Office (GAO) report issued in 2005. The report also stated that textbook prices nearly tripled increasing at an average rate of 6% per year from December 1986 to December 2004."). *See also* COLL. BD., TRENDS IN COLLEGE PRICING 9 (2007), *available at* http://www.collegeboard.com/prod_downloads/about/news_info/trends/trends_pricing_07.pdf (charting "variation in tuition fee increases" between public and private institutions from 2007-2008).

5. Pressler, *supra* note 3 ("The $3.4 billion-a-year higher-education publishing industry says . . . that [textbook] prices are competitive in each market."). *See also* National Association of College Stores, Where the New Textbook Dollar Goes, http://www.nacs.org/common/research/textbook$.pdf (last visited Apr. 20, 2009) (reporting the average college textbook cost allocation as 23.7% college bookstore cost, 11.7% author royalty, and 64.6% publisher's revenue and cost). The industry is a classic oligopoly with five firms—Pearson, Cengage Learning, Thompson, Houghton Mifflin, and McGraw-Hill—controlling 80% of the supply. *See* JAMES V. KOCH, AN ECONOMIC ANALYSIS OF TEXTBOOK PRICING AND TEXTBOOK MARKETS 6 (2006), *available at* http://www.ed.gov/about/bdscomm/list/acsfa/kochreport.pdf. Furthermore, high startup costs keep new companies from entering the market and challenging the oligopoly. *Id.*

book publishers are in the same position as drug makers; they offer unique products protected by intellectual property rights (patent, copyright, and trademark protection) and benefit from the moral hazard of having doctors or professors require the drug or the book without regard to the cost ultimately paid by the consumer.[6] The person who buys the product does not get to choose it, and hence the price of the product is something that becomes merely what one needs to pay if he or she wants either medical treatment or an education.

In protest of what he understood as monopoly pricing, Professor Adams encouraged his economics class to join him in a day of protest by sitting-in at the university bookstore. Professor Adams put his economic ideas into action and encouraged his class to do the same. His personal initiative was reflected in his writing and teaching that advocated taking "positive action" to halt monopoly pricing in our society.[7] Taking his class to the bookstore that day to protest intolerable textbook prices was perhaps motivated by these ideals and presented a real lesson

---

6. Noam Cohen, *Don't Buy That Textbook, Download it Free*, N.Y. TIMES, Sept. 14, 2008, at C3, *available at* http://www.nytimes.com/2008/09/15/technology/15link.html. Professor Koch explains that the college textbook market does not operate according to the same economic principles as a normal consumer market. KOCH, *supra* note 5, at 2. First, the end consumers (students) do not select the product, and the people choosing the product (faculty) do not purchase the product. *Id.* Therefore, price is removed from the purchasing decision, giving the producers (publishers) disproportionate market power to set prices high. *See id.* This fundamental flaw in the market is blamed as the primary reason that prices are out of control. *See id.* Congressman David Wu, in addressing the Advisory Committee on Financial Assistance, used the term "broken market" to explain this phenomenon. ADVISORY COMM. ON STUDENT FIN. ASSISTANCE, U.S. DEP'T OF EDUC., SUMMARY OF THE ADVISORY COMM.'S HEARING ON NEXT STEPS IN IMPROVING COLLEGE ACCESS AND PERSISTENCE 6 (2006), *available at* http://www.scribd.com/doc/1232010/-description-tags-sept06hringsum. The more common name for this phenomenon is "moral hazard." *See* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 53-55 (3d ed. 2003). The concept of moral hazard is based on the way insurance can change the way people respond to risk, including taking more risks. *Id.* at 53. Hence an insurance policy that completely eliminates a risk might have the undesirable side effect of causing people to be less careful and thus expose themselves to more risk. *Id.* at 54.

7. WALTER ADAMS, *Public Policy in a Free Enterprise Economy*, *in* THE STRUCTURE OF AMERICAN INDUSTRY 482, 513 (5th ed. 1977) ("A hard look at the choice before us is indicated because, in the absence of positive action, we can expect little but aimless drifting and a gradual erosion of our traditional values [caused by monopoly pricing]."). I continue to encourage my antitrust law students to read this essay as an introduction to the reality of monopoly pricing in the American economy.

in the importance of understanding both theory and practice. The sit-in at the bookstore taught me that the dangers of monopoly pricing were more than just an abstraction of economics and that the solution to such dangers may require direct action by consumers.[8]

This year, the New York State legislature passed the Textbook Access Act ("Act"),[9] which purports to finally do something about monopoly prices in the textbook industry.[10] In the preamble, the Act declares that "[i]t is the policy of the state that any institution of higher education receiving money from the state shall work to identify ways to reduce student expenditures on course materials, thereby making college more affordable."[11] The Act requires textbook publishers to disclose wholesale prices to faculty in state supported universities.[12] The Act also allows a faculty member to order a textbook without the supplementary materials normally "bundled" with the hard copy text.[13]

In this short essay, I will explain what this Act purports to do and how it fails to end monopoly pricing of textbooks. I will also offer some ideas that college administrators and teachers might consider in order to become more proactive in addressing the problem of textbook pricing. Drawing from the story of the sit-in at the Michigan State University bookstore and the recommendations of the New York Public Interest Research Group's ("NYPIRG") recent report on textbook prices,[14] I will suggest some direct action strategies for countering the monopoly chokehold that textbook publishers now maintain. I will also suggest what a more effective Textbook Access Act should require. The Act is unlikely to solve the monopoly pricing on

8. *See id.*

9. Ch. 433, 2008 N.Y. Laws 433 (codified as amended at N.Y. EDUC. LAW §§ 720-724 (McKinney Supp. 2009) (effective July 1, 2009)).

10. *See id.*

11. *Id.* § 1.

12. N.Y. EDUC. LAW. § 721(1).

13. *Id.* § 722. *See also id.* § 720(1) ("'Bundled' means a textbook and any other learning material, including, but not limited to, workbooks, online technologies, dictionaries, CD-ROMS, or books, packaged together to be sold for one price.").

14. *See* N.Y. PUB. INTEREST RESEARCH GROUP, STICKER-SHOCK 101: FACULTY OPINIONS ABOUT TEXTBOOK PRICES, PUBLISHERS' TACTICS, AND EFFORTS TO REIN IN TEXTBOOK PRICES (2008), *available at* http://www.nypirg.org/higher_ed/StickerShock101.pdf.

New York campuses, but it does offer the first step toward the development of affordable textbook prices.

I. New York's Textbook Access Act

New York Governor David A. Paterson signed the Textbook Access Act into law on the last day of the legislative session in 2008, and it will take effect on July 1, 2009.[15] The Act is very similar to Section 112 of the federal Higher Education Opportunity Act,[16] which was signed into law on August 14, 2008.[17] The stated intent of the Act is "to help ensure students are receiving fair value for the course materials they purchase. Therefore, the purpose of this act is to promote open and transparent marketing choice, pricing and purchasing of course materials."[18]

Specifically, the Act requires publishers to sell textbooks and related materials "in the same manner as ordered by such faculty,"[19] thus allowing faculty to order "unbundled" texts to ensure "pricing transparency."[20] The Act further encourages faculty members to make their textbook selections early so both the school's bookstore and students have more time to find less

---

15. *See* ch. 433, 2008 N.Y. Laws 433.

16. Pub. L. No. 110-315, § 112, 122 Stat. 3078, 3107-10 (2008) (codified as amended at 20 U.S.C. § 1015b). "The purpose of this section is to ensure that students have access to affordable course materials by decreasing costs to students and enhancing transparency and disclosure with respect to the selection, purchase, sale, and use of course materials." *Id.*

17. *See id.* § 1125, 122 Stat. at 3508.

18. Ch. 433, § 1, 2008 N.Y. Laws 433.

19. N.Y. EDUC. LAW § 722 (McKinney Supp. 2009) (effective July 1, 2009) ("Textbooks shall be sold in the same manner as ordered by such faculty member or entity in charge of selecting textbooks for courses. In the event such product is unavailable as ordered, the bookstore, faculty, and relevant publisher shall work together to provide the best possible substitute that most closely matches the requested item or items, and the publisher shall make available the price of such substitute or substitutes readily available.").

20. *Id.* § 721 ("To ensure pricing transparency, all publishers of college textbooks shall, on request, make readily available to prospective adopters of their products who are members of the faculties or purchasing entities of institutions of higher education the price at which the publisher would make the products available to the college bookstore that would offer the products to students."). The Act thus intends to end the practice of "textbook bundling" (selling printed materials together with electronic or other media without choice) by mandating that publishers' pricing structures of course material be transparent for each product. *See id.* §§ 720, 721.

expensive used books in the aftermarket.[21] It also prohibits any "employee at an institution of higher education [from] demand[ing] or receiv[ing] any payment, loan, advance, goods, or deposit of money, present or promised, for adopting specific course materials required for coursework or instruction . . . ."[22] The Act does exempt, however, publisher distribution of "sample copies, instructor's copies, or instructional materials, that are not to be sold."[23] In addition, the Act exempts "royalties or other compensation from sales of textbooks that include such instructor's own writing or work; . . . honoraria for academic peer review of course materials; or . . . training in the use of course materials and learning technologies."[24]

The Act states that it is the "policy of the state that any institution of higher education . . . shall work to identify ways to reduce student expenditures on course materials, thereby making college more affordable."[25] However, the Act only applies to "any institution of higher education receiving money from the state . . . ."[26] It defines such institutions as those "recognized and approved by the regents of the university of the state of New York, which provides a course of study leading to the granting of a post-secondary degree or diploma."[27] Thus, the Act does not cover private, non-state supported colleges and universities.

Of course, it is the faculty who order the texts to be used in their courses, and there is nothing in the Act that encourages faculty to choose lower-cost options in making their book adoptions. The Act's requirement of transparency and "unbundling" will, however, help those faculty members who want to make price sensitive choices.[28] Bundled materials such as CD-ROMS, workbooks, and the like can significantly add to the price of the

21. *Id.* § 723 ("Each institution of higher education shall institute policies that encourage faculty members or the entity in charge of textbook adoptions to place their orders with sufficient lead-time to enable the university, or contract-managed, bookstore to confirm the availability of the requested materials and, when appropriate, the availability of used textbooks or alternative digital formats.").

22. *Id.* § 724.

23. *Id.* § 724(1).

24. *Id.* § 724(2)-(4).

25. Ch. 433, § 1, 2008 N.Y. Laws 433.

26. *Id.*

27. N.Y. EDUC. LAW § 720(2).

28. *See id.* §§ 721(1), 722.

basic text, and some faculty may not know that the book they choose is bundled because a single price is charged for all materials.[29] On the other hand, if a faculty member has picked a text that is bundled, the Act does not require the publisher to sell the book as an unbundled stand-alone text.[30]

Nor is there anything in the Act that would encourage administrators to use their purchasing power to negotiate lower priced materials for students. What is even more problematic is that the Act fails to encourage faculty or administrators to support the development of aftermarkets where used texts are sold at substantially lower prices than those suggested by the publisher for a new copy. For example, the Act does not make it lawful for faculty members to resell complimentary copies of textbooks, which they receive from publishing companies. The Act states that "sample copies, [and] instructor's copies . . . are not to be sold . . . ."[31] These books are given to faculty when they are considering adopting textbooks for their courses and are a potential source for the used book aftermarket. The Act should encourage faculty members to give these textbooks to their respective university's bookstore to support the aftermarket that competes with new textbooks. If publishers object to such action, then the Act should require the publishers to provide low cost alternatives for the textbooks they sell in university book stores.

While the Act establishes a useful policy for reducing monopoly pricing of textbooks, it fails in a number of important respects. Primarily, the Act fails to do anything meaningful about the moral hazards created by a system that gives no incentive to faculty to order lower-cost texts and materials for their students. The problem is that the student who buys the book has no voice in the selection process. This places the student in the same position as the person who buys drugs prescribed by a doctor. Prescription drug prices are intolerably high partly due to moral hazards created by a system that allows doctors to prescribe drugs regardless of cost.[32] Today, however, the Food and Drug Administration requires

29. *See id.* § 720(1).
30. *See id.* § 722.
31. *Id.* § 724.
32. *See* Cohen, *supra* note 6.

pharmaceutical companies to provide information about lower-cost generic drugs.[33] The Textbook Access Act requires price transparency on wholesale prices,[34] but this information is to be given to faculty who request it and who may or may not take it into account in selecting their course materials.[35]

This does not remove the problem of moral hazard. A faculty member who authors a textbook will naturally want to use that book, and therefore the choice of texts will not be based on cost considerations. Other faculty may simply want to use the best book, regardless of cost. Still others may simply not pay attention to the cost issue. The parent or student who actually pays for the text will not be able to have a choice in the selection decision. The cost of the materials no longer becomes a factor in the forces that created demand because consumers do not have substitutes to turn to when faced with high prices. Textbook prices thus behave like drug prices, forever maintaining levels that could only be maintained by a monopoly.

Furthermore, there is nothing in the Act that changes the textbook publishers' and universities' or colleges' marketing practices that are responsible for the monopoly pricing. What is missing in the Act is a change in the underlying marketing system that publishers and institutions of higher education have created for selling and distributing course materials to students at inflated monopoly prices. University book stores and administrators actually serve to facilitate monopoly pricing by textbook publishers by failing to encourage vibrant aftermarkets in used textbooks and use the bulk purchasing power of the school to negotiate lower prices from the publisher.

II. Recommendations for More Effective Textbook Legislation: Changing the Monopoly Market Structure

In order to have a meaningful impact on monopoly pricing, the structure of the market must change. A monopolist will sell at the highest price that clears the market, and if there is no competition, that price will always be set at a higher level.[36]

33. *See* 21 C.F.R. § 200.200(a)(2) (2009).
34. N.Y. EDUC. LAW § 721(1).
35. *Id.*
36. *See* ADAMS, supra note 7, at 485.

Normally, prices will remain at competitive lower levels so long as consumers can choose alternative substitute products.[37] The key to maintaining low competitive prices is the availability of substitute products in the market.[38] If prices for a product remain at relatively high levels for a period of time, then it must be that consumers lack alternatives.[39] High prices can be maintained if there are no substitute products because the firm can then restrict its output, thereby enhancing the price level of its products.[40] The basic rule is that if you change market structure, you can change conduct and performance.[41]

In the case of textbook prices, this means that the focus should be on understanding the market dynamics of the marketing and distribution system that textbook publishers and universities create within their bookstores. By changing the structure of how books are bought and sold, one can change the ultimate price performance of textbooks. This is the basic organizing rule that the New York legislature should have followed in the Act.

A. *Intellectual Property Is Not the Problem, But It Can Be One of the Solutions*

One might think that high textbook prices result from the royalties paid to the author of the text, since it is the author who has a proprietary interest by virtue of copyright law.[42] Textbook publishers, however, pay insubstantial royalties to the author—less than twelve percent of the purchase price.[43] It is true that an author of a popular text that enjoys wide adoption can earn substantial royalty fees by virtue of the large quantity of sales. But even those authors who do receive hand-

37. *Id.* at 486.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id*. at 507-08.

42. *See* Feist Publ'ns, Inc. v. Rural Telephone Serv. Co., 499 U.S. 340, 344-51 (1991) (finding that copyright assures authors the right to their original expression but encourages others to build freely upon the ideas and information conveyed by a work).

43. *See* National Association of College Stores, *supra* note 5.

some rewards are still earning substantially less than the publisher.[44]

The problem is that authors lack the bargaining power necessary to negotiate publishing contracts that would better favor their interests. Today, book publishing contracts are written by the publisher and are offered on a "take it or leave it" basis.[45] Most authors do not receive any royalty payments or advances until the cost of publishing the hardcover edition is fully recovered by the publisher.[46] Royalty rates are then paid only after a certain number of copies of the text are sold and are merely five or ten percent of the retail price of the text.[47] For the vast majority of authors, royalty payments amount to just a few hundred dollars and some authors receive no monetary return on the publication. There are exceptions: some authors who sell popular books are rewarded substantially, but textbooks of these well known authors usually have a robust aftermarket that works to provide students with low cost used texts.

The copyright of the text does, however, remain a potential source of power that the authors could use to alter textbook pricing. First, if academic authors could organize into an association of authors, such an association could then bargain on behalf of the group for better contract terms and provisions for price ceilings on the text. The Act is already moving in this direction by allowing individual authors to require unbundling and greater transparency in wholesale pricing, with the ultimate goal of pressuring the textbook publishers to reduce their prices.[48] The problem with New York's minimalist approach is that it relies on individual faculty to take action.[49] Individuals, however, simply lack the bargaining power, time, or skills necessary to negotiate better price terms from the publishers.

Academics should follow the example of workers who have organized themselves into unions and engage in collective bargaining with their employers. If academic authors were to or-

---

44. *See id.*

45. *See e.g.*, Zilg v. Prentice-Hall, Inc., 717 F.2d 671, 679-82 (2d Cir. 1983).

46. The actual royalty will depend on the ability of the author to negotiate the fee, but in the context of law school publication, these are standard fees that can be expected.

47. *See* National Association of College Stores, *supra* note 5.

48. *See* N.Y. EDUC. LAW § 722 (McKinney Supp. 2009) (effective July 1, 2009).

49. *See id.*

ganize themselves, they would be able to countervail the bargaining power of textbook publishers. Collective negotiations by the copyright holders could be used to reduce book prices, since reduced prices would lead to greater sales and ultimately lower prices for students. The effort would benefit both authors and students because collective action would go a long way in countervailing the monopoly power of the publishers. For example, the Act could have allowed faculty members to pool their royalty rights with one member from the pool to be the exclusive bargaining agent for the group. This selected individual would be charged with negotiating the lowest retail price for the textbooks. This arrangement would also include a provision that grants the members the right to receive the standard royalty payment. The statutory royalty would ensure that faculty members receive what they would expect without pooling, thus encouraging the faculty to collectivize for the purpose of reducing monopoly prices without having to take a cut in royalty income.

B. *University Support for the Aftermarket*

One way to counter the monopoly levels of textbook pricing would be to encourage the development of the aftermarket for new and used textbooks. Faculty should be encouraged to either sell or donate complementary copies that they receive from the publishers to textbook expediters and clearing houses that specialize in selling new and used textbooks at reduced prices.[50] Faculty members are given free complementary copies to examine each year. These complementary copies are given for examination purposes only and are not intended for resale. However, once the complementary copy is given to the faculty member, it is the faculty member's property. Faculty should donate these copies to their schools for resale to students at substantially reduced prices. Resale of complementary copies would not be illegal, and any attempt to prevent resale would and should be regarded as an unlawful interference with the rights of property.

---

50. *See, e.g.*, Amazon.com, Textbooks, http://www.amazon.com/New-Used-Textbooks-Books/b?ie=UTF8&node=465600 (last visited Apr. 20, 2009) (subdivision of Amazon.com selling new and used textbooks); eCampus, http://www.ecampus.com (last visited Apr. 20, 2009) (online vendor of aftermarket textbooks).

Universities can also encourage the formation of aftermarkets for used textbooks by instituting new policies for establishing aftermarket programs in their bookstores. There is already a well established practice of selling used textbooks in most university bookstores. The existence of used textbooks for sale is an important aftermarket that can compete with the sales of new textbooks and can create downward pressure on the publishers' textbook prices. These aftermarkets need to be expanded and more fully developed by educational institutions themselves.

Institutions can also create programs where new texts from publishers are rented to students with the goal of selling the used copy after its return for a recovery charge of the original price of the new text. Administrators could adopt a policy that encourages faculty members to donate free copies to bookstores for resale to students. The institutions would have to subsidize bookstores to administer rental programs, but the subsidy could be made part of a loan that the bookstores would have to repay at favorable interest rates. The ultimate statutory policy would be to create a structure for stimulating competition in the college textbook market on campus.

C. *Minimizing the Moral Hazard Problem*

Faculty should also be encouraged to consider cost in making their textbook selections. Deans and administrators should ask each faculty member to choose low cost options of texts whenever possible, and faculty should be subject to disclosure requirements, explaining why a higher cost, newer edition textbook is necessary. Academic freedom ultimately protects faculty choice of materials, but the academic freedom to choose should not allow faculty to act like drug makers and simply disregard the moral hazards of the choices they make in selecting books that their students must buy in the market. The problem of moral hazard is now partly responsible for the high textbook prices.[51] Faculty who get to choose their course materials need to exercise responsibility to lower the prices of the materials they require their students to buy. Reasonable intervention in

51. *See supra* note 6 and accompanying text.

the normal prerogatives of professors and instructors may be necessary.

The Act does not directly allow students a choice, but it does allow faculty to choose unbundled materials, and it gives faculty access to price information.[52] Thus, the Act does not solve the moral hazard problem. In order to do what has been done in prescription drug markets, New York's legislature should subsidize institutions of higher education that establish alternative formats for distributing course materials.[53] There are a number of important projects that can be utilized to restructure the textbook market, and they should be encouraged by state subsidies and low-cost loans.

First, faculty can be encouraged to move to online publication of course materials. Professor R. Preston McAfee, an economics professor at the California Institute of Technology, has led the way with this idea by providing free online access to his introductory economics textbook.[54] Professor McAfee is reported to have foregone royalties (estimated at one hundred thousand dollars over the life of the text) in order to save his students the text's purchase list price of approximately two hundred dollars.[55] The model is based on what is known in the open-source movement as a Wikibook.[56] Professor McAfee does license his economics textbook to smaller publishers—Lulu and Flat World Knowledge—to sell the print version of the book at

52. *See* N.Y. EDUC. LAW § 722.

53. The policy for doing this is the same policy that has justified state legislation providing subsidies for prescription drugs. For a review of subsidy legislation in prescription drug markets, see Robert Pear, *States Creating Plans to Reduce Drug Cost*, N.Y. TIMES, Apr. 23, 2001, at A1, *available at* http://www.nytimes.com/2001/04/23/us/states-creating-plans-to-reduce-costs-for-drugs.html?fta=Y.

54. *See* R. PRESTON MCAFEE, INTRODUCTION TO ECONOMIC ANALYSIS (2006), *available at* http://www.introecon.com/IEA.pdf.

55. Cohen, *supra* note 6.

56. Wikibooks, http://en.wikibooks.org/wiki/Main_Page (last visited Apr. 20, 2009). Wikibooks are collaborative internet textbooks that anyone can edit. *Id.* They are based on the popular Wikipedia model, which invites internet users to make and correct entries in the internet encyclopedia known as Wikipedia. A wikibook is a textbook, annotated text, instructional guide, and/or manual. *Id.* Wiki materials can be used in a traditional classroom, an accredited or respected institution, or a home-school environment, as part of a Wikiversity course or for self-learning. *Id.* As a general rule, only instructional books are allowed in the Wiki community. The use of literary elements, such as allegory or fables, as instructional tools can be permitted in some situations. *Id.*

list prices that "further constrain [textbook publishers'] ability to engage in monopoly pricing,"[57] and his open-source text has been adopted at Claremont-McKenna College and Harvard University.[58]

By providing state subsidies and low cost loans, New York could encourage its state universities to experiment with programs for the development of free online course materials for students. Faculty who agree to participate in creating free online course materials could be compensated by stipends from the state equal to, or maybe even greater than, the typical royalty revenues they would receive from textbook publishers. The economic case for state subsidies can be justified by reducing the cost of tuition assistance programs that would no longer have to cover the full cost of print materials from commercial publishers.

One model to consider is the free textbook web entity known as Connexions, which offers free textbooks online and is supported by a William and Flora Hewlett Foundation grant.[59] Connexions is an internet repository for textbooks based on a "Creative Commons" license, which allows users to "rip, burn and mash" material into new configurations that suit the purposes of the user, who can then download the new configuration.[60] The advantage of such a network is that it allows teachers to easily update materials they use for their courses without placing financial burdens on their students who must buy the material.[61] Connexions works best for statistics, physics, and electrical engineering courses where updating is constant and necessary.[62] A comparable model is the open course networking site at the Massachusetts Institute of Technology

57. Cohen, *supra* note 6.

58. *Id.*

59. *See id. See also* Connexions, FAQ, http://cnx.org/aboutus/faq (last visited Apr. 20, 2009). Connexions is an internet community that shares educational material made of small knowledge chunks called "modules" that can be organized as courses, books, reports, etc., for those who are interested in finding and exploring new knowledge content in various fields of study. *Id.* Anyone may view or contribute to the material. *Id.* Connexions is a place to create and collaborate in the building and sharing of custom collections of intellectual content. *Id.*

60. Cohen, *supra* note 6.

61. *See id.*

62. *See id.*

called OpenCourseWare ("OCW").[63] OCW, however, is a limited content sharing site and does not provide the same freedoms as Connexions.[64]

There is also the open source project known as CourseSmart, which is owned by a number of publishers that are currently developing online textbooks for a fee.[65] The service allows students to subscribe to a textbook, read it online, and download portions of the text for highlighting and printing.[66] The fee for the online service is approximately one half the cost of the print version of the book, which is still substantial given that the average print textbook today sells for about two hundred dollars.[67] There are now approximately four thousand texts available on CourseSmart.[68] The danger with this model is that it may facilitate cartel behavior and price fixing by the publishers who have created the CourseSmart website.[69] Such a website may allow the publishers to exchange information

---

63. *See* MITOpenCourseWare, About OCW, http://ocw.mit.edu/OcwWeb/web/about/about/index.htm (last visited Apr. 20, 2009). OCW "is a free publication of MIT course materials that reflects almost all the undergraduate and graduate subjects taught at MIT." *Id.* OCW is open and available to the world, with no registration or enrollment process, and is a permanent MIT activity. *Id.* OCW does not grant degrees or certificates or provide access to MIT faculty. *Id.* Additionally, materials presented on the website may not reflect the entire content of the course, but the site does include video lectures, notes, examinations and text. *See id.*

64. *See* Cohen, *supra* note 6.

65. *See* CourseSmart, http://www.coursesmart.com (last visited Apr. 20, 2009). CourseSmart is a joint venture founded by five higher education textbook publishers. *Id.* The founding publishers are Bedford, Freeman & Worth Publishing Group; Cengage Learning (formerly Thomson Learning); Houghton Mifflin; McGraw-Hill Education; Pearson Education; and John Wiley & Sons. *Id.* Cengage subsequently acquired Houghton Mifflin, reducing the number to five. *See id.* CourseSmart brings together thousands of textbooks across hundreds of courses in an e-book format on a common platform. *Id.* CourseSmart allows students to find their assigned textbook as an e-Textbook at savings that average 51% versus the print version. *Id.* The value of CourseSmart is web functionality allowing for ease of search functions, instant access, and note taking—all with computer access, which provides new opportunities for "wired" campuses. *Id.*

66. Cohen, *supra* note 6.

67. *Id.*

68. *Id.*

69. Exchanges of information between dominant firms in an oligopolistic industry can facilitate illegal price fixing, especially when there are entry barriers as there are in the publication industry and when price competition is not a constraining force on competitors as is the case in the textbook market. *See* LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST § 5.6c (rev. ed. 2000) (discussing United States v. Container Corp. of Am., 393 U.S. 333 (1969)).

and coordinate, thereby stabilizing prices and publication output. It would thus be preferable if authors and faculty controlled the web site and content for e-textbook publishing.

Universities ought to be investing in online and open source projects. While not all subjects will lend themselves to these models, the more projects that are instituted, the more likely that the current moral hazard problem will be broken. By changing the authorship model, open source and online publishing can remedy the failed market system where prices fail to allocate texts efficiently at the lowest possible prices. The person who buys the text must be brought back into the pricing system, and online publishing and open source projects are at least nudging the pricing structure of textbooks in that direction.

D. *Generic Textbook Alternatives*

One way to minimize the moral hazard problem involving textbook pricing would be to do what federal and state governments have done in dealing with similar moral hazard problems involving drug sales. Drug companies are required to provide information about generic drugs that would be good substitutes for the proprietary drugs they sell.[70] This disclosure allows consumers to recognize and choose lower-cost generic drugs.[71] In addition, moral hazard problems are avoided by allowing pharmacies to fill prescriptions with the low-cost generic whenever a doctor has prescribed a higher cost proprietary drug.[72]

University faculty could also agree to adopt a "generic" textbook created for the basic courses they teach. The generic text could be the product of material derived from zero-cost internet sources like Connexions or an intra-campus e-textbook community. This approach is indicative of the open course movement created by OCW, which now consists of more than two hundred academic institutions worldwide.[73] Yale University, Johns Hopkins, Tufts, and Notre Dame have all joined the

70. *See* 21 C.F.R. § 200.200(a)(2) (2009).
71. *See id.*
72. *See id.*
73. *See* OpenCourseWare Consortium: About Us, http://www.ocwconsortium.org/about-us/about-us.html (last visited Apr. 20, 2009).

consortium of schools promoting OCW.[74] Virtually all M.I.T. courses are now available online for free on the OCW site, which currently receives more than one million hits per month.[75] Yale University has adopted an OCW model that offers "courses [that] span the full range of liberal arts disciplines, including humanities, social sciences, and physical and biological sciences."[76] On the other hand, the commercial version of OCW that sells e-textbooks has not proven to reduce textbook prices significantly.[77]

If faculty could agree to adopt a generic text for the basic course they teach and then make it available online, perhaps for a minimal fee, with the ability to supplement the online material for particular classroom uses, then there would be an effective, low-cost alternative to the print texts now being sold in the university bookstore. Generic alternatives would, in theory, compete with the higher cost authorship model sold by textbook publishers. While open-source textbooks will not be an answer for all subject matters, they should be supported, developed, and adopted by faculty and administrators as a means for providing students with generic substitutes that cost less and are likely to be more up-to-date, since online supplementation and revision would be more efficient and expeditious than traditional print publication.

---

74. *See id. See also* About Open Yale Courses, http://oyc.yale.edu/about (last visited Apr. 20, 2009).

75. *Online University Courses Hit Big*, CBCNEWS.CA, Dec. 31, 2007, http://www.cbc.ca/technology/story/2007/12/31/mit.html. *See also* MITOpenCourseWare, *supra* note 63.

76. About Yale Open Courses, *supra* note 74.

77. *See* Merris Stansbury, *Online Textbooks, Hope or Hype?*, ESCHOOL NEWS, Sept. 9, 2008, http://www.eschoolnews.com/news/top-news/index.cfm?i=55156&i-d. One study by the Student Public Interest Research Groups found the offerings from CourseSmart were too expensive and hard to access. *Id.* The Study also found that

> CourseSmart digital texts on average cost the same as a new hard copy of the same title bought and sold back to the bookstore—and they cost 39 percent more than a used hard copy of the same title bought and sold back online. . . . CourseSmart's printing options were limited to 10 pages per session for each of the eTextbooks available—and buying and printing just half an electronic text reportedly cost three times as much as buying a used hard copy and selling it back to the bookstore. . . . CourseSmart's eTextbooks expired after 180 days, so students did not have the ability to access their books in the future.

Id. Most e-textbooks have an average price of fifty dollars. *Id.*

E. *Hardware and Technology: E-books and Cloud Computing*

One model for developing the hardware and technology for the next generation of university textbooks is already provided by Amazon's Kindle book or Microsoft's E-book Reader.[78] These new electronic readers use electronic paper that is readable in direct sunlight, weigh less than a pound, and are the size of a small notebook.[79] They are based on a new cloud computing technology which allows readers, at a low cost, to download books that are stored on a mainframe computer through the same technology currently used for cellphones and WiFi computers.[80] Because of this new, inexpensive technology, there is no longer any reason why university students, including graduate and law students, should be required to carry bulky and heavy texts to class. Instead, a simple electronic reader could be used that would access all the texts and related materials that are needed for every course at a fraction of the cost of actually purchasing such materials.

These new electronic books also enable the reader to search the internet for recent developments, as well as access dictionary definitions and other textual material related to assigned class readings. There is no reason why publishers could not allow authors to make their texts electronically available through this new technology. The fact that the cost of the electronic texts would be less than what a hardcover would sell for may well be offset by increased sales. Moreover, students and readers who still wish to have a hard cover version would be able to purchase the actual text at the higher price.

One could imagine students accessing a library of texts in the cloud of a university's computer system. The cloud would be created by the professorate, who would make their texts accessible via the school's internet network. Students who pay a fee to download individual texts would gain access to the cloud. The texts would then be available as e-texts, which students could underline, edit, and pull apart in bites for their notes and outlines. The text would be easily updated and revised by the author. Of course, this, as well as the other alternatives

78. Steven Levy, *The Future of Reading*, NEWSWEEK, Nov. 26, 2007, at 54, *available at* http://www.newsweek.com/id/70983.

79. *Id.*

80. *Id.*

discussed, would require the cooperation of authors and publishers. But without any incentive or pressure to change, the status quo will probably remain.

F. *Student Direct Action Pressure*

As my experience in Professor Adams's class once taught me, students are not helpless victims of monopoly textbook pricing—they can counter it by taking direct political action. First, students can demand that their schools provide them with the published textbook International Standard Book Numbers ("ISBN") online, so they can search the internet to determine if lower-cost alternatives are available in the primary and secondary-aftermarkets. If universities provided students with the ISBN for all required texts in their course schedules, students would be in a much better position to find lower cost books.

Second, because universities allow bookstores to sell books on-campus, students can demand that administrators pressure textbook publishers and bookstore managers to reduce the costs of the books they sell. Third, students should demand that administrators use their purchasing power to negotiate lower prices from textbook publishers. A large state university system, like SUNY or CUNY, is responsible for selling a lot of textbooks and print materials. These institutions should seek to negotiate quantity discounts through bulk purchasing, much in the same way that Walmart does in negotiating low wholesale prices for the products it sells.[81] The purchasing power of a large state institution like SUNY can act as a countervailing power to the monopoly position of textbook publishers. If the administrators do not take such action, then students should pressure their administrators to respond to their interest in seeking lower cost course materials. As consumers, students (and in some cases, their parents) are an important constituency that administrators cannot ignore.

Finally, students could experiment with other direct action strategies, including sit-ins at school bookstores, to protest the monopoly pricing of textbooks. From my own experience, I can

81. *See* ARINDRAJIT DUBE ET AL., UC BERKLEY CTR. FOR LABOR RESEARCH AND EDUC., LIVING WAGE POLICIES AND WAL-MART: HOW A HIGHER WAGE STANDARD WOULD IMPACT WAL-MART WORKERS AND SHOPPERS 2 (2007), *available at* http://laborcenter.berkeley.edu/retail/walmart_livingwage_policies07.pdf.

say that demonstrations at bookstores can be an empowering strategy for raising the community's consciousness of the monopoly pricing problem. I recall how the sit-in at the Michigan State University bookstore, instigated by an economics professor dressed in a tweed sport coat and tie, brought attention to the high cost of textbooks being sold. I am not saying that the world changed as a result of the sit-in, but it did get the attention of administrators, faculty, and other students.

Like most sixties demonstrations, once the sit-in ended and everyone left, the world went back to business as usual. The book store continued to sell books at monopoly level prices because the underlying market forces were simply conducive to allowing textbook publishers to sell their products at intolerably high prices. On the other hand, as my experience has taught me, participation in direct action can be a great moment of learning in one's life. It can also teach others of the need for change. Who can say for sure that the lessons of direct action by students and teachers would not influence university administrators and state legislators to take more aggressive action to counter monopoly book pricing? Perhaps activism on the campus can be one of the most effective strategies for mobilizing support for more meaningful change and end the greed and exploitation of textbook publishers who use our great universities and colleges to make money at the expense of students and their families.

IV. Conclusion: What Textbook Access Legislation Should Require

While New York's Textbook Access Act is a beneficial first step in bringing down textbook prices, more effective action is needed. Textbook prices will remain at monopoly levels so long as textbook publishers can benefit from the moral hazards of allowing someone who does not have to pay for the book to choose which book students must buy in the marketplace. The legislative goal should be to restructure the market for textbooks as it now exists on college campuses. The fact that the site of the market is on campus means that universities have a responsibility to do something to reduce the cost of education for its students. Universities cannot sit on the sidelines and allow private textbook companies to come on campus and sell their

texts at monopoly level prices. Rather, universities should be actively supporting aftermarkets and faculty and student efforts to create generic substitute course materials that students can buy at affordable prices.

Moreover, it is in the self-interest of students and faculty to encourage administrators to facilitate changes in the current textbook pricing market. Authors of the print materials will ultimately discover that reducing the monopoly power of textbook publishers may lead to greater freedom and reward in the development of a new generation of course materials for the universities of the twenty-first century. The current authorship model that is now utilized by textbook publishers to sell their products at monopoly prices must be changed if higher education is to be available to all that are qualified.