

January 2001

Discrediting Accreditation?: Antitrust and Legal Education

Marina Lao

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview

 Part of the [Antitrust and Trade Regulation Commons](#), [First Amendment Commons](#), [Legal Education Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Marina Lao, *Discrediting Accreditation?: Antitrust and Legal Education*, 79 WASH. U. L. Q. 1035 (2001).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol79/iss4/2

This Article is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

DISCREDITING ACCREDITATION?: ANTITRUST AND LEGAL EDUCATION

MARINA LAO*

I. INTRODUCTION

For almost eighty years, the American Bar Association (ABA) has set minimum educational standards for American law schools, granting accreditation to those schools that complied with them, and denying it to those that did not.¹ In theory, ABA accreditation is nothing more than an expression of the organization's considered professional opinion on the quality of different law schools. After all, the ABA does not compel law schools to seek ABA approval. And law schools may decline to comply with ABA standards, should they be willing to forego accreditation. In practice, however, ABA accreditation is critical for the existence of most law schools because, in over forty states, only graduates from ABA-accredited law schools are entitled to sit for the bar examination.² Schools whose graduates have no chance of being admitted to the bar because of their exclusion from the bar examination would naturally have difficulty attracting enough students to be financially viable.³ The system, in effect, imposes a barrier to

* Professor of Law, Seton Hall University School of Law. Email: laomarin@shu.edu. I would like to thank David Jake Barnes, Michael Risinger, Charles Sullivan, and Spencer Weber Waller for their thoughts and comments. I am also grateful for the suggestions made by participants at the faculty colloquium at the University of Connecticut School of Law where I first raised some of the issues presented in this Article. Finally, my thanks go to the library staff at Seton Hall University School of Law, especially Maja Basioli, for their invaluable research assistance.

1. For a discussion of the history of American legal education, including the genesis of ABA control over the accreditation process, see RICHARD L. ABEL, *AMERICAN LAWYERS* 40-73 (1989); ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983); Harry First, *Competition in the Legal Education Industry (I)*, 53 N.Y.U. L. REV. 311, 333-400 (1978) [hereinafter *Competition I*]; Harry First, *Competition in the Legal Education Industry (II): An Antitrust Analysis*, 54 N.Y.U. L. REV. 1049, 1050-65 (1979) [hereinafter *Competition II*].

2. See SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N & NAT'L CONFERENCE OF BAR EXAMINERS, *COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2000* 10-11 (2000) [hereinafter *BAR ADMISSION REQUIREMENTS*]. Additionally, the ABA is recognized by the United States Department of Education as the sole accrediting body for law schools, which enables students at the accredited schools to obtain federal financial assistance for their education. Complaint at 3, *United States v. Am. Bar Ass'n*, No. 95-1211(CR) (D.D.C. filed June 27, 1995), available at <http://www.usdoj.gov/atr/cases/f0200/0254.htm> [hereinafter *Complaint*].

3. There are presently 183 ABA-approved and 21 non ABA-approved law schools in the United States. Of the 21 non ABA-approved schools, 19 are located in states that do not require graduation from an ABA-accredited law school as a condition for sitting for the bar examination (16 in California, 2 in Massachusetts, 1 in Alabama), and only two are located in states that do have such requirement (Kansas and Florida). From this data, it is clear that non ABA-approved law schools have difficulty

entry and impedes competition in legal education.⁴

Despite this fact, rarely anyone, not even federal antitrust officials, would contend that accreditation is inherently anticompetitive and hence must be treated as per se illegal under the Sherman Act.⁵ This perspective likely exists because accreditation is widely acknowledged to serve a procompetitive function as well, by providing consumers with information about quality that they need to make informed decisions on complex professional services.⁶ In other words, to the extent that ABA accreditation informs the public which schools, in the organization's opinion, offer legal education of acceptable quality, it has the potential of benefitting consumers by protecting prospective students from substandard schools and future clients from unqualified practitioners.⁷

However, in any accreditation program where market participants wield the power to exclude, there is an inherent conflict of interest and a risk of anticompetitive abuse,⁸ for even the most selfless and well-intentioned

surviving in states that limit the bar examination to those with J.D. degrees from ABA-approved schools. See AM. BAR ASS'N & LAW SCH. ADMISSION COUNCIL, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS (2000) [hereinafter OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS] (listing all 183 ABA-accredited law schools); BAR ADMISSION REQUIREMENTS, *supra* note 2, at 10-11 (listing states in which graduates of non ABA-approved schools are eligible to sit for the bar examination); BARRON'S GUIDE TO LAW SCHOOLS 557-63 (14th ed. 2000) [hereinafter BARRON'S GUIDE] (listing non ABA-accredited law schools).

4. See generally, *Competition I*, *supra* note 1, at 314-22 (describing legal education as fitting an economic model); *Competition II*, *supra* note 1, at 1099-101 (characterizing the ABA accreditation system as a cartel of legal educators engaged in a boycott of unaccredited law schools in order to control the legal education market); George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2219-29 (1996) (contending that the ABA accreditation system is illegal per se as a horizontal price-fixing agreement among law faculty, enforced by a boycott). *But see* Clark C. Havighurst & Peter M. Brody, *Accrediting and the Sherman Act*, LAW & CONTEMP. PROBS., Autumn 1994, at 199 (1994) (arguing that accreditation, standing alone, is not a restraint but merely an expression of opinion on quality by the accrediting body, and that the proper way to approach the problem of potential anticompetitive results of accreditation is to ensure more information is produced).

5. See Competitive Impact Statement at 16, *United States v. Am. Bar Ass'n*, No. 95-1211(CR) (D.D.C. filed June 27, 1995), available at <http://www.usdoj.gov/atr/cases/f1000/1034.htm> (last visited May 16, 2001) [hereinafter Competitive Impact Statement] (acknowledging that many of the ABA accreditation standards implicate educational concerns and that it was unclear whether these standards were "anticompetitive or set a procompetitive minimum educational standard for law school programs"). The Supreme Court is also generally unwilling to condemn restraints adopted by professional associations as per se unlawful. See *infra* notes 220-21 and accompanying text.

6. See *infra* Part IV.C.1.

7. One commentator has argued, however, that the accreditation system is a price fixing agreement of law school faculty enforced by a boycott of the unaccredited schools and should be treated as per se illegal. See Shepherd & Shepherd, *supra* note 4, at 2219-29.

8. As early as 1976, the Federal Trade Commission was concerned that the Liaison Committee on Medical Education, the accrediting body for medical schools that the American Medical Association and its Council on Medical Education dominated, was being used to limit the number of doctors entering the field. Therefore, the FTC urged the Department of Health, Education, and Welfare

decision makers might find it difficult to consistently make neutral decisions or assessments on issues bearing direct implications on their own status, self-identity, and well-being. For this reason, despite the general benefits attributed to accreditation, subjecting it to some level of antitrust scrutiny is appropriate.

However, applying the Sherman Act to law school accreditation is not an easy task. It raises not only perplexing legal questions concerning state action, petitioning immunity (commonly referred to as the *Noerr* doctrine), and the First Amendment, but also various educational and other social policy issues. It is probably due to these complications that the ABA has faced only a handful of private antitrust suits challenging its accreditation practices and has never lost any of them.⁹ However, the most recent of these actions, *Massachusetts School of Law at Andover v. American Bar Association*,¹⁰ prompted a related Department of Justice antitrust action, which was eventually settled in a consent decree wherein the ABA agreed to discontinue certain accreditation practices.¹¹ While a consent decree has no precedential force, the ABA's capitulation, or at least its failure to litigate and aggressively assert immunity doctrines that had successfully shielded it from antitrust scrutiny in the past, may well increase its vulnerability and inspire more sustained accreditation-related challenges in the future.¹²

to terminate the Liaison Committee's status as an accrediting agency. *FTC Criticizes AMA Involvement in Accreditation of Medical Schools*, [Jan.-June] Antitrust & Trade Rep. (BNA) No. 802, at A-4, A-4 to A-6 (Feb. 22, 1977). The concerns raised about the accrediting of medical schools would clearly apply to law schools as well.

9. See *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 107 F.3d 1026, 1034-38 (3d Cir. 1997) (dismissing unaccredited law school's antitrust action against the ABA on state action and petitioning immunity grounds); *Feldman v. Gardner*, 661 F.2d 1295, 1304-08 (D.C. Cir. 1981) (holding that D.C. Court of Appeals is entitled to state action immunity for limiting bar admission to graduates of ABA-approved schools), *vacated by* 460 U.S. 462 (1983); *Brandt v. Am. Bar Ass'n*, No. CIV.A.3:96-cv-2606D, 1997 WL 279762 (N.D. Tex. 1997) (dismissing suit brought against the ABA over its failure to grant accreditation to a law school on petitioning immunity grounds); *Zavaletta v. Am. Bar Ass'n*, 721 F. Supp. 96, 98 (E.D. Va. 1989) (dismissing suit brought by students at unaccredited law school against the ABA on First Amendment grounds).

10. 107 F.3d 1026 (3d Cir. 1997).

11. *United States v. Am. Bar Ass'n*, 934 F. Supp. 435, 436 (D.D.C. 1996). After receiving complaints from MSL, the Department of Justice initiated an investigation into the ABA accreditation process and subsequently filed suit against the ABA. See John Yemma, *Law School Loses Fight with Bar Association*, BOSTON GLOBE, Oct. 7, 1997, at B4.

12. Probably one of the most intriguing unaccredited law schools to emerge in recent years is Concord University School of Law, the nation's first completely on-line law school. "Based" in California, Concord is a division of Kaplan, Inc., the well-known "test-prep" company, which is a wholly owned subsidiary of the Washington Post Company. In addition to being backed by Kaplan and the Washington Post, Concord also enjoys the very public support of Harvard Law School's Arthur Miller, who serves on the school's board of directors. See Wendy Davis, *Law School Without the Paper Chase: Internet-based Schools May Change Not Only the Way Law Is Studied but Also Who Studies It*, N.J. LAW J., Sept. 27, 1999, at 1B, 2B; Concord Law School, at

This Article addresses the major antitrust issues concerning ABA accreditation. The first issue pertains to the reach of the unsettled state action and petitioning immunity doctrines, and the First Amendment. The analysis of state action and petitioning immunity draws a distinction between restraint on competition flowing from *decisions* to grant or deny accreditation and their associated state use on the one hand, and restraints on competition emanating from the accreditation *standards* themselves on the other. This Article concludes that, though the *decisions* may be immunized, neither doctrine clearly exempts restraints resulting from the accreditation *standards* from antitrust liability. With respect to the First Amendment defense, this Article takes issue both with the characterization of accreditation as mere speech and with the view that the First Amendment absolutely protects pure speech effectuating a restraint on competition.

Following this discussion, the Article looks at the overall anticompetitive impact of the ABA accreditation program. Every analysis of anticompetitiveness requires, of course, a showing of harmful effects on competition, which should be relatively straightforward here because ABA accreditation almost certainly has an adverse output and price effect on legal education and, possibly, legal services. However, the purpose of the accreditation program, the legitimacy of that purpose, and the means of effectuating it are all much more complicated to ascertain.

Accreditation of professional education (and, in fact, all professional self-regulation) is often said to benefit consumers. In the case of legal education, consumers include two groups—consumers of legal education and consumers of legal services. The alleged benefit is the provision of otherwise unavailable information regarding the quality of education or services—information that enables consumers to make informed market choices without incurring high search costs.¹³ Whatever its merits in other situations, however, the strength of this claim may be weaker when applied to legal education and services than when applied to more scientific and technically sophisticated areas, such as medicine.¹⁴

<http://www.concordlawschool.com/kaplanconnection.htm> (last visited May 27, 2001). As a virtual law school, Concord is clearly ineligible for ABA approval under current standards. However, assuming that its graduates perform well on the California bar examination (California being one of the few states that allow graduates of non ABA-approved schools to take the state bar examination), it is conceivable that Concord might challenge the ABA's accreditation standards. With its corporate backing, Concord would certainly have the ability to engage in protracted antitrust litigation, should it choose to do so. Or it might wage an uphill, state-by-state battle to try to secure waivers that would allow its graduates to take the bar examination in every state.

13. See *infra* Part IV.C.1.

14. See *infra* notes 265-68 and accompanying text.

Another possible justification is that accreditation provides quality assurance for legal education.¹⁵ In light of clear Supreme Court pronouncements indicating that general welfare claims will not justify an otherwise anticompetitive restraint,¹⁶ it might seem, at first, that quality protection can never be considered a legitimate goal of accreditation. However, because educational policy implications probably make such an approach undesirable, I draw on the market failure theory, particularly that of externalities, to argue that quality assurance in legal education can be construed as a competitive benefit and, therefore, a legitimate objective for accreditation.¹⁷

Acceptance of the view that, in principle, quality considerations may justify the constraints of accreditation does not mean, however, that the overall purpose and effect of the ABA accreditation program is necessarily legitimate. Because there are obviously different degrees of quality, the ABA's objective in accreditation must be more precisely defined if it is to be meaningful. This Article argues that a more accurate characterization of the ABA's goal is the promotion of quality as quality is defined in an elite system of education, and that this objective is unreasonable because a lesser education suffices for many practicing attorneys.¹⁸

Despite my conclusion that aspects of the ABA accreditation program are anticompetitive, the antitrust laws may not be the best tool to bring about drastic changes with important policy implications. Courts might be unwilling to second-guess the ABA's motivations or its policy choices or to engage in the kind of policymaking that is essential in crafting an effective remedy. But regardless of whether it can survive an antitrust attack, the ABA should consider overhauling its accreditation standards to allow the operation of nonelite style law schools, not only because the current standards are unreasonably restrictive, but also because of their unfair social consequences.¹⁹

This Article proceeds as follows: Part II briefly describes the ABA accreditation system, without detailed reference to specific procedures or standards. Part III then analyzes the scope of the antitrust state action and petitioning immunity doctrines, and the First Amendment free speech clause as it relates to accreditation practices. Part IV develops arguments for concluding that the ABA accreditation system is anticompetitive. And Part V

15. *See infra* Part IV.C.2.

16. *See infra* notes 269-74 and accompanying text.

17. *See infra* Part IV.C.2.

18. *See infra* Part IV.C.3.

19. *See infra* Part V.

concludes by noting that, even if the current accreditation system can withstand an antitrust challenge, relaxing the ABA's accreditation standards is desirable for policy reasons.

II. LAW SCHOOL ACCREDITATION

The ABA administers law school accreditation through its Section of Legal Education and Admissions to the Bar (Section of Legal Education), which was created in 1893 and began its accrediting function in 1921.²⁰ The ABA's Consultant on Legal Education, who has traditionally been a legal educator, manages the day-to-day operation of the accreditation process.²¹ Supervising all accreditation matters for the Section of Legal Education is its Council, and assisting the Council are two committees: a Standards Review Committee and an Accreditation Committee. The Standards Review Committee reviews and recommends changes on accreditation standards and their interpretations, and the Accreditation Committee oversees site inspections of new law schools seeking accreditation (as well as that of approved schools seeking reaccreditation every seven years) and makes initial recommendations to the Council on these applications.²²

Central to any accreditation program are standards setting minimum requirements that must be satisfied for approval to be granted. The ABA's standards cover many aspects of the operation of a law school, such as its curriculum, faculty, administration, admissions, library resources, and physical facilities.²³ Included among them are rules requiring a three-year full time program for a J.D. degree,²⁴ limiting the student-faculty ratio,²⁵

20. See ABEL, *supra* note 1, at 46; OFFICE OF THE CONSULTANT ON LEGAL EDUCATION TO THE AM. BAR ASS'N, THE ABA'S ROLE IN THE LAW SCHOOL ACCREDITATION PROCESS 1 (1997) [hereinafter ABA'S ROLE]; STEVENS, *supra* note 1, at 95.

21. See Competitive Impact Statement, *supra* note 5, at 4-5.

22. *Id.* at 2-4. See also ABA'S ROLE, *supra* note 20. For the procedural rules of the accreditation process, see OFFICE OF THE CONSULTANT ON LEGAL ED. TO THE AM. BAR ASS'N, RULES OF PROCEDURE FOR THE APPROVAL OF LAW SCHOOLS (1999) [hereinafter ABA RULES OF PROCEDURE]. For the accreditation standards, see OFFICE OF THE CONSULTANT ON LEGAL ED., AM. BAR ASS'N, ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS (1999) [hereinafter ABA STANDARDS].

23. See ABA STANDARDS, *supra* note 22. The core of the standards was adopted in 1973 and periodically amended since then. The most significant changes came about as a result of the 1995 consent decree signed by the ABA in the civil suit brought by the Department of Justice. Under the terms of the consent decree, the ABA can no longer collect faculty salary data or consider faculty compensation in accreditation, bar accreditation of for-profit schools, or prohibit acceptance of transfer credits from unaccredited schools. *United States v. Am. Bar Ass'n*, 934 F. Supp. 435, 436 (D.D.C. 1996). The ABA also made other changes in 1996, including eliminating a teaching load limit and the requirement of periodic sabbaticals; allowing some counting of adjuncts in the calculation of the student-faculty ratio; and making minor changes in the language of a few other standards.

24. ABA STANDARDS, *supra* note 22, std. 304(b).

prohibiting academic credit for bar review courses,²⁶ prohibiting correspondence schools,²⁷ and imposing certain requirements on library resources²⁸ and law school physical facilities.²⁹ The ABA makes its approval or denial decisions based on an application of these standards,³⁰ and it apprises the states of its accreditation decisions.³¹ The ABA also annually provides the states with the *Review of Legal Education in the United States*, the current ABA accreditation standards, and any proposed modifications.³²

The ABA's accreditation decisions initially had little impact because no state before 1928 required graduation from any law school (let alone an ABA-accredited one) as a condition for admission to the bar.³³ In a majority of jurisdictions, anyone could become a licensed attorney through apprenticeship and passing the bar examination.³⁴ By 1958, however, the ABA and the Association of American Law Schools (AALS)³⁵ had prevailed upon all but fourteen jurisdictions to require candidates for the bar examination to be graduates of ABA-approved schools.³⁶ Today, graduation from an ABA school is a condition for taking the bar in forty-three jurisdictions.³⁷

25. *Id.* std. 402, interps. 402-1, 402-2.

26. *Id.* std. 302(f).

27. *Id.* stds. 304(b), 304(g).

28. *Id.* std. 606.

29. *Id.* stds. 701-03. For further discussion of some of the accreditation standards, see *infra* notes 290-99 and accompanying text.

30. It is not the purpose of this Article to describe or analyze the procedural aspects of accreditation, such as how applications for accreditation are processed, how on-site inspections of new schools (or periodic reinspections of approved schools) are performed, or how accreditation decisions are actually made. The focus of this Article is, instead, on the effects of the substantive standards. For a description of the accreditation procedures, see ABA RULES OF PROCEDURE, *supra* note 22; *Competition II*, *supra* note 1, at 1067-69.

31. *Mass. School of Law at Andover, Inc. v. American Bar Ass'n*, 107 F.3d 1026, 1030 (3d Cir. 1997).

32. *Id.*

33. See STEVENS, *supra* note 1, at 174. See also *Competition I*, *supra* note 1, at 333-34 (describing vast differences among law schools in the post-Civil War period and the fact that they were not the only path to the bar).

34. See STEVENS, *supra* note 1, at 174.

35. The AALS is an association of American law schools formed in 1900 as an entity separate from the ABA. ABEL, *supra* note 1, at 46. Its current members are all ABA-accredited schools. *Mass. Sch. of Law*, 107 F.3d at 1030. The AALS accredits law schools only in the sense that it evaluates them for membership in the association, but its decisions, unlike those of the ABA, have no impact on bar admission rules. See *Mass. Sch. of Law*, 107 F.3d at 1030. See generally ASS'N OF AM. LAW SCH., 2000 HANDBOOK art. 6 (2000) (listing requirements for AALS membership); *Competition II*, *supra* note 1, at 1078-80 (describing the close relationship between the ABA and AALS).

36. STEVENS, *supra* note 1, at 207-08.

37. See BAR ADMISSION REQUIREMENTS, *supra* note 2, at 10-11. The only jurisdictions permitting graduates of non ABA-approved schools to take the bar examination are Alabama, California, Connecticut, Massachusetts, Michigan, Nevada, Tennessee, and Virginia. *Id.* In addition to

A common thread running through most of the accreditation standards is their effectuation of an elite-style law school.³⁸ While no precise definition for an “elite” education exists,³⁹ certain attributes are often recognized as typical of any elite school. Among them are selective enrollment; relatively low student-faculty ratios; courses taught predominantly by full-time faculty, rather than part-time adjuncts; faculty who engage in scholarly research and writing in addition to teaching; an academic or intellectual, rather than utilitarian, approach toward education; libraries with extensive collections; and good physical facilities.⁴⁰ The ABA standards appear to be consistent with these expectations.⁴¹ For example, rules governing the student-faculty ratio and how adjuncts figure into the calculation of that ratio ensure the primary reliance on full-time faculty for instruction and a low student-faculty ratio. Furthermore, the barring of academic credit for bar review type courses reflects the elite system’s vision of education as having more intellectual depth. Other standards, likewise, perpetuate the elite model.⁴²

Another commonality of the standards is that they tend to raise the price of a law school education.⁴³ Costs would clearly be lower for students, for instance, if law schools could have high student-faculty ratios, predominantly

a degree from an ABA-accredited law school, admission to the bar in most states currently requires a college degree or three years of college study, passing of the state bar examination, and approval of character and fitness by the committee governing bar admissions. *Id.* (listing bar admission requirements for each state).

38. Within the ranks of the many ABA-accredited law schools, some are, of course, considered more prestigious than others. My use of the terms “elite-style” or “elite-model” law school refers not to the prestige factor of the individual law schools, but to the form of educational system that is followed by all accredited law schools, ranging from the most to the least prestigious. I argue that the ABA accreditation system requires that all law schools follow the elite model. In contrast, some undergraduate colleges and universities (such as the Ivy League schools and other prestigious schools) follow the elite model while others (such as community and less prestigious four-year colleges) do not.

39. A dictionary definition of elite is “the choice part . . . or socially superior group.” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 268 (1989).

40. Since there is no real definition of what an “elite” school is, this description is largely based on what I believe to be generally held perceptions of such schools. *See also Competition I, supra* note 1, at 323-26 (arguing that the AALS monopoly over legal education allows legal educators to indulge their elite preferences, which include full-time teaching, time to pursue nonclassroom tasks, a bright student body, a large library, and a degree of freedom from economic discipline).

41. Standards that were changed or eliminated under the consent decree (or thereafter) also promoted an elite-model law school. They include ensuring that faculty are paid adequately—presumably to attract a high caliber of faculty who would not have to supplement their income with part-time practice—and that faculty have periodic sabbaticals and limited teaching loads to facilitate academic research and writing. *See United States v. Am. Bar Ass’n*, 934 F. Supp. 435, 436 (D.D.C. 1996), *modified by* 135 F. Supp. 2d 28 (2001), *and modified by* 2001 WL 514376 (2001) (listing prohibited conduct under consent decree).

42. For a more extensive discussion of some of the standards and how they implement the elite-model law school, see *infra* notes 290-99 and accompanying text.

43. For a more extensive discussion of the high costs of attending law school, see *infra* notes 338-40 and accompanying text.

use adjuncts, rely on on-line sources for its “library,” offer two-year instead of three-year programs, and so forth. From an antitrust perspective, it is the standards’ exclusion of less expensive schools with more humble aspirations—that might nonetheless provide an acceptable (though not first-rate) legal education—that raises antitrust concerns.

As previously noted, the ABA faced two serious antitrust challenges in the mid-1990s: a private suit and a related Department of Justice action.⁴⁴ After being denied ABA approval, the Massachusetts School of Law at Andover (MSL), a school operating on a low budget and in conscious defiance of many ABA rules, sued the ABA alleging that the enforcement of its standards amounted to a group boycott against MSL and an agreement to fix prices in violation of the Sherman Act.⁴⁵ The case was dismissed, on a summary judgment motion, on antitrust state action and petitioning immunity grounds,⁴⁶ but not before it had triggered a related Department of Justice civil antitrust action against the ABA.⁴⁷

The government’s case alleged that the law school accreditation process had been captured by legal educators⁴⁸ and that the ABA, under these educators’ influence, formulated and enforced anticompetitive standards and engaged in a group boycott of schools failing to achieve those standards.⁴⁹

44. In addition to these two cases and the cases cited in *supra* note 9, the ABA also faced a challenge from Western State University College of Law (WSU) in the mid-1970s, although no suit was filed. WSU, a for-profit law school in California, was ineligible for ABA approval because of the nonprofit standard in existence at that time. Denied ABA approval, WSU applied for accreditation from a recognized regional accrediting agency in order to allow its students to participate in federal financial aid programs. When the ABA attempted to interfere with WSU’s efforts, WSU filed a complaint against the ABA with the Department of Education. This complaint prompted a Department of Education investigation and a Department threat to remove the ABA’s accrediting status. The ABA eventually decided to delete the standard prohibiting proprietary schools but did not accredit WSU, presumably because of other deficiencies. See STEVENS, *supra* note 1, at 244-45; *Competition II*, *supra* note 1, at 1082-86.

45. *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass’n*, 107 F.3d 1026, 1031 (3d Cir. 1997). For a good analysis of this case, see Peter James Kolovos, Note, *Antitrust Law and Nonprofit Organizations: The Law School Accreditation Case*, 71 N.Y.U. L. REV. 689 (1996).

46. *Mass. Sch. of Law*, 107 F.3d at 1034-38. The court determined that MSL’s injuries did not stem from the ABA’s actions. Rather, the states’ exclusion of non ABA-approved schools’ graduates from the bar examination was the direct cause of injuries. Therefore, state action and petitioning immunity doctrines provided antitrust immunity. For a discussion of these two antitrust immunity doctrines, see *infra* Part III.

47. See Complaint, *supra* note 2.

48. At that time, approximately ninety percent of the members of the Section of Legal Education, all members of the Standards Review Committee, and a majority of the members of the Accreditation Committee were legal educators. Furthermore, site inspection teams that performed on-site evaluations of law schools for accreditation purposes typically consisted of an overwhelming majority of legal educators. See Competitive Impact Statement, *supra* note 5, at 4-5.

49. The standards and practices alleged to be anticompetitive include the following: the requirement that faculty compensation be comparable to that of other similarly situated ABA-approved

The case was eventually terminated with a consent decree in which the ABA agreed to discontinue a few of the challenged practices⁵⁰ and alter the composition of the committees and organizations that control the accreditation process in order to reduce legal educators' role in the process.⁵¹ Because the ABA settled the case without first insisting on summary disposition based on the state action and petitioning immunity doctrines, its earlier invincibility on these threshold issues is now more questionable; it would be unsurprising to see more resolute arguments for limiting the scope of these doctrines in the future.

III. SCOPE OF STATE ACTION, PETITIONING, AND FREE SPEECH

The antitrust immunity doctrines are often said to express “the principle that the antitrust laws regulate business, not politics”.⁵² state action “protects the States’ acts of governing, and [petitioning immunity protects] the citizens’ participation in government.”⁵³ But, other than this truism, not much else is settled about the two doctrines, least of all their implications for private standard setting—such as accreditation—that has been adopted by the State. The following discussion seeks to make sense of these two ambiguous immunity doctrines in the law school accreditation context.⁵⁴ It will also

schools, the prohibition against granting transfer students credit for courses completed at unaccredited law schools, the requirement that schools be nonproprietary, the exclusion of adjunct faculty in the calculation of the student-faculty ratio, limitations on faculty teaching loads, the requirement that faculty be granted periodic sabbaticals, the prohibition against bar review courses, and a few interpretations of standards relating to facilities and resources. *See id.* at 5-9.

50. *See* United States v. Am. Bar Ass’n, 934 F. Supp. 435 (D.D.C. 1996). Under the consent decree, the ABA is enjoined from adopting or enforcing any standard that (1) effectively imposes compensation requirements for legal educators as a condition for accreditation (including the collection of salary data and using that data in connection with accreditation review); (2) prohibits member schools from enrolling graduates of unaccredited law schools in a post-J.D. program; (3) prohibits member schools from granting transfer students credit for courses completed at an unaccredited law school (except that transfer credits can be limited to no more than one-third of the total credits required for graduation); or (4) denies accreditation on the basis that the school is proprietary. *Id.* at 436.

51. Structural changes mandated by the consent decree include the following: no more than 50% of the members of the Council to the Section of Legal Education, the Accreditation Committee, and the Standards Review Committee, and no more than 40% of the nominating committee for the officers of the Section of Legal Education may be law school deans or faculty; site-inspection teams will, to the extent possible, consist of at least two members who are not legal educators; and an independent consultant, who is not a legal educator, will be hired to assist in validating all standards and interpretations. *Id.* at 437. For a discussion of the composition of ABA councils, committees, and site-inspection teams at the time the Department of Justice brought the suit against the ABA, see *supra* note 48.

52. *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 383 (1991).

53. *Id.*

54. Not only have the state action and petitioning immunity doctrines insulated the ABA from

examine a further contention that accreditation is pure speech entitled to First Amendment protection, independent of the petitioning immunity doctrine.

A. Antitrust Immunity: State Action and Petitioning

1. The Antitrust State Action Doctrine⁵⁵

State action immunity is intended to accommodate two conflicting interests: the federal antitrust interest in promoting competition (which is premised on the notion that competition advances consumer welfare)⁵⁶ and the state interest in regulation (which generally restricts competition).⁵⁷ The

antitrust scrutiny in connection with accreditation, they have also shielded lawyers in cases involving bar examination grading, unauthorized practice rules, and advertising restrictions. *See, e.g.*, *Hoover v. Ronwin*, 466 U.S. 558 (1984) (dismissing, on state action immunity grounds, an antitrust action brought against a committee appointed by the Arizona Supreme Court challenging the bar examination grading system adopted by that committee); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (holding a lawyer-advertising ban unconstitutional, but also holding that the ban was not subject to antitrust review because of the state action immunity doctrine); *Lawline v. Am. Bar Ass'n*, 956 F.2d 1378 (7th Cir. 1992) (dismissing, on state action immunity grounds, an antitrust action challenging rules related to the unauthorized practice of law).

55. The term “state action” as used in antitrust law is different from the concept of state action used in civil rights cases under the Fourteenth Amendment. The definition of state action is relatively narrow in antitrust law, as will be discussed *infra*; however, it is much broader under Fourteenth Amendment analysis. In the Fourteenth Amendment context, state action has been held to extend even to certain private actions with a quasi-public character. *See generally* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 18-1 to 18-7 (2d ed. 1988) (discussing the state action doctrine within the constitutional law context). Consequently, conclusions as to what constitutes state action under constitutional law do not apply to the question of whether state action is implicated under antitrust law. The difference between the two state action concepts is most evident in the treatment of municipal action, which is ipso facto state action for Fourteenth Amendment purposes but not for antitrust purposes. For municipal or state agency acts to constitute state action under antitrust law, there must be clear authorization from the state legislature or, where applicable, the state supreme court. *See infra* notes 67-69 and accompanying text.

56. *See, e.g.*, *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) (noting the goal of antitrust and the premise underlying that goal).

57. *See, e.g.*, *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 61 (1985) (viewing state action as a balance of the federal interest in advancing competition and the state interest in regulating competition); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 110-11 (1978) (same); *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 398-400 (1978) (same). Commentators have also widely seen state action as achieving an accommodation of the two conflicting interests. *See* Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 24-25 (1983); Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CAL. L. REV. 227, 227-29 (1987); David McGowen & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J.L. & PUB. POL'Y 293, 298-301 (1994); John Shephard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 713-15, 729-39 (1986). *But see* Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 673-96 (1991) (rejecting the “conflict and accommodation” paradigm and arguing instead that state action cases can be best explained under the “process” paradigm) [hereinafter *Antitrust Process*].

doctrine began with the seminal case of *Parker v. Brown*⁵⁸ involving a California statute that essentially established a program that fixed raisin prices and restricted competition among raisin growers.⁵⁹ Aiming to promote the values of federalism and state sovereignty, the Supreme Court held that state officials enforcing the raisin program were immune from antitrust liability because the Sherman Act was not intended to restrain “state action.”⁶⁰ Because *Parker* was brought against only the state administrators of the program, not the private growers who either orchestrated or complied with it, the case does not decide under what circumstances, if any, private parties acting under warrant of state law are also exempt.

In a series of subsequent cases, the immunity from antitrust liability accorded state officials in *Parker* was extended to private parties whose anticompetitive acts were the product of state action.⁶¹ The doctrine gradually evolved into three formal rules. If courts consider the anticompetitive restraint in question a direct act of “the State as sovereign,”⁶² the restraint enjoys absolute immunity from antitrust review.⁶³ However, if courts consider the actor private, then, under a test articulated in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,⁶⁴ immunity exists only if the challenged restraint was taken pursuant to a “clearly articulated and affirmatively expressed . . . state policy,”⁶⁵ and was subject to

58. 317 U.S. 341 (1943).

59. The Act was passed during the Depression in the 1930s. According to the preamble to the Act, there was an overproduction of raisins, resulting in “the unreasonable waste of [the state’s] agricultural wealth.” 1933 Cal. Stat. 754, § 1. The Act established a program, backed by the state’s enforcement authority, that essentially allowed raisin producers to control output and fix prices of raisins. *Parker*, 317 U.S. at 346.

60. *Id.* at 351 (“The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.”).

61. See *infra* notes 62-70.

62. *La. Power & Light*, 435 U.S. at 410. A direct act of the state as sovereign generally includes acts of the state legislature, the highest state court acting in its legislative capacity, and possibly the governor. See *Hoover v. Ronwin*, 466 U.S. 558, 567-69 (1984); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 359-60 (1977); *Parker*, 317 U.S. at 350-51.

63. See, e.g., *S. Motor Carriers, Inc. v. United States*, 471 U.S. 48, 64 (1985); *Cnty. Communications Co. v. City of Boulder*, 455 U.S. 40, 50-54 (1982); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 790-91 (1975).

64. 445 U.S. 97 (1980).

65. *Id.* at 105 (quoting *La. Power & Light*, 435 U.S. at 410). See also *Patrick v. Burget*, 486 U.S. 94, 100 (1988). To satisfy the clear authorization requirement, it is unnecessary to show that state law compelled the challenged actions. See *S. Motor Carriers*, 471 U.S. at 60-61; *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 43 (1985). The actor only needs to show that the legislature or state supreme court contemplated the type of activity that is being challenged. *Town of Hallie*, 471 U.S. at 42. However, it should be noted that “mere [state] neutrality respecting the . . . actions challenged as anticompetitive” will not satisfy this first requirement. *Cnty. Communications*, 455 U.S. at 55 (emphasis omitted).

active state supervision.⁶⁶ A third, intermediate rule governs acts of municipalities, state agencies, and other subordinate state entities. Under this rule, these lower-level state entities are not deemed “the state” for purposes of the state action doctrine⁶⁷ and must show state authorization to enjoy state action immunity.⁶⁸ However, unlike private actors, subordinate state entities do not have to show active state supervision of their actions.⁶⁹

The additional demands in cases where the sovereign state is *not* deemed to be the actor seem to be based on the view that federal antitrust law should give way to state regulatory decisions only if the state actually imposes a regulatory scheme that it believes would serve the state’s interests more effectively than free competition.⁷⁰ However, if the state does not clearly indicate its regulatory intentions or if the state does not appear to be taking its own policy seriously (by failing to actively monitor it),⁷¹ then the rationale

66. *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminium, Inc.*, 445 U.S. 97, 105-06 (1980) (citing *La. Power & Light*, 435 U.S. at 410). *See also* *Fed. Trade Comm’n v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992); *S. Motor Carriers*, 471 U.S. at 58-59; *Patrick*, 486 U.S. at 100. The active state supervision requirement is not satisfied when the state “simply authorizes price setting and enforces the prices established by private parties” because this broad authorization merely “cast[s] . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.” *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344-45 (1987) (quoting *Midcal*, 445 U.S. at 105).

67. *See La. Power & Light*, 435 U.S. at 408-17; *Town of Hallie*, 471 U.S. at 38-40; *Hoover*, 466 U.S. at 568-69; *Cnty. Communications*, 455 U.S. at 50-54.

68. *See S. Motor Carriers*, 471 U.S. at 60-61, 62-63; *Town of Hallie*, 471 U.S. at 38-40; *Cnty. Communications*, 455 U.S. at 51-52. It should be noted, however, that it does not take much for municipalities to meet this clear authorization requirement. Municipalities only need to show that the state as sovereign demonstrated an intention “to displace competition in a particular field with a regulatory structure.” *S. Motor Carriers*, 471 U.S. at 64. In fact, antitrust courts have found clear state authorization for agency action even when the state supreme court specifically found that the challenged action was not authorized by state law, and even when evidence showed that state officials abused their authority. *See Lease Lights, Inc. v. Pub. Serv. Co.*, 849 F.2d 1330, 1333-35 (10th Cir. 1988); *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985).

69. *See Town of Hallie*, 471 U.S. at 46-47, 47 n.10 (concluding that municipal actors need not show active state supervision, and suggesting—though not deciding—that state agency actors also need not show active state supervision); *Hass v. Or. State Bar*, 883 F.2d 1453, 1457-63 (9th Cir. 1989) (viewing state bar association as a state agency requiring clear state authorization for a restraint, but not active state supervision). Municipalities (and probably state agencies) need not show active state supervision because they are considered less likely than private actors to pursue private interests in imposing regulation. *Hass*, 883 F.2d at 1459.

70. *See Cnty. Communications*, 455 U.S. at 55 (holding that the state must clearly articulate and affirmatively express a state policy of replacing competition with regulation and that municipalities are not simply free “to do as they please”); *Parker v. Brown*, 317 U.S. 341, 351 (1943) (pointing out that state action doctrine does not permit the state to “give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful”); Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 *YALE L.J.* 486, 500 (1987) (defending the *Midcal* two-prong test as a sensible federalism compromise that does not permit delegation of unsupervised power to restrain trade, which would effectively allow states to nullify the Sherman Act).

71. The active state supervision requirement stems from fears that private actors may act to further their own self-interests, rather than state policies, and it serves to ensure that the state exercise

for immunity disappears.⁷² Thus, if the state chooses to delegate its authority to regulate, the law requires some demonstration that the state clearly authorized the restraint and, in the case of private actors, also actively supervised the conduct before antitrust immunity is deemed warranted.

The state action doctrine has been widely criticized for “spawn[ing] more confusion and litigation than certainty”⁷³ and for its lack of a coherent theory.⁷⁴ No clear theoretical principles exist to aid in the determination of which actor bears responsibility for the restraint,⁷⁵ when a restraint is considered an act of the state,⁷⁶ how much supervision suffices for the active state supervision requirement, who needs supervision, who can supervise on the state’s behalf, and so forth.⁷⁷ Critics also lament the absence of an acceptable doctrinal explanation for most judicial decisions as to whether a particular case involves a state or private action.⁷⁸

In the context of restraints on competition involving state bar associations and boards or committees appointed by the states’ highest courts, the Supreme Court has found these entities’ activities to be private in one case⁷⁹ and to be acts of the state supreme court in two cases.⁸⁰ In *Goldfarb v.*

ultimate control over the imposed restraint on competition. See *Patrick*, 486 U.S. at 101. On the assumption that municipalities and state agencies are less likely to pursue private interests, rather than state policies, these lower-level state entities and subdivisions do not need to meet the active state supervision requirement. See *Town of Hallie*, 471 U.S. at 46-47.

72. See *Ticor Title Ins.*, 504 U.S. at 636. See also *Garland*, *supra* note 70, at 501, 508 (noting that *Midcal* effectively immunizes true state action or “action taken by the state qua state,” but does not immunize conduct that is “effectively private action” or the delegation of competition-restraining power to private parties).

73. *Antitrust Process*, *supra* note 57, at 674.

74. See, e.g., *id.*; Daniel J. Gifford, *Federalism, Efficiency, the Commerce Clause, and the Sherman Act: Why We Should Follow a Consistent Free-Market Policy*, 44 EMORY L.J. 1227, 1229 n.5 (1995) (noting that “case law exhibits a remarkable lack of coherence”); McGowan & Lemley, *supra* note 57, at 298 (remarking on the “confused state of the cases” and the “doctrinal confusion” caused by the Court’s state action interpretation); William H. Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U. L. REV. 1099, 1109 (1981) (describing the current doctrine as “internally inconsistent”); John Shephard Wiley Jr., *Revision and Apology in Antitrust Federalism*, 96 YALE L.J. 1277, 1280 (1987) (criticizing the state action doctrine as “irrational antitrust policy”).

75. See PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 212.6, at 160 (Supp. 1989) (commenting on the “pervasive vexatiousness” of the problem).

76. See *id.* ¶ 212.2c-d, at 127-31, ¶ 212.9f, at 184-87.

77. See *id.* ¶ 212.7, at 164-67.

78. See, e.g., *Antitrust Process*, *supra* note 55, at 685 (observing that the Court simply “ignored the clear state action . . . [and] made the conclusory assertion that these restraints were ‘private’ . . . and thus not immune without active state supervision”).

79. *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975).

80. *Hoover v. Ronwin*, 466 U.S. 558 (1984); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977). See also *Lawline v. Am. Bar Ass’n*, 956 F.2d 1378 (7th Cir. 1992) (holding that bar associations were immune from antitrust liability because the state supreme court had adopted the associations’ disciplinary rule prohibiting unauthorized practice of law).

Virginia State Bar,⁸¹ the earliest Supreme Court case dealing with state action in connection with the legal profession, the Court did not accord the Virginia State Bar state action immunity for its issuance of an ethical opinion requiring bar members to adhere to a minimum fee schedule.⁸² Although the Supreme Court acknowledged that the Virginia State Bar was “a state agency for some limited purposes,” it treated the bar as a private actor⁸³ apparently because the Virginia Supreme Court had not compelled the fee schedule adoption.⁸⁴

Bates v. State Bar of Arizona,⁸⁵ in contrast, attributed an act of the State Bar of Arizona to the Arizona Supreme Court. The case involved an antitrust challenge to the state bar's enforcement of a disciplinary rule banning lawyer advertising.⁸⁶ Finding that the Arizona Supreme Court was “the ultimate body wielding the State’s power over the practice of law”⁸⁷ and that the disciplinary rule in question was an “affirmative command” of that court,⁸⁸ the U.S. Supreme Court held that the real actor was the Arizona Supreme Court and, therefore, state action immunity applied.

Lower courts have also treated state bar associations, committees, boards, and other entities appointed by a state supreme court as state agencies. *See, e.g.*, *Benton v. La. Pub. Facilities Auth.*, 897 F.2d 198, 203-04 (5th Cir. 1990) (holding that LPFA, a public corporation authorized by the state to issue bonds, operated as a state agency in selecting the bond counsel and, therefore, a showing of active state supervision was unnecessary for state action immunity); *Hass v. Or. State Bar*, 883 F.2d 1453 (9th Cir. 1989) (concluding that the state bar acted as a state agency in requiring all state attorneys to purchase malpractice insurance through the state bar, and therefore must show clear state authorization but not active state supervision); *Guralnick v. Supreme Court of N.J.*, 747 F. Supp. 1109, 1117-18 (D.N.J. 1990) (holding that the Fee Arbitration Committee appointed by the New Jersey Supreme Court acted as a state agency and, therefore, probably did not need to show active state supervision), *aff'g* 961 F.2d 209 (3d Cir. 1992).

81. 421 U.S. 773 (1975).

82. Although the minimum fee schedule was supposedly merely “advisory,” the state bar’s ethical opinion provided that the “consistent and intentional violation of the . . . minimum fee schedule for the purpose of increasing business can . . . constitute solicitation,” in violation of the Virginia bar disciplinary rules. *Goldfarb v. Va. State Bar*, 497 F.2d 1, 4 (4th Cir. 1974), *rev'd*, 421 U.S. 773 (1975).

83. *See Goldfarb*, 421 U.S. at 791-92 (“The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act.”). *See also Lender’s Serv., Inc. v. Dayton Bar Ass’n*, 758 F. Supp. 429 (S.D. Ohio 1991) (concluding that the state bar’s prosecution of an alleged violation of the Ohio Supreme Court rule banning the unauthorized practice of law cannot be considered an act of the Ohio Supreme Court, but the state bar’s action was nonetheless immunized because the state both clearly authorized and actively supervised the restraint).

84. *Goldfarb*, 421 U.S. at 790-91.

85. 433 U.S. 350 (1977).

86. *Bates* is mostly remembered for holding that bans on lawyer advertising violated the constitutional right to free speech. However, the case is also significant for its rejection of the plaintiff’s antitrust claim on state action grounds. *See id.* at 359-62.

87. *Id.* at 360.

88. *Id.* at 359-60.

In another case where a state supreme court's involvement seems even less direct, *Hoover v. Ronwin*,⁸⁹ the Supreme Court likewise attributed the challenged conduct to the state supreme court, which was, therefore, entitled to per se immunity. *Hoover* involved an antitrust suit brought by a failing candidate of a state bar examination against the Committee on Examination and Admissions. The plaintiff argued that the committee had graded on a curve formulated to limit the number of passing examinations (and, hence, the number of new attorneys) in violation of the Sherman Act.⁹⁰ In affirming the lower court's dismissal of the complaint, the Court held that the challenged conduct "was in reality that of the Arizona Supreme Court," which had appointed the committee and formally made all final bar admission decisions, and was therefore per se immune.⁹¹ However, as the dissent pointed out, the more realistic view of the situation *Hoover v. Ronwin* presented is that the state supreme court left real control of the examination and bar admissions process to the committee, composed of practicing lawyers, and rarely exercised its formal powers.⁹² Given this reality, the Court's holding that the committee acted as "the state," and not merely as a subordinate state agency, is somewhat puzzling.⁹³

89. 466 U.S. 558 (1984).

90. *Id.* at 564-65, 570 & n.19.

91. *Id.* at 573. The Court gave the following reasons for its conclusion that the state was the real actor: The committee filed its grading formula with the state supreme court prior to the examination; the state supreme court had considered and rejected the plaintiff's challenge to the grading formula; and the state supreme court made the final decisions on admission of bar applicants. *Id.* at 572-73, 576-78. Thus, even if the committee members had decided to grade more strictly in order to reduce the total number of new lawyers admitted to practice, the state supreme court would have been aware of it. *Id.* at 576 n.28.

92. *Id.* at 588-89, 589 n.12, 592 n.16 (Stevens, J., dissenting).

93. In an effort to harmonize the seemingly ad hoc judicial resolutions regarding when an actor in a case is deemed to be the state, Professor Einer Elhauge has persuasively argued that the true dispositive issue in each case, and the normative approach to the doctrine, is whether "the person controlling the terms of the restraint" is financially interested. *Antitrust Process*, *supra* note 57, at 685. Einer Elhauge suggests that, because financially interested parties cannot be trusted to promote the public interest, the Court, in fact, applies state action immunity only when financially disinterested state officials control the terms of the restraint in question. *Id.* at 683-96. Thus, when the state delegates its decision making function to private parties, the person controlling the terms of the restraint is financially interested. Therefore, courts are unwilling to grant state action immunity unless that the state clearly authorized the restraint and actively supervised it (i.e., unless a financially disinterested party was ultimately in charge of the decision making process). Viewed from this paradigm, the Courts' seemingly inconsistent decisions as to whether the actor in a case is deemed the state can be better understood.

2. *Petitioning Immunity*⁹⁴

In *Parker*, the case from which the state action doctrine was derived, the Court implied that if state action (regardless of the degree of its anticompetitiveness) is immune from antitrust liability, petitioning the state for that restraint cannot be punished.⁹⁵ This implication was made explicit in *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*,⁹⁶ a case involving a publicity campaign conducted by a group of railroads against truckers. The campaign, which included fraudulent and disparaging statements about truckers, produced two effects: it persuaded the state to pass legislation impeding truckers' ability to compete with the railroads,⁹⁷ and it also directly impaired truckers' good will with their customers.⁹⁸

The Supreme Court had little trouble finding that the first effect did not subject the railroads to antitrust liability.⁹⁹ It stated simply that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly."¹⁰⁰ Antitrust immunity for joint efforts to influence government officials would seem to be a corollary of state action, given the value of the right to petition in a democracy.¹⁰¹ As to the more difficult question concerning the second effect, the Court concluded that petitioning immunity should extend to that effect as well because it was incidental to legitimate attempts to influence government action.¹⁰²

94. The petitioning immunity doctrine is often referred to as the *Noerr* doctrine or the *Noerr-Pennington* doctrine. However, like a growing number of commentators, I will not refer to it by that term because the doctrine today raises many more complex issues than were presented in *E. R.R. President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), or in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Furthermore, subsequent case law has eclipsed some of the significance of these two early cases.

95. *Parker v. Brown*, 317 U.S. 341, 350-52.

96. 365 U.S. 127 (1961).

97. *Id.* at 129-30.

98. *Id.* at 129, 133, 142.

99. *Id.* at 136.

100. *Id.* at 136-38. See also *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. at 508, 510-11 (1971); *Pennington*, 381 U.S. at 670.

101. See *E. R.R. President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961) (noting that "the whole concept of representation depends on the ability of the people to make their wishes known to their representatives," and that the Court cannot penalize citizens for making demands of the government when the government is expected to be responsive to their needs).

102. *Id.* at 142-44. It did not address, however, what effects would be deemed "incidental" to the petitioning. For example, does the effect have to be small relative to the political effect to be incidental? Or is the effect considered incidental whenever it is related to the petitioning activities? Or is it incidental only if it is necessary for petitioning? The Court did make clear, however, that it does not matter whether the individuals that sought a government restraint were motivated by a financial

As with state action, petitioning immunity suffers from a lack of doctrinal coherence.¹⁰³ Commentators have criticized the doctrine's lack of "clear moorings,"¹⁰⁴ its inconsistency,¹⁰⁵ and the uncertainty as to whether the doctrine is based on a statutory interpretation of the antitrust laws or on the First Amendment right to petition.¹⁰⁶ Although some of the doctrinal muddle in earlier petitioning cases was resolved in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*¹⁰⁷ (and other recent cases),¹⁰⁸ that decision has created new sources of confusion, and its implications on standard setting, which includes

interest or whether the lobbying methods employed were unethical or deceptive. *Id.* at 139-42.

103. The sweeping principle articulated in *Noerr*—that joint efforts to influence the government do not violate the antitrust laws, even though intended to eliminate competition—was marked with conflicting and confusing exceptions, especially in the earlier years of the development of the doctrine. For example, there is the "sham" exception, which was stretched to cover improper petitioning activities even if these activities were intended to and did influence government action. A "commercial" exception to the doctrine was also unclear and poorly defined, as was the conspiracy exception. See generally Stephen Calkins, *Development in Antitrust and the First Amendment: The Disaggregation of Noerr*, 57 ANTITRUST L.J. 327 (1988) (discussing these exceptions and other ambiguities); Gary Minda, *Interest Groups, Political Freedoms, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HASTINGS L.J. 905 (1990) (critiquing the incoherence of the *Noerr* doctrine). The sham exception has since been narrowed so that only activities not genuinely intended to gain government action would be considered sham. See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 502-03 (1988). For further discussion of *Allied Tube*, see *infra* notes 109-25 and accompanying text.

104. Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 CAL. L. REV. 1177, 1191 (1992).

105. See Calkins, *supra* note 103, at 338-39; McGowan & Lemley, *supra* note 57, at 363-64.

106. The cases seem to say that the doctrine is based on statutory interpretation, but is influenced by an appreciation of the First Amendment right to petition. See, e.g., *Fed. Trade Comm'n v. Superior Court Trial Lawyers' Ass'n*, 493 U.S. 411, 424 (1989) (seeing the doctrine as "[i]nterpreting the Sherman Act in light of the First Amendment's Petition Clause"); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1971) (taking a more constitutional approach by noting that the failure to recognize petitioning immunity "would be destructive of rights of association and petition"); *Pennington*, 381 U.S. at 669 (stating that "[t]he Sherman Act . . . was not intended to bar concerted action of this kind"); *Noerr*, 365 U.S. at 138 (casting its decision as based on statutory interpretation, but noting that a ruling otherwise "would raise important constitutional questions"). For commentary supporting a statutory interpretation approach, see Milton Handler & Richard A. De Sevo, *The Noerr Doctrine and Its Sham Exception*, 6 CARDOZO L. REV. 1, 4-5 (1984). For arguments supporting a First Amendment analysis, see Daniel Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 80-84, 94-96 (1977); Garland, *supra* note 70, at 512-16; James D. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 GEO. L.J. 65, 66 (1985); McGowan & Lemley, *supra* note 57, at 361-70.

107. 486 U.S. 492 (1988). The case sharply restricted the sham exception to petitioning immunity. It now applies only to activities not genuinely intended to influence government action. Real efforts to petition the government, no matter how improper and abusive, are no longer considered sham. *Id.* at 502, 507 n.10.

108. See, e.g., *City of Columbia v. Omni Outdoor Adver.* 499 U.S. 365, 374-84 (1991) (overturning a jury verdict that found a conspiracy between a private competitor and municipal officials on the ground that there is no conspiracy exception to either state action or petitioning immunity, except possibly when the government acts as a market participant).

accreditation, are particularly unclear.

Allied Tube involved a widespread practice of trade association members promulgating standards that were later adopted by state and municipal governments. The plaintiff alleged that Allied Tube, a steel conduit maker, stacked a meeting of a highly respected private standard setting association with its own agents in order to defeat the inclusion of a competitor's plastic conduit in the association's electrical code.¹⁰⁹ The defendant's activities allegedly had two effects. First, numerous state and local governments eventually adopted the code, which effectively banned the use of plastic conduit in those areas.¹¹⁰ Second, the exclusion of plastic conduit from the code stigmatized the product, even where the code was not incorporated into law, which was a harm separate from the states' adoption of the code.¹¹¹ In an antitrust action brought by the plastic conduit maker seeking damages for the second effect,¹¹² Allied Tube asserted petitioning immunity as a defense. The question, therefore, was whether Allied Tube's petitions to the private standard-setting association should be immunized from antitrust liability with respect to the stigma effect.

The Court's decision was complex. It first reaffirmed and elaborated on the difference, drawn in *Noerr*, between harm caused by the requested state action and harm resulting from "private action."¹¹³ Where a restraint is the result of state action, those urging the action are absolutely immune;¹¹⁴ but where a restraint results from private action, there is immunity only if the restraint is "incidental" to valid efforts to influence the government, with "validity" depending on the "context and nature" of the activities.¹¹⁵ The case further held that petitions to a *private* organization might still enjoy

109. *Allied Tube*, 486 U.S. at 495-96. Allied Tube's methods were subversive of the standard-setting process. Allied Tube recruited (and financed) 230 new members specifically for the purposes of voting at the critical meeting. *Id.* at 496-97. The new members were rounded up for the vote and even "instructed where to sit and how and when to vote" by Allied Tube group leaders "who used walkie-talkies and hand signals to facilitate communication" during the critical meeting. *Id.* at 497. Allied Tube eventually won on a very close vote of 390 to 394. *Id.*

110. *See id.* at 495-96.

111. For example, many underwriters refused to insure buildings not constructed in conformity to the code, and many contractors would not use unapproved products, even if the relevant local government had not adopted the code. *Id.* at 496.

112. The issue of damages for direct harm caused by state action (i.e., the enactment of the code in many states and municipalities) was not before the Court, either because the plaintiff never sought those damages or was not awarded these damages and chose not to appeal. However, the Court implied that injury from the enactment of the code would not be recoverable because of state action immunity. *Id.* at 500-01.

113. *Id.* at 499.

114. *Id.* (citing *E. R.R. President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961)).

115. *Id.* (citing *Noerr*, 365 U.S. at 143).

petitioning immunity if the petition was a “valid effort to influence government action,”¹¹⁶ again with validity depending on “the context and nature” of the private actor’s activities.¹¹⁷

Applying this standard, the Court said the private standard-setting association was not a “quasi-legislative” body simply because the states routinely adopted its work product.¹¹⁸ Thus, to enjoy petitioning immunity, the defendant’s efforts to affect the association vote must be “incidental” to “valid” attempts to influence government action.¹¹⁹ While the Court conceded that the defendant’s activities were incidental to genuine efforts to indirectly influence state and local governments,¹²⁰ it said that the efforts were not “valid.”¹²¹ Thus, harm flowing from the defendant’s efforts to influence the private association (thereby indirectly influencing government action) did not enjoy immunity.¹²² Although it is not entirely clear from the decision, the “context and nature” that made the defendant’s petitioning efforts invalid seemed to have been the defendant’s subversion of the standard-setting process.¹²³ The Court also ended with a broad holding: “[W]here, as here, an economically interested party exercises decision making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* liability from any antitrust liability flowing from the effect the standard has of its own force in the marketplace.”¹²⁴

Given the vagueness of the decision, the implications of this case for standard setting (which includes accreditation) are uncertain.¹²⁵ If the

116. *Id.* at 502.

117. *Id.* at 504.

118. *Id.* at 501.

119. *See id.* at 499 (citing *Noerr*, 365 U.S. at 143) (noting that an “anticompetitive restraint result[ing] directly from private action . . . cannot form the basis for antitrust liability if it is ‘incidental’ to a valid effort to influence governmental action”).

120. *Id.* at 503. The Court rejected earlier interpretations of the “sham” exception that covered any form of improper petitioning, and specifically said that the defendant’s activities were not “sham” because they were obviously aimed at influencing government action. *Id.* at 502. The Court also rejected the argument that petitioning immunity can apply only to direct petitioning of government officials, noting that petitioning a private standard setting organization may sometimes be the only effective way to influence government action. *Id.* at 503.

121. *Id.* at 503-10.

122. *Id.* at 509-10.

123. *Id.* at 504 (noting the defendant’s “rounding up economically interested persons to set private standards”).

124. *Id.* at 509-10.

125. In dissent, Justice White, joined by Justice O’Connor, said:

[C]onduct otherwise punishable under the antitrust laws either becomes immune from the operation of those laws when it is part of a larger design to influence the passage and enforcement of laws, or it does not. No workable boundaries to the *Noerr* doctrine are established by declaring, and then repeating at every turn, that everything depends on ‘the context and nature of’ the activity

expansive holding applies, few participants in standard-setting organizations will ever have immunity for the effects of those standards on the marketplace (i.e., effects other than those that flow from their adoption into law) because most standard-setting organizations are composed of interested market participants. If, however, the narrower holding applies, the tactics that are used will, instead, be the determinative factor, and an interested participant who has not engaged in improper methods of persuasion might still enjoy immunity.

*B. Application of Immunity Doctrines to Law School Accreditation*¹²⁶

Applying these immunity doctrines to law school accreditation proves more complicated than usual for several reasons. First, accreditation, unlike most state action and petitioning immunity situations, includes an additional restraint that precedes, and is separable from, state action and petitioning.¹²⁷ An accrediting body must first agree on the standards to be used in making accreditation decisions and then apply those standards accordingly. Even if state action fails or does not follow, the accreditation standards continue to be used in making accreditation determinations. Second, state action is usually limited to the official adoption of the accreditation results. The state rarely, if ever, endorses the criteria used to reach those results. Thus, it remains unclear whether state action immunity extends to the standards as well, assuming the doctrine's applicability to the states' use of accreditation decisions in bar admissions. Third, there is usually no current petitioning of

. . . if we are unable to offer any further guidance about what this vague reference is supposed to mean, especially when the result here is so clearly wrong as long as *Noerr* itself is reputed to remain good law. . . . [Lower courts] will be obliged to puzzle over claims raised under the doctrine without any intelligible guidance about when and why to apply it.

Id. at 513 (White, J., dissenting).

126. Because the United States Department of Education recognizes the ABA as the sole accrediting body for American law schools, and attendance at an ABA-accredited school entitles students to federal financial assistance, some might argue that the ABA enjoys federal antitrust immunity from the antitrust law. This argument should not succeed because there is no explicit immunity granted under the congressional act authorizing the Department of Education to designate accrediting agencies. *See* 20 U.S.C. § 1099b (1994). And, the Supreme Court has long disfavored implicit exemptions from the Sherman Act, noting that “[i]mplied antitrust immunity . . . can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.” *Nat’l Gerimedical Hosp. v. Blue Cross*, 452 U.S. 378, 388 (1981) (quoting *United States v. Nat’l Ass’n of Sec. Dealers*, 422 U.S. 694, 719-20 (1975)). There is no such repugnancy between the Department of Education’s regulation of the ABA accreditation system and the antitrust laws. The Department’s regulations focus on accrediting activities, and make certain disclosures mandatory. *See* 34 C.F.R. §§ 602.14-26 (2000). The regulations do not compel or even facilitate violation of the antitrust laws.

127. A preexisting restraint, independent of state action, also exists where trade associations set standards that the state later adopts, such as in *Allied Tube*.

the state: the successful petitioning typically occurs long before the particular accreditation decisions.¹²⁸ Therefore, petitioning immunity, which might have been applicable when efforts were first made to secure state backing, may not have any application today, long after the successful petitioning. These complicating factors have not drawn much notice: of the few cases dealing with antitrust claims in the accreditation context,¹²⁹ only *Massachusetts School of Law at Andover, Inc. v. American Bar Association*,¹³⁰ has even briefly noted them.¹³¹

1. *Exclusionary Effect of States' Use of Accreditation Decisions Is Immune Under State Action*

The first anticompetitive effect of ABA accreditation flows from the state's effective adoption of the ABA's accreditation results (by excluding graduates of non ABA-approved schools from the bar examination). This exclusionary effect will be ipso facto immune from antitrust review if the bar admission rule effectuating the exclusion can be considered an act of the state itself, a conclusion that *Hoover v. Ronwin*¹³² seems to compel. The plaintiff in *Hoover*, who attributed his bar examination failure to the use of a grading

128. For example, the ABA petitioned the states decades ago to allow only graduates from ABA-approved schools to take the bar examination, and had largely succeeded in its campaign by 1958. STEVENS, *supra* note 1, at 207-08. Since then, the ABA merely conveys its list of accredited law schools to the states annually, along with a copy of its accreditation standards. *See supra* note 32 and accompanying text. The ABA's current activity—that of merely communicating its accreditation results to the states—may not qualify as petitioning. The actual petitioning associated with ABA accreditation took place prior to the accreditation decisions.

129. *See* *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 107 F.3d 1026 (3d Cir. 1997); *Feldman v. Gardner*, 661 F.2d 1295, 1304-08 (D.C. Cir. 1981) (holding that the Court of Appeals for the District of Columbia was entitled to state action immunity for requiring graduation from an ABA-accredited school as a condition for bar admission); *Brandt v. Am. Bar Ass'n*, No. CIV.A.3:96-CV-2606D, 1997 WL 279762, at *1-2 (N.D. Tex. May 15, 1997) (dismissing accreditation-related suit against the ABA on petitioning immunity ground); *Zavaletta v. Am. Bar Ass'n*, 721 F. Supp. 96 (E.D. Va. 1989) (denying plaintiffs' request for an injunction compelling the ABA to grant accreditation to plaintiffs' school on the ground that the ABA merely expressed a First Amendment protected opinion and did not restrain trade); *Sherman College of Straight Chiropractic v. Am. Chiropractic Ass'n*, 654 F. Supp. 716 (N.D. Ga. 1986) (holding that chiropractic board of examiners enjoyed petitioning immunity for their lobbying activities with state licensing boards), *aff'd*, 813 F.2d 349 (11th Cir. 1987).

130. 107 F.3d 1026 (3d Cir. 1997).

131. *See id.* at 1038 (noting that while the ABA's petitioning activities occurred before the 1970s, its current conduct in communicating accreditation decisions to the states and "[d]iscussing the quality and competence of its decisions" also constituted petitioning); *id.* at 1038-39 (concluding that unaccredited school showed no antitrust injury from the ABA's enforcement of its accreditation standards, but stating that "the ABA is not immune in the actual enforcement of its standards" because "the state action relates to the use of the results of the accreditation process, not the process itself").

132. 466 U.S. 558 (1984).

formula allegedly designed to limit the number of passing applicants, sued the Committee on Examinations and Admissions (the “Committee”) that had set the “curve” and graded the examinations.¹³³ While the Committee, comprising attorneys appointed by the Arizona Supreme Court, administered the bar examination and bar admissions process, final authority to admit or deny applications for admission to the bar rested with the Arizona Supreme Court.¹³⁴ In affirming the dismissal of the plaintiff’s claim, the U.S. Supreme Court attributed the Committee’s grading formula to the Arizona Supreme Court,¹³⁵ which acts as the state, and thus held the Committee per se immune.¹³⁶

Similarly, the Third Circuit in *Massachusetts School of Law* found that the states acted as sovereign when they promulgated bar admission eligibility rules.¹³⁷ Noting that every state regulates admission to the practice of law in its own state,¹³⁸ the court of appeals held that the unaccredited law school’s injuries were the effects of state action because they resulted from its students’ inability to sit for the bar examination in most states.¹³⁹ Thus, the ABA enjoyed state action immunity without needing to make any further showing of clear state authorization or active supervision.¹⁴⁰

This conclusion seems proper despite the fact that there is effectively some functional delegation of authority to the ABA: the ABA, through the accreditation decisions, essentially controls who will be affected by the bar examination rule. That is because the states remain the ultimate decision makers due to their ability to abandon their reliance on the ABA process at any time (by revising or eliminating the bar examination exclusion rule). Indeed, a contrary conclusion would be hard to justify under *Bates*,¹⁴¹ which held that a state bar association’s enforcement of a disciplinary rule that had been proposed by a private bar constituted an act of state because the state supreme court ultimately promulgated the rule.¹⁴² A different conclusion would probably also be inconsistent with *Hoover*,¹⁴³ which attributed the grading methods of a committee appointed by a state supreme court to the

133. *Id.* at 564-65.

134. *Id.* at 561-64.

135. *Id.* at 569-73.

136. *Id.* at 573.

137. *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass’n*, 107 F.3d 1026, 1036 (3d Cir. 1997).

138. *See id.* at 1035.

139. *Id.* at 1036.

140. *Id.*

141. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

142. *Id.* at 362-63.

143. *Hoover v. Ronwin*, 466 U.S. 558 (1984).

court itself, despite the fact that the state supreme court obviously played, at most, a minor role in the derivation of the challenged grading formula.¹⁴⁴

2. *Stigma Effect Enjoys No Petitioning Immunity*

In addition to the exclusionary effect caused by state adoption of ABA accreditation decisions, another potentially anticompetitive effect resulting from the ABA's accreditation activities is the stigma that attaches to unaccredited law schools as a result of their unapproved status, which hinders their ability to compete on the merits. This second effect does not implicate the state action doctrine because the effect exists independently of the restraint imposed by the state bar eligibility rules. However, under *Noerr*,¹⁴⁵ petitioning immunity protects this effect if it is incidental to legitimate petitioning activities.¹⁴⁶ In other words, as long as there is valid petitioning of the state, petitioning immunity extends, not only to the anticompetitive effects of the state action that may result from petitioning, but also to the incidental anticompetitive effects on the marketplace.

In the context of ABA accreditation, if the ABA has legitimately lobbied the states to adopt restrictive bar examination eligibility rules, any stigma harm (i.e., nonstate-action injury) caused by the petitioning will probably be considered incidental to the lobbying efforts and therefore immunized. Given that most states require graduation from an ABA-accredited law school as a condition for taking the bar, the exclusionary effect of the states' rules (i.e., state action) must be significantly greater than the stigma injury inflicted on the unaccredited schools. Moreover, an explanation of why the ABA considers its seal of approval the only reliable signal of law school quality would logically be an integral part of the ABA's case to the states for acceptance of its accreditation decisions. Furthermore, unlike in *Allied Tube*, nothing in the "context and nature" of the ABA's petitioning can be construed as invalid.¹⁴⁷

However, if the ABA has not engaged in any activities to influence the state, there has been no petitioning to which a stigma effect can be incidental. Therefore, there can be no possible petitioning immunity for such a stigma effect. In the early to mid-1900s, the ABA unquestionably engaged in valid petitioning by waging a state-by-state campaign to secure the restrictive bar

144. *Id.* at 569-74.

145. *E. R.R. President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

146. *See id.* at 143-44.

147. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-511 (1988).

admission eligibility rules that currently exist in most states.¹⁴⁸ Under *Noerr*, the anticompetitive effect of the state bar admission rules passed as a result of that successful campaign has immunity.¹⁴⁹ Furthermore, if the petitioning also resulted in incidental stigma injury, the stigma effect most likely has antitrust immunity as well.

The open question, however, is whether resting on one's laurels and relying on prior successful petitioning can be considered current petitioning so as to immunize stigma injury inflicted long after the initial petitioning campaign. In other words, does the ABA's current practice of merely sending to the states its list of accredited schools and a copy of its accreditation standards¹⁵⁰ constitute petitioning activity sufficient to invoke petitioning immunity for any incidental stigma injury that might flow from the denial of accreditation? I argue that it does not. And if there is no petitioning to which the stigma can be incidental, then, under *Noerr*, there cannot be petitioning immunity for the stigma effect.¹⁵¹

3. Restraint of ABA Accreditation Standards

Accreditation and general standard-setting cases further complicate the already difficult application of state action and petitioning immunity doctrines. First, these cases inevitably include standards that exist whether or not state action follows. Second, even when states adopt the accreditation decisions, they typically do not expressly adopt the standards applied in reaching those decisions.¹⁵² Third, even if accreditation and standard-setting entities petition the states to adopt the accreditation decisions, there is usually little, if any, attempt to influence the states regarding the standards themselves.¹⁵³

148. See generally STEVENS, *supra* note 1, at 93-321 (discussing the ABA attempts to restrict entry into the legal profession).

149. See *E. R.R. President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 143-44 (1961).

150. See *Mass. Sch. of Law*, 107 F.3d at 1030.

151. See *Noerr*, 365 U.S. at 143-44.

152. In standard-setting cases not involving accreditation, such as *Allied Tube*, standards are typically embodied in the codes submitted to the states for enactment into law. See, e.g., *id.* at 495-96. To the extent that the code includes an enumeration of the standards, the state, by adopting the code, has technically adopted each standard therein. As a practical matter, however, when states enact a code consisting of numerous (and usually highly technical) standards relating to a specific industry, they do not actually consider the substantive merits of each standard and decide to adopt each into law. Therefore, in this respect, no substantive difference exists between accreditation and other standard-setting programs.

153. Similarly, in presenting a code of standards to the states for adoption, a private standard-setting organization has technically petitioned the state with respect to each of the standards. However, in truth, a private standard-setting organization, much like an accrediting body, does not generally

In other kinds of cases, this overlay of standards, independent of the ensuing state action and petitioning, does not exist. For example, if a group of raisin producers petitions the state legislature to set minimum raisin prices and the legislature obliges by passing a statute that fixes the prices as requested, price fixing is clearly the only restraint. As a result, the price fixing legislation is protected as state action, and the raisin growers' "compliance" with the fixed prices enjoys state action immunity. The growers' petitioning activities, including their discussions regarding optimal price levels and their efforts to win favorable legislative action, will also be protected under petitioning immunity. If the attempt to obtain government action fails, things return to the way they were before the campaign (i.e., no fixed prices), but the growers' petitioning activities still receive petitioning immunity.¹⁵⁴ However, any agreement among the growers to maintain the prices and other restraints discussed in connection with their lobbying efforts, even in the absence of state action, would not constitute protected petitioning activities.¹⁵⁵

In the ABA accreditation context, the government restraint requested involves excluding (or disadvantaging) unaccredited institutions.¹⁵⁶ The ABA asks the states to limit bar examination eligibility to graduates of ABA-approved schools. If the states agree, as most do, the states' restrictive bar examination rule effectuating the ABA's accreditation decisions constitutes state action. But the states do not actually incorporate the standards the ABA used in reaching its accreditation decisions. And, even assuming that the ABA actually petitions the states to adopt its accreditation decisions, it seems highly unlikely that the discussion would extend to the merits of the substantive standards employed to reach those decisions. Furthermore, even

spend time persuading the state to adopt each standard included in the code. Instead, the organization urges the state to adopt the code in its entirety on the basis of the association's general reputation. Thus, little real difference exists between accreditation and nonaccreditation standard setting in this respect.

154. The existence of petitioning immunity does not depend on the presence of state action immunity. In other words, even if no state action follows (because the state is unpersuaded by the petitioning) or state action *fails* (perhaps because the restraint is not deemed an act of the state as sovereign and is otherwise insufficiently authorized or supervised to qualify for state action), the defendant's right to petition the government remains protected and the defendant enjoys petitioning immunity. See *Video Int'l. Prod. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1083 (5th Cir. 1988) (describing the purpose of *Noerr* as protecting the private party making the petition regardless of whether the government agency acted appropriately in passing the legislation).

155. The raisin growers' agreement would simply be a price-fixing agreement. While the right to petition encompasses the right to agree on the contents of a request made of the government, that right obviously does not extend to agreements to collectively and privately adhere to those restraints if the petitioning fails.

156. In standard-setting cases not involving accreditation, the state is asked to exclude unapproved products. See, e.g., *Allied Tube*, 486 U.S. at 495-97.

if some states choose not to give effect to the ABA accreditation decisions, the standards remain. Thus, the question arises whether the restraint of the standards will be shielded by state action or petitioning immunity, assuming that those doctrines do protect the restraint relating to the accreditation decisions. In other words, can the ABA be sued on the theory that one or more of its accreditation standards has an anticompetitive effect if it enjoys state action or petitioning immunity for the exclusionary effect flowing from the state use of its accreditation decisions? I argue that it can.

In the only case that has addressed this issue, *Massachusetts School of Law*, the Third Circuit said that “[a]lthough the ABA is immune from liability attributable to the state action in requiring applicants for the bar examination to have graduated from an ABA-accredited law school . . . under the Noerr petitioning doctrine, the ABA is not immune in the actual enforcement of its standards.”¹⁵⁷ Although the court’s analysis of this issue was rather limited (because it found no antitrust injury to the plaintiff), the opinion noted that to rule otherwise “would run counter to *Allied Tube*.”¹⁵⁸

Although I agree with the conclusion that neither immunity doctrine should extend to the anticompetitive effects resulting from the ABA’s promulgation and enforcement of its accreditation standards, I question the Third Circuit’s reliance on *Allied Tube*. The circumstances involved in *Allied Tube* cannot easily be analogized to the ABA’s situation. In *Allied Tube*, the court assessed the question whether and under what circumstances the participants in a private standard-setting process should enjoy petitioning immunity for the anticompetitive market effects of a standard that they persuaded a private organization to adopt, not whether the private standard setting organization itself was entitled to immunity for those effects.¹⁵⁹ Had *Allied Tube* involved a standard-setting organization deciding, in the normal course of its activities, to exclude plastic conduit from its code, and the court had to determine whether the organization enjoyed petitioning immunity for the effects of the no-plastic standard, then the analogy would be more fitting. Stated differently, *Allied Tube* would be more applicable in a hypothetical case against a few accredited law schools that urged the ABA to promulgate, interpret, or enforce certain standards so as to deny accreditation to another law school than it would be in a case against the ABA alleging that its formulation and application of accreditation standards constituted a violation of the Sherman Act.

157. *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass’n*, 107 F.3d 1026, 1038-39 (3d Cir. 1997).

158. *Id.* at 1039.

159. *Allied Tube* did not address the issue of state action immunity.

Apart from the question of its applicability to ABA accreditation, *Allied Tube* has ambiguous implications in other respects. The Court denied the defendant petitioning immunity for the plaintiff's stigma injury, holding that one's attempt to influence a private organization receives immunity only if the anticompetitive effect is incidental to valid petitioning. In *Allied Tube* the defendant's subversion of the standard-setting process presumably made the petitioning invalid.¹⁶⁰ This suggests that participants in a private organization's standard setting process who use less offensive tactics might still enjoy petitioning immunity.

However, *Allied Tube* also broadly held "that at least where . . . an economically interested party exercises decisionmaking authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace."¹⁶¹ Under a reasonable reading of this holding, if the ABA accrediting body is construed as comprising market participants, then no one involved in setting accreditation standards who is also considered an economically interested party will enjoy petitioning immunity for any anticompetitive effects ABA standards have on the marketplace (i.e., effects other than those resulting from state action), even if no improper tactics were used.¹⁶²

Before the ABA entered into a consent decree with the Department of Justice in 1995, legal educators made up the majority of the members of the ABA Section of Legal Education (and its committees), which administered the accreditation process¹⁶³ and could be fairly characterized as a private association comprising "market participants."¹⁶⁴ Although the consent decree has significantly lessened the influence of legal educators in the accreditation process, lawyers still retain almost exclusive control.¹⁶⁵ While lawyers not

160. *Allied Tube*, 486 U.S. at 502-07. See also *supra* notes 109-12 and accompanying text.

161. *Id.* at 509-10.

162. See *id.* at 515 (White, J., dissenting) (criticizing the majority holding on this point).

163. See *supra* note 51.

164. While individual legal educators are not literally market participants in that they do not personally compete for students, they have a substantial personal stake in preserving the status of accredited law schools and thus could be viewed as interested participants.

165. The consent decree limits the role of law school deans and faculty in the ABA accreditation process as follows: they may make up no more than 50% of the members of the Council to the Section of Legal Education, the Accreditation Committee, the Standards Review Committee, and no more than 40% of the nominating committee for the officers of the Section of Legal Education. Furthermore, each site-inspection team should, to the extent possible, include at least two members who are not legal educators. The decree also requires the ABA to hire an independent consultant, who is not a legal educator, to assist in validating all standards and interpretations. *United States v. Am. Bar Ass'n*, 934 F. Supp. 435, 437 (D.D.C. 1996).

involved in legal education do not literally compete with law schools seeking accreditation, they still have an interest in the process because accreditation implicates the status, income, and general well being of the profession as a whole. Thus, lawyers may have a collective self-interest in using accreditation to control entry into the profession.¹⁶⁶ Under a broad reading of *Allied Tube*, this collective self-interest would mean that no participant in formulating the ABA accreditation standards would enjoy petitioning immunity for the effects of those standards.

While the implications of *Allied Tube* are far from clear, it is safe to say that the case certainly does not compel an extension of either state action (which the court did not discuss) or petitioning immunity to the ABA's formulation of accreditation standards. To the extent that both doctrines are based on statutory interpretation, they should be construed narrowly.¹⁶⁷ Furthermore, public policy would seem to favor denying immunity for the standards in the accreditation context. When states adopt private standard-setting rules (including accreditation decisions), state attention to the underlying standards is usually infeasible as a practical matter. This is because accrediting and other rule-making generally involve specialized fields requiring expertise. Although state officials may have some experience in the field, they typically do not have the resources or specific knowledge needed to make substantive inquiries into the merits of the group's recommendations, much less the reasonableness of the standards underlying those recommendations. We can assume that when state officials adopt a group's recommendations, it is because the group (perhaps by its reputation) has convinced them of the action's general desirability. The state officials merely place their trust in the rule-making group with respect to the standards' integrity.

While the political right to petition is important and may justify a group's persuasion of the state to adopt its decisions, this right should not be broadly

166. For example, the American Medical Association and its Council on Medical Education, which dominate the accrediting body for medical schools, have been criticized for using accreditation to limit the number of doctors entering the medical profession, thereby limiting future competition. *See supra* note 8. Documentation shows that members of the legal profession, in the early days of ABA accreditation, wanted to use the process to control primarily the social and ethnic composition of the profession. *See infra* notes 301-05 and accompanying text.

167. Antitrust tradition demands narrow construction of all exemptions. *See, e.g.,* *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 787 (1975) (stating that "there is a heavy presumption against implicit exemptions," even in areas where Congress has enacted a special regulatory scheme). Even if the petitioning immunity doctrine is based on First Amendment principles and not on statutory interpretation of the antitrust laws, it should still be given a limited interpretation. First Amendment protection for content-neutral regulations tends to be limited, unless the regulations unduly burden speech and there is no alternative avenue of expression. *See* LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2, at 789-94 (2d ed. 1988).

construed to shield the standards on which the decisions were made when the accrediting body never sought to persuade the state of the reasonableness of the standards. As to state action immunity, because states do not specifically approve (or even review) the underlying accreditation standards, but merely give effect to the accreditation decisions, the standards themselves should not be construed as an act of the state.¹⁶⁸ If they are not acts of the state as sovereign, they must be clearly authorized and actively supervised by the state before state action immunity applies.¹⁶⁹ The formulation and application of ABA accreditation standards clearly do not meet these requirements.

C. Free Speech and the First Amendment

Although the Supreme Court frequently speaks of constitutional principles in petitioning immunity cases, it has traditionally based the doctrine on a statutory interpretation of the antitrust laws, construed in light of constitutional principles, rather than on the First Amendment right to petition.¹⁷⁰ More recently, a First Amendment free speech protection argument has been made for accreditation. This argument contends that accreditation, standing alone, does not constitute a restraint at all but is merely “speech.”¹⁷¹ It is premised on the notion that accreditation carries no coercive sanctions (the denial or withdrawal of accreditation is not considered a sanction under this theory) and is, therefore, merely a professional group’s expression of its private opinion concerning quality.¹⁷²

Essentially, this view draws a distinction between collaborating to set standards and evaluating whether they have been met on the one hand, and explicitly agreeing to follow the set standards and sanctioning noncompliance on the other.¹⁷³ Under this view, an accrediting program falls

168. Although the Supreme court in *Hoover* considered the allegedly anticompetitive bar examination grading process an act of the state, *Hoover* is distinguishable. See *Hoover v. Ronwin*, 466 U.S. 558, 576 & n.28 (1984). In *Hoover*, the Committee on Examination and Admissions was required to file its grading formula with the Arizona Supreme Court before they administered the bar examination. *Id.* Thus, the Arizona Supreme Court at least had an opportunity to review the challenged grading method. See *id.*

169. See *supra* notes 64-69 and accompanying text.

170. See, e.g., *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1960) (stating that the Sherman Act’s purpose is to regulate business activity, not political activity, and noting that a different construction of the Act would raise First Amendment concerns). See also *supra* note 106 and accompanying text.

171. See generally *Havighurst & Brody*, *supra* note 4, at 216-22.

172. See *id.* at 218-19.

173. See *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 397, 399 (7th Cir. 1989) (“There can be no restraint of trade without a restraint [W]hen a trade association provides information . . . but does not constrain others to follow its recommendations, it does not violate the antitrust laws.”) (citation omitted); *Havighurst & Brody*, *supra* note 4, at 213-16 (viewing

within the first category of activities and is not a restraint because it involves only speech, which is protected under the First Amendment. If this position is valid, the ABA accreditation program would not implicate the Sherman Act at all—it would be mere speech and not a restraint.

At least one district court has apparently taken this approach. In *Zavaletta v. American Bar Ass'n*,¹⁷⁴ a trial court dismissed an antitrust accreditation case against the ABA on the ground that the ABA's accreditation activities "impose[d] no restraint on trade, unreasonable or otherwise."¹⁷⁵ Noting that the ABA neither limited its members' freedom to hire graduates of unaccredited law schools, nor restricted the unaccredited schools' access to prospective students, the district court concluded that the ABA was merely expressing "its educated opinion" in denying accreditation.¹⁷⁶ Additionally, it found that the ABA's communication of its accreditation decisions to the states was a First Amendment protected activity.¹⁷⁷

The argument that accreditation is mere speech, and cannot constitute a restraint absent explicit coercion or agreement to adhere to the standards, seems flawed. It is clear that any coercion or even a simple agreement to comply with the standards would subject accreditation activities to antitrust review.¹⁷⁸ While there is a conceptual difference between the collective setting of standards and an actual agreement to abide by the agreed-upon standards, the distinction is more theoretical than real. Standard setting by a group of interested participants carries an implicit expectation or understanding that the participants will follow the standards; otherwise standard setting would be a meaningless exercise.¹⁷⁹ Therefore, it is unduly formalistic to argue that standard setting is merely an exercise of free speech when an explicit agreement by the participants to follow (or enforce) the standards is clearly actionable.

accreditation as distinct from self-regulation because accreditation does not include any explicit agreement to comply with the standards set or any sanction for noncompliance, other than nonapproval).

174. 721 F. Supp. 96 (E.D. Va. 1989).

175. *Id.* at 98.

176. *Id.*

177. *Id.*

178. See Havighurst & Brody, *supra* note 4, at 212-13 (agreeing that "a collective agreement to boycott anyone who did not follow . . . standards voluntarily" or "naked agreements among competitors to sell only products meeting agreed-upon standards" violate antitrust law).

179. See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988) (observing that "[a]greement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products"). As previously noted, the accreditation activities of the ABA Section of Legal Education and its committees could be construed as standard setting by interested participants both before and after the 1995 consent decree. See *supra* notes 163-66 and accompanying text.

The contention that accrediting is merely speech and not conduct because it carries no coercive force on its own¹⁸⁰ seems equally illusory. In a technical sense, compliance with accreditation standards is, indeed, voluntary. Schools are not compelled to follow the standards and punishment is not meted out to those that do not, except to the extent that accreditation is denied or withdrawn. Thus, law schools that are indifferent to accreditation are perfectly free not to heed its standards. Given the practical reality that ABA approval is critical for the survival of most law schools,¹⁸¹ however, it is disingenuous to say that accreditation denial or withdrawal for noncompliance with the standards is not a form of sanction.

In one antitrust case unrelated to accreditation, the Seventh Circuit said, in effect, that speech unaccompanied by coercion or sanction cannot be considered a restraint. But the speech in that case, *Schachar v. American Academy of Ophthalmology, Inc.*,¹⁸² was classic speech and is very different from the so-called “speech” in standard setting. *Schachar* involved an American Academy of Ophthalmology (Academy) press release that described a new surgical ophthalmology procedure as “experimental,” called for more research, and urged caution on the part of patients, doctors, and hospitals alike.¹⁸³ Several ophthalmologists sued the Academy alleging that the press release constituted a restraint of trade in violation of the Sherman Act. Holding for the defendant, the Seventh Circuit said that simply stating an opinion without constraining others to follow it is not a restraint,¹⁸⁴ and that “[a]n organization’s towering reputation does not reduce its freedom to speak out.”¹⁸⁵

The Seventh Circuit stressed that the Academy did nothing other than issue its press release. It did not require members to cease performing the procedure, discipline, or expel anyone for disregarding its warning. Nor did it induce hospitals to restrict those surgeries or urge insurers to withhold payment for them.¹⁸⁶ In other words, it was pure speech, with no implicit agreements and no coercion or sanction in any form for dissidents. In contrast, accreditation usually involves an implicit understanding among participating schools that they will adhere to the standards. There is also coercion and sanction in the sense that failure to comply with those standards

180. See Havighurst & Brody, *supra* note 4, at 212-16 (arguing that collective accreditation, standing alone, sanctions no one and should be considered mere speech rather than a restraint).

181. See *supra* note 3.

182. 870 F.2d 397 (7th Cir. 1989).

183. *Id.* at 398.

184. *Id.* at 399.

185. *Id.*

186. *Id.* at 398.

results in a loss of accreditation status or a failure to obtain such valuable status.

Moreover, even assuming that accrediting does constitute mere speech, antitrust immunity does not necessarily follow. That the First Amendment does not provide blanket protection for commercial speech is beyond debate.¹⁸⁷ In an analysis articulated in *Central Hudson Gas v. Public Service Commission*,¹⁸⁸ the Supreme Court said that for commercial speech to come within the First Amendment clause, it must “concern lawful activity and not be misleading.”¹⁸⁹ In other words, untruthful, misleading, or deceptive statements do not enjoy absolute constitutional protection.¹⁹⁰ For example, in a case involving a false pre-announcement of a new product, the Seventh Circuit held that a “knowingly false statement designed to deceive buyers” could constitute an exclusionary practice violative of the Sherman Act.¹⁹¹ Even speech that is normally labeled “opinion” is not automatically entitled to absolute First Amendment protection¹⁹² because expressions of opinion “often imply an assertion of objective fact”¹⁹³ that can be as deceptive or misleading as statements of fact.¹⁹⁴ It would be difficult, of course, to characterize the normative judgment of an accreditation standard as deceptive.¹⁹⁵

However, even for speech that concerns lawful activity and is not misleading, government regulation would still be permissible under *Central Hudson* if the government interest in such regulation is substantial, if the regulation directly advances the government interest, and if the regulation of

187. See *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-57 (1978) (recognizing a distinction between commercial speech, which is traditionally subject to government regulation, and other varieties of speech); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771-72 (1976) (stating that, especially in the area of commercial speech, the government may restrict speech that is not demonstrably false, but merely deceptive or misleading).

188. 447 U.S. 557 (1980).

189. *Id.* at 566.

190. See, e.g., *Va. State Bd. of Pharmacy*, 425 U.S. at 771-72; *MCI Communications Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1129 (7th Cir.), modified by 1983-2 Trade Cas. (CCH) ¶ 65,520 (7th Cir. 1983).

191. See *MCI Communications*, 708 F.2d at 1128.

192. See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990) (noting that statements couched as opinion but implying a false assertion of fact may be actionable libel); *Washington v. Smith*, 80 F.3d 555, 556 (D.C. Cir. 1996) (“There is no categorical First Amendment immunity against defamation suits for statements of opinion.”).

193. *Milkovich*, 497 U.S. at 18.

194. *Id.* at 19.

195. On the other hand, an inaccurate finding of noncompliance with the standards, rather than the judgment guiding the formulation of the standards, can be more easily attacked as untruthful or deceptive.

the speech in question is narrowly tailored to serve that interest.¹⁹⁶ Preventing anticompetitive conduct, which application of the antitrust laws is intended to do, is obviously a substantial government interest; and applying the antitrust laws to alleged restraints of trade that are effectuated by speech, not overt acts, directly advances that government interest. Affording blanket First Amendment protection to seals of approval, standard setting, and accreditation on the grounds that mere speech is involved would ignore market realities. Restraints of trade can be effectuated by speech, as well as by overt acts, and they can be just as harmful to competition. For example, if a group of competitors creates a seal of approval based on subjective factors and denies approval to pesky competitors for the primary purpose of excluding or disadvantaging them, the effects of this “speech” may be as anticompetitive as if the parties had used traditional “conduct” activities to engage in a boycott. In that event, the government’s interest in preventing these anticompetitive effects is substantial and the use of the antitrust laws to circumscribe the “speech” directly serves this government interest. Thus under *Central Hudson*, the application of the antitrust laws to such commercial speech would be entirely appropriate assuming that its use is no broader than necessary.

Similarly, if it is alleged, in a law school situation, that any of the ABA accreditation standards (“speech”) were promulgated to lessen competition, it would seem that subjecting that “speech” to antitrust review would advance a substantial government interest. To the extent that a rule of reason analysis is applied to determine antitrust liability, the regulation is “not more extensive than necessary”¹⁹⁷ to serve the government interest in protecting competition and should be quite permissible under the First Amendment.

IV. IS LAW SCHOOL ACCREDITATION ANTICOMPETITIVE?

Even if the accreditation process is not immune from antitrust scrutiny, as the above discussion concludes, whether it is unlawful under the antitrust laws is a separate issue that must be addressed. With any meaningful accreditation system, some will inevitably fail to satisfy the standards and will be denied approval. When the individuals who set and apply the standards are the unsuccessful applicants’ competitors, a concerted refusal to deal or group boycott exists by definition.¹⁹⁸ Although group boycotts have

196. *Central Hudson*, 447 U.S. at 566.

197. *Id.*

198. The term “group boycott,” also referred to as concerted refusals to deal, covers a wide variety of conduct, including an association’s exclusion (or limitation of access) of others from their

traditionally been characterized as per se illegal,¹⁹⁹ the rule of reason, rather than the per se rule,²⁰⁰ is likely to be applied to law school accreditation. Under the rule of reason, courts analyze whether a restraint is, on balance, anticompetitive. As developed by lower courts, this test generally entails an examination of the effects of the restraint in a defined relevant market. If the restraint is harmful to competition, courts ask whether the restraint, nonetheless, has a legitimate objective; if it does, courts question whether the restraint is reasonably necessary to achieve that legitimate objective.²⁰¹ The following explores these issues and concludes that, under the rule of reason, ABA accreditation is on balance anticompetitive and hence a violation of section 1 of the Sherman Act.

A. *The Rule of Reason Governs*

Assuming that state action and petitioning immunity doctrines do not apply, accreditation activities are unquestionably within the reach of the Sherman Act. Although an earlier court of appeals decision, *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary*

association or joint venture. *See, e.g.,* Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 293-94 (1985); Associated Press v. United States, 326 U.S. 1, 21-22 (1945). Trade or professional associations are treated as combinations of their members so that the activities of these associations are considered the collective conduct of their members, thus satisfying the “agreement” or “combination” requirement of section 1 of the Sherman Act. *See* VII AREEDA & HOVENKAMP, *supra* note 75, ¶ 1477, at 343.

199. *See, e.g.,* United States v. Gen. Motors Corp., 384 U.S. 127, 145-46 (1966); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 659-60 (1961); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 211-12 (1959); Fashion Originators' Guild of Am. v. Fed. Trade Comm'n, 312 U.S. 457, 467-68 (1941); E. States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 611-12 (1914); Montague & Co. v. Lowry, 193 U.S. 38, 45-47 (1904).

200. Per se illegality means that the conduct is conclusively presumed illegal, without regard to the restraint's actual effects or the possible procompetitive justifications. *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958). The rule of reason analysis is used to determine the anticompetitiveness of all restraints not subject to the per se rule. The rule of reason test involves a detailed inquiry into whether the restraint is harmful to competition, whether there is a legitimate justification for it, and whether the restraint is reasonably necessary to achieve that legitimate justification. *See infra* notes 227-32 and accompanying text.

201. *See, e.g.,* Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56-57 (2d Cir. 1997); Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1367-68 (3d Cir. 1996); K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123, 127 (2d Cir. 1995); United States v. Brown Univ., 5 F.3d 658, 668-69 (3d Cir. 1993); Capital Imaging Assocs. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 543 (2d Cir. 1993); Bhan v. NME Hosp. Inc., 929 F.2d 1404, 1413 (9th Cir. 1991). *See also* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 53 (4th ed. 1997). If the plaintiff does not satisfy the first test (i.e., show harm to competition), no prima facie case is established and there would be no need to proceed to the second step. If an anticompetitive harm is established, however, the burden then shifts to the defendant to demonstrate a legitimate objective for the harm. If he can show such an objective (or redeeming virtue), then the burden shifts back to the plaintiff to show that the restraint is not reasonably necessary to achieve the plaintiff's procompetitive objective. *Id.*

Schools,²⁰² found that the Sherman Act did not apply to accreditation activities conducted with a “noncommercial” purpose,²⁰³ the continued validity of this case is doubtful after *Goldfarb v. Virginia State Bar*.²⁰⁴ *Goldfarb* refused to find a “learned profession[]”²⁰⁵ exemption from the Sherman Act, observing that “the exchange of . . . a service for money is ‘commerce.’”²⁰⁶ Subsequent Supreme Court cases have consistently followed *Goldfarb* in applying the Sherman Act to professional activities, thus making it clear that these activities are considered business related and subject to antitrust review.²⁰⁷ More recently, in *United States v. Brown University*,²⁰⁸ a case involving an on-going agreement among Ivy League schools to fix the level of financial assistance offered to admitted students,²⁰⁹ the Third Circuit quickly dismissed the schools’ claim that their nonprofit status provided an exemption from the Sherman Act, holding that the payment of money for an education is commerce.²¹⁰ Probably recognizing that a nonprofit or educational exemption claim is untenable today, the ABA apparently did not even raise this defense in *Massachusetts School of Law*.²¹¹

The more difficult question is whether the per se rule or the rule of reason should apply. Group boycotts, or the concerted refusals of competitors to deal with another competitor, are commonly said to be per se illegal.²¹² Over

202. 432 F.2d 650, 655 (D.C. Cir. 1970) (finding that “the process of accreditation is an activity distinct from the sphere of commerce; it goes rather to the heart of the concept of education itself,” and that because the accrediting body had noncommercial intent, the accreditation activities were outside the Sherman Act’s reach).

203. *Id.*

204. 421 U.S. 773 (1975).

205. *Id.* at 786.

206. *Id.* at 787.

207. *See, e.g.*, *Cal. Dental Ass’n v. Fed. Trade Comm’n*, 526 U.S. 756, 759 (1999) (requiring a rule of reason analysis, not the “quick look,” to determine the legality of a professional rule banning a broad range of advertising); *Fed. Trade Comm’n v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990) (holding per se illegal an agreement among members of an association of criminal defense lawyers not to represent indigent criminal defendants until the government raised their compensation rates); *Fed. Trade Comm’n v. Ind. Fed’n of Dentists*, 476 U.S. 447 (1986) (finding dentists’ collective refusal to submit x-rays to patients’ insurers to be an illegal antitrust restraint); *Ariz. v. Maricopa County Med. Soc’y*, 457 U.S. 332 (1982) (holding that doctors’ setting of maximum fees for specific medical procedures constituted price fixing and was per se illegal); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679 (1978) (finding professional rule prohibiting competitive bidding among engineers to be an antitrust violation).

208. 5 F.3d 658 (3d Cir. 1993).

209. *Id.* at 662.

210. *Id.* at 666.

211. I draw the conclusion that the ABA did not raise this exemption from the fact that neither the Third Circuit nor the district court mentioned this issue in its respective opinion. *See Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass’n*, 107 F.3d 1026 (3d Cir. 1997); *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass’n*, 937 F. Supp. 435 (E.D. Pa. 1996).

212. *See supra* note 199.

the years, however, this “black-letter” law has become riddled with exceptions as courts began to question the economic impact of boycotts and became unwilling to summarily condemn arrangements that were not obviously anticompetitive.²¹³ This shift from per se illegality is particularly true with respect to the many concerted refusals to deal that are ancillary to legitimate joint ventures or cooperative endeavors formed by competitors for efficiency reasons.²¹⁴ Today, a more apt description of the law on concerted refusals to deal is that the rule of reason applies, unless the group refusing to deal has “market power or unique access to a business element necessary for effective competition,”²¹⁵ or when the group boycott’s only possible purpose is to facilitate a naked restraint.²¹⁶

Even though the ABA possesses market power in the legal education industry,²¹⁷ and accreditation is necessary for the successful operation of a law school,²¹⁸ it seems unlikely that any court would apply the per se rule to an antitrust analysis of ABA accreditation. Though the Sherman Act has been held applicable to the professions since *Goldfarb*,²¹⁹ the Supreme Court

213. Sometimes courts do not invoke the per se rule by simply refusing to characterize conduct resembling a concerted refusal to deal as such. *See, e.g., Ind. Fed’n of Dentists*, 476 U.S. at 458 (declining to “forc[e]” dentists’ collective refusal to supply insurers with patient x-rays “into the ‘boycott’ pigeonhole,” despite the conduct’s resemblance to practices that have been considered per se illegal group boycotts). *See also* *Wilk v. Am. Med. Ass’n*, 719 F.2d 207, 221 (7th Cir. 1983) (refusing to apply the per se rule to a medical association’s boycott of chiropractors because the economic impact of the boycott was not readily apparent).

214. *See, e.g., Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986); *Nat’l Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592 (11th Cir. 1986); *Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185 (7th Cir. 1985).

215. *Northwest Wholesale Stationers*, 472 U.S. at 298; *Fishman v. Wirtz*, 807 F.2d 520, 541 (7th Cir. 1986) (holding that a concerted refusal to deal is illegal per se if the defendants either have market power or “exclusive access to an element essential to effective competition”) (quoting *Northwest Wholesale Stationers*, 472 U.S. at 296).

216. *See, e.g., Fed. Trade Comm’n v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990) (condemning as per se illegal the collective refusal of a group of criminal defense lawyers to represent indigent clients unless and until the government increased their compensation, despite the absence of evidence of the group’s market power). *See also* *Denny’s Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217 (7th Cir. 1993) (finding a group boycott per se illegal where a trade association of marine products dealers excluded from the association another dealer who regularly met or beat other competitors’ prices); *Collins v. Associated Pathologists*, 844 F.2d 473, 479 (7th Cir. 1988) (observing that boycotts are illegal per se only if used to enforce agreements that are themselves illegal per se).

217. There are presently 183 ABA-accredited law schools in the nation and 21 unaccredited law schools, and over 40 states require a degree from an ABA-accredited law school as a condition for bar admission. *See* OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS, *supra* note 3, at 56-65 (listing 183 accredited schools); BARRON’S GUIDE, *supra* note 3, at 557-63 (listing 21 unaccredited schools). Thus, it is clear that the ABA, as the accrediting body, has the power to control the legal education market.

218. *See supra* note 3 and accompanying text.

219. 421 U.S. 773 (1975).

has generally been unwilling to find the collective decisions of professional associations per se unlawful,²²⁰ unless those decisions are tantamount to price fixing.²²¹ While some of the ABA accreditation standards may be overly restrictive,²²² it is difficult to make the case that they are naked restraints deserving of per se treatment.²²³

Because concerted refusals to deal in the accreditation context refer to the exclusion of unaccredited schools, application of the per se rule is even less probable. For accreditation to have any utility, an accrediting body must be able to deny accreditation to those who fail to meet the established standards. Accreditation programs are usually administered by professionals in the field²²⁴ who are, as previously noted, considered interested market participants;²²⁵ therefore, by definition, a concerted refusal to deal exists whenever accreditation is denied or withdrawn. Yet it is rational to have such market participants administer the program, despite their self-interested status, because they have the expertise, knowledge, and competence to make the requisite quality judgments. Once we accept the premise that accreditation administered in good faith by interested participants often serves the consumers' best interests, per se rule application to accrediting makes little sense. Thus, the rule of reason, rather than the per se rule, would likely be applied in any evaluation of the ABA accrediting standards' legality.²²⁶

220. See, e.g., *Cal. Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756 (1999) (remanding for a rule of reason analysis to a professional rule that set severe limits on advertising); *Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 447, 458 (1986) (noting that the Court has "been slow to condemn rules adopted by professional associations as unreasonable per se"); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692-96 (1978) (declining to apply the per se rule because the restraint was adopted by a professional association, but finding the restraint unlawful under an abbreviated rule of reason); *Wilk v. Am. Med. Ass'n*, 719 F.2d 207, 221 (7th Cir. 1983) (declining to apply the per se rule to a medical association rule that effectively limited competition from chiropractors partly because of the Supreme Court's historical reluctance to apply that test to professional organizations).

221. See, e.g., *California Dental*, 526 U.S. at 771-74 (insisting on a full rule of reason analysis instead of the intermediate quick-look test in a case involving a dental association's ban of a broad range of advertising—a practice that is usually regarded as similar to price fixing); *Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

222. See *infra* notes 287-99 and accompanying text for a discussion of the standards.

223. But see *Shepherd & Shepherd*, *supra* note 4, at 2221-25 (arguing that ABA accreditation constitutes a price-fixing agreement of law school faculty effectuated by a group boycott, and should be treated as per se illegal).

224. See *supra* notes 163-65 and accompanying text.

225. See *supra* note 164 and accompanying text.

226. An abbreviated or quick-look rule of reason is sometimes applied to restraints that are naked restraints on price or output or are otherwise obviously anticompetitive. The quick-look is a hybrid of the per se rule and the rule of reason. Under this intermediate test, the plaintiff is not required to formally prove market power or anticompetitive effect (unlike the full-fledged rule of reason), but the defendant is allowed to show procompetitive justification (unlike the per se rule). In *California Dental*, the Supreme Court sharply curtailed the application of the quick-look inquiry. 526 U.S. at 771-74. It is

The rule of reason, as formulated by Justice Brandeis in *Board of Trade of Chicago v. United States*,²²⁷ calls for an open-ended, multi-factored test.²²⁸ In practice, this test has evolved into a three-step structured analysis.²²⁹ Initially, the plaintiff must show that the restraint has substantially harmed or is likely to substantially harm competition.²³⁰ If the plaintiff makes this showing, the burden shifts to the defendant to show a legitimate objective for the restraint.²³¹ If the defendant succeeds, the burden shifts back to the plaintiff to prove that either the restraint is not reasonably necessary or that less restrictive alternatives could effectuate the legitimate objective.²³²

therefore now unlikely that an accreditation case would be analyzed under a quick-look test, rather than the full rule of reason. For a more extensive discussion of *California Dental* and its implications on the rule of reason in the context of professional restraints, see generally Marina Lao, *The Rule of Reason and Horizontal Restraints Involving Professionals*, 68 ANTITRUST L.J. 499, 507-12 (2000).

227. 246 U.S. 231 (1918).

228. *See id.* at 238.

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Id.

229. The rule of reason analysis evolved into this structured inquiry primarily because the *Board of Trade of Chicago* formulation was seen as too unwieldy to be applied efficiently.

230. The plaintiff establishes a prima facie case only upon proof of the anticompetitive effect of the challenged restraint. *See* L.A. Draper & Son v. Wheelbrator-Frye, Inc., 735 F.2d 414, 422 (11th Cir. 1984). Anticompetitive effect can be demonstrated by evidence of an actual adverse effect on competition or, in the alternative, by defining the relevant market and proving defendant's market power in that defined market. *See, e.g.,* Flegel v. Christian Hosp., N.E.-N.W., 4 F.3d 682, 688 (8th Cir. 1993); Capital Imaging Assocs. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 546-47 (2d Cir. 1993); Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1413 (9th Cir. 1991).

231. *See, e.g.,* Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997); K.M.B. Warehouse Distributions, Inc. v. Walker Mfg. Co., 61 F.3d 123, 127 (2d Cir. 1995); *Capital Imaging*, 996 F.2d at 547; *Bhan*, 929 F.2d at 1413.

232. *See, e.g.,* Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1019 (10th Cir. 1998); Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1368 (3d Cir. 1996); *K.M.G. Warehouse*, 61 F.3d at 127; *Flegel*, 4 F.3d at 688; *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993); *Clorox*, 117 F.3d at 56; *Bhan*, 929 F.2d at 1413; *Yeager's Fuel, Inc. v. Pa. Power & Light Co.*, 953 F. Supp. 617, 657 (E.D. Pa. 1997). If the plaintiff satisfies this burden, she prevails. Otherwise, the court then balances the anticompetitive harms against the benefits. *See* VII AREEDA & HOVENKAMP, *supra* note 75, ¶ 1507, at 397.

B. Harm to Competition

Two most obvious measures of anticompetitive effect are output and price.²³³ Competition is impaired if a restraint reduces output or raises prices in the relevant markets,²³⁴ of which there are two in the case of law school accreditation²³⁵—the legal education market²³⁶ and the legal services market.²³⁷ Assuming that the bar examinations' difficulty level remains constant, accreditation's adverse impact on output in both markets is clear. If the ABA lifted or relaxed its accreditation standards, there would probably be more law schools and more law students.²³⁸ Schools that might not meet current accreditation standards (such as MSL) would likely emerge, survive, and perhaps even flourish. Even in states, such as California, where the lack of ABA approval does not mean effective exclusion from the law school market, accreditation may still have anticompetitive effects. Accreditation tends to distort competition because consumers usually do not look behind the seal of approval. Thus, unaccredited schools are put at a competitive disadvantage in the recruitment of good faculty and students, among other things.

In the legal services market, the output effect of accreditation, though indirect, is also evident. Again, if bar examination difficulty is held

233. See, e.g., *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 (1984) ("Because it restrains price and output, the NCAA's television plan has a significant potential for anticompetitive effects."); *Broad. Music, Inc. v. CBS*, 441 U.S. 1, 20 (1979) (stating that the test of anticompetitiveness is whether the challenged practice would "tend to restrict competition and decrease output").

234. See *Regents of the Univ. of Okla.*, 468 U.S. at 104.

235. Relevant product markets are defined by looking to economic conditions and applying the tests of elasticity of demand or supply. To illustrate, if the price of *X* were to rise, and consumers would reasonably substitute *X* with the purchase of *Y*, *X*, and *Y* would be said to be in the same product market. In *United States v. E.I. du Pont de Nemours & Co.*, the Court engaged in a fairly lengthy discussion of what constitutes the relevant product market. 351 U.S. 377, 394-400 (1956). The Court determined that the relevant product market is defined by the "cross elasticity of demand between products" and the reasonable "interchangeability" of the product. *Id.* at 398-400.

236. Because there are currently no substitutes for law schools for consumers who wish to become lawyers (apprenticeship and self-study are no longer acceptable alternatives in most states), the law school or legal education market is a defined antitrust market. If tuition of one law school rises, prospective legal education consumers can turn only to other law schools—other sources of legal training will not suffice in most states.

237. Similarly, consumers who need legal representation can turn only to lawyers because, in every state, only state-licensed lawyers are authorized to practice law. If a lawyer raises fees, a potential client can turn to other licensed attorneys for legal representation, but not to nonlawyers. Accordingly, the legal services market represents a separate antitrust market that, as discussed below, law school accreditation may affect.

238. Whether there would be more law schools offering programs of acceptable quality, and more law graduates who are adequately prepared for the practice of law, is another question that will be discussed below. See *infra* Parts IV.C.2-3.

constant,²³⁹ it is reasonable to expect that lower accreditation standards would result in a greater supply of lawyers and, therefore, greater consumer access to legal services.²⁴⁰ Even assuming that students attending the lesser law schools receive a relatively inferior education, it is fair to assume that a percentage of them would eventually pass the bar examination and become licensed attorneys.²⁴¹

Accreditation's adverse impact on price in the legal education market is also clear. Changing accreditation standards to permit the operation of less expensive alternative law schools, such as MSL, would mean lower tuition for students attending those schools.²⁴² Furthermore, the price pressure of these alternative schools would likely bring down the tuition of at least some lower-tiered accredited schools.²⁴³ Whether there would be a similar downward trend in legal fees (i.e., price reduction in the legal services market) is less certain, however. There should probably be some impact in market segments served predominantly by sole practitioners and small

239. States may, of course, choose to make the bar examination more difficult (or otherwise limit bar pass rates) if accreditation standards are eased. In that event, we cannot say with certainty that accreditation has reduced the output of lawyers. However, the statement that accreditation adversely affects output would still be correct because it tampers with the "ordinary give and take of the marketplace" in achieving market output. *See Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (quoting *United States v. Nat'l Soc'y of Prof'l Eng'rs*, 404 F. Supp. 457, 460 (1975), *quoted in Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978)).

240. Some may argue that we already have a surplus of lawyers, not a deficit. But it is assumed, in antitrust law, that the correct output should be determined by consumer demand. If there is, indeed, an oversupply of lawyers, we would expect demand for legal education to decrease. To the extent that there is apparently demand fueling the interest in schools such as MSL and Concord, we have to assume that either the market for legal services may not be as saturated as is widely assumed, or prospective students may be misinformed about employment prospects. If prospective students are misinformed, demand for legal education should drop once the market becomes informed and market equilibrium is restored. The antitrust law does not permit private regulation of supply in other industries, and there is no particular reason why legal education should be treated differently in this respect.

241. To use California as an example, graduates of non ABA-approved schools had a bar pass rate of 20% for 1999, as contrasted with 56% for graduates of ABA-approved schools. *THE LAWYER'S ALMANAC* 2001 E-334 (2001).

242. For example, the present tuition at MSL for full-time study is \$10,800 a year, which is about 55% of the average tuition at private law schools. *See BARRON'S GUIDE*, *supra* note 3, at 560. The tuition at Concord, the online law school operated by Kaplan, is only \$5,000 a year. *See supra* note 12; Concord Law School, *at* <http://www.concordlawschool.com/info/custom/concord/admissions/tuitionfees.asp> (last visited May 27, 2001).

243. Some of the weaker existing accredited law schools might lose students to the new lower-cost schools if students do not believe that the weaker, but traditional, schools offer sufficient added-value to justify their additional cost. In the long run, some of these weaker, but presently ABA-accredited, law schools might follow the new low-cost model, seek to upgrade their quality, or go out of business. While these uncertainties may be uncomfortable for those who might be affected, that is how the market system works in other industries and there is really no justification for treating law schools differently.

firms,²⁴⁴ but not in those sectors generally represented by larger law firms. This differing effect is to be expected because the legal profession seems to be divided into two spheres so separate that they can hardly be said to constitute the same market: attorneys in sole and small practices representing mostly individuals and some small businesses, and attorneys in large firms representing large organizations.²⁴⁵ Easing the accreditation standards would primarily raise the number of lower-tiered schools' graduates. Given the hierarchical nature of our profession,²⁴⁶ these graduates would predominantly join the personal client and small business service sector, should they choose to enter private practice.²⁴⁷ Therefore, the price effect of any increase in the supply of lawyers caused by the lifting of certain accreditation restrictions would largely be confined to the personal client and small business sector.

In addition to the output and price impact just discussed, accreditation may have other anticompetitive effects. Whatever its benefits, accreditation also brings about a certain amount of product standardization and effectively

244. I recognize that many in the profession believe that there is already cut-throat competition in this segment. Assuming that this perception is true, the appropriate remedy cannot be to raise unreasonable barriers to entry. Perhaps the better solution is for the bar to educate the public on the value of seeking legal counsel. This would increase general demand for legal services, which would benefit both consumers and practitioners—consumers would receive more legal services, and practitioners would have higher volume practices. Another common complaint of many lawyers who serve this market segment is that individual clients often do not value good lawyering and are unwilling to pay even comparatively modest fees. To the extent that this is true, perhaps the bar can engage in publicity or educational campaigns to raise public awareness of the time and effort that good representation requires.

245. See MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS* (1991) (discussing the large firm environment); JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1982) (showing, through a random sample of 777 Chicago lawyers in 1977, the marked divide between those who serve business clients and those who serve personal clients); Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 538-41 (1994) (describing the two spheres of legal practice); Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 957-63 (2000) (providing empirical evidence to demonstrate the sharp divide between the two spheres of representation); John P. Heinz et al., *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 L. & SOC'Y REV. 751 (1998) (updating their 1970s study). The income and fee disparities between the two groups have grown so wide that one can only conclude that they do not compete in the same market but actually constitute different markets. A solo practitioner's \$75/hour fee, for example, is unlikely to put much pressure on large firm lawyers' hourly rates; in addition, corporate clients are unlikely to cut costs by transferring their business from an established large firm to a sole or small firm practitioner. See Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 L. & SOC. INQUIRY 431, 449-51 (1989) (noting significant escalation in the incomes of lawyers in large firms, but a fall in income for solo practitioners during a period of tremendous increase in the total number of attorneys).

246. It is no secret to anyone in the profession that large firms, which primarily serve corporate clients, generally hire only graduates from the top law schools or the top graduates from middle-tiered schools. All other graduates compete with each other in the personal or very small business sphere.

247. Other options available to graduates include governmental employment or nonlegal occupations.

deprives consumers of options. For example, prospective law students are not completely free to choose an on-line law school, such as Concord University School of Law,²⁴⁸ if they plan to practice outside of California.²⁴⁹ Nor can they select a cheaper school with minimal library facilities taught mostly by adjuncts, such as MSL, even if they were willing to make the price-quality tradeoff.²⁵⁰ This restriction of choice occurs because an overwhelming majority of states excludes graduates of nonaccredited schools from the bar examination.²⁵¹ Because consumer choice is a value that antitrust law normally cherishes,²⁵² accreditation's limitation of that choice should be considered an anticompetitive effect unless the limitation is justified.²⁵³

Another potential anticompetitive effect of accreditation relates to innovation.²⁵⁴ Although it is difficult to show conclusively that accreditation has caused stagnation in legal education, a persistent criticism of the system is its lack of change over the last fifty years.²⁵⁵ It is probably safe to assume

248. See *supra* note 12.

249. See BAR ADMISSION REQUIREMENTS, *supra* note 2, at 10-11 (listing states in which graduates of non ABA-approved law schools are eligible to sit for the bar examination).

250. See *id.*

251. See *id.*

252. See *Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (stating that a horizontal agreement to restrain trade that limits "consumer choice by impeding the 'ordinary give and take of the marketplace' cannot be sustained under the Rule of Reason") (internal citation omitted). *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585, 610 (1985) (noting that defendant's refusal to deal with plaintiff did not allow "consumers to make their own choice on these matters of quality"); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 102 (1984) (stating that conduct would be deemed procompetitive when such "actions widen consumer choice"). See generally Neil W. Averitt & Robert H. Lande, *Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law*, 10 LOY. CONSUMER L. REP. 44 (1998) (discussing the interaction between antitrust and consumer protection laws); Robert H. Lande, *Consumer Choice As the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503 (2001) (discussing the theory of consumer choice); Spencer Weber Waller, *Antitrust As Consumer Choice: Comments on the New Paradigm*, 62 U. PITT. L. REV. 535 (2001) (discussing antitrust law through a consumer choice paradigm).

253. See *supra* notes 201, 231 and accompanying text.

254. The importance of innovation to consumer welfare and, hence, to antitrust is increasingly being recognized. See, e.g., CHARLES J. GOETZ & FRED S. MCCHESENEY, *ANTITRUST LAW: INTERPRETATION AND IMPLEMENTATION* 423 (1988) (arguing that innovation is often the essence of competition); HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* 140-240 (1994) (arguing that joint ventures that increase industry-wide innovation should be treated as procompetitive and legal); Richard J. Gilbert & Steven C. Sunshine, *Incorporating Dynamic Efficiency Concerns in Merger Analysis: The Use of Innovation Markets*, 63 ANTITRUST L.J. 569 (1995) (discussing the importance of innovation in antitrust analysis).

255. See, *Competition I*, *supra* note 1, at 314 (stating that "legal education has been a nondynamic industry, slow to change and short on innovation"); *Competition II*, *supra* note 1, at 1076-78 (describing criticisms of the lack of innovation and diversity in legal education); Shepherd & Shepherd, *supra* note 4, at 2182-85 (arguing that ABA accreditation reduces the pace of innovation). But see John A. Sebert, *Modest Proposals to Improve and Preserve the Law School Accreditation Process*, 45 J. LEGAL EDUC. 431, 435 (1995) (rejecting the notion that ABA accreditation standards impede improvements or produce inappropriate commonality in legal education, and suggesting that

that, with fewer accreditation constraints, there would be more experimentation with alternative programs, especially programs that substantially lower costs or otherwise have student appeal, such as two-year J.D. programs.²⁵⁶ Indeed, there might even be proposals for more daring and controversial low-budget programs that seem unimaginable today. An enterprising school might be convinced, for example, that academically weaker students could be more cheaply, and as effectively, taught through a series of bar review type courses, combined with a few required college-level writing courses, than in an expensive, elite-style, traditional program. My point is not that any “wild” alternative program is beneficial to consumers, but that an overly standardized system impedes experimentation and deprives unorthodox schools of the opportunity to demonstrate their program’s potential merits.²⁵⁷

C. Legitimate Objectives (or Benefits to Consumers)

Under the rule of reason, not all restraints with anticompetitive effects will be condemned: those with redeeming virtues may be lawful.²⁵⁸ Although law school accreditation almost certainly has an adverse output and price

“to the extent that the standards now do create significant barriers to change, those barriers are generally justified”).

256. See *Competition II*, *supra* note 1, at 1077-78 (describing various unsuccessful attempts to change the three-year course of study requirement); Chris Klein, *Revolution from Above? A Judge Calls for Two-Year J.D. Program*, NAT’L L.J., Oct. 14, 1996, at A12 (reporting on Judge Richard Posner’s proposal, made at a panel discussion on legal education, that the J.D. program should be market driven and trimmed to two years—a proposal with which other panelists, including Judge Guido Calabresi, disagreed).

257. Accreditation may also hinder innovation in the legal profession in a broader sense. Standardization obviously creates a commonality in legal education. This commonality, in turn, produces a degree of homogeneity in reasoning in law students, causing the profession to replicate itself. While I am not suggesting that this is undesirable per se, one has to wonder whether any dramatic innovations can occur within a system whose members are all inculcated with a uniform set of norms and perceptions about legal process. For example, despite a general consensus that litigation may not be the most efficient way (or even a desirable way in areas such as divorce and child custody) to resolve all legal disputes, innovations in alternative dispute resolution have not been tremendously successful. Although there may be many reasons for this failure, the emphasis of law schools on appellate cases and the adversarial process cannot help but make it difficult for attorneys to seriously contemplate radically different options.

258. See, e.g., *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 113-14 (1984) (noting that achieving lower costs of production would be a legitimate antitrust benefit); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 21-23 (1979) (finding that the creation of a new product, that would not have been possible without the restraint, justified the restraint); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54 (1977) (considering the achievement of efficiencies a “redeeming virtue” in sustaining a restraint under the rule of reason). See also VII AREEDA & HOVENKAMP, *supra* note 75, ¶ 1504, at 377-83 (discussing legitimate justifications under the rule of reason).

impact on legal education and, to some extent, legal services, law school accreditation may be justified if the ABA can demonstrate that it serves a legitimate objective.²⁵⁹ The following discussion concludes, however, that the principal object of the ABA accreditation program is to perpetuate an elite system of legal education (to the point of excluding all other systems). This objective is not cognizable under the rule of reason and hence cannot justify the restraints law school accreditation imposes.

1. *The Value of Accreditation in Providing Information*

A traditional rationale for accreditation (and professional self-regulation in general) is that it promotes competition by providing information about quality to a market where such information is usually unavailable, thereby helping consumers make informed decisions and instilling market confidence in the services offered.²⁶⁰ In economic terms, this objective is characterized as correcting a market failure caused by information asymmetries.²⁶¹

The theory of information asymmetries posits that wide information disparities exist in professional services markets (which includes legal education and legal services) between providers and purchasers. The theory's premise is that professional services are highly specialized and highly skilled, and that very little specific information about the quality of professional services is available to the public. Because of the sophisticated and often technical nature of these services, consumers typically lack the knowledge needed to understand and evaluate the little information they might have; to compare the value of services offered by competing professionals; or to judge the quality of their work during or after services are rendered. In contrast, professionals in the field have the expertise and competence to make these judgments.²⁶²

259. As to what constitutes legitimacy, Areeda states that "[l]egitimacy lies in consistency with the law generally and with the premises of the antitrust laws in particular." *Id.* ¶ 1504, at 379.

260. See generally Clark C. Havighurst & Nancy M. P. King, *Private Credentialing of Health Care Personnel: An Antitrust Perspective (Part I)*, 9 AM. J.L. & MED. 131, 173-84 (1983) (discussing the informational value of credentialing in the health-care industry).

261. See Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941, 951-52 (1963) (discussing the use of regulation to combat information asymmetries when customers do not have the information or knowledge to make informed market decisions).

262. See generally George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 490-92 (1970) (discussing the theory of information asymmetries); Jack Carr & Frank Mathewson, *The Economics of Law Firms: A Study in the Legal Organization of the Firm*, 33 J.L. & ECON. 307 (1990) (discussing information within the context of the legal profession); Hayne E. Leland, *Quacks, Lemons, and Licensing: A Theory of Minimum Quality-Standards*, 87 J. POL. ECON. 1328 (1979) (discussing quality deterioration in markets with asymmetric information); Richard Schmalensee, *A Model of Advertising and Product Quality*, 86 J.

Given the relative paucity of reliable information on professional services, professional self-regulation, including accreditation, generally benefits consumers because it fills the information gap and helps consumers select and evaluate a professional without incurring high search costs.²⁶³ Consider, for example, a patient who has to select a surgeon. The theory explains that a patient would normally have a difficult time doing so based on her own assessments of different surgeons' comparable skills. In fact, she may be incapable of evaluating a surgeon's performance even after receiving treatment.²⁶⁴ A certification or credentialing program administered by a group of expert surgeons would assure patients that any surgeon certified under the program has met certain minimum standards established by the credentialing body. It would effectively allow consumers to use certification and accreditation as a quality measure to help with their selection of a professional (or professional service). The search costs would be minimal and the selection well-founded. In this respect, accreditation or credentialing is procompetitive and is a legitimate objective of a restraint.

We cannot automatically assume, however, that the ABA accreditation program serves this purpose. For the theory to apply to legal education, one would have to argue that the intricacies of legal education are so perplexing that, without accreditation, prospective law students would have difficulty

POL. ECON. 485 (1978); Dennis E. Smallwood & John Conlisk, *Product Quality in Markets Where Consumers Are Imperfectly Informed*, 93 Q.J. ECON. 1 (1979) (discussing market effects of imperfect information on product quality); Charles Stuart, *Consumer Protection in Markets with Informationally Weak Buyers*, 12 BELL J. ECON. 562 (1981) (examining the motive for consumer protection in markets where consumers lack product quality information). See also Arrow, *supra* note 261, at 951-52 (arguing that regulation is necessary when information asymmetry makes it difficult for customers to evaluate a product or service); Ira Horowitz, *The Economic Foundations of Self-Regulation in the Professions*, in REGULATING THE PROFESSIONS: A PUBLIC-POLICY SYMPOSIUM 3, 7 (Robert D. Blair & Stephen Rubin eds., 1980) (arguing that regulation is needed to protect the public from unqualified professionals, where information asymmetries exist); Jonathan Rose, *Occupational Licensing: A Framework for Analysis*, 1979 ARIZ. ST. L.J. 189, 191 (1979) (arguing that licensing is necessary when consumers are unable to make informed decisions "free from undue exploitation"); Charles L. Schultze, *THE PUBLIC USE OF PRIVATE INTEREST* 35-42 (1977) (arguing that "public provision of consumer information" helps the market overcome "uncertainty and information costs"); Alan D. Wolfson et al., *Regulating the Professions: A Theoretical Framework*, in OCCUPATIONAL LICENSURE AND REGULATION 180, 190-91 (Simon Rottenberg ed., 1980).

263. See Keith B. Leffler, *Physician Licensure: Competition and Monopoly in American Medicine*, 21 J.L. & ECON. 165, 172-74 (1978) (suggesting that high information costs may justify professional regulation); Rose, *supra* note 262, at 191; Schultz, *supra* note 262, at 35-42.

264. See *Cal. Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756, 772 (1999) (holding that a dental association rule banning a wide range of advertising must be analyzed under the full-fledged rule of reason, in part because professional service markets are characterized by information asymmetries, making it difficult to "determin[e] whether, and the degree to which, an outcome is attributable to the quality of services (like a poor job of tooth-filling) or to something else (like a tough walnut)"). See also BARRY R. FURROW ET AL., *HEALTH LAW* § 3-1, at 86 (1995) ("The lay public is incapable of adequately evaluating the quality of medical services.").

evaluating different educational programs and would be easily defrauded by disreputable law schools. With respect to consumers of legal services, the theory would hold only if law's complexities severely impede consumers' ability to screen out poorly educated lawyers on their own.

The information justification has relatively little strength with respect to consumers of legal education (i.e., prospective law students) because these consumers have other sources of information. For example, *U.S. News & World Report* annually rates law schools. Although imperfect, it does provide data of interest to students, such as bar passage and job placements rates.²⁶⁵ Given the availability of objective information and the sophistication of today's students, it is unlikely that, in the absence of accreditation, students would be easily duped into attending substandard law schools. If they do attend poorer quality schools, it would likely be a conscious choice based on the students' grades, or financial and other personal circumstances.²⁶⁶

With respect to consumers of legal services, accreditation might, indeed, serve a useful informational function, at least for a segment of the market. Generally, though, the information gap is much narrower in law than in more scientific and technical areas such as medicine. Law involves knowledge, not so much of science, technology, or immutable features of nature, but of socially created norms, rules, and procedures. Good lawyering probably depends as much on diffuse skills such as negotiation, communication, and the ability to process complicated facts, as on skills grounded in legal scholarship and doctrine. Knowledge and skills of this nature are not incomprehensible to a layperson.²⁶⁷ Therefore, it is much easier for clients, especially corporations and sophisticated individuals, to assess the competence of an attorney²⁶⁸ than a physician, for instance. Furthermore,

265. See *America's Best Graduate Schools: Law Schools*, U.S. NEWS & WORLD REPORT, April 9, 2001, at 78 (ranking law schools). A fair criticism of the report is that it leaves out indicia of quality that are difficult to quantify. The ABA itself also publishes a guide to all of its accredited law schools. This guide provides more information than the *U.S. News & Report*, but does not rank the schools. See OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS, *supra* note 3.

266. Milton Friedman said that fears about consumers' inability to make choices for themselves are paternalistic and unsound, and that excluding competitors only serves to enhance a profession's income and status. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 148-49 (1962).

267. In fact, it is questionable whether these skills have any relation at all to where the lawyer once attended law school. Most in the profession, for example, have always known that there is often little correlation between how good attorneys are and the ranking of the law school they attended, particularly for experienced lawyers.

268. See Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97-103 (1974) (describing repeat users of legal services as knowledgeable consumers); Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 900-03 (1990) (describing corporate users of legal services as increasingly knowledgeable due to their use of in-house counsel); Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 481-

corporate and more affluent individual clients tend to rely on larger law firms' lawyers, who have been effectively screened by their firms in the hiring process. However, less sophisticated clients who use solo or small firm practitioners may have more difficulty evaluating attorney competence on their own. For this segment of the market, at least, accreditation does instill a measure of trust in the profession and therefore may be a legitimate justification.

2. *Quality Benefits of Accreditation Expressed in Terms of Promoting Competition*

The Supreme Court, in *National Society of Professional Engineers v. United States*²⁶⁹ and subsequent cases,²⁷⁰ made clear that only "impact on competitive conditions,"²⁷¹ not quality and other noneconomic benefits, may be considered in a rule of reason analysis of antitrust restraints.²⁷² The Court's stated rationale for rejecting general welfare justifications was that such claims presented a "frontal assault" on antitrust policy,²⁷³ which assumes that quality is ultimately enhanced by competition, not collective decision making by the sellers.²⁷⁴ Given the ease with which self-interested professionals can create or exaggerate quality claims in order to mask anticompetitive motives, the Court's skepticism of such claims is well-founded.²⁷⁵ The rejection of this defense also seems wise as a general rule

86 (1989) (noting increased expertise and influence of in-house counsel).

269. 435 U.S. 679 (1978).

270. See, e.g., *Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984).

271. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 690 (1978).

272. See *Superior Court Trial Lawyers*, 493 U.S. at 421-23 (finding per se illegal an agreement among criminal defense lawyers to cease representing indigent criminal defendants unless the government of the District of Columbia agreed to increase the lawyers' compensation rates, regardless of the possible social utility of the agreement); *Ind. Fed'n of Dentists*, 476 U.S. at 462-64 (rejecting the dentists' quality of care defense, on the ground that noneconomic concerns are not legitimate justifications for anticompetitive restraints); *Regents of the Univ. Okla.*, 468 U.S. at 104 n.27 (stressing that "the criterion to be used in judging the validity of a restraint on trade is its impact on competition," and that the premise underlying the Sherman Act is that competition will ultimately yield the lowest prices and highest quality of goods and services); *National Society of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978) (writing that the rule of reason "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason," but is rather limited to justifications that are competition based).

273. *Prof'l Engineers*, 435 U.S. at 695.

274. *Id.* ("The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services."). The premise of the quality justification is that consumers will not make wise cost-quality tradeoffs or other market decisions, thus requiring sellers to act in concert in order to bring about quality or social welfare enhancement.

275. Although much has been made of the Court's statements in *Professional Engineers* and other

because the conflicting interests of even well-intentioned market participants will almost inevitably color their quality judgments.

However, a categorical refusal to allow quality considerations to influence the formulation and application of accreditation standards seems irrational. Accreditation is useful primarily because it informs consumers about quality, and therefore one would expect the standards to relate to quality. If quality assurance is considered a noneconomic general welfare concern and therefore not a proper justification for any restrictive standard, then virtually all accreditation programs would violate the antitrust laws. This result would be inherently inconsistent with the general consensus that accreditation can be procompetitive if it is administered reasonably and in good faith.²⁷⁶ It would also contradict common sense, for it is no doubt socially desirable to have some form of quality control over education.

This dilemma can be solved by an extension of the market failure theory to argue that quality standards may be seen as promoting competition in certain situations and, therefore, are properly subject to a rule of reason analysis. Phillip Areeda first expressed the insight that a restraint's general welfare benefits can be construed as benefits to competition if the restraint corrects a market failure.²⁷⁷ In other words, if competition cannot function properly because of market imperfections, then a restraint that protects quality or social welfare promotes competition if it corrects the condition that caused the market failure and the corresponding quality degradation.²⁷⁸

In light of this reasoning, one can reasonably argue that quality assurance

cases to the effect that quality, health, and safety concerns, being noneconomic, are not legitimate justifications under the rule of reason, I tend to believe that the statements were not intended to be taken literally. The Court would not have ignored strong, credible evidence that the health or safety of consumers would truly be jeopardized without the restraint. It is important to note that in every case where the Court rejected quality claims, the defendants had made broad, unfocused, and unsupported arguments that competition would not work. Thus, the Court was probably, and justifiably, skeptical of the defendants' motives and of the need for drastic anticompetitive restraints, given the self-interests of the professionals involved. *See, e.g., Prof'l Engineers*, 435 U.S. 679; *Ind. Fed'n of Dentists*, 476 U.S. 447.

276. *See supra* Part IV.C.1.

277. VII AREEDA & HOVENKAMP, *supra* note 75, ¶ 1504, at 382-83.

278. Professor Thomas Greaney developed this theme further, suggesting a narrow market failure defense in the health care area, which is particularly plagued with market failures. Rather than claiming that quality benefits justify a particular restraint, as health care professionals are prone to do, he argues for a narrow market failure defense. In other words, in limited circumstances where there is a market failure, quality claims in health care can be expressed as improvements in competition. Thomas L. Greaney, *Quality of Care and Market Failure Defense in Antitrust Health Care Litigation*, 21 CONN. L. REV. 605, 627-49 (1989). And, Professor Peter Hammer has built on these insights to make a case that antitrust law should recognize a defense, as "an intramarket second-best tradeoff," for acts that restrain competition under traditional antitrust analysis but advance total welfare. Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs*, 98 MICH. L. REV. 849, 882-91 (2000).

in legal education is a procompetitive, not merely noneconomic, benefit of accreditation (and thus a legitimate objective) because it corrects market failures in the legal education industry that would otherwise lead to quality deterioration. Two common forms of market failure are information asymmetries and externalities.²⁷⁹ The economic theory of information asymmetries, discussed earlier in connection with accreditation's role in filling the information gap, further asserts that uncorrected information disparities ultimately lead to a progressive degrading of professional services.²⁸⁰ The theory's premise is this: If consumers lack the expertise and competence to discern quality in professional services, they will be unwilling to pay a premium for quality, or will otherwise make unwise cost-quality tradeoffs. If consumers are unwilling to pay, professionals will have no incentive to incur the costs necessary to provide above-average quality services. In fact, they may be compelled by market forces to engage in race-to-the-bottom competition in order to meet consumers' ill-advised choices. The result would be a downward spiral in the quality of professional services.²⁸¹

In the legal education context, the argument would probably be as follows: Because of the complexities of law and legal education, students are incompetent to evaluate quality differences in law school programs. Left to their own devices, they will tend to make ill-advised cost-quality tradeoffs, leading to a progressive deterioration in quality as schools compete to be the least costly and ignore quality considerations. This, in turn, will result in the unleashing of incompetent lawyers on the public. Accreditation would correct the market failure by having experts (the ABA) set a minimum level of quality that schools must adhere to. The strength of this theory in the context of legal education, however, is questionable. There is little support for the underlying premise that students are generally uninformed and unable to assess quality in law school programs.

279. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 45-49 (1988) (discussing externalities, information asymmetries, and other market failures); PAUL R. FERGUSON & GLENYS J. FERGUSON, *INDUSTRIAL ECONOMICS* 143 (2d ed. 1994) (illustrating the effects of negative externalities on price and output); WALTER NICHOLSON, *MICROECONOMIC THEORY* 537-53, 748-55 (5th ed. 1992) (discussing generally market failures caused by externalities and information asymmetries); HAL R. VARIAN, *MICROECONOMIC ANALYSIS* 259-63 (2d ed. 1984) (discussing externalities and possible remedies); Hammer, *supra* note 278, at 859-64 (discussing the problem of negative externalities and how they may be counteracted). For more extensive discussions of the problem of imperfect information, see articles cited *supra* note 262.

280. See Akerlof, *supra* note 262, at 488-500; J. Howard Beales III, *The Economics of Regulating the Professions*, in *REGULATING THE PROFESSIONS*, *supra* note 262, at 125-28; Leland, *supra* note 262 (showing, through an economic model, that information asymmetries in health care markets lead physicians of above-average quality to withdraw from the market).

281. See Akerlof, *supra* note 262, at 488-500.

Probably the better market failure argument is that we need minimum standards because a free market will not produce a socially acceptable level of quality in legal education. The reason for the free market's failure to achieve this desirable level of quality is that not all of the benefits of a quality education accrue to the students and law schools. Therefore, they may opt for a lower level of quality than is socially desirable unless action is taken to correct the situation. This is termed correcting the market failure in quality caused by externalities.²⁸² Externalities arise when parties to a transaction do not bear the full social costs or enjoy all of the benefits of the transaction. Rather, some of these social costs are externalized (or some of the benefits accrue to those outside the transaction).²⁸³ The theory of externalities posits that in a free market where externalities exist, there will be a misallocation of resources (i.e., market failure) because too many products or services will be produced and consumed if some of the social costs can be externalized. The reverse will be true if the parties cannot internalize all the benefits.²⁸⁴

Externalities clearly affect education. Society benefits from a well-educated public as well as suffers from a poorly educated one. Yet, in private transactions between students as "buyers" and schools as "sellers," these externalities are not taken into account. Thus, students can be expected to undervalue educational quality. The value of higher education to many students, for example, may lie in the credentials that it provides while the benefit to society derives from the learning and skills that students acquire. Most educators have probably observed that, everything else being equal, many students prefer a less demanding course even though they would learn more in a demanding one. This behavior would seem irrational for buyers, who typically want more value for their dollar, unless the value that the buyer is most interested in purchasing is the credential.

In the legal education context, externality problems may exist if the public is better served with attorneys whose legal education had greater depth, while students require only a minimalist, low-cost, utilitarian program consisting almost exclusively of well-organized bar review type courses to pass the bar

282. See *supra* note 279.

283. *Id.*

284. See COOTER & ULEN, *supra* note 279, at 169-70 (discussing the effects of private actors failing to internalize the social costs of their actions); FERGUSON & FERGUSON, *supra* note 279, at 143 (illustrating that negative externalities cause prices to be lower and output higher than may be socially desirable); HAMMER, *supra* note 278, at 860-64 (discussing the effect of negative externalities, such as pollution). Pollution provides the classic example of externalities. Companies engaged in activities that cause pollution do not internalize all of the associated social costs. As a result, in a free market, the level of production of these companies will be higher than is socially desirable. In other words, a completely free market will not function efficiently if externalities are present and are not corrected.

examination and make a living. Because the total benefits of a better education do not all accrue to the students, many students may tend to choose a quality of education that is not optimal for society.

Externalities may explain why education is almost universally subject to some form of regulation or supervision. It may also be the reason that education, although a business in the sense that it involves the “sale” of education to student-buyers,²⁸⁵ does not function like other businesses. For example, schools will decline to “sell” to a failing student even if the student is willing and able to continue to “buy” an education. Moreover, while student views are not unimportant, faculty often teach and give assignments as they see fit, and schools insist on examinations even if the majority of the “buyers” prefer not to have them. In short, ordinary observations about education support the conclusion that externalities are a problem in education. That is why society insists on taking into account the general welfare policy implications of education in transactions between schools and students.

To the extent that externalities exist in education and can be corrected with accreditation, seeking to protect quality in legal education, in principle, can be construed as promoting competition—a legitimate objective for a restraint. The problem, however, lies with the ambiguity of the term “quality.” Because varying degrees of quality exist, the ABA’s objective in accreditation cannot simply be expressed as quality protection, but must be refined to more accurately reflect the true goal of the ABA’s accreditation program. A more apt description of the ABA’s purpose is to protect and promote an elite-style legal education—arguably an illegitimate purpose that cannot justify the anticompetitive effects of its accreditation program.

3. Promoting an Elite Model Law School Is Not a Legitimate Objective

The preamble to the ABA standards states that the purpose of the requirements is to advance “the basic goal of providing a sound program of legal education.”²⁸⁶ No one can possibly find fault with that objective; the public is certainly better off without law schools offering unsound legal education programs. However, the generality of the term “sound program” is not very informative. To discern more precisely the ABA accreditation program’s objectives, it is necessary to look at the standards themselves. It is

285. See *United States v. Brown Univ.*, 5 F.3d 658, 666 (3d Cir. 1993) (holding that “the payment of tuition in return for educational service constitutes commerce”).

286. ABA STANDARDS, *supra* note 26, pmb1. at 26.

not the purpose of this Article, however, to analyze the specific standards and determine their individual legality. Instead, this Article will draw from them an underlying theme, which reflects the overall objective of the program, and analyze the legitimacy of that objective.

The standards set minimum requirements concerning operation of a law school, including its curriculum, faculty and administration, admissions, library resources, and physical facilities.²⁸⁷ They are seemingly aimed toward the objective of assuring that *all* law schools are operated along an elite school model.²⁸⁸ While there is no real definition of an “elite” school, most people have a general sense of what the term means. Elite schools typically have selective enrollment; educational programs predominantly taught by well-credentialed full-time faculty who engage in academic scholarship; a low student-faculty ratio; curricula with intellectual, rather than vocational, focus; physical facilities that are reasonably well appointed; and library collections that are quite extensive.²⁸⁹

The ABA accreditation standards are generally consistent with these characteristics, as a few illustrations show. The requirement of a three-year program,²⁹⁰ coupled with the necessity of a bachelor’s degree for admission to law school,²⁹¹ means that legal education is essentially a graduate course of study. Rules covering the student-faculty ratio, limiting the extent to which adjuncts may be counted in the calculation of that ratio,²⁹² and requiring that full-time faculty teach first year courses²⁹³ all further the goal of assuring that full-time academics primarily teach the curriculum.

Rules barring academic credit for bar review courses²⁹⁴ reflect the elite school view that education is not merely utilitarian, but is an intellectual exercise. Similarly, the rule prohibiting payment for externships²⁹⁵ reflects the elite opinion that externships should be an academic, not vocational, experience for students, and that payment might affect the nature of the work

287. *See supra* notes 23-29.

288. *See supra* notes 38-42, *infra* notes 290-99 and accompanying text. As previously noted, the term “elite-model” or “elite-style” law school, as used in this Article, refers to the form of educational system that is followed by all accredited law schools, not to the prestige factor of each law school. I recognize that some accredited law schools are considered more prestigious than others. However, my argument is that all accredited law schools, from the most prestigious to the least prestigious, follow an elite form of education, as required by the ABA accreditation system.

289. *See supra* notes 38-39 and accompanying text.

290. ABA STANDARDS, *supra* note 26, std. 304(b).

291. *Id.* std. 502(a) (requiring a bachelor’s degree or completion of three-fourths of work toward a bachelor’s degree).

292. *Id.* std. 402, interps. 402-1, 402-2.

293. *Id.* std. 403(b).

294. *Id.* std. 302(f).

295. *Id.* std. 304, interp. 305-2.

given to students and jeopardize that ideal experience. Rules excluding correspondence schools²⁹⁶ and barring credit for such courses²⁹⁷ correlate with the view that a first-rate legal education should be an interactive experience involving person-to-person exchanges among students and faculty—not mere learning from books, tapes, and videos. Finally, standards relating to physical facilities,²⁹⁸ such as the library,²⁹⁹ are consistent with the common expectation that elite schools are not located in warehouses and that their library facilities and collections are reasonably large.

But what motivates the ABA's pursuit of the elite model?³⁰⁰ Some commentators have focused on the earlier legacy of ABA accreditation and argued that the ABA's historical purpose was to exclude the poor, especially immigrants,³⁰¹ and generally limit entry into the profession.³⁰² Unfortunately, in the early to mid-twentieth century, the ABA's efforts to control accreditation and its insistence on continually raising standards were, indeed, rooted in its desire to exclude “Jew boys,”³⁰³ immigrants, children of

296. *Id.* std. 304(b) (requiring a “course of study in residence”).

297. *Id.* std. 304(g).

298. *Id.* stds. 701-03.

299. *Id.* std. 606.

300. An examination of subjective intent is often useful in an analysis of professional restraints because their competitive effects are often ambiguous. While good intentions will not “save an otherwise objectionable regulation or the reverse,” it has long been held that knowing the motive underlying a restraint can help with an interpretation of its effects. *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

301. *See* JEROLD S. AUERBACH, *UNEQUAL JUSTICE* 74-124 (1976) (arguing that the “Harvardization” of legal education and other efforts to raise law school standards in the early 1900s masked hostility toward Jews and immigrants and were largely designed to exclude them from the profession); STEVENS, *supra* note 1, at 100-01, 126 n.18, 180 n.3, 184 n.41 (quoting numerous statements by leaders of the bar and legal academy that reveal hostility toward immigrants and Jews). The demonstrable elitism of American law schools in the early years is quite jarring. For example, the admissions literature of New York University School of Law for 1858-59 said that it was seeking a “class of young men, who are hereafter to control the mercantile and commercial interests of our country,” and the University of Georgia law school sought “young men who intend to devote themselves to the honorable employment of cultivating the estates they inherit from their fathers.” STEVENS, *supra* note 1, at 21 (internal citations omitted). *See also infra* notes 335-37 and accompanying text.

302. Chief Justice William Howard Taft reminded delegates at an ABA meeting to discuss legal education standards that “we have all the lawyers we need now, and there is likely to be no dearth of them.” *Competition I*, *supra* note 1, at 358 (footnote omitted). William Hadley, former Governor of Missouri and then-University of Colorado law professor, agreed with Taft and pointed out that the surplus of lawyers had not been sufficiently addressed in the discussions. *Id.* In a speech delivered as ABA President in 1916, Eliha Root noted that the “ease with which admission to the Bar is secured in many jurisdictions . . . has crowded the Bar with more lawyers than are necessary to do the business.” *Id.* at 358 n.274 (citation omitted). *See also* STEVENS, *supra* note 1, at 101 (describing the move to ban night and part-time law schools in the early to mid-1900s as motivated by “a confusing mix of public interest, economic opportunism, and ethnic prejudice”).

303. A prominent Philadelphia lawyer, at an ABA meeting in 1929 discussing law school requirements, noted that the “Russian Jew boys” needed a college education before being admitted to

immigrants, and the lower class.³⁰⁴ The record relating to discussions of law school standards and accreditation during that period is replete with unabashed comments from bar leaders about their desire to keep the legal profession a bastion of privileged “old-American” families.³⁰⁵ If this is, indeed, still the motivation behind the ABA’s insistence on an elite-style legal education for all law students, then the objective would not be legitimate and would not justify the restraints imposed. While the narrow-minded bias of many bar leaders in the early twentieth century is appalling, there is no reason to attribute the same sinister motives to the ABA today.

It has also been said that accreditation exists to allow law faculty to engage in price fixing: By averting competition from less expensive nonelite schools, legal educators enjoy higher salaries and benefits.³⁰⁶ While law professors certainly have self-interested concerns, the argument that the accreditation system is nothing but a price-fixing mechanism for legal educators’ salaries is unconvincing. Most of the accreditation standards do not relate, or are only remotely related, to faculty benefits.³⁰⁷ Moreover, many law professors, especially the more junior ones, could probably earn more by practicing law.³⁰⁸ Thus, there are easier ways for law school faculty

law school so they could “absorb American ideals.” *Competition I*, *supra* note 1, at 363. The record does not reveal much discussion about keeping out African-Americans, but perhaps at that time it was almost a foregone conclusion that few blacks would be admitted to law schools. Thus they probably were not viewed as a threat to law schools and the profession.

304. Many in the legal profession considered the “influx of foreigners an uneducated mass of men who have no conception of our constitutional government’.” See STEVENS, *supra* note 1, at 101 (endnote omitted). Some believed that “[y]ou can produce a moral and intelligent bar, by raising the standard, not only of education, but along economic lines so that every Tom, Dick and Harry cannot come to the Bar.”). See *id.* at 100 (endnote omitted). Most amusing was Yale’s fear that having a grade-based admissions criterion would lead to an “inferior student body ethically and socially” because “foreign” students tended to have better grades than students of “old American” parentage. *Id.* at 101 (endnote omitted).

305. See *supra* notes 302-03; *infra* notes 336-37.

306. See Shepherd & Shepherd, *supra* note 4, at 2221-23.

307. While the faculty, as users, do benefit from standards relating to physical facilities and library collections, it is hard to say that they are the primary intended beneficiaries of such standards. In addition, rules prohibiting payment for externships or limiting the hours of student employment do not, in any way, benefit legal educators. While one may disagree with the ABA philosophy underlying various other rules, such as the rules prohibiting correspondence schools or credit for bar review courses, it is a stretch to argue that the ABA promulgated these rules to benefit the faculty. Of all the current accreditation standards (disregarding those that have been eliminated or revised since the 1995 consent decree), the only ones having a nontrivial bearing on faculty benefits are the standards governing the number of full-time faculty, the student-faculty ratio, and those requiring a three-year curriculum. See ABA STANDARDS, *supra* note 22, stds. 402 & 304(b).

308. The median salary of first-year associates in firms of over 250 attorneys for the year 2000 was \$125,000 in the Northeast and \$95,000 in the Midwest. These figures are clearly above the median salaries of assistant professors. See National Association for Law Placement (NALP) 2000 Associate Salary Survey, at <http://www.nalp.org/press/asr00.htm> (visited June 23, 2001).

to enjoy higher income than constructing and maintaining an elaborate accreditation scheme.³⁰⁹

Law school accreditation, today, probably reflects a complex mix of motives. No doubt, many in the legal academy and legal profession do sincerely believe that, given the importance of law to our society, only an elite-style law school education will serve both law students and the public interest. But their conviction may have been at least subtly influenced by elitist concerns about professional status, income, and other matters unrelated to public interest.³¹⁰ For example, there might be a fear that the image of the legal profession as a highly intellectual one would erode if standards were lowered. This erosion would deflate our collective egos and lead to a loss of stature and, possibly, income for the profession as a whole.

Given the possible mix of motives, it is difficult to know whether the ABA has pursued the elite model because of a genuine belief that it is in the public interest or because of more selfish reasons. But a resolution of that question is not essential to determining whether the objective of fostering an elite system of legal education, and excluding all others, is a legitimate one. Even assuming complete good faith on the part of the ABA, the objective would still be illegitimate unless it is reasonable.³¹¹

The objective would be reasonable if the nature of the legal profession calls for an elite-style legal education for all law students. There are obviously different views of the profession and its role in society. A grand vision, one that is often espoused at law school orientations or commencements, depicts attorneys as not just professionals handling legal tasks and handling them well, but as important guardians of democracy and the justice system.³¹² It stresses that lawyers have special responsibilities—

309. Admittedly, there are different cost-benefits associated with academic careers and the practice of law. While salaries tend to be lower for academics than for large firm attorneys, law faculty rarely have to work as many hours or endure the same unrelenting pressure that practicing lawyers face. Some faculty also simply enjoy teaching or academic research and writing, and there is usually little time or opportunity for either activity in law practice. Thus, it is conceivable that law faculty may not be willing to give up an academic career for higher pay and may, instead, resort to price fixing in academia. Still, it seems overly cynical to suggest that accreditation's primary object is to facilitate price fixing among faculty.

310. See *Competition I*, *supra* note 1, at 398 (quoting a critic of the legal education system who suggested that law schools' preference for brilliant students does not have a sound basis, but rather stems from legal educators' desire to have brighter students simply because they are "more fun to teach").

311. See *Wilk v. Am. Med. Ass'n*, 719 F.2d 207, 227 (7th Cir. 1983) (stating that if plaintiff chiropractors can show the anticompetitive effect of an AMA rule hindering competition from chiropractors, the defendants have the burden of showing, not only that they had a genuine concern about the scientific basis of chiropractic, but that the concern was "objectively reasonable").

312. Many in the legal profession have historically held a highly exaggerated view of lawyers' role in society and, therefore, the need for all lawyers to be people of exceptional intellect and training.

they hold positions of extraordinary power in government and private sectors, and they play a unique role in shaping law and society.³¹³ If this view of the legal profession is accurate, and most law students are expected to become important national or state leaders, judges, and major policy makers, then assuring that all law schools follow the elite model might be a valid objective on the premise that only an elite-style education can produce intelligent, reflective, and socially responsible leaders.³¹⁴

Most attorneys must surely recognize that this inflated image of law and the profession does not describe the reality.³¹⁵ Only a small percentage of law students, even at the top schools, will ever play a truly significant role in society's power structure or otherwise have the kind of impact suggested by this grandiose view.³¹⁶ Thus, the objective of ensuring that *all* law students receive an elite, first-rate legal education cannot reasonably be based on this lofty notion of the important societal impact of all lawyers.

A more realistic view of the profession is that most lawyers simply practice law, just as other professionals practice their respective professions. The question is then whether, given this reality, the ABA's objective of having an exclusively elite legal education system is legitimate. I conclude that it is not. A traditional (i.e., elite-style) law school education may well be more enriching and probably produces more critical and creative thinkers. But simply because it is better does not necessarily mean that the alternative must be inadequate. Given the opportunity, for example, most of us would probably have chosen for ourselves (and our children) an elite undergraduate college that instills students with a love of James Joyce and the "great books," that employs an intellectually stimulating faculty with eclectic ideas, that has a library with a broad collection of books, and that provides an

See AUERBACH, *supra* note 301, at 64 (quoting the president of the American Bar Association stating, in 1915, that law was "as omniscient and omnipotent as God because it is an attribute of God, and its home is the bosom of God"); ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953) (describing the legal profession as the "[p]ursuit of the learned art in the spirit of a public service" where "[g]aining a livelihood is incidental").

313. *See* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 13 (1988) (describing the typical "Law Day Sermon" about lawyers' "public duties, being officers of the court and so on," as "aspirational . . . inspirational, boozily solemn, [and] anything but real").

314. *See* AUERBACH, *supra* note 301, at 82-83 (describing efforts made by Roscoe Pound and others to ensure that students are prepared, not only for a career at the bar, but to be reformists and leaders, and that law professors are equipped to "fit new generations of lawyers to lead the people").

315. Inspirational, and aspirational, speeches exhorting lawyers and law students to serve society are, of course, entirely appropriate. My point is simply that one must not lose sight of the fact that many, if not most, lawyers simply engage in the mundane practice of law.

316. Many more law students will probably apply their legal training to lead in various capacities in their communities; for example, they may serve on zoning boards or local school boards. This Article does not mean to minimize these contributions. However, it is doubtful that these roles, important as they may be, require an elite-style legal education.

idyllic environment for work and play. But no one would suggest that a nonelite college education is necessarily unacceptable or that only colleges providing an elite education and experience are worthy of existence.

Some may argue that law school is different from undergraduate college, and that the subtleties of the law call for an elite approach. The gist of this argument is that law is not just the embodiment of doctrine consisting of bodies of rules that can be mastered simply by learning different tests, prongs, and requirements. Rather, it involves theory and policy as well, which require critical, creative, and more nuanced thinking. To the extent that law is not merely accumulated rules to be mechanically applied, one could argue that it is necessary to learn the breadth and limitation of the rules in order to know when and how to argue for modifying, extending, or rejecting them. One could also argue that because law is often indeterminate, uncertain, and even conflicting, studying law involves learning not just dogma, but how legal issues are resolved given this “messiness.” Finally, of course, lawyers must learn to write persuasively and to “think on their feet.”

Under this vision of the study of law, it is quite possible to justify the elite-model law school. If the study of law entails more than learning the tools-of-the-trade, then it might not be unreasonable, for example, to require full-time faculty to teach classes rather than adjuncts because full-time faculty generally engage in academic research and writing that should raise the intellectual content of their teaching.³¹⁷ Part-time adjuncts, in contrast, seldom have time in their busy practices to veer from the nuts-and-bolts of practice to think about theory, policy, or other broader issues. Similarly, the requirement of a three-year full-time J.D. program would not be unreasonable, even if a shorter program might be sufficient to train a competent practitioner, because it would give students breadth of knowledge by allowing them to take in a variety of nondogma or interdisciplinary seminars.³¹⁸

I do not take issue with the big picture of law, or even with the notion that the elite model is usually more conducive to gaining a deeper understanding of law and becoming a thoughtful legal thinker.³¹⁹ There is also general

317. It has been suggested that this standard is primarily intended to protect the interests of full-time faculty, by preventing schools from hiring less expensive adjuncts. *See* Shepherd & Shepherd, *supra* note 4, at 2138.

318. A more selfish motive for the three-year program requirement has also been suggested—law schools benefit financially from a longer course of study. *See Competition I, supra* note 1, at 337-38.

319. From my experience in practice, I am not persuaded, however, that an attorney with a deeper intellectual understanding of the law would necessarily always be a better practitioner. Appreciating both the strengths and weaknesses of the efficient breach theory of contract law, for example, generally does not help one either draft a contract or litigate a breach of contract claim.

consensus that legal education has improved significantly in the last several decades,³²⁰ and that may be a tribute to the elite model. However, the mere fact that one model may be preferable to another, everything else being equal, does not necessarily mean that the latter should be banned or disadvantaged. If modest, low-budget law schools can adequately train students to become competent practitioners in many areas of the law, then there is no legitimate reason to exclude them.

Many legal practices, such as home closings, simple wills, and other simple uncontested matters, involve primarily following forms or routines. Such work rarely requires much legal analysis or even resort to the legal rules underlying the legal mechanics. In other areas, such as immigration, effective lawyering may be primarily a matter of learning bureaucratic rules and having the interpersonal skills and patience to deal with both desperate (or difficult) clients and intractable government agencies.³²¹ Even some business matters, such as the buying and selling of small businesses,³²² or simple breach-of-contract actions,³²³ involve very routine legal work. Representation of clients in these matters seldom requires complex legal

320. See Lee Bolinger, *The Mind in the Major American Law School*, 91 MICH. L. REV. 2167, 2170-71 (1993) (stating that there is a greater depth of intellectual sophistication in law schools today, and that students are better educated); Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 548 (1994) (observing that legal education has improved dramatically, and the range of difference between top and bottom schools has narrowed substantially). However, law schools today have also been criticized for not adequately preparing law students for the actual practice of law. See John S. Elson, *Why and How the Practicing Bar Must Rescue American Legal Education from the Misguided Priorities of American Legal Academia*, 64 TENN. L. REV. 1135, 1135 (1997) (arguing that law schools “graduate students who are by and large unprepared to practice law competently and ethically”); *The Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development: An Educational Continuum*, 1992 A.B.A. SEC. OF LEGAL & ADMISSIONS TO THE BAR 6 (criticizing many aspects of law school education today, including its insufficient focus on practical skills and practical considerations, and its lack of connection with the real practice of law) [hereinafter MACCRATE REPORT].

321. See Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 709 (1996) (arguing that three years of law school is “neither necessary nor sufficient to ensure competence” in areas such as “divorce, landlord-tenant disputes, bankruptcy, immigration, welfare claims, tax preparation, and real estate transactions”).

322. While such transactions involve a lot of document preparation and “due diligence,” the work itself is quite routine where the business being purchased is relatively small. Most attorneys probably have a checklist of items that must be done in addition to drafting the relevant documents—such as, in the case of representing purchasers, ordering a title search to ensure that there are no undisclosed liens or encumbrances on the property; reviewing leases and contracts to ensure that the sale does not constitute breach of any such lease or contract; obtaining consents from affected third parties where necessary; obtaining appropriate transfers and assignments of transferable contracts and leases; and including an appropriate noncompete agreement. None of these activities requires thorough understanding of complex legal analysis.

323. For such simple litigation, knowledge of basic civil procedure and local rules, rules of evidence, and rules and practices regarding execution of judgment is generally sufficient.

analysis, let alone an understanding of abstract legal theories. A strong case can be made that lawyers who primarily engage in these kinds of practice do not require a legal education that thoroughly teaches critical thinking, broad legal theories, or even sophisticated analysis, although such an education would undoubtedly be more enriching.

If law practice, in many instances, does not require the extent of learning that the ABA deems necessary, then imposing the ABA's concept of legal education (i.e., the elite model) is unreasonable. This assertion does not mean that there should be no standards or that the free market should control legal education. My argument is merely that the ABA's objective cannot be to categorically exclude schools that subscribe to a different educational policy or have more modest goals. Instead, the objective should be to ensure that law schools adequately train students to become competent and ethical practitioners. And the standards should be sufficiently flexible to allow alternative or low-cost schools, such as MSL and Concord, to demonstrate that their unorthodox models are fully capable of providing an education of acceptable quality for the kinds of practice that their students are likely to pursue.

4. Restraint Reasonably Necessary for Objective, and Least Restrictive Alternatives

If the ABA's objective of requiring an elite legal education system is unreasonable, then the restraint on competition resulting from the accreditation standards would be illegal, and there would be no need for further inquiry. If the objective is not unreasonable, however, the restraint would be justified unless it is not reasonably necessary for the achievement of the lawful objective, or the objective can be attained through less constraining means.³²⁴ This Article does not explore this issue in detail, for its intention is to look at the anticompetitive effects and other implications of the overall ABA accreditation scheme, not to analyze the vulnerability of specific standards, which would require more data and a case-by-case determination. Instead, this part of the Article will merely note what might suffice to meet this burden, should courts consider the ABA's objective

324. See *Associated Press v. United States*, 326 U.S. 1, 14 (1945) (suggesting that, though efficiencies may justify news agencies combining resources to gather news, the membership restriction was unnecessary and illegal for the achievement of the benefit); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899) (holding that a restraint ancillary to a legitimate main purpose is reasonable only if it is necessary for the attainment of the legitimate purpose and does not exceed "the necessity presented"). See also *supra* note 232 and accompanying text.

legitimate.

Showing that a specific standard does not actually achieve the legitimate objective can defeat the defendant's justification.³²⁵ For example, assume that the general purpose of the rule prohibiting credit for bar review courses is to ensure that students are taught, not only black-letter law, but also the subtleties and nuances of law. Even if courts consider this objective legitimate, a plaintiff challenging the standard might still prevail if it can be proven that the standard does not, in fact, achieve its stated objective. The plaintiff could accomplish this, for example, by demonstrating that this rule (or any other rule for that matter) does not prohibit professors from teaching in a style that focuses exclusively on black-letter law in "regular" courses. In fact, neither this nor any other rule covers acceptable and unacceptable teaching methods at all, thus exposing the futility of the bar review course restriction.

As another illustration, the standard and interpretations relating to student-faculty ratio are presumably grounded on the assumption that they facilitate smaller classes, promote student-faculty interaction, and ensure that the school's educational program is taught primarily by full-time faculty whose academic scholarship informs their teaching. A plaintiff challenging these standards can point to the fact that the rules do not provide for a yearly minimum number of small class offerings. Nor do they set the maximum class size for "core" courses, which generally have much higher enrollment than electives. One might reason that these omissions demonstrate the rule's ineffectiveness in promoting small classes. Similarly, because faculty are not required to interact with students or to engage in legal scholarship, it can be argued that this rule does not, in fact, achieve the claimed objective of promoting student-faculty exchanges or faculty scholarship.

A plaintiff can also defeat the defendant's justification for a restraint with evidence that a method less restrictive of competition might achieve the same legitimate objective.³²⁶ For example, assume that the rule prohibiting correspondence schools is intended to foster live exchange of ideas among students and between students and faculty, and that this objective is legitimate. Plaintiffs might still be able to invalidate this rule if they show that the objective of having real-time exchanges can be accomplished in a

325. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 114 (1984) (finding that the restraint—packaging college football games and limiting the number of times they are broadcasted on television—is not really necessary for the attainment of the restraint's legitimate objective).

326. *See id.* at 119 (stating, in response to defendant's claim that limiting the number of television broadcasts of each college's football games promoted competitive balance among the teams, that the balance could be better accomplished through NCAA rules directly governing those matters).

manner less constraining of competition. Perhaps plaintiffs can demonstrate that Internet technology has made it possible for “chat room” discussions led by professors to simulate classroom interaction. Therefore, even a completely on-line law school, such as Concord, may be able to provide the kind of real-time exchange that is presumably the objective of the correspondence school ban. A standard requiring merely that all legal educational programs provide a forum for real-time classroom discussion (either in-person or “live” via the Internet) should be sufficient to achieve the stated objective. Such a rule would have less anticompetitive impact than a blanket prohibition of all correspondence schools because it would not automatically exclude all on-line legal educational programs, but only those that are unable, or unwilling, to provide the means for simulated “live” classrooms.

Although many of the ABA accreditation standards are most likely anticompetitive, an antitrust approach may not be the best way to bring about fundamental reform with broad-ranging educational implications. Courts may be unwilling to review policy choices reflected in the accrediting standards or to substitute their own opinions for those of the ABA, except where the practices closely resemble *per se* violations (and those have been largely eliminated by the consent decree). There would also be the difficulty of fashioning an appropriate remedy. If the current standards are drastically eased, it would seem that the remedy must also include some mechanism to protect the public from unqualified lawyers. Fashioning such a remedy would draw the court into a larger policy making role than it might care to assume, or should assume. For these reasons, notwithstanding its anticompetitiveness, the ABA accreditation process may be able to withstand future antitrust challenges.

V. SOCIAL IMPLICATIONS OF AN ELITE LAW SCHOOL SYSTEM

Nevertheless, the ABA should consider revamping its standards voluntarily, not only because they are anticompetitive, but also because doing so would diversify the student pool and possibly also increase affordable access to legal services for lower-income individuals. Under the rule of reason, it is true that noneconomic social concerns are generally deemed irrelevant.³²⁷ The social implications of an elite policy toward law school accreditation neither add to nor militate against its anticompetitiveness as a legal matter. However, they should certainly be relevant when questioning whether the ABA is right in effectuating and maintaining that policy.

327. *See supra* notes 269-72 and accompanying text.

A. *Effect on the Composition of Law School Student Body and of the Profession*

Lawyers and law students disproportionately come from privileged backgrounds.³²⁸ For example, a 1970s study of a group of elite and semi-elite law schools showed that the majority of their students came from relatively high-status families.³²⁹ A remarkable 50% of the sample had fathers with college degrees (another 16% had attended some college),³³⁰ at a time when only 15% of all white men had graduated from college.³³¹ A number of studies on the class origins of lawyers similarly found significant overrepresentation of people from high socioeconomic circumstances.³³² This skewed social composition of the profession appears to be worsening.³³³ For example, one study of law schools in the 1990s shows that a whopping 61.68% of students in the top American law schools had fathers who had attended graduate or professional schools.³³⁴

In the early part of the twentieth century, the bias in favor of the socially and economically privileged was apparently intentional.³³⁵ The lengths to which the legal academy and the profession were then willing to go to keep the profession an exclusive club are almost laughable.³³⁶ Dean Thomas Swan

328. ABEL, *supra* note 1, at 87-90 (describing many empirical studies showing that a disproportionate number of attorneys and law students, throughout the history of this country, come from privileged backgrounds). *See also* JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 186 (1982).

329. Robert B. Stevens, *Law School and Law Students*, 59 VA. L. REV. 551, 573, 600 tbl.29, 601 tbl.30 (1973) (showing, from a sample of white law students at eight elite and semielite law schools in 1970 and 1972, that 14% of the students came from families with incomes over \$40,000, at a time when only about 14% of all American families had incomes exceeding just \$15,000; 85.5% of the students' fathers were in white-collar occupations, about 50% of the students' parents had college degrees and another 16% had attended some college).

330. *Id.* at 601 tbl.30.

331. ABEL, *supra* note 1, at 51.

332. *See id.* at 87-89.

333. *See* HEINZ & LAUMANN, *supra* note 245, at 186 (showing, from a study of a large number of Chicago lawyers, that over seventy-three percent had fathers who held professional, managerial, or technical positions).

334. LINDA F. WIGHTMAN, LAW SCHOOL ADMISSIONS COUNCIL, LEGAL EDUCATION AT THE CLOSE OF THE TWENTIETH CENTURY: DESCRIPTIONS AND ANALYSES OF STUDENTS, FINANCING, AND PROFESSIONAL EXPECTATIONS AND ATTITUDES 33 tbl.17 (1995).

335. *See supra* notes 301-05 and accompanying text.

336. Yale was particularly obsessed with "the Jewish problem." *See* ABEL, *supra* note 1, at B5. Dean Thomas Swan suggested that students with foreign born parents should be required to complete more years of pre-law college studies. *See id.*; STEVENS, *supra* note 1, at 101. John Henry Wigmore urged cutting the number of attorneys in half by requiring two years of college, which would reduce the "spawning mass of promiscuous semi-intelligence which now enters the bar." *See* ABEL, *supra* note 1, at 47. Leaders of the bar were not embarrassed at all about explicitly expressing their desire to raise standards, "not only of education, but along economic lines," to exclude the socially undesirable.

of Yale Law School, for example, argued in the 1920s against using grades as an admissions criterion because immigrants and children of immigrants—the nonelite—performed as well if not better than students of “better” parentage, and Yale would therefore become a school with an “inferior student body ethically and socially.”³³⁷ It would be unfair to say that leaders of the bar and legal academy today are consciously pursuing an elitist policy in its accreditation process for the purpose of keeping out the low and working class. But, no matter how well-intentioned, the ABA policy of excluding or disadvantaging nonelite law schools has a disparate impact on qualified lower-income students and is just as undesirable.

Attending law school is expensive. Today, law school tuition can range from almost \$10,000 a year for state schools to \$30,000 for private schools.³³⁸ The high tuition is partially due to the demanding standards imposed, such as the library and physical facilities rules and the student-faculty ratio rules, which are all expensive to satisfy.³³⁹ Adding to the already high tuition costs are the indirect opportunity costs that law students must also bear, some of which are also attributable to restrictive ABA standards. For example, standards limiting student employment, prohibiting pay for academic externships, and requiring a lengthy term of study all increase the amount of income that students must forego when they attend law school.³⁴⁰

Legal education with fewer frills can be offered at a significantly lower cost. For instance, tuition at Concord, the Internet law school, is only \$5,000 for the year 2001, and at MSL, it was \$10,800 in the year 2000—merely 25% and 55%, respectively, of the average tuition at private law schools during the same period.³⁴¹ Suppressing these “low-brow” law schools on the basis of their failure to meet certain elite-based criteria not only denies all students a

See STEVENS, *supra* note 1, at 100.

337. STEVENS, *supra* note 1, at 101. Interestingly, some of the same biased concerns about an ethnic group “taking over” and “bringing down” an elite school are being voiced about Asian-Americans today, and efforts have been made at the University of California, Berkeley, (and perhaps elsewhere) to minimize, in undergraduate admissions, the importance of grades and test scores, which Asian-American students tend to do well in, and to emphasize more subjective factors such as “leadership” and extracurricular activities, areas in which Asian-Americans are perceived as weaker. See Linda Mathews, *When Being Best Isn't Good Enough: Why Yat-Pang Au Won't Be Going to Berkeley*, L.A. TIMES, July 19, 1987, at 22.

338. OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS, *supra* note 3, at 39; BARRON'S GUIDE, *supra* note 3. In addition to tuition, there are living and book expenses which, for 1999-2000, averaged \$8,647 for students living on campus and \$12,054 for those living off campus per year. Am. Bar Ass'n, Average Living and Book Expenses, at <http://www.abanet.org/legaled/statistics/living.html> (last visited June 16, 2001). One estimate for the total cost of a three-year private law school education is \$140,000. OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS, *supra* note 3, at 39.

339. See *supra* notes 292-93, 297-99 and accompanying text.

340. See *supra* notes 290 & 295 and accompanying text.

341. See *supra* note 242.

quality-price tradeoff choice, but it also has the invidious effect of disproportionately screening out students from more modest backgrounds. It stands to reason that when law school is very expensive, poorer students will be able to attend only if they can obtain sufficient scholarship assistance or are willing to take on massive student loans. For students whose families' annual incomes may have never exceeded \$18,000,³⁴² for example, the thought of carrying loans several times that amount³⁴³ can be so daunting that many may be discouraged from attending or even applying to law school.³⁴⁴

B. Effect on Access to Legal Services for People of Low or Modest Incomes

Surprising as it may seem in a country that is often said to be overlawyered and overlitigious,³⁴⁵ there is in fact too little access to affordable legal services for many individuals. In a broad critique of the American legal system, Derek Bok, former dean of Harvard Law School, charged that the system is "grossly inequitable and inefficient,"³⁴⁶ with "far too much law for those who can afford it and far too little for those who

342. An annual household income of \$18,000 for a family of four is just above the poverty threshold of \$17,761 for the year 2000. See U.S. Census Bureau, Poverty Thresholds 2000, available at <http://www.census.gov/hhes/poverty/threshld/thresh00.html> (last visited June 16, 2001).

343. See Margaret Graham Tebo, *The Debt Conundrum*, ABA J. Mar. 2001, at 42; Law School Admissions Council, available at <http://www.lsac.org/LSAC.asp?url=/lsac/financial-aid-repayment.asp> (last visited June 16, 2001) (reporting that, for the period 1999-2000, the average debt for law school graduates who borrowed both federal and privately guaranteed student loans was about eighty thousand dollars).

344. Furthermore, it is generally known that people of lower income tend to marry and have other family and financial responsibilities at a younger age. Lower tuition will ease the financial burden of law school, making it less difficult for qualified but poorer students to attend.

345. See Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 571 (1983); Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers?, Perspectives on a Turbulent Market*, 14 L. & SOC. INQUIRY 431 (1989). Derek Bok lamented that too many exceptionally talented people are diverted into law, which adds little to "the economy, the pursuit of culture, or the enhancement of the human spirit" when "the country cries out for more talented business executives, more enlightened public servants, more inventive engineers, more able high school principals and teachers." *Id.* at 573. Others, however, disagree with that critique. See DEBORAH L. RHODE, *JUSTICE AND GENDER* (1989) (arguing that whether a particular claim is frivolous depends on normative judgments); Lawrence M. Friedman, *Litigation in Society*, 15 ANN. REV. SOC. 17, 27 (1989) (arguing that litigation has brought immeasurable benefits to women and minorities, expanded civil liberties, ensured fair procedures and placed limits on government); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 38 (1986) (arguing that the "consternation about litigation" is due, not so much to the actual number of suits brought, but the sense of being held accountable and the fear "about what courts might do"); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983) (contending that the claim of a litigation explosion is a myth).

346. Bok, *supra* note 345, at 571.

cannot.”³⁴⁷ Several studies confirm that the legal needs of many low- to moderate-income Americans are, indeed, unmet. For example, a 1994 ABA survey showed that 61% of moderate-income respondents with legal problems did not consult a lawyer.³⁴⁸ Another ABA study reported that, in 1990, 52% of all divorces in the United States were obtained without a lawyer, and at least one party was unrepresented or defaulted in 88% of other litigated family law claims.³⁴⁹

A few commentators have attributed this access problem to the fact that the bulk of our legal resources, including the time and energy of most of our numerous lawyers, are devoted to corporate clients and well-to-do individuals, and that only a small percentage go toward meeting the legal needs of ordinary Americans.³⁵⁰ Another reason may be the high costs of legal services, except perhaps for routine legal work such as house closings and simple wills.³⁵¹ Relaxing accreditation standards may increase the number of lawyers primarily serving individual clients. The increased supply, along with the fact that these graduates would have a smaller educational cost to recoup, might lead to a reduction in legal fees.³⁵²

This is not to suggest that high tuition is the leading cause for expensive legal services³⁵³ or that relaxing accreditation standards that lead to high

347. *Id.*

348. See ROY W. REESE & CAROLYN A. ELDRÉD, ABA, LEGAL NEEDS AMONG LOW-INCOME AND MODERATE INCOME HOUSEHOLDS: SUMMARY OF FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY (1994).

349. See STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES, ABA, RESPONDING TO THE NEEDS OF THE SELF-REPRESENTED DIVORCE LITIGANT 7 (1994).

350. A 1995 study of the Chicago bar revealed that in 1995, 61% of the total legal work performed by the Chicago bar was devoted to corporate clients, and 29% to personal clients. John P. Heinz et al., *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 L. & SOC'Y REV. 751, 765 tbl.3 (1998). The “personal plight” segment, which was defined to include civil rights, family, immigration, employment, plaintiff personal injury, criminal defense, accounted for only sixteen percent. *Id.* See generally Galanter, *supra* note 245 (generally emphasizing that organizational clients dominate the legal system).

351. Deborah Rhode, a strong proponent of nonlawyer practice, has written extensively on the costs of legal services and the need to increase the poor's access to such services through nonlawyer practice. See, e.g., Ralph C. Cavanaugh & Deborah L. Rhode, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104 (1976); Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209 (1990).

352. It is unlikely, however, that relaxing accreditation standards and approving schools with less rigorous programs would have much effect on the legal fees of corporate clients. As previously noted, there is a structural divide in the legal profession between corporate representation and individual-client service, and there is little competition between the two groups. Given the hierarchy of the legal profession, most graduates from the new, less expensive programs would probably work in the individual-client service segment and, therefore, not pose a competitive threat to the corporate sector. Nonetheless, the possibility that loosening accreditation standards might increase access to legal services for those with less income is an additional point in favor of change.

353. See Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice*

tuition will solve the perplexing problem of unequal access.³⁵⁴ The legal process itself is expensive, and it may take “delegalization,” favored by Bok,³⁵⁵ or other drastic fundamental changes to the system³⁵⁶ to make legal services affordable.³⁵⁷ Still, it is logical to expect some reduction in legal fees, at least in the personal client market, if the costs of attending law school were to decline because these costs are inevitably built into the fee structure of legal services. Today, the cost of attending a private law school, even without taking into account the opportunity costs of foregone income, is approximately \$140,000,³⁵⁸ and one commentator estimates that it adds approximately twenty dollars per billable hour to legal fees.³⁵⁹

While a substantial lowering of the accreditation standards might lead to more affordable legal services for low-income people, it also presents an increased risk of harm to clients. But states can minimize this risk if they simultaneously adopt a more comprehensive scheme for client protection than is in existence today. This scheme might include requiring some form of disclosure to potential clients regarding the nature and extent of training that the attorney has received, changing the nature of the bar examinations, or strengthening the state bars’ disciplinary procedures in order to more efficiently sanction or disbar incompetent practitioners. It is not the purpose of this Article to discuss or recommend any client protection mechanisms, but only to suggest that there are ways to increase client protection if accreditation barriers are eased.

System, 98 MICH. L. REV. 953, 968-82 (1999-2000) (analyzing reasons for the astronomical costs of legal services in general).

354. For a discussion of the problem of access to legal services, see generally DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 784-894 (1992); Cramton, *supra* note 245.

355. Bok, *supra* note 345, at 579-80 (urging a combination of delegalization and better access to justice). Delegalization means simplifying rules and procedures, standardizing forms, and eliminating burdensome personal appearances in many instances. *Id.*

356. See Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 713-16 (1996) (advocating changes to unauthorized practice rules to permit nonlawyer practice in routine areas of the law, in order to increase access to legal services). Another issue that is often debated is the form-of-practice restrictions prohibiting lawyers from practicing in any association in which a nonlawyer owns an interest. The removal of this restriction would allow, for example, Sears to open a law clinic and might bring down the costs of legal services. This issue, along with multistate and other emerging issues relating to increasing competition in legal services, will not be discussed in this Article.

357. There are now also various self-help aids available, such as do-it-yourself divorce kits and software for wills and personal bankruptcy petitions, that bypass attorneys altogether. The result is a reduction in legal fees in those areas.

358. See OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS, *supra* note 3, at 39.

359. See Cramton, *supra* note 245, at 550.

CONCLUSION

The ABA's accreditation standards reflect the profession's preference for the elite-model law school. As a historical matter, that preference had little impact until the ABA succeeded in securing the backing of most states, in the form of bar admission requirements that effectively foreclosed other options. It is the states' action in giving effect to the ABA's accreditation decisions that have, in the past, shielded the organization from private antitrust challenges relating to its accreditation activities. Despite the ABA's previous successes, which were grounded on state action and petitioning immunity doctrines, I have argued that these doctrines should not extend to the setting and enforcement of the accreditation standards themselves, as distinct from the accreditation decisions and the use of those decisions.

On the issue of anticompetitiveness, I have concluded that many of the standards are unreasonable and, therefore, anticompetitive, because they perpetuate the elite-model law school and exclude others, even though a nonelite legal education is perfectly adequate for many types of legal practice. However, given the broad policy implications of any decision to fundamentally change the accreditation system, courts might be reluctant to second-guess the ABA. Nonetheless, this Article argues for voluntary reforms from the profession because the elite model, though perhaps better in the absolute sense, is not only unnecessary for many practitioners, but also has the unintended consequence of keeping the profession largely a bastion of the privileged.

Change is inevitable. The ABA's leadership in legal education ultimately depends on its ability to retain its reputation and credibility with the states. Should it lose that credibility because its standards are eventually perceived as elitist or self-serving, some states might withdraw their reliance on ABA approval, which would cause important changes in the profession. It would be in the profession's best interests to take the lead in the process of change than to have changes proceed without its participation or influence.